

NEITHER FORCE NOR WILL: A THEORY OF JUDICIAL POWER

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## **ABSTRACT**

ALIXANDRA B. YANUS: *Neither Force Nor Will: A Theory of Judicial Power*  
(Under the direction of Georg Vanberg)

This dissertation seeks to shed greater light on the scope of judicial power and the role of the courts in the American political system. It seeks to expand our understanding of the influence of courts beyond the almost exclusive focus on the aftermath of particular decisions—central to debates about enforcement powers (or the lack thereof)—to a broader understanding of more sophisticated ways in which the judiciary shapes the exercise of political power. I argue that the interactions between the courts and these agents have significant effects on public policy, both within the judiciary and in the broader political system.

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## CHAPTER 1

### NEITHER FORCE NOR WILL

Questions about the scope of judicial power in the American political system are as old as the United States itself. Writing in *Federalist No. 78*, Alexander Hamilton argued that the Supreme Court's inability to enforce or implement its decisions—the idea that the Court had neither the purse nor the sword—made the judiciary the “least dangerous branch.” Later, on the heels of the Court's decision in *Worcester v. Georgia* (1832), President Andrew Jackson is reported to have again pointed to this relative lack of power, declaring, “[Chief Justice] John Marshall has made his decision. Now let him enforce it.”

But, much has changed since 1832, including the judiciary's visible role in many twentieth century social movements. This role has spawned volumes of judicial politics scholarship documenting the courts as agents of social change (e.g. Vose 1957, 1959, 1972, O'Connor 1980). These studies have demonstrated that, at least in some conditions, the involvement of the judiciary can be a significant impetus to altering public policy, changing grassroots opinion, and inspiring political change.

This dissertation seeks to shed greater light on the scope of judicial power and the role of the courts in the American political system. It seeks to expand our understanding of the influence of courts beyond the almost exclusive focus on the aftermath of particular decisions—central to debates about enforcement powers (or the lack thereof)—to a broader understanding of more sophisticated ways in which the judiciary shapes the exercise of



political power. I argue that the interactions between the courts and these agents have significant effects on public policy, both within the judiciary and in the broader political system.

### **The Evolution and Institutionalization of Judicial Power**

The judicial branch occupies a unique role in the American political system. As Hamilton noted, the courts have neither the purse nor the sword. They can neither make laws nor command power in the appropriations process; these powers are given to Congress under the U.S. Constitution of 1787. The judiciary also lacks the power to implement or enforce legislation; these tasks fall to the president and the executive branch.

In fact, the Framers are said to have regarded the judiciary as little but a strategic necessity within the new political system. As a result, little thought was given to this third branch of government, and few specifics about the judiciary are enumerated in Article III of the U.S. Constitution. The document creates a Supreme Court and grants Congress the power to establish inferior courts as it sees fit. It establishes the original and appellate jurisdiction of the high court, but says little about how the inferior courts should be structured or what types of cases they should consider.

The Constitution also states that justices should be given lifetime terms with good behavior. But, even this provision was added with deference to the fact that the federal judiciary would have limited power. Hamilton wrote in *Federalist No. 78* that without the guarantee of a lifetime term, it would be unlikely that the most qualified legal minds would be interested in serving their country in this capacity. And, as experiences in the early republic demonstrated, even with the guarantee of lifetime tenure, few statesmen wanted the “honor” of serving on the Supreme Court. The Court’s first chief justice, John Jay, refused

to reassume the post after serving as governor of New York. One associate justice also resigned so that he could serve as chief justice of the South Carolina Supreme Court.

The Court was so insignificant in the early days of the republic that the planners of the new capital city, Washington, D.C., failed to include a home for the Supreme Court in their sketches of the new city. When this mistake was discovered, the Court was given a room in the basement of the U.S. Capitol building. By all accounts, it was a crowded, dark, dismal place.

The Court remained largely invisible and insignificant in the new republic until the appointment of Chief Justice John Marshall in 1801. Chief Justice Marshall took a number of steps to establish the judiciary as a more equal (although still quite inferior) branch in the American political system. Among these were claiming for the Court the power of judicial review of the constitutionality of federal laws in *Marbury v. Madison* (1803) and state laws in *Martin v. Hunter's Lessee* (1816). The Court also asserted its power in adjudicating provisions of the Constitution, including the necessary and proper clause and the commerce clause, in cases such as *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824).

Despite the victories achieved during the more than thirty-year tenure of Chief Justice Marshall, the Court remained a “lesser” branch of the U.S. political system when he died in office in 1835. The Court’s power continued to grow gradually over the next 100 years, with a major victory achieved in 1929, when Congress authorized the construction of a building built exclusively for the Court. This building, which the Court first occupied in 1935, continues to be its home today.

The Court also has become institutionalized in a number of other ways over the last 150 years. Judges today come to the Court with much more judicial experience than in years

past. The Court's budget today is substantially higher today than in earlier years, allowing the justices to hire more law clerks (and write longer opinions with a larger number of footnotes). The evolution of the writ of *certiorari* has allowed the Court to gain greater control over its docket. And, the justices no longer have to spend endless days and hours "riding the circuit" on horseback (McGuire 2004).

Perhaps because of these changes, the Court's role as policymaker has also become increasingly obvious, especially in the last fifty years. The Court under Chief Justice Earl Warren made this power particularly visible, handing down decisions on a variety of civil and political issues that had previously been outside the purview of the American judiciary. In addition to the Court's civil rights rulings in cases such as *Brown v. Board of Education* (1954), the Court also expanded its power in dealing with issues that had traditionally been considered "political questions" and broadened the range of issues appearing on its docket.

These policymaking powers have remained visible during the tenures of Warren's successors, Chief Justices Warren Burger, William Rehnquist, and John Roberts. Issues such as abortion, gay rights, employment discrimination, and environmental protection—just to name a few—have occupied a significant proportion of the Court's docket. These cases have generated rulings that affect broad cross-sections of Americans and attract vast attention from the media and interest groups, to say nothing of Congress and the presidency.

The Rehnquist Court, in particular, was more eager than any previous Court to not only apply, but utilize the power of judicial review. For example, from 1787 to 1987, the Supreme Court struck down 127 federal laws for an average of less than one law per term. However, the Rehnquist Court (1987-2005) invalidated 33 statutes, for an average of nearly two laws per term (Miller 2004). That Court also took the unprecedented step of ruling in

two cases that essentially decided the outcome of the 2000 presidential election; both dealt with issues that could have easily been considered “political questions” outside the purview of the Court’s traditional responsibilities.

### **The Court as Policy Maker**

The Court’s role as policymaker, however, has not been met with entirely open arms. Some legal scholars, most notably Supreme Court Justice Antonin Scalia (1998), charge that the Court has overstepped its boundaries in interpreting the law far beyond what is explicitly stated in the Constitution. These scholars contend that the courts should only answer those questions explicitly posed to them, and should not attempt to make or decree policies in their decisions.

So, for example, these critics charge that, while the Court should be able to rule on the constitutionality of a piece of state or federal legislation, the Court should not be able to prescribe a precise remedy or new course of policy. To use the Court’s decision in the abortion case of *Roe v. Wade* (1973) as an illustration, according to many critics, the Court rightly had the power to rule on the constitutionality of the Texas statute, but its decision should have been based only on the powers and provisions explicitly stated in the constitution. The Court should not have been able to use so-called penumbras to create a right to privacy or lay out a specific trimester approach for other policymakers to follow as they implemented new regulations on abortion procedures.<sup>1</sup>

Other observers of the political process have charged that it matters little how broad the Court’s decisions are, in large part because the Court cannot truly create wholesale policy change. The most notable (or, perhaps, notorious) work written from this viewpoint

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<sup>1</sup> There are, of course, two separate, but related issues raised by a decision such as the one in *Roe*. One is whether the court should specify a remedy or policy to be adopted. The other is what the court can use as a basis for reaching its decisions.

continues to be Rosenberg's (1991) seminal work, *The Hollow Hope*. In this analysis, Rosenberg uses case studies of several policy issues, including civil rights, women's rights, and abortion to show that judicial decisions alone cannot alter the course of public policy. Rosenberg provides evidence that even in issue areas where the U.S. Supreme Court made a landmark decision, significant policy change occurred only after Congress and the executive branch began to focus on these issues. In short, Rosenberg argues that because the judiciary lacks the power to ensure compliance with its decisions, courts are a "hollow hope" for those individuals who seek to achieve policy change.

More recent studies of compliance with judicial decisions in other policy areas provide an equally dismal impression of the judiciary's ability to make public policy. A number of studies, most recently by McGuire (2009), demonstrate that despite the U.S. Supreme Court's repeated prohibitions on prayer in public schools, students continue to participate in religious activities in secondary education institutions. This is especially true in the South, in rural communities, and in areas with large conservative Christian populations.

Findings such as these about implementation and compliance illuminate an important truth about judicial power. But, in some ways, they also tempt scholars to give the courts short shrift as actors in the policymaking process. In this dissertation, I argue that even if the courts cannot immediately—or even eventually—assure compliance with their decisions, by simply making a decision, judges and justices can act as important agenda setters, altering the issue attention and lobbying activity of other actors within the political system. These changes have a waterfall effect within the governmental process, and lead to both instantaneous and gradual change in public policy.

The judiciary's agenda and decisions, for example, affect the actions of the legislative and executive branches by altering their policy priorities and providing incentives to consider the possibility of judicial review. A vast body of research has considered specific examples of this relationship (e.g. Ferejohn and Shipan 1990, Gely and Spiller 1990), as well as the informational and political constraints that affect the environment in which these actors function (Vanberg 2001, Rogers 2001).

But, we know less about how the judiciary's influence extends beyond the judicial review process and the formal institutions of government. By accepting petitions for certiorari, hearing oral arguments, and issuing decisions, the judiciary can cause political actors to pay more attention to old issues or shift attention to new ones. This dissertation considers how judicial decisions affect the actions of two particularly important quasi-institutional policy actors: the media, which informs the public about political events, and interest groups, who use the courts as an additional venue to mobilize citizens and achieve social and political change. This is particularly true in cases where the courts act as policy venues.

### **Courts as Policy Venues: Constitutional v. Statutory Law**

Policy venues are the particular institution(s) with the authority to make decisions over an issue (Baumgartner and Jones 1993). Changes in policy venues may happen over time, and occur as a result of history, constitutional arrangements, or cultural norms. But, once an issue becomes associated with a policy venue, that institution has significant power to shape how the issue is framed and alter popular understandings of the issue.

Previous research largely examines how the elected branches function as policy venues. However, the judiciary may also have ownership of some political issues. In fact,

because of the large number of courts and wide range of issues handled by the American judiciary, the courts' power to influence the agendas of other political actors may be quite varied and significant.

### *The Effects of Institutional Rules*

Most lower courts in the American judicial system (trial courts and intermediate appellate courts in state court systems, district and courts of appeals in the federal system) have mandatory jurisdiction and are forced to rule on the full range of issues that comes before them. This mandatory jurisdiction compels these courts to consider issues in a way that is very different than the legislative and executive branches. The mandatory nature of this jurisdiction may be particularly attractive for disadvantaged groups seeking to achieve policy change (Cortner 1968). While the other branches can effectively ignore groups with less political clout, the lower courts, especially, enjoy no such luxury. Thus, interest groups representing the politically disadvantaged often use interest group litigation to achieve policy change.

The federal and state supreme courts' largely discretionary jurisdiction presents a different agenda-setting dynamic. But, this dynamic is no less significant. First, by deciding which cases to hear in a given year, courts make a powerful statement about the issues that they consider to be worthy of a place on the agenda; this power is especially significant before the U.S. Supreme Court, which is asked to hear nearly 10,000 cases every year and rules on less than 100 cases. The types of cases that the Court chooses to hear and the rulings the justices make on those cases can have a powerful legacy and transform the political landscape in part because of the significance of simply being selected out of the pile of possible cases. A pattern of choosing cases in a particular issue area asserts the Court's

agenda-setting power even more clearly. The Warren Court, for example, was able to bring attention to civil rights issues, and the Rehnquist Court gave increased visibility to questions of federalism.

### *Constitutional v. Statutory Issues*

The courts may act as policy venues when there is great controversy between the other branches. They may also become involved in policymaking on issues where the public is pushing for a clear policy position, but it is making no progress in the elected branches. One of the more enduring distinctions in the policy issues handled by the government, however, is the distinction between constitutional and statutory cases. Although common wisdom on this distinction has been criticized in recent years (Friedman and Harvey 2003, Martin 2006), a body of research demonstrates that the institutional dynamics within the judiciary are quite different in these two types of cases.

Institutional constraints on judicial power, for example, are much lower in constitutional than statutory cases (Epstein and Knight 1998). There is little that the elected branches can do to change the course of constitutional policy that cannot be reviewed by the courts. The legislature can alter the courts' jurisdiction and impeach judges. The legislative and executive branches are also able to limit the budget of the judiciary and amend the Constitution.

These executive and legislative powers, however, are rarely utilized. They are high cost propositions that may have limited rewards; even the most far-reaching of these tools, Congress' power to amend the U.S. Constitution, has only been used 17 times since 1800. Furthermore, even though these threats may compel the judiciary to pay greater attention to the preferences of Congress and the executive branch in some issue areas, they do not change



the final reality that the judiciary has—and often uses—broad latitude in making decisions regarding constitutional issues.

Perhaps for these reasons, judges appear to make decisions differently in constitutional and statutory cases (e.g. Stock 1990, Spiller and Gely 1992, Pacelle et al. 2007). In constitutional cases, for example, the Supreme Court pays comparatively little attention to the ideology of Congress, the preferences of the president, and precedent. In contrast, in statutory cases, these factors have a significant impact on judicial decisions (Pacelle et al. 2008). This is likely because the executive and legislative branches have greater institutional power to alter judicial decisions on statutory issues. The congressional majority needed to change a statute, for example, is much smaller than the supermajority required to amend the constitution. As a result, judicial power may be less significant.

#### *Additional Considerations*

A number of additional variables may affect the clarity of this distinction between judicial power in constitutional and statutory cases. These include divided government, public opinion, and the political environment. It is worthwhile to consider the consequences of each, but also important to note that the effects of these variables may often only mediate the judiciary's power over an issue for a brief period of time.

#### Divided Government

Divided government is a persistent reality, at least in the last fifty years of American politics. Its influence on the executive and legislative branches has been widely debated, with scholars arguing that it affects legislative productivity (Mayhew 1991, Edwards, Barrett, and Peake 1997, Howell et al. 2000), alters congressional delegation of authority to the bureaucracy (Epstein and O'Halloran 1996), and boosts presidential approval ratings

(Nicholson, Segura, and Woods 2002). Divided government may also affect how (or if) the court system is used as an arbiter of the law.

Having an executive and legislature from different parties may, at least temporarily, push some statutory issues into the judiciary, increasing the courts' power in situations where it might normally have little control. Consider a situation where there is a conflict between the legislative and executive branches on a piece of legislation or an executive order. Rather than attempt to veto the bill or write a new law, the opposing branch may choose to challenge the legality of the statute or the executive order. This is particularly true when the courts are believed to be ideologically similar to the opposing branch. When the courts are in this role, their decisions may be particularly influential, even on statutory issues. These decisions may also be harder to override in periods of divided government, since the legislative and executive branches are likely to have opposing policy preferences.

In contrast, if there is widespread agreement between the executive and legislative branches on an issue, the judiciary may temporarily have less power over the visibility of some constitutional issues. This is particularly true in times of unified government. The ability of the executive and legislative branches to essentially ignore a decision they oppose or to take a decision they support and broadly expand upon it may make the judiciary's activity less noteworthy than under other circumstances.

### Public Opinion

Public opinion may also affect courts' power over constitutional issues. When public sentiment is very strongly for or against a policy position, the legislative and executive branches may attempt to make policy on issues they might not ordinarily address. Recently, this battle has become evident on the issue of Internet pornography. The Supreme Court has

tried to claim aspects of the issue as constitutional matters under the First Amendment.

Nevertheless, because few citizens support children having free access to sexually explicit information, Congress continues to very actively monitor and legislate on the issue.

### Political Environment

The political environment may also affect judicial power over political issues. Particularly in a presidential election year, all issues may be refocused around the electoral contest. The judiciary's visibility may be lower than normal, and even constitutional issues that are usually controlled by the courts may be framed in the context of the upcoming election. Often, such discussion centers on the judicial nominating process or the composition of the Supreme Court.

Despite these obstacles, the distinction between constitutional and statutory issues remains an enduring way to differentiate between those areas where the judiciary is more and less likely to act as a policy venue, and therefore, more or less likely to accept policymaking powers. The sections that follow explain how the courts engage in this process with regard to the media and interest groups.

### **Interactions with Media**

The actions taken by the judiciary can influence media coverage of the courts alone, as well as media coverage of courts in the broader political system. The sections that follow briefly detail the theoretical intuition underlying both.

### *Within the Judiciary*

The courts have a vested interest in using the media to present at least some of their decisions to the public. However, this may be a strategic process where all cases are not viewed by the justices as equally important. Accordingly, justices and judges may take steps

to increase the visibility of some issues and cases and decrease the visibility of others. These actions may be taken throughout the judicial process. Case selection and opinion writing are two key stages where judges can take actions that may affect media coverage of the courts.

The case selection stage in discretionary courts allows the judges seated on a given court significant latitude to bring new issues into the public eye or to avoid issues they do not want to address. Thus, when a court is presented with a policy issue in need of resolution, it may consider how deciding to decide that case—or offering a particular final decision—may affect the attention of the media and other policymakers.

Alternately, justices and judges' decisions about which cases to consider may result in keeping issues off the political agenda. By deciding *not* to decide cases that would be likely to attract media attention or focus on controversial issues (like the United States Supreme Court with gay marriage), a court can assert negative agenda control. Such a device may be particularly useful when the court wants to maintain its public goodwill and remain outside the scope of conflict until the political climate is more favorable.

During the opinion writing stage, in contrast, judges may take steps to make their decisions appear more (or less) formal or narrower (or broader) in scope, so that they attract varying degrees of media attention. For example, in a study of television news coverage of U.S. Supreme Court decisions, Slotnick and Segal (1998) showed that opinion characteristics were significant predictors of media attention. Decisions that overruled a lower court, altered a precedent, or were decided by a small margin (e.g. 5-4) were more likely than other cases to receive coverage. The decision date, too, was significant. Decisions handed down closer to the end of the Court's term were more likely to receive coverage, perhaps because media outlets plan to devote greater attention to the Court at that time.

### *In the Broader Policy Arena*

Researchers have frequently observed that Congress (Walker 1977, Baumgartner and Jones 1993) and the executive branch (Baumgartner and Jones 1993, Kingdon 1995, Edwards and Wood 1999, Canes-Wrone 2001) can affect the media's coverage of particular issues. The ability of officials in these branches to set the media's agenda gives the institution significant power to affect public agendas and policies.

Previous research on the judiciary, however, has argued that courts much more limited agenda-setting ability. One specific illustration of the judiciary's limited power to alter the media's agenda occurred in the years following the U.S. Supreme Court's landmark decision in *Roe v. Wade* (1973). Despite the decision's dramatic liberalizing effect on abortion policies, Rosenberg (1991) found that the salience of the abortion issue did not increase in the months following the high Court's decision.

I argue that (at least in certain political circumstances) the judiciary should, like the executive and legislative branches, be able to act as agenda setter and increase the visibility of social and political issues. This ability to set the agenda gives the Court tremendous institutional power. It is a result of a number of factors, including the Court's institutionalization and interactions with other institutional and quasi-institutional actors. It may, however, be a more sophisticated or nuanced process than other scholars have found or examined.

### **Interactions with Interest Groups**

The actions taken by the judiciary can also influence interest group activity before the courts, and in the broader political system. The sections that follow briefly detail the theoretical intuition underlying both.

### *Within the Judiciary*

The courts and the judges who sit on these tribunals stand to gain substantial knowledge and insight from attracting the attention and input of organized interests. Accordingly, they take a number of actions that encourage group participation before the judiciary. First, justices on a court with discretionary jurisdiction may make it known, either by public pronouncement or through their decisions, that they are interested in adjudicating certain political issues; interest groups are often uniquely equipped to bring these cases before the Court. Groups may also provide the Court with policy expertise and information about how a decision will affect its institutional prestige that the Court would not ordinarily possess.

But, interest groups are not equally likely to engage in all types of cases. By choosing cases that help interest groups to serve their dual goals of influencing public policy (Epstein and Rowland 1991, Hansford 2004, Solberg and Waltenburg 2006) and organizational maintenance (Wilson 1973, Salisbury 1984, Kobylka 1987, Caldeira and Wright 1989, Wasby 1995), the Court can attract greater levels of attention from interest groups. This variation in resource allocation has the potential to affect case and policy outcomes.

### *In the Broader Policy Arena*

The Court's choices about what types of cases to consider should also affect how interest groups allocate limited lobbying resources (such as finances [Walker 1983], membership [Salisbury 1984, Gray and Lowery 1996], selective benefits [Olson 1965, Wilson 1973, Moe 1980], and access to policy-makers [Browne 1990]) across branches. The Court's short-term policy agenda and long-term reputation for creating salient policy change

in an issue area should affect groups' decision calculus.

These effects may extend far beyond a given term of the Court. They may affect not only the policy information received by the Court, but also the information received by the other branches of the federal government (in this case, the legislature). In addition, the resource allocation of organized interests affects the attentiveness of policy monitoring by these groups, and alters the constituencies that policymakers feel the greatest pressure to please.

This specialization creates a symbiotic relationship between interest groups and government that reinforces institutions' positions as policy venues. A group interested in a given issue strategically chooses to lobby a particular branch of government *precisely because* it is the most likely agent to create lasting long- and short-term policy change. But, interest group lobbying in a particular branch of government also generates media attention and constituent awareness that further cements that branch's control over a policy issue.

### **Looking Forward**

This dissertation proceeds in four empirical chapters that consider the courts' interactions with two quasi-institutional actors, the media and interest groups. The first two empirical chapters consider the judiciary's ability to affect the media. The latter two empirical chapters consider the judiciary's ability to affect interest group activities.

Each of these sections—the media and interest groups—have two major parts. The first chapter of each section considers how judges and justices affect interactions within the judicial system. The second chapter of each section moves beyond the courts to examine how judicial decisions affect media perceptions and lobbying activity in other branches. These dual analyses help to paint a more complete picture of the judiciary's power as an

agenda setter. The paragraphs that follow provide a preview of the findings and highlight a number of major themes that will be evident throughout this dissertation.

Chapter 2 examines how state court judges shape the way the business of the courts is presented in the media. Judges can affect the flow of information about their court in two key ways. First, by deciding to decide cases concerning issue areas where the judiciary is more (or less) likely to influence public policy, judges can attract attention to a broader (or narrower) array of judicial decisions and garner more (or less) in-depth coverage of the issues they decide. Alternately, judges can craft their ultimate decisions to conform to certain characteristics that make them more or less appealing to the media. These characteristics affect both the breadth and the depth of the media's coverage, and are conditioned by the political environment in which the court operates.

Chapter 3 demonstrates that composition of the U.S. Supreme Court's docket can affect the types of political issues the general public is exposed to through news coverage. I show that the Court's ability to act as an agenda setter actually surpasses that of the presidency, which appears to be a more reactive institution. This agenda-setting ability is particularly important in constitutional issue areas where the judiciary is more likely to act as a policy venue.

Chapter 4 shows that the characteristics of cases the U.S. Supreme Court decides to consider can influence interest groups' lobbying activities before that body. Even after controlling for other factors that shape interest group participation, significantly more briefs are filed in cases that allow interest groups to pursue their dual goals of influencing public policy and organizational maintenance. This finding suggests that the composition of the Court's docket may be extremely important in establishing and maintaining its institutional



power, as well as its influence over the American policy making process.

Chapter 5, further, uses data on interest group activity before the U.S. Supreme Court and registered lobbyists before the U.S. Senate and House of Representatives to show that groups make calculated decisions about how to allocate their lobbying resources. These decisions are affected by a number of factors, including each branch's overall agenda composition. The findings of this analysis provide further evidence that the types of cases the Court decides to decide can have significant policy implications, both in the courts and in the federal government.

Finally, Chapter 6 brings together the findings of the previous four analyses and discusses the broader implications of this theory. It contains a discussion of what the findings of this dissertation mean for judicial power and the courts as an agenda-setter in the American political system. It also includes a number of considerations about what the findings of this research may mean for future scholarship on the institutional power of the American judiciary.

## **CHAPTER 2**

### **EXPLAINING HOW COURTS AFFECT MEDIA ATTENTION TO JUDICIAL BUSINESS**

One way the judgments of the judiciary set the agenda of other political actors is by deciding to decide cases that attract the attention of the news media. The ability to affect the agenda of the news media is significant for the normally secretive judiciary, which needs a conduit to reach out to the public. In many ways, the media acts as this filter through which citizens get their information about government and politics, and especially the courts. To most citizens, if political issues are not placed on the policy agenda through media coverage, they do not exist. And, if citizens are not aware of issues, they are unable to demand further political change, whether through direct lobbying techniques or by being part of organized interest activity that seeks to influence public policy.

In this chapter, I use evidence from state capital newspapers to examine how courts affect media coverage of judicial dockets and decisions. I find that, by taking cases where they can influence public policy and issuing opinions with particular characteristics, the judiciary can increase media attention to its business. These results hold true even after controlling for a broad range of environmental factors such media characteristics, judicial selection system, and divided government. This conclusion suggests that judges and justices may have greater agenda-setting power than many commentators have suggested.

#### **Theoretical Foundation**

The secrecy of the U.S. Supreme Court, as evidenced by its longstanding resistance to

cameras in the courtroom and sunshine on its conference process, have created a perception that the judiciary as a whole desires very little media attention to its business. But, this perception is not entirely true. Even the high Court has broken its shroud in some cases: Individual reporters have been given significant access to the inner workings of the Court (e.g. Toobin 2007, Woodward and Armstrong 1979), and a prestigious press corps that has included the likes of Linda Greenhouse, Joan Biskupic, and Nina Totenberg carefully report the Court's landmark decisions.

Lower courts provide a more frequent avenue for judicial transparency. These tribunals generally provide much greater access to the media and the public than the Supreme Court, and have been the focus of many television trials. Moreover, much of the daily coverage of many local news sources, for example, focuses on the activities of the judicial system, broadly defined. Stories of murders, thefts, and even high profile divorce cases are extremely common. Whether citizens acknowledge it or not, each of these stories has a large judicial component, beginning with police officers and district justices and moving upwards through the judicial system to encompass district attorneys, county judges, lawyers, and any number of other policy actors.

In fact, it is far from an exaggeration to say that the judiciary *needs* media coverage for a number of reasons.<sup>2</sup> First, the courts rely on news outlets to inform citizens about the implications of their often technical decisions. Reporters can reduce complex legalese to language that is comprehensible to the average citizen and make these people understand how a decision may affect their life.

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<sup>2</sup> Some reporters have even argued that Supreme Court justices should give up the veil of neutrality in order to improve their relations with the public. As veteran Supreme Court reporter Tony Mauro (2010) wrote in *USA Today*, "Clarence Thomas on *Face the Nation*? John Roberts taking questions posted on YouTube? Sam Alito blogging? Why not? Really, why not?"

Second, courts can use the media as a means of providing transparency to (Vanberg 2005), and in some ways, lobbying the public, who can, in turn, pressure their elected representatives to implement policies that are consistent with judicial decisions (Staton 2006, 2010). This technique may be particularly important when a court knows that its viewpoint is consistent with public opinion. It may also be important for judges to reach out to citizen lobbyists because courts lack the ability to enforce their decisions and often require cooperation from the legislative and executive branches of government.

