Published in the United States of America by the
University of Michigan Press
Manufactured in the United States of America
♾ Printed on acid-free paper

2019 2018 2017 2016 4 3 2 1

A CIP catalog record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Danelski, David Joseph, 1930– editor. | Ward, Artemus, 1971– editor.
Title: The Chief Justice : appointment and influence / edited by David J. Danelski and Artemus Ward.
Description: Ann Arbor : University of Michigan Press, 2016. | Includes bibliographical references and index.
Identifiers: LCCN 2016006531 | ISBN 9780472119912 (hardcover : alk. paper) | ISBN 9780472121953 (e-book)
Subjects: LCSH: United States. Supreme Court.
Classification: LCC KF8748 .C385 2016 | DDC 347.73/2634—dc23
LC record available at http://lccn.loc.gov/2016006531

The Chief Justice

APPOINTMENT *and* INFLUENCE

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UNIVERSITY OF MICHIGAN PRESS
ANN ARBOR

8 ~ The Chief Justice and Procedural Power

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Associate justices may acquire influence on the Court through force of intellect, force of personality, political skill, or the good fortune to be ideologically pivotal. And so may the chief justice. But by virtue of the procedural rules employed on the Court, the chief justice has access to resources that the other justices do not. The chief's *procedural power* is analogous to the powers held by the Speaker of the House, the Senate majority leader, or the chairman of the Rules Committee: these officers have no right of absolute command. Rather, their power lies in the ability to manipulate the decision rules used by the members. Although some Speakers or majority leaders or committee chairs display more adroitness than others in using their procedural powers, it is in these special "vantage points" (to use Richard Neustadt's phrase) that their special influence lies. So, we argue, it is with the chief justice. Procedural power is the foundation of the chief's special impact on the Court.

This perspective on the chief is not new; indeed, it is the essence of what Danelski called the chief's "task leadership."[1] By task leadership, Danelski meant the chief's procedural steering of the Court's production of majority opinions. In his discussion of task leadership, Danelski highlighted the chief's key role in opinion assignment and suggested that the chief could exploit his special opportunities in that domain to advance his goals for the Court, for instance by minimizing the number of dissents.

In this chapter, we follow Danelski's lead in considering procedural power. Coming to the subject more than a half-century later, though, we can exploit perspectives from contemporary theories and empirical studies of Supreme Court decision making that were unavailable to the pioneers of judicial behavior.[2] Those theories formally model the decision-making procedures on the Court using noncooperative game theory, and allow a

subtle analysis of the chief's incentives and ability to exploit procedural power. In some cases, the formal analysis underscores the essential validity of earlier scholars' intuitions, perhaps especially about opinion assignment. In other cases, existing theories are silent about, but nonetheless hint at, opportunities to exploit procedural power that have yet to receive much attention. In both these "new" and "old" areas, we can exploit powerful new data to gain empirical leverage. Similarly, empirical scholarship since Danelski has provided powerful insights into behavioral regularities on the Court.[3] We contribute to this line of research by bringing additional empirical data to bear on the chief justice's procedural powers.

Varieties of Procedural Power

What types of procedural power are available to the chief? Three stand out. The most obvious is *opinion assignment*. As is well-known, after oral argument the justices take a nonbinding straw vote on the proper disposition of a case. If the chief is in the dispositional majority, he has the power to assign the authorship of the majority opinion to a member of the dispositional majority in the straw vote.[4] As we discuss below, depending on one's theory of the Court this assignment power may or may not allow the chief to bend the content of majority opinions in a favorable way.

A second opportunity for procedural power arises because the chief has a special role in drawing up the "discuss list" of cases from which the Court chooses its cases. The chief creates a draft discuss list of cases he deems worthy of consideration, which he circulates. Any justice may then "nominate" additional cases to the chief's initial list. The chief has no veto power over these nominations. In forming coalitions around multiple competing cases, however, even ideologically allied justices face a coordination problem. The chief may be able to use his first draft and early knowledge of the nominated cases to organize a coalition in favor of particular cases and opposing others. Hence when the justices walk into the room to select the cases to hear, the chief may have wired the meeting, at least for particular cases. This kind of steering via *case selection* may again afford the chief some ability to affect the content of majority opinions. (We discuss how below.)

Finally, a more subtle form of procedural power may stem again from the chief's role in compiling the discuss list. The chief may be able to "seed" the discuss list with cases on topics he favors; conversely, he may hold back cases he wishes to avoid. All the other justices are free to nominate cases, so this is a weak form of agenda setting. Still, by virtue of a degree of doggedness and behind-the-scenes lobbying, the chief over time may be able

to exert special influence over the topics the Court addresses. As we discuss below, this kind of *agenda setting* can have subtle yet important doctrinal consequences.

We organize the chapter as follows. First we use the lens of contemporary theories of Supreme Court decision making to view these three types of procedural power. The theories offer clues about how procedural power can work in the three venues of opinion assignment, case selection, and agenda setting. We then scour the systematic empirical record seeking the traces suggested by theory.

Theory suggests we focus our search on important cases. Accordingly, as we turn to empirical work, we identify the most important cases decided by the Court since 1946. We also derive estimates of judicial ideologies, and estimates of the location of cases selected by the Court. We then review the empirical evidence.

Broadly speaking, using new data we find clear evidence that the chief justice uses his power to assign majority opinions to his ideological allies in the most important cases. We also find that case outcomes (dispositions) are closely associated with the chief justice's own ideology and do not appear to be driven by the median, pivotal justice. This finding, we argue, is consistent with the chief justice exercising influence over case selection. In addition, transitions in the chief justice are associated with marked transitions in the topics that make up the Court's docket. Again, this suggests the chief's influence in case selection. Taken together, these findings suggest that the chief justice can use his few and seemingly paltry procedural prerogatives to strategically shape the Court's decisions. Danelski's "task leadership" appears powerful indeed.

The Foundations of Procedural Power

Many sitting justices, politicians, and legal figures have longed to hold the center chair at conference. William Howard Taft famously valued the chief justiceship over the presidency, and Associate Justice Robert Jackson's ambition for the office became an obsession that distorted his life both on and off the Court. But status aside, why is the office valuable? As Harvard law professor Noah Feldman notes, "The Chief Justice of the United States has no extra votes. His responsibilities are to handle the administrative duties of the Court, to assign opinions when he is in the majority, and to run the conferences of the justices. His influence on the other justices is not necessarily any greater than that of his peers."[5]

If the chief is no more than a housekeeper for the other justices—as

Feldman's formulation implies—then it is indeed hard to see why holding the center seat makes any difference for judicial policy. To understand why managing apparently "administrative" chores can lead to influence over judicial policy, we must take a closer look at the decision process used on the Court and at the theories developed by political scientists and judicial scholars to understand it. Then, given a clearer theoretical appreciation of how the Court operates, we can identify the leverage points the chief could use to affect decision-making, if he wanted to.

Supreme Court Decision Making

Decision making on the Court is a bargaining game played by the nine justices. The game has two distinct phases, *case selection* and *case resolution.* As we shall see, the chief has special leverage in both phases of the bargaining game.[6]

The bargaining game played by the justices is a complex one, partly because each case's resolution has two parts, not one. The two parts are a *case disposition* (the "judgment") and a *legal rule*. Literally, the case disposition either upholds or reverses a lower court's prior disposition of the case. Practically speaking, however, it resolves the dispute between the two litigants in favor of one party or the other. Thus, the case's disposition is an act of dispute resolution. In contrast, the legal rule accompanying the disposition states an abstract and general principle that leads to the Court's disposition when applied to the case in hand. In other words, it provides a "why" for the Court's resolution of the dispute. This "why" can be used by other parties to predict the Court's likely behavior in similar disputes in the future. Hence, the legal rule involves policymaking, for it creates new law or modifies old law.

To simultaneously produce the two outcomes—a case resolution and a definitive rule rationalizing the case resolution—the justices employ a distinctive process and a unique voting rule. First, a case is chosen from among those appealed to the Court (we provide some details momentarily). Then, a single justice is designated as the potential majority opinion author for the case (again, we discuss the details below). This justice pens an opinion providing both a disposition of the case and a candidate legal rule justifying the disposition. Some bickering or bargaining, in the form of memos and written suggestions, often plays a role during the author's drafting work.[7]

The justices then vote on the potential majority opinion using a strange rule. In this rule, each vote can take three values, not just two. The three values are "dissent," "concur," and "join."[8] Each of these values simultane-

ously indicates (first) a preference for one of the two possible dispositions of the case, and (second) an endorsement or lack of endorsement of the candidate legal rule offered in the potential majority opinion. A "dissent" vote indicates a preference for the disposition *not* offered in the potential majority opinion. Since the voting justice indicates a preference for the disposition not favored in the candidate majority opinion, a dissent automatically withholds an endorsement of the candidate rule offered in the potential majority opinion. The other two values—"concur" and "join"—both indicate a vote for the other disposition, the one favored in the potential majority opinion. The difference between the votes concerns the endorsement of the rule offered in the potential majority opinion. A join endorses that rule. It says, "I believe the case disposition offered in the opinion is correct, and the candidate legal rule is a good one." A concur withholds the endorsement of the rule. It says, "I believe the case disposition offered in the potential majority opinion is correct, but the candidate legal rule rationalizing the disposition is not a good one."[9] If five or more justices endorse the candidate legal rule, the potential majority opinion becomes the actual majority opinion of the Court (the case disposition then follows automatically) and the rule has precedential value in the lower courts. If the potential majority opinion fails to garner five or more joins, other justices can try to offer candidate rules that do so. If no justice's candidate rule gains five or more endorsements, the Court simply resolves the dispute without offering a definitive rationale for the resolution. There is no provision for a runoff or other device forcing the selection of a specific rule among those suggested, so the state of the law in this eventuality is unclear. In addition, there is no reversion to a "status quo ante" since taking the case implies a rejection of the status quo rule (which might not even exist). Rather, a judgment of the Court simply leaves the law in a confused state.

