

STRATEGIC VERSUS SINCERE BEHAVIOR: THE IMPACT OF ISSUE SALIENCE AND  
CONGRESS ON THE SUPREME COURT DOCKET

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The theory proposed here is that the Supreme Court behaves in a strategic manner at the agenda-setting stage in order to vote sincerely on the merits. To test this, I measure the impact issue salience and ideological distance between Congress and the Supreme Court has on the agenda. The results indicate that whether the Supreme Court behaves either sincerely or strategically depends on the policy area. The strategic nature of the Supreme Court at the agenda-setting phase may be in large part why some research shows that the Court behaves sincerely when voting on the merits. By behaving strategically at the agenda-setting phase, the Court is free to vote sincerely in later parts of the judicial process.

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## INTRODUCTION

The Supreme Court, as dictated by the United States Constitution, is dependent on the other institutions of American politics in a variety of situations. The Supreme Court receives the least amount of discussion in both the Constitution and *The Federalist Papers*. It is often argued that the Supreme Court was intended to be the weakest branch of government, due in part to their reliance on these other institutions. A variety of factors both limit and strengthen the power of the Supreme Court.

First, the members are not popularly elected, as are the other two branches of government. The justices must first be nominated to the bench by the executive and then confirmed by the Senate. However, justices are appointed for life tenure to the bench, and they are therefore removed from the political process in the sense that they do not have to maintain popular approval in order to maintain their positions. Second, the power, jurisdiction, salaries, and size of the Supreme Court are all controlled by Congress. Therefore, the Supreme Court is reliant on Congress in terms of the types and numbers of cases that they may decide. On the other hand, the Supreme Court has original jurisdiction over specific areas of law. Third, the Supreme Court lacks enforcement power of its decisions. The Supreme Court must rely on the executive branch and the various state institutions to implement the decisions they hand down.

Even though the Supreme Court relies on others to implement their decisions, the decisions are also regarded as the supreme law of the land. Consequently, the Supreme Court is a unique institution that is both independent of the public and the other two

branches of government, but also depends on these institutions in order to implement and enforce their decisions. Scholars disagree about both the role of the Supreme Court in American politics and the degree of independence of the Supreme Court within the system. There is a variety of arguments about the true nature of judicial behavior and whether the justices behave in a sincere manner or strategic manner in the numerous steps of the judicial process.

Sincere and strategic behavior can be defined in a number of different ways. Sincere behavior is defined here as when the Court makes its decisions independent of external factors. Sincere behavior is when the decision-making process of the justices is independent of the potential influence of factors like congress, the president, the media, interest groups, or the public. Instead, the behavior of the Court is dictated by the members' ideological preferences when they behave sincerely. I define strategic behavior as when the behavior of the Court is effected by external factors. There are a variety of external factors that have been shown to influence the behavior of the Court in previous research (circuit court conflict, the presence of interest groups, the presence of the Solicitor General, etc.), but the external factors measured here are both issue salience and congress. This paper attempts to contribute to this understanding by examining the degree of sincere/strategic behavior of the Supreme Court at the agenda-setting phase of judicial process for the issues of affirmative action and tax policy.

Why the Supreme Court behaves in the way it does is a question scholars have been trying to answer for years from a variety of different perspectives. While scholarly understanding has increased exponentially through scientific analysis of the Supreme Court, there are still unanswered questions. One specific question that has not been

satisfactorily answered is why the Supreme Court decides to hear the cases it does. Factors such as experience of lawyers, the presence of the Solicitor General as a plaintiff, the involvement of interest groups and justices' personal preferences have all been advanced as affecting this process. The question advanced in this paper is whether the Supreme Court behaves differently for issues that have high versus low issue salience. I also attempt to see if the Supreme Court behaves differently for issues that are traditionally dealt with by Congress (economic issues) than it does for issues traditionally left to the Supreme Court (civil rights). Lastly, are there issues the Supreme Court deals with despite the salience level? More specifically, does the Supreme Court accept cases dealing with certain issues even if the salience increases/decreases over time? To gain a preliminary answer to these questions, this research examines the period from 1969 to 1996, to see what the impact of both Congress and issue salience is on the Supreme Court's docket.

The Supreme Court has a wide degree of discretion over the types of cases that it hears. Since the decisions of the Supreme Court are considered the supreme law of the land, it is therefore important to have an understanding of the whole Supreme Court process. The agenda setting phase of the process may be the most important since it is how the Supreme Court decides which cases it will review. If the Supreme Court hears only cases that are high in salience, this may mean that the Supreme Court is neglecting to hear cases from groups in society that may be disadvantaged. Often, the Supreme Court is viewed as the branch of government that is sympathetic to disadvantaged groups. The other branches of government may be constrained by re-election goals, and may therefore spend their time and resources attempting to satisfy the majority. The Supreme



Court, on the other hand, is not under these re-election constraints, and is therefore able to make unpopular decisions, or hear the cases, of these disadvantaged groups.

At the same time, if the Supreme Court only hears cases that are low in salience, then they may be neglecting the important issues of contemporary politics. Regarding issue type, the attitudinal model argues that the Supreme Court behaves sincerely in their votes. However, it may be that the Supreme Court behaves sincerely only for certain types of issues, but strategically for other types of issues. By analyzing if the Supreme Court behaves the same for all issues, or if it behaves strategically or sincerely depending on the circumstances, this will provide a greater overall understanding of judicial behavior. Therefore, understanding the relationship of both issue type and issue salience to the Supreme Court docket can provide a greater understanding as to why certain types of cases get on the docket, and who is likely to be represented.

## LITERATURE REVIEW

There are many theories that attempt to explain the decision process of the Supreme Court. These include the legal model, the attitudinal model (Segal and Spaeth 1993, Schubert 1965), the institutional model (Clayton and Gilman 1999, Epstein and Knight 1998), the disadvantage theory (Cortner 1968) and more recently the positivist approach (Eskridge 1991, Segal 1997). Each of these approaches attempts to identify the behavior of the Supreme Court in order to explain how the Supreme Court makes its decisions. There are strengths and a degree of support for each of these models. However, each model is also limited in its ability to predict and account for certain types of behavior.

This paper proposes to synthesize elements of several of these approaches, specifically the sincere behavior of the attitudinal model and the strategic behavior proposed by the separation of powers models. It is hypothesized that the Supreme Court does not exclusively follow any one of these approaches all the time for all issues. Instead, the Supreme Court likely behaves differently under different circumstances, within the constraints of its relationship to the other branches of government. Specifically, I examine the extent to which justices behave sincerely or strategically across: 1) levels of issue salience, 2) type of policy area, and 3) ideological distance between the Supreme Court and Congress. I also examine whether or not the type of issue conditions the impact of issue salience and ideological distance on the agenda-setting behavior of the Supreme Court. Prior research has shown that the Supreme Court behaves differently for highly salient cases than it does for low salience cases (Dahl 1957, Maltzman and Wahlbeck 1996b, Kluger 1976, Slotnick 1978). This paper will try

to gain a better understanding of issue salience in relation to the Supreme Court docket, and also the behavior of the Supreme Court in relation to Congress.

One approach to this topic is the legal model, according to which justices make their decisions based on the plain meaning of the Constitution, precedent, and the original intent of the founding fathers. The justices are thought to be above politics according to this model, and they make their decisions in an impartial manner based on what the law states. Their decisions are impartial to political biases. Rather than trying to further their personal policy goals, justices simply make their decisions based on the plain meaning of law.

