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Legal Change on the United States Supreme Court

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Abstract of the Dissertation

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In this dissertation I develop and test a theory of legal change that views the U.S. Supreme Court as operating within a complex legal and political framework. I argue that the Court uses the process by which it decides cases as an institutional tool, allowing it to exert influence in the broader political and legal environment. The Court does this by allocating agenda space to specific types of issues over others, and also by articulating legal doctrine in its written opinions that helps to shape outcomes outside of the immediate case. I test the implications of this theory in the context of both the Court's agenda setting and its written opinions. I find evidence of influence in these contexts not only from the justices but also from a variety of policy entrepreneurs that have a stake in the outcomes on the Court.

For Shannon
and
For my parents

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Chapter 1

Introduction

There is a long tradition in political science of viewing the U.S. Supreme Court as an important source of public policy in America (Dahl 1957; Shapiro 1964; Casper 1976; Baum 2007). Courts, and in particular the Supreme Court, play a prominent role in both the legal and political life of the United States. The U.S. Supreme Court, as the appellate court of last resort in the U.S., is a key player in shaping law and policy. The primary mechanism through which this occurs is the Court's written opinions (Epstein and Kobylka 1992; Hansford and Spriggs 2006; Lax 2011; Maltzman, Spriggs and Wahlbeck 2000; Rohde and Spaeth 1976). A definitive opinion from the U.S. Supreme Court can provide policy guidance to lower courts and law enforcement (Canon and Johnson 1999) and can lend legitimacy to the policy positions of groups and individuals alike (Silverstein 2009). The proclamations of the U.S. Supreme Court are thus a powerful tool of policy creation and control. One of the goals of this dissertation is to examine the Court's use of this tool

and how it can shape law and policy.

The institutional role of the Supreme Court in American politics is unique. It must straddle the line between being a significant force in altering, maintaining, and managing the legal system in the United States and remaining above the political fray (Estreicher and Sexton 1986). In a common law system like that which exists in the United States, judges at lower levels of the legal hierarchy rely on past precedents from their courts as well as relevant Supreme Court opinions to guide their decisions; the law and an entity is thus built through a gradual and incremental process wherein small changes either perpetuate or die off (Merryman 1985; Pacelle 2008). Adherence to the common law norm of *stare decisis* requires courts below the Supreme Court in the legal hierarchy to treat its decisions as binding precedent that must be followed.[1] Thus, its decisions and the rules and standards it creates and applies often act as "guideposts for future action." (Jacob 1972, 27). These written opinions have the power to shape both the behavior and expectations of actors in the legal system, who must respond to and act upon the policies articulated by the Court (Hansford and Spriggs 2006; Songer, Segal and Cameron 1994). These actors of course include lower courts and litigants, but also those charged with implementing the law such as bureaucratic agencies and law enforcement (Spriggs 1996; Canon and Johnson 1999).

The importance of law and legal policy in shaping outcomes does not stop at the courthouse

[1]The extent to which lower courts are "bound" by Supreme Court decisions is an empirical question that has been addressed extensively in the literature. While lower courts may not be bound to mechanically follow all precedents, these precedents do still act to shape the behavior of lower court judges; even through the simple act of forcing these judges to distinguish the case they are decided from a relevant Supreme Court decision.

door. Changes in the law can reverberate throughout American society through the media and through changes in public opinion (Flemming, Bohte and Wood 1997; Hoekstra 2000). Influencing the state of the law in a given area is, or ought to be, a critical component to the strategy of any policy minded actor. Thus individuals and groups, the Court among them, have an important stake in shaping the legal status quo (Silverstein 2009). Like no other court in the U.S., the Supreme Court's opinions influence this status quo. In the language of institutions, the Court's output represents the legal "rules of the game" (North 1991; Knight 1992). These rules are not just the product of nine "politicians in robes", but are shaped endogenously by the primary actors in the legal and political system (Aldrich 1995; Epstein and Kobylka 1992; Rohde 1991). It is therefore important to look to these actors and their roles in the process to fully understand legal change and development.

A full understanding of the Supreme Court's role in the American system requires an in-depth look at legal dynamics on the Court. The question that motivates this research then is, given our understanding of the nature and role of law in American political society and given our understanding of the process by which the Supreme Court affects policy, how do we best understand the changes in law that emanate from the Court? More specifically, how and why does the Supreme Court change the legal rules of the game?

Past work interested in legal change has done well to explain how some legal considerations may or may not influence case outcomes or vote choice (*e. g.* Baum 1988; Ignagni 1993; Segal

1984). However, beyond membership change on the Court, this work is not able to tell us much about how or why the law changes over time (but see Epstein and Kobylka 1992; Wahlbeck 1997). Other studies have looked closely at specific aspects of legal change such as the Court's treatment of its own precedents (Fowler and Jeon 2008; Hansford and Spriggs 2006). Although the treatment of precedent is an important aspect of legal change and development, focusing exclusively on this aspect of the law does not adequately account for how legal considerations influence the position of the Supreme Court in American government.

Collectively, these perspectives on legal change are limited by their breadth. The law does not change simply through variation in the votes of the justices or the treatment of precedent. The law changes through a complex interaction of institutions, individuals, and groups (Epstein and Kobylka 1992; Marlowe 2008; Pacelle 1991, 2008). However, there is little work in political science that brings this perspective to bear on the *entire* process of legal development, from agenda formation to the enunciation of doctrine.

This dissertation takes a unique approach to investigating the question of legal change in that it does not attempt to measure legal change directly. My contention is that legal change is a complex process that occurs through the interaction of actors, both institutional and otherwise. The goal of this work is to understand the nature of these interactions by adopting a perspective that sees legal change and development as a process rather than as a discrete event that can be measured

and quantified. What can be quantified, and studied in-depth, is how the important actors in the process of legal change and development come together to shape outcomes at specific points along the path.

The contributions of this dissertation are several. First, by conceptualizing law and legal change from an institutional perspective, I draw important connections between the broader study of political institutions and the more focused study of American courts and the law. Second, this work develops a theory of legal change that can adequately account for both the dynamic nature of the law in a common law system and for the unique role that doctrine emanating from an ultimate appellate court in such a system occupies. The theory is general enough to accommodate the discretion that the Supreme Court has in both setting its agenda and in producing rules and standards for others to observe and follow. Finally, this works seeks to make an important contribution to the body of accumulated knowledge of both American law and American political institutions by broadening understanding of legal dynamics and the actors that shape the law in American politics.

The remainder of this chapter provides a review of theoretical and empirical advances in our understanding of legal change and development as well as a review of the more specific literatures addressed by the empirical analyses. In Chapter 2, I develop a theory of legal change that comports with the wider perspective on the development of the law briefly discussed above. This theory emphasizes the role of the Court as an institutional actor in the legal and political system in the United

States, as well as the potential for influence from actors outside of this institutional setting (*i. e.* the public and various interest groups.) Specifically, I argue that these relevant actors play significant roles in shaping law and policy during the setting of the Court's agenda and in the enunciation of legal doctrine within particular issue areas.

Chapter 3 contains the first empirical investigations of the implications of the theory developed in Chapter 2. Here I employ a unique statistical approach, time-series ARFIMA models and tests for co-integration and error correction, to investigate both long and short-term dynamics in the Court's agenda. In Chapter 4 I discuss the construction of issue-specific measures of aggregate public opinion. This is a significant departure from much of the work in judicial politics that relies on Stimson's (1999) measure of aggregate "public mood." Stimson's measure has proved useful, but it encompasses many different issues. To get a more fine-grained look at public opinion within a specific issue area, and the public's influence on legal change and development in that area, I use Stimson's technique and software to construct unique measures of issue-specific public opinion. Chapter 5 employs these data, along with a measure placing written opinions of the Court in "doctrine space" (Clark and Lauderdale 2010), to investigate the implications of the theory on the position of the Supreme Court's doctrine. Finally, Chapter 6 contains conclusions, discussion of possible future extensions, and discussion of the implications of this work on the larger understanding of legal change and development.

Legal Change and Development

Interpreting and synthesizing the constitutional decisions of the U.S. Supreme Court is its own industry in the legal academy. However, empirically minded political scientists have been slow to address inherently "legal" concepts in their work (but see Hansford and Spriggs 2006; Segal 1984; Wahlbeck 1997). This reluctance is not due to a lack of appreciation for the importance of these concepts to understanding courts in a political context, but is rooted in the inherent difficulty of quantifying these concepts in a way that makes them amenable to statistical analysis. Nevertheless, there does exist a relatively small literature in political science on the question of legal change and development on the U.S. Supreme Court. This work spans perspectives and methodological approaches, and another goal of this project is to bring some of these disparate approaches and perspectives together to produce a more unified solution to the question. Below I discuss the extant theoretical and empirical approaches to legal change in the literature. I then place this work within that existing context. Finally, I discuss some of the insights from previous work that inform the empirical analyses in chapters 3 and 5.

Outcomes as Policy

For the last 40 or 50 years much of the empirical research in political science addressing questions related to the U.S. Supreme Court has its origins in what has come to be known as the "be-

havioral revolution." The hallmark of this research is a focus on what the justices do, not what the justices say (Spaeth 1965). An implicit (but sometimes explicit) assumption of this perspective is that the behavioral outcomes on the Court are significant because they represent policy choices by the justices and the Court.

Working within this framework, and in an effort to more specifically address questions of policy change on the Court, Segal (1985) tested several competing hypotheses regarding when and how the Supreme Court became more conservative in its search and seizure decisions between the Warren and Burger eras. For Segal, policy change happens when the Court becomes more or less likely to uphold a search conducted by law enforcement. He found that changes in the Court's general predisposition (*i. e.* personnel changes) were the most likely cause of changes in its treatment of search and seizure cases. Similarly, Baum (1988; 1995) developed an alternative method for measuring policy change that sought to control for particulars of individual cases not through explicit modeling of case facts, but by making assumptions about the relationship between justices' ideal points and the policy alternatives contained within a given case. Baum found civil liberties support on the Court to be at its apex during the middle of the Warren Court (early 1960s) (1988).

The approaches of these studies differ somewhat, but their goal is the same. Both seek to explain policy change on the Supreme Court. Both also make a significant assumption; that behavioral outputs such as the votes of the justices or the outcomes of cases are sufficiently analogous to

policy outputs and that this relationship allows one to draw conclusions about the nature of policy change on the Court. Both the work of Segal and Baum understand policy change to occur through changing patterns in case outcomes. These outcomes, while certainly carrying with them policy implications, do not provide us with the best measure for understanding the means by which the Supreme Court actively influences policy. This view of policy change largely minimizes the role of law on the Supreme Court. If policy making happens primarily through the Court's written opinions, studying policy change by equating votes and case outcomes with policy obscures the mechanism through which the Court's influence flows (Hansford and Spriggs 2006).

Discrete Legal Change

One of the first rigorous statistical examinations of legal change as as an endogenous variable of interest is due to Wahlbeck (1997). Wahlbeck argues that "the law can be defined by the set of factual matters that are included within the scope of the legal rule." (785) By observing when the Court changes that set of factual matters, we can observe and quantify "legal change." He finds the clearest example of this concept of the law in the Supreme Court's treatment of search and seizure cases. Examining instances of what he terms "expansive" and "restrictive" change (wherein the Court either expands the set of facts applicable or limits the set), Wahlbeck finds that the ideological makeup of the Court is a significant predictor of the direction of legal change. He also finds mixed evidence that other legal considerations, as well as characteristics of the litigants

and their attorneys, can influence the direction of change.

Another line of research that appreciates the importance of legal concepts places significant emphasis on the operation of precedent on the Supreme Court. This work sees precedent and the norm of *stare decisis* as the primary means of legal development. Several approaches to studying precedent have been initiated. Each carries with it certain beliefs and assumptions about how the law develops and changes. First, scholars interested in Supreme Court decision making employed precedent as a possible exogenous control on vote choice (Segal and Spaeth 1996; Spaeth and Segal 1999). These studies were designed to test the proposition that a felt desire to adhere to precedent acted as a significant control on the justices vote choices. Of course, this proposition runs counter to the theoretical expectations of the attitudinal model which argues that the institutional and political position of Supreme Court justices leave them free to exercise their ideological preferences largely without constraint (Rohde and Spaeth 1976; Segal and Spaeth 2002). The empirical evidence for an influence of prior precedent on vote choice is limited at best, however some argue that precedent acts on the justices of the Supreme Court in other ways and not as a direct influence on vote choice (Knight and Epstein 1996).

More recently, studies of precedent have moved away from the realm of decision making and begun to investigate the Court's precedents for their own sake (*e. g.* Fowler and Jeon 2008; Fowler et al. 2007; Hansford and Spriggs 2006). This work shares the interest in rigorous empirical exam-

ination with the above research on decision making, but it carries with it a conception of precedent that differs substantially. As Hansford and Spriggs (2006) note, prior work on the influence of precedent has been unable to adequately distinguish the causal connection between past behavior and current behavior. This has led to an emphasis not on the impact of precedent on current Court behavior, but a desire to understand how precedent operates to influence policy on a broader scale. This interest in precedent for its own sake has led researchers to employ new and interesting techniques in their analyses. For example, the work of Fowler et al. (2007) and Fowler and Jeon (2008) has applied the technique of network analysis to help us understand what makes individual precedents more or less authoritative.

My belief is that an emphasis on discrete legal change, either in the form of changing fact patterns or alterations in internal precedents, unnecessarily constrains the view of legal change. Wahlbeck's work comes closest to the conception of legal change and development discussed in more detail in the next chapter. His theoretical framework draws on clear conceptions about what the law is and how it operates (Levi 1949) and he accounts for influences outside of the Court and the justices themselves. However the question of agenda setting is not addressed explicitly. Similarly, work focusing on changes in precedent at the Court largely ignores the process by which the Court allocated agenda space for those cases in the first place. It also does not do well in allowing for the influence of outside forces on the Court's process. Theory and anecdote suggest that the Court

is often significantly in line with public sentiment and other political actors (Dahl 1957; Segal and Spaeth 2002). Thus, a theory of legal change and development ought to be accounting for the potential influence of these factors as best as possible.

Neo-Institutional Approaches

What has come to be known in the American courts literature as "neo-institutionalism" can be generally be understood as an appreciation for the context in which courts operate. According to Epstein, Walker and Dixon (1989), the neo-institutional perspective "...combines the traditional scholar's interest in institutional factors with the behavioralist's emphasis on systematic explanation and prediction." (825) On the Supreme Court, this means that, "outcomes are the consequence of individual, goal-oriented behavior as determined within the limitations and opportunities afforded by the institutions in which the political actors function." (Hurwitz 2006, 325) (see also Brace and Hall 1993). It is this perspective that informs the theory developed in chapter 2. Several book length treatments of legal change and dynamics start from this point of view and are worth noting.

In a study of policy change and dynamics on the Supreme Court, Pacelle (1991) focused on the Court's agenda as an institutional tool. To Pacelle, the decisions made by the Court over finite agenda space represent significant policy statements. These decisions are influenced by other actors in the system, but the Court also sees its agenda as a means of controlling and shaping policy. Pacelle's theoretical perspective is definitely neo-institutional, but also, at its heart, it is a work

informed by "political jurisprudence." (Shapiro 1964) He is interested in the Supreme Court as a policy-making institution and, theoretically, draws parallels between the Supreme Court's policy making and that which occurs in other branches of the government. So, while his broader perspective appreciates the role of law and the nature of legal considerations, his ultimate focus is agenda setting. Therefore, his theoretical framework draws heavily on previous work on agenda setting outside the context of Courts (*e. g.* Kingdon 1984) and does not explicitly look at the question of doctrinal change.[2]

There is much to be gained from the theoretical insights in Pacelle's book. Indeed, the theory developed in the next chapter borrows heavily from Pacelle's insights. However, his approach leaves many questions unanswered. For instance, what is the precise nature of the relationship between the policy entrepreneurs he identifies and the Court's agenda? Are the relationships systematic or idiosyncratic to certain issues? How might these actors influence the Court's choice of doctrine? All of these are questions that this dissertation seeks to answer.

Another perspective from which my theory draws heavily is due to Epstein and Kobylka (1992). Their discussion of "agents of change" provides the starting point for the theory I develop herein. Epstein and Kobylka are interested in explaining why the Court's doctrine in certain areas of law are stable and consistent over time, and why some can vary dramatically. Using the Court's treatment

[2]In later research, Pacelle develops a more complete model of legal change and development focusing on the evolutionary process of doctrinal development on the Court (Pacelle 2008). He produces a useful framework for understanding legal development on the Court, but does not provide empirical evidence or tests of this theory.

of abortion and the death penalty as examples, they argue that the law is shaped significantly by not only the Court, but by agents of change. Ultimately though, this book is limited in its application. The use of selected case studies makes the generalization to further situations difficult. They also leave considerable room to investigate the precise nature of the relationships identified in their theory and discussion.

From both Epstein and Kobylka and Pacelle, we get the idea that legal and policy change happens as the result of a complex and often long process. While Pacelle builds a theoretical framework within this paradigm, his book is limited by its focus solely on the Court's agenda. Epstein and Kobylka's work represents one of the only pieces that takes this broad view of legal change and applies it to the entire process of case adjudication. This dissertation seeks to expand on their work by testing many of the unanswered empirical questions implied by their research.

Summary and Conclusions

Much of empirical research addressing legal change on the Supreme Court tends toward viewing legal change as a discrete event that can be quantified and explained. This can take the form of either changes in patterns of votes and case outcomes over time, or more specifically "legal" notions of change. Much of the reluctance to incorporate more explicitly legal concepts into empirical work was related to the difficulty of quantifying such things. Advances in data collection and analysis have allowed researches to delve much more deeply into how these legal concepts operate on the

Supreme Court. One particularly fruitful area of research is in empirical analysis of the Court's precedents.

There also exists a line of research that sees legal change from a broader perspective. This research is interested in the role of the Court within the larger institutional framework of the U.S. government and legal system. Legal change is understood to take place as part of an evolutionary process of doctrinal development. A hallmark of this perspective is an appreciation for the expansive reach of law and the role the Supreme Court plays in developing law and policy. Similarly, this broad perspective makes room for actors and forces external to the Court and the legal system to shape law and policy. This work provides a rich source of theoretical insights but is often lacking some of empirical sophistication of research with a narrower focus.

Below I discuss how this dissertation seeks to takes aspects of each of these perspectives and weaves them together to produce a more unified view of legal change. Drawing on the theoretical insights of some work while still appreciating the importance of compiling data and rigorous empirical testing, this dissertation seeks to construct a theoretical framework that accurately depicts the relationship between law and policy and to test the implications of that theory with appropriate data and methodologies.

This Dissertation in Context

Synthesizing Approaches and a "New" Perspective

Conceptually, it is important to properly understand how the law operates in the U.S. and how courts and other actors rely upon the Supreme Court as a source for much of that law. Neo-institutionalism provides us with a basic theoretical starting point. If the Court uses the law and legal doctrine as a means of shaping outcomes, both internally and externally, it is incumbent on researchers to account for the potential influence of other actors that have a stake in these outcomes. However, there are several stages in the process of case adjudication on the Supreme Court. At each stage, the Court and interested actors have some input.

Considerable work has been done that gives us a theoretical framework for understanding how these players interact. This work has lacked some of the rigorous empirical examination that is the hallmark of other approaches to legal change. Also, while some previous work has been able to test aspects of legal change, it has tended to focus on one particular aspect of the law or process at the expense of others. The theory and empirics developed in this dissertation seek to bring these two perspectives and approaches together. By rejecting discrete legal change in favor of a process perspective, my empirical investigations can focus on answering empirical questions that arise at different points in the process. The result is a theoretically accurate picture of legal change and development coupled with empirical tests of the nature of the relationships between actors and

outcomes implied by the theory.

Advanced Empirics and New Measures

The question of change implies a dynamic process and thus investigating change necessitates a dynamic approach. On way to get at dynamics statistically is though times series data. Econometricians have developed advanced techniques for analysing these type of data. These techniques are designed to account for the unique statistical properties in the data and allow researchers to draw confident inferences from the results of analyses. To investigate the implications of the theory in the context of the Court's agenda setting, I compile time series data on the Supreme Court's attention to First Amendment and civil rights cases over time. ARFIMA models and tests for co-integration and error correction allow me to investigate both short term and long term relationships in the data.

Aside from agenda setting, a key point in the process of case adjudication is the enunciation of doctrine. To test the implications of the theory in this context, I need a measure of legal output. Newly developed measures of doctrinal position due to Clark and Lauderdale (2010) provide a useful way to asses the impact of actors both on and off the Court. This measure relies on the internal citations of an opinion to place it in a unidimensional policy space. I generate scores for a random sample of First Amendment and civil rights cases to examine how the Court's doctrine is impacted by important players identified in the theory.

Relatedly the Court's need and desire for legitimacy require that policy not stray too far from

public opinion (Marshall 1989; McGuire and Stimson 2004). To examine the potential impact of the public on the state of the law, I require an adequate measure of aggregate public opinion. Existing measures of aggregate public opinion rely on survey marginals from questions spanning a wide range of issues (Stimson 1999). Given my focus on specific issue areas, I generate issue-specific measures of aggregate public opinion using Stimson's procedure. These measures allow me to more accurately test the potential relationship between the public and the Court's doctrinal output.

Diverse Literatures

The empirical chapters of the dissertation speak to literatures whose focus is understanding discrete events or decisions by the Court and its justices. For example, much of the work on agenda setting on the Court has focused on the decisions of the justices to either grant or deny *certiorari* in certain cases (Boucher and Segal 1995; Brenner 1979; Caldeira, Wright and Zorn 1999). Similarly, there is a small but growing literature seeking to understand the policy making by the Court through models of bargaining between the justices (Carrubba et al. 2007; Clark and Lauderdale 2010; Lax and Cameron 2007; Westerland 2003). However, I am interested in these aspects of the Court's business not for their own sake, but as parts of a much larger whole. The process of legal change and development is one that passes through several important stages. To better situate the empirical

chapters of the dissertation, I briefly review some insights from the more specific literatures on the Court's agenda and its doctrine.

The Supreme Court's Agenda

Most recent empirical examinations of the Supreme Court's agenda have tended to focus on the individual decisions of the justices to grant or deny *certiorari* in a given case. This work is primarily interested in the strategic behavior of the justices at this stage. More specifically, this work asks, are justices thinking prospectively about the outcomes of cases at the merits stage when they make agenda setting decisions? Considerable empirical evidence suggests that this is indeed the case (Brenner 1979; Boucher and Segal 1995; Caldeira, Wright and Zorn 1999; Segal and Spaeth 2002). Justices, it seems, are more willing to allow what they consider to be bad law to exist at the lower courts (where it is theoretically contained) than at the national level (Perry 1991). Importantly, this work suggests that justices are motivated by policy outcomes but are, to some extent, constrained in their agenda choices.

With respect to external influence on the Court's agenda, Caldeira and Wright (1988), Epstein (1985), and Kobylka (1991) argue that interest groups have a considerable role in shaping the Court's agenda (see also Epstein and Kobylka 1992; Collins 2008). Similarly several studies have found that litigation at the lower courts, and experienced litigants in particular, play an important part in shaping the dynamic agenda (Pacelle 1991; Baird 2007; Cameron, Segal and Songer 2000;

Baird 2004; Hurwitz 2006; Yates, Whitford and Gillespie 2005).

Several book-length treatments of the broader process have also advanced our understanding of agenda setting on the Court. In particular, the work of Provine (1980) and Perry (1991) exemplify attempts to view the Court's agenda setting process in its entirety. Provine's book argues against the underlying perspective of cue theory, which she says "downplays the individuality of judgment and treats case selection as a mechanical screening process."(1980, 173). Instead she concludes that the case selection process contains important aspects of both preference based and legalistic decision-making.

A similar conclusion is drawn by Perry (1991), who offers his version of a "process model" to explain the apparent contradiction between motivations based on policy or outcome and those based on jurisprudential considerations. Perry's work also provides strong evidence for a view of the case selection decisions by the justices as imbued with a certain amount of strategic consideration. Through extensive interviews with clerks and justices, Perry outlines what he terms "aggressive grants" and "defensive denials." These are case-selection choices made with explicit forethought about the outcome of the case on the merits, providing still further evidence that the justices (and their clerks) are going beyond simple policy choices when setting the agenda. Importantly, Perry's work stops short of specifying exactly how these other influences on decision-making change the shape of the agenda over time.

Perry's omission is indicative of a general lack of attention in the *certiorari* literature to the question of dynamics. That is, are there patterns of change in the Court's agenda that are worth noting and understanding? Given the findings of studies looking at individual decision-making at the agenda stage, how might the Court's agenda be impacted in the aggregate? Pacelle's work (1991; 1995) sets out to answer these questions directly. Drawing on more general theories of institutional agenda setting by scholars such as Kingdon (1984) and Walker (1977), Pacelle argues that the Court's agenda is, in fact, an institutional entity. That is, it represents the culmination and interaction of important "policy entrepreneurs"; what Epstein and Kobylka (1992) call "agents of change."

Pacelle's work departs from the decision-making literature in that he sees important qualitative differences between the choices of the justices on *cert* and the structure of the Court's aggregate agenda. While individual case-selection choices may be governed by strategy and case facts, we need to look more broadly at the process of agenda setting to see precisely how the aggregate agenda takes shape. He notes: "the process of institutional agenda building in the Supreme Court is a function of the individual case selection policies of the members of the Court. It is more than a mere summation of the work of the `nine little law firms, however." (1991, 27). To Pacelle, the Court's agenda serves an important role in shaping and maintaining legal policy. The Court's influence extends outward through its doctrinal statements. The resolution of cases and the written

opinions of the Court must first arrive on the docket through the agenda setting process however. It is here that the Court defines the issues of the day.

Pacelle views the agenda setting and policy making of the Supreme Court as an evolutionary process where "the responsibility for the construction of policy is shared between the Court and litigants."(1991, 36)(see also 2008) These litigants are "policy entrepreneurs" in that they take advantage of institutional rules and outcomes to help shape the agenda and the legal policy coming from the Court. Where Pacelle stops short however is laying out a more specific role for other policy actors or change agents such as the public and the executive.

While Pacelle's work is critical as a foundation for a broad theory of the role the Court's agenda plays in policy making, many important empirical questions remain unanswered. In particular, what is the extent and nature of the relationship between the Court's agenda and these agents of change? Specifically, do these agents have a significant impact on changes in the Court's agenda in the short term? Likewise, do these relationships hold up over the long haul providing evidence of systematic, long-term influences for these agents?