Finally, it is only with media coverage and a public understanding of the importance of the courts' work that the judiciary can maintain its institutional prestige and aim to influence public policy (Greenhouse 1996, Baum 2006). This allows the judiciary to maintain power as an institution, even without the ability to enforce their decisions (McCubbins, Noll, and Weingast 1987, Carrubba and Rogers 2003).

### *Avenues of Judicial Influence*

The courts have a vested interest in using the media to present at least some of their decisions to the public. However, this may be a strategic process where all cases are not viewed by the justices as equally important. Accordingly, justices and judges may take steps to increase the visibility of some issues and cases and decrease the visibility of others. These actions may be taken throughout the judicial process. Here, I focus on case selection and opinion writing as two key stages where judges can take actions that may affect media coverage of the courts.

### Case Selection

Many courts in the American political system have discretionary dockets that allow their judges to choose the cases that they want to hear. This is the system used by the United

States Supreme Court, for example, which hears only about 75 of the nearly 10,000 cases presented to it each year. State supreme courts in forty states also have somewhat discretionary dockets. The remaining ten state supreme courts have very limited discretion (National Center for State Courts 2009).<sup>3</sup>

A discretionary docket allows the judges seated on a given court significant latitude to bring new issues into the public eye or to avoid issues they do not want to address. Thus, when a court is presented with a policy issue in need of resolution, it may consider how deciding to decide that case—or offering a particular final decision—may affect the attention of the media and other policymakers. In some cases (such as the issues of enforcement discussed earlier), attracting the attention of these other actors and putting the issue on the public agenda may be at least a tangential concern for judges and justices.

Alternately, justices and judges' decisions about which cases to consider may result in keeping issues off the political agenda. By deciding *not* to decide cases that would be likely to attract media attention or focus on controversial issues (like the United States Supreme Court with gay marriage), a court can assert negative agenda control. Such a device may be particularly useful when the court wants to maintain its public goodwill and remain outside the scope of conflict until the political climate is more favorable.

As courts choose cases to decide, they are doubtless aware that the stakes are higher for their decisions in some types of cases than others. For example, recall from Chapter 1 that, as a result of a variety of agenda-setting processes, the judiciary should be more likely to act as a policy venue and have a lasting impact on public policy in some types of cases than others. Among these are constitutional cases, where the courts are given great latitude

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<sup>3</sup> The states with limited discretion are Maine, Mississippi, Montana, Nevada, North Dakota, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

to interpret the meaning of that document and adapt its provisions to modern America. Because the courts have significant power to influence the course of public policy in these cases, they may be more likely to attract media attention in the first place. Thus, judges and justices on discretionary courts must be particularly mindful when deciding to decide these cases.

### Opinion Writing

Judges on both courts of discretionary and mandatory jurisdiction may also alter the media attention paid to their decisions during the opinion writing process. By taking steps to make their decisions appear more (or less) formal or narrower (or broader) in scope, judges and justices can attract varying degrees of media attention. For example, in a study of television news coverage of U.S. Supreme Court decisions, Slotnick and Segal (1998) showed that opinion characteristics were significant predictors of media attention. Decisions that overruled a lower court, altered a precedent, or were decided by a small margin (e.g. 5-4) were more likely than other cases to receive coverage. The decision date, too, was significant. Decisions handed down closer to the end of the Court's term were more likely to receive coverage, perhaps because media outlets plan to devote greater attention to the Court at that time.

This suggests that a court wanting to draw attention to a policy issue would be unlikely to issue an important decision as a per curiam opinion on a busy news day.<sup>4</sup> Instead, such decisions should be handed down during a slower point in the news cycle, and with a signed opinion. In contrast, a court that wanted to conceal its decision in a relatively controversial case would do well to reach a unanimous conclusion and issue an unsigned

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<sup>4</sup> This was perhaps the case with the Supreme Court's decision in *Roe v. Wade* (1973), which was decided in mid-January. Coincidentally, this was also the day that former President Lyndon Baines Johnson died, making *Roe* not even front-page news.

opinion.

### **Why States?**

The analysis that follows considers the relationship between courts and the media with specific reference to U.S. state supreme courts. The decision to use data on state supreme court decisions rather than the United States Supreme Court may, at first seem a peculiar one. But, for a number of reasons, it is not only a pragmatic decision, but also one that enriches the test of the theory in a way that national level data could not.

First, applying the foregoing theory to state supreme courts demonstrates its universality. The theory discussed in this dissertation is a theory of judicial power, not an exclusive theory of the U.S. Supreme Court's power. Testing it in state governments clearly demonstrates this point.

Second, testing this theory in state supreme courts demonstrates the wide array of cases and issues on which the courts may act as agenda setters. State supreme courts are the courts of last resort for a large proportion of cases handled by the U.S. judicial system. Only a fraction of state cases reach the U.S. Supreme Court (and those must involve a federal issue); this body decides fewer than 100 cases each year. Therefore, most of the nation's judicial business is conducted in state and other federal courts.

Last, studying state supreme courts also enables a much more robust test of how the political environment affects the courts' ability to act as an agenda setter. A study of state supreme courts, for example, can account for the varying institutional structures of the media, the judiciary, and the state government. A comprehensive test such as this is nearly impossible using data from the Supreme Court, which has no cross-sectional institutional variation.

Controlling for these variations is especially important because previous research on the media and the judiciary demonstrates that the political environment may temper the amount of coverage received by judicial decisions. For example, scholars have found that media outlets with greater circulation and resources are more likely to cover the courts than those with lesser resources (Hale 2006). Multiple news outlets in a city, especially in the case of newspapers, may also promote additional coverage of local issues (Schaffner and Wagner 2006). The competition that results over readership and profits at a time that many newspapers are in danger of collapse may drive these outlets to pay more careful attention to political issues than under other circumstances.

Media ownership may also affect the type of coverage received by the courts; outlets that are locally owned may rely less on national news staff and more on reporters within the community, leading to greater coverage of local issues. In an analysis of media coverage of judicial elections, for example, Schaffner and Diascro (2007) found that locally owned newspapers provided twice the coverage of state high court contests than their chain-owned counterparts.

In addition, the accountability of the judiciary may also affect the likelihood that cases receive coverage. In the American states, this means that, holding the size of a court's docket and prestige constant, decisions by elected judges may be more newsworthy than those made by appointed judges. This is especially true in years where judges on that court are facing reelection. In these cases, it becomes increasingly more important that citizens are aware of the issues that judges consider, as well as decisions made by incumbent judges while serving on the court.

The importance of selection system and the proximity of judicial elections is not a



new idea. Scholars have long examined how judicial selection systems affect judges' decisions (Hall 1987, Hall 1992, Brace and Hall 1993, Brace and Hall 1995, Hall 1995, Brace, Hall, and Langer 1999) and considered how selection systems and other institutional factors affect the presence and quality of challengers in judicial elections (Bonneau and Hall 2003). It should, therefore, be unsurprising that such factors would also influence courts' relationships with the media.

Finally, other features of state governments, particularly their partisan composition, may also affect courts' ability to attract media attention. As noted in Chapter 1, in times of divided government, the courts' ability to act as a policy venue on certain issues may fluctuate. In addition, in times of divided government the contentiousness between the governor and the legislature may be such an engaging story that it makes covering the courts a less interesting story.

## **Hypotheses**

This theory of the judiciary's ability to set the media's agenda leads to several hypotheses about media coverage of the courts. These affect both the probability that a given case will receive coverage (breadth of coverage) and how much coverage that case will receive (depth of coverage). Both of these concepts measure a court's ability to put an issue on the public agenda. The breadth of coverage provided by the media taps into the scope of issues a court's decisions can expose to the public, while the depth of coverage is a gauge of how well the courts can make these issues "stick" in a crowded news environment.

### *Case Selection and Public Policy*

First, courts should attract more media attention in cases where they have greater ability to influence public policy. A useful empirical distinction in the policy issues handled

by the judiciary is the difference between constitutional and non-constitutional decisions. Although the judiciary decides far fewer constitutional than non-constitutional cases, courts have much broader latitude to influence public policy in constitutional cases than in other cases. Therefore, for the purposes of this study, constitutional cases should be more likely to receive more coverage than their non-constitutional counterparts.

A court's ability to influence public policy, however, is certainly more nuanced. Within the category of constitutional issues, for example, some judicial decisions should be particularly likely to attract media attention. Death penalty cases are one example where the judiciary's broad latitude in decision-making is perceived to have a significant impact on society. In these cases, judges make determinations that affect public safety, and literally choosing between life and death. The stakes are high in these cases, and the courts' role is large. Accordingly, courts should attract more attention in death penalty cases than other cases.

In contrast, courts may have particularly limited power to make lasting policy decisions in some non-constitutional issue areas. Torts, for example, are highly technical and heavily regulated by executive branch regulations and legislation. Most tort decisions are also narrow in scope and affect only a small group of citizens. Thus, most judicial decisions regarding torts should attract relatively little media attention.

#### *Opinion Characteristics*

A court's actions during the decision-making process should also affect the types of cases that receive media attention. Cases that are contentious—either because the court's decision is closely divided or because the court alters a lower court's decision—should attract more media attention (Slotnick and Segal 1998). And, opinions that are signed by the

judges or justices of the court send a message about the case's political or social significance. If a case is truly significant, it is unlikely that judges will dismiss it with a per curiam decision or without extended discussion. Therefore, signed opinions should receive more media coverage than their unsigned counterparts.<sup>5</sup>

### *Political Environment*

As the theory postulates, courts' ability to influence media coverage through case selection and opinion writing should be affected by the political environment in which both the courts and the media operate. The media's capacity to provide coverage, as well as the economic pressures of the community, may limit or enhance coverage. Newspapers with greater circulation and a local owner, as well as competition within the city should, for example, provide more comprehensive news coverage than in other cases. A judicial election should put the courts on the political agenda more than in other years. And, divided government is likely to create such a contentious political environment in state government that news outlets shift resources away from the judiciary, reducing coverage of the courts' decisions.

### **Data and Methods**

This analysis relies on two dependent variables assembled using state capital newspapers' coverage of their own high courts. It also includes a series of independent and control variables that capture variations in judicial decisions and the political environments in which they are made. These variables, along with the models used to conduct these inquiries are described in greater detail in the following sections.

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<sup>5</sup> The unsigned opinion, of course, may also be a strategic tool for judges who want to downplay the significance of a particular decision. However, it is difficult to systematically determine when judges and justices are using this mechanism. Thus, since the signed v. per curiam distinction has been used in previous research (Slotnick and Segal 1998) as a proxy for contentiousness, I continue to use it here.

### *Dependent Variables*

This analysis employs two dependent variables—a dummy variable that indicates whether or not a case received coverage in its own state capital newspaper and a count variable indicating how many times each case was discussed in its own state capital paper.<sup>6</sup> Using two dependent variables allows me to consider two separate but related ideas: whether cases received any coverage (breadth of coverage) and the amount of coverage received by each case (depth of coverage). As previously discussed, considering both of these dependent variables provides a more nuanced impression of how judges and justices are able to set the media's agenda through their case selection and opinion writing.

Both the binary and count variables were created using state supreme court coverage from calendar year 1998. I used 1998 because it was the most recent year available in the Brace and Hall (2002) State Supreme Court Data Project, a comprehensive database of state supreme court decisions from all fifty states between 1995 and 1998. All states whose largest circulation state capital newspaper was archived in Lexis-Nexis Academic Universe for 1998 were included in the analysis.<sup>7</sup> This led to the inclusion of twenty states and papers,

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<sup>6</sup> I could also have chosen to use the largest circulation state papers (see Wilhelm and Vining 2009), but chose to use state capital papers for several reasons. First, even among largest circulation papers, there would be variation in size and, therefore, resources available to cover the courts (the largest circulation paper in Wyoming, the *Wyoming Tribune Eagle*, is still very different from the *New York Times*). Second, using largest circulation papers would introduce another kind of variation—distance from the state capital—that could also affect news coverage of state supreme courts.

<sup>7</sup> The states and papers included in this analysis are: Arkansas ([Little Rock] *Arkansas Democrat Gazette*), Colorado (*Denver Post*), Georgia (*Atlanta Journal-Constitution*), Illinois ([Springfield] *State Journal Register*), Kansas (*Topeka Capital Journal*), Louisiana (*The [Baton Rouge] Advocate*), Massachusetts (*Boston Globe*), Maryland (*The [Annapolis] Capital*), North Carolina ([Raleigh] *News and Observer*), North Dakota (*Bismarck Tribune*), New Mexico (*Santa Fe New Mexican*), New York ([Albany] *Times-Union*), Ohio (*Columbus Dispatch*), Rhode Island (*Providence Journal*), Texas (*Austin American Statesman*), Utah (*Salt Lake Tribune*), Virginia (*Richmond Times-Dispatch*), Wisconsin ([Madison] *Wisconsin State Journal*), West Virginia (*Charleston Gazette*), and Wyoming ([Cheyenne] *Wyoming Tribune-Eagle*).

and a total of 3,012 cases.

To identify whether or not a case received news coverage as well as how much coverage a case received, I searched the 1998 Lexis-Nexis Academic Universe archives of each state capital newspaper using the over-inclusive term “supreme court.”<sup>8</sup> All stories identified by the search engine were collected and read by a single coder to verify that they related to that state’s highest court and not the United States Supreme Court or the supreme court of another state. If the story was appropriate, the case(s) discussed in its text were identified using characteristics such as the plaintiff, defendant, or opinion author. These characteristics were then matched to case characteristics in the Brace and Hall State Supreme Court Data Project.

After identification, cases were coded on each of the variables. Cases were coded 1 on the news coverage variable if they received any attention in the media and 0 otherwise. Cases were also assigned a value for the news count variable, which indicated how many total stories mentioned that case. Overall, 16 percent of cases decided by state supreme courts in 1998 received coverage in state capital newspapers. Of these cases, 77 percent were discussed only once. The remaining 23 percent of cases received multiple mentions (ranging from two to sixteen articles). Generally speaking, scandals in government, death penalty cases, and school finance decisions received the most attention.

There is every reason to expect that the twenty-state sample used in this analysis is a representative sample of state supreme court business. Moreover, it appears that 1998 is a rather average year in state supreme court business. As shown in Table 2.1, the percentage of criminal and civil cases is relatively consistent across all cases included in the Brace and

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<sup>8</sup> Most decision dates are far enough removed from the end of the year (judges like to celebrate December holidays, too!) that I made the decision to code only 1998 rather than attempting to define an arbitrary endpoint for coding into 1999.

Hall Data Project, all cases decided in 1998, and the cases included in the analysis. This pattern holds true for a number of other case characteristics, including whether the decision concerned a constitutional issue, was unanimous, or altered a lower court decision.

### *Independent Variables*

The primary independent variables of interest included in this model relate to the issue area of the case and the characteristics of the courts' final opinions. The paragraphs that follow consider the measurement of each of these in turn.

#### Issue Variables

The courts' ability to affect news coverage by choosing to hear a case where it may influence public policy is measured using a binary variable that separates constitutional and non-constitutional cases. This has been chosen as a proxy variable and will be used throughout the dissertation as a basic measure of the judiciary's ability to act as a policy venue.

For the purpose of this analysis, a constitutional case is any case that concerns either a state or federal constitutional issue. These cases are combined into one variable to eliminate concerns about collinearity. Because the federal and state constitutions include many of the same provisions, many cases that related to a state constitutional issue also concerned a federal constitutional issue, and vice versa. In fact, the Brace and Hall databases' values for whether a case concerned a state constitutional issue and a federal constitutional issue matched 97 percent of the time. Cases concerning constitutional issues are coded 1 and were present in approximately 4 percent of cases.<sup>9</sup>

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<sup>9</sup> This percentage is much lower than the percentage of constitutional cases adjudicated by the U.S. Supreme Court. This is likely the result of the jurisdiction of state supreme courts, which requires courts in many states to hear and dispose of a much greater number of mandatory jurisdiction cases (which are often not constitutional) than the federal supreme court.

The models also include two additional independent variables measuring specific policy areas where the courts' ability to influence public policy may be particularly high or low. First, a binary variable is used to indicate those cases where the court either considered or imposed the death penalty; this was the case in 4 percent of decisions. As discussed in the hypotheses, death penalty cases are representative of a particular class of constitutional cases where the courts are particularly likely to make decisions with significant policy implications. These cases may, therefore, also be more likely to attract media attention.

Second, the models also include a measure of whether the case concerned a tort. As discussed in the hypotheses, tort cases are representative of a class of statutory decisions where courts have limited ability to influence public policy and thus, these decisions should be especially unlikely to receive news coverage. Tort cases include any cases that Brace and Hall (2002) classified as falling under the general issue category of civil government or civil private torts. Examples include employee injury, workers' compensation, professional malpractice, and libel cases. Nearly 25 percent of cases fit these criteria; these cases are coded 1.

#### Opinion Characteristics

The models also control for three opinion characteristics that may affect the quantity and quality of news coverage of state supreme court cases. Unlike the issue area of the case, these variables are factors judges can influence after the case has been heard and considered, even in mandatory jurisdiction cases. These characteristics are whether the decision of the court was unanimous, whether the opinion was signed, and whether the decision altered the opinion of one or more lower courts. These characteristics are derived from the Brace and Hall State Supreme Court Data Project. They are coded 1 if the characteristic is present and

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0 otherwise. For more descriptive statistics on these variables, see Table 2.1.

### *Controlling for the Political Environment*

Both the binary and count models include several controls for the political environment, which may alter judges' ability to affect media coverage about their court. These variables fall into three major categories: media characteristics, judicial characteristics, and divided government.

#### Media Characteristics

The first three environmental factors relate to the characteristics of the media. Information on each of these variables was collected from the 1998 edition of the *Editor and Publisher International Year Book* (Editor and Publisher 1998). First, newspaper circulation is a continuous variable that measures each paper's average weekday sales. The circulation of the newspapers included in this analysis ranges from nearly 17,000 to almost 477,000. The average circulation of papers included in this analysis is approximately 160,000 copies per day.

Second, newspaper ownership is a binary variable that divides newspapers into two categories: those published by media conglomerates (coded 0 in the analysis) and those that are locally owned and operated (coded 1 in the analysis). Overall, five of the twenty state capital newspapers included in this study were locally owned. This accounted for approximately 25 percent of all cases.

Finally, state high court cases are coded 1 if they were decided in cities with multiple daily papers and 0 if they were decided in cities with only one major daily newspaper. Overall, five of the twenty capital cities included in this analysis had multiple papers. These states accounted for roughly 25 percent of cases.



### Judicial Characteristics

The models also control for two characteristics of the judiciary. The first of these judicial characteristics is a binary variable indicating whether a state held an election for its supreme court in 1998. States that held an election are coded 1; all other states are coded 0. Of the states included in this sample, five held elections in 1998. Four of these states held partisan elections, and one held a non-partisan election.<sup>10</sup> Just over 30 percent of cases were decided in states holding elections in 1998.<sup>11</sup>

Each state high court's caseload is considered by using a binary variable measuring whether the court has a discretionary docket. I use the discretionary docket variable for two reasons. First, courts with discretionary dockets generally consider fewer cases than their counterparts with mandatory jurisdiction. Second, a discretionary docket allows its judges greater latitude over the cases they choose to consider. This, in turn, empowers the court to make a greater (or lesser) number of judgments that may attract media coverage. This variable is coded 1 for cases decided in states where the court has largely discretionary jurisdiction and 0 otherwise. Of the states included in this analysis, fifteen had discretionary dockets. These states accounted for almost 80 percent of the cases in this study.<sup>12</sup>

### Divided Government

Finally, the models consider whether a state had divided government in 1998.

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<sup>10</sup> I also tested other models employing more nuanced measures of judicial selection. The results of these models were substantively similar to those shown here.

<sup>11</sup> All cases considered in states that held elections in 1998 were coded 1, regardless of if the coverage was before or after the election. This is done for a number of reasons. First, defining an endpoint for election coverage would also require defining a beginning, and such a definition would be arbitrary, and likely vary widely across states. Second, nuanced coding of pre- and post election coverage of cases would have been quite difficult on the count variable.

<sup>12</sup> A separate model also controlled for the size of the courts' docket. This variable was collinear with the newspaper circulation and performed similarly to the binary measure of discretionary dockets.

Divided government is defined as having a governor and at least one house of the state legislature controlled by different political parties. States with divided control are coded as 1 and unified states are coded as 0. Fourteen of the twenty states included in this analysis had divided government, accounting for 66 percent of cases.

### *Model Estimation*

The model considering the court's affect on the breadth of news coverage is estimated using probit estimation. Probit is a maximum likelihood estimator appropriate for use with binary response variables. The model predicts the probability of an event—in this case, newspaper coverage of a state supreme court decision—occurring in the absence or presence of particular independent variables. The probit model is based on the normal distribution and assumes an error term with a variance of one.

The model estimating the courts' affect on the depth of news coverage is estimated using an event count model, specifically negative binomial regression. I choose to use negative binomial regression rather than a Poisson model because the negative binomial model accounts for (by estimating an additional parameter) overdispersion, or greater variance than might be expected given the mean of the data. I expect that overdispersion could be cause for concern in this model, given the large number of observations that receive no coverage.<sup>13</sup> In addition, the negative binomial model also accounts for a potential violation of the assumption of conditional independence of observations, or where the occurrence of one event makes another event more or less likely. In this case, once a reporter has put the resources into covering a case at one stage of the judicial process (for example,

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<sup>13</sup> Some readers might argue for the use of a zero-inflated model in the presence of so many zero observations on the dependent variable. However, there is no reason to think that there are differing theoretical explanations for why an observation falls in the zero group or the non zero group and why an observation may be greater than one. Thus, a zero inflated model is theoretically inappropriate.

oral argument) it is more likely that a paper might choose to follow up on that story later in the process (perhaps on decision day).

The models used in this paper also employ robust standard errors. Robust standard errors are generally used when there is a small departure from the fundamental assumptions of the model. In this case, the assumption of conditional independence of observations has likely been violated. There are multiple case observations from each of the twenty states, and it is likely that the residuals for observations within each state will be correlated.

### **Findings: Breadth of Coverage**

The model of news coverage shown in Table 2.2 demonstrates support for most of the hypotheses regarding the breadth of news coverage of state supreme courts. The results of this model, therefore, indicate dramatic differences in the likelihood of cases receiving coverage based on their characteristics. By deciding to decide certain types of cases or crafting opinions that have particular identifying features, judges can influence the visibility of courts as a whole, as well as specific political issues.

First, consider the courts' ability to set the media's agenda by deciding to decide particular types of cases. I postulated that the courts would attract greater media attention in cases where they acted as policy venues; this hypothesis received strong support. Constitutional cases were 27 percent more likely to receive media attention than their non-constitutional counterparts. This is the largest substantive difference seen in the probit model, and almost twice as large as the next largest effect. Clearly, issue area and judicial discretion matter for attracting at least a minimal level of media attention.

More specific case types also demonstrate evidence for the importance of issue area in determining a case's probability of news coverage. Death penalty cases, for example,

were 15 percent more likely than other cases to receive news coverage. And, tort cases were 4 percent less likely than other cases to receive news coverage.

It also appears that courts can influence the probability of a case receiving news coverage by crafting opinions with particular characteristics. Unanimous decisions, for example, were 6 percent less likely than other cases to receive news coverage. Signed opinions and decisions that altered a lower court's verdict increased a case's predicted probability of news coverage by 8 percent and 2 percent, respectively.

Importantly, these effects for issue area and opinion characteristics hold true even in the presence of controls for political environment. Media characteristics had particularly significant effects. Cases decided in capital cities with two major daily newspapers, for example, were 15 percent more likely to receive news coverage than those decided in a capital city with one paper. And, cases decided in cities with higher circulations and locally owned papers were both about 6 percent more likely to receive news coverage than cases decided in cities with lower circulation newspapers.

Judicial characteristics were also statistically and substantively important. Both the variable indicating whether a state held a judicial election in 1998 and the control for whether the court had a mandatory or discretionary docket were significant predictors of whether a case received coverage. Cases decided in states that held elections in 1998 were 6 percent more likely to receive news coverage, while cases decided in states with discretionary dockets were 3 percent less likely to receive news coverage.

### **Findings: Depth of Coverage**

The count model shown in Table 2.3 also provides substantial support for the courts' ability to affect media coverage by choosing to decide cases that will "stick" on the political

agenda. The issue area of the case is again the most important predictor of how much coverage a case received; cases concerning constitutional cases receive 360 percent more coverage than non-constitutional cases. Death penalty cases also received an increased quantity of coverage, about 180 percent more than other cases. Torts, in contrast, received 39 percent less coverage than other cases.

The courts' ability to affect media coverage by crafting judicial opinions with particular characteristics also persisted in this model. Unanimous decisions received 38 percent less coverage than other cases. And, cases decided with signed opinions received 176 percent more coverage than their unsigned counterparts.

And, once again, the political environment also influenced the courts' ability to act as an agenda setter. Cases decided in cities with two newspapers received 237 percent more coverage than cases decided in one-paper cities. Similarly, cases decided in cities with locally owned papers received 140 percent more coverage. And cases decided in states with divided government received 33 percent less coverage than cases decided in states where the same party controlled the executive and legislative branches.

To get an idea of the substantive implications of these findings, consider the following example. A constitutional case decided with a signed opinion and in a capital city with two newspapers would receive roughly two more stories than a non-constitutional case with an unsigned opinion decided in a one paper city, holding all else constant. Since the mean number of stories mentioning each case is .23, this is a substantial increase in media attention, especially when considering only three variables.

#### *Breadth v. Depth*

In many ways, the two models are very similar. The direction of the effects of the

individual variables observed in each of the models, for example, fluctuates very little. Moreover, both models provide persuasive evidence that, even after controlling for the political environment, judges have some ability to affect the type of information citizens receive about their courts. Whether by choosing to decide cases that address (or do not address) certain issues or crafting their opinions to meet particular characteristics, judges are active participants in the agenda-setting process. This is true in both courts with discretionary and non-discretionary dockets; the models indicate only small differences across these two types of courts (discussed in greater detail below).

In both models, constitutional cases, death penalty cases, and having two papers in a city have the greatest effect on the news coverage received by a case. The substantive impacts of each of these predictors cannot be underestimated. The effects of each of these variables on judges' ability to set the media's agenda are considered further in the discussion section of this chapter.

The circulation of the newspaper, having a discretionary docket, and the presence of judicial elections appear to be more important predictors of whether a case receives coverage at all than how much coverage that case will receive. All of these predictors have modest statistically significant effects in the news coverage model. However, only judicial elections remain significant in the count model. These are reasonable findings; one might expect circulation to affect a paper's ability to cover a broad number of issues before it affected a paper's ability to cover the same issue in depth. Elections may bring to light more issues in passing than in other cases. And, discretionary courts may consider fewer cases of interest in a given year (perhaps in an exercise of negative agenda control).

In contrast, divided government, especially, seems to matter more in determining the

depth of coverage a case will receive than the breadth of the media's attention to the judiciary. This suggests that individual judicial decisions may receive more intensive attention from the media when conflict between the governor and the legislature is lower. The cause of this phenomenon is not immediately clear. It may be that unified control frees up news space or is more likely to make the court a controversial figure than under divided government.

## **Discussion**

The findings of this analysis provide support for the broad contention that judges can play a role in shaping the agenda of the media. They can do this in two key ways. First, by deciding to decide cases concerning certain issue areas where the court is more (or less) likely to influence public policy (act as policy venues) a court can attract attention to a broader (or narrower) array of judicial decisions and garner more (or less) in-depth coverage of the issues they decide. Or, judges can craft their decisions to conform to certain characteristics (i.e. unanimous decision, unsigned opinion) that make them more or less appealing to the media. These characteristics also affect both the breadth and the depth of the media's coverage, and are conditioned by the political environment in which the court operates.

