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The Impact of the National Economy on Supreme Court Decision Making

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Abstract of the Dissertation

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Is the decision making of the Supreme Court of the United States influenced by the health of the national economy? In the development of the literature on the Supreme Court, scholars have mainly focused on how legal, attitudinal, and strategic considerations impact judicial decision making. There has been less work focusing on exogenous factors such as the economy. In this dissertation, I hypothesize that the Supreme Court is responsive to the national economy during multiple stages of the decision making process of the Court—case selection, voting, and the opinion stage. In a sense, I posit that the justices of the Court are similar to voters and elected officials in that they are interested in and influenced by how the economy is performing. Examining the potential influence of economic cues is important to scholars of the Supreme Court in that it is another source of information the Court is potentially using in making their decisions. Also, finding a link between the economy and decision making provides further evidence that the Court is perhaps not immune to the same political and societal pressures other government offices are. To empirically test these hypotheses, I use data on Supreme Court cases and national economic indicators going back as far as 1946. Findings indicate that as the economy is doing worse—as measured by consumer sentiment—the Court is more likely to hear cases related to economic issues. Furthermore, the Court becomes less reliant on ideology in their case decisions and becomes more likely to vote against the preferences of the federal government in response to an economy that is doing worse. Finally, during times when the economy is doing worst—during national recessions—the coalitions that vote for the winning side in the case are smaller.

For April
(and some other people)
but, mostly April

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Chapter 1

Introduction

In the 1934 case of *Home Building & Loan Assn. v. Blaisdell*, the Supreme Court of the United States of America upheld the Minnesota Mortgage Moratorium Act. Briefly, the Act in question allowed mortgagors who were unable to make their payments to go to the state courts in order to get a moratorium put on their payment. This in effect gave the state courts the power to alter the terms of a mortgage contract without the consent of the mortgagees. This act was passed in the wake of the Great Depression as a response to the great number of foreclosures that were happening. The constitutionality of the Act was challenged on the grounds that it violated the Contract Clause of the constitution. The Contract Clause more or less explicitly denies states the power to alter contracts. Chief Justice Hughes wrote in the opinion "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community..." (1934).

The emergency referred to in the opinion was the Great Depression and the opinion of the Court implies that because of the economic crisis, the state of Minnesota was justified in using broad police powers here.[1] This decision has been criticized by some legal scholars, saying the decision implies "a constitutional provision should be interpreted both in the context of the entire Constitution and in the context of the social situation confronting the Court" (Bieneman 1992, pg. 2534). Another critic of the decision, Richard A Epstein refers to a passage from the opinion where Justice Hughes is outlining the Court's reasoning for limiting the Contract Clause because

[1] "Police powers" generally refer to broad powers given to the states to pass laws regulating behavior with the general purpose of enforcing order or to regulate the health, safety, and well-being of the inhabitants of that state. The Constitution does not grant police powers to the federal government, but they have been generally implied to the states via the 10th amendment.

of external conditions as "[containing] some of the most misguided thinking on constitutional interpretation imaginable" (1984, pg. 735). Whether one ultimately agrees with the decision or not, it seems to be clear that in this case the Supreme Court's decision was heavily influenced by the context or environment that the decision was being made in.

The study of political institutions and actors is intermingled with economics in many ways. Policymakers are charged with shaping economic policy and evidence indicates that voters reward parties and political candidates for good economic times and punish them for bad economic times (e.g. Abramowitz, Lanoue, and Ramesh 1987; Fair 1978). There is also work that suggests a more nuanced relationship between politics and the economy that shows that citizens' perceptions about the health of the national economy are often shaped by their partisan attachments and by the cues they receive from party elites (Lewis-Beck et al 2008; Gerber and Huber 2010). This work implies that in the current political and economic climate, the perception of how the economy is doing would be different for Republicans and Democrats with Republicans likely thinking the economy is in worse shape than Democrats would because of the two parties perceptions of President Obama and other party elites. All of this goes to show that economic events affect political actors and consumers in many ways. One of the goals of this dissertation is to examine how the decision making of the Supreme Court of the United States may also be influenced by the economy.

The Supreme Court, as an institution, is unique amongst other institutions and actors in the American political system for a variety of reasons. One of these reasons is that the Supreme Court is in many ways designed to be insulated from external pressures and incentives. For example, justices are isolated from the public by virtue of not being popularly elected. Justices are also given lifetime tenure and cannot be removed from office except for impeachment. With

that, the Court is devoid of many of the "sticks and carrots" that motivate other political actors who do not have that same amount of freedom or security. The Court also has the power to decide on whether or not they will hear a particular case and give a decision in that case. The Court is furthermore unconstrained in its decision making by virtue of it being the highest court in the land. Being at the top of the judicial hierarchy, the Court is not subject to having its opinions re-examined or overturned by any higher court.

Justices make many choices that shape legal policy. This includes deciding what cases they will hear argued (granting certiorari), the vote on the outcome of the case (what party in the case "wins"), and the myriad decisions after the vote such as the content of the majority opinion of the Court and which justices are going to write/sign that opinion and the various dissents and concurrences. All of these different decisions that the Court makes have policy implications and therefore merit serious investigation by scholars into the mechanisms that influence these decisions.

In this dissertation, I ask whether external, national economic conditions influence the Court. The constitution provides the legislative branch and the executive branch with direct means to influence and make economic policy. The legislative branch is able to use the "power of the purse" in order to propose and pass bills concerning things such as fiscal policy. The president has the power to make appointments to bureaucratic agencies that have a hand in economic policy. The president also has other powers to execute the policies crafted by the legislature. It is also customary for the president to have a large hand in crafting the budget of the federal government.

The constitution does not vest the judicial branch with any similar, direct powers over the economy. Throughout the rest of this dissertation, a series of findings are presented that

emphasize that the Supreme Court is active and interested in influencing economic policy. Also, after establishing whether the Court is interested in the economy, this dissertation examines how the decisions that the Supreme Court make are in some way influenced by the context of the national economic climate that they are deciding cases in.

Uncovering a connection between the national economy and the behavior of the Supreme Court is potentially interesting and important to scholars of the Supreme Court for numerous reasons. For one, though Supreme Court decision making models such as the "attitudinal model" (Segal and Spaeth 2002) perform quite well in predicting and explaining judicial behavior, finding a link between another factor such as the macro-economy and the Court is important in order to give a more complete model of judicial decision making. Also, uncovering whether or not justices are responsive to the economy could give scholars clues as to the motivations of justices when deciding cases. If the justices are responsive to the economy, it could be an indication that they are motivated by the economic health or stability of the nation in a manner similar to elected officials or voters and not only motivated by doctrinal or political concerns that most models specify. This could indicate that justices are in fact motivated by "good" policy and are more active in trying to make good policy. After all, having a strong, prosperous national economy—as opposed to a weak, stagnating economy—would be considered a "valence issue" that people can agree on regardless of the their partisan affiliations (Stokes 1963). Finding an influence of economic processes on judicial decision making may also be important because of potential implications for Supreme Court legitimacy, as scholars have found that citizens confer legitimacy to the Court because they feel they know less about judicial decision making and trust the justices to use their own discretion to make decisions (Gibson and Caldeira 2011).

In this dissertation, I take a distinct approach to studying the behavior of the Court by looking at decision making during different phases of the Supreme Court process. Most studies looking at the Court will limit their focus to a single stage—whether the Court decides to hear a certain case, what was the voting outcome of the case, etc. By looking at multiple decisions that the Court makes and looking at similar independent variables as predictors of those decisions, it may allow us to better understand what the relationship between these different stages in the process are. This could have implications for other work in the field of Supreme Court behavior. When testing a model of decision making—which will be discussed later on—or how a particular variable may influence the Court, most work will stop after only looking at one aspect the Court's process and then potentially make a broad claim of the form of "model x is false". Taking a more complete view of the process can give us a greater understanding of what factors influence decision making and when those factors do so.

It is my hope that this dissertation contributes to the literature by shedding a bit more light on how environmental factors, particularly the economy, influence the decision making of the Court. Earlier work on the influence of ideology and attitudes fascinated me and made me begin to think a bit more about what was happening on the Supreme Court. The high school civics textbook description of the Court as an impartial body who was there to "interpret the law" does not paint a complete picture of how the Supreme Court actually operates. Finding other factors that influence decisions, and also shedding light on when and why those factors matter can give us a more complete and accurate portrait of the Court's behavior and role in American politics.

Outline for the Rest of the Chapter

The remainder of Chapter 1 of this dissertation will provide an overview of the rest of the chapters of the dissertation as well as give an overview and introduction to what I will call the "classic" models of Supreme Court behavior. The Supreme Court makes many decisions at different stages of a case's progress through the judicial system. In this dissertation, I will examine three of those stages or decisions in particular: the decision of a court to hear a case (agenda setting), the vote on the merits, and what I will refer to as the "post-merits stage" or the "opinion stage". Particularly in the post-merits stage I will be examining the assignment of the majority opinion and the bargaining that leads to the formation of the majority opinion coalition. I am interested in examining how the national economy may influence decision making in all three of these stages.

In Chapter 2, I give an overview of scholarship that has looked at how exogenous events and factors influence Supreme Court decision making. I do this in order to develop a theoretical perspective as to why the Court would be influenced by the economy. Looking at past work on exogenous influences—including some work that has already looked specifically at the national economy and developing theoretical expectations, I aim to begin providing answers for two questions:

1. Does the Court care about the health of the economy?
2. If they do care, how would that influence decision making?

While the answer to the first of those questions seems rather straightforward—a "good economy" is a valence issue and any rational citizen should be in favor of it—the second question is potentially trickier. As noted above, there are good reasons to expect the Court to not be

influenced by the economic environment.[2] However, I work off a theory of decision making in context. Borrowing a theoretical framework and terminology from Bartels (2011) and Collins (2008c.), justices' and the Court's decisions do not happen in a vacuum but are instead made in the context of an "informational environment". In this chapter I will lay out why I expect factors such as the health of the national economy to be a part of this informational environment that decisions are made in and why I subsequently expect these factors to have an impact on the decisions that the Court make.

In Chapter 3, I look at the agenda setting stage of Supreme Court decision making. The Court has the power to grant certiorari to the cases it wants to decide out of a large pool of cases that apply to be heard by the Court.[3] While a great deal of prior work has looked at the decisions of the Court to grant certiorari to individual cases, not as much work has looked at the Supreme Court agenda as its own aggregate entity worth examining. In this chapter, I use time series methods to uncover the ways the economy influences the Court's aggregate agenda. This gives us some idea about how concerned the Court is about the economy. Agenda space is finite and the amount of agenda space dedicated to a particular issue area should be an indication of how important the Court believes that issue is at the present time. Choosing one case or issue area naturally comes at the expense of not addressing another case or not devoting much time on another issue.

In Chapter 4, I move my focus to the voting stage of Supreme Court decision making. The voting stage has been arguably what scholars have spent most of their focus on, with well

[2] Again, the institutional design of the Court makes it insulated from the public and other factors that may influence the behavior of other political actors. Also, the Court lacks constitutionally granted authority to make or enforce economic policies and regulations.

[3] Certiorari is often abbreviated as "cert". For the court to grant cert to a petition means that they have agreed to formally hear the case. If the Court denies cert to a petition the holding of the last lower court to hear the case stands.

developed models predicting what the outcome of individual cases will be. In this chapter, I use multi-level modeling techniques in order to show how the context the decisions are made in—the exogenous national economic environment—moderates the influence of ideology and attitudinal concerns on the decisions of the Court. In this chapter, I also test a hypothesis that has been suggested and tested by earlier literature—that the Court "punishes" the United States government during bad economic times by not voting for the government's side in cases that it is a party to in Court.

In Chapter 5, I look at what happens after the outcome of the case has been decided and whether or not the economy plays a role. Once the vote on the merits has been made, the case is not "over". There are still interesting actions for the Court to take and decisions that have implications for policy and jurisprudence. Here I will look at the assignment of the majority opinion and the formation of the opinion coalitions. These decisions have a great deal of influence over policy. After all, it is in the majority opinion where the Court gives the legal reasoning for the decision it has reached and where the lower courts will look to when interpreting the law in future cases that deal with similar issues. As will be discussed later, the decision by a justice to join an opinion is often a result of bargaining over the content of the opinion. So it is not only the writer of the opinion, but the coalition that have an impact on the opinion and how the case will be interpreted in the future.

Finally, Chapter 6 contains some conclusions of the dissertation. This includes discussing implications of the overall dissertation project. It also contains discussion of some possible future extensions and discusses how this work fits into our larger understanding of how environmental or exogenous factors may influence the Court.

Classic Models of Supreme Court Decision Making

As alluded to earlier, a large focus of political scientists in the scholarly literature on the Supreme Court has been on determining what factors influence votes on the Supreme Court. Three models that have been the focus of a large amount of the literature are the legal, attitudinal, and strategic models. Throughout the rest of this dissertation, I may refer to these three models as the "classical models" of Supreme Court decision making.

Scholars who support the legal model hold that justices arrive at their decisions based on legal reasoning. This means justices' decisions on cases are grounded by examining stare decisis, text, and legal intent (e.g. Dworkin 1988; Kahn 1999). As part of the legal model, the norm of stare decisis may be the most well known legal consideration. In simple terms, stare decisis means that the Court is constrained by what was written in past decisions and will adhere to the legal reasoning of past decisions in cases where the same or similar legal issues and questions are at stake.

One reason the legalists argue we should expect legal doctrine to shape justices' decisions is because justices were trained as lawyers and law school instills in its students the value and importance of legal doctrine (Baum 1997). Gillman (2001) argues that there are strong reasons to believe legal influences matter, as decisions are often framed in terms of precedent and legal doctrine. Knight and Epstein (1996) also provide evidence that justices discuss precedent when talking about cases at the conference stage and argue this indicates that those concerns are on their mind when they make their decisions.

At odds with the legal model of decision making is the attitudinal model. Segal and Spaeth (2002) make the argument that there is not much evidence of legal factors influencing justices decisions. Instead, we can do a much better job of explaining their votes by looking at

ideology and policy goals alone. Even the influence of precedent pales in comparison to the influence of attitudes. In an earlier article, Segal and Spaeth found that when analyzing major cases that over 90% of votes were consistent with the ideological preferences of the justices and fewer than 10% of those votes were consistent with precedent and not the preferences of the justices (1996).

Throughout the rest of this dissertation, when speaking about the Supreme Court and/or justices I will use the terms "ideology", "attitudes", and "policy preferences"/"policy concerns" rather interchangeably. Predictions of the attitudinal model are notable for their parsimony and general accuracy. If we wish to know whether the Court is going to issue a liberal or conservative opinion in the case, we often just need to look at whether the ideological composition of the Court is liberal or conservative. This will allow us to predict the outcome with a relatively high degree of success.

Though not the first to make the case policy concerns matter to justices (see Dahl 1957; Rohde and Spaeth 1976; Schubert 1965), Segal and Spaeth lay out a list of reasons why we should expect Supreme Court justices in particular to be free to pursue their ideological goals. One of these reasons is that the Supreme Court is the highest court in the land. This means that its decisions are not constrained by any other Court. Lower courts do not have this same "luxury" because their decisions can be appealed up to the next level of the American judicial system and can subsequently be overturned.

Another reason the Court is free to pursue ideological and/or policy goals in their decisions is that the justices have lifetime tenure and have little to no ambition for further office—being that it is already the highest Court in the American system. The members of the

Court do not have to answer to the voting public and cannot easily be removed from office.[4] Another argument why argue that the power of docket control that the Court has also allows it to be free to be more ideologically focused than other courts in the judicial system that do not have that same power.

Another of the classic models of Supreme Court behavior is the strategic model. Proponents of the strategic model generally agree with attitudinalists that justices do not rely solely on traditional legal tools and that justices do have policy preferences that they use as a determinant for their votes. However, the models differ is in their treatment of the context that decisions are being made. The strategic model argues that justices are not making their decisions in a vacuum. Instead, the justices and the Court are constrained by the preferences of other relevant actors—including other justices and Congress (e.g. Epstein and Knight 1998). In this model, justices may not always necessarily vote with their sincere preferences if they feel that doing so would lead to a sub-optimal outcome.[5]

These models have largely been applied to the votes justices make on the outcome of a case—or, when aggregated up to the case-level, the "vote" of the Court as a whole. A large part of all judicial politics research has been devoted to the votes justices make. In particular, one of the biggest debates if not the biggest debate surrounding Supreme Court voting in the literature has been to what extent, if any, legal considerations matter in the decisions making of the Court.

[4] It is possible for Supreme Court justices to be impeached. Impeachment of a Supreme Court justice follows the same process of impeachment of the president. The House of Represents must vote to impeach followed by a trial and vote by the Senate. In the history of the United States, the only Supreme Court justice to be impeached was Samuel Chase, who was subsequently not convicted by the Senate.
[5] In the book The Choices Justices Make, the authors give an example of how in the case of Craig v. Boren (1964) the sincere preference of Justice Brennan would have been to apply strict scrutiny in the case. However, Brennan acted strategically by applying a more relaxed level of scrutiny because the more relaxed level would be able to attract the needed amount of votes from the other justices.

While justice's votes in this stage are still of interest in the current project, agenda setting and the opinion stage are also of interest. Though these stages have arguably not had as much attention as the voting stage in the literature, there is still plenty of work to draw on from judicial scholars. I will discuss the literature pertaining to those specific stages later on in the dissertation. To preview what those literatures do say, many of the same things that influence voting at the merits stage also impact the agenda setting stage and post-merits stage—perhaps unsurprisingly.

The three models briefly discussed in this chapter—legal, attitudinal, and strategic—account for a great deal of the literature on Supreme Court behavior. In this dissertation, I look at how the economy impacts the behavior of the Court. This would fall into the category of "environmental influences" or "exogenous influences". The next chapter will introduce some of the extant literature on how exogenous influences, including some work that has already looked at the impact of the economy, and use that to lead into a more theoretical discussion of why the Court will care about what is going on with the economy and how that translates into the decisions that it makes.

A point about the models presented in this dissertation that I would like to stress is that I do not wish to "argue against" any of the classic models. Instead, I feel like the different models can be synthesized and each may be able to explain different parts of Supreme Court behavior. Prior work has made suggestions that the attitudinal model and the legal model can work together and that legal factors can constrain or moderate the Court's ability to use ideology (Bartels 2009). In a similar way I believe that taken as a whole, we should see that legal, ideological, strategic, and other considerations are all potentially operable and are capable of

exerting their influence on the decision making of the Court concurrently—both orthogonally or in some manner where they are modifying or constraining each other.

Chapter 2

Theoretical Framework

In Chapter 1, I laid out in broad strokes what I referred to as the "classic" models of Supreme Court behavior. Out of these models, the two seemingly at most odds with each other have been the legal model and the attitudinal model. The general form of the attitudinal model states that there is not much evidence of legal considerations impacting the Court's behavior, even not much evidence that stare decisis acts as all that much of an influence (Segal and Spaeth 2002; Spaeth and Segal 1999).[6]

Critics of the attitudinal model have fired back that the legal model that attitudinal scholars present and critique is of a simplistic or mechanistic form and that the law and its relationship to the Court's decision making is a highly complex process (Gillman 2001). A lot of this back and forth debate about the role of law in the Court's decisions has ultimately lead to models that argue for both legal and attitudinal concerns having an impact and for legal principals to act as contextual constraints or modifiers of the Court's ability to act in an ideological fashion (e.g. Bailey and Maltzman 2008; Bartels 2009; Bartels 2001; Collins 2008c; Richards and Kritzer 2002).

Just as there has been debate amongst scholars about the roles of law and politics in judicial decision making, there have also been debates on the role of environmental or exogenous concerns. In this dissertation, I make the case that just as others have focused on law as a constraint of political concerns, these environmental concerns—particularly the economy of the country—will also act in a manner similar to constraints. This chapter will proceed as follows.

[6] Stare decisis, or adherence to precedent is a legal principle that scholars advocating for the legal model often cite as being an important influence or constraint on the decisions of the Court.

First, I will briefly survey some of the work that has gone outside of the classic models of Supreme Court decision making and looked at how exogenous, environmental factors influence the Court. Then I will discuss a little bit some of the work that has looked at the environmental factor I am particularly interested in—the national economy. I will use these prior pieces of literature as well as some work on the motivations of justices to develop a theoretical expectation for why the Court cares about the health of the national economy and how that translates into the decision making of the Court.

Exogenous Influences on the Court

Beyond legal and attitudinal factors, there are a whole class of environmental factors that can potentially be influential when it comes to the judicial decision making. Some exogenous influences that have been studied include war, public opinion, and interest groups. These pieces all look at different influences that go beyond what is normally included in the classic models and present some interesting results.

