The Power to Decide

Seth W. Greenfest

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Agenda control is an important institutional power as it may afford an institution the capacity to influence outcomes simply by choosing which issues to consider. For the Supreme Court, increasing discretion has been viewed as a factor contributing to the shift in the Court's focus on economic cases to civil rights cases. However, while the Judges Bill of 1925, which expanded the ability of the Supreme Court to issue writs of certiorari, set the stage for further expansions of the Court's discretionary agenda setting power, over the course of the 20th century a subset of the Court's jurisdiction remained mandatory. This paper examines the relationship between variations in the Court's jurisdiction and the transformation of the Court's agenda by charting expansions and contractions of the Court's mandatory and discretionary appellate jurisdiction over time. A discussion of changes in the Court's agenda between 1953 and 1996 takes into account the ways in which the Court's mandatory jurisdiction has changed since the Judges Bill of 1925.

Introduction

The United States Congress in June of 1988 passed and President Ronald Reagan signed into law important changes affecting the Supreme Court's appellate jurisdiction. Continuing a historical trend in which the Court's appellate jurisdiction has increasingly become, by law, discretionary rather than mandatory, Public Law 100-352 removed the legal right to appeal certain state court and certain lower federal court decisions to the Supreme Court. Instead, such decisions would be appealable to the Supreme Court only by *writ of certiorari* and often only after review by the federal courts of appeals. The Court's mandatory appellate jurisdiction, once the source of the majority of the Court's business, was now more than ever formally supplanted by the Court's discretionary appellate jurisdiction. Summarizing the new landscape of the Court's appellate jurisdiction, Representative Robert W. Kastenmeier characterized the 1988 reform as "the most significant jurisdictional reform affecting the High Court in over 60 years" (Taylor 1988) while legal scholars Boskey and Gressman (1988) wrote that these "statutory changes fortify the Court's power to control its docket: it is the Justices themselves who determine which of the petitions for certiorari brought before them should be granted and decided on the merits" (81).

Sixty-three years before the passage of Public Law 100-352, as is well known, Congress passed and President Calvin Coolidge signed into law the Judiciary Act of 1925, known as the "Judges Bill" for Chief Justice William Howard Taft and his colleagues' efforts on behalf of the bill (see, e.g., Hartnett 2000). While the *writ of certiorari* was not invented in the Judges Bill – the *writ of certiorari* was recognized in the Judiciary Act of 1789 and became more important over time, especially in the Judiciary Act of 1891 (Hartnett 2000: 1650-7) – the Judges Bill is a

landmark in the Court's history as it expanded the Court's discretionary control over its agenda in a number of meaningful ways.

Indeed, as generations of political scientists and legal scholars have noted, the Judges Bill played an important role in establishing the Supreme Court's power to control its own agenda by expanding its power to decide (Provine 1980; Boskey and Gressman 1988; Pacelle 1991; Fallon et al. 1996; Segal and Spaeth 2002). Numerous studies of shifts in the issues appearing on the Court's agenda have explicitly linked the decline of judicial attention to economic regulation and the corresponding increase of judicial attention to civil rights and liberties to the justices' ability to select cases for review.[1] In the standard account of the Supreme Court's role in American politics in the twentieth century, Supreme Court justices used the "power to decide" to reshape the Court's agenda in response to public and political pressure against the Court's opposition to the New Deal and moved towards civil rights and civil liberties in response to changing perceptions of the judicial role (epitomized in Footnote 4) and in response to new demands made by increasingly active civil rights movements who built on earlier, litigation-based successes.

This perspective correctly links the power of agenda control to the process of agenda formation and long-term agenda change.[2] At the same time, there is reason to question characterizations of a direct link between the Judges Bill, the Court's power to decide, and corresponding changes in the issues appearing on the Court's agenda. First, as noted above, the

[1] Pacelle (1991), for example, describes the period between 1933 and 1998 (the focus of his analysis) as a "period in which the Court had discretion over the cases it wish[ed] to accept … The Court chose, in part because of external pressure, to limit its consideration of some issues and to become a forum for others" (15).

[2] For the Supreme Court, as for any policymaking institution, the power of agenda control is an important one. Taking agenda control to mean the power of an institution to decide for itself which issues to attend to, the degree to which an institution has control over its own agenda and how it exercises that control is integral to policy outcomes. Agenda setters may have the capacity to influence outcomes simply by choosing which issues are considered (Hinich and Munger 1997: 162). After an agenda is set, policymakers go through the process of defining and considering alternatives as well as choosing which alternatives to implement as the policy outcome (Jones and Baumgartner 2005: 37-43). Each subsequent stage of this policy process is dependent in part upon that which came before.

Judges Bill did not create the *writ of certiorari* nor did it grant the Supreme Court, for the first time, discretionary control over some aspects of its agenda. The Judges Bill rather maintained some forms of mandatory appellate jurisdiction and both created new and expanded on existing forms of discretionary appellate jurisdiction, a pattern that would continue through the late 1980s, when Congress removed all but a few vestiges of the Court's mandatory jurisdiction. This suggests that, second, Congress continued to play an important statutory role in establishing the parameters of the Court's mandatory and discretionary appellate jurisdiction since the Judges Bill of 1925 and, as a result, the Court's power to decide has varied during this time.

The implications of revisiting in this manner the Supreme Court's varying appellate jurisdiction relate to the role that Congress plays as a source of judicial power and to the role of the Court in American politics. Scholarship on the Supreme Court has become increasingly attentive to the ways in which judicial power is contingent upon decisions made by actors in the legislative and executive branches of government who may be motivated by electoral and policy goals. Legislators may invite judicial participation in order to shift decision-making responsibility from the legislature to the courts (Graber 1993) or to lock-in and advance policy goals (Gillman 2002), some of which may be difficult for legislators to achieve on their own (Graber 1993; Lovell 2003). Legislators may additionally look to courts as institutions that can provide an oversight function for the executive branch (Shipan 2000; Smith 2005). Variation in the Court's mandatory and discretionary appellate jurisdiction, both set by statute, speak to the role that Congress and the executive play in structuring judicial participation in the policy-making process.

