Issues, Agendas, and Decision Making on the Supreme Court

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In the process of agenda setting, the U.S. Supreme Court is limited to selecting from among only those cases brought before it. Despite this limitation, the justices possess considerable discretion and can reshape the issues in a case as a means of advancing their policy preferences. With data drawn from the Court's opinions, we find that, over the past twenty-five years, the justices have evinced a frequent willingness to expand the issues on their plenary docket and resolve questions not formally presented by the parties. We conclude that, notwithstanding informal norms that disapprove of this practice, issue fluidity is an important component in a continuous program of agenda building.

In 1972 the U.S. Supreme Court heard oral arguments in two cases that, in one way or another, touched on the subject of abortion. In neither of these cases did attorneys raise questions concerning the point at which, during a pregnancy, the state had a legitimate interest in regulating or proscribing abortions; rather, all the claims hinged on other matters (e.g., whether the appellant presented a justiciable controversy, and whether the Constitution guarantees the right to abortion).[1] Yet, during the argument, several of the justices made repeated inquiries regarding the application of abortion laws at different stages of fetal development. Sarah R. Weddington, the lawyer appearing on behalf of Jane Roe, recognized that neither party had briefed this issue: "There are some states that now have adopted time limits. Those have not yet been challenged. And, perhaps that question will be before this Court. . . . But that's really not before the Court in this particular case." Ms. Weddington's response to these questions, however, "underscored her strategic naiveté. Whether the issue was formally 'before the Court' was far less significant than the fact that the justices were obviously concerned about it" (Epstein and Kobylka 1992, 191–2).[2] In the end, as is well known, the Court's opinion in *Roe* v. *Wade* (1973) divided pregnancy into trimesters, delineating the state's increasing regulatory interest in each successive period. Arguably the case's "most significant [question] was at what point states can become involved in the abortion decision" (p. 197); interestingly enough, it was never posed by the parties.

This story, and many others we could tell, serves to illustrate the practice of issue fluidity on the Supreme Court, that is, the ability of the justices to expand or contract the range of issues presented by the parties in a case (Ulmer 1982). In particular, the *Roe* decision highlights the Court's substantial capacity to engage in issue expansion, to resolve authoritatively legal questions not raised by the parties to litigation.[3] Thus, as the justices set about making decisions on the merits, it is quite possible that, in the end, their written opinions will focus on concerns that go beyond the boundaries of the written briefs. The reason the Court expanded the range of issues in *Roe* is not difficult to discern; as Epstein and Kobylka (1992) correctly note, it was merely what a majority of its members were disposed to do. What enabled them to engage in this behavior is not particularly baffling either; the justices possess an enormous degree of discretion in the disposition of their plenary docket (Segal and Spaeth 1993). Is *Roe* representative of a more general pattern of decision making on the Supreme Court?

With our interest kindled by illustrative cases such as this one, we attempted to answer this question (McGuire and Palmer 1995). Briefly, our analysis of the 1988 term of the Court found evidence of issue expansion in roughly 10% of the cases, and, consistent with our expectations, the practice appeared to be a proactive decision driven largely by discretionary factors. Ironically, in the critique of our analysis by Epstein, Segal, and Johnson (1996, 848), one of the scholars who drew our attention to the potential importance of this behavior now seemingly disavows the prior compelling research in Epstein and Kobylka (1992). The authors of the critique argue that the justices "virtually never" decide an issue not presented by the parties; in other words, in the process of decision making in the Court, cases such as *Roe* v. *Wade* are wholly uncharacteristic events. Notwithstanding the extraordinary stochastic case in which the Court resolves issues *sua sponte*, the justices are instead bound by a legal norm that limits the Court to deciding only the questions presented by the parties.[4] In short, according to our critics, issues simply are not fluid in the U.S. Supreme Court.

To the contrary, we are inclined to view the expansion of issues at the merits as an inevitable (and perhaps even necessary) part of formulating an agenda in the high

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[1] See *Roe* v. *Wade*, Brief for Appellee 1973, 6–7.

[2] Although this exchange took place during the reargument of the case in fall 1972, it was a matter of similar concern during both the original argument and its subsequent conference discussion (see Epstein and Kobylka 1992, 178–86; Schwartz 1988, 83–92).

[3] Given that our work was derived directly from Ulmer (1982), we initially adopted his specific terminology for this behavior, referring to it as "issue discovery." In light of the criticism it here receives, we are convinced that this term is a bit too value-laden, connoting—however indirectly—an inappropriate behavior. Ulmer also employed other descriptors, including "issue expansion," and we now propose to substitute it as a formal alternative (see also Pacelle 1991). The reason is that, at least to us, "issue expansion" seems to imply greater neutrality regarding the advisability of its practice.

[4] When the Supreme Court decides an issue *sua sponte*, it does so "of . . . its own will or motion; voluntarily; without prompting or suggestion" (Black 1979, 1277).

court, a position we develop here more fully. To that end, we argue that the manipulation of issues at the merits stage is but one part of what is principally an ongoing process of agenda setting. In addition, we marshal evidence suggesting that, at least for the past two decades, it has occurred persistently. More important, we find that, far from validating the doctrine of *sua sponte*, ours is an interpretation that is largely shared by the justices themselves.

EXPANDING ISSUES ON THE JUDICIAL AGENDA

Broadening the range of issues in a case has a long history in the Supreme Court. At least as far back as *Marbury* v. *Madison* (1803), the justices have been receptive to the idea of injecting new issues into the cases brought before them. In that instance, the only question before the Court was whether the justices had the authority to issue the writ of mandamus against Secretary of State James Madison; the Court's right to exercise judicial review was not raised by either party (Schwartz 1993, 40). "Indeed, in *Marbury* ... the argument of Charles Lee on behalf of the applicants ... reproduced in the Reports of [the] Court where anyone can see it ... devotes not a word to the question of whether [the] Court has the power to invalidate a statute duly enacted by the Congress. Neither this ground of decision nor any other was advanced by Secretary of State Madison, who evidently made no appearance" (*Monell* v. *New York City Department of Social Services* 1978, 717). Since then, the justices have frequently transcended the formal issues presented by litigants, using a variety of cases as vehicles to amplify their policy ambitions. Drawing from such diverse issues areas as antitrust, criminal law, libel, and school desegregation, the Court has, in case after case, been willing to speak to substantive legal issues that were not contemplated by their participants (Ulmer 1979, 1982). Why would such transformations of issues take place? Why would the justices be willing to decide important questions not formally presented? To answer these questions, it is profitable to see the Court's potential to remold the questions brought before it as a part of a larger process of establishing an agenda.

One of the most important lessons of recent years that has emerged from the literature on the Supreme Court's agenda setting is that its mechanics are highly continuous. Far from just selecting some cases and rejecting others, the Court follows a more sequential mode of operation in which cases are gradually siphoned off, as the justices make increasingly more exact judgments at each successive phase. Thus, for example, based on such general indicators as dissent in a lower court or the presence of a civil liberties issue, some of the myriad filings are placed on the Court's list of candidates worthy of formal discussion; responding to more distinct indices, such as actual conflict or the United States as a petitioning party, some petitions on the discuss list are, in turn, ultimately granted formal consideration (Caldeira and Wright 1990, Perry 1991). Since these cases, however, are only a convenient legal architecture within which to resolve the more specific issues they contain, it seems highly plausible that, as they are being resolved, those issues may be subject to some amount of reshuffling—some further degree of refinement—at the hands of the justices. In this light, then, the expansion of issues at the merits stage can be seen as merely one in a series of steps that constitutes the Supreme Court's agenda setting.

