

THE UNITED STATES SUPREME COURT'S VOLITIONAL AGENDAS, 1801-
1993: HISTORICAL CLAIMS VERSUS EMPIRICAL FINDINGS

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In this study, I examined the Supreme Court's agenda from 1801 to 1993 to determine the composition and dynamics of the issues that have dominated the business of the Court. Specifically, I set out to test empirically Robert G. McCloskey's (now standard) characterization of the Supreme Court's history, which sees it as dominated by nationalism/federalism issues before the Civil War, by economic issues just after the War through the 1930s, and by civil rights and liberties since the 1930s. The question that drove my investigation was "Is McCloskey's interpretation, which appears to be based on the great cases of Supreme Court history, an accurate description of the agenda represented in the Supreme Court's total body of reported decisions?"

To test McCloskey's historical theses I employed concepts adapted from Richard Pacelle's (1991) important work on the agenda of post-Roosevelt Court and used the methods of classical historical analysis and of interrupted time-series analysis. Data for my research came from existing datasets and from my own collection (I coded the manifest content of thousands of Supreme Court's decisions from 1887 back to 1801). The most important finding from my analyses is that McCloskey notwithstanding, the pre-Civil War Supreme Court's agenda was clearly dominated by economic issues of various sorts, not by nationalism/federalism as previously believed. Another key finding is that partisanship had a pronounced impact on the Court's attention to this category of

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CHAPTER 1

INTRODUCTION

Significance of the Problem

The Judiciary Act of 1789 established the authority of the United States Supreme Court to review “all cases in law and equity arising under the laws of the United States...,” other than those which might be brought originally, and “with such exception, and under such regulations, as the Congress shall make.” With this legislation, Congress essentially imposed a mandatory appellate jurisdiction on the Supreme Court, thus limiting its ability to set its agenda. As the country entered the industrial age, the Supreme Court’s docket grew substantially, and the Court began to lag behind in its workload. For example, the Fuller Court, in 1886, was deciding in excess of 250 cases per term, most of which were mandatory appeals (Wood et al. 1995; 1996). In 1889, it was several years behind in its docket (Rehnquist 1987: 196).

To reduce the Court’s caseload, Congress in 1891 established an intermediate appellate system and directed that all federal court appeals be taken first to the new circuit courts of appeals (the Evarts Act). The new legislation also provided the Supreme Court with discretionary power to review or reject cases appealed from the circuit courts. From then on, the Court made it known repeatedly that it would grant certiorari “only in

cases ‘of gravity and general importance’ or ‘to secure uniformity of decision’ between two or more federal courts of appeals” (Boskey and Gressman 1988). However, this

effort to reduce the Court's workload yielded very little success, and cases continued to pile up on the Court's docket. Further reforms to the Court's jurisdiction in 1914, 1916, and 1922 provided additional relief to the Supreme Court by extending its certiorari power to state courts' rulings. Still, these reforms failed to reduce the workload of the Court. Concerned about the Court's growing docket, Chief Justice Taft and a committee of judges proposed to Congress that the Court's mandatory jurisdiction be reducing while expanding its discretionary docket. The result was the Judiciary Act of 1925 (dubbed the "Judges' Bill"), which gave the Court discretionary power "to decline to hear cases that it deemed frivolous or that presented well-worn issues of law" (Wood et al. 1998b: 204). This law allows the Supreme Court to focus its attention on significant legal questions rather than on "mundane" issues. Thus, beginning with the passage of the Judges' Bill of 1925 and continuing through other legislation such as the Judicial Improvements and Access to Justice of 1988, Congress has transformed the Court's jurisdiction from "primarily mandatory to almost entirely discretionary" (Jucewicz and Baum 1990: 123). Except in a few minor exceptions, litigants needing judicial review now have to petition the Court for a writ of certiorari (explained later), which may or may not be granted (Boskey and Gressman 1988).

This change from a mandatory to discretionary jurisdiction raises several interesting questions about the Supreme Court's institutional agenda that so far have received very little attention in empirical research. For instance, what was the nature of the Supreme Court's issue agenda and pattern of agenda change prior to and after 1925? How was this agenda determined across time; that is, what factors account for the Court's

changing agenda over time? If judicial behavior scholars find these questions rather murky, Supreme Court historians and constitutional scholars have not shied away from trying to provide some answers. They have painted a picture of the Supreme Court's agenda formation that is more or less based on the leading cases the Court decided in different periods. Moreover, they have suggested possible factors that account for the changing nature of the Supreme Court's agenda (see Bates 1963; McCloskey 1960; Schwartz 1993; Biskupic and Witt 1997; Foster and Leeson 1998). By contrast, judicial behavior scholars have yet to examine the Court's agenda and agenda-building process in the earlier eras or test the validity of these historical explanations. Empirical analyses have focused disproportionately only on the periods of the Court after the New Deal (see Likens 1979; Caldeira 1981; Pacelle 1991; Peters 1997; Hurwitz 1997). To date, there has been little or no systematic inquiry into the nature and dynamics of the Court's agenda in the past or how the past connects with the present.

This research attempts to bridge that gap by examining the Supreme Court's primary issue agenda from 1801 to 1993, a much longer period than any study of the Court's agenda has covered. Analyses like this are needed because, as Caldeira warned, scholars should treat the Supreme Court "as an institution that operates across time" and should account "for variations in its behavior across that temporal dimension" (1981: 450). And as Pacelle (1991) noted, the Supreme Court's agenda never begins in a vacuum. It is a dynamic process in which issues rise and decline on the Court's agenda space.

Definition of Terms

The term “agenda,” as used in the context of public-policymaking, generally refers to the multitude of issues that citizens, organized groups, and government actors want the government or any of its institutions to address or resolve (Kingdom 1984: 3). It is a list of citizens’ concerns to which government officials and policymakers are paying serious attention. As used in this study, agenda also represents the universe of cases or issues that citizens, political actors, and “policy entrepreneurs” want the Court to address. Ross and Ross (1976: 126) called this the *public* agenda; in contrast to the *formal* or *institutional agenda*, which is the list of issues or items that decision-makers have formally accepted as worthy of serious consideration. In the case of the Supreme Court, *agenda formation* refers to how the Court converts the public agenda into an institutional agenda. This generally consists of two processes: agenda setting and agenda building. The *agenda-setting* process narrows the set of conceivable subjects to the set that will receive official attention. It is the first step in the process of agenda formation on the Court. From the mass of petitions for certiorari, the Chief Justice decides which cases to place on the discuss list, then four justices or more must decide which ones from the discuss list merit or are deserving of review. Once a case is granted certiorari or chosen for review, it becomes part of the Court’s docket. The next stage is the determination of the case. In any given case, one or more issues may be involved. For example, questions may be raised not only about the merits of a case, but also about the Court’s jurisdictional power. The process of picking from the selected issues is agenda building (Pacelle 1991: 3). Issues considered by the Court formally become a part of the Court’s institutional agenda.

These two stages of agenda formation (agenda setting and agenda building) are, however, not mutually exclusive. First, the number of cases selected for review or opinion writing helps to reduce the overall “load” on the court’s docket. Second, case types, or the selection of particular cases, may determine *agenda change*—the movement from one issue area to another. The Court may use particular cases to acknowledge the importance of new issues and to set its policy agenda, and, by so doing, open opportunities for “policy entrepreneurs” to advance their policy goals (Pacelle 1991). Thus, agenda setting represents the gate-keeping stage in the continuous process of agenda building. The problem in most Supreme Court’s agenda literature is that these two stages of agenda formation are not often made clear to readers. Most studies of Supreme Court’s individual case-selection process correctly use the term “agenda-setting” to describe this process. However, some, like Caldeira (1990), employed the term “agenda-building” to denote the placing of cases on the Court’s discuss list, which is an individual-level process, while others, like Likens (1980), used the term “agenda-setting” to explain what is clearly a macro-level process--the dynamics of the Court’s attention to issues. In this study, agenda building is considered an institutional-level process—a macro-level dynamics of the issues receiving attention from a political institution on the broadest level. Consequently, this study, like other recent Supreme Court agenda-building studies, focuses on the Court’s institutional agenda and the pattern of agenda change on the Court over time.

The importance of agenda change cannot be overlooked. As Pacelle (1991) argued, agenda change reflects changes in the priorities of the Supreme Court, the

complexion of the issues dominating the political environment, and the demands of external political actors or “policy entrepreneurs.” Issues rise and fall on the Court’s agenda space in response to changes in these factors. Thus, understanding the composition of the Supreme Court’s agenda and the dynamics of agenda change is as important as knowledge of the case selection process itself.

Lastly, Pacelle (1991) classifies the Court’s institutional agenda into two types. The *volitional agenda* represent the current issues that the Court believes require greater attention. It is the mass of issues at any given period to which the Court allocates the greater proportion of its agenda space. However, the closure of Court’s agenda space to “old issues” is never complete. Even when the Court has moved a previously dominant issue area off its priority list, it still must deal with the exigencies in this area. Pacelle labels this later category the Court’s *exigent agenda*. The exigent agenda, in other words, represent some of the previously dominant issues or set of issues on the Court’s agenda space that continually need redefining or reshaping. Throughout this study, I use the terms “volitional agenda” and “primary issue agenda” interchangeably, and to denote the list or class of issues that dominate the Court’s agenda space at any given period. Some readers may find the use of the term “volitional” troubling, since the term “volition” implies choice, and since the Supreme Court, for much of its history, never had much control over its docket. However, it should be noted that the Court’s mandatory jurisdiction in the earlier periods extended only to the Court’s docket, not to the determination of issues involved. As far as the latter is concerned, the Court always has had considerable discretion in this area. It could, for instance, suppress a question raised

by the litigants or refuse to issue a formal opinion. More will be said about these agenda-control mechanisms shortly. But first, a few words about the purpose of this study.

Focus of the Research

My aim in this study is to test historical claims about the composition and dynamics of the volitional agenda of the United States Supreme Court from 1801 to 1993, and to determine if these claims have empirical validity. My inquiry is based on Robert G. McCloskey's historical analysis of the Supreme Court's institutional and decisional agenda. In his book *The American Supreme Court* (1960, ed. 1994), McCloskey divided the Supreme Court's political history into three major eras and argued that judicial decisions were in each era were geared toward protecting or affirming the Court's overriding judicial interest and value. While legal scholars and political scientists have noted instances of a majority on the Court imposing its will now and then, the notion that the Court in a particular era may have a collective judicial interest or value which it might seek to affirm or protect is intriguing and worthy of empirical test. Still more intriguing, and more relevant to this study, is the suggestion by McCloskey that the issues that received the most attention during each of the Court's political eras reflected not only the Court's dominant interests but its values as well. These are two interesting propositions. After all, it makes sense that if a majority on the Court wants to affirm a particular interest, one sure way for it to accomplish this is to manipulate the Court's institutional agenda. Intuitively, we know that this would have been very difficult to do prior to the passage of the 1925 Judges' Bill when the Court had

little or no control over its docket. But this is an empirical matter that could be investigated.

In the next chapter, I shall comment more on these two propositions and present the hypotheses derived from them. For now, I wish to describe how cases reach the Supreme Court—for the benefit of those who are not familiar with this process. Second, I take a brief look at where previous research on the Court’s agenda has focused and why that focus is inadequate for understanding the Court’s institutional agenda. Third, I argue that extending the analysis of Supreme Court’s institutional agenda to earlier periods is not, by any means, a fruitless exercise. Rather, it is a task, which if pursued diligently, should enhance our knowledge of the Court’s agenda-building process across different eras.

The U.S. Supreme Court’s Appellate Process

Article III, Section 2, of the U.S. Constitution establishes two ways by which cases can reach the U.S. Supreme Court. The first is by original jurisdiction; the second is through the appellate process. Cases brought by or against foreign ambassadors or consuls, those involving the United States and a state, and cases in which a state is a party, fall under the Court’s original jurisdiction; that is, they can go directly to the Supreme Court without having been heard by another court. All other cases are to reach the Supreme Court through its appellate jurisdiction, except “under such Regulations as the Congress shall make.” That is, unless subject to congressional exemptions or regulations, these cases must first be reviewed by the lower appellate courts before reaching the Supreme Court.

As most legal scholars have pointed out, very few cases come to the Court on original jurisdiction. The vast majority of cases reach the Court under its appellate jurisdiction (Carp and Stidham 1991: 43; Perry 1991: 24-25; Epstein and Knight 1998: 25). Litigants invoking the Court's appellate jurisdiction can choose one of three methods, depending on the nature of their dispute. They may appeal as *a matter of right* if their case involves a federal question or falls within the category of cases that Congress has determined as obligatory on the part of the Supreme Court. But even here, the review is not automatic since the Court itself must often decide whether the question presented is of a "*substantial* federal nature" (Abraham 1994: 6). In the past, mandatory appeals often included cases in which a lower court struck down a state or federal law as unconstitutional or in which a state court let stand a state law challenged as violating the U.S. Constitution. However, in 1988, at the Court's request, Congress reduced the list of mandatory cases to only those involving the Voting Rights Act, and only if appealed from special three-judge courts (Epstein and Knight 1998: 26).

Litigants can also request the appellate court, where it is divided on questions of law, to certify these questions to the Supreme Court. Section 1254 of Title 28 of the *U.S. Code* authorizes the Supreme Court to review cases that are in courts of appeals: "By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or give the entire record to be sent up for decision of the entire matter in controversy." Certifying questions to the Supreme Court is a prerogative only of the lower courts; litigants cannot file writs of certification to the Supreme Court. Moreover, the

granting of such writs is discretionary; that is, the justices are free to accept or dismiss a question certified to them. According to Perry, requests for writs of certification are rarely made or granted, at least in the modern times (1991: 27).

Finally, litigants can petition the Supreme Court for a *writ of certiorari*, which is a legal procedure for sending up cases from the lower court to the High Court for review. To request certiorari is to ask the Supreme Court to order the lower court to send up the record of the litigants' case for review. Except for those that fall under the Court's original jurisdiction, most cases requesting review now reach the Supreme Court through the certiorari process, courtesy of the Judge's Bill of 1925 and the 1988 legislation. These two enactments gave the Court absolute discretionary power to choose those cases it would hear on a writ of certiorari. This, the Court has often done through the Rule of Four, a customary process by which the Court accepts for review only those cases that at least four justices want to hear.

The granting of certiorari has attracted significant scholarly attention, in part because the Supreme Court receives thousands of petitions for certiorari in each term but only grants a few (less than 100 since the 1960s), and in part because the Supreme Court rarely explains its certiorari decisions. But as discussed below, the Supreme Court certiorari or case-selection process is inadequate for understanding the nature and dynamics of the Supreme Court's agenda. The latter requires focusing on the process of agenda building and agenda change on the Court.

Toward a Macro-level Analysis of the Supreme Court's Agenda

Ever since the pioneer work of Tannenhaus and his associates (1963), there has been a great deal of interest in the United States Supreme Court's agenda. Much of this interest has centered on explaining factors which influence the Court's decision to grant writs of certiorari in individual cases, so much so that there is now a great body of literature on the Supreme Court's agenda-setting process. This research has produced strong evidence of the factors that affect certiorari grants (see Armstrong and Johnson 1979; Baum 1977, 1979, 1993; Brenner 1979; Brenner and Krol 1989; Caldeira and Wright 1988; Krol and Brenner 1990; Palmer 1982; Perry 1991; Provine 1980; Ulmer 1972, 1978, 1983, 1984; Ulmer et al. 1972) or the initial placement of cases by the justices on the discuss list (Caldeira 1990). Only in recent years have scholars begun to examine the Court's institutional agenda and how the Court builds this agenda.

There are, of course, valid reasons for focusing research on the Court's agenda-setting or case-selection process. First, Tannenhaus's study not only directed inquiry to an important but little-known aspect of Supreme Court decision-making, but it also raised several methodological and substantive questions that had to be addressed. Second, the Court's agenda-setting process is as much a political process as it is a legal process (Perry 1991; Caldeira and Wright 1990). In deciding which issues should receive substantive consideration and which ones should not, the Court is setting the conditions and environments for participation of citizens as well as allocating values. The Supreme Court's agenda-setting process, then, provides not only an indication of the openness of the Court as a political institution but also the way it allocates valuable resources to

different groups in American society. Third, the inquiries into the Court's case-selection process serve, even if only slightly, to unveil the shroud of secrecy that marks this process. As every judicial scholar or lawyer in this country knows, the Supreme Court rarely offers explanations for its certiorari decisions. And so, identifying factors that affect Supreme Court's certiorari decisions enhances our knowledge of the process.

However, case selection studies provide little insight into changes in the Court's issue agenda over time. As Peters (1997) has noted:

... case selection studies do not help explain one interesting feature of the Court's agenda setting—changes in the Court's attention to issues. Specifically, they give little insight into why the Court's agenda waxes and wanes over time, or why issues appear on and disappear from the agenda. Further, they cannot tell us why issues appear on the Court's agenda when they do, or why some issues capture the Court's attention for extended periods of time while others are addressed only briefly.

For instance, civil rights and liberties claims commanded only a small portion of the Court's institutional agenda prior to the 1950's (Pacelle 1991; Lanier 1997). Most of the Court's business up to this time involved private law issues and economic issues (Frankfurter 1927; Wood et al. 1997). Why did the Court shift its focus from economic to civil rights and liberties agenda? More importantly, why do some issues or a set of issues dominate the Court's agenda space at one time, only to decline at another? Only by extending our analysis across time periods to cover much of the Supreme Court's history can we be able to provide some answers to these questions, and only then can we be confident about our explanations of the Court's institutional agenda and agenda-building behavior.

Analysis of the Court's Agenda: Connecting the Past and the Present

As indicated earlier, most longitudinal and empirical analyses of the Supreme Court's institutional agenda have focused disproportionately on the modern Court. Three reasons usually justify this contemporary focus. First, scholars may choose to emphasize the current issue agenda of the Court over issues of past importance. Second, the lack of readily available data on the earlier Supreme Court may have discouraged judicial scholars from examining the Court's institutional agenda in earlier periods. Third, the study of the Supreme Court's agenda in earlier periods is complicated by the Court's lack of control over its docket. Indeed, Professor Pacelle has argued that in studying how the Court apportions its agenda space by policy area, one must assume that the Court's agenda space is limited, otherwise such an exercise becomes "a mere summation of individual cases," and agenda building, correspondingly, "has no independent empirical meaning" (1991: 12). Thus, Pacelle sees the Supreme Court's institutional agenda as worthy of study only if the Court has control over its docket.

If one accepts Pacelle's argument, then there is no need to study the Court's institutional agenda in the periods prior to 1925 when the Court had mandatory jurisdiction. Such a study would become a mere counting of cases, as there would be little or no difference between the number of cases and proportion of issues the Court decided upon. Indeed, there may be a stronger correlation between the two in the earlier periods than in the modern ones. But simply writing off a study of Supreme Court's agenda in the periods prior to 1925 is unacceptable for several reasons.

First, to do so, one would have to assume that the Supreme Court, in the periods prior to 1925, was totally powerless in the determination of issues that came before it. That assumption is untenable. Throughout its political history, the Supreme Court, using what Murphy (1964) calls “passive instruments” of agenda control, has always been able to exert some degree of control over its decisional agenda. These instruments include legal devices, such as remanding a case back to the lower court, disposing of a case summarily (that is, without the benefits of the case having been briefed and argued on the merits), declining jurisdiction, or rejecting a case because petitioning parties have not exhausted the remedies provided by the lower courts or administrative agencies. For example, in Parcels v. Johnson (1874), the Court declined jurisdiction because the parties have not yet exhausted the power of the state courts. Chief Justice Waite, speaking for the Court, wrote that until that was done, the Supreme Court’s power could not be called into action. Simply put, the Court always has been able to exercise some discretion over its decisional agenda, even when it lacked total control of its caseload. Furthermore, the Court’s mandatory jurisdiction did not extend to opinion writing: the Court did not have to issue a formal opinion in every case brought before it.

Congressional and presidential scholars, of course, have long noted the tendency of policymakers to engage in the “manipulation of bias”—the ‘practice of limiting the scope of actual decision-making to “safe” issues by manipulating the dominant community values, myths, and political institutions and procedures’ (Cobb and Elder 1972: 8). Likewise, the cases the Supreme Court accepts do not necessarily indicate the precise issues to which the Court will speak when it renders an opinion. One case,

Roosevelt v. Meyer (1863) provides a good example. The case involved not only a question of whether Congress had power to issue paper money during the Civil War, but also whether it could compel creditors to accept it as payment. The Court, instead of deciding on the merits of this case, simply declined jurisdiction on the basis of the 1789 Judiciary Act. As McCloskey sarcastically pointed out, one “must assume either that the justices were unfamiliar with the law that furnishes their very basis for being, or that they deliberately chose a Pickwickian interpretation in order to avoid deciding, in war time, a question so central to the conduct of the war. It is hard to think of a third reasonable explanation” (1994 ed.: 75).

Questions remain about whether “issue suppression” or “issue fluidity” occurs only at the opinion-writing stage (McGuire and Palmer 1995) or begin at the agenda-setting stage (Ulmer 1982; Palmer 1997), or whether the latter is the extension of the former. But preliminary evidence from recent empirical research so far indicates that such a practice is far from uncommon on the Court. Although this research has focused only on the modern Court, as yet there is little reason to doubt that such was not the case on the Court in earlier periods.

Second, the question of the nature of the Supreme Court’s agenda and of its underlying dynamics at any given period is and should be a matter of empirical investigation; it should not be so summarily dismissed or made a matter of conjecture. Such inquiry makes sense, especially where there is a theory to guide research or where historical studies provide interesting propositions for empirical testing.

Research interests aside, there are even more substantive reasons to extend current studies of the Court's institutional agenda to the past. First, political scientists tell us that decision-making in a political institution is invariably shaped by the nature of its agenda. Agendas, says Riker, "foreshadow outcomes: the shape of an agenda influences the choices made from it" (1993: 1). Second, empirical investigation into the Court's institutional agenda in the past broadens our knowledge of the Court's agenda and agenda-building behavior across time. It allows us to answer important questions for which they are still few answers.

In the ensuing chapters, I attempt to examine the nature, patterns, and dynamics of the Supreme Court's volitional agenda from 1801 to 1993. The year 1801 is significant because it marked the rise of the Supreme Court as a powerful force in the nation's affairs. In the very early years of the Republic, the Supreme Court was not a particularly powerful institution. The justices spent much of their time on the road ("riding circuit") and met as a body only for a few weeks in February and August. Hazardous conditions, and the perception by many distinguished statesmen of the day that the Supreme Court lacked the authority and power to shape national policies, made it especially difficult to recruit and retain Supreme Court justices. But a period of profound change began in 1801 when President John Adams appointed his secretary of state, John Marshall, to the position of chief justice.

Much has been written about Marshall's great influence on the Supreme Court and the ways he dealt with many constitutional questions of fundamental importance to the future of the new Republic. Some of these will be discussed later in the study. There

is no question, however, that the period beginning with Marshall's appointment as Chief Justice marked a fundamental change in the early history of the Supreme Court. Under Marshall's leadership, the Court began to address several constitutional issues and to exert its authority on the affairs of the nation (Caldeira and McCrone 1982: 105-106; Frankfurter and Landis 1927: 5-14; Goebel 1971; Gordon 1987; Janda, Berry, and Goldman 1995: 468; Marcus 1990; McCloskey 1960, ed. 1994).

The year 1993 is chosen primarily for data availability. But Pacelle (1997) suggests that a new era of the Court with a new agenda priority may have begun under Chief Justice Rehnquist's leadership. Foster and Lesson (1998) present a different starting date. For them, the change probably began with the appointment of Chief Justice Burger. If, in fact, the Court's primary issue agenda has changed, the nature of this agenda can be discerned by extending the analysis to the 1990s.

The rest of this study proceeds as follows. Chapter 2 presents the theoretical framework underlying the study. Chapter 3 examines historical accounts of the Supreme Court's agenda in the first era. These accounts set the stage for the empirical testing conducted in chapter 4. Chapter 5 also looks at the Supreme Court and its agenda from historical and doctrinal perspectives, and sets the stage for the empirical analysis conducted in Chapter 6. The same pattern of study is repeated in chapters 7 and 8 for the purpose of determining the nature and dynamics of the Court's primary issue agenda in the Court's third political era. Chapter 9 summarizes the results of the study and offers suggestion for future research in this area.

CHAPTER 2

THEORETICAL FRAMEWORK AND FOUNDATION

Robert G. McCloskey and the Supreme Court's Agenda

In his seminal work, *The American Supreme Court* (1994), Robert G. McCloskey identified three major periods in the U.S. Supreme Court's political history and argued that the dominant value and interest of the Court was different for each period. From 1789 to the end of the American Civil War, the major interest of the Court was the relationship between the national government and the states, and the dominant value was the preservation of the Union. McCloskey conceded that other matters, such as the question of property rights and of slavery, engaged the justices' interests and attention in this period. He also held that these issues were virtually inseparable from issues of federalism. But he maintained that the question of nation-state relationships received the most attention from the justices, and that the principal concern of the Court in this first period was keeping the nation together. This was no less true of the Taney Court than it was for its predecessor.¹

¹ Some scholars view the Taney Court as less pro-national government than the Marshall Court (see the next chapter). McCloskey contended that the Taney Court did not undo the work of its predecessor, but only relaxed the "rigidities of the Marshallian dogma..." (1994 ed.: 55).

Beginning from 1865, the major interest of the Court, according to McCloskey, shifted from nation-state relationship to relationship between government and business. And until 1938 when the Supreme Court enunciated a new economic doctrine, the dominant value of the Court was the protection of economic rights and private property. The Court's new interest reflected new changes in the political environment in which the central political issue was no longer federalism but the relationship between business and government, in particular how much government should control free enterprise. The center-periphery issues, which had dominated the political debate in the first period, had now declined in salience. The Civil War, while not completely eliminating state-federal issues, had relegated those issues to the bottom of the Court's agenda.

But while economic relationships became the Court's primary concern, judicial supervision of economic regulation did not begin immediately after the war. Reconstruction issues and questions about the nature of judicial power first had to be resolved. From 1865 to the late 1890s, the Supreme Court, said McCloskey, was testing and sharpening the constitutional doctrines it would later employ to invalidate many state and federal actions regulating economic freedom. By the turn of the century, the Court was ready to use its judicial review power and the constitutional doctrines it had developed to supervise social and economic regulations. And this, the Court did till 1937, with the justices acting, for the most part, as guardians of economic laissez faire. Thus, according to McCloskey, there are really two distinct sub periods in this second era of the Court (1865-1899 and 1890-1937). In both sub periods, the Court's interest remained

primarily economic, but the second sub period was when economic laissez-faire ideology gained a firm hold on the Court.

McCloskey identified the third period in Supreme Court's history as the post-New Deal period. He argued that the major interest of the Court changed dramatically after 1937 from preoccupation with economic issues and state regulation of economic activities to concerns about government interference with, or violation of, individual's rights and liberties. McCloskey attributed the new interest of the Court to a series of factors: the effect of the Russian Revolution, a series of state and federal laws that were passed in the aftermath of World War I, and latter the explosion of racial issues which had been simmering under the surface. Inside the Court, the justices signaled an end to the dominance of economic issues in a footnote to the U.S. v. Carolene Products (1938), when they ruled that state regulation of business would no longer command the Court's attention or be subject to strict scrutiny, except where government has acted egregiously. Thus in the post-1937 period, the Court's interest turned to the relationship between government and individual, and the major value of the Court, according to McCloskey, became the preservation of civil rights and liberties of the individual.

Implications of McCloskey's Theses

Judicial Interest and the Supreme Court's Volitional Agenda

The first implication of McCloskey's historical analysis is that the Court's primary issue agenda in each of its three eras reflected its dominant interest in that era. Shifts in the dominant interests of the Court produced corresponding shifts in its primary issue agenda. If McCloskey is right, the Court should allocate more of its agenda space to

nation-state issues in its first era, to economic issues in the second era, and to civil rights-civil liberties issues in the third. But is McCloskey's interpretation, which appears to be based on the great cases of Supreme Court's history, an accurate description of the agenda represented in the total body of reported decisions? To put it differently, did federalism issues constitute the primary issue agenda of the Supreme Court from 1801 to 1865? And were they supplanted by economic issues in the period running from 1865 to 1937, and by civil liberties-civil rights issues thereafter?

Empirical analysis could help produce answers to these questions. Already, there are a few facts that seem to support McCloskey's analysis of the second and third eras of the Court. First, the period from the close of the Civil War to the New Deal period was the period in which the United States, previously an agrarian society, became one of the world's industrial giants. Second, other scholars have noted also that the issue that dominated the political debate in this second period was the extent to which government can interfere in economic activities. According to Segal and Spaeth (1993), the major political controversy in that period centered on two contrasting economic philosophies: economic laissez-faire and government regulation. Proponents of economic laissez-faire favored total free markets, while advocates of government regulation argued that government intervention was needed to control unbridled capitalism and to mitigate its attendant social ills. Segal and Spaeth (1993, 87) noted that the Supreme Court frequently supported those who favored laissez-faire. Indeed, a few of the landmark decisions of the Court in the late nineteenth and early twentieth centuries (to be discussed more fully in

Chapter 5) support's McCloskey's claim that concern about economic freedom occupied the justices during most of the second period.

Finally, results from recent empirical studies indicate that economic issues dominated the Court's agenda space from 1888-1940, with 67 percent of the docket devoted to this issue area. The types of issues the Court decided during this time period range from constitutional issues involving due process, freedom of contract, and interstate commerce clauses to more trivial cases, such as wills and individual tax claims (Wood et al. 1998).

With regard to the third period, McCloskey, writing in the early 1960s, could not have foreseen how long and how much attention the Supreme Court would devote to civil rights and civil liberties issues. His death precluded him from documenting the extent to which the Court has paid attention to this issue area since 1937. But empirical studies, again, lend credence to his claim that civil liberties and civil rights issues have commanded significant attention from the Court in the post-1937 period. Pacelle's longitudinal analysis of the Supreme Court's agenda from 1933 to 1988 indicates that economic cases dominated the Court's docket prior to the 1938 term, capturing about 50 percent of the Court's agenda space as late as 1937 but declining sharply and suddenly thereafter, to be replaced by civil liberties-civil rights issues (1991: 65). A similar analysis by Lanier (1997) presents a slightly different picture than Pacelle's. That analysis shows that economic issues did not decline sharply and suddenly after 1938 but continued to dominate the Court's agenda space up till about the mid-1950s. The same study, however, shows that civil liberties-civil rights issues began to rise on the Court's

docket after 1938, and that after 1947, this category of issues began to command a lion's share of the Court's docket (97).

Historical facts and existing empirical evidence thus seem to support McCloskey's description of Supreme Court's principal issue agendas in the periods after the Civil War. The most questionable part of McCloskey's analysis is his assertion that nation-state concerns dominated the Court's agenda prior to the Civil War. Directly contradicting McCloskey's claim are several analyses (Goldman 1982; Haskins and Johnson 1981; White 1988; Sutherland 1965), which indicate that the business of the Court up to 1825 consisted primarily of contracts and commercial transactions, land disputes, and admiralty matters, most of which did not raise constitutional issues. Segal and Spaeth also noted that the Court's major decisions in that first period focused as much on judicial supremacy and economic matters as it did on national supremacy issues. Even as the division between the North and the South was widening over the issue of slavery, the Supreme Court, they said, did not directly address the slavery question until 1857, long after Chief Justice Marshall's death (1993, 76-81). The implication from these studies is that other issues competed with or even dominated nation-state issues on the Court's agenda space in the first era of the Supreme Court. The possibility that the Supreme Court may have focused more on issues other than those dealing with federalism, together with the likelihood that McCloskey's opinion of the Court's dominant agenda in this period may have been based only on landmark cases, makes empirical testing of McCloskey's accounts of the Court's agenda a worthy enterprise. In general, McCloskey's analysis leads to my first proposition, which is that *the primary*

issue agenda of the Supreme Court reflected the Court's major interest in each of its political eras. This proposition, in turn, leads to three hypotheses, all of which are also derived from McCloskey's study:

- H1: *From 1801 to 1864, the Supreme Court devoted the greater proportion of its agenda space to nation-state issues.*
- H2: *Beginning from 1865, economic issues replaced federalism issues as the Court's primary agenda, and these issues dominated the Court's agenda space till 1937.*
- H3: *After 1937, civil liberties and civil rights issues supplanted economic issues as the Court's volitional agenda.*

These hypotheses will be tested with empirical data in the latter chapters.

Judicial Value and the Supreme Court's volitional Agenda.

The second implication of McCloskey's analysis stems from his claim that the Court's principal agenda focus in each of its political eras reflected its dominant values.

Wrote McCloskey:

The very question of what subjects should claim judicial attention, involves an avowed or implicit decision about what is most important in the American polity at any given time, for the Court has always enjoyed some leeway in controlling its own jurisdiction (though less in the past than it does now). The Court's "interests" are likely indeed to be affected by the historical context, but historical imperatives can be strengthened or weakened by the Court's eagerness or reluctance to accede to them. And since the constitutional questions that do successfully claim the attention of the Court are often those least answerable by rules of thumb, the predilections, the "values" of the judges, must play a part in supplying answers to them" (1994 ed.: 16-17).

Clearly McCloskey believed that the values of the justices play a significant role in the constitutional cases, a proposition now supported by modern empirical studies. But more importantly for this study, McCloskey claimed that the Court could manipulate its agenda

regardless of the historical context in which it found itself (although less so in the past than today). If that is the case, then the Court should be able to devote significant attention to those issues it values most. It should be less constrained by other contextual factors. Stated differently, the Court's values should play a significant role in how the Court allocates its agenda space to issues it is called upon to address at any given time period. According to McCloskey, the dominant values of the Court were, in the first era, the preservation of the Union; in the second era, the safeguarding of property rights; and in the third, the protection of the rights and liberties of the individual. Throughout his book, McCloskey argued that these values reflected the values of the prevailing forces on the Court. The implication, then, is that there was a convergence between the Court's volitional agenda—the issues that received the most attention—and the Court's dominant interest and value in each of its political eras.

Previous Research on the Supreme Court's Agenda-Building Process

McCloskey, of course, is not the only scholar to have tried to provide explanations of the processes of agenda formation on the Supreme Court. Before examining other works in this area, a few words about the focus and some of the findings of agenda-building studies are in order. First, the central puzzle that many agenda-building studies have tried to unravel is where issues come from and how they get on the agendas of political institutions (see Cobb and Elder 1983; Kingdom 1997; Likens 1980; Caldeira 1981; Pacelle 1991; Peters 1997; Hurmitz 1997). Second, congressional scholars and students of bureaucracy argue that issues arise from mobilization of interests and from group conflict. It is organizations, not individuals, which expand the “scope,

intensity, and visibility” of a particular issue so they can attract the attention of policymakers. However, an issue becomes part of the institutional agenda only when it “commands the support of at least some decision-makers, for they are the ultimate guardians of the formal agenda” (Cobb and Elder 1983). Kingdom (1997) makes the same point, arguing that the most important factor determining which set of issues from the public agenda will attain the governmental agenda is the perception of the national mood by policymakers. While insightful, studies of agenda building in Congress or the bureaucracy are of limited value in explaining how governmental agendas respond to changes in the political environment over time because of their case-study approach.

Among judicial scholars, Likens (1980) was the first to explain the Supreme Court’s issue agenda as a function of demands from the Court’s political environment. Using the number of petitions in the certiorari (cert.) pool as a measure of these demands, Likens performed a time-series analysis and found a statistically significant and positive relationship between the number of cert. petitions and the proportion of the Court’s docket devoted to obscenity and reapportionment cases.

Caldeira (1981) examined the factors that influenced the Supreme Court’s attention to criminal cases over the period 1935 to 1976. His analysis found that neither media coverage, public opinion, external demand (measured as the number of criminal cases filed in each year under consideration) nor partisan configuration on the Supreme Court had statistically significant effects on the Court’s criminal law agenda. Rather, the Court’s attention to criminal law issues was driven by a combination of ideological

configuration on the Court, the leadership of Chief Justices Warren and Burger, and the passage of time.

Pacelle's (1991) study covers a much broader area of policy decisions. His work also has two additional distinguishing features. Pacelle first explains how the Supreme Court builds its decisional agenda, then he examined changes in the Court's attention to various issue areas that defined and shaped the period between 1953 and 1989. Pacelle begins with the premise that the Court's agenda space is not infinite. The Court, he says, must choose only important cases for consideration among the myriad it is called upon to decide. Pacelle offers a theory of how the Supreme Court builds its agenda. The theory posits a "bifurcated agenda" or two agendas that the Court must balance: the exigent and volitional agendas. The former is comprised of "old" issues, and the latter, issues currently dominating the Court's agenda space. The volitional agenda, Pacelle contends, is driven largely by the policy goals of some or all of the Court's members. However, the constraints of the American judicial process limit the extent to which these goals can be advanced. For instance, the justices have to wait for a case to enter the judicial system before they can act. Policy activists or "entrepreneurs" who seek to advance particular goals assist the Court by filing *amicus curiae* briefs. Whether or not the Court accepts a case for review depends on several factors, but the number of groups that file *amicus* briefs may indicate to the justices the importance of that case to organized pressure groups in the society. Such actions provide a signal to the justices to include the case on the Court's docket (see, also, Caldeira and Wright 1988; Perry 1991).

