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# Impact: The Supreme Court in American Politics

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## Abstract

In this dissertation I seek to answer the question: when, how, and under what conditions does the Supreme Court make or influence policy and politics in the United States? In working to answer this question, I demonstrate that the Supreme Court has significantly more power and influence than scholars have typically given it credit for. I argue that the nature of the Court's power is interpretive: it is the power to say what the law is. This power gives the Court the ability to make policy routinely, in every case that comes before it. Often the exercise of this policymaking power is mundane, but sometimes it is profound. By shifting focus away from compliance—the dominant focus in the empirical literature on Court power—and towards interpretation, I significantly extend the range of cases and the scope of outcomes of decisions covered by the theory of power. Finally, this theory of power allows me to develop a theory of judicial impact. I contend that judicial impact has two key sources: judicial power, and indirect judicial influence, by which I mean any action which is attributable to an exercise of judicial power, but which is not a direct outcome of any power relationship. For example, political elites respond to Court decisions, other institutions rationally anticipate Court action, and judicial decisions can incentivize or discourage activism, lobbying, legislation, litigation, and more. In short, this points to the utility of expanding the study of judicial impact to encompass all policy-relevant outcomes of judicial action, and the theory offered here provides an anchor for this approach as well as a framework for systematizing a wide range of different impacts. I go on to show that the Court's indirect influence can be seen in that its decisions routinely affect media coverage of the issues on which it speaks, as well the policymaking agendas of the president and the political parties. In other words, I show that the Court indirectly influences policy in a number of ways, one of which is to alter the political agenda of the public and of other policymaking institutions in the United States.

**IMPACT:**  
**THE SUPREME COURT IN AMERICAN POLITICS**

by

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Dissertation

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## Chapter 1:

### Introduction: The Supreme Court in American Politics

In February of 2016 the Supreme Court's conservative stalwart, Justice Antonin Scalia, passed away unexpectedly while vacationing in Texas. Justice Scalia's untimely passing ignited a political firestorm in Washington as partisan elites began to position themselves for the ensuing battle over who would fill Scalia's now-vacant seat on the Supreme Court. In relatively short order, President Barack Obama nominated the Chief Judge of the United States Court of Appeals for the D.C. Circuit, Merrick Garland, to fill the empty seat. Garland was a well-respected jurist and a political moderate—in many ways, he seemed to be a safe pick for the outgoing administration.

Republicans in the U.S. Senate were not content with Obama's moderate appointment, however. Senate Republicans, led by Majority Leader Mitch McConnell, took the highly unusual step of refusing to even hold confirmation hearings for Garland. Senators were clear that this move was not about Garland's fitness for office, but about *politics*. McConnell set the tone for the party line on this issue, arguing that “this nomination should not be filled, this vacancy should not be filled by this lame duck president” (quoted in Kelly 2016). Democrats, on the other hand, pointed out the historical oddity of the Republicans' position, and urged their counterparts to give Garland full consideration for the seat to which he had been nominated.

Clearly at stake in this recent partisan controversy was the political balance of the United States Supreme Court. Justice Scalia was perhaps the Court's most conservative member during most of the term of his service. Thus replacing him with a moderate like Garland would have shifted the Court's ideological center of gravity considerably to the left. Republicans naturally

sought to resist this change, and did so by arguing that “the People” should decide who would fill Scalia’s seat. Democrats, who were thrilled at the opportunity to move the Court to the left, pointed out that “the People” had already answered that question by electing Barack Obama *twice*, and that as the sitting president, he had the constitutional right to fill court vacancies that arise while he is in office, and that the Senate had a constitutional duty to fully consider his nominees. In other words, both parties were using all of the tools at their disposal to ensure that they would be the ones to choose Justice Scalia’s successor.

This battle was in part about scoring political points with voters, to be sure, but there is more to it than that. A key component of the president’s choice as to who to nominate to the Supreme Court is the direction in which that nominee is expected to move the law. Indeed, today, both parties have various formal and informal “litmus tests” for nominees, concerning their jurisprudential and political commitments. For this reason, the president’s co-partisans have strong incentives to support the nominee, and the president’s opponents have strong incentives to try to leverage their political strength (however much or little) in order to win concessions from the president—that is, to induce him to nominate a candidate that is acceptable to members of both parties (see generally Yalof 1999; Epstein and Segal 2005; Nemacheck 2007). In this light, the controversy over Republicans’ refusal to consider Merrick Garland’s nomination was just an example—if a rather extreme one—of partisan politicking over control of the future development of the Supreme Court. The heat generated by this controversy indicates the tremendous importance of the Court’s makeup as recognized by the president, Senators, and partisans (both elite and otherwise) on both sides of the issue.

The importance of this vacated seat on the nation’s highest court, then, points to the importance of the Court as an institution in American politics. That is, the intense political

battles surrounding recent Supreme Court nominations implicitly recognize that the Court's decisions are important and politically consequential. Why else would political elites expend scarce resources—time, money, and political capital—fighting for and against judicial nominees?

Considering the fact that nominations to the Supreme Court have become increasingly polarizing, and confirmation battles increasingly acrimonious, one might suspect that it is conventional wisdom that the Supreme Court powerfully shapes politics and policy in the United States. Interestingly, though, this is not the case. Many scholars contend that the Supreme Court is a fundamentally weak institution which has little—if *any*—power to make public policy. Gerald Rosenberg (1991; 2008) has famously described the Supreme Court as a “hollow hope” for activists who seek to change policy through litigation, because, on his account, it lacks any real power to directly alter policy on the ground.

American thinkers have debated the power and importance of the Supreme Court since before it even came into existence. In what is undoubtedly the most cited Federalist Paper (among Public Law scholars, at least), Alexander Hamilton famously wrote:

“...the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter...” (Hamilton, in Rossiter 2003: 464).

This basic weakness, Hamilton continues, is attributable to the fact that the Court has “no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (Hamilton, in Rossiter 2003: 464). Far

from being a potent policymaker, Hamilton assures his readers that the Court will have virtually no ability to move policy without help from at least one of the “political” branches of government.

This position was not universally accepted, however, even in the run up to the ratification conventions. Many Anti-Federalists were deeply suspicious of the proposed court, fearing that it would run roughshod over the representative branches. Brutus opined at length on the problems the Court would present for the young republic:

“the supreme court under this constitution would be exalted above all other power in the government, and subject to no control. ... There is no power above them that can correct their errors or control their decisions—The adjudications of this court are final and irreversible... They cannot be removed from office or suffer a diminution of their salaries for any error in judgment or want of capacity. ... The power of this court is in many cases superior to that of the legislature. I have showed, in a former paper, that this court will be authorized to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature.” (Brutus XV, in Ketcham 1986: 307).

Thus Brutus contends that the proposed court’s power to interpret the law, including the Constitution itself, would be wholly unchecked and that the Court therefore is a threat to liberty and self-government. Hamilton, as Publius, counters that the Court can interpret the law in any way it wants, but its interpretations will be meaningless unless one of the representative branches agrees to implement its decision with the “sword or the purse.”

The famous activism of the Warren Court in the 1950s and 1960s—the advent of the so-called “rights revolution”—gave legal scholars impetus and opportunity to test these competing hypotheses in order to find out whether these landmark decisions were having the real-world effects that liberals hoped for. This question was typically addressed by assessing the extent to which real-world practices lived up to the dictates of the Court; in other words, the extent to

which outside actors complied with the Court’s rulings. Empirical studies of these questions became known as judicial “impact studies.”<sup>1</sup> The premise of this body of scholarship is simple: if the Court’s decisions significantly alter policy on-the-ground, then the Court is powerful, its decisions impactful; otherwise, it is not.

Today, despite more than six decades of study, there is little consensus among scholars on this important point. Many scholars have concluded that the Court (or courts more generally) can directly and significantly influence policy development, and thus imply that it is powerful (e.g. McCann 1994; Feeley and Rubin 1998; Frymer 2003; Keck 2009; Keck 2014). However, the more common perspective seems to be that the Court’s power to alter public policy is quite limited due to its institutional context and the checks other branches can impose upon it (e.g. Horowitz 1977; Rosenberg 1991, 2008; Pickerill 2004; Klarman 2004; Irons 2006; Sweet 2010). Others have sought to carve a middle ground, arguing that the questions of judicial power and impact are context bound, and thus recast the question to focus on the various institutional and political contexts in which Court power waxes and wanes (e.g. Andersen 2006; Hall 2011; Hall and Windett 2015).

This state of affairs presents an interesting puzzle. If the Supreme Court rarely influences politics or policy, or, in other words, if its decisions have little impact in the real world, why do Supreme Court vacancies matter at all? Or to put it differently, if the Supreme Court lacks force and will, if it is a hollow hope for those seeking political change, then does the Supreme Court really *matter* in American politics? Politicians in Washington, at least, seem to think that the Court does matter: they expend substantial time and energy working to staff the Court with ideological fellow-travelers, as the brief description of the Garland nomination above attests (see

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<sup>1</sup> Some scholars came to facetiously refer to these as “gap studies” because they routinely identified significant gaps between “law on the books” and “law on the street” (e.g. Sarat 1985; Gould and Barclay 2012).



Yalof 1999); they campaign on the Court's importance (e.g. Busch 2007; Stephenson 1999); and they routinely respond to the substance of Supreme Court decisions both rhetorically and by initiating their own policy responses (e.g. Barnes 2004; Keck 2014; Eshbaugh-Soha and Collins 2015). The American public also views the Court as an important policymaking institution, and expects it to authoritatively address important questions of constitutional politics (e.g. Marshall 1989; Bybee 2011).

To restate the question then, if the Supreme Court's decisions have little impact, *why* do American politicians and citizens care about the Court at all? Why do they expend scarce resources trying to influence the Court by shaping its personnel, or by responding to its decisions with statutes, executive orders, and the like? One possible answer to this question is that political elites and the American public are simply misguided—that they wrongly believe that the Court's decisions matter, and are thus willing to devote resources to shaping those decisions.

Alternatively, it could be the case that the long line of scholars who have contended that the Supreme Court is fundamentally weak have overstated their case, and that the Court is actually rather more influential in our politics than is typically recognized in the empirical literature on judicial impact. A key goal of this dissertation is to adjudicate this question.

In a broad sense, the purpose of this dissertation is to answer the question, “How powerful is the Supreme Court?” In the following pages, I will argue that the Supreme Court is much more powerful and influential in American politics than the judicial impact literature typically admits—that is, that these scholars have indeed overstated their case for the “weak Court” hypothesis. At the same time, though, I will argue that the Court is not the all-powerful policymaker that members of the public sometimes think it is, and that Brutus feared. Rather, I will make the case that the Supreme Court is an important policy-making institution, but one that

is subject to all of the travails of our checks-and-balances system. The Court is at once more powerful than it usually gets credit for being, but far less powerful than is frequently feared.

### **The Study of Judicial Power and Judicial Impact**

I contend that much of the heat generated by debates over judicial impact is attributable to imprecise definition of terms and divergent perspectives on what counts as impact (Keck and Strother 2016; see also Gould and Barclay 2012; McCann 1992, 1996; Rosenberg 1992, 1996). “Judicial impact” is a broad, ambiguous term—almost a catchall—that is widely used, but which has no widely agreed-upon definition (Becker and Feeley 1973). For many, judicial impact is synonymous with compliance with judicial orders (e.g. Horowitz 1977; Rosenberg 1991; Hall 2011), to some judicial impact means transmission of Supreme Court precedent through the judicial hierarchy (e.g. Hansford and Spriggs 2006), while for others judicial impact encompasses things like spurring subsequent legal or political activism (e.g. McCann 1994; Keck 2009). These disagreements have been further inflamed by divergent epistemologies and conceptions of the law itself among these different camps.

Rosenberg’s (1991) famous claim that the Court is but a “hollow hope” for reform-minded activists opened up an exchange with McCann that would span the next five years (McCann 1992; Rosenberg 1992; McCann 1994; Rosenberg 1996; McCann 1996). In this exchange, Rosenberg (1996) argues that the disparate conclusions reached by he (and other positivists) and McCann (and other socio-legal scholars) come down to perceptions of whether the glass is half full or half empty. McCann famously responded that he “must respectfully disagree...Such an accounting—typically in quantitative images—obscures our qualitatively very different points of reference and terms of understanding the issues at stake; we are not viewing the same glass of water” (1996: 479).

This snippet from the McCann-Rosenberg exchange highlights two important differences in the then-mainstream impact literature and the socio-legal literature. First, the impact literature was, by the 1990s, largely quantitative, and thus took a positivist view of what “impact” could be—namely, it could be measured and counted. Socio-legal scholars, on the other hand, were frequently interested in forms of impact that do not lend themselves to easy measurement, such as changes in identity, legal consciousness, and the like. In other words, this difference was epistemological, which then implied divergent methodological approaches (McCann and March 1996). Second, McCann points to a more fundamental difference in the two schools of thought: the positivist approach to the study of impact frequently misses “a wide range of arguably important, often unintended ‘effects’ of legal rulings” because it takes a top-down view of impact and ignores bottom-up forces (1996: 480; see also McCann 1994: 290-293). These effects are, in essence, downstream effects of law or legal decisions on the strategic choices of citizens, litigators, and interest groups, and on politics more generally. In this dissertation, I will argue that McCann is right: scholars motivated by questions of judicial impact or court power have long been looking at different glasses. Moreover, I argue that each glass that has been so far considered is in itself incomplete. Each comprehends an important aspect of Court power (and/or impact), but none has offered a complete and nuanced theory of Court power, because each ignores or marginalizes other important aspects of power. A truly general theory of Supreme Court power must comprehend all aspects of its power. Similarly, a general theory of judicial impact must comprehend the whole range of impacts that court decisions can have. To be clear, I am arguing that a necessary first step in the effort to gain clarity on questions of judicial power and impact, is to explicitly define both, and to clearly distinguish between the two.

## My Argument

First, I argue that we should conceptualize judicial impact as all policy-relevant outcomes of judicial behavior. This understanding of judicial impact is intended to capture the full range of changes in policy that are attributable to Court decisions; in other words, to provide a comprehensive account of judicial influence on politics and policy. The very breadth of this conceptualization of impact raises its own set of problems, chiefly, the problem of specifying expectations regarding a wide range of impacts *ex ante*, and of rigorously studying a potentially huge variety of types of impact. Indeed, it may well be the case that is impossible to predict with any precision the full range of impacts that any given decision may have. Rather, we may have to settle for the far less satisfying recognition of the reality that the range of impacts a decision may have is contingent on numerous variables of political context, including the level of interest from political elites, the relevance of the decision to issues currently on the political agenda, the creativity of interested policy entrepreneurs, the activity of interest groups working in the area, and variations in the media cycle, to name a few.

While it may be impossible to predict the full extent of any given decision's impact *ex ante*, it is still possible to predict *some* types of impacts of decisions. That is to say, there are basic features which all Court decisions share, and which can thus be used as a foundation for a theory of impact. Furthermore, some types of impacts are relatively common, such as responses from other political agents, which can help to guide theory-building as well. To this end, I contend that there are two sources of judicial impact, broadly speaking: the Court's direct power to make policy, and the indirect influence that emanates from that power. The Supreme Court's power is fundamentally the same in all of its decisions (even if political context can shape its

ability to effectuate that power)—as such, we can predict the impact of the Court’s direct power exercised in any give case.

Understanding the nature of the Court’s power is clearly central to this endeavor. Indeed, we cannot possibly understand or rigorously study judicial impact if we harbor inaccurate or incomplete theories of judicial power. The typical view of judicial power in the literature is coercive: the Court is powerful to the extent that it causes other actors to do things they would not otherwise have done. Most studies in the impact tradition have concluded that the Court is weak, then, because it frequently fails to cause outside actors to change their behavior in accordance with its orders. In contrast to most scholarship in the impact vein, however, I argue that the nature of the Court’s power is interpretive; the Court’s power is the power to say what the law is, what it means, and how it applies in concrete cases.<sup>2</sup> In other words, this theory explicitly recognizes the fact that law *is* policy.

Because written law is indeterminate, courts make policy when they interpret and flesh out law for application in particular cases. This power is especially important in the realm of constitutional law because the language of the Constitution is frequently ambiguous, and because many of its provisions are fundamentally contested. Thus the Supreme Court’s constitutional cases provide it ample opportunity to make policy. The very ambiguity of the constitution’s text means that the constitution-in-practice is shaped almost entirely by Supreme Court interpretation (of course Congress and the president frequently influence the Court’s decisions and interpretations in very meaningful ways). In this dissertation, I aim to show that the Court’s ability to give meaning to the Constitution, not its ability to change the behavior of non-court

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<sup>2</sup> In a way, it seems that this definition of Court power should be uncontroversial, as this is what generations of jurists and legal scholars considered the judicial power to be, at least until the Realist revolution of the early twentieth century. In any event, this theory is a significant departure from the theories of Court power that have dominated the empirical Public Law literature for the last 50 years or so.

actors, is its fundamental power. Moreover, I intend to show that this understanding of judicial power illuminates a wide range of outcomes of judicial decisions that have too frequently been omitted from academic discussions of judicial power.

The theory advanced here improves upon compliance-based theories in two ways: first, it incorporates a far wider range of direct outcomes of judicial action than do the compliance oriented theories, and second, it provides leverage for understanding judicial power in *all* cases the Court decides. As I show in chapter two, the conventional compliance-oriented theories of judicial power consider only one type of power, and apply only to a very small subset of cases. As such, I argue that the power to induce compliance must be nested within a broader theory of judicial power. By extension, I argue that the study of compliance with judicial decisions that typifies the study of judicial impact needs to be nested within a wider-ranging study of the ways in which Court decisions alter policy in politics. Put differently, I do not argue that we should abandon compliance studies or attempts to theorize compliance with courts, but rather that we should recognize explicitly that compliance is only part of the story, and our efforts to theorize and study judicial power and impact must recognize that fact.

In the following chapters I show that this conceptualization of judicial power as fundamentally interpretive provides substantial new leverage to understand the many ways that the Supreme Court shapes public policy and politics in the American political system. The most straightforward effect of this power is the direct policy changes that new interpretations of the law sometimes require. In other words, doctrine—legal policy—in many contexts *is* public policy that has direct and unambiguous effects on various groups and institutions in politics. For example, in its landmark decision in *Employment Division v. Smith*, the Supreme Court reinterpreted the First Amendment, which is to say it created a new legal rule for deciding Free

Exercise cases; and it did so without formally overturning precedent or invalidating any statute. However, the simple act of reinterpreting the law of the First Amendment significantly altered the political landscape of Free Exercise—in particular, it made it much more difficult for individuals and groups bringing Free Exercise challenges in federal courts to win their cases. In practical terms, this means that *Smith* significantly expanded the scope of governmental authority to regulate public activities in ways that—at least arguably—impinge on some citizens’ religious liberty.

Even this brief example points to the importance of attending to the second source of judicial impact: the indirect influences Court decisions have on subsequent politics and policy development. Supreme Court decisions, including *Smith*, are only *final* insofar as there is no higher court to whom the losing litigant can appeal. There are a wide range of actors that have the ability to alter, mitigate, stymie, and even overturn Supreme Court decisions—but they can also entrench, expand, and build upon those decisions. That is to say Supreme Court decisions, even its landmark decisions, are just one component of the much larger politics of policy development in the American political system. Perhaps the Court’s most famous case of the 20<sup>th</sup> century, *Brown v. Board of Education*, did not begin nor end the process of desegregating public schools. Yet *Brown* was undoubtedly an important step in that process: implementation was imperfect and it led to backlash in parts of the old South, certainly, but it also directly resulted in desegregation in a large number of school districts around the country, and greatly energized subsequent activism as people continued the fight in the following years. A key argument that I advance in this dissertation, then, is that the full impact of Supreme Court decisions can only be observed by focusing on policy development itself, and then locating the Court’s influence within that developmental story.

This approach to impact has a methodological implication: taking “the long view” is critical to understanding the full range and extent of judicial influence on policy and politics. Far too often impact studies take a “snapshot view” that emphasizes the environments or conditions under which Court decisions effectively alter the behavior of other actors. This approach to the study of the aftermath of Court decisions obscures or entirely misses important categories of outcomes of those decisions. In reality, politics are “moving pictures” of which snapshots can account for only a fraction. The growing movement toward a developmental study of politics and policy, which attends to dynamic, iterative, and conflictual nature of the American political system, reflects recognition of this fact. That is, by focusing on policy development over time, we can see how courts, legislatures, interest groups, and other actors interact to continually produce new politics and policies.

In light of the above observations, the theory advanced in this dissertation is supported by a wide variety of data sources, both primary and secondary. I examine judicial power and influence by situating a case or a series of cases within the context of the policy issue to which it speaks: rather than studying the impact of *Furman v. Georgia*, I study the impact of Supreme Court decisions on law and policy of capital punishment. By taking a developmental view, I am able to show how Court decisions influence policy immediately, but also how those decisions spark responses from Congress or politicking by interest groups, and how these responses from other actors and institutions themselves shape policy. Ultimately, by attending to the political push-and-pull between a wide range of actors in the policy arena, the approach offered here provides a more complete, more nuanced, and more realistic picture of the Supreme Court’s role in American politics.



## **The Plan of the Dissertation**

This dissertation proceeds in two broad parts, which correspond to the two sources of judicial impact discussed above. In the first part of the dissertation I focus on Supreme Court power. I begin in chapter two by discussing existing theories of judicial power and judicial impact. I then offer a new synthesis of these bodies of scholarship, and contend that by integrating these works we can begin to see patterns of types of impacts from Supreme Court decisions. I then present my theory of judicial power and judicial impact, and contend that the approach offered here promises new insights into the role the Court plays in American politics.

I build on these arguments in chapter three by presenting a series of case studies aimed at explicitly demonstrating the limitations of the conventional approach and theories derived therefrom, and which in turn point to the utility of the theory offered here. Defending this theory of Court power requires a departure from the conventional approach to the study of impact. As discussed above, taking “the long view” is critical to understanding the full range and extent of judicial influence on policy and politics. The growing movement toward a developmental study of politics and policy, which attends to dynamic, iterative, and conflictual nature of the American political system, reflects recognition of this fact (Hacker and Pierson 2014; Keck 2014; Strother 2017b). Here, by focusing on policy development over time, I show how courts, legislatures, interest groups, and other actors interact to continually produce new politics and policies.

Next, in chapter four, I tease out an implication of my theory: in brief, because the Supreme Court has substantial power to make policy by interpreting the law, it should be largely unconstrained in its decision-making on the merits of cases. I then test this hypothesis against a sample of more than six-thousand Supreme Court decisions, using both time-series and cross-sectional econometric approaches. I conclude that the Court is much less constrained than most

leading studies have suggested. Indeed, I find that the Supreme Court is only significantly influenced in its decisions on the merits of cases in the context of judicial review of federal statutes, or when it issues highly salient decisions that cannot be implemented by lower courts. Taken together with chapter three, the findings from this first part of the dissertation strongly suggest that Public Law scholars have long been underestimating Supreme Court power.

In the second part of the dissertation I build on the arguments in chapter three regarding the importance of indirect judicial influence over policy in any study of judicial impact. I focus in this part of the project on one particularly important type of indirect influence: the Court's role as a national agenda setter. I begin in chapter five by assessing the Court's ability to influence the political agenda of the American public. This is accomplished by conducting time-series Box-Tiao intervention analyses on twenty sets of serial observations of media coverage on issues on which the Court issued at least one important decision. These analyses show that the Court regularly exerts significant influence over the public's political agenda by increasing media attention to issues on which it speaks. Even so, my analyses of these significant Court interventions in the agenda do not get us very far down the road toward predicting which cases might have these import agenda-influencing effects *ex ante*.

In chapters six and seven, I turn my attention to the agenda of some of America's policymakers. In chapter six, I examine Supreme Court influence on the agenda of the sitting president. I use a rare-events (Firth) logistic regression approach to show that the Supreme Court can and does significantly affect the president's agenda in theoretically predictable ways: the political and legal importance as well as the salience of a given decision, and mobilizability of the larger issue all significantly increase the probability that a president will respond to a given decision. Importantly, putting issues on the president's agenda can have important policy effects,

such as George H.W. Bush's advocacy for what would ultimately become the Flag Protection Act of 1989.

In chapter seven, I utilize qualitative content analysis to examine the influence of the Supreme Court on the official agendas of America's two major political parties. The research presented in this chapter indicates that the parties tend to include Supreme Court decisions in the official agendas when doing so provides them with an opportunity to mobilize their base by reminding voters about the important policy stakes of Supreme Court decisions—and by extension, the importance of electing co-partisans to nominate and confirm justices. However, I also find that the parties respond to the Supreme Court differently, with Republicans being much more responsive than Democrats, especially over the last twenty years or so.

Taken together, chapters five, six, and seven indicate that the Supreme Court regularly influences the American political agenda, and does so in a number of different ways. These findings strongly suggest that agenda influence is a key pathway by which the Court indirectly influences public policy. Put differently, these chapters utilize a variety of methodological approaches and data sources to show that the Supreme Court has significant *impact* in American politics that is not directly attributable to outcomes of exercises of its power. I conclude this work in chapter eight: I summarize my findings, restate the argument, and draw out some of its key implications for the study of the Supreme Court, public policy making, and American politics more generally.

## Chapter 2:

### A Theory of Judicial Power and Impact

#### Judicial Impact and the Limits of Compliance Studies

In many ways, the theories of judicial power that we have today are legacies of the historiography of judicial impact. The activism of the Warren Court in the 1950s induced many students of the Supreme Court to ask whether its landmark decisions early in the “Rights Revolution,” such as *Brown v. Board of Education* and *Miranda v. Arizona*, were having the real-world effects that liberals hoped for. Empirical studies of these questions became known as judicial “impact studies.” Decades worth of research in this tradition has taught us much about the conditions under which the Supreme Court of the United States is able to meaningfully alter public policy. Even so, the literature suffers from a number of significant limitations. Prominent among these is the tendency toward case studies focusing on unusual cases, in nearly all of which the Supreme Court has reversed a policy decision made by another state actor and issued a corresponding order (e.g. Sarat 1985; see generally Martens 2007). Additionally, the literature on impact has increasingly defined “impact” as essentially synonymous with behavioral compliance of non-court actors with judicial decisions (e.g. Rosenberg 1991; Hall 2011). In this dissertation, I argue that in order to advance our understanding of judicial impact, and to deepen our knowledge of the role of the Supreme Court in American politics, we must significantly broaden both our conceptualization of impact and the range of cases we study. Specifically, I argue that in order to fully appreciate the ways that the Court affects and influences American politics and policy we should define judicial impact as all policy-relevant effects of a given decision.

### ***What is “Judicial Impact”?***

The Rights Revolution sparked significant scholarly interest in the real-world impact of Supreme Court decisions. As the study of impact developed, it increasingly came to be defined as essentially synonymous with “compliance.” Compliance studies typically formulate impact as follows: the Supreme Court ordered X, we should thus expect to see X in the real world; scholars would then look for X in the real world, and report the extent to which real-world political practice lived up to the dictates of the Court. These studies, then, interrogate the extent to which the Court is able to exercise power over the behavior of a wide range of political actors.

For example, Birkby (1970) assessed the impact of *Abington School District v. Shempp* (1963), in which the Court held that mandatory religious activities in public schools violated the Establishment Clause, by surveying school administrators in Tennessee, asking whether they stopped holding school-sponsored Bible readings. Birkby found that fewer than half (51 of 121) of the districts in his sample altered their policies to comply with the Court’s ruling. Other notable examples of first-generation impact studies assessed the effects of *Miranda v. Arizona* on coercive interrogation tactics of local police (e.g. Seeburger and Wettick 1973; Wald, et al. 1970), and the effects of *Baker v. Carr* (1962), *Reynolds v. Sims* (1964) and other landmark decisions on legislative districting (e.g. Hacker 1965; Erikson 1971; Hanson and Crew 1973).

Many notable recent studies take this approach as well, including Rosenberg’s influential *The Hollow Hope* (1991; 2008), Sweet’s (2010) study of *City of Richmond v. Croson* (1989), and Hall’s (2011) study of the impact of fifty-four landmark Supreme Court decisions. The sum finding of these studies is rather mixed: some, such as Feeley and Rubin (1998) and Frymer (2003) argue that courts significantly shape policy outcomes, while others such as Sweet (2010), Silverstein (2007), and Gould (2005) demonstrate that actors responsible for implementation of

judicial decisions are frequently able to evade those rulings. Hall (2011) persuasively argues that the key insight of the compliance literature is that the Supreme Court is *sometimes* able to induce compliance with its decisions: it succeeds when its rulings can be implemented directly by lower federal courts *or* when the decision is not too unpopular amongst the public. Put differently, Hall (2011) describes the conditions under which the Court can successfully exercise power over different actors charged with implementing its decisions (see also Hall 2015; Hall and Windett 2015).

Hall's (2011) study is persuasive with regards to the cases that it covers, but like many scholars studying compliance with judicial decisions, he only looks at cases in which the Court struck down some statute or practice on constitutional grounds. Such cases are undoubtedly important but they constitute only a fraction of the Court's work. Cases in which the Court declines to exercise its power to impose constitutional limits on other state actors are also important and politically and legally consequential (Casper 1976). For example, the Court declined to strike down Oregon's ban on the use of peyote in *Employment Division v. Smith* (1990), but in doing so affected a sea-change in free exercise doctrine and led to a decades-long battle with Congress over religious free exercise that produced several important policy changes, including the Religious Freedom Restoration Act (RFRA).

This emphasis on Court reversals of policies is probably attributable in large part to the disciplinary fascination with the "countermajoritarian difficulty" (Martens 2007), but it leaves a large fraction of the Court's cases virtually untapped. In many studies in the compliance vein, scholars are interested at least in part in discerning the extent to which the presumptively non-democratic Court can enforce its preferences in a democratic polity. This move has the unintended effect of blurring the line between judicial *power* on the one hand, and *impact* on the

other. This distinction merits discussion. Many scholars working in the compliance vein use the terms somewhat interchangeably; Hall (2011) on the other hand, is careful to frame his study as one of judicial *power*. Disentangling these important concepts is difficult because of the obvious valence between them.

Here I define impact judicial impact as all policy-related consequences of a court decision. Supreme Court power—the ability to affect the decisions and behaviors of other institutions and actors—will clearly cause its decisions to have impact. That is, as Court power grows, so should grow the impact of its decisions, but the inverse is not necessarily true. Thus judicial impact is a concept that will encompass a wider array of real-world phenomena than will power; it allows for both direct and indirect effects, so long as they are policy-relevant. Blurring this line has caused some substantial degree of disagreement in the literature as to the efficacy of courts. As I will show in the following sections, many of the “gap” studies which purported to examine “impact” were actually examining Court power (a rather higher bar)—and when they found little or no power, declared that courts had little impact (e.g. Rosenberg 1991, 2008; Sweet 2010). Many critics of these gap studies demonstrate the *impact* of courts by looking beyond power, focusing instead on second-order effects of decision, such as on mobilization of activists or influence on the political agenda (e.g. McCann 1994; Keck 2009). Hall’s (2011) study is commendable then, in that it rigorously explores Supreme Court *power* without yielding to the temptation to make broader claims about impact. Thus I turn next to establishing a definition of Supreme Court power, which is the necessary first step to establish a theory of judicial impact.

### ***The Nature of Supreme Court Power***

Power is a crucial concept in political science. The power of persons, groups, and institutions vis-à-vis other persons, groups, and institutions can be fairly said to animate virtually

all scholarly work in the study of politics. Students of the Supreme Court are no exception to this rule: a huge literature in the Public Law subfield seeks to understand the power the Court has to make or alter public policy (Keck 2014; Hall 2011; Rosenberg 2008; Frymer 2003; Becker and Feeley 1973). I depart from most works in the empirical Public Law literature in defining judicial power not as synonymous with compliance, but rather as fundamentally interpretive.

Echoing Chief Justice Marshall’s famous line in *Marbury v. Madison*, I argue that the judicial power is in its essence the power “to say what the law is” (1803: 177; see also Pound 1922). This power, even when used modestly, necessarily includes the power to legislate (that is, to create law) “‘incidentally and in a subsidiary way’ under the formula of declaring what the law is and forever has been” (Pound 1922: 790, quoting Thayer 1898: 319; see also Brutus XV). Put differently, the Court “legislates”—it creates law or makes policy—simply by authoritatively declaring what existing law (common, statutory, or constitutional) means. This understanding of the judicial power is couched in a recognition that written law is fundamentally indeterminate of a wide range of questions (Pound 1908; Cardozo 1921; Llewellyn 1931; see generally Whittington 1999a). Put differently, the law—whether it be the Constitution, Congressional statute, or some municipal ordinance—is incapable of providing objectively correct answers to all questions that might arise in practical application. This fundamental indeterminacy means that judges must make policy, even if only in a mundane way, when applying law to particular cases (Thayer 1898; Tamanaha 2006).

To be clear, I am arguing that the nature of the Court’s power is to create authoritative legal rules—to announce the rule of law—which most often have binding precedential value. The legal rules developed by the Court in its Constitutional law decisions define the terms of the “constitution-in-practice,” and in doing so outline the boundaries of legitimate political authority



in the United States. Most “landmark” decisions involve some significant change in the rule of law as interpreted by the Supreme Court which alters the scope or balance of power in the American political system. For example, in *Roe v. Wade* the Supreme Court interpreted the Fourteenth Amendment as protective of a woman’s autonomy during the first trimester of pregnancy; in doing so, that decision prohibited governments around the country from interfering with her decisions regarding her pregnancy during that time. As a result of this new rule, the abortion policies of 46 states were upset, including many which were invalidated. However, it is very important to note that the Court can substantially alter legal policy without invalidating any statute or otherwise reversing the policy decisions of other units of government. Consider the example of *Employment Division v. Smith*: in that case, the Court significantly altered Free Exercise Doctrine by ruling that the First Amendment did not necessarily protect individuals from adverse effects of “neutral” and “generally applicable” laws in order to uphold an Oregon drug statute. In other words, the *Smith* Court substantially revised the law of Free Exercise and announced a wholly new legal rule for such cases even as it upheld the statute in question in the case.

Thus I argue that the Court’s power to authoritatively interpret the law, and in doing so to create binding legal rules, is its fundamental power, and that any other power it might have is derived from or pursuant to this basic power. For example, the power to invalidate statutes (such as the restrictions on abortion discussed above) is simply the power to interpret the Constitution as not permitting some activity embodied in statute. The power to invalidate a statute is the strongest form of its interpretive power, but is not a wholly separate or distinctive thing from its general interpretative power (Barnett 2004b).

Furthermore, the power to compel implementation through lower courts is pursuant to this fundamental power; that is, the Court’s hierarchical control over the judiciary is not the nature of its power, but rather is a chief site of the implementation of its power. The extent of implementation or compliance with Court decisions (that is, the rules of law announced in those decisions) clearly speaks to the real-world impact of the Court, and has for this reason garnered much scholarly attention. But reliance on the compliance approach to develop theories of judicial power (e.g. Hall 2011; Rosenberg 2008) marks a subtle shift in focus that confuses the study. We must ask, what is it that lower courts (or even outside actors) are to comply with? The answer, of course, is the Supreme Court’s interpretation of the law, and the accompanying order regarding the execution of its decision. In *Furman v. Georgia*, the Supreme Court interpreted the Eighth Amendment’s ban on cruel and unusual punishments as a prohibition on capital punishment as it was then practiced, and thus ordered a moratorium on “imposition and carrying out of the death penalty” (1970: 239-240). In cases like *Furman*, compliance with the Court order is a reasonable proxy for compliance with the Court’s basic interpretation of the law. In *Employment Division v. Smith*, however, the Court interpreted the First Amendment’s free exercise clause as permitting a potentially wide range of legislation that could cramp individuals’ religious practices, so long as those laws were not written intentionally to harm religious practitioners. The only order issued in *Smith* was that federal courts use this interpretation of the free exercise clause (and the new doctrinal rule of “neutrality and general applicability”) in subsequent cases.

To make the point in another way, imagine a Supreme Court that is the same in every way as the one we know except that it *may not* invalidate or nullify statutes. This hypothetical Court remains vested by Article III with “the judicial power” which is commonly understood to be the ability to interpret the law so as to apply it to particular disputes, and in doing so to set

precedent for future similar disputes. This counterfactual Court may still “say what the law is” up to the point of invalidating a statute. History demonstrates that this practice can be transformative (think of *McCulloch v. Maryland*, *US v. Carolene Products*, *Wickard v. Filburn*, *Employment Division v. Smith*, etc.; see for example, Ackerman 2014; Barnett 2004a; Gillman 1992). Further, this counterfactual Court would still sit atop the federal judicial hierarchy, allowing it wide latitude to shape policy within the more distinctively juricentric sphere of policy, such as criminal procedure and rights of the accused. It could, for example, still command lower courts not to admit certain kinds of evidence, not to issue warrants under some given conditions, and the like (see, for example, Hall 2011; Westerland, et al. 2010; Songer, Segal, and Cameron 1994). Finally, take the perspective of a party to the case being decided: whether the Court can invalidate a statute or not, it will still definitively resolve the conflict at hand with one party winning and the other losing. This is a clear exercise of power, especially when one remembers that governments, including the national government, can lose a case without a statute being invalidated.

### **Synthesizing Power and Impact to Understand the Supreme Court in American Politics**

From the above discussion it should be clear that judicial power and judicial impact are fundamentally distinct, yet they correlate highly enough that it is valuable to theorize about and study them together. Indeed, the very term “power” implies impact. However, there are impacts of Court decisions that are directly attributable to the reality of the Court’s power, but that are not direct outcomes of exercises of that power. For example, legislative responses to Supreme Court decisions implicitly recognize the power the Court has over policy: if Court decisions were inefficacious or could be stripped of their force simply by being ignored, then legislatures would have little reason to expend scarce resources on response legislation.

Returning to the example of *Employment Division v. Smith*, it is clearly the case that the Court did not intend for Congress to statutorily overturn its decision and in doing so alter policy in the area of religious free exercise, which is to say that the Religious Freedom Restoration Act was not a product of the Court's power over Congress. However, it is equally clear that RFRA was a direct response to the Court's power to change policy itself. That is, RFRA was necessary, from the viewpoint of the 103<sup>rd</sup> Congress, precisely because the Court was able to significantly alter free exercise policy in *Smith*. Or to put it differently, the reality of the Court's power to make policy necessitated a policy response from Congress. On this view, RFRA is attributable to the Court's decision in *Smith*—it is an “impact” of the *Smith* decision—and it is directly traceable to the Court's power to make policy. However, RFRA is not a direct outcome of the Court's power to alter policy by interpreting the law. Rather, RFRA is a directly traceable second-order effect of the Court's power.

The example of RFRA in response to the Court's decision in the *Smith* case highlights some of the complications of the study of judicial impact. In *Smith*, the Court reinterpreted the requirements of the Free Exercise Clause of the First Amendment, and in doing so, dramatically altered federal free exercise policy. Lower courts implemented the new doctrinal rule articulated by the *Smith* Court, making it much harder for free exercise claimants to win their cases in federal courts. This is the direct policy outcome of the Court's interpretive power in this particular case: the Court's power to interpret the law has direct, unambiguous impacts on real-world policy (this case will be discussed at length, and this argument bolstered with empirical evidence, in chapter 3). As such, we can correctly speak of the “impact” of Supreme Court decisions in terms of the changes in policy articulated by the Court in its decisions. Such impacts are the necessary outcomes of exercises of Court power. Impact, as I have argued, is more than

just the necessary outcomes of exercises of judicial power, however. The Religious Freedom Restoration Act illustrates the point. RFRA was a direct Congressional response to the Court's *Smith* decision, but it was certainly not a necessary outcome of the Court's interpretive power as exercised in *Smith*. Yet to define "impact" in such a way as to miss policy responses such as RFRA makes little sense, as such responses can profoundly influence politics and policy—and are directly traceable to the Court's action. This reality points to the necessity of conceptualizing of impact as all policy-relevant outcomes, and to the importance of cleanly distinguishing between direct power and indirect impact. I further elaborate on these themes in the following section.

### ***Leading Alternative Theories of Supreme Court Power***

The power to reverse a policy decision made by another branch or unit of government has been aptly described as the Supreme Court's "most potent" power (Keith 2008). It is perhaps also the Court's most clearly observable power. The disciplinary fascination with the "countermajoritarian difficulty" has led scholars to disproportionately focus on cases in which the Court exercises this power to invalidate statutes or otherwise reverse policies, as they seem to represent the clearest instantiation of the Court's power to act as a deviant institution in a largely democratic polity (Bickel 1962; Martens 2007; Friedman 2009; Hall 2016). These features have led compliance-oriented scholars to focus on these relatively rare but important actions, and to largely ignore many other operations of Court power which are subtler, but no less real. Scholars working in other research traditions have studied some of the other types of Court power, but have yet to integrate their insights into a comprehensive theory of Court power (see Gould and Barclay 2012).

As noted above, compliance studies typically formulate judicial impact as follows: the Supreme Court ordered X, we should thus expect to see X in the real world; scholars would then look for X in the real world, and report the extent to which real-world political practice lived up to the dictates of the Court. As such, the compliance formula, as I call it, interrogates the extent to which the Court is able to exercise power over a wide range of political actors. Five-plus decades of research in this vein demonstrates that the Court is *sometimes* able to induce compliance with its decisions.

Hall (2011) persuasively argues that the Court succeeds in inducing compliance when its rulings can be implemented directly by lower federal courts *or* when the decision is not too unpopular among the public at large.<sup>3</sup> This approach, for all that it has taught us, can provide at best a partial picture of Court power, however: the compliance formula can only work if the Court issues an order requiring an actor to alter its behavior in an observable way—if this condition is not satisfied, “compliance” becomes non-falsifiable. As such, this approach can speak only to a fraction of the Court’s decisions: those in which it invalidates a statute or practice, or those in which it significantly alters precedent. Additionally, prior works in numerous scholarly traditions have documented a huge array of downstream effects of court decisions which are missed entirely by the compliance approach, even in cases to which the formula can be applied (Dahl 1957b; Scheingold 1974; Casper 1976; Brigham 1987a; McCann 1994; Melnick 1994; Barnes 2004; Keck 2009; see generally Keck and Strother 2016). Unless *none* of these effects are attributable to Court power, then the compliance approach clearly considers only a limited portion of the Supreme Court’s power.

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<sup>3</sup> One can reasonably question whether “power” is appropriately invoked if compliance depends on popularity in some category of cases.

### ***Why the Focus on Compliance?***

The compliance orientation of much of the judicial impact literature seems to be borne of Hamilton's famous claim in the 78<sup>th</sup> Federalist, that the Court "may be truly said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (Rossiter 2003: 464). That is, Hamilton claimed that the Supreme Court would be the "least dangerous" branch because it lacked the power to enforce its decisions. Compliance studies seek to test Hamilton's thesis (Horowitz 1977; Rosenberg 2008; Hall 2011).

Hamilton's claim is at least partially right: it is true that the Court's fundamental power is "judgment." As an empirical matter, however, it is not the case that the Court is wholly dependent on outside actors for implementation of its judgments. In Hamilton's defense, the literature on judicial power suggests he may actually have been correct in his observation at the time that he made it: leading works on Court power strongly suggest that the Court's chief source of implementation power comes from its substantial hierarchical control over lower federal courts (Hall 2011; Songer, Segal, and Cameron 1994; Lax 2003; Westerland, Segal, Epstein, Cameron, and Comparato 2010). When Hamilton made his claim no lower federal courts yet existed, as the then-prospective Constitution only provided for a "supreme Court" (though it did vest Congress with the power to create lower federal courts; see generally Crowe 2012). In short, a key source of the Supreme Court's power to induce compliance comes from its hierarchical control over lower federal courts; that being the case, Hamilton's famous claim may well have been correct when he made it, as the Court had (and still has) no power to force Congress or the president to enforce its judgments. A key takeaway here, though, is that the Court does have substantial hierarchical control over lower federal courts, and thus it can enforce its own

decisions insofar as the legal rules it announces are binding on lower courts. To restate the argument: the nature of Supreme Court power is the power to interpret the law; the Court's ability to ensure implementation of its interpretations is contingent on its hierarchical control over the federal judiciary.

The Court's basic interpretive power is distinct from its power to force other actors to comply with its judgments or implement its orders. A large literature in policy studies interrogates implementation of policies (e.g. Pressman and Wildavsky 1973; Van Meter and Van Horn 1975; Mazmanian and Sabatier 1983). Mazmanian and Sabatier define implementation simply as "[t]he carrying out of basic policy decisions" (1983: 20).<sup>4</sup> That is, these studies are concerned with "the degree to which the actions of implementing officials and target groups coincide with the goals embodied in an authoritative decision" (Matland 1995: 146). A substantial body of scholarship in the implementation tradition has found that "street-level" actors are often able to shape policy-in-action to a substantial degree (May and Winter 2009; Canon and Johnson 1999; Matland 1995; Lipsky 1980; Pressman and Wildavsky 1973). As such, I argue that compliance studies tell us less about the *nature* of Supreme Court power than they do about the nature of policy implementation in a complex state with separated institutions. Few scholars, for example, point to the imperfect implementation of legislation, such as of the National Environmental Policy Act of 1969, as evidence that Congress is impotent; rather, they typically point to various principal-agent problems in explaining limited compliance (e.g. Cortner 1976; McCubbins, Noll, and Weingast 1989; Pressman and Wildavsky 1973).

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<sup>4</sup> Another related issue with the judicial compliance literature is highlighted by the implementation literature in Policy Studies. The top-down approach to judicial compliance has two key problems: it focuses on the Court decision as the starting point (without considering how pre-existing policy might condition/constrain/influence implementation); and compliance studies emphasize the Court as the key actor, and ignore the discretion of street-level implementers (see generally Matland 1995).



In short, a key motivation of the compliance literature is to address the “so what” question in the study of the courts. If Hamilton is right that the Court cannot enforce its decisions, then the countermajoritarian question may not be all that important. Put differently, if the Court is beholden to outside actors for the force of its decisions, then the content of those decisions is of relatively less importance than if the Court can unilaterally impose its will. If Hamilton is wrong, however, and the Court does have some degree of power to see its decisions implemented, then the content of its decisions, the processes by which it arrives at those decisions, etc., are crucially important to the broader study of American politics. To put it very clearly, I am arguing here that compliance with judicial decisions is important, but that compliance is *not* “the judicial power.” Rather, compliance is tied up with questions of implementation, which is a notable concern for all units of government. Compliance with Supreme Court decisions has important normative and empirical implications, but both are incidental to its more fundamental power, which is the power to interpret the law and create binding legal rules.

### ***Problems with the “Power Over” View***

There are significant theoretical and empirical problems with a theory of Supreme Court power based entirely on the Court’s ability to induce compliance. First, as noted above, the compliance approach typically elides the basic distinction between power and policy implementation. Theoretically, scholars have long pointed to numerous types, or faces, of power, which operate in distinct ways. Empirically, large and well developed literatures have pointed more or less directly to types of Court power that are wholly distinct from its ability to induce compliance. I take up both varieties of problems in turn.

Power is a concept that is notoriously difficult to pin down (Baldwin 1989). Early power analysts viewed power as the ability of one actor to make decisions or control outcomes that affect another actor (Dahl 1957a; Nagel 1975). Scholars soon pointed out that this was an overly narrow conception of power, and highlighted its other “faces” which are subtler and perhaps more invidious (Schattschneider 1960; Bachrach and Baratz 1962; Lukes 1974; Gaventa 1982). The “first face” of power is typically formulated as “power over” or “power to.” Dahl’s classic formulation of power fits this mold: “A has power over B to the extent that he can get B to do something that B would not otherwise do” (1957a: 203). Jack Nagel defines power in a similar fashion: “A power relation, actual or potential, is an actual or potential causal relation between the preferences of an actor regarding an outcome and the outcome itself” (1975: 29). In short, first face power consists of an actor’s ability to shape behavior. Because exercises of first face power tend to be fairly explicit (A issues an order), and its operation is generally observable (B complies or does not), analyses of first face power relations tend to be relatively easy. It is this face of power which compliance studies examine: can the Court (A) unilaterally cause some other actor (B)—a police force, a school board, a lower court—to change its behavior?

The “second face” of power is subtler; it is the ability to define (or confine) the scope of decision-making—it is power over the political agenda. In their classic essay on power, Bachrach and Baratz note “Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A” (1962: 948). Put differently, second face power is the power to act as a veto point before outright contest occurs—and is thus perhaps the surest way to preserve the status quo. Or as

Schattschneider puts it, “All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization is the mobilization of bias. Some issues are organized into politics while others are organized out,” (1960: 71). Schattschneider goes so far as to argue that the definition of alternatives is the “supreme instrument of power” (1960: 68).

An example of the operation of the Court’s “second face” power can be seen in the failure of the Religious Liberty Protection Act. Despite significant pressure from interest groups to act in response to the Court’s invalidation of RFRA as applied to the states in *City of Boerne v. Flores*, the RLPA died in the Senate Judiciary Committee, as committee members were divided over the constitutionality of the act in light of the Court’s recent federalism decisions (*Boerne v. Flores*, *Printz v. United States*; *United States v. Lopez*).<sup>5</sup> In introducing the Religious Land Use and Institutionalized Persons Act of 2000, Senator Orrin Hatch noted that “Our bill deals with just two areas where religious freedom has been threatened—land use regulation and persons in prisons, mental hospitals, nursing homes and similar institutions. ...It is no secret that I would have preferred a broader bill than the one before us today. Recognizing, however, the hurdles facing passage of such a bill, supporters have... agreed to move forward on this more limited, albeit critical, effort” (Congressional Record S7774, July 27, 2000). In short, despite broad support for the substance of the proposed RLPA, proponents of that act settled on the much narrower RLUIPA in light of concerns that RLPA would not survive judicial scrutiny. Put differently, members of the Senate Judiciary Committee, and then members of Congress more

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<sup>5</sup> Like RFRA, the RLPA would have required courts to use the strict scrutiny standard outlined in *Sherbert v. Verner* (1963). Senators seemed largely unworried about the possibility of RLPA of being construed as protecting racial or ethnic discrimination, as the Court had previously recognized that preventing discrimination on those lines constitutes a compelling state interest. Sexuality, and to a lesser extent, gender, raised a harder question for proponents of RLPA). Additionally, it should be noted that some groups raised concerns about the RLPA’s implications for gays and lesbians.

generally, adopted RLUIPA instead of RLPA at least in part because they rationally anticipated the likely outcome of subsequent judicial review of the legislation. In this case, at least, it appears that they anticipated rightly, as the RLUIPA was unanimously upheld by the Supreme Court in *Cutter v. Wilkinson* (2005).

Another example of a somewhat different type of second face operation of the Court's power can be seen in the flip-side of the Court's "passive virtues" (see generally Bickel 1962). Staszak (2015) demonstrates that over the last forty years there has been a dramatic decline in the number of civil rights class action lawsuits filed, and in the number of civil rights cases that reach trial in federal courts. She argues that this precipitous drop is directly attributable to "judicial retrenchment"—reforms internal and external to the judiciary which seek to alter institutional rules to constrict access to the courts (Staszak 2015: 5-6). She offers an example in the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Betty Dukes, et al.* (2011), holding that the group of all women employed in Wal-Mart stores nationwide lacked the "commonality" necessary for class certification. This decision highlights the power the Court has to "confine the scope of decisionmaking" by bounding the set of cases (that is, the type of disputes) that can be raised in courts around the nation. Numerous bodies of Supreme Court doctrine, including those respecting standing and class certification at issue in *Wal-Mart v. Dukes*, allow the Court to organize some issues out of the realm of judicial contestation, to borrow from Schattschneider.

Scholars critiquing the compliance genre have documented a number of effects of Court decisions that can be understood as operations of second face power. For example, Scheingold (1974) argues that court victories serve as catalysts for political mobilization. An observed victory may embolden potential activists by endowing them with purpose and confidence.

Similarly, McCann argues that federal courts generally lacked the will and the capacity to correct

discriminatory wage practices, but that legal norms “significantly shaped the terrain of the struggle... [and] that litigation and other legal tactics provided movement activists an important resource for advancing their cause” (1994: 4). For McCann, legal mobilization occurs when members of a social movement, sharing a general legal consciousness, understand their rights to have been violated and thus utilize courts as at least part of their strategy to fight policy battles and advance their goals (see also Zemans 1983). With respect to the pay equity movement in particular, McCann argues that “legal rights discourse provided reform activists with a compelling normative language for identifying, interpreting, and challenging the unjust logic of wage discrimination”; and that movement litigation served as an important tactical resource to raise expectations among working women that wage reform was possible (McCann 1994: 48). Legal challenges in state courts served most importantly to raise consciousness and offer a course for action, and were cited as highly important by movement activists in both these regards *despite* the failure of any of these cases to win past the trial-court level (McCann 1994: 74-77). Scholars have made similar claims in studies of a wide range of issue domains, consistently finding that both victories and defeats in court can spur subsequent activism (McCann 1992; O’Brien 1996; Kelly and Dobbin 1999; Keck 2004b; Andersen 2006; Keck 2009).

A separate body of scholarship has examined the many ways the Supreme Court interacts with Congress and the president. Dahl (1957a) famously argued that the Court was a political institution that routinely makes policy in concert with the dominant governing coalition. Some Court decisions come to pass because legislators punt hot-button or otherwise costly issues to the judiciary (Graber 1993; Whittington 2005). Similarly, elected officials might seek to consolidate or entrench legislative policies in the Court (Gillman 2002). Or courts and their decisions may simply serve the general electoral and political interests of legislators (Powe 2009; Engel 2011;

Crowe 2012). In short, the “political branches” routinely seek to capture and utilize judicial power for their own ends—though they do so at some risk (Whittington 2005). And in fact, the Court regularly exercises its power in ways that upset the coordinate branches. The fact that Congress or the president respond to the Court’s decisions suggests that those branches understand and appreciate the significance of the Court’s power—and those responses point to ways in which its power operates.

Because the Court is a potent policymaking institution, the elected branches must take its decisions seriously. Most scholars agree that the justices of the Supreme Court rationally anticipate reactions to prospective decisions by Congress, and thus rarely issue decisions that they think are likely to provoke Congressional responses (Segal, Westerland, and Lindquist 2011; Clark 2009; Harvey and Friedman 2009; Harvey and Friedman 2006; Ferejohn and Shipan 1990). That Congress or the president might rationally anticipate Court action is less appreciated. Further, the fact that Congress frequently responds to the Court’s decisions by altering policy (Blackstone 2013; Barnes 2004; Pickerill 2004; Eskridge 1991) does not suggest that the Court is impotent—only that it, like Congress and the president, does not have a free hand to make or alter policy, but rather that it operates in a separated institutional context in which it shares power over policy with the other branches. In other words, scholars have too often inferred that the Court has little or no institutional power simply because it does not have absolute power to shape public policy.

Lukes (1974) extended the argument of Bachrach and Baratz by identifying a third face of power which operates even more subtly, and as such, is even more difficult to neatly observe, measure, and analyze. Third-face power is the ability to manipulate others by altering their attitudes or preferences. Gaventa (1982) argues that third-face power can be observed when

people are unaware of their own interests. Such power takes the form that A exercises power over B when A convinces B that B's interests are the same as A's interests. The Marxian formulation of this face of power as offered by Lukes and Gaventa amounts in its essence to false consciousness. A major empirical problem is presented by the normative assumptions of both Lukes' and Gaventa's formulations of this form of power: both require the researcher (or theorist) to know what other people (i.e. "B") really ought to want. That is, study of this face of power would have researchers infer its operation whenever some party B believes some thing Y is in her interests when the researcher believes that Y is not in B's best interest. For example, a Lukesian might conclude that low-income, religious whites who affiliate with the Tea Party are acting against their own interests by resisting downwardly redistributive social policies, and thus infer that they are operating on the basis a false ideology (that is, that they've been had by A's third-face power). Research in this vein requires that the researcher have some normative baseline developed ex ante against which to judge the beliefs of others. In the example above, it is taken for granted that redistributive policies would benefit low-income Tea Partiers, and thus that their stated beliefs in free enterprise and government non-intervention are invalid. In short, study of this third face of power assumes the priority of the researcher's normative biases.

I argue, however, that the Marxian overtones of Lukes and Gaventa notwithstanding, their insights into the nature of power relations can be fruitfully used to inform our understanding of Supreme Court power.<sup>6</sup> Specifically, I argue that it is not necessary to assume

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<sup>6</sup> As the above literature suggests, some of these classic accounts view power primarily as interactive, or agentic, while others view it as relational, or constitutive. The former is often referred to as "power over" – that is, that which points to the exercise of control over others; the latter is often referred to as "power to" – which emphasizes "how social relations define who actors are and what capabilities and practices they are socially empowered to undertake" (Barnett and Duvall 2005, 466). These fundamental ontological differences in what power is suggest different ways to observe its effects. Those taking the interactive view look for the effects of power in terms of the behavior of the object of that power (e.g. Dahl 1957a). Those taking the constitutive view see power as producing effects in terms of the identities of individuals (or perhaps groups) occupying social positions (e.g. Gaventa 1982).

that some decision caused people to have the “wrong” interest, but instead, one can document how a Supreme Court decision altered the way that people think about issues, policies, or themselves without respect to any normative benchmark. In this formulation, one does not have to infer any sort of false consciousness, or “false ideology” (patriotism, capitalism, etc.) operating on individuals. Rather, one conceptualizes the *ideology of the Supreme Court itself* to be the ideology which acts upon the affected individuals. By “ideology of the Supreme Court” I do not mean how conservative or how liberal the Court is (in the conventional realist-attitudinalist sense), but rather that the Court’s own institutional aura, its public legitimacy, is the relevant ideology. Brigham (1987) calls this “the cult of the Court.” I contend that one could infer the operation of this “ideology of the Court” when public opinion moves toward the Court’s position after it announces a decision, when individuals internalize the Court’s holding, or when individuals accept a policy outcome they disagree with precisely because the Court announced it. And the operation of this legitimacy can be seen, though not expressed in these terms, in the literature above. Brigham (1987), McCann (1992), Bumiller (1992), and others, are clearly seeking to understand how law influences individuals’ and groups’ identities, and the ways that they interact with outside actors.