### *The Judges' Role*

It is important to note that the issue area of the case—especially whether a case concerns a constitutional issue—had the largest substantive effect on both the breadth and depth of news coverage. This suggests that by deciding to decide cases related to certain political issues (or by deciding to decide cases on constitutional or statutory grounds), the courts have significant power to put issues on the public agenda. They may also have great

latitude to keep issues off the public agenda by deciding not to decide particular cases and issues.

For example, by repeatedly becoming involved in the battle over school funding, the Ohio Supreme Court has helped to keep an important political issue on the public agenda and tried to assure equality for all children. One exhibit of the court's influence can be seen in the wake of its 1997 decision, just one in a series of battles between the court and the Ohio legislature. Although the court did not even consider the issue in 1998, it was mentioned in more stories than any other Ohio Supreme Court decision during that year. One reason why this case was followed so closely was likely its reaching impact on both public policy and a large number of Ohio residents. But, if the court had not decided to get involved in this battle, the window of opportunity would likely have closed on this concern.<sup>14</sup>

The characteristics of the court's opinion in a case had somewhat more modest effects on the breadth and depth of the coverage received by the judiciary than issue area. Nevertheless, the persistence of these effects suggests that judges are able to affect the media's coverage throughout the judicial process, and empowers judges and justices with a much greater ability to take actions to influence the media's agenda than is often accorded to officers of the court.

One example of a case that may have garnered additional attention because of the characteristics of the opinion—non-unanimous, signed, altering a lower court decision—may be the Colorado Supreme Court case of *Bayer v. Crested Butte* (1998). This case asked the narrow question of which of two Colorado transportation laws governed ski lift maintenance during the winter season. Had the judges of the court agreed and/or issued an unsigned

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<sup>14</sup> Of course, this action also had benefits for the court, which clearly increased its visibility with the general public. And, by repeatedly declaring unpopular financing plans approved by the legislature to be unconstitutional, the court garnered a great deal of goodwill with citizens.



opinion, this case would likely have received only limited attention in trade publications for ski resorts. Instead, it was one of the 16 percent of cases that received coverage—and in multiple stories, at that!

### *Environmental Effects*

The model also shows that judges' decisions must be contextualized within the larger political system. Although judges may have some control over which cases are covered by the media and how often, this varies with the characteristics of the media and the courts, as well as with the partisan control of the state. Several of these characteristics merit special consideration because of trends present in modern politics.

First, consider news media ownership and publication. In the past, it was common practice for most medium and large cities to have two newspapers. In many cases, one of these papers was published in the morning and the other was published in the afternoon. For example, before their merger in 1991, the city of Little Rock had the *Arkansas Gazette*, which was published in the morning, and *Arkansas Democrat*, which was published in the afternoon for most of its history. Local families or individuals also owned many of these newspapers. But the numbers of both locally owned newspapers and two newspaper cities have steadily declined over the last several decades (Editor and Publisher 1998). In a very recent and visible case, for example, one of the few remaining two paper cities, Denver, Colorado, lost its second paper, the *Rocky Mountain News*, on February 27, 2009. Today, the *Denver Post* is the only daily newspaper published in the Denver metropolitan area. And, it seems that every time we turn around, we hear stories of yet another newspaper up for sale or struggling to survive.<sup>15</sup>

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<sup>15</sup> In fact, of the five states that had two state capital papers in 1998, only three remain in print editions today—the Charleston, West Virginia *Gazette* and *Daily Mail*, the Boston, Massachusetts *Globe* and *Herald*, and the

But, the findings of this and other research suggest that if the trends of media consolidation and newspaper closures continue, it is likely that citizens' knowledge of state supreme courts will suffer. Fewer stories, and less in-depth coverage mean fewer opportunities for citizens to truly learn about what state supreme courts do and the types of cases they adjudicate. This change could potentially create a public that is vastly unaware of the activities of one of the major branches of their government.

Second, consider the role of judicial elections in increasing the visibility of judicial business. As these contests become more polarized and more costly (Goldberg et al. 2005), state legislatures inevitably consider how the states' selection systems can be reformed to maintain the integrity of the judicial process. One common proposal is for states to move away from holding elections, choosing instead to appoint judges, or to use a hybrid selection model such as the Missouri Plan, which can take many forms, but usually combines gubernatorial or legislative appointment with a non-partisan nominating commission. However, this analysis suggests that these changes may have potential consequences for citizens' awareness of the business of their judiciary.

Finally, note that in states with divided government, state supreme court cases received less in-depth coverage than in states with a unified legislature and executive. This is likely the result of a limited news hole for politics being filled by a "better" or more contentious story. Once again, this potentially jeopardizes citizens' knowledge of one of the three main branches of their state government. In an era where divided government is more a norm than an anomaly, we should be concerned that the contentious relationship between the legislature and the executive may have consequences beyond those that scholars have

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Salt Lake City, Utah (*Deseret News* and *Tribune*). Denver, Colorado (*Post* and *Rocky Mountain News*), discussed in text, and Madison, Wisconsin (*State Journal* and *Capital Times*) have both seen their second newspaper move to an online only edition since 2008.

originally considered.

## **Conclusion**

This chapter begins to offer evidence for how the court can affect the agendas of other political actors. Specifically, it demonstrates that, through case selection and opinion writing, the courts can affect the depth and breadth of media coverage provided to the judiciary. This ability, however, is conditioned on the political environment in which the court operates, including the characteristics of the media, the court, and the partisan control of state government.

This chapter, however, examines judicial decisions in isolation. It can only speak to how judges' decisions affect coverage of their own business. But, it is possible that the judiciary's decisions to consider particular political issues can also affect the media's broader attention to political issues. A decision, for example, may attract media attention to an issue, which may follow that issue through the legislative or executive branches. Chapter 3 uses time serial data from the Policy Agendas Project to shed greater light on this phenomenon.

Table 2.1. Characteristics of State Supreme Court Decisions

	All Cases in Database	All 1998 Cases in Database	Cases Included in Analysis
% Criminal	31.92	31.65	31.19
% Civil	65.84	66.26	66.49
% Other	2.24	2.09	2.32
% Constitutional Cases	4.69	3.44	3.65
% Death Penalty	5.31	5.61	4.02
% Torts	22.50	24.40	24.14
% Unanimous Decisions	78.72	77.30	78.55
% Alter Lower Court Decision	40.57	40.37	39.85
% Signed Opinions	84.11	82.73	78.61
Total Cases	28,332	7,045	3,012

Table 2.2. Predictors of the Breadth of News Coverage of State Supreme Courts

	Coefficient (Robust S.E.)	Change in Predicted Probability
<i>Case Type</i>		
Constitutional Issue	.870 *** (.125)	.27
Death Penalty	.520 *** (.130)	.15
Torts	-.201 *** (.072)	-.04
<i>Opinion Characteristics</i>		
Unanimous Decision	-.246 *** (.070)	-.06
Alter Lower Court Decision	.104 * (.059)	.02
Signed Opinion	.392 *** (.083)	.08
<i>Political Environment</i>		
Two Papers	.589 *** (.084)	.15
Local Owner	.216 ** (.086)	.05
Circulation	.0000005 * (.0000003)	.05
Discretionary Docket	-.156 * (.090)	-.03
Judicial Election	.260 *** (.072)	.06
Divided Government	-.092 (.069)	-.02
<i>Constant</i>	-1.40 *** (.155)	
Pseudo $\ell$	-1222.24	
Wald $\chi^2$	188.46	
$P$	.000	
$R^2_{M\&Z}$	0.13	

$n=3,012$

\*Significant at  $p < .10$  (two-tailed).

\*\*Significant at  $p < .05$  (two-tailed).

\*\*\*Significant at  $p < .01$  (two-tailed).

Table 2.3. Predictors of the Depth of News Coverage of State Supreme Courts

	Coefficient (Robust S.E.)	IRR
<i>Case Type</i>		
Constitutional Issue	1.28 *** (.200)	3.60
Death Penalty	.587 *** (.193)	1.80
Torts	-.484 *** (.130)	.61
<i>Opinion Characteristics</i>		
Unanimous Decision	-.479 *** (.142)	.62
Alter Lower Court Decision	.189 * (.115)	1.21
Signed Opinion	.564 *** (.161)	1.76
<i>Political Environment</i>		
Two Papers	.862 *** (.150)	2.37
Local Owner	.344 ** (.171)	1.4
Circulation	.0000005 (.0000005)	1.0
Discretionary Docket	-.246 (.200)	.78
Judicial Election	.326 * (.162)	1.39
Divided Government	-.402 *** (.344)	.67
<i>Constant</i>	-1.77 *** (.344)	
$\alpha$	2.34	
Pseudo $\ell$	-1666.60	
Wald $\chi^2$	218.73	
$P$	.000	
$R^2_{MLE}$	0.06	

$n=3,012$

\*Significant at  $p < .10$  (two-tailed).

\*\*Significant at  $p < .05$  (two-tailed).

\*\*\*Significant at  $p < .01$  (two-tailed).

## CHAPTER 3

### EXPLAINING HOW COURTS INFLUENCE THE PUBLIC AGENDA

The previous chapter provided evidence that the composition of courts' dockets affects how the business of the judiciary is portrayed in the media. However, that chapter did not speak to courts' broader ability to influence the issues that appear on the public agenda, taking account of the agendas of the other political branches. The ability to compete with the legislative and executive branches to put issues on the agenda, if it exists, would be even more significant than the ability to manipulate coverage of the courts. This broader agenda setting role would also suggest much greater judicial power than many scholars (e.g. Rosenberg 1991) have suggested. It would also suggest an even larger role for the judgments of the judiciary in altering the visibility of political issues.

To examine the courts' ability to act as agenda setters in the political system, this chapter considers the courts in context. Using data from the Policy Agendas Project, it explores whether the agenda of the U.S. Supreme Court influences the types of policy issues that receive media coverage, even after controlling for the agendas of the executive and legislative branches.<sup>16</sup> Using a time-series cross-sectional model, it demonstrates that the judgments made by the judiciary, do, indeed influence the issues that are covered in the

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<sup>16</sup> As will be discussed later, the agendas of these branches are defined using information on the issues considered by each branch in a given year. The data is obtained from Baumgartner and Jones' Policy Agendas Project dataset.

media. Courts may even have greater agenda-setting abilities than the executive branch. This relationship varies over issue area, with the Supreme Court's power being even greater in areas where it has the greatest ability to make lasting policy change.

### **Theoretical Foundation**

The ability of political institutions—and policy entrepreneurs within those institutions—to put issues on the media and public agendas has been the subject of a great deal of public policy literature over the last forty years (e.g. Cobb and Elder 1972, Baumgartner and Jones 1993, Kingdon 1995, Mintrom 1997). Much of this literature, however, has put the president or Congress at the center of the policy process. In so doing, these studies have largely ignored the role that the courts (and the judges and justices that make up those bodies) may play in putting issues on the public agenda.<sup>17</sup>

The paragraphs that follow explore the existing literature on the executive and legislative branches as agenda setters. I then consider the role of the courts, specifically the U.S. Supreme Court, in putting issues on the media and public agendas. After examining the existing literature on the relationship between courts and the media, I discuss why the judiciary's power to set the agenda is much greater than existing research suggests.

#### *Agenda Setting in the Executive Branch*

For years, scholars have argued that the president may be the most important agenda setter in the American policy process (e.g. Cobb and Elder 1972, Bond and Fleisher 1990, Baumgartner and Jones 1993, Kingdon 1995, Cohen 1995). The president, unlike his colleagues in Congress, faces no collective action problem and can speak for the American people in a single voice. He is a representative of the nation at home and abroad, and has

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<sup>17</sup> Of course, the ability to place issues on the public agenda is not solely confined to institutional actors. Non-institutional actors, such as political parties and interest groups, may also play a significant role in this process.



easy access to the bully pulpit. In addition, through daily press briefings and weekly radio broadcasts, the president also has more direct access to the media and the American people than the legislative or judicial branches.

However, empirical research has not fully supported these claims. Some scholars, for example, have found no relationship between a president's State of the Union Address (usually viewed as his main agenda-setting tool during the course of a year, and often used as a measure of the president's policy goals for that year) and media coverage of political issues (Gilberg et al. 1980). Other studies have been less definitive and found mixed results, conditioned by time or issue area. Wanta and his co-authors (1989), for example, found that two of the four presidents they studied (Carter in 1978 and Reagan in 1985) were able to influence media coverage of political issues through their State of the Union Addresses. The other two presidents (Nixon in 1970 and Reagan in 1982) were not.<sup>18</sup>

In a broader study of President George Bush's public speeches, Wanta and Foote (1994) found significant differences in the president's ability to set the media's agenda based on the type of issue the president was discussing. Their research revealed that the president's power was much greater in foreign policy and on pet policy matters than in economic or social policy (see also Peake 2001). In contrast to other studies, Edwards and Wood (1999) found no evidence for the president's ability to set the media's agenda on issues of foreign policy, but found evidence that on domestic policy issues, particularly health and education, the president can act as a powerful agenda setter.

Though the results of existing analyses vary widely, it is likely that there is some truth to all of these findings. The role of time and idiosyncratic factors, for example, cannot be ignored. As Edwards and Wood (1999) suggest, a president's ability to pursue his goals may

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<sup>18</sup> Each analysis used only one year of the president's State of the Union Address.

certainly be conditioned on other variables such as his time in office (honeymoon period), charisma, public reputation, and personal interest in serving as a policy entrepreneur.

### *Agenda Setting in the Legislative Branch*

The most notable research on Congress' ability to act as media agenda setter is the series of works conducted by Baumgartner and Jones (e.g. 1993, Jones and Baumgartner 2005, Baumgartner, Jones, and Leech 1997). In one such study, these authors use data on a range of issue areas from tobacco use to nuclear power to examine the relationship between the quantity and tone of media coverage and the quantity and tone of congressional hearings. They provide persuasive evidence that congressional action and media coverage are inextricably linked on each of these issues (Baumgartner and Jones 1993). Not only do levels of media attention to political issues and congressional attention to these issues follow a similar path, but the tone of media coverage and governmental attention to these issues also appear to mimic one another.

The source of this relationship has been attributed in part to the representational role of members of Congress. Members need to know their constituents' positions on political issues, and constituents need to know what their members are doing in Washington. This makes the media's role as a linkage between the public and Congress extraordinarily important.

But, perhaps more importantly, Congress (as the law-making branch) has significant power to make policy and appropriate funds for nearly all policy issues that come before the federal government. In other words, this institution may be naturally predisposed to act as a policy venue, or institution with the primary control over the course of public policy in an issue area, for a large number of issues. Since, as discussed in Chapter 2, the media should

be more likely to cover the actions of a political institution when it acts as a policy venue, Congress may be predisposed to garner a great deal of media attention and therefore have significant ability to set the media's agenda.

#### *Agenda Setting in the Judicial Branch*

Although it has rarely been brought into the policy literature, the Supreme Court's ability to set the public agenda has been widely debated by scholars of judicial politics. Conventional wisdom, especially in the 1960s and 1970s, suggested that the U.S. Supreme Court played a dynamic role in putting issues on the national agenda and creating social change (e.g. Murphy 1964, Kluger 1976, Wasby, D'Amato, and Metrailler 1977, O'Connor 1980).

Rosenberg (1991), however, has made the case that the Court is a constrained policy actor whose decisions have limited effects. In a study of the Court's ability to create social change, he points out that the justices are bound by their docket, the rules of the legal system, and the checks and balances of the American political system. As a result, the Court is limited in its ability to increase media and public attention to issues; by simply deciding a case in a given issue area, the Court is unlikely to increase the salience of political issues. For example, Rosenberg shows that the highest levels of media attention to African Americans' civil rights during the 1950s and 1960s came as a result of the Montgomery Bus Boycott (1955) and the Birmingham Demonstrations (1963), and not the Court's landmark decision in *Brown v. Board of Education* (1954), which ordered the desegregation of public elementary and secondary schools. In fact, he provides evidence that there was not even a significant increase in attention to civil rights issues in the days and weeks following the Court's decision.

In a similar analysis, Rosenberg also shows that newspaper and magazine attention to the abortion issue did not reach new heights after the Court's decision in *Roe v. Wade* (1973), which overturned the abortion laws of forty-seven states. In fact, magazine coverage of the abortion issue actually reached its peak in 1971, well *before* the Court's ultimate decision. Other analyses by Rosenberg of women's rights and the environment—issues that are much less constitutional (and perhaps controversial) in nature—also reveal similar trends.

#### Reconsidering the Courts as Agenda Setter

Rosenberg's findings paint a bleak picture for the Court's ability to create social change. These facts do not change the reality that (at least in certain political circumstances) the judiciary should, like the executive and legislative branches, be able to act as agenda setter and increase the visibility of social and political issues. This ability to set the agenda gives the Court tremendous institutional power.

First, like the elected branches, the judiciary is a fully institutionalized policy actor (McGuire 2004). It has all of the resources necessary to make policy pronouncements on a wide range of social and political issues. Moreover, the U.S. Supreme Court, especially, has a highly professionalized public information office that is well equipped to publicize the policy consequences of the Court's decisions (Greenhouse 2004). And, scholarly indicators of issue salience reveal that many of the Court's decisions do receive front-page coverage in major newspapers such as the *New York Times* (Epstein and Segal 2000).

Second, substantial anecdotal evidence demonstrates that other institutional actors respond to judicial decisions; this is the essence of agenda setting. For example, following the Court's decision in the equal pay case of *Ledbetter v. Goodyear Tire and Rubber Company* (2007), which limited the amount of time women workers had to sue for

employment discrimination, women members of Congress reignited their calls for legislation to ensure equal pay for women workers. The issue was discussed frequently during the 2008 presidential campaign. And, following the election of a Democratic Congress and president, the bill was one of the first pieces of legislation Barack Obama signed as president.

Some of the cause of Congress and the president's response to decisions such as *Ledbetter* may owe to the fact that these actors fundamentally disagree with the policy position taken by the Court. The Court may also (for example as in *Brown*) leave much of the policy implementation to the other branches, thus forcing them to respond to a particular judicial decision. But, whatever the motives of the actors involved, one simple fact remains unchanged—by handing down a policy decision, the Court can cause other institutions (and often the media covering these institutions) to reallocate their issue attention and consider policy matters they might otherwise have ignored. This is the essence of agenda setting.

Third, it has been widely acknowledged (and is demonstrated again in Chapter 4 of this dissertation) that the publicity generated by judicial decisions is one of the main motivating factors for interest groups' involvement before the courts. As O'Connor (1980: 5) notes, "Publicity generated by adjudication places its sponsor in the public eye and can provide a legitimate way for the organization to place its issue on the public agenda." To this end, organizational maintenance is cited as one of the major reasons for groups' participation before the courts (O'Connor 1980, Epstein 1985, Kobylka 1987, Caldeira and Wright 1989, Wasby 1995). If groups did not see some sort of return on their investment in organizational maintenance—likely in terms of visibility of their issue or organization—it would be unlikely that they would continue to devote resources to lobbying the courts. However, interest group

participation before the courts is hardly on the decline, as it has increased by about 800 percent since 1950 (Kearney and Merrill 2000, Collins 2008).

Finally, there is the simple fact that Rosenberg's argument may be time or issue bound, and, as a result, tells only part of the story. Although he observes no immediate social change after the Court handed down *Brown* on May 17, 1954, it appears there may be a subtle and delayed agenda setting effect. There is a significant increase in coverage in 1955-56 (Rosenberg 1991: 113). Rosenberg attributes this increase to the Montgomery Bus Boycott. While this may be true, *prima facie*, without empirical analysis of time-serial data, it is hard to determine whether it was the Boycott itself that led to the spike in coverage, or if the Court's decision played a role in priming the news media to look for and cover events such as the Boycott.<sup>19</sup> In fact, it could also be said that, without the Court's desegregationist decision in *Brown*, the Boycott may not have happened. Moreover, in 1955, the Court handed down a second desegregation decision, *Brown II*, which provided the direction to southern states on how and when they were to desegregate—"with all deliberate speed." The more explicit directions in this case could have spurred greater grassroots discussion of civil rights and desegregation that the more vague *Brown I* could not (see McCann 1992 for an extended discussion of this phenomenon).

The same can be said for the case of abortion. Although social change on the issue was not immediate, media attention to the abortion issue was higher in the years following *Roe* than it was in 1973, when the case was decided. Without more detailed analysis of the agenda setting process than Rosenberg provides, it is not possible to conclude that the Court's decision was not at least somewhat responsible for this trend. It may be that the

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<sup>19</sup> Still others have suggested that the Court's decision emboldened black southerners to contest their rights in the form of a boycott. Thus, the Court's decision was more important for its grassroots and word of mouth effect than its national media attention (McCann 1992).

effects of the Court's decision took time to be considered in state legislatures and on the agendas of old and new interest groups, and that the increase in media attention in 1974 was due to this mobilization process.

### Variability of Judicial Power

Still, the Court's ability to set the media's agenda through its policy decisions—like that of the executive and legislative branches—may not be universal. There may be some types of issues where the Court is simply a more significant policy actor with greater ability to influence ultimate policy outcomes. Again, this brings us back to the notion of policy venues (Baumgartner and Jones 1993).

In cases where the Court acts as a policy venue—usually constitutional issue areas, for reasons discussed in detail in Chapter 1—the Court should have greater ability to influence the media's issue attention. Because the Court's decisions in these policy areas are more likely to have lasting policy implications, they are more likely to be stories that the media must not only cover in the immediate aftermath of the Court's decision, but where the media will also follow the issue for the days and weeks following the decision. Stories about the response of interest groups, legislators, the president, and even policymakers in the states are likely to result from the Court's decisions in these cases. This may help the Court to set the public and media agendas.<sup>20</sup>

### **Hypotheses**

This theory leads to a simple, testable hypothesis: By deciding to hear cases involving particular issue areas and ultimately making judgments on these matters, the U.S. Supreme Court, just as Congress and the president, should be able to set the media's agenda and

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<sup>20</sup> Of course, this pattern of media attention may also give the Court incentives to use negative agenda control to keep issues off their docket and the media's agenda. The Roberts Court, in particular, has been criticized under suspicion of using this very practice to avoid controversial issues and public criticism.

increase the salience of political issues. Accordingly, there should be a positive relationship between the issue composition of the Court's docket and the issues that receive coverage in the news media.

This agenda-setting ability should be at least somewhat conditional on issue area. The Court should have greater latitude in setting the media's agenda in issue areas where it acts as a policy venue than in issue areas that are controlled by the legislative and/or executive branches. Thus, the Court should have greater agenda setting power in those issue areas where it considers the greatest average percentage of constitutional cases.

The reverse should also be true. The Court should have less latitude in setting the media's agenda in issue areas where it is least likely to act as a policy venue. Instead, the legislative and/or the executive branch should have greater agenda setting power in these issue areas.

## **Data and Methods**

To examine the relationship between institutional agendas and media coverage, I use time-serial data from the Policy Agendas Project. The Policy Agendas Project is a database that uses a unified issue-based coding scheme to bring together data from the legislative, executive, and judicial branches of American federal government. It also includes data on issue salience, measured using Gallup's Most Important Problem survey question and *New York Times* coverage.<sup>21</sup>

The activities of each of the branches, as well as the information on media coverage, are coded using a consistent scheme. There are nineteen major issue areas—covering things such as health, education, and the law—and more than two hundred sub-issue codes. Using

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<sup>21</sup> *Times* coverage in the Policy Agendas Project is a random sample of articles listed in the *New York Times Index*.



the same issue codes across datasets allows for easier inter-branch analysis, and is particularly useful for examining questions such as the one I examine here.

In addition to using this data to identify the issues considered by each of the political institutions, I use this issue data in combination with information from the Spaeth Dataset to determine the issue areas where the Court is most and least likely to act as a policy venue. To do this, I classify each case heard by the Court as constitutional/non-constitutional using the Spaeth “authdec” variable. I then combine this with the Policy Agenda Project issue codes assigned to each case to calculate the average percentage of constitutional cases considered by the Court in each issue area. These values range from 11 percent to 52 percent. The top five issue areas in terms of percentage constitutional cases (those 40 percent and over) are grouped as the policy venue issue areas for purposes of this analysis.<sup>22</sup> These issue areas are macroeconomics, civil rights and liberties, education, law, and government operations. The six issue areas with the lowest percentage of constitutional cases (those 20 percent and under) are grouped as the non-policy venue issue areas.<sup>23</sup> These issue areas are agriculture, labor, energy, banking, defense, and international affairs.

### *Dependent Variable*

This model is particularly concerned with examining the judiciary’s ability to put issues on the public agenda vis a vis the other branches of the American federal government. As such, the dependent variable must be an indicator of an issue’s media attention in a given year. *New York Times* coverage has been used in a variety of other studies as a gauge of this visibility; I continue to use it here.

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<sup>22</sup> I choose to use five issue areas because, with 19 total issue areas, five issues represent roughly the top and bottom quartiles.

<sup>23</sup> I use six issue areas here because two issue areas had identical percentages of constitutional cases.

Some scholars may question the use of the *New York Times* as a proxy for all media attention. However, repeated analyses by Baumgartner and Jones (1993, Jones and Baumgartner 2005) have shown that the *Times* is a reasonable proxy for the issues covered by a range of media sources, including those listed in the *Readers' Guide to Periodical Literature*. In their recent book on the death penalty, moreover, Baumgartner, DeBoef, and Boydston (2008) show that the quantity and tone of coverage provided by the comparatively liberal *Times* paralleled that of the more conservative *Houston Chronicle*.

Because the *Times* data contained in the Policy Agendas Project is a random sample of all coverage from a given year, and because the model makes comparisons across issues and time (which may have substantial variation), using a raw count of news stories is not workable. Such a count would not control for variations in the total news space allotted by the *Times* over the thirty year time period included in this analysis.<sup>24</sup> Thus, the dependent variable is the percentage of all news coverage in a given year allocated to a particular issue area. The proportion of media coverage devoted to an issue area in a year ranges from 0 percent to 40 percent.

### *Independent Variables*

The model contains three main independent variables of interest—each one gauging the policy agenda of one of the three branches of the federal government. The first of these variables is the variable measuring the proportion of the U.S. Supreme Court's docket dedicated to each issue area in each year.<sup>25</sup> It is created using a combination of Policy

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<sup>24</sup> For example, there might be a greater number of stories on a given issue area in a given year because the issue was more important in that year, or it may simply be because the media published more total stories in that year.

<sup>25</sup> To make the data as comparable as possible, I calculate the proportion of the docket using decision dates rather than terms of the Court.

Agendas Project data and information from the Spaeth dataset. In accordance with the standard practices associated with using the Spaeth dataset, I sort by case citation so as not to count cases more than once. The proportion of judicial decisions devoted to an issue area in a year ranges from 0 percent to 45 percent.

The second of these variables measures congressional attention to each issue area in each year. I choose to use the congressional hearings data from the Policy Agendas Project, and again construct a proportion of all hearings devoted to each issue area. The proportion of congressional hearings devoted to an issue area in a year ranges from 0 percent to 18 percent.

I could have also chosen to use public law enactments as a measure of Congress' agenda setting activity. However, I chose not to do this for several reasons. First, I was concerned that this might be too narrow a measure because so few bills become law. Second, a bill becoming a law can often be an endpoint for an issue's time on the public agenda, at least in the short run. It is in the deliberation and policymaking phases that Congress can really set the public agenda. It is, however, worth noting that the proportions of hearings and public laws in a given issue area and year are correlated at .71.