Pacelle argues that the volitional agenda is fundamental to the dynamic of agenda change. The Court changes its policy focus as the policy concerns of the external actors change. Previously dominant issues become the exigent agenda and are supplanted by new ones. The Court acknowledges the importance of new emerging issues by selecting a few important cases from which to set its policy agenda. These cases in turn create opportunities or “policy windows” for external actors to advance their policy goals. Examining the cases the Supreme Court accepted from 1953 to 1989, Pacelle finds that the Court alters over time the attention it gives to particular issue areas. During that period, the Court allocated less space on its docket to federalism and economic issues, but substantially increased space for due process, substantive rights, civil liberty, and equality issues.

Two recent studies also focus on some of the forces shaping the Supreme Court’s agenda formation. The first, by Peters (1997), explores the relationship between the number of cases the Supreme Court accepted between 1948 and 1997 in six issue areas—racial discrimination, antitrust, advertising, abortion, school financing, homosexuality and obscenity—and two variables, the impact of the political environment (measured as the number of certiorari petitions received within those issue areas) and legal percolation (defined as the level of attention the legal community pays to each issue area). The initial findings show that both variables are statistically significant. The second study finds that while the Supreme Court from 1944 to 1988 was its own driving engine in the area of civil rights and liberties, the Court’s economic agenda was constrained by changes in the economic agenda of the Courts of Appeals (Hurmitz 1997).

Each of the above judicial studies sheds some important light on the Supreme Court's agenda-building process and the various factors influencing its issue agenda. Together, they suggest that the amount of attention that the Supreme Court pays to an issue area may be a function of several factors such as external demands, policy goals of the Court's majority, leadership of the Chief Justice, or the passage of time. Since the effects of these variables have been examined to date only for the post-New Deal Supreme Court's agenda formation, the important question is how much impact each had on the Supreme Court's issue agenda in the earlier eras? The inference from McCloskey's analysis is that the variations in the Supreme Court's volitional agendas across time periods are, to a greater extent, a function of the policy interest and goals of the Court's majority, or what he called the "dominant value of the Court." This leads to my second proposition: which is, that *the dynamics of the Court's primary issue agenda at any given time period is significantly influenced as much by the dominant value of the Court as by any other factors*. Stated differently, the Court's volitional agenda in a given era would be influenced significantly by the prevailing judicial value in that era.

To test this second proposition, I propose the following indicators as measures of the Court's judicial value. If these indicators individually or together account for a significant proportion of the variations in all the three periods that McCloskey identified, then I believe his historical analysis of the dynamics of the Court's major issue agendas would have much validity.

Indicators of Judicial Value

1. Ideological Control of the Court

The basic assumption underlying the use of this indicator is that the Court's behavior would generally reflect the value of the dominant ideological bloc on the Court. This assumption is not without foundation. Judicial scholars have found that shifts in ideological balance can lead to policy shifts on the U.S. Supreme Court (Ackerman 1988; Blasecki 1990; Baum 1992). Pacelle (1991: 193) claims that this factor also can structurally alter the composition of the Court's agenda. Increase in the strength of an ideological bloc on the Court provides the potential numbers to control case selection and decisions on merits. Hodder-Williams (1980: 25) noted that the most significant criterion for nomination to the Court, beside a nominee's personal relationship with the appointing president, is that nominee's philosophical position on the great issues currently dominating the work of the Court. His analysis suggests that the presence of a number of justices with similar ideological views can shape the nature and dynamics of the Court's volitional agenda. And Caldeira (1981) found that liberal control of the Court significantly increased the share of the Court's attention to criminal issues over the period 1935-76.² Thus, measures of ideological configuration can be used to test the effect of the Court's dominant value on its volitional agenda.

² Caldeira's results were based on univariate time-series regression analysis. This, and the focus on a narrow set of issues, seriously undermines the validity of his study. However, it must be noted that Caldeira conducted the study when the time-series method was in its infancy.

2. Partisan Control of the Court

Students of Congress and the Presidency have long acknowledged that the probability that issues will move into the political agenda depends on which party controls government as much as any other factor (Cobb and Elder 1983; Downs 1973; Costain 1992; Walker 1977). Judicial scholars, likewise, have documented the existence of partisanship influence on the U.S. Supreme Court. Tate (1981) and Tate and Handberg (1991) found that party affiliation explained much of the variation in Supreme Court's liberalism in economic and civil rights and liberties cases over a period of eighty years. Their studies indicate that partisanship is a major factor in the Court's behavior. The question is whether or not the dominance of one partisan group or the other could alter the composition of the Court's agenda. Caldeira's (1981) study shows that partisan control had no statistically significant effect on the Court's attention to criminal issues from 1937 to 1976. However, the impact of partisanship may be felt more in a broader category of issues than the smaller category that Caldeira examined.

3. The Leadership of the Chief Justice

Judicial scholars tell us that the Chief Justice (CJ) is more than *primus inter pares*; that he may be able to influence the Court's agenda-setting process if he is adroit enough. This is because the CJ, as the Court's official leader, directs the business of the Court, presides in both the Courtroom and in the Chamber, and controls the discussion in conference. In addition, the CJ assigns the writing of Court opinions except when he is in the minority, and he has the discretion to call and discuss cases before other justices speak.

These extralegal powers provide a skillful and ideological Chief Justice with ample opportunities to influence not only Court decisions but the nature of the Court's primary issue agenda as well. As Umbreit (1983) explains, the Chief Justice "has considerable control both over the course of the argument before the judges and over the course of the discussion among the judges. He can direct attention to a point or away from it more easily than any of his colleagues." His opinion assignment power "gives him in a sense a form of patronage but it also gives him a tremendous influence over the development of the law" (xiii). A Chief Justice, declared the late Justice Felix Frankfurter, "wields great authority over its internal administration. The extent to which complicated and subtle issues are effectively explored at argument, the thoroughness with which they are canvassed at conference, and the ripeness of judgment which is the fruit of serene and brooding deliberation—all these indispensable requisites of wise adjudication, especially in a domain of thought so close to statecraft as constitutional law, are largely in the keeping of the Chief Justice" (1937: 6-7; see also Murphy 1964; Danelski 1989).

Clearly, some chiefs, as Caldeira (1981) pointed out, have been more sensitive to the dominant political issues of their time than others. In his study of the Supreme Court's criminal agenda between 1935 and 1976, Caldeira found that more criminal cases were decided under Chief Justices Warren and Burger than under other Chiefs (1981: 465-466). Based on this result, he suggested that the personal leaderships of some presiding officers might account for variations in the Court's attention to a particular issue area. Thus, we can expect the chief justices with exceptional skills to significantly influence the major issues dominating the work of the Court during their tenure.

4. Landmark Rulings

The Court's opinions in landmark cases generally reflect the dominant value of the Court. These rulings may contribute to the growth or decline of an issue area on the Court's agenda space (Casper and Posner 1976; McCloskey 1960, 1994 ed.; Pacelle 1991). However, identifying which decisions may have influenced the nature and dynamics of the Court's primary issue agenda is problematic, because any of the several landmark decisions that the Court handed during the period under study had the potential to do so. Still, some cases stand out as more likely to influence the Court's agenda than others. For example, judicial scholars have often attributed the decline of economic issues on the Court's agenda space after 1938 to the famous footnote to the Court's Carolene Products decision (see McCloskey 1960, 1994 ed.; Pacelle 1991; Segal and Spaeth 1993). For it was in that footnote that the Supreme Court declared its intention to relegate economic issues to a secondary position on its agenda and to devote more of its attention to civil liberties issues. Likewise, Brown v. Board of Education is viewed as a landmark case that opened the door to civil rights for blacks. Therefore, one would expect these cases to significantly affect the major issue agendas of the Court in the periods in which they were decided.

The relationship between the indicators of judicial value just proposed and the Court's volitional agenda can be expressed in the following hypothetical forms:

- H4.** *When an ideological bloc controls the Court, this group will have a pronounced effect on the Court's volitional agenda or the major issues dominating the work of the Court.*

- H5:** *When a partisan group controls the Court, that group, too, will have a similar effect on the same agenda.*
- H6:** *A policy-oriented Chief Justice will exert a notable influence on the Court's volitional agenda.*
- H7:** *Key Supreme Court rulings will account for a greater proportion of the variations in the Court's primary issue agenda.*

Judicial Value and Historical Constraints

Contrary to what McCloskey's analysis suggests, however, I do not expect the indicators just described to significantly account for the variations in the Court's volitional agendas in the earlier eras, or the hypotheses derived from them to be confirmed for the periods before 1925. This is because the historical context of the earlier Courts is different from that of the modern Court. First, the justices, prior to the passage of the Judges' Bill of 1925, had limited control over the Court's docket and were obligated to hear almost every appeal. The lack of total docket control meant that virtually every losing litigant had a right to have his case appealed to and decided by the Supreme Court. Because they had little discretion in selecting cases for review prior to 1925, the justices were less likely to have control over the Court's institutional agenda in the earlier periods.

Secondly, recent empirical studies indicate the Supreme Court operated for the most part with a high degree of unanimity (Wood et al. 1995; 1996; 1998) and that dissents among the justices were very few prior to the 1930s (Walker, Epstein, and Dixon 1988; Haynie 1992). The possibility that strong norms of consensus existed on the earlier Courts also suggests that partisan considerations and individual attitudes would be

submerged in the case selection process. Thus, I posit that factors other than the Court's dominant judicial values would have more impact on the Court's primary issue agenda in the first and second eras than in the third. The lack of docket control and the norm of consensus on the Court should moderate or neutralize the effects of the Court's values in those earlier periods. Consequently, measures of the Court's dominant values are not expected to be statistically significant in their effects on the Court's volitional agendas until the third era of the Court.

The Impact of other Factors

Because the historical context of the earlier Courts is different from the modern Courts, it is possible that the issues dominating the work of the Court in each of its eras might be influenced much by the historical context or conditions specific to that period than by the Court's values. For example, events such as congressional legislation, wars, or depressions could affect agenda formation on the Court by helping to focus or decrease attention to some issues. In fact, McCloskey's analysis suggests that period-specific factors such as the Northern victory over the South, the Interstate Commerce Act of 1887, the Wilson-Gorman Tariff Act of 1894, and the Sherman Antitrust Act of 1895 may have accounted for some of the variations in the Court's volitional agendas in the periods that they occurred. Some of these factors are examined in the latter chapters.

Previous research (Caldeira 1981) also suggests the potential impacts of the *political environment* and *passage of epochs* on the Court's agenda-building process. A closer look at these two factors reveals why.

1. The Political Environment

The French diplomat Alexis de Tocqueville, traveling across the United States in the mid-nineteenth century, observed that “scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question” (1899 ed.: 290). Tocqueville’s observation suggests that the major issues and disputes in the political environment are likely to wind up on the Supreme Court for judicial resolution. Cases generated by these disputes may crowd the Court’s docket, thus driving the Court’s primary issue agenda. Although Caldeira’s (1981) study suggests that this factor may have a minimal effect on the modern Court’s agenda, this may not have been the case in the earlier periods when the Supreme Court had mandatory jurisdiction. As Chief Justice Rehnquist noted, the Supreme Court prior to the Judges’ Bill was deciding for the most part cases that litigants considered important, with the effect that these cases were causing an overloading of the Court (1987: 196). Consequently, the number of case filings in each of the major issue areas is expected to account for much of the variations in the volitional agendas of the Supreme Court in the periods prior to 1925. The effect of this factor should be less in the post-1925 period.

Other factors from the environment likely to affect the nature and dynamics of the Court’s primary issue agenda include key congressional legislation and period-specific factors such as wars or depressions.

2. The Passage of Time

The growth of an issue area in the Court’s list of decisional agenda may also be a function of time or follow what Caldeira (1981) describes as “the law-like quality of the

life-cycle of attention to issues—rise, decline, leveling off...” (470). That is, from a fairly stationary or steady state an issue area may grow in a rapid fashion, level off, and then decline or reach a new constant level. Issue evolution in American politics sometimes follows this pattern (Carmines and Stimson 1989: 13), and a similar pattern or cycle may exist for certain policy areas on the Supreme Court. Likens (1979) identifies an “on-off” cycle in the Court’s attention to a number of policy areas. Caldeira (1981) finds that a growth and decline model “does an excellent job of accounting for the movement of the Court’s agenda-building behavior in criminal justice over the last forty or so years.” Its major shortcoming is that “it does not explain how a Court’s interest in a particular policy area begins, but it does at least predict its behavior once that interest begins. It takes account of what is, apparently, an underlying process in the politics of agenda setting on the Court” (466-467).

If these additional factors just described, rather than measures of the dominant value of the Court discussed earlier, are found to significantly account for the variation in the Court’s volitional agenda in any of the three periods that McCloskey identified, then the validity of McCloskey’s analysis will be seriously undermined.

Testing McCloskey’s Analysis

The first three hypotheses (H1-H3) seek to ascertain the composition of the primary issue agenda of the Court in each of its political eras. In order to do so, I have classified the Court’s decisions into four major issue categories—federalism, economics, judicial power, and civil rights and civil liberties—and measured each issue area as a proportion of all the Court’s *full opinions* per term. My first reason for aggregating the

issues is the same as Caldeira's: namely, that disaggregated categories such as criminal rights, civil rights, first Amendment, privacy, and due process simply do not provide enough cases upon which to base systematic analysis (1981: 454). My other reason for doing so is that testing those hypotheses requires that the Court's decisions be aggregated into the major issue categories that McCloskey identified. Without such aggregation, McCloskey's analysis becomes very difficult to test. Attention is focused on *full opinions* because, as Caldeira (1981) points out, they constitute the cases that the Court spends much time on, and because they also represent "a major portion of the High Bench's rhetorical product each term, i.e. the decisions that present new rules or modify old ones" (453-454).

Hypotheses H4 to H7 seek to estimate the effect of the Court's judicial value on its primary agenda in each of the three political eras that McCloskey identified. This set of hypotheses, along with other potential factors identified above as likely to shape the volitional agenda of the Court in each of its political eras, will be tested in a multivariate regression analysis. The *dependent variable* is the percentage of the Court's full opinions that comprises its primary issue agenda per term and across a given period (see Caldeira 1981: 456). The independent variables for each period are *ideological and partisan control, the leadership of the Chief Justices, key Supreme Court rulings, time*, and some *period-specific factors*. The *number of case filings in each issue area* is excluded from the model for reasons given below.

Estimation of Independent Variables

1. Ideological Control

The measurement of ideological configuration on the Supreme Court is problematic. The first problem stems from the use of the label “liberal” and “conservative.” While these labels can be applied without problem to justices of the modern Court, they may not adequately capture the underlying basis of the cleavage in earlier Courts. As Pritchett (1968) and Mason (1968: 71-72) have both pointed out, the justices of the earlier eras were all conservatives. The division among them stemmed from differences in their views on the nature of judicial function. Pritchett (1948) preferred to use the term “conservative” and “liberal” in a “strictly relative sense indicating deviation away from the majority view of the Court at any given time” rather than in terms of “any fixed connotation or...the possession of any definite set of political principles” (33-44). That approach is adopted in this research. Justices in each period are classified into “conservatives,” “liberals,” and “moderates” based on historical and empirical descriptions of their affinity with or deviation away from the majority view during their tenure on the Court. For each Court period, the measured group is the one that theory posits as dominant in that period. This means conservatives, in the first and second periods; and liberals, in the third.

The second problem has to do with specifying a threshold for the ideological control of the Court. Since it now takes only four justices to grant certiorari, some studies of the modern Court often use the “rule of four” as a baseline for an ideological bloc’s control of the Court (see, for example, Caldeira 1981). However, Brenner and Krol’s

(1989) study of the justices' voting patterns at the certiorari stage suggested that justices were more likely to vote for a hearing when they disagreed with the lower court's decision, when they expected to be on the winning side in the Court's decision, and when they were part of the Court's ideological majority (828-840). Another important reason why the rule of four is unacceptable as a baseline measure of ideological control in the earlier Courts is that these Courts operated under mandatory jurisdiction and had membership ranging from six to ten at some points in time.³ Under this condition, the *majority* rule appears to provide the best alternative threshold. This is the rule adopted in this study.

The third problem has to do with the measurement of the variable itself. A frequently used indicator is a dummy variable for the identity of the ideological group that controlled the Court for the previous term. The major problem with this measure is that it suppresses the magnitude of ideological configuration. There could be, for example, five or more conservatives on the Court and the measure would not reflect this. Subtracting the actual number of justices belonging to one ideological bloc from those of the other blocs in each Court term eliminates this problem. Ideological control, then, is

³ The Supreme Court began with six members, with each of the justices responsible for a geographical area or circuit. In 1807, Congress, responding to the population growth in Kentucky, Ohio, and Tennessee and the accompanying increase in judicial caseload, created a seventh circuit, and a corresponding seat on the Court. Two more seats were added to the Court in 1837 when Congress created two new circuits in the West and Southwest. A tenth seat was added in 1863 when another circuit was established for California, Oregon, and (latter) Nevada. This increased membership on the Court from nine to ten. However, in 1865, the Republican-controlled Congress, infuriated by President Andrew Johnson's policies and unsuccessful in their attempts to remove him by impeachment, sought to block Johnson's further nominations to the Court by abolishing two seats left vacant by the death of Justices Catron (1865) and Wayne (1867), thus reducing membership to eight on the Court. The ninth seat was later restored after the much-hated Johnson left office and so as to allow newly elected Republican General Ulysses S. Grant to appoint more Republicans to the Court (Abraham 1974: 77, 93, 109-115; Bates 1936: 177; Biskupic and Witt 1997: 18).

measured in the first and second periods by subtracting, in each Court term, the number of liberal and moderate justices from the number of conservative justices, and vice-versa in the third period. The relationship between ideological control and the Court's volitional agenda in each Court period is specified in the appropriate chapters.

2. Partisan Control

Like the ideological configuration variable, partisan control is measured by subtracting one partisan group from the other. In the first period, the value of partisan control variable is calculated by subtracting in each Court term the number of Democratic-Republican and Democratic justices from the number of Federalist, Whig, and Republican justices; and in the second and third periods, by subtracting the number of Democratic-Republican or Democratic justices from Republican justices.⁴ As with ideology, the relationship between partisan control and the Court's primary issue agenda for each period will be specified in the appropriate chapters.

3. Leadership of the Chief Justices

The chief justice leadership variable is measured as a dichotomous variable, that is, *each year that a chief justice occupies the center chair* is measured as 1; and 0, otherwise (see Caldeira 1981; Haynie 1992). The main problem with this measure is that it does not measure leadership "in its most pristine form," but rather confuses tenure with leadership (Caldeira 1981: 466). Still, the measure may provide a good indication of the

⁴See chapter 3, footnote 2, for a brief description of the American party system in the period between 1801 and 1864.

leadership effect, especially if, in contrast to justices with shorter tenure, those with longer tenure are found not to have any significant impact on the Court's volitional agenda in the specified periods.

4. Key Supreme Court Rulings

The impact of key Supreme Court rulings in each period of the Court will be measured by employing time-series intervention variables. McCleary and Hay (1980) refer to the method of determining the impact of specific events on time-series data as "impact assessment" analysis, or a process whereby one can test "the null hypothesis that a postulated event caused a change in a social process measured as time series." Each event (or decision), according to these two scholars, can *be modeled as a temporary or permanent impact variable, with gradual or abrupt onset (142-160)*.

5. The Political Environment and other Period-Specific Factors

The number of case filings in a particular issue area per term provides one important measure of the effect of the political environment on the dynamics of the Court's primary issue agenda. The more cases filed in one issue area, the more likely the Court will write more opinions in that area. Because of the earlier Courts' mandatory jurisdiction, case filings should account for a greater proportion of the variations in the Court's volitional agendas in the earlier eras than in the present. The impact of other specific events in each period can be measured using time-series intervention variables.

6. The Passage of Time

The effect of time on the Court's primary issue agenda in each of the two periods is measured by creating two trend variables. The first variable "is a counter, beginning in the first year of the (period), with a value of one and continuing." The second variable is the value of the first variable squared." The inclusion of these variables into the analysis enables us to posit a curvilinear relationship between the passage of time and the share of the Court's attention to its dominant issue agendas (see Caldeira 1981: 467).

Model and Method

The appropriate statistical method of estimation of these variables is Box-Jenkins' (1976) time-series ARIMA method. This technique allows researchers to estimate both the effects of independent transfer function (time-series) and the different of specific events on time-series data. The model posited by my multivariate analysis takes the following form:

$$AG_t = \beta_0 + \beta_1 CJ_{n,t-1} + \beta_2 PARTYC_{t-1} + \beta_3 IDEOC_{t-1} + \beta_4 CF_{t-1} + \beta_5 T_t - \beta_6 T_{t-1}^2 + \omega_{n,t-1} + e_t,$$

where

AG_t = the proportion of all "full opinions" in a particular term that comprises the Court's primary issue agenda.

CJ_{t-1} = Chief Justice's leadership (measured for each of the Chiefs that occupied the position in that period).

$PARTYC_{t-1}$ = Partisan Control

$IDEOC_{t-1}$ = Ideological Configuration

CF_{t-1} = Number of Case Filings in the primary issue agenda category

I_{t-1} = Key decisions and period-specific intervention variables
T = Time

The variable for the number of case filings is excluded from the above model because data for this measure is presently not available and its collection will require significant time and effort. It is mentioned here simply for its potential effect.⁵

Data Collection

The data for the ideological configuration variable for each period that McCloskey identified are compiled from several historical and empirical analyses of Supreme Court justices and their ideologies. Chase and Ducat (1979: 1447-50) and Epstein et al. (1996) provide the data for the partisan control variable. The data for the Court's issue agenda come from several sources. Professor Harold J. Spaeth's (1995) Judicial Database provides the data for the period between 1953 and 1993. This dataset is archived at ICPSR. Professor Sandra Wood of the political science faculty of the University of North Texas has graciously provided the data for the period from 1937 to 1952. Wood's (1994) dataset, which she collected for her dissertation, and her coding scheme, followed the procedures laid down in Spaeth's Judicial Database and thus extended it back into the late 1930s. A research group comprising Professor Wood and three doctoral candidates (Linda Camp Keith, Drew Noble Lanier, and this writer) further extended the Wood's dataset back to 1888 (see Wood et al. 1998a; 1998b). Finally, I collected and coded all the cases from 1801-1887 in which the Supreme Court issued a

⁵ The data for the types of cases filed in the earlier Courts does not presently exist, and its collection is prohibitively expensive and time-consuming. Most definitely, it will require traveling to Washington and rummaging through the Supreme Court's archives.

formal opinion (N = 7509) and reported in the U.S. Report, following the same coding scheme that Spaeth (1995), Wood (1994), and Wood et al. (1998a, 1998b) employed.

Memoranda cases were excluded. The variables in my data set include:

- Case citation
- date of oral argument
- date of decision
- source of decision
- source of the case (which lower federal or state court)
- participation of the solicitor general
- direction of the lower court decision
- vote (e.g. 90 for unanimous or 54 for split)
- decision type (following Spaeth's lead, I differentiated cases with full oral argument, decrees, per curiams).
- majority opinion author
- majority opinion assignor (assumed from final vote)
- votes of the justices
- opinion writing of the justices
- joining behavior of the justices

I coded the issue area and the direction of each case, using the same coding scheme that Spaeth (1995), Wood (1994), and Wood et al. (1998a; 1998b) employed in creating their databases. Issue areas include the 14 separate areas previously defined: criminal, civil rights, first amendment, due process, privacy, attorney, union, economic, judicial power, federalism, interstate relations, federal taxation, miscellaneous, and separation of powers. I added a new issue area, called admiralty or maritime cases, which covered seizure, prize, and condemnation cases (all the cases involving the Slave Trade Acts, the Neutrality Acts, the Non-Importation Acts, and U.S. blockade and seizure

activities during the Civil War).⁶ In several cases, mostly economic and judicial power cases, the Court decided more than one issue per case, and these were coded as such.

Lastly, I coded the direction (liberal or conservative) of the case based on the coding rules of Spaeth (1995). In the context of issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys the decision was coded liberal if it was pro-person accused/convicted of crime or denied a jury trial, pro-civil liberties or civil rights claimant, pro-indigent, pro-Indian, pro-underdog, anti-government in the context of due process, and pro-attorney. In cases involving economic activity, decisions were coded liberal if they were pro-economic underdog, pro-consumer, and pro-accountability in governmental corruption. In the context of federalism, decisions were coded liberal if they were pro-federal power. In federal taxation cases, decisions were coded liberal if they were pro-United States and conservative if they were pro-taxpayer. In cases involving seizure, prize, and condemnation, decisions were coded as liberal if they were pro-seizure, pro-condemnation, and pro-prize, and conservative if they were pro-claimant. Separation of powers, interstate relations, and judicial power were not coded as conservative or liberal because of the difficulty of establishing the ideological directions of the Court's decisions in these areas.⁷

The most difficult aspect of the coding is determining the liberal or conservative direction of the cases. The case syllabus most often gave sufficient information to

⁶These types of cases, arguably, could be classified as economic, as they involved trade and commercial activities.

⁷ Wood et. al. (1998b: 220) noted that the notion of judicial power has varied over time, which may make decisions of this type difficult to classify into one ideological direction or another.

accurately categorize a case into an issue area. However, if a particularly difficult case was encountered, I had Professor Wood and/or my colleague, Linda Camp Keith, read the case. Then, the two or three of us would reach a consensus as to how to code the case. These cases comprised less than four cases per term in the period between 1801 and 1835 (out of about 100 cases per term) and less than eight cases per term between 1836 and 1887 (out of about 200 cases per term). I selected a random sample of 100 cases to test my reliability. The reliability scores for these checks indicated a high level of agreement: 90 percent overall, and 95 percent when considering only the issue area and the decision direction.

Finally, in order to test the two propositions deduced from McCloskey's (1994) analysis of the Supreme Court eras, I aggregate the 15 issue types identified above into four major categories. Decisions in criminal, civil rights, first amendment, privacy and due process cases are aggregated into a civil liberties-civil rights category. Decisions in union, economics, attorney, federal taxation, and admiralty cases are combined into an overall economics category. Decisions in federalism cases are also allocated into a single category, as are decisions in judicial power cases (see Pacelle 1991; Schubert 1965; 1974; Epstein and Knight 1998). Decisions in interstate relations, "State as a litigant," separation of powers, and miscellaneous cases are excluded from the analysis.⁸

Some may question the validity of a data collections system for a historical time period that is drawn from the modern era. But as Wood et al. (1998b: 210) point out, the coding system developed by Spaeth works well even for earlier cases; only in a few cases

⁸ These types of cases constitute less than five percent of the total cases.

were there problems with Spaeth's coding scheme, and these were usually resolved after further discussion and analysis by our research group. But above all, the creation of Supreme Court database system that is comparable across time is a worthwhile enterprise. At a minimum, it enables researchers to conduct longitudinal studies of the Supreme Court and to observe changes that have occurred on the Court.

The next two chapters focus on the first period of the Supreme Court that McCloskey identified; that is, from 1801 to 1865. Chapter 3 discusses the Supreme Court and its agenda in this period from a historical perspective. Chapter 4 uses empirical data to determine the composition of the court's primary issue agenda during that time period and to account for its dynamics.

CHAPTER 3

THE U.S. SUPREME COURT'S AGENDA FROM HISTORICAL PERSPECTIVE, 1801-1864

The Court's Volitional Agenda: Federalism or Economic Issues?

As discussed in the previous chapter, McCloskey's main thesis is that the Supreme Court's primary agenda in each of its three political eras reflect its judicial interest and value. One of his claims was that federalism constituted the principal concern of the Supreme Court in its first period. He argued that the major problems that caused the collapse of the Old Confederacy—the issue of states' rights, interstate commerce, and slavery—did not disappear after a new nation was born in 1789 but continued to plague the new Republic right up to the Civil War. The Court faced other matters as well. Questions involving property rights and slavery engaged the justices' interests and attention just as federalism issues did, and sometimes these issues were inseparable from the nation-state debate itself. But the overriding issue of interest to the Court was federalism—the delicate and emerging power relationship between the national government and the states. Among the justices, the dominant value, wrote McCloskey, was the preservation of the Union. Their concern about the survival of the nation—viewed in terms of national supremacy—led them to devote a significant amount of attention to this important issue.

McCloskey is not the only scholar to assert that federalism cases dominated the Court's agenda in its first period. Foster and Leeson (1998) also view the Supreme Court

“as in institution whose work reflects three distinct era and an emerging fourth era,” with each era “marked by particular constitutional concerns and distinctive patters of interpretation.” They contend that issues of federalism constituted the primary agenda focus of the Court from 1793-1876. During this era, the Court dealt mostly with the question of national and state sovereignty in the areas of commerce, property rights, and slavery, two important areas left unresolved by the framers of the Constitution (5-7). Similar conclusions can be found in other historical and doctrinal studies (see Bates 1936; Schwartz 1993; Spaeth 1966).

The Supreme Court did decide several key federalism cases during this time period. The most notable, of course, is McCulloch v. Maryland (1819), in which Chief Justice Marshall established the implied powers of the federal government and affirmed the national government’s supremacy over the states by striking down Maryland’s tax on a federal government’s institution. The Marshall Court also decided in Martin v. Hunter’s Lessee (1816) the important question of judicial power and its place in U.S. federalism and ruled that the Supreme Courts, not the state courts, has the last word on the meaning of the Constitution. The same Court, in Gibbons v. Ogden (1824) and Brown v. Maryland (1827), strengthened the powers of the national government by broadly defining commerce and the powers of Congress. In the Gibbons case, the Court ruled that New York did not have exclusive rights of grant over steamboat navigation in state waters, since commerce “included every species of commercial intercourse.” In the Brown case, the Marshall Court overturned Maryland’s statute imposing a tax on importers of out-of-state goods on the basis that it encroached on national government’s powers. The Taney

Court also gave a liberal construction to the commerce clause, holding in Cooley v. Board of Wardens (1837) that Congress had complete and exclusive authority over regulation of commerce and that states might regulate this area only if their regulations did not conflict with those of Congress.

Nation-state relationship was no less an underlying concern in a number of important economic cases that the Court decided during this period. In Fletcher v. Peck (1810) and Dartmouth College v. Woodward (1819), the issue of national supremacy versus states' rights was an elemental part of the Marshall Court's decision to protect private property rights and rights of corporations against state abridgment (McCloskey 1994 ed. 31; Goldman (1982: 46). Likewise, the question of reserved state power was a crucial issue in the Taney Court's decisions in Charles River Bridge v. Warren Bridge, Briscoe v. The Bank of Kentucky, and Mayor of New York v. Miln (Bates (1936: 137-166; Schwartz 1993: 73-90; Goldman 1982: 92). In the Bridge case (1837), the Court ruled that nullification of a corporate charter by a state to protect public interest was not an impairment of the obligation of contract in the Constitution. In the Briscoe case (1837), the Court sustained the issuance of state bank notes, holding that they were not bills of credit forbidden by the Constitution. In Mayor of New York v. Miln (1837), the Court upheld New York state regulation applying to ships entering the port of New York on the ground that the state had merely been exercising its police powers, not regulating commerce.

Even the issue of slavery, like all other issues before the Court, was cast in a federal versus state mold. In the two most important cases dealing with this matter, Prigg

v. The Commonwealth of Pennsylvania (1843) and Dred Scott v. Sanford (1853), Congress's authority to act was just as much at issue as were slavery and property rights (Goldman 1982: 94). In the Prigg case, the Taney Court struck down a Pennsylvania statute that criminally punished an individual who had forcibly removed a fugitive slave from Pennsylvania to the slave-owner state. Justice Story, writing for the Court, declared that only Congress may act in the fugitive slave area and that the Pennsylvania law was an unconstitutional invasion of federal power. In the Dred Scott case, the Court declined jurisdiction in part because Congress did not have the authority to prohibit slavery, since it did not have the power to infringe upon the property rights of slave owners under the Fifth Amendment.

The fact that these and other landmark cases directly or indirectly raised the nation versus state controversy (the most notable exception are Marbury v. Madison (1803), *the Prize Cases* (1863), and Ex Parte Milligan (1866)) may have led McCloskey and other scholars to conclude that federalism issues dominated the Court's agenda in its first era. However, as Goldman (1982: 43-44) pointed out, a large portion of the Court's workload between 1801 and 1864 dealt with common law economic cases and consisted mostly of land and maritime disputes. Hobson (1996: 151) noted that "the vast majority of cases...belonged squarely to the conventional domain of law. Contracts and commercial transactions, land titles, civil procedure, marine insurance and admiralty cases form the bulk of the Court's business" (see also Haskins and Johnson 1981: 654-64; White 1988: 978-79).¹ Sutherland (1965: 318) observed that the business of the Court

¹ This author finds the same types of cases when coding the Court's decisions during this time period.

“picture a growing restless, adventurous, and litigious people, ready to take to court their inevitable and diverse controversies.” These scholars portray an agenda for the Court in its first era that is very different from McCloskey’s and other historical or doctrinal accounts.

The Dominant Value of the Court: Hamiltonian or Jeffersonian?

Along with the notion that nation-state concerns dominated the Court’s agenda in the first period is the view among many judicial scholars that the supremacy of the national government and the sanctity of private property constituted the prevailing doctrines on the Marshall Court. Swisher (1974: 2) wrote that “the Marshall Court had defended broad exercise of the delegated powers of the federal government, asserted the doctrine of implied powers, and subordinated the states to the authority of the federal Constitution. It gave protection to property, and particularly to property in land, by enforcing against the states the superior authority of federal treaties and of constitutional provisions such as that forbidding impairment of the obligation of contracts.”

Schwartz (1993: 49) stated that Marshall used constitutional law to establish and strengthen federal power and to further the protection of property rights. The Chief Justice did not act alone, said Hobson (1996). “In all the great cases affirming a nationalist interpretation of the Constitution, he had the unanimous or nearly unanimous concurrence of his brethren” (116).

By most accounts, the Taney Court was no less nationalistic and supportive of property right than the Marshall Court was. Justice Charles Evans Hughes (a former chief

justice, himself) argued that Taney was equally pro-federalist in most of its key opinions (1987: 56). Segal and Spaeth (1993: 81), in their review of the political history of the Court, declare that “No more than the Burger Court undid the decisions of the Warren Court did the Taney Court undo those of the Marshall Court. Expectations that the leveling influences Jacksonian democracy would curtail vested property rights, commercial interests, and expand the sphere of states’ rights went largely unrealized.” As evidence, they point to the decision in Cooley v. Board of Wardens (1852) in which the Taney Court upheld Congress’s exclusive power to regulate commerce, and they contend that even in the Charles River Bridge case the Taney Court “did not markedly deviate from Marshall’s position.”

Goldman (1982) echoed the same point. He argued that while the Taney Court was clearly sympathetic to the states in some of its decisions, and despite some very real differences among the Taney Court’s justices, there was no marked departure from the major constitutional doctrines laid down by John Marshall and his Court. The majority was as devoted to national supremacy, the exercise of federal judicial power, and the rights of private property, as was the Marshall Court (108). Bates (1936) noted that after some initial reactionary phase, the Taney Court soon returned to type--in the mold of the Marshall Court. So strong was the Taney Court’s support for honoring contract obligations, said Bates, that it was now the Northern States that were asserting the Jacksonian doctrine of state rights and the authority of states to invalidate the decisions of the Supreme Court (154-158). Thus, the prevailing view among scholars is that the

Supreme Court in its first era was a stronghold of nationalistic and pro-property rights views.

However, Swisher (1974: 97-98) argued that while the Taney Court's constitutional jurisprudence did not represent a radical break from that of the Marshall Court, there was some change nonetheless, even if limited. He wrote:

The work of the 1837 term thus marked the beginning of a new order. The transition was not a sharp one, and those who saw it as such were mistaken. In spite of the radical doctrines sponsored by some Jacksonians of the time, the Court was careful to adhere to traditional patterns... The change was limited, sometimes almost infinitesimal, and yet it was there. There was a great tendency to look to items of local welfare and to emphasize the rights of the states, a greater concern with living democracy in a rapidly changing society. The tendency was to manifest itself further in succeeding terms in other kinds of cases.

Schwartz made the same point. He noted that while Chief Justice Taney could, when the occasion demanded, assert federal powers just as Marshall did—if not more, some fundamental change in doctrine did occur under his leadership. According to Schwartz:

The Taney Court did make important doctrinal changes, particularly in shifting the judicial emphasis from private to community rights and stressing the existence of power to deal with internal problems. That the Court's reaction after Marshall's death was not as great as has often been supposed does not alter the fact that there was a real change (1993: 91).

Thus, there is some indication of sympathy toward states' rights and public regulation of business and property rights.

The Justices: Hamiltonian, Jeffersonian, Undistinguished, or Just Unknown?

As discussed in chapter 2, ideological control of the Court, effected through membership change, has the potential to fundamentally reshape the Court's agenda in a given period. The following section identifies all the justices who sat on the bench during

its first era and provides an overview of their attitudes toward the major political issues of the era. Knowledge of these attitudes should enable us to identify the prevailing ideological bloc in each Court term during this first era and to calculate its relative strength.

Between 1801 and 1864, thirty-one men served on the Supreme Court. Several of these justices served brief periods. Some who served with Marshall were considered as “mere appendages” to the Chief Justice. Most left no distinct mark on the Court’s jurisprudence. Nonetheless, some conclusions have been drawn about their attitudes toward national supremacy and vested property rights. In general, justices with Hamiltonian orientations are characterized as supportive of national supremacy, mercantile interests, vested property rights, and a broad interpretation of the Supreme Court’s power of judicial review. Usually included in this category are Federalist, Whig, and Republican justices. Those with Jeffersonian or Jacksonian orientations are said to favor states’ rights, reduced national power, and economic regulation to protect public interest. Democratic-Republican and Democratic justices are usually characterized as such (Schwartz 1993: 72-74; Goldman 1982: 29-34, 91-92; Segal and Spaeth 1993: 81-82). However, not all the justices fit tightly into one category or another. While some were strongly Hamiltonian or Jeffersonian, others varied in their orientations, depending on the issue.

