Why the Supreme Court Cannot Make Liberal Economic Policy

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Abstract

While the U.S. Supreme Court hands down liberal economic cases from time to time, there have been few eras of progressive economic change since the New Deal. My argument is that this has to do with strategic litigants' and their varying incentives based on whether they are motivated by profit when they litigate. When a liberal Court indicates a willingness to hear economic cases, risk averse profit-minded litigants are more likely to settle their cases and are less likely to initiate litigation than they otherwise might. Economically progressive interests, who might want to respond to those liberal signals, have no one to litigate against. Evidence presented here is that the Court's conservative economic signals (measured in multiple ways) result in an expansion of economic cases heard by the Court years later (as suggested by Baird 2007). But liberal economic signals interrupts the Court's economic agenda, which suggests that the Court cannot easily use the same agenda building strategy as in other issue areas, and moreover, that conservative Courts' precedent that constrains Congress' ability to regulate for profit interests is not easily undone.

One of the most important effects of interest groups in courts is that many cases – especially the politically important ones – would not reach the Supreme Court without their support (Epp 1998; Baird 2004; Rice 2014). Because the sponsorship of cases is costly, groups have an incentive to pay close attention to recent Supreme Court cases when deciding how to get the most policy-relevant bang for each buck. This allows Justices to have a hand in attracting future cases that maximize their own policy relevance, creating a symbiosis between interest groups and Justices.

The argument in this paper is that there is an exception to the theory laid out in this body of work: signals from the Supreme Court will not inspire litigation that will eventually be decided by the Court in the future if the Court indicates a willingness to challenge business interests. This is because while most litigants have an incentive to take risks when pursuing litigation, profit minded actors (or those groups that represent their interests, such as the Chamber of Commerce) are entirely risk averse. When they perceive an increased risk of losing (i.e., when the Court signaled a willingness to be liberal in economic issues), they will fail to participate in litigation. If someone sues them in a case that might otherwise be interesting to some set of liberal Justices, they have a greater incentive to settle that litigation, removing it from the judicial agenda entirely. To understand why this would be so requires some in-depth analysis of prior literature in this area along with a more complete justification of why any actor would be willing to take risks.

This paper proceeds by providing an account of this theory, which has novel implications for understanding why the Court has not had liberal eras related to economic issues, and indeed implies that it is basically incapacitated from inspiring litigation to build on its signals as has been shown in prior literature. I then replicate Baird's (2007) analysis to show that if anything,

the effect is stronger than previously shown, as it benefits from nearly three more decades of data. I then use multiple measures of signals to show that this effect only holds if the signals occur in issues related to civil rights or liberties (regardless of ideology), or for conservative economic signals – and the impact of conservative economic signals on future litigation that ends up on the Supreme Court's agenda is strong. Moreover, the theory outlined here suggests that groups keep the median Justice in mind when developing a litigation strategy, and as in Baird (2007, chapter 6), the impact is particularly strong for cases that are more likely to be 5-4 or 6-3 decisions.

But for its liberal signals in economic issues, I show that future litigation screeches to a halt in future years, with a strong negative impact (especially in its impact on cases that are 5-4 and 6-3). Though this does not mean that the Court will have no opportunity to inspire future litigation after signaling its intent to be liberal, the snowballing effect revealed by prior literature is absent. I end by arguing that this exception proves the rule outlined in this prior literature: the Court would be impotent in its ability to advance comprehensive policy that could lend itself to protecting workers, the environment, or otherwise, regulate the economy in ways that challenge business interests, even if a majority of Justices wished to do so.

The importance of strategic litigation for *comprehensive* policymaking by courts

The importance of active interests has been substantiated in many contexts, even outside the U.S. In a cross-national comparative study, Epp (1998) concludes that the most important attribute of a country with comprehensive rights and liberties protections is not the activism of the judges or the comprehensiveness of the constitution, but the litigation "support structure." He uses the case of India to show that even when justices are motivated to protect the rights of

ordinary individuals, they cannot *comprehensively* protect these rights without litigation sponsorship.

Comprehensive policy making in courts depends on access to cases that represent different issues within policy areas. For example, the legal guarantee for equal pay for women is insufficient if there are no protections against unequal benefits, unequal access to promotion, pregnancy discrimination, or sexual harassment. The situation for women cannot change unless there is a comprehensive set of cases that represent all these issues. *Brown* did not bring about legal change by itself. It took dozens of cases to chip away (at least legally) at the Jim Crow political structure. Organizations and other political or legal entrepreneurs who support litigation provide courts with the cases they need to make comprehensive policy.

Baird (2004, 2007), Baird and Jacobi (2009), and (Rice 2014) provide evidence that information about Justices' policy priorities from the most recent term result in additional cases four to six years later. Baird (2007) reveals this impact on the Circuit Courts 3-4 years later. Likewise, Rice (2014) shows that the Supreme Court affects the federal trial courts' agendas after four years. Baird (2007) shows that these resulting cases are more likely to be perceived as politically important, both by interest groups who file a higher number of amicus briefs (measured as the number of briefs per case in those policy areas), but also by the Justices themselves, in their increased numbers of concurring or dissenting opinions. Despite all of this corroboration, this process remains in a black box without direct measures of interest groups' decisions about which cases to support and how to frame that litigation.

Baird and Jacobi (2009) open a bit of this black box by looking at the impact of information contained in dissenting opinions on future litigation. Specifically, when dissenting opinions mention that a case – in any policy area – is not about the policy area itself but is

instead should have been decided based on legal precedent regarding federal versus state power. They show that resulting majority opinions in those policy areas are, after time for litigation and appeals, are more likely to be framed in terms of federal and state power. Baird and Jacobi (2009) use a measure from Baird (2007) that indicates how liberal or conservative a case outcome is, using the mean of the majority coalition's ideal points.[1] With this measure, they quantify how much dissenting opinions can move policy in doctrinal space. They conclude that the dissent becomes the majority by inspiring new litigation that transforms the issue, thereby attracting support Justices in previous majorities. Despite the indirectness of the evidence, there is moderately strong evidence that the Supreme Court's ability to affect its own agenda using groups who react to its signals.

Addressing some critiques: The intentionality of these signals and the role of ideology in groups' strategies

Though some may worry that the Court's signals are not as deliberate as this analysis implies, it would hardly be a stretch to imagine that Justices would want to have an impact on the policy-relevance of future litigation. Moreover, the Justices themselves have acknowledged that they intentionally signal for cases (Perry 1991). Another critique of these studies is that Justices do not have to rely on litigants to respond to their signals because the cert pool is so large, but if that is true, why do all these studies find evidence of a consistent lag, such that Justices' preferences only translate into agenda change four to six years later? If the cert pool already has

[1] The use of the mean was later updated by Jacobi (2009) and Clark and Lauderdale (2010) as the median of the majority coalition's ideal points to more accurately reflect the likely bargaining power of the Justices in each majority. As the correlation between these measures is .98, the update would not likely affect the validity of these prior studies.

the cases the Court needs, why wouldn't the Court be more likely to build on the cases in its prior term using the cases present in the cert pool immediately? The consistent finding that it does not do so – in no policy area – makes this critique less valid.

Others have critiqued the assumption that both liberal and conservative groups might sponsor litigation regardless of the ideological direction of these prior cases. The counter to that critique is that all litigation has two sides; if litigants who wants a liberal outcome does not want to pursue litigation, they can simply settle and there would be no case to be heard at the Supreme Court. In essence, all litigation is pursued in the context of a risk of losing, by definition. In liberal eras, there can be no further litigation if the conservative side always settled in the context of a potentially hostile Supreme Court – and vice versa for conservative eras. All policy motivated litigants want to get as much as they can out of litigation, which means moving policy outputs as far to the left – or right – as they think is possible. Thus, even in conservative (liberal) Court eras, one litigant always overshoots by asking the Court to be more conservative (liberal) than it is willing to be. As with the measure of doctrinal space, whether the Court is liberal or conservative is a measure of degree and is therefore not perceived – by any policy minded litigant – to be dichotomously one or the other.

Since it might seem that all litigants might be deterred by a hostile ideological composition at the Court, I begin with the argument that groups that are not motivated by profit are not likely to be as deterred by a hostile ideological environment as profit-minded litigants. Then, I explain why profit motivated groups may be more deterred by an ideologically hostile Court than other kinds of groups. For these reasons, I argue that the ideological composition of the Court is not likely to matter for the Supreme Court's ability to inspire both conservative and liberal litigants to bring litigation in non-economic policy areas. Similarly, policy minded

litigants who are interested in protecting labor, consumers, or the environment are similarly undeterred by a conservative Court. But because profit motivated actors (or those who represent them) will perceive higher levels of risk when profit is on the line, the ability for the Court to undermine profit as a policy motive will be impaired.

Though some might argue that all groups will be deterred by a hostile Court, anecdotal evidence suggests otherwise. *Roe* started the pro-life litigation movement. Despite decades of a clear *Roe*-preserving majority, pro-life groups supported litigation with the hope that the Court would permit states to restrict abortion access under certain conditions. The NAACP helped the University of Michigan defend its affirmative action program before an inhospitable Supreme Court (*Gratz*[2] and *Grutter*[3]). After losing at the federal district court level, the NAACP may have chosen to cut their losses rather than allow the Supreme Court to outlaw affirmative action in the entire country. Yet they decided to help the University of Michigan appeal the loss despite numerous clear signals from the Court that it would not likely uphold affirmative action. Why would groups litigate when the tea leaves from previous Court decisions suggest that they will lose?

To answer this question, consider Sebelius[4], which upheld the ACA, but began with conservative rhetoric that guts the Commerce Clause. The Supreme Court Judicial Database codes that decision as liberal, and rightfully so, but conservative litigants have every incentive to use the conservative content in that decision to their advantage. Thus, all groups have an incentive to aim toward the median justice.

