

Rules of Access: Congress, the Federal Courts, and Judicial Agenda-setting and Change

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Abstract

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Abstract: What explains variation over the issues federal courts examine over time? Adopting an interbranch approach, I argue that this variation is a function of changes in rules of access. Rules of access govern whether litigants can use the federal courts and are set by both lawmakers and judges. I focus on two rules of access – jurisdiction and standing. During the legislative process, lawmakers decide how to grant policy-making authority to federal courts through rules of access. Open access encourages litigants to use the federal courts. These decisions create statutory environments that shape the federal courts' agendas. I examine how Congress varies jurisdiction and standing. Using original data of Public Laws that grant jurisdiction to the federal district courts and Public Laws that confer standing on potential litigants, I explain how rules of access for the federal courts have changed over time and across policy issues. I present a theory that links changes in rules of access to the courts' agendas in that Congress makes antecedent decisions that influence which issues are presented to the federal courts. I employ both quantitative and qualitative methods to demonstrate the relationship between rules of access and judicial agendas.

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Chapter 1. Agenda-setting, agenda change, and judicial power

1.1 Introduction

Litigants may proclaim their intention to sue, and may believe that federal courts will always be willing to hear their claims. Courts, however, may not always be available to hear certain claims because of determinations by legislators and judges regarding *rules of access*, rules that govern whether and how courts participate in the policy process. While access to the courts is often taken for granted, examination of when courts are actually available reveals that legislators and judges often make decisions that both decrease and increase access. This variation in access has implications for potential litigants, who may find the courthouse doors closed to them. The ability of individuals and groups to use the courts to gain information about private or government action, to review decisions of other actors that impact their lives, and to resolve problems may be curtailed. Furthermore, and in a more general sense, rules of access structure how courts participate in the policy process. Rules of access influence the issues to which courts attend and how that attention changes over time. Rules of access thus are important to understanding what roles federal courts perform in the American political system.

The stakes for potential litigants can be high. Recently, for example, the U.S. Supreme Court handed down its decision in the case *Wal-Mart Stores, Inc. v. Dukes et al.* (10-277 [2011]), a case in which the Court determined if a proposed class action suit on behalf of 1.5 million female employees could proceed. In deciding this case, the Court was not dealing with the merits of the women's claims that Wal-Mart engaged in sex discrimination but was instead considering a threshold question of whether this group of women satisfied the Federal Rules of Civil Procedure's requirements for who consists of a class. Unanimously, the Court agreed that the women did not meet these requirements and the class action suit against Wal-Mart could not

go forward.¹ For the women for which the class action status was argued, the implication of this loss is that individual women will potentially have to pursue their claims individually if they even continue to seek redress of their claims, or, as some have already done, attempt to re-file as smaller groups on a state-wide basis.²

Certain avenues that might have existed have been foreclosed by the Supreme Court's decision that the women could not constitute a class on a nationwide basis. One of the motivations for seeking class action status against this particular defendant is Wal-Mart's sheer size. Wal-Mart is the largest private employer in the world. Litigation requires money, among other resources. While the Civil Rights Act of 1964 sets the standard for the treatment of employees – prohibiting discrimination based on sex – it leaves open the question of how that standard will be enforced. Litigation is one tool by which to enforce that standard, but the cost of litigation can easily outstrip the benefits (Farhang 2010). Stark differences exist between the resources of the average woman and those of Wal-Mart. Wal-Mart has in-house counsel on staff to process lawsuits, and needs not hire lawyers specifically to pursue litigation as they are already on staff. Wal-Mart has experience and knowledge of the law and how to defend itself against complaints. Allowing – or denying – women to band together as a group has implications for the ability of women to even pursue their claims, regardless of how a court treats the merits of their case. Women who might sue may be discouraged from doing so because they cannot afford to litigate. The consequences of limiting access also relate to the stage at which

¹ Justice Scalia delivered the Court's opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito with Justices Ginsberg, Breyer, Sotomayor, and Kagan joining Parts I and III and with Justice Ginsburg concurring in part and dissenting in part and joined by Justices Breyer, Sotomayor, and Kagan.

² State-based cases have been filed in California and Texas, according to walmartclass.com. This case has already been used as a precedent in similar cases, including *Chinese Daily News v. Wang* (08-55483 [2011]) at the Supreme Court and in *Ellis v. Costco Wholesale Corporation* (2011 WL 433668 [2011]) in the United States Court of Appeals for the Ninth Circuit. Additionally, analysis of the case using the "Shepardize" tool on LexisNexis shows that 139 lower courts have followed the *Dukes* decision, demonstrating again the impact of the case.

Wal-Mart successfully challenged the women's claims. By challenging the class action status, the case did not progress to the discovery process which prevents the plaintiffs from getting access to Wal-Mart records, and also from deposing Wal-Mart managers under oath. Therefore, the capacity of the plaintiffs to use the tools of the legal system to advance their case is limited by the threshold requirement of class certification.³

When it decided in *Dukes* against certifying class action status, the Supreme Court was exercising its power to determine which individuals or groups will have *access to the federal courts*. By access to the federal courts, I mean the ability of individuals and groups to use the federal courts. This is most often about securing judicial review of government action such as the decisions made by executive branch administrative agencies but at other times it involves the pursuit of private claims such as those brought by the women in the *Dukes* case. Access is determined by federal judges when they make decisions whether potential litigants satisfy *rules of access* and when they make decisions about what those rules are. Rules of access govern whether a court has the power to hear a case and include such factors as jurisdiction, standing, and class action rules. Access is also determined by Congress when it makes decisions to grant individuals or groups access to the federal courts. Congress decides as part of the legislative process in that lawmaking includes deliberations over access to the courts. This means that Congress makes antecedent decisions that affect whether and how federal courts, including the Supreme Court, participate in American politics.

This may come across as surprising, because it is a surprising idea especially considering what we are usually taught about how the federal courts (and especially the Supreme Court) operate. There are a lot of myths about the Supreme Court including the idea that the Court is

³ This can also work to protect defendants from the embarrassment of discovery in circumstances in which plaintiffs might abuse the discovery process without having a real case.

always handing down constitutional cases, that it is all powerful, and that it always has the last word when it comes to deciding what the law means. However, there recently has been quite a lot of empirical work that presents a different picture of the Supreme Court. The Court often attends to non-constitutional questions that might come across as highly technical but that nonetheless have important implications for individuals' lives and American politics. The Court is not all powerful as there exist important checks on the power of the Court. When engaging in statutory interpretation, or figuring out the meaning of legislation, the Court's decisions can be overridden by Congress as happened with the case *Lilly Ledbetter v. Goodyear* (550 U.S. 618 [2007]) and the subsequent Lilly Ledbetter Fair Pay Act. Congress can strip jurisdiction from the federal courts, including the appellate jurisdiction of the Supreme Court, an activity Congress often engages in (Chutkow 2008). Constitutional amendments can override Court decisions, as can the tide of public opinion and the rival interpretations of the coordinate branches of government. We also tend to think that the Supreme Court gets its power and authority solely from the U.S. Constitution, when in fact Congress has the constitutional power to set the appellate jurisdiction of the Supreme Court. This means that Congress is a player in figuring out which issues the Supreme Court places on its agenda. In fact, Congress enjoys the constitutional power to create, staff, and fund the lower federal courts meaning Congress is an integral player with respect to the agendas of the federal judiciary as a whole. As this dissertation helps demonstrate, Congress influences the agendas of the federal courts through a number of mechanisms.

In contrast, scholars often explain the judicial agenda-setting process, and how the agendas of the federal courts change over time, in terms of the behavior of individual judges and justices – a court-centered approach. Judicial preferences alone are often seen as explaining why

judges focus on the issues they do. I offer an alternative explanation for judicial agenda-setting and agenda change over time. I argue that Congress establishes federal courts as participants in American politics by granting jurisdiction to courts or conferring standing on potential litigants. These litigants decide whether to sue, and judges evaluate whether their courts have jurisdiction to hear claims and if potential litigants have standing to sue. Based on answers to preliminary, threshold questions cases may advance through the adjudicatory process or may be thrown out of court.

To demonstrate how this process unfolds, I focus on two rules of access through which Congress influences the agendas of the federal courts: jurisdiction and standing. Jurisdiction and standing are two aspects of the legal system that are important for understanding the capacities of federal courts to participate in the policy process. Both jurisdiction and standing are threshold requirements that must be met in order for a litigant to move to the merits of a case and judges will explicitly evaluate whether these requirements are met. In the pages that follow, I demonstrate the importance of these rules of access for understanding how courts come to participate in the policy process. I show how rules of access are altered and how political the process is of altering them. Decisions regarding rules of access are made in the course of the legislative process and are subject to many of the same forces that influence the scope and content of legislation in general. Additionally, I show how jurisdiction and standing are key to unpacking how interbranch interactions influence judicial agenda-setting and change. On the surface, standing, for example, is a question of whether a litigant is a proper party to bring a case. To demonstrate this, the litigant must show injury-in-fact, traceability (linking the defendant's action to the harm complained of), and redressability (demonstrating that the court can resolve the problem). Questions of standing implicitly involve questions regarding which issues courts

will hear. When standing requirements are met, certain issues will be adjudicated while absent the satisfaction of standing requirements, courts will not hear other issues. Standing thus has both narrow technical and broader policy implications.

Rules of access are familiar subjects to students of American politics in that such students are often introduced to the basics of rules of access when studying judicial behavior. As familiar subjects, the origin and effects of rules of access on judicial policy-making may be understudied. However, examining the origins and effects of rules of access exposes a number of ways in which judicial policy-making is structured by actors outside of the legal system, calling attention to the ways in which judicial power is constructed and exercised. When lawmakers and judges determine whether people will have access to the federal courts, they make decisions regarding whether those people will be able to have their claims heard. Open access to the courts makes available a venue in which to work out policy questions while limited access forecloses the possibility of the adjudication of certain issues. The manner in which the federal courts participate in the American policy process is thus determined in part by the answers to these preliminary questions surrounding jurisdiction and standing. Depending on the decisions made by legislators and judges, courts may play a central or peripheral role in the policy process. For the agendas of the federal courts, the implication is that the issues to which courts attend – the make-up of their agendas – depends in part on these threshold decisions.

In this dissertation, I make two claims related to judicial power. First, decisions made by legislators regarding what rules of access will be foster the exercise of judicial power. Courts participate in the policy process in part because of these legislatively-created opportunities. This stands in contrast with traditional conceptions of judicial power (namely, the attitudinal model), in which Supreme Court justices are viewed as unbounded actors who are free to pursue personal

policy goals. Second, the agendas of the federal courts reflect in part the structure of rules of access. There are a number of decisions made by legislators that influence the number and content of potential court cases long before a judge bangs his gavel. The key implication of this study is that judicial power is not unlimited, but is influenced in meaningful ways by decisions of legislators regarding rules of access.

1.2 Overview of the argument

In this dissertation, I argue that the exercise of judicial power varies with decisions made by legislative actors. Judges are empowered to act by Congress and judicial activity may be traced to decisions made by Congress to involve courts in the policy process. Decisions regarding jurisdiction and standing made by lawmakers (and judges), and legislative activity in general, have an effect on the agendas of the federal courts. As noted by Flemming et. al, the passage of a law is almost certain to create questions of statutory and constitutional interpretation (Flemming et al. 1999: 79). Federal courts at all levels, at the behest of litigants, interpret the meaning of statutory language or determine the constitutionality of statutes. Either through legislative ambiguity (Lovell 2003) or by creating explicit roles for courts, laws create new problems that must be solved. Furthermore, when lawmakers and judges make decisions regarding what rules of access – specifically, jurisdiction and standing – will be and apply these rules of access, they influence which issues will be heard in a court of law. Over time, as jurisdiction and standing develop and change, so do the issues appearing on the courts' agendas. To the extent that Congress establishes the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court and grants standing through legislation, Congress is therefore a participant in the processes through which courts set their agendas. Congress

influences which issues will be heard in a court of law by making courts available as venues in which certain issues are to be heard.

The perspective adopted here is an *interbranch perspective*, one that focuses on interbranch interactions as a way to study the development and functioning of the federal judiciary. There are two characteristics of this approach. First, it is thought that public policy results from the “continuing interaction” among “separated institutions sharing power” in which, second, the “intricate dispersal of power creates a complex and shifting web of relations among various centers of power, which varies across issues areas and over time” (Barnes 2007: 27). The result may be a number of possible interactions, as opposed to merely opposition, between the branches of government. Interactions, and not solely the actions of single actors at single points in time, lead to politics and policy making (Barnes 2007: 28).

I emphasize the manner in which Congress creates opportunities for judicial policy-making and the manner in which these decisions affect the agendas of the federal courts. In contrast, many political scientists focus on what courts do with cases once they get them by focusing on whether justices decide cases in a liberal or conservative direction. In a similar manner, many law scholars focus on the development of Supreme Court doctrine over time. The fact that courts are able to decide cases is sometimes taken for granted as a fixed feature of the institutional environment, although recent political science scholarship has increasingly focused on interbranch interactions and the institutional development of the federal judiciary (see, e.g., Gillman 2002; Whittington 2005; Farhang 2010; Staszak 2010). At other times, courts are described as *existing* with little attention placed on how courts came to take the forms they do. In actuality, the power of courts to hear cases is the result of a complex and ongoing process

through which actors outside the courts, particularly members of Congress, shape and reshape the power of different courts to hear particular types of disputes.

In focusing on institutional factors that influence whether courts become involved in the policy process, this work builds on a body of scholarship that investigates the conditions under which courts gain policy-making responsibility and authority. Whether and how courts will participate in the policy process is not a fixed notion, but rather is open to manipulation by other actors. Judicial participation in the policy process is regularly structured through the language of statutes as members of Congress work to create opportunities for judges to exercise discretion (Graber 1993; Gillman 2002; Frymer 2003; Lovell 2003; Crowe 2007). This scholarship focuses on the “relationships between justices and elected officials,” searching out ways in which elected officials “encourage or tacitly support judicial policymaking” (Graber 1993: 37). The result is a way of studying and explaining judicial policy-making in which scholars investigate the numerous mechanisms through which legislators share power, responsibility, and blame with judges (Graber 1993: 37; Lovell 2003: 20).

This project shares with existing research an interest in the “conditions that make it possible for judges to rule” (Crowe 2007: 7). Often focusing on jurisdiction, these studies show that there are deliberate efforts to expand jurisdiction and that those expansions add to judicial power. They have also begun to identify some background political conditions that might lead legislators to expand jurisdiction. The existing studies often do this by examining a few particularly dramatic or historically consequential efforts to expand jurisdiction, an effort that has helped to show that interbranch effects on judicial power are important and worth studying.

My study builds on these findings by attempting to provide an understanding of manipulation of jurisdiction and standing as routine occurrences. I do this by surveying laws

passed over a fixed period of time and identifying ones that alter jurisdiction and standing. I developed two original datasets of Public Laws that grant jurisdiction to the federal district courts for the years 1949-2000 and Public Laws that confer standing on litigants for the years 1921-2006. To study agenda dynamics, I additionally use data from the Policy Agendas Project,⁴ the U.S. Supreme Court Database (*The Supreme Court Database* 2011), and the U.S. Court of Appeals Database (Songer 2006) to identify trends in judicial agendas over time and to compare changes in these agendas over time.

Public Law scholars often use datasets such as the U.S. Supreme Court Database which codes cases according to the substantive issues the justices decide. That database is organized around categories important to the courts by using classification schemes that mainly reflect the legal issues at the heart of a case. Such an approach is useful for studying courts in isolation but does not work well for exploring interbranch processes as it also incommensurable with measures used to mark agenda change in Congress. Such an approach – focused on legal categories – cannot capture the policy and political concerns of Congress very effectively. To address this concern, I have adopted the Policy Agendas Project, developed over time and used in a series of award winning books and articles on the congressional agenda and expanded to include the executive and judicial agendas. Using the Policy Agendas Project allows me to trace attention to issues across time separate from decisions justices have made regarding which issues to focus on.

I find that the number of jurisdiction-granting and standing laws is surprisingly large, and that these laws cannot easily be fit into conditions identified by earlier studies. Previous studies

⁴ The Policy Agendas Project data used were originally collected by Frank R. Baumgartner and Bryan D. Jones, with the support of National Science Foundation grant numbers SBR 9320922 and 0111611, and were distributed through the Department of Government at the University of Texas at Austin. Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.

of expansions of judicial power have found that the exercise of judicial power is encouraged when legislators are unable (or unwilling) to resolve cross-cutting issues on their own (Graber 1993); when legislators work to lock-in policy outcomes through expansions of the judicial infrastructure (creating new courts and judgeships) after electoral losses that might threaten long-term policy goals (Gillman 2002); when legislators deliberately use ambiguous statutory language to encourage judicial resolution of issues legislators prefer not to take a stand on for electoral or policy reasons (Lovell 2003); and when legislators delegate power to judges to establish rules such as the Federal Rules of Civil Procedure that govern the ability of litigants to use the courts and how courts respond to litigants (Frymer 2003).⁵ Case studies include slavery, anti-trust regulation, and abortion; efforts undertaken in the late 19th century by the Republican Party; labor law; and civil rights. Examining these important historical cases has helped to establish the baseline concept that legislators *do* empower judges for a variety of reasons in a variety of situations. My study builds on these findings. Having a broader sample of the routine practices of granting jurisdiction and conferring standing makes it possible to step away from looking at only major cases and thus to see a broader variety of ways that construction of judicial power is part of the give and take of ordinary politics.

Additionally, as noted above, this project focuses on the relationship between manipulation of jurisdiction and standing and the agendas of the federal courts. Existing scholarship has hinted at the implications of such manipulation on the agendas of the federal courts. For example, when Congress invites judges to take up issues related to slavery, anti-trust regulation, or abortion, more cases related to those issues may appear on the agendas of the federal courts. However, scholarship in this vein has focused on the underlying conditions that

⁵ This happens outside the US context as well, as evidenced by comparative scholarship (much of which inspired the development of the interbranch perspective in the United States). Examples include Hirschl (2000) and Cichowski (2007).

lead to expansions of judicial power and has not explored the implications for agenda-setting and agenda change. My study builds on these findings by focusing explicitly on the relationship between the manipulation of jurisdiction and standing and the agenda dynamics of the federal courts.

It is worthwhile to note at this point the importance of a multiplicity of actors who are involved in the judicial agenda-setting process and whose reactions determine how legislative changes matter. At the very least, it is necessary that there be parties to bring claims, with access to legal services. In turn, there must be the legal infrastructure composed of a legal bar with members committed to pressing claims made possible through expanded rules of access. The fact that a variety of actors are *reacting* to legislative changes suggests a related set of questions. Are shifts in rules of access and the corresponding changes in the behavior of affected actors always intentional – do members of Congress envision that certain outcomes will result from their decisions regarding the parameters of rules of access? Do changes in rules of access always have their intended effects of increasing (or, at times, decreasing) access to the federal courts? Do such shifts have unintended effects that might have been unanticipated by legislators? Legislators may be aware or unaware of the effect of their actions and in this dissertation, I acknowledge this uncertainty but focus on the fact that rules of access have been created or modified and trace the effect on the agendas of the federal courts.

That legislators have multiple motivations for their actions and that their actions may have multiple effects creates uncertainty around understanding the processes by which rules of access influence people's behavior. One model for approaching these questions comes from the legal mobilization literature, in which law is described in part as creating opportunities for action while also constraining possible responses (McCann 1994: 9). Law may have direct and indirect

effects, and may make possible certain avenues of response while closing off others. This dissertation focuses on the creation of one set of opportunities for action – rules of access that open the courthouse doors. If accomplishing goals depends in part on how the law is structured, this dissertation adds to our understanding of such processes by focusing on how the law itself comes to take the forms it does.

The format of the remainder of this Chapter is as follows. To provide a baseline by which to evaluate the relationship between rules of access and the agendas of the federal courts, the dissertation next moves to a discussion of existing scholarship on the federal district courts, courts of appeals, and Supreme Court. Especially for the Supreme Court, this scholarship has focused primarily on the relationship between justices' ideological dispositions and the agendas of the courts. Along with presenting these theories of agenda-setting and change, I discuss scholarship that looks beyond judicial preferences to explain agenda dynamics. Different theories of judicial power are then discussed as are implications for the role of the courts in American politics. This Chapter concludes with an overview of the empirical chapters that follow.

1.3 Rules of access, agenda-setting, and agenda change

Scholars have long recognized the importance of the agendas of the federal courts, especially the agenda of the Supreme Court, to American politics. As a co-equal branch of government, the Supreme Court's choice of which issues to attend to, the exercise of constitutional judicial review, and its engagement in statutory interpretation are crucial to the success or failure of government policies. Additionally, as the head of the federal judiciary, the Court supervises the decisions of lower courts and, when such cases arise, decisions of state courts. District courts and courts of appeals engage as well in constitutional judicial review and

statutory interpretation, determining the constitutionality of government action or figuring out the meaning of laws and regulations.

Scholarship on the district courts, courts of appeals, and Supreme Court answers some core questions about the judiciary's agendas. As discussed in more detail below, scholars have identified circumstances under which "legal" and "extralegal" factors are important for explaining agenda-setting; have demonstrated a link between ideological predispositions and agenda-setting; and have identified changes in agendas over time. However, to the extent that this scholarship focuses on judges and their behavior as the primary or sole influence on agenda-setting and agenda change such scholarship has not accounted for the multiple ways in which actors outside the judicial branch influence judicial agenda-setting and agenda change.⁶

1.3.1 Supreme Court agenda-setting and agenda change

There is a considerable literature on agenda-setting and agenda change at the Supreme Court. As with studies of the agendas of other governmental institutions, scholars have focused on the mechanisms through which the Court's agenda is constituted and how it changes. To explain agenda-setting and agenda change at the Supreme Court, research often centers on a set of institutional features that allow justices to express and act on their preferences. These features include discretionary agenda control, life-tenure, and institutional independence given the perceived infrequency with which the Court's decisions are reversed by constitutional amendment or legislative override. Justices are thus understood to choose which cases to place on the Court's agenda and how to decide the merits of those cases based on their ideological predispositions (Segal and Spaeth 2002: 86). Understanding the Court's agenda at any one time is as simple as investigating the Court's membership.

⁶ One challenge faced by this literature is how to account for judicial agenda change that takes place in the absence of changes in the make-up in the Supreme Court. See Chapter 5 of this dissertation.

Scholarship on the judicial agenda-setting process generally focuses on decisions made by the individual justices and credits the justices themselves as the driving force behind agenda change. The most visible and dramatic change in the Supreme Court's agenda began post-1937 when the Court began to focus more on civil liberties and civil rights cases instead of its historical attention to economic cases. According to a representative explanation, discretionary agenda control gave the justices the tools and opportunity to shift away from economic cases – to “formulate the Court's agenda more to [the justices'] liking” (Hurwitz 2006: 329).

Studies of the Supreme Court's agenda, generally following the attitudinal model, focus on the justices' decision to grant or deny certiorari, the decision which formally places cases on the Court's agenda. There are multiple influences on this decision, which are often characterized as “legal” and “extralegal” (Baum 1977; Perry 1991; George and Epstein 1992). Legal factors include whether or not conflict exists among lower courts, if the federal government participates in the case, and whether there is dissent in lower courts (Provine 1980; Ulmer 1984; Caldeira and Wright 1990; George and Epstein 1992; Segal and Spaeth 2002). Extralegal factors include the ideological predispositions of the justices, the ideological direction of the decision below, and the relative policy positions of other branches of government (Caldeira and Wright 1990; Epstein and Knight 1998; Segal and Spaeth 2002).

Justices may also be affected by their understanding of the “judicial role,” which some scholars have interpreted as influencing the justices to accept cases that “require” resolution by the Court or to avoid deciding economic cases in favor of civil rights and liberties (Pacelle 1991). Provine (1980) describes the agenda setting process in the Supreme Court as a function of policy preferences interacting with role perceptions in that justices make decisions regarding what cases they would like to hear based on their personal preferences, but also act within a

framework of how they view their proper role as justices. Perry (1991), based on interviews with both Supreme Court justices and clerks, posits a theory of agenda-setting through which justices decide to grant or deny *certiorari* based on one of two strategies, either an outcome model or a jurisprudential model. Justices employ the outcome model when they “care strongly about the outcome of the case on the merits at the time of the cert[iorari] decision;” in this case, a justice would make a decision regarding *certiorari* based on strategic considerations. In contrast, if a justice “does not feel particularly strongly about the outcome of a case,” he will decide according to the jurisprudential model and his thinking will be dominated by “legalistic, jurisprudential types of considerations” (274).

Accounts of agenda change explain shifts in judicial attention over time with similar influences: the changing preferences of justices tempered by constraints such as the judicial role and the preferences of other institutions (Pacelle 1991; Segal and Spaeth 2002; Lanier 2003). Changes in the political, social, and economic environment surrounding the Court influences not only the justices’ perception of the judicial role but the issues that litigants bring to court (Casper and Posner 1974; Pacelle 1991). Others have noted a somewhat symbiotic relationship between Supreme Court justices and litigants, who “use information from previous cases about Supreme Court justices’ preferences and priorities to develop their litigation strategies” (Baird 2007: 83). Baird (2007) finds that across policy areas, judicial signals about the importance of a case influence the number of cases brought within those policy areas (99). Thus, the justices themselves may foster agenda change, through encouraging litigants to bring more cases in policy areas in which justices signal their interest. Additionally, when litigants organize or gain increased access to the legal system, judicial attention to their issues may increase (Lawrence 1990).

Agendas (and outcomes) change in response to the replacement of justices through the appointment process (McMahon 2004). Linking the appointment process to changes in judicial agendas, McMahon provides an alternative, interbranch explanation of the shift from economic cases to civil liberties and civil rights. McMahon's study adds to our understanding of how the Supreme Court, and appointments to the Supreme Court, were part of President Roosevelt's efforts to maintain the Democratic Party coalition. The President therefore had multiple motivations for his decisions regarding how to staff the Court. More broadly, political actors outside the federal courts may have multiple motivations for empowering courts, as this example shows.

Major works that examine trends in the Supreme Court's agenda over time each credit the justices themselves with the lion's share of responsibility for both agenda-setting and agenda change. Describing decreasing attention to economic issues in the Warren, Burger, and Rehnquist Courts, Segal and Spaeth write that "a likely explanation for these trends may be the justices' perceptions that business, labor, and tax matters have relatively little *saliency*" – a perspective that links the Court's agenda to judicial preferences and characteristics of the issue under consideration (250 emphasis added). In a similar manner, Pacelle (1991) writes that the "Court *chose*, in part because of external pressure, to limit its consideration of some issues and to become a forum for others" after 1937 (15 emphasis added). Lanier agrees, and states that the Court "began to turn away from [economic regulation] and refocused its priorities on questions of civil liberties-civil rights" (Lanier 2003: 212). By focusing on justices' perceptions of saliency and the choices made by the justices, this scholarship does not account for the influences of actors outside the Supreme Court. In these models, agenda change is driven primarily by the decisions made by individual actors (Supreme Court justices), isolating the agenda change

process from larger dynamics. This stands in contrast to the model of agenda change adopted by Baumgartner and Jones in which agenda change is driven by changes in “[h]ow a policy is understood and discussed” and by shifts in venues in which policies are discussed (Baumgartner and Jones 1993: Chapter 2). To the extent that scholars explain changes in the judicial agenda as a function of judicial decisions alone, they overlook how the Supreme Court’s agenda has changed in part as a function of dynamics in the larger political system. Among other things, questions to be asked and answered include: where do changes in what justices want come from? Are such changes connected to, for example, policy changes undertaken by the political parties that nominate justices? Are lawyers and potential litigants responding to changes in judicial attitudes in pursuing cases or are they acting preemptively?

Thus, studies of the Supreme Court’s agenda focus on the justices and their decisions and generally adopt the model that judicial behavior is a function of ideological predispositions. In turn, the Court’s agenda is described as a reflection of justices’ priorities. While some explanations of decisions on the *merits* decisions account for the influence of Congress or the President’s policy positions (George and Epstein 1992; Epstein and Knight 1998), for the most part the attitudinal model minimizes or eliminates the influence of the legislative and executive branch in the Court’s process of agenda-setting and in influencing how the agenda changes over time. As is discussed below and in Chapter 5, the assumptions of the attitudinal model that undergird such conclusions about the Court’s agenda are based on certain theories of judicial power that emphasize Court independence and insulation over other characteristics.

1.3.2 Lower court agenda-setting and agenda change

The processes of agenda-setting and agenda change are different for the district courts and courts of appeals as these courts do not enjoy discretionary control over their agendas. The

issues to which they attend cannot be described as primarily a function of their ideological predispositions (though decisions on the merits may be). At the same time, there are situations in which these judges have the ability to exercise discretion including their determinations of whether jurisdiction exists and if standing can be granted (Rowland and Todd 1991; Pierce 1998-1999). Additionally, the courts of appeals exercise discretion over whether to hold an *en banc* re-hearing (Giles et al. 2006).

District courts. Studies of the federal district courts focus primarily on the task of explaining the decisional outputs of federal district judges. District court judges occupy a unique institutional position compared to other courts in the federal judicial system (Kim et al. 2009). A comparison between the district courts and the United States Supreme Court, which occupies its own unique place in American politics, helps to highlight this observation. According to Segal and Spaeth, “[m]embers of the Supreme Court can further their policy goals because they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload” (Segal and Spaeth 2002: 92). District courts, in contrast, are trial courts, not appellate courts, and do not enjoy docket control outside of their ability to determine justiciability.⁷ Decisions of district court judges may be reviewed by higher courts, which may temper ideological decision making. District court judges may have ambitions for higher office, which may temper their willingness to overtly pursue political or policy goals. However, as the likelihood of review by a higher court is low, district court judges may not fear too highly reversal by a higher court. Rowland and Carp place the percentage of appeals at 20 percent annually, with fewer appeals being successful, leading to an overall

⁷ Justiciability refers generally to the process by which judges determine if threshold requirements are met by parties to a case.

“declining reversal rate” (Rowland and Carp 1996: 8). As a result, both legal and extralegal factors are thought to influence district court judges’ decisions.