The particular votes are always presented as a bundle, but conceptually one can break them into two parts: first, a dichotomous vote on case disposition, and second, an endorsement vote held only among the dispositional majority. In other words, one can think of the Court's rule as a compound voting rule.[10] One can also distinguish the populations of eligible voters in the two distinct parts of the compound rule. That is, all nine justices vote on the case's disposition, but only members of the dispositional majority can endorse the candidate rule. In addition, the majority thresholds differ in the two parts of the compound rule. With respect to the disposition, simple majority rule applies (the winning disposition requires at least five supportive votes). But the endorsement threshold is always five joins regardless of how many justices are in the dispositional majority (assuming there are eight or more justices participating). So the effective endorsement threshold can range from simple majority rule (when all nine justices agree on the disposition, hence five constitutes a bare majority), to a unanimity rule (when only five justices are in the dispositional majority, hence five joins requires unanimity).

In short, the Supreme Court's voting rule is a *compound rule* (disposition, endorsement) with the first part using *universal franchise* (all nine justices can vote) and *pure majority rule*, and the second part using a *restricted franchise* (only members of the dispositional majority can vote) and a *variable majority threshold* which ranges from pure majority to unanimity depending on the size of the dispositional majority.[11]

The reader's head may be spinning at this point, but political scientists and legal theorists have devised a fairly simple framework for understanding what is going on. This framework, usually called "the case space approach," adapts the standard spatial theory of voting[12] to the judicial context.[13]

Figure 8.1 suggests the basic building blocks. Cases are bundles of facts, such as how fast a car was going, how much care a manufacturer exercised in producing a product, how intrusive a government search for evidence was, how entangled religious symbols were with government operations, and so on. A legal rule typically classifies cases (fact patterns) into two groups, allowable and not allowable. Thus, simple adjudication involves discovering the facts in a case and applying a legal rule to them, thereby yielding a disposition of the case. The division by a legal rule of possible facts into the two categories is shown in figure 8.1.

Justices, it is assumed, have preferences about legal rules. As shown in figure 8.2, a justice has an ideal point in a fact space, corresponding to his or her perception of the "best" legal standard or cut point separating the possible fact patterns into two classes for purposes of dispositions. (In the figures, we simplify by imagining a Supreme Court with three blocks of justices, whose memberships total nine.)

Suppose no rule yet exists for a particular class of dispute. Then the Court may take a case in order to make a rule. For instance, in the example shown in figure 8.3, the Court takes a case at location $\hat{x}$, that is, a case involving a police search with level of intrusiveness $\hat{x}$. In this example, the justices making up Block L favor one disposition of the case (e.g., "exclude the evidence"), while those in Blocks M and C favor the other ("admit the evidence"). Conversely, if the level of intrusiveness of the case had placed it to the left of Block L, all the justices would have favored the "admit" disposition; if the case had been located to the right of Block C, all would have favored the "exclude" disposition.

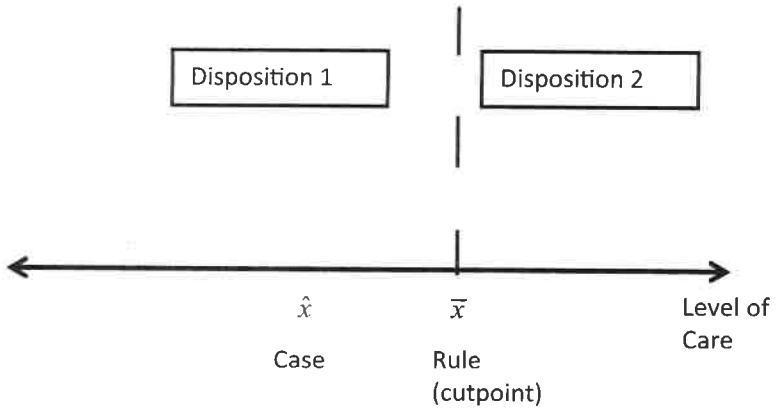

Fig. 8.1. A rule indicates how to dispose a case
A case is a bundle of facts indicating "what happened." For example, it may be the level of care exercised by the defendant. A legal rule partitions possible cases—the case-space—into equivalence classes, each class corresponding to a case disposition. For example, levels of care below a standard receive one disposition ("negligent"), while levels of care above the standard may receive the other disposition ("not negligent"). Applying the rule to a particular case yields a disposition of the case.

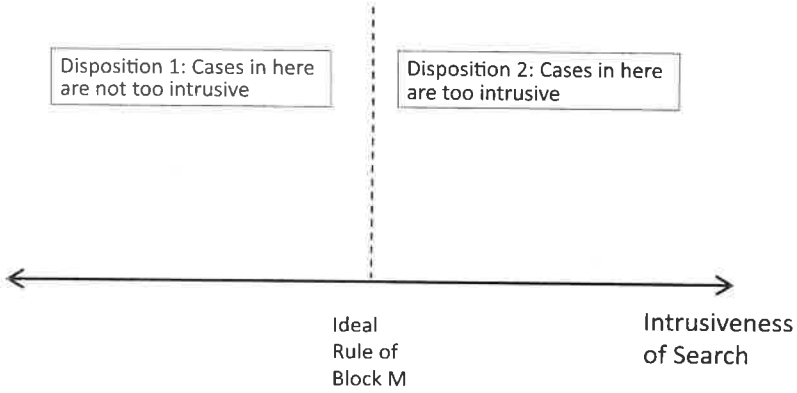

Fig. 8.2. Preferences about a search-and-seizure rule
The moderate block on the Court, Block M, prefers a moderate standard. Cases whose intrusiveness level was less than a standard yield evidence that is admissible; but cases whose intrusiveness level was too high yield inadmissible evidence.

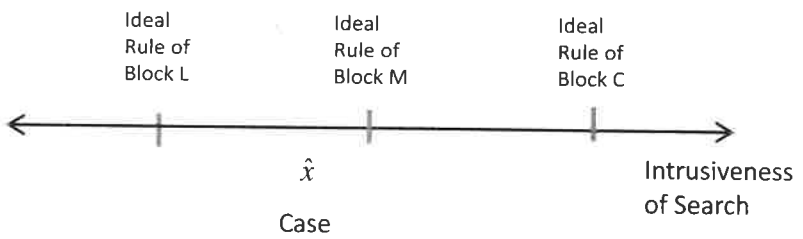

Fig. 8.3. The Court takes a case to make a rule
No rule exists that covers search-and-seizure cases of a certain type. The Court therefore takes a specific case in order to make a rule. After hearing arguments in the case, Block L favors a standard that would exclude many searches, including the one in the case at hand. Block C favors a permissive standard that would admit most searches, including the one in the instant case, though it would exclude the most intrusive. Block M favors a standard between these extremes. The moderate standard would admit the evidence in the instant case.

In turn, the case location and the winning disposition have strong implications for the possible content of rules rationalizing the disposition. For example, as shown in figure 8.4, given the case location $\hat{x}$, if the "admit" disposition prevails, then the rule must be set to the right of $\hat{x}$. But if the "exclude" disposition prevails, the rule must be set to the left of $\hat{x}$. This important feature of adjudication is sometimes called *disposition consistency*: the announced rule must yield the majority's disposition when applied to the facts in the instant case.[14] For example, if a car was going 57 mph and the Court indicates the car was speeding, a Court creating a speed limit must set it at less than 57 mph; conversely if the Court indicates the car was not speeding, the Court must set the speed limit at 57 mph or higher.

Suppose, in the search-and-seizure example, the "admit" disposition prevails (see figure 8.5). The standard must then be set to the right of $\hat{x}$ in figure 8.5. But who gets to determine the standard in the announced rule, that is, who determines the exact location of the rule from within the permissible range determined by the case location and the winning disposition? The rule is chosen by bargaining *among the justices in the winning dispositional coalition*. If Block L is committed to a dissent, it is out of the bargaining and the rule will be selected by bargaining among the justices in Blocks M and C in the figure.[15] If that bargaining is efficient, the final outcome will lie between the ideal points of these two blocks (the Pareto set). This is because both blocks can agree that points in the interval between them are better than points outside the interval. But where will the rule lie within that interval? One of the main lessons of modern bargaining

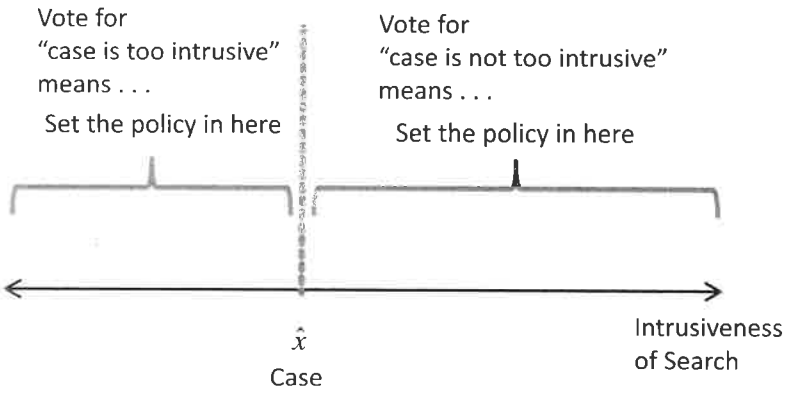

Fig. 8.4. The dispositional vote creates two distinct regions in which a new rule may be created
If the "too intrusive" disposition prevails, the new rule must be set in the left-hand region. If the "not too intrusive" disposition prevails, the new rule must be set in the right-hand region. The case location thus bifurcates the case space. Accordingly, case selection can be extremely consequential for policy making.

theory is that the exact procedures used in the bargaining determine the outcome.[16] So, given the procedures used on the Court, what is likely to happen?