While the legal model may sound good in theory, it is limited in a number of ways. First, justices come from different backgrounds, have different ideologies, and have differing views on exactly how to interpret the Constitution. There is disagreement over whether the Constitution should be interpreted in a strict manner, or whether it is a flexible document that should be adapted to the times. A strict constructionist would make decisions strictly on whether or not a right was explicitly defined in the Constitution, whereas a judicial activist would be more likely to interpret the Constitution and the rights within according to contemporary circumstances. Therefore, two justices who are basing their decisions on their interpretation of the Constitution may have two contrary opinions. Second, there is not a single agreed-upon understanding on what the original intent of the founding fathers was. They were a diverse group with differing opinions. Therefore, the intent of the founding fathers can also be interpreted in a variety of ways. Third, justices on opposite sides of a decision will frequently cite precedents to

support their divergent views. Depending on the ideology, goals, and characteristics of the individual justices, they can each use all of these tools to make their decisions.

However, maybe the biggest problem with the legal model is that it is not testable or irrefutable. Even if the model is correct, it cannot be confirmed since this would require knowledge about the psychological reasoning for justices' decisions. Since this data is not available, more practical and testable models have been developed to explain the decision-making process of the Court. The legal model also lacks both explanatory and predictive power. It cannot explain why justices disagree in their decisions, and it cannot predict the way in which justices will behave for individual cases. Therefore, more practical and testable theories need to be developed in order to gain greater insight into judicial behavior.

One of the most commonly accepted models of Supreme Court decision-making is the attitudinal model developed by Segal and Spaeth. This is an adaptation of the model first proposed by Schubert. Proponents of the attitudinal model say that the behavior of justices is based on their own personal policy preferences. Due to the independence and safety (life tenure) that justices have, they make decisions that are in line with their own ideology, according to attitudinalists. The theory also states that the structure of the system allows the justices to vote sincerely. Since justices are not concerned with re-election goals like legislators, they are free to make unpopular decisions. Therefore, attitudinalists would argue that factors like issue salience and the preferences of Congress will not effect the behavior of the Supreme Court.

While the attitudinal model is both popular and fairly accurate, it is still limited in a number of ways. First, the most persuasive arguments for the attitudinal model regard

the merit stage of the process. Even though they admit that factors like circuit court conflict, desire to overturn lower court decisions, and whether the United States is a party in a lawsuit are related to the likelihood of cases being accepted by the Court, they argue that individual preferences are the main determinant in this process. However, research is limited in that up until now, it has not systematically examined if Congress and issue salience are related to agenda setting in great detail. If these two factors do not effect the agenda-setting process, then further support will be provided for the theory of sincere behavior proposed by attitudinalists. However, if the variables are significantly related to the likelihood of cases being accepted by the Court, this will be an indication of strategic behavior. If this is the case, then it may be that the reason the Court appears to behave sincerely at the merit stage is due to their strategic behavior at the agenda-setting phase. Only by rigorously examining both phases of the process can the true behavior of the Court be determined.

A second problem of the attitudinalists theory is that it argues that justices are independent and unconstrained by other institutions, specifically Congress. Even though this model has strong support and is widely accepted, it still has limitations in its explanations of strategic voting. While judges are fairly independent and may be able to vote sincerely to a large degree, this may not always be the case. First, the Supreme Court is constrained by Congress in a number of ways. Congress influences who is confirmed to the bench and defines the jurisdiction of the Supreme Court, and Congress can overturn Supreme Court decisions with new laws and amendments. While new amendments may be rare, it is still a potential constraint that Congress can impose, because “Congress has in the past overridden the Supreme Court, the justices have reason

to believe that the legislature will do so in the future, and this may be enough to make them pay some attention to its preferences” (Epstein and Knight, 142).

Further support for the idea that the Court has to fear the actions of Congress comes from Meernik and Ignani (1997). In their work, they find that Congress is effective in overturning decisions of the Supreme Court. One condition that facilitates this ability is the support of the public. Whenever the decisions go against majoritarian views, Congress has the power and ability to successfully overturn Court decisions. Therefore, the Court is not independent from Congress in the decisions that it makes. If the Court wants its decisions to be effective, then they should take into consideration the preferences of both the public and Congress. However, if the Court behaves in a sincere manner without regard for the other branches, then their decisions may be overturned. To be effective in implementing their ideological preferences then, the members of the Court should behave in a strategic manner in deciding which types of cases to accept for review. If the Court accepts highly salient issues, then they will be more likely to be concerned with a potential backlash from both the public and Congress, which may result in a reversal of its decisions.

Therefore, even though the attitudinal model may be correct, it is limited in that it neglects to account for the power of these other institutions. The Supreme Court has to consider the preferences and potential actions of Congress when deciding a case. If the Supreme Court decides a case that is traditionally an issue Congress deals with, they will have to consider the reaction that Congress will have. This is not to say that the personal preferences of the judges do not matter. Instead, justices decide cases according to their preferences, but in light of the constraints of other institutions. Eskridge (1991) also

discusses how the decisions of the Supreme Court are difficult to understand without considering the constraints of Congress.

Related to this is the institutional model. Clayton and Gilman (1991) explain this theory in *Supreme Court Decision-Making*. The institutional approach says that even if justices are trying to advance their own policy preferences, they are constrained by both the institution of the Supreme Court and the other institutions in American politics. Rules of how the Supreme Court can behave, the cases that they review, and the relationship of the justices with their peers are all factors that effect how a justice can act. It is still possible that a judge may act in accordance with the attitudinal model, but only after taking into consideration the constraints that all of these institutions place on them. Therefore, institutionalists would argue that in order to effectively advance their policy preferences, justices should behave in a strategic manner.

Justices cannot simply implement their policy preferences with no accountability. First, justices are limited to the degree that they can implement their preferences by the types of cases that they receive. Both the number and nature of cases that are appealed to the Court restrict them. Also, if the Supreme Court consistently makes decisions with no regard for the public or the preferences of Congress, Congress can restrict the jurisdiction of the Supreme Court. They can also overturn legislation with new laws and statutes.

Lastly, if the Supreme Court has no legitimacy (in the sense that they behave in a way that is contrary to public will), then the public and Congress may simply ignore the decisions of the Supreme Court. This goes back to the argument posed by Rosenberg (1991). He argues that in order for the Court to be effective in shaping social policy, that the Court must have support from either the public or the other branches of government.

Without support from either the public or the other branches of government, the preferences that the Supreme Court tries to impose through its decisions will be ineffective. While justices can make decisions based exclusively on their personal preferences, this would not be the most effective way to act. Instead, for the decisions of the Supreme Court to be effective, justices must consider the preferences of external factors when making their decisions. Therefore, in order to impose their policy preferences, the Court should occasionally behave in a strategic manner by taking into consideration the preferences of both the public and Congress.

Related to this idea is the positivist position. Positivist theorists argue that in order to achieve their goal of imposing their policy preferences, the Supreme Court must defer to the preferences of Congress on occasion (Eskridge 1991, Segal 1997, Spiller and Spitzer 1992). Again, the Supreme Court is constrained in its decision-making by Congress. Instead of always voting sincerely, justices will frequently have to behave strategically. They have to be concerned with the preferences of Congress and the ability of Congress to overturn their decisions. If the Supreme Court makes a ruling that is too far from the ideal point of Congress, it is possible that Congress will pass new measures to limit the impact of the ruling, or even overturn it. The fact that Congress can and does overturn decisions of the Supreme Court implies that the Court is not completely independent. Therefore, it seems likely that members of the Court will take into consideration the preferences of Congress, at least to some degree, when making its decisions.