Furthermore, to the extent that the Court's power to decide is contingent on decisions made by other actors, its ability to set its own agenda and shift the focus of its attention is

similarly contingent. For this reason, the post-New Deal shift in judicial attention from economic regulation to civil rights and civil liberties may be attributed not only to the power to decide, but to the obligation to decide as well. This has implications for understanding the ways in which the Court's participation in the policy-making process has changed over time.

I focus here on providing an overview of the ways in which the Supreme Court's mandatory and appellate jurisdiction have changed, from the Judiciary Act of 1789 through the 1988 reforms. This overview, albeit brief, places the Supreme Court's current power to decide in historical context. This section emphasizes the expansions and contractions of the Court's mandatory appellate jurisdiction, especially since 1925. Using data from the Policy Agendas Project,[3] I then discuss the relationship between jurisdiction reform and shifts in the issues appearing on the Court's plenary docket for the period between 1953 and 1996. I conclude with further discussion of the implications for understanding how the Court's agenda has and may change, as well as discuss further avenues of study.

The Evolution of the Power to Decide

The ultimate source of the Supreme Court's jurisdiction is the United States Constitution which defines the scope of the judicial power and defines the Court's original and appellate jurisdiction. The Court's original jurisdiction has long been interpreted to be limited to that which is expressly listed in the Constitution (e.g. *Marbury v. Madison* 1 Cranch 137 [1803]) while specifics of the Court's appellate jurisdiction is subject, according to the U.S. Constitution, to exceptions and regulations made by the Congress. As will become more clear in the next few

[3] The data used here were originally collected by Frank R. Baumgartner and Bryan D. Jones, with the support of National Science Foundation grant number SBR 9320922, and were distributed through the Center for American Politics and Public Policy at the University of Washington and/or the Department of Political Science at Penn State University. Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.

pages, the Court's power to decide has evolved from one in which jurisdiction was *entirely mandatory*, to one in which the Court's jurisdiction was a *mix of mandatory and discretionary*, to one in which the Court's jurisdiction is almost *entirely discretionary*.

Mandatory Jurisdiction

Between 1789 and 1891, the Supreme Court's appellate jurisdiction was completely controlled by Congress as the "exclusive mode of appellate review by the Supreme Court" was by *writ of error*, a precursor to an "appeal as of right" (Boskey and Gressman 1988: 82). While the Court could potentially dismiss a *writ of error* because of "some jurisdictional defect," on the whole "it was never the theory or the practice that allowance of the writ of error was a discretionary matter [and] the Court was mandated or obligated to accept and (assuming that the issue did not run afoul of some substantive rule of abstention) to decide the case" (Boskey and Gressman 1988: 82).

The Judiciary Act of 1789 applied this theory into practice. The Act created lower federal courts, established their jurisdiction, and established the Supreme Court's appellate jurisdiction with respect to these lower courts. The Supreme Court was limited to reviewing upon a *writ of error* final decisions of circuit courts where the amount in controversy exceeded $2000; *habeas corpus* petitions; and final decisions of the highest state court, again on *writ of error*, in three types of cases dealing in some way with questions of federal law decided by state courts. Review by *writ of error* was required when (1) the highest state court ruled against the validity of a federal treaty or statute; (2) when the legality or constitutionally of a state law (under the U.S. Constitution) was questioned and the highest state court ruled in favor of the state law; and (3) when the highest state court interpreted the U.S. Constitution or federal laws or treaties in such a way to deny a claim made under the U.S. Constitution, federal laws, or treaties

(Fallon et al. 1996: 32). The Act recognized that the Court could additionally grant a number of other *writs,* including the *writ of certiorari*. However, *certiorari* was not defined as a vehicle for bringing appeals to the Court (Hartnett 2000: 1650).

Mix of Mandatory and Discretionary

From the Founding to the end of Reconstruction, the federal courts experienced increasing caseloads in response to changing demographics and economic expansion with the result that "by 1890, the number of cases on the [Supreme] Court's docket was nearly three times as large as in 1870, with no end of the growth in sight" (Fallon et al. 1996: 36). As the Court was mandated by law to decide every case brought to it upon appeal, the pressure placed on the Court's docket could be linked to the Court's mandatory jurisdiction (Boskey and Gressman 1988: 83; Fallon et al. 1996: 36-7; Hartnett 2000: 1650).

The Evarts Act of 1891 addressed this problem in two major ways: through the creation of an intermediate court of appeals that would have final decision power with respect to some issues and by granting to the Supreme Court a limited power of discretionary review. Decisions by these circuit courts of appeals in the area of "diversity litigation, in suits under the revenue and patent laws, in criminal prosecution, and in admiralty suits" were to be final. However, for these "final" decisions, "the Supreme Court … was authorized, regardless of the amount in controversy, to order the judgment brought before it for review" by "certiorari or otherwise" (Fallon et al. 1996: 37). The Supreme Court, for the first time, had the statutory power to decide *not* to review the decision of a lower federal court. At the same time, mandatory appellate review by the Supreme Court still existed in other "important classes of cases" (Fallon et al. 1996: 36-7; Hartnett 2000: 1650).

Incremental changes between 1891 and 1925 continued to affect the Supreme Court's appellate jurisdiction. On the discretionary side, the Supreme Court was granted the power to review by *writ of certiorari* certain state court decisions that were previously to be reviewed by *writ of error* and granted the power to review by *certiorari* state court decisions that *upheld* a federal statute, as opposed to having been limited (and required) by the Judiciary Act of 1789 to reviewing only state court decisions that held federal laws invalid (Boskey and Gressman 1988: 84). On the mandatory side, the Court was required to review, by direct appeal, decisions of three-judge district courts regarding "civil anti-trust cases … [and] suits to enjoin enforcement of state and federal statutes as being repugnant to the Constitution" as well as certain administrative agency orders, including those of the Interstate Commerce Commission (Boskey and Gressman 1988: 85). While the creation of an intermediate court of appeals and the granting of a limited power of discretionary review increased the Court's agenda control, after these reforms the Court's jurisdiction was still primarily mandatory. Additionally, the Court's mandatory jurisdiction expanded with the requirement that the Court review, often on direct appeal, the decision of three-judge district courts. By the 1920s, "another docket crisis was in full swing" (Boskey and Gressman 1988: 85).