However constituted, there is no doubt that the Court's agenda is driven in no small degree by the policy preferences of the members. In fact, scholars have long recognized that the justices' attitudes are manifested in the selection of cases (Armstrong and Johnson 1982, Baum 1977, Songer 1979, Ulmer 1978). Accordingly, one might suspect that, if issue transformation were a natural consequence of establishing agenda priorities, those attitudes would be in operation in the treatment of specific issues as well. Yet, because Epstein, Segal, and Johnson (1996) are unwilling to consider the transformation of issues on the merits as a possible component of agenda building, they conclude that any such modification violates a sacrosanct norm of judicial restraint, casting doubt upon the Court's institutional legitimacy. This is a rather puzzling perspective, since the literature's portrayal of issue fluidity has precisely the opposite orientation; issue expansion is generally conceded as an illustration of how policy-minded Court members may realize their goals within the limits unique to the enterprise of judging:

> In an important sense, the justices of the Supreme Court are policy entrepreneurs, who seek to fulfill their policy goals through their case selection policies and their decisions on the merits of the issues.... Members of the Court who desire to make public policy may not have the proper cases necessary to make policy at the appropriate time. In such instances, purposive justices can manipulate cases before them to pursue their designs. This process [i.e., issue expansion] mitigates the problems created by the fact that the Court is not a proactive institution (Pacelle 1991, 31–2).

In other words, because the justices are unable to create cases and are bound to resolve only those conflicts brought before them, broadening the range of issues within an existing case sometimes becomes the only legitimate route by which they can realize their policy preferences. It is precisely *because* the Court is a reactive institution that issue expansion becomes a requisite part of agenda formulation in the judicial arena. In deciding questions of law, the justices can surely paint with a fairly broad brush on the canvas supplied by a case, but they must still respect the frame that circumscribes it.

Clearly, then, there are contextual limits posed by individual cases; indeed, the Court's rules codify those lines of demarcation. Still, there can be no question but that the justices have reserved—again, quite explicitly within their rules—the right to remold a case to suit their purposes, a provision that "has been invoked with some frequency to dispose of cases on grounds not raised or even noticed by the parties, let alone the courts below" (Stern et al. 1993, 346). In this respect, the general guideline that new questions ought not be considered is by no means unusual; most of the limits that rein the Court's policymaking are not exempt from breach at the

whim of its membership. Jurisdiction and standing, for example, are obvious threshold requirements that must be overcome in order for the justices to review a case, but these criteria "are no less subject to judicial manipulation than are those governing other areas of the law" (Segal and Spaeth 1993, 206). Similarly, the norm against deciding issues not presented is entirely of the Supreme Court's own creation. Consequently, "in determining whether to consider issues not raised in a petition, the Court not only has broad discretionary power, but . . . it can exercise that discretion so as to permit it to decide the issue it wants to decide. . . . [I]t reflects the Court's discretionary authority to dispose of cases in what it determines to be the most sensible and reasonable way" (Stern et al. 1993, 345–6).

Quite apart from the Court's leading practitioners, to say nothing of the justices themselves, political scientists for some time now have recognized the incidence of issue fluidity. In *Elements of Judicial Strategy*, Murphy (1964, 29–30) observed that the justices "have found issues in the case which opposing counsel did not see and have decided those issues without allowing argument." Leading examples of issue expansion have since figured prominently in individual cases studies (see, e.g., Cortner 1981, Epstein and Kobylka 1992) as well as textbooks on both the Court's processes and policies (see, e.g., Epstein and Walker 1995, 538; Wasby 1993, 205–6). Why has this method of docket management not been subject to more systematic investigation? The answer, we think, is that this practice—long exercised, widely acknowledged, and (until now) not subject to dispute—has not yet come to occupy a place in our theoretical notions of how the Supreme Court establishes an agenda (cf. Pacelle 1991, Ulmer 1982). In other words, many students of the Court are still inclined to think of the justices' agenda building as a discrete process, a dichotomous choice model in which petitions are either accepted or rejected. So it is scarcely surprising that, despite the frequency with which it appears to occur, those who study the Court's decision making might be apt to view issue expansion as entirely idiosyncratic, orthogonal to any system of decision making.

Hence, the challenge that Epstein, Segal, and Johnson mount to our original analysis reflects an understandable reluctance to view issue fluidity within the framework of the justices' process of agenda formation. They believe, instead, that the Supreme Court is governed by a rule that disfavors deciding questions not presented. Unfortunately, the strength of their predilection substantially controls the development of a research design which, though carefully constructed and well executed, leads inexorably to a predetermined conclusion. To fortify this assessment, it is essential to examine the built-in biases of their coding and to compare their results to our own measures.

TESTING OUR CRITICS' MODEL

The track record of research on issue fluidity is not particulary lengthy. As a result, agreement on what constitutes issue fluidity and how best to measure it is not widespread. One way to accentuate the differences between our approach and that of our critics would be to select a case and illustrate the operation of our respective coding rules. In the absence of agreement about which decisions fall under the heading of issue expansion, however, selecting any one case leaves us—and Epstein, Segal, and Johnson, for that matter—open to the charge that it was chosen selectively as a means of playing up the strengths of one strategy while stressing the weaknesses of the other. Seeking to eliminate the potential for such bias, we ask whether there exists some case that scholars uniformly agree illustrates issue expansion by the Supreme Court. Is there some documented case of issue expansion, independent of our original data, on which there is universal agreement? The most likely candidate in this category is *Mapp* v. *Ohio* (1961).

The story of this case is easily summarized.[5] In May 1957, members of the Cleveland police arrived at the home of Dollree Mapp, a woman suspected of harboring a bombing suspect. Over Ms. Mapp's objections, the police, apparently without a warrant, forcibly entered her home and conducted a wide-ranging search, the fruits of which included various books and pictures that the police judged to be obscene. With this evidence, Ms. Mapp was subsequently convicted under an Ohio law that forbade the possession of obscene materials. In the U.S. Supreme Court, the parties focused largely on the constitutionality of that state law, but when the Court announced its opinion, it became clear the justices had eschewed that issue in favor of applying the exclusionary rule to the states. Previously, in *Wolf* v. *Colorado* (1949), the justices had declared that the states were bound by the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, but it had left the principal federal enforcement mechanism—the exclusionary rule—to the states' discretion. In *Mapp*, however, the Court abandoned the *Wolf* decision, holding that illegally obtained evidence could not be used in state criminal trials.

Neither Ms. Mapp nor the state of Ohio had asked the justices to address this issue. Why, then, did the Court elect to forge such an important ruling when the parties had not presented that question? The answer is that the American Civil Liberties Union, acting as an amicus curiae, served to refocus the central concern of the case by inviting the justices to consider "the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding" (*Mapp* v. *Ohio*, Brief of the American Civil Liberties Union 1961, 20). The justices, stimulated by a friend of the Court, decided to transform the case by injecting a new issue into their plenary agenda.