Similarly, a long-standing literature on “judicial legitimation” suggests that the Court can significantly influence public opinion about issues on which the Court speaks, and can influence public acquiescence to policies with which people disagree (e.g. Easton 1965; Jaros and Roper

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There are other difficulties in the study of power. For example, much agenda setting power appears to be accidental (or at least, incidental) – which raises the question of intentionality (i.e., does an outcome have to be an intended outcome to constitute an act of power?). Baldwin (1989) argues that the study of power is difficult, and afflicted with many apparent analytical paradoxes. Even so, he argues that there is a core of agreement of among “large numbers of power analysts” that includes: 1) agreement that power should be treated as a relationship between two actors, not a property of one of them; 2) agreement that “the bases of powers are many and varied”; and 3) agreement that “power is a multidimensional phenomenon that varies in scope, weight, domain, and cost” (Baldwin 1989: 3).



1980; Tyler and Rasinski 1991; Caldeira and Gibson 1992; Mondak 1994; Gibson, Caldeira, and Spence 2005; Bartels and Mutz 2009; Gibson, Lodge, and Woodson 2014; Christenson and Glick 2015; Linos and Twist 2016). In short, I argue that diverse literatures suggest that the Court can powerfully affect individual and group opinions, identities, and behavior; and that understanding these effects of judicial action as manifestations of the Court’s power (operating in the “third face”) allows us to think systematically about these effects, and to incorporate them into the broader study of judicial power (that is, synthesizing them with the “first-” and “second-face” instantiations of Court power).

The literature discussed above points to a key conclusion: the Supreme Court’s fundamental power, which is to interpret the law, has multiple “faces.” This power operates in the first face, as the compliance literature demonstrates, when it requires other actors, including lower courts, to alter their behavior by implementing new legal rules and, occasionally, more explicit policy ramifications of those rules. The second face of the Court’s power can be seen when the Court influences the decisions of other institutions or precludes certain kinds of challenges from being heard, by restricting standing, for example. Finally, the Court’s power to interpret the law operates in the third face when it shapes individuals’ or groups’ opinions, identities, and decisions to participate in politics. Importantly, it should be noted that a decision can do all of these things simultaneously—and that the effects of power operations in one face may interact with operations in another face. For example, by restricting standing the Court not only restricts some cases from being heard, but may also influence individuals’ willingness to make rights-based claims, or even to think of their situation in terms of right and remedy. In short, I argue that these empirical literatures map on to the three faces of power reasonably well, and as such, they point to a promising avenue forward in the study of the nature of judicial

power, in that this perspective allows us to synthesize largely disparate understandings of the Court, and to systematize the wide range of effects caused by Court action.

### ***Empirical Problems with Alternative Theories of Court Power***

With these theoretical shortcomings noted, I now turn to some of the empirical problems with a theory of Court power rooted in an external (non-court) policy-compliance (or a limited first-face power) perspective.<sup>7</sup> Compliance studies are essentially “actor success” models of policy change (see generally Grossmann 2014). Actor success models “focus on how circumstances might influence the success of the particular actor[.]” in obtaining some desired policy change (Grossmann 2014: 155; see also Matland 1995). This approach is problematic for two primary reasons. First, understanding policymaking in the US requires attention to interactions among numerous actors over time, as no single actor can unilaterally make policy (Grossmann 2014; Hacker and Pierson 2014; Keck 2014; Barnes 2007). Second, this approach implicitly (and sometimes explicitly) assumes that Supreme Court justices are motivated primarily by their desire to make public policy. As such, compliance studies have generally assumed that the practice of judicial review is fundamentally undemocratic, and that the Court exercises that power in order to shift policy toward its own preferences. Much scholarship in the area of judicial politics, though, has shown that Justices have many motivations, of which policy is only one: justices also care about the law, about doing their job well, about their party, and even about their prospective historical legacies (e.g. Bybee 2010; Keck 2007; Pacelle, Marshall, and Curry 2007; Keck 2004a; Clayton and Gillman 1999). Finally, the compliance approach assumes that the principal component of a judicial decision is the order the Court issues which

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<sup>7</sup> It should be noted that there may be even more empirical problems with second- and third-face power perspectives, as many operations of power (or elements of power) in these faces may be fundamentally unobservable (see Bachrach and Baratz 1962; Anzia and Jackman 2013).

requires some actor to change its behavior in an observable way (e.g. to stop condemning convicts under constitutionally invalid capital punishment statutes in *Furman v. Georgia*). This move, however, assumes that the Court is only exercising power when it invalidates a statute or reverses a policy decision.

With respect to the compliance literature, the first point means that such studies are myopic, or that they set an extremely high standard by which to judge the Court, because they will only find compliance (and thus “impact” or “power” depending upon the author) when the Court succeeds, for some period of time, in unilaterally altering policy. The second point suggests that the assumption that the Court was necessarily motivated by a desire to change policy is off-center: even if the Court *did* change policy (such as by invalidating a statute), it does not follow that changing the policy, for example, by striking down the Religious Freedom Restoration Act as it applied to the states in *City of Boerne v. Flores*, was the proximal goal motivating the decision. Rather, it may well be that the Court majority’s fundamental goal in *Boerne* was to assert the Court’s preeminence in constitutional interpretation, and that invalidation of RFRA was somewhat incidental to that primary goal. This does not mean, of course, that a compliance study of the *Boerne* decision is in some sense wrong, or unhelpful, but only that assuming in general that the proximal policy outcome of cases is the most important outcome (to the justices, to the Court as a whole, or as a general matter) is problematic. The final point suggests that theories of Court power derived from compliance-oriented studies are inherently biased because they cannot account for Court power outside of the context of judicial review.

To take another example, consider Pickerill’s (2004) account of *United States v. Lopez* (1995). In *Lopez*, a 5-4 Court invalidated the Gun Free School Zones Act (GFSZA) on the

grounds that the mere possession of a gun within a single state cannot be considered interstate commerce. Pickerill (2004) persuasively argues that the primary goal of the justices in the majority in *Lopez* was to find a limit to Congress' commerce power—not to make it easier to possess guns in school zones (2004: 116-131). And indeed, Congress modestly modified the GFSZA in 1996, preserving all of the policy features of the original statute but stipulating that the government must prove that the firearm “moved in or the possession of such firearm otherwise affects interstate or foreign commerce.”<sup>8</sup> The Court has allowed this modified version of the GFSZA to stand for two decades, strongly suggesting that the constitutional question, and not the particular gun policy, was the key focus of the justices in the majority. These cases demonstrate that the actor success approach that compliance studies typify is misguided, in both its assumptions about the nature of judicial decisions, and its assumptions about the nature of policy change in the American political system.

In sum, I have argued that existing approaches to the study of judicial impact have taught us much about the real-world consequences of judicial decisions. A number of scholars have demonstrated that the Court can directly cause (Frymer 2003; Feeley and Rubin 1998) or significantly influence (Keck 2009; Grossmann and Swedlow 2015) major changes in public policy. More recently, we have begun to develop a fuller understanding of the particular political contexts in which such Court-induced policy change is possible or likely (Hall 2011; Grossmann and Swedlow 2015). Additionally, many scholars have shown ways in which judicial actions indirectly influence policy developments by provoking responses from other political institutions

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<sup>8</sup> Public Law 104-208, 110 Statute 3009 (1996).

See also: President Bill Clinton, “Message to the Congress Transmitting Proposed Legislation to Amend the Gun-Free School Zones Act of 1990,” May 10, 1995. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=51344>.

(Pickerill 2004), spurring (or quashing) subsequent litigation and activism (McCann 1994; Andersen 2006; Bennett 2017), and even by influencing public opinion on important policy questions (Franklin and Kosaki 1989; Christenson and Glick 2016).

The problem, I have argued, is not so much lack of attention to some key aspect of judicial impact on politics, but rather that each of the literatures referenced above has developed more-or-less independently from each of the others. As a result, we have today a number of robust bodies of scholarship that examine Court power and influence in some particular domain, but which are almost entirely self-referential. In one important sense, the goal of this dissertation is synthetic: I intend to bring together the theoretical and empirical insights of these generally disparate literatures in order to shed new light on the nature of judicial power and scope of judicial impact in American politics. By synthesizing the prevailing approaches to judicial impact I will show the utility—as well as the limitations—of each approach; in doing so, I will make the claim that for all their contributions, the existing approaches to the study of judicial impact have failed to produce a general theory of Supreme Court power (or impact). Providing such a theory is the chief goal of this project.

### **A Theory of Judicial Power and Judicial Impact**

I have argued that the limitations of existing theories of judicial power in the empirical literature stem from two primary sources. First the conventional, compliance-based mode of study excludes types of power that are orthogonal to compliance, such as agenda influence or control. Further, these studies have frequently fixated on only one aspect of a judicial decision—the “order”—and ignored how changes in legal policy (doctrine) themselves can profoundly influence policy on the ground. Second, the method and focus of the compliance approach discounts judicial power in non-invalidation cases (i.e. in the majority of Supreme Court cases);

and even with respect to the cases for which it works, the compliance approach cannot capture a huge range of downstream effects of judicial power, such as responses from other branches, subsequent interest group action, or changes in public opinion, even though these effects are often traceable to the Court's decision. The many existing critiques of the compliance literature have rightly pointed out the limitations of compliance studies, but have yet to offer a compelling theory of judicial power or impact that could supplant the compliance theories.

To conclude this chapter I will briefly restate the argument and describe the expected payoff of the proposed theoretical perspective. First, I have argued that the fundamental power of the Supreme Court is the power to interpret the law, and in doing so, to create binding legal rules. Second, but relatedly, I have argued that scholars should understand judicial impact as all policy-relevant effects of judicial action. The definitions offered explicitly differentiate between two cognate concepts that have been frequently muddled in the extant literature, and thus allow us to theoretically and empirically distinguish between the two. Moreover, the definitions provided are intended to synthesize the diverse insights that scholars working in a variety of research traditions have generated regarding the impact of judicial decisions. In doing so, I hope also that these conceptualizations of Court power and impact will lay the foundation for a new generation of judicial impact scholarship.

## **Chapter 3:**

### **Supreme Court Power and Impact**

In the previous chapter I argued that existing bodies of scholarship concerning compliance with judicial orders, transmission of legal precedent, and Court-induced activism and opinion change all point to aspects of judicial power and judicial impact. In this chapter I begin the task of demonstrating the utility of the theoretical and empirical perspective outlined in the previous chapter, as well as the limitations of existing alternative perspectives on judicial power and impact. Here I focus especially on the literature on judicial compliance, because it represents the historical genesis of the study of judicial impact, and because compliance today remains the dominant mode of the empirical study of real-world effects of judicial behavior.

In this chapter I will show that the prevailing mode of studying both judicial impact and judicial power—the study of compliance with judicial decisions—is significantly limited in ways that have not been previously appreciated. Critics of the compliance approach have long noted that there are other “types” of impact that are not adequately captured by the compliance approach. Here, however, I argue that these critics have at once gone too far and not far enough in their critique of this literature: they have gone too far in rejecting this approach and its insights outright; yet they have stopped short of identifying the fundamental limitations of that approach. I agree with critics of the compliance approach that there is far more to judicial impact than compliance can comprehend—but I do so, at least at first, by assessing the compliance approach on its own terms. To this end, I show that the compliance approach relies, however implicitly, on a methodological approach that provides little to no analytical leverage on outcomes in the majority of Supreme Court decisions. At the same time, the case studies presented in this chapter

demonstrate that focusing on the Court's ability to shape legal rules via its interpretive power greatly expands the applicability of the compliance approach. I then show that even in the cases to which the compliance formula can be fruitfully applied, it accounts for only a fraction of the politically relevant outcomes of Court action. As such, even the refocused understanding of power that I defend here points to the need for a broader understanding of judicial impact.

In this chapter I defend these arguments in several parts. I first walk through the logic of the compliance approach to the study of power and impact in order to show that compliance studies consider only judicial power and not broader judicial impact, and that they do so for only a limited range of Supreme Court cases. I then argue that by shifting focus to legal rules, the scope of the compliance approach can be greatly expanded, and indeed can speak to Supreme Court power in all of its decisions. I then present five case studies which concretely demonstrate both the utility and the limitations of compliance studies, even given my broadened conceptualization of compliance. The case studies also show that there are a wide range of downstream effects of Supreme Court decisions which cannot be captured by the concept of compliance; in other words, they show the need for a broader theory of impact than compliance can provide. I conclude with a discussion of the findings, and their implications for the study of judicial power and judicial impact.

### **The Limited Applicability of the Compliance Formula**

The compliance approach, discussed at length in chapter two, remains the dominant mode of studying judicial impact, though the sum of the findings of research in this vein is quite inconsistent. This approach, for all that it has taught us, can provide at best a partial picture of Court power, however: the compliance formula can only work if the Court issues an order requiring an actor to alter its behavior in an observable way—if this condition is not satisfied,



compliance becomes non-falsifiable. As such, this approach can speak only to a fraction of the Court's decisions: those in which it invalidates a statute or practice, or those in which it significantly alters precedent. This defect in the approach has not been noticed, it seems, because the vast majority of self-described impact studies consider only judicial review cases.<sup>9</sup>

Hall (2011) synthesizes existing accounts of impact and persuasively argues that the Court succeeds in inducing compliance when its rulings can be implemented directly by lower federal courts *or* when the decision is not too unpopular among the public at large. Even so, Hall's (2011) study of Court power is limited by its focus on constitutional invalidations (see also Casper 1976). Goldman's (2005) study of landmark cases identified twenty-eight cases in which the Court invalidated a statute or practice, and twenty-five in which it upheld the statute or practice at issue. Similarly, Hall's (2011) "two-sweeps" approach generates a list of two-hundred-three "landmark cases," of which at least sixty-five are validations of challenged statutes.<sup>10</sup> In short, in two key studies aiming to identify landmark constitutional decisions, between one-third and one-half of the cases identified are judicial validations of statutes or practices. Thus any theory of impact, or of Supreme Court power, derived solely from cases in which it invalidates statutes is incomplete at best, and is likely to be substantially biased—unless,

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<sup>9</sup> To think about this in another way, imagine what something like this compliance approach would look like if applied to the study of Congressional or executive power. Taking Congress as an example, this approach would require us to examine compliance with statutes (among other things); we might look at the extent to which patterns of narcotic consumption change after Congress passes prohibitory legislation. This example points to two of the major problems with the compliance approach. First, many people continue to possess and consume prohibited narcotics, which would require the compliance theorist to conclude that Congress' power is "limited" despite the reality Congress has spent billions of dollars and directed millions of hours of work toward the goal of prohibition, has jailed millions and killed thousands of people in pursuit of that goal, etc. Second, the compliance approach cannot easily distinguish among people who do not consume narcotics because it is illegal, and those who would not consume narcotics in any event. More generally, the compliance approach cannot tell us anything about Congress' behavior in incentivizing or disincentivizing behavior via appropriation, causing backlashes, etc.—and of course, no one studies Congressional power in this way. Yet this is exactly what judicial impact scholars do when they limit study to "compliance."

<sup>10</sup> I say "at least" because there are approximately two dozen cases in which the coding is ambiguous. This number includes cases in which part of some statute was invalidated and part upheld, e.g. *Planned Parenthood v. Casey*, *Buckley v. Valeo*, etc.

of course, one assumes that the Supreme Court is not actually doing anything except when it exercises its power to invalidate.

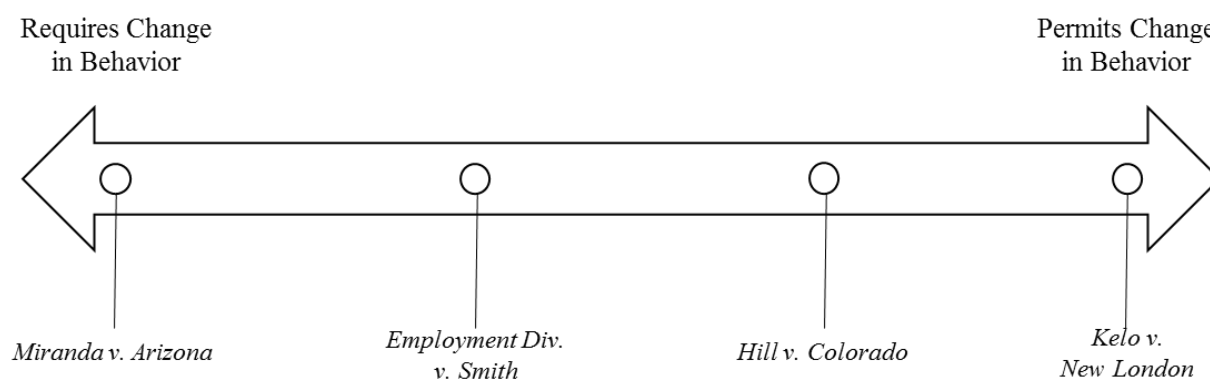
### **Conceptualizing Compliance in “Restraintist” Decisions**

In order to extend the coverage of conventional compliance studies to include cases in which the Supreme Court declined to exercise its power to invalidate a statute, we must consider the ways in which validations and invalidations are alike as well as different as classes of phenomena. First we should note that in both types of decisions the Court is doing something that is politically consequential (Casper 1976). Clearly, when it strikes down a law, the Court is explicitly attempting to upset the status quo and thus to rearrange politics on that issue (e.g. Keith 2008; Hall 2011). When the Court does *not* strike down a law, it might affirmatively validate the work of a coordinate branch, an administrative agency, or a state government; but so might it simply defer to the “political” actor by declining to declare it unconstitutional (but declining also to expressly validate the practice at hand) (e.g. Bickel 1962; Silverstein 2009). Further, the Court *might* (but does not necessarily) upset the status quo when it upholds statutes, just as when it reverses them. Returning to the example of *Employment Division v. Smith*, it is clear that though the Court declined to overturn Oregon’s ban on ingestion of peyote, it still significantly altered the status quo ante by issuing a new doctrinal rule that would govern subsequent federal free exercise litigation.

When the Court reverses a policy it necessarily commands some actor to change the way it is doing things (start throwing out evidence collected in illegal searches; stop banning contraceptives; etc.). There is more variation in the nature of the Court’s behavior when it upholds statutes, however. In all cases, non-invalidations result in a command to lower courts to issue decisions consistent with the Court’s holding, but these decisions may or may not represent

deviations from the status quo. For example, in its decision in *Employment Division v. Smith*, the Court significantly altered its free exercise doctrine, and thus lower courts had to change their behavior to comply. In *Kelo v. New London*, however, the Court essentially reaffirmed several decades worth of precedent in its Public Use doctrine to uphold a series of takings against constitutional challenge. Thus lower courts did not have to alter their behavior to comply with *Kelo*. In short, while all cases in which the Court invalidates statutes represent departures from the status quo, *not* all cases in which the Court declines to invalidate represent continuations of the status quo. To the extent that the Court seeks to impose some change in behavior in these non-invalidation cases, they are ripe for study in the conventional compliance vein. Figure 3.1 graphically depicts the applicability of the compliance formula to different types of cases. As you move from left to right on the continuum, the compliance formula becomes increasingly problematic to apply to actual cases.

**Figure 3.1. The Compliance Continuum**



One more important difference must be considered. Court orders can be directed toward two types of actors: lower courts, or non-court government actors such as Congress, the Social Security Administration, or local school boards (Hall 2011). Hall refers to these as “vertical” and “lateral” implementers, respectively. In vertical issues, the Court usually identifies “a group of potential criminal defendants as constitutionally immune from criminal prosecution” (such as

abortionists or flag burners), and orders lower courts not to convict these persons (Hall 2011: 16). In lateral cases implementation is controlled by non-court actors: the Court might order local public school districts to discontinue practices that include prayers, or command Congress to cease using the “legislative veto.” In these cases, only the non-court actor can directly comply with the Court’s order. The relevant difference, then, is that when the Court declines to impose some constitutional limitation on other government institutions, it does not issue orders to so-called lateral actors. Rather, orders in such cases are always directed to lower courts (vertical actors).

As noted above, the compliance formula takes the following form: the Supreme Court ordered X, we should thus expect to see X in the real world; we then look for X in the real world, and report the extent of compliance. The order from the Court and the actor responsible for implementing that order are clearly crucial in this formula. To summarize my argument, there can be important differences in judicial reversal and non-reversal decisions. Reversals of policies set by other institutions always compel a change in the status quo that is to be implemented by either a lower court or a non-court government actor. Non-reversals are always directly implemented by lower courts, but do not always compel a change in the status quo (though they may also allow other actors to decide whether to maintain or deviate from the status quo within some prescribed parameters).

Developments in capital punishment policy in the 1970s illustrate the complexities in these distinctions in historical practice. In *Furman v. Georgia* (1972) the Supreme Court invalidated Georgia’s capital punishment statute on the grounds that it violated the prohibition on Cruel and Unusual Punishment found in the 8<sup>th</sup> Amendment. In *Furman* the Court issued an unambiguous order to lower federal courts not to sentence criminal defendants to death under

existing capital punishment statutes. Lower courts complied with this order, thus the immediate impact of the decision was the significant reduction of the number of inmates on death row in American prisons (Hall 2011). In short, the Court's order *required* the observed outcome: a reduction in death sentences as well as commutations for unconstitutionally sentenced convicts. Four years later the Court upheld Georgia's newly refined capital punishment statute in *Gregg v. Georgia* (1976). The Court held in *Gregg* that the death penalty was not inherently cruel or unusual, and thus that it was permissible so long as its imposition was not wanton, arbitrary, or capricious. Pursuant to this holding, the Court instructed lower federal courts to uphold death sentences that were imposed fairly (that is, those that meet requirements to assure that they were neither arbitrary nor capricious). We see then in *Gregg* the Court announced that it would permit, but not require, departures from the post-*Furman* status quo (by legislatures), provided that those departures met conditions outlined by the Court in *Furman* and *Gregg*. In short, after *Furman* states were required to cease issuing capital sentences; after *Gregg* states were *permitted* to begin issuing capital sentences provided they met certain requirements.

**Table 3.1. Example of Compliance in Application to Cases**

Case	Pre-decision Status quo	Change	Subsequent Policy
<i>Furman v. Georgia</i>	Death penalty	Required	No death penalty w/out revision
<i>Gregg v. Georgia</i>	No death penalty	Permitted	Death penalty acceptable if adequately revised

In both instances lower courts would be compelled to issue judgments in subsequent cases challenging the constitutionality of death penalty statutes consistent with the Court's holdings. Thus the Court's preference, as stated in *Gregg* (just as in *Furman*), would be carried out directly by lower Courts, but in terms of its indirect effects both reinstatement of capital

punishment *and* continued abstention from capital punishment can be reasonably considered as consistent with the Court’s ruling in *Gregg*. Put differently, studying the extent to which states reinstated the death penalty would be a perverse test of Court *power*, as the Court does not *command* that outcome; yet the reinstatement of the death penalty in many states is inarguably an *impact* of *Gregg* (and of *Furman!*).

The upshot of this is that in Hall’s (2011) terms, *all* constitutional cases in which the Court upholds statutes should be understood as “vertical cases” implying that we should expect a very high degree of compliance with all such decisions. Compliance will be difficult to measure in some cases, though, as in many such cases the expectation is that the behavior of the implementer should not change after a decision is implemented. For example, the Court’s decision in *Employment Division v. Smith* did not include an order to ban the use of peyote everywhere, but rather stated that such bans were not unconstitutional (and thus permissible) provided that they were not intended to single out religious practices. What these examples from capital punishment and free exercise demonstrate is that the conventional compliance “formula” only makes sense if the Court orders a deviation from the status quo ante.

To summarize, I make two key claims in this chapter. First, the Supreme Court can and does exercise power outside of the context of judicially imposed constitutional limitations on non-court actors. Second, too narrow a focus on power (operationalized as compliance) misses much of the impact that Court decisions have in the real world—and even misses much of the Court’s power. In the following sections, I elaborate and empirically test these claims. I examine the first claim by selecting five landmark Supreme Court cases in which the Court declined to reverse a policy challenged on constitutional grounds, but in which it still somehow ordered a deviation from the status quo ante. I show, unsurprisingly, that when the Court issues such an

order, lower Courts comply just as they do in the context of invalidations. Moreover, I show that emphasis on the Court's interpretive power sheds new light on the ways in which the Court shapes public policy and subsequent politics when deciding cases.

## **Case Studies**

### ***On Case Selection***

To identify cases, I use the list of landmark cases generated by Hall's (2011) "two sweeps" approach. Hall utilized Goldman's (2005) list of "important" Supreme Court cases, which are deemed so by inclusion in a majority of constitutional law textbooks, complemented by cases discussed in the *New York Times* and *Washington Post's* annual end-of-term write-up.<sup>11</sup> This list captures two complementary conceptions of landmark status. Lawyers generally understand landmark cases to be those in which the Court establishes a new and significant legal principle or concept, or which otherwise substantially alters the existing state of law; such cases are captured by Goldman's (2005) study of constitutional law casebooks (see also Wiecek 2000). Landmark means something a little different to historians and political scientists, who are perhaps less interested in new legal tests, but more interested in the political and social importance of a decision; this contemporary importance is captured by Hall's (2011) sweep of leading newspapers. The cases included were decided between the Court's 1954 and 2005 terms; 1954 was chosen as the lower bound because it is remarkably difficult to find reliable data from earlier times, and 2005 was chosen as the upper bound in order to allow for sufficient time to have passed for compliance and non-compliance, policy responses, political mobilizations, resistance, etc. to have occurred. This procedure produced a list of two-hundred-three important cases, including sixty-five in which the Court rejected a constitutional challenge to a statute (i.e.

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<sup>11</sup> For details, see Hall (2011) pp. 21-27, 167-172.

upheld a statute or practice against a constitutional challenge). A complete list of cases can be found in the supplementary materials at the end of this chapter.

From these cases, five were chosen for close study because of the values they take on the key independent variable—the extent to which they compelled an observable behavioral change in lower courts. These cases are *Gregg v. Georgia* (1976), *Employment Division v. Smith* (1990), *Agostini v. Felton* (1997), *Hill v. Colorado* (2000), and *Kelo v. New London* (2005). I chose to study five cases in order to have variation across time and institutional context which a single case-study would not provide. It is worth noting also the majority of non-reversals do *not* upset the status quo, which significantly constrains the range of cases from which to choose for analysis. These cases run the gamut from ideal examples of classical compliance study type cases to cases for which the compliance formula is utterly useless. This variation in the applicability of the compliance approach—with respect to both non-court implementation of orders and court implementation of legal policies—allows me to demonstrate the fundamentally limited nature of that approach to the study of judicial impact. *Employment Division v. Smith* and *Agostini v. Felton* are cases in which the Court’s decision requires a fairly clear deviation in behavior, in that both significantly altered doctrine. *Gregg v. Georgia*, *Hill v. Colorado*, and *Kelo v. New London* are cases in in which the Court permits but does not require an observable change in behavior. The differences between these cases illustrate how quickly the compliance formula breaks down when moving away from the judicial reversal paradigm.

Each of the studies of the particular cases listed above are embedded within the broader context of the development of the relevant policy area. That is, I argue that the impact of *Gregg v. Georgia* cannot be understood outside of the context of the politics of capital punishment in the 1970s, which then also requires discussion of *Furman v. Georgia*. Similarly, some scholars



have studied the impact of *City of Boerne v. Flores* on Free Exercise policy, but I argue here that the impact of *Boerne* cannot be understood when divorced from the larger context of the politics of religious practice in the 1990s, including *Employment Division v. Smith* and the Religious Freedom Restoration Act. In short, by embedding my case studies in the larger policy debates of which they are part, I show that there is far more to judicial impact than a compliance story can tell, even in the best of circumstances.

I first briefly discuss a canonical case in the impact literature: *Brown v. Board of Education* (1954). In *Brown v. Board* the Court issued an order requiring an observable behavior change from *non-court actors*—the desegregation of public primary schools—which is one reason that it has received much attention from scholars working in the compliance tradition. After summarizing leading accounts of *Brown*'s impact, I argue that even in this ideal case for a compliance study, focus on compliance misses much of the point, and has even led to problematic theories of judicial power broadly considered.

### **The Canonical Impact Study: *Brown v. Board of Education***

The impacts of *Brown v. Board of Education* (1954) has received a tremendous amount of scholarly attention. The story of *Brown v. Board* is familiar. On May 17, 1954, the Supreme Court handed down its decision in *Brown v. Board of Education (I)*, which unanimously overturned *Plessy v. Ferguson*, holding that separate accommodations are inherently unequal—at least with respect to primary schools. Because racial segregation was found to have a tangible, detrimental effect on black children, state-enforced racial segregation in public schools was ruled unconstitutional. This ruling was accompanied by an order to desegregate public schools nationwide. The Court followed up a little more than a year later in *Brown v. Board of Education (II)*, holding that that the substance of *Brown (I)* should be implemented by local school

authorities under the supervision of federal courts “with all deliberate speed.” In other words, in *Brown* the Court significantly altered policy by invalidating a widely-used discriminatory practice (“separate but equal”), and in doing so also significantly altered the landscape of equal protection doctrine by revamping the way the federal courts would interpret the requirements of the 14<sup>th</sup> Amendment.

The practical impact of *Brown* has been the subject of much debate—indeed, *Brown* is probably the single most-studied case in the impact literature. Rosenberg (2008) argues that *Brown* had little practical importance in terms of altering the status quo. On Rosenberg’s account, desegregation in schools did not get underway until Congress and the Eisenhower administration inserted themselves into the issue several years after *Brown* was decided. Historian Michael Klarman takes a much stronger view of the impact of *Brown*, arguing that its primary outcome was to provoke a massive backlash in the deep South. Indeed, he argues that *Brown* “radicalized southern politics” and led to “fire-breathing” segregationist rhetoric and increased racialized violence (Klarman 2004: 385).

Resistance to Court-ordered desegregation in the South was not a great surprise; at least two Supreme Court justices countenanced such a reaction when they discussed *Brown I* at conference. Chief Justice Vinson explicitly stated that the possibility of resistance was real—he argued in deliberation that the Court should not “close our eyes” to the “serious” possibility of the “complete abolition of public schools in some areas” if the Court were to invalidate segregation (quoted in Klarman 2004: 294). Justice Black concurred, and even went as far as to predict “violence if [the] court holds segregation unlawful” (quoted in Klarman 2004: 294).

These predictions proved to be prescient. Because *Brown II* put the onus of desegregation on school boards, and because school boards are largely beholden to local communities, the local

popular will could stymie desegregation with relative ease. Indeed, enforcement of *Brown* essentially required litigation from black parents (almost always with the support of the NAACP). Southerners apparently recognized the necessity of this judicial support structure for the enforcement of desegregation, and thus sought to dismantle it. Several states moved to forbid the NAACP from operating within their borders and to require it to publish its membership rolls, potentially opening individuals to personal reprisal (Klarman 2004: 383). Harassment and intimidation of NAACP officials and lawyers, as well as of litigants and their families, also served to disrupt enforcement litigation (Klarman 2004: 352-353). Even when litigation did reach federal courts, the judges hearing those cases were Southerners, and were subject to the same harassment and social opprobrium as litigators and litigants, thus lower courts had little incentive to press desegregation.

Additionally, there was significant civil unrest in parts of the deep South as whites mobilized to prevent their schools from being desegregated. As noted above, Klarman (2004) argues that the primary direct result of *Brown* was the radicalization of southern politics. On this account, Southerners resented federal interference with Jim Crow, especially with regard to their schools, and were willing to mobilize to pursue their policy goals. Many diehard segregationists even proved willing to employ extremely violent tactics, including bombing Black churches and killing Black protesters, to suppress attempts at desegregation. Importantly, more than 100 prominent Southern politicians signed the “Southern Manifesto,” promising to resist attempts by the federal government to interfere in Southern race relations.

This rich and detailed account of Southern politics after *Brown* led Klarman to conclude that the “1964 Civil Rights Act, not *Brown*, was plainly the proximate cause of most school desegregation in the South” (2004: 363). In a roundabout sort of way, Klarman attributes the

1964 Civil Rights Act to *Brown*, however, arguing that “it was the brutality of southern whites resisting desegregation that ultimately rallied national opinion behind the enforcement of *Brown* and the enactment of civil rights legislation” (Klarman 2004: 385).

However, available evidence suggest that Klarman overstates the strength of this argument. Perhaps most telling is the fact that the six border states and the District of Columbia moved to desegregate their schools almost immediately after *Brown (I)* was handed down (Klarman 2004; Rosenberg 2008; Hall 2011). As a result, more than half of black school children in these states were attending public schools with white children by 1963 (Rosenberg 2008: 50). Hall’s (2011) analysis suggests that *Brown* had a meaningful direct impact on desegregation in the border states, as the percentage of black children in school with whites jumped from just over ten percent in 1955 to about forty percent in 1956. Even Klarman acknowledges that “*Brown* easily desegregated schools in border-state cities” (2004: 346). In Maryland, Missouri, Delaware, Kentucky, Oklahoma, and West Virginia, compliance was fairly quick (if not total), and most prominent politicians publicly acknowledged their intent to comply with the Court’s ruling. Additionally, Rosenberg’s data suggests that *Brown* did spur some increased egalitarian-minded activism, including increased membership rolls and donations to groups such as the NAACP, and increasing public support among whites (outside of the deep South) for more racially egalitarian policies (see for example McCann 1992). In sum, Klarman’s account seems to gloss over important parts of the *Brown* story, especially the pattern of subsequent political development in border states, and a significant amount of genuine desegregation that occurred in direct response to the Court’s decision.

Even so, as with *Furman*, this story of successful (or at least partially successful) implementation misses much of the impact of that decision. Scholars, including some discussed

above, have acknowledged the importance of *Brown* in bringing renewed attention to segregation and related racial disparities in American public life, as well as in spurring new activism among blacks and whites alike (and on both sides of the issue; see Klarman 2004; McCann 1992; Keck 2004b). While accounts such as these rightly highlight the importance of *Brown* in spurring subsequent activism as an important impact of that decision, they too deemphasize a key feature of *Brown*'s impact, which was its remaking of the doctrinal landscape in the area of Equal Protection. In other words, they downplay changes in legal policy and emphasize instead more expressly “political” outcomes of the decision, both direct (compliance) and indirect (subsequent activism, etc.). As Hall (2011) has argued, *Brown* was a “lateral” decision, which means the implementation of the Court’s order requires the cooperation of non-court actors—in this case, local school boards. As such, the Court has no direct ability to enforce its decision; this fact, on Hall’s account, explains the uneven implementation of the Court’s desegregation directive prior to the Civil Rights Act of 1964. Indeed, Hall contends that the struggle to desegregate schools “highlights the distinction between the Court’s power when issuing popular and unpopular rulings.”

It seems strange, though, to contend that *power* depends on popularity in some category of cases. Hall defines power as the ability to cause actors to do something they otherwise would not—but then argues that in “lateral” cases that power relies on public acquiescence; this is clearly a very weak conceptualization of power. Indeed, if power is predicated on acquiescence, then Hall’s theory essentially holds that Court power only exists in “vertical” cases (those implemented by lower courts), and it has none in “lateral” cases, which are only implemented when the relevant actors are willing to comply. As I argued in the previous chapter, however, Hall’s order-oriented view of Supreme Court decisions obscures the fact that the rule of law—the

legal policy—announced in *all* decisions is implemented by lower courts. Which is to say, the legal policy in *all* cases is by definition “vertical,” whereas the vertical/lateral distinction is only relevant with respect to the Court’s order. This implies that changes in policy which run through the legal policy announced in Court decisions should always have substantial impact, whereas changes which run through the Court’s order are significantly dependent on political context as described by Hall.

The legal policy espoused by the Court in *Brown* was (and is) implemented by federal courts, over which the Supreme Court has significant control. As such, *Brown*’s impact on legal policy was much more certain and still highly politically consequential. As noted above, in *Brown* the Supreme Court unanimously ruled that “separate but equal” facilities are inherently unequal, and thus violate the Equal Protection Clause of the Fourteenth Amendment. In doing so, the Court overruled a longstanding precedent, established in *Plessy v. Ferguson* (1896), that segregation of public facilities is not per se unlawful discrimination, and is constitutionally permissible so long as the separate facilities for the races were basically equal in quality (the phrase “separate but equal” did not actually appear in this decision though it established the doctrine that is known by that name). In other words, *Plessy* established judicially enforced constitutional protection for racial discrimination. To be clear, I am not making the claim that the *Plessy* Court caused Jim Crow, but rather that the Court in *Plessy* declared that the federal judiciary would not interfere with segregationist policies (see also *Cumming v. Richmond County Board of Education* [1899]). Overturning this long-standing legal policy is what made *Brown* a “landmark” decision; the fact that *Brown* led to more black kids going to school with white kids is a downstream effect of the decision, however direct.

## **Capital Punishment: *Furman v. Georgia* & *Gregg v. Georgia***

In 1972 the Supreme Court radically altered capital punishment policy nationwide. In a landmark decision in *Furman v. Georgia*, the Court interpreted the 8<sup>th</sup> Amendment's prohibition on "cruel and unusual punishment" as forbidding the death penalty as it was then practiced. This decision was accompanied by an unambiguous order to lower federal courts not to sentence criminal defendants to death under the then-current capital punishment. The *Furman* decision was unpopular among the public and political elites; as such, it instigated a flurry of legislative action aimed at reinstating the death penalty—yet for a time, that decision was complied with by the lower courts, and the number of convicts sentenced to die was greatly reduced (Hall 2011).

This was not the only outcome of the *Furman* decision, however. Legislatures around the country moved to respond to the decision, often by reinstating capital punishment provisions that might be constitutional in light of the Court's new ruling. In 1976, the Supreme Court upheld a newly revised capital punishment statute in *Gregg v. Georgia*.<sup>12</sup> In *Gregg* and its companion cases the Court held that the death penalty did not constitute a *per se* violation of the Eight Amendment, and thus that its use could be appropriate in some circumstances. The Court determined that Georgia's revised capital punishment statute, as well as those of Texas and Florida, had sufficiently responded to the concerns outlined in *Furman* and could thus withstand constitutional scrutiny. For example, Georgia's statute required a bifurcated proceeding wherein the trial and sentencing were separate, jury findings as to the severity of the crime, and automatic review of death sentences by the Supreme Court of Georgia to establish that the imposition of the death penalty was reasonable when compared to similar cases. As a result, *Gregg* effectively

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<sup>12</sup> *Gregg* affirmed the decision of the Supreme Court of Georgia (*Gregg v. State* [1974]). *Gregg* was decided along with four companion cases; the others were *Jurek v. Texas*, *Roberts v. Louisiana*, *Proffitt v. Florida*, and *Woodson v. North Carolina*.

reinstated the death penalty and provided legislators with basic guidelines for crafting legal capital punishment statutes. Put differently, the Court's decisions in *Furman* and *Gregg*—that is, its interpretation of the 8<sup>th</sup> Amendment's requirements in each case—effectively bounded the range of constitutionally permissible death penalty policies that were available for legislatures to choose from.

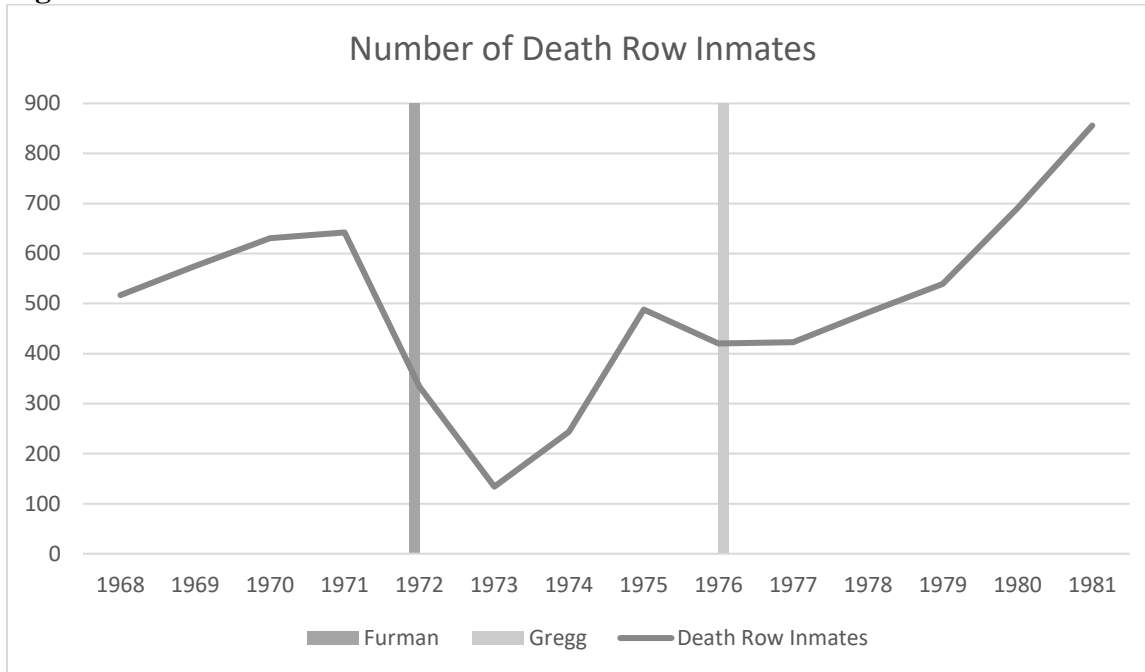
Figure 3.2 paints a complicated picture of the effects of *Furman* and *Gregg* on capital punishment practices in the U.S. It is true, as Hall (2011) points out, that hundreds of death row inmates had their sentences commuted after *Furman*. But figure four clearly indicates that the downward turn began before *Furman* was decided. After 1973 the number of persons sentenced to death began to climb again, these having been sentenced under newly enacted death penalty statutes. The constitutionality of many of these new statutes were affirmed in *Gregg* and its companion cases, which validated the upward trend that began in 1973. It is important to note also that no state directly defied *Furman* by executing a convict—executions did not resume until after *Gregg*. In short, the compliance stories of *Furman* and *Gregg* are not as clear-cut as one might hope; both appear to have had effects on larger trends in capital punishment, but neither can tell the whole story of the observed changes in capital sentencing or executions.

Of course, it is clear that the *Gregg* Court did not intend to compel states to adopt capital punishment. Rather, the justices recognized in the reaction to *Furman* clear signs that they had strayed too far from the mainstream of public opinion on that issue (Friedman 2009). Thus in *Gregg* the Court articulated that capital punishment statutes could be upheld provided they took pains to avoid arbitrariness and caprice. One way to examine compliance with *Gregg*, then, is to look at the extent to which lower courts upheld revised death penalty statutes consistent with the Court's holding. *Shepard's* reveals that federal courts have treated *Gregg* positively (followed)



462 times, while treating it negatively only 32 times (31 times distinguished, once questioned). In short, federal courts have largely followed the guidelines set down in *Gregg* when considering constitutional challenges to capital punishment statutes.

**Figure 3.2. Death Row Inmates in the US**



Source: Bureau of Justice Statistics: Capital Punishment.

But as I have argued, compliance tells at best a partial story. The Court exercised significant power in both *Furman* and *Gregg* by offering authoritative interpretations of what constitutes constitutionally-acceptable policy. These declarations powerfully shaped both the scope and extent of death penalty laws in the US in ways that cannot be captured by emphasis on compliance. For example, while many states moved to reinstate capital punishment after *Furman*, some did not. In other words, a number of states declined to take any action to reinstate the death penalty after *Furman* (and *Gregg*), thus functionally allowing the Supreme Court’s nullification to stand even after the Court walked that policy back. Take Kansas as an example: *Furman* invalidated Kansas’ extant (passed 1935) capital punishment statute, and though Kansas had executed a convict as recently as 1965, it did not reinstate the death penalty after *Furman* (or

*Gregg*) until 1994—and it has never executed anyone under this recently revived statute. Washington D.C. also declined to reinstate its death penalty after nullification in *Furman*, and the city council formally repealed its death penalty ordinance in 1981. Vermont also made no effort to reinstate the death penalty after nullification in *Furman*. New Hampshire reinstated the death penalty in 1991 (though it has never used it), but this reinstatement is sufficiently removed from the *Furman-Gregg* era that reinstatement can hardly be attributed to those cases.<sup>13</sup>

A significant number of states only nominally reinstated the death penalty after *Furman*—by which I mean they formally adopted revised capital punishment statutes, but did not execute any convicts for some extended period of time (if ever). Idaho, Nebraska, and Ohio reenacted the death penalty in 1973, but Idaho and Nebraska did not execute anyone until 1994, and Ohio did not until 1999.<sup>14</sup> Delaware, Pennsylvania, and Tennessee reinstated the death penalty in 1974, but did not execute convicts until 1992, 1995, and 2000, respectively. Washington, Colorado, and Connecticut each reenacted capital punishment statutes in 1975, but did not execute any convict for nearly 20 years (1993 in Washington, 1997 in Colorado, and 2005 in Connecticut). Wyoming reinstated capital punishment in 1977 but has only executed on person since then, and not until 1992. Oregon and South Dakota restored capital punishment in 1978, but Oregon did not execute any person until 1996, and South Dakota has never executed anyone under its new statute. Finally, New Mexico reenacted in 1979 but has only executed on person since then, in 2001. By the same token, the federal government formally reinstated capital punishment in 1987 but did not execute anyone until 2001—and has done only two more since

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<sup>13</sup> Death Penalty Information Center State-by-State Database: [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state)

<sup>14</sup> New York also passed a revised statute in 1973, but this statute was quickly invalidated by the state supreme court (called the New York Court of Appeals). Several more unsuccessful attempts to pass death penalty statutes failed over the next two decades before the state formally reinstated the death penalty in 1995. The 1995 statute was invalidated by the state high court in 2004. New York has not executed anyone in the post-*Furman* era.

that time; the US military reinstated capital punishment in 1983, but has never executed under the reinstated policy. In short, 13 states plus the federal government and United States military nominally adopted revised capital punishment statutes in the decade or so after *Furman*, but none executed a convict for at least 14 years after formal reinstatement of the policy—and for many states it was much longer than that. In total, these 13 states have executed a total of 98 prisoners, but 53 of those were in Ohio, and another 16 were in Delaware; four of these states have executed only one person (CO, CT, NM, WY), Oregon has executed only two, and four more have executed only three convicts in the whole span of the new capital punishment regime (ID, NE, PA, and SD).<sup>15</sup>

Rhode Island quickly reinstated the death penalty after *Furman* (in June of 1973), but that law was declared unconstitutional by the state supreme court before anyone was executed in *State v. Cline* (1979).<sup>16</sup> The Rhode Island legislature formally forbade the death penalty in 1984. Massachusetts passed an amendment that allowed the death penalty in 1982, but the law was immediately challenged and ultimately nullified in 1984 by the state supreme court in *Commonwealth v. Colon-Cruz*,<sup>17</sup> on the grounds that it was unfairly applied (in that only those tried for murder were eligible, while those that plead guilty were not), and no one was executed while the law was in force. New Jersey also reinstated capital punishment in 1982, but never executed anyone under the revised statute, which the state legislature formally repealed in 2007.

Additionally, it should be noted that the impetus for revision of death penalty statutes after *Furman* did not in all cases lead to reinstatement: until *Furman*, North Dakota law made capital punishment an option in cases of murder by a person already serving a life sentence, as

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<sup>15</sup> Death Penalty Information Center State-by-State Database: [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state)

<sup>16</sup> *State v. Cline*, 39 A.2d 270 (1979)

<sup>17</sup> *Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984)

well as treason. In 1973, however, the North Dakota legislature revised its criminal code to make no crimes eligible for the death penalty. And of course, the revival of death penalty statutes around the country, and the swell of popular support for such policies, resulted in the introduction of death penalty statutes in state legislatures even in places where the death penalty had been abolished pre-*Furman*, such as in Hawai'i, Maine, and Wisconsin, though these measures failed in all states except for Oregon.

The narrative here paints an uneven picture of the impact of the Supreme Court's landmark death penalty cases: there was an immediate and complete moratorium on executions and hundreds of convicts had their sentences commuted. At the same time, however, public support for the death penalty increased, as did the salience of the policy, and many states adopted new capital punishment legislation in the decade or so following *Furman*. But I have argued that simply counting the number of death penalty statutes on the books may be misleading, as in many states the new statutes were extremely restrictive (in that the only permitted capital punishment in an extremely narrow set of circumstances, as in New Mexico and Rhode Island), and many cases these states did not convict or execute prisoners under these revised statutes for many years (and some never have).

Finally, even among states that reinstated the death penalty after *Furman*, and which have used that punishment with some regularity or consistency, *Furman* and *Gregg* meaningfully changed the substance of capital punishment statutes in force. These decisions (and many others on the topic since then) have produced policies which are—however imperfect—significant improvements on their pre-*Furman* predecessors. As legislators and lawyers sought to feel out the boundaries imposed by the *Furman* Court, one element of statutes that received attention was their discretionary nature—and the concomitant possibility that juries would assign the death

penalty in a biased fashion. In a challenge to North Carolina’s first revised capital punishment statute, the North Carolina Supreme Court held in *State v. Waddell* (1973)<sup>18</sup> that *Furman* outlawed jury discretion in capital cases, but otherwise upheld the statute, effectively making the death penalty mandatory for some crimes (the NC legislature formalized this rule the following year). Other states sought to address the problem of discretion by following President Nixon’s suggestion to utilize the American Law Institute’s recommended code: these statutes typically included a bifurcated trial with guilt and sentencing determined separately, and many clearly specified “aggravating” or “mitigating” circumstances that should figure into the decision making of judges and juries at sentencing. As noted above, it was this approach that was ultimately upheld in *Gregg v. Georgia*.

Thus a key outcome of *Gregg* is the clarification of the requirements for non-arbitrariness imposed in *Furman*. And while the revised statutes are far from satisfying to abolitionists (e.g. Epstein and Kobylka 1992; Baumgartner et al. 2008), the Court’s decisions in *Furman* and *Gregg* did restrict the scope of capital punishment in the United States, and contributed significantly to the general downward trend in the practice that continued over the next few decades, especially to the increasing number of judicially imposed restrictions on the practice.<sup>19</sup> In the five years following *Gregg*, the Supreme Court itself decided five other capital punishment statutes: in *Woodson v. North Carolina* (1976), the Court held that mandatory imposition of the death penalty for first-degree murder violated the Eighth and Fourteenth Amendments; in *Coker v. Georgia* (1977) the Court held that the death penalty was an

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<sup>18</sup> *State v. Waddell*, 194 S.E.2d 19 (1973)

<sup>19</sup> Nationally, there was a considerable up-tick in the number of executions performed between the late 1980s and the mid-2000s. Close examination of the data, however, reveals that this upward trend is driven almost entirely by the state of Texas, which has conducted more than one-third of all executions since *Gregg* was decided. See generally Baumgartner et al. (2008) and the Death Penalty Information Center (DPIC). Relatedly, the upward trend in public support for the death penalty after *Furman* was likely driven primarily by fear that a major “crime wave” was sweeping the nation in the 1970s and 1980s—see Enns (2016).

unconstitutional punishment for rape of an adult woman when the woman is not killed; in *Lockett v. Ohio* (1978) the Court held that sentencing authorities (juries or panels) must be permitted the discretion to consider every possible mitigating factor when considering the death penalty; in *Beck v. Alabama* (1980) the Court held that juries must be allowed to consider lesser penalties, and thus could not be forced to choose only between a capital sentence and acquittal; and in *Godfrey v. Georgia* (1980), the Court held that the death penalty could not be imposed for ordinary murder. In sum, the Court's landmark decisions in *Furman* and *Gregg* profoundly altered the state of death penalty policy in the United States. The moratorium imposed by *Furman* was short lived, to be sure, but the *Gregg* decision does not mark an outright abdication by the Court; rather *Gregg* was the first in a line of cases decided by the Court imposed new limitations on the scope of capital punishment while simultaneously upholding the practice in general.<sup>20</sup> These decisions, and the national debates that they sparked, led directly to a number of major substantive changes in death penalty policies around the country.

In summary, I have argued that Supreme Court's capital punishment decisions in the 1970s profoundly influenced death penalty policy in the United States. The decision in *Furman* ended the death penalty for a short period of time, but even after it was revived, its new form was markedly different than its pre-*Furman* form. In other words, *Furman* was complied with (as we would expect in a case that is implemented by lower courts), but this compliance story misses much of the impact of these decisions, in terms of the direct power the Court exercised in bounding the policy choices available to legislators, as well as the indirect outcomes of the

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<sup>20</sup> In this sense, these decisions highlight the Court's responsiveness to public opinion and the representative branches of government, which has been described as the Court's tendency to stay "within the mainstream" of popular understandings of the Constitution (McCloskey 1994; see also Friedman 2009). Such tendencies have been documented in numerous other areas of doctrine as well, including abortion and gun rights, among others (e.g. Keck 2014; Keck and McMahon 2016).

decisions. The policy compliance story cannot explain the reintroduction of the death penalty in numerous states after *Furman*, nor can it fully explain how the Court's rulings influenced the substance of the reintroduced legislation. That is, *Gregg* was not a total retreat from *Furman*, as it is often treated. The Court certainly did distance itself from *Furman*, but it also imposed restrictions on the death penalty that had not existed pre-1972. The Court's power to interpret the constitution allowed it to bound the range of policy choices available to legislators, which it did in *Gregg* and subsequent capital punishment cases.

### **Free Exercise: *Employment Division v. Smith* and its Aftermath**

Al Smith and Galen Black were rehabilitation counselors at an alcohol and drug treatment facility known as ADAPT in Roseburg, Oregon. Both Smith and Black were fired by ADAPT for ingesting peyote as a sacramental rite at Native American religious ceremonies, and both were denied unemployment benefits because the reason for being dismissed from their jobs was "work related misconduct." Smith and Black each fought independently for his benefits in state administrative and judicial courts from 1983 to 1986, arguing that dismissal and denial of unemployment benefits for using sacramental peyote placed an undue burden on their right to free religious practice. Their cases eventually made it to the Supreme Court, where they were combined (see Epps 1998). The case seemed to be controlled by *Sherbert v. Verner* (1963) and *Thomas v. Review Board* (1980). In both cases, the Court ordered unemployment benefits be paid to religious persons who were unemployed because of adherence to their faith. In those cases the Court held that such burdens would only be upheld where the state could demonstrate that it was "the least restrictive means of achieving some compelling state interest" (*Thomas v. Review Board* 1981: 718).

The Supreme Court's decision in *Employment Division v. Smith* upset some thirty years of Free Exercise jurisprudence by replacing the strict scrutiny requirement of the *Sherbert* regime with a new rule that individuals would not be relieved of burdens to their religious observances caused by "neutral, generally applicable" laws. While the Court had previously held that "only those interests of the highest order...can overbalance legitimate claims to the free exercise of religion" (*Wisconsin v. Yoder* 1971, 215), it changed tack in *Smith*, holding that "incidental effects" of otherwise neutral and generally applicable laws that might forbid or require actions in conflict with religious beliefs may be upheld as constitutional. The Court did not dispute the fact that the use of peyote was sacramental, but nevertheless concluded that "...the nation cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order" (*Employment Division v. Smith* 1990: 888). In short, the Court threw out the requirement that abridgments of free exercise rights meet a compelling state interest in most cases. It is important to highlight here that the Court substantially altered the state of the law as it stood at the time. Justice Blackmun called the decision "...a wholesale overturning of settled law concerning the Religion Clauses of our Constitution" (*Employment Division v. Smith* 1990: 908). Of course, the mere act of rejecting a constitutional challenge did not itself change the law, but rather the manner in which the Court went about rejecting that challenge: the Court authoritatively altered the law and policy of Free Exercise.

Because lower federal courts would implement the decision by applying the new rule in free exercise cases, compliance should be high. Thus we should see that the use of strict scrutiny should be diminished in federal cases. Further, because the standard announced in *Smith* was more deferential to legislatures than the pre-*Smith* test, we should observe a decline in success



rates of free exercise claimants in cases decided in federal courts. Data collected by Adamczyk, Wybraniec, and Finke (2004) demonstrate that this is in fact the case: federal court decisions using the language of compelling interest dropped off after *Smith* from around 25% (before) to about 11% (after). Additionally, Brent (1999) shows that in the three years prior to *Smith*, litigants making Free Exercise claims in U.S. Courts of Appeals won 31.8% of their cases, but after *Smith* their success rate fell to 20%. I *Shepardized* the *Smith* decision as a robustness check. The *Shepard's* summary indicates that lower federal courts have positively treated (“followed”) *Smith* 179 times, and have negatively treated it 85 times (“questioned” 39; “criticized” 8; “distinguished” 38).