Discretionary Jurisdiction

The Judges Bill of 1925 expanded the Supreme Court's power to set its own agenda by explicitly shifting review of the bulk of lower federal and state court decisions from mandatory appellate review to discretionary appellate review. However, this shift was far from complete as the right to appeal was preserved in a number of ways.

Under the Judges Bill, appeal as of right still existed with respect to cases relating to the relationship between the state and federal government. Specifically, review was mandatory for

cases in involving: the invalidation a federal law by a state court; when a state court upheld a state law against a challenge under federal law; or when a federal court of appeals overturned a state law (Boskey and Gressman 1988: 87). With respect to decisions made by <u>federal</u> courts, the Supreme Court's mandatory appellate jurisdiction was maintained over the following federal court decisions: when any federal court held an act of Congress unconstitutional or, as just noted, when any federal court invalidated a state law to the detriment of a party that was relying on the state law. Additionally, mandatory review of the decisions of three-judge courts described above would not be eliminated or made discretionary until the 1970s (Boskey and Gressman 1988: 89; Perry 1991: 303-8). Indeed, Boskey and Gressman refer to four major reforms in the 1970s as a "wholesale repeal of most of the federal statutes requiring the Supreme Court to hear direct appeals from lower federal courts" (89).

News appeals as of right were <u>created</u> after 1925 including: direct review by the Supreme Court of declaration of a federal law as unconstitutional by any lower federal court in a civil suit to which the United States was a party, passed in 1937 (Boskey and Gressman 1988: 85) and direct review by the Supreme Court of decisions by three-judge district courts under or concerning the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Regional Rail Reorganization Act of 1974, the Presidential Election Campaign Fund Act of 1971, and issues relating to apportionment of state or congressional legislative districts (Perry 1991: 307).

For those cases not subject to the mandatory appellate review by the Court, the Court under the Judges Bill now had the power to grant or deny a *writ of certiorari* according to the discretion of the members of the Court. Specifically, the Court's certiorari jurisdiction covered "any civil or criminal case, before or after rendition of judgment or decree" – an arrangement that "include[d] virtually every type of case in a federal court of appeals" (Perry 1991: 301). As

a result, according to Boskey and Gressman, by 1988 "[o]nly about 20% of [cases scheduled for plenary review] have been falling within the mandatory appeal category" with the balance being brought by *writ of certiorari* (88).[4]

Under the 1988 law, review of a decision declaring a federal law unconstitutional must now be taken first to the federal court appeals, the decision of which would be reviewable upon *certiorari* by the Supreme Court. Review of the invalidation of a state law by a federal court could be appealed directly to the Supreme Court solely by *writ of certiorari* (Boskey and Gressman 1988: 95). After the 1988 reforms, state court decisions upholding or overturning a federal law, or upholding a state law against a federal constitutional challenge (previously mandatory as noted above) were also only reviewable upon a *writ of certiorari.* Finally, pre-1988 mandatory appellate review existed under the five statutes listed above (plus a few more added throughout the years [Boskey and Gressman 1988: 97]) while post-1988, mandatory appellate review of certain three-judge decisions existed only under the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Presidential Election Campaign Fund Act of 1971, and the Antitrust Procedures and Penalties Act of 1974 (Boskey and Gressman 1988: 97-98).

Summary of changes to Supreme Court jurisdiction

The overview provided here certainly does not do justice to the nuances of the complex historical processes by which the Supreme Court's appellate jurisdiction was transformed. Nonetheless, a few conclusions can be drawn. The Court's jurisdiction was originally tightly controlled by limiting review by the Supreme Court to certain lower federal court and state court

[4] Even though the Supreme Court was required by law to hear cases brought on appeal, the Court was able to implement a number of institutional rules and practices that allowed the Court to dismiss cases brought on appeal. This practice became more formalized after 1925 and allows the Court to exercise some discretion over ostensibly mandatory appeals (see for example Provine 1980: 14; Pacelle 1991: 6). For this reason, the procedures by which justices "select" mandatory appeals cases for placement on the formal agenda are thought to be the same as those governing the decision of whether or not to grant certiorari [PROVINE, SEGAL and SPAETH].

decisions, and mandating that such review take place. Reforms to the Court's jurisdiction prior to 1925, on the whole, both granted the Court some power to decide but additionally continued to mandate the Court decide certain questions – especially those related to how lower federal courts and state courts treated federal and state law under the laws of the United States, including the federal Constitution and federal treaties. After 1925, the balance shifted in the other direction as the Court was increasingly given the power to decide. The Judges Bill itself included maintenance of existing mandatory jurisdiction, creation of new mandatory appellate jurisdiction, and the creation and expansion of discretionary jurisdiction.

The Power to Decide and the Supreme Court's Agenda

The relationship between the Supreme Court's power of agenda control and the issues appearing on the Court's agenda has long been apparent. In political science, the attitudinal model of judicial decision making explicitly links agenda control, judicial preferences, and judicial outcomes and Court's agenda is conceived of as a reflection of the policy priorities of the justices themselves (Provine 1980: 2; Segal and Spaeth 2002: 86,250-251; Pacelle 1991: 15). While not inaccurate, this description of transformations in the Court's agenda emphasizes the Judges' Bill of 1925 and its expansions of the Court's discretionary jurisdiction. Less attention is devoted to expansions and contractions of the Court's mandatory jurisdiction since 1925. As the discussion in the previous section makes clear, the Court's jurisdiction has varied since 1925. A fuller account of transformations of the Court's agenda must consider the ways in which changes to the Court's mandatory and discretionary appellate jurisdiction have changed.