Finally, the model includes a measure of executive branch activity. Consistent with previous research that argues that the president's main agenda-setting tool is the State of the Union Address, this variable measures the proportion of the president's State of the Union Address devoted to each issue area in a given year. This data is also obtained from the Policy Agendas Project. The proportion of a president's State of the Union Address devoted to an issue area in a year ranges from 0 percent to 57 percent.

Alternately, I could have chosen to use executive orders as a measure of the president's ability to set the agenda. However, State of the Union Addresses have been used

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in many previous analyses of the president as agenda setter and have shown to be powerful indicators of a president's policy priorities for a given year. Moreover, few executive orders receive a great deal of public attention; many of these are highly procedural and do not relate to major policy goals.<sup>26</sup>

### *Model*

The nature of this data lends itself naturally to a time series model for panel data. There are nineteen issue areas for each year from 1972-2003, for a total of 608 observations. I choose to show the results using an ordinary least squares regression model, though the results remain substantively the same using a generalized least squares model.

This model addresses a common problem in panel data, unit effects. Unit effects are differences in the data that are a result of natural variations in the categories pooled to create a panel dataset (in this case, issue areas), and are not the result of the change of time or other independent variables. It is easy to see how unit effects may be present in this data—the dynamics of education policy may vary dramatically from the dynamics of agriculture policy, which may also vary dramatically from the dynamics of civil rights laws. To address these effects, I use a model with fixed effects. Fixed effects allow a researcher to model the specific causes of unit effects by introducing a series of dummy variables for each of the units but one. The model then estimates a series of coefficients for each of the variables, pulling the unit effects out of the coefficients for other variables in the model. Although these coefficients do not display in a computerized model, a fixed effects model is often employed when, as in this case, the variation between units is interesting in and of itself (Maddala 1971).

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<sup>26</sup> To test the robustness of my models, I have tested alternate models using both the bills and executive orders variables. Although the fit of these models is less than those using the hearings and State of the Union variables, the substantive results remain the same.

Alternately, I could have chosen to employ a random effects model to address the unit effects. Instead of estimating a series of unit dummies for each of the units (as in a fixed effects model), a random effects model removes unit effects from the model and captures all of the unit effects in an error term. This statistical technique assumes that the differences between the units are theoretically uninteresting stochastic variation. Since the theory in this paper explicitly argues that there should be theoretically significant differences across issue areas (as a result of policy venues), a random effects model is inappropriate in this case.

## **Findings**

The findings shown in Table 3.1 clearly reveal that the judiciary does, indeed, play a role as an agenda setter.<sup>27</sup> This role is significant across all issue areas, although the courts have the greatest relative institutional power in cases where the court is most likely to act as a policy venue. Interestingly, the president's State of the Union Address does not appear to influence media coverage in any of the issue combinations. Consider each of these models separately.

In the model of all nineteen issue areas (shown in the first results column of Table 3.1), congressional hearings clearly have the largest substantive effect. As shown in Figure 3.1, increasing the proportion of congressional hearings devoted to an issue area from its minimum to maximum increases media attention to that issue area by about 8 percent. This is more than a standard deviation increase in the media coverage variable.<sup>28</sup> This effect suggests a powerful connection between the congressional agenda and the issues that the media covers and citizens consider.

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<sup>27</sup> To be as certain as possible about the direction of this relationship, I also did a test of Granger causality. The test was significant at three lags,  $F=3.07$ ,  $p=.02$ . It can be said that judicial attention to issues Granger causes media attention.

<sup>28</sup> The *Times* variable has a standard deviation of .07.

Judicial decisions also have a substantively significant effect. Increasing the proportion of judicial decisions devoted to an issue area from its minimum to its maximum increases media attention to that issue by about 4.5 percent. Although this effect is not as large as that observed for Congress, it is still speaks to a significant—and previously unclear—role of the Court as media agenda setter.

The executive branch, however, lacks similar agenda setting power. Increasing the proportion of the president’s State of the Union Address devoted to an issue from its minimum to maximum level only increases media attention by 1.5 percent. This effect is statistically and substantively insignificant. Such a finding is consistent with previous research, which has struggled to find a consistent presidential agenda setting effect, particularly using State of the Union Addresses (e.g. Gilberg, McCombs, and Nicholas 1980, Wanta 1989, Edwards and Wood 1999).

#### *The Court as a Likely Policy Venue*

Recall the secondary hypothesis that the Court’s agenda setting ability should vary with issue area. Specifically, the Court should have greater ability to affect media coverage when it acts as a policy venue. The previously identified Policy Agendas Project issue areas where this is most likely to be the case are macroeconomics, civil rights and liberties, education, law, and government operations.

The empirical analysis reveals that the Court’s agenda setting role is, indeed, magnified in these issue areas (shown in the second results column of Table 3.1). The absolute size of the increase in the proportion of coverage is modest—the maximum change in coverage that is the result of the judicial docket increases from 4.5 percent in the full model to 5.4 percent in the policy venues model. But, in relative terms, the Court’s agenda

setting impact vis a vis the legislature is now nearly equal, as revealed in Figure 3.2.

Although the legislature was able to increase media attention by 8 percent in the full model, in the policy venue model, I observe only a 5.9 percent increase in media coverage over the range of the legislative variable.

Again, I find no evidence for the role of the president as agenda setter. This model actually predicts a negative (albeit insignificant) relationship between presidential attention and media coverage. Thus, it appears that if the president is able to act as an agenda setter in any issue area it is not the ones where the Court acts as a policy venue.

#### *The Court as an Unlikely Policy Venue*

The hypotheses further predict that the Court's agenda setting power should be much lower in issue areas where it does not act as a policy venue. Because of the largely statutory nature of many of these issue areas, the elected branches should play a much larger role in setting the media's agenda. The unlikely policy venue issues from the Policy Agendas Project considered here are agriculture, labor, energy, banking, defense, and international affairs.

The significantly decreased role of the judiciary as agenda setter in these issues is readily apparent in Figure 3.3 and the third column of Table 3.1. As the figure reveals, the judicial agenda has a statistically and substantively insignificant effect on media coverage of these issues. Over the range of the judicial variable, media attention changes by less than 1 percent.

Interestingly, executive branch attention to issues also remains an insignificant predictor of media coverage. Media attention changes by only about 1 percent over the range of the State of the Union variable. Legislative attention, however, is another story. Over the

range of the legislative variable, media attention to issues changes by about 13 percent. This likely owes to the highly statutory nature of these issues, and may suggest that the legislature actually acts as a policy venue for at least some of these matters. Accordingly, the media is even more reliant upon legislative attention to determine coverage of these issues.

## **Discussion**

The preceding models provide evidence that the judiciary can act as an agenda setter for the media, and, therefore, that the types of cases the Court decides to decide affect the types of political issues the general public is exposed to through news coverage. These effects are particularly important in issue areas where the Court is more likely to act as a policy venue. This assigns to the judiciary a much greater role as agenda setter than is typically assumed, both in the judicial politics literature and in the public policy literature.

This ability to put issues on the media's agenda has a number of potential consequences. First, putting issues on the media's agenda is one way for the judiciary to reach out to the public to raise the public's knowledge of and interest in political issues that the Court deems important. This can be an essential part of the Court's actions to maintain institutional prestige, and can also be a way for the Court to use public pressure to help build support for judicial decisions that it cannot enforce on its own.

Of course, as discussed in Chapter 2, this is a two-way street. The Court can also attempt to keep issues off the media and public agendas by choosing not to adjudicate cases on those issues. Particularly in issue areas where the Court acts as a policy venue, its ability to set the media's agenda is nearly as great as that of Congress. Thus, an exercise of negative agenda control can have sweeping effects in limiting public knowledge and interest. In fact, since the Court considers such a small number of cases in an average year (75-80 of the



10,000 cases presented to it in recent years), we might actually expect that the Court's negative agenda control is more significant than its ability to put issues on the agenda by deciding to decide particular cases.

Second, by deciding cases that put issues on the public agenda, the Court may compel other institutional actors to consider policies related to issues that they would rather avoid (or to make policies different from their ideal). For example, if the Court decides to take a case related to enforcement of the Equal Pay Act, it is likely that its decision will have cascading consequences for the workload, priorities, and regulations implemented by the Equal Employment Opportunity Commission; if this decision receives significant public attention, the pressure to implement regulations consistent with public opinion will be much greater. Similarly, when the Court hands down a decision on abortion, it is not uncommon to see members of Congress and the state legislatures refocusing their attention on the abortion issue and introducing relevant new legislation.<sup>29</sup>

The ability to cause actors in other institutions to pay attention to issues they might otherwise ignore is a fundamental part of the American political system. Yet, for much of the Court's history, the other branches paid little attention to many of its decisions. The fact that the Court can put issues in the public eye and attempt to compel other actors to respond to its actions is a significant power for the Court.<sup>30</sup>

Third, this cascade of power and influence may also extend to interest groups and other non-institutional actors (e.g. political parties). By deciding cases that increase the visibility of political issues, the Court may create windows of opportunity that inspire the

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<sup>29</sup> Testing this hypothesis using the existing Policy Agendas Project data is not possible; abortion is one of the issue areas where Policy Agendas Project data is not particularly useable. To test this hypothesis, I would have to collect separate data on media coverage of the abortion issue.

<sup>30</sup> Admittedly, this power is conditional and relies on a number of other political circumstances.

creation of new interest groups (Kingdon 1995). It may also lead existing groups to reallocate resources to lobbying on or addressing new and different political issues. For example, the growth in women's rights litigation in the 1970s prompted the creation of a number of public interest law firms designed to work alongside and in cooperation with the American Civil Liberties Union's Women's Rights Project.

### *Returning to Rosenberg*

The evidence regarding the Court's ability to set the media's agenda merits a return to Rosenberg's (1991) arguments. Recall that Rosenberg argued that the Court was a relatively powerless actor because its decisions did not lead to immediate changes in public policy and media attention. Yet, this analysis shows that, when we consider broad issue areas and longer periods of time, the general composition of the Court's docket does, indeed, affect the types of issues covered by the media. When the Court talks more about civil rights and liberties, for example, the media follows suit. Thus, although the Court's power to create social change is subtler than Rosenberg expected, it is not non-existent; the Court is not a totally hollow hope.

For example, if we consider the immediate effects of one judicial decision, we may see no social change. But, if we look at the broader policy agenda over the course of several years, we may see a slow course of change beginning with the Court's decision that provides the real evidence of judicial power in the policymaking process. *Roe v. Wade* (1973) was not even the lead news story the day after it was decided—January 23.<sup>31</sup> And, although news coverage of the issue in 1973 did not reach the high water mark established in 1971, Rosenberg observed an increase in attention to the abortion issue in the media between 1973

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<sup>31</sup> Former President Lyndon B. Johnson died on January 22, 1973 and was the top news story on January 23.

and 1974.<sup>32</sup> In addition, in the seven years after *Roe*, eight major pro-life groups as well as countless national, state, and local affiliates came on to the scene.<sup>33</sup> These groups sponsored litigation campaigns, organized marches and rallies, and lobbied state and federal legislators.

Many of these groups were also instrumental in working with federal legislators and President Gerald R. Ford to gain approval of the Hyde Amendment, which restricted the use of federal funds for abortions under the Medicaid program. This is most certainly an issue that the elected branches would not have devoted attention to if the Court had not handed down *Roe*. Similar processes, moreover, played out over the next few years in the forty-seven state legislatures whose statutes had been invalidated by the Court's decision. Pro-life legislators sponsored legislation and lobbied for the passage of new statutes designed to test the boundaries of the Court's new decision.

A number of these state statutes, as well as the Hyde Amendment, ended up before the Supreme Court in the early 1980s and beyond. The Court's willingness to hear and decide these cases (many of which were sponsored by interest groups such as NARAL) kept the abortion issue on the agenda,<sup>34</sup> and set off another trip around the policymaking cycle. It would, in fact, be little exaggeration to say that one of the major litmus tests and

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<sup>32</sup> It may also be that some of the spike in attention to the abortion issue observed by Rosenberg in 1971 was due to the fact that the Court granted certiorari to *Roe v. Wade* and *Doe v. Bolton* in that year. Many observers forget the extended period of time (and the two oral arguments) that it took for the Court to hand down its decision in this case.

<sup>33</sup> These groups were the National Committee for a Human Life Amendment (1974), the National Right to Life Committee (1974), the National Conference of Catholic Bishops Congressional Conference Committees (1975), Americans United for Life Legal Defense Fund (1976), the National Pro-Life Political Action Committee (1977), the Life Amendment Political Action Committee (1977), the Moral Majority (1979), and the Pro-Life Action League (1980). Notably, many of these groups had ties to the Catholic Church—one group who took note of the Court's decision in *Roe* almost immediately.

<sup>34</sup> Moreover, 1980 marked the first time that both major political parties discussed the abortion issue in their platforms. This opened the door to further politicization of the issue, such as that seen during the recent partial birth abortion debates.

battlegrounds for political conflict today would never exist if the Court had not decided *Roe* in 1973. There is little more that can be said to demonstrate the power of the Court in putting and maintaining issues on the political agenda.

### *Congress as Agenda Setter*

It is, of course, also worth noting the power of Congress as an agenda-setter. It should be unsurprising that the issues that appear on the congressional agenda also become issues that receive attention in the news media. This finding is consistent with earlier research by Baumgartner and Jones (1993, Jones and Baumgartner 2005) and is essential to maintaining the representational linkage between members of Congress and members of the general public. In fact, given this linkage, it would be more surprising, and perhaps even troubling, if there was no connection between the issues discussed by the peoples' branch and media coverage. Given the perpetual campaign, members' need to attract publicity, and citizens' interest in the implications of these policies, it seems this is a natural connection.

The even greater power of Congress to set the agenda in issue areas where the Court does not act as a policy venue is also noteworthy. These issue areas—many of them statutory in nature, are frequently discussed and regulated by Congress. For many of these issues, it can probably be said that Congress has at least some of the powers of a policy venue.

Congress, for example, has tremendous power to regulate and authorize spending on issues such as agriculture, defense, and international affairs. Agricultural subsidies, for example, are a subject of major contention in many areas of the country and one reason why seats on Congress' agriculture committees are so desirable to many members. When Congress devotes attention to or considers changing these policies, it should be no surprise

that the media responds accordingly. Similarly, although many matters of defense and international affairs are handled on a day-to-day basis by the executive branch Departments of State and Defense, Congress plays a major role in activities such as funding war and national defense and imposing sanctions. Once again, these are decisions that have a significant national policy impact and are of concern to many Americans. Thus, when Congress considers these issues it should follow that media coverage responds accordingly.

#### *The Executive Branch as Agenda Setter*

The consistent lack of significance for the president's State of the Union Address in setting the media's agenda is also quite notable. Though the president may be able to take some policy actions or work with Congress to put issues of particularly broad or narrow appeal on the public agenda, it appears that, during the course of day-to-day business, the president's agenda setting power is somewhat limited. This may confirm the suspicions of other scholars who view the presidency as a largely reactive institution and regard the president's policy priorities to be determined more by necessity than personal priority (e.g. Edwards 1989, Jones 1994, 1995).<sup>35</sup>

#### **Conclusion**

This chapter uses data from the Policy Agendas Project to examine whether the agenda of the U.S. Supreme Court influences the issues that receive coverage in the media. Using a time-series cross-sectional model, it demonstrates that the judgments made by the judiciary, do, indeed influence the issues that are covered in the media; the relationship between the judicial agenda and media coverage even surpasses the relationship between the executive branch's policy priorities and media attention. The individual issue area also

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<sup>35</sup> This, incidentally, may be consistent with the Framers' intentions in crafting the executive office.

affects this relationship, with the Court's agenda setting power being even greater in areas where it acts as a policy venue.

Taken together with Chapter 2, this chapter has provided substantial evidence for the ability of the courts to act as agenda setters and to influence the activities of non-institutional policy actors. Even without the purse or the sword, the courts can influence the way that issues are portrayed in the media. This is a significant power for the courts. First, it gives the judiciary significant control of how its business is portrayed in the public, which may allow the courts to retain and gain institutional prestige. Second, this ability to act as agenda setter may compel other institutional and quasi-institutional actors—at least in some issue areas—to address policy questions they might have otherwise avoided.

The next two chapters explore the courts' influence on another quasi-institutional political actor, interest groups. Chapter 4 embarks on an exploration of how the types of cases decided by the courts influence interest groups' allocations of resources within the judiciary. Chapter 5 takes a broader perspective, examining how the composition of the Court's docket influences groups' lobbying strategies across branches, specifically the judiciary and the legislature.

Figure 3.1. Institutional Effects on Media Attention, All Issues

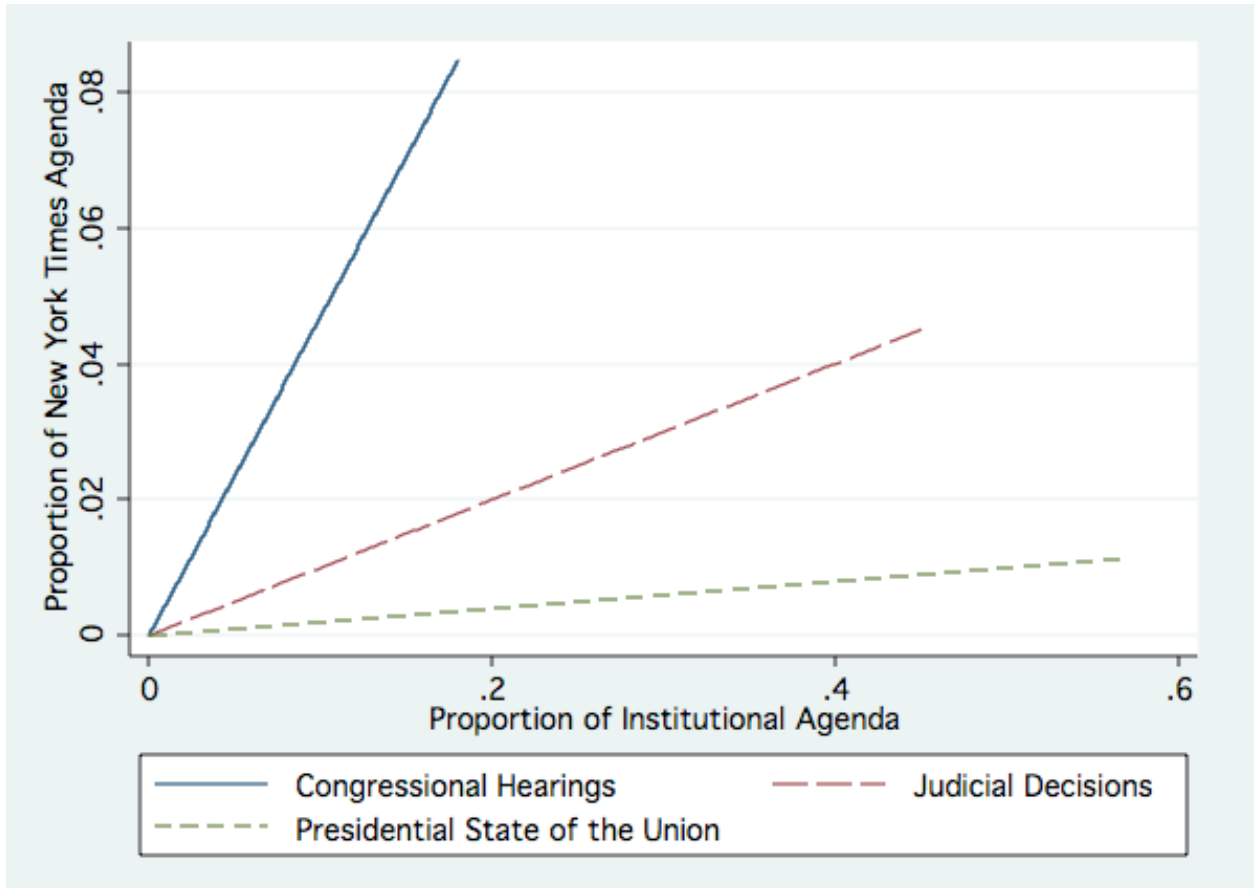


Figure 3.2. Institutional Effects on Media Attention, Policy Venue Issues

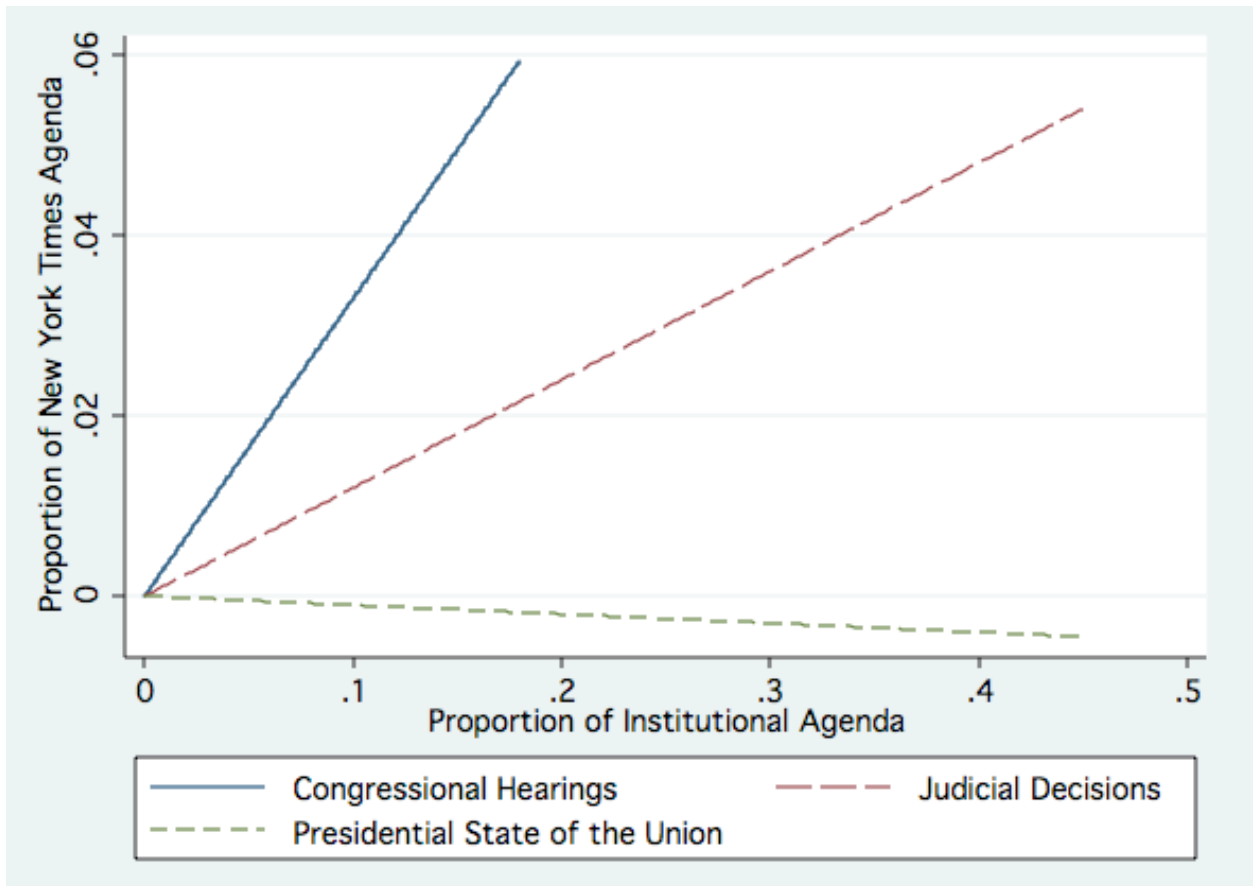




Figure 3.3. Institutional Effects on Media Attention, Non-Policy Venue Issues

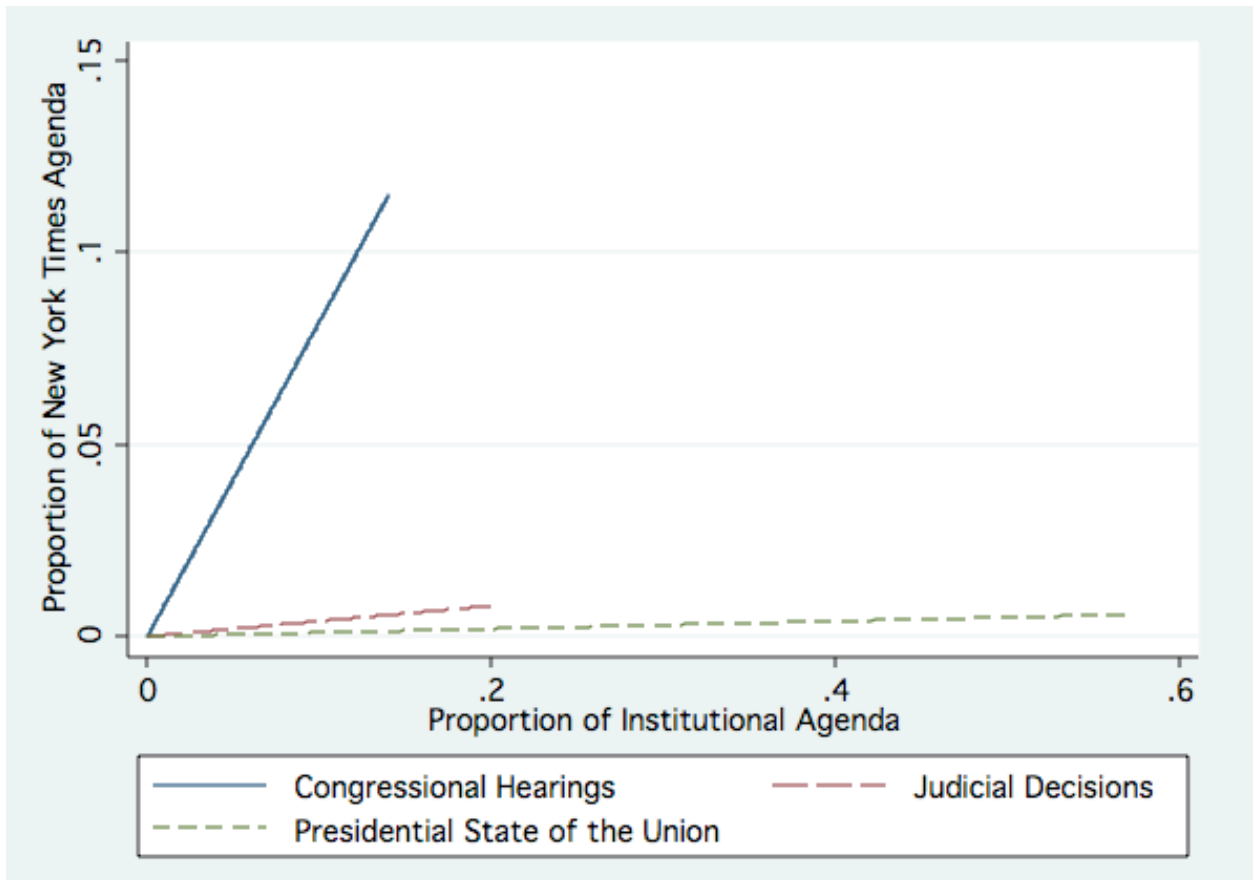


Table 3.1. Predictors of Media Attention to Political Issues

	All Issues		Policy Venue Issues	
	Coefficient		Coefficient	
	(Robust S.E.)		(Robust S.E.)	
Congressional	.47 ***		.33 **	
Hearings	(.09)		(.18)	
Judicial	.11 **		.12 ***	
Decisions	(.06)		(.04)	
Presidential	.02		-.01	
State of Union	(.02)		(.02)	
F	12.37 ***		4.79 ***	
$R^2_{overall}$	.24		.46	
$\rho$	.85		.34	
N	608		160	

\*\*Significant at  $p < .05$  (one-tailed)

\*\*\*Significant at  $p < .01$  (one-tailed)

## **CHAPTER 4**

### **EXPLAINING HOW COURTS INFLUENCE INTEREST GROUP PARTICIPATION AS AMICUS CURIAE**

Judicial politics scholars know much about the types of groups that participate before the judiciary, particularly the U.S. Supreme Court, how much they participate, and the forms this participation takes. We do not, however, fully understand how courts' dockets affect interest group participation before the judiciary or how this participation affects lobbying in other branches. These questions are the focus of the next two chapters of this dissertation.