Opportunities for district court judges to exercise discretion do exist, over both procedural and substantive questions (Rowland and Todd 1991: 177; Kim et al. 2009: 85). Where opportunities to exercise discretion exist, ideological influences on decision making are more likely to be found. Scholarship on lower court decision making has thus often focused on situations that allow judges to exercise discretion. Political party affiliation has been correlated with standing decisions of liberal and conservative judges (Rowland and Todd 1991) and with the civil liberalism of the federal district courts in times when ambiguity from the Supreme Court creates legal uncertainty (Rowland and Carp 1980: 294, see also Rowland and Carp 1996). According to Rowland and Todd, “[w]hen the legal context of the dispute is sufficiently ambiguous to accommodate the exercise of judicial discretion, *and* the dispute evokes extrajudicial appointment criteria, the trial judge often resolves ambiguity by reference to the extrajudicial values that secured his or her appointment” (1991: 176 emphasis original). Legal ambiguity exists when the Supreme Court fails to provide lower courts with clear signals, and instead produces “inconclusive, conflicting, and ambiguous ideological signals” which, according to Rowland and Carp, “permits trial court judges much more discretion and leeway in their decision making” (1996: 32). When judges recognize the potential to exercise discretion, “they will be more likely to give vent to their own set of personal attitudes” (Rowland and Carp 1996: 41), attitudes that have been found to align with those of their appointing president (Rowland and Carp 1980, 1983; Stidham et al. 1984).

Agenda change at the federal district courts has been explained by changes in the “parameters of American jurisprudence” (Rowland and Carp 1996: 7). According to Rowland

and Carp, understandings of rights and duties have shifted from a “contractual model” to a “fiduciary model.” While in the former rights only exist if specified, in the latter “vague standards of care [may be] inferred from the fiduciary relationship between litigants or, more importantly, between the state and its citizens” (7). While judges were constrained by the contractual model (as they can only enforce rights that affirmatively exist), the fiduciary model increases judicial discretion as judges must work to understand the nature of the relationship between citizen and state. Judges become involved in policy questions in part because legislation may create a fiduciary relationship that courts may have to enforce or because judges themselves create new obligations, such as through expanding access to courts through standing doctrines (Rowland and Carp 1996: 7). Rowland and Carp acknowledge the role of legislation in creating opportunities for judges to exercise discretion. According to the authors, “fiduciary jurisprudence has been characterized by legislation ... that assigns standards of care rather than creating specific obligations” (7). While the authors recognize a link between legislation and the exercise of judicial discretion, they do not explore the link between jurisdiction-granting or standing conferring legislation and the agendas of the federal district courts.

Courts of appeals. As the Supreme Court gets to choose from a pool of available cases, the attitudinal model is more applicable to understanding and describing Supreme Court agenda-setting as compared to lower courts. The circuit courts (and the district courts) mostly take mandatory cases, so they are more responsive to the bar and litigants – responding, that is, to the issues as raised by the parties that bring those issues as opposed to enjoying more complete agenda control as does the Supreme Court. At the same time, lower court judges may take many steps to control their dockets, including by issuing summary judgments or using expedited

processes, or trying to get parties to settle cases. At both the trial and appellate level, judge's interests will influence how they attempt to manage cases.

The literature on the agendas of the courts of appeals has focused in part on describing changes in agendas across time and circuits. Howard (1973) examined the agendas of the U.S. Courts of Appeals for the District of Columbia, the Second Circuit, and the Fifth Circuit and argued that location and social conditions account for differences in issues heard across circuits as did ideological effects and regionalization (38). Baum et al. (1981-1982) focused as well on three courts of appeals – the Second, Fifth, and Ninth Circuits – but expand the scope of their study to cover 1895-1975. They posited that growth in criminal cases is linked to a growth in crime and “the expansion in the domain of federal criminal law and the criminal jurisdiction of federal courts” while the declining attention to “real property cases” over the time period of the study is attributed to the closing of the frontier, and the fact that “the law which determined rights to land became more certain, making resort to litigation less necessary and less promising (Baum et al. 1981-1982: 295-7). Additionally, despite increased economic activity, attention to business-related cases were found to be relatively low (Baum et al. 1981-1982: 299). On the other hand, the growth of the modern administrative state contributed to increased attention to cases related to the regulation of society, a trend that has contributed to the overall character of the agendas of the circuit courts (Baum et al. 1981-1982: 302). In this manner, Baum et al. identify legal and societal factors that contribute to agenda formation and change in the courts of appeals (for similar scholarship see, e.g., Kaheny 1999).

In describing the business of the courts of appeals, Songer et al. (2000) characterize the work of these courts as “dispute resolution and norm enforcement,” as courts of appeals focus on “detecting legal error in trial court or agency decisions” (47). Surveying existing literature on

agenda-setting at the circuit courts, the authors identify socioeconomic and political context, choices made by litigants, and institutional norms and practices as important for understanding agenda-setting and agenda change (48). They conclude that “changes in the social, political, and legal environments” account for changes in the issues appearing on the courts” with “political and legal factors” leading to “more dramatic change” (Songer et al. 2000: 70).

Hurwitz (2006) examines in more detail the nature of agenda change at the courts of appeals. The process of agenda change at the courts of appeals is described as depending on decisions of litigants to appeal, which may be influenced by Supreme Court decisions which act as signals encouraging or discouraging future litigation (Hurwitz 2006: 327). Additionally, “salient political events, public opinion, and the outcomes stemming from other branches of the government should influence the manner in which ... cases are appealed to the circuit courts” (Hurwitz 2006: 328). Characteristics of issues matter as well so that Supreme Court attention to “salient, controversial” issues, such as civil liberties, will affect attention on the courts of appeals as, again, litigants respond to positive or negative signals sent by the Court (Hurwitz 2006: 329). But attention to economic issues at the courts of appeals should not be affected by Supreme Court attention as the Supreme Court has the option of avoiding these cases through its discretionary control over its agenda – a luxury the courts of appeals do not enjoy.

As with the district courts, scholars have also focused on situations in which the courts of appeals enjoy discretionary control over their agendas including the decision to grant *en banc* review of a panel decision (Giles et al. 2006). In that study, the authors examine three steps to the process: a litigant’s decision to ask for rehearing, an active judge’s request that all active judges be polled, and a vote by all active judges on the panel regarding the petition (853). For each of these three steps, ideological factors and legal factors are examined. Focusing on the

Fifth Circuit for the years between 1981 and 1991, the authors conclude that litigants (and their attorneys) and judges “structure their decisions according to very different sets of goals and priorities” (Giles et al. 2006: 865). Thus, attorneys focus, in part, on the ideological distance between the panel and the circuit majority as well as the likelihood of victory while judges focus, in part, on legal uncertainty, intra- or inter-circuit conflict, disagreement between district and appellate court judges, and whether there are dissenting opinions (Giles et al. 2006: 865).

Studies of the agendas of the lower courts have thus found that these agendas have been transformed over time, as has the Supreme Court’s agenda. The causes of these transformations include factors external to the courts such as changes in the political and social environment – which may influence litigants’ decisions to sue – as well as changes in the nature of the relationship between citizens and their government. The lack of discretionary control over their agendas means that judges on these courts are generally unable to avoid deciding the cases brought before them. In situations in which judges can exercise discretion, such as over access to the courts, they do so and their decisions may be influenced by ideological predispositions. As with studies of the Supreme Court, legal and extralegal factors are therefore important to understanding agenda dynamics at the lower courts.

Studies of the agendas of the lower courts *have* described agenda-setting and agenda change as more than the product of deliberations by individual judges. However, while some hint at a relationship between Congress’s activities and the agendas of the courts, a model of the relationship between congressional manipulation of rules of access has not been presented – for either the lower courts or the Supreme Court. In the next section, I present a model of this relationship with the goal of illuminating the manner in which Congress can influence the agendas of the federal courts.

1.4. Rethinking judicial agenda-setting and agenda change

In this dissertation, I argue that judicial agenda-setting and agenda change over time cannot be explained exclusively by looking at judges' ideological predispositions or at factors such as issue salience. While courts have indeed become more involved in multiple aspects of Americans' lives as reflected by changes in the courts' agendas over time, this increased involvement is not solely because of efforts on the part of judges to involve themselves in new, different, or more issue areas. To explain the agenda-setting process and agenda change over time, I argue that the changes in the agendas of the federal courts described above are in part a function of congressional activity. Relevant congressional activity includes passing a law in a policy area, thereby creating new legal issues to be adjudicated; passing jurisdiction-granting legislation to designate a court as venue in which to hear claims; and conferring standing on litigants to allow their claims to be heard in a court of law.⁸

First, the passage of a law is almost certain to create questions requiring resolution in a court of law. Congressional activity leads to judicial activity as litigants look to the courts to settle legal and policy questions, questions that might not exist absent related legislation. Second, like other policy-making institutions, the manner in which U.S. courts participate in policy processes is structured by their jurisdiction. The jurisdiction of the federal courts is generally established in the U.S. Constitution, with Congress frequently exercising its constitutional authority to determine the specific jurisdiction of the lower courts. When Congress grants jurisdiction to the courts, it confers upon them a number of related characteristics. It establishes courts as policy venues, giving them the power to make “authoritative decisions ... concerning a given issue” (Baumgartner and Jones 1993: 31-2) and

⁸ These are not the exclusive mechanisms through which Congress can empower the courts or litigants. Other mechanisms include changing rules regarding class action suits (Barnes 2007) or by manipulating the costs and benefits of litigation (Farhang 2008, 2010).

confers agenda-setting powers (Hinich and Munger 1997: 157-65; Adler and Wilkerson 2008: 33). Grants of formal jurisdiction designate courts as venues in which individuals and groups may work to advance policy goals. A court's agenda at any point in time is a reflection in part of that court's jurisdiction. Furthermore, a court's agenda over time is in part a reflection of how jurisdiction changes.

Third, the manner in which courts participate in the policy process is additionally structured by standing. Judges make decisions of what these rules are and apply these rules. Lawmakers also make decisions regarding the availability of standing. As the Supreme Court has cabined important parts of standing and other rules of justiciability in constitutional terms – that is, as requirements set by the Constitution – courts enjoy a great deal of authority over determining what standing rules will be and how they will be applied. That is, while judges sometimes call standards “constitutional” these standards are not explicitly in the Constitution but are judicial embellishments of the constitutional text. These include the prohibition against advisory opinions, against mootness, the need for ripeness, and for the avoidance of political questions, to name a few. The idea is that judges have developed a large body of doctrine with the goal of delineating the proper exercise of judicial power. Sometimes, the effect is to encourage judicial participation in deciding certain policy questions while at others, such rules work to discourage judicial participation. Additionally, the Supreme Court often mixes pragmatic and constitutional standards – meaning it is not always clear if a rule of justiciability stems from prudential or constitutional grounds. There is often confusion about what level a standard rises to, and the Court has at times avoided resolving this confusion and even uses it to its advantage as shifting between pragmatic and constitutional standards is one way for the Court to escape its precedents.

At the same time, members of Congress have the capacity, and act on that capacity, to grant (or deny) standing to litigants (see Chapter 3). Individuals and groups bring claims based in part on whether they have standing to sue. As with claims that courts have jurisdiction, judges evaluate standing claims and determine if standing does in fact exist. The make-up of courts' agendas change over time in part because standing doctrine is changed either judicially or legislatively. When the standing requirements are lowered by judges or when Congress confers standing on more individuals or groups, or when availability is limited, the court's agendas will reflect in part these standing rules and laws.

It is worth noting that the Supreme Court often takes standing cases because there is some new issue, novel strategy or confusion regarding how to apply an existing rule in the lower courts. The justices may choose a case to determine a new rule that is probably of broad import to a number of other cases. Further, the Court often avoids deciding the merits of these cases and focuses instead on the threshold questions. In some cases, threshold issues such as standing are not the only issues in the case – the Court could move to the merits – but the Court avoids ruling on substance because it concludes that a lower court was wrong to grant standing in the first place. A ruling on standing often, then, avoids the merits, and a ruling against standing always does. And in some cases, the Court at one time rules on standing and then returns to similar issues farther down the line. For example, the Court ruled in *Baker v. Carr* (1962) that people had standing to sue regarding apportionment of legislative districts but did not establish the one person, one vote standard until *Reynolds v. Sims* (1964).

This dissertation therefore addresses a gap in our understanding of how the agendas of the federal courts are constituted and change over time by accounting for the role of congressional enactments and of rules of access in this process. New legal questions are created

in relationship to new laws. Jurisdiction and standing are granted by Congress, meaning that the legislative body plays an integral role in the process by which federal courts set their agendas. Litigants may be able bring certain cases and judges have the capacity to hear those cases because Congress has created opportunities for judges to adjudicate certain issues. For conceptions of judicial power, the recognition of a role for Congress in the judicial agenda-setting process has numerous implications.

1.5 Judicial power in a democracy

Previously, I discussed two ways of explaining judicial agenda-setting and change – a “court-centered” view in which the ideological predispositions of judges explain agenda dynamics and a “interbranch” view in which actors outside of the judicial branch influence the agendas of the federal courts. These two different approaches to explaining judicial agenda-setting and change are rooted in different conceptions of the origins and operation of judicial power and of how courts participate in American politics. In the court-centered view, the role of the Supreme Court in American politics is to resolve disputes and make policy, where appropriate (Segal and Spaeth 2002: 406-29). At the Court, agendas are set by judicial actors who control their docket. Decisions may be “counter-majoritarian” if they declare Acts of Congress or other government actions unconstitutional. In the interbranch view, judicial agenda-setting and agenda change are viewed as processes that result from the decisions of judges who operate in legislatively-created environments – environments that are structured in part by decisions made by Congress. Agenda-setting is a manifestation of judicial power, but judicial power itself is understood as contingent on decisions made by actors in other branches of government. Decisions by the courts may have multiple implications and cannot be simply categorized as counter-majoritarian or majoritarian.

1.5.1 Court-centered views of judicial power

Here, the Supreme Court is viewed as deriving its power from the Constitution, which serves as the fundamental law of the land. Operating in a political culture that distrusts centralized federal power, the Court is additionally situated in a federal system and a system of separated powers. In the former, power is divided vertically between the federal and state governments while in the latter, power is divided among three co-equal branches each with its own sphere of activity and ability to check and balance the actions of other branches. These are viewed as the source of a need for the Court to make public policy – to resolve disputes which arise between levels of government and among branches of government. The Court does so through the power of judicial review, or the power to “declare an action of the other branches of government incompatible with the content of the fundamental law” (Segal and Spaeth 2002: 1-20).

Additional characteristics of the Supreme Court are important to note as they contribute to understandings of how justices make their decisions and of the impact of their decisions. Supreme Court justices are conceived as operating in a unique institutional environment that allows them to act on their preferences. Justices are appointed to the Supreme Court for life; absent are the periodic checks of elections. Justices’ salaries are constitutionally protected, and the formal removal of justices depends upon impeachment (or, more often, retirement or death). The Supreme Court’s agenda is primarily discretionary and is constructed when justices agree, according to various institutional rules, to grant review to cases that have been litigated through the federal and state judiciaries. When justices make their decisions, they are relatively free from external constraints. According to Segal and Spaeth, “[a]ttitudinalists argue that because legal rules governing decision making (e.g., precedent, plain meaning) in the cases do not limit

discretion; because justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort, the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies” (2002: 111). As described above, the implications for agenda-setting and change are clear: the justices of the Supreme Court set the agenda and are responsible for changes in the issues appearing on the agenda over time.

In the court-centered view, interactions between the Supreme Court and other branches take on a “direct” nature. The Supreme Court exercises its power through the practice of judicial review and either strikes down or upholds a law. It is clear when the Court exercises its power for a law has been struck or upheld, and the impact of the Court’s action can be clearly defined (see, e.g., Rosenberg 1991). Additionally, as illuminated by Lovell in his critique of predominant conceptions of judicial power, scholars often assume that laws represent clear policy choices and policy positions adopted by Congress. This “legislative baseline” is thought to establish a yardstick of legitimacy by which to evaluate the Supreme Court’s action. If the Court strikes down a law ostensibly supported by a majority of elected officials, then it has acted in a counter-majoritarian fashion (Lovell 2003: see, e.g., Chapter 1).

1.5.2 Interbranch views of judicial power

In the interbranch literature, judicial power is described as contingent in both its origins and its exercise. In addition to the powers granted to the federal judiciary by the Constitution, power is granted to the courts through positive action by Congress. The jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court are established legislatively. Members of Congress foster the exercise of judicial power by creating jurisdiction upon which courts act. Congress often manipulates the parameters of jurisdiction, granting jurisdiction in

new policy areas and taking it away in others (Peabody 2006; Chutkow 2008). Only with grants of jurisdiction from Congress are the lower federal courts able to participate in the policy process (though once courts and jurisdiction are created, there is a constitutional basis for their continued existence). And, Congress grants standing to people, creating new opportunities for courts to exercise power, again contingent upon legislative-grants.

The relationship between courts and other branches of government is not always conceived as “direct.” Supreme Court decisions may not operate in a straightforward fashion to the extent that their impact may not be immediately discernible or may depend on other actors for implementation (McCann 1999). Furthermore, interactions between the Supreme Court and the United States Congress are complex. Coordination between the branches of government to advance policy and political goals is a characteristic of our political system. The act of striking down legislation cannot be viewed as a straightforward action that is easily interpreted (Lovell 2003). As noted early on by Dahl (1957), the legislative coalition that originally passed the legislation may no longer be in power, meaning it is not always clear which “legislative will” is theoretically thwarted. The Supreme Court rarely overturns legislation of the national governing coalition of which it is a part meaning there is little danger to an existing legislature that its policies will be affected.⁹

While there is no direct electoral connection between judges and the public, important links exist between the courts and the public through elected officials who nominate, vet, and approve of judges. U.S. Senators continue to influence the choice of judicial nominees through the practice of senatorial courtesy (Giles et al. 2001). The ability of the President to shape the federal judiciary through the appointment power, while not absolute, is nonetheless important as

⁹ While Dahl drew attention to this puzzle early on, the public law literature did not really set about answering it until a generation and a half later.

the relative balance of liberal and conservative judges on the courts shifts along with new presidential administrations (Rowland and Carp 1980, 1983; Stidham et al. 1984; Rowland and Carp 1996; Songer and Ginn 2002). McMahon (2004), for example, argues that strategic choices on the part of presidents in their choices of appointees to the Supreme Court can impact outcomes and finds that President Franklin D. Roosevelt was successful in staffing the Court with members who would advance civil rights and liberties.¹⁰

Further links between elected officials and the courts come by way of Congress's constitutional authority to establish the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court. Along with passing jurisdiction-granting legislation and legislatively expanding access through standing, two mechanisms discussed in the chapters that follow, Congress often has the opportunity to respond to Supreme Court decisions. If the Court's decision stands on statutory interpretation, Congress may pass legislation to override the Court's opinion. Recently, for example, Congress overrode the Court's decision in the case of *Lilly Ledbetter v. Goodyear Tire Company* (550 U.S. 618 [2007]) through the passage of the Lilly Ledbetter Fair Pay Act of 2009. Additionally, Congress has the capacity to remove jurisdiction from the federal courts and frequently does so (Chutkow 2008), thereby engaging in an ongoing dialogue with the courts over their interpretation of federal laws.

These different views of judicial power thus lead to different conclusions about the role of the Supreme Court in American politics. Under the court-centered framework, the Supreme Court is described as a pervasively independent and powerful institution, one that often acts in a counter-majoritarian fashion. The Court's agenda reflects the power it enjoys as justices are free

¹⁰ A president's ability to direct the course of the federal courts is influenced by the make-up of the Senate. When the Senate is controlled by the opposite party from the president, for example, it is much harder to get a judge or justice through the process. Furthermore, when there is divided government, it is much harder for the elected branches to retaliate against the Court. Divided government is a characteristic of government in recent times, complicating interactions between the branches.

to act on their ideological predispositions given the nature of the institution in which they operate. Assumptions include the idea that the source of the Court's power is the grant of power from the Constitution, that judicial decisions on constitutional decisions are final, that powers are relatively fixed, and that competition against branches is a zero-sum game where each side wants to move policy toward some ideal point (as opposed to the possibility of cooperation among the branches). Under the interbranch framework, the ability of justices to act is contingent in part on grants of power from other institutions. The Court's agenda reflects the legislatively-created environment as well as judicial preferences. Courts may act in ways that frustrate the policy priorities of other governmental actors, but they also act in ways that further those priorities. A more complex and contextualized description of judicial power emerges from this perspective as it takes into account the manner in which the legislative, executive, and judicial branches share power and responsibility for governing. Public policy often results from the coordinated efforts of all three branches, which work within their respective spheres to draft, enact, implement, and interpret legislation.

1.6 Summary

Positing a distinct theory of judicial agenda-setting and change that depends in part on congressional activity, including granting jurisdiction and conferring standing, this dissertation will make a number of related theoretical contributions to the existing literature. First, by focusing on the federal district courts and the Supreme Court and their agendas, this project works to further illuminate the processes by which federal courts set their agendas. That is, I identify jurisdiction and standing as factors that, in addition to ideological predispositions, are integral to agenda-setting and agenda change over time. In doing so, a picture of the judicial

agenda-setting process emerges as the process accounts for the roles that Congress plays in influencing the issues that appear on the courts' agendas.

Second, I provide an explanation of the changing nature of the issues appearing on the agendas of the federal courts. Numerous scholars have described fundamental changes in the issues appearing on the agendas of the federal courts over time. Tracking the issues to which courts attend, scholars have found that the agendas of the federal courts have undergone a fundamental transformation throughout the twentieth-century. Courts all at three levels currently devote less attention to questions of economic regulation when compared to earlier periods. Half of the published opinions of district courts in the period between 1933 and 1953 dealt with regulation of the economy while only 17 percent did so in the period between 1969 and 1987 (Rowland and Carp 1996: 22-3). An analysis of the business of the courts of appeals for 1895-1975 concluded that while economic cases once dominated those courts' agendas, in the latter period "a large proportion of ... disputes are essentially noneconomic in character" (Baum et al. 1981-1982: 306). Since the late 1930s the Supreme Court's plenary docket has been transformed from one dominated by economic issues to one dominated by civil liberties and civil rights issues (Pacelle 1991). While economic cases accounted for almost half of the Court's agenda space in the 1930s by 1987 only 10 percent of the Court's agenda was devoted to cases dealing with such topics as injury compensation, insurance claims, and personal economic disputes (Pacelle 1991: 62-7). Once venues for adjudicating "private economic disputes," courts are now more likely to deal with issues related to criminal justice, civil rights and liberties, and the regulatory state (Baum et al. 1981-1982: 306; Rowland and Carp 1996: 22). Often focusing on ideological predispositions as explanations for these changes, scholars have not accounted for the relationship between the manipulation of rules of access and judicial agenda dynamics. This

dissertation improves our understanding of the causes of agenda change over time by developing a theory in which judicial agendas change partly in response to legislatively-created opportunities.

Third, this dissertation challenges conceptions of courts as “counter-majoritarian” by providing additional evidence of links between Congress and the courts. I demonstrate that courts often have the opportunity to participate in the policy process due to decisions made by elected officials, who serve as an important link between the public and the courts (Lovell 2003). Judicial power is described as contingent on decisions made by elected officials, meaning that elected officials – as representatives of the people – have the capacity (and act on that capacity) to influence how the courts participate in American politics.

1.7 Chapter outline

Following this introductory chapter, the dissertation proceeds to a number of empirical examinations of the relationship between rules of access and the agendas of the federal courts. By using a mixture of methodologies and by focusing in part on the district courts, the courts of appeals, and the Supreme Court, the next four chapters provide a compelling case that there is relationship between rules of access and the agendas of the federal courts. These chapters present examinations of the importance of interbranch processes. Each chapter uses a large dataset that captures the population of cases across a large period of time. Furthermore, I estimate models that link decisions in Congress to changes in outcomes in the federal courts. Together, these chapters make the compelling case that there is an effect of rules of access on federal judicial agendas, that these changes occur over time, and can be measured and explained using quantitative data.

In **Chapter 2**, I link changes in the manner in which federal courts participate in the policy process by identifying how Congress encourages judicial participation. Armed with the constitutional capacity to structure courts, various Congresses have left their mark on the ways in which the judiciary participates in the policy process. Using data on Environment-related cases, this Chapter examines how Congress creates roles for the courts of appeals and the Supreme Court in the policy process. Courts participate in part because of these legislative-created opportunities. The key implication is that judicial power is contingent in part on congressional grants of power.

Chapter 3 focuses on standing to sue, tracing the development of the Supreme Court's standing doctrine from 1921 through 2006 and examining the manner in which Congress conferred standing over the same time period. This Chapter helps to establish how both judges and lawmakers make decisions that affect the agendas of the federal courts, and uses an original dataset of laws that confer standing on potential litigants. Rules of access, including whether litigants will have standing to sue, are determined by judges during the legal process and by legislators during the legislative process. Open access encourages litigation while closed access discourages litigation. Standing has changed over time in response to decisions made by lawmakers and judges.

Chapter 4 examines the conditions under which Congress empowers the judiciary by passing jurisdiction-granting legislation, defined as legislation that explicitly expands judicial discretion by designating courts as venues through which certain specified categories of people or organizations may work to address their claims. I use an original dataset of jurisdiction-granting laws passed between 1949 and 2000 that grant jurisdiction to the federal district courts and the relationship between separation-of-powers concerns and the passage of jurisdiction-

granting legislation. Chapter Four establishes a number of key themes including the idea that Congress routinely passes jurisdiction-granting legislation, that these laws may be important to understanding changes in the agendas of the federal courts, and that there is an important link between lawmakers and decisions made by judges.

In **Chapter 5**, the dissertation turns to the Supreme Court's agenda by focusing on the relationship between the passage of a federal law in a policy area and the Court's subsequent attention to that same policy area. I use data from the Policy Agendas Project, which categorizes all Public Laws and Supreme Court cases according to the same coding scheme for this analysis – allowing for comparison across institutions according to the same metric. The results support the conclusion that judicial attention, often explained as a function of justices' ideological predispositions, can be partly explained in terms of congressional attention to a policy area.

Chapter 6 concludes with a discussion of the implications of rules of access for the agendas of the federal courts and includes a discussion of the contributions of this project, which include constructing and using new databases of jurisdiction-granting legislation and laws that make standing available; rethinking the judicial agenda-setting process to account for Congress's influence; challenging conceptions of the courts as inherently "counter-majoritarian;" investigating the impact on the ability of individuals and groups to use litigation to participate in the political process; and rethinking conceptions of judicial power to account for the relationship between the legislative and judicial branches.

Chapter 2. Rules of Access and Judicial Agenda-setting

2.1 Introduction

Litigants are not always ensured their day in federal court. Rather, litigants must satisfy *rules of access* which govern the ability of individuals and groups to secure judicial review of government action.¹¹ Litigants must show, among other things, that a court has jurisdiction and as potential litigants they must establish standing to sue. Jurisdiction refers to the authority of a court to hear a case while standing is a set of requirements through which a federal judge determines if a litigant is a proper party to bring a case.¹² As part of the judicial process, judges make preliminary, threshold related decisions related to whether cases can advance depending on whether rules of access are satisfied. The relationship between rules of access and the agendas of the federal courts is not immediately obvious. Decisions on rules of access may be overlooked, misunderstood as technical or routine decisions that judges make in the process of hearing a case. Two facts about rules of access complicate this picture, however.

First, it has been demonstrated elsewhere that rules of access are used by judges to control which issues are aired in their courts (see, e.g., Rowland and Todd 1991; Pierce 1998-1999). Decision on rules of access are not always straightforward technical determinations made by judges regarding the ability of a court to hear a case or litigants to bring a case, but have been found to include an ideological dimension as well. Second, and more importantly, rules of access are not set by judges alone. *Congress* is active in figuring out what rules of access will be, within its constitutional powers to establish the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court.

¹¹ As noted in Chapter 1, rules of access may also be implicated in private causes of action, such as the *Dukes* case.

¹² Additional related considerations are whether other rules of justiciability are met, which include ripeness and mootness as well as avoidance of advisory opinions, collusive suits and political questions (Mullenix et al. 1998).

While the U.S. Constitution creates the broad outlines of a federal judiciary, it delegates to Congress the power to fill in the details – an activity Congress often engages in. Congress has the power to create lower federal courts and to participate in the process by which courts are staffed and funded. An important component of the constitutional power to create the lower courts includes the congressional power to establish the structure of the courts. To do so, Congress frequently both grants jurisdiction to and strips jurisdiction from the courts and confers standing on litigants, meaning Congress is intimately involved in determining what courts have the capacity to rule upon. Just as judges make decisions regarding which issues will be heard in their courts, *Congress too makes decisions regarding which issues will be heard in the courts.* Legislation structures the courts' agenda-setting process. Judges set their agendas in part as a response to what they are able to do under the law, and as the laws governing judicial participation change the issues appearing on the agendas of the courts change as well.

In the post-World War II era, United States district courts, courts of appeals, and the Supreme Court have all shifted from adjudicating primarily economic issues to adjudicating non-economic and social issues. Accounts of judicial agenda-setting and change usually focus on judicial actors themselves, concluding that federal judges seek out opportunities to exercise (or avoid exercising) the judicial power and pick and choose, especially at the Supreme Court, which issues to attend to. Whether courts participate in the policy process is often viewed as a judicial decision separate from decisions made by other political actors to empower the courts.

This dissertation explicitly links congressional decisions regarding rules of access to the agendas of the federal courts. In doing so, I build on existing scholarship that has identified the numerous ways in which Congress influences what issues courts attend to. This includes shifting policy-making authority to the courts (Graber 1993; Frymer 2003; Lovell 2003); creating and

staffing courts according to a variety of partisan and policy goals (Gillman 2002; McMahon 2004); varying the expected costs and benefits of litigation (Barnes 2007; Farhang 2010); and creating litigation centers such as the Legal Services Program (Lawrence 1990). Congressional motivation for doing so may take a number of forms, including seeking judicial participation to handle issues difficult for the legislature to resolve; to answer policy questions legislators refuse to answer on their own; to provide an oversight function with respect to executive branch administrative agencies; and, at times, to have courts implement public policy. The manner in which the courts will participate is thus not a fixed notion, but is rather subject to manipulation by Congress.¹³ Existing scholarship has focused primarily on identifying the underlying conditions that lead to judicial policy-making without exploring separately the implications for judicial agenda-setting. This dissertation thus fills in a gap in our understanding of the relationship between rules of access and judicial agenda-setting and change.

An important piece to this puzzle of shifting judicial agendas is judicial behavior. Judges' understandings of how they would participate in the policy process have certainly changed post World War II. However, as the account that follows demonstrates, any changes in these attitudes came against the backdrop of changes in the legal field upon which judges operate. By way of illustration, in the pages that follow, I trace the development of environmental regulation in the United States through an analysis of every environmental law passed between 1948 and 2006, as coded by the Policy Agendas Project. As noted in Chapter 1, as part of the Policy Agendas Project, researchers coded Public Laws according to a classification scheme that allows for tracking of developments in institutional attention over time

¹³ The manner in which the federal courts will participate in the policy process is also subject to manipulation by judges themselves especially when they determine whether potential litigants satisfy rules of justiciability which include standing, ripeness, mootness, exhaustion, or whether litigants run afoul of the general ban on asking courts to issue advisory opinions or to take up political questions (see, e.g., Pierce 1998-1999).

and across institutions. I find that Congress grants policy-making authority to the federal courts by looping them into the administrative process and that there are important variations in the type and amount of authority granted to courts over time. The 1970s and the 1980s were particularly fruitful times for the creation of new environmental policies, which often included provisions to include the courts in the regulatory process. However, this enthusiasm for enacting statutory measures that would explicitly involve the courts dissipated. In addition to exploring congressional activity, I examine how judicial agendas responded to changes in statutory authority.

