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The Nature of Agenda in the United States
Supreme Court and Courts of Appeals

presented by

Mark S. Hurwitz

has been accepted towards fulfillment
of the requirements for

Ph.D. degree in Political Science

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THE NATURE OF AGENDA IN THE UNITED STATES SUPREME COURT
AND COURTS OF APPEALS

VOLUME I

By

Mark S. Hurwitz

A DISSERTATION

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

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Department of Political Science

1998

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ABSTRACT

THE NATURE OF AGENDA IN THE UNITED STATES SUPREME COURT AND COURTS OF APPEALS

By

Mark S. Hurwitz

While there is a good deal of scholarly research on the agenda in the United States Supreme Court, much less is known about agenda setting in the United States Courts of Appeals. Moreover, even less is known about whether the agenda of one of these institutions influences the agenda of the other and, if so, the nature of any such agenda change. These questions are especially vexing in light of the disparate jurisdiction of the Supreme Court, which is principally discretionary, and of the Courts of Appeals, which is generally mandatory, and considering the Supreme Court's limited oversight of the circuit courts. Utilizing both the United States Supreme Court Judicial Database and the United States Courts of Appeals Data Base, and taking a neoinstitutional approach, I address these issues systematically by examining the agendas of both of these judicial institutions and, more importantly, employing time series analyses to identify the extent to which agenda setting on the Supreme Court inspires agenda change on the Courts of Appeals, and vice versa. I find that under some conditions the Supreme Court inspires agenda change in the Courts of Appeals, while under other circumstances it is the Courts of Appeals which take the lead in setting the agenda of the federal courts. Moreover, additional factors enter into the issue of agenda setting in these courts as well.

Dedicated to my wife Sheralee,
for her abiding love, encouragement, and support

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It was rather simple for me to decide to leave the practice of law in New York City in order to pursue a Ph.D. in political science. It was much harder, however, to make this transition work and realize my goals. As with any demanding task such as this, I could not have succeeded solely on my own, and thus I would like to recognize those people who represent a significant part of my achievement.

To begin, I appreciatively acknowledge the members of my dissertation committee at Michigan State University. First among them is Reggie Sheehan. As chair of my committee, he has guided me through the dissertation process, ensuring I was on the right track, while always encouraging me to carry through with my ideas, even when they diverged from his. As a judicial scholar, he has provided a stellar model for me to emulate, and I hope to be as successful as he has become. Finally, as a friend, he has demonstrated the importance of balancing professional success with other important aspects of life, such as our respective families – of course, quality time on the golf course doesn't hurt, either. I thank him for all of these things.

I also would like to thank David Rohde who granted me a PIPC fellowship in my first year of graduate school and has continued to support my studies since then. While there were many tangible benefits for being a part of the PIPC program, it is the intangible values I acquired from PIPC for which I am most grateful. In particular, I am indebted to being part

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of an academic environment in which graduate students work with each other in a positive setting. While the other PIPC fellows are responsible for this constructive climate as well, as director of PIPC it was he who had the foresight to design the program as it is and to choose these prospective scholars. I am convinced that he is quite correct in his assumption that graduate students can learn as much from their peers as from their mentors, and PIPC is substantial evidence in this regard. Accordingly, I thank him for the opportunity to be a part of this wholly successful and enjoyable program, and I wish PIPC well in the future. Dave, as you once noted in regard to my achievements, PIPC is batting 1.000, and I am certain its record will continue to flourish under your guidance.

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I also would like to thank the final member of my committee, Harold Spaeth, for reading drafts of my dissertation and assisting me with data coding decisions.

A number of other faculty members have been concerned with my success and helped me in my graduate studies, and they deserve to be acknowledged as well, including Brian Silver, Darren Davis, Carol Weissert, and Jeff Riedinger. Additionally, I would like to thank Ada Finifter who, as editor of the *American Political Science Review*, chose me to be one of

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her first interns, a position I found to be very gratifying and intellectually stimulating. My experience at the *APSR* should be invaluable in my endeavor to move my name from the front inside cover to the Table of Contents page, a goal I hope to achieve while she remains the *APSR* editor.

I again must thank all those scholars who believed in me and my work, supported my aspirations throughout my graduate studies, and sought to advance my career in a positive direction, particularly when the circumstances were such that it was difficult or inconvenient for them to do so. It is my heartfelt promise to each of you, and you know who you are, that I will do everything possible to become the political scientist you believe I can be, to act as professionally in my career as you have been in yours, and to leave you with nothing but a sense of pride in me. Your support and concern are debts I cannot repay, but they are something I always will remember and of which I will remain deeply appreciative.

I would like to acknowledge a few graduate students as well. In particular, I enjoyed sharing an office with the PIPC boys, including Bryan Marshall, Brandon Prins, and Roger Moiles, who provided lots of encouragement and laughs. Carry on, gentlemen. Additionally, I especially want to acknowledge Matt Kleiman, for nothing in particular and everything in general. He is a great friend who, if he wants to, should become one of the top scholars in the profession. Besides, having a fellow fan of the New York Rangers, Yankees, and Knicks around has made living in Michigan all that much better.

I also must thank all those in my family for all they have done for me, particularly my parents, who believed in me long before I ever did. Their encouragement and love have served me immeasurably in all aspects of my life. Their greatest success, however, pertains

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to the family they have raised. Having each come from difficult family backgrounds, my parents came together to provide all of their children with a set of values and morals second to none. The fruit of their efforts is found in the lives of their four children and respective families, and (at this point) their eight grandchildren. I look forward to going to the Marvin and Patricia Hurwitz family reunions for many years to come. I am very proud of you both.

Last, but certainly not least, I must acknowledge the importance in my life of my wife Sheralee, my daughter Rachel, and my new son Jacob. All of you continue to provide me with the love, strength, and incentive to do my best in everything I do. I could not have wished for a better family, and I truly feel blessed by all of you. Most prominently, however, is my love, respect, and admiration for you, Sheralee. You have given up so much of yourself so I could pursue what I needed to do for me, yet I never received anything but encouragement and support from you. I have no doubt that I would not be where I am now if not for you, and I am eternally grateful. Besides being the best wife and friend I ever could have, you are the best lawyer I know. I am so pleased we have not forgotten the meaning of these words we chose to symbolize our lives almost six years ago (Springsteen 1992):

Now there's a beautiful river in the valley ahead
There 'neath the oak's bough soon we will be wed
Should we lose each other in the shadow of the evening trees
I'll wait for you
And should I fall behind
Wait for me.

My beloved, this dissertation is dedicated to you.

Mark S. Hurwitz
August 10, 1998

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INTRODUCTION

Setting an agenda is an exceedingly important responsibility of any political institution. In addition to allocating the resources of those currently before the institution, the agenda of a political institution defines its priorities and future events, as conflicts are designated, alternatives are clarified, power is exercised and allocated, and the direction of public policies is delineated. Perhaps, then, setting its agenda is the most important act any political institution exercises. This contention is as applicable to the judiciary as it is for the other branches of government.

For these reasons, setting the judicial agenda conceivably is the most critical stage of the policy process, as it is the stage at which private and public entities interact with the government as they seek to rectify their complaints. At the same time, if a case survives on the judicial agenda, decisions by courts on the issues presented have broad, policy-related effects beyond the distinct consequence on the particular parties before the judiciary. Thus, studies on agenda setting in the courts are vital if we are to learn about the nature of these effects by and on the courts, the government, and society.

Acknowledging this fact, there have been myriad studies on the United States Supreme Court. Nevertheless, most of this research considers the Supreme Court in isolation, judging the incidences when the Court is more likely than not to decide a case. Moreover, these studies usually consider the Supreme Court and only the Supreme Court,

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as other political institutions are ignored. That is, there is little research on the agendas of courts other than the Supreme Court; and, few studies compare the Supreme Court's agenda with that of other courts or political institutions, the repercussion being that studies comparing the effects between the Supreme Court and other courts have not taken place.

Notwithstanding this perceived bias in the research, the Supreme Court does not exist totally in isolation. As a result, it is plausible that these other political intuitions in general and courts in particular might influence the Supreme Court, just as the Supreme Court's agenda may affect other political institutions. Specifically, is there any interactive effect between the agenda of the Supreme Court and that of the United States Courts of Appeals, which endure just below the Supreme Court in the hierarchical system of federal courts? Since the Supreme Court has discretionary jurisdiction, while the Courts of Appeals have mandatory jurisdiction, it seems feasible that the Supreme Court will influence the agenda in federal appeals courts; moreover, whereas it is constrained to an extent by institutional rules and structures, in turn the Supreme Court could be influenced by the agenda of the courts from which the majority of its cases stem. These issues will be addressed in some detail herein, in an attempt to discover the nature of agenda setting in the federal courts.

CHAPTER 1

THE NATURE OF AGENDA IN THE FEDERAL COURTS: A REVIEW

One of the most important acts any political institution can engage in is setting its agenda. Indeed, the process of setting an agenda embraces the entire array of an institution's possible actions, including allocating resources of those currently before the political institution, defining its priorities and future events, designating conflicts, clarifying alternatives, exercising and allocating power, and determining the direction of public policies (Schattschneider 1960; Kingdon 1984; Riker 1993). As Schattschneider (1960, 68) provided: "the definition of the alternatives is the supreme instrument of power." Perhaps, then, setting its agenda is the most important act any political institution exercises.

The significance of agenda setting is as befitting to the judiciary as it is for the other political institutions. For an institution which has discretion over its own agenda, as does the United States Supreme Court, the process of agenda building and setting is far from random. In fact, the Supreme Court's agenda is determined by both internal and external influences and constraints on the institution (Pacelle 1991; Epstein and Segal 1997). Moreover, once the Court establishes its priorities through its agenda, the effects of those choices reverberate throughout the judiciary, the legal profession, other political institutions, even society (Caldeira and Wright 1988). Thus, studies on agenda setting in the courts are

vital if we are to learn about the nature of these effects by and on the judiciary, the judicial process, other political institutions, and society.

One of the institutions potentially affected by the Supreme Court's choices on agenda is the United States Courts of Appeals. The jurisdiction of the Courts of Appeals essentially being mandatory, they must accept nearly all appeals properly made, a consequence of which is that the circuit courts have almost no control over their agenda considerations. The agenda of the appeals courts, therefore, is determined almost entirely by external forces including, among other things, the Supreme Court. At least, that is one of my arguments posited in this study. In particular, I argue in part that changes in the Supreme Court's agenda over time signal rational litigants, interest groups, and lawyers that the Court is becoming more or less inclined to review particular types of cases. As a result, the agenda of the Courts of Appeals will fluctuate in line with the dynamic agenda priorities set by the Supreme Court, as litigants and their representatives will increase or decrease their docket filings at the Courts of Appeals accordingly.

Since the jurisdiction of the Supreme Court is almost wholly discretionary, and due to the importance of this institution atop the judicial hierarchy, public law scholars generally have found the nature of its agenda more interesting than that of the federal appeals courts; consequently, there have been scores of studies on the agenda of the Supreme Court, yet there have been few inquiries on the agenda of the Courts of Appeals. Further and more significantly, there has been no apparent research comparing the agendas of these federal

courts, let alone whether the agenda of one has any influence, systematic or otherwise, on the other.¹

This research is an exploration in that direction, as I seek to determine the effects on the agendas of these institutions. In particular, this study examines the extent to which the agenda of the Supreme Court inspires changes in the agenda of the Courts of Appeals, and vice versa, in an attempt to ascertain the exogenous and endogenous nature of the agendas of these institutions, including both the influences which drive their agenda priorities and the effect each court has with respect to the other.

THE RELEVANCE OF AGENDA FORMATION AND POLITICAL INSTITUTIONS

Setting a political institution's agenda is of paramount import. As Hammond (1986, 381-382) stated in a non-judicial context: "in some cases . . . whoever controls the agenda controls the outcome." *See e.g.*, McKelvey (1976; 1981); Plott (1976); Plott and Levine (1978). Since agenda formation affects or may even determine the output of any political institution, issues relating to agenda inevitably are linked to the process of policy making. Since setting an agenda is an integral part of the policy process for any political institution, application of the policy literature on agendas easily can be extended to an institution such as the courts, which regularly decides important political and societal issues. Accordingly,

¹In fact, the only research of which I am aware which looks into judicial agendas while taking into account the preferences of, or constraints set by, another political institution is the preliminary study by Epstein and Segal (1997), who compared the potential actions by Congress on the Supreme Court's process of agenda setting.

it is appropriate to begin with a discussion of some of the major works on the policy process, particularly with respect to agenda development.

In his seminal study *Agendas, Alternatives, and Public Policies*, Kingdon (1984; 1995) suggested that the manner in which agendas are set and alternatives specified is influenced by both systematic and random factors, particularly when it comes to selecting public policies on the agenda. With respect to the nonrandom determinants, Kingdon asserted that for each policy area there are separate streams, each of which affects agendas and resulting policies. First, there is the *political stream*, which constitutes electoral and partisan considerations, institutional and interest group pressures, and public opinion. The *policy stream* is composed of an amalgamation of proposals, some more prominent than others, advanced to solve society's problems. Finally, such societal ills, how they are perceived over time by both the masses and political elites, their prominence, and whether they can be solved by the available alternatives, are found within the *problems stream*. These streams generally run independently of each other until they are "coupled" (1984, 182) due to some change arising from the political and/or problem stream.² When the streams finally meet, Kingdon argued, policy windows open which yield an occasion for particular measures and, consequently, a potentially changing agenda

Simply because a policy window opens does not ensure that certain policies will be enacted, let alone be advanced onto the agenda. First, policy windows "stay open for only short periods" (174); moreover, they do not always open in a predictable fashion.

²As a consequence, the political and problems streams pertain to the process of setting the agenda, while the policy stream concerns the available alternatives.

Accordingly, the participants of the policy process must take expedient advantage of the policy window when it opens. These participants, known as policy entrepreneurs, are "advocates for proposals for the prominence of an idea" (129). As such, policy entrepreneurs embrace and polish their policy proposals, awaiting the opportunity to project them when a policy window opens. Once the process is in motion during the short-lived window of opportunity, the entrepreneurs add their proposals to the debate, aspiring for, and championing, their adoption. Whether or not policy entrepreneurs are successful depends upon issues such as bargaining, majority coalition and consensus building, and resource commitment.

Kingdon's thesis on agendas and public policy has been exceptionally influential among policy scholars. More recently, in *Agendas and Instability in American Politics*, Baumgartner and Jones (1993) built on Kingdon's work while they provided a somewhat different yet valuable perspective concerning the manner in which agendas are determined. In the heart of their analysis, they contended that the policy process is characterized by both long-term stability and short-term change. That is, protracted periods of incrementalism are displaced by abrupt shifts in the policy landscape. Baumgartner and Jones referred to this ebb and flow of stability and change in politics as "punctuated equilibria" (18), suggesting that inquiry for a general equilibrium in the policy process presumably would be in vain.

One of the prime contrasts between the study by Kingdon and that by Baumgartner and Jones is the latter supported their theoretical analysis with credible empirical verification and results. Accordingly, their evaluation of agendas and the policy process was generalizable across many distinct policy arenas or, as they prefer, policy subsystems.

Nevertheless, both of these perspectives specifically concerned the non-judicial branches of government, as each pertained primarily to the manner in which agendas are set and public policy is made via legislative votes and presidential decisions. As a consequence, the query inevitably becomes, can the theoretical positions and analyses by these policy scholars be applied to the manner in which agendas are set and policies made in the courts? I contend that not only are these perspectives applicable to a study on judicial agendas, but that it is both beneficial and vital that they not be ignored in any such exploration. Indeed, both judicial and policy scholars have argued that these respective approaches to agendas and policy can be applied to the courts (*see, e.g.*, Perry 1991b; Barclay and Birkland 1997), especially since there is little disagreement at this point among judicial scholars and other political scientists that judges are political actors who seek to impose their policy preferences on society (Rohde and Spaeth 1976; Rohde 1972; Murphy 1964).³ As argued by policy scholars: "A political institution deciding on issues of policy fits the parameters of a traditional policy making institution" (Barclay and Birkland 1997, 9). Since it seems obvious that this statement includes the courts, the policy literature is appropriate for any study on judicial agendas.

How then should these scholarly approaches to the policy process be adopted to this study on the federal courts? To begin, since the 1930s the Supreme Court's agenda has developed from being populated predominantly with economic regulation cases to having

³Of course, legal, institutional, and social constraints place limitations of varying degrees upon judges in their ability to promote their favored policies to the extent possible (Brace and Hall 1993; Caldeira and Wright 1988; 1990; Songer 1987), although these checks are much less apparent or realistic at the Supreme Court than at other courts (Segal 1997).

a more extensive emphasis on civil liberties, although this transformation has not been entirely smooth or without peril. Under these circumstances, the relevance of issues such as punctuated equilibria and the coupling of policy streams seems axiomatic. With respect to the judicial process, for instance, policy entrepreneurs could be a Supreme Court justice, the Solicitor General, the Chair of the Senate Judiciary Committee, litigants and their lawyers, or interest groups, among others, each of whom vies to advance particular issues onto the agendas of the courts. Their success depends, in part, on the extent the political and problem streams provide for an open, relevant policy window (*see* Pacelle 1991). Or, as Baumgartner and Jones (1993) suggested, groups seek out certain venues, or institutions, which might afford them a more favorable hearing (Barclay and Birkland 1997); resort to the courts by litigants, interest groups, and their representatives seems pertinent in this regard, especially when the Supreme Court signals that it is becoming more amenable to particular types of issues.

While scholarly research on agendas and policy in general, such as those by Kingdon or Baumgartner and Jones, have tended to ignore the courts in their analyses, it does not follow necessarily that judicial research has neglected either agenda or policy issues as well. To the contrary, there has been a good deal of notable research on agenda issues in the courts.⁴ Nevertheless, more needs to be accomplished. As Schattschneider provided (1960, 68): "[T]he definition of the alternatives is the supreme instrument of power . . . He who

⁴For instance, some judicial research has incorporated various concepts stemming from the policy literature (*see, e.g.*, Hackman 1966; Barker 1967; Olson 1984; Caldeira and Wright 1988; Pacelle 1991).

determines what politics is about runs the country, because the definition of the alternatives is choice of conflicts, and the choice of conflicts allocates power." Since, as I argue, these concepts are as applicable for the judiciary as for other political institutions, now it is time to turn to what we know about judicial agendas.

AGENDA SETTING IN THE COURTS

Public law scholars who have studied agenda formation unquestionably champion the magnitude of such research. For instance, Caldeira and Wright (1988, 1109) contended that "the decision to review a case ranks as important as – if not more important than – the decision on the merits." Pacelle asserted (1991, 23): "At the broadest level, the agenda [of the Supreme Court] is an integral part of the policymaking process." And, Perry (1991b, 235) noted: "Deciding to decide is one of the most important tasks performed by any political institution."⁵ Still, public law scholars must concede that, despite these and other studies, all important in their own right and representing solid research agendas, analysis of agenda issues concerning the courts "has not been commensurate with its importance" (Perry 1991a, 5). Nonetheless, while I believe that more research needs to be performed, this section reviews much of the past literature on agenda setting in the courts.

Research on issues pertaining to judicial agendas has focused chiefly on the Supreme Court; and, most of this scholarship has concentrated solely on one (albeit consequential)

⁵Similar assertions are made by those studying other political institutions. For instance, Light (1991, 105) insisted: "Selecting alternatives is perhaps the single most important step in the presidential policy process. . . More than any other choice, the choice of alternatives determines who gets what when, where, and how."

element of agenda formation, the manner in which the Court accepts individual cases. Accordingly, the earliest studies on the Court's case selection process were accomplished by Schubert (1959, 1962), who utilized formal theory and voting patterns on the merits to argue that justices voted strategically when deciding whether or not to grant writs of certiorari (hereafter, "cert.") in order to obtain preferred decisions on the merits. In particular, Schubert asserted that a bloc of justices could force the Court to grant cert. in order to achieve the bloc's preferred policy results on the merits. While his game-theoretic approach was critical in alerting scholars to the study of judicial agenda issues, Schubert offered no empirical tests of his model.⁶

Other pioneers of this variety of agenda research include Tanenhaus, *et. al.* (1963), who used "cue theory" to explain that cert. more likely would be granted by the Supreme Court given a cert. petition comprising certain signals. That is, they propounded that particular cues which were displayed in a petition would alert the justices to their relevance, thereby increasing the potential of cert. being granted. As they posited (118): "The presence of any one of these cues would warn a justice that a petition deserved scrutiny. If no cue were present, on the other hand, a justice could safely discard a petition without further expenditure of time and energy." Specifically, Tanenhaus and his colleagues postulated that the appearance of any of the following cues would lead to a greater incidence of the Supreme Court granting cert. in particular cases: 1) if review was sought by the federal government; 2) if either conflict among the circuits or dissent among the judges on the court below was

⁶*But see* Provine (1980), who utilized Justice Burton's papers to test, and potentially undermine in part, Schubert's theory.

present; or 3) if either a civil liberties or an economic case was at issue. Scrutinizing the dockets for the Court's 1956 through 1958 terms, they charged that all of these cues led to a greater incidence of case selection, save for the hypothesized cues on economic cases.⁷

Ensuing research variously has substantiated much of both Schubert's and Tanenhaus' analyses. With respect to Schubert's claim that cert. votes were associated with final votes on the merits based on the justices' policy preferences, Baum (1977) concluded that cert. decisions were attitudinally-based, as judges are more likely to vote to hear and decide a case when they disagreed ideologically with the decision in the court below. In that same vein, Jucewicz and Baum (1990, 133) offered that "the justices followed primarily the value-based model of case-screening." Brenner and Krol (1989) found evidence that justices' votes on cert. and the merits were connected in a number of ways, such that they were more likely to grant cert. when they disagreed with the decision below or when they were part of the ideological majority of the Court. Krol and Brenner (1990, 340-342) subsequently asserted, contrary to a part of their initial findings, that cert. votes likely were not related to a justice's expectation of being in the ensuing majority coalition. Nonetheless, Boucher and Segal (1995, 835) then contended that justices do act strategically when voting on cert. petitions, as they "cast an eye toward the Court's behavior on the merits." Additionally, a number of other researchers have verified assorted portions of Schubert's examination, though each from a different perspective and to varying degrees of concordance

⁷It should be noted that such a research design clearly is problematic, as it is based on selection on the dependent variable (*see* King, Keohane, and Verba 1994). Once the papers of several retired justices subsequently were released, however, this statistical dilemma was elucidated to a degree.

(see, e.g., Ulmer 1972; Songer 1979; Palmer 1982; Perry 1991a; and Caldeira, Wright, and Zorn 1996).⁸

Similarly, several judicial scholars have determined that the presence of certain factors induced an elevated likelihood of cert. being granted by the Supreme Court, thus in part ratifying cue theory and the findings by Tanenhaus and his associates. In particular, researchers have determined that conflict among circuits (Ulmer 1983; 1984), review sought by the solicitor general (Segal 1988), filing of amicus curiae briefs (Caldeira and Wright 1988) and the presence of particular professional lawyers in a case (McGuire and Caldeira 1993) all ushered a higher probability of the Court granting cert.⁹

As the above discussion makes clear, the assertions and findings by these innovators of judicial agenda research generally have been validated by many and diverse researchers.¹⁰ Nonetheless, one important study on case selection at the Supreme Court critically questioned the findings of both Schubert and Tanenhaus. Taking a legalistic approach in *Case Selection in the United States Supreme Court*, Provine (1980) argued that the judicial role restricts the articulation of personal preferences, at least in the cert. process. Utilizing the Burton papers to test and challenge Schubert's theory, Provine determined that his

⁸See also Rowland and Todd (1991), who ascertained that the ideology of judges is associated with their gatekeeping decisions on standing when parties seek access to the Federal District Courts.

⁹Nevertheless, while Caldeira and Wright (1990) found that most of these factors influenced the cases which made the Court's 'discuss list,' they contended that all were not instrumental in the decision to grant cert.

¹⁰As Boucher and Segal stated (1995, 825): "Like so many areas in the judicial subfield, the first work in cert. strategy belongs to Schubert."

power-motivated game among strategic voting blocs on cert. decisions did not comport with empirical reality.¹¹ "The evidence that power politics was not central in case selection, where such behavior could have been highly effective, suggests that Supreme Court justices deem outcome-oriented voting inappropriate. It seems likely that a shared conception of the proper role of a judge prevents the justices from exploiting the possibilities for power-oriented voting in case selection" (172). With respect to Tanenhaus' analysis, Provine again employed Justice Burton's papers, which enabled her to circumvent Tanenhaus' problem of selection on the dependent variable, provided for a greater number of cases to study, and facilitated an enhanced test of cue theory.¹² She insisted that her results illustrated that the specific cues set forth by Tanenhaus, *et. al.*, necessarily did not lead to a greater incidence of cert. being granted.

A discussion of Provine's work on cert. decisions inevitably leads to Perry's (1991a) comprehensive study on the cert. process entitled *Deciding to Decide: Agenda Setting in the United States Supreme Court*, where Perry also concentrated on the means of individual case selection. To do so, he interviewed several Supreme Court justices and many of their law clerks over a number of years, while keeping their identities anonymous, in order to determine the manner in which the Court decides to accept and deny cases on cert. By focusing on individual justices and the method of decision making at the cert. stage, Perry's

¹¹Justice Burton's papers were released to the public after his death in 1965; accordingly, they were not available to Schubert when he conducted his analyses, which were published in 1959 and 1962.

¹²As with Schubert, Tanenhaus and his associates did not have access to the Burton papers when carrying out their study, published in 1963.

primary finding was that the cert. process, while more complex than he had anticipated, displayed a greater prevalence of legal attributes, as opposed to political characteristics (whether ideological or strategic, such as those posited by the adherents of Schubert and Tanenhaus), than political scientists had come to believe. This complexity revealed by Perry is illustrated by the following excerpt from an article in which the authors argue that the justices generally exhibited strategic behavior during the cert. process: "The essence of Provine's claim is supported by the recent work of Perry . . . who argues that cert. is essentially a legal process, not a political one. . . Nevertheless, Perry does not deny the existence of strategic voting, merely its prevalence" (Boucher and Segal 1995, 825).

Which view of the Supreme Court's agenda formation is correct, then, the legalistic one supported by Provine and, to a lesser extent, Perry, or the behavioral and strategic approaches suggested by Schubert, Tanenhaus, and their followers? Probably both, at least to a certain extent. As Perry (1991b, 238) insisted: "notwithstanding the convincing argument by Provine that cue theory as described by Tanenhaus was disproved by the Burton data, the idea of cues has been discarded too quickly. Few cues will be sufficiently important by themselves to place a case on the discuss list or predict case selection with any degree of impressiveness. Nonetheless, Tanenhaus's basic idea of cues still has validity in describing a decision process, though not as precisely as Tanenhaus envisioned it."

Thus, while Provine (1980) maintained that the cert. process is essentially a legal exercise, this is not the sole or even primary manner in which cert. decisions are made. Perry continued (1991b, 239): "sometimes justices cast cert. votes as this literature [following upon Schubert and Tanenhaus] describes and sometimes they do not, depending upon their interest

in the outcome of a case. . . But the findings are mixed. . . Findings by various scholars are consistent enough to know that cert. votes are related to votes on the merits, but results have not been stable enough, or studies have not measured the same things in such a way as to be able to say definitively, how the cert. vote and merits are related."

Review of the literature thus far demonstrates that much of the scholarship on judicial agendas concentrates on the Supreme Court; moreover, the core of this focus almost entirely is on the cert. process of individual case selection, with no definitive portrayal thereof. Nevertheless, as Perry (1991b, 244) admonished: "One way to become broader and more theoretical, and to tie in more directly with other political science research, is to expand the horizon from case selection to the broader concept of agenda setting." One public law scholar who took this advice to heart in his research on the Supreme Court was Pacelle (1991). Incorporating a distinct theoretical and methodological approach from the preponderance of agenda research which had transpired before him, in *The Transformation of the Supreme Court's Agenda* Pacelle (23) focused on the Court's agenda "as an institutional entity rather than the summation of individual case selection."¹³

Pacelle's study encompassed a 50 year period, from the time of the constitutional crisis of the late 1930s through the initial terms of the Rehnquist Court in the 1980s. He discovered that the alterations of the Court's docket over time embodied a dynamic,

¹³Interestingly, the few studies which have viewed judicial agendas in broad, institutional terms concerned either lower federal or state courts (*see, e.g.*, Grossman and Sarat 1975; Atkins and Glick 1976). With respect to these works, Pacelle (1991, 11) maintained: "These studies are different in emphasis but support the propositions that underlying social, political, and economic activities affect the complexion of the agenda and that the agenda has an independent empirical meaning."

nonrandom process, such transformations being steered by landmark decisions which were espoused when relevant policy windows opened (*see* Kingdon 1984). The result was an incremental yet systematic and orderly increase in the number of civil liberties cases over time which replaced the economic cases that earlier had predominated the Supreme Court's docket. Nevertheless, Pacelle argued that inertia stemming from institutional constraints functioned to impede both wholesale agenda change and the pace of dynamic alteration of the Court's agenda.

Understanding agenda issues is vital, therefore, if we are to learn fully about the nature and priorities of political institutions, including the judiciary. As Pacelle (1991, 1) succinctly professed: "Changes in agenda priorities and judicial doctrine are a function of institutional transformations and may reflect broader-scale changes occurring in the external political, social, and economic environment." Yet, as I believe I have demonstrated, most of the research on judicial agendas concerns only the Supreme Court, as there is a relative dearth of research on the agendas of other federal courts.¹⁴ Furthermore, most of the research on the Supreme Court's agenda is limited to individual case selection, as few beside Pacelle (1991) have inquired into "the broader concept of agenda setting" (Perry 1991b, 244) or other external influences on judicial agendas. Whatever the variety of research, there are few if any studies making comparisons, systematic or otherwise, of the Supreme Court's agenda to the agenda any other court, whether federal or state. Indeed, the only comparative study of any sort of which I am aware is the preliminary one by Epstein and Segal (1997)

¹⁴Howard's (1981) study on the Courts of Appeals is a notable exception, although lack of systematic analysis, to a certain extent, limits his implications.

which explored the Court's ostensible strategic behavior on agenda setting in reaction to potential congressional action.¹⁵ Just as studies across various courts are necessary to determine a general theory of judicial decision making (*see* Hall and Brace 1995), it behooves us to make similar comparisons in studies on issues other than decision making, such as the manner in which judicial agendas are set. As Epstein and Segal counseled (1997, 21): "we encourage more studies on the external context of Court agenda setting." Accordingly, it remains to be seen if, in fact, the federal judicial system "articulates as a system" (Frankfurter and Landis 1927, 3), at least with respect to the agenda-setting nature of the federal courts. Therefore, it is my intent that this study fill part of this void by systematically comparing and contrasting the agendas of the Supreme Court and the Courts of Appeals over time.

DYNAMIC CHANGES IN THE AGENDAS OF THE FEDERAL COURTS

In the previous sections I discussed the manner in which scholarly research has viewed agendas, both in general and with specific regard to the judiciary. In this section I address the procedures by which the Supreme Court and Courts of Appeals set their respective agendas and the manner in which these agendas have changed over the years.

The dialogue on agendas and public policy characterized a political environment in which issues appeared on the agenda when appropriate opportunities arose and relevant entrepreneurs took advantage of such prospects. Nevertheless, this review did not consider

¹⁵It remains to be seen whether Epstein and Segal (1997) expand upon or follow through on their study of external constraints on the Court's agenda.

the fact that particular institutions may have additional political constraints which neither Kingdon (1984) or Baumgartner and Jones (1993) alluded to concerning the formation of the institution's agenda. In particular, they did not address the practical limitations on the federal courts' ability to form their agendas (Epstein and Segal 1997).

Some of these restraints on agenda formation stem from the Constitution. For instance, as provided in Article III, Section 2 thereof,¹⁶ no issue can be addressed on the Supreme Court's agenda unless it is presented to the Court as a legitimate case or controversy.¹⁷ Moreover, there are standards which potentially limit the development of new issues in a case before the Court, although issue fluidity may be commonplace and tend to limit this legal principle (McGuire and Palmer 1995). The Constitution further abridges the ability of the Supreme Court to set its own agenda by confining its jurisdiction to federal questions and cases brought under diversity of citizenship. These various constitutional specifications and restrictions preclude the Supreme Court from enjoying complete and unfettered discretion over formation of its agenda.

Likewise, a distinction exists between the Supreme Court's original and appellate jurisdiction. Generally speaking, the Constitution provides Congress with the ability to

¹⁶All references to the Constitution in this section are made to Article III, Section 2, unless provided specifically otherwise.

¹⁷Generally speaking, the criteria for determinating whether real case or controversy exists include: the parties must have standing; the case must be ripe; the case must neither be moot nor a political question; available remedies must be exhausted; the decision being appealed from must be final; and, advisory opinions from the court are precluded (Baum 1995; Fine 1997). Nevertheless, courts usually can evade most of these technical requirements if they so desire (Segal and Spaeth 1993).

institute the Supreme Court's appellate jurisdiction through legislation, while it precludes the legislature from modifying the Court's original jurisdiction (Baum 1995). *See also Marbury v. Madison*, 1 Cranch 37 (1803); *Ex parte McCordle*, 7 Wallace 506 (1869). As a consequence, Congress has the potential to narrow further the Supreme Court's ability to compose its own agenda, at least with respect to its appellate jurisdiction. Since the vast majority of cases before the Supreme Court derive from its appellate jurisdiction, not its original jurisdiction,¹⁸ Congress' power to adjust the Court's authority to hear cases, while not absolute, is quite extensive (Baum 1995).

While Congress' broad authority to abridge the appellate jurisdiction of the Supreme Court hypothetically might hamper the Court in its ability to construct its own agenda, in reality Congress' revisions of the Court's appellate jurisdiction over the years instead have afforded the Court with an enhanced ability to fashion its agenda. This has been accomplished by a series of laws which have diminished the category of cases the Supreme Court must hear (*i.e.*, the Court's mandatory jurisdiction) while expanding the Court's power to select the cases it wishes to hear (*i.e.*, its discretionary jurisdiction). Most of the legislation reducing the Court's mandatory jurisdiction has been grounded primarily upon perceived workload concerns of the Court. As well, each law was passed with the Court's consent, and many times in light of strong judicial lobbying.¹⁹

¹⁸The few cases decided under the Supreme Court's original jurisdiction usually have arisen as disputes between two states (Baum 1995; Carp and Stidham 1991).

¹⁹"In May 1988, Chief Justice Rehnquist wrote that the elimination of the Supreme Court's mandatory jurisdiction was 'the primary legislative goal of the Court'" (Carp and (continued...)

The Judiciary Act of 1925 was the first major legislative effort specifically designed to lessen the Court's workload by amending its appellate jurisdiction, as this law eliminated many of the issues which previously arose under the Court's mandatory jurisdiction. More importantly, the Judges Bill (as it is commonly known) created the writ of certiorari and required that the majority of cases decided by the Court derive from such writs. The establishment of writs of cert. essentially granted the Court with discretionary jurisdiction, a power it did not have ordinarily prior to enactment of the Judges Bill. That is, instead of being compelled to decide all cases properly brought under writs of appeal, the Supreme Court now could grant cert., and thus decide cases, on a discretionary basis.²⁰

Subsequent to the Judges Bill, a number of laws was passed by Congress which continued to increase the operation of the discretionary cert. process while abating the availability of mandatory writs of appeal. This legislative trend culminated with passage of the Judicial Improvements and Access to Justice Act of 1988, which for all practical purposes eliminated writs of appeal, leaving the cert. process as the principal means by which a case could reach the Supreme Court (*see* Baum 1995; Carp and Stidham 1991; Pacelle 1991; Perry 1991a). Ergo, from 1925 through 1988, Congress fundamentally transformed the Supreme Court's jurisdiction "from primarily mandatory to almost entirely

¹⁹(...continued)
Stidham 1991, 43; *quoting from, The Third Branch* 1988).

²⁰As Justice Murphy elucidated: "Writs of certiorari are matters of grace." *Wade v. Mayo*, 334 U.S. 672, 680 (1948). Of course, the procedure by which the Supreme Court now grants cert. is the rule of four, whereby the approval of a minimum of four justices is necessary for the Court to decide a case on its merits; if less than four justices want to hear a case, then cert. is denied, leaving to stand the decision below.

discretionary" (Jucewicz and Baum 1990, 123). The integral consequence of these changes in the Supreme Court's discretionary jurisdiction is a heightened, indeed nearly absolute, capacity to determine its own agenda, circumscribed only by the constitutional requirements that cases and controversies, brought under the auspices of either a federal question or diversity, be decided by the Court.²¹

To the contrary, the jurisdiction of the Courts of Appeals, and thus the manner in which the agenda of these courts is defined, is very disparate from that of the Supreme Court. Article III, Section 1 of the Constitution provides Congress with authority to establish federal courts inferior to the Supreme Court. Although the Constitution does not mandate Congress to do so, in 1891 the modern Courts of Appeals were established with enactment of the Circuit Courts of Appeal Act. As a result of this legislation, nine circuits courts were formulated. The Court of Appeals for the District of Columbia Circuit was incorporated into this system in 1893; finally, the Courts of Appeals for the Tenth and Eleventh Circuits were added in 1929 and 1981 when existing circuits were divided (Howard 1981; Carp and Stidham 1991; Stidham, Carp, Songer and Surratt, 1992). Accordingly, a dozen separate, geographically-based federal Courts of Appeals exist today.²²

²¹The Supreme Court cannot initiate cases; like most other courts, it must await cases to be brought to them. Notwithstanding this technical, potentially limiting requirement, this likely does not handicap the Court's potential to shape its own agenda, simply due to the fact that in recent years the Court has received nearly 7,000 petitions per term, of which it has decided approximately 100 by full, written opinions (Baum 1995; Carp and Stidham 1991).

²²Pursuant to the Judiciary Act of 1789, the First Congress created the initial federal circuit courts. These courts remained active in various forms until they were abolished in 1911, after becoming obsolete with passage of the 1891 law (Carp and Stidham 1991).

In addition to the power to create these inferior courts, the Constitution necessarily provides Congress with the capacity to assign the appellate jurisdiction to these courts. Through a variety of laws, Congress accordingly has defined the jurisdiction of the Courts of Appeals to be predominately mandatory.²³ Thus, subject to the constitutional requirements that federal courts decide only cases or controversies characterized by a federal question or diversity, the Courts of Appeals must accept and hear each and every properly appealed case.

The difference between the Supreme Court and the Courts of Appeals with respect to jurisdiction, therefore, is stark. One consequence of this distinction has been an incredible expansion of the number of cases commenced in, and decided by, the Courts of Appeals. The number of cases filed in the Courts of Appeals increased from about 15,000 in 1973 to over 50,000 in 1993 (Carp and Stidham 1996). Songer (1991, 36) similarly reported that there has been a "sixty-seven-fold increase [in docketed cases] since 1895 and a ninefold increase just in the twenty-seven years from 1960 to 1987." In contrast, the Supreme Court issued a mere 84 written opinions in its October 1993 term. It accordingly has been argued that the Courts of Appeals are effectively courts of last resort (Howard 1981).

Furthermore, with respect to agenda formation, this glaring distinction in jurisdiction between these federal courts signifies that the Supreme Court has the ability to, and does, construct its own agenda. While the justices may be constrained in ways political actors in

²³The mandatory jurisdiction of the Courts of Appeals consists of two broad categories of appeals: 1) ordinary civil and criminal appeals from the federal district courts, *see* 28 *U.S.C.* §§ 1291, 1292; and 2) administrative appeals, whether of rule making or adjudicative character, *see A.P.A.* §§ 552b, 702 (Carp and Stidham 1991).

the other branches of government are not (Epstein and Segal 1997), for all practical purposes the Supreme Court has considerable discretion to set its own agenda. The federal appeals courts, however, remain in the position the Supreme Court was in before enactment of the Judges Bill in 1925, where "agenda reflected the cases and issues litigants considered important" (Pacelle 1991, 62). In other words, circuit court judges have no authority over the mode by which the agenda of their courts is demarcated, as those decisions instead are made by those who seek access to the appeals courts, *i.e.*, the parties. Thus, the Supreme Court justices appear to possess the "supreme instrument of power" (Schattschneider 1960, 68) to determine the Court's agenda, whereas the various judges sitting on the Courts of Appeals must accept all cases properly brought before them.

The next subject, then, is to examine the agendas of these courts and observe how they have been modified over the years. That is, which issues has the Supreme Court emphasized, which has it ignored, and has this pattern changed over time? Similarly, what types of cases have parties considered to be meaningful enough to petition the Courts of Appeals? I employ the term "issues" here because a court's agenda is composed essentially of the disparate issues which appear in the cases on its docket. The more significant an issue is to those who affect the agenda, then the greater the number of times that issue will appear on the court's agenda relative to other issues. Since absolute numbers provide no relative or meaningful measure of agenda change, I will note the percentage of the various issues on these courts' agendas per year and the manner in which such emphases have changed over time.

The following types of issues comprise the vast majority of cases which shape the agendas of the federal courts: civil liberties (which specifically includes civil rights, first amendment, due process, and privacy); economic regulation; criminal procedure; union and labor; attorneys; federalism; interstate relations; federal taxation; and miscellaneous. Accordingly, these are the issues I will examine throughout this study as I attempt to discover the various influences of agenda changes in both the Supreme Court and the Courts of Appeals. A review of the following graphs demonstrates, in a summary fashion, the changing accentuations by the agenda-setters on each of these courts.²⁴

To begin, I will look at civil liberties, a topic which has garnered much attention among political scientists, judicial and legal scholars, the media, and the public. Figure 1.1 demonstrates the dynamics of this issue in both the Supreme Court and Courts of Appeals. The Supreme Court decided a relatively stable percentage of civil liberties cases from the mid-1940s through the 1950s, while there was quite an increasing emphasis on these cases in the 1960s which peaked in 1971 and steadily decreased since then. The mean percentage of civil liberties cases decided by the Supreme Court during this entire time period (from 1946 through 1995) was just under 30 percent. Parties apparently did not value civil liberties cases with the same significance as Supreme Court justices, since the percentage of these cases was less in the appeals court than in the Supreme Court for every year in the series. Nevertheless, there was an analogous, steadily increasing trend of civil liberties cases in the

²⁴These issues are defined by the coding methods utilized by the United States Supreme Court Judicial Database. The manner in which I operationalized the variables in order to formulate these graphs is set forth in Chapter 2 and Appendix A.

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Since civil liberties cases are made up of a variety of issues dealing with personal or individual liberties, I need to examine each of these issues separately. The manner in which these issues have varied in these courts over the time period is represented in Figures 1.2 (civil rights), 1.3 (first amendment), 1.4 (due process), and 1.5 (privacy). The general trends in civil rights cases, particularly the upward tendencies but also the recent decreasing trend in the Supreme Court, closely followed those for civil liberties cases in both courts, with a mean of about 15 percent and seven percent in the Supreme Court and Courts of Appeals, respectively (*see* Figure 1.2). First Amendment cases demonstrated two increasing slopes in the Supreme Court, the first which peaked in the early years of the Burger Court, the other which began a few years later and crested at the dawn of Chief Justice Rehnquist's tenure; the mean percentage was slightly less than ten percent. In contrast, the percentage of speech cases in the Courts of Appeals remained relatively low and stable; mean percentage here was less than two percent (*see* Figure 1.3).

Due process cases, on the other hand, followed a dissimilar pattern from the rights and speech cases just described, as due process cases seemed to have peaked in the early years of this study in the Supreme Court, while a very slight increasing trend was noticeable in the appeals courts. Averages here for each court were about five percent and two percent, respectively (*see* Figure 1.4). Finally, privacy cases were not all that popular in either court, although some increasing movements and wider variances were apparent for both courts

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throughout the 1970s. The mean percentage of privacy cases in the Supreme Court leveled at only one percent and half of that for the Courts of Appeals.

Furthermore, Figures 1.6 and 1.7 amalgamate all the issues which compose civil liberties in order to illustrate collectively their dynamics. These graphs demonstrate that civil rights cases made up the largest portion of the category of civil liberties in both courts, followed by first amendment issues; neither the Supreme Court justices nor parties in the circuit courts apparently placed too much emphasis on due process or privacy cases, at least not in terms of relative emphasis.²⁵

The next issue concerns economic regulation, the types of cases which Pacelle (1991) asserts the Supreme Court systematically replaced with civil liberties cases. Figure 1.8 reveals that the Courts of Appeals decided more of these types of cases than the Supreme Court throughout the series, as the mean values for economic cases is about 25 percent in the Supreme Court, yet it is a solid 20 percentage points higher in the appeals courts. Nevertheless, while each court displayed a decreasing emphasis of these cases, the pace of decline was much steeper in the Courts of Appeals, although a slight upward inclination is evident in the most recent years of this series.

Revising emphases are visible for criminal procedure cases in both courts over the years. Figure 1.9 illustrates that for criminal procedure cases in the Supreme Court the variance remained fairly stable about the mean of 20 percent or so. A very different propensity was noticeable in the Courts of Appeals, as the percentage of these cases steadily

²⁵In this regard, for instance, *Roe v. Wade*, 410 U.S. 113 (1973), is among the most salient cases, privacy or otherwise, ever decided by the Supreme Court.

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escalated, which culminated in 1969 with about a quarter of its docket being composed of criminal procedure cases; the good times in the appeals courts for these cases did not last, however, as the emphasis on criminal procedure tumbled after this peak. The mean value here was nearly 30 percent over the series.

Next I look at union and labor cases. In the Supreme Court, a fairly stationary percentage of these cases was decided until the early 1980s, when the percentage drastically plunged to nearly nothing. In the Courts of Appeals, however, the relatively constant share of these cases for the entire series demonstrates that litigants did not minimize their emphasis on union and labor cases as Supreme Court justices apparently did (*see* Figure 1.10). The means for these series were about five and eight percent for the Supreme Court and Courts of Appeals, respectively.

Attorneys cases at times are important to the legal bar and to the specific attorneys involved in the matter, but these cases are not too prominent in either the Supreme Court or Courts of Appeals, as Figure 1.11 illustrates. Nevertheless, while the variance seemed fairly stable around the mean of about a half percent attorneys cases in the appeals courts, there seemed to be an increasing trend in the final 15 to 20 years of the Supreme Court series, which is likely responsible for this mean to be about one percent for these cases.

Figure 1.12 denotes the dynamics for federalism cases. Specifically, the Supreme Court never moved too far from its mean percentage of about four percent and, save for a few boom years in the late 1950s, the Courts of Appeals remained fairly close to its mean of less than one percent of these cases. Similarly, neither court seemed to emphasize interstate relations cases, although the Supreme Court reserved about one percent of its docket for

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these cases over the years; however, the percentage of these cases rarely rose to that level in any year in the appeals courts (*see* Figure 1.13).

In contrast, both Supreme Court justices and parties in the appeals courts generally stressed cases concerning federal taxation, although the significance of these cases has changed over time. Figure 1.14 illuminates that tax cases were very important in the Courts of Appeals early on, making up about 20 percent of its docket, but this magnitude dropped precipitously, with the average for this series being about nine percent. The Supreme Court, however, exhibited very different behavior. While the mean for federal tax cases was about four percent in the high Court, it decided a percentage of cases above the mean for the entire period prior to the mid-1960s, while its emphasis on these cases remained below the mean for all the years thereafter. Finally, those cases not appropriate for categorization are codified as miscellaneous cases; that is, besides defying classification, they probably are not all that notable in either substance or numbers. Figure 1.15 corroborates this intuition in part, as only about one percent of each court's docket is made up of miscellaneous cases, although there are a few years in the Courts of Appeals where the percentages appeared to be nontrivial.

The final graphs for this chapter exhibit the agendas for both of these courts in a consolidated fashion. That is, Figure 1.16 illustrates the changing docket for the Supreme Court, while Figure 1.17 is its counterpart for the Courts of Appeals.²⁶ In addition to the discussion earlier in this chapter, what these graphs should make abundantly clear is that the

²⁶Due to the manner in which the United States Courts of Appeals Data Base was coded, slight double counting inevitably occurred. *See* Appendix A.

agendas of both the Supreme Court and the Courts of Appeals are dynamic structures worthy of study. In particular, for the benefit of both judicial scholars specifically and political scientists in general, it is meaningful to determine the influences on the agenda of each court along with the influences of each court's agenda on the other. My purpose in the ensuing chapters will be to ascertain the variety and extent of these effects.

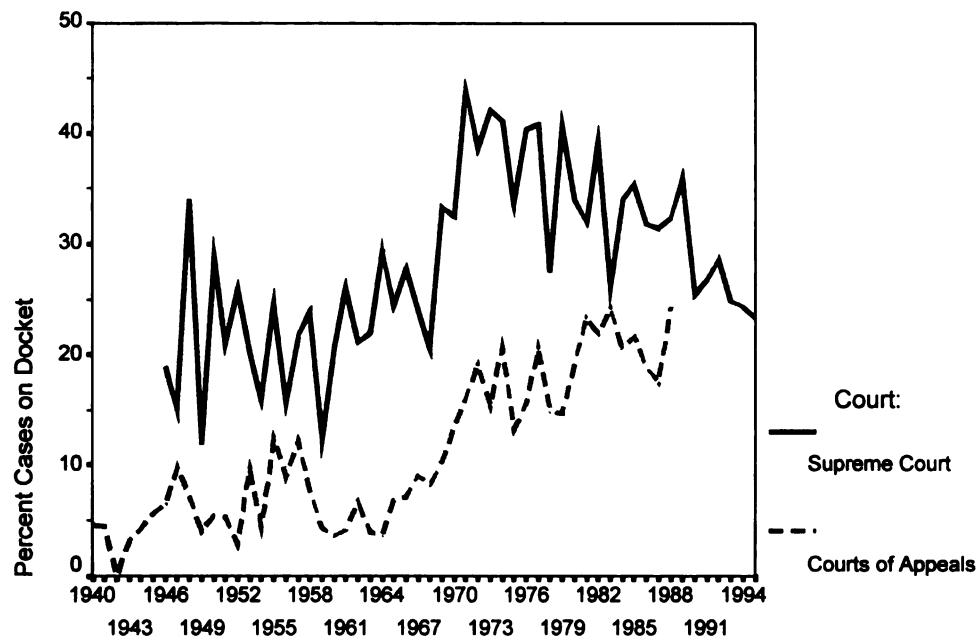


FIGURE 1.1
CIVIL LIBERTIES CASES, 1940-1995

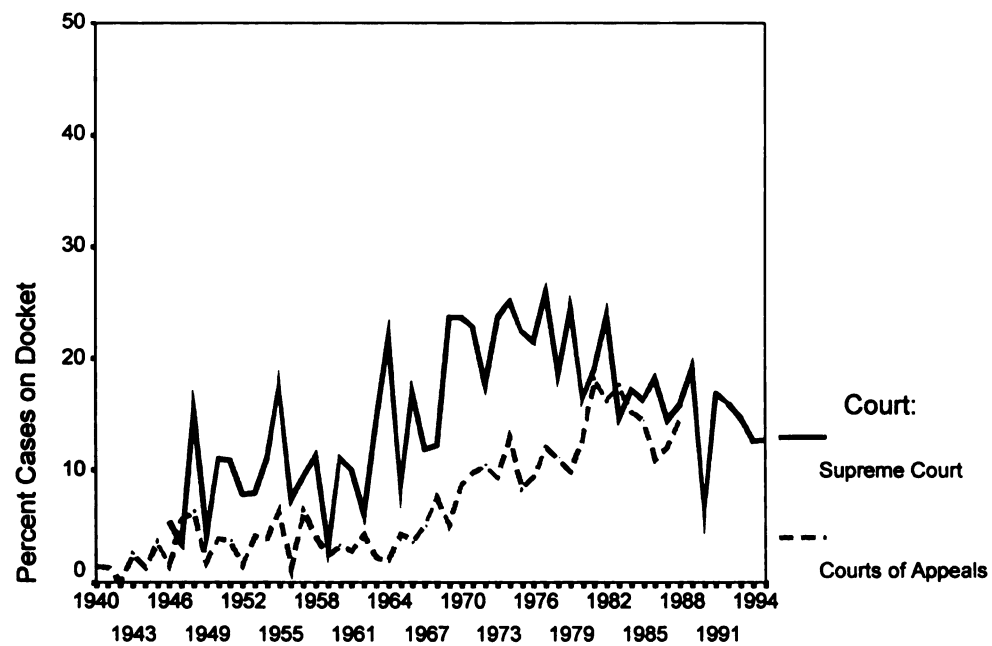
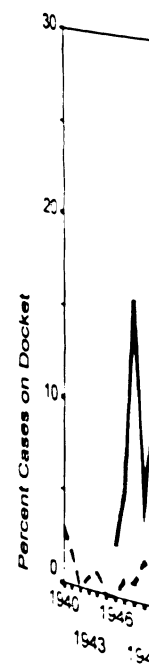
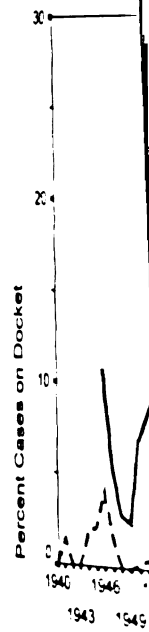


FIGURE 1.2
CIVIL RIGHTS CASES, 1940-1995



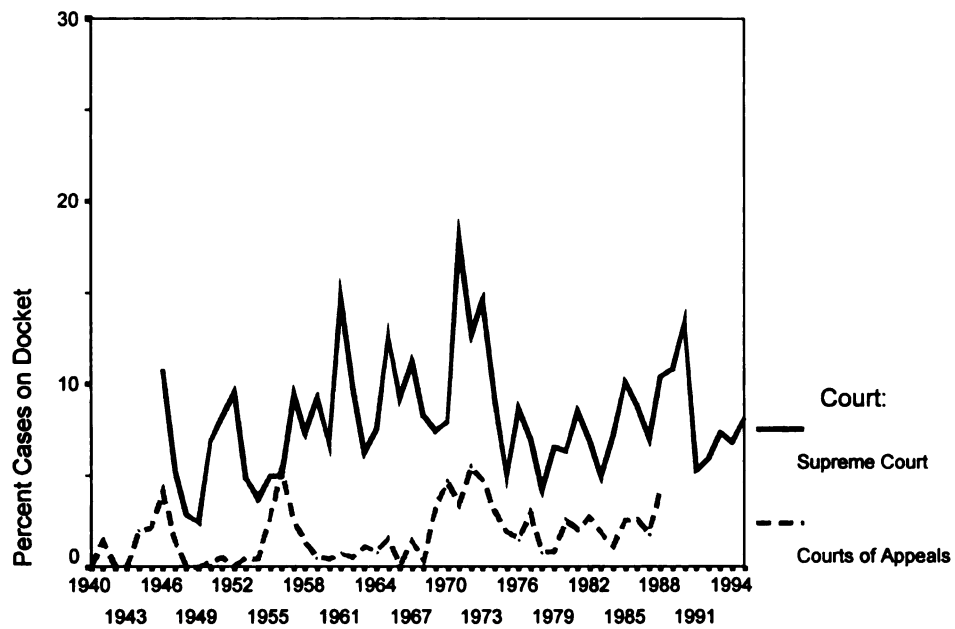


FIGURE 1.3
FIRST AMENDMENT CASES, 1940-1995

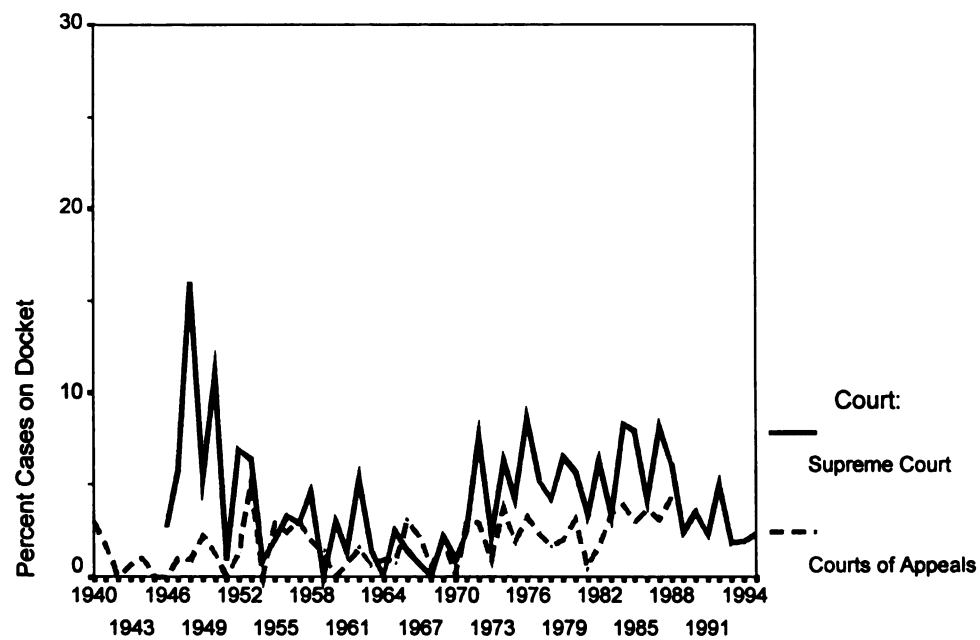


FIGURE 1.4
DUE PROCESS CASES, 1940-1995

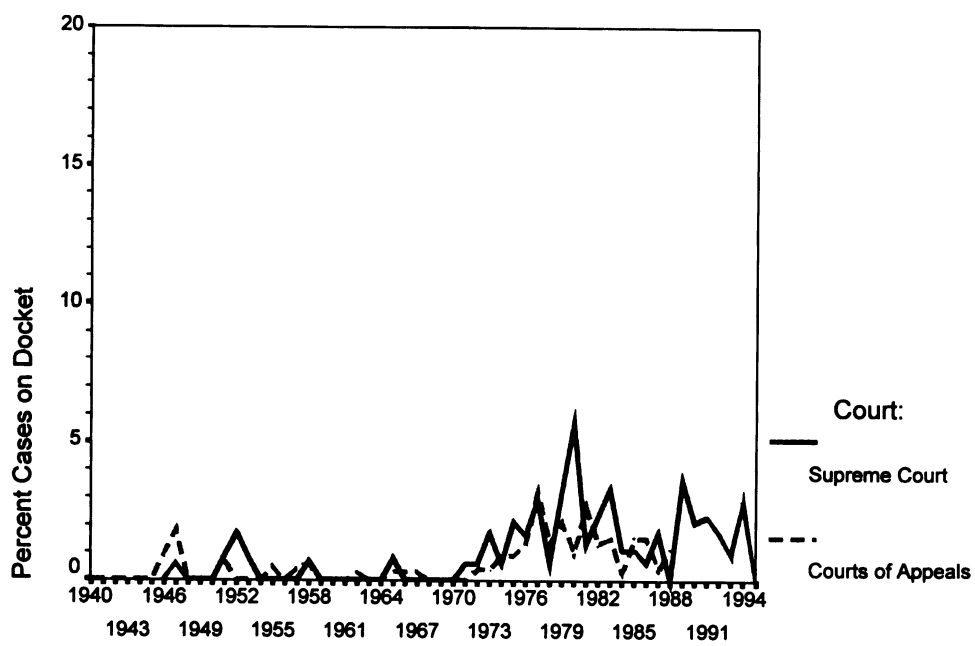


FIGURE 1.5
PRIVACY CASES, 1940-1995

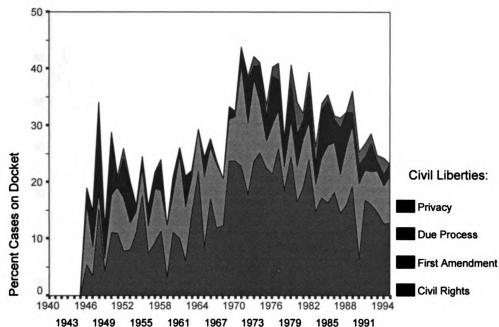


FIGURE 1.6
SUPREME COURT CIVIL LIBERTIES CASES, 1946-1995

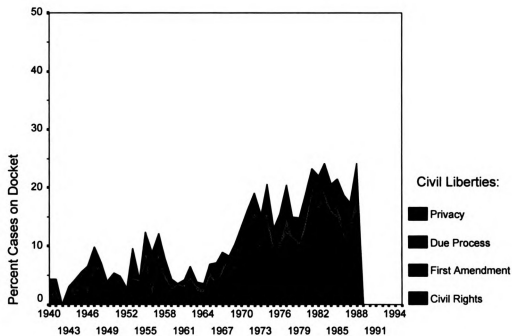
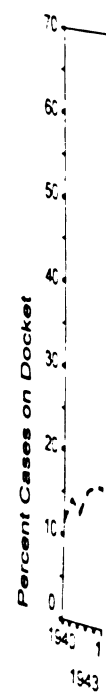
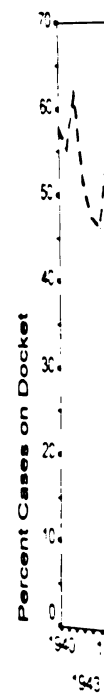