Epstein et al (2005) look at the potential impact of war on voting. They ask, in the context of the United States being at war with forces in both Afghanistan and Iraq, whether or not outcomes of similar cases are the same when the nation is at war as they are during times of peace. Particularly, the authors are interested in systematically testing various theories about how the Court responds to war—such as the "crisis thesis". The crisis thesis argues for an impact of war on the Court that is similar to a "rally around the flag" effect and that during times of war the Court is deferential to the actions of the government. Interestingly enough, they find that war does have an impact on justices' voting but not on cases pertaining to war. Using matching techniques they find that during times of war liberal justices are more likely to vote to curb civil

liberties. This is contra to those justices general preferences about civil liberties issues and their expected vote. With this finding, they have evidence that the decision making of the Court as it pertains to civil liberties is systematically different during period of times when the country is at war than if the country were not at war.

Another potential source of influence coming from the exogenous environment is public opinion. Does the Court issue rulings or behave in any manner that is consistent with the preferences of the public? Because the justices are not directly accountable to the public through elections, we may not expect them to be responsive to the public. In one example of scholars looking at how judges are responsive, Kuklinski and Stanga (1979) found that the courts in California were responsive to changes in public opinion about legalizing marijuana. As public support for the legalization of marijuana grew, some of the same judges who voted against it in the past began to vote for it. However, this was not at the Supreme Court level. Because of the reasons listed above that Segal and Spaeth (2002) say make the attitudinal model applicable to the Supreme Court and not lower courts, perhaps we would only find lower court judges to be influenced by public opinion and not the justices.

In one study that did look at the Supreme Court, Flemming and Wood (1997) argue that justices who are concerned with policy should be concerned with the institutional legitimacy of the court, which is reflected in public opinion. Any time the term "institutional legitimacy" is brought up with regards to the Court, it is usually a reference to the Court not having the power to enforce its decisions and needing other forces to ensure that their decisions are executed. Therefore, the public can be an ally to the Court in that they can put pressure on those who do enforce the decisions and who are accountable to them electorally. They find that judicial decision making largely reflects public mood in that as the public becomes more liberal

(conservative) in their policy preferences, the decisions that the Court makes in aggregate become more liberal (conservative) as well.

In a similar vein, Mishler and Sheehan (1993) find that the court stays in line with public opinion and the other branches out of concern for institutional legitimacy. They replicate this finding at the individual level of justices as well (1996). However, Norpoth and Segal (1994) have both theoretical and methodological critiques of this work.[7] Instead, Norpoth and Segal argue that the Court does not directly respond to public opinion, but there may be indirect linkages as popularly elected presidents are responsible for appointing new members to the Court. If the president is in tune with or is a reflection of public preferences, the Court may subsequently begin to turn that way due to membership change and new members being a reflection of the president's preferences.

In another study arguing for a relationship between the public and the Court, McGuire and Stimson (2004) find a court that is responsive to the ideological preferences of the country as a whole. Here, the authors restrict their analysis to looking only at cases where the Court is overturning decisions made in the lower courts and are not looking at all cases. Using Stimson's public mood as a predictor variable to represent the overall liberal/conservative preferences of the country, they use time series methods to find that courts outputs track with the public over time.

In a book length treatment of the topic, Friedman (2009) finds qualitative and historical evidence that public mood shapes the opinions of the court. He concludes that the court follows the public because they need to for reasons of institutional maintenance. His argument is that the Court cannot afford to be too out of line with the public because the Court needs public support

[7] These methodological critiques I am sympathetic to. Mishler and Sheehan make some odd choices in the way they choose to specify the time series models they run.

in order to be an effective branch. This argument indicates that without public support of the Court, the other branches of government would not support the Court's decisions and respond by not executing the decisions (executive branch) or pass statutes that overturn the decisions (legislative branch). This argument about needing the public in order to protect the Court from the other branches shares many similarities with the institutional legitimacy arguments discussed above.

Using quantitative methods to test Friedman's assertions, Epstein and Martin (2010) find that the court is influenced by public opinion. Though they find a significant relationship between public mood (measured on a conservative to liberal scale) and the ideological direction of case decisions, they remain unsure or agnostic as to the theoretical reasons why. Like Friedman, they only speculate as to why the justices seem to be influenced by public opinion. They do not fully endorse the reasons that Friedman puts forth, but instead argue that perhaps the Court responds to public opinion because the justices themselves are a part of the public. The justices may be responding to the same events and forces that shape public opinion. All of this work taken together seems to be building toward some consensus that the Court is in fact influenced by the public, or at least that the Court generally trends in the same direction ideologically as the public. Though, like Epstein and Martin state, consensus on the theoretical mechanism or consensus on whether or not this is a direct or indirect effect has not been fully reached.

Another way justices' may not be as insulated as their position was designed to be is in the influence of interest groups on judicial behavior. One way that interest groups can attempt to influence the Court is through the filing of amicus curiae briefs—also called "friend of the court" briefs. There has been much debate on whether or not amicus briefs really have a direct influence

on Supreme Court policy (Collins 2008a; Songer and Sheehan 1993). Though the evidence on the substantive effects of the briefs in terms of moving policy or changing the votes of justices is mixed, we do have strong evidence that the justices at least pay attention to them and are aware of their content. In the opinions the justices write—whether it is the majority opinion, minority opinion, etc.—information that was contained in amicus briefs that was not necessarily brought up by the official parties to the case in their briefs or in oral arguments is often cited (Ennis 1984; Epstein 1990).

There is also statistical support for the hypothesis that the presence of amicus briefs has a significant impact on the amount of non-consensual opinion writing that happens in a case (Collins 2008a). Non-consensual opinion writing happens in a case where the majority of the Court can agree on the dispositional outcome of the case, but one or more justices in that majority do not necessarily agree with legal reasoning of the majority and wish to write their own opinion. This finding may imply that when justices are writing opinions and bargaining over the content of opinions that they are being influenced by the information that is given to them in amicus briefs for coming up with legal reasoning for the votes they cast.

The Court and the Economy

One final potential exogenous influence that is the focus of this dissertation project and has been seen a little bit in the literature so far is the health of the national economy. A question one may ask is why would there be any link between justice's decision making and the economy. The Supreme Court is not given the power or authority to make and adopt policies that will shape the national economy. That power is given to the other branches.

While it does not make economic policy in the sense that it drafts legislation, the Court does rule on many cases that have implications for the economic well being of businesses, individuals, and the nation as a whole. Some scholars have argued that Supreme Court policy making in issues like economic policy and labor is more impactful than in issues such as civil liberties and civil rights in terms of how closely the lower courts follow shifts in Supreme Court doctrine (Songer 1987). Johnson and Canon (1984) argued that scholars spend too much time focusing on the relatively few landmark decisions the court makes and not enough time on the "ordinary" decisions that justices make more commonly, such as decisions that impact economic policy. Baum (1977) also noted that economic policy was an area where the Court is able to make a large impact, but has been somewhat ignored by researchers.

The labor attitudes of the justices is one aspect of economic-related decision making that has been studied in the past. During the span of the Warren Court, it was found that justices' individual attitudes on labor and support for labor varied over time (Spaeth 1963). Other work has found that justices' votes in labor cases are influenced by changes in the unemployment rate, with Court being more likely to make "pro-labor" decisions when the unemployment rate is worse (Key 2010).

In a recent paper, Brennan, Epstein, and Staudt develop a “macrotheory” of the Court that hypothesizes that the court reacts to the national economy (2009a). These authors assume that Supreme Court justices rationally prefer a prosperous national economy to a stagnant one. They argue that the Court views times of economic contractions as a signal that the economic policies of the President and Congress are not succeeding and subsequently react to it by voting against the government more frequently. They also argue that during times of deep depression and national economic crisis, the court views this as being out of the hands of the policymakers in

Washington and rallies behind the government in an attempt to pull the nation out of economic decline. Looking at tax cases that arose before and during the great depression, the authors determine the Court voted against the federal government in times of recession. In this way, the authors conclude that the justices are somewhat akin to economic voters who have been found to attribute economic woes to public officials and punish them electorally (e.g. Abramowitz, Lanoue, and Ramesh 1987; Gomez and Wilson 2003).

This macrotheory shows that even controlling for things like ideology, the decision making of the justices is influenced by the national economy. In a similar paper, the same group of authors found that the court punishes the federal government in times of recession, but rewards them in times of prosperity (Brennan, Epstein, and Staudt 2009b). They punish the federal government by showing less deference to the Solicitor General. All else being equal, the side that the Solicitor General advocates in Court is less likely to be successful when the economy is doing poorly. The authors note that the finding of less deference to the federal government can somewhat repudiate one potential way that the court could be expected to be influenced by the economy, team theory. Team theory is a theory of cooperation between institutions that would hypothesize that the Court would work with the other branches in an attempt to fix the economy and that the advantages associated with working as a team to fix the problem would outweigh political or institutional interests (Tjosvold 1995). In a team theory set-up, we would expect there to be more deference to the solicitor general and federal government in times of economic downturn or crisis instead of less.

Other work has found an indirect path that economic conditions can influence the court. Erikson, MacKuen, and Stimson looked at how the economy influences judicial decision making through how the economy influences public opinion (2002). They argue that influence then

moves indirectly through to the judiciary through the influence that public opinion has on the court. As discussed above, whether or not the public actually does have an impact on the Court is debatable. However, going back to the idea that the Court is "part of the public too" we might see this effect that Erikson, MacKuen, and Stimson see as being that the Court is simply responding to the economy in the same way that the public is and not necessarily just responding to the public.

To look at evidence from the Court's history that would potentially support the idea of an indirect influence of the economy on decisions, we can go back to the circumstances surrounding the Court at around the same time as the *Home Building & Loan Assn. v. Blaisdell* (1934) case that was discussed in Chapter 1. While the nation was going through the Great Depression, a great deal of President Roosevelt's New Deal legislation was being struck down by a Court that was unfriendly to Roosevelt's policies. This was the famed "Four Horsemen" era.[8] However, that era did not last, as Roosevelt's popularity—in no small part due to his handling of the Great Depression—allowed him and his party to retain power for a long period of time. Eventually, Roosevelt was able to appoint justices to fill vacancies on the Court and with membership change came a Court much more supportive of Roosevelt's policies. During this time period, the economy arguably had the same kind of indirect effect on the Court's decision making—through its effect on membership change—that some of the literature on public opinion cited earlier talked about.

[8] The "Four Horsemen" being Justices Butler, McReynolds, Sutherland, and Van Devanter who opposed the New Deal and were often joined by Justice Roberts in order to make a majority to strike down New Deal legislation. The era of the Horsemen ended when Justice Van Devanter retired and was replaced by Justice Black.

The Court's Interest in the Economy and the Economy as Context

After discussing the literature on environmental and economic influences on the behavior of Supreme Court, in this section I will more fully flesh out the theoretical underpinnings of the models being presented later in the dissertation. I will first go back again to the question of why the Court is interested in the economy to begin with. Then, I will turn to some papers that have made the argument that legal influences act as a constraint or modifier on the Court's decision making. Using a similar set up, I argue that the health of the economy can similarly act as a constraint in that the economy gives the Court additional information to process when they are making their decisions.

Court's Interest in the Economy

Though the literature on how the economy may impact the Court's decision making is relatively under-developed in comparison to literature on how other factors influence decision making, there does appear to be some support that justices do care about the health of the national economy. As Posner (1973, 1993) argued, the public interest is a part of a judge's or justice's utility function that they seek to maximize with their actions and decision making. Even though judges and justices have high, stable salaries and their chances of unemployment approach zero they will still be responsive and concerned with national economic trends. How much weight these considerations are ultimately given in the judicial utility function as compared to other considerations such as legal and ideological preferences is still an open question.

According to Posner—who is himself a judge on the United States Court of Appeals—judges and justices are interested in the overall good of the economy and the public at large. It

appears that those who petition and argue in front of the Court are aware of this interest in the economy, or at least they hope that that Court cares about the economy. It is common for petitioners to bring up the state of the economy in their legal briefs and certiorari petitions to the Court and attempt to draw the Court's attention to economic issues and conditions with appeals to them (Brennan, Epstein and Staudt 2009b).

For another clear expression of the belief that the Court should have some interest in how the economy is doing, I again turn to Brennan, Epstein, and Staudt (2009a). They state in a straightforward manner:

> "Our account begins with what we believe is an uncontroversial claim: the Justices, like virtually all policymakers and citizens, prefer national prosperity to a deteriorating economy plagued by high unemployment, high inflation, and low productivity. Perhaps this preference emerges from the Justices' role as national leaders in the development of law and legal policy, or perhaps it stems from their own private investments and purchasing power" (1197).

In these few lines, the authors lay out their beliefs that the Court will have an interest in the health of the national economy. Though they do not use this specific terminology, here the authors are making the case that a "good economy" is a valence issue and is preferable. Even with their job security and relative financial security, things like high unemployment and inflation that are signals of a bad economy are not preferable. Also, they give a few potential reasons for why they do. One of those reasons is fairly simple and can be somewhat paraphrased: Supreme Court Justices are citizens and citizens have an interest in a healthy economy, all else being equal.

I posit multiple potential reasons for why the economy can or should influence justice's decision making. The first reason is tied up with what Posner and the authors who develop the "macrotheory" have put forth. Justice's are interested in the public good and in good public policy. Justice's themselves are citizens of the United States and, though well paid and more

immune to economic shocks than the average citizen, still have an interest in good public policy and the overall health of the nation's economy. As Brennan, Epstein, and Staudt (2009a; 2009b) have shown, the Court uses the state of the economy as a signal to how those in elected office are doing at their jobs. They then show that the court responds to good times with deference to the federal government and responds to bad times by punishing the federal government. Though the constitution does not give the Court the power to make fiscal policy or directly influence the economy in the way it does the legislative or executive branch, this is how the Court can in some way influence economic policy.

The argument that the Court is interested in the health of the national economy and would all else being equal prefer a robust economy to a stagnant one seems to be rather uncontroversial. Later in this dissertation, some of the models I present are more or less tests of whether or not the Court is interested and aware of the economic climate. In Chapter 3, I will develop models to test whether or not the Court responds to the economy in the types of cases and issues that they decide to hear. In Chapter 4, one of the models presented is somewhat of a replication testing that the Court uses the economy as a signal and punishes/rewards the United States government for bad/good economic times. As to whether or not this interest in the economy or awareness of the economy translates itself into influencing other behaviors of the Court, in the next section I lay out a theory of the economy as a source of information or as context that can shape/constrain judicial behavior.

Economy as Context and Information

While the work mentioned in the previous section and the expectation of this dissertation is that the Court does care about the economy, there is still a question as to how that can

potentially manifest itself in a way that matters in terms of decision making. It could be the case that even though the justices as citizens of the United States do have a concern for the overall well being of the country that this will not influence their choices and actions. In building a theory about how the economy influences the behavior of justices, I take a cue from prior work that looked at how other constraints or contextual influences shape the way that the Court makes decisions.

In some of the modern studies examining the relationship between law and the Court's behavior that was alluded to earlier, one of the findings has been that while the Court is indeed policy motivated the law can still have an impact as a source of constraint or as a modifier of ideological behavior. Bartels (2009; 2011) proposes models that bring together legal considerations with attitudinal considerations by looking at the transmission of attitudes into behavior in a slightly different way than what traditional attitudinal accounts would suggest. In discussing the relationship between ideology and voting by justices, Bartels writes: "In specifying this relationship as a process of judgment that can be explained, the focus becomes not simply whether ideology guides behavior, but *when* ideology influences justices' votes to greater or lesser degrees" (2011, pg. 147). He argues that one of the shortcomings of previous work has been that it assumes a uniform effect of ideology and he attempts to correct that shortcoming. To do so, he examines the magnitude of ideological voting on the court and finds that case-level contextual factors such as the salience of a case increase the magnitude of ideological voting on the Court. By specifying some interaction terms between ideology and case-level factors, he was able to find that the coefficient representing ideology's impact on voting was significantly larger or smaller depending on the presence of these various case-level contextual factors.

Collins (2008c) uses the term "informational environment" to describe all the information that is available to justices and factors that can influence their decision. Case-level factors are an important part of the information environment. Instead of looking at the magnitude of ideological voting, Collins models the variance of Supreme Court votes and finds that case-level contextual factors can make the final outcome of Court become more uncertain. Though Collins uses some different terminology—"informational environment" is a term he uses that I will use to describe the context a decision is made in at various points in this dissertation—and different methodology, his study is similar to Bartels' in the argument that the context that a decision is being made in matters.

As mentioned above, litigants and amicus participants do mention the economy in their briefs from time to time. Also, the bulk of the prior discussed work on the economy and the Supreme Court assumes that justices are aware in some way of the health of the economy. I argue that that information about the economy is also a part of the informational environment the justices and Court are making their decisions in. Also in the informational environment are case-level factors, strategic considerations, other environmental considerations, etc. Though a thorough examination of how information is processed into decision making is well beyond the scope of this line of research, we may expect that if justices have that information to draw on it can influence their decisions and actions in some way.

Figure 2.1 below presents a simplified, stylized look at the attitudinal model. Justices, or the Court as a body, have policy preferences. Those policy preferences directly manifest themselves into outcomes. These outcomes can take the form of votes on whether or not to hear a case, the vote on the merits in the case, etc. This direct effect of preferences into outcomes is uniform across contexts.

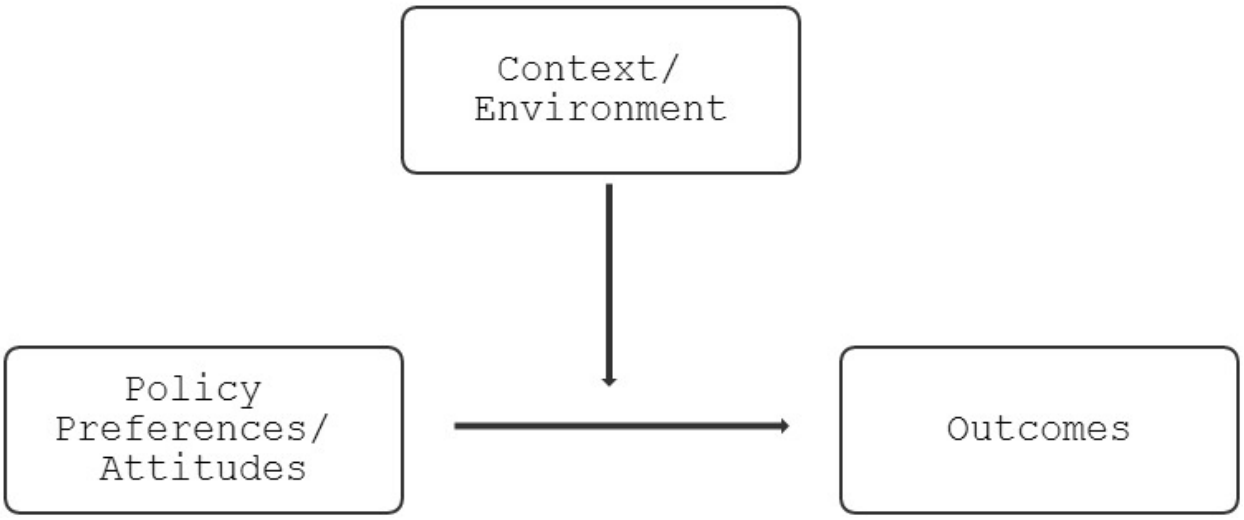
Figure 2.1

Stylized Representation of Attitudinal Model

Figure 2.2 presents a model that bears more of a similarity to the Collins (2008c) and Bartels (2009; 2011) work. Here, the justices have policy preferences just as in the first figure. Those policy preferences manifest themselves into behavioral outcomes and decisions. The difference here is that the direct causal arrow between the two is now moderated by the context or the environment that the decision is made in. This moderator does not have to just be exogenous information, but can also be different types of legal or institutional constraints that are placed on the Court. For example, if stare decisis is a constraint on the Court's decisions—putting aside the arguments about just how much of a restraint it actually is—in this model policy preferences would first pass through the constraint of stare decisis and the final outcome would be moderated as it goes through/around that constraint. The final outcome is still a function of policy preferences, but how much those policy preferences directly caused the outcome is potentially different because of the context that it "passed through".

Figure 2.2

Supreme Court Decision Making in Context



This type of constraint/context is what Bartels (2009; 20011) and Collins (2008c) argued and showed influenced Supreme Court outcomes. While in their models they looked at legal considerations, other considerations that can also be seen as context or the environment include information about the economy as well as information from some of the other environmental sources talked about earlier.