Political scientists and legal scholars have repeatedly cited *Mapp* as a case representative of issue fluidity (Adamany 1991, Carp and Stidham 1996, Cortner 1981, Hall 1992, Murphy and Pritchett 1986, Pacelle 1991, Ulmer 1982). Doubtless the justices were equally aware

[5] Our account of *Mapp* v. *Ohio* (1961) is based upon the opinions filed by the justices in that case, as well as the parties' briefs, reprinted in microform, among the *U.S. Supreme Court Records and Briefs*, Washington, DC: Microcard Editions.

of it, as evidenced by Justice Stewart's letter to Justice Clark, the author of the Court's opinion, admonishing him for crafting a ruling on a point not raised by the parties (Dorin 1982), and subsequent cases only confirm Justice Stewart's view (see, e.g., *Andrews* v. *Louisville & Nashville Railroad Co.* 1972; *Gilmer* v. *Interstate/Johnson Lane Corp.* 1991). In fact, it is (quite literally) a textbook example which, to quote one of our critics, "presents an excellent illustration of the effect amicus curiae briefs can have on the justices" (Epstein and Walker 1995, 538). Given such consistent accounts, we find it hard to imagine a case less likely to spark debate. Fortunately, it meets our most important test; identifying it as a "classic" case, Epstein, Segal, and Johnson agree with our assessment. With such unanimity, *Mapp* can serve as an appropriate palette upon which the two competing coding schemes can readily be compared.

How would *Mapp* v. *Ohio* be coded under our mode of data collection? We use an approach that has been profitably employed by other scholars investigating similar research questions; like Spriggs and Wahlbeck's (1995) study of the informational role of briefs amicus curiae, for example, our coding involves a comparison of the summary statements at the outset of the briefs against the Court's authoritative conclusions that are highlighted in the opinions' syllabi.[6] Under the heading of "Questions Presented," parties are required to devote an introductory portion of their briefs to the substantive legal problems posed. So far as we know, this is a credible indicator of what is and is not at issue in a case. After all, based on this information alone, clerks and justices alike make judgments about whether a case merits the Court's attention (Perry 1991).

Having identified the legal issues at stake, one then examines the Court's syllabus to determine if "we know more than we would expect to know based upon the questions presented"; that is, did the justices "rule on an issue completely unique to a case" or "answer a question presented at a level of generalization greater than is necessary to cover that question" (McGuire and Palmer 1995, 700)? Note that, while arguably formalistic, this is a highly reliable classification procedure; relying upon the summaries in both the briefs (i.e., the questions presented) and the opinions (i.e., the syllabi) greatly reduces the likelihood of disagreement among coders. Plumbing the depths of either the merits briefs or the Court's opinion to determine whether an issue genuinely was presented or addressed, by contrast, introduces enormous potential for subjective error.

To illustrate these coding rules, *Mapp* easily serves as a case in point. In their brief on the merits, the attorneys for Ms. Mapp included the following question: "Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV . . . of the United States Constitution?" (*Mapp* v. *Ohio*, Brief of Appellants 1961, i). Since the Supreme Court had previously ruled that the states were bound by the Fourth Amendment, it easily could have disposed of this question by determining whether the Cleveland police had exceeded the constitutional bar on unreasonable searches and seizures. The Court concluded that they had; in reversing Ms. Mapp's conviction, however, the justices also ruled that "all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court" (p. 643). In other words, the Court not only answered the question presented by concluding that the police conduct violated the Fourth Amendment, but also reached well beyond that question by ruling, as a consequence, the evidence could not be used in a state trial. Had it been in our original data, *Mapp* v. *Ohio* would have been counted as a case of issue expansion.

Asserting that this standard is flawed, Epstein, Segal, and Johnson craft a different method, one that they claim provides a more appropriate measure of issue expansion. Its significant departure from the coding of McGuire and Palmer is threefold. First, they "begin by comparing points raised in the syllabi with the questions listed in the parties' briefs" (p. 848). That is, rather than identify the questions posed by the parties and then determine if the Court transcended those questions, they identify the Court's ruling and then ask whether it can be interpreted as fitting the questions presented. Second, in their search for issues, they explore the full text of the parties' briefs, since "if an issue is raised in the body of a brief (even if it is not a 'Question Presented'), we can hardly say that the Court is engaging in issue creation" (p. 848). Third, consistent with their assertion that the doctrine of *sua sponte* is a norm that governs the Court's decision making, our critics claim that "it tends to generate informal sanctions from other justices when it is not followed" (p. 845). So, when this norm is violated by a majority of the Court, other justices—typically in their dissenting or concurring opinions—formally take exception to the practice.

It is certainly true that our critics' standards are, on the face of it, objective and, we readily concede, intuitively appealing, but reasonable and impartial coding rules by no means guarantee an accurate barometer of political reality (see, e.g., Casper 1976). It is instructive, therefore, to examine the method of Epstein, Segal, and Johnson in application. We test each of their alternative coding rules in turn.

The Search for Questions

When the justices consider briefs on the merits, the "statement of any question presented [is] deemed to comprise every subsidiary question fairly included therein."[7] This rule of the Court, which obviously anticipates that questions will be phrased so as to embrace all ancillary issues, ensures that questions will be presented at their greatest level of abstraction. Drawing considerable attention to the requirement that questions also be "concise" and phrased "without unnecessary detail," Epstein and her colleagues misread this rule and imply that a succinct statement, by definition, cannot be broad in scope (p. 846). The flaw with this reasoning is obvious

[6] For a detailed description of these coding rules, see McGuire and Palmer (1995, 699–700).

[7] See Rule 14 of the Rules of the Supreme Court of the United States, reprinted in Stern and others (1993, 887–928).

TABLE 1. Application of Epstein, Segal, and Johnson's Coding Rules to *Mapp* v. *Ohio*

Ruling of the Supreme Court: "All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court."

Coding Rule	Issue Expansion?
Does the ruling cover the Question Presented?	
(Yes) "Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV of the United States Constitution?"	No
Is the issue in the body of the brief?	
(Yes) "The evidence introduced in the trial . . . was procured contrary to the provisions and in violation of appellant's constitutional rights under Amendment IV . . . of the United States Constitution . . . and should not have been received in evidence" (Appellant's brief, p. 26).	No
(Yes) "Under the judicial rules of evidence prevailing in the courts of the State of Ohio, the trial court in this case and the appellate courts on review had every right to rely upon the authority of the *Lindway* case . . . in holding that the criminal evidence obtained in this search was competent and admissible on the trial" (Appellee's brief, p. 9).	No
(Yes) "To argue . . . that a different rule of evidence or a modification of the non-exclusionary rule of evidence adopted by the Courts of the State of Ohio should apply to the instant case is an attempt to open the door to arbitrary application of a judicially created rule of evidence in Ohio" (Appellee's brief, pp. 10–1).	No
Do opinions verify that a question not raised was decided?	
(No) "From the Court's statement of the case one would gather that the central . . . issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution . . . [A]lthough that question was indeed raised here and below among appellant's subordinate points, the new and pivotal issue brought to the Court by this appeal is whether . . . making criminal the mere knowing possession or control of obscene material . . . is consistent with the rights of free thought and expression" (*Mapp* v. *Ohio*, pp. 673–5).	No
(No) "The occasion which the Court has taken here is in the context of a case where the question was . . . argued only extremely tangentially. . . . I would think that our obligation to the States . . . would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. . . . Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. . . . [A]t the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point" (*Mapp* v. *Ohio*, pp. 676–7).	No

enough; that the Court expects *brevity* says nothing about the relevant degree of *specificity*.[8]

Traditionally, the Court has sought to limit the scope of its decisions (*Ashwander* v. *Tennessee Valley Authority* 1936). So, assuming that a question is presented—concisely or tediously—in its most general terms, it is fair to say that a ruling whose breadth exceeds the boundaries of that question reflects a degree of issue expansion (Ulmer 1979, 1982). Our original scheme of data collection sought to take this into account. We began with the questions as posed by the parties in their briefs and then asked whether any of the Court's answers to those questions were more sweeping than necessary.