Hamiltonians

Of the justices who served during this first period, the most extreme supporters of national supremacy and economic rights were Bushrod Washington (1798), Chief Justice

Marshall (1801), Justices Joseph Story (1811), John McLean (1829), James M. Wayne (1835), Benjamin R. Curtis (1851), Noah H. Swayne (1862), David Davis (1862), and Stephen J. Field (1863). The nationalism and economic conservatism of Chief Justice **Marshall** and Justice **Story** are well documented (Bates 1936; Goldman 1982; Gordon 1987; Hobson 1996; McClellan 1967; Schwartz 1993; Siegel 1987; Surrency 1955; Swisher 1974). **Washington**, one of the stalwarts of the Marshall Court, believed in the supremacy of the Union and in upholding the integrity of contracts (Schwartz 1993: 62; Siegel 1987; 213). **McLean** was “the constitutional nationalist of the Marshall school...” (Steamer 1986: 107), and a vigorous defender of the rights of property (Siegel 1987: 242). As a Supreme Court justice, McLean disappointed the Jacksonians who had expected him to support states’ rights positions. He was like Marshall on issues of federalism and property rights and continued to follow the same approach under Marshall’s successor (Schwartz 1986: 107; White 1987: 297). **Wayne** was a Jacksonian Democrat, a slaveholder, and a racist; but he was a Southern Unionist and an economic conservative as well. In a significant number of cases involving the interpretation of federalism and judicial power, Wayne sided with the nationalist rather than the states’ rights side (Abraham 1974: 90; Siegel 1987: 248). On economic issues, Wayne was a friend of corporate enterprise during his twenty years on the Court, frequently opposing state laws that impaired the obligation of contracts (Gatell 1969: 106). However, Schwartz (1993: 98) described his performance on the Court as unremarkable. By contrast, **Curtis** was one of the most able jurists to serve on the Taney Court (Steamer 1986: 102). He is described as a “firm defender of contract rights and of property rights

generally...His defense of property rights included property in slaves” (Swisher 1974: 239).

President Abraham Lincoln appointed Justices Davis, Field, and Swayne to the Supreme Court in the late part of the first era. Of the three, only Field was a Democrat. All three were strong nationalists and supporters of conservative economics, and all would make their mark in the latter period. **Davis** was a Union loyalist and an economic conservative. While occasionally voting for states’ economic regulation, Davis reportedly displayed a conservative streak in many of his opinions, including Pete v. Morgan (1873) that struck down a Texas law levying tonnage tax on ships entering its harbor. Another opinion, U.S. v. Union Pacific Railway Co. (1875) was highly applauded by the Wall Street because it freed the railroads from having to pay interest on government bonds held by them before the due date of the principal (Kutler 1969: 1051). **Field** is regarded as one of the intellectual giants of the earlier Courts and as a “fanatic” who vigorously defended property rights and private enterprise” (Goldman 1982: 163). He was instrumental in getting the Court to declare corporations as persons within the meaning of the Fourteenth Amendment’s due process clause and to use the clause to strike down federal and state economic regulation (Furer 1986: 225; Kens 1997). **Swayne** was a Union loyalist and “the judicial patron of the holding class” (Gillette 1969: 994). He would dissent vigorously in the 1873 Slaughterhouse Cases when the majority refused to strike down government regulation conferring monopoly right. Swayne’s loyalty to the railroads, even in the face of popular protest against railroading and its financing, is said

to have caused a deep and long-lasting animosity between him and Justice Miller, his colleague on the Court (Gillette 1969: 996).

Jeffersonians

The justices described as strongly Jeffersonian or Jacksonians are most opposed to national power and unregulated commercial enterprise. They are Phillip B. Barbour (1835), John Catron (1837), Peter V. Daniel (1841), Samuel Nelson (1845), Robert C. Grier (1846), and John A. Campbell (1853). The trio, Daniel, Nelson, and Catron “were among the strongest states’ rights men on the Court” (Gatell 1969: 877). But **Daniel** was perhaps the most extreme of them all. His extreme views often made him to dissent from his colleagues (Goldman 1982: 100; Segal and Spaeth 1993; Steamer 1986: 107).

Nelson, a Northern Democrat, was loyal to the Union but opposed to expansive federal powers. He served only a brief period on the Court and is described as generally supportive of state regulation of property rights for public interest (Gatell 1969: 1829; Swisher 1974: 221). **Catron**, who spent twenty-eight years on the Court, was a Jacksonian Democrat opposed to monopolies (Gatell 1969: 744-745; Swisher 1974: 476).

Barbour’s political philosophy stood at the opposite poles from the nationalism and conservative economics of Marshall (Swisher 1974: 56). He is described as “a strong states’ rights advocate of the Southern school” (Abraham 1974: 91). **Campbell**, the man who became an advocate for laissez-faire in his legal career, was, on the Court, a states’ rights Democrat who believed in subordinating property rights to public interest and refused to treat corporations as citizens with federal protection (Gillette 1969: 931).

Grier spent nearly a quarter of a century on the Court, retiring in 1870. A solid

Jacksonian Democrat, Grier was closer, philosophically, to Justice Catron than to any other of his colleagues (Swisher 1974: 233). Gatell (1969: 875-883) described him as generally supportive of states' rights and state regulation of corporate power to protect public interests.

Moderates

Rather than doctrinaire nationalists and economic conservatives, some of the justices have been characterized as moderately or marginally adhering to Hamiltonianism. Included in this category are William Johnson (1804), Smith Thompson (1823), Roger Taney (1835), and Samuel F. Miller (1862). **Johnson**, one of Marshall's most important colleagues (the other is Justice Story) and a man whom Jefferson and Democratic- Republicans had hoped would curb Marshall's jurisprudence, presents a much more difficult analysis. While Schwartz (1993: 64) and Goldman (1982: 35-36) viewed him as nationalist and supporter of property rights, Siegel (1987: 219) portrays his economic philosophy as "a harbinger of Franklin Delano Roosevelt's New Deal reforms." **Thompson** served on the Marshall Court for twelve years. Though his service is said to be less influential and his substantive positions less uniform than those of Marshall and Story, he is seen as a moderate who, while supporting national power, also recognized states' concurrent power to regulate commerce (Schwartz 1993: 65; White 1987: 317). **Taney**, a Federalist turned Jacksonian Democrat, was also a moderate whose "states' rights heritage did not bind him to the need for effective government power"... and whose "distrust of corporations did not make him disregard the practical possibilities of the corporate device and its utility in an expanding economy" (Schwartz 1993: 103-

104). **Miller**, another late appointee of Lincoln, was a Republican and a Unionist, but on economic and civil liberties issues, Miller was a liberal when compared to his colleagues. He is described as a defender of both economic regulation and individual's rights. Throughout his judicial career, Miller reportedly tried to protect the government's taxing power and authority so it could handle its problems and responsibilities. He also fought against the use of the due process clause of the Fourteenth Amendment to protect the business community. Miller served on the Court for 28 years, wrote 616 opinions, and is considered one of the great nineteenth-century jurists (Goldman 1982: 101-102; Gillette 1969: 1022; Furer 1986: 221).

Undistinguished

A number of justices, however, draw scant notice from historians or biographers either because their tenure on the Court was short or undistinguished. **Brockholst Livingston** (1806), **Thomas Todd** (1807), and **Gabriel Duvall** (1811) were the "silent Justices" of the Marshall Court who could be counted upon to "steadfastly support...the constitutional doctrines which Mr. Chief Justice Marshall promulgated, in the name of the court" (Justice Story, quoted by Schwartz 1993: 65; see also White 1987: 300-305).

William Paterson (1793), William Cushing (1796), Samuel Chase (1796), Alfred Moore (1799), and Robert Trimble (1826) were Marshall's alter egos as well. **Paterson**, a man the Federalist Senate preferred as chief justice to John Marshall, and **Chase**, the only Supreme Court Justice to be impeached, generally followed Marshall's lead in constitutional jurisprudence (Schwartz 1993: 62; Siegel 1987: 205). **Cushing**, one of George Washington's nine appointees to the Supreme Court, served twenty-one

unremarkable years on the Court, but he “was a Federalist who could be counted on to uphold both a broad construction of the Constitution and property rights” (Siegel 1987: 204). **Moore** was another Federalist who was said to possess intellectual power but served five undistinguished years on the Court (Schwartz 1993: 63). **Trimble** served only two terms on the Marshall Court and is characterized as a mediocre and Marshall’s protégé (White 1987: 305). **Levi Woodbury** (1845), a Republican turned Jacksonian Democrat, spent five years on the Taney Court. During his short undistinguished tenure, he favored state police powers and was moderate on federal powers (Gatell 1969: 843).

Henry Baldwin (1830) suffered mental problems during most of its tenure and was “never able to articulate a consistent jurisprudential posture on the Court,” sometimes affirming Marshall’s jurisprudence and sometimes supporting states’ police powers (White 1987: 300). **John McKinley** (1837) was undistinguished as well (Steamer 1986: 103). **Nathan Clifford** (1857) is described as “a Northern man with Southern principles,” “an ardent Democrat of the Jeffersonian persuasion,” who never quite distinguished himself on the Court and wrote no major opinions with important constitutional questions. His specialties were commercial and maritime law, the law of Mexican land grants, and legal procedure and practice. According to Gillette (1969: 969-71), Clifford generally supported state regulatory activity and viewed with alarm federal incursions upon it, and he did not regard the due process clause of the Fourteenth Amendment as a severe limitation on state action (see also Swisher 1974: 247).

The Justices: Partisans or Independents?

The American political party system underwent significant changes during the period from 1801 to 1864. The early parties—Federalists, Whigs, Jeffersonians, and Jacksonians—consisted of coalitions of ideologically-compatible individuals drawn together in a conflict over the two major political issues of their era: the power of the national government and the protection of vested property rights. The Federalists and the Whigs generally favored a strong national government and the protection of private property, while the Jeffersonians and Jacksonians championed states' rights and economic regulation (Formisano 1984; 1981).² The two political parties that replaced them, the Republican and Democratic Parties, were similarly divided on the question of private enterprise. The Republican Party, since its birth in 1854, has generally supported economic freedom over government regulation, while the Democratic Party has favored government regulation of business activities and of the economy as a whole (Gitelson et al. 1993: 164).³

Although the Supreme Court is less subject to partisan control than is Congress or the president, there are indications that party politics not only extended to the Court in its

² From 1789 to 1824, the American political party system featured the Federalists and the Jeffersonians, also known as the Democratic-Republicans. The Federalists ceased to be a strong political group as early as 1840. Torn apart by internal feuds between John Adams and Alexander Hamilton over the direction of the party, particularly over foreign policy, many Federalists abandoned their party and joined the newly formed Whig Party, which also became pro-federal and business. The Democratic-Republican Party and its offshoot, the Democrats, dominated national politics from 1800 to 1860. The split within the Democratic-Republican occurred in 1824 when Andrew Jackson formed the Democratic Party after being denied the presidency even though he had won the popular vote but not the Electoral College vote (Gitelson et al. 1993: 163-164).

³ The Republican Party was born in 1854 in opposition to slavery and drew a large part of its membership from former Federalists and Whigs. With the election of Abraham Lincoln as president in 1860, the party became a truly national party and dominated national politics for at least the next sixty years (Ewing 1938: 17; Gitelson et al. 1993: 164).

first era but also affected the Court's behavior and orientation toward the major issues of that era. For example, judicial scholars have noted the bitter political feuds between the Federalists and Jeffersonians over questions of judicial power, federalism, and property rights, and the Federalists' attempt to pack the courts after their defeat in 1800. There are, of course, those who argue that party affiliations were virtually meaningless during the Marshall Court, because the Chief Justice dominated his colleagues (Hobson 1996: 10). Still, only one justice—Stephen J. Field—was appointed by a president of the opposing party during this time period. The remaining justices were appointed by presidents of the same political affiliations. If partisanship extended to issue consideration on the Court, Federalist, Whigs, and Republican justices could be expected to pay closer attention to federalism and economic issues than Jeffersonian or Jacksonian justices because of their concern about states' activities in these areas.

The Chief Justices: Leaders or Followers?

The United States Supreme Court had only two leaders between 1801 and 1864. President John Adams appointed John Marshall as Chief Justice in 1801. Marshall led the Court till his death in 1835. His successor was Chief Justice Roger B. Taney. Taney was appointed by President Andrew Jackson, confirmed by the Senate in 1836, and presided over the Court from January 1837 till his death in 1864. Details about the lives of these two men exist in several historical and biographical accounts (see, for example, Bates 1936; Carson 1891; Hobson 1996; Schwartz 1993; Steamer 1986; Umbreit 1938). Below is a summary of their leadership qualities.

Chief Justice John Marshall, 1801-1835

By most accounts, a period of profound change on the Supreme Court began in 1801 with the appointment of John Marshall to the position of chief justice (Bates 1936; Schwartz 1993; Frankfurter and Landis 1927; Hobson 1996; Goebel 1971; Marcus 1990, McCloskey 1960; Umbreit 1938). Marshall came to the Court as a devout nationalist. His nationalist views had been shaped by his experience in state politics. As an elected member of the Virginia House of Delegates, Marshall had witnessed first hand the weaknesses of the Articles of Confederation. This experience led him to campaign for the ratification of the new U.S. Constitution and to support James Madison whom he regarded as “the enlightened advocate of the Union and of an efficient federal government “ (Hobson 1996: 4). By the time the Constitution was ratified, Marshall had become the unofficial leader of the Federalist Party in Virginia and later would be appointed by President John Adams first as Secretary of State and then as chief justice (Hobson 1996: 5). When Marshall accepted the chief justice position, he did so because he feared the possibility of the Jeffersonians coming to power, and because he felt that the country was approaching a crisis from which he could not shrink (Umbreit 1938: 147).

If Marshall brought to the bench an already developed nationalist disposition, as chief justice he sought to use the Supreme Court “to lay the constitutional foundation of an effective nation” (Schwartz 1993: 38). First and foremost, Marshall claimed and got for the Court the power of judicial review, which established the Court as a co-equal branch of the national government. Having established the Court’s power, Marshall then

used it to broaden the scope of national government's powers. Secondly, Marshall established the custom of the chief speaking for the Court or deciding which justice would so speak in those cases in which the chief was in the majority. Before his appointment as Chief Justice, individual justices were in the habit of writing their own opinions. This practice had deprived the Court of a united voice. Starting with the Marbury v. Madison case (1803), Marshall made it clear that not only would his opinions become the opinions of the Court but that in great cases the Chief Justice would speak for the judicial branch of government. From there on, his decisions, in most cases, became the Court's decisions (Schwartz 1993: 38-39; Umbreit 1938: 169-170).

Marshall's dominance on the Court and over his colleagues has been attributed to a number of factors. Schwartz (1993: 59) ascribed it not to Marshall's intellect and learning—men like Story and Johnson had superior intellect and education—but to the Chief Justice's leadership and the acceptance of Marshall's jurisprudence by most of his colleagues on the Court, including the Democratic-Republican appointees. Hobson (1996: 15), however, believed that Marshall was equal to his colleagues in intellectual ability, noting that "all who observed him (that is, Marshall) closely attested to his intellectual vigor, the powers of logic, analysis, and generalization that peculiarly fitted him for a large role in law while setting him apart from the general mass of the profession." Umbreit (1938) points to Marshall's charming personality as one of the factors responsible for his influence on and dominance of the Court. Marshall, wrote Umbreit, had such attractive traits of personality that made it difficult for anyone to

challenge him or refuse his wishes (172). To these must be added another factor: the justices' living conditions at the time, which played to Marshall's strength.

During most of Marshall's tenure (from 1801 to 1830), the justices lived together in a boarding house. It was in this family atmosphere, wrote Umbreit, that Marshall gained influence over his associates (1938: 172). The communal living, said Hobson, blended professional and social life of the justices into one and allowed Marshall to achieve a working consensus among his brethren in many cases (1996: 15). One anecdote from Marshall's biographers illustrates the Chief Justice's charming nature and the friendly atmosphere he helped nurture during this communal living arrangement. In the early years of the Court, the justices reportedly had a custom of not drinking wine except when it was raining. But Marshall who loved his wine after dinner would sometimes ask "Brother Story" (Justice Story) to step to the window and see if it was raining. And if Story reported that the sun was shining brightly, the Chief Justice might reply "all the better; for our jurisdiction extends over so large a territory that the doctrine of chance makes it certain that it must be raining somewhere" (Hobson 1996: 14; Umbreit 1938: 174). In short, Marshall's influence on the Court during his tenure extended not only to the Court's jurisprudence but to his colleagues as well. Bates (1936: 136) noted that when Marshall died in July 6, 1835, "he had won his place as one of the great makers of the America of the nineteenth century."

Chief Justice Roger B. Taney, 1837-1864

Because of Marshall's complete dominance of the Court during his tenure, it was inevitable that considerable attention was going to focus on who ever succeeded him.

Marshall's successor was Roger B. Taney, a lawyer and a former Federalist who later became one of Jackson's trusted advisers. As expected, Taney faced stiff Senate's resistance to his nomination—his confirmation hearing lasted two and a half months debate—and he was confirmed by a vote of twenty-nine to fifteen (Bates 1936: 138).

The Taney Court began at the beginning of 1837 and ended in 1864 when the Chief Justice retired. His leadership skills have drawn mixed reviews from historians and biographers. Steamer (1986) described Taney as one of the good but not great leaders of the Court.⁴ While conceding Taney's superb legal mind and skillfulness at managing conference deliberations, Steamer nonetheless faulted Taney's leadership for the way he and his colleagues handled the slavery problem in the controversial Dred Scott Case. "Truly great leaders," wrote Steamer, "must be able to transcend the parochialism of their own backgrounds, and this Taney could not do" (103-110). Bates (1936), however, believed that to judge Taney's tenure and leadership by this one unfortunate decision is to do the Chief Justice injustice. Taney, argued Bates, was not only a very brilliant lawyer but a superb Court manager as well. He credited Taney's success not to his personal charm or power of oratory but to "the compelling logic of his arguments, the simplicity of his style, and, at least in his early days, the overwhelming impression of personal sincerity which he created." That Taney's judicial career was not as spectacular as Marshall was not totally his fault. The Chief Justice "was caught up in mighty issues over which he had no control and on which the best minds of his period were divided and

⁴ Others included in this category by Steamer were Morrison R. Waite, Melvin Weston Fuller, and Edward Douglass White.

confused” (137-139, 171). Abraham, likewise, decried the tendency by some scholars to judge the Taney Court on the basis of its *Dred Scott* decision of 1857. He noted that under Taney’s “assertive and sophisticated leadership,” the Court was just as protective of judicial power as it did under Marshall (1974: 87). Carson (1891: 18) agreed, noting that those who take the pains to study Taney’s long judicial career would find an upright and able magistrate who for twenty-eight years was the most conspicuous figure upon a bench adorned by able jurists. Schwartz echoed the same view. He argued that while the devastation of the Civil War and Marshall’s glory would always cast a great shadow on Taney’s leadership on the Court, the intellectual power of Taney’s opinions and their enduring contributions to a workable federalism “place Taney second only to Marshall in the constitutional history of our country” (1993: 104).

Chapter Summary

Most historical and doctrinal studies of the Supreme Court describe its agenda in the period from 1801 and 1864 as dominated by issues of federalism. Indeed, a significant proportion of the landmark cases the Court decided during this time period dealt with nation-state issues. However, some accounts of the Court indicate that a greater proportion of its business during this period involved common-law cases, mostly land and maritime disputes.

With regard to the Court’s dominant value, the Marshall Court has been portrayed as a bastion of strong nationalist views and economic conservatism, while the Taney Court is characterized as, to use Bates (1936: 137)’s phrase, “an interlude of moderate liberalism between the preceding and following conservatisms.” Examining the

ideologies of the justices who adorned the bench during this time, historical accounts indicate that more than a half of them was strongly Hamiltonian in their ideological orientations. Those described as strong nationalists and economic conservatives are Marshall, Story, Washington, Livingston, Duvall, Todd, Cushing, Moore, Paterson, Chase, Trimble, Wayne, McClean, Curtis, Swayne, Davis, and Field. Six justices—Daniel, Nelson, Catron, Barbour, Campbell, and Grier—were staunchly Jeffersonian. The rest were neither strong Unionists nor doctrinaire supporters of vested property rights. Justices with Hamiltonian orientations were the majority in thirty-five of the sixty-four terms (about 55% of the terms) that the Court was in session between 1801 and 1864. Strongly Jeffersonian or Jacksonian justices controlled the Court in only nine of the sixty-four terms (14%).

With regard to party affiliations, eleven of the justices were Federalists, Whigs, or Republicans, and twenty were Jeffersonians, Democratic-Republicans, and Democrats. After 1810, Democratic-Republican and Democratic justices dominated the bench (see Appendix A). Finally, the two men who guided the Court during its first era, Chief Justices Marshall and Taney, are both described as able jurists and great leaders, with Chief Justice Marshall regarded as the greater of the two. These general conclusions about the Court provide the context for testing the hypotheses derived from McCloskey's analysis of the Supreme Court's volitional agenda in its first era. If McCloskey's account of this agenda is correct, we should find nation-state issues to command the greater proportion of the Court's agenda space. Also, measures of the Court's judicial value should explain a significant proportion of the variations in the Court's attention to these

issues or any other set of issues found to receive the most attention during this first period. That empirical investigation is carried out in the next chapter.

CHAPTER 4

THE COMPOSITION AND DYNAMICS OF THE U.S. SUPREME COURT'S VOLITIONAL AGENDA, 1801-1864: AN EMPIRICAL ANALYSIS

The preceding chapter noted that most historical accounts, including McCloskey's, have described the Supreme Court's volitional agenda in the period from 1801 to 1864 as dominated by federalism issues. Moreover, these accounts indicate that the Court's attention to these issues was driven primarily by its dominant value in this period—the survival of the nation. This chapter employs empirical data to examine the validity of these claims. The first section of the chapter focuses on the composition of the Court's primary issue agenda to determine what proportion of this agenda was devoted to nation-state issues. The next section examines the dynamics of the Court's primary issue agenda to determine what proportion in the variations of that agenda was accounted for by measures of the Court's dominant value.

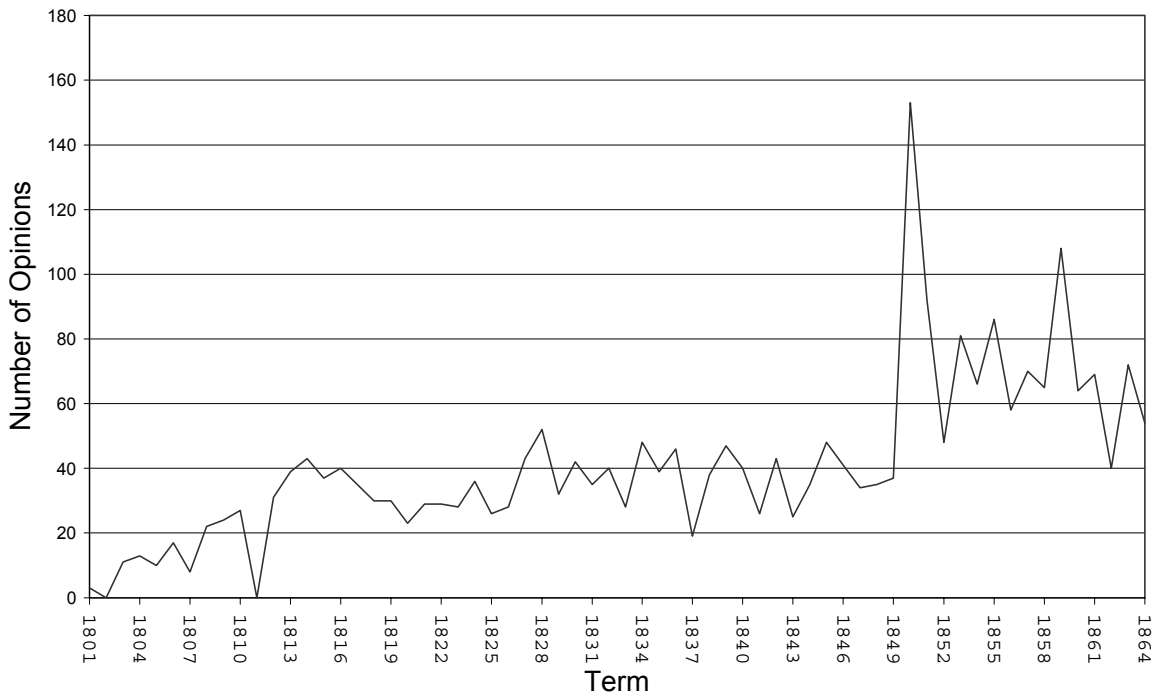
How Much Did Federalism Issues Dominate?

Based on McCloskey's and other historical depictions of the Supreme Court's agenda in its first era, one should expect federalism issues to dominate the Court's agenda space during this time. In other words, the Court should devote a greater proportion of its full opinions to nation-state issues. Thus, the following hypothesis:

H1: *In the Court terms running from 1801 to 1864 the Supreme Court allocated the largest share of its agenda space to nation-state issues. Alternatively, federalism opinions constituted the largest proportion of the Court's full opinions across this time period.*

Figure 4-1 shows the trend in the number of cases in which the Court wrote a full, formal opinion (opinions of more than one page that were not memorandum or per curiam cases) in the Court terms running from 1801 to 1864. The graph indicates a gradual upward trend, with an outlier in 1850. The large number of land grant claims the Court decided in this particular term (85) appears to account for this outlier. On the whole, a total of 2,837 cases were decided during this time, of which 2,618 were full opinions. During the Marshall era, the Court wrote an average of 28 opinions, compared

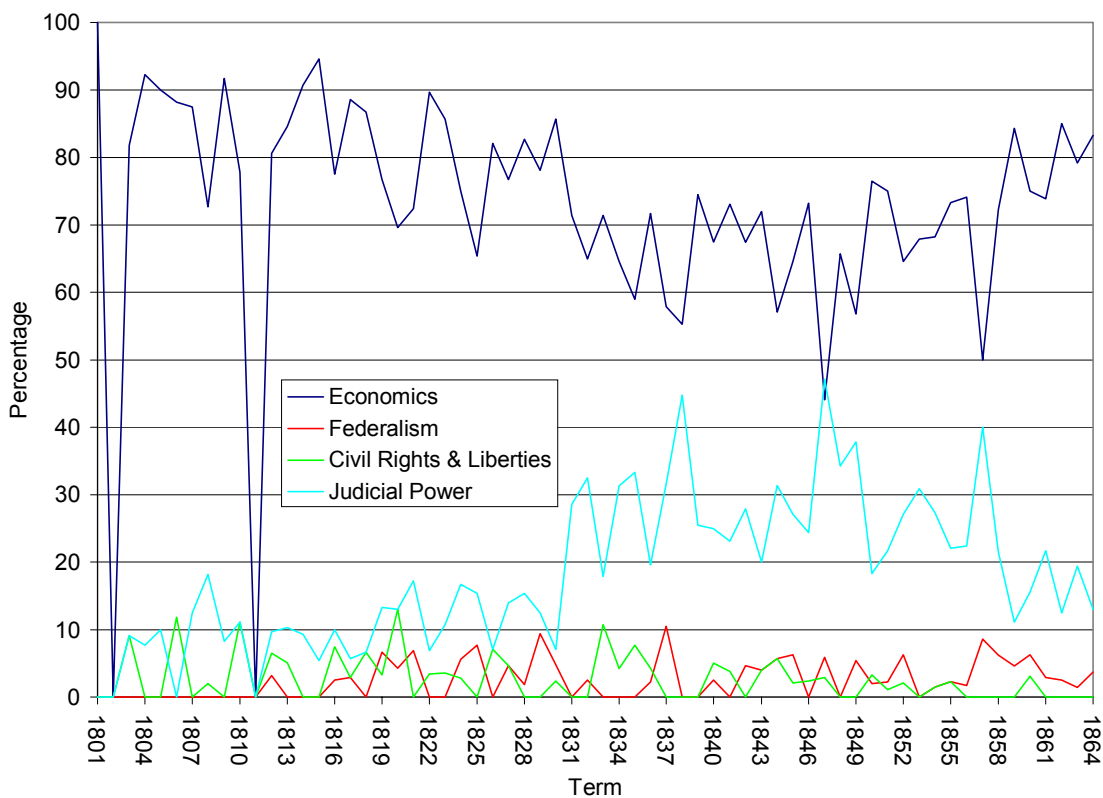
Figure 4-1. Trends in the Full Opinions of the U.S. Supreme Court, 1801-1864 Terms



to 56 under the Taney Court. The progression in the number of these opinions reflects perhaps the nation’s gradual transition from an agricultural to an industrial society and the accompanying change in the Court’s caseload.

When the full opinions themselves are further analyzed according to the issue areas in which they fall, an interesting picture emerges. Figure 4-2 shows the relative proportion of these opinions that each of the four major issue areas comprises for the period from 1801 to 1864. The most noticeable finding from the figure is that over the

Figure 4-2--Trends in the Allocation of Agenda Space to Four Major Issue Areas (Full Opinions), 1801-1864 Terms



entire 63 years in which the Court met (Court did not meet in 1802 and 1811), economic issues dominated the Court's agenda space, averaging 74%. The largest percentage of economic decisions occurred from 1801 to 1830 (78%) during the Marshall Court, declining below 70% during Chief Justice Taney's tenure. Judicial power was the next largest segment of the docket (18.3%); the highest percentage of this category of issues occurred under the Taney Court (26%) compared to 10% under the Marshall Court.

Federalism issues remained at the bottom of the Court's agenda space along with civil rights and liberties issues (3% for both). Both the Marshall and Taney Courts decided about the same proportion of federalism decisions (3%). Overall, these findings fail to support McCloskey's and other historical claims about the Court's volitional agenda in its first era.

Analysis of the Great Cases

But suppose McCloskey and other Supreme Court historians focused their analyses of the Court's agenda only on the great cases of Supreme Court history, as it appears they did. If so, the preceding investigation might be criticized for failing to distinguish between the great and the "lesser" cases the Supreme Court decided during this time period. This makes it imperative to determine how much of the landmark cases, in that first period, involved federalism. Figure 4.3 shows that federalism opinions indeed constitute the greater proportion of opinions the Court issued in the great cases, followed, respectively, by economic and judicial power opinions (N=46). At a glance, this would appear to support McCloskey's and other historical analyses. However, Figure 4.4 indicates that the opinions from these major cases constitute only a very small portion (1.53%) of the total body of reported decisions rendered by the Court between 1801 and 1864 (N = 2618)—a very tiny slice of the pie, so to speak. Consequently, they do not represent an accurate depiction of the Court's full agenda, at least for this first period.

Figure 4.3--Major Opinions of the U.S. Supreme Court by Issue Area, 1801-1864*

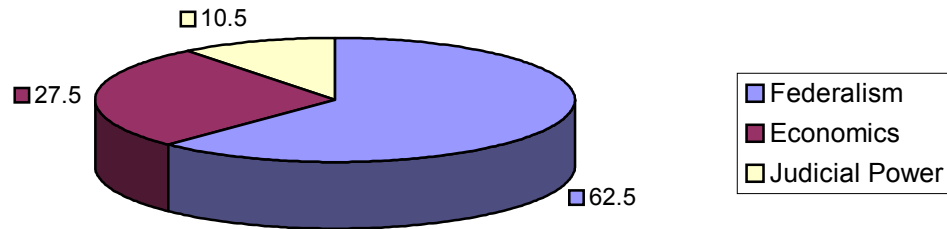
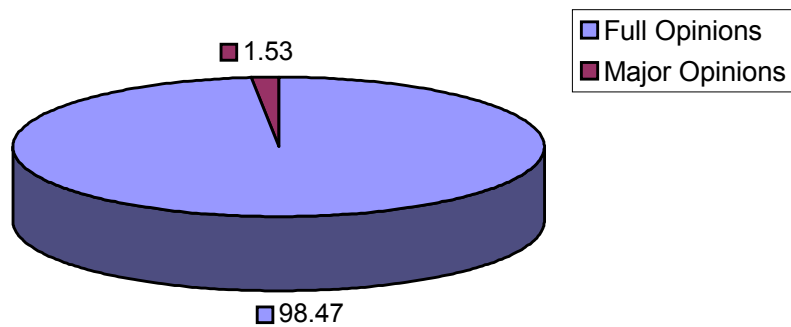


Figure 4.4--Proportion of the Supreme Court's Full Opinions that Constitutes Major Opinions, 1801-1864



*Source: Epstein, Segal, Spaeth, and Walker. 1996. *The Supreme Court Compendium*, pp. 94- 98.¹

¹ Controversy exists over which cases can be labeled as important or salient to the justices. In their latest research, Epstein and Segal (2000) criticize existing measures of issue salience, including the one used in this section for analysis of the great cases. However, the alternative measure they propose—one based on the New York Times (NYT) coverage—suffers from the same problem of time dependency that supposedly afflict the others. Basically, it cannot be extended further back in time to assess case salience in the earlier periods, since the New York Times was not in print then. An earlier newspaper of the same caliber could be used, of course. But such a measure raises more questions than can be discussed here.

How Much Effect Did Judicial Values Have on the Court's Volitional Agenda?

With Figure 4.2 indicating that economic issues constitute the largest share of the Court's agenda in the Court's first era (Figure 4.2), the next question is: what accounts for the Court's disproportionate attention to these issues? Relying on McCloskey's thesis, I posit that the proportion of the Court's attention devoted to economic issues is a function of its dominant judicial value during that period. Consequently, measures of the judicial value employed in this study should explain much of the variations in the Court's economic agenda across the period. The following section specifies the relationship between those measures and the Court's economic agenda.

Ideological Control

The last chapter indicates that justices with Hamiltonian views (those strongly in favor of national supremacy and vested property rights) constituted the majority in slightly more than half of the terms that the Court was in session from 1801 to 1864. In the majority of the remaining terms, the Court was either under the control of the moderate or Jeffersonian justices who tended to support economic regulation. This makes ideology a potential factor in the Court's attention to economic issues. I predict that under the control of Hamiltonian justices, the Court would devote more attention to economic issues than under a moderate or Jeffersonian majority. The presence of a Hamiltonian majority should encourage businesses to challenge state economic regulation and thus significantly add to the number of economic cases brought to the Court. Furthermore, unlike the moderate or Jeffersonian justices, those with a Hamiltonian orientation could be expected to focus more on economic issues so as to keep watch over and, whenever

possible, repel state governments' attempt to regulate property rights. This leads to the following hypothesis:

H2: *The Supreme Court, when controlled by Hamiltonian or economic conservative justices, placed on its agenda of full opinions more economic cases than when controlled by Jeffersonian or moderate justices.*

Partisan Control

The last chapter indicated the existence of partisan differences in the political environment as well as among the justices over the issue of economic rights in the period 1801-1864. I predict that under the control of the Federalist, Whig, and/or Republican justices, the Court will write more economic opinions than under Jeffersonian, Jacksonian, and/or Democratic control. The former group's preference for property rights and its desire to safeguard those rights should lead it to devote more attention to economic issues. The following hypothesis expresses this relationship:

H3: *The Supreme Court devoted the larger share of its full opinions to economic issues under a Federalist, Whig, and/or Republican majority than under a Jeffersonian, Jacksonian, and/or Democratic majority.*

Chief Justice's Leadership

The literature on the leadership of the chief justice of the U.S. Supreme Court suggests that an ideological and very skillful CJ can manipulate the conference debates to shape the Court's agenda. The preceding chapter indicates that while the two men—Marshall and Taney—who occupied the center chair between 1801 and 1864 were very influential and extremely skillful presiding officers of the Court, Marshall, more than Taney, dominated his Court and wrote most of its opinions. Moreover, historical accounts indicate that the two justices were different in their views toward vested property rights.

Marshall was a champion of private property and free enterprise, and the Marshall Court has been characterized as a stronghold of conservative economic views. By contrast, Taney believed in moderate government intervention in the economy and his Court has been described as an interlude of moderate liberalism between the preceding and following conservatisms. Thus, we should expect the Court to devote more attention to economic issues under the leadership of Marshall than under Taney's leadership, for the same reasons noted above.

There is one more reason why Marshall's leadership is expected to affect the Court's attention to economic issues. The Court's caseload during most of Marshall's tenure was relatively small compared to the subsequent periods. This should allow Marshall to exert strong influence on the Court's economic agenda. The expectation is expressed as follows:

H4: *Under the leadership of Chief Justice John Marshall the Court placed on its agenda of full opinions more economic cases than it did under Chief Justice Roger Taney's leadership.*

Key Court Rulings

Landmark Supreme Court's decisions often provide an indication of the value of the dominant majority on the Court, and some have the potential to shape the Court's agenda. Three particular cases have been noted for their effect in fostering corporate growth and economic expansion during the Court's first period. Schwartz (1993: 102) declared that the Dartmouth College case (1819), Charles River Bridge v. Warren Bridge Co. (1837), and Bank of Augusta v. Earle (1839) "opened the door to the greatest period of corporate expansion in our history." In the Dartmouth case, the Marshall Court held

that a corporate charter was a contract within the contract clause of the U.S. Constitution and was, therefore, protected from government infringement. In Charles River Bridge, the Taney Court declined to rule that a publicly granted corporate charter conferred exclusive or monopoly rights. Chief Justice Taney, writing for the majority, held that such a charter must be weighed against the public interest; where the rights of private property conflict with the interest of the community, the latter must be paramount. The Bank of Augusta case involved the question of whether corporations could engage in transactions beyond the states in which they were chartered. Chief Justice Taney, speaking for the Court's majority, rejected the idea that corporations cannot act or engage in contract making outside of their home states.

