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THE SUPREME COURT AGENDA ACROSS TIME: DYNAMICS AND DETERMINANTS OF CHANGE

The Ohio State University

Ph.D. 1985

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The Supreme Court Agenda Across Time: Dynamics and Determinants of Change

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the degree Doctor of Philosophy in the Graduate School of The Ohio State University

By

Richard L. Pacelle, Jr., B.A., M.A.

* * * * *

The Ohio State University

1985

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Lawrence A. Baum, Ph.D.
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This is the one section of the dissertation that I have complete control over, and I aim to exercise it. I ask the indulgence of the reader because I have many people to thank for their invaluable assistance during the evolution of this project.

First, I would like to thank a number of people who had no direct impact upon this dissertation, but whose help and guidance helped get me to this point. I owe great intellectual debts to Professors Richard Curry, George Cole, W. Wayne Shannon, Robert Gilmour, and especially Howard Reiter at the University of Connecticut for their guidance and examples. I hope I have justified their confidence in me. I would like to thank everyone responsible at the Rutgers University Law School for disabusing me of the notion that I wanted to be a lawyer. Whether the world needs another political scientist is at least debatable, it certainly needs no more lawyers.

I would like to thank the Graduate School for a research grant that allowed me to hire someone to put my data on the computer. This saved me untold hours and enormous
frustration. I often saw the various coders from the Ohio State Polimetrics Laboratory diligently typing my data into the computer. Several times I wanted to thank them, but I was afraid to identify myself as the cause of their misery for fear of physical retaliation.

Mere thanks cannot express my gratitude to the various experts from the Ohio State Polimetrics Lab who kindly endured my odd questions. These people truly suffer fools gladly, or at least appear to. The consultants from Polimetrics were always available for help, even at the strangest hours, when I did my best work. I would like to single out, in no particular order, Dee Allsop, Stephen Anderson, Elizabeth Cook, Susan Hunter, and Mark Teare. I sleep well knowing the future of Political Science is in such good hands. I cannot, of course, forget Jim Ludwig, the Department's computer guru, who could solve the most insuperable problems in seconds. I would also like to thank Aiji Tanaka for helping me get the final conversion of the dissertation into an acceptable form. Aiji is currently working on his dissertation, and it is quite true that misery loves company. My colleague Gerald Wright and Joseph Aistrup of the Data Lab were instrumental in putting the final figures together.

A number of professors, who were spared the misfortune of serving on my dissertation committee, were nonetheless
very willing and able to help me, particularly with methodological questions and problems. Professor Herbert Asher was very helpful with my problem of regression as he likes to call it. Professor Herbert Weisberg offered expert guidance in the factor analysis. Finally, Professors Brian Pollins and Donald Sylvan assisted me with time series analysis. The fact that there is no formal time series analysis in this study should not reflect poorly on their efforts, but on my translation. It is very convenient to have such exceptional in-house experts to consult with when the inevitable methodological problems arise.

A number of professors from other universities also made important contributions to this study. First, I would like to thank Professor Sheldon Goldman of the University of Massachusetts for making some of his not yet published data on bloc analysis available to me. During the gestation of this project I was fortunate enough to have two interviews for academic positions, and at both institutions I found very helpful suggestions that I later utilized. Professor Milton Heumann of Rutgers University was instrumental in getting me to appreciate some of the larger ramifications of the process of agenda-building. I have incorporated some of his suggestions, and will continue to think about other macro-level concepts he raised. Professors Elinor
Ostrom and Lawrence Dodd of Indiana University also had very helpful suggestions from different theoretical perspectives. I would also like to thank Professor Ostrom, the former chairperson of the Political Science Department, and Professor Harvey Starr, the current chairperson at Indiana, for giving me a leave of absence during the Fall semester so I might finish my research. I hope this product justifies their decision, and I look forward to joining them in Bloomington very, very soon.

Finally, I owe an immeasurable debt of gratitude to the members of my dissertation committee. First, I would like to thank Professor Paul Peterson who volunteered to serve as the Graduate School Representative despite the fact that the dissertation defense was scheduled between Christmas and New Year's. The more "permanent" (or so it must seem to them and me) members of my dissertation committee have been extremely patient and very helpful, particularly in the scheduling of my defense and the final stages of this projects. During the entire project, however, each member of the committee was available for assistance, read the chapters promptly, and offered constructive suggestions for improvement.

Professor Elliot Slotnick offered me extremely helpful advice, particularly at the outset when many of my ideas were forming and still vague. A number of his suggestions
figured prominently in background research and the design of this project. He was always quite encouraging, even when my work may not have merited such encouragement. I reserve the right to change this part of the acknowledgement, however, because Professor Slotnick has promised to give me a difficult time during my defense.

Professor Randall Ripley has been an especially valuable source of feedback for a few reasons. First, he offered a different, public policy-oriented perspective that enabled me to see implications beyond those in the judicial realm. Second, his exacting editing has helped immeasurably to tighten my arguments, reduce repetition, and refine my grammar, areas in which I need assistance.

I owe a particularly enormous debt to Professor Lawrence Baum, the chairperson of this committee. His leadership and direction at all stages of the dissertation were indispensable. Professor Baum saw far more drafts of chapters than he cares to remember. What I hope has been a continual improvement in the dissertation as it has progressed is due, in no small part, to his guidance. I am very pleased that I had the opportunity to work with Professor Baum, and that I was wise enough to take advantage of that opportunity. He has been an excellent role model for me as a teacher and a scholar. I fervently hope that this dissertation and my future work reflects
well on the training I received from him and others at Ohio State. His assistance has been so valuable that I fully intend to avail myself of his expertise in the future as well.

It is traditional to preface a dissertation or book with the statement that the strengths of this work are a result of the contributions of others, while all remaining errors, whether of omission or commission are the responsibility of the author. Particularly in this work, those sentiments should be highlighted. I have profited enormously from the suggestions of the aforementioned individuals, particularly the members of my committee. This work is significantly better because of the help I have received from all quarters. I wish I could share the blame for the remaining shortcomings, but unfortunately, I alone bear responsibility for those.

I would be remiss if I did not acknowledge the moral support and constant encouragement that I received from my family and friends during this ordeal. Through no fault of their own, these people were often forced to share my occasional suffering and frequent complaining. I hope they can share some of my happiness that this ordeal is over. I also hope this ends, particularly from my family, the incessant jokes about being a professional student. Not everyone can say he/she played twelve years of college
intramurals. Quite seriously, my family and friends helped me survive and retain at least a portion of my sanity. I would single out my brother Wayne for special thanks for his long distance encouragement and unflagging support.

While it may be customary to dedicate a work to one or two people, I need to dedicate this to four people who have had an unquestionable impact upon me and my work. I am sorry to say the first dedication must be posthumous. I owe an unfathomable debt to my late uncle, Stanley Kledaras, who had been my benefactor and continues to be a constant source of inspiration to me. I dedicate this to his memory. My only regret is that he could not be here to see the fruition of this project. I miss him terribly. I hope he would be proud.

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Finally, I would like to dedicate this to my wonderful, patient, understanding wife, Betty. We were married during the evolution of this project and I am sorry to say that
since our wedding I have seen more of my advisers and the people at the computer center than I have of her. This dissertation has necessitated a diversity of citizenship of sorts—Betty living in Connecticut, while I toil in Ohio. I am happiest, perhaps, because the end of this project removes the final obstacle to our life together. I cannot express how much her love, support, and understanding have meant to me. More than anyone else, she has had to bear the setbacks that arose along the way and the moods that accompanied them. It may sound trite, but I truly could not have done it without her help. I hope she can stand to have me around from now on. If she begins to suggest that I start another dissertation I guess I will know she can't.
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- x -
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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>ii</td>
</tr>
<tr>
<td>Vita</td>
<td>x</td>
</tr>
<tr>
<td>List of Figures</td>
<td>xix</td>
</tr>
<tr>
<td>List of Tables</td>
<td>xxiv</td>
</tr>
<tr>
<td>Chapter</td>
<td></td>
</tr>
<tr>
<td>I. The Supreme Court and the Agenda: Foundations</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td>The Supreme Court and the Agenda</td>
<td>5</td>
</tr>
<tr>
<td>The Process of Selecting What to Decide</td>
<td>7</td>
</tr>
<tr>
<td>Past Research and its Implications</td>
<td>10</td>
</tr>
<tr>
<td>The Agenda in Nonjudicial Literature</td>
<td>10</td>
</tr>
<tr>
<td>The Agenda in Judicial Literature</td>
<td>13</td>
</tr>
<tr>
<td>The Agenda in Lower Court Literature</td>
<td>13</td>
</tr>
<tr>
<td>The Agenda in Supreme Court Literature</td>
<td>15</td>
</tr>
<tr>
<td>Scope of the Study</td>
<td>24</td>
</tr>
<tr>
<td>The Allocation of Agenda Space</td>
<td>25</td>
</tr>
<tr>
<td>Factors Influencing Agenda Change</td>
<td>27</td>
</tr>
<tr>
<td>Court Composition and Its Effect on Change</td>
<td>29</td>
</tr>
<tr>
<td>Landmark Cases as a Cause of Agenda Change</td>
<td>33</td>
</tr>
<tr>
<td>The Agenda as a Portent of Policy Outputs</td>
<td>34</td>
</tr>
<tr>
<td>Outline of the Study</td>
<td>37</td>
</tr>
</tbody>
</table>

- xii -
### LIST OF FIGURES

<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Percentage of Ordinary Economic Cases Accepted, 1933-1982</td>
<td>72</td>
</tr>
<tr>
<td>2.</td>
<td>Percentage of Internal Revenue Cases Accepted, 1933-1982</td>
<td>80</td>
</tr>
<tr>
<td>3.</td>
<td>Percentage of United States Regulation Cases Accepted, 1933-1982</td>
<td>83</td>
</tr>
<tr>
<td>4.</td>
<td>Percentage of Federalism Cases Accepted, 1933-1982</td>
<td>90</td>
</tr>
<tr>
<td>5.</td>
<td>Percentage of Equality Cases Accepted, 1933-1982</td>
<td>102</td>
</tr>
<tr>
<td>6.</td>
<td>Percentage of Due Process Cases Accepted, 1933-1982</td>
<td>115</td>
</tr>
<tr>
<td>7.</td>
<td>Percentage of Substantive Rights Cases Accepted, 1933-1982</td>
<td>127</td>
</tr>
<tr>
<td>8.</td>
<td>The Move from the Early Term Factor to the Recent Term Factor: A Representation of the Pace of Agenda Change</td>
<td>141</td>
</tr>
</tbody>
</table>
# LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Frequency of Cases Accepted by the Supreme Court in Various Policy Areas, 1933-1982</td>
<td>48</td>
</tr>
<tr>
<td>2.</td>
<td>The Frequency and Percentage of Cases Decided in Policy Areas, 1933-1982</td>
<td>69</td>
</tr>
<tr>
<td>3.</td>
<td>Frequency and Percentage of Cases in Ordinary Economic Subareas</td>
<td>74</td>
</tr>
<tr>
<td>4.</td>
<td>The Frequency and Percentage of Cases in the State as Litigant Policy Area</td>
<td>76</td>
</tr>
<tr>
<td>5.</td>
<td>Frequency and Percentage of Cases in United States as Litigant Subareas</td>
<td>78</td>
</tr>
<tr>
<td>6.</td>
<td>Frequency and Percentages of Cases in United States Regulation Subareas</td>
<td>85</td>
</tr>
<tr>
<td>7.</td>
<td>Frequency and Percentage of Cases in State Regulation Subareas</td>
<td>87</td>
</tr>
<tr>
<td>8.</td>
<td>Frequency and Percentage of Cases in Federalism Subareas</td>
<td>92</td>
</tr>
<tr>
<td>10.</td>
<td>Frequency and Percentage of Cases Based on Group in Equality Area</td>
<td>107</td>
</tr>
<tr>
<td>11.</td>
<td>The Percentage of Due Process Cases Heard</td>
<td>116</td>
</tr>
<tr>
<td>13.</td>
<td>Frequency and Percentage of Cases in the Criminal Due Process Subarea</td>
<td>120</td>
</tr>
<tr>
<td>14.</td>
<td>Frequency and Percentage of Cases in Prisoner</td>
<td>- xvii -</td>
</tr>
</tbody>
</table>
Due Process Subarea .......................... 123

15. Frequency and Percentage of Cases in Other
    Subareas of Due Process .................. 125

16. Frequency and Percentage of Cases in
    Substantive Rights Subareas .............. 130

17. Varimax Factor Loadings for the 1933-1982
    Terms .................................. 143

18. Varimax Factor Loadings for Terms Loading
    Significantly on Factor II .............. 144

19. The Transition or Hybrid Agendas ........... 146

20. Varimax Loadings for Terms with Significant
    Loadings on Factor I .................... 150


22. The Relative Ideological Stances of the
    Supreme Court, 1933-1982 .............. 184

23. Correlation and Regression Values for the
    Impact of Ideology on Agenda Change in
    Various Policy Areas, 1933-1982 .......... 189

24. The Relationship Between Ideology and Agenda
    Space in the Economic and Individual Rights
    Policy Clusters .......................... 199

25. Relationship Between Ideology and Agenda
    Space in the Federalism, State Regulation,
    and State as Litigant Areas ............. 203

26. The Relationship Between Ideology and the
    Individual Rights Policy Areas Agenda Status .. 205

27. The Relationship Between Ideology and the
    Agenda Status of Subareas of Substantive
    Rights .................................. 209

28. The Relationship Between Ideology and Agenda
    Space in the Reapportionment and Race
    Subareas ................................ 212

29. The Relationship Between Ideology and Agenda
    Space in Antitrust and Commerce Regulation .. 213

30. The Effects of the Erie Case Upon the Agenda

- xviii -
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>31.</td>
<td>The Growth and Decline of the Internal Revenue Policy Area</td>
<td>233</td>
</tr>
<tr>
<td>32.</td>
<td>Landmarks in the Labor Relations Area and Their Effects Upon the Agenda</td>
<td>247</td>
</tr>
<tr>
<td>33.</td>
<td>The Agenda in the Gender Discrimination Subarea Before and After Reed</td>
<td>263</td>
</tr>
<tr>
<td>34.</td>
<td>The Impact of Landmark Decisions Upon the Agenda in the Obscenity Subarea</td>
<td>282</td>
</tr>
</tbody>
</table>
Chapter I
THE SUPREME COURT AND THE AGENDA: FOUNDATIONS

INTRODUCTION
A democracy presupposes that the preferences of the citizenry are addressed by duly elected or appointed officials. The key to the enterprise involves the mechanism of linkage. The governmental (or institutional) agendas serve as a vehicle of critical linkage between public perception of the problems and governmental response or nonresponse to the perceived problems. If a governmental body decides to consider a given issue formally, that item is said to have achieved the institutional agenda. This institutional agenda signals a primary legitimation of demands. Regardless of the ultimate disposition, the governmental body has granted the issue or appeal some legitimacy. This is a threshold that must be negotiated before further action can be propagated.

The selection of which issues or problems to consider formally and which to ignore involves active participation by the governmental agency. The members of the agency thus participate in what is known as "agenda building." The
institutional agenda serves a very necessary gatekeeping function. In any given year the number of demands for governmental activity will far exceed the capacity of government to deal with these issues.

If politics is indeed "who gets what, when, and how," then the concept of agenda building is crucial. Deciding which issues will receive serious consideration is a stage in the ultimate allocation of resources. Any governmental agency that must build an institutional agenda, in effect, sets the conditions and the environment for participation of citizens. The consequences of decisions made at this stage have enormous implications for individuals, collectivities, and the polity.

The agenda is, in some senses, a bellwether for public policy writ large. It should be a portent of things to come. The shape of the agenda should have some fundamental impact on the shape of policies emerging from the various governmental agencies. The association will never be perfect, but influence should be evident. Knowing the extent of agenda change may suggest the magnitude of policy output change that will follow.

The concept of an official or institutional agenda is especially important for the Supreme Court. The Court often aids in charting national public policy. Directly or indirectly, the judicial branch determines or influences
the construction of governmental policies. The institutional agenda of the Supreme Court is thus a critical linkage mechanism tying citizen aspirations to potential governmental activity. The Court uses the threshold from the public agenda to the institutional agenda to winnow out frivolous demands, requests that cannot be met for a variety of reasons, and issues whose time has not yet arrived.

Past research has posed a number of hypotheses to explain the factors that govern the selection of individual cases. Larger notions of agenda-building, however, have typically been ignored. Agenda building refers to the process by which the Court apportions its agenda space. It is unnecessary to study agenda building if either of two assumptions are accepted. First, if agenda space is unlimited, then studies of case selection alone are sufficient. If there are no concerns with the limits of the agenda, then it is enough to study the selection of individual cases, and the choice of one case would have no effects on the acceptance or denial of other cases. Second, if the Court's agenda is a mere summation of the selection of individual cases, then agenda building has no independent empirical meaning. Neither of these assumptions is tenable, however. The Court's agenda is finite, and real choices must be made whereby important items are denied access in deference to other cases.
This study addresses the nature of Supreme Court agenda building across time. The focus is on the policy areas the Court addresses in the 1933-1982 period, and how the allocation patterns change. The first step is simply to map the contours of the agenda across time in order to identify the ebbs and flows. This will permit analysis of the magnitude and the rate of the changes.

Ultimately, these empirical results will be utilized to assess the impact of possible underlying causes of agenda change. Determinants of agenda change are external and internal to the Court. Societal, economic, or political conditions often prompt officials to take corrective actions. Those environmental factors may influence the Court. Certainly the decisions of lower courts may affect the Supreme Court. Finally, all courts need litigants to provide the cases for them.

Despite the importance of external factors, this research begins with the assumption that internal mechanisms and determinants overwhelm the outside forces. The demand for Court action is so heavy that the justices have a great deal of discretion concerning which cases to accept. Two independent variables are assumed to influence agenda change. First, the Court's membership and changes in its ideological composition are presumed to induce agenda changes. Second, while the Court is passive and
must wait for litigants to bring cases, it is assumed that the Court can condition, or at least influence, demand. The primary vehicles the Court uses are landmark decisions that signal future litigants about the Court's policy designs. Landmark cases are often cases that open or change the direction of policy in an area, and as a result, there are unanswered questions that the Court must address. Thus the Court ties its hands to a policy area and forces itself to hear cases that build upon or will clarify the landmark decision. After testing the validity of these independent variables and the dynamics of the agenda, an attempt will be made to systematize the results as a means of explaining the process of Supreme Court agenda building.

The Supreme Court and the Agenda

In the judicial realm, the agenda is arguably more critical than it is in other branches. Courts are not self starters and are thus dependent on litigants for the cases crowding the dockets. This might call into question the notion of agenda building. The viability of a concept like "agenda building" would seem to be predicated on the ability of the Court to control its own affairs. Yet there are some cases the Court must hear, at least in theory. By Congressional statute, the Court must grant agenda status to cases brought by a writ of appeal. These cases often involve conflicts between state law and either federal law or the
Constitution, decisions of three-judge panels, or acts of Congress that have been declared unconstitutional. In practice, however, the justices possess devices that allow them to prune these cases from the docket. In effect, the Court can avoid cases it is "required" to hear. The justices often give these cases a very cursory treatment. The Court can also refuse to hear "nondiscretionary" cases by dismissing the writ as "improvidently granted," or as "not raising a substantial federal question." The Court thus has the means to screen mandatory appeals and regulate its agenda. In any event, potential appeals make up only about ten percent of the total demand.1

The remainder of the cases brought to the justices fall within the discretionary domain of the Court. The formal device is the writ of certiorari. Supplicants seek this writ as a means of opening the doors to the Court. The Court's formal procedure for granting the writ of certiorari, which requests that the lower court send up the records of the case, is the vote of at least four justices during conference.

The formal listing of considerations governing the writ of certiorari is found in the Supreme Court's Rule 17. These considerations are suggestions only and justices need

---

not follow the guidelines. In other words, the Court has virtually complete discretion in deciding when to grant a writ of certiorari.²

For all practical purposes, the appeals that will receive real, formal attention are treated by the Court and analysts in a fashion quite similar to certiorari. For the purposes of this research, the question of whether the accepted cases came to the Court via writs of appeal or writs of certiorari is irrelevant. As long as the Supreme Court accepts the case and gives it some prespecified treatment, the case is included in this study.

The Process of Selecting What to Decide

The Court has a wealth of cases from which to choose. In recent years, approximately 4000 petitions have reached the Court annually. The Court is capable of giving less than 200 full opinions, however. The Court has developed a few procedures to help it sift through the mountain of petitions and reduce the workload. First, the petitions brought to the Court are sorted by the Clerk of the Court according to the issues raised, and the statutes challenged.³ This may allow the justices to sharpen their attention and focus more systematically on the policy areas


or the cases they wish to address.

To further facilitate the case selection process, Chief Justice Charles Evans Hughes created a "special" or "dead list" to summarily dispose of trivial cases that are not presumed to merit further consideration. In the 1970's, the process was reversed with what is now called the "discuss list." The Court now discusses only the cases that have been placed on this list. The remainder of the petitions are denied hearings. In either form, the list paral the Court's workload.

The recent creation of a "certiorari pool" by members of the current Court can also lend a degree of coherence to the process by reducing the workload of the justices. The clerks of the justices involved examine the petitions brought to the Court and circulate recommendations to the justices concerning which cases those justices should vote to accept. This "cert pool" saves time and makes the process more manageable by allowing the justices to focus on some cases and exclude others. Finally, the Court has been forced, due to the expansion of demand, to develop its own form of deficit spending. The agenda has only a finite amount of space each term. The Court has increasingly had to borrow from next year's agenda by carrying cases over.

---

6 Baum, The Supreme Court, p. 81.

for decision to the subsequent term.6

Analysts have discovered or inferred other means by which justices can reduce the time needed to sort through the petitions. The most prominent explanation is that the justices search for cues or perceptual shorthands.7 If such a cue exists, the justice is alerted to give the petition a closer examination. These cues can revolve around policy areas, the identity of petitioners, or other considerations. The existence of these cues is seen as a response to rising caseloads and a means of combatting them.

In conference, the justices discuss the petitions that have survived this first set of funnels. The justices then vote on whether to grant review and accept the case. It takes the votes of four justices to accept a case. The process of case selection might imply that the Court's agenda is but the sum of a series of individual decisions whether to accept cases. This research examines the possibility that a more complicated process of agenda-building underlies the selection of cases. The existing literature has not adequately addressed this


approach to understanding agenda-building.

PAST RESEARCH AND ITS IMPLICATIONS

It is necessary to provide a brief survey of past agenda research in order to provide a context for this study. This past literature provides the basis for many of the assumptions that govern this research.

The Agenda in Nonjudicial Literature

Agenda setting as a research topic occupies a gray area in the zone of overlap between the subfields concerned with public policy and institutions. Much of the sparse literature comes from the public policy area and addresses very different types of concerns from this study. The agenda/policy research is very broad and more concerned theoretically with the bottom-up phenomenon. That is to say, much of the research deals with group behavior and organization and how unarticulated demands are translated into a form that government can deal with. Roger Cobb and Charles Elder authored the most often cited study concerning agenda setting. Their subject pivots around group dynamics, political participation, and the use of the agenda.\footnote{Roger Cobb and Charles Elder, Participation in American Politics: The Dynamics of Agenda Building, second edition (Baltimore: The Johns Hopkins Press, 1983).} Robert Eyestone has somewhat broader concerns, although interest groups and participation figure in his
calculations as well. More broadly, the works with the most relevance to the topic at hand investigate agenda-building more systematically.

John Kingdon has investigated the process of agenda-setting in the other branches of government. Based upon interviews and case studies, Kingdon has identified the processes and tendencies surrounding agenda-setting and governmental responses. While the focus of the processes of problem recognition, policy proposal, and politics are different in the "political branches," Kingdon's work has implications for this study.

Of particular interest to Supreme Court agenda-building research are Kingdon's notions of agenda patterns, incrementalism, constraints, and policy windows. These concepts may have analogues in the judicial agenda building processes. The most significant concept is the policy windows, which are the propitious opportunities for a policy area to attain agenda status. The existence of windows depends, to a large extent, upon limited agenda space. Windows occur periodically when agenda space is available. According to Kingdon, "the scarcity of open windows is due to the simple capacity of the system." Limitations thus constrain agenda space in the other


branches. It is reasonable to assume that windows exist in the judicial sector as well, and a finite agenda determines their availability. Kingdon is also concerned with the dynamics of the agenda, and those dynamics should also be important for the Court.

In another study, Jack Walker has investigated agenda setting in the United States Senate. Like the Court, the Senate faces the task of reducing the enormous numbers of demands to a manageable level. The determinants of the Senate's agenda are external events that demand attention and internal dynamics. The discretionary agenda in the Senate often follows a type of surge and decline, whereby there is a burst of legislative activity in a policy area but that policy area gradually slows down or dies out altogether. In addition, issues reach the agenda if an easily understood solution is thought to exist. In some areas, the Court's agenda should display similar characteristics. Certain policy areas may demonstrate a cycle beginning with initiation, followed by a rise in the frequency of cases heard, and concluding with an abrupt or gradual decline in the number of cases the justices decide to entertain in the relevant policy area.

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The Agenda in Judicial Literature

The Agenda in Lower Court Literature

The existing literature concerning judicial agenda setting often focuses on courts below the Supreme Court level. As a result, very different interests are addressed. The primary reason for the differences is the question of judicial discretion. Many of the lower courts that have been studied do not possess the ability to refuse the cases brought to them. This means the variation in the court's agenda across time is purely a function of litigant demand. The determinants of changing litigant demand are the subjects of investigation.

The common thread in most of these lower court studies is a concern with the nature of activity in the environment or the relevant policy area. Burton Atkins and Henry Glick selected state environmental characteristics to measure six aspects of state socioeconomic and political conditions. These proximate measures were utilized in an attempt to explain the types of cases decided by state courts of last resort. Lawrence Friedman and Robert Percival offer a "tale" of two state trial courts. Their subjects are a rural and urban court and the evolution of their dockets.

\[\text{\begin{footnotes}
\item[13] Lawrence Friedman and Robert Percival, "A Tale of Two
\end{footnotes}}\]
Wayne McIntosh investigates many of the same phenomena for St. Louis trial courts. Joel Grossman and Austin Sarat investigate the "social" and "political" determinants of litigation and legal activity. External activities figure prominently in their calculations of changes in the nature of the agenda of the federal district courts.

These studies are different in emphases, but they do support the assumption that underlying social, political, and economic activities have some impact on the complexion of the agenda. The preponderance of the evidence certainly supports the conclusion that trial level courts and at least some appellate tribunals are affected by surrounding environmental factors. This is not surprising; there is no break in the causal flow of litigation. The potential litigant is affected by environmental conditions and seeks redress in the judicial sphere. The trial courts and the majority of the appellate courts have no discretion. For the Supreme Court and state courts of last resort with discretion the linkage between the environment and the


agenda is not direct.

The Agenda in Supreme Court Literature

At the Supreme Court level, discretion under Rule 17 allows the justices to determine which policy areas they wish to pursue. Litigants must still bring the cases to the Supreme Court, but the volume is much greater than the decision-making capacity of the Court. This gives the justices tremendous latitude in choosing the cases they feel merit attention. Consequently, researchers studying the Supreme Court have not generally concentrated on external events. Another element that contributes to this attention is the distinctive nature of the Supreme Court. The Court is visible, and the personalities and predilections of its members are relatively well-known. For these reasons, Court analysts focus on the internal dynamics of the decision-making process in their attempts to explain Court activity.

The Supreme Court agenda per se has not been studied in any depth. Much of the relevant research is similar to this study in one respect: the unit of analysis is the policy area. These studies have investigated the variation in the frequency with which the Court chooses to address certain policy areas and their ebb and flow across time. The implications that emerge from these studies yield some of the assumptions and hypotheses that underlie this research.
Arthur Hellman investigates the Supreme Court agenda during a portion of the time span of this study. In two studies, Hellman addresses the cases the Court heard in the 1959-1979 period, and divides these into cases involving civil rights, federalism, Court supervision, and the interpretation of federal legislation and common law. While Hellman does investigate the changes in the types of cases the Court decides over this time period, his emphasis is on the state of legal doctrine in these areas.\textsuperscript{16} Hellman's research has implications for this study, but there are problems of comparability due to Hellman's categories and the purposes underlying his study.

Thomas Likens and Gregory Caldeira also employ the policy area as the unit of their respective analyses. Caldeira is interested in the variation in Court's attention to criminal procedure cases. Caldeira attempts to explain the variation in the Court's criminal rights agenda as a function of internal and external determinants. Crime rates are used as a proxy for the external independent variable. Caldeira concludes that the external factors do not cause the fluctuations in the Court's working agenda. Internal forces, such as the ideologies of

the justices, did have an effect on the Court's disposition to hear criminal cases.\textsuperscript{17}

Likens has authored a dynamic analysis of the Supreme Court agenda in six policy areas. The research traces the variation in those six policy areas across time. Likens attempted to explain this variation using a number of factors. Likens discovered that while external determinants, most notably demand, had some impact upon changes in the agenda, it was the internal dynamics of the institution that best explained change. Justices, according to Likens, creatively shape their future agenda with present decisions as in the areas of obscenity and reapportionment. Certain decisions signal prospective plaintiffs or leave unanswered questions that other litigants may decide to raise. Justices can also close off policy areas by settling questions or simply refusing to hear cases involving certain subjects. This dynamic model of agenda building means justices can create conditions that may cause changes in the external determinants. Likens accepts the fact that the environment has an impact, but that impact can be determined to a substantial degree by the Court itself.\textsuperscript{18}


\textsuperscript{18} Thomas Likens, "Agenda Setting by the High Court: Systematic Processes or Noise?" Paper prepared for
In light of the justices' ability to control the inputs to the system, it is not surprising that internal variables are frequently used to explain the Supreme Court's agenda. The justices are, of course, selected by the president to a position with essentially no concern about tenure. This fact has fueled popular and academic speculation that the Court is insulated from public opinion and the external socio-political environment. Does that insulation mean the Court is, in essence, a self-contained unit that makes its decisions without being influenced by external factors? To address that question it is necessary to look more closely and critically at some of these studies.

In order to treat determinants internal to the Court as the primary agents of agenda change it is necessary to present some evidence to show that the role of external determinants is less significant. The larger environment had some impact on lower courts. Does the relevant research suggest that that also holds true for the Supreme Court? Gross level changes in societal conditions do not appear to have any direct impact on the Court's decision to hear certain cases rather than others. Certainly Caldeira's findings are consistent with this supposition. Moreover, there is no particular reason to believe the connection should exist. The influence of external variables has, if anything, an indirect effect. The

American Political Science Association Convention, 1979.
changes in the social fabric induce demand and that may lead the Court to hear more cases in certain policy areas. Demand is a more reasonable candidate for an external variable with the power to cause changes in the Court's agenda. While demand is important in theory, in practice the consequences are considerably less certain. If the Court must deny approximately 90 percent of the petitions for review then the implication is that by sheer numbers, the cases the Court desires are there. This mitigates concerns with demand to a degree. The Likens study may support this conclusion in two respects. First, the justices "create" the demand through relevant decisions that signal potential litigants. Second, the "on-off" cycle Likens discovers in some policy areas has implications for the impact of demand. This cycle refers to the presence of cases from a policy area on the agenda one year, relatively absent the following year, a reappearance the following year and so forth. Demand data do not evince such an annual fluctuation. Demand changes, in fact,

19 Ibid., pp. 20-25.

20 The Harvard Law Review ran an annual assessment of "The Business of the Supreme Court at October Term" for the years 1932-1938 and 1955-1967. The citations for these articles are: 1932 (vol. 47: 245-297); 1933 (vol. 48: 238-281); 1934 (vol. 49: 68-107); 1935-1936 (vol. 51: 145-200); 1937-1938 (vol. 53: 529-626); 1955 (vol. 70: 83-188); 1956 (vol. 71: 83-208); 1957 (vol. 72: 77-198); 1958 (vol. 73: 84-240); 1959 (vol. 74: 81-195); 1960 (vol. 75: 40-244); 1961 (vol. 76: 54-222); 1962 (vol. 77: 62-191); 1963 (vol. 78: 142-312); 1964 (vol. 79: 56-211); 1965 (vol. 80: 91-272); 1966 (vol. 81: 69-262);
tend to be quite incremental in most areas.

Likens' analysis tests the impact of demand in two areas: obscenity and reapportionment. He concludes that some impact is evident. Arguably, these areas represent two of the clearest examples of Court induced demand. In 1946, the Court closed access to litigants unhappy with legislative apportionment by declaring that this issue was beyond judicial purview. In 1962, the Court threw open the doors to the judicial forum with the Baker v. Carr decision.

The obscenity cases also represent a Court directed pattern. Likens recorded but one obscenity case over the first two decades of his study. In 1957 after the Roth v. United States decision, the Court in effect, created conditions that mandated judicial attention. By enunciating a vague standard that only materials "utterly without redeeming social value" were obscene, the Court thus placed the burden on itself and had to hear many obscenity cases. In 1973, the Court changed its standards in the


21 Likens, "Agenda Setting by the High Court," p. 22.
Miller v. California decision. The new yardstick was "contemporary community standards." The Court eventually limited access to its agenda in this area by allowing local authorities to decide whether the materials were offensive in that locality.

The dynamics of the decisional process in both of these policy areas may have created conditions that induced further litigant activity. These two policy areas dramatize Supreme Court reversals after sixteen years. The subject matter involved also made the judicial arena the appropriate, and perhaps the only, forum available. One further mitigating fact cautions against any quick judgment that demand leads to agenda change, and that is the percentage of cases involved. Obscenity and reapportionment cases each composed less than one percent of the total agenda.

The dynamic quality that the agenda may display shifts the focus of determinants to internally based variables. The closer analysis of the past research preserves at least the viability of this hypothesis. The notion of internal determinants means, in effect, looking at the individual policy makers themselves. Indeed, many of the studies of the Supreme Court have focused on the justices. There is a voluminous literature concerning judicial decision-making.


26 Likens, "Agenda Setting by the High Court," p. 5.
Most of this centers on the end-result, how the justices voted on the merits of the cases the Court agreed to hear. The ideological or policy predilections of the justices are the most frequently used explanatory variables. The decision-making literature normally identifies varying dimensions upon which the justices align themselves.

That literature is relevant because analysts have hypothesized that certiorari decisions are based on similar ideological and policy grounds as the final vote on the merits of the case. There is much to recommend in the theory that certiorari is a first vote on the merits of an issue. If justices are purposive policy-makers, then they must decide which cases will allow them to exercise their desired policy prerogatives. In addition, if the dynamic quality of the agenda does exist as Likens maintains, then the justices would be responsible for shaping future demands. This can take two forms. First, the decision itself clarifies the issue or confuses it suggesting future avenues for litigation. Second, agreeing to hear certain cases can encourage or discourage similarly affected potential litigants.

There are a few studies dealing with the case selection process. That literature focuses on the individual case as the unit of analysis and has implications for this research. S. Sidney Ulmer addresses the meaning of
certiorari votes and concludes that they are much like preliminary votes on the merits. Ulmer claims that when justices decide whether or not to hear a case, that determination is made with policy designs in mind. In general, this is consistent with the hypothesis that changes in agenda building should help create changes in policy outputs.

Glendon Schubert lends credence to the hypothesis that the certiorari vote is related to the merits of the case. His research promotes the notion of a game theory and strategic voting by blocs of similarly disposed justices. This occurs at the certiorari stage when justices are deciding how to allocate their precious votes for certiorari. If Schubert is correct, then the implications for this study are clear: justices are using their certiorari votes to further their policy goals.

Although Doris Marie Provine takes exception to the Ulmer and Schubert studies, her thesis still involves individual preferences coupled with justices' conceptions concerning the role of the Court. The role of the Court

27 S. Sidney Ulmer, "The Decision to Grant Certiorari as an Indicator to Decision 'On the Merits'," Policy, vol. 4, 1972: 429-447.


involves the justices' notions about the proper work and workload of the Court. Thus, the justice's policy preferences might be suppressed by that justice's conception of the Court's role. The basis of Provine's research then fits within the realm of internal determinants of agenda building. What Ulmer and Schubert ignore, and Provine addresses only by implication, is the effects of agenda-building upon case selection. The impact of finite agenda space is important in that it may deny access to certain cases.

The connection between ideology or policy designs and agenda-building is sufficient to offer a justification for the inclusion of this as an internally based determinant. Tying certiorari decisions to the ultimate disposition means the individual justice's policy preference will help guide his or her decision about whether or not to hear the case.

**SCOPE OF THE STUDY**

The preceding discussion focusing on the judicial agenda literature identified a number of significant issues related to this research. These elements or considerations are important components of this study. As noted, some are hypotheses to be tested, others are assumptions that lead to certain choices in the research design. At this point
it is necessary to outline the study by addressing the form of the analysis and the variables and factors that may contribute to an understanding of agenda-building.

Strands from past literature give credence to the hypothesis that the Court may attempt to allocate its time and agenda space in a purposive or rational manner. The systematic evaluation of the hypothesis that the Court has a great deal of control over its agenda is a major portion of this study. The process of agenda building and the tactics and strategies behind it are dependent upon other facets of the study. More basically, the nature and magnitude of agenda change must be identified before the analysis can proceed. It makes sense to begin at the most general, descriptive level and discuss the premises underlying this part of the analysis.

The Allocation of Agenda Space

The first stage of the analysis is a description of the agenda. Beginning at the macro level, the basic question to focus on is which issues and policy areas populate the agenda and how they change from 1933-1982. The pace and scope of the changes are significant. Certainly a volatile agenda that evinces dramatic changes in short periods of time means something very different than an agenda that varies incrementally.
The Court term and the relative distribution of cases selected across policy areas are the variables of interest. The descriptive analysis of this distribution sets the stage for the interpretative portions of this study.

At the next level of analysis, the investigation shifts to the allocation of agenda space. As noted, the Court has finite resources in this area; it can only handle so many cases per term. This procedure has been studied from the perspective of the individual case. It is necessary to invert this process and study it from the macro-level perspective. Across time agenda building may take on its own patterns. The process may be random, where the justices gravitate to the most important cases regardless of the policy niche the case occupies. The mode of agenda building may be more systematic, however, whereby justices make conscious tradeoffs, one policy area gaining coveted agenda space at the expense of another. The differences between these scenarios certainly have important implications for the study of agendas and the Court's policy making. Having laid out the changes in the agenda across time, it is necessary to investigate whether the allocation is rational or more random.

The selection of the cases to decide on the merits is important for a number of reasons. The Supreme Court has the ability to regulate the cases it accepts through its
agenda. The Court also has the incentive to do so due to the large demand. As a result, Court attention must be allocated to those cases or areas deemed most pressing or important. The Court must make certain choices, an election of alternatives. Selecting some cases for a decision on the merits means the Court must refuse other cases that objectively seem just as worthy as those selected.

This part of the study will analyze the shifting priorities the Court follows in its agenda building, how systematically the Court shifts its priorities, and how frequently those shifts occur. Determining the results of the agenda-building process will lead to insights about the process. The factors that may influence agenda change need to be addressed next as another means of assessing the influence justices have upon the agenda.

**Factors Influencing Agenda Change**

Before addressing which factors will be used as determinants of agenda change, it is necessary to say a few words about which possible determinants are excluded from this study. Justices do not seem to watch public opinion in order to shift with the changing political winds. Litigant demand, as a special form of public opinion, may have some impact. Certainly without the cases the justices are unable to further their policy designs. While there
are a few examples of the Court shopping around for the proper vehicle for a major policy statement as in the process that eventually spawned the \textit{Gideon v. Wainwright} case.\textsuperscript{30} Those examples are very likely to be exceptions. The overload of demand suggests strongly that the justices have virtually free rein in choosing which cases they will address.

The other branches of government can have a significant impact on the Court. The business of Congress occasionally crosses paths with the work of the Court. Court decisions affect Congressional activities and vice-versa. Do the actions of Congress cause the Court to hear certain cases? Perhaps, but again the vast demand is such that many Congressional acts are challenged or cited in the Court. That being the case, the justices have a great deal of latitude concerning which Congressionally related issues they seek to address.

The president and the Justice Department have a great impact on the Court. The Solicitor General and his staff take the most important cases involving the United States and bring them to the Court. The government enjoys an unrivaled degree of success in getting the Court's attention.\textsuperscript{31} Pro-governmental bias is not, according to

\textsuperscript{30} 332 U.S. 335 (1963).

Provine, the reason for this success. Rather, the Solicitor General's advantage can be traced to the fact that he culls the best cases from a vast reserve. The government is involved in the most important cases. This means the justices may again have a fairly free hand in selecting the cases they desire from a large number of significant cases.

The bottom line is that many of the external determinants have some impact on agenda change. The internal factors, however, seem to override the external. This study is exploratory and makes these choices based upon various hypotheses and a desire to investigate in some detail a portion of what underlies agenda change.

Court Composition and Its Effect on Change

The first internal determinant to be investigated involves the role that ideological change plays in altering the shape of the agenda. If the decision-making literature is correct, then the composition of the Supreme Court may play a major role in the construction of the agenda.

Membership changes (which often create ideological changes) within an institution can have a large impact on the policy emerging from that agency. By implication,

32 Provine, _Case Selection in the United States Supreme Court_, pp. 87-92.

33 Herbert Asher and Herbert Weisberg partially attribute changes in Congressional policy to membership change in Congress. Herbert Asher and Herbert Weisberg, "Voting
this hypothesis can be extended to the agenda. Changes in
the policy outputs should induce changes in the agenda as
well. This is a testable hypothesis. Perhaps the change
in the agenda is much less perceptible. The policy outputs
may change dramatically, while the agenda remains
stationary. On the other hand, a Court that represents an
ideological antithesis to a previous Court may hear
different cases as a function of the ideological
differences. Either way there are important implications
for the relationship between agenda building and the policy
that eventually emerges.

In general, change in the Court's ideological
composition is seldom so radical that it drastically alters
either the agenda or public policy in what amounts to
overnight. To overcome the natural inertia that may move
the agenda at a crawl requires the large scale membership
changes that seldom occur.

On the Supreme Court changes in the Court's composition
come at irregular intervals and often with little warning.
At the same time, with the size of the Court, changes in
it's composition loom large in a very real sense. One new
justice on the court means an 11 percent change, a
relatively large percentage for one individual. That
change can be magnified in terms of the agenda.

Change in Congress: Some Dynamic Perspectives on an
Evolutionary Process," American Journal of Political
Certiorari, the major avenue for attaining the agenda, requires just four votes. Adding one new member to the Court can contribute 25 percent toward a successful certiorari vote. For any single member change, however, a great change in the agenda is not expected. When a series of membership changes that create ideological changes occur within a brief time frame, dramatic changes in the composition of the agenda are possible.

Measuring change is somewhat problematic on its face. A systematic available proximate measure is ideology. There is a sound theoretical basis for using justices' ideological predilections, but the impact of ideology may not extend to all policy areas. There are policy areas in which changes in ideology might well be reflected in large scale changes in the Court's disposition to hear certain cases. In other areas the connection between membership change and agenda change is not so readily apparent. This becomes important because ideology may not affect propensity to hear the case, at least in the fashion in which ideology is conceived. Liberals and conservatives may want to hear the same types of cases, they just want to decide them differently. In some policy areas one ideological wing may vote not to hear certain cases because they are pleased with the existing state of precedent and law. There is perhaps one preconceived notion concerning
the types of cases liberals and conservatives would prefer. Liberals would presumably be more disposed to entertain civil liberties or civil rights cases. Their ideological counterparts might be more interested in economic cases.

The impact of the change in the Court's composition upon the agenda could possibly be masked by the fact that an ideologically different Court could set the clock back on policy in the relevant policy area. Finding what appears to be no result will actually be noteworthy when framed in a discussion of agenda and policy change. Different policy areas may demonstrate wide ranging patterns of agenda change due to shifts in the membership. These transformations in the composition of the Court hold implications for the nexus between the Court's agenda and the resultant policy outputs.

Voting on the merits is seen as a result of policy and ideological beliefs. This study, based on previous research, will assume that certiorari votes are cast in the same fashion. If certiorari votes are the first decision on the merits, then the ideological underpinnings that researchers have identified for the justices should also explain their certiorari votes.
Landmark Cases as a Cause of Agenda Change

The justices can have another impact on the agenda through their decisions. The Court can condition future litigant demands by means of another internal device, the landmark decision. These are the major cases that effectively change the state of law in the relevant policy area. In theory the effect of these cases should be immense. It thus becomes necessary to test this hypothesis and determine whether these cases have the preconceived impact.

Many of these major decisions open or close a policy area. Often case law in a certain area seems settled and the Court essentially closes access. Eventually demand may fade as a result of the Court's refusal to accept similar cases. On the other hand, a new landmark decision may open the floodgates as similarly based litigants attempt to flesh out the details and take advantage of the Court's propensity to hear these types of cases. These decisions may introduce an uncertainty, confusion, or a vagueness that induces demand and "forces" the Court to allocate more agenda space to correct past defects or refine the earlier decision.

Marc Galanter refers to repeat players as groups or corporations that are experts in using the judicial system. In the Supreme Court, repeat players would include interest groups and the government, among others. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," Legal Society Review, vol. 9, 1974: 97-125.
Repeat players and interest groups monitor decisions made by the Supreme Court to determine whether the time is propitious for further litigation. If the Court seems sympathetic, the groups push further in an attempt to pursue their goals. A key signaling device can be the landmark decision. The forms this major case may take can vary widely. The landmark case may be the first or the last case in a line of similar decisions, though that will probably not be evident at the time. The decision may also reverse a previous precedent. These landmarks may induce similarly based litigants to test the Court's resolve or see how far the Court will go in this direction.