Some research has sought to follow up on these questions. Baird (2004) found that the agenda of the Supreme Court in particular issue areas was significantly effected by salient cases decided in the recent past by the Court. Baird argues that this effect occurs primarily through the litigation process at lower courts. As salient case results percolate through the lower courts, litigation builds

up and this manifests itself in a greater number of cases on the Supreme Court's agenda in later years. Baird's work does not however, investigate the impact that other sources may have on the structure of the Court's agenda.

Hurwitz (2006) and Yates, Whitford and Gillespie (2005) look at the role of the preferences of the justices and the influence of other institutional actors on the Court's agenda. Coming from a similar theoretical perspective as that advocated here, these authors find significant effects for the Courts of Appeals agenda, the Court's aggregate liberalism, and the liberalism of other political actors in the civil liberties context. Both authors employ time series data to investigate dynamics in the Court's agenda. However, both authors ignore the question of long term relationships. Further, while the data employed in my analyses are not identical to those used by Yates, et al. and Hurwitz, they are substantially similar. Unlike these authors I find significant evidence of and account for fractional integration in the data (Box-Steffensmeier and Smith 1998; Granger 1980). Failing to account for this feature of the data can have important consequences for inferences, a point that will be discussed in more detail in chapter 3.

Doctrine

There is a growing body of literature in political science interested in the written opinions of the Supreme Court. As noted above, much of the reluctance to investigate questions surrounding the Court's written output has been due to a general lack of amenability to rigorous statistical anal-

ysis. Thus, much of the work looking at legal doctrine and the Court's opinion has been theoretical in nature. However, studies are beginning to emerge that empirically examine the Court's written opinions. The primary debate in this literature is over "who owns the majority opinion" (Westerland 2003). That is, the task of quantifying written judicial output is made easier if the internal policy can be quantified. An easy way to do this is to assign the ideological score of a particular justice to the written opinion. The question then becomes, who? This debate has produced several competing theoretical frameworks wherein justices bargain over opinion content.[3] The result is that the doctrine in the Court's written opinion reflects the preferences of the pivotal bargainer.

One set of theories draws on the median voter model (Black 1958; Downs 1957) to conclude that the Court's written output will ultimately rest at the preferred position of the median justice. As the necessary piece to any coalition, a majority needs to include the median justice.[4] Thus, in order to maintain a majority coalition, bargaining occurs that ultimately places the policy of the opinion in line with the view of the median justice (or at least within her range of acceptable outcomes) (Epstein, Knight and Martin 2003; Martin, Quinn and Epstein 2005).

A similar perspective argues that it is not the median justice on the Court, but the median of the majority coalition that is the pivotal member (Carrubba et al. 2007; Clark and Lauderdale 2010; Westerland 2003). Carrubba et al. argue that the importance of the median of the majority is

[3]There seems to be little consensus in the debate, save for the conclusion that a more unified approach, that accounts for several sources of influence, is necessary (see Bonneau et al. 2007).

[4]This conclusion assumes of course that preferences are unidimensional.

conditional on several coalition specific factors such as size. Also, Westerland shows that the propensity to join the majority is greatest for justices that are close to the median of the majority. Finally, using a measure of opinion location in policy space, Clark and Lauderdale show that the median of the majority is the best predictor of the opinion location.

Still another perspective argues that it is the opinion author who exercises considerable control over opinion location (Hammond, Bonneau and Sheehan 2005; Lax and Cameron 2007; Maltzman, Spriggs and Wahlbeck 2000; Schwartz 1992). Here, the opinion author can write at her ideal point but must accord the views of the other justices. While this perspective is reluctant to explicitly claim that the opinion author retains sole control over the content of the opinion, there is a general emphasis on the importance of opinion assignment to outcomes and the control that justices as opinion authors have to accommodate (or not) their fellow justices.

Until recently, what was lacking from this literature was a way to actually measure the content of Supreme Court opinions without resorting to bargaining theories. In a recent article Clark and Lauderdale (2010) provides such a measure by using what they call a "proximity model" of internal citiations to place Supreme Court opinions in unidimensional space. The result is a numerical value, locating a particular opinion in a policy space relative to other cases in that same issue area. Clark and Lauderdale use their measure to test some of the competing theoretical claims of the bargaining model literature. They find that it is the median of the majority that best predicts

the opinion location, but they reserve other questions for future work. What remains to be seen are empirical models employing this measure as a dependent variable in a policy making/decision making context that account for outside influences on the Court's doctrinal positions.

Plan of the Dissertation

This dissertation seeks to develop and test a theory of legal change on the Supreme Court. I take a perspective on the Court and its business that is different from much of the empirical studies in the literature in that I view the process of case adjudication on the Court as a whole. Much of the existing research seeks to view parts of this process in isolation from one another. However, to develop sound theory about how the law changes as a result of Supreme Court output, it is necessary to begin with an accurate depiction of what the Court does and how law and policy are related. It is my contention that this broader starting point is essential to developing accurate theory and useful hypotheses.

In Chapter 2, I formulate a theoretical framework that is general enough to accommodate different stages of case adjudication on the Court. The theory emphasizes the institutional role of the Court and the use of doctrine to shape the behavior and expectations both internally on the Court as well as among actors in the legal system and beyond. The theory focuses on "agents of change" or policy entrepreneurs that have been identified in previous work as important to the policy making

process on the Court. I conclude chapter 2 with a discussion of several hypotheses implied by the theory, both in the context of the Court's agenda setting over time and in the context of its written opinions.

Chapter 3 begins the empirical tests of the hypotheses identified in chapter 2. My theory asserts that the first stage at which policy entrepreneurs can influence legal outcomes on the Supreme Court is at the agenda stage. It is here that the important players interact for the first time. The setting of the agenda is critical to the ultimate policy outcomes on the Court (Riker 1983), thus allocation of limited agenda space is a high stakes game (Pacelle 1991; Silverstein 2009). This chapter focuses on the Court's dynamic agenda. More specifically, the empirical tests focus on hypotheses related to short term changes in the Court's agenda as well as how certain actors might influence the allocation of agenda space in the long term. I rely on two original data sets covering the Court's attention to the First Amendment and civil rights between 1937 and 2008 to test the impact of relevant actors such as lower courts, interest groups, the public, and of course the justices themselves.

In Chapter 4 I develop issue-specific measures of aggregate public opinion on the First Amendment and civil rights. My interest in issue-specific public opinion stems from the theoretical expectation that public sentiment on a particular issue will influence the content of Supreme Court doctrine. Empirical evidence is mixed as to the impact of public opinion on the votes of the justices, however I suspect that public sentiment operates in a different way on the Court. Whereas

we may not expect the institutionally isolated justices to choose a winning or loosing litigant based on public sentiment, we may expect them to adjust the content of an opinion in one direction or the other to lend it an air of legitimacy. A measure of issue-specific public opinion is needed to see if this hypothesis holds true. Existing measures of aggregate public opinion are constructed based on survey marginals covering a wide range of issues. My interest is in aggregate public opinion only within the area being addressed by the Court. To construct the measures, I rely on Stimson's technique of aggregating survey marginals. However, I limit the survey questions to those related to the issues in question. My issue-specific measures differ substantially from Stimson's public mood measure, and I describe these differences in the discussion of the completed measures. I then employ the measures in the empirical analyses in chapter 5.

These analyses are focused on the content of the Court's written opinions. I test hypotheses related to the influence that policy entrepreneurs can have on the ultimate written output of the Court. As a dependent variable, I rely on a new measure of legal doctrine developed by Clark and Lauderdale (2010). Their measure is designed to place the Court's written opinions in a unidimensional policy space based on a proximity model of Court citations. Essentially, their estimator uses the internal citations of an opinion to place it in policy space relative to other related opinions. The result is a numerical measure of opinion location akin to judicial ideology scores constructed by Martin and Quinn (2002) and legislator ideology scores developed by Poole & Rosenthal Poole (see

e. g. 1998) and Bailey (2007). I calculate these scores for each written opinion in random samples of 150 First Amendment cases and 150 civil rights cases, decided by the Court between 1953 and 2008. Using the public opinion measures from chapter 4 and additional data at the case level, I am able to test several hypotheses relating to the potential of policy entrepreneurs to influence the written output of the Court.

Chapter 6 offers a summary of the substantive findings in the dissertation. I also discuss some implications of both the theoretical developments and the results of the empirical tests. I conclude chapter 6, and the dissertation, with a brief discussion of possibilities for future work.

Chapter 2

Theoretical Framework and Hypotheses

In this chapter I lay out a theory of legal change and development and suggest a number of hypotheses. The goal of the chapter is to offer a general theory of legal change that seeks to explain how and why the law changes as it does. I do this by first identifying key players in the legal and political process in the United States. Then the theory outlines the motivations for each actor with respect to the state of "the law" or the legal status quo. The theory takes a broad view of legal change in that it sees the *process* of case adjudication as critical to understanding legal change. This is because of the unique role of the law in shaping outcomes outside of the legal system. Influence over the law can often translate into influence over policy outcomes and thus policy entrepreneurs wish to exert as much influence as possible. The theory outlined below is general enough to account for the motivations and behaviors of different actors at different stages of this process, from agenda formation to the ultimate written opinion. In the next section I describe the general theory, paying

specific attention to potential policy entrepreneurs or "agents of change" and how and why they might influence the law. Then I discuss hypotheses, implied by the theory, relating to dynamics in the Supreme Court's aggregate agenda and the written outputs of the Court.

A Theory of Legal Change and Development

The theory begins with the proposition that legal change and development in the United States can be understood primarily through the country's embrace of a common law legal tradition. As Merryman (1985) notes:

> [a] legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is made, applied, studied, perfected, and taught. (2)

The common law legal tradition provides the framework within which the legal system in the U.S. operates. Understanding the traditions of the common law is critical to a full understanding of how law changes and evolves in the United States. In particular, the common law norm of *stare decisis* plays an important role in shaping the state of the law.

> *Stare decisis* treats, in any given area of law, each judicial decision as a potential precedent for the next round of litigation or, rather, treats the body of rules and reasoning announced in previous cases as binding upon the judge deciding the current case. Like cases shall be decided alike. (Shapiro and Sweet 2002, 91)

Stare decisis creates an expectation that judges are to follow, as closely as possible, relevant previous rulings. It also helps to describe the hierarchical nature of the legal system in the U.S. wherein Supreme Court opinions are seen as binding precedents on lower courts. In the U.S., cases decided by the Supreme Court move down the legal hierarchy through a process of "vertical *stare decisis*". It is this downward movement that provides the key mechanism for the great influence of the Supreme Court's written output within the legal system in the U.S.

The common law perspective sees law as a collection of court-articulated doctrines generated through an evolutionary process (Gennaioli and Shleifer 2007; Pacelle 2008). As cases are decided, precedents are established that shape not only future court decisions but also the behavior and expectations of policymakers and the general public. The common law is often thought of as applying primarily to questions surround torts, but it has applications to statutory interpretation and constitutional law as well (Strauss 1996; Wellington 1990). Viewing legal change in the U.S. through the lens of the common law helps to illuminate many of the forces and relationships that can go into shaping law and legal policy.

The common law perspective is important to the theory developed here from two reasons. First, within the legal system in the U.S., the written output of the Supreme Court represent the "currency of the law." (Tiller and Cross 2006) That is, the manner in which legal actors engage one another is through the language of the law and precedent (Knight and Epstein 1996; Shapiro 1972). Viewed

through the common law perspective, the Supreme Court's constitutional interpretation produces an ever evolving “language” through which legal policy and public policy are shaped by judges and others.

The second reason that the common law perspective is important has to do with the broader policy impact of the Court's doctrine. The legal declarations of the Supreme Court have influence well beyond the confines of the immediate case being decided, or even the federal court system more generally (Canon and Johnson 1999). As Murphy et al. (2006) note, the written opinions of a court of last resort can often act much the same as a statute passed by a legislature, “serving as a guide for future conduct of all persons within the court's jurisdiction.” (44).

The Court's influence can also be felt among those not directly involved in legal and public policy making. For example, much of the popular understanding of the Constitution and its principles has its origins in the decisions of the Supreme Court, and not necessarily the text of the document itself. Students of the Supreme Court and constitutional law, as well as the general pubic, often view the law in a particular area as a collection of cases and decisions rather than as part of some underlying theory (Strauss 1996). Thus, the common law perspective not only helps to illuminate the importance of law for the justices and the legal system, but for the broader political system in the U.S.

Given this "common law" conception of law and legal change, how do we understand legal change and development as it pertains to the U.S. Supreme Court? It is first necessary to contemplate the scope of the problem. There are many factors that must be accounted for in order to answer this question well. As Epstein and Kobylka (1992, 5) note:

> …to understand the dynamics of legal change, it is necessary to contemplate the variety of legal and political forces at work, to identify the relationship of these factors to the emerging law articulated by the Supreme Court, and to examine their operation over an extended period of time in settings where we can most readily identify and assess their impact.

This dissertation relies on this characterization of the question to develop a theory accounting for these legal and political forces and devise empirical tests of some of the implications of the theory. These empirics will hopefully shed some light on the nature of the relationship between these actors and the state of the law.

Legal Doctrine as Endogenous Institution

Any theory of legal change on the Supreme Court must necessarily begin with the justices. Their institutional position provides them with considerably ability to shape the state of the law in particular areas and to make policy. Extensive research on case outcomes and merits voting has found that the justices' policy preferences are paramount (Segal and Spaeth 2002). Equating these behavioral outcomes with policy outcomes, however, obscures a more nuanced reality. There is a certain amount of stability in constitutional law that can not be explained by looking only

at the Court's personnel. Also, legal change may occur when personnel stability might suggest more constant policy (Epstein and Kobylka 1992). Indeed, there are myriad instances of justices, whose policy preferences "dictate" a given response, producing decisions counter to what we might expect.[1] While policy preferences are critical, a more complete view of the law and its importance both on and off the Supreme Court is needed to fully account for these dynamics (Hansford and Spriggs 2006). Questions that such a theory must address are, what reasons beyond their personal preferences might the justices on the Court have for changing the law? Or, how might the justices be constrained in their policy choices?

The theory assumes one overarching motivation for the justices on the Supreme Court: that law and legal policy reflect as accurately as possible their preferences, both individually and collectively. The goals of the Court, and indeed of the individual justices, are best achieved through the shaping of the law and legal policy. That is, their role as "case adjudicators" and their position in the institutional framework (both legal and political) of the United States, provides them an opportunity to significantly influence policy. More specifically, the justices make policy through doctrinal statements put forth in the written opinions of the Court.[2]

This control over the law can serve two important purposes for the Court. First, doctrine can

[1]Former Chief Justice Rehnquist's majority opinion in *Dickerson v. United States* (2000) 530 U.S. 428 upholding the liberal Warren Court decision in *Miranda v. Arizona* (1966) 384 U.S. 436 is a well known example.

[2]Lax (2011, 135) calls these two aspects of the Supreme Court's role, the generation of rules and standards and the communication of those through written opinions, "doctrinal instrumentalism" and "legal insturmentalism" respectively (See also, Rohde and Spaeth 1976; Segal and Spaeth 2002).

provide a unique focal point around which justices can coordinate when deciding cases (McAdams 2000; Schelling 1960; Strauss 1996). This can lead to not only desired outcomes, but to stability in the law that we might not see if law simply changed as a function of changes in preferences. By essentially limiting the set of possible doctrinal outcomes, the creation of rules and standards within written opinions allows justices with seeming divergent preferences to come together. Thus, the law and policy in that area are more stable over time. Second, doctrinal rules and standards can shape the outcomes of future cases at lower courts as well as the behavior and expectations of other policy minded actors (Cameron, Segal and Songer 2000; Canon and Johnson 1999; Epstein and Kobylka 1992; Hansford and Spriggs 2006; Knight 1992; North 1991; Richards and Kritzer 2002; Silverstein 2009; Songer, Segal and Cameron 1994). The Court has little or no alternative device for shaping legal policy. Therefore they must use doctrine to control, as best as possible, outcomes outside of their immediate reach.

In the context of courts, a "neo-institutional" perspective sees output not only as a function of personnel, but of the larger political environment within which courts operate (Brace and Hall 1993; Epstein and Kobylka 1992; Epstein and Knight 1998; Hurwitz 2006; Pacelle 1991). The Supreme Court, as a voting body with disparate preferences, faces many of the same collective action problems that are present in a legislature. They also face problems of enforcement and implementation[3] (*i. e.* they lack a formal enforcement mechanism for their decisions and they have

[3]It is possible to think of the rules and standards created through the Supreme Court's opinions as analogous to

no concrete way of implementing a preferred policy). Like legislators and other political actors, the Supreme Court must rely on institutions to solve these problems (Aldrich 1995; Rohde 1991). However, the nature of the legal system in the U.S. and the structure of the federal court system gives both the Court and actors external to the Court opportunities to influence the choice and application of these institutions. It remains to elaborate on who, other than the Court, can influence the law and how this might happen.

Who are the key players?

The key players in my theory of legal dynamics are "agents of change" (Epstein and Kobylka 1992) or "policy entrepreneurs"(Kingdon 1984; Pacelle 1991). The most important of these players is, of course, the Supreme Court; and any theory of legal change on the Supreme Court must contend with the proposition that the justices are self-interested actors who choose both case outcomes and legal doctrine to satisfy their individual preferences over legal and public policy.[4] Aside from the justices, the literature on legal change and development suggests several other important actors, external to the Court, that can have influence on law and legal policy.

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the "costly escape clauses" discussed by Rosendorff and Milner (2001) with respect to international trade (see also, Shepsle 2006). Justices can and must give some discretion to other actors, but excessive exercise of that discretion can be costly (see also, Epstein, Knight and Shvetsova 2001).

[4]In a study of issue creation by the justices of the Supreme Court, Epstein, Segal and Johnson (1996) make a distinction between "policy seekers" and "policy entrepreneurs" that seems to imply active issue creation as a necessary condition for being labeled an "entrepreneur." However, this labeling distinction is never discussed in detail. In this research, my use of the term "policy entrepreneur" follows Pacelle (1991), who writes, "the justices of the Supreme Court are policy entrepreneurs, who seek to fulfill their policy goals through their case selection policies and their decisions on the merits of the issues."(31)

First, as a passive institution, the Court must rely on others for the raw materials of policy-making. That is, the cases that the Supreme Court chooses to hear and ultimately decide authoritatively must be presented to it by outside actors. So, from where do these cases come? Since the passage of the Judiciary Act of 1925 made the Court's agenda almost totally discretionary, the predominant method by which cases arrive at the Court is through the *certiorari* process. Here litigants file a petition for a writ of *certiorari*, asking the Court to review questions of law decided by a lower court. Thus, the level of activity at the lower courts, within a certain issue area, will undoubtedly impact the extent of Supreme Court attention to that issue (Baird 2004; Hurwitz 2006).

Similarly, lower courts have their own preferences over policy and legal questions (Benesh and Reddick 2002; Hettinger, Lindquist and Martinek 2006). Although there is some evidence that the likelihood of review can act to constrain lower courts (McNollgast 1995; Songer, Segal and Cameron 1994), the shear volume of cases decided at levels below the Supreme Court make it difficult to ignore the ability of lower courts to make policy (See Posner 2008, for a first hand account of the motivations of a Circuit Court judge.). Given that lower courts do enjoy some discretion in their decision making, and the fact that legal issues are often simultaneously litigated at many lower courts, the Supreme Court's resolution of legal questions and ultimately, the content of the law, will be impacted considerably by activity at the lower courts.

Institutionally, the Supreme Court operates within a system of shared and separated powers.

As a goal-oriented actor, the Court wishes to not only make policy at its ideal position, but wishes that policy to be viewed as legitimate. If this is to be the case, the Court must be cognizant of the preferences and potential reactions of other institutional actors (Baum 2006; Clark 2009*a*; Pickerill 2004; Rogers 2001; Stephenson 2004). Also, some empirical evidence suggests that the Court's decisions are influenced by strategic decision making (Clark 2009*a*; Eskridge 1991; Gely and Spiller 1990)(, but see (Segal 1997)). Given this desire for legitimacy and for enduring policy, I expect that the Court's output will to some extent reflect the preferences of other institutional actors such as Congress.

Much of the above cited work focuses on the Court-Congress relationship. However, through the Office of the Solicitor General, the president's influence on the Court is considerable. Empirical evidence has shown that the Solicitor General, as a repeat player on the Court, is disproportionately successful at getting cases onto the agenda (Black and Owens 2009), winning cases on the merits (Bailey, Kamoie and Malztman 2005), and also influencing the content of written opinions (Corley 2008; Segal 1990). As an executive appointee, the Solicitor General often represents the preferred position of the president and the executive branch (Pacelle 2003). Thus, any theory of endogenous legal change must account for the influence of the executive through the Solicitor General.

Aside from institutional actors, interest groups can act as important policy entrepreneurs and agents of change (Caldeira and Wright 1990; Collins 2008; Epstein 1985; Epstein and Kobylka

1992). Groups bring cases to the Court as litigants but they also participate as *amici curiae*. Like the Solicitor General, interest groups can also garner "repeat player" status and be the source of important ideas for the justices. This participation is costly though. Interest groups make economic calculations and they would be unlikely to participate at the Court in such a way if their participation did not pay off in policy outcomes. Because of this intimate involvement at every stage of the process, a theory of legal change must account for the influence of interest groups both on the Court's agenda and on the content of its written output.

Finally, the potential influence of the public on the Court must be addressed. The mechanism connecting the Court to the general public is the Court's desire and need for legitimacy (Baum 2006; Marshall 1989). Indeed, some evidence suggests that the justices on the Court are aware of and concerned with how they are perceived by other actors, including the public (Epstein and Knight 1998). Further, the Court is often deciding issues of national legal and policy importance. The extent to which these decisions are viewed as legitimate can impact support for and perceptions of the Court (Durr, Martin and Wolbrecht 2000). Thus, the Court has incentive to not only allocate agenda space to issues of public importance, but also to couch its doctrine in language that is largely acceptable to the public.

My theory argues that the justices rely on doctrinal statements to shape the law and legal policy. That is, faced with important problems internal to the Court and throughout the broader legal

system, justices rely on doctrine as a means of effectively solving these problems. The persistence (or lack thereof) of a particular legal doctrine is thus endogenous to the Court and its political environment. The stakes of the legal game are high, and policy entrepreneurs are increasingly turning to the Courts as a means of achieving lasting policy impact (Epstein 1985; Silverstein 2009).

The process of adjudication provides ample room for the Court and for other policy minded actors to shape the state of the law (Epstein and Kobylka 1992; Wellington 1990). To adequately test the theory above then, it is necessary first to identify points in the process where the Supreme Court can influence doctrine broadly speaking. The most obvious point at which doctrinal changes can be made is in the written opinions of the Court. However there is another crucial juncture in the process where change can be initiated; the construction of the Court's agenda. This is the first stage in the process of adjudication wherein these relevant actors can interact. Thus, if the justices on the Court and the other actors in the legal process wish to shape law and policy, the agenda setting stage is the place to begin.

The Construction of the Court's Agenda

Given their level of discretion in setting the agenda and their institutional insulation, the most important actors in the theory of agenda change developed here are the justices themselves. In accord with the vast literature on judicial decision-making, I assume that the justices have specific policy preferences and that they desire to see these preferences reflected in the content of the law.

To be more specific, I assume that the justices of the Supreme Court operate under one overarching motivation: to see legal policy in the United States reflect, as accurately as possible, their policy preferences.

Policy preferences are often operationalized in the literature through measures of judicial ideology (*e. g.* Segal and Cover 1989). Of course, ideological valence does not necessarily carry with it an interest in resolving disputes within a particular issue area. However, it may be the case that ideology plays a role in shaping the Court's attention to certain issues. Pacelle (1991; 1995) finds that the Court's attention to civil liberties issues tracks well with conventional views of the Court's relative ideology over time. That is, as the Court became more liberal from the 1940's onward, they devoted more and more attention to civil liberties issues. This trend begins to disappear with the conservative movement of the Court beginning in the middle 1980's. This change in attention may also be driven, to some degree, by the preferences of the Chief Justice (Pacelle 1995). Institutional rules give the Chief Justice considerable authority to set the initial agenda through the initiation of the "discuss list"(Caldeira and Wright 1990). Riker (1983) and others have also shown that an ability to define the terms of debate is critical to power and control in the agenda setting context. If the policy-minded justices on the Court see agenda-setting as critical to shaping the law and legal policy:

> **H_1:** The tenures of Chief Justices will exhibit distinct trends with regard to agenda attention within a specific area of law.
> **H_{2a}:** As the Court median becomes more liberal (conservative), the Court will allocate

more (less) agenda space to civil rights cases.
H_{2b}: As the Court median becomes more liberal (conservative), the Court will allocate more (less) agenda space to First Amendment cases.
H_{2b}: The median Court ideology and agenda attention within a particular issue area will trend together over time exhibiting a long-run equilibrium relationship.

The dynamics of the agenda are not solely attributable to the Court's personnel. As a passive institution, the Court cannot simply choose which cases to decide based on policy considerations alone. It must rely on others to present it with cases and controversies. This creates an important potential for external actors to shape the Court's policy and requires that we move beyond explanations of agenda change relying primarily on the changing personnel on the Court. The agenda stage is an important meeting point for the members of the Court and these external actors. They can present arguments to the Court in the form of written briefs (Corley 2008) and they can alter the Court's agenda simply through decisions to litigate cases (Cameron, Segal and Songer 2000). It is the Court's response to these external forces that begins the process of doctrinal maintenance, and it is here that the Court first begins to shape public policy through defining the agenda.

According to the Supreme Court's Rule 10, one of the only "official" reasons for the Supreme Court to grant *certiorari* is to resolve conflicts in the lower courts[5] (see also Gressman et al. 2007). These conflicts can arise when the Court has been ambiguous in its rulings within an area of law or it can simply happen as more and more lower court judges weigh in on a particular legal question. As

[5]The Court makes minor changes to its official rules periodically. I has recently begun to post the most recent version on its website. A current version of the Supreme Court Rules can be found online at http://www.supremecourt.gov/ctrules/ctrules.aspx

I note above, lower courts, particularly the federal Courts of Appeals, have their own preferences over policy and the law. These preferences are revealed when lower courts decided cases and issue written opinions. Thus, I hypothesize:

> **H_{3a}:** As the Courts of Appeals decide more cases in a particular issue area, the attention the Supreme Court pays to that particular area in the form of agenda allocation will also increase.
> **H_{3b}:** The Supreme Court's issue agenda and the extent of Court's of Appeals litigation will trend together over time. That is, they will exist in long-run equilibrium where changes in one will be reflected in the other over time.