A clear example of the basic acceptance of the *Smith* decision by lower federal courts is seen in the case of *Yang v. Sturner* (1990).<sup>21</sup> Dr. William Sturner was the Chief Medical Examiner for the State of Rhode Island, and in that capacity he conducted a medical autopsy on the Yang's son against the Yang's wishes. The Yangs are Hmongs—an animist religion with origins in southeast Asia—and thus are deeply opposed to autopsies, which they believe constitute a sacrilegious mutilation of the body that would cause their son's spirit to “not be free, therefore his spirit will come back and take another person in his family” (*Yang v. Sturner* 1990: 558). The Yangs sued, believing the mistreatment of their son's body constituted a violation of their constitutional rights. Judge Raymond Pettine ruled in the Yang's favor under the then-controlling precedent of the *Sherbert* regime, holding that Dr. Sturner's justifications for his actions fall far short of the compelling state interest standard, and thus found Sturner liable for damages. However, after the Supreme Court announced its decision in *Smith*, Sturner's lawyers

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<sup>21</sup> *You Vang Yang, Ia Kue Yang v. William Q. Sturner*, 728 F.Supp, 845 (1990).  
*You Vang Yang, Ia Kue Yang v. William Q. Sturner*, 750 F.Supp. 558 (1990).

petitioned for reconsideration in light of that decision. In a short, poignant opinion, Judge Pettine recalls his earlier decision. He writes:

“It is with deep regret that I have determined that the *Employment Division* case mandates that I recall my prior opinion. ... While I feel constrained to apply the majority’s opinion to the instant case, I cannot do this without expressing my profound regret and my own agreement with Justice Blackmun’s forceful dissent. Justice Blackmun points out that the majority distorted long-standing precedent to conclude that: ‘[...] I do not believe the Founders thought that their dearly bought freedom from religious persecution a ‘luxury,’ but an essential element of liberty—and they could not have thought religious intolerance ‘unavoidable,’ for they drafted the Religion Clauses precisely in order to avoid that intolerance.’”<sup>22</sup>

Judge Pettine concludes “In the instant case, the Rhode Island statute governing autopsies is a generally applicable law. The law is facially neutral. There is no indication that the law was enacted with any animus toward any religious group. The law’s application did profoundly impair the Yang’s religious freedom; however, under *Employment Division* I can no longer rule that this impairment rises to a constitutional level” (*Yang v. Sturner* 1990: 560). As such, *Yang v. Sturner* provides a stark illustration of the Court’s ability to induce compliance in lower federal courts, and also highlights the profound implications the Court’s interpretive power has for its ability to shape law and policy.

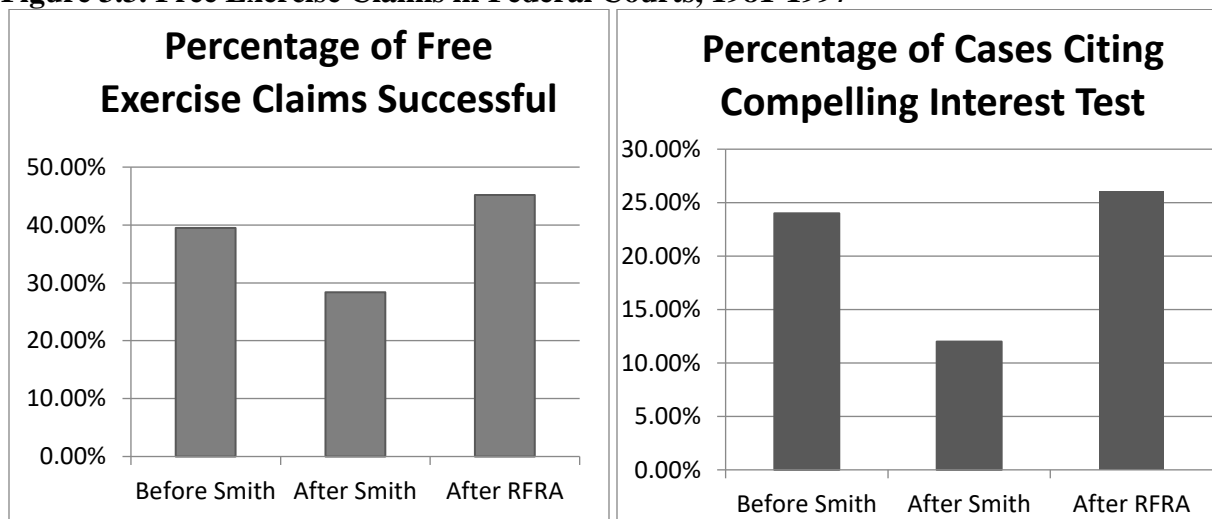
The first two columns at left in each part of figure 3.3 demonstrate that *Smith* resulted in a precipitous drop in the use of the compelling interest test by federal courts, and in the success rate of individuals bringing free exercise challenges to statutes in federal courts. These figures likely underestimate the effects of *Smith*, because religious groups were far less likely to initiate free exercise cases in federal courts following that decision (rate of cases filed per month dropped from 7.1 to 3.2; see Adamczyk et al. 2004). In short, lower federal courts complied with the Supreme Court’s decision in *Smith* to a substantial degree.

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<sup>22</sup> *You Vang Yang, Ia Kue Yang v. William Q. Sturner*, 750 F.Supp. 558 (1990), at 559-560, quoting *Employment Division v. Smith*, 110 S.Ct. 1595 (Blackmun, dissenting) at 1616.

Interests from across the political spectrum lambasted the *Smith* decision as an assault on the free exercise of religion (Niebuhr 1993). And indeed, the number of Free Exercise claims brought into federal courts by religious groups—especially small minority religious groups—dropped by more than fifty-percent after *Smith*, and when cases were brought, religious claimants were significantly less likely to win than before (Adamczyk et al. 2004; Richardson 1995). Groups such as the American Civil Liberties Union, the National Council of Churches, Americans United for the Separation of Church and State, the American Jewish Congress, and many others formed an unlikely alliance to protest, and importantly, to resist the Court’s decision. These groups ultimately led an effort to pursue constitutional change (by restoring the pre-*Smith* status quo) by extra-judicial means: they pushed for the Religious Freedom Restoration Act.

**Figure 3.3. Free Exercise Claims in Federal Courts, 1981-1997**



Source: Adamczyk et al. (2004). Pre-*Smith* period includes cases decided between January 1981 and April 1990; Post-*Smith* period includes cases decided between May 1990 and November 1993 [i.e. before RFRA was enacted], After RFRA includes cases decided between December 1993 and January 1997.

The Act, widely known as RFRA, was introduced to the House of Representatives on March 11, 1993 by Chuck Schumer (D-NY). The bill (H.R. 1308) garnered 170 co-sponsors between the two houses. The bill passed on a voice vote in the House of Representatives the

same day it was introduced. The Senate took rather longer, passing an amended version of the bill on October 27, 1993 by a vote of 97-3. A week later, the House agreed to the Senate amendment without objection. President Bill Clinton signed the bill into law (PL 103-141) on November 16, 1993. Thus, the coordinate branches of government, by overwhelming margins, set aside the rule of law announced by the Court and replaced it with one they found preferable.

RFRA was designed to alter the state of constitutional practice by restoring the pre-*Smith* status quo, that is, by reviving the strict scrutiny regime in Free Exercise doctrine. In its own words, the Act held that both federal and state laws that “substantially burden a person’s exercise of religion” can be upheld only if the government “demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means to furthering that compelling governmental interest.”<sup>23</sup>

This change had its own significant impact on the state of constitutional practice in the area of Free Exercise. Looking at all Free Exercise cases decided by federal courts between 1981 and January of 1997, Adamczyk, et al. (2004) find that before *Smith*, 39.5% of Free Exercise cases were decided in favor of the religious practitioner; after *Smith* but before RFRA, that success rate falls to 28.4% (despite the massive drop in cases filed, mentioned above); but after RFRA, the success rate for religious claimants rises to 45.2%, and the rate of filings returned to its pre-*Smith* levels. The right-most columns in each graph in figure 3.3 visually depict these changes. It is noteworthy that RFRA had as much impact on case outcomes as *Smith*: lower Courts responded as much to Congress as they did to the Court (Brent 1999).

RFRA was not without its critics, however. Many argued that it placed an undue burden on democratic majorities, or that it interfered with the ability of states and municipalities to

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<sup>23</sup> Public Law No. 103-141, Section 1

govern effectively. This latter claim came to center stage in 1997, in the case of *City of Boerne v. Flores*, in which the local government argued that RFRA unconstitutionally burdened its capacity to govern. The Court ruled in the city's favor, holding that Congress could enforce the Bill of Rights against the states, but that it could not change "what the right is" nor "determine what constitutes a constitutional violation" (*Boerne v. Flores* 1997: 519). In other words, the Court held that only it gets to say what the Constitution means, and that Congress can only enforce the Court's interpretations. Thus the *Boerne* Court struck down RFRA as unconstitutional as it applied to the states (RFRA still stands with respect to federal laws). And again, *City of Boerne*, as *Smith* before it, substantially altered the outcomes of challenges brought under the Free Exercise clause. Brent (2003) reports that the success rate of claimants in U.S. Courts of Appeals in the three years following *Boerne* was basically identical to the success of claimants after *Smith* but before RFRA (20.6% versus 20.0%, as compared to the 31.8% before *Smith*, and 32.4% during RFRA).

Once again, advocates of robust religious freedom moved to alter the constitutional playing field by extra-judicial methods. These groups again primarily pursued change through legislatures, as they thought an attempt at amending the Constitution was both too risky and too time and resource consuming (Adamczyk et al. 2004). Members of Congress proposed the Religious Liberty Protection Act of 1999 (RLPA), which was intended to overturn *Smith* and expand protections for religious expression. The law would operate by requiring strict scrutiny in free exercise cases involving programs that receive federal financial support or affect interstate commerce. After passing in the House, however, the bill died in committee in the Senate as members there thought the bill stood on too tenuous of constitutional footing. Thus in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),

which protects religious construction activities (such as those that had been at the center of the controversy in *City of Boerne v. Flores*) and prisoners, relying on Congress' commerce power. In 2005, a unanimous Supreme Court upheld RLUIPA as constitutional in *Cutter v. Wilkinson* (2005).

To summarize, the Supreme Court rejected a constitutional challenge to a statute in *Employment Division v. Smith*, but in doing so significantly altered the state of free exercise policy. Lower courts complied with the Court's ruling in *Smith* by implementing the new rule in subsequent free exercise cases. Thus we see that the compliance formula can speak to non-invalidations provided that the Court requires some change in behavior from the implementing actors. This was not the end of the story, however. The Religious Freedom Restoration Act was undoubtedly an impact of the Supreme Court's decision in *Smith*. Indeed, the entire interbranch exchange from RFRA to *Boerne* to RLUIPA to *Cutter v. Wilkinson* can be understood as reverberations of *Smith*—though RFRA is obviously the most direct impact in this inter-institutional vein. It is equally clear that none of this subsequent development can be understood in terms of compliance and non-compliance. This fact points to the problems of understanding impact as compliance only, without also paying attention to larger systemic effects in the political arena. To conclude that *Smith* was a “successful” exercise of Court power because that decision was largely complied with is to miss the larger political story of which *Smith* is only part.

### **Religious Nonestablishment: *Agostini v. Felton***

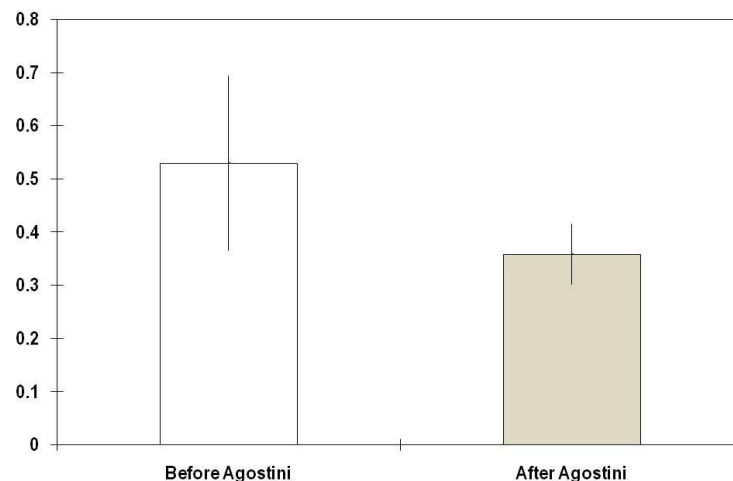
Title I of the Elementary and Secondary Education Act of 1965 provided financial support to local schools in order to meet the needs of “educationally deprived children from low-income families,” even those enrolled in private schools (*Aguiar v. Felton* 1985: 404). In many

communities these funds were used to pay employees who taught in non-public schools and programs. In 1985 the Supreme Court ruled that schemes using Title I funds to pay employees of parochial schools in New York City, and for a “Shared Time and Community Program” that provided nonpublic classes in nonpublic schools were unconstitutional in *Aguilar v. Felton* and *Grand Rapids v. Ball*, respectively. These were “Popular-Lateral” decisions in Hall’s (2011) framework, meaning that the decisions were popular but had to be implemented by non-court actors—in these cases, local school boards. Consistent with his theory, Hall finds that both cases had “a profound impact on the administration of Title I programs for private school students in the United States. Very shortly after the ruling, every school district administering Title I funds ceased to use these funds to pay for teachers to instruct students within religiously affiliated school buildings” (2011: 112).

The Court reconsidered its position on Title I funding in parochial schools a decade later in *Agostini v. Felton* (1997). The ruling in *Aguilar* required alternative delivery of Title I services, often at leased sites or in mobile instructional units, which were much costlier than provision directly in the parochial schools. In New York City, for example, compliance with *Aguilar* cost an average of \$15 million per year, significantly reducing the amount of Title I funds available for actual remedial education (Mangrum 1998). The Board of Education of the City of New York (hereafter “the Board”) filed a motion in federal court seeking relief from the injunction against provision of services on private school grounds issued in the wake of *Aguilar*. The US District Court for the Eastern District of New York and the Second Circuit Court of Appeals each ruled against the Board. The case ultimately made it to the Supreme Court, where a narrow majority ruled that *Aguilar* and *Grand Rapids v. Ball* had been wrongly decided, and thus overruled them. Justice O’Connor, in her majority opinion, also repudiated the *Lemon Test*,

suggesting a somewhat softer “Endorsement Test,” which served to further muddy the already murky waters of Establishment Clause doctrine (Mangrum 1998; Sisk and Heise 2012).<sup>24</sup> One consequence of this doctrinal development was that lower federal courts now had more tools at their disposal to find against Establishment Clause claimants. Figure 3.4 demonstrates the *Agostini* ruling did in fact significantly affect subsequent Establishment Clause litigation, with Establishment clause claimants losing at higher clip after compared to before.

**Figure 3.4. Predicted Probability of Success for Establishment Clause Claims, Before and After *Agostini***



Predicted probability and 95% confidence intervals calculated by Sisk and Heise (2012). Their models estimate that *Agostini* resulted in a 17 percentage-point decline in the success rates of Establishment Clause claimants.

The practical upshot of the *Agostini* decision was that Title I funds could again be used on parochial school grounds, so long as schools maintained strict standards to insulate Title I services from religious influences. As noted above, Hall (2011) demonstrates that *Aguilar* had the effect of ending the provision of Title I services in private schools, and also of decreasing the overall number of private school students receiving Title I services across the U.S. Hall was able

<sup>24</sup> The so-called “*Lemon Test*” was a three-pronged test announced by the Court in *Lemon v. Kurtzman* (1971) in order to assess the constitutionality of practices dealing with religious establishment. To be constitutional, the statute must have a “secular legislative purpose,” its principal effects must neither advance nor inhibit religion, and it must not foster “excessive government entanglement with religion.”



to establish this pattern because the Government Accountability Office (GAO) conducted studies in 1987, 1989, and 1993 explicitly examining the extent of compliance with *Aguilar*.

Unfortunately, the GAO did not conduct any similar studies after *Agostini*.<sup>25</sup> In any event, because the same New York School Board that lost in *Aguilar* won in *Agostini*, it seems extremely unlikely that it would not have reverted, more or less immediately, to the activities it conducted pre-*Aguilar*. That is, it would be strange indeed if schools did not respond to *Agostini* by reinstating some of the pre-*Aguilar* modes of delivering Title I services, such as by paying parochial school teachers to participate and by hosting supplementary educational services on private school properties.

### **Buffer Zones: *Hill v. Colorado***

In 1993 the Colorado legislature passed a law intended to prevent the “willful obstruction of a person’s access to medical counseling and treatment” by criminalizing knowing obstruction, hinderance, impediment, etc. of another person’s entry to or exit from any health care facility.

Section 3 of the law went much further than this, making it a crime for any person:

“[to] knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.” (quoted in Raskin and LeBlanc 2001, 190).

Thus the statute effectively banned or curtailed a range of speech activities in this “buffer zone.”

The State acknowledged that Section 3 criminalized purely speech activities, but defended that move as a “prophylactic” regulation which would prevent demonstrators from descending into

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<sup>25</sup> Correspondence with GAO Research Librarian, January 21, 2016.

I have also tried to find data on Title I delivery methods *within* the New York City School District itself, but to no avail.

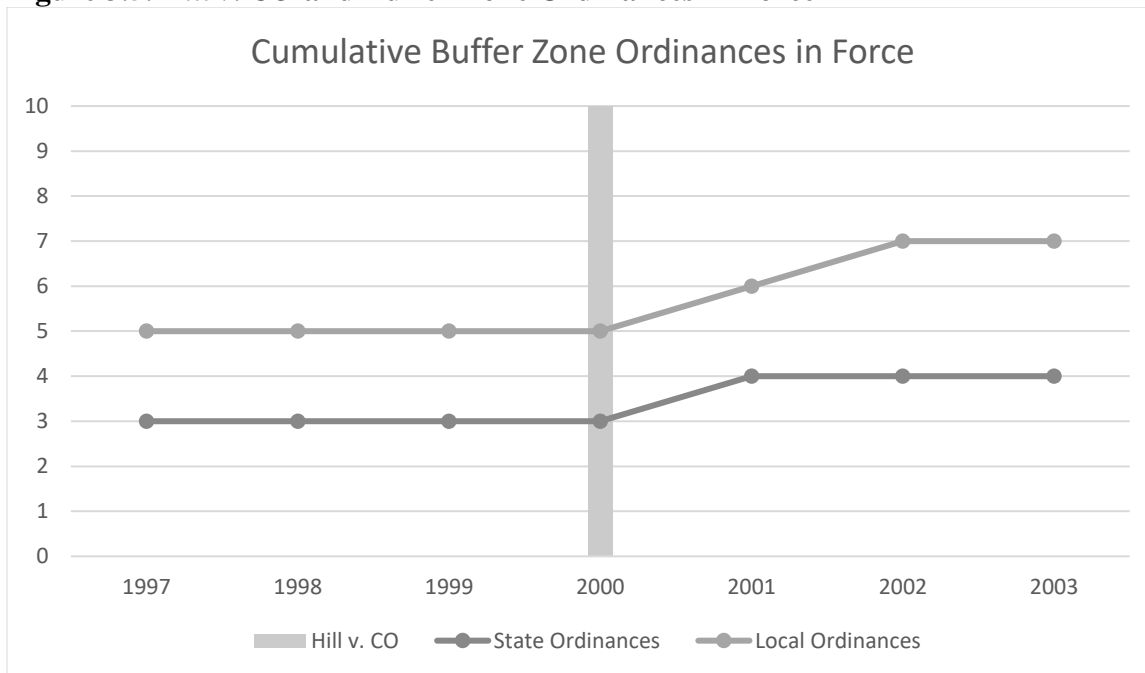
non-speech conduct—namely the sorts of activities outlawed in Section 2 of the act, especially blocking and other acts of physical violence or threat.

Shortly after enactment a group anti-abortion protestors (self-described “sidewalk counselors”) filed suit in state court, arguing that Section 3 was an unconstitutional restriction of their right to speak. The protestors lost at all levels of court in the state of Colorado (*Hill v. City of Lakewood* [1995]). The protestors appealed to the U.S. Supreme Court, challenging Section 3 of the Colorado act on the grounds of content and viewpoint discrimination, insufficiently narrow tailoring, failure to leave open alternative channels of communication, prior restraint, vagueness, and overbreadth (Raskin and LeBlanc 2001). In a 6-3 decision the Court upheld Section 3 against all of the petitioners’ challenges. The Court did not expressly overrule any precedent in its decision in *Hill v. Colorado*, though many scholars argue that *Hill* represents a significant step away from precedent, in that it defined protection of the “interest of the unwilling listener” as a compelling state interest (see Scalia, dissenting in *Hill v. Colorado*; also Raskin and LeBlanc 2001; Chen 2003; O’Neill 2006).

The *Hill* decision provides a roadmap of sorts for other states and municipalities to create statutory buffer zones around abortion facilities that could withstand judicial scrutiny when challenged on constitutional grounds. In 2014, the National Abortion Federation published a handbook for its members, “Legal Remedies to Address Clinic Violence and Harassment,” which states that “The *Hill* decision upheld a Colorado ordinance...[that] has successfully served as a model for similar ordinances across the country” because “they would likely survive a constitutional challenge” (NAF 2014: 7; see also Guttmacher Report 2001). And there was in fact a modest uptick in state and local-level buffer-zone type ordinances after *Hill*. The Court’s decision in *Hill* clearly did not open any floodgates for abortion clinic buffer zones, but it does

appear to have had some effect in terms of the cumulative number of buffer zone laws on the books. It would be unfair to argue that the Court *intended* to cause states to adopt buffer zone laws, however. As in *Gregg*, *Hill* represents not an affirmative command toward some policy, but the acknowledgment that a policy is permissible within some bounds.

**Figure 3.5. *Hill* v. CO and Buffer Zone Ordinances in Force**

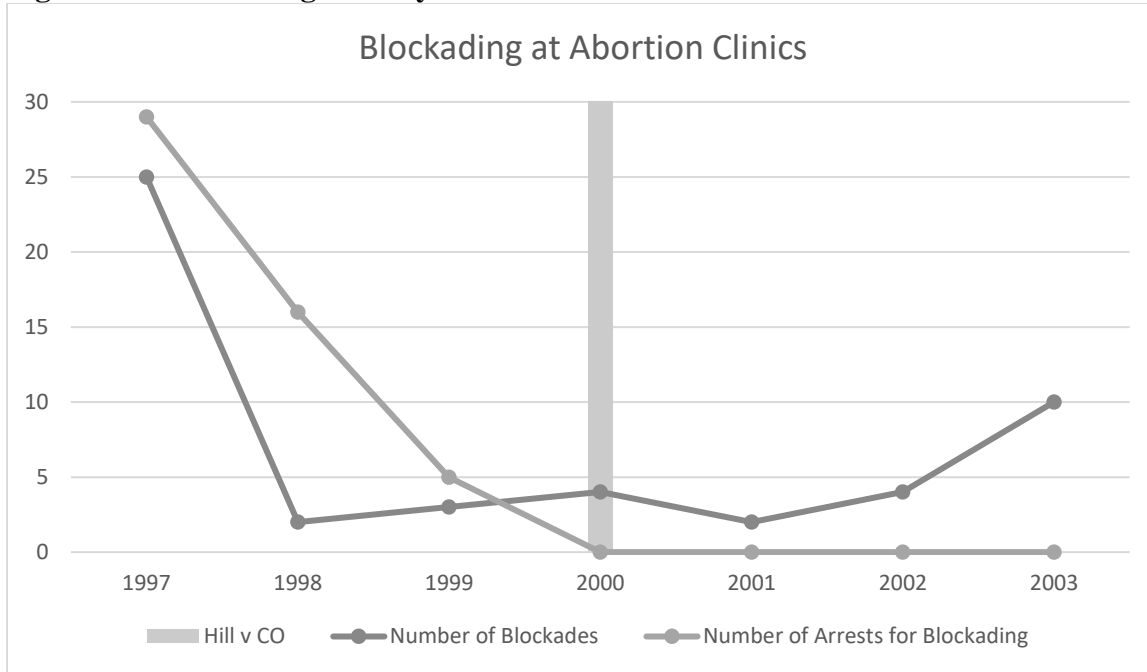


Source: NAF Handbook (2014)

If we look to the stated purpose of the law and the presumptive intention of the Court in upholding the statute—reducing the incidence of obstruction at abortion clinics—the picture is fuzzier. Figure 3.6 demonstrates that the downward trend in blockading abortion clinics began before *Hill* was decided; the post-*Hill* trend is, if anything, slightly upwards. Additionally, figure 3.6 shows that arrests for blockading activities fell to zero in 2000, and that no person in the US was arrested for such an activity in the next three years, despite the modest uptick in buffer zone restrictions. Thus, if reducing obstruction at abortion clinics was the Court’s intent in *Hill*, it is far from clear that it achieved its purpose. Regardless, the Court did effectively shift federal free speech doctrine by defining a new type of interest as suitably compelling to meet the

requirements of strict scrutiny. *Shepard's* reveals that federal courts have followed the Court's lead, having treated *Hill* positively (178 instances) far more often than negatively (30 instances).

**Figure 3.6. Blockading Activity at Abortion Clinics**



Source: NAF Violence and Disruption Statistics (2014)

**Eminent Domain: *Kelo v. New London***

The Supreme Court decided *Kelo v. New London* on June 23, 2005. In that decision, a 5-4 majority held that a series of condemnations of homes and other private properties by the city of New London, CT, for the purpose of economic redevelopment were constitutionally valid. Justice Stevens, writing for the majority, held that the condemnations were permissible because redevelopment was a “public use” within the meaning of the Fifth Amendment’s Taking Clause, even though the land would not be used by, or even open to, the public at large. In this decision, the Court upheld the relevant legislation against a constitutional challenge, and declined to alter existing precedent in more than a very minor way. As such, the compliance approach can tell us very little about the impact of this decision. Even so, one could study the implementation of this decision in lower federal courts, for example, to see if the decision is being complied with

throughout the judicial hierarchy. To assess compliance with *Kelo* in federal courts, I *Shepardized* the decision to see how the case was treated in subsequent federal cases.<sup>26</sup> I find that *Kelo* has been “followed” twenty-eight times, and “distinguished” only eight times by federal courts (*Shepard’s* also reports nine “neutral” analyses). For example, a federal judge in Pennsylvania dismissed a constitutional challenge of a taking for economic redevelopment, holding that *Kelo* established private development as a sufficiently “public” purpose to meet the Constitution’s “public use” requirement (*Whittaker v. County of Lawrence* 2009). Thus we see, unsurprisingly, that the Court’s significant hierarchical control of the federal judiciary translates into a high degree of compliance with its decision—if we understand compliance to include faithful implementation by lower courts.

On June 27, 2005—just four days after the Court announced its decision in *Kelo*—Senator John Cornyn (R-TX) introduced the “Protections of Homes, Small Businesses and Private Property Act of 2005” (S.B. 1313, 109<sup>th</sup> Congress). The bill was a direct response to the *Kelo* decision, as its purposes was to limit the use of eminent domain for purposes of economic development. The bill stated that “The power of eminent domain shall be available only for public use... ‘public use’ shall not be construed to include economic development.” S.B. 1313, however, never made it out of the Senate Judiciary Committee, despite the fact that it had 32 co-sponsors in the Senate, including 3 members of the SJC itself. Not much later, the House passed the “Private Property Rights Protection Act of 2005” (“PRPA”; H.R. 4128, 109<sup>th</sup> Congress) by a

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<sup>26</sup> *Shepard’s* analyzes how treatment cases interpret a particular precedent, labelling a positive interpretation “followed”, and labels a negative treatment as either “distinguished,” “criticized,” “limited,” “questioned,” or “overruled” (see Hansford and Spriggs 2006, 43-54 for an extended discussion). Importantly, for *Shepherd’s* to code a treatment case in any of the above categories, the case must more than simply cite the precedent – it must “provide specific language that has a potential effect on the legal authority of the precedent” (Hansford and Spriggs 2006, 45; citing *Shepard’s* 1993 in-house training manual). While this is an admittedly coarse measure of “compliance,” it is a valid and reliable measure of the treatment of a Court precedent – and because that is all compliance entails with respect to courts, it is suitable for the purpose at hand.

huge margin (376-38). This bill would also prohibit the use of eminent domain for the purpose of economic development by any entity that receives federal economic development funds.

Violators would be punished by losing eligibility for future federal redevelopment funds for two years. The PRPA, like S.B. 1313, languished before the Senate Judiciary Committee, and was never reported to the floor for a vote. This bill has been reintroduced and passed by several subsequent Congresses—most recently the “Private Property Rights Protection Act of 2015”—but has died in the Senate each time.

Both chambers were able to agree on one minor adjustment to the law in the wake of *Kelo*, passing the “Bond Amendment” in November of 2005. The Bond Amendment was an amendment to an appropriation bill for the departments of Transportation, Treasury, and Housing and Urban Development. The amendment forbids the use of funds allocated in the Act to support the use of eminent domain “for economic development that primarily benefits private entities” (quoted in Somin 2009: 2152). Additionally, President George W. Bush issued an executive order on the one-year anniversary of the *Kelo* decision, stating:

“It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for advancing the economic interest of private parties to be given ownership or use of the property taken.”<sup>27</sup>

Somin (2009; 2015) has argued, however, that this order does little to curtail takings, as government officials always at least claim that a taking is for the benefit of the general public.

The states have been much more active in altering the state of constitutional practice regarding eminent domain than have actors at the federal level. Within a year of the decision, twenty-nine states had acted on Justice Stevens’ invitation to enact limitations on eminent

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<sup>27</sup> Executive Order No. 13,406, 71 Federal Register 36,973 (June 23, 2006).

domain more stringent than the one adopted by the Court (Ross and Tolan 2006). Today that number has risen to forty-five, including ten which have gone as far as amending their constitutions (see Beienburg 2014). In addition to this tide of legislation, state courts have also bitten back against the Court's ruling. The state supreme courts of Oklahoma and Ohio have both explicitly rejected *Kelo* and ruled that their respective state constitutions forbid economic development takings.<sup>28</sup> The high court of South Dakota has also directly repudiated *Kelo*, but did not rule outright that takings for economic development are *per se* invalid.<sup>29</sup> Other state high courts have restricted the takings power in other ways: "quick take" condemnations have been severely constrained in Maryland and Rhode Island<sup>30</sup>; blight condemnations have been constrained in Ohio, New Jersey, and Pennsylvania<sup>31</sup> (see generally Somin 2011). In fairness, it is not obvious that these state court decisions were "caused" by *Kelo*: four state supreme courts (those of Illinois, Michigan, Montana, and South Carolina<sup>32</sup>) had forbidden economic development takings *before Kelo*. Thus these decisions since 2005 may be part of a broader intellectual and political trend against broad deference to legislatures on questions of public use that began in the 1980s (Ely 2008; Somin 2011).

As above, I utilize *Shepard's* to document the treatment of *Kelo* in state courts. The data suggest that state courts were considerably less deferential to the Supreme Court than were the

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<sup>28</sup> *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006)

*Board of County Commissioners of Muskogee County v. Lowery*, 136 P.3d 639 (Oklahoma 2006)

<sup>29</sup> *Benson v. State*, 710 N.W.2d 131 (South Dakota 2006)

<sup>30</sup> *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324 (Maryland 2007)

*Rhode Island Economic Development Corp. v. The Parking Company* 892 A.2d 87 (Rhode Island 2006)

<sup>31</sup> *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006)

*Gallenthin Realty Developers, Inc. v. Borough of Paulsboro*, 924 A.2d 447 (New Jersey 2007)

*In re Condemnation by Redevelopment Authority*, 962 A.2d 1257 (PA Commonwealth Court 2008)

<sup>32</sup> *Southwest Illinois Development Authority v. National City Environmental, L.L.C.* 768 N.E.2d 1 (Illinois 2002)

*County of Wayne v. Hathcock* 684 N.W.2d 765 (Michigan 2004)

*City of Bozeman v. Vaniman* 898 P.2d 1208 (Montana 1995)

*Georgia Department of Transportation v. Jasper* 586 S.E.2d 853 (South Carolina 2003)

lower federal courts. *Shephard's* indicates that *Kelo* was twice ruled as superseded by state statutes (in Missouri and Pennsylvania), twice “criticized,” “distinguished” nineteen times, and “followed” twenty-one times. In one of the noted “negative” treatments, the Ohio Supreme Court contrasts state-level protections for property owners with the *Kelo* decision’s apparently minimal requirements. It held in *City of Norwood v. Horney*<sup>33</sup> that “although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution.” In contrast, an appellate court in Illinois favorably cited *Kelo* in *City of Chicago v. Eychaner*<sup>34</sup> as grounds for upholding a taking of a conservation area for redevelopment: “Guided by...*Kelo*, we turn to the City’s taking, and hold that it unquestionably serves a public purpose of preventing blight, promoting economic revitalization, and protecting existing industry.” Overall, this pattern indicates that *Kelo* was treated positively twenty-one times, and negatively twenty-three times in state courts (compared to twenty-eight and eight times respectively, in federal courts). In short, individuals and interest groups litigating for a tighter conception of “public use” found a considerably more hospitable audience in state courts than in federal courts.

A key reason that the *Kelo* decision precipitated so much political activity was that it dramatically increased the salience of eminent domain policy (e.g. Zilis 2015). In order to assess the effect of the Court’s decision on coverage of the eminent domain issue, broadly construed, I gathered data on the average daily number of stories in the *New York Times* including the term

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<sup>33</sup> 110 Ohio St. 3d 353

<sup>34</sup> 389 Ill. Dec. 411



“eminent domain.” These data were gathered by keyword searching the Lexis-Nexis Academic database for *NYT* coverage from January 1, 2002, to December 31, 2008.<sup>35</sup>

I assess the impact of *Kelo* on media coverage of eminent domain utilizing Box-Tiao (1975) intervention analyses, which estimate the effects of an event (or events) on a set of serial observations. This method is attractive because intervention analyses assess natural experiments; in this case, the quasi-experimental treatments (interventions) are judicial decisions, and the set of serial observations is media coverage of the issues in which the cases are embedded (Box-Steffensmeier et al. 2014; Ura 2009). Box-Tiao analyses explicitly model ARIMA error processes by estimating the auto-regressive and moving average components of the dependent time series (Box and Jenkins 1976). This means that the effects of intervention on the dependent time series are assessed after other sources of dynamic error are accounted for (reduced to white noise). Importantly, as Ura (2009: 438) points out, when intervention analyses are properly modelled, “only the identification of a rival causal event threatens inferences drawn from the assessment of the impact of the event of interest.”

**Table 3.2. Impact of *Kelo v. New London* on *NYT* Attention to Eminent Domain**

<b>Issue Area/Case</b>	<b>Finding</b>	<b>%Change in Coverage</b>
<i>Eminent Domain</i>		
<i>Kelo v. New London</i>	step***	931.35

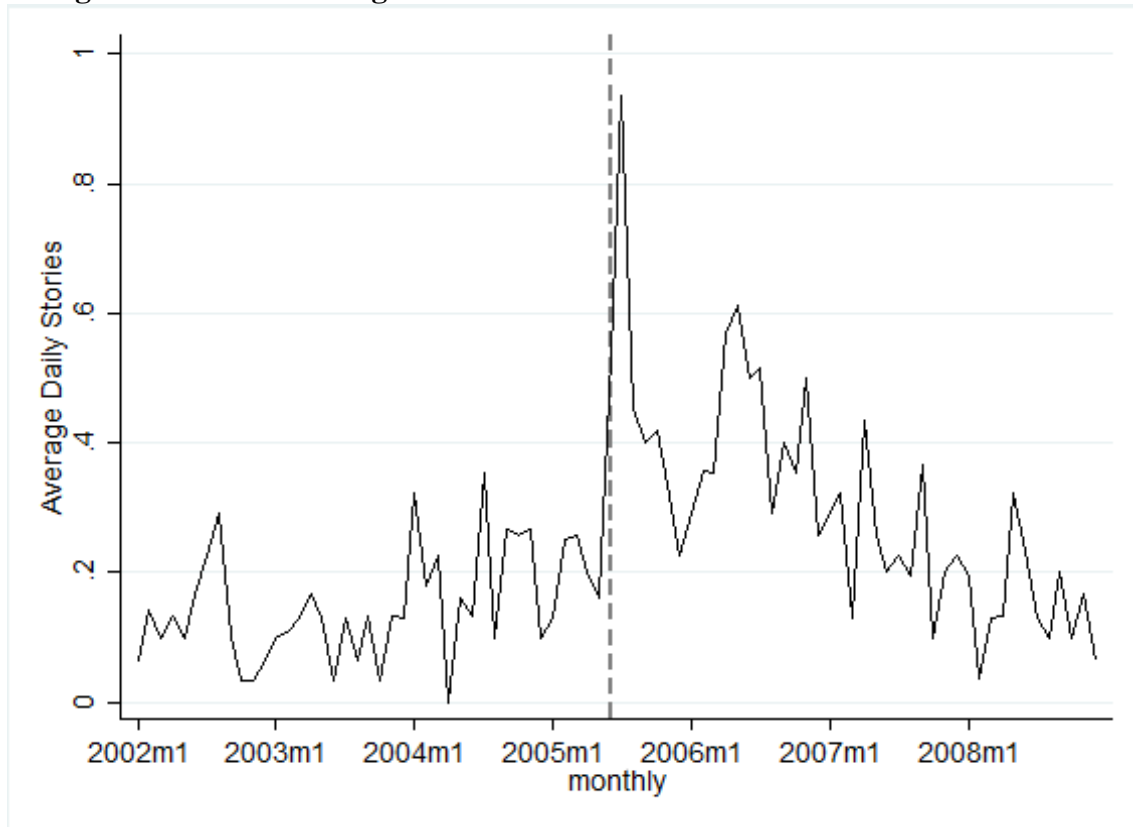
\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

The first step in assessing potential intervention effects of decisions is to develop appropriate ARIMA models of the media coverage series. I then model the effects of the *Kelo* decision on the media coverage data. Following Ura (2009), I take a stepwise approach to developing the final model specifications. The decision is treated first as a “pulse” intervention, a dummy variable coded as one for the month of the intervention and zero otherwise. Decisions

<sup>35</sup> This approach was borrowed from Ura (2009); see chapter 5 for extended discussion of the method.

were then modeled treating the intervention as “steps” to assess the extent to which the data supported such a specification; when events or complexities in the models were insignificant or unsupported by the data, they were dropped (Ura 2009).

**Figure 3.7. NYT Coverage of Eminent Domain**



Note: Figure depicts the average number of daily stories containing the string “eminent domain.” The vertical gray line at 2005m6 (i.e. June of 2005) depicts the Court’s announcement of its decision in *Kelo v. New London*.

Table 3.2 indicates that *Kelo* had a massive, long-term effect on the salience of eminent domain. In the three years before *Kelo*, eminent domain was mentioned in about one *New York Times* story per month; immediately afterward, eminent domain was covered in an average of a little more than nine stories per month (Table S5.8 in the supplementary materials for chapter 5 presents the full model). Figure 3.7 depicts this shift graphically. Clearly, *Kelo* caused a massive and sustained increase in attention to eminent domain. The effect clearly decayed over time, but persisted for more than two years.

**Table 3.3. State Adoption of Legislative Eminent Domain Reform, by Year**

2005	2006	2007	2008	2009
Alabama	Alabama	Connecticut	<b>California +</b>	Delaware
Ohio	Alaska	Maryland	<b>Nevada +</b>	<b>Texas +</b>
Texas	Colorado	Michigan	Rhode Island	
	<b>Florida +</b>	Montana		
	Georgia	Nevada		
	Idaho	New Mexico		
	Illinois	North Dakota		
	Indiana	Ohio		
	Iowa	South Carolina		
	Kansas	Texas		
	Kentucky	Utah		
	<b>Louisiana +</b>	<b>Virginia*</b>		
	Maine	Washington		
	<b>Michigan +</b>	Wyoming		
	Minnesota			
	Missouri			
	Nebraska			
	Nevada			
	<b>New Hampshire +</b>			
	North Carolina			
	<b>North Dakota +</b>			
	Oregon			
	Pennsylvania			
	<b>South Carolina +</b>			
	South Dakota			
	Tennessee			
	Utah			
	Vermont			
	West Virginia			
	Wisconsin			

**Note:** All reforms were adopted in the conventional legislative mode unless noted with an \* or an +. States denoted with an asterisk (\*) adopted their reforms through popular initiatives or referenda, states denoted with a plus-sign (+) adopted a constitutional amendment. States are listed in alphabetical order to facilitate reference. States are listed multiple times if they adopted substantively different reforms in multiple years.

The Court's decision in *Kelo* was also extremely unpopular. Polls in the weeks after the decision found that huge majorities of Americans disagreed with the decision: 81% of

respondents to a Saint Index survey expressed disagreement with the Court, as did 95% of respondents to a Zogby poll (see Strother 2016). State-level polls generally comported with these national averages (Strother 2016; Somin 2015). This massive increase in coverage of eminent domain issues, combined with the significant public disfavor for the Court’s ruling, created a “political opportunity structure” for significant policy change. That is, the salience and unpopularity of the issues created incentives for electorally minded office holders to “do something” about the problem (Mayhew 1974). And we see in fact that thirty-nine states adopted statutory or constitutional reforms during this period of heightened salience (Table 3.3).

Additionally, the Court’s decision profoundly affected public opinion. *Kelo* was an unusually newsworthy decision because of the sympathetic plaintiffs and the strident disagreements over the decision between the justices in the majority and the dissenters, making it a prime candidate to cause an opinion backlash (Zilis 2015; Strother 2017a). Further, Strother (2016) argues that the substance of the Court’s ruling—upholding “broad” economic development takings—caused the public to strongly disapprove of eminent domain. Thus heightened and long-lasting media coverage of a decision which caused strong negative reactions among virtually all subsets of the public created a unique opportunity for interested parties to pursue policy change in this area. Court decisions, at least highly salient ones, have the potential to focus mass opinion and reframe political debates (Franklin and Kosaki 1989; Engel 2013; Egan, Persily, and Wallsten 2008). Recognizing this power, Christenson and Glick (2015) argue that after cases such as *Lawrence v. Texas*, “[i]t is unclear how much we should attribute opinion changes to the direction of the Court’s ruling, and how much we should attribute to it simply priming gay rights issues” (2015: 883; see also Engel 2013). To be sure, even if the Court did not alter the substance of public opinion, by focusing attention on eminent domain, it made the

public's strongly anti-taking views salient, and in doing so opened a window of opportunity for policy entrepreneurs to push anti-takings policies in legislatures around the country (Somin 2015).

### **Discussion: Judicial Power and Judicial Impact**

These cases can teach us much about the nature of judicial power and the scope of judicial impact. First, they show that the Court's power is more robust is often appreciated by scholars working in the impact tradition. Second, they show that the "compliance" approach to the study of judicial impact is fundamentally limited in two ways: it can only speak to a subset of the Court's decisions, and even for decisions to which it can be applied, the compliance approach can tell only a partial story of case impact. Third, Supreme Court decisions can have a huge range of impacts on politics and policy: they can increase the salience of an issue, they can provoke Congressional or presidential responses, and they can spur interest group or mass activism to name just a few. I draw out each of these points below.

First, to the extent that the Court issued clear orders requiring behavioral deviations from the status quo in the above cases, the relevant actors largely complied with those decisions. Additionally, in all of the cases discussed the Court presented an authoritative interpretation of a clause or provision of the constitution which lower courts were bound to follow. Thus to the extent that the rule of law announced in each case required an observable change in lower court behavior, we observed lower court compliance. From these case studies we can infer that the Court is able to exercise power over other actors' behavior even when it declines to use its power to impose constitutional limitations on other government institutions. As such, theories of judicial power must countenance such cases.

Second, and relatedly, the conventional compliance formula is considerably strained by

moving away from Court reversals of policies set by other state actors and examining instead cases in which the Court does not invalidate laws or practices. The formula is strained for two reasons: first, the Court does not always change the law or issue an order which requires any observable change in behavior from implementing actors; second, even when the Court does alter doctrine, such decisions may permit changes in behavior, but not require them. As a result, only a small subset of non-invalidation cases can be studied using the compliance formula. The case studies presented here demonstrate that when the Court does change the law or issue an unambiguous order in these non-invalidation cases, lower courts comply with those decisions. That is, by putting focus on compliance with the legal policy announced in each decision we can significantly broaden the applicability of the compliance formula, and shed new light on that aspect of the Court's impact on policy. For example, in the study of *Employment Division v. Smith*, I showed that the decision to alter Free Exercise doctrine in that case (replacing the *Sherbert* rule with the new rule of neutrality and general applicability) significantly changed policy on the ground in the area of free exercise. However, the discussion of *Kelo* shows that even this broadened approach to compliance is limited: indeed, compliance is an essentially useless concept with respect to *Kelo* as the Court did not significantly change legal policy or issue an order requiring an observable deviation in behavior, and thus rendered compliance nonfalsifiable with respect to that case.

This points to the third key takeaway, which is that judicial power, which is captured by compliance studies, tells only part of the story of judicial impact. *Kelo* had tremendous impact on eminent domain policy despite the fact that it did not directly change law or policy. Even in cases for which the compliance formula gives us some traction, such as *Furman v. Georgia* and *Employment Division v. Smith*, the compliance story is decidedly incomplete. The indirect effects

of those decisions—such as spurring responses from Congress and state legislatures—are arguably even more consequential than the direct effects captured by the compliance approach. More generally, with respect to impact, these cases show that there are numerous types of effects that can be caused by judicial decisions: they can increase the public salience of an issue and/or put the issue on the agenda of other policymakers, they can provoke Congressional or presidential responses or responses from state governments, they can spur interest group or mass activism, they can influence public opinion, and more. The variety of effects discussed in the above cases is certainly not exhaustive. In fact, it is likely impossible to define the range of possible effects of Court decisions before they are rendered. In any event, the fact of multifarious modes of impact points to the utility of the policy-oriented conceptualization of impact suggested here. By focusing on a case or series of cases within a given issue domain and in their institutional context, and by studying the pathways by which Court influence ultimately led to changes in policy, we can see that the Supreme Court routinely shapes American politics and policy. I build on these insights in chapters five, six, and seven, by studying the Court's influence on the public agenda, the president's agenda, and the agendas of the political parties.

## **Conclusions**

The foregoing discussion point to a few key considerations for students of impact and judicial power. One clear implication of these findings is that the Court can and does exercise power over the behavior of actors outside of the context of judicial reversals of policies established by other institutions. As such, studies of judicial power that omit any consideration of non-reversals are limited at best, and likely biased. Hall's (2011) study is remarkably effective at explaining patterns of compliance when the Court invalidates statutes, but the two-by-two scheme he uses to predict compliance does not translate well to non-invalidations. His concept of

“lateral” implementers appears only to be relevant in the subset of cases in which the Court strikes laws down as unconstitutional. A fuller theory of the nature of Supreme Court power must explain that power in broader set of contexts. That is, the power to invalidate statutes has been aptly described as the Court’s “most potent power” (Keith 2008), but unless we are prepared to stipulate that the Court only exercises power by invalidating statutes on constitutional grounds, which the above case studies demonstrate is not the case, we must strive to develop a theory which can speak to cases outside this narrow context.

These limitations of the compliance formula point also to a major shortcoming in the broader judicial impact literature: compliance is important, but it leaves much of what is properly understood as judicial impact unexplored. I have argued that there is much more to the story of *Employment Division v. Smith* than what a compliance study can tell. The fact that lower courts implemented the Court’s *Smith* ruling fails to explain subsequent developments in Free Exercise doctrine and practice, such as the Religious Freedom Restoration Act, *City of Boerne v. Flores*, and so on, all of which are directly attributable to the Court’s decision in *Smith*. Similarly, to focus on compliance with *Gregg v. Georgia* (or *Furman v. Georgia*) is to miss the larger picture of rapid development in capital punishment policy of which those cases are only part. The impact of *Gregg* can only be understood in the broader context of death penalty politics in the 1960s and 1970s. The Supreme Court issued a controversial decision which effectively abolished the death penalty as it was then practiced in *Furman v. Georgia*. This decision was complied with (Hall 2011), but as with *Employment Division v. Smith*, to focus on compliance is to miss the forest for the trees. More important is the fact *Furman* directly precipitated a host of constitutional and legislative politics aimed at both reversing and further entrenching that decision.



To be clear, none of these things are direct outcomes of intentional exercises of Court power, but they are emphatically impacts of Court decisions. As such, I argue that the conceptualization of judicial impact as compliance is incomplete, and that the policy-oriented view adopted here much better explains the Court's role in American politics and policymaking. For example, students of the Court would do well to follow in the footsteps of other institutionalists by probing the role of the Supreme Court as a major political agenda setter for the other institutions of government.

The above studies point to the limitations of the conventional compliance formula, and to the utility of the study of compliance generally. While the Supreme Court can and does exercise power over actors in the political system outside of the context of judicial reversals of policies, a narrow focus on power misses much of the real-world importance of judicial action. Put differently, the reality of Court power certainly affects politics in important ways, but Court decisions have important effects that are not attributable to its power to influence the behavior of other actors. As such, I argue that we must adopt a broader conception of judicial impact which considers all of the policy-relevant effects of a given decision. Existing literatures point to paths forward in this endeavor: a focus on the policy-relevance of Court decisions would have us consider the impacts of decisions on the political agenda, on motivation or incentive to act, and on public opinion along with more typical behavioral-compliance stories. By focusing on policy development, scholars can systematize the study of these disparate elements in order to achieve a better understanding of the Court's role in processes of political contestation that continually produce and alter policy.

Returning to the example of *Employment Division v. Smith*, this approach would have us consider the importance of lower court's application of the new doctrinal rule to the free exercise

of religion, as well as how that decision was received by the public and political elites, how those political actors altered policy in turn (RFRA), and the subsequent iterative battle over free exercise (*City of Boerne v. Flores*, RLPA, RLUIPA, *Cutter v. Wilkinson*, etc.). By focusing on the policy back-and-forth between the branches instead of mere compliance with *Smith* and *Boerne*, we gain a more accurate and more nuanced understanding of the Court's role in American politics.

### Supplementary Materials for Chapter 3:

#### Full List of Landmark Restraintist Cases

*Williamson v. Lee Optical Service v. Dulles*  
*Wilson v. Girard*  
*Roth v. US*  
*Barenblatt v. US*  
*Ferguson v. Skrupa*  
*South Carolina v. Katzenbach*  
*Adderley v. Florida*  
*In re Gault*  
*Walker v. City of Birmingham*  
*Powell v. Texas*  
*Terry v. Ohio*  
*US v. O'Brien*  
*Branzburg v. Hayes*  
*Moose Lodge No. 1 v. Irvis*  
*San Antonio Independent School Dist. v. Rodriguez*  
*Miller v. California*  
*Gregg v. Georgia*  
*Buckley v. Valeo*  
*Massachusetts Board of Retirement v. Murgia*  
*Penn Central Trans. Co. v. New York City*  
*US Steelworkers v. Weber*  
*Harris v. McRae*  
*Rostker v. Goldberg*  
*Michael M. v. Superior Court*  
*Dames & Moore v. Regan*  
*New York v. Ferber*  
*Bob Jones v. US*  
*Michigan v. Long*  
*Hawaii Housing Authority v. Midkiff*  
*Lynch v. Donnelly*  
*Bowers v. Hardwick*  
*Bethel School Dist. v. Fraser*  
*Davis v. Bandemer*  
*Maine v. Taylor*  
*South Dakota v. Dole*  
*McClesky v. Kemp*  
*Morrison v. Olson*  
*Employment Division v. Smith I*  
*Mistretta v. US*  
*Employment Division v. Smith II*  
*Cruzan v. Missouri*  
*Metro Broadcasting v. FCC*  
*Payne v. Tennessee*  
*Rust v. Sullivan*  
*Planned Parenthood v. Casey*  
*Nixon v. US*  
*Wisconsin v. Mitchell*  
*Vernonia School Dist. v. Acton*  
*Seminole Tribe v. Florida*  
*Denver Area Consortium v. FCC*  
*US v. Armstrong*  
*Agostini v. Felton*  
*Washington v. Glucksberg*  
*Vacco v. Quill*  
*Clinton v. Jones*  
*National Endowment for the Arts v. Finley*  
*Hill v. Colorado*  
*FEC v. Colorado Republicans*  
*Whitman v. American Trucking Assoc.*  
*Zelman v. Simmons-Harris*  
*Grutter v. Bollinger*  
*US v. American Library Assoc.*  
*Georgia v. Ashcroft*  
*Kelo v. City of New London*  
*Gonzales v. Raich*

## Chapter 4:

### The Rarely Constrained Court:

#### The Influence of External Constraints on Supreme Court Decisions

The theory presented in chapter two strongly suggests that the Supreme Court should be able to interpret the law with minimal meddling from outside forces. That is, if the Court's power is fundamentally interpretive, as I have argued, then the Court should be mostly free from outside influence in exercising this power. Further, I have argued that most Supreme Court decisions are "vertical" (meaning they can be implemented by lower federal courts), which suggests that the Court need not worry much that unpopular decisions might not be implemented. After all, few political elites are likely to care about the vagaries of constitutional law; members of Congress, for example, care about getting elected, not Commerce clause doctrine (Mayhew 1974; Pickerill 2004; Hall 2011). The majority of judicial decisions are implemented by lower courts, over whom the Supreme Court has substantial hierarchical control, which implies that fear of nonimplementation should not much constrain the Court (cf. Hall 2011; Hall 2014; Hall 2016). Relatedly, sanctions from a coordinate branch are exceedingly rare, rendering that threat fairly impotent (Sala and Spriggs 2004; Segal, Westerland, and Lindquist 2011; Hall 2014).

A major focus of judicial politics research has been the extent to which the Supreme Court is constrained or influenced by external forces such as public opinion or institutional pressure from the coordinate branches of government. This question of external constraint has perennially occupied students of the Court because it has profound implications for the long-standing debates over the Court's role as a policymaker in the American political system (Dahl 1957; Segal 1997; Keck 2007; Clark 2009). The extent of judicial independence, from the people

and from their elected representatives, suggests the extent to which the Court has a free hand to impose its policy preferences on the country. Thus the possibility of constraint also has implications for the “countermajoritarian difficulty,” as a constrained Court is perhaps less “deviant” in a democratic polity than an unconstrained Court (Bickel 1986; Hall 2016). On the other hand, if a key benefit of an independent judiciary is insulation from routine political pressures, then a highly constrained Court may not “act according to the law” but rather attend to “the will of the political branches of government” (Breyer 1995: 989). As such, answering this question has important empirical and normative implications for American politics, broadly considered.

To the extent that political elites do care about Court decisions, they typically do so because of the policy effects those decisions have (or are expected to have) (e.g. Barnes 2004). The “people themselves” have only vague notions of what the Constitution says or means, and these views are generally not typically well thought out; rather, ideas about constitutionalism tend to correlate highly with what one’s preferred political elites think about the constitution. It is of course the case that Congress and the president can influence judicial decisions in some cases: the “political” branches can level unambiguous threats to the Court regarding a pending case (Glick 2009), they can sanction the Court for issuing an unfavorable decision (Engel 2011; Clark 2009; however, as noted above, such sanctions are relatively rare), or they can signal their preferences to the Court while the decisions is still pending (Caldeira and Wright 1988; Salokar 1992; Bailey, Kamoie, and Maltzman 2005).

However, this view—that the Court should be largely unconstrained in its decision-making—stands in contrast to the generally-accepted understanding of the Court in the separation of powers literature. A major focus of judicial politics research has been the extent to

which the Supreme Court is constrained or influenced by external forces such as public opinion or institutional pressure from the coordinate branches of government. This question of external constraint has perennially occupied students of the Court because it has profound implications for the long-standing debates over the Court's role as a policymaker in the American political system (Dahl 1957; Segal 1997; Keck 2007; Clark 2009). The extent of judicial independence, from the people and from their elected representatives, suggests the extent to which the Court has a free hand to impose its policy preferences on the country. Thus the possibility of constraint also has implications for the "countermajoritarian difficulty" as a constrained Court is perhaps less "deviant" in a democratic polity than an unconstrained Court (Bickel 1986; Hall 2016). On the other hand, if a key benefit of an independent judiciary is insulation from routine political pressures, then a highly constrained Court may not "act according to the law" but rather attend to "the will of the political branches of government" (Breyer 1995: 989). As such, answering this question has important empirical and normative implications for American politics, broadly considered.

Most scholarship in this area has found that the Supreme Court is in fact constrained by external forces, at least under some circumstances (Hall 2014; Casillas, Enns, and Wohlfarth 2011; Segal, Westerland, and Lindquist 2011; Clark 2009). As such, recent research has largely shifted focus from the fact of constraint to the conditions under which the Court is more or less constrained, and to the mechanisms by which such constraints might operate (e.g. Peabody 2011). Today, most scholars agree that the Court is constrained by some combination of its desire for institutional maintenance (Friedman 2009; Segal, Westerland, and Lindquist 2011; Hall 2014), and rational anticipation of possible adverse reactions (Harvey and Friedman 2006; Clark 2009; Casillas, Enns, and Wohlfarth 2011).

In many of these accounts, case salience is theorized to play a key role in the operation of external constraint on the Court, as adverse responses to judicial decisions are thought to be much more likely in salient than non-salient cases. This expectation has been supported by members of the Court itself; an anonymous justice stated in an interview that “we read the newspapers and see what is being said—probably more than most people do... We know if there is a lot of public interest; we have to be careful not to reach too far” (Clark 2009: 973). Several leading theories of judicial constraint find empirical support for this observation. In one recent study of constraints on the Court, Hall (2014) finds that the Supreme Court is constrained in salient cases—especially in its decisions that cannot be implemented by lower courts. In another study, Bailey and Maltzman (2011) find that the Court responds to changes in preferences in the elected branches, and that these effects are most pronounced in salient cases.

These findings stand in stark contrast to that of Casillas, Enns, and Wohlfarth (2011), who contend that the Court is constrained in its non-salient cases, as it seeks to avoid activating latent opinion that might erode its institutional legitimacy, but not in its salient cases, in which the policy stakes are high. Similarly, Bartels (2011) finds that justices are significantly more likely to vote ideologically in salient cases, suggesting that the justices are not strongly constrained in such cases. Thus leading accounts of the operation of external constraint on the Supreme Court reach diametrically opposed conclusions. However, in testing these theories scholars have uniformly relied on post-decision measures of case salience—but post-decision salience is clearly endogenous to the decision rendered by the Court. Further, post-decision salience is theoretically distinct from the salience of the case that came before the Court. Reliance on an endogenous measure of a key explanatory variable prevents us from adjudicating between these competing models of constraint. In this paper, I reexamine these competing

theories using two theoretically appropriate and complementary measures of pre-decision case salience. Ultimately, I conclude that the Supreme Court is much less constrained by Congressional and public preferences than we have typically thought.