In the empirical analysis that follows, I depend on a variety of descriptive statistics to help lay a foundation for future analysis. The data help to illustrate three points. First, changes

in the Supreme Court's mandatory jurisdiction has an discernable effect on the issues appearing on the Court's agenda suggesting that Congress has played a role in influencing the Court's agenda through the expansion, preservation, and elimination of mandatory jurisdiction. Second, the Court's agenda may respond to changes in its jurisdiction separate from changes in justices serving on the Court. Third, the nature of the Court's agenda has changed, potentially in response to changes in the Court's mandatory jurisdiction. Over time, the Court's grants plenary agenda space to fewer issues and fewer cases, a reflection of the lack of an obligation to hear certain issues and a reflection of the Court's growing power to decide.

As the question of interest relates to the Supreme Court's institutional agenda, I utilize the Policy Agendas Project Supreme Court Cases data set. Each case reported in the U.S. Court reporter was coded according to the Policy Agendas Project coding scheme, which assigns entries one of 19 major topic codes and one of 220 minor topic codes (Sommer and Huynh 2005).[5] I focus on the period between 1953 and 1996 and compare the issues appearing on the Court's formal agenda – cases for which a hearing was held and a full opinion was issued – by way of a mandatory appeal ("Appeals") and a discretionary appeal ("Certiorari"). To simplify the analysis, I focus on major topic categories only.

Four "stages" of agenda-setting

Figure 1 displays the percentage of cases formally considered by the Supreme Court for the term years 1953-1996 with Appeals represented by the darker bars and Certiorari represented by the lighter bars.[6] There are two points illustrated by Figure 1. First, the Court's mandatory appellate jurisdiction accounted for between 15 and 36 percent of the Court's plenary agenda

[5] A list of the major topics may be found in Table 1, with a complete description at http://www.policyagendas.org/codebooks/topicindex.html.
[6] The Supreme Court's term generally runs from October of one year through June of the next. The 1979 term, for example, ran from October 1979 through June 1980.

during this time period – a small share, but one that exists nonetheless. Second, there seem to be four "stages" here: growth in the percentage of appeals on the formal agenda between 1953 and the early 1970s; a peak in the 1970s, especially in 1974 and 1976 when 36 percent (in both years) of the Court's agenda was made up by appeals; a decline in appeals from 1976 through 1988; and a marked reduction in appeals after 1988.

In light of the description of changes in the Supreme Court's mandatory and discretionary appellate jurisdiction presented in the previous section, these stages of agenda-setting can be linked to statutory reform, thought statutory reform alone most likely does not account for these shifts alone. The Civil Rights Act of 1964 and the Voting Rights Act of 1965, for example, most likely contributed to the number of appeals considered by the Court during the late 1960s. At the same time, these Acts became law during a period of time in which the percentage of appeals accepted by the Court was already rising. This may be attributed in part to efforts on the part of litigants to use the courts to advance their policy goals, and the incidental role that existing law regarding appeals played in their efforts. For example, Susan Lawrence finds that among "the 164 cases the LSP sponsored before the [Supreme] Court, 56 percent (92) came to the Court on appeal, and 75 percent (69) of those came from three-judge district courts. Largely because there was a direct right of appeal to the Supreme Court from these three-judge courts, the LSP's Supreme Court docket did contain a disproportionate percentage of appeals" (Lawrence 1990: 73).

As noted above, appeals peaked as a percentage of the Supreme Court's plenary agenda in the 1970s. Additionally, four major reforms – culminating in 1976 – of the Court's mandatory appellate jurisdiction were enacted during the 1970s. Figure 1 gives an idea of the effect of these reforms on the Court's agenda. Between 1970 and 1976, appeals accounted for between 27

percent (1971) and 36 percent (1974). After the 1976 reforms, the share of appeals settles just above 20 percent. Over the course of the 1980s, the percent of appeals stays in the 15 percent to 21 percent range. After the 1988 reforms, appeals all but disappear from the Court's agenda – falling to a low of 1 percent in 1992 before climbing back up to 9 percent in 1988.

It must be noted that during this time, the membership of the Supreme Court itself was changing. Shifts in the Court's appellate agenda in the 1972 term, the 1976 term, the 1981 term, and the 1989 term may be linked to relevant judicial appointments. Lewis Powell and William H. Rehnquist were confirmed as justices in January of 1972 (during the 1971 term); John Paul Stevens joined the Court in December of 1975 (during the 1975 term); Sandra Day O'Connor in September of 1981 (the 1981 term); and Anthony Kennedy in February of 1988 (during the 1987 term). From the 1971 to 1972 terms and 1975 to 1976 terms, appeals increased while they decreased between 1981 and 1982 (although slightly) and decreased the most between 1988 and 1989.

The effective date of the 1988 reforms suggests that these reforms had an effect on the Supreme Court's agenda separate from changes in the Court's membership.[7] Justice Kennedy replaced Justice Powell in February 1988 – during the 1987 term – and well before the effective date of Public Law 100-352. Public Law 100-352 was written in a way that most of the reforms would not become effective until the 1989 term, which began in October 1989. According to Boskey and Gressman, cases pending on appeal before the September 25, 1988 effective date would not be affected by the changes and as result the authors speculated that "the full impact of the 1988 Act upon the calendar will not be felt until the Court's October 1989 term, though the changes will incrementally be exerting their influence month-by-month during the October 1988

[7] At this time, I do not have information on the effective dates of earlier reforms.

term" (97-8), Effects on the Court's agenda in the 1987 term related to Kennedy's appointment would have presumably already been apparent.[8]

Shifts in attention

Explanations of shifts in the issues appearing on the Supreme Court's agenda have focused on the justices' ability to grant or deny petitions based on a host of case selection criteria developed by the Court, made possible by the "power to decide." Judicial attention is thought to be a reflection of the priorities set by the justices, coupled with their understanding of the judicial role and as a response to litigation brought to them. Judicial inattention is made possible in the first instance by the Court's discretionary control over its agenda, and is generally taken as a sign that justices are not interested in considering certain issues.[9] This could be for policy or political reasons; the Court, for example, often does not consider cases dealing with issues internal to the legislative or executive branches and it at times justifies inattention to other issues by casting them as best decided through the political process. Overall, both agenda-setting and agenda change are strongly influenced by the Court's power to decide.