Another potential influence on the Court's attention to certain issues is the public (Epstein and Kobylka 1992). To the extent that it is possible to assign a collective motivation to the public, I assume that it is to see legal policy reflect as closely as possible the predominant views of society on a particular issue. Thus, as an agent of change, the public has a vested interest in the types of cases the Supreme Court is deciding. The Court, by-in-large, obliges by hearing cases that reflect important social problems. As Provine (1980, ,63) notes, "cases filed in the Supreme Court reflect shifting currents of opinion in our society." Issues that are salient to the public, those with important policy implications and those of which they are particularly aware, are often reflected onto the Supreme Court's agenda. The public's thinking on these issues is shaped considerably by media coverage (Zaller 1992). Thus, it is reasonable to assume that an issue that receives considerable media attention may also be one that the Supreme Court ought to be addressing, from the perspective of the public. As Justice Brennan noted: "the Court's calendar mirrors the ever-changing concerns

of this society." (Brennan 1973, quoted in Provine (1980,63)). Therefore, I hypothesize:

> **H_{4a}:** As the level of public awareness of an issue increases, the Court's allocation of agenda space to that issue will also increase.
> **H_{4b}:** Over time, the level of public awareness of an issue and the Court's agenda will move in long-run equilibrium with one another.

Institutional actors outside of the Court can also influence the Court's agenda. As a repeat player (McGuire 1995), the Solicitor General represents the government on the Court and most often takes positions on cases that reflect the views of the executive. Increased involvement by the Solicitor General as an *amicus curiae* acts a signal to the Court that an issue is particularly important to the executive. The Court, as considerable empirical evidence suggests, takes the signals of the Solicitor General seriously. Similarly, the president's explicit statements regarding a certain issue will serve as a signal to the Court of executive preferences. Dahl (1957) and others suggest that the Court largely represents the existing governing coalition. Thus, I expect:

> **H_{5a}:** Increases in the rate at which the Solicitor General is involved as an *amicus curiae* within a particular issue area will lead to greater attention from the Supreme Court.
> **H_{5b}:** The relationship between the attention of the Solicitor General and the Court will exist in long-run equilibrium.
> **H_{6a}:** Greater allocation of the executive agenda to a particular area will be reflected in increased attention to that issue area by the Court.
> **H_{6b}:** The relationship between the attention of the executive branch and the attention of the Court to a particular issue area will exist in long-run equilibrium.

Along with the executive, and the Court, Congress must allocate limited resources when constructing its agenda. I assume that congressional motivations are driven by both a desire for reelection and a desire to make sound policy. This combination suggests that congressional agenda items

will often reflect salient policy concerns for both Congress and the general public. Given Dahl's (1957) thesis regarding the connection between the Courts and the current governing coalition, I expect Congressional priorities and judicial priorities to overlap. Moreover, my theory suggests that the Court will respond to statements of congressional preference as a means of enhancing its its institutional legitimacy. Therefore, I hypothesize:

> **H_{7a}:** Increases in congressional attention to a particular issue area will lead to increased allocation of agenda space to that issue by the Court.
> **H_{7b}:** The relationship between the attention of Congress and the attention of the Court to a particular issue area will exist in long-run equilibrium.

Finally, existing literature on Supreme Court decision making, legal change and development, and the dynamic agenda suggests that interest groups play a critical role (Caldeira and Wright 1988; Epstein 1985; Epstein and Kobylka 1992; Kobylka 1991; Collins 2008). Interest groups want to see policy reflect their views. To that end, they will participate in the process of policy development on the Court in the ways available to them. One primary way that interest groups engage the Court is as *amici curiae*. Research at the *certiorari* stage suggests that interest group involvement will increase the likelihood that a case is chose for review (Caldeira and Wright 1988). Thus, I hypothesize:

> **H_{8a}:** As the rate at which interest group engage the Court as *amici* in a particular issue area increases, the Court will allocate more agenda space to that issue.
> **H_{8a}:** The rate of interest group involvement in an issue and the Court's attention to that issue will move together over time.

Shaping Legal Doctrine

With regard to doctrinal outcomes, the implications of the theory are similar to those for the agenda. To wit: if justices want legal policy to as closely as possible reflect their preferences, they will act to shape doctrine to their advantage. They are limited by their institutional position and the requirements of their role as managers of the legal system however. There is also evidence that doctrinal content is influenced by outside groups or individuals.

As the most important agent of legal change, the Court plays the central role in shaping doctrine and legal policy. The theory outlined above suggests that the justices rely on their written opinions to move policy toward their preferred position and to help bring stability and uniformity to the law. However, changes in Court membership can have important implications for the construction and maintenance of coalitions. Several theories exist that connect judicial ideology with the Court's written opinions. Some argue that it is the opinion author who has the most influence over policy (Lax and Cameron 2007; Schwartz 1992). Others suggest that the median justice on the Court is the key determinate of policy location in a written opinion (Martin, Quinn and Epstein 2005). Still a third perspective suggests that the median justice in the majority coalition determines policy location (Carrubba et al. 2007; Westerland 2003). Some empirical evidence suggests that the median of the majority model is the strongest candidate (Clark and Lauderdale 2010), however I test several hypotheses:

H_{9a}: As the median justice on the Court becomes more liberal(conservative), the ideological position of the opinion will become more liberal(conservative).
H_{9b}: As the opinion author becomes more liberal(conservative), the ideological position of the opinion will become more liberal(conservative).
H_{9c}: As the median member of the majority coalition becomes more liberal(conservative), the ideological position of the opinion will be become more liberal(conservative).

Along with the Court, other institutional actors can have important influence over doctrine. For example, the Court regards the Solicitor General's office as a legitimate source of both cases and arguments within cases McGuire (1995); Corley (2008). Also, as the government's attorney, the Solicitor General serves at the pleasure of the president and will likely represent at least a close approximation of the president's policy position. Because of the high regard in which the Court holds the office of the Solicitor General, the president, through his official representative on the Court, may have important influence on doctrine and legal policy. However, this influence may depend on the position taken by the president and the Solicitor General.

H_{10}: Court doctrine will be drawn in the direction of the government position when the Solicitor General participates as a party.

Also, because it must rely on the consent of both the public and other actors in the political and legal system for legitimacy, the Court must be cognizant of public opinion (Marshall 1989; Caldeira and Gibson 1992). Segal and Spaeth (2002, 424) note that the opinions of the Supreme Court "by and large correspond with public opinion." (see also Friedman 2009) Similarly, Dahl (1957) argues that the Court's policy is often directly in line with the current or recent governing majority. Also, McCloskey (1960) credits (among other forces) public sentiment toward the reactionary policies

of Nazi Germany and Soviet Russia for the Supreme Court's shift in the late 1930's toward a focus on civil rights and civil liberties issues. However, there is still considerable debate about the relationship between public opinion and the Supreme Court's outputs (Mishler and Sheehan 1993; Stimson, Mackuen and Erikson 1995; Norpoth and Segal 1994). One of the goals here is to provide some clarity to the role the public plays in shaping both the Court's agenda and ultimately the law.[6] Therefor, I hypothesize:

> **H_{11}:** Court doctrine in a particular issue area will reflect aggregate public opinion on that issue.

Conclusion

The theory outlined above is rooted in a view of constitutional law that sees doctrine and the legal proclamations of the Supreme Court as providing substance to often vague constitutional provisions. This substance evolves over time as actors in the process influence both the Court's agenda and the content of its written opinions. This "common law" perspective informs a neo-institutional view of the Supreme Court that emphasizes the political and institutional environment within which the Court operates. As an endogenously generated and maintained institution, the law and legal change is best understood by focusing analytical attention on points in the process of case adjudication on the Supreme Court that allow relevant players to interact.

[6]The question of the public's impact on the Supreme Court will be discussed in more detail in Chapter 4, wherein I describe the development of issue specific measures of public opinion designed to test the impact of public sentiment on doctrinal positions taken by the Court.

The first instance where this interaction takes place is the setting of the Court's agenda. Chapter 3 tests hypotheses related to the Court's dynamic agenda, both with respect to short term and long term influences. These hypotheses are tested using two original data sets covering the Court's attention to civil rights and the First Amendment between 1937 and 2008. The nature of these data require the use of advanced statistical techniques designed specifically for time-series analysis. These techniques are not only appropriate given the structure of the data, but they allow me to answer substantively interesting questions implied from the theoretical discussion above.

Another spot where players interact is in the shaping of the content of Supreme Court opinions. The theory identifies the relationship between the Supreme Court and the public as potentially important to this output. However, empirical evidence is decidedly mixed as to the impact of the public on some Court behavior. One standard measure of aggregate public opinion, due to Stimson (1999), is often employed in studies linking the Court with the public. It is designed to measure the "public mood", which Stimson defines as a "general disposition." (20) However, my interest is in the nature of doctrine within two very specific issue areas: civil rights and the First Amendment. Thus, Chapter 4 discusses the generation of issue-specific measures of public opinion using the same methodology as that used by Stimson to create his measure of the more general public mood. These more fine-grained measures are then used in Chapter 5 to examine the impact of public opinion on the position of Court doctrine. This and other hypotheses regarding the Court's doctrinal

output are tested using data on the position of the Court's written opinions in civil rights and First Amendment cases between 1953 and 2008.

Chapter 3

Empirical Analyses of the Aggregate Agenda

In this chapter, I test hypotheses related to the structure and dynamics of the Supreme Court's agenda. Recall from the previous chapter that this phase of the adjudication process represents the first point at which the relevant actors identified in the theory interact to shape the state of the law. To test the hypotheses, I rely on two original data sets spanning the Court's 1937-2008 terms. The data are time-series, meaning the unit of analysis is the individual Court term.[1] Further, because the state of the law differs so dramatically across issue areas, I test the hypotheses within a particular issue area. The two data sets relied upon in this chapter cover the Court's treatment of the civil

[1] The Supreme Court's term begins in October and ends (typically) in the following June. So, the 1954 term of the Court spans October 1954 through about June 1955. When possible, the data were collected to match this date range. Aggregate data at the yearly level are adjusted to account for the time lag. For instance, Courts of Appeals case loads are measured by the calendar year. These data are included in the analyses such that they match as best as possible with the Court's term. Therefore, because the bulk of the Court's term actually takes place during the *following* calendar year, yearly data such as Courts of Appeals case loads are indexed with the *preceding* term of the Court.

rights and the First Amendment. The choice of these two areas of jurisprudence was driven primarily by the fact that, since the late 1930's, much of the Supreme Court's attention to constitutional law has been in the area of individual rights and liberties. Indeed, legal scholar Laurence Tribe largely defines post-1937 constitutional law through what he calls the Model of Preferred Rights and the Model of Equal Protection (1988, Chapters 11 & 16). Using Tribe's characterization of the important legal questions of the post-1937 era on the Supreme Court as a starting point, I selected issue areas that were important to both social and legal policy.

The Court has traditionally recognized the right of free speech, as well as the other rights protected by the First Amendment, as fundamental to the proper functioning of a democracy. However, they have almost never explicitly advocated the position that these rights are unconditional.[2] The crucial question surrounding First Amendment cases is almost always: when can the government legitimately limit the protections afforded citizens under the First Amendment, and when can it not. Needless to say, there have been varying answers to this question from the Court over the years.

Civil rights cases also offer a rich source of jurisprudential variation. This area includes "hot button" social issues such as racial segregation and sex discrimination. It also includes cases involving questions of voting rights and affirmative action. For the public and for politicians, these are often emotionally charged issues that can polarize public sentiment.

[2]Except, notably, Justice Black's repeated assertions that the first words of the First Amendment, "Congress shall make no law…" should be read literally. See for example, *Smith v. California*, 361 U.S . 147, 157 (1959) (Black, J., concurring)

Previous work has found the justices merits votes in these types of cases, and in civil liberties cases more generally, to be primarily influenced by individual preferences over policy (Segal and Spaeth 2002). So, the civil liberties context and the two specific issue areas chosen here, provide a stringent test of a theory that posits an important role for forces external to the Court such as the public and interest groups.

This empirical analysis of the Court's agenda is designed to test the implications of the theory with regard to the changing nature of the Court's attention to a particular issue. The dependent variable in each of the analyses presented below is the percentage of the Court's "issue-action agenda" (Caldeira 1981) devoted to a particular area of law in a given term. The issue-action agenda consists of cases that the Court decides authoritatively in a term. More specifically, they are the cases that are presented to the Court for oral argument and then decided by a written opinion.

Research Design

The data that I have gathered to test hypotheses related to the Court's dynamic agenda are of a special character. They are time-series data, where the unit of analysis is a particular point in time. The nature of time-series data requires specific attention be paid to problems of autocorrelation. Below I discuss some of these problems, along with the solutions that I employ.

Time Series Methods

When dealing the time-series data, the first issue to address is the stationarity of the series. A non-stationary, or integrated of order I(1), series follows a "random walk" process where the value at time t is a function of the past values of the series, plus or minus a stochastic error. Employing classical regression techniques on non-stationary series can lead to spurious results because of the high degree of autocorrelation in the series (Granger and Newbold 1974; Enders 2004). A standard approach to this problem is to estimate models using differenced series generated through ARIMA models (Box and Jenkins 1976). This process helps to remove the influence of past values from the series and essentially transforms the series into white noise. Generally speaking, ARIMA modeling involves transforming each continuous, non-stationary, series y by the equation:

$$(1 - \phi_1 L^1) y_t = \epsilon_t \tag{3.1}$$

where $\phi_1 = 1$. This yields:

$$\Delta y_t = \epsilon_t = y_t - y_{t-1} \tag{3.2}$$

ARIMA techniques require differencing a series using only integer values. However, the data in political and social science time-series are often aggregated over many different lower level units and individual processes. Granger's aggregation theorem suggests, as individual level pro-

cesses or choices are aggregated to form time-series, data can become fractionally integrated (Box-Steffensmeier and Smith 1998; Box-Steffensmeier and Tomlinson 2000; Granger 1980). This means that they are often integrated of an order greater than zero but less than 1. Differencing by 1 can over correct for the problem, as the data are not integrated to that degree. Considerable empirical evidence shows that political time-series follow just such a model and are often integrated of an order less than one (DeBoef and Granato 1997; Box-Steffensmeier and Smith 1996; Lebo, Walker and Clarke 2000). So, although first differencing is a method for removing the influence of past values from a series, it can often be the case that first differencing is too strong an approach.

The solution to this problem is fractional differencing (Granger 1980; Box-Steffensmeier and Smith 1996) using ARFIMA models for continuous series of the form:

$$(1-L)^d y_t = \frac{(1+\theta_q L^q)}{(1-\phi_p L^p)}\epsilon_t \tag{3.3}$$

where ϕ_p and θ_q represent p and q autoregressive and moving average parameters respectively. In the above equation, d represents the differencing parameter; the amount of differencing needed to achieve stationarity. This value, d, can be estimated using various techniques developed in the Econometrics literature (*i. e.* Geweke and Porter-Hudak 1983; Reisen 1994; Robinson 1994).

An unfortunate consequence of estimating models using differenced or fractionally differenced series is that long-run relationships between series cannot be examined. This is because differencing

to produce a white noise series can obscure the long term trends in the data (Durr 1992; Greene 2003). In the context of the Supreme Court's agenda, fractionally differenced series can be used to test hypotheses focused on the causes of term-by-term changes in the agenda. However, the over-time relationships between particular independent variables and the structure of the agenda cannot be investigated. A separate approach is needed to test hypotheses of long-term impacts on agenda change. Two useful tools developed in Econometrics and applied in Political Science are the concepts of co-integration and error correction (DeBoef and Keele 2008; Dickinson and Lebo 2007; Enders 2004; Greene 2003)

A linear combination of two fully integrated, and entirely unrelated series y and x in a basic regression model:

$$y_t = \beta x_t + \epsilon_t \tag{3.4}$$

yields a series, $\epsilon_t = y_t - \beta x_t$, that is also fully integrated. However, two integrated series that are trending together in the long-term will produce a linear combination that is not integrated, but stationary. These two series are in a long-term equilibrium relationship with one another and are said to be co-integrated (Greene 2003). The precise nature of this trending relationship can then be assessed through tests of error correction. Error correction is simply the speed at which the series return to equilibrium after a shock in one or the other moves them out.

Several approaches exist to test for both co-integration and error correction. One that is espe-

cially suited to the data used here is due to Pesaran, Shin and Smith (2001)(hereinafter PSS). This procedure is particularly useful in that it is robust to both small samples and to the level of integration in the data (PSS; Dickinson and Lebo 2007). Given both my small N and initial evidence that the series of interest are fractionally integrated, the PSS procedure is well suited for my purposes.

The first step in the PSS procedure is estimating an unrestricted error correction model of the form:

$$\Delta Y_t = \beta_0 + \sum_{i=1}^{k} \lambda_1 \Delta Y_{t-k} + \sum_{i=1}^{k} \lambda_2 \Delta X_{t-k} + \lambda_3 Y_{t-1} + \lambda_4 X_{t-1} + \epsilon_t \tag{3.5}$$

in which Y and X are the level forms of the dependent variable and independent variable of interest, respectively. ΔY is simply the differenced version of the dependent variable and ΔX is the differenced version of the independent variable of interest. The number of lags is represented by the value of k above and is determined iteratively using the Akaike Information Criterion and the Bayesian Information Criterion.

Once the error correction model is estimated, the second step is to evaluate the parameters for both co-integration and error correction. The parameters of interest for the PSS procedure are λ_3 and λ_4. An F-test of the null hypothesis that these two parameter estimates are equal to zero is the initial test of co-integration. The t-statistic on the λ_3 estimate is then used to evaluate the speed of error correction. The test statistics are evaluated using upper and lower bounds as defined by Pesaran, Shin and Smith (2001, 300-303) that depend on the preferred α level and the value of k

used to estimate the unrestricted error correction model.

Data and Measurement

As mentioned above, the dependent variable for all the analyses in this chapter is the percentage of the Court's issue action agenda devoted to a particular issue in a given Court term. The data span the 1937-2008 terms of the Court. For the period 1946-2008, these data were collected using the U.S. Supreme Court Database.[3] For the period before 1946, I used search terms in Lexis-Nexis to identify relevant cases.[4] The specific value of the dependent variable was then calculated by dividing the number of issue-specific cases by the total number of cases and then multiplying by 100. For example, if the Court's issue-action agenda in 1964 consisted of 123 cases and 15 of these were First Amendment cases, the dependent variable for an analysis of the First Amendment agenda would be 12.20 for that term. Figures 3.1 and 3.2 show time plots of the dependent variables for the civil rights and First Amendment analyses respectively.

The public represents an important agent of change that may influence the Court's agenda choices (Epstein and Kobylka 1992; Marshall 1989). To investigate both the short and long term

[3]The database can be accessed at `http://scdb.wustl.edu`. The database codes cases as falling into one of 14 broad issue areas. Within issue areas, cases are further subdivided by specific issues. Two of the 14 broad issue areas are “First Amendment” and “Civil Rights” Thus, to select cases for the analyses presented in this chapter, I relied on the native coding in The U.S. Supreme Court Database with cases indexed by citation

[4]Search terms were selected and tested based on the detailed description of issue area coding contained in the Codebook for the U.S. Supreme Court Database. To assess the efficacy of the search, I first used the selected terms to search Lexis-Nexis over a date range covered by the Supreme Court Database. Once satisfied that my search terms were accurately capturing the desired cases, I reviewed the search results for more specific coding.

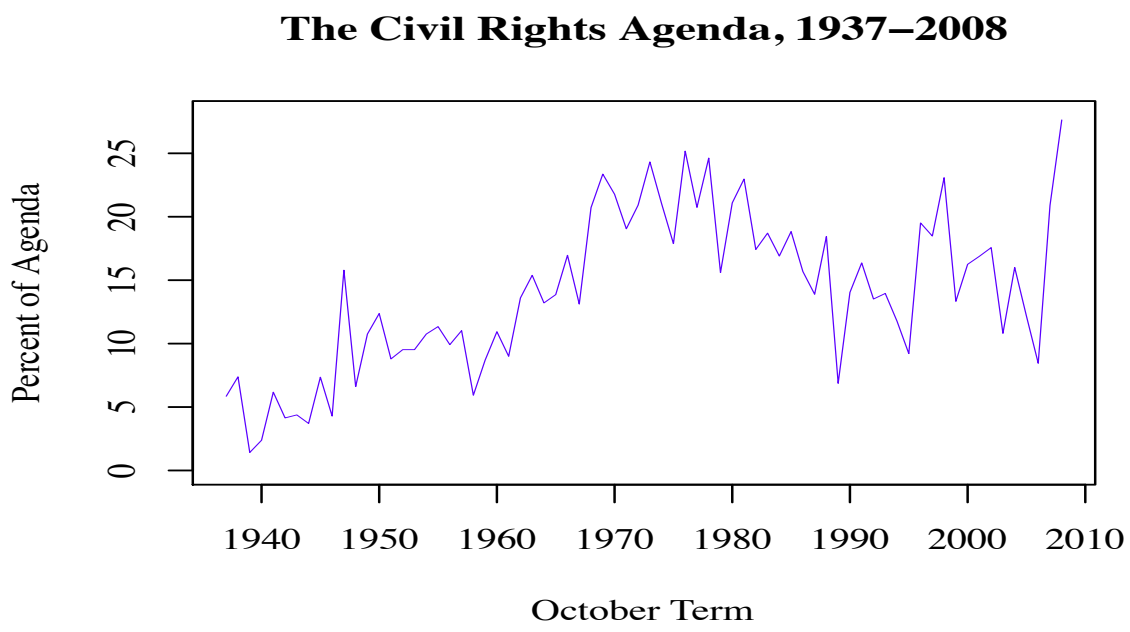

Figure 3.1: The Court's attention to civil rights as measured by allocation to its "issue action" agenda. The issue action agenda is simply the set of orally argued cases decided by the Court with a written opinion.

impact of the public on the Court's agenda , I include in the model a measure of *public awareness*. The scope of the data make the use of survey data impossible but, even if survey data were consistently available between 1937 and 2008, it would be exceedingly difficult to aggregate up to the level of analysis used here. As a result of these limitations, I employ a proxy to measure yearly public awareness of a particular issue area. Specifically, I measure public awareness as a count of front page newspaper stories touching on the relevant issues for each Court term in the data This technique is consistent with other empirical examinations of public sentiment and awareness related to the Supreme Court (see Persily, Citrin and Egan 2008).

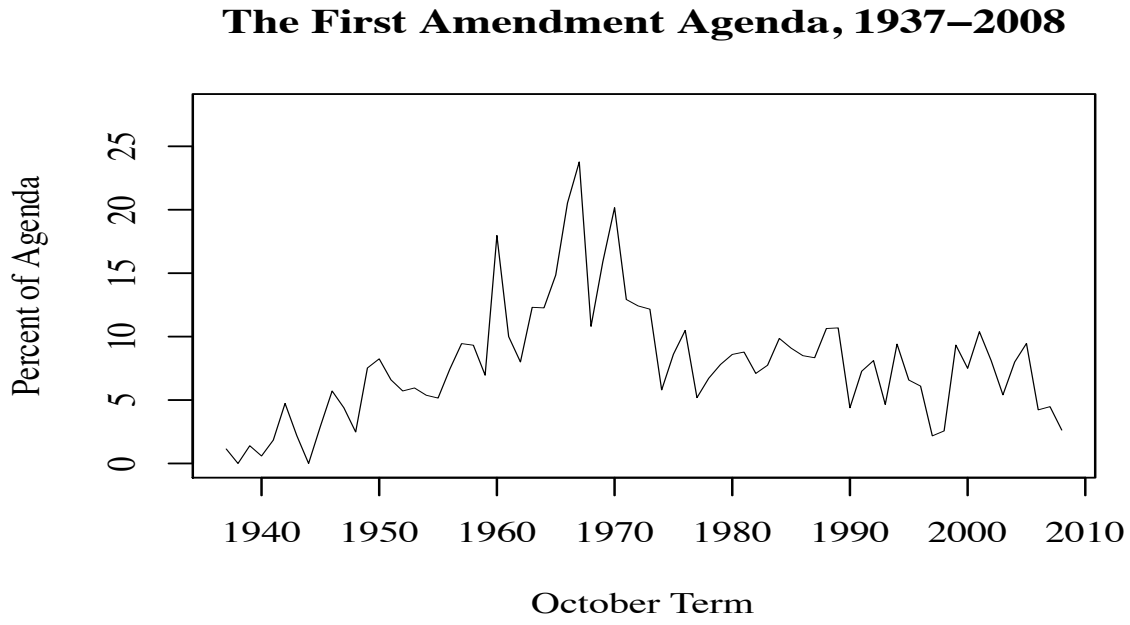

Figure 3.2: The Court's attention to the First Amendment as measured by allocation to its "issue action" agenda. The issue action agenda is simply the set of orally argued cases decided by the Court with a written opinion.

Archived access to newspapers exist through several databases. Most prominently, ProQuest maintains a keyword searchable database of newspapers from across the United States going back as far as the mid nineteenth century. To maximize geographic reach, I searched for front page articles that appeared in the New York Times, Washington Post, or Los Angeles Times.[5] Because the dependent variable is measured by term of the Court rather than by calendar year, each observation of the awareness series encompasses the October term of the Court. For example, the observation of the public awareness series for October term 1945 consists of a count of front page stories that

[5]See the appendix for a more detailed description of search procedures in Lexis-Nexis and ProQuest

appeared in any of the three newspapers between July 1, 1945 and June 30, 1946.[6]

To account for the influence of *lower court* activity on the Supreme Court's agenda, I include a measure of case dispositions at the U.S. Courts of Appeals. These data were compiled using the U.S. Courts of Appeals Database and its update (Songer 1998; Kuersten and Haire 2007) and are simply an annual percentage of all cases decided, across all circuits[7], that fall into the relevant issue area. The U.S. Courts of Appeals Database takes a random sample of cases within each circuit/year and thus it is necessary to use weighting (provided by the administrators of the data) to produce accurate estimates of annual data of the kind used here. The database contains a variable labeled `CASETYPE1` which is analogous to the issue coding of the U.S. Supreme Court Database (Songer 1998). I thus relied on the native coding in the database to sort cases into issue areas. These data range from 1937-2001.

The role of interest groups in shaping policy through litigation is a crucial component to the theoretical framework developed herein. Measuring the activity or influence of interest groups during a Court term is a difficult task. One approach would be to observe those cases in which an interest group was a primary party or provided representation for a primary party. While this approach is certainly feasible, it is likely only a small part of the activity of interest groups at the

[6]Stories appearing in the summer would measure public awareness that could only influence the *subsequent* term of the Court and have no real influence on the preceding term. So, the July 1 start date for the search was used to better align the appearance of the newspaper stories with the Court's term.