This model could potentially be complicated to a further degree by the possibility that the external environment may also influence the policy preferences and attitudes of actors. This would mean that the model in Figure 2.2 would also have an arrow going directly from "Context/Environment" to "Policy Preferences/Attitudes". While this may be true in some contexts, here I will assume that the actual ideologies or policy preferences of justices/the Court are relatively stable or unaffected by the economic information that they have. For instance, if unemployment were rising in the country, this model would not expect the labor preferences of a justice to change or for a justice to become more liberal/conservative. Instead, this model would

expect that information about unemployment will moderate the transfer of those attitudes into an outcome. The final outcome will be more or less of a function of those attitudes than it would be during a time when unemployment was lower.

This model of decision making simplistically presented in Figure 2.2 is the model that will serve as the theoretical guide for the empirical work presented later in the dissertation. The context or environment has the ability to moderate the impact of preferences on the choices that the Court makes.[9] Political psychology research has often looked at what role attitudes play in people's behavior and decision making and under what conditions this role can be strengthened or weakened (Braman and Nelson, 2007; Krosnick 1990; Miller and Peterson 2004). One insight from research like this, which falls in line with the judicial choices in context literature, is that there is some variation in the amount that attitudes matter. Under some contexts, attitudes matter more and under some contexts attitudes matter less.

Though not necessarily dealing with the attitudes of Supreme Court justices, prior research has made a point about how economic situations can impact behavior. There has been prior academic work done on showing the link between national economic performance and an individual's own level of "happiness" (Di Tella, MacCulloch and Oswald 2003; Oswald 1997).[10] One of the major insights from the field of "prospect theory" is that people make different choices under different circumstances (see Kahneman 2011 for a general summary of the long line of work on prospect theory and related behavioral phenomena). Work of this type examines the decision making of individuals and can be mostly summed up by saying that people do not

[9] In this theoretical set up, there can be contextual or environmental factors which could conceivably strengthen the ideology-outcome relationship. In general, I am more focused on what attenuates the impact of ideology.

[10] The notion that the state of the economy influences the "happiness" of a person lead me to informally referring to this line of research looking the Court's responsiveness to bad economic times with friends and colleagues as my "Grumpy Clarence Thomas Model" of Supreme Court decision making.

always transfer their preferences into choices in a "rational" way. Context and environmental stimuli can lead decision makers into deviating from rationality. While the work on prospect theory and other similar theories has been mostly focused on "normal people", there has been some experimental evidence to show that judges are also subject to being affected by cognitive biases or influenced by the context a decision is made in (e.g. Guthrie, Rachlinski, and Wistrich 2001 and 2007; Rachlinski, Guthrie, and Wistrich 2006 and 2011; Wistrich, Guthrie, and Rachlinski 2005).[11] In these studies, the authors were able to show that the decisions that judges would make can be subject to framing effects and anchoring effects.

Summary

In this chapter, I discussed some studies of Supreme Court that have found evidence of a significant impact of environmental factors on decision making. These environmental factors typically fall outside of what the classic models of the Supreme Court have argued as being the determinants of behavior. While there is evidence that these contextual factors influence the Court, there has not been an attempt that I am aware of to fit these into a more unified model of decision making.

Borrowing from work by Bartels (2011) and Collins (2008c) on how context impacts decision making—in their case context meaning case-level legalistic factors, I present a simple model of judicial behavior that posits that the transferring of preferences into outcomes is first moderated by the context or informational environment that the Court is making that decision in. This informational environment includes legal/institutional factors, strategic considerations, and other considerations, which I argue includes the economy.

[11] For a more thorough endorsement of scholars utilizing behavioral insights into judicial decision making, see Segal, Woodson, and Johnson (2013).

Prior research has made a clear case that the Supreme Court, though the constitution does not grant it power on par with the legislative or executive branch to make economic policy, does have an interest in the economy and a preference for a stronger national economy over a stagnant or contracting one (Brennan, Epstein, and Staudt 2009a, 2009b; Posner 1973, 1993, 2008). Not only do they have an interest in having a stronger national economy, but the model I am presenting here posits that whatever contextual cues the Court is getting from the economy will also impact decision making. The Court, with a preference for a stronger economy, will react make decisions differently when the economy is doing poorly than when it is doing well.

Chapter 3

The Agenda Setting Stage

In this chapter, I examine the agenda setting stage of Supreme Court decision making. This is the stage where the Court decides whether or not to grant certiorari to a case. Unlike other courts in the United States judicial hierarchy, the Supreme Court has the power of docket control—being able to select what cases they will hear. This is a hugely important power for the Court. It is able to decide what cases—and by extension—what legal issues get to be on and off the agenda.

The Supreme Court hears cases that pertain to many different policy domains or issue areas.[12] The Supreme Court Database, which will be discussed later on as the source of much of the data in this dissertation, codes specific issues that cases address into fourteen different rough issue areas. These issue areas are: Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, Attorneys, Unions, Economic Activity, Judicial Power, Federalism, Interstate Relations, Federal Taxation, Miscellaneous, and Private Action. In this chapter, I will be primarily focused on the area of "Economic Activity" and what influences the Court's decision to hear more or fewer cases in this issue area over time.

Prior Work on the Agenda Setting Stage

What follows is a very brief summary of the agenda setting process of the Supreme Court. For a more thorough, detailed discussion see Perry (1991) or Tanenhaus et al (1963). The agenda-setting process of the Supreme Court begins when a party or parties file a petition for a

[12] Throughout this chapter and other parts of the dissertation, I will use the terms "issue area", "policy area", etc. relatively interchangeably.

writ of certiorari (or a cert petition). This most commonly happens after a party loses a decision in a lower court case and wishes to appeal that decision to the Supreme Court—though the Court does have original jurisdiction in a small subset of case types.[13] The court gets thousands of these petitions every term.

After petitions are filed, what follows is largely a two-step process. First, there is a discuss list of cases that the justices think deserve formal consideration. After the discuss list is circulated, the justices meet in conference to discuss the merits of hearing the cases that have made the discuss list. Traditionally, the chief justice will go first in discussing the cases and then is followed by the associate justices in order of seniority—most senior to least senior. If four or more justices vote to hear a case, it is put on to the Supreme Court docket. A justice may also cast a "Join-3" vote instead outright rejecting it. This type of vote will give a potential case the decisive fourth vote it would need to be selected if there is a group of three justices that voted to grant cert to that case. Out of the thousands of cases that the court receives petitions to hear, many times as few as 1% of those potential cases are granted certiorari (Perry 1991).

Part of the difficulty of studying agenda setting on the Supreme Court is the ambiguity and non-binding nature of Rule 10, as well as the general secrecy of the overall process (Songer 1979). Rule 10 is a general statement of the criteria that justices use when making their decision on whether or not to hear a case. Some of the criteria that are a part of Rule 10 include whether or not there is lower court disagreement in a case and whether the question at stake in the case is an important question that the Court has not heard yet. However, Rule 10 is not a binding rule

[13] The domain of the Court's original jurisdiction has shrunk over time and now very few cases are decided on which came to the Court via original jurisdiction.

and can probably best be thought of as a list of criteria that can be necessary conditions for hearing a case, but not necessarily sufficient conditions.[14]

Firsthand accounts of the process from "the inside" have only recently become available through the digital archive of Justice Harry A. Blackmun's papers (Epstein, Segal, and Spaeth 2007). Blackmun's papers give some interesting notes pertaining to what is discussed during conference. Also, Blackmun recorded the votes of his fellow justices on whether or not they granted certiorari to a particular case. Black and Owens (2009b) tested the reliability of the Blackmun papers and found them to be reliable and accurate records of the votes that his colleagues made. Knowing that the papers give accurate records of votes should set aside some of the fears other scholars have about the overall reliability of other information that can be gleaned from looking through the Blackmun papers. While the Blackmun papers are obviously limited because he served on the Court spanning from 1970 to 1994, they are still an invaluable resource in giving scholars a greater amount of insight into what is going on behind the scenes of the Supreme Court, which is often shrouded in mystery.[15]

While there has been an inherent difficulty in studying the determinants of why the court grants certiorari to a petition because of the opaqueness of the process, it is still an area that has been studied in some depth by political scientists and legal scholars. The scholarly literature that has developed around agenda setting on the court has largely focused on explaining the case-level votes by the Court on whether or not to grant certiorari. In this literature, like all other well developed literatures, there are a few common themes that have developed.

[14] Perhaps the most accurate answer to the question of what makes a case that is appealed to the Supreme Court cert-worthy is the glib response of "when four or more Supreme Court justices say so".
[15] At least much more so than with other national political institutions such as the Presidency and Congress.

Many previous scholars have discussed how justices employ a reversal strategy in determining the cases they will choose to hear (Ulmer 1972; Brenner 1997). The logic of the reversal strategy is fairly straightforward. A justice does not have much incentive to grant certiorari to a case when they agree with the lower court ruling.[16] Therefore, we would expect that justices who vote to hear a case disagree with all or part of the lower court ruling and wish to reverse it.

Similar to a reversal strategy, conflict in the lower courts has also been cited as a determinant of case selection. Ulmer (1984) and Perry (1991) argued that the Supreme Court sees a need to resolve conflict when it exists in the lower courts, so the justices look for that when making decisions. This stems from the Court being the highest court in the land. Once they establish precedent about a certain legal issue or question, lower courts should be constrained in how they interpret that particular question.

Another theme in some of the earlier agenda setting scholarship was focused on justices determining if cases were worthy or important enough to be heard on the court. Tannenhaus et al (1963) argued that justices looked for cues in the petitions that would help separate the worthy petitions from the rest. Songer (1979) in a way synthesized the cue theory of granting certiorari with the reversal strategy argument by saying that the court would look for cues in the petition that indicated whether the lower court had decided "correctly" or "incorrectly". Songer then argues if there are cue(s) present that indicate that the lower court treatment was incorrect, a petition will be scrutinized more and will be more likely to make the discuss list and potentially

[16] Although, if it is an issue or question that that justice would want to make a ruling on in order to establish Supreme Court precedent, which is much stronger than lower court precedent, they may wish to grant cert—assuming they were confident that their preferred side would win and the Supreme Court precedent which gets established matches with their preferences. This type of behavior would be a good example of the strategic type of behavior that many scholars argue the Court shows in the various decisions that it makes.

be chosen by the justices to be heard. Another cue to the Court about the worthiness of a particular case can be the parties involved. For instance, the United States government playing a role in the case as either a party in the case or as an amicus has been found to increase the likelihood that the case is granted certiorari (Ulmer 1972). This role is filled by the Solicitor General—the person appointed by the president to represent the United States interests in the Court—and in certiorari decisions the Solicitor General is often given the benefit of the doubt that if she is advocating for a case to be heard it is a case that is important.

Factors external to the petitions themselves may also give justices a cue as to the importance of a case or its worthiness for review. For example, scholars have found that interest group activity can act as a signal to a justice on whether or not the case is important. Caldeira and Wright (1988) did this by looking at how many groups file amicus curiae briefs that support or oppose the court granting review to a case as a measure of how much interest there was in a case. In a subsequent study, Caldeira and Wright (1990) found that amicus briefs play an important in role in both getting cases onto the discuss list as well as the final decision to grant certiorari. Similarly, McGuire and Caldeira (1993) found that repeat players being involved in a case is a cue to the justices of the case's importance and therefore lead to that case being more likely to be reviewed. These works and others have shown the important role of interest groups via amicus activity when it comes to shaping the Supreme Court agenda (see also Collins 2008a; Epstein and Kobylka 1992; etc.).

Cue theory would also account for some other studies that have similar findings to work that has found a "repeat player" bias in Supreme Court decision making. Several studies have argued and shown that experienced litigants play a role in shaping the agenda (Baird 2004; Baird 2007; Hurwitz 2007). All of these taken together—the role of the Solicitor General, interest

groups, and experienced litigators—help give us some insight about something quite basic: the Court prefers to hear cases that are important. The cues they look for in certiorari petitions are often cues as to whether or not the case is important enough for the highest court in the land to make a decision on.

As with other aspects of Supreme Court decision making, there are groups of scholars who argue that legal and jurisprudential concerns shape the justices' behavior at the certiorari stage. In particular, Provine (1980) argues against things such as cue theory and instead argues that legalistic concerns impact the decision to grant cert to cases. Scholars arguing for why legal factors matter use arguments such as the fact the justices are trained in law and taught legal norms (Knight and Epstein 1996) as well as the fact the justices rely on another branch to execute their decisions (Lindquist and Klein 2006). Perry (1991) argues that legal factors such as legal conflict are relevant when justices are voting on certiorari. An example of a legal consideration influencing justices is the argument that when a lower court strikes down a law as unconstitutional, there is a strong legal norm that compels the Supreme Court to hear the case because of the desire for the Supreme Court to be the ultimate arbiter in determining the constitutionality of a law (Stern et al. 2002).

Black and Owens (2009a) find support for justices using legal considerations when making their agenda votes, even though they concede that justices are largely policy motivated. They argue that when legal considerations and policy concerns are congruent, the justices are free to act in a manner that gets them their most preferred policy. When legal considerations and policy are not congruent, they find that it is policy concerns that ultimately lose out during this stage of the process.

Another common line of research on the certiorari stage involves scholars asking whether or not justices are strategic in the decisions they make on what cases to hear. Acting strategic in the certiorari stage is most commonly defined as whether or not there is evidence that justices are looking forward to the merits stage when making their decision. Schubert (1959) argued that justice's certiorari voting was consistent with them achieving their policy goals on the merits. The examples that Schubert draws upon are a series of labor cases in the 1940s where the liberal justices voted to hear cases that had a greater likelihood of leading to a pro-labor decision on the merits. On the flip side, these justices avoided granting cert to cases when there was a greater potential for a more conservative decision to be made.

Scholars that advocate the strategic theory argue that justices, in order to further policy goals, need to anticipate the Court's ruling on the merits and vote in the agenda setting stage accordingly (Boucher and Segal 1995; Benesh, Brenner, and Spaeth 2002). In this strategic literature, there is commonly thought of as two types of strategic behavior: aggressive grants and defensive denials (Perry 1991). These terms are defined straight forwardly. An aggressive grant is when a justice grants cert in a case when they are likely to get a positive outcome in the voting stage. Conversely, a defensive denial is when a justice strategically denies cert when they are anticipating a vote that is contra to their preferences. They would instead prefer for the lower court decision to stand or to wait to hear a case on that issue when they would anticipate a "better outcome". Caldeira, Wright, and Zorn (1999) argue that if justices are pursuing policy goals, there should be no difference between aggressive grants and defensive denials. However, Benesh, Brenner, and Spaeth (2002) find evidence of aggressive grants and not defensive denials in part because reverse-minded justices have more to lose if they miscalculate what the decision on the merits will be.

Amongst the already discussed literature on agenda setting, most of them looked at individual case attributes and whether or not the court granted certiorari to that particular case. Seemingly less work has been done looking at the aggregate Supreme Court agenda as a quantity of interest. Among the papers that have looked at the aggregate agenda of the Court, Likens (1979) looked at the ideology of the justices of the Court and linked shifts in the agenda to shifts in those ideologies. Casper and Posner (1976) tell a similar story about shifts in ideology and preferences, only they are concerned more with the shifts that happen in the population and how those shifts lead to different types of litigation being more prominent in the courts. Both of these papers are making the case that their differences between liberals and conservatives in the types of cases that they like to see being decided and that liberal and conservative justices will subsequently have different case type preferences.

Caldeira (1981) was another study that looked at the Supreme Court agenda in the aggregate. In this case, Caldeira was focused on one type of case in particular—criminal law cases. In a finding that falls in line with Likens (1979) and Casper and Posner (1976), this study attributed changes in the criminal law agenda to changes in the ideological composition of the Court. All of these findings about ideological composition and whether or not liberal and conservative justices like dealing with certain types of cases shares some similarities with the "issue ownership" literature (i.e. Petrocik 1996). Work on issue ownership posits that voters associate certain issues to the individual parties and the other party should not try to go too much into the other party's "turf". While this was all done looking at elected officials who have to answer to voters, it is potentially interesting if the ideological factions on the Court also take ownership of certain issues.

Perhaps the strongest argument for using the aggregate agenda of the Supreme Court and not just the individual level votes on certiorari comes from Pacelle (1991). Here Pacelle makes the argument that the aggregate agenda of the Court can in a sense give us a measure of what issues or policy areas the Court feels are important at various time points. This is because of something I alluded to in the first chapter of the dissertation—the finite nature of the Supreme Court agenda. The Court receives roughly eight or nine thousand petitions for certiorari each term. The Court is limited in the number of cases it can hear and clearly cannot hear all of them. Therefore, any case that the Court decides to hear must be at the expense of another case—perhaps even an important case. So if the Court decides in a term to give X% of the docket space to an issue like economic activity, that X% is taking away from other issue areas.

Agenda Setting Hypotheses

For these analyses, I am building somewhat off of the work of Pacelle (1991) and the argument that the aggregate Supreme Court agenda is an entity of interest and gives us some insight into what issues and policy areas the Court feels are more or less important at various time points. So, how does the Court decide what the importance of various issues/policy areas are? As discussed above, work on the certiorari process starting with Tannenhaus et al (1963) has argued that justices search for signals or cues in the petitions that signal whether or not the case is worthy or important enough to be heard. These cues can also come from external forces, such as amicus curiae briefs from interest groups (Caldeira and Wright 1988) or the federal government (Ulmer 1972). I argue that exogenous events can also be a cue to the type of cases the justices will deem to be worthy of being heard. I argue that one of these exogenous factors is the national economy and present my first hypothesis.

H 3.1: The court will decide to hear more economic cases in times of economic downturn.

If, as others have argued, the court is interested in hearing important cases, I argue that in times where the economy is flagging it will become a more important issue to the Court. I expect the Court to respond to this by using the economic nature of a case as a cue to its importance and worthiness of being given full treatment. As noted earlier, this hypothesis—and other hypotheses presented in later chapters of this dissertation—does somewhat pre-suppose that the justices are reasonably well informed citizens. If not well informed about the specifics of the health of the economy, at least aware enough to have a basic understanding of when things are going generally "good" or "bad" in the country.

Another potential cue to the court as to what cases or issue areas are important may come from the public. Though justices are not elected by the people and not directly accountable to them, there still seems to be some effect of public opinion on the behavior of justices (Epstein and Martin 2010; McGuire and Stimson 2004; Mishler and Sheehan 1993).

H 3.2: The Court will be responsive to the public by granting certiorari to cases more often when the public places a greater emphasis on that issue area.

Similar to the first hypothesis, where I argued that negative economic conditions increase the salience and importance of economic issues and makes it more likely for justices to choose those cases to go onto the agenda, I argue that the justices can get a sense from the public about what are the most important issues in the country. As public opinion stresses the importance of economic issues, crime, and civil rights issues more, I expect the Supreme Court agenda to be further populated with those types of cases.

Another reason for the court paying attention to public opinion is the Court's dependence on other institutions. Many scholars have noted that Supreme Court may often find itself in a

difficult position because it cannot enforce or execute its own decisions, but instead relies on other branches to do so (e.g. Baird and Hurwitz 2006; Lindquist and Klein 2006; McGuire and Stimson 2004). McGuire and Stimson argue that this dependence requires the Supreme Court to stay attentive to public attitudes. It is my argument that being attentive to public attitudes goes beyond the decision on the merits of cases, but also influences the choosing of the Court's agenda. The Court may feel its decisions will be more important and more likely to be enforced when it comes from an issue area that the public has deemed as being important.