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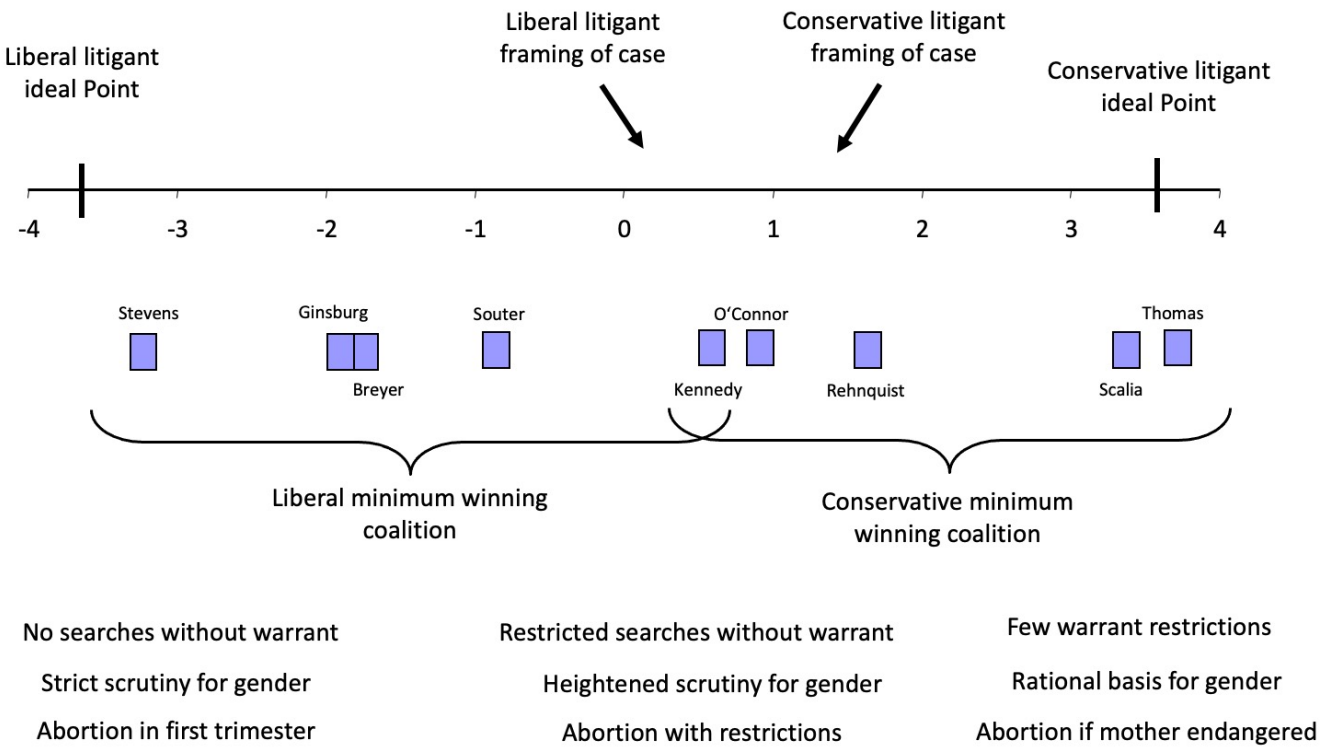
[2] 539 US 244 (2003).
[3] 539 US 306 (2003).
[4] 567 U.S. 519 (2012).

To illustrate why policy-minded litigants would care more about their perception of the median Justice(s) than the ideological direction of the cases from recent years, I created a spatial model of likely interest group ideal points, relative to the ideal points of the Justices. Figure 1 presents an historical illustration of how groups may have perceived a winning strategy in 1997, a year I chose because of the wide variation of Justice ideal points. Justices are situated along the continuum using Martin-Quinn (2002) dynamic ideal points. The main takeaway is that regardless of whether the cases that comprise the signals are more liberal than conservative, the main ideological information that groups must understand is the placement of the Court's median. Very few groups – if any – are choosing a strategy based on whether the Court's median matches their own ideal points.

Figure 1. Strategic Agenda Setting Model: Civil Rights and Liberties Litigation, 1997



Here is a story from an interview from two decades ago that makes this point even clearer. When I interviewed Steven Shapiro, the legal director of the ACLU in May of 2001, I asked: what if the Supreme Court moved much further to the right, would you stop bringing cases to the Court? He laughed at me for asking such a stupid question. I pushed further: well, what if, as in Miller v. California, the Court itself said: stop bringing us these kinds of suits, and again, looked at me quizzically until I told him that reviewers told me I had to ask that question. He told me that right after Miller, the ACLU continued sponsoring cases, not just related to the First Amendment, but also in obscenity law. They may change the nature of exactly which cases they bring or change how they are framed, but they refuse to relent. In other words, it is not as if the ACLU or most other groups are thinking: "well, 65% of the most recent Supreme Court term were conservative / liberal, so we had better look elsewhere for something else to do until the tide changes." Indeed, (Kobylka 1991) found that many groups who supported obscenity litigation meant for the Supreme Court actually increased their participation in such cases after *Miller* (Kobylka 1991). Why might this be the case? Because they are experts at framing legal cases, but also perhaps because there may be a benefit to losing.

An important caveat is worth mentioning on the assumptions for the impact of conservative signals on liberal interests or vice versa. For litigation to reach a court, it takes two sides, by definition. If a liberal group like the ACLU decides to sponsor litigation, it cannot do so without the other side to also litigate. If one can believe that *Brown* inspired future litigation, it inspired liberal interests to begin litigation, perhaps, but if the other side refuses to respond, or pays off the litigant, or eventually settles at any point along the way, the case cannot get to the Supreme Court. So, if a case is at the Supreme Court, two sides participated. Just liberal groups responding to a liberal signal (or vice versa) without the "cooperation" of the other side is a

logical impossibility. It takes two to tango, but when the Supreme Court is liberal, the liberal litigant may find himself along on the dance floor.

The benefit of losing

Since interest groups not only care about policy outcomes but also organizational maintenance, groups may benefit from losing a policy battle because members or potential members who are disappointed with the policy outcome may be inspired to join or send more money. At the most basic level, groups must convince their members that the group's institutional strategies matter; otherwise, they will not succeed in perpetuating their survival (Wilson 1973). Specifically, groups tend to ensure that the benefits that they offer to members are different than the benefits offered by other groups. Browne suggests that interest groups try to cultivate "specific and recognizable identities" to distinguish themselves from other groups (1990). Spill (1997) finds empirical evidence that when there are many groups with similar policy priorities, only a few of them will spend their resources on litigation, precisely for the reason given by Browne (1990) – they are trying to develop their own identity. Groups who spend their resources on judicial lobbying should be relaying the message that courts matter to current and potential members. The message that courts can do good things may be just as important as the message that courts can do harm; *that courts can do both harm and good justifies their institutional niche of those who litigate*. Losing, therefore, is part of their narrative to their supporters.

One example of a group that uses bad news to generate financial support is the American Civil Liberties Union's (hereafter, ACLU). The ACLU's website uses bad news to generate enthusiasm for donating money:

> **The ACLU needs your help to defend our most basic freedoms!** The Bush Administration is rolling back our rights in the name of homeland security ... extremists on the Christian Right have the ear of the White House ... and the federal judiciary is increasingly hostile to civil liberties.[5]

The Eagle Forum's most prominent leader, Phyllis Schlafly wrote a book entitled, "The Supremacists: The Tyranny of Judges and How to Stop it," but the Eagle Forum also did not give up. During the Bush II era, the Sierra Club's website, you can sign up for email alerts called "RAW: the Uncooked Facts of the Bush Assault on the Environment." But perhaps the most persuasive example of the benefit to losing is that the ACLU received $24 million in donations in the single weekend of the travel ban in January 2017, and added 200,000 members to their rolls, which was a 50% increase.[6] While balancing the losses with the achievements, the clear message from both liberal and conservative groups is that there is something about the political environment that is threatening and therefore it is worth participating in action to curb additional negative outcomes.

Moreover, groups have an incentive to put out the message that their institutional venue is powerful. Groups have an incentive to publicize their losses because it shows that the venue that they have chosen matters. In a public statement about the Supreme Court's decision in *Bush v Gore*, Steven R. Shapiro, Legal Director of the ACLU, said, "While the ACLU has criticized many court decisions over the years, we respect the independence of the courts and the special

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[5] https://www.aclu.org/Contribute/Contribute.cfm

[6] Stack, Liam. "Donations to A.C.L.U. and Other Organizations Surge After Trump's Order." *New York Times*, Jan. 30, 2017.

role they hold in our carefully structured system of limited and divided governmental powers."[7] The obvious message is that the Court should and does have power – power to protect civil rights and civil liberties – or allow those protections to falter. What underlies this point is that if the ACLU lacks support, our civil rights and liberties will be eroded. Thus, perhaps bad Supreme Court decisions are not so bad because they are advertisements for generating organizational resources.

We have evidence of the possibility that such a strategy works on the individual's choice to join or support a group. First of all, one of the most commonly cited reasons for political participation is dissatisfaction with the status quo. Part of Azjen and Fishbein's (1980) expectancy value model of participation includes dissatisfaction as an impetus toward participation. It is the perceived "attractiveness or aversiveness of expected consequences" (Feather 1982: 1). Fenwick and Olson (1986); Jessup (1978) and Lyons and Lowery (1986) find that workers are more active within unions when they are more dissatisfied. Furthermore, Opp (1988) and Finkel and Opp (1991) find that when something salient happens to make people angry, they are more likely to join political parties. Thus, since dissatisfaction matters for participation, and there is likely to be a jump in participation after highly salient political outcomes that are perceived as "bad," groups and social movements benefit from highlighting undesirable policy outcomes.[8] In the context of Supreme Court amici participants, Hansford

[7] American Civil Liberties November Press Release. https://www.aclu.org/press-releases/election-controversy-aclu-urges-high-court-defend-power-judiciary-and-safeguard-right. Retrieved on February 9, 2021.

[8] There are many examples of groups that highlight bad outcomes. If you join the ACLU on-line, you receive an email from Ira Glasser, the Executive Director, saying "Thank you for helping us hold the line in this alarming political climate."

shows that conservative and liberal amicus briefs react to decisions regardless of ideological content (2011).

Undesirable policy outcomes also make for a threatening environment, which tends to spawn activity for the benefit of the public good or collective benefits (King and Walker 1992). Hansen (1985) even suggests that the threat of undesirable policy outcomes is a greater cause of participation in collective action activities than the potential of accessing a collective good. One example of this is when businesses organized in the 1960s to try to thwart increasing massive government regulation (Salisbury 1984). Furthermore, Walker concludes that one of the most important causes of interest group activity is threat from the ideological opposition's activities (1991).