Of the three rulings, only the Dartmouth and the Bank of Augusta decisions were favorable to corporations and businesses. However, Schwartz (1993: 76) argued that while the Charles River Bridge decision was a blow to economic rights, "it actually facilitated economic development by providing the legal basis for public policy choices favoring technological innovation and economic change, even at the expense of some vested interests." Schwartz's argument is that the effect of the Charles River Bridge on corporate expansion proved positive on the long run. While that may have been the case, the immediate effect of the decision would be to create a chilling effect on corporate business, which, prior to this ruling, had seen the Court as a friendly place to halt or put a brake on state economic regulation. I predict, then, the following:

H5: *The Charles River Bridge case, in the short run at least, decreased the volume of economic cases coming to the Court. By contrast, the Dartmouth and Bank of Augusta decisions increased the number of economic cases the Court had to decide.*

All of the preceding hypotheses are formalized as:

$$ECON_t = \beta_1 CSRDOM_{t-1} + \beta_2 PARTYC_{t-1} + \beta_3 MARSHALL_{t-1} + \beta_4 TANEY_{t-1} + (-) \omega_0 CASES_{t-1} + \epsilon_t$$

where

ECON = the proportion of the Court's full opinions comprising economic issues

CSRDOM = Hamiltonian or conservative control of the Court (see Appendix A)

PARTYC = partisan control of the Court (see Appendix A)

MARSHALL = dummy variable for the leadership of Chief Justice Marshall

TANEY = dummy variable for the leadership of Chief Justice Taney

CASES = intervention variables for the Dartmouth, Charles River Bridge, and Bank of Augusta cases

Results

Tables 4-1 and 4-2 present the results of the multivariate time-series regression analysis between the Court's primary issue agenda during this time period (economic issues) and measures of the dominant value of the Court. The ideological variable in the first table measures the dominance of justices with strong Hamiltonian views on the Court; the same variable in the second table measures the dominance of justices with strongly Jeffersonian views. Before the regression analysis, diagnostics were run on all the independent variables to check for multicollinearity. The chief justice's leadership variables were highly correlated with the other variables ($R^2 = 0.94$), and thus were removed from the model. Regression of the party control variable on the ideological control variable shows a R^2 of 0.71 in the first table, and 0.32 in the second table, which

is below the rate of 0.80 set by Lewis-Beck (1980: 58-62). A Box-Jenkins ARIMA model (0,1,1) was estimated for the economic series.²

The results indicate that the partisan control variable was statistically significant and in the posited direction. That is, the Court was significantly more likely to write more economic opinions under the control of Federalist, Whig, and Republican justices than under the command of Jeffersonian and Democratic justices. The conservative control variable and the intervention variables for the Dartmouth, Charles River Bridge, and Bank of Augusta cases were all insignificant. Table 4.2 shows no change in the results when the ideological control variable is based on the Jeffersonian control of the Court.

Table 4-1—Measures of the Court’s Dominant Value and their Effects on the Court’s Economic Agenda, 1801-1864

Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA (1)	-0.84	0.11	-7.74	0.000
Partisan Control	1.50	0.78	1.93	0.06
Hamiltonian Control	0.11	0.90	0.13	0.90

² The ARIMA (0,1,1) is the three parameters that have to be specified for the economic series before the model can be considered a white noise model, that is, a non-integrated process or one having no autoregressive or moving-average components. In Box-Jenkins time-series technique, these parameters are denoted (p,d,q) . The p parameter refers to the order of autoregression (AR), the portion of the accumulated past that is carried over from one period to the next. The d parameter refers to the number of differencing required to make the series stationary; that is, to remove the trend or cycle in the time series. The q parameter refers to the order of the moving average (MA) or random shock that is carried from one period to the next. The moving average parameters indicate how many previous disturbances are averaged into the current values. The economic series here is specified as a first-differenced and one moving average ARIMA process. (McCleary and Hay 1980). The reader would notice that Figure 4.2 shows two outliers, one for the 1902 Court term and the other for the 1911 Court term. The Court did not meet in those two years. In the ARIMA Time-Series technique, missing values are not allowed. To resolve this problem, the value for each of these two years is calculated by averaging the scores for the year before and after (Clarke, Norporth, and Whiteley 1994).

Dartmouth	-3.70	9.00	-0.41	0.68
Charles River Bridge	-6.90	8.86	-0.78	0.44
Bank of Augusta	9.45	8.86	1.07	0.29

Q(20) = 11.90 Sig. Level = 0.54 DW = 1.89 R² = 0.37 R² (adjusted) = 0.32
(t₅₈ = 1.68, p ≤ .10, two-tailed test)³.

Table 4-2—Measures of the Court’s Judicial Value and their Effects on the Court’s Economic Agenda, 1801-1864: An Alternative Model

Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA (1)	-0.85	0.11	-7.86	0.000
Partisan Control	1.58	0.68	2.33	0.02
Jeffersonian Control	0.16	0.86	0.19	0.85
Dartmouth	-3.51	8.99	-0.39	0.70
Charles River Bridge	-6.89	8.82	-0.78	0.44
Bank of Augusta	9.58	8.88	1.08	0.28

Q(20) = 11.57 Sig. Level = 0.56 DW = 1.87 R² = 0.37 R² (adjusted) = 0.32
(t₅₈ = 1.67, p ≤ .10, two-tailed test).

The Influence of Time and the Political Environment

The Effect of Time

The two contextual factors described in Chapter 2—the lack of total docket control power by the Supreme Court prior to 1925 and the norm of unanimity that characterized the early Court—strongly suggests that factors beside the dominant value of the Court would exert a stronger influence on the Court’s primary agenda in its first

³ Since all of the hypotheses tested in this study are directional (one tailed test), the statistically significant variables at p ≤ .10 two-tailed test are significant also at p ≤ .05 one tailed test. The figure in the t subscript represents the degrees of freedom (*df*). The general rule for *df* is N - the number of parameters to be estimated (Gujarati 1988: 61).

era. One potential factor is time. The dominance of issues could simply have been a matter of growth and decline of these issues over time on the Court's docket. The model of growth and decline predicts that the Supreme Court would begin with a relatively stable share of full economic opinions, that these issue area would grow for a while, level off, and then reach a new constant level. Time, then, could be an important factor in the dynamics of the Court's attention on economic issues. This variable is represented in the model as:

$$ECON_t = \beta_1 TIME_t - \beta_2 TIME_t^2 + \varepsilon_t$$

Where $Time_t$ is a counter, beginning with the first year of the series, 1801, with a value of one and continuing, and $Time_t^2$ is the value squared. The equation posits a curvilinear relationship between the passage of time and the share of the Court's attention on economic issues (Caldeira 1981: 467).

When the time variables were added to the model, they were highly correlated with the partisan and ideological control variables and signed in the wrong direction. And when they were regressed on the economic series with other variables excluded, the results below show that they were statistically significant but not in the posited direction. Thus, they were not significant. Figure 4.2, indeed, provides additional evidence that time was not a factor in the dynamics of the Court's economic agenda. The economic series does not rise slowly, levels off, and then declines or reaches a new constant level, as would be expected if time was a factor.

Table 4-3—The Impact of Time on the Court’s Primary Issue Agenda, 1801-1864

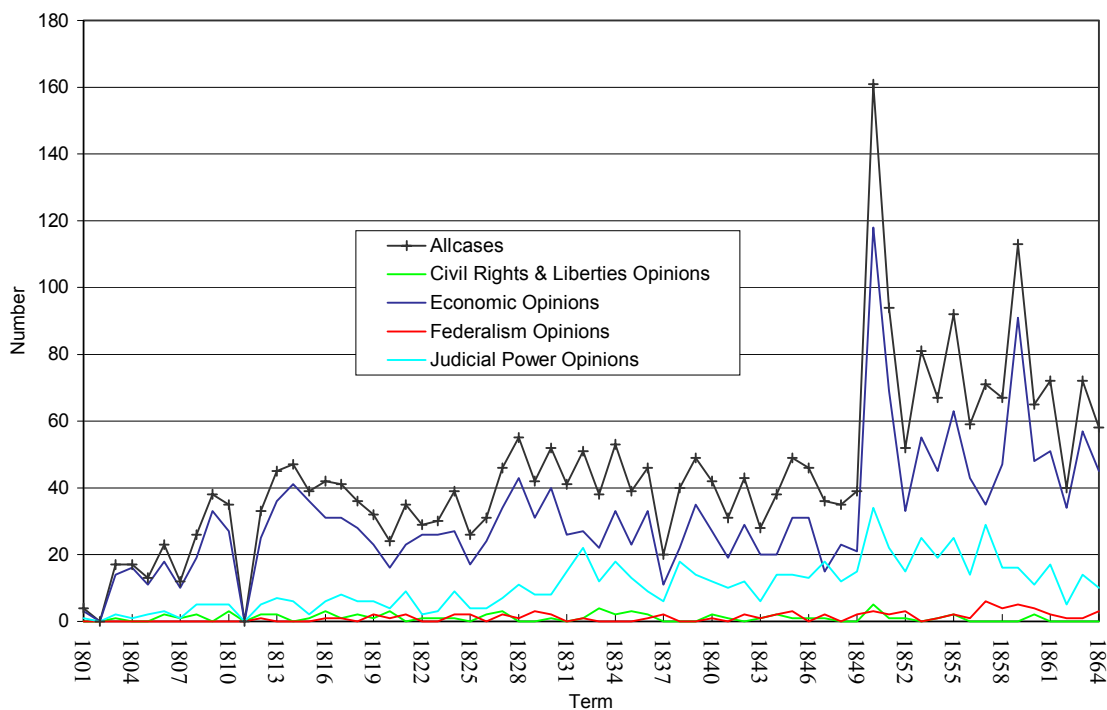
Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
MA (1)	0.88	0.07	-13.15	0.000
Trend	-1.54	0.34	-4.50	0.000
Trendsq	0.02	0.01	3.78	0.000

$Q(20) = 13.25$ Sig. Level = 0.65 DW = 1.86 $R^2 = 0.39$ R^2 (adjusted) = 0.37

The Court’s Environment

Another probable cause for the dominance of economic issues on the Court’s agenda may have been the high proportion of economic cases reaching the Court. Unfortunately, there are no data for the composition of the cases filed with the earlier Courts, which would have allowed for the effect of economic case filings to be tested in the time-series regression model. However, Figure 4.5 below shows the relationship between the Court’s caseload and the number of full opinions the Court wrote in each of the major issue areas. The chart indicates a close match between the Court’s caseload and its economic opinions per term. Pearson Correlation Coefficient for both series is 0.98 at 0.00 sig. level (two-tailed test), compared to the value for judicial power (0.77 at 0.00 sig. level), federalism (0.54 at 0.00 sig. Level, two tailed test), and civil rights and liberties (0.24 at 0.06 sig. Level, two tailed test). This strongly suggests that economic cases dominated the Court’s docket. As noted in the previous chapter, a high proportion of these cases, involved land and maritime disputes, or technical and trivial issues—the types that the late Justice Brandeis reportedly characterized as “better than they be decided than they be decided right” (Rehnquist 1987: 196).

Fig. 4.5--Trends in the Supreme Court's Caseload and in Opinions in Four Major Issue Areas, 1801-1864 Terms



Chapter Summary

The results from the empirical analysis conducted in this chapter do not support the predominant view in the judicial literature that nation-state issues constitute the dominant issue agenda of the Supreme Court from 1801 to 1864. Rather, they confirm the claims of those who have depicted the Court of the earlier eras as a common law rather than a constitutional law Court (see Goldman 1982; Frankfurter 1927; Haskins and Johnson 1981; Hobson 1996; Sutherland 1965; White 1988; Wood et al. 1998b). To be sure, the Court did decide some nation-state issues. But while these issues were fundamental to the survival of the nation, they did not dominate the business of the Court.

Economic issues dominated the Court's docket, followed by judicial power issues.

Federalism issues, like civil rights and liberties issues, constituted a very small proportion of the Court's agenda space.

McCloskey's analysis also suggests that the dominant agenda of the Court in a given period would reflect the Court's dominant value. The empirical results here provide limited support for that proposition. Partisan control of the Court was found to affect the dynamics of the Court's attention to economic issues. The Court was more likely to devote more attention to economic cases and to write more economic opinions when Federalist, Whigs, and Republican justices controlled the Court than when the Court was controlled by Jeffersonian and Jacksonian justices. However, partisan control accounted for a very small percentage of the variation in the Court's economic agenda. This, together with the fact that a close fit exists between the Court's economic opinions and its caseload during the entire period, suggests the preponderance of the influence of the environment on the Court's primary agenda. Stated differently, the dominance of economic issues on the Court's agenda space was likely to have been due more to the high proportion of economic cases reaching the Court than to its judicial value.

The next chapter surveys historical and doctrinal literature for their accounts of the volitional agenda and dominant value of the Court in its second era and for comparison with McCloskey's claims. The chapter also sets the stage for the empirical investigation carried out later.

CHAPTER 5

THE U.S. SUPREME COURT'S AGENDA AND JUDICIAL VALUES, 1865 TO 1937: HISTORICAL AND DOCTRINAL ACCOUNTS

The Court's Primary Issue Agenda: Economic Issues Dominate

The reader may recall that among McCloskey's claims was that the post-Civil War developments brought about remarkable change in the focus and agenda of the U.S. Supreme Court and that laissez-faire economic issues dominated this agenda till the New Deal. This claim is not limited to McCloskey. Most historical accounts as well as doctrinal narratives also describe the Court's agenda during its second period as dominated by economic issues (Bates 1963; Biskupic and Witt 1997; Foster and Leeson 1998; Goldman 1982; Yarbrough 1995; Schwartz 1993; Spaeth 1996). For example, Schwartz (1993: 148) declared that the dominant concern of the pre-Civil War Supreme Court shifted from nation-state problem to government-business relationships. He ascribed this shift to changes wrought by industrialization and to the reaction of the dominant political and legal order to the new economy. Spaeth (1966: 9) proclaimed that "with the end of the Civil War, the issue of federal-state relationship took a secondary position in the panoply of judicial concerns" and was replaced by the old issue of property rights now cloaked in a new guise. He noted that the Supreme Court, in the ensuing controversy, frequently aligned itself with the forces of wealth.

However, not everyone believes that the Court's fixation with economic matters began immediately after the Civil War. Goldman (1982: 160) claimed that the Court's preoccupation with economic regulation issues took place during the 35 years beginning with 1873. Foster and Leeson (1998: 8) averred that the Supreme Court concentrated on "interpreting the Constitution in the light of the nation's changing economy" in the years between 1877 and 1940. Even McCloskey himself conceded that in the early postwar years, the Court seemed willing, if not entirely content, to leave economic affairs to the political branches of government (1994 ed.: 82).

Still, these are differences over the timing and tenure of the Court's economic jurisprudence, not its substance. In general, all of these scholars agree that economic issues dominated most of the Court's second period. Their position is supported by a recent empirical study (Wood et al. 1998b), which finds that the Court allocated the lion's share of its docket to economic cases in the period between 1888 and 1940.

But much like the accounts of the Court's agenda in the first era, historical and doctrinal explanations of the Court's activities in its second era also seem to be based on several landmark economic cases the Court decided during that period. The Chase Court's decisions in Hepburn v. Griswold (1869), Knox v. Lee (1870), and the Slaughterhouse Cases (1873) are among the most frequently mentioned of these cases. In the Hepburn case, the Court declared the Legal Tender Acts as impairing the obligation of contracts, only to reverse itself in Knox v. Lee. In the Slaughterhouse Cases, a narrow majority ruled that the states' right to bestow a monopoly privilege on a corporation was a valid exercise of their police powers. The Waite Court is also noted for its decisions

prohibiting states from passing tonnage taxes on interstate shipments (Philadelphia v. Reading Railroad, 1873), denying state governments the right to grant telephone monopolies (Pensacola Telegraph Co v. Western Union Telegraph Co., 1878), and forbidding state regulation of interstate railroad rates (Wabash, St. Louis and Pacific Railway Co. v. Southern Pacific Railway Co., 1886).

Other frequently cited cases include the Court's decisions in U.S. v. Knight (1895), Pollock v. Farmers' Loan and Trust Co., Allgeyer v. Louisiana (1897), and Lochner v. New York (1905). In the *Knight* case, the Fuller Court limited the ability of the government to fight trusts and monopolies, holding that the interstate commerce clause of the U.S. Constitution did not extend to manufacturing. The same Court struck down Congress's authority to establish an income tax in Pollock, established contractual rights of individuals in Allgeyer, and employed the liberty of contract doctrine to invalidate state governments' regulation of working hours for women and children in Lochner. The "Lochner era" continued throughout the early part of the twentieth century, as the Court employed its judicial review power to invalidate most of the elements of the New Deal. Not until after 1937 did the Court reverse its course and repudiate the Lochner doctrine.

There is a question, however, over how much attention the Court devoted to property rights and economic regulation questions. As this author discovered when coding the cases, economic regulation issues formed only a very small proportion (less than 5%) of the cases the Supreme Court decided between 1865 and 1887. Most of the economic issues in litigation in the years between 1888 and 1940 were predominantly

common law topics and federal specialties like admiralty, bankruptcy, diversity mortgage foreclosures, patents, diversity suits against railroads for personal injuries, and claims against the government (see also Rehnquist 1987; Wood et al. 1995, 1998b). Cases of these types swelled the Court's docket, in part, because the Court during this time period inhabited a mostly economic environment. After the Civil War, the U.S. entered the industrial age and became transformed from primarily an agrarian society to an industrial giant. Social and economic dislocations caused by the new economic milieu led to a rapid growth in the litigation and to a substantial increase in economic cases on the Court's appellate docket. Furthermore, the majority of these economic cases came to the Court under mandatory jurisdiction. Wrote Frankfurter and Landis (1927):

“The great commercial development brings its share of litigation to courts; booms and panics alike furnish grist for the courts. The vigorous stimulus of invention occasions many and complicated patent controversies. The new sea-borne traffic also carries a heavy cargo of admiralty business. These are items that add greatly to the work of the courts without any enlargement of their jurisdiction. They were the natural increment of the country's growth. But the Civil War also marks the beginning of vast extensions of federal jurisdiction...A new body of federal laws widely touched the business of the country and correspondingly affected the business of the courts” (63).

These observations suggest that the Court's primary issue agenda in this second period was more likely to have been shaped by the Court's political environment than by its dominant value.

The Dominant Value of the Court: Conservative Views Prevail

If the prevailing view in the historical and doctrinal literature is that laissez-faire economic issues dominated the Court's agenda, the Court itself is often portrayed as a stronghold of economic conservatism during most of this second period. For instance,

Abraham and Perry (1994: 10) asserted that “The chief concern of this long era was to guard the sanctity of property.” McCloskey, of course, made the same argument in his analysis, holding that the Court was preoccupied with conservative propertied interests. Similar views are found in other historical and doctrinal works (see Goldman 1982; Schwartz 1993: 174-175; Spaeth 1966:9; Swindler 1969: 35).

The Court is said to have espoused economic laissez-faire the most under Chief Justices Fuller and Taft. Currie (1990: 5) found the Fuller Court more active in protecting economic interests than its predecessors. The Court “showed that it was on the side of business clearly in 1894.” He described the Taft Court as having brought about “ a reign of terror for state and federal legislation” (133). Other scholars also describe the Fuller and Taft Courts as bastions of conservatism. Trotsky (1988: 617) wrote that the Taft Court “displayed a pro-business stance that had not been seen since the 1890s.” Mason noted that “Taft and his majority of six believed there are certain rights beyond the reach of experimentation” and that “it was the business of the Court to stay such efforts” (1956: 293). Not surprisingly, the Taft Court’s majority raised the principle of laissez-faire to an ideal by its vigorous defense of business and commercial enterprise from government regulation (1984: 94). Echoing a similar note, Biskupic and Witt wrote that the Court became increasingly conservative under Taft. The Taft Court not only revived the Lochner doctrine of freedom of contract but vigorously use it to derail state economic regulation and to restrict federal interstate commerce powers (1997: 37).

However, not all scholars agree that the Supreme Court was doctrinal in his support for economic laissez-faire. Goldman (1982) argued that the advent of the Fuller

Court was not the turning point to a full-scale laissez-faire Court as is usually assumed, but rather a transition. To be sure, there were several famous closely decided decisions that gave laissez-faire a significant constitutional boost, but overall the proportion of state economic legislation the Fuller Court struck down (1.6 percent) was precisely the same as that of the Waite Court. Bates (1963: 231) also noted that some decisions of the Fuller Court were very supportive of state police powers. Currie (1990: 231, 249) describes the White Court as "at best a weak-kneed well-meaning sort of court which responded to liberal pressure but as soon as that pressure was removed by the entrance of the United States into the World War immediately reverted to type--the traditional conservative type of the Supreme Court". Schwartz (1993) divides the Hughes Court into two sub-periods. From 1930 to 1937, the conservative bloc dominated the Court and vigorously defended property rights against government regulation. The second sub period (1938-41) was the period of liberal dominance, made possible by new additions to the Court. This sub-period began in 1938 when Justice Roberts, who had initially voted with the conservative bloc in several decisions striking down important New Deal measures, suddenly switched sides and joined the liberal wing in bringing about the great reversal in the Court's economic jurisprudence--the so-called "switch in time to save nine" (228-38). Martin (1992: 683) observes that overall the Supreme Court was generally responsive to the massive changes transforming the American life and "ultimately sanctioned an expansion of both state and federal power in order that government at both levels might cope more effectively with the unprecedented problems of the age" (see also Semonche 1978; Urofsky 1985, 1983). Thus, there are indications of progressivism during this era.

The Ideology of the Justices

The Supreme Court witnessed more membership change in this second era than in any other era. Forty-two associate justices sat on the Supreme Court during the 72-year period between 1865 and 1937. Three of them—Justices White, Hughes, and Stone—later became chief justice. However, there was considerably more continuity than raw figures would indicate. Two of the most influential justices ever to sit on the Court—Samuel Freeman Miller and Stephen J. Field—served under four chief justices: Taney, Chase, Waite, and Fuller. Two other giants of the Court, Joseph Bradley and John M. Harlan I, also served under both Waite and Fuller. Another of the Court’s intellectual leaders, Oliver Wendell Holmes, Jr., served under both Fuller and White. Four of the justices who sat with Chief Justice White—Hughes, Van Deanter, McReynolds, and Brandeis—were still on the Court when President F. D. Roosevelt proposed a Court-packing plan.

Among the remaining justices who sat on the Court during this second period none was distinguished, several served for less than 10 years, and a few for less than 5. Most of them made no lasting contribution to the Court’s constitutional jurisprudence. Nonetheless, historical and doctrinal accounts, as well as recent empirical studies, have shed some light on their ideological views, as well as on the views of the distinguished justices.

Conservatives

The justices described or categorized as strongly conservative include three holdovers from the previous era, David Davis, James Wayne, and Stephen J. Field.

Others include William Strong (1870), William B. Woods (1880), Horace Gray (1881), Locus Q. Lamar (1887), David J. Brewer (1889), Howell E. Jackson (1893) Rufus Wheeler Peckham (1894), Williams Van Devanter (1910), James McReynolds (1914), Pierce Butler (1922), George Sutherland (1922), Edward Sanford (1923), and Owen J. Roberts (1930).

The conservatism of Davis, Wayne, and Field has already been noted in Chapter 3. Justice **Strong**, despite his opinion in the second Legal Tender case, “usually sided with the conservative, pro-corporation wing of the Court” (Kutler 1969: 1157). **Woods** served seven unremarkable years on the Court and was conservative on economic matters (Filler 1969: 1334; Lanier 1997: 43). **Gray** showed no consistency in his views on many legal issues. His specialty was largely historical and technical (Filler 1969: 1715). But he is described as strongly pro-business (Furer 1986: 236; Lanier 1997: 43). **Lucius Q. Lamar** was a “strict constructionist,” who during his five years on the Court voted consistently to uphold the rights of business (Paul 1969: 1444-46). In one of his most famous opinions, Kidd v. Pearson (1888), Lamar excluded manufacturing from the definition of commerce, making it difficult for Congress to regulate (Biskupic and Witt 1998: 903).

Brewer and Peckham were very conservative as well. **Brewer**, according to Latham (1970: 70; Fiss 1992), was a “stand-pat conservative” who strongly opposed government interference in the economy, while **Peckham** “embraced a social Darwinist approach that went considerably beyond that of his nominator...” (Abraham 193: 146). The two justices, along with Justice Field and Chief Justice Fuller, formed the nucleus of

the conservatism on the Fuller Court, “jointly concerned that the task of the Court should be the prevention of dangerous changes in society”(Swindler 1969: 14). Their frequent ally on the Court was Justice Jackson. **Jackson** believed in “close judicial scrutiny over actions of state and local governments” (Schiffman 1969: 1612-13; Abraham 1993: 146, 150-151; Furer 1986: 245-254; Lanier 1997: 45-48).

Much has been written about the so-called “four horsemen”—**Sutherland**, **McReynolds**, **Butler**, and **Van Devanter** (see Brown 1945; Friedman 1996; Green 1992; Paul 1992; Rosenberg 1992; Scheb 1992). Their reputation is that of a coalition of reactionary conservatives who consistently opposed the New Deal legislation and drew the wrath of President Franklin Roosevelt, leading the latter to propose a Court-packing plan. This reputation has empirical support. In their study of the Supreme Court between 1888 and 1940, Wood et al. (1998b: 217) find the average liberalism scores in nonunanimous economic cases for the four justices to be below 40 percent, with McReynolds being the most extreme. Finally, **Sanford**, one of the Taft Court justices, was “an undistinguished conservative justice” who generally followed the lead of the Chief Justice (Schwartz 1993: 214; see also Goldman 1982: 253).

Moderates

Several of the justices of this period have been described as neither doctrinaire conservatives nor extreme liberals. Included in this category is one holdover from the previous era, Nathan Clifford (1858). Others are Joseph Bradley (1870), Ward Hunt (1872), Stanley Matthews (1881), Samuel Blatchford (1882), Henry B. Brown (1890), George Shiras (1892), Joseph McKenna (1898), William R. Day (1903), Horace H.

Lurton (1909), Mahlon Pitney (1910), and J. R. Lamar (1910). **Hunt** had a brief tenure and left no mark on the Court (Bates 1936; Schwartz 1993). But while there, he “tolerated the exercise of state regulatory power so long as it did not interfere with economic opportunity and development” (Kutler 1969: 1225). **Matthews**, a noted railroad lawyer and counsel to “robber baron” Jay Gould, also had a brief and unremarkable Supreme Court career. He was expected to join the conservative wing of the Court, but once on the bench, he “was more moderate in his defense of laissez-faire than had been anticipated by his former senatorial opponents” (Goldman 1982: 167-168). **Blatchford**, who replaced Hunt, also spent a few years on the Court. He is described as moderately conservative (Lanier 1997: 44).

Brown was “neither a liberal nor a reactionary, neither an extreme nationalist nor a states’ rights advocate, neither a representative of the plutocracy nor an exponent of progressivism” (Goldfarb 1969: 1557).¹ **Shiras** “appeared to have been an undistinguished Justice, conservative but not dogmatically (or articulately) so” (Paul 1969: 1577). **McKenna** is described as showing no consistent philosophy while on the Court, sometimes voting to uphold economic regulation and at times aligning himself with the laissez-faire forces (Furer 1986: 264-65; Lanier 1997: 52), but his leanings were toward the liberal side (McKenna 1992). **Day** and **Pitney** were moderately conservative on economic matters (Handberg 1976: 375; Bartee 1992a, 1992b; Furer 1986: 264-65; Helminski 1992; Lanier 1997: 52; Stenzell 1992; Wood et al., 1998: 207). **Lurton**,

¹ But see Goldman (1982), whose empirical analysis of the voting behavior of the justices on the Fuller Court indicates that Brown’s economic conservatism matches that of Brewer, Field, Peckam, and White (176).

according to Schwartz (1993: 205), “was a mediocre judge who turned out to be a mediocre Justice.” He spent five lack-luster years on the Court and “contributed little to Supreme Court’s jurisprudence.” Furer (1986: 276-277) described him as a moderate conservative who voted to uphold the Sherman Antitrust Act and supported several legislative acts designed to enhance the federal government’s regulatory powers. However, Goldman’s empirical analysis indicates that Lurton was far more conservative than historical accounts suggest (1982: 176). **J. R. Lamar** was another Justice with short and undistinguished career. But in his six years on the Court, Lamar was sympathetic to property rights as well as supportive of state economic regulation under the states’ police powers (Goldman 1982: 252).

Bradley, a former railroad attorney, presents a difficult analysis. While Abraham (1974: 119) viewed him as a justice who “would not disappoint the conservative business community during his two decades on the bench,” Friedman (1969: 1189) noted that “Bradley turned out to be the Court’s staunchest defender of state regulation of railroad rates.” Schwartz (1993: 162) also found Bradley’s opinions on matters affecting corporate control “to be strikingly free of bias in favor of corporate power.” Another justice difficult to categorize is **Roberts**, appointed by President Hoover. Goldman (1982) argued that except for his brief alliance with the liberals in the late 1930s, Roberts remained generally conservative in both economic and civil liberties issue areas (336). However, Urofsky (1997: 14-15) noted that while Roberts tended to vote with conservatives, he was basically a moderate. Mayer (1987:227-228) made the same observation, noting that in cases involving New Deal legislation, Roberts sometimes

would vote with the liberal majority and sometimes with the conservative bloc. And Pritchett, in his analysis of the pattern of voting alignment on the Roosevelt Court, also found that Roberts, along with Chief Justice Hughes, occupied the ideological center of the Court between 1931 and 1936 (1948: 33).

Liberals

The associate justices typically described as liberals, in comparison with other justices of this period, are Justices Samuel Freeman Miller (1862), John Marshall Harlan (1877), Oliver Wendell Holmes (1902), Williams H. Moody (1906), Charles Evans Hughes (1910), Louis Brandeis (1916), John Clarke (1916), Harlan Fiske Stone (1925, before assuming the chief justice position), and Cardozo (1932).

Miller's economic liberalism was noted in Chapter 3. **Harlan** is described as a strong supporter of judicial deference to the legislature in matters of public policy and a justice who consistently applied this principle to not only economic matters but civil liberties and civil rights issues as well (Leavitt 1974: 5-9; Lanier 1997: 42). **Holmes**, the best-known member of the Fuller Court, is also regarded as one of the most brilliant men to sit on the Court. According to Schwartz (1993: 219), Holmes espoused a judicial philosophy—often in dissent—that was not only progressive for his time but also laid the groundwork for the eventual change in the Court's decisions to support economic regulation and the coming welfare state. **Moody**'s career on the Court was lack-luster—he wrote very few opinions. But he is portrayed as a Theodore Roosevelt progressive who “demonstrated a clear liberal policy perspective” (Lanier 1997: 55). **Hughes** is also described as a liberal or progressive throughout his tenure as associate and chief justice.

Friedman (1996) claimed that “in the general area of civil rights and liberties...no member of the Court was more liberal.” Nearly as strong a statement, he said, could be made with respect to Hughes’s views on economic regulation issues.

Brandeis’s philosophical differences with Holmes are well documented (Novick 1989; Strum 1984). However, the two men, with Justices Harlan and Clarke, were supporters of the Progressivist ideals (Leavitt 1970: 415). Goldman (1982) described **Clarke** as “one of the most liberal justices ever to sit on the Court.” He believed that had Clarke stayed on the Court long enough for Franklin Roosevelt to be elected, the confrontation between the Court and the New Deal could have been avoided (253). **Stone** also gets categorized as a liberal, but not as strong a liberal as Holmes, Brandeis, Clarke, and Cardozo (Bates 1963; Matsuda 1992). The literature on Stone indicates that in his early years on the Court, and while a member of the minority, he usually aligned with Holmes and Brandeis, but that he became moderate or conservative in both economic and civil liberties issues after his promotion to the chief justice position (Mayer 1987: 224-225; Goldman 1982: 254; see also Abraham 1993, 1997; Lanier 1997: 74; Reinstrom 1972: 66; Goldman 1982: 336; Mayer 1987: 225; Wood et al. 1997). **Cardozo**, who replaced Holmes in 1931, also has been described as a New Deal liberal who supported major pieces of the New Deal programs as well as broader protections for civil liberties (Abraham 1993: 206; Lanier 1997: 79; Pritchett 1948: 3).

Finally, four carry-overs from the first period, John Catron, Nathan Clifford, Robert C. Grier, and Samuel Nelson fit into the liberal category on economic issues

because of their general opposition to monopolies and support for economic regulation. Their economic jurisprudence has already been noted in chapter 3.

The Leadership of the Chief Justices

In the period between 1865-1937, six different justices directed the work of the Court and led the institution through the changes in jurisprudence that accompanied the massive changes in society and politics. They were Chief Justices Chase, Waite, Fuller, White, Taft, and Hughes.

Samuel Portland Chase, 1864-1873

In 1864, President Abraham Lincoln appointed Samuel Portland Chase, a fellow Republican, to replace the retiring Chief Justice Taney. Chase led the Court from the close of the Civil War through the Reconstruction period. As chief justice, Chase was undistinguished. Schwartz (1993: 150) described Chase as mediocre and intellectually inferior to several of his associates on the Court—particularly to Justices Miller and Field. He noted that during Chase’s tenure as chief justice, the control of the constitutional legislation and policy rested with Congress. The Court took no dramatic legal initiatives and played only a minor role. Schwartz attributed the problem to the fact that Chase never gave up his presidential ambitions throughout his tenure as chief justice, which reduced his ability to exert effective leadership on the Court (1993: 149). Bates (1938: 193) echoed the same view. He depicted the Chase Court as “a dramatic episode, but nonetheless merely an episode, in the turbulent transition from war conditions to those of settled peace.”

Very little information exists about Chase's economic views, but he appeared to have been a conservative. Prior to his appointment, **Chase** was an abolitionist with a reputation for defending runaway slaves. President Lincoln appointed him as chief justice on the expectation he would help lead the Court to validate several emergency measures the federal government took during the war and others contemplated for the postwar period (Biskupic and Witt 1997: 893). However, on the Court, Chase espoused a conservative economic philosophy. In the two most celebrated economic decisions rendered by his Court, Hepburn v. Griswold (1869) and the Slaughterhouse Cases, Chase opposed government power. He wrote the majority decision in Hepburn v. Griswold (1869), which declared the Legal Tender Acts unconstitutional, and his preference for property rights also led him to dissent in the Slaughterhouse Cases. (see Schwartz 1993: 157-161).

Morrison R. Waite, 1874-1888

Upon Chase's sudden death in 1873, President Grant appointed Morrison Waite as chief justice. At the time Waite assumed the mantle of leadership, the Court was still reeling from the effects of the Civil War and its tarnished reputation under the former chief. Waite, according to Schwartz (1993), managed to restore the Court's prestige, but he "had nothing of the grand manner—the spark that made Marshall and Taney what they were"... and "he remains a dim figure in our constitutional history." Bates (1938) notes that the Waite Court, like its predecessor, was relatively undistinguished, and that except for a few outstanding justices like Miller and Bradley, the rest of the membership were mediocre—men whose performance was either unremarkable or short. However, Steamer

(1986) described Waite as the most capable of the six chief justices that followed Marshall and Taney. He argued that while Waite did not turn out to be like his noted predecessors, he was nonetheless a successful chief. Steamer rated Waite the best manager of the Supreme Court's business, along with Chief Justice Fuller. He noted that Waite's primary goal was to maintain the Court's unity. This Waite tried to accomplish by 1) keeping dissent at a minimum, 2) tactfully dealing with the sensitive egos of his colleagues, 3) assigning where possible the writing of liberal opinions to conservative justices and vice versa, and 4) assigning more opinions to himself (1986:130).

With regard to the Waite Court's economic jurisprudence, Goldman (1982: 171) finds that while the majority of the Waite Court's justices were sympathetic toward property rights, they were not promoters of laissez-faire. They upheld state and federal regulation in over seventy-five percent of the cases in which the constitutionality of the actions of government was at issue. **Waite** himself "was sympathetic to the rights of private property," but he "was even more sympathetic to the rights of states to exercise their police powers in the public interest" (Goldman 1982: 167). According to Filler (1969: 1251-1253), Waite disappointed all those who thought he would use his leadership to repudiate state economic regulation and to forestall "confiscation" of private property. Waite's moderation reportedly stemmed from his concern about the consequences of unbridled laissez-faire. He and a majority of his colleagues believed that the state deserves discretion in its actions toward the individual (Filler 1969: 1251-1253). They were "not as fanatic as was Justice Field, who vigorously espoused economic laissez-faire" (Goldman 1982: 163).

Melvin Fuller, 1888-1910.