[7]From 1937 through 1981 this consists of the 10 numbered Circuit Courts of Appeals, plus the Circuit Court for the District of Columbia. Established in 1981, the addition of the 11th Circuit is reflected in the data beginning in 1982.

Supreme Court. Further, there is no indication in the literature that interest group involvement as litigants has much effect on the makeup of the Court's agenda. What is clear from the literature however is that the Court's agenda can be influenced by *amici curiae* (friends of the court) (Caldeira and Wright 1988). Interest groups do much of their work at the Supreme Court in the form of *amicus* briefs filed either at the agenda stage or at the merits stage.

Ideally, I would prefer to have a count of interest group *amicus* participation at the agenda stage for each Court term. However, given limitations in data, it would be exceedingly difficult to compile a complete series for the terms used in these analyses. As a proxy, I use the percentage of issue specific cases garnering *amicus* participation by interest groups at the merits stage.[8] This measure is constructed in the same way as the dependent variable in that I simply divided the number of cases receiving interest group attention by the total number of cases decided and multiplied by 100. The use of this proxy raises the obvious objection that the extent of *amicus* participation at the merits is occurring after decisions on the agenda have been made. To account for this, I include this series in the model lagged back one term so that, in the model, the dependent variable at time t is regressed on the amicus series at time $t-1$.

To account for the impact of the individual justices, I employ a measure of aggregate *policy preference* on the Court in a give term. Ideology scores developed by Segal and Cover (1989)

[8]This series began as data collected by Collins (2008) on *amicus* involvement. The Collins data does not have a variable for interest group involvement however. Because Collins's data is centered around the United States Supreme Court Database, I used the same case selection criteria to identify cases by issue area. I then manually coded each case to get an accurate count of only interest group participation.

provide an exogenous measure of preference, but are fixed at the time of judicial appointment and remain static throughout the tenure of a justice. Because I am interested in how changes in ideology may impact changes in the agenda, and because there exists some empirical evidence that voting patterns do indeed change for some justices over their tenures on the bench (Epstein et al. 2007), a static measure of preferences is not the best option for my purposes.

Martin-Quinn ideal point estimates (Martin and Quinn 2002) provide a dynamic measure of judicial ideology that make it possible to account for individual level ideology, case-level majorities, or simply the Court's median ideology in a given term. Given the focus on agenda change over time, the dynamic nature of the Martin-Quinn scores make them ideal for my purposes. I measure the Court's aggregate ideology using the median on the Court during a term.[9] For the few instances in which mid-term membership change shifted the median, I use the average of the medians for that term.

Finally, I collected series designed to measure *institutional agendas* other than that of the Supreme Court. Relying on data available through the Public Agendas Project at the University of Texas[10], I compiled a count of executive orders and State of the Union speech mentions as a mea-

[9]Given the median voter theorem, it is logical to locate a measure of aggregate Court ideology at the median. But the interest here is in agenda dynamics, and the Court's agenda decisions are not governed by a majority vote, but by the "Rule of Four." This provides for the granting of *cert* if four justices agree. However, empirical evidence suggests that the justices are forward thinking in their *cert* choices (Brenner 1979; Boucher and Segal 1995). Thus the median does represents a reasonable location for a control variable measuring aggregate Court ideology.

[10]The data are available through the website of the Policy Agendas Project at the University of Texas, `http://www.policyagendas.org/`. The website allows users to specify the area of interest as well as the quantity of interest to assess.

sure of the executive agenda. Similarly, I compiled a count of congressional hearings conducted as a measure of the congressional agenda. Both of these series are issue-specific, in that they are unique to either the First Amendment or civil rights. Figures 3.3 and 3.4 show time plots of the data for each of the civil rights and First Amendment issue areas.

To asses the level of integration in the times series data, I used the `RGSER` procedure in the RATS software package. This procedure implements Robinson's (1994) method of semi-parametric estimation of the value of d for a given series. Once the d value is estimated, the `FIF` procedure filters the series by the specified value. The resulting stationary series are those used in the analyses discussed below.

Results

Below I discuss each issue area in the context of the different effect types. The models discussed herein are designed to test hypotheses 1-8 from the preceding chapter. All models testing short and long term effects are estimated via ordinary least squares.

Short Term Effects

Civil Rights

Linear models with fractionally differenced data provide a useful means of testing hypotheses dealing with term-by-term changes in the agenda. I began by estimating two "Court-centric" mod-

Figure 3.3: Time plots of the primary independent variables used in the analyses of the Supreme Court's aggregate civil rights agenda.

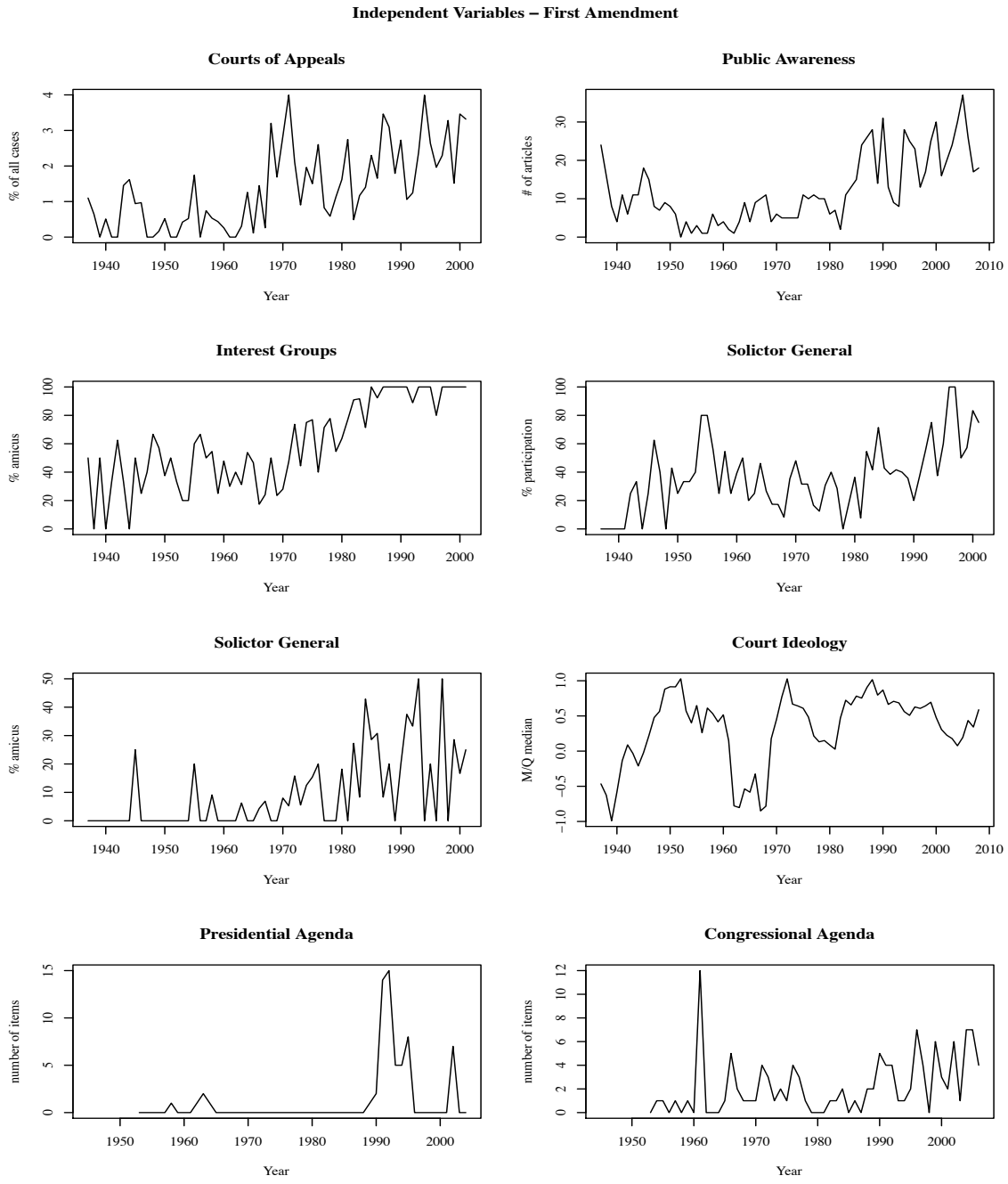

Figure 3.4: Time Plots of the primary independent variables used in the analyses of the Supreme Court's aggregate First Amendment agenda.

els of agenda change that rely solely on Court personnel to explain changes in the agenda. Table 3.1 contains the results of these models for the civil rights issue area.

Table 3.1: Court-Centric Models of Agenda Change, Civil Rights

	Model 1	**Model 2**
Variable	**Coef. / (S.E.)**	**Coef. / (S.E.)**
Median Ideology	-0.220	-1.710**
	(0.853)	(0.807)
Hughes Court	--	-6.590***
		(1.505)
Stone Court	--	-1.045
		(1.001)
Vinson Court	--	2.109*
		(1.052)
Warren Court	--	0.861
		(0.871)
Burger Court	--	2.638**
		(1.075)
Roberts Court	--	3.173
		(2.285)
Civil Rights Agenda$_{t-1}$	--	-0.262*
		(0.146)
Constant	1.540***	1.423**
	(0.479)	(0.568)
R^2	0.001	0.17
Durbin-Watson	2.16	
Durbin's H		-0.70
N	71	70

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Model 1 in Table 3.1 simply regresses change in the civil rights agenda allocation on changes in median Court ideology. Standard error estimates are clustered on natural courts. Standard techniques for estimating standard errors assume independence. Clustering the errors in this way allows

me to account for the potential relationship of observations within periods of membership stability on the Court. My expectation is that the relationship between ideology and the agenda here is negative. That is, as the median Court ideology becomes more liberal (decreasing values on the Martin-Quinn measure), the Court will allocate more agenda space to civil rights cases. Conversely, as the Court becomes more conservative this allocation will decrease. Overall, the fit of Model 1 relying solely on ideology to account for changes in agenda allocation is very poor; the R^2 value is 0.001. The Durbin-Watson statistic of 2.16 indicates a lack of residual autocorrelation. The results of Model 1 show the expected negative relationship between Court ideology and agenda allocation, however the standard error is considerably larger than the coefficient estimate. Thus I must fail to reject the null hypothesis of no effect.

Model 2 in Table 3.1 extends the basic model to include fixed effects for Chief Justice tenures on the Court. These take the form of a series of dummy variables coded 1 in terms when each individual served as Chief and 0 otherwise. I exclude the Rehnquist Court as the reference category, thus all effects are with respect to the Rehnquist Court. I also include a lagged dependent variable here to clean up autocorrelation in the residuals. Recall from the previous chapter that I expect the individual tenures to exhibit distinct effects on agenda change. This is partially because of the Chief Justice's unique ability to set the agenda via the discuss list. The fixed effects also provide a way to account for unobserved heterogeneity. Thus if some unknown, or unaccounted for, force is driving

agenda change over time, this effect will be reflected to some extent in the coefficient estimates on the Chief Justice dummies. Again, I estimated the model with the standard errors clustered on natural courts.

The results of Model 2 are decidedly different than those in Model 1. The model fit improves, with the R^2 value rising to 0.17. This is not unexpected though as the addition of the 6 Chief Justice dummies is likely to account for a large portion of the variance in the data. However the root MSE, a measure of model fit that tells us the average error in the model estimates, drops only slightly. It goes from 4.08 in Model 1 to 3.96 in Model 2. So, the dummy variables are soaking up some variance, but there is still a considerable amount of error in the model estimates. In Model 2, I use Durbin's H to evaluate autocorrelation because The Durbin-Watson statistic is not appropriate for models that use a lagged dependent variable as a right hand side variable. The tests statistic value of -0.70 suggests that I should fail to reject the null hypothesis of no authorcorrelation in the residuals.

The negative impact of ideology is still present, but is now statistically significant ($p < 0.05$). The coefficient estimate of -1.710 indicates that a one unit increase(decrease) in the Court's median ideology yields a 1.71% decrease(increase) in the Court's allocation of agenda space to civil rights cases. So, as the the Court becomes more conservative(liberal) they allocate less(more) space to civil rights as a policy area. On the current Court, Justice Kennedy is firmly ensconsed in the median

position between two more ideologically polarized groups to his left and to his right. To put the estimated effect of ideology from Model 2 in perspective, a one unit shift in the Court median is roughly equivilent to going from a the current Court with Justice Kennedy at the median to a Court with either Justice Roberts or Justice Sotomayor as the median. This is a rather sizeable shift to the left or to the right . However, it is not unprecedented. Between 1961 and 1962, the Court saw a similarly sized shift of the median in the liberal direction with the addition of Justice Goldberg to the Court. Ultimately though, what is a rather large change in the Court median does not yield a comparatively large change in agenda attention.

Some of the Chief justice dummies also show significant effects in Model 2. While the effect of Stone, Warren, and Roberts Courts does not reach significant levels, the impacts of the Hughes, Vinson, and Burger Courts all show significant effects. Because the Rehnquist Court is the excluded category, the negative impact of the Hughes Court indicates that the agenda change was significantly smaller in the Hughes Court relative to the Rehnquist Court. The opposite conclusion can be drawn fromt he positive coefficents on the Vinson and Burger dummies, which indicate significantly larger levels of agenda change relative to the Rehnquist Court.

The Court-centric approach does a reasonably good job of explaining variation in the dependent variable, but much seems to be missing. My theory suggests that several other important actors can influence agenda change on the Court. Model 3 tests the impact of these actors on agenda change

in the area of civil rights. As with Models 1 and 2, I estimated Model 3 using ordinary least squares with standard errors clustered on natural courts. Because of limitations in the data however, Model 3 is estimated only on the 1946-2001 terms of the Court.

Table 3.2: A Unified Model of Civil Rights Agenda Change, 1946-2001

		Model 3	
Variable	**Coeficient**	**(Standard Error)**	p **value**
Median Ideology	-2.255***	(0.715)	0.005
Vinson Court	0.917	(1.533)	0.557
Warren Court	-1.123	(1.166)	0.347
Burger Court	1.105	(1.406)	0.441
Congressional Agenda	0.264***	(0.058)	0.000
Presidential Agenda	0.104*	(0.052)	0.061
Solicitor General$_{t-1}$	0.026	(0.026)	0.318
Courts of Appeals$_{t-1}$	0.394**	(0.168)	0.030
Public Awareness	0.002	(0.003)	0.577
Interest Groups$_{t-1}$	-0.493***	(0.091)	0.000
Constant	2.135	(1.297)	0.116
R^2		0.40	
Durbin-Watson		2.20	
N		57	

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Overall Model 3 performs well, especially given the small N. The R^2 of 0.40 indicates that half of the variance in the data is being explained and the root MSE drops to 3.24. The Durbin-Watson statistic of 2.20 indicates that autocorrelation in the residuals is not a problem for this specification. Finally, 5 of 10 independent variables show significant effects ($p < 0.10$). The more fully specified model yields some different results for the Court-centric variables from Models 1 and 2. The impact of ideology is now much more pronounced, with a highly significant coefficient

estimate of -2.26. However, the Chief Justice dummies drop out of significance with the addition of the other variables. Figure 3.5 graphically depicts the point estimates for the variables in the model along with 95% confidence intervals.

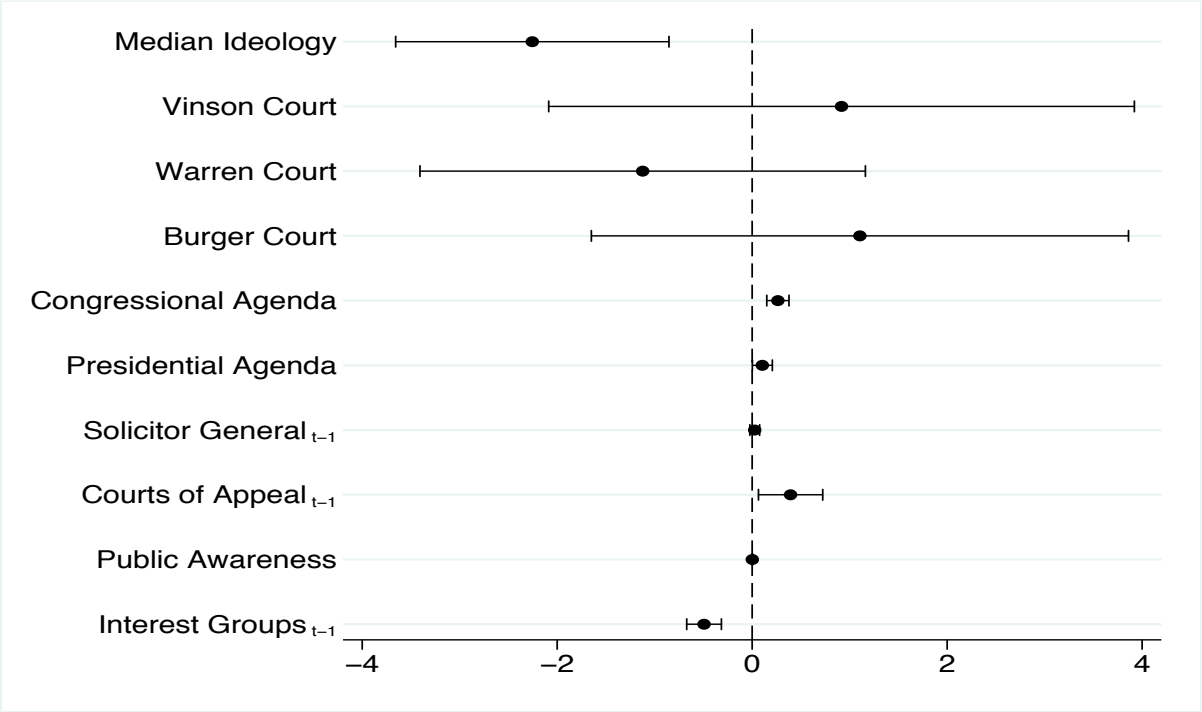

Figure 3.5: Results from Model 3 in table 3.2. The points are coefficient estimates for each of the independent variables and the bars are 95% confidence intervals.

Aside from the justices on the Court, other institutional actors influence agenda change. Both changes in the presidential agenda and changes in the congressional agenda exhibit strong, positive influence on the Court's agenda. For Congress, 5 more hearings on civil rights issues yields 1.32% more space devoted to civil rights cases on the Supreme Court. For the president, the effect is weaker but still positive. So, as both the president and Congress pay more attention to civil rights,

so too does the Supreme Court increase its agenda allocation in this area. These results support my hypothses and also lend support to the notion that the Court is addressing policy issues that are salient to the goverment as a whole.

My theory and past research also suggest that the president can influence the Court through the office of the Solicitor General. As a repeat player on the Court, the Solicitor General's office enjoys a high degree of deference from the justices (McGuire 1995; Segal 1990). My expectation was that increase attention from the Solicitor General as amicus would act as a signal to the Court of the importance the administration placed on the issue. However, the results in Model 3 do not support the hypothesis that increased attention to the issue by the Solicitor General will increase the Court's attention to the issue. While the estimated effect of the Solicitor General variable is positive as I hypothesize, it is statistically indistinguishable from zero.

To control for cases coming from the lower courts, Model 3 also contains a variable measuring the percentage of Courts of Appeals cases dealing with civil rights issues. This variable shows a strong and positive impact, as hypothesized. More specifically, for every 3 point increase in the percentage of cases at the Courts of Appeals in the area of civil rights, the Supreme Court sees a 1.18 percent increase in its civil rights agenda in the following term, *ceteris paribus*. This finding follows Hurwitz (2006) who finds a that caseloads at the Courts of Appeals are influencing the Supreme Court's agenda in civil liberties cases. Thus it seems that, with respect to civil rights

cases, accounting in some way for activity at levels in the legal hierarchy below the Supreme Court is critical to understanding what and who shape the Court's ultimate agenda allocations.

The final two variables are designed to test the impact of both "extra-legal" and "extra-institutional" forces on changes in the Court's agenda allocation. First my theory suggests that public awareness of an issue represents, to a certain degree, the level of policy importance of the issue to the public at large. That is, as an issue becomes more and more important to the public, general awareness of the issue will increase. My proxy for public awareness, a count of front page newspaper stories across three newspapers, was designed to capture this level of awareness. The estimated effect of awareness is positive as hypothesized, although the coefficient is vanishingly small and is not statistically distinguishable from zero.

A couple explanations for this result are possible. First, it may be the case that there is no impact of the public on changes in the Court's agenda. This however, goes against notions that the Court is deciding important and relevant policy questions regularly (Dahl 1957; Provine 1980). What is more probable is that the limitations in the data are too great to overcome. Any effect of the public is being missed because the proxy variable is not adequate to the task. I would hesitate to conclude that no relationship exists. Theoretically, I believe that the expectation of public influence on the Court's agenda is still valid. However, the evidence here based on the use of a proxy for public awareness suggests otherwise.

Finally, my measure of interest group influence on the changes in the Court's agenda exhibits a significant but *negative* relationship. Recall that my expectation, based on past empirical evidence, was that increasing attention from interest groups would lead the Court to take more cases in a particular issue area. My finding of a negative relationship runs counter to these past findings, but must be taken with a grain of salt.

Past work has found that increases in interest group participation as amici has increased the chances that the Court will agree to hear a case (Caldeira and Wright 1988). This finding is based on an analysis of decisions by the justices using data on amicus filings by interest groups *at the certiorari stage*. For the large time span used in these analysis, data on interest group amicus filings at the certiorari stage of the process are either unavailable or prohibitively difficult to collect. My solution was to use data on amicus filings at the merits stage (*i. e.* after a case has been added to the docket) and to lag the series by one year. The result was that amicus filings by interest groups from time $t-1$ would be used to predict agenda change at time t.

This measure is problematic in that it does not accurately capture the decision calculus of interest groups to commit resources to participation. If the justices have already agreed to hear the case, the participation of the interest groups does not carry the same signal to the justices as participation at the merits stage. The incentives are different in that participation at the merits is an overt attempt to influence ultimate policy whereas participation at the certiorari stage is simply an attempt to have a

chance to influence policy. However, my belief is that this difference is one of degree and not one of kind. That is, the signal to the justices is the same. The signal may be strong at the certiorari stage because the stakes are higher for the interest group. They could expend a great deal of resources for zero outcome. However, participation at the merits is not without cost. Participation by interest groups on the merits does indicate to the justices the degree to which interest groups view the issue as important generally. Also, evidence suggests that the justices take the information in amicus briefs very seriously (Collins 2008). Thus, a term with high levels of interest group involvement may signal to the justices that this is an issue that deserves more agenda attention.

Assuming, *arguendo*, that interest group participation as amici at the merits does carry with it a valid signal to the justices, the results in Model 3 suggest that the opposite is true. That is, a high degree of interest group involvement at the merits in the previous term leads to less agenda allocation in the next term. More specifically, if change in interest group involvement takes place at its median value of 1.86 percentage points, the Court's civil rights agenda will shrink by almost 1 percentage point in the following term. The effect of moving from the median value to the 95^{th} percentile value is even more pronounced. In that instance the Court's agenda allocation shrinks by 3.25 percentage points in the next term. This impact, along with similarly judged impact of each of the independent variables in Model 3[11] can be seen more clearly in Figure 3.6

[11] I exclude the insignifigant effects of the Chief Justice dummies from the figure.

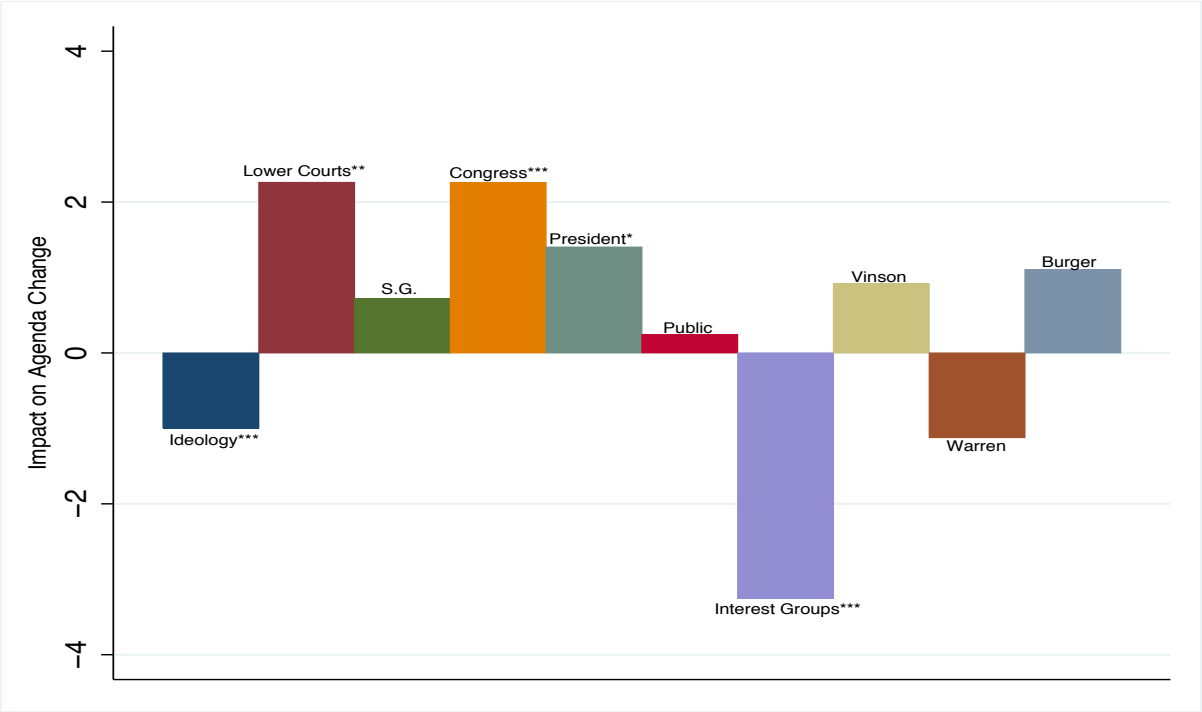

Figure 3.6: The impact of each independent variable from Model 3 when values increase from their median to their 95th percentile, holding other variables constant.

The First Amendment

My expectation is that the impacts of various actors will be different depending on the context within which they are operating. However, the theory developed in chapter 2 is general enough to account for legal change in many different issue areas. To check the robustness of the theory, I repeat the above analyses in a different issue area. Rather than civil rights cases, I focus on the Court's attention to the First Amendment. As Figure 3.2 shows, this is an issue area where Supreme Court agenda allocation has varied pretty dramatically over the terms in the data.