Through a subtle but significant change in coding, illustrated in Table 1, Epstein, Segal, and Johnson reverse this process. With the Court's ruling in hand, they ask whether it can be understood as applying to the issues articulated in the briefs. Stated differently, instead of beginning with "questions" and then looking for "answers," they begin with the answers and seek to apply them to the questions. Testing this rationale in *Mapp* v. *Ohio* reveals that the distinction is scarcely trivial. By their standards, one begins with the justices' holding—the evidence illegally obtained from Ms. Mapp is inadmissible in a state criminal trial—and then asks if it applies to the question of whether the police search violated the Fourth Amendment. Does the ruling cover the question? It certainly does; the justices ruled that the evidence was illegally obtained, and that is precisely the issue the parties presented. That, as a part of the same ruling, the majority also held that such evidence must be excluded from state criminal courts is irrelevant under the coding rules of our critics. Following their guidelines, *Mapp* would not qualify as a case of issue expansion. In fact, had it been in our original data set, it would have been chalked up as an error on our part.

This deficiency in the method of Epstein, Segal, and Johnson is readily revealed by cases in our own data. In *Duckworth* v. *Eagan* (1989), for example, the justices confronted the question of whether, under *Miranda* v. *Arizona* (1966), it is sufficient to inform a suspect that an attorney will be appointed "if and when you go to court."

[8] Their discovery that, on average, there are more points highlighted in an opinion's syllabus than there are questions presented in a case is quite meaningless unless one knows something about the substantive content of both. One highly plausible interpretation of their finding is that the syllabi of the Court's opinions are simply more detailed than the questions presented in the briefs on the merits.

The specific question posed by the state in its brief was "whether the Seventh Circuit's ... application of *Miranda*, prohibiting the use of objectionable 'magic words,' in advance of rights, is in conflict with the decisions of this Court" (*Duckworth* v. *Eagan*, Brief for Petitioners 1988, i). Concluding that "*Miranda* warnings need not be given in the exact form described in *Miranda* but simply must reasonably convey to a suspect his rights" (p. 195), the Supreme Court indeed responded to this issue but at a level much broader than the parties contemplated. After all, the state only asked about conditioning the availability of a lawyer on some future event; no one asked the Court the more sweeping question of whether reasonably stating one's *Miranda* rights was sufficient. Clearly, the justices provided a good deal more than they were asked, but adherents to the model of Epstein and colleagues must conclude that this is not the case: The ruling covered the question presented. That the ruling covered a good deal more—consider the myriad *other* ways in which *Miranda* warnings might be varied and still reasonably convey rights—is of no consequence.

Likewise, in *DeShaney* v. *Winnebago* (1989), the Court examined the obligations of county social welfare services when a child is severely beaten. The question, as presented by the parties, focused on the narrow concern over whether the state has an obligation to protect a child from parental abuse, once it establishes a program of child protection. Nevertheless, the members of the Court went well beyond the boundaries of that question, holding that "the Due Process Clause [of the Fourteenth Amendment] imposes no duty on the State to provide members of the general public with adequate protective services" (p. 189). So broad a question as whether a state has an affirmative obligation to provide adequate protection was never posed.

Because of the way Epstein, Segal, and Johnson collect their data—going from opinion to briefs, rather than from briefs to opinions—they carefully avoid the Supreme Court's issue expansion in cases such as these. Even *Roe* v. *Wade* (1973), our initial illustration of issue expansion and a case spotlighted as such by one of the critics, does not pass their standard.[9] According to Epstein, Segal, and Johnson, these cases do not qualify as issue expansion. It is not hard to see why; they would never qualify, nor would any other comparable case, since the more limited question will always be included within the more expansive holding.

Exploring Briefs on the Merits

Leaving aside their initial flaw in method, our critics proceed in their replication of our original analysis in a manner quite comparable to ours. We both begin with information from two sources, briefs on the merits and opinions of the Supreme Court, each of which have specific portions that conveniently summarize the legal issues involved in a case. From the Court's opinion, both we and they rely upon the syllabus, the brief abstract that presents the facts of the case, the proceedings in the lower courts, the majority's principal holdings, and so on. Using this synopsis as a means of measuring what the Court did (and did not) conclude struck us as particularly appropriate "because the syllabus underscores the central elements of the Court's decisions.... These summaries are also generally unadorned by distracting dicta" (McGuire and Palmer 1995, 700). Epstein, Segal, and Johnson share these instincts, noting that "they provide reliable roadmaps to Court decisions. In other words, while two independent scholars, examining the contents of a decision might disagree over whether the opinion writer raised a particular issue, no such dissentience can occur over the points listed in the syllabus" (p. 848).

The analogous roadmap for the briefs on the merits is, of course, the section appearing under the heading "Questions Presented." It is here, as in an opinion, that there is an effective outline of a case's essentials; obviously, just as focusing upon syllabi reduces the probability of discrepancy, so, too, does reliance on the "Questions Presented" drastically minimize debate over what legal questions are at issue in a case. Given that a set of merits briefs can routinely reach 100 pages, restricting attention to these headlines is especially important; two independent scholars laboring through the full text of the briefs could easily reach different conclusions about what issues the parties brought before the Court.

This logic would seem to apply with equal force for briefs as well as opinions, but when our critics are unable to locate syllabi points within the "Questions Presented"—which, more often than not, they are unable to do—this logic is cast away. Despite the disagreements that their judgments might well engender, Epstein and her coauthors mount an expedition through the full text of the merits briefs to see if a question can be found which corresponds to the Court's answer. They do not explain how it was determined that one of the primary points of the Court's opinion could be traced to the parties' filings. Unfortunately, their account of their coding procedures is frustratingly vague on this issue, noting only that questions were coded as present if they could be "located" in the "balance of the brief." Even this subjective standard does not suffice in some cases, and their solution is, in effect, to exclude those cases from consideration.[10]

[9] Despite Epstein and Kobylka's (1992) claim to the contrary, Justice Blackmun's trimester framework, which delineates the interests of the state throughout the term of pregnancy, clearly covers the question, raised by the state, regarding the circumstances under which the state can outlaw abortion: "Whether the state of Texas has a legitimate interest in preventing abortion except under the limited exception of 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother' " (*Roe* v. *Wade*, Brief for Appellants 1973, 7).