Furthermore, the participation of opposing groups in litigation also inspires collective action groups to litigate to offset their impact. Gates and McIntosh (1988; as seen in Olson 1990: 855) found that motivations to litigate emerged as the number of groups who participate in litigation increased. Furthermore, abortion group memberships were affected greatly by *Roe* (Epstein and Kobylka 1992). After *Roe*, pro-life memberships and activities boomed, and pro-choice memberships and activities declined dramatically (Johnston 1977; Jackson and Vinovskis 1983, as seen in Rosenberg 1991: 339). Thus, losing ground is one way to attract potential members and additional resources.

It should be emphasized that this does not mean that groups participate with the intention of losing. It simply means that they may be inspired to take risks. Risks in litigation are often associated with pushing the policy envelope as far as they perceive justices will allow it to go. Groups can litigate offensively after a pleasing Supreme Court decision, or they may also engage in defensive litigation to prevent further losses. Furthermore, there are often ways of framing the

issue in a way to increase the chance of winning. Those who study interest group litigation often emphasize the interest groups' strategies in framing the issues to maximize the chances that they will get a majority on their side (Vose 1959; Cortner 1968). Epstein (1985) and Epstein and Kobylka (1992) show that the success rates of interest groups depend on their ability to successfully frame the legal issues.

The decision to litigate incurs costs and provides benefits that are not likely to depend on whether the group or actor is motivated by profit. There is no reason to believe that the costs of litigation in terms of fees or the benefits in terms of winning policy would be different across different kinds of groups.[9] What is not constant across groups is the cost and benefit of losing. Interest groups that support litigation in the areas of civil rights and civil liberties or the liberal side of economic issues are often large membership groups which depend on their memberships for resources used to perpetuate and strengthen their organizations. Groups with memberships overcome the collective action problem of providing collective benefits because they can claim credit for them, as suggested by Browne with the idea of carving out an identity that is related to their strategy (1990).

The risk-aversion of for-profit interests

Groups or actors that are profit-motivated have no incentive to provide collective benefits through litigation, unless their individual benefit from the policy outcome outweighs the costs of litigation.[10] Therefore, the money spent on litigation must be less than the potential gain in profit

[9] In some kinds of cases, attorney's fees are provided statutorily, and furthermore, house counsel means that additional attorney's fees are not required. However, this is likely to have an impact on the differences between these kinds of cases, rather than the aggregate policy area.

[10] This model transforms the collective action game from a prisoner's dilemma into an assurance game, first recognized by Taylor (1976). The assurance model suggests that cooperation will ensue as long as individual benefits are greater with cooperation, even under the condition that the other actor defects.

that is predicted to come from winning the case. Risky litigation is particularly costly for actors primarily motivated by profit; there is nothing to gain from losing. Thus, though the benefit of winning in court may be great, the costs and the potential risk may often be sufficiently high to decrease the amount of litigation when the Court is perceived to be hostile to their interests. Greater uncertainty leads to a greater assumption of risk. Consequently, when the Supreme Court's median justice moves in a liberal direction, businesses are less likely to initiate litigation or more likely to settle, making fewer cases in economic policy areas available to the Court.

Perpetuating the organization is an important goal of interest groups that dominate civil rights and civil liberties policy areas, or the liberal side of economic policy areas. This allows these groups to be less deterred by the risk associated with litigating under conditions of high risk because losing allocates (at minimum, perceived) benefits to the losers. On the other hand, there is no benefit associated with losing if an actor is primarily motivated by profit. Therefore, when the Supreme Court is perceived to be liberal, profit-minded interests are less likely to engage in litigation. They are more likely to settle before litigation begins or they are less likely to appeal a loss to the Supreme Court. Since there are two sides of a case, litigation only continues when both sides believe that there is a potential benefit to litigating.

This does not mean that businesses never litigate in hostile situations. They may litigate to put off having to pay the other side. They may litigate in circumstances in which they believe that they can out-resource their opponent. They also may litigate when they believe that a liberal Supreme Court decision does not have implications for the case facts in a particular case. This theory does not predict any one case's outcome. Rather it provides the theoretical basis for the expectation of aggregate patterns. Nevertheless, I expect that when the Supreme Court is liberal, economic litigation is less likely to be appealed to the Supreme Court.

On the other hand, when the Court is conservative, liberal groups who are interested in policies that have economic implications will be inspired to support litigation for the same reasons that the nonprofit groups litigate in hostile conditions. Since most groups interested in the liberal side of economic policy derive their resources from memberships, both sides of the litigation will be equally undeterred by the risk associated with the ideological composition of the Court. For this reason, litigation will continue whether the Court is liberal or conservative in civil rights and civil liberties policy areas. Thus, because of the difference in the benefit of losing across groups, the ideological composition of the Court does not matter for non-economic policy areas but will matter for economic policy areas because one side will be unwilling to play ball.

Data and Measures

The data for this project is the United States Supreme Court Database,[11] which, together, include all Supreme Court cases from the terms 1946-2016. Since the interest here is in how litigation patterns affect the Supreme Court's policy-making capacity, the dependent variable comprises the number of cases within policy areas on the Supreme Court's agenda over time. Table 1 presents the eleven policy areas in the analysis, along with their mean number of cases and standard deviations from 1946 to 2016. Taking each policy area across all years, the means range from 1.6 to 28 cases and the standard deviations range from 1.7 to nearly 10.3. There is a great deal of variation both within and between policy areas.

[11] Spaeth, Harold J. United States Supreme Court Judicial Database, 1946-2016. Maintained by Washington University School of Law. http://scdb.wustl.edu/

Table 1. The number of cases on the Supreme Court by policy area, 1946-2016

Policy area	Mean	Standard deviation	Minimum	Maximum
Non-economic policy areas				
Discrimination	20.7	10.1	6	44
First amendment	9.5	5.8	1	29
Privacy	1.6	1.7	0	7
Criminal rights	28.1	10.3	9	67
Taxation	6.7	4.2	0	17
Due process and government liability	6.9	4.3	0	16
Judicial power	17.0	6.2	6	39
Federalism	7.5	3.3	1	16
Economic policy areas				
Labor	5.0	3.6	0	14
Environment	2.9	2.1	0	11
Economic regulation	17.3	6.9	5	41

Note: These policy area categories match Spaeth's coding of "Value" from The United States Supreme Court Judicial Database fairly closely, with the exception of the separation of environmental cases into their own category, the inclusion of personal injury and government liability with non-criminal due process cases, and the inclusion of state and federal taxation into the same category. Attorney law issues are distributed into the relevant policy area. Miscellaneous issues are excluded from the analysis.

Measures of case importance: legal change

Generally, there is an impact of "important" cases on the future agenda (Baird 2004, 2007), regardless of ideology. Baird conceptualizes as important cases as an indication of whether the policy area can be perceived as a priority to the justices on the Supreme Court. This is not easy to measure because as Epstein and Segal claim, I "cannot survey, say, members of the Supreme Court to ascertain those cases that are especially salient to the justices" (1998, 66). Information must not necessarily be perfect to have an impact on behavior, consistent with Theil's (1965) definition of information as the "reduction of uncertainty."

The assessment of the importance of a Supreme Court decision is not a new problem in the literature (see Cook 1993; Epstein and Segal 1998; Collins and Cooper 2012). Judicial

scholars have accumulated several assessments based on constitutional law textbooks to assess the importance of a Supreme Court decision, which are problematic because they have an obvious bias against important statutory cases. Furthermore, Biskupic and Witt (1997) and Epstein, et al. (1996) have derived measures of "landmark decisions." The problem with these assessments is that they are retrospectively evaluated, perhaps even with their impact on future litigation in mind. If I based my measure on the effect of the case on future litigation, then my analysis would contain an element of circularity. Moreover, these measures tend to be biased toward civil rights and liberties cases (Epstein and Segal 1998), and they underestimate the importance of economic or other constitutional issues.

Therefore, it is essential to measure contemporaneous importance rather than retrospective evaluations of the importance of a case, and furthermore, it is important that I use a measure that is less biased against statutory and economic decisions. Epstein and Segal (1998) suggest that the presence of a Court decision on the front page of the *New York Times* is a valid measure of contemporaneous evaluations of the case's political salience. A new measure developed by Collins and Cooper (2012) depends on a wider variety of news sources. One problem with the measure of news attention as the measure in this context is that it is a function of actions of members of the media and therefore is separated from actions of the justices. Baird (2007) measured the indications as the number of reversals, declarations of unconstitutionality, and formal alterations of precedent. This can be thought of as indications of the justices' willingness to engage in legal change, because each of them is literally a function of change. She added the *New York Times* measure as part of the composite measure, mostly because of the evidence that this is less biased against economic cases. Here, these four measures are

standardized on a scale from 0-1 and then summed and are conceptualized as indications of legal change.

The suggestion here is that profit motivations will cause actors' litigation strategies to differ from non-profit motivated actors, because the risk of a loss affects their cost-benefit analysis of whether to litigate differentially. Since profit motivated actors generally dominate economic policy areas, at least for one side of a case, under the condition of an ideological hostile Court, the conservative side of a case is less likely to want their case heard at the Supreme Court, which means that fewer cases with economic policy implications will reach the Court. Because coherent policy cannot be made with a few random cases, the perception that the Court will make decisions that are harmful for profit inhibits the policy-making capacity of the Supreme Court regarding economic policy. I predict that the indications of legal change will follow the analysis in Baird (2004, 2007), and I expect that whether the decisions are liberal or conservative, they will follow the same patterns. Moreover, I suspect that the impact will happen mostly with nonunanimous cases, as Baird (2007) finds that the impact of the indications of justices' policy priorities is most pronounced in cases with divided outcomes.

Measures of ideological content

To test our hypothesis about information that would encourage or dissuade corporate interests to litigate, we need measures that are likely to be information that would be relevant for profit-motivated actors. To measure indications that the Court is liberal or conservative, I use a few measures. First, I use the measure of common space scoring created by Epstein, et al. (2007) to indicate the median justice's ideal point. The justification of this is that the information that would be relevant to profit motivated actors such as corporations or interest groups like the National Association of Manufacturers or the Chamber of Commerce is whether the Court is largely liberal or conservative. I expect that economic cases arriving at the Supreme Court in the

years after indications that the Court's median justice moved in a conservative direction will increase but will decrease when the court is perceived to be largely liberal.