Opinion Assignment: Creating and Edge in the Bargaining Game

Political scientists and judicial scholars have taken several distinct approaches to modeling the bargaining procedures used on the Supreme Court to create rules. The value of opinion assignment varies wildly across the different models, ranging from zero to very large. While there have been many empirical studies of opinion assignment, in order to derive a series of conjectures below we focus here on those that are primarily theoretical.

The oldest approach, the Median Justice Approach, simply applied a standard model from legislative and committee politics to the Court. It therefore neglected the role of the case location, case disposition, and disposition consistency in limiting the set of possible rules and determining the identity of the bargainers.[17] Instead, it assumed rules could be set at any location in the relevant space irrespective of the facts in the case and the majority disposition, and all justices could participate in bargaining over opinion content. The Median Justice Approach assumed intense competition between the justices in choosing rules. These assumptions rationalized

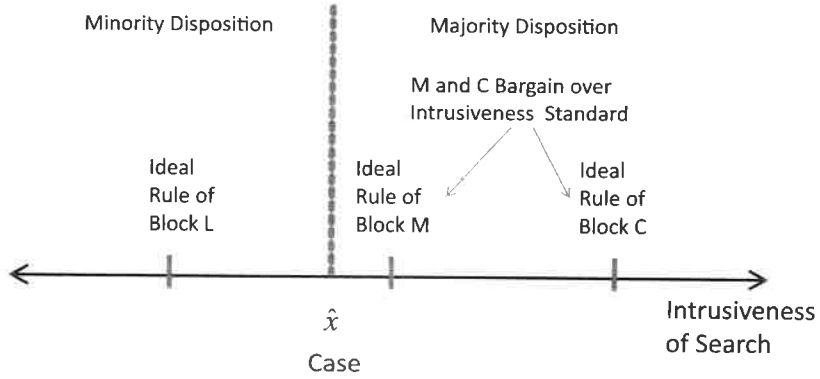

Fig. 8.5. Members of the dispositional majority bargain over the new rule
In the figure, the Moderate and Conservative blocks prevail in the dispositional vote. As a result, the new rule must be set to the right of the case location. But where? The two blocks in the dispositional majority bargain between themselves. The new rule must receive five or more endorsements ("joins") from justices in the two blocks if it is to have precedential value.

an application of the long-familiar median voter theorem.[18] The Median Justice Approach leads to the conclusion that the Court, in all cases and all circumstances, sets policy at the location of the ideal rule of the median justice on the Court. Consequently, *in the Median Justice Approach opinion assignment does not matter*; it is a resource of no value for the chief since all opinions end up in the same place irrespective of author.

Empirical tests of contemporary theories of Supreme Court decision making are in their infancy. Tests conducted using a variety of different data sets and methodologies, however, consistently and emphatically reject the Median Justice Approach when applied to the Court.[19] Perhaps this finding is not so surprising, given the poor fit of the Median Justice Approach and the actual procedures used on the Court.

No consensus has yet emerged about the best alternative to the Median Justice Approach, but two broad approaches have emerged. The first is the Majority Median Approach.[20] This approach acknowledges the importance of case location, the winning disposition, and disposition consistency in limiting the range of possible rules and the identity of the bargainers. But it retains the assumption that intense bargaining among the justices in the winning disposition drives the opinion to the ideal point of the median justice in the majority disposition. Who the median in the majority dispositional coalition will be depends heavily on the case location (the location

of $\hat{x}$ in figures 8.2–8.5) and the willingness or lack of willingness of justices to vote strategically on the case disposition. But, given a specific majority dispositional coalition, opinion assignment does not matter in the Majority Median Approach, since regardless of the author the majority opinion is driven to the median of the dispositional majority. So, the Majority Median Approach holds that opinion assignment is valueless to the chief.

The third approach encompasses a set of models that for a variety of reasons depart from the median voter theorem and accordingly afford a degree of monopoly power to the opinion author. Call these models the Author Influence Approach to Supreme Court decision making. For example, the model in Cameron and Kornhauser[21] acknowledges the importance of case location and case disposition in limiting the possible rules and determining the identity of the bargainers. But in that model, the pressure of time and effort allows the assignee to pull opinion content toward his most preferred location. This ability is pronounced for cases that do not produce "tough" bargaining—for example, relatively unimportant cases—but less pronounced for ones that do. In the latter, bargaining draws opinions away from the author and toward the center of the dispositional majority coalition (if the author did not come from that center in the first place). Other Author Influence models rely on slightly different explanations for the power of the opinion author, but the basic message is the same: opinion assignment matters for the content of the opinion, and it can matter a lot.[22]

In the spirit of the Author Influence models, we suggest:

> **Conjecture 1 (Assignment Prediction):** *The chief will use his assignment power to award the majority opinion in important cases to justices who are ideologically proximate to himself.* In addition, in order to avoid overburdening his "friends" and maintaining some equity in overall opinions assigned, the chief will tend to assign unimportant cases to justices who are ideologically distant from himself.

We don't suggest that this conjecture is novel. There is considerable empirical work on opinion assignment, some of which offers an intuitive "proximity hypothesis" and some of which links proximity and "case importance." The "proximity hypothesis" suggests that the chief disproportionately assigns opinions to ideological allies.[23] The "importance hypothesis" further suggests that case importance may enhance the attractiveness of proximate justices as targets for assignment.[24] None of these studies, however, tightly links these seemingly intuitive hypotheses with Author Influence models of bargaining or views positive evidence as smoking-gun evidence of the chief justice's procedural power through a deliberate exploitation of author influence in bargaining.

Below, we provide a new test of the proximity–case importance prediction. We make use of existing and original data on case importance in conjunction with recently developed measure of judicial preferences. We see this analysis as contributing not just to "facts," but to better knowledge about opinion assignment. In addition, the analysis speaks more broadly to how procedural power is rooted in the bargaining protocols used on the Court. In this sense, it joins other recent work that explicitly links empirics to the new theories of Supreme Court bargaining (see note 19).

Case Selection: Winning the Coordination Game

As we have seen, the location of the case used as the vehicle for making law can affect the content of the rule, for at least two reasons. First, the case location constrains the rules that can possibly be set due to disposition consistency (recall figure 8.4).[25] Second, case selection can affect or—under sincere dispositional voting—even determine the identity of the justices in the majority coalition who bargain over the content of the rule (recall figure 8.5). Hence different cases may facilitate the creation of different rules. As a result, the chief may try to influence the selection of cases to help create the most congenial law.[26]

Two questions then arise: First, what cases would the chief—or indeed any group of policy-minded justices—prefer the Court to take as the vehicle for making law? Second, what can the chief do to help his preferred group prevail in case selection?

Let's start with the second question: How can the Chief "steer" the certiorari process toward certain cases and away from others to benefit his ideological cohort on the Court? Our thinking on this question is admittedly speculative, as this question seems to have received little scholarly attention of which we are aware. H. W. Perry, though, in his authoritative study of the certiorari process, notes the widespread impression that Chief Justice Warren was a leader in the cert process, a "toreador," though—according to justices who served with Warren—generally with the acquiescence of his brethren.[27] With respect to Chief Justice Burger, Perry quotes a clerk: "It was always interesting to see which ones [cases] the chief would put on [the discuss list]; he generally lists about 70 percent of the obvious ones, then he lists some of the conservative favorites, but they are supplemented with pretty much rapid fire."[28] Perry also notes the relative infre-

quency with which the other justices push cases forward if the chief has not included them on the discuss list. In fact, though, Perry is skeptical of any justice's ability to shape the process: "Whether or not there is political or intellectual leadership on the Court at the opinion-writing stage, given the way the cert. process works—with most decisions made in chambers and with little discussion between chambers—there is little opportunity for leadership on cert."[29]

Before totally dismissing the idea of "leadership" during the cert process, it is important to see that cert decisions confront a group of policy-minded justices with a substantial coordination problem: there are many more cases available than the Court can possibly consider, and many of the available cases are just as good, or nearly as good, as policy vehicles. But if the policy-minded group is to rally effectively behind a few policy vehicles, it must pick and choose among the many cases, lest it split its votes ineffectually. How can it do that? One way is to effectively delegate the selection process to a like-minded chief who, after all, draws up the discuss list. In other words, the chief can create *focal points* for his fellow liberals (in the case of Warren) or fellow conservatives (in the case of Burger and the subsequent chiefs). There will be art in this, for the chief and three confederates can push forward a case, but it must be one that at least one more justice will support on the vote on the merits if not at the cert stage. Still, it seems at least possible that focal point creation can allow the chief to do some "steering." Finding direct evidence of steering—a smoking gun—will be difficult if not impossible. One should, however, be able to see its *effects*.

So let's turn to the first question. If the chief can do some steering of case selection, which cases would he and his like-minded confederates want to select? Here we turn for guidance to contemporary theories of Supreme Court decision making. The Median Justice Approach has nothing to say about strategic case selection since it ignores the roles of cases, dispositions, and disposition consistency in judicial decision making. So we put it aside. The Majority Median and Author Influence approaches offer more useful insights, which are broadly similar though not quite identical.

The key and most basic insight is that a group of policy-minded justices selecting cases want to select cases that put them in the dispositional majority. That way, a group member can receive the opinion assignment, write an ideologically attractive opinion, and garner the joins of fellow group members. Or if a group member does not receive the assignment, the group can collectively bargain with the opinion author and force her to compromise in order to receive their join votes. Conversely, cases that force the policy-minded justices into the minority disposition effectively remove them from bargaining over the content of the majority opinion. A group of policy-minded justices will wish to avoid this if at all possible.