Data

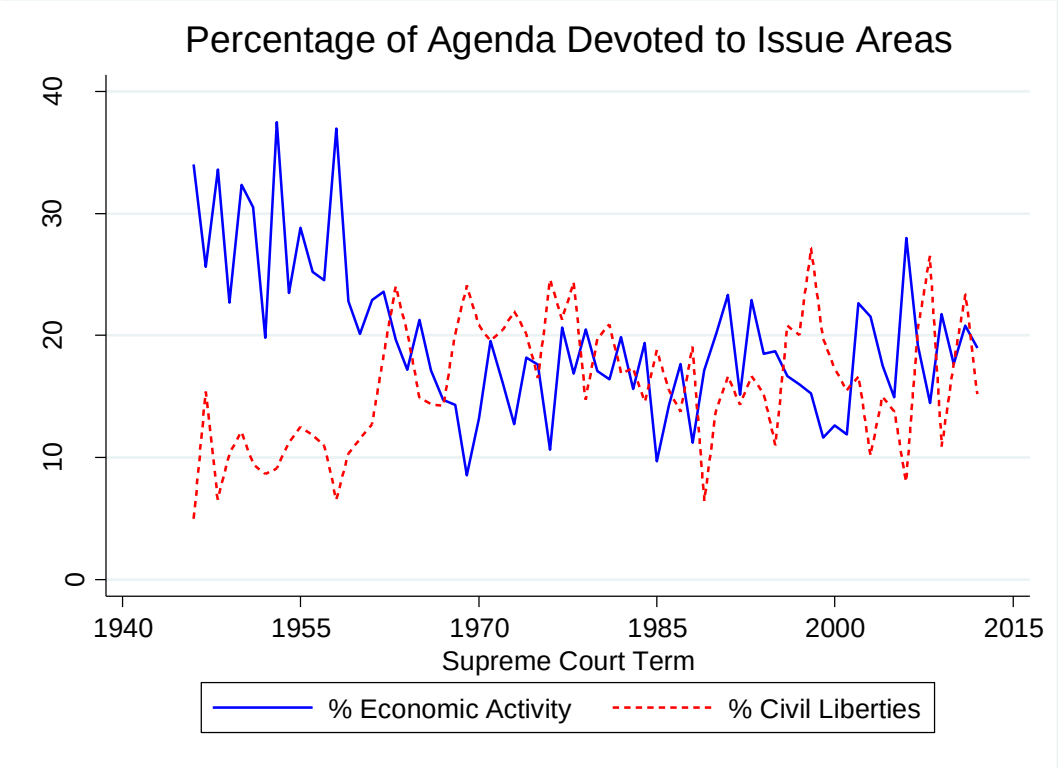
For this analysis, the primary dependent variable will take the form of what percentage of the Court's docket in each term is dedicated to a case of a certain issue area. Since I am interested in the economy, it will be the percentage of cases heard that are classified as being economic. Classification of cases into issue areas is taken from the Supreme Court Database (Spaeth et al 2014).[17] Data from the Supreme Court Database was available for the 1946-2012 terms of the Court. However, certain independent variables that will be discussed below were not available for that entire time frame, so some of the models presented below will not cover that entire time frame.

To get a general sense of how large a part of the agenda the economy is, I first report some descriptive statistics. During the timeframe the Supreme Court Database covers—the 1946 to 2012 terms—the issue area of "economic activity" comprised—on average—19.7% of the agenda. It reached a high of 37.5% of the agenda in 1953 and a low of 8.5% in 1969. The figure below shows a time series plot of the percentage of economic cases over time. To get a sense of

[17] An alternative coding scheme for the percentage of the docket devoted to a particular issue comes from the Policy Agendas Project, which categorizes the issue areas of cases into similar categories as the Supreme Court Database. Data from this source was only available up through the 2009 term.

how important economic cases are in terms of agenda space, I include a time series line for a separate issue type—civil liberties. As noted earlier, when the Court decides to hear a case and devote a part of the agenda to one issue area they must do so at the expense of devoting more space to another issue area do to the finite nature of agenda space. Civil liberties cases would be just one example of an issue that would potentially be heard less if the Court decided to hear more economic cases.

Figure 3.1



In order to explore whether or not the Court is responsive in the types of cases they will hear to the economy, I will look at a variety of measures of national economic health. The independent variables of interest will be indicators of the economy. These will include the unemployment rate in the country (taken from the Bureau of Labor Statistics), consumer

sentiment, and GDP growth. Consumer sentiment is measured using the Index of Consumer Sentiment (ICS). Using multiple indicators of the economy is not only valuable as a robustness check of the results, but may also be useful in separating what indicators are more important or being paid attention to more by the justices.

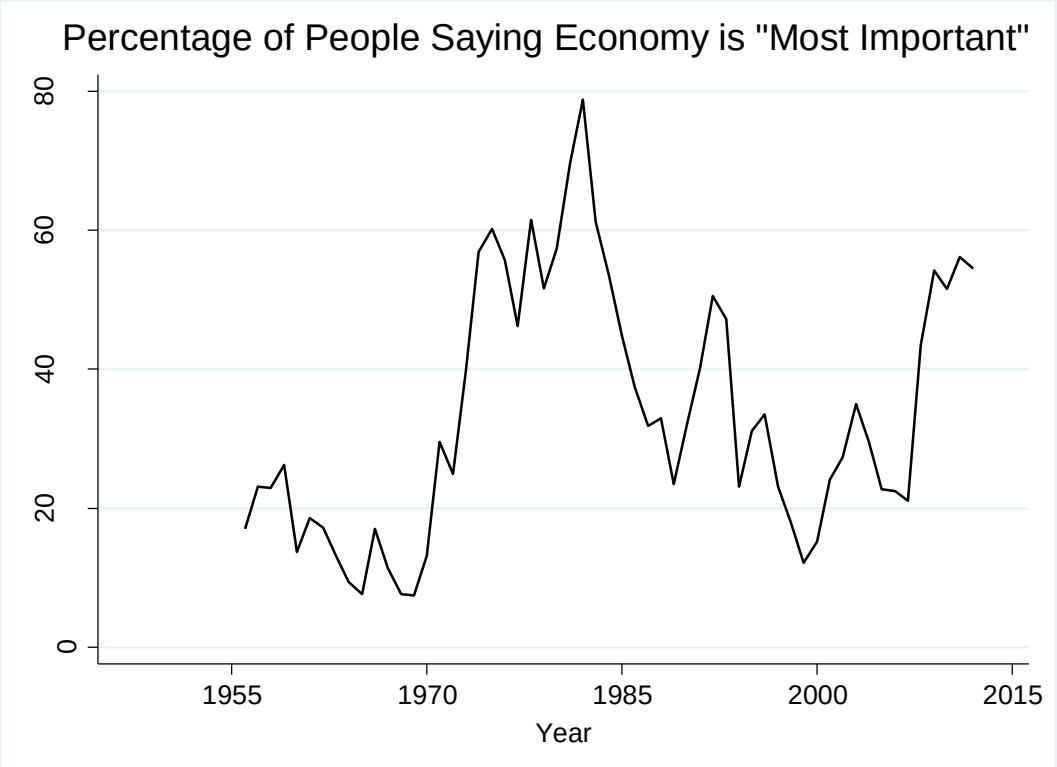
The ICS index is the result of compiling monthly data from the Michigan Survey of Consumers. The overall index mixes socio-tropic and pocketbook questions about current economic conditions and also expectations about where the economy is going. This is a measure commonly used in economic voting and other political science studies to get at overall perceptions of the economy in the public (see generally MacKuen, Erikson and Stimson 1992, 1996). In a forthcoming piece, Kellstedt, Linn, and Hannah critique the ICS and examine its usefulness as a measure. They find that the ICS as an overall index does not do as well at predicting certain economic outcomes such as future consumer spending as some of the individual components of the ICS do. While it does not do as well as a predictor of future economic activity, the authors note that it is a useful concept in terms of showing times when the public is optimistic and pessimistic about the economy and tracks well with our knowledge of economic history. For the purposes of this study and dissertation, I am most interested in the ICS for its ability to capture the optimism/pessimism about the economy. However, in order to alleviate concerns about using the full ICS index, I will also estimate some of the models using one of the components of the ICS the Court may be most interested in—prospections about how well the national economy will be doing in the near future.

One issue to deal with in measuring the data is that Supreme Court terms do not coincide with the calendar year. Instead, a term generally runs from October through June—and sometimes can go into July. In order to get term level economic data, I took quarterly data for the

three quarters that coincide with a Supreme Court term and averaged them. This gave me term level data that I could then match up with the other term level data such as the ideology of the Court during that term. For the ICS and its components, quarterly data is only available fully going back to the year 1960. However, they did collect data at certain times during each year from 1952 until 1960. To backdate the term level ICS data to 1952, I used the data from the available months of each term and averaged them.

Another potential way that the Court may be interested in the economy is by the public's interest in the economy. Perhaps, ceteris paribus, the Court has an interest in selecting cases because the public feels the issues at stake in the case are important. To measure the public's sentiment on what are important issues, I will look at the Gallup poll. For a period of time in the Gallup poll, they have a question asking what respondent's feel is the most important issue facing the country. For models of how much of the court's agenda is devoted to economic cases, I will use as a predictor variable the percentage of people who said the economy was the most important issue. Data on Gallup's most important problem is available from the years 1956-2012 from the Policy Agenda Project and is presented in Figure 3.2 below.

Figure 3.2



One set of controls that will be important for these models are variables that measure the ideological make-up of the court. Previous scholarly work has found that there is a difference in what types of cases that liberal and conservative justices grant certiorari to (Caldeira 1981; Likens 1979). To measure ideology I will employ the scores developed by Martin and Quinn, specifically the ideological score of the median justice of the Court.[18] Martin-Quinn scores use Bayesian item response measurement models via Markov chain Monte Carlo methods to model ideal points for the justices, which are flexible to changes over time instead of being time invariant like some other ideological scores (Martin and Quinn 2002). I use this measure of

[18] The median voter theorem makes it logical to measure the aggregate ideology of the Court by looking at the ideology of the median. Because in a cert vote only four justices are needed, the median is not necessarily the agenda setter of the Court—the fourth and sixth justices on a left to right scale are. However, as I am interested in aggregate dynamics and how the aggregate agenda of the Court is influenced by aggregate economic factors and aggregate ideology, I will still use the median of the Court to control for ideology. Similar models were run using the ideology of the 4th and 6th justice and the results were substantively the same. A table showing some of these models is presented in the appendix.

ideology primarily for two reasons: they are used as an ideology measure in a large proportion of the literature devoted to attitudinal influences on Supreme Court behavior and the scores can be compared across time. These scores are theoretically unbounded, but in practice run from -6.36 (liberal) to 4.84 (conservative).

Methods

For the above hypotheses, I am interested in testing these relationships over time. The variables in this case are each time-series, and when dealing with time-series data there are many issues that should be addressed as they can be threats to our ability to make inferences. One of the first issues to look at is whether or not a series we are using in a model is stationary. If a series is non-stationary—or I(1)—the value of a variable at time *t* is a function of value of the variable at time *t-1* plus or minus some random error. If we were to go ahead and use regular regression techniques on I(1) data, there is a likelihood of us attaining spurious results due to the autocorrelation inherent in the I(1) series (Granger and Newbold 1974). Instead of modeling these in level form, I will model them in terms of changes, or differences. This is a standard approach to dealing with these types of problems in time series data (Box and Jenkins 1976).

Differencing and other forms of "ARIMA" modeling help to remove the influence of the values of past observations on the time series. It also makes intuitive sense to test the hypotheses I am testing by looking at changes in the variables. To test hypotheses about how the focus of the court's agenda changes, I am interested in seeing how that focus varies and whether or not that is responsive to changes in other variables.

Having non-stationary data as either the independent variable or right-hand side predictor variables may induce serial correlation in the residuals, making the standard errors incorrect and

all hypotheses testing and inference unreliable (Enders 2004). Running analyses on time series data that is not stationary also leaves a researcher vulnerable to finding spurious significant results upwards of 75% of the time (Granger 1974). Because it is such a large threat to inference, other steps may need to be taken beyond simply differencing the data in order to make it stationary. Recent work in political time series has made the argument that aggregated time series could exhibit characteristics of both stationary and non-stationary series and be fractionally integrated (Box-Steffensmeier and Smith 1996; Lebo, Walker, and Clarke 2000).

The series I am using in these models are likely to be fractionally integrated because they are mostly series that are aggregated over individuals or individual level processes. When the series are constructed in that way, that leads them to be fractionally integrated due to Grangers Aggregation Theorem (Granger 1980). For example, one of the variables I utilize in these models is ICS. The ICS series takes the answers that a variety of people give to a variety of survey questions in an attempt to come up with one number that gives a general sense of consumer sentiment in the country. Each person in the survey may have a different amount of memory that influences what their responses are (from 0 being no memory to1 being full memory). In aggregating those people's responses together, we usually get a series that is integrated of an order greater than 0 but also less than 1. The series is neither I(0)—stationary—or I(1)—non-stationary. This is the case for other series in my models as well and not just ICS.[19]

The problem with having fractionally-integrated data is that our solution to dealing with I(1) data—differencing—may not correct the problem. By "over differencing" we may in fact be putting negative-autocorrelation into the series, which gives us the same problems with regard to making inferences as autocorrelation does (DeBoef and Granato 1997). The remedy for dealing

[19] For the percentage of the agenda devoted to an issue area, that series is an aggregation of individual decisions that the nine justices make to grant or deny certiorari.

with these fractionally integrated series is to make them stationary by fractional differencing of each series by its own differencing parameter *d*. In order to have the most confidence in conclusions I can make from the models, I run the models using both first differenced series and fractionally differenced series.

In order to elaborate on the potential for memory or autocorrelation to be present in the series, I present the next few figures in a way to—in a sense—"walkthrough" the problem. These figures present the Autocorrelation Function (ACF) and the Partial Autocorrelation Function (PACF) of the dependent variable when I leave the variable in level form, first difference it, and fractionally difference it. What the ACF and PACF show are the memory of the series by showing how much the variable is correlated with itself out to various lags.[20] In these graphs, if the bar chart that represents the autocorrelation or the partial autocorrelation extend beyond the confidence intervals, we would take that as evidence that are series has enough memory in it to be threatening to inference.[21]

[20] ACF and PACF graphs were obtained using the "BJIDENT" procedure in WinRATS 8.0.
[21] Here, the confidence interval is represented by the lines that look somewhat "squiggly".

Figure 3.3

Level-Form DV

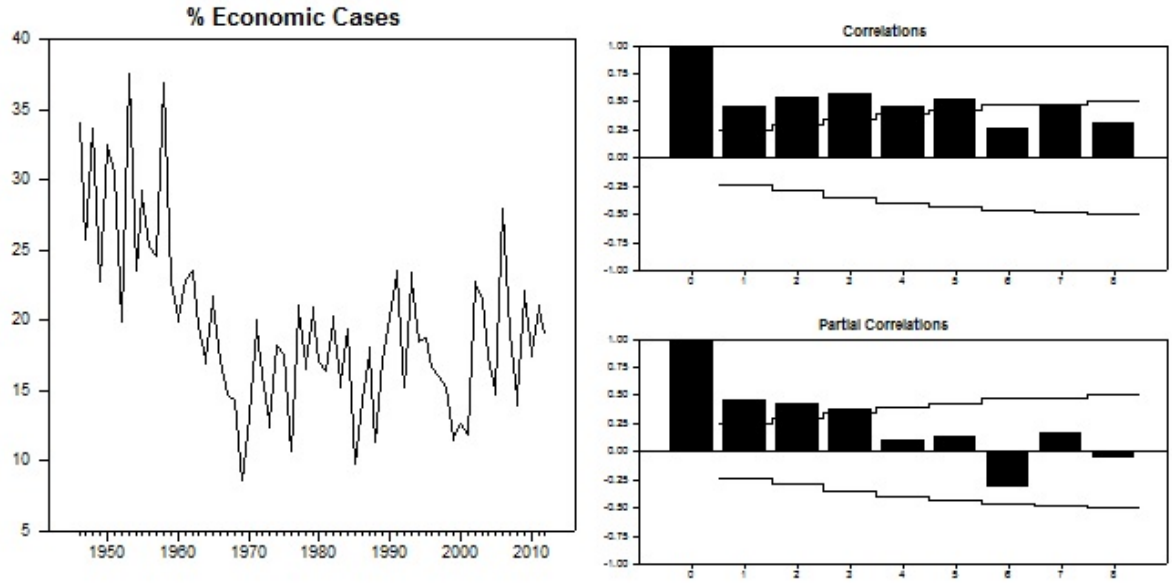
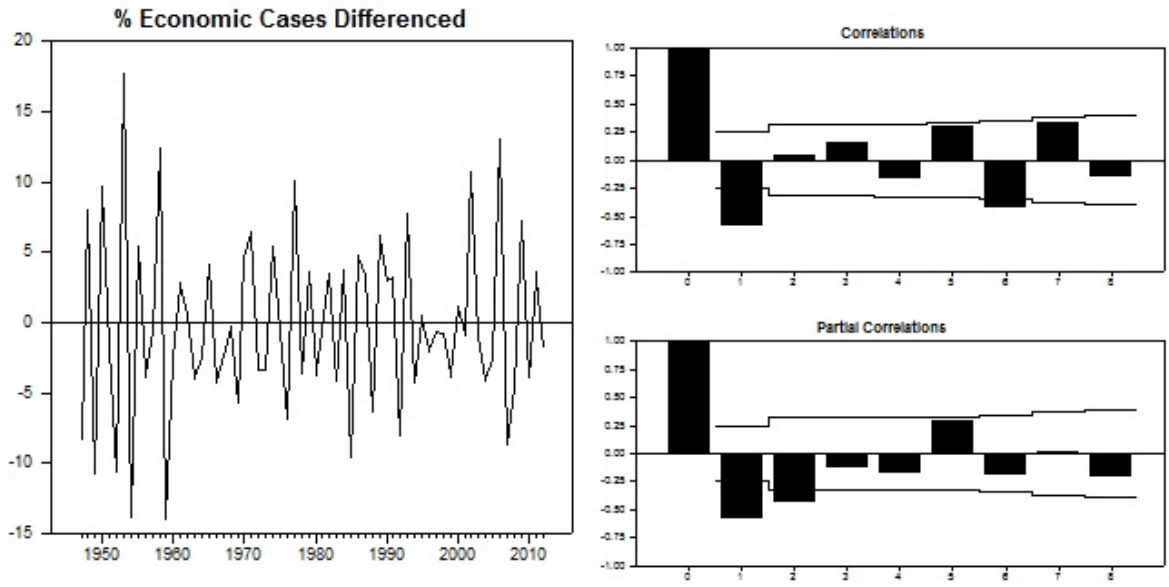


Figure 3.3 above shows a time series plot of the dependent variable, percent of cases in a term that deal with economic activity, on the left with the ACF and PACF of that series on the right. As we can see, the correlations in both graphs go beyond the boundaries for multiple lags. In traditional methodology of the Box-Jenkins type, we may try to correct for this by adding in AR (autoregressive) or MA (moving average) parameters at those lags in an effort to "clean-up" this autocorrelation. Another common way of dealing with this memory, differencing the variable can be seen in Figure 3.4.

Figure 3.4

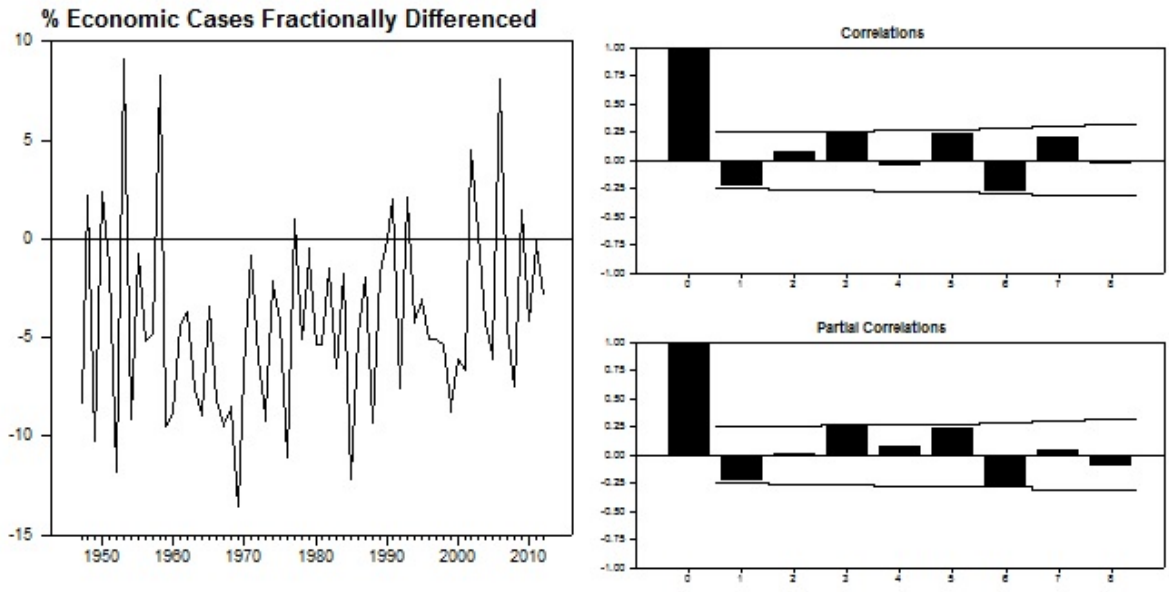
Differenced DV



As we can see in Figure 3.4, differencing the variable was effective in that it took away the positive autocorrelations out at the first, second, and third lags. However, in this figure we do see what can happen when we first difference a variable that is not I(1). Earlier I mentioned that "over differencing" could be a problem that would induce negative autocorrelation in a series. We see a good example of this here. By differencing the series, we have induced negative autocorrelation at the first lag. Again, this could potentially be dealt with my estimating an MA parameter. Instead, what we could is fractionally difference the variable, which can be seen in the next figure.