This chapter examines how the composition of the U.S. Supreme Court's docket affects interest groups' lobbying activities as *amicus curiae*. I expect that, even after controlling for the other factors that may affect interest group participation before the judiciary, more briefs should be filed in cases where the Court's decisions help interest groups to serve their long-term goals of influencing public policy and organizational maintenance. The analyses find support for this hypothesis and begin to demonstrate that the judiciary's agenda does, in fact, influence the attention paid to it by organized interests.

#### **Theoretical Foundation**

As I have argued in previous chapters, the judiciary's ability to shape the agendas of other policy actors hinges, in part, on the composition of its docket. Some cases are particularly alluring to other actors in the policy system, including the media and interest groups, while other cases are merely procedural or affect such a small class of citizens that

they seem inconsequential. Among the types of cases that should increase the courts' agenda-setting power are those where the courts are more likely to influence public policy, and salient cases such as those discussed in Chapter 2, which attract high amounts of media and public attention. Considering cases that fit these criteria may affect the activities of a range of policy actors, but the effects of these cases are particularly interesting for interest groups. Salient cases and cases where the courts can influence public policy map neatly onto the primary goals of many types of organized interests in the political system.

The following paragraphs detail groups' decisions to turn to the courts. They then consider the goals groups attempt to achieve through participation and the resource limitations faced by these policy actors. This section concludes with a note on what courts gain by attracting group participation.

#### *Interest Group Participation Before the Courts*

Groups, particularly those who are somehow disadvantaged in the electoral branches, have chosen to turn to the courts to achieve social and political change for at least 150 years (Bentley 1908, Truman 1951, Vose 1957, 1959, Cortner 1968). Many of these early groups who turned to the judiciary chose to pursue test-case litigation strategies, wherein group lawyers or their active members guided a series of cases through the legal system in an attempt to achieve incremental change in public policy. This strategy is most commonly identified with the lawyers of the NAACP Legal Defense and Education Fund, who used test-case litigation with great success in desegregating education and housing in the mid-twentieth century (Vose 1957, 1959, 1972). Women's rights activists also used test-case litigation in their attempt to elevate gender to a suspect classification (O'Connor 1980). And, today, lawyers in a variety of states continue to pursue similar strategies in attempt to legalize

gay marriage (O'Connor and Yanus 2007).

While case sponsorship allows significant control over the course of litigation, it is time-consuming, costly, and requires great expertise. Thus, most groups who participate before the judiciary choose to do so by filing *amicus curiae* (or friend of the court) briefs or joining *amicus curiae* briefs written by other organizations. Such participation is very common, and there are few cases heard by the U.S. Supreme Court today that do not have *amicus curiae* participation (Kearney and Merrill 2000, Owens and Epstein 2005, Collins 2008). *Amicus* participation is also increasing in state and lower federal courts (e.g. Martinek 2006).

#### *Incentives for Group Participation*

Scholars have highlighted two particularly important reasons why groups choose to turn to the courts. The first of these reasons is influencing public policy (Epstein and Rowland 1991, Hansford 2004, Solberg and Waltenburg 2006). The second is organizational maintenance (Wilson 1973, Salisbury 1984, Kobylka 1987, Caldeira and Wright 1989, Wasby 1995). Achieving both of these goals is essential for the survival of groups in the political system.

#### Participation to Influence Public Policy

Influencing policy outcomes is perhaps the primary goal of many groups that participate before the courts (Epstein and Rowland 1991, Hansford 2004, Solberg and Waltenburg 2006). Although groups may lobby the judiciary to affect public policy in a broad range of cases, constitutional cases may provide groups with particularly good opportunities to pursue this goal. As I have found in previous chapters, the courts are more likely to act as policy venues in these cases. Therefore, the Court's decisions are also more

likely to have a lasting effect on policy in constitutional cases.

This may mean that groups acting as case sponsors have significant incentives to frame particular types of cases as constitutional cases if they have the option to do so. A decision by the Court in a constitutional case is often a solid platform for long-term lobbying efforts, especially as the group defends the precedent in lower federal and state courts and the other branches. Furthermore, as will be discussed later (and was discussed in Chapter 2), constitutional cases might also provide better opportunities to attract media coverage and therefore engage in organizational maintenance.

Most organized interest participation before the Court, however come not through sponsorship but through *amicus curiae* briefs. Previous research has found that groups use *amicus curiae* briefs in an attempt to affect Supreme Court policy outcomes in several ways. One study divides these effects into two major categories: 1) an informational role; and, 2) a signaling role (Flango, Bross, and Corbally 2006). Informationally, interest groups may see *amicus* briefs as an opportunity to move beyond the issues highlighted in the party briefs. This may consist of providing the Court with unique information congruent with the group's ideal policy preferences or it may consist of providing the Court with additional, often more ideological, information about the potential consequences of its decision (Flango, Bross, and Corbally 2006).

Spriggs and Wahlbeck (1997) have examined the informational role of *amicus curiae* in substantial detail. They find that more than 60 percent of *amicus* briefs filed before the Court during its 1992 term contained information not discussed in the party briefs; a quarter of these briefs contained only new information. Although the justices did not frequently cite briefs that contained solely unique information, the predicted probability of an argument

being adopted from a brief that blended information from party briefs with additional data was more than 60 percent (Spriggs and Wahlbeck 1997).

More recently, Collins (2007, 2008) has explored how the information provided by amicus briefs affects justices' decision-making processes. He finds that the effects of information provided by these briefs are quite far reaching. Specifically, he provides evidence that amicus briefs can alter justices' votes, justices' decisions to join or author opinions, and ultimately, case outcomes.

The second role of amicus briefs, that of a signal to the Court, is also significant. At the certiorari stage, justices may be uncertain about which cases most merit review. One or more amicus briefs may help to amplify the significance of a case. This solves an information problem for the justices by informing them about a case's public or political intrigue, as well as citizens' opinions on these concerns. Caldeira and Wright (1988) provide further evidence that cases supported by one or more amicus brief at certiorari are more likely than other similar cases to be granted review.

#### Participation and Organizational Maintenance

Members of Congress, having been elected to the federal legislature, quickly realize that if they want to secure long-term policy change, their actions must be geared toward winning re-election (Mayhew 1974). Accordingly, members hold town hall meetings, send press releases, perform constituent service and engage in a number of other activities designed to help them maintain their seat. These activities may also stave off future challenges and help incumbents to build support among their constituency.

Interest groups are little different from these legislators in that they must take actions to assure their survival in the political system so that they can continue to lobby for policy

change. This broad class of activities designed to promote interest groups' survival is generally referred to as organizational maintenance and includes activities such as garnering publicity, credit claiming and attracting the attention (and money) of old and new members or constituents (Wilson 1973, Salisbury 1984, Kobylka 1987, Caldeira and Wright 1989, Wasby 1995).

In a survey of interest groups participating before the Supreme Court during its 1982 term, Caldeira and Wright (1989) find substantial evidence that organizational maintenance is a motivating factor behind at least some groups' participation before the Court. More than 30 percent of business, trade, and professional organizations, for example, responded that filing an amicus brief was very important to "keeping their members happy." Almost 40 percent of groups said that such participation was essential to avoiding conflict among the organization's constituent base.

Groups can engage in organizational maintenance activities in connection with any Supreme Court case. But, like legislators who strive to take a position and play a key role on important legislation, interest groups may be particularly effective at pursuing organizational maintenance in salient cases (Hansford 2004). Constituents are more likely to be aware of these visible issues, and thus groups can more easily mobilize, fundraise, and garner praise and targeted contributions.

#### *Limited Resources and the Costs of Participation*

Importantly, a group's ability to participate before the judiciary in general, and the U.S. Supreme Court in particular, is bounded by a number of factors, including its limited financial and human resources. Financial resources may pose the most significant obstacle to many groups, who must pay filing fees and hire legal experts (either in-house or at an outside



law firm) to research and write amicus briefs. Although these costs can be difficult to estimate, they are substantial. In their survey of more than 500 interest groups, Caldeira and Wright (1989), for example, found that groups spent between \$500 and \$50,000 to file a brief before the Court. The mean amount spent was roughly \$8,000. Importantly, these figures are more than twenty years old, and costs have inevitably increased in that time.<sup>36</sup>

Groups wishing to participate before the Court may also incur a human cost when they have to divert some of their often limited staff resources from lobbying the legislative or executive branches or the groups' day-to-day activities to focus on the judiciary. Using a Supreme Court case as an opportunity for organizational maintenance, for example, requires press releases, member contact, and other public relations events. Organizing these events and activities can take away from the group's pre-existing goals and activities in lobbying the other branches. This need to reallocate resources can pose a significant obstacle to many groups' full involvement before the Court.

The extent of an interest group's resource limitations when lobbying the courts may depend upon the type of group. Some groups, such as public interest law firms, generally have extensive in-house legal staffs whose sole responsibility is to follow litigation and write briefs on matters of interest to the group. These groups most likely have lower costs for filing an amicus brief than groups that do not have the same personnel and resources. Similarly, other types of groups, such as corporations, may have such large litigation budgets and be less concerned with organizational maintenance, lowering the cost of lobbying the Court. But, on the other hand, many citizen or public interest groups have minute litigation budgets and limited personnel resources, which leave little room for additional expenditures.

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<sup>36</sup> Some groups may receive substantial assistance in funding litigation campaigns from major law firms looking to do pro bono work. But, even this comes at a cost—group leaders must meet with attorneys, publicize involvement, and spend time identifying related cases.

Thus, although some groups will inevitably be one-shotters before the Court, for many organized interests, making the commitment to lobby the judiciary may be a long-term strategic decision. Groups interested in issues that come before the Court frequently may choose to specialize in judicial lobbying and even establish public-interest law firms. This dedication of resources, however, may come at the expense of lobbying the legislative or executive branches. Whether such a dedication of resources exists, as well as the consequences of such a decision for public policy, are considered in greater detail in Chapter 5.

### *Judicial Perspectives on Group Participation*

As the preceding paragraphs have demonstrated, interest groups can gain significant benefits from lobbying the judiciary. However, this is not a one-sided relationship. The courts and the judges who sit on these tribunals stand to gain substantial knowledge and insight from attracting the attention and input of organized interests. Accordingly, they take a number of actions that encourage group participation before the judiciary. First, justices on a court with discretionary jurisdiction may make it known, either by public pronouncement or through their decisions, that they are interested in adjudicating certain political issues. For example, in the 1870s, Chief Justice Salmon Chase notably suggested to women's rights activists that they should test the boundaries of the newly ratified Fourteenth Amendment to determine whether its provisions extended to sex discrimination (O'Connor 1980). What followed was a series of cases, including *Bradwell v. Illinois* (1873) and *Minor v. Happersett* (1875), which did exactly that.<sup>37</sup>

Second, the rules of many courts, including the U.S. Supreme Court, encourage the

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<sup>37</sup> Unfortunately, these cases reached the Court after Chase's death, and it would be nearly 100 years before the Fourteenth Amendment was extended in this way.

participation of interested parties through the filing of amicus curiae briefs. The high Court's Rule 37.1, for example, states, "An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court."

A visible example of the utility of these briefs is the U.S. Supreme Court's decision in *Mapp v. Ohio* (1961). The case originally was presented to the Court as a First Amendment case dealing with obscenity. But, the American Civil Liberties Union's amicus brief suggested that it should be a Fourth Amendment case. The justices ultimately heeded this suggestion, and the Court's decision in *Mapp* went on to develop the exclusionary rule, one of the most frequently used regulations governing the admission of evidence in American criminal courts.

Finally, continually adjudicating cases that pose salient questions and attract interest group participation may also serve another larger goal for judges and justices. Cases such as these raise the visibility of the courts—and by extension, can affect the judiciary's institutional prestige. Although the U.S. Supreme Court, especially, sometimes appears as though it is actively avoiding press coverage, the institution still needs to maintain a certain degree of public visibility if it intends to have any institutional power as a policymaker. Attracting the attention of interest groups who place the Court's decisions at the center of their lobbying activities may be a potential solution to this problem, especially with respect to its standing vis a vis the legislative and executive branches.

### **Hypotheses**

The preceding theory leads to a number of expectations related to how the composition of judicial dockets should affect interest group participation before the Court.

These expectations can be divided into the central hypotheses, which focus on the primary independent variables of interest, and the auxiliary hypotheses, which focus on other factors that may affect interest group participation before the Court.

### *Central Hypotheses*

As the preceding pages demonstrate, groups participate before the courts for two primary reasons: to influence public policy and to engage in organizational maintenance. Accordingly, by hearing cases that allow groups to achieve these goals more or less easily, the Court should alter interest groups' agendas and resource allocations.<sup>38</sup>

One way to measure a case's potential for influencing public policy in a case is to look at the issue area of the case presented to the Court. Because the Court is more likely to act as a policy venue in constitutional cases, it should also be more able to influence the course of public policy in these cases. Interest groups should respond to this reality and more briefs should be filed in constitutional cases than their statutory counterparts.

Interest groups are also inspired by organizational maintenance. As has been argued elsewhere, this activity is made easier in salient cases, which by definition generate media attention (and most likely public knowledge of an issue area) for a group.<sup>39</sup> Therefore, more groups should participate in salient cases than their less-salient counterparts.

### *Auxiliary Hypotheses*

Other case characteristics may also affect interest groups' choice to participate before the Court. These have been thoroughly examined by many scholars, but are also worth noting here. They include the participation of the U.S. government, both as party and amicus

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<sup>38</sup> This should be particularly true for groups that do not traditionally turn to the courts, though the data to test such a hypothesis are not presently available.

<sup>39</sup> As I discuss later, there may be some endogeneity in this relationship.

curiae.

First, volumes of research have documented the success of the solicitor general before the U.S. Supreme Court (e.g. Puro 1971, Salokar 1992, Pacelle 2003). The U.S. government as a party is not only more likely to have its cases accepted by the Court, but is also more likely to win than other types of litigants. The participation of the U.S. government as a party, therefore, may be a disincentive for interest groups to participate before the Supreme Court. Except in extraordinary circumstances, groups who agree with the government's position may conclude that their interests have been protected and direct limited resources elsewhere. Groups who disagree with the U.S. government may follow a similar logic, choosing not to waste time and money in a losing battle.

On the other hand, the presence of the solicitor general as *amicus curiae* may be an added incentive for groups to participate before the Court (Hansford 2004). The solicitor general's participation often signals a case of political importance, and may be an excellent opportunity for groups to engage in organizational maintenance while also (sometimes) influencing public policy. Thus, more interest group briefs should be filed in cases where the solicitor general also files an *amicus* brief.

## **Data and Methods**

These analyses are conducted using data on *amicus* participation originally collected by Kearney and Merrill (2000) and updated by Collins (2008). This dataset contains counts of all *amicus* briefs filed in all cases before the Court from 1946-2001.<sup>40</sup> Because I merge this data with Baird's combined Phase I and II of the Spaeth Dataset (Baird 2007), I am only

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<sup>40</sup> This includes briefs filed at certiorari and on the merits. I am not concerned that this inclusion compromises my theory because briefs filed at certiorari constitute relatively small percentages of all briefs and briefs filed in a particular case.

able to use all cases from 1953-2001 in my analysis.<sup>41</sup> This still yields a total of more than 5,000 cases.<sup>42</sup>

### *Dependent Variable*

The simplest dependent variable that could be employed in a study of this nature is a count of the number of briefs filed in each of the cases heard by the Court during this time period. However, such a variable is problematic because it so obviously trends upward. This trend has been well documented in the literature (e.g. Kearney and Merrill 2000, Owens and Epstein 2005). Groups' increasing success in the courts, as well as the growth of the interest group state in the 1970s led more interest groups to explore lobbying the Court as an avenue of political influence.

For purposes of illustration, Figure 4.1 shows the average number of briefs per case received by the Court in each year of this study.<sup>43</sup> It is evident that this line displays a decidedly positive trend, with the average number of briefs per case growing by between six and eight briefs from 1946 to 2001. To remove this trend from the data, I create a dependent variable that is best described as the deviation between the number of briefs filed in a given case and the mean number of briefs filed in all cases decided during the same term.<sup>44</sup> So, for example, if ten amicus curiae briefs were filed in a given case, and the average number of

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<sup>41</sup> The data used were compiled from a variety of sources funded by the National Science Foundation by Vanessa A. Baird at the University of Colorado at Boulder, and were distributed through the Department of Political Science at the University of Colorado, Boulder. Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.

<sup>42</sup> This number is also the result of filtering by case citation and including only those cases that were orally argued before the Court.

<sup>43</sup> Reliable data on the total number of groups (filers and co-signers) is not available for this time frame.

<sup>44</sup> To construct this variable, I do not include the participation of the solicitor general, as these briefs will be considered as their own independent variable.

briefs per case for that year was 2.2, the dependent variable would take on a value of 7.8. As Figure 4.2 demonstrates, this transformation removes much of the time-bound element present in the original data, and allows for much greater comparability across all years included in the dataset.<sup>45</sup> This variable is also useful for the purposes of this analysis because the primary phenomenon of interest is how groups allocate their resources across cases in a given year; a deviation taps this construct exactly.

Over the more than fifty years included in this analysis, the average mean deviation was essentially 0. The highest deviation, 72.94 briefs, came in the 1989 case of *Webster v. Reproductive Health Services*,<sup>46</sup> which set records for interest group participation at the time.<sup>47</sup> The lowest deviation, -6.9 briefs, came in the nine cases decided in 1999 where there was no amicus curiae participation.<sup>48</sup>

### *Independent Variables*

The primary independent variables of interest in each of these models relate to the issue area and the salience of the case. The first of these variables is a dummy variable that determines whether or not a case concerns a constitutional issue. It is derived from the U.S. Supreme Court Judicial Database (also known as the Spaeth Dataset). Specifically, the Spaeth Dataset's "authdec" variable is used to separate constitutional decisions from other

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<sup>45</sup> After observing the greater variation in averages in recent years as compared to earlier years, I decided to test another model that used the average standard deviation of the briefs as the dependent variable. The results of this model were substantively the same.

<sup>46</sup> Seventy-eight briefs were filed in this case. The Court did not receive more briefs in a single case until the 2003 cases of *Grutter* and *Gratz v. Bollinger* (the University of Michigan affirmative action cases).

<sup>47</sup> Examples of other cases with particularly high deviations—and thus particularly high levels of interest group participation—include the 1978 affirmative action decision of *Regents of the University of California v. Bakke* (50.83) and the 1997 assisted suicide cases of *Washington v. Glucksberg* (45.92) and *Vacco v. Quill* (40.92).

<sup>48</sup> Because the data is skewed to the positive side, I reran the models several times excluding higher values on the dependent variable. Both statistically and substantively results of the model were similar.

decisions of the Court. Cases are coded 1 if they concern constitutional issues and 0 otherwise. Overall, 34 percent of decisions included in the analysis concerned constitutional issues.

Second, the salience of a case is measured using the *Congressional Quarterly* (CQ) indicator. This information is obtained from the *Supreme Court Compendium*, 4<sup>th</sup> ed. (Epstein et al. 2006b). A case is considered salient and coded as 1 if CQ deemed it a legally important decision. All other cases are considered non-salient and are coded as 0. Overall, 6 percent of cases included in the analysis were salient.<sup>49</sup>

While it may be more customary in the political science literature to use the *New York Times* indicator of salience derived by Epstein and Segal (2000), it is not necessarily appropriate in this case. Because the *Times* variable is generated based on news coverage after the decision—and thus after groups’ decisions to participate—the measure may be an endogenous gauge of participation. That is, the *Times* might choose to cover certain cases simply because of the presence of so many amicus curiae. To avoid questions about these issues, I show the models using the *Congressional Quarterly* salience measure, which is not as directly dependent on interest group activity.<sup>50</sup>

### *Control Variables*

Three additional variables are also included in the model. These controls account for other factors that could affect the level of interest group participation in Supreme Court cases. These are the participation of the U.S. government, both as a party and as amicus

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<sup>49</sup> Some readers may be concerned about the collinearity of salience and constitutional cases. Statistically speaking, however, this is not a concern; the variables only correlate at .20.

<sup>50</sup> For exploratory purposes, I tested the model with the *Times* measure of salience. All of the variables yielded the same substantive results on all variables of interest.



curiae, and the ideological orientation of the Supreme Court.

The first variable measures whether the U.S. government was a party to the case. This variable is taken from the Collins dataset's "usparty" variable. It is coded 1 if the U.S. government was a party to the case and 0 otherwise. The U.S. government was a party in 22 percent of cases included in this analysis.

Second, the model includes a variable that measures the participation of the U.S. government as amicus curiae. This variable is derived from the "sgamicus" variable in the Collins dataset. It is coded 1 if the U.S. government participated as amicus curiae and 0 otherwise. The U.S. government participated as amicus curiae in 20 percent of cases.

Finally, the model includes a measure of judicial ideology.<sup>51</sup> This variable is added as a control and is intended to assure that the political environment of the Court does not affect interest group activity.<sup>52</sup> This is an important concern because of the perception that liberal groups were more likely to turn to the Court during much of this time period. This may, in part, owe to the ideology of the justices sitting on the tribunal. To measure the Supreme Court's ideological leanings, I use the Martin-Quinn (2002) score indicating the position of the Supreme Court's median justice. As is the standard practice, the more positive the Martin-Quinn score, the more conservative the Court. The average Martin-Quinn score of the cases included in this analysis was .39.

### *Method of Analysis*

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<sup>51</sup> To consider the broader political climate, I tested other models that also controlled for the ideology of the president and Congress. In all cases, these variables were insignificant, and so I do not show their results here.

<sup>52</sup> I also tested the model using Segal-Cover (1989) scores and Judicial Common Space Scores (Epstein et al. 2007). Both of these models yielded substantively similar results to those presented here. Since Martin-Quinn scores are somewhat of an industry standard in judicial models that do not predict justices' votes, I show them here.

After transforming my dependent variable from a count to a continuous dependent variable, I am able to use ordinary least squares regression as to consider the effects of the independent variables on amicus curiae participation. The models also employ robust standard errors. Robust standard errors are generally used when there is a small departure from the fundamental assumptions of the model. In this case, the assumption of conditional independence of observations has likely been violated. The Supreme Court considers multiple cases at one time, and it is likely that a group's decision to participate in one case is affected by other cases on the Court's agenda.

Using OLS to estimate a model of group participation is a relatively unique approach. In his model of groups' decision to participate before the Court, for example, Hansford (2004) employs a logit model; this is a logical decision given the binary nature of the dependent variable. And, in his work evaluating the influence of amicus briefs before the Court, Collins (2007, 2008) relies on count or logit models, often with dummies for the Court's term to deal with the trend in the number of briefs filed before the Court over time. I believe transforming the dependent variable is a sufficient advancement in the parsimony of the model that presents promise for future research. Using this variable also allows me to more effectively consider interest group participation as a function of case characteristics. In addition, as discussed earlier, this variable facilitates greater comparison across cases decided during the same term.

## **Findings**

The results of this analysis of interest group participation before the Supreme Court can be seen in Table 4.1. All of the variables are statistically significant and perform in the hypothesized direction. Although their substantive significance varies widely, these models

provide evidence for the fact that, by hearing cases that allow groups to achieve their goals of influencing public policy and organizational maintenance, the Court can, at least to some degree, affect interest group activity.<sup>53</sup>

Influencing public policy, although still statistically significant, has a very modest substantive effect on interest group participation, especially when compared to other variables in the model. A constitutional case receives about .28 more briefs than the average case filed in the same year. The small magnitude of this result is somewhat surprising; the potential causes of this small size are analyzed in greater detail below.

Salient cases, which provide groups with greater opportunities for organizational maintenance, have the most powerful effect on interest group activity. As the model demonstrates, salient cases attract 4.55 more briefs than the average case filed in the same year. This is a substantial substantive impact, particularly given that the mean number of amicus briefs filed in a case over the fifty year time span included in this dataset is but two briefs. It also suggests that these types of cases are important opportunities for the Court to set the agenda of other political actors.<sup>54</sup>

The control variables also have a statistically significant effect on the level of amicus curiae participation before the Court. The involvement of the U.S. government, for example, has important implications, both as a party and as an amicus. As expected, the U.S. government's involvement as a party decreases participation by three-quarters of a brief over other cases filed in that same year. As an amicus, however, the solicitor's involvement

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<sup>53</sup> The  $r^2$  of this model is, objectively, small and suggests that a range of other idiosyncratic factors may affect group participation. This is certainly to be expected—some of these factors are even suggested in the theory presented in this paper. However, because previous models have not generally used OLS analysis, it is difficult to compare this finding to studies of similar relationships.

<sup>54</sup> Again, a model using the *New York Times* measure (Epstein and Segal 2000) performs similarly.

increases participation by more than one brief per case.

The control for judicial ideology is also statistically significant, indicating that Courts with a more liberal median tend to receive more amicus briefs than their more conservative counterparts. This is not, perhaps, surprising since much of the traditional literature documents that liberal groups have used litigation as a form of lobbying more often than their conservative counterparts. However, the substantive significance of this variable is not large; a one unit increase in a Court's Martin-Quinn score only leads to a .16 decrease in the number of briefs. The range of this variable is approximately two units, so the maximum change that can be caused by the Court's ideology remains about one-third of a brief, and is likely much smaller on a year-to-year basis.<sup>55</sup>

Taken as a whole, the findings of this model confirm that the characteristics of the cases accepted by the Supreme Court statistically and substantively affect the level of interest group participation before the Court. A salient, constitutional decision where the U.S. government participates as *amicus curiae*, for example, attracts almost six more briefs than a case filed in the same year that does not have these characteristics. This is a tremendous redirection of interest groups' resources that may have dramatic consequences for policymaking in the other branches (as discussed in Chapter 5).

### *The Role of Public Policy*

The most surprising result of this model is that constitutional cases, although statistically significant, have a very small substantive effect on the level of participation before the Court. These findings fly in the face of the argument that groups' primary reason for turning to the courts is to influence public policy. There may be a number of reasons for

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<sup>55</sup> Again, models using the Segal-Cover (1989) scores and the Judicial Common Space Scores (Epstein et al. 2007) perform similarly.

this finding.

First, although many judicial scholars argue that influencing public policy is often the primary goal of groups participating before the Court (e.g. Hansford 2004, Collins 2008), this may not be the case. Groups may, instead be pursuing organizational maintenance with greater vigor than we assume. This argument is consistent with the motivation for groups' participation in other stages of the judicial process. Recent analyses of federal judicial nominations, for example, suggest that interest groups have accepted that there is little they can do to influence the president's nominee, especially after that person has reached judicial confirmation hearings. But, groups continue to participate actively in these hearings, appearing before the Senate Judiciary Committee, sending out mail and e-mail, and sponsoring television and radio ads. These activities allow organized interests to claim credit, attract new members, and raise money. In other words, they serve another, more important, goal—organizational maintenance (Epstein et al 2006a).

Second, groups may still be very interested in influencing public policy. However, their litigation strategies may focus not on the type of case and the Court's ability to create lasting policy change in a case (constitutional/statutory), but on their ability to win a case and establish a precedent. If this is the case, some statutory cases may be equally as attractive as their constitutional counterparts. These effects would not be visible in the current model.