FIGURE 1.7
COURTS OF APPEALS CIVIL LIBERTIES CASES, 1940-1988



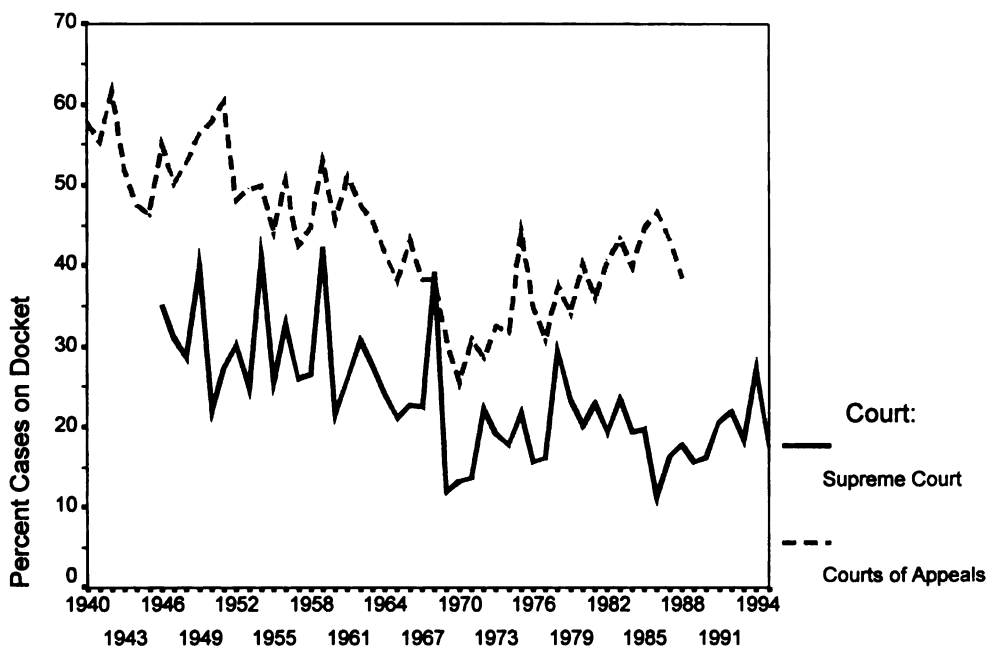


FIGURE 1.8
ECONOMIC CASES, 1940-1995

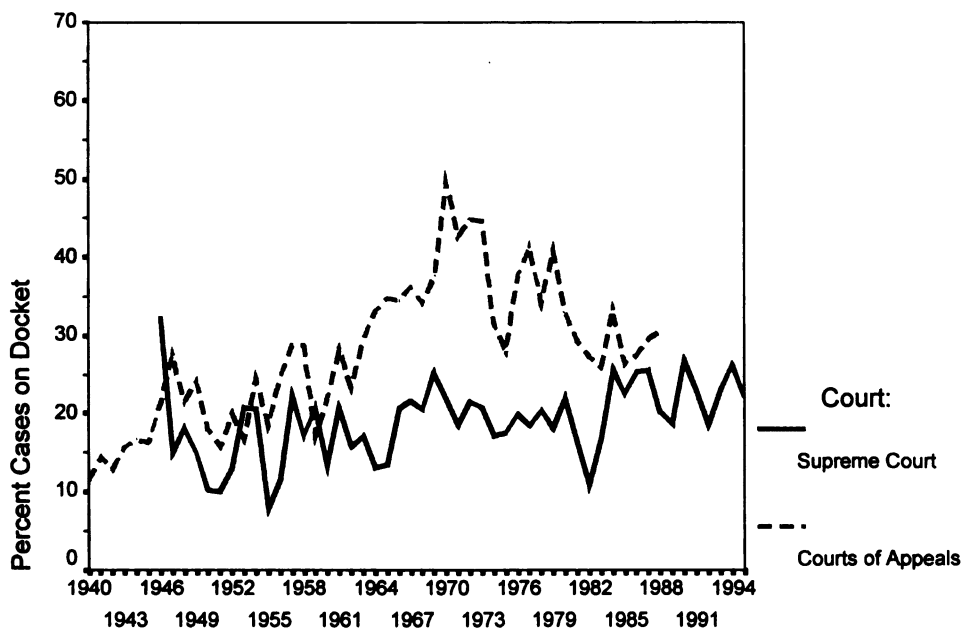


FIGURE 1.9
CRIMINAL PROCEDURE CASES, 1940-1995

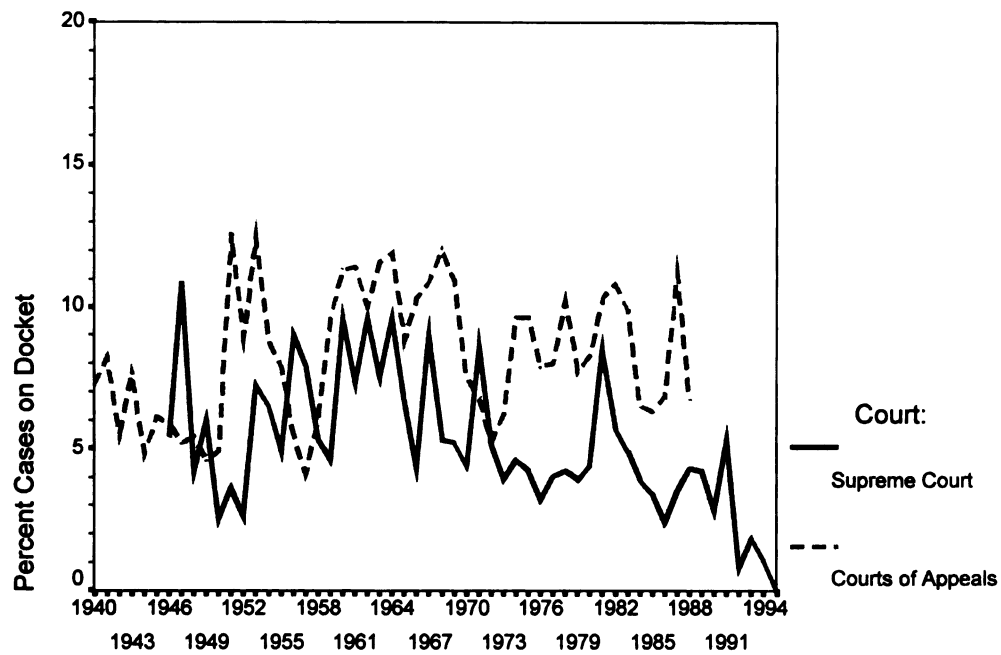


FIGURE 1.10
UNION AND LABOR CASES, 1940-1995

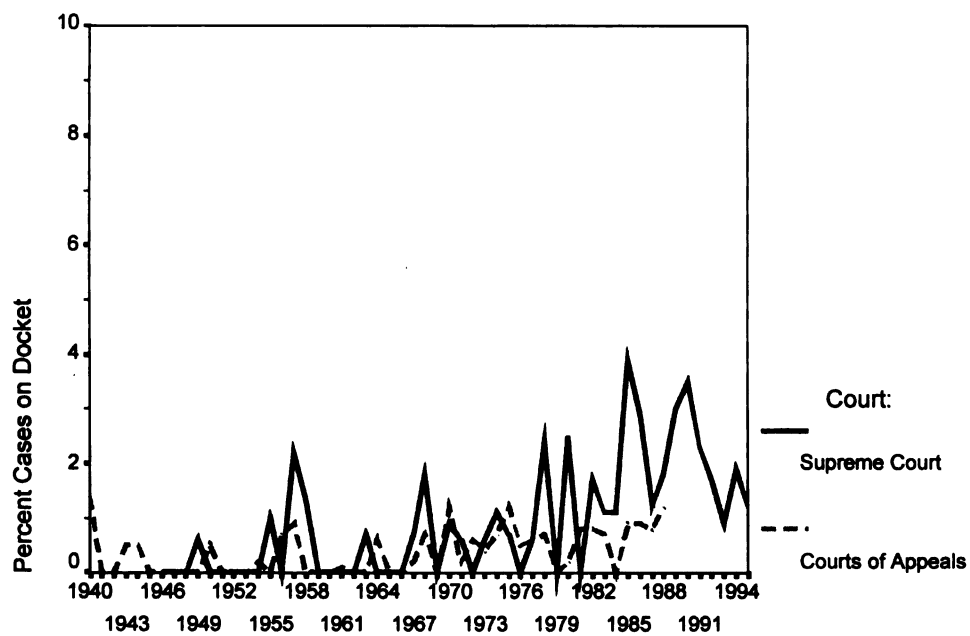


FIGURE 1.11
ATTORNEYS CASES, 1940-1995

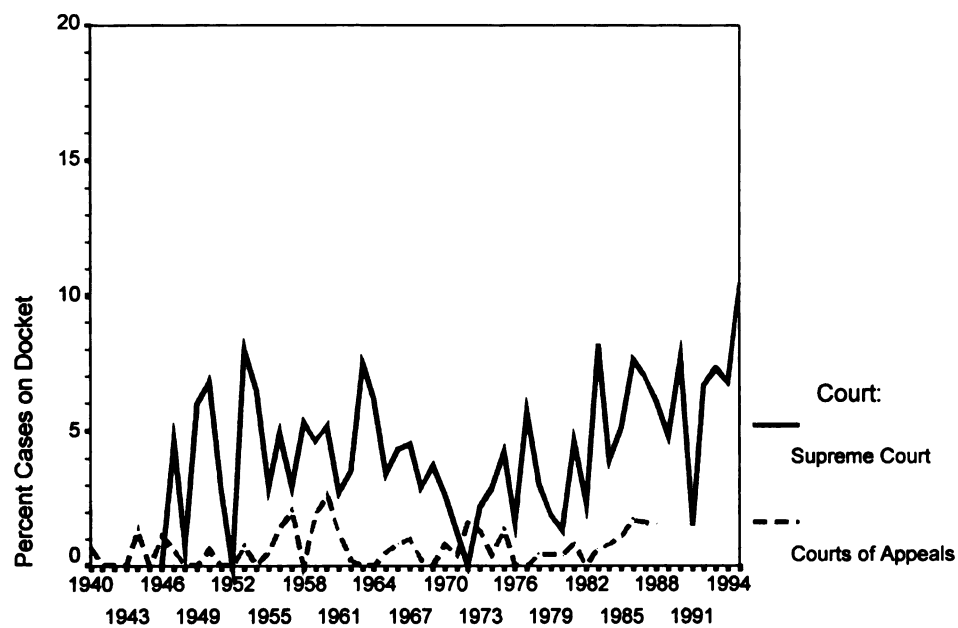


FIGURE 1.12
FEDERALISM CASES, 1940-1995

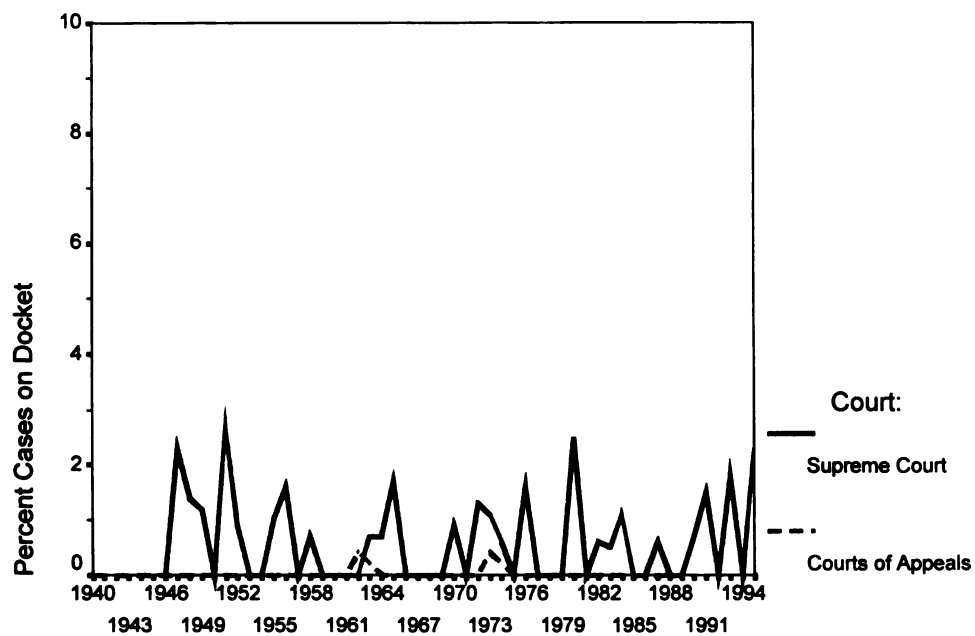
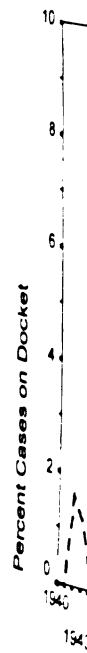


FIGURE 1.13
INTERSTATE RELATIONS CASES, 1940-1995



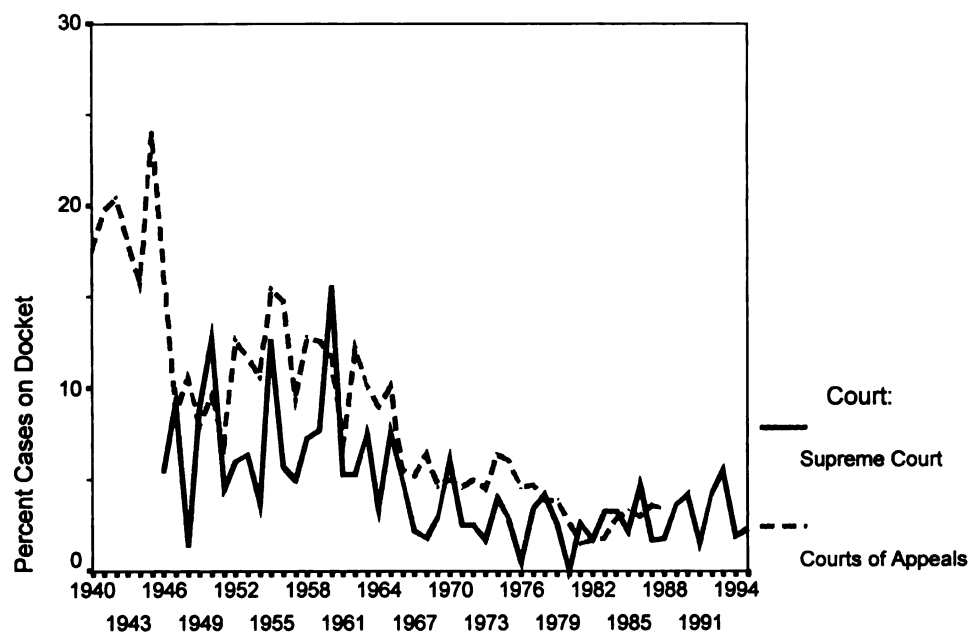


FIGURE 1.14
FEDERAL TAXATION CASES, 1940-1995

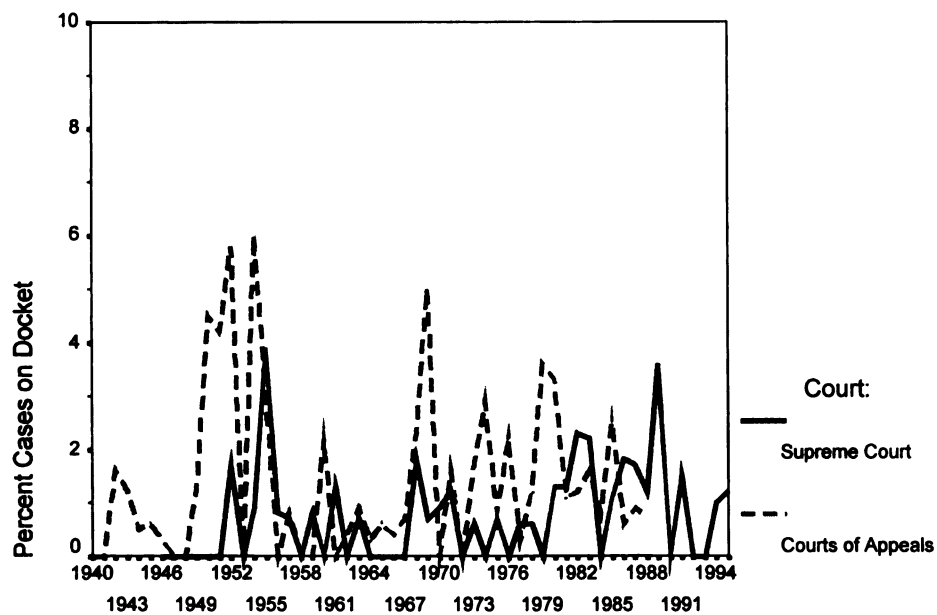


FIGURE 1.15
MISCELLANEOUS CASES, 1940-1995

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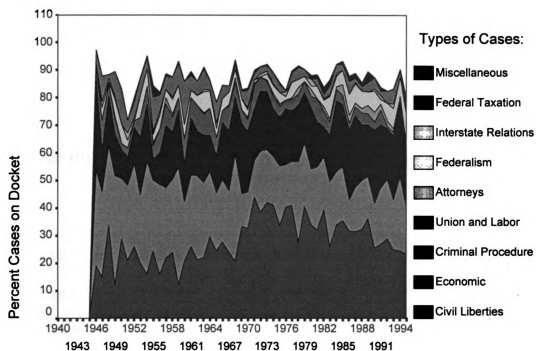


FIGURE 1.16
SUPREME COURT ALL CASES, 1946-1995

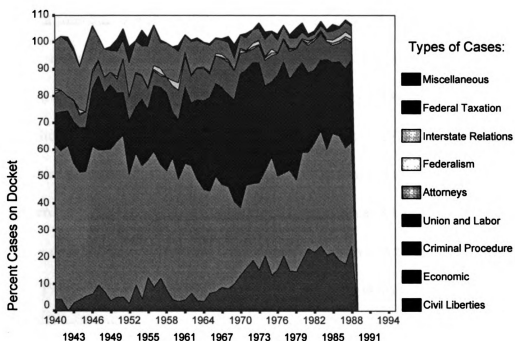


FIGURE 1.17
COURTS OF APPEALS ALL CASES, 1940-1988

CHAPTER 2

THEORETICAL RELATIONSHIPS AND RESEARCH DESIGN AND METHODOLOGY

In this chapter I intend to present a set of theoretical arguments which explain the relationships between the changing agendas of the Supreme Court and Courts of Appeals over time; additionally, I will describe the methods by which I foresee addressing and testing these conditions in the ensuing chapters. Both theory and methodology, I believe, not only are important but are indispensable to this (or any) study, because a full portrayal cannot be accomplished if either of these approaches is shunned or excluded. That is, a strong theoretical foundation in the social sciences is essential in order to explain and generalize about the substantive specifics of human events. Nevertheless, empirical implications of any theory are critical as well (Shepsle 1995; Green and Shapiro 1994). This is particularly true, and applicable, for studying political phenomena (Riker 1990). As the behavioral desideratum provides: "It is possible to understand, explain, and ultimately predict political phenomena; the most accurate way of accomplishing this feat is by *using methods tested by science – empiricism . . .* Thus, research should be *theory oriented* and *theory directed*" (Brown 1981, 58) [emphasis in original]. As outlined in the following pages, I will incorporate such a theory-oriented and -directed approach to this study.

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Since the manner in which the agendas of the Supreme Court and Courts of Appeals are set is so different, any systematic changes in these agendas must be tied together by some cohesive theory. The theory I utilize in this study is rational choice. Rational choice theory has a good deal in common with behavioralism, in that each employs a scientific approach to the study of politics. Nonetheless, there is a key difference between behavioralism and rational choice, to wit: rational choice theory has as its base the theoretical assumption that goal-oriented behavior drives political actors (Rohde and Shepsle 1978). With respect to the Supreme Court's agenda, for instance, the actors involved are the justices themselves, who establish the Court's docket by use of its discretionary jurisdiction. On the other hand, it is the parties and their representatives (whether lawyers or interest groups) which form the agenda at the Courts of Appeals. Accordingly, this study assumes that these political actors are motivated by their various goals, and such an underlying assumption can help explain their behavior.

Application of rational choice theory to politics has its roots in studies on microeconomic behavior (Riker 1990; Aldrich 1994). Indeed, the initial application of rational choice to politics generally concerned an analogous area – issues of mass political behavior. That is, in a manner similar to microeconomic theory, rational choice was implemented by assuming that individual political behavior could be explained by individuals' maximizing their goals, such as when a citizen votes for a party which she

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believes will optimize her benefits (*see, e.g.*, Downs 1957).¹ However, as Aldrich (1994) adeptly propounded, political behavior is unlike economic behavior. Even within politics, however, Aldrich asserted that mass behavior is distinct from elite behavior; in particular, elites likely care a great deal more about the political outcomes than the masses, and elites at times are able to affect or change the rules under which those outcomes are produced, an ability almost entirely lacking in mass actors. According to Aldrich, then, rational choice theory is best utilized in political science when the behavior to be studied concerns political elites engaging in salient, high-stakes endeavors. Moreover, when these elite political actors make political decisions within dynamic institutions which feature endogeneity (*i.e.*, political elites who make or even change the rules of the institution under which their decisions are made), then rational choice proves to be exceedingly appropriate.²

Aldrich's description of the applicability of rational choice theory assuredly incorporates the political actors in my study. For instance, Supreme Court justices are political elites who engage in high-stakes behavior as they pursue their judicial functions

¹Of course, Downs (1957) was not solely interested in the behavior of individuals in the electorate; he also was concerned with a government's maximization of political support and, most importantly, the "mutual interdependence" between the government and the electorate in pursuit of their respective utilities (72).

²A few examples of studies utilizing rational choice in which the research concerned political elites making high stakes decisions in endogenous institutions include: Shepsle's (1978) work on committee assignments; Schlesinger's (1966; 1991) research on political ambition and political parties; the study by Rohde and Spaeth (1976) on Supreme Court decision making; Rohde's (1991) examination of parties and leaders in Congress; Krehbiel's (1991) informational theory of legislative organization; and, the rationale for political parties in America by Aldrich (1995). This list, while certainly not exhaustive, is provided merely to demonstrate situations specified by Aldrich (1994) to be most appropriate for rational choice theory.

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pursuant to the Constitution. Moreover, the Court is a dynamic institution with features of endogeneity. With complete oversight of its agenda, authority which it gained essentially via its own lobbying efforts before Congress (Carp and Stidham 1991), the Supreme Court is able to exploit the judicial process based upon the ideologies of the individual justices (Caldeira and Wright 1990). This affects not only the types of cases which reach the Court's docket but also the eventual decisions on the merits. In other words, different cases accepted by the Court indicate that distinctive decisions eventually will be conveyed on the merits; and, since it is the justices themselves who choose the cases to be heard, their own actions thereby affect their decisions. Similarly, litigants engage in salient political behavior when they decide whether or not to appeal particular cases to the Courts of Appeals, a process which affects not only the parties themselves but others in the legal profession when the judges publish their opinions in these cases. This operation of high-stakes behavior within endogenous political institutions seems especially clear when professional attorneys and/or interest groups pursue particular cases (yet not others) before specific judges, circuits, or courts (McGuire and Caldeira 1993). Accordingly, rational choice theory seems remarkably apropos for my study.

As stated, rational choice initially was employed in research on mass political behavior. However, numerous rational choice scholars have moved away merely from studying individuals; instead, individual behavior has been incorporated within the context of the institutions housing these political actors and their actions. Termed "new institutionalism," this is the study of "political outcomes . . . [which] result from actors' seeking to realize their goals, choosing within and possibly shaping a given set of

institutional arrangements, and so choosing within a given historical context" (Aldrich 1995, 6; *citing* Rohde and Shepsle 1978). On the judicial landscape, new institutionalism, or neoinstitutionalism, has been defined as a "perspective [which] bridges the gap between the traditional jurisprudence, attitudinal theory, and institutional analysis. Neoinstitutionalism [sic] proposes that institutional arrangements, which consist of internal and external rules as well as organization structures, determine the aggregation of individual preferences within any given decision-making body" (Brace and Hall 1993, 916). Moreover, these institutional rules and structures continue to affect political outcomes once decisions are made regarding structure and prior outcomes. This final point, perhaps, is the key to employing a neoinstitutional perspective – not only are the institutions themselves of major consequence to individual political behavior, but it is the endogenous nature of the political actors and their utility-maximizing behavior within these institutions which neoinstitutionalism seeks to incorporate.

Furthermore, while these institutional rules and structures may be viewed as constraints on individual behavior, a neoinstitutional perspective realizes that these apparent restrictions in fact may be opportunities for the political actors within the institution; and, even if institutional arrangements indeed are confining, in reality they may not be binding (Aldrich 1994). As Aldrich (227) advanced: "The 'fundamental equation' of the new institutionalism is that political outcomes are the result of the interplay of actors as they seek to realize their goals, of the institutional settings in which they act and which they may help to shape, and of the historical context in which their decisions are set." Thus, according to neoinstitutionalism, political outcomes are the result of individual, goal-oriented behavior

as determined within the limitations and opportunities afforded by political institutions in which the political actors function.

As a theoretical foundation, then, this study incorporates a neoinstitutional perspective with respect to the agendas of the Supreme Court and Courts of Appeals. By focusing on these courts and their respective agendas in this theoretical manner, hypotheses which flow from the assumptions of rational choice and neoinstitutionalism can be posited. Once proposed, these hypotheses can be empirically analyzed.

What, then, are some of these specific assumptions? Under neoinstitutionalism, the initial assumptions concern basic rational choice suppositions on individual behavior. Thus, I assume that the individuals involved will seek to further their goals to the extent possible. At the Supreme Court, this suggests that the individual justices are political actors who attempt to impose their own policy preferences on society and who seek to influence other political institutions and actors. At the Courts of Appeals, individual litigants, interest groups, and their lawyers are assumed to act rationally by utility maximization when deciding to appeal cases, and it further assumes that they desire to win cases, influence others in the political process, or both.

The next branch of neoinstitutionalism concerns the institutional arrangements which help shape the aggregation of individual preferences. With respect to the Supreme Court, the assumption is that, while individual justices are potentially restricted by institutional rules and structures which affect individual preferences, the Supreme Court systematically

determines its agenda over time.³ Thus, constitutional stipulations such as the cases and controversies requirement, Congress' ability to set and restrict the Court's appellate jurisdiction, the rule of four, and the fact that the Court must await cases to be brought to the institution, all help to constrain the justices' ability to set the Court's agenda. Nevertheless, these same arrangements can be seen as opportunities for the justices to fashion the Court's agenda to their own liking, as the only true and genuine institutional constraints include the rule of four and any self-imposed restraints relating to judicial role which some individual justices may adhere to. The institutional structures, on the other hand, are more binding with respect to the agenda at the Courts of Appeals. Here, the assumption is that parties, interest groups, and counsel are pressured when making decisions to appeal, such constraints usually stemming from budgetary or strategic considerations.

By applying this neoinstitutional perspective and focusing on the agendas of the federal courts in this manner, I am able to make several arguments on the relationship between the Supreme Court and Courts of Appeals. The first of these arguments is that the choices the Supreme Court makes concerning its agenda ripple throughout the judiciary. Thus, agenda priorities generated at the Supreme Court soon will be found in the dockets of the Courts of Appeals. In particular, when the Supreme Court changes its preferences for various types of cases over time, signals are sent to parties and their representatives in the courts below that the Supreme Court is becoming more or less agreeable to certain kinds of

³On a broader level with respect to agenda, it is assumed that "the Supreme Court is a political, unitary actor and the variation in its behavior and policies over time can be explained systematically" (Pacelle 1991, 13).

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issues. In time, the behavior of litigants is conditioned by the Supreme Court's actions, as **parties** will react accordingly by appealing cases more in line with the Supreme Court's **changing** agenda priorities. As a result, since the agenda of the Courts of Appeals is **determined** by litigious behavior, over time the agenda of the Courts of Appeals should **fluctuate** in response to that of the Supreme Court.

What are some of these signals which are sent by the Supreme Court and acted upon **by parties** and their representatives in the Courts of Appeals? Essentially, they are encased **in a** variety of dynamic behaviors stemming from the Court's agenda management. First, **the** Supreme Court might accept either a greater or lesser number of cases on particular **issues.** The enhanced (or lessened) emphasis provided by the Court for certain types of **issues** will make it more likely that litigants will recognize such trends and thereby appeal **(or refrain** from appealing) those classes of law suits in the federal courts below. Thus, **simply** by changing its priorities as expressed in the percentage of cases it hears compared **to other** cases, the Supreme Court beckons litigants to its changing preferences with respect **to its** agenda.

Another manner in which the Supreme Court signals parties is by issuing a greater **or lesser** percentage of liberal decisions each year. That is, not only is it the types of cases **decided** by the Court which matter to litigants but also the direction in which those cases are **decided.** In the long term, this signifies that a liberal trend in Supreme Court decision **making** will alert parties to appeal cases more in line with such liberal doctrine, while an **opposite** development in the lower courts should be apparent when conservative inclinations **on the high Court** are operation. Thus, parties will reflect upon decision-making trends in

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the Supreme Court and appeal more of those cases which are conducive to that type of **judicial** doctrine.⁴ In the short term, however, a different outcome may transpire. As a **contemporary** Court attempts to reverse the decisional trends set by its predecessors with **which** it disagrees, the Court may accept more "liberal" issues but decide them in a **conservative** manner if it is becoming more conservative, and vice versa if the Court is **developing** a more liberal demeanor. When such mixed signals from the Supreme Court (**hearing** more liberal cases but deciding them in a conservative direction) are relayed, parties **must** decide which trend is the best one to follow. Generally, the directionality of the Court's **decisions** will be more persuasive to appellants' utility, so long as the types of cases on the **docket** drops off and falls in line with directionality at a slight lag. Under these **circumstances**, parties should follow the changing liberalism more than the types of issues **accepted** by the Court. If, on the other hand, the issues and directionality remain polar **beyond** the short term, it is much more likely that parties will follow neither trend during the **time** period, whether short or long term.

The Supreme Court ushers in a new direction by issuing landmark decisions (Pacelle 1991). In this way, it is not necessarily the percentage or direction of the cases but, instead, **which** particular cases are so salient that they advise others of the Court's new agenda

⁴Interestingly, while appellants may pursue more particular types of cases based on the **trends** in the Supreme Court, they may be less discriminating about bringing cases in line with the trend while being a good deal more discerning concerning cases which do not conform to the trend. The result is that litigants on the endorsed side of the trend may appeal more "bad" cases, while the stronger cases will stem from the disfavored pool, since parties there must be much more strategic about which cases to appeal (Moe 1985). The result is a decision-making trend in the Courts of Appeals which is opposite of that from the Supreme Court (*see* Sheehan, Hurwitz, and Reddick 1996).

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priorities. Thus, issuance of landmark decisions by the Court is a crystal indication to parties, interest groups, and lawyers that particular types of cases will be favored by the Court, the consequence of which is that the percentage of cases addressing that type of issue being appealed to the Courts of Appeals will increase.

Personnel changes on the Supreme Court also can have an effect beyond a changing judicial doctrine. That is, parties realize that particular appointees to the Court can have a distinct effect on the agenda, notably where the Court turns sharply more liberal or conservative, and thus they commence appealing cases in the lower courts in the perceived direction of ideological changes taking place in the Supreme Court. Similarly, the appointment of a new Chief Justice can have a strong effect on litigious behavior in the Courts of Appeals, particularly when the change is from a conservative to a liberal Chief, or from a liberal to a conservative. In these circumstances, parties again will recognize a new emphasis on specific issues in the Supreme Court, manifested by more of the types of cases which would harmonize with the Chief being appealed.

As stated, these are the theoretical rationales for the increasing or decreasing of certain issues in the appeals courts as determined by changes in the Supreme Court. The overriding theme about each of these particular arguments is that, since the agenda of the Courts of Appeals is determined by litigious behavior, over time the agenda of the Courts of Appeals will fluctuate in response to various changes within the Supreme Court.

Nevertheless, the direction of causality should not exist solely from the Supreme Court to the Courts of Appeals. Since the Supreme Court's agenda is a function of both internal and external rules and structures, I maintain that one of the external influences on

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the Court's agenda is the agenda of the Courts of Appeals. That is, the Supreme Court's agenda is both an exogenous influence on appeals in the lower courts as well as an endogenous variable which responds to litigious behavior in the courts below.

Accordingly, my next argument is that the Supreme Court reacts to litigious behavior in the Courts of Appeals. This can occur in one of two general ways. First, a particular type of issue may gain favor and momentum in the lower courts, which the Supreme Court will recognize. As a consequence, the Supreme Court eventually will begin to accept more cases on that type of issue. On the other hand, the Supreme Court may hope to avoid certain types of issues, but due to "percolation" in the lower courts (Perry 1991a), usually resulting in conflict among the circuits or negative publicity in the legal or political communities, the Supreme Court eventually is constrained to accept some cases it would rather not. The manner in which the Court is impelled to accept cases in this regard has to do both with the tools of rational choice and the procedure by which the Court grants cert. Thus, as the utility for some justices decreases when potential conflicts or negative publicity increases, those justices soon will vote to hear particular cases they might otherwise prefer to avoid. When this occurs over time for more than a few justices such that cert. is granted in an expanding measure of cases pursuant to the rule of four, then the Supreme Court will be reacting to litigious behavior in the lower federal courts. The point is, under either of these stated scenarios, the agenda of the Supreme Court will be a reflection, in part, of the agenda priorities of the appellants in the Courts of Appeals.

My final argument is that, beyond their effects on each other, external environmental influences additionally should have a bearing on the political actors in both courts. In

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particular, salient political events (such as the civil rights movement), public opinion, and the state and structure of the other federal governmental institutions all should effect the manner in which the Supreme Court accepts cases and cases are appealed to the circuit courts. That is, as these external forces lean in a liberal direction over time, then more liberal cases should be heard in both of these federal courts, with the converse transpiring when these non-judicial factors are conservative in nature.

This is the theoretical foundation for the manner in which I maintain that agendas are set and related to each other in the Supreme Court and Courts of Appeals. It incorporates a neoinstitutional perspective by utilizing the concepts of rational choice while embodying institutional effects, both from within each court (that is, endogenous effects) and on the other court (that is, exogenous effects), along with integrating other external influences on agenda formation. By so doing, I can assert specific hypotheses, which will be stated and empirically tested in the ensuing chapters. The manner in which I will test them is explained in the following section.

RESEARCH DESIGN AND METHODOLOGY

The fundamental purpose of this study is to determine the nature and relationship of agenda modifications within the federal courts. As provided in the theoretical section, I hypothesize generally that certain changes in the Supreme Court eventually will be grounded in the agenda of the Courts of Appeals, but that there are endogenous effects emanating from these lower courts which cause certain agenda transformations in the high Court as well. Moreover, external influences additionally are of consequence to the agendas of these courts

as well. In order to ascertain which of these postulated effects are empirically verifiable, I have fashioned a research design which incorporates these theoretical constructs within the neoinstitutional perspective. Moreover, I draw upon particular statistical methodologies which I believe are well-suited to addressing the issues in question in this research. The specifics of this design and the various methodologies I have assimilated into this design are detailed in the following sections.

Data

Time-series analysis, a type of methodology which has not been utilized in public law studies all that often, is vital and necessary to explore the long-term, systematic variations in agendas of the Supreme Court and Courts of Appeals. Two databases were utilized for this purpose: the United States Supreme Court Judicial Database (hereafter, the "Supreme Court Database"); and, the United States Courts of Appeals Data Base (hereafter, the "Courts of Appeals Database").⁵ Specifically, I generated series of data from each of these databases encompassing the years in which the data overlap, from 1946 through 1988. Since the Supreme Court Database provides data for a number of years beyond the Courts of Appeals Database, while data for the appeals courts are available for years prior to that available for the Supreme Court, I included appeals court data commencing in 1940 and Supreme Court data terminating in 1995 for comparative, but not statistical, purposes.

⁵Harold J. Spaeth is the principal investigator for the Supreme Court Database (ICPSR 9422); Donald R. Songer is the principal investigator for the Courts of Appeals Database (SES - 8912678).

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For each series, I determined the percentage of cases on each court's docket per year for all of the issue areas to be studied. Each of these issue areas was designated strictly in accordance with the coding scheme reported in the Supreme Court Database. Identical coding decisions were made for Courts of Appeals cases.⁶ At the Supreme Court, I included only orally argued decisions which were formally decided, even if by an equally-divided Court, while I excluded memorandum decisions, per curiam decisions, and decrees.⁷ Moreover, for the Supreme Court time series, the unit of analysis in this study is the case, as demarcated either by its citation or docket number.⁸ In the Courts of Appeals, no such delineations are necessary. Nevertheless, while the Supreme Court Database includes the universe of Supreme Court cases, the Courts of Appeals Database does not encompass an analogous survey of all cases in the Courts of Appeals. In particular, the Courts of Appeals Database includes a random sample of a certain number of appeals court cases per circuit per year from 1925-1988. In order to ensure validity in the inferences made regarding the Courts of Appeals data, therefore, weighting techniques necessarily were employed so as to standardize the data among the circuits. The dependent variable for all of the analyses in this research is the agenda of either the Supreme Court or the Courts of Appeals. See Appendix A for details on decision rules and all issues of coding for this study.

⁶See Appendix A for coding decisions with respect to issue areas differences between the Supreme Court and Courts of Appeals.

⁷Accordingly, I included DEC_TYPES 1, 5, 6, and 7 in the Supreme Court Database.

⁸This includes ANALU = ' ' or '1'.

Methods

As with any time-series analysis, all data must be stationary in order to make valid inferences; thus, unit root tests, including augmented Dickey-Fuller (1979) and Box-Jenkins (1976) tests, were used to identify potential problems. Appropriate transformations, whether differencing or log conversions of the data, were effected to ensure stationarity. Once time dependencies were removed from the data, numerous statistical procedures could take place without producing spurious results.⁹

In chapter 3, I will determine whether causal relationships between the Supreme Court and Courts of Appeals exist with respect to the emphasis by each court on the types of issues they hear. I hypothesize generally that changes in agenda at the Supreme Court transform the agenda of the Courts of Appeals, but that there are endogenous features to these effects which depend in part upon the issue area. By looking at the percentage of cases decided over time in each court and whether such changes affect the percentage of cases heard in the other court, I will be able to determine whether the Supreme Court motions rational litigants simply by deciding more or less of particular types of cases over time. Moreover, I will discern whether parties, interest groups, and their representatives in turn

⁹As discussed in greater detail in chapter 3 (*see, e.g.*, p. 81, footnote 10), while differencing data is necessary to avoid spurious results in time-series analysis, this transformation comes at the cost of losing long-run relationships in the data. One manner of avoiding such loss of information concerns the time-series technique called cointegration (Engle and Granger 1987). Cointegration is a statistical method for determining whether nonspurious, long-run relationships in equilibrium exist between variables while providing for an error-correction mechanism to ascertain deviations from that relationship in equilibrium (Banerjee, Dolado, Galbraith, and Hendry 1993). Nevertheless, due to the variety of other statistical methods to be employed herein, cointegration is beyond the scope of this study and will not be utilized.

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react to these signals by litigating suitably in the courts below, and whether the Supreme Court justices themselves reciprocate by addressing any changing emphases found in the lower courts.

For purposes of chapter 3, there are a variety of time-series methodologies available which will uncover the causal tendencies with respect to transforming percentages of issues on the dockets of each of these courts. First, I will employ Granger causality tests (Granger 1969; Freeman 1983); then, vector autoregression (hereafter, "VAR") will be used (Sims 1980; Freeman, Williams, and Lin 1989). Both of these techniques apply very different means to estimate essentially the same phenomenon, to wit: to examine whether one series of data causes effects in another series.

Specifically, Granger causality is based on "the idea that a variable X 'causes' another variable Y , if by incorporating the past history of X one can improve a prediction of Y over a prediction based solely on the history of Y alone" (Freeman 1983, 327-328). That is, Granger causality is a simple regression of Y on itself, including its lags, and on X and its lags. This method employs standard f -tests, and if X provides a better explanation of Y than Y explains on its own, then X is said to "Granger cause" Y . Consequently, since it addresses pair-wise exogeneity, the Granger causality method lends itself rather well to the determination whether one of these federal courts influences the agenda of the other over time.

Nevertheless, Granger causality tests are insufficient on their own, essentially for two reasons. First, Granger tests address causality only in one direction, so there is no mode of analyzing feedback in a system. Also, there is a debate as to whether Granger causality

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ascertains "causation" in the statistical sense we generally are accustomed to in political science. Alternatively, then, in this chapter I will employ VAR, which is useful in this research in that this approach allows for feedback, since it is a reduced form (Sims 1980). VAR does not treat any variables in the system as exogenous. Each variable is regressed on past lags of all the variables, where fewer restrictions are imposed on the data (Freeman, Williams, and Lin 1989). In other words, VAR relaxes the causal assumptions which are necessary in the process of identification in structural equations modeling, such as is necessary in two-stage least squares. VAR is able to test causal relationships within a system of equations by imposing few restrictions on the variables, as it regresses each variable on past lags of itself and all other variables. Accordingly, VAR is well-equipped to concentrate on the direction of causal inferences over time, which makes this approach especially pertinent for analyzing the dynamic, causal relationships between changes in the agendas of the Supreme Court and Courts of Appeals.¹⁰ For these reasons, in this study I will resort to both Granger causality tests and VAR procedures on all the series of data for each of the issue areas in order to determine whether appropriate causal inferences can be made.

In the succeeding chapter, I seek to determine in greater detail the systematic relationships between the several sub-issues which comprise the aggregate civil liberties category. In chapter 4, then, I segregate the broad civil liberties classification into its separate issues of civil rights, first amendment, due process, and privacy cases. Then, in the

¹⁰Freeman, Williams, and Lin (1989) adeptly address the various criticisms of VAR while demonstrating the appropriateness and many benefits of utilizing this methodological approach. *See also* Granato and Krause (1998); Sims (1980).

same manner in which I proceeded in chapter 3, I employ further Granger causality and VAR tests on these sub-issues to determine whether these federal courts exist within a system for civil liberties cases, and to ascertain whether the disaggregated civil liberties agendas behave in the same manner the full category.

Chapters 3 and 4 incorporate the theoretical arguments that justices and parties react to the agendas of each court along with decisional trends, but they do so by employing bivariate statistical analyses. On the other hand, chapter 5 carries the theoretical concepts of this research a step further by utilizing multivariate analysis in order to determine the factors which influence agenda changed in the federal courts. Specifically, two-stage least squares time-series regression analysis is employed, due to the endogenous nature of judicial agendas, as the civil liberties, economic, and criminal procedure agendas of both courts are regressed on a variety of potential influences. These independent variables are both judicial and non-judicial in nature, including the past agendas and dynamic liberalism of each court, the relative liberalism of the political branches of the federal government, public opinion, landmark Supreme Court decisions, and the influence of the tenures of different Chief Justices of the Supreme Court. In this manner, the time-series analysis is able to examine whether factors other than the judicial agenda of the other court influence changes in the agendas of the federal courts.

Validity

By setting up my research design in this manner, I believe that threats to internal and external validity should be minimized. As to internal validity, since this research does not represent an experimental design, problems such as history, maturation, testing, and

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instrumentation should not be of concern (Campbell and Stanley 1963). Nevertheless, while the possibility of selection bias does exist as a potential threat to internal validity, this should not be an issue due to the nature of the data. First, the Supreme Court data represent the universe of cases. Second, while the Courts of Appeals data include a random sample by circuit, the weighting index used should minimize problems with respect to selection bias (Cook and Campbell 1979). Lastly, since there are 43 annual data points over which the Supreme Court and Courts of Appeals data coincide, no small N problem is apparent with respect to selection. And, I have not chosen the data on the dependent variable (King, Keohane, and Verba 1994).

The ability to generalize obviously is an important feature of any research design, which necessitates the minimization of threats to external validity. Again, since I am not employing an experimental design, problems associated with reactive or interactive effect of testing, reactive effects of experimental arrangements, or multiple-treatment inference do not pose a problem (Campbell and Stanley 1963). Moreover, there should be sufficient variance of all the dependent and independent variables, especially when the different issues are considered over the time span incorporated in this research. And, the weighting techniques utilized should temper any potential dilemma with respect to the Courts of Appeals data.

The most extreme threat to external validity with respect to this research, however, concerns the limitation of data to the Supreme Court and Courts of Appeals, an approach which ignores the influence of agenda effects from the numerous and assorted State Supreme

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Courts.¹¹ To be thoroughly valid, similar analyses should be made with respect to, and including, the state courts. Due to lack of data, however, particularly from a longitudinal perspective, such a task is unmanageable at this time and, unfortunately, will not be alleviated any time soon.¹² Accordingly, while lack of state court data limits the generalizability of this research to a certain extent, at this stage of data development there is nothing that can be done. Irrespective of this potential difficulty, however, the results from this study should be sufficiently robust to ascertain agenda effects in the federal courts, if not the entire judicial system in the United States.

I need to point out a caveat at this stage of my research. While I would have hoped to analyze circuit differences in this research, due to the nature of the Courts of Appeals Database I will not be able to do so. Very simply, because this Database is limited to at most 30 cases per circuit per year, if each circuit is broken down further into the various issues studied, a small N problem inevitably results, precluding valid inference. While this difficulty would apply regardless of the type of methodology employed, this dilemma is particularly troublesome with respect to analyses utilizing VAR, which can produce what has been characterized as a "vanishing degrees of freedom problem" (Johnston and DiNardo 1997, 305). Accordingly, no analysis of agenda at the circuit level will be accomplished in

¹¹Cases from State Courts make up about 30 per cent of the Supreme Court's docket (O'Brien 1991).

¹²Due to the strategy behind the Hall and Brace State Supreme Courts Judicial Database (*forthcoming*), it appears that this problem of a lack of longitudinal data will not be remedied any time soon, even with their substantial undertaking.

udy. Nevertheless, this should not detract from my research herein, as there is an
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CHAPTER 3

AN EXPLORATION INTO THE CAUSAL ASSOCIATIONS BETWEEN THE AGENDAS OF THE SUPREME COURT AND COURTS OF APPEALS

The Supreme Court sits atop the judicial hierarchy in the United States. As a result, scholars in both the legal and political science communities insist that lower courts, whether by norm or structure, are bound by the precedents established by the Supreme Court. While adherence (or lack thereof) to *stare decisis* forms the bulk of much of the literature in political science on the Courts of Appeals, it is not at all clear whether the lower courts heed the Supreme Court with respect to agenda formation. First of all, the dockets of the Courts of Appeals are not determined by the judges, so judicial norms and structures are irrelevant in this regard. Nevertheless, the Supreme Court occupies a powerful position from its judicial perch. Accordingly, it seems reasonable to suspect that parties will sustain any trends in agenda instituted by the Supreme Court, especially when it is assumed that litigants and their representatives are rational actors. Indeed, one of the arguments I make in this study is that, once the Supreme Court establishes its agenda priorities, the effects reverberate throughout the judiciary; and, one of the political institutions inspired by the Court's agenda preferences is the Courts of Appeals. As a consequence, the agenda of the federal circuit courts should fluctuate in line with the agenda trends of the Supreme Court.

The Supreme Court theoretically is isolated from political and social pressures; indubitably, this professional seclusion, combined with lifetime appointments, in large part constitute the rationale that justices' decisions are linked so closely with their own ideology (Rohde and Spaeth 1976). Still, the Court does not exist in complete quarantine or detachment. To the contrary, the fact that the decisions of the Court generally are not countermajoritarian (Dahl 1956), and that some judgments potentially are influenced by public opinion, either directly or indirectly (Mishler and Sheehan 1993), demonstrate that the Supreme Court necessarily is not as disengaged as some might believe, hope, or fear. From a neoinstitutional perspective, institutional structures should influence individual political behavior, and for the Supreme Court such influences might stem both from within and without the Court. With respect to agenda formation, the internal rule of four both limits (Epstein and Segal 1997) and provides for enhanced prospects (Shubert 1959; 1962) for the Court's agenda formation. From the outside, judicial or political institutions other than the Supreme Court might provide for constraints upon the justices' ability to establish the Court's agenda in line with their true preferences. Thus, the Supreme Court's agenda is not merely the aggregation of the justices' proclivities over cert. in individual cases but instead is a "function of a complex interaction of individual preferences and institutional structures and rules" (Pacelle 1991, 13-14). To that end, I maintain expressly that one of the external influences on the Court's docket is the agenda trends established in the Courts of Appeals. That is, the Supreme Court's agenda is both an exogenous influence on lower court appeals as well as an endogenous variable which responds to litigation in the courts below.

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In this chapter I consider whether the agenda of each of these courts influences the agenda of the other over time. As such, I do not take account of external or other influences on agenda formation, but instead I inquire into the nature of agenda setting in these courts based exclusively on the agendas established and the trends grounded in any changes therein.

AGENDA INFLUENCES IN THE FEDERAL COURTS IN GENERAL

One of the arguments posited in this study is that the choices the Supreme Court makes concerning its agenda ripple throughout the judiciary. In particular, agenda preferences established by the Supreme Court over time soon will be found in the agenda of the Courts of Appeals.

As stated, I view the Supreme Court's agenda as the accretion of individual preferences, subject to institutional structures and rules. I assume further that, as the institution sitting atop the judicial hierarchy, the Supreme Court affects courts below, including the Courts of Appeals (Baum 1994; Pacelle and Baum 1992). Similarly, litigation begets comparable litigation (Provine 1980). As a result, I posit the following hypothesis:

Hypothesis # 1. The agenda of the Courts of Appeals should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

The Supreme Court has discretionary jurisdiction, while the jurisdiction of the Courts of Appeals is mandatory. Thus, the Court controls its agenda, subject to institutional forces, but the appeals courts lack analogous command over their agenda. Accordingly, their agenda is determined by litigious behavior which is shaped, to a certain extent, by the Supreme Court's agenda priorities, as over time the Court "condition[s] the behavior of litigants"

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(Pacelle 1991, 80). Thus, as the Court modifies its agenda preferences, I assert that rational litigants, interest groups, and lawyers will recognize these changes and react accordingly in accordance with their own goals. For instance, as the Supreme Court's agenda became increasingly filled with civil liberties cases during the 1940s through 1960s, I expect that the Courts of Appeals also would hear and decide a greater number of civil liberties cases at a short to moderate lag, as litigants began to increase their appellate filings in this issue area in response to changes instituted by the Court.

Nevertheless, the Supreme Court's place at the top of the judicial hierarchy does not ensure total authority over the Courts of Appeals (Baum 1994). Indeed, even assuming strong hierarchical dominance, at best it is questionable whether such authority extends beyond the appeals court judges to litigants. Moreover, due to the disparity in the number of cases the Supreme Court and Courts of Appeals hear each year, the circuit courts are effectively courts of last resort; thus, the Court's oversight capabilities with respect to the courts below are extremely limited (Howard 1981; Songer 1991).¹

Further, the extent to which rational choice theory is relevant to nonelite political behavior is somewhat dubious, at least when compared to its pertinence to elites engaging in high-stakes political behavior (Aldrich 1994). Thus, while some parties and lawyers driving federal appeals might be likened to political elites (such as those involved in national

¹Over 50,000 cases now are commenced in the Courts of Appeals each year, while the Supreme Court, which generally decides about 150 cases per term, has issued less than 100 written opinions in the each of the past few terms (Carp and Stidham 1996).

interest groups or certain professional bars), a better analogy might be one of parties to the masses, where rational behavior is not necessarily germane.²

Under these circumstances, the agenda of the appellate courts may not be directly responsive to the dynamics of the Court's docket. For these reasons, I offer the following alternative hypothesis:

Alternative Hypothesis # 1. The agenda of the Courts of Appeals should not respond to changes in the agenda of the Supreme Court.

Quite simply, due to the vast number of docketed appeals, limited oversight by the Court, and the ambivalent behavior of litigants, the agenda of the Courts of Appeals may not be responsive to shifts in the Court's agenda.

While I argue generally that the Court's agenda influences appellants in the Courts of Appeals, I speculate as well that the Court as an institution is motivated by a variety of rules and forces. Consequently, I contend that the Court's agenda is influenced by these various external pressures. As opposed to propounding that the Court's agenda merely is affected by outside influences, without specifying the nature of any of these effects which operate to control agenda change, I take Pacelle's (1991) argument a step further by maintaining that one of these external influences on the Court's agenda is the changing dockets of the Courts of Appeals. That is, the Court's agenda is both an exogenous influence on the litigious appeals (*see Hypothesis # 1*) as well as an endogenous variable which responds to litigation in the courts below.

²Even if it is befitting, certainly the applicability of rational choice theory to mass behavior is much more complex than for elite behavior.

I thus present my next hypothesis:

Hypothesis # 2. The agenda of the Supreme Court should respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

Concededly, causation in this hypothesized direction should not be as strong as that proposed in *Hypothesis # 1*. Moreover, there should be a greater lag in the effect by the appeals courts on the Court's agenda than vice versa. Nevertheless, this does not diminish the endogenous nature of agenda change, and for this reason I offer my *Hypothesis # 2*.

Of course, as attitudinalists would attest, the justices are well-insulated from most tangible constraints on their behavior, at least when it comes to their roles as decision makers. There is reason to believe that this judicial resilience also might extend to the stage of the agenda formation. That is, the justices may be no more influenced or constrained by rates of appeals in the lower courts as they are by congressional threats of reversing particular decisions (Segal 1997). For this reason, I offer the following alternative hypothesis:

Alternative Hypothesis # 2. The agenda of the Supreme Court should not respond to changes in the agenda of the Courts of Appeals.

So stated, these hypotheses embody my general argument that the Supreme Court's agenda explains part of the agenda of the Courts of Appeals, but that an endogenous effect additionally should be evidenced as well which stems from the preferences of parties' appeals. In the next section, I describe some of the hypothesized relationships between the agendas of these courts for specific issues.

SPECIFIC ISSUES, AGENDAS, AND THE FEDERAL COURTS

Prior to the Switch in 1937, the Supreme Court predominantly heard and decided cases which concerned economic issues, while very few civil liberties cases reached the Court's docket; in part, this emphasis on economic issues was a consequence of the Court's mandatory jurisdiction of the day, but it also revealed the agenda preferences of the justices once the Judges Bill of 1925 gave them more discretion to construct the Court's agenda. That is, the conservative justices in the majority during the late-1920s through mid-1930s were interested in deciding economic cases, particularly when the issues at bar concerned the commerce or substantive due process clauses and the justices were able to base their decisions on preferred *laissez-faire* doctrine (Segal and Spaeth 1993). Due to both politics and evolving judicial preferences, this state of affairs began to vary after the Switch, particularly once President Roosevelt's appointees assumed the Bench. As a consequence, over the ensuing half century civil liberties came to replace economic cases on the Court's agenda.

With respect to civil liberties cases, there is a sense today among many in both the scholarly and public communities that the Supreme Court should be the ultimate forum for the preservation of individual rights (Adamany 1991). Indeed, Justice Stone, in his famous footnote 4 in *United States v. Carolene Products*, 304 U.S. 144, 153, fn.4 (1938), positively asserted that custodian of "discrete and insular minorities" would symbolize the Court's appropriate judicial role in the future. Justice Stone was somewhat prescient, inasmuch as this landmark decision soon led to an increase in the number of civil liberties cases heard by

the Court.³ In particular, Pacelle (1991) argued that the Supreme Court was interested in purging its docket of economic cases to the extent possible, and the Court was able to do so in part because a large pool of civil liberties cases was available to replace the economic cases.⁴

This strategy of exchanging economic for civil liberties cases comported with the policy goals of the justices after the Switch and enabled them to avoid the controversial economic cases which in large part were responsible for the Court's self-inflicted wounds in the 1930s. *Hypothesis # 1* contends that, in general, a similar effect will be found in the agenda of the Courts of Appeals as parties follow the lead of the Supreme Court. Nevertheless, there is reason to believe that the context of agenda change in either court may not be uniform across the panorama of issue areas. Thus, as the Supreme Court decided greater numbers of civil liberties cases over the years, it seems intuitive that rational parties would heed this call by the Supreme Court. But what about other issues, such as economic cases? In other words, when the Court changed its agenda preferences for issues other than civil liberties, how should parties in the lower courts have reacted to such changes?

³Nonetheless, some empirical evidence demonstrates that the Supreme Court may not be the great defender of civil liberties and individual rights it frequently is proclaimed to be (see, e.g., Dahl 1956; Caldeira and Gibson 1992; Mishler and Sheehan 1993; 1996).

⁴In Pacelle's (1991) terms, the bifurcated nature of the Supreme Court's agenda contained an exigent agenda, which included cases which the justices needed to attend to at some point and usually were decided on the basis of judicial roles; and, there was the volitional agenda, which contained cases which would "fulfill the policy designs or goals" of the justices (28). This dual character of the Court's agenda enabled the justices to transfer economic cases from the volitional to the exigent agenda and fill the void on the volitional agenda with civil liberties cases, while at the same time the justices were shrinking the exigent and augmenting the volitional agenda.

Essentially, the answer relates to a combination of conditions, including the saliency of the issue, whether the Supreme Court is interested in increasing or decreasing a type of issue on its docket, whether the Courts of Appeals truly represent the court of last resort for particular categories of cases, and spillover effects. That is, the more salient an issue, the greater the likelihood that parties would observe the agenda trends of the Supreme Court for that issue. Similarly, if the Court elevated its emphasis on a particular issue, the more likely parties would boost their appeals in that area as well. However, if the Court decreased its emphasis on a specific issue, especially if that issue is one in which litigants need to pursue their rights via the federal courts, then the appeals courts unquestionably would be the courts of last resort; under these circumstances, parties would be less likely to follow the trends established by the Supreme Court for those issues. In fact, the converse may be true, in that this represents situations in which the Supreme Court may be compelled to settle disputes on issues it would rather avoid. That is, it is when the Supreme Court attempts to elude certain issues that the endogenous effect from the courts below should be most apparent. Finally, spillover effects (Kingdon 1984) would occur when trends in one issue beget similar inclinations in another, such that parties would be more likely to regard the Court in one issue based upon the Court's actions in a comparable issue.

These expectations for specific issues further enhance the general theoretical conditions I posited in chapter 2. The implication to be realized from the motivations listed above and in chapter 2 is that the Supreme Court should have been persuasive to parties' litigious decisions in the courts below for all issue areas. The only substantive question these expectations leave open, then, is: 1) the extent to which the Supreme Court's agenda

influenced the dockets in the Courts of Appeals; and 2) whether the Supreme Court in turn was influenced by trends being grounded in the lower courts. Based on these theoretical expectations, I delineate the following hypotheses for each of the following issues.

The first issue is civil liberties, in which there should be strong effects from the Supreme Court to the Courts of Appeals but not necessarily in the opposite direction.⁵ First, there is no questioning the saliency of, and controversy over, civil liberties cases, which generate potentially intense beliefs among judges and others (Segal and Spaeth 1993). Thus, as the Court heard greater numbers of civil liberties cases after the Switch in 1937, a comparable effect seemed unavoidable among interest groups and others which perceived an opportunity to foster their causes by bringing similar cases to bar in the lower courts. Even when the Court began to hear fewer civil liberties cases over time, litigants would sense that the Court might fail to perform its perceived role of guardian of individual rights, leading to a decrease in appeals in civil liberties cases. Finally, spillover effects from similar issue areas, such as criminal procedure or the prevailing, external political environment, should have more of an effect on parties' adherence to the Court's agenda priorities than vice versa. These expectations form the essence of the following hypotheses:

Hypothesis # 3a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

⁵For purposes of this chapter 3, the classification of civil liberties cases includes civil rights, first amendment, due process, and privacy issues (*see* Stimson, MacKuen, and Erikson 1995; Hurwitz and Reddick 1996). In chapter 4, I will break down this omnibus civil liberties issue into its corresponding branches in order to determine whether any systematic influences flow from the separate parts or the whole.