Figure 3.5

Fractionally Differenced DV



Here in Figure 3.4, we have fractionally differenced the variable by its estimated value of *d*—which is .29.[22] This procedure has appeared to "work" in that now in the ACF and in the PACF we no longer see any correlations that extend beyond the confidence bounds. All of these mentioned procedures—fractional differencing, differencing, etc.—are often referred to as "pre-whitening" methods. This name comes from the desire of wanting to have residuals in our model that our random, "white noise".[23]

[22] One potential source of error for this estimate of *d* is the possibility that it is driven by the structural breaks of different Chief Justice terms. Potentially, this series could be seen as being stationary within Chief Justice terms but behaves as a non-stationary series because of the breaks. In order to examine this, I first ran a regression of the Supreme Court agenda on the changes in Chief Justice term and saved those residuals. I then estimated the *d* on those residuals, which act as a series that is "cleansed" of the structural breaks. The resulting estimate of *d* of that series was about .26. With the error around the measures of *d* for the original series and the series cleansed of the structural breaks, it cannot be concluded that they are statistically different. This provides some assurance that fractionally differencing the original series was the proper strategy for dealing with the potential threats to inference of autocorrelation.

[23] One of the Gauss-Markov assumptions being that errors are uncorrelated.

As noted, one of the first steps of my analysis will now be to estimate the *d* value of each—the level of integration. This was done so using Robinson's Gaussian Semiparametric Estimator (RGSER) procedure implemented in WinRats 8.0 (Robinson 1994). The table below presents the value of *d* that each of the series was differenced by in the models what were fractionally differenced.

Table 3.1 Estimated *d* Values

Variable	*d*
% Economic Cases (SCDB)	.29
% Economic Cases (Policy Agendas)	.24
ICS	.77
ICS-National Prospections	.76
Unemployment	.88
GDP Growth	.55
% Gallup Economic	.97
Ideology (MQ)	1.03
Public Mood	1.07

Notes: Values in the table are the values of *d* that were attained using Robinson's procedure in WinRats 8.0.

After calculating these *d* values, each series is differenced using its *d* value using the Fractional Integrating Filter (FIF), also in WinRats (Diebold and Rudebush 1989). The resulting fractionally differenced series, though they look quite similar to the first-differenced series and are highly correlated with first-differenced series, should lead to the resulting models having better autocorrelation diagnostics and will lead to us having higher confidence in the estimated parameter.

To test the hypotheses outlined above, I will estimate the following basic models:

$$\Delta\text{Economic Agenda}_t = \boldsymbol{\alpha} + \boldsymbol{\beta_1}\Delta\text{Economic Indicators}_{t-1} + \boldsymbol{\beta_2}\Delta\text{Controls}_t + \boldsymbol{\varepsilon}_t$$

In these models, α is a constant, the βs are estimated coefficients, and the ε term is an error term that is normally distributed $(0,\sigma^2)$. The Δ indicates a variable was first differenced or fractionally

differenced (depending on the model). In the tables, I will denote the fractionally differenced variables with $\mathbf{\Delta^d}$, with the d superscript indicating that the variable was differenced by its estimated *d* parameter. For each set up of an equation, I will use a variety of indicators for the sake of robustness.[24]

In the equations, I specify that my main independent variable of interest, either economic indicators or the public opinion variables, will be put in as the first lag. I do this because of the reactive nature of the hypotheses I present. I hypothesize that the court will react to changes in the economy or changes in public opinion by then hearing more cases of certain issue areas. A subsequent reason for using lags of the variables of interest is the amount of time that it takes for a case to make it to the Court. If the Court is making a decision to hear a case that is petitioned to it, it goes on the docket for some time down the line and not instantaneously. Because the court is being reactive and the process takes time, I would not expect to see the effects instantaneously but would instead expect that the variables would have an effect after lagging them.

Results

Using the percentage of court cases that are coded as being about economic activity as the dependent variable, I estimated a series of models using various economic measures and controls. Before talking in more detail about the results in the tables, one thing to discuss that is common to many of the models here is the difficulty of substantively interpreting the coefficients. This is arguably the biggest downside of using fractional differencing techniques. Whereas in a regular OLS regression, we can interpret the coefficient using a phrase such as "this coefficient of β indicates that a one unit increase in X leads to a β unit increase in Y, holding all

[24] For instance, in the economic models, I will vary which economic indicator is used in the model. I will also vary which ideological measures I will use in the models.

else equal." However with fractional differencing, the units of the variable lose a lot of this easily described substantive meaning. Now the interpretation is of the form "the coefficient of β indicates that a one fractionally differenced unit of X corresponds with a β increase of fractionally differenced Y units." Again, this is not a problem that is unique to the present analysis but is a problem that that is present in models using fractional differencing in general. The benefit of using this method is that the sign of the coefficient and tests of statistical significance are still the same and that we can have a higher degree of confidence that the statistically significant relationships that we may find are not just spurious results that are induced by the presence of autocorrelation. For the sake of simplicity and clarity, when I interpret the findings in these time series results I will focus only on the direction of the relationship and its statistical significance.[25]

The table below shows the results of some simple models that look at the impact economic trends on the percentage of the agenda that is made up of economic activity cases and controlling for the ideology of the Court. As we can see from the table, a consistent finding from these models is that the Court decides to devote less (more) time to cases that are economic in nature when the economy is doing better (worse)—as measured by the Index of Consumer Sentiment (ICS). This is not necessarily the case when using other predictors of the economy such as GDP growth or the unemployment rate of the country. Though not statistically significant, the other economic indicators were signed in the expected direction. As unemployment increases (the economy gets worse) the Court selects more economic cases to hear, and as the GDP growth rate increases (the economy gets better) the Court hears fewer economic cases. Though, again, neither of those were statistically significant. Similarly, while

[25] However, since the fractionally difference series correlate so closely with the first difference series, it may be helpful to think about the interpretation of the coefficients in a similar way was if they were just first differenced.

the coefficient on ideology was consistently negative—indicating that more conservative courts are associated with fewer economic cases—it was not statistically significant and we can therefore not draw too many conclusions about that particular relationship.

Table 3.2 Determinants of Economic Agenda %

	Δ%Econ β (S.E)	**Δ^d %Econ β (S.E)**	**Δ%Econ β (S.E)**	**Δ^d %Econ β (S.E)**	**Δ%Econ β (S.E)**	**Δ^d %Econ β (S.E)**
Δ| Δ^d Ideology (MQ)	-2.30(2.95)	-3.52(2.2)	-3.30(3.03)	-3.63(2.19)	-2.07(2.69)	-3.03(2.18)
Δ| Δ^d ICS	-.170(.098)*	-.11(.062) †	-	-	-	-
Δ| Δ^d Unemployment	-	-	.407(.390)	.727(.545)	-	-
Δ| Δ^d GDP Growth	-	-	-	-	-.025(.245)	-.217(.243)
Constant	-.019(.711)	-4.83(.59)*	-.205(.806)	-4.19(.59)*	-.243(.722)	-5.35(.596)*
R^2	.025	.080	.024	.064	.013	.082
Durbin-Watson	2.89	2.08	3.02	2.37	2.90	2.15
N	60	60	64	64	64	64

Notes: Dependent variable is differenced (or fractionally differenced) percentage of cases that are coded as being economic in the SCDB. Hypothesis tests are two-tailed *p<.05 †p<.1

Another thing to note about the entries in the table are the different N sizes for some of the models. The models that use the ICS variable have an N size of 60 while the other variables have an N of 64. This is strictly due to data availability. The Index of Consumer Sentiment data is only available from 1952 on, while the other economic variables can go back a couple years more. In terms of model diagnostics, the Durbin-Watson statistic reported in the tables give us some indication that the fractionally-differenced models should be preferred over their first-differenced counterparts. A general rule of thumb is that the Durbin-Watson statistic should approach 2.00. Numbers significantly higher than that are generally associated with the presence of autocorrelation, and with autocorrelation, we cannot be sure that our estimates are reliable.

Consistently across the models, we see that the Durbin-Watson statistic is worse in the models where the data was first differenced than it is in the models where the data is fractionally differenced. This is consistent with "the story" that was laid out with Figures 3.3 through 3.5.

First differencing "over differenced" and induced some negative autocorrelation. The resulting residuals of the regressions produced autocorrelated errors in violation of the Gauss-Markov assumptions.

In order to address concerns about the use of the ICS as raised by Kellstedt, Linn, and Hanna, I also estimated the model using one of the components of the ICS—prospections about the national economy. Those results are presented in Table 3.3 below. The results using this component as the economic indicator are similar to results using the full ICS. The coefficient in the fractionally difference model is significant and in the expected direction. Also, the Durbin-Watson statistic in the models here suggests that the fractionally differenced results are more reliable.

Table 3.3 Determinants of Economic Agenda %
(ICS Component)

	Δ%Econ **β (S.E)**	**Δ^d%Econ** **β (S.E)**
$\Delta\|\ \Delta^d$ Ideology (MQ)	-2.69(2.94)	-3.47(2.16)
$\Delta\|\ \Delta^d$ ICS (National Prosp.)	-.085(.063)	-.105(.047) *
Constant	-4.95(.591)*	-4.95(.591)*
R^2	.041	.105
Durbin-Watson	2.86	2.10
N	60	60

Notes: Dependent variable is differenced (or fractionally differenced) percentage of cases that are coded as being economic in the SCDB. Hypothesis tests are two-tailed *p<.05 †p<.1

The models presented in Table 3.2 and Table 3.3 are quite sparse—with only two predictor variables in each model. This was done partially out of the necessity to preserve as many degrees of freedom as possible, as having such small N sizes limits the power of statistical

tests.[26] However, in order to determine how robust the relationship reported in those models is, I ran a series of other models using a variety of control variables. For the sake of parsimony, I will report only the results from the fractionally differenced models using the ICS variable as my independent variable of interest.[27] This is done because the diagnostics indicate the fractionally differenced model is more reliable and the ICS variable is the one from prior models that it appears the Court is responding to.[28] Control variables put into the following models include dummy variables for Chief Justices, the party of the president, public mood, and measures of the ideology/partisanship of Congress.

Table 3.4 Model with Additional Controls

	Δ^d **%Econ** **β (S.E)**	Δ^d **%Econ** **β (S.E)**	Δ^d **%Econ** **β (S.E)**
Δ^d ICS	-.123(.069) †	-.128(.072) †	-.121(.071) †
Δ^d Ideology (MQ)	.677(2.33)	-2.37(2.25)	-1.83(2.15)
Warren	13.5(3.96) *	-	-
Burger	2.78(4.31)	-	-
Rehnquist	1.65(3.72)	-	-
President (Dem)	-	1.96(1.67)	-
Congress (Dem)	-	-2.47(2.14)	-
Δ^d Public Mood	-	-	.156(.260)
Constant	-5.02(.582)*	-4.92(.595)*	-5.07(.57)*
R^2	.172	.097	.073
Durbin-Watson	2.28	2.09	2.03
N	60	60	60

Notes: Dependent variable is fractionally differenced percentage of cases that are coded as being economic in the SCDB. Hypothesis tests are two-tailed *p<.05 †p<.1

[26] Time series data and modeling in particular is often much more reliable with longer time series.
[27] Again, not reporting the first differenced models was done because of the unreliability of the estimates. I am reporting only one of the economic indicators at this point because these tables reveal pretty much the same pattern as the previous table—ICS is a consistently significant predictor of the Supreme Court agenda across models while other economic indicators are not.
[28] The Models using the national prospections component of the ICS were also significant with a similar coefficient size to the coefficient in table 3.3 across models.

Again we can see that, *ceteris paribus*, as the economy gets better (as measured by sentiment), the Court will devote a smaller percentage of the docket to cases that concern economic activity. Even controlling for some things like the party of the president, the party of Congress we still see the same relationship between consumer sentiment and the percentage of cases being selected. Including Chief Justice dummy variables—with Roberts being the excluded category—did not substantively change the economic effect. Interestingly, we see that the coefficient on Warren is significant at the .1 level. This indicates that the Warren Court was more likely to select more economic cases than the excluded group, the Roberts Court.[29]

Moving away from indicators of economic health, to test my hypotheses concerning the Court being responsive to public interest in economic issues, I run a similar set of models as in the previous tables. However, for these models the independent variable of interest is the percentage of people who answered Gallup's question about what was the most important issue facing the country with "the economy"—as coded by the Policy Agendas project. The results of this first stab at the model is presented in the table below.

[29] One thing that may be of a concern in some of the models is to think about the pool of cases that the Court is drawing the cases they hear from. For this, I use data from the U.S. Court of Appeals Database and its update (Songer 1998; Kuersten and Haire 2007). This database takes a random sample of cases within each circuit and year. This data was only available up until 2001. When looking at changes in the economic agenda of the Supreme Court, I found that that was not influenced by changes in the percentage of the appeals court cases that were economic. Therefore, I was not concerned about any potential omitted variable bias by leaving this variable out—though I was able to keep a much larger amount of degrees of freedom. As a robustness check, I re-ran models including as a control the percentage of the agenda devoted to the pertinent issue areas in the court of appeals. The results when including this control did not substantively change any of the results, though the standard errors were higher because of the low sample size and the statistical significance levels were slightly "worse".

Table 3.5 Impact of Public Issue Salience on Supreme Court Agenda

	Δ^d **%Econ** **β (S.E)**
Δ^d %Economic (Gallup)	.098(.067)
Δ^d Ideology (MQ)	-2.36(3.48)
Constant	-4.34(.606)*
R^2	.054
Durbin-Watson	1.98
N	55

Notes: Hypothesis tests are two-tailed *p<.05 †p<.1

The results in Table 3.5 do not give us statistical evidence to overturn the null hypothesis that the importance the public says the economy is as an issue is does not have a relationship with the percentage of the agenda devoted to those issues.[30] However, the coefficient is correctly signed and is approaching levels of statistical significance (significant at about the .14 level in a two-tailed hypothesis test). While we must be cautious, the direction of the coefficient indicates that there may be a relationship, but we cannot say with certainty that the coefficient is different from zero.

To investigate this relationship a little further, we can look at an alternative coding scheme for the dependent variable. The Policy Agendas project codes many different things related to politics into the issues they cover, including Supreme Court cases. As it was this coding scheme that coded the Gallup question that is being used as the independent variable of interest, I decided to re-run the model using this different coding scheme of the dependent variable. Below in Figure 3.6 we can see the two different coding schemes plotted together. The two appear to track well together, though the Policy Agendas coding scheme consistently

[30] Presented here are the results of the simplest model with only the economy and ideology as predictor variables. More thorough analysis similar to that which was seen in Table 3.3 did not yield any different insights.

categorizes more cases as economic than the Supreme Court Database does. This could be because this alternative coding scheme encapsulates cases pertaining to the economy in just about every way while the Supreme Court Database has separate categories for some issue areas that are somewhat economic in nature such as tax issues and union issues. Table 3.6 below the figure gives the results of the simple model with the alternative dependent variable.

Figure 3.6

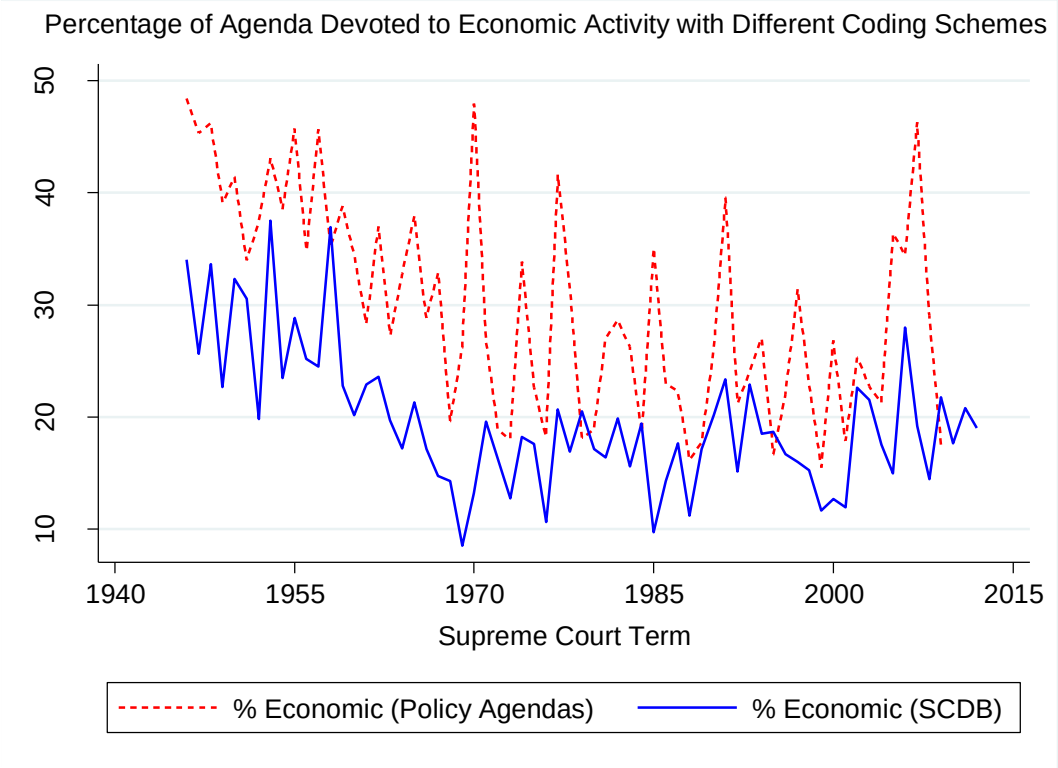


Table 3.6 Impact of Public Issue Salience on Supreme Court Agenda (alternative DV)

	Δ^d **%Econ** **β (S.E)**
Δ^d %Economic (Gallup)	-.021(.125)
Δ^d Ideology (MQ)	-1.22(4.31)
Constant	-5.79(1.15)*
R^2	.002
Durbin-Watson	1.99
N	52

Notes: Dependent variable is fractionally differenced percentage of cases that are coded as being economic in the Policy Agendas database. Hypothesis tests are two-tailed *p<.05 †p<.1

As we can see in the table, using a different formulation of the dependent variable did not yield different results. The coefficient on the Gallup public importance measure is still not a significant predictor of the Supreme Court agenda. Taking these models together, I would conclude that there is not a relationship between the importance the public places on an issue and the Court subsequently deciding to hear more case.

Summary of Results and Conclusion

This chapter sought to test a couple of hypotheses about how responsive the Supreme Court is to the economic environment around them in terms of allocating agenda space to economic topics. While the great bulk of prior research on the agenda of the Court has been more focused on examining the decision to grant or deny certiorari at the case level, I examined the aggregate Supreme Court agenda. Looking at the Court in this way required me to use time series methods, mainly methods that deal with the fractional integrated nature of much of the data.

The results from these analyses were mixed. The first hypothesis I tested said that as the economy is declining (improving) the Court will make economic activity a larger (smaller) proportion of the agenda. Controlling for things such as the Court's ideology, eras of the Court (chief justices), and other variables, I found that the economy as measured by consumer sentiment to be a significant predictor of the size of the economic agenda. As the ICS increases (the economy gets better), the Court hears fewer economic cases—and vice versa. This result was the same when using just one component of the ICS, prospections about the national economy, instead of using the full index. This same pattern did not emerge when looking at other economic indicators such as unemployment rates or the GDP growth rate.

The second hypothesis stated that the Court would hear a greater amount of economic cases in response to the public signaling that the economy was a policy area that they were most interested in. Here the results of the model did not provide any evidence to overturn the null hypothesis of no relationship. Even when looking at an alternative coding of the dependent variable than the coding of the Supreme Court Database, the finding was still null.[31]

One of the limitations of these particular analyses stems from the choice to look at things at the aggregate level. While it is important to look at the aggregate level and look at overall trends in the agenda, by aggregating the data up there is going to be some tradeoff and in this case we lose some information about the particular cases that are being granted certiorari. It could be the case that there are some "big" cases that the Court decides to hear on that are "more important" or more salient that would have the same impact as if the Court decided to hear several "smaller" cases in a similar issue area. In other words, if 20% of the cases the Court hears in a term are dealing with the economy and 20% are dealing with another issue area (or 20% in a

[31] The interface of the Policy Agendas project allows the user to break down the broad policy areas into much more specific issues. In doing further analysis on the series' for more specific issues such as "unemployment" or "labor" did not yield any interesting or different results.

different term), those two chunks of equal agenda space may not carry the same weight on some dimensions because of the more specific issues at stake in the cases and/or their salience.

One other limitation of these analyses is far more practical in nature—data availability. All else being equal, having more data is better than having less data.[32] Data on the Supreme Court agenda only went back to 1946. While the updated, backdated Supreme Court Database could potentially be helpful in going back further when constructing the aggregate agenda variable, the economic variables I was interested in looking at do not go back much further with any reliability. So, for the present time, analyses of the aggregate agenda of the Supreme Court are limited to around sixty terms worth of data.