Therefore, the Supreme Court will vote in a manner that is as close to their own ideal point as possible, but that is also close enough to the ideal point of Congress to



prevent congressional action. Intuitively, it seems that the Supreme Court will be able to vote sincerely on low salient issues with less concern for congressional response. For low salience issues, Congress would be less likely to monitor the decisions and actions of the Supreme Court. However, on highly salient issues, the Supreme Court will likely have to take into consideration the preferences of Congress when making their final decision. Congress is more likely to be aware of these types of issues, and will therefore be more likely to punish the Supreme Court if they behave too far from Congress's ideal point. The public is also more likely to have well-formed opinions on these issues. This may also make members of Congress more responsive to the opinions of the Court for these types of issues.

Also, for issues that are typically relegated to the Supreme Court, they will have more freedom to vote sincerely since justices will be less likely to consider the congressional response. The reason for this is that the congressional constraint will be lessened. With issues that are typically relegated to Congress, the Supreme Court will have to behave more strategically since this is an additional constraint imposed on the Supreme Court. Therefore, for Supreme Court issues, justices can behave more sincerely, while for congressional issues the justices will have to behave more strategically.

The argument posed here is that justices do indeed want to impose their policy preferences. It is the goal of justices to implement their preferences as much as possible. However, to do so effectively, they must behave strategically in the types of cases that they decide to hear. For issues that are viewed as belonging to Congress, or that are highly salient, the constraints placed on the justices will be at their greatest. For issues

that belong to the Court, or that are low in salience, the constraints on the Court will be lessened. In order for the justices to implement their policy preferences without constraints or a fear of retribution from Congress, they should accept cases in which they can implement their policy preferences more freely. Therefore, the justices should behave strategically in deciding which cases to accept. By behaving strategically in deciding which cases to accept, the justices will have more discretion to vote sincerely on the merits. If the justices accept cases where the constraints are lessened, they will be more independent and able to vote in accordance with their ideology at the merit stage. The constraints are at their highest for the Supreme Court when the cases are perceived as being issues that belong to Congress (e.g. tax policy) and when the issue is highly salient. The constraints are at their lowest when the cases are perceived as being issues that belong to the Supreme Court (e.g. affirmative action) and when the issue has low salience. When the constraints are at their lowest, the Supreme Court will have the most freedom to implement their preferences. Therefore, the Supreme Court should accept a high number of these types of cases if they truly want to be able to implement their personal policy preferences. Since previous work has looked at strategic and sincere voting at the merit stage, this study looks at this idea at the cert stage.

Maltzman and Wahlbeck also discuss the issue of strategic voting. They say that the votes of justices are constrained by the institution of the Supreme Court and by the potential impact of the decision. “This constraint is potentially enhanced by producing a unanimous decision from the bench” (1996a, 583). This would seem to be the case for highly salient cases. An issue that is highly salient would have the potential to have a large impact. Therefore, the justices would want to produce a unanimous decision in

such a case. This idea is related to Dorff and Brenner's (1992) work. They find that issue salience and size of the majority at the original vote are important variables associated with switching votes. In cases that are highly salient, justices are less likely to switch their votes. Even though these two pieces are related, they are also contradictory to a degree. One is arguing that the Supreme Court is more likely to attempt to produce a unanimous decision on an important case. The other argues that for important cases, justices are less likely to switch votes. Therefore, there is not an accepted theory on how the Supreme Court behaves for highly salient issues. Also, each of these studies examines the impact of strategic voting at the merit stage rather than at the cert stage. Only by understanding the behavior of the justices at both stages can we gain a more accurate understanding of the behavior of the Supreme Court. The behavior of the Supreme Court at the agenda setting stage may in fact influence the behavior of the Supreme Court at the merit stage. For example, it may be the case that the Supreme Court behaves strategically when deciding which types of cases to accept so that it may vote more sincerely on the merits.

There has also been considerable research done on the impact of public opinion on Supreme Court decisions (Mishler and Sheehan 1993, Fleming and Wood 1997). Much of this research has found that public opinion does influence the behavior of the Court. However, most of the research dealing with public opinion measures what impact it has on case outcomes. This is an important topic, but to gain a better understanding of Supreme Court behavior, we also need to measure what affects the likelihood of issues getting onto the Supreme Court docket. Also, public opinion and issue salience, while similar, measure different things. The advantage of using issue salience is that it allows

me to examine the behavior of the Court when the public is less likely to be informed.

The public is less likely to be aware of low salience issues, much less the decisions of the Court regarding such issues. Therefore, while public opinion may influence the behavior of the Court, this is less likely to be the case for low salience issues.

In relation to the impact of public opinion is Vanberg's work (2001). He finds that the political environment is one of the most important factors in determining judicial-legislative relations. In general, constitutional courts have high approval ratings from the public. Therefore, in general, the public will support the decisions of the Court. Since legislators are single-minded re-election seekers (Mayhew 1974), they will comply with the decisions of the Court to appease their constituents. For noncomplex issues (e.g. civil rights), the public is more likely not only to understand the issue, but it is also more likely to require legislatures to abide by the decisions of the Court. However, for complex issues (e.g. tax), legislatures will be less concerned about their constituents having opinions on these issues. Therefore, legislators will be free to either ignore or overturn the decisions of the Court for these types of issues. This would imply, again, that justices should be strategic when deciding the types of cases to accept for review. If justices want to implement their preferences, then they should accept noncomplex issues where Congress would be more likely to abide by its decisions. The Court should be less likely to accept tax cases for several reasons. First, this is an issue that falls within the congressional domain. Second, this is a complex issue area where Congress will be less likely to accept the decisions of the Court.

There is a fair amount of research that deals with the topic of issue salience and the Supreme Court. Some of the current literature can be applied to the present research.

However, there are several limitations and problems with the current state of the literature concerning issue salience. First, there is no current literature that specifically discusses the relationship of issue salience with the ability of a case to get on the Supreme Court's docket. Based on the number of articles on issue salience in general (Flemming, Bohte and Wood 1997, Slotnick 1978, Maltzman and Wahlbeck 1996b, Kluger 1976, Epstein and Knight 1998, etc), salience is obviously an important factor in the Supreme Court process. However, these studies analyze salience in relation to other aspects of the judicial process such as opinion assignment (Slotnick 1978, Rohde 1972) and whether there is more bargaining to try to obtain unanimous decisions on important issues (Kluger 1976).

The second problem with the current literature is the measurement of issue salience in many of these studies is flawed. Epstein and Knight say that there are two types of issue salience: retrospective and contemporaneous. Retrospective salience views issues as salient today even if the Supreme Court did not view them as such at the time. Contemporaneous salience deals with issues that were salient at the time by the Supreme Court but are not viewed as important by modern scholars. A quality measurement is necessary in order to understand the relationship between issue salience and Supreme Court decision-making. The measure cannot be biased by time. Salience needs to tap into whether the case or issue was salient at the time of the decision. Epstein and Knight develop a new measurement that will hopefully avoid the past measurement problems of issue salience. They measure case salience as whether the New York Times carried a front-page article on the case. This measurement is an improvement, because it tells whether the case was viewed as salient at the time it was decided. This new

measurement helps to give a more accurate account of the impact of salience on judicial decision-making. My study is an adaptation of this measurement. While they measure case salience, I measure issue salience to see if issues that are highly salient are more or less likely to have cases on the Supreme Court docket. While they measure the likelihood of a single case getting on the docket based on the salience of that particular case, this study measures the likelihood of cases dealing with specific issues getting on the docket based on the salience of the issue. While similar in approach, this study is a more comprehensive examination of the impact of issue salience, and also provides greater understanding of the agenda setting process of the Supreme Court.