Hypothesis # 3b. The agenda of the Supreme Court in civil liberties cases should not respond to changes in the agenda of the Courts of Appeals.

Accordingly, parties should be influenced by agenda priorities in the Supreme Court, but the justices unlikely will be similarly influenced by appeals rates in the courts below.

Economic cases, however, posed a somewhat different situation from civil liberties. In fact, economic issues constituted the bulk of the Supreme Court's agenda before the Switch. Nevertheless, once the justices were provided with discretion over the Court's docket and they became concerned about circumventing the controversies of the mid-1930s, the justices used this newly-found discretionary jurisdiction to resist economic cases. Irrespective of the Court's inclinations, however, economic issues formed, and continued to shape, the basis for much of the case load of the Courts of Appeals. Indeed, Howard (1981) advocated that a prime responsibility of the appeals courts was to adjudicate civil litigation, much of which encompassed economic issues. Thus, while certain corporate parties needed to continue pursuing their economic interests via litigation in the federal courts, the Supreme Court clearly shied away from this area, the result being that the Courts of Appeals in fact became the effective court of last resort for this issue. Lastly, economic cases generally are less controversial than civil liberties. While this may signify that lower court judges will be more likely to follow Supreme Court precedent in economic rather than in civil liberties cases (Songer 1987; Baum 1978; Johnson and Canon 1984), such lack of salience should have the opposite effect on parties in the lower courts, who likely would appeal less

controversial economic cases without nearly as much concern for the Court's priorities.⁶ Under these circumstances, while parties with economic interests continued to follow the Supreme Court, such adherence should not be nearly as strong, either in terms of time or effect, as for civil liberties cases. Furthermore, these are the conditions under which the Supreme Court likely will be obliged over time to accept such cases it would rather not. For these reasons, I assert the following hypotheses:

Hypothesis # 4a. The agenda of the Courts of Appeals in economic cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 4b. The agenda of the Supreme Court in economic cases should respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

That is, if endogenous effects are to be observed stemming from the lower courts to the Supreme Court, I anticipate that it should occur with cases involving economic issues.

Criminal procedure cases are more similar to civil liberties than to economic cases, at least for any effects derived from the Supreme Court. That is, cases involving the Fourth Amendment present salient and controversial issues, they have received enhanced emphasis by the justices over time, and there should be spillover effects from civil liberties cases. Nevertheless, once the criminal defense bar realized these avenues of appeal were available, even if the Supreme Court decreased its accent on these issues, it is likely that similar

⁶Note that this appraisal logically follows from what I argued concerning civil liberties cases, where litigants are hypothesized to be more likely to follow these agenda trends of the Supreme Court, even though the Court's impact on decisional trends lower courts may be less in civil liberties cases (Songer 1987).

appeals would persevere in the lower courts. Accordingly, as demonstrated in the ensuing hypotheses, the effect in criminal procedure cases should be observed in both directions, as the Supreme Court likely persuaded parties to bring these appeals, while contemporaneously litigious behavior ought to have influenced the Supreme Court's docket as well:

Hypothesis # 5a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 5b. The agenda of the Supreme Court in criminal procedure cases should respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

The next issue under consideration concerns union and labor cases. I anticipate that this issue will produce effects in both directions as well, since it has been somewhat controversial in the past, and when the relevant interest groups recognized trends in the Supreme Court in other issues, the spillover effect should have manifested itself in these cases in the lower courts. Still, even when the Supreme Court exhibited diminished interest in union issues, parties would continue to pursue their labor interests, thus inducing the Supreme Court to accept some of these cases over time. The following hypotheses, then, arise from these conditions:

Hypothesis # 6a. The agenda of the Courts of Appeals in union and labor cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 6b. The agenda of the Supreme Court in union and labor cases should respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

For both the legal and political communities, attorneys cases are relatively unimportant, as their only tangible pertinence is to the parties at bar. Thus, if there is any causation at all between these courts for this issue, it should emanate only from the Supreme Court. Accordingly, I posit the following hypotheses:

Hypothesis # 7a. The agenda of the Courts of Appeals in attorneys cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 7b. The agenda of the Supreme Court in attorneys cases should not respond directly to changes in the agenda of the Courts of Appeals.

The same can be said for cases involving both federalism and interstate relations issues, which comprise a small fraction of the dockets in the federal courts. In fact, such issues may be more important to the justices themselves than to any of the myriad interests which take advantage of the federal courts. Thus, any effects at all should be noticed solely from the Supreme Court and not in the other direction:

Hypothesis # 8a. The agenda of the Courts of Appeals in federalism cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 8b. The agenda of the Supreme Court in federalism cases should not respond directly to changes in the agenda of the Courts of Appeals.

Hypothesis # 9a. The agenda of the Courts of Appeals in interstate relations cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 9b. The agenda of the Supreme Court in interstate cases should not respond directly to changes in the agenda of the Courts of Appeals.

On the other hand, federal taxation cases seem to be most similar to those involving economic issues. Indeed, in the early part of the time period involved in this study, taxation cases made up about one fifth of the dockets in the Courts of Appeals, while the Supreme Court for the most part appeared to be relatively uninterested in these cases. Moreover, taxation issues are not all that salient, in that their interpretive foundation generally is statutory in nature. Under these conditions, and in a similar vein as with economic issues, where spillover effects could be observed, it appears that influence from both courts to the other should be expected, as depicted in the succeeding hypotheses:

Hypothesis # 10a. The agenda of the Courts of Appeals in federal taxation cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 10b. The agenda of the Supreme Court in federal taxation cases should respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

Finally, there is no *a priori* expectation for miscellaneous cases, a category which includes cases fitting none of the issue areas in this study. For this reason, no testable hypotheses are posited for these unspecified issues, and results will be reported only for demonstrative purposes. In the subsequent section, therefore, I will test the foregoing hypotheses in order to determine whether adjusting emphases in the agenda priorities of either the Supreme Court justices or the parties, interest groups, and their counsel influence inevitable changes in the dockets in the other court.

DATA, METHODS, AND ANALYSIS

As I explained in some detail in chapter 2, time series will be utilized to determine the dynamic agenda influences between the Supreme Court and Courts of Appeals. In particular, the time-series techniques I will employ in this chapter include Granger causality tests and vector autoregression (VAR). Both of these approaches to time series are fairly well-suited to identifying causal associations over time, yet each applies a disparate methodological strategy to explore whether one series of data influences another. I employ both Granger causality and VAR, as opposed merely to one of them to the exclusion of the other, because their distinct approaches in tandem should convey results which neither could yield on its own.

Nevertheless, before applying these various approaches, I need to ascertain whether the data are stationary. The data, as outlined in chapter 2, include various time series of the percentage of cases per year of several issues before the Supreme Court and Courts of Appeals. Since these are time series, the data must achieve stationarity before appropriate modeling can take place. Stationarity simply denotes that time plays no role in the sample moments of mean and variance of the data. That is, stationarity implies that both the mean and variance are unconditional, finite, and not dependent on time; moreover, shocks to the system will dampen over time, as the system is mean-reverting.⁷ To the contrary, if the data

⁷Technically, this is the definition of weak stationarity. On the other hand, strict stationarity is characterized by the joint distribution which is the same throughout the series. Nevertheless, weak and strict stationary are identical when a normal distribution is assumed, since the first two moments of mean and variance are the same in the normal case. Accordingly, weak stationarity is sufficient for most time-series applications.

are not stationary, then applicable transformations to stabilize the data must be accomplished before statistical techniques are employed, since nonstationary, or integrated, data feature infinite memory due to their time-dependent means or variances. If appropriate transformations are not made to integrated data, the results will be spurious, since shocks to the system will have a permanent effect. Generally speaking, taking a natural log of the data usually calms nonstationary variances, while differencing takes care of inappropriate means and trends in the data. If these transformations are to be employed contemporaneously, natural log conversions must precede differencing, since the latter results in negative values which cannot be logged.

A unit root is associated with nonstationary data; that is, the data are integrated when a unit root is present. For instance, in the following AR(1) representation,

$$Y_t = \rho Y_{t-1} + u_t$$

a unit root is present when $|\rho| = 1$. In this case, the data are integrated of the first order, where $I = (1)$. The goal, then, is to ensure that the data are $I = (0)$, such that $|\rho| < 1$, and there are a variety of processes to detect whether or not a unit root is evidenced.⁸

The first procedure to determine whether the various series in this study are stationary or integrated, even before performing statistical operations, is to eyeball the data. "In practice, it is essential at least to look at plots of the individual series against time to establish what are the major features of the data that the model must capture . . . Some possible

⁸At this stage of analysis and discussion, implications of the near-integrated case, where $|\rho|$ approaches but does not equal 1, are not relevant. Notwithstanding this factor, because near-integrated processes "mimic integrated series in finite samples" (DeBoef and Granato 1997, 622) they should be of concern at the appropriate phase of research.

dominant features are trends in mean or variance, strong seasonal components or the long swings associated with unit root components" (Granger 1990, 11). Accordingly, viewing the graphs from chapter 1,⁹ it appears that time dependencies likely are present in nearly all the series of data; possible exceptions based simply on viewing the data include the Supreme Court's criminal procedure cases (Figure 1.9), the Courts of Appeals' federalism cases (Figure 1.12), interstate relations in both courts (Figure 1.13), and miscellaneous cases in the Supreme Court (Figure 1.15), as these series appear to display a stationary character.

Since it seems very likely that various transformations will be necessary to ensure stationarity in most of the data, one method which diagnoses more definitively whether time series data are characterized by time dependencies is the augmented Dickey-Fuller (AD-F) tests, which are designed to detect unit roots in time series. The AD-F test applies the following restrictions to three separate regressions utilizing the data:

- a) no intercept, no trend:
 $\Delta Y_t = \phi Y_{t-1} + \sum \rho \Delta Y_{t-i} + \varepsilon_t$ where:
 $H_0: \phi = 0$; unit root (random walk)
 $H_A: \phi \neq 0$; no unit root (stationarity);
- b) intercept, no trend:
 $\Delta Y_t = \alpha + \phi Y_{t-1} + \sum \rho \Delta Y_{t-i} + \varepsilon_t$ where:
 $H_0: \phi = 0$; unit root (random walk with drift)
 $H_A: \phi \neq 0$; no unit root (stationarity);
- c) intercept and trend:
 $\Delta Y_t = \alpha + \phi Y_{t-1} + \sum \rho \Delta Y_{t-i} + \delta * t + \varepsilon_t$ where:
 $H_0: \phi = 0$; unit root (random walk with drift around a deterministic trend)
 $H_A: \phi \neq 0$; no unit root (stationarity);

⁹See Figures 1.1 (civil liberties), 1.8 (economic), 1.9 (criminal procedure), 1.10 (union and labor), 1.11 (attorneys), 1.12 (federalism), 1.13 (interstate relations), 1.14 (federal taxation), and 1.15 (miscellaneous).

where the Y_{t-1} coefficient is observed, the null hypothesis being that a unit root, and thus nonstationarity, is present in the data. Values for rejection of the null are not based on the t -distribution, but instead they are predicated on the nonstandard Dickey-Fuller distribution. Consequently, the alternative MacKinnon (1990) critical values are used for rejection of the null, since they have been found to be more accurate than the original critical values established by Dickey-Fuller for their distribution.

As a caveat, the tests I have delineated here are the augmented Dickey-Fuller tests, representing modifications of the original Dickey-Fuller tests which have been determined to provide inaccurate results when serial correlation is present. To correct for this dilemma, the augmented D-F tests incorporate a lagged, endogenous series at higher order which is not present in the original Dickey-Fuller tests. By absorbing any serial correlation present in the data, the augmented Dickey-Fuller tests are preferred, as the lagged, endogenous variable in the regressions captures the autocorrelated influences which otherwise would appear in the autocorrelated error term. Once the errors are white noise based on the augmented version of these regressions, the presence of a unit root will be reported accurately when the alternative MacKinnon critical values are applied.

Accordingly, I ran AD-F tests on all the series of data in this study in levels (that is, the raw data without differencing) to determine which series were integrated, the results of which are disclosed in Table 3.1. In every instance save for interstate relations and miscellaneous cases in both the Supreme Court and Courts of Appeals, the null hypothesis of a unit root could not be rejected for all three versions of the AD-F tests at the conventional 95 percent confidence level. Thus, every series besides interstate relations and miscellaneous

cases exhibited a nonstationary process and, as a result, must be transformed appropriately before statistical analyses can be estimated with the data.

The type of data transformation I implemented was first differences, a process which removes trends by eliminating the long-term component in the data, particularly with respect to the mean. If data are integrated of the first order (that is, when the function in the polynomial is equal to one), then an $I(1)$ series will become stationary by first differencing. Generally speaking, differencing removes the unit root, such that $|\rho|$ no longer equals one. First differencing is accomplished as follows:

$$Y_t - Y_{t-1} = \Delta Y_t$$

Once the data have been differenced, AD-F tests can be run to determine whether this data transformation was successful in removing the unit root and achieving stationarity. Of course, if first differencing the data is effective, then appropriate time-series techniques can be accomplished.

Ergo, I differenced all the series of data which displayed a unit root (that is, all the data except the interstate relations and miscellaneous cases in both courts). Then, I ran AD-F tests on the transformed data, the results of which are reported in Table 3.2. As this table demonstrates, first differencing was successful at eradicating the integrated processes in every instance, as the null of a unit root could be rejected universally, and at the 99 percent confidence level. Thus, the first-differenced data are stationary and can be subjected to time series without the threat of spurious results.

Of course, the augmented Dickey-Fuller test is not the only manner of determining whether the data are stationarity. Nevertheless, utilizing the Box-Jenkins (1976) approach

confirmed the results presented above. In fact, the only issue posed by ACF and PACF outputs from these data was whether a log transformation was necessary to calm a changing variance in some of the series. However, taking the logs of these series (in particular, the Supreme Court criminal procedure and the Courts of Appeals economic cases) failed to remedy any problems. Accordingly, the only transformation of the data I incorporated to achieve stationarity was a first differencing of each series where necessary.¹⁰

The first method to be employed here is Granger causality (Granger 1969).¹¹ Since this procedure examines pair-wise exogeneity, it is ostensibly appropriate for exploring whether the agenda of one of the federal courts in this study influences agenda changes in the other court for a particular issue. Specifically, the Granger causality analysis assumes that "if variable X (Granger) causes variable Y , then changes in X should *precede* changes in Y . Therefore, in a regression of Y on other variables (including its own past values) if we include past or lagged values of X and it significantly improves the prediction of Y , then we

¹⁰While the data attained stationarity due to this transformation, this balance came at the expense of losing long-term information due to differencing. For this reason, an alternative to differencing the data has been espoused by Engle and Granger (1987), designated as cointegration (*see also* Granger 1981; 1983; Granger and Weiss 1983; Johansen 1991). While beyond the scope of this study, the cointegration method combines two or more series of data which are integrated at $I(1)$, the linear combination of which will be stationary, $I(0)$, if the data are cointegrated, which enables the researcher to capture the long-run relationships while producing nonspurious results (Banerjee, Dolado, Galbraith, and Hendry 1993). Irrespective of cointegration's benefits, however, the first-differenced series for those data which exhibited a unit root will suffice. For the series in which the raw data were stationary, I will utilize those data in levels, with no transformations.

¹¹As Freeman (1983) advised, while this method is referred to as Granger causality, Wiener (1956) evidently was the first scholar to connote this concept of causality.

can say that X (Granger) causes Y " (Gujarati 1995, 621). The test for Granger causality involves estimating the following regressions:

$$X_t = \sum \alpha_i Y_{t-i} + \sum \beta_j X_{t-j} + \varepsilon_t \quad (1)$$

$$Y_t = \sum \lambda_i X_{t-i} + \sum \delta_j Y_{t-j} + \mu_t \quad (2)$$

where the assumption of no correlation in the error terms is maintained.¹² The researcher determines the number of lags for the right hand side variables.¹³ The null hypothesis is that lagged terms of the Y variable do not belong in equation (1), while the null for the second regression is that lagged terms of the X variable are not appropriate. Thus, for equation (1), $H_0: \sum \alpha_i Y_{t-i} = 0$; and, for equation (2), $H_0: \sum \lambda_i X_{t-i} = 0$. If the null can be rejected in either of these regressions using standard F -tests, then that particular independent variable (Y in equation (1) and X in equation (2)) provides a better explanation of the respective dependent variable than the dependent variable does on its own. Under those circumstances, that independent variable is said to Granger cause the other. Essentially, Granger causality attempts to determine whether the contemporaneous dependent variable is explained only by its own past values or whether lags of the independent variable provide for a fuller accounting; moreover, the Granger approach facilitates in ascertaining whether additional lags of the independent variable are necessary in the equation.

¹²This assumption is necessary in order to perform Granger causality regressions (Engle, Hendry, and Richard 1983).

¹³"One relies on the lagged values of the endogenous variables to capture autonomous (purely endogenous) sources of variation in Y and X , that is, to take into account the predictive capability of each variable's own history" (Freeman 1983, 333, fn. 11).

Granger causality tests were estimated for all of the issue areas in this study; the results are shown in Table 3.3. Of the major issues in this study, the strongest influence derives from the Supreme Court for criminal procedure cases, where significant values are apparent from lags four through ten. That is, the Supreme Court's agenda for criminal procedure cases precedes analogous changes in the Courts of Appeals for this issue. Nevertheless, there is no corresponding effect arising from the lower courts on this issue. At this early stage, then, these results comport with *Hypotheses # 5a* but not *# 5b*. Among the remaining significant issue areas, there is no Granger causality for civil liberties cases. And, while there appears to be some Granger causality for both economic and federal taxation cases, the influence stems only from the Supreme Court at distant lags, as there is no apparent endogenous effect emanating from the appeals courts for these issues. As for other endogenous effects, two issues of consequence remain: first, union and labor cases, where there is Granger causality at three lags originating from the Supreme Court; and second, economic issues, where the effect of the Courts of Appeals on the Supreme Court's economic agenda approaches but does not exceed significance at the conventional 95 percent confidence level for ten lags ($p = .056$).

Granger causality tests provide preliminary information with respect to the hypotheses I posited in this chapter. Nevertheless, as I contended in chapter 2, this approach is inadequate as the sole or even primary method of analysis. At the outset, while Granger causality addresses pair-wise exogeneity, it does so in a unidirectional fashion. Thus, it is incapable of ascertaining endogenous causation within a system, as simultaneous feedback

is beyond its limits.¹⁴ Moreover, Granger causality may be a misnomer, as it does not provide for causality in the customary, statistical definition. That is, while it demonstrates whether changes in one time series precedes comparable movements in another, this method does not establish whether these influences are causal in nature. Finally, problems endemic to social science data, such as missing data, lack of variation, and measurement dilemmas, "can confound Granger causal inferences" (Freeman 1983, 336). For these reasons, it is axiomatic that I utilize other time-series approaches in order to provide for a fuller explanation of causality within the federal courts with respect to their agendas.

One approach which serves these purposes well and provides for information beyond Granger causality is VAR. As Sims (1980, 152) initially contended, the "incredible" restrictions necessary for simultaneous modeling often result in very disparate results from competing researchers, even when the same data are employed. That is, if the exogenous restrictions implemented *a priori* in structural equations modeling are incorrect, then the results and implications of the ensuing regressions, such as two-stage least squares, will be misleading at best (Freeman, Williams, and Lin 1989). For this reason, Sims (153) conceived of VAR, an approach which enables the researcher to "estimate large-scale macromodels as unrestricted reduced forms, treating all variables as endogenous." By utilizing Sims' approach, VAR allows for feedback in a system, since it is a reduced form, but it does so in a manner which considers all variables in the system as endogenous. Thus, VAR is a very different kind of approach to statistical analysis, as it does not assume any

¹⁴The sole manner in which Granger causality can detect feedback between X and Y is if both null hypotheses can be rejected at the same time (Freeman 1983).

variables are explanatory. Because none of the variables are deemed to be exogenous, when each variable in the system is regressed on past lags of all variables in the system, fewer restrictions are imposed on the data, since the causal assumptions necessary in simultaneous equations are relaxed (Freeman, Williams, and Lin 1989). "The strength of the VAR approach is that the investigator tests these restrictions rather than imposing them in advance" (Williams 1987). For these reasons, VAR is rather adept at concentrating on both the direction and nature of dynamic, causal inferences; accordingly, it is especially pertinent for analyzing the relationships between the agendas of the federal courts.

VAR embodies vectors and matrices of time series. In its compact notation, VAR is represented as follows:

$$\mathbf{y}_t = \mathbf{m} + \mathbf{A}_1 \mathbf{y}_{t-1} + \mathbf{A}_2 \mathbf{y}_{t-2} + \dots + \mathbf{A}_p \mathbf{y}_{t-p} + \epsilon_t$$

where: \mathbf{A}_i denotes $k \times k$ matrices of coefficients; \mathbf{m} is a $k \times 1$ vector of constants; ϵ_t is a $k \times 1$ white noise disturbance vector with a mean of 0 ($E(\epsilon_t) = 0 \forall t$) with no serial correlation but possible contemporaneous correlation; and, $\mathbf{y}_t = [y_{1t}, y_{2t}, \dots, y_{kt}]'$. Lastly, the \mathbf{y}_t term incorporates the conventional lag operator developed for the unrestricted reduced form. As a consequence, in VAR each variable is depicted as a linear combination of the lagged values of itself and all other variables in the system.

VAR circumvents the identification problem endemic to traditional structural equations modeling by assuming no exogeneity among the variables; for this reason, this approach dispenses with interpretation of coefficient estimates, since traditional parameter estimation (such as in OLS or MLE) is meaningless and nonsensical in VAR due to the lack

of restrictions placed on the data.¹⁵ While neutering the interpretability of parameter estimates is an inherent sacrifice of VAR, one of its prominent features is in its ability to track causal inferences over time through impulse response functions, otherwise known as innovation accounting, and variance decomposition. Sims (1980) contends that these VAR alternatives to interpretation of the β s demonstrate which variables in the system genuinely are most consequential.

As one of these alternative forms of analysis used in VAR, innovation accounting traces a one standard deviation shock in the error of each equation (that is, it traces an impulse or innovation) through the entire system of equations; in other words, this sort of analysis models the effects of the innovation on current and future values of all the variables in the system. More particularly, innovation accounting pursues the effects of the various impulses on current and future values of all the variables in the system by converting the AR representation of the data to a moving average representation which "expresses the y_t vector in terms of accumulated past shocks or errors in the system" (Freeman, Williams, and Lin 1989, 846). By tracking into the future the response of the variables in the system to this shock, innovation accounting enables the VAR modeler to discover which variables "have causal priority, create the greatest response in the other variables in the system" (Granato and Krause 1998, 10).¹⁶

¹⁵Of course, if the researcher believes that all of the right hand side variables truly are exogenous and no dynamics diffuse through a system, then OLS or MLE is appropriate.

¹⁶The innovations must be uncorrelated with each other. Choleski factorization, which creates a triangular matrix in which the orthogonalized residuals are set forth on the
(continued...)

Variance decomposition is the complement to innovation accounting. Pursuant to this type of dynamic analysis, "the decomposition of forecast error variance provides an estimate of the amount of influence variables have in the system. . . By decomposing this forecast error, we can determine the impact of one variable's forecast on the error in forecasting other variables. Thus, we can measure the effects that variables have on each other over time" (Freeman, Williams, and Lin 1989, 847).¹⁷ As a consequence, variance decomposition does not demonstrate whether effects are significant (as innovation accounting provides), but instead this technique yields the cumulative effect of one variable on another in a system over time, measured in terms of a proportion or percentages (Granato and Krause 1998).

Before proceeding to the VAR analyses, two issues must be settled. First, should data in levels or differences be used in the VAR models? Some VAR modelers insist that the data should remain in levels and not be differenced, although logging variables, if appropriate, is permissible (Williams 1995). Nevertheless, other scholars who have incorporated VAR models in their research have utilized differenced data (Granato and Krause 1998). Therefore, which should be used in this analysis, data in levels or in differences? It seems that the answer depends in part upon the issues in which the researcher is interested. Certainly, if long-term forecasting via VAR is to be employed, then

¹⁶(...continued)

diagonal, ensures that the impulses are uncorrelated (*see* Granato and Krause 1998 for a fuller exposition on this topic). The Econometric Views program which I utilized to run the various VAR models in this study incorporates Choleski factorization.

¹⁷Variance decomposition tests apply Choleski factorization as well.

differenced data clearly are inappropriate, since stationarity via differencing comes at a cost of losing any long-run components in the data. Nevertheless, if innovation accounting and variance decomposition solely are to be utilized in order to determine dynamic causality, this suggests that stationary data might provide more interpretable results, despite the adverse consequences of differencing. Based on this appraisal, then, since I do not expect to estimate long-run forecasts based on VAR, yet I will observe the innovation accounting and variance decomposition measures in this study, I will employ stationary data achieved through differencing, where appropriate. Nevertheless, I additionally will run the VAR models with data in levels as a variety of sensitivity analysis, in order to confirm that the results of this approach are robust.

The second issue concerns determining the appropriate lag length, in order to ensure that the VAR models are specified properly (Granato and Krause 1998). One manner of choosing the suitable lag length for the models simply is to use available rules of thumb, as follows: if monthly data, 15 lags; if quarterly data, 6 lags; nevertheless, there is no general rule of thumb for annual data (Williams 1995). More definitive methods for settling on the number of lags for the system of equations, particularly when annual data are adopted as in this study, include Sims' (1980, 156, fn. 17) modified log-likelihood test, the Akaike Information Criterion (AIC), and the Schwartz Criterion (SBC). The Sims test statistic for determining the appropriate lag specification for VAR models is:

$$LR = (T-k) \left[\ln|\Sigma_R| - \ln|\Sigma_U| \right] \sim \chi^2_{(k \text{ d.f.})}$$

where: T = number of observations; k = number of estimated parameters in the unrestricted model; $\ln|\Sigma_R|$ = natural log of determinant residual covariance in the restricted model; and, $\ln|\Sigma_U|$ = natural log of determinant residual covariance in the unrestricted model. For AIC and SBC, when a different lag length is chosen, the best-specified model has the lowest AIC or SBC value, which is the statistic closest to negative infinity ($-\infty$).¹⁸

For purposes of this study, I have applied Sims' modified log-likelihood statistic as the primary tool, along with the AIC and SBC statistics as secondary diagnostics, to determine the appropriate lag length for the VAR models. That is, as a decision rule I will use the lag length specified by Sims' modified log-likelihood test unless both the AIC and SBC statistics instruct otherwise. With respect to calculating the suitable number of lags for each VAR system, I have incorporated the reduction theory of model building.¹⁹ Accordingly, for each system I first will compare five lags to four lags. Then, if the unrestricted model (the one with the greatest number of lags) is not significant, I will repeat the process and compare four lags to three lags, then three lags to two lags, until I am able to ascertain a VAR model with the most fitting number of lags for each system. Based on this model-building approach utilizing these several statistics and decision rules, the

¹⁸While Sims' modified log-likelihood test has better small sample properties than AIC, both statistics are the same asymptotically.

¹⁹Reduction theory encompasses a general to simple framework. With respect to specifying the appropriate number of lags for a VAR model, this model-building process commences with a model consisting of the greatest number of lags (in this case, 5 lags) and employs various diagnostics as lags are dropped in order to attain a model which is both "theoretically and statistically defensible" (Granato 1991, 135).

appropriate lag lengths for the respective VAR systems, in both differences and levels, are as follows:

data in differences:

civil liberties:	2 lags
economics:	2 lags
criminal procedure:	2 lags
union and labor:	3 lags
attorneys:	2 lags
federalism:	2 lags
federal taxation:	4 lags

data in levels:

civil liberties:	3 lags
economics:	2 lags
criminal procedure:	2 lags
union and labor:	2 lags
attorneys:	2 lags
federalism:	2 lags
interstate relations:	2 lags
federal taxation:	5 lags
miscellaneous: ²⁰	2 lags

Now that the preliminaries have been confronted, I am able to pursue the VAR analyses at issue in this chapter. For the various systems, each of which includes the time series of identical issues in both federal courts of interest, I estimated a VAR model and proceeded to employ the innovation accounting and variance decomposition analyses; this was accomplished for the data in both levels and differences, as appropriate. The results for each particular VAR system follow.

According to innovation accounting for the differenced data, the greatest effect on the agenda of the Supreme Court's civil liberties agenda is the Court's own agenda for this

²⁰The interstate relations and miscellaneous series only will be estimated in levels, since those data exhibited stationarity in levels.

issue area, as there is no appreciable effect stemming from the Courts of Appeals. When a one standard deviation shock is applied to the agenda of the Supreme Court, the only significant effect derives from the Supreme Court's agenda, which is illustrated by Figure 3.1a. In a VAR innovation accounting graph, the solid line represents the impulse, while the dotted lines represent \pm two standard errors (approximately 95%) surrounding that impulse. If either of the standard error bars crosses the zero effect margin line at any point, there is a statistically significant effect at about the conventional .05 probability. In Figure 3.1a, since one of the standard error bars breaks the zero line at time period three, there is statistical significance in response to that shock to the system. That is, the Supreme Court's civil liberties agenda is a significant influence on its future civil liberties agenda. To the contrary, Figure 3.1b provides no analogous significance, since the standard error bars never cross zero. Apparently, the justices do not consider civil liberties cases in the courts below when accepting these cases on cert. As for the Courts of Appeals, Figure 3.1c demonstrates that parties are influenced to a significant degree by their own civil liberties appeals through two time periods. Moreover, the Supreme Court's agenda for these cases also has a significant, albeit short lived, effect on these appeals in the circuit courts (*see* Figure 3.1d).

These results are confirmed when the data in levels are employed, as demonstrated by the graphs in Figure 3.2. The only difference is that the findings in levels are much more dramatic than those when differenced data are exploited. For instance, Figure 3.2a provides that the Supreme Court is influenced by its own agenda decisions in civil liberties for nearly the entire 10-year period, not just for a few years. As with Figure 3.1b, Figure 3.2b exhibits no effect whatsoever stemming from the Courts of Appeals. And, while Figure 3.2d

illustrates that litigants are inspired by their own litigious appeals, the greater effect stems from the Supreme Court itself, where parties react to changes in the Supreme Court's agenda for civil liberties for very nearly the entire period (*see* Figure 3.2c).

The variance decomposition results provide further evidence along these lines, as decomposing the forecast error variance into the future provides that the Supreme Court has strong influence in the Courts of Appeals, but that an endogenous effect does not appear to influence the justices in their cert. decisions for civil liberties cases. For the differenced data, Figures 3.3a and b illustrate that roughly 15 percent of the agenda of the Courts of Appeals is determined by the Supreme Court's agenda, an influence which remains fairly consistent over time, while there is a negligible effect emanating from the lower courts. Tables 3.4a and b provide the exact percentages for the values found in these variance decomposition figures. When the VAR models incorporate the data in levels, once again the results are striking. Figures 3.4a and b demonstrate that, while litigation in the circuit courts do not affect the justices, the effect deriving from the justices is so forceful that by the end of the time period, it is forecasted that litigious appeals are influenced more so by the Supreme Court's agenda than by the agenda of the lower courts themselves. Again, Tables 3.5a and b provide the particular percentages of the variance decomposition.

Economic cases additionally provide for interesting results. The innovation accounting in differences provides that the Supreme Court only is influenced by its own agenda for this issue (*see* Figures 3.5a and b). Similarly, appeals in the lower federal courts are most influenced by the litigants' own behavior, as the Supreme Court has a slightly significant effect in this regard (*see* Figures 3.5c and d). Once again, the data in levels

provide for more potent inferences. As evidenced by the various graphs in Figure 3.6, the Supreme Court affords statistically significant influence on the economic agenda in the Courts of Appeals. Nevertheless, while litigious appeals are most persuaded by their own history, the influence of Supreme Court's agenda for this issue becomes significant throughout segments of the period. As for the potential influence of the Courts of Appeals, innovation accounting in levels demonstrates that economic appeals provide for a slightly significant effect on the Supreme Court; variance decomposition analysis confirms this modest but nonetheless important finding. It is somewhat surprising that the Supreme Court was not influenced to a greater degree than it was by the economic agenda as set by parties in the courts below. Still, these analyses suggest that the Supreme Court contemporaneously inspires agenda changes in the circuit courts and is motivated by agenda trends established in the lower courts for economic issues (*see* Figure 3.7 and Table 3.6 for the differenced results, along with Figure 3.8 and Table 3.7 for the levels results in levels).

The Supreme Court also appears to be influential when it comes to criminal procedure cases. The innovation accounting analyses provide that the justices arouse agenda changes in the Courts of Appeals to a nontrivial, even significant, degree, at least for a small portion of the time period when the analysis is run in differences. On the other hand, the justices are not at all motivated by analogous changes in the lower federal courts. Once again, each court is affected chiefly by its own past history (*see* Figures 3.9 [differences] and 3.10 [levels]). The variance decomposition results, however, demonstrate that the Supreme Court's influence is more profound than appears at first blush from the impulse response functions, as a notable portion of the criminal procedure agenda for the lower courts is

determined by changes in the Supreme Court's agenda for this issue (*see* Figure 3.11 and Table 3.8 [differences] and Figure 3.12 and Table 3.9 [levels]).

Similar implications are obtained for union and labor cases, as innovation accounting demonstrates that each court is most responsive to its own past agenda to a significant degree; however, the Supreme Court may be slightly susceptible to agenda changes in the circuit courts for this issue, as faintly significant effects obtain. At this stage it is inconclusive whether the justices influence parties in the lower courts, as the differenced data provide for barely significant outcomes, while no such inference can be made from the impulse response in levels (*see* Figures 3.13 [differences] and 3.14 [levels]). Variance decomposition analyses are a bit more sensitive to these responses and, as a consequence, shed additional light on causal influences for union cases. Specifically, while the effects are not immediate, both the Supreme Court and Courts of Appeals are influenced to a considerable degree by agenda changes in the other institution, as this conclusion can be drawn from all variance decomposition analyses, save for the decomposition of forecast error of the Courts of Appeals when level data are employed (*see* Figure 3.15 and Table 3.10 [differences] and Figure 3.16 and Table 3.11 [levels]).

As for attorneys cases, this generally nonsalient issue provides for somewhat predictable results. That is, innovation accounting demonstrates that each court is most influenced by its own actions but not those of the other, although when data in levels are employed the Supreme Court appears to influence changes in the Courts of Appeals (*see* Figures 3.17 [differences] and 3.18 [levels]). Variance decomposition confirms these results, as the Supreme Court does not appear to respond to the agenda of the lower courts for this

issue, while the data in levels provide evidence that the Supreme Court engenders changes in the courts below. The differenced data, however, do not permit such a strong conclusion (*see* Figure 3.19 and Table 3.12 [differences] and Figure 3.20 and Table 3.13 [levels])

Federalism is another of the relatively minor issue areas, so it is not surprising to observe relatively few influences between the courts. For both differenced and level data, the innovation accounting demonstrates no cross-institutional influences (*see* Figures 3.21 [differences] and 3.22 [levels]). Similarly, there is little to no effect in the variance decomposition graphs in either direction (*see* Figure 3.23 and Table 3.14 [differences] and Figure 3.24 and Table 3.15 [levels]). Nearly identical results obtain for interstate relations cases in both impulse response and variance decomposition analyses; that is, each court influences only itself with respect to this issue (*see* Figure 3.25 for innovation accounting, and Figure 3.26 and Table 3.16 for variance decomposition [levels only]).

Returning to a relatively salient issue, at least for the early portion of the relevant time period, federal taxation demonstrates that this issue works within a system. For instance, with respect to innovation accounting, the Supreme Court influences the agenda of the Courts of Appeals to a significant degree, particularly when level data are utilized. Moreover, it appears there may be some feedback from the lower federal courts, as demonstrated by the impulse response function in levels; however, no such effect arises when differenced data are employed (*see* Figures 3.27 [differences] and 3.28 [levels]). Variance decomposition suggests that the Supreme Court's agenda changes for tax cases has a strong influence on these appeals in the lower courts, hovering at about 20 percent. Solid, long-term effects arise from the lower courts in the level data analysis, although the influence

seems not as convincing when differenced data removes this long-term component (*see* Figure 3.29 and Table 3.17 [differences] and Figure 3.30 and Table 3.18 [levels]).

Finally, since there is no *a priori* expectation for any influence or direction thereof with respect to miscellaneous cases, these results are reported merely for illustrative purposes. Both the innovation accounting and variance decomposition depict that the past history of each court is most influential on current and future histories, although it appears there may be a slight effect stemming from the Courts of Appeals as well (*see* Figure 3.31 for innovation accounting, and Figure 3.32 and Table 3.19 for variance decomposition [levels only]).²¹

DISCUSSION

The results of the Granger and VAR analyses in this chapter provide initial support for my theory that the agendas of both the Supreme Court and Courts of Appeals affect each

²¹Earlier in this chapter, I briefly mentioned the debate among time-series scholars concerning the use of differenced or level data in VAR analyses. Without solving this dispute, I ran Johansen (1991) cointegration tests to determine whether the time series in this study consisted of cointegrating vectors. If cointegrated, that would lend evidence that data in levels should be utilized, since by definition time series must be integrated in order to be cointegrated with each other.

Nevertheless, the results of these Johansen tests were inconclusive. Specifically, some of the issue series definitively were cointegrated (these include: criminal procedure; union and labor; attorneys; and, interstate relations). Others showed some but equivocal evidence of vector cointegration (economic; federalism; federal taxation; and, miscellaneous). Finally, civil liberties displayed no vector cointegration at all.

Accordingly, I report and rely on the VAR analyses utilizing both differenced and level data. The results for the VAR analyses in levels and differences do not conflict with each other; indeed, for the salient theoretical hypotheses and issues, in large part they are corroborating.

other, albeit to varying degrees. The strongest conclusion which can be drawn at this stage of the analysis is that the agenda priorities the justices of the Supreme Court establish clearly influence their own future decisions on their agenda; additionally, parties in the appeals courts recognize these trends and, in a rational manner, appeal cases in line with them, thus further demonstrating the Supreme Court's influence in setting the judicial agendas of the federal courts, and not just their own agenda. Thus, while the Supreme Court clearly flexes its agenda muscles in this regard, at the same time it is not entirely isolated in fashioning agenda decisions, as it appears to be influenced by agenda priorities as determined by parties in the federal courts below, at least for some issues areas.

As for the specific issues, the Supreme Court evidently has a potent influence on litigious appeals in civil liberties cases. While the Granger tests were not entirely conclusive in this regard, the VAR analyses leave little doubt that parties and their representatives respond to priorities set by the justices concerning the civil liberties agenda. The justices, however, do not at all consider appellate decisions on this issue when setting the Court's agenda. Accordingly, *Hypotheses # 3a* and *# 3b* appear to be verified, as the Supreme Court has an influence beyond its own institutional walls but is not persuaded similarly by behavior in the lower federal courts.

The results for economic issues also comported with the general aspects of my theory. For instance, while the Supreme Court triggered trends in circuit court economic appeals, it also was slightly influenced by the hypothesized endogenous effect emanating from the lower courts. As well, while causality in this direction was not as strong as I had

anticipated, these results clearly were not negligible. Thus, the evidence provides support for both *Hypothesis # 4a* and *# 4b*.

The criminal procedure results additionally provided convincing evidence of the proposition that the Supreme Court influences parties in their litigious decisions to appeal, as nearly every test and approach utilized in this study supported this aspect of the theory. Nevertheless, the examination also evinces that the justices were not affected similarly by criminal procedure appeals in the courts below. These analyses, then, ostensibly sustain *Hypothesis # 5a* but not *# 5b*.

Union and labor cases provided support for both aspects of the theory, as not only did the Supreme Court influence appeals below, but those same appeals constituted part of the basis of the justices' cert. decisions for this issue. Both *Hypotheses # 6a* and *# 6b* appear to be bolstered by the analyses, then, as each court spurs corresponding agenda changes in the other for union and labor issues.

There is no dispute that appeals in the circuit courts do not enter into the justices' decisions to accept cases which concern attorneys; however, the results of this study do not resolve the issue of whether the Supreme Court influences lower court appeals of attorneys cases. Thus, while *Hypothesis # 7b* is supported, the evidence is inconclusive as to *# 7a*. Additionally, the findings herein suggest that there is no cross-institutional influence in either direction for cases concerning federalism or interstate relations issues. For these two generally nonsalient issues, the only influence on agenda priorities appears to be each court's own past history, thus conflicting with *Hypothesis # 8a* and *# 9a* while indicating support for *Hypothesis # 8b* and *#9b*.

The issue of federal taxation is another which provided support for the theoretical proposition that agenda decisions in both of these courts cause changes in the agenda of the other. Certainly, the Supreme Court influenced parties bringing federal tax appeals. Moreover, as with both economic and labor issues, some feedback arose from the circuit courts for this issue as well. As a consequence, these analyses intimate that both courts affect the agendas of the other, thereby rendering evidence favoring *Hypotheses # 10a* and *# 10b*.

At this stage of this study, then, the evidence appears to support my theory in general, in that agenda trends established by the Supreme Court were complied with by litigants in the appeals courts, as it is in their interests to do so. Furthermore, for some issues the justices apparently were constrained to agree to hear certain types of cases they either would rather not accept or did not realize were of consequence. While the results for economic issues were not as profound as hypothesized, this issue in tandem with others, such as federal taxation and union and labor cases, provide preliminary yet notable evidence of an endogenous influence from the courts below. Thus, it appears that the Supreme Court has an important influence beyond its institutional boundaries, as appellants recognize the justices' agenda priorities and respond accordingly. Nevertheless, the causality demonstrated is not unidirectional, as the analyses in this chapter suggest that for some issues the water seems to run uphill, at least to a certain extent, as rates of appeals in the lower courts have considerable influence on the Supreme Court's agenda priorities over time. Thus, the agenda of the Supreme Court in fact may be both an exogenous influence on lower court appeals as well as an endogenous variable which responds to litigation in the courts below.

TABLE 3.1
AUGMENTED DICKEY-FULLER TESTS FOR UNIT ROOTS (SERIES IN LEVELS)

Court	Issue	No Trend, No Intercept	Intercept Only	Intercept and Trend
Supreme Court	Civil Liberties	-0.238	-2.187	-1.854
	Economics	-1.044	-3.057*	-4.597*
	Criminal Procedure	-0.495	-3.771**	-5.302**
	Union and Labor	-1.613	-2.282	-2.978
	Attorneys	-1.596	-2.709	-4.157*
	Federalism	-0.598	-3.174*	-3.496
	Interstate Relations	-2.657**	-4.817**	-4.693**
	Federal Tax	-1.844	-3.354*	-4.907**
	Miscellaneous	-2.1185*	-3.847**	-4.042*
Courts of Appeals	Civil Liberties	0.606	-0.0727	-2.542
	Economics	-0.965	-1.836	-2.094
	Criminal Procedure	-0.061	-2.088	-2.198
	Union and Labor	-.0730	-3.105*	-3.207
	Attorneys	-1.668	-3.177*	-4.919
	Federalism	-1.884	-3.732**	-3.507*
	Interstate Relations	-4.456**	-4.800**	-4.763**
	Federal Tax	-1.943	-1.966	-3.327
	Miscellaneous	-2.163*	-3.753**	-3.685*

H₀: unit root (data are not stationary)

*p ≤ .05

H_A: no unit root (data are stationary)

**p ≤ .01

Note: MacKinnon (1990) critical values are used for rejection of null hypothesis of a unit root.

TABLE 3.2
AUGMENTED DICKEY-FULLER TESTS FOR UNIT ROOTS (SERIES IN FIRST DIFFERENCES)

Court	Issue	No Trend, No Intercept	Intercept Only	Intercept and Trend
Supreme Court	Civil Liberties	-10.052**	-9.928**	-9.954**
	Economics	-9.102**	-9.031**	-8.951**
	Criminal Procedure	-7.815**	-7.730**	-7.673**
	Union and Labor	-7.075**	-7.074**	-7.053**
	Attorneys	-7.692**	-7.630**	-7.552**
	Federalism	-8.441**	-8.450**	-8.376**
	Federal Tax	-10.185**	-10.077**	-9.955**
Courts of Appeals	Civil Liberties	-5.771**	-5.993**	-5.927**
	Economics	-6.362**	-6.396**	-6.492**
	Criminal Procedure	-6.737**	-6.741**	-6.842**
	Union and Labor	-5.219**	-5.162**	-5.111**
	Attorneys	-8.606**	-8.550**	-8.518**
	Federalism	-7.744**	-7.701**	-7.617**
	Federal Tax	-7.634**	-7.926**	-7.996**

H_0 : unit root (data are not stationary)

* $p \leq .05$

H_A : no unit root (data are stationary)

** $p \leq .01$

Note: MacKinnon (1990) critical values are used for rejection of null hypothesis of a unit root.

TABLE 3.3
GRANGER CAUSALITY RESULTS

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Civil Liberties	2	.415	Courts of Appeals Granger Cause Supreme Court	Civil Liberties	2	.867
		3	.234			3	.771
		4	.156			4	.826
		5	.132			5	.535
		6	.138			6	.695
		7	.292			7	.703
		8	.578			8	.838
		9	.755			9	.879
		10	.886			10	.928
Supreme Court Granger Causes Courts of Appeals	Economic	2	.427	Courts of Appeals Granger Cause Supreme Court	Economic	2	.371
		3	.737			3	.402
		4	.918			4	.835
		5	.854			5	.920
		6	.263			6	.954
		7	.075			7	.814
		8	.077			8	.637
		9	.117			9	.340
		10	.016*			10	.056

H₀: no Granger causality

H_A: Granger causality

*p ≤ .05

**p ≤ .01

TABLE 3.3 (CONT'D)

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Criminal Procedure	2	.138	Courts of Appeals Granger Cause Supreme Court	Criminal Procedure	2	.822
		3	.248			3	.990
		4	.012*			4	.690
		5	.011*			5	.903
		6	.029*			6	.490
		7	.000**			7	.417
		8	.001**			8	.357
		9	.002**			9	.575
		10	.007**			10	.637
Supreme Court Granger Causes Courts of Appeals	Union and Labor	2	.318	Courts of Appeals Granger Cause Supreme Court	Union and Labor	2	.834
		3	.040*			3	.177
		4	.120			4	.191
		5	.454			5	.144
		6	.615			6	.842
		7	.171			7	.891
		8	.314			8	.472
		9	.412			9	.319
		10	.509			10	.616

H₀: no Granger causalityH_A: Granger causality

*p ≤ .05

**p ≤ .01

TABLE 3.3 (CONT'D)

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Attorneys	2	.973	Courts of Appeals Granger Cause Supreme Court	Attorneys	2	.468
		3	.764			3	.665
		4	.851			4	.693
		5	.914			5	.508
		6	.665			6	.668
		7	.768			7	.651
		8	.761			8	.595
		9	.884			9	.287
		10	.541			10	.550
Supreme Court Granger Causes Courts of Appeals	Federalism	2	.456	Courts of Appeals Granger Cause Supreme Court	Federalism	2	.112
		3	.469			3	.145
		4	.385			4	.109
		5	.156			5	.248
		6	.170			6	.322
		7	.239			7	.461
		8	.313			8	.378
		9	.452			9	.591
		10	.407			10	.777

H_0 : no Granger causality

H_A : Granger causality

* $p \leq .05$

** $p \leq .01$

TABLE 3.3 (CONT'D)

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Interstate Relations	2	.549	Courts of Appeals Granger Cause Supreme Court	Interstate Relations	2	.835
		3	.693			3	.519
		4	.777			4	.140
		5	.498			5	.281
		6	.611			6	.191
		7	.700			7	.164
		8	.614			8	.170
		9	.627			9	.344
		10	.814			10	.304
Supreme Court Granger Causes Courts of Appeals	Federal Taxation	2	.131	Courts of Appeals Granger Cause Supreme Court	Federal Taxation	2	.982
		3	.173			3	.829
		4	.136			4	.832
		5	.059			5	.417
		6	.183			6	.271
		7	.201			7	.101
		8	.027*			8	.286
		9	.006*			9	.340
		10	.074			10	.349

H_0 : no Granger causality

H_A : Granger causality

* $p \leq .05$

** $p \leq .01$

TABLE 3.3 (CONT'D)

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Misc.	2	.096	Courts of Appeals Granger Cause Supreme Court	Misc.	2	.079
		3	.143			3	.092
		4	.110			4	.203
		5	.119			5	.266
		6	.297			6	.283
		7	.505			7	.508
		8	.153			8	.694
		9	.140			9	.517
		10	.576			10	.794

H_0 : no Granger causality

H_A : Granger causality

* $p \leq .05$

** $p \leq .01$

TABLE 3.4
VARIANCE DECOMPOSITION OF CIVIL LIBERTIES CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.54	0.46
3	99.25	0.75
4	99.18	0.82
5	99.19	0.81
6	99.18	0.82
7	99.18	0.82
8	99.17	0.83
9	99.17	0.83
10	99.17	0.83
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	13.14	86.86
2	11.69	88.31
3	12.35	87.65
4	14.15	85.85
5	14.96	85.04
6	15.06	84.94
7	15.07	84.93
8	15.10	84.90
9	15.12	84.88
10	15.12	84.88
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.5
VARIANCE DECOMPOSITION OF CIVIL LIBERTIES CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.09	0.91
3	99.22	0.78
4	98.84	1.16
5	98.54	1.46
6	98.37	1.63
7	98.02	1.98
8	97.78	2.22
9	97.53	2.47
10	97.27	2.73
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	14.00	86.00
2	19.74	80.26
3	20.71	79.29
4	30.12	69.88
5	33.85	66.15
6	39.32	60.68
7	44.16	55.84
8	48.01	51.99
9	51.75	48.25
10	54.78	45.22
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.6
VARIANCE DECOMPOSITION OF ECONOMICS CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.69	0.31
3	98.14	1.86
4	94.95	5.05
5	94.20	5.80
6	94.27	5.73
7	94.12	5.88
8	93.98	6.02
9	93.95	6.05
10	93.95	6.05
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	10.90	89.10
2	15.36	84.64
3	18.43	81.57
4	18.95	81.05
5	18.87	81.13
6	19.10	80.90
7	19.30	80.70
8	19.33	80.67
9	19.33	80.67
10	19.34	80.66
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.7
VARIANCE DECOMPOSITION OF ECONOMICS CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	97.70	2.30
3	95.90	4.10
4	94.25	5.75
5	93.04	6.96
6	92.10	7.90
7	91.40	8.60
8	90.86	9.14
9	90.45	9.55
10	90.14	9.86
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	16.90	83.10
2	14.44	85.56
3	21.02	78.98
4	21.94	78.06
5	23.53	76.47
6	24.26	75.74
7	24.87	75.13
8	25.27	74.73
9	25.58	74.42
10	25.80	74.20
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.8
VARIANCE DECOMPOSITION OF CRIMINAL PROCEDURE CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.64	0.36
3	98.94	1.06
4	98.91	1.09
5	98.85	1.15
6	98.83	1.17
7	98.83	1.17
8	98.83	1.17
9	98.83	1.17
10	98.83	1.17
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	4.73	95.27
2	4.68	95.32
3	13.71	86.29
4	15.11	84.89
5	15.52	84.48
6	15.89	84.11
7	15.89	84.11
8	15.94	84.06
9	15.94	84.06
10	15.94	84.06
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.9
VARIANCE DECOMPOSITION OF CRIMINAL PROCEDURE CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	98.16	1.84
3	96.29	3.71
4	94.94	5.06
5	94.07	5.93
6	93.50	6.50
7	93.10	6.90
8	92.84	7.16
9	92.65	7.35
10	92.52	7.48
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	8.30	91.70
2	12.70	87.30
3	10.73	89.27
4	9.69	90.31
5	9.07	90.93
6	8.69	91.31
7	8.46	91.54
8	8.31	91.69
9	8.20	91.80
10	8.13	91.87
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.10
VARIANCE DECOMPOSITION OF UNION AND LABOR CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.51	0.49
3	99.42	0.58
4	91.75	8.25
5	86.21	13.79
6	86.16	13.84
7	85.91	14.09
8	85.49	14.51
9	85.57	14.43
10	85.56	14.44
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	0.35	99.65
2	12.48	87.52
3	12.42	87.58
4	13.55	86.45
5	21.13	78.87
6	21.22	78.78
7	21.22	78.78
8	21.30	78.70
9	21.22	78.78
10	21.26	78.74
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.11
VARIANCE DECOMPOSITION OF UNION AND LABOR CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	95.88	4.12
3	91.45	8.55
4	89.03	10.97
5	88.05	11.95
6	87.67	12.33
7	87.54	12.46
8	87.49	12.51
9	87.48	12.52
10	87.47	12.53
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	3.41	96.59
2	2.97	97.03
3	2.93	97.07
4	2.93	97.07
5	2.93	97.07
6	2.93	97.07
7	2.93	97.07
8	2.93	97.07
9	2.93	97.07
10	2.93	97.07
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.12
VARIANCE DECOMPOSITION OF ATTORNEYS CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.75	0.25
3	98.93	1.07
4	95.96	4.04
5	94.49	5.51
6	94.41	5.59
7	94.34	5.66
8	94.23	5.77
9	94.21	5.79
10	94.21	5.79
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	6.52	93.48
2	6.99	93.01
3	6.94	93.06
4	7.17	92.83
5	7.35	92.65
6	7.36	92.64
7	7.37	92.63
8	7.38	92.62
9	7.38	92.62
10	7.38	92.62
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.13
VARIANCE DECOMPOSITION OF ATTORNEYS CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.34	0.66
3	99.36	0.64
4	99.24	0.76
5	99.23	0.77
6	99.21	0.79
7	99.21	0.79
8	99.21	0.79
9	99.20	0.80
10	99.20	0.80
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	16.83	83.17
2	20.54	79.46
3	27.20	72.80
4	28.54	71.46
5	29.73	70.27
6	30.09	69.91
7	30.31	69.69
8	30.39	69.61
9	30.43	69.57
10	30.45	69.55
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.14
VARIANCE DECOMPOSITION OF FEDERALISM CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	94.88	5.12
3	94.87	5.13
4	91.46	8.54
5	89.97	10.03
6	89.90	10.10
7	89.07	10.93
8	88.88	11.12
9	88.83	11.17
10	88.68	11.32
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	1.03	98.97
2	1.82	98.18
3	1.77	98.23
4	3.03	96.97
5	3.56	96.44
6	3.61	96.39
7	3.97	96.03
8	4.03	95.97
9	4.06	95.94
10	4.13	95.87
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.15
VARIANCE DECOMPOSITION OF FEDERALISM CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	98.68	1.32
3	98.57	1.43
4	98.46	1.54
5	98.43	1.57
6	98.43	1.57
7	98.43	1.57
8	98.43	1.57
9	98.43	1.57
10	98.43	1.57
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	3.50	96.50
2	3.61	96.39
3	5.04	94.96
4	5.37	94.63
5	5.41	94.59
6	5.42	94.58
7	5.42	94.58
8	5.42	94.58
9	5.42	94.58
10	5.42	94.58
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.16
VARIANCE DECOMPOSITION OF INTERSTATE RELATIONS CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.83	0.17
3	99.20	0.80
4	99.04	0.96
5	99.04	0.96
6	99.02	0.98
7	99.02	0.98
8	99.02	0.98
9	99.02	0.98
10	99.02	0.98
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	97.67	2.33
2	97.42	2.58
3	97.42	2.58
4	97.40	2.60
5	97.40	2.60
6	97.40	2.60
7	97.40	2.60
8	97.40	2.60
9	97.40	2.60
10	97.40	2.60
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.17
VARIANCE DECOMPOSITION OF FEDERAL TAXATION CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	98.35	1.65
3	96.74	3.26
4	96.85	3.15
5	95.64	4.36
6	95.13	4.87
7	95.20	4.80
8	95.26	4.74
9	95.24	4.76
10	95.15	4.85
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	5.46	94.54
2	16.87	83.13
3	18.45	81.55
4	18.10	81.90
5	20.56	79.44
6	21.08	78.92
7	21.08	78.92
8	21.06	78.94
9	21.26	78.74
10	21.49	78.51
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.18
VARIANCE DECOMPOSITION OF FEDERAL TAXATION CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	93.45	6.55
3	93.33	6.67
4	93.28	6.72
5	89.14	10.86
6	90.56	9.44
7	90.17	9.83
8	89.29	10.71
9	89.27	10.73
10	88.96	11.04
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	20.31	79.69
2	18.85	81.15
3	26.86	73.14
4	37.28	62.72
5	40.38	59.62
6	49.00	51.00
7	51.96	48.04
8	53.17	46.83
9	55.64	44.36
10	56.79	43.21
Ordering: Supreme Court/Courts of Appeals		

TABLE 3.19
VARIANCE DECOMPOSITION OF MISCELLANEOUS CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	88.95	11.05
3	87.81	12.19
4	86.42	13.58
5	86.37	13.63
6	86.37	13.63
7	86.37	13.63
8	86.37	13.63
9	86.37	13.63
10	86.36	13.64
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	2.58	97.42
2	10.69	89.31
3	12.33	87.67
4	13.88	86.12
5	14.12	85.88
6	14.15	85.85
7	14.15	85.85
8	14.15	85.85
9	14.15	85.85
10	14.15	85.85
Ordering: Supreme Court/Courts of Appeals		

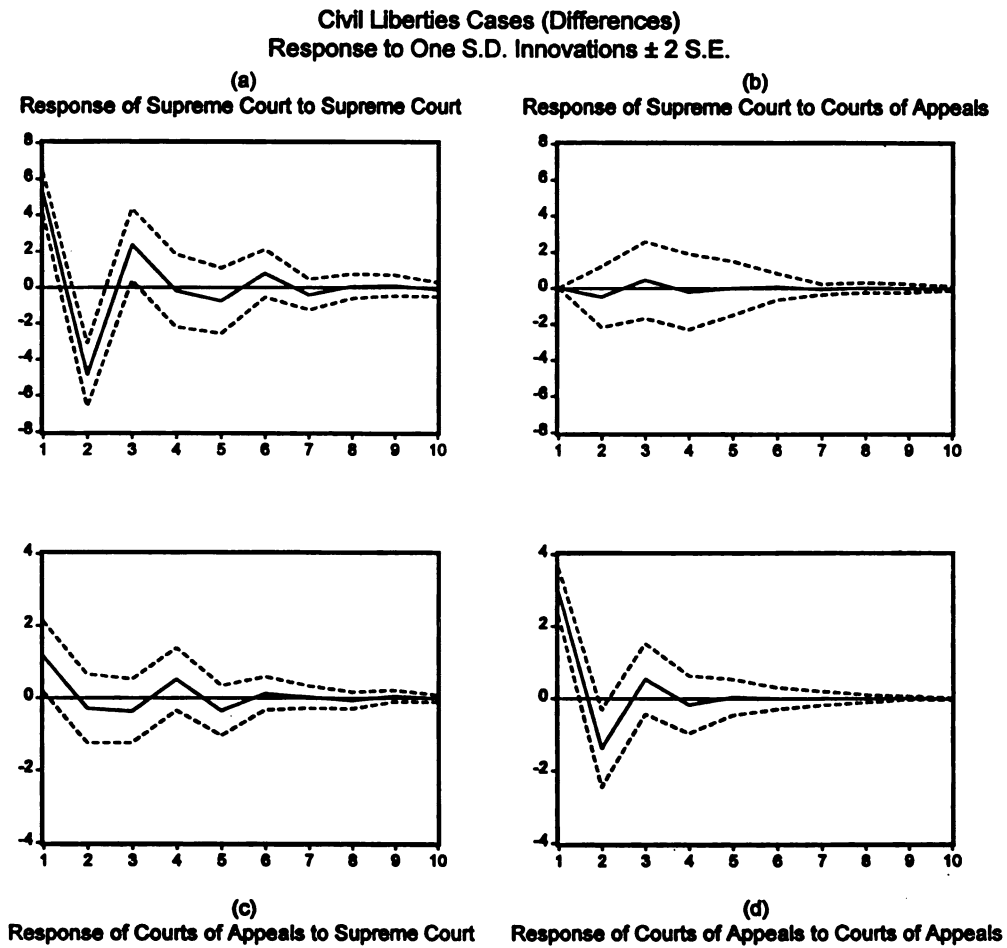


FIGURE 3.1
INNOVATION ACCOUNTING OF CIVIL LIBERTIES CASES (DIFFERENCES)