Assume for the moment that the chief justice has some influence over which cases the Court hears. If so, he would prefer cases that result in a disposition that includes justices from his wing of the Court. Chief Justice Warren, a liberal, would want to hear cases that disproportionately result in liberal outcomes, so he would have a liberal majority, with more conservative justices more likely to be in the minority (and therefore excluded from bargaining over the majority opinion). By the same logic, Chief Justices Burger, Rehnquist, and Roberts would want to hear cases that result in a conservative majority more often, thereby excluding the liberal members of the Court from the majority more often.

Conjecture 2 (Disposition Prediction): *Independent of the composition of the Court, the chief justice will use his influence over the discuss list to select cases that disproportionately result in a disposition aligned with his wing of the Court.*

To the best of our knowledge, this theoretical prediction is novel and has yet to receive any empirical study.

Agenda Setting: Shifting to More Favorable Ground

An additional way in which the chief justice may use influence over the discuss list to select the best cases for his policy agenda may manifest itself through the *topics* the Court addresses. Recent research suggests that the justices' preferences vary considerably across substantive areas of the law.[30] A consequence is that "the" Court shifts from case to case depending on the topic. Indeed, the median can well shift. Thus some areas of the law may afford the chief a more receptive or amenable Court than others. A strategic chief justice would anticipate these differences across substantive areas of the law and political cleavages and seek to direct the Court to topics in which he will have an easier time building coalitions that result in his favored doctrine. Thus if the chief justice seeks to push for cases that are good vehicles for his policy objectives, he should be most likely to push for cases in which he has a strong, homogenous block of allies.

Conjecture 3 (Topic Selection Prediction): *Transitions in the chief justice's office should be correlated with shifts in the distribution of topics the Court hears.* This effect should be particularly noticeable

in increases in cases in which the chief justice has an especially strong block of allies.

Again, this is a novel prediction, which seems not to have received systematic empirical investigation in the literature on Supreme Court agenda setting.[31]

Empirical Analysis

Opinion Assignment

Conjecture 1, the assignment prediction, suggests that the chief will disproportionately assign important cases to ideologically proximate justices. We now derive new measures and evaluate the prediction.

Measuring Case Salience and Judicial Ideology

Testing the assignment prediction requires measuring case salience and judicial ideology. While there are many existing measures of each concept, we employ original measures of both, although our original measures do rely on existing data.

First, to measure case salience, we build on four different indicators often used as proxies for case salience. First, we use the measure developed by Lee Epstein and Jeffrey Segal, which is simply an indicator of whether a case decision was reported on the front page of the *New York Times* the day after it was decided.[32] Second, we use a list of the most important cases compiled by Cornell Law School's Legal Information Institute.[33] Third, we use a list of cases discussed in *The Oxford Guide to United States Supreme Court Decisions*.[34] Fourth, we use a list of landmark cases suggested by *Congressional Quarterly*.[35] To combine these lists, we specify an item-response model in which we posit a latent dimension that corresponds to a propensity to appear on each of these lists. The resulting estimates are essentially an average of the four lists, in which any given list can be more or less discriminating among salient and nonsalient cases. (We provide more detail in the appendix.)

Second, to measure judicial ideology, we employ a simple model. We again use an item-response ("IRT") model, in which justices are assumed to have unidimensional, constant ideal points, which are treated as latent variables that are predictive of dispositional voting decisions. We recognize that judicial preferences vary considerably over legal issues, and a few justices have preferences that change over time. The constant ideal point

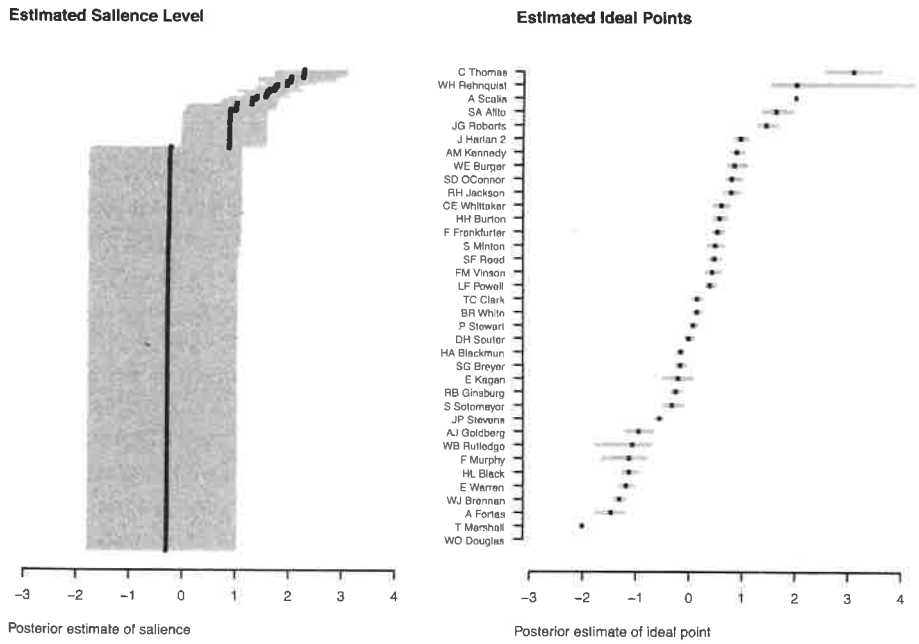

Fig. 8.6. Posterior estimates of case salience and justice ideal points
The left panel shows posterior estimates of salience; the right panel shows posterior estimates of justice ideal points. Each panel shows shows both posterior means and 95 percent high density credible intervals.

model we employ, however, is a sufficient proxy for our purposes here. Again, we provide details in the appendix.

The results of both of our measurement models are summarized in figure 8.6, which shows the distribution of our posterior estimates of case salience (using posterior means) and our posterior estimates of individual justices' ideal points (showing both posterior means and 95 percent high-density credible intervals). As the figure makes clear, both measurement models yield results that are substantively facially valid. The vast majority of cases are at the extreme low end of salience, whereas there is a long tail with a few bumps at the high end, suggesting there are a few "clumps" of extremely salient cases. Among the most salient cases are *U.S. v. Nixon* (1974) (executive power), *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) (abortion), *Katz v. U.S.* (1967) (search and seizure),

U.S. v. Eichman (1990) (flag burning), and *Reynolds v. Sims* (1964) (electoral districting). These are well-known, prominent cases touching on many substantive issues (as opposed to being primarily civil liberties cases).

Assigning to Friends

With these data in hand, we can evaluate the relationship between the ideological alignment between the chief justice and the opinion assignee and the salience of the case. (We focus our analysis only on cases in which the chief justice was in the majority and therefore had the power to assign the majority opinion.)

First, consider the raw relationship, which is shown in figure 8.7. Here the gray points show cases; the x-axis measures the salience of the case; and the y-axis measures the distance from the chief justice to the majority opinion assignee. The black line is a best fit line from a linear regression model. While there is a great deal more to explaining opinion assignment than just case salience, and therefore a great deal of variation that cannot be explained by salience alone, there is indeed a negative relationship (b = −0.19, se = 0.03). In fact, the magnitude of the estimated relationship is considerable, as a two standard deviation change in salience is associated with a nearly 0.3 standard deviation change in opinion author distance. This result suggests that the chief justice assigns more salient cases to his ideological allies and less salient cases to more distant justices.

Perhaps the most important limitation on our ability to interpret this relationship is that the range of options available to the chief justice varies as the composition of the Court changes (as justices leave and are replaced by others) and even from case to case (due to disposition consistency and the identity of justices in the majority dispositional coalition). To help account for (at least) the former, we estimate a more flexible empirical model to evaluate the relationship between salience and opinion assignee distance. Specifically, we specify a random coefficients model, in which we allow the intercept and slope to vary from natural court to natural court (periods when the Court's membership is stable). This model allows for the possibility that during some natural courts there is not much variance in salience or in the ideological alignment among the justices (in which case we'd expect a flatter slope and/or a lower intercept). The model we estimate is given by:

$$\Pr(Y_{ij} = 1) = \Lambda(\alpha_{n[i]} + \beta_{n[i]}\text{Distance}_{jc[n[i]]})$$

where Y_{ij} equals 1 if justice j is assigned the majority opinion in case i; $n[i]$ identifies the natural court that decided case i; $c[n[i]]$ identifies the chief

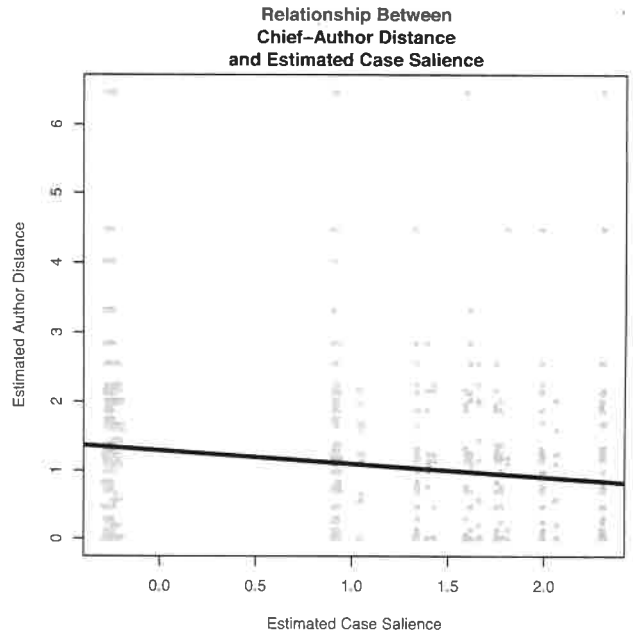

Fig. 8.7. The basic relationship between case salience and distance of assignee from the chief justice
The x-axis measures estimated case salience; the y-axis measures estimated distance from the author to the chief justice (data include only cases in which the chief justice assigned the majority opinion). The black line is a best fit line from a linear regression (OLS) model.

justice of the natural court deciding case i; and $\text{Distance}_{jc[n[i]]}$ measures the distance in our latent ideology space between the chief justice and justice j. The results of our estimation are summarized in figure 8.8.