### **Theories of External Constraint on the Supreme Court**

Scholars have been drawn to questions regarding the separation of powers, including judicial independence and constraint, because of the theoretical and normative importance of their implications for American democracy. Studies in this rich tradition of scholarship have often found that the Supreme Court is constrained, at least to some degree or under some circumstances (Mishler and Sheehan 1993; McGuire and Stimson 2004; Segal and Westerland 2005; Clark 2009; Engel 2011; Segal et al. 2011; Bailey and Maltzman 2011; Casillas, Enns, and Wohlfarth 2011; Enns and Wohlfarth 2013; Marshall, Curry, and Pacelle 2014; Hall 2014; Bryan and Kromphardt 2016), though a few contest this finding (e.g. Segal 1997; Sala and Spriggs 2004; Giles, Blackstone, and Vining 2008; Owens 2010). As a result, many recent works have sought to uncover the mechanisms by which such constraints operate (Clark 2009; Casillas, Enns, and Wohlfarth 2011; Segal, et al. 2011; Hall 2014).

One frequently hypothesized mechanism is rational anticipation by the justices of sanctions from the coordinate branches. Several scholars have highlighted the many tools available to Congress, in particular, to sanction the Court: jurisdiction stripping, impeachment, reducing the Court's budget, court-packing, altering decision rules, refusing to raise judicial salaries, eliminating courts or judges, ignoring decisions, tampering with bench size, etc. (Engel 2011; Clark 2009; Rosenberg 2008). In light of the reality of these formal checks, many scholars working in the separation-of-powers tradition argue that the Court's policy decisions are significantly influenced by the possibility of Congressional override (Ferejohn and Shipan 1990;



Harvey and Friedman 2006). As Epstein, Knight, and Martin put it: “why would justices who are preference maximizers take a position they know Congress would overturn?” (2001: 591).

Indeed, this possibility of override may even influence the Court’s constitutional decisions (Dahl 1957; Meernik and Ignagni 1997). However, the empirical case for the rational anticipation model is thin (Segal and Spaeth 2002; Segal, Westerland, and Lindquist 2011).

Segal, Westerland, and Lindquist (2011) argue that Congressional overrides are not a meaningful threat to the Court, and that their mere possibility is therefore unlikely to exert much influence over judicial behavior (see also Owens 2010; Segal and Westerland 2005). They posit instead that the Court is motivated by a concern for “institutional maintenance”—that is, a collective desire to maintain the institutional power and legitimacy by avoiding decisions that might prompt an attack from Congress (see also Harvey and Friedman 2006; Keck 2007). More important decisions may be more likely to garner Congressional attention—including rebukes, if the Court is not careful (Hall 2014; Lindquist and Solberg 2007). For example, Lindquist and Solberg (2007) argue that the Court is likely more sensitive to the preferences of other actors when it is considering a constitutional challenge to federal statute. Moreover, if the justices are concerned with the possibility of sanctions from Congress they may also be more attentive to public opinion in such cases (Hall 2014; McGuire and Stimson 2004; Mishler and Sheehan 1993).

Some recent works have suggested the Court is directly responsive to changes in public opinion, though again the mechanism through which this potential constraint operates is subject to debate (McGuire and Stimson 2004; Giles, Blackstone, and Vining 2008; Epstein and Martin 2010; Casillas, Enns, and Wohlfarth 2011; Bartels 2011; Enns and Wohlfarth 2013). Giles, Blackstone, and Vining (2008) suggest that justices respond to changes in public opinion through

a slow process of individual attitude change. That is, they contend that Supreme Court justices are subject to the same social forces as is the public at large, and thus their beliefs and attitudes evolve in a similar fashion to those of the general public (see also Mishler and Sheehan 1996). Casillas, Enns, and Wohlfarth (2011) offer a different mechanism: justices' desire to maintain institutional legitimacy leads them to strategically respond to public opinion. They develop an original measure to control for "social change" in an effort to isolate the effects of attitudinal change and external influence from public opinion, and conclude that public opinion constrains judicial decision making in nonsalient cases (Casillas, Enns, and Wohlfarth 2011: 75-78, 84-86). Relatedly, Bartels (2011) argues that because the stakes are highest in salient cases, justices are least constrained by public opinion in those cases.

Hall (2014) offers a very different picture of the operation of external constraints on the Court. He argues that because research suggests that public support for the Court is both high and resistant to change (Gibson, Caldeira, and Spence 2003; Bybee 2010), and because sanctions on the Court are so rare (Segal, Westerland, and Lindquist 2011; Owens 2010; Segal and Westerland 2005), neither of the above mechanisms is likely to significantly constrain the Court. Hall posits instead that the "justices' concern for institutional maintenance may be partially rooted in a fear of nonimplementation" of its decisions (2014: 354; see also Friedman 2009). Recurrent nonimplementation, he argues, might reduce the power and legitimacy of the Court in the long run (see also Cross and Nelson 2001; Owens 2005; Casillas, Enns, and Wohlfarth 2011). Importantly, while it may be quite difficult for Congress or the president to formally sanction the Court (Clark 2009), it is relatively easy for them to ignore its decisions (Engel 2011; Rosenberg 2008).

Hall (2014) draws on a key theoretical distinction, developed in his 2011 book, between “vertical” and “lateral” cases to test this theory. Hall (2011) argues that the Supreme Court has significant power to implement its decisions in “vertical cases” (those concerning criminal or civil liability) because lower courts, over which the Court has significant hierarchical control, directly implement such rulings. Lateral cases, on the other hand, must be implemented by other (i.e. non-court) actors, over whom the Court has little power. As such, he reasons that the Court will be constrained by popular preferences and by Congress in its lateral decisions, precisely because implementation of those decisions relies on nonjudicial actors. Ultimately, Hall concludes that fear of nonimplementation is indeed a crucial factor motivating Supreme Court responses to external pressures: “When deciding important lateral cases, the Court is highly constrained by external forces because it lacks the necessary implementation powers to give efficacy to its rulings in the absence of popular and/or elite support” (2014: 364). Bailey and Maltzman reach a similar conclusion, arguing that “separation of powers constraints are more binding on politically salient issues” (2011: 117).

In short, these leading theories of external constraint on the Court hold that case salience is a key factor in the operation of constraint from both mass and elite sources (Hall 2014; Casillas, Enns, and Wohlfarth 2011; Bryan and Kromphardt 2016; Bailey and Maltzman 2011; Bartels 2011). In these accounts, justices’ desire to maintain their reserve of diffuse institutional support, and their fear of nonimplementation of their decisions, cause them to alter their behavior (decisions) under some conditions. In particular, Casillas et al. (2011) argue that this constraint operates in nonsalient cases; Hall (2014) argues it operates primarily in salient cases—especially salient “lateral” cases.

## **The Importance of Case Salience**

It has been frequently noted that the salience of a given case may influence justices' thinking and behavior with respect to that case (Bartels 2011; Bailey and Maltzman 2011; Collins and Cooper 2012; Black, Sorenson, and Johnson 2013; Clark, Lax, and Rice 2015). This observation is an important part of the basis for the competing theories of the operation of external constraints on the Court discussed above. Some, such as Casillas, Enns, and Wohlfarth (2011) and Bartels (2011) argue that the Court should be most attentive to public opinion in nonsalient cases because the Court must maintain its reservoir of "diffuse support" by saving "countermajoritarian" decisions for a select few cases that are particularly important or influential. Scholars including Hall (2014) and Bailey and Maltzman (2011), on the other hand, suggest that constraint from both public opinion and Congress should operate most significantly on the Court in the context of salient cases, perhaps because its unpopular, salient decisions might not be implemented by non-court actors.

These studies, however, may not have adequately accounted for the influence of case salience on Court action in their models. Salience is a latent quality that some cases possess—or perhaps that all cases possess in different measure. In general, this latent quality speaks to the contemporaneous importance of a given case. This importance may be due to legal or political significance, controversialness, expected impact, or other factors (Clark et al. 2015; Black, Sorenson, and Johnson 2013; Collins and Cooper 2012; Epstein and Segal 2000). Scholars have adopted a number of strategies to try to proxy this latent quality of interest, including media coverage (e.g. Clark et al. 2015; Collins and Cooper 2012; Epstein and Segal 2000), interest group participation as *amicus curiae* (e.g. Maltzman, Spriggs, and Wahlbeck 2000; Collins

2011), and the level of engagement individual justices display in cases (Black, Sorenson, and Johnson 2013).

Because salience is a key factor theorized to influence the operation of external constraint on the Court, specification and measurement of salience are critical. Virtually all research in this literature relies on Epstein and Segal's (2000) case salience measure. Epstein and Segal's (2000) measure is media based: cases are coded as salient if they appeared on the front page of the *New York Times* the day after the decision is announced, and as non-salient otherwise. Numerous scholars have pointed out that this measure, though widely used, has significant shortcomings (Clark, Lax, and Rice 2015; Black, Sorenson, and Johnson 2013; Collins and Cooper 2012). For example, the Epstein-Segal measure is overly-conservative and yields too many false negatives (Clark, Lax, and Rice 2015). This is the case in part because space on the front page of the *New York Times* is both scarce and in high demand, and thus a multitude of considerations likely influence the substance of the front page (Collins and Cooper 2012). This data draws on only one news source, and thus may be systematically influenced by internal idiosyncrasies (Collins and Cooper 2012; Clark, Lax, and Rice 2015), and may magnify natural fluctuations in the news cycle (Boydston 2008). Relatedly, the Epstein and Segal measure is dichotomous—cases are either salient or nonsalient—which masks the wide variability in salience actually observed in cases (Clark, Lax, and Rice 2015; Black, Sorenson, and Johnson 2013; Collins and Cooper 2012).

Most crucially, though, its use is problematic in application to judicial decision making research because salience is measured after the case is decided, and thus the salience captured by this measure could not have caused or influenced the decision. As Clark and colleagues put it, “While claims of causation are always suspect in observational research, measuring a treatment

by proxy after the observed outcome is a particularly troublesome form of posttreatment bias. If decisions and related choices affect the salience measure (coverage of the decisions themselves), then even if salience itself affects decisions or choices, our estimate of that effect can be biased in an unknown direction” (2015: 42). Epstein and Segal’s measure, if it is to be validly used as a measure of salience that might influence judicial decision making, relies on the assumption that salience before a decision correlates highly with post-decision salience. Put differently, the Epstein-Segal measure and other measures of post-decision media coverage or importance capture the salience of the Court’s decision; measures of pre-decision media coverage or importance, on the other hand, capture the salience of the case when it came before the Court. This distinction is crucial because the salience of any given Court decision is clearly endogenous to the decision rendered by the Court. Put differently, in deciding a given case the Court itself may make that case much more (or less) salient than it was before having been decided.

This theoretical distinction points to the importance of the strategy employed to proxy salience. Epstein and Segal’s (2000) salience measure is a dummy variable that takes on a “1” value if the case appeared on the front page of the *New York Times* the day after it was decided, and a “0” otherwise. That is, this measure clearly captures the salience of Supreme Court decisions, but it is less clear that it captures the salience of the case that comes before the Court.

Scholars have sought to address this issue by developing measures of salience of cases as they come to the Court. Clark, Lax, and Rice (2015), for example, also rely on media coverage, though their data includes all media mentions of Court cases in the first section of the *New York Times*, the *Washington Post*, and the *Los Angeles Times*. In addition to drawing from a wider range of media sources, their data also comes from a much wider timespan: they collect data on cases from one year before the case is decided, to one year after, and most importantly, they

differentiate between coverage at different stages of a case's life, including between pre- and post-decision coverage. These data offer a significant improvement over the Epstein-Segal measure for studies of judicial decision making because they allow the researcher to restrict the measure of salience to pre-decision salience and thus to test the effect of the salience of the case as it came before the Court. In other words, this measure avoids the endogeneity problem of post-decision measures in that it only captures case salience before a given decision is handed down by the Court.

As noted above, measures of post-decision salience, such as the Epstein-Segal measure, if they are to validly used to proxy the salience that might influence judicial decision making, rely on the assumption that post-decision and pre-decision salience correlate at a high level. Pre- and post-decision salience do not correlate highly, however. When pre-decision coverage and post-decision salience are both specified using media measures they only correlate at 0.23 (Clark et al. 2015 and Epstein-Segal 2000, respectively, specifying both as dummy variables).<sup>36</sup>

This low level of correlation is likely due both to the overly-conservative nature of the Epstein-Segal measure, and to the fact that pre- and post-decision salience of cases differ in important ways. Substantively, the theoretical distinction between the latent concepts captured by these measures, and the extremely low level of correlation between those measures, casts doubt on findings in which salience was argued to significantly influence behavior at the Supreme Court, but which relied on an ex post measure of salience. As such, theories of external constraint on the Court must be tested utilizing chronologically appropriate measures of salience.

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<sup>36</sup> For these correlations, all variables are specified as dummy variables, taking on a "1" value on cases that received any *pre-* or *post-* decision coverage (respectively). Pre-decision salience is coded so that roughly the same proportion of cases are coded as salient as in the Epstein and Segal measure, approximately 15% of cases. This is accomplished by restricting cases coded as "salient" pre-decision to those covered in 3 or more pre-decision news stories for the media measure, and as the 15% of cases in which the justices exhibited the highest levels of engagement.

To this point I have argued that because salience is a key factor theorized to condition the operation of external constraint on the Court, specification and measurement of salience are critical. The specification relied on in many important studies in the Law and Courts literature is inappropriate for studies of judicial decision making, in that some phenomenon  $X$  at time  $t$  clearly cannot have caused or influenced  $Y$  at time  $t-1$ . In the following section, I empirically reexamine leading theories of external constraint on the Court, which reached opposite conclusions regarding the role of case salience in the operation of constraints on judicial action, using chronologically appropriate measures of case salience.

### **Empirical Assessment of Constraints on the Supreme Court**

In this section I empirically reassess two competing theories of external constraint on the Supreme Court—those of Casillas, Enns, and Wohlfarth (2011) and Hall (2014)—utilizing theoretically and chronologically appropriate measures of case salience. With the exception of the salience measures, all data were obtained from the original authors' replication files. These data allow me to test the theories against cases decided from 1956 to 2000 in the time series analysis, and from 1956 to 2007 in cross-sectional analyses. To reiterate, because pre- and post-decision salience differ significantly, and because accurately distinguishing between salient and nonsalient cases is crucial to these theories of external constraint on the Court, I utilize Clark, Lax, and Rice's (2015)<sup>37</sup> measure of pre-decision salience.<sup>38</sup>

In their analyses, Casillas and colleagues (2011) operationalize Court output in the aggregate, as the percentage of liberal decisions each term among all cases that reverse the lower court's ruling, in salient and nonsalient cases respectively (see also McGuire and Stimson 2004).

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<sup>37</sup> Harvard Dataverse, V1: <http://dx.doi.org/10.7910/DVN/29637>

<sup>38</sup> As a robustness check, I also dichotomize the salience measures, and reestimate the models using these dummy variables, and at different levels of salience. The core findings are robust to these alternative specifications—see the supplementary materials for full presentation of these models.



As such, in their analyses the dependent variables are the percentages of reversals of lower court decisions decided in the liberal direction among cases that appeared on the front page of the *New York Times* the day after they were decided (DV1), and among those that did not appear on the front page of the *New York Times* the day after they were decided (DV2). As argued above, post-decision salience clearly could not cause or influence judicial behavior in the decision-making process. Thus in order to retest their theory, I first constructed a new dependent variable series in which I differentiate between cases that were salient before they were decided on the one hand, and cases that were not salient before they were decided on the other. This approach required dichotomizing the salience measure, in that it required the creation of two discrete series delineated by their “salience.” For this purpose, I coded the most salient 15% of cases in Clark, Lax, and Rice’s (2015) dataset as “salient” and all others as “nonsalient.” This proportion matches the proportion of cases coded as salient in the Epstein and Segal data.<sup>39</sup>

After creating the new dependent variables, I retest Casillas, Enns, and Wohlfarth’s (2011) theory. The measure of public opinion is Stimson’s *Policy Mood* (Stimson 1999), which incorporates data on public opinion from hundreds of survey questions to capture the public’s changing preferences on a single liberal-conservative dimension. Virtually all studies of the influence of public opinion on the Court rely on this measure (Hall 2014; Casillas, Enns, and Wohlfarth 2011; Giles, Blackstone, and Vining 2008; McGuire and Stimson 2004). Segal-Cover median scores are used to control for the justices’ ideology (Segal and Cover 1989). A major contribution of Casillas, Enns, and Wohlfarth’s article was their novel approach to control for “social forces,” which have long been theorized to influence both justices and the public at large:

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<sup>39</sup> As a robustness test, I relaxed the threshold for qualification as “salient,” and coded all cases receiving *any* pre-decision news coverage as “salient,” and only coded cases as “nonsalient” if they received *no* pre-decision news coverage: the findings are robust to this alternative coding. See Table A1 in the appendix for the full models.

they utilize Martin-Quinn (2002) scores, which provide a dynamic measure of justice’s revealed preferences, and rely on the two-stage least-squares (TSLS) estimation to get around the potential problem of circularity introduced by use of the Martin-Quinn scores (see generally Enns et al. 2016). In brief, TSLS generates predicted values of the Martin-Quinn score by regressing these scores on a series of exogenous instruments—in this case, the social forces theorized to simultaneously influence the justices and the public: the overall liberalness of national policy, changes in the economy, unemployment, inflation, income inequality, and crime rate (for an extended discussion see Casillas, Enns, and Wohlfarth 2011: 78). Thus the first stage of the model isolates changes in the ideology measure from changes in the measure of public mood; the second stage uses the predicted values of judicial preferences to assess the influence of the independent variables on changes in observed ideological outcomes of judicial decisions. All variables are coded such that higher values correspond to liberal preferences and outcomes, and lower values correspond to conservative outcomes.<sup>40</sup> Analyses include all formally decided cases reversing lower court decisions from the 1956 through 2000 Supreme Court terms. Table 1 reports the results of the second stage of this TSLS analysis.

The analyses presented in Table 4.1 are decidedly mixed with respect to the theories being tested. The models suggest that the Court is somewhat constrained in its salient decisions but not in its nonsalient decisions. In salient cases, the influence of *Public Mood* is relatively small and only marginally significant ( $p=0.097$ ). Notably, this influence of public mood on Court outputs is more immediate than has been previously thought (Casillas et al. 2011; Giles et al. 2008). Substantively, the model indicates that as public mood becomes more liberal, the proportion of liberal Court decisions in salient cases increases, net of controls: a one-unit (that is,

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<sup>40</sup> I obtained these measures from the replication data of Casillas, Enns, and Wohlfarth (2011), available at: Harvard Dataverse, V2: hdl:1902.1/14568. Detailed discussion of these measures can be found in the original article.

a one percentage-point) increase in public liberalness results in a 3.8% increase in liberal behavior in its salient cases.

**Table 4.1. The Influence of Public Opinion on Salient and Nonsalient Supreme Court Decisions While Controlling for Attitudinal Change, 1956-2000**

	Nonsalient	Salient
<i>Short-Term (Immediate) Effects</i>		
$\Delta$ Public Mood	1.34 (0.88)	3.80 <sup>+</sup> (2.29)
$\Delta$ Court Ideology	11.06* (4.83)	-26.53* (13.44)
$\Delta$ Social Forces (IV)	4.29 (3.42)	9.03 (7.16)
<i>Long-Term Effects</i>		
Public Mood $_{t-1}$	0.80 <sup>+</sup> (0.47)	1.37 (1.11)
Court Ideology $_{t-1}$	9.59** (3.40)	17.43* (8.79)
Social Forces (IV) $_{t-1}$	0.53 (2.41)	0.87 (5.97)
<i>Error Correction Rate</i>		
Percent Liberal $_{t-1}$	-0.75*** (0.15)	-0.92*** (0.17)
Constant	-6.09 (28.23)	-30.97 (67.73)
Observations	45	38
R-squared	0.43	0.54

Note: Table reports results from TSLS regression models of decision making by the U.S. Supreme Court: the dependent variable represents the change in the percentage of liberal decisions issued by the Supreme Court each term (among reversals only) in nonsalient and salient cases, respectively. Standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed test).

In short, these analyses do not strongly support the contention that the Court is constrained in either its salient or its nonsalient decisions; indeed, we cannot conclude definitively that salient and nonsalient cases are statistically distinct. In summary, when the models are specified with chronologically appropriate measures of case salience, Casillas, Enns, and Wohlfarth's (2011) theory of constraint in nonsalient cases receives limited empirical support.

With these findings in mind, I now turn to a case-level analysis in order to more closely parse the effects of case salience on the operation of external constraints on the Court. As

discussed above, numerous accounts suggest that the Court should be more constrained in its salient decisions than in its nonsalient decisions (e.g. Bailey and Maltzman 2011; Bryan and Kromphardt 2016). Hall (2014) goes further, theorizing that the Court is constrained by its fear of nonimplementation of its decisions, and that this concern turns on case salience. He draws on a key theoretical distinction, developed in his 2011 book, between “vertical” and “lateral” cases to test this theory. Hall (2011) argues that the Supreme Court has significantly greater implementation power in “vertical cases” (those concerning criminal or civil liability) because lower courts directly implement such rulings. Lateral cases, on the other hand, must be implemented by other (i.e. non-court) actors. From this he reasons that the Court will be constrained by popular preferences and by Congress in its lateral decisions, precisely because implementation of those decisions relies on nonjudicial actors. Case salience is crucial to his analysis because, in his words: “First, my findings may be biased if lateral cases are more likely to be salient to the public and, therefore, attract public criticism. That is, the justices may fear public criticism rather than nonimplementation. Therefore, it is important to control for Salience. Second, my theory suggests that the justices primarily fear nonimplementation in important cases. Therefore, I expect constraint to be strongest in salient lateral cases” (2014: 357).

Like Casillas, Enns, and Wohlfarth, though, Hall (2014) uses Epstein and Segal’s (2000) measure to capture salience, raising the problems of causality and chronology discussed above. I retest Hall’s theory to see if it holds when using chronologically appropriate measures of salience. As above, all other data and code are obtained from Hall’s replication files.<sup>41</sup> Most of the variables are identical to those discussed in the previous section. *Congressional Ideology* is measured using Poole and Rosenthal’s (1997) Common Space score for the median House and

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<sup>41</sup> Harvard Dataverse, V2: hdl:1902.1/22018.

Senate members each year, which are then averaged (Hall 2014). The *Lateral* variable is a dichotomous indicator coded as “zero” (i.e. “vertical”) if the case involves potential criminal penalties, potential monetary damages, or internal administration of lower courts, and coded as “one” otherwise (Hall 2014: 356). The dependent variable in this part of the study is the ideological direction of each Supreme Court decision (liberal decisions are coded as “1”, conservative decisions as “0”; decisions where ideological direction could not be determined were dropped). The sample includes 6,035 merits decisions issued by the Court between 1956 and 2007. These models include natural Court fixed effects to control for the influence of changes in the Court’s composition.

The results of these logit analyses are presented in Table 4.2. The column at left utilizes the continuous specification of the salience variable; the column at right utilizes a dichotomized version of the continuous variable which codes the top 15% of salient cases as “salient” and the rest as “nonsalient” so that the proportion of cases coded as salient mirrors the Epstein and Segal measure. The analyses presented here provide little support for the propositions that the Court is constrained by either Congress or the mass public, or that constraint is conditioned by salience. Note that the main effects of *Congressional Ideology* and *Public Mood* are insignificant in all models. Further, it is also notable that the interaction variables between *Salience* and ideology and mood are also insignificant. In all four cases, we cannot reject the null that there is no relationship between the variable of interest and the Court’s output. This suggests that, contra much work in this vein, the Court is not often constrained by external forces.

**Table 4.2. The Impact of External Constraint on Supreme Court Decision Making**

	Continuous Pre-Decision Salience Measure	Dichotomous Pre-Decision Salience Measure
<i>Main Effects</i>		
Court Ideology	0.29*** (0.08)	0.27** (0.08)
Public Mood	-0.08 (0.08)	-0.10 (0.08)
Congressional Ideology	0.07 (0.07)	0.09 (0.07)
Lateral	0.13+ (0.07)	0.17* (0.08)
Pre-Decision Salience	0.02 (0.05)	0.10 (0.09)
<i>Interaction Effects</i>		
Public Mood x Lateral	0.03 (0.07)	-0.02 (0.07)
Congressional Ideology x Lateral	0.01 (0.07)	-0.06 (0.08)
Public Mood x Salience	-0.00 (0.06)	0.05 (0.12)
Congressional Ideology x Salient	-0.08+ (0.05)	-0.10 (0.08)
Lateral x Salience	0.09 (0.10)	0.12 (0.18)
Public Mood x Lateral x Salience	0.21* (0.10)	0.51* (0.21)
Congressional Ideology x Lateral x Salience	0.14 (0.09)	0.28+ (0.16)
Constant	1.13*** (0.24)	1.12*** (0.24)
Observations	6,035	6,035
Prob > $\chi^2$	0.0000	0.0000
Pseudo R-squared	0.034	0.035

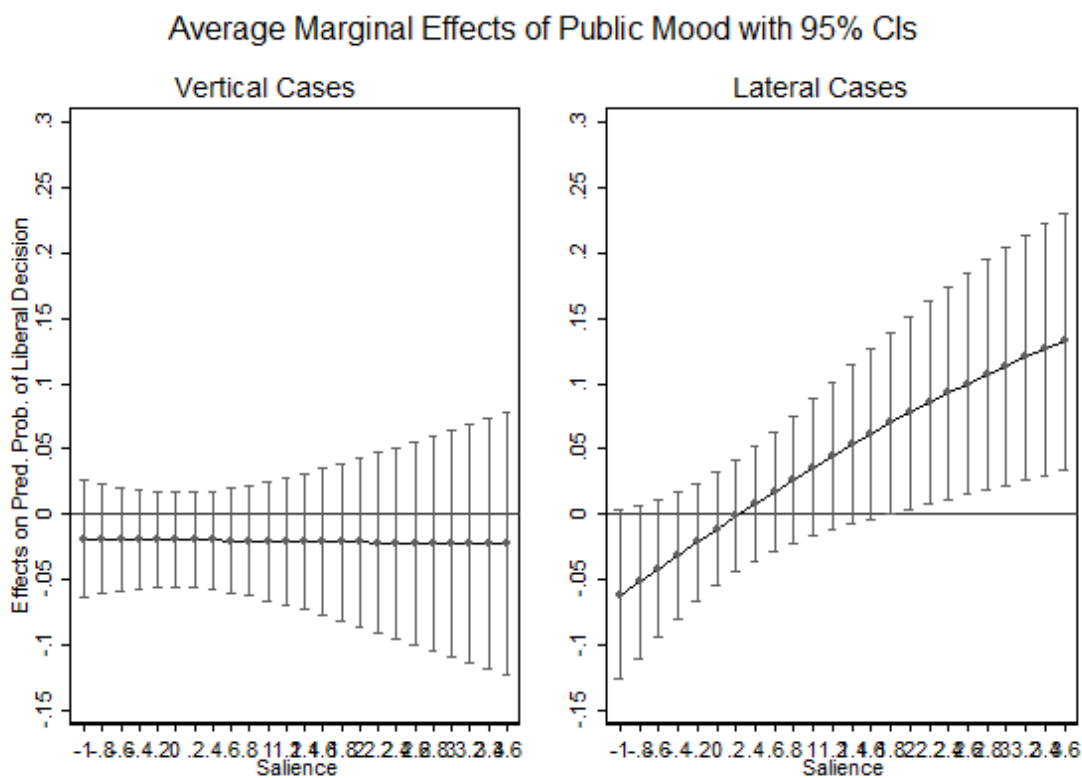
Note: Table reports results from logistic regression models of decision making by the U.S. Supreme Court: the dependent variable takes on a value of 1 if the ideological direction of the decision is liberal. Natural Court fixed effects are omitted for presentation. Robust standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed tests).

With that said, Table 4.2 does provide support for Hall's theory regarding the importance of implementation. The crucial variables testing Hall's theory are the three-way interactions between *Lateral*, *Salience*, and *Public Mood* or *Congressional Ideology*.<sup>42</sup> Note first that the

<sup>42</sup> Note that *Lateral* exerts influence on Court decision making in the main effects portion of the analysis. Recall, however, that *Lateral* is an indicator that non-court actors will be tasked with implementation, and not a measure of

three-way interaction including *Congressional Ideology* does not rise to accepted levels of significance in any model specification, though it does approach significance in model using the dichotomized media measure of salience ( $p=0.076$ ). The three-way interaction including *Public Mood* indicates that the Court is significantly constrained by the public in its lateral decisions that are salient in the media. This pattern of findings partially supports Hall, insofar as it suggests that the Court does indeed respond to the public, as he theorized; however the story regarding Congress is less clear. Figure 4.1 depicts the relationship graphically.

**Figure 4.1. Average Marginal Effects of Public Mood on Supreme Court Decisions**



any source of constraint in itself. Put differently, there is no obvious reason to expect that the Court should be more liberal (the outcome variable) with respect to its lateral decisions than it is in its vertical decisions *independent of influence from the public or Congress*, yet that is precisely what the models indicate. Because most vertical cases concern criminal procedure, it is likely that this variable is actually just picking up the fact that the Court is, on average, more conservative in its criminal procedure decisions than it is in most other issue areas.

The graphs depict the marginal effect of *Public Mood* on the probability of a liberal decision being rendered in a given case at various levels of case salience in vertical and lateral cases, respectively. The graph at left indicates that in vertical cases, which are implemented by lower courts, mood has no discernible effect on Court outputs at any level of salience. The graph at right, however, shows that when decisions must be implemented by non-court actors (i.e. are lateral), mood significantly influences outputs—and the size of this effect grows as salience increases.

Moreover, we have no strong evidence that salience influences or conditions the effect of constraints *except* in the narrow context of salient-lateral cases identified by Hall (2014). Put differently, these analyses suggest that external constraints only significantly influence the Supreme Court’s merits decisions in cases which are of high salience *and* which must be implemented by non-court actors. Importantly, such cases are quite rare, accounting for only about 2% of all decisions in the sample: 123 cases out of 6,035 are coded as both lateral and salient enough for *Public Mood* to influence the Court (from model at left in Table 2). These cases are undoubtedly important (the high level of salience suggests as much), but the fact of their relatively rarity has important normative implications for our understanding of the Court’s role in American politics.

Finally, I turn attention to cases involving constitutional review of federal statutes in particular. A number of scholars working in this area have suggested that the Supreme Court may be most responsive to external constraints—perhaps especially to Congress—when it is exercising its constitutional review power (e.g. Meernik and Ignagni 1997; Segal et al. 2011; Hall 2014). These cases merit special attention here for two reasons. First, these cases receive extensive attention from students of law and courts because they most directly implicate the



countermajoritarian difficulty; that is, because the possibility of invalidation of a policy passed by a representative body is a poignant manifestation of the Court's counter-democratic power. Second, while many scholars have studied the influence of external constraints on Court decision-making in the context of judicial review, none have examined the influence of case salience on the operation of those constraints in the particular context of judicial review. This is an important question, however: if justices fear nonimplementation of their decisions (Hall 2014), criticism from other political elites (Baum and Devins 2009), and reprisals from the coordinate branches (Clark 2009; Engel 2011), then they should be especially wary of bucking the preferences of elites in this context. In order to probe this question, I estimate the influence of external constraints on the Court's decisions in cases in which the Court is reviewing a federal statute and cases in which it is not separately.

As above, I present the models using both the continuous (column at left) and dichotomous (column at right) specifications of the pre-decision salience variable. The findings presented in Table 4.3 indicate that the Court responds very differently to external forces in its judicial review and non-judicial review cases. With respect to the cases involving judicial review of federal statutes, we see that the Court is significantly influenced by Congress, but no such evidence of influence from the mass public is present. In particular, in these cases, *Congressional Ideology* exerts a direct and statistically significant effect on the Court's decisions: a one standard deviation increase in Congressional liberalness corresponds to roughly a nine percentage point increase in the probability of a liberal decision. Additionally, the models indicate that the Court is further influenced by Congress in its judicial review cases that are both salient and which must be implemented by non-Court actors (i.e. lateral cases), net of controls.

Figure 4.2 depicts the effects of Congress on Court decision-making in federal judicial review cases graphically.

**Table 4.3. The Differential Impact of External Constraint on SCOTUS Decision Making**

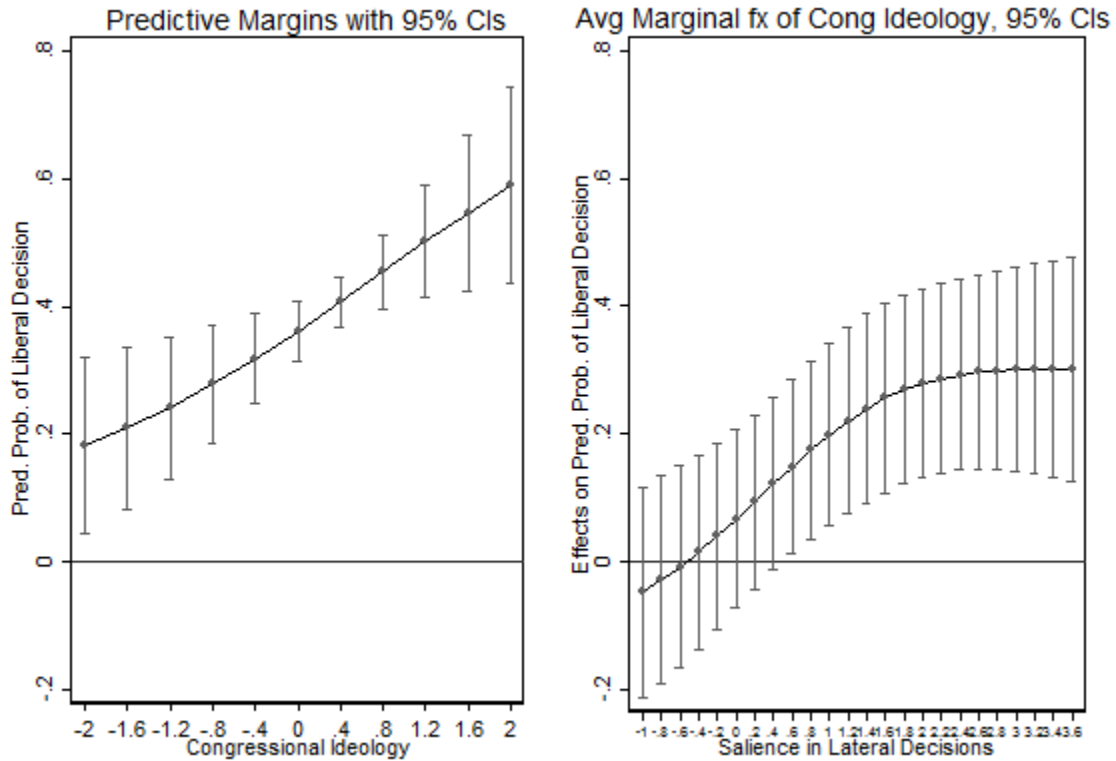
	Judicial Review of Fed. Statutes		All Other Cases	
<i>Main Effects</i>				
Court Ideology	0.56*	0.47 <sup>+</sup>	0.24**	0.23**
	(0.27)	(0.28)	(0.09)	(0.09)
Public Mood	-0.10	-0.28	-0.08	-0.10
	(0.26)	(0.29)	(0.08)	(0.08)
Congressional Ideology	0.49 <sup>+</sup>	0.59*	0.03	0.06
	(0.28)	(0.28)	(0.07)	(0.08)
Lateral	0.42	0.68*	0.11	0.13
	(0.26)	(0.32)	(0.07)	(0.08)
Salience (continuous)	0.20		0.01	
	(0.20)		(0.05)	
Salient (dichotomous)		0.67 <sup>+</sup>		0.06
		(0.37)		(0.10)
<i>Interaction Effects</i>				
Public Mood x Lateral	0.30	0.26	0.01	-0.05
	(0.24)	(0.25)	(0.07)	(0.07)
Congressional Ideology x Lateral	-0.18	-0.40	0.02	-0.02
	(0.25)	(0.30)	(0.07)	(0.09)
Public Mood x Salience	0.42	0.87	-0.04	0.00
	(0.27)	(0.52)	(0.06)	(0.12)
Congressional Ideology x Salient	-0.19	-0.00	-0.09 <sup>+</sup>	-0.12
	(0.18)	(0.31)	(0.05)	(0.09)
Lateral x Salience	0.02	-0.61	0.09	0.16
	(0.34)	(0.56)	(0.10)	(0.19)
Public Mood x Lateral x Salience	-0.55	-0.78	0.30**	0.62**
	(0.35)	(0.69)	(0.11)	(0.23)
Congressional Ideology x Lateral x Salience	0.76*	1.05*	0.08	0.19
	(0.31)	(0.51)	(0.10)	(0.17)
Constant	0.08	-0.02	1.23***	1.22***
	(0.87)	(0.90)	(0.26)	(0.26)
Observations	591	591	5,435	5,435
Prob > $\chi^2$	0.002	0.002	0.0000	0.0000
Pseudo R-squared	0.076	0.075	0.034	0.034

Note: Table reports results from logistic regression models of decision making by the U.S. Supreme Court: the dependent variable takes on a value of 1 if the ideological direction of the decision is liberal. Natural Court fixed effects are omitted for presentation. Robust standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed tests).

The graph at left in figure 4.2 depicts the direct effect that *Congressional Ideology* has on the probability of a liberal Supreme Court decision in judicial review cases. The graph at right

depicts the average marginal effect of *Congressional Ideology* on the Court in its salient-lateral decisions. This graph indicates that when decisions must be implemented by non-court actors (i.e. are lateral), Congress significantly influences the Court’s decision in judicial review cases, net of the direct effect depicted in the graph at left.

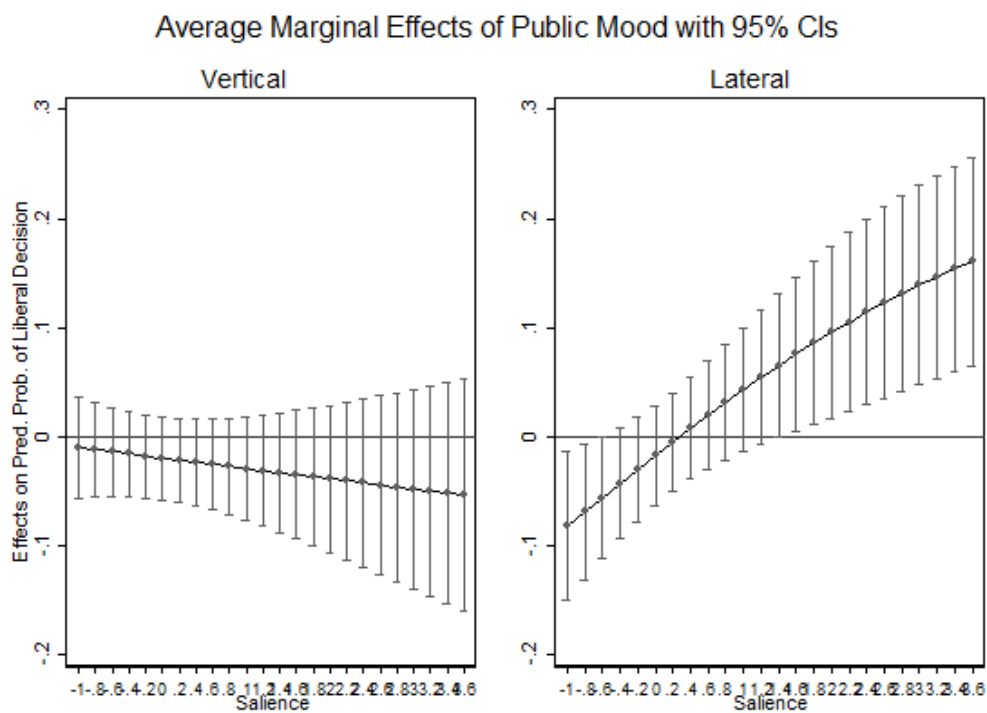
**Figure 4.2. Congressional Influence on Judicial Review Decisions**



The effects of external constraints in the rest of the Court’s work are much different. In the models concerning all cases except those involving constitutional review of federal statutes (the two models at right), we find no evidence of Congressional influence. However, both models reveal significant influence from the mass public. Again consistent with Hall’s perspective, this influence is limited to salient cases that rely on lateral actors for implementation. This effect is presented graphically in Figure 4.3.

The findings presented in Table 4.3 indicate that the Court appears to be responsive to both public opinion and Congressional preferences in cases in which it is reviewing federal statutes, but supplementary analyses reveal that these effects are less clear in cases in which it is reviewing the constitutionality of state or local statutes. This finding is consistent with some previous work, but is somewhat puzzling, just the same: Congress clearly has no power over the Court’s constitutional interpretation, but can easily override its statutory decisions, so why does the Court respond to Congressional preferences in cases over which Congress has little to no institutional power? And why does it appear to ignore Congressional preferences in the context of the most significant Congressional power? One answer may be something like “duty” (Keck 2007); that is, the Court may be intentionally incorporating Congressional preferences out of a sense of institutional duty in precisely those cases over which Congress has no other recourse.

**Figure 4.3. Mass Public Influence on Decisions Except Federal Judicial Review**



The key takeaway from this portion of the analysis is that the Supreme Court responds very differently to external constraints in different institutional contexts. Congressional

preferences strongly and directly influence the Supreme Court's decision-making in cases concerning constitutional review of federal statutes. However, these analyses also indicate that the Court is especially responsive to Congress in that subset of its judicial review decisions which are both salient and which must be implemented by non-court actors. Put differently, the Court regularly attends to Congress when considering invalidating a federal statute, but it is particularly attentive when that case must be implemented by outside actors and which has received significant media attention. In cases not concerning judicial review of federal statutes, however, I find no evidence that the Court responds to Congressional preferences. Indeed, in these cases the Court is largely unconstrained by external forces. However, consistent with Hall's implementer dependence theory, I find that the Court is influenced by public opinion in these cases when the case is highly salient and must be implemented by non-court actors. In summary, I find that the Court is only significantly constrained by Congress when it is considering invalidating a federal statute, and by the public only when it is deciding highly salient cases which cannot be implemented by lower courts. It is important to keep in mind that while both of these institutional contexts in which constraints operate are substantively quite important, they are also relatively uncommon. In a large majority of the Court's merits cases, I find no evidence that it is constrained by external forces.

## **Discussion**

I have argued that most leading accounts of the operation of external constraints on the Supreme Court have been empirically tested using an endogenous measure of a key variable. I reexamined this important question utilizing a chronologically appropriate measure of salience in order to shed new light on the nature of external influences on the Court's decision making. I find that case salience itself does not much influence the operation of external constraints on the

Court's work. The time-series analyses presented in Table 1 provide some weak support for the proposition that the Court is constrained in its salient cases. Closer analysis indicates, however, that any effect of case salience is concentrated in those decisions that must be implemented by non-court actors, as theorized by Hall (2014). However, I modify Hall's argument by showing that the Court's fear of nonimplementation is not uniform across institutional contexts: the Court responds to Congress only when it is considering constitutional challenges to federal statutes.

The analyses presented above have two major implications for the study of the Supreme Court in American politics. First, I have argued that the Supreme Court is rarely constrained by external forces. It is significantly constrained by public opinion only when it is considering cases which are highly salient and must be implemented by non-court actors. It is significantly constrained in its merits decisions by Congress only when it is considering constitutional challenges to federal statutes. Together, these two institutional contexts account for less than fifteen percent of the cases in the sample. To be clear, these are substantively important sets of cases, but the fact that no influence of external constraints is observed in a large majority of the Court's decisions is notable. This finding has important implications for ongoing empirical and normative debates regarding the relative importance of judicial independence vis-à-vis democracy in practice in the United States. It suggests that the Court is rather more independent in its decision-making than prior works have often suggested. And while this may be heartening to those concerned about the potential for undue partisan influence over matters of law, it also suggests that the "countermajoritarian difficulty" may be alive and well (cf. Hall 2016). The Court may be less constrained than we have thought, but this not to say that the Court is the unconstrained super legislature that Brutus feared (Brutus XV 1788).

The second key contribution is methodological: numerous scholars have pointed out the significant inferential problems created by utilizing an ex post measure of case salience as an explanatory variable for judicial decision making. The analyses presented here lend credence to that concern, as leading theories of the operation of judicial constraint received limited empirical support when tested using chronologically appropriate measures of case salience. More broadly, the findings here should motivate scholars to reexamine other theories in the field which rely on case salience. Indeed, any study relying on salience to explain judicial behavior should be replicated and validated using chronologically appropriate measures. Of course, measures of post-decision salience are important and appropriate for a wide range of studies—the claim here is simply that they are suspect in their application to studies of judicial decision making.

## Supplementary Materials for Chapter 4

### Robustness Checks:

**Table S4.1. The Influence of Public Opinion on Salient and Nonsalient Supreme Court Decisions While Controlling for Attitudinal Change, 1956-2000**

	Nonsalient (Any)	Salient (Any)	Nonsalient (Top 15%)	Salient (Top 15%)
<i>Short-Term (Immediate) Effects</i>				
$\Delta$ Public Mood	1.05 (1.58)	1.81 <sup>+</sup> (0.98)	1.34 (0.88)	3.80 <sup>+</sup> (2.29)
$\Delta$ Court Ideology	11.36 (8.65)	-1.02 (5.67)	11.06* (4.83)	-26.53* (13.44)
$\Delta$ Social Forces (IV)	2.21 (6.67)	5.92 (4.36)	4.29 (3.42)	9.03 (7.16)
<i>Long-Term Effects</i>				
Public Mood $t-1$	0.24 (0.85)	0.68 (0.52)	0.80 <sup>+</sup> (0.47)	1.37 (1.11)
Court Ideology $t-1$	2.85 (4.69)	11.17** (3.73)	9.59** (3.40)	17.43* (8.79)
Social Forces (IV) $t-1$	-3.04 (4.23)	3.36 (2.61)	0.53 (2.41)	0.87 (5.97)
<i>Error Correction Rate</i>				
Percent Liberal $t-1$	-0.42** (0.14)	-0.78*** (0.13)	-0.75*** (0.15)	-0.92*** (0.17)
Constant	15.20 (51.01)	3.02 (31.33)	-6.09 (28.23)	-30.97 (67.73)
Observations	43	45	45	38
R-squared	0.17	0.56	0.43	0.54

Note: Table reports results from TSLS regression models of decision making by the U.S. Supreme Court: the dependent variable represents the change in the percentage of liberal decisions issued by the Supreme Court each term (among reversals only) in nonsalient and salient cases, respectively. Standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed test).



**Table S4.2. The Impact of External Constraint on Supreme Court Decision Making [Utilizing Dichotomized Specifications of the Salience Variables, Media and Justice-Centered at higher threshold, and using Amicus participation as an alternative salience measure (amici data from Collins 2008)]**

	Media (top 5%)	Justice (top 5%)	Amici (top 15%)	Amici (top 5%)
<i>Main Effects</i>				
Court Ideology	0.27*** (0.08)	0.27** (0.10)	0.25* (0.10)	0.25* (0.10)
Public Mood	-0.09 (0.08)	-0.09 (0.12)	-0.04 (0.09)	-0.05 (0.10)
Congressional Ideology	0.09 (0.07)	0.10 (0.10)	0.04 (0.09)	0.04 (0.09)
Lateral	0.16* (0.07)	0.26* (0.11)	0.10 (0.08)	0.12+ (0.07)
Pre-Decision Salience	-0.23 (0.19)	-0.08 (0.23)	-0.15 (0.12)	-0.01 (0.25)
<i>Interaction Effects</i>				
Public Mood x Lateral	0.04 (0.07)	0.21 (0.14)	0.05 (0.07)	0.04 (0.06)
Congressional Ideology x Lateral	-0.02 (0.07)	0.03 (0.09)	-0.01 (0.08)	0.03 (0.07)
Public Mood x Salience	0.11 (0.26)	-0.10 (0.28)	-0.28+ (0.15)	-0.15 (0.25)
Congressional Ideology x Salient	-0.31+ (0.16)	-0.13 (0.19)	0.13 (0.11)	0.04 (0.15)
Lateral x Salience	0.23 (0.30)	0.36 (0.53)	0.29 (0.20)	0.16 (0.31)
Public Mood x Lateral x Salience	0.23 (0.38)	0.69 (0.56)	0.23 (0.23)	0.35 (0.37)
Congressional Ideology x Lateral x Salience	0.42+ (0.26)	0.04 (0.39)	0.12 (0.18)	-0.05 (0.25)
Constant	1.12*** (0.24)	-0.50* (0.24)	0.07 (0.30)	0.05 (0.29)
Observations	6,035	2,974	5,968	5,968
Prob > $\chi^2$	0.0000	0.682	0.0000	0.0000
Pseudo R-squared	0.034	0.004	0.035	0.034

Note: Table reports results from logistic regression models of decision making by the U.S. Supreme Court: the dependent variable takes on a value of 1 if the ideological direction of the decision is liberal. Natural Court fixed effects are omitted for presentation. Robust standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed tests).

**Table S4.3. The Differential Impact of External Constraint on SCOTUS Decision Making  
[Utilizing Dichotomized Specifications of the Salience Variables]**

	Judicial Review (Federal)		All Other Cases	
<i>Main Effects</i>				
Court Ideology	0.47 <sup>+</sup> (0.28)	0.43 (0.36)	0.23** (0.09)	0.24* (0.11)
Public Mood	-0.28 (0.29)	0.18 (0.41)	-0.10 (0.08)	-0.13 (0.13)
Congressional Ideology	0.59* (0.28)	1.23** (0.45)	0.06 (0.08)	0.03 (0.10)
Lateral	0.68* (0.32)	0.50 (0.37)	0.13 (0.08)	0.23 (0.12)
Salience (Media Measure)	0.67 <sup>+</sup> (0.37)		0.06 (0.10)	
Salience (Justice Centered)		0.41 (0.46)		0.13 (0.14)
<i>Interaction Effects</i>				
Public Mood x Lateral	0.26 (0.25)	0.31 (0.47)	-0.05 (0.07)	0.23 (0.15)
Congressional Ideology x Lateral	-0.40 (0.30)	0.06 (0.32)	-0.02 (0.09)	0.02 (0.10)
Public Mood x Salience	0.87 (0.52)	1.48* (0.64)	0.00 (0.12)	0.03 (0.18)
Congressional Ideology x Salient	-0.00 (0.31)	-0.63 (0.39)	-0.12 (0.09)	0.02 (0.12)
Lateral x Salience	-0.61 (0.56)	5.92** (2.23)	0.16 (0.19)	0.22 (0.38)
Public Mood x Lateral x Salience	-0.78 (0.69)	0.38 (1.22)	0.62** (0.23)	0.19 (0.42)
Congressional Ideology x Lateral x Salience	1.05* (0.51)	-6.37* (2.54)	0.19 (0.17)	-0.01 (0.28)
Constant	-0.02 (0.90)	-1.20 (0.90)	1.22*** (0.26)	-0.46 (0.25)
Observations	591	305	5,435	2,668
Prob > $\chi^2$	0.002	0.104	0.0000	0.906
Pseudo R-squared	0.075	0.069	0.034	0.004

Note: Table reports results from logistic regression models of decision making by the U.S. Supreme Court: the dependent variable takes on a value of 1 if the ideological direction of the decision is liberal. Natural Court fixed effects are omitted for presentation. Robust standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed tests).

## Chapter 5:

### Supreme Court Influence on Public Issue Attention

In chapter two, I echoed early scholars of judicial impact in defining impact as “all policy relevant outcomes” of judicial action (e.g. Becker and Feeley 1973; Wasby 1970). I then argued that the more recent conceptualization of impact actually captures only one distinct type of judicial *power*. Thus in chapter three I showed how a theory of judicial power that focuses on the Supreme Court’s power to authoritatively interpret the law can shed new light on questions of judicial policymaking and the Court’s role in the American political system. This theory of Supreme Court power is intended to present a more accurate and nuanced picture of the role the Court plays in American politics—but studying Court power is not all there is to the theory of impact offered here. Policy-relevant effects need not be directly caused by exercises of judicial power; moreover, even policy-relevant effects that are more-or-less directly caused by Court power may not be direct outcomes of a power relationship.

In this section, I build on the previous chapters by probing systematic but indirect effects of Court power in American politics. I argue that because the Court is quite powerful, and because its decisions (even the routine ones) are quite meaningful, we should expect that other political institutions, groups, and actors should respond to it as such. Put differently, the reality of the Supreme Court’s power will cause its actions to have significant indirect downstream impacts in addition to the more direct impacts discussed above. Some examples of these types of effects have already been discussed, as the direct and indirect effects of Court decisions are often essentially simultaneous. For example, the Supreme Court’s decision in *Employment Division v. Smith*, discussed at length in chapter three, significantly altered the law and policy of free

exercise, but one of its chief effects was to induce a Congressional response in the form of the Religious Freedom Restoration Act of 1993. RFRA, then, while a directly traceable result of the Court's decision in *Smith*, was not an outcome of the particular power operation (i.e. the reinterpretation of the First Amendment) in that decision, insofar as the decision did not necessitate the Congressional response.

Relatedly, sometimes Court decisions—even those which do not much alter the status quo—may create political opportunity structures that other actors or institutions can exploit in their own pursuit of policy change (Tarrow 2011; Andersen 2006). The example of *Kelo v. New London*, also discussed in chapter three, highlights this possibility. The Court's decision in *Kelo* itself had very little effect on the state of the law or politics—that is, the decision did not substantially reinterpret the requirements of the law, nor did it set aside any existing political arrangements or policies (Somin 2015). However, the decision garnered significant attention in the media and quickly became extremely unpopular (Zilis 2015; Strother 2016). By making eminent domain policy salient, and by activating significant latent opposition to the existing policy status quo, the *Kelo* decision created an ideal political environment for property rights interest groups, activists, and interested legislators to assail the policy status quo in this area—and they did so with considerable success. Within a decade of *Kelo*, forty-four states had revised their eminent domain statutes (Beienburg 2014; Somin 2015).

Responses such as these fit with what Grossmann and Swedlow (2015) have described as the Court's routine “indirect” contributions to public policy development. In a recent study, Grossmann and Swedlow (2015) utilize a dataset of “significant policy changes” that occurred between 1945 and 2004 created by Grossmann (2013), which is drawn from an extensive review of published policy history case studies, and codes the sources of each policy change (e.g.

whether it was the result of Congress, the executive, a bureaucracy, a court, etc.), relying on the expert judgment of the authors of the case studies for the coding. To further capture judicial influence in policy development, Grossmann and Swedlow also coded for mentions in these studies of court rulings that required or influenced actions of other branches, fear of court interventions, or patterns of related lawsuits, and the like. Using this innovative method, Grossmann and Swedlow find that federal courts (not just the Supreme Court) directly made policy in 15.8 percent (125 instances) of the significant policy changes in their dataset, and indirectly influenced policy outcomes in another 7.5 percent (59 instances) (see generally Keck and Strother 2016). Grossmann and Swedlow’s findings are important in their own right, as they indicate how regularly the Court significantly influences public policy. However, they offer no pathways by which this indirect influence operates (see also Howard and Steigerwalt 2011; Pacelle 2015). It is my argument that agenda influence is one such pathway, and indeed, is likely the chief pathway by which the Court indirectly influences policy development. To this end, I show in this chapter that the Supreme Court has significantly and routinely influenced the public political agenda, although the specific factors that might predict such impact are difficult to identify.

### **Supreme Court Influence on the Public Agenda**

On June 23<sup>rd</sup>, 2005, the Supreme Court issued its decision in *Kelo v. City of New London*, a theretofore little remarked-upon case concerning eminent domain. The Court held that New London’s takings of private properties to sell to a developer in the hope of boosting the local economy was permissible under the Fifth Amendment’s “public use” clause. This decision garnered extensive—and wholly unexpected—attention from the media, and from the public. *Kelo* generated a political backlash that is unprecedented in modern times despite the fact the

decision did not much alter the state of the law. In the decade since *Kelo*, forty-five states have passed legislation or amended their constitutions to curtail takings for economic development. In short, eminent domain went from being a virtually unknown topic to the center of key policy debates around the country because the Supreme Court decided a case concerning the issue. Many scholars have asked *why* the *Kelo* decision resulted in this massive backlash (see generally Strother 2016), but scholars have given less attention to the larger questions raised by this phenomenon: how often, and under what circumstances, does the Supreme Court have this profound effect on the American political agenda?

Scholars have posited that the Supreme Court has this effect on the political agenda when it issues decisions that significantly alter the political status quo (Flemming, Bohte, and Wood 1997; Ura 2009). If correct, this theory has major implications for our understanding of the Supreme Court's role in the American political system. For example, Grossmann and Swedlow (2015) have argued that the Court routinely contributes to public policy development "indirectly," but they offer no pathways by which this indirect influence operates; agenda influence is one such possible pathway. Relatedly, agenda influence may help us to understand the nature of backlashes to judicial decisions (Fontana and Braman 2012; Keck 2009). However, this theory of Supreme Court agenda influence rests on shaky foundations: Fleming and colleagues (1997) arrived at this argument inductively and did not directly test it. Since then, Ura (2009) found empirical support for the theory, but only examined four cases in one issue area. As such, the empirical case for this theory is quite thin. Moreover, the case of *Kelo* briefly outlined above seems to belie this theory, as it had a major influence on the political agenda though the decision did not alter the political or legal status quo. Given the importance of the implications of this theory, it is critical to investigate it more thoroughly.