I argue that understanding the ways in which federal courts participate in the policy process depends in part on understanding how Congress structures their participation. For conceptions of the origins and exercise of judicial power, the key implication is that the power of courts to participate in the policy process varies with grants of authority from Congress. Judges do enjoy a great deal of discretion and exercise that discretion to achieve a variety of goals. At the same time, the opportunity for judges to exercise that discretion depends in part on what they are able to do under the law.

The format for the remainder of this Chapter is as follows. In the next Part, I first discuss changes in the agendas of the federal courts over time. In Part II, focusing on environmental law, I examine how the legal field upon which courts operate changed over time. In Part III, I draw a number of conclusions about the relationship between these changes and judicial agenda-setting.

2.2 Court participation in American politics

In this Part, I examine trends in the manner in which federal courts participate in American politics. Reflecting dominant theories of judicial behavior – such as the attitudinal

model – scholars generally attribute the changes I describe to decisions made by individual judges. In contrast, I adopt an “interbranch” model of judicial behavior in which judges’ decisions can be understood by examining the context in which they make their decisions. Judges do make important policy decisions, and recognizing the role of discretion and the ability to act on discretion is important. At the same time, the ability of judges to make these discretionary decisions is often taken for granted. This study works to demonstrate how such opportunities arise through Acts of Congress.

The federal district courts, courts of appeals, and the Supreme Court each have unique characteristics that inform their agenda-setting process and how their agendas change over time. For the lower courts, the lack of discretionary control over their agendas means that courts generally must hear every case properly before them. At the same time, both the district courts and courts of appeals are able to exercise discretion in determining if threshold requirements such as standing and jurisdiction are met (Rowland and Todd 1991: 177; Kim et al. 2009: 85). Courts of appeals can also make the discretionary decision whether to grant *en banc* review (Giles et al. 2006), and all judges make substantive decisions during the course of litigation. Judges serving on these courts make a host of decisions regarding how to deal with matters related to cases, and may issue summary judgments, encourage settlement, or otherwise expedite litigation. The Supreme Court, armed with discretionary control over its agenda, exercises almost complete control over its agenda by picking and choosing which petitions of *certiorari* to grant or deny.

The judicial agenda-setting process and the manner in which these agendas change over time are thus linked to the behavior of individual judges. In one respect, this focus on judicial behavior makes sense especially for the Supreme Court, given institutional features such as life

tenure, the placement of the Court at the top of the judicial hierarchy, and its discretionary agenda-setting powers (Segal and Spaeth 2002: 111). However, such a focus on judicial behavior relies on certain assumptions regarding the origins and exercise of judicial power that minimize the relationship between Congress and the federal courts. Judicial power is viewed as stemming from the U.S. Constitution, and as courts exercise the judicial power they are often seen as at odds with the preferences of Congress such that the relationship between Congress and the courts is often characterized as adversarial. Courts are often described as operating in an environment relatively free from congressional oversight, because Congress is unwilling or unable to “control” the judiciary (see, e.g., Melnick 1994; Segal and Spaeth 2002).

In contrast to these court-centered views of judicial power, scholars adopting an interbranch perspective conceive of judicial power as contingent in both its origins and exercise. Congress enjoys a host of constitutional powers with respect to the federal judiciary, including the power to set the jurisdiction of lower courts and to set the appellate jurisdiction of the Supreme Court. Congress both grants jurisdiction to the federal courts and removes jurisdiction. The ability of courts to participate in the policy process depends on these congressional grants of power, and research on this activity demonstrates just how often Congress tinkers with the ability of the federal courts to participate (Gunther 1984; Peabody 2006; Chutkow 2008). Congress may have policy or partisan goals in mind when it makes decisions during the legislative process to grant (or deny) policy-making authority to the courts and may grant (or deny) authority based on evaluations of the relative partisan or policy positions between the legislature, courts, and the executive branch (Shipan 2000; Smith 2005).

Furthermore, the interbranch model accounts for growth in the power and the influence of the federal judiciary as an institution. The power and influence of the federal judiciary has

grown from the early days in which Supreme Court justices were forced to ride the circuit. For the courts, decisions made by judges and justices *are* important to understanding how individual cases or a line of cases furthers or checks the power, prestige, and influence of the courts. When the Court upholds the policies of a governing coalition, for example, it is perhaps rewarded by support from other sectors of the political system. However, courts are not self-organizing. Without Congress's frequent legislative decisions regarding the structure of the federal courts, the judiciary would not exist in the form it does today. Decisions by judges alone cannot account for the growth and development of the judicial branch.

In the interbranch model, judicial agenda-setting and agenda change are described as a function of the interplay of judicial preferences and interbranch factors. Interbranch factors include rules of access, or rules that govern if a court has the authority to hear a case and include jurisdiction, standing, and class action rules. A judge has the opportunity to determine if rules of access are satisfied but to the extent that rules of access may be established (and manipulated) by Congress, judges are playing on a legal field that Congress has helped construct.

I argue that the agenda-setting process unfolds through a number of steps. First, Congress sets or varies rules of access by, for example, granting jurisdiction to a lower court. Congress grants jurisdiction to the federal courts by explicitly stating that a specific court shall have jurisdiction to hear cases related to the issues raised by a statute. For example, the Civil Rights Act of 1964 states that “[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law” (*Civil Rights Act of 1964*: 245). Second, litigants determine whether to sue based on their evaluations of whether they meet the requirements for bringing a case and based

on their evaluations of the costs and benefits of litigation (Farhang 2010). Third, a judge exercises his discretion and determines whether rules of access are satisfied. For example, a judge would evaluate if the court has jurisdiction or if litigants meet the basic standards required by standing. The basic requirements for standing are that a potential litigant must show injury-in-fact, must be able to trace the injury to the actions of the defendant, and must show that a court can provide a remedy. Standing is a classic rule of access in that absent standing, a case cannot go forward (see Chapter 3). Fourth, the court moves to the disposition of the case which may mean making a preliminary decision on access or moving to the merits of the case. While judges are making substantive and discretionary decisions, this model emphasizes that Congress is making antecedent decisions that affect a court's agenda.

2.3 Judicial agendas: environmental policy-making

How federal courts will participate in the policy process depends in part on how Congress structures their participation. Congress has a variety of legislative options at its disposal, and may create peripheral or central roles for courts in the administrative process. That courts will participate in the policy process is often unquestioned. That is, it is often taken for granted that courts will be available to hear people's claims. There are both constitutional and statutory reasons why courts may or may not be available. Potential litigants may not meet constitutional standards for bringing a case (see Chapter 3). And Congress may not have enacted laws that allow lawsuits or may have specifically removed jurisdiction from the courts (Chutkow 2008). As the data that follows helps to demonstrate, court participation depends in important respects on statutory decisions made by legislators to include the courts.

Using data from the Policy Agendas Project, I identified every Public Law with the code *Environment*. I focus on the environment because it is an area of law that has been identified as

one in which the courts are especially active (see, e.g., Melnick 1983). Scholars typically note the wealth of environmentally-related laws passed by Congress but do not explicitly link congressional activity with court involvement in the policy process. This set of 540 laws covers the period between 1948-2006 (80th-109th Congresses). I coded laws as creating new programs or making other substantive changes (308 laws), compared to those laws in which Congress took “non-substantive” action (232 laws). These include appropriating funds (90 laws), making technical or other minor amendments (39 laws), extending existing legislation (29 laws), issuing environmental-themed proclamations (30 laws), reauthorizing legislation (19 laws), or taking other action (25 laws).

Figure 2.1 displays the number of environment-related statutes enacted by Congress between 1948-2006 (80th-109th Congresses), with distinction made between the total number of laws passed, the total number of substantive laws passed, and the total number of non-substantive laws passed. Overall, congressional activity related to the environment increased over the course of the time period with the most laws passed during the decades between 1971-1980 and 1981-1990. The number of substantive laws enacted peaks between 1981-1990 (69 laws).

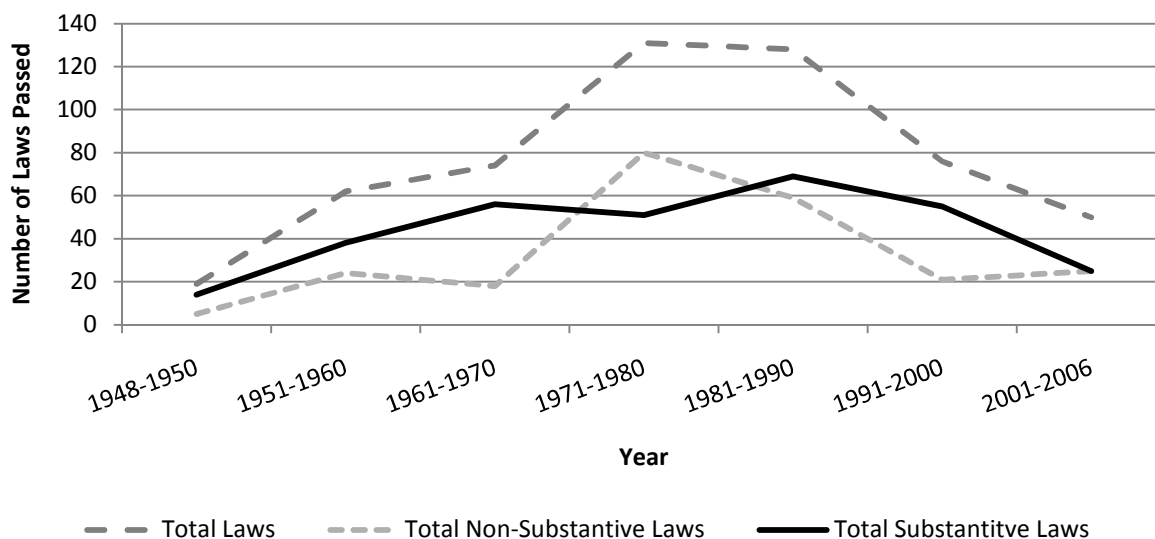


Figure 2.1: Environmental Laws, 1948-2006 (80th-109th Congresses). Source: Policy Agendas Project with additional coding by the author.

2.3.1 Environmental regulation in the United States, 1948 - 2006

Environmental regulation in the United States appears to have undergone three related transformations. As with many areas of law in the United States, regulation of the environment was first the province of the common law. Through common laws tools such as property, contract, and torts, federal courts were active in regulating society including issues that would now be considered “environmental” (Eagle 2007-2008: 583). Second, due to the failure of common law institutions (courts) to adequately address problems, “state governments began enacting broad regulatory schemes to control the environmental effects of private industrial activity” (Adler and Morriss 2007-2008: 575). Third, federal regulation replaced this state-based system of environmental regulation (Lazarus 2004; Brooks 2009). The common-law and state-based systems regulation were “dramatically” replaced by a “vast [federal] administrative apparatus” (Sunstein 1984: 51). The modern environmental movement is generally dated to 1970, in which the first national Earth Day celebrations were held, the National Environmental Policy Act (*National Environmental Policy Act of 1969*) was enacted, and various Congresses

going forward increasingly passed environmental regulation laws (Wenner 1982; Baumgartner 2006).¹⁴

The manner in which the federal government regulated the environment changed over the time period under study, as evidenced from data from the Policy Agendas Project on Public Laws passed from 1948-2006 concerning the environment. I coded the 308 laws that created new environmental regulations or made substantive amendments to existing regulations based on whether they granted policy-making authority to an administrative agency (227 laws), a federal court (12 laws), or both an administrative agency and a federal court (69 laws). Figure 2.2 displays these three substantive categories. By far, administrative agencies received the most grants of policy-making authority. As can be seen from Figure 2.2, there are really two peaks of activity. In the years between 1949-1960, 44 laws were passed granting policy-making authority to administrative agencies to regulate the environment and in the decade between 1991-2000, 47 such laws were passed. Up until the 1960s, Congress granted almost no policy-making authority exclusively to the courts and only does so in 12 laws from 1948-2006. Agencies and courts share a great deal of authority, with the most grants to these institutions coming in the decades between 1971-1980 (23 laws) and 1980-1991 (22 laws). The total number of court-related laws declines to the point that no laws conferring policy-making authority on the courts were passed between 2000-2006.

¹⁴ Brooks (2009) provides a comprehensive analysis of regulation of the environment from 1945-1970, demonstrating that the movement did not appear fully formed in 1970. Rather, in the post-WWII era, numerous factors influenced the development of local and then national environmental movements that used a variety of tactics to place environmental issues on the local, state, and national agendas.

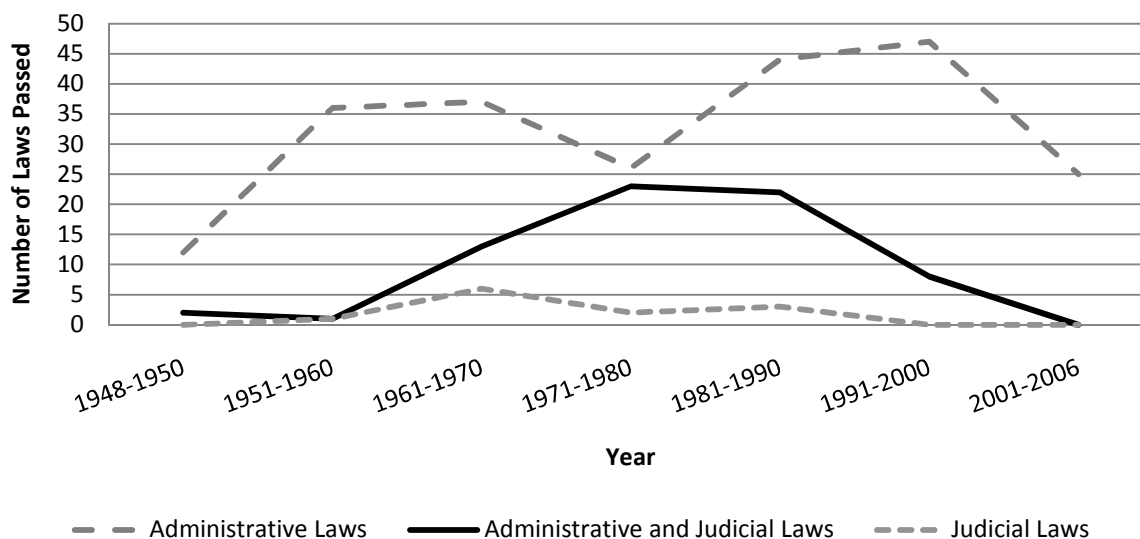


Figure 2.2: Environment Laws by Type, 1948-2006 (80th-109th Congresses). Source: Policy Agendas Project with additional coding by the author.

2.3.2 Environmental regulation in the courts, 1948-2006

I coded laws as granting policy-making authority to the federal courts if they expanded the discretion of the courts and created mechanisms for them to participate in the administrative process. Through these provisions, courts become policy venues through which individuals and groups may work to address their claims. Based on my reading of these statutes, I identified five ways in which courts can become involved in the administrative process.

First, Congress authorizes civil actions, often by the Attorney General at the request of the regulating agency. The Water Pollution Control Act, for example, states that the appropriate regulator may “request the Attorney General to bring a suit on behalf of the United States to secure abatement” of pollution (*Water Pollution Control Act* 1948: 1157). Second, Congress authorizes civil actions by litigants who may be affected by agency action, often by enacting citizen suit provisions. The Clean Air Amendments of 1970, for example, includes a citizen suit provision granting standing to “any person” to enforce in district court violations by any person of an emission standard or of an order issued by the Administrator. Additionally, a suit may be

brought against the Administrator “when there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary within the Administrator” (*Clean Air Amendments of 1970*: 1706; see also Smith 2006).

Third, Congress authorizes judicial review of agency rules, regulations or other agency determinations. For example, in the Radiation Control for Health and Safety Act of 1968, “any person who will be adversely affected by [a] regulation” may seek judicial review in the United States courts of appeals (*Radiation Control for Health and Safety Act* 1968: 1178). Fourth, Congress grants jurisdiction to the courts to take a number of actions including to restrain violations or to hear an action arising under relevant provisions (e.g. *Federal Water Pollution Control Act, Amendments* 1970: 94, 97). Fifth, Congress authorizes judges to issue warrants, to seize goods for libel, or to enforce subpoenas. For example, in the Clean Water Restoration Act of 1966, Congress stated that “[a]ny boat or vessel ... from which oil is discharged in violation of ... this Act shall be liable for a penalty of not more than \$10,000 ... The penalty shall constitute a lien on such boat or vessel which may be recovered in proceedings in libel in rem in the district court of the United States for any district within such boat or vessel may be” (*Clean Water Restoration Act of 1966*: 1253).

From 1948-1960 (80th-86th Congresses), 81 laws regulating the environment were passed. Early federal laws aiming to substantively address environmental issues vested authority or responsibility with administrative agencies, and infrequently created a role for the federal courts. The earliest example of a law that involved the courts was an Act to prohibit the importation of certain birds and animals, and the law allowed for criminal prosecution of violators (*Importation of Birds and Animals* 1948). The Water Pollution Control Act, also enacted in 1948, authorized the Attorney General to bring a suit “on behalf of the United States to secure abatement of ...

pollution” (*Water Pollution Control Act* 1948: 1157). Amendments to the Water Pollution Control Act passed in 1956 additionally allowed for Attorney General suits to abate pollution, and also established the United States courts of appeals as a venue for a State or interstate agency to appeal actions undertaken by the Surgeon General (*Water Pollution Control Act Amendments of 1956* 1956: 501). Finally, the Tennessee River Basin Pollution Control Compact authorized the Attorney General to institute actions in “any court of competent jurisdiction,” which were in turn vested with jurisdiction, to enforce agency orders (*Tennessee River Basin Water Pollution Control Compact* 1958: 826).

Between 1961-1970 (87th-91st Congresses), 74 laws were passed regulating the environment, with the majority granting authority only with administrative agencies (37 laws). One law granted authority solely to a federal court while in an additional 13 laws Congress granted authority to both agencies and federal courts. As the majority of laws granted policy-making authority solely to an administrative agency this can be characterized as a time of transition when Congress began to look more to the courts as venues for environmental regulation. Courts were established as venues in which the Attorney General could bring suits or courts were granted jurisdiction (e.g. *Air Quality Act of 1967* 1967: 493, 499). In other instances, Congress created procedures for the judicial review of agency action at both the court of appeals and Supreme Court (e.g. *Radiation Control for Health and Safety Act* 1968: 1178).

In the decade between 1971-1980 (92nd-96th Congresses) Congress passed 131 laws regulating the environment, with 26 granting authority to administrative agencies only, 6 to federal courts only, and 23 to both agencies and federal courts (with 76 “non-substantive” laws). These patterns continued in the decade between 1981-1990. Out of 128 laws passed regarding the environment, 44 granted authority exclusively to administrative agencies, 2 to courts

exclusively, and 22 to both agencies and courts (with 60 “non-substantive” laws passed).

However, Congress shifted tactics by the 1990s. Reducing its activity overall, Congress passed only 76 environmental laws, with 47 granting authority exclusively to administrative agencies, 3 exclusively to courts, and only 8 to both agencies and courts (with 18 “non-substantive” laws passed). Finally, between 2000-2006, Congress passed only 50 environmental laws (25 being “non-substantive” laws) and granted authority solely to administrative agencies – leaving courts out of the picture.

Table 2.1 displays a count of provisions in the five subject areas introduced above for the time period between 1948-2006. Among other powers, federal courts were tasked with hearing civil suits in which the Attorney General (acting on behalf of the agency) attempted to restrain violations (e.g. *Federal Water Pollution Control Act Amendments of 1972* 1972: 860); were granted the authority to hear claims brought by citizen suits (e.g. *Safe Drinking Water Act* 1974: 1690); were granted jurisdiction to take actions such as granting relief (e.g. *Marine Protection, Research, and Sanctuaries Act of 1972* 1972: 1037); or were given the power to exercise judicial review of agency rules and regulations (e.g. *Noise Control Act of 1972* 1972: 1247). Both the amount and type of authority granted in these provisions are noteworthy. Between 1971-1990, Congress granted more policy-making authority to the federal courts compared to other periods. Courts would both assist agencies in enforcing the law and oversee agency action through citizen suits and petitions for judicial review.

Table 2.1. Environment Provisions Passed Among Five Provision Types, 1948-2006 (80th-109th Congresses).

	Agency or Attorney General civil action	Citizen suit or Private civil action	Judicial review	Jurisdiction	Other (e.g. Issue warrants, enforce subpoenas)
1948-1960	3	0	1	0	1
1961-1970	6	3	6	9	9
1971-1980	29	9	18	10	22
1981-1990	20	1	20	11	18
1991-2000	2	0	3	5	3
2000-2006	0	0	0	0	0

Source: Data compiled by the author.

Litigants acted on these legislatively-created opportunities to use the courts. The agendas of the Courts of Appeals and the Supreme Court reflect in part these legislative trends.¹⁵ Figure 2.3 displays the weighted count of published cases coded as concerning the environment for the U.S. Courts of Appeals (Songer 2006) and the count of docketed cases coded as concerning the environment for the Supreme Court (Spaeth 1998; *The Supreme Court Database* 2011). According to the U.S. Court of Appeals Database, no cases concerning the environment were published prior to the 1960s. However, attention at this level of the judiciary quickly increases, to about 40 cases each for the decades between 1971-2000. Supreme Court attention to the environment peaks between 1971-1980 at 41 cases and declines thereafter. Both the courts of appeals and the Supreme Court, then, showed increased attention to the issue of the environment starting in the 1970s.

One explanation for the shifts in the courts' agendas described above centers on the behavior of judges. According to one variation of this explanation, judges in the 1970s perhaps became more attuned to issues related to the environment in part because litigants themselves

¹⁵ Comparable data for the U.S. district courts are not available for the time period under study. One possible source, the Annual Report of the Director of the U.S. Courts (Courts 1940-2006), provides a count of the number of civil cases filed in the district courts starting at 1940 but this source does not begin to explicitly identify environmental related cases until 1982.

were more attentive to this issue (Glicksman 1987: 214). Coupled with concern about agency capture, the situation was ripe for increased judicial oversight of administrative agencies (Glicksman 1987: 215). For the Supreme Court, its attention to the environment may have led to increasing attention over time as early or initial cases encouraged litigants to bring further cases down the line (Pacelle 1991; Baird 2007). The decade between 1971-1980 is especially associated with increased judicial oversight of the environment, with judges seen as leading the charge to intervene in the regulation of the environment.

I offer an alternative explanation. Compared to other periods, between 1971-1990, Congress established federal courts as integral players in the regulatory process. While judges may have taken public opinion regarding the environment into account and may have signaled to litigants their receptivity to hearing environmental-related cases, Congress did much to encourage the participation of the federal courts in the process of regulating the environment. As the data used in this Chapter helps demonstrate, Congress began to create a central role for the courts in the decade between 1971-1980 by enacting citizen suit provisions, granting courts the power to exercise judicial review, or otherwise granting courts the jurisdiction to hear environmental-related claims (see Table 2.1). Judicial attention to the environment responded in part to these legislatively-created opportunities.

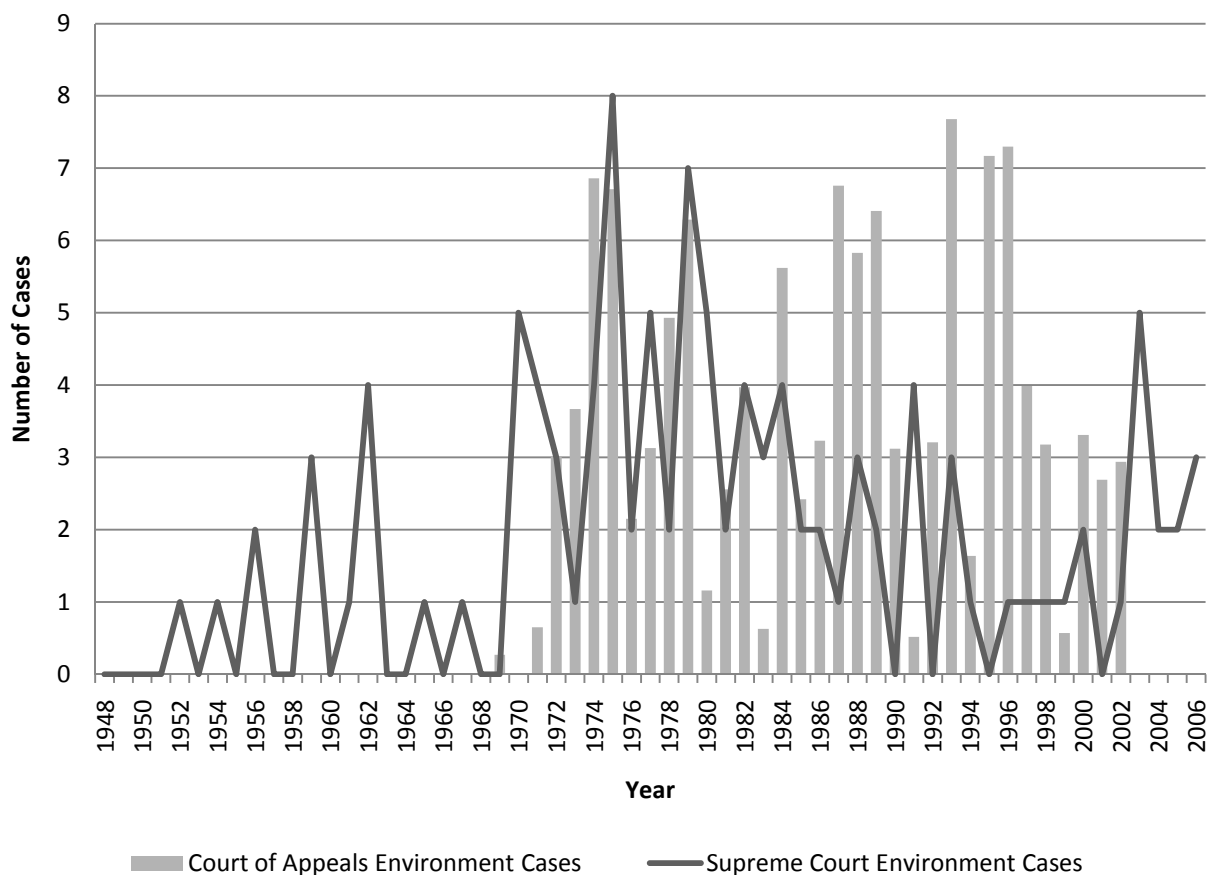


Figure 2.3. Published Court of Appeals Opinions (1948-2002) and Docketed Supreme Court (1948-2006) Environment Cases. Source: The U.S. Court of Appeals Database (using weighted data) and the U.S. Supreme Court Database.

2.4 Conclusion

The fact that federal courts participate in the policy process is often taken for granted. Courts are viewed as self-organizing, with their power and authority stemming from constitutional grants. One result is that observers of the courts overlook the ways in which the ability of courts to participate in the policy process depends in part on grants of authority from other actors. A second result is that observers of the courts at times bemoan the courts' involvement in the policy process especially when judges make decisions that run counter to the perceived preferences of elected officials. Further, observers often conclude that little can be done to modify the manner in which courts act.

While drawing generalized conclusions based on a study of one policy area should be done with caution, the key implication of the argument advanced in this Chapter is that judicial power varies with grants of authority from Congress. The U.S. Constitution does vest the federal courts with the judicial power and does establish a Supreme Court. At the same time, the Constitution vests Congress with the power to create lower courts and to set the appellate jurisdiction of the Supreme Court. Congress actively embraces this power and creates central or peripheral roles for the courts. Decisions made during the legislative process regarding how the courts will participate create a framework upon which judges act. Frameworks change over time. As the example of environmental regulation makes clear, courts were initially left out of the regulatory process but were increasingly to be involved in assisting administrative agencies in enforcing the law, and in overseeing agency decisions.

That judges participate in the policy process is often taken as evidence of judges seeking out new opportunities to exercise judicial power. In this view, lawmakers have little input into the decisions that judges make especially whether judges will make decisions that run counter to the preferences of legislators. In reality, judges ultimately have the capacity to rule in ways that further, have no effect on, or frustrate legislators' goals and preferences. Judges may make discretionary decisions that run counter to the preferences of members of Congress and this may be a risk members are willing to take. The kinds of legislative-grants of power examined here often concerned judicial oversight of executive branch administrative agencies decisions, meaning Congress overall is keen on creating opportunities for courts to review decisions made by administrative agencies.

As the example of environmental regulation makes clear, lawmakers went far in creating opportunities for judges to engage in the policy process. Grants of authority varied over time

and various Congresses were able to influence the manner in which the federal courts would participate in regulating the environment. Judicial agendas responded in part to these legislative-grant of authority depending not only on judicial preferences but on the manner in which Congress varied rules of access, on how litigants did or did not take up these opportunities to use the courts, and on how judges decided to treat congressionally-created rules of access. These interbranch factors, along with judicial preferences, explain judicial agenda-setting and agenda change over time.

Chapter 3. The Politics of Standing: How Congress and the Supreme Court Determine Access to the Federal Courts

3.1 Introduction

Beginning perhaps with de Tocqueville's observation that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one" (de Tocqueville 2003: 315), numerous scholars have noted the propensity of Americans to look to the courts to address questions of public policy. The fact that people are so eager to use the courts is often viewed with dismay, as invoking the judicial process is thought to lead to a number of unwelcome outcomes including a reliance on "rights-talk" (Glendon 1991); oversubscription to the courts and the judicial process (Rosenberg 1991); and an overly litigious society (Kagan 2003). Litigation, at the same time, is viewed as a by-product of our legal and political system. The idea that courts can solve policy problems is explicitly linked by Kagan (2003) to core features of our governmental system. Separation-of-powers disperses power between three co-equal branches of government and, in the meantime, makes getting things done especially difficult. People who desire policy change can advance their policy goals by working through the courts (Kagan 2003: 22-5). Litigation is also encouraged by the political, social, and legal reality that in the absence of a social safety net a lawsuit may be one of the few recourses an individual has to address their grievances (Haltom and McCann 2004).