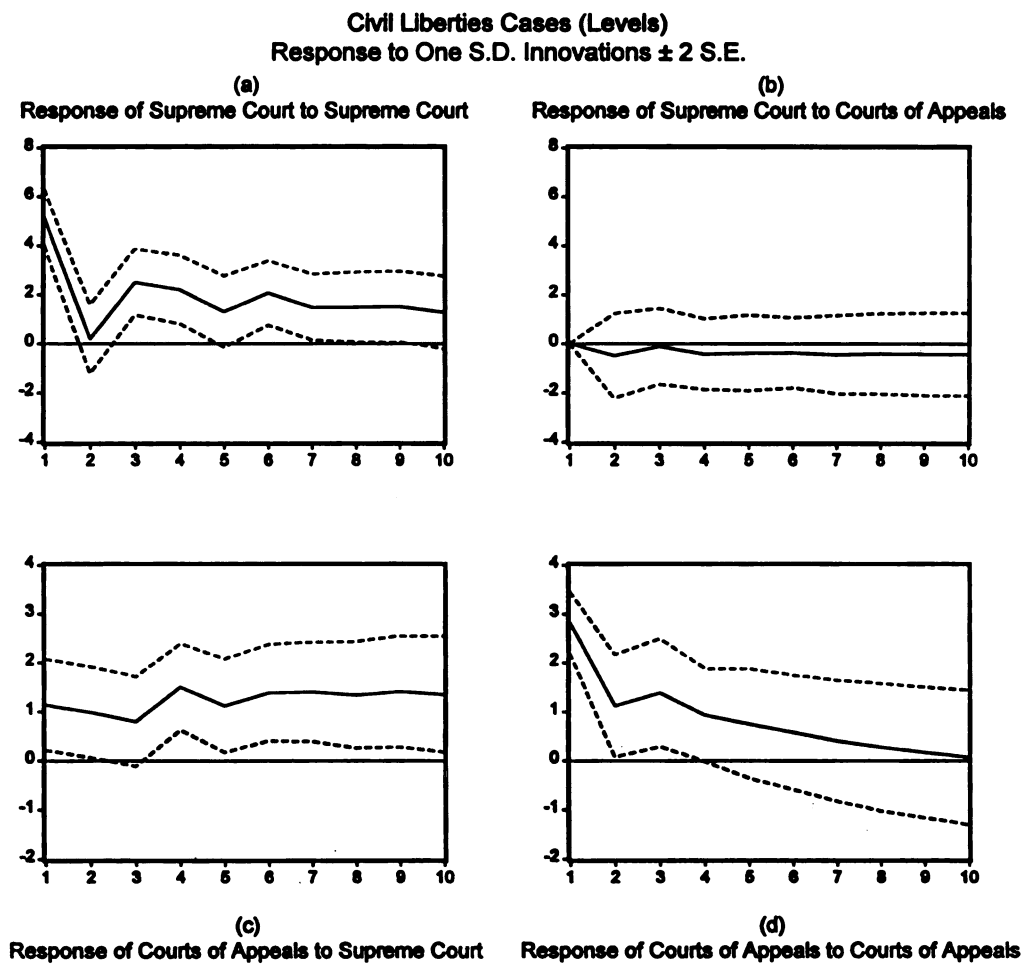


FIGURE 3.2
 INNOVATION ACCOUNTING OF CIVIL LIBERTIES CASES (LEVELS)

Civil Liberties Cases (Differences)

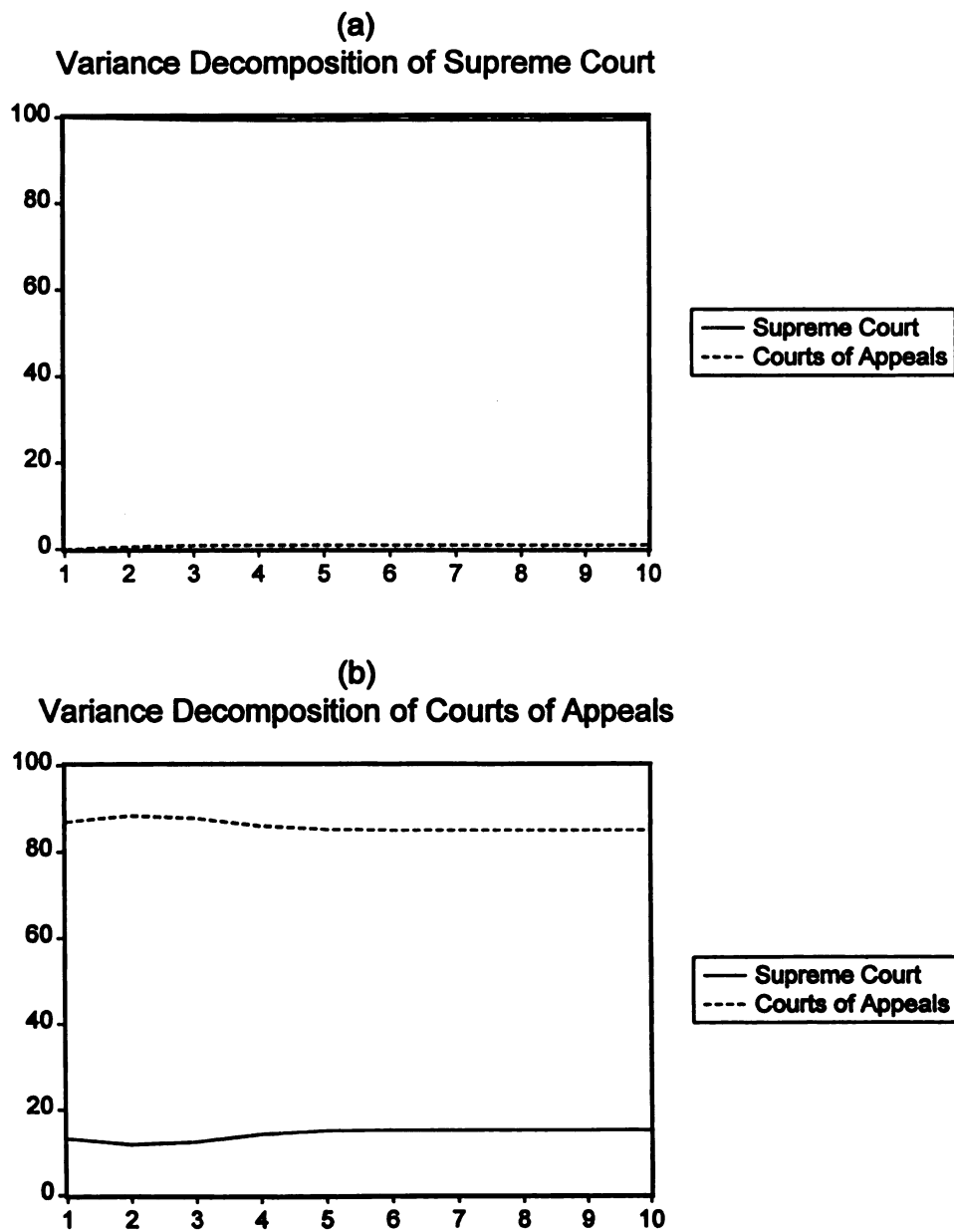


FIGURE 3.3
VARIANCE DECOMPOSITION OF CIVIL LIBERTIES CASES (DIFFERENCES)

Civil Liberties Cases (Levels)

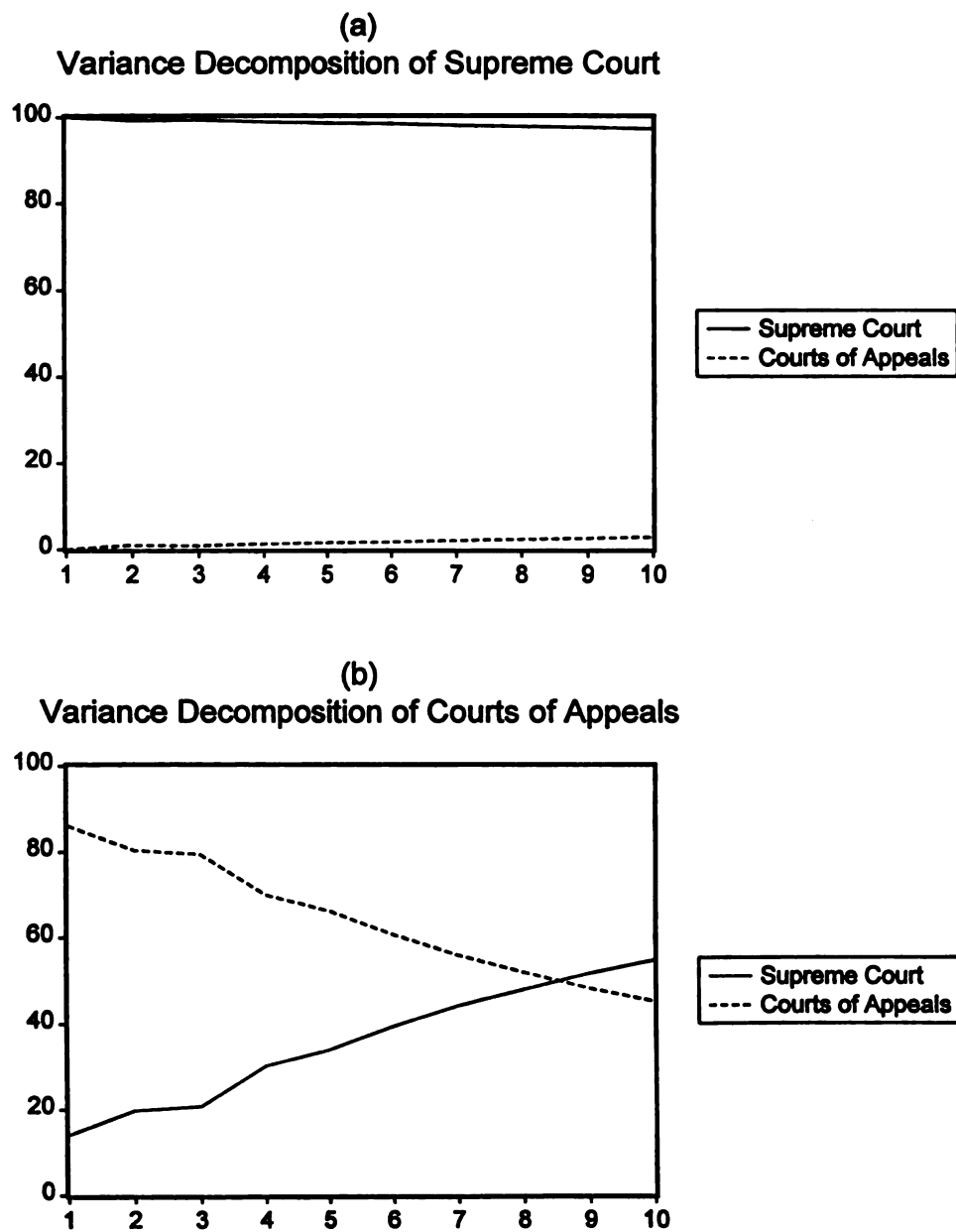


FIGURE 3.4
VARIANCE DECOMPOSITION OF CIVIL LIBERTIES CASES (LEVELS)

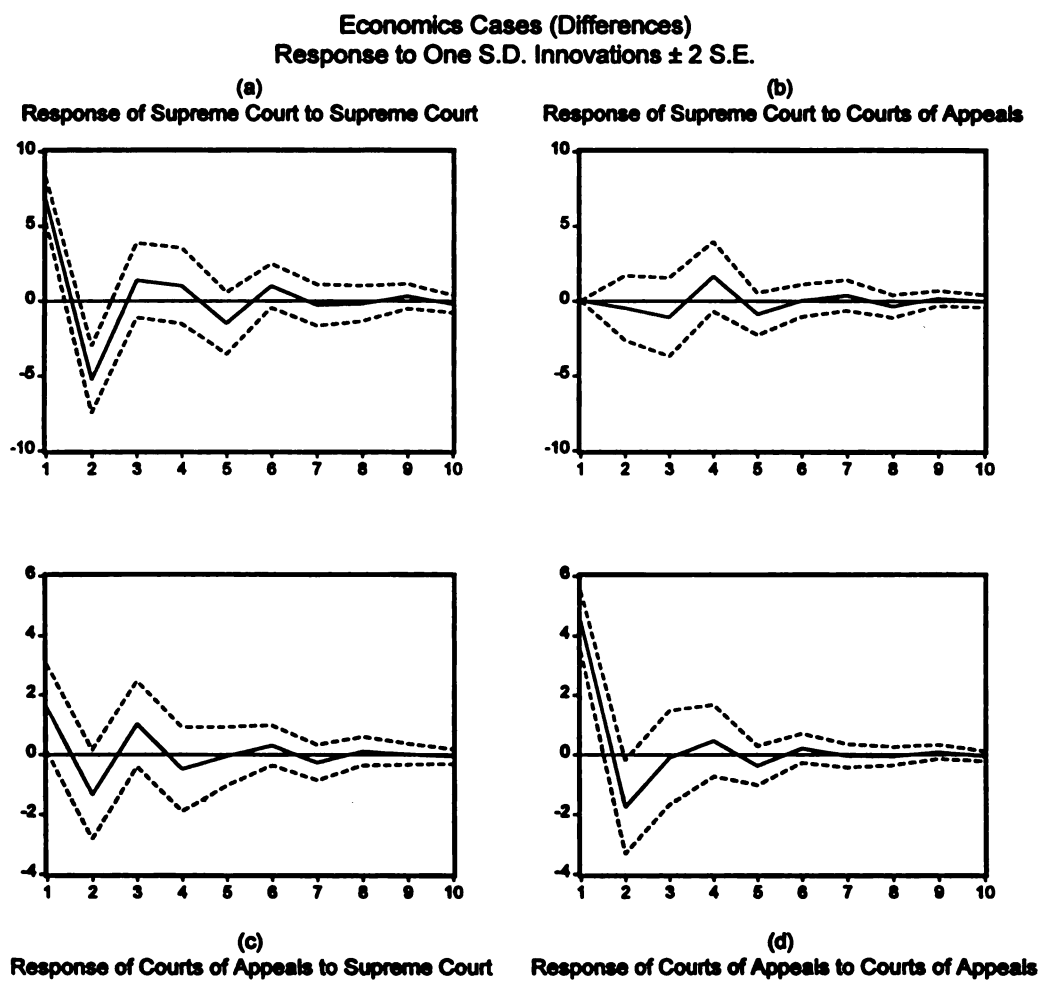


FIGURE 3.5
INNOVATION ACCOUNTING OF ECONOMICS CASES (DIFFERENCES)

Economics Cases (Levels)
Response to One S.D. Innovations ± 2 S.E.

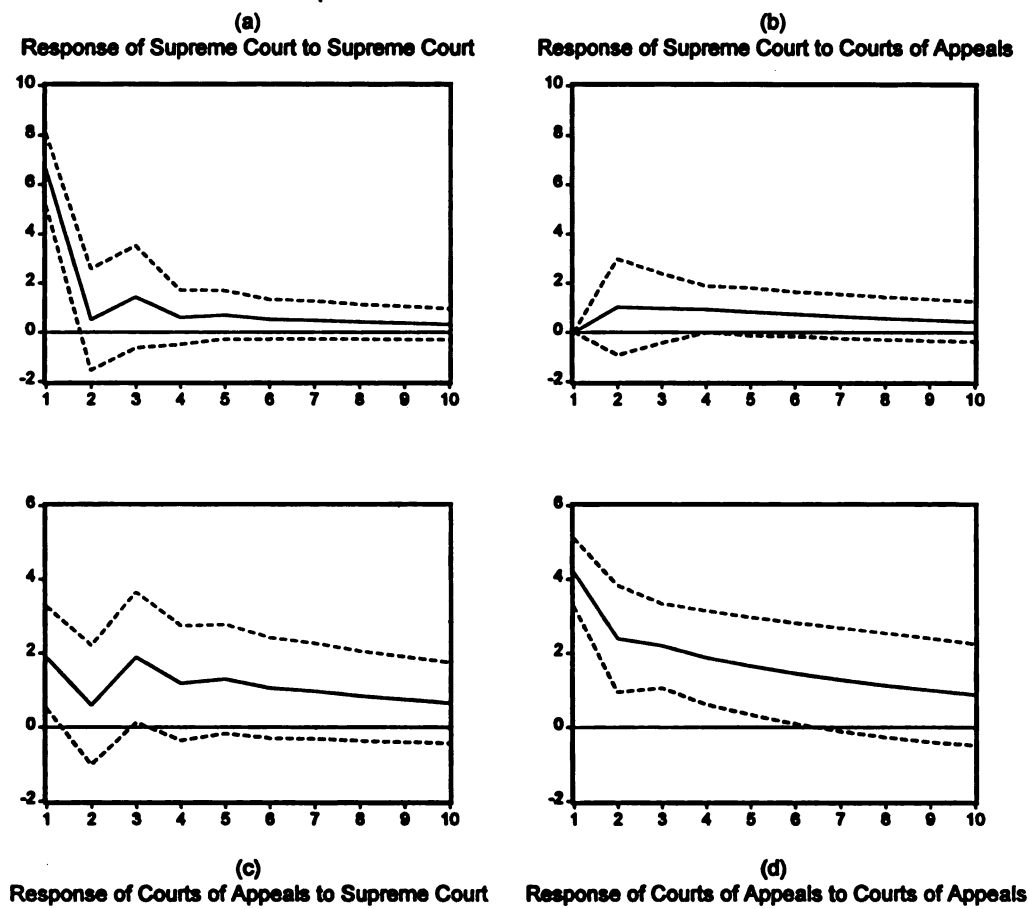
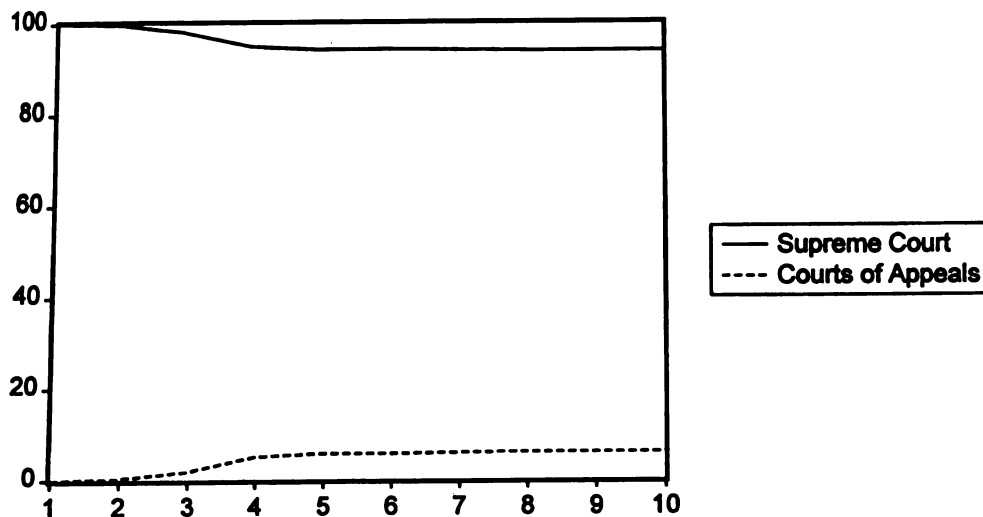


FIGURE 3.6
INNOVATION ACCOUNTING OF ECONOMICS CASES (LEVELS)

Economics Cases (Differences)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

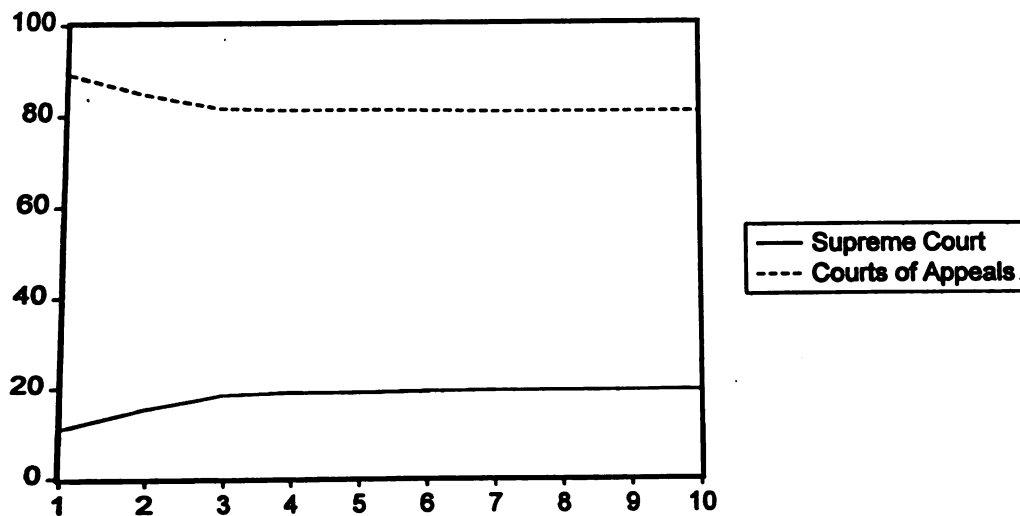


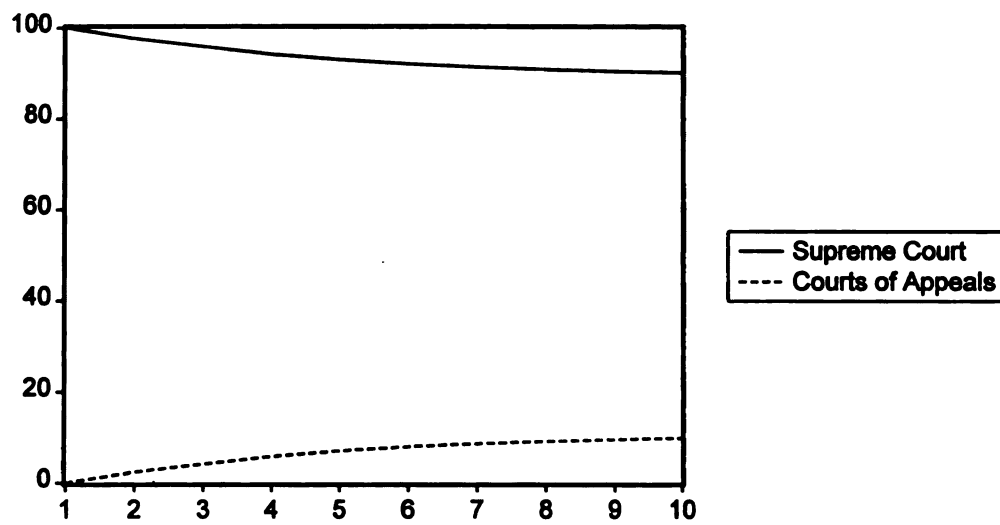
FIGURE 3.7

VARIANCE DECOMPOSITION OF ECONOMICS CASES (DIFFERENCES)

Economics Cases (Levels)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

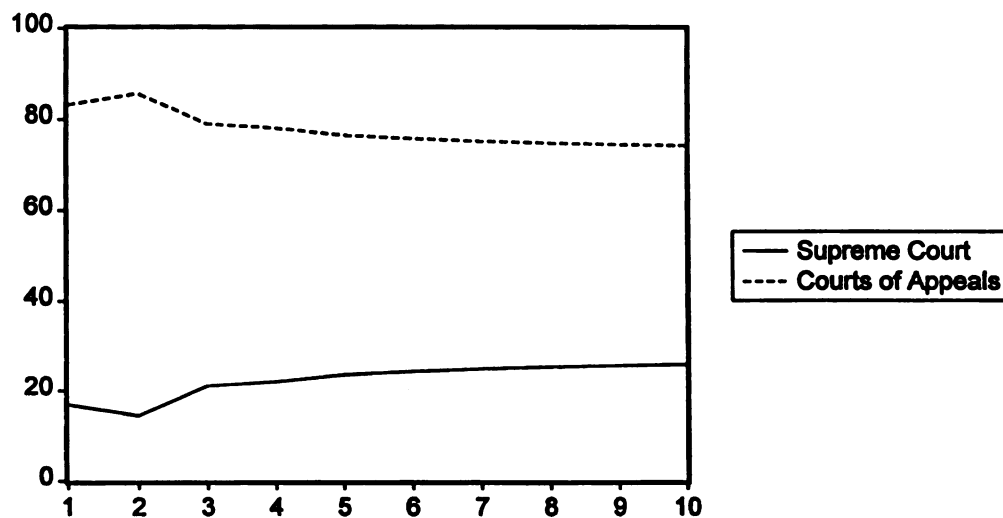
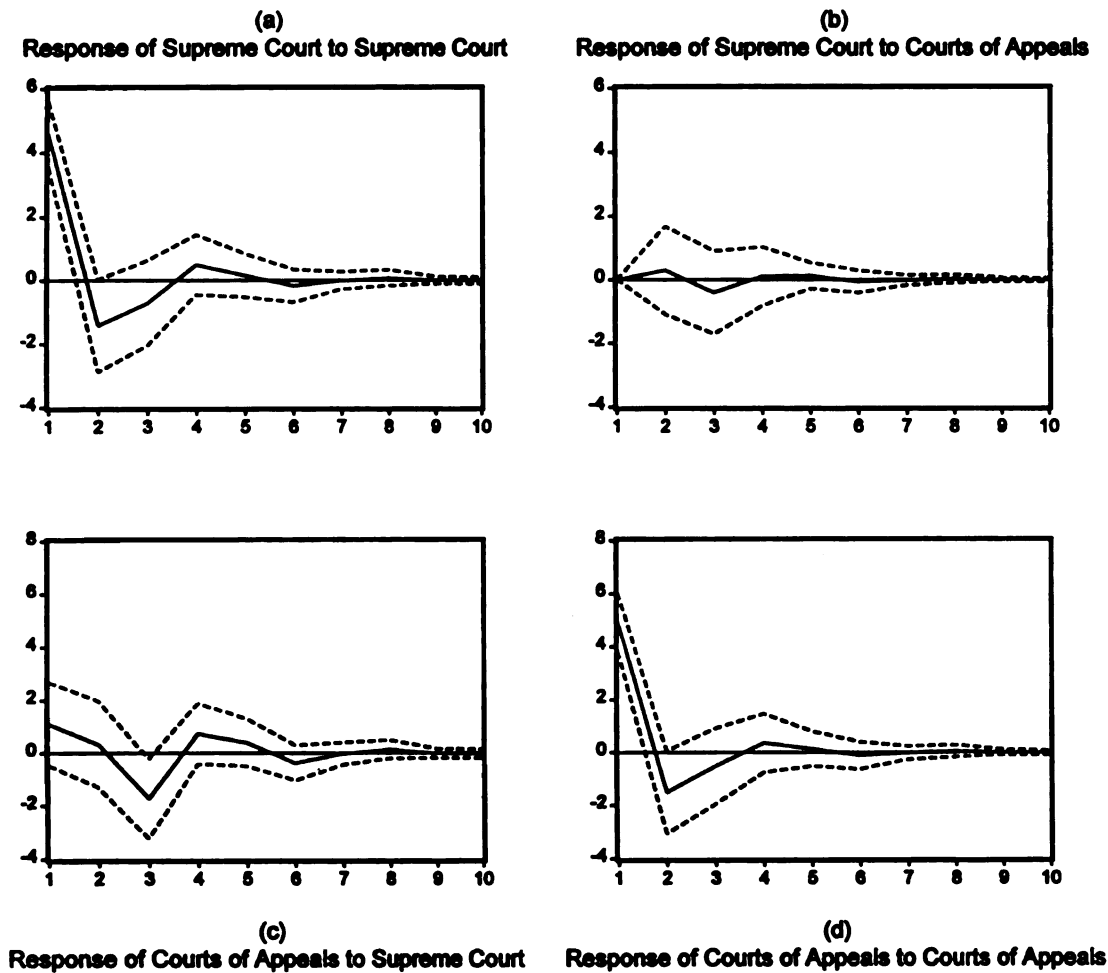


FIGURE 3.8
VARIANCE DECOMPOSITION OF ECONOMICS CASES (LEVELS)

**Criminal Procedure Cases (Differences)
Response to One S.D. Innovations ± 2 S.E.**



**FIGURE 3.9
INNOVATION ACCOUNTING OF CRIMINAL PROCEDURE CASES (DIFFERENCES)**

Criminal Procedure Cases (Levels)
Response to One S.D. Innovations ± 2 S.E.

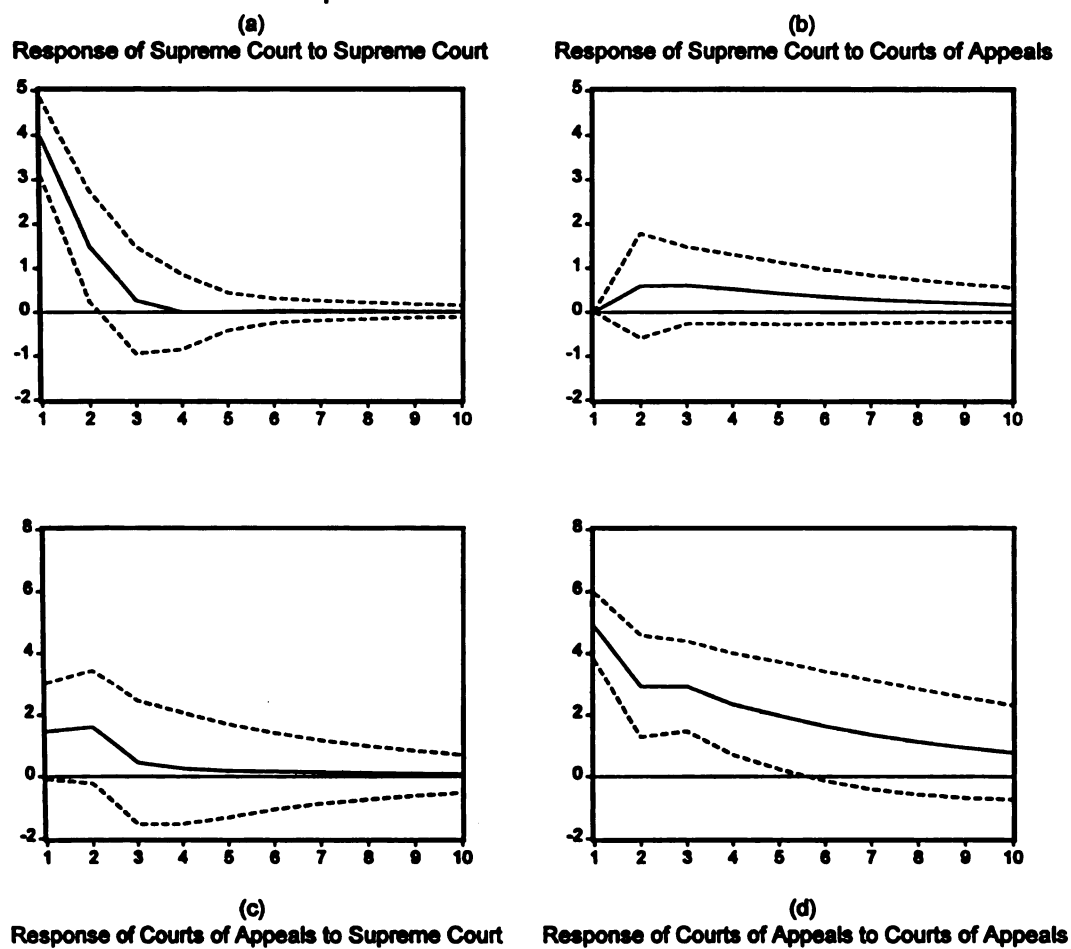
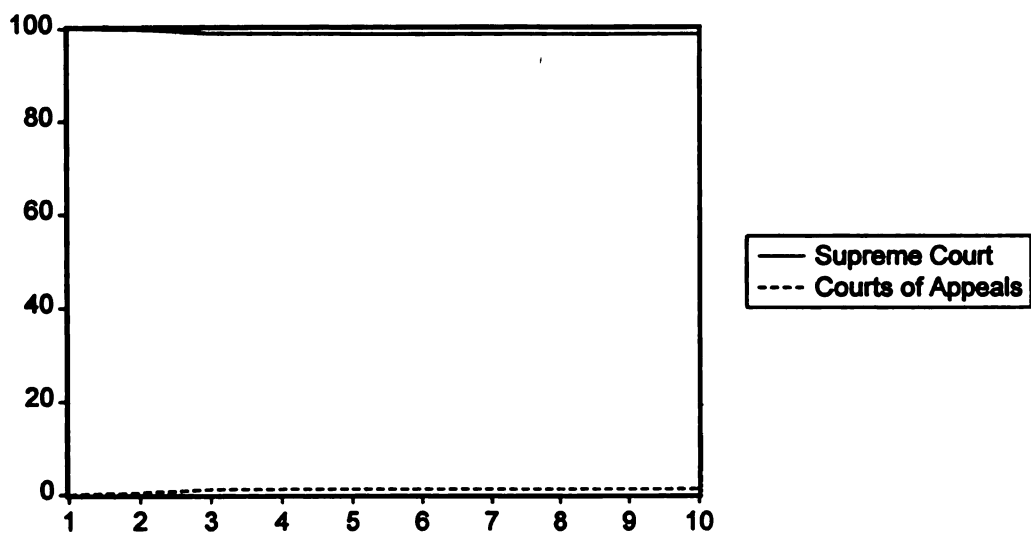


FIGURE 3.10
INNOVATION ACCOUNTING OF CRIMINAL PROCEDURE CASES (LEVELS)

Criminal Procedure Cases (Differences)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

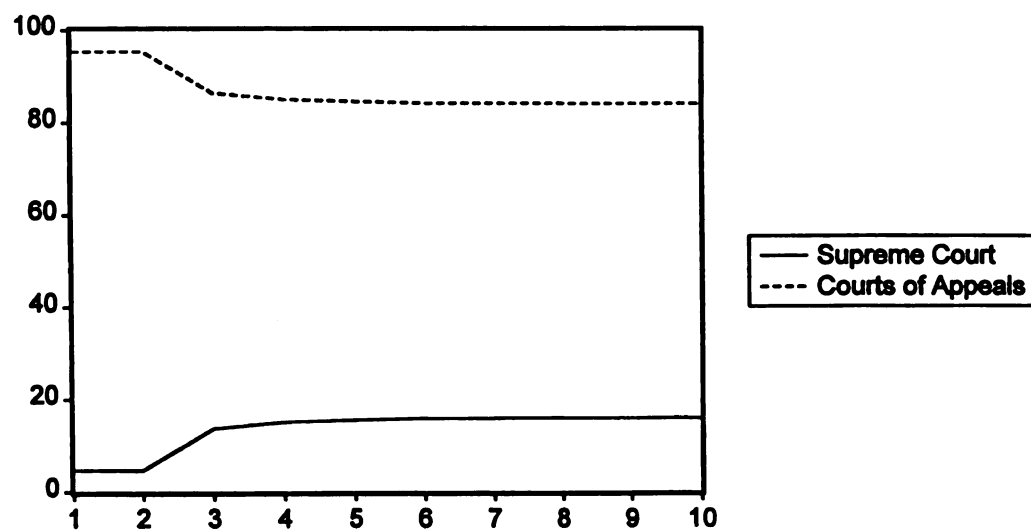


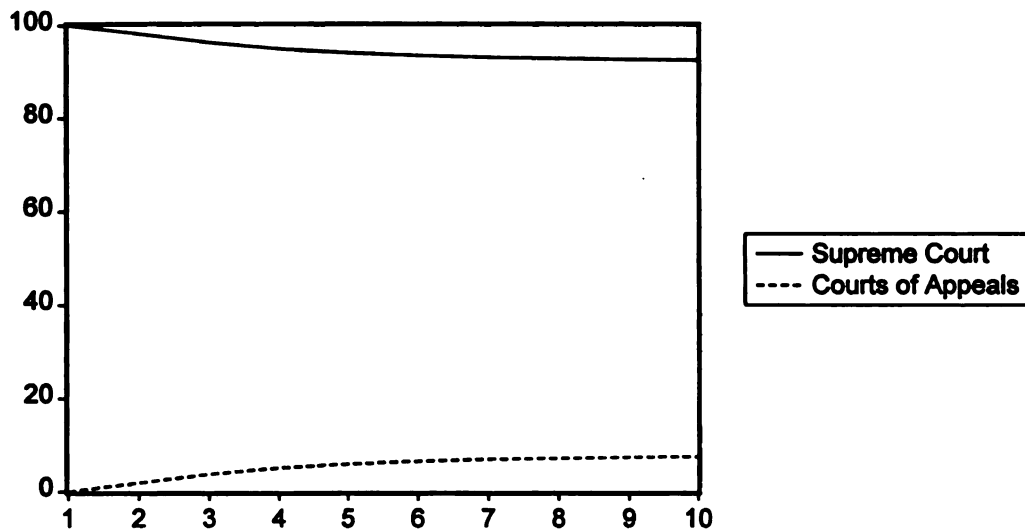
FIGURE 3.11

VARIANCE DECOMPOSITION OF CRIMINAL PROCEDURE CASES (DIFFERENCES)

Criminal Procedure Cases (Levels)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

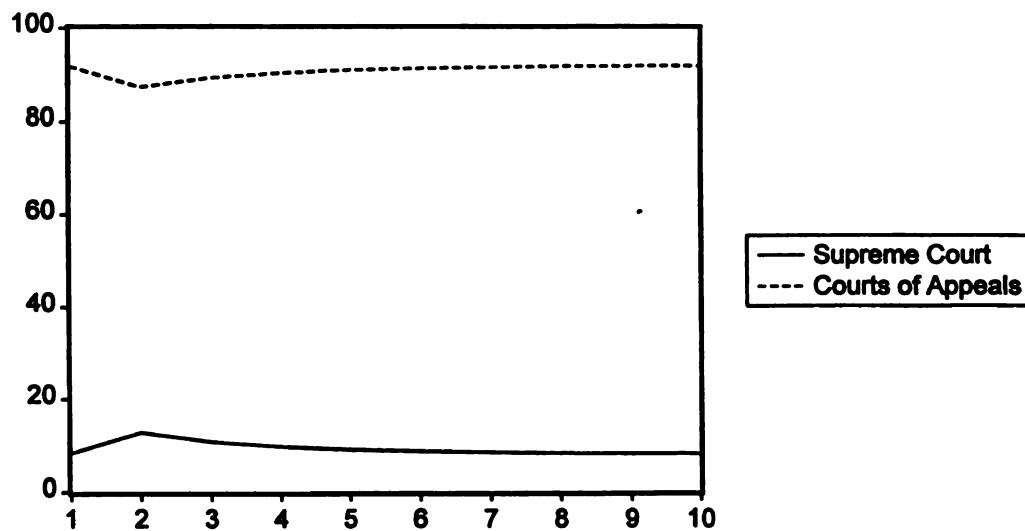


FIGURE 3.12

VARIANCE DECOMPOSITION OF CRIMINAL PROCEDURE CASES (LEVELS)

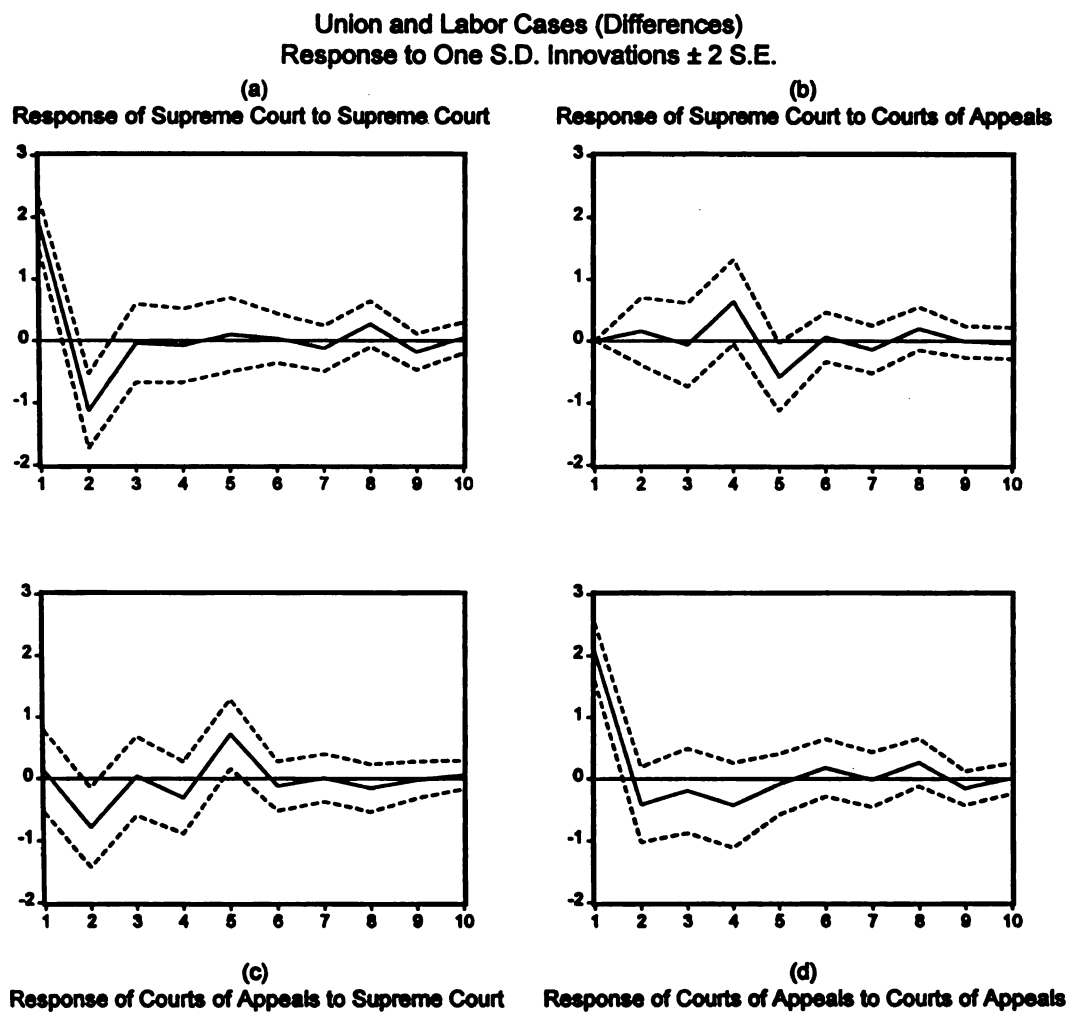


FIGURE 3.13
INNOVATION ACCOUNTING OF UNION AND LABOR CASES (DIFFERENCES)

Union and Labor Cases (Levels)
Response to One S.D. Innovations ± 2 S.E.

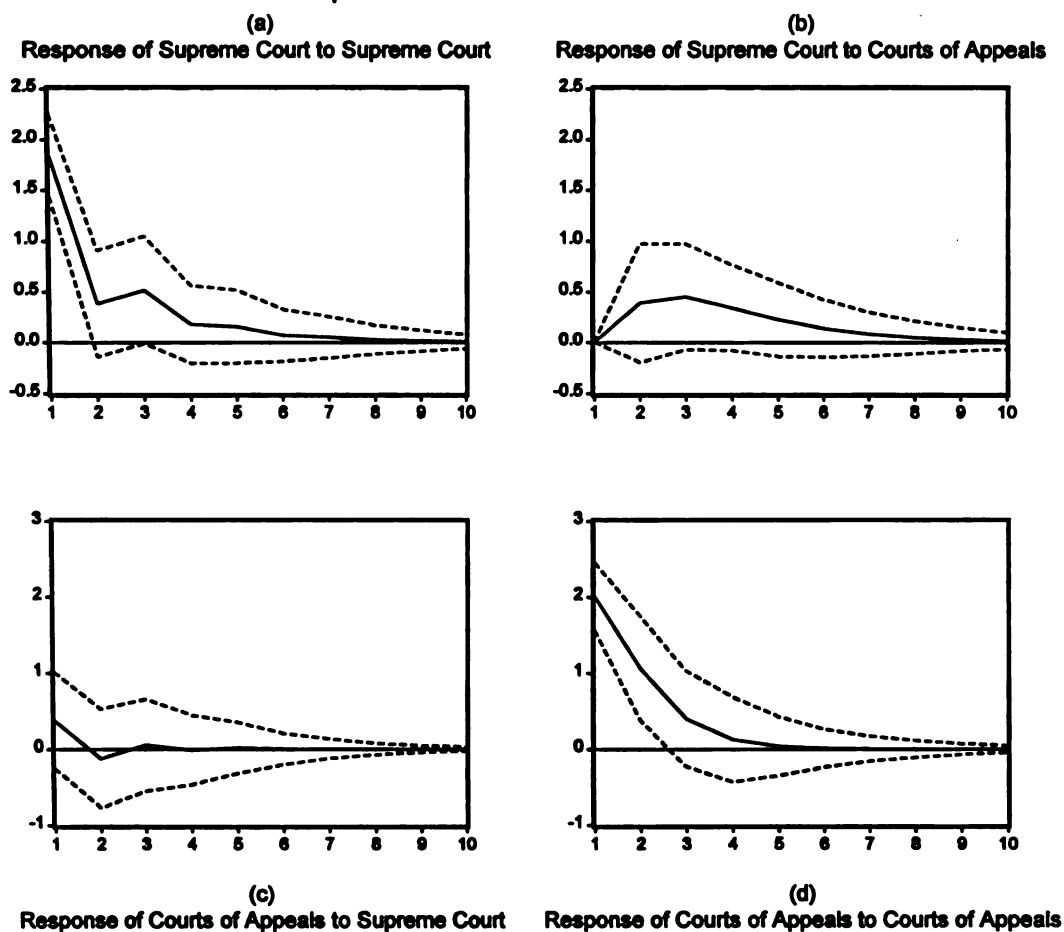
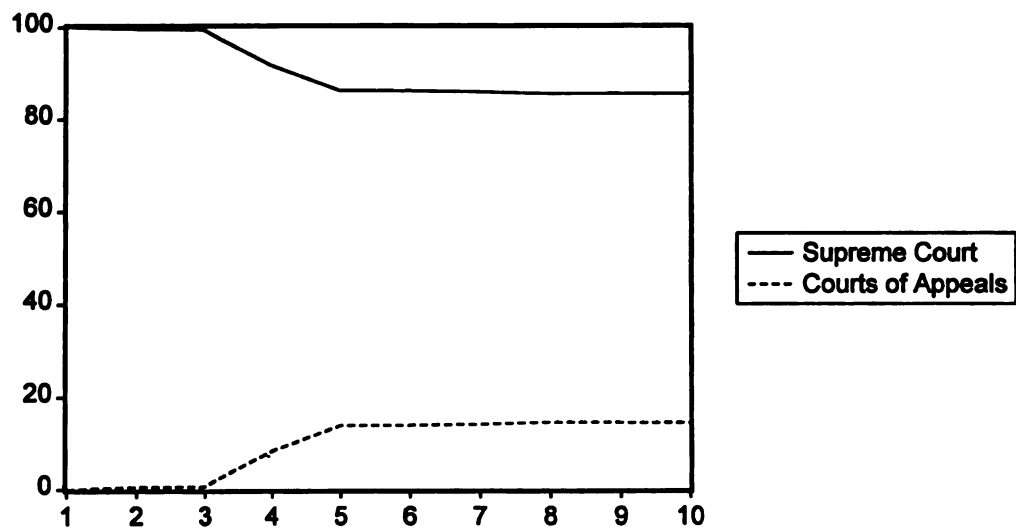


FIGURE 3.14
INNOVATION ACCOUNTING OF UNION AND LABOR CASES (LEVELS)

Union and Labor Cases (Differences)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

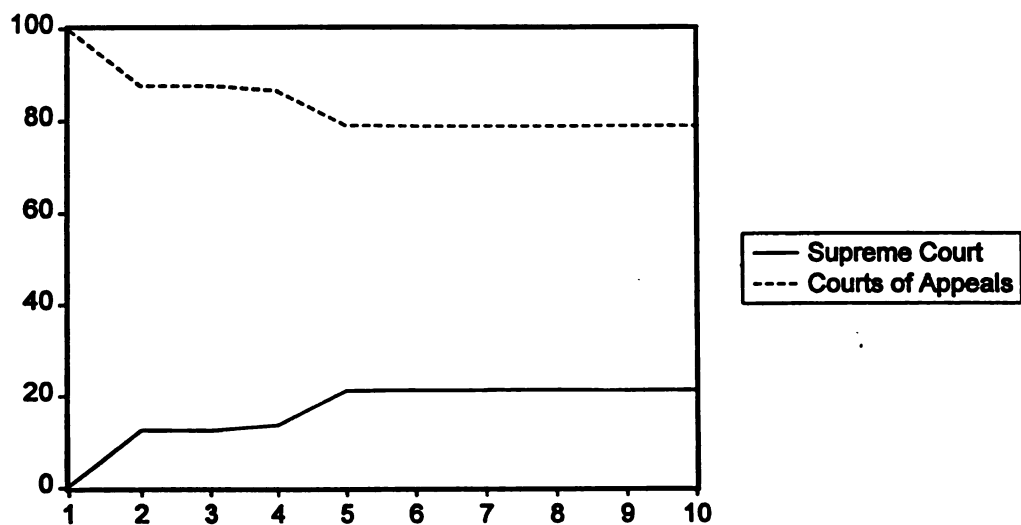


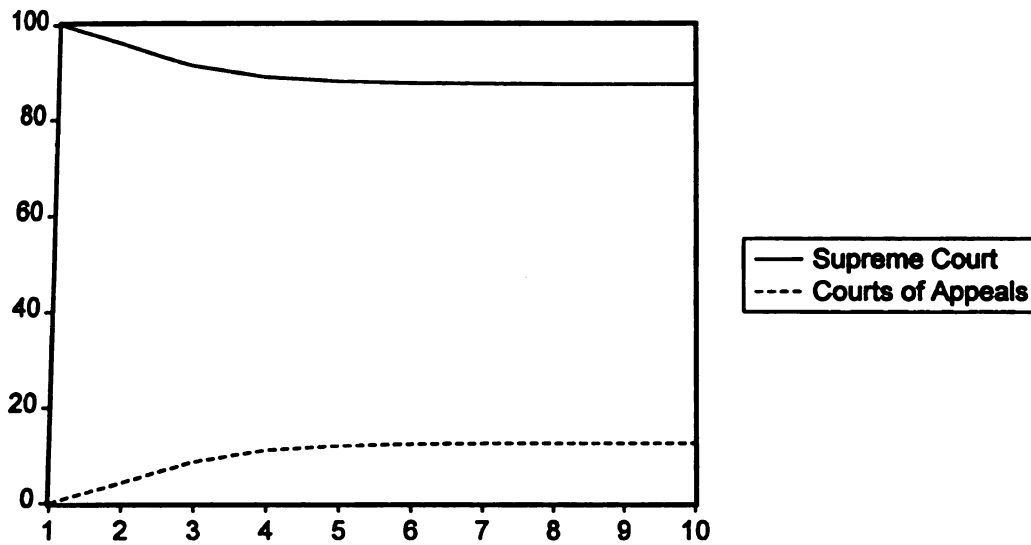
FIGURE 3.15

VARIANCE DECOMPOSITION OF UNION AND LABOR CASES (DIFFERENCES)

Union and Labor Cases (Levels)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

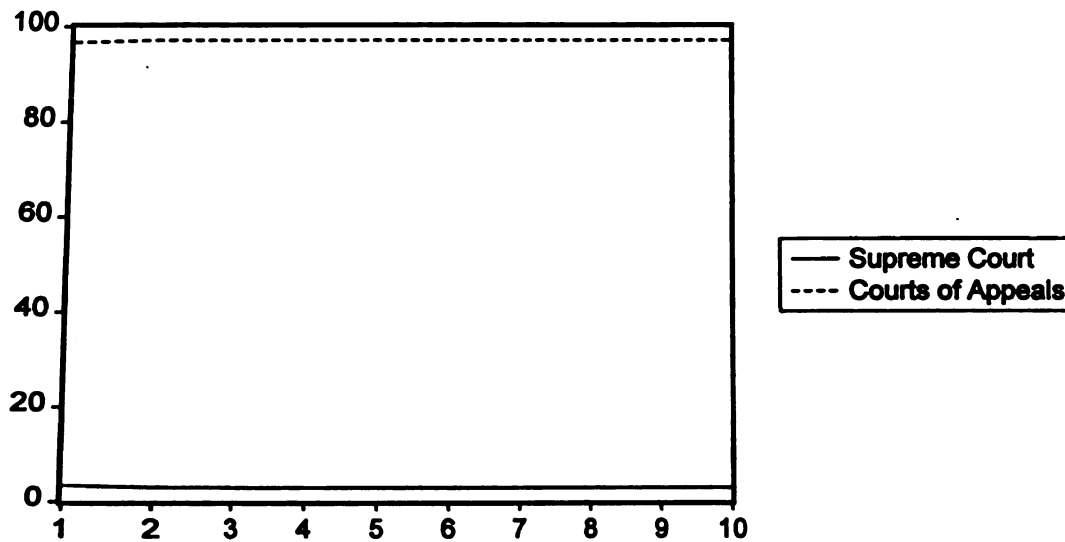


FIGURE 3.16

VARIANCE DECOMPOSITION OF UNION AND LABOR CASES (LEVELS)

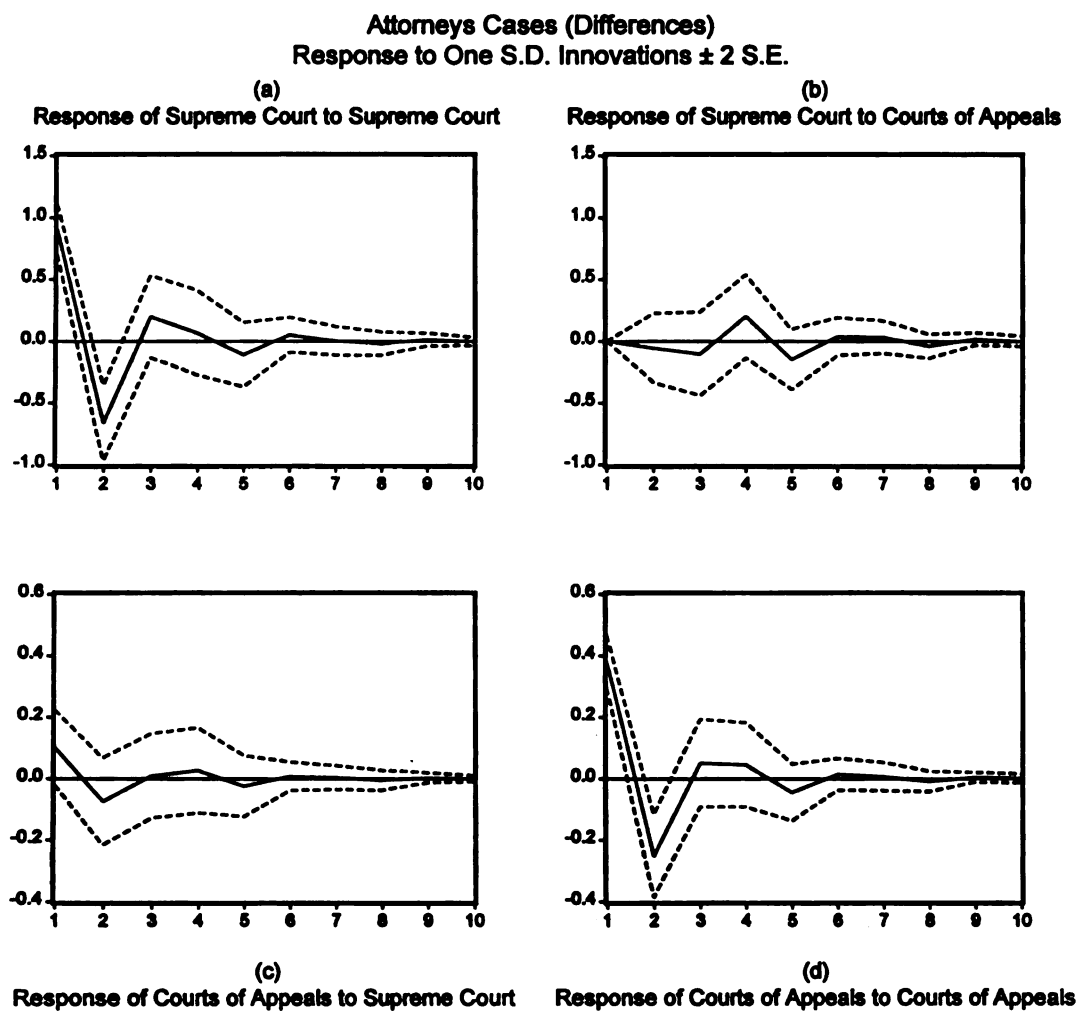


FIGURE 3.17
 INNOVATION ACCOUNTING OF ATTORNEYS CASES (DIFFERENCES)

Attorneys Cases (Levels)
Response to One S.D. Innovations ± 2 S.E.