Here each panel shows a natural court (that is, a membership-constant court). The gray points show cases, the x-axes indicate case salience, and the y-axes indicate the distance between the chief justice and the opinion assignee. The text in each panel gives the estimated intercept and slope of a linear regression fit to the data. The black line shows the natural court-specific relationship, and the gray line shows the average relationship across all natural courts.

The overall pattern is a consistent negative relationship across all natural courts. There is nevertheless some important variation. Panels with black lines that are steeper than the gray lines are natural courts where the relationship between salience and assignment is sharpest; panels where

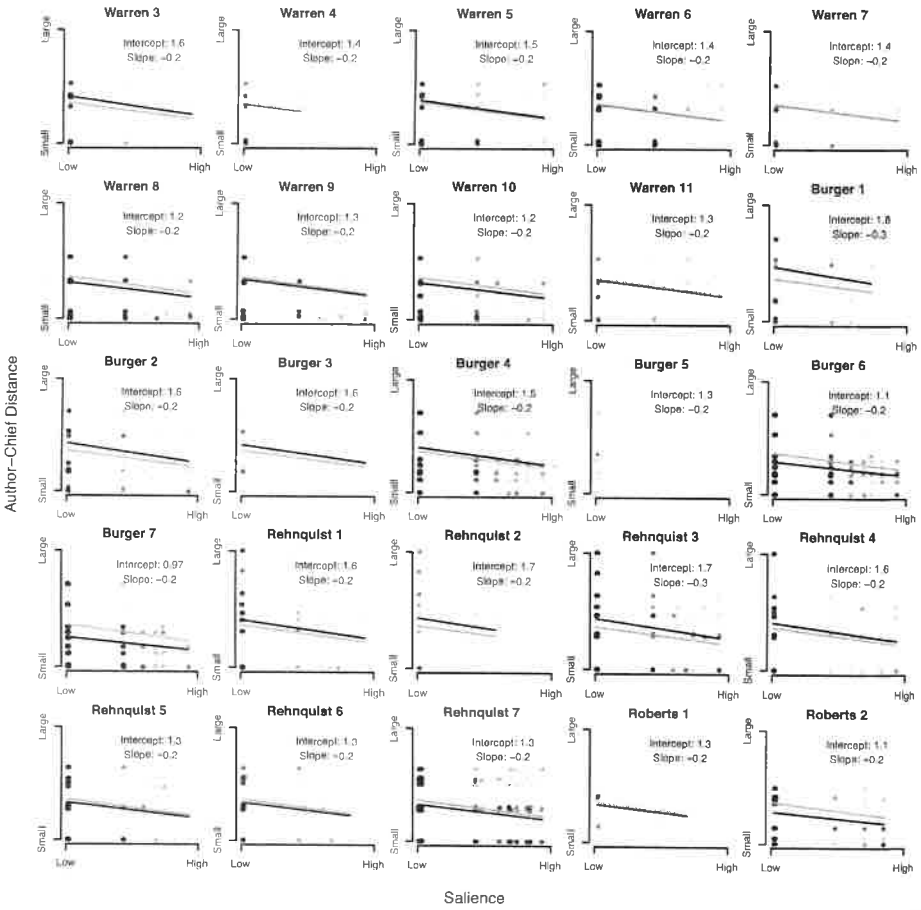

Fig. 8.8. Natural courts, case salience, and the distance of the opinion assignee from the chief justice

Each panel shows a natural court. The *x*-axes measure salience, and the *y*-axes measure author distance to the chief justice; the gray points show individual cases. The gray lines show the average relationship, and the black lines show the natural court-specific relationships.

the gray line is steeper are natural courts where salience discriminates less among opinion assignees. Among those natural courts with the sharpest relationship are the earliest Burger Courts. These natural courts are notable because Chief Justice Burger was a conservative leader of a predominantly liberal court, at least until subsequent nominations by Presidents Nixon and Reagan bolstered the right wing of the Court. And, as we see, the later Burger Courts are not characterized by such a sharp relationship. This is precisely what we would expect: When Burger was faced with an ideologically divergent Court, he had the strongest incentive to assign important cases to his ideological allies; as the Court became more homogenous and more conservative, the incentive to steer important cases to his closest allies diminished.

The correlation between salience and opinion assignment indicates the type of strategic opinion assignment we posit would characterize a chief justice who uses his institutional prerogatives to exercise influence over the Court's decisions. By selectively steering the most important cases to his ideological allies, he can shape the law by giving his allies some influence over opinion content (as the opinion author) in the cases that have the most long-run impact. We note that these results provide additional fodder for an ongoing empirical debate about how the chief justice uses his assignment power in a setting in which he is constrained by norms of equality in opinion assignments.[36]

Case Selection

Our theoretical prediction concerning case selection is that a shift in the liberalism of the chief justice should result in a shift in the Court's dispositional liberalism. We now present empirical evidence concerning this prediction.

Consider first dispositional liberalism. Figure 8.9 shows the proportion of case dispositions coded in the United States Supreme Court Judicial Database as "liberal" each term. The *y*-axis measures the proportion of liberal dispositions; the *x*-axis measures the term. The points are labeled with the initial of the presiding chief justice. As this figure makes clear, once Chief Justice Warren came to the Court in 1953, there was an immediate and sustained jump in the proportion of dispositions decided in the liberal direction. When Chief Justice Warren left and was replaced by Chief Justice Burger, there was an immediate and sustained drop in the Court's dispositional liberalism. What is particularly important is that while Chief Justice Warren's tenure is usually associated with an increasingly liberal Court—

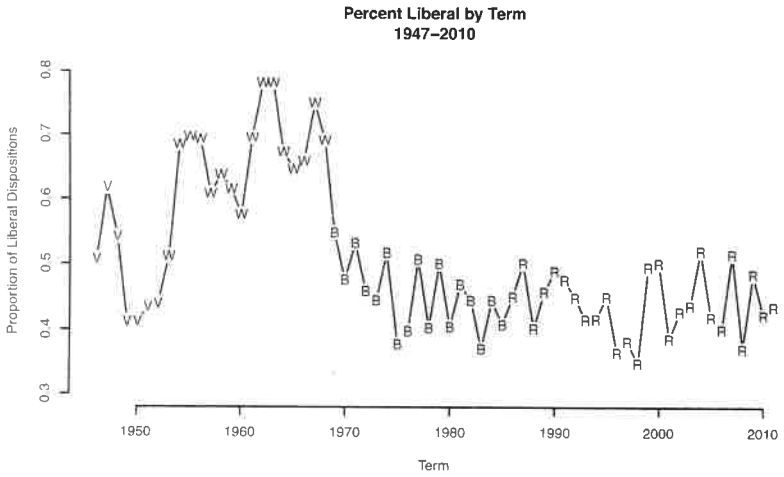

Fig. 8.9. Dispositional liberalism by term
Figure shows the proportion of case dispositions coded as "liberal" in the United States Supreme Court Judicial Database. The points are labeled with the initial of the last name of the presiding chief justice.

subsequent appointments to the Court during the 1960s are known to have been more liberal and shifted the Court's median to the left—the jump in dispositional liberalism is associated with the arrival of Warren, and subsequent appointments to the Court do not seem to have affected that pattern. What is more, the drop in liberalism is associated with the arrival of Chief Justice Burger. While Burger and Rehnquist's tenures are associated with an increasingly *conservative* Court, the dropoff in liberalism is clearly associated with the change in chief justice, whereas subsequent appointments moving the Court to the right do not have a noticeable effect on the Court's dispositional conservatism.

To make this point clearer, consider figure 8.10, which plots the proportion of liberal dispositions (same as figure 8.9) against the conservatism of the median justice (using our IRT estimates). Here the *y*-axis measures the proportion of liberal dispositions and the *x*-axis measures the conservatism of the median justice. Again, the points are labeled with the initial of the presiding chief justice. A number of findings stand out.