The idea that Americans so often turn to the courts is reflected in popular tropes such as "everyone gets their day in court" and the belief that the amount of litigation is dangerous and out of control. At the same, litigation is an important tool through which individuals and groups participate in the American policy process (Zemans 1983). Courts play an important role in American politics, and understanding democratic responsiveness requires attention to the way

that legal processes work. By democratic responsiveness, I mean the degree to which institutions take action in response to demands from citizens. Courts are not as proportionally responsive as other governmental institutions, but still do respond to demands. Examining democratic responsiveness includes examining how structure and process affect outcomes. Careful examination of the reality of litigation in the United States reveals an often overlooked fact: *not everyone gets their day in court*. This is because threshold rules *limit* access to the federal courts to individuals or groups that have been injured, a concept that has specific legal implications for those wishing to challenge government action. The fact that individuals and groups might not successfully demonstrate an injury, and other related threshold requirements, means that judicial review of administrative agency decisions might be unavailable and that government decisions will go unchecked in a court of law. For those wishing to participate in the policy process, such participation is not guaranteed but is rather subject to interpretation regarding whether rules of access are satisfied. The result is that certain issues may be placed beyond the reach of a federal court. Questions of access are therefore just as important as substantive decisions on the merits as they help determine the roles that courts play in American politics.

While there are numerous components to rules of access – often compiled under the concept of justiciability and including jurisdiction, mootness, ripeness, the political question doctrine, and others – in this Chapter I focus on one seemingly technical area, that of *standing*. In the pages that follow, I show how examining the politics of standing provides a window into the importance of process for access to the federal courts. Standing is not usually at the forefront of studies on democratic responsiveness in a political system characterized by adversarial legalism. Focusing on standing and in particular on moments when rules of standing are changed, however, provides insight into democratic responsiveness. I reveal the evolution of

standing as a dynamic political process involving *both* judges and elected officials. My analysis shows how different actors – in and out of courts – shape the institutional framework that determines how legal processes are responsive to potential litigants’ demands.

The key components of standing are as follows. The basic requirement is that a person must have been injured (an “injury-in-fact”), that the injury must be linked to the actions of the defendant (traceability), and that a federal court can provide a remedy (redressability). These concepts have long roots in the common-law, and are related to the system of adversarial justice that expects that people arguing before judges have a stake in the matter, as opposed to a mere interest in the outcome. Standing precepts stem most directly from Article III of the U.S. Constitution, which holds that the judicial power extends only to “cases” and “controversies” which can be satisfied only by meeting the common-law rules of standing (injury-in-fact, traceability, and redressability).

The Supreme Court’s rulings on standing often mix together both constitutional arguments about for the need for a case or controversy (meaning, the need for an injury) and prudential arguments related to separation-of-powers or judicial workload. Standing decisions serve as markers to guide lower courts as they determine which cases to focus on. Standing is also about protecting judicial resources from a possible glut of cases when resources are perhaps already stretched thin. Additionally, standing concerns separation-of-powers and the relationship between the judicial, executive, and legislative branches. Federal judges are wary of becoming embroiled in questions better handled by the other branches and are invested in respecting our constitutional separation of functions. In addition to the constitutional requirements of injury, traceability, and redressability, there are a number of prudential (or “judge-made”) standing requirements which are that parties are barred from bringing generalized grievances, the interests

raised must be within the zone of interests protected by a statute or a constitutional provision, and parties are barred from litigating the interests of a third-party. For an overview of the rules and process of the constitutional and prudential rules of standing, see Connelly (1987), Fletcher (1988-1989), Sunstein (1992-1993), Roberts (1993), June (1994), Pierce (1998-1999), Staudt (2004), Magill (2009), Ho and Ross (2009-2010), and Elliott (2011).

In most contexts, including most private law and criminal law contexts, standing is fairly straightforward – one party has an injury and seeks compensation from another and both sides have a stake in the result. However, in the regulatory context or in cases involving public expenditures, the story becomes more complicated. The nature of the administrative state is that the effects of a host of decisions made by administrative agencies will be diffuse and widely shared, and the ability of individuals and groups to participate in the administrative process through the federal courts therefore is more complicated than in other contexts. Judges and elected officials try to resolve the challenges imposed by such cases by making decisions that establish new rules that expand or narrow access to the courts.

When judges and lawmakers make standing decisions, they open or close the door to allowing people to try to address their claims in a court of law. That both Congress and the Supreme Court participate in articulating standing rules speaks to the idea that standing is determined by both branches. Congress confers standing through statute while the Court subjects statutory expansions of standing to judicial scrutiny, generally supporting congressional expansions that touch on prudential concerns but blocking expansions that do not meet constitutional thresholds. The Court is not always clear whether it is making constitutional or prudential arguments, meaning the legal justification of the rules is often obscured which makes the task faced by Congress and potential litigants that much more difficult.

As is well known, access is determined by federal judges when they make decisions whether people satisfy standing rules. In this Chapter, I advance the idea that access to the federal courts is also determined by Congress when it makes decisions to statutorily grant individuals or groups standing to sue. Congress, as I will show in the pages that follow, plays a large role in defining standing in borderline cases, passing statutes granting standing to different entities. As discussed in Part IV, the Supreme Court has articulated constitutional limits on the ability of Congress to extend access to individuals and groups but Congress is nonetheless active in figuring out who will have access to the federal courts. Congress does so as part of the legislative process in that lawmaking includes deliberation over access to the courts (Shipan 1997, 2000; Lovell 2003; Smith 2005).

This Chapter builds on existing scholarship that has focused on the manner in which interbranch processes lead to the deliberate empowerment of judges, which occurs for a variety of reasons. Legislators often work to shift decision-making responsibility regarding “cross-cutting” issues from the legislature to the courts (Graber 1993) or work to lock-in or advance policy goals (Gillman 2002), some which may be difficult for legislators to achieve on their own (Graber 1993; Frymer 2003; Lovell 2003; Whittington 2005). Legislators may look to courts as actors that can provide an oversight function with respect to the executive branch (Shipan 2000; Smith 2005) or to shield the executive branch from judicial review (Melnick 1994). Political scientists have also recognized standing’s role as a rule of access and have linked justices’ ideological predispositions to determinations regarding whether access will be granted (Rathjen and Spaeth 1983); how standing doctrines evolved in the 1970s to allow litigation between groups otherwise not in conflict (Orren 1976); that standing is an important component to understanding how courts are able to intervene in the “political environment” (Crowe 2007); and

that the extension and contraction of standing is part of larger trends in the development of the federal judiciary (Staszak 2010). Scholars have additionally examined factors that influence circuit court threshold decisions (Kaheny 2010) and the use of rules of justiciability to avoid deciding constitutional questions (Kloppenber 2001; Goetzhauser 2011). Scholars have also recognized mechanisms beyond standing through which legislators may make it more or less difficult for people to access the courts. Mechanisms include passing laws allowing class action suits and the awarding of attorney's fees (Epp 1998; Smith 2006; Barnes 2007); varying the expected costs and payoffs of litigation (Farhang 2010); or financing litigation programs such as the Legal Services Program (Lawrence 1990). Thus, whether individuals and groups (and courts) will participate in the policy process is not a fixed notion, but rather one open to manipulation by legislators and judges themselves.

Building on legal and political science scholarship that examines standing doctrine, this Chapter addresses a gap in our understanding of the politics of standing by accounting for how both the Supreme Court and Congress influence the ability of individuals and groups to access the federal courts, and of the implications of the manipulation of standing as a rule of access for participation in American politics. In Part II, I first provide an overview of what the Supreme Court does when it makes standing decisions. I focus on a set of cases in which justice discuss standing.¹⁶ In the majority of these cases, which span from 1921-2011, the common element is that the potential litigants often have not been “directly” harmed by agency action but are instead

¹⁶ I constructed a comprehensive list that covered the development of standing from *Fairchild v. Hughes* (258 U.S. 126 [1922]) to the present day as, as noted by Ho and Ross (2009-2010), modern standing is often traced to *Fairchild* (621). Two sources were used to create a set of thirty-eight Supreme Court cases covering the years 1921-2011, a list of which is provided in the Appendix. The most important source was the list of Supreme Court standing cases generously provided by Daniel Ho and Erica L. Ross, a dataset which they originally compiled for their examination of the insulation theory of the origins of standing (Ho and Ross 2009-2010). While this dataset contains over 1500 cases, I focused on a subset of cases in which there is disagreement between justices, moments in which the justices are consciously grappling with questions related to standing and moments when standing doctrines may be changing. I looked next to the Supreme Court Database (*The Supreme Court Database* 2011) which can be search by legal subject, including standing, and covers the years 1946-2010.

attempting to use the federal courts to address concerns of theirs that arose from agency regulation of other entities. These cases point to the existence of a basic asymmetry regarding which category of potential litigants can gain access to the federal courts. Targets of government regulation – power plant owners, for example, who are required to install scrubbers to control emissions – are ensured standing as they are demonstrably affected by agency regulations. In contrast, those whose health is affected by pollution are not ensured the chance to challenge in court either private or government decisions regarding the scope and content of pollution control. Unlike targets of regulation, those who might benefit from pollution controls are not guaranteed a place at the table. This asymmetry between those who can and cannot demonstrate injury extends to other areas of the law, besides environmental regulation. The result is that for those who have an interest in the operation of the law, but who may not be affected as traditionally understood by a court, access to the courts may be foreclosed.¹⁷ In Part II, I discuss three categories of potential litigants who may have an interest in the operation of law but who may not have been injured as traditionally understood by a court: those falling within *common-law* understandings of what constitutes an injury; those who claim standing under a *statute*; and those who attempt to meet standing requirements as *taxpayers*.

While in Part II, I emphasize that standing doctrines are the product of decisions made by judges when they articulate and apply rules of standing, in Part III I turn to explaining Congress' role in determining access to the courts. I emphasize the manner in which Congress is an active participant in the process of figuring out who will have standing to sue. In Part IV, I return to the Supreme Court and examine the interplay between the branches as the Court works to determine

¹⁷ Another example of how access to the courts might be foreclosed arises in cases dealing with prosecutorial discretion. The Supreme Court's precedents honor prosecutorial discretion meaning those who might be harmed by action or inaction of a prosecutor are precluded from suing as are those who might benefit if a prosecutor were to take action (e.g. *Poe v. Ullman* 367 U.S. 497 [1961], *Linda R.S. v. Richard D.* 410 U.S. 614 [1973], *O'Shea v. Littleton* 414 U.S. 488 [1974], and *Leeke v. Timmerman* 454 U.S. 83 [1981]).

if congressional grants of standing run afoul of constitutional requirements. In the discussion that follows, I emphasize the question of who will have access to the federal courts and how the answer to that question changes over time and across branches of government.

3.2 Standing to Sue: The Supreme Court

3.2.1 Common law: Legal wrongs and economic competition from the government

One way to satisfy standing is to meet a common-law understanding of injury. Those who have suffered a “legal wrong” through the violation of a property right, a contract, or a tort generally meet the common-law requirement for demonstrating standing. However, mere damage from economic competition – in the following cases economic competition from the government – was not recognized as an injury by the Supreme Court (Orren 1976: 730; Magill 2009: 1139). Specifically defining legal rights in this manner limits standing to those circumstances in which specified legal rights are violated.

In *Alexander Sprunt & Sons, Inc. v. United States* (281 U.S. 249 [1929]), the appellant shippers (Alexander Sprunt & Sons) sought to challenge an order of the Interstate Commerce Commission (ICC) that directed certain railroads to make changes in the rates they charged, rates that gave advantages to certain businesses including the appellant. Deprived only of an “economic advantage over competitors,” the appellants “were not subjected to or threatened with any legal wrong” (281 U.S. 249, 257). The Supreme Court cited as precedent the earlier case of *Edward Hines Yellow Pine Trustees v. United States* (263 U.S. 143 [1923]) as illuminating the present case in that in neither case did the plaintiff/appellant show that the “order alleged to be void subject them to legal injury, actual or threatened” (263 U.S. 148). In *Tennessee Electric Power Co et al. v. TVA* (306 U.S. 118 [1939]), while the appellants (power companies) complained of competition from the Tennessee Valley Authority (the TVA), the Court described

the competition as “damage not consequent upon the violation of any right recognized by law” (360 U.S. 137). In the end, and as with the cases that follow, what matters is whether the parties bringing the case have been injured in a way that will be recognized by a court of law.

3.2.2 *Statute*

A second way to meet the requirements of standing is through a statutory grant of standing. As discussed in Part III, Congress confers standing on litigants and groups in a number of ways. To take one example out of many, the Public Utility Act of 1935 allowed for “[a]ny person or party aggrieved by an order issued by the [Securities and Exchange] Commission [to] obtain judicial review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia” (*Public Utility Act of 1935*: 834-5). The Act confers standing, states that judicial review is available regarding an agency order, and specifies in which courts review is to be had. Congress additionally enacted the Administrative Procedure Act (the APA), codifying practices regarding access to the courts with respect to administrative agency decisions. The APA serves as a “statute of general application,” meaning it applies to questions of administrative law unless it is expressly overruled by another statute (Strauss 2002: 191). In the absence of legislative grants specific to an area of regulation, litigants can attempt to claim coverage under the APA.

The *absence* of a statutory basis for standing has been noted by the Supreme Court as a basis for denying standing, among other factors. In *Perkins v. Lukens Steel Company* (310 U.S. 113 [1939]), iron and steel manufacturers who desired judicial review of the Department of Labor’s wage determination were denied standing (310 U.S. 117). The Court ruled “that no legal rights of respondents were shown to have been invaded or threatened” and that “[r]espondents, to

have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law" (310 U.S. 125). Along with failing to meet common-law requirements to demonstrate standing, the respondents furthermore could not point to a statutory authority that allowed them to sue (310 U.S. 125). The Court additionally took the opportunity to remind lower courts of the necessity for judicial restraint in an area traditionally left up to the discretion of the legislative and executive branches, that of "exerci[sing] complete and final authority to enter into contracts for Government purchases" (310 U.S. 128).

On the other hand, the Supreme Court found that litigants did have standing stemming from statutory grants. *The Chicago Junction Case* (264 U.S. 258 [1923]), for example, turned in part on the presence of statutory language "declar[ing] that any party to a proceeding before the [Interstate Commerce] Commission may, as of right, become a party to 'any suit wherein is involved the validity of such [an] order'" (264 U.S. 267). A line of cases concerning the Federal Communications Commission (FCC) and the Communications Act of 1934 similarly depended on relevant statutory language. In *FCC v. Sanders Brothers Radio Station* (309 U.S. 470 [1940]), the Court decided that under the Communications Act of 1934 licensees have standing under Section 402 (b) of the Act which allows for judicial review (309 U.S. 477). Similar language is found in *Columbia Broadcasting System v. United States* (316 U.S. 407 [1942]), in which the Court recognized that section 402 (a) of the Communications Act of 1934 granted standing and allowed judicial review of a FCC order that would vastly affect CBS's ability to do business. As these and other cases show, the presence of statutory language helps to overcome

barriers against standing in the Congress can identify an injury that in turn can be recognized by a court.¹⁸

In a grand departure from precedential language regarding standing, the Supreme Court in 1970 directed lower courts to move away from investigating whether a “legal wrong” has occurred and to instead examine whether Article III and statutory grants, should they exist, are satisfied. Building on *Baker v. Carr* (369 U.S. 186 [1962]) and *Flast v. Cohen* (392 U.S. 83 [1968]), the Court effectively lowered the bar in favor of demonstrating standing. In *Association of Data Processing Service Organizations Inc. v. Camp* (397 U.S. 150 [1970]), the Court quoted *Flast*, stating that “the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution” (397 U.S. 157). This suggests an “abstract” approach to determining if Article III requirements are met in that a court should examine whether the parties to the case are adversaries and if a court can provide a remedy, separate from the content of the parties’ claims. This interpretation is supported by the Court’s statement that “the ‘legal interests’ test goes to the merits. The question of standing is different” (397 U.S. 153). And this statement is also supported by the Court’ reasoning in *Flast*, discussed below in the context of taxpayer standing, that it is not the issue that matters but the “party seeking to get his complaint before a federal judge” (392 U.S. 99).

Instead of investigating the legal merits of a claim to determine standing, the Supreme Court stated that the test “concerns, apart from the ‘case’ or ‘controversy’ test, the question

¹⁸ For additional cases in this vein see *FCC v. NBC* (319 U.S. 239 [1943]), in which the Court referred to section 402 (b) (2) of the Communications Act of 1934 to support the conclusion that certain parties have standing to sue (319 U.S. 246); *Stark v. Wickard* (321 U.S. 288 [1944]), where the Court found no specific statutory basis but granted standing based on “the existence of courts and the intent of Congress as deduced from statutes and precedent” (321 U.S. 288); and *Hardin v. Kentucky Utility Co.* (390 U.S. 1 [1968]), in which the Court found that there was a statutory basis to protect the interests of respondents against competition from the TVA (390 U.S. 2).

whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question” (397 U.S. 153). Specific statutes or constitutional provisions may create a zone of interests that may be recognized and protected by a court. This includes the APA, which “grants standing to a person ‘aggrieved by agency action within the meaning of a relevant statute’” (397 U.S. 153). As is discussed below, the Court’s interpretation of the APA in *Data Processing* adopted a broader understanding of the zone of interests concept. Finally, the type of interests affected “may reflect ‘aesthetic, conservational, and recreational’ as well as economic values” (397 U.S. 154).¹⁹

Barlow v. Collins (397 U.S. 159 [1970]) applied the reformulated “injury-in-fact” and zone of interests tests to a dispute between tenant farmers and the Secretary of Agriculture over a rule change that the farmers argued would go against their interests. The opinion, written by Justice Douglas (as was *Data Processing*), found that the farmers met the Article III requirements and were within the zone of interests protected by the Food and Agriculture Act of 1965 (397 U.S. 164). Although the Act did not expressly or impliedly grant the right of judicial review, the Court nonetheless found that it was implicit in the statutory scheme that the Secretary protect the farmers’ interests (397 U.S. 164).

In departing from the legal wrong test and in articulating the injury-in-fact test, the Supreme Court seemingly lowered the bar that had limited access to the federal courts to those who could satisfy Article III, common-law, or statutory requirements needed to demonstrate standing. However, additional constitutional and prudential requirements would soon emerge as

¹⁹ McCann (1986) describes this as a “legal coup” in which the Supreme Court and other federal courts “recognize[d] various collective environmental, consumer, aesthetic, and recreational interests as valid legal claims for review” (64).

the Supreme Court began to flesh out the new formula. The Supreme Court has identified two additional components to constitutional standing in that an injury-in-fact must be traceable to the actions of the defendant and amenable to remedy in a federal court. However, while the Court often speaks of traceability and redressability, at the core potential litigants must demonstrate a judicially recognized injury even when otherwise able to claim statutory grants of standing.

In *Sierra Club v. Morton* (405 U.S. 727 [1972]), the Supreme Court denied standing to the Sierra Club which had invoked the APA's judicial review provision in an attempt to secure review of a proposed recreational development project in the Mineral King Valley of the Sierra Nevada Mountains (405 U.S. 727-731). For the Court, the case hinged on whether or not the Sierra Club or any of its members would in fact be injured by the development of Mineral Valley (405 U.S. 735). In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* (412 U.S. 669 [1973]), in contrast, the appellees successfully invoked the APA by showing that they would be "directly harm[ed] in their use of natural resources of the Washington area" (412 U.S. 670). In *Warth v. Seldin* (422 U.S. 490 [1975]), petitioners attempted to sue regarding a zoning ordinance alleged to contribute to racial segregation. Standing was denied in that petitioners did not show injury to themselves (422 U.S. 490-2). And organizations representing indigents and indigent individuals attempting to challenge IRS's grants of tax-exempt status to hospitals that nonetheless refused to serve indigents failed because neither the organizations nor the individuals could demonstrate an injury to themselves and thus did not to meet Article III requirements (*Simon v. Eastern Kentucky Welfare Rights Organization* 426 U.S. 26 [1976]).

3.2.3 Taxpayers

As with the other categories of potential litigants discussed above, taxpayers must demonstrate an injury in order to satisfy standing requirements. For a long time, the issue of taxpayer standing seemed to be settled because of the broad ban on federal taxpayer suits established in *Frothingham v. Mellon* (262 U.S. 447 [1923]).²⁰ The Court, however, revisited this issue as part of its larger effort of rethinking standing doctrine, making it easier for people in general to access the federal courts. While *Flast v. Cohen* established a new framework for evaluating taxpayer standing, this case has for all intents and purposes been severely limited by subsequent Courts to limit taxpayer standing to cases only involving federal religious expenditures.

In *Frothingham v. Mellon*, Mrs. Frothingham alleged status as a taxpayer in order to challenge the constitutionality of a federal law which she claimed violated her Fifth Amendment right against taking of property without due process of law. In finding that federal taxpayers should not be allowed to sue, the Supreme Court argued that an individual taxpayer's interest in the money of the Treasury is shared with millions of others, is comparatively minute and indeterminable, and that the effect of governmental programs on future tax rates is "fluctuating and uncertain" (262 U.S. 487). The Court also expressed worry about the dangers of the precedent of allowing one taxpayer to sue – that it would lead to an overwhelming number of similar lawsuits.

As noted by the Supreme Court in *Flast v. Cohen*, *Frothingham* "has stood for 45 years as an impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers" (392 U.S. 85). In *Flast*, the Court specifically asked

²⁰ Taxpayers wishing to challenge state and municipal taxing and spending historically fared somewhat better establishing standing compared to federal taxpayers, *Arizona Christian School Tuition Organization v. Winn et al.* (09-987 [2011]) notwithstanding.

whether “the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the grounds that it violates the Establishment and Free Exercise Clauses of the First Amendment” (392 U.S. 85). The Supreme Court created a two-part test: “the taxpayer must first establish a logical link between their status as a taxpayer and the type of legislative enactment attacked ... [and] must establish a nexus between their status and the precise nature of constitutional infringement alleged” (392 U.S. 102). The Court elaborated on both points, stating that the logical link could be established only with respect to congressional action under the Taxing and Spending Clause of the Constitution²¹ and the constitutional nexus could only be established if the legislative enactment violates some other limitation expressed in the Constitution.

The specificity of statements in *Flast* would be used in subsequent cases to *limit* the ability of individuals and groups to sue based on their status as taxpayers. In *United States v. Richardson* (418 U.S. 166 [1974]) and *Schlesinger v. Reservists Committee to Stop the War* (418 U.S. 208 [1974]), taxpayers were found not to have standing because they failed in part to satisfy the two-part test outlined above. In *Richardson*, the respondent attempted to ferret out information on the CIA’s budget which was not published along with information about the rest of the government’s expenditures, seemingly in violation of the Statement and Account Clause.²² Since the respondent was not relying on the Taxing and Spending Clause, as required by *Flast*, the suit could not move forward. Similarly, in *Schlesinger*, the Court found that the nexus test was not satisfied. In that case, respondents attempted to sue to challenge the service by members of Congress in the Armed Forces Reserve, violating the Incompatibility Clause (418 U.S. 208).²³ The Court characterized the *Flast* test as creating “certain limited circumstances” under which

²¹ United States Constitution Article I, Section 9, Clause 1.

²² United States Constitution Article I, Section 9, Clause 7.

²³ United States Constitution Article I, Section 6.

taxpayers could sue (418 U.S. 227). These were not met in that the respondents did not challenge the Taxing and Spending power but instead an executive branch decision that allowed members of Congress to serve in the Armed Forces Reserves (418 U.S. 228).

Attempting to challenge the transfer of government property to a religious school, respondents in *Valley Forge Christian College v. Americans United for Separation of Church and State* (454 U.S. 464 [1982]) failed, according to the Supreme Court, to pass the either part of *Flast's* two-part test. The Court concluded that respondents were challenging an agency determination, not an Act of Congress, and were not challenging activity falling under the Taxing and Spending Clause of the Constitution. (454 US. 479-80). In *Hein v. Freedom from Religion Foundation, Inc.*, plaintiffs attempted to challenge an Executive Order establishing offices and programs related to faith-based community groups (551 U.S. 587). As the program being challenged was not a congressional program made pursuant to the Taxing and Spending power, the Court ruled against standing. Finally, in *Arizona Christian School Tuition Organization v. Winn et al.*, the Court decided that the Arizona taxpayers did not have standing as the program consisted of a tax credit as opposed to a government expenditure. In these cases, the Supreme Court has narrowed the *Flast* rule with the effect that it is once again very difficult for taxpayers to demonstrate standing, outside of a narrow category of cases dealing with federal religious expenditures.

3.2.4 The Supreme Court: Conclusions

For the Supreme Court, which enjoys almost complete discretionary control over its docket, the power to establish and apply rules of standing thus represents an additional exercise of judicial power. Standing decisions may curtail the ability of individuals and groups to use the courts to address their concerns. As is noted in the next Part, Congress is willing to grant

standing. Potential litigants, however, still have to contend with Supreme Court decisions that limit access to the courts. By basing conclusions about standing on the Constitution, the Court is able to shield its decisions given the difficulty (but not impossibility) of challenging judicial proclamations of constitutionality. Judicial statements regarding standing work to solidify judicial power at the expense of Congress in that the justices successfully reserve the ability to mark the boundaries of access to the federal courts, and act upon that ability.²⁴

Additionally, decisions to limit or grant access have an impact on how government policies are reviewed and implemented. When available, for example, judicial review may slow down implementation of policies (Chutkow 2008). In addition to litigants' substantive concerns about how judges might rule, access can also be used as a tool by litigants and judges to influence whether agency regulations are ever produced or enforced. Making it easier to challenge regulations in court can delay their implementation, or make agencies less likely to push for rules because of the costs of defending them.

Understanding expansions or contractions of access is not as simple as correlating judicial liberalism or conservatism and access. Left to right ideology does not always cleanly line up with open and closed access to the federal courts. Recent trends demonstrate the nuances of figuring out what is going on with standing. Conservative justices often work to relax rules of standing to make it easier for potential litigants to challenge certain types of government actions, such as environmental regulations and civil rights initiatives such as those raised by affirmative-action cases. In *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville* (508 U.S. 656 [1993]), for example, the Supreme Court granted standing to contractors allowing them to challenge a city program that set aside contracts for minorities

²⁴ As Graber (1999) notes in a different context – the development of the power of judicial review – the Court will only be successful to the extent that it gains support for its actions from other sectors of the political system.

because members of the Association “regularly bid on construction contracts in Jacksonville” (508 U.S. 668). Precedent such as *Warth v. Seldin* suggest that to demonstrate an injury, a contract had to have been actually denied. However, the Supreme Court distinguished *Warth* from the present case, finding the plaintiffs were injured by the absence of an “opportunity to compete” (508 U.S. 668-8). Standing decisions concerning challenges to the Patient Protection and Affordable Care Act (*Patient Protection and Affordable Care Act* 2010) also illustrate this phenomenon in that judges have found standing for litigants who technically have not yet been injured by provisions of the law which do not become effective until 2014 (see e.g. Greenhouse [2010]).

This account of standing from the Supreme Court’s perspective helps illustrate the manner in which constitutional and prudential requirements have been developed by the Supreme Court itself. The Court’s determinations are important as they represent judicial conclusions regarding access to the courts. When judges make decisions about what rules of standing will be and when they apply those rules to specific cases, they are active participants in the process of determining which issues will be adjudicated. Standing doctrines have changed from the legal wrong test to injury-in-fact, traceability, and redressability due to judicial interpretations and reinterpretations of relevant constitutional, common-law, and statutory principles. Standing is far from static and technical, and is amenable to manipulation by courts.

3.3 Access to the Federal Courts: Congress

Judges develop rules of standing when they determine if people will have access to court. These rules state the constitutional threshold people must pass as well as the additional, prudential, requirements they must satisfy. Standing is also determined by Congress when it makes decisions as part of the legislative process to grant individuals or groups standing to sue

(McCann 1986; Connelly 1987; Dumont 1988-1989; June 1994; Pathak 2009-2010). Congress grants standing when it designates by law that a person *aggrieved* and/or *adversely affected* by government action may bring suit in a court of law, often designating the court in which the person may sue.²⁵ In doing so, Congress statutorily recognizes that a person has been injured by the actions of an administrative agency.

For the period between 1921 and 2006, I identified 258 Public Laws in which standing was granted by Congress through a search of the U.S. Public Laws for the terms “aggrieved” or “adversely affected.” These are key terms that identify an individual or group as a party that has been injured in some way by the decisions of an executive branch administrative agency. For example, the Pipeline Safety Improvement Act of 2002 states that “[a]ny person aggrieved or adversely affected by an order issued ... may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or in the circuit in which the complainant resided on the date of such violations” (*Pipeline Safety Improvement Act of 2002*: 2922).

When Congress grants standing, it is most often specifying what kinds of challenges can be made and assigning them to courts. A representative example comes from the Securities Act of 1933 in that “[a]ny person aggrieved by an order of the [Federal Trade] Commission may obtain a review of such order in the Circuit Court of Appeals of the United States ... praying that the order of the Commission be modified or set aside in whole or in part” (*Securities Act of 1933*: 80). The statute identifies the individual who would be aggrieved, identifies the Commission’s order as the cause of the trouble, and allows for judicial review specifically in the Court of

²⁵ These are not the exclusive means by which Congress grants standing. As described by Connelly, “Congress has ... enacted even broader statutory review provisions granting standing to ‘any person’ or to ‘any party opposed[.]’ Courts have tended not to distinguish between the specific phraseology of these statutory review provisions, but instead generally have interpreted such provisions to authorize judicial review of agency action to the maximum extent permitted by Article III” (Connelly 1987: 158 footnotes omitted).

Appeals. As is discussed below regarding citizen suits, in other laws Congress attempts to grant standing to an entity in a way that may more accurately be described as an attempt to expand standing as compared to merely recognizing existing standing rules. Congress can grant standing to individuals or groups who are merely interested in the contours of regulation and who are not directly subject to regulation themselves, often through citizen suit provisions.

I cross-referenced these Public Laws with the Policy Agendas Project Public Laws dataset, a resource in which laws are coded according to one of nineteen policy areas. As described in Chapter 1, the Policy Agendas Project is a comprehensive project in which researchers classify information from a variety of governmental sources (such as State of the Union Speeches, Public Laws, public opinion data, and Supreme Court cases) according to one coding scheme. The benefit of cross-referencing with the Policy Agendas Project is that doing so allows me to understand the policy areas in which Congress confers standing and allows me to track changes in policy areas over time. I find that the policy areas in which Congress concentrates its statutory standing grants changes over time and reflects larger political trends. For the ability of individuals and groups to participate in the policy process, this means that at times Congress has opened up new policy areas for adjudication.