[10] When some of the major holdings in the data speak to different aspects of the Supreme Court's jurisdiction and the parties' briefs provide no trace of these questions, their answer is to exempt them from their requirements under the doctrine of "reverse *sua sponte*," a rule apparently of their own fashioning, by which unasked questions of jurisdiction and justiciability can be answered by the justices at their discretion. Their interpretation is not widely held. "Jurisdictional issues," according to the standard manual on Supreme Court practice, "can always be considered, even sua sponte" (Stern et al. 1993, 346); in other words, parties are entitled, as a matter of course, to present

Aside from its patent problems of reliability, whether our critics have adopted a method that accurately captures how the Court determines what issues are presented in a case is a relevant concern about which they say nothing; such an omission is especially odd in an article otherwise devoted to emphasizing the Supreme Court's adherence to internal norms of decision making. Citing no authority, they merely assert that, if an issue can be "located" within the text of a merits brief, the issue is properly before the Court and therefore cannot be decided *sua sponte*. Is this an outlook shared by the justices? In a word, no. As the members of the Court have frequently emphasized, "the fact that the parties devoted a portion of their merits briefs to [an] issue does not bring that question properly before us" (*Izumi Seimitsu* v. *U.S. Philips Corp.* 1993, 427; see also *Radzanower* v. *Touche Ross & Co.* 1976, 151).[11] As we have argued, the justices remain quite free to manipulate this condition by elevating an issue not formally before them onto the plenary agenda.

Again, *Mapp* provides ample evidence of this shortcoming in our critics' model. The evidence from Table 1 suggests that the argument over the applicability of the exclusionary rule was visited not by one but by both parties. Counsel for Ms. Mapp explicitly maintained that the tainted evidence should not have been admitted at her trial, and the state, with equal clarity, argued that Ohio's decision to allow such evidence should not be disturbed by a mandate of the federal courts. Still, any one of these statements within the briefs, by the standards of our critics, would be prima facie evidence that the issue of binding the states to the exclusionary rule was a question formally presented in *Mapp* v. *Ohio*.

All the more glaringly, this problem dogs their reanalysis of our original data. In *Argentine Republic* v. *Amerada Hess Shipping Corp.* (1989), for example, the justices were asked to interpret federal court jurisdiction over a foreign state under the Foreign Sovereign Immunities Act of 1976, after a cargo ship owned by commercial interests in the United States was attacked by Argentina during its conflict with Great Britain over the Falkland Islands. In one of its principal holdings in the case, the Supreme Court concluded that none of several international agreements—the Geneva Convention on the High Seas, the Pan American Maritime Neutrality Convention, and the Treaty of Friendship, Commerce and Navigation—created exceptions to this law. According to Epstein, Segal, and Johnson, the issue of these exceptions is presented in the following sentence in the respondent's brief:

> The right of an innocent neutral shipowner to seek, and receive, compensation for the illegal destruction of its ship and cargo on the high seas has been recognized for centuries under customary international law. Story, Notes on the Principles and Practices of Prize Courts (Thomas Pratt, ed; London, 1854); Argentine Provisional Regulation for Privateering of 1817; The London Naval Conference of 1909; Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989; Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 (*Argentine Republic* v. *Amerada Hess Shipping Corp.*, Brief for the Respondents 1989, 16).

Obviously, this is an assertion of a right to compensation, but whether this is a claim that certain international agreements establish exceptions to the Foreign Sovereign Immunities Act is far less clear. As to the dictates of the Pan American and Geneva Conventions, this language hardly constitutes substantive interpretation. Moreover, that their coding judgments "are clear enough to be beyond any controversy" (p. 848) is a bit of a stretch, since one of the three agreements in the Court's ruling—the Treaty of Friendship, Commerce and Navigation—is mentioned nowhere on this page of the brief.

Nothing here approaches the specificity and directness of the arguments found in the parties' briefs in *Mapp*, a case in which, even our critics concede, the issue decided was not presented by the parties. Still, this is precisely the kind of slender reed upon which Epstein, Segal, and Johnson hang their argument.[12] Cases such as these, others of which we easily could illustrate from our data, reveal the kind of heroic interpretations that can be brought to bear when one abandons the "Questions Presented" for the subjective uncertainties of the "balance of the briefs."

Confirmation from the Court

The most compelling criticism of our analysis is the assertion by Epstein, Segal, and Johnson that, when an issue not presented has been decided, the members of the Court provide confirmatory evidence in their written opinions. In their view, the justices typically will take their colleagues to task, most likely in their concurring or dissenting opinions, for violating the doctrine of *sua sponte*. By that benchmark, one thus reliably can find cases in which the transformation of issues has taken place. The upshot of their argument is that, if the cases we identify provide no such evidence—no statements within the various opinions filed indicating the Court answered a question not raised—then we must be wrong. There is much to commend this logic, since the justices are surely as qualified as anyone to judge whether an

formally questions of jurisdiction, and, in the absence of these, the justices are free to take up such questions on their own. When this troublesome group of cases arises, however, Epstein, Segal, and Johnson simply declare that category of legal concerns to be off limits. Thus inoculated, these cases are impervious to claims of issue transformation. Although obviously unnecessary in light of their argument, our critics also add that the standard statement as to how the Court's jurisdiction is established—a bill of particulars mandatory in every case—amounts to a "Question Presented." This obligatory bit of recitation, however, is merely " 'boilerplate.' ... This jurisdictional section is for the benefit of the Clerk's Office and the law clerks" (Baker 1984, 615).

[11] This holds with particular force when parties devote portions of their briefs to issues not passed upon by the lower courts. In such cases, "this is the rule the Court normally applies: 'We do not reach the constitutional questions not raised by the parties.... *The fact that the issue was mentioned in argument does not bring the question properly before us*' " (Stern et al. 1993, 344, emphasis added).

[12] In fact, in our own attempts to retrace the steps of our critics, we sometimes found it difficult, even by the broadest stretch, to interpret a ruling as applying to the relevant passages of the merits briefs (see, e.g., *Coit Independence Joint Venture* v. *FSLIC* 1989).

TABLE 2. Cases with Written Opinions Verifying Issue Expansion, 1951–95

Years	Number of cases
1951–55	4
1956–60	6
1961–65	7
1966–70	6
1971–75	13
1976–80	25
1981–85	22
1986–90	22
1991–95	12
TOTAL	117

Note: See Appendix for list of cases.

opinion reaches beyond the boundaries of a case and resolves unasked questions.

Epstein and her colleagues caution, however, that such cases should be few and far between; based on their convictions about the power of the doctrine of *sua sponte*, they assert that one should observe only the most sporadic deviations from the norm. To test their beliefs, we conducted a search of the *U.S. Reports* over the last 45 years to determine the frequency with which the justices filed such opinions. Drawing from a list of key words and phrases we mechanically searched the Court's written opinions for evidence of the brand of informal sanctions our critics envision.[13]

It bears emphasizing that our search was limited to concurring and dissenting opinions, since it is in those that members of the Court raise these objections. One contingency our critics regard as too remote even to contemplate is that the justices may unanimously decide to transform the issues in a case. Since violations of the *sua sponte* doctrine invariably draw criticism from those justices unwilling to abide such aberrant behavior, unanimous cases, by definition, must be excluded. This assumption allows Epstein and colleagues to eliminate a vast number of potential candidates. So much for *Marbury* v. *Madison*.