I begin with the "Court-centric" models described above. Table 3.3 contains the results of

models 4 and 5 focusing on changes in Court personnel as the primary predictor of agenda change. In both models 4 and 5 I include a lagged dependent variable to account for residual autocorrelation left after fractionally differencing the continuous variables. This reduces the N slightly to 68 and necessitates dropping the dummy variable for the Hughes Court as the model is only estimated on the 1940-2008 terms of the Court.

Table 3.3: Court-Centric Models of Agenda Change, First Amendment

	Model 4	**Model 5**
Variable	**Coef. / (S.E.)**	**Coef. / (S.E.)**
Median Ideology	-0.737	-0.162
	(0.825)	(0.880)
Stone Court	--	0.375
		(1.315)
Vinson Court	--	1.414*
		(0.730)
Warren Court	--	1.725***
		(0.734)
Burger Court	--	-0.036
		(0.785)
Roberts Court	--	-1.518
		(1.478)
First Amendment Agenda$_{t-3}$	0.322***	0.283***
	(0.088)	(0.092)
Constant	0.744	0.084
	(0.462)	0.550
R^2	0.12	0.19
Durbin's H	-0.006	-0.125
N	68	68

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Compared with model 1, the fit of model 4 is much better. However, much of this is due to the highly significant lagged dependent variable. The lagged dependent variable is doing a good job of

controlling any autocorrelation, as evidenced by the Durbin's H statistic of -0.006.. The coefficient for median Court ideology is in the expected direction, but the standard error is larger than the coefficient estimate. This is the case even with the help of the lagged dependent variable and the clustered robust standard errors. Thus, ideological changes alone do not account well for changes in the Court's attention to the First Amendment..

Addition of the Chief Justice dummies does little to improve the results in model 5. Again, here I exclude the Rehnquist Court as the reference category. In model 5, both the Vinson and Warren Courts show strong positive effects relative to the Rehnquist Court. This indicates that agenda change was signficantly larger in these eras than the Rehnquist era; a dynamic that is evident from the plot of the time series in figure 3.2.. As far as median Court ideology, it continues to show no effect in model 5 and none of the other Chief justice indicators are statistically significant.

The addition of the variables measuring the impact of other external actors in model 6 does little to clarify the situation. Model 6, as with model 3, is estimated using only the 1946-2001 terms of the Court. I also include a lagged dependent variable in model 6 to clean up the estimates as best as possible. In the civil rights issue area, the effects for many of the variables were strong and clear. In the area of the First Amendment however significant effects are harder to come by. Table 3.4 contains the results of the full model for the First Amendment agenda. Overall, the model does not perform particularly well. The R^2 is 0.23 and only one of the substantive independent variables is

statistically significant.

Table 3.4: A Unified Model of First Amendment Agenda Change, 1946-2001

		Model 6	
Variable	**Coefficient**	**(Standard Error)**	p **value**
Median Ideology	-0.276	(1.175)	0.817
Vinson Court	2.784**	(1.140)	0.025
Warren Court	2.774**	(1.115)	0.022
Burger Court	0.048	(0.953)	0.961
Congressional Agenda	-0.045	(0.146)	0.762
Presidential Agenda	0.130	(0.139)	0.363
Solicitor General$_{t-1}$	0.007	(0.027)	0.807
Courts of Appeals$_{t-1}$	0.981*	(0.543)	0.087
Public Awareness	0.046	(0.066)	0.493
Interest Groups$_{t-1}$	0.013	(0.046)	0.779
First Amendment Agenda$_{t-3}$	0.264*	(0.147)	0.088
R^2		0.23	
Durbin's H		-0.168	
N		57	

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The effect of Court ideology on changes in the First Amendment agenda remains negative, but the coefficient does not meet standard levels of statistical significance. The impacts of the Vinson and Warren Courts are strong, positive, and statistically significant. Again, these effects are relative to the Rehnquist Court, indicating that agenda change in the area of the First Amendment was significantly larger in the Vinson and Warren Courts than in the Rehnquist Court. This largely matches what we can see in the dynamics of the First Amendment agenda series in Figure 3.2 where attention to the First Amendment rose steadily through the 1940s and 1950s and peaked during the late Warren Court era. The effect of the Burger Court is not significant. The only other significant

predictor in the unified First Amendment model is the lower court control. The coefficient of 0.981 suggests that a one percentage point increase in First Amendment cases at the Courts of Appeals yields about a one percentage point increase in the Supreme Court's First Amendment allocation. All of the other estimates in the model are hovering at or near zero.

This is a somewhat curious result, given the relative strength of the findings for the civil rights agenda. What the lack of significant results does highlight however is that the nature of agenda change and ultimately legal change can vary dramatically by issue area. Ultimately, several thing may be holding down the analyses of the First Amendment. First, the First Amendment as a unified issue area is highly aggregated. There are several internal issues and considerations within the First Amendment where the hypothesized relationships may have come out more clearly. However the Court's First Amendment agenda overall, and especially the more specific agendas, do not exhibit a great deal of variation over the span of the data. As the civil rights analysis showed, even the statistically significant results there were substantively rather small. For the entire First Amendment, most of the variation in the dependent variable is happening in the Vinson and Warren Courts. These impacts are picked up in the model, but variation outside this time frame is relatively slight. Thus, the impacts of the Vinson and Warren Courts may be drowning out other effects.

Long Term Relationships

Having assessed several possible models of the short term impacts on agenda change in both the civil rights and First Amendment issue areas, I turn now to investigating whether any long term relationships exist in the data. For these tests, I rely on the procedure outline above due to (Pesaran, Shin and Smith 2001). This involves estimating a series of bivariate models pairing each independent variable with the dependent variable. I first test for long-run equilibrium between the independent variables of interest and the changes in the civil rights agenda and then move to relationships in the First Amendment area.

I begin by estimating the unrestricted error correction model in equation 3.5. For each independent variable-dependent variable pair I iteratively test for the appropriate lag length using the Bayesian Information Criterion and the Akaike Information Criterion. Once the lag length is determined, I estimate the model in equation 3.5 and evaluate the two critical values identified by Pesaran, Shin and Smith (2001). First, a Wald test of the null hypothesis that the effect of the lagged, level independent variable and the lagged, level dependent variable are jointly equal to zero is a test of the degree of co-integration between the variables. This tells me whether and to what degree the two series are in long-run equilibrium with one another. Second, the t-statistic on the lagged, level dependent variable gives a measure of the speed at which error correction occurs. That is, if the two series are driven out of equilibrium by some shock how quickly do they return?

This gives us some sense of the "stickiness" of the relationship over time. These test statistics are evaluated using lower and upper bounds determined by Pesaran, Shin and Smith (2001) that depend on the preferred α level and the number of lags in UECM equation. Table 3.6 displays the upper and lower bounds for both the F-statistic and the t-statistic for $\alpha < .05$.

Table 3.5: Upper and Lower Bounds for PSS procedure

k	**Lower Bound**	**Upper Bound**
	F-statistic	
2	3.79	4.85
3	3.23	4.35
4	2.86	4.01
5	2.62	3.75
6	2.45	3.61
7	2.32	3.50
8	2.22	3.39
	t-statistic	
2	-2.86	-3.53
3	-2.86	-3.78
4	-2.86	-3.99
5	-2.86	-4.19
6	-2.86	-4.38
7	-2.86	-4.57
8	-2.86	-4.72

Civil Rights

Table 3.7 contains the relevant test statistics for the test of long-run relationships. The second column, labeled k, is the number of lags used in the estimating equation. Again, this value was determined iteratively using the Akaike and Baysian Information Criteria. The third column is the

F-statistic that represents a test of co-integration between the two series. The final column is the t-statistic on the lagged, level dependent variable which is a test of the speed at which the series return to equilibrium after a shock.

Table 3.6: Co-Integration & Error Correction Tests - Civil Rights

Variable	k	**F-statistic**	**t-statistic**
Ideology	7	3.99***	-1.96
Congressional Agenda	8	4.33***	-2.89*
Presidential Agenda	8	3.65***	-2.29
Solicitor General	2	2.42	-2.04
Courts of Appeals	8	2.16	-1.91
Public Awareness	6	4.94***	-2.81

* within bounds, *** above upper bounds

Overall, I find strong evidence of co-integration between my independent variables of interest and my dependent variable. All of the Wald tests except those on the Solicitor General and Courts of Appeals variables yield significant F-statistics. Estimating equation 3.5 using the ideology series and the agenda series at 7 lags yields an F statistic of 3.99. This is well above the upper bound of 3.50 ($\alpha < 0.05$). Thus, I can confidently conclude that ideology and the civil rights agenda are in long run equilibrium. How fast do they return to this equilibrium after a shock? The t-statistic on the lagged agenda series of -1.90 suggest not very quickly. The bounds at 7 lags and $\alpha < 0.05$ are -2.86 and -4.19, so the t-statistic observed here falls well below the lower bound. This suggests that the long-run equilibrium between ideology and the civil rights agenda is fairly fragile and any error correction that is taking place is happening very slowly, if at all. So, while

there is a strong relationship in the short term between Court ideology and the civil rights agenda, it appears that shocks from other variables or sources can dislodge the two series from equilibrium with considerable success.

The result of testing the long-run relationship between the Supreme Court's agenda and the presidential agenda yields similar results. Here, equation 3.5 is estimated using 8 lags. The resulting F-statistic on the test of the λ_3 and λ_4 parameters is 3.65. This is above the upper bound of 3.39 ($\alpha < 0.05$). Here, as with ideology, I can conclude that the two series are indeed co-integrated and there exists a long-run equilibrium relationship between them. This result, coupled with the strong positive result on the presidential agenda variable in model 3, suggest that the president's agenda and the Court's agenda are closely related in the area of civil rights, both in the short term and over time. The t-statistic of -2.29 testing for error correction between the two series is below the lower bound for significance. The value is close however and does suggest that a minimal amount of error correct may be taking place.

The results in table 3.8 suggest that the results from model 3 testing short term relationships do indeed translate into the long term. However, it appears that the equilibrium relationships I have found are rather fragile. I found no evidence of significant error correction in any of the bi-variate tests. That is, even though strong co-integration exists between the civil rights agenda and four of the six variables, this equilibrium tends to be rather fragile and does not correct from a shock very

quickly. Only the Courts of Appeals series has an error correction test statistic that falls between the lower and upper bounds. Pesaran, Shin and Smith (2001) recommend that this result be treated as inconclusive. However, taken as it is, this result suggests that that if a shock drives the two series out of equilibrium, about 44% of that shock is re-equilibrated in the following term, and other 44% in the next term and so on. Thus the Court's attention to civil rights seems to be *very* closely related, in the long term, to the degree to which Congress is attending to the issue.

It is notable here too that I find evidence that the Court's agenda is in long-run equilibrium with the level of public awareness. This is a result that does not follow from model 3. There I found no evidence of a short-term relationship between changes in public awareness and changes in the agenda. However, examining the relationhsip over a considerable time span shows that the two series are connected in the long term. It suggests that the Court's attention to civil rights is being driven in part by a connection between the Court and the public. As with the other series however, I find no evidence of significant error correction. Again though, the t-statistic for the awareness series comes close to the bounds for significance but is ultimately below the lower bound providing no definitive evidence of error correction.

In general, the results for the civil rights series suggest that there are significant long-run relationships between the Court's agenda and some of the identified actors in the model. This is in line with the strong results found in the short term as well. However, the lack of strong error correc-

tion also suggests that these equilibrium relationships are not very sticky and that the equilibriums can be dislodged for an extended amount of time by shocks to either series. Next I discuss testing equilibrium relationships in the First Amendment context.

The First Amendment

Table 3.8 contains the relevant test statistics for testing for long-run equilibrium between each of the independent variables and the First Amendment agenda. As is evident from the table, only the courts of appeals series shows significant evidence of being in long-run equilibrium with the Court's First Amendment agenda. This follows from the short-term results as this was the one variable with a consistent and strong effect. The F-statistics for the presidential agenda and public awareness series fall within the critical bound but are ultimately inconclusive. These should not be entirely dismissed however. Recall that the data for the short term tests were considerably noisy and that it was only after accounting for substantial residual autocorrelation that many of the relationships revealed themselves. Here we see some evidence that the Court's agenda on the First Amendment is in equilibrium with both the president and the public. Test of all other variables yield statistics that cause me to fail to reject the null hypothesis of no equilibrium relationship.

Similarly, tests for error correction all fail to reach the critical lower bound. As with the civil rights agenda, it appears that any equilibrium relationships that exist are rather fragile. There are two likely explanations for the lack of results in table 3.8. It is either the case that the data are too

Table 3.7: Co-Integration & Error Correction Tests - First Amendment

Variable	k	F-statistic	t-statistic
Ideology	4	2.30	-2.14
Congressional Agenda	2	1.76	-1.81
Presidential Agenda	7	3.32*	-2.51
Solicitor General	2	2.39	-2.13
Courts of Appeals	8	3.87***	-2.00
Public Awareness	2	4.49*	-2.57
Interest Groups	2	2.50	-2.14

* within bounds, *** above upper bounds

noisy for these effect to come out, or there are no strong long term relationships to be found. The small n and the disparity in the findings between model 6 and model 7 lead me toward a tentative conclusion of the former.

Alternative Models of Agenda Change

There is some evidence in the literature that the Court's agenda actually impacts some of the factors that I am measuring and testing for in this chapter. For example, some research has found that the Court's attention to an issue can subsequently influence the public's attention to that issue (Flemming, Bohte and Wood 1997; Hoekstra and Segal 1996). Similarly, there is some evidence to suggest that the Supreme Court's agenda can influence litigants and shape the workload of the lower courts (Cameron, Segal and Songer 2000; Epstein and Kobylka 1992). As a check on the robustness of the short term tests discussed above, I re-estimated models 3 and 6 as Seemingly Unrelated Regressions. This technique allow me to simultaneously estimate my original model,

while also specifying any of the independent variables as functions of other predictors. It also insures that the estimates in the original model are efficient in the face of possible endogeneity (Enders 2004).

My data are limited. Estimating this type of model places considerable demands on the data and, with the limits with which I am working, I concluded that simply specifying the independent variables as a function of the dependent variable was the limit of my comfort with these demands. I am not concerned about the enodgeneity of the variables included in the original model at one lag, as these variables are by definition exogenous. Therefore, I estimate separate regressions only for the public awareness, congressional agenda and presidential agenda series. Table 3.9 contains the result of the estimation for the civil rights agenda.

The results presented in table 3.9 suggest that there may be a degree of reciprocal causation in the model of agenda change presented earlier. Within the primary model, coefficient estimates and standard errors remain largely unchanged from model 3. In terms of sign and significance, all other variables are the same. The two equations measuring the impact of the *Court's* agenda on the other institutional agendas show that the Court is having a positive, significant effect.

Both the presidential agenda and the congressional agenda seem to be driven in part by the Court's agenda. Often times, analyses of these dynamics are framed as an “either/or” proposition. However, the results presented above suggest that the Court's agenda may be simultaneously giving

Table 3.8: Seemingly Unrelated Regressions, Civil Rights

		Model 8	
Variable	**Coefficient**	**(Standard Error)**	**p value**
Primary Model			
Median Ideology	-1.676*	(0.995)	0.092
Vinson Court	0.681	(1.375)	0.620
Warren Court	-0.834	(1.276)	0.513
Burger Court	0.821	(1.045)	0.432
Courts of Appeals$_{t-1}$	0.293**	(0.146)	0.045
Solicitor General$_{t-1}$	0.019	(0.028)	0.483
Congressional Agenda	0.440***	(0.073)	0.000
Presidential Agenda	0.156***	(0.055)	0.005
Public Awareness	0.006	(0.005)	0.248
Interest Groups$_{t-1}$	-0.367***	(0.132)	0.005
Congressional Agenda			
Civil Rights Agenda	0.887***	(0.166)	0.000
Constant	-1.129	(0.703)	0.108
Presidential Agenda			
Civil Rights Agenda	0.422*	(0.232)	0.069
Constant	1.406	(0.956)	0.141
Public Awareness			
Civil Rights Agenda	1.551	(2.437)	0.525
Constant	0.297	(10.012)	0.976
N		57	

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

and receiving influence with respect to the other branches of government on the topic of civil rights. This fits with a conception of the Court as situated within a larger framework of legal and public policy creation and maintenance. The notion that agenda change my be driven partially by forces external to the Court and that the Court is simultaneously influencing these other actors fits well into my broader theory of legal change.

Table 3.10 contains the result of re-estimating model 6 above using Seemingly Unrelated Regressions. Again, I only specify separate equations for the congressional agenda, the presidential agenda, and public awareness.

Table 3.9: Seemingly Unrelated Regressions, First Amendment

		Model 9	
Variable	**Coefficient**	**(Standard Error)**	p **value**
Primary Model			
Median Ideology	-0.274	(1.077)	0.799
Vinson Court	2.769*	(1.599)	0.083
Warren Court	2.759*	(1.494)	0.065
Burger Court	0.047	(1.116)	0.966
Courts of Appeals$_{t-1}$	0.975*	(0.516)	0.059
Solicitor General$_{t-1}$	0.007	(0.034)	0.842
Congressional Agenda	-0.040	(0.176)	0.822
Presidential Agenda	0.179	(0.177)	0.313
Public Awareness	0.060	(0.073)	0.411
Interest Groups$_{t-1}$	0.013	(0.030)	0.664
First Amendment Agenda$_{t-3}$	0.262**	(0.125)	0.018
Congressional Agenda			
First Amendment Agenda	0.008	(0.091)	0.930
Constant	1.035***	(0.322)	0.001
Presidential Agenda			
First Amendment Agenda	0.074	(0.098)	0.451
Constant	0.085	(0.349)	0.807
Public Awareness			
First Amendment Agenda	0.134	(0.228)	0.577
Constant	-0.151	(0.806)	0.850
N		57	

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The results of estimating the four equations simultaneously largely mirror those in model 6. I find no evidence of reciprocal causation between the agenda series and any of the three tested

variables. The effect of the presidential agenda does come out a bit more using the more efficient estimation technique. However, the estimates for the primary model remain almost unchanged.

Summary of Results

Above I test for two distinct types of relationships in the context of the Court's agenda setting. In the short-term, my models of agenda change allow me to investigate relationships that exist between agenda change and the changing behavior of other important actors in the legal and political process. However, the tests of co-integration and error correction performed above allow me to make conclusions about another type of relationship. Because these tests evaluate the *bivariate* relationship between the Court's agenda and other actors, these effects speak more to the overall institutional position of the Court in American politics. For instance, a strong effect for median ideology in the short term tells us that changes in personel the Court and shifts in the Court's median position will have an effect on the shape of the agenda in a specific issue area. However, evidence that ideology the agenda trend together over time suggests a much deeper relationship between ideology and the justices preferences and the Court's agenda allocations.

In the models above, I find strong support for the hypothesis that liberal Courts will hear more civil rights cases. I also find that ideology and the civil rights agenda exist in long-run equilibrium with one another. However, I find no evidence of an effect for ideology in the First Amendment

context. Jurisprudence in both of these areas is changing constantly. Recently, conservative majorities on the Court have co-opted the traditional tool of liberal Courts by striking down affirmative action laws using strict scrutiny. Similarly, the traditionally liberal area of First Amendment protection (Epstein and Segal 2006) has been expanded to include corporations, with commercial speech the likely next move. Thus, the connections we see now may be different when future cases and terms are considered.

I also find strong evidence, across all contexts, that Courts of Appeals activity is influencing the Court's agenda and that this relationship exists in the long-term as well. Again, I interpret these long run effects as evidence that the position of the Court in a larger legal system is influenced by activity at the Courts of Appeals. While the year-to-year changes may fluctuate, the impact over time remains. I also find no evidence that the influence is moving in the other direction. This conclusion is in line with work by Hurwitz (2006) who also found the direction of causation to be flowing from the Court to the lower courts and not the other way around.

With respect to other institutional actors in the government, I found that the presidential agenda and the congressional agenda play significant roles in shaping the Court's agenda in the civil rights context. However, I also found some evidence that suggests that these relationships travel in the other direction as well. While my initial hypotheses were with respect to the influence of the other branches on the Court, I believe that the finding of reciprocal causation fits into my broader

conception of the Court and legal change laid out in chapter 2. In the First Amendment context, I found no evidence of a relationship between the Court's agenda and Congress, but there was some indication that the presidential agenda is influencing the Court's in the short term. Also, I found some support for the hypothesis that these series are in long-run equilibrium. Conversely, I found no evidence that the activity of the Solicitor General in the previous term had any influence on the Court's construction of its agenda; either in the civil rights or First Amendment contexts.

Finally, in the civil rights area I found evident that an increase in the percentage of cases waning attention from interest groups in the preceding term negatively impacts the Court's agenda in the following term. This suggests that the Court may be scaling back its attention after a considerable number of highly relevant (to interest groups) cases were decided in the previous term. This dynamic fits with suggestions made in past work that the Court tries to space out its policy defining cases to avoid the appearance of excessive activism (Epstein and Knight 1998; Pacelle 1991; Perry 1991).

Conclusion

What do the results in this chapter tell us about legal change and development. Although it is not a new claim, understanding agenda setting on the Court is critical to understanding how the law changes. The nature of the *certiorari* process and the institutional features of the Court allow

for input from many different policy entrepreneurs. These actors all what to shape policy in their favor, and thus have a stake in the outcomes that the Court ultimately produces. Influencing the allocation of limited agenda space is the first step in the process of influencing the shape of law and policy.

My findings also lend considerable weight to my theoretical argument about the endogeneity of legal outputs on the Court. Many of the hypothesized relationships exist in the short term, when looking at term by term changes in the Court's agenda allocation, but also in the long term when viewing the strength of the equilibrium relationship between the Court's agenda and other variables. This suggests that the theory is actually capturing multiple dynamics and that the policy entrepreneurs identified in the theory are influencing the Court's agenda consistently over time. This over-time influence over the agenda necessarily translates into influence over the law.

Chapter 4

Measuring Public Opinion on Specific Issues

Specifying the explicit mechanism connecting Supreme Court outputs and public opinion has been an difficult endeavor for researchers. Marshall (1989) posits no fewer than 12 possible models connecting the Supreme Court with the public, though he ultimately rejects many of them. In the Supreme Court decision making literature, scholars seek to show a direct connection between public opinion and the votes of the justices (McGuire and Stimson 2004; Mishler and Sheehan 1993; Stimson, Mackuen and Erikson 1995), with mixed results (Norpoth and Segal 1994). The difficulty these scholars face is largely due to equating votes and case outcomes with policy outcomes. As is argued briefly in chapter 2, equating these two concepts leads to a less than accurate conception of the manner in which the law operates as an institutional mechanism. One may not expect a Supreme

Court justice to choose a winning or losing litigant based on anything other than their preference for who ought to win or lose.[1] However, outside considerations are more likely to come into play in the manner in which these choices become policy.

To that end, chapter 5 contains empirical tests of hypotheses relating to the the Court's doctrinal positions. These hypotheses are derived from the theory of legal change outlined in chapter 2. One aspect of this theory is that public opinion and public sentiment about a certain issue will influence the nature of legal change on that issue. Specifically, I hypothesized that the public will influence both the Court's allocation of agenda space and ultimately its written output. To adequately test hypotheses relating to the Court's written output, I need measures of aggregate public opinion that are specific to certain issue areas in the Court's jurisprudence. This chapter is dedicated to discussion of the need for these measures as well as description of the process by which they were constructed.

The Role of Public Opinion on the U.S. Supreme Court

Theoretical interest in the relationship between the public and the Supreme Court is rooted in the countermajoritarian difficulty (Bickel 1986). The Supreme Court is an unelected, largely unaccountable body that is designated as the court of last resort on matters pertaining to federal

[1] There are theoretical arguments on either side of this question, but the overwhelming weight of empirical evidence suggests that justices base vote choice primarily on their personal preferences.

law. As a branch of the federal government, the Supreme Court and the federal judicial system operate outside the normal scope of representation. Judges and justices in the federal system are not beholden to constituents for reelection nor can their employment credibly be threatened.[2] However, "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now." (Bickel 1986, 17) Thus, the Supreme Court's exercise of its prerogative of judicial review may generate a tension between the Supreme Court and public sentiment. This is by design, as one of the important roles of the federal courts and the Supreme Court in particular is to act as a safeguard of minority rights against the "tyranny" of majority rule and to keep the legislative and executive branches from acting outside of the powers granted to them by the people through the Constitution (see *e. g.* Hamilton, *Federalist No. 78*). It may seem that judicial review creates a situation where the Court has excessive authority over the other branches, but the Court's lack of a mechanism to properly enforce its decisions creates a balance in this natural tension. The Court must rely on its legitimacy in the eyes of both the public and other institutional players for its decisions to shape policy. They thus have much incentive not to stray too far from public sentiment on particular issues.

If this is the case, how does the Court retain its legitimacy? One possibility is that the justices behave strategically when constructing their opinions (Casillas, Enns and Wohlfarth 2011; Epstein

[2]But see, Clark (2009*b*), who presents a theoretical argument along with empirical evidence that suggests the Court's behavior is impacted by "Court curbing" efforts by Congress, and that the extent of this constraint is influenced by public perceptions of the Court.

and Knight 1998; Murphy 1964). Under this perspective, the justices on the Court are aware of and influenced by the preferences and behavior of other relevant actors. Although systematic empirical evidence of strategic voting by justices is mixed (see Segal 1997, but see Clark 2009), strategic behavior by the justices in decisions surrounding the opinion writing process is more likely (Friedman 2009). By crafting opinions that do not stray too far from the views of the public and of other institutional actors, the Court is able to operate without arousing the ire of those on whom it depends for power.

The Public Mood

The primary measure for scholars interested in connecting macro level public sentiment with the Supreme Court is due to Stimson (1999) (see *e. g.* Best 1999; Flemming and Wood 1997; Giles, Blackstone and Vining 2008; Mishler and Sheehan 1996). Stimson's measure of aggregate "public mood" is designed to "capture the idea of changing general dispositions" (20) in public opinion. It thus provides a useful measure of aggregate public sentiment and a way to account for changes in mass opinion over time. Stimson's measure is created using factor analysis of survey marginals over time to generate a yearly value on a liberalism index. This annual value represents the mood of the public, and changes in this value represent aggregate shifts in public sentiment.More specifically, Stimson collects survey marginals on a wide variety of policy questions. Each question, repeated

over time, represents a "series". He then scales the different series such that they represent comparable values over time. The rescaled series are then factor analyzed to produce an annual measure of policy mood shown in figure 4.1.