The history of the Supreme Court's mandatory and discretionary appellate jurisdiction presented in the previous section helps to illustrate the importance of the power to decide. Prior to being granted discretionary control over its docket, the Court faced the challenge of dealing

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[8] The apparent lack of an independent effect of Justice Kennedy's appointment on the Court's agenda could be attributed to the lack of ideological and jurisprudential distinction between Justice Powell and Justice Kennedy.
[9] This theme is echoed by Jeffrey Segal and Harold Spaeth in their examination of the trends in the type of issues scheduled by the justices for review: ". . . while economic activity is second overall in type of case heard, it occupies a decreasing share of the Court's agenda. A full quarter of the Warren Court's cases dealt with economic activity as compared to less than a fifth of the Burger and Rehnquist total. Also showing a substantial decrease are cases dealing with unions and federal taxation, now with less than half the proportion they had in the Warren Court. Alternatively, issues of federalism are substantially more frequently litigated by the Rehnquist than its two predecessor courts. *A likely explanation for these trends may be justices' perception that business, labor, and tax matters have little salience, as compared with increased autonomy for state and local government* (Segal and Spaeth 2002:250-251, emphasis added).

with thousands of cases appealed annually on a variety of issues. Indeed, many of the reforms to the Court's mandatory jurisdiction were inspired in part by the justices lobbying for increased control over their agenda precisely so they could weed out those issues thought to be less deserving of the Court's attention (see, e.g., Hartnett 2000: 1665). On the flip side, the existence of an appeal as of right and the continued existence of an appeal as of right even in the face of other reforms, suggest that there are some issues that other policy makers have determined (actively or passively) best dealt with by the courts. Direct appeal of the decisions of three-judge district courts, for example, ensured prompt review by the Supreme Court of decisions made by lower judges and seemed to be an especially popular tool in the early 1900s (Fallon et al. 1996: 1637). The implication is that as the Court's mandatory appellate jurisdiction was changed by law, the issues brought to the Court changed as well.

To help to illustrate this point, entropy scores were calculated to measure the range of issues appearing on the Court's agenda. Entropy scores are a statistic by which to evaluate the degree to which an agenda is concentrated or dispersed, based on both the total number of cases brought and total number of issue categories that could be raised. To understand what entropy scores illustrate, think of each of the 19 major topic codes used in the Policy Agendas Project as different cubbyholes in a mailroom and individual cases as pieces of incoming mail. Each case must be sorted according to its major topic (each case is assigned only one major topic). When the sorting is all done, is it spread out among many cubbyholes or clustered in just a few?[10] Treating the mandatory appellate and discretionary appellate agenda as two separate agendas,

[10] More specifically, the score is calculated "from the sum of the probability of discrete events weighted by the log of its inverse" (Sheingate 2006: 847). In this study, the discrete events of interest are the number of cases docketed per major topic per term year. Entropy scores were calculated by summing the number of cases docketed per major topic per term year, dividing that sum by the total number of cases docketed for the period under study, and then multiplying that result by the log of its inverse. The entropy score for discrete event x out of total discrete events y would be calculated as: (x/y)*log(1/((x/y)).

entropy scores were calculated for the Appeals and Certiorari agendas and these results are displayed in Figure 2, with results multiplied by 100 for ease of illustration.

Entropy scores provide information about the range of issues appearing on the Supreme Court's agenda. A higher score corresponds to a more diverse agenda, while a lower score corresponds to a less diverse, or more concentrated agenda (Sheingate 2006: 847). A score for an individual year may be interpreted on its own and in relationship to other years. The actual values themselves are less informative than a comparison of the values across years, and between *Appeals* and *Certiorari*. A number of elements of Figure 2 deserve mention.

The *Appeals* agenda shows a good deal of variation over time. While similar in the degree of concentration to the *Certiorari* agenda in 1953, the *Appeals* agenda becomes much more dispersed over the course of the period under study. The *Appeals* agenda is most diverse at its peak in 1972, and after 1976 becomes more concentrated. After the 1988 reforms, the *Appeals* agenda almost entirely collapses. In contrast, the *Certiorari* agenda shows less variation over time: the *Certiorari* agenda is both relatively stable and relatively concentrated. There is a slight increase in the diversity of the Court's *Certiorari* agenda over time. When the Court's mandatory appellate jurisdiction is eliminated, litigants usually still have the opportunity to file the same cases by *writ of certiorari,* meaning that the Court's *Certiorari* agenda may absorb some of the issues eliminated from the *Appeals* agenda. At the same time, Figure 2 shows that the Court has not expanded its *Certiorari* agenda to absorb all of the agenda space previously taken up by *Appeals*. After 1980, the entropy score for the *Certiorari* agenda decreases, meaning that the Court considered a smaller range of issues even though its discretion was extended to a larger part of its agenda.

For the Supreme Court's *Appeals* agenda, 1953, 1972, and 1992 represent the beginning, high point, and low point of the period under study. Using these as points of reference, Figure 3 displays the content of the Court's *Appeals* and *Certiorari* agendas for those years. Entries are the percent of the *Appeals* and *Certiorari* agendas, respectively, that were taken up by each of the 19 issue areas. For example, in 1953, 7 percent of the Court's *Appeals* agenda and 17 percent of the Court's *Certiorari* agenda covered "Government Operations." Comparing the *Appeals* agenda in 1972 to 1953, we see that in 1953 the *Appeals* agenda covered only 8 issue areas but 15 in 1972, reflecting 1972 as the most diverse year for the Court's *Appeals* agenda and the increasing diversity of the *Appeals* agenda between 1953 and 1972. By comparison in 1992, the year for which the Court's *Appeals* agenda was most concentrated, the Court heard only *one* case by an appeal, dealing with Civil Rights, Minority Issues, and Civil Liberties. Overall, between 1953 and 1976, the number of appeals increased and the Court considered more issues by appeal. After 1976, the number of appeals began to decrease and the range of issues coming to the Court by way of appeal similarly decreased.