Despite this limitation, we find little support for the claim that the expansion of issues occurs in a trivial number of cases. The results presented in Table 2 indicate that, while such transformations were intermittent during the Warren Court, over the last 25 years the justices have been quite willing to incur the wrath of their colleagues by manipulating the issues on their plenary agenda. Furthermore, unlike searches for decisions pertaining to broad issue areas—such as search and seizure or death penalty cases, which can be readily distinguished with a few key words—it is virtually impossible to specify all the enormous variations in language that the justices might use to indicate a change in issues. The implication is obvious enough: The data in Table 2 are most assuredly an underestimate. Yet, even as a conservative figure, the incidence of issue expansion uncovered here is, in proportional terms, comparable to the rates at which the Court overturns precedent, invalidates federal legislation, and grants certiorari, "infrequent" decisions which many political scientists regard as systematic and explainable (see, e.g., Caldeira and McCrone 1982, Funston 1975, Perry 1991, Segal and Spaeth 1993, 319–20, 323–4).

What kind of language from these opinions serves to validate issue fluidity? The following examples convey their general flavor.

> All of those persons in Illinois who may have followed the progress of this case will, I expect, experience no little surprise at the Court's opinion handed down today. Stanley will undoubtedly be surprised to find that he has prevailed on an issue never advanced by him. The judges who dealt with this case in the state courts will be surprised to find their decisions overturned on a ground they never considered (*Stanley* v. *Illinois* 1972, 662).

> The Court today decides a question the parties did not present, brief, or argue. By so doing, the Court rules without the benefit of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions" (*State Land Board* v. *Corvallis Sand & Gravel Co.* 1977, 384–5).

> I . . . cannot join the Court's opinion because it reaches out to decide a wholly distinct issue not presented and not capable of being treated fairly without further development of a factual record. . . . This question was not presented in the certiorari petition and not a single word is devoted to it in the briefs (*United States* v. *Sharpe* 1985, 700).

> This Court inappropriately reaches out to address two *Miranda* issues not raised by the prosecutor in his petition for certiorari (*Colorado* v. *Connelly* 1986, 183–4).

> This case could easily be decided within the contours of established First Amendment law. . . . Instead, "find[ing] it unnecessary" to consider the questions upon which we granted review, the Court holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court (*R.A.V.* v. *St. Paul* 1992, 397–8).

> The Court holds that Amtrak is a Government entity and therefore all of its actions are subject to constitutional challenge. Lebron, however, expressly disavowed this argument below, and consideration of this broad and unexpected question is precluded because it was not presented in the petition for certiorari. The question on which we granted certiorari is narrower (*Lebron* v. *National Railroad Passenger Corp.* 1995, 975).

The justices' concerns or complaints about rulings that are overly broad or that address issues not found among the "Questions Presented" correspond quite favorably with our original coding rules. These samples make clear that at least some members of the Court believed a decision exceeded its proper scope and reached questions not formally presented.

[13] Our electronic search was conducted on the Law Office Information System's CD-ROM version of the *U.S. Reports* for cases decided from the Terms of the Court, 1951 to 1995. The key words and phrases for our search were the following: advisory opinion, beyond what is necessary, did not brief, did not raise, fully developed record, neither raised, not among the questions presented, not argued, not asked, not briefed, not litigated below, not presented, not raised, not the question presented, Rule 14.1, Rule 21.1, Rule 23.1, Rule 24.1, *sua sponte*, without a full briefing, without argument, without briefing, and without the benefit of argument.

Whatever conclusions one may draw about how often the justices have disparaged the expansion of issues, the more penetrating questions is whether, by this yardstick, *Mapp* v. *Ohio* qualifies as a legitimate case. The information in Table 1 presents what definitely appears to be precisely the same manner of remarks; writing in dissent, Justice Harlan protested the Court's decision to use that case to examine a question not presented. A careful review of our critics' coding procedures, however, quickly reveals that Harlan's dissent does not suffice. True enough, he begins by claiming that the issue of admissibility in state courts of evidence obtained by illegal searches was not properly presented, but according to our critics, any concession that the question was raised in the litigation—however remotely—invalidates his claim. Harlan's opinion therefore fails to qualify because it maintains not that the question was never raised but that it was not presented sufficiently; he admits that, although it was "argued only extremely tangentially," the applicability of the exclusionary rule was indeed an issue in the case. Likewise, he is dismayed the decision had been reached without "the benefit of full briefing." As Epstein, Segal, and Johnson explain, such language "suggests that the issue was in fact briefed, and that is the case. . . . Thus, under the circumstances, it would be rather difficult to claim that issue was not part of the legal record" (p. 852). As we have already noted, the question of binding the states to the exclusionary rule can be "located" within the briefs. Once again, *Mapp* v. *Ohio* cannot overcome the hurdles put in place by Epstein, Segal, and Johnson.

Notwithstanding our critics' dismissal of *Mapp*, their more general suggestion that the Court's opinions can serve to flag bona fide cases of issue expansion remains highly plausible. Accordingly, the acid test is whether any of the cases in our original data set contained such opinions, and, if so, whether those opinions were filed in the same cases in which we claimed that the plenary agenda had been expanded. It turns out that, of the cases identified by our search, eight were decided during the 1988 term; more important, six of those eight were precisely ones we had labeled as cases of issue transformation.[14] In other words, both we and the justices—completely independent of each other—came to substantially the same conclusions.[15]

The following are the relevant excerpts from those opinions.

> I . . . do not join the latter part of the Court's opinion to the effect that none of the FSIA's exceptions to foreign sovereign immunity apply in this case. As the majority notes, the Court of Appeals did not decide this question. . . . Moreover, the question was not among those presented to this Court in the petition for certiorari, did not receive full briefing, and is not necessary to the disposition of the case. Accordingly, I believe it inappropriate to decide here, in the first instance, whether any exceptions to the FSIA apply in this case (*Argentine Republic* v. *Amerada Hess Shipping Corp.* 1989, 443).
>
> I join Parts I, II, and III of the Court's opinion. I refrain from joining Part IV and thus concur only in the judgment. My concern with Part IV is that it seems to me to amount to only an advisory opinion on what the Bank Board may do, based on a surmise of what the Bank Board might someday conclude it must do in order to liquidate "in an orderly manner" (*Coit Independence Joint Venture* v. *FSLIC* 1989, 588).
>
> I do not join the Court's assessment of this case under the Equal Protection Clause. Although the equal protection issue received nominal attention in the trial court. . . . it was neither reviewed by the Texas Court of Appeals nor briefed before us (*Dallas* v. *Stanglin* 1989, 29).
>
> It may well be, as the Court decides . . . that the Due Process Clause . . . creates no general right to basic governmental services. That, however, is not the question presented here; indeed, that question was not raised in the complaint, urged on appeal, presented in the petition for certiorari, or addressed in the briefs on the merits. No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties (*DeShaney* v. *Winnebago County Social Services Dept.* 1989, 203–4).
>
> The Court, I fear, because of what it regards as the investment of time in having this case argued and briefed, is strong-arming the [jurisdictional] concept. . . . We have jurisdiction . . . only if there is a "final judgment" by the "highest court of a State" in which a decision could be had (*Duquesne Light Co.* v. *Barasch* 1989, 317).
>
> In the past, this Court has overruled decisions antagonistic to our Nation's commitment to the ideal of a society in which a person's opportunities do not depend on her race . . . and I find it disturbing that the Court has in this case chosen to reconsider, without any request from the parties, a statutory construction so in harmony with that ideal (*Patterson* v. *McLean Credit Union* 1989, 191).