The Agenda as a Portent of Policy Outputs
The analysis of agenda change across time is important, but one further step must be taken. The findings must be put into a framework tying this research to other literature and tying the agenda stage of the policy process to subsequent stages. The importance of Supreme Court decisions and the policy process, more generally, is often seen in terms of what emerges from the system. While this may be exaggerated, there is some tie between the agenda and the outputs. On a larger systemic level, how does the judicial agenda parallel the Court outputs over the fifty year period of the study? In addition, on a more theoretical plane, there are implications for the connection between the agenda and legitimation stages.
Many judicial scholars and Constitutional historians have mapped the policy chart the Court has followed across time. Robert McCloskey is perhaps the most prominent of the historical analysts. He and others have divided the Supreme Court's policy making into different periods during which the Court emphasized a certain policy area or had an ideological bent. These studies concentrate on policy outputs and the changes which have occurred.

McCloskey has identified the eras surrounding the Court under Marshall and Taney and the Supreme Court during the Gilded Age and the post-New Deal era as watershed periods. Other analysts have divided the periods more finely. These panoramic studies of the Court focus on the policy the justices announce. These studies do not aggregate the decisions. They focus on the few major, attention-grabbing cases and shape their interpretations around these key decisions.

Does the pattern of the agenda mirror the trends evident in the policy outputs? In order to make a substantive decision, the Court or any governmental agency must put the issue on its agenda. Changes in policy outputs are relatively simple to discern. The decisions can usually be given an ideological tag and if the direction of the decisions is different relative to a previous time, policy

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output change is evident. One would infer that such is not normally the case with agenda change. Or is it? The so-called "watershed" periods might demonstrate wholesale agenda revision vis a vis the preceding era. A "new" Court, buoyed by a change in the political environment or a change in membership, may suddenly decide to hear very different types of cases. The Court may, for example, shift from an economic emphasis to concerns with civil liberties. Watersheds or judicial realignments are, by definition, aberrations. Finding agenda change during the interim periods is more problematic. Deciding to hear a case does not always carry the ideological tag that a final disposition wears. After all, liberals or conservatives may want to hear the same case or cases, albeit for very different reasons.

The changes in the agenda relative to the previously identified shifts in Court policy may make for an intriguing contrast. The results of the comparison have implications for the relationship between the agenda and the formulation stage, at least in the judicial realm. Some similarities are likely, but the scope and depth of those parallels, if they indeed exist, need to be revealed.

Students of the Supreme Court know a great deal about the paths the judicial branch has paved through its policy decisions. The study of the agenda is much more indirect.
Knowledge of this stage is implicit, a given step, that has been taken for granted, because the final stage is a known commodity. Questions concerning the agenda and its connection to currents in the socio-political environment can be addressed, at least impressionistically.

**OUTLINE OF THE STUDY**

The research design and the choices made in data gathering will be outlined in the next chapter. Subsequent chapters will be devoted to the data analysis. The first step will be to map the agenda and the ebb and flow of policy areas across time. Later chapters will attempt to explain the changes or stability in the agenda. The emphasis will be placed on the internal determinants of agenda change, Court membership and the so-called "landmark cases." With this evidence, an attempt will be made to fit the pieces together in order to form hypotheses concerning the nature of the agenda building process and to fit this study in with relevant past research. Finally the study will return to a macro-level, albeit a different one. In this chapter, the shape of the agenda will be compared to the important trends in the policy outputs emanating from the Court. The implications for the connection between the agenda and policy legitimation will be addressed in the judicial realm and in the policy process, more generally.
Chapter II
RESEARCH DESIGN

THE TIMEFRAME 1933-1982

The timeframe for this study of the Supreme Court agenda is 1933-1982. The year 1933 represents a watershed of sorts for the United States. Franklin D. Roosevelt assumed the mantle of power and ushered in a new era in American socio-political history. To combat the Great Depression Roosevelt introduced a dramatic change in the role of government. Roosevelt inaugurated a modern era for the presidency, the government, and the economy.\textsuperscript{36} The Roosevelt policy package, the New Deal, provided a new set of issues for the other branches of government to deal with.

The election that led to Roosevelt's ascension to the throne of American government has frequently been described as a "critical election" leading to a partisan realignment.\textsuperscript{37} This concept of a realignment refers


specifically to the restructuring of the two major political parties, but if the notion of a realignment has any viability, then it is certain that it goes well beyond the two parties. A realignment is a fundamental reconstitution of the political universe. The realignment penetrates well below the party level and, in effect, changes the nature of political discourse for the next generation.\textsuperscript{38}

Realignments have been dubbed "the peaceful American revolutions." The new party system that emerges from the ashes of the preceding party system after the realignment often removes many of the vestiges of the preceding generation. The dawning of the new party system serves as a convenient initiation point for a study. It is as close to a clean slate, politically, as one can find. The government's institutional memory is temporarily purged. The era following a critical election is often characterized as the most propitious time for true policy innovation.\textsuperscript{39} Certainly this seemed to be the case in 1933 with the change in regime and the attendant change in political philosophy.


Court procedures also mandate a starting date around 1930 for a study of the Supreme Court's agenda building. The Judiciary Act of 1925 created a radical departure in Court procedures. Prior to 1925, the Court was bound by past statutes that obligated the Court to hear large numbers of the cases brought before it. In 1891 and 1893 Congress attempted to give the Court some relief from its obligatory chores. The justices were slow to exercise their recently acquired prerogatives. Congress continued to pare the Court's obligatory jurisdiction incrementally. These changes did not have the desired impact, as a large percentage of the cases (over 50 percent) were still not discretionary.40

The Judiciary Act of 1925, which was essentially written by the justices, increased the Court's discretionary control over its docket. The Act reduced the mandatory appeals jurisdiction, while increasing the use of writs of certiorari. This legislation marked "a new chapter in the history of the federal judiciary" as Frankfurter and Landis prophesized.41 The impact of the act was to expand the Court's influence over its own docket.

For the purposes of studying the process of agenda building across time, it makes sense to let the novel changes from the 1925 Act percolate and allow the justices


41 Ibid., p. 12.
to experiment and develop new patterns. The eight year period from the 1925 changes to the 1933 research starting point has neither a scientific nor magical rationale. It is plausible to believe that within a half dozen the years the Court had purged its procedures of the remnants of its antiquated process. The starting date of 1933 then falls within the acceptable time frame, the choice of the precise year is justified by the reasons stated above.

The time span of the research is a half-century. This allows the project to be topical and recent. The fifty years also provide the opportunity to assess changes in the agenda over a sufficient time period. More importantly, the enormous technological and historical rates of development since the 1930's make this era a fundamental period in socio-political history. The pulse of government quickened dramatically. Remarkable and climactic events crowded this half-century and induced the Court's participation in the shaping of American public policy and history.

THE CASES
The tasks of this study are to map the nature of the Supreme Court's agenda-building, examine the scope and pace of agenda changes, and explain why those changes developed. The first step is a description of the Court's agenda
across time. It then becomes necessary to discover the reasons that underlie the changes. The variables advanced as possible explanations for the change in the nature of agenda allocations to various policy areas across the 1933-1982 period are the membership of the High Court and the landmark decisions the Court authors. The various methodological techniques are designed to aid in the discovery of the impacts, if any, of these possible internal determinants.

Inclusion of Cases
The analysis needs first to identify the cases that compose the Court's agenda. The decision was made to include all cases that received a one page or longer opinion in *The United States Reports*. This would include full opinions, *per curiam* decisions, and memoranda. This decision was based on the need to exclude the relatively trivial cases that usually fell within the Court's obligatory jurisdiction. Their numbers were sufficient that to include them would skew the results. The barrier of one page refers to the opinion of the Court and also includes dissenting and concurring opinions. This is designed to make certain that unreasonable restrictions were not placed upon the selection of cases. In this instance, the majority of the justices might see the issue before the Court as trivial or simple and opt for a terse statement.
One or more justices might well disagree and think that the Court is not giving the issue the fuller treatment they believe is justified. Including concurring and dissenting opinions in deciding whether a case is a full page or not reflects the belief that the majority may have misperceived the case or that the relative unimportance of the case is not agreed upon. In any event, this pertains to a distinct minority of cases. Most of those cases needing a dissent or concurrence to cross the inclusion threshold came in the memoranda decisions and often had more than one justice disputing the overall Court's wisdom. In short, some justices are arguing the case is more important than their colleagues would grant.

There was no distinction made between writs of appeal and writs of certiorari. Despite the formal differences between appeals and certiorari, it is increasingly clear that cases are judged by their relative merit or importance rather than the nature of the writ brought to the Court. If the writ of appeal is worthwhile and the Court wants to decide the case, it will treat the appeal as a writ of certiorari. If the appeal is conceived of as trivial or unimportant the Court will dismiss it in much the way it would deny the writ of certiorari. To clarify a related matter, any denials of writs of appeals or certiorari were not included even if the rationale explaining the denial
was longer than a page. The denial, in effect, keeps the item off the agenda. Over the fifty year period these decision rules yielded 6805 cases.

Aggregating the Cases

An important question that has consequences for further analysis is how the cases should be aggregated. The alternatives are to treat the cases by using the raw numbers within each policy area or as a percentage of that term's total. The two require very different underlying assumptions. The total number of cases varies dramatically from a low of 75 (1953) to a high of 190 (1973). The differences mean at least two things. First, simply more cases were granted a hearing in some years. Second, some of the cases that would be characterized as trivial or relatively easy to decide one year would attract dissensus other terms. In effect, more disagreement might mean cases would be more likely to pass the rule of exclusion, they would be more than one page in length. Certainly the differences suggest that the ultimate reason may be a function of both of these explanations and perhaps some others. In any event, using the policy area percentages would eliminate many of the concerns with the large variation in the total number of cases.

The variation in the number of cases raises interesting questions that need to be addressed. Demand does not seem
to be the explanation for the variation. Demand, in the form of the petitions for Court activity, has steadily risen while the number of cases accepted has varied. Indeed from 1933-1942, the Court heard an average of over 155 cases per term. From 1949-1955 the justices entertained fewer than 95 cases per annum.

Post-World War II America was often seen as reeling from the Depression and the War. As a result, it is often maintained that America sought a respite from the events of the previous decade. The pulse of governmental activity appeared to slow dramatically. Perhaps the Court sensed this and joined the other branches in slowing the growth of governmental power. The answer may not be so global in scope, however.

The determinant of this variation may be internally based. Perhaps the justices of the period were less disposed to entertain large number of cases. Their modus operandi may have included more deliberation or discussion in their proceedings or they simply performed less work. The abilities of the justices during the 1940's and 1950's have been questioned, as well as the leadership of the Court during this era. On the other hand, the fluctuations in the numbers of cases accepted might be related to the agenda itself.

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These large differences have important consequences for the study due to the fact that agenda space is finite. Perhaps the agenda has a ceiling but no particular floor. If this is the case, the justices can hear as few cases as they wish, but cannot go over a certain number for organizational purposes.

For some forms of the analysis it makes sense to use the raw numbers. Using these requires very different assumptions from using the percentages, but as an alternate model of agenda building it merits some attention. Some of this study is exploratory in nature and that means some choices of tactics should be preserved. As a result, both the raw numbers of cases heard and the percentages will be used when necessary.

THE VARIABLES

Policy Area
The policy area is the important variable under consideration. The variation in the agenda across time will be measured as a function of the variation in the relative shares of agenda space allocated to the various policy areas. The cases were gathered from The Supreme Court Reporter, The United States Reports, and The Lawyer's Edition. The Supreme Court Reporter, published by West, has its "key" system that labels the policy areas of each
case. These were relied upon in the clearest cases, for example, when all the keys listed the same policy area as controlling. In the cases that had multiple codings, the decisions were read quickly in order to prioritize the issue areas.\footnote{The descriptions of what constitutes the various policy areas, later in this chapter, gives some examples of multiple issue cases and the prioritizing of those issues.} The case was ultimately coded in terms of the most important issue or policy area.

The analysis is concerned with the variation in the Court's attention to different issue areas from 1933-1982. The original coding was based on the substantive policy of the case such as search and seizure, antitrust, state taxation, and establishment of religion cases. These were later collapsed into fourteen major categories which included all but six of the cases. Table 1 shows the breakdown of the cases into their respective policy area categories.

The construction of these categories merits some attention. Most of the cases easily fit in one category, but some cases could arguably fit in more than one policy category. The categories are mutually exclusive; each case is placed into only one classification. This division is neither unique nor completely unprecedented. The breakdown of policy areas is at least loosely based upon past research directed at understanding judicial
Table 1

Frequency of Cases Accepted by the Supreme Court in Various Policy Areas, 1933-1982

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due Process</td>
<td>1275</td>
<td>18.7%</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>181</td>
<td>2.7</td>
</tr>
<tr>
<td>Substantive Rights</td>
<td>594</td>
<td>8.7</td>
</tr>
<tr>
<td>Government as Provider</td>
<td>41</td>
<td>0.6</td>
</tr>
<tr>
<td>Equality</td>
<td>493</td>
<td>7.2</td>
</tr>
<tr>
<td>U.S. Regulation</td>
<td>1903</td>
<td>28.0</td>
</tr>
<tr>
<td>State Regulation</td>
<td>264</td>
<td>3.9</td>
</tr>
<tr>
<td>Internal Revenue</td>
<td>554</td>
<td>8.1</td>
</tr>
<tr>
<td>U.S. as Litigant</td>
<td>127</td>
<td>1.9</td>
</tr>
<tr>
<td>State as Litigant</td>
<td>85</td>
<td>1.2</td>
</tr>
<tr>
<td>Federalism</td>
<td>713</td>
<td>10.5</td>
</tr>
<tr>
<td>Ordinary Economic Litigation</td>
<td>394</td>
<td>5.8</td>
</tr>
<tr>
<td>Foreign Affairs</td>
<td>118</td>
<td>1.7</td>
</tr>
<tr>
<td>Separation of Powers</td>
<td>57</td>
<td>0.8</td>
</tr>
</tbody>
</table>

decision-making. These policy areas resemble in some fashions the dimensions, scales, or subscales found in the judicial literature.44

Underlying the categorization of cases into these areas is the hypothesis that the justices undergo some thought processes by which they sort the cases into policy areas. Indeed, if the concept of agenda building has any viability and justices allocate agenda status in a purposive way, then the implicit division of cases into policy areas should take place. No one would suggest that these

fourteen categories, or any demarcation for that matter, would be agreed upon by all justices or analysts. The hope is this approximates the policy areas justices identify in their decision-making.

The resultant categories in this study are a mixture of substantive policy areas and legal concepts or rights. The makeup of these classes occasionally cuts across the substantive policy/legal rights divisions. To cite one example, garnishment or attachment of wages without due process could conceivably fit in the due process category or in an economic category. While this is a bit unsettling, these divisions are based on past research. Not everyone would agree that any specific case fits into any particular category, but this classification is defensible and consistent. A few comments are necessary to describe the parameters of the various taxonomies of cases.45

The first policy area is labeled Due Process. This policy area includes primarily, but not exclusively, criminal procedure cases involving search and seizure, right to a fair trial, cruel and unusual punishment, and the like. This category also contains cases involving due process for prisoners. In addition, due process considerations in administrative proceedings are included

45 A more complete description of the categories and their components is found in the Appendix.
in this policy classification. Some examples of particular types of cases fitting into this category are the termination of social security benefits, license revocation, and disbarment without due process of law.

The second category, Criminal Law, involves all Supreme Court cases which turned on a substantive interpretation of a criminal statute by the Court. These cases involve some behavior by the defendant and whether it falls within the strictures proscribed by the statute alleged to govern those activities. Some examples of these cases involve possible violations of the Mann Act, firearms statutes, the Omnibus Crime Control and Prevention Act, or other statutes.

The next grouping of cases is called Substantive Rights and it is primarily composed of First Amendment cases. In addition to cases involving freedom of speech, religion, and expression, there are other cases concerned with specific rights that are not of the First Amendment genre. Some of these cases include the rights of alleged communists, conscientious objectors, women seeking abortions, among others.

A fourth classification involves cases arising from the post-New Deal expansion of governmental power. Many of these cases involve social welfare disputes. Food stamps,

These are not First Amendment cases but they involve the rights of individuals and are consistent with the spirit of the category.
social security cases, low income housing are part of the class of cases that fit this area. The social security cases primarily involve questions of eligibility for benefits. Thus they are different than the termination of benefits cases that fall within the Due Process realm because the failure to follow proper procedures was the basis of that policy area. This category is labeled Government as Provider and the cases share a trait in that the activity is initiated by big government. These cases came to the forefront after the Great Depression as government took a more active role in aiding those less able to help themselves.

Equality is the fifth category of cases. The cases that compose this category are often characterized as civil rights. These cases involve challenges to discrimination on account of race, gender, age, or factors such as alien or naturalization status. Many of these issues raise the notion of equal protection and possible violations or denials of it.

Governmental regulation has also increased as the size of government has grown. Both the states and the central government are directly involved in this enterprise. As a result two categories were created. One of these categories involves cases concerning the regulatory powers of the central government and is labeled, appropriately
enough. *United_States_ Regulation.* The preponderance of these cases involve economic regulation of private industries by the central government.

The second of these categories would involve regulation of economic actors by states. These cases involve regulation of industries or people by the state. The principal means of regulation found in most of these cases involved taxation or licensing by state agencies. If due process, substantive rights, or federalism was involved in the case, then it was removed from the *State_ Regulation* area and placed in one of those three categories. A small number of cases involved similar economic regulation by sub-state governments (cities, municipal corporations, and the like). There were too few of these to merit a separate category so they were included in the *State Regulation* classification. This does no violence to the spirit of that category, as the nature of regulatory activities was very similar except for the fact that the levels of government were different.

One form of regulation by the central government is distinctive enough to merit its own category. This eighth category is composed of internal revenue cases. These cases involve interpretations of the tax codes and Internal Revenue Service policies. As in the *State Regulation* classification, due process, federalism, and substantive
rights take precedence if one is involved in a case which would otherwise be conceived of as Internal Revenue.

States and the United States government are also involved in "ordinary litigation" that does not revolve around providing for citizens or regulating some facet of the economic sphere. These residual cases are grouped into two classes, one for each level of government. As a result the ninth and tenth categories are United_States_as Ordinary_Litigant and State_as_Ordinary_Litigant. Cases that fall within the rubric of United States as Ordinary Litigant include disputes concerning government contracts and United States liability for or immunity from certain actions. The category State as Litigant contains cases such as disputes between states over boundaries, navigable waters, state liability for certain actions, and the like. A few cases involve the liability of cities or municipal corporations. There were too few to create a new category, so these cases were placed in the State as Ordinary Litigant category. The nature of the activity, despite the difference in governmental level, was consistent with the spirit of the State as Litigant category.

Conflicts between the levels of government are endemic to a federal system. Thus Federalism is the eleventh category of cases. The Supreme Court has frequently assumed the task of arbiter in these disputes. These cases
involve a wide range of activities, but ultimately turn on the boundaries between federal and subnational authority. A number of cases involve other specific areas such as antitrust, labor relations, workman's compensation, and the like. If, however, a question of federalism is involved, it takes priority.

The Court also plays host to a series of miscellaneous cases, whose only common denominator is an economic factor. The cases often involve the allocation of a good or service between competing litigants. The cases are often before the Supreme Court because of a jurisdictional defect or question or in a diversity proceeding. The underlying economic basis of the cases puts them into the category of Ordinary Economic Litigation.

The thirteenth category is Foreign Affairs, which houses cases involving the nation's response to international relations. Some examples of cases that fit this category are governmental power during times of crises, war and national defense related questions, and cases involving governmental activity regarding territories. Some of this activity involves regulation by the central government, but the causes of the regulation are war and national defense concerns. For that reason the foreign affairs component dominates the case and as a result, they are coded under this heading.
The final class of cases regards the means by which the Supreme Court regulates the boundaries between itself and its coequal branches or between the legislative and executive branches. The great majority of the cases involve the central government. A few cases over this period involve disputes between the branches on the state level. These cases were incorporated in this Separation of Powers category due to the fact that the issues involved most closely approximate the spirit of this category.47

Landmark Decisions

One of the important independent variables to be used to explain variation in the agenda is the landmark decision. The controlling precedents, the important similar previous cases the Court used to get to its new decision, were also coded. These were included if the syllabus of the present case cited them.48 Knowing which cases the Supreme Court

47 The discrete subareas that compose these fourteen policy areas have been preserved and will be used for some portions of the analysis. While policy area is the critical variable, it is by no means the only variable gathered. For each case, the term was coded as well as the relevant Constitutional provision present, if indeed there was any, whether the case was considered "Constitutional law" by The Supreme Court Reporter, and the form of the opinion: full opinion, per curiam, memorandum. For some secondary forms of analysis this information will be important.

48 For the early terms in this study, the headnotes in the United States Reports had not evolved. This required a reading of the case to determine the controlling precedents. These were included if the Court decision specifically announced this case was a precedent or was overturned. Because the Court does not often clearly
cites means the student of the Court can perhaps infer two processes. First, the precedent may have induced the litigant to bring the case in hope of modifying, extending, or overturning it. Second, the Court may be searching for a vehicle to do the same thing, to revise the earlier precedent. These decisions are a means of addressing the impact of internal dynamics upon the Court's agenda building. These landmark precedents may help explain the processes and scope of agenda change across time.

There is one significant problem with this type of analysis, however. Whether the intermediate policy areas or the larger scales are employed, the makeup of both types is such that they house larger numbers of discrete categories. The large number of subcategories and cases may well obscure the dynamics which the landmark case sets into motion. To correct this narrower categories will be used for the analysis of the impact of landmark decisions. For example, if the Supreme Court was to make a major pronouncement concerning antitrust that would close access to future agendas for similarly situated litigants, while at the same time taking increasing numbers of labor relations cases, the parallel rise in one area in the United States Regulation category coupled with the corresponding drop in cases in another area within the same

label these, previous cases were used if they were cited several times in the text of the majority opinion.
larger category would leave the perception that nothing had changed in the overall policy area over the time period in question. In actuality, two important forces would have cancelled each other out. It is important to have the capability to be sensitive to such movement beneath the surface.

This will necessitate a closer examination of the components which comprise the policy areas under consideration. A major decision in the obscenity area might induce a dramatic rise in similar cases, but not in the entire Substantive Rights area unless landmark decisions have spillover effects. The effect of the landmark decision should be much more issue specific. As a result, specific issue areas will be the unit of investigation. No attempt will be made to be representative. Rather, some areas will be chosen in an attempt to be suggestive of the possible impact of the landmark case.

**Changes in the Ideological Composition of the Court**

One further variable to be gathered is the ideology of the justices. This will be used as an internal mechanism to determine whether changes in ideology induce changes in the composition of the agenda. Identifying the ideological predilections of the justices is not the objective of this study. There is an extensive judicial decision-making
literature identifying the ideological preferences of the members of the Court. The results of these studies will be used in an attempt to measure ideological changes in the membership. Ideological changes will be tied to the changes in the agenda to determine whether some causation exists.

It should be noted that the change in the membership need not require an actual physical change. There are examples of sitting justices who occupy different ideological niches at different times during their careers on the bench. Justices Black and Blackmun are two recent examples of this phenomenon of ideological migration. These movements as well as those necessitated by an actual vacancy will be considered when assessing the change on the Supreme Court ideologically.

Tying ideology to the agenda is, as noted, an uncertain linkage. Do liberals choose systematically to hear different types of cases than their ideological opponents? The possible connections can be examined by looking at changes in the membership of the Court and their relationship to the agenda. Are changes in the composition of the agenda coterminous with changes in the composition of the Court?

Values have been identified as the single most important component of judicial decision-making. That being the
case, the ideology of individual justices will be used as a proxy for those values. More generally, the question of whether a Court with certain ideological proclivities is more likely to hear different types of cases from a Court with a different ideological perspective can be addressed.

The specification or measurement of ideology is based upon bloc analysis. Bloc analysis assumes that the members of the bloc share common attitudes and values, and that there is a stability in the alignments across time. Some problems of operationalization are complicated, and no solutions are entirely satisfactory. Caldeira's operationalization of the Courts in his study rated the Court as liberal or not liberal. This was a dummy variable, with the decisive factor being whether there were four liberals on the Court. This measure is not

69 C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values (New York: Quadrangle Press, 1950) was the first example of overtly behavioral Supreme Court decision-making research. Some other examples that will be consulted are Rohde and Spaeth, Supreme Court Decision Making; Glendon Schubert, The Judicial Mind (New York: Free Press, 1963); Glendon Schubert, The Judicial Mind Revisited (New York: Free Press, 1974). Primary reliance is placed upon S. Sidney Ulmer, "Toward a Theory of Sub-group Formation in the United States Supreme Court," Journal of Politics, vol. 27, 1965: 133-152. The Ulmer study and subsequent research that replicated it have used bloc analysis to categorize the justices.Bloc analysis or interagreement scores are available for every term of the study. The results of these studies will be mined in order to find how this research categorized the justices. That categorization will be the basis for the translation to the operationalization in this study.

discriminating enough to capture the necessary distinctions. An alternative is to devise a summary measure for the Court as a whole. First, each ideological division is assigned a value, then the justices are categorized and the nine values are totalled to yield a measure for the entire Court.

This measure would still be inadequate if certain other processes are prevalent. If Schubert is correct that there is strategic bloc voting on petitions for certiorari, then this proposed measure would be unworkable. Provine, however, refutes the Schubert thesis by finding "no power voting" on certiorari petitions.\footnote{Provine, \textit{Case Selection in the United States Supreme Court}, pp. 166-170.} Accepting Provine's research and adding the assumption that moderates are ideological hybrids, this measure should suffice as a proxy for the Court's ideological tenor.

\section*{Methods of Analysis}

Mapping the agenda is a relatively mechanical process. Discovering the reasons for the shape and pace of the changes is more difficult. The description of changes implies the impact that time had on the agenda (if time is attributed the properties of a variable). The changing periods brought different demands and responses to those
demands. As a result, time can perhaps be independently responsible for some of the variance in agenda allocations. More tangible factors affect the agenda and may create the conditions that spawned the changes in the allocation of agenda space. Two independent variables, membership changes and landmark decisions, will be investigated. The following methodological techniques are tools to be used in order to go beyond the description of agenda change to address concerns with the rate of change, the processes of change, and the reasons underlying the ebbs and flows in the judicial agenda.

**Factor Analysis**

First, factor analysis can help in determining the scope of agenda change across time. The terms will be factor analyzed to see how they align. The terms will be defined by the policy composition of the agenda of each year. This analysis will yield some preliminary evidence concerning the magnitude and pace of agenda change.

If proximate terms cluster together or share a common factor, that would suggest incremental changes in the nature of the agenda. If terms from different periods share a commonality, that may indicate quite different patterns. First, some recurrent cycle or periodicity may emerge. Another possible scenario is that the Court has realigning terms. The agendas in these realigning years
would, like the electoral realignment, represent a radical break from the recent past. If comparisons with this electoral concept are viable, then the decisive turning point should initiate new agendas that are very different from those that preceded the change. The notion of a realignment, or what McCloskey labels a "watershed," has some support in the literature concerning the policy outputs of the Court. Those historical analyses, as noted, are largely based on trends in the law and a few major, landmark decisions. This agenda research will allow a first view of the agenda process across time and perhaps have some implications for the historical analyses of the Court's policy outputs.

Another possible pattern of agendas across time might well be that dramatic breaks with the past are nothing more than aberrations. Following these atypical terms the Court then returns to a more "normal" agenda, consistent with the recent past. This would be evident if some string of years were found to be loading on the same factor except for one term during the time span that would not load on the same factor.

This first form of factor analysis can identify the changes in the composition of the agenda. The scope and pace of change across time have implications for the process of agenda building. The second factor analysis
concentrates on the policy areas and their shares of the agendas to determine if any factors or common grounds underlie the various policy areas. If justices implicitly see certain policy areas as similar or related to each other, then that perception may govern case selection or policy-making decisions. This is important in attempting to understand agenda building. The number of underlying factors may have implications for the strategies justices pursue in constructing the Court's agenda. The manner in which the justices conceptualize the cases brought to them may suggest the tradeoffs justices must make in allocating their finite agenda space. At a minimum, changes in the agenda should be evident if the Court is moving into some areas and away from others.

The attempt to reveal the number and the nature of the dimensions is important in order to understand the dynamics of the allocation process. When the cases are before the justices for a first decision, whether or not to hear the case, how do they sort these requests out? Do the justices see underlying factors, place the cases within the categories and then allocate agenda space between them? The first step is to determine whether there is a commonality among the policy areas such that a smaller number of factors emerge. The technique used to determine whether underlying dimensions or factors exist among the
policy areas is factor analysis with varimax rotation to maximize commonality among the factors and minimize it between the factors.

The principles behind the analysis of factors have precedent in the judicial decision-making literature. Decision-making analysts typically find three or four dimensions, but there is some disagreement as to what composes these dimensions. Schubert, for example, found two major scales: a civil liberties scale (C) and an economic scale (E). In addition, Schubert discovered a number of minor scales, including federal fiscal interests, federal centralization, and judicial supremacy.52

Rohde and Spaeth investigated the Court's decisions over the period 1958-1973. They were able to fit the vast majority of the cases and policy areas into three major scales. These three scales are labeled "freedom," "equality," and "New Deal economics." The freedom scale is composed of cases involving civil liberties. Criminal procedure and First Amendment cases are the primary elements in this scale. The cluster of policy areas which comprise the equality scale concerns persons alleged to be the victims of political, racial, gender, or similar types of discrimination. The final major cluster involves economic activity in the context of governmental

The question of which cases or policy areas cluster or factor together can be quite important, because the clusters of policies have never been investigated for the agenda. The agenda is hypothetically related to the policy outputs. This research presents the opportunity to compare these two stages.

**Methods of Determining the Impact of Landmark Decisions**

Within each area there are a limited number of important cases. As a result, they can be used in a fashion similar to a quasi-experimental design. The landmark decisions are treated as interruptions in the series, and the allocation of agenda space to the policy area before and after the landmark can be assessed. The analysis in this area will be designed to help discover whether the Court's decisions are creating their own dynamic such that they induce future litigation. The actual numbers of times a precedent is cited in subsequent cases, as well as the gross-level changes in the policy and agenda allocation, are available. These will be used along with the secondary sources to confirm the impact of landmark decisions.

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53 Rohde and Spaeth, *Supreme Court Decision Making*, pp. 138-141.
Methods of Determining the Impact of Membership

Regression analysis will be used to assess the impact of membership changes upon the agenda. The values derived for the ideology of the Court's membership will be regressed upon the composition of the agenda. In this manner, the impact of the Court's ideological changes upon the agenda can be assessed to determine the strength and direction of the relationships that materialize.

The analysis of the impact of ideology will take on a number of different forms. First, in order to test the hypothesis that liberal Courts would be more likely to accept civil liberties cases and conservatives would be disposed toward economic issues, regression analysis using those two clusters of issues will be utilized. It is likely that ideology will have an impact upon some policy areas, but not others. To determine if that is the case, ideology will be regressed upon each of the fourteen policy areas. These analyses will utilize the entire fifty-year period and other subperiods that will be determined by the results of the factor analysis of the terms. This will allow a more complete picture of the effects of ideology. It is possible that the impact of ideology may be time specific in some areas. In addition, using subperiods will reduce the problem of using ideological comparisons of Courts across a fifty-year period. Notions of liberalism
and conservatism may have shifted and that may confound the utility of examining the entire period.

**PLAN OF THE STUDY**

The next chapter will provide a descriptive analysis of agenda change in the 1933-1982 period. Chapter IV will utilize the factor analyses to begin to assess the nature of agenda change systematically. The next two chapters will assess the impact of the Court's ideology and landmark decisions upon the agenda. Finally, the larger issues of the nature of Supreme Court agenda-building and connections to the other stages of the policy process will be considered.
Chapter III
THE SHAPE OF THE SUPREME COURT AGENDA 1933-1982

The 1933-1982 period witnessed dramatic changes in the socio-political fabric of the nation. The role of government changed as this period began. Public policy has undergone a number of revisions during this half-century. The Supreme Court has been a part of the governmental machinery that has created the policies to confront the issues of the time.

The investigation of policy areas and the ebb and flow of cases within these areas is a prerequisite to an understanding of the dynamics of change. This chapter will trace the growth and decline of cases in each of the policy areas across time. The trends in the fourteen policy areas may mask shifts that run deeper. Thus it will be necessary to look at the constituent parts of the policy areas to determine whether the subareas hold the answers or at least some clues to the scope of agenda change or the process underlying that change. Table 2 shows that the Court's agenda, those cases the justices have decided to address, has changed substantially over the fifty year period.

- 68 -
### Table 2

**The Frequency and Percentage of Cases Decided in Policy Areas, 1933-1982**

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<thead>
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<td>0.8%</td>
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<td>4.1%</td>
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<td>0.3%</td>
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<td>202</td>
<td>202</td>
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<td></td>
<td>26.8%</td>
<td>33.8%</td>
<td>35.2%</td>
<td>32.7%</td>
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<td>34.1%</td>
<td>30.6%</td>
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<tr>
<td>State Regulation</td>
<td>10.1%</td>
<td>6.0%</td>
<td>2.9%</td>
<td>3.2%</td>
<td>2.0%</td>
<td>2.9%</td>
<td>1.2%</td>
<td>2.2%</td>
<td>2.9%</td>
<td>3.6%</td>
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<td>(N = 264, 3.7%)</td>
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<tr>
<td>Internal Revenue</td>
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<td>123</td>
<td>73</td>
<td>33</td>
<td>41</td>
<td>43</td>
<td>29</td>
<td>26</td>
<td>27</td>
<td>20</td>
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<tr>
<td></td>
<td>17.8%</td>
<td>16.1%</td>
<td>6.5%</td>
<td>8.4%</td>
<td>7.3%</td>
<td>4.4%</td>
<td>3.6%</td>
<td>3.2%</td>
<td>2.5%</td>
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<td>(N = 554, 8.1%)</td>
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<tr>
<td>Federalism</td>
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<td>108</td>
<td>90</td>
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<td>39</td>
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<td>89</td>
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<tr>
<td></td>
<td>14.0%</td>
<td>14.1%</td>
<td>13.6%</td>
<td>11.6%</td>
<td>10.0%</td>
<td>7.6%</td>
<td>7.1%</td>
<td>5.4%</td>
<td>9.3%</td>
<td>11.2%</td>
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<tr>
<td>(N = 713, 10.5%)</td>
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</table>
In very general terms the Court has changed its allocation patterns from issues that can be considered economically based, such as regulation, to individually based issues falling in areas such as Due Process, Substantive Rights, and Equality. A first look at the data suggests that various turning points occurred during the 1950's and 1960's as the Court directed its attention to civil liberties questions and less to economics. Some policy areas, for a variety of reasons, are more important than others. The more significant will receive the preponderance of the attention.
THE TRADITIONAL ECONOMIC CASES

The policy areas that might loosely be labeled "economic" are a convenient place to begin the analysis, because these cases dominated the early period of the study. In past factor analyses based upon analyses of substantive decisions, some of these areas loaded on an economic factor.

Ordinary Economic Litigation

The purest category of cases that would presumably fit an economic factor would be what this study has classed as Ordinary Economic Litigation. This category showed a marked, almost linear decline in both frequency and proportion of the annual agenda. Figure 1 shows the percentage of agenda space granted the Ordinary Economic cases across time.

In the first five years of the study's timeframe 126 Ordinary Economic cases were on the agenda. This represented 16.1 percent of the total number of cases heard during the 1933-1937 period. A dramatic fifty percent decline ensued in the next five year period. The decline continued, although not quite as precipitously. By 1943, the Ordinary Economic cases' share of the agenda averaged about six percent of the total agenda. This dwindled to less than three percent in the last three periods of the study. It is tempting to view the individual cases as
Figure 1: Percentage of Ordinary Economic Cases Accepted, 1933-1982
idiosyncratic and impute no pattern to what appears to be a clear trend in this area. The reason is that the consistent elements of the Ordinary Economic category are a combination of issues with only the broadest common denominator. The apparent trend, however, is striking and cautions against immediate dismissal. A number of scenarios are possible. First, economic issues became less relevant to justices. Second, these Ordinary Economic cases were more idiosyncratic and dependent on the quality of the petitions.

Considering the data in annual increments rather than five year periods confirms the trends. The decline was basically linear, although there were exceptions and some periods of stability. During the 1935 term Court attention to these Ordinary Economic cases declined sharply. This proved to be a harbinger of future agenda allocations. The Court doubled its allotment of space to Ordinary Economic cases to 16 percent in the next term, but by 1938 the Court began to allot the Ordinary Economic cases eight to nine percent of agenda space or less. In 1951 the Court began to decrease its allocation to Ordinary Economic cases still further. Exceptional terms interrupted this pattern, but for the next three decades this low portion of agenda space was consistent.
In Table 3 a closer examination of the subcategories that comprise the Ordinary Economic classification reveals patterns generally consistent with those in the larger category.

Table 3

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</thead>
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<tr>
<td>(N = 34)</td>
<td>1.7%</td>
<td>1.0</td>
<td>0.5</td>
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<td>0.2</td>
<td>0.0</td>
<td>0.5</td>
<td>0.6</td>
<td>0.1</td>
<td>0.1</td>
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<tr>
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<td>28</td>
<td>10</td>
<td>5</td>
<td>3</td>
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<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>(N = 53)</td>
<td>3.6%</td>
<td>1.3</td>
<td>0.8</td>
<td>0.6</td>
<td>0.8</td>
<td>0.2</td>
<td>0.2</td>
<td>0.0</td>
<td>0.1</td>
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<td>2</td>
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<td>3</td>
<td>4</td>
<td>4</td>
<td>4</td>
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<tr>
<td>(N = 73)</td>
<td>4.5%</td>
<td>1.3</td>
<td>1.1</td>
<td>0.4</td>
<td>0.6</td>
<td>0.2</td>
<td>0.5</td>
<td>0.6</td>
<td>0.5</td>
<td>0.5</td>
</tr>
<tr>
<td>Veteran Benefits</td>
<td>16</td>
<td>10</td>
<td>5</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>3</td>
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<td>(N = 47)</td>
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<td>1.3</td>
<td>0.8</td>
<td>1.0</td>
<td>0.6</td>
<td>0.3</td>
<td>0.3</td>
<td>0.1</td>
<td>0.4</td>
<td>0.0</td>
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<tr>
<td>Torts</td>
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<td>3</td>
<td>4</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>7</td>
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<tr>
<td>(N = 36)</td>
<td>1.4%</td>
<td>0.4</td>
<td>0.6</td>
<td>0.8</td>
<td>0.4</td>
<td>0.3</td>
<td>1.1</td>
<td>0.0</td>
<td>0.2</td>
<td>0.1</td>
</tr>
<tr>
<td>Torts</td>
<td>15</td>
<td>7</td>
<td>5</td>
<td>8</td>
<td>10</td>
<td>11</td>
<td>2</td>
<td>4</td>
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<td>3</td>
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<tr>
<td>(N = 68)</td>
<td>1.9%</td>
<td>0.9</td>
<td>0.8</td>
<td>1.6</td>
<td>2.0</td>
<td>1.8</td>
<td>0.3</td>
<td>0.6</td>
<td>0.4</td>
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</table>

Each subcategory shows the same pattern: the 1933-1937 period is the highpoint. Part of the disproportionate number of Ordinary Economic cases found in this period seemed to be a function of the Depression. Two of the subcategories with the most cases accepted were insurance and banking issues, with a combined total of 126 cases.
Many of these cases involved banking problems that were created by the Depression. Just under half of these cases were decided by the Court in the first five year period of the study. Personal injury and property damage issues were responsible for 104 of the Ordinary Economic cases. These cases tend to regain a little attention in the middle of the fifty year period while most of the other subcategories were disappearing. Even these subcategories were a collection of diverse, individual cases with little common thread. The pattern of Ordinary Economic cases was a combination of somewhat systematic attention to some areas and a general distribution of other cases.

**Government Litigation**

Two policy areas involve cases in which the government is an ordinary litigant. The line of demarcation between the areas is based on level of government. There is a series of cases directly involving the United States government and a class of cases with direct state involvement. Other cases bring the state and central governments before the Court, but the policy areas of Due Process, Federalism, and Regulation, to name a few, take precedence, and the cases bear the labels of these areas. The remaining cases have little in common except for the identity of one of the litigants and the fact that the cases are almost exclusively economically oriented. These two areas, State
as Litigant and U.S. as Litigant, fall between the larger economic and governmental power domains.

Neither of these categories boasts an impressive number of cases, nor do they consume much of the space on the agenda. The State as Litigant category held a consistent percentage, albeit less than two percent, of the agenda until the final period, when the rate climbed to just over two percent. Virtually all the State as Litigant cases involved border disputes and conflict between states over navigable waters or rivers. To the extent that a trend can exist with such a small number of cases, these cases tend to fall in the earliest and latest periods, as Table 4 shows.

Table 4

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</thead>
<tbody>
<tr>
<td>State v.</td>
<td>10</td>
<td>4</td>
<td>4</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>5</td>
<td>9</td>
<td>9</td>
<td>16</td>
</tr>
<tr>
<td>State</td>
<td>1.3%</td>
<td>0.5</td>
<td>0.6</td>
<td>0.2</td>
<td>1.2</td>
<td>0.3</td>
<td>0.8</td>
<td>1.3</td>
<td>1.1</td>
<td>2.0</td>
</tr>
</tbody>
</table>

Many of these cases were recycled from earlier periods. In other words, many of the same disputes were recurrent. The boundaries or conflicts were seldom settled permanently, and the Court was asked to arbitrate these cases periodically.
The United States as Litigant area does exhibit some tendencies, but too much should not be made of this because of the small number of cases. In the fifteen year period, 1938-1952, while the Court allotted only three percent of agenda space to these types of cases, this was the highpoint for the area. Looking at individual terms, only 1941 and 1946 saw the Court allocate more than five percent of its agenda to cases involving the United States as Litigant. In most of the terms few, if any, cases dotted the Court's agenda.

Table 5 shows that two subcategories accounted for many of the cases in this category. Just under one half the United States as Litigant cases involved government liability for or immunity from suits. From 1935 to 1956 these cases appeared at a consistent, low level and accounted for the limited agenda space United States as Litigant cases held. The disappearance of government liability cases was the reason the larger category is consigned to one percent or less of the total agenda. A few of these cases also materialized on recent agendas. One other subcategory involves government contracts and the posting of surety bonds under the rubric of the Miller Act. About half of these cases were accepted between 1940 and 1943. The remainder of the cases literally materialize with no apparent pattern after varying periods during which the Court ignored the area.
Table 5

Frequency and Percentage of Cases in United States as Litigant Subareas

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<td>13</td>
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<td>3</td>
<td>3</td>
<td>2</td>
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<td>9</td>
</tr>
<tr>
<td>U.S.</td>
<td>0.5%</td>
<td>1.4</td>
<td>2.0</td>
<td>2.6</td>
<td>0.8</td>
<td>0.5</td>
<td>0.5</td>
<td>0.3</td>
<td>0.6</td>
<td>1.1</td>
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<td>(N= 67)</td>
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<tr>
<td>Contract</td>
<td>4</td>
<td>11</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>4</td>
<td>2</td>
<td>1</td>
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</tr>
<tr>
<td>w/ U.S.</td>
<td>0.5%</td>
<td>1.4</td>
<td>0.3</td>
<td>0.4</td>
<td>0.2</td>
<td>0.7</td>
<td>0.3</td>
<td>0.1</td>
<td>0.1</td>
<td>0.3</td>
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<tr>
<td>(N= 30)</td>
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The two important generalizations gleaned from these areas are the dearth of cases and the mixed bag of concerns housed in these categories. As a result, it does not make a great deal of sense to hunt for trends from such small numbers of cases.

THE REGULATORY AREAS

A number of policy areas could be viewed in an economic vein, but with a variation. In addition to the economic component, these policy areas have a governmental connection. These cases reach the Court largely on the grounds that there is some question concerning the regulatory powers of government. Challenges occur to the scope of regulation by states and the central government. A proliferation in governmental agencies and a growth in the power of many existing agencies has occurred since the New Deal and that has created concerns that blend economic
considerations with questions regarding the proper extent of governmental power.

**Internal Revenue**

The Internal Revenue policies combine components of regulatory activity with basic economic concerns. Like most of the economic areas, the percentage of cases on the agenda declined across time. The erosion of agenda space was more rapid and pronounced than the declines in most other economic areas as Figure 2 shows.

During the 1933-1937 period federal tax cases were prominent, averaging 17.8 percent of the agenda. This declined slightly to an average of 16.1 percent during the next five year period. The erosion of agenda space continued in the next period as these cases captured an 11 percent share of the agenda. Another substantial decline occurred in the 1948-1952 period, as the Court allocated 6.5 percent of its agenda space to the taxation cases. Following this period there was a temporary halt to the deterioration of Internal Revenue claims upon the agenda. The reversal of the flow was shortlived and far from dramatic. In the final twenty years the Court annually allotted 4.5 percent or less of its agenda space to the Internal Revenue area.

Beneath the surface there was a substantial amount of flux in the series across time. In the first decade the
Figure 2: Percentage of Internal Revenue Cases Accepted, 1933-1982
range of agenda space Internal Revenue cases consumed varied from 11.3 percent (1942) to 24.4 percent (1940). There is no discernible pattern to the data. In 1935, 1937, and 1940 the taxation cases captured over one-fifth of the agenda. The 1940 apex occurred one year after the 1939 version of the Internal Revenue Code, the first major compilation of tax legislation.