The *Certiorari* agenda has always commanded a greater share of the Supreme Court's total agenda for the period under study. However, as Figure 2 helped to illustrate, the Court's attention has been focused on a smaller range of issues despite the larger agenda space. Figure 3 helps to demonstrate that while the size of the *Certiorari* agenda has increased, there has not been a corresponding increase in the issues considered by the Court. Rather, the Court has focused its diminishing attention on somewhat fewer issue areas. The *Certiorari* agenda started with 8 issues in 1953 and grew to include 15 issues in 1972, and 14 in 1972. Attention to *Government Affairs* has declined, while attention to *Law, Crime, and Family Issues*, to *Labor, Employment, and Immigration*, and to *Civil Rights, Minority Issues, and Civil Liberties*, have all

increased. These three issues accounted for 38 percent of the *Certiorari* agenda in 1953, 50 percent in 1972, and 63 percent of the agenda in 1992. Attention becomes even more concentrated in the area of *Law, Crime, and Family Issues* in 1992 at the expense of other issue areas.

This analysis suggests that in the past, the Supreme Court's attention to some issue areas was related to its mandatory appellate jurisdiction. The range of issues brought by appeal to the Court, compared to the range of issues brought to the Court by *writ of certiorari,* was broader when the right of appeal existed. After reforms removed the right of appeal, litigants still often had the opportunity to bring cases by *certiorari*; however, the Court's agenda did not expand to include a wider range of issues.

Conclusion

The data presented above lend support to the idea that the presence and absence of mandatory appellate jurisdiction has had some effect on the Supreme Court's agenda. While the analysis presented here does not allow for firm conclusions, there are a number of findings that provide a foundation for further study. First, while the Judges Bill of 1925 is an important landmark for understanding the Supreme Court's power to decide, the Judges Bill did not grant the Court complete control over its agenda. Rather, a portion of the Court's agenda remained mandatory throughout the twentieth century. Second, Congress exercised its power over the Court's jurisdiction at a number of points after 1925 through legislation preserving, expanding, and eliminating the Court's mandatory jurisdiction.

Third, jurisdictional reform was linked above to changes in the content of the Supreme Court's agenda. Judicial attention in this period was never dominated by its obligation to hear

certain cases as the Court's discretionary jurisdiction overwhelmed its mandatory jurisdiction. At the same time, both the presence and absence of a right to appeal had an effect on the issues on the Court's formal agenda. Prior to reforms that removed mandatory jurisdiction, the Court's mandatory appellate agenda was more diverse than its *certiorari* agenda, suggesting that appeals were an important avenue for bringing issues to the Court.

Future study should focus more completely on the role that Congress (and the executive) has played in structuring the Supreme Court's power to decide. Both the bureaucratic politics and judicial empowerment literature provide a framework studying the conditions that may lead a legislature to delegate decision-making authority to another entity. Expansions or restrictions on the Court's power to decide could be modeled as a function of ideological distance between Congress and the Court (Epstein and O'Halloran 1999; Shipan 2000) and of legislator's policy goals and their conceptions of what role the judiciary can play in advancing those goals (Lovell 2003; Smith 2005; Lovell and Lemieux 2006).

Additionally, future study should examine in more detail the relationship between the Court's mandatory appellate jurisdiction, the diversity of issues coming to the Court, and the nature of judicial power. The justices themselves have been variously lauded and criticized for their participation in the major issues of American politics over the past 84 years. To the extent that justices can be found to participate in American politics in part because of legislative grants of power, in this case the power to decide, this complicates efforts to describe the Supreme Court as a too-powerful, or counter-majoritarian, institution. As has other scholarship on the contingent nature of judicial power (Graber 1993; Lovell 2003), this study adds to our understanding of how and why courts become involved in the public policy process by examining the legal structure that encourages or discourages such participation.

Finally, future study should expand to include the other ways in which legislation can influence judicial agenda-setting. The analysis presented above suggests that the elimination of mandatory appeals did have an effect on judicial attention over time, but these particular statutory changes alone cannot explain major shifts in judicial attention over time. Along with expanding the Court's power to decide, Congress has been equally active in other areas of law especially with respect to judicial review of administrative agencies which structures the capacity of federal courts to participate in a wide variety of questions regarding social and economic regulation.

Table 1: Major topic codes

1	Macroeconomics
2	Civil rights, Minority Issues, and Civil Liberties
3	Health
4	Agriculture
5	Labor, employment, and immigration
6	Education
7	Environment
8	Energy
9	Transportation
10	Law, Crime, and Family Issues
11	Social Welfare
12	Community Development and Housing Issues
13	Banking, Finance, and Domestic Commerce
14	Defense
15	Space, Science, Technology and Communications
16	Foreign Trade
17	International Affairs and Foreign Aid
18	Government Operations
19	Public Lands and Water Management

Source: Policy Agendas Project at http://www.policyagendas.org/codebooks/topicindex.html