Another indication that the conservative or liberal bloc is indicating that they are interested in overturning the current set of cases is the number of liberal or conservative justices who are writing dissenting opinions. I expect economic cases to decline in the years after an increase in the number of liberal dissenting opinions, [12] and will increase in the years after conservative justices write separately, dissenting. The idea is related to what Baird and Jacobi (2009) find: that dissents can act as a signal for future cases to frame their litigation in a way that will lead to an ideologically opposite outcome. I use pooled cross-sectional time series to test the hypothesis that when the Supreme Court is likely to be perceived as liberal, the number of economic issues decreases at the Court. Our analysis confirms this speculation, along the same timeline in Baird (2004, 2007) and Baird and Jacobi, which is after four to six years. If there is an effect in the first or second lags, I believe that this will consist primarily of unanimous cases.

Furthermore, I conduct a corroborative analysis, using liberal and conservative dissenting opinions. I believe that liberal dissenting opinions will inspire new cases after a number of years but these opinions will depress cases in economic areas. Conservative dissenting opinions, on the

[12] Liberal is pro-person accused or convicted of crime, or denied a jury trial, pro-civil liberties or civil rights claimant, pro-indigent, pro-Indian, pro-affirmative action, pro-neutrality in religion cases, pro-female in abortion, pro-underdog, anti-government in the context of due process, except for takings clause cases where a pro-government is conservative, anti-owner vote is considered liberal except in criminal forfeiture cases, pro-attorney, pro-disclosure except for employment and student records. In the context of issues pertaining to unions and economic activity, liberal is pro-union except in union antitrust, pro-competition, anti-business, anti-employer, pro-liability, pro-injured person, pro-indigent, pro-small business vis-a-vis large business, pro-debtor, pro-bankrupt, pro-Indian, pro-environmental protection, pro-economic underdog, pro-consumer, pro-accountability in governmental corruption, anti-union member or employee vis-a-vis union, anti-union in union antitrust, and pro-trial in arbitration. Between the Warren and Burger Courts, the average intercoder reliability of this variable is 99%.

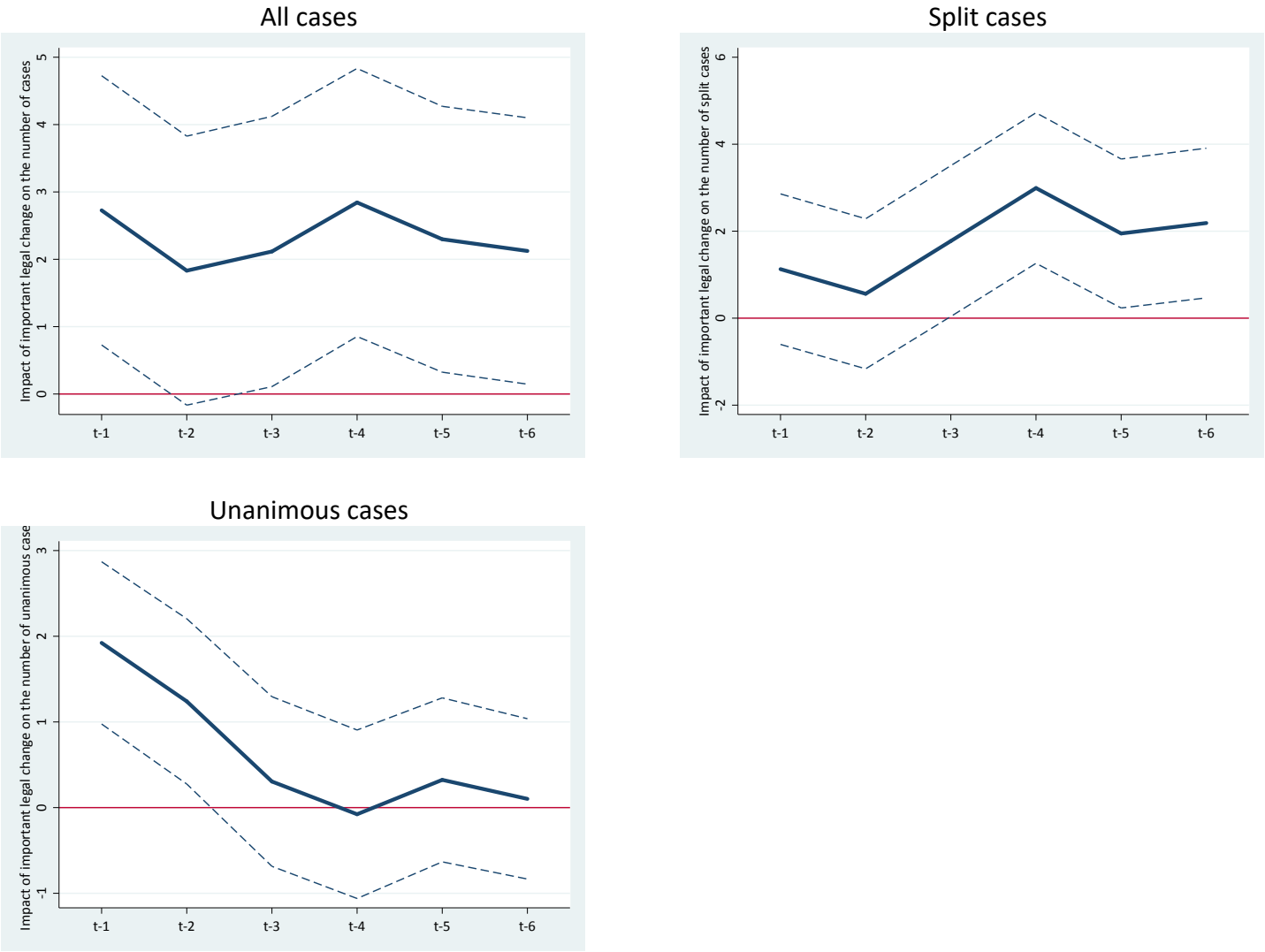
other hand, will translate into new cases after several years. Additionally, a case study of the liberal labor union decisions in the early 1960s illustrates the negative impact of a liberal Court on the number of labor union cases that reach the Court's agenda in the following years.

Analysis

Modeling this analysis is not perfectly straightforward, since several alternative statistical methodologies might be appropriate. I computed Ordinary Least Squares parameter estimates with panel corrected standard errors, according to Beck and Katz (1995). I use a fixed effect model in all the analyses and I include controls for the natural courts. This ensures that the findings are not a function of a high number of both politically salient decisions and issues in a particular policy area. In our models, I estimate a Prais-Winsten autoregressive term of the first order to correct for autocorrelation.

First, I update Baird (2007) from the analysis that included years 1953-1995, expanded to 1946-2016. Figure 1 shows the impact of the composite measure of important cases of the justices on all cases, just non-unanimous cases and unanimous cases. As expected, the impact is significant in all years in the model predicting all cases. The models comparing unanimous with nonunanimous cases show that the impact happens immediately for unanimous cases, but only has an impact on later lags in nonunanimous cases. This is because the various policy entrepreneurs who litigate are looking to respond to those previous important cases with case vehicles that push the envelope: liberal and conservative litigants, generally prefer to win with split decisions, because cases in which Ginsburg and Thomas agree are much less likely to push the envelope in terms of ideological gains. But in the years immediate to important legal change, cases that are already in the litigation pipeline are more likely to be unanimous because those cases were begun years before the important legal changes that had just happened.

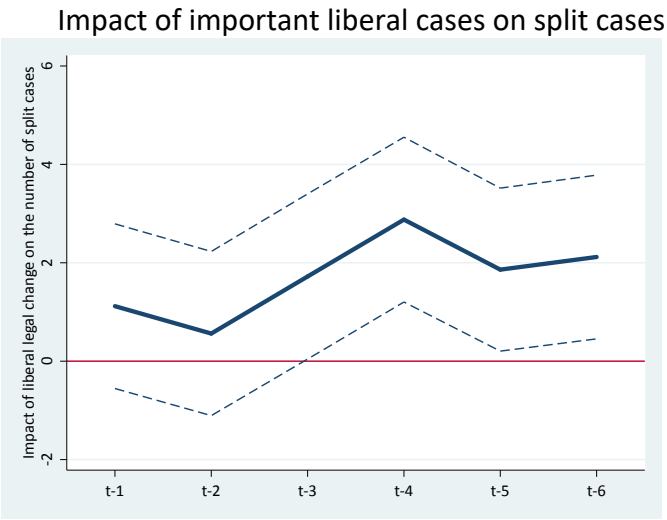
Figure 1. Coefficient plots: the impact of important cases on the number of cases on the Supreme Court's agenda, by case outcome

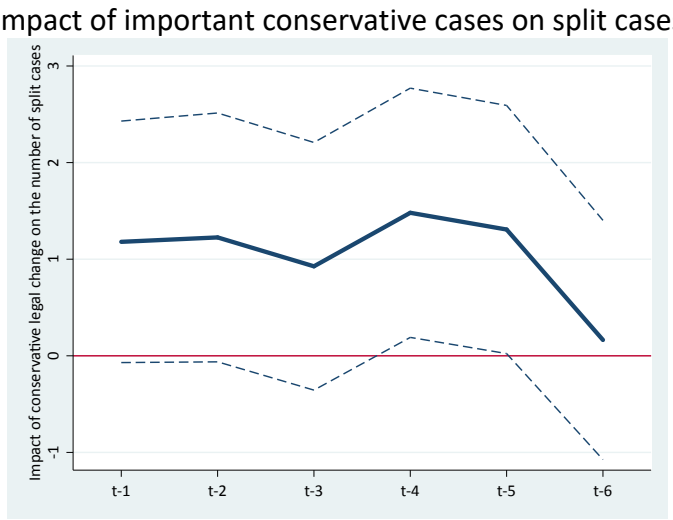


I also validate that the impact is virtually identical whether the cases are categorized as liberal or conservative. This is because I believe that both liberal and conservative groups will engage in defensive litigation when the Court moves in a hostile ideological direction. Figure 2 shows that both liberal and conservative legal change results in positive gains in the number of cases, four and five years after the important cases, consistent with the time lags in Figure 1. Important liberal cases have a positive impact on nonunanimous cases, starting at three years,

and the positive impact lasts for six years, with the largest effect at the fourth lag. Conservative important cases have a positive impact in the four and five years later.