In this chapter, I analyze time-series data to test this theory against a large and heterogeneous sample of cases in a wide range of issue domains. I find, contrary to expectations, that disruption of the status quo, when specified ex ante, fails to predict Supreme Court influence on the public agenda. I also examine a competing explanation—that controversial or unpopular Supreme Court opinions are likely to drive agenda influence—but this theory also fails to garner clear empirical support. The findings presented here are exciting for students of the Supreme Court and public policy in that they show that the Court does regularly influence the mass political agenda. However, these findings do not conclusively reveal the political context(s) in which Court decisions are likely to have this important effect in the political system. As such, this research points to important avenues for future work.

### **The Supreme Court and the Public Agenda**

A growing body of scholarship has identified numerous pathways by which the Supreme Court influences politics and policy. Under some circumstances, the Court can directly alter public policy, as shown in chapter 3 above (see also Hall 2011; Howard and Steigerwalt 2012), and Congress or state legislatures may respond to Court decisions by altering policy itself (Barnes 2004; Pickerill 2004). Some salient decisions may influence public opinion, and thus motivate legislative responses (Christenson and Glick 2015; Linos and Twist 2016). Another important way in which the Supreme Court may powerfully impact American politics and policy is through influence on the political agenda (Flemming, Bohte, and Wood 1997; Ura 2009). Scholars are increasingly recognizing that no actor or institution has the “final word” in America’s famously fragmented political system (e.g. Barnes 2004; Silverstein 2009; Keck 2014). This developmental view of policy emphasizes interbranch interplay over time. But governing institutions have limited time and resources to devote to policy problems, which

suggests that understanding the agenda setting process in the American political system is crucial to understanding what gets done and when (Schattschneider 1975; Baumgartner and Jones 2009). As such, a fuller understanding of the Supreme Court’s ability to shape public policy must take into consideration its influence on the national political agenda (Ura 2009).

Policy scholars typically distinguish between the “public agenda” and the “policymaking agenda.” The policymaking agenda is the agenda of political actors empowered to make binding decisions on behalf of the polity—typically Congress and the president (Wolfe et al. 2013). The public agenda is more amorphous: it is the agenda of the American public, which is to say, it is the mix of issues that occupy the public mind at any given time. Scholars have begun to study the public agenda because it is politically consequential in that it significantly affects the policymaking agenda (e.g. Wolfe et al. 2013; McCombs 2014) and behavior of political elites (by rearranging their incentives), and thus can ultimately influence public policy (e.g. Arnold 1990; Hall 2011; Wolfe et al. 2013).

The public agenda is broad and amorphous. Given the American public’s low levels of political knowledge and interest, the public agenda is unstable and notoriously difficult to measure (Wlezein 2005). As a result, scholars interested in the public agenda have typically utilized media attention as a proxy for the public agenda (Flemming, Bohte, and Wood 1997; Pralle 2006; Ura 2009). This move is warranted not only because of convenience, however. The media are known to play a central role in allocating public attention and informing the public about the political world (Baumgartner and Jones 2009; Jones and Wolfe 2010). Importantly, this is true regardless as to whether the media sets the public agenda or simply indexes to it (Wolfe et al. 2013).



Further, media attention can powerfully affect governmental attention, public opinion, and public policy in its own right (Boydston 2013; Iyengar and Kinder 2010; McCombs 2014).<sup>43</sup> The relationship between mass media and systemic (macro-level) attention are reciprocal in nature. The media faces market incentives to follow events that attract audiences (Prior 2007). At the same time, however, systemic concerns about issues reflect media coverage (Iyengar and Kinder 2010). As a result, media attention provides a useful lens to study the public agenda as a proxy for public attention. This may be particularly true for the Supreme Court, which receives relatively little media attention (Graber 2010), and because the coverage it does receive appears to exert substantial influence over popular awareness of the Court and its decisions (Gibson and Caldeira 2009; Zilis 2015).

The question for students of judicial politics, then, is when or under what circumstances a given Supreme Court decision is likely to significantly influence public attention to the issue or issues that a given case concerns. Flemming, Bohte, and Wood (1997) first sought to answer this question by assessing the influence of thirty-one “important” Supreme Court decisions on media coverage of the issues touched by those decisions.<sup>44</sup> They gathered their media data from the *Reader’s Guide*, then conducted Box-Taio intervention analyses on these sets of serial observations, finding that seven cases resulted in significant changes in public attention in the

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<sup>43</sup> There has been substantial work done on the extent to which policymakers are able to influence the media agenda. A common approach in this literature has been to examine the “success rates” of various groups and actors who seek to gain news coverage by looking at the proportion of news releases and other “information subsidy” efforts that are kept versus those that are discarded by media gatekeepers. For most groups, the success rate is between 5 and 10 percent (e.g. Morton 1986; Berkowitz 1990). Such efforts by government actors are generally much more successful, with success rates ranging from 20 percent to as much as 50 percent (Turk 1986; see generally Berkowitz 1992). A look at the demand side of the equation demonstrates just how important this discrepancy is: studies of media content routinely find that more than half of all stories in newspapers, and as much as three-fourths of stories covered on television news, originate from information subsidy efforts by some non-media actor (Berkowitz 1992; Soloski 1989; Berkowitz 1987; Sigal 1973). As a result, government-affiliated news sources influence media coverage—and thus the public agenda—far more than do other sources (Berkowitz 1992; Soloski 1989; Sigal 1973). The Supreme Court, however, does not engage in any traditional public relations activities.

<sup>44</sup> Importance was measured as inclusion in the *CQ Guide to the Supreme Court*.

areas of desegregation, flag burning, and public school prayer. Four of those cases caused long-run shifts in attention, which Flemming et al. attribute to the cases being “extremely controversial at the time they were announced” which resulted in “intense national debates that drew in new participants and expanded the scope of conflict through time” (1997: 1247). In discussing their findings, Flemming and colleagues reason that the Court may have the observed agenda-setting influence when its decision “expand the scope of conflict by activating new groups and accentuating old rivalries” (1997: 1225). To be clear, though, they develop this theory inductively and do not rigorously test it.

Ura (2009) builds on this foundational study by conducting an out-of-sample test of Flemming et al.’s (1997) theory: he analyzes the effects of four gay rights decisions between 1990 and 2005 on media coverage of gay rights issues. Ura also conducts Box-Tiao intervention analyses on a set of serial observations, though he opted to draw his sample from *Lexis-Nexis* rather than the *Reader’s Guide* owing to concerns with the *RG* sample that have been raised since Flemming and colleagues conducted their study. Ura reaches essentially the same conclusion as Flemming et al., leading him to conclude that cases that “expanded gay rights increased content related to homosexuality, while gay rights cases that confirmed the existing scope of gay rights had little effect on media coverage of homosexuality” (2009: 441). In short, the central argument of these two studies is that Court decisions which upset the status quo ante are likely to affect issue attention, while those that affirm the status quo are not.

Despite the importance of this question, it is notable that the theory has only been tested in one issue domain (gay rights), over a relatively short period of time (1990-2005), and for only four cases. It is not hard to imagine that the observed effects were driven by some contextual feature other than the cases’ relationship to the status quo. Put differently, while there is little

doubt that *Lawrence v. Texas* caused a significant shift in issue attention to gay rights issues, it may well be that that effect is attributable to the decision's controversial nature, some happenstance of timing, or something else entirely, and not because it "rearranged the distribution of political benefits."

Recent work in judicial politics suggests that case controversy may indeed be an important factor in explaining Court influence on issue attention. Consider again the example of *Kelo v. New London* outlined in the introduction of this chapter—that decision profoundly influenced public attention to the issue of eminent domain, but it did not change the state of the law or the distribution of political benefits much, if at all. Zilis (2015) argues that *Kelo* garnered so much attention because it was controversial—and that controversy helped it to stay salient for many months after the decision was rendered. More generally, controversy is viewed by media scholars as a key indicator of newsworthiness (Halton 1998; Straubhaar et al. 2009; Johnson and Socker 2012; Sill et al. 2013; Strother 2017a). Relatedly, Bryan and Ringsmuth (2016) argue that dissenting opinions, and especially strongly negative dissenting opinions, are especially likely to draw media coverage; and as Zilis (2015) points out, dissents are a clear indicator of controversy that reporters can build a story around. In sum, case controversy seems a likely candidate to explain the observed effects of the few cases found to have significantly altered media attention to political issues.

In short, media coverage of Supreme Court decisions is critically important because it powerfully influences what issues citizens think are important (Iyengar and Kinder 2010) as well as how they think about those events and issues (Chong and Druckman 2007). Thus a strong theoretical and empirical account of the effect of Supreme Court's decisions on media attention to issues should provide new insight into an understudied pathway by which the Court influences

public policy and politics: influence on the national political agenda. Systematic differences in the types of cases that tend to affect coverage will suggest different impacts of cases on the public agenda. Further, systematic differences in effects of cases with particular features may significantly affect the ways in which public attitudes are shaped by Court decisions. Finally, to the extent that political elites are attentive to the issues that voters view as important, this agenda influence will also reverberate in the policymaking realm.

Flemming, Bohte, and Wood (1997) argue that cases that disrupt the political status quo may be likely to influence systemic issue attention, though they arrived at this conclusion inductively in trying to explain the pattern of agenda influence they observed, as few cases in their sample had any effect on media coverage. Ura (2009) tested this theory of status-quo disruption on a small set of out-of-sample cases (four) in one issue area (homosexual rights), and found support for it in that policy domain. Thus the leading theory of Supreme Court influence on issue attention holds that such influence depends on the Court disruption of the political status quo. While this theory is intuitively appealing, the empirical case for it is quite thin. Further, alternative explanations that fit the evidence can be easily imagined: the literature on media coverage and newsworthiness suggests that controversy could be a key explanatory variable in the issue-attention equation.

### ***Expectations***

1. Supreme Court decisions which significantly alter the political or legal status quo will also significantly affect media coverage of the issue that decision speaks to.
2. Supreme Court decisions which are controversial will significantly affect media coverage of the issue that decision speaks to.

## Approach & Data

In order to assess the effects of Supreme Court cases on media coverage of the larger issues to which they speak, I conduct time-series intervention analyses of 52 Supreme Court decisions in 20 distinct issue areas. The data gathering process for this study is time consuming, as separate time series have to be constructed for every issue area. For this reason, the two existing studies in this vein examine relatively small numbers of issues (Flemming and colleagues looked at four issue areas, Ura at one). That being the case, the selection of particular cases for study is crucial. In this study, I aim to move beyond prior works by examining a larger number of issue areas and cases, selected on the basis of key hypothesized independent variables. These variables are disruption of status quo and case controversy. Following Fleming et al. (1997) and Ura (2009), I started by identifying “important” cases; I utilized Hall’s (2011) list of “landmark” constitutional cases (see above) as a starting point, but restricted the list to only cases decided between 1970 and 2005 in light of data availability.

Data for the dependent variable for this part of the study is original data on the media salience of a number of policy issues in American politics.<sup>45</sup> I follow Ura (2009) in measuring media coverage of an issue as a simple count of the mean number of daily stories each month in the *New York Times*. I gathered these data by keyword searching Lexis-Nexis for terms that indicate content related to each particular topic. For single cases, the search was time-bounded from January 1 three years prior to the decision to December 31 three years after. For issue areas with multiple cases, the time-series runs from January 1 three years prior to the earliest decision in that area to December 31 three years after the last decision. This process yielded 20 separate sets of serial observations. The issue keywords utilized to obtain the data for each series are

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<sup>45</sup> One exception: part of the time series on coverage of LGB issues comes from Ura’s (2009) data, accessed at: <https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/14164>

presented in the supplementary material at the end of the chapter; as an example, the keywords “eminent domain” were used to construct the time series to assess the influence of *Kelo v. New London* on media coverage of the larger issue (eminent domain) that case concerned. Thus the time series for eminent domain consists of the daily average number of stories appearing in the *New York Times* containing the string “eminent domain” every month from January of 2002 to December of 2008.

Because the leading work in this area suggests that disruption of the status quo is the key predictor of Court-induced change in public issue-attention, I use the Supreme Court Database to specify ex ante whether each case disrupts the status quo. I specify the status quo in two ways: first, cases which formally overturn precedent are coded as altering the legal status quo, while cases which leave existing precedent intact are coded as preserving the status quo. Second, decisions which invalidate statutes (federal, state, or local) are coded as disrupting the policy status quo, while cases which uphold the challenged statute are coded as preserving the policy status quo.

A key indicator of news value or newsworthiness is controversy. As such, I select cases for which reliable public opinion data is available whenever possible in order to specify controversy from contemporaneous public opinion (38 of 52 cases). Public opinion data for these cases is drawn from Marshall’s canonical studies on public opinion on the Court’s work (Marshall 1989; Marshall 2009). I operationalize “controversy” as a dummy variable (following Hall 2011) coded as “1” if a majority (50% or more) of respondents are opposed to the decision and as “0” (i.e. uncontroversial) if a majority favors the decision. Cases are coded as unclear if there is no clear majority *or* if there were no polls on the case. Descriptive statistics of the cases studied are presented in Table 5.1.

**Table 5.1. Descriptive Statistics of Case Characteristics (n reported)**

<b>Independent Variable</b>	<b>Yes</b>	<b>No</b>	<b>Unclear</b>
<b>Controversial</b>	20	18	14
<b>Alters legal status quo</b>	8	44	n/a
<b>Alters policy status quo</b>	18	34	n/a

## **Analysis & Results**

The processes discussed above yield 52 decision interventions between 1970 and 2005 in twenty separate issue areas for analysis. These theories of Supreme Court influence on issue attention are assessed using Box-Tiao (1975) intervention analyses, which estimate the effects of an event (or events) on a set of serial observations. This method is attractive because intervention analyses assess natural experiments; in this case, the quasi-experimental treatments (interventions) are judicial decisions, and the set of serial observations is media coverage of the issues in which the cases are embedded (Box-Steffensmeier et al. 2014; Ura 2009). Box-Tiao analyses explicitly model ARIMA error processes by estimating the auto-regressive and moving average components of the dependent time series (Box and Jenkins 1976). This means that the effects of intervention on the dependent time series are assessed after other sources of dynamic error are accounted for (reduced to white noise). Importantly, as Ura (2009: 438) points out, when intervention analyses are properly modelled, “only the identification of a rival causal event threatens inferences drawn from the assessment of the impact of the event of interest” (see also Peake and Eshbaugh-Soha 2008).

The first step in assessing potential intervention effects of decisions is to develop appropriate ARIMA models of each media coverage series. I then model the effects of each Court decision on the relevant media coverage series. Following Ura (2009), I take a stepwise approach to developing the final model specifications. Each decision is treated first as a “pulse” intervention, a dummy variable coded as one for the month of the intervention and zero

otherwise. Decisions were then modeled treating the intervention as “steps” to assess the extent to which the data supported such a specification; when events or complexities in the models were insignificant or unsupported by the data, they were dropped (Ura 2009).

The expectation here is that decisions which are controversial, or which alter the status quo ante will alter the public agenda, while cases which are not controversial or leave the status quo unchanged, will not. In each table, the column labeled “ $\Delta$  Status Quo” indicates whether that decision changed the policy (indicated with a “P”) or the legal (indicated with an “L”); cases that left the status quo unchanged are designated in the tables with a “No.” Similarly, the column labeled “Controversial” indicates whether the cases is coded as controversial with a “Yes” or a “No”—cases for which no data were found are coded as missing, and designated as “[.]” in the tables. The column labeled “finding” indicates whether a statistically significant pulse or step was present in the data, and the level of significance of the step; in all cases, \*\*\*  $p < 0.001$ , \*\*  $p < 0.01$ , and \*  $p < 0.05$ . The size of the statistically significant effects was calculated by predicting (using STATA’s margins command) the level of coverage, in terms of average daily stories, before and after the intervention. Put simply, this column indicates the size of the effect caused by the intervention. The full tables from which these summaries are derived are presented in the supplementary material for presentational purposes. The technical tables in the supplementary material at the end of this chapter are labeled to correspond to the labels presented below; for example, Table S5.2 in the supplementary material at the end of the chapter presents the full results of the analyses summarized in Table 5.2 in the main text.



### Congressional Power

**Table 5.2. Impact of Supreme Court Decisions on NYT Attention to Congressional Power**

<b>Issue Area/Case</b>	<b>Δ Status Quo</b>	<b>Controversial</b>	<b>Finding</b>	<b>% Δ in Coverage</b>
<b>Public Sector Minimum Wage</b>				
<i>National League of Cities v. Usery</i>	P, L	[.]	null	
<i>Garcia v. SAMTA</i>	L	[.]	null	
<b>Gun Control</b>				
<i>U.S. v. Lopez</i>	P	No	null	
<i>Printz v. U.S.</i>	P	No	null	
<b>Minimum Drinking Age</b>				
<i>South Dakota v. Dole</i>	No	No	step*	-66.67
<b>Medical Marijuana</b>				
<i>Gonzales v. Raich</i>	No	Yes	null	

### Separation of Powers

**Table 5.3. Impact of Supreme Court Decisions on NYT Attention to Separation of Powers**

<b>Issue Area/Case</b>	<b>Δ Status Quo</b>	<b>Controversial</b>	<b>Finding</b>	<b>% Δ in Coverage</b>
<b>Separation of Powers</b>				
<i>INS v. Chadha</i>	P	[.]	null	
<i>Bowsher v. Synar</i>	P	[.]	step*	89.39
<i>Morrison v. Olson</i>	No	No	null	

### Sovereign Immunity

**Table 5.4. Impact of Supreme Court Decisions on NYT Attention to Sovereign Immunity**

<b>Issue Area/Case</b>	<b>Δ Status Quo</b>	<b>Controversial</b>	<b>Finding</b>	<b>% Δ in Coverage</b>
<b>Sovereign Immunity</b>				
<i>Seminole Tribe v. Florida</i>	P, L	Yes	null	
<i>Alden v. Maine</i>	No	[.]	step**	100.9

### Abortion

**Table 5.5. Impact of Supreme Court Decisions on NYT Attention to Abortion**

Issue Area/Case	$\Delta$ Status Quo	Controversia I	Finding	% $\Delta$ in Coverage
<b>Abortion</b>				
<i>Roe v. Wade</i>	P	Yes	null	
<i>Harris v. McRae</i>	No	[.]	<b>step***</b>	277.61
<i>Webster v. Reproductive Services</i>	L	[.]	<b>step**</b>	130.65
<i>Rust v. Sullivan</i>	No	Yes	null	
<i>Planned Parenthood v. Casey</i>	P, L	No	null	
<i>Stenberg v. Carhart</i>	P	Yes	null	

### Affirmative Action

**Table 5.6. Impact of Supreme Court Decisions on NYT Attention to Affirmative Action**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>Affirmative Action</b>				
<i>Richmond v. Croson</i>	No	Yes	null	
<i>Metro Broadcasting v. FCC</i>	No	Yes	null	
<i>Adarand Contractors v. Pena</i>	L	No	<b>pulse**</b>	58.44
<i>Gratz &amp; Grutter [v. Bollinger]</i>	No	No	null	

### Capital Punishment

**Table 5.7. Impact of Supreme Court Decisions on NYT Attention to Capital Punishment**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>Capital Punishment</b>				
<i>Furman v. Georgia</i>	P	Yes	null	
<i>Gregg v. Georgia</i>	L	No	<b>step***</b>	81.91

### Eminent Domain

**Table 5.8. Impact of Supreme Court Decisions on NYT Attention to Eminent Domain**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>Eminent Domain</b>				
<i>Kelo v. New London</i>	No	Yes	<b>step***</b>	931.35

### Free Exercise of Religion

**Table 5.9. Impact of Supreme Court Decisions on NYT Attention to Free Exercise of Religion**

Issue Area/Case	Δ Status Quo	Controversial	Finding	% Δ in Coverage
<b>Free Exercise of Religion</b>				
<i>Employment Division v. Smith</i>	No	Yes	null	
<i>Church of Lukumi v. Hialeah</i>	P	[.]	null	
<i>City of Boerne v. Flores</i>	P	[.]	step***	125.37

### Free Press

**Table 5.10. Impact of Supreme Court Decisions on NYT Attention to Freedom of Press**

Issue Area/Case	Δ Status Quo	Controversial	Finding	% Δ in Coverage
<b>Freedom of Press</b>				
<i>New York Times Co. v. U.S.</i>	No	No	null	
<i>Branzburg v. Hayes</i>	No	Yes	null	
<i>Nebraska Press Assoc. v. Stuart</i>	No	Yes	null	
<i>Richmond Newspapers v. Virginia</i>	No	Yes	step***	>1000.00

### Free Speech

**Table 5.11. Impact of Supreme Court Decisions on NYT Attention to Free Speech**

Issue Area/Case	Δ Status Quo	Controversial	Finding	% Δ in Coverage
<b>Free Speech</b>				
<i>Wisconsin v. Mitchell</i>	No	No	null	
<i>Denver Area Consort. v. FCC</i>	No	No	null	
<i>Reno v. ACLU</i>	P	Yes	null	
<b>Flag Desecration</b>				
<i>Texas v. Johnson</i>	P	Yes	step***	94.44
<i>U.S. v. Eichman</i>	P	[.]	step***	-1.79
<b>Buffer Zones</b>				
<i>Hill v. Colorado</i>	No	No	null	

### Gay Rights

**Table 5.12. Impact of Supreme Court Decisions on NYT Attention to Gay Rights**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>Gay Rights</b>				
<i>Bowers v. Hardwick</i>	No	No	null	
<i>Romer v. Evans</i>	P	Yes	null	
<i>Boy Scouts of America v. Dale</i>	No	Yes	null	
<i>Lawrence v. Texas</i>	P, L	No	step***	65.43

### Non-Establishment

**Table 5.13. Impact of Supreme Court Decisions on NYT Attention to Establishment Issues**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>Public Aid to Religious Schools</b>				
<i>Aguilar v. Felton</i>	P	No	step*	-23.81
<i>Agostini v. Felton</i>	No	[.]	step*	31.25
<b>Public Displays of Religious Icons</b>				
<i>Marsh v. Chambers</i>	No	[.]	null	
<i>Lynch v. Donnelly</i>	No	[.]	null	

### Right to Die

**Table 5.14. Impact of Supreme Court Decisions on NYT Attention to Right to Die**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>Right to Die</b>				
<i>Cruzan v. Missouri</i>	No	Yes	pulse***	361.54
<i>Washington v. Glucksberg</i>	No	Yes	pulse***	658.33

### School Funding

**Table 5.15. Impact of Supreme Court Decisions on NYT Attention to School Funding**

Issue Area/Case	$\Delta$ Status Quo	Controversial	Finding	% $\Delta$ in Coverage
<b>School Funding</b>				
<i>SAISD v. Rodriguez</i>	No	Yes	step*	175

## Wiretapping

Table 5.16. Impact of Supreme Court Decisions on NYT Attention to Wiretapping

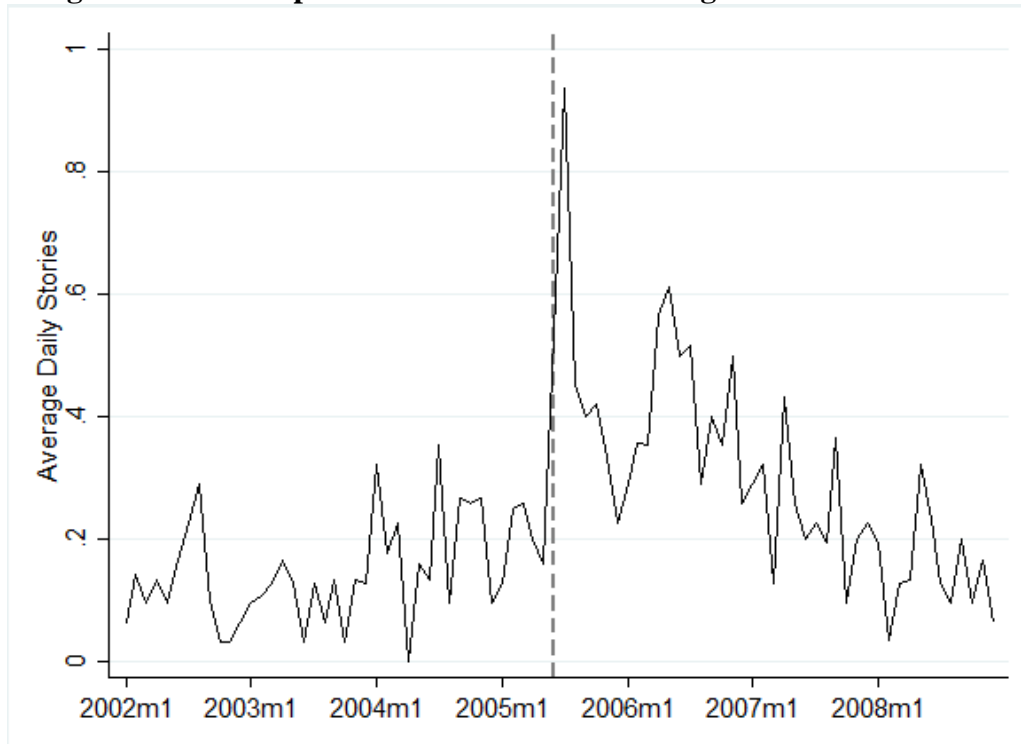
Issue Area/Case	$\Delta$ Status Quo	Controversial Finding	% $\Delta$ in Coverage
<b>Wiretapping</b>			
<i>U.S. v. US District Court</i>	No	No step**	323.81

Of the 52 cases analyzed, 17 resulted in statistically significant, long-run changes (steps) in media coverage of the larger issues in which they are embedded. Of those 17, 14 were positive steps (increases in coverage), and 3 were negative steps. Four more cases resulted in short-term (pulse) increases in media attention to an issue. The 17 cases that resulted in significant long-run changes in issue coverage in the *New York Times* were: *South Dakota v. Dole*, *Bowsher v. Synar*, *Alden v. Maine*, *Harris v. McRae*, *Webster v. Reproductive Health Services*, *Gregg v. Georgia*, *City of Boerne v. Flores*, *Kelo v. New London*, *Richmond Newspapers v. Virginia*, *Texas v. Johnson*, *U.S. v. Eichman*, *Lawrence v. Texas*, *Aguilar v. Felton* & *Grand Rapids v. Bell*, *Agostini v. Felton*, *San Antonio Ind. School Dist. v. Rodriguez*, and *U.S. v. US District Court*. Additionally, *Adarand Constructors v. Pena*, *Cruzan v. Missouri*, *Washington v. Glucksberg* and *Vacco v. Quill* resulted in short-term (pulse) increases in *New York Times* coverage of affirmative action and right-to-die, respectively. Some cases, such as *New York Times Co. v. US*, *Roe v. Wade*, *Romer v. Evans*, and *Employment Division v. Smith*, among others, are conspicuous for their absence from the foregoing lists.

The size of the substantive effects of these interventions varies but is quite large on average, as noted above. Figure 5.1 depicts the effect of the Court's *Kelo* decision on coverage of eminent domain graphically. Specifically, figure 5.1 shows that the Court's decision in *Kelo v. New London* caused a 931-percent increase in media attention to eminent domain from the month before *Kelo* was decided to the month after. Further, the graph indicates that this effect began

regressing toward the mean relatively quickly (that is, the effect decayed over time), but eminent domain was covered at a substantially higher level for more than two years post-*Kelo* compared to the average level of coverage before that decision.

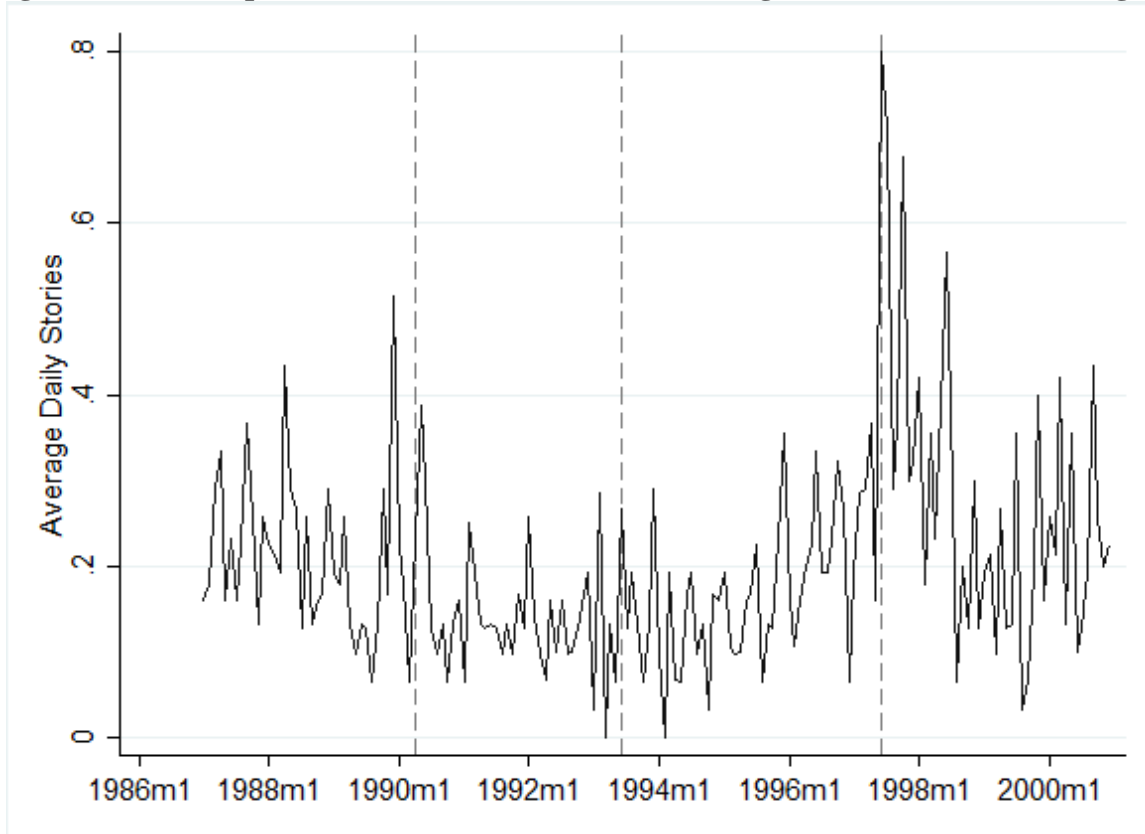
**Figure 5.1. The Impact of *Kelo* on Media Coverage of Eminent Domain**



Note: the vertical dashed line indicates the Supreme Court intervention in this issue area: its decision in *Kelo v. New London*.

Similarly, Figure 5.2 depicts the effects (or lack thereof) of three decisions in the area of religious free exercise: *Employment Division v. Smith*, *Church of Lukumi Babalu Aye v. City of Hialeah*, and *City of Boerne v. Flores*. Of these, only *Boerne v. Flores* had a significant effect on media coverage of religious freedom; the case caused a roughly 125% increase in media attention to that issue. As indicated by Table 5.9 above, and depicted graphically in Figure 5.2, neither *Employment Division v. Smith* nor *Church of Lukumi Babalu Aye* had a significant effect on media attention. Together, these figures provide a good illustration of the size of the substantive effect Supreme Court decisions can have on media coverage.

**Figure 5.2. The Impact of Three Cases on Media Coverage of Free Exercise of Religion**



Note: The vertical dashed lines indicate the three Court interventions in this issue area; from left to right, they are *Employment Division v. Smith*, *Church of Lukumi Babalu Aye v. City of Hialeah*, and *City of Boerne v. Flores*.

So far I have shown that Supreme Court decisions can and do significantly impact media attention to issues. In fact, at least one case in every issue area I examined resulted in a statistically significant effect. This basic finding is important in its own right because it indicates the pervasiveness of the Court’s influence, and suggests that influence on issue attention is likely a key pathway of the Court’s documented “indirect influence” over policy (Grossmann and Swedlow 2015). I now turn to more explicit interrogation of the expectations presented in the preceding section, namely, that the Court is more likely to exert significant influence over issue attention when its decisions disrupt the status quo ante, or when they are controversial.

Only one case had all three theorized predictors of influence—*Seminole Tribe v.*

*Florida*—and it did not cause a significant change in issue attention to sovereign immunity. On

the other hand, seven cases had none of the theorized predictors present, yet one of those did result in a large and significant increase in attention to the issue concerned: *South Dakota v. Dole*. At first blush, these patterns do not bode well for the theories presented.

**Table 5.17. Testing Theories of Court Impact on Issue Attention**

Intervention	Controversial		Statute Invalidated		Precedent Altered	
	No	Yes	No	Yes	No	Yes
No	58.8%	70.0%	59.4%	66.7%	64.3%	50.0%
Yes	41.2%	30.0%	40.6%	33.3%	35.7%	50.0%
	$\chi^2=0.504, p=0.478$		$\chi^2=0.26, p=0.61$		$\chi^2=0.582, p=0.445$	

Table 5.17 presents the findings from the full sample of cases analyzed. Among the 37 cases for which I have public opinion data (so as to code for the controversialness of the decision), 20 were coded as controversial, and 17 were not. Of the 20 controversial decisions, only 6 resulted in significant changes in issue attention. A Wald's  $\chi^2$  test indicates that we cannot reject the null, which is to say, there appears to be no significant difference in the effects of controversial and noncontroversial decisions ( $p=0.478$ ). Similarly, neither disruption of the political nor legal status quo even approaches statistical significance. Among the 18 cases coded as disrupting the political status quo, only 6 resulted in significant changes in issue attention; moreover, cases disrupting the status quo cannot be statistically distinguished from those not disrupting the status quo, with respect to their effects on media coverage ( $p=0.610$ ). Finally, eight cases in the sample disrupted the legal status quo, and among these four resulted in significant changes in issue attention. But again, cases disrupting the legal status quo cannot be statistically distinguished from those not disrupting the status quo ( $p=0.445$ ). In sum, the prevailing theory, that disruption of the status quo is a key predictor of significant media influence by the Supreme Court, is not supported when tested against a relatively large and heterogeneous set of cases and issue areas. However, the competing theory offered here, that



case controversy would be a key predictor of significant media effects, also fails to garner empirical support. The implications of these important findings are discussed in the concluding section.

## **Discussion**

In this chapter I have shown that the Supreme Court does in fact regularly influence media attention to the issues that it is speaking when it decides cases. These findings have several important implications for our understanding of American politics. The paper also raises important questions for future research. First, I provide new evidence that decisions made by the Supreme Court regularly influence media attention to issues in significant ways. In this sample of 52 cases decided between 1970 and 2005 in 20 distinct issue areas, 20 cases (38%) caused statistically significant changes in subsequent media attention to the issue each case was concerned with. Importantly, 17 of these cases (32.6%) resulted in long-term changes in the salience of the issue to which they spoke. And the size of these effects was clearly significant as well, with the average change in the volume of coverage being about 220 percent.

This finding clearly indicates that the Supreme Court can powerfully influence the public agenda. Indeed, Peake and Eshbaugh-Soha (2008) argue that presidents' best opportunity to increase media attention to their preferred policies is in their televised addresses. Even so, they find that the ability of presidents to significantly alter media coverage of issues through such televised addresses is significantly constrained, with presidents doing so successfully only in 14 of the 40 instances they studied (35%). They conclude that the "president's public leadership may be limited because the presidency must rely upon an independent, economic-driven media to communicate with the public" (Peake and Eshbaugh-Soha 2008:130). My analyses indicate that the Court is able to influence media coverage of issues about as often as the president is.

The second key takeaway is that the theorized predictors of significant changes in media coverage do not perform well in a large, heterogeneous sample of issue areas and cases. That is, neither the controversialness of a decision nor the disruption of the political or legal status quo reliably predicts significant impact on public issue attention. As such, while these analyses have offered significant insight into the nature of Court influence on issue attention, I have also uncovered ambiguity in the causal dynamics of the relationship. I noted at the outset that the leading view of Court impact on issue attention was developed inductively (Flemming et al. 1997) and only tested once, on a small sample concerning only one issue (Ura 2009). In my analyses, I find no empirical support for this perspective: decisions that disrupt the status quo appear to be no more likely to affect media attention than decisions which leave the status quo intact. However, I also failed to find support for the alternative offered here: I hypothesized, drawing on a large body of research in media studies, that controversial decisions would be more likely to influence issue attention than noncontroversial ones.

The fact that the Supreme Court regularly influences public issue attention is profoundly important to American politics research. To the extent that American citizens monitor politics and political elites, they do so by consuming information provided by media; thus the modern mass media is a crucial link between political elites and the general public (Pritchard 1992; McCombs 2004; Jones and Wolfe 2010). Media coverage of issues and events powerfully influences what issues people think are important (e.g. Iyengar and Kinder 2010), how people think about those issues (e.g. Chong and Druckman 2007), and subsequent levels of interest in and attention to those issues (e.g. McCombs 2005; Albertson and Gadarian 2015). Put differently, the media plays a powerful role in shaping the national political agenda (Sill et al. 2013). As such, any theory of how and when political institutions shape politics and policy must

take media coverage into account. Given that recent work has found that the Court often shapes public policy indirectly (Grossmann and Swedlow 2015), this research can be plausibly read as suggesting a pathway for such indirect influence. Put different, it seems likely that one pathway by which the Court indirectly shapes public policy is by influencing the political agenda.

These important implications of the analyses presented here point to the importance of further research on this question. Namely, are the observed effects random, or is there some yet-unknown variable that predicts Supreme Court influence on public issue attention? Since the Court likely does not seek to intentionally influence public issue attention, it is quite possible these effects are random or quasi-random (Rutledge and Price-Larsen 2014). In any event, more leverage on this important question promises to significantly shape our understanding of the Court's role in the American political system.

## Supplementary Materials for Chapter 5:

### Technical Tables from Time-Series Intervention Analyses

**Table S5.2. Impact of Supreme Court Decisions on NYT Attention to Congressional Power**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b><i>Public Sector Minimum Wage</i></b>			
<i>National League of Cities v. Usery</i>	0.08	11.57	0.99
<i>Garcia v. SAMTA</i>	0.37	1.49	0.25
MA1	-0.09	0.06	0.14
constant	0.03**	0.01	2.72
N	180		
<b><i>Gun Control</i></b>			
<i>U.S. v. Lopez</i>	0.63	0.73	0.87
<i>Printz v. U.S.</i>	0.43	1.21	0.35
AR1	0.67***	0.05	11.51
constant	1.36***	0.23	5.99
N	108		
<b><i>Minimum Drinking Age</i></b>			
<i>South Dakota v. Dole</i> (pulse)	0.13	0.18	0.73
<i>South Dakota v. Dole</i> (step)	-0.10*	0.04	-2.29
AR1	0.09	0.26	0.36
MA1	0.43	0.28	1.57
constant	0.15	0.02	6.09
N	84		
<b><i>Medical Marijuana</i></b>			
<i>Gonzales v. Raich</i>	0.82	3.52	0.23
AR1	-0.69	1.21	-0.57
MA1	0.73	1.14	0.64
constant	0.22***	0.02	9.89
N	84		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.3. Impact of Supreme Court Decisions on NYT Attention to Separation of Powers**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Separation of Powers</b>			
<i>INS v. Chadha</i>	0.04	0.32	0.12
<i>Bowsher v. Synar</i> (pulse)	0.45*	0.22	2.01
<i>Bowsher v. Synar</i> (step)	0.07*	0.03	2.27
<i>Morrison v. Olson</i>	0.29	0.65	0.45
AR1	0.93***	0.04	22.08
MA1	-0.73***	0.09	-7.82
constant	0.12***	0.03	3.34
N	144		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.4. Impact of Supreme Court Decisions on NYT Attention to Sovereign Immunity**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Sovereign Immunity</b>			
<i>Seminole Tribe v. Florida</i>	0.09	7713682	0
<i>Alden v. Maine</i> (pulse)	0.41	403364.5	0
<i>Alden v. Maine</i> (step)	0.02**	0.009	2.73
constant	0.03***	0.007	4.05
N	120		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.5. Impact of Supreme Court Decisions on NYT Attention to Abortion**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Abortion</b>			
<i>Roe v. Wade</i>	0.41	2.27	0.18
<i>Harris v. McRae</i> (pulse)	-0.54	0.77	-0.7
<i>Harris v. McRae</i> (step)	1.35***	0.38	3.5
<i>Webster v. Reproductive Services</i> (pulse)	1.31	5.41	0.24
<i>Webster v. Reproductive Services</i> (step)	0.90**	0.21	4.13
<i>Rust v. Sullivan</i>	-0.44	2.01	-0.22
<i>Planned Parenthood v. Casey</i>	-0.03	0.3	-0.1
<i>Stenberg v. Carhart</i>	0.13	0.85	0.16
AR1	1.03*	0.43	2.44
AR2	-0.22	0.23	-0.93
MA1	-0.57	0.42	-1.34
constant	0.64	0.35	1.84
N	408		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.6. Impact of Supreme Court Decisions on NYT Attention to Affirmative Action**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Affirmative Action</b>			
<i>Richmond v. Croson</i>	0.82	0.58	1.41
<i>Metro Broadcasting v. FCC</i>	-0.09	0.57	-0.15
<i>Adarand Contractors v. Pena</i> (step)	0.43**	0.16	2.69
<i>Gratz v. Bollinger &amp; Grutter v. Bollinger</i>	1.72	2.43	0.71
AR1	1.18***	0.15	7.99
AR2	-0.24*	0.11	-2.29
MA1	-0.74***	0.13	-5.6
constant	0.75***	0.14	5.31
N	240		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.7. Impact of Supreme Court Decisions on NYT Attention to Capital Punishment**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Capital Punishment</b>			
<i>Furman v. Georgia</i>	0.28	0.27	1.04
<i>Gregg v. Georgia</i> (pulse)	0.58	2.01	0.29
<i>Gregg v. Georgia</i> (step)	0.29***	0.07	3.86
AR1	1.35***	0.09	14.9
AR2	-0.38***	0.09	-4.2
constant	0.42***	0.03	12.16
N	132		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.8. Impact of Supreme Court Decisions on NYT Attention to Eminent Domain**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Eminent Domain</b>			
<i>Kelo v. New London</i> (pulse)	-0.04	0.1	-0.37
<i>Kelo v. New London</i> (step)	0.31***	0.07	4.4
AR1	1.12***	0.19	5.84
AR2	-0.14	0.16	-0.86
MA1	-0.76***	0.15	-4.94
constant	0.02	0.19	0.12
N	84		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.9. Impact of Supreme Court Decisions on NYT Attention to Free Exercise of Religion**

<b>Issue Area/Case</b>	<b>Parameter Est.</b>	<b>S.E.</b>	<b>z-statistic</b>
<b><i>Free Exercise of Religion</i></b>			
<i>Employment Division v. Smith</i>	0.03	0.32	0.12
<i>Church of Lukumi v. Hialeah</i>	0.14	0.86	0.16
<i>City of Boerne v. Flores</i> (pulse)	0.42*	0.19	2.17
<i>City of Boerne v. Flores</i> (step)	0.12***	0.03	3.35
AR1	0.94***	0.05	18.65
MA1	-0.81***	0.09	-8.77
constant	0.17***	0.03	4.93
N	168		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.10. Impact of Supreme Court Decisions on NYT Attention to Freedom of Press**

<b>Issue Area/Case</b>	<b>Parameter Est.</b>	<b>S.E.</b>	<b>z-statistic</b>
<b><i>Freedom of Press</i></b>			
<i>New York Times Co. v. U.S.</i>	0.43	0.83	0.52
<i>Branzburg v. Hayes</i>	0.03	0.59	0.06
<i>Nebraska Press Assoc. v. Stuart</i>	0.07	0.34	0.23
<i>Richmond Newspapers v. Virginia</i> (pulse)	-0.14	0.31	-0.48
<i>Richmond Newspapers v. Virginia</i> (step)	0.81***	0.14	5.75
AR1	-0.11	1.1	-0.1
AR2	0.24	0.39	0.62
MA1	-0.47	1.11	-0.43
MA2	-0.46	1.04	-0.45
constant	0.0005	0.001	0.31
N	179		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.11. Impact of Supreme Court Decisions on NYT Attention to Free Speech**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Free Speech</b>			
<i>Wisconsin v. Mitchell</i>	-0.14	0.43	-0.33
<i>Denver Area Consort. v. FCC</i>	0.19	3.48	0.05
<i>Reno v. ACLU</i>	0.30	2.01	0.15
AR1	0.39***	0.08	4.64
constant	1.21***	0.05	23.96
N	132		
<b>Flag Desecration</b>			
<i>Texas v. Johnson</i> (pulse)	0.07	0.21	0.35
<i>Texas v. Johnson</i> (step)	0.53***	0.09	5.57
<i>U.S. v. Eichman</i> (pulse)	1.61***	0.44	3.6
<i>U.S. v. Eichman</i> (step)	-0.50***	0.08	-6.17
MA1	0.14	0.08	1.89
constant	0.18*	0.08	2.13
N	96		
<b>Buffer Zones</b>			
<i>Hill v. Colorado</i>	0.03	0.25	0.12
MA1	0.32**	0.1	3.09
constant	0.06***	0.007	9.26
N	84		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.12. Impact of Supreme Court Decisions on NYT Attention to Gay Rights**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Gay Rights</b>			
<i>Bowers v. Hardwick</i>	0.03	6.07	0
<i>Romer v. Evans</i>	0.63	6.41	0.1
<i>Boy Scouts of America v. Dale</i>	1.03	1.63	0.64
<i>Lawrence v. Texas</i> (pulse)	1.70*	0.71	2.38
<i>Lawrence v. Texas</i> (step)	2.21***	0.6	3.64
AR1	1.11***	0.08	13.63
AR2	-0.12	0.07	-1.66
MA1	-0.77***	0.05	-13.82
constant	3.57***	0.63	5.62
N	276		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05; NOTE: *Lawrence* pulse and step functions were estimated separately.



**Table S5.13. Impact of Supreme Court Decisions on NYT Attention to Establishment Issues**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Public Aid to Religious Schools</b>			
<i>Aguilar v. Felton &amp; Grand Rapids v. Bell</i> (pulse)	0.20	0.62	0.32
<i>Aguilar v. Felton &amp; Grand Rapids v. Bell</i> (step)	-0.05*	0.02	-2.4
<i>Agostini v. Felton</i> (pulse)	-0.04	1.02	-0.04
<i>Agostini v. Felton</i> (step)	0.05*	0.02	2.3
AR1	-0.51	0.4	-1.27
AR2	0.10	0.13	0.76
MA1	0.74	0.38	1.93
constant	0.21	0.02	10.28
N	240		
<b>Public Displays of Religious Icons</b>			
<i>Marsh v. Chambers</i>	-0.08	4.73	-0.02
<i>Lynch v. Donnelly</i>	0.23	1.81	0.13
AR1	-0.24	2.6	-0.09
MA1	0.20	2.66	0.07
constant	0.04*	0.02	2.04
N	84		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.14. Impact of Supreme Court Decisions on NYT Attention to Right to Die**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>Right to Die</b>			
<i>Cruzan v. Missouri</i> (pulse)	0.43***	0.08	5.48
<i>Cruzan v. Missouri</i> (step)	0.05	0.04	1.18
<i>Wash. v. Glucksberg &amp; Vacco v. Quill</i> (pulse)	0.82***	0.18	4.44
<i>Wash. v. Glucksberg &amp; Vacco v. Quill</i> (step)	-0.05	0.05	-1.32
MA1	0.36***	0.08	4.65
constant	0.10**	0.03	2.9
N	168		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.15. Impact of Supreme Court Decisions on NYT Attention to School Funding**

Issue Area/Case	Parameter Est.	S.E.	z-statistic
<b>School Funding</b>			
<i>SAISD v. Rodriguez</i> (pulse)	-0.06	0.09	-0.69
<i>SAISD v. Rodriguez</i> (step)	0.07*	0.03	2.13
AR1	0.44	0.08	5.5
constant	0.03	0.03	1.14
N	84		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S5.16. Impact of Supreme Court Decisions on NYT Attention to Wiretapping**

<b>Issue Area/Case</b>	<b>Parameter Est.</b>	<b>S.E.</b>	<b>z-statistic</b>
<i>Wiretapping</i>			
<i>U.S. v. US District Court (pulse)</i>	0.12	1.01	0.12
<i>U.S. v. US District Court (step)</i>	0.67**	0.24	2.78
AR1	0.43***	0.13	3.24
constant	0.22	0.21	1.01
N	84		

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

## Issue-Area Keywords for Time-Series Data-Gathering

Following Ura (2009), I measure media attention as a simple count of the mean number of daily stories each month appearing in the *New York Times*, archived at Lexis-Nexis, that mention a set of keywords related to the case.

For the Free Speech cases: “free speech” or “freedom of speech”

For the flag desecration cases: ("flag" AND "desecration") OR ("flag" AND ("burn" OR "desecrate" OR "burning")) AND NOT “Iraq”

For the Free Exercise cases: “free exercise” OR “religious freedom”

For the Establishment clause cases: “establishment clause” OR “separation of church and state”

For the more specific public display of religious icon cases: “public display” AND (“Ten Commandments” OR “Nativity Scene” OR “crèche”)

For the Title I cases: “Title I” AND “school”

For the sovereign immunity cases: “sovereign immunity”

For the Free Press cases: (“free press” OR “freedom of press” OR “freedom of the press” OR “press freedom”)

For the right to die cases: “right to die” OR “physician assisted suicide”

For the abortion cases: “abortion”

For the public sector minimum wage cases: “minimum wage”

For the affirmative action cases: (“affirmative action” OR “minority preference”)

For *SD v. Dole*: "minimum drinking age" OR "legal drinking age"

For *SAISD v. Rodriguez*: (("public school" AND "funding") OR ("public education" AND "funding") OR ("public" AND ("school" OR "education") AND "funding") OR ("public" AND "funding" AND "equal"))

For *US v US District Court*: “wiretapping” OR “wire tap”

For *Hill v. CO*: ("buffer zone" AND "speech") OR ("abortion" AND "free speech")

For *Kelo*: “eminent domain”

For *Gonzales*, the keywords were: (“medical” OR “medicinal”) AND (“marijuana” OR “cannabis”)

## **Chapter 6:**

### **Supreme Court Influence on the Presidential Agenda**

In chapter five I showed that the Supreme Court has regularly influenced the public political agenda, specified as media attention to given issues, in significant ways. In this chapter, I turn attention away from the mass political agenda and toward what is often referred to as the “policymaking agenda,” which is the agenda of political actors empowered to make binding decisions on behalf of the polity—typically Congress and the president (Wolfe et al. 2013). In this chapter I focus specifically on Supreme Court influence on the agenda of the sitting president. I chose to focus on the president rather than Congress for two primary reasons. First, the president is widely considered the “agenda-setter-in-chief”—that is, he is theorized to be the foremost agenda leader in American politics (Rutledge and Price-Larsen 2014), and because presidents are uniquely successful among the institutions in seeing their agenda translated into policy change (Grossmann 2014). Thus, I argue that it is likely that Supreme Court influence on the presidential agenda is particularly likely to result in subsequent politicking and/or policy development. Second, the Supreme Court-Presidential relations are much less studied, and as result, much less understood, than Court-Congress relations (e.g. Eshbaugh-Soha and Collins 2016). As in the previous chapter, I ultimately argue here that the Supreme Court has regularly shaped the policy agenda of the sitting president, that it does so in theoretically predictable ways, and that Court influence over the presidential agenda is a function of political context as well as the relatively independent incentives and goals of both institutions.

## The Supreme Court and the Presidential Agenda

In a press conference about a week after the Supreme Court handed down its decision in *Texas v. Johnson*, President George H.W. Bush opened with remarks on that decision:

“On Wednesday morning, the Supreme Court issued a decision which held that a person could not be convicted for desecration of our flag, the American flag, because to do so would infringe upon the right to political protest.  
... And I have the greatest respect for the Supreme Court and, indeed, for the Justices who interpreted the Constitution, as they saw fit. But I believe the importance of this issue compels me to call for a constitutional amendment. Support for the first amendment need not extend to desecration of the American flag. And we are reviewing proposed language for a constitutional amendment. We are beginning consultation with Members of the United States Congress who hold similar views. And as President, I will uphold our precious right to dissent. But burning the flag goes too far, and I want to see that matter remedied.”<sup>46</sup>

President Bush’s call to action on flag desecration is representative of a relatively rare yet regular impact of Supreme Court decisions: influence on the agenda of the sitting president. In previous chapters I explored the role of the Supreme Court in shaping the so-called “public agenda,” understood as the mix of issues that occupy the public mind at any given point in time. In this chapter, I turn my focus to the policymaking agenda itself. Understanding Court influence on the policymaking agenda is critical to a full understanding of the Court’s role in the American political system, as agenda change is an important step in the policy process. Here I begin this work by systematically examining the influence of the Supreme Court on the agenda of the sitting president. In doing so, this paper will significantly improve our understanding of the Court’s role in shaping public policy in the US.

Understanding agenda setting is fundamental to understanding policy change. Governing institutions have limited time and resources to devote to policy problems, and as a result, many issues never get addressed. The first step in one key pathway to policy change is getting an issue

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<sup>46</sup> George Bush: "The President's News Conference," June 27, 1989. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=17216>.

on the agenda of some policymaker in the political system. To paraphrase Schattschneider (1975), understanding the agenda setting process in the American political system is crucial to understanding what gets done and when.

The president is commonly understood to be the primary agenda setter in the American political system (Kingdon 1984; Peake 2001; Baumgartner and Jones 2009). Indeed, the president's ability to set the agenda is often viewed as a key source of presidential power: it allows him (or prospectively, her) to influence the priorities of other governmental actors, the media, and the mass public—to say nothing of the president's own unilateral powers (Grossmann 2014; Peake and Eshbaugh-Soha 2008; Eshbaugh-Soha and Peake 2004; Kernell 1997). Discussion of issues by the president can focus Congressional attention (Edwards and Wood 1999) and may influence the Supreme Court's agenda (Yates 2002).<sup>47</sup> As such, presidential involvement in some given policy area significantly increases the probability that official action will be taken in that policy area. Further, presidential involvement in an issue influences the substance of legislation and administrative action, as well as court outputs (Grossmann 2014; Cameron 2000). Additionally, presidential responses may significantly influence the willingness of the public or of implementing actors to cooperate with or resist policies handed down by the Supreme Court (Canon and Johnson 1999; Hall 2011). For these reasons, understanding the Supreme Court's ability to influence the presidential agenda will provide a window into an important pathway by which the Court influences policy development. Or to put it differently, presidential attention significantly increases the likelihood that action will be taken on a given

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<sup>47</sup> When the president gives even a single high-profile speech on a policy issue, that policy typically rises on the public agenda (Behr and Iyengar 1986; Cohen 1995). Importantly, Cohen finds that the president does not have to lay out an extended, substantive case for some policy in order to achieve this agenda setting effect; rather “[m]erely mentioning a problem to the public heightens public concern with [that] policy problem” (1995: 102; see also Hill 1998).

issue, thus Supreme Court influence on the president's agenda is one likely pathway by which the Court indirectly influences public policy and politics.

### ***The Policymaking Agenda***

Scholars are increasingly recognizing that no actor or institution has the “final word” in America's famously fragmented political system (e.g. Barnes 2004; Silverstein 2009; Keck 2014). This developmental view of policy emphasizes interbranch interplay over time. But governing institutions have limited time and resources to devote to policy problems, which suggests that understanding the agenda setting process in the American political system is crucial to understanding what gets done and when (Schattschneider 1975; Jones and Baumgartner 2005; Baumgartner and Jones 2009). Understanding Court influence over the “policymaking agenda”—the agenda of political actors empowered to make binding decisions on behalf of the polity (typically Congress and the president; see Wolfe et al. 2013)—is thus of central importance in understanding the Supreme Court's role in the American political system.

The Supreme Court may powerfully influence American politics and policy by shaping the political agenda. To date, the majority of the work on agenda setting and the Supreme Court concerns how the Court sets its own agenda, rather than how it shapes or influences the national agenda (e.g. Perry 1991; Yates et al. 2005; Black and Owens 2009; Owens 2010; Owens 2011). These are certainly interrelated phenomena, as, for example, members of the Court anticipate possible reactions from Congress when deciding whether or not to hear a case (Owens 2011).<sup>48</sup> As a result of this focus, however, relatively little is known about the role the Supreme Court

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<sup>48</sup> It should be noted that the Court is often able to advance its policy goals by speaking on issues not formally raised by the parties in a particular case (McGuire and Palmer 1996), indicating that the Court's agenda is somewhat more fluid than is often thought.

plays in shaping the broader policymaking agenda—that is, the agendas of other policymaking institutions in the US.