The second decade began in the same fashion as the first ended. In 1946 the real break was evident, as the agenda space of Internal Revenue cases was more than halved. A brief rally in 1952 was followed by a sharp decline in 1953. The following years showed a brief return to the importance of taxation cases. That sudden growth was coterminous with the Internal Revenue Code of 1954.

These years were the last significant terms for income tax cases, however. While there were occasional gains in agenda status, the overall pattern was decline. This ebb began anew in 1960 and continued to the present. There has been a steady low level of Internal Revenue cases entertained by the Court during the recent years.

United States Regulation

United States Regulation cases consumed 26.8 percent of agenda space in the 1933-1937 period. From 1938 to 1967 the proportion of agenda space (when viewed in five year periods) for these cases was consistently found at 30 to 35
percent of the total agenda. Figure 3 shows that when the periods are decomposed to single years, the variation is considerably greater.

The range in the 1938 to 1967 period was from 24.4 percent of the total agenda (in 1951) to a robust 42.5 of the total agenda (in 1944). Twenty-three of the years during this period showed agendas with a 30 percent or higher proportion of United States Regulation cases. In the final fifteen years the proportion of these cases never reached 30 percent. Indeed the 1963-1967 period showed that 30.6 percent of cases involved United States Regulation as the primary policy area. That declined precipitously to 19.4 percent in the next five year period. In the final decade about 20 percent of the agenda was dedicated to the regulatory activities of the federal government. A closer examination of the subcategories in Table 6 reveals interesting underlying phenomena. The subcategories represent a variety of different activities sharing the fact that the central government is regulating them. The flux that existed in the larger Regulation category is magnified in the component categories. As one subcategory ebbed, another seemed to flourish and take the former's place. Bankruptcy cases were important in the first decade. In fact, 99 of the 160 bankruptcy cases reached the agenda during this period. One-half of the
Figure 3: Percentage of United States Regulation Cases Accepted, 1933-1982
patent cases were heard by 1942. On the other hand, only 32 of 223 antitrust cases were allotted agenda space in the 1933-1942 period. Only two of 60 securities regulation cases achieved the agenda in the first seven years. In the 1933-1937 period only five of 436 labor relations cases negotiated the threshold allowing those issues to reach the Court's institutional agenda.

In the later periods the reverse process occurred as those issues prominent in the first decade faded. To take their positions on the agenda the areas mentioned above such as labor relations, worker's compensation, and securities regulation waxed. In a few areas, most notably interstate commerce, antitrust, and the energy areas, there were no dramatic peaks and valleys. Instead there was a fairly consistent annual pattern with occasional exceptions. The general decline in United States Regulation cases writ large can be traced to sudden drops in the number of cases heard in labor relations, commerce, and worker's compensation, three of the largest subcategories. The parallel declines in these and other subareas suggest there may be an underlying similarity among them and that the justices consciously chose to allocate less agenda space in this direction. In the face of these declining trends across the board, one new area gained a place on the agenda, environmental policy.
Table 6

Frequency and Percentages of Cases in United States Regulation Subareas

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<tr>
<th>Year</th>
<th>Policy</th>
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<th>Copyright</th>
<th>Commerce</th>
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(N = 163)

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(N = 223)

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(N = 223)
State Regulation

The State Regulation policy area has some interesting phenomena unfolding as time passes. As noted, this category is composed largely of challenges to state taxation and licensing activities. The early years of the study were the ones that showed the most cases attaining the agenda. In the first five year period, 1933-1937, the Court accepted 79 cases in this area, just over ten percent of the total agenda. This declined in the next period to six percent and then was halved in the following period. From that point to the present State Regulation cases compose about two to three percent of the total agenda. There was a very slight rise in the last decade, with these cases comprising slightly over three percent of the available agenda space.

A breakdown by individual years shows that state regulation cases grabbed a consistent 10 to 11 percent of the total agenda from 1933 through 1936. In 1937 the percentage of agenda space allotted these cases dropped to 7.8 percent. There was a brief rally, but it ended in 1940 when a precipitous decline that was to continue until 1950 began. The 1950 term turned out to be aberrant, however, as the Court returned to the two to three percent level that had been so common. From 1953 to 1971 only one term saw the Court allocate more than 3.5 percent of its agenda
space to State Regulation. In 1972 the Court began to hear a slightly higher percentage of State Regulation cases. In five of the final eleven years of the study, the Court allotted four or more percent of its total agenda to State Regulation.

Breaking down the State Regulation category into its constituent subcategories, as shown in Table 7, sheds some light on the reasons for this downward trend. The three largest subcategories, state taxation, state licensing, and public service commission cases, made up 203 of the 264 total cases in the State Regulation area. About half of these 203 cases were heard in the first seven years of the period under investigation.

Table 7

<table>
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<tr>
<th>Frequency and Percentage of Cases in State Regulation Subareas</th>
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<td>Licenses</td>
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<td>(N= 76)</td>
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<td>Public</td>
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<td>Comm</td>
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<td>(N= 30)</td>
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</table>
The State Regulation cases cannot be viewed in isolation, however. The content and fabric of these cases should be interwoven with two other categories in particular. First, the underlying concerns of governmental power vis à vis the private economic sector would suggest a commonality between State and United States Regulation. This did not appear to materialize, however. While United States Regulation remained vital and even increased its share of the agenda, State Regulation declined precipitously. Before confronting the question of why the two areas diverge it makes sense to consider the second related policy area, Federalism.

**The Scope of Governmental Power**

**Federalism**

The category Federalism represents another transition area. It is certainly involved with questions of the balance of governmental power. At the same time, however, there is an unmistakeable economic component to this area. Many of the issue areas that comprise Federalism involve questions of regulation and which level of government is entitled to perform the regulatory activities.

Federalism is defined as the boundary between the powers of state and national government. The prevailing mood or beliefs about the proper scope of governmental power would
presumably lead the Court to be consistent in decisions in the policy areas of Federalism and regulation. Some of the state regulation cases were superseded by questions of Federalism. That is to say, litigants come to the Court to adjudicate an issue concerning state regulatory activity. The state regulation in question, however, strays into the province of federalism. That issue takes precedence over the regulatory activity. The upshot is that the number of State Regulation cases may be a bit depressed due to the fact that some of these cases were translated into questions of Federalism.

The pattern of Federalism cases looks somewhat similar to the movement of State Regulation cases across the time period. From 1933 to 1947 the Court allocated 14 percent of its agenda space to Federalism cases. This declined to 11.6 and 10.0 percent in the following two five-year periods. The ebb of agenda space continued unabated during the next fifteen years. In the last decade of the study, Federalism cases returned to some prominence, ten percent of the total agenda. Figure 4 shows the shifting patterns of agenda allocation to Federalism across time.

Viewing the data in individual years confirms the very basic trends, but is more revealing. From 1933 to 1955 the Court consistently allocated 11 to 16 percent to Federalism cases, with a few aberrant terms (22.1 percent in 1938, 8.8
Figure 4: Percentage of Federalism Cases Accepted, 1933-1982
percent in 1942, and 7.3 percent in 1949). These low terms for Federalism explain the variation between the five year periods, they pull the means down. In 1956 the Court again reduced its allocation toward Federalism cases, but instead of being an exception the 1956 term was the beginning of a long period that averaged seven percent of agenda allocation for Federalism cases. In only one of the next 18 terms did the Court allocate Federalism cases ten percent of the agenda. In 1974 the Court gave these cases a 10.5 percent share of the agenda. With two exceptions this became the new pattern, and the two final five year periods reflect the growth in the impact of Federalism upon the agenda.

Table 8 shows that within the subcategories of Federalism there is a process of change: as some subareas disappear and others assume their positions on the agenda. During the early years of the study the dominant Federalism cases involved state regulation by taxation or licensing and commerce. Over half of the Federalism cases during this period were found in these areas. These declined in subsequent time periods as did full faith and credit cases. This trend is quite consistent with the patterns found in the State Regulation category. As these declined a related issue area, the scope and reach of federal regulatory power into state provinces, grew to fill the void. This can be
traced to the growth of the central government since the New Deal. As the federal government continued to pursue its prerogatives, states and other affected litigants challenged the creeping encroachments of the federal sector.

Table 8

<table>
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</table>
Each of these areas was still relatively important in the following time periods, but their shares of the agenda declined in similar fashions. This reduction in each area contributed to the overall drop in the impact of Federalism upon the agenda and again suggests an underlying Federalism dimension. The decline of Federalism continued during the next fifteen years. State regulation issues ebbed to insignificant levels. Questions regarding the scope of federal power were still prevalent, and its share of the agenda climbed in the face of the overall decline. Commerce questions also underwent a resurgence in the last decade. These two areas explain the upturn of Federalism in the most recent ten years. This upturn of Federalism, while not a restoration to past levels, did represent a reversal of a 25 year trend. The nature of the activities falling within the general Federalism category and the commerce and federal powers subareas also changed. While the general issue of state versus federal authority remained the centerpiece of Federalism concerns, the battleground shifted to a more modern issue, social welfare.

It is not surprising to see why parallels between State Regulation and Federalism cases might exist. They tap similar dimensions, and a Court disposed to take one type of these cases might be likely to hear the other type as
well. One subcategory that fits both the Federalism and State Regulation is state taxation. In those state taxation cases that fell within the Federalism domain, the pattern of cases resembles the trends in the State Regulation area.

It is logical to suppose that United States Regulation cases would demonstrate a pattern similar to State Regulation and Federalism. The shorthand answer is that the pattern is somewhat different, in that the flow of United States Regulation cases across time diverged from the trends that State Regulation and Federalism cases seemed to share.

In theory these three categories seem similar. Why are there differences in the tendencies across time? First, the differences that seem to exist might not be as great as the large number of cases populating the United States Regulation area might suggest. The rate of federal governmental regulatory activity climbed dramatically during the half-century under consideration. The allocation of agenda space by the Court increased also, but at a much slower rate. While no valid indicators exist to gauge the growth in regulatory activity precisely, it is clear that this activity increased until recently. The cases the Court heard in the realm of United States Regulation stayed at a fairly consistent level until the
last fifteen years. Relative to the nature of regulatory activity, however, this could be viewed as a decline of sorts. Another potential explanation is that the federal regulatory policy area either taps a different dimension across the entire timeframe or some parts of it. The different patterns of agenda trends in these areas might suggest that a factor analysis of the agenda would find these policy areas on different factors.

If these three policy areas do indeed share a larger factor, and the decision-making literature suggests this, these policy areas might well be on different calendars. Regulation questions blossomed after the apex of the Federalism area. Certainly federalism questions were prominent in the early years of the Republic, as the Court was asked to interpret and breathe life into the vague phrases of the new Constitution. The growth of federal regulatory policies was a more recent phenomenon, tied more closely to the growth in government and its activities.

The different time clocks argument may be compelling in another sense. Some of the Federalism cases involved state challenges to encroaching federal regulations. The Court did not appear to be overly sympathetic to the states' contentions after 1937. As a result, opponents were forced to develop different arguments and challenge the substantive nature of the regulations. This could explain
part of the decline in Federalism and a later growth in United States Regulation cases on the agenda.

Governmental regulatory powers, federalism questions, and the mixed lot of cases comprising the government as litigant categories assure that government attorneys will be occupied. Two other areas involving the realm of governmental power might also attract their attention. The first category is concerned with relationships between governmental actors, a class of cases labeled Separation of Powers. The second involves an area exclusively conceived of as the federal government's domain, foreign affairs.

**Separation of Powers**

Separation of Powers questions are seldom found on the Court's agenda. The issues have the potential effect of forcing the Court to choose between powerful governmental forces with the ability to harm it. Despite the dearth of cases, there is some trend evident. While the first cases occur in the 1930's, what is a bit surprising is that there are so few cases over this period. The expansion of governmental power, generally, and presidential power, specifically, would seem to be ideal grist for the judicial mill. Despite this fact the percentage of Separation of Powers cases heard from 1933 to 1940 was virtually equal to the percentage heard across the entire period.
The next group of cases occurred in the 1951-1958 period, the preponderance involved civil service questions. Over half of the Separation of Powers cases occurred in the last twelve years of the time period. The 1973 term had the most Separation of Powers cases, six or 3.2 percent of that year's total cases. This was during the Watergate investigation, and the Court played a role in the final outcome. During the final decade a number of civil service questions also populated the Court's agenda. In the most recent terms the Court has entertained a number of legislative veto cases. The fundamental issue in these cases is the division between executive and legislative powers.

Foreign Affairs

Foreign Affairs cases have not been numerous on the agenda across the fifty year period. They comprise less than two percent of the 6805 cases decided. This probably reflects the Court's reluctance to meddle in this area. The rate of Foreign Affairs cases varies greatly, however. Over half of the 118 cases were accepted in the 1943-1952 decade. In the first half of that decade 6.2 percent of the agenda was allotted to cases of this genre. World War II was apparently the impetus. The 1945 and 1947 terms were the highpoints for Foreign Affairs cases, 9.3 percent in the former and 10.7 percent in the latter. These cases were
predominantly war claims issues, controversies involving the Trading with the Enemy Act, and the scope of governmental power during wartime.

After 1956, questions involving Foreign Affairs never captured as much as two percent of the agenda in any term. An occasional Korean War or Vietnam War question reached the agenda, but the total numbers are insignificant. It might be noted, parenthetically, that war and times of crisis do create other, related demands for Court action. These cases, however, are found in other categories. Some, for instance, involve the suspension of an individual's rights as a part of restraints government considers necessary during crises. These cases are placed in the Substantive Rights policy area.

**INDIVIDUAL RIGHTS**

The remaining categories involve the rights of individuals, although in different degrees. As a general rule, these cases have increased their shares of the agenda with the passage of time.

**Government as Provider**

The category of Government as Provider occupies a curious niche. It is not purely a case involving individual rights, but they come into play. At the same time this category does not fit into the category of government
regulation, though once again elements of this are prevalent. For convenience it will be placed here, similar to many diverse categories, but not clearly a part of any specific one. The deciding factor that recommends inclusion at this point is that the trends are much more similar to the individual rights categories than the regulatory categories.

In terms of real numbers and percentages, the Government as Provider grouping is the least significant of the policy areas. That is mitigated by the fact that nearly half the cases are crowded into the final decade. Only seven cases composing one half of one percent of the agenda were decided in the first two decades of the study. The Depression led to the first governmental activities to provide for citizens. The first cases were challenges to the very existence of social security legislation. The early cases were directed at the Social Security Act itself. Other cases were directed at different social welfare type programs such as federally sponsored housing programs. As the power of government to take an active, positive role became more accepted, these cases went into a long period of dormancy.

The policy area reappeared, albeit at low levels, toward the end of the fifties. Most of the cases during this period again involved subsidized housing projects. In the
final decade, many of the cases challenged amendments to the Social Security Act. Other cases involved questions about specific programs such as Food Stamps and Aid to Families With Dependent Children.

As with many other policy areas, Social Security and other Government as Provider cases can be found in policy areas such as Substantive Rights, Due Process, Equality, and Federalism. The cases involve questions such as privacy, suspension of benefits without due process, sexual discrimination, and the boundaries between state and federal social security programs. Those other issues took precedence and took these cases out of the Government as Provider area.

**Criminal Law**

There is no obvious place for the Criminal Law cases. They do not represent individual rights per se, but some elements of those concerns exist. The category of Criminal Law involves interpretations of substantive criminal law and whether the behavior in question is proscribed by the statute.

There is no trend evident across the time period. The Court allots approximately two to three percent of its agenda to the Criminal Law area. The exception to this is the 1948-1957 decade, when the allocation reached four to five percent. Despite the growth in federal criminal
legislation in more recent times, no patterns materialized. The category houses a diverse group of substantive laws with very little underlying similarity. In fact, only one subarea had more than eight cases attain the agenda in fifty years. In addition, the 181 cases in the Criminal Law area were spread across 72 subcategories. The challenges to the provisions of the substantive criminal laws do not show any meaningful pattern.

Equality
The Supreme Court is frequently seen as a forum for groups shut out of, or at a disadvantage in, the political process. The modern Court has been associated with moves to eliminate or reduce discrimination in many areas. The category Equality covers concerns with discrimination on grounds of religion, race, gender, and a variety of conditions of life.

The Equality area shows what appears to be the clearest pattern of movement across time. The Equality cases followed a three-step expansion. Figure 5 shows these trends across the 1933-1982 period.

These subcategories involve different activities proscribed by criminal statutes. Examples of these violations include possession of illegal firearms, murder, conspiracy, robbery, kidnapping, trespassing, fraud, extortion, and contempt among others.
Figure 5: Percentage of Equality Cases Accepted, 1933-1982
During the first three five-year periods the Court allotted about two percent of its agenda to these Equality cases. In the next three time periods (1948-1962), the Court consistently allotted five percent of its agenda space to these types of cases. In the final four periods, the Equality cases took their next step up to 12 percent of the agenda and consistently maintained that level.

The clear pattern that appears to exist when the terms are collapsed into five year categories is less evident when the individual terms are investigated. During the 1933 to 1945 terms the Court gave limited attention to Equality issues. In only the 1940, 1943, and 1945 terms did the Court allocate as much as three percent of the total agenda to Equality cases. In only one of the intervening terms during this period did the Court allot as much as two percent of its agenda space to these cases. The three terms cited above can be interpreted to be harbingers of the second stage of Equality cases.

The real step occurred in 1947 when the Court allocated 5.4 percent of its agenda to Equality cases. This declined in 1948, then surged to a new peak, and declined again in 1950. In 1951 the second level was restored and remained in place until the advent of the third level. Until 1958 the proportion of agenda space allotted to Equality consistently varied around a mean of five percent. In the
1959 and 1960 terms the space devoted to Equality cases declined to approximately three percent. The trend had been pointed in that downward direction.

The decline ended abruptly in the 1961 term, as the Court allocated 8.5 percent of its total agenda to Equality concerns. That declined, but only slightly, in 1962. This represented the end of the second stage and the start of the most recent trend. The 1963 term represented an apex as Equality cases grabbed a 19.3 percent share of the total agenda. The policy area underwent a steady ebb for the next four terms, but at no point did the allocation of agenda space slip to previous levels. The trend was reversed and a steady climb in the allocation of agenda space ensued, reaching 14.5 percent in 1970. During the 1971 term agenda space declined to 8.8 percent. This proved to be a brief respite, however.

From 1972 to 1978 the portion of agenda space for this area maintained a level of ten percent or more. Within that period the annual fluctuations were considerable, ranging from 10.0 to 17.8 percent of the total agenda. In 1979 there was a substantial decline in agenda space for Equality cases, from the previous year's 15.8 percent share of the agenda to 8.4 percent. Again, this appeared to be an aberrant term, with Equality cases returning to past levels of prominence, capturing 13.1 percent of the agenda.
space in 1980. The portion of the agenda dedicated to Equality grew to 17.3 percent in 1981. In the final term of this series, 1982, Equality cases declined significantly to 9.4 percent of the agenda. Whether this is another temporary ebb or the beginning of another step remains to be seen.

The use of annual data rather than five year periods preserves the generalization that there is a three-step progression in Equality cases. Before this apparent trend can be confirmed, however, it is necessary to examine the subcategories comprising Equality to determine whether the pattern is merely an artifact of their dynamics.

The subcategories can be divided along two very general classifications. First, cases are divided by the activity involved, such as voting, employment, or education, as Table 9 demonstrates. The other alternative is divisions based on the group claiming discrimination, be it women, blacks, or aliens, as Table 10 shows.

The question is whether the Court's allocation patterns within the Equality sector vary systematically by one or both of these possible divisions. First, the functional demarcation is not very useful in the early periods. The Court in the early periods is not more likely to hear employment discrimination cases than voting rights, for instance. Rather, the relative dearth of cases in the
Table 9

**Frequency and Percentage of Cases in Equality Policy Subareas**

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The early period suggests that only a few cases achieve agenda status, without any particular pattern evident. The plurality of cases involved immigration and nationalization. A few of these appeared in the first years and then again in the mid to late forties, carrying Equality to a second level. The distinction between the activity and the group charging discrimination is quite
Table 10

Frequency and Percentage of Cases Based on Group in Equality Area

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blurred in the naturalization area: the two are fundamentally interrelated.

As the naturalization cases virtually disappeared in the late fifties, cases involving discrimination in accommodations and reapportionment and elections filled the void. These areas, aided by the return of naturalization cases, took Equality to the third level. In the later periods, as accommodations discrimination cases declined, school discrimination cases took their places. In the final decade, election and reapportionment cases declined while Social Security and employment cases either reached
the agenda for the first time or grew dramatically. In these senses the policy or issue area does appear to have some impact in that as one area disappeared another appeared to arise to take its place on the agenda.

Despite appearances, however, this may be a function of the attention granted to certain groups. Alternatively, these trends might be based on simple arithmetic. The Court has a finite number of agenda spaces at its disposal. The growth of one subarea as another faded could be the result of the Court's determination that the first subarea is settled or closed and that, as a result, attention can be shifted to other areas.

In terms of the groups concerned the first burst of cases involved aliens and the earliest racial discrimination cases. As concerns with the plight of aliens waned, the concentration on racial issues increased dramatically. The growth was enough to carry Equality to the second step. The Court sprinkled in a few cases concerning other areas as well in a random manner. Racial issues declined slightly in the last periods, while gender discrimination cases grew dramatically. Coupled with this new category, other groups including aliens and illegitimate children grabbed additional agenda spaces. The sum total of these movements brought Equality to the third stage and kept it there.
Group allocations thus appeared to be important, but those allocations do not explain all the variance in Equality cases. From 1956 to 1960 the Court heard fewer Equality cases than in the previous terms, and the percentage of agenda space declined annually. This reversed in 1961, as the Court took Equality cases to the third level. Fueling the 1961 growth were cases involving reapportionment, racial discrimination, in general, and discrimination in accommodations and facilities, more specifically. This suggests that the Court may have followed a mixed strategy: some allocation based on activities (reapportionment and voting rights) and some based on group. That may mean no allocation strategy as well. The Court might merely take the best cases, and these cases would just happen to span the policy-group division identified here.

The real watershed for the Equality policy area was 1963, when the Court decided 28 Equality cases, comprising 19.3 percent of the agenda. Half of these were reapportionment cases. Immigration and naturalization cases returned to the agenda after a hiatus. The 1964 term saw a sharp decline to 17 cases (still a relatively impressive 14.7 percent of a total agenda which declined from 145 cases in 1963 to 116 in 1964). Most of the decline can be attributed to the disappearance of the
immigration cases. Reapportionment cases again comprised about half the Equality cases heard, but that was 8 of 17 rather than the 14 of 28 the previous term. Voting rights and other election related discrimination made up much of the remainder of the 1964 Equality cases, suggesting that at least for this term function or activity dictated allocation.

The subcategory reapportionment, which by itself composed over eight percent of the 1963 and 1964 terms, declined over the next seven terms, and that helps explain the drop in the agenda space allocated to Equality. The waning of the reapportionment cases left agenda space vacant, and other areas within the Equality sector were beneficiaries. Perhaps the Court had finally created satisfactory doctrine in the reapportionment area and could now turn its attention toward other areas. Voting rights cases began to flourish during the late sixties. The voting rights cases involved racial as well as functional concerns, but the concerns for groups would seem to be the impetus that motivated the justices. The Court also heard more cases from the school desegregation area, which had been a periodic contributor to the agenda.

The 1970 and 1972 terms also had agendas that dedicated a significant portion of space to Equality cases (approximately 15 percent per term). Reapportionment cases
reappeared and voting rights cases grew to an unprecedented level. Although accommodations discrimination cases ebbed, the final cases in this area were heard during these terms. Three other areas, portents of issues to come, made appearances on the Court agenda during these terms. First, employment discrimination cases were heard. The alleged basis of discrimination in these cases was racial. An occasional case of this genre was heard by the Court previously, but the early seventies marked the beginning of a perennial place on the agenda for these cases. Second, the Court legitimated the issue of gender discrimination by hearing the first of these cases. Finally, the Court began to cast the net of equal protection farther and in other directions. The cases in this period involved illegitimate children, but would later bring the handicapped, indigents, the aged, and others under the purview of equal protection.

The emphasis seemed to be on groups rather than activities. What might resemble systematic attention to certain policy activities actually seemed to be a means of smuggling in group concerns under the guise of addressing different policy areas. Perhaps the best examples were the accommodations and Social Security cases that were essentially vehicles to address the concerns of blacks and women respectively. The tendency to accept relatively significant numbers of cases from some policy areas was a
means to get the concerns of certain groups before the Court. Employment discrimination, the right to recover benefits, and the like are policy areas, but the allocation was based on aiding racial minorities or illegitimate children. The Court seemed to attend to the needs of one group such as blacks. In doing so, the Court began in one area, such as accommodations, and gradually expanded minority rights into other realms. This seemed to represent a conscious agenda building strategy. The Court developed a paternalistic attitude toward certain groups, pushing into various areas to insure their rights.

The final decade found the Court allocating Equality cases approximately the same portion of the agenda (over 12.5 percent), despite fluctuations in individual years. This kept the Equality area on the third plane. The nature of the cases shifted, however. In this instance the aforementioned two dimensions or divisions materialized. First, in terms of policy area or activity, employment discrimination cases grabbed the preponderance of available agenda space. Reapportionment and voting rights, on the other hand, declined. These policy areas did not disappear, but their apex had clearly passed. School desegregation cases also declined moderately, freeing space for the burgeoning employment area.
Second, there was a shift in the attention the Court granted to the various groups. During the rise in the importance of the Equality area, the vast majority of the cases involved questions of racial discrimination. In the final decade racially motivated cases still captured agenda space, but in decreasing percentages. Other groups asserted their claims and found access to the Court granted. The largest proportion of these cases involved alleged sexual discrimination (a 400 percent growth in cases heard over the previous four decades combined). The expansion of equal protection rights to other groups also accounted for positions on the judicial agenda.

To summarize, the Equality area appeared to demonstrate a three stage progression. The subcategories show the dynamics that seem to underpin the Equality area. During the early terms many of the Equality cases involved immigration and naturalization questions. These served as a bridge to the second level. The additional cases that brought Equality to this next level were the early discrimination cases. The incremental growth in these cases offset the virtual disappearance of immigration and naturalization cases. The sudden surge in reapportionment cases was the impetus behind the climb to the third stage. Racial discrimination continued to gain judicial attention as well. The reapportionment cases declined somewhat while
the racial discrimination areas stabilized and decreased. In their stead gender discrimination became an issue in the Court's eyes and a variety of groups had their equal protection claims recognized. Despite the surges and declines in various subcategories and the emergence or disappearance of others, the Equality policy area captured a consistent piece of the agenda space.

**Due Process**

While Equality cases grew in stages such that they would reach a plateau and stabilize at that level for a few time periods before the next increase, the story of the Due Process area is much different. Due Process cases grew on the agenda in an unabated, linear pattern for the first eight five-year periods. The growth from period to period was steady and inexorable until the 1973 to 1977 period, when agenda space declined to a previous level where it stabilized for the final five-year period. Figure 6 shows the percentage of agenda space Due Process attracted across time.

From humble beginnings, 5.2 percent of the total agenda for the 1933 to 1937 period, the Due Process area achieved the preeminent place on the agenda during the 1968-1982 period. During the 1958 to 1962 period one-fifth of the cases heard involved Due Process concerns. This increased during the next period to one quarter of the agenda and
Figure 6: Percentage of Due Process Cases Accepted, 1933-1982
peaked at a level just under one-third during the 1968-1972 period.

The first task in exploring this trend is to see if the neat patterns are still evident if the individual terms are viewed separately. This analysis yields the existence of a very curious phenomenon. Almost invariably, one term of the five-year periods more closely resembled the subsequent time period mean than either the mean from its period or the first two terms of the subsequent period. Table 11 shows this fluctuating pattern.

<table>
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<th>%</th>
<th>Aberrant Term</th>
<th>%</th>
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<td>5.2%</td>
<td>1937</td>
<td>9.2%</td>
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<tr>
<td>1938-1942</td>
<td>7.1</td>
<td>1942</td>
<td>13.2</td>
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<tr>
<td>1943-1947</td>
<td>10.0</td>
<td>1947</td>
<td>21.4</td>
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<tr>
<td>1948-1952</td>
<td>14.4</td>
<td>1951</td>
<td>21.1</td>
</tr>
<tr>
<td>1953-1957</td>
<td>17.1</td>
<td>1957</td>
<td>22.5</td>
</tr>
<tr>
<td>1963-1967</td>
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<tr>
<td>1968-1972</td>
<td>31.0</td>
<td>Not Applicable</td>
<td></td>
</tr>
</tbody>
</table>

While this pattern might seem coincidental, it seems as if the Court was striking out boldly and then, thinking better of it, retrenching for a few terms, perhaps to allow the target populations to adapt or prepare for the policy innovations. There may be something about these terms such that the Court can free significant agenda space for
further Due Process cases. These terms may be what are called "open policy windows" that allow issues to achieve increased agenda status and break from the incremental pattern. The retreat after these aberrant terms would allow litigants to determine the direction the Court is following.

Table 11 clearly shows that the single terms do not evince as clear a pattern as the five year periods. The pattern exists, but is more incremental and punctuated by sudden bursts. The first burst occurred in 1937. The next three terms witnessed a return to pre-1937 levels. In 1942 another burst occurred followed by a return to pre-1942 levels. The next sudden surge occurred in 1947, but after this the retrenchment was not as drastic. The return was to some intermediate level between the previous mean and the aberrant term.

Over the final three decades the Court's allocation pattern is less discernible. In 1954 the Court allocated 10.3 percent of its agenda to Due Process. The surrounding agendas had 16.0 and 19.6 percent Due Process cases. This obviously represents quite a fluctuation in a relatively short period of time. In general, a linear trend exists with a large number of exceptions.

The next step toward understanding the dynamics of the Due Process category is to investigate the plethora of subcategories. In very general terms 1144 of the 1275 Due Process cases involve criminal procedure questions. Of the 1144 criminal procedure cases, 1031 involve the arrest, interrogation, and trial procedures. In short, these involve the pre-incarceration periods. The remainder of the criminally related cases (113) involve prisoner rights, habeas corpus petitions, parole procedures, and related issues. The other 131 cases involve due process concerns outside of the criminal realm. These cases involve a variety of cases concerning proper procedures in areas such as eviction, civil hearings, termination of benefits or services, and the like.

The first question is whether these three subareas vary systematically across time vis à vis each other. If they do, that might mean the Court would concentrate on one or two subareas and either abandon those in favor of others or augment the existing ones by incorporating a previously ignored subarea. In this respect, Table 12 is revealing.

The growth of criminal procedure cases is steady, but incremental. It was the other two areas of Due Process that were responsible for the final impetus that pushed the entire Due Process area into its position of prominence in the 1968-1972 period. Sharp rises in these areas fueled
the growth and in the last decade slowed the erosion in Due Process. The decline in the larger Due Process category can be attributed almost exclusively to criminal procedure cases as the most recent Courts have decided fewer cases in this area. It is necessary to investigate each of the subdivisions of these three subareas. Table 13 begins with the criminal procedure subdivisions.

First, in the criminal procedure subarea the earliest stages saw a scattered distribution of procedural rights. During the 1938-1942 period this was still true, but with a variation. Two groups of cases arose to aid the general growth of criminal procedure. Right to counsel cases (such as *Betts v. Brady*) and admissibility of evidence cases appeared in fairly significant numbers. The rise in the next period can be attributed to a continuing number of admissibility of evidence cases and right to counsel cases and a beginning for search and seizure cases.
Table 13

Frequency and Percentage of Cases in the Criminal Due Process Subarea

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</tr>
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</tbody>
</table>

During the 1948-1952 period, search and seizure cases...
remained on the agenda, as did right to counsel cases. Questions concerning jury procedures, specifically jury selection, captured a relatively significant portion of the agenda and aided the growth of Due Process more generally. The remainder of the cases were distributed throughout a number of subareas. In the subsequent period illegal confession cases began to assume a place on the agenda. Search and seizure and right to counsel cases continued what appeared to be their institutionalized positions on the agenda.

The 1958-1962 period was a bit different. Confession, search and seizure, right to counsel, and double jeopardy cases held their shares of the agenda. Three new areas, admissibility of witnesses' testimony, self-incrimination, and sentencing procedure, had their first impacts upon the agenda. The number of areas with one or two cases heard declined. During the next period confession and right to counsel cases maintained their levels. Self-incrimination cases heard more than doubled to 16. Much of the overall growth in Due Process can be ascribed to search and seizure where 27 cases were heard during this period. The right to confront witnesses area was the area to emerge full-blown during these terms.

The 1968-1972 era was the apex for Due Process cases. Search and seizure continued to hold a place of prominence.
The right to counsel and confession cases maintained their consistent levels. The number of other areas capturing some portion of the agenda increased. The absolute number of criminal procedure cases heard did not decline in the next period, but the proportion of agenda space did. Counsel and search and seizure cases maintained relatively high levels, but they did decline in number and percentage. Two new areas, death penalty and Miranda warnings cases, appeared during this period. Double jeopardy grew dramatically to offset declines in other areas. In the most recent period, the Court has constricted its attention to Due Process cases. The hardy perennials, search and seizure and right to counsel, remained prominent. Death penalty cases continued to attract attention as did questions involving jury procedures. Double jeopardy declined precipitously, but still held a significant number of positions on the agenda.

To summarize, in the criminal procedure subsection of the Due Process category, some areas, most notably search and seizure and right to counsel, became entrenched on the agenda. Other areas rose and ebbed. These areas would consume a significant portion of the agenda for a period or two and then disappear, surrendering their positions to the next area of criminal procedure needing attention. During the steady rise in both Due Process and the criminal
subarea, the disappearance of one important criminal procedure area would mean that two areas would rise in its place. The additional area would help explain the steady general growth in criminal procedure writ large. Also contributing to the overall growth were the ever enlarging number of miscellaneous criminal areas which would periodically contribute a case or two. The addition of one area with a half-dozen cases or so and a half-dozen areas with one or two cases explain the steady rise in the criminal procedure area from one period to the next.

The prisoner rights subdivision lay relatively fallow for a long period. Occasional cases were distributed across policy subareas and terms. As Table 14 shows, many of the early cases involved parole procedures.

Table 14

<table>
<thead>
<tr>
<th>Frequency and Percentage of Cases in Prisoner Due Process Subarea</th>
</tr>
</thead>
<tbody>
<tr>
<td>Habeas</td>
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<tr>
<td>Corpus</td>
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<tr>
<td>(N= 31)</td>
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<tr>
<td>Parole</td>
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<td></td>
</tr>
<tr>
<td>(N= 30)</td>
</tr>
<tr>
<td>Prisoner Rights</td>
</tr>
<tr>
<td>(N= 45)</td>
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<tr>
<td></td>
</tr>
</tbody>
</table>
In the 1968-1982 period the prisoner rights area grew to capture two to four percent of the total agenda. The reasons behind the expanded impact of this area upon the agenda can be traced to three specific areas. First, parole procedure returned to the agenda after a long period of dormancy. Cases involving specific prisoner rights also abetted the growth of the subcategory when the Court recognized the right of prisoners to use civil rights legislation to combat alleged abuses. This spawned a new series of cases. Finally, questions of habeas corpus procedure also reached the agenda as before and increased in the last period. These cases contributed to the growth in the subsection of prisoner rights.

Other forms of due process also expanded the scope of the larger Due Process category. Table 15 demonstrates that the earliest cases in this subcategory reflected the times.

Most of the few cases involved garnishment, probably arising from debts incurred during the Depression. Virtually all the cases during the 1948-1952 period in these areas of due process involve procedures in

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56 Habeas corpus cases included in the prisoner rights subarea solely involve the procedures connected with these petitions. Criminal procedure cases frequently involve habeas corpus petitions, but those petitions are not central to the arguments before the Court. Instead, they are vehicles used to get the case into a federal court where substantive procedure issues such as search and seizure and right to counsel can be litigated.
naturalization trials. In the 1968-1972 period these forms of due process changed emphasis, many now involving administrative procedures followed or ignored in terminating social security benefits. These continued to gain space on the agenda and were joined by a series of cases involving due process in child custody, neglect, and abuse cases. This again reflected the times, as divorce and domestic problems grew and society became more aware of them. It is important to note that challenges to administrative procedures have existed throughout the entire period; it was the substantive policy areas linked to those procedures that have changed.
Substantive Rights

The area of Substantive Rights paralleled the general trends of the Due Process area. Figure 7 shows the fifty year trend in the allocation of agenda space to the Substantive Rights policy area.

Like Due Process, Substantive Rights refers to concerns with the rights of individuals. Most of these cases involve questions of First Amendment protections. The proportion of the agenda assumed by Substantive Rights cases was consistently about one-half that allocated to the Due Process cases.

The Substantive Rights cases received only 1.2 percent of the total agenda space in the 1933-1937 period. This rose to about 4.5 percent in the next decade, eight percent in the decade following that, and 10 percent in the 1958-1967 period. As an area Substantive Rights crested in the 1968-1972 period, gaining 16.2 percent of the agenda. This slipped to 14.3 percent in the following five-year period and declined further to 10.1 percent in the final five-year period.

The general pattern when the data are viewed in five-year periods shows an incremental growth-stability cycle that recurs four times. Viewed in discrete terms the dynamics do not seem quite so orderly. From 1933 to 1936 the Court allocated 1.3 percent of its agenda to these
Figure 7: Percentage of Substantive Rights Cases Accepted, 1933-1982

SUBSTANTIVE RIGHTS

TERM

% OF CASES ACCEPTED


26 24 22 20 18 16 14 12 10 8 6 4 2 0
cases per term. In 1939 the Court increased its attention to 4.5 percent. The Court consistently allocated five percent of its agenda space to Substantive Rights cases, although exceptions did occur. In 1949 the Court allocated the area 10.4 percent of its agenda. Until 1955, the Court allotted about nine percent annually to this area. The 1955 term was curious in a number of ways, however. First, the Court heard no Substantive Rights cases during that term. Second, it was the initial step in what became a wildly fluctuating movement from year to year.

In the next two years the Court went from hearing no cases to allotting 13.2 percent of its total agenda to Substantive Rights, the high point to that juncture. This declined in the next two terms before a dramatic rise to 20 percent in 1960. This was followed by three terms in which the Court allotted only 5.7, 7.6, and 5.5 percent of the agendas to Substantive Rights. The percentage rose to 10.3 and stayed around that level until 1968, when the percentage grew to 15.1. In 1970 another peak was reached when the Court allotted 23.7 percent. This was followed by a large two stage decline to 11.4 percent in 1972. In the following term the Court again increased its allocation to the Substantive Rights area to 24.2 percent. This preceded a general decline over the next five years to 8.7 percent in 1977 and 9.9 percent in 1978. This was halted in 1979
with the Court designating 14.2 percent of its agenda for this area. This was followed by a reduction to 6.9 percent, the lowest allotment in 17 years. In the final two years the percentages increased to 9.2 and 10.0 percent of the total agenda.

The general pattern is evident, but the yearly allocations are erratic. Responsibility for at least part of the trend can be attributed to the occasional term that was very different from surrounding terms. It is necessary to break Substantive Rights down into its component subareas to determine whether any systematic processes occurred.

During the first decade the cases that put Substantive Rights on the agenda were primarily First Amendment concerns and Table 16 shows the great preponderance of these cases involved freedom of religion and speech concerns. Freedom of speech cases declined while religion cases continued to populate the agenda, later abetted by the conscientious objection cases in the mid-forties. The advent of this subarea explained the rise in the Substantive Rights area. By 1948, conscientious objection cases disappeared, but freedom of speech cases reappeared to fill the vacuum. The first House UnAmerican Activities Committee cases reached the agenda in 1949. Speech cases
Table 16

Frequency and Percentage of Cases in Substantive Rights Subareas

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<td>1.0%</td>
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declined again in the early fifties, but a miscellaneous
set of subareas contributing one or two cases picked up the slack. Cases involving conscientious objection returned to the Court's agenda. In addition, cases involving alleged Communists were allocated a relatively substantial portion of the available agenda. In the 1958-1962 period the agenda space allotted to Substantive Rights grew to ten percent. Much of the growth again can be attributed to cases involving Communists. The Court continued to accept these cases in increasing numbers. After five terms of ignoring religion cases, the Court heard 14. Freedom of assembly and association cases also attracted Court attention. The overall level in the 1963-1967 period was very similar to the preceding period, but the subareas shifted. Communist cases disappeared, while libel, freedom of expression, and obscenity cases captured a significant portion of the agenda.

The 1968-1972 period was the apex of the Substantive Rights cases, as they averaged 16.2 percent of the total agenda. The obscenity and expression cases continued to flourish in this period. After a long dormant period, conscientious objection cases returned to the agenda, spawned by the Vietnam War. The Court also decided to accept cases involving the right to be on election ballots. These areas all aided the overall growth in Substantive Rights, but responsibility is shared by a large number of
areas that contributed a few cases. The sum total was a dramatic rise in the impact of Substantive Rights cases upon the Court's agenda.

The 1973 term stands as the single peak year for Substantive Rights cases. This is due primarily to the Court agreeing to decide nineteen obscenity cases and ten freedom of speech cases. In addition to these areas, right to privacy in abortion cases captured agenda space during the 1973-1977 period. Again there was a large scattering of subareas contributing a few cases. The total number of Substantive Rights cases in this period increased slightly, but the percentage of agenda space declined by two percent, due to the fact that the Court heard an additional 120 cases in the latter period.

The final five-year period represents a substantial decline both in raw numbers and in percentage (10.1) of agenda space. Obscenity cases, so prominent a few years before, led the decline. Speech cases also dwindled in number. The largest decrease came from the miscellaneous areas whose individual contributions were relatively unimportant, but collectively had an impressive impact. In the face of the downward trend, abortion cases maintained their level, expression and religious cases increased. In addition, a newer area, right to know and freedom of information cases, grabbed a significant portion of the agenda of the period.
The concluding remarks for the Substantive Rights area are fraught with caveats. All is not what it seems on the surface. Given the general trend to the data, the annual fluctuations are perhaps the largest found in any policy area. In addition, the subgroups demonstrated more dramatic ebbs and flows than those in other policy areas. In this area the Court seemed likely to attack one subarea, exhaust and abandon it, and move on to other subareas within Substantive Rights.

THE OVERALL PATTERN

An analysis of the total agenda from the perspective of the policy areas and their relationships to each other is the subject of the next chapter, by means of laying the groundwork for a discussion of agenda building. A few words about the overall pattern as a means of concluding this discussion and introducing the next topic are appropriate. If informal factors were constructed solely by viewing the patterns within each of the areas, a few striking trends appear evident. The traditional economic cases decline across the time period. Although different interpretations are possible, the areas that seem to fit together on this informal factor are the Ordinary Economic, the two regulatory areas, Internal Revenue, and government as litigant areas. Federalism, not solely an economic
category, but with a certain degree of similarity with these areas, also underwent the general decline. The economic areas had been dominant in the early years of the study. They do not disappear, to be sure, but their impact has been reduced. The decline in these areas meant that prime agenda space had been freed up.

The beneficiaries of this development were the areas loosely conceived of as Individual Rights. The categories of Equality, Due Process, and Substantive Rights had relatively parallel growth patterns. These patterns were inversely related to the economic areas; as they declined the Individual Rights cases flourished. This largely confirms the preponderance of research that has discovered the growth of civil liberties since the late-1930's. What may distinguish this study, however, is the finding that the nature of agenda change occurred later than the turning points other analysts have identified. Looking at the data in five-year periods, the mid to late sixties appears to be the watershed. The trends had already been set in motion two decades before that, but the activities of the sixties seemed to be a catalyst. The most recent period, however, suggests a reversal, as the economic areas rallied at the expense of the Individual Rights areas. Whether this is a temporary, aberrant period or the beginning of a new phase remains to be seen. It also remains to be seen whether the
very general, descriptive conclusions in this final section will stand up to more formal analysis.
Chapter IV

CHANGE IN THE AGENDA OF THE SUPREME COURT: A
MACRO-PERSPECTIVE

The previous chapter's concentration on the policy area as a unit of analysis suggested larger trends in agenda construction. First, what could loosely be called the economic areas flourished in the early terms and faded in the later terms of the study. The general category of individual rights followed a different trend. Few cases in these areas achieved agenda status in the early terms. Their shares of the agenda grew steadily and peaked in the late sixties and early seventies.

The analysis in Chapter III was, by necessity, somewhat fragmented or disjointed. Each of the policy areas and important subareas were investigated separately. The descriptions of the discrete policy areas hinted at the process of agenda change. Factor analysis, which will be used to view the entire period and the policy areas, will provide a more formal, systematic assessment of the nature and pace of agenda change. The analysis is designed to explore the process of agenda change and see if the factors confirm the results of the previous chapter.
Factor analysis is designed to represent a large number of variables in terms of a smaller number of factors. This reduction is based upon the search for common elements existing in the variables.

Two factor analyses will be used. First, the fifty terms will be analyzed to study the form the changes take across time. The terms are factored to determine two things: the types and numbers of factors and the pace of change. The analysis is constructed in order to see if the pace of the change is incremental and when, and if, large scale agenda changes occur.