Figure 3.1 charts the number of laws in which Congress granted standing for the 1923-2006 – no laws conferring standing were found for 1921-1922 using “aggrieved” and/or “adversely affected” as search terms. In the discussion that follows, I trace Congress’ activity chronologically and identify three periods of activity. These periods of activity generally align with both the Supreme Court’s jurisprudence regarding standing and larger political trends that influence the content of public policy. The first period, from 1923-1967 is one in which the Supreme Court doctrine limited access to the federal courts (excepting *Baker v. Carr* and *Flast v.*

Cohen). This is also a period of time in which deference to administrative agencies informed attitudes towards agencies, across branches of government. Scholars have suggested that an early purpose of standing was to, in the words of Sunstein, “insulate progressive and New Deal legislation from frequent judicial attack” (1992-1993: 179) while others have found that the “insulation thesis” describes only a short period of time between the 1930s and 1940s (Ho and Ross 2009-2010: 595-6). Even if its historical reach is limited, the idea of an “insulation thesis” supports the observation that Supreme Court justices’ standing decisions serve at times to protect administrative agency discretion.

From Congress’ perspective, delegation to administrative agencies could initially be justified as acceptable as Congress would be delegating to experts with the knowledge and drive to produce sound public policy (Landis 1938). However, scholars, politicians, and the public, in the time period after World War II started to question fundamental assumptions that motivated earlier visions of delegation, especially that barriers against participation were low and that those wishing to participate in the agency process were able to participate. Administrative agencies were increasingly seen as overly beholden to the interests of industry and as no longer serving the interests of the public (Shapiro 1988) and decision-making was increasingly regarded as taking place behind closed doors, or behind the aegis of agency discretion (Stewart 1975). In the 1960s and 1970s, members of Congress were motivated by a desire to provide more direction to agencies to prevent agencies from straying too far from the stated purpose of legislation, and to control generally the executive branch (Melnick 1994: 28-9).

The second period of congressional activity, from 1968-1980, corresponds with these changing attitudes towards deference to administrative agencies. On the judicial side, if other periods were characterized by justices wishing to insulate government activity from review, this

period might be characterized by justices wishing to foster increased judicial review. For example, Stewart (1975) described increased judicial scrutiny of administrative agency decisions as part of a shift in which judges became skeptical of agency decision-making, whereas before judges limited themselves to limiting administrative abuses. Judicial review thus became less about “the prevention of unauthorized intrusions on private autonomy” and more about “the assurance of fair representation for all affected interest” (Stewart 1975: 1712). Courts would provide a needed venue for interests associated with the administrative process to air their claims.

From 1981-2006, while Congress is still active in conferring standing on potential litigants (compared especially to the first period), its overall level of activity declines. Starting with the Burger Court (1969-1986), the Supreme Court (despite its initial liberalization of standing in *Data Processing*) began a trend of decreasing access to the federal courts. As noted by Galloway (1981), “[t]he [Burger] Court used traditional threshold doctrines to create formidable obstacles to judicial review. The rules of standing were tightened drastically and constitutionalized. ... The Warren Court’s presumption in favor of private causes of action to enforce statutory rights was converted into a presumption *against* private causes of action” (940 emphasis original, internal footnotes omitted). Constitutionalization, as discussed in the previous Part, refers to the practice of speaking and writing about, in this context, standing doctrines as stemming from the Constitution. This places standing doctrine on a separate, constitutional footing, making it more difficult (but not impossible) for other branches of government to respond to these constitutional proclamations.

These trends continued under the Rehnquist Court (Kuhn 1994-1995: 888). At a time when administrative agencies were staffed by a Republican president, Supreme Court decisions

denying standing to litigants had the effect of providing for “legal immunization of [an] administrative agency” (Krauss 1991-1992: 829), placing agency decisions beyond the reach of a federal court. Congress conceivably had nothing to gain by encouraging litigants to turn to the courts when those courts would be unreceptive to litigants’ efforts to review agency decisions. From Congress’ perspective, deciding whether to grant standing is not a purely technical issue, then, as Congress must figure out whether litigation will be of benefit to litigants (or whether the lack of litigation will be beneficial to agencies).

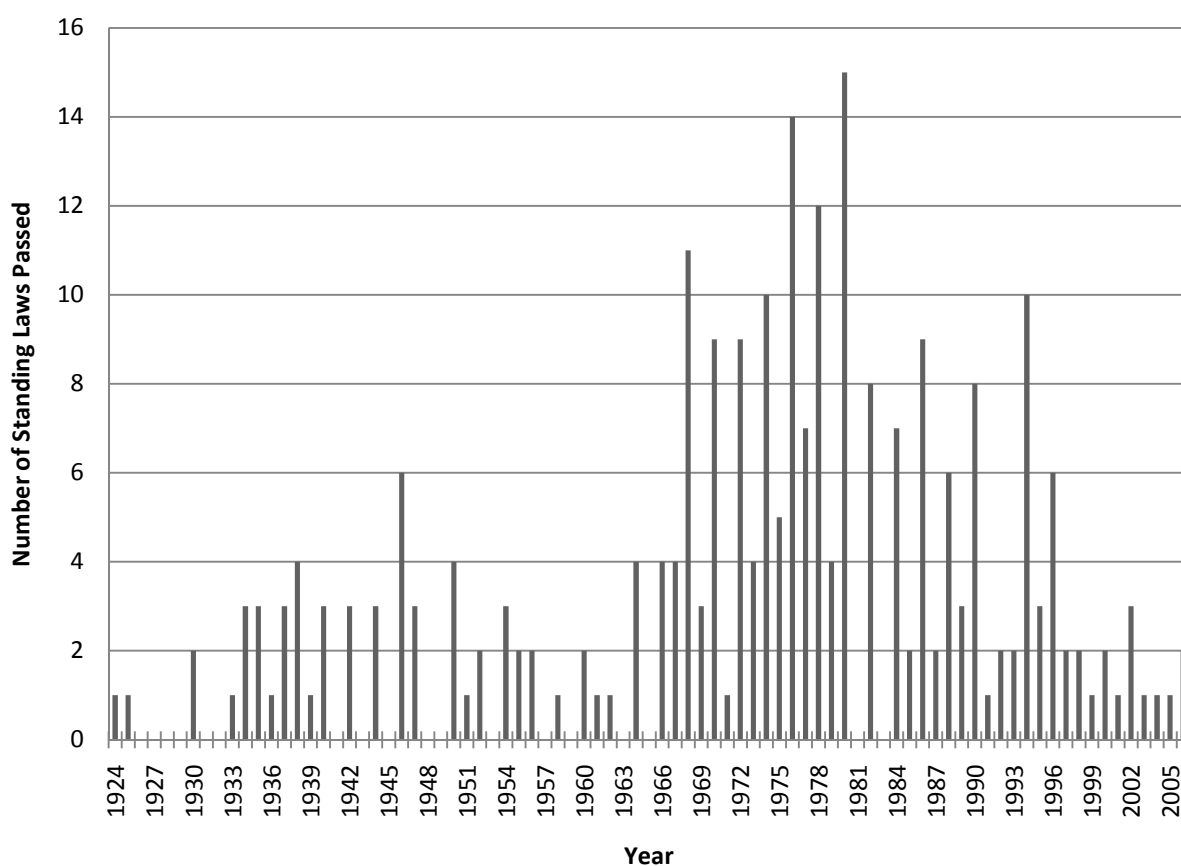


Figure 3.1: Laws Granting Standing 1923 – 2006, Source: Data compiled by the author.

Table 3.1 displays the number of standing laws as coded by the Policy Agendas Project by policy area for 1923-2006. In each law, Congress conferred standing on individuals or groups aggrieved and/or adversely affected by agency action. Between 1923-1967, Congress granted

standing in sixty-nine laws. The legal wrong test, discussed in Part II, restricted access to the courts in that courts often required some legal basis (related to property, a tort, a common-law principle, or a statute) upon which to base standing. For its part, Congress was willing to create such a statutory basis for standing, but in a limited number of laws compared to the next time period. In this time period, the most grants of standing come in *Agriculture and Labor, Employment, and Immigration* while no grants of standing were conferred in *Community Development and Housing Issues, Education, Environment, or Social Welfare*.

Table 3.1: Number of Standing Laws by Policy Area 1923-2006.

	1923-1967	1968-1980	1981-2006
<i>Policy Area</i>	Count (%)	Count (%)	Count (%)
Agriculture	8 (12)	7 (7)	2 (2)
Civil Rights, Minority Issues, and Civil Liberties	4 (6)	4 (8)	8 (9)
Community Development and Housing Issues	0 (0)	2 (2)	1 (1)
Defense	5 (7)	1 (1)	3 (4)
Education	0 (0)	3 (3)	5 (6)
Energy	4 (6)	10 (10)	2 (2)
Environment	0 (0)	11 (11)	6 (7)
Foreign Trade	2 (3)	4 (4)	2 (2)
Government Operations	6 (9)	10 (10)	13 (15)
Health	1 (1)	2 (2)	3 (4)
International Affairs and Foreign Aid	1 (1)	3 (3)	2 (2)
Labor, Employment, and Immigration	11 (16)	12 (12)	4 (5)
Law, Crime, and Family Issues	2 (3)	7 (7)	4 (5)
Macroeconomics	4 (6)	3 (3)	3 (4)
Public Lands and Water Management	4 (6)	10 (10)	4 (5)
Space, Science, Technology, and Communications	3 (4)	0 (0)	2 (2)
Social Welfare	0 (0)	3 (3)	2 (2)
Transportation	2 (3)	2 (2)	9 (11)
<i>Total</i>	69 (100)	104 (100)	85 (100)

Source: Data compiled by the author. Policy Areas are Policy Agendas Project coding.

In addition to passing specific regulatory statutes that granted the right to sue to those aggrieved or adversely affected by agency action, Congress in 1946 passed the Administrative Procedure Act (the APA). As noted above, the APA serves as a statute of general application. The APA grants affected parties standing to challenge agency action in that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof” (*Administrative Procedure Act* 1946: 243). Strauss (1996) provides an account of how legal and political understandings of this provision of the APA changed over time. Section 10(a) could originally be read as codifying existing law (circa 1946), “point[ing] to existing (and future) ‘relevant statute[s]’ containing ‘adversely affected or aggrieved provisions’” or “it could be understood as making a universal judgment that persons ‘adversely affected or aggrieved’ in relevant statutory terms should have standing to invoke judicial review to redress those harms” (Strauss 1996: 1402). The first interpretation relies on the existence of specific statutory language of “aggrieved” or “adversely affected” while the second interpretation relies on a more permissive interpretation of when a person is aggrieved or adversely affected regardless of whether that specific language exists in statute. In *Data Processing*, the Court “gave section 10(a) the broader of its possible meanings, reading it independently to confer standing” (Strauss 1996: 1404-5).

Between 1968-1980, Congress more frequently granted standing (see Figure 3.1). While as early as 1972 in the *Sierra Club* decision, discussed above, the Supreme Court began to reduce access to the courts by adding to the constitutional requirements of standing, Congress forged ahead through the end of the decade by continuing to grant standing to litigants by statute. One hundred and four laws granting standing were passed by Congress during this time. While no laws were passed conferring standing related to the *Environment* between the 1923-1967, 11

laws related to the *Environment* were passed between 1968-1980. While Congress still focused on “traditional” areas of regulation – such as *Banking, Finance, and Domestic Commerce* – during this time period it did much to ensure that litigants would meet basic requirements for bringing a case in more diverse policy areas.

In addition to expanding standing, Congress took other action to increase access to the federal courts including changing the rules regarding awarding attorney’s fees and expanding the jurisdiction of federal courts over agency decisions (Stewart 1975; McCann 1986; Shapiro 1988; Melnick 1994; Gillman 2002; Frymer 2003; Smith 2005; Farhang 2008, 2010). In describing Congress’s activity with respect to standing, the Court in *Data Processing* recognized Congress’s role in increasing access to the courts:

Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved “persons” is symptomatic of that trend (397 U.S. 154).

This highlights the dialogue between Congress and the Supreme Court regarding access to the federal courts. The Court recognized Congress’s ability and willingness to confer standing on individuals and groups. Rather than one branch determining who can sue, both Congress and the Supreme Court participate in the process of figuring out what standing requirements are and who meets those standards.

During this time period, Congress additionally granted standing by enumerating the ability of individuals or groups to bring *citizen suits* to enforce agency action. The Clean Air Act of 1970, for example, includes a citizen suit provision granting standing to “any person” to enforce in district court violations by any person of an emission standard or of an order issued by the Administrator. Additionally, a suit may be brought against the Administrator “when there is alleged a failure of the Administrator to perform any act or duty under this Act which is not

discretionary within the Administrator” (*Clean Air Amendments of 1970*: 1706; see also Smith 2006). My database includes thirteen citizen suit provisions enacted from 1970 through 1986. Eight laws, a majority, were passed with respect to environmental regulation.

The expanded use of citizen suit provisions have been described by Melnick (1983) as part of a trend of more involvement on the part of Congress in the regulatory process with the goal of creating a mechanism through which to check the activities of the executive branch by empowering litigants (8). Granting individuals standing through citizen suit provisions is common in environmental laws given the challenges that individuals often face in demonstrating the necessary conditions to meet standing requirements – to demonstrate an injury. While in other laws, Congress often is reflecting existing standing doctrines conferring standing through citizen suits may be a more aggressive attempt on the part of Congress to influence access to the federal courts. In these laws, Congress confers standing on individuals and groups who may have an interest in how regulation is carried out but who are not targets of regulation. By granting standing through statute, Congress is attempting to allow these individuals and groups to influence the direction of administrative law through the judicial process.

Between 1981-2006 the number of grants of standing is still high compared to the first period, but declines overall (see Figure 3.1). Eighty-five laws granting standing were passed during this time. Like the Supreme Court’s jurisprudence in which standing is sometimes granted (e.g. *Massachusetts v. EPA* 549 U.S. 497 [2007]) Congress during this time does confer standing on individuals and groups despite the decreasing trend. Along with passing thirteen laws in the area of *Government Operations*, Congress conferred standing in ten laws dealing with *Banking, Finance, and Domestic Commerce*. Congress granted standing in all nineteen policy areas. As noted above, despite some liberalization of standing doctrines in the 1960s and

1970s, by the late 1970s and 1980s the Court began to reduce access to the courts by reiterating the requirement that, at the core, an injury is necessary. The increasing conservatism of the Supreme Court included efforts on the part of the Court to once again insulate administrative agency decisions from judicial review. And, as discussed in the next section, the Court sent strong signals regarding the ability of Congress to convey upon potential litigants the ability to satisfy the injury requirement.

Figure 3.2 displays graphically the number of laws passed per policy area for 1921-2006. What is striking about the distributions of the passage of law per policy area is that the topic of legislation in which Congress confers standing changes over time. In the 1970s, attention to policy areas such as *Health, Education, and Environment* increased reflecting new congressional attention to these issue areas. In other policy areas, such as *Macroeconomics, Civil Rights, Minority Issues, and Civil Liberties, and Agriculture*, attention is more consistent over time (although attention increases and decreases within these policy areas). As also described by Table 1, Figure 2 helps demonstrate the growing diversity of the laws in which Congress confers standing over the time period under study.

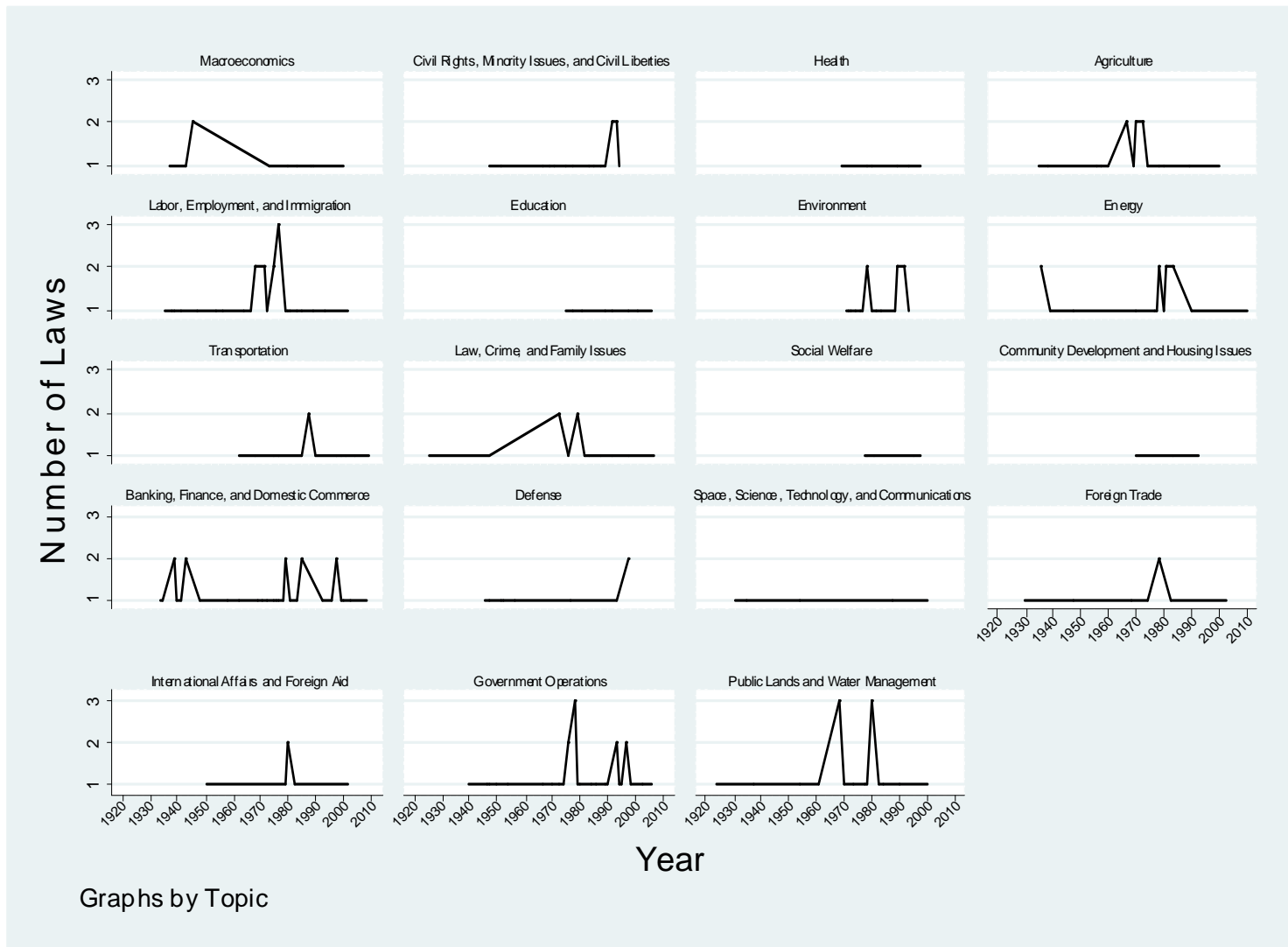


Figure 3.2: Laws Conferring Standing by Policy Area 1921-2006. Source: Data compiled by the author. Policy Topics are Policy Agendas coding.

3.4 Interbranch interactions

Congress's ability to grant standing has been bounded in important ways by Supreme Court decisions on its limits. There is an important distinction between constitutional and prudential standing with constitutional standing being linked to Article III and prudential standing serving as judge-made requirements. Congress, according to the Supreme Court, can override prudential but not constitutional standing requirements. At various times, the Supreme Court has been explicit about what Congress is able to do under the Constitution by consistently referencing the Article III limits (Connelly 1987: 161). For example, in *Data Processing*, the Court stated that "Congress can, of course, resolve the [standing] question one way or another, save as the requirements of Article III dictate otherwise" (397 U.S. 154). In *Warth v. Seldin*, the Court noted that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself" (422 U.S. 501 and see, e.g., *Gladstone, Realtors v. Village of Bellwood* 441 U.S. 91, 100 [1978] and *ASARCO Inc. et al. v. Kadish et al.* 490 U.S. 605, 613 [1988]). To the extent that judges determine what the Article III requirements are and to the extent that they successfully declare congressional action as satisfying (or not satisfying) those requirements, judges at times have therefore enjoyed the opportunity to mark the limits of legislative power. These judicial statements regarding standing have worked to define the boundaries of what Congress is able to do.

Questions related to Congress's power to grant standing in this manner were of central concern in *Lujan v. Defenders of Wildlife* (504 U.S. 555 [1992]). In response to a 1983 interpretation of the Endangered Species Act (ESA) of 1973 by the Secretary of the Interior and the Secretary of Commerce that limited the reach of certain portions of the Act to the United

States and the high seas (and not foreign nations), the respondent organization brought an action in district court to challenge the agency's decisions. The Supreme Court ultimately accepted the case for review. In his opinion (joined by six other justices), Justice Scalia first reviewed the three constitutional requirements of standing, and then discussed the manner in which standing is more difficult to prove for those challenging government action or inaction by parties not directly subject to government action or inaction (504 U.S. 561-2). Focusing first on injury-in-fact, Justice Scalia stated that, as decided in *Sierra Club*, the "party himself seeking review [must] be himself among the injured" (504 U.S. 563 quoting *Sierra Club v. Morton*) and that respondents failed to demonstrate injury. Focusing next on redressability, Justice Scalia found that respondents, in challenging the Secretaries of Interior and Commerce were not directly going after the agencies that would fund projects that might impact endangered species (504 U.S. 568-9).

More importantly, Justice Scalia then turned to the citizen suit provision upon which respondents relied, and upon which the Court of Appeals had found standing (504 U.S. 572). The citizen suit provision of the ESA provided for standing in that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter" (504 U.S. 572). The lower court interpreted the provision in such a manner, according to Justice Scalia, "so that *anyone* can file suit in federal court ... notwithstanding his or her inability to allege any discrete injury" from a failure of an agency to follow correct procedure (504 U.S. 572 emphasis original). In doing so, the lower court "held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by

law” (504 U.S. 573 emphasis original). Reviewing the Court’s past standing cases that have touched on this question, Justice Scalia argued that “concrete injury” is required (504 U.S. 578). *Lujan* has had implications for both the impact on other statutes that include citizen suit provisions and for standing doctrine itself (Sunstein 1992-1993; Pierce 1993; Roberts 1993; Feld 1994). In declaring that specific citizen suit provision unconstitutional (Pierce 1993: 1751), the Court in one respect fired a shot across Congress’s bow by making a statement regarding the limits of congressional power to grant standing through that particular method. Additionally, *Lujan* highlights the manner in which there is dialogue between the branches regarding who has standing. In this instance, legislators had attempted to expand standing through statute and a subsequent Supreme Court pushed back. It is not merely that one branch makes a rule regarding standing, but that there is interplay and negotiation over the contours of standing.

Outside of the environmental context and separate from citizen suits, the Supreme Court has recognized the congressional power to extend standing to those interested in regulation but not directly affected. Absent a congressional extension of standing, however, such litigants normally find it difficult to meet standing requirements. In *Federal Election Commission (FEC) v. Akins* 524 U.S. 11 (1997), this type of issue was raised. Voters who sought information from the FEC on the “membership, contributions, and expenditures” of the American Israel Public Affairs Committee (AIPAC) were denied this information by the FEC based on the FEC’s determination that AIPAC was not a “political committee” and therefore not required to provide certain information (524 U.S. 13). The FEC made two arguments: first, that AIPAC did not have to disclose this information and, second, that the voters did not have standing to challenge the FEC’s determination. If the FEC was successful in both realms, voters would be barred both

through the administrative process and through the courts from obtaining the information they sought.

The Supreme Court found, however, that voters did have standing due to Congress conferring standing on such litigants. As noted in the opinion, Congress created opportunities for “any person” to file a complaint with the FEC for alleged violations of the Act and additionally allowed for “any party aggrieved” by an agency order to seek judicial review in district court (524 U.S. 19). According to the Court, “[h]istory associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested” (524 U.S. 19). While the government made various arguments that voters did not meet prudential (and, elsewhere in their argument, constitutional) standing requirements, the Court found that “[g]iven the language of the statute and the nature of the injury, we conclude that Congress ... intended to authorize this kind of suit” (524 U.S. 20).

It is worthwhile to note that this seems to be of the type of litigation that Orren (1976) identifies in her exploration of standing doctrines. She argues that the evolution of standing doctrines allows the “juxtaposition in court” of conflicts that might otherwise not see the light of day (723). Individuals not directly regulated by government action – in *FEC v. Akins*, the voters interested in the government collecting and disseminating information from AIPAC – usually do not have the opportunity to use the courts to advance their claims. With congressional grants of standing and judicial recognition of those grants, such claims may advance in court.

3.5 Conclusion

Legislators and judges both have engaged in determining whether potential litigants will have access to the federal courts. Judges, when presented with a case, have the opportunity to

determine if litigants satisfy constitutional and prudential rules of standing, and consequently through their decisions are able to further develop constitutional and prudential rules of standing. As part of the legislative process, members of Congress have the opportunity to confer standing on potential litigants, though this capacity is bounded in important ways by decisions of the Supreme Court. Standing is not static, but rather has developed because of these decisions made by legislators and judges.

Access to the courts is a political resource, the presence of which allows litigants to participate in the policy process or to have their constitutional claims heard and the absence of which prevents litigants from doing so. Judicial review of government decisions is not a given, but has depended historically on changing judicial and congressional understandings of what counts as a justiciable claim. The choices that judges and legislators make about rules of standing determine which groups of people are able to move their claims into a judicial forum to challenge government action. This is not to claim that litigants will always be successful on the merits, but rather that they merely have the opportunity to argue their case.

Along with implications for people's ability to participate in the policy process, recognizing the role of judges and legislators in determining access to the courts has implications for conceptions of judicial power. The availability of courts as policy venues depends in part on congressional grants of authority and in part on constitutional grants of authority. The Constitution establishes the basics of a federal judiciary but delegates to Congress the power to fill in the details – a task Congress frequently undertakes. As the data presented above makes clear, Congress routinely empowers the federal courts to adjudicate certain issues by conferring standing on potential litigants. Whether courts participate in the policy process – based on who has standing to sue – is determined in important respects by Congress.

For studies of American politics, conceiving of judicial power in this way presents a more comprehensive picture of the role of the federal courts in the policy process. As others have noted, courts should not be viewed as outlier, freelance, or rogue actors who take up policy issues and make decisions free from meaningful outside influence (see, e.g., Dahl 1957; Epstein and Knight 1998). Nor should judicial forays into new policy areas be taken as evidence of the bald exercise of judicial power alone, or at the behest solely of judges seeking out new policy areas (for examples of this type of scholarship see, e.g., Stewart 1975; Tate and Vallinder 1995). Rules of access such as standing, set by Congress and the courts, determine whether courts will participate in the policy process. Judicial power itself is therefore contingent on decisions made by judicial actors in the course of legal proceedings and extra-judicial actors in the course of the legislative process.

Table 3.2 List of Cases

Title	Citation	Date decided
<i>Fairchild v. Hughes</i>	258 U.S. 126	2/27/1922
<i>Frothingham v. Mellon</i>	262 U.S. 447	6/4/1923
<i>Edward Hines Yellow Pine Trustees v. United States</i>	263 U.S. 143	11/12/1923
<i>The Chicago Junction Case (Baltimore & O.R.R.) v. United States</i>	264 U.S. 258	3/3/1924
<i>Alexander Sprunt & Son, Inc. v. United States</i>	281 U.S. 249	4/14/1930
<i>Alabama Power Co. v. Ickes</i>	302 U.S. 464	1/3/1938
<i>Tennessee Elec. Power Co. v. Tennessee Valley Authority</i>	306 U.S. 118	1/30/1939
<i>FCC v. Sanders Bros. Radio Station</i>	309 U.S. 470	3/25/1940
<i>Perkins v. Lukens Steel Co.</i>	310 U.S. 113	4/29/1940
<i>Columbia Broadcasting System v. US</i>	316 U.S. 407	6/1/1942
<i>FCC v. NBC</i>	319 U.S. 239	5/17/1943
<i>Stark v. Wickard</i>	321 U.S. 288	2/28/1944
<i>Poe v. Ullman</i>	367 U.S. 497	6/19/1961
<i>Baker v. Carr</i>	369 U.S. 186	3/26/1962
<i>Hardin v. Kentucky Util. Co</i>	390 U.S. 1	1/16/1968
<i>Flast v. Cohen</i>	392 U.S. 83	6/10/1968
<i>Association of Data Processing Service Organizations Inc. v. Camp</i>	397 U.S. 150	3/3/1970
<i>Barlow v. Collins</i>	397 U.S. 159	3/3/1970
<i>Sierra Club v. Morton</i>	405 U.S. 727	4/19/1972
<i>Linda R.S. v. Richard D.</i>	410 U.S. 614	3/5/1973
<i>US v. Students Challenging Regulatory Agency Procedures (SCRAP)</i>	412 U.S. 669	6/18/1973
<i>O'Shea v. Littleton</i>	414 U.S. 488	1/15/1974
<i>US v. Richardson</i>	418 U.S. 166	6/25/1974
<i>Schlesinger v. Reservists Committee to Stop the War</i>	418 U.S. 208	6/25/1974
<i>Warth v. Seldin</i>	422 U.S. 490	6/25/1975
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i>	426 U.S. 26	6/1/1976
<i>Gladstone Realtors v. Village of Bellwood</i>	441 U.S. 91	4/17/1979
<i>Valley Forge Christian College v. Americans United for Separation of Church and State Inc.</i>	454 U.S. 464	1/12/1982
<i>Leeke v. Timmerman</i>	454 U.S. 83	11/16/1981
<i>Allen v. Wright</i>	468 U.S. 737	7/3/1984
<i>ASARCO Inc. v. Kadish</i>	490 U.S. 605	5/30/1989
<i>Lujan v. National Wildlife Federation (NWF)</i>	497 U.S. 871	6/27/1990
<i>Lujan v. Defenders of Wildlife</i>	504 U.S. 555	6/12/1992
<i>Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville</i>	508 U.S. 656	6/14/1993
<i>FEC v. Akins</i>	524 U.S. 11	6/1/1998

<i>Massachusetts v. EPA</i>	549 U.S. 497	4/2/2007
<i>Hein v. Freedom from Religion Foundation, Inc.</i>	551 U.S. 587	6/25/2007
<i>Arizona Christian School Tuition Organization v. Winn et al</i>	09-987	4/4/2011

Chapter 4. Jurisdiction-Granting: Separation-of-powers and Ideological Distance

4.1 Introduction

Through grants of jurisdiction, Congress promotes judicial participation in the policy process by establishing federal courts as venues in which individuals and groups may bring their claims. Armed with the constitutional power to establish the jurisdiction of the lower federal courts (and the appellate jurisdiction of the Supreme Court), Congress confers on courts the authority to hear certain issues. The power of courts to hear cases is the result of a complex and ongoing process through which actors outside the courts, particularly members of Congress, shape and reshape the power of different courts to hear particular types of disputes. That process involves, among other things, efforts by Congress to limit or protect the discretion of regulatory officials, to alter which individuals or groups have standing to bring cases to court, and to assign particular types of disputes to particular courts by granting courts jurisdiction to hear certain claims.