Finally, it may also be that this result is diluted by the fact that the distinction between constitutional and statutory cases is too blunt of an instrument to capture the full dynamics of policy-motivated participation before the Court. In their seminal work on interest group participation before the Court, O'Connor and Epstein (1982) demonstrated that levels of interest group participation before the Court varied widely even within similar case

types. Constitutional criminal cases, for example, received far less amicus participation than other constitutional cases. More recent scholarship on the Rehnquist Court suggests that these differences are smaller in modern times, but it is a possibility worth exploring (Owens and Epstein 2005). Perhaps there are countervailing forces at work.

### *Considering the Impact of Criminal Cases*

To this point, this dissertation has conceptualized the courts' ability to act as policy venues as a dichotomous choice—is the case constitutional or not? However, such a dichotomy is certainly an oversimplification of the judiciary's role. One way this may be the case is in considering the difference between constitutional cases that involve criminal issues and those that do not.

The courts are quite able to fulfill the traditional policy venue role in constitutional non-criminal cases. The issues in these cases, which are often hot-button civil rights and liberties concerns such as affirmative action and equal protection, are precisely the type of matters that require judicial involvement for redefinition and change. Moreover, the courts' decisions in these cases often have broad consequences that affect a number of policy areas and a wide class of citizens. For example, the U.S. Supreme Court's decision in the affirmative action cases of *Grutter* and *Gratz v. Bollinger* (2003) had the ability to affect not only education, but business, the military, and society at large.

In contrast, criminal cases, even when they deal with constitutional provisions such as the Fourth, Fifth, or Sixth Amendments of the Bill of Rights, do not afford the Court the opportunity to make such lasting, visible policy change. If the court decides a case solely based on the case facts, it may apply only to a narrow class of circumstances, a phenomenon that the Rehnquist Court's jurisprudence on the Fourth Amendment illustrates perfectly.

Though the Court decided a large number of search and seizure cases, each decision only applied to limited circumstances—stopped cars, borders, and thermal imaging, to name a few. Moreover, state and local law enforcement and policymakers can more easily challenge the courts’ decisions in such cases. As a result, then, the courts are less able to act as policy venues in constitutional criminal cases than constitutional non-criminal cases, and we are likely to see interest groups respond to this difference.

The results of the model support this contention. There appears to be a significant difference in *amicus curiae* participation between constitutional cases that deal with criminal issues and those that do not. Because the coefficients for all of the other variables remain almost identical in both statistical and substantive significance to the previous model, I do not discuss them in detail here. Instead, I focus on the implications of the constitutional case variables.<sup>56</sup>

As shown in Figure 4.2, the coefficients of the constitutional-not criminal variable and the constitutional-criminal variable have very similar coefficients. They are, however, in the opposite direction. Constitutional cases that do not deal with criminal issues attract about one more brief than the average case filed in a given year. In contrast, constitutional cases that address issues of criminal law receive about one fewer brief than the average case filed in a given year. Although this is a still relatively small effect when compared to salient cases or the range of the variable, these coefficients display much larger effects than in the previous model.

This model also sheds greater light on how the Court can set interest groups’ agendas. A certain percentage of the Court’s annual docket deals with constitutional issues. By

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<sup>56</sup> Again, correlations between salience and constitutional cases may be a concern. However, these correlations remain relatively low—.19 for salience and constitutional non-criminal cases and .04 for salience and constitutional criminal cases.

choosing to decide constitutional cases that deal more with issues of criminal law, the Court may deter groups from participating. But, when choosing to decide cases that deal with non-criminal constitutional issues, the Court should expect at least a modest degree of additional attention from interest groups.

## **Discussion**

The preceding models provide substantial evidence that the characteristics of the cases the Court decides in a given term can affect the level of interest group participation before the Court. Specifically, by deciding cases that enable interest groups to pursue their dual goals of influencing public policy and organizational maintenance, the Court can attract additional interest group attention in the form of amicus curiae briefs. This allows the justices to gain greater information about the issues at hand and, perhaps, additional attention from the general public.

Two points resulting from this analysis merit additional attention. First, I consider the effects of salient cases on judicial power. Second, I consider the importance of this analysis for interest groups' motivations for participation before the Supreme Court.

### *Salience and Judicial Power*

The large substantive impact that salient cases have on participation before the Court is particularly noteworthy. Since justices of the Supreme Court have discretionary dockets, they are able to choose which of the thousands of cases presented to them they would like to hear. By deciding to decide a case that could be salient to citizens or the legal community (or, later in the process, crafting an opinion that increases these odds, as discussed in Chapter 2), justices, either individually or as a group, can increase their own impact on the political system. This impact can be an extensive one.



In short, by attracting greater attention from interest groups, the Court begins an agenda-setting domino effect. These groups not only file amicus briefs, but they also use the case as an opportunity to mobilize and send mailings, publications, and email to their members and potential constituents. This contact can activate citizen interest, especially if the mainstream media also pays attention to a given case. And, because interest groups' constituents are often members of a politically aware special public, they are likely to continue to push for policy change in an issue area even after the Court hands down its final decision.

Decisions, too, may be catalysts for major group activity beyond the courts. This lobbying of state legislatures, local governments, or the federal executive or legislative branch is essential to seeing the Court's decision implemented (or not implemented), since the Court itself has no enforcement power. Defending (or attempting to defeat) a precedent in state and federal courts may also be essential to assuring continued progress in an issue area (e.g. Scheingold 1974). When such a pattern of lobbying behavior occurs, the Court has intentionally or unintentionally affected the agendas of other political institutions and campaigns.

For example, interest groups on both sides of the issue used their participation in *Webster v. Reproductive Health Services* (1989) as a springboard to future lobbying efforts. While the Court was writing its opinion, for example, pro-choice groups organized a march on Washington, D.C. attended by between 400,000 and one million people. Many of these individuals provided mailing addresses and telephone numbers groups could use to get in touch with them for years to come. This allowed the groups to claim larger membership (which translates into clout with members of Congress), have a broader fundraising base, and

generally engage in more lobbying than they might otherwise have been able to pursue.

Pro-life activists were similarly inspired by the Court's decision in *Webster*. Scholars have, for example, asserted that the growth of the direct action movement at abortion clinics (i.e. clinic protestors) was a direct result of the Court's decision. They argue that this decision got the attention of average citizens who would not have otherwise considered the abortion issue at the center of their lives (Stagenborg 1991). These individuals formed local citizen action groups, who were able to mobilize and create controversy that resulted in more than ten years of litigation and, eventually, reframing the abortion issue before the Supreme Court.

The critic will say that many issues that meet the "salient" criteria already have places on the public or systemic agenda, and that the Court's decision is merely a validation of an issue's importance, not the creation or emergence of a new issue. While this may be true in some cases, it is most certainly not always the case. As we know from Chapter 3, the activities of the Court can be a powerful agenda setter, particularly in issue areas where it most frequently acts as a policy venue.

More anecdotally, the courts, particularly when their decisions alter the status quo, may—and often do (as discussed in Chapter 3)—lead issues waiting for their time to come to take visible positions on the public and systemic agendas. Though the Court may struggle to enforce these decisions without force or will, their judgment compels other political actors to take up issues they might otherwise avoid. Examples of this behavior, from gender and race discrimination to criminal rights, abound.

### *Interest Groups' Motivations*

Though this is not the central focus of this study, the findings of this analysis also

speak to interest groups' motivations for amicus participation before the Court. Although by definition interest groups are collections of individuals who join together to influence public policy, it appears that this goal may not motivate amicus participation before the Court as often as scholars have hypothesized. Instead, this model reveals that groups may more frequently turn to participating as amicus curiae before the Court because they are seeking to claim credit for political activity.

One empirical explanation for this finding may be that the dependent variable used in this analysis has illuminated different motivations than previous analyses. By using the numbers of briefs filed before the Court in each case—rather than a group's decision to lobby the Court during a given term or case (Hansford 2004, Solberg and Waltenburg 2006)—as the dependent variable, I capture a totally different phenomenon. Groups may, as previous scholars have suggested, make the individual decision to lobby the Court (as compared to not participating) because it is considering an important policy issue. But, all cases are not equal; cases that allow groups to pursue organizational maintenance (alone or in combination with influencing policy), may attract a disproportionate amount of that participation.

Several theoretical explanations for this relationship may exist. First, and perhaps most importantly, it may be that the groups most interested influencing public policy through litigation do not participate as amicus curiae, but instead choose to sponsor test cases and shepherd litigation through the legal process. This type of participation is not captured in the data used here, so it is difficult to speak conclusively on this contention. However, anecdotally, we know that many of the groups most engaged in issue areas such as race, gender, and sexual discrimination have been very active case sponsors. As Cortner (1975) has noted, “cases do not arrive on the doorstep of the Supreme Court like orphans in the

night.”<sup>57</sup>

Second, neo-pluralist theories of interest group formation and survival suggest that within any issue area, there can only be a finite number of interest groups working to achieve policy change. An even smaller number of these groups have the financial and human resources to participate before the Court; many groups also work together to file co-signed amicus briefs. Thus, the number of purely policy motivated briefs that can be filed in a particular issue area or case is necessarily limited. To move beyond this number, groups with a smaller stake or tangential interest must be engaged. Claiming credit for their involvement in the case may be a more powerful incentive than influencing public policy, especially in visible cases.

Finally, it is not a stretch to say that the Court acts as a policy venue in less than a third of its cases. But, even when the Court’s decisions have little immediate or lasting impact on public policy, these cases may be important to an interested clientele, who expect interest groups representing them to be involved before the judiciary. This trend is magnified in issue areas that are already salient. In many ways, then, it can be said that credit claiming is a more broadly applicable goal for interest groups than influencing public policy.

## **Conclusion**

This chapter demonstrates that the characteristics of cases the Court decides can influence interest groups’ lobbying activities. Even after controlling for other factors that shape interest group participation, significantly more briefs are filed in cases that allow interest groups to pursue their dual goals of influencing public policy and organizational

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<sup>57</sup> Capturing the groups that sponsor particular cases is a difficult endeavor. Sometimes groups (and their lawyers) openly acknowledge the role they play in bringing cases before the Court. On other occasions, groups and lawyers may have privately acknowledged relationships that are not discussed on briefs. And, in still other cases, lawyers may list an interest groups’ address on a brief but not provide the name of the group.

maintenance. This finding suggests that the Court's docket composition may be extremely important in establishing and maintaining its institutional power, as well as its influence over the American policy making process.

However, this is just the beginning of courts' influence on the policymaking process. While this analysis confirms that there is a link between the Court's docket and interest groups' lobbying activity before the Court, it still does not provide concrete evidence of how, if at all, the Court's case selection process influences interest groups' broader resource allocations. In other words, this analysis alone cannot answer the question of whether groups consciously acknowledge the Court's institutional power when crafting their lobbying strategies.

Chapter 5 uses a variety of data sources on lobbying activity in both the Court and Congress to shed greater light on this balancing act. It first reviews lobbying registrations before the legislature, and then turns to interest group participation before the Court. Finally, it compares and contrasts participation before each of these branches with a special eye toward issue area. In so doing, it answers a number of significant questions regarding the effects of the Court's case selection process on interest group agendas. For example, do groups that focus on constitutional issues devote greater resources to lobbying the Court than groups that are interested in statutory issues? Are groups that are interested in constitutional issues less likely to lobby the legislature than their statutory counterparts? And, how are these differences reflected in the populations of interest groups that lobby each branch?

Figure 4.1. Average Number of Amicus Briefs Per Year, 1946-2001

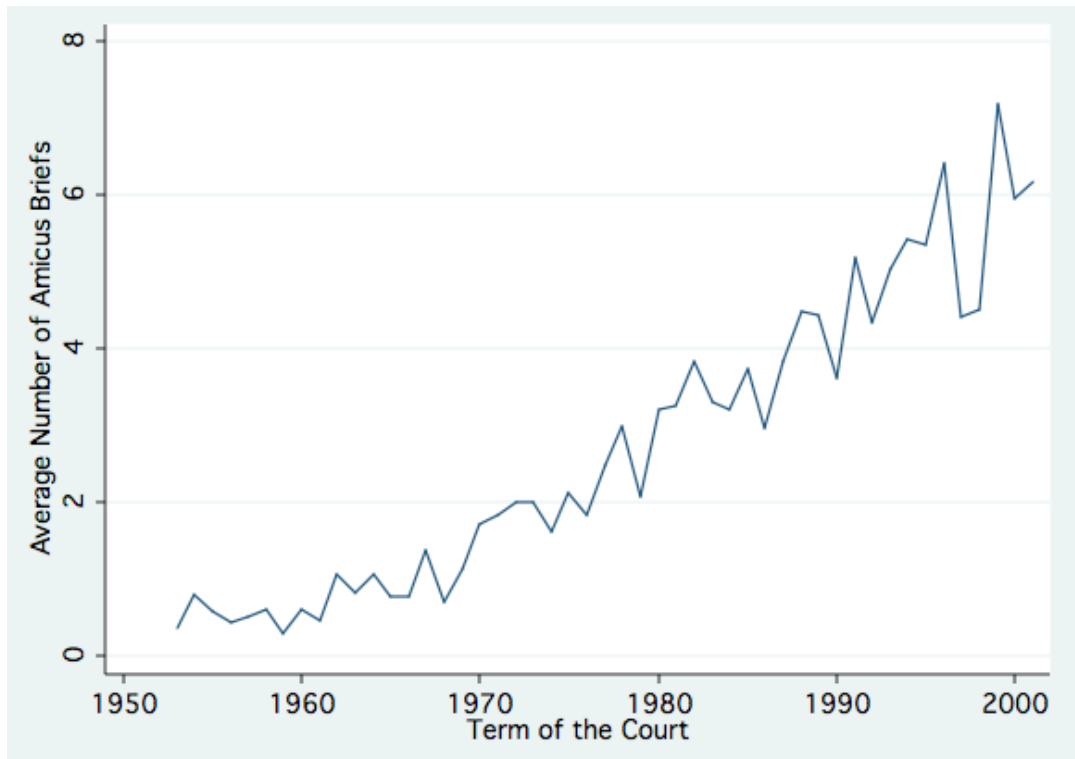


Figure 4.2. Average Deviation of Amicus Briefs Per Year, 1946-2001

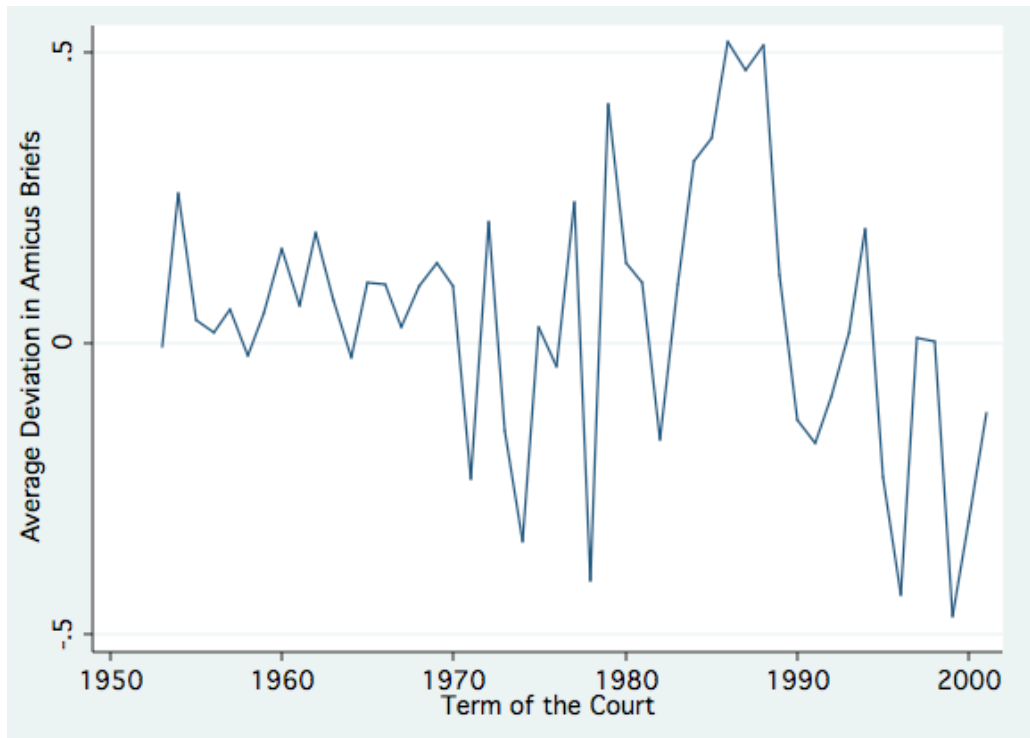


Table 4.1. Predictors of Amicus Participation Before the Supreme Court

	Coefficient (Robust S.E.)	
Constitutional Issue	.28	***
	(.10)	
Salient Case	4.55	***
	(.46)	
Solicitor General Amicus	1.33	***
	(.16)	
U.S. as Party	-.77	***
	(.08)	
Supreme Court Median	-.16	**
	(.08)	
Constant	-.38	***
	(.07)	
F	64.91	***
$R^2$	.14	

$n=5,148$

\*Significant at  $p < .10$  (two-tailed).

\*\*Significant at  $p < .05$  (two-tailed).

\*\*\*Significant at  $p < .01$  (two-tailed).



Table 4.2. Predictors of Amicus Participation Before the Supreme Court Reconsidered

	Coefficient (Robust S.E.)	
Constitutional, Non-Criminal	1.00	***
	(.14)	
Constitutional, Criminal	-.96	***
	(.10)	
Salient Case	4.38	***
	(.44)	
Solicitor General Amicus	1.39	***
	(.16)	
U.S. as Party	-.59	***
	(.08)	
Supreme Court Median	-.17	**
	(.08)	
Constant	-.43	***
	(.07)	
F	67.74	***
$R^2$	.16	

$n=5,148$

\*Significant at  $p < .10$  (two-tailed).

\*\*Significant at  $p < .05$  (two-tailed).

\*\*\*Significant at  $p < .01$  (two-tailed).

## CHAPTER 5

### EXPLAINING JUDICIAL EFFECTS ON LEGISLATIVE LOBBYING

To this point, I have only considered the judiciary's ability to affect interest group participation before the courts. But, if it is true that interest groups are strategic policy actors with limited resources, groups' decisions to respond to the agenda of the judiciary should also come at the expense of lobbying activity in other branches. This chapter examines whether such a tradeoff occurs with respect to the legislature.<sup>58</sup>

Using data on interest group activity before the U.S. Supreme Court and registered lobbyists before the U.S. Senate and House of Representatives, I show that, groups do, indeed, make calculated decisions about how to allocate their lobbying resources. These decisions are affected by a number of factors, including the policy agendas of each branch. The findings of this analysis provide further evidence that the types of cases the judiciary decides can have significant policy implications.

#### **Theoretical Foundation**

As the theory in Chapter 4 posited, interest groups that choose to lobby the federal government have limited resources and must make choices regarding how they participate. These concerns should affect participation not only within one branch, as discussed in Chapter 4, but across branches. Groups must decide when and how to direct limited

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<sup>58</sup> Testing judicial, legislative, and executive lobbying would be ideal, but consistent lobbying disclosure data are not readily available for the executive branch, even through standardized processes such as notice and comments.

resources toward lobbying the judiciary, and when to lobby the legislature instead. Similarly, although not the focus of this analysis, groups must consider when their efforts would best be spent working with regulators in the bureaucracy and when to turn to the Supreme Court.

### *The Role of Resources*<sup>59</sup>

Resources are essential to interest groups' survival in the political system. Without resources, broadly defined, groups would be weak political actors able to attract little attention from policymakers or the public. Organized interests would also struggle to change policy or maintain their organizations.

Interest groups, however, do not have unlimited resources. As a result, they must make decisions about how to use the resources they have—or lack—to their political advantage. Here, I consider four interest group resources that scholars have regarded as particularly important (see Gray and Lowery 1996): (1) finances (Walker 1983), (2) membership (Salisbury 1984, Lowery and Gray 1995), (3) selective benefits (Olson 1965, Wilson 1973, Moe 1980), and (4) access to policy-makers (Browne 1990). I discuss each resource and evaluate how that resource limits and expands groups' ability to lobby.

### Funding

When thinking about resource constraints on interest groups, funding is perhaps the most significant. Without financial resources, groups simply cannot exist—they have no way to pay for day-to-day expenses such as office space, staff, and supplies. And, without the funds to pursue these simplest of goals, groups have little to no way of raising their visibility in the media and the public, attracting the attention of new members, or organizing lobbying strategies to attract the attention of policymakers.

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<sup>59</sup> Some of the discussion of resources in this section borrows from Chamberlain and Yanus (2009).

Funding may come from a number of sources. For many groups, membership contributions and other small donations are the major source of funds. Prominent organized interests may also have large-scale charitable functions that help to offset operating costs. These groups may also have patrons (e.g. foundations or governments) that support their activities. And, still other groups may derive their funds from alternative sources, such as dedicated corporate or institutional budget lines devoted to governmental relations.

Groups with larger budgets, of course, are faced with fewer decisions about lobbying one branch of the government at the expense of another. Such groups—the NAACP, for example—are able to establish both litigating and lobbying arms and make their presence felt throughout the policy process. But, groups such as these are the exception and not the rule. Most groups’ budgets force them to choose a focus, based on a variety of factors, including influencing public policy, organizational maintenance, and agenda composition. Traditionally, research has shown that groups with greater resources do not choose to lobby the judiciary first. These groups turn to the legislature and leave the courts for the “politically disadvantaged” (Cortner 1968).

### Membership

Members are the lifeblood of most non-institutional interest groups. Members, first and foremost, pay dues that fund groups’ lobbying activities. They also provide organized interests with a loyal network of grassroots supporters who can lobby policymakers at all levels of government and give groups clout as they approach political leaders. As a result, the number of members a group has can be a strong determinant of lobbying strategy. Groups with more members, for example, are more likely to have larger budgets and be more able to pursue diverse lobbying agendas. They also face advantages in lobbying the

legislature since representing a greater number of constituents becomes important for members wanting to win reelection.

Membership, of course, is not a one-sided proposition. In exchange for dues and support, interest groups provide members with a variety of benefits. These may include representation of their viewpoint during the policy process, information that they might not be able to access in other forums, and a range of unique selective benefits.

### Selective Benefits

Selective benefits, in and of themselves, do not provide groups with significant advantages in the lobbying process. However, the literature has long noted that selective benefits, or those benefits offered only to individuals who join a group, serve an important role in maintaining a group's membership (Olson 1965, Moe 1980). Groups offer selective benefits to differentiate themselves from other groups and provide a unique reason for people to join, and donate to, their group. All else equal, individuals are more likely to remain members of an organization if the group's selective benefits provide them with information and opportunities that cannot be obtained outside the group. This can involve anything from magazines and newsletters to trips and cookouts with other members and donors.

It is worth noting that some groups, such as AARP or the American Automobile Association (AAA), rely more heavily on selective benefits than others. People do not typically join groups such as these just because they are over 50 or because they own a car. Instead, they join to enjoy the various selective benefits the groups offer, including discounts and travel packages. These benefits often have little to do with the groups' policy goals, and in this case, as long as the group retains the capacity to continue to offer these benefits, the

group is likely to retain members and all of the attendant benefits discussed in the previous section.

### Access to Policymakers

As I have extensively discussed elsewhere in this dissertation, the goal of interest groups, by definition, is to influence public policy. This means that they must clearly articulate their position to government officials, with the long-term goal of having policymakers advocate for their cause and pass legislation, enforce a regulation, or alter a precedent. Having greater financial and human resources facilitates this process and means that groups have a greater ability to set the agenda as well as more contacts within the government. They are also less limited in their ability to lobby and can make more frequent contacts with policymakers (see discussion of Galanter [1974] below).

### *Making Choices About How to Lobby*

As discussed in the previous section, groups' ability to lobby is constrained by human and financial resources, as well as their capacity to offer selective benefits and build contacts with policymakers. Thus, periodically—perhaps at the beginning of each (calendar or fiscal) year—groups (or more often, their leadership boards) must step back and examine the political landscape and assess where their financial and human resources would best be allocated.<sup>60</sup> These considerations, certainly, are affected by groups' dual motivations of policy change and organizational maintenance, which are discussed at length in the previous chapter. They may include crafting a lobbying strategy, designing member outreach campaigns, or any of the other tasks groups must undertake to survive.

### *Agenda Composition*

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<sup>60</sup> As scholars, we lack an understanding of how groups allocate their lobbying resources. Further qualitative research is necessary to reach a greater comprehension.

Groups' considerations should, however, also be altered by their impressions about the composition of an institution's agenda over a longer time period. If an institution has developed a reputation as a policy venue (Baumgartner and Jones 1993), groups may see significant benefits from specializing in lobbying that branch. These advantages may come in the form of close relationships with policy makers, lower costs for lobbying on individual policy actions, or higher rates of success in making public policy. Such specialization allows groups to get more for their money, as activities become more cost-effective over time. Specialization may also enable groups to increase their rate of success in influencing public policy. For example, in discussing "repeat players," or lawyers who appear before a given court again and again, Galanter (1974: 99) argues that these actors achieve greater success than their counterparts, who he dubs "one shotters." Repeat players, he argues, appear before courts so frequently that they establish special relationships, expertise, and credibility with the judges or justices as they "play the odds," bringing only the most winnable cases to a court for their resolution.<sup>61</sup>

These long-term considerations, however, are not absolute. For example, consider an interest group that traditionally spends a significant portion of its resources lobbying the judiciary. In a given year, however, the Supreme Court may choose not to consider a particular issue. So, the group must decide whether to direct greater resources to lobbying the lower courts, or to redirect resources to the legislature, the executive branch, or to other pursuits. These calculations will be influenced by perceived opportunities to influence public

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<sup>61</sup> In practice, scholarship has found mixed results on the success of repeat players before the courts (see, for example, Atkins 1991, Haire, Lindquist, and Hartley 1999, Kritzer and Silbey 2003, McCormick 1993, McGuire 1993a, 1993b, 1994, 1995, Songer, Kuersten, and Kaheny 2000, Songer and Sheehan 1992, Wheeler et al 1987).

policy or carry out organizational maintenance that may appear on an institution's agenda during that year.

## **Hypotheses**

The theory articulated here and in Chapter 4 posits that most interest groups have limited resources and therefore must make choices about how they allocate those resources in lobbying the federal government. These decisions may be affected by influencing public policy and organizational maintenance, as shown in Chapter 4. An additional way for groups to make choices about how to allocate these resources is to respond to the issues that make up the policy agendas of each of the political institutions. When one institution devotes more attention to an issue, both in the long and short term, groups interested in that issue should be more likely to shift their resources and goals toward that branch.

Specifically, then, groups interested in issues that comprise a greater percentage of the judicial agenda should devote a disproportionately high ratio of their resources to participation before this branch. This participation should come at the expense of legislative lobbying. The reverse should also be true. Groups interested in issues that comprise a greater percentage of the legislative agenda should devote a disproportionately high ratio of their resources to participation before this branch. This participation should come at the expense of judicial lobbying.<sup>62</sup>

## **Data**

This analysis brings together data from a variety of sources to build a fuller understanding of how the Court's docket affects interest groups' lobbying activity in the legislative and judicial branches. The paragraphs that follow highlight these data sources and

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<sup>62</sup> I use the term "judicial lobbying" to encompass the range of activities interest groups undertake to influence policy before the courts. This includes case sponsorship, filing amicus briefs, and joining amicus briefs written by others.



discuss how they were used to compare and contrast groups' participation across the legislative and judicial branches.