Even though issue salience has never been studied to see if it is related to the likelihood of a case getting on the Supreme Court's docket, a number of factors have been associated with this process. Circuit court conflict, justices' preferences, the presence of amicus briefs, etc. are all shown to impact the likelihood of cases being granted cert. Presumably, issue salience would play an important role in this process as well. As Epstein and Knight point out, the decisions of the Supreme Court occasionally make reference to newspaper accounts. The Supreme Court does take account of these media reports when making its decisions. Justices are not immune to the media and its articles on current political events. Therefore, it seems plausible that the Supreme Court responds to and is influenced to some degree by the media. It is likely then that the Supreme Court may behave differently for issues that are highly salient than it does with issues that are low in salience. The degree of sincere versus strategic behavior may be influenced by whether the issue is either high or low in salience.

Perry (1991) also examines this process in detail with his study. While this research provides a good description of the process, my research provides an empirical analysis of the process. More specifically, where previous research has neglected to see if the Supreme Court behaves differently in different situations of the agenda setting process, this study provides a first look at the potential differential behavior of the Supreme Court in the agenda setting phase.

## THEORY

Based on previous research, the topic of Supreme Court behavior is a complicated one. There is disagreement on how the Supreme Court behaves. Some argue that justices make decisions in light of their own ideology while others argue that the Supreme Court is constrained by the other branches of government. Also, there are disputes about what role issue salience has in the way that the Supreme Court behaves. There is also a lack of research on whether issue salience affects the likelihood of cases landing on the Supreme Court docket. Based on the insufficient and contradictory research that has been produced so far, the research that follows both adds to the current understanding of the decision-making process and clears up some of the disputes that currently exist.

Based on the lack of research for this specific area of study, there is not a clear-cut theory to follow for guidance. As stated, the main research question is trying to examine the degree of strategic versus sincere behavior by the Supreme Court in relation to both Congress and issue salience for the agenda setting phase of the Supreme Court process. The research attempts to measure if, as an issue increases or decreases over time in regard to salience, if the Supreme Court is more or less likely to include the issue on its agenda. This question has important implications. First, there is the possibility that if the Supreme Court does behave differently, they may behave countermajoritarian for issues of high/low salience. For issues of high salience, the Supreme Court may be constrained by the public, interest groups, Congress, and the president. Also, the Supreme Court must maintain legitimacy in the eyes of these external groups in order for its policies to be implemented. However, for issues of low salience, there may be a lesser likelihood of



there being a “watchdog” to limit the degree of the Supreme Court’s ruling. The Supreme Court would likely make decisions based primarily on its own ideology with few constraints. For issues of high salience, the Supreme Court would likely have to consider the reactions of various institutions, and may therefore be constrained in its ability to make decisions exclusively based on their personal preferences. Based on this, it seems likely that the Supreme Court would behave differently when different constraints are placed upon it.

The theory proposed here supports and builds upon the attitudinal model in the sense that justices do indeed want to implement their policy preferences. Where my research contradicts the attitudinal model is that justices are not in fact completely independent. Justices must behave strategically in order to implement their personal preferences in an effective and free manner. There are constraints that justices must face, which include both the public and Congress. Where the constraints are highest, the justices will have less ability to implement their preferences fully. Therefore, I should find that justices would like to accept cases where these constraints are at their lowest. The Supreme Court will not want to accept cases that deal with congressional issues because this constraint limits their independence. When dealing with congressional issues, members of the Court may be influenced by the preferences of Congress overturning its decisions. Therefore, personal policy preferences will not be the only factor influencing the decisions of the Court. However, where the Supreme Court is most independent, justices would be more fully able to implement their policy preferences. Therefore, the Supreme Court in theory would want to accept issues that are not viewed as falling within the congressional domain.

Related to this, however, is the idea of the Supreme Court wanting to maintain legitimacy. The Court may lose power, respect, and support from external actors if they do not consider a broad array of important political issues. Therefore, they cannot solely accept cases that are low in salience. Neither can they solely accept cases that are viewed as belonging to congress. They must also accept issues that are viewed as important in the current political climate (Epstein and Knight 1998). Therefore, they will also accept salient cases in order to appease the public and maintain legitimacy. Also, it may be that even though the Court faces higher constraints for highly salient issues that they would prefer to have some influence on the policy formation for these issues than none at all. Nonetheless, the Supreme Court should accept more cases that are low in salience in order to freely implement their policy preferences without concern of external constraints.

Public opinion and issue salience, while similar, address distinct issues as well. Part of the benefit of using issue salience is that it allows me to look at the behavior of the Supreme Court where there is a lack of knowledge concerning a given topic. Issue salience allows me to measure if the Supreme Court behaves differently where there is a lack of public opinion. Issue salience also allows me to infer what the important issues of the day are based on the media. It provides an unbiased estimate of what issues are important to both the public and government. Where there is a lack of salience for an issue, the Supreme Court would be less likely to worry about constraints of other institutions. Without an awareness or knowledge of an issue by the public, the Supreme Court would be free to act as it chooses, e.g. to make decisions based on their personal ideology. For issues that are highly salient, the public is likely to have well-formed

opinions about an issue (Vanberg 2001). There are also likely to be interest groups that respond and monitor the Supreme Court for these types of issues. Therefore, since public opinion is less likely to have an impact on Supreme Court decisions for issues that are low in salience, and since justices want to implement their own policy preferences, justices should accept a large number of low salient cases in order to do so. The reason for this is that the Supreme Court is more likely to be swayed by public opinion for highly salient issues than for less salient issues.

As stated, in order for the justices to vote sincerely on the merits, they must behave strategically at the cert stage. By selecting cases with fewer constraints, the Supreme Court will be more independent at later phases of the policymaking process. There is no clear-cut research on what is a “Supreme Court” issue and what is a “Congressional” issue, but traditionally, the power of the purse is regarded as an issue for Congress to deal with. The Constitution gives Congress control over monetary issues (Article I, Sections 7 and 8). Issues dealing with civil rights are viewed as issues that the Supreme Court intervenes in to protect the rights of minorities. This is because the Supreme Court is supposed to protect and defend the rights of citizens based on the rights granted in the Constitution (Article III, Section 2 and Amendment 14). Therefore, certain issues are viewed as belonging to the Supreme Court, while others belong to Congress.

Even if one does not agree with the general claim that certain issues belong to certain branches, this research may provide systematic evidence of such a claim. If the Supreme Court behaves sincerely for one issue but strategically for another, it may be due to the domain in which the issue falls. If they behave sincerely for an issue, it is likely perceived as a Court issue by the justices since they are less likely to fear

retribution from Congress. However, if evidence exists that the Court behaves strategically for an issue, it is likely viewed as a Congressional issue by the justices since they take into consideration the preferences of Congress. This research addresses these questions systematically and provides further insight into the relationship between the Supreme Court and Congress.