Secondly, the policy areas will be investigated to see which areas cluster together and which are inversely related to each other. The policy areas are factored to see if the justices might use some implicit ordering in selecting which areas to devote agenda space to. This could suggest possible tradeoffs between clusters of policy areas. In both analyses, the resulting variables were then factor analyzed using a varimax rotation. This rotation produces orthogonal factors in order to maximize the differences between factors for the purpose of exploring and explaining the data.
Both factor analyses utilize the percentages of cases accepted, rather than the frequencies. The analysis of terms uses the percentage of agenda space allocated to each policy area. As a result, there are fifty variables with fourteen observations (representing each of the policy areas) per term. The analysis of the policy area uses the percentage of agenda space granted each term. Thus, there are fourteen variables with fifty observations (representing each of the terms) per policy area. Percentages were chosen under the assumption that the justices have a finite amount of agenda space and that amount varies depending perhaps upon the capacities of the judges.57 The numbers of cases accepted vary dramatically over the fifty year period, but there is consistency within subperiods. That may suggest that different Courts have different levels of tolerance for cases. Internal dynamics, such as task and social leadership on the Court

57 Regarding the analyses of the terms, the largest deviation in factor loadings between the analysis using the frequencies of cases accepted and the analysis using the percentages is .00134 for the 1933 term. No other differences even approached this miniscule divergence. The analyses of the policy areas yielded different loadings for the factors of the percentages of cases accepted in a policy area versus the frequencies of cases accepted. These cases were most striking in the third and fourth factors. The differences were of degree not kind, however. Those differences do not violate the spirit of the descriptions nor do they contradict the basic findings: economic areas are inversely proportional to individual rights areas in the contest for agenda space.
the Court's cohesiveness, might also affect the numbers of cases accepted.\textsuperscript{58} Some Courts can accept and decide a relatively large number of cases, other Courts many fewer.

\textbf{THE SHAPE OF AGENDA CHANGE}

The scope of agenda change can be assessed by freezing the agenda at any two Court terms and comparing the content of the agendas. A more complete and systematic picture can be gleaned by looking at the entire period, however. The first step toward determining the nature of agenda change is to factor analyze the fifty terms. The process of agenda change is ongoing, and decisions during term \(x\) are not independent of past judgments. Past terms have an impact on term \(x\), and that term will have implications for agendas to come. Factor analyzing the terms will provide some clues as to the effect one agenda had on subsequent terms. The exploratory factor analysis will also be a first description of the process of change. The analysis will permit a formal assessment of the changes in the relative allocation of agenda space to the various policy areas, the pace of the change, possible watershed periods,

\textsuperscript{58} David Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," in \textit{American Court Systems}, ed. Sheldon Goldman and Austin Sarat (San Francisco: W.H. Freeman, Co., 1978), pp. 509-513. The issue of the large scale fluctuations in the numbers of cases accepted will be addressed later to see if the process of agenda-building has any impact upon it.
and by implication, the policy areas that were related or inversely proportional to one another (though that concern will be addressed more directly through the second factor analysis).

Two factors materialized, explaining about 92 percent of the variance. The first factor was responsible for the larger proportion, 74.7 percent. The factors suggest an incremental pattern of agenda change. The most recent terms and their agendas load significantly on factor I. Thus it would not be inappropriate to label factor I the recent agenda factor. The policy areas that composed these factor I terms are basically the individual rights issues that crowded the agenda in this period. The earlier terms are highly correlated with factor II, and this factor can be labeled the early term factor. The economic areas largely comprised the agendas of these early terms. Diagramatically the incremental flow is quite clear, as Figure 8 shows.

There is an obvious fade or ebb to the data, as terms move smoothly from one factor to the other. Physically, the shape of the fade is a half-moon. The early terms load heavily on the second factor and the recent terms are most related to the first factor. Some of the terms falling in

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59 Factor II is more important than its proportion of variance might suggest. There is a good deal of overlap between the factors. Because of that, factor I gets credit for the shared variance.
Factor II: Early Terms Factor
the middle load fairly evenly on both factors, suggesting a transition period from the early term agendas to the more recent agendas. This movement is not perfectly consistent, however. Some of the terms seem out of place, a short term divergence from a previously inexorable pattern. Table 17 shows the results of the factor analysis of the terms. This will be disaggregated into the appropriate subdivisions, but this presentation allows a look at all fifty terms.

It is best to examine the data and the factors briefly, but systematically, to analyze the patterns and deviations from those patterns. The examination will begin with those terms that load on factor II and are not strongly correlated with factor I.

Table 18 shows those terms with the strongest relationship to factor II. The omitted terms represent breaks from the early term factor. Some, as will be seen, are tied to both factors as transitional periods.60 Others were more closely tied to the factor that represents the more recent terms.

60 Those terms whose agendas had factor loadings of .600 or greater for both factors I and II were considered transition terms, befitting the fact that individual rights and economics shared agenda space about equally. These terms tended to occur around the middle of the fifty year period.
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Table 18

**Varimax Factor Loadings for Terms Loading Significantly on Factor II**

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</tr>
<tr>
<td>1949</td>
<td>0.812</td>
<td>0.450</td>
</tr>
<tr>
<td>1950</td>
<td>0.766</td>
<td>0.487</td>
</tr>
<tr>
<td>1952</td>
<td>0.783</td>
<td>0.569</td>
</tr>
<tr>
<td>1953</td>
<td>0.742</td>
<td>0.579</td>
</tr>
<tr>
<td>1954</td>
<td>0.792</td>
<td>0.431</td>
</tr>
<tr>
<td>1955</td>
<td>0.789</td>
<td>0.562</td>
</tr>
<tr>
<td>1956</td>
<td>0.752</td>
<td>0.576</td>
</tr>
</tbody>
</table>

The 1935, 1936, 1939, and 1940 terms had the highest loadings on factor II. It is not coincidental that these four terms represented the smallest allocations of agenda space to the Due Process subareas. In some senses they are the quintessential early term factor agendas, representing the apex for the economic areas. The 1942 term represented
the first real break in the strength of the economic areas. As a result, Substantive Rights and Due Process reached their early peaks in agenda space in that term.

The following terms returned to the early agenda pattern as Substantive Rights and Due Process cases declined. That decline did not, however, reach the low levels of the earliest terms. In some respects an incremental change had taken place. This is especially evident when the longer pattern is viewed. In retrospect it is clear that three trends that would continue to evolve for four decades were beginning to form. First, even though economically related cases remained at about the same level, there was some shift, as the United States Regulation area captured some of the agenda space relinquished by other economic policy areas. Second, Substantive Rights and Due Process had not attained significant portions of the agenda at this point, but clearly a growth process in these areas was beginning.

The third trend was a recurring pendulum effect of sorts. This was evident after the 1942 term, but most noticeable subsequent to 1947. To describe the pendulum effect requires some background explanation about the 1947 term and those that followed it. The 1947 term was, perhaps, the first of the modern terms or at least a harbinger of the more recent terms.
The 1947 term can be considered a transition term. The economic categories, most notably Internal Revenue and Federalism, declined, and Due Process cases took a quantum leap. As a result, 1947 loads rather evenly on both factor I, the recent term factor, and factor II, representing the earlier terms. Table 19 shows these transition or hybrid agendas. That table also shows that 1947 was aberrant and that a more sustaining move toward the transition agendas was still in the offing.

Table 19

<table>
<thead>
<tr>
<th>Term</th>
<th>Factor II</th>
<th>Factor I</th>
</tr>
</thead>
<tbody>
<tr>
<td>1947</td>
<td>.677</td>
<td>.621</td>
</tr>
<tr>
<td>1958</td>
<td>.697</td>
<td>.643</td>
</tr>
<tr>
<td>1959</td>
<td>.748</td>
<td>.609</td>
</tr>
<tr>
<td>1961</td>
<td>.679</td>
<td>.655</td>
</tr>
<tr>
<td>1962</td>
<td>.648</td>
<td>.722</td>
</tr>
<tr>
<td>1965</td>
<td>.642</td>
<td>.682</td>
</tr>
</tbody>
</table>

In a larger sense, 1947 was what might be labeled a "recrudescent agenda." The recrudescent agenda represents a dramatic, sudden shift from the otherwise incremental flow in the shares of agenda space gained by the various policy areas.

The next three terms (1948-1950) saw a return to the early terms factor. It is clear that the return was not a total restoration that paralleled the early agendas.
Rather, this return seemed to be the interstitial fulfillment of the gaps the recrudescent agendas created in the otherwise larger incremental movement toward the more recent, civil liberties agenda. The 1947 agenda is thus curiously out of place in that it represents a dramatic swing to a future type of agenda, but was its appearance an accident or a conscious attempt to signal a new era? It is difficult to determine, but consider the pendulum effect.

Subsequent to each of the recrudescent agendas (as in 1947, 1951, and 1957, for instance) the agenda would swing back toward its pre-recrudescent composition. The recrudescent terms were temporary respites in the incremental paths the agenda followed. The recrudescent agendas appear to offer the Court the opportunity to innovate and change its agenda. The Court may be relatively free during these periods to break the incremental pattern. The subsequent retrenchments were never a complete return to the previous agenda, but part of the larger pattern: the piecemeal transitions to the recent civil liberties dominated agendas. The retreat established a new center of gravity for the agenda.

The 1951 term represents another sudden turn to the recent terms factor. If 1947 was a portent of the more recent terms, then 1951 was perhaps the first fruition of the move in that direction. The 1947 term was a hybrid
agenda: While ordinary economic, federalism, and regulation cases were still prominent on the agenda, there was a sharp rise in Due Process cases. The combination of these groupings explains the loadings of the 1947 term on both factors. The distinguishing element in the 1951 agenda was a growth in the other areas of individual rights. Equality reached its early apex in agenda space and Substantive Rights, which recently rose to a new level, maintained that level. The surge in this triumvirate took its toll on economically related cases, particularly in the regulatory areas. The decline in the economic areas cleared the agenda space for the individual rights cases. The typical retreat toward factor I followed the 1951 term.

The 1957 term represents the next turning point. The Court seemed ready to fulfill the prophecy of the 1951 term and move the agenda suddenly into the modern era. The primary components of the individual rights policy areas, Substantive Rights and Due Process, received shares of the agenda that they had never attained before. Some of the other economically related areas also received less attention from the Court.

Again having pushed the agenda toward individual rights and the recent terms factor, the Court retrenched. In all the previous retreats the Court never returned to its prior agenda levels after striking out on a new frontier. This
post-1957 retrenchment was different, albeit only in
degree. When the Court backtracked, this time its new
agenda was a transition or hybrid agenda. The subsequent
terms loaded on both factors almost equally, meaning that
the Court was dividing its attention and agenda between the
individual rights and economic policy areas. Again the
Court appeared to be returning to close the gap that had
been opened when the previous agenda had been a significant
departure from its predecessors. There was no return to
factor I. The apex of the economic areas had passed after
1957.

In 1960 the Court broke the incremental pattern again
and extended its reach into the individual rights area.
Due Process and Substantive Rights attained their zeniths.
Together they comprised over 46 percent of the cases the
Court agreed to hear. This consumption of agenda space
meant that the Federalism and United States Regulation, the
backbones of the economically related areas, did not have
agenda space available to them.

In 1966 the Court again seemed poised to fulfill its
earlier promise by moving the agenda to the more recent
factor. The next two terms hastened the progress toward
the civil liberties areas and the recent agendas. Table 20
demonstrates the movements toward the first factor.
Table 20

Varimax Loadings for Terms with Significant Loadings on Factor I

<table>
<thead>
<tr>
<th>Term</th>
<th>Factor I</th>
<th>Factor II</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951</td>
<td>.798</td>
<td>.504</td>
</tr>
<tr>
<td>1957</td>
<td>.750</td>
<td>.571</td>
</tr>
<tr>
<td>1960</td>
<td>.829</td>
<td>.390</td>
</tr>
<tr>
<td>1963</td>
<td>.750</td>
<td>.532</td>
</tr>
<tr>
<td>1964</td>
<td>.761</td>
<td>.566</td>
</tr>
<tr>
<td>1966</td>
<td>.859</td>
<td>.436</td>
</tr>
<tr>
<td>1967</td>
<td>.945</td>
<td>.255</td>
</tr>
<tr>
<td>1968</td>
<td>.971</td>
<td>.146</td>
</tr>
<tr>
<td>1969</td>
<td>.925</td>
<td>.309</td>
</tr>
<tr>
<td>1970</td>
<td>.883</td>
<td>.103</td>
</tr>
<tr>
<td>1971</td>
<td>.963</td>
<td>.049</td>
</tr>
<tr>
<td>1972</td>
<td>.975</td>
<td>.168</td>
</tr>
<tr>
<td>1973</td>
<td>.892</td>
<td>.142</td>
</tr>
<tr>
<td>1974</td>
<td>.934</td>
<td>.314</td>
</tr>
<tr>
<td>1975</td>
<td>.953</td>
<td>.279</td>
</tr>
<tr>
<td>1976</td>
<td>.976</td>
<td>.024</td>
</tr>
<tr>
<td>1977</td>
<td>.931</td>
<td>.299</td>
</tr>
<tr>
<td>1978</td>
<td>.972</td>
<td>.167</td>
</tr>
<tr>
<td>1979</td>
<td>.932</td>
<td>.274</td>
</tr>
<tr>
<td>1980</td>
<td>.854</td>
<td>.474</td>
</tr>
<tr>
<td>1981</td>
<td>.918</td>
<td>.218</td>
</tr>
<tr>
<td>1982</td>
<td>.938</td>
<td>.284</td>
</tr>
</tbody>
</table>

The Court would retreat, as before, toward the hybrid type of agenda. The larger incremental flow was clear, however. The Court was moving inexorably toward the recent term factor. After 1965 further retreats would be confined to factor I, the recent terms factor. The individual rights policy areas have decisively dominated the agendas in the last two decades. Policy areas surged and declined, but even given the variation, the preponderance of agenda space was directed toward areas such as Due Process, Substantive Rights, and Equality.
The 1971 agenda marked the watershed period for the more recent term or individual rights factor. This term loaded very heavily on factor I and had virtually no relationship to factor II. The Court heard 70 Due Process cases (40.9 percent of the total agenda, an increase from 29 cases, 22.1 percent during the previous term). United States Regulation remained at the level of the past term, its lowest ebb. The other economically related areas also declined. These parallel reductions contributed to the negligible relationship of 1971 to the second factor.

The next four terms were an incremental move away from the strong relationship with factor I and the nonexistent correlation with factor II. The 1976 term, perhaps the prototype of the modern term factor, halted the retreat toward factor II. Due Process returned to a prominent place on the agenda while Equality flourished. On the weight of these two areas, 1976 was very strongly related to factor I. Despite a growth in Federalism, the drastic fall in United States Regulation cases (to 13 percent, an all-time low) meant the association between the 1976 agenda and factor II was almost nonexistent.

The term was only a temporary stopgap, however. The 1977 term represented a return to the 1972-1975 trend. This trend has continued, with one moderate detour, through the present. The form of this new pattern was a
retrenchment of sorts. The correlation of the 1977 agenda with the first factor declined incrementally. At the same time, this agenda loaded significantly on factor II relative to previous recent terms. Due Process remained a vital part of the agenda, capturing a 30 percent share. The other important parts of individual rights withered, thus explaining the move away from factor I. The backtracking toward factor II was based on the rebirth of Federalism. After over a decade of dormancy, these cases returned to the forefront. Coupled with this was a significant resurgence in the United States Regulation area.

In the final four terms the Court began first, to slow its progress toward the recent terms factor and, then to reverse itself and move back toward factor II. The 1980 term was a more sudden turn for the Court. Indeed, the Court abandoned its incremental path and seemingly set the agenda back to 1966. The 1980 agenda was still considerably closer to factor I than factor II, but the association with the latter factor was impressive nonetheless. Attention to Due Process and Substantive Rights waned, and this carried the agenda away from factor I. On the other hand, the United States Regulation and Federalism cases grew considerably. Internal Revenue cases returned, and a few other areas were granted an increased
share. All this served to align the Court with an earlier period.

Using the past as prologue, the Court's 1980 agenda may be a forewarning of a more long-term incremental move back to the economically dominated earlier agendas. The Court still directs the preponderance of its attention toward individual rights, but the peak periods have apparently passed. Due Process and Substantive Rights have been in a state of decline for a while. Equality had been vital as late as 1981, but its precipitous decay in 1982 may be a harbinger of an erosion in this area.

On the other hand, the United States Regulation and Federalism areas have enjoyed a renaissance of late. The reappearance has not matched the levels of earlier terms, but it seems that the increased attention may be incrementally headed in that direction. The longer trends that have come and gone over fifty years suggest that these areas will continue to grow. It is unclear whether the Court will ever return completely to the earlier agenda types. If so, it should be a long time coming.

Agenda Change Across Time: Some Summary Remarks

The finding that economic cases were increasingly denied access as individual rights flourished is not novel. Most analysts have discovered similar trends. What has not been systematically identified, however, is the scope, nature,
and pace of agenda change. While the Court has a great deal of freedom, in theory, to build its agenda, changes in the agenda are slow to materialize. It should be remembered though, that the incremental pace obscures some significant changes.

In general, the Court's agenda construction was a steady evolutionary fade from one factor to another. There were, however, a number of exceptions. First, within the individual policy areas, the agenda changes were not incremental. Due Process and the subareas that comprised it, for instance, demonstrated a great deal of flux.

Second, the points of departure from the larger incremental pattern were not as random as might be expected. There seemed to be a certain periodicity to the recrudescent agendas. These agendas recur approximately every four to six years. The interruptions in the incremental fade pattern seemed to be portents of the Court's future agenda allocation strategies. After a number of terms showing a pattern of inertia, the Court would suddenly depart and move dramatically in the same direction as the evolutionary pattern, normally increasing the allocation of agenda space for individual rights. Subsequently, however, the justices would invariably retrench and fill in the gaps. The process had the properties of a pendulum effect.
The recrudescent agendas were evidence of these sudden changes and they served to modify the dynamics of the agenda for future terms. The explanation of what underlies the incremental changes with the occasional digression is inexorably tied to the larger questions concerning the Court's agenda construction and must await further analysis. Aligning the fifty terms on the two factors provides some insight into the processes, but another slice at the data is necessary. A different perspective involves turning the data in order to look at how the policy areas factor together across time. Of course, subsequent parts of the analysis will involve independent variables, most specifically membership change, and those variables may help explain the periodicity associated with the recrudescent agendas.

**POLICY AREAS ACROSS TIME**

Analysts have long noted the existence of a number of dimensions or factors that presumably govern or organize the processes of conversion. Much of the judicial decision-making literature has attempted to explain the attitudes and values of justices through a relatively small number of scales or dimensions. Policy areas are said to cluster around a few dimensions, such as civil liberties and economics.
There is said to be enough consistency in the voting of the justices in individual cases to impute the existence of underlying scales or dimensions that serve to organize the decisional patterns of the justices. Analysts believe these dimensions demonstrate that the justices see underlying currents in the various policy areas such that decision-making is based upon the justices fitting the specific cases into their relevant dimensions. For example, justices' decisions in due process and First Amendment cases might demonstrate a consistency that would lead analysts to assume that the justices see a broader underlying dimension, perhaps individual rights, in the cases.

The question is what occurs when the policy process is backed up one stage to the agenda stage. If the decision to take the case is a first vote on the merits of the issue, then the factors might be expected to be similar for both stages. On the other hand, even if the merits are tied to the choice of which cases to take, the factors may be different.

The identification of the factors serves a more important function, however. Discovering the nature and scope of agenda change is a key goal of this study. The factors that emerge can suggest which policy areas coalesce and which diverge from one another. If patterns exist in
the surges and flows in policy areas, then it is possible that some tradeoffs are made when justices are building an agenda. This factor analysis is designed to determine which policy areas are related to each other across time. It is important to see if the Court does some implicit clustering of policy areas and whether that resultant cluster is balanced against other clusters when the Court allocates its finite agenda space.

Four factors of varying significance were found in the analysis. First, factor I can be labeled an economic versus individual rights factor. This largely confirms and reinforces the results of the previous factor analysis. The economic policy areas are negatively related to the individual rights policy areas. This is parallel to the early and late agendas that are inversely related, with the early terms dominated by economic areas and the later terms by the individual rights areas. Table 21 shows the polarization in the policy areas that exists across time.

There are a number of policy areas that load significantly, whether positively or negatively, on factor I. The State Regulation, Internal Revenue, and Economic areas, and to a lesser degree Federalism, have significant positive correlations with the first factor. The reason is clear: these policy areas dominated the early agendas and withered as time went on and the individual rights areas
Table 21  

Policy Areas Across Time: Factors I–IV

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>Factors</th>
<th>I</th>
<th>II</th>
<th>III</th>
<th>IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due Process</td>
<td></td>
<td>-.814</td>
<td>.341</td>
<td>-.278</td>
<td>.088</td>
</tr>
<tr>
<td>Substantive Rights</td>
<td></td>
<td>-.687</td>
<td>.208</td>
<td>-.418</td>
<td>-.240</td>
</tr>
<tr>
<td>Equality</td>
<td></td>
<td>-.625</td>
<td>.506</td>
<td>-.240</td>
<td>.134</td>
</tr>
<tr>
<td>Government as Provider</td>
<td></td>
<td>-.128</td>
<td>.057</td>
<td>-.710</td>
<td>.238</td>
</tr>
<tr>
<td>Criminal Law</td>
<td></td>
<td>-.022</td>
<td>.003</td>
<td>.138</td>
<td>-.904</td>
</tr>
<tr>
<td>Separation of Powers</td>
<td></td>
<td>-.164</td>
<td>.729</td>
<td>-.100</td>
<td>-.077</td>
</tr>
<tr>
<td>Foreign Affairs</td>
<td></td>
<td>.065</td>
<td>-.232</td>
<td>.776</td>
<td>-.134</td>
</tr>
<tr>
<td>United States Litigant</td>
<td></td>
<td>.084</td>
<td>-.637</td>
<td>.384</td>
<td>.210</td>
</tr>
<tr>
<td>State as Litigant</td>
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<td>.107</td>
<td>.473</td>
<td>-.174</td>
<td>.363</td>
</tr>
<tr>
<td>United States Regulation</td>
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<td>.224</td>
<td>-.776</td>
<td>.180</td>
<td>-.149</td>
</tr>
<tr>
<td>Federalism</td>
<td></td>
<td>.517</td>
<td>-.023</td>
<td>.609</td>
<td>.316</td>
</tr>
<tr>
<td>State Regulation</td>
<td></td>
<td>.800</td>
<td>.030</td>
<td>-.084</td>
<td>.419</td>
</tr>
<tr>
<td>Internal Revenue</td>
<td></td>
<td>.844</td>
<td>-.212</td>
<td>.084</td>
<td>-.105</td>
</tr>
<tr>
<td>Ordinary Economic</td>
<td></td>
<td>.880</td>
<td>.039</td>
<td>.053</td>
<td>.013</td>
</tr>
<tr>
<td>Variance Explained</td>
<td></td>
<td>38.1%</td>
<td>15.7</td>
<td>8.8</td>
<td>7.6</td>
</tr>
</tbody>
</table>

grew. Federalism is not as related to factor I as the other economic areas, perhaps because of its reappearance in the closing years of the study. United States Regulation is moderately correlated with this factor. This is easily explained by the fact that United States Regulation was an omnipresent part of the Court's agenda. This area was prominent in the earlier terms, but it flourished and peaked later than the economically related areas that otherwise shared some commonality with it.

A series of areas have miniscule relationships to factor I. Criminal Law, United States and State as Litigants, and Foreign Affairs cases were few in number and fairly evenly spread out across the time span. Their marginal existence
did not depend on the agenda space granted or denied to either the individual rights or economic areas. As a result, the association to the factor was virtually nonexistent.

Substantive Rights, Equality, and especially Due Process are the principal policy areas composing what might be called the individual rights domain. The agenda status of these areas was negatively related to factor I. This confirms the other analyses, in that individual rights areas were not very visible on the early agendas when the economic areas flourished. They were spawned later, as the economically related areas receded.

Factor II is less obvious and more difficult to interpret and label. The highest negative factor loadings belong to United States Regulation and United States as Litigant. Equality, State as Litigant and Separation of Powers have the most significant positive loadings on factor II. This seems to be a strange hybrid of areas with perhaps the common element of governmental activity. Except for Separation of Powers there is an unmistakeable, but secondary economic component. In addition, Equality is inversely related to United States Regulation and United States as Litigant. Once again this confirms the findings of factor I and the relationship between the individual rights and economic clusters; as one rises, the other falls.
The relationship also materialized because these policy areas were notable by their absences or surges in the most recent 10 to 15 terms. Nearly half the State as Litigant cases are found in the final fourteen terms. Over half the Separation of Powers cases achieved agenda status in the final dozen years. Well over half the Equality cases accepted were heard in the last 12 to 15 terms. The loading for the Equality cases was a bit lower than Separation of Powers, due to the fact that the Equality cases had begun to assume a significant hold on the agenda prior to this period.

On the other hand, two areas that are seemingly related to each other were significantly correlated with factor II, albeit negatively. United States Regulation and United States as Litigant cases declined throughout this policy factor II period. In the final 20 terms (40 percent of the total fifty year period) only 20 percent of the United States as Litigant cases heard by the Court attained agenda status. The United States Regulation area never disappeared, but its apex was far removed from this recent period. Over the entire fifty year period these cases comprised 28 percent of the agenda, yet during the final fifteen terms the area never attained that percentage of the agenda.
Factor III is less important than the previous two factors, but it is of some significance. Foreign Affairs and Federalism load positively on factor III, while Government as Provider has a strong negative correlation with the factor. This suggests a governmental power factor, perhaps traditional governmental authority represented by Foreign Affairs and Federalism versus Government as Provider, a nontraditional exercise of federal power. This could suggest that the Court does see a governmental power factor and that the questions have evolved as the acceptable range of governmental power has grown and changed. The periods that show the factor most starkly are the 1940’s, when Foreign Affairs and Federalism were vibrant, and the late sixties and early seventies, when those two policy areas reached their nadirs and the Government as Provider area reached its highpoint.

There is one other factor that contributes some portion of explained variance over and above the other three factors. Factor IV is very different from the previous factors. First, the highest loading belongs to Criminal Law, an area that was not correlated with any of the other three factors. Factor IV, and to a degree factor III, are residual factors as a result of the varimax rotation. This process attempts to maximize the differences between the factors. These factors do not seem overwhelmingly strong,
but they do make independent contributions toward reducing the unexplained variance.

**Policy Changes Across Time: Some Summary Remarks**

The factors derived from this analysis are quite similar to the preponderance of evidence gleaned from similar analyses of the conversion process. The decision-making research has identified varying numbers of factors that are said to inform the justices in making their decisions. Past analyses cover most periods and are consistent in one respect: they typically find two dominant factors or dimensions, an economic and a civil liberties factor. Most of the cases and policy areas fit either the civil liberties or economic dimension. Decisions on the merits of these cases are informed by the dimensions (if the analysts are correct).

Some studies of decision-making have discovered other factors or subscales, but those are often timebound. These minor factors and subscales materialized during some periods, but disappeared during other periods. The factor analysis of the policy areas offers some support for temporary factors. Factors II and III show different clusters of issue areas, and are confined to certain periods when the policy areas that comprise the factors flourished or disappeared. Civil liberties and equal protection were occasionally found on different factors.
There is a suggestion of the existence of that phenomenon in this factor analysis of the agenda stage. As demonstrated, Equality shares a factor with the individual rights area, but also occupies another factor. Governmental power has periodically emerged as a dimension in studies of the conversion process. Something resembling that was also found in this analysis of the agenda. One factor appeared to incorporate a number of policy areas involving the scope and depth of governmental authority.

In some senses, then, there are some similarities between the factors found at the agenda stage and those involved in conversion. The processes of agenda building have yet to be determined, but it is possible that the factors or dimensions that appear to guide decision-making may also inform the choice of which cases are accepted. If that is the case, then it may confirm research that suggests that the certiorari vote is a first vote on the merits of the case. The incremental nature of the movement across time may, however, suggest otherwise. Analyses of possible determinants of agenda change may help determine the answer.

The four agenda factors do carry at least one common message. The loadings vary, but those items labeled "individual rights" appeared to share common patterns of growth and decay. The major components of the individual
rights factor were Substantive Rights, Due Process, and Equality (although Equality also shows some relationship to another factor). The movements of these areas were inversely related to the economically related areas. As one group of areas rose, the cost was borne by the other large policy area. The economic factor was composed of the State Regulation, Internal Revenue, and Ordinary Economic areas. Other factors suggest that the Federalism and United States Regulation areas are closely related to the economic areas. Those two areas show up on other factors, but are negatively related to the individual rights areas throughout. For all intents and purposes, Federalism and United States Regulation are economically related; certainly there are economic components to the issues falling within these realms. These two major factors are similar to those typically found in factor analyses of the conversion stage.

The overall pattern suggests that some elements of tradeoffs between individual rights and the economically related areas exist. This may or may not be purposive. Whether that was a function of time or changes in the Court and a conscious attempt to change the agenda needs to be investigated. First, however, it is necessary to address the implications these factor analyses raise for the process of agenda building.
THE IMPLICATIONS FOR AGENDA BUILDING

The objective of these analyses is to discover the underlying process of agenda building. What do these factor analyses suggest about the agenda construction? While the factors based on the terms and the factors based on policy might appear to offer different implications, the two can be reconciled.

The factor based on the terms might suggest that agenda building is not an overly rational process. The factor shows a clear fade from the factor labeled the early term factor to the more recent factor. With a few exceptions the pattern or trend is incremental. This implies an autocorrelated process. Such a process seems to intimate that the Court is not working with a clean slate each term. The agenda construction for the term in year x is a function of the agenda in year x-1. This limits the amount of leverage, and in some senses the amount of rationality, that can be imputed to the justices. The Court could be seen as a captive of its previous agenda and constrained in the latitude it has to construct its agenda. This might seem curious in that the Court is perceived to have a great deal of freedom in constructing its agenda. If that is the case, one might expect to see greater deviations from the incremental flow, at least occasionally.
If the focus is changed to the policy areas, it is possible to interpret the process in a somewhat different manner. All four factors are consistent in at least one respect: certain types of policy areas tend to cluster together while other groups of policy areas align together. Two basic blocs tend to reappear in varying forms. Individual rights and economically related areas tend to materialize. Furthermore, these larger areas seem to be orthogonal to one another. That is to say, the areas are inversely related. Deciding to hear a preponderance of cases in one area means less attention is granted to the other major area. This might intimate that more rational form of agenda construction may indeed take place. The tradeoffs are too consistent to ignore. Parenthetically, a few minor policy areas do not align with the economic or individual rights clusters. The few cases heard in these minor policy areas (Criminal Law, Separation of Powers, and Foreign Affairs, for example) are apparently unaffected by ebbs and flows in either major policy cluster.

The implications gathered from these two forms of analyses are not mutually exclusive. The agenda may change incrementally, but the changes are manifested by tradeoffs between the individual rights and economic areas. The consistency of the tradeoffs and the direction of the movement suggest that some rationality or coherence in
agenda construction may well exist. On the other hand, the incremental nature of changes in the composition of the agenda intimates a much less rational, coherent design to the process. It is important to remember that the changes being specified occur at the first level, the general policy clusters. Use of those clusters may mask a great deal of variation below, and further analysis is necessary to uncover the nature of that change and whether it requires that these results be qualified.

The first stage in determining the nature of agenda building requires further analysis directed at possible determinants of agenda change. The internal determinants of agenda change will be represented by the Court's ideological composition and the creation of landmark cases that would affect future agendas. Once the impact of these variables has been evaluated, the results can be combined with the factor analyses to suggest what the process of agenda construction incorporates.
Chapter V
THE IMPACT OF SUPREME COURT MEMBERSHIP ON AGENDA CHANGE

Old axioms and myths die hard. One formerly predominant belief concerning judicial decision-making has been labeled the judicial myth of "mechanical jurisprudence." That long perpetuated myth maintained that a judge finds, rather than makes, the law. Personal predilections and political beliefs are suspended once a judge scales the apolitical bench. While some judges still pay verbal homage to the need to divorce personal values from the decision-making calculus, analysts, judges and presidents are increasingly cognizant of, and concerned about, the

64 One need only read Justice Sandra Day O'Connor's confirmation hearings proceedings to see that these views are still prevalent even today. O'Connor, in response to questions about her views on abortion answered, "...the personal views and philosophies, in my view, of a Supreme Court Justice and indeed any judge should be set aside insofar as it is possible to do that in resolving matters that come before the Court. Issues that come before the Court should be based on the facts of that particular case or matter and on the law applicable to those facts. They should not be based on the personal views and ideology of the judge with regard to that particular matter or issue." Senate Judiciary Committee Confirmation Hearings as reported in Michael D. Wormser, ed., The Supreme Court: Justice and the Law, third edition (Washington, D.C.: Congressional Quarterly Inc, 1983), p. 38.
introduction of values into the practice of jurisprudence. Social scientists, beginning with C. Herman Pritchett, have propounded "judicial realism," and identified ideological values as primary determinants of judicial decision-making. The question is whether the same attitudes and values are manifested at the agenda stage and, if they are, whether they govern the choices justices make when selecting which policy areas they wish to address.

VALUES AND AGENDA BUILDING

Little research has been concerned with the impact of ideology upon case selection. Although there is disagreement concerning the incidentals, most of the available literature supports the use of values in case selection. The preponderance of that evidence suggests that justices' votes for or against certiorari are a first indication of their ultimate vote on the merits.

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64 The most relevant of the literature in this area is Provine, Case Selection in the United States Supreme Court; Schubert, "Policy Without Law," pp. 284-307; Ulmer, "The Decision to Grant Certiorari as an Indicator to Decision on the Merits," pp. 429-447.
If justices are deciding which cases to accept based upon their ideological predilections, then those values may be translated to policy areas. If justices are purposive policy makers pursuing a preferred set of policy designs, then they may more or less systematically attack a policy area. With the flood of cases, the justices cannot afford to examine each individual petition thoroughly. The sorting of petitions by policy area and the shorthand cues that are presumed to be used by the justices to pare their workloads make the use of policy area as the criterion for selection possible. The justices may have a policy area in mind, sift through potentially relevant petitions, and isolate and closely examine the cases most likely to allow them to achieve their goals. A continuing cycle is initiated, because justices know the scope and reasoning of their decisions can induce further litigation. A decision that changes doctrine or reveals some voids in the policy area should lead the justices to further cases in the area.

Regardless of whether the criteria for agenda-building revolve around the individual case or the policy area, the role of ideology is significant and must be addressed. There are questions concerning the connection between membership on the Court and changes in the agenda, however. First, if justices make policy judgments based on their ideological values, then it makes sense to assume that the
decisions concerning what is to be decided would be based on similar grounds. In fact, the decision of which cases to hear may be at least as important as the ultimate decision on the merits of the case. The problem is the nexus between ideology and the selection of cases based on policy area. It is not readily apparent whether a certain ideological propensity is more disposed to accept some policy areas and limit others.

There is an expectation, perhaps, that liberal justices and Courts would be more disposed to accept individual rights cases than conservatives in order to protect the individual. There is a hidden assumption or implication that lower courts or the so-called political branches might not be as sympathetic to the rights of individuals and that the Supreme Court would have to be in the forefront in protecting individuals and minorities. The political branches tend, by virtue of their majoritarian nature, to be conservative on questions involving individual rights. Liberal justices would have to remain vigilant and keep agenda space available in order to correct abuses. This attention to individual rights should also be manifested in the notion of judicial activism and restraint. The liberal justices are activists in the civil liberties domain, accepting significant numbers of cases so they can stamp their imprint upon the area and correct the perceived errors of the other branches.
Conservatives would presumably be more likely to opt for economic issues and might ignore the civil liberties cases so ably handled by the lower courts and the other branches of government. Since the New Deal, the political branches have been, if not more liberal on economic matters, at least considerably less conservative than in the past. The political branches have pushed the government into a direct role in regulating the economy. Conservatives have sought less governmental intervention in economic matters. Consequently, conservatives might seek economic cases to correct what they perceive as errors made by the other branches. As a result, the conservative justices may be staunch judicial activists in the economic areas. These justices might demonstrate restraint in individual rights matters because of their basic agreement with the conservative political branches on civil liberties issues.

There is little empirical evidence to substantiate these distinctions: instead, they might be said to fall into the realm of the conventional wisdom. The little existing

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65 Incidentally, this duality in a justice's conception of judicial activism and restraint, whereby a justice may simultaneously be an activist and a restraintist depending on the issue, does offer some support for the position advanced in Schubert's "functional theory" of activism restraint that activism and restraint may not be as ingrained or consistent as other analysts might contend. The Schubert theory does not directly address this duality, but is used by implication. Glendon Schubert, Judicial Policy Making (Chicago: Scott Foresman and Co., 1965), pp. 153-157.
evidence is gathered by implication, although Provine does agree with Pritchett that the most liberal justices in civil liberties cases also tended to be the most review prone, while the least liberal were less likely to accept these types of cases. She focuses on Justices Hugo Black, William Douglas, and Frank Murphy as examples of the former, and Felix Frankfurter as a prototype for the latter.66

These hypothetical connections also result from the general association of certain Courts and individual justices with broad policy areas. These relationships are based upon the policy outputs of the Court during different periods. The conservative pre-New Deal Court was preoccupied with economic matters. The replacement of the "Four Horsemen" with justices like Douglas and Black helped lead the Court into the individual rights domain. The Warren Court was a major force in the individual rights realm. The justices took unprecedented steps in civil liberties. Perhaps because of that, the later Warren Court was perceived as exceptionally liberal. The more conservative Burger Court has often been characterized as retreating from the highwater marks the Warren Court had created. As a consequence of these periods, liberals became associated with civil liberties and conservatives

66 Provine, Case Selection in the United States Supreme Court, pp. 122-125.
with governmental power and the protection of economic interests. Formally, these will be the hypotheses that govern this research.

These generalizations seem overly simplistic, however. The relationships or tendencies are probably much more complex. First, it should be remembered that the conventional wisdom concerning these connections is derived from the policy outputs of the Court, not the agenda. Whether the same perceived relationships exist at the agenda stage is uncertain.

If the agenda and the policy outputs are developed and affected by parallel or similar factors, then ideological changes can have a pronounced effect upon the agenda. The Court changes slowly and, often it seems, imperceptibly. By the same token, however, a change or two in the Court's membership may have a large impact, particularly on the certiorari stage. It only takes four votes to grant certiorari, so a new justice has a magnified effect at this juncture. Poisson distributions and simple probabilities hold that the average president will make two selections in one full four-year term.67 On the average there is a vacancy on the Supreme Court approximately every 2.3 years.

Perhaps enough ideological changes accumulate and create the conditions that spawn what have been labeled the "recrudescent agendas." Moreover, membership changes may not be required to induce changes in the ideological makeup of the Court and, in turn, the agenda. There are well-known instances of judicial leopards who do change their ideological spots. The ideological migration of one justice, coupled with a new member, might change a Court, or the changes might cancel one another out. The answers to these questions should have important implications for the impact of ideological change upon agenda change.

On the other hand, there are factors that could confound or interrupt the relationship between ideology and the agenda. On the individual level, one might arguably expect little or no agenda change when the Court's ideology changes. After all, it takes less than a majority to accept a case. As a result, a few ideological changes ultimately may not have a direct, immediate, or apparent impact upon the agenda. An existing bloc may not be emasculated by the changes, and its base of power may weather the advent of a new member or two.

What may further confound analysis is the so-called "freshman effect." Members new to the Court are said to

be searching for their eventual niches. As a result, the decision patterns and the voting behavior of these new members might appear somewhat erratic. If that is the case, there may be a lag between the arrival of a new member on the Court and a discernible difference in the Court's behavior.

In addition, a change in the ideological composition of the Court may actually create conditions that stabilize or maintain a policy area's level of agenda space. Justices who are a part of a new ideological balance might use their new found muscle to accept the same types of cases as their predecessors, but to reverse the previously enunciated policies.

On a different level, the impact of the effects of ideology upon the agenda may be delayed due to the legacy bequeathed by preceding agendas. Even ambitious new members may be constrained by the issues left unresolved by the Court in previous terms. The hypothesized effect of the landmark cases suggests a process that sets certain forces in motion that the Court is not completely free to alter. In other words, at any given time, in any given policy area, the Court may be constrained by the need to hear certain types of cases to clarify doctrine or qualify past rulings.
Other governmental actors or institutions can issue authoritative policies that may compel the Court to get involved or may restrict judicial action. Ultimately it is important to remember that the decision whether or not to grant certiorari is at least partially a function of the decision issued by courts below. Certain strategic designs may govern the choices made by individual justices. If the certiorari decision is a first vote on the merits, then policy conscious justices must weigh the consequences. If they accept the case will they get the outcome they desire?

Finally, on the largest level, the overall incremental flow of the policy areas suggests, on the face, that membership or ideological changes may have a limited impact, at least for the short term. The course the agenda takes almost seems inexorable, and changing a few members does little to alter that course. Each of these constraints may limit the Court's effectiveness or ability to manipulate some policy areas, while others are porous and afford justices an opportunity to shape an area creatively. In addition, the chance to change the agenda may be time specific in some policy areas.
MEASURING IDEOLOGY

The Use of Bloc Analysis

The investigation of this connection between ideology and the agenda is complicated by methodological problems and choices. The first step is to create an ideological measure for the Court for each term. That measure can then be used to investigate the association between ideology and agenda change in various policy areas and subareas. The Court is assigned an ideological value for each term based on the ideologies of the members. The changes in the ideological makeup of the Court can then be related to the changes in the composition of the Court's agenda.

The membership of the Court is deliberately given the opportunity to explain the preponderance of the variance in agenda change. Certainly, other variables such as environmental factors, levels of demand, Congressional policies, and presidential influence could affect the Court's ability to construct its agenda. The assumption has been made, though, that the justices have enough control over a burgeoning docket to preempt, or at least narrow, the effects of other factors. While ideology may not overwhelm the influence of other variables, it is assumed to have a strong enough impact to be discernible.

The exploratory nature of this research should not obscure the existence of a few problems. The major problem
results from the operationalization of ideology. The translation of ideology into a measure or indicator is always an uncertain enterprise. The problems are compounded when such a long period of time is covered. The ideological proclivities of the justices, and hence the Supreme Court, were gathered from a number of sources.\(^6^9\) Consistency was sought, when possible, in the gathering of

\(^6^9\) The following sources were used to gather the ideologies of the justices: Ulmer, "Toward a Theory of Sub-Group Formation in the United States Supreme Court," pp. 133-152; Sheldon Goldman, Constitutional Law and Supreme Court Decision-Making: Cases and Essays (New York: Harper & Row, 1982), pp. 250-265, 330-341, 412-423, 539-547; Sheldon Goldman and Thomas Jahnige, The Federal Courts as a Political System (New York: Harper & Row, 1971), pp. 158-159, 164-166; Goldman and Jahnige, The Federal Courts as a Political System, second edition (New York: Harper & Row, 1977), pp. 162-163, 168-170. I would also like to thank Professor Goldman for allowing me to use the results of his bloc analysis that will appear in the third edition of the Goldman-Jahnige text (forthcoming). Pritchett, The Roosevelt Court; Glendon Schubert, The Judicial Mind: Attitudes and Ideology of Supreme Court Justices, 1946-1963 (Evanston: Northwestern University Press, 1965). This wealth of literature did not span the entire 1933-1982 period, however. As a result, it was necessary to seek other sources. The most fruitful were the interagreement scores for the justices found in the annual review of "The Supreme Court Term" for the 1963-1970, 1972, 1977, and 1982 terms. The citations for these articles are: 1963 (vol. 78: 148-312); 1964 (vol. 79: 56-211); 1965 (vol. 80: 91-272); 1966 (vol. 81: 69-262); 1967 (vol. 82: 63-317); 1972 (vol. 87: 1-313); 1977 (vol. 92: 5-339); 1982 (vol. 97: 1-306). The use of blocs offered the greatest amount of consistency as well. In one form or another there was some bloc analysis available for each of the fifty terms in the study. The use of blocs to identify ideology was reinforced by individual term scalograms and other research. There was a great deal of agreement between the the various sources. When there were discrepancies, the disputes were resolved in favor of consistency.
the sources. While that was not possible over the full fifty years, attempts were made to to be as consistent as possible.

Bloc analyses were used to identify the ideologies of the justices, and these were aggregated to give the Court an ideological score for each term. Bloc analysis was used for practical and substantive reasons. First, in one form or another, there are bloc analyses or interagreement scores for virtually the entire period. More importantly, there is a substantive rationale based upon earlier research. Schubert, for one, believes blocs are prevalent at the initial stages, when petitions for certiorari are discussed.\textsuperscript{70} While Provine would not subscribe to the influence of blocs as means of power consolidation at the certiorari stage, she does accept the impact of ideology coupled with a justice's perception of judicial role.\textsuperscript{71} Bloc membership is based upon the attitudes and values of the justices, thus taking ideology into account. Blocs allow analysts to map the Court ideologically. The composition and relative size of the different blocs during different periods provide a significant measure of the Court's ideological balance.

\textsuperscript{70} Schubert, "Policy Without Law," pp. 296-319.

\textsuperscript{71} Provine, \textit{Case Selection in the United States Supreme Court}, pp. 170-172.
The problems posed by bloc analysis and the theories of decision-making are well-documented. The problems revolve around the use of non-unanimous cases to determine ideological blocs, and the failure to account for the impact of the judicial role, small group analysis, or the idiosyncrasies of individual cases. Bloc analysis is no worse in these respects than other modes of analyzing individual decision-making. In addition, it has the advantages noted above. If the premise that certiorari votes are a first vote on the merits is accepted, then bloc analysis is useful under the assumption that those who vote together on the merits of the case will also coalesce on certiorari votes.