In contrast, conventional explanations of federal court participation in the policy process often focus on the U.S. Supreme Court and center on judicial behavior and decisions made by individuals justices as they determine which issues to focus on. That courts become involved in American politics is often viewed as a pure manifestation of judicial power and of the ability of justices to set their own agendas free from outside influence. The fact that federal courts are able to decide cases is usually taken for granted as a fixed feature of the institutional environment.

Courts, however, do not merely spring into existence. Constitutionally, Congress has a host of powers with respect to the federal courts including the power to create lower courts, to staff them, to fund their operations, and to define their jurisdiction. Indeed, the Constitution is

relatively silent regarding the federal judiciary as it does not establish any federal courts besides the Supreme Court, and includes very little detail about how even that court is structured. The Constitution instead specifically delegates the power to establish components of the federal judiciary to Congress. Courts do not appear fully formed and do not come armed with jurisdiction to hear all types of disputes but rather depend on Congress to establish the conditions under which they will operate.

Recognizing the manner in which Congress exercises its constitutional power with respect to the federal courts is important for understanding how courts operate in American politics. In one view, how courts operate can be understood by examining the judges who staff the courts and exploring the factors that explain their behavior. These accounts of judicial behavior often focus on the “backgrounds, attitudes, and ideological preferences of individual justices” to explain judicial decision-making (Gillman and Clayton 1999: 1). In contrast, this dissertation adopts an institutionally focused approach in which “[s]cholars seeking to explore the broader cultural and political contexts of judicial decision-making ... examin[e] how judicial attitudes are themselves constituted and structured by the Court *as an institution* and by its relationship to other institutions in the political system at particular points in history” (Gillman and Clayton 1999: 2 emphasis original). In contrast to court-centered or behavioralist approaches, the theory presented here argues that Congress has played an integral role in influencing the creation of opportunities for judicial decision-making.

In focusing on institutional factors that influence whether federal courts become involved in the policy process, this dissertation builds on a body of scholarship that investigates the conditions that lead to judicial empowerment. Judicial participation in the policy process is routinely structured through the language of statutes as members of Congress work to create

opportunities for judges to exercise discretion (Graber 1993; Gillman 2002; Frymer 2003; Lovell 2003; Crowe 2007; Farhang 2008, 2010). This scholarship focuses on the “relationships between justices and elected officials,” searching out ways in which elected officials “encourage or tacitly support judicial policymaking” (Graber 1993: 36-7). The result is a way of studying and explaining judicial policy-making in which scholars investigate the numerous mechanisms through which legislators share power, responsibility, and blame with judges (Graber 1993: 37; Lovell 2003: 20). This scholarship has also been attentive to reasons why Congress may create opportunities for judicial policy-making, which includes advancing political and policy goals (Graber 1993; Gillman 2002; Lovell 2003; Smith 2005; Farhang 2008, 2010). Legislators may wish to shift decision-making responsibility from the legislature to the courts (Graber 1993) or to lock-in and advance policy goals (Gillman 2002), some of which may be difficult for legislators to achieve on their own (Graber 1993; Lovell 2003). Legislators may additionally look to courts as institutions that can provide an oversight function for the executive branch (Shipan 2000; Smith 2005).

The present study adds to our understanding of judicial empowerment by focusing on an additional mechanism through which Congress empowers the judiciary. Congress makes choices about the jurisdiction of the federal courts by passing *jurisdiction-granting legislation*. As defined here, jurisdiction-granting legislation is legislation that explicitly expands judicial discretion by designating courts as venues through which certain specified categories of people or organizations may work to address their claims. Congress can take the opposite action as well by removing jurisdiction from the federal courts through the passage of jurisdiction-stripping legislation, a frequent subject of scholarship (see e.g. Gunther 1984; Weiman 2005; Peabody 2006; Chutkow 2008; Olsen 2009; Fallon 2010). It is recognized that Congress has the

constitutional power to remove jurisdiction, though there is disagreement over whether Congress's power is plenary or limited by either the language of Article III or other provisions of the Constitution (Gunther 1984: 900, 908). With the exception of Chutkan (2008), studies assume that removal of jurisdiction from the Supreme Court rarely occurs (Epstein and Knight 1998: 143; Weiman 2005: 1678-9; Fallon 2010: 1045).

The expansion and contraction of federal court jurisdiction has not gone unnoticed by students of the federal courts. Crowe (2007) links the passage of the Judges' Bill of 1925 and its expansion of the Court's discretionary appellate jurisdiction (through the *writ of certiorari*) to the institutional development of the judiciary. Curry (2007) examines the "politics of federal diversity jurisdiction," finding that "jurisdictional issues present important opportunities for Congress and its members to oversee the federal courts" (463). That Congress has the capacity and willingness to define the jurisdiction of the federal courts, either by granting or stripping jurisdiction, speaks to important institutional links between Congress and the federal courts. However, scholarship on the judiciary varies to the degree with which it recognizes these links between Congress and the courts. The attitudinal model, for example, assumes that Supreme Court justices are independent from Congress (and the President and public as well) and have fixed powers. Members of the Supreme Court, the focus of the attitudinal model, are "life-tenured [...] lack electoral or political accountability" and enjoy discretionary control over their docket (Segal and Spaeth 2002: 92). This allows Supreme Court justices to act free from outside influence at both the *certiorari* and merits stages of the judicial process, with their decisions being the product of their individual, personal deliberations and policy preferences.²⁶

²⁶ As a point of contrast, consider Epstein and Knight's strategic account, in which the authors argue that the justices must take into consideration the "preferences and expected actions" of other branches as well as the "greater social and political context of society as a whole" during the *certiorari* and decision stages of the judicial process (1998: 138).

Scholarship additionally varies to the degree with which it recognizes the role that Congress performs in determining the jurisdiction of the courts. While scholars might acknowledge that Congress establishes jurisdiction and that Congress has control over, for example, the Supreme Court's appellate jurisdiction (Segal and Spaeth 2002: 230), they do not investigate the implications of jurisdiction-granting for how courts participate in the policy process.

The present study addresses a gap in our understanding of the relationship between congressional action and judicial empowerment by investigating the conditions under which Congress passes jurisdiction-granting legislation. While previous scholarship has tended to focus on periodic (though important) "Judiciary Acts," in this dissertation I evaluate the passage of a comprehensive set of laws that grant jurisdiction to the federal district courts between the 81st and 106th Congresses (1949-2000). As can be seen from Figure 4.1, jurisdiction-granting laws are consistently and routinely passed. The number of laws passed ranges as high as 51 in the 93rd Congress and at least 10 laws are passed per Congress.

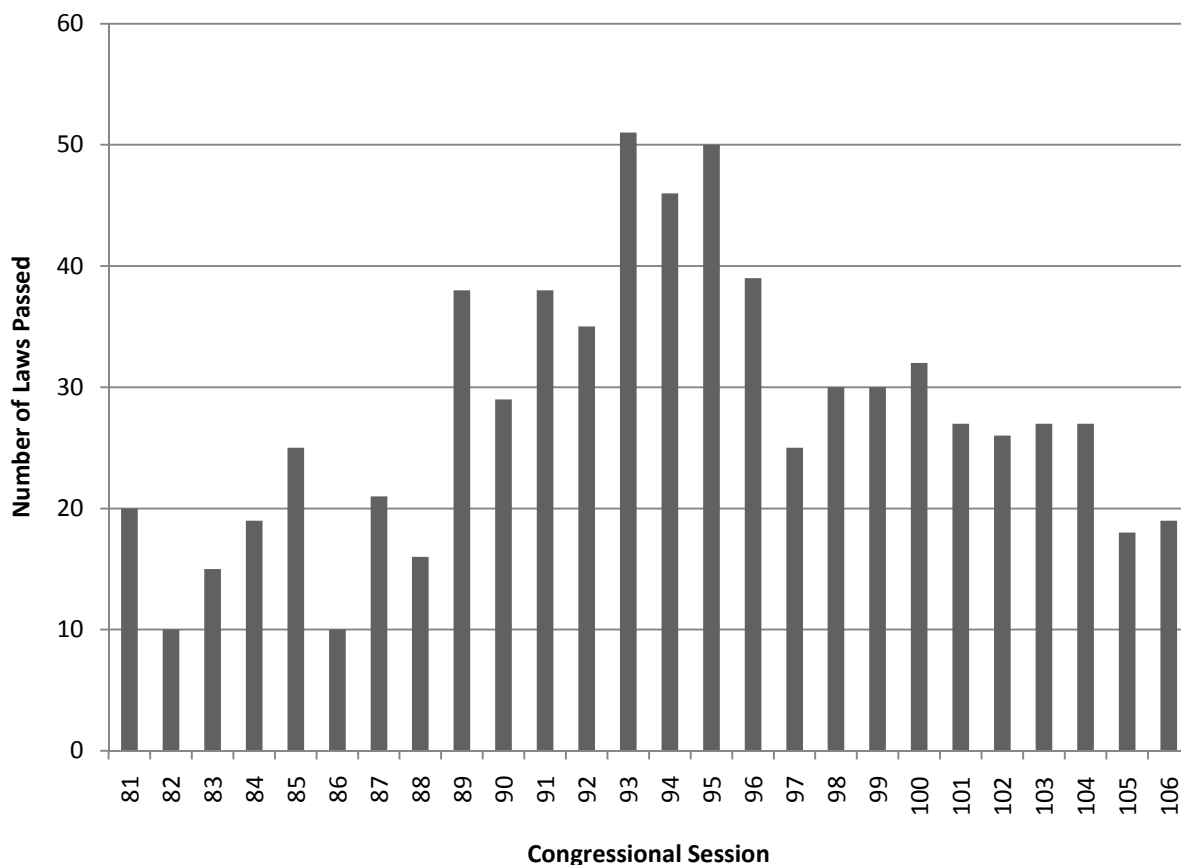


Figure 4.1. Number of Federal District Court Jurisdiction-Granting Laws Passed by Congress, 81st -106th Congresses (1949-2000). Source: Data on file with author.

These data support the argument that Congress exercises its constitutional power to determine the jurisdiction of the federal courts. Given the frequency with which it occurs, it illustrates the importance of focusing on the conditions leading to the passage of jurisdiction-granting legislation. As Congress frequently grants jurisdiction to the district courts it is an active participant in deciding whether and how the courts will participate in the policy process. In the pages that follow, I build upon these initial empirical findings in an attempt to further demonstrate the importance of studying congressional efforts to empower the courts. I first discuss existing literature on why courts become involved in the policy process. Then, two explanations that might explain the passage of jurisdiction-granting legislation are considered. I

explore the implication of separation-of-powers and judicial ideology for the passage of jurisdiction-granting laws. Along with a new dataset of jurisdiction-granting laws introduced above, a new measure of district judge ideology is constructed and employed for this analysis. The results support the conclusion that separation-of-powers concerns are important to understanding judicial empowerment.

4.2 Courts in the policy process

Motivating scholarship on the federal judiciary is the question of how courts come to decide certain public policy questions. In the behavioralist tradition, most often associated with the attitudinal model and studies of the U.S. Supreme Court, it is thought that Supreme Court justices come to decide certain public policy questions primarily because justices are in an institutional position that allows them to act on their preferences (e.g. Pacelle 1991; Segal and Spaeth 2002; Lanier 2003; Baird 2007). For the lower federal courts, the picture is somewhat more complicated as lower courts do not enjoy discretion in the way that Supreme Court justices do. However, even district court judges have the ability to exercise discretion in their determinations of whether jurisdiction exists and if standing can be granted (Rowland and Todd 1991: 177; Kim et al. 2009: 85). Furthermore, district court judges may become involved in the policy process in part because legislation may create a “fiduciary relationship” that courts may have to enforce or because judges themselves create new obligations, such as through expanding access to courts through standing doctrines (Rowland and Carp 1996: 7).²⁷ Whether scholarship investigates Supreme Court or lower court policy-making, emphasis is placed on decisions made by judges as they determine which issues to focus on.

²⁷ In this manner, Rowland and Carp acknowledge the role of legislation in creating opportunities for judges to exercise discretion. According to the authors, “fiduciary jurisprudence has been characterized by legislation ... that assigns standards of care rather than creating specific obligations” (7). While the authors recognize a link between legislation and the exercise of judicial discretion, they do not explore the link between jurisdiction-granting legislation and judicial empowerment.

In a separate tradition of scholarship, scholars investigate how opportunities for courts to review the constitutionality of statutes or to interpret the meaning of legislative language arise, and conclude that members of Congress work actively to create such opportunities (Graber 1993; Shipan 2000; Lovell 2003). In doing so, Congress empowers the federal judiciary to participate in the policy process. Constitutionally, Congress has a host of powers with respect to the federal courts covering whether courts will exist and in what form (creation), who will occupy the judges' chair (staffing), what resources they will have to complete their tasks (funding), and what issues they will attend to (jurisdiction). In this view, Congress makes antecedent decisions that structure the ability of judges to participate in the policy process. Judges do make decisions regarding which issues their courts will attend to but these decisions stand on a legal field constructed by Congress.

Following the tradition of examining judicial empowerment by Congress, the present study focuses on jurisdiction-granting legislation as one tool that Congress may use to empower the federal courts to participate in the policy process. Much like the drafting of ambiguous statutes (Graber 1993; Lovell 2003) or political party efforts to institutionalize policy gains through the creation and staffing of courts (Gillman 2002), jurisdiction-granting legislation represents choices made by members of Congress regarding whether to empower the judiciary. These decisions are part of the legislative process (Smith 2006). In the process of drafting legislation, members of Congress decide whether the courts are to be granted jurisdiction and in what form such grants will take. These decisions are frequent and routine. Congressional attention to the courts is not reserved only for issues of major importance, but instead is an integral part of the legislative process on a range of issues. As the examples in the next section make clear, congressional choice regarding the courts takes a variety of forms, meaning courts

may have a peripheral or central role to play in the public policy process depending in part on how Congress envisions their role.

What emerges is a more complex picture of the reasons why courts are involved in deciding public policy questions. In this conception, judicial forays into the policy thicket are not the result of desire on the part of judges alone, but a function as well of legislatively-created opportunities. Courts are able to review the language of statutes because Congress explicitly includes provisions granting them the authority to do so. Complexity arises from the process of tracing judicial decisions back to decisions made by other institutional actors to involve the courts in the policy process. Decisions made by judges reflect in the immediate sense the judges' deliberations. At the same time, these specific outcomes can be situated in context by looking at the multiple decisions that lead up to particular outcomes. Additionally, when courts do act it does not automatically follow that the effect of their decisions is to thwart the will of a legislative majority as judicial decision-making might serve to advance the goals of other sectors of the political system (Dahl 1957; Gillman and Clayton 1999; Lovell 2003).

Building on this theoretical background, the next section explores in detail the reasons why Congress might grant jurisdiction to the federal district courts. It examines the relationship between separation-of-powers concerns as well as judicial ideology to explain the passage of jurisdiction-granting legislation.

4.3 The decision to grant jurisdiction

Under what conditions will Congress empower the federal courts? Expansions of judicial power have been studied elsewhere as “the sort of familiar partisan or programmatic entrenchment that we frequently associate with legislative delegation to executive or quasi-executive agencies” (Gillman 2002: 512). In treating the decision to empower the federal courts

as analogous to the decision to delegate to administrative agencies, this dissertation draws on parallels between the two situations. In both situations, Congress determines the costs and benefits of producing policy “in-house” versus the costs and benefits of allowing another entity to produce policy. Congress must overcome time, resource, and expertise challenges that would otherwise prevent the legislative body from writing complex, detailed legislation itself. Producing public policy is a time-consuming enterprise and Congress’ attention is split between numerous activities. Institutional features such as the committee system provide members with tools needed to overcome cognitive limitations; nonetheless, Congress cannot attend to all issues equally and producing legislation is a costly enterprise. For Congress, resolving policy concerns might involve granting authority to a court to implement the policy given the constraints described above. In making the decision to empower the courts, Congress must also take into account the relative ideological positions of entities that might become targets of judicial oversight, as well as the ideological positions of courts themselves.

4.4 Research design

4.4.1 Jurisdiction-granting legislation

Using HeinOnline’s U.S. Statutes at Large database, I identified Public Laws with provisions that grant jurisdiction to the federal district courts for the years 1949-2000, or the post-World War II period. Laws were identified using the advanced search feature of the database to search for the following combination of terms: “district court,” “district courts,” “court,” or “courts.” Through this method, I identified a set of 726 laws that grant jurisdiction to the federal district courts. In constructing this set of laws and in the analysis that follows, I focus on the federal district courts. This reflects the importance of the district courts in American politics in that these courts decide more cases across more policy areas compared to other federal

courts. As these decisions often go un-reviewed by higher courts (Rowland and Carp 1996: 8), the decisions of the district courts affect all aspects of American's lives. Furthermore, the federal district courts are important players in the public policy process, ones that often go overlooked in scholarship on the federal judiciary.

The dependent variable *Laws* is a count of the number of jurisdiction-granting laws passed per year. As the following examples demonstrate, laws were considered to grant jurisdiction if provisions expanded the discretion of the federal district courts. Through these provisions, courts become policy venues through which individuals and groups may work to address their claims. Laws granted jurisdiction in one of four general categories. First, laws granted jurisdiction to the federal district courts by authorizing civil actions by the United States Attorney General or by a federal agency. For example, the Housing Act of 1954 states that “[w]hensoever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any territory,” which are granted jurisdiction to “hear, try, and determine such matter[s]” (*Housing Act of 1954*: 612).

Second, federal district courts were at times designated as venues in which persons affected by agency regulations could obtain judicial review of agency rules, regulations, or other agency decisions. According to the Marine Mammal Protection Act of 1972, for example, “[a]ny applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue a permit. Such review, which shall be pursuant to chapter 7 of title 5, United States Code, may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for a permit resides” (*Marine Mammal Protection Act of 1972*:

1035). Third, in instances in which parties needed to figure out the value of goods and services, the courts were granted jurisdiction to judicially determine those values. Thus, for example, the Special Health Revenue Sharing Act of 1975 states that the “United States shall be entitled to recover ... an amount bearing the same ratio to the ... value (as determined by the agreement of the parties of by action brought in the United States district court for the district in which the center is situated)” as an amount of the project in question that constituted the federal share (*Special Health Revenue Sharing Act of 1975*: 327). Fourth, a law could authorize a district judge to issue warrants, to seize goods for libel, or to enforce subpoenas. For example, “[a] fishing vessel ... used in the commission of act prohibited by section 307 shall be liable in rem for any civil penalty assessed for such violation under section 308 and may be proceeded against in any district court of the United States having jurisdiction thereof” (*Fisheries and Conservation Management* 1986: 3714).

While this measure includes many categories of jurisdiction-granting, the measure does not capture the full range of ways in which Congress empowers the federal district courts. Other measures include expansions of the judiciary through increasing the number of judgeships or creating new courts (De Figueiredo and Tiller 1996; Gillman 2002); encouraging litigation through “private enforcement regimes” (Farhang 2008, 2010); authorizing class action suits (Barnes 2007); or otherwise empowering the courts through deferring to the courts on policy questions (Graber 1993; Lovell 2003). Additionally, this measure captures only expansions of judicial power and does not account for the numerous ways in which Congress may limit the power of the federal courts through stripping jurisdiction (Curry 2007; Chutkow 2008).

4.4.2 Jurisdiction-Granting Legislation: Separation-of-Powers and Judicial Ideology

The congressional decision to grant jurisdiction to the federal district courts comes against the background of a key characteristic of the U.S. political system: separation-of-powers (Burke 2002; Kagan 2003; Farhang 2008, 2010). By separation-of-powers, I mean the existence of three co-equal branches operating in system of checks and balances in which power and responsibility are dispersed but in which each participates in the public policy process. This article builds on earlier findings that support the conclusion that separation-of-powers may encourage, when certain conditions are present, grants of power to the federal courts. These explanations generally focus on partisan congruence or ideological distance between the branches of government to explain judicial empowerment. Judicial empowerment may encompass a number of different, and sometimes contradictory, goals. The discussion that follows explores a number of these goals in the context of partisan congruence between Congress, the President, and the federal district courts as well as ideological distance between these players.

Unified and divided government. While conflict is a characteristic of our political system, alignment between the various players – the U.S. House of Representatives, the U.S. Senate, and the President – is also an empirical fact and alignment has been associated with expansions of judicial power. De Figueiredo and Tiller (1996) explain the timing and size of expansions of the federal judiciary in terms of alignment between five players: the enacting House, Senate, and President, and the nominating President and confirming Senate. Gillman (2002) describes successful Republican Party efforts to expand the size and jurisdiction of the federal judiciary as stemming from their control of the House, Senate, and Presidency. As with

other expansions of judicial power, decisions to grant jurisdiction to the federal district courts might similarly rely on alignment between the House, Senate, and Presidency.

At the same time, the presence of divided government may also be associated with expansions of judicial power as Congress may look to the courts to provide an oversight function with respect to executive branch administrative agencies. Epstein and O'Halloran (1999) first discuss the implications for congressional delegation to the executive branch in times of divided government, finding that "Congress delegates less ... under divided government" (77-81, 129-38). Noting that delegation may still take place in times of divided government, the authors further examine the type of delegation that occurs and find that Congress does delegate to "non-executive" entities including courts in times of divided government (Epstein and O'Halloran 1999: 154). In his examination of the potential oversight role of federal courts with respect to administrative agencies, Shipan (2000) argues that members of Congress may work to increase or decrease the participation of the courts in the policy-making process depending on their evaluation of the relative policy positions of Congress, courts, and agencies. Therefore, Congress may look to federal courts, including the district courts, to check the decisions made by executive branch administrative agencies when there is divergence between the policy positions of the legislative and executive branches.

The literature suggests the following hypotheses:

H1: Under unified government, it will be more likely for Congress to pass jurisdiction-granting legislation.

H2: As the ideological distance between Congress and the President increases, Congress will be more likely to pass jurisdiction-granting legislation.

Judicial ideology. As noted by Farhang (2008), the ideological position of the federal judiciary may influence legislators' calculations regarding empowering the judiciary. This may manifest in two ways. First, when the judiciary is aligned with Congress and the President empowerment may be more likely as Congress and the President may be more certain that the judiciary's policy outputs will mirror their preferences. However, when the judiciary is of a different "party" from other players, empowerment should be less likely. Second, the direction in which the judiciary is trending will affect legislator evaluations of the costs and benefits of granting policy-making authority to the courts (Farhang 2008: 826). Increasing distance between the branches will most likely result in fewer grants of jurisdiction.

This suggests two hypotheses:

H3: When Congress, the President, and the federal district courts are of the same "party," it will be more likely for Congress to pass jurisdiction-granting legislation.

H4: As the judiciary becomes more ideologically distant from both Congress and the President, it will be less likely for Congress to pass jurisdiction-granting legislation.

4.4.3 *Data and measures*

I construct measures that use both ideological and partisan measures of the positions of Congress, the President, and the federal district courts (Chutkow 2008: 1057; Farhang 2008: 831). To measure the ideological position of the U.S. House (*House Median*) and U.S. Senate (*Senate Median*), I use Poole and Rosenthal's DW Chamber median scores. I use Common Space Scores for the President (*President*).²⁸ These scores were used to construct the following variables.

²⁸ These data were download from www.voteview.com, last visited February 19, 2012.

Judicial ideology. Reflecting interest in the manner in which federal judges make their decisions, scholarship has identified a relationship between judges' political ideology and their substantive decisions. This literature extends to the federal district courts. Opportunities for district court judges to exercise discretion do exist, over both procedural and substantive questions (Rowland and Todd 1991: 177; Kim et al. 2009: 85). Political party affiliation has been correlated with standing decisions of liberal and conservative judges (Rowland and Todd 1991) and with the civil liberalism of the federal district courts in times when ambiguity from the Supreme Court creates legal uncertainty (Rowland and Carp 1980: 294, see also Rowland and Carp 1996). When judges recognize the potential to exercise discretion, "they will be more likely to give vent to their own set of personal attitudes" (Rowland and Carp 1996: 41), attitudes that have been found to align with those of their appointing president (Rowland and Carp 1980, 1983; Stidham et al. 1984).

However, the President does not act alone in picking nominees for the federal district courts. Senators, especially those of the same political party of the President and additionally those who represent the state in which a district court appointment arises, may participate in the process of choosing nominees (Rowland and Carp 1996: Chapter 4). Senatorial courtesy is thought to be active when one or both of the home-state Senators are of the same political party of the President and the assumption is that under this circumstance, the nominee reflects in part the Senators' input.

I constructed a measure of the ideological make-up of the federal district courts for the years 1949-2000 following the methodology of Giles, Hettinger, and Peppers (Giles et al. 2001). I first identified the judges serving on the district court during this time period and, using the

Federal Judicial Center's History of the Federal Judiciary,²⁹ I identified the nominating President and the home-state of the nominee. Taking account of the norm of senatorial courtesy, I assigned each judge a score based on the ideology of each judge's home-state U.S. Senator(s) when senatorial courtesy was active and assigned the judge a score corresponding to the President's when it was inactive. As noted by Giles et al., who compute an ideological score for court of appeals judges using this approach, this method is an advantage over measures that depend solely on the appointing party of the President as it takes into account additional factors that influence judge selection and additionally allows for comparisons across branches (Giles et al. 2001: 630-1). Averaging across the judges serving on the district courts per year produces the variable *Judge Median*. Negative values correspond with liberalism and positive values correspond with conservatives. Figure 4.2 displays *Judge Median* for the 81st-106th Congresses (1949-2000).

I focus on the federal district courts and do not account for the ideology of circuit court judges or Supreme Court justices, both of whom oversee decisions made by the district courts. It could be argued that the courts of appeals and the Supreme Court are participants on appeal in cases that stem from jurisdiction-granting legislation, meaning that Congress might take into consideration the ideology of the courts of appeals and the Supreme Court when designing this legislation. Congress might take into account where they stand on the ideological spectrum along with the ideology of the district courts, knowing that these courts might be involved in deciding certain policy questions. I argue, however, that a category of decisions are being made primarily by the federal district courts with little oversight from higher courts, justifying focusing on the ideology of federal district judges only. That is not to argue that the federal district courts

²⁹ Federal Judicial Center's History of the Federal Judiciary (<http://www.fjc.gov/history/home.nsf>).

always operate free from appellate review, but rather (as noted above) that it is more likely than not for their decisions *not* to be reviewed by a higher court (Rowland and Carp 1996: 8). I argue, therefore, that Congress considers the ideology of the district courts when passing jurisdiction-granting legislation because it is aware that it is these courts that will be making the bulk of policy decisions in these cases.

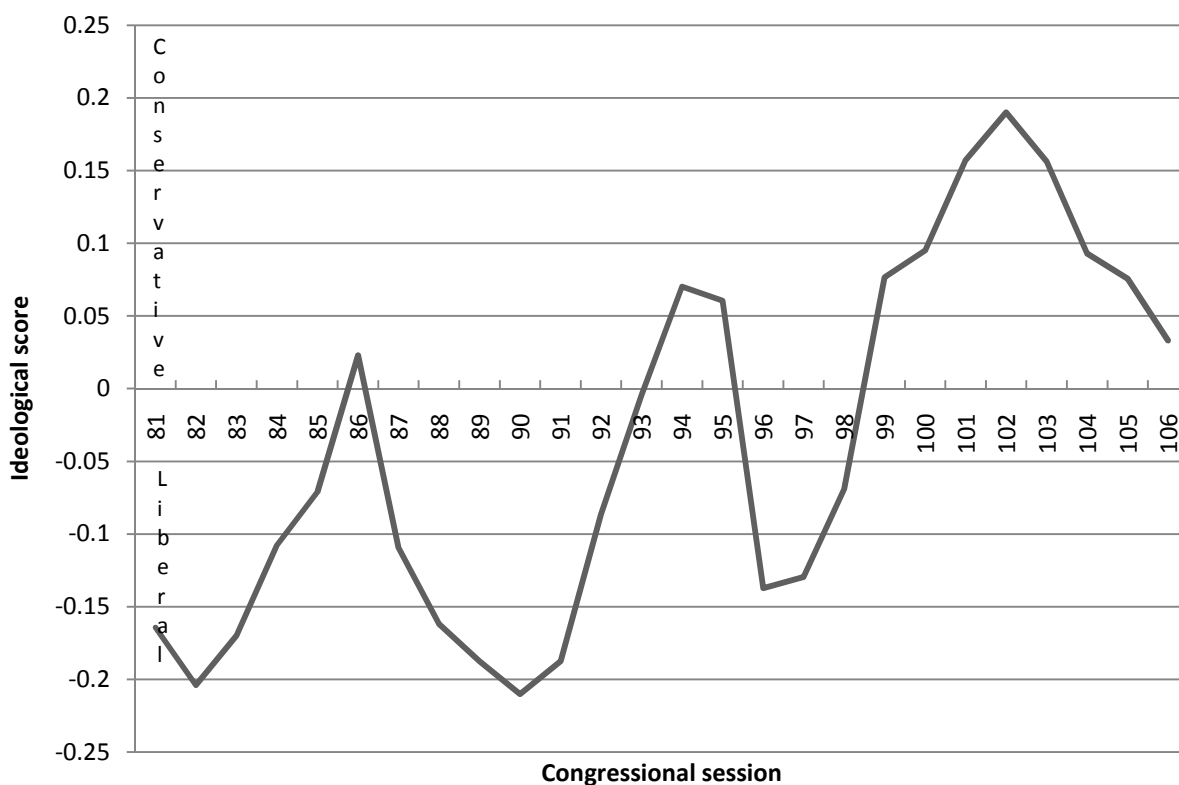


Figure 4.2. Federal District Judge Median Ideology Score, 81st-106th Congress (1949-2000). Note: Negative scores correspond with liberalism, positive scores with conservatism. Source: Data on file with the author.

Unified and divided government. The variable *Congress–President Unified* takes on a value of 1 when the House, Senate, and Presidency are controlled by the same party and 0 otherwise. Moving from divided to unified government should result in the passage of more jurisdiction-granting legislation, a positive coefficient. The variable *Judicial Direction* takes on

a value of 0 when the Congress, President, and federal district courts are of the same party and 1 otherwise (Farhang 2008: 831). As discussed above, when Congress and the President are of different parties, Congress may still grant jurisdiction to the federal district courts in that the district courts might serve an oversight function. Here, the coefficient should also be positive. In addition to these partisan variables, I calculated the distance between Congress and the President (*President-Congress Distance*). As distance increases, the likelihood of passage of jurisdiction-granting legislation should increase (a positive coefficient). *Judicial Distance* captures the relative ideological position of Congress and the President versus the federal district courts; as distance increases, the number of grants of jurisdiction should decrease.