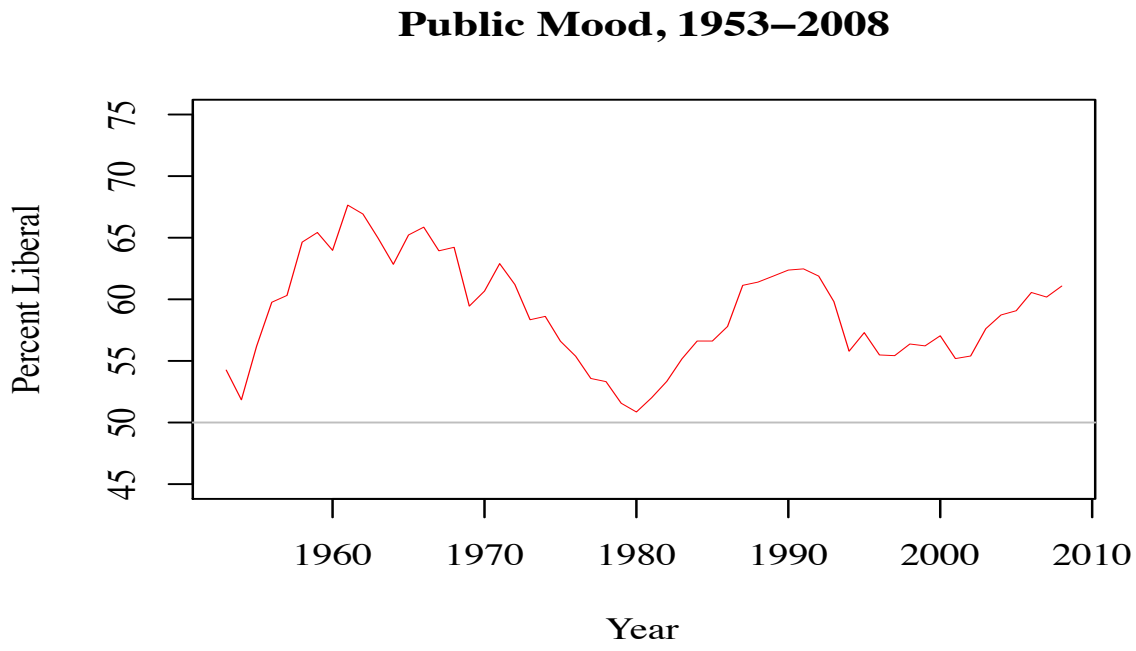

Figure 4.1: Stimson's measure of aggregate policy liberalism, by year.

Stimson draws on survey responses over a wide array of policy issues. These include health issues, military spending, the size of government, race and civil rights, the environment, and crime and civil liberties. His measure thus ostensibly represents a measure of aggregate policy attitudes about salient issues.[3] Over time, Stimson finds no evidence of a relationship between mood and

[3]Stimson assumes that the decision by polling firms to ask questions about certain issues is randomly distributed based on the salience of these issues to the public. This assumption allows Stimson to ignore the potential bias in the measure toward issues addressed more frequently (Best 1999). The accuracy of this assumption is certainly ques-

partisanship, but he does find that, when accounting for incumbency and marcropartisanship, mood is a strong predictor of the Democratic share of the two party vote in presidential elections. Similarly, the outcomes of congressional election follow patterns that map onto the mood measure fairly well. Although, Stimson is careful not to draw too firm conclusions from the results of his statistical analyses.

While scholars have been quick to adopt the public mood measure as a standard for aggregate policy preferences, it is not without its limitations. As Best (1999) notes, the assumption made by Stimson that policy salience is reflected in the polling houses' choices to ask questions about a particular issue is questionable. The result is that Stimson's measure tends to be biased in favor of sentiment reflected in the questions that are asked most frequently. Best notes that these are government spending questions and thus proposes an alternative measure that captures the multi-dimensional nature of public mood across government spending issues but also social issues as well. Best's analysis is useful for my purposes here not because it produces an alternative measure of public mood, but because it points out a flaw in Stimson's measure upon which I am able to capitalize.

By its very nature, Stimson's measure is designed to capture aggregate public sentiment over a *wide* range of issues. The extent to which this is the cases is a debatable empirical question. Best's

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tionable, and Best shows that a more accurate gauge of salience in the aggregate is the Gallup poll question asking respondents to state what they think is the most important problem facing the nation.

criticism notes that the estimation procedure used by Stimson will necessarily bias the estimates toward issues that are more represented in the set of survey questions used to generate the measure. Regardless of the degree to which Stimson's measure accurately represents the range of salient issues, it is clear that this measure is too general to use as a proxy for public sentiment about a *particular* issue. However, by compiling series addressing a single issue, it is possible to use Stimson's algorithm to generate measures of aggregate public mood that are issue-specific.

Issue Specific Measures of Public Opinion

My interest in issue specific measures of public opinion has to do with an interest in the relationship between the Court's written outputs and pubic opinion. Past empirical work has focused on the votes of the justices, but has not looked closely at how public opinion may influence the written opinions of the Court (but see Marshall 1989). My theory suggests that the public's views on a particular issue may shape the content of the Court's written opinions by moving Court doctrine closer to public sentiment. In particular, the Court's desire and need for legitimacy creates incentives for the justices to shape the written policy proclamations in their opinions to comply with the views of the general public. In the next chapter, I present empirical tests of my theory in the context of the Court's written opinions. Specifically, I am interested in investigating the relationship between important policy entrepreneurs and the ideological positioning of Court doctrine in the areas of

civil rights and the First Amendment. To test the influence of public opinion, I need measures of aggregate public sentiment, over time, that are specific to the issue area under consideration.

Civil Rights Mood

The first step in creating an issue-specific measure of public mood is to adequately define the issue. Cases for the opinion analyses in chapter 5 and the agenda analyses in chapter 3 were selected using the U.S. Supreme Court Database's issue coding. The database provides documentation regarding which types of cases fall into the broader issue codes, so as a starting point I recorded all sub-issues within the broader civil rights issue. These include topics as obvious as equal protection claims and housing discrimination as well as less obvious categories such as Indian rights. The underlying connection for the database coding of civil rights cases is that the case must involve the unequal (or potentially unequal) treatment of an individual or group based on some classification (*i. e.* race, gender, age, alienage, etc.). Specifically, the civil rights category in the Supreme Court Database contains, "non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage." (Spaeth et al. 2011)

Armed with these somewhat general topics I began by formulating a list of possible sources of questions. Given my reliance on Stimson's technique, I began with the list of question sources provided by him in the appendix of *Public Opinion in America* (Stimson 1999). These include the

General Social Survey, the American National Election Studies, and various polling houses such as Gallup and CBS News. I then began compiling series, or questions repeated over time, that pertained to the civil rights issue as defined.[4]

I began with the General Social Survey (GSS). As a data source for this endeavor, the GSS is rather unique in that it tends to ask identical questions over time. Thus, if you find a question that has been asked many times, the odds are that the language is identical or close to identical over the entire time span. This is important because the data collection and calculation of mood measures can require a small degree of subjective grouping of different questions within series. That is, if two questions are designed to capture the same sentiment but with slightly different wording they can often be included in the same series. The key is to ensure that the underlying concept addressed by the questions are as close to identical as possible. Minimizing this subjectivity is, of course, optimal. Thus the GSS is a useful place to start building series. In all, I collected 15 different series from the GSS spanning the years 1974-2008.

Next, I examined the American National Election Study (ANES). Like the GSS, the ANES tends to ask questions similarly over time. However, its coverage of social issues like civil rights is not as extensive as that found in the GSS. Indeed, the ANES coverage of civil rights issues like racial equality and gender equality is primarily centered on the years when these issues were

[4]The appendix contains a list of all questions collected for both the civil rights and First Amendment measures, their source, and the dates used.

salient in national elections. In all, I collected 8 different series from the ANES spanning the years 1962-2004.

To supplement the series collected from these two primary sources and to generate data for the earlier years of interest, I relied on iPoll. iPoll is the searchable database of surveys and survey questions housed at the Roper Center for Public Opinion Research at the University of Connecticut. iPoll's search functionality allows users to specify key words, general topics and specific data ranges. To begin, I searched by each of the 40 sub issues lists within the broader civil rights issue coding the the Supreme Court database. I then used small variations in wording to expand my search outward. In total, my search efforts yields 9 series over several different polling houses spanning the years 1953-1987.

For all surveys, the liberal response(s) was recorded as the input value for algorithm. Thus, the resulting factor scores should measure policy liberalism in the area of civil rights. The measure was computed using software developed by Stimson entitled `wcalc5`. The software takes a tab delimited text file as input with four columns of data: a series indicator, the date of the survey, the marginal, and n of the survey. Each row in the file is an instance of a particular survey, and "series" are simply clusters of rows.

Figure 4.2 displays a plot of the yearly measure of civil rights mood from 1953-2009 as calculated using Stimson's software. Interestingly the low point in the series comes in the middle 1950's,

right about the time of the Court's decision in *Brown v. Board of Education*. After a slight increase through the early 1960's the series levels off at around 50% for much of the Nixon and Ford administrations. Beginning in the middle 1970s, the series begins what appears to be a consistent and monotonic move upward indicating a persitent liberalization of public sentiment about matters of civil rights and equality. Interestingly again, the first major drop in civil rights mood since the late 1970s occurs in the early 2000s; right around the time of the attacks on New York City and Washington and the beginning of the United States' "War on Terror." The largely upward trend in the series follows with Gallop's observation that public attitudes toward racial and gender equality have been steadily liberalizing (Newport, Moore and Saad 2009).

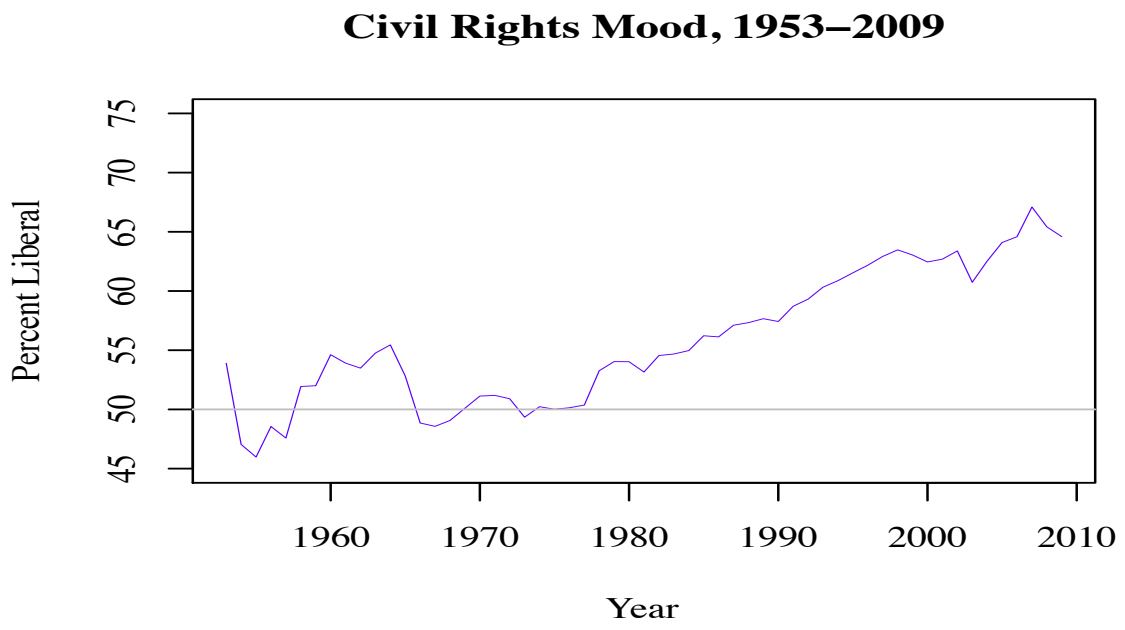

Figure 4.2: Aggregate policy liberalism on civil rights, by year.

One way to assess whether the measure is adequately capturing the underlying mood is by viewing the factor loadings on the individual series and the eigenvalue estimate of the estimated dimension. For my civil rights model, the average of the absolute value of the factor loading across all series in the data is 0.80037, indicating strong correlation between my series and the underlying sentiment. Relatedly, the eigenvalue estimate of my estimated dimension is 3.73 out of a possible 5.43, indicating that almost 69% of the variance in the data is explained by the single factor. In contrast, the 1st dimension of Stimson's mood measure only explains about 27.4% of the variance in his data. Thus, I conclude that my focused search for survey marginals has yielded a valid measure of civil rights sentiment over time.

Figure 4.3 plots civil rights mood overlaid with Stimson's "global mood." Here we can see where the major differences in the measures obtain. First, civil rights mood does not experience the same major swings as the global mood measure. Indeed, for much of the first 30 years, the civil rights mood measure hovers at or around 50%. Both measure begin to rise after about 1980, with the global measure moving more rapidly upward. However, global mood exhibits another move in the conservative direction around the beginning of the Clinton administration whereas civil rights mood continutes its upward tradjectory.

Perhaps a more accurate way to compare the measures is to plot their difference. This is calculated by simply subtracting the global mood measure from the civil rights measure. Negative

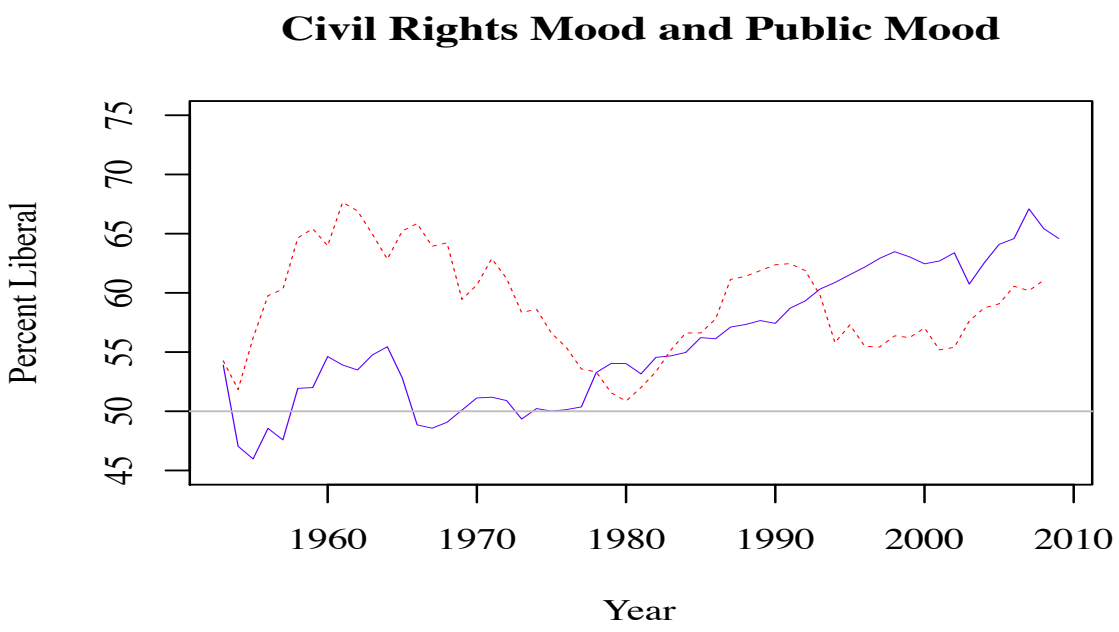

Figure 4.3: The solid blue line is aggregate civil rights mood and the dashed red line is Stimson's global policy mood.

values indicate years in which global mood is more liberal whereas positive values indicate years in which civil rights mood is more liberal. Zero, of course, indicates no difference between the series. As figure 4.4 shows, the series differ substantially over time. As is evident from the graph, civil rights mood was considerably more conservative than the global mood up until the late 1970s, then again through much of the 1980s and early 1990s. It is not until the drop in liberalism in the 1990s for global mood and the continuing rise in liberalism of civil rights mood, that the later become significantly more liberal than the former.

What is evident from figures 4.2, 4.3, and 4.4 is that the civil rights mood is fundamentally

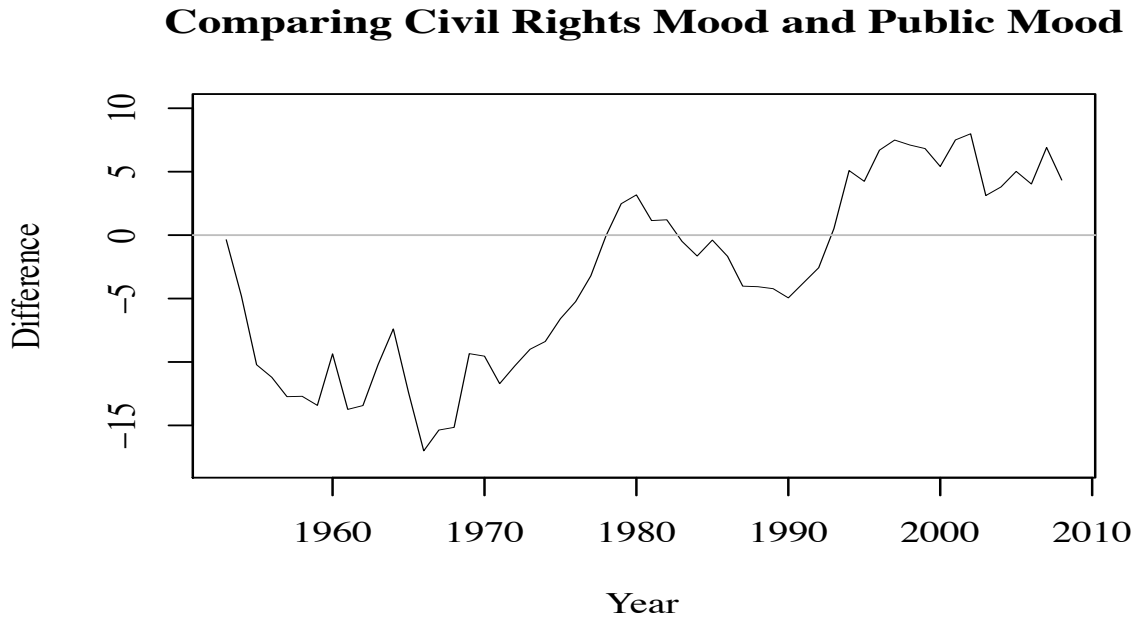

Figure 4.4: Negative values represent years in which global public mood was more liberal than civil rights mood. Positive values indicate years in which the opposite was true.

different than the global public mood. While they do follow similar dynamics at certain points in the data, they also differ substantially over much of their spans. I am further encouraged by the fact that the mood measure seems to track well with evidence of racial equality and gender equality attitudes from Gallop over time. While it is true that Gallup polls do make up part of the civil rights mood measure, this was far from the modal data source. Thus, I am confident in the general validity of the civil rights mood measure.

First Amendment Mood

The procedure for constructing the First Amendment mood measure was identical to the above described. I began with the issue sub-codes from the United States Supreme Court database and the General Social Survey. The GSS contains several questions that pertain to First Amendment freedoms such as free speech and freedom of religion. In all, I collected 22 series from the GSS spanning the years 1974 to 2008. The American National Election Study was much less fruitful with respect to the First Amendment issue area. Here I was only able to find one useful series on school prayer ranging between 1964 and 1998. iPoll yields significantly more results for the First Amendment issue area than for the civil rights issue area. I was able to fill in the data with 15 more series from various polling houses and organizations. These series range in years from 1953 to the 2009. Figure 4.5 displays the annual estimates of First Amendment mood. As with civil rights mood, the First Amendment mood measure has generally strong factor loadings and the eigenvalue estimate of 5.03 out of 7.63 suggests that almost 66% of the variance in the data is explained by the single estimated dimension.

As the figure shows, First Amendment mood never dips below the 50% mark on the liberalism scale; although it does exhibit quite a bit of variation over the span of the data. This may be an indication of the complex way that the First Amendment is viewed in the United States. On the one hand, there seems to be almost universal reverence for the underlying freedoms protected by

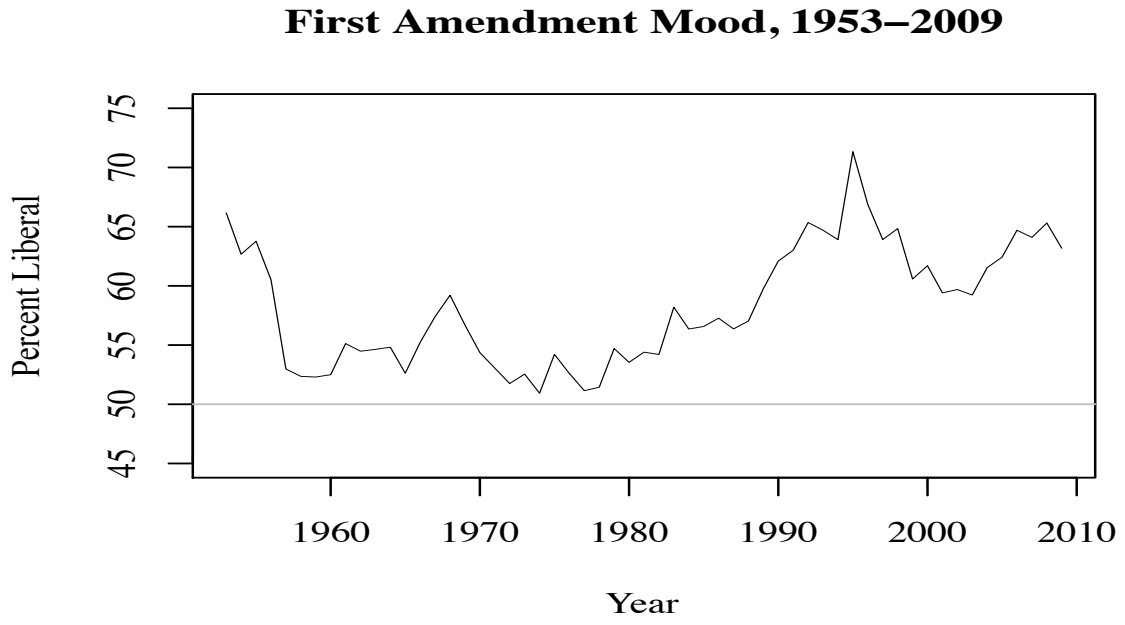

Figure 4.5: Aggregate policy liberalism on the First Amendment, by year.

the First Amendment. On the other hand, there seems to be quite a bit of disagreement about how and to what extent these freedoms ought to be protected. So, when we see in figure 4.5 a realtively high level of liberalism over time this may be an indication of the support for the First Amendment *per se*. However, disagreement over the nature of these rights and the manner in which they should be protected is reflected in the variation in the series around the mean value.

Another interesting point about the First Amendment mood series is it seems to track fairly closely with the Cold War. Looking at figure 4.5, the First Amendment mood is relatively high at the beginning of the series but drops rather precipitously during the middle 1950s. This coincides with the height of the "Red Scare" and fears in the U.S. over nuclear war with the Soviet Union.

Aside from a small rise in liberalism in the late 1960s, the First Amendment mood does not begin a major move in the liberal direction until the 1980s. It does not reach its peak liberalism until the fall of the Soviet Union and the end of the Cold War in the early 1990s. This provides some evidence that public sentiment toward civil liberties like those protected by the First Amendment may be influenced by foreign policy and military considerations like war. However, the rise in First Amendment mood in the early part of the 21st century seems to work against that conclusion.

Comparing First Amendment mood with the global public mood provides more insight into the differences between the two measures. Figure 4.6 plots the two series in the same graph; the dashed red line is global mood and the solid black line is First Amendment mood. While some of the dynamics are similar across the two series, there are major differences as well. As with the civil rights measure, the relative liberalism of the global public mood from the mid 1950s to the mid 1970s is not matched by the First Amendment Mood. This is likely a reflection of Stimson's reliance on spending more than social issues as the basis for his measure. Both the global mood and the First Amendment mood become more liberal after 1980 but that increase continues into the mid 1990s for First Amendment mood whereas global public mood begins to get more conservative after the start of the first Clinton administration.

Figure 4.7 plots the difference between global mood and First Amendment mood. As with figure 4.4, negative values indicate years in which the global mood was more liberal than First Amendment

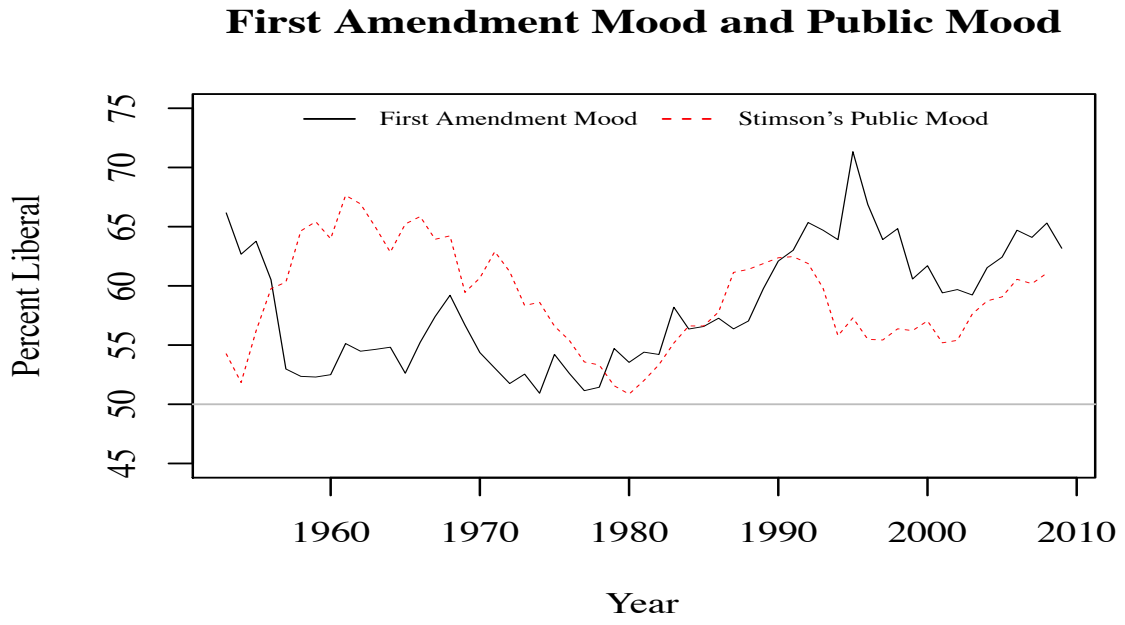

Figure 4.6: The solid black line is aggregate First Amendment mood and the dashed red line is Stimson's global policy mood.

mood. Figure 4.7 reveals some very similar dynamics to those seen when comparing civil rights mood with global public mood.[5] Again, First Amendment mood is considerably more conservative than the public mood for much of the early years of the data. This difference steadily decreases through the 1970s and little difference between the series exists from the late 1970s through about 1990. At that point the series again diverge, this time First Amendment mood becoming more liberal than the global mood.