Among other things, they inveigh against deviations from the questions presented as well as the absence of adequate briefing and argument. These opinions, we think, do not invite wildly varying interpretations; indeed, the tenor of this language is difficult to distinguish from the companion examples we have already sketched. As such, they strike us as illustrations of a majority's capacity to remold a case to suit its purposes, even at the cost of their colleagues' objection. We are convinced, therefore, that this feature of our critics' coding is a useful and reliable method for helping to pinpoint legitimate cases of issue expansion; since it successfully unearths many of the same cases we had placed in that category, we can hardly conclude otherwise.

In the analysis of our critics, however, our data fare no better than *Mapp* v. *Ohio*. Confronted with this highly confirmatory evidence, Epstein, Segal, and Johnson cast it all away with the following rationale: The justices are wrong. In a series of footnotes to their appendix (see p. 852), they dismiss all of these "informal sanctions," declaring that they instead reflect a justice's ill-advised misstatement, poor judgment, or misreading of the

[14] Moreover, one of the remaining two, which protested issue expansion by a mere plurality of the Court, could not have qualified by our standards. By our original coding rules, a question could qualify as expanded only if the treatment of that issue was found in an opinion (or one of its component parts) to which a majority of justices subscribed.

[15] In one case, even the majority opinion provided additional confirmation, noting that "although the parties have not discussed it, we must first inquire into our jurisdiction to decide this case" (*Duquesne Light Co.* v. *Barasch* 1989, 306).

briefs.[16] So, in some instances—at least those cases within our data, certainly—the members of the Court cannot be trusted to provide the necessary corroborative evidence. According to this view, not only we but also the justices are wrong and (coincidentally) about the same cases.[17]

By each of our critics' standards, then, our data fail to measure up: Broad rulings cover narrow questions, issues lurk within the briefs, and the justices create mistaken impressions of issue expansion. The proof of our shortcomings is dubious, however, if the method used to arrive at that judgment is itself flawed. We conclude that it is. Transfixed by the doctrine of *sua sponte* and unwilling to consider issue fluidity as a possible component of the Supreme Court's agenda setting, Epstein, Segal, and Johnson make a serious error of empirical analysis: They allow their predispositions to guide both their appraisal of our contrary findings and the design of their own research; not surprisingly, prior beliefs receive considerable support (see Gould 1996).

In evaluating our original analysis, for example, Epstein and colleagues indict our method on a number of grounds, not the least of which is its use of key summaries within the briefs as a means of calibrating the issues that parties present to the Court. Our critics counsel what they believe to be a more prudent approach, citing as a worthy model recent scholarship by Spriggs and Wahlbeck (1995) on briefs amicus curiae. Ironically, our coding scheme is virtually identical to Spriggs and Wahlbeck's. Still, our design is judged seriously deficient, while this same method employed in a different context produces results with which our critics "do not, and cannot, take issue" (p. 849). It appears that they laud the method when it generates agreeable results and condemn it when it leads to conclusions less to their liking.

Moreover, in developing their own research strategy, our critics establish coding rules that make it difficult, and in some cases impossible, for the Court to expand the range of issues. At the same time, some of those rules are left vague and flexible enough so that subjective judgments favoring their hypothesis are possible. Finally, Epstein and colleagues demand independent confirmation from the Court, but when the justices provide it, it is pronounced undependable, explained away, and banished to an appendix.

In the end, our critics accuse us of not understanding the subtleties of a collegial court bound by important norms that impose significant constraints on the justices' discretion. Supported by a set of alternative tests, Epstein, Segal, and Johnson dismiss our claims of issue expansion. By their tests, we are only too willing to concede, the data often do not support our conclusions. Of course, we should also emphasize that, by those same standards, *Mapp* v. *Ohio*—the classic case of issue expansion, acknowledged by political scientists, legal scholars, the justices, and even our challengers—fails as well. Not only does it fail, it fails utterly and miserably.

THE CASE OF CONSTRUCT VALIDITY

An important question remains: Did our original analysis genuinely measure transformations in the Supreme Court's plenary agenda, or did we assess degrees of adherence to the doctrine of *sua sponte*? Whether a measure accurately taps the property it purports to gauge is a principal question in any research design. One of the more effective ways of resolving the issue of construct validity is through convergent and discriminant procedures; principally, this involves a systematic comparison of different attributes measured by multiple means (Campbell and Fiske 1959). The central assumption is that "correlation coefficients among scores for a given property measured by different instruments should be higher than correlations among different properties measured by similar instruments" (Nachmias and Nachmias 1987, 171). Fortunately, we are provided with just such a scenario.

In this context, we and our critics employ techniques of measurement that are roughly equivalent; with some important differences, both coding systems require one to compare the syllabi from the Court's opinions against the contents of the briefs on the merits. We clearly have conflicting views, however, about what concepts are reflected through this instrumentation.

Quite separate from either of these measures, we have the independent evaluations of the justices themselves. It is obvious from their written opinions that the members of the Court sometimes conclude that a majority has addressed issues not presented. Since the syllabus in a case is prepared by the Clerk of the Court only after all the opinions have been written, the justices certainly are using a different procedure for arriving at their conclusions. Whether those protests are sparked by the majority's agenda transformations or by violations of the Court's norm against deciding issues *sua sponte* remains to be seen; in either case, it is still an independent estimate of a characteristic, calculated by a wholly separate method.

It follows that, if Epstein, Segal, and Johnson are correct, then the correlation between their coding of violations of the Court's norm and the justices' informal sanctions (i.e., the correlation between two different measures of the same attribute) should be greater than the relationship between our critics' results and our original coding of issue expansion (i.e., the correlation between two different attributes measured by a common method). If, however, our coding correlates more highly with the justices than with our challengers, then that would suggest the concept of issue expansion on the Supreme Court is the more meaningful one.

With the data from the 1988 term (N = 160), the correlations for these three different measures are easily

[16] Epstein and her coauthors claim to deal exhaustively with such opinions; curiously, they offer no explanation for the opinions in two of these six cases.

[17] It stresses credulity to argue that we were wrong in every case *and* that the justices were wrong in every case *and* that, even though they are substantively similar, each of the justices' errors are explained by idiosyncratic factors *and* that our combined "errors" (i.e., McGuire/Palmer's and the justices') are unrelated. If our critics' analysis were a regression model, it would clearly violate one of its basic assumptions (Berry and Feldman 1985, 73–8).

computed.[18] (Epstein, Segal, and Johnson only replicated our analysis for one category of our variable; since they do not question it, we assume that they agree with our coding when no issue transformation was found.) The results are revealing: The correlation between the judgments of the justices and Epstein, Segal, and Johnson is −0.02, while the relationship between our coding and that of our critics is 0.23. This is exactly the opposite of what one would expect to find if the concept of *sua sponte* had validity. In contrast, at 0.48, the correlation between our coding and the Court's is substantially greater than either of the other two, suggesting that issue fluidity carries the more plausible interpretation. Measured by alternative means, judgments about the nature of transformations in the high court's plenary agenda track one another quite closely indeed.[19]

We hasten to add, however, that because of limited variance the two correlations involving our critics' measure are suspect. Furthermore, in fairness to Epstein, Segal, and Johnson, we cannot be certain how they would have coded the remaining cases. A general survey of the data they do code remains equally telling, nonetheless. Among the 18 cases they examine, their method of analysis uncovered none of the cases in which the justices protested issue expansion. Observing our coding rules, we located them all.