[32] Especially with time series data. Having a longer series of data to work with gives much more options for the types of models that can be run. In time series, there are many interesting types of models to look at different aspects of the data that are too computationally demanding to do with a series that has as few time points as the ones used in this chapter—i.e. various forms of ARCH and GARCH modeling to look at the volatility of a series, dynamic conditional correlations, time-varying parameters, etc..

Chapter 4

The Vote on the Merits Stage

Any discussion of the voting behavior of Supreme Court justices should note the influence of justices' attitudes and ideologies on their final vote. This is the basis of the "attitudinal model" and in its most simple form we would say that conservative justices vote conservatively and liberal justices vote liberally.

While the data show this to be generally true, there are a number of examples of justices voting counter-attitudinally that suggest that there is a slightly more complicated story going on. For instance, Chief Justice Roberts vote in *National Federation of Independent Business v. Sebelius* (2012) in effect "saved" President Obama's heath care bill—though some aspects of the decision can still be seen as being at least partly a conservative decision. Similarly, former Chief Justice Rehnquist voted in *Dickerson v. United States* (2010) to uphold the liberal *Miranda v. Arizona* (1966) decision. These cases are both instances of conservative justices making a deciding, liberal vote. While citing a few counterexamples in no way invalidates the insights of the attitudinal model, it does give some evidence that there are other factors that impact a justice's decision apart from just attitudes and that attitudes do not fully explain every vote.

As noted earlier in the dissertation, previous literature makes the case that multiple types of exogenous factors (economy, public opinion, and war) have an influence on judicial decision making. I argue, putting it in terms similar to Collins (2008b), that these exogenous events change the informational environment that justices are making their decisions in by expanding it. Collins found that the informational environment influenced the consistency or variance of judicial voting. I argue that the informational environment can influence the magnitude of

ideological voting on the Supreme Court. The more outside influences there are that may be factoring into the justice's decision, the less potential weight they will put on their ideology to determine their votes.

Bartels (2011), in constructing his theoretical mechanism for why he expected that the influence of ideology on Supreme Court voting would not be uniform but context dependent, cited a large line of work on political and social psychology research (e.g. Krosnick 1988; Miller and Peterson 2004, Eagly and Chaiken 1993; etc.). The general summary of this research provided a rationale for why context can influence the degree that attitudes will determine behavior. This work was focused on how context influences the behavior of "regular people", but Bartels work argued that context would also influence the degree that attitudes were a predominant determinant of behavior for the justices. In this case, the attitude is ideology and the behavior is voting on the Supreme Court.

Merits Stage Hypotheses

While Bartels (2011) was interested in how case facts can change the context a case is decided in, I am interested in how the national economic context that justice's are deciding in has an impact on their use of attitudes or ideology to make decisions. As the literature described above says, justices are likely attuned to the national economy. When the national economy is contracting, the justices are deciding cases in a context that is different from when the economy is prospering. I argue that when the economy is contracting or in a downturn, that provides extra information or context to the justices and makes them less likely to rely solely on ideology. This leads to the first hypothesis.

> ***H 4.1***: During times of economic contraction or downturn, the impact of ideology on a justice's vote will be attenuated.

This hypothesis does not state that ideology does not matter in certain circumstances. My expectation is that ideology will still matter to the justices in these cases, but I do expect the economic context to impact the degree to which ideology matters.

The first hypothesis above implies that the economy has a uniform impact on the magnitude of ideological voting across justices. This means that liberals and conservatives or weak partisans and strong partisans on the court will be equally impacted by the economy. However, there is an alternative hypothesis that can be tested that may be more theoretically viable. As mentioned above, Brennan, Epstein, and Staudt (2009a) found that during times of recession, the court voted against the federal government as recessions were a sign of government incompetence. Fitting this finding into an attitudinal framework, we may expect that this only applies to justices who are co-partisans or ideologically similar to the president.

The second hypothesis that I will test looks at the impact of the economy on the Court's vote in a slightly different way. Brennan, Epstein, and Staudt (2009a; 2009b) make a suggestion that the Court will explicitly punish the United States government during times of economic downturn. Taking economic downturns as some form of a signal about the competence and merits of the government's economic policies, the Court is more likely to vote against the government when times are bad. Using a somewhat similar setup, I hypothesize:

> ***H 4.2***: As the economy is doing better (worse), the probability that the Court supports the United States side in a case will increase (decrease).

While I will restrict the analysis here to looking at cases that are dealing with economic activity, it may also be interesting to see if the signals the Court takes from the economy about the government's policy competence will bleed over to other issue areas. So I will also run an analysis that looks at all types of cases and not just economic ones.

Data

In order to test the proposed hypotheses, the unit of analysis I will focus on are the outcomes of cases orally argued in front of the Supreme Court during the 1946 to 2012 terms. Some of the data used here will be taken from Spaeth's United States Supreme Court database. Data on economic variables comes from other sources.

In the models testing the ideological magnitude hypothesis, the dependent variable will the direction of the vote the Court makes (liberal or conservative) as coded in the Spaeth dataset. I will use this as a dichotomous variable where "1" is a conservative vote and "0" is a liberal vote. The analysis in these models is restricted to cases where the Supreme Court Database coded the direction as liberal or conservative and dropped those cases where an ideological direction was not specified.[33]

It is generally well established in the literature that the Court engages in a "reversal strategy" (e.g. Segal and Spaeth 2002). This means that when the Court hears a case they are more likely to reverse the lower court decision than they are to uphold it. This makes intuitive sense because if the Court agreed with the decision of the lower court, there would not be much incentive to take the time to hear and decide on the case.[34] Therefore, I include the direction of the lower court decision in the model.

One other "bias" the court has been found to potentially have in the literature is a repeat player bias that favors the Solicitor General and by extension the United States government (McGuire 1995; McGuire and Caldeira 1993). There are multiple potential reasons for this bias.

[33] In the most up to date release of the database, there are 141 cases where no decision direction is specified and over 8,000 where a direction is specified.

[34] Also, if a Justice agrees with the lower court they would be risking having that case overturned and having Supreme Court precedent established that did not match their preferences if they were to decide to hear that case.

The Solicitor General has more experience and practice in dealing with the Court than most other litigants. Also, there is an assumption that the positions that the Solicitor General takes are important to the administration and in the best interest of the country. To control for this, I will include two dummy variables. One is coded a "1" if the Solicitor General advocates a liberal position and the other one is a "1" when a conservative position is advocated. This includes cases that the Solicitor General—or the United States— is a party in the case as well as cases where they advocated their position via the filing of an amicus curiae brief.

As I am testing an ideological voting model, I need a measure of justice Ideology. As I did in Chapter 3, I will primarily employ the Martin-Quinn score of the median justice. Martin-Quinn scores are a useful way of measuring the ideology of justices and of the Court because of their dynamic qualities. Because they are based on the votes within a term, they allow for there to be some ideological movement or "drift". I will also estimate an alternative model for the sake of robustness using Segal-Cover (1989) scores for ideology.[35] While the Segal-Cover scores are designed to measure ideology on civil liberties issues specifically, they correlate quite highly with Martin-Quinn and other ideological measures.

For the second hypothesis, I am only interested in cases where the United States is a party in the case. This includes cases where the United States is a named party. It also includes cases where one of the parties is an agency or department of the federal government. For instance, a case such as *National Federation of Independent Business v. Sebelius* (2012) would count as having the United States as a party. Sebelius was named in the case because of her position

[35] Another reason for wanting to use an alternative measure of ideology is to assuage concerns that some scholars raise when using Martin-Quinn scores to predict Supreme Court votes. As Martin-Quinn scores are derived from an item-response analysis of the votes themselves, it is not uncommon for scholars to raise concerns about the potential endogeneity of using "votes to predict votes".

as the Secretary of Health and Human Services—a cabinet department—at the time the case was petitioned and decided.

In order to test the second hypothesis, I need a measure of the ideological or partisan congruence between the sitting president and the Court. One simple manner of doing this is to just have a dummy variable that is a "1" if the Court's ideology and presidential party "match" (liberal-Democrat; conservative-Republican) and "0" otherwise. To determine if there was a match between the president and the Court, I looked at the ideology of the median justice and whether or not they were "liberal" or "conservative". The expectation in this case would be that—in line with the attitudinal model—the Court would be more likely to side with the positions of the United States government if they and the government were aligned ideologically.[36]

I will use a variety of economic variables to test my hypotheses. One economic variable I use will be a simple dummy of "1" if the country is in a recession at the time of oral arguments and "0" otherwise (using recession dates as defined by National Bureau of Economic Research (NBER)). Using this simple economic measure is done as so to be congruent with the work of Brennan, Epstein, and Staudt (2009a) who found that recessions had a significant impact on justice voting. Besides this measure of recessions, I will also use other economic variables in alternative models. Measured at the term level, I will also estimate models that use objective measures of the economy—national unemployment and GDP growth rate taken. I will also use a more subjective measure that gets at public perceptions of the economy, the Index of Consumer Sentiment (ICS) from the University of Michigan. Also, in keeping with the analyses presented

[36] As another measure of ideological congruence, I used the difference in the "common space" score of the president and the median justice of the Court (Epstein et al 2007). Using this instead of the simple dummy variable did not substantively change any of the findings presented later on.

in Chapter 3, I also ran models which used one of the components of the ICS instead of the entire ICS due to some concerns raised in the literature about the ICS as a measure.[37]

On final aspect of the data collection I must address is issue area or case type as defined by the Spaeth dataset. Many previous models of ideological voting (e.g. Bartels 2011; Segal and Spaeth 2002) only look at civil rights and liberties cases as the ideological dividing lines on those types of cases have remained relatively stable and unidimensional over time. However, it may be the case that the impact of economic trends (if any) on the magnitude of ideological voting by the justices only appears in those cases where the economy is more salient or primed. Therefore, I will estimate models only looking at cases that are coded as being about economic activity in the Supreme Court database. I will also estimate a complete model that looks at all cases, regardless of issue area.

Methods

Because of the nested nature of my data, to test my hypothesis I will specify a multilevel model. The first level is the level of my unit of analysis, Supreme Court cases. Supreme Court cases are then nested in terms. One of the most important advantages of this modeling strategy is that confidence in our estimates increases as we are able to account for unobserved heterogeneity at the term level. This is generally preferred to alternative strategies, such as clustering the standard errors by group because clustering standard errors only adjusts the standard errors and not the estimates (Gelman and Hill 2007).

The general form of the model is as follows. The first level equation is that justices' votes (conservative or liberal) are a function of justice's ideology and an intercept. The coefficient for

[37] These are the same economic indicators that were used in the analyses of Chapter 3. For a more thorough description of these variables, see Chapter 3.

ideology and the intercept are specified to be able to vary across both of the other two levels of the model (cases and terms). The second level equation includes the case-level amicus activity variable, the solicitor general involvement variable, and the lower court direction variable. Also in the level two equation are the economic variables that are measured at the case level that I hypothesize to attenuate the impact of ideology on justices' votes. To get at this attenuation, I do a cross level interaction of justices' ideology and the economic variable in that model.

Because the dependent variable is dichotomous, I need to use a generalized linear model to model the probability of success or failure. For these analyses, I will use a logit link function. I specify these models as mixed-effect logit models. This allows me to estimate the fixed effects of the variables of interest and the controls on the dependent variable while also allowing the intercept to vary randomly across groups. This will help to filter out the impact that group level heterogeneity will have on the estimates due to cases being clustered together within Supreme Court terms. Another benefit to estimating random effects is that I can allow the slope coefficients of various variables such as ideology to vary across groups as well.[38]

Results

Table 4.1 presented below presents the results from a series of mixed-effects logit models. The only difference between the models is what economic indicator is put into the model as a constituent term and interacted with the variable measuring the ideology of the Court during the term the decision was made. Entries in this table are logit coefficients, thus they are not as easily interpretable as regression coefficients. Gelman and Hill (2007) provide a quick way of

[38] I will note here that in these models I ran many different specifications for the random effects: allowing just the intercept to vary, allowing the intercept and the slop of ideology to vary, etc. In doing so there were not any substantive differences in the results across model. This was comforting and indicates that any significant results presented in the tables were robust across models and not a result of model specification.

interpreting logit coefficients—the "divide by four" rule. In basic terms, if we take logit coefficients—not including the intercept/constant coefficient— and divide them by four that will give us an upper bound on the predictive difference in probability of our dependent variable equaling 1.[39] Under this rule a logit coefficient of 1 on an X variable would according to this rule be interpreted as a one-unit change in X leads to a .25 change in the predicted probably of Y=1, ceteris paribus.

Table 4.1. Mixed Effects Logit Predicting Direction of Court's Decision (Economic Cases)

	β(S.E)	β(S.E)	β(S.E)	β(S.E)	β(S.E)
Term Level Effects					
Ideology (Martin-Quinn)	.480(.120)*	.474(.118)*	.459(.136)*	.431(.218)*	.452(.127)*
Economic Health (ΔICS)	-.013(.0121)	-	-	-	-
Economic Health (ΔNatProsp)	-	-.011(.007)	-	-	-
Economic Health (ΔUnemp)	-	-	-.024(.104)	-	-
Economic Health (ΔGDP)	-	-	-	-.001(.019)	-
Economic Health (Recession)	-	-	.	-	-.178(.247)
Ideology x Economic Health	***.027(.016)*** †	***.012(.012)***	***020(.196)***	***-.020(.062)***	***.155(.467)***
Case-Level Effects					
US as Liberal Party	-.345(.148) *	-.354(.149) *	-.345(.148)*	-.321(.150)*	-.347(.148)*
US as Conservative Party	.539(.291)*	.541(.228)*	.546(.228)*	.673(.234)*	.545(.228)*
Lower Court Direction (Lib)	.993(.103)*	.994(.102)*	.999(.102)*	1.06(.105)*	.998(.103)*
Intercept	-1.05(.093)*	-1.05(.093)*	-1.03(.098)*	-.915(.087)*	-1.00(.099)*
χ^2(Pr> χ^2)	135(.000)	136(.000)	131(.000)	123(.000)	132(.000)
N (Cases)	1,549	1,549	1,788	1,788	1,788
Groups (Term)	60	60	64	64	64

Notes: Dependent variable is a dummy variable where "1" indicates that the Supreme Court decision was "conservative" as coded by the Supreme Court Database. Coefficients are unstandardized logit coefficients. Hypothesis tests are two-tailed *p<.05 †p<.1

Across models, we see no significant direct effect of the economy on Supreme Court outcomes. However, this was to be expected and the hypothesized relationship was an interactive

[39] Gelman and Hill (2007) show that this is the upper bound of the changes in predicted probability because they derive it from where slope of the logistic curve is at its maximum, the midpoint. The divide by four rule works best if the data is close to this midpoint and would not be optimal with heavily skewed data.

relationship that I will discuss in more detail below. Looking at the other variables we see that they are mostly consistent across models.

Interpreting the coefficients, I will look only at the model that is the farthest left on the table but the other models will all follow a similar interpretation. Using the divide by four rule, the .480 coefficient on ideology indicates that a one unit increase in the Martin-Quinn score for the median justice of the Court would correspond with roughly a 12% increase in probability of a conservative decision. As noted earlier, the Martin-Quinn scores are unbounded but effectively range from about -6 (liberal) to 5 (conservative). A one unit change in these scores is roughly equivalent to the distance between Justice Breyer (.439) to Justice Kennedy (1.636).[40]

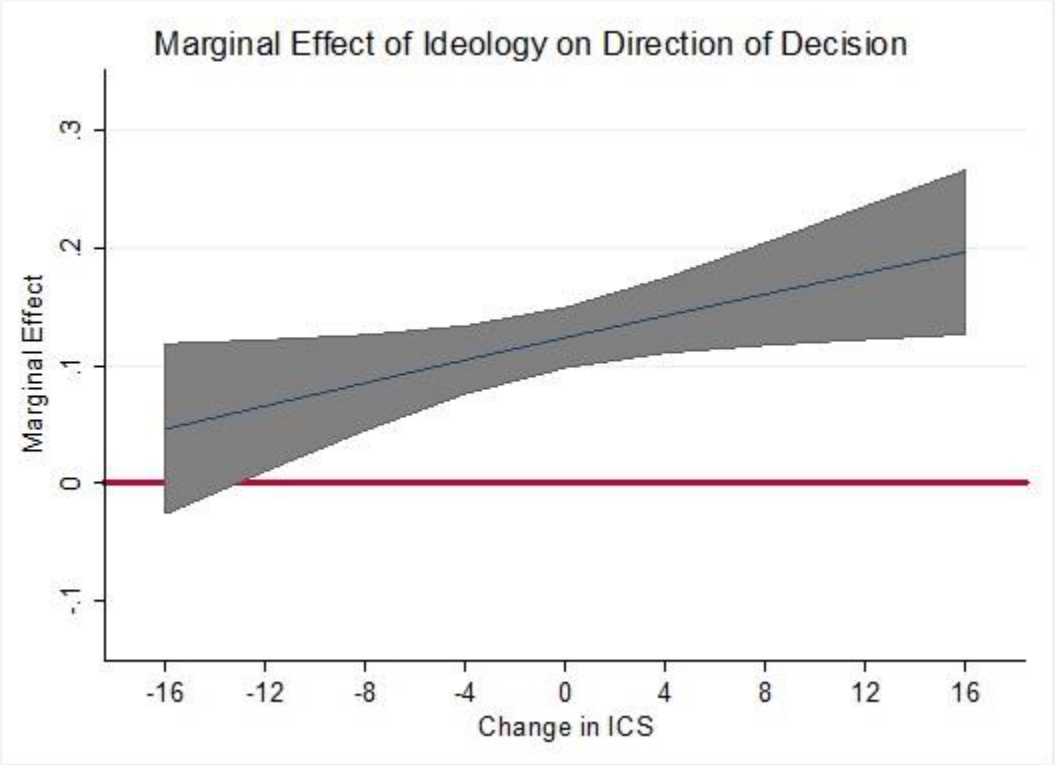
The control variables in these models yielded expected results. If the United States participated as a liberal party in a case, the predicted probability of the decision being conservative went down about .09. If the United States was a conservative party, the predicted probability of a conservative decision increased about .14. Finally, to control for the reversal strategy of the Court a variable was included that indicated if the lower court ruling was coded as liberal. In these cases, the probability that the decision was reversed from the lower court was ceteris paribus about .25.

While the coefficients in the table for the control variables and the constituent terms of the interaction can generally be interpreted in a traditional manner, it can be a little more difficult to interpret interaction coefficients. While the interaction coefficient in the model that uses change in ICS as the economic indicator was statistically significant, Brambor, Clark, and Golder argue that looking at the conditional marginal effects is one way of getting a better sense of how the interactive relationship behaves (2006). The best way of seeing these marginal effects is to

[40] These scores indicate their Martin-Quinn score in the most recent term for which that data is available—2012.

plot the marginal effect across different levels of the conditioning variable. In this case, to see the interaction at work I plot the marginal effect of the Court's ideology on the outcome of the case across different levels of the economic indicator that operates as the conditioning variable. Below Figures 4.1 to 4.5 show the marginal effect of ideology on the direction the decision across different levels of the economic variable.

Figure 4.1



This first marginal effect plot in Figure 4.1 shows the interaction that showed up as marginally statistically significant in the table. Here, the thin line represents the conditional marginal effect of Ideology with the shaded gray area representing the 95% confidence region of that marginal effect. The thick reference line shows when that marginal effect and confidence region include 0—meaning that we would not be able to reject a null hypothesis that stated there was no marginal effect. As we see in this figure, the marginal effect of ideology steadily

increases as the economy is doing better. The marginal effect is at its highest point when the economy is showing the greatest signs of improvement. Conversely, when the economy is contracting and the ICS is dropping from the previous time period, we see this marginal effect get smaller. In fact, at the lowest levels of economic performance we cannot overturn the null hypothesis that there is no effect of Ideology on the decision of the Court. However, that is only at the extreme low points and in the vast majority of time/cases we can overturn that null.

As can also be seen in the table with the results from the multilevel models, the moderating relationship between the economic indicator and ideology was most obvious when using change in ICS as the economic indicator. In the other models, the interaction term was not statistically significant. In the marginal effects plots below, Figures 4.2, 4.3, 4.4, and 4.5, we see a similar story as can be seen in the table.