First, the gray line shows the fit from a linear regression of the proportion of liberal dispositions against the median justice's ideal point. As one

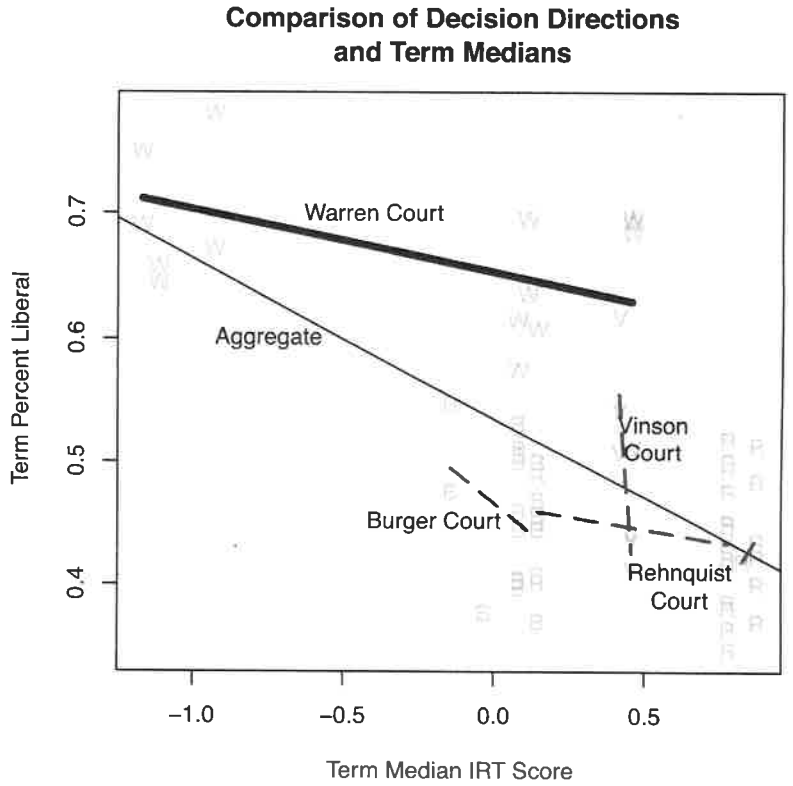

Fig. 8.10. Dispositional liberalism, median conservatism, and chief justices
Figure shows the proportion of dispositions coded as "liberal" in the United States Supreme Court Judicial Database (*y*-axis) against the estimated ideal point of the median justice (*x*-axis). Points are labeled with the last-name initial of the presiding chief justice. The thin line shows the estimated relationship among all years; the thick and dashed lines show the estimated relationships within chief justices.

can see, there is a negative correlation, suggesting that the common understanding that more conservative medians result in fewer liberal dispositions (a la Median Justice model). What is striking is that once one considers the chief justice, that relationship appears to vanish. The dashed and thick lines in the figure show the fit from a linear regression model fit to subsets of the data corresponding to each individual chief justice's tenure. What we see is that during any given chief justice's tenure, the relationship between the median's ideal point and the proportion of liberal decisions is

essentially flat. Independent of the location of the median, once one knows who is the chief justice, one can effectively predict the proportion of liberal dispositions.

Indeed, if one were to estimate a linear regression model of the percent of dispositions that are coded as liberal against the conservatism of the median justice (using our measure), one would find a statistically significant relationship with an R^2 statistic of 0.40 and a residual standard error of 0.09. By contrast, estimating a linear regression of the percent of dispositions that are coded as liberal against the conservatism of the chief justice (again, using our measure), one would find a statistically significant relationship with an R^2 statistic of 0.64 and a residual standard error of 0.07. In other words, the chief justice's conservatism explains more of the variation with less error than does the median justice's conservatism. This striking pattern has not, to our knowledge, been previously documented. It appears to be one of the more dramatic pieces of evidence of the chief's impact on the Court's policymaking yet uncovered.

Before drawing this conclusion, however, we must be careful about a potential threat to this inference: perhaps the shifts in dispositional liberalism seemingly driven by changes in the identity of the chief justice were actually due to shifts in the ideological makeup of the Court coincident with those changes. For example, Warren Burger arrived on the Court in June 1969, replacing the liberal Earl Warren. Burger was soon followed by the (then) conservative Harry Blackmun in May 1970, replacing the liberal Abe Fortas. Hence the two appointments occurred fairly quickly and both moved the Court in a conservative direction. Thus the very dramatic "Burger effect" so evident in figure 8.9 may actually have been due to an ideology shift caused by the replacement of two liberals with two conservatives.

The arrival of Roberts presents the same issue but in more muted form. In particular, Roberts and Samuel Alito both arrived on the Court within a six-month period (Roberts was confirmed in September 2005 and Alito at the end of January 2006), but both replaced conservatives, not liberals (Rehnquist and O'Connor, respectively). Although most analysts scored the two new appointments as moving the median on the Court to the right—from O'Connor to Kennedy—this was hardly a dramatic ideological shift. Still, one might worry about this ideology shift. Fortunately, there is evidence that is helpful in evaluating the threat to inference. First, Warren's arrival on the Court was not a double appointment. Warren was a recess appointment who first sat on the Court in October 1953, replacing Fred Vinson. The change in the Court's ideological makeup from this shift would have been minor (in our data the ideology of the median justice

is completely unaffected). No other justice joined the Court until March 1955, when the Senate confirmed the moderate conservative John Marshall Harlan II, who replaced the liberal Robert Jackson. Hence the Warren case becomes extremely interesting. In Warren's first full term, 1953, dispositional liberalism increased noticeably. But in his second, 1954, which preceded the next arrival on the Court, dispositional liberalism jumped dramatically and remained at a high level even in 1955, 1956, and 1957 (in 1957 the moderate conservative Charles Whittaker joined the Court, moving the median very slightly in a liberal direction, in our data). In short, it is difficult to tell a story in which Warren's arrival and the jump in dispositional liberalism that followed coincided with any shift in the Court's makeup in a liberal direction. We apparently have a pure Warren effect.

Additional evidence comes from close examination of figure 8.10, which arrays dispositional liberalism against the ideology of the median justice. Consider the point where the median is approximately zero. Chief Justices Warren, Burger, and Rehnquist presided over courts that had median justices in this range of the ideological dimension. Notice that all of the points from Chief Justice Warren's tenure fall above those from Chief Justices Burger and Rehnquist's tenure. That is, with an essentially identical median (in our latent ideology space), a liberal chief justice was associated with roughly 65 percent liberal dispositions, whereas a conservative chief justice is associated with roughly 45 percent liberal dispositions. Thus while it is true that the most liberal medians and most liberal dispositions occurred during Chief Justice Warren's tenure, and the most conservative medians and most conservative dispositions occurred during Chief Justice Rehnquist's tenure, the overlap of more moderate medians across liberal and conservative chief justices provides analytic leverage on the effect of the chief justice on case dispositions. This leverage points to an important influence by the chief justice.

Agenda Setting

We now turn to the final mechanism by which chief justices may influence the Court: agenda setting. To study the subjects that occupy the Supreme Court's agenda, we rely upon a topic model for text, Latent Dirichlet Allocation (LDA).[37] This model uses the different terms (words) that appear in a document to estimate a set of (fixed) topics and the probability that each document falls into that topic. In a recent paper, Lauderdale and Clark[38] employ LDA to study the voting dimensions on the Supreme Court; they conclude that approximately twenty-four different topics is sufficient for

studying the cleavages on the Court. In another paper, Rice demonstrates that LDA outperforms expert coding, such as the "Issue" codes used by the United States Supreme Court Judicial Database to assign cases to discrete topics.[39]

Using LDA, we can plot over time the extent to which each topic appears on the Supreme Court's agenda. Figure 8.11, which comes from Lauderdale and Clark's study, shows the representation of each of the twenty-four topics on the Court's docket over time. The *x*-axes in each panel measure the Supreme Court term, the *y*-axes measure (essentially) the proportion of the docket represented by each topic. Above each panel are the words most closely associated with the topic (giving a sense of what the topic is about). The panels are shaded to show the different chief justices' tenures.

A striking pattern emerges. In nearly every panel, we see shifts in the topics considered by the Court that coincide with transitions in the chief justice. While the trends are smooth because we force them to be smooth, the points of transition generally stand out as sharp. Take, for example, the topic associated with the terms "speech," "ordinance," and "public." Here we see a sharp increase in that topic when Chief Justice Warren came into office, followed by a sharp drop when Chief Justice Burger took over. By contrast, there is a sharp increase in the "jury," "death," "penalty" topic during Chief Justice Burger's tenure, followed by a drop-off once Chief Justice Rehnquist was elevated to chief justice.

Another important example is the dropoff in "trial," "counsel," "testimony" cases once Chief Justice Burger arrived, followed by a subsequent rise in those cases once the Court's conservative shift (following Nixon's and Reagan's appointments) had solidified. This is precisely what our expectations regarding case selection would imply; Chief Justice Burger was interested in those cases, but upon his arrival on the Court he faced a relatively liberal group of colleagues. So he would have had an incentive to remove those cases from the docket. Once Presidents Nixon and Reagan had nominated more justices, moving the Court to the right, the Chief Justice Burger would have had an incentive to return to those cases, with a new conservative Court that could shape the law as he preferred. Notably, though, as soon as Chief Justice Rehnquist was elevated, those cases quickly dropped off of the Court's docket.

To be sure, there are myriad factors outside of the Court that affect the suite of issues that form the Court's options. Most important, external events, such as the terrorist attacks of September 11, 2001, prompt government action in certain arenas that leads to litigation. This increases the supply of cases, though it does not necessarily compel the Court to hear

them. Second, organized interests often mobilize to push a subject matter on the Courts. Again, though, the availability of those cases simply means they are an option, not that they will be heard. Moreover, strategically minded interests are unlikely to pursue an issue and expend their finite resources if they anticipate a hostile Court (led by a hostile chief justice).

Of course, these patterns are only suggestive. But they are consistent with a role for the chief justice in which he exercises procedural power in a way that is consequential for the Court's policymaking. If a chief justice is able to exercise agenda-setting influence to direct the Court's attention to specific topics in the law, then he can use his other procedural powers, including case selection and opinion assignment, to shape the body of American law.

Discussion and Conclusion

Scholars have long speculated about the extent to which the chief justice has any special powers on the Supreme Court. We have identified a few of the institutional prerogatives the chief justice has—opinion assignment when he is in the majority and a potential first-mover's advantage in creating the discuss list—and contemplated the incentives created by those prerogatives. While we have not developed a full-blown theory of how those incentives work to shape the chief's behavior and the Court's decision making, we have traced a few of the implications that follow. In particular, we have argued that the power to assign the majority opinion implies that the most important cases decided by the Court should be assigned to the chief's ideological allies, while the less important cases should be reserved to those justices who are less aligned with the chief. In addition, if the chief is able to influence the discuss list by coordinating the Court on specific cases, we should see case dispositions being affected by the chief justice's preferences and shifts in the topics the Court addresses.