Figure 2. Coefficient plots: the impact of important cases, by ideological outcome, on the number of split cases on the Supreme Court's agenda





But what is the impact of the perception that the Court has moved in a liberal direction on the number of cases on the Supreme Court's agenda? And is there a difference in the impact on economic cases? To test this, I estimate models of changes in the median justice's ideal point with common space scores, generated by Epstein, et al. (2007)[13]. I do not expect how important the case to be to have an impact on the Court's future economic agenda in the same way. This is because I believe corporate actors and other profit motivated actors to consider all cases to be relevant for their purposes. Any move in a liberal direction, I believe, will deter those actors from litigating, and certainly will deter them from considering whether the Court will be an institution that is friendly to their interests.

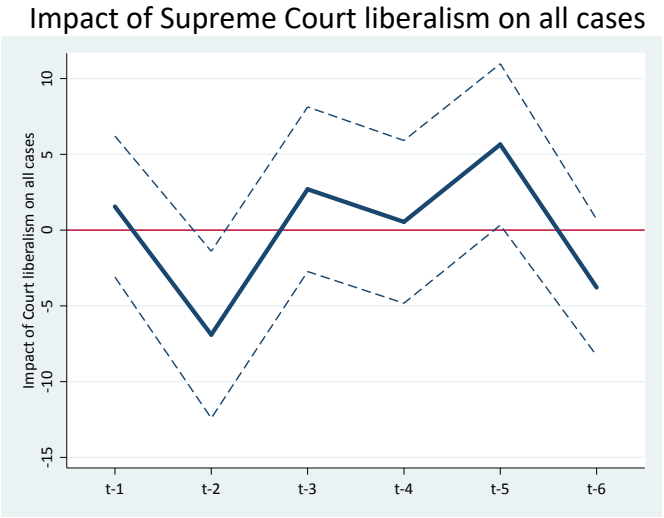
For ease of interpretation, because I want to present the impact of a liberal median justice on economic cases, common space scores are recoded here such that liberal is positive, and conservative is negative (range is from -.46 to .35). Figure 3 shows the impact of changes in the median justice's ideological point (using Common Space Scores) on the number of all cases and the number of all split cases. When the Court moves in a liberal direction, this has a barely significant impact on the fifth lag on both models of cases: all cases and split cases. In the model predicting all cases, there is a negative impact on the second lag. This disappears in the model of split cases, showing that this negative impact happens for unanimous cases. It is not clear why I are seeing this impact.

Figure 4 shows the impact of the scores on the number of economic cases and the number of split economic cases. The economic cases and split cases model include the linear term for Supreme Court liberalism and it is modeled as an interaction with economic cases. The analysis confirms our expectations: the number of economic cases decline significantly on the fifth lag.

[13] Available for download: http://epstein.wustl.edu/research/JCS.html

When the Supreme Court moves in a liberal direction, the kinds of litigation that respond to signals about its priorities and preferences in economic issues are not available for the court to decide. Of course, there are cases in the cert pool, but these cases may not have the benefit of being crafted in response to cases from four to five years before. One thing I have been curious about is why it takes five years to see this effect, because if the corporations are simply settling, this could have an impact immediately in the following year. What I suspect is that these are exactly the kinds of cases that liberal groups pursuing litigation in economic areas: environmental groups, labor unions, consumer groups, etc. are trying to pursue, and they are unable to react to the liberal signals because they cannot find a willing partner on the opposing side of the litigation. Just to illustrate in the case of the most common economic policy area of economic regulation, margins analysis suggests that when the Court is most conservative, the number of economic cases five years later is 18 and when it is most liberal, the number of cases are around 10 five years later, which is the decline of about a standard deviation.

Figure 3. Coefficient plots: the impact of Supreme Court liberalism on the number of cases on the Supreme Court's agenda, by case outcome



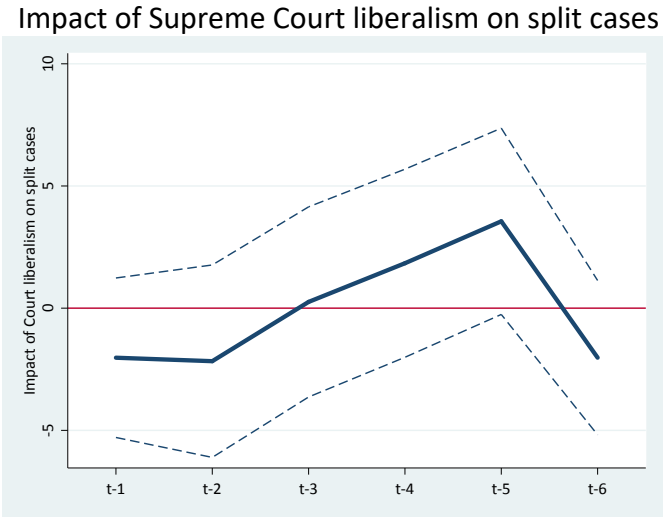
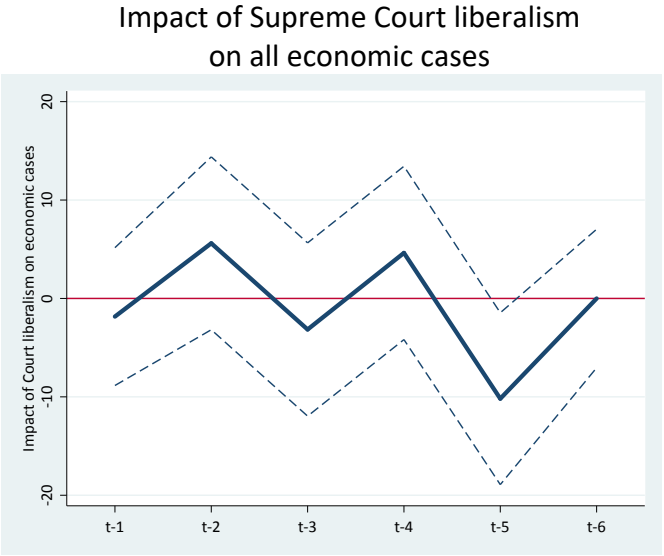
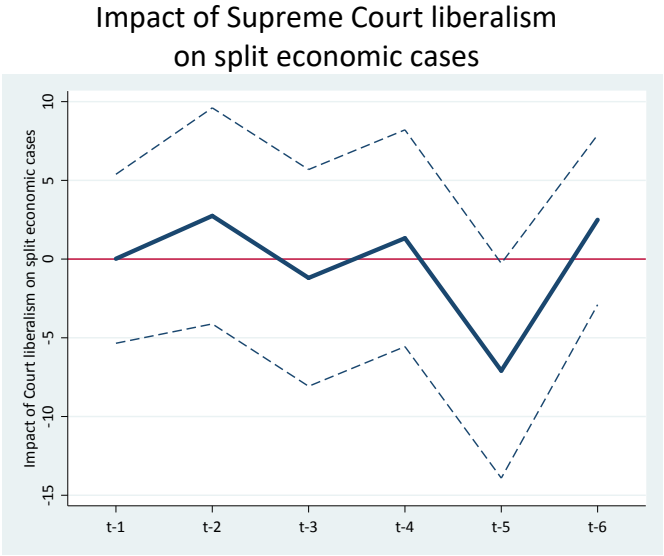


Figure 4. Coefficient plots: the impact of liberalism of the median justice (Common Space Scores) on the number of economic cases on the Supreme Court's agenda, by case outcome





Corroborative analysis: the impact of liberal and conservative dissenting opinions

Another way of thinking about indications of Supreme Court justices' priorities and preferences are separate opinions. Baird and Jacobi (2009) demonstrate the impact of dissenting opinions – in all policy areas – that mention that the case should have been decided on the basis of federal versus state power rather than the other legal issues, the Court gets additional cases on its docket – in the same policy areas – framed in terms of federalism. And more than that: the

future case outcomes were found to be more likely to reflect the preferences of the dissenting justices. Similarly, I believe that when conservative justices write a higher number of dissenting opinions, economic cases will increase along a similar time frame: four or five years later.

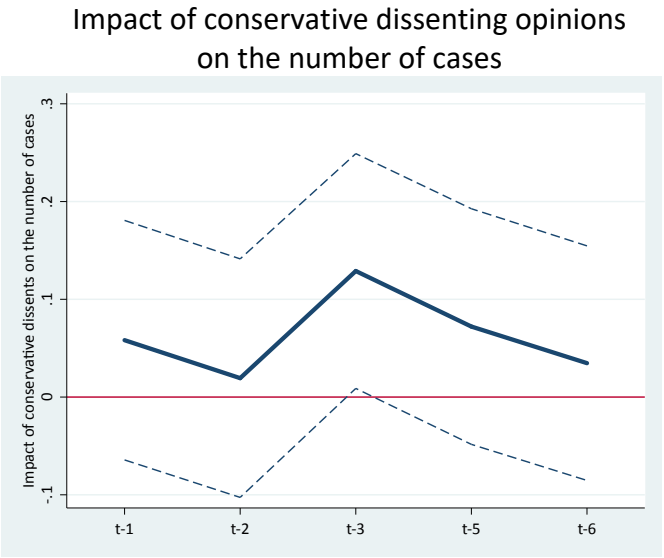
Figure 5 shows that this is indeed the case: conservative dissents lead to an increase in the number of cases, in all policy areas, around the third lag.[14] But in the case of economic cases, there is quite a significant effect in the five years after the increase in conservative dissenting opinions. This helps confirm that corporate or other profit motivated actors are responding positive to those signals, along about the same timeline. We still do not know whether the dissenting opinions contained valuable information that the economic interest groups use to frame their litigation. This is an unnecessary assumption, but also not a particularly difficult one to make. It is nonsensical to doubt that policy entrepreneurs of all types pay attention to justices' opinions, whether majority, dissenting or concurring, when deciding how to frame cases.