As stated, the Supreme Court must behave strategically when making decisions, and they have to take into consideration the preferences of Congress. Theoretically, this relationship should work in the reverse direction as well. When considering legislation, Congress has to consider the preferences of the Supreme Court and the likelihood that the Supreme Court will overturn legislation. Therefore, the two branches of government both likely behave strategically when making their decisions. However, the behavior of legislators will be further limited by an additional constraint not faced by members of the Court, re-election.

While unable to address all aspects of this topic, issue salience may provide some insight into when and why the Supreme Court decides to hear certain types of cases. For highly salient issues, Congress would be more likely to be active in protecting its powers. The Supreme Court would be in essence overturning a popularly elected institution's actions. This brings in the constraints of the public as well. The Supreme Court would have to act more strategically and less on their preferences for these types of issues. As a result, if justices truly want to implement their preferences, they should be less likely to accept these types of cases. This is because they have to consider the preferences and ideal points of Congress and the likelihood of Congress overturning its decision. However, a low salience issue would be less influenced by these constraints. Therefore,

low salience issue areas are where the Supreme Court would have the most freedom to implement their preferences. The constraints will be the highest for issues that are highly salient and that belong to Congress.

## CASE SELECTION

The first step in performing this study is to decide which issues to analyze. In order to do a rigorous test, the issues need to vary in salience. The issues also need to vary in the sense of issues traditionally belonging to the Supreme Court and issues belonging to Congress. Ideally, there would be at least four issues to analyze: low salience Supreme Court issue, high salience Supreme Court issue, low salience Congress issue, and high salience Congress issue. However, since this research measures salience across time, the salience of issues will likely vary over time. What is considered salient today may not have been salient in 1969. The variance is likely to fluctuate for issues over the course of the time period. It is difficult to find testable issues that remain static throughout time as far as salience is concerned. Also, the variance of salience is to a large degree what this research tries to measure. This research tests whether, as salience increases or decreases over time, the Supreme Court is more or less likely to hear a case involving the given issue. This being said, the issues to be studied will be civil rights and federal taxation. These issues provide variance across time regarding salience and are also divided between issues that Congress usually deals with and issues that the Supreme Court usually deals with.

The reason for these issues is that it is typically regarded as the Supreme Court's responsibility to promote and defend the civil rights of individuals, and this issue has likely become more salient over time. Therefore, the congressional constraint will be lessened for this issue. This variable can also test whether the Supreme Court is in fact less likely to hear cases dealing with this issue as it becomes more salient. Federal taxation is an issue that is regarded as belonging to Congress, and it is likely to have been

highly salient over time. Therefore, the congressional constraint and the salience constraint are both high for this issue. Therefore, the Supreme Court should accept less of these types of cases, since they are less free to implement their policy preferences in this area.

## HYPOTHESES AND OPERATIONALIZATION

As previously mentioned, it is likely that the Court behaves strategically when facing certain constraints, but sincerely when the constraints are removed. There are three broad hypotheses tested here: the impact of issue salience, issue type, and congress's impact on the agenda-setting behavior of the Supreme Court. Therefore, it is expected that whether the Court behaves either in a sincere versus strategic manner depends on the level of salience, the type of issue, and the ideological distance between the Court and Congress.

As stated, the Supreme Court wants to implement their personal policy preferences. However, when resolving highly salient issues, the Supreme Court will face higher constraints from both the public and Congress. Therefore, members of the Court should accept a fewer number and proportion of highly salient cases.

However, as stated, the Court must also maintain legitimacy. In order to do this, they must accept cases dealing with highly salient issues. Also, justices are likely to have opinions on these issues as well, and would like to have some influence on these policy matters. Lastly, there are likely a larger number of cases appealed that deal with highly salient issues than low salience issues. Therefore, due to the types of cases the Court receives, the number of highly salient cases heard by the Court will be higher. This leads to the following hypothesis:

Hypothesis 1A: As salience for tax and affirmative actions issues increases, the number of these cases on the Supreme Court docket will increase.

However, as stated, the Court also wants to implement their personal policy preferences. For highly salient issues, the Court will face higher constraints from both



the public and Congress. Therefore, even though the Court accepts a higher number of high salience cases, they likely accept a higher proportion of appealed low salience cases than high salience cases. This leads to the following hypothesis:

Hypothesis 1B: As salience for tax and affirmative issues increases, the proportion of these cases from those appealed on the Supreme Court docket will decrease.

As discussed earlier, the type of issue also might constrain judicial behavior. Thus, I delineate below hypotheses about judicial behavior in tax policy compared to affirmative action policy. As previously mentioned, tax policy is an issue that is generally dealt with by Congress, and affirmative action is an issue generally reserved for the Supreme Court. If the justices want to implement their policy preferences, they will be able to do this more easily where the constraints are at their lowest.

If the justices behave in a sincere manner, it should be in the issue area of affirmative action. Since this issue area falls within the domain of the Court, the congressional constraint will be minimized for affirmative action. As the salience of affirmative action increases, so should the number of cases before the Court dealing with that issue. Since the justices want to implement their policy preferences, they are likely to want to do this for the most salient contemporary issues. The Court will want to hear cases that are important in the media, to the public, and to the Supreme Court itself. This leads to the following hypotheses regarding issue salience and affirmative action:

Hypothesis 2A: As salience increases for affirmative action, the number of affirmative action cases will increase.

Hypothesis 2B: As salience increases for affirmative action, the proportion of appealed affirmative action cases on the Supreme Court docket will increase.

Tax policy, on the other hand, falls within the congressional domain. Therefore, the Court would have more reason to fear potential retribution from Congress when deciding these types of cases. Also, as the salience of the issue increases, Congress is more likely to be aware of the Court's decisions regarding this issue. Therefore, the behavior of the Court will be constrained by Congress for tax policy cases. To be able to freely implement its decisions, the Court should only accept low salient congressional issues. This leads to the following hypotheses regarding issue salience and tax policy:

Hypothesis 3A: As salience increases for tax policy, the number of tax policy cases on the Supreme Court docket will decrease.

Hypothesis 3B: As salience increases for tax policy, the proportion of appealed tax policy cases on the Supreme Court docket will decrease.

Since tax policy falls within the congressional domain, I should find that as the ideological distance between Congress and the Supreme Court increases that the Court will accept fewer tax policy cases. The reason for this is that as the distance between the two branches increases, the Court would have more reason to fear retribution from Congress. If the Court wants to implement their policy preferences, they will be constrained from doing so. As the distance between the two branches increases, the ideal point of the Court will also be further from the ideal point of Congress. Therefore, the decisions of the Court will be constrained at the merit stage of the process. If the Court truly is strategic at the agenda-setting phase so that they may be sincere at the decision on the merits phase, I should find that the following hypotheses regarding tax policy and ideological distance hold:

Hypothesis 4A: As the ideological distance between the Court and congress increases, the Court will accept a lower number of tax policy cases.

Hypothesis 4B: As the ideological distance between the Court and Congress increases, the Court will accept a lower proportion of appealed tax policy cases.

Since affirmative action falls within the Court's domain, they will not have to behave strategically when deciding whether or not to accept these cases. If the Court does behave sincerely at the agenda-setting phase for affirmative action cases, then the ideological position of Congress should have no impact on the Court. Therefore, as the ideological distance between the two branches of government increases, there should be no relationship with either the number or the proportion of cases accepted by the Court. This leads to the following hypotheses:

Hypothesis 5A: Ideological distance should not be statistically related to the number of affirmative action cases accepted.

Hypothesis 5B: Ideological distance should not be statistically related to the proportion of appealed affirmative action cases on the Supreme Court docket.