Controls. Congress may be less likely to grant new policy-making authority to the district courts if they perceive the courts are already dealing with a high number of cases. The model controls for the number of federal district court civil cases, denoted as *Cases*, filed annually, in thousands of cases (Courts 1940-2006). Additionally, the model controls for the total numbers of laws passed per congressional session (*Total Laws*) to account for the possible effects of otherwise increasing congressional activity on the number of jurisdiction-granting laws passed.

4.4.4 Results

Grants of jurisdiction are evaluated in light of separation-of-powers concerns and judicial ideology. The data utilized here are time series data. Ordinary Least Squares (OLS) may be employed with time series data in the absence of serial correlation (Fox 1997: 381; Wooldridge 2003). In the presence of serial correlation, OLS standard errors will be biased. The Durbin-Watson test for serial correlation was used to determine if the results of an OLS regression were serially correlated (Fox 1997: 381-3; Wooldridge 2003: 401). Having found evidence of serial

correlation, standard errors were corrected using the technique advanced by Newey-West (Wooldridge 2003: 411-3).

Table 4.1. Number of Jurisdiction-Granting Laws Passed 1949-2000 (81st – 106th Congress)

Congress-President Unified	9.388** (4.038)
Judicial Direction	12.685** (4.707)
Judicial Distance	14.968 (8.922)
President Distance	27.277** (13.123)
Senate Judiciary	-0.792 (18.248)
House Judiciary	-11.264 (23.868)
Cases	1.55 X 10 ⁵ (2.48 X 10 ⁵)
Total Laws	0.052*** (0.009)
Constant	-25.634*** (4.319)

Notes: p<0.05*, p<0.01**, p<0.001***. Cell entries are OLS coefficients with Newey-West corrected standard errors in parenthesis.

4.5 Discussion

Judicial empowerment – the passage of legislation that grants jurisdiction to the federal district courts – was evaluated here in terms of separation-of-powers concerns and judicial ideology. The results strongly support the conclusion that separation-of-powers concerns inform the legislative choice to empower the federal district courts. First, moving from divided government to unified government (*Congress-President Unified*) is associated with the passage of 9 jurisdiction-granting laws, all else equal. Second, alignment between the federal district courts with the rest of government (*Judicial Direction*), is associated with the passage of approximately 13 jurisdiction-granting laws, all else equal.

Measures of ideological distance, with one exception, failed to reach conventional levels of statistical significance. Increasing ideological distance between Congress and the President (*President Distance*) is associated with increased passage of jurisdiction-granting laws at

approximately 27 laws, all else equal. As hypothesized, as Congress and the President move apart, Congress may look to the federal district courts to provide an oversight function with respect to the executive branch. Variables capturing the ideological distance between the federal district judges and the House and the Senate failed to reach statistical significance. It may be the case that Congress does not take district judge ideology into account when determining whether to grant jurisdiction to the federal district courts. Congress might be more attuned to the ideological positions of higher courts, especially the Supreme Court, who might have a more visible impact on the direction of public policy (Chutkow 2008). It may also be the case that the methodology used to capture district court ideology – based in part on the ideological position of home-state Senators and the President – does not accurately reflect the ideological position of these judges.

4.6 Conclusion

Congress empowers the federal district courts, through the mechanism of jurisdiction-granting legislation. As discussed above, Congress is more likely to pass such legislation when there is alignment between the branches of government or to use the courts to check the activities of the executive branch. These results suggest a number of conclusions regarding the relationship between Congress and the federal district courts and the federal judiciary.

First, Congress frequently grants jurisdiction to the federal district courts. This suggests an active role for Congress in determining the boundaries of what courts are able to accomplish. The district courts are not self-organizing but rather depend on Congress to make choices regarding their jurisdiction. Congress frequently makes such choices, granting jurisdiction to the federal district courts in at least 10 laws per congressional session. Coupled with the frequency with which Congress strips jurisdiction from the federal courts (Chutkow 2008), overrides the

Supreme Court (Eskridge 1991), or otherwise impacts the ability of individuals and groups to use the courts (Barnes 2007; Farhang 2008, 2010) the data collected for this study speak to the consistent attention given to the courts by Congress.

Second, by granting jurisdiction, Congress is taking action that empowers the federal district courts to participate in the policy process. Congress makes choices to establish courts as venues through which certain questions are to be asked and answered, either by establishing courts as primary venues to which individuals and groups originally turn or by creating an oversight role for courts as part of the regulatory process. Recognizing these causes of judicial participation in the policy-making process is important to understanding trends in courts' involvement in the policy process. It has long been recognized that federal courts at all levels are increasingly involved in deciding important policy questions. Compared to earlier periods in United States history, courts today are involved in multiple aspects of Americans' lives and even have taken up issues heretofore considered the sole provenance of the legislative and executive branches.

Known as the "judicialization of politics" (Vallinder 1995; Clayton 2002; Ferejohn 2002), this process has resulted in the involvement of the federal courts in the "administration and operation of schools, prisons and jails, mental health centers, public housing authorities, and juvenile detention facilities" (Taggart 1989: 242) and involved courts in numerous policy areas such as environmental law and abortion policy (Rowland and Carp 1996: 6-10). The present study argues that trends associated with the judicialization of politics might be attributed to decisions made by Congress regarding how courts participate in the policy process. If Congress plays an active role in granting courts jurisdiction, understanding what issues courts consider becomes more complicated than under a model in which courts are solely responsible for setting

their agendas. The results here suggest an antecedent stage to the judicial agenda-setting process in which Congress's choices influence who may sue, when they may sue, and which issues they may raise.

Third, decisions of whether to grant jurisdiction to the courts are part of the legislative process (Lovell 2003; Smith 2005). Congress therefore serves as an important link between the public, their elected representatives, and the courts. When courts participate in the policy process, they are doing so in part because of decisions made by elected officials. Congress has opportunities throughout the legislative process to consider the implications of its decisions regarding the participation of the courts in the policy process. While many scholars bemoan the lack of meaningful checks on the judiciary, the frequency with which Congress grants (and removes) jurisdiction demonstrates that Congress is not powerless when it comes to the federal courts.

A more comprehensive picture of the judicial agenda-setting process emerges when scholars take into consideration Congress' role in establishing the jurisdiction of the federal courts. Judges set their agendas in response to a number of influences, which includes the jurisdiction granted to them by Congress. Without these congressional grants, courts would have no power or authority. With these grants, litigants, acting as individuals or as part of groups, take advantage of legislatively-created opportunities and bring their cases to court with an understanding of what courts are able to do under the law.

Chapter 5. Congress and the Supreme Court's Agenda: Interbranch Interactions and Judicial Agenda-setting and Change

5.1 Introduction

In a 2008 piece in the New York Times Magazine, Jeffrey Rosen described the Supreme Court's changing posture towards business matters, writing that under Chief Justice John Roberts, "the court has seemed only more receptive to business concerns" by both scheduling more cases related to business issues and deciding more cases in favor of business interests (Rosen 2008). Others have commented on whether the Supreme Court is hearing more cases on economic related topics and whether decisions in these cases have a "pro-business" slant (Conrad 2009; Liptak 2009; Pickerill 2009). Independent indicators do support contemporaneous descriptions of increasing judicial attention to issues dealing with business and the economy. Figure 5.1 charts the percentage of cases devoted to Economic Activity, a category of cases that includes antitrust, mergers, federal regulation of securities, federal or state consumer protection, and patents, among others – with data coming from The Supreme Court Database.³⁰ The Court's attention to economic issues has fluctuated over the years, from a peak of close to 40 percent in 1953 to a low of less than 10 percent in 1968. For a long stretch of time, attention hovered between 10 and 20 percent of the Court's agenda. In recent years, the Court's attention seems to be on the upswing, reaching a high of 27 percent in the 2006 Term.

It may be too soon to tell if a new transformation is taking place with respect to judicial attention to economic matters. At the same time, one trend that emerges from Figure 5.1 is the *lack* of an obvious trend. Over time, spanning natural courts and courts in transition, judicial attention to Economic Activity dances around. Regardless of who is on the bench, judicial

³⁰ Available online at the Supreme Court Database, <http://scdb.wustl.edu/index.php>, and last accessed February 2011.

attention to Economic Activity varies from year to year. Indeed, Rosen notes how both conservative and liberal justices penned decisions favorable to business interests (Rosen 2008).

What explains this variation in judicial attention?

Scholarship on the Supreme Court's agenda tends to look at the behavior of Supreme Court justices themselves to explain patterns such as the one described above. Given the Supreme Court's discretionary control over its agenda, coupled with conceptions of the judicial role, the issues to which the Court attends are thought to be a function of the preferences of the justices. In fact, justices of all ideological stripes are thought to avoid economic issues partly as a result of the 1937 constitutional crisis, the subsequent recalibrating of the judicial role (Pacelle 1991), and because of the lack of salience of issues related to the economy (Pacelle 1991; Hurwitz 1998; Segal and Spaeth 2002).

In contrast, this dissertation looks beyond the Supreme Court to investigate whether forces external to the Court are influencing the Court's attention to issues. Specifically, I examine whether the passage of a law in a policy area has an effect on Supreme Court attention to that same policy area. Using data from the Policy Agendas Project, which categorizes Public Laws and Supreme Court cases according to one of nineteen policy areas, this Chapter explores whether judicial attention flows along with congressional enactments.

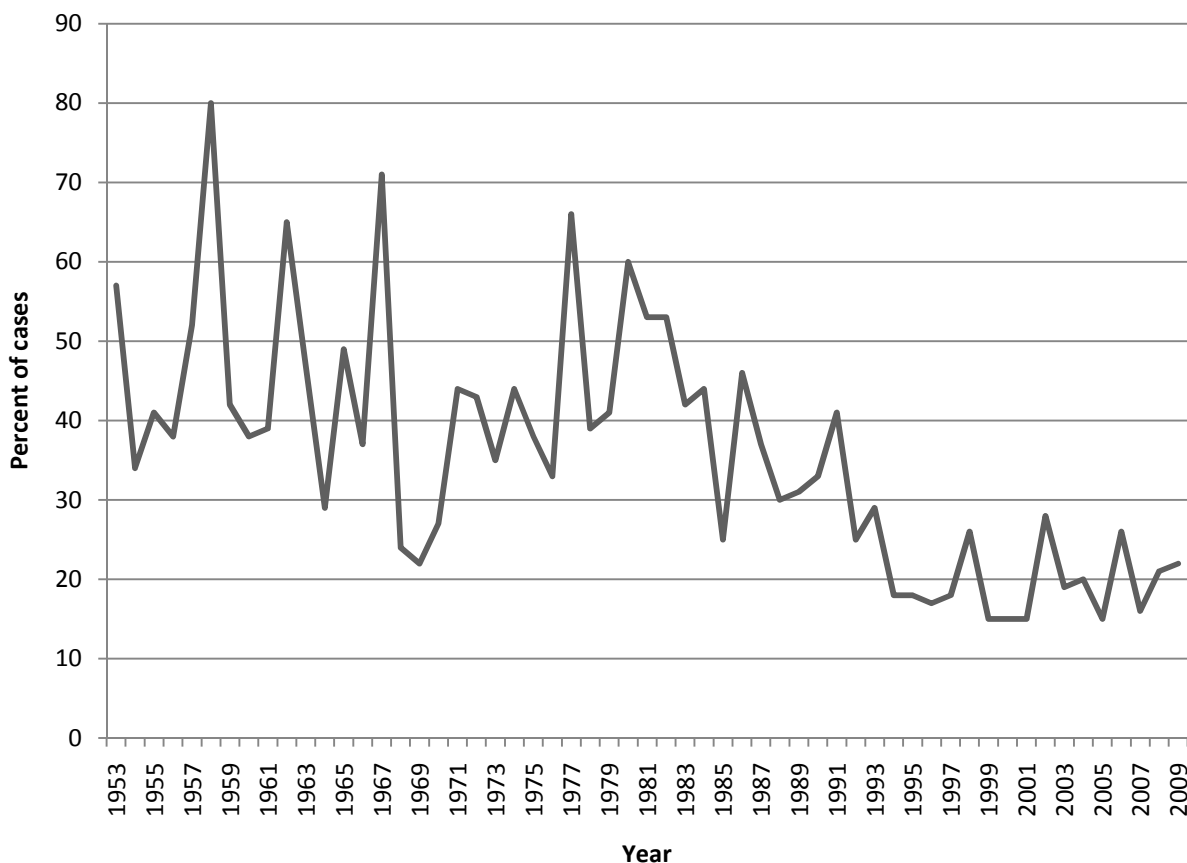


Figure 5.1: Percent of Total Supreme Cases Devoted to Economic Activity, 1953-2009. Source: The Supreme Court Database.

I build upon scholarship that investigates the conditions that lead to judicial policy-making. This scholarship has been attentive to the ways in which legislators create the possibility for judges to participate in the policy process (Graber 1993; Shipan 2000; Gillman 2002; Frymer 2003; Lovell 2003). In this dissertation, I build on these insights to investigate the question of whether there is a relationship between congressional activity and the agenda of the Supreme Court. This emphasis is unusual in that the process by which the Supreme Court sets its agenda is traditionally thought to be driven primarily by the justices themselves and as a manifestation of their preferences for which issues to attend to. Judicial preferences *are* important to understanding how judges decide which cases to focus on (and what outcomes to pursue), but judicial preferences cannot account entirely for the mix of cases that justices are

presented with and therefore cannot solely account for the manner in which the Supreme Court's agenda changes over time. Judicial preferences may explain what judges do with the cases once they are presented with them, but do not adequately account for why the cases are before the Court. While justices have some influence on the issue area and quality of cases presented to them (Baird 2007), they do not bear sole responsibility for the nature of the legal field upon which they work. That legal field is constructed by Congress when it passes laws, creating new questions of statutory and constitutional interpretation (Flemming et al. 1999: 79). Judicial attention to an issue is in part a product of the opportunity for a court to attend to that issue, an opportunity that might exist only in relationship to a statutory or regulatory scheme. Indeed, the Supreme Court, like all courts, is not a self-starter but depends on individuals and groups to bring the Court litigation. Without the raw materials of statutes or other government action, the Court has little to work with.

In the pages that follow, I first discuss the process by which the Supreme Court builds its agenda. The literature points to a number of case characteristics that may influence the decision of whether to place an case on the Court's agenda. I then present hypotheses to test the relationship between Congress's agenda and the Supreme Court's agenda. The results demonstrate that, depending on the policy under consideration, congressional attention does have an effect on Supreme Court attention to an issue.

5.2 Which Issues for Consideration?

Scholarship on the Supreme Court's agenda tends to explain judicial attention by looking at the Supreme Court justices themselves. Given the Supreme Court's discretionary control over its agenda, coupled with conceptions of the judicial role, the issues to which the Court attends are thought to be a function of the preferences of the justices. Discretionary agenda control gives

justices the power to pursue their policy goals as they choose which cases to decide. Justices can focus on issues important to them while paying less attention to others. Additionally, institutional independence from the public and from other branches of government accords Supreme Court justices the freedom to pursue their goals in terms of which cases to decide. Understanding agenda formation and agenda change at the Supreme Court thus requires an understanding of the preferences of the justices serving on the Court.

In choosing which cases to decide, justices may employ a number of tools to inform their decision of whether to grant or deny *certiorari*. Rule 10 of the Rules of the Supreme Court enumerates some criteria the justices consider when determining if *certiorari* should be granted. Rule 10 provides some guidance to potential litigants on what case characteristics might lead to review, including conflict among courts of appeals, conflict between state courts of last resort and federal courts of appeals, or state courts of last resort or federal courts of appeals deciding questions of federal law not yet addressed by the Supreme Court (or contradicting a Supreme Court precedent). In addition, case characteristics such as the presence or absence of a civil liberties issue, the participation of the federal government as a petitioning agency, dissent in lower courts, and the number and content of amicus briefs provide information for justices to use as they work to determine whether to grant *certiorari* (Tanenhaus et al. 1963; Armstrong and Johnson 1982; Caldeira and Wright 1990; Perry 1991; Bailey et al. 2005).

Just as the Supreme Court's agenda at any one time is thought to reflect the preferences of individual justices, the Court's agenda over time is thought to reflect the priorities of the justices serving on the Court. Empirical examinations of the Supreme Court's agenda illustrate the manner in which the issues appearing on the Court's agenda have changed over time (Pacelle 1991; Lanier 2003; Baumgartner and Gold 2005; Segal and Spaeth 2002). According to Pacelle

(1991), for example, “[e]conomic issues dominated the agenda prior to the 1938 term, capturing about 50 percent of the Court’s agenda space . . . Since that time, their agenda space has continued to decline, stabilizing in recent Court terms at approximately 10 percent” (65). In contrast, “[c]ivil liberties . . . cases consumed less than 10 percent of the agenda space until 1941” and over the span of his study, which ends with the 1987 term, “stabilized [at] around 60 percent of the total agenda” (Pacelle 1991:139). Similarly, in their comparison of agenda change in the Congress versus the Supreme Court post-World War II, Baumgartner and Gold (2005) find that “the Supreme Court moved out of economic matters to focus more on matters of civil rights and liberties, social welfare, and criminal justice” (282).

Explanations of these trends focus on issue salience and case characteristics. According to Segal and Spaeth (2002), for example, “[a] likely explanation for these trends may be the justices’ perception that business, labor, and tax matters have relatively little salience, as compared with increased autonomy for state and local governments” (251). To explain lack of attention to economic issues, Hurwitz (2006) describes differences in attention to economic issues “based on the justices’ desire to evade economic issues,” the fact that these cases “represent less salient issues than in civil liberties cases,” and given the discretionary control the justices enjoy over their agenda (329). Pacelle (1991) describes shifts away from economic issues as a purposive project undertaken by the Supreme Court justices, writing that the “decline suggest that the Supreme Court made a conscious effort to reduce the agenda space available to these types of issues” (63-5). Salience is important here as well; according to Pacelle, “[h]istorically, since 1938, Economic issues have been considered relatively unimportant by the Court regardless of its composition, underlying societal activities, or the litigants seeking judicial attention” (1991: 88).

A common characteristic of these studies is their focus on the relationship between the justices' preferences and the construction of the Court's agenda. On the one hand, such a focus makes sense given the dynamics of agenda-setting. Agenda-setting is typically studied in terms of the actors setting the agenda, reflecting the idea that understanding what powers agenda setters possess leads to an understanding of the agenda-setting process (as well as outcomes). Therefore, the justices' ability to decide which cases to hear is important to understanding agenda dynamics at the Court.

On the other hand, focusing on judicial preferences and issue salience depends on certain assumptions regarding the origins and exercise of judicial power – assumptions that are central to studies that adopt the attitudinalist approach to studying the Supreme Court. First, the Supreme Court is viewed as deriving its power from the Constitution. The assumption here is that the Court depends only on the Constitution as a source of power, and does not depend on other sources such as legislative grants of jurisdiction. Second, the exercise of judicial power is made evident by how the Court operates and in how the branches of government relate to one another. According to this view, the Supreme Court sits at the top of the judicial hierarchy, and decides important constitutional and statutory issues over which it for all intents and purposes has the last word. Despite the existence of constitutional and statutory mechanisms through which Congress may potentially respond to the Court, these devices are rarely or never used. Justices are appointed to the Supreme Court for life; absent are the periodic checks of elections. Justices' salaries are constitutionally protected, and their formal removal depends upon impeachment (or often retirement or death). The Court therefore operates free from outside influence.

Furthermore, the Supreme Court's agenda is primarily discretionary and is constructed when justices agree, according to various institutional rules, to grant review to cases – most of

which come to the Court through the discretionary writ of *certiorari*. When justices make the decision to grant review and when they decide the outcome of a case, they are free from external constraints. The Supreme Court's agenda is therefore a function of justices' preferences.

The assumptions undergirding the attitudinal model provide only part of the picture when it comes to the sources and operation of judicial power. First, judicial power is contingent in both its origins and its exercise. In addition to the powers granted to the federal judiciary by the Constitution, power is granted to the courts through action by Congress. The jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court are established by law. As noted in Chapter 4, for example, Congress fosters the exercise of judicial power by creating jurisdiction upon which courts act. Congress often manipulates the parameters of jurisdiction, granting jurisdiction in some policy areas and taking it away in others. Second, interactions between the Supreme Court and the United States Congress are numerous and complex. Coordination between the branches of government to advance policy and political goals is a characteristic of our political system. Additionally, opportunities exist for Congress to respond to Supreme Court decisions. If the Supreme Court's decision stands on statutory interpretation, Congress can and does pass legislation to override the Supreme Court's ruling. Judicial power depends on other actors for its existence and for its operation. The exercise of judicial power is possible in part because of decisions made by other actors to empower the Court. Supreme Court decisions are not self-executing but depend for implementation on the participation of other actors.

The assumption of an independently powerful Supreme Court leads to the conclusion that justices are able to act on their preferences and that issue salience is of importance. However, once one takes into account the numerous ways in which judicial power is contingent, the role of

preferences and salience must change. This is not to say that preference and salience are not important. Rather, judicial preferences and salience are some of a number of factors that influence which issues a court attends to. Broader social, economic, and political factors influence the issues that are brought before the Court separate from what the justices might prefer to decide. Once cases get to the Supreme Court, it is fairly clear the procedures followed by the Court to set its agenda and it is fairly clear which factors influence placement on the formal agenda. However, the process that determines which mix of cases appear before the Court are subject to forces broader than the justices themselves.

The manner in which the Supreme Court participates in the policy process is influenced in important ways by the actions of other governmental actors. Congress has the capacity to influence how the Supreme Court participates in the public policy process by, for example, expanding the Court's discretionary control over its docket (i.e. the Judges Bill of 1925) or by removing jurisdiction to hear certain federal *habeas corpus* claims (i.e. the Military Commissions Act of 2006). The former increased the justices' ability to pick and choose among the thousands of cases petitioned annually according to their own subjective criteria while the latter represents an attempt to limit judicial oversight of executive branch decisions regarding detainees. Furthermore, Congress can design statutes so that courts are given a policy-making role as part of the statutory framework. The Employee Retirement Income Security Act of 1974 (ERISA), for example, contains provisions that spell out when litigants may use the courts to address their claims. In one provision the ERISA grants the federal district courts "exclusive jurisdiction of civil actions under this title brought by the Secretary [of Labor] or by a participant, beneficiary, or fiduciary" (*Employee Retirement Income Security Act of 1974*: 892).

Additionally, as noted by Flemming et. al, the passage of a law is almost certain to create questions of statutory and constitutional interpretation (Flemming et al. 1999: 79). Federal courts at all levels, at the behest of litigants, interpret the meaning of statutory language or determine the constitutionality of statutes. Either through legislative ambiguity (Lovell 2003) or by creating explicit roles for courts, laws create new problems that must be solved often regardless of a court's position on the ideological spectrum. For example, Congress established a statutory framework for regulating private pensions plans when it passed the ERISA legislation. The passage of the ERISA created a new regulatory system for pension plans in this country, which in turn created new legal issues which require resolution in court. In response to litigants raising issues under the ERISA, courts would become involved in implementing the law or determining the meaning of its provisions. In 1980, the Supreme Court in *Nachman Corp v. Pension Benefit Guaranty Corporation* (446 U.S. 358 [1980]), considered the definition of the term "nonforfeitable" under the ERISA, its first but far from last opportunity to participate in determining the meaning of provisions of the ERISA. According to data from the Supreme Court Database, between its 1979 and 2009 terms, the Supreme Court has decided 56 cases dealing with the ERISA and its amendments (*The Supreme Court Database* 2011). Cases have covered a variety of issues including determining the constitutionality of ERISA provisions under the Taking Clause (*Connolly v. Pension Benefit Guaranty Corporation* 475 U.S. 211 [1986]); reviewing decisions of the Pension Benefit Guaranty Corporation (PBGC) which administers the Act, for adherence to the law (*PBGC v. LTV Corporation et al.* 496 U.S. 633 [1990]); and reviewing the procedure through which "installment schedules" are to be calculated (*Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Company et al.* 513 U.S. 414 [1995]).

While not an exhaustive account of the possible links between Congress and the Supreme Court, the preceding discussion highlights constitutional and statutory ways in which Congress and the Supreme Court may interact. Despite these numerous links, scholarship on the judiciary varies to the degree with which it recognizes connections between Congress's agenda and the Supreme Court's agenda. I argue for a conception of judicial agenda-setting that takes into account the manner in which Congress creates opportunities for courts to participate in the policy process often merely by passing legislation. In this conception, judicial participation in the policy process does not reflect solely the preferences of judicial actors, but reflects additionally their capacities to act. The capacity of courts to participate in the policy process depends in part on the presence of material to work with. Congress often works actively to create opportunities for judges to interpret the meaning of statutes or the constitutionality of legislation with the knowledge that courts will then interpret the meaning of statutes or the constitutionality of legislation (Graber 1993; Gillman 2002; Frymer 2003; Lovell 2003). The agendas of the federal courts thus partly reflect the policy questions that legislatures create for them.

A recognition of the links between Congress and the courts requires an examination of how the legislative branch influences the judicial. The next section turns to this task, investigating whether the passage of legislation has an impact on the Supreme Court's agenda.

5.3 Research Design

The literature suggests two explanations that may account for Supreme Court agenda-setting. First, the justices of the Supreme Court, acting on their discretionary control over their agenda, decide which cases to decide. The salience of the issue for the justices is important – lack of salience may equal lack of attention – as is whether or not the issue comports with understandings of the judicial role. Judicial role conceptions should steer justices towards civil

rights and liberties cases and away from economic cases (Provine 1980; Pacelle 1991; Hurwitz 2006). These “judge-centered” explanations for agenda-setting suggest the following hypotheses:

H1: The passage of a law in highly salient policy area or a policy area for which judicial role conceptions govern attention to an issue will have no effect on judicial attention. This is because the Supreme Court would attend to these issues regardless of congressional attention to these issues.

H1a: The passage of a law in a non-salient issue area or issue area not comporting with the judicial role will have no effect on judicial attention. Justices will choose not to attend to these issues given lack of importance or given the fact that the issues do not align with what the justices feel the Supreme Court should attend to.

The second process is institutionally based. Congress creates issues for courts to consider as a product of the legislative process by creating statutory and constitutional questions to be answered, suggesting the following hypothesis:

H2: The passage of a law in a policy area will lead to an increased number of cases on the Supreme Court’s docket independent of the salience or judicial role conceptions. This is because the passage of a law creates issues that may be dealt with by the courts.

Before turning to the data and measures, it is necessary to identify policy areas in which to test these hypotheses. First, civil rights and liberties are recognized in the literature as highly salient issues that align well with conceptions of the judicial role. The Supreme Court is thought to attend to issues related to civil rights and liberties because of the importance of the issues and the centrality of the issues to the Court’s purpose. Second, issues related to economic regulation are a less salient issue area and one that the Court, post-1937, should shy away from (Hurwitz

2006: 328-30). Finally, environmental regulation is a policy area that is more technical in nature and may be of mixed salience to the Court. It is included here as it is an example of a regulatory issue area in which Congress and the Court might be linked (Pacelle 1991: 94).

5.3.1 Data and measures

Data for this project come from the Public Laws and Supreme Court Cases datasets made available through the Policy Agendas Project, housed at the University of Texas at Austin. The Policy Agendas Project is a resource that provides comparable measures of policy change across United States institutions, covering the post-World War II period. The Project has produced a wealth of research on agenda-setting processes and policy change in the United States – a comprehensive list is available at www.policyagendas.org. A benefit of using these datasets is that as both have been constructed using the same coding scheme, direct comparison between the agendas of the two institutions over a large period of time is possible.

For the United States Congress and the Supreme Court, Public Laws and cases are coded according to a comprehensive coding scheme that includes nineteen major topics and 225 subtopics. The Public Laws dataset includes every public law passed from 1948 to 2007. The Supreme Court dataset includes each case granted on *certiorari* or appeal on the Court's docket from 1948 to 2006. Cases are listed according to both citation and docket number and additional docket numbers may be assigned if more than one case are bundled together by the Court, a common practice when cases raise similar issues that can be resolved with one decision. Counting by docket numbers gives the researcher an idea of the magnitude of the Court's attention to an issue that is not gained by examining just citation numbers. As I am interested in attention over time, I count by docket number rather than citation.

5.3.2 Independent and dependent variables

For the purposes of this study, the years under analysis are 1948-2006 which allows for comparison between the datasets starting with the post-World War II era. The dependent variable *Cases* is the number of Supreme Court cases docketed per policy area per calendar year.³¹ The independent variables *Banking Law*, *Civil Rights Law*, and *Environment Law* are a lag of the number of laws passed per policy area per calendar year. The variable is lagged for one to six years to account for the amount of time it may take for cases get to the Supreme Court (Baird 2007: 67-9).

Figures 5.2, 5.3, and 5.4 display the number of Public Laws and Supreme Court cases docketed per policy area for 1948 – 2006. In all three policy areas, a common characteristic of congressional and judicial attention is the variability demonstrated from year to year. As with Economic Activity (Figure 5.1 above), levels of judicial attention to all three areas varies regardless of court composition, suggesting that in addition to judicial preferences, other factors may be influencing the Court's agenda.

³¹ Cases are coded for the Supreme Court Term in which they were decided and also normalized to calendar year, allowing for comparison between the Court and other institutions. For the purposes of this project, dates are for the calendar and not the Term year.