Liberal justices writing a higher-than-normal number of dissenting opinions have a positive impact, starting at the second lag. But the impact on economic cases is starkly negative on the fourth and fifth lags. The number of economic cases plummet. The mean of liberal and conservative dissenting opinions is about 4-5, and they range from 0-28 in the case of liberal dissents and 0-48 in the case of conservative dissenting opinions. A margins analysis shows that when there are no liberal justices writing dissenting opinions (either four or five years ago), there about 18 economic regulation cases, but when there are 30 dissenting opinions in that area (the maximum), the docket declines to 8 cases. The number of cases decline precipitously when profit motivated actors such as corporate interests have reason to believe that liberal justices are fired

[14] The economic cases models include linear terms for the number of dissenting opinions in general and the economic models are modeled with an interaction with the liberal or conservative dissents and a dummy for whether the policy area is economic.

up enough to spend their time writing dissenting opinions. The sad thing from the perspective of those liberal justices is that their conservative colleagues are likely to be effective at getting future cases to try and change the law, but liberal justices will not be effective at inspiring future litigation.

Figure 5. Coefficient plots: the impact of conservative dissenting opinions on the number of cases on the Supreme Court's agenda, all cases and all economic cases



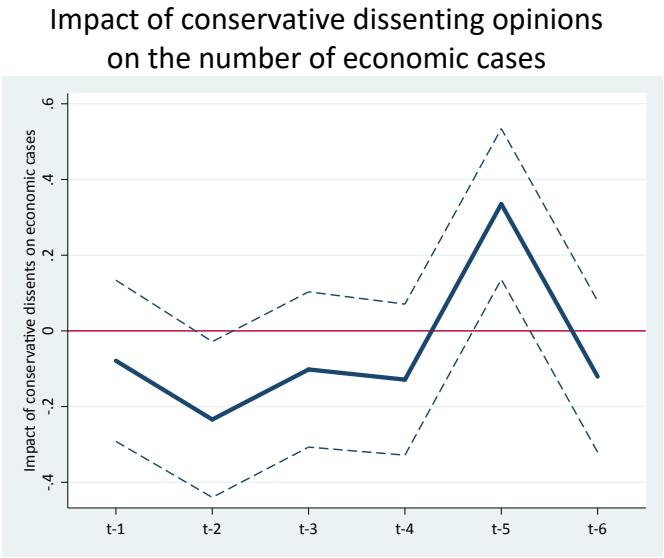
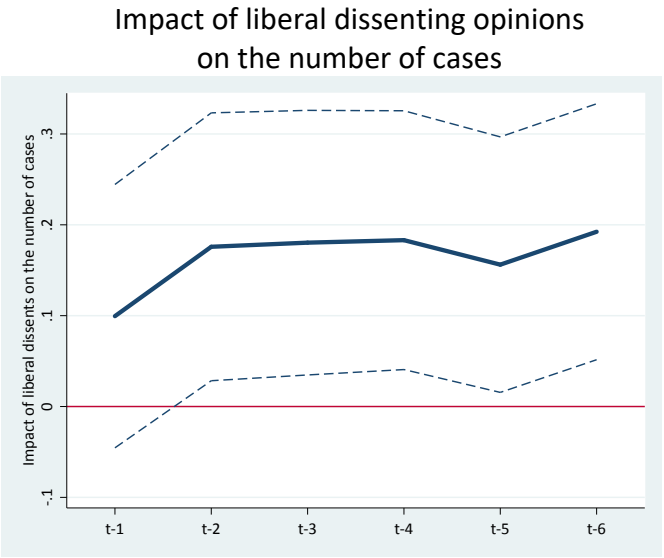
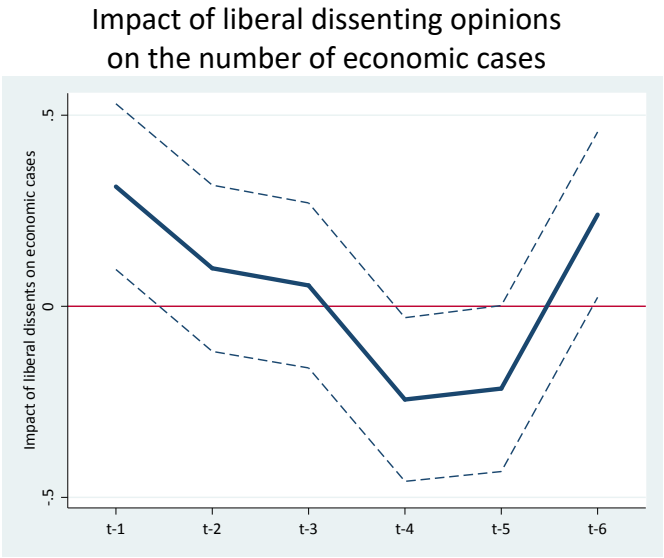


Figure 6. Coefficient plots: the impact of liberal dissenting opinions on the number of cases on the Supreme Court's agenda, all cases and all economic cases





A case study: The Supreme Court's pro-union era, 1960-1964

A case study of a time period in which the Court handed down many salient liberal pro-union decisions corroborates the statistical results. Between 1960 and 1964, the Court heard an average of 11 cases per year dealing with labor or labor unions. During that time, nine pro-labor or pro-union decisions ended up on the front page of the *New York Times*.[15] During 1960 and 1965, there were only thirteen total conservative labor decisions, only two of which ended up on the front page of the New York Times. Thus, the Court gave a clear signal that it intended to support labor and labor unions.

There were a number of wins for unions between 1960 and 1964. For example, during these few years, the Court ensured that labor unions could use their funds for their own political purposes, regardless of whether union members agreed with these purposes (*Machinists v. Street*, 367 U.S. 740 (1961), *Railway Clerks v. Allen*, 373 U.S. 113 (1963). The Court also allowed union members to be in control of hiring, as long as they were responsible to employers (*Carpenters Local v. Labor Board*, 365 U.S. 651 (1961), *Teamsters Local v. Labor Board*, 365 U.S. 667 (1961), *Typographical Union v. Labor Board*, 365 U.S. 705 (1961)). They also gave unions increased power over what kinds of operations could be shut down during a strike (*Electrical Workers v. Labor Board*, 366 U.S. 667 (1961)), and how much arbitration was required before a strike (*Teamsters v. Yellow Transit*, 370 U.S. 711 (1962)). Furthermore, the Court ruled that even though union activities were illegal, the members themselves could not be held liable for the damages resulting from such illegal activities (*Atkinson v. Sinclair Refining Co*., 370 U.S. 238 (1962)). The Court also allowed unions to charge non-union members fees

[15] This is a great many within a five-year period, given that in the twenty year period between 1965 and 1985, there were only seven liberal labor decisions that ended up on the front page of the *Times*.

(*Labor Board v. General Motors*, 373 U.S. 734 (1963)) unless state law prohibited this practice (*Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963)). Thus, the Supreme Court handed down a number of important decisions that protected the strength of unions during this time.

Corroborating the theory that the representation of economic issues decline after the Court is perceived to be liberal, in the period directly following this, from 1965 to 1970, the number of labor union cases per year declined from an average of eleven to six decisions per year. Five of these cases (on average per year) had conservative outcomes. Four of those conservative decisions during the last 5 years of the 1960s appeared on the front page of the *Times* whereas only two liberal decisions during this time were important enough to be on the front page of the *Times*. Thus, with the few issues that reached the Court in the second part of the decade, the Court ruled primarily in a conservative direction. That most of these decisions were conservative in outcome suggests that, indeed, when businesses choose to litigate in a hostile environment, they will only do so when they are relatively certain that the outcome will be in their favor. Corroborating this theory is that, on average, five out of every six cases heard at the Court in the last part of the 1960s were conservative. Furthermore, during the first part of the decade, three quarters of the cases involved private businesses; during the second half of the decade, only half involved private businesses. Thus, the few cases dealing with labor or unions were brought to the Court by non-businesses. In the years following 1960-1964, there may have been additional cases that might have helped the Court reach its goal in protecting workers or unions, but since the cases did not reach the Court, it was in fact incapacitated to do so. This case study shows that, though the Supreme Court can hand down some liberal economic decisions, the reluctance of businesses to continue with litigation prevents the Court from making comprehensive liberal economic policy.

Discussion

John Roberts, in *Sebelius*,[16] pulled a *Marbury v. Madison*. He spent the first several pages of the decision gutting the commerce clause and then upheld the ACA. Perhaps this was less because he was worried about non-compliance and more because upholding the decision gave him the freedom to engage in rhetoric that signaled his low support for the commerce clause. If conservative litigants respond with litigation that challenges the ability for Congress to regulate businesses, the evidence here suggests that those cases can get to the Supreme Court and Roberts can start to gut the commerce clause one case at a time.

But imagine this hypothetical: Congress and the President have strong Democratic majorities. They pass sweeping legislation to protect workers, consumers, and the environment. And then imagine further that this legislation can be successfully challenged in the Supreme Court and be declared unconstitutional, based on the commerce clause according to Roberts. But then, imagine again that Thomas, Alito, and Kavanaugh are replaced by liberal members. The Supreme Court is now liberal, perhaps as liberal as it was in the 1960s. Now, it is time to bring back the commerce clause.

My results suggest that this may not happen; if the liberalism of the Court scares corporations, liberal litigants in economic litigation won't have counterparts to depend on to hold up the conservative side of litigation. Cases are settled. New cases in economic policy areas are less likely to get any traction. This isn't deterministic to be sure. But this finding makes it seem less likely than we would have thought. It is not likely that the Court would be so liberal, as it seems unlikely that Alito or Kavanaugh are going to be replaced. But even if they were, it might

[16] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

make little difference. The Supreme Court's power to decide economic issues when it is liberal is constrained.

A few caveats are in order. First, this paper does not claim that the Supreme Court cannot make liberal economic decisions; it rests on the assumption that in order to make policy on a continuous basis, the Court needs to be able to "stock the stream" with a large number of appropriately tailored decisions. This is the process that is inhibited by the reluctance of profit-minded interests to litigate. Furthermore, I do not claim that private business would always refuse to litigate when the Court is perceived as liberal. Instead, the argument is that a liberal Court will affect the general trends of litigation. I do argue that these general trends matter for the policy-making capacity of the Court, but I do not provide dispositive evidence of this.