The Waite Court ended with the death of Chief Justice Waite in 1888. The man who replaced him was Melvin Fuller, appointed by President Cleveland. At the time of his appointment, Fuller, a Democrat, was a nationally unknown figure. There are conflicting historical accounts of his leadership. Bates describes Fuller as “the least important member of his own Court, rarely leading and occasionally dissenting.” He points out that during Fuller’s twenty-two years on the Court, the Chief Justice managed to write only one landmark opinion, the *Knight Case*, in which he demonstrated less than brilliant performance (1936: 242). But other historians find Fuller to be one of the most effective chief justices the Supreme Court has produced. According to Frankfurter (1970), King (1950), and Schwartz (1993), Fuller had a remarkable sense of good humor that helped him smooth over differences among strong independent minds on the Court. It was Fuller, wrote Schwartz, who started the tradition of having each Justice greet and shake hands with every other Justice each morning. Besides his charming and courteous personality, Fuller is also described as a skillful manager and moderator of conference deliberations. He reportedly had a remarkable capacity for directing the Court’s conferences (Schwartz 1993: 175). Steamer (1986: 133) noted that Fuller, like Waite, generally assigned more opinions to himself than to any other justice and retained control of opinion writing by dissenting as little as possible.

In terms of his economic views, **Fuller** is described as a “defender of wealth” (Orth 1992: 321) and a strict constructionist who espoused economic laissez-faire and a limited role for government in economic activities (Furer 1986: 218).²

Edward Douglas White, 1910-1921

After Melvin Fuller died in 1910, President Taft appointed associate Justice Edward Douglas White to become the new Chief Justice. Taft, himself, would later succeed White after the latter died in 1921. White’s record of leadership on the Court is mixed. According to Goldman (1982: 261-262) and Schwartz (1993: 204-205), White inherited a Court divided by personal feuds and personality conflicts among its members. Justice Harlan I, for example, disliked Justice Holmes. Justice McKenna lacked self-confidence, which rendered him unable to express a definite opinion. Justice Hughes was often tense and hypersensitive. The Chief Justice himself, before his promotion, was distant and difficult to work with. But by 1912, the atmosphere on the Court had become amiable. Both scholars credit White’s successful social leadership for the new relaxed situation. White, says Schwartz, was not only considerate, he was intellectual as well. He sought to promote agreement on the Court’s opinions (1993: 207).

Not everyone is convinced, however, about White’s “effective” leadership. Goldman (1982) argued that White’s social and intellectual effectiveness was not matched by his conference leadership skills. “The problem with Chief Justice White,” wrote Goldman, “was not that he lacked the intellectual prerequisites for effective task leadership, but that

²But according to Goldman (1982), Fuller had the second highest rate of support for government regulation during his tenure.

he lacked the intellectual prerequisites for effective conference leader. White was often indecisive and his conference presentations of cases were models of long-windedness and ambiguity. He allowed his colleagues to be similarly diffused in their remarks, thus unnecessarily prolonging the conferences” (262). Steamer (1986) agreed that White was “the intellectual equal of all who served him, was in fact superior to most of them,” and was a skillful and an effective administrator. But he found White to be deficient in his role as manager of the conference. White’s easy-going nature, wrote Steamer, made him unable to exercise leadership at the conferences, with the result that he often allowed extended debate, which in turn “exacerbated normal personal differences and elevated the level of tension” (135-136).

Some scholars (Highsaw 1981: 5; Latham 1970: 96) have described White’s position on economic issues as conservative. Others, however, noted that White occasionally voted to sustain government regulations that he regarded as beneficial to the public interest (Abraham 1993: 145; Lanier 1997: 49). The White Court, according to Biskupic and Witt (1997: 35) approved some progressive measures, such as employers’ liability and government’s authority to regulate food and drugs. But perhaps this was because liberals like Harlan 1, Holmes, Clarke, Brandeis, and moderates like Pitney and J. Lamar dominated that Court.

William Howard Taft, 1921-1930

In May 1921, Chief Justice White died suddenly. The man chosen to replace White was none other than the man who had appointed him, former President William Howard Taft. Taft was the only person ever to serve both as president (1909-13) and as chief

justice on the Supreme Court. As president, Taft had made no secret of his long-burning desire to be Chief Justice. Nominated by President Harding, Taft was confirmed in June 1921. His tenure lasted only nine years. Historical accounts indicate that Taft demonstrated exceptional administrative and conference skills as chief justice. Mason noted that while Taft did not dominate his colleagues the way Marshall did, he too had a clear conception of the office and powers of Chief Justice. Taft believed, as Marshall did, that unanimity on the Court gives " 'weight and solidarity' to judicial decisions" (1964: 198). Indeed, Taft was said to be a great admirer of John Marshall and reportedly told a friend when he was still president that he would rather have been John Marshall than George Washington (Mason 1987: 90). What made Taft an effective leader on the Court, according to Goldman (1982: 262) was that, unlike his two predecessors, he recognized his limitations. He never hesitated to defer to his colleagues, especially to Van Devanter whom Taft regarded as intellectually gifted and a brilliant jurist. Mason noted that Taft, like Marshall, went to great pains to promote teamwork and unanimity on the Court.

He "persuaded by examples, frowned on dissents, exploited personal courtesy, charm, maximized the assignment and reassignment powers, relied on the expertise of his associates...Seemingly trivial personal considerations--the sending of Salmon to Justice Van Devanter, the customary ride he gave Holmes and Brandeis after the Saturday conference, the Christmas Card that always went out to Justice McKenna--all such personal attention to highly dissimilar human beings contributed immeasurably to judicial teamwork (1964: 198-205).

Taft's associates on the Court appeared to have appreciated his warmth and leadership skills. Justice Holmes who had been on the bench since 1902 reportedly stated in 1925 that "never before...have we gotten along with so little jangling and dissension" (Mason 1964: 199). Justice Brandeis, referring to how other Justices often deferred to the

Chief Justice in many opinions, was said to have remarked that "They (the other justices) will take it from Taft but wouldn't take it from me...If it is good enough for Taft, it is good enough for us, they say-- and a natural sentiment" (quoted in Mason 1964: 203). Only in his last years in office, we are told, did Taft feel like he had lost control of the Court (Mason: 69-70).

Taft's exceptional leadership was not confined to conference deliberations and conflict management on the Court. Before Taft, political considerations openly affected Senate confirmation decisions. But Taft strove hard both as president and as chief justice to raise the quality of the nominees, minimize the significance of confirmation proceedings, and boost the Court's prestige (Abraham 1992). Taft pushed for and got Congress to pass the 1925 Judiciary Act that gave the Court total control over its docket.

Taft is described as a doctrinaire conservative. According to Mason, **Taft** believed he was appointed to the mantle of Court to quell any "socialistic raids on property rights." So deep-seated was his belief in free enterprise that he refused to accept government intervention as an appropriate and essential remedy for economic depression. Consequently, Taft worked tirelessly to oppose the appointment of justices whose views differed from his own, and he often wrote the majority opinions that constrained the powers of both the national and state governments to the limits that he believed was set by the Constitution (1987: 94).

Charles Evans Hughes, 1930-1941

The Hughes Court began in 1930 after President Hoover nominated and the Senate confirmed Justice Charles Evans Hughes to succeed retiring Chief Justice Taft. Hughes, a

former associate justice, was 68 years old when he was appointed and the oldest man chosen to head the Court. But by many accounts, Hughes was an effective task leader. Schwartz (1993) compares him to Marshall and Taney in the way he ran the Court. According to Schwartz, Hughes exercised tight control over the conference discussion, rarely allowing any Justice to speak out of turn and making sure that the discussion followed his own guidelines (1993: 227). Justice Frankfurter's comments illustrate the way Hughes conducted conference business. Frankfurter wrote that under Chief Justice Hughes "the conference was not a debating society"...(and that) "To see (Hughes) preside was like witnessing Toscanini lead an orchestra...Everyone was better because of Hughes, the leader of the orchestra" (quoted in Schwartz 1993: 227). As Chief Justices, Hughes frequently—but not always—aligned himself with the liberal wing of his Court (Goldman 1982: 332-336).

Agenda and Partisan Control of the Court

Goldman (1982: 160-65) points out that the dominant political forces in the country during this second era of the Court were the Republican Party and their business allies, and that they favored and promoted economic laissez-faire (the idea that government should not interfere in a free-market economy). The forces of economic regulation were labor, farmers, and the Democratic Party. Gates (1987) echoed the same point, noting that the Republican Party, throughout its history, has generally supported economic freedom over government regulation, while the Democratic Party has generally favored state regulation of business activities or of the economy as a whole. Examining the party affiliation of the forty-six justices who sat on the Court during this second

period, thirty-one of them (67%) were Republicans, fifteen (33%) were Democrats. Only seven—Lurton, Jackson, J.R. Lamar, Brandeis, Brandeis, Butler, Stone, and Cardozo were appointed by presidents of the opposing parties. Fifty-eight percent of the justices classified as conservatives and moderates were Republicans, compared to twenty-six percent of those classified as liberals and moderates. If the justices' views mirrored that of their respective political parties, Republican justices should be more pro-business and anti-economic regulation than Democratic justices. Again, such an alignment between the partisan affiliations of the justices and these two major parties could have significant implications for the Court's volitional agenda during this period.

Chapter Summary

Although this author and others found the Court's workload in the period between 1865 and 1937 to consist mostly of what Pacelle referred to as "ordinary economic" cases, historical accounts paint a different picture of the Court's primary issue agenda and its dynamics. According to these accounts, nearly all the landmark cases of this era dealt with economics, and questions about economic regulation formed the major constitutional issue and the substance of these cases. Furthermore, the Court is often portrayed as a stronghold of conservative views, and the majority of the justices as supporters of economic laissez-faire. Fifteen justices have been characterized as very conservative on economic matters. They are Wayne, Field, Swayne, Strong, Gray, Lucius Q. Lamar, Fuller, White, Taft, Brewer, Peckam, Sutherland, McReynolds, Butler, and Van Devanter. Five justices—Chase, Davis, Jackson, Woods, and Sanford—also fall into the conservative bloc. Economic liberals were Miller, Harlan I, Holmes, Clarke,

Brandeis, Stone, Hughes, Cardozo, and Moody. Those falling in the moderately conservative category are Justices Blatchford, Bradley, Brown, Catron, Clifford, Day, Grier, Waite, Hunt, Matthews, McKenna, J.R. Lamar, Nelson, Pitney, Shiras, and Roberts. Overall, there were twenty conservative or conservative-leaning justices, nine liberal or liberal-leaning justices, and seventeen moderates. Conservatives were in the clear majority in thirty-three of the seventy-three terms (that is, 45% of the terms) that the Court was in session between 1865 and 1937. Liberals had a clear majority only in the 1937 term. The rest of the terms can be described as swing terms, that is, terms in which there was no clear conservative or liberal majority (see Appendix B). Republican justices dominated the Court in about half of the terms that the Supreme Court held sessions. Among the chief justices of this period, Waite, Fuller, Taft, and Hughes are described as great administrators and the most effective conference leaders, while the Fuller and Taft Courts reportedly espoused economic laissez-faire the most. These general findings about the Court provide the basis upon which to test McCloskey's claims.

The next chapter will use empirical data to determine the nature of the Court's volitional agenda in this second period and to assess the effects of the Court's dominant value on that agenda.

CHAPTER 6

THE COMPOSITION AND DYNAMICS OF THE SUPREME COURT'S PRIMARY ISSUE AGENDA, 1865-1937: AN EMPIRICAL ANALYSIS

The last chapter raises two important questions. Was economics the Court's primary issue agenda from 1865 to 1937, and, if so, was this agenda determined by the dominant value of the Court or by other factors, such as demands from the political environment? This chapter uses empirical data to answer these questions. The first section of the chapter examines the Court's decisional agenda to determine how much of this agenda was devoted to economic issues. The next section tests the proposition that the Court's primary issue agenda during this time period was driven by the Court's dominant value.

How Much Did Economic Issues Dominate?

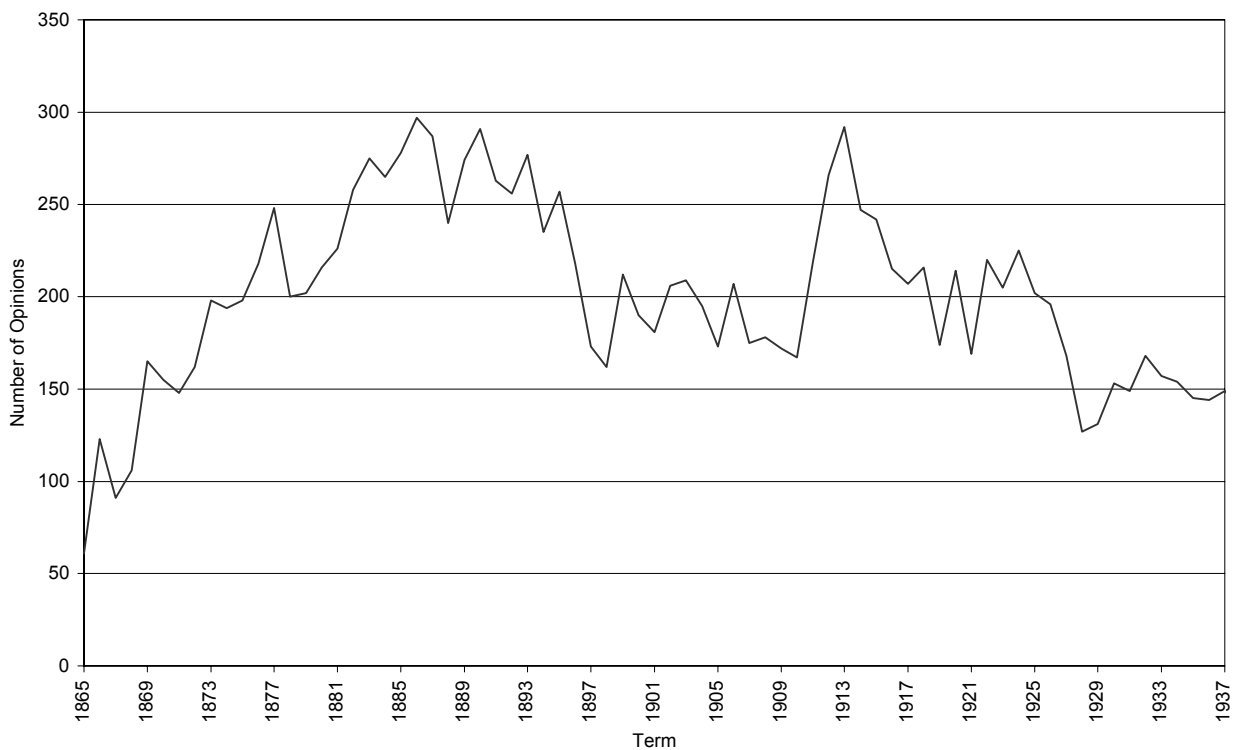
As indicated in the last chapter, most Supreme Court historians and doctrinal scholars, including McCloskey, contend that economic issues commanded the Court's primal attention during its second era. If their assessments of the Supreme Court's agenda are correct, economic issues should constitute the Court's volitional agenda during this period. This expectation is expressed as follows:

H1: *From 1865 to 1937, economic issues commanded the largest share of the Court's agenda space.*

Figure 6-1 shows the number of cases in which the Supreme Court wrote a full, formal opinion during the Court terms 1865-1937. The chart describes a general upward

trend across the first half of the period (1865-1887), that is, during the height of the Industrial Revolution. It then drops to a constant level during the Progressive Era, between 1897 and 1912, only to rise sharply thereafter. After 1915, the Court's full opinions return once again to the downward trend that began in 1890, seeming to level off in the 1930s. Over the entire period, the Court decided a total of 14, 918 cases, of which 14, 636 were full opinions. The latter averaged 200 opinions per term. The largest

Fig. 6.1. Trends in the Full Opinions of the U.S. Supreme Court, 1865-1937 Terms

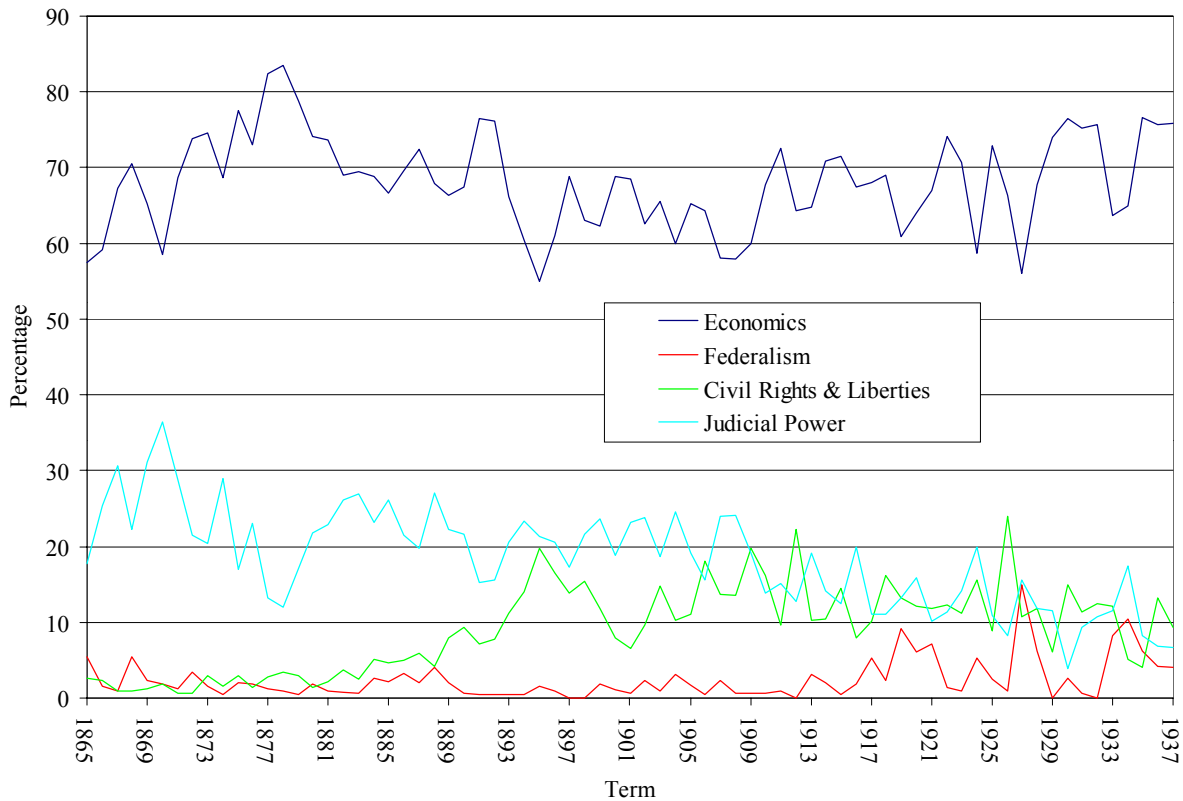


number of opinions occurred during the Fuller Court (297), while the smallest occurred during the Chase Court (61).

While the overall number of opinions shows different trends across this second period, the opinions themselves can be further analyzed according to the issue areas in

which they fall. Figure 6.2 shows the proportion of the Court’s full opinions from 1865 to 1937 devoted to each of the four major issue areas in the period from 1865 to 1937.

Figure 6-2--Trends in the Allocation of Agenda to Four Major Issue Areas, 1865-1937 Terms



Clearly, economic issues received the most attention. Over this entire period, 68% of the Court’s agenda space was devoted to economic issues. Ironically, given the historical interpretations of McCloskey and others, economic issues were less dominant in 1865-1937 than they were in the 1801-1864 period analyzed in Chapter 4. The largest percentage of economic decisions (84%) occurred from 1879 to 1883, during the Waite Court, while the smallest occurred from 1893 to 1896, during the Fuller Court (60%). Judicial power was the next largest category of issues on the Court’s agenda space (18%);

followed by civil liberties issues, most of which dealt with criminal procedure issues (9%). As in the first period, federalism issues constituted the smallest portion of the Court's docket, averaging less than 3%. The high proportion of economic issues on the Court's docket support McCloskey's claims about the Court's interest and agenda in its second era. Indeed, it would be surprising if any other types of issues, rather than economic issues, was found to command the largest share of the Court's decisional agenda during this time. As indicated in the previous chapter, the Supreme Court inhabited a mostly economic environment during the greater part of this period. Therefore, economic cases would be expected to strongly dominate the Court's docket, which would result in more economic decisions being made by the Court.

Analysis of the Great Cases

When the analysis is based on the great cases of Supreme Court's history, Figure 6.3 indicates that less than 35 percent of the most important opinions the Court issued during this period (N = 140) comprises economic opinions, a lower figure when compared to that for civil rights and liberties opinions (43 percent). The difference between this result and the findings reported above is probably due to the fact that several of the civil rights and liberties decisions dealt with due process. But again, the proportion of the full opinions that comprises important opinions is very small (1.39 percent; N = 10,065).

The next task is to examine the dynamics of the Court's primary issue agenda during this second era; that is, to try to determine what factors accounted for the dominance of economic issues on the Court's agenda space.

Figure 6-3--Major Opinions of the U.S. Supreme Court by Issue Area, 1865-1937*

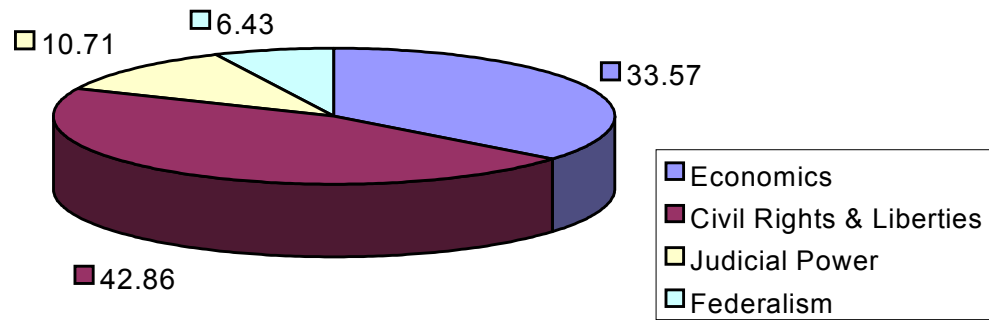
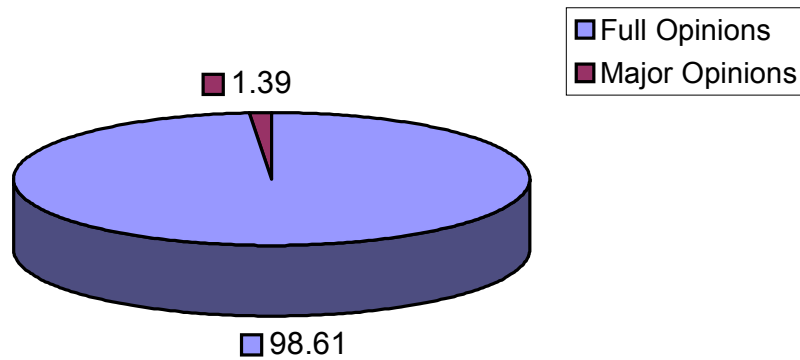


Figure 6.4--Proportion of the Supreme Court's Full Opinions that Constitutes Major Opinions, 1865-1937*



*Source: Epstein, Segal, Spaeth, Walker. 1996. *The Supreme Court Compendium*, pp. 94-98

How Much Effect did Judicial Values Have on the Court's Economic Agenda?

The suggestion from McCloskey's analysis is that the Court's primary issue agenda in each of its three political eras was significantly influenced by the Court's dominant value. Therefore, I expect measures of the dominant value of the Court described in chapter 2 to exert significant effect on the Court's volitional agenda in this second period, which are economic issues. The following hypotheses describe the relationship between those measures and the Court's economic agenda.

How much did Economic Issues Dominate?

The reader may recall that McCloskey specifically argued that the dominant value of the Court from 1865 to 1937 was the protection of economic rights and laissez-faire. His analysis thus portrays the Court as a defender of economic freedom and property rights. Chapter 5 also indicated that most of the landmark cases during this time period were economic cases, that the Court is viewed by most scholars as generally opposed to economic regulation, and that conservative justices—supporters of economic laissez-faire—constituted the majority in about half of the terms that the Court was in session between 1865 and 1937. This makes ideological configuration a potential factor in the Court's attention to economic issues during this period. The expectation, then, is that under the control of a conservative majority, the Supreme Court would pay more attention to economic issues than under a liberal majority. The presence of a conservative majority should significantly increase the number of economic cases, in part because of the activities of those affected by economic regulation. On the Court itself, economic conservative justices could be expected to devote more attention to economic issues in

order to repel government's attempt to regulate business or interfere with individual's economic freedom; liberal justices should oppose doing so for fear of allowing the Court's majority to further curtail government regulations. The potential effect of this factor is expressed by the following hypothesis.

H2: *From 1865 to 1937, the Supreme Court placed more economic cases on its agenda of full opinions when it was controlled by economic conservatives than when it was controlled by economic liberals and/or moderates.*

As indicated in Chapter 2, the value for the ideological control variable in each Court term is calculated by adding the number of conservative justices and subtracting from it the total number of liberals and moderates on the Court. All the values for the period 1865-1937 are derived from the information in the preceding chapter as well as from empirical studies (see Appendix B). The preceding hypothesis posits a positive and statistically significant relationship between the ideological control variable and the proportion of the Court's agenda that is comprised of economic issues (the Court's volitional agenda in this second period).

Partisan Control

The two major political parties during the second era of the Supreme Court were the Republicans and Democrats. According to Gates (1987), the Republican Party, throughout its history, has been generally opposed to economic regulation, while the Democratic Party has generally supported state regulation of business activities or of the economy as a whole. If the justices' partisan attitudes mirrored that of the two parties, Republican justices should favor economic freedom than Democratic justices. In terms of agenda building, Chapter 5 indicates that a Republican majority existed on the Court

during most of this second period. The presence of a Republican majority, therefore, should lead to a significant increase in the number of economic cases brought to the Court by those seeking to overturn government economic regulation. Furthermore, Republican justices, more than Democratic justices, can be expected to devote more attention to economic issues and to accept more economic cases for review in order to deter government's attempt to regulate the economy. This expectation is expressed as follows:

H3: *From 1865 to 1937, the Supreme Court placed more economic cases on its agenda of full opinions when it was controlled by Republican justices than when it was controlled by Democratic justices.*

As in the case of the ideological control variable, the value of the partisan control variable for each Court term is calculated by adding the number of Republican justices on the Court and subtracting from it the number of Democratic justices. As hypothesized, this variable should be positively related to the attention the Court pays to economic issues and statistically significant.

Chief Justice leadership

Chapter 5 indicates that of all the men who occupied the center chair from 1865 to 1937—Chase, Waite, Fuller, White, Taft, and Hughes—Waite and Hughes were probably the most skillful, while Fuller and Taft were arguably the most conservative and ardent supporters of laissez faire. Also, the Supreme Court under Fuller and Taft reportedly espoused laissez-faire ideology the most. Thus, we can expect these four Chief Justices to exert their influence on, or to seek more control of, the Court's agenda. Additionally, Chief Justice Hughes should have more impact on the Court's economic agenda during

this second period than any one of the four. Unlike his predecessors, Hughes began his tenure after the Congress had given the Supreme Court discretionary power over its docket. He also presided over the Court during the New Deal period when economic issues dominated the nation's political radar screen. The Court, therefore, should pay more attention to economic issues under his leadership than under any other Chief Justice in this period. The following hypothesis expresses the potential effect of the leadership of the four chief justices on the Court's economic agenda from 1865 to 1937:

H4: *Under Chief Justices Waite, Fuller, Taft, and Hughes, the Court placed on its agenda of full opinions more economic cases than it did under other chief justices of this period.*

Key Court Decisions of the Periods

The Supreme Court rendered several important economic decisions during its second political era that it becomes almost a guessing game to know which specific ones had a significant effect on the Court's economic agenda in this era. However, based on the writings of several judicial scholars and commentators, certain decisions stand out as likely to impact the Court's economic agenda during this era.

From McCloskey's viewpoint, three early Supreme Court's decisions—the Slaughterhouse Cases (1873), the Pensacola Telegraph Case (1878), and the Wabash Case (1886)—had important ramifications for the Supreme Court's emerging judicial agenda. In the first case, the Court's majority rejected the proposition that the Fourteenth Amendment's guarantees extended to individual's economic activities; in the second, it denied the states the right to grant telephone monopolies; and in the third case, the Court prohibited state regulation of interstate railroad rates. According to McCloskey, the

dissenting opinions of the minority in the Slaughterhouse Cases indicated that economic laissez-faire had some friends on the Court, a fact made clear in the Philadelphia v. Reading Railroad, also decided in the same year. In the latter case, the Court prohibited states from passing tonnage taxes on interstate shipments. The other two cases, the Pensacola and Wabash cases, signaled the Court's intention to protect business against government regulations (1994 ed.: 76-83). These decisions, then, should embolden businesses and other corporate actors to challenge government regulation and thus should have a positive effect on the Court's attention to economic issues. If McCloskey is right, these three cases should help to catapult economic issues to the top of the Court's agenda space.

Scholars have also pointed to United States v. E.C. Knight Co. (1895) and Lochner v. New York (1905) as two of the most important economic decisions of this era (McCloskey 1994 ed.; Goldman 1992: 184-185, 324; Segal and Spaeth 1993). In the Knight case, the Court rendered the Sherman Antitrust Act ineffective by declaring that manufacturing was not commerce within the meaning of the interstate Commerce Clause of the U.S. Constitution. In Lochner, the Court puts itself squarely on the side of business by striking down a New York's child labor protection law. I hypothesize that all of these landmark cases will embolden business and other corporate actors to challenge government regulation, and thus *should have an increasing (positive) effect on the Court's economic agenda*, the Court's volitional agenda during this period. Their effects may be temporary or permanent, with a gradual or abrupt onset.

H5: *The Supreme Court's decisions in the Slaughterhouse Cases, Pensacola Telegraph, Wabash, E.C.Knight, and Lochner cases led to more economic regulation cases being brought to the Court and consequently produced more economic opinions.*

Each decision is measured as described in chapter 2—that is, as a time-series intervention or transfer function variable, and each is tested for its effect according to the postulated impact patterns.

Hypotheses H2-H5 are formalized as follows:

$$ECON_t = \beta_0 + \beta_1 CSRDOM_{t-1} + \beta_2 PARTYC_{t-1} + \beta_3 CJ_{t-1} + \beta_4 CASES_{t-1} + \epsilon_t$$

Where

$ECON_t$ = the proportion of the Courts full opinions comprising economic issues during this second period.

$PARTYC_{t-1}$ = the value for the political party controlling the Court in the previous term.

$CSRDOM_{t-1}$ = the value for conservative dominance of the Court for the previous term.

CJ_{t-1} = a dummy for each of the Chief Justices in this period (measured as 1 when the Chief Justice was on the Court and 0 when he was not).

$CASES_{t-1}$ = intervention variables for the Slaughterhouse, Pensacola Telegraph, Wabash, E.C. Knight, and Lochner cases.

Judicial Value and Agenda Building: Results

To what extent, then, are the dynamics of economic issues, the Court's volitional agenda from 1865 to 1947, shaped by the dominant value of the Court in this period?

Tables 6-1 and 6-2 present the results of the multivariate time-series regression between the Court's economic agenda and measures of the dominant value of the Court described above for the period from 1865 to 1937. First, diagnostics were run on all the independent variables to check for multicollinearity. Except for the *Lochner* variable, all

others are correlated at less than .30, which is well below the rate of .80, as set forth by Lewis-Beck (1980: 58-62).¹ Second, a Box-Jenkins ARIMA model (0,1,1)_{1,2} is estimated for the economic series.

Table 6-1 shows that out of the four chief justices posited to exert influence on the Court's economic issue agenda, only Chief Justice Hughes's variable has a positive and statistically significant impact on that agenda (one-tail test). The lack of statistically significant results for the other justices is to be expected, given the fact that they presided when the Court had little discretionary control of its docket. Several of the postulated key Supreme Court's decisions have no statistically significant effects on the economic series, either in a bivariate or multivariate analysis, and thus are excluded from the model. The

Table 6-1—Measures of the Court's Dominant Value and their Effects on the Court's Economic Agenda, 1865-1937

Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA(1)	-0.36	0.14	-2.56	0.01
MA(2)	-0.87	0.15	-5.90	0.000
Cons. Dominance	-0.21	0.65	-0.33	0.74
Partisan Control	1.64	0.82	1.99	0.05
Chase	5.00	7.25	0.69	0.49
Waite	0.47	6.06	0.08	0.94
Fuller	-1.60	4.05	-0.39	0.69
White	0.21	3.71	0.06	0.96
Taft	-0.31	3.25	-0.10	0.92
Hughes	7.26	4.22	1.72	0.09
SlaughterH. Cases				
ω_0	16.81	5.20	3.24	0.002
Pensacola Telegraph				
ω_0	-2.02	3.86	-0.52	0.60
E.C. Knight & Co.				
ω_0	-2.06	3.39	-0.61	0.55

Q(20) = 14.41 Significance level = 0.03 Durbin-Watson Statistic = 2.15
R² = 0.49 Adjusted R² = 0.39; (t₆₀ = 1.67, p ≤ .10, two tailed test).

¹ Because of its high collinearity with other independent variables, the *Lochner* variable is removed from the model.

exception is the 1873 Slaughterhouse Cases, which has a positive and permanent effect. The ideological variable is statistically insignificant and signed in the wrong direction. By contrast, the partisan control variable has a statistically significant effect, with the coefficient sign in the posited direction. According to these findings, partisan configuration, more than ideological control, affected the share of the Court's attention to economic issues. Economic issues received more attention under Republican control than under Democratic control. More importantly, the fit of the model improves considerably when the insignificant variables are removed from the model (Table 6-2).

Table 6-2– Measures of the Court's Dominant Value and their Effects on the Court's Economic Agenda, 1865-1937: A Trimmed Model

Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA (1)	-0.32	0.10	-3.06	0.003
MA (2)	-0.56	0.11	-5.28	0.000
Slaughterhouse Cases				
ω_0	6.53	3.51	1.86	0.07
Partisan Control	1.06	0.57	1.85	0.07
Hughes	7.13	3.35	2.13	0.04

Q(20) = 13.24 Sig. Level = 0.58 DW = 2.06
R² = 0.37 Adjusted R² = 0.34 (t₆₀ = 1.67, p ≤ .10, two tailed test).

Still, the percentage of the variations in the Court's economic agenda explained by the model is quite small (34 percent) and suggests that factors other than the Court's dominant value may also have accounted for much of the variations in this agenda. Some of these factors are examined below and tested for their effects.

Additional Factors

The Effect of Time

Table 6.3 indicates that when the time variables were added to the model, neither of the variables is statistically significant and the fit of the model declines. Time, then, had little or no effect on the Court's volitional agenda during this time period.

Table 6-3 – The Impact of Time on the Court's Economic Agenda, 1865-1937

Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA (1)	-0.40	0.16	-2.57	0.01
MA (2)	-0.85	0.18	-4.76	0.000
Slaughterhouse Cases	14.13	5.47	2.58	0.01
Conservative Dominance	-0.44	0.65	-0.67	0.50
Partisan control	1.57	0.83	1.89	0.06
Chase	2.21	9.48	0.23	0.82
Waite	-2.82	7.86	0.36	0.72
Fuller	-4.87	4.69	-1.04	0.30
White	-1.78	3.99	-0.44	0.66
Taft	0.20	3.37	0.06	0.95
Hughes	11.72	5.02	2.33	0.02
Trend	0.36	0.73	0.49	0.63
Trendsq	-0.006	0.01	-0.71	0.48

Q(20) = 12.87 Sig. Level = 0.05 DW = 2.16
R² = 0.50 Adjusted R² = 0.40 (t₇₂ = 1.67, p ≤ .10, two tailed test).

The Political Environment: Key Legislation

Several factors in the political environment of the period 1865-1937 had the potential to affect the dynamics of the Court's economic agenda during this period. A few such factors are key congressional legislation and constitutional amendments, such as the Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890, the Wilson-Gorman-Tariff Act of 1894, and the passage of the Thirteenth Amendment in 1913.

1. The Interstate Commerce Act and the Sherman Antitrust Act

In 1887, in response to the unscrupulous trade practices of the railroads, Congress passed the Interstate Commerce Act. This legislation established the first regulatory commission, the Interstate Commerce Commission (ICC) and authorized it to regulate prices and standards of service for interstate railroad companies. But according to McCloskey (1994 ed.: 84), the work of the Commission was “impeded from the outset by corporate opposition and court-contrived encumbrances.” The Commission, says McCloskey, represented what most of the justices in this period had anticipated and feared most—the beginning of the regulatory movement and the extent to which government might go in interfering with free enterprise.

The Sherman Antitrust Act of 1890 was Congress’s response to a growing problem in the late eighteenth century: the amalgamation of several companies into giant trusts. The legislation was designed to reduce economic monopolies, foster competition, and eliminate unfair trade practices. But the statute, according to McCloskey, was no more pleasing to the business community and the Court than the Interstate Commerce Act (1994 ed.: 84, 98). I posit that opposition to these two legislative acts would invite more court challenges by big business, and this in turn should lead to more economic cases being brought to the Court.

2. The Wilson-Gorman Tariff Act and the Passage of the Sixteenth Amendment

Taxation has always been an important issue in American politics. It was a major factor in American declaration of independence from Britain, and its effect on American politics has not lessened since then. The two most important tax laws passed in the period

between 1865 and 1937 were the Wilson-Gorman Tariff Act of 1894 and the Sixteenth Amendment ratified by the states in 1913.