The blocs, scalograms, dimensional analyses, and judicial behavior literature rank the justices relative to each other for that term. There are no mechanisms for comparing individual justices across time or to equate liberals in 1939 with those in 1968. This yields the strange result that in some terms, on the basis of the bloc analyses, the Burger Court is the most conservative Supreme Court in the 1933–1982 period. Few could defend this relative to the Court in the early 1930's, for example. After all, the Burger Court has often been characterized as not reversing the liberal path of the Warren Court so much as slowing down the work of the previous Court.72

72 Anthony Lewis, "Foreword" in The Burger Court: The
To assign a value that might reflect a comparative dimension would be highly subjective. This shortcoming will present a problem in assessing the impact of membership across the entire period. Testing the effects of membership over the entire fifty-year period is only meant to be suggestive of the impact membership change has upon the agenda. To correct for this problem and to make the analysis more realistic, the timeframe will be circumscribed. Using subperiods of approximately fifteen terms will compensate for the problem of comparing the ideological propensities of different Courts. The Burger Court will now be compared only to the Warren Court. The long-range comparisons that are most suspect will be eliminated.

**Methodology**

Specifying the independent variable, despite the existence of the decision-making literature, is fraught with the aforementioned problems. The values for the Court each term are based on coding liberals = 2, moderates = 1, and conservatives = 0.\(^7^3\) Table 22 shows the sum of the justices' ideological scores:

\(^7^3\) As an example of the computation of a Court's ideological score, the 1933 Court, the first in the study, would have a value of 8. This is the result of the categorization of Justices Butler, Sutherland, Van Devanter, and McReynolds as conservatives (a value of 0 for each); Hughes and Roberts as moderates (1 each); and Brandeis, Cardozo, and Stone as liberals (2 each). The
individual scores and the value assigned the Court for each term in the 1933-1982 period.

This means of operationalizing ideological values is not without its own problems. Chief among the shortcomings is the translation of this summary measure. The value of this measure would range from 0 (nine conservatives) to 18 (nine liberals). Outlying values this extreme are not likely to emerge however, so the effective range is somewhat more circumscribed. Nevertheless, this should be sufficient to yield enough discriminatory power for most purposes.

A related problem is the interpretation of any specific value. For instance, would a score of 10 represent 5 liberals and 4 conservatives, or 3 liberals, 4 moderates, and 2 conservatives? Presumably this would make a difference. The differences between these judicial alignments might not be as great as they appear at first blush, however. If one accepts the premise that a moderate is in actuality an ideological hybrid, half-liberal and half-conservative, then the differences in the composition of the Court in the example above would not be overwhelming. Moderates would be assumed to be justices who are liberal up to a certain, internally derived threshold, and once this is crossed, their decision-making would assume a conservative slant. This would be akin to

total is the sum of $4c + 2m + 3l$ and is equal to 8 ($0 + 2 + 6$). Table 22 shows any ideological changes evident on an annual basis.
### Table 22

**The Relative Ideological Stances of the Supreme Court, 1933-1982**

<table>
<thead>
<tr>
<th>Term</th>
<th>Score</th>
<th>Reason for Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1933</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>1934</td>
<td>8</td>
<td>No change</td>
</tr>
<tr>
<td>1935</td>
<td>9</td>
<td>Hughes moderate to liberal (m to l)</td>
</tr>
<tr>
<td>1936</td>
<td>9</td>
<td>No change</td>
</tr>
<tr>
<td>1937</td>
<td>10</td>
<td>Black (l) rep Van Devanter (c); Hughes (l to m)</td>
</tr>
<tr>
<td>1938</td>
<td>12</td>
<td>Reed (l) rep Sutherland (c)</td>
</tr>
<tr>
<td>1939</td>
<td>13</td>
<td>Murphy (l) rep Butler (c); Roberts (m to c)</td>
</tr>
<tr>
<td>1940</td>
<td>10</td>
<td>Reed (l to m); Stone (l to m); Hughes (m to c)</td>
</tr>
<tr>
<td>1941</td>
<td>10</td>
<td>Byrnes (m) replaced McReynolds (c); Frankfurter (l to m)</td>
</tr>
<tr>
<td>1942</td>
<td>8</td>
<td>Rutledge (l) rep Byrnes (m); Frankfurter, Jackson (m to c)</td>
</tr>
<tr>
<td>1943</td>
<td>8</td>
<td>No change</td>
</tr>
<tr>
<td>1944</td>
<td>9</td>
<td>Reed (c to m)</td>
</tr>
<tr>
<td>1945</td>
<td>8</td>
<td>Reed (m to c)</td>
</tr>
<tr>
<td>1946</td>
<td>10</td>
<td>Burton, Reed (c to m)</td>
</tr>
<tr>
<td>1947</td>
<td>11</td>
<td>Vinson (c to m)</td>
</tr>
<tr>
<td>1948</td>
<td>11</td>
<td>No change</td>
</tr>
<tr>
<td>1949</td>
<td>9</td>
<td>Minton (m) rep Rutledge (l); Clark (m) rep Murphy (l)</td>
</tr>
<tr>
<td>1950</td>
<td>7</td>
<td>Reed, Clark, Vinson (m to c); Frankfurter (c to m)</td>
</tr>
<tr>
<td>1951</td>
<td>8</td>
<td>Burton, Minton (m to c); Frankfurter (m to l); Jackson (c to l)</td>
</tr>
<tr>
<td>1952</td>
<td>9</td>
<td>Burton, Minton, Reed (c to m); Frankfurter, Jackson (l to m)</td>
</tr>
<tr>
<td>1953</td>
<td>10</td>
<td>Warren (m) rep Vinson (c); Burton, Reed (m to c); Clark (c to l)</td>
</tr>
<tr>
<td>1954</td>
<td>10</td>
<td>Warren (m to l); Minton (m to c)</td>
</tr>
<tr>
<td>1955</td>
<td>11</td>
<td>Burton, Reed, Minton (c to m); Frankfurter, Harlan (m to c)</td>
</tr>
<tr>
<td>1956</td>
<td>10</td>
<td>Brennan (l) rep Minton (m); Clark (l to m); Burton (m to c)</td>
</tr>
<tr>
<td>1957</td>
<td>10</td>
<td>No change</td>
</tr>
<tr>
<td>1958</td>
<td>8</td>
<td>Whitaker, Clark (m to c)</td>
</tr>
<tr>
<td>1959</td>
<td>9</td>
<td>Clark (c to m)</td>
</tr>
<tr>
<td>1960</td>
<td>8</td>
<td>Clark (m to c)</td>
</tr>
<tr>
<td>1961</td>
<td>8</td>
<td>No change</td>
</tr>
<tr>
<td>1962</td>
<td>12</td>
<td>Goldberg (l) rep Frankfurter (c); White (m) rep Whitaker (c); Stewart (c to m)</td>
</tr>
<tr>
<td>1963</td>
<td>13</td>
<td>Clark (c to m)</td>
</tr>
<tr>
<td>1964</td>
<td>13</td>
<td>No change</td>
</tr>
<tr>
<td>1965</td>
<td>12</td>
<td>Black (l to m)</td>
</tr>
<tr>
<td>1966</td>
<td>12</td>
<td>No change</td>
</tr>
<tr>
<td>1967</td>
<td>13</td>
<td>Marshall (l) rep Clark (m)</td>
</tr>
<tr>
<td>1968</td>
<td>14</td>
<td>Harlan (c to m)</td>
</tr>
<tr>
<td>1969</td>
<td>11</td>
<td>Burger (c) rep Warren (l); Harlan (m to c)</td>
</tr>
</tbody>
</table>
Table 22 continued

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>Justices</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>9</td>
<td>Blackmun(c) rep Fortas(l); Harlan(c to m); White(m to c)</td>
</tr>
<tr>
<td>1971</td>
<td>9</td>
<td>Rehnquist(c) rep Harlan(m); White(c to m)</td>
</tr>
<tr>
<td>1972</td>
<td>7</td>
<td>Powell(c) rep Black(m); White(m to c)</td>
</tr>
<tr>
<td>1973</td>
<td>7</td>
<td>No change</td>
</tr>
<tr>
<td>1974</td>
<td>7</td>
<td>No change</td>
</tr>
<tr>
<td>1975</td>
<td>4</td>
<td>Stevens(c) rep Douglas(l); Stewart(m to c)</td>
</tr>
<tr>
<td>1976</td>
<td>6</td>
<td>Stevens (c to l)</td>
</tr>
<tr>
<td>1977</td>
<td>7</td>
<td>Stevens(l to m); Blackmun, Powell(c to m)</td>
</tr>
<tr>
<td>1978</td>
<td>8</td>
<td>Stevens(m to l); Powell(m to c); White(c to m)</td>
</tr>
<tr>
<td>1979</td>
<td>8</td>
<td>White, Blackmun(m to c); Stewart, Powell(c to m)</td>
</tr>
<tr>
<td>1980</td>
<td>5</td>
<td>Stevens(l to m); Stewart, Powell(m to c)</td>
</tr>
<tr>
<td>1981</td>
<td>6</td>
<td>Blackmun (c to m)</td>
</tr>
<tr>
<td>1982</td>
<td>8</td>
<td>Stevens(m to l); Powell(c to m)</td>
</tr>
</tbody>
</table>

the assumptions made in scalogram analysis, which ranks the cases and the justices on continua from most liberal to most conservative. Each justice has a threshold point, and cases beyond that division would be beyond the justice's capacity to cast a liberal (or conservative, depending on the scale) vote.

The definition of the dependent variable raises questions as well. There are three hypothesized levels that can serve as points of division. The use of each level can be justified by past research. Level one results from the dimensional and factor analyses of this and other studies and has two clusters: individual rights and economics. Level two is made up of the various policy areas and level three represents the subareas. Past chapters suggest the second and third levels are the bases of the decisions. It is necessary to investigate each of
these levels to determine which, if any, shows the impact of ideology upon the agenda.

The primary analytical tool used to see if changes in the ideology of the Court yield changes in the agenda space allotted to the various policy areas and subareas is bivariate regression analysis. The inherent weakness in the independent variable might seem to militate against the use of regression to discover the impact of ideology upon the agenda. Regression is, perhaps, too powerful a technique for this analysis. If the proper perspective is maintained, however, it can be useful. The tool is a measure of association, and the exact regression coefficients are not crucial. Rather, the coefficients serve as indicators of the effects of ideology upon the agenda. The approximate strength and direction of the changes are sufficient for analytical purposes, and validity should be no problem. The measures, no matter how problematic, are consistent. As a result, regression affords the analyst the opportunity to compare the various policy areas in order to determine which areas are most affected by ideology and during which periods the relationships are most evident. In addition, the direction of the relationships between ideology and the agenda can be assessed, both across time and during different periods.
The Analysis

The Impact of Ideology Upon the Agenda Across the 1933-1982 Period

The first step is to determine whether the impact of membership is evident across the entire 1933-1982 time period. By and large, the results do not suggest a dramatic impact for ideology. On level one, the expectation would be that as a Court got more liberal, it would accept a higher percentage of individual rights cases and fewer economic cases. The actual correlations of Court membership and these two policy clusters are not impressive. As the Court gets more liberal, justices are slightly less likely \((r = -0.13)\) to hear individual rights cases and slightly more likely \((r = 0.16)\) to accept economic cases. In regression terms, an increase of one unit in the Court's ideology means the Court will hear 0.88 percent fewer individual rights cases and 1.29 percent more economic cases. These changes should not be exaggerated. A one percent rise in areas as large as the individual rights and economic clusters is actually quite modest. Too much should not be made of these results, because neither

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74 Because the analysis is bivariate regression the correlation coefficients largely tell the story. The regression values are more important, however, because they reveal how much change in the agenda results from a one unit change in the Court's ideology. For the most part both the correlation and regression coefficients will be included.
value is significant at the .05 level. This is a piece of evidence to suggest that decisions that appear to be made at this first level might actually be artifacts of level two and three choices.

Despite the caveats and the weakness of the relationships, the direction of those relationships contradicts the hypotheses. Throughout the fifty year period, as the Court gets more liberal, it hears more economic cases. The relatively liberal Courts may not accept a significantly larger number of economic cases, but there is an increase, however slight, despite the expectation that the opposite phenomenon would materialize. As a Court gets more conservative, the justices are inclined to accept an increased percentage of individual rights cases. Before examining possible explanations for the nature of these associations, the relationships on the second level should be considered. These level two results may show that the level one relationships were spurious.

Progressing to level two, the ideology of the Court was correlated with, and regressed upon, the percentage of cases accepted in each policy area. The results are mixed and point to a variation in agenda construction impact. Table 23 shows the correlation and regression values gathered from this analysis of the entire fifty year period.75

75 Where no value is given for b (the regression
Table 23

Correlation and Regression Values for the Impact of Ideology on Agenda Change in Various Policy Areas, 1933-1982

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>r</th>
<th>b</th>
<th>Significance Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantive Rights</td>
<td>-.15</td>
<td>-.38</td>
<td>not significant</td>
</tr>
<tr>
<td>Due Process</td>
<td>-.09</td>
<td>-.39</td>
<td>not significant</td>
</tr>
<tr>
<td>Gov't as Provider</td>
<td>-.16</td>
<td>-.38</td>
<td>not significant</td>
</tr>
<tr>
<td>Equality</td>
<td>-.31</td>
<td>-.12</td>
<td>.05</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>.07</td>
<td>.06</td>
<td>not significant</td>
</tr>
<tr>
<td>Foreign Affairs</td>
<td>.01</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Separation of Powers</td>
<td>-.23</td>
<td>-.09</td>
<td>.05</td>
</tr>
<tr>
<td>Federalism</td>
<td>.00</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>State Regulation</td>
<td>-.15</td>
<td>-.20</td>
<td>not significant</td>
</tr>
<tr>
<td>U.S. Regulation</td>
<td>.29</td>
<td>.95</td>
<td>.05</td>
</tr>
<tr>
<td>Internal Revenue</td>
<td>.17</td>
<td>.47</td>
<td>not significant</td>
</tr>
<tr>
<td>State as Litigant</td>
<td>-.32</td>
<td>-.16</td>
<td>.05</td>
</tr>
<tr>
<td>U.S. as Litigant</td>
<td>.07</td>
<td>.05</td>
<td>not significant</td>
</tr>
<tr>
<td>Ordinary Economic</td>
<td>.09</td>
<td>.17</td>
<td>not significant</td>
</tr>
</tbody>
</table>

There is no apparent reason to suspect why these particular policy areas exhibited statistical significance. The direction of the relationship makes sense in the United States Regulation area, less so in the Equality sphere. In United States Regulation, as the Court gets one unit more liberal it accepts approximately one percent more cases. Through most of the period in this study the enlargement of federal regulatory power is equated with a liberal ideology. In the Equality area, it would seem logical that as a Court grows increasingly liberal it would venture

... (coefficient) in a policy area, it is because it is undetermined and virtually zero. A positive relationship means, in effect, that as the Court gets more liberal, it accepts a higher percentage of cases in that policy area. A negative relationship means that as the Court gets more liberal, it hears fewer cases.
further and further into the Equality area.

Although many of the coefficients are neither terribly impressive nor significant, two things should be noted. First, in direction and strength, the regression coefficients confirm the factor analyses. The same policy areas that were related in the factor analyses seem to be related in strength and direction in the regression analysis. Second, once again, the results are counterintuitive. Virtually all the economic policy areas carried positive signs, meaning that as the Court got more liberal, more economically related cases were accepted. The individual rights cases were negatively related to this measure of ideology; thus, as the Court got more liberal, it heard fewer cases of these types.

While these results may be a function of the methodological problems alluded to previously, there are some reasonable explanations for these curious results. First, it is important to remember that the Court, at any given time, does not work with a clean slate. The decisions concerning which cases or policy areas to address are functions of past decisions.

Ideological changes accumulate, but the agenda inexorably continues, apparently without reference to membership changes. When a new ideological slant takes over the Court, the new justices must first reverse the
decisions of their predecessors before turning to their own agendas. As a result, the issues the new bloc accepts may look very much like the cases its predecessor addressed. The old Court is weakened, but its legacy constrains the choices the new Court can make, at least at the outset.

It takes the new justices a few terms to earn themselves the freedom to use the agenda for their own purposes. Inadvertently, the new Court may be further tying its hands to the old agendas. As will be seen in Chapter VI, when the Court makes a major change in doctrine in a policy area it is often through a landmark case. Landmarks encourage other litigants to bring cases, thus allowing the Court to flesh out the new doctrine. New decisions may push the new Court deeper into the business of the "old" agenda before the questions are resolved satisfactorily and the new Court can attend to its "new" agenda. As a result, even though the policy outputs and doctrine may be drastically different after ideological changes, the agendas may still look quite similar. The dynamics of the agenda are thus responsible for these seemingly incongruous results.

In real terms, the Roosevelt Court had to reverse the trends of the more conservative Court that preceded it. The agenda was crowded with economic issues. The Court was relatively conservative during this period, as well. This may explain why the justices concentrated on economic
issues, but more likely, the reason has deeper roots. The cases accepted may have been economically oriented because that was the business of the Supreme Court in the previous terms. The agenda has a memory and constrains justices in subsequent terms. The upshot is that even though the Court had become more liberal by the late 1930's, the new justices still had to stay within the framework left by their predecessors.

The liberal Court had to dismantle the policies of its predecessors before it could address individual rights issues. The individual rights area was effectively spawned during this period. The early years of agenda success for these areas were tentative extensions of individual rights. Significant attention to individual rights was unprecedented prior to this period. Potential litigants were probably unaccustomed to a Court sympathetic to individual rights. In short, there was no history of civil liberties in the Supreme Court. Individual rights needed to be established before serious, more complete attention could be given to the area.

The genesis of this area occurred in the New Deal Court when those justices legitimated the place of individual rights on the agenda. In effect, they created the history or the conditions that allowed later Courts the freedom to expand the individual rights agenda. While the New Deal
Court opened the floodgates, the more conservative Stone and Vinson Courts, perhaps through the inexorable flow of cases, were sitting during the first dramatic rise in individual rights cases. That expansion was likely no matter what the ideological disposition of the later Courts. The opening of the agenda was a cue to litigants that the Court was disposed to hear these types of cases. Eventually, acceptance of cases in new areas leads to similar cases, and attempted extensions to related policy areas. Once individual liberties cases claimed their place on the agenda, the dynamics of the agenda began to take over. The Warren Court continued the expansion by opening up more areas to judicial scrutiny. The more conservative Burger Court did not contract the agenda during its ascent.

As a result, relatively conservative Courts were also likely to accept individual rights cases and often, due to the times and the incremental flow, expand the agenda in this area. This would explain both the magnitude and direction of the relationships, as well as that incremental flow.

The qualification of the hypotheses that liberal Courts will give increased attention to individual rights may seem surprising, but it must be remembered that the old notions are based upon policy outputs, not the agenda. The

conventional wisdom may not translate to the agenda. There has been a great deal of flux evident in the outputs of the Court. These same changes are not visible at the agenda stage.

Finally, on the third level, there are literally hundreds of policy subareas. A few will be isolated, not to offer the final word on level three, but to suggest whether the impact of membership penetrates that deeply. Two criteria are necessary prerequisites for choosing the subareas. First, there must be a sufficient number of cases across the fifty year period. That excludes a large number of subareas. Second, if the allocation of agenda space is likely to occur at the second level, it is unnecessary to proceed to level three. Federalism and Internal Revenue are examples of policy areas that stand on their own on level two and are not merely collections of subareas.

These two criteria yield a number of subareas, and most of these are found in the individual rights domain. The candidates selected are the search and seizure, jury procedure, right to counsel, freedom of speech and expression, religious exercise and establishment, First Amendment,77 racial equality, and reapportionment subareas.

77 This is basically a residual category composed of all cases governed by the First Amendment, regardless of their specific substantive (speech, libel, obscenity, etc.) nature.
In addition, the diversity of the United States Regulation area suggests that decisions might be based upon the third level. To test that proposition, three subareas will be isolated and their relationships with Court ideology examined. The subareas are labor relations, antitrust, and the regulation of commerce.

The results of these analyses are decidedly mixed. None of the Due Process subareas were significantly correlated with membership across time. In the realm of Substantive Rights, religious cases are correlated \( r = -0.31 \) with Court membership. The percentage of religious cases accepted declined .17 percent for each unit the Court moves in a liberal direction. The percentage of freedom of speech and expression cases attaining agenda status is not significantly related to the Court's ideology. There is some relationship \( r = -0.18 \) between the attention granted First Amendment cases and Court membership. The decline in agenda space for these cases is .36 percent for each unit the Court moves in a liberal direction. The regression coefficient is not quite statistically significant, however. Once again, the direction of the relationship is contrary to the hypotheses posited above. The reasons that this relationship materialized in this direction are similar to those cited above.
In the Equality area, attention granted to racial discrimination is not significantly related to ideology. On the other hand, reapportionment does exhibit some relationship \( r = .20 \). As the Court gets one unit more liberal, it takes .22 percent more reapportionment cases. This relationship is statistically significant at the .05 level and in the expected direction.

In the United States Regulation area, the third level appears a bit more promising. Labor relations was not significantly correlated with ideology, but antitrust \( r = .25 \) and commerce \( r = .41 \) were. As the Court moves one unit in the liberal direction, it accepts .24 percent more antitrust cases and .36 percent more interstate commerce regulation cases. Both of these are statistically significant at the .05 level.

**The Impact of Ideology Upon the Agenda During Various Periods**

The impact of ideology across time is not particularly impressive at any level. That does not mean it is nonexistent, however. It is possible, indeed probable, that the effect of the Court's membership might have different impacts upon the agenda with the passage of time. Indeed, it is too much to expect that ideology would have a fifty-year impact upon the agenda. The incremental agenda growth and decline in some areas would suggest that the
long-range effects of ideology would be minimal. The impact of ideology upon the agenda is much more likely to be conditional. Ideology may have an effect in certain policy areas during certain periods.

Even if ideology does have an impact upon agenda change throughout the entire fifty-year period, the measures used here might not detect it. The validity of the ideological scores across time is very suspect. There is no means of adequately comparing the ideological makeup of the pre-1937 Supreme Court, for example, with that of the Burger Court. The measures are on much firmer grounds for the purpose of shorter range comparisons. In order to determine whether ideology had time-specific effects on agenda building certain periods were isolated. The choice of these overlapping periods was governed by past literature and the earlier results of this study. There are any number of Court terms that could potentially be labeled critical, or at least significant. Many of the studies of Court created public policies have identified 1937 as a watershed and the early seventies as at least the symbolic end of the revolutionary Warren Court. Between these apparent watersheds such terms as 1942, 1947, 1951, 1957, 1960, and 1965, identified as the recrudescent agendas, also need to be taken into account.
To incorporate these terms, the fifty year period was divided into five partially overlapping subperiods: 1933-1946, 1941-1955, 1950-1964, 1959-1973, and 1967-1982. These subperiods allow distinctive timespans to test the impact of Court membership on agenda change. These five periods also provide boundaries for the important terms identified above.

Returning to level one, the impact of ideology upon the agenda space granted the individual rights and the economic clusters is not overly impressive. The relationships are not statistically significant until the final period. Table 24 shows the relationship between ideology and the agenda space allocations for level one for each of the time periods.

The correlation coefficients are not overwhelming in the first four periods. The regression coefficients are not dramatic either, particularly in light of the number of cases and policy areas that makeup the economic and individual rights areas. An increase in agenda space of one percent as a result of the Court becoming one unit more liberal is relatively small considering, that these large areas may consume fifty percent or more of the agenda space.

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78 The use of a small number of data points, 14-16 in these subperiods, means statistical significance is difficult to obtain without a very dramatic relationship. The lack of statistical significance may not mean that substantive significance is absent, but appropriate cautions should be raised.
What is interesting, though, is the direction of the relationship: positive during some periods and negative during others. Through most periods, the economic areas' shares of the agenda decrease as the Court gets more liberal. The lack of strong relationships suggests that economic cases were declining regardless of the Court's ideology. The pace of the decline may have varied a bit with the ideological changes. The relationship may be spurious and due to other factors.

Individual rights cases were basically absent from the agenda in the early terms. A small first burst appears to be tied to the Court's becoming more liberal. In the next two periods, though, as the Court became more conservative, the percentage of individual rights cases climbed. This may represent the fact that individual cases were ascending

Table 24

The Relationship Between Ideology and Agenda Space in the Economic and Individual Rights Policy Clusters

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>1933-</th>
<th>1943-</th>
<th>1950-</th>
<th>1959-</th>
<th>1967-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic</td>
<td>-</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>r</td>
<td>.28</td>
<td>-.16</td>
<td>-.12</td>
<td>.14</td>
<td>-.38</td>
</tr>
<tr>
<td>b</td>
<td>1.14</td>
<td>-1.13</td>
<td>-1.44</td>
<td>-70</td>
<td>-1.84</td>
</tr>
<tr>
<td>lev of signif</td>
<td>n.s.</td>
<td>n.s.</td>
<td>n.s.</td>
<td>n.s.</td>
<td>.05</td>
</tr>
<tr>
<td>Individual</td>
<td>.02</td>
<td>.20</td>
<td>-.20</td>
<td>-.21</td>
<td>.58</td>
</tr>
<tr>
<td>Rights</td>
<td>.87</td>
<td>-.82</td>
<td>-.99</td>
<td>1.47</td>
<td></td>
</tr>
<tr>
<td>lev of signif</td>
<td>n.s.</td>
<td>n.s.</td>
<td>n.s.</td>
<td>n.s.</td>
<td>.05</td>
</tr>
</tbody>
</table>

in a given term.
without regard to the ideology of the Court. The Roosevelt Court legitimated agenda status for the individual rights cases. Whether as a result of incrementalism, the need to reverse precedents, or a new commitment to individual rights regardless of ideology, the more conservative Courts expanded the agenda in these areas. The direction of the relationship changed again as the more conservative Burger Court later reduced the space available to the individual rights policy areas after initially expanding the agenda for these cases in its early terms.

The first level is perhaps too large and composed of too many policy areas to demonstrate the impact of ideology. Even if ideology does affect the agenda in these large policy clusters, the net effects are likely to be cancelled out, at least partially, by movements in each direction by the subareas on levels two and three. The second level may be more likely to produce a relationship between ideology and the agenda in some policy areas.

The analysis of the level two data shows that some policy areas never demonstrate the impact of ideology. Separation of Powers and Criminal Law show only the slightest evidence of ideological impact. It is important to remember that these policy areas had very few cases accepted even across the entire fifty year period.
Two other areas with large numbers of cases across the fifty years, Internal Revenue and United States Regulation, are apparently not affected by ideology. Internal Revenue may not be as ideologically based as other areas. United States Regulation, however, is an anomaly. Ideology was related to United States Regulation over the entire fifty year period, but not in any of the subperiods. The appearance of a relationship between ideology and agenda space for United States Regulation across the entire time period may be spurious. The general growth of federal regulatory power may have induced the Court, regardless of its ideological predilections at the time, to accept cases of these types. The policy-making and the detail work could be created quite differently by liberals and conservatives, but necessitate that both would have to hear the cases, hence little change in the agenda despite ideological changes on the Court.

A few policy areas showed only one period with a relationship between ideology and the various areas. United States as Ordinary Litigant was significantly affected by ideology in the 1941-1955 period (r = -.42, b = -.63). The United States as Litigant area demonstrated its only real agenda growth during this period, and apparently that spurt coincided with the reign of a more conservative Court. The impact of ideology upon the agenda for Ordinary
Economic cases is substantively significant (but not statistically significant) in the 1933-1946 period \( (b = -0.84) \), in that as the Court moves one unit in a liberal direction, it accepts about one percent fewer cases. This period represented the beginning of the decline of these areas, perhaps as a consequence of an increasingly liberal Court (though it may be a spurious relationship created by a landmark case that was issued during this period).

In the Foreign Affairs area, the largest relationship occurred in the 1933-1946 period \( (b = -0.48) \), but it was not statistically significant. The final two periods showed some small \( (b = 0.10 \text{ in } 1959-1973 \text{ and } b = -0.10 \text{ in } 1967-1982) \), but statistically significant relationships. While a .10 percent change may seem miniscule, it should be remembered that the percentage of cases heard in the Foreign Affairs area averaged less than one percent annually during these periods. It is likely that these relationships are spurious. Foreign Affairs does not appear to be an area that would necessarily arouse ideological responses. Rather, the cause of agenda change would seem to be tied to outside events. The periods that demonstrated statistical significance were not coincidentally periods of American involvement abroad, and the justices, regardless of ideology, may have had to accept some of these cases.
For remaining policy areas, agenda success was affected by the ideology of the membership over some periods, but not others. Ideology seems to have had a frequent impact upon Federalism, State Regulation, and State as Litigant. Table 25 shows the relationships between ideology and the success at attracting agenda space for these three areas.

Table 25

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>1933-</th>
<th>1941-</th>
<th>1950-</th>
<th>1959-</th>
<th>1967-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federalism r</td>
<td>.45</td>
<td>.43</td>
<td>--</td>
<td>.36</td>
<td>-.37</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>.93</td>
<td>.89</td>
<td>--</td>
<td>-.49</td>
</tr>
<tr>
<td></td>
<td>level of sig.</td>
<td>.05</td>
<td>.05</td>
<td>n.s.</td>
<td>.10</td>
</tr>
<tr>
<td>State r</td>
<td>.18</td>
<td>-.56</td>
<td>-.40</td>
<td>-.50</td>
<td>-.65</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>.40</td>
<td>-.72</td>
<td>-.39</td>
<td>-.31</td>
</tr>
<tr>
<td></td>
<td>level of sig.</td>
<td>n.s.</td>
<td>.05</td>
<td>.05</td>
<td>.05</td>
</tr>
<tr>
<td>State as r</td>
<td>-.41</td>
<td>-.19</td>
<td>.50</td>
<td>-.04</td>
<td>-.51</td>
</tr>
<tr>
<td></td>
<td>b</td>
<td>-.35</td>
<td>-.17</td>
<td>.17</td>
<td>-.01</td>
</tr>
<tr>
<td></td>
<td>level of sig.</td>
<td>.05</td>
<td>n.s.</td>
<td>.05</td>
<td>n.s.</td>
</tr>
</tbody>
</table>

Many of the cases in these areas were concerned with the scope of state power. These cases came to the fore in the early periods of the study, perhaps as a consequence of the legacy bequeathed by the New Deal. As the federal government has grown, the struggles between the levels have often taken on an ideological hue. That may explain the continuing impact ideology has on these policy areas. The
ideological component may be clear, and thus the agenda status of these areas is a function of the membership.

The impact of ideology upon the agenda in the area of Federalism is fairly impressive across the first two time periods and the final one. It appears that as the Court got more liberal, Federalism grabbed more agenda space in the 1933-1946 period and the partially overlapping 1941-1955 period. As the New Deal expanded the province of federal power, cases came to the agenda and the Court seemed to support federal growth. Decisions favoring the federal government during this period are generally associated with liberal Courts and justices. The Supreme Court may have taken these cases in order to reverse lower courts. The opposite may be true in the final period, the rebirth of Federalism was tied to the increasing conservatism of the Court. This may represent the more recent Court's desire to redress the perceived imbalance between state and federal authority.

With the exception of the first period, as the Court got more conservative, it accepted more State Regulation cases. The growth for every unit the Court moved in a conservative direction is about a third of one percent. This is a relatively significant percentage in view of the fact that throughout these periods the Court only allotted about three percent of its agenda space to State Regulation cases annually.
Agenda space for the State as Litigant area also seemed to be affected by ideology. This relationship may be spurious or coincidental, however. The nature of the cases that comprise this area do not seem to contain an ideological component. Many of the cases involve conflicts over state borders or water rights.

In the individual rights cluster, each of the policy areas was affected by membership at varying times. Substantive Rights, Due Process, Government as Provider, and Equality demonstrated similar patterns, perhaps befitting the fact that they share a common factor. Table 26 shows the impact of ideology on the agenda status of these four areas.

Table 26

<table>
<thead>
<tr>
<th>The Relationship Between Ideology and the Individual Rights Policy Areas Agenda Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>----------------</td>
</tr>
<tr>
<td>Substantive Rights</td>
</tr>
<tr>
<td>b</td>
</tr>
<tr>
<td>level of sig.</td>
</tr>
<tr>
<td>Due Process</td>
</tr>
<tr>
<td>b</td>
</tr>
<tr>
<td>level of sig.</td>
</tr>
<tr>
<td>Government as Provider</td>
</tr>
<tr>
<td>b</td>
</tr>
<tr>
<td>level of sig.</td>
</tr>
<tr>
<td>Equality</td>
</tr>
<tr>
<td>b</td>
</tr>
<tr>
<td>level of sig.</td>
</tr>
</tbody>
</table>
A few observations are worth noting. First, there is a statistically significant relationship between ideology and the agenda of each area in the early periods of the study. This is important, because this represents the initial bursts of activity in these areas. In other words, each of the four areas had their first significant allocations of agenda space. That may purely be a function of the variation in the dependent variable. The first significant allocation of agenda space may not actually be tied to ideological changes, but may be coincidental with them.

On the other hand, the effects may be quite real. The impact of ideology is more pronounced in the Substantive Rights, Due Process, and Government as Provider policy areas than in the economic areas. A change in the Court's ideology induces relatively large changes (one to two percent for every unit change in the Court's ideology in some periods) in the agenda attention granted these policy areas. This may be a function of the fact that these individual rights policy areas carry ideological baggage. Unlike some economic areas, the ideological lines may seem clearer in a dispute involving the rights of the individuals.

There are two possible explanations for the findings that suggest that the impact of ideology is more pronounced for the individual rights agenda than for the economic
agenda. First, the birth and gestation of individual rights, because it had no prior history, was more likely to be ideologically related than the long-entrenched economic area. Once the individual rights areas had been set in motion, they achieved agenda space often at the expense of the economic issues. The reduction of the economic agenda was a steady process that all Courts, conservative or liberal, participated in. In the economic areas, the dynamics of the agenda had taken over and served to confound the impact of ideology.

Second, there is another fundamental difference between the economic and individual rights areas, and it involves statutory versus Constitutional interpretation. The economic area is dominated by actors outside the Court, particularly Congress. This means the Court is less likely to be able to choose its opportunities to intervene than in the individual rights area. The civil liberties issues are Constitutionally related, and the Court has been seen as the interpreter of the Constitution. Intervention in this area requires the will to get involved, and is much less subject to the whims and actions of external forces. This distinction is confirmed and expanded upon in the analysis of landmark cases.

After the initial impact of ideology, the relationship with the individual rights areas often disappeared. There
are two possible reasons for this. First, following the early appearance of Equality, Government as Provider, and to a lesser degree, Substantive Rights, these areas had periods of remissions. Second, at some point, usually after the second appearance of these areas, the claims of these policy areas acquire a legitimate stake in the agenda. Regardless of ideology, the Court accepts cases in these areas. In fact, changes in ideology might induce the "new" Court to maintain or expand agenda levels in these areas for the sole purpose of revising the outputs and changing the decisions.

In the Substantive Rights, Equality, and Government as Provider areas, the direction of the relationships is often negative: as the Court gets more liberal it hears fewer of the cases often associated with a liberal philosophy. The dynamics of the agenda may be responsible for this in the early periods. A relatively liberal Court opened the agenda to these areas with a few cases. The expansion of the agenda came later under a more conservative Court. In the last period, the results in the Equality and Government as Provider areas could suggest that conservative Courts were taking these cases to undo or limit the work of their more liberal predecessors. All four areas are significantly influenced by ideology in the 1967-1982 period, as the Warren Court ebbed and the Burger Court
became more entrenched. That may be a function of the relatively large variation in the independent variable during this period.

On the third level the picture is very similar: some relationships for some policy areas during some periods. In the Substantive Rights area, ideology seemed to have an impact upon each of the subareas. Table 27 shows the periods in which ideology had a significant impact upon the agenda allocations granted subareas of Substantive Rights.

Table 27

<table>
<thead>
<tr>
<th>Policy Subarea</th>
<th>r</th>
<th>b</th>
<th>level of sig.</th>
<th>period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom of Speech</td>
<td>-49</td>
<td>-37</td>
<td>.05</td>
<td>1933-1946</td>
</tr>
<tr>
<td>First Amendment</td>
<td>-.58</td>
<td>-.98</td>
<td>.05</td>
<td>1941-1955</td>
</tr>
<tr>
<td>Freedom of Religion</td>
<td>-.48</td>
<td>-.60</td>
<td>.05</td>
<td>1941-1955</td>
</tr>
<tr>
<td>Freedom of Speech</td>
<td>-.45</td>
<td>-.34</td>
<td>.05</td>
<td>1950-1964</td>
</tr>
<tr>
<td>Freedom of Religion</td>
<td>-.42</td>
<td>-.21</td>
<td>.05</td>
<td>1959-1973</td>
</tr>
</tbody>
</table>

Ignoring the coefficients for a moment, Chapter III demonstrated that in the first period the Court heard speech cases and that in the second period it was freedom of religion's turn. Then there was a return to the freedom of speech subarea that had been in a period of remission and later the same was true of the religion subarea. Ideology has an impact because, at some point, the Court purged first the speech cases, and later the religion
cases. In effect, the justices cleared the agenda in each subarea for a few terms. The reopening of the area may have been ideologically motivated. On the other hand, the results may simply be a function of the variation in the dependent variable.

The discovery and rediscovery of these areas (and indeed, any areas) seemed to create the best conditions for the impact of ideology. Creating or recreating the policy area (after a decade of inactivity) might suggest that the initial costs of developing a policy area on the agenda might be ideologically oriented. In other words, opening the agenda to a new area might require, or at least intimate, an ideological component. With less precedent to confound or bind the Court, the connection between the agenda to the merits of the case might be more direct. Indeed, an ideological bloc on the Court might take the initial cases in the area in order to pursue their preferred policy posture. Once the policy area grabs a consistent share of the agenda then ideology might be less relevant as each group seeks to tailor policy outputs to its liking.

The impact of ideology upon the agenda success of the Due Process subareas is less prevalent and materializes somewhat later. The only statistically significant relationships occur in the 1950-1964 period (jury
procedure) and in the 1967-1982 period (search and seizure). Only in the latter period was the impact of ideology upon a Due Process subarea, search and seizure, both significant and strong ($r = .50$, $b = .37$). This would suggest that the Burger Court is less willing to entertain search and seizure cases. Despite that, however, the 1967-1982 period is the pinnacle for agenda allocations for the search and seizure cases. There is a great deal of variation within that period though. As the Court reached its greatest degrees of conservatism, it did accept fewer search and seizure cases than it had when the justices were more liberal.

The overall lack of impact is perhaps not surprising because ideology's impact on Due Process as a whole is not overly impressive. Due Process, more than any other policy area, had a seemingly inexorable, steady growth pattern, apparently in spite of the ideological composition of the Court, until the last period when the more conservative Court cut the amount of agenda space available to Due Process.

Equality reached its apex in the sixties and seventies, yet the impact of ideology upon the agendas of the subareas was significant in earlier periods. Table 28 shows the impact of ideology upon the agendas of two subareas, race and elections and reapportionment.
Table 28

The Relationship Between Ideology and Agenda Space in the Reapportionment and Race Subareas

<table>
<thead>
<tr>
<th>Policy Subarea</th>
<th>r</th>
<th>b</th>
<th>level of sig.</th>
<th>period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Election/Reapport.</td>
<td>-.50</td>
<td>-.32</td>
<td>.05</td>
<td>1941-1955</td>
</tr>
<tr>
<td>Election/Reapport.</td>
<td>.59</td>
<td>1.06</td>
<td>.05</td>
<td>1950-1964</td>
</tr>
<tr>
<td>Race</td>
<td>.44</td>
<td>.55</td>
<td>.05</td>
<td>1950-1964</td>
</tr>
</tbody>
</table>

The change in the direction of the relationship between ideology and the agenda in the election/reapportionment subarea is not surprising. The relatively conservative Court accepted the earliest cases, but denied judicial relief to the moving parties. A more liberal Court used the wedge of equal protection to correct abuses in the electoral process. Race and reapportionment became accepted and perpetual occupants of the Court's agenda regardless of the ideological makeup of the Supreme Court. For both the election/reapportionment and race subareas ideology had an impact upon the agenda during the periods in which these areas made their first gains. It is possible that the generation of a policy area occurs because policy conscious justices deliberately accept these cases to get to the merits of the issues.

Finally, in the realm of United States Regulation ideology seemed to have an impact upon the agendas of the subareas of antitrust and interstate commerce regulation. Table 29 shows the only significant results for any of the subareas of United States Regulation.
Table 29

The Relationship Between Ideology and Agenda Space in Antitrust and Commerce Regulation

<table>
<thead>
<tr>
<th>Policy Subarea</th>
<th>Antitrust</th>
<th>Commerce</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959-1973</td>
<td>-40</td>
<td>-64</td>
</tr>
</tbody>
</table>

In both these subareas the patterns are similar. At the beginning of the 1959-1973 period both of these subareas burgeoned and later both receded. For the antitrust subarea the decline was a return to previous levels. For commerce regulation it was a virtual disappearance from the agenda. Agenda status for both areas grew as the Court became more liberal. That being the case perhaps the decline in these subareas can be tied to the more conservative Burger Court in the last decade of this study.

CONCLUSIONS: THE IMPACT OF IDEOLOGY UPON THE AGENDA

At the outset it was hypothesized that the membership of the Supreme Court would dictate, or at least influence, the shape of the agenda and changes in the nature of the agendas across time. In addition, it was presumed that liberal Courts would be expected to expend their agenda space more toward individual rights than toward economic issues. For conservative Courts, the opposite would be
hypothesized. The results of the formal analyses are not overly impressive on the face of it. There is a lack of impressive coefficients, and the direction of the relationships is often counterintuitive. The lack of large regression coefficients does not necessarily mean that ideology does not affect the agenda, however.

The first generalization that emerges from the analysis is that few policy areas show any long-term relationship between ideology and the agenda. Many level two policy areas and level three subareas do show, in at least one time period, some impact of ideological change upon their agenda status. While it is not an inviolate rule, a tendency does exist. The pattern more often than not is a relationship between ideology and the agenda when the area or subarea has its first significant success in getting items upon the institutional agenda. This may be an artifact of variation in the dependent variable. On the other hand, the opening of an area may be initiated by a bloc or group of justices with ideological and policy designs. Indeed, it may be that the conditions for ideological impact are optimum when the area is opened.

The evidence suggests the possibility that while ideology directly affects the agenda at the outset, it has an indirect effect on subsequent agendas. Through the acceptance of the initial cases, and the resulting
decisions, the Court sets a tone that may require future Courts to keep the policy area alive. Areas may gain an institutionalized position on the agenda. The Court's decisions create questions for the subsequent Courts to answer. Regardless of ideology the Court is, if not forced, at least directed toward taking cases in the relevant area.

It is important to remember that the apparent lack of a significant relationship between ideology and the other policy areas in the intervening periods does not preclude the existence of an impact. Ideology may still have a large effect. A new ideological coalition might be disposed to accept certain cases with the express purpose of changing the legal doctrine by reversing the decisions of a previous Court. Ideological values thus induce that bloc to accept the cases.

One result of ideological changes on the Court that should affect the agenda, but cannot be systematically evaluated, is the increased likelihood of doctrinal inconsistencies as ideological changes accumulate. Changes in ideology can leave the Court with a new balance of power, and as the Court searches for its niche, changes in the tenor of the law may result. The revisions in the law may create uncertainty, and that would perpetuate the claims for agenda space in many policy areas. This could
also explain why the direction of the relationships contradicts the hypotheses.

Landmark decisions are the subjects of the next chapter, but as a means of a preview and a transition, these decisions may blunt or obscure the impact of ideology upon the agenda. Aggregate analysis will not capture the effects of a landmark decision. After all, a landmark decision is a single critical decision that opens or closes the agenda in a certain policy area. An ideological bloc can issue a landmark decision, but the impact of that landmark may not materialize for a number of terms. The regression analysis might not capture the effects, but they would be present nonetheless. The importance of landmark decisions is that they are prospective and require feedback in the form of other cases. By the time the landmark decision's impact has been felt, the justices who issued the significant decision might no longer exert the power that they had at the time of the landmark. Furthermore, by the time the effects of the landmark decision materialize, the Court may have undergone an ideological facelift and a different Court (ideologically) might be given credit for the policy designs of a predecessor.

Ultimately, the belief that liberals would concentrate on civil liberties cases seems to be almost axiomatic. Yet the results of the analysis contradict this. As this
litanies implies, the impact of ideology is more complex than either the hypothesis or results would suggest. In one form, the results contradict the hypotheses; yet in another, they seem to confirm them.

Quite clearly, liberals did open the agenda to individual rights. In essence, they legitimated individual rights. In doing so, the Roosevelt Court began to change the nature of judicial agendas for decades to come. This liberal Court began to exhaust, or grow weary of, the economic issues. That was probably the result of opening the judicial Pandora's box of individual rights. Once the first cases were heard, there was no turning back. A frontier had been blazed and later Courts were obligated, in some senses, to travel the new path.

The actual perceptible growth in individual rights that was evident in the regression coefficients was accomplished during the tenure of relatively conservative Courts. That runs counter to the hypothesis, but it is a significant finding in agenda research. The dynamics of the process are such that the new, perhaps exciting, questions of individual rights stimulated litigants, lower courts, and justices of all ideological hues to confront the issues. Liberals may have pushed the issue to the central stage, but inertia kept the issue there.
Perhaps in retrospect, two related events were the catalysts. The ascension of justices like Black and Douglas may have been significant. For whatever reason, they were (or became) articulate spokespersons for civil liberties. Their longevity allowed them the opportunity to nurture respect for individual rights for decades. Indeed, both justices were sitting through periods of relative conservatism on the Court and were, perhaps, voices of conscience that demanded that their brethren continue to accept individual rights cases. Secondly, the issuance of the *United States v. Carolene Products* case and its famous footnote four\(^7\) was a judicial call to arms and a quasi-moral imperative. It justified the Court's move into the civil liberties domain, and perhaps created a new paradigm of sorts.