Though Supreme Court justices can guide future litigation (albeit perhaps unwittingly), when they attempt to change economic policy in a liberal direction, they are not likely to get very far. Perhaps they can issue a few decisions in the short term, such as the labor and union liberal decisions in the early 1960s, but without litigation efforts supported by both sides, the U.S. Supreme Court is as incapacitated to deal with economic policy as Epp (1998) suggests that the Indian Supreme Court is in protecting human rights. He suggests that the Indian Court can make a few decisions in favor of human rights, but not enough to make major policy change. The Supreme Court's ability to exert its influence in making public policy is greatly determined by extra-judicial support of litigation.

These findings have implications for the way public policies are made in a democracy. The policy-making process described here takes place between two kinds of actors who are not necessarily under pressure to be responsive to the public – Supreme Court justices and policy entrepreneurs. When justices communicate their policy priorities to policy entrepreneurs, they

each can increase their own power over the policy-making process, without the need to be representative of the public. This brings about a potential democratic deficit.

These findings also have implications for those who are not bothered by the potential democratic deficit because they believe that a court's role is to protect minorities even against majority will (i.e. Dahl 1989). The reason is that it takes money to fund the necessary amount of litigation to develop sufficiently broad policies that can protect human rights effectively. Without groups such as the American Civil Liberties Union or the National Association for the Advancement of Colored People, human rights may not be protected and legislation may not be checked for its constitutionality. Consequently, it matters whether those who support the rights of minorities (or the minorities themselves) have sufficient resources to support such groups. When there are a low number of such groups, as in the case of India (Epp 1998), justices are dependent on the random appearance of a few cases. Under these conditions, even when justices are motivated to protect those rights and even when the law is clear, those who violate human rights might continue, sensing the low probability of their actions being challenged in court. Thus, in the context of the making economic policy in United States Supreme Court, these findings echo Schattschneider's warning that "the flaw of the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent" (1960:35).

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Appendix

Table A1. The impact of important cases on the number of cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Important cases, $_{t-1}$	2.73	1.05	2.60	.009
Important cases, $_{t-2}$	1.83	1.05	1.75	.080
Important cases, $_{t-3}$	2.12	1.06	2.00	.046
Important cases, $_{t-4}$	2.84	1.05	2.70	.007
Important cases, $_{t-5}$	2.30	1.03	2.22	.026
Important cases, $_{t-6}$	2.12	1.04	2.04	.041
Warren	3.33	.63	5.26	.000
Burger	3.68	.64	5.78	.000
Rehnquist	.22	.61	.36	.723
Discrimination	5.69	1.35	4.21	.000
First amendment	-3.30	1.06	-3.11	.002
Privacy	-4.35	.58	-7.57	.000
Criminal rights	12.45	1.61	7.72	.000
Labor	-1.27	.61	-2.09	.037
Environment	-2.72	.63	-4.33	.000
Economic regulation	6.80	.97	7.03	.000
Taxation	-.98	.64	-1.53	.126
Due process and government liability	-.82	.66	-1.24	.217
Judicial power	8.40	.96	8.75	.000
Constant	2.94	.64	4.59	.000

R^2 = .74. Rho = .19.

Table A2. The impact of important cases on the number of split cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Important cases, $_{t-1}$	1.13	.88	1.28	.202
Important cases, $_{t-2}$	.56	.88	.64	.524
Important cases, $_{t-3}$	1.77	.88	2.00	.045
Important cases, $_{t-4}$	2.99	.88	3.39	.001
Important cases, $_{t-5}$	1.95	.87	2.23	.026
Important cases, $_{t-6}$	2.19	.88	2.49	.013
Warren	2.56	.53	4.83	.000
Burger	2.37	.53	4.46	.000
Rehnquist	.06	.51	.12	.908
Discrimination	3.21	1.08	2.98	.003
First amendment	-.60	.86	-.70	.485
Privacy	-1.29	.39	-3.31	.001
Criminal rights	9.21	1.38	6.66	.000
Labor	.49	.44	1.10	.269
Environment	-.52	.40	-1.30	.193
Economic regulation	4.08	.76	5.40	.000
Taxation	.45	.46	.99	.321
Due process and government liability	.48	.47	1.02	.309
Judicial power	3.30	.64	5.17	.000
Constant	.12	.48	.24	.808

R^2 = .66. Rho = .19.

Table A3. The impact of important cases on the number of unanimous cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Important cases, $_{t-1}$	1.92	.48	3.98	.000
Important cases, $_{t-2}$	1.24	.49	2.52	.012
Important cases, $_{t-3}$	.30	.51	.60	.546
Important cases, $_{t-4}$	-.08	.50	-.15	.877
Important cases, $_{t-5}$	.32	.49	.66	.507
Important cases, $_{t-6}$	.10	.48	.21	.831
Warren	.99	.34	2.91	.004
Burger	1.52	.33	4.55	.000
Rehnquist	.40	.33	1.22	.224
Discrimination	2.12	.64	3.30	.001
First amendment	-2.91	.50	-5.84	.000
Privacy	-2.98	.33	-8.94	.000
Criminal rights	2.72	.63	4.31	.000
Labor	-1.71	.34	-5.06	.000
Environment	-2.12	.36	-5.83	.000
Economic regulation	2.56	.48	5.34	.000
Taxation	-1.41	.35	-4.02	.000
Due process and government liability	-1.34	.37	-3.67	.000
Judicial power	5.02	.57	8.83	.000
Constant	2.53	.37	6.75	.000

R^2 = .63. Rho = .08.

Table A4. The impact of important liberal cases on the number of split cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Important liberal cases, $_{t-1}$	1.12	.85	1.31	.190
Important liberal cases, $_{t-2}$	.56	.85	.66	.509
Important liberal cases, $_{t-3}$	1.72	.86	2.01	.044
Important liberal cases, $_{t-4}$	2.88	.85	3.37	.001
Important liberal cases, $_{t-5}$	1.86	.85	2.20	.028
Important liberal cases, $_{t-6}$	2.12	.85	2.49	.013
Warren	2.54	.53	4.78	.000
Burger	2.36	.53	4.45	.000
Rehnquist	.05	.51	.10	.920
Discrimination	3.15	1.08	2.91	.004
First amendment	-.64	.86	-.74	.460
Privacy	-1.29	.39	-3.32	.001
Criminal rights	9.15	1.38	6.62	.000
Labor	.48	.44	1.09	.277
Environment	-.52	.40	-1.30	.194
Economic regulation	4.06	.75	5.39	.000
Taxation	.48	.46	1.05	.293
Due process and government liability	.49	.47	1.03	.304
Judicial power	3.28	.64	5.16	.000
Constant	.12	.48	.24	.809

R^2 = .66. Rho = .19.

Table A5. The impact of important conservative cases on the number of split cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Important conservative cases, $_{t-1}$	1.13	.63	1.79	.074
Important conservative cases, $_{t-2}$	1.19	.65	1.82	.069
Important conservative cases, $_{t-3}$	.96	.65	1.47	.143
Important conservative cases, $_{t-4}$	1.46	.66	2.23	.026
Important conservative cases, $_{t-5}$	1.27	.65	1.94	.053
Important conservative cases, $_{t-6}$	.13	.63	.21	.836
Warren	3.84	.65	5.95	.000
Burger	4.36	.66	6.66	.000
Rehnquist	.88	.67	1.32	.188
Discrimination	5.36	1.60	3.34	.001
First amendment	3.22	.95	3.37	.001
Privacy	-2.54	.46	-5.49	.000
Criminal rights	13.90	1.59	8.72	.000
Labor	-2.21	.71	-3.11	.002
Environment	-2.57	.49	-5.27	.000
Economic regulation	3.95	.99	3.99	.000
Taxation	-.99	.65	-1.53	.125
Due process and government liability	-2.63	1.01	-2.61	.009
Judicial power	1.85	.95	1.95	.052
Constant	.78	.58	1.33	.184

R^2 = .53. Rho = .39.

Table A6. The impact Supreme Court liberalism on the number of cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Median justice liberalism, $_{t-1}$	1.55	2.37	.65	.513
Median justice liberalism, $_{t-2}$	-6.90	2.81	-2.46	.014
Median justice liberalism, $_{t-3}$	2.70	2.77	.97	.331
Median justice liberalism, $_{t-4}$	.54	2.74	.20	.843
Median justice liberalism, $_{t-5}$	5.65	2.72	2.08	.037
Median justice liberalism, $_{t-6}$	-3.79	2.29	-1.65	.099
Warren	4.84	.98	4.94	.000
Burger	7.01	.98	7.18	.000
Rehnquist	2.24	.95	2.35	.019
Discrimination	13.49	1.69	7.99	.000
First amendment	2.03	1.25	1.62	.105
Privacy	-5.82	.79	-7.38	.000
Criminal rights	20.75	1.94	10.70	.000
Labor	-2.55	.89	-2.87	.004
Environment	-4.50	.88	-5.12	.000
Economic regulation	8.72	1.29	6.78	.000
Taxation	-1.31	.91	-1.43	.152
Due process and government liability	-1.00	1.04	-.96	.339
Judicial power	8.99	1.46	6.15	.000
Constant	3.92	1.07	3.67	.000

R^2 = .51. Rho = .46.

Table A7. The impact Supreme Court liberalism on the number of split cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Median justice liberalism, $_{t-1}$	-2.03	1.67	-1.22	.223
Median justice liberalism, $_{t-2}$	-2.17	2.01	-1.08	.280
Median justice liberalism, $_{t-3}$	.26	1.98	.13	.897
Median justice liberalism, $_{t-4}$	1.84	1.96	.94	.349
Median justice liberalism, $_{t-5}$	3.55	1.94	1.83	.068
Median justice liberalism, $_{t-6}$	-2.03	1.61	-1.26	.209
Warren	3.63	.66	5.53	.000
Burger	4.51	.65	6.90	.000
Rehnquist	1.25	.64	1.95	.051
Discrimination	9.31	1.21	7.70	.000
First amendment	3.40	1.01	3.36	.001
Privacy	-2.52	.47	-5.35	.000
Criminal rights	15.79	1.56	10.14	.000
Labor	-.53	.62	-.86	.390
Environment	-1.96	.46	-4.21	.000
Economic regulation	5.72	.94	6.10	.000
Taxation	.18	.60	.31	.759
Due process and government liability	.33	.69	.48	.633
Judicial power	3.92	.89	4.39	.000
Constant	1.11	.71	1.56	.119

R^2 = .47. Rho = .42.