[5]This is not surprising given that my two measures are correlated rather strongly ($r = 0.87$) while there is a lack of a strong correlation between either of my measures and the global public mood.

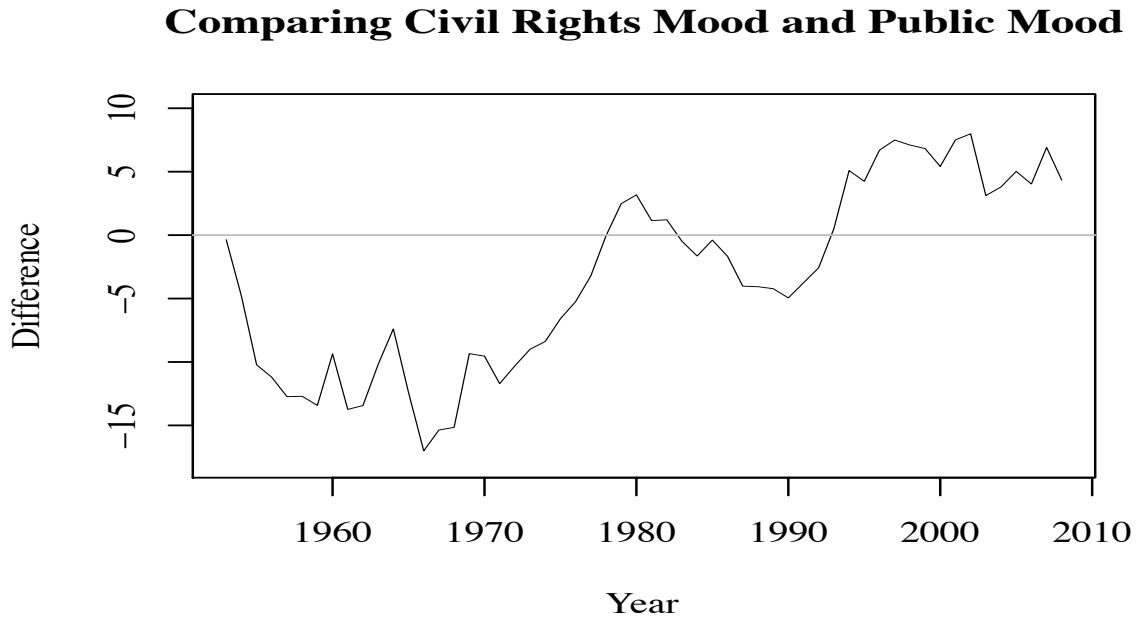

Figure 4.7: Negative values represent years in which global public mood was more liberal than First Amendment mood. Positive values indicate years in which the opposite was true.

Conclusion

In all, the above review provides some interesting conclusions. First, measuring public sentiment on specific issues allows for testing of the impact of public opinion on the Supreme Court in new ways. The relationship between the public and the Court and the extent to which the justices are impacted by public sentiment is a debate that is still ongoing in the literature (Casillas, Enns and Wohlfarth 2011). One important finding from this research is that public opinion seems to most impactful on justices' votes in non-salient cases. This finding suggests a larger point about the impact of public opinion on the Court; it is highly contextual. It may be that public opinion

impacts the Court in different ways, depending on the issue in question. It also may be the case that the impact of public opinion differs substantially between the justices' votes and their opinion writing choices. That is, public opinion can have no discernible effect on the justices' propensities to vote liberally or conservatively but it can still have a critical impact on the nature of the law.

Second, the standard measure of aggregate public sentiment used to study the relationship between the public and the Court may be inadequate for more nuanced studies that are necessary to clearly discern the effect of the public on the Court. Stimson's measure of global public mood does not capture the dynamics that are evident when the measure is disaggregated and re-estimated using only questions on a particular issue area. My measures of civil rights mood and First Amendment mood are designed to capture these dynamics. The preceding discussion suggests that they are indeed measuring sentiment that differs from the global public mood. In the next chapter I employ these measures to test the impact of public sentiment on the location of Court doctrine.

Chapter 5

Empirical Analyses of Doctrinal Positions

In this chapter I test hypotheses related to the doctrine contained within the Supreme Court's written opinions. In chapter 3, I argued that the dynamics in the Court's issue action agenda can be explained with reference to several agents of change. The institutional setting within which the Supreme Court operates provides opportunities for the justices to exercise discretion over policy, but also for outside forces to shape the nature of the agenda. The actors understand the implications of the agenda decisions of the Court. In order to shape the outcome of cases and the resulting legal doctrine, it is first necessary to determine the set of cases the Supreme Court will decide. The results in chapter 3 showed some evidence that these actors can exert both short and long term influence on the Court's agenda. I also found some evidence of reciprocal causation wherein the Court's agenda decisions were impacting outputs from other sources. However, setting the agenda is only one aspect of shaping legal outcomes. If actors, the Court included, want influence over

policy it remains to shape the actual rules and standards that the Court develops.

In this chapter, my empirical investigation moves from the agenda setting stage to the final stage in the adjudication process, the annunciation of legal doctrine. To test hypotheses relating to doctrinal position I rely on two original datasets covering the Court's 1953 to 2008 terms. The datasets are again organized by issue area, with one focusing on civil rights cases and the other focusing on First Amendment cases. I describe the particular features of the data in more detail below.

The dependent variable in the analyses presented in this chapter is the doctrinal position of the Court's opinion. This quantity is measured using a procedure developed by Clark and Lauderdale (2010), wherein Supreme Court opinions are place in a unidimensional "policy space" akin to existing measures of judicial and congressional ideal points (Martin and Quinn 2002; Poole 1998). Whereas those scores seek to measure the preferences of particular actors, the measure developed by Clark & Lauderdale place both the actor and the written opinion of the Court in the same policy space. Because the scaling is identical, it is then possible to directly compare the "ideology" of the individual justices and the written opinions of the Court.

Data and Measurement

The Dependent Variable

The procedure for generating the measure of justice and opinion location, as outline by Clark and Lauderdale (2010) involves estimating what they refer to as a "proximity model" (875) of Supreme Court citations. Their Bayesian ideal point estimator uses opinions and their internal citations as data to estimate opinion location in a policy space. They also develop a procedure for estimating judicial ideal points in the same policy space, thus facilitating direct comparisons between individual justices and opinion locations. Their model makes several important assumptions. With respect to citations, the proximity model assumes that ideologically proximate opinions will cite to one another, and that the probability that an opinion will cite another case is decreasing in the distance between them (Clark and Lauderdale 2010). With respect to judicial ideal points, their model uses dissenting opinions and their authors to connect the two ideological spaces. That is, they assume that dissent authors write at their ideal points. This assumption acts as the bridge that allows direct comparison between the ideological space of the justices and the policy space of the written opinions.

The data used to estimate the model are extensive. First, they identify the set of cases decided by the Supreme Court between October term 1953 and 2008 within a particular issue area[1]. Then

[1] They look at search and seizure cases and freedom of religion cases. The standard method of case identification in the empirical literature is the U.S. Supreme Court database. The database (now) contains all decisions by the Supreme

for each written opinion in each case, including concurrences and dissents, they code the cases cited within each and whether that citation is positive or negative.

To generate the data used as the dependent variable in this chapter, I took several steps. The first was to replicate the findings of Clark and Lauderdale (2010) with respect to their investigation of the Court's search and seizure cases[2]. The second step was to take a random sample of 150 cases from their data and re-estimate the model to compare the results. My expectation was, as long as the number of cases was sufficient to produce sufficient data to estimate the model, a random sample of cases would produce reliable and accurate estimates of opinion and justice ideology. As expected, the results when estimating the model with only a random sample of the data were similar and very highly correlated with the results from the population. Indeed, in pairwise comparisons between the sample and the full data on the opinion locations and three separate measures of justice ideology (author, court median, and majority median) the smallest correlation coefficient was 0.968.

The reason for testing the random sample was to confirm the feasibility of relying on only a random sample of cases within an issue area rather than the entire population of cases. Both issue areas discussed herein contained populations of over 400 cases each between 1953 and 2008. Within each case, each separate written opinion must be examined for internal citations to Supreme

Court from 1946-2008. Clark and Lauderdale rely on the issue coding in the database to identify the set of relevant cases to their analysis. I do the same in this chapter and in chapter 3.

[2]It should be noted that the authors' replication archive contained not only their data, but annotated R code as well. Using the excellent description in the published article and the authors' code, I was able to replicate their work with little trouble. The result would likely be the same for any scholar interested in reconstructing the measure.

Court precedent and the polarity of those citations coded. Given limitations in time and resources, collecting data on only 150 cases within each issue area while still obtaining accurate estimates for the dependent variable was an optimal strategy. The results of the replication provide support for this conclusion.

Given this initial support, I began constructing the my dependent variables by generating a random sample of 150 cases each in the areas of civil rights and the First Amendment using issue coding in the U.S. Supreme Court database. Cases were indexed by citation. The random sample yielded a total of 342 written opinions in civil rights and 448 written opinions in the First Amendment issue area. The breakdowns for the civil rights cases is 150 majority or plurality opinions, 73 concurrences, and 117 dissents. For the First Amendment cases, 150 majority or plurality opinions, 137 concurrences, and 133 dissents. All civil rights opinions in the random sample contained a total of 3,792 separate citations to Supreme Court precedent, 3,336 of which were positive for a rate of 87.97%. For the First Amendment cases that rate was 87.63% or 4,314 out of 4,923.[3] For each written opinion, in each issue area, I used a combination of Shepard's Table of Authorities and manual coding to code each internal citaion to a Supreme Court case for polarity.

When possible, I relied on Shepard's Table of Authorities for both citations and polarity. Shepard's codes citations into three general categories: positive, negative, and neutral. Positive and negative citations are straight forward and useful, but the neutral codes require a bit of extra effort.

[3]Clark & Lauderdale coded 82.53 % of search and seizure citations as positive.

Clark & Lauderdale chose to eschew Shepard's entirely in favor of manual coding in all cases, on the belief that the neutral categories in Shepard's contained sufficiently many cases of distinct polarity to warrant the increase in specificity. My own experience was that Shepard's determinations were exceedingly accurate. The overwhelming majority of citations in Supreme Court opinions are positive, so a reasonable assumption can be made that all citations listed by Shepard's as "citing" (the most prevalent neutral category) are positive. This is, in fact, the assumption I made for the majority opinions I coded using Shepard's.[4] Truly neutral categories such as "explained" or "harmonized" occur with sufficient infrequency as to make manual checking of these a simple task. The nature of the Shepard's Table of Authorities service makes it feasible to use only for majority opinions or all opinion in cases with less than two separate opinions. For other cases, I relied on manual coding of citations and polarity.

To code the polarity of a citation, I relied primarily on the model of Clark & Lauderdale and coded as negative only those citations that "challenge a precedent or reject its reasoning." (878). This occasionally took the form of outright overruling, but by-in-large negative citations were instances in which a justice clearly distinguished a prior case. By way of example, in *Kramer v. Union Free School District*, a voting rights case decided toward the end of the Court's 1968 term, Justice Stewart wrote in his dissent, "Since Carrington v. Rash, 380 U.S. 89, and Harper v. Virginia Bd. of Elections, 383 U.S. 663, dealt with requirements for voting in general elections, those

[4]A spot check of 50 citations coded "citing" across both issue areas revealed 49 to be positive.

decisions do not control the result here." 395 U.S. 621, 640 (J. Stewart, dissenting).

Using these data, I estimated judicial ideology and opinion locations using the model and procedure outline in Clark and Lauderdale (2010). The model estimation results in not only justice ideology measures, but also an estimate of the written opinion's location in the same policy space. This value is theoretically unbounded, but in practice ranges from about -2 to 2 where negative values are liberal and positive values are conservative. It is this value that I use as dependent variable for the analyses presented below.

Independent Variables

To account for the influence of individual justices I have several variables measuring the ideology of potentially key players. The above described procedure also generates ideology scores for the justices in the same policy space as the written opinions. To account for competing theoretical expectations about which justice influences the positioning of the majority opinion, I have variables accounting for the ideological position of the opinion author, the median on the Court, and the median of the majority coalition. Like the opinion location measure, these values range from about -2 to 2 with negative values being liberal and positive values conservative.

I also rely on ideal point estimates of judicial ideology generated by Bailey (2007). Bailey not only measured judicial ideology however. He also constructed comparable scores for the House, the Senate, and the Presidency. I thus rely on the Bailey scores to make comparisons both across

institutions and construct variables to account for the institutional difference between the Court and the Senate, House, and president. These variables are designed to test the impact of institutional considerations on doctrinal positioning.

To measure the impact of public sentiment on the Court's written opinions, I use the issue-specific measures of public opinion discussed in chapter 4. To generate these measures, I relied on Stimson's (1999) technique of aggregating and factor analyzing survey marginals from questions within each specific issue area. The result was two measures of issue-specific public sentiment ranging from 1953-2008 on a "liberalism" scale. This simply means that rising values on the scale indicate increased levels of liberal sentiment.

I also use two dummy variables to test for the influence of the Solicitor General on the positioning of the Court's written opinions. The first indicates whether the Solicitor General took a liberal position as a litigant and the second whether she took a conservative position as a litigant. My expectation here is that the Solicitor General's presence on either side of an issue will move doctrine toward that position.

Finally, to test for the influence of *amici* on the location of Court doctrine I rely on a measure of amicus participation due to Collins (2008).[5] Specifically, for each case in my data, I note the number of *amici* advocating a liberal position and the number advocating a conservative position. My expectation here, as with the Solicitor General, is that the weight of *amicus* participation will

[5]The amicus data and the Solicitor General data discussed above were both collected and made available by Collins.

pull doctrine toward one ideological position or the other.

Results

The dependent variable in the below analyses, the location of the Court's written opinion, is theoretically unbounded. Thus, I treat this variable as continuous and estimate linear models for the analyses below. As with the empirical analyses in chapter 3, I begin with a discussion of the results in the civil rights context and then proceed to the First Amendment context.

Civil Rights Doctrine

Given the strength of the attitudinal model in studies of Supreme Court decision making (Rohde and Spaeth 1976; Segal and Spaeth 2002), I begin the investigation of Court doctrine by specifying several models using only various measures of ideology to predict the location of doctrine. There is an active theoretical and empirical debate in the literature about which ideological position on the Court best represents the written output (Bonneau et al. 2007; Carrubba et al. 2007; Clark and Lauderdale 2010; Hammond, Bonneau and Sheehan 2005; Lax and Cameron 2007; Westerland 2003). In general, these studies suggest three possibilities for pivotal justice when it comes to bargaining over the policy content of opinions: the opinion author, the Court median, and the median justice in the majority coalition. To test these competing claims, I use the measure of judicial ideology generated at the same time as the dependent variable. Thus, these ideology measures exist

within the same policy space as the dependent variable and are directly comparable. Tables 5.1 and 5.2 contains the results of several alternative model specifications.

Table 5.1: Testing the Impact of Ideology on Civil Rights Doctrine - All Opinions

	Pooled Opinions			
Variable	Model 1	Model 2	Model 3	Model 4
Author	0.425***			0.412***
	(0.026)			(0.030)
Majority Median		-0.034		0.581***
		(0.111)		(0.085)
Court Median			0.200*	0.544***
			(0.096)	(0.107)
Constant	-0.010	0.061	0.018	-0.012
	(0.026)	(0.042)	(0.042)	(0.021)
R^2	0.316	0.001	0.021	0.381
N	325	340	340	325

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Table 5.2: Testing the Impact of Ideology on Civil Rights Doctrine - Majority Opinions

	Majority Opinions			
Variable	Model 5	Model 5	Model 7	Model 8
Author	0.047			0.032
	(0.040)			(0.059)
Majority Median		0.081*		0.160
		(0.041)		(0.103)
Court Median			0.041	-0.156
			(0.048)	(0.123)
Constant	0.004	-0.003	0.003	0.007
	(0.026)	(0.023)	(0.025)	(0.027)
R^2	0.009	0.012	0.002	0.019
N	138	150	150	138

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Models 1-4 are estimated on all of the written opinions in my sample, including concurrence

and dissents. In the bivariate setting, the opinion author is clearly the strongest predictor of opinion location. Recall that the measure of opinion location and ideology range from liberal to conservative thus, the strong positive effect in model 1 confirms that as the opinion author becomes more conservative (liberal), the doctrine within the opinion becomes more conservative (liberal). Not surprisingly, the median of the majority is not a very good predictor across all types of opinions. The Court median is a significant predictor of opinion location ($p < 0.10$). Pitting the measures against one another in model 4 reveals all of the measures to be strongly significant. My belief is that this is because each is good at predicting a sub-set of the opinions in the sample. For instance, the majority median may be the best predictor of the majority opinion location (Clark and Lauderdale 2010; Westerland 2003) while the Court Median and the opinion author may be accounting for variance at other points in the data.

Models 4-8 are identical to 1-4 except that they were estimated on only the majority or plurality opinions of the Court. Here, the results are rather different from those found in models 1-4. In the bivariate models, only the median of the majority shows a significant impact on opinion location. Including each of the variables together in the same model causes any significant impacts to wash out. Thus, initial evidence suggests that the strength of ideology is in predicting opinions other than the majority. This makes sense, given the amount of bargaining taking place over majority opinions versus separate opinions (Maltzman, Spriggs and Wahlbeck 2000). Whereas we may

expect a justice or set of justices writing separately to locate at or near their preferred position, the majority opinion requires more compromise between the justices.

To test the impact of other policy entrepreneurs on opinion locations, I estimate a more fully specified model. More specifically, I include measures of public sentiment on civil rights, indicators of Solicitor General participation, counts of *amicus* participation, and measures of institutional distance between the Court and both houses of Congress and the president. The institutional distance variables are calculated using the Court (and floor) medians. I also test the full model on the full sample of opinions and separately on just the Court's majority or plurality opinions. To best account for ideological preferences in the models, I use the opinion author as the measure of ideology for the pooled analysis and the median of the majority coalition for the majority opinion sample. The results of the full models are presented below in Table 5.3.

In the pooled model, only author ideology exhibits a significant impact on opinion location. Specifically, the coefficient of 0.455 suggest that a one unit shift in author ideology in the conservative direction (about a quarter of the range of the measure) yields about a half a point conservative shift in opinion location, across all types of opinions. No other variables are statistically significant in the pooled model, indeed many of the coefficients are in a direction opposite from my expectations. As a check, I re-estimated the majority opinion model with several other measures of judicial ideology including Martin-Quinn Scores (Martin and Quinn 2002) for author ideology and Segal-

Table 5.3: Full Model of Civil Rights Doctrine

Variable	Pooled Opinions	Majority Opinions
Opinion Author	0.455***	--
	(0.077)	
Majority Median	--	0.123
		(0.121)
Public Opinion	0.008	0.005
	(0.009)	(0.011)
S.G. - Liberal	0.167	-0.040
	(0.108)	(0.099)
S.G. - Conservative	0.069	0.143*
	(0.069)	(0.074)
Liberal *Amici*	-0.003	0.028
	(0.017)	(0.025)
Conservative *Amici*	-0.043	-0.003
	(0.028)	(0.055)
House Distance	-0.034	-0.171
	(0.113)	(0.151)
President Distance	-0.003	-0.039
	(0.030)	(0.036)
Senate Distance	0.024	0.220
	(0.116)	(0.150)
Constant	-0.435	-0.399
	(0.528)	(0.593)
R^2	0.367	0.092
N	282	120

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Cover scores (Segal and Cover 1989) for author ideology. The results of the models for civil rights cases remain the same.

First Amendment Doctrine

As an additional check on the theory, I re-estimate the above models in the First Amendment context. Tables 5.4 and 5.5 contain various alternative model specifications testing the impact of ideology on First Amendment opinion locations. Again, I estimate each model on both the pooled opinions and just the majority and plurality opinions.

Table 5.4: Testing the Impact of Ideology on First Amendment Doctrine - All Opinions

	Pooled Opinions			
Variable	Model 10	Model 11	Model 12	Model 13
Author	0.389***			0.369***
	(0.059)			(0.057)
Majority Median		-0.223**		-0.532***
		(0.085)		(0.142)
Court Median			0.099	0.481**
			(0.113)	(0.200)
Constant	0.033	-0.176***	-0.090*	0.003
	(0.026)	(0.050)	(0.045)	(0.045)
R^2	0.204	0.015	0.002	0.239
N	447	448	448	447

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

As with the opinions in the civil rights issue area, the opinion's author ideology is a strong predictor in the pooled opinions context. Also, the median of the majority does not perform well when it is used to predict the locations of all opinions, for obvious reasons. The Court median is not a significant predictor of opinion location in a bivariate model, but when accounting for the other ideological measures, it does well to predict a portion of the variance in opinion locations. Again, it appears that these measure may be capturing different aspects of the variance in the pooled

Table 5.5: Testing the Impact of Ideology on First Amendment Doctrine - Majority Opinions

	Majority Opinions			
Variable	Model 14	Model 15	Model 16	Model 17
Author	-0.019			-0.068
	(0.055)			(0.066)
Majority Median		0.198		0.399
		(0.171)		(0.267)
Court Median			0.095	-0.238
			(0.195)	(0.238)
Constant	0.037	0.087	0.060	0.062
	(0.054)	(0.067)	(0.072)	(0.064)
R^2	0.001	0.016	0.002	0.027
N	149	150	150	149

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

opinions scenario.

When I limit the sample to only majority or plurality opinions, the results also look similar to those found in the civil rights context. Despite strong and positive associations in the pooled opinions context, ideology in any form does not perform well as the sole predictor of First Amendment opinion location. There are several possible explanations for this outcome. First, it may be the case that the ideological dimension in the First Amendment context is more complex than assumed. The model used to construct the dependent variable assumes that policy space within which the opinion is located is unidimensional. If it is the case that the First Amendment as an issue area contains more than one ideological dimension, this could be confounding the association between ideology and the opinion outcomes.

Another option, and one I can directly examine, is that there are other influence on the opinion location for which I am not accounting in the above models. To test that proposition, I re-estimate the full model from the civil rights context using the data for the First Amendment. The results of the this model estimation are presented in Table 5.

Table 5.6: Full Model of First Amendment Doctrine

Variable	**Pooled Opinions**	**Majority Opinions**
Opinion Author	0.422***	
	(0.059)	
Majority Median		0.235
		(0.190)
Public Opinion	-0.002	-0.027**
	(0.004)	(0.011)
S.G. Liberal	-0.295***	-0.340
	(0.073)	(0.211)
S.G. Conservative	-0.030	0.015
	(0.062)	(0.095)
Liberal *Amici*	0.023*	0.034
	(0.011)	(0.032)
Conservative *Amici*	-0.012	-0.032
	(0.017)	(0.023)
House Distance	-0.068	0.228*
	(0.103)	(0.127)
Senate Distance	0.055	-0.266
	(0.091)	(0.163)
President Distance	0.025	0.101
	(0.031)	(0.071)
Constant	0.118	1.748**
	(0.182)	(0.643)
R^2	0.253	0.119
N	390	126

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

The results in Table 5.6 are slightly more interesting than those in table 5.3. As with the civil

rights cases, opinion author ideology is the strongest predictor for the pooled opinions model. In the First Amendment cases though I some evidence that the Solicitor General is moving doctrine by her presence as a litigant. Specifically I find that the location of a given opinion will move 0.3 points in the liberal direction when the Solicitor General is representing the liberal position as a party. This is not a small impact, especially given the strength of the opinion author variable. Interestingly though, I find that as the number of liberal *amici* rises, opinion location becomes more conservative. At first blush this seems a bit counter-intuitive, especially given that my theory would suggest that *amici* are able to draw doctrine toward them. However, it may be the case that the presence of a high number of liberal *amici* indicates a case in which they are trying to sway doctrine dramatically. If the weight of precedent is conservative, all else equal, it may be the case that the Court is simply deciding these cases in line with their conservative precedents.

When I restrict the sample to majority opinions, I see even more intriguing results. The effect of ideology remains positive, but the p-value rises slightly and lands outside of conventional levels of significance. Most notable is the significant negative coefficient on the public opinion variable. This variable is measured on a liberalism scale such that rising values indicate more liberal public sentiment. This is the opposite direction of the opinion location measure ideologically, so the negative coefficient suggests that liberalizing public sentiment will lead to liberalized majority opinions, *ceteris paribus*. Conversely, movement of public opinion in a conservative direction will

lead to more conservative First Amendment policy from the Court. This result provides at least initial evidence that the effect of public opinion on the Court may be in areas other than the justices votes. However, the fact that this result is not robust across issue areas does weigh against that conclusion slightly.

I also find some evidence of institutional effects in the First Amendment context. While the Solicitor General and *Amici* variables are not statistically significant, my institutional distance measures all have p-values below 0.18. Not strongly significant by conventional standards, but close enough to warrant mention. Intriguing to me is the negative effect of Senate distance. What this means is, as the Court becomes more conservative relative to the Senate, its doctrine becomes more liberal. Thus it appears that the Court is moderating its doctrinal statements in situations when institutional conflict may be likely. This effect does not hold however for the House and the President. In fact it goes in the other direction, indicating that increasing conservatism (liberalism) relative to the other branches leads to more conservative (liberal) doctrine. Ordinarily it would seem that the positive relationship on the House and president distance variables was just picking up the impact of the Court median. However, the contrary result with the Senate distance is suggestive of another factor at work.

Conclusion

In this chapter I sought to test the implications of my theory on the location of Court doctrine. My theory suggests that the Court's written opinions will be influenced by several factors, not least of which are the justices themselves. In both the civil rights and the First Amendment context I found the ideology of several pivotal justices to be important predictors of the location of the written opinions on the Court, both majority and separate. However, when I restricted analyses to only the majority or plurality opinions, the impact of ideology was much harder to see. In the civil rights context I found a slight effect for the Solicitor General indicating that her taking a conservative position can move doctrine in a conservative direction, *ceteris paribus*. However, I found scant support for my theory in with respect to the other factors.

In the First Amendment context, several interesting results obtained. First, I found that the policy location of the Court's majority opinions is strongly influenced by the state of public sentiment on the First Amendment. This is a significant finding that can hopefully shed some light on the debate over the role of the public on the Court. However, the fact that this result was not robust across issue areas suggests that the influence of the public may be highly contextual. I also found that the Court responds to its relative ideological position with other institutions. In particular, as the Court becomes more ideologically distant from the Senate, majority opinion locations moderate toward the center.