Figure 1: Appeals and Certiorari, percent of agenda

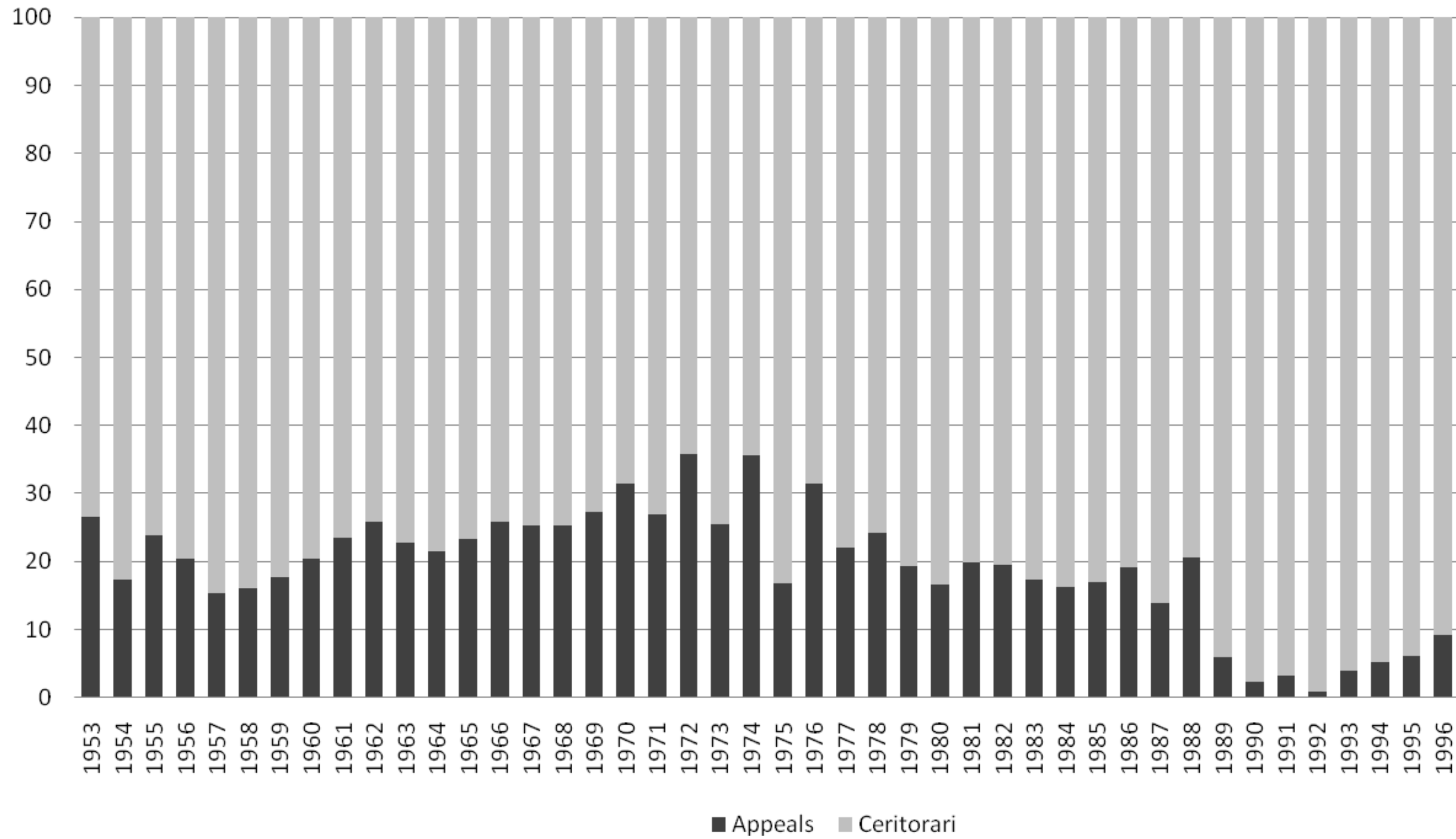


Figure 2: Entropy scores, 1953-1996

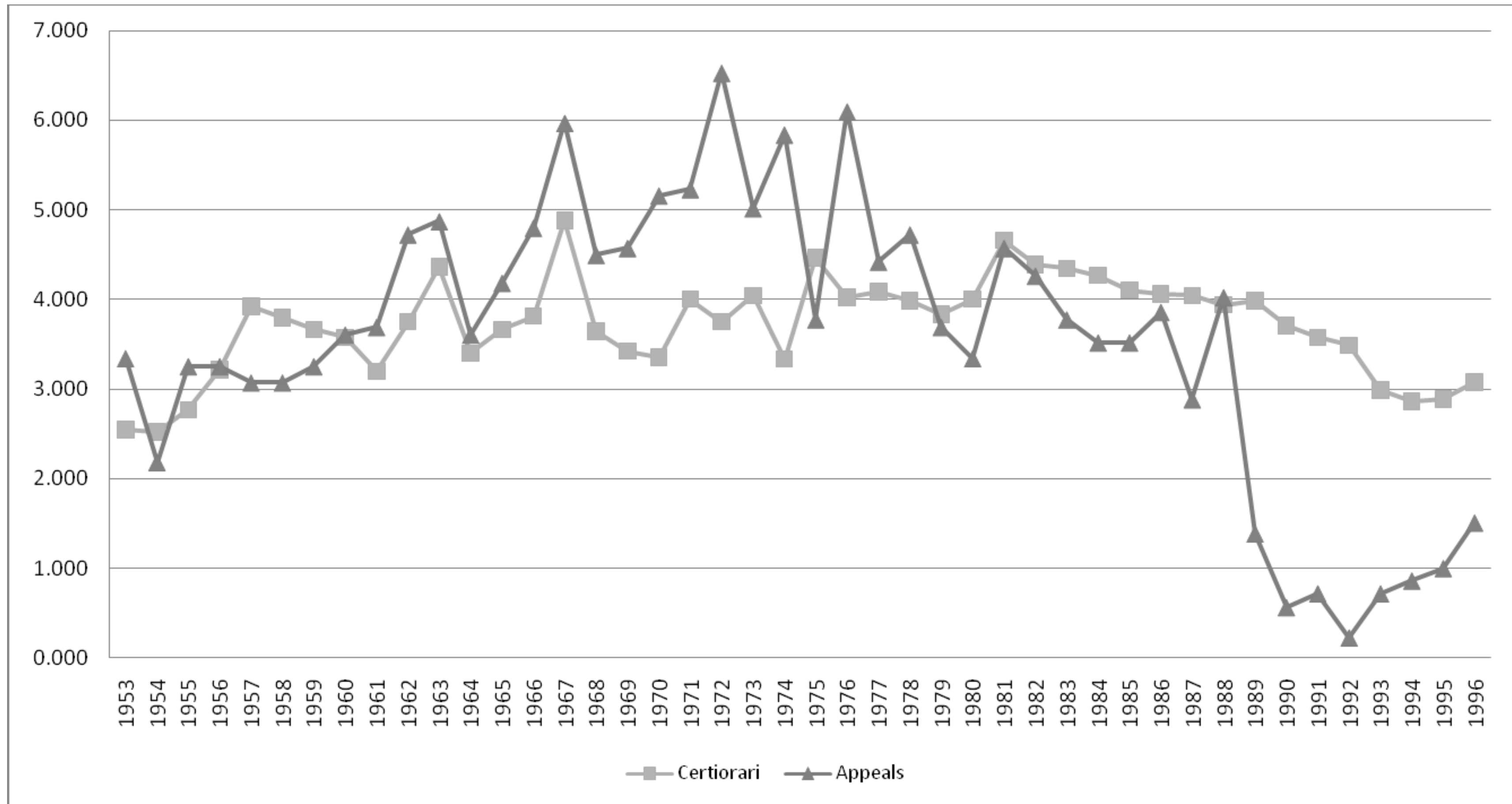
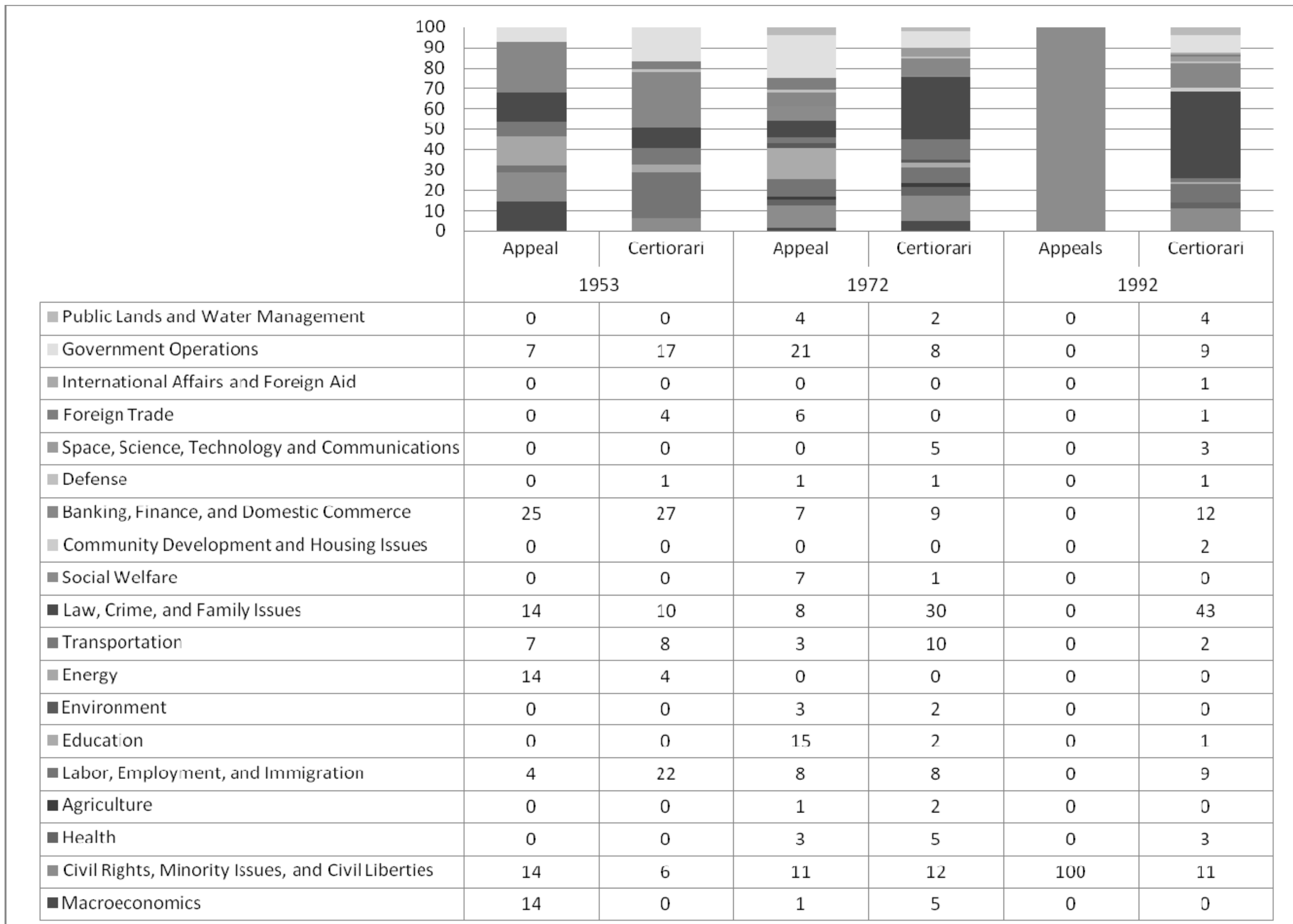


Figure 3: Appeals and Certiorari, by major topic



	1953 Appeal	1953 Certiorari	1972 Appeal	1972 Certiorari	1992 Appeals	1992 Certiorari
Public Lands and Water Management	0	0	4	2	0	4
Government Operations	7	17	21	8	0	9
International Affairs and Foreign Aid	0	0	0	0	0	1
Foreign Trade	0	4	6	0	0	1
Space, Science, Technology and Communications	0	0	0	5	0	3
Defense	0	1	1	1	0	1
Banking, Finance, and Domestic Commerce	25	27	7	9	0	12
Community Development and Housing Issues	0	0	0	0	0	2
Social Welfare	0	0	7	1	0	0
Law, Crime, and Family Issues	14	10	8	30	0	43
Transportation	7	8	3	10	0	2
Energy	14	4	0	0	0	0
Environment	0	0	3	2	0	0
Education	0	0	15	2	0	1
Labor, Employment, and Immigration	4	22	8	8	0	9
Agriculture	0	0	1	2	0	0
Health	0	0	3	5	0	3
Civil Rights, Minority Issues, and Civil Liberties	14	6	11	12	100	11
Macroeconomics	14	0	1	5	0	0

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