The empirical evidence we present corroborates those expectations. The most salient cases tend to be assigned to justices who are ideologically proximate to the chief justice. The chief justice's ideological preferences predict the distribution of case dispositions (liberal v. conservative) better than does the ideological preferences of the median justice. Indeed, for comparable median justices, liberal chief justices are associated with more liberal dispositions, whereas conservative chief justices are associated with more conservative dispositions. Finally, when there is a transition in the chief justice, we see marked shifts in the topics the Court addresses in its cases. Taken together, these findings suggest that the chief justice's institu-

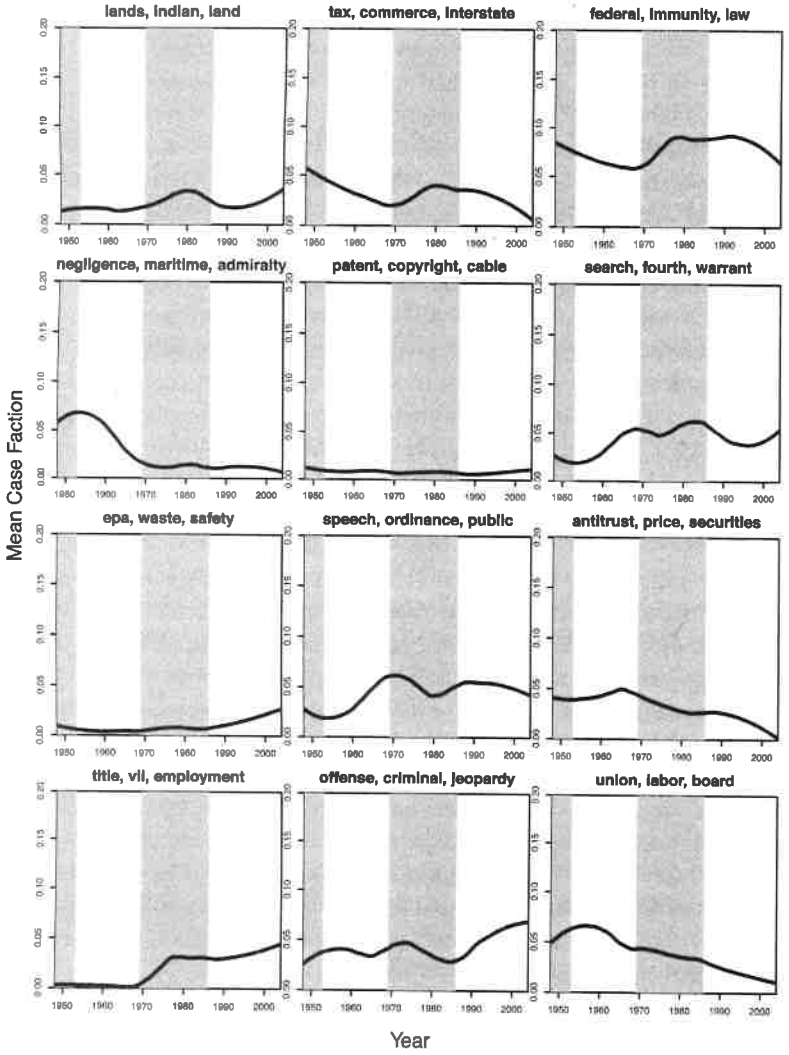

Fig. 8.11. Representation of twenty-four different topics on the Court's docket over time (data from Lauderdale and Clark, "Scaling Politically Meaningful Dimensions").

The figure shows the mean posterior assignment probability to each topic across all cases each term, using a 24-topic Latent Dirichlet Allocation model estimated via MCMC Gibbs sampling. The words above each panel show the three most topical words associated with each topic. The black lines are lowest fits.

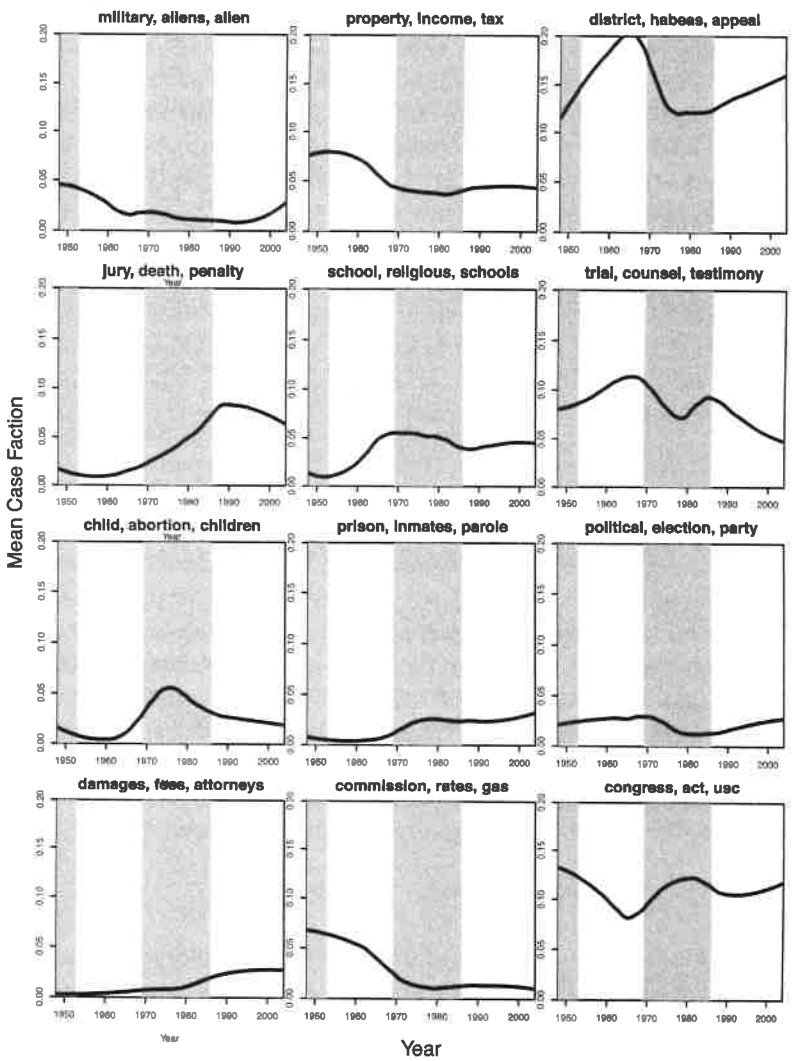

Fig. 8.11. (*continued*)

tional prerogatives translate into procedural power. Being the administrative leader of the Court comes with the benefit of being able to influence which cases the Court hears and how those cases are resolved. Of course, there remain a number of important questions that our analysis does not address, and which require deeper theorizing. For example, how does the chief justice's incentive to bring "good vehicles" to the Court affect the types of coalitions he can build or wants to build? How can the chief justice sustain an ability to coordinate the Court, without revolt by his ideological opponents? Does the Rule of Four, which allows a minority to force a case onto the Court's docket, enhance or attenuate the chief's prerogatives? These and other questions are beyond the scope of our analysis here, but we believe they are the right questions to be asking. We believe the study of the chief justice is ripe for more theoretical inquiry, and we expect this volume will lead to such work.

APPENDIX

Case Salience

As described in the chapter, to measure case salience, we reference four widely used indicators. In order to aggregate the information from those four indicators, we employ a latent variable model (essentially, an item-response theory model) to reduce the indicators into a summary of a latent propensity to appear on the four lists of important cases. Our model is given as follows:

$$\Pr(Y_{ij} = 1 \mid \alpha,\beta, \textbf{\textit{Salience}}) = \Phi(\alpha_j + \beta_j Salience_i)$$

where j indexes the four lists of important cases, i indexes the cases, Y_{ij} equals 1 if case i appears in list j, and Φ is the Normal cumulative density function. We estimate the model via Markov Chain Monte Carlo Gibbs sampling and assign diffuse normal priors to the indicator parameters. Specifically, we assume a Normal prior for the intercept and a truncated Normal prior for the slope parameter where we put positive density only on positive values, imposing our assumption that appearing on the list of important cases is positively correlated with latent salience. We assign a standard Normal prior to the *Salience* parameters. The estimates we report in the paper are based on a 50,000-iteration simulation, with a 20,000-iteration burn-in period.

Judicial Ideology

We also use a latent variable model to develop estimates of judicial ideology. Here we employ a standard item-response theory model,[40] as follows:

$$\Pr(Y_{ij} = 1 \mid \alpha,\beta, \boldsymbol{x}) = \Phi(\alpha_j + \beta_j x_i)$$

where Y_{ij} equals 1 if justice i is in the majority disposition coalition on case j, and 0 otherwise, and x_i is the latent ideal point for justice i. We estimate the model via Markov Chain Monte Carlo Gibbs sampling. We assign diffuse normal priors to both the intercept and slope parameters (formally $N(0,100)$ for both parameters). We assign a standard Normal prior for the latent ideal points. The estimates we report are based on a 20,000-iteration sample, discarding a 500-iteration burn-in period.

It bears noting that the IRT model we employ does not fully utilize the information provided by the Court's peculiar voting rule, as discussed early in the chapter. In particular, the model utilizes only the directional information provided by the dispositional part of the voting rule, that is, whether a justice's ideal partition of the fact space lies to the left or the right of the case location. It does not employ the additional information provided by the join/concur decision with respect to the majority opinion among the members of the Court in the dispositional majority. Indeed, it is not completely obvious how best to utilize fully the information in the Court's voting rule. Dispositional votes do, however, provide sufficient information to yield estimates of the justices' ideal points and (under the assumption of sincere dispositional voting) case locations (that is, $\hat{x}$).