## DATA

There have been several different ways of measuring issue salience. As stated previously, there have been numerous problems with a number of these. Issue salience is measured for this study as the number of articles about the given issue in a given year. This is conducted with Lexis-Nexus. More specifically, salience is the total number of articles that have specific key words in either the headline or lead paragraph of the article for a given year in the New York Times. This measurement attempts to provide an accurate measure of how salient an issue was at the given time. However, any measure of the influence of the media will be subject to bias to a degree. To avoid this problem, the measure needs to be both comprehensive and narrow. It needs to be comprehensive in the sense that it captures all the articles dealing with a specific issue. It needs to be narrow in the sense that it does not include articles that are only marginally associated with the issue. The measure in this study does both by specifying appropriate keywords to be found only in the title or lead paragraph.

Spaeth's Supreme Court database is used to measure the total number of cases that landed on the Supreme Court docket for each issue in a given year. It is the most extensive and up to date data base regarding Supreme Court decisions. It also provides information on several of the variables for the whole time period. Specifically, it details the issues that were involved in each case. This database provides a description of the issues that decided cases dealt with. The issues are divided into thirteen issue areas, of which the two previously mentioned are examined for this study.

However, there is not a database that analyzes the issues for all of the cases that are appealed to the Supreme Court. Therefore, the number of cases appealed to the

Supreme Court for each year will have to be estimated with the best available resources. The number of appealed cases is based on Songer's circuit court database. The proportion of cases decided at the circuit court level for each issue should be representative of the total number of cases that are appealed to the Supreme Court for each issue. To estimate the number of cases appealed to the Supreme Court, first the number of cases dealing with each issue on the circuit court level will be divided by the total number of cases decided at the circuit level for each year. This provides the proportion of cases dealing with each issue that were decided at the circuit court level. There are approximately 5,000 cases appealed to the Supreme Court each year. Therefore, to estimate the actual number of tax and affirmative cases that were appealed to the Supreme Court, the proportion of cases dealing with each issue at the circuit level is multiplied by 5000. This should provide an accurate measurement of the total number of cases that were appealed to the Supreme Court for each issue. Therefore, the proportion of cases accepted for each year will simply be the number of cases that were accepted by the Supreme Court for each issue (Spaeth data set) over the number of cases appealed for that issue (Songer's data set).

Within each of the thirteen issue areas defined by Spaeth, the issues are further broken down. Each area includes a variety of different topics that address different aspects of the issue. In order to provide a more refined analysis, I define each issue so that the measurement of issue salience for the issues more closely matches the measure of the issue before the Supreme Court. This provides a more accurate measurement of salience and allows us to better capture the true effects of salience on the Supreme Court docket.

For civil rights, I focus on affirmative action (variables 222 and 223<sup>1</sup> in the Spaeth data set and variables 221-224<sup>2</sup> for the Songer data set). For each year from 1969-1996, the dependent variable is either the total number of cases on the Supreme Court docket for the issue, or the proportion of the number of Supreme Court cases dealing with affirmative action for each year (estimated from the Spaeth data set) over the number of cases appealed (estimated from the Songer data set). Salience is measured using Lexus-Nexus using the search terms “affirmative action” and “reverse discrimination” for each calendar year. This identifies how many articles contain these terms within either the headline or lead paragraph for each year

For the issue area of federal taxation, I use variables 960, 970<sup>3</sup>, 975, and 979<sup>4</sup> from the Spaeth data set and variables 701-705<sup>5</sup> from the Songer data set. To measure the salience for this variable the following keywords were used: “tax policy,” “tax law,” and “tax statutes.” This variable also taps into the congressional issue area. I should find that the Supreme Court is less likely to accept these cases due to the congressional constraint.

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<sup>1</sup> Variable 222 deals with employment discrimination on the basis of race. Variable 223 deals with cases involving affirmative action.

<sup>2</sup> Variable 221 deals with employment discrimination based on race alleged by minority. Variable 222 are other race discrimination cases alleged by minority. Variable 223 are employment discrimination based on race alleged by a Caucasian. Variable 224 are other discrimination cases alleged by a Caucasian.

<sup>3</sup> Variable 960 deals with federal taxation cases. Variable 970 deals with federal taxation cases for gifts and personal and professional expenses.

<sup>4</sup> Variable 975 deals with the priority of federal taxation over state and private claims. Variable 979 deals with miscellaneous federal taxation cases.

<sup>5</sup> 701 involves state or local taxes, 702 involves individual federal income tax, 703 involves business federal income tax, 704 involves federal tax for excess profits, 705 involves federal estate and gift tax.

In order to test the ideological distance hypothesis, there needs to be a measure of ideology for both the Supreme Court and Congress. To measure the Supreme Court's ideology, I use Segal and Cover's measurement of Supreme Court ideology. For Congress, I use Poole's D-W NOMINATE measure of Congress's ideology. The scores for each of these measures are standardized in order to provide a measure of absolute distance between the two institutions for each year.

Lastly, I include a lagged dependent variable to control for the Court's docket in previous years. Since the best predictor of the Court's behavior may be the action it takes in the previous year, this variable controls for a possible lagged effect. This variable will be lagged by one time period. I also lagged the salience variable by one time period to account for the possibility that the salience of a variable for the previous year will affect the likelihood of a case being granted cert in the following year.

## ANALYSIS

All of the regressions for this analysis were run twice. The first set of regressions include the lagged dependent variable. This variable was not significant in any of the tests, and it did little to increase the explanatory power of the dependent variable. The second group of tests was run without the lagged dependent variable. These results are presented in the following discussion.

Table 1 provides the results to test Hypothesis 1A. This hypothesis tests the impact of issue salience on the number of affirmative action and tax policy cases on the Supreme Court docket. The salience variable is the total salience combined for the two issue areas. For this table, the salience variable is negative which is contrary to the hypothesis. This would initially support the notion of strategic behavior by the Court. As the salience increases, the Court will accept a fewer number of cases dealing with affirmative action and tax policy cases. On the other hand, the variable fails to reach significance at the .05 level. Therefore, I fail to reject the null hypothesis of no relationship. However, even though the variable is not significant, this may support the notion of sincere behavior. The salience of the issues may not effect the decision process of the Court, and this may be why the variable fails to reach significance. The Court is not independent to accept the cases that it wants, which means that the media has little or no role in the agenda-setting process of the Court.

Table 2 provides the results to test Hypothesis 1B. Rather than looking at the number of cases accepted, this hypothesis tests the relationship between issue salience



TABLE 1

OLS REGRESSION OF ISSUE SALIENCE AND IDEOLOGICAL DISTANCE ONTO  
TOTAL NUMBER OF TAX AND AFFIRMATIVE ACTION CASES ON THE  
SUPREME COURT DOCKET

	COEFFICIENT	STANDARD ERROR	T
SALIENCE	-.00077	.001	-.821
DISTANCE	-1.714	.721	-2.378**
CONSTANT	13.772	1.28	10.758***

N=28

Adjusted R-square: .157

\*p≤.10, \*\*p≤.05, \*\*\*p≤ .01

and the proportion of appealed affirmative action and tax policy cases on the Supreme Court docket. As can be seen, the coefficient for this variable is positive, which would support the notion of sincere behavior. As the salience of the issue increases, the Court tends to accept a higher proportion of cases dealing with these issues. However, the variable fails to reach significance at the .05 level. Therefore, I fail to reject the null hypothesis of no relationship between these two variables. Even though the test fails to reject the null hypothesis of no relationship, these results may still provide support for the notion that justices behave in a sincere manner. Since the variable is insignificant, this may imply that the justices are independent when deciding which types of cases to

TABLE 2

OLS REGRESSION OF ISSUE SALIENCE AND IDEOLOGICAL DISTANCE ONTO PROPORTION OF APPEALED TAX AND AFFIRMATIVE ACTION CASES ON THE SUPREME COURT DOCKET

	COEFFICIENT	STANDARD ERROR	T
SALIENCE	.00001032	.000	1.599
DISTANCE	-.013	.005	-2.653**
CONSTANT	-.05591	.009	.000***

N=28

Adjusted R-square: .196

\*p≤.10, \*\*p≤.05, \*\*\*p≤.01

accept. It may be that the salience of the issue does not effect the decision process of the Supreme Court, and this may be why there appears to be no relationship between total issue salience and the proportion of cases on the docket dealing with affirmative action and tax policy cases.