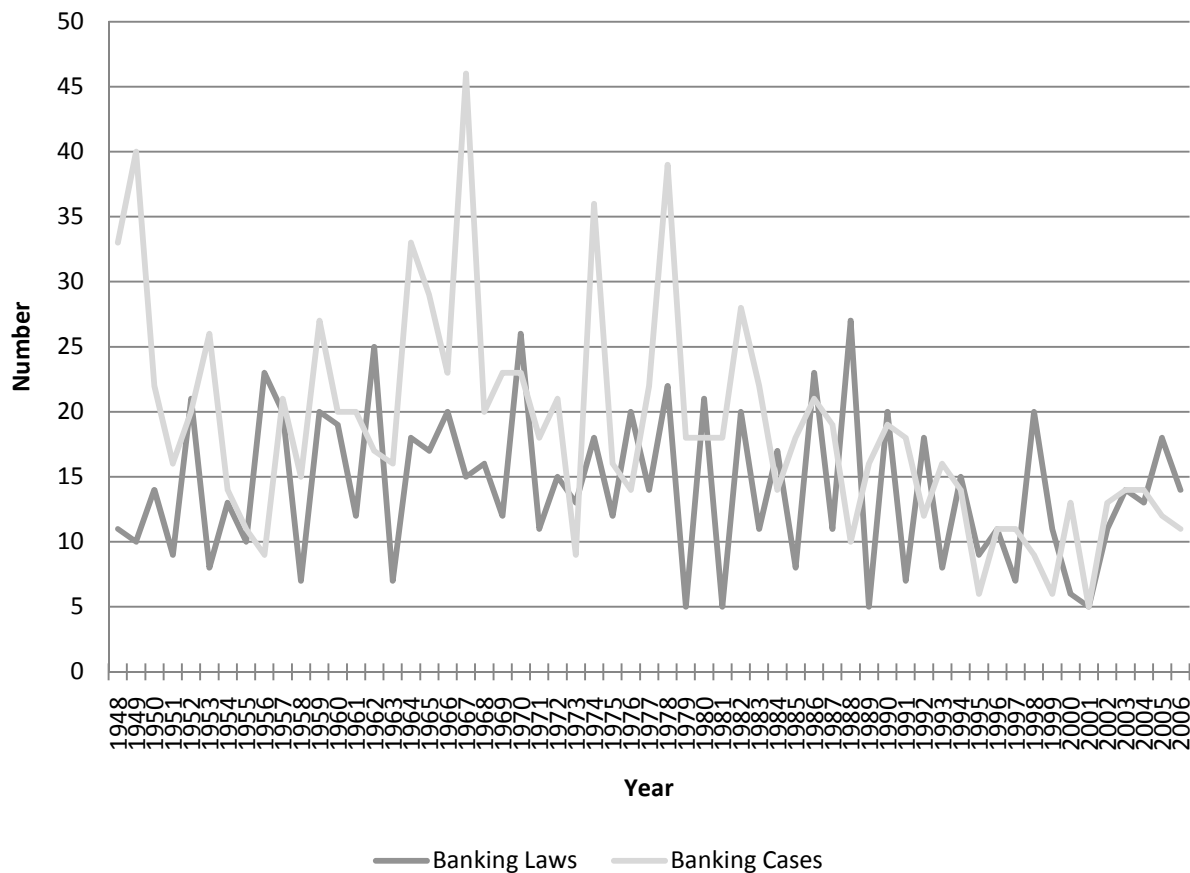


Figure 5.2. Number of Banking, Finance, and Domestic Commerce Public Laws Passed and Supreme Court Cases Docketed, 1948 – 2006. Source: Policy Agendas Project.

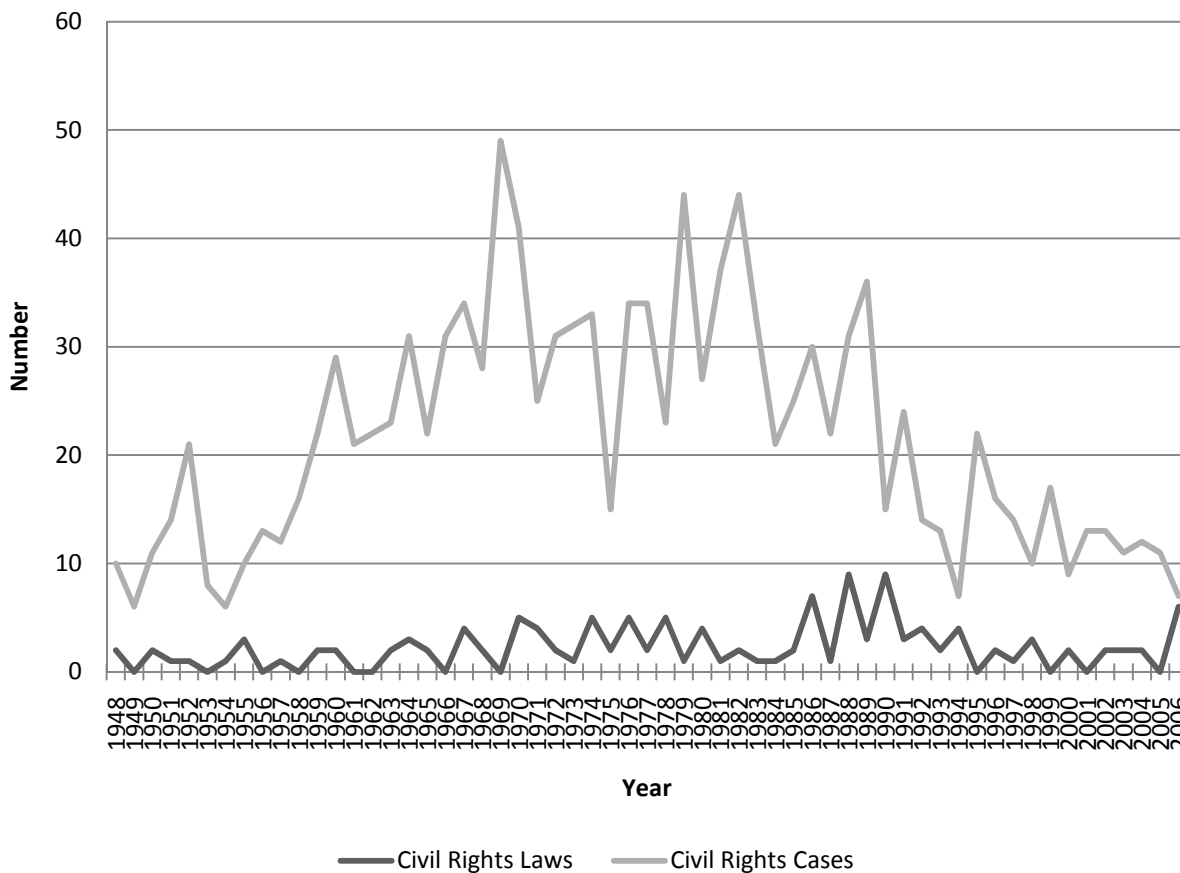


Figure 5.3. Number of Civil Rights, Minority Issues, and Civil Liberties Public Laws Passed and Supreme Court Cases Docketed, 1948 – 2006. Source: Policy Agendas Project.

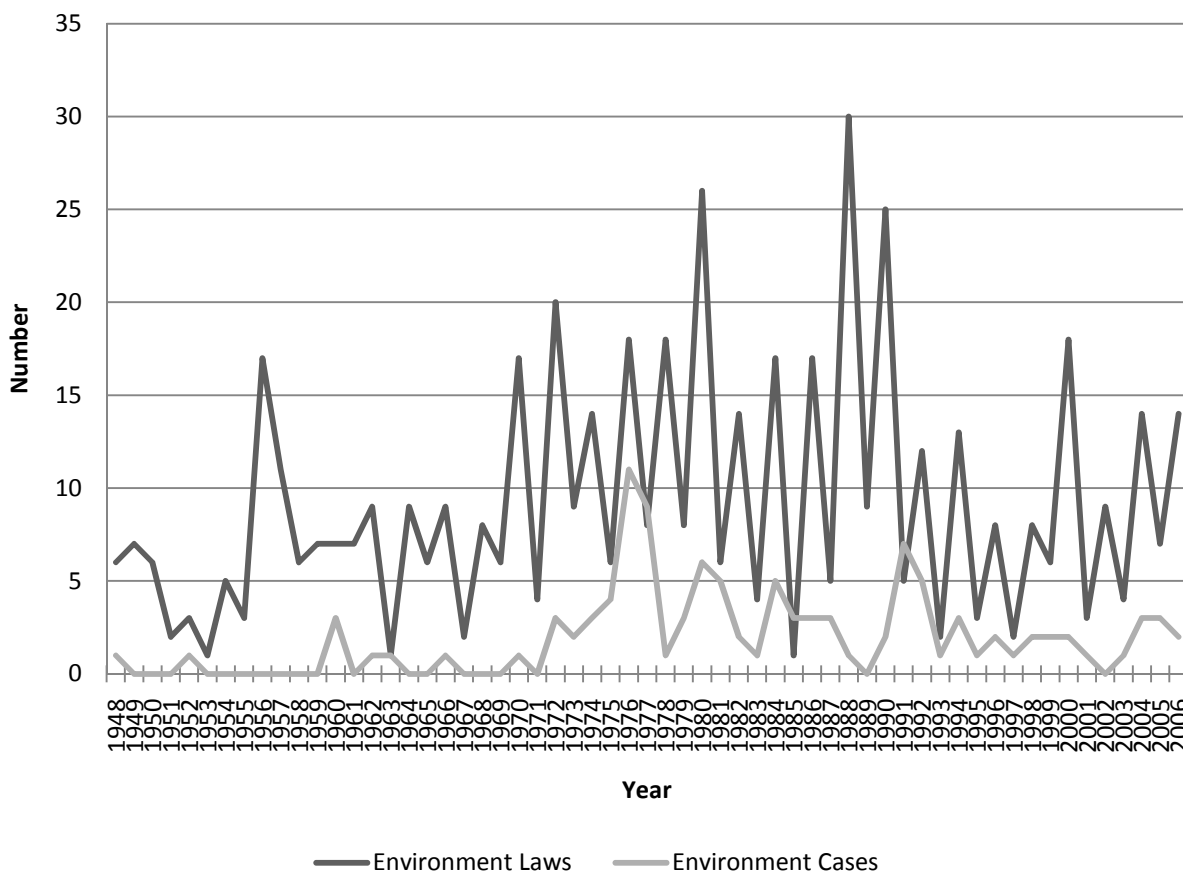


Figure 5.4. Number of Environment Public Laws Passed and Supreme Court Cases Docketed, 1948 – 2006. Source: Policy Agendas Project.

5.3.3 Control variables

In testing these hypotheses, I control for factors that might independently affect judicial attention to civil rights and liberties, economic cases, and environmental regulation or might independently lead to increased congressional policy-making. First, all three models include controls for Supreme Court ideology (*Justice Ideology*). Data come from Martin and Quinn scores, which provide the estimated placement of the median justice on an ideological continuum (Martin and Quinn 2002). The impact of ideology is uncertain as there is little theoretical reason to support claims of a relationship between justice ideology and cases appearing on the Court's agenda. In other words, it is not clear if a more conservative court pursues certain policy areas compared to a more liberal court (Hurwitz 2006: 330-1).

For Banking, Finance, and Domestic Commerce, I include change in GDP to capture the independent effect, if any, of changing economic circumstances (Hurwitz 2006: 333).

Additionally, initial analysis of the data suggests time specific effects in 1967, 1974, and 1978. Dummy variables control for potential exogenous shocks to the economy – the Six Day War (1967), the failure of the Franklin National Bank (1974) – at the time the largest bank failure in the U.S. – and the effects of the energy crisis (1978). For Environment, the annual budget of the Environmental Protection Agency is used as a proxy of the level of environmental regulation in the United States. Data come from the Policy Agendas Project Budget Authority database (www.policyagendas.org). Increasing environmental regulation may have an independent effect on the amount of environment-related litigation, separate from Congress’s activity in passing environmental legislation.

5.3.4 Analysis and results

The data utilized here are time series data. Ordinary Least Squares (OLS) may be employed with time series data in the absence of serial correlation (Fox 1997: 381; Wooldridge 2003). In the presence of serial correlation, OLS standard errors will be biased. Both the Durbin-Watson and Breusch-Godfrey tests for serial correlation were used to determine if the results of an OLS regression were serially correlated (Fox 1997: 381-3; Wooldridge 2003: 401). If serial correlation was found to exist, standard errors were corrected using the technique advanced by Newey-West (Wooldridge 2003: 411-3). Evidence of serial correlation was found in the Civil Rights, Minority Issues, and Civil Liberties model as well as the Environment model.

Tables 5.1 – 5.3 present the results of OLS regression for the three policy areas of Banking, Finance, and Domestic Commerce; Civil Rights, Minority Issues, and Civil Liberties;

and Environment. Each Table displays results for laws passed by Congress. Cell entries are OLS coefficients with standard errors in parenthesis, unless otherwise noted.

For Banking, Finance, and Domestic Commerce the model shows a positive and statistically significant relationship between the number of laws passed lagged for two, three, and four years. Thus, two years after passage of a law in the area of Banking, the Supreme Court docketed approximately four more cases in the area of Banking, all else held equal. For both three and four years after the passage of a Banking-related law, the effect is smaller at approximately three additional cases. Congressional enactments in the area of Banking, Finance, and Domestic Commerce influence the Supreme Court's attention to these same issues, independent of the effect of changes in the economy or judicial ideology. *Change in GDP* had no effect on the number of Supreme Court cases docketed, a somewhat surprising result considering the hypothetical relationship between economic hardship and the creation of economic legal claims. No relationship was found between *Justice Ideology* and the number of Supreme Court cases docketed in this policy area. This suggests that justices attend to economic related issues regardless of their ideological position. The largest effects were found for the 1967, 1974, and 1978 dummy variables suggesting that exogenous shocks such as a war in the Middle East, a large bank failure, and an energy crisis have an independent effect on the number of business-related claims docketed at the Supreme Court.

In the area of Civil Rights, Minority Issues, and Civil Liberties the results also demonstrate a relationship between the passage of a law and Supreme Court attention. Two years after the passage of Civil Rights related legislation, the Supreme Court hears about one additional Civil Rights related case. Additionally, Justice Ideology shows a negative and statistically significant effect at a lag of six years, suggesting that a one unit change in the

ideological position of the median justice results in approximately nine fewer cases docketed.

This effect is independent of congressional enactments, suggesting that litigants take into account the ideological position of justices when deciding whether to bring cases to the Court.

For Environment, a positive and statistically significant relationship exists between the number of laws passed at a lag of four years and the Supreme Court's agenda. All else equal, two additional cases will be docketed four years after the passage of a law. No effect was found for *Justice Ideology* or *Change in Environmental Budget*, suggesting that judicial attention to the Environment is independent of the justices' placement on the ideological scale and of the overall magnitude of the government's attention to environmental regulation.

Table 5.1. Supreme Court Banking, Finance, and Domestic Commerce Cases, 1948-2006

	Public Laws
	-0.023
Banking Laws, Lag 1 year	(0.148)
	0.403*
Banking Laws, Lag 2 years	(0.154)
	0.346*
Banking Laws, Lag 3 years	(0.152)
	0.304*
Banking Laws, Lag 4 years	(0.150)
	0.301
Banking Laws, Lag 5 years	(0.160)
	-0.047
Banking Laws, Lag 6 years	(0.145)
	-35.626
Change in GDP, Lag 1 year	(33.116)
Change in GDP, Lag 2 years	6.611 (31.380)
Change in GDP, Lag 3 years	3.591 (27.026)
Change in GDP, Lag 4 years	19.791 (25.973)
Change in GDP, Lag 5 years	-11.656 (28.270)
Change in GDP, Lag 6 years	54.068 (28.452)
	-0.472
Justice ideology, Lag 1 year	(3.358)
	-6.271
Justice Ideology, Lag 1 year	(5.048)
Justice Ideology, Lag 2 years	0.514 (4.459)
Justice Ideology, Lag 3 years	-2.132 (4.264)
Justice Ideology, Lag 4 years	2.024 (5.370)
Justice Ideology, Lag 6 years	1.351 (4.172)
1967	23.620*** (6.591)
1974	24.411*** (6.464)
1978	19.750*** (5.339)
Constant	-2.657 (5.408)

Note: *= $p < 0.05$, **= $p < 0.01$, ***= $p < 0.001$. Entries are OLS coefficients with standard errors in parenthesis. Data source: For Supreme Court cases and Laws, data come from the Policy Agendas Project Supreme Court Dataset and Public Laws Dataset, respectively. Data on Justice Ideology come from Martin and Quinn (2002).

Table 5.2: Supreme Court Civil Rights, Minority Issues, and Civil Liberties Cases, 1948-2006

	Public Laws
Civil Rights Laws, Lag 1 year	1.118 (0.612)
Civil Rights Laws, Lag 2 years	1.178* (0.563)
Civil Rights Laws, Lag 3 years	0.995 (0.732)
Civil Rights Laws, Lag 4 years	-0.891 (0.768)
Civil Rights Laws, Lag 5 years	-0.105 (0.708)
Civil Rights Laws, Lag 6 years	0.733 (0.746)
Justice ideology, Lag 1 year	-1.293 (4.559)
Justice Ideology, Lag 2 years	-12.085 (6.193)
Justice Ideology, Lag 3 years	9.230 (7.140)
Justice Ideology, Lag 4 years	-6.002 (5.882)
Justice Ideology, Lag 5 years	0.835 (5.529)
Justice Ideology, Lag 6 years	-9.286* (3.519)
Constant	23.374 (3.233)

Note: *= $p < 0.05$, **= $p < 0.01$, ***= $p < 0.001$. Entries are OLS coefficients with Newey-West (1987) corrected standard errors in parenthesis. Data source: For Supreme Court cases and Laws, data come from the Policy Agendas Project Supreme Court Dataset and Public Laws Dataset, respectively. Data on Justice Ideology come from Martin and Quinn (2002).

Table 5.3. Supreme Court Environment Cases, 1948-2006

	Public Laws
Environment Laws, Lag 1 year	0.116 (0.076)
Environment Laws, Lag 2 years	-0.035 (0.043)
Environment Laws, Lag 3 years	0.080 (0.070)
Environment Laws, Lag 4 years	0.217*** (0.059)
Environment Laws, Lag 5 years	-0.030 (0.055)
Environment Laws, Lag 6 years	0.045 (0.038)
Justice ideology, Lag 1 year	0.486 (0.687)
Justice Ideology, Lag 2 years	-1.003 (0.986)
Justice Ideology, Lag 3 years	1.203 (1.020)
Justice Ideology, Lag 4 years	-0.677 (1.488)
Justice Ideology, Lag 5 years	1.331 (1.481)
Justice Ideology, Lag 6 years	-0.799 (1.069)
Change in Environmental Budget	0.593 (07.712)
Constant	-1.8608** [0.007] (0.658)

Note: *= $p < 0.05$, **= $p < 0.01$, ***= $p < 0.001$. Entries are OLS coefficients with Newey-West (1987) corrected standard errors in parenthesis. Data source: For Supreme Court cases and Laws, data come from the Policy Agendas Project Supreme Court Dataset and Public Laws Dataset, respectively. Data on Justice Ideology come from Martin and Quinn (2002).

5.4 Conclusion

The results presented above provide support for a relationship between congressional enactments and the Supreme Court's agenda. The results show a statistically significant relationship between the passage of *Banking, Finance, and Domestic Commerce* laws and the Supreme Court's agenda. It was hypothesized that the passage of a law in a non-salient issue area or issue area not comporting with the judicial role will have no effect on judicial attention. This was based on the idea that justices will choose not to attend to these issues given lack of importance or given the fact that the issues do not align with what the justices feel the Supreme Court should attend to. The findings presented in Table 5.1 show that the Court *does* attend to *Banking, Finance, and Domestic Commerce* and that Congress can have an effect on the Court's attention merely by passing legislation in that policy area. A relationship was also found in the *Civil Rights* policy area – supporting the argument that Congress can influence judicial attention even in an area in which the Court might already devote a good deal of attention. And a relationship was found for a policy area of mixed salience and importance in that the passage of a law in the *Environment* policy areas was found to lead to increased judicial attention.

Answering the question of which issues the Supreme Court chooses to attend to depends on accounting for the variety of influences that contribute to the agenda-setting process. Studies of the Supreme Court's agenda-setting process tend to focus on the influences that justices themselves have on agenda-setting. Issue characteristics such as salience and whether or not the issue aligns with understandings of the judicial role are thought to influence agenda-setting, along with the justices' ideological predispositions.

The findings presented in this Chapter add to our understanding of the process by which the Supreme Court sets its agenda by considering the role that Congress plays in influencing that

process. The passage of laws in a policy area creates new opportunities for the courts to answer policy questions. Separate from judicial ideology or other factors that might influence judicial attention, congressional enactments influence judicial attention by establishing the legal field upon which courts operate and creating legal issues to be resolved. These institutional links between Congress and the Court are many and important to comprehensively examining the process by which the Supreme Court's agenda is set.

Chapter 6. Conclusion

Rules of access structure how courts participate in the policy process and are set by Congress when it exercises its constitutional powers with respect to the courts. Rules of access are also set by judges themselves when they figure out what rules of access will be and when they apply those rules in specific cases. Congress influences the judicial agenda-setting process through its decisions regarding rules of access. The judicial agenda-setting process is not a closed system but rather one in which outside actors influence the issues to which courts attend.

The judicial agenda-setting process is generally studied as one in which judicial behavior is the paramount influence. On the one hand, this attention to how judges decide makes sense given the numerous opportunities judges have to act on their preferences to set their agendas. On the other hand, this focus overlooks the numerous ways in which actors outside the judicial branch influence judicial agenda-setting. This dissertation addresses a gap in our understanding of the judicial agenda-setting process by accounting for the role played by Congress.

Congress influences the agendas of the federal courts by tinkering with the legal environment in which courts operate. Through rules of access, Congress helps determine whether potential litigants can sue – and potential litigants additionally make determinations whether they should sue. Litigants bring their claims to court and judges determine if rules of access are satisfied. In this way, Congress primes the process through which courts come to hear certain issues over others.

For the agendas of the federal courts, the key implication of this study is that courts attend to the issues they do in part because of decisions made by Congress regarding which issues belong in a court of law. Judicial agendas are set and change over time in response in part

to rules of access. Rules of access help determine which issues are brought to court and as rules of access change, so do the issues appearing on the agendas of the federal courts.

The nature of the relationship between Congress and the Supreme Court has changed over time. While in present times, the Supreme Court enjoys discretionary control over its agenda this was not always the case. Through much of the 19th century, the working assumption in the political culture was that the *only* way the Court could hear a case was through a specific grant of authority from Congress (see, e.g., Graber 2006). In that context, in which congressional authority over the agenda of the Supreme Court was greater, efforts on the part of Congress to strip jurisdiction from the Court or otherwise vary the parameters of judicial review were not viewed as troublesome. In present times, when the Supreme Court enjoys virtually complete discretionary control over its agenda, jurisdiction-stripping is often discussed in apocalyptic terms. However, recent efforts at jurisdiction-stripping – around indefinite detention in the Wars on Terror and in immunizing telecommunications companies for surveillance activities – show that Congress still plays with jurisdiction in a high profile way and can influence the agendas of the courts.

Judicial agenda-setting, and especially Supreme Court agenda-setting, is typically cast as revolving around decisions made by individual judges as they exercise their discretionary control over their agenda. In the model advanced in this dissertation, I recognize that the ability of judges to pick which cases to attend to is important and account for the fact that judges make discretionary choices regarding both what rules of access will be (i.e. standing) and in applying rules of access. However, judges are only able to make these discretionary choices because over time legislators have made choices that alter the structure of the federal courts.

In focusing on rules of access, this dissertation does not do justice to the number of times that Congress alters the composition of the federal courts by creating new judgeships or otherwise changing the manner in which cases come to court (i.e. the Judges Bill of 1925). The contribution made in this dissertation, however, is to illuminate the idea that Congress makes a host of decisions, of which varying rules of access is one type, to influence how the courts participate in American politics.

The idea that federal judges can and do make decisions that run counter to the preferences of elected officials and the public, and that responding or overruling such decisions is difficult (or impossible), has a lot of currency in American politics. Politicians may try to gain traction, for example, by running against the courts or otherwise making public statements that criticize the courts for their activist decisions.³² This criticism is misplaced because legislators themselves do much to encourage litigation and thereby create opportunities for judges to rule. While it is true that legislators have little control over the substantive decisions that judges make, they do have control over whether judges can find themselves in the position to make such decisions. Legislators may have reasons for both creating opportunities for judges to act and then bemoaning the specific outcomes (Graber 1993; Lovell 2003). Conceptions of judicial independence add to these dynamics in that, for example, by increasingly speaking about judicial independence politicians (and judges) have done much to create the idea of judicial independence. That is, the Court is a powerful, independent institution because it is set up as such by other powerful components of the larger political system.

³² Running against the courts may not always be successful and may depend on the nature of underlying splits in coalitions. For example, in coalition-splitting issues like abortion in which one's base may be placated by appeals against the courts running against the courts might be a successful electoral strategy. Additionally, it is worth noting that while it was relatively easy for Andrew Jackson to defy the Supreme Court – it was a vastly different institution when he issued his famous statement that Justice Marshall should enforce his own decision – it is much harder to defy the Court today given in part the ways in which the present-day Court is supported by various parts of the political system.

Just as legislators can encourage litigation, they can discourage litigation and rules of access are a useful tool for doing so. While the emphasis in this dissertation has focused on expansions of judicial power through rules of access, legislators (and judges) also may and do use rules of access to limit the ability of individuals and groups to use the courts. The empirical fact is that Congress has tools with which to encourage or discourage judicial participation in the policy process and often uses those tools.

The ability to use the federal courts to advance political or policy goals is often taken for granted but courts are not always available when needed. Rules of access govern whether courts exist as venues in which individuals may bring their claims. Congress varies rules of access and judges figure out what rules of access will be and apply those rules. Together, Congress and the courts make decisions that have the effect of increasing or decreasing access to the courts.

Certain classes of individuals or groups may be virtually ensured access to the courts while for others, access is less of a sure thing. Regulated entities are understood to be injured by the law when they are subject to agency rules or regulations, and therefore can use the courts to influence the application of the law to their specific situation as well as influence the overall direction of the law. For individuals and groups who are merely interested in how the law is written or how it is applied but who are not directly injured, it is more difficult for them to convince a court to hear their concerns. And as the *Dukes* case helps illustrate, rules of access may be interpreted by judges in a way that limits access to the courts.

Litigation can be viewed as a form of political participation (Zemans 1983) meaning it is an avenue through which individuals and groups can work to petition government for redress of their claims. While it takes a different form than voting, writing letters or otherwise communicating with elected officials, or lobbying it is nonetheless political participation in that

those pursuing cases work to influence the direction of public policy. Additionally, this is a political resource that – like all political resources – is not distributed evenly across society. Different groups of potential litigants have access to varying levels of resources which influence their ability or willingness to use the courts to advance their claims. To the extent that legislators and judges make decisions to increase or decrease access to the federal courts through rules of access, they affect whether litigation is available as a form of political participation.

In this dissertation, I have adopted the theory that judicial power varies with or is influenced by grants both from the U.S. Constitution and from positive action by Congress. To Congress the Constitution delegates the power to establish the lower federal courts and to set the appellate jurisdiction of the Supreme Court and Congress frequently acts on this power. Both in periodic “Judiciary Acts” and in the course of legislation that otherwise establishes regulatory programs Congress creates roles for the courts in the policy process. In doing so, Congress empowers the courts to act.

Concerns about judicial power underlie much commentary and scholarship on the federal courts. At worst, judicial power is described as unbounded with judges having the capacity (and willingness) to exercise their power at the expense of other branches or levels of government. Overlooking the fact that most judicial decisions take the form of statutory interpretation, scholars focus mainly on the constitutional decisions handed down by judges and conclude that there is little that can be done either to rein in courts or to respond to decisions once made (but see, e.g., Eskridge 1991). When attention is paid to statutory interpretation decisions, scholars typically conclude that Congress is unwilling or unable to respond to judicial determinations (but see, e.g., Chutkan 2008).

However, empirical examinations of the nature of judicial power and its origins work against conceptions of judicial power as unbounded. Despite a body of work that has demonstrated theoretically and empirically that courts depend in important ways on grants of power and authority from Congress, the opposite vision of the courts dominates public consciousness. This is because there might be something to be gained politically or policy-wise through making claims of congressional powerlessness in the face of judicial supremacy. Additionally, judges do sometimes make decisions that are unpopular politically or that advance unpopular policies and it is not always clear what can be done to respond to these decisions.

The fact that judges sometimes make unpopular decisions and that legislators sometimes tolerate or speak out against those decisions does not challenge the central notion that judicial power depends on grants from Congress. Rather, it points to a related concept. The exercise of judicial power is not a straightforward enterprise. When judges make decisions, they can advance the political or policy goals of other political actors. Or, they may make decisions that hinder or have no effect on the goals of other actors. To the extent that scholars paint all interactions between the judiciary and other political actors with one broad brush – that of the counter-majoritarian problem, for example – means that nuances of the relationship between political actors may be missed.

It may be that there is more to be gained by having a judiciary that can make policy decisions, even unpopular ones, than in not having a judicial branch. While legislators cannot be sure in how judges will specifically decide cases, they nonetheless have reasons for granting to them the power to make decisions. Congress faces limitations in what it can figure out and decide within the institution itself. Granting power to the federal courts may allow Congress to overcome information disadvantages – such as in choosing a specific policy regarding levels of

environmental regulation – by creating a process through which interested parties may participate in the creation of rules and regulations. Congress may be willing to trade-off control over its “agent” in exchange for the advantages conferred by delegation. Advantages from empowering the courts may include creating avenues for interest groups to participate in the process by which policy is set or creating oversight mechanisms for the actions of executive branch administrative agencies. Limiting rules of access may have the opposite effect by precluding the participation of interest groups or protecting administrative agencies from judicial scrutiny.

Judges participate in the policy process because of decisions made by legislators regarding how courts can participate in the policy process. For democratic responsiveness, the key implication is in the American political system, it is possible to influence the content of judicial agendas through the legislative process. Courts set their agendas and participate in the policy process in part because of what they are able to do under the law.

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Committee: George Lovell (Chair), Michael McCann, John Wilkerson
- 2009 *Ph Candidate.* Political Science, University of Washington, Seattle, Washington
- 2008 *M.A.* Political Science, University of Washington, Seattle, Washington
Master's Thesis: "*Legislative Design and the Supreme Court's Agenda*"
- 2001 *M.A.* Political Science, Ohio University, Athens, Ohio
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- 2000 *B.A.* Political Science, Ohio University, Athens, Ohio

FIELDS OF SPECIALIZATION:

Public law: United States Supreme Court; judicial behavior; judicial review; judicial politics
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Public policy: Agenda-setting; decision-making; policy change

DISSERTATION:

Rules of Access: Congress, the Federal Courts, and Agenda-setting and Change

Abstract: What explains variation over the issues federal courts examine over time? Adopting an interbranch approach, I argue that this variation is a function of changes in rules of access. Rules of access govern whether litigants can use the federal courts and are set by both lawmakers and judges. I focus on two rules of access – jurisdiction and standing. During the legislative process, lawmakers decide how to grant policy-making authority to federal courts through rules of access. Open access encourages litigants to use the federal courts. These decisions create statutory environments that shape the federal courts' agendas. I examine how Congress varies jurisdiction and standing. Using original data of Public Laws that grant jurisdiction to the federal district courts and Public Laws that confer standing on potential litigants, I explain how rules of access for the federal courts have changed over time and across policy issues. I present a theory that links changes in rules of access to the courts' agendas in that Congress makes antecedent decisions that influence which issues are presented to the federal courts. I employ both quantitative and qualitative methods to demonstrate the relationship between rules of access and judicial agendas.

TEACHING EXPERIENCE:

- Instructor, University of Washington
- Spring 2012: Law in Society
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HONORS:

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RESEARCH SUPPORT:

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CONFERENCE PAPERS:

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- May 2009, “The Power to Decide.” Presented at the Annual Meeting of the Law and
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PROFESSIONAL EXPERIENCE AND SERVICE:

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