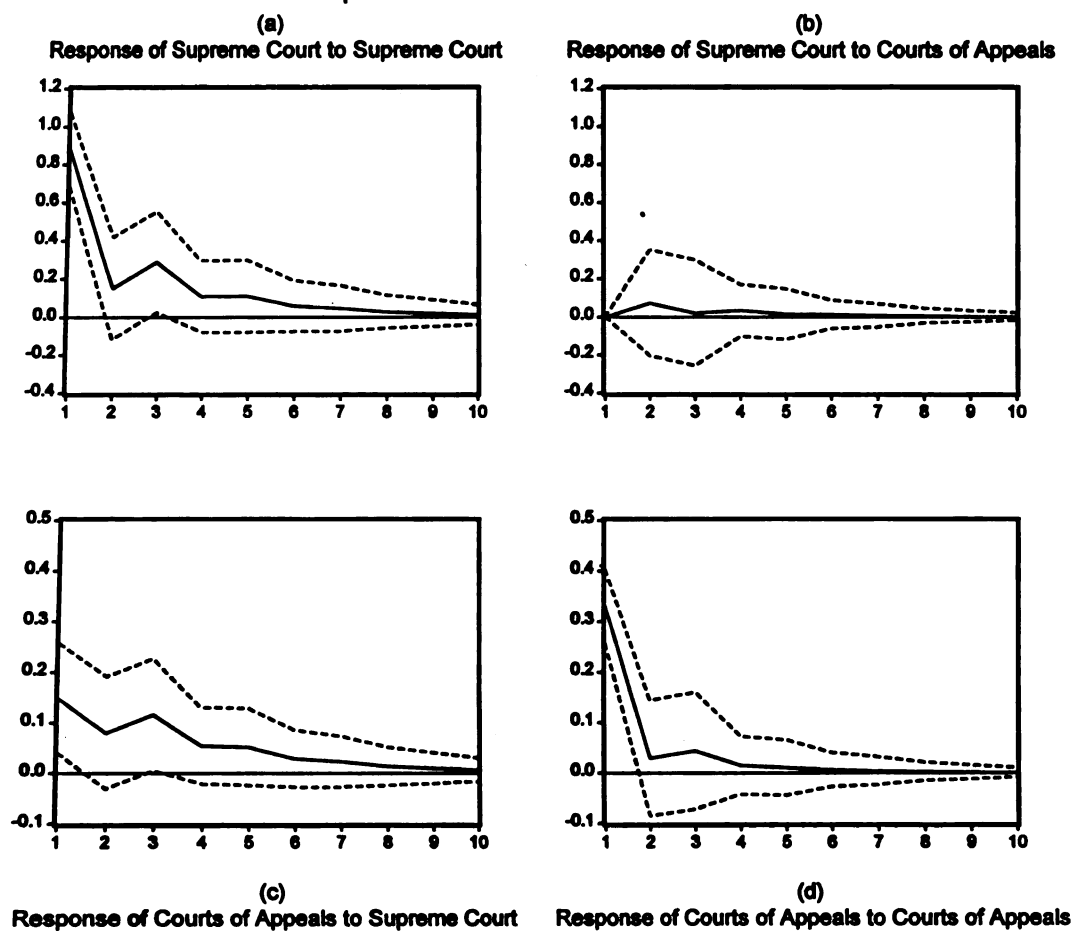
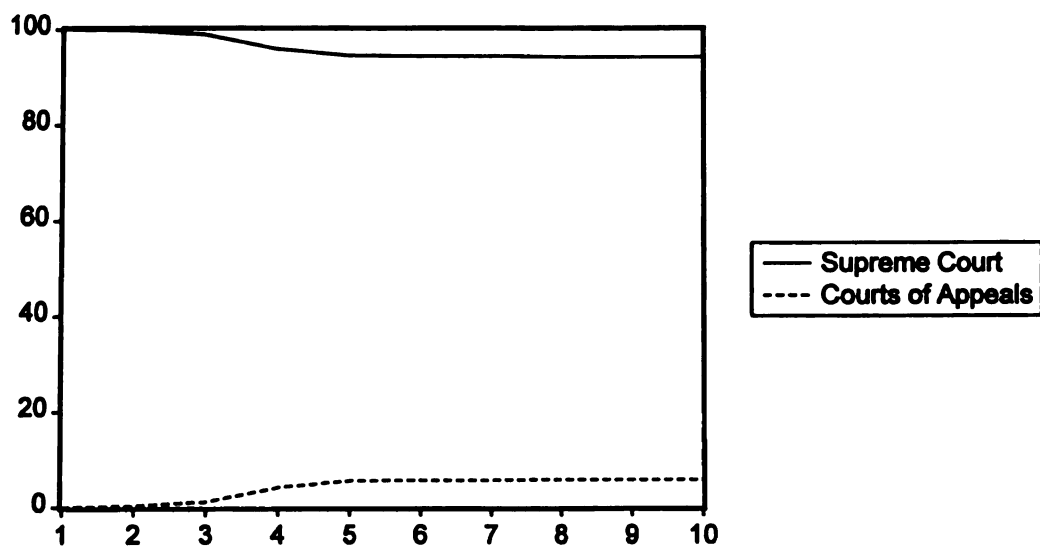


FIGURE 3.18
INNOVATION ACCOUNTING OF ATTORNEYS CASES (LEVELS)

Attorneys Cases (Differences)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

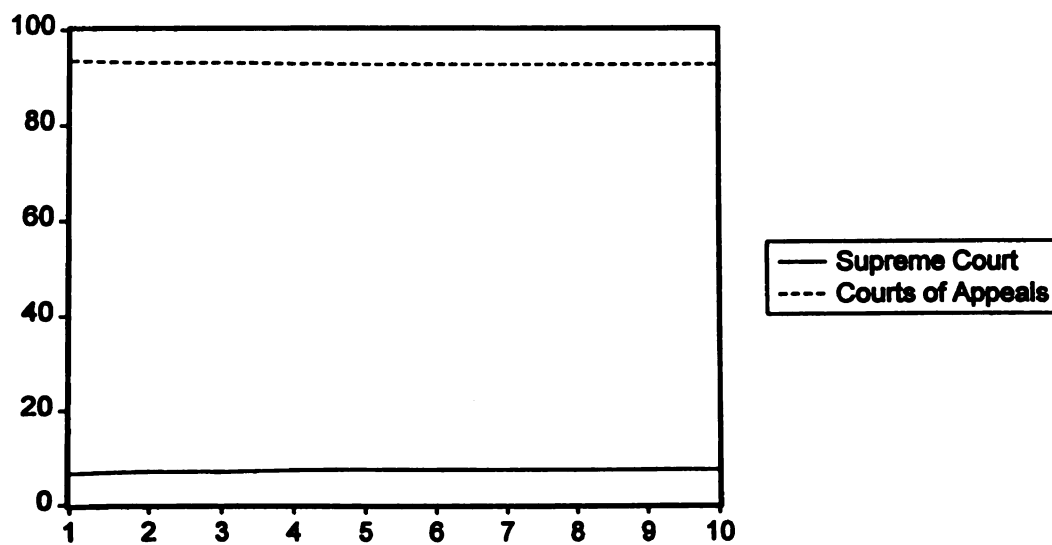


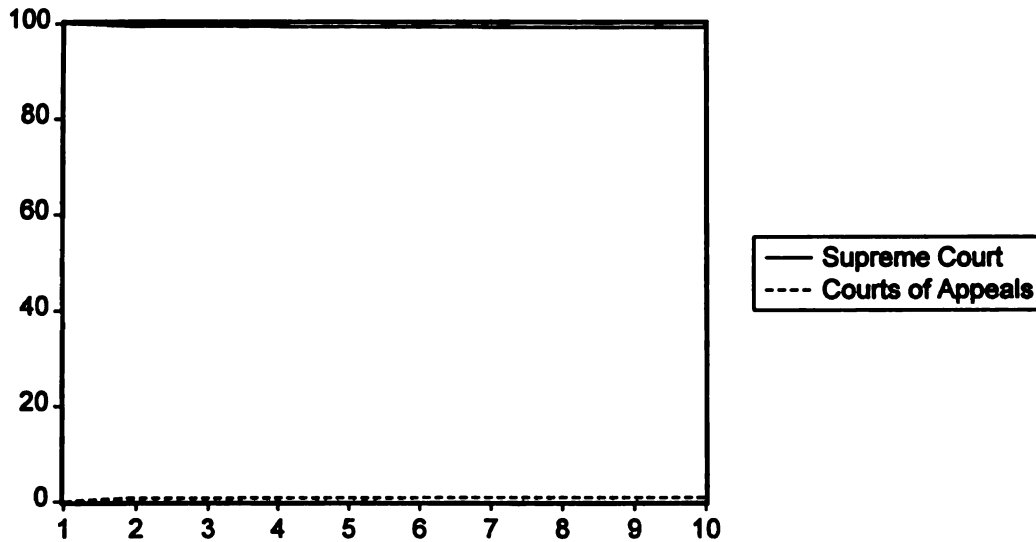
FIGURE 3.19

VARIANCE DECOMPOSITION OF ATTORNEYS CASES (DIFFERENCES)

Attorneys Cases (Levels)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

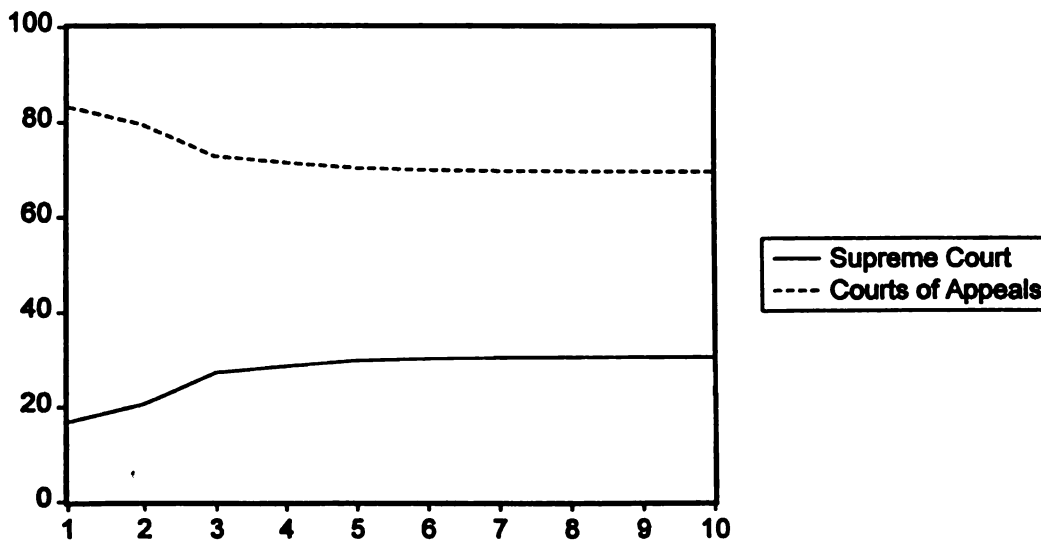


FIGURE 3.20
VARIANCE DECOMPOSITION OF ATTORNEYS CASES (LEVELS)

Federalism Cases (Differences)
Response to One S.D. Innovations ± 2 S.E.

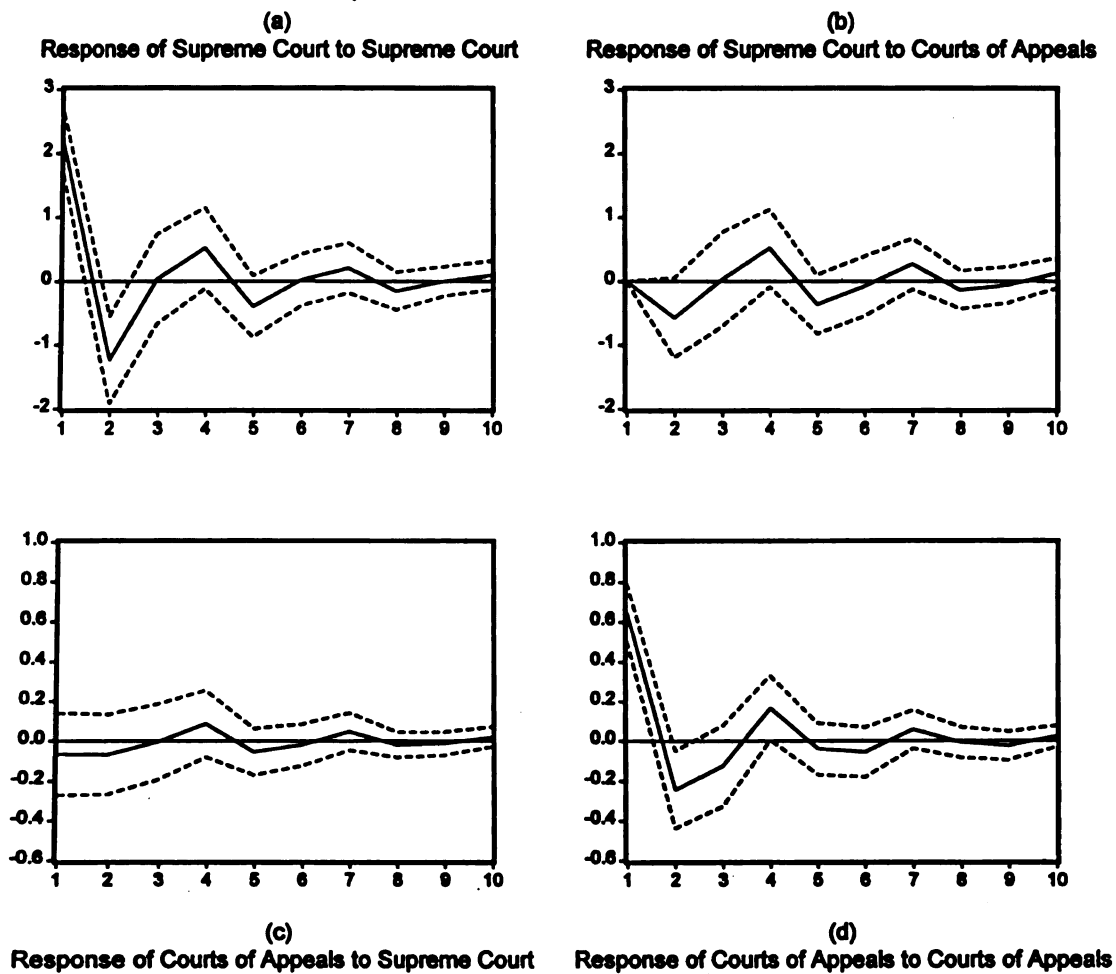


FIGURE 3.21
INNOVATION ACCOUNTING OF FEDERALISM CASES (DIFFERENCES)

Federalism Cases (Levels)
Response to One S.D. Innovations ± 2 S.E.

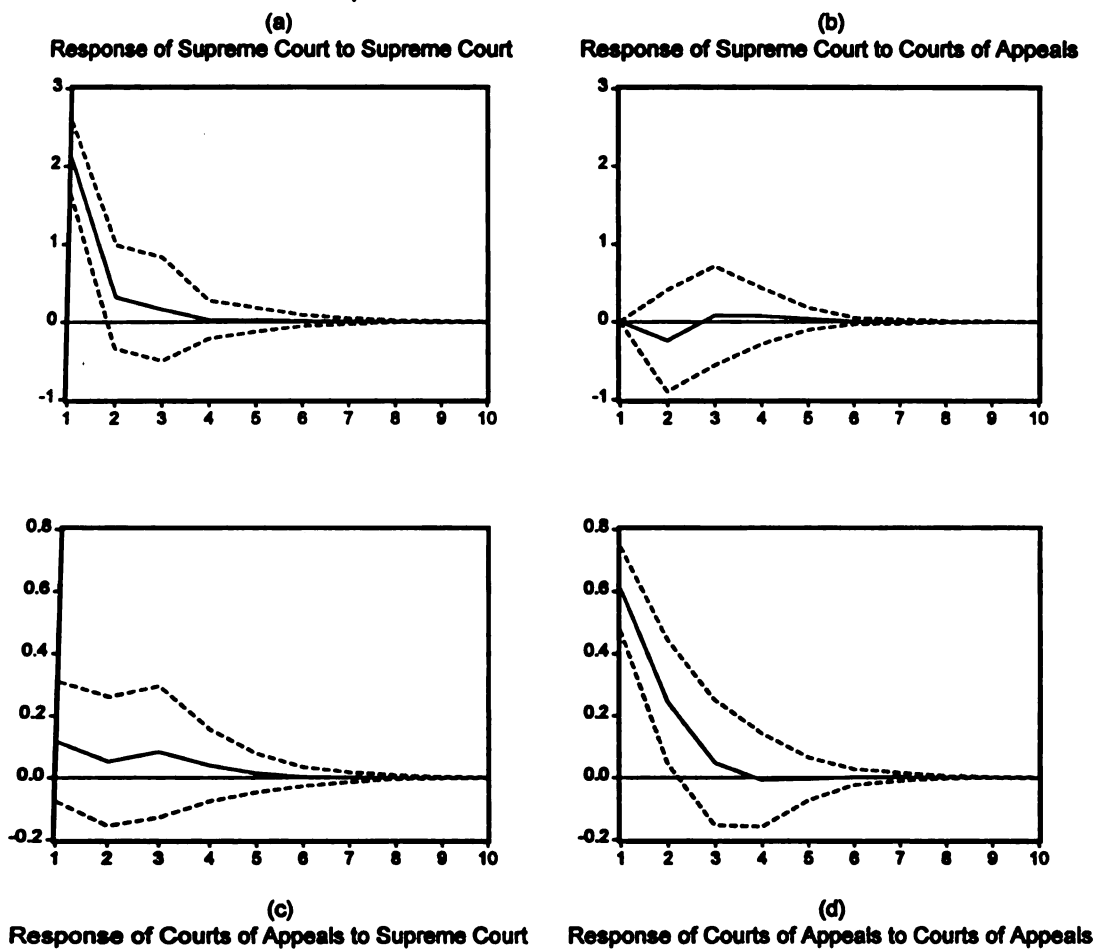


FIGURE 3.22
INNOVATION ACCOUNTING OF FEDERALISM CASES (LEVELS)

Federalism Cases (Differences)

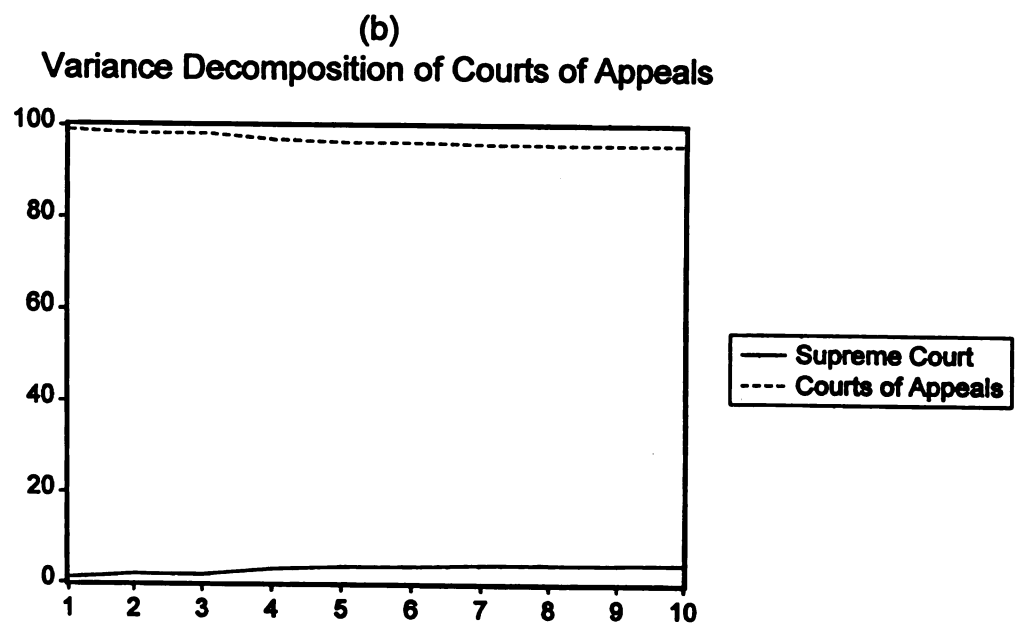
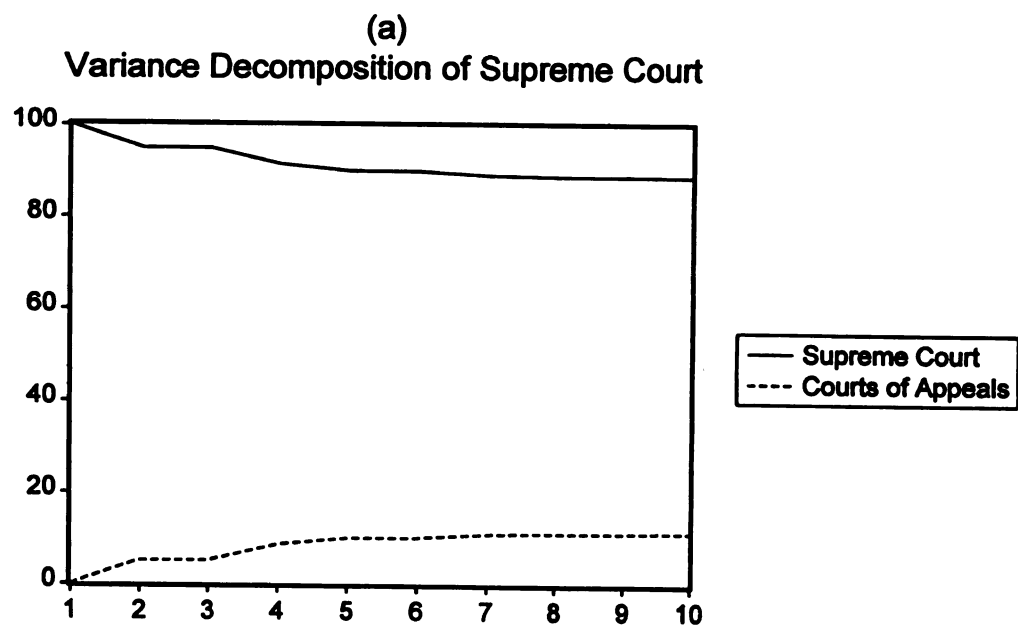
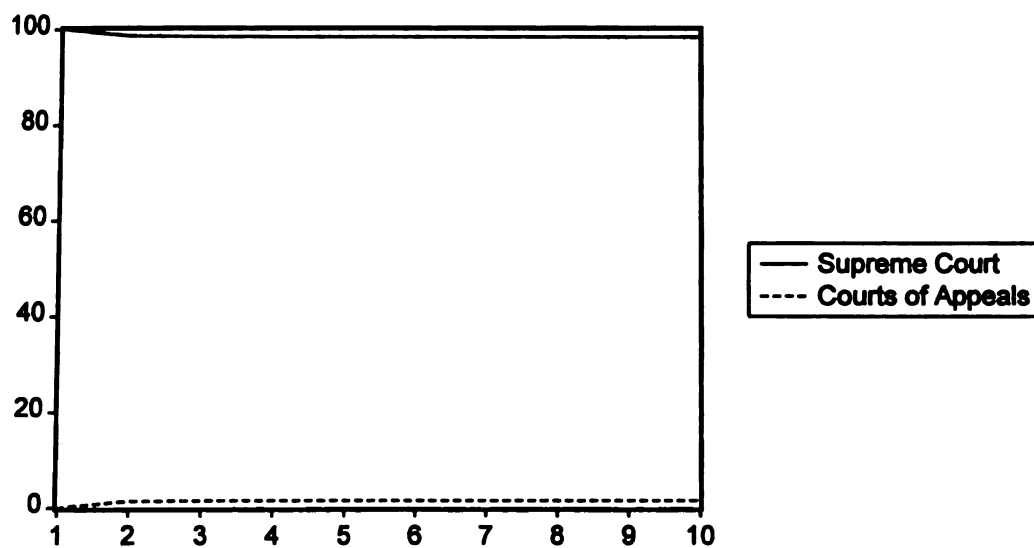


FIGURE 3.23
VARIANCE DECOMPOSITION OF FEDERALISM CASES (DIFFERENCES)

Federalism Cases (Levels)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

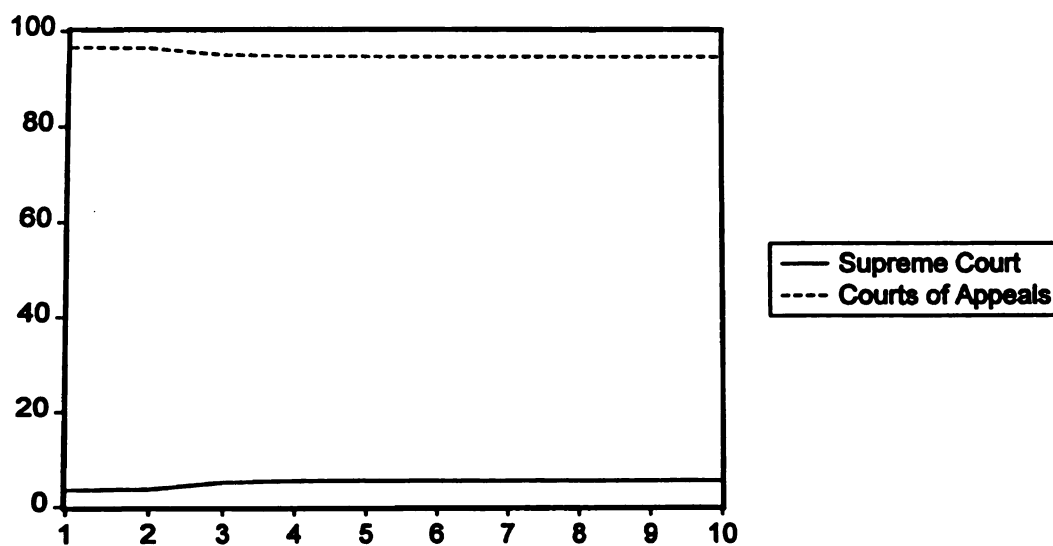


FIGURE 3.24

VARIANCE DECOMPOSITION OF FEDERALISM CASES (LEVELS)

Interstate Relations Cases (Levels)
Response to One S.D. Innovations ± 2 S.E.

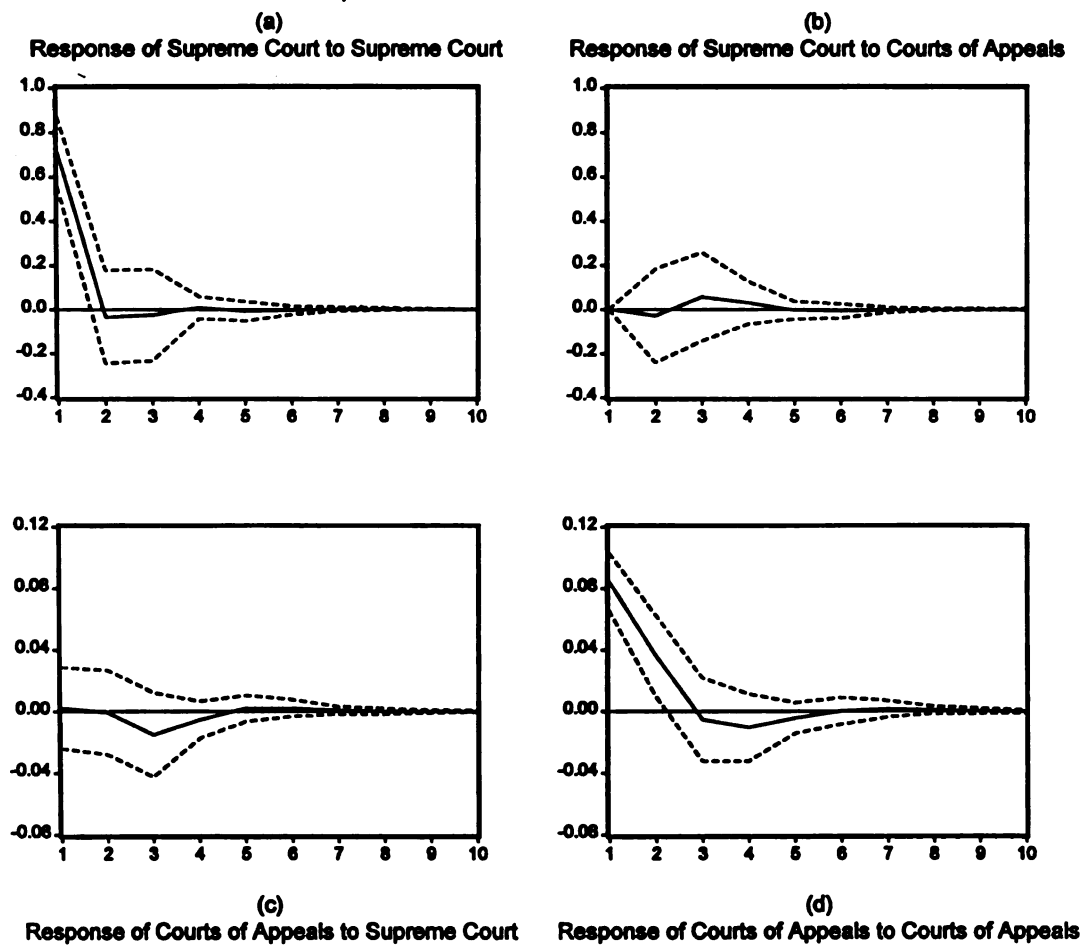
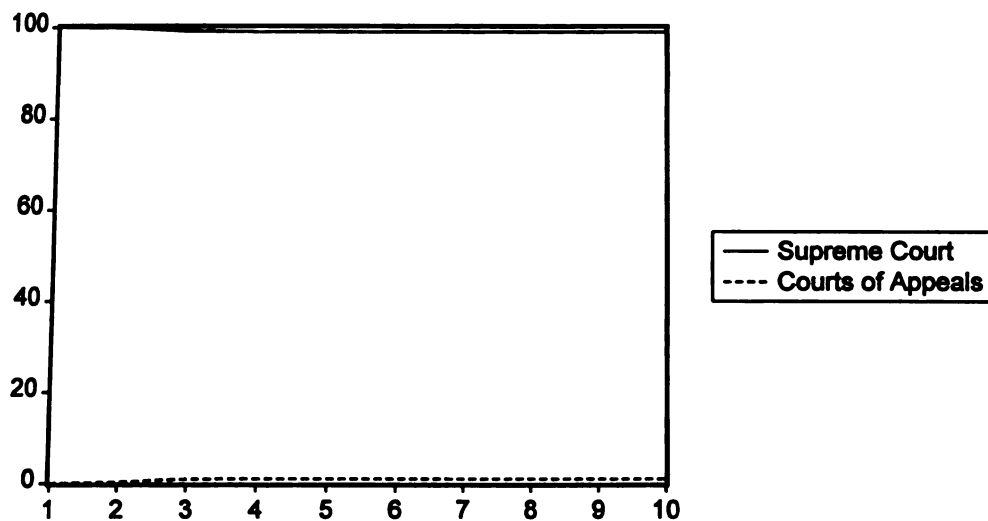


FIGURE 3.25
INNOVATION ACCOUNTING OF INTERSTATE RELATIONS CASES (LEVELS)

Interstate Relations Cases (Levels)

(a)

Variance Decomposition of Supreme Court



(b)

Variance Decomposition of Courts of Appeals

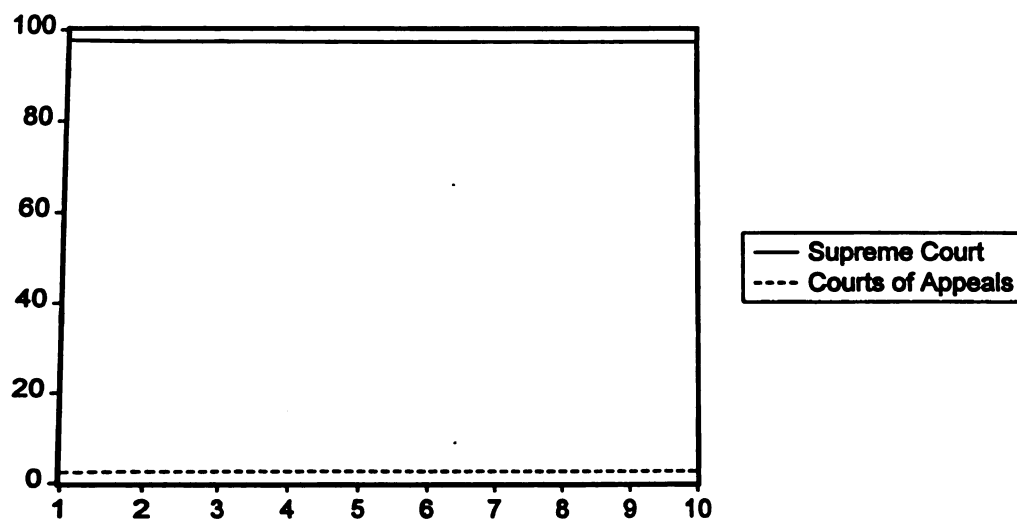


FIGURE 3.26

VARIANCE DECOMPOSITION OF INTERSTATE RELATIONS CASES (LEVELS)

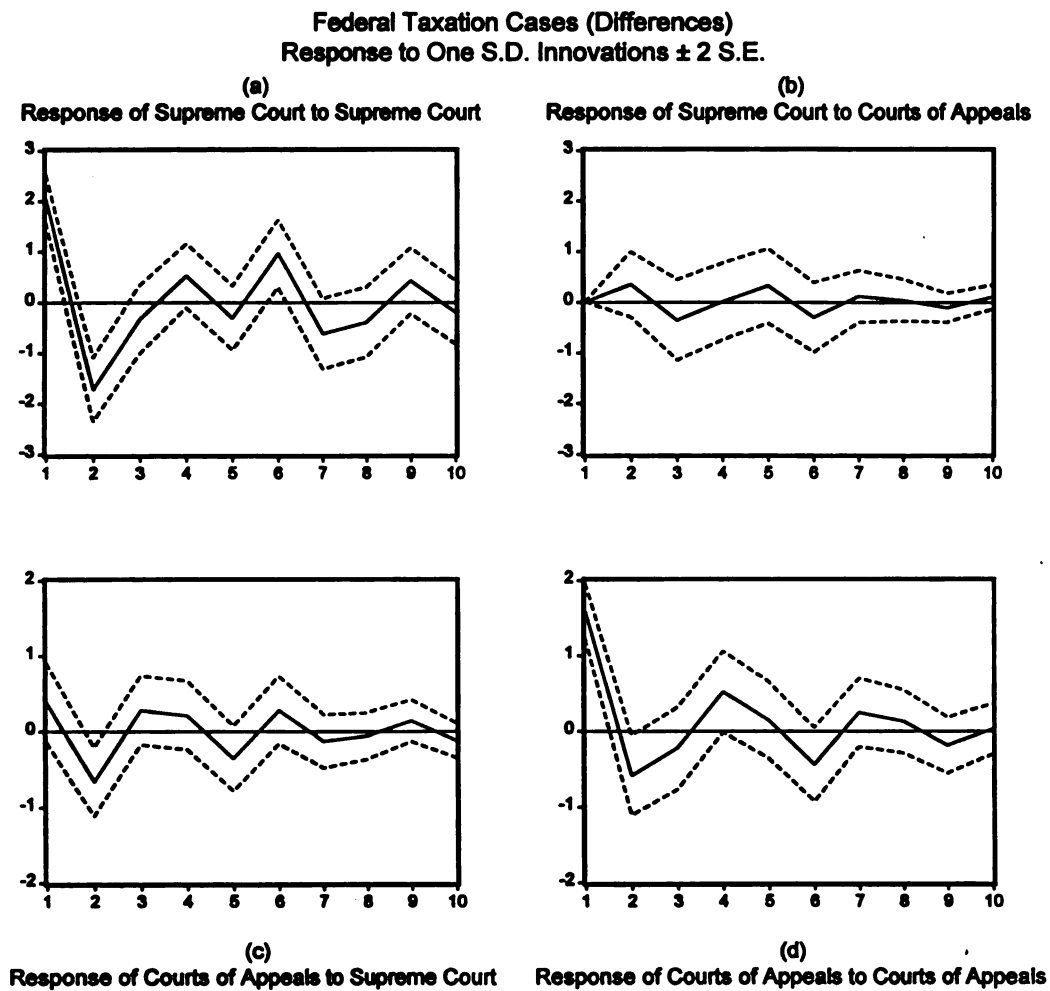


FIGURE 3.27
INNOVATION ACCOUNTING OF FEDERAL TAXATION CASES (DIFFERENCES)

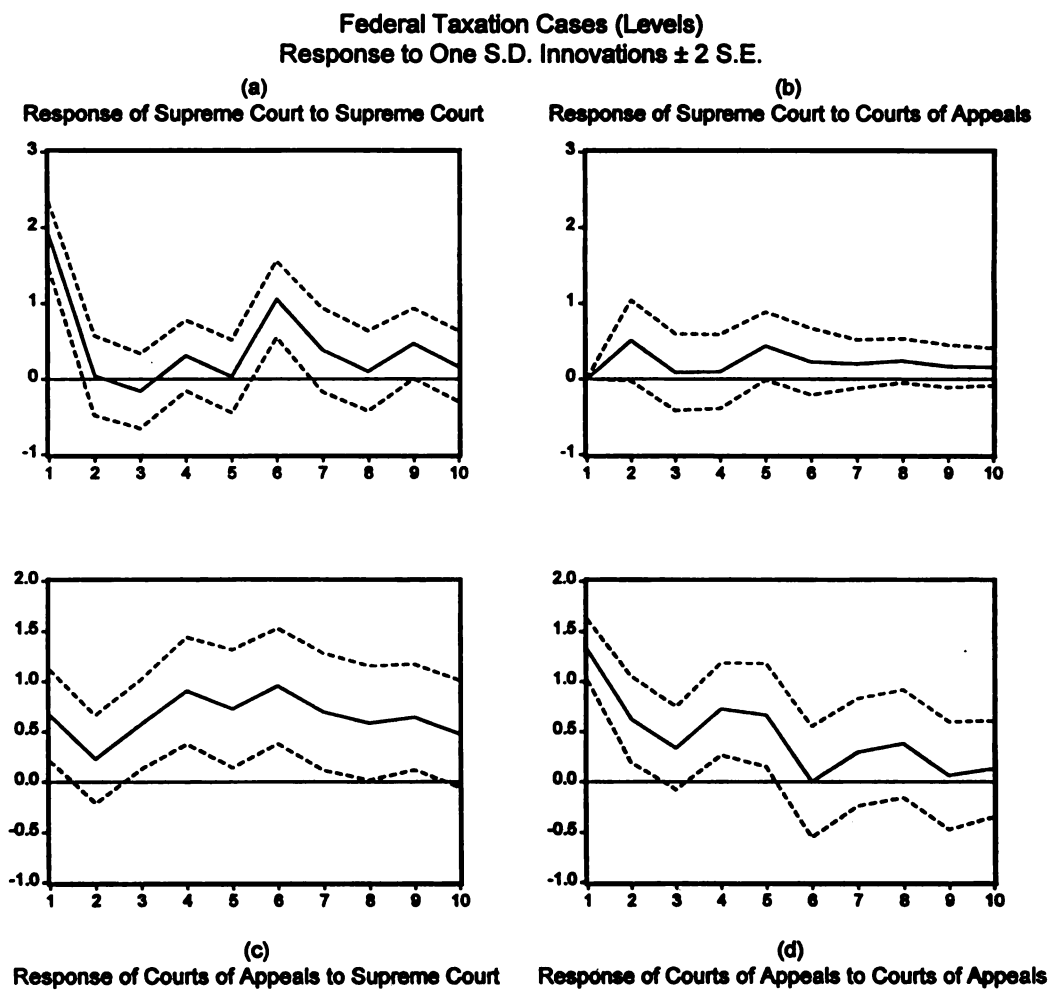


FIGURE 3.28
INNOVATION ACCOUNTING OF FEDERAL TAXATION CASES (LEVELS)

Federal Taxation Cases (Differences)

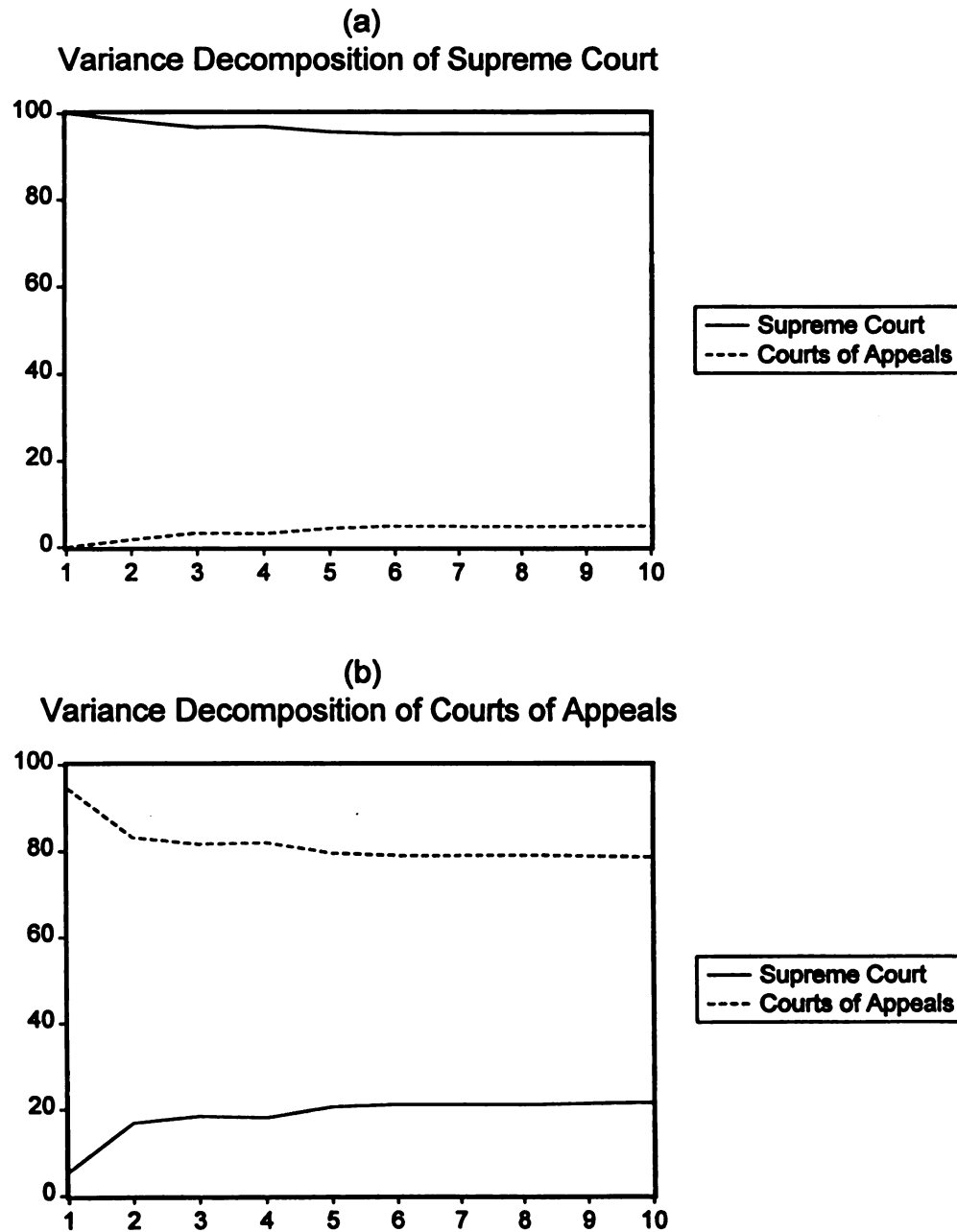


FIGURE 3.29
VARIANCE DECOMPOSITION OF FEDERAL TAXATION CASES (DIFFERENCES)

Federal Taxation Cases (Levels)

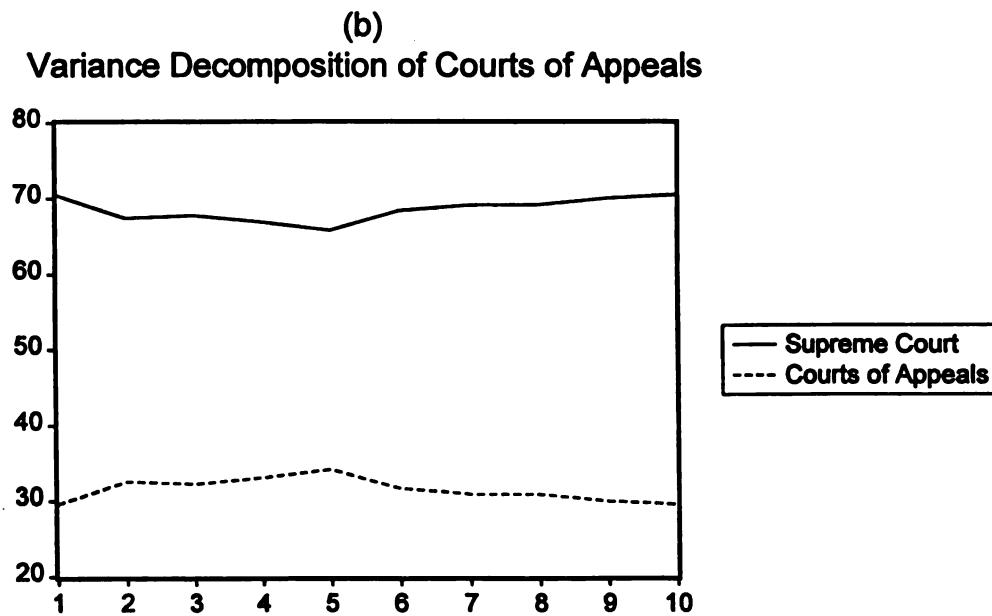
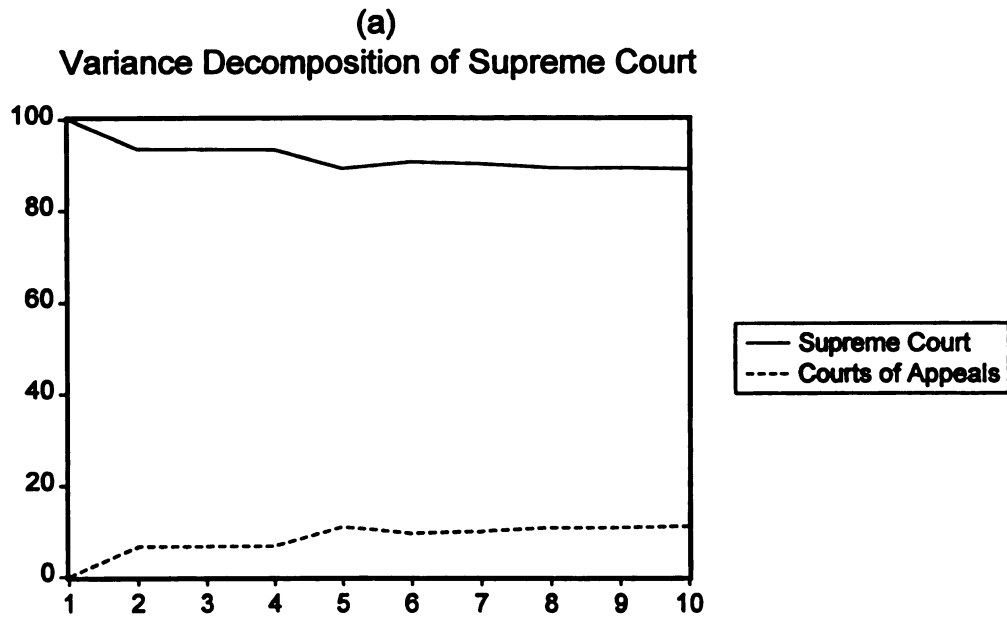


FIGURE 3.30
VARIANCE DECOMPOSITION OF FEDERAL TAXATION CASES (LEVELS)

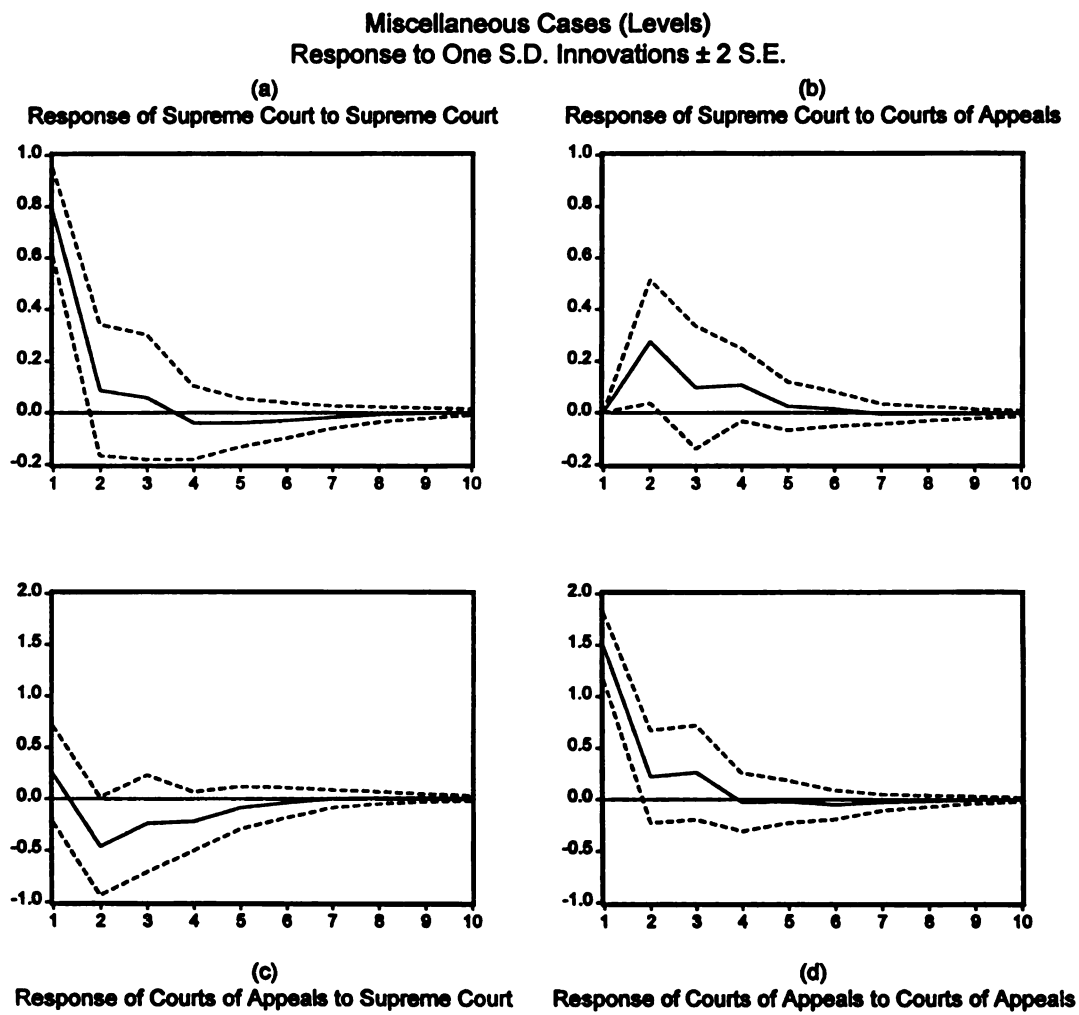


FIGURE 3.31
 INNOVATION ACCOUNTING OF MISCELLANEOUS CASES (LEVELS)

Miscellaneous Cases (Levels)

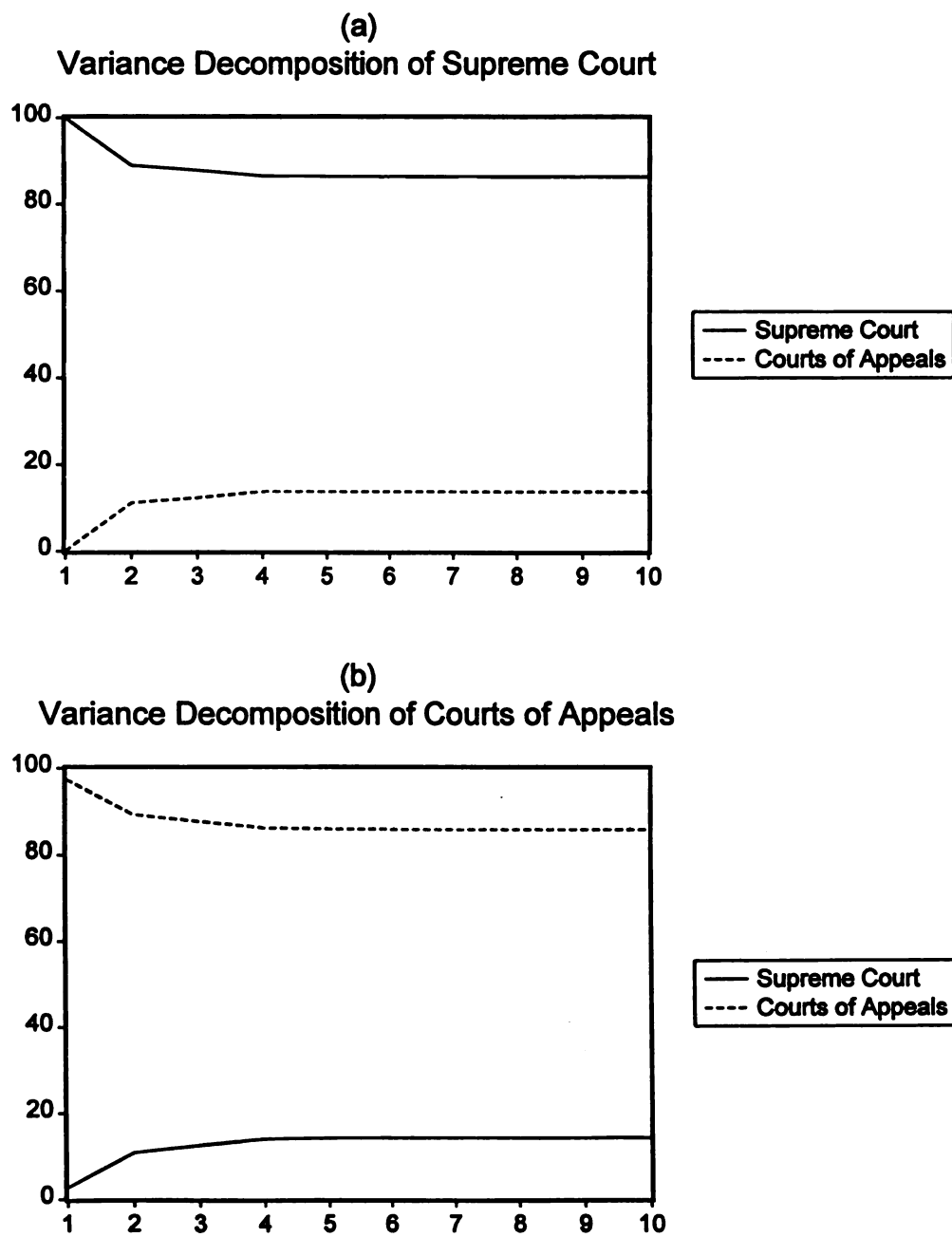


FIGURE 3.32
VARIANCE DECOMPOSITION OF MISCELLANEOUS CASES (LEVELS)

THE NATURE OF AGENDA IN THE UNITED STATES SUPREME COURT
AND COURTS OF APPEALS

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CHAPTER 4

A CLOSER EXAMINATION OF THE RELATIONSHIP BETWEEN THE CIVIL LIBERTIES AGENDAS OF THE SUPREME COURT AND COURTS OF APPEALS

Civil liberties cases are among the most salient of all issues decided by the judiciary in the United States. As Figures 1.1 and 1.16 demonstrate, these types of cases formed about one third of the docket of the Supreme Court over the time period of this study.¹ These statistics, however, do not include criminal procedure cases. Thus, when criminal procedure issues are included in this appraisal,² the percentage of civil liberties cases heard by the Supreme Court is significantly higher. While the relative numbers were not as high in the Courts of Appeals, they certainly were far from trivial, as depicted in Figures 1.1 and 1.17. From a qualitative viewpoint as well, civil liberties decisions by the judiciary have been exceedingly important for the latter two-thirds of this century. While this trend began to be noticeable in the late 1930s (Pritchett 1948; 1954), more particularly the drive behind the activism of the Warren Court was fueled predominantly by civil liberties cases (Pacelle

¹This, of course, is contrasted with the rather slight emphasis the Supreme Court placed on civil liberties before the "Switch" in 1937 (Pacelle 1991; McCloskey 1994).

²Segal and Spaeth (1993, 106-111) included the issue of criminal procedure within their discussion of the overall civil liberties agenda of the Supreme Court; *see also* Segal and Cover (1989); Lanier (1998).

1991; Baum 1995); and, the success rate among individuals claiming civil liberties violations rose in the 1950s and 1960s to the point where these litigants won a majority of these cases before the Supreme Court (Adamany 1991). The Burger and Rehnquist Courts diminished both the number and consequence of these cases on the Supreme Court's docket, and Adamany (1991) documented that the success rate among individuals alleging liberties violations subsided in this recent era as well. Nevertheless, civil liberties cases continue to comprise a brand of salience among the justices, the judicial system, and the political process in general not found among any of the other issue heard in the federal courts.

Whether because of the salience of civil liberties issues, or possibly because they are considered among the more interesting of issues, many scholars have researched civil liberties as part of their judicial behavior studies. This type of scholarship, particularly those studies which are empirically based, usually envelops a multitude of issues within the rubric of civil liberties. Specifically, this field encompasses civil rights, first amendment, due process, and privacy cases.³ The prior chapter is one such example of research which combined these various issues into a general civil liberties category, and there are an abundance of others.⁴ On the other hand, the scholarship dissecting the various issues which constitute the whole of civil liberties is much more deficient. In fact, the issue of civil liberties is so broad that it is logical to disentangle the derivative issues, for two primary reasons. First, since the issue so often is aggregated, we need to determine whether any

³Each of these issues is defined in both this chapter and in Appendix A, *infra*.

⁴*See, e.g.,* Segal and Cover (1989); Reddick (1997).

differences indeed do exist among these issues, so as to validate this fairly standard practice of categorization within the subfield. Second, each of these issues is important in its own right and deserving of its own study, regardless of the various methodological implications. Accordingly, in this chapter I break down the civil liberties issue into a set of separate components in order to determine whether the results I obtained in the prior chapter for civil liberties *en masse* apply to each issue. That is, I am interested in ascertaining whether, and if so the extent to which, the agenda of the Supreme Court for specific civil liberties issues influences appeals in the Courts of Appeals over time. Analogously, in this chapter I examine whether endogenous forces stemming from the lower federal courts for these issues have any effect on the agenda of the Supreme Court.

ISSUES WITHIN CIVIL LIBERTIES, AGENDAS, AND THEORETICAL SUPPOSITIONS

As described in the prior chapter, prior to the Switch in 1937, the Supreme Court decided relatively few civil liberties cases each year. Indeed, one study which specifically addressed the cumulative civil liberties agenda of the Supreme Court concluded that the proportion of these decisions remained "relatively flat" from 1888 through 1936 (Lanier 1998, 10). The year 1937, however, proved to be a monumental one for the Supreme Court, as political science and legal scholarship have documented *ad nauseam*, for after the Switch the Court adjusted its priorities away from conservative economic decisions in favor of more liberal civil liberties outcomes. This shift first occurred even without a change in personnel on the Bench, although the trend toward upholding civil liberties claims of individuals quickly accelerated once the conservative wing of the Court was replaced with President

Roosevelt's appointees. Decisions such as *Palko v. Connecticut*, 302 U.S. 319 (1937), and *United States v. Carolene Products*, 304 U.S. 144 (1938), represent abounding examples of the newer focus and direction from pre-Switch cases such as *Lochner v. New York*, 198 U.S. 45 (1905), *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

There is no questioning the accretion of an emphasis on civil liberties in the agendas of both the Supreme Court and the Courts of Appeals after 1937. See Figure 1.1. Accordingly, the inquiry necessarily becomes, were the resultant trends in the agenda for all civil liberties issues similar, at least with respect to the Supreme Court's agenda? As Figures 1.2 through 1.5 evidence, the answer is No, since the discrete civil liberties issues were treated disparately on the dockets of each of these federal courts. The following sections address in some detail each of these issues which comprise the civil liberties category.

Civil Rights

In a variety of contexts, the terms 'civil rights' and 'civil liberties' often have been employed interchangeably. In part, this is likely because the overall issue has been aggregated to incorporate its separate elements. Notwithstanding, I deliberately do not utilize that practice here, as each label has a very specific and definitive meaning in this study. For purposes of this study, then, the former classification represents a subset of the latter; that is, the category of civil liberties includes civil rights cases, along with the other classes of liberties cases.⁵

⁵The remaining categories within civil liberties which I will analyze, including first
(continued...)

With specific reference to civil rights, as detailed in the documentation for the Supreme Court Database (1995, 57): "Civil rights includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage." Figures 1.6 and 1.7 illustrate that issues incorporating civil rights comprised the majority of civil liberties cases over the course of the relevant time period in the Supreme Court and Courts of Appeals, respectively. As a consequence, the trends for civil rights cases and the whole of civil liberties have been rather similar over time (*compare* Figures 1.1 and 1.2).

From a theoretical perspective, the relationship between the civil rights agendas of the Supreme Court and Courts of Appeals should be very similar to the expectation in the general civil liberties category, as asserted in chapter 3. To reiterate, *Hypothesis #3a* provides that litigants in the Courts of Appeals should respond to changes in the civil liberties agenda of the Supreme Court. For the same reasons cited in reference to that hypothesis, including salience, controversy, intense beliefs, perceived role of the Supreme Court as guardian of individual liberties, and spillover effects, parties in the federal appeals courts should be influenced by changes in the Supreme Court's agenda on civil rights. This prospect leads to the following hypothesis:

Hypothesis # 11a. The agenda of the Courts of Appeals in civil rights cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

⁵(...continued)
amendment, due process, and privacy cases, are addressed in detail, *infra*.

For these same reasons, however, there is little reason to believe that the justices will be motivated by trends in the civil rights agenda in the Courts of Appeals. Segal and Spaeth (1993, 225) found strong evidence for attitudinal-based decision making in the area of civil rights among the Supreme Court justices, and there is little evidence to suggest that their agenda decisions on this issue would be any different. Accordingly, I submit:

Hypothesis # 11b. The agenda of the Supreme Court in civil rights cases should not respond to changes in the agenda of the Courts of Appeals.

That is, as specified in chapter 3 for civil liberties, *Hypothesis #11b* exhibits the expectation that the justices unlikely will be influenced by the incidence of civil rights cases below. Thus, while appellants should react to the civil rights agenda in the Supreme Court, an endogenous effect is not expected.