The salience measurement failed to achieve significance for both the proportion of cases on the Supreme Court docket and the total number of cases on the docket. As stated, even though the variable is not statistically significant, this may still imply that the Supreme Court is behaving in a sincere manner. Since the variables are not statistically related, it may be that the justices are independent from the contemporary politically

important issue areas. However, it may also be that justices behave in a sincere manner for certain issue areas, but in a strategic manner for other issue areas. Therefore, when looking at the behavior of the Court in general for a combination of issue areas, the impact of salience for specific issue areas may be masked. Therefore, to gain a better understanding of the impact of issue salience, each issue area will be examined individually below.

Hypothesis 2A tests whether the Court behaves strategically or sincerely for the total number of affirmative actions on the Supreme Court docket. The results can be seen in Table 3. Here, the ideological distance variable fails to reach significance at the .05 level of confidence. Therefore, I fail to reject the null hypothesis of no relationship between these two variables. Again, while these results fail to support the formalized hypothesis, these results support the idea of sincere behavior. Neither issue salience nor Congress appears to impact the likelihood of affirmative action cases landing on the Supreme Court docket. Instead, the Court appears to be acting independently when deciding whether or not to accept these cases. It may be that only their personal preferences enter into the decision-making process of members of the Court when dealing with issues that fall within the Court's domain.

Hypothesis 2B measures the degree of sincere versus strategic behavior for the proportion of affirmative action cases. For this hypothesis, the dependent variable is the proportion of appealed affirmative action cases that were accepted onto the Supreme Court docket. The results in Table 4 show that neither the distance variable nor the salience variable are significant. Again, the failure of these variables to achieve significance at the .05 level tends to support the notion of sincere behavior. Since the

TABLE 3

OLS REGRESSION OF ISSUE SALIENCE AND IDEOLOGICAL DISTANCE ONTO  
TOTAL NUMBER OF AFFIRMATIVE ACTION CASES ON THE SUPREME  
COURT DOCKET

	COEFFICIENT	STANDARD ERROR	T
AFFIRMATIVE ACTION SALIENCE	-.001368	.005	.281
DISTANCE	-.720	.486	-1.485
CONSTANT	4.212	.939	4.488***

N=28

Adjusted R-square: .008

\*p≤.10, \*\*p≤.05, \*\*\*p≤ .01

issue of affirmative action is within the Supreme Court's domain, this is an issue where the Court tends to have more freedom in the first place. Also, since this is within their domain, the Court may be less likely to be concerned with the reaction of Congress when deciding these types of cases. Therefore, this may be why the distance variable fails to reach significance.

Hypothesis 3A measures the degree of sincere versus strategic behavior for the total number of tax policy cases on the Supreme Court docket. Table 5 provides the results for this test. The result for the tax salience variable in this regression is not significant at the .05 level of confidence. Again, while the results fail to reject the null

TABLE 4

OLS REGRESSION OF ISSUE SALIENCE AND IDEOLOGICAL DISTANCE ONTO  
PROPORTION OF APPEALED AFFIRMATIVE ACTION CASES ON THE  
SUPREME COURT DOCKET

	COEFFICIENT	STANDARD ERROR	T
AFFIRMATIVE ACTION SALIENCE	-.000059	.000	-.963
DISTANCE	-.0056	.006	-.916
CONSTANT	.05347	.012	4.554***

N=28

Adjusted R-square: .012

\*p≤.10, \*\*p≤.05, \*\*\*p≤.01

hypothesis of no relationship between the tax salience variable and the total number of cases on the docket, this may indicate sincere behavior by the members of the Supreme Court. Since there is no relationship for this regression, it may simply be that the salience of an issue does not affect the agenda-setting phase of the Court process. The justices may simply only accept cases that they are interested in, or that they personally find politically important. This would also support the idea that justices are independent to pursue their own policy preferences. Since justices are not concerned with re-election goals, they are free to accept only the cases that they are interested in. The salience of the variable may not impact the number of cases that the justices accept for a given issue.

TABLE 5

OLS REGRESSION OF ISSUE SALIENCE AND IDEOLOGICAL DISTANCE ONTO  
TOTAL NUMBER OF TAX CASES ON THE SUPREME COURT DOCKET

	COEFFICIENT	STANDARD ERROR	T
TAX SALIENCE	-.00072	.001	-.885
DISTANCE	-1.048	.558	-1.784*
CONSTANT	9.292	1.020	9.107***

N=28

Adjusted R-square: .082

\*p≤.10, \*\*p≤.05, \*\*\*p≤ .01

Hypothesis 3B measures the degree of sincere versus strategic behavior for the proportion of appealed tax policy cases. The dependent variable is the proportion of tax policy cases that were on the Supreme Court docket dealing with tax policy issues over the number of tax policy cases that were appealed. Table 6 provides the results for this test. As can be seen, the test fails to reject the null hypothesis of no relationship between tax salience and proportion of tax policy cases accepted at the .05 level of significance. However, if one were willing to use the .10 level of significance, then this variable would be significant. The relationship between the two variables is positive, which is opposite

TABLE 6

OLS REGRESSION OF ISSUE SALIENCE AND IDEOLOGICAL DISTANCE ONTO  
PROPORTION OF APPEALED TAX CASES ON THE SUPREME COURT DOCKET

	COEFFICIENT	STANDARD ERROR	T
TAX SALIENCE	.00002187	.000	1.866*
DISTANCE	-.02	.009	-2.358**
CONSTANT	.07223	.015	4.885***

N=28

Adjusted R-square: .185

\*p≤.10, \*\*p≤.05, \*\*\*p≤ .01

of the hypothesized strategic hypothesis. As the salience for the issue of tax policy increases, the Court tends to accept a higher proportion of these cases. If the Court were behaving in a strategic manner, then they would accept a lower proportion of cases as the salience increased. The reason for this is that as the salience increases, the constraints are raised, thus limiting the freedom of the justices to impose their personal policy preferences. However, this is not the case. As the issue becomes more salient, the Court tends to accept a higher proportion of these cases, even though the constraints would tend to be higher.

Hypothesis 4A measures the impact of Congress on the total number of tax policy cases on the Supreme Court docket. These results can be seen in Table 5. The coefficient is negative, which supports the strategic hypothesis. As the distance between the two branches increases, the Court tends to accept a lower number of tax policy cases. While the distance variable is not significant at the traditional .05 level, the significance level is .087. Therefore, while not statistically significant, it appears that the Court is behaving strategically to a certain degree.