Figure 4.2

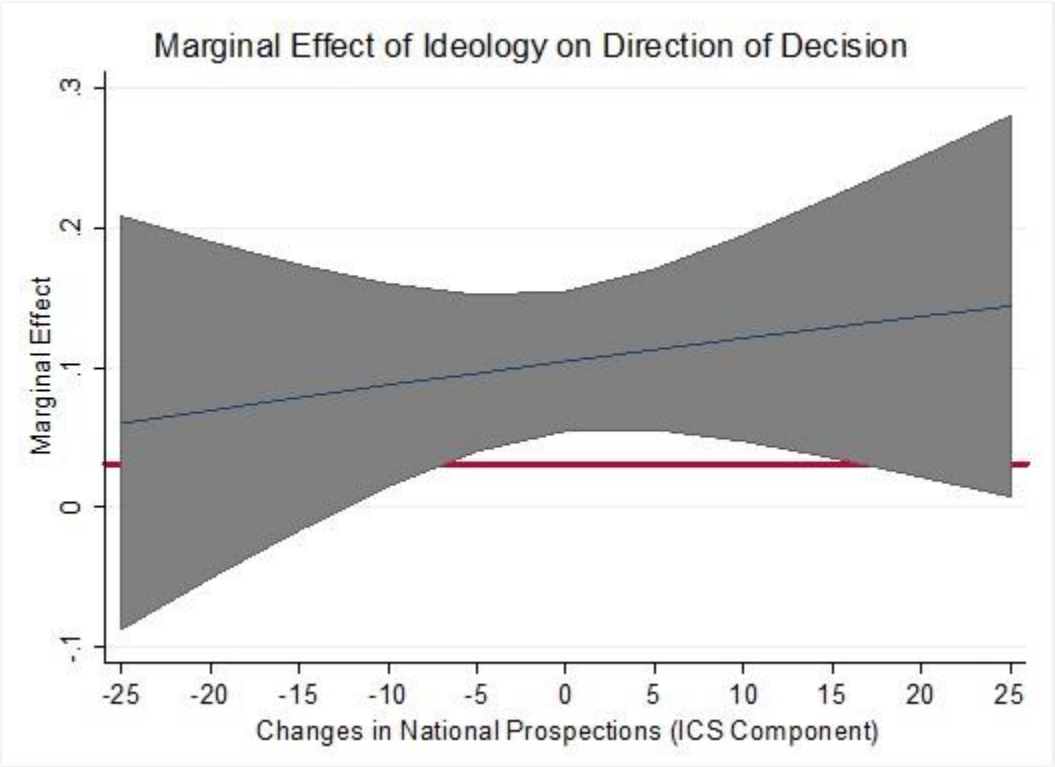

Marginal Effect of Ideology on Direction of Decision
Marginal Effect
-.1
0
.1
.2
.3
-25
-20
-15
-10
-5
0
5
10
15
20
25
Changes in National Prospections (ICS Component)

Figure 4.3

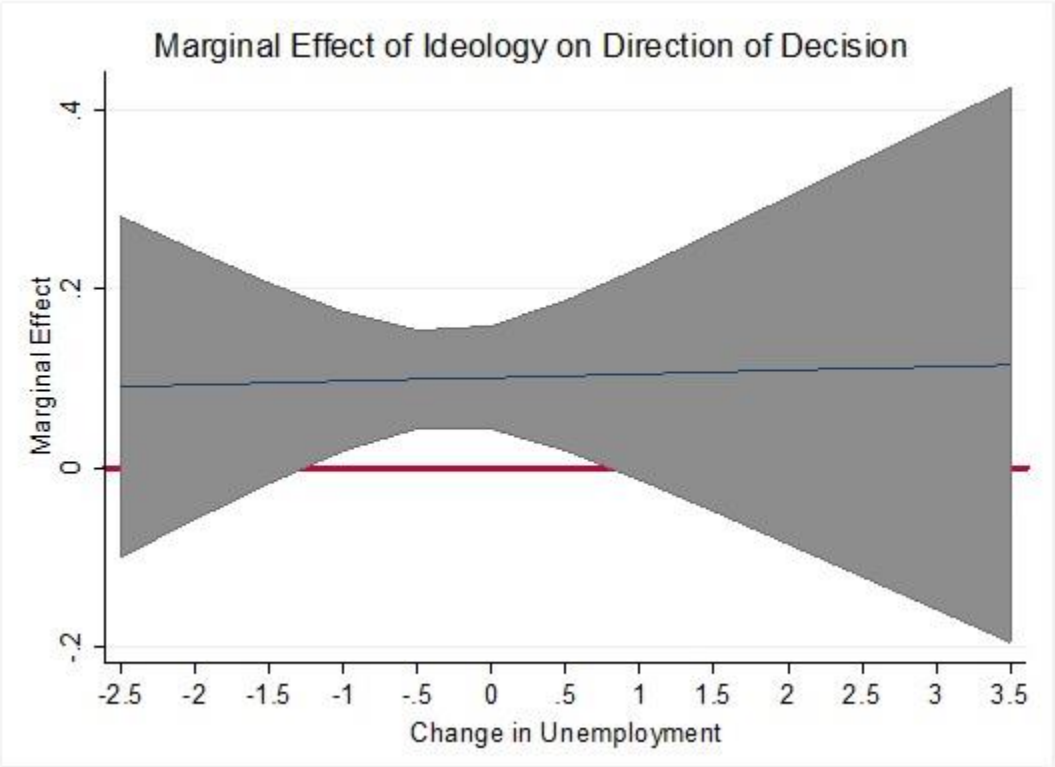

Marginal Effect of Ideology on Direction of Decision
Marginal Effect
.4
.2
0
-.2
-2.5
-2
-1.5
-1
-.5
0
.5
1
1.5
2
2.5
3
3.5
Change in Unemployment

Figure 4.4

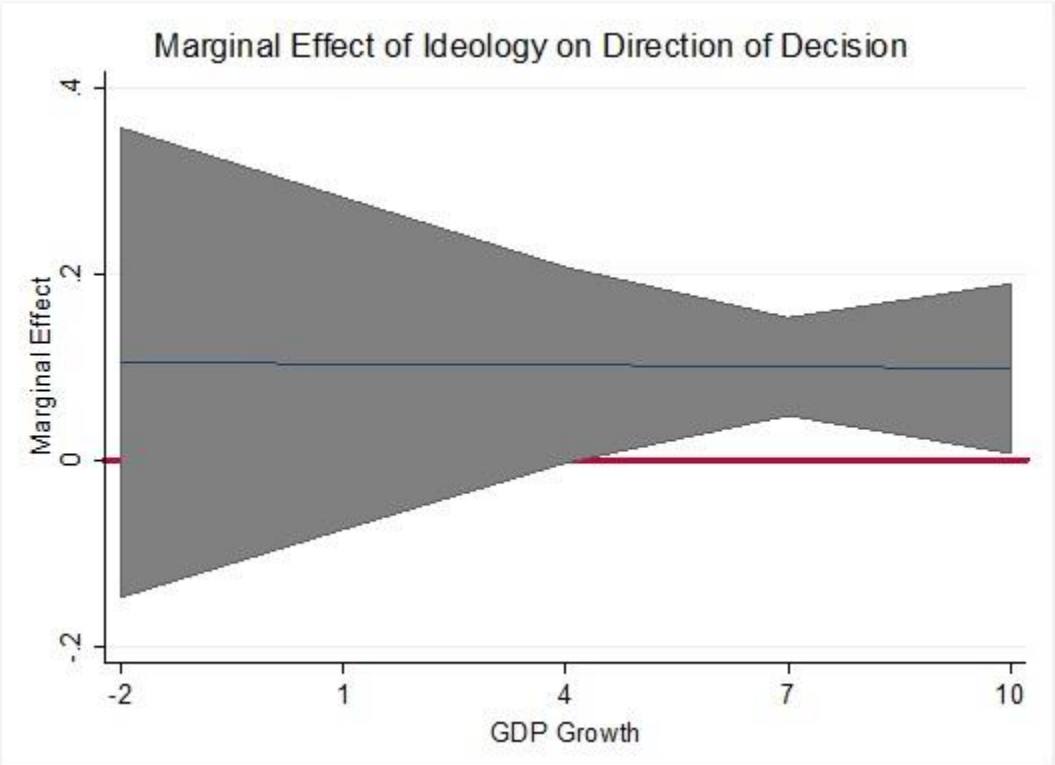
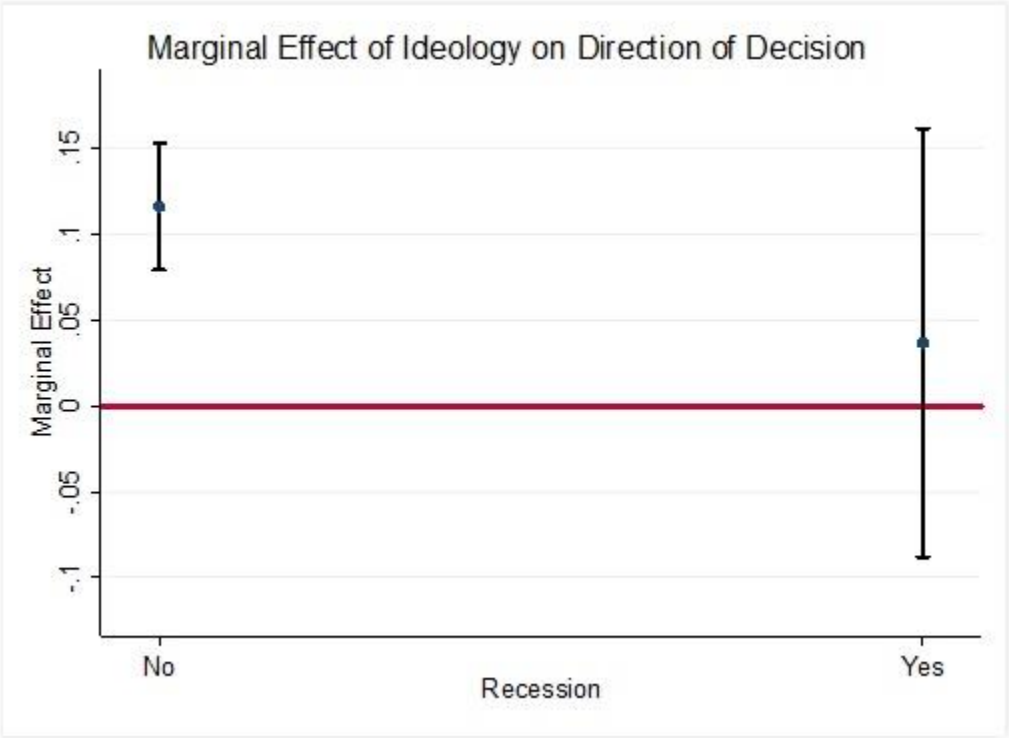

Marginal Effect of Ideology on Direction of Decision
Marginal Effect
.4
.2
0
-.2
-2
1
4
7
10
GDP Growth

Figure 4.5



With these figures, it is difficult to see any patterns because the confidence intervals on the marginal effects are so large. This is because of the large confidence interval around the interactive term in the respective models. Figure 4.2, which uses a component of the ICS looks most similar to Figure 4.1, but has wider confidence intervals. Out of the remaining figures, perhaps Figure 4.5 that shows the marginal effect of ideology conditions on whether or not the Country was in a recession is the clearest and most interesting. In this figure, we see a strong positive marginal effect of ideology when the country is not in a recession. When the country is in a recession, we still see a positive marginal effect thought it looks to be smaller. Again, because of the large confidence interval it is difficult to make inferences based on these figures.

When taken together the table with the results of the models and the marginal effects plots tell the same story. When looking at the impact that ideology has on the direction the decision the health of the national economy has a significant moderating effect when that is

measured by changes in consumer sentiment. The impact of ideology is greater when the case is heard during a time where sentiment is on the rise and it reaches its nadir when consumer sentiment is tanking.

Autocorrelation in Level-2 Data?

One of the potential threats to inference with the present analysis would be the possibility of autocorrelation in level-2 variables. In Chapter 3 of this dissertation, I already covered a little bit about the threats to inference that autocorrelation can raise. I also discussed some of the benefits and drawbacks of various pre-whitening or cleansing methods such as differencing the data or fractionally differencing the data if the variable in question shows evidence of being fractionally integrated. The data for these analysis are different than the data used in Chapter 3 and used in studies that employ ARIMA or ARFIMA techniques in that there are multiple observations for each time point instead of one aggregated observation. Data of this form, which the Supreme Court Dataset is, can be described as a Repeated Cross Section (RCS).

In a recent article, Lebo and Weber (2013) have laid out compelling evidence for the utility of an ARFIMA-MLM approach to modeling RCS data. An ARFIMA-MLM approach applies an ARFIMA model to appropriate level-2 variables before estimating the model as a multilevel model. For the particular models presented in this chapter, the variables in level-2 that may need to be fractionally differenced include the Martin-Quinn ideology score of the Court as well as economic indicators such as the ICS. In fact, we have already seen in Chapter 3 of this dissertation that those variables showed some evidence of not being stationary and needed to be differenced by their estimated *d* value.

In Lebo and Weber's article, they also showed the potential pitfalls of autocorrelation of multiple types in the level-1 independent variable and recommend a process that they call "double filtering" to the dependent variable before running the analysis.[41] However, one of the limitations of Lebo and Weber's ARFIMA-MLM technique as it applies to the current study is that the method was developed for use on a continuous dependent variable.[42] The dependent variable in this case is a dichotomous outcome, therefore we cannot use all of the methods proposed by Lebo and Weber for dealing with an RCS. What we can do is apply the first filter to the second-level predictor variables in the series. This will alleviate some of the concern over potentially having variables on the "right hand side" of the equation with memory properties likely to produce residuals that are not independent and identically distributed.

Table 4.2 below presents the results of a model that applies the ARFIMA filter to the continuous level-2 variables—ideology and ICS—before estimating the same multilevel level model that was presented in table 4.1.[43] The results in this case look similar to the results of the model utilizing ICS as the economic indicator in Table 4.1. Ideology remains a significant predictor of outcomes (as the Court becomes more conservative the probability of the Court issuing a liberal decision increases). Controlling for the direction of the lower court decision as well as the activity of the United States as a party in the case also yielded significant results in the expected directio

[41] Double filtering involves taking the individual-level observed value of the dependent variable and subtracting from it the group-level mean of the dependent variable and the residuals from a noise model run on the time series of the group-level means.

[42] In time series methodology in general, particularly methods which require some form of pre-whitening such as fractional differencing, studies are often limited to studying continuous outcome variables—though some methods have been developed specifically for count outcomes (e.g. Brandt and Williams 2001; Brandt et al 2000).

[43] The filter applied in this case is ARFIMA. One of the benefits of employing the Lebo and Weber method is that it can be generalized to other noise models as well—ARIMA for I(1) data and ARMA for I(0) data.

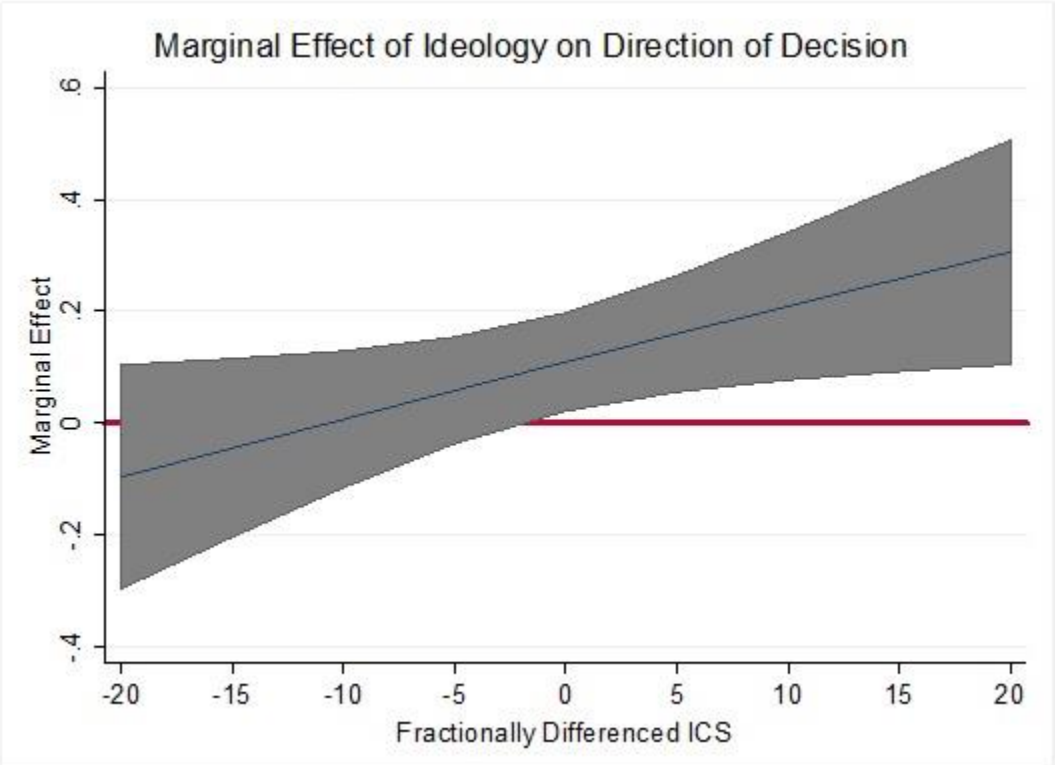
Table 4.2. Mixed Effects Logit with Δ^d Level-2 Predictors

	Economic Cases
	β (SE)
Term Level Effects	
Ideology (Δ^dMartin-Quinn)	.415(.210)*
Economic Health (Δ^dICS)	-.001(.007)
Ideology x Economic Health	.042(.022)*
Case Level Effects	
US as Liberal Party	-.366(.149)*
US as Conservative Party	.547(.229)*
Lower Court Direction (Lib)	1.02(.103)*
Intercept	-.869(.086)*
χ^2(Pr> χ^2)	119(.000)
N (Cases)	1,549
Groups (Term)	60

Notes: Dependent variable is a dummy variable where "1" indicates that the Supreme Court decision was "conservative" as coded by the Supreme Court Database. Coefficients are unstandardized logit coefficients. Hypothesis tests are two-tailed
*p<.05 †p<.1

Just as was the case with the previous models, perhaps the best way of showing how the interaction between the ideology of the Court and the health of the economy is working is to look at a marginal effects plot conditioned on levels of the economy. This plot can be seen in figure 4.5 below. Figure 4.5 looks quite similar to Figure 4.1 in that it shows that as the economy is doing worse (the ICS is decreasing) the impact ideology on the Court's decision is muted.

Figure 4.6



This analysis showed that the findings for the significant impact of the ICS on the magnitude of ideology in Supreme Court voting holds up even when accounting for autocorrelation in the level-2 units that the cases are nested in. This gives more confidence that the results presented in Table 4.1 and Figure 4.1 are not spurious. This gives a little bit of support to the first hypothesis presented in this chapter. When the economy is doing worse—as measured by the ICS—the coefficient for the effect of ideology is weakened. However, similar to the results of Chapter 3, this finding did not hold up when looking at more objective measures of economic performance.

United States as a Party

To test the hypothesis that the Court is more likely to support the positions of the United States when the economy is doing better, I estimated a model with the dependent variable being whether or not the position of the United States—was victorious. The results are presented in Table 4.3 below.