First Amendment

This classification is somewhat self-explanatory, at least for the most part. In particular, as described by the Supreme Court Database (1995, 57): "First Amendment encompasses the scope of this constitutional provision, but do note that not every case in the First Amendment group directly involves the interpretation and application of a provision of the First Amendment."⁶ Figure 1.3 demonstrates that the Supreme Court decided a greater percentage of first amendment cases than did the Courts of Appeals; in fact, the rate for the Courts of Appeals has been generally steady over time, while the variance and possibly the mean have changed in the Supreme Court with respect to first amendment cases. Indeed,

⁶To reiterate, Appendix A delineates the decision rules on coding these variables.

after civil rights, first amendment issues formed the bulk of civil liberties cases in the Supreme Court (*see* Figure 1.6), although the same cannot be said for the appeals courts (*see* Figure 1.7).

The theoretical expectations are similar for first amendment cases as for civil liberties and civil rights. That is, a strong effect stemming from the high Court but not in the opposite direction should be anticipated, as the following hypotheses depict:

Hypothesis # 12a. The agenda of the Courts of Appeals in first amendment cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 12b. The agenda of the Supreme Court in first amendment cases should not respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

Due Process

The category of due process includes cases in which this type of claim was raised in a non-criminal setting. The Supreme Court Database codebook provides: "Due process is limited to non-criminal guarantees and, like First Amendment issues, need not show '5ADP' or '14ADP' in its LAW field" (*Id*). As depicted in Figure 1.4, the mean and variance for the Supreme Court's emphasis on due process has changed over the years, while these indicators have remained moderately stable in the federal appellate courts.

From a theoretical perspective, once again there is little reason to postulate an endogenous effect springing from the dockets of the Courts of Appeals in due process cases, although the influence of the Supreme Court should be apparent. The ensuing hypotheses set forth these expectations:

Hypothesis # 13a. The agenda of the Courts of Appeals in due process cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Hypothesis # 13b. The agenda of the Supreme Court in due process cases should not respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

Privacy

As the Supreme Court provided in the landmark case of *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965): "We have had many controversies over these penumbral rights of 'privacy' . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."⁷ While never enumerated in the Constitution, the issue of a right of privacy has had a powerful impact on politics in the United States, particularly as concerns the abortion cases which were decided pursuant to a constitutional right of privacy.⁸ Nevertheless, despite their emphasis in the political arena and media, cases comprising this controversial issue rarely constitute a notable part of the judicial agendas of the federal courts. Indeed, in only four of the years in this study did the percentage of privacy cases in the Supreme Court exceed three percent, while this occurred only once in the Courts of Appeals. Yet, the mean and variance of the

⁷Privacy cases fall within the purview of substantive due process. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

⁸See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973): "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

time series in both courts seem to have increased since the time of the *Roe v. Wade* decision (see Figure 1.5). Specifically, the Supreme Court Database defines three issues within the privacy domain, including issues concerning privacy in general, abortion and contraception, and the Freedom of Information Act.

Theoretically speaking, for all the reasons cited with respect to the civil liberties agenda in general, the influence of the Supreme Court on litigants in the Courts of Appeals should be apparent in privacy cases. Accordingly, I posit:

Hypothesis # 14a. The agenda of the Courts of Appeals in privacy cases should respond directly to changes in the agenda of the Supreme Court in either a positive or negative direction.

Nevertheless, privacy cases are a bit different from the other issues within the civil liberties category. That is, the nature of the privacy issue leads to a different theoretical expectation from an endogenous perspective. First, the right of privacy was discussed and debated in law reviews and other legal publications prior to the Supreme Court's ruling in *Griswold v. Connecticut*, and the likelihood is that lower courts were experimenting with this issue as well during this time. See, e.g., Northwestern L. Rev. (1960); Beaney (1962). Moreover, once the Supreme Court espoused its decision in *Roe v. Wade*, it generally left the details of this issue to be hashed out in the lower courts, only to hear selective abortion cases after sufficient percolation below. These are precisely the circumstances under which I postulated that an endogenous effect deriving from the lower courts would be expected, such that the justices slowly but surely react to a changing emphasis in the legal community and, by implication, the lower courts. The result is a Supreme Court agenda which reflects in part

the agenda in the lower courts with respect to this issue (*see* chapter 2, p. 50). Accordingly, I submit the following hypothesis:

Hypothesis # 14b. The agenda of the Supreme Court in privacy cases should respond directly to changes in the agenda of the Courts of Appeals in either a positive or negative direction.

That is, in privacy cases the expectation is that an influence should be seen in both directions, as the agendas of each court motivate corresponding changes in the other over time.

DATA, METHODS, AND ANALYSIS

The data and methods utilized in this chapter essentially will be the same as provided for in chapter 3. Indeed, since I already have delineated the particulars of the procedures implemented in this research earlier in this study, I will not repeat them here (*see* ch. 2, pp. 52-58; ch. 3, *passim*). Accordingly, in this chapter I will detail only those issues specifically related to the issues within civil liberties. For instance, with respect to the data, the only difference in this chapter from the prior ones is that the entire civil liberties category is factored into its respective components, such that I am able to analyze the relationships between these courts for the particular issue areas of concern in this chapter. As in chapter 3, the time series applications to be utilized herein are Granger causality and vector autoregression (VAR).

Of course, when employing time series, the data must be examined for stationarity. Eyeballing the various data suggests that most of the series have nonstable means and/or variances, and the more definitive augmented Dickey-Fuller (AD-F) tests confirm this

impression (*see* ch. 3 for the applicable equations for the AD-F tests). More specifically, when the data remain in levels, in every series within the civil liberties category, the null hypothesis of a unit root could not be rejected in all of the variations of the AD-F tests, indicating nonstationarity in the data (*see* Table 4.1). In two of the series, including Supreme Court first amendment and Courts of Appeals due process cases, the null of a unit root could be rejected beyond the conventional 95% confidence level in two of the AD-F variations; but, since every variation could not be rejected, I decided to difference all the data series to reduce the risk of spurious results. Indeed, once the data were differenced, AD-F tests demonstrated that the integrated problems in the level data were eliminated, as the null hypothesis of a unit root could be rejected in every instance beyond the 99% confidence level (*see* Table 4.2). Examination utilizing the Box-Jenkins (1976) approach corroborated the success of differencing the data. Accordingly, I now am able to proceed with the various time-series analyses.⁹

As in the last chapter, Granger causality (Granger 1969) is the initial method I incorporate to determine whether the agenda of one of these courts influences changes in the other. To reiterate, this method addresses pair-wise exogeneity such that it enables the researcher to determine if the dependent variable is best explained solely by its own past behavior or by lags of the independent variable. The Granger results are presented in Table 4.3. Interestingly, these tests suggest that the Supreme Court seems to have little effect on the agenda of the Courts of Appeals, as the only significant result in this direction occurred

⁹Chapter 3 provides additional details along the lines of ensuring stationarity.

at 7 lags in privacy cases. On the other hand, the Courts of Appeals did not Granger cause the Supreme Court's agenda for any of the issues of civil rights, first amendment, or due process, which was as expected. Nevertheless, there was a rather strong Granger effect stemming from the Courts of Appeals to the Supreme Court with respect to privacy cases, as significant results obtained for lags six through ten, lending preliminary support for *Hypothesis #14b*. The VAR analyses will shed further light on these results and implications.

VAR is a useful approach to managing feedback in a system over time without resorting to the potentially misleading identification assumptions endemic to structural equations modeling of simultaneous variables, such as two-stage least squares (Sims 1980; Freeman, Williams, and Lin 1989; *see* ch. 3, p. 84-85). Since VAR is a reduced form, it enables the researcher to model endogeneity in the system, since none of the variables are considered to be exogenous. As a consequence, while fewer restrictions are imposed on the data, interpretation of the resulting coefficients is meaningless due to the lack of exogenous variables. Thus, instead of resorting to the usual means of traditional parameter estimation, the VAR approach utilizes innovation accounting and variance decomposition techniques, which allow causal inferences to be traced over time.¹⁰

As for the requisite preliminaries of VAR analysis, I employed Sims' (1980, 156, fn. 17) modified log-likelihood test, along with the Akaike Information Criterion (AIC) and Schwartz Criterion (SBC), to ascertain the appropriate lag length for model specification.

¹⁰For details, *see* ch. 3 (*supra*, pp. 84-87).

As in chapter 3, the data will be evaluated in both levels and first differences. Based on these procedures, the appropriate lag lengths for the respective VAR systems are as follows:

data in differences:

civil rights	2 lags
first amendment:	2 lags
due process:	2 lags
privacy:	2 lags

data in levels:

civil rights	2 lags
first amendment:	2 lags
due process:	3 lags
privacy:	2 lags

Accordingly, having concluded these preparatory procedures, the VAR models are suitably specified and can be estimated. More particularly, for each issue area, I ran a VAR model and then applied both innovation accounting and variance decomposition techniques.

The first issue estimated in a VAR model is civil rights. Pursuant to the innovation accounting for the differenced data, the only effect on the agenda of each court for this issue is each court's own past history, as neither court produces significant effects in the other. Indeed, Figures 4.1b and 4.1c display that the \pm two-standard error bars which represent roughly 95 percent confidence intervals do not cross the zero bar, indicating no causal effect. Nevertheless, when the data remain in levels, the results are both more profound and as hypothesized. More particularly, this analysis demonstrates that the Supreme Court's agenda trends for civil rights clearly influences the dockets of the Courts of Appeals for nearly the entire time period (*see* Figure 4.2c); however, an endogenous effect deriving from the lower courts is not apparent (*see* Figure 4.2b). The level data analysis also establishes that the past

history of each court is important as well, particularly in the early part of the series (*see* Figure 4.2a and 4.2d).

Variance decomposition corroborates the innovation accounting, and once again the results are very different depending upon whether differenced or level data are analyzed. That is, for the differenced data, there is little effect over time when the forecast error variance is decomposed. Figures 4.3a and b display the variance decomposition in graphical form, while Table 4.4 reveals the particular percentages ensuing from this analysis. Yet, estimation via the level data provides that the Supreme Court has a consequential effect on the Courts of Appeals, as approximately 35 percent of the civil rights appeals in the lower courts are determined by the agenda in the high Court (*see* Figure 4.4 and Table 4.5).

The analysis for first amendment cases establishes that there is a negligible effect stemming from the Supreme Court, and this is true whether differenced or level data are employed; moreover, there is no influence arising from the lower courts for this issue. In fact, the only systematic effect concerning the agendas of these courts concerns each court's own past agenda. That is, the justices are most reliant on their own past cert. decisions, while litigants look to their own prior appeals in the appeals courts (*see* Figure 4.5 [differences] and Figure 4.6 [levels]). The variance decomposition analysis produces similar results, as there is little influence from one court to the other on first amendment issues (*see* Figure 4.7 and Table 4.6 [differences] and Figure 4.8 and Table 4.7 [levels]).

The results were more consequential for the due process cases. Indeed, whether the data were in differences or levels, the innovation accounting illustrated that the Supreme Court influences due process appeals in the lower courts, at least for a few years; however,

no endogenous effect was found in the opposite direction (*see* Figure 4.9 [differences] and Figure 4.10 [levels]). When variance decomposition is applied, the effects from the Supreme Court become very noticeable, as between one-quarter and two-fifths of the agenda of the Courts of Appeals is caused by changes in the due process agenda in the Supreme Court. Interestingly, the level-data analysis suggests that the justices may be influenced by lower court appeals in this area more so than indicated by the innovation analysis (*see* Figure 4.11 and Table 4.8 [differences] and Figure 4.12 and Table 4.9 [levels]).

Finally, the VAR analyses for privacy cases are consistent with the Granger results. In particular, while there is no significant effect originating from either court when differenced data are utilized, there is no doubt about the rather strong effect in both directions when level data are analyzed. That is, not only are litigants responsive to changes in the Supreme Court's privacy agenda, but the justices themselves react to the privacy trends found in the lower courts, and this effect appears for many lags (*see* Figure 4.13 [differences] and Figure 4.14 [levels]). Variance decomposition authenticates these results, at least for level data, as the actors in both the Supreme Court and Courts of Appeals are sensitive to changes in the privacy agenda of the other court (*see* Figure 4.15 and Table 4.10 [differences] and Figure 4.16 and Table 4.11 [levels]). These results are consistent with the hypothesized expectations for the privacy issue.

DISCUSSION

The Granger and VAR analyses employed in this chapter provide additional support for my theory that the agendas of the highest federal courts in the United States influence

each other. As featured in chapter 3, the Supreme Court was notably influential as concerned the civil liberties agenda of the Courts of Appeals, although an effect in the opposite direction was not established. When the civil liberties category is broken down into its representative issues, similar results obtain, although there are meaningful differences as well. One of the most important findings from this chapter is that the Courts of Appeals do not influence any part of the Supreme Court's civil liberties agenda, *except* when it comes to privacy cases. That is, the Supreme Court influenced the agenda in most of the civil liberties issues but was swayed in return only when privacy issues were at issue, an unobvious but crucial finding.

Before making generalizations, however, I first need to discuss the specific civil liberties issues which constituted the bases of this chapter. To begin, the civil rights agenda of the Supreme Court proved to be somewhat influential on litigiousness in the Courts of Appeals in a manner very similar to the effect found in civil liberties in chapter 3, at least as far as the VAR analyses were concerned. This is not entirely surprising, since civil rights formed the preponderance of the civil liberties category. Furthermore, there was no endogenous effect which derived from the Courts of Appeals. Accordingly, *Hypotheses #11a* and *#11b* appear to be borne out by the analysis.

As for first amendment cases, however, none of the analyses here demonstrated an influence in either direction. That is, the Supreme Court seems to ignore the first amendment agenda of the Courts of Appeals, and vice versa. While *Hypothesis #12b* was verified, then, the expected effect on the lower courts from above did not materialize, thus eschewing *Hypothesis #12a*.

The results for due process cases generally acquitted my theory, as the VAR analyses in particular demonstrated that the Supreme Court has a powerful effect on the dockets in the Courts of Appeals but that a reverse effect did not materialize. In fact, causality in the direction of the Courts of Appeals was fairly convincing, particularly as demonstrated by the variance decomposition analyses. For these reasons, the evidence provides significant support for *Hypotheses #13a* and *#13b*.

Furthermore, the analyses clearly promoted the theoretical expectations on privacy cases as well, as causal effects were observed in both directions. Thus, the Supreme Court remains on the sidelines for events to occur in the legal profession, at least to a certain extent, when it comes to privacy cases, apparently allowing for sufficient percolation to occur in the courts below before being constrained (or strategic, perhaps) to accept particular cases on abortion or otherwise within the privacy classification. For privacy cases, at least, it appears that the federal courts do resemble a functioning system, as opposed to detached institutional entities acting independently of one another.

This chapter accordingly builds upon the results achieved in chapter 3. First, the agenda of the lower federal courts generally comported with the trends established by the agenda choices made by the Supreme Court. Nevertheless, the justices seem to follow certain agenda trends in the Courts of Appeals as well, accepting specific types of cases when impelled to do so. What is most interesting about this result is that this endogenous influence was obtained for one particular issue (privacy) when no such consequence could have been gleaned from the analysis if this category had been aggregated in the manner it usually is in other judicial studies and, of course, the manner it was analyzed herein in

chapter 3. That is, when the issue of civil liberties *en masse* was analyzed in chapter 3, only an effect from the Supreme Court was discernible, but this chapter demonstrates that this is not the entire story. Thus, the negligible influence from the Courts of Appeals for the non-privacy civil liberties cases overwhelmed the convincing effect stemming specifically from privacy issues.

In a similar vein, while the Supreme Court influenced litigants concerning the overall civil liberties agenda of the Courts of Appeals, the analyses in this chapter demonstrated that this effect was most apparent for due process, privacy, and, to a lesser extent, civil rights cases; nonetheless, the more particularized analysis illustrates that the Supreme Court's agenda on first amendment issues was not effectual on the agenda in the courts below. Again, this is an instance where the aggregated issue captivated the behavior of the political actors with respect to one of the issues' respective elements.

At this stage, it is logical to reiterate the results for criminal procedure cases as well. While this issue was separated from the overall civil liberties category in chapter 3, these types of cases often have been included within the broader classification. Indeed, as reported in chapter 3, the results for criminal procedure were very similar to those for civil liberties, in that the Supreme Court had an influence on the lower courts' dockets but that the reverse effect did not materialize (*see* Figures 3.9-3.12 and Tables 3.8 and 3.9). If this issue were aggregated within the overall civil liberties category, the results for the amassed issue likely would have been even stronger. Nevertheless, severing this issue from the whole enabled a distinct result on criminal procedure cases to be revealed.

Accordingly, the aggregated civil liberties analysis in chapter 3 might lead to the implication that the Supreme Court influences the lower courts on first amendment issue, while the high Court is not persuaded by trends in privacy cases in the appeals courts. The results of this chapter demonstrate rather convincingly that such conclusions are inappropriate and should not be made. As Robinson (1950) exhorted long ago, researchers should be careful about extracting inferences regarding individual behavior (or in this case, individual issues) from aggregate data.¹¹ In particular, as the analysis here portrays, all civil liberties issues are not treated equally in the federal courts, at least with respect to the agenda effects between the Supreme Court and Courts of Appeals.

¹¹*But see* Kramer (1983, 93), who contended: "[I]t is the *aggregate* time-series evidence – rather than that based on individual-level . . . data – which is most likely to yield valid inferences about the underlying individual-level behavioral effects we are trying to measure" [emphasis in original].

TABLE 4.1
AUGMENTED DICKEY-FULLER TESTS FOR UNIT ROOTS (SERIES IN LEVELS)

Court	Issue	No Trend, No Intercept	Intercept Only	Intercept and Trend
Supreme Court	Civil Rights	-0.517	-2.720	-2.568
	First Amendment	-0.976	-3.818**	-3.834*
	Due Process	-1.511	-2.874	-2.853
	Privacy	-1.738	-2.605	-3.382
Courts of Appeals	Civil Rights	0.400	-0.939	-2.517
	First Amendment	-1.441	-3.015*	-3.486
	Due Process	-1.124	-3.071*	-4.826**
	Privacy	-1.449	-2.199	2.726

H_0 : unit root (data are not stationary)

* $p \leq .05$

H_A : no unit root (data are stationary)

** $p \leq .01$

Note: MacKinnon (1990) critical values are used for rejection of null hypothesis of a unit root.

TABLE 4.2
AUGMENTED DICKEY-FULLER TESTS FOR UNIT ROOTS (SERIES IN FIRST DIFFERENCES)

Court	Issue	No Trend, No Intercept	Intercept Only	Intercept and Trend
Supreme Court	Civil Rights	-10.252**	-10.144**	-10.202**
	First Amendment	-6.597**	-6.525**	-6.478**
	Due Process	-9.832**	-9.852**	-9.766**
	Privacy	-8.783**	-8.695**	-8.6.3**
Courts of Appeals	Civil Rights	-6.662.**	-6.895**	-6.813**
	First Amendment	5.716**	-5.682**	-5.613**
	Due Process	-8.861**	-8.814**	-8.752**
	Privacy	-6.481**	-6.424**	-6.355**

H_0 : unit root (data are not stationary)

H_A : no unit root (data are stationary)

* $p \leq .05$

** $p \leq .01$

Note: MacKinnon (1990) critical values are used for rejection of null hypothesis of a unit root.

TABLE 4.3
GRANGER CAUSALITY RESULTS

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Civil Rights	2	.801	Courts of Appeals Granger Cause Supreme Court	Civil Rights	2	.788
		3	.804			3	.982
		4	.882			4	.863
		5	.929			5	.790
		6	.840			6	.651
		7	.949			7	.740
		8	.937			8	.303
		9	.906			9	.441
		10	.505			10	.424
Supreme Court Granger Causes Courts of Appeals	First Amendment	2	.654	Courts of Appeals Granger Cause Supreme Court	First Amendment	2	.305
		3	.397			3	.459
		4	.530			4	.606
		5	.720			5	.610
		6	.406			6	.612
		7	.355			7	.687
		8	.513			8	.796
		9	.728			9	.820
		10	.613			10	.883

H₀: no Granger causality

H_A: Granger causality

*p ≤ .05

**p ≤ .01

TABLE 4.3 (CONT'D)

Direction of Causality	Issue	Lag Length	p-value	Direction of Causality	Issue	Lag Length	p-value
Supreme Court Granger Causes Courts of Appeals	Due Process	2	.583	Courts of Appeals Granger Cause Supreme Court	Due Process	2	.227
		3	.947			3	.398
		4	.265			4	.206
		5	.351			5	.185
		6	.262			6	.400
		7	.759			7	.220
		8	.638			8	.269
		9	.205			9	.556
		10	.274			10	.625
Supreme Court Granger Causes Courts of Appeals	Privacy	2	.410	Courts of Appeals Granger Cause Supreme Court	Privacy	2	.988
		3	.334			3	.518
		4	.409			4	.548
		5	.346			5	.384
		6	.192			6	.002**
		7	.060*			7	.004**
		8	.200			8	.026*
		9	.103			9	.016*
		10	.285			10	.034*

H₀: no Granger causalityH_A: Granger causality

*p ≤ .05

**p ≤ .01

TABLE 4.4
VARIANCE DECOMPOSITION OF CIVIL RIGHTS CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.72	0.27
3	98.50	1.50
4	97.84	2.16
5	97.90	2.10
6	97.79	2.21
7	97.67	2.33
8	97.67	2.33
9	97.66	2.34
10	97.65	2.35
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	0.17	99.83
2	0.72	99.28
3	1.61	98.39
4	1.88	98.12
5	1.88	98.12
6	1.98	98.02
7	2.05	97.95
8	2.05	97.95
9	2.06	97.94
10	2.07	97.93
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.5
VARIANCE DECOMPOSITION OF CIVIL RIGHTS CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	94.78	5.22
3	95.44	4.56
4	94.35	5.65
5	94.22	5.78
6	93.90	6.10
7	93.66	6.34
8	93.48	6.52
9	93.30	6.70
10	93.17	6.83
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	3.60	96.40
2	4.35	95.65
3	14.61	85.39
4	18.42	81.58
5	23.89	76.11
6	27.52	72.48
7	30.64	69.36
8	33.07	66.93
9	34.98	65.02
10	36.50	63.50
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.6
VARIANCE DECOMPOSITION OF FIRST AMENDMENT CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	95.77	4.23
3	95.71	4.29
4	94.85	5.15
5	94.79	5.21
6	94.78	5.22
7	94.77	5.23
8	94.77	5.23
9	94.77	5.23
10	94.77	5.23
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	0.97	99.03
2	1.33	98.67
3	3.44	96.56
4	3.70	96.30
5	3.73	96.27
6	3.76	96.24
7	3.76	96.24
8	3.76	96.24
9	3.76	96.24
10	3.76	96.24
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.7
VARIANCE DECOMPOSITION OF FIRST AMENDMENT CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	92.93	7.07
3	90.77	9.23
4	90.21	9.79
5	90.11	9.89
6	90.09	9.91
7	90.09	9.91
8	90.09	9.91
9	90.09	9.91
10	90.09	9.91
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	1.79	98.21
2	4.54	95.46
3	4.50	95.50
4	4.40	95.60
5	4.38	95.62
6	4.39	95.61
7	4.39	95.61
8	4.39	95.61
9	4.39	95.61
10	4.39	95.61
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.8
VARIANCE DECOMPOSITION OF DUE PROCESS CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.87	0.13
3	96.44	3.56
4	90.28	9.72
5	86.75	13.25
6	85.97	14.03
7	85.96	14.04
8	85.96	14.04
9	85.96	14.04
10	85.96	14.04
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	26.78	73.22
2	22.46	77.54
3	21.80	78.20
4	23.10	76.90
5	23.55	76.45
6	23.54	76.46
7	23.57	76.43
8	23.58	76.42
9	23.58	76.42
10	23.58	76.42
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.9
VARIANCE DECOMPOSITION OF DUE PROCESS CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.03	0.97
3	97.77	2.23
4	93.81	6.19
5	93.89	6.11
6	93.19	6.81
7	93.27	6.73
8	93.08	6.92
9	93.08	6.92
10	92.97	7.03
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	38.33	61.67
2	39.09	60.91
3	38.43	61.57
4	39.71	60.29
5	39.69	60.31
6	39.81	60.19
7	39.85	60.15
8	39.89	60.11
9	39.89	60.11
10	39.91	60.89
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.10
VARIANCE DECOMPOSITION OF PRIVACY CASES (DIFFERENCED DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	99.96	0.04
3	99.94	0.06
4	99.95	0.05
5	99.94	0.06
6	99.94	0.06
7	99.94	0.06
8	99.94	0.06
9	99.94	0.06
10	99.94	0.06
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	0.37	99.63
2	0.46	99.54
3	1.45	98.55
4	4.38	95.62
5	5.48	94.52
6	5.48	94.52
7	5.63	94.37
8	5.69	94.31
9	5.69	94.31
10	5.71	94.29
Ordering: Supreme Court/Courts of Appeals		

TABLE 4.11
VARIANCE DECOMPOSITION OF PRIVACY CASES (LEVEL DATA)

Variance Decomposition of Supreme Court		
Period	Supreme Court	Courts of Appeals
1	100.00	0.00
2	93.16	6.84
3	88.27	11.73
4	87.77	12.23
5	86.76	13.24
6	85.96	14.04
7	85.45	14.55
8	85.09	14.91
9	84.81	15.19
10	84.60	15.40
Variance Decomposition of Courts of Appeals		
Period	Supreme Court	Courts of Appeals
1	8.64	91.36
2	19.03	80.97
3	33.66	66.34
4	35.30	64.70
5	37.82	62.18
6	39.48	60.52
7	40.64	59.36
8	41.41	58.59
9	42.02	57.98
10	42.47	57.53
Ordering: Supreme Court/Courts of Appeals		

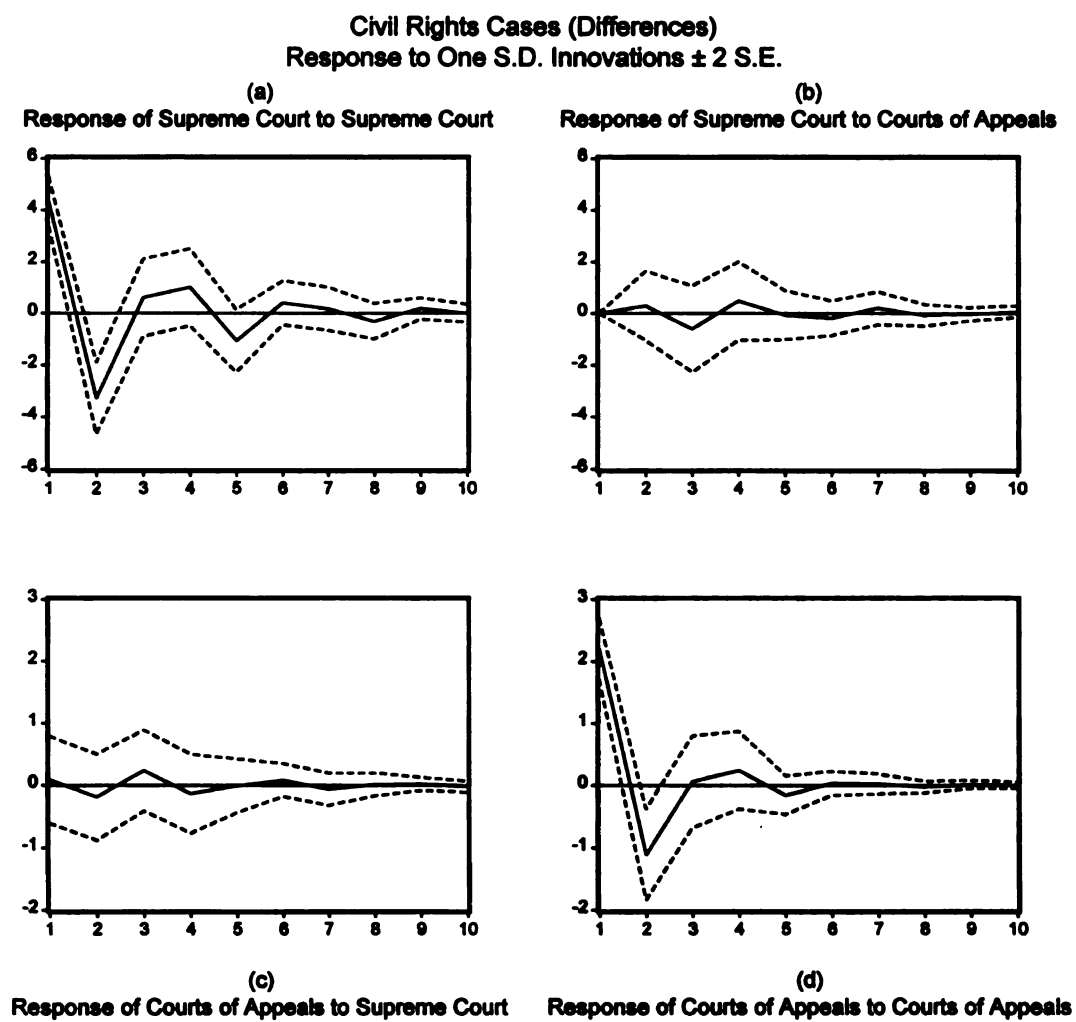


FIGURE 4.1
INNOVATION ACCOUNTING OF CIVIL RIGHTS CASES (DIFFERENCES)

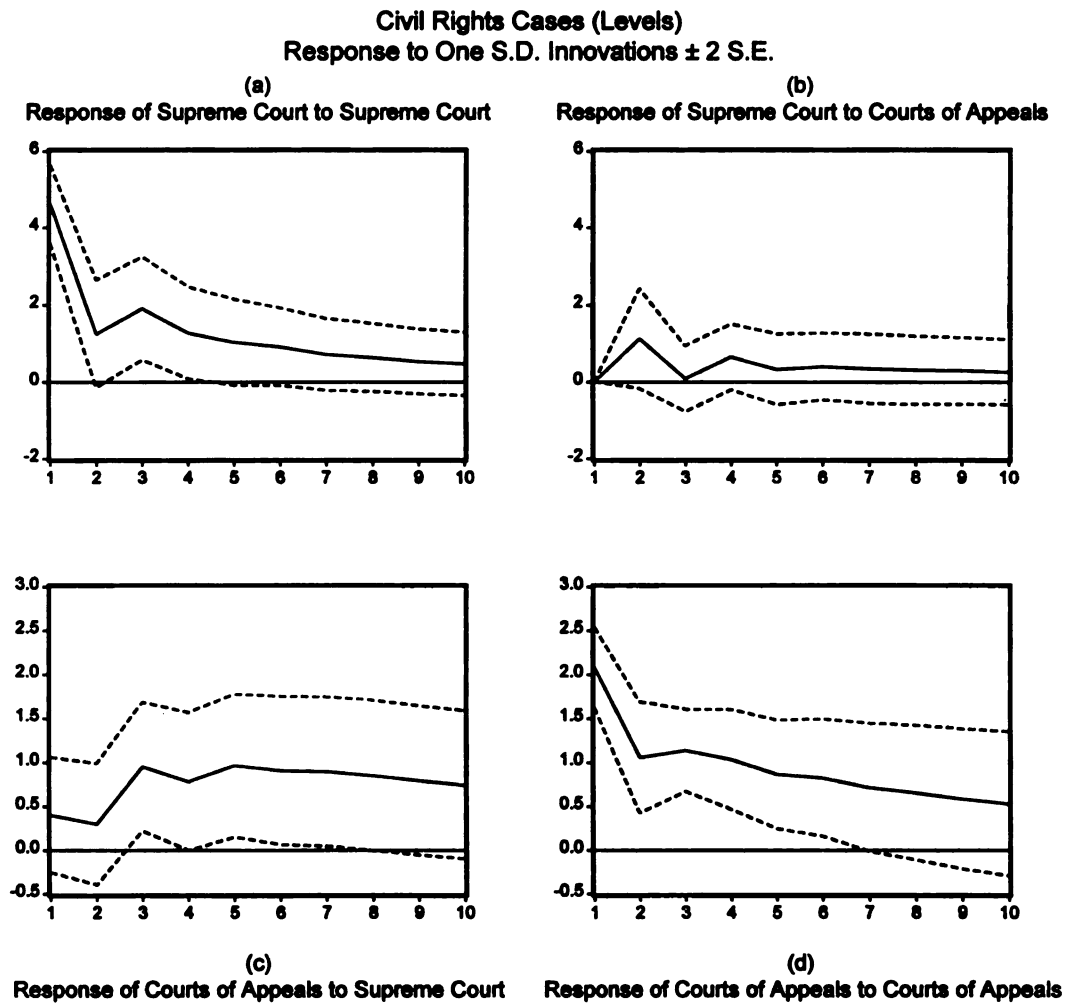


FIGURE 4.2
 INNOVATION ACCOUNTING OF CIVIL RIGHTS CASES (LEVELS)

Civil Rights Cases (Differences)

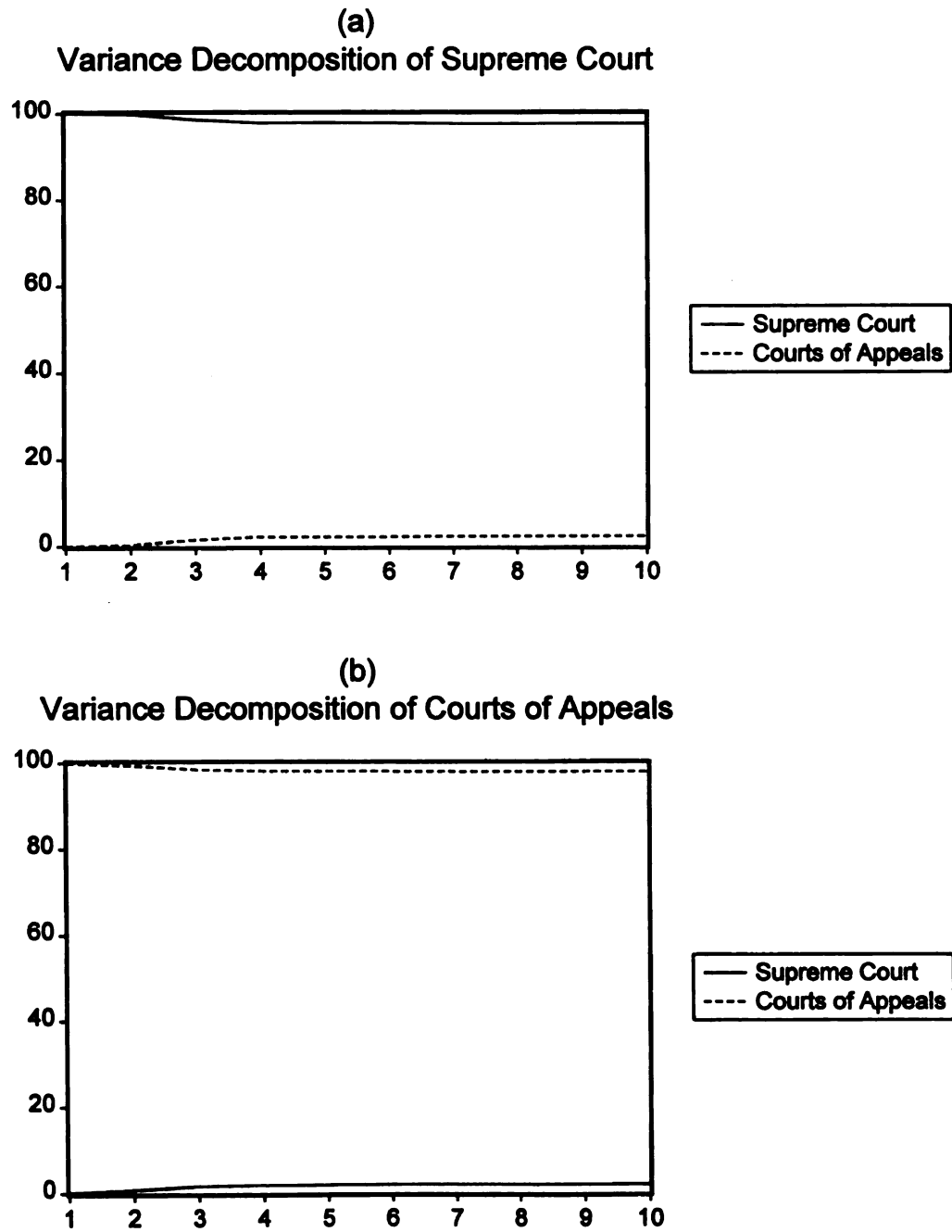


FIGURE 4.3
VARIANCE DECOMPOSITION OF CIVIL RIGHTS CASES (DIFFERENCES)

Civil Rights Cases (Levels)

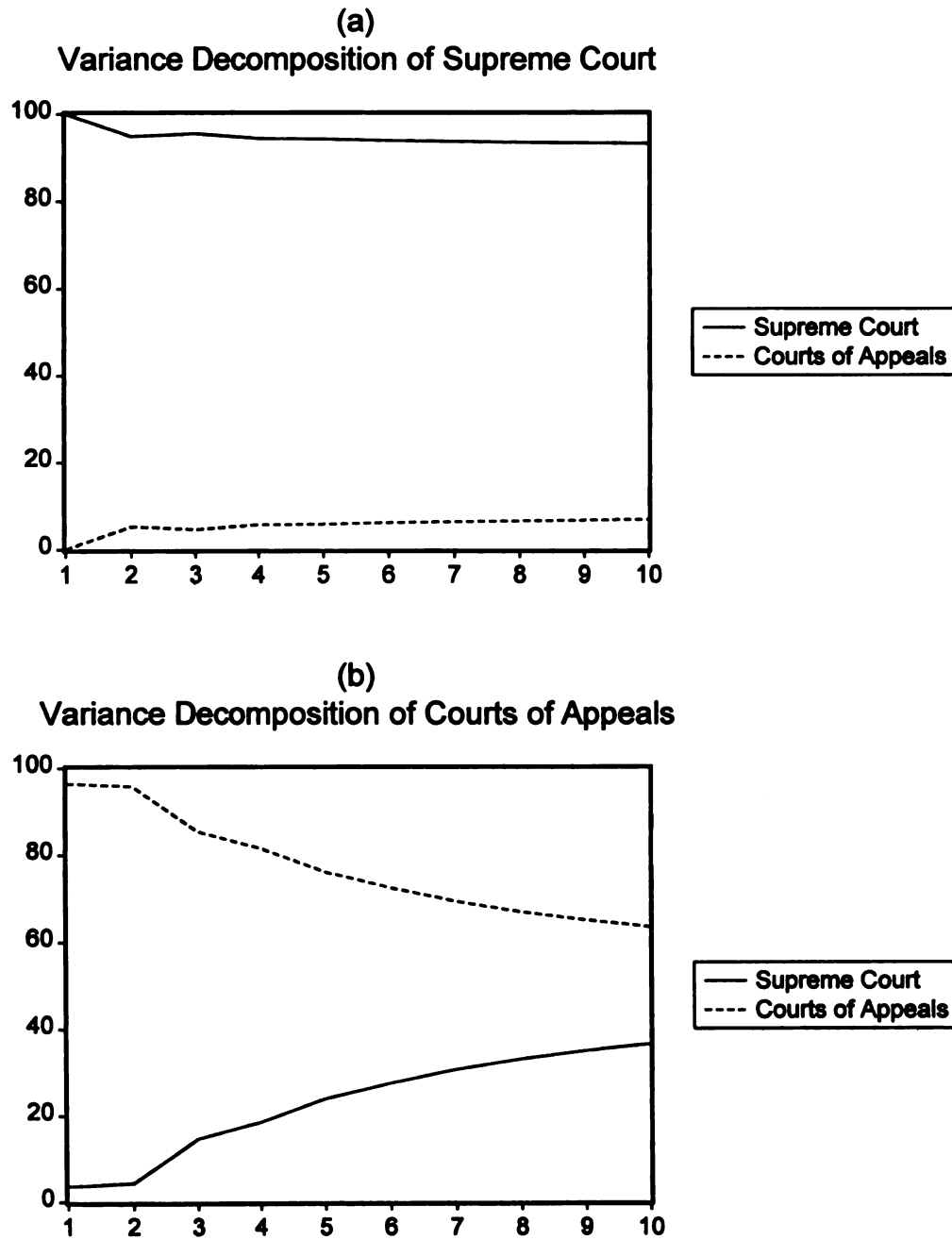


FIGURE 4.4
VARIANCE DECOMPOSITION OF CIVIL RIGHTS CASES (LEVELS)

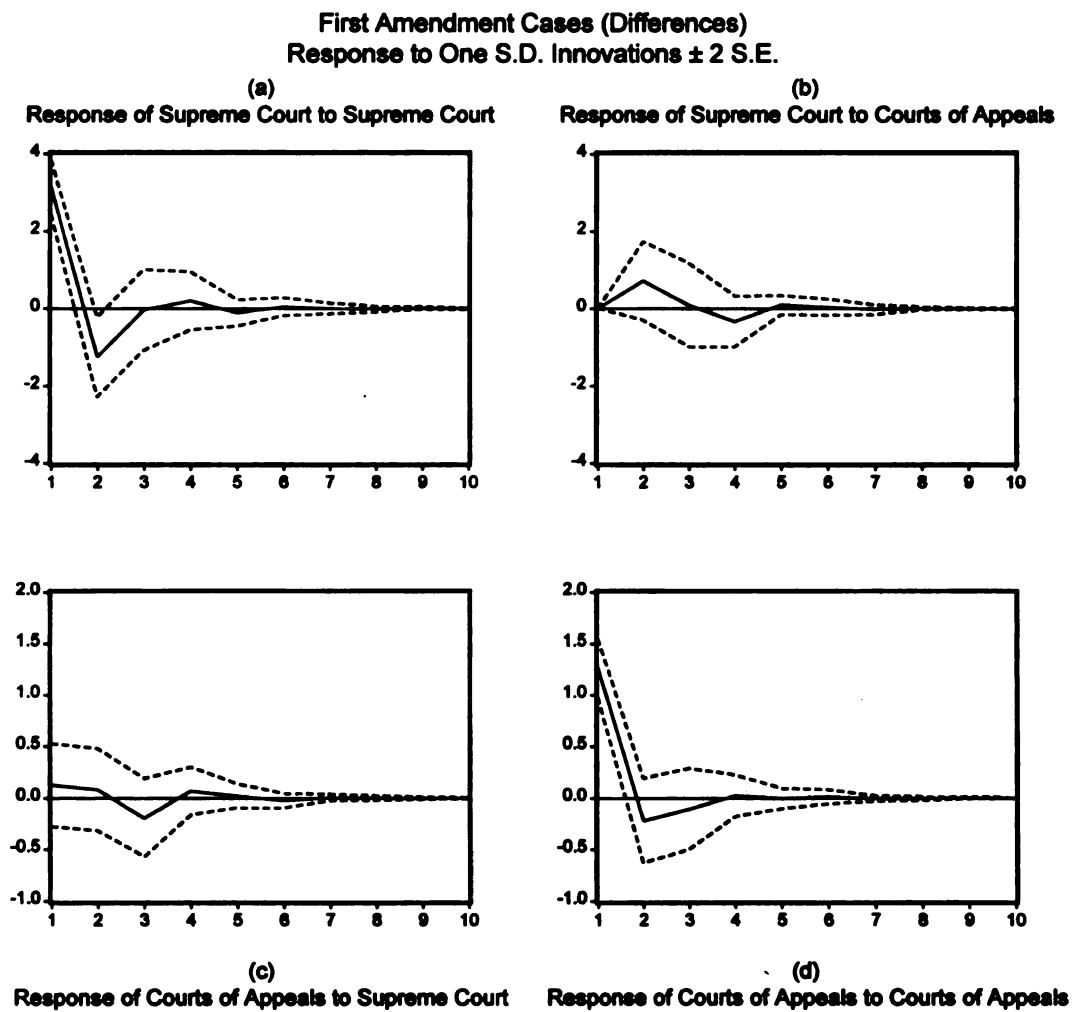


FIGURE 4.5
 INNOVATION ACCOUNTING OF FIRST AMENDMENT CASES (DIFFERENCES)

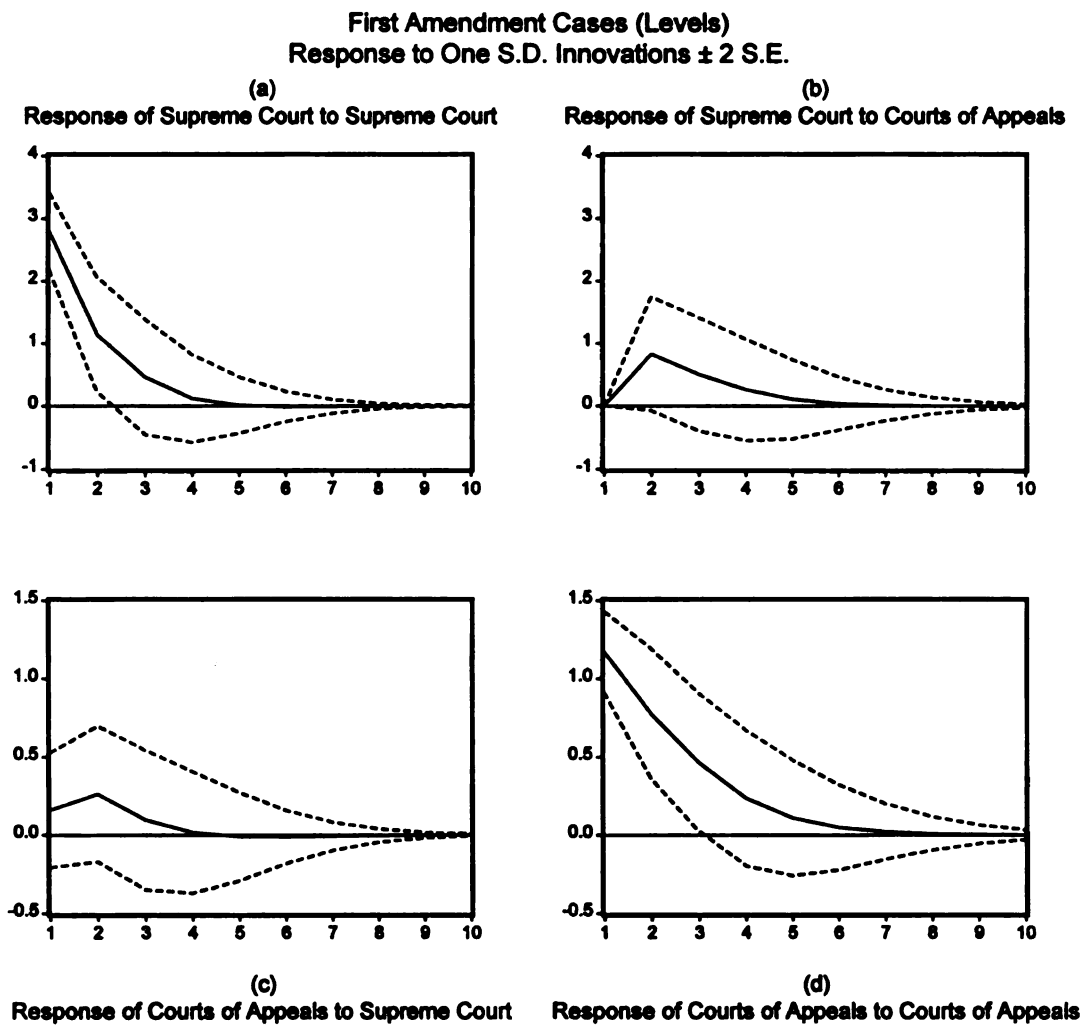


FIGURE 4.6
INNOVATION ACCOUNTING OF FIRST AMENDMENT CASES (LEVELS)

First Amendment Cases (Differences)

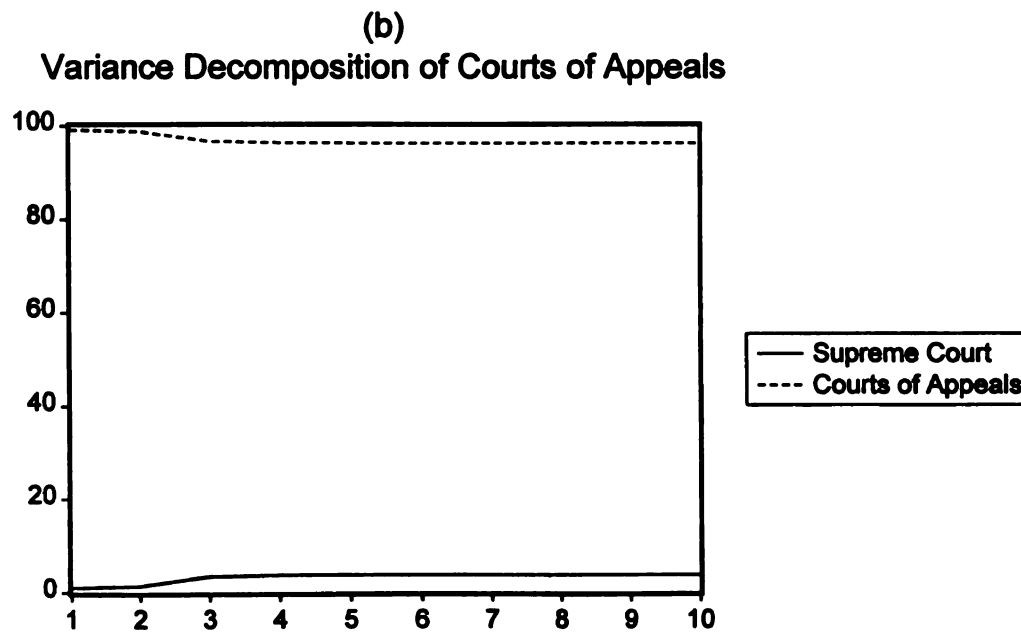
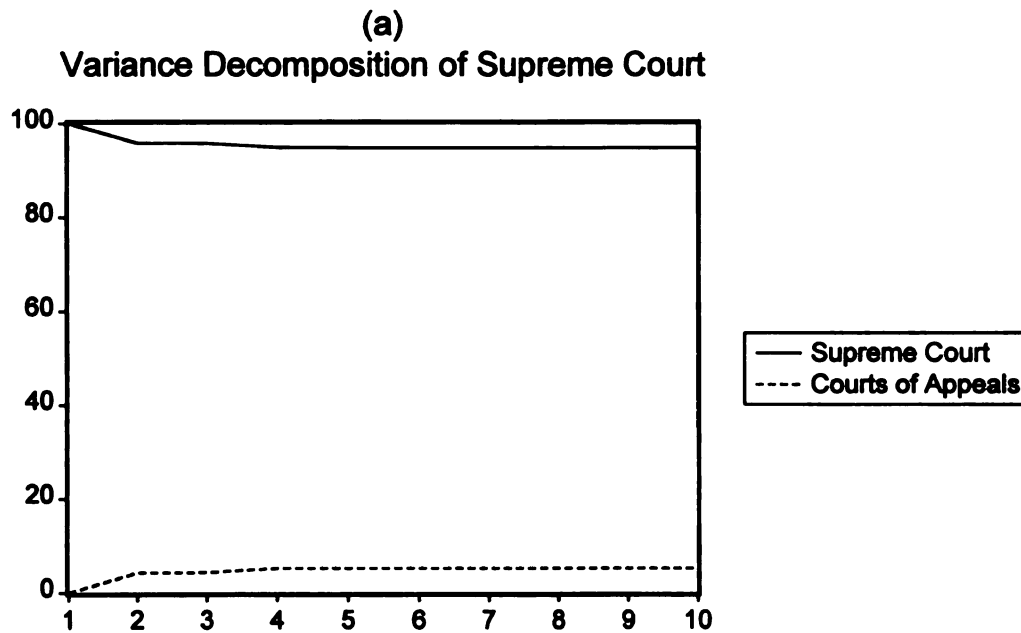


FIGURE 4.7
VARIANCE DECOMPOSITION OF FIRST AMENDMENT CASES (DIFFERENCES)

First Amendment Cases (Levels)

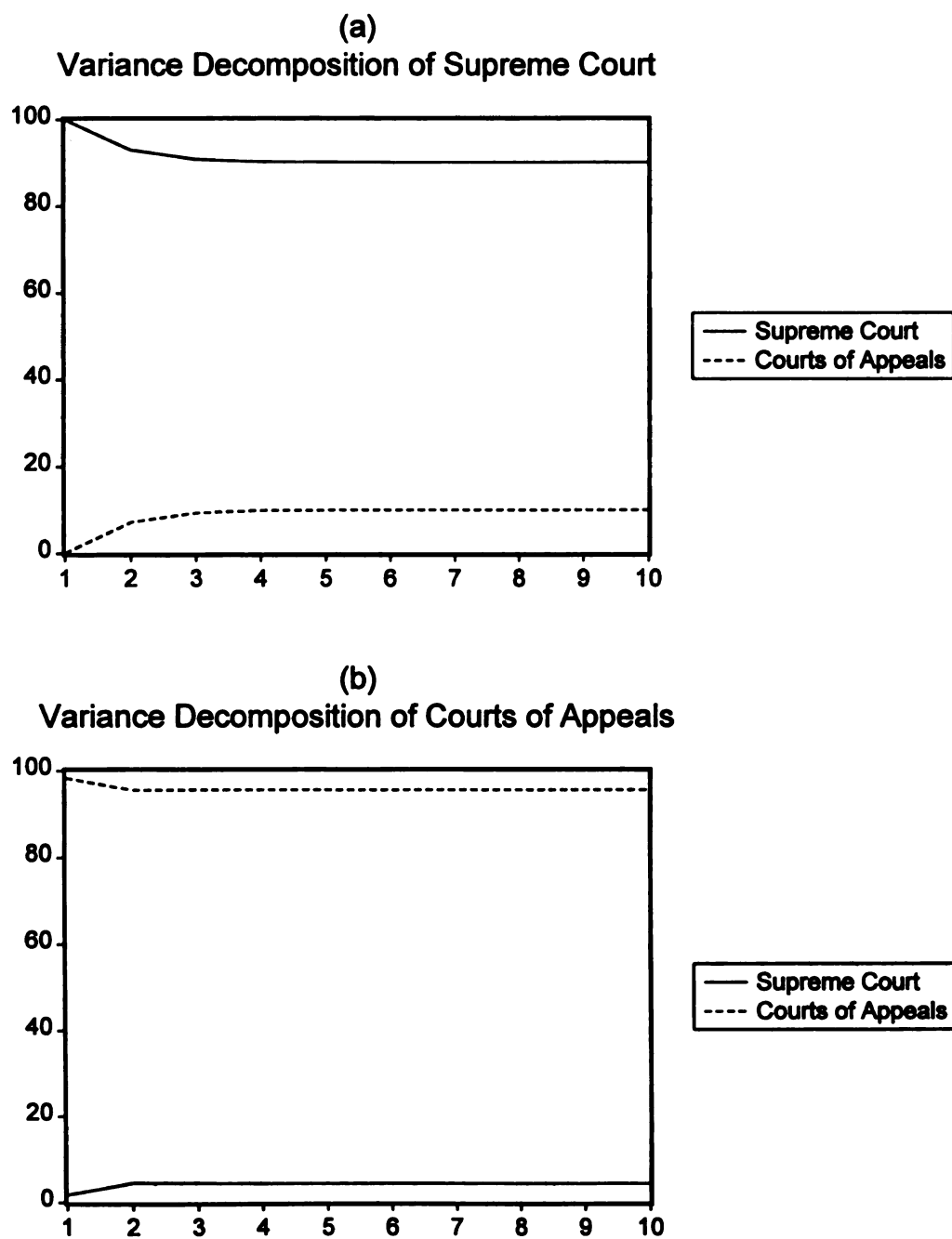


FIGURE 4.8
VARIANCE DECOMPOSITION OF FIRST AMENDMENT CASES (LEVELS)

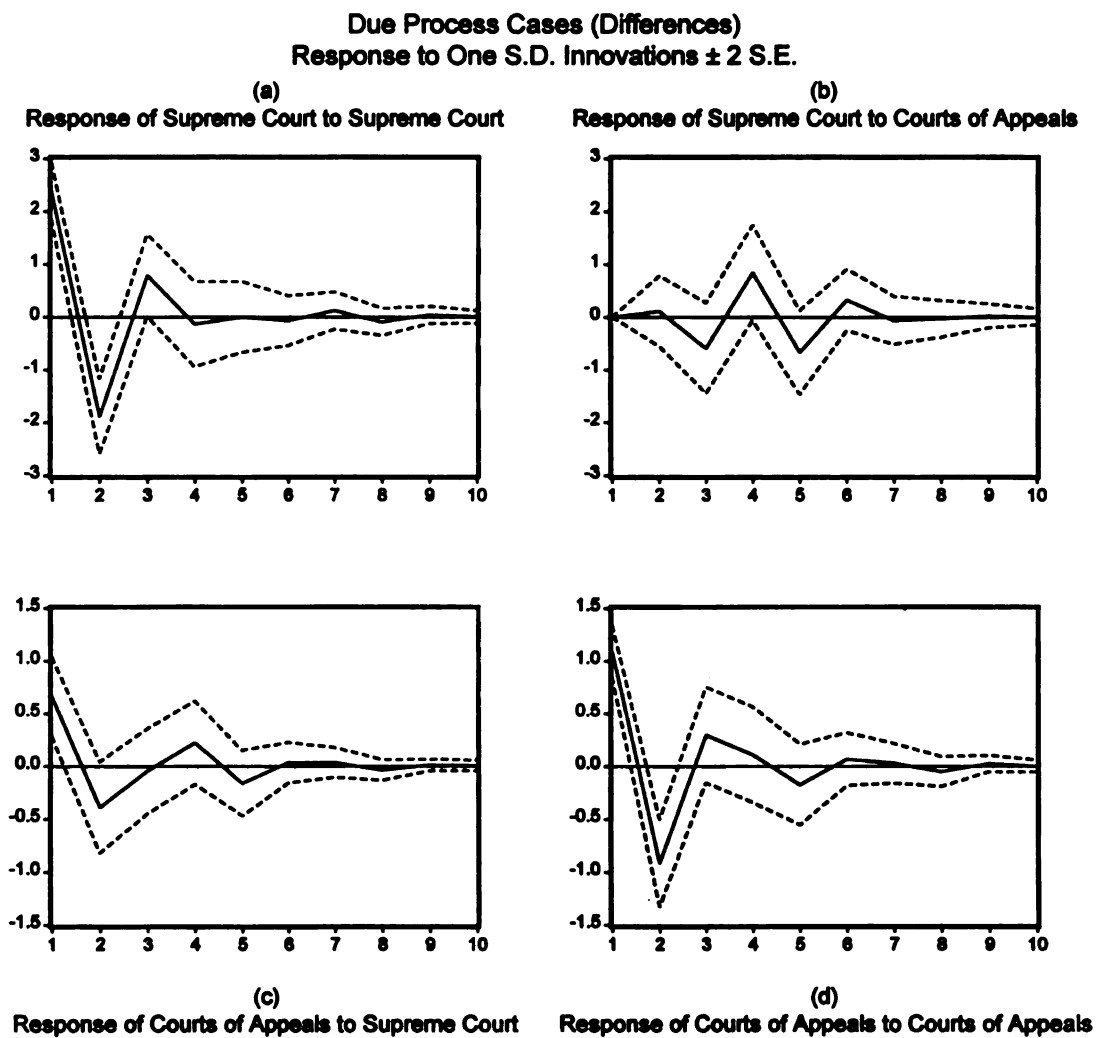


FIGURE 4.9
INNOVATION ACCOUNTING OF DUE PROCESS CASES (DIFFERENCES)