As in scientific discovery and progress, the new paradigm of individual rights recast judicial thinking and made the economic cases seem less relevant and less significant. Others could deal with those issues. The Court could defer to Congress and work at the margins. The old paradigm was fundamentally bankrupt. As with any new paradigm, the solution to one question raised several others. As a result, the individual rights area flourished and grew. Liberal and conservative alike needed to address the increasing number of unanswered questions flowing from

\(^7\) 304 U.S. 144 (1937 term) at pp. 152-154.
the increased litigant demand that had been created by the rising expectations attached to the early decisions.

Finally, in a less systematic fashion, one other piece of evidence might suggest a possible impact of ideology upon agenda change. A number of terms had agendas that showed a relatively large deviation from the previous incremental flow that seemed to govern the agenda. In eight of the ten recrudescent agenda terms there was a concurrent change in the ideological composition of the Court. Those ideological changes, though often not great, may have contributed to the large scale changes occurring in the agenda during that term. The change in the Court's ideology may have led the Court, or more precisely a bloc on the Court, to venture in different directions and set the conditions for agendas over the next five to six terms. More likely, ideological changes coincided with particularly propitious timing to free up a greater than usual proportion of the agenda. Use of that open agenda space might merely accelerate the incremental flow to create what has been labeled a recrudescent agenda.

The question of whether ideological changes actually induced the dramatic changes in the agenda cannot be answered conclusively. There were other ideological changes that did not produce revisions in the agenda. The

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ideological changes may have contributed to the recrudescent agendas, but may not have been the ultimate causes of them. The periodicity of these changes in the agenda might mean that certain conditions existed that, coupled with a change in ideology, could bear fruit in the form of agenda changes.

In the interim periods between recrudescent agendas confusion in doctrine might be settled, or a new ideological bloc may have accepted the same cases as its predecessor and completed the task of rewriting policy. Having done so, the justices could turn to the task of pursuing their own designs, not merely coping with the legacy bequeathed by the previous justices. In the four to six terms between recrudescent agendas, membership or ideological changes can accumulate and reach a point at which the justices are freer to create their own agenda.

The total picture regarding the impact of ideology upon the agenda is, if nothing else, confusing. It appears that in some periods, in some policy areas or subareas, ideology may have been influential. If this assessment is cautious, it is rightly so. First, the hypothetical nexus between ideology and agenda change is uncertain. Second, some of the apparently significant relationships may be spurious. Third, the specification of the ideology variable is fraught with the problems cited above. These problems
confound the analysis and require caution in interpretations. At the same time, these insuperable dilemmas should not cloud one issue: the questions involved concerning the connection between ideology and agenda change are significant. The fact that measures are soft and problematic should not deter analysts from investigating these questions, but prudence should be the watchword.
Chapter VI

THE IMPACT OF LANDMARK DECISIONS UPON THE AGENDA

While the impact of the Court's ideological composition may not appear to be overwhelming, it may be more important than the coefficients suggest. One means of translating the impact of ideological changes may be through the so-called "landmark cases." It is hypothesized that the justices can use present decisions to control or influence future agendas.

Justices do not only make the law, they find it as well. They often find the law in the landmark precedents. In a real sense the original landmark case was probably judge-made law. In addition, if the landmark case opens or closes the agenda for similar types of cases, then it can also be viewed as prospective agenda building.

Certain cases create or remove a cause of action, and the agenda is affected as a result. Other cases introduce confusion or resolve it, and both conditions have an impact on the future agenda. Furthermore, the tenor of current decisions signals potential litigants whether the Court will be sympathetic to their causes.
A landmark decision is, by definition, a significant case that changes, modifies, or resolves the nature of law or policy in a subarea. Landmark decisions can be important tools for justices to utilize in prospectively building future agendas. The doctrinal changes created by the landmark decision virtually assure the justices the opportunity to address similar types of cases if they so desire. For justices bent on having an impact on public policy, this is critical.

A charge frequently leveled at the judiciary is that it lacks the capacity to make coherent public policy because the Court is passive and the cases come to the Court in a disjointed, piecemeal fashion. One case is rarely enough of a basis upon which to construct public policy. The landmark case represents a mechanism that allows the Court to circumvent some of the problems inherent in the judicial process, at least to a degree. The justices create conditions that invite litigants to bring cases that could help the Court fill in the nascent doctrine. On the other hand, if the Court chooses, it can use the landmark to restrict access to the agenda in the relevant policy area. Either way, the Court can gain some measure of control over its agenda.

The difficulty in interpreting the landmark cases lies in attributing intent to the justices. The important question is whether when the justices announce a decision, they are consciously attempting to control future agendas, or the cases themselves exert an independent causal effect quite apart from any intent. Perhaps the word “control” is a bit strong and the landmark is, more precisely, an acknowledgement of some change in policy direction and a recognition that agenda space must be preserved to resolve the questions left in the wake of the landmark decisions. If justices are purposive policy-makers, then the landmark decision represents their opportunity to solicit litigation that can further their goals. Even if their designs are not so carefully formulated, the justices are intelligent enough to realize that doctrinal changes, deep cleavages on the Court, or confusion in policy direction will induce increasing volumes of litigation from interested litigants.

The important decision can thus take three possible forms. This major case may create further litigant demand in the policy area and induce the Court to accept more cases of this type. Second, a landmark decision may signal or result in a termination of agenda allocations for the relevant policy area. In either case the landmark decision is created by the justices as a means of influencing future agendas. In addition, the landmark case can have a
concurrent effect on the agenda. When the Court makes an important pronouncement it often reinforces that decision by taking a number of cases similar to the landmark decision. These collateral cases often receive more cursory treatment than the full landmark decisions. In terms of the agenda, however, these supplementary cases are consuming agenda space on the Court's working agenda. Their presence is a direct result of the landmark case, and so that landmark is seen as the triggering mechanism.

SELECTING THE LANDMARK DECISIONS

There is no systematic means of evaluating the impact of landmark decisions across all fourteen policy areas during the entire 1933-1982 period. Rather, the intent is to track the impact of major landmark decisions in some policy areas as a means of gathering some empirical evidence. This analysis should thus be regarded as exploratory, at least to a degree. The evidence that is gathered will be used to derive hypotheses or identify conditions that would seem to spawn landmark decisions.

Identifying the key decisions is first based upon their citations by the Court in other cases. These were gathered, as noted, from the syllabi of later cases. All of the cited cases were coded, but it was necessary to distinguish truly important cases from those that are less
consequential. A number of criteria were utilized. The first two criteria serve as means of isolating candidates for landmark status from the total pool of all cases cited by the Court in its decisions. First, there are sheer numbers of citations in other cases. A case that is cited a dozen times or more, for instance, is probably significant. The number of citations is only a first clue used to separate some potential landmark cases from other cited cases.

Numbers, however, are not completely reliable, particularly for those landmark decisions that close future agendas to that area. The second condition or prerequisite for inclusion as a bonafide landmark case involves the use of outside sources. These help to identify and discriminate between candidates for inclusion as landmark decisions and other cases that do not quite achieve that level. These sources are typically analyses of the policy areas by experts in those substantive fields. Their research has identified critical events and court cases that have changed the policy areas they have studied. These studies are used to confirm the empirical results, or offer other candidates for inclusion that can then be reinvestigated.

The final criterion is the impact of the possible landmark case. Evidence of the effects of the landmark
case can only be seen when juxtaposed with the long-term progression of agenda status. A deviation from the normal agenda pattern in that policy area might suggest the existence of a landmark case. A significant break with pre-existing patterns that dramatically pares or increases subsequent agenda allocation for that policy area and results in moving the area to a different level of agenda allotment would be necessary. The question is what constitutes such a dramatic change in the agenda as to suggest that the potentially important case is indeed a landmark decision.

The form of this part of the analysis thus resembles a quasi-experimental design. The landmark case is treated as an interruption in the series, and subsequent agenda levels are then assessed. It differs from a quasi-experimental design in that there are recorded citations that actually show the direct results of the landmark and outside sources are used to inform the analysis. The effects are similar, however, in the attempt to discover the impact of the introduction of the landmark decision in that policy area.

While these criteria may seem ad hoc, there are some quantifiable and valid indicators used to cull landmarks from the vast reserve of cases cited by the Court. Despite this, however, there are elements in the criteria for landmark cases that could lead other analysts to exclude
some of the landmarks identified here and include others that did not meet these standards. If the criteria specified here were followed, the result would be a faithful, if not exact, replication of the landmarks included in this study.

It is relatively easy to discover a number of areas that were either created or expanded by an important decision. Determining the existence of a landmark case that closes an area or signals the reluctance of the Court to take similar cases is considerably more difficult. The appearance of a case followed closely by a dormancy stage does not necessarily mean that case was responsible for the termination. The existence of the case and the subsequent cessation of Court attention may be coincidental. As a result, estimates of what constitutes a terminating landmark case will be conservative.

THE INFLUENCE OF LANDMARK DECISIONS

Whether the landmark decisions open or close the agenda to similar cases, their impact is internally derived. That is to say, the justices can use landmarks to influence future agendas. The results of the analysis to this point create some expectations or hypotheses that can serve to frame the analysis of landmark decisions.
First, despite the long-term incremental trends at the largest level, there is a great deal of flux in the agenda allocations to the various policy areas and subareas. Those fluctuations suggest the possibility that landmark decisions may be prevalent. Another long-term trend is the rise in the individual rights areas and a similar decline in the economic areas. This raises a number of possible implications for the potential influence of landmark decisions. The opening of the agenda to areas such as Due Process, Equality, and Substantive Rights might imply the existence of significant agenda expanding landmarks. In the economic sphere, particularly the Ordinary Economic and Federalism areas, the landmarks might be expected to constrict the agenda.

The analysis of the impact of ideology upon the agenda also raises implications for landmark decisions. The impact of ideology was periodic in some areas. That could have been a result of landmark cases. More significantly, the fact that the relationships were frequently small and often counterintuitive might also mean that landmark decisions were responsible. The landmark decision could be bequeathed from one Court to another, forcing the later Court to address the same types of issues. Even though a new ideological balance might have been struck, the agendas would still look similar. The fact that the liberal
Roosevelt Court pushed individual rights onto the agenda, but the largest initial growth occurred during more conservative Courts, could possibly be explained by landmark decisions issued by the liberal Court.

One other pattern found in the analysis of ideology may also be explained by landmark decisions. The economic cases seem less susceptible to ideological influence and to judicial control than the individual rights area. Perhaps there are some fundamental differences between the substantive natures of these areas that makes judicial control of the agenda less likely. Hypothetically, conditions for judicial influence over the agenda should be more propitious in the individual rights domain than in the economic areas. In the economic areas the Court is faced with policy-making competitors (or allies), most notably, Congress. The involvement of another actor should constrain the Court. Judicial decisions must be made with reference to statutes. Those statutory provisions and intent narrow the Court's options. In the economic areas, the Court's ability to issue landmark decisions and influence the agenda may be constrained.

On the other hand, individual rights should be an area of Court domination. The referent here is the Constitution, and the Court is presumed to speak with the most forceful voice in interpreting it. Legislative
gambols into this area are fewer and more open to judicial scrutiny. In the form of a hypothesis, then, the Court would be expected to exercise its prerogatives more freely in the areas requiring Constitutional interpretation than in those mandating statutory interpretation.

For various reasons, the analyses of the impact of landmark decisions are more useful in some policy areas than in others. It is necessary to address each policy area, highlighting the effects of significant cases if such cases exist in that area. The effects of the landmark decisions should be most pronounced on the third level, the subareas. A number of these subareas, but by no means all of them, will be investigated.

The Economic Areas
In general, the economically related areas would seem less conducive to landmark cases than individual rights areas due to the impact of other relevant actors. Despite that generalization, there is a great deal of variation between and within the various policy areas.

The Ordinary Economic Cases
The Ordinary Economic cases, by definition, involve two "ordinary" litigants, and quite often the very jurisdiction of the federal courts to try the case is open to question. The Ordinary Economic cases were very strong in the
1933-1937 period and declined precipitously after that. The decline was consistent across virtually all subareas. The closing of the agenda appeared to result from a landmark case. The landmark case, *Erie Railroad v. Tompkins*, applied state law and, in effect, created a barrier blocking some access to the federal courts. The *Erie* decision maintained that there was no federal common law and courts should not substitute federal authority for state prerogatives. In short, the Court ruled that state, not federal, law should govern cases of this type, and state, not federal courts should deal with these cases. In the next decade, twenty Ordinary Economic cases were accepted by the Court with the purpose of defining and reaffirming the *Erie* doctrine.

This might intimate that the *Erie* case was one of those landmarks that expanded the agenda. In the longterm, however, the *Erie* case effectively helped restrict access to the agenda for Ordinary Economic cases. In many of these cases the Court's decision did not even get to the merits of the economic allocation; the justices denied access to a federal tribunal in the name of *Erie*. Whether the demand dried up or the Court just halted access one

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82 304 U.S. 64 (1937 term). This research is based on the term, not the calendar year in which the Court decides the case. As a result, in citations of the cases the term will be given. Many of the decisions were actually announced in the calendar year subsequent to the Court term that is cited.
stage earlier, the effect was the same: the withering of
the Ordinary Economic area. Table 30 shows the two-stage
decline that was apparently the result of this landmark.

Table 30

The Effects of the Erie Case Upon the Agenda in
the Ordinary Economic Policy Area

<table>
<thead>
<tr>
<th>Period</th>
<th>Percentage of Agenda Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Erie (1931-1937)</td>
<td>16.1%</td>
</tr>
<tr>
<td>1938-1943 (Erie + 6 terms)</td>
<td>7.9</td>
</tr>
<tr>
<td>1944-1953</td>
<td>5.5</td>
</tr>
</tbody>
</table>

State as Litigant

In the area labeled State as Litigant the description,
"landmark decision" is much too strong. At the same time,
however, a decision in one case may induce other similar
cases. Many of the cases in this area involved disputes
between neighboring states over borders or water rights.
Most of the disputes were recurring battles. The Court
decided the cases, but seldom resolved them. The Supreme
Court would frequently appoint a special master to draw
boundaries. One state would invariably challenge the
decision of the master and the Court would need to accept
another case. Disputes between Arizona and California over
borders yielded seven cases.83 While they are not landmark

83 Arizona v. California 298 U.S. 558 (1936 term); 373 U.S. 546 (1963 term); 376 U.S. 340 (1963 term); 439 U.S. 419
controversies that required multiple dispositions were:
decisions, the impact was similar: the case created the condition that virtually forced the Court to reopen the controversy at various intervals.

United States as Litigant
The United States as Litigant policy area largely seemed to be unaffected by major doctrinal decisions. The ebbs and flows seemed to be more closely tied to Congressional statutes than to important Court cases. This is expected because the ability to sue the government is a legislatively created right. The Federal Tort Claims Act and the Miller Act were the important statutes. These legislative acts seemed to create the conditions for growth in the agenda space allotted to these subareas.

Internal Revenue
There is no clear pattern to the growth and decline of Internal Revenue cases. At various times, though, there is evidence suggesting that legislation and landmark cases may have contributed to the changes in agenda allocation for Internal Revenue. The apex for Internal Revenue follows the issuance of the 1939 Code. The 1954 Code produced a resurgence in these cases and an end to the precipitous decline that had existed for over a decade. At the margins, however, the occasional important case seemed to

Wisconsin v. Illinois (6); Oklahoma v. Texas (5); Arkansas v. Tennessee (4); Wyoming v. Colorado (4); Wisconsin v. Michigan (4).
spawn similar cases that the Court agreed to decide.

A closer examination of the Internal Revenue field reveals a basic pattern with some recurring features. The study commences in 1933 with Internal Revenue cases commanding a large share of the agenda. One key case, *Pinellas Ice Company v. Commissioner of Internal Revenue*, was decided in the previous term. The *Pinellas* case involved corporate taxes arising from mergers and reorganization. In 1935 the Court accepted 33 Internal Revenue cases. The reason to take these cases was apparently to refine the *Pinellas* precedent. The Court's decisions in 1935 involved trusts, reorganization, and similar concerns. In some of the cases the Court claimed it was following *Pinellas*, in other cases the Court was distinguishing the current cases from the past precedent.

*Morrissey v. Commissioner of Internal Revenue* apparently replaced *Pinellas* as the controlling precedent. It expanded the *Pinellas* precedent to include associations under the aegis of corporate taxation. The *Morrissey* decision had two effects. First, a flood of cases decided concurrently cited *Morrissey*. Second, it became a controlling precedent for similar cases decided in subsequent terms. In the 1939 and 1940 terms Internal Revenue cases surged to new levels. The *Morrissey*

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84 287 U.S. 462 (1932 term).
85 296 U.S. 344 (1935 term).
precedent gave way to the *Helvering v. Wilshire Oil* case that expanded the holdings of its predecessors.\(^8\) This case specifically involved depletion allowances, but in a large sense was an extension of corporate tax interpretation.

A major legislative initiative, the Internal Revenue Code of 1939, was an apparent turning point for the Court. In the wake of the Code, the cases decided by the Court cited no precedents, but relied upon the Code. The amount of agenda space allotted to Internal Revenue cases was reduced in two stages. Subsequent cases would often cite a new precedent coupled with the 1939 Code. Three cases stand out as bridges from the 1939 Code to the 1954 Code. *Helvering v. Hallock*, *Maguire v. Commissioner of Internal Revenue*, and *Dobson v. Commissioner of Internal Revenue* were the oft-cited precedents\(^8\) that seemed to govern the cases in the 1940's. These cases shifted the emphasis toward individual taxation questions involving trusts, wills, and what should be considered taxable income.

The 1939 Code seemed to represent an opportunity for the Court to retreat from the Internal Revenue area. After a brief flurry, space for Internal Revenue cases declined. Perhaps the Court clarified many issues, reducing the need

\(^8\) 308 U.S. 90 (1939 term).

\(^8\) 309 U.S. 106 (1939 term); 313 U.S. 1 (1940 term); 320 U.S. 489 (1943 term).
for the Court to become further involved in this area. On the other hand, the Court may have decided to defer to Congress, or the Court may simply have tired of these issues and conserved the space for more pressing needs.

In 1946 the allotment of agenda space to Internal Revenue cases declined significantly, representing the second stage reduction. The reasons are not readily apparent. The Court seemed to be signalling a virtual end to agenda allocation for the area. The Court took its few cases in pairs, occasionally because of conflict between circuits. The few cases accepted contained a statutory interpretation. Table 31 shows the multistaged decline from the early apex until the 1954 Code, the brief renaissance that ensued, and the ultimate decline.88

Table 31

<table>
<thead>
<tr>
<th>Period</th>
<th>Percentage of Agenda Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1933-1939</td>
<td>18.1%</td>
</tr>
<tr>
<td>(1939 Code)</td>
<td></td>
</tr>
<tr>
<td>1940</td>
<td>19.3</td>
</tr>
<tr>
<td>1941-1945</td>
<td>13.7</td>
</tr>
<tr>
<td>1946-1953</td>
<td>5.9</td>
</tr>
<tr>
<td>(1954 Code)</td>
<td></td>
</tr>
<tr>
<td>1954-1959</td>
<td>9.2</td>
</tr>
<tr>
<td>1960-1982</td>
<td>3.7</td>
</tr>
</tbody>
</table>

88 During the 1939 term the justices did not cite the 1939 Code as a justification for their decisions. In the 1954 term, however, the 1954 Code was used to substantiate the Court's Internal Revenue decisions.
The post-1953 resurgence in Internal Revenue cases lasted until the end of the decade. The impetus for the rebirth on the Court's agenda apparently was the Internal Revenue Code of 1954. That brief flurry, however, was not a return to past levels, but a temporary halt to the sharp long-term decline. Very few precedents were cited as the Court seemed to defer to legislative mandates. The Court's decisions appeared to uphold most provisions in the Code and perhaps this suggested the Court's reluctance to continue pursuing these types of cases.

In general, the landmark cases in the Internal Revenue area seemed to be interstitial bonds first, between the biennial tax bills and, later, between the Internal Revenue Codes. The important cases are significant, but the constraints imposed by Congress reduced the latitude afforded the Court. The lack of a relationship between ideology and Internal Revenue agenda allotments is prevalent during all periods. This may further suggest the inability of justices to control the agenda in this policy area.

State Regulation

State Regulation cases claimed a significant portion of the agenda until the area fell off in 1940. Cases in the 1933-1935 period appeared to be responsible for the significant agenda allotments in the area.
Loan v. Blaisdell and Nebbia v. New York involved protective state regulations and led to similar legislation and litigation. The former case upheld state legislation extending the moratorium on debt collection for farmers. The latter approved state regulation of milk prices. Both cases were narrowly decided (5-4) liberal decisions that belied the doctrinal patterns of this basically conservative Court. The Court’s underlying conservative nature, the liberal decision, and division on the Court are factors that may have created mixed signals, and thus led to increased demand and growth in the agenda.

The real burst of agenda activity was tied to two other types of cases, many of which were decided in 1934. These subareas involved challenges to state taxation (often based upon the Fourteenth Amendment) and disputes over the scope of power of state public service commissions. The cases that appear to be the closest to fitting the description of landmark cases are Liggett v. Lee (taxation) and Los Angeles Gas v. Rail Commission (public service commission). These decisions resolved the individual cases, but did not reveal any clear standards to guide the lower courts or state governments. This led to an expansion of the agenda. The cases the Court accepted in

\[\text{89} 290 \text{ U.S. 398 (1933 term) and 291 U.S. 502 (1933 term).} \]
\[\text{90} 288 \text{ U.S. 517 (1932 term).} \]
\[\text{91} 289 \text{ U.S. 287 (1932 term).} \]
1934 seemed to be the stimuli that kept the State Regulation area on the agenda until 1939. Well over half the state taxation and public service commission cases were accepted in the 1933-1939 period. The Court did not stray from these precedents and standards began to emerge. By following these previous cases the Court introduced elements of consistency into the policy area, and that in turn is a condition that could hypothetically lead to agenda closing in that area. Most of the decisions followed earlier precedents and sustained state authority. The decline in agenda attention may also be the result of other reasons: lack of agenda space due to the rise of United States Regulation and individual rights, deference to state legislatures, or simply a Court tired of these types of issues.

**United States Regulation**

United States Regulation was the dominant level two policy area until the late sixties, when it was supplanted by Due Process. The consistently large shares of agenda space granted to this area mask the underlying shifts in the subareas.

The bankruptcy policy area attracted considerable agenda attention in the first decade of the study, but in the 1949-1982 terms the Court averaged taking only about one bankruptcy case per term. This would suggest the
possibility of a landmark case that signaled an end to access to the Court's agenda. There does not appear to be such a case, however. The entire fifty year period for bankruptcy largely appears to be directed by outside forces.

During the 1933-1945 terms, Court decisions were dominated by legislative interpretations of the Bankruptcy Acts of 1934 and 1938. These statutes were Congressional responses to the havoc wreaked by the Depression. One landmark case, *Louisville Bank v. Radford*, appeared to stimulate the area by striking down New Deal legislation.92 This decision forced Congress to amend bankruptcy legislation and induced a new round of litigation.

In the area of reorganization the Court issued a triumvirate of cases93 that upheld section 77B of the Bankruptcy Act of 1938. These three cases were apparently the thrusts behind the last significant batch of bankruptcy cases to gain agenda status. The apparent reason behind this late growth was the Court's doctrinal inconsistencies in these cases. The Court ultimately resolved these and


93 The three cases were *Case v. Los Angeles Lumber* 308 U.S. 106 (1939 term); *Consolidated Rock Products v. DuBois* 312 U.S. 510 (1940 term); and *Ecker v. Western Pacific Railroad* 318 U.S. 448 (1942 term).
the allocations of agenda space were reduced.

It appears, however, that external determinants influenced the bankruptcy policy area more than the internal variables. First, there were far fewer commercial failures and bankruptcy cases filed in lower courts after 1945. Second, the significant demand for Supreme Court action withered as the nation emerged from the Depression. Third, there were important legislative acts designed to deal with these problems, and they may have restricted the Court's ability to exert influence over the area. As a result, even the landmark cases were tied to the Congressional statutes.

Another area in which the Court has been constrained across time was antitrust. Congressional action, in the form of the Sherman Antitrust Act and the Clayton Act, largely preempted the field. The Court was left to work at the margins in this policy area, as it often is in statutory areas.

There are two important cases in this area, though they would not seem to fit the spirit of a landmark case because the precedents do not penetrate and change the law or

94 The Historical Statistics of the United States: Colonial Times to 1970 has annual levels of bankruptcies and related activities gathered from The Statistical Abstract of the United States

95 The Harvard Law Review had analyses of the cases brought to the Supreme Court for a number of terms surrounding the apex and decline of bankruptcy cases, and those analyses show the ebb quite clearly.
endure as a source of litigant demand or Court policy-making. The *United States v. Columbia Steel Company* case was decided while Congress was redesigning the antitrust legislation. The result was a revamped section 7 of the Clayton Act in 1950. A more critical decision was *Brown Shoe v. United States*, the first case to interpret the revised Clayton Act. The *Brown Shoe* case represented the Court's first real attempt to interpret Congressional intent and the goals of the Clayton Act. As with any initial significant case in a field, the Court did not conclusively resolve the issues. The confusion of the Court over antitrust policy was quite apparent to some analysts. As a result, *Brown Shoe* had a short-term effect, but the impact was coterminous with, and perhaps the cause of, the highpoint of the antitrust area's success in achieving agenda space, 1963-1968. This occurred during a relatively liberal period on the Court and the relationship between ideology and the agenda demonstrates this.

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96 334 U.S. 495 (1948 term).


Labor relations was the subarea that consumed the most agenda space among the United States Regulation divisions. Congressional statutes were the primary determinants, but landmark cases at certain junctures provided the essential catalysts to propel the labor relations policy area. The National Labor Relations Act was crucial, but only when the Court stamped its approval on the Act did the subarea begin to flourish. National Labor Relations Board v. Jones & Laughlin Steel Company was the major landmark decision. This case was important for the series of concurrent cases that rode its coattails, and for the cases it seemed to provoke for the next five years. Indeed, no labor relations cases were accepted before this landmark decision was issued.

The acceptance of the National Labor Relations Act eventually led to a decrease in the number of cases involving it, yet the policy area continued to flourish thanks to more legislative initiatives. The Fair Labor Standards Act created regulations allowing minimum wages and maximum hours to protect employees. The conventional wisdom would maintain that United States v. Darby Lumber, the case that upheld this Act, was the next landmark case. In a sense, it was the classic floodgate opening case. C. Herman Pritchett maintains that the Darby case

\[101\] 301 U.S. 1 (1936 term).
\[102\] 312 U.S. 100 (1940 term).
was not the decisive statement or clear response that Jones & Laughlin had been. As a result, there was "a continuing stream of wage and hour cases after 1941." The confusion in doctrine led the Court deeper into this policy thicket.

Parenthetically, two items should be noted. First, neither the Jones & Laughlin nor the Darby case is categorized as a labor relations case in this study. Both are labeled Federalism cases, because that issue took precedence over the substantive issue area. Often, and this was the case here, the major landmark cases that open an area (even a normally statutory one) involve Constitutional interpretations. They were Constitutional in that the cases challenged the very legitimacy of the statutes and the division of authority between the federal and state governments. The decisions that these statutes were indeed consistent with Constitutional requirements opened the agenda for the next round of cases that requested interpretations of various provisions.

The need or desire to accept large numbers of cases led to the Court's creation of doctrinal progeny for Darby. Walling v. Belo and Kirschbaum v. Walling were outgrowths of Darby, and both apparently had effects upon future cases

Each case involved the scope of the Fair Labor Standards Act. The extension of the provisions encouraged litigants to entreat the justices to accept their cases. For a number of terms the justices were sympathetic and opened the agenda. Agenda allotments to these types of cases declined at the same time as, (and perhaps as a result of) the passage of the Taft-Hartley Act and the litigation resulting from its genesis.

Taft-Hartley and the Labor Management Disclosure Act a decade later fueled litigation and induced the Court to accept more labor relations cases. Challenges to these statutes did not, however, lead the Court to create anything resembling a classic landmark decision. A decision issued in 1958, however, rekindled interest in the National Labor Relations Act when the Court gave the reluctant National Labor Relations Board even more authority. This seemed to expand the agenda as the question of the scope of labor regulation was reopened. The case, San Diego Unions v. Garmon, appeared to lead other litigants to bring cases and prodded the Court to take a percentage of those cases in the sixties.105 Table 32 tracks the agenda allocations to the labor relations subarea, using the key cases and legislation as dividing points. The Court citations are quite revealing.

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104 316 U.S. 624 (1941 term) and 316 U.S. 517 (1941 term).
The percentages of cases accepted do not change dramatically, but the rationale behind the decisions, and presumably, the reasons behind the acceptance of the new cases changed significantly as the landmarks changed.

Table 32

Landmarks in the Labor Relations Area and Their Effects Upon the Agenda

<table>
<thead>
<tr>
<th>Period</th>
<th>Percentage of Agenda Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Jones &amp; Laughlin (1933-1936)</td>
<td>0.0%</td>
</tr>
<tr>
<td>Jones (1937)-Darby (1941)</td>
<td>3.4</td>
</tr>
<tr>
<td>Darby (1941)-Taft-Hartley (1947)</td>
<td>6.5</td>
</tr>
<tr>
<td>Taft-Hartley (1948)-San Diego Unions (1958)</td>
<td>6.5</td>
</tr>
<tr>
<td>San Diego Unions (1959)-1964</td>
<td>8.9</td>
</tr>
</tbody>
</table>

The last chapter showed that ideology had no apparent impact upon agenda allocation in the labor relations area. This area may, however, have represented a classic example of the effects of ideology. The cases that upheld and expanded the power of the National Labor Relations Board were basically the work of a liberal Court. The passage of the more conservative Taft-Hartley Act and its acceptance by a relatively conservative Court were reactions to the growth of the power of labor.106 A more liberal Court later expanded the Board's power in the San Diego Unions case. The volume of cases accepted did not change, but the

scope of the decisions and the ideological goals appeared to change significantly. Despite appearances, the effects of ideology were pronounced.

The regulation of interstate commerce is an area virtually void of landmark cases, at least in the 1933-1982 period. If governmental activity is causing litigation and Supreme Court attention, it is evolving from Congress and/or the Interstate Commerce Commission. The Interstate Commerce Act and the various Transportation Acts appear to be the source of the litigation. Similarly, the Environmental policy area was Congressionally created through the Clean Air Act and the National Environmental Policy Act. These statutes and the Environmental policy area's place on the agenda were recent phenomena. The Supreme Court has apparently not issued a landmark decision in this area.107

There is variation among the subareas in the United States Regulation area, but the differences are of degree rather than kind. Legislation seems to be the lifeblood of the litigation and pushes the Court to accept the cases. For some areas, most notably labor relations, landmark decisions are critical to the growth and sustenance of the agenda. Even in those areas, however, it is Congress that ultimately governs the policy area and constrains the

Supreme Court. Congress is often seen as better equipped to tackle the allocation of economic resources and the regulation of a policy area.

Federalism

The impact of legislation is quite different in the area of Federalism. The major Congressional statutes are brought to the Court and challenged on the basis of their presumed encroachments on state prerogatives. The challenges required Constitutional interpretations by the Court. Once the Court has decided whether the statute in question did or did not violate tenets of Federalism, that individual statute seldom reappeared for another hearing on the question of federalism; it had had its day in court. Future cases were based upon the application of the precedent issued to other statutes. This differs from statutes in areas such as labor relations, bankruptcy, and Internal Revenue where the Court was asked to weigh legislative intent periodically. This process reduced the impact of Congress and left the Court somewhat more control in the area of Federalism than in the economic areas.

The 1933-1947 period was an important time for Federalism. Cases in this area commanded significant portions of agenda space. Fast studies have intimated that a previous decision was exerting the attributes ascribed to
a landmark case in the early thirties. That case was *Hammer v. Dagenhart*, and its restrictive position regarding the Congressional exercise of the power to regulate interstate commerce was a broad statement of "dual federalism." The clear intent of *Hammer* was complicated by decisions that recognized the existence of a "stream of commerce" and granted Congress regulatory powers based upon that.

Confusion in doctrine or the process whereby the Court distinguishes a new decision from a previous precedent is a condition that is expected to lead to more litigation and force the Court to hear more cases to settle the law in that area. There seemed to be little confusion as to the Court's intent in the first few years of the New Deal. The Court declared portions of the National Industrial Recovery Act unconstitutional in the *Schechter Poultry Corporation v. United States* case, and the Bituminous Coal Conservation Act was found wanting in the *Carter v. Carter Coal* case. In both instances the Court said Congress


109 247 U.S. 251 (1918).


111 295 U.S. 495 (1934 term).

112 298 U.S. 238 (1935 term).
had strayed across the bounds of federalism this Court had drawn. The Schechter and Carter cases created litigation, as required of landmark cases, but their effects were to be short-lived.

A good deal of speculation and research has been promulgated in an attempt to explain the Court's doctrinal reversals in 1937. Whatever the reason, the result of the "switch in time" was uncertainty, a growing volume of litigation, and increased agenda status for Federalism cases. The landmark case, National Labor Relations Board v. Jones & Laughlin Steel Company, is the same decision that opened the agenda to the labor relations area and its effects were similar in the Federalism area. The sudden reversal purged remnants of the restrictive commerce clause interpretations. But as Sheldon Goldman notes, "it took several years of subsequent decisions to make clear the full sweep of the new constitutional order." In light of the sudden doctrinal revision, it is not surprising that litigants and Congress sought to test the Court's resolve. The Court stood firm in United States v. Darby Lumber and upheld the Agricultural Adjustment Act in Mulford v. Smith, another consequential case. 113

113 Goldman, Constitutional Law and Supreme Court Decision-Making, pp. 342-343.

114 307 U.S. 38 (1938 term).
For all the force of its sudden reversal, the Court stopped short of emasculating state power. The fine distinctions the Court made in allowing federal intervention in some areas while denying it in others defied clear prediction. As a result, the Court needed to address the recurrent cases that its struggle for doctrinal clarity and consistency created. The early Roosevelt Court was responsible for the landmark cases, and the increasingly liberal Court carried the issues to the agenda. The relationship between ideology and the agenda in the Federalism area was positive, meaning that as the Court got more liberal, agenda space was increased.

It is indisputable that, while the details needed to be fleshed out, the overall tenor of the Court's message was to remove many of the shackles from Congress. As the particulars were decided, the expectation that consistency would reduce either litigation or the Court's felt need to accept these cases seemed to be borne out.

Before investigating the recent resurgence, it is necessary to address a specific arena of Federalism: state taxation and licensing of a federal instrumentality. This subarea had a development contrary to that of Congressional use of the commerce clause. Prior to 1937, state licensing and taxation policies were normally set aside when they seemed to encroach upon agents of the federal government.
About the same time that the Court struck a blow for the commerce clause and federal prerogatives, the Court issued *James v. Dravo Corporation*, sharply expanding a state's power to tax federally sponsored agents. The Court claimed it was distinguishing the *James* case from a battery of previous decisions with contrary holdings. In retrospect, *James* appeared to be a first step in creating exceptions to the immunity the federal government enjoyed from state taxation.

That prophecy was fulfilled in the *Alabama v. King & Boozer* case. In that case the Court made its designs clearer by completely overruling the same cases it had distinguished in the *James* decision. The *Alabama* case showed the Court would not deviate from the *James* exception. In fact, the new case not only reinforced *James*, but pushed it farther. This lent an element of consistency and contracted the agenda somewhat in this subarea. The Court had been allocating approximately 4.5 percent of its annual agenda space to this subarea after the *James* decision, but this was pared to less than one percent after the *Alabama* case.

In virtually all subareas of Federalism there were parallel declines beginning in the forties. With the exception of *Alabama v. King & Boozer*, there was no classic

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115 302 U.S. 134 (1937 term).
116 314 U.S. 1 (1941 term).
landmark case to close or reduce the area. Rather, what existed was the Court issuing a basically consistent strand of decisions that reduced the Court's need to define and refine the details of Federalism doctrine.

Federalism captured a diminished portion of the agenda until the last decade, when it underwent a renaissance of sorts. Part of this may be attributed to the growth of federal regulations and the extended reach of the central government. Another stimulus was National League of Cities v. Usery, a modern landmark decision.117 This case was a dramatic halt to four decades of deference to the federal government. The decision prohibited federal regulation of wages and hours for state and municipal employees. The case promised to clog the Court with requests for more precise definitions of the scope of the decision. As Pritchett points out, "a substantial volume of litigation was also generated, some forty-two cases growing out of Usery being filed by 1978."118 The Court was apparently paying attention also, because in the terms preceding the National League of Cities decision the Court was allocating approximately 4.5 percent of its annual agenda space to Federalism. That was expanded to almost 11 percent by the late seventies.119 The impact of ideology upon the agenda

117 426 U.S. 833 (1975 term).
in the Federalism area during this most recent period seems to be apparent; as the Court grew more conservative, the agenda was expanded.

The impact of National_League_of_Cities was important, but indirect and rechanneled. The Court refused to extend the precedent and, in fact, returned to the language it used before the National_League_of_Cities case. If the National_League_of_Cities case did not directly affect the agenda, the uncertainty left in the wake of subsequent decisions would.

Hodel_v._Virginia_Surface_Mining_and_Reclamation Association or Equal_Employment_Opportunity_Commission_v. Wyoming may eventually come to be seen as landmark cases that narrowed the agenda for Federalism. These cases confined the impact of National_League_of_Cities, but the division in the E.E.O.C._v._Wyoming case may encourage litigants to continue to pursue Federalism cases of this ilk. In light of the ages of the current justices, purposive litigants may be waiting for the most propitious

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119 The impact of National_League_of_Cities was not confined to questions concerning federal regulation of state and local governmental employment practices. It led to other Federalism cases involving other substantive areas. That is consistent with the earlier supposition that the specific issue is subsumed and dominated by the question of Federalism. The decision had ramifications, and raised questions about the state of legal doctrine in the Federalism area, writ large.

time.

**Foreign Affairs, Separation of Powers, and Criminal Law**

Three areas cannot accurately be categorized as either economic or individual rights: Foreign Affairs, Separation of Powers, and Criminal Law. The three share a similar background: they are conceived outside the Court. External actors draw the bounds and constrain the Court. Congressional statutes dictate the context of Criminal Law, and nothing resembling a landmark decision existed in this area. In the Foreign Affairs sphere, executive and legislative prerogatives coupled with international events pushed the Court to settle some disputes.

Separation of Powers questions involve the power bases of the other branches of government. The Court is presumed to be loath to interfere in these questions because the solution may raise the ire of at least one branch of government. About half the cases have come to the Court since Watergate and some are the result of that. The closest thing to a landmark decision is *Butz v. Economou*, which involved the immunity of governmental officials.\(^\text{121}\) That decision led to subsequent cases involving other federal officials to see how far the Court would extend immunity. The best possible recent candidate for landmark status is *Immigration and Naturalization Service v. Chadha*.\(^\text{121}\)

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\(^{121}\) 438 U.S. 478 (1977 term).
involving, but not resolving, the volatile issue of legislative vetoes.\textsuperscript{122}

**Individual Rights**

Hypothetically, the areas comprising individual rights are less encumbered by legislative gambols. As a result, the Court is less constrained by outside influence and freer to create its agenda via the landmark case. Many of the landmark decisions involve Constitutional interpretation and are, thus, the province of the Supreme Court.

**Government as Provider**

The Government as Provider area is not purely an individual rights area, but has strands of economic relevance. At the same time, it tends to fit on the individual rights factor. Perhaps as a result of the economic remnants and the paucity of cases, few potential landmarks are evident. One case, *Dandridge v. Williams*, denied welfare benefits, and in turn induced a number of cases over the next four terms.\textsuperscript{123} The subsequent cases were apparently designed to test the Court’s resolve or give the justices the opportunities to issue further standards. This is consistent with the negative relationship between ideology and the agenda in the 1967-1982 period. The *Dandridge* landmark was issued just after the liberal apex of the

\textsuperscript{122} 103 S.Ct. 2764 (1982 term).

\textsuperscript{123} 397 U.S. 471 (1969 term).
Court. The subsequent cases were accepted as the Nixon appointees replaced members of the Warren Court.

Equality
The Equality policy area has a few tangents with economic concerns. Many of the Equality cases involved specific concerns with employment, a subarea with a certain economic component. Legislation had an impact on the Equality area, but the vital force was the Court. The Court's influence penetrated throughout the area. An argument could be made that the Equality area was the most Court dominated area.

The school desegregation subarea was governed by a series of landmark cases, each built and expanding upon the preceding precedent. The initial landmark case in this area was *Missouri ex rel. Gaines v. Canada*, opening heretofore denied access to white graduate schools to minorities. This decision offered a cause of action for blacks and induced litigation to expand it. It was a quantum leap to *Brown v. Board of Education*, to be sure, but that decision led directly to the first surge in the agenda.  

*Brown* was not an end, however, but another stage. The high point did not occur until the late sixties, and three cases shared responsibility. *Alexander v. Holmes* was

124 305 U.S. 337 (1938 term).

125 347 U.S. 483 (1953 term) and 349 U.S. 294 (1954 term).
important because it led the Court to hear a series of other cases concurrently. The real surge was due to Green v. School Board of New Kent County and Swann v. Charlotte-Mecklenburg Board of Education, both of which expanded the Brown decision. Over half of the desegregation cases accepted by the Court were heard in the ten terms following the Green landmark.

Parenthetically, the Brown case transcends the notion of a landmark decision. The impact of that decision is frequently seen not only as a catalyst for school desegregation, but for civil rights writ large. The Brown decision is widely painted as a symbol for blacks and their legal strategies. Those strategies kept the Court busy. The Court's willingness to entertain the litigation built the civil rights agenda. As the Court dug in its heels, Congress was eventually forced into action or became a willing ally. The Court then set the agenda of Congress and that, in turn, affected the Court's agenda.

Perhaps the quintessential landmark case was not even an Equality case but one whose impact was felt most directly in the Equality area. Monroe v. Pape breathed new life

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into section 1983 of Title 42.\textsuperscript{129} This decision made it easier to use section 1983 as the basis for civil suits. In the decision, the Supreme Court decided that police brutality constituted state action depriving the victims of their civil rights consistent with the intended prohibitions of section 1983. It is inconceivable to think that the justices were unaware that the \textit{Monroe} decision would dramatically increase litigation at all levels including their own. As Pritchett notes, "this decision unloosed a flood of private civil rights damage actions in the federal courts..."\textsuperscript{130} In the decade preceding \textit{Monroe}, the Court heard 52 Equality cases (an annual average of 4.5 percent of the total agenda). In the half-dozen terms after \textit{Monroe}, however, the Court accepted 89 cases, and that represents an average of 12.1 percent of the annual agenda space available.

While \textit{Monroe v. Pape} was used as a wedge for different types of discrimination cases, three landmark cases directly affected agenda construction in the racial discrimination in employment subarea. These cases were

\textsuperscript{129} 365 U.S. 176 (1960 term); This act is Chapter 21, Title 42, section 1983 of the U.S. Code. It was originally known as the Ku Klux Klan Act of 1871, as it sought to stop the Klan from violating the civil rights of the recently freed blacks. This act is usually referred to as the Civil Rights Act of 1871 (passed April 20, 1871).

interpretations of Title VII of the Civil Rights Act of 1964. That act made it illegal for employers to deprive individuals of employment due to race. Title VII opened the area, abetted by the landmark decisions. \textit{Grisggs v. Duke Power Company} appears to be the case most responsible for opening the agenda to these demands.\textsuperscript{131} Only one employment discrimination case had been accepted in the decade prior to this decision. In this case the Court monitored the tests used for employment.

The Court retrenched a bit in \textit{McDonnell-Douglas v. Green} and \textit{Washington v. Davis} by placing the burden of proving that a test was discriminatory upon the alleged victim.\textsuperscript{132} The mixed signals would be expected to induce litigant demand, and that was the case, as 80 percent of the employment discrimination cases involving alleged racial bias were accepted after these two landmarks. When the Court considered employment discrimination, its decisions often needed to incorporate the Civil Rights Act of 1964. This constrained the Court in constructing a judicial remedy.

The race discrimination cases and application of Title VII eventually had spillover effects into the gender discrimination in employment subarea. There are no obvious landmark cases in the gender discrimination in employment

\textsuperscript{131} 401 U.S. 424 (1970 term).

\textsuperscript{132} 411 U.S. 792 (1972 term) and 426 U.S. 229 (1975 term).
subarea. The race discrimination in employment cases may have sensitized the justices. Concurrent with the initial cases in gender discrimination in employment, the Court began to take other cases involving sex discrimination. The Court's foray into other areas of gender inequality may have been a consciousness raising experience that induced the justices to create agenda space for females discriminated against in the workplace. The gender discrimination decisions did fall within the framework of statutory interpretation, but the Court still had to legitimate the application of Title VII and other legislative acts through its agenda.

In the larger gender discrimination realm, Reed v. Reed stands out as the classic landmark decision. It clearly seemed to be the key unlocking agenda space. This decision was cited in Frontiero v. Richardson, another landmark apparently responsible for a half-dozen cases over the next four terms. The Frontiero case was a bit confusing. The case was decided 8-1 on the merits, but only four justices would accept the contention that gender should be a "suspect classification." In any event, the decision seemed to expand Reed, but the depth of the expansion was uncertain. That may have led the Court to increase its agenda allocation to sort out the confusion.