Political scientists have been interested in agenda setting at least since the early 1960s when Schattschneider (1975 [1960]) and Bachrach and Baratz (1962) published their seminal works on the topic. These scholars point out that exercising control over the agenda is no less an exercise of power than is exercising control over another actor’s behavior. Or as Schattschneider put it, “All forms of political organization have a bias in favor of the exploitation of some kinds of conflict and the suppression of others because organization is the mobilization of bias. Some issues are organized into politics while others are organized out,” (1975: 71). Schattschneider famously referred to the definition of policy alternatives as the “supreme instrument of power” (1975: 68).<sup>49</sup>

Put differently, most contemporary work on agenda setting examines the ability of groups and other interested actors to influence the national political agenda in order to pursue some desired policy change. This is the basic approach I will take in this chapter, with one key distinction. Rather than focus on some advocacy organization’s attempts to strategically alter the agenda in pursuit of some policy (e.g. gun control or environmental protection), I will focus on the effects a particular political institution has on this agenda. In other words, while most policy scholars focus on advocacy organizations’ attempts to influence the agendas of political actors (including the Supreme Court, via amicus participation and strategic litigation), I will focus instead on how the actions of one political institution shapes the agenda of another. Many studies

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<sup>49</sup> This face of power is subtle and thus very difficult to study (e.g. Anzia and Jackman 2013). Indeed, many of the operations of second face power are unobservable (Baumgartner and Leech 1998). As a result, much of the policy studies literature focuses on the positive side of agenda setting; that is, on when groups or actors are able to overcome second face power by placing issues on the political agenda (e.g. Baumgartner and Jones 2009; Pralle 2006; Rochefort and Cobb 1994; Sabatier 1988; Kingdon 1984).



of presidential power utilize this approach, and for good reason: the president is often thought of as the nation's "agenda-setter-in-chief" (Rutledge and Price-Larsen 2014), and because presidents are the actor in Washington most likely to achieve policy change (Grossmann 2014). The Supreme Court's role as a national agenda setter, on the other hand, has received very little scholarly attention.<sup>50</sup>

### ***Inter-Institutional Agenda Setting***

The importance of the policymaking agenda has led many scholars to interrogate the power of governing institutions to set or influence the agendas of other such institutions. Indeed, the ability to set or constrain the policymaking agenda has long been considered one of the most important sources of political power (Schattschneider 1975; Bachrach and Baratz 1962; March and Olsen 1976; Cobb and Elder 1972). As such, a few scholars have sought to systematically examine the complex dynamics of agenda setting in the American political system. Flemming, Wood, and Bohte (1999), for example, examine how the institutional agendas of Congress, the president, and the Supreme Court interact with each other, and with the "systemic" or "public" agenda. They find that issue attention to civil rights, civil liberties, and environmental issues is driven by complex interactions among the four groups studied, and that the patterns of interactions vary significantly across issue domains. That is, Flemming and coauthors (1999) conclude that neither top-down nor bottom-up models of agenda setting adequately capture agenda dynamics in the American political system. Similarly, Edwards and Wood (1999) find

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<sup>50</sup> The importance of inter-institutional agenda influence is illustrated by an important paper on Court-Congress relations by Hettinger and Zorn (2005). Hettinger and Zorn observe that many existing studies in the separation of power literature rely on explanations of case-level factors in their attempts to explain Congressional overrides of the Court. Hettinger and Zorn demonstrate, however, that the relative rarity of overrides hampers this approach, and that both Court- and Congress-specific features determine whether a Court decision will receive attention from Congress, and thus even be a candidate for override. Put differently, they argue that even if overrides are the ultimate outcome of interest, scholars must pay careful attention to the related but distinct set of features that influence the Congressional agenda if we are to develop a realistic model of Court-Congress interactions. It is on important insights such as this that I intend to build in this chapter.

that the president, Congress, and the media, all react to issues and all influence the attention of the others, though the president does have significant opportunity to lead in domestic policy. In short, these scholars argue that the agenda emerges from complex interactions of institutional preferences, recent history, electoral incentives, and exogenous events.

In light of this significant complexity, researchers often seek to explain the sources of a single institution's agenda, or the influence of one branch of government over the agenda of another branch. Light (1999) argues that information, expertise, and political capital significantly shape the president's agenda. Eshbaugh-Soha (2005) builds on this work, arguing that a president's decision to pursue major policy goals in Congress is significantly shaped by political context, especially fiscal constraints and partisan gridlock. Others have found that the president selectively and strategically uses his agenda setting capacity to respond to (and perhaps even manipulate) public opinion (Druckman and Jacobs 2015; Canes-Wrone 2006; Yates and Whitford 2005).

Much of this inter-institutional research has centered on the ability of the president to influence the Congressional agenda. Edwards and Barrett (2000), for example, find that presidential initiatives are more likely to receive consideration from Congress than are initiatives advanced by members of Congress. Further, presidents' most significant legislative proposals are virtually guaranteed to receive hearing in Congress (Mayhew 2004; Edwards and Barrett 2000). Recent research clearly demonstrates that presidents can significantly shape the Congressional agenda, at least under some conditions. (Rutledge and Price Larsen 2014; Lovett et al. 2015; Eshbaugh-Soha and Peake 2004; Peake 2001). Rutledge and Price Larsen (2014) call the president the "agenda setter-in-chief" in light of their finding that in the areas of environmental policy, law and crime, health care, macroeconomics, defense, and international affairs,

presidential attention significantly increases the amount of attention paid by Congress to these issues. Similarly, Lovett et al. argue that when a “popular president announces a major policy initiative in the State of the Union address at the beginning of a new congressional session, committee chairs follow suit” (2015: 22). However, they demonstrate that while presidents are key agenda setters, this ability is conditional on presidential approval, shared party control of the presidency and Congress, and timing (Lovett et al. 2015).

Many students of judicial politics have sought to shed light on the president’s influence on the Supreme Court. In the extensive literature on agenda setting within the Supreme Court, for example, the influence of the Solicitor General (SG) has received significant attention. The Solicitor General is the litigating arm of the executive branch; it is this office that signals the president’s preferences to the Court directly, both at the certiorari stage, and on the merits (Caldeira and Wright 1988; Meinhod and Shaw 1998; Salokar 1992; Caplan 1988). Further, litigants supported by the Solicitor General are much more likely to win than not (Segal 1988; Segal 1990; McGuire 1994; Bailey, Kamoie, and Maltzman 2005). When the SG submits an amicus, he wins 74% of the time; when the office argues orally, it wins 76.6% of the time; when the SG himself argues before the Court, he wins 94% of the time (Segal 1988). Typical explanations for the high degree of success Solicitors General find before the Supreme Court include his status as a “repeat player,” his elite status, or his reputation as a source for credible legal arguments and information (but see Wohlfarth 2009).

Segal (1990), however, argues that the apparent influence of the Solicitor General over the Supreme Court is actually a function of the Court’s tendency to defer to the president (see also Collins 2004; Yates 2002). Bailey, Kamoi, and Maltzman (2005) argue that Justices tend to vote with the SG when s/he adopts a policy that is ideologically congruous with the justice.

Further, justices are more likely to take seriously a cue from the SG when he takes a position contra to his typical policy predilections (e.g. a conservative SG advocates a liberal position). Thus, the SG is not an apolitical legal expert—his influence must be understood in political terms. These studies in the judicial decision-making literature suggest that the office of the Solicitor General exerts an institutional constraint on the Court by signaling the president’s preferences to the justices.

Other scholars have explored interactions between Congress and the Supreme Court. For example, Dahl (1957) famously argued that the Supreme Court routinely makes policy, and that if in doing so it upsets the current “lawmaking majority” Congress typically reverses the Court’s policy (cf. Hall and Black 2013). Similarly, Hall and Ura (2015) argue that the Court tends to only invalidate federal laws that have little support from elected officials (see also Uribe et al. 2014). This relationship is likely attributable to Congress’ willingness to work to respond Supreme Court invalidations of its statutes, especially when doing so is consistent with the reelection goals of members of Congress (Ignagni and Meernik 1994). Put differently, these works indicate that Supreme Court invalidations of statutes that are favored by sitting political elites often return to the institutional agenda of Congress. Pickerill (2004) and Blackstone (2013) have demonstrated that such invalidations frequently prompt Congress to respond by reenacting the statute in modified form, such that the new law comports with the Court’s ruling but also pursues Congress’ policy goal (see also Clark and McGuire 1996; O’Brien 2005).

Meernik and Ignagni (1997) find Congress attempted to override a Supreme Court invalidation of some policy 125 times (out of 569 such reversals, or 22% of the time) between 1954 and 1990, and that in 41 of those 125 cases it succeeded (33%; 7.2% overall overturn rate). Bringing the president back into the fray, in analyzing attempted and successful overrides of

Court invalidations by Congress, Meernik and Ignagni (1997) find that presidential opposition to a Court ruling is the strongest predictor of Congressional decisions to work against the Court (making it 21% more likely than average that they will attempt, and 89% more likely that they will succeed). Additionally, they find that Congress is considerably more likely to attempt to reverse the Court when “there is evidence of public opposition,” when the ruling involves a state law, and when the ruling involves issues of federal power (Meernik and Ignagni 1997: 463).

These studies consistently find that Congress is relatively more likely to respond to invalidations when the cases concern issues of federal power, and is more likely to do so effectively when the offending decision is salient and unpopular among the public. Policy responses necessarily begin as issues on the Congressional agenda. These studies collectively demonstrate the importance of understanding the Court’s influence on other institutions’ agendas. Importantly, Congress can also respond to decisions it views favorably (that is, there is more to the story than “backlash,” e.g. Graber 1993; Gillman 2002). For example, Klarman (2004; 1994) has famously argued that the chief impact of the Court’s decision in *Brown v. Board* (1954) was to provoke a massive political backlash in the South, which in turn rallied national opinion behind *Brown* and precipitated the enactment of the 1964 Civil Rights Act.

Casper (1976) goes further, making a powerful case that the Supreme Court has several tools beyond invalidation at its disposal to shape public policy, including its power of statutory construction. Works in this vein demonstrate that Congress itself clearly views the Court’s statutory decisions as important, as it frequently works to override or alter them (Eskridge 1991; Barnes 2004; Baum and Hausegger 2004; Hettinger and Zorn 2005). These overrides provide the opportunity for “dissatisfied groups to revisit issues in a legislative forum, and raise concerns that courts—as adjudicators of discrete legal disputes—may either have overlooked or be poorly

designed to consider” (Barnes 2004: 5). Moreover, Barnes argues that this interbranch dialogue promotes broad political participation, provides an opportunity for Congress to assert control over contested issues, and often increases judicial consensus on those issues (see also Barnes 2007).

Relatedly, recent works suggest that Congress significantly influences the Supreme Court’s agenda. Harvey and Friedman (2006) argue that members of the Supreme Court rationally anticipate and seek to avoid Congressional punishment for adverse decisions (such as those documented by Meernik and Ignagni 1997), and thus that the Court’s decisions to grant certiorari, as well as decisions on the merits, are influenced by Congressional preferences (see also Uribe et al. 2014). Clark (2009) goes further, arguing that the desire to maintain judicial legitimacy drives justices to exercise self-restraint in the face of congressional (and public) preferences. That is, Clark concludes that “[w]hen the Court fears it will lose public support, it will adjust its behavior in light of congressional signals about the Court’s level of public support” (2009: 985; cf. Owens 2010, arguing that archival evidence suggests that justices do not take separation of powers concerns into consideration at cert stage).

The above studies explore the role the president plays in shaping the agendas of Congress and the Supreme Court, and the Supreme Court’s influence over the agenda of Congress and vice versa. Somewhat less attention has been paid to the role Congress and the Court play in shaping the president’s agenda. What little research does exist in this area suggests that Congress has little to no ability to influence the presidential agenda (Rutledge and Larsen Price 2014; Edwards and Barrett 2000; Edwards and Wood 1999; Flemming et al. 1999). The existing literature has two major limitations. First, existing work emphasizes Congressional responses to Court decisions, and thus leaves unanswered significant questions regarding agenda of the executive

branch. Yet influence on the presidential agenda is important, as the presidential agenda is a key factor in policy change in the US. Second, like the compliance literature (and much other work in Law and Courts), the literature focuses almost entirely on judicial invalidations. As a result, we know very little about how non-invalidations, which make up the bulk of the Court's work, influence the agendas of other institutions. In chapters two and three I argued that non-invalidations are important, and that their effects on politics and policy must be rigorously scrutinized if we are to develop a full understanding of the Court's impact in the American political system—the potential agenda-influence of such decisions are one pathway through which such decisions may significantly influence subsequent politics and policy development.

The few works that seek explicitly to examine the Court's role as an agenda setter tend to focus on the "public agenda"—that is, on media coverage, as examined in the previous chapter. Recall, for example, that Flemming, Bohte, and Wood argue that Supreme Court decisions can "expand the scope of conflict by activating new groups and accentuating old rivalries" (1997: 1225). These processes, they argue, may in turn amplify public and media attention, and draw other institutions into the fray. Flemming et al. identify thirty-one "important" cases (importance measured as appearing in the *CQ Guide to the Supreme Court*) and found that seven affected the agenda. Flemming et al. find that in these seven cases, which involve school desegregation, flag burning, and public school prayer, the Court did cause long-term shifts in media attention on those issues, and that those decisions "rearranged the distribution of political influence, and significantly expanded the scope of conflict for the underlying issues" (1997: 1224; see also Ura 2009). In a later paper, Flemming, Bohte, and Wood recognize that changes in attention to issues "emerge from interaction between the three branches of government, as well as between the government and the people" (1999: 76). Here again though, Flemming and coauthors focus on a

subset of issues (civil rights, civil liberties, and environmental policy) and measure attention as coverage in the media, again finding that the Court, like other institutions, can influence attention to an issue. More importantly, they argue that neither top-down nor bottom-up explanations for agenda setting are satisfactory; the reality of national agenda setting is far more complex, entailing a “hybrid of both vertical and horizontal interactions” (1999: 104).

Very little existing research explicitly examines Supreme Court influence on the presidential agenda. Rather, most work examining the executive-judicial relations focuses on presidential rhetoric about judicial nominations (e.g. Maltese 1995; Johnson and Roberts 2004; Holmes 2007; Holmes 2008). One recent study has taken first steps in the direction of understanding presidential responses to the Court by examining why and when presidents refer to Supreme Court decisions in their speeches or written commentary (Eshbaugh-Soha and Collins 2015). Eshbaugh-Soha and Collins (2015) argue that presidents will comment on cases when doing so serves their reelection or policy goals, or when they expect that doing so might enhance their historic legacy. This perspective is well-grounded in the literature on presidential behavior (e.g. Ross 2012; Canes-Wrone 2001; Light 1999; Moe 1985). Similarly, Blackstone and Goelzhauser (2014) argue that presidents direct more rhetoric toward the Supreme Court during election years and when there is a vacancy on the Court. In short, existing works find that political context significantly affects the likelihood that the sitting president will respond to Court decisions with political rhetoric, and specifically, that political and policy views importantly condition the likelihood of a presidential response. However, these existing works focus on how the political environment shapes the president’s incentives; no work has yet systematically examined how Supreme Court action per se might provoke a presidential response. Collins and Eshbaugh-Soha (2014) begin to address the shortcoming in the literature



by examining the influence of some case-level characteristics on presidential rhetoric. They find that presidents are more likely to comment on salient cases, and are especially likely to make negative remarks about decisions when the Court exercises its constitutional review power, and when the Court's decision is ideologically distant from the president's preferred outcome.

In summary, the institutional agendas of each of the three branches of government are significantly related. The president can influence the agenda of Congress by focusing attention on issues, especially when he is popular, and when his party controls Congress. The president can influence the Supreme Court's agenda by signaling his preferences through the Solicitor General. Congress, in turn, appears to influence the Supreme Court's agenda, as members of the Court rationally anticipate and generally seek to avoid adverse responses from Congress. In contrast, Congress appears to have relatively little influence over the presidential agenda. Finally, we know very little about the extent to which the work of the Supreme Court may influence the agenda of the president, although some recent work suggests that the Court may place issues on the presidential agenda when it makes salient decisions that are adverse to the president's policy preferences. It is toward this important but poorly understood relationship that I now turn.

### **Theory & Hypotheses**

The theory here begins from the perspective that the president's political agenda seeks to serve two primary goals: attaining policy preferences and reelection. Eshbaugh-Soha and Collins (2015) find that presidents speak on Court decisions almost exclusively after they have been decided, and attribute this finding to presidents' desire to signal their preferences on important and salient issues. To be sure, the Supreme Court lacks the formal agenda setting powers that the president enjoys: for example, it has no officer to carry its preferences to the executive for

consideration. But the lack of institutional mechanisms for agenda setting in the other branches hardly indicates that the Court lacks the ability to influence the agendas of the other institutions, as the literature discussed above with respect to Court-Congress relations amply demonstrates. Rather, this suggests that the Court's ability to influence the president's agenda will be contingent on the factors that shape the president's agenda under normal circumstances. Put differently, if the president's agenda is shaped by his policy preferences (however constrained by political context), then Supreme Court decisions which speak to issues on the president's agenda may be likely to draw a response. By the same token, if a Supreme Court case moves some policy away from the president's preferred policy, then that decision may place an issue on the presidential agenda even if it was not there before. Similarly, if the president's agenda is shaped by a desire for reelection, then cases relevant to the president's reelection goals are likely to influence his agenda.

Existing scholarship strongly suggests that both Court- and presidential-level factors should influence the likelihood that a Court decision puts an issue on the president's agenda (e.g. Lovett et al. 2015; Hettinger and Zorn 2005; Eshbaugh-Soha 2005). That is, the likelihood that the president utilizes his agenda setting power varies in predictable ways; thus the extent to which he will respond with that agenda setting power to Court decisions varies according to both case-level factors and the presidential-level factors that inform the more general phenomenon.

Previous works have identified several important variables that influence a president's ability to successfully put an issue on Congress' agenda. Popular presidents are better able to set the agenda than are less popular presidents (Lovett et al. 2015; Eshbaugh-Soha and Peake 2004; Page and Shapiro 1985; Horvit et al. 2008). Unsurprisingly, presidents are more successful at setting the Congressional agenda when copartisans control Congress. (Lovett et al. 2015).

Finally, Presidents are likely to be more successful in setting the agenda when the issue is already salient (Eshbaugh-Soha and Peake 2004).

While these studies have shed important light on the conditions under which relative success of presidential agenda-setting efforts are more likely to succeed, we know less about what induces a president to try to utilize this power to shape the national agenda—that is, about the sources of the president’s own agenda per se. Eshbaugh-Soha (2005) argues that a few key factors influence the president’s agenda. The overall size of a president’s agenda is influenced by the previous year’s budget: larger deficits lead to smaller agendas (i.e. fewer distinct issues are tackled by the president). In contrast, higher approval ratings encourage presidents to take on more issues. Finally, Eshbaugh-Soha (2005) argues that presidents build a larger agenda during unified government than during divided government, as they expect to be able to successfully take on more policy issues.

Building on these studies, and the perspective that the president’s agenda centers on his policy and reelection goals, I hypothesize that presidential-level, court-level, and political-context variables will influence the likelihood that a Supreme Court decision influences the presidential agenda. To be clear, some of these factors can be plausibly grouped with either policy goals or reelection goals, but this fact simply attests to the valence between those two abstract categories when they are brought down to a more concrete level.

The key hypotheses here are that the political and legal importance and the mobilizability of issues will be central in informing presidents’ decisions to take up an issue decided by the Supreme Court. Politically important cases are more likely to draw presidential attention because they are those most likely to affect the president’s ability to pursue his policy and reelection goals (Eshbaugh-Soha and Collins 2015). The logic here is twofold: first, the president’s agenda

is necessarily limited—he can deal with only so many issues and problems at a time—thus only important decisions are likely to earn presidential attention; second, as chief executive, the modern president is expected to have answers to all important issues facing the nation (e.g. Lowi 1986). This is perhaps especially true when cases are both important and salient (though importance or impact of a case also predicts its media salience; see Strother 2017a). Similarly, interest group participation in a case indicates the extent to which politically active interests care about an issue. This points to the perceived contemporary political importance of the case, certainly—but also the potential for group mobilization on the issue. Given the central importance of such interests in electoral politics (Cohen et al. 2008), officeholders—even presidents (at least in their first term)—ignore such “intense policy demanders” at their peril.

***Key Hypotheses:***

**H1:** The president is more likely to respond to important Supreme Court decisions than less important ones.

**H2:** The president is more likely to respond to cases on issues that are mobilizable.

**H3:** The president is more likely to respond to cases which are salient.

Clearly, one issue here is that interest group participation as *amicus curiae* is a key indicator of *both* importance and mobilizability. This theory of *amicus-as-cue*, well-established in the Public Law literature, holds that the “potential significance of a case is proportional to the demand for adjudication among affected parties and that the amount of *amicus curiae* participation reflects the demand for adjudication” (Caldeira and Wright 1988: 1112). In fact, the potential for political mobilization on that issue may be part of what makes a case important. The problem for this analysis is that relying on this one variable makes it very difficult to adjudicate between two potential explanations (importance versus mobilizability, except for the extent to which those latent concepts covary). In an effort to address this, I also include a widely accepted measure of the importance of Supreme Court decisions—the length of the opinion (Black and

Spriggs 2008). This measure, however, is generally thought to capture *legal* importance, not necessarily political importance.<sup>51</sup>

Additionally, a number of other factors will likely influence the president's willingness to take up a Court decision. First, previous research suggests that two key presidential-level policy preference factors influence the likelihood that an issue makes it onto the presidential agenda: the ideological distance between the policy announced by the Court and the president's preferred policy outcome, and Court invalidations of policies. Both of these factors should significantly increase the probability of negative reactions from the president (Collins and Eshbaugh-Soha 2014). Further, the president may be more likely to take on new agenda items (including by responding to Court cases) during election years (Collins and Eshbaugh-Soha 2014). Finally, presidents are more likely to take on issues when they expect to be successful in pursuing their policy aims on that issue: as such, presidents may be more likely to respond to Court decisions when their job approval rating is high, when the national debt is relatively small, and during times of unified government (Eshbaugh-Soha and Collins 2015; Peake and Eshbaugh-Soha 2008; Eshbaugh-Soha 2005; Eshbaugh-Soha and Peake 2004). Measurement strategies for these theorized indicators will be discussed in the following section.

### **Ancillary Expectations from the Literature:**

#### ***Presidential-Level Factors***

**E1:** The president is more likely to respond to Supreme Court decisions when they are ideologically distant from his preferred policy position.

**E2:** The president is more likely to respond to Supreme Court decisions that invalidate statutes than those in which it upholds statutes.

**E3:** The president is more likely to respond to Supreme Court decisions during election years.

**E4:** The president is more likely to respond to Supreme Court decisions when his job approval rating is high, and less likely to do so when it is lower.

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<sup>51</sup> A possible alternative measure would be inclusion in *Congressional Quarterly's* (CQ) list of "important" cases. I declined to go this route, however, because of a possible endogeneity problem: the CQ list comes out well after the end of a Supreme Court term, and as such, it might be the case that some decisions make it onto the CQ list in whole or in part because the president took some action responding to the decision. So while word count is an imperfect measure for my purposes, it is at least wholly independent from the outcome of interest.

### ***Political Context Factors***

**E5:** The president is more likely to respond to Supreme Court decisions when the national debt is small (or in surplus), and less likely to respond when the debt is larger.

**E6:** The president is more likely to respond to Supreme Court decisions during times of unified government.

### **Approach & Data**

In order to test the hypotheses outlined above I conduct Firth-logistic regression analyses of presidential responses to all Supreme Court cases formally decided from 1955 to 2001 (N=5,620).<sup>52</sup> The president's agenda is typically measured in one of two ways: the content of speeches and written statements (such as State of the Union Addresses), or the content of executive orders (see, for example the Policy Agendas Project 2016; Peake and Eshbaugh-Soha 2008, Flemming et al. 1999, etc.). In this paper, I take the more common approach in the literature and measure the presidential agenda using written and spoken statements. Thus data for the dependent variables in this study—presidential mentions of Supreme Court cases—comes from Collins and Eshbaugh-Soha's (2014) study of presidential rhetoric about Supreme Court decisions. They collected these data by keyword searching for the string "Supreme Court" in the *Public Papers of the President* database, available online at the American Presidency Project (2016). After locating presidential mentions of the Supreme Court, they determined whether the president referred to a specific case, and if so, identified the case mentioned. Only cases which were decided during the president's tenure were counted (i.e. a president remarking on a case that occurred prior to his term in office would not be counted in this dataset). Further, they coded the tone of all of the presidential remarks in their dataset: negative mentions are those critical of the Court's decisions, positive mentions praise or agree with decisions, while discussions in

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<sup>52</sup> This time period is a reflection of the available data: Collins and Eshbaugh-Soha's (2014) presidential rhetoric data run from 1953 to 2013. Clark, Lax, and Rice's (2015) media data run from 1955 to 2008. Collins (2008) amicus data however, run from 1946 to 2001. Thus 1955-2001 is the available window.

which the president takes no clear stance are coded as neutral. For extended discussion of this dataset and coding rules, see Collins and Eshbaugh-Soha (2014: 11-14).

The key independent variables in this study measure a decision's legal and political importance, its salience, and the extent to which the issue is "mobilizable." Following extensive literature in Law and Courts research, I utilize amicus participation to proxy political importance (Collins 2008; Hansford 2004; Epstein and Knight 1999; see Strother 2017a). Amicus participation by interest groups also indicates the extent to which "intense policy demanders" are interested in a given case, and thus the policy to which it is relevant (Cohen et al. 2008). Amicus participation also provides a reasonable indication of the extent to which an issue is mobilizable at that point in time, for the same reason. Data on amicus participation was obtained from Collins' (2008) "Friends of the Supreme Court" dataset; the variable of interest takes on a value equal to the count of amicus briefs filed (for either party) for a given case. Collins' data also includes a dummy variable indicating whether the office of the Solicitor General participated as amicus.

Data on opinion length (a proxy for legal importance) was obtained from Black and Spriggs' (2008) "Length of U.S. Supreme Court Opinions" data.<sup>53</sup> Black and Spriggs' opinion-length data take values equal to the number of words in a given opinion; I divided the word counts by 1,000 to facilitate interpretation (so a 1-unit increase in the IV is equal to an additional 1,000 words in the opinion). Salience data was obtained from Epstein and Segal's (2000) case salience database.<sup>54</sup> This is a dummy variable that takes on a "1" value if a case appeared on the front page of the *New York Times* the day after it was decided, and "0" otherwise.<sup>55</sup>

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<sup>53</sup> Available at [https://ryancblack.org/webfiles/replication/opLength\\_NYT.zip](https://ryancblack.org/webfiles/replication/opLength_NYT.zip)

<sup>54</sup> <http://scdb.wustl.edu/data.php?s=5&i=2>

<sup>55</sup> This measure is probably overly-conservative (e.g. Clark, Lax, and Rice 2015). All findings are robust to specification of salience as the number of new stories on that case appearing in the *New York Times*, *Washington*

Other independent variables come from two sources: Collins and Eshbaugh-Soha's (2014) dataset, and the Supreme Court Database<sup>56</sup> (Spaeth et al. 2015). Collins and Eshbaugh-Soha constructed several variables which capture important elements of the political environment that may influence presidential responses to Supreme Court decisions: their data includes variables on the ideological distance between a Court decision and the president's policy preference, the president's approval rating (which I have rescaled to vary between 0 and 1), and a dummy indicating whether a rhetorical mention came during an election year.

The Supreme Court Database (SCD) contains data on wide range of case-level variables. I utilize the SCD dummy variable indicating whether a decision invalidated a statute (declared it unconstitutional). I also utilize the SCD "minority votes" variable to operationalize judicial dissensus. This is a count variable equal to the number of justices dissenting from the opinion of the Court in a given case. This minority votes variable was also used to construct a "minimum winning coalition" variable which is equal to 1 when a decision was 5-4 or 4-3, and 0 otherwise.

Data on the annual budget were collected from the White House Office of Management and Budget (OMB); the variable is equal to the national debt (or occasionally, surplus) in billions of dollars.<sup>57</sup> Following Eshbaugh-Soha (2005), I lag the budget one year in all models. Finally, I generated a dummy variable for divided government, which is coded as "1" when the presidency

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*Post*, and *Los Angeles Times*. I rely primarily on the Epstein and Segal measure to mitigate against temporality problems that might arise with reliance on the Clark et al. measure. That is, the Epstein and Segal measure only counts stories coming immediately after the decision, whereas the Clark et al. data counts stories appearing for a full year after the decision. As such, reliance on the Clark et al. measure might introduce serious endogeneity problems, as cases may receive coverage because the president responded to them per se, and not because of Court action in the case.

Clark et al.'s data is available at: Tom S. Clark, Jeffrey R. Lax, and Douglas R. Rice. 2014. "Measuring the Political Salience of Supreme Court Cases." Harvard Dataverse, V1: <http://dx.doi.org/10.7910/DVN/29637>

<sup>56</sup> Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2015. Supreme Court Database, version 2015 release 01. URL: <http://Supremecourtdatabase.org>

<sup>57</sup> All budget numbers are adjusted for inflation (2015 dollars). For original data see Table 1.1 at <https://www.whitehouse.gov/omb/budget/Historicals/>

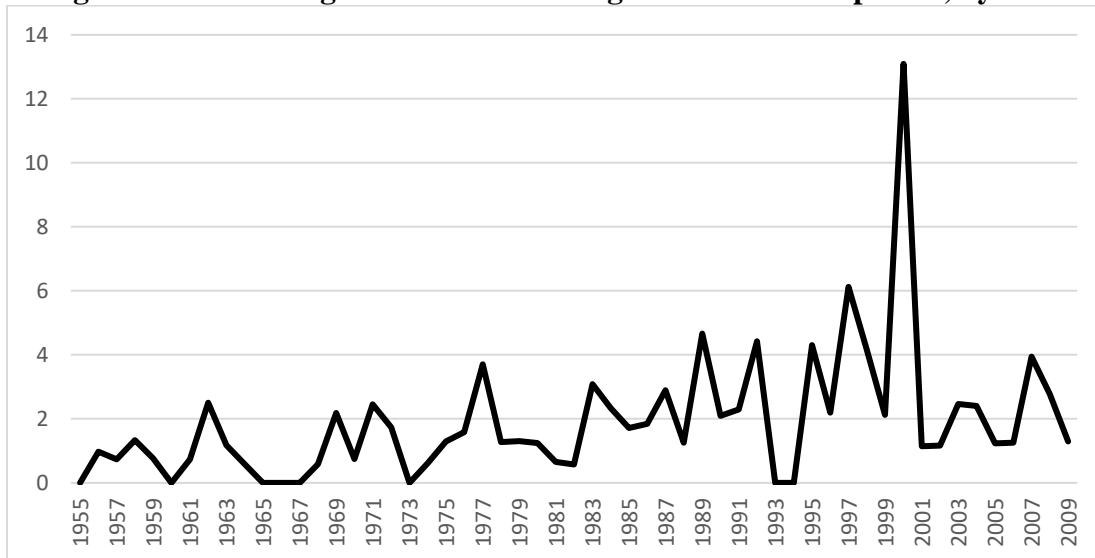


and at least one house of Congress are controlled by different political parties, and “0” when the presidency and both houses of Congress are controlled by the same party.

### Analysis & Findings

Presidents responded in rhetoric to 118 Supreme Court decisions in the sample (2.01 percent of cases in sample). Figure 6.1 shows the frequency of presidential responses to cases over time. A full list of cases discussed by the president is presented in supplementary material at the end of this chapter. Presidents mentioned cases in anywhere from 1 to 31 separate appearances or statements for a total of 381 mentions.<sup>58</sup>

**Figure 6.1. Percentage of Cases Garnering Presidential Responses, by Year**



As noted above, I recoded Collins and Eshbaugh-Soha’s (2014) count data into a dummy variable and use Firth logistic regression to estimate the models (Firth 1993; Zorn 2005; Coveney 2015; Bell and Miller 2015).<sup>59</sup> The Firth approach utilizes penalized maximum likelihood estimation to allow convergence to finite estimates with very sparse data (Coveney

<sup>58</sup> President Obama criticized *Citizens United v. FEC* on 31 separate occasions, making that case a significant outlier in the dataset. *Citizens United* is omitted from the analyses because of constraints imposed by the data for some of the independent variables in the model.

<sup>59</sup> I also estimate rare events logit models using King, Tomz, and Zeng’s relogit package as a robustness check (King and Zeng 2001; King, Tomz, and Zeng 2003). These models are presented in the supplementary materials.

2015; Heinz and Schemper 2002). That is, estimates from standard logit will be biased when modeling sparse (or separated or quasi-separated) data because the maximum likelihood estimates tend toward infinity and thus become inestimable; the Firth approach corrects for this bias by adjusting the likelihood function by a fixed quantity: the Jeffreys (1946) prior. All models include president-level fixed effects.<sup>60</sup>

Table 6.1 presents the full models: model one estimates the effects of the specified variables on all (any) presidential mentions of a Supreme Court decision, model two estimates the effects of those variables on positive/approving presidential mentions, model three considers only negative responses, model four only neutral mentions. As with standard logistic regression, the estimates presented in Table 6.1 are logged odds ratios. The models in Table 6.1 broadly support the hypotheses specified above: importance, salience, and mobilizability significantly increase the likelihood that a Supreme Court decision will influence the president's agenda. Focusing first on model 1 we find that importance (measured as logged word count), salience (number of post-decision newspaper stories on the case), and mobilizability (number of interest groups that participated in the case as *amicus curiae*) all exhibit substantively large and highly significant influence on the likelihood that the case influences the president's agenda, even when controlling for other agenda-related factors. Further, and consistent with expectations from the literature, we see that presidents are significantly more likely to respond to Supreme Court invalidations of statutes than decisions upholding statutes. Contrary to expectations, however, we find that presidents are actually *more* likely to respond to cases during times of divided

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<sup>60</sup> Additionally, I specify both the Firth and relogit models with random effects to ensure that the results were not being driven by the fixed effects, and the results do not change. That is, the fixed effects specification is not driving the finding.

government than during unified government. Further, presidential approval, the budget situation, and election year all fail to significantly influence the likelihood of a presidential response.

**Table 6.1. Predictors of Presidential Responses to Supreme Court Decisions, 1955-2001**

VARIABLES	(1) Any	(2) Positive	(3) Negative	(4) Neutral
Ideological Distance	-0.28 (0.23)	-1.19** (0.38)	1.54** (0.54)	-0.16 (0.32)
Unconstitutional	0.38 (0.29)	-0.56 (0.52)	1.16** (0.42)	0.15 (0.42)
Importance (word count)	0.07*** (0.01)	0.06*** (0.02)	0.02 (0.02)	0.05*** (0.01)
Total number of amici	0.08*** (0.02)	0.10*** (0.02)	0.02 (0.02)	0.03 (0.02)
Salient case	1.99*** (0.26)	2.32*** (0.41)	2.72*** (0.50)	1.97*** (0.35)
Presidential Approval	-0.99 (1.32)	-0.68 (1.94)	-7.15* (2.81)	0.69 (1.88)
Reelection Year	0.06 (0.31)	0.17 (0.46)	-0.26 (0.58)	-0.35 (0.49)
Divided Government	2.12** (0.73)	3.45** (1.17)	1.51 (1.01)	1.69 (1.21)
Previous Fisc. Yr. Budget	-0.0007 (0.001)	-0.001 (0.001)	-0.0001 (0.001)	-0.0003 (0.001)
Constant	-7.37*** (1.08)	-11.44*** (2.11)	-4.61* (1.91)	-7.96*** (1.56)
Observations	5,623	5,623	5,623	5,623

Note: Table reports results from fifth-logistic regression models of presidential responses to the U.S. Supreme Court: the dependent variable takes on a value of 1 if the sitting president responded to a Court decision. Fixed effects are omitted for presentation. Standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed tests).

Models 2 through 4 provide some needed nuance to the findings just discussed. For example, we see that the ideological distance between the Court's decision and the president's preferred policy significantly influences the likelihood of both positive and negative responses, and in the expected directions. That is, presidents are more likely to respond negatively as the ideological distance grows, and less likely to respond positively as that distance grows. We see also that the observed effect of declarations of unconstitutionality on the presidential agenda is driven by negative attention: presidents are much more likely to respond to a decision negatively when the Court invalidated a statute (compared to when it did not), but are no more likely to

respond positively or in a neutral manner to such a decision. Further, we see that the effects of legal importance and public salience are consistent across all three types of presidential responses. Importantly, however, amicus participation (mobilizability) appears to significantly influence the probability that the president will respond positively to a decision, but has no effect on negative or neutral responses. Similarly, we see that presidential approval appears to constrain the president's willingness to respond to cases he disapproves of (i.e. negative mentions of cases), but has no effect on positive or neutral mentions. Finally, we see that presidents are much more likely to comment positively on cases decided during divided government, but are no more likely to do so on negative or neutral cases.

An important objection may be raised at this point: it could be that the president responds to Supreme Court decisions in cases that were on his agenda before the Court decided the case.<sup>61</sup> That is, responding to a Supreme Court decision is not necessarily proof that the Court placed an issue on the presidential agenda; and in fact, it may be the case that the president only responds to Supreme Court decisions on issues that were already on his agenda. In order to examine this possibility, I use participation by the Solicitor General (SG) to proxy the presidential agenda pre-intervention (intervention being the Supreme Court decision). To put it differently, the Solicitor General is essentially the litigating arm of the executive branch, thus cases in which he or his office participates are likely to be on the president's agenda anyway.<sup>62</sup> One thing that is

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<sup>61</sup> Additionally, one might worry about possible selection effects if the set of cases decided on the merits (i.e. the cases analyzed here) made it to the merits stage after being filtered by the executive. This appears not to be a problem: between 1970 and 1993, the SG participated at the cert stage in only 277 cases—and of those, it did so voluntarily (i.e. without invitation from the Court) in only 19 cases. Further, the SG's recommendations at the cert stage matter, but can be trumped by legal considerations (Black and Owens 2010; Pacelle 2003).

<sup>62</sup> These are likely conservative estimates, because many cases in which the SG participates, it does so because the Court invites him to. That is, the Court routinely *requests* executive input on cases—and thus may well be putting some of these cases on the executive agenda before it decides on the merits (Johnson 2003). Data gathered by Rich Pacelle and colleagues indicates that the SG participates as amicus at the merits stage in about 29% of cases. In approximately 23% of the cases in which the SG participates, it does so at the invitation of the Court (or roughly 7% of all cases); in the remainder, the SG participates without any invitation from SCOTUS.

immediately clear is that the president is more than twice as likely to speak on a decision in a case in which the Solicitor General participated by filing an amicus brief (3.6% of cases, compared to 1.5% if SG did not participate;  $p=0.0001$ ). This suggests that pre-decision importance to the executive significantly increases the likelihood of a response afterward.

**Table 6.2. Presidential Statements on Court Cases by SG Participation**

VARIABLES	(5) Any, No SG	(6) Any + SG
Ideological Distance	0.02 (0.28)	-0.91* (0.43)
Unconstitutional	0.17 (0.36)	0.48 (0.51)
Importance (word count)	0.07*** (0.02)	0.07** (0.02)
Total number of amici	0.09*** (0.02)	0.08** (0.03)
Salient case	1.93*** (0.32)	2.16*** (0.47)
Presidential Approval	-0.45 (1.60)	-2.07 (2.39)
Reelection Year	-0.12 (0.37)	0.57 (0.56)
Divided Government	2.32** (0.87)	1.43 (1.30)
Previous Fisc. Yr. Budget	-0.001 (0.001)	0.001 (0.002)
Constant	-7.98*** (1.30)	-4.60* (1.93)
Observations	4,529	1,094

Note: Table reports results from fifth-logistic regression models of presidential responses to the U.S. Supreme Court: the dependent variable takes on a value of 1 if the sitting president responded to a Court decision. Annual effects are omitted for presentation. Standard errors in parentheses; \*\*\*  $p<0.001$ , \*\*  $p<0.01$ , \*  $p<0.05$ , +  $p<0.1$  (two-tailed tests).

Importantly, however, it also indicates that in a significant number of cases, Supreme Court decisions put issues on to the presidential agenda, in that they provoke responses to cases in which the SG did not participate. This being the case, I separate cases in which the SG

In an attempt to see whether invitations were biasing my findings, I estimated my models separately for SG participation with and without SCOTUS invitation. However, the president only responded to 3 cases in my dataset in which the SG participated at the Court's request. See the supplementary materials for full results.

participated from those which it did not to see how the theorized factors may differ in their impact on the presidential agenda across these two contexts. Table 6.2 clearly indicates that the factors driving presidential response to cases are not significantly different between cases in which the SG participates and those in which he does not. The only significant difference between these types of cases is that presidents are more likely to respond to cases during divided government when the SG did not participate, but was not more likely to do so if the SG did participate.

Table 6.3 breaks out presidential responses by tone and SG participation. With respect to the key hypotheses, we see first that the legal importance of a decision positively and significantly increases the likelihood of presidential response in all categories when the SG *did not* participate in the case. Put differently, these analyses strongly suggest that legal importance places decisions and judicial policies on the president's agenda. The same pattern emerges in the influence of public salience and mobilizability: both factors significantly increase the probability of presidential responses when the SG did not participate, but have no effect when the SG did participate. As such, I argue that these analyses strongly support my hypotheses, in that they suggest these political and legal factors strongly influence the likelihood that the Court place cases on the president's agenda.

**Table 6.3. Presidential Statements on Court Cases by Tone and SG Participation**

VARIABLES	(7)	(8)	(9)	(10)	(11)	(12)
	Positive No SG	Positive SG	Negative No SG	Negative SG	Neutral No SG	Neutral SG
Ideological Distance	-0.44 (0.49)	-1.93** (0.65)	1.80** (0.69)	0.73 (0.76)	-0.15 (0.37)	-0.35 (0.66)
Unconstitutional	-1.28 (0.84)	-0.31 (0.70)	0.78 (0.49)	1.76* (0.78)	-0.15 (0.52)	0.58 (0.68)
Importance (word count)	0.03 (0.03)	0.06** (0.02)	0.04+ (0.02)	-0.01 (0.04)	0.07*** (0.02)	0.04 (0.02)
Total number of amici	0.12*** (0.03)	0.09*** (0.03)	0.04 (0.03)	0.04 (0.04)	0.08** (0.03)	0.01 (0.03)
Salient case	2.77*** (0.61)	2.02*** (0.56)	2.95*** (0.62)	1.76* (0.86)	1.51*** (0.41)	2.75** (0.91)
Presidential Approval	0.56 (2.75)	-1.70 (2.86)	-9.91** (3.63)	-0.19 (4.55)	1.98 (2.11)	-2.55 (3.97)
Reelection Year	0.09 (0.62)	0.66 (0.69)	-0.42 (0.70)	0.91 (0.91)	-0.23 (0.52)	-0.88 (1.19)
Divided Government	5.50** (1.93)	1.13 (1.49)	2.08 (1.17)	0.12 (1.94)	1.64 (1.29)	1.63 (2.45)
Previous Fisc. Yr. Budget	-0.006* (0.002)	0.002 (0.002)	-0.0005 (0.002)	0.0008 (0.003)	-0.001 (0.001)	-0.0003 (0.003)
Constant	-14.33*** (2.93)	-5.37* (2.49)	-3.64 (2.41)	-5.51 (3.50)	-8.81*** (1.73)	-4.70 (3.09)
Observations	4,529	1,094	4,529	1,094	4,529	1,094

Note: Table reports results from first-logistic regression models of presidential responses to the U.S. Supreme Court: the dependent variable takes on a value of 1 if the sitting president responded to a Court decision. Annual effects are omitted for presentation. Standard errors in parentheses; \*\*\* p<0.001, \*\* p<0.01, \* p<0.05, + p<0.1 (two-tailed tests).

## Discussion

I have argued that the Supreme Court's role as an agenda setter in the American political system is poorly understood. In particular, I argue that influencing the agenda of other policymaking political institutions is one pathway through which the Supreme Court might significantly—if indirectly—influence politics and policy. In this chapter I have sought to demonstrate that the Supreme Court can and does significantly affect the president's agenda in theoretically predictable ways: the political and legal importance, salience, and mobilizability significantly influences the probability that a president will respond to a given decision.

Important and salient cases are more likely to draw presidential responses because they are those most likely to affect the president's ability to pursue his policy and reelection goals. Because the president's agenda is necessarily limited—he can deal with only so many issues and problems at any given time—only important decisions will merit attention. In other words, because the modern president is expected to have answers to all important issues facing the nation, important, salient Court decisions often merit response. Similarly, interest group participation in a case indicates the extent to which politically active interests care about an issue, which indicates both the political importance of and the potential for group mobilization on that issue. The analyses presented above strongly support the theory outlined here.

This chapter makes three important contributions to our understanding of the Supreme Court in the American political system. For one, it is among the first empirical works to demonstrate that the Supreme Court influences the agenda of another key institutional actor in the US. Perhaps more importantly, it is the first to attempt to isolate the effect of Supreme Court decisions on the presidential agenda in particular. Second, by identifying key factors that predict Court influence over the presidential agenda, this chapter suggests numerous future studies; for



example, do the same factors—importance, salience, and mobilizability—condition the Court’s impact on the Congressional agenda? Finally, these findings point to the importance of understanding the interbranch agenda-setting effects of political action taken by all branches of government.

## Supplementary Material for Chapter 6:

### List of Cases Responded to by Sitting President

*Adarand Constructors v. Pena*  
*Agostini v. Felton*  
*Akron v. Akron Center for Repro. Health*  
*Alaska Airlines, Inc. v. Brock*  
*Alexander v. Holmes County Board of Ed.*  
*Alexander v. Sandoval*  
*Arizona Governing Committee v. Norris*  
*Baker v. Carr*  
*Beal v. Doe*  
*Board of Ed. v. Mergens*  
*Boerne v. Flores*  
*Boumediene v. Bush*  
*Bowen v. Kendrick*  
*Bowsher v. Synar*  
*Boy Scouts of America v. Dale*  
*Bragdon v. Abbott*  
*Brown v. Board of Ed.*  
*Buckley v. Valeo*  
*Bush v. Gore*  
*Bush v. Vera*  
*Carcieri v. Salazar*  
*Church of Scientology of CA v. IRS*  
*Citizens United v. Federal Election Commission*  
*Clinton v. City of New York*  
*Continental T.V. Inc. v. GTE Sylvania Inc.*  
*Cooper v. Aaron*  
*D.C. v. Heller*  
*Dames & Moore v. Regan*  
*DBA Holiday Inn v. Tourism Co. of Puerto Rico*  
*Dept. of Commerce v. U.S. House of Reps.*  
*Dept. of the Navy v. Egan*  
*Dickerson v. U.S.*  
*Employment Division v. Smith*  
*Engel v. Vitale*  
*FDA v. Brown & Williamson Tobacco Corp.*  
*Firefighters Local No. 1784 v. Stotts*  
*First Eng. Evan. Lutheran Church v. Los Angeles*  
*Flood v. Kuhn*  
*Fullilove v. Klutznick*  
*Furman v. Georgia*  
*Garcia v. SAMTA*  
*Gonzales v. Carhart*  
*Gratz v. Bollinger*  
*Greene v. McElroy*  
*Gregg v. Georgia*  
*Grove City College v. Bell*  
*Grutter v. Bollinger*  
*Hamdan v. Rumsfeld*  
*Hamdi v. Rumsfeld*  
*Hampton v. Mow Sun Wong*  
*Hawaii Housing Authority v. Midkiff*  
*Haynes v. U.S.*  
*Hein v. Freedom From Religion Foundation*  
*Hill v. Colorado*  
*Ingraham v. Wright*  
*INS v. Chadha*  
*James v. Valtierra*  
*Kelo v. New London*  
*Kent v. Dulles*  
*Kimel v. Florida Board of Regents*  
*King v. Smith*  
*Leary v. U.S.*  
*Lee v. Weisman*  
*Lucas v. South Carolina Coastal Council*  
*Maher v. Roe*  
*Manual Enterprises, Inc. v. Day*  
*Marcus v. Search Warrant*  
*Marsh v. Chambers*  
*Martin v. Wilks*  
*Massachusetts v. EPA*  
*Meek v. Pittenger*  
*Metro Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*  
*Mich. Dept. of State Police v. Sitz*  
*Miller v. Johnson*  
*Mueller v. Allen*  
*Muscarello v. U.S.*  
*Nat'l Credit Union Admin. v. First National Bank & Trust Co.*  
*Nat'l Treasury Employees Union v. Von Raab*  
*New Jersey v. T.L.O.*  
*New York Times Co. v. U.S.*  
*Nixon v. Administrator of General Services*  
*Nixon v. Shrink MO Gov't PAC*  
*Nollan v. California Coastal Commission*  
*Nordlinger v. Hahn*  
*Northcross v. Board of Ed.*  
*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*  
*Nyquist v. Mauclet*  
*Olmstead v. Zimring*  
*Payne v. Tennessee*  
*Pegram v. Herdrich*  
*Peterson v. City of Greenville*  
*Philbrook v. Glodgett*  
*Planned Parenthood v. Casey*  
*Printz v. U.S.*  
*Raines v. Byrd*  
*Rasul v. Bush*  
*Reeves v. Sanderson Plumbing Products*  
*Regents of Univ. of California v. Bakke*

*Reno v. ACLU*  
*Reynolds v. Sims*  
*Richmond v. Croson*  
*Rust v. Sullivan*  
*Shaw v. Hunt*  
*Skinner v. Railway Labor Execs. Assoc.*  
*Stenberg v. Carhart*  
*Swann v. Charlotte-Mecklenberg Board of Ed.*  
*Texas v. Johnson*  
*Thorburgh v. Am. College of Obst. & Gyno.*  
*U.S. v. Alvarez-Machain*  
*U.S. v. Kubrick*  
*U.S. v. Leon*  
*U.S. v. Lopez*  
*U.S. v. Montgomery Board of Ed.*

*U.S. v. Morrison*  
*U.S. v. Nixon*  
*U.S. v. Thirty-seven (37) Photographs*  
*U.S. v. Twin City Power Co.*  
*U.S. v. US District Court*  
*U.S. v. Will*  
*United Steelworkers of America v. Weber*  
*Vernonia School Dist. v. Acton*  
*Wallace v. Jaffree*  
*Wards Cove Packing Co. v. Atonio*  
*Washington v. Glucksberg*  
*Watson v. Memphis*  
*Webster v. Reproductive Services*  
*Zelman v. Simmons-Harris*  
*Zurcher v. Stanford Daily*

Alternative Specification of Models from Chapter 6:

**Table S6.1. Presidential Statements on Supreme Court Cases, 1955-2001  
(Rare-Event Logistic Regression)**

VARIABLES	(1) Any	(2) Positive	(3) Negative	(4) Neutral
Ideological Distance	-0.23 (0.36)	-1.22 (0.67)	1.27* (0.62)	-0.06 (0.33)
Unconstitutional	0.73** (0.25)	0.10 (0.38)	1.62** (0.52)	0.67** (0.26)
Importance (word count)	1.15*** (0.19)	1.42** (0.48)	1.10*** (0.28)	0.91*** (0.21)
Total number of amici	0.10*** (0.02)	0.14*** (0.03)	0.02 (0.02)	0.03 (0.04)
Salient case	0.22*** (0.06)	0.04 (0.05)	0.13*** (0.02)	0.10* (0.04)
Presidential Approval	-0.35 (0.86)	0.61 (1.17)	-4.54*** (1.12)	0.83 (0.90)
Reelection Year	0.10 (0.19)	0.34 (0.27)	-0.07 (0.26)	-0.25 (0.56)
Divided Government	0.48 (0.47)	0.76 (0.59)	0.41 (0.30)	0.26 (0.45)
Previous Fisc. Yr. Budget	-0.00 (0.00)	-0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Presidential Term	-0.10 (0.06)	-0.02 (0.10)	0.20 (0.12)	-0.11* (0.05)
Constant	-14.49*** (1.86)	-19.01*** (4.84)	-14.36*** (2.76)	-12.78*** (1.79)
Observations	5,620	5,620	5,620	5,620

Robust standard errors in parentheses, clustered on presidential term.

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S6.2. Presidential Statements on Court Cases by SG Participation  
(Rare-Event Logistic Regression)**

VARIABLES	(5)	(6)
	Any No SG	Any + SG
Ideological Distance	0.03 (0.39)	-0.75* (0.38)
Unconstitutional	0.57 (0.41)	1.03* (0.51)
Importance (word count)	1.17*** (0.15)	0.99** (0.33)
Total number of amici	0.11*** (0.01)	0.08*** (0.02)
Salient case	0.18* (0.08)	0.29** (0.09)
Presidential Approval	-0.15 (1.04)	-0.42 (1.37)
Reelection Year	0.10 (0.34)	0.05 (0.32)
Divided Government	0.39 (0.55)	0.57 (0.43)
Previous Fisc. Yr. Budget	-0.00 (0.00)	-0.00 (0.00)
Presidential Term	-0.07 (0.05)	-0.23* (0.12)
Constant	-14.79*** (1.57)	-12.15*** (3.34)
Observations	4,527	1,093

Robust standard errors in parentheses, clustered on presidential term.

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S6.3. Presidential Statements on Court Cases by Tone and SG Participation  
(Rare-Event Logistic Regression)**

VARIABLES	(7) Positive No SG	(8) Positive SG	(9) Negative No SG	(10) Negative SG	(11) Neutral No SG	(12) Neutral SG
Ideological Distance	-0.54 (0.76)	-1.64 (0.98)	1.11 (0.63)	0.72 (0.50)	-0.15 (0.40)	-0.29 (0.60)
Unconstitutional	-0.30 (0.86)	0.41 (1.04)	1.52* (0.66)	2.04* (0.85)	0.32 (0.16)	1.27 (0.66)
Importance (word count)	0.88 (0.53)	1.31*** (0.26)	1.24 (0.68)	0.25 (0.29)	0.87*** (0.15)	0.72 (0.53)
Total number of amici	0.16*** (0.04)	0.08*** (0.02)	0.08*** (0.01)	0.07* (0.03)	0.10*** (0.02)	0.03 (0.05)
Salient case	0.04* (0.02)	0.31* (0.14)	0.21*** (0.04)	-0.00 (0.06)	0.14* (0.06)	0.05 (0.09)
Presidential Approval	1.47 (1.15)	-1.28 (1.51)	-5.99** (1.82)	-0.18 (1.70)	1.39 (1.13)	-0.01 (2.33)
Reelection Year	0.44 (0.42)	0.17 (0.27)	0.05 (0.57)	0.48 (1.07)	-0.03 (0.69)	-0.72 (0.72)
Divided Government	0.55 (1.12)	0.95 (0.49)	0.87 (0.67)	-0.28 (0.58)	0.28 (0.55)	0.51 (0.67)
Previous Fisc. Yr. Budget	-0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)	0.00 (0.00)
Presidential Term	-0.00 (0.12)	-0.11 (0.11)	0.10 (0.16)	0.13 (0.14)	-0.12 (0.06)	-0.36*** (0.10)
Constant	-14.97** (5.38)	-16.29*** (2.27)	-15.04* (6.33)	-8.23*** (2.11)	-13.11*** (1.50)	-8.83 (5.44)
Observations	4,527	1,093	4,527	1,093	4,527	1,093

Robust standard errors in parentheses, clustered on presidential term.

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S6.4. Presidential Statements on Court Cases by SG Participation and SCOTUS Invitation to Participate (Firth Logistic Regression)**

VARIABLES	(13) No SG	(14) SG, Invited	(15) SG, Not Invited
Ideological Distance	-0.18 (0.38)	-0.54 (1.54)	-0.43 (0.50)
Unconstitutional	0.61 (0.53)	-0.11 (1.68)	0.32 (0.64)
Importance (word count)	0.05** (0.02)	0.06 (0.07)	0.09** (0.03)
Total number of amici	0.16*** (0.03)	0.04 (0.14)	0.06 (0.03)
Salient case	1.87*** (0.40)	0.88 (1.21)	2.19*** (0.56)
Presidential Approval	-3.34 (2.24)	-4.01 (6.35)	-1.25 (3.07)
Reelection Year	-0.28 (0.47)	-0.04 (1.44)	1.05 (0.70)
Divided Government	2.46* (1.05)	0.39 (4.23)	0.68 (1.40)
Previous Fisc. Yr. Budget	-0.00 (0.00)	-0.00 (0.01)	0.00 (0.00)
Constant	-5.67*** (1.58)	0.07 (4.71)	-4.38 (2.49)
Observations	2,149	188	604

Standard errors in parentheses. Models include presidential fixed-effects (not shown).