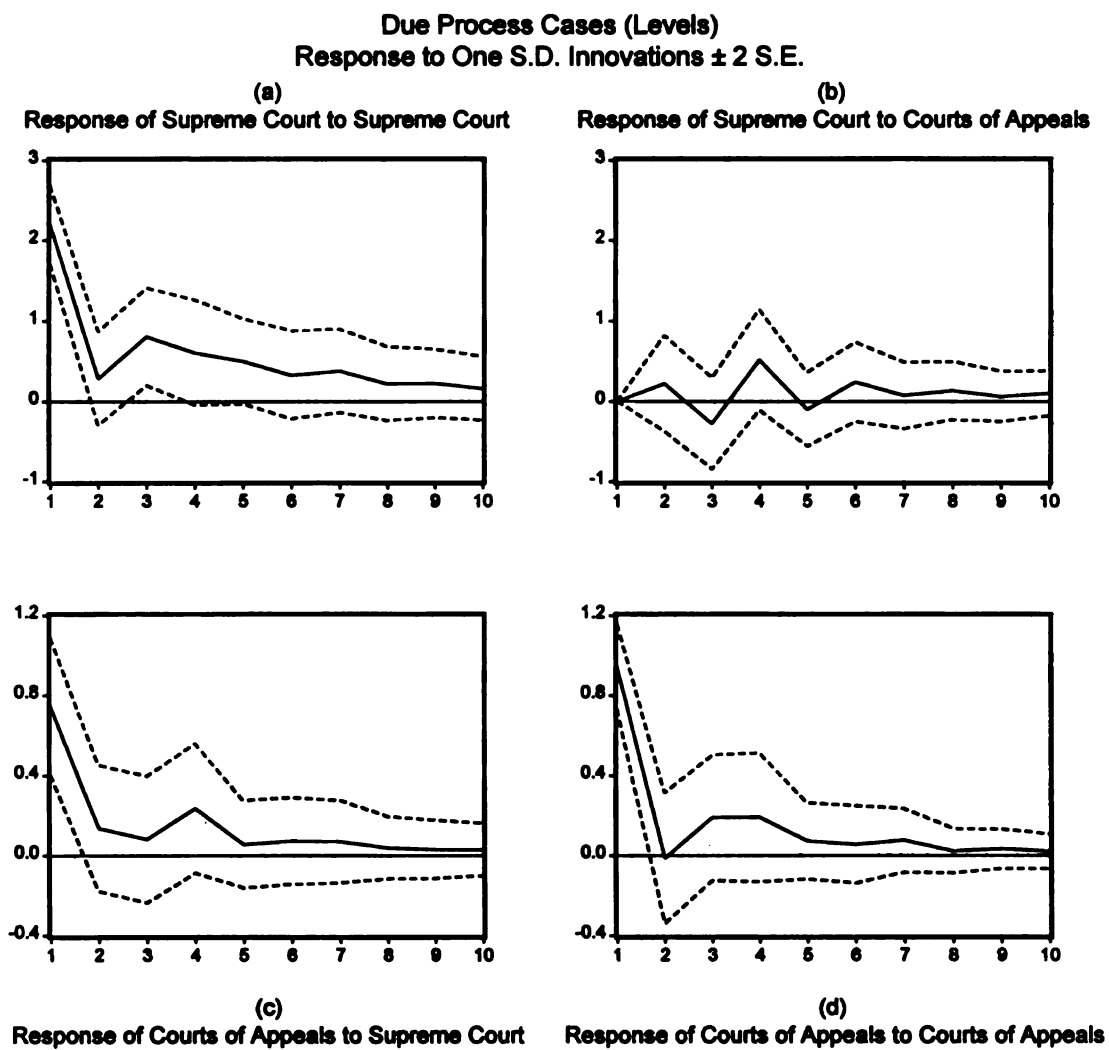


FIGURE 4.10
 INNOVATION ACCOUNTING OF DUE PROCESS CASES (LEVELS)

Due Process Cases (Differences)

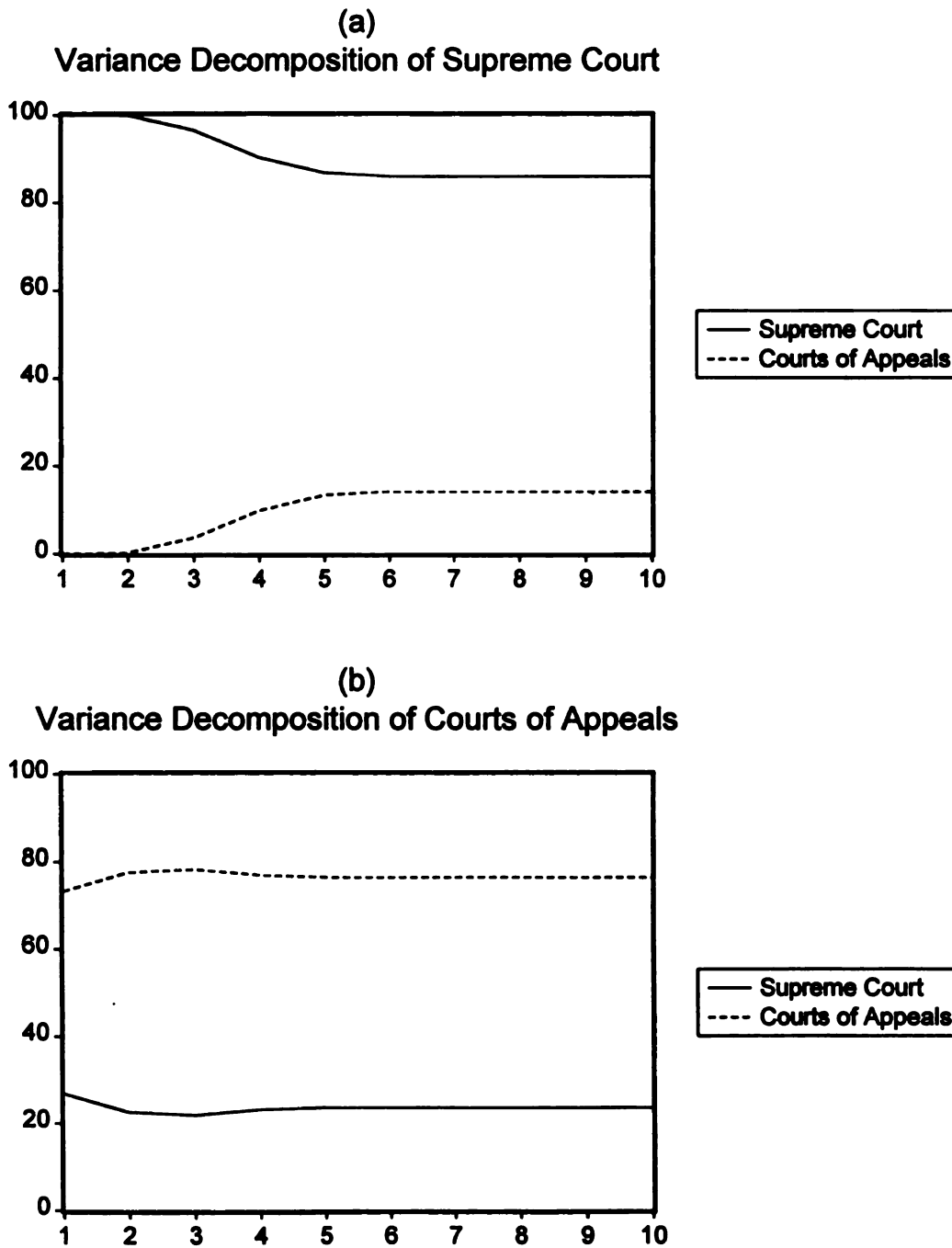


FIGURE 4.11
VARIANCE DECOMPOSITION OF DUE PROCESS CASES (DIFFERENCES)

Due Proces Cases (Levels)

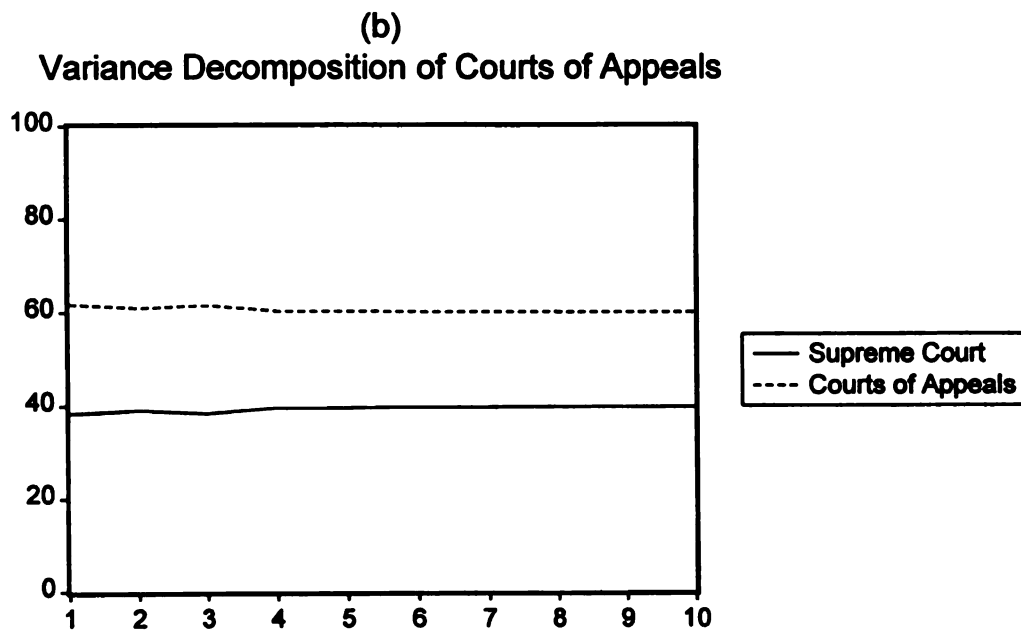
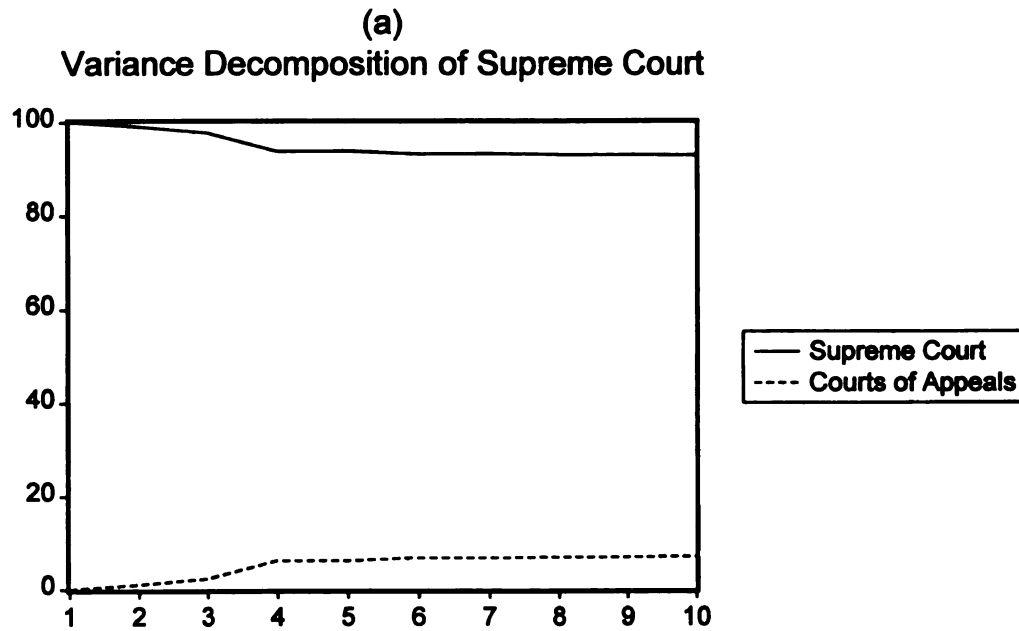


FIGURE 4.12
VARIANCE DECOMPOSITION OF DUE PROCESS CASES (LEVELS)

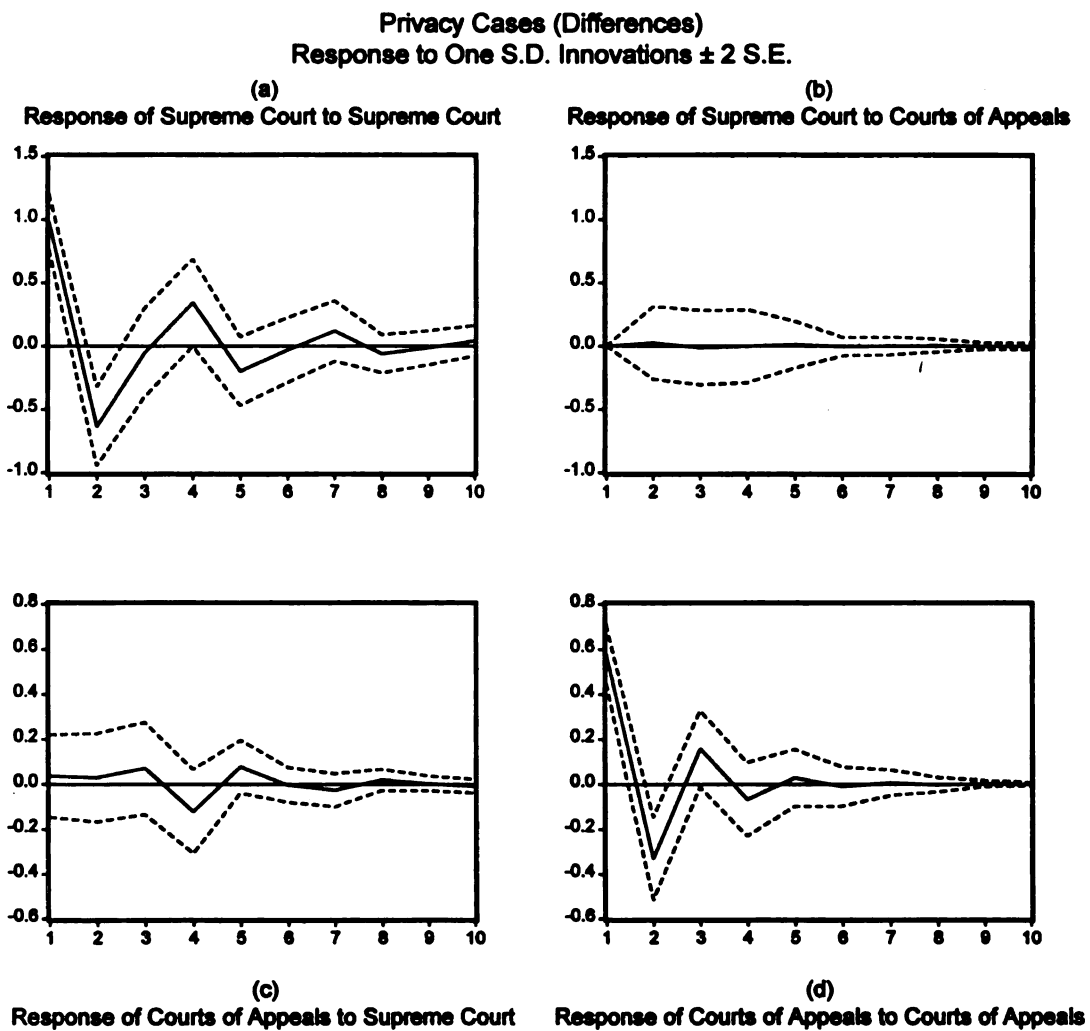


FIGURE 4.13
 INNOVATION ACCOUNTING OF PRIVACY CASES (DIFFERENCES)

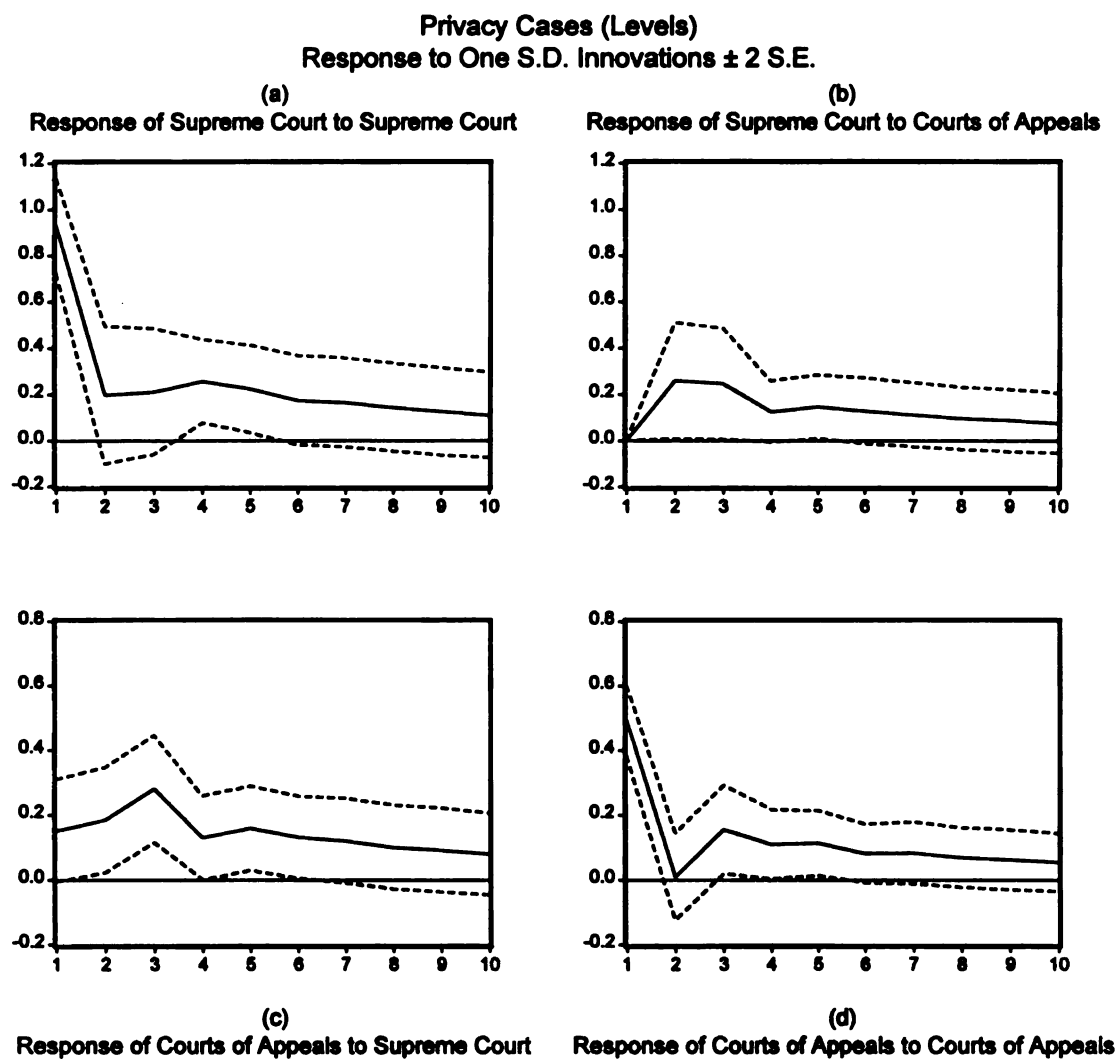


FIGURE 4.14
INNOVATION ACCOUNTING OF PRIVACY CASES (LEVELS)

Privacy Cases (Differences)

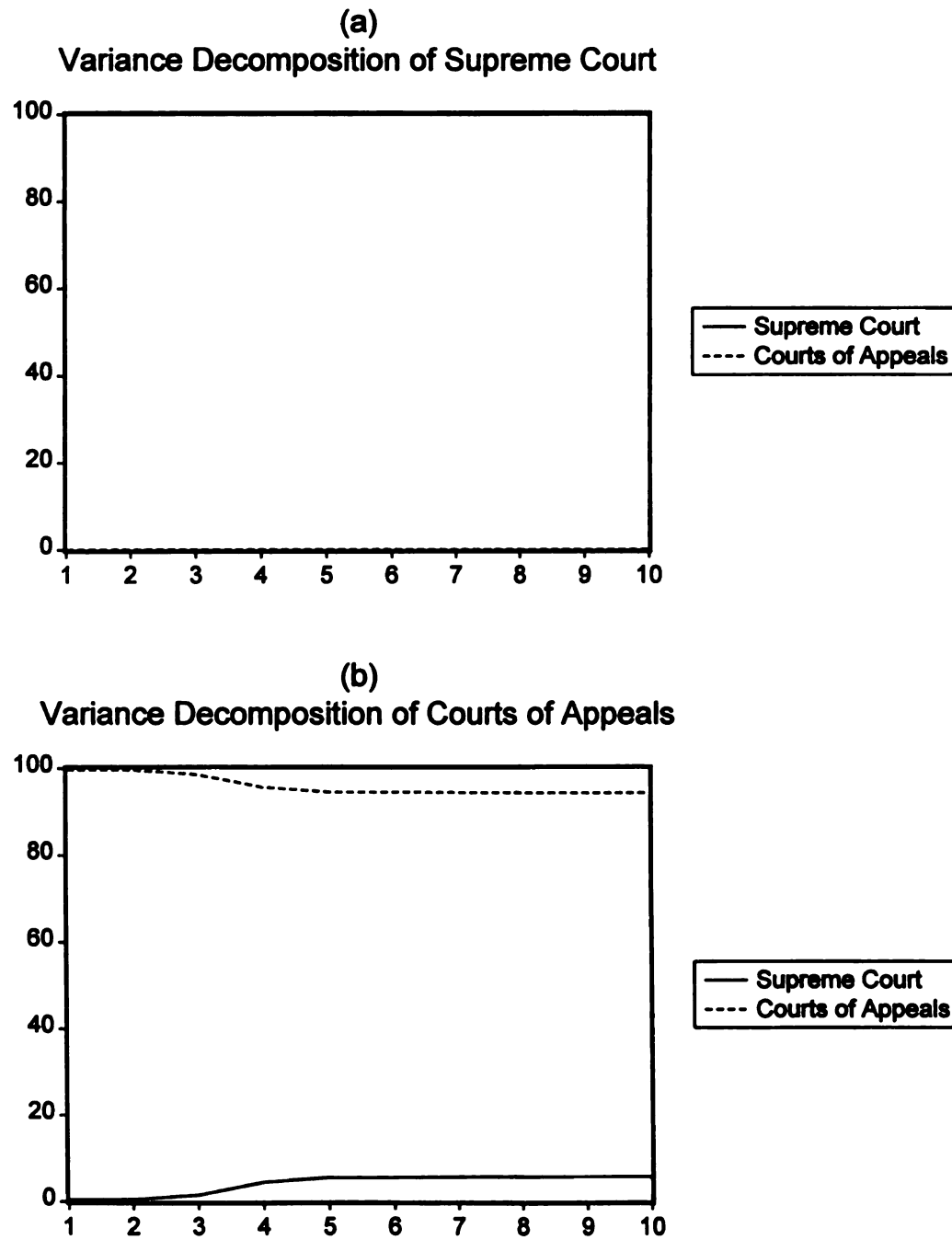


FIGURE 4.15
VARIANCE DECOMPOSITION OF PRIVACY RIGHTS CASES (DIFFERENCES)

Privacy Cases (Levels)

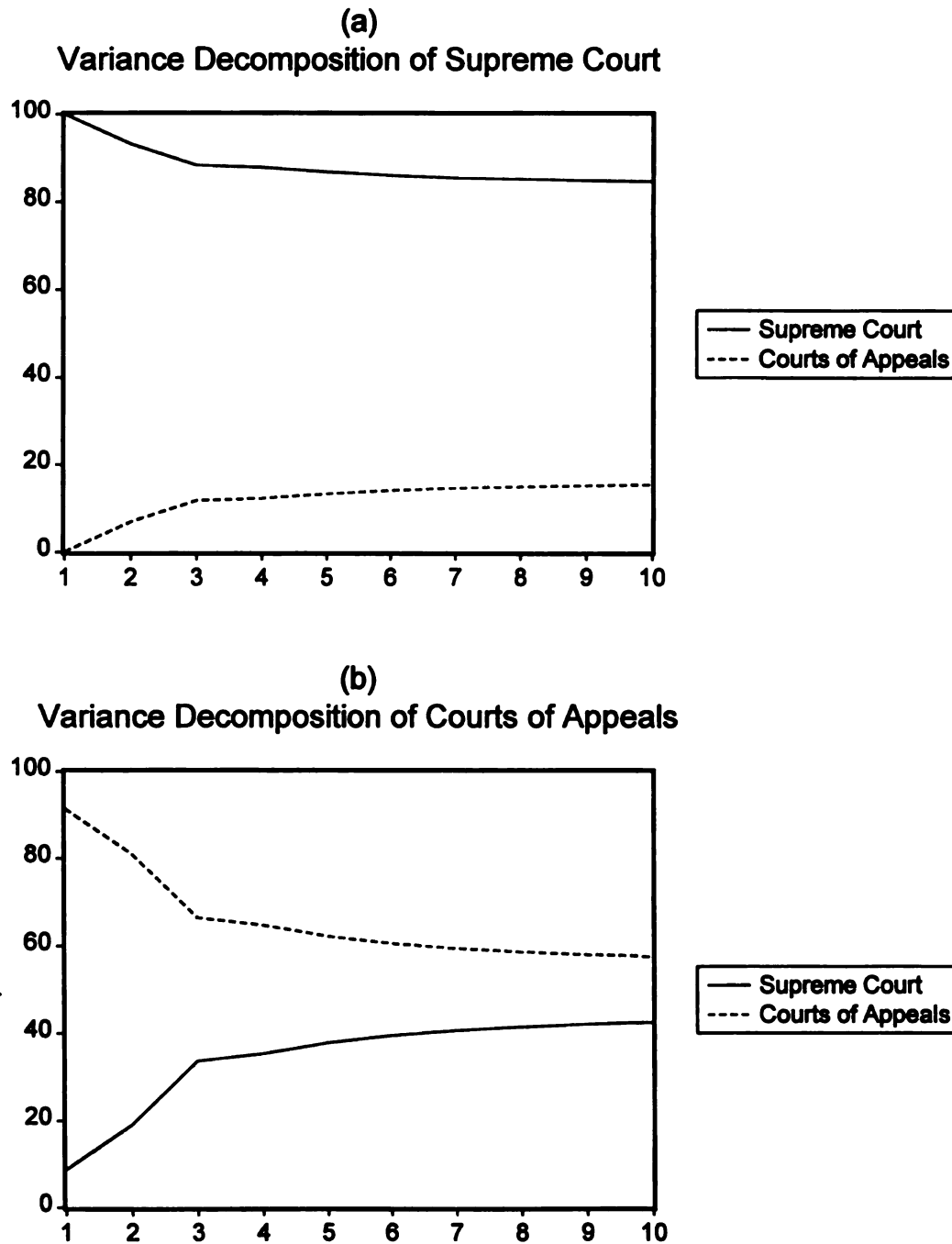


FIGURE 4.16
VARIANCE DECOMPOSITION OF PRIVACY CASES (LEVELS)

CHAPTER 5

MULTIVARIATE ANALYSES OF THE INFLUENCES ON THE AGENDAS IN THE SUPREME COURT AND COURTS OF APPEALS

The chapters preceding this one revealed that the federal courts exist within a system, at least with respect to the agendas of the Supreme Court and Courts of Appeals. In particular, each court influences changes in the agenda of the other, albeit to varying degrees and conditional upon the issues involved. The statistical manner in which these causal relationships were illustrated was vector autoregression (VAR). While VAR is rather well-suited to establishing such causal connections over time, one of the drawbacks to this approach is that it utilizes many degrees of freedom (Johnston and DiNardo 1996). Accordingly, to ensure a large enough N was available, only bivariate relationships could be examined; that is, in the prior analyses I investigated whether the agenda of the Supreme Court influences changes in the agenda of the Courts of Appeals for one particular issue, and vice versa. Nevertheless, I did not test whether other potential influences enter into the equation of agenda setting in the federal courts. In other words, are the effects of agenda the only influence on the agendas of these courts, or do other factors inspire changes in judicial agendas over time? Answering this question is the primary purpose of this chapter.

INFLUENCES ON AGENDAS IN THE FEDERAL COURTS

As I have argued in this study, the agendas of the Supreme Court and the Courts of Appeals stem from an aggregation of rational decisions made by the various political actors involved; yet, this decision is influenced by institutional features surrounding these players in the judiciary. At the Supreme Court, each individual justice has policy preferences which he or she would like to see implemented. Seeking to advance those preferences, the justices endeavor to find particular cases on cert. which serve as the best possible vehicles with respect to their preferences. Thus, each justice favors accepting certain types of cases on cert. rather than others. Nevertheless, institutional characteristics, such as the Supreme Court's internal rule of four or the agenda of the courts below, act to modify these individual preferences as they are represented in the overall agenda of the Supreme Court.

While the process is somewhat different at the Courts of Appeals, the idea is the same. Rational litigants, their lawyers, and interest groups choose whether or not to appeal specific cases to the circuit courts, a decision which is based almost entirely on probability of success. Nevertheless, this judgment is tempered by various institutional aspects both within and without the judicial system. For instance, internal constraints include the type of case to be appealed *vis-a-vis* the ideological state of the federal courts; external forces involve the costs of litigation, the political environment, and various social forces (Hurwitz and Sheehan 1998).

It is the aggregation of these decisions by justices in the Supreme Court and litigants and their representatives in the Courts of Appeals which comprise the agendas of these respective courts. Thus, even though individuals make particular decisions which influence

the judicial agendas, certain patterns of these aggregate decisions may be revealed as they are affected by broader factors stemming from the judicial and political environments. Thus, while individual decisions are fundamental with respect to judicial agenda setting, the composite of those individual decisions is the final factor involved. Accordingly, there is a need to look beyond the agendas of these courts as independent variables and explore the broader determinants of the agendas within the federal courts. In this chapter, then, I analyze such explanations for the following salient issues on the agendas of these federal courts: civil liberties, economic cases, and criminal procedure cases.¹

In the prior chapters, I submitted various hypotheses regarding the influence that each of these federal courts should have with respect to the agenda of the other for the relevant issues areas.² Since the statistical technique I will utilize in this chapter is two-stage least squares (2SLS), I am able to test causality in a particular direction.³ Thus, instead of reiterating the hypotheses from chapter 3, I will posit new hypotheses for the multivariate analyses. These current hypotheses essentially are the same as those presented previously. One distinction, however, is that the hypotheses presented here posit the direction of

¹These categories of issues are defined in Appendix A. For purposes of this chapter, the civil liberties issue embodies civil rights, first amendment, due process, and privacy cases. The economic classification includes cases coded as economic, federal tax, and union and labor cases. The criminal procedure issue area has no sub-issues, as it consists entirely of criminal procedure cases.

²For civil liberties, *see Hypotheses # 3a and # 3b*. For economic, union and labor, and federal tax cases, *see Hypotheses # 4a and # 4b, # 6a and # 6b, and # 10a and # 10b*, respectively. For criminal procedure cases, *see Hypotheses # 5a and # 5b*.

³The need for utilizing 2SLS will be presented subsequently in the Data and Methods section.

causality as well as simply that a causal effect should be expected. That is, the expected outcomes will be similar to that theorized previously (either one court will or will not be projected to affect the agenda of the other court), but when causality is expected, a direction will be postulated as well. Another difference is that I will incorporate the expectations for lagged endogenous variables.

Endogenous Influences on Agenda

The first influence on the agendas of the federal courts to be tested is simply the past history of agenda of each of these courts. That is, depending upon the issue, the Supreme Court's agenda should be influenced to a certain extent by its own agenda and potentially the agenda of the Courts of Appeals for that issue. Similarly, the agenda in the appeals courts should be impelled by its own past agenda and the agenda of the Supreme Court. Essentially, this is what I have asserted and explored in the antecedent chapters through the bivariate VAR analyses. In this chapter, these variables on the courts' agendas will be included among many others in the several multivariate analyses.

For civil liberties, I contended in chapter 3 that effects should be evidenced in only in one direction, as the agenda of the Supreme Court should influence the agenda in the lower courts, but that there should be no expected causality from below. That expectation is reiterated here. With respect to the Supreme Court's anticipated influence on the Courts of Appeals, the direction of causality should be positive; that is, as the proportion of civil liberties cases on the dockets of the Supreme Court increases over time, the consequent proportion of civil liberties cases in the Courts of Appeals should expand as well. Additionally, for both courts, the lagged endogenous variables should be influential in setting

the civil liberties agenda of these courts. In other words, the past history of the Supreme Court's civil liberties agenda should positively affect the contemporaneous civil liberties agenda of the Supreme Court; similarly, the past civil liberties agenda in the Courts of Appeals should be a positive factor in their current civil liberties agenda. These theoretical expectations are depicted in the following hypotheses:

Hypothesis # 15a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to changes in the civil liberties agenda of the Supreme Court in a positive direction.

Hypothesis # 15b. The agenda of the Supreme Court in civil liberties cases should not respond to changes in the civil liberties agenda of the Courts of Appeals.

Hypothesis # 15c. The agenda of the Supreme Court in civil liberties cases should respond directly to the past civil liberties agenda of the Supreme Court a positive direction.

Hypothesis # 15d. The agenda of the Courts of Appeals in civil liberties cases should respond directly to the past civil liberties agenda of the Courts of Appeals in a positive direction.

Similarly, as was expected in chapter 3, for criminal procedure cases the agenda of the Supreme Court should positively affect the agenda of the Courts of Appeals, while no reverse influence should be observed. Moreover, the lagged endogenous variables should positively affect the contemporaneous agenda of each court:

Hypothesis # 16a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to changes in the criminal procedure agenda of the Supreme Court in a positive direction.

Hypothesis # 16b. The agenda of the Supreme Court in criminal procedure cases should not respond to changes in the criminal procedure agenda of the Courts of Appeals.

Hypothesis # 16c. The agenda of the Supreme Court in criminal procedure cases should respond directly to the past criminal procedure agenda of the Supreme Court in a positive direction.

Hypothesis # 16d. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to the past civil liberties agenda of the Courts of Appeals in a positive direction.

On the other hand, the effect on the agenda of economic, and federal tax, and union and labor issues (collectively referred to as the "economic" agenda) should be a bit different than the influence of civil liberties and criminal procedure cases, as economic issues are the most opportune issues for feedback to be expected between these courts. More specifically, in chapter 3, when each of the issues comprising the economic category was explored separately, I hypothesized that causality should be expected in both directions, as the agenda of each court should influence the agenda of the other. In this chapter, where these issues are examined *en masse*, there is no reason to believe that the expectations for the separate issues would be any different from the expectations stemming from the aggregate measure. Moreover, the direction of causality for economic issues should be positive, as an increasing economic agenda in each court should lead to an expanding economic agenda in the other court. As well, the past history of each court should be influential; but, since I have argued that the Supreme Court desires to avoid economic cases, the past history of the Supreme Court should be in a negative direction. That is, after increasing its economic agenda, the

justices will attempt to avoid further economic cases, thus leading to a negative influence.

As a consequence, I propound:

Hypothesis # 17a. The agenda of the Courts of Appeals in economic cases should respond directly to changes in the economic agenda of the Supreme Court in a positive direction.

Hypothesis # 17b. The agenda of the Supreme Court in economic cases should respond directly to changes in the economic agenda of the Courts of Appeals in a positive direction.

Hypothesis # 17c. The agenda of the Supreme Court in economic cases should respond directly to the past economic agenda of the Supreme Court in a negative direction.

Hypothesis # 17d. The agenda of the Courts of Appeals in economic cases should respond directly to the past economic agenda of the Courts of Appeals in a positive direction.

Judicial Influences on Agenda

In this chapter I examine the influences on agendas in the federal courts. Accordingly, it is axiomatic that judicial variables beyond agendas be tested to calculate their effect on these courts' agendas. Paramount among these potential motivations is the dynamic liberalism of the Supreme Court. From a theoretical perspective, as the decisional outcomes of the Supreme Court become more liberal, the justices should be more likely to accept cases over time which would be sympathetic to promoting their policy preferences. Those cases which are most sympathetic to a liberal judicial agenda include civil liberties and criminal procedure issues. Indeed, as Pacelle (1991) argued, after the constitutional crises of the 1930s, the Supreme Court moved away from an agenda dominated by economic cases and shifted toward one based on civil liberties cases, and this trend coincided with an

increasingly liberal Supreme Court. Thus, augmenting decisional trends of the Supreme Court's liberalism should lead to a greater proportion of civil liberties and criminal procedure cases on the docket of the Supreme Court. By the same reasoning, litigants in the federal courts below, recognizing a liberal trend in the high Court, would appeal a greater percentage of civil liberties and criminal procedure cases, which would be reflected in the agenda of the Courts of Appeals. These expectations are grounded in the following hypotheses:

Hypothesis # 18a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to changes in the liberalism of the Supreme Court in a positive direction.

Hypothesis # 18b. The agenda of the Supreme Court in civil liberties cases should respond directly to changes in the liberalism of the Supreme Court in a positive direction.

Hypothesis # 19a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to changes in the liberalism of the Supreme Court in a positive direction.

Hypothesis # 19b. The agenda of the Supreme Court in criminal procedure cases should respond directly to changes in the liberalism of the Supreme Court in a positive direction.

To the contrary, increasing liberalism at the Supreme Court would make for an agenda consisting of fewer economic cases (Pacelle 1991), while such a liberal trend should deter litigants from appealing economic cases as well. That is, greater liberalism in the judiciary is not conducive to economic cases, at least not from a rational perspective. Thus, if any effect is observed which derives from the influence of the liberalism of the Supreme Court, it should be negative. These predictions are incorporated in the following hypotheses:

Hypothesis # 20a. The agenda of the Courts of Appeals in economic cases should respond directly to changes in the liberalism of the Supreme Court in a negative direction.

Hypothesis # 20b. The agenda of the Supreme Court in economic cases should respond directly to changes in the liberalism of the Supreme Court in a negative direction.

Another potential judicial influence stems from the liberalism of the Courts of Appeals. While I have argued throughout this study that the dynamic agenda of the Courts of Appeals influences the Supreme Court to accept some types of cases, there is no rationale for conceiving that the decisional trends of the lower courts have any influence on the high Court in any manner, including the justices' decisions with regard to setting the Supreme Court's agenda.⁴ Nevertheless, it seems rather logical to presume that decisional outcomes in the Courts of Appeals could lead to rational litigants appealing certain types of cases over others in these courts. More particularly, as the liberalism of the Courts of Appeals increases, a greater proportion of civil liberties and criminal procedure cases should be appealed to the circuit courts, as those issues are amenable to a liberal judiciary. To the contrary, increasing liberalism among the Courts of Appeals should inspire fewer economic-based cases from being appealed. Accordingly, I propose the following hypotheses:

Hypothesis # 21. The agenda of the Courts of Appeals in civil liberties cases should respond directly to changes in the liberalism of the Courts of Appeals in a positive direction.

Hypothesis # 22. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to changes in the liberalism of the Courts of Appeals in a positive direction.

⁴For this theoretical reason, and for the statistical reasons stated subsequently in the Data and Methods section, no hypotheses are submitted for any potential effect on the Supreme Court's agenda which might originate from the liberalism of the Courts of Appeals, nor will any such tests be accomplished.

Hypothesis # 23. The agenda of the Courts of Appeals in economic cases should respond directly to changes in the liberalism of the Courts of Appeals in a negative direction.

Liberalism of the respective federal courts may not be the sole judicial influence on agendas. Indeed, the potential effect of particular Chief Justices of the Supreme Court can be explored in time series analysis. Since the Chief Justice is first among equals (Baum 1998), most judicial scholarship on the effect of the Chief's influence has encompassed some aspect of his formal duties, such as opinion assignment (Slotnick 1979; Brenner and Spaeth 1988; Maltzman and Wahlbeck 1996a), or has addressed the voting patterns or considerations on a particular court (Spaeth 1963; Brenner, Hagle, and Spaeth 1989; Hagle and Spaeth 1992; 1993; Maltzman and Wahlbeck 1996b; Gerber and Park 1997). Yet, what I seek to accomplish is a bit different from this research, as I examine whether the Chief Justice or his particular Court has an effect on the overall process of building agendas in the federal courts. Moreover, since the data analyzed in this study persist beyond the tenures of the particular Chief Justices at issue, multivariate estimation allows for a kind of multiplicative analysis of the Chief's influence on agendas.

The potential influences of Chief Justices Warren and Burger will be analyzed in this chapter. Since Chief Justice Vinson's term ended before the available data for this chapter, any possible effect from his tenure cannot be examined.⁵ And, while Chief Justice

⁵While the Supreme Court Database includes data from the Vinson Court and the Courts of Appeals Database commences well before this time, other variables in this study, including political liberalism and public mood, do not provide data points early enough in time to include Chief Justice Vinson's influence on agendas. These variables will be discussed subsequently in this section and in the Data and Methods section.

Rehnquist's term commenced during the time for which some data is available, the short time period thereof, from 1986 through 1988, is insufficient for time series analysis, once appropriate data transformations, including differencing and lags, are incorporated. Notwithstanding, his term will be coded and used to set up part of the analysis (*see* the Data and Methods section).

Nevertheless, the potential influence of the Warren and Burger Courts can, and will, be explored in this chapter. In particular, the liberal Warren Court is known as changing the direction of the Supreme Court by protecting individual rights and liberties and moving toward a decidedly liberal position. The Burger Court reversed this trend set in the Warren Court by supporting civil liberties claims at a much lower rate; however, the Burger Court's retreat from the stances of the Warren Court were even more pronounced in the area of criminal procedure (Adamany 1991).

This brief historical perspective of the Warren and Burger Courts provides sufficient information such that testable hypotheses on their likely effect on agendas can be asserted. More particularly, the Warren Court should positively influence the civil liberties and criminal procedure agendas in both the Supreme Court and the Courts of Appeals, while a negative effect should emerge with respect to economic cases, as stated:

Hypothesis # 24a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to the influence of the Warren Court in a positive direction.

Hypothesis # 24b. The agenda of the Supreme Court in civil liberties cases should respond directly to the influence of the Warren Court in a positive direction.

Hypothesis # 25a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to the influence of the Warren Court in a positive direction.

Hypothesis # 25b. The agenda of the Supreme Court in criminal procedure cases should respond directly to the influence of the Warren Court in a positive direction.

Hypothesis # 26a. The agenda of the Courts of Appeals in economic cases should respond directly to the influence of the Warren Court in a negative direction.

Hypothesis # 26b. The agenda of the Supreme Court in economic cases should respond directly to the influence of the Warren Court in a negative direction.

Nevertheless, the effect of the Burger Court should be in the opposite direction for criminal procedure and economic cases, as this Court generally sought to neuter or even reverse the direction and influence of the Warren Court in these issue areas. Moreover, while the Burger Court was not necessarily as conservative as some scholars and politicians had thought or hoped in civil liberties issues, it certainly was more conservative than the Warren Court, particularly once President Reagan appointed Justice O'Connor in 1981 (Mishler and Sheehan 1993). Thus, I expect that the Burger Court's influence on civil liberties cases be negative as well:

Hypothesis # 27a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to the influence of the Burger Court in a negative direction.

Hypothesis # 27b. The agenda of the Supreme Court in civil liberties cases should respond directly to the influence of the Burger Court in a negative direction.

Hypothesis # 28a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to the influence of the Burger Court in a negative direction.

Hypothesis # 28b. The agenda of the Supreme Court in criminal procedure cases should respond directly to the influence of the Burger Court in a negative direction.

Hypothesis # 29a. The agenda of the Courts of Appeals in economic cases should respond directly to the influence of the Burger Court in a positive direction.

Hypothesis # 29b. The agenda of the Supreme Court in economic cases should respond directly to the influence of the Burger Court in a positive direction.

Accordingly, the assorted hypotheses asserted in this section represent the theoretical expectations of various judicial influences, including the dynamic liberalism of the Supreme Court and the Courts of Appeals, and the effect of the Warren and Burger Courts, on the agendas of the Supreme Court and Courts of Appeals.

Exogenous Judicial Interventions

Time-series analysis permits the researcher to model independent shocks to series of data, in order to ascertain whether such changes in policy or other external event affect the system (Box and Tiao 1975). In this chapter I specifically will test whether a number of interventions of a judicial nature influence agenda changes in the federal courts. Pacelle (1991) maintained that the Supreme Court systematically alters its agenda preferences by issuing landmark decisions in particular issue areas. As he contended (34-35): "Landmark decisions are important tools for justices to utilize in prospectively building future agendas and structuring the nature of agenda change. . . The doctrinal changes created by the landmark decisions virtually assure the justices the opportunity to address similar types of cases in order to continue the development of doctrine in these recently changes areas. . . A landmark decision is a means by which justices create conditions inviting litigants to bring

cases that will fill in the nascent doctrine or signaling litigants that such cases are no longer welcome." In this regard, it is expected that as a greater percentage of specific kinds of cases are brought before the justices, the opportunity for the Supreme Court to pursue its predilections on agenda and policy is elevated.

One of the keys to intervention analysis is that the exogenous shock be readily identifiable (Mills 1990). As Pacelle (1991, 35) asserted, landmark decisions provide such a possibility: "The results of landmark decisions on the agenda can be measured empirically through changes in the levels of agenda allocation that can be ascribed to the landmark." While the specifics of coding these landmark interventions are described subsequently in the Data and Methods section, it suffices here to profess that I will examine landmark decisions espoused by the Supreme Court in issue areas of civil liberties, criminal procedure, and economics to establish their effect on the agendas of the Supreme Court and the Courts of Appeals over time.

I expect to corroborate Pacelle's findings for the Supreme Court's agenda, as landmark decisions in each issue area should positively influence its docket for that particular issue. That is, the proportion of civil liberties cases on the Supreme Court's agenda should increase as a result of landmark civil liberties decisions; and, an analogous expectation should ensue for criminal procedure and economics cases when landmarks are handed down in those issue areas. The expected effect from landmark cases need not be confined to the high Court's agenda, as rational litigants, their lawyers, and interest groups should recognize the intended, future course of the Supreme Court based on its landmarks;

consequently, the agenda of the Courts of Appeals should follow suit. Ergo, I assert the following:

Hypothesis # 30a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to landmark civil liberties decisions issued by the Supreme Court in a positive direction.

Hypothesis # 30b. The agenda of the Supreme Court in civil liberties cases should respond directly to landmark civil liberties decisions issued by the Supreme Court in a positive direction.

Hypothesis # 31a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to landmark criminal procedure decisions issued by the Supreme Court in a positive direction.

Hypothesis # 31b. The agenda of the Supreme Court in criminal procedure cases should respond directly to landmark criminal procedure decisions issued by the Supreme Court in a positive direction.

Hypothesis # 32a. The agenda of the Courts of Appeals in economic cases should respond directly to landmark economic decisions issued by the Supreme Court in a positive direction.

Hypothesis # 32b. The agenda of the Supreme Court in economic cases should respond directly to landmark economic decisions issued by the Supreme Court in a positive direction.

External Influences on Agenda

All of the potential influences discussed thus far have one theme in common, to wit: the past history of agendas, the liberalism of the Supreme Court and Courts of Appeals, the tenure of various Chief Justices, and landmark decisions are judicial-oriented. Nevertheless,

behavior in the federal courts may be influenced by forces outside the judicial branch and, as a consequence, some of those potential forces should be analyzed as well.

The first of these potential influences concerns the non-judicial branches of the federal government, sometimes referred to as the political branches. Indeed, the political actions taken by both Congress and the President have variously been argued to influence judicial behavior. Nevertheless, Segal (1997) persuasively theorized and demonstrated that the Supreme Court ostensibly disregards the actions of Congress, whether statutory or constitutional interpretation is at issue. Primarily for this reason, I expect that the agenda of the Supreme Court will not be affected by the actions taking place in the political environment.

On the other hand, litigants in the Courts of Appeals may be amenable to influence from the political branches of government in a manner the justices of the Supreme Court are not. Nonetheless, as contended by Hurwitz and Sheehan (1998), such influence may not be uniform across distinct types of parties in reaction to a transformed political environment. That is, rational litigants strive for the type of arena which is most responsive to their interests, yet disparate litigants have discrete goals. Thus, when the political branches become more liberal over time, corporate litigants, which generally bring appeals based on economic issues, are more likely to pursue their claims in the courts, since the political environment has become less sympathetic to their interests. To the contrary, individual litigants, whose appeals ordinarily are in the nature of civil liberties and criminal procedure claims, likely would decrease their lower court petitions as the political environment grows

more sensitive to their interests. The following hypotheses incorporate these theoretical expectations:

Hypothesis # 33a. The agenda of the Courts of Appeals in civil liberties cases should respond directly to the liberalism of the political branches in a negative direction.

Hypothesis # 33b. The agenda of the Supreme Court in civil liberties cases should not respond to the liberalism of the political branches.

Hypothesis # 34a. The agenda of the Courts of Appeals in criminal procedure cases should respond directly to the liberalism of the political branches in a negative direction.

Hypothesis # 34b. The agenda of the Supreme Court in criminal procedure cases should not respond to the liberalism of the political branches.

Hypothesis # 35a. The agenda of the Courts of Appeals in economic cases should respond directly to the liberalism of the political branches in a positive direction.

Hypothesis # 35b. The agenda of the Supreme Court in economic cases should not respond to the liberalism of the political branches.⁶

One final non-judicial concept to be analyzed in this chapter is public opinion. As described in Hurwitz and Sheehan (1998, 6): "The . . . variable we use to measure social change is the public mood index (Stimson 1991). While this variable is not a precise measure of social change, it does provide an indication of the perception of the general

⁶These expectations are consistent with those asserted in *Hypotheses # 20a* and *# 23*, where an increasingly liberal federal judiciary should lead to fewer economic appeals in the lower courts; and, *Hypotheses # 18a*, *# 19a*, *# 21*, and *# 22* are consistent with these predictions as well, as a more liberal judiciary should lead to enhanced civil liberties and criminal procedure dockets in the Courts of Appeals.

public towards public policy issues." While some judicial scholars have asserted that public opinion has no influence on Supreme Court, whether individually or in the aggregate (Segal and Spaeth 1993), others have found a direct link between public opinion and the decisions of the Supreme Court, whether in the aggregate (Mishler and Sheehan 1993; Flemming and Wood 1997) or individually (Mishler and Sheehan 1996).

Certainly no consensus exists within the judicial subfield on the effect of public opinion on the Supreme Court (*see, e.g.,* Norpoth and Segal 1994). Nevertheless, these studies incorporating public mood have concerned judicial decision making, yet they have not considered the agenda-setting function of the Court. Accordingly, in this chapter I will examine whether public opinion, as expressed by Stimson's (1991) public mood index, influences the agenda of the Supreme Court. Furthermore, I will base my theoretical assumptions on the various studies which uncovered an influence of public opinion on decision making in the Supreme Court. Accordingly, as public opinion (expressed by the public mood index) becomes more liberal over time, the justices would likely choose cases embracing issues more in line with a liberal agenda; of course, these are the civil liberties and criminal procedure cases. Conversely, a public more comfortable with liberal political outcomes should result in a Supreme Court agenda with fewer economic cases. These expectations are expressed in the following testable hypotheses:

Hypothesis # 36. The agenda of the Supreme Court in civil liberties cases should respond directly to changes in public opinion in a positive direction.

Hypothesis # 37. The agenda of the Supreme Court in criminal procedure cases should respond directly to changes in public opinion in a positive direction.

Hypothesis # 38. The agenda of the Supreme Court in economic cases should respond directly to changes in public opinion in a negative direction.

No hypotheses are submitted for any potential influence of public opinion in the agenda of the Courts of Appeals. While the statistical reasons for ignoring this influence are explained subsequently in the Data and Methods section, there are theoretical reasons for not expecting an effect of public opinion on lower court appeals. First, it is litigants, not judges, who set the agenda of the lower courts, and litigants' decisions to appeal likely have no basis in public opinion but instead are grounded on a rational evaluation of their probability of success on appeal (Songer, Segal, and Cameron 1995; Hurwitz and Sheehan 1998). Even assuming, *arguendo*, that this calculus includes a consideration of factors which affect appeals court decision making, it is not likely that appeals court judges are persuaded by public opinion. Scholars have contended that these judges are bound, at least to the certain extent, by legal precedent (Howard 1981; Songer, Segal, and Cameron 1994; Johnson 1987), or they pursue their own ideologies behind the cloak of legal doctrine (Wasby 1970; Songer 1982; 1987; Songer and Sheehan 1990). Since it is likely that decision making on the Courts of Appeals is most fully explained by both the attitudinal and legal models in tandem (Songer and Lindquist 1996; Hurwitz and Reddick 1996), then public opinion generally should not enter into these judges' decisions. As a consequence, there is no reason to believe that rational litigants, primarily concerned with prevailing on appeal, would consider public opinion as part of their calculus to appeal. That is, public opinion apparently provides no service to parties in enhancing their probability of success on the merits.

The theoretical expectations of this chapter having been expressed in the form of these varied, testable hypotheses, the ensuing section describes the manner in which these concepts are operationalized and tested.

DATA AND METHODS

I am interested in examining the various influences on agendas in the Supreme Court and Courts of Appeals. In this section I explain the manner in which the data I adopt were operationalized, measured and coded, and then I illustrate the statistical methods by which I intend to analyze the influence of the myriad independent variables on the dependent variables.

Coding of Data

Since the particulars of the various agenda data have been described in the prior chapters, I simply will assert here that the categories of issue areas include: the civil liberties issue, consisting of civil rights, first amendment, due process, and privacy cases; the criminal procedure issue, consisting simply of criminal procedure cases; and, the economics issue, consisting of economic, federal tax, and union and labor cases. Figure 1.1 depicts the civil liberties agendas of these courts, while Figure 1.9 illustrates criminal procedure cases over time. *See* Figure 5.1 for the aggregate economic agendas of these courts.

The liberalism of the Supreme Court, which stems from the Supreme Court Database, measures the annual percentage of liberal decisions espoused by the Supreme Court. A similar annual value for the Courts of Appeals, which is derived from the Courts of Appeals

Database, represents the liberalism of the federal appellate courts. Figure 5.2 presents the dynamic liberalism of these courts.

Chief Justice Warren's tenure ranged from 1953 through 1969, whereas Chief Justice Burger commenced his term in 1969 and retired in 1986. Finally, Chief Justice Rehnquist assumed this role in 1986. These variables take the form of a dummy, where a 1 was entered for any year in which these justices sat on the Court in the role of Chief, zero otherwise. Thus, there is a separate variable for each of these Chief Justices.

The landmark decisions stem from Pacelle's (1991) coding in Appendix 4 of his book. In particular, Pacelle lists a number of key Supreme Court decisions in various issue areas. For any year in which a landmark decision was espoused, that landmark category was coded as a 1, while any year in which no landmark was issued was coded as a zero. For instance, *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), both appear as landmark cases in Pacelle's Appendix 4. The Supreme Court Database codes *Brown* as a civil rights case, while *Griswold* is codified as a privacy case. Since both of these categories fall within the civil liberties classification of this study, the civil liberties landmark variable was coded as a 1 in each of 1954 and 1965, the year (not the term) in which these decisions were released, respectively. The other civil liberties landmark cases from Pacelle's Appendix 4 form the remainder of this variable. See Appendix B for details of the cases utilized as landmark civil liberties, criminal procedure, or economics cases.

The rationale for coding landmarks in this fashion is to examine their effect collectively. That is, from 1953 through 1988, according to Pacelle there were nine years

in which landmark civil liberties decisions were issued. Instead of testing the influence of each of these landmarks one at a time,⁷ by coding this landmark variable as a series of 1s for each year a landmark was issued, I am able to test the idea that these decisions systematically were issued by the Supreme Court as they sought to transform the nature of its agenda. Accordingly, this coding scheme analyzed with time-series analysis provides a mechanism to test whether these landmarks affected the agendas of both the Supreme Court and Courts of Appeals in a cumulative sense over time.

As for the political liberalism variable, I rely on the latent policy liberalism score for the President, the House of Representatives, and the Senate as provided by Stimson, MacKuen and Erikson (1995). I averaged the values identified by Stimson, *et. al.*, for both houses of Congress and the President for each year to devise a relative score of political liberalism for the non-judicial branches of the federal government. As expressed in Hurwitz and Sheehan (1998, 7): "The rationale for averaging the scores emanates from the logic of Hammond and Miller (1987) who asserted that all three institutions must be in agreement before any policy outcome can be obtained." This political liberalism variable enables me to test whether the political branches have any influence on the agendas of the federal courts. See Figure 5.3 for the manner in which this measure has changed over time.

To reiterate, public opinion is operationalized by utilizing Stimson's (1991) public mood index. "This index is a composite, aggregate measure of American views about the role of government that can be arrayed along liberal-conservative lines" (Flemming and

⁷Testing each landmark decision individually likely would induce unacceptable levels of collinearity.

Wood 1997, 470). The longitudinal nature of Stimson's index, and the manner in which it was devised by his compiling the results of several public opinion polls into a relative score of liberalism of the populace, make it appropriate for use as a proxy for public opinion in general. *See* Figure 5.4.

Data Transformations for Time-Series Analysis

As I have indicated in this chapter, time series will be utilized to appraise the influence of these variables on the agendas of the federal courts. Indeed, time-series techniques are necessary to explore systematically the dynamic causes of agenda fluctuation over time. In this chapter, however, I will not employ the available but more complex time-series procedures. Instead, the analysis in this chapter will proceed by applying regression techniques. However, as I will discuss subsequently, estimation by ordinary least squares (OLS) is not appropriate in this study due to the endogenous nature of agenda in the federal courts. Instead, two-stage least squares (2SLS) will be utilized.

Nevertheless, before applying any least squares method to time-series analysis, whether OLS, 2SLS or otherwise, a few preliminary inquiries must be settled. More specifically, in order to obtain consistent estimates, the dependent variable must be modeled as an AR process with white noise (that is, no serial correlation) in the error term. There are six dependent variables to be analyzed in this chapter: the civil liberties agendas of the Supreme Court and of the Courts of Appeals, the criminal procedure agendas of the Supreme Court and the Courts of Appeals, and the economic agendas of the Supreme Court and Courts of Appeals. I determined via Box-Jenkins procedures (1976) that each of these dependent variables in first differences can be represented adequately by an AR process;

indeed, each series is an autoregressive of the second order, save for the civil liberties agenda in the lower courts, which is best modeled as an AR(1) process. Moreover, the error terms exhibit only white noise. Accordingly, I am able to estimate these models with least squares, since 2SLS estimators will be consistent under these circumstances, so long as the endogenous nature of the system is addressed.⁸

While these prerequisites have been satisfied, I am not quite ready to confront the endogeneity issue. First, I must ensure that stationarity and balance are achieved for each equation. Valid inferences in time series regression models can only be made when the data are stationary. As I explained in chapter 3 (76): "Stationarity simply denotes that time plays no role in the sample moments of the mean and variance of the data. That is, stationarity implies that both mean and variance are unconditional, finite, and not dependent on time; moreover, shocks to the system will dampen over time, as the system is mean-reverting." If the data are not stationary, then appropriate transformations must be made to ensure that spurious results do not transpire. Balance, on the other hand, signifies that all of the variables in the equation must be integrated of the same order; since stationary data are integrated as $I(0)$, if each variable is stationary in the system, then there is balance.

The agenda series were analyzed previously in chapter 3, and all of them required to be first-differenced to achieve stationarity.⁹ As for the independent variables, Box-Jenkins

⁸If a moving average process best represents a dependent time-series variable, then maximum likelihood procedures should be employed, not least squares.

⁹The several series which comprise the aggregated economic series in this chapter displayed evidence of a unit root in chapter 3, and taking the first difference there resulted (continued...)

analysis demonstrated that all of these series were integrated of the first order, thus exhibiting nonstationary processes. Once again, however, first-differencing resulted in data integrated as $I(0)$; that is, the differenced data were stationary, and any consequent regression equation would be balanced. Thus, spurious estimates should not be expected.

One final data transformation must be pondered before moving to the estimation stage, and that consideration is whether lags of the variables need to be incorporated into the system of equations. The dependent variables will be represented by the contemporaneous agenda (in first differences) of the Supreme Court or Courts of Appeals for the various issues areas. It makes no substantive sense to include contemporaneous independent variables, however, since this is time-series analysis. Thus, with the sole exception of the lagged endogenous, dependent variables, each unrestricted model will implement one, two, and three lags of the independent variables, whether exogenous or endogenous. To ensure validity, the respective lags for these independent variables must be formulated from the differenced data.