133 404 U.S. 71 (1971 term).
134 411 U.S. 677 (1972 term).
The Reed case raises the question whether that case was a landmark or just important by virtue of the fact that it was the first case in the policy subarea. It is a landmark, perhaps because it is first. The initial case is a signal that at least four justices are willing to hear these types of cases. The result should be increased demand and, if a policy-making bloc exists on the Court, increased agenda allocation for that policy subarea. Table 33 shows evidence of a burgeoning subfield in the wake of the Reed decision.

Table 33

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Cases Accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Reed (1957-1967)</td>
<td>0</td>
</tr>
<tr>
<td>1968-1970 (Reed and related cases)</td>
<td>4</td>
</tr>
<tr>
<td>Post-Reed (1971-1982)</td>
<td>50</td>
</tr>
</tbody>
</table>

Another group seeking to end "invidious discrimination" was illegitimate children. The Court's decision in Levy v. Louisiana was the landmark, like Reed, that opened the agenda to this group.\(^\text{135}\) The Levy decision led to a half-dozen cases involving illegitimate children. By analogy, the Levy case was cited to open the agenda for equal protection cases in related areas. Mathews v. Lucas, however, narrowed Levy by creating some exceptions to

\(^{135}\) 391 U.S. 68 (1967 term).
earlier protections. That, in turn, created uncertainty the Court could seemingly resolve only by taking more cases, ten in the final six years.

The reapportionment subarea is dominated by landmark cases. By declaring reapportionment a "political question" in Colegrove v. Green, the Court was closing access. In Baker v. Carr the Court reversed its earlier avoidance and threw open the doors to the courthouse. Baker was critical for creating access and begetting Reynolds v. Sims, the decision that seemed most directly responsible for the dramatic surge in the agenda space available for reapportionment cases. Allocations of agenda space climbed from zero to 8.5 percent of the total agenda within four terms. The success of reapportionment in achieving agenda status is a result of landmark cases, the partisan nature of the legislative decisions that created the need for an impartial arbiter, and the confusion created by decisions that were not completely consistent in setting acceptable levels of deviation from equality in legislative districts.

137 328 U.S. 549 (1945 term).
139 377 U.S. 533 (1963 term).
In general, the relationship between ideology and the Equality agenda is counterintuitive. As the Court gets more conservative, it accepts more Equality cases. Landmark cases are responsible for this. Relatively liberal Courts often issued the landmark decisions, as in the Brown, Green, Reynolds, and Levy cases, thus leaving increasingly conservative Courts with a legacy they must address. As a result, the real growth occurred during the more conservative Courts.

Due Process

Due Process is a policy area largely beyond the purview of legislative initiatives. Many of the critical landmark cases involved Constitutional interpretations. By implication, this means the Court has a freer hand in agenda construction than it has in statute-dominated areas. The evidence confirms the impact of landmark cases in a number of subareas in the larger criminal due process field.

Concerns with possible bias in jury selection were important parts of the Court's agenda in the late thirties and forties. Two landmark cases seemed to spur litigants, and the Court accepted a significant number of cases. Norris v. Alabama and Hill v. Texas were designed to stop the worst Southern abuses in excluding blacks from

140 294 U.S. 587 (1934 term) and 316 U.S. 400 (1941 term).
juries. The consistency and resolve of the decisions over many years may have been responsible for a later closing of Court access. *Taylor v. Louisiana* may be the case that actually narrowed the agenda by expanding the "fair cross section" of society requirements for jury selection to include women.\(^{141}\)

As racial bias questions faded from the agenda, another series of concerns about juries found a place on the agenda. *Duncan v. Louisiana* was the landmark case that created access by incorporating the Sixth Amendment jury procedure protections to the states.\(^{142}\) Once that occurred, cases challenging state jury procedures, most notably the six-member jury, became annual items on the Court's working agenda.\(^{143}\) There were not large numbers of such cases, but those accepted appeared to result from the Duncan precedent.

Double jeopardy represents an area that appears to be governed by two landmark cases. In *Palko v. Connecticut* the Court refused to incorporate the protections against double jeopardy to the states.\(^{144}\) The evidence suggests that that decision either dissuaded demand or was a thinly veiled threat that the Court would not hear those types of


\(^{142}\) 391 U.S. 145 (1967 term).

\(^{143}\) Pritchett, *Constitutional Civil Liberties*, pp. 223-225.

\(^{144}\) 302 U.S. 319 (1937 term).
cases. Indeed only six double jeopardy cases were decided in the 1933-1952 period. By contrast, in the 1968-1982 period fifty double jeopardy cases were accepted. The reason for the change appears to be *Benton v. Maryland*, the case that finally incorporated double jeopardy prohibitions to the states.\(^\text{145}\)

Right to counsel cases exhibited ebbs and flows over the first two decades of this study. Two early landmark decisions seemed to be responsible. *Powell v. Alabama* granted counsel in the "Scottsboro Boys" case due to the circumstances of the case, black youths facing a hostile Southern town.\(^\text{146}\) A decade later, while refusing to expand the right to counsel to the states, the Court legitimated the concept of "special circumstances" in the *Betts v. Brady* case.\(^\text{147}\) "Special circumstances," such as the mental capacity of the defendant and whether the crime was a capital offense would justify guaranteed counsel. This vague standard would seem to insure a parade of litigants coming to the Court to claim the existence of "special circumstances" in their particular cases. Indeed the evidence confirms that that occurred, and it is substantiated by Pritchett, who notes that the Court more

\(^{145}\) 395 U.S. 784 (1968 term).


\(^{147}\) 316 U.S. 455 (1941 term).
or less forced itself to hear each case.\textsuperscript{148}

What perhaps held back a true flood was the need to have something at least remotely resembling a "special circumstance." The Court, however, removed this barrier in \textit{Gideon v. Wainwright}, the true landmark decision in this area.\textsuperscript{149} The clarity of the \textit{Gideon} decision and the relatively faithful compliance with the standards enunciated in the decision\textsuperscript{150} combined to limit the amount of agenda space the Court needed to reserve for right to counsel cases. The Court did, however, take a number of steps to guarantee that at least some of these questions would remain on the agenda. First, it made the decision retroactive. Second, the Court extended the right to juveniles.\textsuperscript{151} Third, the Court widened the scope of this protection by including some types of misdemeanors.\textsuperscript{152} The expansions of the right to counsel encouraged litigants to see at what stage in the law enforcement process that right could be activated.

\textsuperscript{149} 372 U.S. 335 (1962 term).
\textsuperscript{151} \textit{In re Gault} 387 U.S. 1 (1966 term).
\textsuperscript{152} \textit{Argersinger v. Hamlin} 407 U.S. 25 (1971 term).
Miranda v. Arizona was a landmark decision by virtually any definition, and yet there was no explosion of litigation in its wake. This may be due to the clarity of the case and the relative ease with which police can, and apparently did, implement the decision. The Court may have introduced an element of uncertainty during the 1983 term, however, when the justices allowed exceptions to the previously inviolate Miranda rules.

Those elements found in the Miranda decision that apparently did not produce agenda changes were obviously absent from the search and seizure subarea. This subarea has a solid history of confusion and change, and that has led the Court into a thicket that was often its own creation. A number of landmark cases are involved in this subarea. Each major case seemed to reverse or modify substantially the previously existing precedent. Uncertainty was an obvious result. Consequently, the Court needed to expand its agenda after each landmark decision in order to construct its new search and seizure policy and determine the extent of the revisions.

The first cases led to Wolf v. Colorado, the case that incorporated the Fourth Amendment to the states, but not the exclusionary rule. After Wolf litigants could not


155 338 U.S. 25 (1949 term); Brigham, Civil Liberties &
devine, nor the Court devise, a consistent rule regarding the strictures of search and seizure policies. The drift kept these questions on the agenda.

The need for some consistency was met with *Mapp v. Ohio* as the exclusionary rule was applied to the states. It was certain to force the Court to extend its agenda to these questions and that seemed to be what happened. Perhaps leery of possible consequences for future agendas of the Supreme Court and lower courts, the justices took the precaution of not making *Mapp* retroactive.

Evidence gathered from later cases suggests that *Terry v. Ohio* was responsible for the next surge in the agenda in this subarea. The *Terry* case upheld the common police practice of stopping and frisking "suspicious looking" persons, even if the police did not have a warrant or probable cause. Although few cases were specifically "stop and frisk" cases like *Terry*, that landmark decision was cited repeatedly, perhaps by implication, as an example of police behavior that the Court would tolerate. The loosening of restraints upon police, rather than the parameters of the specific decision, may have been responsible for increased litigant demand and agenda

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156 367 U.S. 673 (1960 term).
allocations. The largest number of search and seizure cases (119 or about five percent of the total agenda) were accepted in the 1967-1982 period, the result of the process by which "the Burger Court began to dismantle the exclusionary rule piecemeal."159 Indeed the perceived antipathy of the Burger Court toward this sanction has induced litigation, often by prosecutors who presumably would dearly love to see the ultimate exorcism of this demon.

In the closing days of the recent 1983 term, the Court issued a pair of decisions that seem destined for the landmark niche. If police can prove a "good faith effort" certain procedures can be ignored.160 In addition, if the evidence that has been illegally seized would "inevitably" have been discovered by lawful means, then the restraints of search and seizure can be loosened.161 This language is sufficiently vague enough to suggest that the Court will repeatedly be called upon to determine whether such an effort has been made.

Perhaps the most recent area of new agenda attention is the death penalty subarea. The growth appeared to be the result of the Furman v. Georgia and Gregg v. Georgia

159 Pritchett, Constitutional Civil Liberties, p. 193.
cases. In the former case, the Court held that the procedures used to impose the death penalty, as constituted, were arbitrary and capricious, and represented cruel and unusual punishment that violated the Eighth Amendment. In the latter case, the Court declared that the Eighth Amendment was more flexible, and the procedures that led to the Gregg case were consistent with the Constitution. These two cases introduced uncertainty and increased the impact of state legislatures. A series of rulings issued concurrently with the Gregg case, while designed ostensibly to focus Gregg, appeared to achieve the opposite result. As Pritchett notes, "application and interpretation of the 1976 rulings brought a stream of state death sentences to the Court for review." Virtually all the accepted death penalty cases were post-Furman and Gregg cases.

The question of the propriety of the death penalty has engendered sharp, bitter division on the Court. At least two justices, Rehnquist and Burger, have publicly stated that they would like to see the Court drastically curtail


165 Pritchett, *Constitutional Civil Liberties*, p. 246.
access to the agenda in death penalty cases. Two other justices, Brennan and Marshall, apparently vote to grant certiorari in virtually all death penalty cases and issue pointed dissents from the increasingly routine denials of certiorari by the Court. It seems that a majority of the Court is willing, at this time, to contract, if not close, the agenda to death penalty questions. A ruling during the 1983 term that did not require Texas or California courts to make proportionality reviews of death sentences might well continue to constrict the agenda in this area. The decision seems to augur for an increased hands-off policy by the Court.

In the realm of prisoner rights, the Court has long been unresponsive to the claims of those in prisons. That began to change with Cooper v. Pape, a major access opening case that gave prisoners a cause of action under what was the Civil Rights Act of 1871, Title 42, section 1983. The justices must have expected that this would create an explosion in litigation in lower courts (as it did, from 218 cases in 1966 to over 13,000 in 1980) and later in appellate courts. The effect upon the Supreme Court's agenda was pronounced, but not quite as profound.

167 Pritchett, Constitutional Civil Liberties, pp. 235-236.
169 Brigham, Civil Liberties & American Democracy, p. 111.
Two cases, *Morrissey v. Brewer* and *Wolff v. McDonnell*, that mandated certain procedures have also been important cases frequently cited in subsequent decisions. 170 Indeed, 81 percent of the prisoner rights cases have been accepted since *Cooper v. Pate* and the great preponderance of those since the *Morrissey* and *Wolff* precedents (57 of the 107 prisoner rights cases).

In civil and administrative procedures, the Court has expanded access dramatically in the past fourteen terms. *Sniadach v. Family Finance Corporation* appears to be the masterstroke that engineered access to the agenda. 171 That case and *Fuentes v. Shevin* were clear signals that perfunctory procedures would not satisfy due process designs. 172 A further stimulus appeared to be *Goldberg v. Kelly*, which Leif Carter claimed "initiated a dramatic change in administrative law." 173 The Court denied *Goldberg* the chance to become a full-fledged landmark case by distinguishing its holding in the *Mathews v. Eldridge* case. 174 In the latter case the Court did not require the Social Security Administration to grant a hearing before

terminating benefits. The case generated a dozen cases in the years since its issuance. The civil due process area is the one due process area with significant legislative impact by virtue of the Administrative Procedures Act of 1946. This makes the future of the agenda in this subarea difficult to predict because the Court has some restraints imposed upon it from external forces.

The first cases in a policy subarea are frequently landmarks, although that may not become clear until later terms. Because they are first, these cases are beginning to fill a void. The initial case can only do so much. As a result, litigants can be expected to bring similar cases in hopes of expanding or limiting the landmark. Second and related, entertaining the first case is a signal that the justices may be sympathetic to similar types of cases. Presumably demand in this policy subarea has existed for some time, the Court has now legitimated the subarea by accepting one or more cases. This appears to be the process that unfolded in the prisoner rights and civil due process policy areas.

In the Due Process area, writ large, the relationship between ideology and agenda space was most pronounced in the 1941-1955 and 1967-1982 periods. In each of those periods, as the Court became more liberal, it accepted a higher percentage of cases. In the 1941-1955 period, this
is the result of landmarks such as 

**Betts**. The jury discrimination cases, and **Wolf**. Some of those landmarks were issued by relatively liberal Courts, the others by more conservative ones. In most instances, though, it was subsequent liberal Courts that reacted to the landmark and opened the agenda to these issues.

In the final period, the dynamics are somewhat different. The ideological changes resulting from the end of the Warren Court and the increasing conservatism of the Burger Court appeared to have a considerable impact upon the agenda in the Due Process area. The major incorporation cases were issued during the Warren Court and the impact of some of those landmarks had begun to wane even before the more conservative Court became firmly entrenched. Major Burger Court landmarks included the later death penalty cases that closed agenda access. The Burger Court was not deaf to Due Process claims, by any means, but it did retreat from the apex of the Warren Court. That reduction in agenda space tended to occur as the Burger Court got more conservative. In terms of landmark decisions, the Burger Court decisions tended to retrench from the liberal decisions of the Warren Court. These new policy outputs became signals to litigants and lower courts, and created confusion in doctrine. This led to a short-term rise in the agenda, but as the Court
stabilized, the doctrine became more predictable and agenda space could be reduced, at least marginally.

**Substantive Rights**

On the whole, Due Process is largely free of legislative encroachment. Some state statutes induce the Court to hear cases, particularly in an area such as the death penalty. Most areas of Substantive Rights are similarly less encumbered by legislative prerogatives than the economic areas. Occasional state or local statutes are restrictive and demand judicial attention, but by and large, the policy involves Constitutional interpretation, and as a result, is Court created.

The Court must draw lines between the rights of the individual and the regulations that restrict those perceived rights. This poses a dilemma for the Court. The balancing of concerns often must be done on a case-by-case basis, because clear principles that can be readily applied to future cases are not forthcoming. The result is an uncertainty or confusion in doctrine that can be expected to keep litigation flowing and induce the Court to keep access open. As a consequence, in many subareas with venerable traditions there is no single evident landmark case. By the same token, the nature of First Amendment concerns is such that many cases are important. In addition, precedents seem to have a longer productive life.
Years after the decision had been issued strands of its holdings are resurrected to explain or distinguish a new case.

Perhaps the one clear landmark case is Gitlow v. New York, the case that incorporated the First Amendment protections of speech and press to the states.\[175\] Many of the First Amendment cases to crowd the Court's agenda over the next half-century involved state restrictions upon individual rights. The Gitlow decision predated the time period of this study, but it was still cited as controlling for some freedom of speech cases and an occasional extension of the incorporation doctrine to another Amendment.

In the freedom of speech subarea, there is no predominant landmark case. The tenor of decisions and the imprecise standards are perhaps responsible for the ebbs and flows in the agenda. The freedom of speech subarea actually included some areas of "speech plus conduct" and more specialized forms of speech. The Court expanded the purview of the agenda to other areas in the last decade. No single cases escalated agenda space, but the symbolism attached to the incremental expansion may have encouraged litigants to attempt to stretch the free speech agenda.

\[175\] 268 U.S. 652 (1925).
Free exercise of religion is another area sans a dramatic landmark decision. Like freedom of speech, exercise questions involve individual concerns and lack a specific, controlling standard. Questions involving the establishment of religion do, however, beget standards that serve as landmark precedents.

The early Constitutional decisions did not stimulate the agenda in the establishment subarea. The initial landmark case appears to be *Engel v. Vitale*, the misinterpreted school prayer decision that prohibited state agents from composing a prayer because that would represent an establishment of religion.\(^ {176}\) Surprisingly, perhaps, the case did not cause a quantum leap in agenda space. That had to await two further cases involving state sponsored financial assistance to religiously affiliated schools. The two cases that sought to define some standards concerning the establishment of religion were the *Lemon v. Kurtzman* and *Committee for Public Education v. Nyquist* decisions.\(^ {177}\) After these two cases, the Court accepted 19 establishment cases (51.3 percent of the total number of establishment cases heard in the 1933-1982 period) as compared with nine cases accepted after *Engel*. Explaining the standards and applying them opened the agenda. Further cases needed to be accepted to determine whether the tests

\(^ {176}\) 370 U.S. 421 (1961 term).
\(^ {177}\) 403 U.S. 602 (1970 term) and 413 U.S. 756 (1972 term).
for religious establishment had been met.

The search for landmarks in the speech and religion areas is confounded by the longevity of the areas. In other more recently created Substantive Rights policy areas, the landmark decisions are more readily accessible. In the libel area it is clear that New_York_Times_v._Sullivan was the critical wedge that opened the agenda. This case raised the standard of libel so that public officials were entitled to damages only if they could prove the allegedly libelous statements were false and made with "actual malice." The Court had accepted only ten libel cases in the three decades prior to the New_York_Times case and more than that in the three terms following the landmark, as the Court attempted to decide how far to extend the ruling.

Perhaps the certainty the Court seemed to impose upon the area in the cases following New_York_Times reduced the agenda. A doctrinal modification that separated the alleged victims into public and private citizens and lowered the standards for legal action for the latter changed that. Gertz_v._Robert_Welch_Inc. was in the vanguard of, and perhaps the cause of, the second surge in the libel agenda. Twenty-four libel cases were accepted by the Court in the decade following Gertz, the highest

volume of activity in this subarea.

Perhaps the clearest evidence of the role of landmark cases occurred in the obscenity area. *Roth v. United States* began to enunciate a standard concerning the limits of protected expression. The Court needed to accept a number of cases to flesh out the vague doctrine. After fifteen years of wrestling with questions involving a definition of obscenity the Court issued the *Miller v. California* landmark case. The *Miller* decision appeared to be designed to remove the Court from this policy area. The Court turned the task over to local officials to set "contemporary community standards." This objective did not appear to be met, however. In the term in which *Miller* was decided and the one immediately following the number of obscenity cases climbed dramatically. Many of these cases were accepted concurrently with *Miller* and received *per curiam* or memoranda decisions. A brief flurry of cases was also accepted in the terms immediately following the *Miller* decision. The Court may have taken the later cases to show its resolve. If *Miller* was designed to close the agenda, it was ultimately successful, as the cases accepted have slowed to a trickle in recent years. Table 34 shows the ebbs and flows tied to the major landmark decisions.

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181 413 U.S. 15 (1972 term).
Table 34

<table>
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<tr>
<th>Period</th>
<th>Number of Cases Accepted</th>
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</tr>
<tr>
<td>Roth-1966</td>
<td>29</td>
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<td>1974-1976</td>
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</tr>
<tr>
<td>1977-1982</td>
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The interplay of ideology and landmark decisions is clearly demonstrated in the libel and obscenity policy subareas. The key landmark decisions, *New York Times* and *Roth*, were authored by relatively liberal Courts, but the large scale growth of the agenda in these areas occurred as the Court became more conservative. This is especially evident in the obscenity area. The Burger Court was involved with these types of cases from its inception until two years after the *Miller* decision. Most of these cases were remnants of the *Roth* precedent. There were still well-entrenched members of the Warren Court on the bench, and their influence may have kept the Court active in this area. This would help explain why Substantive Rights cases achieved more agenda space as the Court became more conservative (1950-1964 and 1959-1973 periods).

The strength of the relationship was reduced and the direction reversed in the 1967-1982 period. The reason was that the Burger Court was able to exert its control over
these areas. The more conservative Court issued relatively conservative landmark decisions, *Gertz* and *Miller*. Both cases resulted in immediate expansions, but ultimate contractions in the agenda in these subareas. As a result, as the Court got more conservative, the agenda was reduced in the libel and obscenity subareas.

In the area of abortion policy, another recent subarea to achieve agenda status, the classic case was, of course, the *Roe v. Wade* decision.\textsuperscript{182} That case and the concurrent *Doe v. Bolton* decision were responsible for opening the agenda for abortion cases.\textsuperscript{183} As Charles Johnson and Bradley Canon point out, a footnote in the *Roe* decision left many anticipated questions related to the rights of individuals in this area unanswered because they had not been raised. The Court's recognition of these issues suggests it fully expected to receive and decide further abortion cases.\textsuperscript{184} Legislative reaction to the Court's decisions has affected and should continue affecting the Court's ability to construct its agenda in the future.

\textsuperscript{182} 410 U.S. 113 (1972 term).

\textsuperscript{183} 410 U.S. 175 (1972 term).

In hindsight it is quite evident that a number of important cases had an impact upon future agendas. In many instances it appears clear that the justices had at least an inkling of what would transpire as a result of the introduction of a controlling precedent. The landmark case is one means of setting conditions for future agendas. Another means is negative: a Court issuing confusing decisions or introducing uncertainty into doctrine is leaving itself vulnerable to litigation. The Court is thus creating an environment that presses it to accept cases in order to resolve inconsistencies.

It is important to issue a caveat: the search for so-called landmark cases yielded quite a few impressive candidates. The discovery of some number of these landmark cases should not cloud the fact that they are not omnipresent. They are conditional and can have important implications for the agenda. They do not explain all the variation in the agenda. Under ideal circumstances they can suggest why certain patterns unfold.

If justices do build their agendas in a prospective fashion, then the landmark decision can be an important tool to achieve that purpose. First, even when the Court underwent ideological or personnel changes, the new Court was often constrained by the landmark decisions of its
predecessors. It could expand or contract the landmarks by distinguishing present cases from the precedents. If that was not sufficient, the existing landmark could be overruled, and a new landmark left in its place. That new case would often reverse old policy and lead to other similar cases designed to purge the remnants of the old landmark and build the foundation for a new one.

In addition, in most policy areas the justices have the opportunity and ability to issue a decision that could influence the flow of litigation and present them with the chance to further the construction of policy. Conditions for the creation of landmark decisions vary from policy area to policy area.

In general, the Court seems freer in some areas to construct its agenda from the landmark cases than in other areas. Although it is not an inviolate rule, the Court seems better able to control the policy areas in the realm of individual rights and more constrained in the large economic category. Issues such as due process and First Amendment concerns are often less complicated by legislative encroachments. In addition, the decisions often require Constitutional interpretation, and the Court is seen as the legitimate forum for such determinations. The Court is left to its own devices in these areas, and the ebbs and flows in the agenda should be a function of the Court's own agenda building.
In the economic arena the picture is different. Congress is intricately involved in policy areas such as United States Regulation and Internal Revenue. The so-called "political branches" are, perhaps, better suited than the Court to the task of allocating economic values. This means the Court's actions are often interstitial, because legislation frames the questions brought to the Court. The Court is thus constrained by external factors that may force, or at least lead the Court, to expend agenda resources the Court might believe are better spent elsewhere. The justices must realize that their decisions may bring a Congressional response that may well create further claims upon the agenda.

In historical terms, the "switch in time" was manifested by landmark decisions in many of the economic areas. The justices reversed the economic decisions of their predecessors. They had to undo the work of the previous Court before they could pursue their own designs. Many of the decisions that reversed past policies appeared to create an initial burst of agenda activity. That would be expected, since a dramatic change in policy direction would induce uncertainty. Uncertainty is a condition that should stimulate litigants to bring, and justices to accept, more cases in order to clarify the doctrine.
In all the economic areas, except United States Regulation, the cases following the landmark decisions eventually introduced some elements of consistency into the policy area. That may have led to a purposive reduction in agenda space allocations. A string of consistent Federalism decisions, for example, reduced the need for the Court to accept these types of cases. On the other hand, the justices may simply have grown weary of economic cases. The Erie decision certainly seemed to be designed to purge Ordinary Economic cases from the agenda.

The individual rights area was relatively barren in the 1930's. The dearth of cases meant there was little entrenched policy to hinder the justices. They did not need to raze old policies before creating new ones. The Court had the capacity to make policy in these areas and acquired, perhaps through membership changes, the will to address these areas. In such undeveloped territory, the justices had essentially free rein. The wedges often used to open these policy areas were landmark decisions.

The reversal of the economic policies and the subsequent abandonment of these areas were part of an agenda realignment and a new paradigm. If there was one general landmark decision that set the tone of the new paradigm, it was perhaps the United States v. Carolene Products case. Footnote four was a general signal of the path the Court
was ready to pave. Footnote four essentially said that Congressional statutes dealing with economic matters would be presumed constitutional, while civil liberties issues would receive more exacting judicial scrutiny. The decision actually transcends the notion of a landmark decision because its impact was not limited to any specific area, but was spread across the entire agenda. That decision was issued as a vanguard of the new order.

Since that new paradigm, the High Court has increasingly been portrayed as the guardian of individual liberties and the custodian of the Constitution. The excesses of democracy demand protections for individuals, and legislatures are not charged with those responsibilities. This leaves these fields to the Court, and it is much less constrained in its agenda building and policy-making in these areas.

In some senses, the changing role of the Court had some impact upon the Court's capacity to control its agenda. In the economic areas, the Court conceived of its role as a fundamental policy-maker until the late 1930's. The Court seemed to be considerably less deferential to Congress in this early period than more recently. As the Court's role changed, its capacity to control the agenda was reduced. This appeared to be the design of the Court and was accomplished through a switch from Constitutional decisions in the economic area to statutory decisions.
Once the Court had asserted itself in the individual rights domain, however, the justices recast their roles and increased their capacity to control the agenda in this area. As a result, most of the landmark decisions are found in the individual rights areas. Many of these landmark cases were agenda openers. The Court appeared to use landmark cases to change the direction of its policy-making and to set the conditions for future agendas. Landmark decisions played a major role in the transition, even if the justices did not fully understand the implications of the Constitutional revolution while it was unfolding.

Specific cases became the landmark decisions that would govern subareas. The periodic landmarks were cues to litigants. Slowly the justices would get the petitions they sought in the policy areas they wished to address. The result was a relatively steady incremental growth in individual rights. Within the policy areas and subareas, however, the fluctuations were often dramatic.

While the justices may not have consciously planned this explosion, the inexorable diffusion suggests that the justices were willing to use the agenda to achieve their ends. The landmark case appeared to serve as the clear impetus in a number of areas.
Conclusions

This synthesis is based upon tendencies that suggest when landmark decisions are likely and what impact they should have. The findings suggest that landmark cases are used as tools for future agenda building. They are outputs that create the probability of feedback. The feedback takes the form of another case in a policy area that the justices may want to address systematically. If landmark cases are the tools that they appear to be, then they are a signal that the justices want more cases of this type or have exhausted the area. If they exist as the tendencies imply, then the Court has a means of reducing its passive reliance on external forces. To the extent that landmark decisions have an impact, justices can further their policy-making designs at the critical agenda stage.
Chapter VII
TOWARD A THEORY OF SUPREME COURT AGENDA BUILDING

The process of case selection is one of the least understood aspects of the judicial system. This study addresses the process of agenda-setting from a long-term, policy area perspective. In this respect, it is considerably different from past research that addressed individual cases. The conception of agenda-building offers a look at the whole, rather than a seemingly disjointed view of single cases. The change in perspective is an attempt to gain a more comprehensive view of how justices decide what to decide, and the trends in those decisions across time.

A number of analyses have been utilized in this study, but a major question remains: what is the nature of agenda-building in the Supreme Court? That question cannot be answered conclusively, but the evidence gleaned from the various analyses of preceding chapters does suggest the existence of certain phenomena. The results, when synthesized, can perhaps yield tendencies, hypotheses, or the basis of a theory of Supreme Court agenda-building.
The evidence of agenda building

As noted, past judicial agenda literature focused on the selection of individual cases. The question that needs to be addressed is whether the construction of the agenda goes beyond the case to the policy area. In other words, is there evidence that justices are more systematic in their agenda building by working within policy areas rather than through individual cases? Furthermore, there are questions concerning the process of agenda-building and its impact upon the selection of individual cases. The ultimate concern is one of the Court's control over the agenda. In theory, the Court has virtually complete freedom to hear any cases it desires. In reality, the incremental flow implies that some factors are constraining the Court. This involves the notion of rationality and whether the Court can build its agenda in such a fashion.

The two forms of factor analysis, one based on the terms and the other on the policy areas, the analysis of Court membership, and the use of landmark cases appear to offer partially different implications for the nature of agenda construction. The factors based on the terms suggest that agenda building may not be an overly rational process. The analysis shows a clear fade from the factor labeled the early term factor to the more recent factor. With a few exceptions, the pattern or trend is incremental and implies
an autocorrelated process. Such a process intimates that the Court is not working with a clean slate each term. The agenda construction for the term in year $x$ is a function of the agenda in year $x-1$. This limits the amount of leverage, and in some senses, the amount of rationality, that can be imputed to the justices.

If the focus is changed to the policy areas, it is possible to interpret the process in a somewhat different manner. The factors are consistent in one important respect: certain types of policy areas tend to cluster together while other groups of policy areas align together. Two basic blocs tend to reappear in varying forms: individual rights and economically related areas. Furthermore these larger areas seem to be orthogonal to one another. That is to say, the areas are inversely related. Deciding to hear a preponderance of cases in one area means less attention is granted to the other major area. Throughout all the factors the individual rights and economic areas gravitate to different poles. This might intimate that some form of rational agenda construction may be present. The tradeoffs are too consistent to ignore.

The ideological composition of the Court appears to have some impact upon the agenda in some policy areas, during some periods. The preponderance of evidence gathered in this study, however, suggests that the effects of ideology
occasionally might be blunted or misleading. Justices are often constrained by the work of their predecessors. Members of the Court may not be able to gain control over the agenda at the outset of their tenure.

On the other hand, landmark cases can be used by justices to gain a measure of control over the agenda. A major decision that changes the nature of doctrine may lead to similar cases. Deciding those subsequent cases allows the justices to pursue their policy designs. The use of landmark cases to signal litigants allows the Court to reduce the problems associated with the need to be passive and wait for litigants to petition the Court. On the whole, the analysis of landmark cases suggests that the justices can construct their agendas with some degree of rationality and purpose.

The evidence provided by the study could be interpreted in such a fashion as to imply the Court's ability to build its agenda in what approximates a rational manner. Yet that very same evidence can be viewed from a different perspective and the implications would be significantly different. The Court could be seen as a captive of its previous agendas and constrained in the freedom it has to construct its agenda rationally. The question is which of these scenarios more closely approximates the dynamics of Supreme Court agenda building, if either does.
TOWARD A THEORY OF SUPREME COURT AGENDA CONSTRUCTION

In its selection of cases, the Court seems to have a great deal of discretion. The volume of demand seems to insure that in virtually every policy area the Court can find the cases it desires. On the other hand, the steady incremental growth of individual rights and the corresponding decay of economic issues seem to belie the Court's apparent ability to construct its agenda with few constraints. This might suggest that either the Court is not as free to build its agenda as it might seem or the Court voluntarily surrenders some of its freedom.

The control the Court exerts over its agenda appears to vary considerably. The reasons for that variation revolve around three general themes, which require some attention. First, external events have occasionally conspired to limit the Court's agenda-building capacity. Second, the judicial process also appears to confound the building of the agenda. Perhaps even more significantly, the Court seems to impose some limits on its own ability to construct its agenda. The Court chooses to exert less control than it possesses. The impact of these forces waxes and wanes, and these forces may impair the Court's ability to control its agenda. Before exploring those possible limiting factors, the extent of the limits, and the Court's attempts to reduce their impact, it is necessary to lay out the basic
Elements of Control

While the Court's control over its agenda seems limited because of the incremental flow, in actuality, the Court's ability to construct the agenda may be prospective. In other words, justices may be able to lay a foundation for future agendas. The ideology of the Court is seen as a cause of agenda-building, and leads to concomitant changes in the shape of the agenda. Certain tools are used to create conditions for future agendas. Recrudescent agendas and landmark decisions are the tools used to control the agenda-building process.

The impact of membership (as seen through ideology) upon agenda building appears to be moderate. During some periods, ideological changes create changes in the nature of the agenda in some areas. More generally, the justices seem relatively free to build their agenda during some periods, in some areas. At other times, however, justices seem constrained by the remnants of past agendas.

Justices with ideological predilections and policy designs may not be afforded the opportunity to pursue their goals until they clear away the legacy bequeathed by their predecessors. A recently emergent bloc might accept the same cases as a previous bloc, but with the explicit
purpose of reversing the policy directions of prior decisions. The effects of ideology upon the agenda, in terms of significant agenda change, do not become evident immediately. A relatively liberal Court opened the agenda for individual rights, but the bursts of civil liberties cases did not occur until later, when the Court was more conservative. The effects of ideology were prevalent, but confounded by the dynamics of the agenda. Ideology opens the agenda, but a later Court, with a different ideological balance, is still confronted with cases like those its predecessors decided.

One tool the justices utilize to further their goals is the landmark case. In some areas, during some periods, the justices can prospectively build their future agendas or at least encourage litigants to bring similar cases through landmark decisions. These landmark cases and their doctrinal progeny often have an active life that extends beyond the tenure of the Court that issued the decision. A decision that changes the nature of law or creates elements of uncertainty or confusion induces future litigants to provide the vehicles by which the justices can continue to make policy or reduce the uncertainty.

Another tool is the recrudescent agendas. These agendas represent a relatively sharp break from the incremental pattern, but in the same direction as that flow. It seems
as if some of the cases the Court had been seeking had found their way to the agenda. The terms subsequent to the recrudescent agendas represent a retreat back toward the incremental flow, but at a different level than before. In the aftermath of the recrudescent agenda, more signals are sent and new areas are explored. The agenda dynamics are modified.

While the shape and form of the recrudescent agendas may not be planned by the justices, there does appear to be some design to these agendas. The sudden growth in the individual rights agenda is matched by a parallel decline in the space granted economic cases. That may suggest one of two things. First, the individual rights petitions for Court action are qualitatively better than in other years. Second, the abandonment of some economic subareas frees agenda space for further individual rights gains. Perhaps it is a bit of both. The cases may be better because they are responses to the signals coming from the Court. The process may take a few terms. Indeed, few of the landmark decisions were issued during recrudescent agendas. It is more likely that the landmark occurs a few terms before the subsequent recrudescent agenda, at which point the effects of the landmark become more pronounced.

Recrudescent agendas serve a few important functions. They frequently signaled an increased commitment to
individual rights. Particularly in the terms after the realignment these agendas were important reinforcing agents for lower courts and litigants. In a sense, recrudescent agendas represented opportunities for the Court to fulfill the prophecy that landmarks and earlier agenda changes seem to portend.

The recrudescent agenda is akin to Kingdon's concept of a policy window, in that these agendas may be propitious opportunities for the Court to pursue its designs. In the terms before such agendas, the Court may be constrained by the need to settle questions in certain areas. The Court may be in a position to clear certain policy areas off the agenda thus paving the way for a recrudescent agenda. The decisions proffered during such an agenda are grist for the mill. Litigants see these decisions and bring further cases. These cases multiply and are manifested in another recrudescent agenda. As Hellman noted, case selection proceeds in fits and starts. Perhaps the recrudescent agenda allows the Court a somewhat greater degree of coherence in its agenda construction because agenda space is more available.

The patterns on the second and third levels also suggest a degree of purposiveness in that, periodically, the Court seemed able to make significant adjustments in its agenda. The opening of a policy window appears to be the result of
two basic strategies that the justices appear to follow. These strategies can be labeled the expansion of concerns and the dispersion of attention. The expansion of concerns might suggest what transpired on level two. The Court began to exert its prerogatives in the Due Process area. Substantive Rights received attention a bit later, followed by Equality. In the most recent terms, the Government as Provider area has achieved a larger portion of the agenda.

It seems that Due Process and Substantive Rights created conditions for Equality. The Court's sympathy for the first two areas may have led litigants to push into the Equality area, or served as a consciousness raising experience for the justices. The later areas were outgrowths of the new paradigm once that paradigm took hold and the foundations were built.

The expansion of concerns could suggest a continuum for the justices. In some senses, these might be viewed in terms of degree of difficulty. Arguably, the Due Process and Substantive Rights issues were the easiest to deal with. These areas had a historical basis and cases were available. In addition, the Constitution provides a relatively clear basis for these protections (although disagreements over the extent of those rights endure). Equality, however, is somewhat different. There has been considerably more controversy over the Constitutional basis
of these rights. Civil liberties offer protections against governmental actions. Civil rights, the basis of the Equality domain, requires a more active government to insure equal protection.\footnote{Archibald Cox, The Warren Court: Constitutional Decision as an Instrument of Reform (Cambridge: Harvard University Press, 1968), pp. 5-24.}

On the third level, the process might better be labeled a dispersion of attention. The justices seemed to start in a subarea or two within each policy area, and spread their attention to surrounding subareas. At this level, the incremental pattern is stripped away to reveal significant ebbs and flows. This might suggest a greater opportunity for the Court to decide when and where to expend its agenda resources. Indeed, landmark cases in one subarea were often used as wedges to open related subareas.

Examples of the dispersion of attention abound in the major areas. Once the Court issued the decisions that incorporated amendments to the states, Mapp, Gideon, and Miranda, each of the subareas attached to those decisions flourished. Subsequently, other subareas followed, probably because of the Court's perceived willingness to entertain those claims. The dispersion of attention later spread to prisoner rights and civil due process protections.
Similarly, in the Substantive Rights area, the basic concerns dealt with religion and speech. Once the Court legitimated these areas, cases involving other forms of expression and "speech plus" were presumably brought to the Court and accepted for decision. Rights of assembly and press and concerns with alleged obscenity flourished later. Finally, the expansion of the privacy doctrine was among the most recent innovation.

In the Equality area, as Chapter III demonstrated, the dispersion also appeared to be evident. The Court began by extending the rights to education and voting and subsequently moved to accommodations and employment. In terms of group concerns, race was the first priority. Perhaps sensitized by those cases, later Courts extended equal protection to women, illegitimate children, and other groups.

The expansion of concerns and the dispersion of attention were the apparent impetus behind the recrudescent agendas. The early recrudescent agendas were the result of the Court adding Substantive Rights or Equality to its growing Due Process agenda base. The later recrudescent agendas resulted from the dispersion of attention. The Court added cases from subareas within each policy area. These appeared to be conscious expansions implemented when the appropriate policy windows opened and agenda space was made available.
The impact of Court membership, landmark cases, and recrudescent agendas, the expansion of concerns, and the dispersion of attention seems to be more prevalent in the individual rights areas. The conditions are more propitious in that domain, because external policy-makers are less likely to interfere in these policy areas. Part of that reluctance to intrude is predicated on the fact that many of the cases involve Constitutional interpretation, the province of the Court.

**External Factors Affecting Agenda Building**

To the extent that external factors influence agenda-building, the Court's ability to control its own agenda is impaired. A basic part of the process is the manner in which cases are brought to the Court. The Court needs litigants to bring the proper cases. There are times when the proper cases are not available and the absence of those cases checks the Court's agenda building prowess. The justices may have a preconceived notion of a certain policy they wish to implement, but the vehicle is not present.

Occasionally, the lack of cases may be more sweeping and profound, and may slow the Court to a virtual crawl. There was only one realignment, and it carried with it a new agenda paradigm that elevated individual rights and opened new areas for the Court to explore. While the Court may
have been poised to enter these new areas, the cases were apparently not forthcoming in sufficient numbers. The Court began to signal its intent, but it took potential litigants a while to understand the Court's change in direction.

In 1947, individual rights cases finally began to gain a significant portion of the agenda. That was the same year that the number of cases the Court accepted declined. The question is whether the two are related. There is a plausible connection, though there is no way of proving it. The sharp decline in the number of cases accepted may represent the exhaustion of the economic areas. If the realignment did create a new paradigm, then it is possible that the dropoff in accepted cases may have resulted from the type of cases brought to the Court. In light of the changed priorities and the presumed desire of justices to reduce allocations for economic cases, it may be that the preponderance of the cases were undesirable.

The slow change in the agenda may partially be a function of slow changes in litigation. It is quite likely that the relatively few individual rights cases that were initially brought to the Court did not raise significant questions, were relatively unsophisticated, or were generally deemed deficient in some manner by the justices. This concern with the quality of cases raises an
interesting possible explanation for a dramatic, short-term reduction in the size of the agenda. This was a reduction that occurred despite a basic stability in the Court's personnel and a continued growth in the volume of petitions brought to the Court.

One might assume that the 3000 to 4000 petitions annually brought to the Court must, by sheer volume, contain all the cases the Court could possibly want. This research seems to imply that that may not be the case. The effects of the new paradigm upon the litigants may have been felt for a dozen years in the Court. The justices may also want to move in different directions or go further, but do not have the cases to do so.

The desire of the Court to achieve certain goals of this type depends upon obtaining the proper cases. Landmark cases were used by the justices to signal their intent to potential litigants who provide the next round of cases. When these landmarks reach fruition and the Court has the petitions it wanted, then it can fulfill its policy designs and role demands. The broadening of landmark cases and Court signals may lead to what might be labeled the "expansion of concerns" and the "dispersion of attention."

In the areas of Due Process, Substantive Rights, and Equality, the dispersion of attention governed the policy areas. The Court needed some assistance in broadening the
scope of its protection or rights. Aid came from interested groups reading the entrails of Court decisions and eager to continue probing the Court for future gains. The American Civil Liberties Union, the American Jewish Congress, the National Association for the Advancement of Colored Persons, and more recently the National Organization of Women have followed a variety of strategies designed to further their policy goals. It seems apparent that these groups look to the Court for signals through landmark decisions, membership changes, or the composition of the agenda, and bring further cases based upon their estimates of the Court's proclivities.

Empirical evidence suggests that the identity of the petitioner is an important cue for the justices sifting through the petitions for certiorari. This may be due to the fact that policy-oriented justices agree with the goals these groups espouse. Their landmark decisions and continued willingness to accept these types of cases

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107 Baum, The Supreme Court, p. 91.
suggest that the determinants of the agenda are, to a large
degree, internal, and the messages are sent to receptive
audiences who can provide the petitions.

The Court's perceived affinity for certain petitioners
especially extends to the United States government. As a
litigant or with amicus curiae brief in hand, the Solicitor
General has an unrivaled degree of success in getting cases
accepted and in winning on the merits. In the larger
scheme, however, the Court may be conditioning the
government by the types of cases it accepts. The
government has frequently been involved in liberal cases
extending civil rights and civil liberties, and
consistent with the Court's post-1937 role.

These groups and the government bear some responsibility
for the dispersion of attention in the individual rights
sector. Ultimately, however, it is the Court's decision to
venture further, to fan out in different directions, and to
meet the supplicants' demands that determine the pace and
course of the dispersion. This seems to be the case in the
individual rights area, less so in the economic realm.

188 Stephen Puro, "The United States as Amicus Curiae," in S.
Sidney Ulmer, ed., Courts, Law and Judicial Process
Scigliano, The Supreme Court and the Presidency (New
Selection in the United States Supreme Court, pp.
86-92. Provine and Scigliano suggest that the
government is most successful when the cases it selects
fit the Court's designs.
In the United States Regulation area, the influence of Congress confounds the Court's influence. The dispersion of attention in this area seemed tied to major legislation such as the Internal Revenue Codes, Bankruptcy Acts, the National Labor Relations Act, the Fair Labor Standards Act, and the antitrust amendments to the Clayton Act. Hellman implies that the Court still has the ultimate say in many cases. Long-standing statutes, like the Capper-Volsted Act that regulated agricultural marketing\textsuperscript{189} and the Sherman Antitrust Act, lie fallow for many years. A later Court may change the interpretations of the statute.\textsuperscript{190} In addition, the identity of the petitioner, often the government, may have helped to keep the Court involved. Presumably, the Court could have declined intervention, but it apparently preferred to work at the margins.

The impact of the external determinants upon the Court's agenda appears to vary, and as a result, so does the Court's ability to control its agenda. The evidence shows that the Court feels more external pressure in the economic realm than in the individual rights areas. Since the late 1930's, the Court has moved out of the economic area in a significant way. The Court was increasingly reluctant to


\textsuperscript{190} Hellman, "The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket," pp. 602-603.
use Constitutional interpretation in these areas. It turned instead to statutory interpretation. In doing so, the Court recognized the constraints imposed by Congress.