Table 6 provides the results for Hypothesis 4B where the dependent variable is the proportion of appealed tax policy cases. For this variable, the distance variable is statistically significant at the .05 level of confidence. The relationship between these two variables is once again negative. Therefore, taking into consideration the number of tax policy cases that are appealed to the Court, it appears that the Court behaves in a strategic manner for tax policy cases. As the distance between the two branches increases, a lower proportion of appealed tax policy cases land on the Supreme Court docket. This makes intuitive sense, since tax policy falls within the congressional domain. As stated, issues within the congressional domain raise an additional constraint for the Court. The Court appears to defer these types of cases, since they may fear retribution from Congress when deciding cases that belong to Congress.

Hypotheses 5A and 5B test the relationship of ideological distance with both the number and proportion of affirmative action cases on the Supreme Court docket. The results for these tests can be seen in Tables 3 and 4. The distance variable fails to reach the .05 significance level in both of these tests. While the coefficient is negative, which would support the notion of strategic behavior, the results fail to reject the null hypothesis



of no relationship. However, the reason again that these variable fail to be statistically significant may be because affirmative action falls within the Court's domain. Therefore, the Court is less likely to be concerned with the preferences of Congress. They are also less likely to fear retribution. This would tend to support the notion of sincere behavior.

## CONCLUSION

Table 7 provides a summary of the results found in this paper. Taken together, the results provided here show support for the overall theory. First, the Supreme Court does appear to behave strategically in deciding which cases to accept. They do this by taking into consideration the ideological preferences of Congress for tax policy cases, but not for affirmative action cases. If one were to examine only affirmative action cases, it would appear that the Supreme Court does not behave strategically, or that they are immune from external factors. However, by individually examining a variety of different issues, it can be seen that the Supreme Court only behaves sincerely for certain issues. When looking at tax policy cases, it can be seen that the Court does take into consideration the preferences of Congress. As the distance between these two branches increases, the Court accepts fewer cases dealing with the issue of taxation. This is an indication that the Court is behaving strategically in relation to the preferences of Congress. For issues within the congressional domain, the Supreme Court considers the potential constraints, and behaves in a strategic manner.

However, for issues within the Court's domain, they are less likely to be concerned with external constraints in their environment. For affirmative action, neither the ideological distance variable nor the issue salience variable was significant. This indicates that when deciding whether or not to accept cases, the Court is less likely to be influenced by external factors when it is an issue within the Court's domain.

Second, the results also provide support for the claim that the Supreme Court does behave differently under different situations. For issues in the Supreme Court's domain, there does not appear to be a relationship with the ideological preferences of Congress.

TABLE 7

SUMMARY TABLE

	<u>ISSUE SALIENCE</u>	<u>IDEOLOGICAL DISTANCE</u>
<u>PROPORTION</u> <u>TAX AND AA</u>	NOT SIGNIFICANT; SINCERE BEHAVIOR	SIGNIFICANT; STRATEGIC BEHAVIOR
<u>TOTAL NUMBER</u> <u>TAX AND AA</u>	NOT SIGNIFICANT; SINCERE BEHAVIOR	SIGNIFICANT; STRATEGIC BEHAVIOR
<u>TOTAL</u> <u>AA CASES ONLY</u>	NOT SIGNIFICANT SINCERE BEHAVIOR	NOT SIGNIFICANT; SINCERE BEHAVIOR
<u>PROPORTION</u> <u>AA CASES ONLY</u>	NOT SIGNIFICANT; SINCERE BEHAVIOR	NOT SIGNIFICANT; SINCERE BEHAVIOR
<u>TOTAL</u> <u>TAX CASES ONLY</u>	NOT SIGNIFICANT; SINCERE BEHAVIOR	SIGNIFICANT AT .10; STRATEGIC BEHAVIOR
<u>PROPORTION</u> <u>TAX CASES</u> <u>ONLY</u>	SIGNIFICANT AT .10; STRATEGIC BEHAVIOR	SIGNIFICANT; STRATEGIC BEHAVIOR

The Supreme Court behaves in an independent fashion for these issues, and appears to be free to implement their preferences. For issues in the congressional domain, however, the Supreme Court does take into consideration the preferences of Congress. As the distance between the two branches increases, the Supreme Court accepts fewer tax cases. Therefore, the behavior of the Supreme Court depends in part on which types of issues

that are before it. At times, the Supreme Court behaves in a sincere manner, while in other instances, the Supreme Court behaves strategically.

While the issue salience variable approached significance in several of the regressions, it was never significant at the .05 level of confidence. Salience did approach significance for the proportion of tax policy cases variable. However, in general, the salience of the issues appeared to have little, if any, impact on the likelihood of cases being granted cert. There are several reasons why this might be the case. First, the Court may in fact be independent of how salient an issue is. Instead, they may simply decide to accept cases based on the facts of the case or the justices' personal preferences. Whether or not the issue is highly salient and widely covered in the media may mean little to the justices. This would support the notion that justices are supposed to be above politics, and instead they accept cases strictly on whether they think the case raises important constitutional questions.

A second potential reason why the salience variable is not significant may be due to the measurement. An accurate measurement of issue salience is difficult to obtain. In the measure used in this study, I was conservative in the measurement criteria in order to avoid finding false results. This may have contributed to the lack of findings concerning issue salience. Therefore, even though the results indicate that issue salience is not statistically related to the likelihood of cases being granted cert, measured in another way, issue salience may be shown to be strongly related to the agenda-setting process. Therefore, the measurement of issue salience is one aspect that should be addressed again in new ways in future research.

There are other aspects that should also be included in future research. I have only examined the impact of issue salience and Congress on the agenda-setting phase of the Supreme Court process. By looking at just these two factors, I have addressed the main research question by examining under what circumstances the Court behaves in a strategic or sincere manner. However, the predictive power of all of the models could be improved. To do this, other variables will have to be considered to gain a more complete understanding of the agenda-setting process. One aspect that has been shown to impact the behavior of the Court is the presence of amicus briefs. However, this data is not currently available for all of the cases that are appealed to the Court. If this variable was included in a similar model, the predictive power would likely be improved. Other factors that would also improve the model would be whether there is conflict between lower courts, if there is conflict within a court, and whether the government is a party in the case.

Another aspect that should be addressed when data limitations can be overcome is to examine the behavior of individual justices. In the current research, I have examined the aggregate behavior of the Court. However, examining the individual voting behavior of justices would also potentially add more insight into the strategic/sincere behavior of the Court. All of the previously mentioned factors would help to provide a clearer understanding of the agenda-setting process. However, the data is either currently unavailable, or the questions are beyond the scope of the current research. Even with the limitations, the results provided here are still able to show that whether the Court behaves strategically or sincerely depends in large part on the issue that is before the Court.

As stated, the reason that previous research indicates that the Supreme Court votes sincerely on the merits may be in part due to the strategic behavior of the Supreme Court at the agenda-setting phase of the process. This research has provided an initial look at the impact of issue salience on the Supreme Court docket and the strategic behavior of the Supreme Court at the agenda-setting phase. Future research should expand the number of issues examined to gain an even better understanding of the strategic and sincere behavior of the Supreme Court. Future research should also examine the vote on the merit stage for these issues. As stated, it may be that the reason the Supreme Court votes sincerely on the merits is because they behave strategically in deciding which types of cases to hear. However, research may indicate further support for the constraint theory in that justices also behave strategically at the merit stage as well for congressional issues.

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