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

**Table S6.6. Presidential Responses when SG Wins and Loses**

	(16) Any SG Win	(17) Any SG Loss
Ideological Distance	-1.71* (0.76)	-0.78 (0.94)
Unconstitutional	0.20 (0.82)	1.36 (0.97)
Importance (word count)	0.07* (0.03)	0.03 (0.03)
Total number of amici	0.07* (0.03)	0.05 (0.06)
Salient case	2.03*** (0.56)	2.97* (1.36)
Presidential Approval	-4.37 (3.02)	6.41 (6.94)
Reelection Year	0.43 (0.79)	2.18 (1.42)
Divided Government	1.12 (1.75)	2.91 (2.58)
Previous Fisc. Yr. Budget	0.00 (0.00)	-0.01 (0.01)
Constant	-2.17 (2.38)	-14.63 (7.99)
Observations	713	269

Standard errors in parentheses  
 \*\*\* p<0.001, \*\* p<0.01, \* p<0.05



**Table S6.7. Presidential Response Direction when SG Wins and Loses**

	(1)	(2)	(3)	(4)	(5)	(6)
	Positive SG Win	Positive SG Loss	Negative SG Win	Negative SG Loss	Neutral SG Win	Neutral SG Loss
Ideological Distance	-1.38 (0.78)	-1.47 (1.29)	-1.40 (1.56)	0.88 (1.48)	-1.54 (1.44)	-0.42 (1.26)
Unconstitutional	-0.20 (1.13)	1.75 (1.31)	0.79 (1.64)	2.02 (1.18)	0.96 (0.91)	-1.43 (2.48)
Importance (word count)	0.10** (0.03)	0.00 (0.04)	-0.07 (0.22)	-0.03 (0.04)	0.00 (0.05)	0.07 (0.05)
Total number of amici	0.06 (0.04)	0.07 (0.08)	0.06 (0.06)	0.02 (0.08)	0.01 (0.03)	0.07 (0.10)
Salient case	2.11*** (0.63)	1.59 (1.28)	0.08 (1.64)	1.57 (1.22)	2.22* (1.02)	1.40 (1.26)
Presidential Approval	-3.77 (3.36)	1.78 (7.28)	-2.15 (7.12)	4.49 (8.03)	-6.59 (5.84)	2.39 (6.63)
Reelection Year	0.57 (0.85)	0.51 (2.14)	0.38 (1.47)	1.97 (1.67)	-0.21 (1.55)	0.07 (1.79)
Divided Government	0.85 (1.93)	3.41 (2.99)	0.56 (2.75)	0.43 (3.56)	1.09 (3.03)	0.35 (3.50)
Previous Fisc. Yr. Budget	0.00 (0.00)	-0.01 (0.01)	0.00 (0.00)	-0.00 (0.01)	0.00 (0.01)	-0.00 (0.01)
Constant	-3.69 (2.81)	-8.43 (6.47)	-2.59 (4.45)	-8.67 (9.28)	-0.74 (4.11)	-5.81 (5.28)
Observations	713	269	713	269	713	269

Standard errors in parentheses

\*\*\* p&lt;0.001, \*\* p&lt;0.01, \* p&lt;0.05

**Table S6.8. Logit Regression of Table 3 (for Marginal effects)**

VARIABLES	(1) Positive No SG	(2) Positive SG	(3) Negative No SG	(4) Negative SG	(5) Neutral No SG	(6) Neutral SG
Ideological Distance	-0.51 (0.52)	-2.19** (0.72)	2.05** (0.75)	0.99 (0.89)	-0.16 (0.38)	-0.38 (0.75)
Unconstitutional	-1.62 (0.94)	-0.45 (0.76)	0.82 (0.52)	2.12* (0.90)	-0.22 (0.55)	0.64 (0.77)
Importance (word count)	0.03 (0.03)	0.08** (0.02)	0.05 (0.03)	-0.01 (0.05)	0.07*** (0.02)	0.05 (0.03)
Total number of amici	0.13*** (0.03)	0.11*** (0.03)	0.04 (0.03)	0.02 (0.05)	0.08** (0.03)	0.00 (0.04)
Salient case	2.93*** (0.65)	2.14*** (0.59)	3.14*** (0.66)	2.12* (0.97)	1.52*** (0.42)	3.24** (1.10)
Presidential Approval	0.62 (2.86)	-1.62 (3.08)	-10.97** (3.82)	-0.64 (5.32)	2.07 (2.16)	-3.25 (4.55)
Reelection Year	0.00 (0.66)	0.64 (0.76)	-0.57 (0.77)	0.99 (1.06)	-0.30 (0.54)	-1.54 (1.52)
Divided Government	20.15 (2,421.23)	1.62 (1.72)	2.29 (1.24)	0.47 (2.38)	1.98 (1.45)	16.07 (3,256.53)
Previous Fisc. Yr. Budget	-0.01* (0.00)	0.00 (0.00)	-0.00 (0.00)	0.00 (0.00)	-0.00 (0.00)	-0.00 (0.00)
Constant	-26.45 (2,421.23)	-9.48** (2.89)	-3.90 (2.57)	-6.39 (3.31)	-9.43*** (1.88)	-19.63 (3,256.53)
Observations	2,706	1,059	3,162	743	4,529	965

Standard errors in parentheses  
 \*\*\* p<0.001, \*\* p<0.01, \* p<0.05

## Chapter 7:

### Supreme Court Influence on the Party Agendas

The Supreme Court's decision in *Dred Scott v. Sanford* (1856) was widely reviled by the emergent Republican Party. Republicans sought to repudiate the decision by winning the election of 1860 and then staffing courts (especially the Supreme Court) with judges who would overturn *Dred Scott* and restore their preferred interpretation of the Constitution. So central was this goal that it made its way onto the Republican Party Platform, which stated, "the new dogma that the Constitution...carries slavery into any or all of the territories...is a dangerous political heresy" and was "subversive of the peace and harmony of the country" (Republican Platform of 1860, quoted in Ross 2012: 324).

In this chapter I move from Supreme Court influence on the presidential agenda to influence on the agendas the two major political parties. Every four years the Democratic and Republican parties articulate in their official platforms the interests and goals that will animate party activities until the next presidential election cycle. These platforms represent the policy goals of the party coalition, and also seek to bolster the coalition by appealing to groups not yet in the coalition (Maisel 1999; Schattschneider 1942). Importantly, these platforms provide significant insight into the consequences of elections, in that they provide a good window into the policy commitments of political elites (Maisel 1993; Fine 1994). As such, I argue that if some Supreme Court decisions are viewed as sufficiently important by political elites, those decisions may affect the policy and governance goals of the political parties. When they do, one place those changes may appear is in the official party platforms. In this chapter, I analyze all Democratic and Republican Party platforms from 1952 to 2016 in order to shed light on the

extent of Court influence over these official agendas. I find that important Supreme Court decisions regularly influence the substance of these official agendas. Further, I contend that the responses to Court decisions in these platforms frequently treat those decisions as “focusing events” around which the parties seek to mobilize their base, to attract new constituents, and when possible to use the event to enact relevant parts of their policy agendas.

### **The Political Significance of Party Platforms**

Political parties are commonly considered to be “indispensable elements” of democratic governance (APSA 1950). Parties are expected to compete for citizens’ votes on the bases of their proposed policies, then once elected, to carry out those policy commitments.<sup>63</sup> On this view, voters reward parties for proposing favored policies, and punish parties for failing to live up to their promises.<sup>64</sup> Party platforms, then, represent party elites’ specific pledges to take action on particular issues or policies. Platforms thus serve to help inform voters about the intentions of the parties, and provide a credible commitment from the party that voters can use to punish that party if it fails to live up to its promises.

While there is little evidence to suggest that members of the electorate actually read—let alone critically evaluate—party platforms, platforms do provide meaningful insight into the consequences of elections (Pomper 1967; Maisel 1993; Froio, Beban, and Jennings 2016). Recent research has found that party control is strongly linked to institutional agendas (Baumgardner et al. 2009; Froio 2012), though there appears to be significant variation of this effect across policy domain (Froio, Beban, and Jennings 2016). Further, Budge and Hofferbert (1990) find that party platforms are strongly linked to post-election government outputs (see also Hofferbert and Budge 1992; King et al. 1993). That is, party platforms are indicative of the

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<sup>63</sup> This is the assumption, at least, in responsible party theories of democracy.

<sup>64</sup> This family of theories probably demands far too much of voters: see Achen and Bartels (2016).

policy commitments of party elites (e.g. Fine 1994). By indicating what parties intend to do when in power, platforms also provide an accessible shorthand for what coalitions the party seeks to attract (Conger 2010). For these reasons, the substance of party platforms is generally considered to be politically consequential.

Changes in party platforms tend to be slow and piecemeal, reflecting the evolutionary changes in party commitments in light of changes in the party elite, the commitments of the parties' presidential candidates, and policy concerns of the general public. Even so, platforms can sometimes change more rapidly, such as in response to an exogenous event (a so-called "focusing event"; see Birkland 1998), an unusual or otherwise disruptive presidential nomination, or even heightened interparty electoral competition (Fine 2003).

In sum, platforms represent both elite views of the policy priorities that the next administration and Congress must address, as well as their (i.e. elites') perceptions of the issue priorities of their constituents (and those of constituent groups they hope to capture). Here I will explore an understudied influence on the parties' policy commitments: Supreme Court decisions.<sup>65</sup> That is, I will examine the platforms of both major parties in the US in order to ascertain the extent to which Supreme Court decisions have directly influenced the stated agendas of the parties.

### **Approach & Data**

The full text of all party platforms of the Democratic and Republican parties have been collected by Peters and Woolley as part of the *American Presidency Project*.<sup>66</sup> Following Eshbaugh-Soha and Collins' (2015) approach (outlined in chapter six), I keyword searched each platform from 1952-2016 for the terms "Supreme Court" and "constitution." After locating each

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<sup>65</sup> As far as I can find, this is the first study focusing explicitly on Court influence on the party agendas.

<sup>66</sup> <http://www.presidency.ucsb.edu/platforms.php>

mention of the Supreme Court or constitution, I determined whether the platform referenced a specific case, and if so, identified the case. Occasionally the platform would reference a case by name, as in the following example from the 2008 Republican Party Platform: “We condemn the Supreme Court's disregard of homeowners' property rights in its *Kelo* decision...” More often these references to Court decisions are slightly less explicit, such as the 1956 Democratic Party’s official stance on *Brown v. Board*:

“Recent decisions of the Supreme Court of the United States relating to segregation in publicly supported schools and elsewhere have brought consequences of vast importance to our Nation as a whole and especially to communities directly affected. We reject all proposals for the use of force to interfere with the orderly determination of these matters by the courts.”

Coding all thirty-four platforms revealed that the parties referred to forty-six unique cases for a total of seventy-four mentions (a few cases, like *Brown v. Board* and *Citizens United v. FEC*, were referenced numerous times by both parties). The full list of cases referred to in the parties’ platforms can be found in tables 7.1 and 7.2 in this chapter.

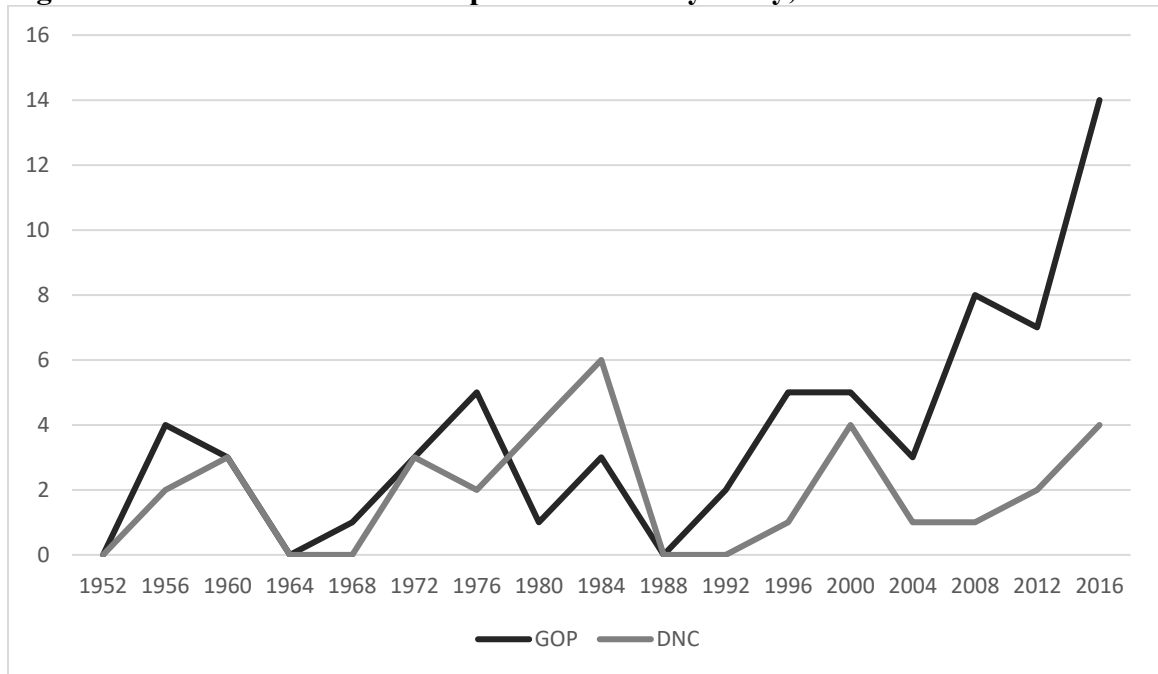
I first present summary data and historical trends to show how often the parties respond to the Court in their platforms, and also to uncover variation between the parties in such responses. In order to assess the substance of parties’ responses to various Court decisions over time, I selected four issue areas in which the parties have responded to multiple cases in their platforms: abortion, eminent domain, gun rights, and campaign finance. Following Keck (2014), I closely examine the content of the parties’ responses to the Court rulings, and draw on data from diverse sources to show how these cases and the responses to them altered the subsequent politics of these policy issues.

## Analysis & Findings

### Summary Data & Trends

In the thirty-four party platforms studied, the phrase “Supreme Court” appears 97 times: 33 times in Democratic platforms and 64 times in Republican platforms. Figure 7.1 graphically depicts explicit mentions of the Court by each party over time.

**Fig 7.1. Platform Mentions of “Supreme Court” by Party, 1952-2016**

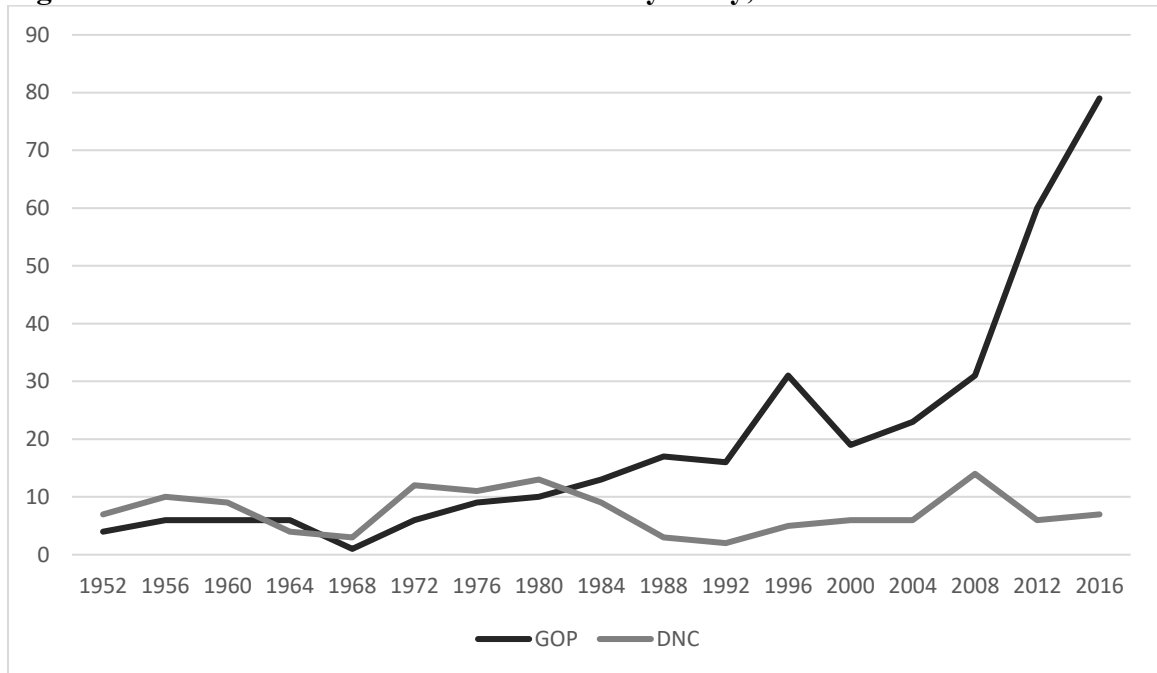


The term “constitution” appears 464 times: 127 times in Democratic platforms and 337 times in Republican platforms. While the majority of these references were fairly abstract—talks of “constitutional principles” or homage to constitutional government, etc.—some did directly implicate the Court and its work. Some of these mentions were calls for a constitutional amendment overturning some decision; others were promises to appoint justices that would interpret the constitution correctly, and so on.

The data presented in figures 7.1 and 7.2 suggests that for much of the period studied, the parties were quite similar in terms of the frequency of their discussion of the constitution and the

Supreme Court in their stated agendas, but that recently, significant differences have emerged. Republican platforms began a substantial climb in the number of references to the constitution as the “Conservative Movement” increasingly captured the GOP in the 1980s and 1990s (e.g. Glenn and Teles 2009; Edwards 2002), while references in the DNC platforms remained essentially constant. The break between the parties in terms of explicit mentions of the Supreme Court came much later: in 2008 GOP platforms began to refer to the Court much more frequently did the DNC platforms, and the gulf between the parties on this front only grew in the next two election cycles.

**Fig 7.2. Platform Mentions of “Constitution” by Party, 1952-2016**

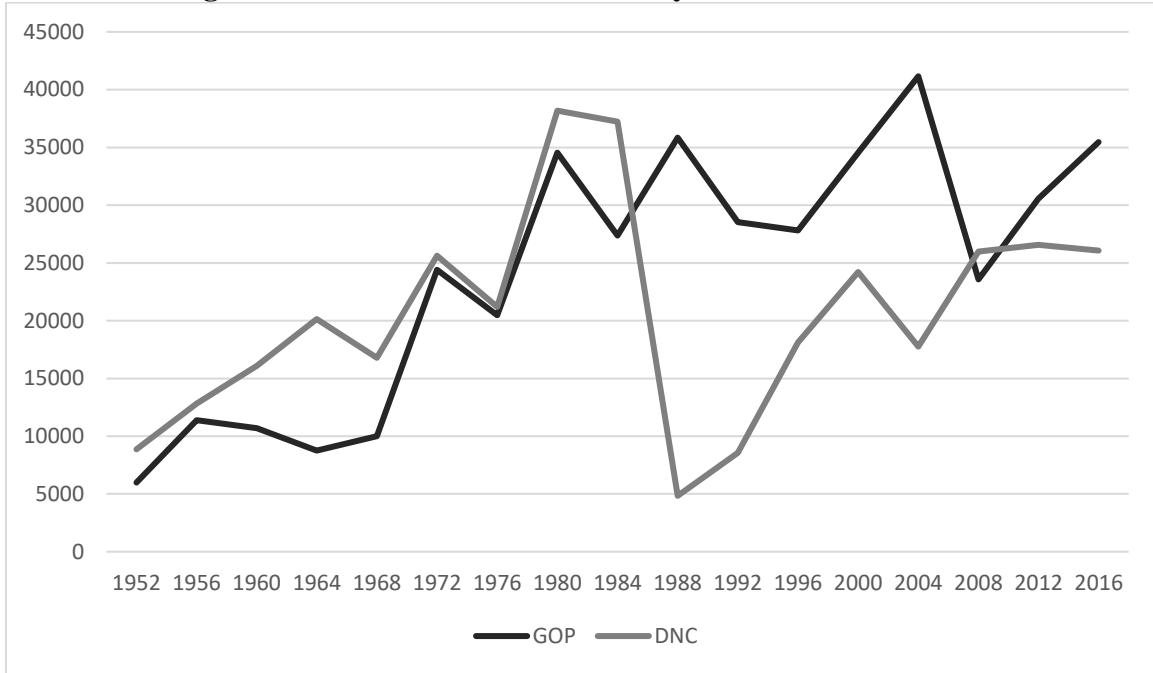


With these basic trends in references to the Supreme Court and the constitution in mind, I turn now to references to particular cases. First, it should be noted that only a fraction of the references to the constitution or the Court contain reference to specific cases. Second, patterns of reference to the Court broadly are mirrored in the patterns of reference to cases, as figures 7.3 and 7.4 demonstrate graphically. Specifically, references to cases in the Democratic Party



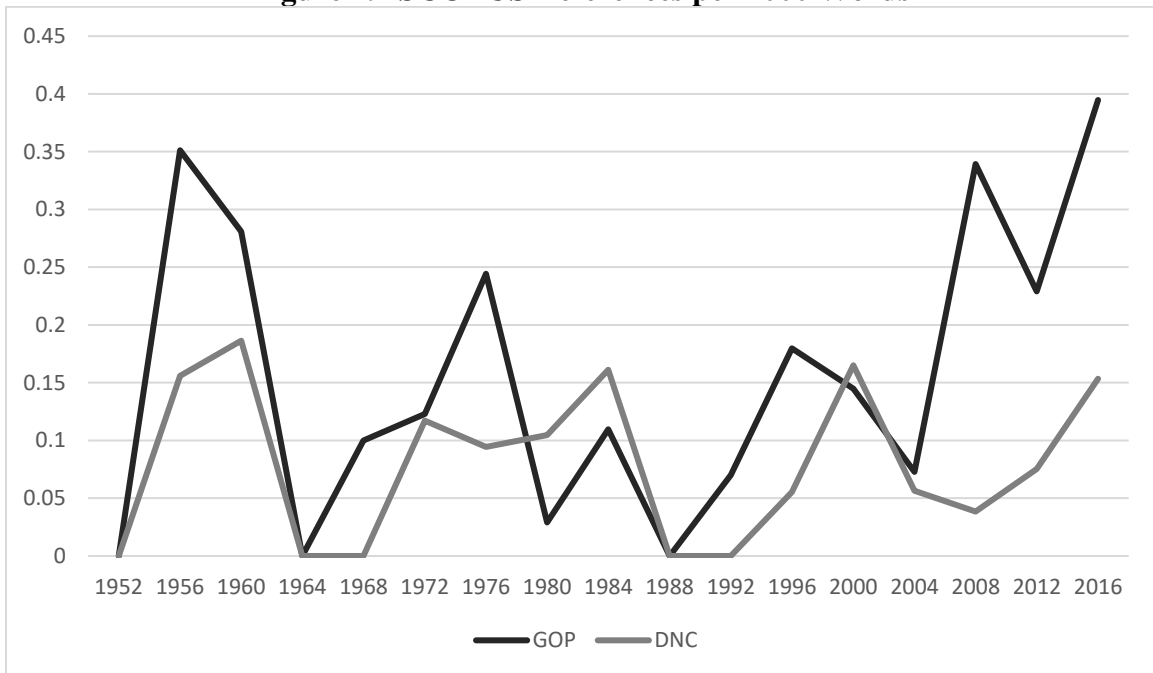
platforms have been relatively stable over time, while such references in Republican platforms have steadily increased over the last twenty years. Indeed, in the most recent platforms, GOP references to cases outnumber Democratic references more than three to one.

**Figure 7.3 Number of Words in Party Platforms Over Time**



**Note:** Wordcount data from the *American Presidency Project*

**Figure 7.4 SCOTUS References per 1000 Words**



The apparent rise in frequency, as well as the differences across the parties, in mentions of Supreme Court in the platforms may be a function of the breadth of the parties' platforms. In order to control for this possibility, I present the overall length (in number of words) of the platforms in Figure 7.3, and the rate of mentions of the Court by each party (mentions per 1000 words) in Figure 7.4. Figure 7.3 indicates a significant upward trend in the length—and thus, the breadth of coverage—of both parties' platforms during the time period covered. Figure 7.4 indicates that this growth does indeed seem to capture much of the rise in Supreme Court references: longer platforms, which cover more topics, are more likely to touch on Court decisions than shorter platforms. Even so, Figure 7.4 does indicate that Republicans seem to be more likely to reference the Court—and especially so during the last several election cycles. Put differently: while the parties' general move towards longer and more detailed policy agendas in their official platforms explains some of the observed increase in references to the Supreme Court, it does not explain all of the observed variation.

Among the references to cases in the data, there are some notable differences also in tone and the general policy motivations accompanying those references. That is, some cases were simply mentioned in passing, while others were expressly supported and others still were accompanied by calls to overturn or otherwise cut back against the decision. Thus to further parse the basic form of these case references, I coded each mention for its tone—being positive, negative, or neutral—again following the approach of Eshbaugh-Soha and Collins (2015). Negative mentions include references that are critical of or otherwise offer disagreement with a particular decision. For example, consider the Democratic party's response to *Zurcher v. Stanford Daily* in its 1980 platform: "As we enter the 1980s, we must...shape legislation to overturn the Supreme Court Stanford Daily decision..." Positive references are coded as those in

which the platform expresses praise or agreement with the Court's decisions. An example of this type of reference is seen in the GOP response to *Elk Grove v. Newdow*: "We condemn decisions by activist judges to deny children the opportunity to say the Pledge of Allegiance in its entirety, including 'Under God,' in public schools and encourage States to promote the pledge."

Finally, neutral references include references to cases that are devoid of the above indicators; that is, they are ambiguous, or perhaps expressly ambivalent. Consider for example the responses of both parties to *Brown v. Board* in their 1956 platforms:

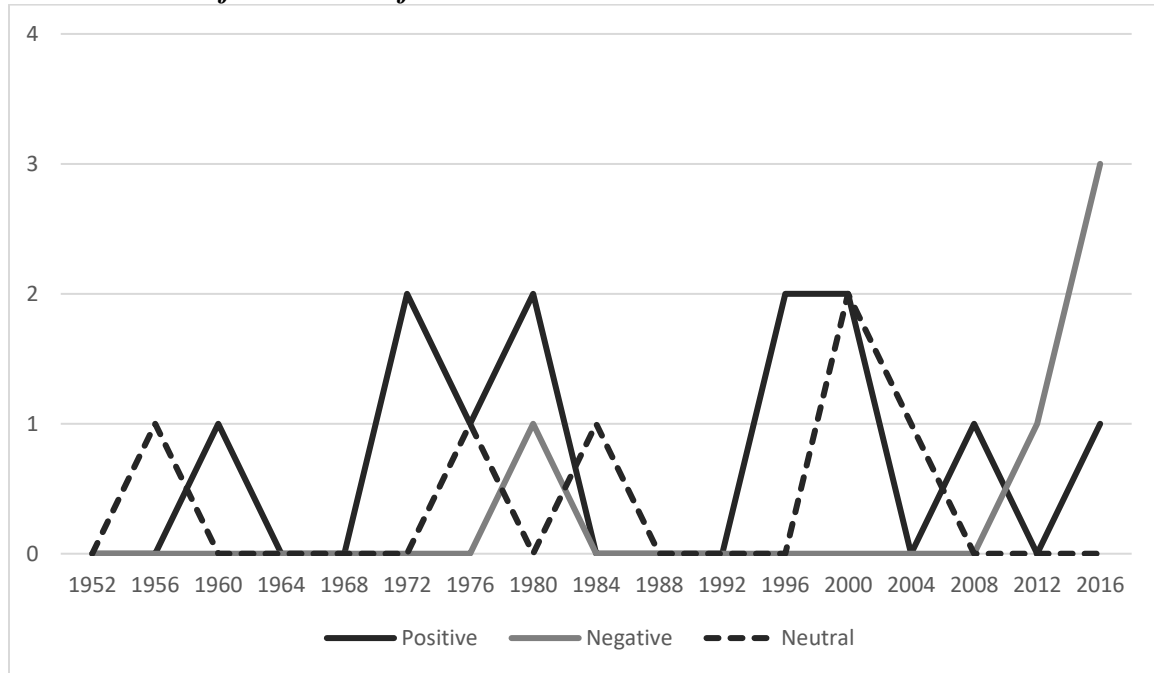
"Recent decisions of the Supreme Court of the United States relating to segregation in publicly supported schools and elsewhere have brought consequences of vast importance to our Nation as a whole and especially to communities directly affected. We reject all proposals for the use of force to interfere with the orderly determination of these matters by the courts." (DNC Platform 1956)

And,

"The Republican Party accepts the decision of the U.S. Supreme Court that racial discrimination in publicly supported schools must be progressively eliminated. We concur in the conclusion of the Supreme Court that its decision directing school desegregation should be accomplished with 'all deliberate speed' locally through Federal District Courts. The implementation order of the Supreme Court recognizes the complex and acutely emotional problems created by its decision in certain sections of our country where racial patterns have been developed in accordance with prior and long-standing decisions of the same tribunal." (GOP Platform 1956)

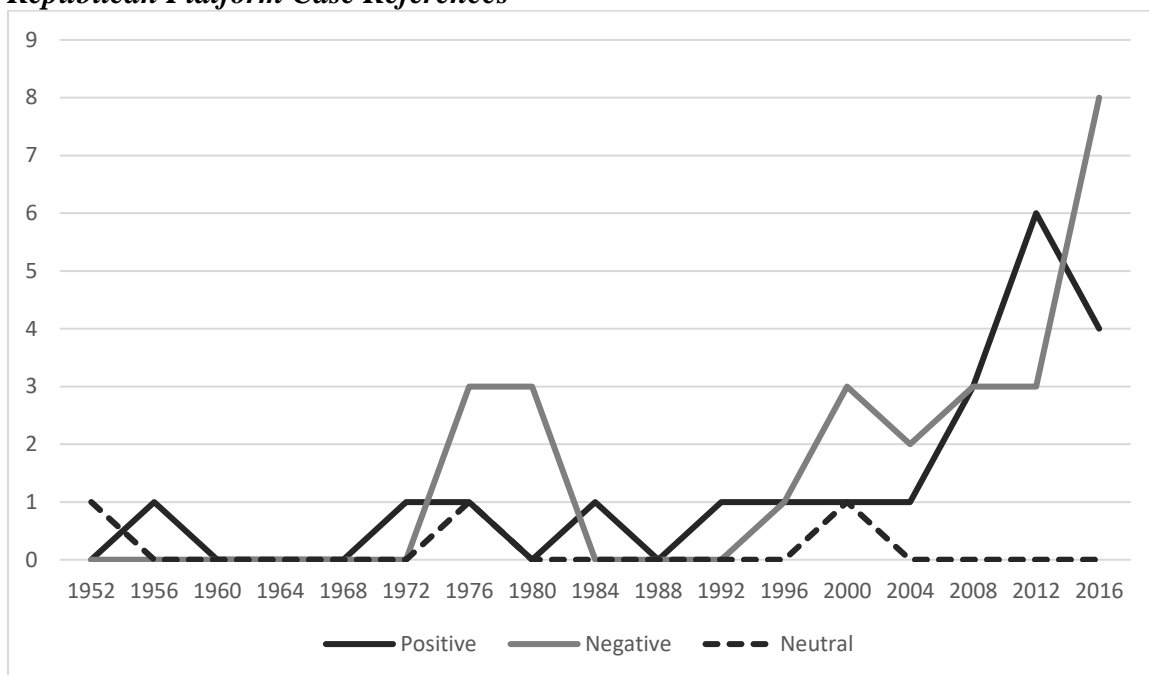
These passages both explicitly accept the decision as legitimate and authoritative, but neither goes so far as to praise the decision or to call for clear legislative support. However, both parties include language in their 1960 platforms that are much more express in their agreement with the *Brown* decisions.

**Fig 7.5. Platform References to SCOTUS Decisions by Party and Tone, 1952-2016**  
*Democratic Platform Case References*



Figures 7.5 and 7.6 depict the general trends of references to cases, as well as the tone of those references, in the Democratic and Republican platforms, respectively. Of the twenty-three case references in Democratic platforms, twelve are positive, five are negative, and six neutral. References in GOP platforms follow a decidedly different pattern, with twenty-one positive references, twenty-six negative, and three neutral. Perhaps unsurprisingly, the Democratic platform is most negative towards the Court at the same time that the Republican hold on the federal judiciary is strongest. Tables 7.1 and 7.2, below, present complete lists of the cases mentioned in each platform, as well as the tone of those references. Table 7.1 and Figure 7.6 clearly indicate that Republican platforms routinely reference Supreme Court decisions, and that they have done so with increasing frequency over the last twenty years or so.

**Fig 7.6. Platform References to SCOTUS Decisions by Party and Tone, 1952-2016**  
*Republican Platform Case References*



**Table 7.1. GOP Platform Case References**

Year	Positive	Negative	Neutral
1952			
1956			<i>Brown v. Board</i>
1960	<i>Brown v. Board</i>		
1964			
1968			
1972	<i>US v. Nevada and California</i>		
1976	<i>Union Electric Co. v. EPA</i>	<i>US v. Miller</i> <i>Fisher v. US</i> <i>Planned Parenthood v. Danforth</i>	<i>Roe v. Wade</i>
1980		<i>Roe v. Wade</i> <i>Planned Parenthood v. Danforth</i> <i>Bellotti v. Baird</i>	
1984	<i>US v. Leon</i>		
1988			
1992	<i>Comm. Workers of Am. v. Beck</i>		
1996	<i>Comm. Workers of Am. v. Beck</i>	<i>Coker v. Georgia</i>	
2000	<i>Comm. Workers of Am. v. Beck</i>	<i>Santa Fe Indep. Sch. V. Doe</i> <i>Stenberg v. Carhart</i> <i>Boy Scouts of America v. Dale</i>	<i>Dept of Commerce v. CNY</i>
2004	<i>Miller v. California</i>	<i>Elk Grove Unified Sch. v. Newdow</i> <i>Santa Fe Indep. Sch. v. Doe</i>	
2008	<i>DC v. Heller</i> <i>Rumsfeld v. FAIR</i> <i>Gonzales v. Carhart</i>	<i>Kelo v. New London</i> <i>Roper v. Simmons</i> <i>House v. Bell</i>	
2012	<i>Comm. Workers of Am. v. Beck</i> <i>Hosanna Tabor v. EEOC</i> <i>Citizens United v. FEC</i> <i>Wisc. Right to Life v. FEC</i> <i>DC v. Heller</i> <i>McDonald v. Chicago</i>	<i>Kelo v. New London</i> <i>NFIB v. Sebelius</i> <i>Elk Grove Unified Sch. v. Newdow</i>	
2016	<i>DC v. Heller</i> <i>McDonald v. Chicago</i> <i>Michigan v. EPA</i> <i>US v. Texas</i>	<i>Roe v. Wade</i> <i>Obergefell v. Hodges</i> <i>NFIB v. Sebelius</i> <i>King v. Burwell</i> <i>US v. Windsor</i> <i>Whole Woman's Health v. Hellerstedt</i> <i>Kelo v. New London</i> <i>Kennedy v. Louisiana</i>	

Democrats on the other hand, have only recently gone negative in their platforms: four of the five negative mentions of Supreme Court decisions came in their 2012 (*Citizen's United v. FEC*) and 2016 (*Shelby County v. Holder*, *Citizens United v. FEC*, and *Buckley v. Valeo*) platforms.

**Table 7.2. DNC Platform Case References**

Year	Positive	Negative	Neutral
1952			
1956			<i>Brown v. Board</i>
1960	<i>Brown v. Board</i>		
1964			
1968			
1972	<i>Brown v. Board</i> <i>Swann v. Charlotte-Mecklenburg</i>		
1976	<i>Brown v. Board</i>		<i>Roe v. Wade</i>
1980	<i>Roe v. Wade</i> <i>Brown v. Board</i>	<i>Zurcher v. Stanford Daily</i>	
1984			<i>Bob Jones Univ. v. US</i>
1988			
1992			
1996	<i>Roe v. Wade</i> <i>Vernonia Sch. Dist. v. Acton</i>		
2000	<i>Olmstead v. L.C.</i> <i>Roe v. Wade</i>		<i>Stenberg v. Carhart</i> <i>Hill v. Colorado</i>
2004			<i>Cheney v. US Dist. Court</i>
2008	<i>Boumediene v. Bush</i>		
2012		<i>Citizens United v. FEC</i>	
2016	<i>Obergefell v. Hodges</i>	<i>Shelby County v. Holder</i> <i>Citizens United v. FEC</i> <i>Buckley v. Valeo</i>	

## Case Studies

### Abortion

In finding a privacy-based right to abortion in its decision in *Roe v. Wade*, the Supreme Court laid the groundwork for a decades-long battle over both policy and constitutional meaning.

In many ways, abortion has been the touchstone for the American “culture war” of the late

twentieth century. And while abortion politics predate *Roe*, that case clearly marks a major turning point in abortion politics.

Rosenberg's (2008) account of the battle over abortion would have us believe that litigation over abortion, culminating in *Roe v. Wade*, engendered a backlash which has led to retrenchment of abortion rights. Greenhouse and Siegel (2011), however, argue that energetic opposition to the liberalization of abortion laws was taking place at least a decade prior to *Roe* (see also Tribe 1990). A central point of Greenhouse and Siegel's argument is that political conflict over abortion "engulf[ed] adjudication," and thus that accounts of judicially centered backlash miss the point. Put differently, a growing body of scholarship suggests that "backlash" is endemic to the issue of abortion, not merely the judicial engagement of that issue (Greenhouse and Siegel 2011; Burns 2005; Garrow 1999; Tribe 1990).

Greenhouse and Siegel's account of the history of the debate around the criminal status of abortion suggests its contested nature. In the 1950s, some (mostly male) doctors, lawyers, and clergy began to suggest that in certain circumstances relating to the health of the mother, abortion should be decriminalized. In the 1960s, some states began to decriminalize abortions in certain tightly regulated circumstances (Garrow 1999; Ginsburg 1985). Catholics, and shortly thereafter, Republican Party strategists, began to mobilize against this liberalizing trend (Greenhouse and Siegel 2011). On this view, *Roe* is ultimately part-and-parcel of a larger story in which the Republican Party adopted an anti-abortion platform so as to attract social conservatives of many stripes into the Republican coalition, including traditionally Democratic Catholics.



The responses to *Roe* by both parties in their 1976 platforms are fairly tepid: both parties added abortion to their platforms for the first time, but the substance of each was lukewarm. The decision prompted the Republican Party to add the following passage to its 1976 platform:

“The question of abortion is one of the most difficult and controversial of our time. It is undoubtedly a moral and personal issue but it also involves complex questions relating to medical science and criminal justice. There are those in our Party who favor complete support for the Supreme Court decision which permits abortion on demand. There are others who share sincere convictions that the Supreme Court's decision must be changed by a constitutional amendment prohibiting all abortions. Others have yet to take a position, or they have assumed a stance somewhere in between polar positions.”

In short, the GOP discussed the Supreme Court's intervention on the abortion issue without taking a firm substantive stance on the topic. The Democratic Party also adopted an official abortion plank on its platform:

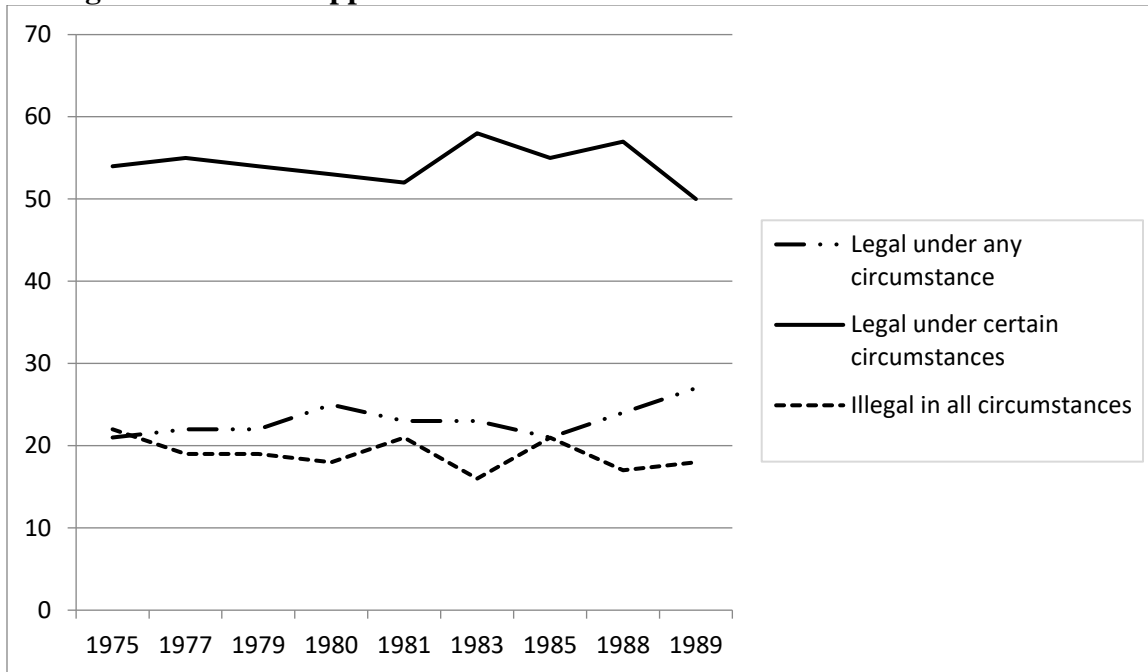
“We fully recognize the religious and ethical nature of the concerns which many Americans have on the subject of abortion. We feel, however, that it is undesirable to attempt to amend the U.S. Constitution to overturn the Supreme Court decision in this area.”

Abortion had never before appeared on either of the parties' platforms. Indeed, the text of these passages clearly suggest that abortion made it onto the platforms precisely because the Supreme Court spoke on the issue.

But in *Roe* the Court did more than simply weigh in on a contested political issue—it sought to resolve and end the contentious politics of abortion. Indeed, the modern Court explicitly recognizes what it was doing in *Roe* and the cases that follow it. In *Planned Parenthood v. Casey*, the opinion of the Court states that sometimes “in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases...” In such a case, “the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their

national division by accepting a common mandate rooted in the Constitution.”<sup>67</sup> It is clear that the Court failed in this purpose.

**Figure 7.7. Public Approval of Abortion**



Data from Gallup: <http://www.gallup.com/poll/1576/abortion.aspx>

The influence of *Roe* on mass opinion has been studied extensively. In his classic work on the Court, McCloskey (1960) argues that the Supreme Court rarely steps outside the mainstream of public opinion. Franklin and Kosaki (1989) argue, however, that when the Court rules on politically controversial cases this general rule is rather difficult to abide. Indeed, though such a decision may “establish the law of the land” it does not settle the debate; “It neither converts the opposition nor ends the controversy,” as Franklin and Kosaki put it (1989: 753). Regardless of the immediate impact of the decision in *Roe* on mass opinion, it is clear that public opinion was significantly divided on the issue in the 1970s. Figure 7.7 presents historical trends in support for abortion as measured by a series of nationally representative Gallup Poll surveys.

<sup>67</sup> *Planned Parenthood v. Casey* (“majority troika” opinion) 505 U.S. 833 (1992) at p. 867.

The polls show that in the years following *Roe* the broad contours of public opinion suggest that a majority of Americans believe that abortion should be legal in *some* circumstances, but that large and enduring minorities of the population want to alter the state of the law to either ban abortion outright or to legalize it in all cases. Thus in one rather crude sense, *Roe* adopts the position of the median American. Relatedly, the data in Figure 7.7 suggest that around 20% of the population would have been strongly opposed to the decision no matter which way the Court decided the case. Perhaps even more tellingly, Luks and Salamone (2008) present historical data (also from Gallup) showing that from 1974 to 1985, explicit support for *Roe* varied between 47 and 55 percent, while opposition to *Roe* varied between 45 and 48 percent, with opposition eclipsing support on one survey.

The foregoing discussion suggests a couple of key points. First, in *Roe* the Court attempted to “end” an intense debate over abortion, an issue which is fraught with moral, religious, and constitutional problems. In doing so, the Court consciously lifted the abortion debate from the realm of ordinary politics into the realm of constitutional politics. In doing so, it essentially raised the stakes—and thus the temperature—of the debate.<sup>68</sup> In other words, for the roughly 40% of Americans who had strong views on abortion, the *Roe* decision made abortion a fundamental question of politics. The parties, seeking always to shore up their constituencies and to capture new ones, responded by beginning to clarify their positions—and to do so by mutually distancing themselves from each other (Greenhouse and Segal 2011; Keck and McMahon 2016). In other words, *Roe* contributed significantly to the polarization of the abortion issue.

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<sup>68</sup> As Balkin put it, “when a court seeks to protect [unenumerated] declaratory rights...it needs evidence that the rights in question have achieved a special status as fundamental” (2011: 209-210). Abortion rights certainly did not meet this threshold in 1973, and they may not even today—but this is a question of politics, not “fundamental law.” As Whittington notes, “[c]onstructions never leave the realm of politics; they do not become a higher law to be recognized and applied from above” (1999b: 15). That is, the unenumerated nature of the right to abortion means it will remain constitutionally contestable for as long as it remains ethically or morally contestable.

This move is observable in parties' post-*Roe* platforms, as they replace the rather ambivalent positions in their 1976 platforms with firmer—and divergent—positions in 1980. The Democratic platform simply states that “The Democratic Party supports the 1973 Supreme Court decision on abortion rights as the law of the land and opposes any constitutional amendment to restrict or overturn that decision.” The Republic Platform, in contrast, states:

“There can be no doubt that the question of abortion, despite the complex nature of its various issues, is ultimately concerned with equality of rights under the law. While we recognize differing views on this question among Americans in general—and in our own Party—we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children. We also support the Congressional efforts to restrict the use of taxpayers' dollars for abortion.”

Further, the 1980 GOP platform states “We protest the Supreme Court's intrusion into the family structure through its denial of the parent's obligation and right to guide their minor children.”

This section is a clear reference to the Court's decisions in *Planned Parenthood v. Danforth* (1976) and *Bellotti v. Baird* (1979), in which the Court built on *Roe* by invalidating a number of restrictions on abortion enacted by the states of Missouri and Massachusetts—in particular, the invalidation of the states' requirement for parental consent if a woman under the age of 18 sought an abortion.

In short, the parties had by 1980 clearly diverged on the issue of abortion, with the Democratic Party officially supporting constitutional protections for abortion rights, and the GOP officially calling for constitutional protection of a fetal right-to-life. By taking clear and divergent views on this heated political (and now, constitutional) question, the parties helped to sort the electorate along this salient dimension. This process would continue apace for at least two decades as states and interest groups worked to alter abortion policy around the country. The

constitutionalization of this issue in *Roe*, however, ensured that the Court would weigh in on these policy changes, creating further opportunity for position-taking by the parties.

Two more abortion decisions made it on to the parties' platforms: *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007), and the responses to each reflect what were by then the entrenched positions of the parties on the abortion question. In *Stenberg v. Carhart*, a sharply divided Court struck down Nebraska's ban on partial-birth abortions as unconstitutional under *Roe* and *Planned-Parenthood v. Casey*. The official Republican Party stance on this decision was predictably negative:

“The Supreme Court's recent decision, prohibiting states from banning partial-birth abortions — a procedure denounced by a committee of the American Medical Association and rightly branded as four-fifths infanticide — shocks the conscience of the nation. As a country, we must keep our pledge to the first guarantee of the Declaration of Independence. That is why we say the unborn child has a fundamental individual right to life which cannot be infringed. We support a human life amendment to the Constitution and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children. Our purpose is to have legislative and judicial protection of that right against those who perform abortions.”

This response clearly attacks the Court's ruling, but also explicitly lays out the GOP's plan to fight it and similar decisions: passing abortion-restrictive legislation, appointing judges who will interpret the constitution correctly (i.e. who will protect the rights of unborn children), and, if possible, amending the constitution to explicitly protect the rights of the unborn.

The Democrat's official response was perhaps less bombastic, but at least equally clear in the partisan stakes of the Court's abortion rulings. The Democratic platform states:

“The Democratic Party stands behind the right of every woman to choose, consistent with *Roe v. Wade*, and regardless of ability to pay. We believe it is a fundamental constitutional liberty that individual Americans - not government - can best take responsibility for making the most difficult and intensely personal decisions regarding reproduction. This year's Supreme Court rulings show to us all that eliminating a woman's right to choose is only one justice away. That's why the stakes in this election are as high as ever.”

This passage does not explicitly support a right to partial-birth abortions (which the corresponding GOP platform explicitly attacks), but rather contends that the fact of 5-4 abortion decisions in cases like *Stenberg v. Carhart* and *Hill v. Colorado* (2000), suggest the precarious nature of judicial protection of abortion. By extension, the party argues, the stakes of elections are quite high: if Republicans win and appoint judges and justices, abortion rights are seriously threatened and thus the protection of abortion rights requires the election of Democrats, who will appoint pro-abortion judges.<sup>69</sup>

Finally, the Court's decision in *Gonzales v. Carhart* (2007) drew praise from the Republican Party, because it upheld a federal ban on some types of partial-birth abortions. The 2008 GOP platform states "We have made progress. The Supreme Court has upheld prohibitions against the barbaric practice of partial-birth abortion." The platform goes on to celebrate other progress made on this front, including legislation protecting infants born alive during abortions, and states extending health-care coverage to prenatal infants.

One thing the foregoing study makes clear is that the Court can influence politics and policy not only by "creating" issues or moving issues up the political agenda, but can also do so by "constitutionalizing" issues. By that I mean that the Court, because it speaks in terms of fundamental law, can and does increase stakes of political contests. When abortion policy is left to elective politics, there is certainly much at stake for people affected by those policies, but when a policy decision is made by the Supreme Court the tenor of the popular debate necessarily changes from "regular" politics to the absolutes of constitutional (fundamental) rights and wrongs. Thus the Court's decision in *Roe* had the downstream effect of incentivizing the parties

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<sup>69</sup> See Keck and McMahon (2016) however, for a perspective on why "*Roe* still stands" after decades of Republican ascendance in state legislatures and dominance of the federal courts.

to capture intense partisans of this particular issue, which has had major and wide-range effects over the last 50-plus years. This move has been so successful that today, stances on abortion are one of the key “litmus tests” for elites in both parties—perhaps especially those being considered for federal judgeships.

Additionally, the intense partisan rancor surrounding questions of abortion has allowed parties to continually use the issue to mobilize their respective bases. As noted above, in recent platforms, the GOP has reminded voters that the only way to secure the rights of the unborn is to elect pro-life (implied Republican) legislators, who will in turn appoint pro-life judges. Democrats, on the other hand, have used recent 5-4 decisions protecting abortion rights as evidence that protections for abortion hang on a single vote, and thus that their continued protection depends on voters choosing pro-choice (Democratic) legislators who will appoint pro-choice judges.

In sum, the parties have both responded multiple times to changes in abortion policy initiated by the Supreme Court. The Court’s first major foray into this issue—*Roe v. Wade*—remains controversial today. Both parties tip-toed around *Roe* in their first platform after that case (1976), but by 1980, the parties had taken firm, oppositional stances on the issue. Response to subsequent cases, such as *Planned Parenthood v. Danforth* and *Hill v. Colorado* further highlight how the parties’ stances on abortion have changed over time—and how they have been shaped in important part by decisions made by the Supreme Court.

### ***Eminent Domain***

The Court’s infamous 2005 decision in *Kelo v. New London* (which is discussed at length in chapter 3), put eminent domain on the political agenda around the country. The decision was extremely unpopular and received extensive news coverage. Sustained media attention to the

case itself was undoubtedly a key contributing factor to the heightened attention to eminent domain more generally after the *Kelo* decision was announced (see chapter three). Substantial media attention to an unpopular policy, I have argued, created a situation in which electorally minded representatives in Congress and in state legislatures had incentive to score points with their constituents by attacking the decision, and possibly by introducing legislation to curb its potential impact.

Eminent domain, as a policy issue, is typically bundled with issues like property taxes, zoning regulations, and the like under the broader issue header of “property rights”—and is almost always considered a “conservative” issue. This is especially true in American politics since the so-called “Conservative movement” of the 1970s (Teles 2010). Indeed, a significant “property rights movement” was a defining force within the broader conservative turn during that time (Hatcher 2002). It is worth noting that this is true despite the fact that eminent domain abuses disproportionately harm poorer, socially disadvantaged populations in urban areas (Carpenter and Ross 2009).

It should come as no surprise, then, that the litigation in *Kelo* was supported, and eventually led, by a libertarian-leaning public interest law firm called the Institute for Justice (IJ). After *Kelo* was decided, property rights groups including IJ, the Pacific Legal Foundation, and the Castle Coalition mobilized to stymie the decision’s impact by exploiting the opportunity created by the unusually large (and almost wholly negative) amount of media coverage the decision received. Nor should it come as any surprise that anti-takings reform efforts post-*Kelo* were typically led by Republicans (although such measures often had substantial bi-partisan support).



At the national level, we see that the Republican Party included discussion of *Kelo* and cognate property rights issues in each of its platforms since that decision was handed down. In 2008, the GOP included the following passage in its platform:

“At the center of a free economy is the right of citizens to be secure in their property. Every person has the right to acquire, own, use, possess, enjoy, and dispose of private property. That right was undermined by the Supreme Court's *Kelo* decision, allowing local governments to seize a person's home or land, not for vital public use, but for transfer to private developers. That 5-to-4 decision highlights what is at stake in the election of the next president, who may make new appointments to the Court. We call on state legislatures to moot the *Kelo* decision by appropriate legislation, and we pledge on the federal level to pass legislation to protect against unjust federal takings. We will enforce the Takings Clause of the Fifth Amendment to ensure just compensation whenever private property is needed to achieve a compelling public use. We urge caution in the designation of National Historic Areas, which can set the stage for widespread governmental control of citizens' lands.”

Here the party not only condemned the decision itself, but expressly called for actions from both its elites and the rank-and-file members. To the rank-and-file it issues a reminder about the importance of voting for (Republican) executives and legislators who will appoint judges that will defend property rights. To the elite, it calls for legislation to curb “unjust” takings and to otherwise reform contemporary eminent domain practices. Importantly, the platform specifically promises that Republicans in Congress will “pass legislation to protect against unjust federal takings.” As I note in chapter three, the House has voted in favor of such legislation multiple times, but all such bills have died in committee in the Senate.

Though the Supreme Court has not issued another decision in the *Kelo* line (i.e. on express physical takings with respect to the meaning of public use), *Kelo* has continued to appear in the GOP platforms. In 2012 the party states:

“The Takings Clause of the Fifth Amendment—“nor shall private property be taken for public use without just compensation”—is a bulwark against tyranny; for without property rights, individual rights are diminished. That is why we deplore the Supreme Court's *Kelo v. New London* decision, allowing local

governments to seize a person's home or land, not for vital public use, but for transfer to private developers. We call on State legislatures to moot the impact of the *Kelo* decision in their States by appropriate legislation or constitutional amendments. Equally important, we pledge to enforce the Takings Clause in the actions of federal agencies to ensure just compensation whenever private property is needed to achieve a compelling public use. This includes the taking of property in the form of water rights in the West and elsewhere and the taking of property by environmental regulations that destroy its value.”

This passage indicates a strategic shift had occurred since the initial GOP response in the 2008 platform. Note, for example, the absence of any promise for federal legislation—wise in light of the failure to pass any such law even during the period of heightened attention to the issue in the immediate aftermath of *Kelo*. Republicans instead emphasize the importance of state-level legislative and constitutional innovation to “moot the impact” of the Court’s decision.

By 2016, most states had already taken political action on takings: 44 states had revised their policies, including ten that amended their constitutions, in an effort to “reduce the impact” of *Kelo* (Somin 2015; Beienburg 2014; Strother 2016). As such, the 2016 GOP platform reflected the relative success of the anti-takings wave of activism that *Kelo* generated:

“The Framers of our government knew, from history and experience, that when private property is not secure, freedom is at risk. That is why the Fifth Amendment declares that private property may not be ‘taken for public use without just compensation.’ The Supreme Court's *Kelo* decision undermined this safeguard by allowing local governments to seize a person's home or land not only for vital public use, but also for ‘public purpose,’ which thus allowed the government to seize it for transfer to private developers or other private entities. We call on any state legislatures that have not already done so to nullify the impact of *Kelo* within their jurisdiction by legislation or state constitutional amendments declaring that private property may be taken only for true public use, and we join House Republicans in supporting the Private Property Rights Protection Act.”

In this passage, the GOP implicitly recognizes this success, by calling only upon “any state legislatures that have not already done so” to take action to secure property rights against *Kelo*-esque takings. Very importantly, however, the 2016 platform renews the promise of 2008 (but

omitted in 2012) for federal protection against such takings, in the form of the pledge to support the Private Property Rights Protection Act (see chapter three for discussion of that Act's history in earlier sessions of Congress).<sup>70</sup>

In sum, the Court's decision in *Kelo v. New London* spurred the Republican Party to officially reaffirm its support for property rights, and to promise legislative action to curb the potential impacts of that decision. It should be noted that the Democratic party has not included any such reference to *Kelo* in its subsequent platforms, which likely indicates Democratic party elites' recognition that "property rights" are an issue that is "owned" by the Republican party (see generally Petrocik 1996). Further, the nearly unanimous public opposition to the *Kelo* decision means it would be politically unwise for the DNC to adopt an oppositional stance to that of the Republicans.

The House of Representatives has passed several bills aimed at improving property rights protections, but so far all of these have failed to pass the Senate. State legislatures have been extremely successful, however, in re-writing their own laws of eminent domain to restrict the scope of that power. Thus *Kelo*, by incentivizing legislators to take up the issue of eminent domain, directly led to dozens of reform measures around the country *despite* the fact that *Kelo* did not mark any substantial change in federal law. Put differently, *Kelo* demonstrates that Court decisions can draw significant public attention even when they do not cause major changes in law or policy (see also chapter five above), and that cases can create political opportunity structures (Andersen 2006) which policy entrepreneurs can exploit to push their favored policies during these windows of opportunity.

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<sup>70</sup>As of this writing, the Republican-controlled 115<sup>th</sup> Congress has not yet introduced a new version of the PPRPA.

## ***Gun Rights***

The Supreme Court's decision in *D.C. v. Heller* was its first major decision concerning the Second Amendment in almost 70 years.<sup>71</sup> The facts of the case were straightforward: the city of Washington, District of Columbia had since 1976 completely banned the possession of usable handguns, including those kept in the home for the purpose of self-defense. Brian Doherty summarizes the city's regulatory scheme concisely:

“According to D.C. codes 7-2502.01, 7-2502.02, 7-2507.02, as well as 22-4504 and 22-4515, it was illegal to have a handgun without registering it, and you couldn't register it if you didn't already own it before the law was passed in 1976; it was illegal to have a long gun in your home in any condition other than unloaded and disassembled or trigger-locked; and if you had a registered handgun, even carrying it around your house could get you a year in jail and a \$1,000 fine.” (Doherty 2008: 40)

Dick Heller, a D.C. resident and a trained and licensed special police officer for the city, wanted to keep a gun in his home for personal protection. Heller sued, alleging that D.C.'s policy violated the right to bear arms enshrined in the Second Amendment.