Congress is a perpetual factor in the Court's environment, but the Court can reduce its impact. The Court can often choose when to intervene, when to confront Congress, and when to capitulate. Congressional impact is conditional in two respects. It is important when the Court allows it to be. In addition, Congress often serves as a leader in economic areas. Congress first gets involved in a policy area and the Court confronts the issues later. The regulatory area, in general, and specific areas such as environmental and labor policies are examples of Congressional initiation.

A more pressing external factor is the lower courts. Lower courts provide the cases that may get to the Supreme Court. As the last resort, the Supreme Court must pay attention to the policies emanating from the lower courts. Despite the external nature of this factor, the role the Court defines for itself includes its oversight of lower courts. The Court seems to feel the need to have consistency in the law and may accept cases based upon that need.

In general, the role of external factors may depend upon the Court's proclivities. Some external influence is
unavoidable, but the Court can probably limit the impact if it wants through landmark decisions and the Court's role. Landmarks can initiate litigation. The role of the Court can be used as a justification to close loopholes left by Congress and settle judicial inconsistencies.

**Self-Imposed and Procedural Limits on Agenda Building**

The most important factor in agenda building would seem to be the justices' policy designs. As the case selection literature maintains, justices accept cases in order to get to the merits of the issues. Part of the incremental agenda change can be tied to ideology. Despite changes in the ideological balance of the Court, the agenda is slow to change because the new order accepts the same types of cases as its predecessors, ostensibly to reverse the direction of policy. A new ideological breed might accept the same cases as its predecessors, but do so to advance very different policy goals.

Agenda-building is not predicated solely upon policy designs, however. It appears that the judicial role is a crucial intervening force in agenda building. The judicial role seems to manifest itself in two basic ways. First, the role was marked by an active attention to individual rights and restraint in economic matters. This was part of the new paradigm. The justice's concept of the Court's role is presumed to be different from, and more
encompassing than individual policy designs or ideology. The role is a larger philosophy that includes ideology, but not exclusively. This role would have implications for agenda building in that individual rights cases were increasingly granted special status, while economic cases were slighted.

In more general terms, the judicial role means consistency in the law, attention to precedent, and a need to keep order over the judicial sector. Considerations of this type appear to influence agenda building. The move toward an individual rights agenda was tempered by a need to put the economic issues in order. The Court needed to stay with the same types of issues to secure doctrinal consistency, and to fill the gaps in policy. To cite one example, Hellman noted that the tenor of the Internal Revenue decisions left a consistent message: the Court was tired of these issues. Yet in recent terms, the Court accepted some Internal Revenue cases. The overwhelming majority of these cases were accepted because of conflicting decisions in the circuits. The Court's role induces it to expend precious agenda space that policy

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191 Provine believes that the justice's conception of the Court's proper role helps determine case selection. Provine, *Case Selection in the United States Supreme Court*.

designs would reserve for other issues. In short, the role of the Court thus appears to be an omnipresent limitation the Court imposes upon its agenda-building.

The judicial process also constrains the Court. The finite amount of annual agenda space available is grossly disproportionate to the demand for Court action. In principle, the flood of petitions should liberate the Court, and allow it to accept whatever cases it would desire. The actual impact may be quite different, however. The Court's screening of as many as 4000 cases takes a great deal of the justices' time. Time constraints may militate against sudden agenda change. The justices might be led to accept the same types of cases as in previous terms to reduce their workload a bit. The need to sift through the mountain of petitions might induce the justices to concentrate upon issues they are familiar with or issues needing some attention to flesh out doctrine.

The various devices the Court uses to speed the dynamics of the agenda, the recrudescent agendas, the expansion of concerns, and the dispersion of attention, occur infrequently. The time constraints on the Court may help explain why these devices are manifested only occasionally. The Court must often stay within the confines of past agendas. The familiarity with issues reduces the amount of time the justices need to spend on each individual case.
The Court can then hear more cases. The expansion and dispersion usually occur one subarea at a time, because the Court may only be able to address a small number of unprecedented issues at a time.

Hellman confirms the procedural problems confronting the justices. "A Court that can decide no more than 150 cases with full opinion has little choice but to address most topics in fits and starts, and only when particular exigencies—head on conflicts, threats to important Government programs, and the like—require it."\(^{193}\) In essence, Hellman implies that the Court's rationality and coherence in agenda building are impaired. It is difficult to plan a strategy that would allow the Court to attack policy areas systematically under these conditions.

**Conclusion**

The Court can be quite rational and exert some measure of control over its agenda. That rationality requires certain conditions. Control over the agenda is never total, because no court works with a clear slate. Even something as fundamental as an agenda realignment or a new paradigm takes a significant amount of time to reach fruition. The dynamics of the agenda exert an inertia that cannot easily be altered. Changes do not occur rapidly; rather, justices must set them in motion, and then the dynamics of the

agenda largely govern the pace of the changes. This is true of landmarks, recrudescent agendas, or realignments. The influence in these instances is manifested in the creation of an inertia that requires later Courts to work within prespecified boundaries.

This might suggest that "control" is too strong a description, and that "influence" is more appropriate. By and large, that is probably true, but occasionally on the third level, elements of control may be evident. The abandonment of certain fields, often economic, implies some control. Short-term changes in priorities may also suggest control. The Court seemed to make tradeoffs on occasion. Freedom of religion cases were seemingly ignored, while concerns with free speech captured agenda space. Later, the reverse seemed to occur. Slighting one area of Due Process to incorporate another also raises questions of conscious choices and perhaps control.

The element of control appears, in a seemingly contradictory way, to be a result of the Court's overall lack of control. It is tied to the fact that the agenda is finite. When less controllable items must be on the agenda, that pares the free available space justices can use to pursue their goals. As a result, hard choices and tradeoffs must be made. Those show up as control over at least a small portion of the agenda.
Congress and other political actors, as well as litigants, can have an impact upon the Court and its agenda building. The Court can minimize this interference or in a more positive vein, use its agenda to influence those external forces. The Court can influence litigants through the tenor of its decisions. The Court can reduce Congressional impact by retreating from statutory and economic areas, as it did. The process also constrains the Court. The Court lacks the ability to screen cases as carefully as it might, due to the volume of demand. The level of demand limits the Court's capacity to build its agenda in a completely coherent fashion.

The major restraint on the Court's agenda building is still the Court itself. Earlier agendas restrict the freedom available to later Courts. The essence of control or influence over the agenda seems to be more prospective than immediate. That is to say, acceptance of cases and the decisions on the merits have consequences for future agendas. The influence on immediate agendas is more limited because justices have to work within the boundaries set by others. The Court is quite free in theory to shape the agenda to its liking, but the Court appears to narrow its options consciously.
THE IMPLICATIONS FOR THE CASE SELECTION AND AGENDA RESEARCH

Past research has advanced our knowledge of the case selection process. The intent of this research is a bit different. First, the concentration is on terms and policy areas. This study assumes a macro-perspective of the larger process of agenda-building. It is necessary to evaluate how the assessments of agenda-building in this study relate to the case selection literature.

The case selection literature reveals a number of factors that contribute to the selection of individual cases. That research does not address agenda-building, however, unless one accepts the premise that the Court's agenda is a mere summation of the discrete cases the Court accepts. The evidence in this study disputes that premise decisively. This research seems to show that there is an agenda dynamic at work, and that a more complex process governs the selection of which cases compose the agenda.

The hypotheses suggesting what constitutes agenda-building hold implications for the case selection studies. The most basic research has identified cues, or shorthands, that prompt a justice to separate petitions with such cues from the mountain of petitions without them. Tanenhaus found that dissension in lower courts, civil liberties issues, and the presence of the United States as litigant served as viable cues in the 1947-1958 period.194

194 Tanenhaus, et al., "The Supreme Court's Certiorari
The results of this fifty-year analysis of agenda building suggest that the existence of these cues may be feasible.

Civil liberties issues flourished with the new paradigm. If that paradigm did indeed change the way cases are viewed, then the existence of a civil liberties issue may have been a signal for justices to take a closer look at the petition. If concepts such as the expansion of concerns and the dispersion of attention have any viability, then the existence of cues may penetrate to the second and third levels. The justices may look for Due Process or Substantive Rights cases or for search and seizure or establishment of religion cases. This appears to translate to a civil liberties cue when, in actuality, the cue being used is the policy subarea.

On the other hand, the presence of an economic issue did not appear to be a cue for justices in their case selection. The results of this analysis support that finding. Economic issues declined, and the perception that the Court would defer to the elected branches in these areas might actually suggest that the presence of an economic cue was a deterrent for the Court.

The presence of the United States as litigant is also a plausible cue. The one economic area that did not collapse after the institution of the new paradigm was the United States Regulation area. The government was a party in most

of these actions and often the moving party, particularly in the early years of this time period. The government was also involved in civil liberties and civil rights cases, increasingly in favor of the individual.\textsuperscript{195} Governmental actions against individuals would also merit attention. The involvement of the government might encourage the Court to take a closer look at the petition.

The dissension in lower courts could also be a result of the new paradigm. The changes at the Supreme Court level may not have penetrated to lower courts in the years after the realignment. If that had been a cue, it might disappear later as the Court's role and its policies became entrenched and lower courts became more certain of Supreme Court policies. In addition, it is assumed that liberal justices would take civil liberties cases due to the perceived conservatism of the courts below. Finally, the felt need to settle disputes between circuits might be the result of the Court's role as head of the judiciary.

The results suggest that the theory may be credible as an aid in describing agenda-building. With a finite amount of available agenda space, the justices must make choices. Utilization of cues is consistent with a need to make choices because agenda space is limited.

Some analysts presume that the actual decisions to accept cases are first votes on the merits of the cases.\textsuperscript{196} Similar dimensions or factors seem to guide the justices' behavior at the agenda and decision-making stages. The second and third levels change rather significantly, but the economic and individual rights clusters demonstrate a steady incremental flow. That might suggest that the justices see two important dimensions underlying the cases. This might suggest some elements of rationality in agenda-building. Policy designs may well be the determinant of an individual justice's certiorari vote, but in terms of agenda-building that explanation is too simplistic.

Schubert extends the connection even further, maintaining that bloc voting for certiorari petitions is evident in some cases.\textsuperscript{197} This agenda-building research does not dismiss that possibility. Indeed, if agenda-building is purposive, then strategic voting might be expected. The recrudescent agendas, landmark decisions, expansion of concerns, and dispersion of attention might be fertile ground for strategic or subgroup voting. The policy windows, a rise in "appropriate" litigation, and relatively available agenda space are characteristics that

\textsuperscript{196} Ulmer, "The Decision to Grant Certiorari as an Indicator to Decision on the Merits," pp. 429-447.

result from the four items noted above and each offers an opportunity for coherence in agenda-building. If strategic voting does exist, however, this research suggests it would have to be conditional. The effects of strategic voting might be magnified in future agendas because it signals litigants, renews commitments, and sets into motion a revised dynamic.

Ideology thus appears to play an important role in agenda building. Conservatives often accept the same types of cases as their liberal predecessors in order to reverse the policy direction of the existing doctrine. The expansion of concerns and dispersion of attention are also means by which policy preferences can be spread out in different directions. The means by which the Court apportions its agenda appear to be more complex than a series of discrete, ideologically-based decisions.

Provine's explanation, incorporating the justices' conception of the role of the Court, is more persuasive. The role of the Court seems to limit the options of the justices somewhat. The incremental flow of policy areas suggests that attention to an area continues despite the ideological balance of the Court. The role of the Court may be partially responsible for this. First, part of the role may incorporate a need for consistency in the law. When liberals overturn conservative precedents, they must
stay with the policy area in order to reduce uncertainties in the law. Second and more broadly, the role of the Court changed with the agenda paradigm. The Court moved into the individual rights area, and, in a sense, protecting and guaranteeing those rights became the Court's role as Provine confirms.\textsuperscript{198} This new role dictated agenda building strategies and constrained the Court somewhat.

While the role of the Court appears to have some impact upon agenda-building as well as case selection, this concept of role may be malleable. Provine contends that review-prone justices such as Black and Douglas viewed the Court's role very broadly. Justice Burton and others, however, were review-conservative and much less likely to accept cases.\textsuperscript{199} On the face of it, this appears to represent a clear judicial activism-restraint dichotomy. The question is whether these notions change over time. A hypothesis, advanced earlier, was that after the change in the agenda paradigm, a new type of liberalism emerged. The new paradigm may also have changed the meanings of activism and restraint. If that is the case, then Schubert's functional theory of activism and restraint may have a corollary. The review conservative justices may have merely been out of step with the new paradigm, and that,

\textsuperscript{198} Provine, \textit{Case Selection in the United States Supreme Court}, pp. 96-97.

\textsuperscript{199} \textit{Ibid.}, pp. 113-115.
rather than a deep philosophical attachment to judicial restraint, may have led them to vote against many petitions. These justices may have been products of their times, coming to political and legal maturation prior to the change in the paradigm.

The Court was moving in unprecedented directions, and these justices may have wanted to slow the progression. Indeed, Provine suggests this, stating that the disagreements over role were most pronounced in the less established civil liberties areas. The key here is that the conception of role was still evolving, as was the new paradigm. Even if such a realignment in role perception existed, that does not mean Provine’s theory is fallacious. It might require a redefinition or clarification of what the judicial role means and when, however. Provine’s study may be timebound. The Burton papers she relied upon covered the 1945-1957 period that witnessed important agenda and role changes that may have affected the analysis.

The Likens dynamic analysis is one of the few studies that has broached the issue of agenda-building. Likens chose eight policy subareas and incorporated demand in his analysis. His general conclusions are that the agenda-building process is quite systematic. In a

limited sense that is true, but Likens may go a bit too far. Certain tendencies occur frequently and the process is by no means random, but it is not entirely rational either.

Likens fails to include the general trends surrounding the policy areas besides the ones he selected. His analysis, like the case selection studies, lacks an overall perspective and a sensitivity to the finite nature of the agenda space available each term. None of these analyses address the fact that the selection of individual cases must be viewed in the larger context of agenda-building. Agenda space is at a premium and some very important cases must be denied access to the agenda. Furthermore, he neglects those overriding concerns of the justices that might be labeled the perceived judicial role, and which appears to influence agenda-building.

CONCLUSION

It seems clear that ideology alone does not govern agenda building. On any given issue, ideology may dictate the decision whether or not to hear a case. Agenda building raises issues of a finite docket, policy areas in a variety of doctrinal states, and possible signals sent out by the Court previously. Some form of the judicial role is incorporated in the macro-level decision structure. The
nature of role may be broader than Provine had surmised. Certainly concerns for consistency and completeness in doctrine may form a portion of this role. The expansion of concerns and dispersion of attention may have resulted from a deepening commitment to individual rights that might personify the role of the Court in the modern era. The entrenchment of the paradigm may have inculcated that role to the justices. One other overlooked, related factor also influences case selection and that is agenda-building itself. The need to attract certain cases through landmarks, to fill doctrinal holes, to reverse a doctrine, to abandon an area, to create expansions or dispersions all contribute to a dynamic that has an impact upon which cases are actually selected.

The case selection literature intimates that the justices have a great deal of control over the petitions accepted, and by implication, the construction of an agenda. This fifty year study takes a different perspective and reaches a different conclusion. The Court's control, or more precisely, its influence over the agenda is conditional. At some times, the Court can exert its prerogatives; at other times, constraints reduce the influence. The cue theory incorporates the problem posed by the volume of demand, Provine includes the limiting judicial role factor, those who impute strategic voting
recognize the lower court's impact, Likens is concerned with the varying state of law in the policy areas and litigation. The truth is that all those factors and more are involved. More systematic research that combines these and other factors is needed to evaluate the process of agenda-building and its implications for judicial decision-making, and to make the linkage between the selection of individual cases and the construction of an entire agenda.
Chapter VIII
SUPREME COURT AGENDA BUILDING: SOME LARGER
IMPLICATIONS

In this final chapter, some larger themes need to be addressed to determine the implications of Supreme Court agenda-building. While the last chapter was confined to considerations of judicial agenda-building and case selection, this chapter expands concerns in two directions. First, the connections between trends in Supreme Court policy-making and agenda-building during the 1933-1982 period need to be investigated. In this fashion, the inputs and the outputs can be compared. Of particular interest is the lag between significant policy changes and the reflection of those changes in the agenda. Second, the nature of Supreme Court agenda-building can be assessed in a broader agenda context. The questions concern the significance that the results of this study have for agenda research writ large. A related concern is how the Court's agenda-building resembles or diverges from the agenda-building processes of the other branches of government.
A number of analysts, most notably Robert McCloskey, have traced the cumulative policy-making of the Supreme Court. Cumulative policy-making refers to the broad changes and policies the Court has instituted across time. It describes Court activities in broad strokes by highlighting the trends in judicial policy. The analysts have identified the changes in judicial direction and used these as demarcations. The existence of such divisions is based upon the decisional outputs of the Court. The question is whether the divisions evident when cumulative agenda-building is assessed are similar to those based upon the outputs. If they are different, what does that mean for the connections between the agenda and output stages in the judicial realm?

When justices decide which cases to accept, it is assumed that there is a connection between the selection of the cases and the merits of the case. How does this translate to the agenda as a whole? What is at issue is the degree of purposiveness attributed to the Court. Is the Court able to achieve its policy goals efficiently through the agenda? The most significant issue involves comparisons between the critical junctures identified by the cumulative policy-making literature and those apparent in the map of the agenda. Important questions concern the
lags between the agenda and the policy outputs, the implications of the lags, and the means by which those lags are reduced.

Generally, the trends that cumulative policy analysts have discovered are reflected in the agenda research, but there are important differences. As a first step toward investigating those differences, the historical context of the cumulative policy research should be presented briefly. The crucial watershed occurred in 1937, according to virtually every analyst of cumulative policy making.201 The Court had seriously impaired its own effectiveness and legitimacy by attempting to slow the New Deal. According to analysts, the Court was threatened with second-class status for the foreseeable future.202

In 1937, the Court retreated and began to uphold the building blocks of the New Deal. The Court's message after 1937 seemed to be an acceptance of Congressional prerogatives and a move away from Constitutional confrontation and toward statutory accommodation. Once the Court had capitulated, a move solely into the regulatory areas would have relegated it to a subordinate, purely interstitial role. The Court faced a vacuum of power and needed to develop a new role.

201 That would correspond to the 1936 term in this study.

The Court's retreat and shift signaled an agenda realignment that led to a new paradigm. The analysts of cumulative policy-making find a two-pronged realignment. The mapping of the agenda supports that realignment. First, the Court began to expand a newer economic realm, United States Regulation. As a consequence, the Court began to purge the agenda of older economic questions, such as Internal Revenue and Ordinary Economic. It is at this point that the justices also branched out to individual rights. In doing so, the Court salvaged its place in the governmental scheme by adapting its role.

The double standard of the United States v. Carolene Products case appeared to articulate the Court's evolving role. Analysts of cumulative policy-making impute a good deal of purposiveness to this decision. It clearly appeared to signal the routes the Court wished to travel and those it sought to abandon. Having established the historical context, the issue is the extent to which agenda-building aided the Court in achieving the policy goals and the new role enunciated in the Carolene Products footnote. In other words, the question is whether a lag existed and the magnitude of such a lag.
Cumulative Policy-Making and Agenda Lags

This move from economic concerns to individual rights may have seemed smooth in policy-making, but the agenda did not reflect an easy transition. The Court was in the throes of what has been labeled a realignment and a new paradigm here, and a revolution elsewhere. Litigants and Court watchers were uncertain in 1937 whether the "switch in time" was a short term aberration or a portent of a penetrating change.\(^{203}\) The byproduct of the agenda expansion of individual rights was confusion and uncertainty. The uncertainty in this area resulted from the unfamiliar territory. The justices were creating doctrine where none had existed previously, rather than modifying what was already in place as in the economic areas.

In fact, the dynamics of the agenda suggest that the process that culminated in the change from economic policy to individual rights was fitful and marked by surges and declines. For a long period, economic issues were still the standard staple of the agenda. The Court's economic decisions may have signaled restraint and a retreat, but economic cases continued to hold a significant portion of agenda space. While 1937 is identified as the crucial turning point, the changes were not manifested in the agenda until the recrudescent agendas of 1942 (only the

\(^{203}\) Mason, The Supreme Court from Taft to Burger, p. 114.
first hints) and 1947. The changes in 1937 were only signals of a new order and a Constitutional revolution. Alpheus Thomas Mason and William M. Beaney summed it up succinctly, "The most striking examples of the Court's about face occurred long after the dust of the 1937 battle had settled." In this respect, the agenda is not a particularly efficient means of changing policy or roles. Momentum and inertia can be redirected, but the incidentals and the detail work of policy-making create a protracted process that evolves slowly.

The crucial point is that the agenda change lags behind changes in policy-making. Watersheds or fundamental revisions in doctrine do not revolutionize the agenda overnight. Despite a few doctrinal changes, no matter how dramatic, the agenda as a whole does not change very much. In addition, the effects of those doctrinal changes are not seen in the agenda for some time. The Court must slow down the flow of old items. That requires the Court to take some numbers of cases in order to reverse doctrine, clarify remaining questions, and signal a cessation of interest. Only after that is done, can the Court turn to the newer items.

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204 Mason and Beaney, The Supreme Court in a Free Society, p. 187.
In sum, the lags demonstrate that agenda-building is an uncertain process. Signals are sent and occasionally go unnoticed. The Court undergoes membership or ideological changes that might interrupt periods of relatively coherent policy-making. The proper cases may fail to arrive in a timely manner. The Court may prolong its attention to an area through its doctrinal confusion. The amount of time necessary to build an agenda and a bank of individual rights cases seems to be substantial. The point is that, while 1937 may appear to be the major watershed from the cumulative policy-making perspective, analyzing the agenda suggests the turning point was as much as a decade later. The justices set a new inertia or dynamic in motion with their 1937 decisions. Their subsequent task was to flesh out the policies and continue to create this new framework.

While lags are a systematic part of the relationship between the agenda and policy output stages, the institution of a new role and paradigm undoubtedly served to prolong the lag. The Court was faced with a new paradigm and the dilemma of role definition. The Court seemed confused, unsure how to use its power. The slow advances can be tied to the emergence of the Court's role. 205

205 McCloskey, The American Supreme Court, pp. 182-223.
The Court does have means of shifting the agenda from its incremental path and, in effect, filling the gaps between emerging Court policies and agendas that can be used to continue the evolution of policy. The Court uses the recrudescent agenda to reduce the lag period between changes in policy direction and an agenda that reflects those changes. These agendas are the Court's opportunities to modify its allocation. Those agenda changes occur through the expansion of concerns and the dispersion of attention. The recrudescent agendas appear to be examples of what Kingdon calls policy windows. The time and conditions may be propitious for such a general expansion. During some periods, the Court can gather its resources and exert greater influence over the process. The dynamics of the agenda are not changed, but there is a hastening of the trends. The lag between the agenda and policy-making was quite pronounced after the realignment. The Court used various tools to reduce that lag.

Other Significant Periods in Cumulative Policy-Making and the Nature of the Agenda

The next concern is with other terms identified in the cumulative policy-making literature as significant and the relationship of the agenda to those terms. Since 1937 there has been no single watershed of comparable degree.

There have been a number of terms, however, that have been identified as significant. These terms represented changes in the scope or direction of the Court's short-term philosophy. The shifts in direction became pronounced because the agenda had moved after a few recrudescence agendas and the policy outputs reflected the changes. To achieve recognition in the cumulative policy-making literature, the changes resulting from a few recrudescence agendas apparently must accumulate. The various periods or terms so noted are the early Warren Court (more precisely, the 1953 term during which the Brown v. Board of Education decision was announced), the later Warren Court, and the period surrounding the transition to the Burger Court.

Brown represented major steps in two directions. First, it was a continuation of the expansion of concerns into the Equality area. Second, Brown was a landmark that signaled what would become a dispersion of attention into other subareas of Equality. In terms of cumulative policy-making, Brown signaled a change, in that the Court began to assert positive protections on behalf of minorities.²⁰⁷ This was a departure for the Court, and analysts were critical of the Court for being result-oriented and not basing its decisions upon precedent or the

Constitution.208

Brown did not emerge full blown, however. The decision was a quantum leap, to be sure, but Equality had begun to attract agenda space over a decade prior to Brown. Brown was still the quintessential landmark case, because it threw open the doors to the Court's agenda even further. As Richard Funston claims, "it represented not merely a continuation of past tendencies, but one of those mutational leaps which occur from time to time in the evolution of species."209

The identification of the later Warren Court as the next critical juncture is based upon the belief that it was the most liberal Court. In reality, the later Warren Court was, perhaps, a logical extension of the Court that issued the Brown decision (which probably represented the true break point).210 Funston confirms this: "The desegregation decision was both an early symptom and a cause of the rising spirit of activism that characterized the Warren Court."211 In any event, the later Warren Court set up the


conditions that moved individual rights to an unprecedented place upon the agenda.

It is important to remember that, despite the growth in individual rights, the economic areas held fast, maintaining a decreasing but still significant portion of agenda space until the recrudescent agenda of 1960. The cumulative policy-making literature does not recognize the resilience of the economic issues. It concentrates exclusively on the individual rights cases, often because of their Constitutional scope. The economic cases are statutory interpretations, and thus are seen as less significant. It is clear, however, that they are important for two reasons. First, some economic decisions closed the Court's door to further economic cases of that type. Second, by consuming half the available agenda space, the economic cases were closing the door to further individual rights cases.

In some senses, the later Warren Court fulfilled the promise of the 1937 realignment. The advances that occurred in the 1954-1962 period might be compared to the electoral concept of a secular realignment, if one views the trends of the agenda. The growth of individual rights was still the basic framework of the agenda, but the pace of the growth was altered. The Court in the early to mid-sixties probably went considerably further than anyone

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211 Ibid., p. 369.
a decade earlier would have believed. This is especially apparent when the outputs or decisions of the Court are studied. Analysts of cumulative policy-making often refer to this period in bolder terms as a Constitutional revolution, and by implication, a realignment. Some might view the Warren Court's unprecedented moves as the search for a broader, more active role than the one that seemed to govern the Court since 1937. If the potential for a new paradigm was in the offing, however, it was never realized because of the dismemberment of the Warren Court. Whatever the consequences, the different perspectives offer different interpretations of the Court's activities.

The ascension of the Burger Court was accompanied by forecasts of the demise of the Warren Court's individual rights doctrines. These predictions were based upon the Court's membership changes that continued to substitute conservative jurists for departing Warren Court members. In selecting new Supreme Court justices, conscious efforts were made to select lower court judges whose philosophies differed from those of the members of the Warren Court, and who might implement those philosophies through their decisions.

While there may have been some reversals, the basic thrust has been to moderate many of the Warren Court's doctrines and even expand a few. The work of the late

212 Ibid., pp. 327-330.
Warren Court created agenda dynamics that have confronted the Burger Court. The agenda, in fact, reached its individual rights apex during the Burger Court. That recent growth may be a function of the ideological changes. The Burger Court may have sought to develop its own identity and tailor many of the Warren Court policies to its liking. As a result, it would need to accept the same types of cases that its predecessors accepted.

In the last few terms, however, the Court has edged away from individual rights and back toward economic issues. In some senses, this recent change may lend some credence to the predictions of a new agenda trend moving toward economic issues for the Burger Court. If the more conservative Court was interested in moving back into the economic sphere, then it would need to clear some individual rights areas off the agenda in order to create space. Recent efforts to keep death penalty and obscenity cases off the agenda may suggest elements of a retreat. If the present Court decides to move in an economic direction, though, that move should not be drastic. The post-1937 role of the Court has been firmly entrenched and it would appear to take far more significant changes internally and externally to modify that role and the agenda.
The Governmental Context and the Agenda of the Court

The lags between policy-making and subsequent agendas and the recrudescent agendas used to shorten those lags raise the issue of the Court's role in the governmental structure. The dynamics of the agenda might give pause to that noted political pundit, Mr. Dooley. His belief that "the Supreme Court follows the election returns" has been formalized and substantiated by Robert Dahl.213 He contends that the Supreme Court joins the political branches as part of the national governing majority. The Court is seen as an ally, often called upon to legitimate the activities of the other branches. Dahl also believes that within a short period of time following a change in the political order, the Court will join the new majority in its policy-making.

Other analysts disagree, seeing the Court as an independent bulwark guarding against majoritarian impulses. The Court often stands against the other branches, Jonathan Casper contends.214 The 1933-1982 period shows many examples of the Court standing against public opinion and


the other branches. Furthermore, according to David Adamany, the Court does not invariably capitulate to the other branches when a new political order is initiated.\textsuperscript{215}

The dynamics of the agenda might suggest, or at least support, the contention that the Court does not necessarily gravitate to the majority. The incremental flow of the agenda intimates that the Court may be unable to follow the new majority even if it wanted to. Even after membership changes that would recast the Court in the mold of the new political majority, the justices must confront unfinished work that delays the implementation of their priorities. The agenda dynamics might cause Mr. Dooley to accept Fred Rodell's qualification: "the Supreme Court follows the election returns of ten or twelve years before."\textsuperscript{216} The Court must contend with an entrenched agenda and its inertia before turning to other priorities.

**Conclusion**

Cumulative policy-making requires cumulative agenda-building. The Court signaled a change in its role after 1937, but the agenda changed much more slowly. Not for another decade did the agenda begin to resemble the new paradigm. That is the nature of the agenda. The turnover


from economic issues to civil liberties was slow due to the fact that the paradigm was so novel.

The new judicial order had the initial task of reversing and clarifying issues and policy areas. Part of the judicial role that has not changed is a need to keep the law consistent. That part of the role restricts the agenda-building capabilities for the short-term. The agenda lags well behind the cumulative policy making changes. When the Court shifts direction in outcomes or in the types of cases it wishes to receive, it must wait for the changes to penetrate and reverberate through the system.

The evidence seems to suggest that the pace of agenda change is inversely proportional to the pace of change in policy outputs. That is to say, when justices are in the process of revising doctrine in a policy area, they will be constrained by the need to accept similar cases in order to continue the process of doctrine revision. That means agenda space must be reserved to fulfill these goals. Path breaking agenda moves must be held in abeyance until the policy revision is complete. Agenda change can thus be expected when satisfactory doctrine is in place. At this point, the justices have the latitude to shift their attention toward other policy areas and can expand the agenda accordingly.
The map of the agenda is a testimony to the slow, uneven struggle to achieve goals that are uncertain and evolve throughout the process. It suggests that the Court did not, in 1937, have a clear design of where it wanted to go. The cumulative policy-making literature often paints its pictures with broad strokes and makes the Court look more purposive than it was.

In terms of the Court's purposiveness in agenda-building, the verdict seems mixed. On the level of the policy subarea, the Court seems quite purposive. Justices select cases that will solve immediate unanswered questions, close an area, or reverse policy. On the macro-level, however, the long-range purposiveness of agenda-building is considerably less clear. The Court's broad agenda-building is more fraught with uncertainties. As the Court opened new areas, it encountered increasingly difficult questions, some of which it was unprepared to handle.

The cumulative policy-making literature describes the post-1937 era as a revolution, replete with unprecedented judicial doctrine in new areas of concern. The new policy areas and the Court's novel means of dealing with them meant the Court would lock itself into an agenda dynamic. The nature of the dynamic could not be predicted, but the fact that cases resembling and seeking to expand past
decisions would crowd the Court's docket. One could be forecast.

AGENDA-BUILDING AND THE POLICY RESEARCH AGENDA

Concerns with the processes by which other branches decide what to decide are important as means of yielding general hypotheses concerning agenda-building. A number of findings in this study have some possible implications for comparative agenda-building research. A few of the more interesting questions can be raised as suggestions for further research in these areas.

A first group of issues focuses on the scope and nature of agenda change in other institutions. During the early years of the 1933-1982 period, the Court was in the midst of a realignment that changed the nature of the agenda. In effect, this realignment created a new paradigm that led to increased attention to individual rights. An agenda realignment of some sort almost certainly occurred in the other branches. Did this create a new paradigm by virtue of a change in the perceived role of the institution, or is that something distinctive to the Court?

Second, this research has shown an incremental flow in the broad economic and individual rights areas and a great deal of flux below. This would not seem to be peculiar to the Supreme Court. Congress deals with the same issues,
particularly the budget, on an annual basis. Walker maintains that the great preponderance of the Congressional agenda is composed of "periodically recurring" and "sporadically recurring" items.\textsuperscript{217} When there are significant agenda changes in the so-called political branches, Kingdon suggests there is a diffusion or crossover akin to what has been labeled the expansion of concerns and the dispersion of attention in this study.\textsuperscript{218} The extent of innovation and the procedures needed to open the agenda to new items need to be the subject of further research.

Smaller deviations from the incremental flow of the agenda have been identified as recrudescent agendas. Kingdon identifies "windows" as a relatively brief period in which an issue can achieve agenda space. It would be interesting to see if Congress, for instance, has periodic recrudescent agendas. In order to have such an agenda, Congress must settle a number of matters, or at least reduce attention to them, so it can free agenda space for newer initiatives. Past research would seem to argue against recrudescent agendas. Congress seems to have more perennial, uncontrollable items. The windows would seem to be smaller, with less agenda space available to Congress.

\textsuperscript{217} Walker, "Setting the Agenda in the U.S. Senate," p. 425.

\textsuperscript{218} Kingdon, Agendas, Alternatives, and Public Policies, pp. 147-148, 200-204.
for new items. While much of the Congressional agenda is composed of perennial items that Congress must address, some other issues are granted agenda access. Many analysts maintain that on these newer issues Congress acts upon the area, and then moves on. This surge and decline process is sometimes called an "issue attention cycle."\textsuperscript{219} To the extent that such a cycle exists, that would seem to suggest a fundamental difference between the Congressional and judicial agendas. New issues on the Court's agenda tend to become entrenched for a period of time. The Court may issue confusing doctrine as it struggles with the new area. The role of the Court might lead the justices to prolong their attention to the area in order to reduce the uncertainties. These assumptions need further investigation.

The next series of concerns involves the internal and external determinants of agenda change, and the institution's control over its agenda. Landmark decisions create vital feedback: indeed, that is their purpose. Analysts have identified the importance of feedback to the other branches. It seems reasonable to assume that major legislation yields similar feedback. The extent to which Congress purposively uses legislation to build or influence

its future agendas needs to be assessed.

Ideological change on the Court appears to have an impact upon the agenda. Membership turnover at a critical juncture created ideological changes that abetted the growth of individual rights. New members often bring new perspectives to an institution and may want to change the types of issues that are accepted. In a sense, the ideological changes on the Court opened policy windows in the 1930's and during the Warren Court. A few analysts have addressed the question of membership and ideological change in Congress and its effects on the institution.\textsuperscript{220} The constraints new members face in other branches may be more stifling than those justices encounter when they join the Court.\textsuperscript{221} Certainly, in sheer numbers, new members of Congress have less clout than new justices.

The agenda stage is the most porous stage and most conducive to outside influence. This research has concentrated upon internal determinants. Agenda studies of


\textsuperscript{221} The large Congressional body, the processes of legislative socialization, and the learning of norms have traditionally (though presumably less so recently) forced newcomers into secondary roles and reduced their chances of exerting control over the agenda. Herbert Asher, "The Learning of Legislative Norms," American Political Science Review, vol. 67 (May 1973): 499-513; concerning the more recent changes see Norman J. Ornstein, ed., Congress in Change: Evolution and Reform (New York: Praeger Press, 1975).
other branches have incorporated external factors, perhaps because the other branches are more porous. Congressional research has increasingly focused upon policy entrepreneurs who are often needed to prod or nurse a program through the Congressional maze.\textsuperscript{222} The decentralization of the legislative process requires groups or individuals that can bridge chasms in the policy process. The repeat players in the Court, the interest groups and the government, seem to perform a similar function. Subsequent judicial research needs to include external factors and discover under which circumstances and in which policy areas they exert significant influence.

Finally, there are a series of larger concerns involving general notions of agenda-building. The costs of agenda building have also been alluded to previously. When a Court builds an agenda, it must exclude certain items because space is limited. The process of agenda-building also forces some issues off the Congressional agenda because of limited space.

Kingdon offers an interesting perspective on the finite nature of the agenda. The size of the Congressional agenda expands and contracts. As Congress becomes familiar with issues, it can deal with more of them, because each

\textsuperscript{222} Kingdon, \textit{Agendas, Alternatives, and Public Policy}, pp. 23-74; in addition, there is an extensive literature dealing with interest groups and subgovernments.
individual issue takes less time.\textsuperscript{223} It was posited earlier that a similar process may occur on the Court. As the new paradigm began to evolve, the number of cases declined because so many of the issues raised were unprecedented and the start-up costs were extensive. The entrenchment of the new paradigm and the expansion of concerns and dispersion of attention, whereby solutions that have worked in other policy areas are borrowed for newer areas, meant that the Court could expend less time on each individual case from a policy area with a history. This would, in effect, create a larger agenda because the Court hear more cases. The expansion and reduction of agenda space merits further consideration. This volatility has implications for the existence of policy windows, the strategies of external and internal actors, and the work of policy entrepreneurs.

Decisions in one term have consequences for future agendas. Justices must deal with certain issues that are remnants of past agendas. A similar process should affect the other branches of government. The agenda-building process would appear to have very different impacts on the Court and the Congress. There is a pervasive notion that the status quo would be more likely to dominate Congress than the Court. Membership in the chambers and the committees stabilizes as does the power structure. This

\textsuperscript{223} \textit{Ibid.}, pp. 192-194.
suggests that policy, and by implication the agenda, changes slowly.\textsuperscript{224} Again, further research is necessary to confirm or modify this hypothesis.

In the broadest sense, the Court seems freer to construct its agenda than Congress. Congressional committees have legitimated and guaranteed that a large number of issues will reach the official agenda. The "chosen problems" are the Senate's discretionary agenda. As Walker notes, only a few of these items can attain agenda status.\textsuperscript{225} The Court is able to disregard or ignore some policy areas without fear of political fallout. As a result, the Court's discretionary agenda should be broader. The Court may consciously constrict its agenda, however, by paying attention to its role. Ultimately, if the agenda looks similar in the two branches that would suggest that the Court is not exercising the latitude it appears to possess, and Congress may be exerting as much influence over its agenda as it can muster.

If the apparent gap between the agenda-building capacities of the Court and Congress is narrowed so that the dynamics of agenda change in Congress resemble the dynamics in the Court, then the purposiveness of the institutions in agenda-building may be responsible.


\textsuperscript{225} Walker, "Setting the Agenda in the U.S Senate," pp. 430-431.
Ironically, Congress seems much more purposive in its agenda-building than the Court. Part of that purposiveness is a function of the uncontrolable items that Congress deals with. The issues Congress must address seem to have more of an immediacy to them than the Court's; there are appropriations to pass, regulations to promulgate, and the like. In addition, the committee system allows a specialized portion of the Congress to decide which issues are accepted and which are denied. Those experts can more effectively and efficiently attack problems they would be sensitive to than a generalist judge who must, in toto, decide which cases to decide and how to decide those cases.

The Court, on the other hand, may meander in its attention to issues. The increased freedom to build its agenda may exact a toll on the efficiency with which the Court attacks policy areas through the agenda. Congressional policies are also more mature and predictable than the issues the Court deals with. The Court, on the other hand, has, since the 1930's, increasingly taken on new issues that do not afford the Court the luxury of seeing the long-range ends. The Court's policies have often evolved in a piecemeal fashion and have taken turns the Court may not have foreseen when it entered the area.

The preceding should make it abundantly clear that cross-institutional research needs to be a future priority.
That research would place the primary focus on agenda-setting, rather than studying the agenda as a fragment within the rubric of an institution. The nexus between the inputs, the outputs, and what are sometimes called the withinputs should be a part of the future research agenda. The preponderance of the research has been concerned with the conversion process. Too often that has meant the exclusion of the inputs and the outputs, particularly the former. In the largest terms, the agenda means access to government. It is a first step to the ultimate allocation of values. For that reason alone agenda research is important whether for the political branches or the Supreme Court, where most of the burning questions in society eventually and increasingly pass.
Appendix A
THE COMPOSITION OF THE POLICY AREAS

The fourteen policy areas contain a series of discrete subareas. As a guide to the composition of the policy areas, the subareas are listed here.

DUE PROCESS
Criminal Due Process
Jury Selection
Jury Bias
Jury Instructions
Search and Seizure
Border Searches
Wiretapping/Electronic Surveillance
Self-Incrimination
Confessions
Double Jeopardy
Right to Trial
Miranda Rights
Admissibility of Evidence
Right to Counsel
Right to Transcript
Death Penalty
Cruel and Unusual Punishment
Competency to Stand Trial
Right to Confrontation
Prisoner Rights
Habeas Corpus Procedure
Parole Revocation
Probation Hearing Procedures
Extradition
Prisoner Transfer
Administrative Segregation
Parole Board Review
Sentence Appeals
Prison Conditions
Civil Due Process
Garnishment/Attachment Without Due Process
Challenge to Administrative Procedures
Social Security Benefits Termination
Civil Commitment Without Due Process
License Revocation
Service Termination
Review of Alien Status
Non-Criminal Search and Seizure
SUBSTANTIVE RIGHTS
Exercise of Religion
Establishment of Religion
Freedom of Speech
Freedom of Expression
Freedom of Association
Freedom of Assembly
Freedom of Press
Right to Petition
Defamation
 Libel
Slander
Obscenity
Loyalty Oath
Privacy
Prior Censorship
Commercial Speech
Abortion
Freedom of Information
EQUALITY
Discrimination Based Upon Race, Gender, Age, etc.
Reapportionment
Right to Vote
School Desegregation
Right to Education
Benefits Reductions on Basis of Gender
Right to Accommodations
Right to Housing
Right to Marriage
Employment Discrimination-Race
Employment Discrimination—Gender
Employment Discrimination—National Origin
Employment Discrimination—Age
Discrimination Against the Handicapped
Affirmative Action—Contractors, Employment
Regulation of Retirement Age
Rights of Illegitimate Children to Inherit
Rights of Indians
Rights of Indigents
Rights of Aliens
GOVERNMENT AS PROVIDER
Social Security
Public Welfare
Government Housing
Aid to Families with Dependent Children
Medicare
Medicaid
Food Stamps
CRIMINAL LAW
Homicide
Assault
Trespass
Slavery
Extortion
Bribery
Gambling
Drug Violations
Possession of Firearms
Customs Violations
Robbery
Burglary
Obscenity
Bringing Women Across State Lines for Illicit Purposes
Polygamy
Mailing Obscene Materials
Postal Crimes
Election Fraud
Perjury
Selective Service Violations
Organized Crime
Tax Evasion
Commerce Violations
Kidnapping
Labor Crimes
Conspiracy
Illegal Abortions
Securities Crime
White Collar Crime
Trade Violations
SEPARATION OF POWERS
Executive Power
Legislative Power
President vs. Congress
Civil Service
Removal of Officers
Executive Privilege
Executive Immunity
Legislative Immunity
Judges' Salaries
Judicial Power
FOREIGN AFFAIRS
Governmental Power During Wartime
Trading with the Enemy
Settlement of War Claims
Governance of Territories
National Defense
FEDERALISM
State Taxation-Commerce Clause
State Licensing-Commerce Clause
State Regulation-Commerce Clause
Congressional Right to Regulate-Labor, Securities, Energy, etc.
Water/Land Disputes Between U.S. and a State
INTERNAL REVENUE
Proper Deductions
Gift Tax
Customs and Duties Taxes
Social Security Taxes
Corporate Taxes
Depletion Allowances
Inheritance Taxes
Wills
Taxation of Territories
Interpretations of Code Provisions
UNITED STATES REGULATION
Bankruptcy
Reorganization/Receiverships
Building and Loan Regulations
Federal Reserve System
Regulation of Banks
Trade Regulation
Patents
Copyrights
Environmental Regulation
Energy
Telecommunications-Media
Telecommunications-Telephone
Health Regulation
Agricultural Regulation
Labor Relations
Workplace Safety
Union Practices
Hours and Wages
Securities Regulation
Interstate Commerce Regulation
Regulation of Carriers
Antitrust Regulation
Food and Drug Regulation
Eminent Domain
Airline Regulation
Aviation Regulation
STATE REGULATION
Licensing
Taxation
Public Service Commissions
Corporate Regulation
Labor Relations
Liquor Regulation
Professional Standards
Securities Regulation
Intrastate Commerce
Regulation of Health, Safety, and Morals
Business Regulation
Regulation of Carriers
Railroad Regulation
Fish and Game Regulation
Environmental Regulation
Food and Drug Regulation
Zoning
UNITED STATES AS LITIGANT
Contracts with the United States
United States Immunity from Suit
United States Liability
Torts vs. Government
STATE AS LITIGANT
Contract with State
Liability of State
Immunity of State from Suit
Boundary Disputes
Water Disputes
Navigable Waters
Submerged Lands
Escheat
Replevin
Disputes over Waste Dumping
ORDINARY ECONOMIC
Insurance Claims
Torts-Personal Injury
Wrongful Death
Contract Disputes
Garnishment/Attachment
Mortgages
Lending/Credit Transactions
Wills
Stockholder Suits
Cargo Damage
Collisions Damage
Some of the cases had multiple codings and could have been placed in a number of different areas. A hierarchy was used to decide the proper category for those cases. For instance, if Substantive Rights or Due Process was involved and the Court decided on those bases, that was the categorization of the case. For example, a Social Security termination without due process would be placed in the Due Process category rather than Government as Provider. In addition, if an ostensibly economic regulation was actually an infringement on freedom of expression, the latter took precedent. If government wartime restrictions infringed First Amendment rights, that case was a Substantive Rights issue, and not a Foreign Affairs case. State and federal regulation cases that involved questions of Federalism were placed in that category.
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