Table A8. The impact Supreme Court liberalism on the number of noneconomic and economic cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Median justice liberalism, $_{t-1}$	2.04	2.77	.74	.460
Median justice liberalism, $_{t-2}$	-8.42	3.34	-2.52	.012
Median justice liberalism, $_{t-3}$	3.54	3.31	1.07	.284
Median justice liberalism, $_{t-4}$	-.71	3.28	-.21	.830
Median justice liberalism, $_{t-5}$	8.41	3.25	2.59	.010
Median justice liberalism, $_{t-6}$	-3.75	2.70	-1.39	.165
Median justice liberalism*Economic, $_{t-1}$	-1.84	3.57	-.52	.606
Median justice liberalism*Economic, $_{t-2}$	5.60	4.48	1.25	.211
Median justice liberalism*Economic, $_{t-3}$	-3.15	4.49	-.70	.483
Median justice liberalism*Economic, $_{t-4}$	4.62	4.49	1.03	.303
Median justice liberalism*Economic, $_{t-5}$	-10.19	4.45	-2.29	.022
Median justice liberalism*Economic, $_{t-6}$	-.01	3.59	.00	.999
Warren	4.88	.97	5.03	.000
Burger	7.05	.97	7.29	.000
Rehnquist	2.25	.94	2.38	.017
Discrimination	13.50	1.66	8.12	.000
First amendment	2.03	1.23	1.65	.099
Privacy	-5.82	.77	-7.53	.000
Criminal rights	20.76	1.91	10.89	.000
Labor	-3.81	1.24	-3.06	.002
Environment	-5.76	1.21	-4.74	.000
Economic regulation	7.48	1.53	4.90	.000
Taxation	-1.31	.90	-1.46	.144
Due process and government liability	-1.00	1.02	-.98	.328
Judicial power	8.99	1.44	6.26	.000
Constant	4.24	1.11	3.81	.000

R^2 = .52. Rho = .45.

Table A8. The impact Supreme Court liberalism on the number of noneconomic and economic split cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Median justice liberalism, $_{t-1}$	-2.03	1.97	-1.03	.302
Median justice liberalism, $_{t-2}$	-2.91	2.42	-1.20	.228
Median justice liberalism, $_{t-3}$	.58	2.40	.24	.810
Median justice liberalism, $_{t-4}$	1.48	2.38	.62	.535
Median justice liberalism, $_{t-5}$	5.48	2.36	2.32	.020
Median justice liberalism, $_{t-6}$	-2.70	1.93	-1.40	.160
Median justice liberalism*Economic, $_{t-1}$	.02	2.74	.01	.994
Median justice liberalism*Economic, $_{t-2}$	2.74	3.50	.78	.433
Median justice liberalism*Economic, $_{t-3}$	-1.20	3.51	-.34	.734
Median justice liberalism*Economic, $_{t-4}$	1.32	3.51	.38	.706
Median justice liberalism*Economic, $_{t-5}$	-7.09	3.48	-2.04	.042
Median justice liberalism*Economic, $_{t-6}$	2.50	2.75	.91	.364
Warren	3.64	.65	5.57	.000
Burger	4.51	.65	6.94	.000
Rehnquist	1.25	.64	1.96	.050
Discrimination	9.31	1.20	7.74	.000
First amendment	3.40	1.01	3.38	.001
Privacy	-2.52	.47	-5.39	.000
Criminal rights	15.79	1.55	10.20	.000
Labor	-.99	.89	-1.11	.267
Environment	-2.41	.79	-3.07	.002
Economic regulation	5.26	1.14	4.62	.000
Taxation	.18	.59	.31	.759
Due process and government liability	.33	.68	.48	.631
Judicial power	3.92	.89	4.42	.000
Constant	1.23	.76	1.63	.103

R^2 = .47. Rho = .42.

Table A9. The impact conservative dissents on the number of cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Conservative dissents, $_{t-1}$	.06	.06	.93	.352
Conservative dissents, $_{t-2}$	.02	.06	.31	.756
Conservative dissents, $_{t-3}$	.13	.06	2.10	.035
Conservative dissents, $_{t-4}$	.08	.06	1.25	.212
Conservative dissents, $_{t-5}$	.07	.06	1.17	.241
Conservative dissents, $_{t-6}$	.03	.06	.57	.571
Warren	5.23	.90	5.82	.000
Burger	6.52	.89	7.35	.000
Rehnquist	1.57	.85	1.84	.066
Discrimination	10.95	1.75	6.27	.000
First amendment	.99	1.17	.85	.395
Privacy	-5.37	.70	-7.69	.000
Criminal rights	15.28	2.69	5.67	.000
Labor	-2.74	.77	-3.55	.000
Environment	-4.30	.75	-5.71	.000
Economic regulation	7.07	1.29	5.47	.000
Taxation	-1.34	.77	-1.73	.084
Due process and government liability	-1.46	.88	-1.66	.097
Judicial power	7.31	1.39	5.25	.000
Constant	3.44	.83	4.12	.000

R^2 = .59. Rho = .37.

Table A10. The impact conservative dissents on the number of economic cases on the Supreme Court's agenda, controlling for all dissents

	Coefficient	Panel corrected standard error	Z	p
Number of dissenting opinions, $_{t-1}$	.07	.05	1.43	.153
Number of dissenting opinions, $_{t-2}$	.08	.05	1.53	.127
Number of dissenting opinions, $_{t-3}$	.11	.05	2.31	.021
Number of dissenting opinions, $_{t-4}$	.09	.05	1.75	.079
Number of dissenting opinions, $_{t-5}$	.03	.05	.64	.519
Number of dissenting opinions, $_{t-6}$	.07	.05	1.46	.144
Conservative dissents*Economic, $_{t-1}$	-.08	.11	-.73	.467
Conservative dissents*Economic, $_{t-2}$	-.23	.10	-2.23	.026
Conservative dissents*Economic, $_{t-3}$	-.10	.10	-.97	.330
Conservative dissents*Economic, $_{t-4}$	-.13	.10	-1.26	.206
Conservative dissents*Economic, $_{t-5}$	.34	.10	3.30	.001
Conservative dissents*Economic, $_{t-6}$	-.12	.10	-1.19	.236
Warren	4.78	.78	6.12	.000
Burger	6.15	.76	8.12	.000
Rehnquist	1.22	.73	1.68	.093
Discrimination	8.34	1.70	4.90	.000
First amendment	.28	1.02	.27	.784
Privacy	-4.29	.69	-6.25	.000
Criminal rights	10.72	2.63	4.08	.000
Labor	-1.60	.95	-1.68	.093
Environment	-3.09	.82	-3.77	.000
Economic regulation	7.13	1.63	4.37	.000
Taxation	-1.40	.67	-2.09	.036
Due process and government liability	-1.48	.78	-1.88	.060
Judicial power	6.58	1.20	5.48	.000
Constant	2.44	.77	3.16	.002

R^2 = .66. Rho = .29.

Table A11. The impact of liberal dissents on the number of cases on the Supreme Court's agenda

	Coefficient	Panel corrected standard error	Z	p
Liberal dissents, $_{t-1}$	.10	.07	1.34	.179
Liberal dissents, $_{t-2}$	.18	.08	2.34	.019
Liberal dissents, $_{t-3}$	.18	.07	2.43	.015
Liberal dissents, $_{t-4}$	.18	.07	2.52	.012
Liberal dissents, $_{t-5}$	.16	.07	2.18	.030
Liberal dissents, $_{t-6}$	.19	.07	2.68	.007
Warren	3.98	.83	4.77	.000
Burger	6.25	.78	8.05	.000
Rehnquist	1.63	.75	2.16	.030
Discrimination	8.11	1.55	5.22	.000
First amendment	.22	.94	.23	.814
Privacy	-4.24	.65	-6.53	.000
Criminal rights	12.20	2.02	6.02	.000
Labor	-2.26	.70	-3.24	.001
Environment	-3.50	.69	-5.10	.000
Economic regulation	4.49	1.12	4.02	.000
Taxation	-2.11	.66	-3.18	.001
Due process and government liability	-1.55	.79	-1.97	.049
Judicial power	7.31	1.14	6.39	.000
Constant	2.54	.73	3.46	.001

R^2 = .66. Rho = .30.

Table A12. The impact liberal dissents on the number of noneconomic and economic cases on the Supreme Court's agenda, controlling for all dissents

	Coefficient	Panel corrected standard error	Z	p
Number of dissenting opinions, $_{t-1}$	.05	.05	1.08	.281
Number of dissenting opinions, $_{t-2}$	.06	.05	1.12	.262
Number of dissenting opinions, $_{t-3}$	.10	.05	2.09	.036
Number of dissenting opinions, $_{t-4}$	.08	.05	1.75	.081
Number of dissenting opinions, $_{t-5}$	.06	.05	1.28	.199
Number of dissenting opinions, $_{t-6}$	.05	.05	.98	.327
Liberal dissents*Economic, $_{t-1}$	.31	.11	2.83	.005
Liberal dissents*Economic, $_{t-2}$	.10	.11	.90	.370
Liberal dissents*Economic, $_{t-3}$	.05	.11	.49	.621
Liberal dissents*Economic, $_{t-4}$	-.24	.11	-2.23	.026
Liberal dissents*Economic, $_{t-5}$	-.22	.11	-1.94	.052
Liberal dissents*Economic, $_{t-6}$	.24	.11	2.17	.030
Warren	4.48	.78	5.72	.000
Burger	6.05	.74	8.16	.000
Rehnquist	1.22	.72	1.70	.090
Discrimination	8.86	1.70	5.21	.000
First amendment	.46	1.01	.46	.648
Privacy	-4.44	.68	-6.55	.000
Criminal rights	11.71	2.66	4.39	.000
Labor	-2.76	.78	-3.54	.000
Environment	-3.85	.74	-5.18	.000
Economic regulation	4.05	1.32	3.06	.002
Taxation	-1.40	.65	-2.16	.031
Due process and government liability	-1.44	.76	-1.91	.056
Judicial power	6.80	1.19	5.74	.000
Constant	2.72	.77	3.52	.000

R^2 = .67. Rho = .27.

newer resources

Box-Steffensmeier, Janet M., Christenson, Dino P., and Hitt, Matthew. Replication Data for Quality Over Quantity: Amici Influence and Judicial Decision Making. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2013-08-07. https://doi.org/10.3886/ICPSR34838.v1