The Wilson-Gorman Tariff Act was enacted in response to the depression of 1893. This legislation established a modest federal income tax by levying a flat 2 percent tax on all forms of income over \$4,000 per year. The potential effect of this Act on the Court's economic agenda stems from the intense opposition that followed its passage. While Progressives and Populists welcomed the tax, many, including a majority on the Court, viewed it as "the beginning" of a war of the poor against the rich" or as part of a 'communist march' against the rights of property" (McCloskey 1994 ed., 93-94; Segal and Spaeth 1993, 87-88). The effect of the Sixteenth Amendment would be to increase the range of economic cases that could be brought on appeal to the Court. Indeed, this author and his colleagues found that about 20 percent of the cases the Supreme Court decided between 1888 and 1940 were taxation cases (see Wood et al. 1995). Both of these tax laws, then, should account for some variations in the share of the Court's agenda devoted to economic issues. Opposition to the Wilson-Gorman Tariff Act should significantly increase the share of the Court's attention to taxation issues, while the Sixteenth Amendment should bring more tax cases to the Court. The potential impact of each of these factors is expressed in the following hypothesis:

H7: *The passage of the Interstate Commerce Act, the Sherman Antitrust Act, the Wilson-Gorman Tariff Act, and the Thirteenth Amendment led to more economic regulation cases being brought before the Court, and thus caused the Court to write more economic opinions.*

Table 6.4 shows that none of these key legislative or constitutional enactments had any significant impact on the Court's economic agenda.

Table 6-4—The Impact of Congressional Legislation and the Sixteenth Amendment on the Court’s Economic Agenda, 1865-1937

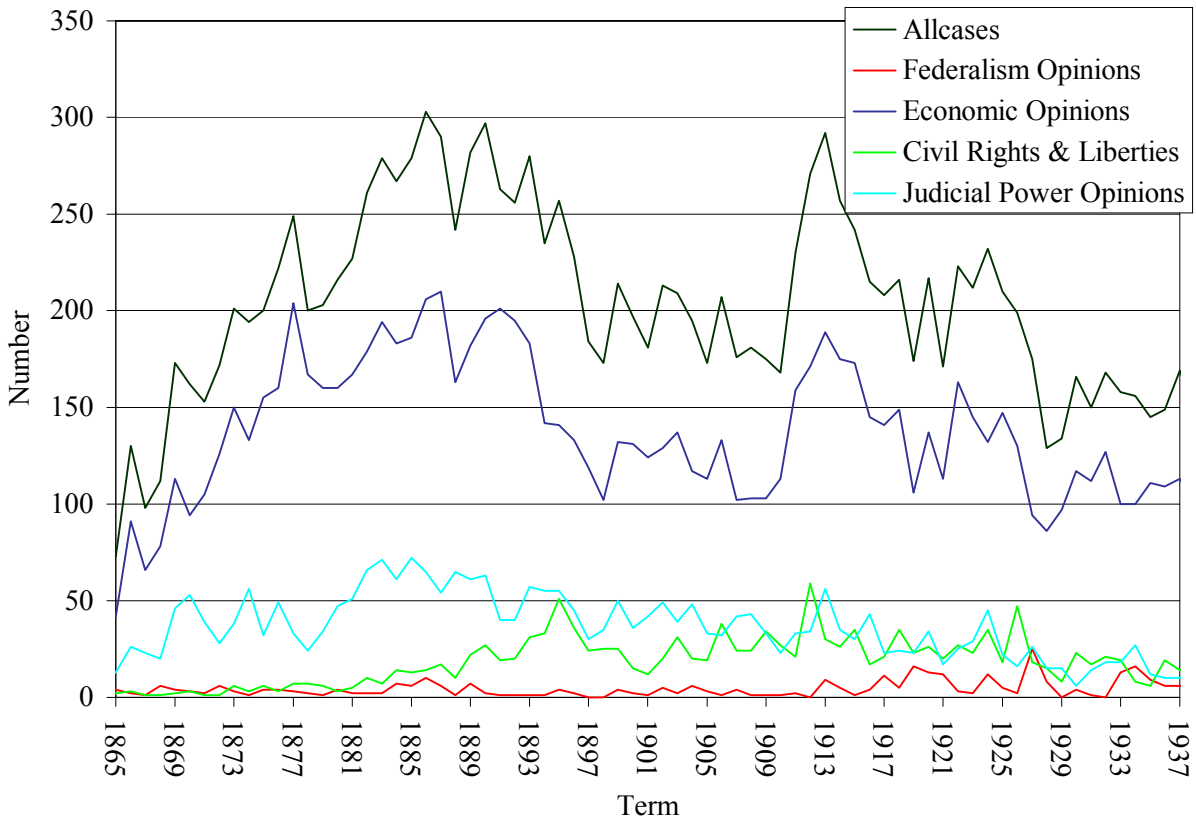
Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA (1)	-0.43	0.13	-3.40	0.002
MA (2)	-0.76	0.14	-5.32	0.000
Slaughterhouse Cases				
ω_0	11.39	5.18	2.20	0.03
Conservative Dominance	-0.37	0.54	-0.69	0.50
Partisan Control	1.64	0.78	2.09	0.04
Hughes	8.32	4.35	1.91	0.06
ICA				
ω_0	1.41	3.99	0.35	0.73
Sherman-Antitrust				
ω_0	-2.75	4.45	-0.62	0.54
Wilson-Gorman Tar.				
ω_0	2.97	4.05	0.73	0.47
The 16th Amend.				
ω_0	-0.22	3.94	-0.06	0.96

$R^2 = 0.45$ Adjusted $R^2 = 0.37$ DW = 2.00 (20) = 13.33 Sig. Level = 0.15
($t_{60} = 1.67$, $p \leq .10$, two tailed test)

The Political Environment: Case Filings

Again, we suspect that the political environment—specifically, the number of economic case filings—had more to do with the Court’s attention to economic issues during this time than the Court’s judicial value. As Figure 6-4 shows, a close association exists between the Court’s caseload and its economic opinions. The Pearson’s Correlation Coefficient for the two series is 0.94 (at 0.01 sig. Level, compared to the value for judicial power (0.70), civil rights and liberties (0.36), and federalism (–0.07 at 0.56 sig. level). This is as should be expected, given that the Supreme Court for most of this period was a common law rather than a constitutional court and had very little control over its docket.

Figure 6-5--Trends in the U.S. Supreme Court's Caseload and in Opinions in Four Major Issue Areas, 1865-1937



1900-1937: Was it a Different Judicial Era?

Although judicial values account for very little variations in the Court's attention on economic issues from 1865 to 1937, the reader still might recall from the discussion in Chapter 2 that one of McCloskey's arguments is that the period was really two judicial eras in one. From 1865 to the late 1880s, the Supreme Court, argued McCloskey, was testing the constitutional doctrines that it would later use to derail economic regulation. Beginning from 1900 and continuing till 1937, judicial supervision of economic

regulation came full circle as the Court began to put into effect the doctrines it had developed earlier.

There are two other reasons why the Court's behavior may be different in the second era of the second period. First, this was the period of the Progressive Movement, with its call for social and economic reforms. Thus the Court may have been reacting to this movement. Second, the Supreme Court assumed complete control of its docket in 1925. Several justices may have seized this opportunity to advance their personal or philosophical agenda on the Court. These considerations indicate why the dynamics of the major issue agenda of the Court were likely to change from 1900 to 1937. The dominant judicial value of the Court should have more impact on the Court's primary issue agenda in this time period than before. Thus, the following hypothesis:

H8: *In the period 1900-1937, the Court's economic agenda (its volitional agenda during this time period) was affected more by ideological and partisan control and by key Supreme Court decisions than by any other factor.*

As Table 6.5 shows, an ARIMA (0,2,0) model is estimated for the economic series during this sub-period. All of the justice variables during this time period show very little variation, are statistically insignificant, and thus are removed from the model. Of the regressed independent variables, only the intervention variable representing the passage of the Sixteenth Amendment is statistically significant and in the expected direction, indicating that the amendment increased the number of economic opinions the Court wrote during this time period. Both the conservative control and Lochner variables are signed in the wrong direction and contrary to the posited effect. Perhaps the Court's reputation as an activist conservative Court stemmed from the landmark cases it decided

during this sub-period. Or perhaps, there was a convergence of views between the conservatives who dominated the Court during this period and the business sector, such that the latter found it unnecessary to look to the Court for relief from economic regulation. In any case, the findings provide very little support for the proposition that the Court's judicial value exerted more influence during this short sub-period than the first.

Table 6-5—The Impact of the Court's Judicial Value on the Court's Economic Agenda, 1900-1937

Variables	Coefficient	Std. Error	T-Stat	Sig. Level
AR (1)	0.65	0.17	3.86	0.00
AR (2)	0.35	0.17	2.05	0.05
Conservative Dominance	-1.83	0.78	-2.34	0.03
Partisan Control	-0.37	0.80	-0.46	0.65
Lochner ω_0	-8.85	4.03	-2.19	0.04
The 16 th Amendment ω_0	7.10	4.00	1.77	0.09

Q(20) = 12.06 Sig. Level = 0.60 DW = 2.05 $R^2 = 0.49$ R^2 (adjusted) = 0.41
 ($t_{31} = 1.70$, $p \leq .10$, two tailed test).

Chapter Summary

In Chapter 4, I demonstrated that McCloskey's claim that the Supreme Court in its first political era was concerned mostly with nation-state issues is not supported by empirical data. My quantitative analysis of the Court's issue agenda in that era shows that the dominance of economic issues on the Court's agenda space began much earlier than McCloskey and other Supreme Court historians have led us to believe. As in Chapter 4, my analysis here was aimed at assessing the degree of the match between McCloskey's

accounts of the Court's agenda during this time period and what empirical data reveal. My empirical investigation in this chapter reveals that McCloskey is correct in his analysis that economic issues dominated the Court's agenda space from 1865 to 1937. As for the impact of judicial values, partisan control of the Court continued to influence the share of the Court's attention to economic issues, just as in the first period. Under Republican control, the Court placed more economic cases on its agenda of full opinions than under Democratic control. This finding, as well as the one for the first period, provides additional support for the role of partisanship on the Supreme Court (see also Tate 1981; Tate and Handberg 1991). The Court's decision in the Slaughterhouse Cases (1873) also added to the share of the Court's attention on economic issues between 1865 and 1937, as did the leadership of Chief Justice Hughes.

However, the overall results provide limited empirical support for the proposition that the Court's judicial value largely determined the Court's attention to economic issues, the dominant agenda of the Court from 1865 to 1937. The judicial value model accounts for only about one-third of the variations in the Court's agenda during this second period. The large number of economic case filings during most of this time period probably accounts for the remaining proportion. Moreover, in the sub-period between 1900 and 1937, measures of judicial had no appreciable effect on the Court's economic agenda; only the passage of the Sixteenth Amendment did. The next chapter examines historical and contemporary accounts of the Court's volitional agenda after 1937.

CHAPTER 7

THE POST-1937 SUPREME COURT'S AGENDA AND JUDICIAL VALUES: HISTORICAL AND CONTEMPORARY ACCOUNTS

The Court's Primary Issue Agenda: Civil Rights and Liberties Issues Dominate

The Supreme Court, according to McCloskey, ended one constitutional era and began a new one in the 1937 term, during the second half of the Hughes Court. The transition came when the Court, faced with the pressure of the Depression and FDR's Court-packing plan, backtracked from its support of laissez-faire and began to support the New Deal legislation—the so called “switch in time saves nine.” From there on, said McCloskey, the question of economic regulation became no longer a primary concern of the Court. Instead, the Court's attention shifted to civil rights and liberties, reflecting its new interest in this area.

Similar claims can be found in the works of other Supreme Court historians and doctrinal scholars. Barnes (1978: 2) noted that the Court's emphasis on civil liberties first appeared during the New Deal Era. Beginning in 1937 the Court, bolstered by an ever-increasing number of Roosevelt appointees, abandoned its former role as the guardian of property rights and began to sustain a series of federal and state social and economic legislation. But rather than lapse into inertia after resolving the constitutionality of government and social regulation, the Court embarked on a new agenda.

The Court began to find a new role for itself in protecting individual freedoms. The very growth of big government raised new questions about its impact on personal rights. The egalitarianism inherent in much of the New Deal created doubts about the second-class status of racial minorities. The rise of totalitarian

dictatorships in Europe aroused concern for safeguarding fundamental liberties in the United States. The Court responded to these currents by starting to examine intently government action that curtailed individual and civil rights (2).

Goldman (1982: 337) made the same point. He noted that the Court during the 1937-1946 period underwent profound transformation in personnel and constitutional doctrine. The negative constitutional commerce and substantive due process doctrines as applied to economic policy were discarded and replaced by an expansive interpretation of the Constitution. At the same time, the Court began to search for and to formulate new doctrines in various areas of civil liberties. Economic policy issues continued to come before the Court, but this time as questions of statutory interpretations rather than as constitutional questions.

Abraham and Perry (1994 ed.: 11) also noted that the main concern during remaining years of the Hughes Court and continuing through the Warren Court was to find a balance between communal values and the basic rights and liberties of individuals. That concern continued under the Burger Court, and has preoccupied even the Rehnquist Court.

Segal and Spaeth (1993: 97), in their analysis of the political history of the Court, claimed that the Court began to pay closer attention to civil rights and liberties issues at the same time it was disengaging itself from managing the nation's economic affairs. The *Carolene Products* case marked the first signal in the Court's agenda change. Foster and Leeson (1998:8) agree that civil rights and civil liberties concerns have preoccupied the modern Court, but noted that these concerns began in 1941.

Schwartz (1993) echoed the prevailing view in the historical and doctrinal literature by noting that there has been a shift in judicial emphasis from defending property rights to protecting personal rights. Such protection, he added, has been elevated to the top of the judicial agenda during the past quarter century, and the modern Court has decided more landmark cases in civil rights and civil liberties issue area than its predecessors did in all the areas combined (320-321).

Several of these cases have, indeed, captured significant attention from scholars. The Hughes Court ruled in Palko v. Connecticut (1937) that while the due process clause of the Fourteenth Amendment does not require states to respect the double jeopardy guarantee of the Fifth Amendment, some Bill of Rights guarantees are so fundamental as to be absorbed by the clause. This principle of selective incorporation of the Bill of Rights into the Fourteenth Amendment's due process clause was to guide the Court's actions on civil liberties for the next three decades. The Stone Court declared the "White primaries" unconstitutional in Smith v. Allwright (1944). The Warren Court struck down segregation laws in public education in Brown v. Board of Education (1954) and enlarged the rights of criminal defendants in Mapp v. Ohio (1961), Gideon v. Wainwright (1963), Escobedo v. Illinois (1964), and Miranda v. Arizona (1966). The Burger Court protected the freedom of the press in New York Times Co. v. U.S. (1971), ruled on the Eighth Amendment's cruel and unusual punishment clause in Furman v. Georgia (1972) and Gregg v. Georgia (1976), and defined obscenity in Miller v. California (1973). The same Court, in Roe v. Wade (1973), further protected the right of privacy established by the Warren Court in Griswold v. Connecticut (1965). In Texas v. Johnson (1989), the

Rehnquist Court protected symbolic political speech against government prosecution. The same Court curtailed freedom of religion in Employment Division v. Smith (1991) and privacy rights in Planned Parenthood v. Casey (1992). These cases are viewed as emblematic of the Court's new attention to fundamental rights and liberties after 1937 and its decision to scrutinize government regulations in this area.

Historical and doctrinal claims aside, there is support also in the empirical literature regarding the shift in the Court's primary issue agenda from economic to civil rights and liberties issues in the post-1937 period. Pacelle (1991) found that in the period between 1933 and 1987, the Court allocated more of its agenda space to issues involving civil rights and liberties. Lanier (1997) discovered that economic decisions comprise the largest portion of the Court's agenda space for the sixty years period between 1888 and 1948. This category of issues experienced a sharp downturn in the late 1940s, and shortly after civil liberties-civil rights decisions began to win the lion's share of the Court's agenda. Thus, there is considerable support both in the historical and empirical literature for McCloskey's claim regarding the nature of Supreme Court's volitional agenda after 1937.

The Prevailing Value on the Court after 1937: Liberalism or Conservatism?

While judicial scholars generally agree that civil rights and liberties issues have been the main focus of the post-1937 Supreme Court, they differ over which value of the court has been predominant during this time period. McCloskey's position was that the court changed from being a defender of property rights to being a protector of individual's rights and liberties. But about the only consensus among judicial scholars is

that the Warren Court was decidedly more liberal or pro-civil rights and civil liberties in many of its decisions than the other chief justice courts of this period (see Barnes 1978; Chamber 1996; Halberstam 1996; Pollack 1979; Schwartz 1993, 1996; Weaver 1967). There is considerable disagreement on both the extent of the Court's liberalism during this period and the endurance of Warren Court's jurisprudence. One group (Baum 1988, 1989, 1995; Blasi 1986; Bryden 1993; Chambers 1996: 21-67; Lewis 1999; Schwartz 1993: 331-336; Simon 1995; Smith 1997) contends that the Burger Court maintained the Warren Court's pro-civil rights and civil liberties' jurisprudence, and that even the Rehnquist Court has not really deviated from this pattern. This group argues that while some of the rights expanded by the Warren court (especially, in the field of criminal justice) were narrowed, they were not and have not been overruled.

There is some empirical support for this argument. Segal and Spaeth (1990) found that the trend in Rehnquist Court's disposition of lower courts' liberal decisions was toward affirmation not reversal. Gerber and Keeok (1997)'s study found a significant relationship between the Rehnquist Court's high level of support for liberal outcomes and its reversal of conservative lower court decisions.

However, other commentators contend that conservative views on civil rights and liberties predated the Warren Court and have continued thereafter. Barnes (1978) wrote that several of the civil liberties decisions of the Vinson Court were conservative. "Only in civil rights cases did the Vinson Court break from its predominantly conservative mold" (4-5). Goldman (1982: 423) echoed the same view, noting that the Vinson Court "was more than willing to defer to government in the regulation of civil liberties except

where it was absolutely clear that the Constitution was violated.” Biskupic and Witt (1997) claimed that that the addition of several conservative justices under the Nixon, Reagan, and Bush Administrations gradually ushered in a new conservative judicial value on the Court. The first sign of the Court’s conservative shift came in January 1989, when the Court struck down a minority-set aside plan (60). One scholar (Kamisar 1996) has even argued that the Warren Court in its final years was not the same liberal Court that had handed down Mapp or Miranda. The Court’s approach in the area of criminal procedure, the author contends, contrasted sharply with the approach it had taken earlier in *Miranda* (116-158). These different accounts indicate that liberalism on civil rights and civil liberties was not as dominant on the post-1937 Supreme Court as McCloskey believed. Far from being a consistent protector of civil rights and civil liberties, the Court, particularly under Vinson and Rehnquist, exhibited some conservatism by curtailing or narrowing these rights.

The Justices: Liberal, Conservative, Moderate, Progressive, or Reactionary?

The Court’s membership changed considerably between 1937 and 1993. Of the forty-one justices who served during this time, nine—Hughes, Stone, Butler, Roberts, Sutherlands, Cardozo, Brandeis, and McReynolds—were holdovers from the previous era, but by 1940 only three of them —Stone, Roberts, and Black—remained on the Court. Beginning in 1937, twenty-nine new associate justices would be appointed to the bench. Two of them—Stone and Rehnquist—were later promoted to the position of Chief. The new justices were Hugo Lafayette Black (1937), Stanley Forman Reed (1938), Felix Frankfurter (1939), William O. Douglas (1939), Frank Murphy (1940), James F. Brynes

(1941), Robert H. Jackson (1941), Wiley B. Rutledge (1943), Harold Hitz Burton (1945), Tom C. Clark (1949), Sherman Minton (1949), John Marshall Harlan (1955), William Joseph Brennan (1956), Charles E. Whittaker (1957), Potter Stewart (1958), Byron Raymond White (1962), Arthur J. Goldberg (1962), Abe Fortas (1965), Thurgood Marshall (1967), Harry A. Blackmun (1970), Lewis F. Powell (1972), William H. Rehnquist (1972), John Paul Stevens (1975), Sandra Day O'Connor (1981), Antonin Scalia (1986), Anthony M. Kennedy (1988), David H. Souter (1990), Clarence Thomas (1991), and Ruth Bader Ginsburg (1993). Compared to the earlier two periods, there is a great amount of information, both in the historical and empirical literature, about the ideological views of most of these justices. In fact, much of the literature on judicial behavior in the last fifty-years has focused on the impact of ideologies on justices' voting decisions.

Liberals

As used by judicial scholars, the term *liberal*, in the areas of civil rights and civil liberties, signifies pro-defendant votes in criminal procedure cases, pro-civil rights claimant, and anti-government in First Amendment, due process, and privacy cases (Segal and Spaeth 1989, 1993; Epstein and Knight 1998: 34). Thus, the justices characterized as liberals in the area of civil rights and civil liberties are those that are generally supportive of individual's civil rights and civil liberties claims against government regulation. **Brandeis**, the first Jewish appointee to the Court has been described as a strong exponent of civil liberties. Pritchett (1948: 266) noted that "liberalism for Justice Brandeis was not merely a rule for deciding cases on the bench. It

supplied motivation for him over the entire range of public policy.” **Cardozo**, another justice of Jewish descent, was “philosophically close to Brandeis, Stone, and Holmes most of the time” (Mayer1987: 230).

According to Pritchett (1948: 248) and Goldman (1982: 336), Black, Douglas, Murphy, and Rutledge formed a four-man liberal bloc on the Court during the 1940s and 1950s. Their liberalism on economic issues extended to civil rights-civil liberties claims. **Black** was, reportedly, the leader of the group. A former member of the Ku Klux Klan, Black, on the Court, became a supporter of economic regulation as well as a defender of individual rights and liberties (Mayer 1987: 234; Schwartz 1993: 238-239). **Douglas**, the longest serving justice on the Court at the time of his retirement, was a champion of individual liberties as well (Barnes 1978: 63; Mayer 1987: 242-243; Pritchett 1948: 258) **Murphy**, according to Schwartz (1993: 241), “turned out to be one of the most liberal justices on the modern Court... voting with his heart rather his head in cases involving racial minorities and the poor” (Schwartz 1993: 241). Barnes (1978: 115) also noted that in the postwar years Murphy “emerged as one of the foremost civil libertarian on the Court, surpassing all others in the consistency of his support for claims of individual liberty and civil rights.” **Rutledge** served only six years on the Court. But while there he believed that “the job of the Court was to guarantee freedom and justice to all men” (Mayer 1987: 254-255). Pritchett (1948: 256) found Rutledge to be “closer to Murphy on individual liberty issues than any other member of the Court, particularly as to the rights of criminal defendants. These two stood together in challenging the validity of the Yamashita and Homma military trials, the power of the federal government to

denaturalize citizens, and the judicial review provisions of the Prize Control Act” (see also Barnes 1978: 131).

Also included in the liberal bloc are Justices Brennan, Goldberg, Fortas, and Thurgood Marshall. **Brennan** was expected to become a moderate on the Court, but he soon became “one of the principal architects of the Warren Court’s jurisprudence” as well as the leader of the liberal bloc during the Burger Court (Barnes 1978: 39).

Goldberg served only three years on the Court, but he was a firm ally of Chief Justice Earl Warren (Schwartz 1993: 274; Barnes 1978: 73-74). So did **Abe Fortas**, whom Barnes (1978: 73-74) described as having one of the best minds of anyone appointed to the Supreme Court. **Thurgood Marshall**, the first African American to be appointed to the Court, was a doctrinal liberal, if undistinguished (Barnes (1978: 109). Schwartz (1993: 315) described him as a “virtual judicial adjunct to Justice Brennan” on the Burger Court.

Two more justices fit into the liberal column. **Butler**, a holdover from the previous era and a member of the anti-New Deal Four Horsemen, is described as a civil libertarian. Mayer (1987: 221-22) noted that in cases of personal freedom Butler was in the company of Brandeis, Stone, and Holmes. Ruth Bader **Ginsburg**, appointed in 1993 and the second woman to ascend the bench, has also been described as an emerging member of the Court’s diminishing liberal wing.

Conservatives

The justices characterized as conservative in the area of civil rights and civil liberties are those who are generally supportive of government regulation in the area of

civil liberties and less sympathetic to civil rights claims. **McReynolds**, a holdover from the earlier era and a member of the anti-New Deal Four Horsemen, was consistently conservative in his economic and civil liberties decision-making (Leavitt 1970: 445-46). Mayer (1987: 221) described his views as “bigoted, anti-Semitic, puritanical, and racist.” **Sutherland**, another member of the Four Horsemen, also espoused conservatism in civil liberties matters (Abraham 1993: 189-90). Mayer (1987: 227) noted that **Roberts** favored the protection of civil liberties and the extension of the Fourth Amendment, although he did not always apply this to black. And he seemed to shift between the liberals and conservatives. Pritchett (1948: 254), however, placed him in the conservative wing based on his votes in non-unanimous personal liberty decisions in the 1941 and 1946 terms. **Brynes**, one of the nine Roosevelt appointees to the Court, spent only one year on the bench before resigning to become the Director of Economic Stabilization. A conservative Southern Democrat and former South Carolina governor, Brynes was an advocate of states’ rights and separate-but-equal education (Witt 1990: 864). Although he was strongly liberal in economic issues, he was much less so on the issues of civil rights and civil liberties. Indeed, after he left the Court, Brynes became very critical of the Warren Court’s civil rights and liberties positions, particularly its desegregation decisions.

Reed, Burton, Clark, Vinson, and Minton formed the conservative bloc that dominated the Court from 1949 to 1952 (Barnes 1978: 113). **Reed**, wrote Urofsky (1997:

19), could be considered an economic liberal in that he was willing to defer to Congress on interstate commerce issues.¹ But on civil liberties, Reed fitted more “into the law-and-order mold” and was one of the least supportive members of the Vinson Court for civil liberties claims. Reed also believed that segregation was acceptable so long as black received equal treatment (Abraham 1993: 219; Barnes 1978: 123-124; Pritchett 1948: 131, 260; Schwartz 1993: 241). **Burton** is described as “an average justice at best—neither a great scholar nor an original thinker” (Barnes 1978: 51). Even his biographer described him as a mediocre, “not a bright, witty intellectual like a Frankfurter or a Black” (Berry 1978). Burton supported a strong government involvement in economic affairs but had little sympathy for civil liberties claims (Barnes 1978: 53)². However, he stood firm with his colleagues in striking down racial segregation laws (Mayer 1987: 257-258). Schwartz (1993) described **Clark** as “the most underrated Justice in recent Supreme Court history.” He noted that Clark usually followed the conservative, pro-government position on civil liberties claims. According to Mayer (1987: 264), Clark believed that national security was more important than individual liberty and generally upheld the government’s position in criminal procedure cases. And while he voted to expand civil rights of Blacks, he did not always condone the tactics of the civil rights demonstrators (Barnes 1978: 57-59). **Minton** was a conservative as well, although he was not an outstanding jurist or a leader on the Court (Barnes 1978: 57-59).

¹ But see Goldman’s analysis of the Roosevelt Court justices’ voting behavior, which shows Reed moving from a moderate to conservative position on economic issues (1982: 336, 420).

² Again, see Goldman’s analysis (1982: 420), which shows Burton to be more conservative on economic issues than historical analyses indicate.

Jackson, Whittaker, Harlan, White, and Powell also get characterized as conservatives. **Jackson** is most noted for his personal feud and philosophical differences with Justice Black on the Court, but Barnes (1978: 101-103) described him as very conservative on civil liberties. **Whittaker** was conservative as well, if undistinguished (Baum 1988; Schwartz 1993: 271). **Harlan**, like Frankfurter, was a firm believer in judicial restraint philosophy, and after the latter's retirement, he became to many the conservative conscience of the Court (Schwartz 1993: 271). **White**, wrote Barnes (1978: 161), was an average justice who proved to be far more conservative on the bench, especially on criminal rights and civil liberties issues, than had been expected. **Powell** is portrayed as "essentially a conservative whose judicial approach was reminiscent of that followed by Justice Harlan during the early Burger years" (Schwartz (1993: 317; see also Goldman 1987: 159; Segal and Cover 1989).

It is hard to categorize the new justices or those not yet off the Court, because the mode of their constitutional jurisprudence may change the longer they stay on the Court or as the dynamics on the Court changes. Nonetheless, the conservatism of Rehnquist, Scalia, and Thomas has been well noted (Baum 1988; Barnes 1978; Mayer 1987; Schwartz 1993; Hensley, Smith, and Baugh 1997; Segal and Cover 1989; Smith and Johnson 1993; Segal and Spaeth 1989). Schwartz (1993: 317) described **Rehnquist** as the most conservative member of the Burger Court, and, at the time of his nomination as Chief Justice, the most influential member of that Court. Simon (1995) noted that Rehnquist quickly earned the reputation as the most out-spoken conservative on the Court in more than a quarter of a century. "As associate justice and later as chief justice, he

consistently supported government regulations of individual liberties and rejected the civil rights claims of racial minorities” (11, 13). Rehnquist’s consistent allies on the Court have been Scalia and Thomas. **Scalia**, who was appointed to the Court the same day in 1986 that Rehnquist was promoted chief justice, “championed a strong conservative ideology as Rehnquist (Simon 1995: 14). **Thomas** is strongly conservative (Smith 1997) and had the second most conservative record among justices in criminal procedure cases next to Rehnquist and the second most conservative record next to Scalia in civil rights cases in the period 1991-1995 (Hensley, Smith, and Baugh 1997).

The final group of new justices described as conservatives consists of O’Connor, Kennedy, and Souter. According to Simon (1995: 14), **O’Connor** “frequently supported government regulation of civil liberties, was openly critical of Roe v. Wade, and opposed liberal interpretations of federal laws and the Fourteenth Amendment that provided broad legal remedies to racial minorities.” She “brings a genuinely conservative outlook to questions of legal and policy change,” wrote Maveety (1996: 132). **Kennedy** “has proved to be a crucial fifth vote for the Court’s conservative wing in civil rights cases, a firm supporter of state authority over defendant’s rights in criminal cases and a strict constructionist in the mode of Chief Justice William H. Rehnquist in nearly all cases” (Biskupic 1989: 1695). **Souter** appears to becoming more liberal in his voting behavior on the Court (Smith et al. 1994), but “he is not liberal in the traditional sense of seeing the Court as an engine for social change” (Greenhouse 1995).

Moderate, Progressive, or Reactionary?

Two justices fit into the moderate category. **Stewart** is portrayed as an independent whose judicial philosophy lacked “clearly defined conceptions” (Schwartz 1993: 272). Barnes (1978: 139) characterized him as a “swing” justice “who cast a pivotal ballot cases dividing the Court’s liberal and conservative wings.” This characterization is supported by an empirical study (Segal and Cover 1989: 560). **Frankfurter**, one of the nine Roosevelt appointees to the Court, is portrayed in the historical literature as generally conservative in economic and civil liberties issues (Schwartz 1993: 241; Barnes 1978: 79; Rehnstrom 1972: 70). But empirical studies by Pritchett (1948: 254) and Baum (1988) show the former Harvard Law professor and a founding member of the American Civil Liberties Union (ACLU) as having a moderate or close to a moderate support score in the areas of civil liberties and civil rights.

Three other justices have been noted for their ideological shift during their tenure. **Stone** is described as “one of the greatest architects of civil liberties” (Mayer 1993: 225), but he became moderate to conservative on both economic and civil liberties issues after becoming chief justice (Barnes 1978: 146; Pritchett 1948: 261; Wood et al. 1998b). According to Schwartz (1993: 316-17), **Blackmun** was virtually a Burger’s disciple early in his tenure, but his opinions “became increasingly as liberal as any that Justices Brennan and Marshall might have written....” Simon (1995: 15) made the same observation, noting that by 1994, his last year on the Court, Blackmun “frequently articulated the most liberal position of any justice on a wide range of civil rights and liberties issues.” Goldman’s (1987) empirical study shows that Blackmun became liberal

after the 1985 term. **Stevens**, one of the few justices from the Burger era still on the Court (Rehnquist and O'Connor are the other two), was appointed as a moderate (Schwartz 1993: 318) but has become more liberal as his tenure progresses on the Court (Barnes 1978: 135-136).

The Justices: Partisans or Independents?

Judicial scholars have noted the role of partisanship in the appointment of justices during this third period of the Court (Pritchett 1948; Schwartz 1993; Goldman 1982; Mayer 1987; Biskupic and Witt 1998). The most frequently mentioned example is Franklin D. Roosevelt's failed attempt to pack the Court when the Court's conservatives refused to endorse his New Deal measures. Other scholars and commentators (Goldman 1985, 1987, 1991; Simon 1995; Silverstein 1994; Smith 1993b) have pointed to similar attempts by Presidents Reagan and Bush to reverse the liberal legacy of the Warren Court and its successor, the Burger Court, by appointing conservative justices to the Court. Indeed, only six of the justices in this period did not share the party affiliation of their appointing presidents. All of these make partisan control of the Court a potential factor in the building of the Court's institutional agenda.

However, specifying the relationship between partisan influence and the Court's civil rights-civil liberties agenda is problematic. Prior to the late 1930s, the Republican Party generally supported civil rights and individual freedom, while the Democratic Party supported slavery and segregation (Carmines and Stinson 1989: 27-47). The party realignment that began in 1928 and culminated in Roosevelt's victory in 1932 divided the two parties (along regional lines) on race-related civil rights and liberties issues (Tate and

Handberg 1991: 464). By the late 1960s, the Democratic Party had become the home of supporters of racial equality and individual freedom, and the Republican Party a haven to segregationists and law-and-order advocates (Carmines and Stimson 1989: 47; Gitelson, Dudley, and Dubnick 1993: 162-64). If this party realignment towards civil rights and civil liberties issues carries over to the Supreme Court, Democratic and Republican justices could be expected to share their party's attitude toward these issues. Empirical studies of the Justices' voting behavior since the 1940's confirm this proposition. In general, Democratic justices have been found to be supportive of civil rights and civil liberties claims, and Republican justices to be opposed to such claims (Carp and Rowland 1983; Goldman 1975, 1966; Nagel 1961; Tate 1981; Tate and Handberg 1991).

The Chief Justices: Leaders or Followers?

Six different men occupied the Court's center chair in the period between 1937 and 1993. Three of them—Charles Evan Hughes, Harlan Fiske Stone, and William H. Rehnquist—had served as associate justices before being appointed to the center chair. The others were Fred M. Vinson, Earl Warren, and Warren E. Burger. The leadership of Chief Justice Hughes has been described already in Chapter 5. The consensus among judicial scholars is that he was an effective leader of the Court. He is also described as a supporter of civil liberties. Mayer (1987) wrote that while Hughes was often ambivalent in his support for economic regulation, he had no such ambivalence in the area of civil liberties. “He led in the incorporation of the basic civil liberties, offering protection under the due-process clause and giving these liberties broad scope and meaning” (227). However, the Hughes Court, in general, is not expected to have significantly effect the

dynamics of the Supreme Court's civil rights-civil liberties agenda. Pacelle (1991: 140) noted that the Hughes Court's contribution to the development of this agenda was in gradually moving economic issues off the stage and preparing the way for civil rights-civil liberties issues to occupy the vacated agenda space. The remaining section of this chapter describes the leadership and ideology of the remaining chief justices and their Court's overall jurisprudence, as portrayed in the historical and contemporary judicial literature.

Chief Justice Harlan Fiske Stone, 1941-1945

The Stone Court began in the 1941 term. Stone was appointed by President Franklin D. Roosevelt to replace Chief Justice Hughes who had retired. He would serve as chief justice for only five years. By most accounts, his leadership on the Court was a failure. Barnes (1978: 146) wrote that, as a chief justice, Stone proved ineffective. He lacked the skills necessary to lead the Court and to keep differences under control. Schwartz (1993) described Stone's leadership as "the very antithesis of the Hughes model of dynamism and efficiency." While conceding that the fragmentation in the Stone Court was, in part, caused by the personal feuds between some of the justices, Schwartz faulted Stone for failing to exercise leadership, especially in conference. Stone, wrote Schwartz, often allowed his colleagues to engage in continuous debate in his eagerness to have all issues thoroughly explored. The result was "a freewheeling discussion in which the Chief Justice was more a participant than a leader" (246-7). Even Stone's biographer admitted that the Stone's Court was "the most frequently divided, the most openly quarrelsome in history" (Mason 1956). This division, perhaps, was responsible for the

significant increase in the rate of dissent during Stone's tenure (see Haynie 1992; Walker, Epstein, and Dixon 1988).

With regard to the Stone Court's jurisprudence, Pacelle (1991: 140) noted that civil liberties did not flourish during Stone's tenure, despite the chief justice's declaration in a footnote to the Carolene Products decision that these issues would begin to receive more judicial scrutiny. He attributed this to a variety of reasons, including the appointment of justices who were less supportive of individual rights to the bench, the rules of the Court which required continuing attention to other issues in the volitional agenda, and the World War II which heightened national suspicion. Stone himself is said to have moved to the right in his views on economic and civil liberties issues after becoming chief justice (Konefsky 1945; Pritchett 1948: 261; Wood et al. 1998b).