We do not consider our analysis to be the last word on the question of issue expansion. The only claim we make here is that, given the choice between the *sua sponte* doctrine and issue fluidity, ours is the more responsible construction.

CONCLUSION

Deciding whether to transform the issues in a case is, we think, essentially an exercise in agenda setting. The justices continually face the responsibility of determining what cases—and thus what issues—deserve their scarce attention. Ideological considerations play a leading role in this process; so, given the Supreme Court's broad discretionary power, it seems entirely likely that the justices may, from time to time, find it in their interest to remold the issues in a case as a means of realizing their policy goals. Such a position is both consistent with and amply supported by research on the process of agenda building in the high court.

We have revisited our earlier findings on the frequency with which the Court capitalizes upon this aspect of its discretionary authority, and our survey reinforces those initial claims. Casting a wider net, we have also found evidence to suggest that our findings are by no means isolated to the term we first examined. Over the last quarter-century, by our conservative estimate, issue expansion has been a modest but steady feature of the Supreme Court's plenary docket.

No one disputes that there are norms militating against the wholesale pursuit of the justices' policy ambitions, and the norm against deciding issues not presented is clearly among them. Still, these are "limitations not absolute bars to the exercise of Supreme Court power" (Murphy 1964, 29); like all norms, it can be transgressed by the members of the Court, and, when a majority decides to chart a new course in a case, some justices may be apt to decry their colleagues' decision. Why does this occur? Do such outcomes manifest varying degrees of faith in the doctrine of *sua sponte*, or are they, like much of the Court's agenda setting, ideologically motivated?

As a capstone to their argument, Epstein, Segal, and Johnson draw instructive value from *Patterson* v. *McLean Credit Union* (1989), one of the cases in our data set in which the majority, with no request from the parties, decided to entertain the advisability of overruling the precedent established in *Runyon* v. *McCrary* (1976). To certify the force of the *sua sponte* doctrine, they note the fallout from this decision to revisit unilaterally the decision in *Runyon*; justices Blackmun, Brennan, Marshall, and Stevens dissented, voicing their strong disagreement with the majority's decision to expand the questions presented. According to our critics, such sanctions help substantiate the doctrine of *sua sponte*.[20]

One need only inquire as to what these four justices have in common to formulate an alternative hypothesis: They were all members of the original majority in *Runyon*. Given the threat of overturning a precedent they themselves had a hand in crafting, we find it not at all surprising that the original members of the *Runyon* majority would dissent in the face of this transformation of the plenary agenda. The more straightforward explanation is that these justices were simply animated by their own values. There was a time when conscientious scholars believed that the Stoic traditions of legal analysis thoroughly governed the decisions of the Supreme Court and that the policy preferences of the justices played little role in their calculus. We had thought that such a time was long since passed.

APPENDIX

Based on our search of the U.S. Reports (1951–95 terms) the following were identified as cases involving issue expansion. These data serve as the basis for the frequency distribution presented in Table 2.

[18] Our coding led us to conclude that issue expansion occurred in 18 cases (McGuire and Palmer 1995, 697), but in replicating our analysis we discovered that, because of a missing merits brief, one of those cases should not have been included. Parenthetically, this case, *Fort Wayne Books, Inc.* v. *Indiana* (1989), was one of the three classified as errors by Epstein, Segal, and Johnson. So we claim issue expansion as having occurred in 17 cases. By contrast, our challengers allow that an issue not formally presented was decided in only one case, the "highly explicable exception" of *City of Richmond* v. *J.A. Croson Co.* (1989).

[19] Since issue expansion is being measured by two different methods, this is not a question of intercoder reliability, which measures agreement between coders using the same measurement tool. Even by that standard, however, our agreement with the justices would still be more than acceptable by the protocol of replication (kappa = .47; see Elder, Pavalko, and Clipp 1993).

[20] According to Epstein and colleagues, however, this case still does not qualify as a legitimate instance of issue expansion. The issue of reversing *Runyon* clearly was not raised, but the Court cannot be said to have engaged in issue expansion, say our critics; although it considered this question "without prompting or suggestion," that the Court ordered the parties to brief this issue is sufficient to establish it as a question the parties "asked" the Court to decide.

1 *Albrecht* v. *Herald Co.* 1968. 390 U.S. 145
2 *Andrews* v. *Louisville & Nashville R. Co.* 1972. 406 U.S. 320
3 *Argentine Republic* v. *Amerada Hess Shipping.* 1989. 488 U.S. 428
4 *Arizona Governing Committee* v. *Norris.* 1983. 463 U.S. 1073
5 *Arkansas* v. *Sanders.* 1979. 442 U.S. 753
6 *Bangor Punta Corp.* v. *Chris-Craft Industries, Inc.* 1977. 430 U.S. 1
7 *Batson* v. *Kentucky.* 1986. 476 U.S. 79
8 *Beck* v. *Ohio.* 1964. 379 U.S. 89
9 *Bellotti* v. *Baird.* 1979. 443 U.S. 622
10 *Berry* v. *Doles.* 1978. 438 U.S. 190
11 *Board of Curators, Univ. of Mo.* v. *Horowitz.* 1978. 435 U.S. 78
12 *Brown* v. *Socialist Workers '74 Campaign Comm.* 1982. 459 U.S. 87
13 *California Federal S. & L. Assn.* v. *Guerra.* 1987. 479 U.S. 272
14 *California* v. *United States.* 1978. 438 U.S. 645
15 *Central Bank* v. *First Interstate Bank.* 1994. 114 S.Ct. 1439
16 *Coit Independence Joint Venture* v. *FSLIC.* 1989. 489 U.S. 561
17 *Coker* v. *Georgia.* 1977. 433 U.S. 584
18 *Colorado* v. *Connelly.* 1986. 479 U.S. 157
19 *Cooper* v. *New York.* 1953. 346 U.S. 156
20 *Concrete Pipe & Prods.* v. *Constr. Laborers Trust.* 1993. 113 S.Ct. 2264
21 *Corvallis Sand & Gravel Co.* v. *Oregon Ex Rel. State Land Board.* 1977. 429 U.S. 363
22 *Culombe* v. *Connecticut.* 1961. 367 U.S. 568
23 *Dallas* v. *Stanglin.* 1989. 490 U.S. 19
24 *Darby Drug Co., Inc.* v. *Ives Laboratories, Inc.* 1982. 456 U.S. 844
25 *Deshaney* v. *Winnebago Cty. Soc. Servs. Dept.* 1989. 489 U.S. 189
26 *Duquesne Light Co.* v. *Barasch.* 1989. 488 U.S. 299
27 *East Carroll Parish School Bd.* v. *Marshall.* 1976. 424 U.S. 636
28 *Electrical Workers* v. *Foust.* 1979. 442 U.S. 42
29 *Evans* v. *Newton.* 1966. 382 U.S. 296
30 *Evans* v. *United States.* 1992. 504 U.S. 255
31 *Farmer* v. *Brennan.* 1994. 114 S.Ct. 1970
32 *First Boston Corp.* v. *Chris-Craft Industries, Inc.* 1977. 430 U.S. 1
33 *Florida* v. *Wells.* 1990. 495 U.S. 1
34 *Ford Motor Co.* v. *EEOC.* 1982. 458 U.S. 219
35 *Ford Motor Co.* v. *NLRB.* 1979. 441 U.S. 488
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