NOTES

1. David J. Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," paper presented at the American Political Science Association meeting, September 8, 1960 (reprinted in chapter 1, this volume).

2. Nancy Maveety, ed., *Pioneers of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2003).

3. See, for example, Forrest Maltzman and Paul J. Wahlbeck, "May It Please the Chief? Opinion Assignments in the Rehnquist Court," *American Journal of Political Science* 40 (1996); Sara C. Benesh, Reginald S. Sheehan, and Harold J. Spaeth, "Equity in Supreme Court Opinion Assignment," *Jurimetrics* 39 (1998); Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the U.S. Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).

4. The incentive for the chief to engage in strategic dispositional voting has often been noted.

5. Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (New York: Twelve, 2010), 204.

6. Formal models of Supreme Court decision making as a bargaining game are reviewed at length in Charles Cameron and Lewis Kornhauser, "Modeling Collegial Courts III: Adjudication Equilibrium (revised)" (working paper, New York University School of Law, Public Law, New York, 2010).

7. Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court*.

8. There is a rarely used fifth option, the "reserve" vote.

9. Sometimes a distinction is made between a "general concurrence" and a "special concurrence." Broadly, a general concurrence is a join, but offers some cavils or supplementary material. A special concurrence is a concur vote as we describe it in the text.

10. This insight was first offered in Clifford J. Carrubba, Barry Friedman, Andrew Martin, Georg Vanberg, "Does the Median Justice Control the Content of Supreme Court Opinions?" *American Journal of Political Science* 56 (2012).

11. We have slightly simplified the process, since some cases present multiple issues and voting occurs over each of the presented issues. For a discussion of some of the complexities that can then arise, see Lewis Kornhauser and Larry Sager, "Unpacking the Court," *Yale Law Journal* 96 (1986); and Christian List, "The Theory of Judgment Aggregation: An Introductory Survey," *Synthese* 187 (2012).

12. See, *inter alia*, James Enelow and Melvin Hinich, *The Spatial Theory of Voting: An Introduction* (New York: Cambridge University Press, 1984).

13. See Lewis Kornhauser, "Modeling Collegial Courts I: Path Dependence," *International Review of Law and Economics* 12 (1992); Lewis Kornhauser, "Modeling Collegial Courts II: Legal Doctrine," *Journal of Law, Economics, and Organization* 8 (1992); Cameron and Kornhauser, "Modeling Collegial Courts III"; and Jeffrey R. Lax, "The New Judicial Politics of Legal Doctrine," *Annual Review of Political Science* 14 (2011).

14. See Cameron and Kornhauser, "Modeling Collegial Courts III."

15. If Block L is willing to engage in a strategic "crossover join," it can join the other two blocks and participate in the bargaining over the content of the rule. But even so, the rule must still lie in the interval to the right of $\hat{x}$; it cannot lie to the left of $\hat{x}$ and still yield the "admit" disposition. This fact limits the attractiveness of a crossover join, which appear to be relatively rare on the U.S. Supreme Court. In contrast, they appear common on the U.S. Courts of Appeal. On the latter, see Joshua Fischman, "Interpreting Circuit Court Voting Patterns: A Social Interactions Framework," *Journal of Law, Economics, and Organization* (forthcoming).

16. David M. Kreps, *A Course in Microeconomic Theory* (Princeton: Princeton University Press, 1990).

17. The Median Justice Approach was ported directly to the study of judicial decision making in Thomas Hammond, Chris Bonneau, and Reginald Sheehan, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (Stanford, CA: Stanford University Press, 2005). The Median Justice Approach also emerges as a special case in several other models of Supreme Court decision making, for example in Lax and Cameron's Entry Blocking model when authoring costs are zero (Jeffrey R. Lax and Charles Cameron, "Bargaining and Opinion Assignment on the U.S. Supreme Court," *Journal of Law, Economics, and Organization* 23 (2007)). It also occurs in Carrubba et al.'s Majority Median model when the case disposition is unanimous so all justices are in the dispositional majority (Carrubba et al., "Does the Median Justice Control."). It is frequently evoked in journalistic commentary about the Court.

18. A classic reference is Duncan Black, *The Theory of Committees and Elections* (New York: Cambridge University Press, 1958).

19. At present, the key studies are Tom S. Clark and Benjamin E. Lauderdale, "Locating Supreme Court Opinions in Doctrine Space," *American Journal of Political Science* 54 (2010); Jeffrey R. Lax and Kelly T. Rader, "Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Fluidity" (working paper, Columbia University, 2011); and Carrubba et al., "Does the Median Justice Control."

20. The Majority Median Approach was first proposed in an empirical paper. Chad Westerland, "Who Owns the Majority Opinion?" (paper presented at the annual meeting of the American Political Science Association, Philadelphia, Aug. 2003). The formal model in Carrubba et al., "Does the Median Justice Control," suggests that opinions should lie at the center of the join coalition; in practice this is likely to be close to the median of the dispositional majority. The game theoretic model in Charles Cameron and Lewis Kornhauser, "Bargaining on Appellate Courts" (working paper, Princeton University, 2013), indicates that opinions for very important cases will usually be located in the middle of the dispositional majority.

21. See Cameron and Kornhauser, "Bargaining on Appellate Courts."

22. Lax and Cameron, "Bargaining and Opinion Assignment"; Cameron and Kornhauser, "Modeling Collegial Courts III"; Cameron and Kornhauser "Bargaining on Appellate Courts"; See also Tonja Jacobi, "Competing Theories of Coalition Formation and Case Outcome Determination," *Journal of Legal Analysis* 1 (2009).

23. Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); David W. Rohde and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman, 1976); Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court*; Maltzman and Wahlbeck, "May It Please the Chief."

24. Sidney Ulmer, "The Use of Power on the Supreme Court: The Opinion Assignments of Earl Warren, 1953–1960," *Journal of Public Law* 30 (1970); Elliot Slotnick, "The Chief Justice and Self-Assignment of Majority Opinions: A Research Note," *Western Political Quarterly* 31 (1978); Saul Brenner, "The Chief Justice's Self Assignment of Majority Opinions in Salient Cases," *Social Science Journal* 30 (1993); Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court*; Maltzman and Wahlbeck, "May It Please the Chief."

25. A great deal of legal literature suggests that learning from a case is local, and this may limit the scope of an announced legal rule.

26. Much of the scholarly literature on Supreme Court case selection focuses on its role in controlling the dispositions of lower court judges. See e.g., Charles Cameron, Jeffrey Segal, and Donald Songer, "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions," *American Political Science Review* 94 (2000); and Jeffrey R. Lax, "Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation, and the Rule of Four," *Journal of Theoretical Politics* 15 (2003). Some recent studies use a similar perspective but

focus on policy setting in the hierarchy, notably Tom S. Clark and Clifford Carrubba, "Rule Creation in a Political Hierarchy," *American Political Science Review* 106 (2012). A handful of studies emphasize case selection as part of social learning within the judicial hierarchy, e.g., Deborah Beim, "Finding Law: Learning in the Judicial Hierarchy" (working paper, Yale University, 2013); see also David Klein, *Making Law in the U.S. Courts of Appeals* (Cambridge: Cambridge University Press, 2002). The perspective on case selection offered in this section—emphasizing strategic selection as part of the collegial, policymaking game on the Court itself—is, so far as we know, novel.

27. H. W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge, MA: Harvard University Press, 1991), 91.

28. Ibid., 87.

29. Ibid., 91.

30. Benjamin E. Lauderdale and Tom S. Clark, "The Supreme Court's Many Median Justices," *American Political Science Review* 106 (2012); Benjamin E. Lauderdale and Tom S. Clark, "Scaling Politically Meaningful Dimensions Using Texts and Votes," *American Journal of Political Science* 58 (2014).

31. Outstanding studies on Supreme Court agenda setting are Richard L. Pacelle Jr., *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration* (Boulder: Westview Press, 1991); Vanessa A. Baird, *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court's Agenda* (Charlottesville: University of Virginia Press, 2007); and Vanessa Baird and Tonja Jacobi, "Judicial Agenda Setting Through Signaling and Strategic Litigant Responses," *Journal of Law and Policy* 29 (2009).

32. Lee Epstein and Jeffrey A. Segal, "Measuring Issue Salience," *American Journal of Political Science* 44 (2000).

33. "Historic Supreme Court Decisions," Cornell University Law School, Legal Information Institute, http://straylight.law.cornell.edu/supct/cases/name.html, accessed Sep. 21, 2013.

34. K. L. Hall, *The Oxford Guide to United States Supreme Court Decisions* (New York: Oxford University Press, 1999).

35. Joan Biskupic and Elder Witt, *Guide to the U.S. Supreme Court: Congressional Quarterly's Guide to the U.S. Supreme Court*, 3rd ed. (Washington, DC: CQ Press, 1996).

36. See for example Maltzman and Wahlbeck, "May It Please the Chief"; Benjamin E. Lauderdale and Tom S. Clark, "Who Controls Opinion Content? Testing Theories of Authorship Using Case-Specific Preference Estimates for the US Supreme Court" (working paper, Emory University, 2013).

37. See David M. Blei, Andrew Ng, and Michael I. Jordan, "Latent Dirichlet Allocation," *Journal of Machine Learning Research* 3 (2003).

38. Lauderdale and Clark, "Scaling Politically Meaningful Dimensions."

39. Douglas Rice, "Measuring the Issue Content of Supreme Court Opinions Through Probabilistic Topic Models" (working paper, Pennsylvania State University, 2012).

40. Simon Jackman, "Multidimensional Analysis of Roll-Call Data via Bayesian Simulation: Identification, Estimation, Inference, and Model Checking," *Political Analysis* 9, no. 3 (2001): 227–41.