### *Issue Area*

To more fully understand how the composition of the legislative and judicial agendas influenced interest groups' decisions about which branch to lobby, it was imperative to separate lobbying activity across issue areas. As in Chapter 3, I defer to the Policy Agendas Project (Baumgartner and Jones 2009) to draw distinctions between issue areas. The Project separates the activities of each branch of the American national government into nineteen broad categories, ranging from education to agriculture to macroeconomics. These categories can be seen in Table 5.1.<sup>63</sup>

The Policy Agendas Project is an ideal coding scheme for a number of reasons. First, Baumgartner and Jones have made substantial efforts to code the activities of each of the branches using this unified coding scheme. As a result, researchers can download databases of congressional laws and hearings, Supreme Court decisions, and presidential speeches coded by issue area. Second, Baumgartner and Jones have encouraged other scholars to adopt these codes, and this has been done in other datasets such as the Congressional Bills Project. Third, these codes are relatively straightforward and easy to employ in recoding data coded using other issue codes. Finally, Baumgartner and Jones have also made substantial efforts to apply similar codes to other countries and the American states, so using this coding scheme presents the opportunity for comparison across other national and subnational units, should the appropriate data become available.

### *Legislative Data*

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<sup>63</sup> For more detail on the policy areas that fall under each of the nineteen major topic codes employed by the Policy Agendas Project, see the Project's website at <http://www.policyagendas.org/codebooks/topicindex.html>.

Data on the raw number of groups lobbying the legislature is drawn from Baumgartner and Leech's Lobbying Disclosure Dataset. This dataset catalogs all of the lobbyists registered to lobby the federal Congress during the 1996 calendar year (the second session of the 104<sup>th</sup> Congress). This data is collected from lobbying disclosure reports filed under the Lobbying Disclosure Act of 1995.

Unfortunately, the 78 issue codes used by Baumgartner and Leech to code the lobbying activities on these reports predate the simplified nineteen issue area coding scheme used in the Policy Agendas Project. However, I was able to recode the great majority of issue areas to match their correct Policy Agendas code. For example, groups with lobbyists coded "CIV" for Civil Rights and Liberties mapped neatly onto Policy Agendas Project issue area 2, Civil Rights, Minority Issues, and Civil Liberties. Similarly, groups with lobbyists coded "ROD" for Roads and Highways mapped neatly on to Policy Agendas Project issue area 10, Transportation. One major exception to this successful recoding were groups with lobbyists coded "TRD" for Domestic and Foreign Trade, which does not neatly map into one category on the Policy Agendas Dataset. It is for this reason that all of the following analyses omit Policy Agendas Project issue area 18 (Foreign Trade).

The raw number of lobbyists registered to lobby on an issue, although a useful data point, does not account for the legislature's variable attention to issue areas. For example, 100 lobbyists registered in a policy area where Congress considered 100 bills is a much denser concentration (and a much greater dedication of resources) than 100 lobbyists in an issue area where Congress considers 500 bills. Thus, where appropriate, I create ratios of the number of lobbyists per bill by matching the Lobbying Disclosure Data with data from the Congressional Bills Project (Adler and Wilkerson 2009). This data source includes

comprehensive information on all of the bills filed during the 104<sup>th</sup> Congress. Although the lobbying data includes only groups registered to lobby during the Congress' second session, I choose to use all of the bills proposed during the 104<sup>th</sup> Congress, because only a small fraction of these had become law as of January 1, 1996, and as such, most were still very much on the table for consideration by Congress during its second session.

Bills, however, may be a very broad measure of congressional activity. Any member of Congress can propose a bill on any issue, and it does not necessarily mean that Congress is particularly interested in or acting upon this issue. As an additional examination of the way that the congressional agenda (and actions taken by Congress) affects interest group activity, I also consider the ratio of lobbyists to the number of hearings held by Congress on each issue area during calendar year 1996. This data is obtained from the Congressional Hearings database of the Policy Agendas Project (Baumgartner and Jones 2009).

#### *Judicial Data*

Data on the number of groups participating and the number of cases heard before the judiciary is drawn from information collected by Collins and Soloweij (2007). This database includes counts of every group writing or joining an amicus curiae brief in each case heard before the Court during its 1995 term (October 1995 to June 1996). Each group is classified by a number of variables, including group type and whether they supported the petitioner or the respondent.

I used the Policy Agendas Project's Supreme Court database to identify the issue area of each case. This information allowed for comparisons regarding group participation in each issue area across the legislative and judicial branches. I also used it to create ratios of

groups participating before the Court to cases heard by the Court. These ratios were created for the same reasons discussed in the legislative section.

## **Findings**

Before examining interest group participation, it is important to verify that 1996 is not an anomalous year in the activity of the legislature and the judiciary. This verification leads to greater confidence in and ability to generalize from the findings shown here.

As shown in Figure 5.1, 1996 is a rather average year in the business of Congress. The proportion of hearings devoted to each issue area is relatively the same across all years from 1972-2006 and in 1996 alone. The highest proportions of hearings by issue area relate to Finance, Defense, International Affairs, Government Operations, and Public Lands. The lowest proportions of hearings by issue area relate to Civil Liberties, Social Welfare, and Housing. All other issues generally fall somewhere in the middle.

Figure 5.2 yields similar results for the judiciary. When compared to all terms from 1972-2003, the 1995-1996 term displays overall similar trends in terms of the proportion of cases in each issue area. In both 1995-1996 and all years included in this database, the Court considered the greatest proportion of cases in the issue areas of Civil Liberties, Labor, Law, and Finance. It considered a moderate proportion of cases dealing with government operations and public lands, and much fewer cases in all other issue areas. Thus, it appears that the 1995-1996 term is not an anomalous term of the Court.

## *Institutional Agenda Composition*

There is no doubt that interest group participation before both the legislature and the judiciary is a vital enterprise, and a subject of substantial concern for a wide array of policy actors. However, as the theory posits, groups' limited resources should compel them to have

to make choices about their lobbying behavior. These choices should be shaped, at least in part, by the issues the legislative and judicial branches choose to consider. The paragraphs that follow explore the effects of these policy agendas in greater detail.

### Considering the Legislature

As shown in Figure 5.3a, the raw number of groups and individuals registered to lobby Congress in 1996 ranges from a high of more than 3,000 groups in Health to a low of less than 150 groups in Civil Rights. These differences are dramatic; widely different numbers of groups lobby on each issue area. This finding may be suggestive of the fact that groups allocate attention to the legislature very differently across issue areas.

These differences, however, become even more remarkable after accounting for Congress' relative issue attention to policy areas. Figure 5.3b shows the number of groups registered to lobby in an issue area as a ratio of the number of bills proposed in that issue area. The graph reveals a high of more than ten groups per bill for Science and Technology. This high figure is likely the result of Congress's consideration of, and the president's ultimate approval of the Telecommunications Act of 1996. Macroeconomics also exhibits a high ratio, with more than seven groups registered per bill. On the other hand, Civil Rights and Law display the lowest ratios, with about 0.6 groups registered per bill.

I also consider the number of groups registered to lobby in an issue area as a ratio of the number of hearings proposed in that issue area. These results are shown in Figure 5.3c. The graph reveals a high of more than 60 groups per hearing for Macroeconomics, as well as high values for Education, Environment, and Housing. Low ratios of participation occur for Civil Rights, Law, and International Affairs.

Although the issue areas with the highest levels of interest group participation vary somewhat across hearings and bills, one truth remains the same. In both cases, the issue areas with the highest levels of participation are those where the legislature has significant power to create lasting policy change. In contrast, the most constitutional of the issue areas, law and civil rights, fall among the lowest ratios of groups to both hearings and bills.<sup>64</sup>

### Considering the Judiciary

Very different patterns of participation become evident in examining group participation in the judiciary. Figure 5.4a shows the raw number of groups participating as amicus curiae in each issue area. Law, Finance, and Civil Rights are quite distinct from all other groups, with 377, 257, and 213 amici, respectively. No other issue area has more than 75 participants. Notably, these issue areas correspond with the major categories of Supreme Court cases studied by judicial scholars—criminal procedure, economics, and civil liberties. They are also issue areas where the Court considers a significant proportion of constitutional cases, and is, therefore, more likely to act as a policy venue.

Figure 5.4b controls for the number of cases on the Court's docket by calculating ratios of groups per case in each issue area. Generally speaking, it reveals similar trends. Among issue areas where the Court heard more than one case during its 1995 term, Civil Rights, Finance, and Law also have the highest levels of amici per case. Only Technology even approaches the average level of participation seen in these issue areas.

### *Inter-Institutional Agenda Composition*

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<sup>64</sup> Admittedly, the number of groups lobbying in an issue area is just one measure of groups' dedication of resources to an issue area. In an ideal world, I would also consider variables such as group size and budgets, but reliable data does not exist on these variables for even a small cross-section of the more than 10,000 groups considered here.

The real effects of institutions' agenda composition, however, become evident when participation in the legislature is combined with participation in the judiciary. The simplest way to consider the effects of these agendas is to consider the ratio of the number of amici per case to the number of lobbyists per bill (or hearing). If groups participate at relatively equal levels across issue areas and branches, the ratio of participation should be at approximately the same level for each issue area.

This, however, is not the case. Figure 5.5a shows the ratio of amici per case to lobbyists per bill in issue areas where the Court considered more than one case. Clearly evident is the fact that this value is dramatically different for Civil Rights, Law, and, to a lesser extent, Finance. These are all issue areas where the Court, on average, adjudicates a high proportion of cases (see Figure 5.2), and issue areas in which the legislature holds the fewest hearings (see Figure 5.1). They are also issue areas that are largely constitutional, and thus where the Court is more likely to act as a policy venue.

It should, then, be little surprise that the same issue areas are outliers in Figure 5.5b, which shows the ratio of amici per case to groups per hearing. Although the rank ordering of Civil Rights and Law varies across the two graphs, the sentiment is the same. Once again, these issues, and to a lesser extent Finance, are distinctly different than the other issues that repeatedly came before the Court during this time.

This result provides some preliminary evidence for the hypothesis that a branch's policy agenda influences interest groups' decisions about how to allocate their lobbying resources. However, these results are only preliminary. To provide additional evidence for the link between institutional agendas and interest groups' lobbying behavior, I conduct a series of ordinary least squares regression models, shown in Table 5.2. In each of these

cases, the dependent variable is the number of groups participating before a given branch in each of the eighteen issue areas. The independent variables are based on institutional agendas. Although the  $n$  of eighteen in each of these models is quite small, they can provide additional preliminary evidence of a relationship between inter-institutional agendas and lobbying activity.

Models I and II address the connection between interest group activity in the legislature and the legislative agenda. Model I considers the effect of the number of bills on group participation, while Model II considers the effect of congressional hearings on group participation. In each case, there is some evidence that the types of issues the legislature chooses to consider affects the level of interest group participation before that branch. Specifically, as the House and Senate consider more bills or holds more hearings on an issue, participation in that issue area increases.

Model III provides similar evidence for the judiciary. This model reveals a very powerful connection between the number of cases considered in an issue area and the number of groups lobbying the Court in that issue area. As the Court considers more cases in an issue area, the number of participants increases dramatically.

The most powerful evidence for the role of institutional agendas, however, can be found in Model IV, which considers the effects of both the legislative (measured as bills<sup>65</sup>) and judicial agendas on group participation in the legislature.<sup>66</sup> This model provides evidence that as the legislature's attention to an issue area increases, so does the number of

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<sup>65</sup> I measure the legislative agenda using bills because the model fit for the bills-only model was better than the model fit for the hearings-only model. I cannot put both bills and hearings in the same model because of their high correlation and the low  $n$  of this model.

<sup>66</sup> Because the correlation between cases and groups lobbying the court is so strong, I am unable to calculate a similar model using judicial participation as the dependent variable.



groups registered to lobby that branch in that issue area<sup>67</sup>. However, the reverse can be said about the judiciary. As the judiciary considers more cases in an issue area, the number of groups registered to lobby Congress in that issue area exhibits a modest but significant decline.

This model thus provides additional evidence that policy agendas—both within that institution and in other institutions—are important in shaping interest groups’ lobbying activities. Moreover, it provides evidence that groups may choose to turn away from lobbying one branch when another branch devotes significant attention to a policy area. This, as I will discuss, has significant consequences for the policy process.

## **Discussion**

The prior section demonstrates that there are dramatic differences in interest groups’ participation in the legislature and judiciary. The overall composition of the legislative and judicial branches’ policy agendas appear to influence how groups allocate their lobbying resources in a given year.<sup>67</sup> Participation in the legislature, for example, is much higher in issue areas where Congress considers more bills and in issue areas that are not constitutional. And, participation before the Court is higher in issue areas where the Court hears the most cases. It is especially high in issue areas dominated by constitutional cases.

In many ways, these findings expand upon the lessons of Chapter 4. In crafting their lobbying strategies—both within and across branches—groups have to make decisions about how to allocate limited human and financial resources. They likely make these decisions not

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<sup>67</sup> Of course, this finding does not exclude the possibility that groups are also responding to institutions’ long-term policy agendas in allocating their resources. Groups may make their initial strategic decisions about how to lobby and allocate their resources based on institutions’ reputations as policy venues for a particular issue, and also make smaller changes to their strategies as they see what issues appear on institutional agendas in a given year. Without further qualitative data on how and when interests allocate their resources, as well as reliable data on groups and agendas for multiple years, it is difficult to make a definitive statement on how this process plays out.

only based on short term considerations regarding policy change and organizational maintenance (as discussed here and in Chapter 4), but also institutions' long term reputations for acting as policy venues, crafting policy change, and attracting media attention. Responding to these dual forces and incentives allows groups to become more efficient and more specialized, and allows them to develop unique relationships with policy actors in each branch (akin to becoming what Galanter [1974] calls "repeat players").

These findings also demonstrate that the cases that the Court chooses to hear have broad policy consequences that extend beyond the marble halls of the nation's highest tribunal. As previously discussed, the composition of the Court's docket affects how interest groups allocate their lobbying resources both within and across branches. These effects may extend far beyond a given term. This, in turn, affects not only the information received by the Court, but also the information received by the other branches of the federal government (in this case, the legislature). It affects the attentiveness of policy monitoring by these groups, and alters the constituencies that policymakers feel the greatest pressure to please.

For example, a group such as America's Health Insurance Plans, which is primarily interested in healthcare issues is likely to choose to focus on lobbying Congress. This means that the group is more likely to spend its money to hire lobbyists registered to address Congress,<sup>68</sup> forge relationships with the members of House and Senate Commerce Committees, and claim credit for victories won in the legislature. The group is also likely to target its research to members and their staffs. In contrast, a group such as the American Civil Liberties Union, which deals largely with issues of civil rights and liberties, is likely to gear its attention toward lobbying the judiciary. The group's ACLU Foundation and various

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<sup>68</sup> Many of these lobbyists may even be former members of Congress or former congressional staffers.

litigation projects, for example, employ a large number of lawyers who act as lobbyists in state and federal courts. It is also likely to expend a great deal of resources on choosing and crafting test cases and claiming involvement in these cases. It is also more probable that the ACLU will be a frequent participant before the Supreme Court as *amicus curiae*.

This specialization creates a symbiotic relationship between interest groups and government that reinforces institutions' positions as policy venues. A group interested in a given issue strategically chooses to lobby a particular branch of government *precisely because* it is the most likely agent to create lasting long- and short-term policy change. But, interest group lobbying in a particular branch of government also generates media attention and constituent awareness that further cements that branch's control over a policy issue.

This symbiosis is not an entirely new idea (Baumgartner and Jones 1993). But, the idea that such a relationship can occur in the judiciary as well as the legislature has received little attention. Similarly neglected has been empirical evidence that there is interdependence (or at least a strategic decision) between groups' decision to participate in the legislature and groups' decision to participate in the judiciary.

The failure to consider interest group activity in an inter-institutional context is not unique to this area of analysis. Too often, researchers studying organized interests base their conclusions on just one branch of government. Data limitations may also lead them to consider only a few issue areas. But, these results suggest that narrow studies such as these may not tell the whole story about who participates, when, and how much.

## **Conclusion**

Using data on interest group activity before the U.S. Supreme Court and registered lobbyists before the U.S. Senate and House of Representatives, I show that, groups make

calculated decisions about how to allocate their lobbying resources. These decisions are affected by a number of factors, including each branch's overall agenda composition. The findings of this analysis provide further evidence that the types of cases the Court decides to decide can have significant policy implications, both in the courts and in the federal government.

These results are a reminder that the judiciary is but one branch in a federal system built on the interdependent systems of separation of powers and checks and balances. They also suggest that the Court may not need the purse or the sword to affect the activities of other policy actors. The discretion that comes from deciding to decide particular types of cases is a powerful tool for the judiciary.

Beyond the judiciary, this analysis is just the beginning of fully understanding the strategic lobbying decisions of interest groups, both across issue areas and across branches of the government. It invites scholars to begin more serious consideration of the consequences of institutional agendas, not only for the institution's own policy outputs, but also for the policy outputs of other branches and the activities of other actors within the political system.

A longitudinal study of interest groups' decision to participate in different branches of the United States government would be the logical first step to enriching the conclusions of this chapter. However, such a study has not, to date, been possible. In fact, it is extraordinarily remarkable that data to compare *amicus curiae* participation before the Court and lobbying activity before Congress was available for even one year. Although interest groups scholars have taken great steps to increase the availability of legislative lobbying data (see Baumgartner et al 2009), judicial scholars have not placed an emphasis on collecting similar data on *amicus* participation. Outside of the data in the Spaeth Phase II dataset, the data used

here (Collins and Soloweij 2007), and a three-year analysis by Schlozman et al (2007), there is almost no data on the number of groups—let alone the identity of the groups—participating before the Court across all issue areas. The lack of such data creates a significant impediment to scholars’ understanding of groups’ strategic lobbying behavior, both within the judiciary and across branches.

It is also important for future scholars of organized interests to broaden their consideration of interest group activity to consider not just the legislature and the judiciary, but also the executive branch. Very little published scholarship accounts for lobbying activities in all three branches; this is a fundamental weakness of extant interest groups scholarship (but see e.g. Heclo 1978). This likely owes to the challenges with accessing and collecting reliable data on interest groups and lobbyists participating in the executive branch for any range of agencies or length of time. Still, making an attempt to understand how executive branch activity affects the conclusions drawn here, even in a few issue areas, would also be a step in the right direction.

Finally, enriching quantitative accounts of group participation with qualitative data obtained from the groups’ would significantly increase the validity of theory posited here. Knowledge of how groups budget, when and how they must commit resources, how they respond to new issues on the policy agenda, and a range of other topics would help to provide greater understanding of which incentives groups believe they are responding to most.

For now, however, I set these future considerations to the side and turn to bringing together the findings of this and the preceding three chapters. The concluding chapter of this dissertation, Chapter 6, fully considers the effects of the judiciary’s ability to affect the agenda of other political actors—specifically the media and interest groups.

Figure 5.1. Congressional Hearings by Issue Area

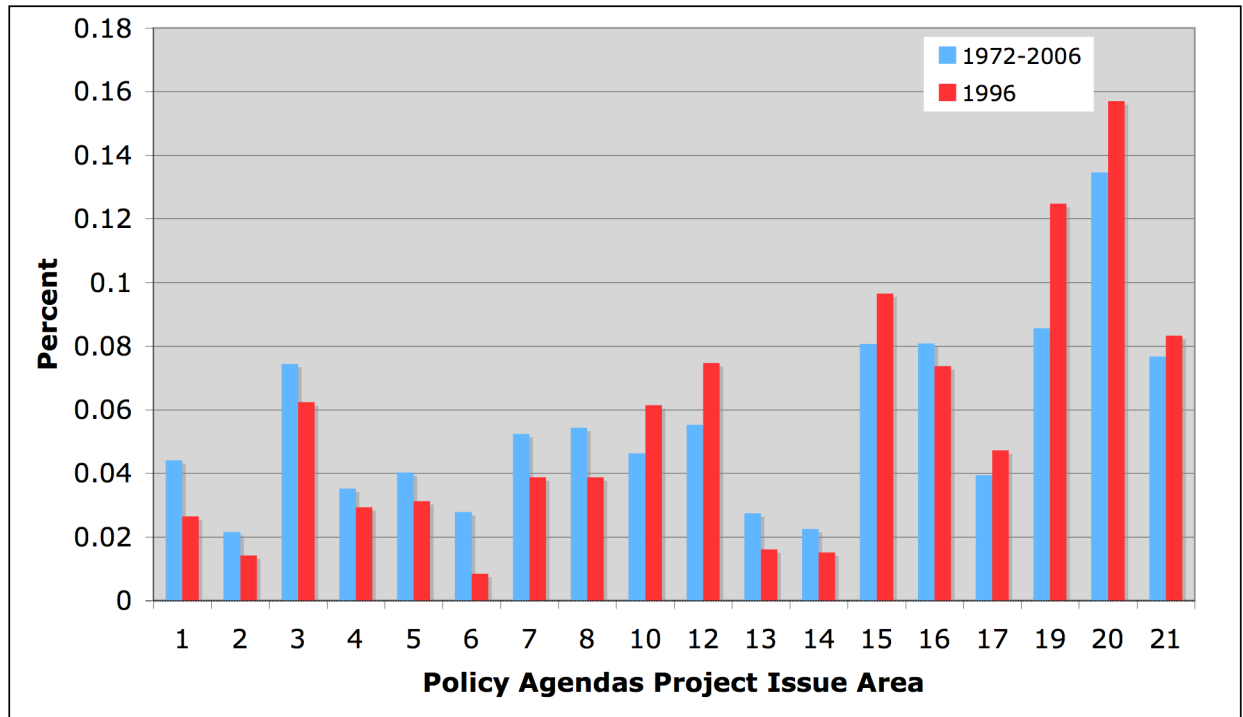


Figure 5.2. Supreme Court Docket by Issue Area

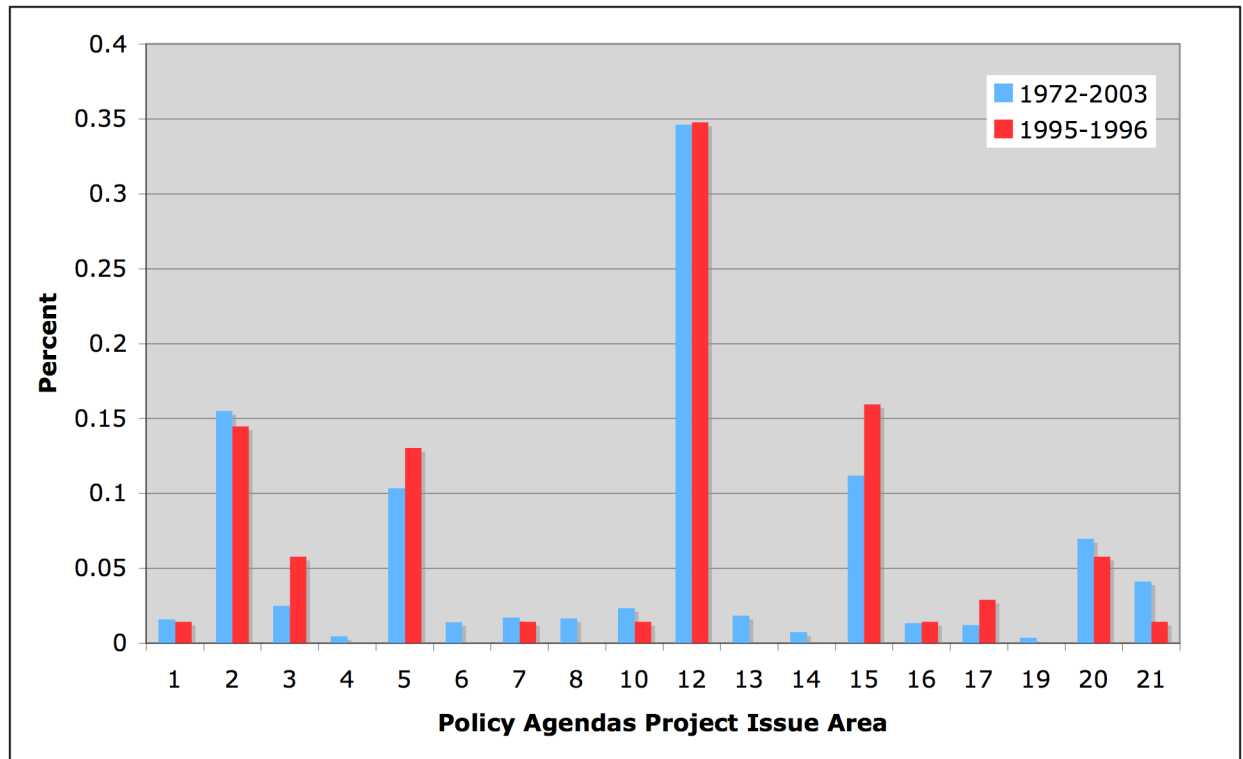
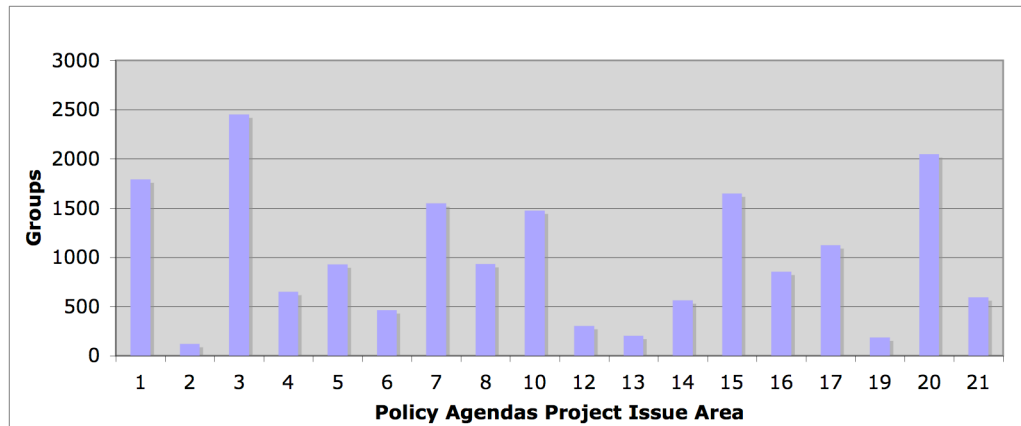
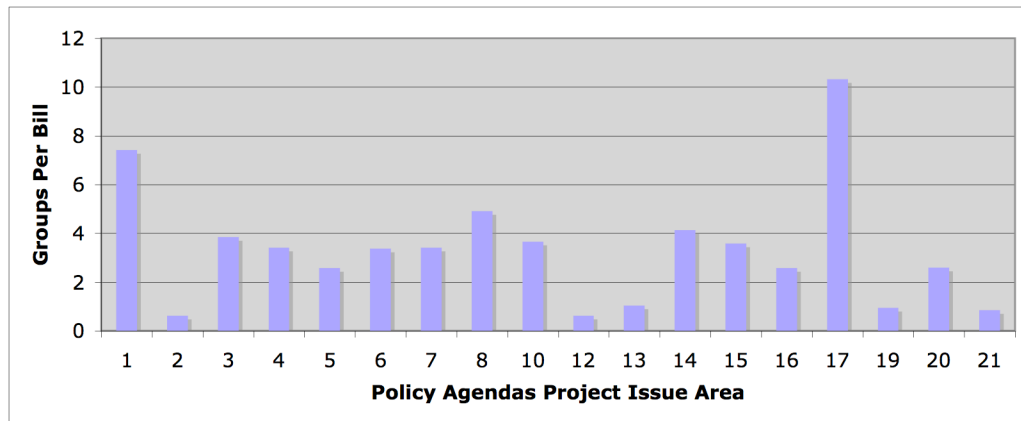


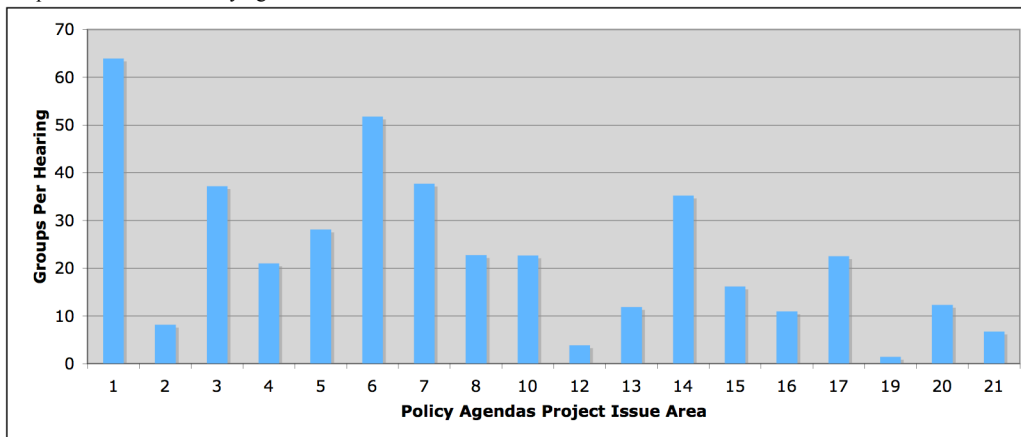
Figure 5.3. Interest Group Participation in the Legislature by Issue Area



Note: Data from the Lobbying Disclosure Data Set.