Fred M. Vinson, 1946-1952

Following Chief Justice Stone's sudden death in 1946, President Harry S. Truman nominated Fred M. Vinson, a former secretary of the Treasury, to become the new chief. Like Stone, Vinson served for a brief period on the Court. But this is not their only similarity. Like Stone, Vinson, has been described as a weak leader in the Court. Kirkendall (1969: 2641-42) declared that the Vinson failed to exercise leadership as Charles Evans Hughes did. Although he inherited a badly divided Court, Vinson failed to unite it. Schwartz (1993) noted that Vinson was one of the few chief justices expected to succeed as a leader of the Court. He had prior political experience and a reputation as a consensus-builder. In fact, his reputation as a conciliator factored into President Truman's decision to appoint him as chief justice. Truman had hoped that Vinson's

interpersonal skills would enable him to restore peace to a Court that had been seriously divided under Stone. However, Vinson failed to live up to this expectation. Not only did he lack intellectual rigor, he was even more inept than his predecessor in leading the conference, so much so that his colleagues were contemptuous of his leadership skills. He “may have been the least effective Court head in the Supreme Court’s history,” wrote Schwartz (253-254).

Similar observation came from Goldman (1982: 408, 424), who noted that while Vinson was able to improve the atmosphere on the Court somewhat, the division on the Court on major policy questions remained as intense as ever. Furthermore, Vinson, observed Goldman, was not a particularly talented jurist or an effective task leader and this was obvious to his colleagues.

The Vinson Court as a whole displayed a conservative disposition to civil rights and civil liberties issues. There were two reasons for this, says Pacelle (1991). First, membership changes on the Court continued to bring in justices who were less sympathetic to individual rights claims. Second, the national hysteria against communism was not conducive to the expansion of civil liberties. Pacelle also noted that in many decisions that upheld the Smith Act the Court created an unfavorable judicial environment for litigants interested in civil liberties for over a decade (141). Thus, as in the case of the Stone Court, civil liberties issues are not expected to command a large proportion of the Court’s agenda space during Vinson’s tenure and under his leadership.

Vinson himself is described as moderate on economic issues and racial issues but conservative on civil liberties claims (Barnes 1978: 150; Mayer 1987: 261). Vinson’s

record on civil liberties, wrote Kirkendall (1969: 2647) “was characterized by an overwhelming tendency to uphold governmental power as opposed to individual claims...the same tendencies appeared in Vinson’s record on economic matters.”

Goldman (1982: 416) found that the Chief Justice along with Justices Burton and Reed formed the heart of the conservative bloc on the Court during his tenure.

Earl Warren, 1953-1969

Upon Chief Vinson’s death in September of 1953, President Dwight D. Eisenhower nominated Earl Warren, a fellow Republican and the then governor of California, to become the new chief. Warren was confirmed by a voice vote in the Senate and took judicial oath in October of the same year. Thus, the beginning of what Schwartz (1993) described as the second most remarkable and creative periods in American public law. The first was the formative era when the Marshall Court laid the foundations of American constitutional law. The judicial task undertaken by the Warren Court, wrote Schwartz, was to keep the law in step with the frenzied pace of social change in the twentieth century. Indeed, the consensus among judicial scholars and observers is that the Warren Court era ushered in changes in American constitutional law not seen since the days of John Marshall, particularly in the areas of civil rights and civil liberties. It is said that the Warren Court did more to advance the rights of individual than any previous Court (Weaver 1967; Chamber 1996; Halberstam 1993; Gray 1997; Schwartz 1983). According to Weaver,

The Warren Court “proceeded to throw open the doors of public schools to all children, to give impecunious defendants the right to counsel when brought to trial in a state court on a criminal charge, to permit the foreign-born to go abroad

on the same terms as other Americans citizens, and to order the equalization of malapportioned legislative districts, which, for years, have a nation of city dwellers under the thumb of rural politicians (1967: 3).

Chamber (1996: 23) echoes the same view in his contribution to the latest biography of Chief Justice Warren. He noted that not until the Warren era were the Civil War amendments, and particularly the Fourteenth, expanded to secure basic civil rights for African Americans. Schwartz (1993) added that the Warren Court displayed solicitude and sympathy for individual rights. “Freedom of speech, press, and religion, and the rights of minorities and those accused of crimes, those of individuals subjected to legislative and administrative inquisitions—all came under the Warren Court’s fostering guardianship” (276-277). These views of the Warren Court permeate the works of Supreme Court historians and doctrinal scholars.

Much of the Court’s judicial activism is attributed to the policy preferences and leadership of the new Chief Justice. Warren’s judicial biographers tell us that he was moderate to liberal in his political views before his appointment to the Court, and that he directed the passage of major liberal legislation during his tenure as governor (Halberstam 1996: 15; Pollack 1979: 66; Schwartz 1983: 17-18). On the bench, Warren, apparently, continued to pursue his liberal agenda. Justice Potter Stewart was quoted as saying that he often thought to himself “that, if the Chief Justice (referring to Warren) can see some issue that involves widows or orphans or the underprivileged, that he’s going to come down on that side.” Schwartz agreed, noting that the underdogs and the less privileged became Warren’s special constituency. The Chief Justice, he wrote, “would,

whenever possible, go out of his way to protect minorities, individual workers, and institutions, such as the family, in which he strongly believed” (1983: 134).

As a leader of the Court, Warren has been compared to the likes of Marshall and Hughes. Steamer (1986: 296) noted that the three chief justices possessed neither the most imaginative minds nor the intellect of several of their associates on the Court. What they had in common, and what distinguish them from others, was their ability to give their colleagues a sense of purpose and direction, while at the same time maintaining the Court’s influence and shielding it from external political attacks. Weaver (1967) noted that Warren, like his predecessors, inherited a Court that was bitterly divided ideologically between conservatives led by Justices Frankfurter and Jackson and liberals led by Black and Douglas. Adding fuel to these ideological differences were personal animosities between some of the justices. He credited Warren’s success on the Court to the force of his personality and to his conference skills (1967: 7). Schwartz likewise noted that Warren, as chief justice, displayed many of the same attributes that had made him one of the most successful state governors ever: the ability to unite diverse viewpoints, to guide men toward attainment of his program, and to work effectively with men he could not coerce. He was never the intellectual equal of many of the men who shared the bench with him—men like Black, Douglas, and Frankfurter, and he never claimed to be one. But unlike his predecessors, “he stated the issues in a deceptively simple way, reaching the heart of the matters while stripping it of legal technicalities (1983: 30-31; 1993: 266-268).

And there are indications that Warren's associates admired and appreciated his leadership. Justice Stewart was quoted as saying that while Justice Black may have been the intellectual leader of the Warren Court, "Warren was the *leader* leader": he possessed "instinctive qualities of leadership." Warren, Stewart reportedly remarked, "didn't lead by his intellect and he didn't greatly appeal to others' intellects; that wasn't his style. But he was an instinctive leader whom you respected and for whom you had affection, and... as the presiding member of our conference, he was just ideal" (quoted in Schwartz 1983: 31). Justice William J. Brennan Jr., in a personal remembrance, wrote that "the term 'the Warren Court' is a fitting tribute to Warren's effective leadership during a period that brought to the Court some of the most troublesome and controversial questions in its history." According to Brennan, Warren's "great gift was his sensitivity to the diverse and conflicting opinions held by his brethren. He (Warren) had about him a grace and courtesy that we all respected deeply, and he set a tone that ensured that even the most heated discussions would be conducted with decorum and consideration" (1996: 10). These tributes to Warren by his former associates suggest that the former Chief Justice possessed exceptional leadership skills that allowed him to move the Court toward his liberal agenda and to pay more attention to civil rights and liberties issues.

One other factor that may have enabled Warren to influence the agenda of the Court was the increase in the Court's Miscellaneous Docket during his tenure. Chief justices and their clerks are primarily responsible for the review of this docket, which often contains *in forma pauperis* (or I.F.P.) petitions, that is, petitions filed by indigent defendants or those unable to afford legal representation. Schwartz reported that the

Supreme Court, at the time of Warren, received an increasing number of I.F.P petitions, and that by the end of Warren's term, the number of these petitions had risen dramatically (1983: 66). The increase in the number of I.F.P. petitions offered additional opportunities for Chief Justice Warren to influence the share of the Court's attention on civil rights-civil liberties issues. However, Pacelle claimed that the early Warren Court did not profoundly alter the Civil Liberties agenda. What it did was to "set into motion the forces that would ultimately affect the growth of individual rights." The later Warren Court was the one that ushered in a constitutional revolution in the area of civil liberties with his consistent liberal decisions (1991: 141). But Chambers (1996: 29-30) argued that while the Warren Court upheld the constitutionality of much of the Civil Rights era legislation, the Burger Court was left with "the task of developing and articulating the appropriate standards that would govern its enforcement." Nonetheless, the inference from these two studies is that Warren had a far greater effect on the imports of the civil rights-civil liberties cases and legislation than on the shaping of the Court's agenda.

Warren E. Burger, 1969-1986

The man who replaced Warren after his retirement in 1969 was Warren E. Burger, a life-long Republican and a former U.S. attorney general and circuit court judge. According to Schwartz, Burger was a critic of the Warren Court's criminal procedure jurisprudence during the 1960s and he came to the Court with an agenda that included a dismantling of the jurisprudence edifice erected by his predecessor. However, he was unable to mass his Court to overturn many important Warren Court's decisions. The

Burger Court, declared Schwartz, “was not marked by strong leadership in molding Supreme Court jurisprudence” (1993: 312-314).

Other assessments of Burger’s leadership on the Court vary from his being a manipulator or a person with no conviction to being a good Court manager. In a controversial 1979 publication, Bob Woodward and Scott Armstrong, two veteran journalists of the Watergate period, presented an unflattering portrait of the Chief Justice as a leader of the Court. Burger is described as a man who did not command enough respect, and who, according to some of his colleagues, frequently engaged in all sorts of maneuvers in order to retain control of opinion assignment. Steamer (1986) also noted that Burger controlled the opinion assignment in all but a few cases each term. While he saw nothing wrong with a chief justice switching his votes in order to maintain control over the Court’s opinion output, he agreed that Burger was not a leader of the conference; his success was in the area of judicial administration (178-183). A similar observation is made by Barnes (1978; 48-49) and by Lamb (1991: 159), both of whom noted that Burger did not dominate his colleagues on the bench, and that he is more likely to be remembered as a task manager than as a jurist.

Ironically, Burger’s tight control of opinion assignments may have enabled him to control the Court’s agenda. Pacelle (1991) claimed that during Burger’s tenure “Civil liberties and its component areas reached unprecedented levels of attention. This growth appears to be a function of agenda context left by the Warren Court, the opening of additional rights by the Burger Court, and its retreats from some of its predecessor’s work” (142). If Pacelle’s assessment is correct, there should be a significant increase in

the share of the Court's attention to civil rights and civil liberties issues under Chief Burger's leadership.

William H. Rehnquist, 1986-

In September of 1986, Chief Justice Burger retired after spending seventeen years on the Court. The man that President Ronald Reagan chose to replace him was associate justice Rehnquist, Burger's conservative ally on the Court. Rehnquist's tenure as chief justice so far has lasted thirteen years, and he remains the chief as of this writing.

The Rehnquist Court is generally considered a conservative Court, and Rehnquist himself is described as a doctrinaire conservative (Ackerman 1988; Barnes 1978; Davis 1991; Goldman 1985, 1987, 1991; Scott and Smith 1990; Schwartz 1993). However, his influence on the rest of the Court has been a matter of debate. Schwartz (1993) viewed him as "a strong Chief Justice, more in the Warren than the Burger mold." He opined that Rehnquist's extreme views have not prevented him from establishing good relationship with his colleagues (364-67). On the other hand, Sue Davis's (1991) study suggests that Rehnquist has not been as effective as Schwartz indicated. The study, which examined Rehnquist's voting behavior in the first three terms of his tenure as Chief Justice, concluded that Rehnquist's leadership has not been essential in bringing together a conservative majority. In terms of the Court's agenda, Pacelle (1991: 143) noted that the growth of civil liberties issues has continued to consume a high proportion of the Court's agenda space. The question, of course, is whether this category of issues has significantly increased during Chief Justice Rehnquist's tenure. If empirical evidence about his leadership on the Court is any indication, it is unlikely that this happened. The

expectation, then, is that the Court's share of attention to civil rights and civil liberties issues will undergo no significant change from 1986 to 1993, the time period in this study during which Rehnquist occupied the center chair.

Chapter Summary

The consensus in the judicial literature is that civil rights and civil liberties have constituted the volitional agenda since the New Deal. However, there is some disagreement about the dominant judicial value of the Court during this third era. One group of scholars, including McCloskey, argues that the Court switched from being a defender of property rights to being a guardian of the rights of individuals. Another contends that the Warren Court's liberalism was but a brief interlude in the streams of conservatism that has run through the Court since 1937, particularly in the areas of civil rights and civil liberties. The question is: what influence, if any, did the Court's judicial value had on the share of the Court's attention to civil rights and civil liberties issues in the period 1937-1993? One way to find out is to measure the effect of ideological and partisan control of the Court, as well as the leadership of the chief justices, on the allocation of the Court's agenda space to these issues.

Examining the ideology of the justices who sat on the Court during the period 1937-1993, fourteen have been described as liberals or found to be so in their voting decisions; twenty-one as conservatives; two as moderates (although empirical studies put them in the conservative bloc in some of the terms); and three as moving from one ideological position to another during their tenure. Liberals had a clear majority in only nine of the fifty-seven terms that the Court was in session, while the rest was dominated

by conservatives or conservative-leaning justices. The Court was about evenly divided among Democrats and Republicans, twenty to nineteen respectively. There was one Independent, Felix Frankfurter. Democrats were the majority in thirty-three terms; Republicans in twenty (see Appendix C). Among the men who presided over the Court during this time, only Chief Justice Warren received high marks for his effectiveness on the Court and in the conference. However, a few studies suggest that Burger had the potential to influence the Court's agenda during his tenure. These general historical and empirical information provide the basis for testing McCloskey's claims about the Court's volitional agenda and its dynamics. That empirical investigation is carried out in the next chapter.

CHAPTER 8

THE COMPOSITION AND DYNAMICS OF THE SUPREME COURT'S AGENDA, 1937-1993: AN EMPIRICAL ANALYSIS

In the last chapter, I noted that judicial scholars generally agree that civil rights and civil liberties issues have dominated the Court's agenda space since the New Deal, but that they disagree on the nature of the judicial value or values underlying the Court's attention to these issues. This chapter employs data to identify trends in the composition of the Court's issue agenda from 1937 to 1993 and to verify McCloskey's claims regarding the dynamics of the Court's volitional agenda during this time period. The first part of the chapter analyzes the Court's agenda to determine what proportion of this agenda the Court allocated to civil rights-civil liberties issues. The second part examines how much of the variations in the Court's civil rights and civil liberties agenda is accounted for by measures of the judicial value described in Chapter 2.

How Much Did Civil Rights and Civil Liberties Dominate?

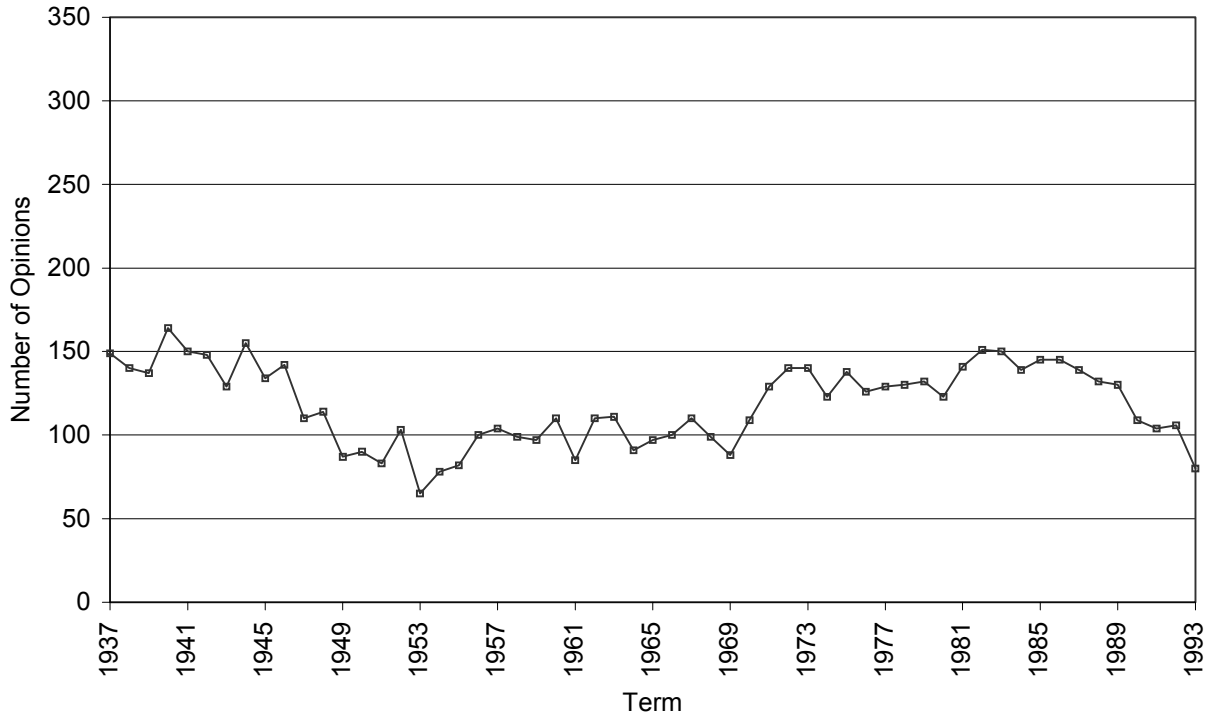
Given the general consensus in the judicial literature that civil rights and civil liberties issues have dominated the third era of the Supreme Court, these issues should command the largest portion of the Court's agenda space in the period 1937-1993.

Hence, the following hypothesis:

- H1** *Between 1937 and 1993, the Supreme Court allocated the greater proportion of its agenda of full opinions to civil rights and civil liberties issues.*

Figure 8-1 shows the trend in the Court's overall opinions from 1937 to 1993. The chart indicates that the Court has been writing less than 150 opinions per term, compared

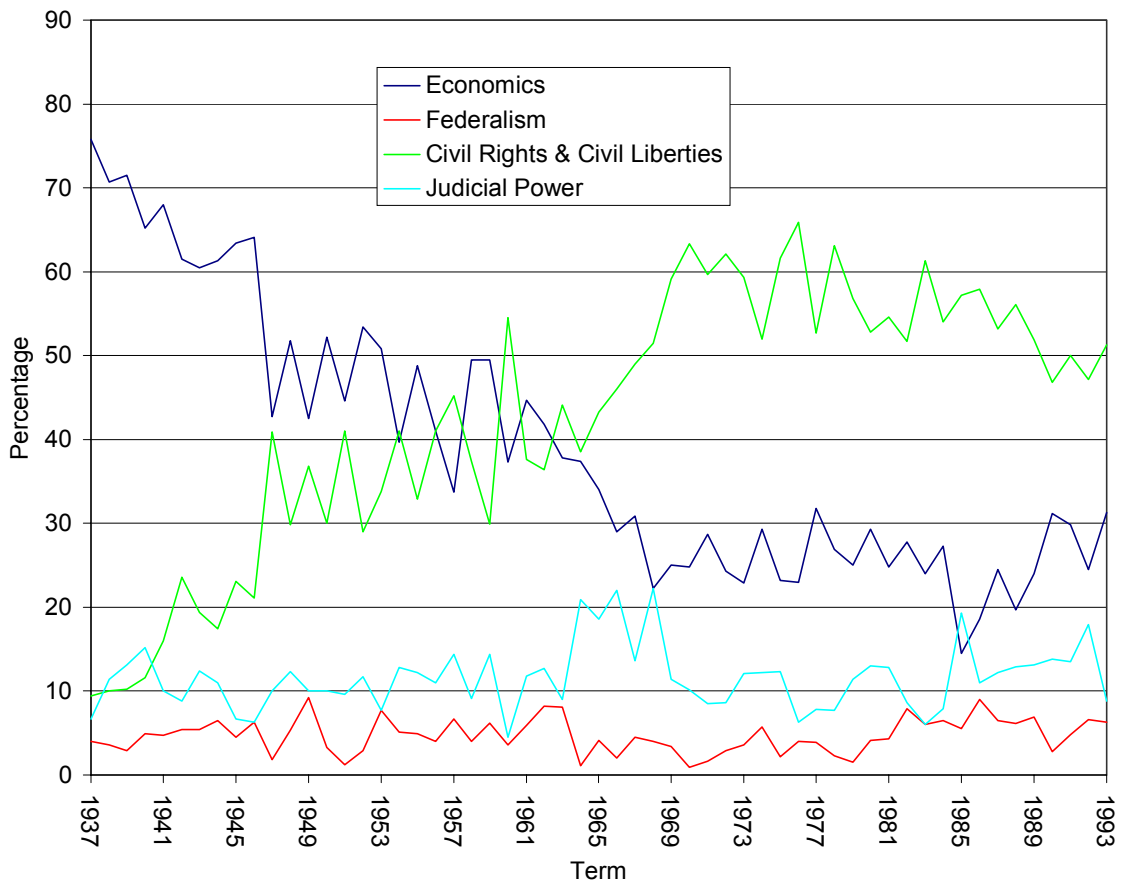
Fig. 8-1. Trends in the Full Opinions of the U.S. Supreme Court, 1937-1993



to its average of 200 opinions in the previous era. The number of opinions declined to below 100 between 1949 and 1955 (the period between the end of the World War II and the beginning of the civil rights movement of the 1960s). It slowly rose back to its original level, and then started to decline again beginning in 1984. Over the entire period, the Court wrote decided a total of 8, 093 cases of which 6, 751 were full opinions. The latter averaged 118 opinions per term. The largest number of opinions occurred between 1937 and 1946 (144), while the smallest (96) occurred between 1947 and 1968, during the Vinson and the Warren Courts.

Figure 8-2 shows the relative proportion of the full opinions by major issue areas. The proportion of civil rights and liberties decisions demonstrate a gradual upward trend from 1937, but not until the 1950's did this category of issues begin to supplant economic decisions as the Court's volitional agenda. There seems to be a transition then occurring,

Figure 8-2--Trends in the Allocation of Agenda Space to Four Major Issue Areas, 1937-1993



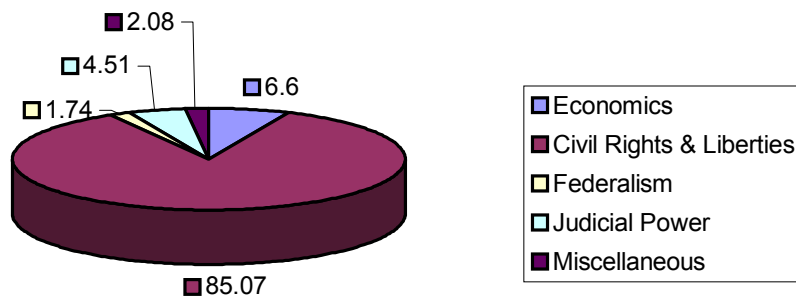
with economic issues declining and civil rights-civil liberties decisions beginning to win the lion's share of the Court's agenda. However, throughout this third period, civil rights-civil liberties decisions never climbed beyond 70 percent of the Court's agenda space, as did the economic dimension decisions in the pre-World War II period. The largest percentage of civil rights-civil liberties opinions occurred between 1968 and 1986 (57%),

during the Burger Court (compared with 50 percent for the Warren Court), while the smallest (16%) occurred from 1937 to 1946, during the Hughes and Stone Courts. Over the entire period, civil rights-civil liberties decisions averaged 43 percent. Economic decisions form the next largest category (39%), followed by judicial power (12%). Federalism issues constitute the smallest portion of the Court's agenda space, averaging 5%.

Analysis of the Great Cases

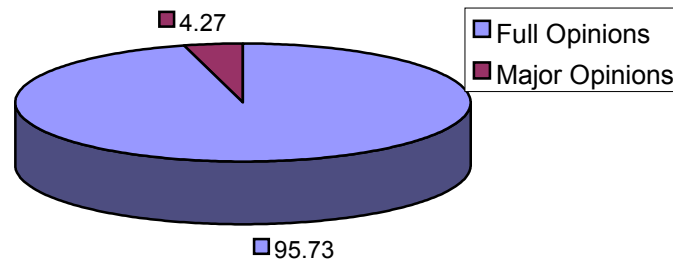
When the analysis is based on only the great cases the Court decided during this third era, the dominance of civil rights and civil liberties issues proves conclusive. Figure 8.3 indicates that this category of issues constitutes the greater proportion of the Court's

Figure 8.3--Major Opinions of the U.S. Supreme Court by Issue Area, 1937-1993*



important opinions from 1937 to 1993, although, as Figure 8.4 shows, the major cases represent only a very small proportion of the total body of reported decisions during this time period (N = 6,751).

Figure 8.4--Proportion of Full Opinions that Constitutes Major Opinions, 1937-1993*



*Source: Epstein, Segal, Spaeth, Walker. 1996. *The Supreme Court Compendium*, pp. 112-141.

Overall, these findings lend support to hypothesis 1 and to McCloskey's claim that the Supreme Court in the post-1937 era has devoted much of its attention to civil rights and civil liberties. But it is clear also that the shift from economic to civil rights-civil liberties agenda did not begin in the immediate post-1937 period as McCloskey's and other historical accounts have asserted. Although declining and commanding less agenda space than before, economic issues remained the Court's volitional agenda until the mid- to late 1950's. This finding is consistent with the result obtained by Lanier (1997) in his own analysis of the Court's agenda from 1888-1988.

As for why the Court's attention to economic issues spawned a much longer period than McCloskey and other scholars imagined, one explanation by Goldman (1982:335-336) is that several economic issues involving statutory interpretations of administrative rules and constitutional challenges to state economic activity were still coming to the Court years after 1937. Even McCloskey himself conceded that the post-1937 Supreme Court did not completely abandon economic issues altogether. Significant economic

questions such as economic procedural due process and states' actions on interstate commerce, he wrote, "still absorbed a respectable share of the Court's attention" (1994 ed.: 119, 125-126). What he and other scholars misjudged is the extent to which economic issues would continue to command the Court's attention after the 1937 term.

Another plausible explanation is that while the Court may have finally declared its intention in 1938 to relegate economic issues to a secondary position and to focus more on civil liberties-civil rights claims, it had to wait till the latter was fully developed in the political environment and had percolated through the appellate system. Indeed, judicial scholars have long maintained that the Court's power is not unlimited; first, there must be a dispute, and second, litigants must petition the Court for redress before it can hear a case. Figure 8-2 shows civil liberties-civil rights issues starting to rise on the Court's agenda after 1937, but it would take a few more years before these issues climbed to the top of the Court's docket.

Judicial Value and The Continuing Dominance of Economic Issues, 1865-1955

The preceding analysis indicates that a major shift in the Court's volitional agenda occurred in the 1950's when civil rights and civil liberties issues began to climb to the top of the Court's agenda, and that these issues have dominated much of the modern Court's agenda. Before examining the impact of the Court's dominant judicial value in the building of this agenda, it might be worthwhile to extend the analysis conducted in Chapter 6 into the modern era, for three reasons. First, as noted above, economic issues, while commanding less agenda space after 1937, continued to predominate on the Court's agenda of full opinions till the mid- to late 1950's, thus suggesting a much-

extended second period than the one McCloskey identified.¹ Second, according to McCloskey and several other scholars (e.g., Pacelle 1991; Schwartz 1993; Segal and Spaeth 1993, Urofsky 1997: 11-12), Justice Stone's memorable footnote to the U.S. v. Carolene Products Co. decision announced in March 1938 effectively marked the end of economic supervision and the Court's second constitutional era. To determine the full impact of this case would require extending the analysis beyond the 1937 term.² Third, perhaps as a result of the Judges' Bill of 1925 that gave the Supreme Court discretionary control over its docket the impact of the Court's judicial value would become pronounced for this extended second period than for the one McCloskey identified.

Table 8-1 presents the results of the analysis of the impact of judicial value variables tested in Chapter 6 on the Court's economic agenda from 1865 to 1955, along with that of three additional variables. One of the new variables estimates the impact of the end of the Second World War in 1945 on the Court's primary issue agenda. A decreasing and gradual effect is posited. The other two weigh the impact of Chief Justice Stone and that of his successor, Chief Justice Fred M. Vinson. As the results indicate, the termination of the war had a negligible effect on the Court's economic agenda. So did the Carolene Products decision and the leadership of Chief Justice Vinson. However, and surprisingly, the Court increased its share of attention to economic issues under Chief Justice Stone by thirteen percent. Moreover, partisan control continued to have an impact

¹In fact, some scholars (see Foster and Leeson 1998: 8) extend the second era of the Court extended beyond the *Carolene Products* decision.

²The Supreme Court term runs from October to May. The *Carolene Products* case was reviewed during the 1937 Court term, but the decision came out in March of 1938. As the effect of a case would likely be felt after it is announced, this study considers the decision date rather than the Court term as crucial for the analysis of case impact on the Court's agenda.

on the Supreme Court's economic agenda during this extended period, as did the Slaughterhouse Cases and Chief Justice Hughes.

Table 8-1—Measures of the Court's Dominant Value and their Effects on the Court's Economic Agenda, 1865-1955

Variable	Coefficient	Std. Error	T-Stat	Sig. Level
MA (1)	-0.52	0.12	-4.15	0.000
MA (2)	-0.62	0.14	-4.47	0.000
Slaughterhouse Cases ω_0	10.65	5.59	1.90	0.06
Conservative Dominance	-0.37	0.61	-0.61	0.55
Partisan Control	1.89	0.52	3.63	0.000
World War II ω_0	-3.72	5.40	-0.69	0.49
Carolene Products ω_0	0.13	4.68	0.03	0.99
Chase	5.79	7.17	0.81	0.42
Waite	1.75	5.69	0.31	0.76
Fuller	0.58	3.74	0.15	0.88
White	0.81	3.68	0.22	0.83
Taft	-0.16	3.42	-0.05	0.96
Hughes	8.29	3.29	2.52	0.01
Stone	13.11	4.24	3.09	0.003
Vinson	3.45	6.83	0.51	0.61

Q(20)=13.40 Sig. Level = .02 DW= 2.04 $R^2 = 0.60$ R^2 (adjusted) = 0.52
($t_{75} = 1.67$; $p \leq .10$ two tailed test)

Table 8-2 shows the improvement in the fit of the model when the insignificant variables are removed. Except for the Slaughterhouse Cases variable, which loses significance, the results remain much the same.

Table 8.2—Measures of the Court's Judicial Value and their Effects on the Court's Economic Agenda, 1865-1955: A Trimmed Model

Variable	Coefficient	Std. Error	T-Stat.	Significance
MA (1)	-0.63	0.11	-5.46	0.000
MA (2)	-0.50	0.12	-4.02	0.000
<i>Slaughterhouse Cases</i>				
ω_0	6.35	4.54	1.40	0.17

Partisan Control	1.90	0.32	5.98	0.000
Hughes	6.45	2.72	2.37	0.02
Stone	11.20	3.54	3.16	0.002

Q(20) = 9.43 Sig. Level = 0.80 DW = 1.93 R² = 0.58 Adj. R² = 0.55

The significance of Chief Justice Stone’s variable may be attributed to the fact that Stone, like Hughes, presided over the Court after it had been given discretionary control over its docket. However, as noted earlier, historical accounts indicate that Stone was not particularly effective as chief justice. A more probable explanation is that Stone’s lack of leadership created a leadership vacuum and provided opportunity for other justices on the Court with an economic agenda to bring more of such cases for review. In fact, several studies (Haynie 1992; Pritchett 1948: 39-45; Walker, Epstein, and Dixon 1988) have found a high rate of dissent among the justices of the Stone Court. Also, Goldman (1982) noted that Stone presided over a Court whose membership was relatively young, lacked judicial experience, and who were not grounded in the mores of the Court. These activist justices were just as determined to superlegislate their own values as the conservative majority before them. They “shared the impatience and activism associated with the New Deal Administration from whose political soil they sprouted...The subtle and sometimes devious arts of judicial reasoning and incrementalism seemed to be lost or deliberately ignored by the newer justices.” This set them on a collision course with Chief Justice Stone who “had a more across-the-board judicial orientation” (339).

Judicial Value and the Growth of the Court's Civil Rights and Civil Liberties Agenda, 1937-1993

Unlike the earlier Courts, the modern Court has had complete control of its docket, meaning that it is no longer mandated to consider every case appealed. It could choose and pick from the list of cases for which review is requested. Therefore, if there is any period of the Court in which the dominant value of the Court should exert a strong influence on the Court's agenda-building behavior, it should be this third period. Figure 8-2 shows a gradual and notable growth in civil rights and civil liberties issues beginning from 1937. The question is what judicial values prevailed on the Court during this later period and what effect did these values have on the dynamics of the Court's civil rights-civil liberties agenda?

Although the last chapter suggests differently, McCloskey claimed that liberal values have prevailed on the modern Court, a view shared by several scholars. His analysis posits a relationship between these values and the predominance of civil rights-civil liberties issues on the Court's agenda space. To test if this proposition has empirical support, I present the following hypotheses, and then test them later with empirical data.

H2: *Under the control of liberal justices, the Supreme Court placed more civil rights-civil liberties cases on its agenda of full opinions than under the control of conservative justices.*

As noted in the preceding chapter, liberalism in the area of civil rights-civil liberties is generally associated with support for individual rights claims against government regulation. The presence of a liberal majority on the Court, then, should lead to an increase in the number of civil rights-civil liberties claims brought to the Court, as well as the Court's attention to these issues. Adding the number of conservative justices

in each Court term from 1937 to 1993 and subtracting it from the number of liberal justices (Appendix C) produces the values for the ideological control variable. As measured, the variable should be positively related with the proportion of the Court's full opinions devoted to civil rights and civil liberties issues during this time period and statistically significant.

H3: *The Supreme Court allocated a greater proportion of its agenda of full opinions to civil rights and civil liberties under the control of a Democratic majority than under a Republican majority.*

Studies of judicial behavior in the post-depression United States have found that, in general, Democratic judges have been generally supportive of civil rights and civil liberties claims, while Republican judges have been less supportive of such claims. Similar behavior has been found among Supreme Court justices (Tate 1981; Tate and Handberg 1991). Thus, as in the case of liberal control, the presence of a Democratic majority on the Court should produce an increase in civil rights and civil liberties claims and in the proportion of the Court's agenda space devoted to these issues. In consistent with the partisan control measure adopted for the earlier periods, Democratic control is measured by subtracting the number of Democrats from the number of Republicans in each Court term from 1937 to 1993. Because the hypothesis posits a *negative* relationship between Republican control of the Court and the proportion of the Court's civil rights and liberties opinions during this time period, the coefficient of the partisan control variable should be negative.

H4: *The Supreme Court wrote more civil rights-civil liberties opinions under the aegis of Chief Justices Warren and Burger than under any other chief justices during this third period.*

As the last chapter indicates, no chief justice has been more effective on the Court than Earl Warren since the days of John Marshall and Charles Evans Hughes. Both in terms of managing the Court and its conference deliberations, Warren, as many scholars attest, is unrivaled among the men who presided over the Court during this time period. Warren's liberalism and that of his Court has also been noted. Therefore, his tenure as Chief Justice should bring about a considerable surge in the Court's attention to civil rights-civil liberties issues. With his leadership skills and liberal majority, Warren should be able to profoundly alter the Court's civil rights and liberties agenda, although both Pacelle (1991: 141) and Chambers (1996: 29-30) suggest differently. Unlike Warren, Burger is generally not regarded as an effective leader of his Court. But a study of his opinion assignment (Steamer 1986) and Pacelle's claim that civil liberties reach an unprecedented level of attention during Burger's tenure suggest that these issues will witness a remarkable growth under his leadership. A dummy intervention variable is used for each of the two chief justices to measure their effect on the share of the Court's attention to civil rights-civil liberties issues during this third period.

H5: *The Supreme Court's decisions in Brown v. Board of Education, Mapp v. Ohio, Gideon v. Wainwright, and Miranda v. Arizona led to more civil rights and civil liberties being brought to the Court and consequently produce more opinions in this issue area.*

Like the economic decisions of the earlier Courts, the modern Court has issued several landmark rulings involving civil rights and civil liberties that it is difficult to posit which specific ones had an impact on the Court's attention to these issues. Nonetheless, judicial scholars and observers have frequently referred to the three cases mentioned above as opening the door to civil rights and liberties claims during this third era

(Biskupic and Witt 1998; Pacelle 1991; Schwartz 1993; Goldman 1987, 1985, 1982, to mention a few) . In the Brown case, the Court opened the door for minorities to challenge segregation in public education, and in the Mapp, Gideon, and Miranda cases, the Court greatly enlarged the rights of criminal defendants. These cases are thus expected to contribute to the proportion of civil rights and civil liberties issues on the Court’s agenda. A dummy intervention variable is used to measure the effect of each ruling. This and the preceding hypotheses are formalized as:

$$\text{CIVIL}_t = \beta_0 + \beta_1 \text{PARTYC}_{t-1} + \beta_2 \text{IDEOC}_{t-1} + \beta_3 \text{CJ}_{n\ t-1} + \omega \text{I}_{n\ t-1} + e_t,$$

where

- | | | |
|-----------------------|---|--|
| CIVIL _t | = | the proportion of “full opinions” allocated to civil rights and civil liberties |
| CJ _{t-1} | = | Chief Justice's leadership (measured for each of the Chiefs that occupied the position in the third period). |
| PARTYC _{t-1} | = | Partisan Control |
| IDEOC _{t-1} | = | Ideological Control |
| I _{t-1} | = | Intervention variables for the <u>Board</u> , <u>Mapp</u> , <u>Gideon</u> , and <u>Miranda</u> decisions |

Results

Table 8-3 presents the initial results of a multivariate time-series regression between measures described above and the proportion of the Court’s civil rights and civil liberties decisions in the Court terms 1937-1993. An ARIMA (2,1,0) was estimated for the civil rights-civil liberties series. Before the regression, diagnostics were carried out to test for multicollinearity between the independent variables. No such effects were found.