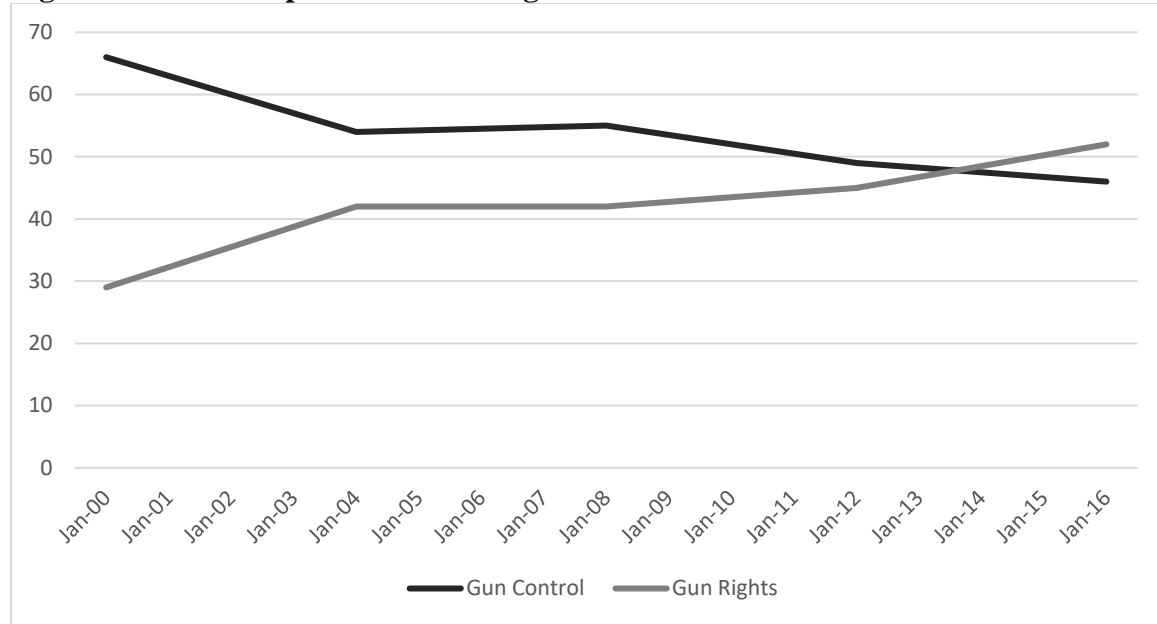
A closely divided Court ultimately ruled in Heller's favor. The five-member majority held that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home. More specifically, the *Heller* decision consists of three core holdings: 1) The Second Amendment protects an individual right; 2) that right is not unlimited; and 3) the handgun ban and trigger-lock requirements of D.C. are effectively prohibitory, and are thus unconstitutional. This decision was the first by the Court to construe the scope of the Second

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<sup>71</sup> The most recent case to directly address the scope of the 2<sup>nd</sup> Amendment before *Heller* was *U.S. v. Miller* (1939).

Amendment, and thus was certain to be a “landmark” decision regardless of the outcome of the case.<sup>72</sup>

**Figure 7.8. Public Opinion on Gun Rights and Gun Control**



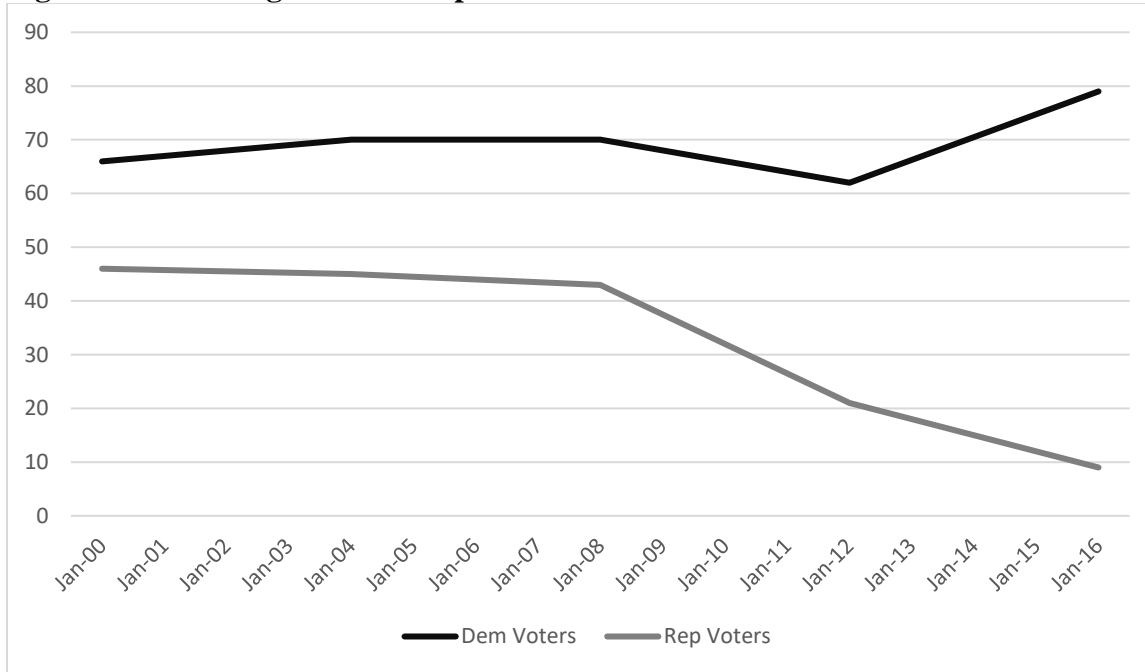
Note: graphic depicts the percentage of the general public saying it is more important to “control gun ownership” (Gun Control series), and to “Protect the right of Americans to own guns” (Gun Rights series), respectively. (Source: Pew Research Center).

Perhaps unsurprisingly given the nation’s close division on questions of gun rights and gun control, the response to the *Heller* decision was polarized. Figure 7.8 shows graphically that support for gun rights has increased significantly over the past decade and a half—however, figure 7.9 makes clear that this basic upward trend masks important partisan differences. That is, figure 7.9 shows that rank-and-file Democrats are increasingly opposed to protections for gun

<sup>72</sup> The Court had decided only four Second Amendment cases before *Heller*: *United States v. Cruikshank* (1876), *Presser v. Illinois* (1886), *Miller v. Texas* (1894), and *United States v. Miller* (1939). In *U.S. v. Cruikshank* the Court decided, five votes to four, that the First Amendment right to assemble, and the Second Amendment right to bear arms, “has no other effect than to restrict the powers of the national government.” That is, in *Cruikshank*, the Court declined to incorporate either amendment against state governments. *Presser v. Illinois* affirmed *Cruikshank*, this time holding that the Second Amendment does not preclude state governments from forbidding “bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns”, most explicitly, because the Second Amendment is a “limitation only upon the power of congress and the national government, and not upon that of the state.” In *Miller v. Texas* the Court held that a Texas law forbidding the “carrying of weapons” does not necessarily deny citizens the “benefit of any of these [Second Amendment] provisions.” Further, the Court again affirmed that “these amendments [the Second and Fourth] operate only upon the Federal Power,” and again declined to consider whether either Amendment could be applied against the states via the Fourteenth Amendment.

owners, while at the same time Republicans have become increasingly opposed to any efforts to control gun ownership.

**Figure 7.9. Growing Partisan Gap in Attitudes on Guns**



Note: graphic depicts proportion of respondents, among registered voters who voted for the Democratic and Republican candidate in each election, respectively, who say that it is “more important to control gun ownership than to protect gun rights” (Source: Pew Research Center).

In this polarized partisan climate, it is little surprise that the responses of the parties to the *Heller* decision were quite different. In their 2008 platform, the Republican party celebrated *Heller* as a needed affirmation of a basic right:

“We uphold the right of individual Americans to own firearms, a right which antedated the Constitution and was solemnly confirmed by the Second Amendment. We applaud the Supreme Court's decision in *Heller* affirming that right, and we assert the individual responsibility to safely use and store firearms. We call on the next president to appoint judges who will similarly respect the Constitution. Gun ownership is responsible citizenship, enabling Americans to defend themselves, their property, and communities.”

It goes on to note that the GOP is “astounded that four justices of the Supreme Court believe that individual Americans have no individual right to bear arms to protect themselves and their families.” In these passages, Republican elites are sending a clear signal not only of the party’s

stance, but also draw a stark difference between their stance and that of the (liberal) Court minority.

The Democratic response to *Heller* in its official platform, however, was not particularly hostile. The DNC pays homage to the Second Amendment and to America's tradition of gun ownership. However, it goes on to note that,

“[Democrats] believe that the right to own firearms is subject to reasonable regulation, but we know that what works in Chicago may not work in Cheyenne. We can work together to enact and enforce commonsense laws and improvements – like closing the gun show loophole, improving our background check system, and reinstating the assault weapons ban, so that guns do not fall into the hands of terrorists or criminals. Acting responsibly and with respect for differing views on this issue, we can both protect the constitutional right to bear arms and keep our communities and our children safe.”

In other words, the immediate Democratic response is actually mostly consistent with the majority ruling in *Heller*—it acknowledges an important right, but also notes that that right is subject to reasonable regulation. The DNC of course goes further than the Court would do in laying out some particular types of regulation that it views as necessary. Moreover, and despite their different tones, there is nothing inconsistent in the expressed views of the GOP and the DNC in their 2008 platforms.

It is after *Heller*, and after the 2008 elections, that we see public opinion on gun rights and gun control begin to significantly diverge along partisan lines (see figure 7.9). In subsequent Democratic Platforms (i.e. 2012 and 2016), there is no reference to *Heller*, nor to guns or the Second Amendment. The GOP, however, significantly expands its discussion of gun rights, and increasingly condemns Democratic-backed regulatory schemes.<sup>73</sup> In its 2012 platform, the Republican party again signals its views on the importance of the right to bear arms: “We uphold

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<sup>73</sup> By 2012, the Supreme Court had decided another important Second Amendment case, *McDonald v. City of Chicago* (2010). The primary effect of this decision was to incorporate the right to bear arms as outlined in *Heller* to apply to the states via the 14<sup>th</sup> Amendment.

the right of individuals to keep and bear arms, a right which antedated the Constitution and was solemnly confirmed by the Second Amendment. We acknowledge, support, and defend the law abiding citizen's God-given right of self-defense.” But it goes further also, in outlining specific policies pursuant to the exercise of this fundamental right that it favors and opposes:

“We support the fundamental right to self-defense wherever a lawabiding citizen has a legal right to be, and we support federal legislation that would expand the exercise of that right by allowing those with state-issued carry permits to carry firearms in any state that issues such permits to its own residents. Gun ownership is responsible citizenship, enabling Americans to defend their homes and communities. We condemn frivolous lawsuits against gun manufacturers and oppose federal licensing or registration of law-abiding gun owners. We oppose legislation that is intended to restrict our Second Amendment rights by limiting the capacity of clips or magazines or otherwise restoring the ill-considered Clinton gun ban.”

This tactic is carried on its 2016 platform as well, where the GOP continues to express support for national concealed carry reciprocity legislation and opposition to restrictions on magazine capacity or “popular and common modern rifle[s]” which are frequently referred to as “assault weapons” by gun control advocates.

There is one major addition to the 2016 Republican platform, however: an explicit appeal to constituents to consider the importance of a pro-Second Amendment Supreme Court. The passage states: “We salute the Republican Congress for defending the right to keep and bear arms by preventing the President from installing a new liberal majority on the Supreme Court. The confirmation to the Court of additional anti-gun justices would eviscerate the Second Amendment's fundamental protections.” Here the GOP praises Senate Republicans for refusing to vote on outgoing President Barack Obama’s Supreme Court nominee Merrick Garland. In doing so, the platform also strongly hints at the importance of the 2016 election for the future of gun rights, especially as it concerns the vacancy on the high Court left by Justice Scalia’s passing in early 2016.



In summary, the Court’s landmark decision in *D.C. v. Heller* prompted both parties to include discussions of gun rights and gun control issues in their 2008 platforms. For Democrats, this is the only time in the entire sample (1952-2016) that any such discussion occurs, while Republicans maintain attention to gun rights and gun control in their 2012 and 2016 platforms. Both parties use their platforms to outline policy proposals in line with their views—and public opinion polling suggests that these correspond with shifts in mass preferences on such policies among their respective constituents. Additionally, the GOP in 2016 makes explicit mention of the importance of appointing pro-gun rights justices to the Supreme Court, doing so in light of an existing vacancy. This strategy hints at the importance of voting for pro-gun candidates for elective office, especially presidents who will nominate pro-gun justices, and Senators who will confirm those pro-gun nominees. In other words, the GOP here reminds its constituents that the future security of their cherished right to bear arms depends on voting for Republicans.

### ***Campaign Finance***

The controversy at issue in *Citizens United v. FEC* concerned a conservative non-profit organization called Citizens United who wanted to air a film critical of Democratic presidential hopeful Hillary Clinton (titled *Hillary: The Movie*). The funding and airing of such a film was a violation of the 2002 Bipartisan Campaign Reform Act (BCRA; also known as the McCain-Feingold Act). In relevant part, BCRA forbade “electioneering communication” expenditures by corporations and unions in the 30 days before a primary election or 60 days before a general election. Citizens United filed suit alleging that the portions of BCRA limiting “electioneering” communications—including their film *Hillary*—were constitutionally invalid restrictions of free speech. The U.S. District Court for the District of Columbia upheld BCRA against this challenge.

The Supreme Court reversed the district court's decision, holding that the First Amendment's protections for free speech prohibit the government from restricting independent political expenditures by nonprofit corporations. In doing so the Court overruled its prior opinion in *Austin v. Michigan Chamber of Commerce* (1990), as well as parts of *McConnell v. FEC* (2003).<sup>74</sup> The majority opinion, written by Justice Kennedy, notes that the dissemination of speech requires money, and thus that limitations on spending are tantamount to limitations on speech. Further, the Court held that the First Amendment protects the speech rights not only of individuals, but also of associations of individuals—thus concluding that the Constitution does not permit prohibitions on speech based on the corporate identity of the speaker.

The Court's decision in *Citizens United v. FEC* (2010) was controversial, to say the least (Levitt 2010; Teachout 2011). Many on the political left, in particular, viewed the decision as an assault on democracy and an invitation to corruption at best, and plutocracy at worst. Law professor Erwin Chemerisnky (2011) for example, described *Citizens United* as part of a "Conservative assault on the constitution." While some on the political right also expressed concerns about the decision's implications, many celebrated the decision as a crucial step towards more robust protection of political speech (e.g. Epstein 2011).

The decision also garnered responses from both parties in their subsequent platforms. In light of the above, the substance of these responses was perhaps predictable. In its 2012 platform the Democratic Party had this to say about *Citizens United*:

"Our political system is under assault by those who believe that special interests should be able to buy whatever they want in our society, including our government. Our opponents have applauded the Supreme Court's decision in *Citizens United* and welcomed the new flow of special interest money with open arms. In stark contrast, we believe we must take immediate action to curb

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<sup>74</sup> *Austin* held that a state law prohibiting corporations from using to support or oppose candidates did not violate the First Amendment. The portion of *McConnell v. FEC* that was overruled held that disclosure requirements as to all "electioneering communications" were constitutional.

the influence of lobbyists and special interests on our political institutions.”

In short, the DNC describes *Citizens United* as an assault on our very political system, one that puts “special interests” ahead of regular people. The GOP’s official response could hardly be more different. In its 2012 platform, the Republican party states:

“The rights of citizenship do not stop at the ballot box. They include the free speech right to devote one’s resources to whatever cause or candidate one supports. We oppose any restrictions or conditions that would discourage Americans from exercising their constitutional right to enter the political fray or limit their commitment to their ideals. As a result, we support repeal of the remaining sections of McCain-Feingold, support either raising or repealing contribution limits, and oppose passage of the DISCLOSE Act or any similar legislation designed to vitiate the Supreme Court’s recent decisions protecting political speech in *Wisconsin Right to Life v. Federal Election Commission* and *Citizens United v. Federal Election Commission*.”

Here the GOP not only lauds the Court’s recent campaign finance and corporate speech decisions (and does so by name), but it calls for legislative action to further deregulate those activities.

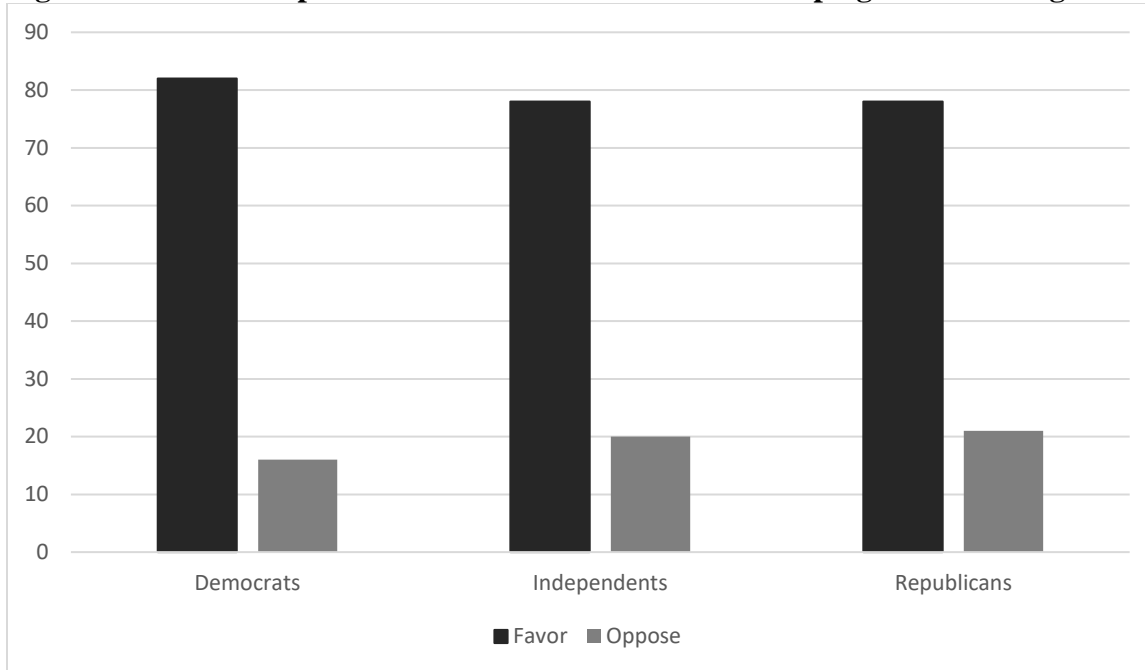
Public opinion on this cluster of issues (campaign finance, corporate/union speech, etc.) is difficult to pin down. This is the case, at least in part, because the problems presented by these issues are both technically complex and normatively fraught, and because there are multiple viable solutions to those problems put forth by a range of political and policy elites (e.g. Primo 2002).<sup>75</sup> A Washington Post-ABC Poll in the weeks after *Citizens United* found that a large majority of Americans opposed the decision, with 65% reporting they were “strongly” opposed. Importantly, this basic finding was true across partisan divisions with 85% of Democrats opposed, 81% of Independents opposed, and 76% of Republicans opposed (Eggen 2010). Polling by Gallup in 2013 revealed that many Americans of all political persuasions favored significant

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<sup>75</sup> Public opinion is notoriously difficult to study in “hard” (complex or technical) issue areas—and indeed, a significant body of research suggests that public opinion may not be particularly meaningful in those areas due to limitations in people’s interest in and attention to such issues (Carmines and Stimson 1980; Johnston and Wronski 2015).

campaign finance reform, including restrictions on fundraising, as figure 7.10 graphically demonstrates.

**Figure 7.10. Public Opinion on Federal Restriction on Campaign Fundraising**



Note: Question wording: Would you vote for or against a law that would put a limit on the amount of money candidates for the U.S. House and Senate can raise and spend on their political campaigns?" (Source: Gallup, June 15-16, 2013).

However, further polling suggests that campaign finance is not a high-salience issue, nor one that many voters view as one that should be prioritized by Congress (e.g. Saad 2013; Saad 2006). So while it seems from the polling that Democrats should have the upper hand on this issue, it may well be the case that the low priority of issue to many voters is making it difficult to push for effective (and probably popular) reforms. Moreover, the technical nature of the issue, combined with its intermittent salience, makes it an issue ripe for elite opinion leadership. That is, it is the sort of issue on which elites may be able to move public opinion—for Republican elites, this means an opportunity to sway Republican voters toward the GOP's announced position by reframing the issue as concerning free speech and anti-political correctness. Whether such efforts will be successful remains to be seen.

By 2016 the Democratic Party had become more explicit in their calls to overturn

*Citizens United*:

“Democrats support a constitutional amendment to overturn the Supreme Court's decisions in *Citizens United* and *Buckley v. Valeo*. We need to end secret, unaccountable money in politics by requiring, through executive order or legislation, significantly more disclosure and transparency—by outside groups, federal contractors, and public corporations to their shareholders. We need to amplify the voices of the American people through a small donor matching public financing system. We need to overhaul and strengthen the Federal Election Commission so that there is real enforcement of campaign finance laws. And we need to fight to eliminate super PACs and outside spending abuses.”

Democratic party elites clearly ramped up their rhetoric, but did so building on the same themes laid out in the 2012 platform: the heart of their opposition to *Citizens United* and *Buckley*, they claim, is a desire to “amplify the voices of the American people.”

The GOP platform, in contrast, became vaguer on this issue in 2016 compared to 2012.

The platform states that:

“Limits on political speech serve only to protect the powerful and insulate incumbent officeholders. We support repeal of federal restrictions on political parties in McCain-Feingold, raising or repealing contribution limits, protecting the political speech of advocacy groups, corporations, and labor unions, and protecting political speech on the internet. We likewise call for an end to the so-called Fairness Doctrine, and support free-market approaches to free speech unregulated by government.”

The policy positions taken in the two platforms GOP are largely the same, but here the party does not explicitly praise the Court's recent campaign finance decisions, nor does it make promises about specific policy commitments should the GOP control government after the election.

To be sure, the politics of campaign finance were contentious long before the Supreme Court's ruling in *Citizens United*. However, like in the cases of *Roe* and *Heller*, discussed above, *Citizens United* seems to have elevated the salience of the underlying issue, and to have raised

the stakes of the political contest. That is, post-*Citizens United*, proponents of campaign finance face a major uphill battle in light of the constitutional protections now afforded corporate campaign expenditures and the like. Whereas before simple legislation would have sufficed, today proponents—mostly Democrats—need stronger medicine: they must amend the constitution or play the slow game of constitutional change by shifting the balance of power on the Supreme Court toward their favor. Republicans (at least those opposed to heavier regulation of campaign related speech) now have the metaphorical high ground and can simply play defense: because of the massive hurdles facing many proponents of reforms, Republicans need only to passively defend the status quo to maintain their preferred policy.

## **Discussion**

The foregoing analyses suggest that important Supreme Court decisions can and do regularly influence the policy commitments of America’s major political parties. Moreover, I show that Court influence on the parties’ agendas has become more common over time—and that the effect is considerably more pronounced on the Republican party than on the Democratic party. To be clear, I am not making the claim that *Roe v. Wade* put abortion on the national policy agenda for the first time, nor that the push for expanding gun rights began after *D.C. v. Heller*. Rather, I argue here that important Supreme Court decisions pushed these issues to the fore of political debate—they moved the issues up the agenda, if you will—and in doing so, fundamentally altered the politics of those issues. I have focused here on the Court’s influence on the policy commitments of the parties in four issue areas: abortion, eminent domain, gun rights/gun control, and campaign finance.

The foregoing analyses suggest that some Supreme Court decisions work as “focusing events” for the parties (Birkland 1998). Focusing events are sudden, relatively rare events with

politically consequential (and usually potentially harmful) implications. These focusing events make issues or problems suddenly salient; they “highlight problems to which government or other institutions might respond” and in doing so “change the dominant issues on the agenda in a policy domain” (Birkland 1998: 53-54). In the context of Supreme Court decisions, this means that a decision makes the larger policy or issue to which it speaks more salient, and often, more controversial. Thus Court decisions can simultaneously raise the profile and the stakes of an ongoing policy debate.

In the policy domain of abortion, for example, I have argued that the Court’s decision to constitutionalize an unenumerated right in *Roe* raised the stakes of the ongoing public debate on that topic. By “raised the stakes” I mean that after *Roe*, political discourse on abortion policy necessarily revolved around questions of fundamental rights and supreme law. With the stakes of winning and losing thus raised, the Court’s decision incentivized intense partisans to pour increasing resources (and ever-increasing vitriol) into this policy debate. This in turn incentivized the parties to capture these intense partisans and the resources they were willing to expend on that policy (see generally Cohen et al. 2008). Shadows of this—though undoubtedly to a lesser extent (yet, at least)—can be seen in the post-*Heller* politics around gun rights and gun control. However, there has always been a constitutional or fundamental rights aspect to these debates, given the Second Amendment explicitly protects a right to bear arms (even if the question regarding to whom this right applies has long been debated). The Court’s decision in *Heller*, by explicitly affirming a broad-based individual and fundamental right to bear arms changed the political landscape of ongoing policy debates over guns.

In other words, public opinion on two of the issues captured in the case studies, abortion and gun control, is significantly divided and increasingly partisan. Public opinion on the other

two issues, however, suggests that one party should dominate policy development: the Republican party's stated preference strongly reflects overwhelming public sentiment on eminent domain, as does the Democratic party's position on campaign finance reform. Taken together, the findings suggest that the parties' responses to Supreme Court decisions are largely strategic. The parties use Supreme Court decisions, like anything else, to attempt to energize their partisans and to try to capture new constituents. Thus in response to abortion decisions, Democrats are reminded by their party elite that Republican electoral success would be fatal to continued protection of abortion rights; Republicans, in contrast, reminded their rank-and-file that Democratic victories at the polls will ensure continued destruction of lives of unborn (or more recently, "preborn") infants. When public opinion is more monolithic—as it is on eminent domain and campaign finance—a rather different reaction is observed. The party on the "right side" of public opinion is presented by a focusing case with an opportunity to enact its agenda, as Republicans did on eminent domain after *Kelo*. In summary, I argue that some Supreme Court decisions cause the parties to focus scarce resources on some particular policy issue. The parties' responses will be shaped by their strategic goals: they will seek to attach preexisting policy goals to the newly salient event or problem (Kingdon 1984), and will attempt to mobilize their base and/or to capture new partisans on the basis of their position on that issue or policy (Birkland 1998; Brewer and Stonecash 2009).

Finally, the research presented here suggests that the level of success the parties have enjoyed in translating their stated preferences on these issues into policy changes is starkly different: eminent domain policies have been heavily revised around the country post-*Kelo*, while campaign finance policy has only been marginally (and minimally) adjusted since *Citizens United*. This difference in success is likely attributable primarily to the ability of state



legislatures to innovate policy on eminent domain, and their (obvious) inability to revise federal campaign finance laws. That is, if we restrict policy development post-decision to the federal level, we see that not much has changed in either policy area (due to partisan gridlock, or for whatever other reason). And while federal campaign finance policy must be changed at the national level if it is going to be changed at all, eminent domain policy can be (and has been) changed significantly at the state level. As such, I contend that the uneven success of the parties at translating their ownership of these two policy areas into policy changes more in line with prevailing opinion is attributable to increased opportunity to innovate policy by shifting from federal into state venues on the one issue (eminent domain) but not the other (campaign finance).

### **Conclusion**

Party platforms are a key site for party elites to espouse their policy commitments and appeal to their constituents on the bases of those policies. Importantly, these platforms have been shown to represent credible policy commitments of party elites, and do in fact meaningfully predict subsequent behavior by the party who captures government in the ensuing election. In this chapter, I have argued that the Supreme Court routinely influences the substance of the policy commitments of America's major parties.

It is clear from the above analysis that one major purpose of official party responses to the Supreme Court's decisions are to score easy political points among their base by reaffirming their pre-existing commitments to some right that has recently been protected (or attacked) in a Supreme Court decision. The parties also use these decisions to mobilize "intense policy demanders" on a given issue, such as abortion. That is, Supreme Court decisions can be used by party elites to remind rank-and-file members of the party that the protection of their political preferences requires electoral support of the party. Occasionally, the Supreme Court raises the

profile of an issue to a previously unknown height; when this happens, the shape of public opinion significantly influences the incentives of the parties. When public opinion on an issue is divided, the decision can provide an opportunity for the parties to try to capture members of the public on the different sides of the issue by taking oppositional positions, as they did in the years following *Roe* (Greenhouse and Siegel 2011). When public opinion is fairly one-sided on such an issue, the party whose position is favored by the public will seek to use the opportunity offered by the case to enact its agenda on that issue, while the other party will seek to minimize its association with the “other” (widely unpopular) position.

In summary, I have argued that the Supreme Court can and does influence the official agendas of America’s two major political parties. As is true of the presidential and public agendas, I argue that Supreme Court influence on the party agendas is relatively rare in terms of the proportion of cases decided that have such an effect, but is also routine in that at least a couple of decisions have this affect in each agenda cycle (in the case at hand, every four years when the parties construct new platforms). Influence on the party agendas, I have argued, is politically consequential because the platforms are good indications of the policies that the party in power will go on to pursue while in office. Moreover, these cases have powerfully shaped politics because they have provided both parties with ammunition to mobilize their constituents around issues. Because Supreme Court decisions effect not only “low” policy but also the state of the constitution-in-practice, they provide parties with an opportunity to emphasize the important ramifications for some policy (abortion, gun rights, etc.) at stake after the Court renders a decision on that policy. As a result, Supreme Court decisions can make policy debates more contentious, which fuels partisan politicking on those issues and thus ensures that said

issue(s) will remain salient and contested. Ultimately, this influence on the party agendas points to another indirect pathway of Supreme Court influence on public policy.

## Chapter 8:

### Discussion and Conclusion:

#### Supreme Court Power and Impact in American Politics

In the foregoing chapters I have advanced two key arguments. First, if we want to understand the Supreme Court's role in our political system, we must conceptualize judicial impact as all policy-relevant outcomes of judicial action. Second, I have argued that a clearly articulated theory of judicial power—distinguished from the broader concept of impact—should be the foundation of any theory of judicial impact. To this end, I argued that the nature of Supreme Court power is the power to interpret the law. I contend that the power to interpret the law is fundamentally a policymaking power: fleshing out provisions of the constitution (or even statutes or prior judgments) to apply them to concrete cases, and doing so with authority and precedential value, inescapably means that Supreme Court interpretation can and does directly alter policy on the ground.

This power operates in the “first face,” as the compliance literature demonstrates, when it requires other actors to alter their behavior, such as by requiring public school principals to stop leading mandatory readings of scripture after *Abington v. Schempp*. In chapter three I showed that focus on the Court's interpretive power allows us to significantly expand the scope of the compliance approach, and in doing so, shed new light on the Court's impact on policy and politics in the United States.

The second face of the Court's power can be seen when the Court influences the decisions of other institutions or precludes certain kinds of challenges from hearing, by restricting standing, for example. As I showed in chapters two and three, the Court's decisions in

*Employment Division v. Smith*, *City of Boerne v. Flores*, and a few other of its federalism decisions in the 1990s effectively precluded Congress from passing the Religious Liberty Protection Act. Finally, the Court's power to interpret the law operates in the third face when it shapes individuals' or groups' opinions, identities, and decisions to participate in politics. While I have not spent much time on this aspect of the Court's power in this dissertation, such effects can clearly be seen in the long literatures in sociolegal studies and judicial legitimation. Importantly, it should be noted that a single decision can do all of these things simultaneously—and that the effects of power operations in one face interact with operations in another face.

I have argued that existing empirical (as well as some more interpretive) literatures—those concerning judicial impact, interbranch politics and policymaking, coordinate construction, judicial legitimation, and sociolegal studies—map on to the three faces of power reasonably well. One goal of this dissertation has been to synthesize these disparate perspectives and approaches to judicial power and impact. Each of these literatures has offered important and unique contributions, but each is limited by its respective (and narrow) focus. Power and impact, being large, broad concepts, must be cast to capture all of the effects of judicial action that so many scholars have ably highlighted over the last several decades.

In support of these arguments developed in chapter two, I examined a different aspect of judicial power or judicial impact in each of the next several chapters. In chapter three, I presented five case studies in which I examined the policy effects of the Court's interpretive power. In order to strengthen my argument, I selected cases in which the conventional compliance approach could tell little or nothing about the effects of the Court's decisions. This approach allowed me to highlight the utility of my theory in direct comparison to its chief rival. In that chapter I showed that the Court's power is more robust is often appreciated by scholars

working in the impact tradition. Further, these studies demonstrated that the “compliance” approach to the study of judicial impact is fundamentally limited in two ways: it can only speak to a subset of the Court’s decisions, and even for decisions to which it can be applied, the compliance approach can tell only a partial story of case impact. Finally, they showed that Supreme Court decisions can have a huge range of impacts on politics and policy: they can increase the salience of an issue, they can provoke Congressional or presidential responses, they can spur interest group or mass activism, and more.

In chapter four I utilized two complementary quantitative approaches to test an observable implication of my theory. To briefly recap, I reasoned that if the Court’s power is fundamentally interpretive, and if the majority of its decisions are implemented by lower federal courts over which SCOTUS has significant hierarchical control, then its decision-making should not be much constrained by Congress or the American public. In other words, I argue that my theory implies a higher degree of judicial independence than is typically suggested in the literature. I test this idea using two complementary methods and sets of data: first, I use a time-series approach (a generalized error-correction model) to examine the influence of the public and of Congress on the aggregate output of the Court between 1945 and 2000; second, I take a closer look by utilizing a logistic regression to estimate the influence of Congress and the public at large on a sample of more than 6,000 Supreme Court merits decisions. Both sets of analyses support my theory: the Court is largely unconstrained by either Congress or the mass public in the majority of its decisions. Indeed, I find that the Court is only significantly influenced by Congress when it is hearing constitutional challenges to federal statutes, and is only significantly constrained by the public at large when it is deciding highly salient cases that must be implemented by non-court actors. Together, these two contexts account for less than 15% of the

Court's cases; in the rest of the Court's work, I find no evidence of constraint. In other words, I find that the Court exercises significant independent authority over policy *except* when it is directly taking on Congress, or when it issues an order that cannot be carried out by Courts in some very salient case—but as I showed in chapter three, the Court can still significantly influence policy in this context, just not unrestrainedly.

With these findings regarding judicial power in hand, I turn in the next part of the study to the Supreme Court's indirect influence in the political system. This second part of the dissertation is designed to more systematically examine some of the indirect effects of judicial decisions discussed in the case studies presented in chapter three. Here I focus especially on the Court's role as a political agenda setter because this is an aspect of the Court's influence that is both especially important and especially understudied. First, in chapter five, I examined the influence of the Supreme Court's decisions on the public political agenda, defined as the mix of issues that the public at large views as deserving policymakers' attention at a given time. To do so, I gathered data on media coverage of a range of issues that the Supreme Court had spoken on in at least one important case. I then conducted Box-Tiao intervention analyses to see whether those Court decisions significantly altered media attention to the larger issues concerned by a given case (abortion or free speech, for example). I found that the Supreme Court regularly and significantly influences media attention to issues by deciding important cases on those issues—however, I did not find any clear pattern among these interventions. In other words, while I have shown that the Court influences the public agenda far more often than existing work suggests, I have not been able to identify any case-level or contextual variables that predict this effect. Even so, my findings indicate that the Supreme Court regularly causes shifts in public attention to

various issues in politics, and in doing so, directly affects the distribution of incentives for policymakers and indirectly influences subsequent politics on those issues.

I then turn my attention to the “policymaking agenda.” In chapter six I focus in particular on the agenda of the president. I begin with the president because the president is often considered America’s “agenda-setter-in-chief” because items on his agenda are especially likely to receive formal attention from policymakers, and because presidents have historically been uniquely successful among America’s institutional actors at translating their agenda into policy change. Here I specified Court influence on the presidential agenda as presidential references to Court decisions in his written and spoken statements. I then conducted regression analyses to test the influence of various theorized factors of decisions and their political context on the likelihood that the president will respond. As expected, I find that the legally and politically important decisions are especially likely to draw presidential attention—and that this is especially true for those cases that drew significant interest group attention and thus are highly “mobilizable.” These findings indicate that Supreme Court decisions can directly influence the political agenda of the president—and in theoretically predictable ways—and in doing so, indicate another indirect pathway by which the Court regularly and substantially influences public policy.

Finally, in chapter seven, I examine the Court’s influence on the official agendas of America’s two major political parties. To do so, I analyzed the platforms of each party, finding that the Court regularly influences the content of those policy statements. Influence on the party agendas, I argued, is politically consequential because the platforms are good indications of the policies that the party in power will go on to pursue while in office. Moreover, the cases that affected the party agendas have powerfully shaped subsequent politics because they have provided the parties with ammunition to mobilize their constituents around issues. Further,



because Supreme Court decisions affect not only routine public policy but also the state of the constitution-in-practice, they can fuel partisan politicking on those issues and thus ensure that the issue(s) will remain salient and contested. Ultimately, this influence on the party agendas points to another indirect pathway of Supreme Court influence over public policy.

Taken together, chapters five, six, and seven demonstrate that the Supreme Court significantly shapes issue attention among the public and America's other political institutions: in other words, that it regularly and powerfully shapes the American political agenda. By describing these pathways of indirect policy influence, these chapters contribute to our understanding of the Court's role in American politics.

In summary, this dissertation advances a broadened conceptualization of judicial impact and a new theory of judicial power. I argue that judicial impact should be conceptualized as all policy-relevant effects of judicial decisions. This very broad conceptualization is rendered tractable by anchoring it to an appropriately capacious theory of judicial power. I argue that the nature of the Court's power is interpretive: it has the power to authoritatively interpret the law, and to bind lower courts to adhere to its interpretations. This power gives the Supreme Court significant ability to directly make policy that is enforced in courts around the country. Judicial impact, then, comes from the policy consequences of this power, but also from the myriad indirect effects these binding interpretations have in American politics. For example, decisions can lead to direct policy responses from Congress (such as the Religious Freedom Restoration Act), the president (such as George W. Bush's Executive Order on Eminent Domain), and state legislatures (such as the numerous states that enacted new death penalty statutes after *Furman v. Georgia*). Moreover, I have shown that the Supreme Court routinely influences the political agenda of the public and some of America's governing institutions, and thus that the indirect

policy effects described in chapter three are not artefacts of case selection. Put differently, I have shown that the Supreme Court frequently shapes public policy via the indirect route of agenda influence.

These findings have significant implications for long standing debates in Public Law beyond the impact and power literatures that I have discussed throughout this manuscript. For one, the present research casts further doubt on the infamous “backlash thesis,” which holds that activists seeking social change should eschew the courts and focus on lobbying legislators and grassroots politicking instead. This argument was most famously made by Gerald Rosenberg, who argued that court decisions like *Brown* and *Roe* were not only inefficacious, but that apparently rights-advancing decisions could result in counterproductive “backlashes” (Rosenberg 2008; Klarman 2004). These accounts generally suggest that Court decisions that preempt legislative reform—going too far too fast, as it were—can provoke rather than resolve major political conflicts (e.g. Ginsburg 1985; see generally Price and Keck 2014). This project adds to the many voices who have shown that Court decisions can and do produce fruit for reform-minded activists (e.g. McCann 1994; Andersen 2006; Keck 2009; Keck 2014).

But perhaps more importantly, my research suggests that one reason that many scholars have fixated on backlash is that they have mistakenly divorced litigation and its direct results from the larger story of policy development of which judicial action is only part. Put differently, the backlash thesis may be largely misstated: first, such studies typically treat the relevant court decision as the first event in a series (which is rarely true); second, these studies typically do not consider the larger political context in which the observed backlash occurs. Major Supreme Court decisions such as *Brown v. Board*, *Roe v. Wade*, and more recently, numerous same-sex marriage cases, have been described as causing counterproductive backlashes (Klarman 2004;

Rosenberg 2008; Klarman 2012, etc.). However, these cases all had significant pro-reform outcomes as well (Keck 2009; Hall 2011). Even in cases in which the responses were rather more monolithic (and negative), such as *Furman v. Georgia* and *Kelo v. New London*, subsequent policy developments were mixed (Strother 2016; Somin 2015). In sum, the research presented in this dissertation strongly indicates that judicial politics are American politics: the Supreme Court and its decisions are part-and-parcel of the American policymaking process (Silverstein 2009; Keck 2014). Its decisions can significantly alter public policy directly through its ability to authoritatively interpret the law, and indirectly, by spurring subsequent politicking—in and out of courts—on the questions on which it speaks.

Which leads to the other major debate in Public Law scholarship toward which this dissertation contributes: the so-called “countermajoritarian difficulty.” There has been much hand wringing among scholars who worry that judicial policymaking is fundamentally undemocratic, even anti-democratic (e.g. Bickel 1962; Segal and Spaeth 2002; Waldron 2006; see generally Friedman 2009 and Martens 2007). Many scholars, however, have suggested that this problem may be overstated because judicial review can be and frequently is used for majoritarian or pro-democratic ends (Marshall 1989; Graber 1993; Whittington 2005; Crowe 2011), and because pure “majoritarianism” is not the only object of a liberal democratic polity (Hall 2016; Lemieux and Watkins 2009). The research presented here contributes to this work in two ways. First, the analyses presented in chapter four show that the Supreme Court is much less constrained in its decisions on the merits of cases than is often thought. Indeed, constraint appears to operate in only two rather narrow contexts: judicial review of federal statutes, and highly salient lateral decisions. This finding is important in itself as it suggests that the one type of case that scholars have most worried about (cases carrying the potential for judicial

invalidation of democratically enacted policies) presents the primary context in which the Court is responsive to the will of Congress. Further, it is important to note that this finding does not suggest that the Court is generally unconstrained; rather, it suggests that if the Court is constrained, those constraints act at a different stage of the judicial process. There is good reason to suspect that external constraints operate much more strongly on the justices at the agenda-setting stage (i.e. when deciding whether to grant *cert*) than at the merits stage. Unpacking this possibility is a promising avenue for future research.

Second, and more generally, the research here points to another avenue by which courts may reinforce democracy. I have shown that Court decisions, especially important or “landmark” decisions, frequently precipitate more politics. That is, major Court decisions can actually spur heightened *democratic* participation on issues. They do this by increasing public attention to issues and by drawing the attention of elected officials to those issues. Even in the event that the Supreme Court issues a decision that is apparently countermajoritarian, such as *Kelo v. New London*, that decision can have significant pro-democracy outcomes (from the standpoint of normative democratic theory) by informing citizens about the state of policy and inducing them to become engaged for some period of time, even if only on the one issue.

\* \* \*

In the introduction to this dissertation I likened the modern impact literature to the pre-constitutional debate over the power of the Supreme Court between Publius and Brutus. Publius famously claimed that the Court has “neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” and as such was the “least dangerous” branch to the security of liberty (Rossiter 2003: 464). Brutus, on the other hand, worried that “the supreme court under this constitution would be exalted

above all other power in the government, and subject to no control. ... There is no power above them that can correct their errors or control their decisions” (quoted in Ketcham 1986: 304-307). Hamilton’s argument of a fundamentally weak Court is echoed in most studies in the compliance literature; Brutus’ argument of a fundamentally powerful—even unrestrained—Court is echoed in much modern scholarship concerning the “countermajoritarian difficulty,” even if that position has not received much empirical support. Here I have argued that the Supreme Court is much more powerful than Hamilton (and most compliance studies) suggested: it has the power to authoritatively shape public policy in every decision that it issues. The political battle over the late Justice Scalia’s seat on the Court was not in vain, and the fact that it was Neil Gorsuch rather than Merrick Garland who ultimately took that seat will have profound implications for the development of law and policy in the United States.

This is not to say that Brutus had it right, however: the Court is only one policymaking institution, and its power is checked by the others. The Court’s policy announcements are authoritative, but they are not necessarily *final*. For these reasons, the multifarious effects of the Supreme Court’s decisions on public policy—direct and especially indirect—deserve more attention than they typically receive if we want to understand the full scope, as well as the limitations, of the Supreme Court’s role in the American political system.

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*United States v. Carolene Products* 304 U.S. 144 (1938)  
*United States v. Cruikshank* 92 U.S. 542 (1876)  
*United States v. Eichman* 496 U.S. 310 (1990)  
*United States v. Lopez* 514 U.S. 549 (1995)  
*United States v. Miller* 307 U.S. 174 (1939)  
*United States v. United States District Court* 407 U.S. 297 (1972)  
*Vacco v. Quill* 521 U.S. 793 (1997)  
*Wal-Mart Stores, Inc. v. Betty Dukes, et al.* 564 U.S. 388 (2011)  
*Washington v. Glucksberg* 521 U.S. 702 (1997)  
*Webster v. Reproductive Health Services* 492 U.S. 490 (1989)  
*Whittaker v. County of Lawrence* 674 F.Supp. 2d 668 (2009)  
*Wickard v. Filburn* 317 U.S. 111 (1942)  
*Wisconsin Right to Life v. Federal Election Commission* 551 U.S. 449 (2007)  
*Wisconsin v. Yoder* 406 U.S. 204 (1972)  
*Woodson v. North Carolina* 428 U.S. 280 (1976)  
*You Vang Yang, Ia Kue Yang v. William Q. Sturner*, 728 F.Supp, 845 (1990)  
*You Vang Yang, Ia Kue Yang v. William Q. Sturner*, 750 F.Supp. 558 (1990)  
*Zurcher v. Stanford Daily* 436 U.S. 547 (1978)

## Curriculum Vitae

### Logan Strother

Department of Political Science  
100 Eggers Hall  
Syracuse, NY 13244

573-470-6306  
lrstroth@syr.edu  
syr.academia.edu/LoganStrother

#### ACADEMIC POSITIONS

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Visiting Scholar, Harry S Truman School of Public Affairs, University of Missouri 2015-  
Instructor, Graduate Assistant, Department of Political Science, Syracuse University 2012-  
Graduate Research Associate, Campbell Public Affairs Institute 2013-

#### EDUCATION

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Ph.D. candidate, Political Science, Maxwell School, Syracuse University June 2017  
Dissertation: "Impact: Supreme Court Power and Influence in American Politics"  
Committee: Thomas Keck (Chair), Keith Bybee, Shana Gadarian, Sarah Pralle  
M.A. Political Science, Southern Illinois University May 2012  
B.A. History, Teacher Education, Missouri University of Science & Technology May 2010  
*Summa cum Laude*

*Research and Teaching Interests:* American Constitutional Law and Development, Public Policy, Public Opinion and Mass Behavior, Environmental and Disaster Policy and Politics

#### RESEARCH AND PUBLICATIONS

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##### *Peer-Reviewed Articles*

Strother, Logan. "How Expected Political and Legal Impact Drive Media Coverage of Supreme Court Cases." Forthcoming at *Political Communication*. Early access: <https://dx.doi.org/10.1080/10584609.2017.1306817>

Strother, Logan. "The National Flood Insurance Program: A Case Study in Policy Failure, Reform, and Retrenchment." Forthcoming at *Policy Studies Journal*. Early access: DOI: 10.1111/psj.12189

Strother, Logan, Spencer Piston, and Thomas Ogorzalek. 2017. "Pride or Prejudice? Racial Prejudice, Southern Pride, and White Support for the Confederate Battle Flag." *Du Bois Review* 14(2).

Strother, Logan. 2016. "Beyond *Kelo*: An Experimental Study of Public Opposition to Eminent Domain." *Journal of Law and Courts* 4(2): 339-375.

Hatcher, Laura J., Logan Strother, Randolph Burnside and Donald Hughes. 2012. "The USACE and Post-Katrina New Orleans: Demolitions and Disaster Clean-Up," *Journal of Applied Social Science* 6(2): 176-190.

### *Book Chapters*

Keck, Thomas M., and Logan Strother. 2016. "Judicial Impact." In *Oxford Research Encyclopedia of Politics* (William R. Thompson, ed.). DOI: 10.1093/acrefore/9780190228637.013.103

### *Book Reviews*

Strother, Logan. 2016. "Review of Ilya Somin's *The Grasping Hand: Kelo v. New London and the Limits of Eminent Domain*." *Law and Politics Book Review* 26(2): 35-38.

Strother, Logan. 2016. "Review of Patrick S. Roberts' *Disaster and the American State: How Politicians, Bureaucrats, and the Public Prepare for the Unexpected*." *Risk, Hazards & Crisis in Public Policy* 7(2): 104-109.

### *Other Publications*

Strother, Logan. 2017. "Congress' U-turn on flood insurance reform shows that lawmaking power can very quickly go from free rein to very constrained." *USAPP-American Politics and Policy Blog* at the London School of Economics' United States Centre, January 4, 2017.

Strother, Logan. 2016. "Trump's Border Wall Would Become A Lot More Unpopular if He Tried to Build It." *The Monkey Cage* at *The Washington Post*, October 12, 2016.

Piston, Spencer, and Logan Strother. 2015. "White Support for the Confederate Flag Really is about Racism, not Southern Heritage." *The Monkey Cage* at *The Washington Post*, July 1, 2015.

- Featured at *Vox.com* "Southern whites who know basic facts about the Civil War don't support the Confederate flag." By Dara Lind. July 6, 2015.

Strother, Logan. 2013. "Preserving the Least Dangerous Branch: A Case Against a Politicized Confirmation Process for Supreme Court Nominees." In *American Government*. ABC-CLIO Online.

Hatcher, Laura J., Logan Strother, and Randolph Burnside. 2012. "Old Man River, the Corps, and Levees: The Meaning of Private Property Rights in a Flood Control System." *Law & Courts Newsletter* 22(1): 33-35.

### *Selected Working Papers*

Strother, Logan. "The Rarely Constrained Court: Case Salience and the Operation of External Constraints on the US Supreme Court." (under review)

Hatcher, Laura J., Logan Strother, and Randolph Burnside. "Support for Public Use of Private Property: A Case Study on the Bird's Point-New Madrid Floodway." (under review)

Glennon, Colin, and Logan Strother. "The Public Rhetoric of Supreme Court Justices." (revising for submission)

## GRANTS AND FELLOWSHIPS

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### EXTERNAL

Southern Political Science Association Prestage-Cook Travel Award, 2017	\$300
Dan Searle Freedom Trust Humane Studies Fellowship, 2016-2017	\$5,000
Mercatus Center Policy Research Seminar Travel Grant, 2016	\$399
CKF Dissertation Research Grant, 2016	\$5,000
IHS Summer Research Fellowship, Summer 2016	\$5,000
Dan Searle Freedom Trust Humane Studies Fellowship, 2015-2016	\$5,000
Dan Searle Freedom Trust Humane Studies Fellowship, 2014-2015	\$2,000

### INTERNAL

Michael O. Sawyer Summer Fellowship, 2017	\$1,875
Roscoe Martin Dissertation Research Award (Syracuse University), 2015	\$1,000
Summer Research Grant (Syracuse University), 2015	\$800
Graduate Student Organization Travel Grant (Syracuse University), 2015, 2016	\$300/year
Conference Travel Grant (Syracuse University), 2012—2016	\$500/year

## TEACHING EXPERIENCE

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### *Syracuse University*

Instructor: PSC 121 – American National Government	Summer 2015
Teaching Assistant: PSC 121 – American National Government (Chris Faricy)	Spring 2015
Teaching Assistant: PSC 121 – American National Government (Shana Gadarian)	Fall 2014
Teaching Assistant: PSC 325 – Constitutional Law II (John Hanley)	Spring 2014
Teaching Assistant: PSC 324 – Constitutional Law I (John Hanley)	Fall 2013
Grader: PSC 324 – Constitutional Law I (Tom Keck)	Fall 2012

### *Southern Illinois University*

Teaching Assistant: POLS 330 – Judicial Process (Laura Hatcher)	Fall 2011
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### *Missouri University of Science & Technology*

Student teacher: history, Newburg (MO) Jr.-Sr. High School	Spring 2010
Student teacher: history and sociology, Dixon (MO) High School	Spring 2010

## RESEARCH EXPERIENCE

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### *Syracuse University*

Research Assistant: Spencer Piston	Summer 2017
Research Assistant: Shana Gadarian	AY 2016-2017
Research Assistant: Spencer Piston	AY 2015-2016

Research Assistant: Shana Gadarian  
Research Assistant: Spencer Piston  
Research Assistant: Shana Gadarian

Summer 2015  
Summer 2015  
Summer 2014

*Southern Illinois University*

Research Assistant: Laura Hatcher & Randy Burnside  
Research Assistant: Robert Clinton

Spring 2012  
AY 2010-2011

**HONORS AND AWARDS**

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Jeffrey M. Stonecash Award (Department of Political Science, Syracuse University, best paper on American Politics), 2017  
Syracuse University Graduate Fellowship, 2015-2016  
Jeffrey M. Stonecash Award (Department of Political Science, Syracuse University, best paper on American Politics), 2015  
Jeffrey M. Stonecash Award (Department of Political Science, Syracuse University, best paper on American Politics), 2014  
Syracuse University Graduate Fellowship, 2012-2013  
MS&T 2009-2010 Outstanding History Major of the Year

Phi Kappa Phi National Honor Society  
Phi Alpha Theta National History Honor Society  
Phi Eta Sigma Honor Society  
MS&T History & Political Science Departmental Scholarship  
MS&T Dean's List  
Missouri Bright Flight Scholarship  
MS&T Excellence Scholarship  
MS&T Curator's Scholarship  
MS&T Alumni Endowment Scholarship  
Louis T. Sicka Scholarship  
William S. Rankin Scholarship  
Douglas Educator's Scholarship  
MS&T Academic Scholar's List

## CONFERENCE PARTICIPATION

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“Supreme Court Influence on Public Issue Attention.” Paper presented at the Annual Meeting of the American Political Science Association. San Francisco, CA. September 2017.  
[*scheduled*]

“Supreme Court Policy Legitimation: Testing the Mechanisms of Court-Motivated Opinion Change and Policy Acceptance.” Paper presented at the Annual Meeting of the Midwest Political Science Association (with Shana Gadarian). Chicago, IL. April 2017.

“The Rarely Constrained Court?” Paper presented at the Annual Meeting of the Southern Political Science Association. New Orleans, LA. January 2017.

“The Supreme Court and the ‘Policymaking Agenda.’” Paper presented at the Annual Meeting of the American Political Science Association. Philadelphia, PA. September 2016.

“The Supreme Court and the National Political Agenda.” Paper presented at the Annual Meeting of the Law & Society Association. New Orleans, LA. June 2016.

“Compliance and Impact in Supreme Court Decisions Rejecting Constitutional Challenges.” Paper presented at the Annual Meeting of the Midwestern Political Science Association. Chicago, IL. April 2016.

“Judicial Power in ‘Restraint’.” Paper presented at the Annual Meeting of the Western Political Science Association. San Diego, CA. March 2016

“Divided by Skin Color: The Influence of Skin Tone and Racialized News Messages on Latino Partisanship.” Paper prepared for presentation at Toronto Political Behaviour Workshop (with Spencer Piston), Toronto, ON. November 2015.

“Proposed Use, Property Taken, and Ownership: An Experimental Study of Public Opposition to Eminent Domain.” Poster presented at the Conference on Empirical Legal Studies. St. Louis, MO. October 2015.

“The Land Below the Levee: Disputing Land Use in a Floodway.” Paper prepared for presentation at the annual meeting of the Law and Society Association (with Laura Hatcher). Seattle, WA. June 2015.

“Judicial Power in ‘Restraint’.” Paper presented at the annual meeting of the New England Political Science Association. New Haven, CT. April 2015

“Reconsidering Backlash.” Paper presented at the annual meeting of the American Political Science Association. Washington, D.C. August 2014.

“Reconsidering Backlash.” Paper presented at the annual meeting of the New England Political Science Association. Woodstock, VT. April 2014.



“Unpacking Public Attitudes Toward Eminent Domain: An Exploratory Study.” Paper presented at the annual meeting of the Law & Society Association. Boston, MA. June 2013.

“Lessons from *Kelo v. New London*: Public Opinion, Constitutional Law, and the Value of Backlash.” Paper presented at the annual meeting of the New York State Political Science Association. Syracuse, NY. April 2013.

“The Land Below the Levees: Disputing Land Use in the Bird’s Point-New Madrid Floodway.” Paper prepared for presentation at the annual meeting of the Law and Society Association (with Laura Hatcher). Honolulu, HI. June 2012.

“Cleaning Up New Orleans: The Corps, the Courts, and the Plight of the Lower Ninth Ward.” Paper presented at the annual meeting of the Association for Law, Property, and Society. Washington, D.C. March 2012.

“The Land Below the Levees: Disputing Land Use in the Bird’s Point-New Madrid Floodway.” Paper prepared for presentation at the annual meeting of the Association for Law, Property and Society (with Laura Hatcher). Washington D.C. March 2012.

“Cleaning Up New Orleans: The Corps, the Courts, and the Plight of the Lower Ninth Ward.” Paper presented at the annual meeting of the Southern Political Science Association. New Orleans, LA. January 2012.

#### **PROFESSIONAL MEMBERSHIPS**

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American Political Science Association	2012-present
Law & Courts Section	2012-present
Policy Studies Section	2015-present
Law & Society Association	2012-present
Midwest Political Science Association	2016-present
Southern Political Science Association	2016-present
Western Political Science Association	2016-present
Society for Empirical Legal Studies	2016-present

#### **PROFESSIONAL DEVELOPMENT**

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Invited participant, Institute for Humane Studies & Liberty Fund Advanced Topics in Liberty Seminar: “Liberty, the Welfare State, and the New Deal.” Arlington, VA. April 2017.

Invited participant, Mercatus Center Policy Research Seminar. Philadelphia, PA. September 2016.

Future Professoriate Program, Syracuse University, 2014-2016

Invited participant, Liberty Fund & CKF Public Policy and Liberty Colloquium. Arlington, VA. February 2016.

Invited participant, Institute for Humane Studies & Liberty Fund Advanced Topics in Liberty Seminar: “Liberty and Responsibility in the American Anti-Slavery Movement.” Arlington, VA. September 2015.

#### **DEPARTMENT SERVICE**

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##### ***Syracuse University***

Undergraduate Honors Thesis Committees:

Carolee Lantigua, Spring 2017  
Brianna Fernandez, Spring 2016  
Eric Lyons, Spring 2014  
Shaun Loughlin, Spring 2013

Organizer, Graduate Professional Development Seminar, AY 2014-2015

Political Science Research Workshop (PSRW) Discussant

##### ***Southern Illinois University***

Hospitality Committee – Academic year 2011-2012