Lagged endogenous variables are also appropriate in the unrestricted regressions, since the past history of each dependent variable is a probable influence on the current measure of the dependent variable at issue. The number of endogenous lags of the dependent variable which is befitting to each model is conditional upon the type of AR process endemic to the particular dependent variable. With the sole exception of the civil liberties series in

⁹(...continued)

in stationary data for each of these series. Similarly, the aggregated economic series for both courts in this chapter needed to be differenced to achieve stationarity.

the appeals courts, each dependent variable was appropriately modeled as an AR(2); consequently, each of these equations will incorporate two endogenous lags of the dependent variable. Since the civil liberties agenda in the Courts of Appeals was represented by an AR(1) process, however, only one endogenous lag will be incorporated into that regression. Of course, the lags of these endogenous variables will be generated from the differenced series.

With these time-series transformations and other considerations regarding data now complete, it is appropriate to move on to the issue of estimating a system of equations which feature endogeneity.

Estimation of an Endogenous System

OLS assumes that causation exists solely in one direction, yet this assumption is violated when there is endogeneity, or feedback, in a system of equations. If classic OLS is performed on such a system, the OLS assumption that the independent variables are distributed independently of the error term is violated. Once this occurs, the result is biased and inconsistent estimators. Thus, classic OLS is inappropriate to estimate a simultaneous system of equations which exhibits endogeneity (Gujarati 1995).

Accordingly, when there is endogeneity, it cannot be assumed that the right-hand side (rhs) variables are uncorrelated with the error term. Maneuvering around this simultaneity problem necessitates that the researcher engage in structural equations modeling. In that regard, a reduced form needs to be calculated. A reduced form expresses endogenous variables solely in terms of exogenous variables which are determined outside the model. Once a reduced form is established, such that the endogenous variables are expressed only

in terms of truly exogenous variables, then the equation can be estimated, and unbiased and consistent estimators will result, so long as the system is identified.

Arriving at the reduced form, therefore, is the first step in the process of estimating the system of equations. But, there remains the so-called identification problem, which concerns whether parameter estimates can be obtained from the reduced form coefficients, which can be accomplished only if the system is identified. "For an equation to be identified . . . it must be shown that the given set of data will not produce a structural equation that looks similar in appearance to the one in which we are interested" (Gujarati 1995, 659). Thus, for parameter estimates to be attained, additional information is needed in each equation to set it apart from the other.

The practical manner of determining whether a system is identified is by the rank and order conditions of identification. The order condition is a necessary but not sufficient condition.¹⁰ In a model of G simultaneous equations, an equation is identified if it excludes at least $G-1$ variables, endogenous or otherwise. If there are $G-1$ exclusions, then it is just identified (the minimum needed to estimate the system); more than $G-1$ exclusions provides for over-identification, which is more restrictions than are necessary; but, if there are less than $G-1$ exclusions, the equation is unidentified, which precludes meaningful estimation. The rank condition of identification is both a necessary and sufficient condition.¹¹ In a model of G equations, an equation is identified if and only if at least one, non-zero $(G-1)*(G-1)$

¹⁰Order refers to the order of a matrix (that is, the number of rows and columns).

¹¹Rank refers to the rank of a matrix, which is the order of the largest, square sub-matrix whose determinant is not zero.

determinant is contained in the array of coefficients with which those variables excluded from the equation in question appear in the other equations.

The manner in which the reduced form of the system is calculated is 2SLS, a technique which provides for unbiased and consistent estimators for the system. The basic idea of 2SLS is to ensure that the dependent variable in each equation in the system is the only endogenous variable in the equation, such that it is a function solely of the error term and the exogenous variables. 2SLS accomplishes this feat by finding a proxy (via an instrumental variables procedure) for the endogenous variables which is not correlated with the error term, which are purified of any influence of the stochastic error.

More particularly, in 2SLS each endogenous variable is regressed on all exogenous variables in the system; that is, the reduced form is estimated in this first stage. The predicted values are saved from these regressions, which become instrumental variables for the endogenous variables in those equations in which the endogenous variables are on the rhs. When the second stage of the regressions is estimated utilizing the instrumental values for the endogenous variables, these instruments are not correlated with the error term, and thus the OLS assumption is no longer violated.

I have argued throughout this study that the agendas of the federal courts exist within an endogenous system, and the VAR analyses in chapters 3 and 4 provided considerable evidence in this regard. Accordingly, since there is feedback within this system, I cannot estimate these models with OLS, otherwise biased and inconsistent coefficients will result. Thus, I necessarily must calculate a reduced form and identify the system of equations so that

the multivariate analyses are able to manifest meaningful parameter estimates which are unbiased and consistent.

The civil liberties system is represented by the following equations:

$$(1) \quad Y_t = \alpha + \beta_1 Y_{t-1} + \beta_2 X_1 + \beta_3 X_2 + \beta_4 X_3 + \beta_5 X_4 + \beta_6 X_5 + \beta_7 X_6 + \beta_8 X_7 + \beta_9 X_8 + u;$$

$$(2) \quad X_{1t} = \gamma + \delta_1 X_{1t-1} + \delta_2 Y + \delta_3 X_2 + \delta_4 X_3 + \delta_5 X_4 + \delta_6 X_5 + \delta_7 X_6 + \delta_8 X_7 + \delta_9 X_8 + v,$$

where: Y = civil liberties agenda, Supreme Court; X_1 = civil liberties agenda, Courts of Appeals; X_2 = Supreme Court liberalism; X_3 = political liberalism; X_4 = Chief Justice Warren dummy; X_5 = Chief Justice Burger dummy; X_6 = Chief Justice Rehnquist dummy; X_7 = civil liberties landmark decisions; X_8 = public mood; and, X_9 = Courts of Appeals liberalism.¹²

The criminal procedure and economic systems are nearly identical to the system referenced above, the only distinction being that the agenda and landmark decision variables are specified for that particular issue; that is, in the criminal procedure system, the agenda and landmark variables include those coded for the criminal procedure issue, and the same decision rule applies for the economic system.

In order to calculate the reduced form, the endogenous variables, which include the variables for the civil liberties agendas of both the Supreme Court and the Courts of Appeals, need to be regressed on all the exogenous variables in the system in separate regressions. The predicted (\hat{y}) values are saved from each of these regressions, and those predicted

¹²For the sake of simplicity, I have not included all the lags for each of the variables, but the number of lags specified earlier in this chapter apply to this system of equations.

values become the proxies, or instrumental variables, for the endogenous variables, which then are regressed on the exogenous variables for that equation.¹³

Once the reduced form is calculated and the predicted values are saved, stage two of 2SLS requires that these instrumental variables be used as proxies for the endogenous variables in the original equations in the system. Unless the system is identified, however, specific parameter estimates will not be obtainable. Nevertheless, I am able to utilize 2SLS because the equations in these systems are ‘just’ identified. That is, there is one variable in each equation which is excluded from the other equation in the system, the minimum required to proceed with 2SLS. In particular, public mood is excluded from equation (2), while Courts of Appeals liberalism is excluded from equation (1), as these are the identifying variables for each equation. Consequently, the order condition of identification is satisfied.¹⁴

¹³It is intuitive that when X causes Y and Y in turn causes X, there is feedback in the system. Under these conditions, instrumental variables need to be generated to rid each equation of any correlation between the variables and the error term. The same concern arises when the rhs variables include lagged endogenous, dependent variables, whether or not a system of equations is specified (Fair 1970; Greene 1990). Instruments are needed here as well, in order to ensure that these variables are not correlated with the error term; otherwise, inconsistent parameter estimates will result (Ostrom 1990).

¹⁴As an aside, the order condition is based on prior theoretical expectations that certain variables are truly exogenous and appear only in one equation. This is a tenuous point, at least according to Sims (1980), who argued that such theoretical suppositions are not credible. For this reason, he introduced the VAR approach to time series, a reduced-form system which assumes that all variables are endogenous in the system.

Notwithstanding Sims’ counsel, I will proceed with the SEQ modeling in this chapter. First, the theoretical presumptions I employed for excluding particular variables in the various systems are defensible. Second, to utilize multivariate analysis I need to engage in appropriate SEQ modeling, since VAR is inadequate in this regard for the data involved. Finally, I incorporated VAR in the prior chapters, and the results from the SEQ modeling in
(continued...)

The rank condition is satisfied as well, since at least one non-zero determinant exists (in this case, they are scalar terms).¹⁵

Since the equations within the system are identified, the system itself is identified, signifying that the second stage of 2SLS can proceed, and unbiased and consistent estimates will be obtained. In fact, all aspects of OLS interpretation apply to the second stage of 2SLS, except that the R^2 statistic is meaningless; thus, it will not be reported in the analysis. Accordingly, I will run each model with the instrumental variables as proxies for the endogenous variables, lagged appropriately.

A few caveats need to be made regarding the dummy variables for the Chief Justices. First, while Chief Justice Rehnquist's tenure was included in calculating the reduced form, it will not be included in the second stage regressions of 2SLS. As stated previously, there is not sufficient data to incorporate the influence of his tenure on agenda due to the time-series transformations of differences and lags. However, this variable was used to create the instruments in order to provide the proxies with as much independent information as possible, such that the second stage regressions would converge closer to the true parameter values. Furthermore, while the Warren and Burger variables will be tested, due to the nature

¹⁴(...continued)

this chapter will provide a kind of sensitivity analysis, such that the VAR and 2SLS analyses can be compared.

¹⁵In the prior section, I provided the theoretical reasons for excluding public mood from the equations where agenda of the Courts of Appeals is the dependent variable, and for excluding Courts of Appeals liberalism where agenda of the Supreme Court is the dependent variable. The current section above, then, provides the statistical rationale for excluding these variables.

of coding these dummies, the variables are nearly perfectly collinear ($|r| > .9$). Thus, they cannot be run in the same regressions. Accordingly, for each dependent variable, two regressions will be reported, one with the influence of Chief Justice Warren's tenure, the other with that of Chief Justice Burger.

Finally, I will utilize the reduction process of model building, as described in chapter 3. In particular, I will commence each unrestricted model with all the available independent variables (utilizing instrumental variables where appropriate), and eliminate ineffectual variables while applying various diagnostics, in order to achieve a final model which is valid both theoretically and statistically (Granato 1991).

ANALYSIS

For each system of equations I will present the results of four regressions, each of which is the second stage of a 2SLS estimation. Two of these models per system include the Supreme Court's agenda for that issue as the dependent variable, while the other two embrace the agenda for Courts of Appeals as the dependent variable. The only difference between the models with the same dependent variable is that one contains the variable for Chief Justice Warren, the other for Chief Justice Burger. As will be seen, the results generally comport with my theory that the agenda functions in the federal courts act within an endogenous system, as the dockets of the Supreme Court and the Courts of Appeals help to comprise the agenda of the other court for some issues but not others. Other factors enter into this equation as well, but the influence of the agendas of each of these courts on the agenda of the other is considerable. On a technical note, every model to be reported

performed rather well, and several diagnostic tests revealed no serial correlation problems in any of them; that is, the error terms exhibited nothing but white noise.¹⁶

Civil Liberties System

I begin by discussing the model where the dependent variable is the Supreme Court's agenda, with the Burger variable included in the model. Every independent variable in this regression was significant beyond the conventional 95% confidence level. In particular, it was expected that the Supreme Court's civil liberties agenda would cause changes over time in the agenda of the Courts of Appeals for this issue, but that an endogenous effect should not be anticipated. For this model, this forecast was partially true. True to form, the Supreme Court's past civil liberties agenda at a lag of one year proved to influential with respect to its contemporaneous agenda. Nevertheless, I expected that the Courts of Appeals would have no influence on the Supreme Court's agenda, but at a lag of two and three years there is a significant effect, and it is in the negative direction. Thus, as the civil liberties agenda in the lower courts increases, the Supreme Court decreases the civil liberties cases on its agenda, at least where the Burger Court's influence is concerned.

While I found that, as expected, an increasingly liberal Supreme Court accepted a greater proportion of civil liberties cases, the influence of the Burger Court was incorrectly signed, as this variable also was associated with an increasing civil liberties agenda. Landmark civil liberties cases indeed led to a stronger civil liberties agenda, thus confirming the expectations asserted by Pacelle (1991) and tested herein. On the other hand, in a

¹⁶Since lagged endogenous variables are included in these models, the Durbin-Watson statistic is inappropriate and will not be reported.

somewhat countermajoritarian fashion, when the political branches became increasingly liberal, the Supreme Court heard relatively fewer civil liberties cases over time, at least when the Burger Court's influence is encompassed. Finally, public mood proved to be significant as well, but surprisingly in a negative direction. That is, as the populace became more liberal, the Burger Court became less interested in civil liberties cases. Table 5.1 displays the results for this model.

The findings were remarkably different when the Warren Court variable was included in the regression of the Supreme Court's civil liberties agenda. In fact, as demonstrated in Table 5.2, the only significant variable was public mood and, contrary to the model with the Burger variable, this coefficient was positive; notwithstanding, the influence of the Warren Court also was very nearly statistically significant, with a p-value of .053.¹⁷ All the other variables in this model either were unwarranted or insignificant. The implications of these findings will be addressed subsequently in the Discussion section.

As expected, the influences on the civil liberties agenda of the Courts of Appeals were quite different than those on the Supreme Court's agenda. In the model including the Burger variable, the past civil liberties agendas of the Supreme Court and Courts of Appeals were influential and in the expected positive direction. Additionally, the liberalism of the Courts of Appeals was a significant influence on their civil liberties dockets but, interestingly, in a negative direction. As illustrated in Table 5.3, no other variables achieved

¹⁷Since all but two of the civil liberties landmark decisions were espoused by the Warren Court, there is some multicollinearity between these variables, which likely neutered the overall effect of each. Nevertheless, the regression results as reported for this model displayed no serial correlation.

statistical significance. The Courts of Appeals model with the Warren variable achieved nearly identical results, the only difference being that the past agenda history of the Courts of Appeals was insignificant, although the Supreme Court's agenda was influential in the expected positive direction. *See* Table 5.4

Criminal Procedure System

While many researchers include criminal procedure cases within the rubric of an overall civil liberties category (*see* the references in chapter 4), the results from the models employing a separate criminal procedure variable were notably distinct from the models with civil liberties as the dependent variable, thus substantiating the argument for disaggregating these issues in judicial studies. In any event, Table 5.5 presents the results for the model of this issue in the Supreme Court, with the Burger variable included as exogenous. In particular, the significant coefficients were for the past Supreme Court criminal procedure agenda and landmark criminal procedure decisions, and each was in the expected positive direction. Also, as hypothesized, there was no effect in either direction stemming from the agenda of the appeals courts. Nearly identical results were obtained for the model employing the Warren variable, with the influences stemming from the past agenda history of the Supreme Court and from landmark criminal procedure cases. *See* Table 5.6.

Once again, the factors which influence agenda in the Courts of Appeals were rather unlike those which affect the Supreme Court. For the model with the Burger variable, one of the consequential variables proved to be the Supreme Court's criminal procedure agenda, in the expected positive direction. The other significant variables included the liberalism of the Supreme Court the Courts of Appeals, and the liberalism of the political branches; the

intriguing aspect of these outcomes is that all of these coefficients were negative, yet only the political liberalism variable was predicted to be in this direction. Indistinguishable results obtained when the Warren variable was incorporated into this model. *See* Tables 5.7 and 5.8, respectively.

Economics System

If the dockets of the Courts of Appeals influence the Supreme Court's agenda at all, as I have argued it should be in the area of economic cases. Indeed, the findings of this analysis generally support these expectations. That is, in the Supreme Court economics model with the Burger variable, at three lags the Courts of Appeals' agenda significantly influenced agenda changes in the Supreme Court in the expected positive direction. However, the agenda in the Courts of Appeals at one lag was a negative influence on the Supreme Court's agenda. Additionally, as the Supreme Court became more liberal over time, the economic agenda increased, which was not as expected, although landmark decisions had the anticipated positive influential effect in setting the high Court's economic agenda. While the Burger Court's influence led to a weaker economic agenda in the Supreme Court, a more liberal public mood led to a more prominence for this issue. *See* Table 5.9.

The results were a bit different, however, when the Warren Court variable was included. In this instance, the economic agenda of the Supreme Court was influenced only in a positive direction by the agenda in the Courts of Appeals, while it was affected negatively by the Supreme Court's past economic agenda. Moreover, Supreme Court liberalism was related to both an increasing and decreasing economic agenda, depending on

the number of lags. And, contrary to the findings on the Burger Court's influence, a more liberal public mood led to fewer economic cases on the agenda of the Supreme Court. *See* Table 5.10.

When the economic agenda of the Courts of Appeals with the Burger variable was analyzed, the past economic history was both positively and negatively influential, once again the difference being conditional upon the number of lags. Furthermore, as the liberalism of the Supreme Court and Courts of Appeals increases, the dockets in the lower courts followed suit with economic issues, yet this result was not as expected. Finally, when this model incorporated the Warren variable, the only significant variables were the Courts of Appeals' past history and the Supreme Court's liberalism, and both of these variables were incorrectly signed. *See* Tables 5.11 and 5.12.¹⁸

DISCUSSION

This analysis demonstrates that a variety of factors influence agenda setting in the Supreme Court and Courts of Appeals. Some of these factors were expected, while others were not. Nevertheless, it should be clear by this stage of this study that these factors are conditional upon the type of issue area involved. Furthermore, as I have argued throughout, the federal courts do seem to act within a system when agenda is concerned, as the Supreme Court causes changes in the cases being appealed in the lower courts, while the justices

¹⁸For each of these regressions, landmark decisions had to be removed in order to rid the models of serial correlation. While I would have preferred to retain this variable due to theoretical considerations, it was far from significant before being extracted from the models.

themselves are influenced by some, but not all, actions in the courts below with respect to agenda.

With respect to the multivariate influences on agendas, I tested a number of models in order to ascertain the extent to which some of the potential factors influence agenda setting. In the civil liberties system, for instance, the past history of the Supreme Court's agenda in this area has an influence on current cases, while a liberal Supreme Court is amenable to a more prominent civil liberties agenda. Moreover, as Pacelle (1991) asserted, landmark cases do have an influence on the Supreme Court's dynamic agenda. One interesting result was that as public opinion became more liberal, the Warren Court's influence on civil liberties increased, while civil liberties cases decreased under the influence of the Burger Court. Instead of being an unexplained anachronism, this result generally comports with the findings of Mishler and Sheehan (1993). They reported that the Supreme Court was directly influenced by public opinion until 1981, when its decisional trends became much more conservative than the public mood. This latter time period, of course, coincides with the Burger Court; thus, it is logical to think that the Burger Court, particularly after Justice O'Connor was appointed to the Bench, had a civil liberties agenda which was not as liberal as the Warren Court, which rode the wave of increasing public liberalism for most of his tenure.

At the Courts of Appeals, clearly the Supreme Court's agenda was strongly persuasive on civil liberties appeals, even more so than such appeals in the lower courts. That increasing liberalism in both courts led to relatively fewer civil liberties cases might be explained by Howard's (1981) explication, where corporate litigants need to pursue their

interests in the Courts of Appeals, regardless of other factors. Thus, higher judicial liberalism leads to lower civil liberties appeals simply because in a relative sense, economic issues necessarily continue to be appealed.

As for criminal procedure cases at the Supreme Court, the only factors which affect this agenda include the Supreme Court's past agenda and landmark decisions. That is, the justices do not seem concerned with anything but their own actions in setting the criminal procedure agenda. This appears to be consistent with attitudinal theory (Segal and Spaeth 1993), where the Supreme Court is sufficiently insulated so as not to be concerned with exoteric influences. Yet, it also comports with Pacelle's (1991) neoinstitutional theory on agenda transformation, such that the Supreme Court takes tangible steps to drive its agenda in the direction of its preferred policy outcomes, but that such transition is subject to inertia stemming from the Court's institutional features. Notwithstanding, the fact that no other variables were significant might be explained by the fact that many of the Supreme Court's criminal procedure cases originate in State Supreme Courts.

Once again, the Supreme Court has an appreciable influence on the agenda in the Courts of Appeals for criminal procedure cases, particularly when compared to the effect of the lower court's own agenda history for this issue. Nevertheless, the Supreme Court's agenda is not the sole factor in criminal procedure appeals. In particular, elevating liberalism within both the judiciary and the political branches leads to fewer of these appeals. While this result was expected only for the political branches, one possible explanation for this result could be that more criminal appeals are made by prosecutors than is commonly believed. That is, as the judiciary becomes more liberal, it is more likely to rule against the

government in criminal cases; thus, a prosecutor who lost a motion in the District Court, such as a motion by the defense to exclude evidence pursuant to the Fourth Amendment, might be less inclined to appeal the adverse decision and instead place prosecutorial resources elsewhere (the efforts of Independent Prosecutor Kenneth Starr notwithstanding!). Since this study examined only the relative proportion of cases on the dockets of the appeals courts, and not whether such appeals were being made by the government or the accused, a future line of research would be to ascertain the types of litigants appealing such criminal procedure cases, and whether an increasing judicial liberalism affects disparate parties in criminal matters distinctly.

Rather interesting results ensued from the economic system models. At the Supreme Court, it seems as if the justices do seek to avoid economic cases, particularly where the Warren Court was involved. First, there was an endogenous effect arising from the appeals courts for this issue, but it was negative when influenced by the Warren Court and both negative and positive with the Burger Court. Thus, the feedback effect was present, but the direction of this effect was mixed. Additionally, when the Supreme Court issued a greater proportion of economic decisions, the Warren Court justices reacted by moving away from these types of cases in the future, thus potentially confirming part of the findings of Tanenhaus, *et. al.* (1963). Similarly, the Warren Court was less likely to hear economic cases when public opinion became more liberal, and landmark economic cases had no effect on Chief Justice Warren's liberal tenure. The story is very different for the Burger Court, however, as a more liberal populace led to a more prominent economic agenda, again comporting with the theory espoused by Mishler and Sheehan (1993) as the Burger Court

became increasingly countermajoritarian in the 1980s. Moreover, increasing Supreme Court liberalism led to higher rates of economic cases on the docket when influenced by the Burger Court, possibly because the conservative nature of this Court was evidenced by a desire to move away from the liberal tendencies of the past. Finally, contrary to the results of the Warren Court, landmark economic decisions led to relatively greater numbers of economic cases on the Supreme Court's agenda, again demonstrating the conservative temperament of the Burger Court.

The final models concerned the influences on the economic agenda of the Courts of Appeals. The most conspicuous result here is that increasing judicial liberalism surprisingly led to higher economic appeals. Again, this could be explained by Howard (1981), in that corporate interests will continue to pursue their economic interests in federal court, regardless of the ideological nature of the circuits.

Accordingly, a number of conclusions can be extracted from this chapter. First, the process of setting the agendas of the federal courts is more complicated than previously surmised, as a multitude of factors enter into the decisional calculus of both the Supreme Court justices and litigants in the Courts of Appeals. Moreover, except for criminal procedure cases, the Supreme Court is not as insulated from outside influence as might otherwise appear; although, the actions of the political branches rarely if ever influence their agenda decisions, thus apparently confirming Segal's (1997) thesis. Furthermore, the federal courts do operate as a system. A hierarchy with respect to agendas seems to exist (Baum 1994), as the Supreme Court has a good deal of influence on parties in the lower courts when it comes to their decision to appeal. On the other hand, the direction of causality is not

merely in one direction, as the this analysis demonstrates once again that the water does indeed flow uphill. This river does not always flow in this arduous direction, and its strength is not entirely consistent. Nevertheless, flow uphill it does, as the agenda in the Courts of Appeals does have a certain influence on the agenda of the Supreme Court.

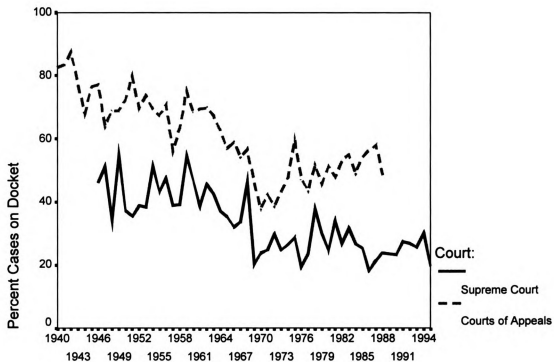


FIGURE 5.1
AGGREGATE ECONOMIC CASES, 1940-1995

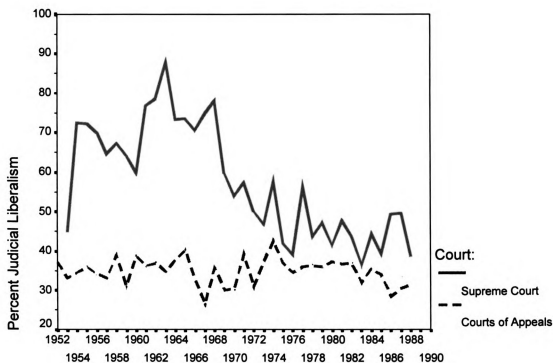


FIGURE 5.2
JUDICIAL LIBERALISM, 1952-1990

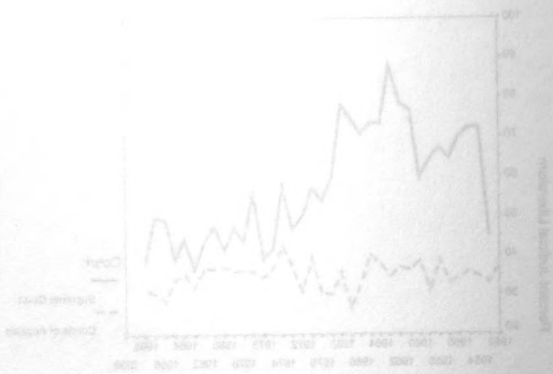
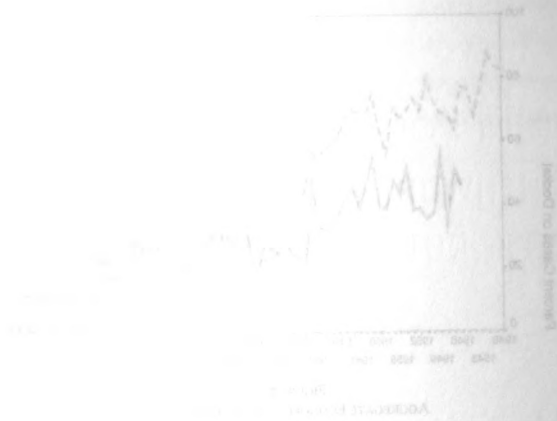


FIGURE 2.3
LIQUOR CREDIT ON DEPOSIT, 1948-1968

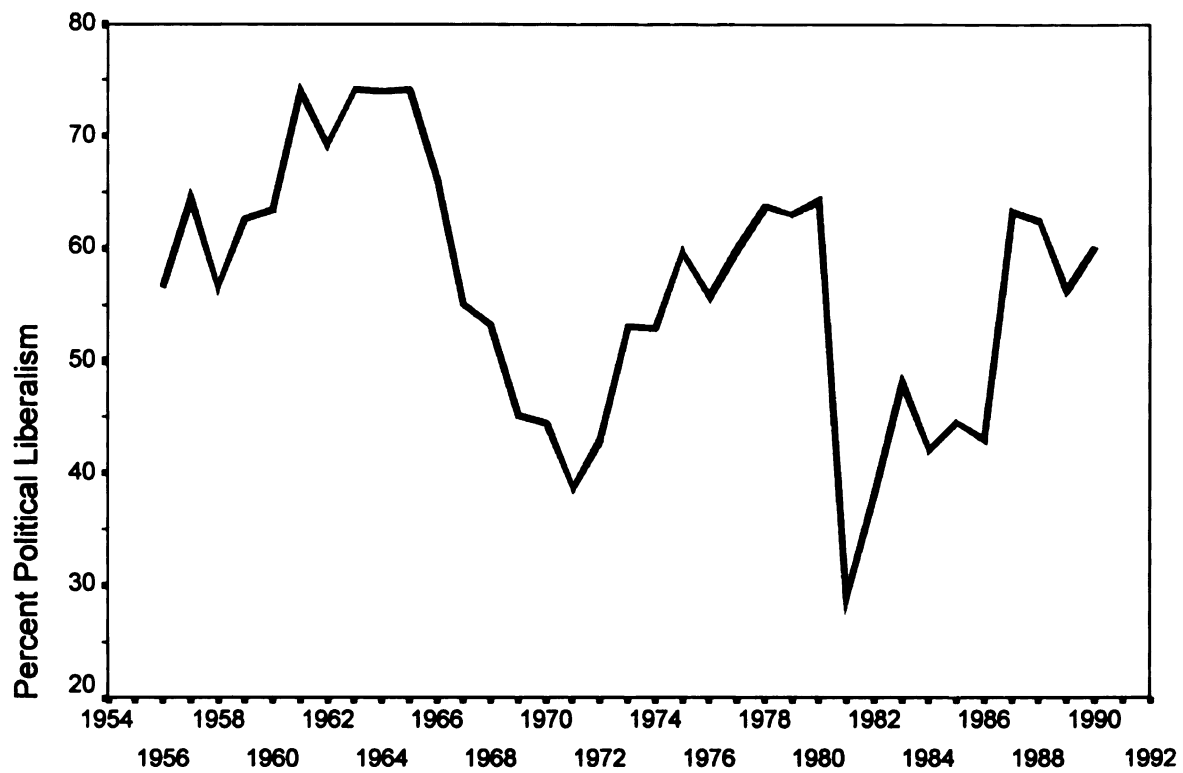


FIGURE 5.3
LIBERALISM OF THE PRESIDENT AND CONGRESS, 1954-1992

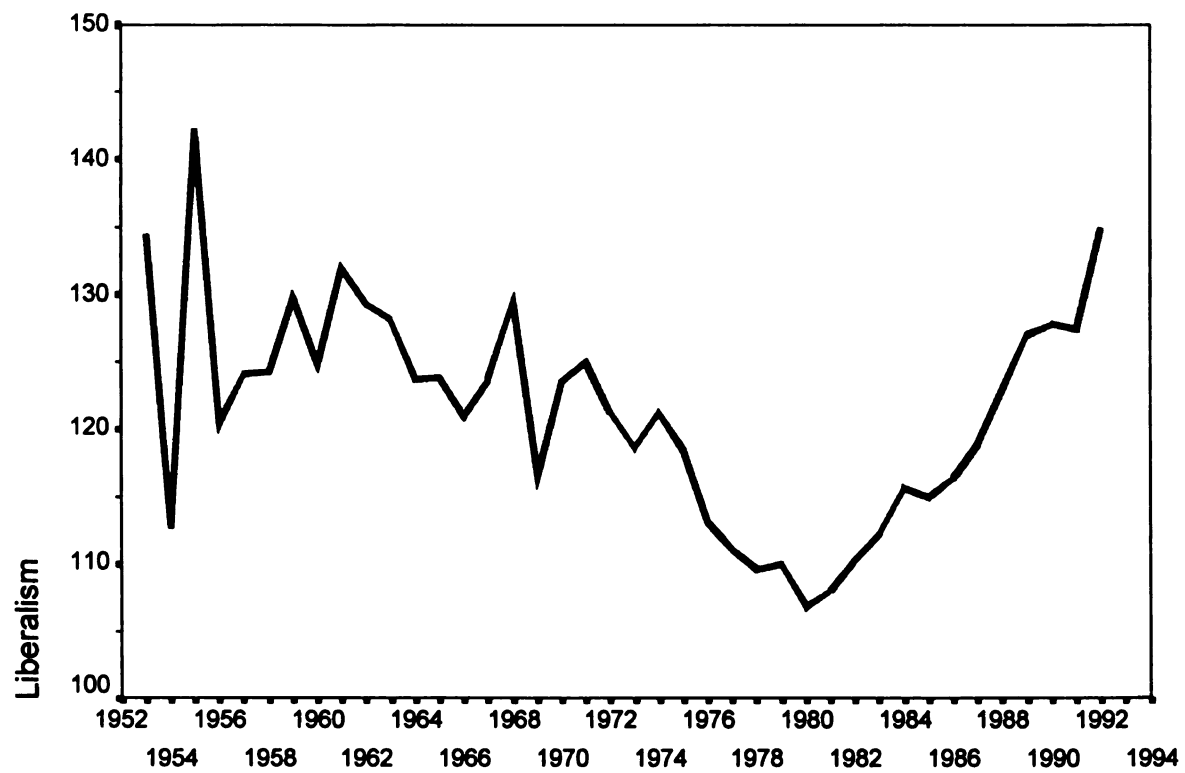


FIGURE 5.4
PUBLIC MOOD, 1953-1992

TABLE 5.1
SUPREME COURT CIVIL LIBERTIES (BURGER) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 22		
Model	947.911169	9	105.323463	F(9, 12) = 5.07		
Residual	249.479752	12	20.7899794	Prob > F = 0.0056		
Total	1197.39092	21	57.0186153	R-squared =		
				Adj R-squared =		
				Root MSE = 4.5596		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
SupCt						
CivLib						
Agenda						
(1 lag)	2.401253	1.000953	2.399	0.034	.2203634	4.582143
CtsApp						
CivLib						
Agenda						
(2 lags)	-6.53211	1.584282	-4.123	0.001	-9.983963	-3.080256
CtsApp						
CivLib						
Agenda						
(3lags)	-5.223624	1.540452	-3.391	0.005	-8.579981	-1.867267
Public						
Mood						
(1 lag)	-1.394307	.5801842	-2.403	0.033	-2.65842	-.1301941
SupCt						
Liberalism						
(2 lags)	.3242274	.1340073	2.419	0.032	.0322507	.6162041
SupCt						
Liberalism						
(3 lags)	.43314	.1341943	3.228	0.007	.1407558	.7255242
Political						
Liberalism						
(2 lags)	-1.025765	.2939995	-3.489	0.004	-1.666335	-.3851949
CivLib						
Landmark						
Decisions	11.01698	5.01122	2.198	0.048	.0984722	21.93549
CJ						
Burger	20.91058	5.527964	3.783	0.003	8.866184	32.95498
Constant	-6.688335	3.0082	-2.223	0.046	-13.24264	-.1340306

TABLE 5.2
SUPREME COURT CIVIL LIBERTIES (WARREN) - 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 23		
Model	561.907359	7	80.2724798	F(7, 15) = 2.26		
Residual	532.341346	15	35.4894231	Prob > F = 0.0874		
				R-squared =		
				Adj R-squared =		
Total	1094.24871	22	49.7385775	Root MSE = 5.9573		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
SupCt						
CivLib						
Agenda						
(2 lags)	.5452691	.504253	1.081	0.297	-.5295208	1.620059
Public						
Mood						
(3 lags)	1.497352	.5361513	2.793	0.014	.3545721	2.640131
SupCt						
Liberalism						
(1 lag)	-.2949136	.1573387	-1.874	0.080	-.6302731	.0404458
SupCt						
Liberalism						
(3 lags)	.2676368	.1599822	1.673	0.115	-.0733572	.6086307
Political						
Liberalism						
(3 lags)	-.1082416	.244785	-0.442	0.665	-.6299885	.4135054
CivLib						
Landmark						
Decisions	-4.638528	5.133775	-0.904	0.381	-15.58091	6.303853
CJ						
Warren	7.02768	3.347657	2.099	0.053	-.1076809	14.16304
Constant	-1.918059	1.970051	-0.974	0.346	-6.117124	2.281006

TABLE 5.3
COURTS OF APPEALS CIVIL LIBERTIES (BURGER) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 30		
Model	154.485167	8	19.3106459	F(8, 21) = 2.33		
Residual	174.2095	21	8.29569047	Prob > F = 0.0578		
				R-squared =		
				Adj R-squared =		
Total	328.694667	29	11.3342989	Root MSE = 2.8802		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
CtsApp						
CivLib						
Agenda						
(1 lag)	1.690862	.7984015	2.118	0.046	.0304952	3.351229
SupCt						
CivLib						
Agenda						
(2 lags)	.707872	.3097456	2.285	0.033	.0637208	1.352023
SupCt						
CivLib						
Agenda						
(3 lags)	.6721199	.2677231	2.511	0.020	.1153591	1.228881
CtsApp						
Liberalism						
(2 lags)	-.2744219	.1131385	-2.426	0.024	-.5097063	-.0391376
SupCt						
Liberalism						
(1 lag)	-.1270054	.0660947	-1.922	0.068	-.2644568	.0104461
Political						
Liberalism						
(2 lags)	-.113749	.0674891	-1.685	0.107	-.2541003	.0266024
CivLib						
Landmark						
Decisions	-2.759482	1.920598	-1.437	0.166	-6.753584	1.23462
CJ						
Burger	-2.499635	1.595211	-1.567	0.132	-5.817059	.8177885
Constant	1.540711	1.166826	1.320	0.201	-.8858353	3.967258

TABLE 5.4
COURTS OF APPEALS CIVIL LIBERTIES (WARREN) - 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 30		
Model	139.525181	8	17.4406476	F(8, 21) = 1.94		
Residual	189.169486	21	9.00807075	Prob > F = 0.1076		
				R-squared =		
				Adj R-squared =		
Total	328.694667	29	11.3342989	Root MSE = 3.0013		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
CtsApp						
CivLib						
Agenda						
(1 lag)	1.115185	.7026003	1.587	0.127	-.3459525	2.576322
SupCt						
CivLib						
Agenda						
(2 lags)	.7360705	.339288	2.169	0.042	.0304825	1.441658
SupCt						
CivLib						
Agenda						
(3 lags)	.6661405	.2908103	2.291	0.032	.0613673	1.270914
CtsApp						
Liberalism						
(2 lags)	-.289255	.117363	-2.465	0.022	-.5333248	-.0451852
SupCt						
Liberalism						
(1 lag)	-.1293552	.0688713	-1.878	0.074	-.2725808	.013870
Political						
Liberalism						
(2 lags)	-.0936502	.0686588	-1.364	0.187	-.2364341	.0491336
CivLib						
Landmark						
Decisions	-2.55458	2.141196	-1.193	0.246	-7.007441	1.898281
CJ						
Warren	1.130857	1.459369	0.775	0.447	-1.904067	4.16578
Constant	-.3393006	.8218128	-0.413	0.684	-2.048354	1.369753

TABLE 5.5
SUPREME COURT CRIMINAL PROCEDURE (BURGER) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 24		
Model	270.672413	9	30.0747126	F(9, 14) = 3.78		
Residual	111.440916	14	7.96006541	Prob > F = 0.0131		
				R-squared =		
				Adj R-squared =		
Total	382.113329	23	16.613623	Root MSE = 2.8214		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
SupCt CrimPro Agenda (1 lag)	.7051993	.4311168	1.636	0.124	-.2194542	1.629853
SupCt CrimPro Agenda (2 lags)	1.589786	.4944845	3.215	0.006	.5292218	2.65035
CtsApp CrimPro Agenda (2 lags)	.3498132	.2823002	1.239	0.236	-.2556606	.955287
Public Mood (3 lags)	-.2153294	.2049949	-1.050	0.311	-.6549996	.2243409
SupCt Liberalism (1 lag)	-.1276587	.0816872	-1.563	0.140	-.3028603	.0475429
SupCt Liberalism (2 lags)	-.1262913	.0771529	-1.637	0.124	-.2917678	.0391851
Political Liberalism (2 lags)	.1840851	.123375	1.492	0.158	-.0805279	.4486981
CrimPro Landmark Decisions	5.965853	1.680484	3.550	0.003	2.361573	9.570133
CJ Burger	1.332141	1.586333	0.840	0.415	-2.070206	4.734487
Constant	-3.142295	1.30227	-2.413	0.030	-5.935386	-.3492039

TABLE 5.6
SUPREME COURT CRIMINAL PROCEDURE (WARREN) - 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 24		
Model	270.062259	9	30.0069177	F(9, 14) = 3.75		
Residual	112.05107	14	8.00364784	Prob > F = 0.0135		
Total	382.113329	23	16.613623	R-squared =		
				Adj R-squared =		
				Root MSE = 2.8291		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
SupCt CrimPro Agenda (1 lag)	.6032359	.4514168	1.336	0.203	-.3649569	1.571429
SupCt CrimPro Agenda (2 lags)	1.628223	.4864374	3.347	0.005	.5849186	2.671528
CtsApp CrimPro Agenda (2 lags)	.3533992	.2828096	1.250	0.232	-.2531669	.9599654
Public Mood (3 lags)	-.2295875	.2139066	-1.073	0.301	-.6883716	.2291967
SupCt Liberalism (1 lag)	-.124815	.0837463	-1.490	0.158	-.3044329	.054803
SupCt Liberalism (2 lags)	-.1218237	.0794726	-1.533	0.148	-.2922755	.048628
Political Liberalism (2 lags)	.1555798	.1284016	1.212	0.246	-.1198143	.4309738
CrimPro Landmark Decisions	6.103779	1.782531	3.424	0.004	2.28063	9.926929
CJ Warren	-1.466116	1.854323	-0.791	0.442	-5.443244	2.511011
Constant	-1.679075	1.109761	-1.513	0.153	-4.059277	.701126

TABLE 5.7
COURTS OF APPEALS CRIMINAL PROCEDURE (BURGER) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 29		
Model	632.139262	8	79.0174078	F(8, 20) = 5.23		
Residual	302.286263	20	15.1143131	Prob > F = 0.0013		
Total	934.425525	28	33.3723402	R-squared =		
				Adj R-squared =		
				Root MSE = 3.8877		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
CtsApp						
CrimPro						
Agenda						
(2 lags)	.4182399	.2784668	1.502	0.149	-.1626316	.9991114
SupCt						
CrimPro						
Agenda						
(2 lags)	1.757767	.5797495	3.032	0.007	.5484304	2.967103
CtsApp						
Liberalism						
(1 lag)	-.4018319	.1745004	-2.303	0.032	-.7658334	-.0378304
SupCt						
Liberalism						
(1 lag)	-.2831633	.1079078	-2.624	0.016	-.508255	-.0580717
SupCt						
Liberalism						
(2 lags)	.1522106	.0973469	1.564	0.134	-.0508516	.3552727
Political						
Liberalism						
(3 lags)	-.2410784	.0926032	-2.603	0.017	-.4342453	-.0479114
CrimPro						
Landmark						
Decisions	.3685859	2.201326	0.167	0.869	-4.2233	4.960472
CJ						
Burger	-3.631799	2.018419	-1.799	0.087	-7.842148	.5785502
Constant	2.370184	1.693702	1.399	0.177	-1.162816	5.903184

TABLE 5.8
COURTS OF APPEALS CRIMINAL PROCEDURE (WARREN) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 29		
Model	591.977419	8	73.9971773	F(8, 20) = 4.32		
Residual	342.448106	20	17.1224053	Prob > F = 0.0037		
				R-squared =		
				Adj R-squared =		
Total	934.425525	28	33.3723402	Root MSE = 4.1379		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
CtsApp						
CrimPro						
Agenda						
(2 lags)	.2893345	.300449	0.963	0.347	-.337391	.9160601
SupCt						
CrimPro						
Agenda						
(2 lags)	1.372793	.5793089	2.370	0.028	.164376	2.58121
CtsApp						
Liberalism						
(1 lag)	-.4354393	.1860464	-2.340	0.030	-.8235252	-.0473533
SupCt						
Liberalism						
(1 lag)	-.2284206	.1092191	-2.091	0.049	-.4562478	-.0005935
SupCt						
Liberalism						
(2 lags)	.1927757	.1001697	1.924	0.069	-.0161747	.4017261
Political						
Liberalism						
(3 lags)	-.2217234	.097801	-2.267	0.035	-.4257327	-.0177142
CrimPro						
Landmark						
Decisions	1.129918	2.826274	0.400	0.694	-4.765586	7.025422
CJ						
Warren	1.777616	2.483542	0.716	0.482	-3.402962	6.958194
Constant	-.6106669	.9835611	-0.621	0.542	-2.662339	1.441006

TABLE 5.9
SUPREME COURT ECONOMIC CASES (BURGER) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 21		
Model	1366.65694	10	136.665694	F(10, 10) = 9.51		
Residual	143.669745	10	14.3669745	Prob > F = 0.0007		
				R-squared =		
				Adj R-squared =		
Total	1510.32669	20	75.5163344	Root MSE = 3.7904		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
SupCt						
Econ						
Agenda						
(2 lags)	-.3376565	.3940922	-0.857	0.412	-1.215749	.5404358
CtsApp						
Econ						
Agenda						
(1 lag)	-3.026313	.4957621	-6.104	0.000	-4.13094	-1.921686
CtsApp						
Econ						
Agenda						
(3 lags)	1.113441	.4722629	2.358	0.040	.0611737	2.165708
Public						
Mood						
(1 lag)	1.00415	.4350803	2.308	0.044	.0347305	1.973569
Public						
Mood						
(2 lags)	1.364231	.4654154	2.931	0.015	.3272205	2.401241
SupCt						
Liberalism						
(1 lag)	.4931607	.1442493	3.419	0.007	.1717534	.8145681
Political						
Liberalism						
(2 lags)	.4235871	.2059591	2.057	0.067	-.0353184	.8824926
Political						
Liberalism						
(3 lags)	-.6286893	.2954129	-2.128	0.059	-1.28691	.0295317
Econ						
Landmark						
Decisions	26.08482	7.426789	3.512	0.006	9.5369	42.63273
CJ						
Burger	-45.30227	8.191714	-5.530	0.000	-63.55455	-27.04999
Constant	139.116	28.11665	4.948	0.001	76.46818	201.7638

TABLE 5.10
SUPREME COURT ECONOMIC CASES (WARREN) - 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 24		
Model	1713.11514	10	171.311514	F(10, 13) = 10.23		
Residual	217.738221	13	16.749094	Prob > F = 0.0001		
Total	1930.85336	23	83.9501461	R-squared =		
				Adj R-squared =		
				Root MSE = 4.0926		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
SupCt Econ Agenda (1 lag)	-1.997094	.5568904	-3.586	0.003	-3.200183	-.7940053
SupCt Econ Agenda (2 lags)	-.495326	.4203347	-1.178	0.260	-1.403404	.4127519
CtsApp Econ Agenda (1 lag)	-1.614127	1.029736	-1.568	0.141	-3.838737	.6104834
CtsApp Econ Agenda (2 lags)	2.059957	.4616899	4.462	0.001	1.062536	3.057377
Public Mood (3 lags)	-.9253076	.3588276	-2.579	0.023	-1.700507	-.1501078
SupCt Liberalism (1 lag)	.4826201	.1090519	4.426	0.001	.2470278	.7182123
SupCt Liberalism (3 lags)	-.2349683	.1060733	-2.215	0.045	-.4641258	-.0058108
Political Liberalism (2 lags)	.1186633	.323551	0.367	0.720	-.5803262	.8176528
Econ Landmark Decisions	2.571399	9.89631	0.260	0.799	-18.80828	23.95108
CJ Warren	20.25499	24.61597	0.823	0.425	-32.92457	73.43456
Constant	48.67144	57.36921	0.848	0.412	-75.26721	172.6101

TABLE 5.11
COURTS OF APPEALS ECONOMIC CASES (BURGER) - 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 29		
Model	656.083021	8	82.0103776	F(8, 20) = 4.68		
Residual	350.784595	20	17.5392297	Prob > F = 0.0024		
Total	1006.86762	28	35.9595577	R-squared =		
				Adj R-squared =		
				Root MSE = 4.188		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
CtsApp						
Econ						
Agenda						
(1 lag)	-1.269145	.3653715	-3.474	0.002	-2.031296	-.506993
CtsApp						
Econ						
Agenda						
(2 lags)	1.853498	.5866641	3.159	0.005	.6297379	3.077258
SupCt						
Econ						
Agenda						
(1 lag)	-.5096901	.2685029	-1.898	0.072	-1.069777	.0503972
CtsApp						
Liberalism						
(1 lag)	.5280064	.2455275	2.150	0.044	.0158449	1.040168
CtsApp						
Liberalism						
(2 lag)	.4332623	.2356771	1.838	0.081	-.0583516	.9248762
SupCt						
Liberalism						
(1 lag)	.4457493	.1080841	4.124	0.001	.2202898	.6712088
Political						
Liberalism						
(3 lags)	.1532316	.1012338	1.514	0.146	-.0579384	.3644016
CJ						
Burger	7.874826	6.157512	1.279	0.216	-4.969519	20.71917
Constant	-21.10224	25.26749	-0.835	0.413	-73.8093	31.60482

TABLE 5.12
COURTS OF APPEALS ECONOMIC CASES (WARREN) – 2SLS REGRESSION RESULTS

Source	SS	df	MS	Number of obs = 29		
Model	684.897746	9	76.0997496	F(9, 19) = 4.49		
Residual	321.969869	19	16.9457826	Prob > F = 0.0028		
				R-squared =		
				Adj R-squared =		
Total	1006.86762	28	35.9595577	Root MSE = 4.1165		

	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
CtsApp						
Econ						
Agenda						
(1 lag)	-.8994285	.4069391	-2.210	0.040	-1.751162	-.0476952
CtsApp						
Econ						
Agenda						
(2 lags)	.9911143	.5179674	1.913	0.071	-.0930041	2.075233
SupCt						
Econ						
Agenda						
(2 lags)	.2725736	.3133541	0.870	0.395	-.3832841	.9284313
CtsApp						
Liberalism						
(1 lag)	.3728426	.2605733	1.431	0.169	-.1725436	.9182287
CtsApp						
Liberalism						
(2 lags)	.3083945	.2277748	1.354	0.192	-.1683437	.7851327
SupCt						
Liberalism						
(1 lag)	.3389151	.1091471	3.105	0.006	.1104676	.5673626
SupCt						
Liberalism						
(2 lags)	-.1407538	.1029997	-1.367	0.188	-.3563348	.0748271
Political						
Liberalism						
(3 lags)	.1522349	.0995358	1.529	0.143	-.0560959	.3605658
CJ						
Warren	-9.189894	5.18704	-1.772	0.092	-20.04649	1.666705
Constant	-11.21169	14.14189	-0.793	0.438	-40.811	18.38762

CONCLUSION

The analysis in this study examined a general theory encompassing neoinstitutionalism. That is, it was argued that the behavior of political actors in the federal courts is driven by a rational desire to pursue their goals, but that such aspirations and efforts are influenced by the institutions in which their decisions are made. In particular, it was theorized that the Supreme Court justices have policy goals which they would like to pursue, and they strive to implement those policies into society, in part by setting the agenda of the Supreme Court. Indeed, as Schattschneider (1960, 68) plainly asserted: "the definition of the alternatives is the supreme instrument of power." However, the individual justices cannot always attain their preferred policies with respect to the Supreme Court's agenda, since their behavior is shaped by institutional rules and functions, including the fact that no case can come before the high Court unless a petitioner files a writ of certiorari or appeal and at least four justices agree to hear the case. This internal constraint is fashioned further by the fact that the agenda function of the federal courts exists within a system, such that appeals in the Courts of Appeals at times impel the justices to choose cases it might otherwise prefer to disregard. That is, not only is the behavior of the Supreme Court forged by an endogenous process from inside its own walls, but additionally endogeneity exists from the outside as well, as lower court appeals by litigants influence some of the aggregate agenda decisions made by the Supreme Court.

If the justices of the Supreme Court potentially are influenced by factors both within and without the institution, surely the appellants in the appeals courts similarly will be constrained by institutional rules and actions under which they must act. Specifically, in an effort to increase its probability of success on the merits, rational litigants, their legal representatives, and interest groups, which are the political actors setting the agenda in the appeals courts, will be influenced by factors inside and out of the judicial system as they seek to pursue their own goals within the judiciary. One of those influences is the agenda of the Supreme Court, which signals litigants that the federal courts are becoming more supportive of certain types of cases while shunning others. Recognizing this trend set by the Supreme Court's changing agenda, parties act accordingly with respect to their appeals.

This, then, is the general framework under which the this study proceeded. In chapter 3, the initial empirical chapter, bivariate VAR analysis was utilized to test whether the agendas of these courts influenced agenda decisions over time. The findings there illustrated that perhaps the most important factor in setting the agenda of one of these courts was the past agenda history of that court, irrespective of the issue area involved. Moving beyond this feature, however, the analysis also exhibited that the Supreme Court has a strong influence on lower court appeals. Thus, the power of the justices' decisions on the Court's agenda reach beyond their own courtroom. Nevertheless, for ceratin issues, particularly those which the Supreme Court either would rather avoid or was not aware of, appeals in the circuit courts have a decided influence on building the agenda of the high Court. While this persuasive ability of the lower court appeals was not as compelling as that garnered by the

Supreme Court in its ability to affect litigants' decisions to appeal, nonetheless the influence deriving from the lower courts was far from trivial on some issues before the Court.

The succeeding chapter 4 then disaggregated the civil liberties category to see if the representative issues were affected dissimilarly on agenda decisions, and to ascertain whether the general theory espoused here would apply within this classification of issues as well. In particular, the bivariate VAR analysis demonstrated that, while the justices were not swayed by lower court appeals in cases defined by this salient issue in the aggregate, not all of its fragmented parts were so affected. Indeed, while similar results obtained for the aggregate civil liberties class as for most of the issues of which it is comprised, the issue of privacy is one in which the high Court is influenced by appeals in the lower courts. It appears that the justices view the controversial privacy cases, which include the abortion cases, in a similar manner in which they view economics cases, as they seek to avoid them and accept only these cases on cert. when compelled to do so; in particular, such compulsion seems to stem from the agenda of the Courts of Appeals.

The final empirical chapter employed multivariate analysis in an exploration of a variety of influences on judicial agendas. This examination illustrated that the respective agendas of the federal courts are influenced by factors in addition to those examined in the prior chapters. Nevertheless, agenda trends over time were found to be influential at both levels of the federal judiciary, depending upon the issue. Moreover, the factors which influence the Supreme Court, for the most part at least, were very different from those from which litigants take their signals. Yet again, the results from this chapter were consistent

with my general theory that the federal courts act within a system on agenda decisions, as each court influences the other.

Several factors outside of agendas were found to be important influences on agendas as well. For instance, the actions of the political branches were much more portentous to, and influential on, litigants in the Courts of Appeals, while actions taking place on Capitol Hill and the other end of Pennsylvania Avenue were not at all salient with respect to the Supreme Court's agenda. Furthermore, the Warren Court's actions and influence were very different than those of the Burger Court. Finally, one important result is that the decisional trends of the Supreme Court were not nearly so influential as hypothesized. Indeed, appellants' decisions to appeal were influenced more so by the Supreme Court's trends in agenda than with the dynamic liberalism stemming from above.

Accordingly, the agenda-building process for each of these federal courts is not as simple as determining whether four justices agreed to hear a case, or whether a litigant paid the proper filing fee to the clerk of the circuit court. To the contrary, various individual decisions made by the relevant political actors are influenced by a multitude of factors, and the aggregation of those decisions are affected as well by some of those same factors and by others. The repercussion is that there are multiple considerations for setting the agendas in the federal courts. Perhaps, then, the most important message to be derived from this study is that, for agenda purposes at least, the federal judiciary in fact "articulates as a system" (Frankfurter and Landis 1927, 3). As a consequence, future judicial studies which seek to ascertain the influences on agenda of either of these federal courts necessarily should incorporate the agenda influences of the other court within the federal system.

APPENDICES

APPENDIX A

CODING DECISION RULES

Issue Areas

To generate the data for this study delineating the various issue areas, a number of coding decision rules needed to be incorporated. In particular, while the Supreme Court Database and Courts of Appeals Database are similar in many regards, there are some particular issues in those Databases which are not coded identically (Songer 1997). Accordingly, to ensure the issues are coded analogously, I operationalized the data as described below.

First, for purposes of this study all issue areas as provided in the Supreme Court Database remained as a given. Thus, the following values are delineated as issues on the Supreme Court's agenda, in accordance with the codebook for the Supreme Court Database:

Criminal Procedure:	if Value = 1;
Civil Rights:	if Value = 2;
First Amendment:	if Value = 3;
Due Process:	if Value = 4;
Privacy:	if Value = 5;
Attorneys:	if Value = 6;
Union/Labor:	if Value = 7;
Economic:	if Value = 8;
Federalism:	if Value = 10;
Interstate Relations:	if Value = 11;
Federal Taxation:	if Value = 12;
Miscellaneous:	if Value = 13.

Note: Judicial power cases (Value = 9) are dropped from the analysis, since there is no analogous issue coding in the Courts of Appeals Database.

Next, data from the Courts of Appeals Database needed to be recoded in order to conform to the decision rules in the Supreme Court Database. For example, in the Courts of Appeals Database, General Category 2, which includes specific case type codes 201-299, defines civil rights issues. However, not all of these specific case type codes within General Category 2 would be coded as civil rights in the Supreme Court Database. For instance, case type 203 is "due process rights in prison." This is coded as a civil rights case in the Courts of Appeals Database, whereas the Supreme Court Database would code this as a due process case.

After consultation with Harold Spaeth, I made the following transformations to the data for the agenda on the Courts of Appeals, in accordance with the codebook for the Courts of Appeals Database:

Criminal Procedure:	if case type = 101-158, 201-202, 206-208, 773;
Civil Rights:	if case type = 204, 209-299, 904, 912-914, 921;
First Amendment:	if case type = 301-399;
Due Process:	if case type = 203, 205, 410-412, 499, 505-507, 774;
Privacy:	if case type = 413, 501-504, 599;
Attorneys:	if case type = 903;
Union/Labor:	if case type = 601-610;
Economic:	if case type = 701, 710-772, 799;
Federalism:	if case type = 902;
Interstate Relations:	if case type = 901;
Federal Taxation:	if case type = 702-706;
Miscellaneous:	if case type = 910-911, 915-916, 999.

For purposes of Chapters 3 and 5, civil liberties includes the aggregate of the following categories: civil rights; first amendment; due process; and, privacy. In Chapter 4, these issues are disaggregated into their separate parts.

For purposes of Chapter 5, economic cases include the aggregate of economic, federal taxation, and union/labor cases. In Chapter 3, these issues are disaggregated into their separate parts.

Specific Database Considerations

Supreme Court Database. For the Supreme Court data, I included only orally argued decisions which were formally decided, even if by an equally-divided court, while I excluded memorandum decisions, per curiam decisions, and decrees. Accordingly, this included DEC_TYPES 1, 5, 6, and 7. Moreover, the unit of analysis in this study is the case, as demarcated either by its citation or docket number; this included ANALU = ' ' or ANALU = '1'.

Courts of Appeals Database. The Courts of Appeals Database utilizes a specific sample across circuits and years. Thus, this data were weighted in order to account for variations in the dockets of the several circuits. The specifics for weighting the data are provided in the codebook for the Courts of Appeals Database.

According to the codebook for the Courts of Appeals Database (1997, 42): "Up to two case types . . . are coded for each case, though the majority of cases have only one case type. No decision was made in coding about which issue was the most important when two or more case types were present. Therefore [sic], CASETYP1 should not be considered more important than CASETYP2." For this reason, in this study I added CASETYP1 and CASETYP2 together for each issue area, in order to account for all issues in the Courts of Appeals. As a consequence, some double counting of issues was inevitable.

APPENDIX B

LANDMARK DECISIONS

Landmark Civil Liberties Decisions:

Shelley v. Kraemer, 334 U.S. 1 (1948).
Brown v. Board of Education, 347 U.S. 483 (1954).
Roth v. United States, 354 U.S. 476 (1957).
Monroe v. Pape, 365 U.S. 176 (1960).
Baker v. Carr, 369 U.S. 186 (1962).
New York Times v. Sullivan, 376 U.S. 254 (1964).
Griswold v. Connecticut, 381 U.S. 479 (1965).
Levy v. Louisiana, 391 U.S. 68 (1968).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Roe v. Wade, 410 U.S. 113 (1973).
Miller v. California, 413 U.S. 15 (1973).

Landmark Criminal Procedure Decisions:

Adamson v. California, 332 U.S. 146 (1947).
Mapp v. Ohio, 367 U.S. 643 (1961).
Gideon v. Wainwright, 372 U.S. 335 (1963).
Miranda v. Arizona, 384 U.S. 436 (1966).
Camera v. Municipal Court, 387 U.S. 523 (1967).
See v. Seattle, 387 U.S. 541 (1967).
Terry v. Ohio, 392 U.S. 1 (1968).
Benton v. Maryland, 395 U.S. 784 (1969).

Landmark Economics Decisions:

Feres v. United States, 340 U.S. 135 (1950).
National League of Cities v. Usery, 426 U.S. 833 (1976).
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

Source: Pacelle (1991, Appendix 4).

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