As the table indicates, the ideological and partisan control variables are not statistically significant, but two chief justice variables are. The percentage of the Court's civil rights and civil liberties opinions decreased as expected under both Chief Justice Hughes and Chief Justice Stone. Neither Court wrote a large number of opinions in this issue area, but the decrease was very pronounced under Hughes. However, the Court increased the share of its opinions devoted to civil rights-civil liberties under Chief Justice Burger. Contrary to expectation—but as Pacelle's (1991) and Chambers's (1996) analyses suggested—these opinions show no appreciable growth under Warren. Of the four Supreme Court rulings examined, none is statistically significant. When all the insignificant variables are removed from the model, the fit of the model improves (Table 8-4). The Stone variable also becomes significant.

Table 8-3. Measures of the Court's Judicial Value and their Effects on the Court's Civil Rights and Liberties Agenda, 1937-1993

Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	-0.88	0.15	-5.70	0.000
AR (2)	-0.49	0.16	-3.08	0.003
Ideological control	-0.40	0.54	0.73	0.47
Partisan control	-0.30	0.72	-0.42	0.67
Hughes	-10.60	5.20	-2.04	0.05
Stone	-6.41	4.10	-1.56	0.13
Vinson	1.06	4.39	0.24	0.81
Warren	1.69	4.09	0.41	0.68
Burger	8.88	3.85	2.31	0.03
Rehnquist	5.10	5.16	0.99	0.33
Brown	0.42	6.08	0.07	0.99
Mapp	1.20	5.92	0.20	0.84
Gideon	-0.99	6.32	-0.16	0.88
Miranda	6.38	4.74	1.35	0.19

Q(20) = 14.16 Sig. Level = 0.03 $R^2 = 0.88$ R^2 (adjusted) = 0.78 DW = 2.19
($t_{42} = 1.68$; $p \leq .10$, two tailed test).

Table 8-4. Measures of the Court's Judicial Value and their Effects on the Court's Civil Rights-Civil Liberties Agenda, 1937-1993: A Trimmed Model

Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	-0.83	0.13	-6.31	0.000
AR (2)	-0.45	0.13	-3.43	0.001
Hughes	-11.64	4.88	-2.38	0.02
Stone	-6.38	3.39	-1.88	0.07
Burger	7.18	3.00	2.39	0.02

Q(20) = 15.71 Sig. Level = 0.33 R² = 0.84 R² (adjusted) = 0.82. DW = 2.15

Additional Factors

The Political Environment

Another potential factor that may have accounted for the rise of civil rights-civil liberties on the modern Court's agenda space is the number of case filings in this area. However, this variable is excluded from the model due to lack of data.³ Beside, it is unlikely that the number of case filings will have any notable effect on the share of the Court's attention on civil rights and liberties issues during this third period, since the Court now had control over its docket. However, there were some important events in the Court's political environment during this time that had the potential to affect the dynamics of the Court's civil rights and liberties agenda. The two most important ones are: the Civil Rights of 1964 and the Voting Rights Act of 1965.

The 1964 Civil Rights Act, to date, has been the most comprehensive legislative attempt to erase racial discrimination in the United States. The Act, among other things, prohibits discrimination in places of public accommodation and establishes the right to

³Harold Spaeth's expanded Supreme Court Judicial Database includes writs of certiorari but these were not coded by issue categories.

equal employment opportunities. The Voting Rights Act of 1965 authorizes the attorney general of the United States to send voter registration supervisors to areas in which minority voters had historically been disenfranchised or prevented from voting. These two civil rights laws should exert a positive effect on the Court's civil rights and liberties agenda during this third era. A dummy intervention variable is used to measure the impact of each Act.

Table 8-5 shows that when these variables were added to the model, they produce no statistically significant coefficients. Thus, contrary to expectation, the two congressional acts that many scholars have described as the most important civil rights legislation in the twentieth century, have had no appreciable effect on the Court's civil rights and civil liberties agenda, at least in the period between 1937 and 1993. Compliance with the two laws may have led to few litigation being brought before the Court, or perhaps much of the litigation generated were resolved at the lower appellate court level.

Table 8-5 The Impact of the Civil Rights Acts on the Court's Civil Rights and Civil Liberties Agenda, 1937-1993

Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	-0.83	0.14	-6.05	0.000
AR (2)	-0.47	0.14	-3.37	0.002
Partisan control	-0.27	0.59	-0.45	0.65
Ideological Control	-0.30	0.47	-0.65	0.52
Hughes	-11.03	5.08	-2.17	0.04
Stone	-6.81	3.55	-1.92	0.06
Burger	6.77	3.16	2.14	0.04
Miranda	7.34	5.59	1.31	0.20
Civil Rights Act	0.33	6.10	0.05	0.96
Voting Rights Act	1.64	5.85	0.28	0.78

Q(20) = 15.04 Sig. Level = 0.13 $R^2 = 0.84$ R^2 (adjusted) = 0.81 DW = 2.14
 ($t_{46} = 1.68$; $p \leq .10$, two tailed test)

The Impact of Time

Caldeira (1981) found that time accounted for some of the variations in the Court's criminal agenda between 1937 and 1978. Figure 8-2 suggests that the same factor may be an important underlying process in the modern Court's attention to civil rights and civil liberties issues. The civil-rights-civil liberties series shows a pattern of curvilinear growth; that is, from a fairly stationary or steady state, the series grows in a rapid fashion, levels off, and then declines to a new constant a level. The proposition is formalized as:

$$\text{CIVIL}_t = \beta_0 + \beta_1 \text{TIME}_{t-1} - \beta_2 \text{TIME}_{t-1}^2 + e_t,$$

Tables 8-6 and 8-7 show that time was indeed a factor in the growth of civil rights-civil liberties issues on the Court's agenda space. The coefficients were significant and in the predicted direction. More important is the fact that the Hughes and Stone variables become statistically insignificant when the time variables were added. This result indicates the strength and importance of the time component in the dynamics of the Court's civil rights-civil liberties agenda from 1937 to 1993, as opposed to the leadership of the Chief Justice. It shows that the Court began with relatively constant opinions in this area, increased them rapidly at one point, and then reached a new equilibrium.

Table 8-6. The Impact of Time on the Court's Civil Rights and Civil Liberties Agenda, 1937-1993

Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	-0.87	0.13	-6.66	0.000
AR (2)	-0.49	0.13	-3.75	0.000
Hughes	-7.04	5.22	-1.35	0.18
Stone	-5.19	3.30	-1.57	0.12
Burger	6.25	2.92	2.14	0.04
Miranda	5.64	4.17	1.35	0.18
Trend	1.61	0.80	2.01	0.05

$$\begin{array}{c}
 \text{Trendsq} \mid -0.02 \mid 0.02 \mid -1.63 \mid 0.11 \\
 Q(20) = 16.97 \text{ Sig. Level } 0.15 \quad R^2 = 0.85 \quad R^2 = 0.83 \quad DW = 2.22 \\
 (t_{46} = 1.68; p \leq .10, \text{ two tailed test})
 \end{array}$$

Table 8-7. The Impact of Time: A Trimmed Model

Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	-0.84	0.13	-6.61	0.000
AR (2)	-0.46	0.13	-3.62	0.000
Burger	5.98	3.02	1.98	0.05
Trend	2.16	0.74	2.91	0.005
Trendsq	-0.02	0.01	-2.17	0.04

$$Q(20) = 15.70 \text{ Sig. Level} = 0.40 \quad R^2 = 0.84 \quad R^2 (\text{Adjusted}) = 0.83 \quad DW = 2.14$$

Chapter Summary

The preceding analyses have shown that McCloskey is partially correct in his assessment of the Court's volitional agenda in the post-1937 period. The Court did allocate a greater proportion of its agenda space to civil rights and civil liberties issues during most of this time, but these issues did not begin to supplant economic issues as the Court's volitional agenda until the late 1950's. In other words, the dominance of economic issues lasted longer than McCloskey and other scholars believed. Moreover, analysis of the dynamics of this economic agenda from 1865 to 1955 indicates that partisanship continued to exert influence on this agenda during this extended period. Also, and surprisingly, the Court increased its share of attention to economic issues under the aegis of Chief Justice Stone as well. But again, it should be noted that Hughes and Stone presided over the Court after the passage of the Judges' Bill. Moreover, Stone's failure to provide leadership in the conference may have given those among his colleagues with an economic agenda the opportunity to accept more of these cases for review.

With regard to the dynamics of the modern Court's civil rights and liberties agenda, the findings in this chapter show that, overall, measures of the Court's dominant judicial value had little effect on the share of the Court's attention to this agenda from 1937 to 1993. However, the proportion of the Court's full opinions devoted to this category of issues increased under Chief Justice Burger. Time, also, was a factor in the building of this agenda. The significance of the time variables bolsters Caldeira's observation that "issues before the Court have a quite distinctive life-cycle." Caldeira (1981: 468) argued that each issue that commands a significant portion of the Court's attention will, at some point in time, give way to other issues as they decline in importance and salience. While Figure 8-2 does not show that civil rights and civil liberties issues have begun to decline on the Court's agenda space, it does show that the proportion of the Court's attention to these issues has leveled off.

The next chapter first examines the overall trends in the Court's agenda over the entire period of this study and then summarizes the results reported in this and previous chapters. It also offers suggestions for future research.

CHAPTER 9

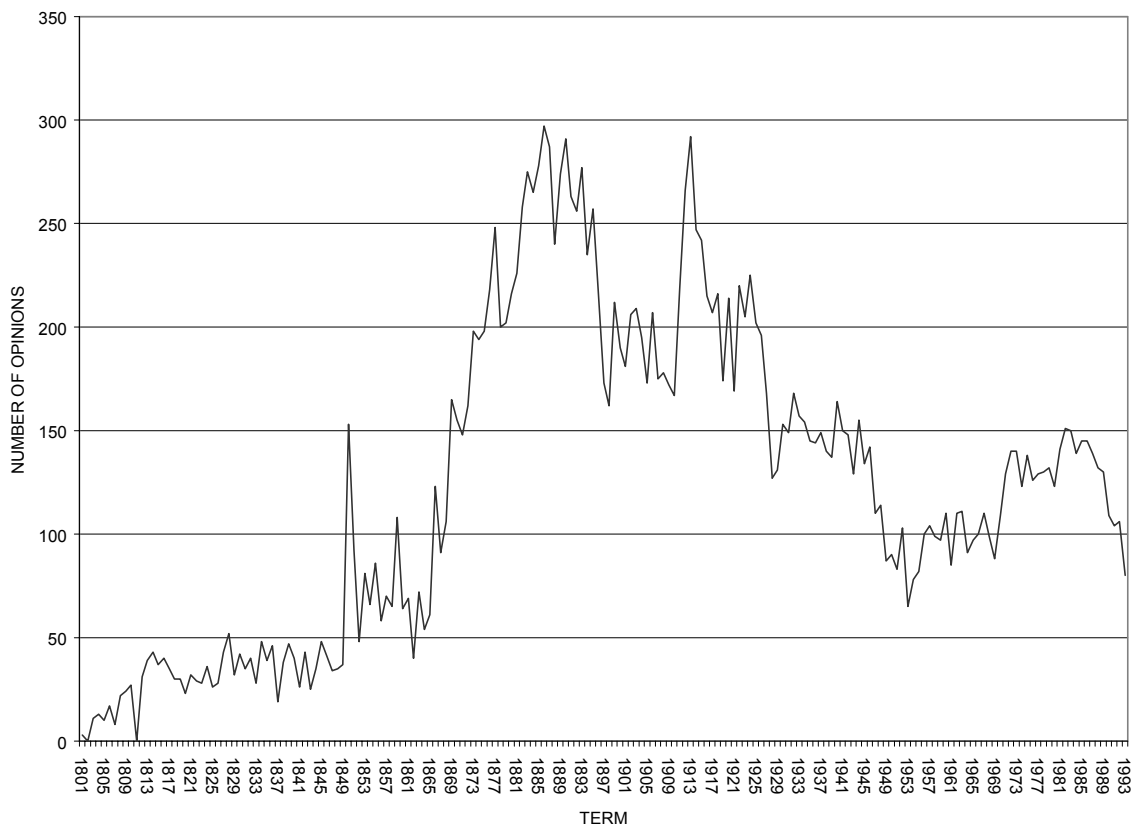
SUMMARY AND CONCLUSION

The question of how issues rise and fall on the agenda of the United States Supreme Court has only begun to be addressed by students of judicial behavior. But almost all the work in this area has focused on the modern Court. What little information exists about the nature and dynamics of the Court's agenda and agenda-building process in the past has come from historians and doctrinal scholars. The inquiry conducted in this study focused on the nature and dynamics of the issues dominating the Court's agenda across three different eras. This inquiry is based on two major propositions derived from historical works on the Supreme Court and, specifically, from Robert G. McCloskey's seminal work, *The American Supreme Court*. The first proposition tested is that the primary issue agenda of the United States Supreme Court in each of its identified eras reflected the dominant interest of the Court in that era. According to McCloskey and several historians and doctrinal scholars, the dominant interest of the Court from the time Chief Justice Marshall ascended the center chair to the close of the Civil War was the nation-state relationship. After the Civil War, this interest became focused on the relationship between government and business. Beginning in 1937, the Court's interest supposedly shifted to the relationship between the individual and government. This analysis of the Supreme Court suggests that nation-state or federalism issues commanded the most attention from the justices in the Court's first era, while economic and civil

rights and liberties issues dominated the Court's agenda space in the second and third eras, respectively.

The findings in the previous chapters provide only partial support for this proposition. First, federalism issues did not dominate the Court's agenda in its first era. Rather, economic issues received the most attention during this period. Figure 9.1 shows

Figure 9-1--Trends in the Full Opinions of the U.S. Supreme Court, 1801-1993

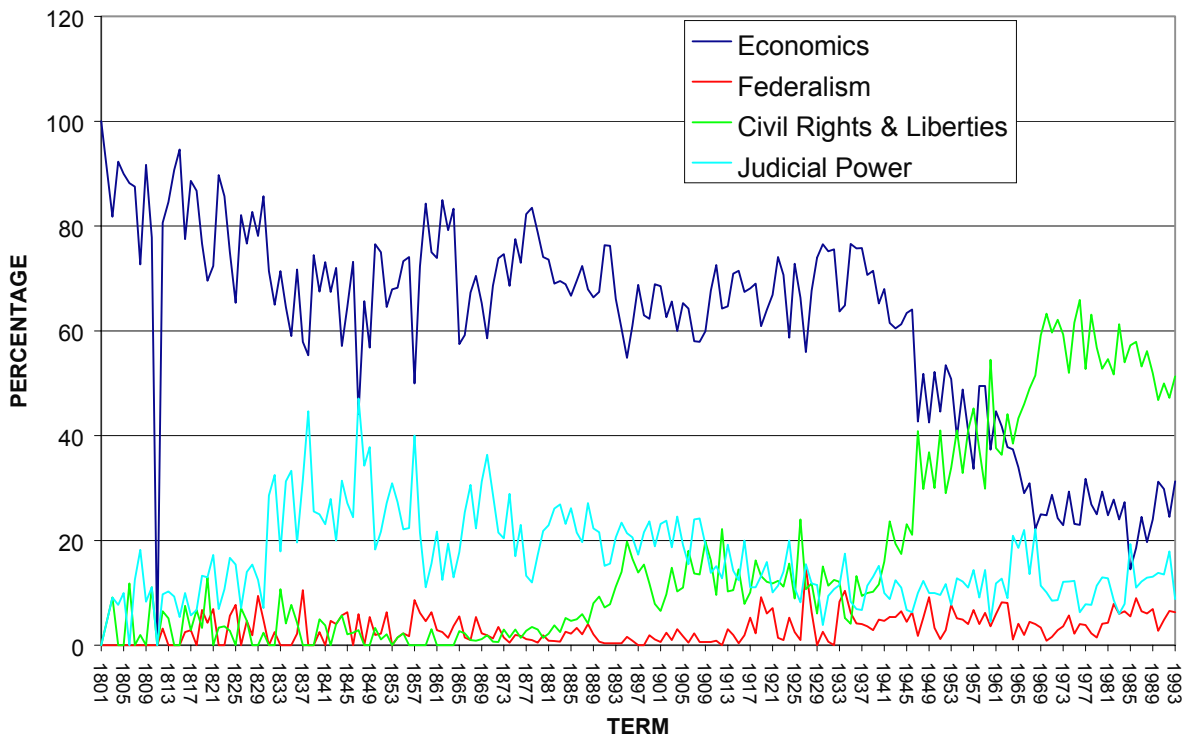


trends in the Court's full opinions and Figure 9.2 shows the proportion of these opinions allocated to economic, federalism, civil rights and civil liberties, and judicial power issue areas from 1801 to 1993. Clearly, the Court began to allocate the greater proportion of its agenda of full opinions to economic issues as early as 1801. In fact, over the entire period

between 1801 and 1864, federalism issues remained at the bottom of the Court's agenda space and averaged only three percent.

Second, the Court allocated the greater proportion of its agenda space to economic issues for a much longer period than McCloskey and others proclaimed. Figure 9.2 shows that economic issues retained its volitional agenda status long after the Court had declared its intention in U.S. v. Carolene Products case to relegate this issue area to a

Figure 9-2--Trends in the Allocation of Agenda of Full Opinions to Four Major Issue Areas, 1801-1993



secondary position on the list of judicial concerns. Although civil rights and civil liberties issues began to receive more attention from the Court from 1937, this category of issues did not replace economic issues as the Court's volitional agenda until late 1950's.

The finding that the Court's considerable attention to economic issues began very early in the Court's history is an important one. For it contradicts the claim by historians and doctrinal scholars that nation-state or federalism issues constituted the principal business of the Court in its first era, that is, from 1801 to 1864. In fact, as Figure 9-2 reveals, not only did federalism issues not receive much attention in this period, the share of the Court's full opinions devoted to this issue area throughout the periods examined is very small. However, this is not to suggest that nation-state problem has been a minor concern for the Court. On the contrary, the early Court, especially, was much concerned with this problem as it was much troubled by it. Questions over the nature of the relationship between the national government and the states underlie several of the landmark decisions of the Marshall and Taney Courts. In fact, a few key federalism cases like McCulloch v. Maryland (1819), Dartmouth College v. Woodward (1819), Gibbons v. Ogden (1824), and Dred Scott v. Sanford (1853) did shape the political system, a reminder that one should be careful of equating the number of cases with their import. Still, as important as the nation-state issues were to the justices, and as fundamental as they were to the survival of the nation, these issues did not dominate the Court's agenda in its first era. Rather, economic issues, most of which involved land and maritime disputes and reflecting the Supreme Court's mandatory jurisdiction during this time, commanded the largest share of the Court's full opinions.

The second proposition derived from McCloskey's work also has limited empirical support. McCloskey, as well as several other scholars, claimed that the dominant values of the Court in its first, second, and third eras were, respectively, the

preservation of the Union, the safeguarding of property rights, and the protection of individual rights. The implication of this analysis is that the major issues dominating the work of the Court in each of its political eras reflected the prevailing judicial value on the Court in each era. Since this value can be expected to mirror the configuration of forces on the Court, this proposition suggests a strong relationship between the Court's primary issue agendas and the prevailing forces on the Court.

Statistical tests of this relationship using ideological and partisan control of the Court, the leadership of the Chief Justice, and key Supreme Court rulings as indicators of the Court's dominant judicial value produced some rather unexpected results. The most surprising finding is the rather remarkable influence of partisan control on the Court's volitional agenda in the first and second periods of the Court. Table 9-1 provides additional support for this finding. Partisan control partially accounted for the variations in the Court's attention to economic issues during these two periods. Under the control of Federalists, Whigs, and Republican justices, the Court allocated more of its agenda of full opinions to this category of issues than when it was controlled by Democratic-Republican and Democratic justices. This finding is unexpected because the Supreme Court, in the first era and for most of the second period that McCloskey identified, had very little control of its docket.

Some of the Chief Justices also affected the Court's volitional agenda during their tenures. For example, the Court increased its share of attention to economic issues under Chief Justices Hughes and Stone, and to civil rights-civil liberties issues under Chief Justice Burger (see Table 8.3 for Burger). When the variables with very low statistical

significance were removed from the model, the result shows that the Court's attention to economic issues also witnessed a pronounced decline under the leadership of Chief Justice Chase (Table 9-2). This is not surprising, given that Chase presided over the Court during Reconstruction when the Court's power was at its lowest ebb. Finally, a few of the key decisions of the Court and congressional enactments examined, such as the *Slaughterhouse* decision and the Sixteenth Amendment, had notable effects on the Court's economic agenda within specific periods as well. But the overall results on the factors shaping the Court's volitional agenda across its three eras provide very little support for McCloskey's analysis.

First, as Table 9-1 indicates, none of the landmark decisions—not even those found to be statistically significant in specific periods—had any meaningful impact on the dynamics of the Court's economic agenda on the long run. Moreover, the statistically significant measures of the Court's judicial value account for very small proportion of the variations in the economic series. Second, measures of the Court's judicial value (see Tables 8-3 and 8-4) fail to explain the dominance of civil rights and civil liberties issues in the third. This particular result is also rather surprising. If there was any period in the history of the Supreme Court in which the dominant judicial value of the Court should have exerted its influence on the issues dominating the business of the Court most, this was the period. The Court during this time had total control of its docket. Moreover, ideological rifts over civil rights and civil liberties claims pervaded the bench. But as the results reported in Chapter 8 indicate, the growth of these issues on the Court's agenda space appears to be mostly a function of some other underlying processes, including time

and the leadership of Chief Justice Burger, rather than of ideology, party, or landmark decisions.

Table 9-1. Measures of the Dominant Judicial Value and their Effects on the Supreme Court's Economic Agenda, 1801-1955¹

Variables	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	0.16	0.06	2.43	0.02
AR (2)	0.84	0.06	12.98	0.000
MA (2)	-0.81	0.09	-9.43	0.000
Partisan control	0.94	0.37	2.52	0.01
Conservative Control	-0.30	0.43	-0.71	0.48
Charles River Bridge	-11.08	7.12	-1.56	0.12
Dartmouth	-3.66	7.09	-0.52	0.61
Augusta	6.10	7.11	0.86	0.39
Slaughterhouse Cases	2.71	6.54	0.41	0.68
Pensacola Telegraph	8.85	7.20	1.23	0.22
Wabash Case	-3.56	7.23	-0.49	0.62
E. C. Knight	-7.92	7.15	-1.11	0.27
Lochner	2.55	7.12	0.36	0.72
Carolene Products	2.20	7.35	0.30	0.77
Chase	-6.49	4.55	-1.43	0.16
Waite	-5.27	5.80	-0.91	0.37
Fuller	-3.56	4.23	-0.84	0.40
White	2.88	4.16	0.69	0.49
Taft	4.64	3.99	1.16	0.25
Hughes	13.47	4.16	3.24	0.002
Stone	13.12	4.29	3.06	0.003
Vinson	2.80	4.36	0.64	0.52

Q(20) = 23.33 Sig. Level = 0.000 DW = 1.92 R² = 0.59 R² (adjusted) = 0.53
(t_∞ = 1.65; p ≤ .10 two tailed test)

Table 9.2. Measures of the Dominant Judicial Value and their Effects on the Court's Economic Agenda, 1801-1950: A Trimmed Model.

Variable	Coefficient	Std. Error	T-Stat.	Sig. Level
AR (1)	0.20	0.06	3.13	0.002
AR (2)	0.79	0.06	12.29	0.000
MA (2)	-0.77	0.08	-10.00	0.000
Partisan Control	0.83	0.25	3.28	0.001

¹ Two rival ARIMA models, ARIMA model (2,0,1)₂ and model (0,1,1)₁ were identified for the economic series for period 1801-1955. The ARIMA model (2,0,1)₂ performs better. The intervention variables for Chief Justices Marshall and Taney show little variation, were highly correlated with other variables, and thus were excluded from the model.

Chase	-6.45	3.15	-2.05	0.04
Hughes	12.04	3.14	3.83	0.000
Stone	11.57	3.80	3.04	0.003

Q(20) = 18.50 Sig. Level = 0.18 DW = 1.89 R² = 0.55 R² (adjusted) = 0.53

What conclusions, then, can we draw from this study? First, it is evident that the Court's volitional agenda has undergone significant transformation since the days of Chief Justice Marshall. Second, it is also clear that the nature of this transformation does not conform totally to the pattern suggested by historians and doctrinal scholars. For much of its history, the Supreme Court devoted most of its attention to economic disputes. Only in the last sixty years did the Court begin to pay much attention to civil rights and civil liberties questions. More importantly, nation-state issues never commanded a significant portion of the High Court's agenda Court in its first era. Again, one suspects that McCloskey and other Supreme Court historians have based their claims about the principal issue agenda of the Court in this era, and in others as well, on the major constitutional cases decided rather on the totality of the issues the Court had to contend with.

Perhaps the most important conclusion from this study is that the question of how the Supreme Court builds its institutional agenda and especially how certain issues come to dominate the work of the Court remains a complex issue. The results reported here raise more questions than they answer. For instance, why did federalism issues receive such little attention from the Court at a time when these issues supposedly were crucial to the survival of the nation? What caused partisanship to play such an important role in the building of the Court's volitional agenda in the periods when the Court had very little control of its docket and not so when it had total control? Why was ideology not a factor

in the dynamics of the volitional agenda of the modern Court when the bulk of the literature on judicial behavior in the last fifty years or so has emphasized the impact of individual attitudes and values on choice? One can only speculate on the answers to these questions.

First, the Court has only been given the authority to control its docket as recently as 1925. In the earlier eras, the Court lived under a mandatory jurisdiction that required it to consider great as well as “small” issues. Supreme Court historians and constitutional scholars often forget to emphasize this point in their analyses of the Court’s earlier decisions, thus giving the impression that the Court only bothered with constitutional issues.

Second, despite the enormous powers of the U.S. Supreme Court in the American policy-making process, the scope of its judicial power is not unlimited. Justices, for instance, cannot instigate cases. They must wait till litigants bring cases to them, and till the issues involved have percolated through the lower court system. Thus, even when the justices are interested in some issues, they must suppress their inclinations until they are asked to address them. This could be one of the reasons why nation-state issues commanded only a very small proportion of the Court’s agenda space in the first era. As important as the questions about federalism may have been to Marshall and many of his colleagues, perhaps many of these questions were resolved by the lower courts, leaving only the most controversial ones for the High Court to address. Or perhaps the cost of the appellate process discouraged many litigants from appealing their cases to the High Court.

Third, economic issues, signifying the development and transformation of U.S. capitalism and involving one of the most enduring issues in American politics—the right to property, may have generated more interests and intense partisan feelings among several of the justices than other issues did. If so, this might explain why partisanship influenced the share of the Court’s attention to economic issues for much of the Court’s and the nation’s history.

Fourth, it appears that the modern Court, using its docket control authority, not only resolved to embark on civil rights-civil liberties agenda in the late 1950s but over time may have decided to place broad limits on this agenda, a luxury that was denied to the earlier Courts. Figure 8.2 shows that the growth of civil rights and civil liberties agenda has leveled off after a rapid increase that began in the early 1940’s. If this happened, it might explain in part why ideological or partisan influences have been greatly minimized in the building of this volitional agenda. Policy wise, the placing of broad limits on civil rights and civil liberties cases by the Court could have important ramifications for individuals and groups seeking its protection against government curtailment of their rights. It means that many with such claims may have to look elsewhere for relief.

Lastly, as Caldeira (1981) and Pacelle (1991) have both pointed out, the building of the Court’s agenda is a very complex and subtle process. Various forces, both on the Court and in the political environment, condition the way the Court allocates its agenda space at any given time. As has been demonstrated here also, the Court, certainly, does not seem to respond in a simple, linear fashion in composing its volitional agenda.

These explanations may not be satisfactory to some. They are not intended to be. If anything, they should lead students of judicial behavior to continue to inquire into the nature and dynamics of the Court's decisional agenda. For its part, this research clearly sheds new light on the Court's volitional agendas and their dynamics, especially in the period for which historical accounts have been the main source of information and knowledge. More importantly, it forces us to reassess or rethink our previous notion of that agenda—the now well-established view that nation-state issues dominated the business of the Court in its formative years—and the idea (often expressed implicitly) that the Court's mandatory jurisdiction suppressed attitudinal factors on the Court in the earlier eras. This, perhaps, is its most important contribution to the scholarly literature on the Supreme Court. However, the study has examined the Court's behavior in only two broader areas of public policy. To quote Caldeira (1981: 471), “it could well be that for other policy areas and at different states of the process quite different results will emerge.”

APPENDICES

APPENDIX A

Term	Econ	Partyc	Csrdom	Csrdom1
1801	100	6	6	-6
1802	90.9	6	6	-6
1803	81.8	6	6	-6
1804	92.3	4	4	-6
1805	90	4	4	-6
1806	88.2	2	4	-7
1807	87.5	1	5	-7
1808	72.7	1	5	-7
1809	91.7	1	5	-7
1810	77.8	1	5	-7
1811	79.2	-1	5	-7
1812	80.6	-3	5	-7
1813	84.6	-3	5	-7
1814	90.7	-3	5	-7
1815	94.6	-3	5	-7
1816	77.5	-3	5	-7
1817	88.6	-3	5	-7
1818	86.7	-3	5	-7
1819	76.7	-3	5	-7
1820	69.6	-3	5	-7
1821	72.4	-3	5	-7
1822	89.7	-3	5	-7
1823	85.7	-3	3	-7
1824	75	-3	3	-7
1825	65.4	-3	3	-7
1826	82.1	-3	3	-5
1827	76.7	-3	3	-5
1828	82.7	-3	3	-5
1829	78.1	-3	3	-7
1830	85.7	-5	1	-7
1831	71.4	-5	1	-7
1832	65	-5	1	-7
1833	71.4	-5	1	-7
1834	64.6	-5	1	-7
1835	59	-5	3	-7
1836	71.7	-7	-1	-5
1837	57.9	-9	-2	-5

1838	55.3	-9	-2	-5
1839	74.5	-9	-2	-5
1840	67.5	-9	-2	-5
1841	73.1	-9	-3	-5
1842	67.4	-9	-3	-5
1843	72	-9	-3	-5
1844	57.1	-8	-2	-4
1845	64.6	-8	-5	-2
1846	73.2	-9	-5	-1
1847	44.1	-9	-5	-1
1848	65.7	-9	-5	-1
1849	56.8	-9	-5	-1
1850	76.5	-9	-5	-1
1851	75	-7	-3	-1
1852	64.6	-7	-3	-1
1853	67.9	-7	-3	1
1854	68.2	-7	-3	1
1855	73.3	-7	-3	1
1856	74.1	-7	-3	1
1857	50	-7	-3	1
1858	72.3	-9	-5	1
1859	84.3	-9	-5	1
1860	75	-9	-5	1
1861	73.9	-8	-5	1
1862	85	-3	-1	-2
1863	79.2	-4	-1	-2
1864	83.3	-2	1	-2

***Econ** = Percentage of the Supreme Court's agenda of full opinions allocated to economic issues.

***Partyc** = Partisan control values, derived by subtracting the number of Jeffersonian, Jacksonian, and Democratic justices on the Court in a term from the number of Federalists, Whigs, and Republican Justices.

***Csrdom** = Ideological control values, derived by subtracting the number of Jeffersonian and moderate justices from Hamiltonian ones.

***Csrdom1** = Ideological control values (alternate), derived by subtracting the number of Hamiltonian and moderate Justices from Jeffersonian ones

*Data is based on the analysis in Chapter 3 and the following additional sources: Chase and Ducat (1979: 1447-50), Epstein, Segal, Spaeth, and Walker (1996), and Goldman (1982).

APPENDIX B

Term	Econ	Partyc	Csrdom
1865	57.5	-1	-1
1866	59.2	-1	1
1867	67.3	0	0
1868	70.5	0	0
1869	65.3	2	0
1870	58.6	3	1
1871	68.6	3	1
1872	73.8	5	1
1873	74.6	5	-1
1874	68.6	5	-1
1875	77.5	5	-1
1876	73	5	-1
1877	82.3	5	-3
1878	83.5	5	-3
1879	78.8	5	-3
1880	74.1	5	-3
1881	73.6	7	-3
1882	69	7	-3
1883	69.5	7	-3
1884	68.9	7	-3
1885	66.7	7	-3
1886	69.6	7	-3
1887	72.4	5	-3
1888	67.9	3	-1
1889	66.4	3	1
1890	67.4	3	1
1891	76.4	3	1
1892	76.2	3	1
1893	66.1	3	1
1894	60.4	1	3
1895	54.9	1	3
1896	61	1	3
1897	68.8	1	1
1898	63	3	1
1899	62.3	3	1
1900	68.9	3	1
1901	68.5	3	1
1902	62.6	3	-1
1903	65.6	3	-1

1904	60	3	-1
1905	65.3	3	-1
1906	64.3	3	-1
1907	58.03	3	-1
1908	57.9	3	-1
1909	59.9	3	-1
1910	67.7	3	-3
1911	72.6	3	-3
1912	64.3	3	-3
1913	64.7	3	-3
1914	70.9	3	-3
1915	71.5	3	-3
1916	67.4	3	-1
1917	68.1	3	-1
1918	69	3	-1
1919	60.9	3	-1
1920	64	3	-1
1921	66.9	3	-1
1922	74.1	5	3
1923	70.7	5	3
1924	58.7	5	3
1925	72.8	5	3
1926	66.3	5	3
1927	56	5	3
1928	67.7	5	3
1929	74	5	1
1930	76.5	5	1
1931	75.2	5	1
1932	75.6	3	1
1933	63.7	3	1
1934	64.9	3	1
1935	76.6	3	1
1936	75.7	3	1
1937	75.8	1	-3
1938	70.7	-2	-3
1939	71.5	--2	-3
1940	65.2	--2	-3
1941	68	-4	0
1942	61.5	-4	0
1943	60.5	-4	0
1944	61.3	-4	0
1945	63.4	-4	0

1946	64.1	-6	1
1947	42.7	-6	1
1948	51.8	-6	3
1949	42.5	-6	5
1950	52.2	-6	5
1951	44.6	-6	5
1952	53.4	-6	5
1953	50.8	-4	5
1954	39.7	-4	5
1955	48.8	-2	5

***Econ** = Percentage of the Court's agenda of full opinions allocated to economic issues.

***Partyc** = Partisan control values, derived by subtracting the number of Democratic justices on the Court in a term from the number of Republicans.

***Csrdom** = Ideological control values, derived by subtracting the number of liberal and moderate justices on the Court in a term from the number of conservative justices

*Data is based on the analysis in Chapter 5 and the following additional sources: Goldman (1982) and Pritchett (1948).

APPENDIX C

Term	Civil	Ideoc	Partyc
1937	9.4	3	1
1938	10	3	-2
1939	10.2	3	-2
1940	11.6	3	-2
1941	16	-3	-4
1942	23.6	-1	-4
1943	19.4	-1	-4
1944	17.4	-1	-4
1945	23.1	0	-4
1946	21.1	-1	-6
1947	40.9	-1	-6
1948	29.8	-1	-6
1949	36.8	-5	-6
1950	30	-5	-6
1951	41	-5	-6
1952	29	-5	-6
1953	33.8	-1	-4
1954	41	-1	-4
1955	32.9	-3	-2
1956	41	-1	-2
1957	45.2	-1	-1
1958	37.4	-1	0
1959	29.9	-1	0
1960	54.5	-1	0
1961	37.6	-1	0
1962	36.4	1	-3
1963	44.1	1	-3
1964	38.5	1	-3
1965	43.3	1	-3
1966	46	-1	-3
1967	49	-1	-3
1968	51.5	3	-3
1969	59.1	-1	-3
1970	63.3	-3	-1
1971	59.7	-1	-1
1972	62.1	-3	-1
1973	59.3	-3	-1
1974	52	-3	-1
1975	61.6	-5	1
1976	65.9	-3	1
1977	52.7	-5	1
1978	63.1	-3	1
1979	56.8	-3	1

1980	52.8	-5	1
1981	54.6	-3	1
1982	51.7	-1	1
1983	61.3	-3	1
1984	54	-3	1
1985	57.2	-1	1
1986	57.9	-1	1
1987	53.2	-1	1
1988	56.1	-1	3
1989	51.9	-1	3
1990	46.8	-3	5
1991	50	-5	7
1992	47.2	-5	7
1993	51.3	-3	7

***Civil** = Percentage of agenda space allocated to civil rights and civil liberties issues

***Ideoc** = Ideological control of the Court, derived by subtracting the number of conservative justices on the court in a term from the number of liberal justices.

***Partyc** = Partisan control of the Court, derived by subtracting the number of Democrats on the Court in a term from the number of Republicans.

*Data is based on the analysis in Chapter 7 and the following additional sources: Epstein, Segal, Spaeth, and Walker (1996); Goldman 1982: 335, 419, 541; Lamb and Halpern 1991: 31-32.

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issues—even in the periods when the Supreme Court had very little control of its docket. These results suggest that Supreme Court scholars should reassess or rethink their previous notion of the Court’s pre-Civil War agenda—the now well-established view that nation-state issues dominated the business of the Court in its formative years—and the idea (often expressed implicitly) that the Court’s mandatory jurisdiction suppressed attitudinal factors on the Court in the earlier eras.