What do the results in this chapter tell us about legal change and development? I found sparing support for the specific expectations of the theory outline in chapter 2. However, some of the results suggest that factors external to the Court are influencing the policy location of Court opinions. Taken on its face, this is an indication that Court-centric models of legal development are insufficient to capture all of the dynamics at work. The nature of legal doctrine is very issue specific. Studying doctrinal evolution and change requires theory that is general enough to accommodate these contextual differences but empirics that are general enough to capture the relationships as they exist. In chapter 2 I argued that doctrine is not only a tool for the justices, but it is also a policy weapon for others as well. The results presented above suggest that doctrine is influenced by more than just the Court and its justices.

Chapter 6

Conclusion

This dissertation began with a rather simple question: How do we understand and study legal change on the United States Supreme Court. The answer to this question, it appears, is decidedly more complex. My theory argues that legal change cannot be measured directly, but that it is necessary to view the process by which cases move to and through the Supreme Court in its entirety in order to fully understand how the law operates on the Court. The law works for the Court as an institutional tool, setting expectations and constraining the behavior of those actors outside of the immediate case that have a stake in the policy shifts that almost inevitably result from Supreme Court rulings.

So, what does legal change look like? Ultimately, the nature of the Supreme Court and its position in the legal and political system in the U.S. means that legal change on the Supreme Court is happening all the time. By definition, the Court takes cases which require alteration of the current

legal *status quo*. This may be as minor as elaborating on an existing precedent so that lower courts are clear about the boundaries of the law, or it may be as drastic as overruling a prior case and totally resetting the legal framework used to interpret and enforce a constitutional provision. These decisions have ramifications not just for the parties to the instant case, but for anyone to whom the issue or issues addressed by the Court may be applicable. So, the parties to the case have a clear stake in the outcome. But so too do all the other individuals, groups, and even governmental institutions that may be impacted by the Court's ruling. Whatever the nature of change, be it major or minor, it is happening each and every time the Supreme Court issues a written opinion. Therefore, thinking about and studying legal change requires us to view the Court not simply as collection of unconstrained and unaccountable policy-minded individuals. Because the process allows for input from so many sources, legal change can only truly be understood by reference to all of the sources of potential influence on the law.

Summary of Findings

The theory outlined in chapter 2 argues that the Court must rely on law, in the form of its written opinions, to shape policy. However, the process by which cases move through the Court allows for input and potential influence from several different sources. Specifically, past theoretical and empirical advances have identified several important policy entrepreneurs, or "agents of change"

that may influence the path of the law. These include the justices on the Court, litigants and interest groups, the general public, lower courts, and the other branches of the federal government. All of these actors have preferences over policy and thus motivation to shape the outcome of cases on the Supreme Court. Several aspects of the legal system in the U.S., and the Supreme Court in particular, allow these actors to act upon this motivation at various points in the case adjudication process. The points identified by the theory as critical, and those examined in the empirical chapters, are the agenda setting stage and the opinion writing stage.

Chapter 3

Chapter 3 examines the Court's changing attention to two issue areas over time: civil rights and the First Amendment. My contention is that the Court's allocation of limited agenda space signals a choice over alternative areas of policy focus (Kingdon 1984; Pacelle 1991). Thus, changes in agenda allocation will be an indication that significant legal change is happening in that issue area. I collected two original data sets covering the 1937-2008 terms of the Court. The first set of analyses, within each issue area, focused exclusively on the Court and its justices to explain changes in the Court's agenda allocation. These models were designed to investigate the degree to which this "Court-centric" perspective adequately accounted for changes in agenda allocation on the Court. To estimate these and the more complete models discussed below I relied on time-series techniques that account for varying levels of fractional integration in the data (Box-Steffensmeier

and Smith 1998; Box-Steffensmeier and Tomlinson 2000; Granger 1980). These techniques address what would ordinarily be problematic levels of autocorrelation in the data. Correcting for fractional integration in the data thus allows me to be much more confident about the inferences drawn from the model results.

Tables 3.1 and 3.3 contain the results of these Court-centric models for each of the issue areas. With respect to the civil rights agenda, I found changes in the Court's median ideology in a conservative direction led to less agenda allocation. I found a similar result for the First Amendment agenda, although the data in this area are a bit noisier than those in the civil rights area. Also, by including dummy variables delineating the tenures of the individual Chief Justices in the data, I was able to discern the impact each Chief's tenure had on changes in the agenda in the short term. Both issue areas showed significant and positive effects for the Warren Court and the civil rights area saw considerable change throughout the Vinson and Burger Courts as well. In both issue areas, the Court-centric approach is useful but does not tell the whole story. Nor does it account for the implied effects of the policy entrepreneurs identified in the theory.

Tables 3.2 and 3.4 contain the results of more full specified models of agenda change in both the civil rights and First Amendment contexts. In these models, in particular those described in tables 3.2 and 3.4, the general results from the Court-centric models held across both areas. Using these more complete models I was also able tto control for activity at the lower courts using a time series

measuring case dispositions in the issue area at the Federal Courts of Appeals. In each instance I found that changes in the Court's agenda are positively related to changes in the percentage of like cases decided at the Courts of Appeals in the previous term. I also found increases in the president's attention to an issue to be positively related to the changes in the Court's attention. That is, as presidents place more emphasis on civil rights and the First Amendment in the form of mentions in the State of the Union address and executive orders, the Court allocates more agenda space to those issues. This is true even after controlling for ideological and temporal effects and the the level of public awareness of the issue.

In the civil rights context, I also found that increases in interest group involvement in the previous term lead to decreases in agenda allocation in the next term. A large increase in interest group involvement indicates the resolution of significant legal and policy issues in the previous term. It would thus make sense to see a lower level of interest from the Court in the subsequent term. Presumably, the resolution of these issues does not require the Court to give the same amount of agenda space to that broad category of cases in the next term. I found no such influence for interest groups in the First Amendment context. However, I did find that the level of public awareness of First Amendment positively impacts the Court's attention to the issue. That is, increases in public awareness lead to increases in agenda allocation by the Court. With respect to the Solicitor General, I did not find a significant impact on changes in the Court's agenda allocation in either issue area.

Past empirical evidence has found the Solicitor General to be an important player in the agenda setting process (Black and Owens 2009). This may indeed be true for a given case, in the aggregate though it appears that increased attention from the Solicitor General does not significantly impact the Court's agenda allocation.

In chapter 3 I also test long-term relationships between the Court's agenda allocation and each independent variable of interest. Using tests for co-integration and error correction, I was able to discern whether there exists a long-run equilibrium relationship between the Court's agenda and the key independent variables. These tests provide some insight into the larger institutional position of the Court *vis a vis* other important legal and political actors. In the civil rights issue area, I found equilibrium relationships between many of the variables and the Court's agenda. These tests give me a sense for the degree to which two time series exist and move in relation to one another. If there is a strong equilibrium relationship this means that the series do not stray too far from one another over time. Similarly, if there is strong error correction, the two series will return to this equilibrium fairly quickly following a disturbance that dislodges them. In the civil rights context I found both the presidential and congressional agendas to be in long-run equilibrium with the Court's agenda. This is a result that we might expect if the branches of the federal government were addressing similar questions over time and their allocation of agenda space was dictated by political and policy considerations. Other than the Congressional agenda, I did not find significant

evidence of error correction however. This indicates that the long-run equilibrium relationships discovered in the data are not particularly "sticky" and do not reset quickly after a shock.

Finally, to account for potential endogeneity in the model and to ensure efficient estimates, I re-estimated the models in tables 3.2 and 3.4 using Seemingly Unrelated Regressions. The results in the First Amendment context did not change appreciably, but the civil rights model showed that both the presidential agenda and the congressional agenda are also being significantly influenced by the Court's agenda. Because the substantive conclusions from the initial model were largely unchanged, the results of the Seemingly Unrelated Regressions model suggest that, in the area of civil rights, the Court may be simultaneously giving and receiving influence with respect to agenda allocation.

Chapter 4

In this chapter I discussed and reported on the creation of issue-specific measures of aggregate public sentiment. Typically, studies in judicial politics looking to measure aggregate public opinion rely on Stimon's (1999) measure of "public mood". This measure is constructing by aggregating survey marginals from many different questions over time. Stimson developed computer software that will receive these marginals as raw data, rescale the data so that they are on a common scale, perform a factor analysis on these data, and then report a yearly or quarterly measure on the standardized scale that represents general policy liberalism that is based on the dimensionality dis-

covered in the factor analysis. Stimson's measure is constructed by drawing survey questions from many different topics and is designed to capture a very general public mood over a wide variety of issues.

My theory suggests that public sentiment about a particular issue will influence the content of the Supreme Court's written opinions. Specifically I argue that doctrine within an opinion will be drawn toward the position of the public, largely because the Court relies on legitimacy as a source of power and because it is constructed of individuals whose preferences likely reflect the preferences of the dominant political coalition at the time of appointment (Dahl 1957). In order to adequately account for public sentiment within the more specific issue areas of civil rights and the First Amendment, I needed a more fine-grained measure of aggregate opinion. I therefore used Stimson's technique to generate a measure of public opinion specific to each of the these areas.

Both of my measures are largely capturing the underlying latent dimension. This is clear from both the consistently high factor loadings on each of the survey questions used in the creation of the measure and in the very high amount of variance explained. More specifically, eigen value estimates suggest that the latent dimension is explaining 69 and 66 percent of the variance in my civil rights and First Amendment data respectively. In contrast, Stimson's first dimension of public mood explains about about 27.4% of the variance. Figures 4.2 and 4.5 show plots of the civil rights and First Amendment mood measures between 1953 and 2009. Figures 4.3 and 4.6 plot each of the

series again, but this time with Stimson's measure overlaid for direct comparison. Figures 4.4 and 4.7 plot the differences between my measures and Stimson's, showing years in which global mood is more liberal or conservative than civil rights or First Amendment mood.

Chapter 5

The analyses conducted in chapter 5 were designed to test the implications of the theory on the positioning of Court doctrine. Recall, this is the second place in the process of case adjudication where past research suggests room for considerable influence from policy entrepreneurs. As a dependent variable in these analyses, I generated ideology scores for a random sample of civil rights and First Amendment written opinion using a model developed by (Clark and Lauderdale 2010) that places both the justices and their written opinion in a common policy space.

I began by testing the impact of judicial ideology on the location of the Court's opinions. Several competing theories suggest different pivotal justices for the location of the Court's written opinions. These include the opinion author, the median on the Court, and the median of the majority coalition. In the civil rights issue area, I found strong evidence that the preferences of the median of the majority is driving the location of the Court's majority opinions. However, I no evidence of a strong effect of ideology in the First Amendment context for any of the justices when looking at all written opinion or when limiting the analysis to majority opinions.

I did find, in a more fully specified model accounting for public opinion using the measure de-

veloped in chapter 4 as well as activity by the Solicitor General and *amicus curiae*, that the location of the opinion author was highly important in First Amendment cases. This result was for a model using all written opinions; the effect for ideology did not hold when limiting the analysis to majority opinions. In that model, displayed in the right hand column of table 5.6, I found a strong and significant effect of public sentiment on the location of First Amendment majority opinions. More specifically, I found that increases in public liberalism on the First Amendment drew court doctrine in this area in the liberal direction. I also found some evidence that suggests the Court is tempering First Amendment doctrine based on its ideology relative to the Senate. I found that, as the Court becomes more conservative relative to the Senate, First Amendment majority opinions become more liberal and vice versa. In total, the results from chapter 5 do not provide overwhelming support for the theory. There remains however a set of intriguing results that suggest the possibility of more than simply judicial preferences at play.

Future Work and Conclusions

While the scope of the dissertation project was rather large, the data and empirics focused on fairly narrow areas of the Court's jurisprudence. Given the nature of legal doctrine and precedent in the federal courts, it is really necessary to limit the empirical examinations to one issue area at a time. Herein I examined two issue areas related to individual rights and liberties. This choice

was made because these types of cases make up a large part of the Court's docket, but also because they represent a general area where studies of Supreme Court decision making have found justices' preferences to be overwhelmingly important in explaining outcomes. They thus provide a stringent test for a theory that posits a role for actors external to the Court. Future work may port this theoretical framework to less politically salient areas of the Court's jurisprudence. This will allow for an investigation into the possibility that different policy entrepreneurs effect the Court in different ways depending on context, a result implied by the findings discussed above.

Second, I think that future iterations of the analyses here may benefit from "fine-tuning" the issues under consideration. Both civil rights and the First Amendment are broad categories that encompass many different smaller areas of law and policy. Focusing the empirics on more nuanced issue areas may allow the effects found here to show more readily. In particular, the measures of doctrinal location and public opinion would likely benefit from a more specific classification. The use of these two measures mark one the significant contributions of this dissertation, and hopefully a step toward more accurately accounting for some of these concepts in future research designs.

With respect to the agenda analyses in chapter 3, the presence of endogeneity in the civil rights model suggests that future work may want to explore this aspect of the Court's role. Certainly extending this analysis to different issue areas would be one way to see whether the Court's agenda is driving the policy agendas of other institutional actors or public awareness. Another of the contri-

butions of this dissertation is the use of time-series econometrics to address some of the questions of dynamics. As more data on the Court become available for terms prior to 1946, the viability of these techniques will increase.

Legal change is a difficult concept to understand. For empirically minded political scientists, the temptation is to think of legal change as a discrete event that we can measure and understand. While it is true that there are discrete events that signal changes in the law, a full understanding of legal change requires a more all-encompassing perspective. One of the goals of this dissertation was to develop and test a theory of legal change that began from this wider perspective. It was and is my contention that understanding legal and policy change on the Supreme Court requires one to view the Court and its output as part of a large whole, that legal change happens every time the Court issues a written opinion, and that a whole host of important policy players including the Court and its justices have a stake in what the law is. I have tried in my empirical analyses to work from this perspective to shed some light on the nature of the relationships between the Court and these other actors.

This dissertation also sought to bring together different approaches to studying the question of legal change. My theory drew on insight from case studies of legal change and more descriptive studies of the Court and its business. I also relied on the insights from more empirically focused research to inform my theory. It has always seemed to me that there is much to be gained from

drawing on a wide range of work. This appreciation for disparate perspectives and approaches will hopefully serve to enhance the literature on the U.S. Supreme Court. Similarly, it is my hope that this dissertation provides some support for the idea that our understanding of law and courts can benefit from thinking in different ways about the answers to important questions.

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Appendix A: Search Terms

ProQuest

Civil Rights Stories

The following search terms were used in ProQuest to gather data on the number of front page stories in the New York Times, the Washington Post, and the Los Angeles Times addressing the subject:

> "civil rights' or "equal w/3 protection" or "discrimination w/5 rac*" or "discrimination w/5 employ*" or "discrimination w/5 gender" or "discrimination w/5 employ*" or "quoto w/5 rac*" or "affirmative action w/para race" or "indian not w/10 sport" or "reapportion*" or "malapportion*" or "social security"

First Amendment Stories

The following search terms were used in ProQuest to gather data on the number of front page stories in the New York Times, the Washington Post, and the Los Angeles Times addressing the subject:

> "free speech" or "freedom of speech" or "free press" or "freedom of the press" or "freedom of religion" or "establishment of religion" or "freedom of association" or "first amendment"

Lexis-Nexis

Beyond the data available in the Supreme Court Database, I used Lexis-Nexis to identify cases in each of the two substantive issue areas. I relied on the Lexis Headnotes as a source of information

for each case. For the First Amendment cases, I used a simple search of "First Amendment" to identify the primary cases. However, the Supreme Court Database categorizes cases based on the major "public policy focus" of the case. Therefore, I also searched using the terms listed above to help identify further cases in the First Amendment area.

My procedure for identifying civil rights cases in the years not covered by the Supreme Court Database was similar. I began by searching the Lexis Headnotes for "equal protection" and then supplemented my search using the more specific terms listed above.

Appendix B: Survey Question

First Amendment Questions

General Social Survey

1. SPKATH: There are always some people whose ideas are considered bad or dangerous by other people. For instance, somebody who is against churches and religion... a. If such a person wanted to make a speech in your (city/town/community) against churches and religion, should he be allowed to speak, or not? [1972-2008]

2. COLATH: There are always some people whose ideas are considered bad or dangerous by other people. For instance, somebody who is against churches and religion... b. Should such a person be allowed to teach in a college or university, or not? [1972-2008]

3. LIBATH: There are always some people whose ideas are considered bad or dangerous by other people. For instance, somebody who is against churches and religion... c. If some people in your community suggested a book he wrote against churches and religion should be taken out of your public library, would you favor removing this book or not? [1972-2008]

4. SPKSOC: Or consider a person who favored government ownership of all the railroads and all big industries: a. If such a person wanted to make a speech in your community favoring government ownership of all the railroads and big industries, should he be allowed to speak, or not? [1972-1974]

5. COLSOC: Or consider a person who favored government ownership of all the railroads and all big industries: b. Should such a person be allowed to teach in a college or university, or not? [1972-1974]

6. LIBSOC: Or consider a person who favored government ownership of all the railroads and all big industries: c. If some people in your community suggested a book he wrote favoring

government ownership should be taken out of your public library, would you favor removing this book, or not? [1972-1974]

7. SPKRAC: Or consider a person who believes that Blacks are genetically inferior. a. If such a person wanted to make a speech in your community claiming that Blacks are inferior, should he be allowed to speak, or not? [1976-2008]

8. COLRAC: Or consider a person who believes that Blacks are genetically inferior. b. Should such a person be allowed to teach in a college or university, or not? [1976-2008]

9. LIBRAC: Or consider a person who believes that Blacks are genetically inferior. c. If some people in your community suggested that a book he wrote which said Blacks are inferior should be taken out of your public library, would you favor removing this book, or not? [1976-2008]

10. SPKCOM: Now, I should like to ask you some questions about a man who admits he is a Communist: a. Suppose this admitted Communist wanted to make a speech in your community. Should he be allowed to speak, or not? [1972-2008]

11. COLCOM: Now, I should like to ask you some questions about a man who admits he is a Communist: b. Suppose he is teaching in a college. Should he be fired, or not? [1972-2008]

12. LIBCOM: Now, I should like to ask you some questions about a man who admits he is a Communist: c. Suppose he wrote a book which is in your public library. Somebody in your community suggests that the book should be removed from the library. Would you favor removing it, or not? [1972-2008]

13. SPKMIL: Consider a person who advocates doing away with elections and letting the military run the country. a. If such a person wanted to make a speech in your community, should he be allowed to speak, or not? [1977-2008]

14. COLMIL: Consider a person who advocates doing away with elections and letting the military run the country. b. Should such a person be allowed to teach in a college or university, or not? [1977-2008]

15. LIBMIL: Consider a person who advocates doing away with elections and letting the military run the country. c. Suppose he wrote a book advocating doing away with elections and letting the military run the country. Somebody in your community suggests that the book should be removed from the library. Would you favor removing it, or not? [1977-2008]

16. SPKHOMO: And what about a man who admits that he is a homosexual? a. Suppose this admitted homosexual wanted to make a speech in your community. Should he be allowed to speak, or not? [1973-2008]

17. COLHOMO: And what about a man who admits that he is a homosexual? b. Should such a person be allowed to teach in a college, or university, or not? [1973-2008]

18. LIBHOMO: And what about a man who admits that he is a homosexual? c. If some people in your community suggested that a book he wrote in favor of homosexuality should be taken out of your public library, would you favor removing this book, or not? [1973-2008]

19. SPKMSLM: Now consider a Muslim clergyman who preaches hatred of the United States. If such a person wanted to make a speech in your community preaching hatred of the United States, should he be allowed to speak, or not?1 [2008]

20. COLMSLM: Now consider a Muslim clergyman who preaches hatred of the United States. Should such a person be allowed to teach in a college or university, or not? [2008]

21. LIBMSLM: Now consider a Muslim clergyman who preaches hatred of the United States. If some people in your community suggested that a book he wrote which preaches hatred of the United States should betaken out of your public library, would you favor removing this book, or not? [2008]

Gallup

1. The Supreme Court ruled this week that burning the American flag, though highly offensive, is protected under the free speech guarantee of the First Amendment to the Constitution. Do you agree or disagree? [1989-1990]

2. Do you believe the physical act of burning the U.S. (United States) flag is an appropriate expression of freedom of speech as guaranteed by the First Amendment, or not? [1998]

ICR Survey Research Group

1. (Free speech is protected in the United States by the First Amendment to the Constitution and by other laws. However, the law recognizes that certain kinds of expression should not always be protected. We are not concerned here about whether you personally approve of any of the behaviors we will mention. We want to know whether you think they should be protected by the law, all of the time, protected under certain circumstances or not protected at all.) Should a person's rights be protected by law when... burning the flag to protest actions of the government? [1990-Duplicated in 1991 by Macro Marketing Research]

Center for Survey Research and Analysis, University of Connecticut

Civil Rights Survey Questions

General Social Survey

1. RACFEW: Would you yourself have any objection to sending your children to a school where a few of the children are [whites/(negroes/blacks/African-Americans)]? [1972-1996]

2. RACHAF: Would you yourself have any objection to sending your children to a school where half of the children are [whites/(negroes/blacks/African-Americans)]? [1972-1996]

3. RACMOST: Would you yourself have any objection to sending your children to a school where most of the children are [whites/(negroes/blacks/African-Americans)]? [1972-1996]

4. RACDIN: How strongly would you object if a member of your family wanted to bring a (negro/black) friend home to dinner? [1972-1985]

5. RACOPEN: Suppose there is a community-wide vote on the general housing issue. There are two possible laws to vote on: a. One law says that a homeowner can decide for himself whom to sell his house to, even if he prefers not to sell to (negroes/blacks/African-Americans). b. The second law says that a homeowner cannot refuse to sell to someone because of their race or color. Which law would you vote for? [1973-2008]

6. RACDIF1: On the average (negroes/blacks/African-Americans) have worse jobs, income, and housing than white people. Do you think these differences are: a. Mainly due to discrimination? [1977-2008]

7. RACDIF2: On the average (negroes/blacks/African-Americans) have worse jobs, income, and housing than white people. Do you think these differences are: b. Because most (negroes/blacks/African-Americans) have less in-born ability to learn. [1977-2008]

8. RACDIF3: On the average (negroes/blacks/African-Americans) have worse jobs, income, and housing than white people. Do you think these differences are: c. Because most (negroes/blacks/African-Americans) don't have the chance for education that it takes to rise out of poverty. [1977-2008]

9. RACDIF4: On the average (negroes/blacks/African-Americans) have worse jobs, income, and housing than white people. Do you think these differences are: d. Because most (negroes/blacks/African-Americans) just don't have the motivation or will power to pull themselves up out of poverty. [1977-2008]

10. AFFIRMACT: Some people say that because of past discrimination, blacks should be given preference in hiring and promotion. Others say that such preference in hiring and promotion of blacks is wrong because it discriminates against whites. What about your opinion - are you for or against preferential hiring and promotion of blacks? If favors: Do you favor preference in hiring and promotion strongly or not strongly? If opposes: Do you oppose preference in hiring and promotion strongly or not strongly? [1986-2008]

11. FEHELP: Now I'm going to read several more statements. As I read each one, please tell me whether you strongly agree, agree, disagree, or strongly disagree with it. It is more important for a wife to help her husband's career than to have one herself. [1977-1998]

12. FEFAM: Now I'm going to read several more statements. As I read each one, please tell me whether you strongly agree, agree, disagree, or strongly disagree with it. It is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family. [1977-2008]

13. FEPOL: Tell me if you agree or disagree with this statement: Most men are better suited emotionally for politics than are most women. [1974-2008]

14. HOMEKID: Do you agree or disagree: A job is alright, but what most women really want is a home and children. [1988-2002]

15. FEWORK: Do you approve or disapprove of a married woman earning money in business or industry if she has a husband capable of supporting her? [1972-1998]

Gallup

1. Do you think the _____ administration is pushing racial integration too fast, or not fast enough? [1962-1964]

2. The U.S. Supreme Court has ruled that racial segregation in the public schools is illegal. This means that all children, no matter what their race, must be allowed to go to the same schools. Do you approve or disapprove of this decision? [1954-1961]

3. Would you favor or oppose lowering the voting age limit so that persons 18, 19, and 20 years old could vote in election? [1953-1970]

4. Do you favor or oppose this (Equal Rights) Amendment? [1975-1981]

5. Suppose that two years from now the Democratic party nominated for the Presidency a Northern Democrat who strongly favors integration in the schools. In this case would you be for or against organizing a separate States' Rights party and naming a candidate who opposes integration in the schools? [1958-1959]

6. The Civil Rights Bill--now before Congress--provides for a trial before a judge, but not a jury, for anyone who disobeys a court order and deprives someone of the right to vote. the violators would be subject to fine and imprisonment. as it is stated here, would you favor or oppose the Civil Rights Bill? [1957]

7. Would you favor or oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples? [2003]

Harris and Associates

1. Many of those who favor women's rights favor the Equal Rights Amendment to the Constitution. This amendment would establish that women in the future would have rights equal to men in all areas. Opponents argue that women are different than men and need to be protected under the law by special laws that deal with women's status. Do you favor or oppose the Equal Rights Amendment? [1975-1981]

2. And how do you feel about the section of the civil rights bill that would prohibit discrimination in public accommodations, such as restaurants, hotels, rest rooms, and other public places. Do you favor or oppose the public accommodations section of the civil rights bill? [1963]

3. How do you feel about the civil rights bill (now being debated) (that was just passed) in the Senate in Washington? From what you know or have heard, do you favor or oppose the civil right bill? [1964]

American National Election Study

1. Some say the civil rights people have been trying to push too fast. Others feel they haven't pushed fast enough. How about you: Do you think civil rights leaders are trying to push too fast, are going too slowly, or are they moving about the right speed? [1964-1992]

2. Are you in favor of desegregation, strict segregation, or something in between? [1964-1978]

3. Some people say that the government in Washington should see to it that white and black children go to the same schools. Others claim this is not the government's business. Have you been concerned enough about [in] this question to favor one side over the other? [1962-2000]

4. If Negroes are not getting fair treatment in jobs and housing, the government should see to it that they do. [1956-1960]

5. An effort is being made to pass an amendment to the U.S. Constitution which would guarantee equal rights for citizens regardless of sex. Do you approve or disapprove of the Equal Rights Amendment to the Constitution? [1976-1980]

6. Do you favor or oppose laws to protect homosexuals against job discrimination? [1988-2004]

ABC News/Washington Post

1. Do you think homosexual couples should or should not be allowed to form legally recognized civil unions, giving them the legal rights of married couples in areas such as health insurance, inheritance and pension coverage? [2003-2007]