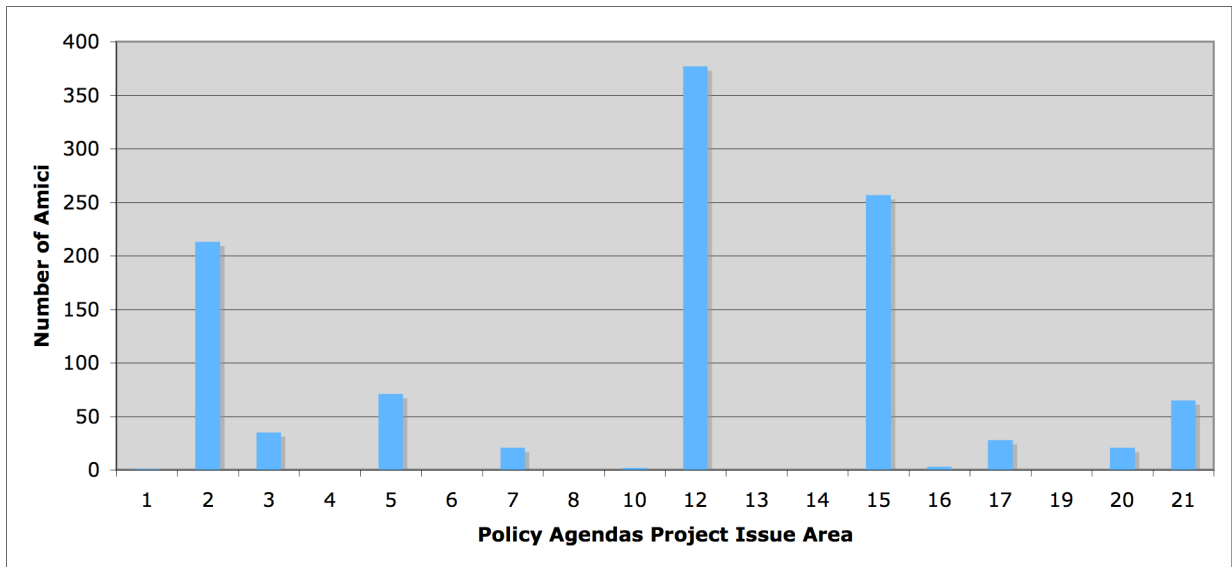
Note: This includes all House and Senate Bills from the 104<sup>th</sup> Congress. Bill data from the Congressional Bills Project, Groups Data from the Lobbying Disclosure Data Set.



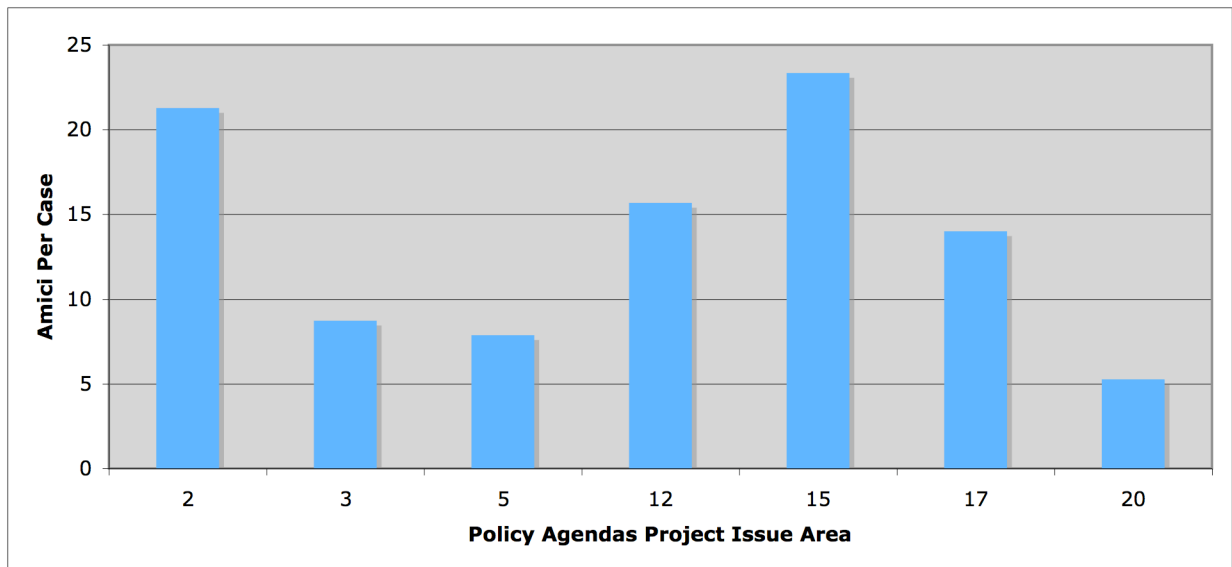
Note: This includes all House and Senate Hearings from the 104<sup>th</sup> Congress. Hearing data from Policy Agendas Project, Congressional Hearings data, Groups Data from the Lobbying Disclosure Data Set.



Figure 5.4. Interest Group Participation in the Judiciary by Issue Area

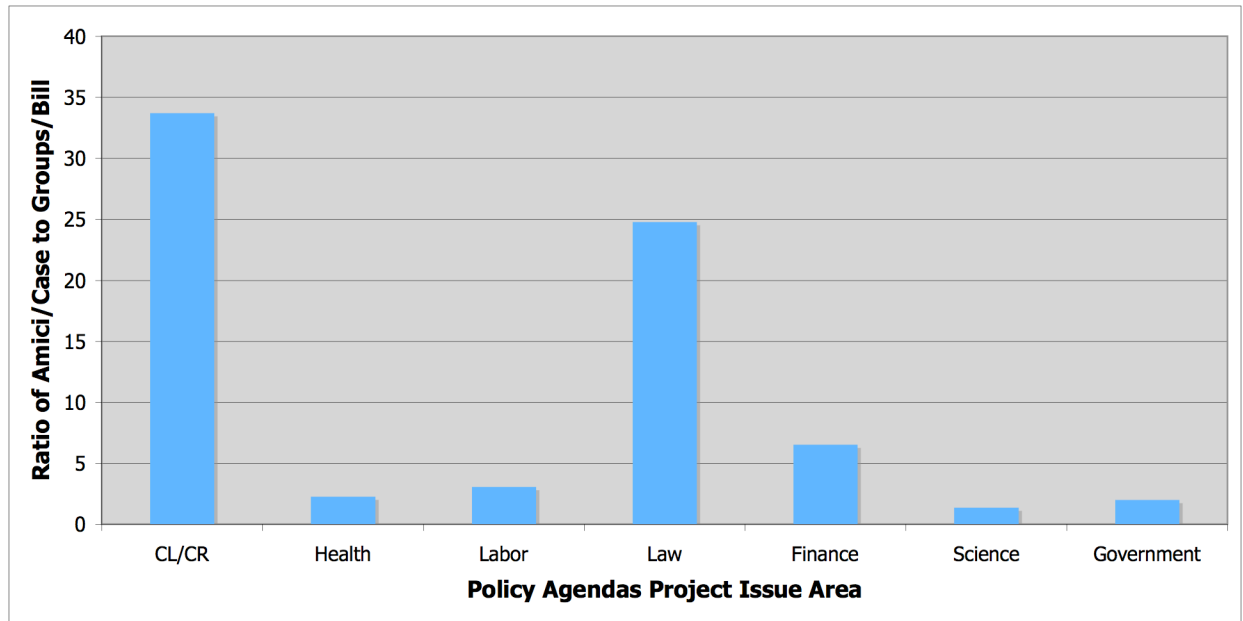


Note: Data from Collins and Soloweij (2007).

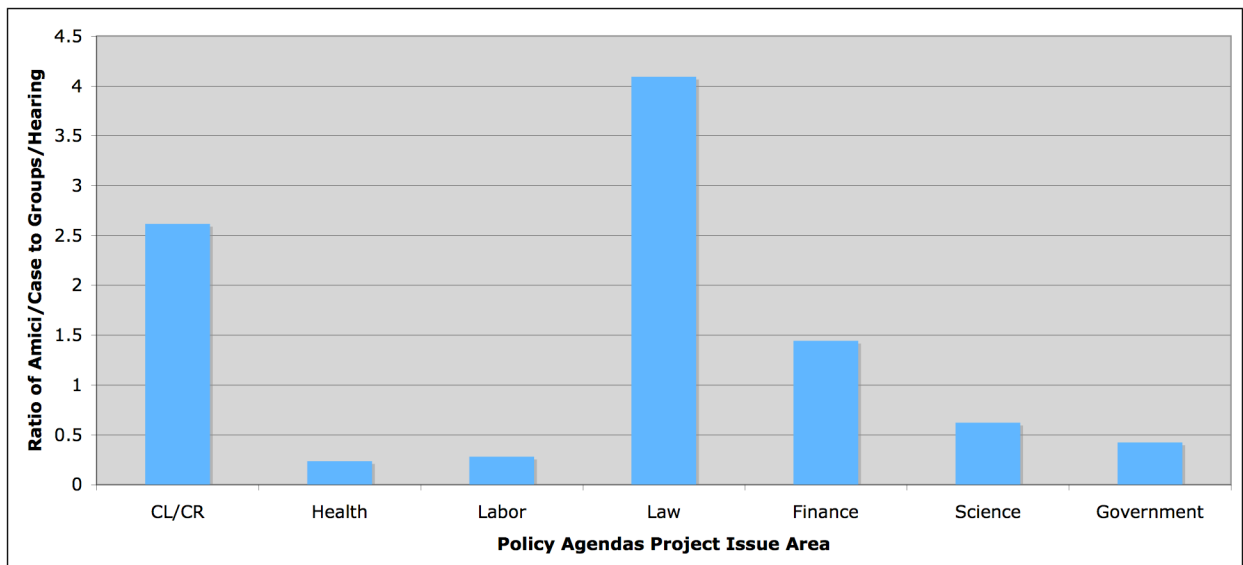


Note: Data from Collins and Soloweij (2007).

Figure 5.5. Ratio of Groups Participating as Amicus Curiae to Registered Lobbyists



Note: Amicus Data from Collins and Soloweij (2007), Congressional Groups Data from the Lobbying Disclosure Data Set, bills data from the Congressional Bills Project.



Note: Amicus Data from Collins and Soloweij (2007), Congressional Groups Data from the Lobbying Disclosure Data Set, hearings data from the Policy Agendas Project.

Table 5.1. Policy Agendas Project Issue Areas

<b>Policy Agendas Code</b>	<b>Issue Area</b>
1	Macroeconomics
2	Civil Rights, Minority Issues, and Civil Liberties
3	Health
4	Agriculture
5	Labor, Immigration, and Employment
6	Education
7	Environment
8	Energy
10	Transportation
12	Law, Crime, and Family
13	Social Welfare
14	Community Development and Housing
15	Banking, Finance, and Domestic Commerce
16	Defense
17	Space, Science, Technology, and Communications
18	Foreign Trade
19	International Affairs and Foreign Aid
20	Government Operations
21	Public Lands and Water Management

Table 5.2. Predictors of Interest Group Participation

	I. Groups in Congress	II. Groups in Congress	III. Groups in Court	IV. Groups in Congress
	Coefficient (SE)	Coefficient (SE)	Coefficient (SE)	Coefficient (SE)
Bills	1.88 *** (.70)	--	--	2.13 ** (.93)
Hearings	--	5.08 * (3.81)	--	--
Cases	--	--	16.53 *** (1.39)	-30.46 * (21.04)
Constant	347.58 (278.85)	695.82 *** (275.02)	-2.61 (9.94)	376.13 * (261.96)
F	7.18 ***	1.78 *	141.21 ***	2.66 **
r <sup>2</sup>	.31	.10	.89	.37
n	18	18	18	18

\*\*\*Significant at  $p < .01$  (one-tailed), \*\*Significant at  $p < .05$  (one-tailed), \*Significant at  $p < .01$  (one-tailed).

## CHAPTER 6

### ...BUT ONLY JUDGMENT

This dissertation began, in many ways, where the American judiciary began: with the assumption that, without the purse or the sword, the judiciary remains “the least dangerous branch” of the American political system. Without the ability to enforce or implement its decisions, traditional wisdom dictates, the courts’ power is necessarily limited. The courts must depend on the legislative and executive branches to assure compliance with their decisions, and without cooperation from these actors, the judiciary’s ability to act as a policymaker is constrained.

In the chapters that have preceded this one, however, I have shown that the judiciary has much broader ability to influence in the American political process—albeit in ways that are not always obvious to the casual observer—than much of the existing scholarship assumes. This power exists in addition to whatever cooperation the courts can muster from the other branches. It may not be evident in every issue area or case the courts consider. But, it is exercised in more sophisticated ways—through, for example, the way that particular judicial decisions affect the agendas and resource allocations of the media and interest groups.

#### **A Broader View of Judicial Power**

Much of the early research on law and the courts (scholarship that we might today call part of the public law tradition) found that the judiciary was an essential tool for securing social and political change, particularly among politically disadvantaged groups (Cortner 1968). These scholars (e.g. Vose 1955, 1957, 1959) drew on anecdotal evidence, particularly from the NAACP's Legal Defense and Education Fund, to demonstrate that, without the courts, activists would have won precious few victories and secured very little policy change in the middle part of the twentieth century. The groups, themselves, acknowledged the centrality of the courts to their goals, crafting test case litigation strategies on issues such as housing and educational segregation. These litigation campaigns ultimately culminated in the U.S. Supreme Court's decisions in *Shelley v. Kraemer* (1948) and *Brown v. Board of Education* (1954), which paved the way for desegregation in the South by establishing legal precedent and inspiring grassroots activists.

The successes of the NAACP LDF and other groups interested in civil rights issues inspired activists affiliated with American Civil Liberties Union to found the Women's Rights Project to engage in similar test case strategies to challenge discrimination in employment and other areas of public life. Scholars (e.g. Cowan 1976, O'Connor 1980) have documented the role of the courts in changing the constitutional standard of review for gender-based claims (elevating these cases to an intermediate standard of review). These scholars and others argue that, without judicial involvement, legal change would have been much slower, if not impossible.

As this evidence demonstrates, qualitative observers and public law scholars painted a relatively rosy picture of the judiciary's power to use its judgments to create and inspire social change and progress. The publication of Rosenberg's (1991) *Hollow Hope*, however,

called many of these conclusions into question. In this analysis, Rosenberg uses case studies of several policy issues, including civil rights, women's rights, and abortion to show that judicial decisions alone cannot alter the course of public policy. Rosenberg provides evidence that even in issue areas where the U.S. Supreme Court made a landmark decision, significant policy change occurred only after Congress and the executive branch began to focus on these issues. In short, Rosenberg argues that the judiciary lacks the power to ensure compliance with its decisions. Therefore, courts are a "hollow hope" for those individuals who seek to achieve social and political change.

More recent studies of compliance with judicial decisions in other policy areas provide an equally dismal impression of the judiciary's ability to implement public policy (e.g. McGuire 2009). Practically, too, examples of citizens and policymakers defying judicial rulings abound. Citizens, for example, may not always be aware of (or choose to ignore) the dictates of the Court's rulings. Such is the case with school principals who continue to encourage prayer at public school events. Similarly, legislators may choose to simply defy the dictates of the Court, such as those who advocated for the passage of a federal partial birth abortion ban, despite the Court's declaration that similar state bans were unconstitutional.

This dissertation does not dispute the contention that the courts often require the cooperation of other actors in order fully implement their decrees.<sup>69</sup> The systems of separation of powers and checks and balances crafted by the Framers require institutions seeking to create policy change to have willing allies in the process. But, the judiciary's range of allies is not limited—as the studies of Rosenberg and others might seem to

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<sup>69</sup> Of course, this challenge is not unique to the judiciary. One need only look at recent debates on healthcare reform to be reminded how difficult it is for the president to create policy change without the cooperation of Congress.

suggest—to solely the executive and legislative branches. Instead, judiciary may seek and utilize alternative methods of political influence. Among these are working with the media and interest groups to place and maintain new issues on the political agenda.

This process may take a significant amount of time, as discussed in the abortion example in Chapter 3 of this dissertation. It may also be more effective in some issue areas than others. Chapters 2 and 4, for example, demonstrate that cases that deal with constitutional issues—or where the courts act as what Baumgartner and Jones (1993) call policy venues—are much more likely to attract the attention of other policy actors. But, given the appropriate circumstances, the judiciary can be a significant agenda setter (see Chapter 3). Its decisions may also have significant consequences for the inputs and outputs of other branches of the federal government (see Chapter 5).

The source of this power is not one based in force or will, but rather judgment. The very activity Hamilton believed would cripple the courts in the political system has, in fact, empowered them to become a more co-equal branch. By deciding which cases to hear (in discretionary courts like the U.S. Supreme Court), and by issuing opinions on these matters, the courts assert themselves as agenda setters at both the grassroots and elite levels.<sup>70</sup>

One need only look at the Court's recent campaign finance/First Amendment decision in *Citizens United v. Federal Election Commission* (2010) to see this process at work. The Court chose the *Citizens United* case (which, notably, was brought to the justices by an interest group) as one of the 75 or so cases it would consider during its 2009-2010 term. This case was selected out of approximately 10,000 other cases. Immediately, interest groups on both sides of the issue became more interested in the issue of campaign finance reform,

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<sup>70</sup> Interestingly, as the power of quasi-institutional and non-institutional actors like the media and interest groups continues to grow within the political system, it would be little wonder if the judiciary was also more able to assert itself in the agenda-setting process and continue to increase its institutional power.



shifting their resources both within the judiciary and in the broader political system to file amicus curiae briefs. Perhaps more importantly, after the Court handed down its decision, which effectively granted corporations many of the rights enjoyed by individuals, the media launched a still-ongoing discussion on the issue of campaign financing. Until the Court's decision, this was thought by many observers to be a relatively settled political issue, at least in the short run. Now, these discussions (and outrage over the Court's decision) have forced Congress to consider new policies in this issue area.

### **Empirical Implications**

This more sophisticated understanding of judicial power has a number of practical implications. On one hand, the findings speak to the ability of the judiciary to control its own image and presentation, as well as the way the courts interact with actors such as the media and interest groups. But, on the other hand, these findings also speak to the way that the courts' judgments affect the broader political system and policymaking process.

#### *Within the Judiciary*

First, consider the judiciary's control over its own image and agenda. As Chapter 2 demonstrates, judges play a role in shaping how the business of the courts is presented in the media. They do this in two key ways. First, by deciding to decide cases concerning certain issue areas where the courts are more (or less) likely to influence public policy, a court can attract attention to a broader (or narrower) array of judicial decisions and garner more (or less) in-depth coverage of the issues they decide. Alternately, judges can craft their decisions to conform to certain characteristics that make them more or less appealing to the media. These characteristics also affect both the breadth and the depth of the media's coverage, and

are conditioned by the political environment in which the court operates.<sup>71</sup>

Further, as Chapter 4 shows, the characteristics of cases the U.S. Supreme Court decides to consider can influence interest groups' lobbying activities before that body. Even after controlling for other factors that shape interest group participation, significantly more briefs are filed in cases that allow interest groups to pursue their dual goals of influencing public policy and organizational maintenance. This finding suggests that the Court's docket composition may be extremely important in establishing and maintaining its institutional power, as well as its influence over the American policy making process. By strategically considering cases that will attract attention from interest groups, the Court can affect whether issues appear on the political agenda by altering the amount of resources that are devoted to lobbying on these concerns.

### *Beyond the Judiciary*

The consequences of the judiciary's judgments do not end at the marble courthouse stairs. Instead, they extend to the broader political system and the courts' interactions with other political institutions. As Chapter 3 demonstrates, the types of cases the U.S. Supreme Court decides to decide affect the types of political issues the general public is exposed to through news coverage. The Court's ability to act as an agenda setter actually surpasses that of the president, which appears to be a more reactive institution. The Court's ability to set the agenda is particularly important in constitutional issue areas where the judiciary is more likely to act as a policy venue. This assigns to the judiciary a much greater role as agenda setter than is typically assumed, both in the judicial politics literature and in the public policy literature.

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<sup>71</sup> The current analysis, of course, was unable to look at the tone of these stories or precisely how the media presented the business of the courts. This remains fodder for future studies, perhaps employing automated content analysis techniques.

Chapter 5, further, demonstrates that the composition of the Court's docket affects how interest groups allocate their lobbying resources both within and across branches. These effects may extend far beyond a given term. This, in turn, affects not only the information received by the Court, but also the information received by the other branches of the federal government (in this case, the legislature). It affects the attentiveness of policy monitoring by these groups, and alters the constituencies that policymakers feel the greatest pressure to please.

This specialization creates a symbiotic relationship between interest groups and government that reinforces institutions' positions as policy venues. A group interested in a given issue strategically chooses to lobby a particular branch of government *precisely because* it is the most likely agent to create lasting long- and short-term policy change. But, interest group lobbying in a particular branch of government also generates media attention and constituent awareness that further cements that branch's control over a policy issue.

This symbiosis is not an entirely new idea (Baumgartner and Jones 1993). But, the idea that such a relationship can occur in the judiciary as well as the legislature has received little attention. Similarly neglected has been empirical evidence that there is interdependence (or at least a strategic decision) between groups' decisions to participate in the legislature and groups' decision to participate in the judiciary.

### **Future Directions**

First and foremost, the findings of this dissertation should serve as a continued call-to-arms for scholars interested in the judiciary to focus their attention on the role and power of courts as the third *co-equal* branch of American government, a branch that has gained tremendous power in the last two hundred years. Studying the judiciary within the context

of its interactions with other institutional, non-institutional, and quasi-institutional policy actors paints a much fuller picture of the policymaking process. It also more fully captures the strategic considerations that motivate the decisions of political actors.

Studies that acknowledge courts' interactions with other political actors have not been uncommon among positive political theorists. They have, however, been less common among traditional quantitative and qualitative researchers. In addition, many game-theoretic approaches to the judiciary in the political system have focused on the courts' direct interactions with other political institutions. But, as this dissertation suggests, courts' influence on the political system as a whole may be more sophisticated. More fully considering the interactions between courts and the media, interest groups, and other actors such as political parties (to name a few) is essential to understanding how issues emerge on public and governmental agendas.

In my view, the next step to more fully explaining the interactions between the judiciary and media outlets and/or interest groups is to better understand the decision making processes and salient concerns of each of the policy actors involved. Anecdotal evidence, for example, tells us that the justices of the U.S. Supreme Court rely (at least occasionally) on interest groups to provide information on the consequences of decisions, educate them about the issues at hand, and gauge how a decision may affect the Court's institutional prestige. Similarly, judges and justices appear to rely upon the media to communicate their decisions to the general public in plain language (e.g. Staton 2010). Confirming these suspicions with the actual judges and justices making the decisions, especially in lower federal and state courts is essential to increasing confidence in the theory (but see Perry 1991).

And, on the other hand, understanding how interest groups and the news media decide to allocate their limited resources will also enhance the richness of this and future explanations of the role and scope of judicial power. How do editors allocate news space across institutions and issue areas? How do reporters choose which cases to write about? Similarly, how and when do interest groups decide when and if to participate before the courts? Is there usually long-term strategy involved, or are decisions made on a more ad hoc basis?

A wealth of evidence on questions such as these could be obtained by conducting interviews with individuals who work in the media and for interest groups. Although this dissertation uses evidence solely from the print media, it would be useful to collect evidence from individuals who worked in print, broadcast, and electronic media to better understand these calculations. Similarly, talking with representatives from a range of different interest groups with a range of different resources and demands would shed greater light on this decision calculus.

Another important dimension of judicial power not thoroughly discussed and analyzed in this dissertation is the scope of the second “face” of power (Bachrach and Baratz 1962, 1963, 1970): negative agenda control. Throughout this dissertation, I have alluded to the importance of having a discretionary docket and the great power that this gives many courts, including the U.S. Supreme Court, in keeping issues off of the agendas of the media and interest groups. I have not, however, been able to empirically demonstrate the scope of this effect. Upon completion of the coding of the Policy Agendas Project’s Certiorari Denied dataset (or through the construction of a similar data source),<sup>72</sup> which would allow for

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<sup>72</sup> The Certiorari Denied dataset is an additional piece of the Policy Agendas Project that is structured in the same way as the existing databases of executive, legislative, and judicial activity used here. When completed, it

empirical analysis of the types of issues the Court does not choose to hear, I am hopeful that the second face of power may receive greater consideration. Once such analyses are conducted, I expect that the subtle power of the judiciary to make policy and set the agenda through little more than its ability to make judgments will become even clearer.

## **Conclusion**

The American systems of checks and balances and separation of powers create a government where the political institutions are naturally, and perhaps, necessarily, enemies in the policymaking process. Hamilton and the other Framers believed that this system would place the greatest limitations on the judiciary. In the Framers' conception, the courts would act as neutral arbiters of the law above the fray of politics. Though the judiciary could make judgments, it would lack the force or will to assure that these decisions were implemented or enforced.

What the Framers did not imagine, however, was that the judiciary might find friends in the policymaking process outside the boundaries of traditional political institutions. Among these are the media and interest groups. By simply making judgments about whether to hear particular types of cases (and then issuing decisions on these matters), the courts can alter the priorities of these quasi-institutional actors. In so doing, judges and justices can increase (or decrease) the salience of particular political issues. They change alter groups' resource allocations and the information that interest groups provide government. And, in so doing, they can affect the efforts of other branches to undertake similar activities.

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will look at cases the Court chose not to hear, coding them using the same nineteen major topic codes as the other databases. It will be the first comprehensive, longitudinal examination of the cases the Court does not consider. The development of this database will, obviously, allow for a wide range of examinations of a significant, but under-analyzed (and under-understood), stage of the judicial process.

If the courts remain, as Hamilton stated, “the least dangerous branch,” it is only because the other branches, too, have become infinitely more powerful over the last 225 years. More likely, however, it is time to dismiss the notion that the courts must be able to independently implement or enforce their decisions in order to exercise political influence. An important element of the judiciary’s modern institutional power, it seems, lies in a much more innocuous place: the ability to make judgments.

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