Table 4.3. Mixed Effects Logit Predicting Prob. of US Winning

	Economic Cases	All Cases
	β (SE)	**β (SE)**
Case Level Effects		
Ideological Congruence	.479(.67) †	.533(.124) *
Lower Court Agreement	-.809(.242) *	-1.05(.122)*
Presidential Approval	-.017(.014)	-.003(.006)
Term Level Effects		
Economic Health (ΔICS)	.029(.016) †	.002 (.006)
Intercept	-.651(1.27)	.807(.540)
$\chi 2$	18.7(.001)	90.2(.000)
N (Cases)	373	1,294
Groups (Term)	60	60

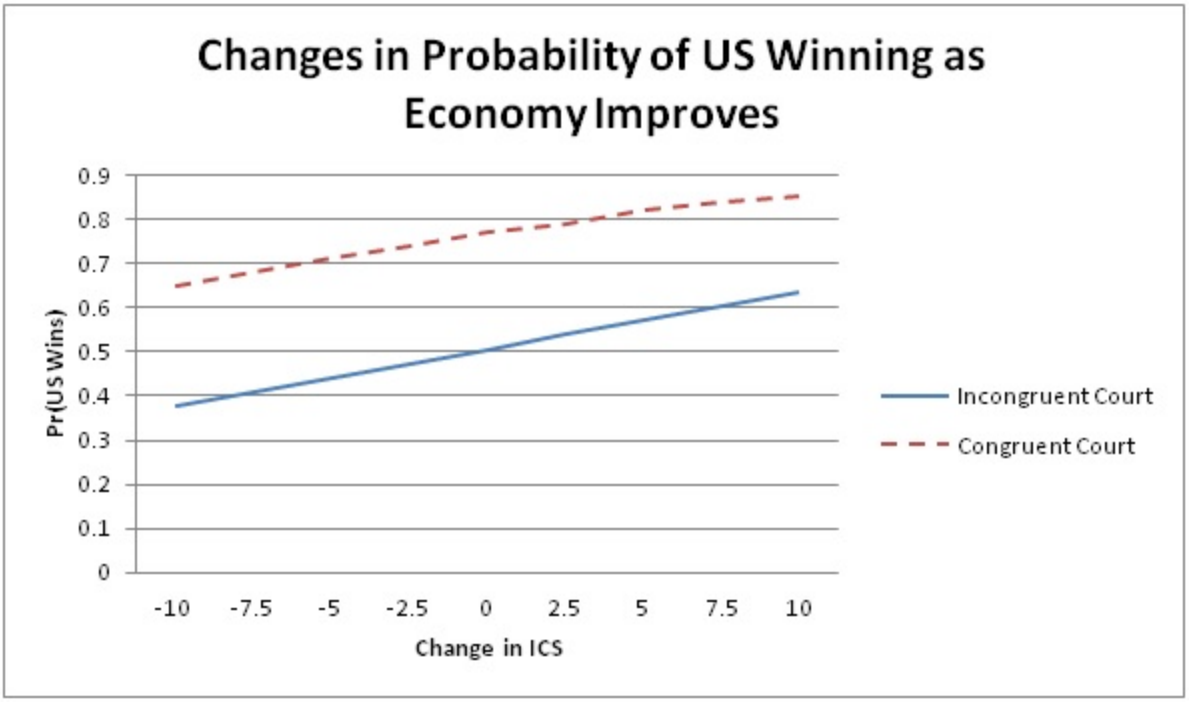
Notes: Dependent variable is a dummy variable where "1" indicates that the Supreme Court decision was in favor of the US Coefficients are unstandardized logit coefficients. Hypothesis tests are two-tailed *p<.05 †p<.1

As we can see from this table, as the economy is doing better as measured by changes in consumer sentiment, the Court is more likely to vote for the United States side in the case in cases coded by the Supreme Court database as dealing with economic activity.[44] This model controls for whether or not the Court was ideologically congruent with the government. In this

[44] Running additional models with other economic indicators as the independent variable of interest were not statistically significant. This is consistent with what has been found thus far in the dissertation in that there is something particular about consumer sentiment/economic sentiment that the Court is responding to and not responding to more "objective" measure of the economic performance.

case, the government's ideology is represented by the party of the president as it is the president's appointee the Solicitor General who is arguing the government's side in most of these cases. Other controls in the model include whether or not the lower court issued a ruling that agreed with the government's position. Again, this was used to control for any impact that the "reversal strategy" the Court uses has on the outcome. One final control for this model was a measure of presidential approval. This was done to control for any potential influence on the court of the popularity of the president and by extension the popularity of the government's position on issues with the public. Figure 4.7 presented below gives a summary of the results of this table in a clearer way by charting the predicted probability of the government's side winning a case.

Figure 4.7



As the figure above shows, the predicted probability of the United States position winning in economic cases steadily increases as the ICS increases. In the figure, two separate lines are plotted. The dashed line shows the changes in predicted probability when the Court and

the government are ideologically congruent—meaning the party of the president is the same as the party that appointed the majority of the members of the Court. When the economy is getting worse, measured as a -10 in the ICS from the previous term, the baseline probability of the government winning a case with a congruent Court is about .6. That improves to over .8 when the economy is showing improvement from the previous term. The solid line shows the changes in probability when the Court and the government are not ideologically congruent. Even with an ideologically incongruent Court, the probability of the United States winning a case still increases if the economy is showing improvement as opposed to when it is getting worse.

The results discussed above only held true in economic cases. When running the model on all cases that the Supreme Court hears that the United States was a party, ideological congruence and lower court activity were still statistically significant. However, the coefficient on the economic indicator was no long significant. While not necessarily unexpected, this is interesting as it indicates that if the Court is "punishing" the United States during bad economic times by voting against the government in their decisions they are restricting this to cases in the economic policy domain. One explanation for this could be that when the Court decides against the government in economic cases it is actively trying to change or influence economic policy. Another possible explanation for this would be that the state of the economy is only primed to the Court and plays a part in the decision making when the case has economic content.

Conclusion and Summary of Chapter

In this chapter I presented a number of different models aimed at testing whether or not the voting decision stage of Supreme Court decision making was influenced by the health of the national economy. In doing so, I presented two main hypotheses. The first

hypothesis stated that as the economy was doing worse or contracting, the magnitude of ideology as a determinant of the final outcome would be diminished. My second hypothesis was that—when the United States was a party in the Supreme Court—the Court would punish the government for a bad economy by being less likely to vote for the governments preferred outcome.

The statistical evidence supporting the first hypothesis was mixed. Across different specifications, the results indicated that when the economy was doing worse—as measured by the Index of Consumer Sentiment—the impact of ideology on the Court's decisions was somewhat diminished in cases dealing with economic activity. While this held up across many different ways of specifying the model, there was not the same pattern for the other economic indicators that were used—unemployment, GDP growth, and whether the country was in a recession.

For the second hypothesis, a very similar pattern emerged. When using the ICS as the economic indicator results implied that when the economy is doing worse the Court is more likely to vote against the national government in cases dealing with economic activity.[45] The reasons for ICS as an economic indicator being significant and robust across numerous specifications of the models are not immediately clear and raise some interesting questions for follow up research.

In doing some post-hoc speculation for why this pattern emerged, there are some possibilities that come to mind. One possibility is that the ICS is deeply tied into public opinion. One way of thinking about what the ICS means is to think of it as how the public feels about the economy—both in the moment and prospectively—at a certain time point. While the literature on whether or not the Supreme Court is responsive to public opinion—

[45] Again, this was not seen in cases that looked at all types of issues and not just economic activity.

or whether or not there is any reason for the Court to be responsive to the public—is quite mixed, the Court being responsive to the ICS above other objective economic indicators could be due to this connection to public opinion. Earlier cited work speculated the Court may be responsive to public opinion because they are responding to the same forces that are driving the public—because they are part of the public too. A similar mechanism may be happening here. Whatever indicators are driving the ICS may also be driving the justices' attitudes about the economy at that particular time.

One other speculative possibility could just be that sentiment is potentially an easier cue for members of the Court to take and use as information. The members of the Court, though hopefully well informed, may not have any idea what the unemployment rate is in the country at a given time but they may be able to have a general sense of what the sentiment of the country is.[46] Also, ICS is a little bit more of a "catch all" measure of economic performance. It asks questions about personal economic evaluations, sociotropic evaluations, retrospective evaluations, and prospective evaluations.[47] Because it has all of these different components, it's possible that it gives a more "complete" picture of the health of the United States economy.

[46] I would personally say that I am guilty of this as well. I could only guess what the current unemployment rate is in the country and would not feel very confident in that guess. But, I feel like I know in a general sense what the sentiment of the country is and how the public at large feels the economy is doing right now.

[47] This represents all the different combinations of evaluations that determine whether people are "peasants" or "bankers".

Chapter 5

The "Post-Merits" Stage

In studying the behavior the Supreme Court, the previous chapters of this dissertation have looked at the decisions the Court makes on what cases to hear. It has also looked at the decision on the merits—the "who won?" part of the case. In the timeline of a case working its way through the system, there are still interesting decisions that the Court has to make about a case even after the question of the general disposition of the case has been answered. While these latter stage decisions arguably do not get the same amount of attention from the public that the dispositional outcome of the case gets, the policy implications of these decisions are important and interesting.

After the vote on the merits is made, a decision is made as to which justice is going to be tasked with writing the opinion of the Court. Some amount of time after oral arguments on a case are made, the Court gets together and meets in conference. At conference, one of the things that the Court does is take a vote on the merits of the case and record that vote. After they have recorded the vote on the merits and know the dispositional outcome of the case, the Court next needs to start formulating the official majority opinion of the Court that gives the legal arguments for why the decision came down in the way that it did.

In order to have an opinion of the Court, one of the justices has to be assigned to write that opinion. By custom, the Chief Justice assigns someone who voted for the majority to write the opinion of the Court if the Chief Justice was on that side of the case. If the Chief Justice

voted with the minority, then the most senior associate justice on the majority's side is tasked with assigning the opinion.[48]

After the assignment of majority opinion authorship, the justices of the Supreme Court need to form the majority opinion coalition. The majority opinion is crucial because on top of the decision on the merits, "it is in the majority opinion that the Court lays down the broad constitutional and legal principles governing the outcome… which are *binding on lower courts in all similar cases* and which *establish precedents to guide future court decisions*" (Rohde 1976, pg. 193, emphasis is my own). The majority opinion is the mechanism through which Supreme Court justices are able to shape policy and able to constrain how the lower courts will treat legal issues in future cases where those issues arise.

After the opinion is assigned, a draft of the opinion is circulated to the other justices. At this point, a variety of things may happen but in general each justice responds to the opinion with a decision to either sign the opinion, not sign the opinion, or attempt to bargain about the content of the opinion.[49] This process continues iteratively until enough justices sign on to the opinion to make it the opinion of the Court. In order for an opinion to become the majority opinion of the Court it needs to get the signatures of a mathematical majority of justices who are taking part in the case. If this does not happen, there is no majority opinion and the decision is handed down as a "judgment of the Court".

After the opinion is assigned and the Court bargains over the content of the opinion, a final decision is eventually reached and subsequently announced. It is these first two aspects of this "later stage" of the Supreme Court process that this chapter of the dissertation will focus on.

[48] While this is not a formal rule, it is a custom that is adhered to fairly strictly. Chief Justice Burger received lots of pushback when during his tenure he would sometimes attempt to assign the majority opinion even when he was not in the majority.

[49] This is an overly simplified description of what can happen, but gives a reasonable summation of the options that the justices have once the opinion starts to circulate.

What impact does the economy have on the assignment of the opinion? What impact does the economy have on the bargaining process over the majority opinion?

Building off of Chapter 4, where I argued and found some support for the idea that during times of economic downturn the impact of ideology on the Court's decision making is lessened. I expect much of the same mechanisms to be at work here. When the economy is doing worse, ideological policy concerns—though still present to some degree—are not as strong as when the economy is not struggling. I expect this to manifest in two ways. First, I expect the assignment of the majority opinion to not be as policy or ideologically oriented. Second, I expect there to be less bargaining over the content of the opinion.

Opinion Assignment

In prior research about the opinion assignment process, empirical support has been found for policy preferences having an impact on who is assigned the opinion (e.g. Rohde 1972). This reasoning is all very similar to the reasoning behind the attitudinal model and why ideology impacts vote choice. If the majority opinion gets to set the policy of the Court, then members have an interest in making that policy match their preferences. Under this framework, the expectation would be that the justice assigning the majority opinion would want to write the opinion to have control over this policy content or, at the very least, assign it to a justice who has similar ideological views to them

Another source of influence on the assignment of the opinion comes from what the literature has called "organizational needs" (Maltzman and Wahlbeck 1996; Maltzman and Wahlbeck 2004). Organizational needs that can serve as a constraint on the ability of the Court to follow policy preferences can take the form of either formal rules or informal customs.

Generally, the Court adjourns for the summer. This means there is only a finite amount of time for the Court to deliver opinions (Maltzman and Wahlbeck 1996). Therefore, the workload needs to be spread and someone the opinion writer may prefer to write the opinion for policy reasons cannot write it for extremely practical reasons.

There are also informal customs of the Court that these pieces mention as other organizational needs. A more harmonious, collegial court is needed for the proper functioning of the judicial system (Danelski 1968). Each justice has an expectation that he or she will write a certain amount of opinions, so in order to keep everything moving smoothly in the Court this norm should be followed. Also, there is a certain expectation that opinions will be written in a timely manner so justices who do not take an inordinate amount of time to write the opinion may be given some preference over others (Brenner and Palmer 1988).

Something else the assigning justice has to keep in mind is the expectation that opinions will be assigned to justices who have a certain amount of expertise or experience in that particular type of case (Malzman and Wahlbeck 2004). I could see this being an important determinant of who gets assigned the opinion for multiple reasons. For practical reasons, it may be better to have someone with more expertise write the opinion because they can potentially get it done in a timely manner—as was just mentioned as being a consideration that the assigner takes into account—because it is a type of issue they are more familiar with the arguments in. Also, going back to the collegial concerns discussed, if a justice were to be continually "slighted" by not being assigned opinions for an area they are particularly interested in that could disrupt the harmony of the Court.

Taken together, this work on the opinion assignment of the Court supports both policy concerns and other concerns as being important factors. Operating without constraints, justices

would probably write the opinions themselves or let somebody who is close to them ideologically write the opinion. This process of opinion assignment being something that is policy motivated yet constrained by legal and institutional factors bears many similarities to the judicial voting literature that also finds policy or ideological goals being constrained or moderated (e.g. Bartels 2009; Collins 2008c). This dissertation has argued for the economic context of the country also operating as a constraint on judicial choices, so I would expect much of the same mechanisms to apply here as well.

Bargaining and Opinion Coalition Formation

Coalition size is an interesting outcome in studies of politics—not just in terms of Supreme Court coalitions. Axelrod, in examining things like congressional committees developed a theory of coalition size that is determined by conflicting interests (1970). His theory states that the fewer people there are in a coalition, the less disperse their preferences are and the less likely a conflict of interest will arise. This is good for the stability of a coalition. This assumes that potential members of a coalition have single peaked preferences along a one dimensional policy space, which is a standard assumption in economics. Logically, his theory reduces to saying that the optimal size of a coalition is however small it can be. This conclusion that the most stable size of a majority in any form of governing coalition is shared by Riker who states minimum winning coalitions are the most stable size of coalitions and are always the predicted size of a coalition when working in a rational choice frame work (1962). This has become a standard assumption of rational choice economic models of coalitions (Stearns and Zywicki 2009).

Moving away from minimum winning coalitions is a function of bargaining. The classic account of majority opinion writing is that the author of the majority opinion begins by writing an opinion that would establish legal policy at her preferred ideal point. In order to get other justices to join the opinion, the author of the opinion must bargain with these other justices and make concessions to them about the policy content of the opinion (Rohde 1972; Rohde and Spaeth 1976). Under this framework, every additional justice that the opinion writer gets to sign onto the opinion implies that there was additional bargaining going on between the opinion writer and the other justices about the policy content of the opinion.

Epstein and Knight (1998) provide evidence of bargaining by the justices using the case files of Justices Brennan, Marshall, and Powell during the 1983 Supreme Court term. They found "bargaining statements" to be present in the circulated memos of the justices over 70% of the time if the case was considered a "landmark case" and 57% of the time when looking at all cases.[50] They also provide many examples of these bargaining statements to show that the justices are using language in the statements to make it clear they are bargaining.[51]

First hand evidence of this process of bargaining is also found in Maltzman, Spriggs, and Wahlbeck (2000). They examine the justices' personal papers including drafts of opinions, memos to other justices, etc. Using this information, they have evidence to argue that justices do engage in some bargaining with each other in order to secure some of their preferred policy goals into the opinion.

This also leaves open the possibility that justices bargain strategically, meaning that they may cooperate and sign on to a majority opinion in a case that is not as personally salient to them in order to signal to the other justices that they are a cooperator and to get justices to sign on to

[50] Here they code a bargaining statement as when a justice explicitly stated that their decision to join an opinion would depend on changes the writer made to the opinion.
[51] The justices use words like "negotiate" and talk about reaching "an accomodation".

opinions that they find personally more important in the future. This is backed up by findings that show collegiality, or the amount two justices cooperate with each other on cases is an important determinant of how much they bargain with each other in future cases (Brenner, Hagle and Spaeth 1990).

In reading the literature about majority opinion coalitions, this concept of bargaining amongst the justices is a common theme. Getting a large majority entails more bargaining than getting a minimum majority. Using this, I will assume that outcomes that result in minimum opinion coalitions are due, at least in part, to a lesser amount of negotiation between the majority opinion writer and the other justices.

Hypotheses

The previous chapters of this dissertation were concerned with how the national economy has been shown to influence other aspects of the judicial decision making process. While the results presented in those chapters are somewhat mixed, there does appear to be some support from those chapters—and prior literature—that there is a connection between the health of the economy and the decisions that the Court makes. In the prior chapters, I talked about the agenda setting stage and the vote on the merits. In this chapter I will look at a couple aspects of the post-merits stage.

As I argued in Chapter 4 of this dissertation, during times of economic downturns, ideology was a less pressing concern for the Court in its decision making. While not all economic indicators were statistically significant, the general pattern of findings from that chapter were that when the economy was doing worse the magnitude of the impact of ideology on the Court's vote was dampened. As the literature on opinion assignment posited, policy or

ideological concerns play a part in the decision of who writes the majority opinion. However that decision is not made for purely ideologically oriented reasons and is subject to some constraints.

If policy concerns were at the forefront of the opinion assigners concerns, we would expect them to assign the opinion to themselves. If not themselves—due to organizational need factors mentioned above or other factors—we would expect them to assign the opinion to someone that is ideologically similar. Under certain circumstances there become other considerations besides policy. As I have argued before, when the economy is doing poorly, policy preferences—in terms of ideology matter less. Therefore, I would expect that the opinion assigner would be more likely to assign themselves the opinion when policy and ideology are more at the forefront of their goal. Therefore, I propose the following hypothesis:

> ***H 5.1:*** The probability that the opinion assigner will assign the opinion to someone other than herself will increase as the economy is doing worse.

An alternative formulation of this hypothesis is that it is not just about assigning opinions to themselves, but assigning opinions to people who are ideologically similar to them. A second, similar formulation of this hypothesis is:

> ***H 5.2:*** The distance in ideology between the opinion assigner and the opinion writer will increase (decrease) when the economy is doing worse (better).

As noted earlier, because of physical/time constraints and customs of the Court dictating that the workload for writing opinions be relatively spread, the assigner of the opinion cannot write the opinion for herself every time. When the assigner does not choose to write the opinion—for whatever reason—she is generally expected to assign it to someone they are ideologically aligned with. If it is the case that during times of economic downturn that ideological alignments do not matter as much, we may see the assigning justices become less likely to assign the opinion to someone that is closer to her ideologically.

The literature cited in the previous section tells a somewhat consistent story that bargaining over the content of the opinion is of interest to justices when they are concerned with policy goals—i.e. joining the opinion in order to move the "ideal point" of the opinion closer to their own preference.

Extending this to the process of opinion coalition formation and bargaining, we could expect that when the Court is less concerned with ideological or policy goals it is less likely that there will be a lot of bargaining over the content of the opinion. To get a measure of "bargaining" we will look at the coalition sizes. Under the assumption that, ceteris paribus, a smaller coalition means that there was less bargaining between the opinion writer and additional justices in order to change the policy content of the opinion in order for them to sign it. This leads to the following hypothesis:

> ***H 5.3:*** The probability that a majority opinion coalition will be minimum winning will increase in negative economic times.

With this hypothesis I predict that during times of economic recession, or other indicators of stagnation of the national economy the majority opinion coalition will be more likely to be a minimum winning coalition.

In order for a coalition to move away from minimum winning, the majority opinion writer needs to bargain with other justices and make concessions that will, ultimately, move the opinion away from their ideal point (Rohde 1972, Rohde and Spaeth 1976). There may be several mechanisms at work that make it less likely for justices to bargain and make concessions during bad economic times.

Data and Methods

For this model, the unit of analysis will be individual cases argued orally in the United States Supreme Court. Again, much of the data on these cases will come mainly from Spaeth's Supreme Court Database, but some other variables were taken from other sources. For these models, I am looking at cases that the Supreme Court Database coded as pertaining to the issue area of "economic activity".

Two of the hypotheses I am testing in this chapter involve the assignment of the majority opinion. The Supreme Court Database records what justice assigned the majority opinion and what justice wrote the majority opinion. For one of my dependent variables, I simply recorded a dummy variable that was a "1" if the justice assigning the majority opinion is the one that ended up writing it. For another dependent variable, I wish to look at how close the assigning justice is to the writing justice in terms of their preferences. For this, I took the absolute value difference between the two justices ideology as measured by their Martin-Quinn scores for that term.

As the other hypothesis deals with the amount of bargaining going on, I am using as a proxy for bargaining whether or not the opinion coalition of the majority was minimal or not. This is based off of work on opinion coalitions that made the argument that getting to coalitions bigger than minimal took extra bargaining over the policy content of the opinion. The definition of a minimum winning coalition—or minimum opinion coalition—is simple: a coalition is a minimum winning one if the majority would not hold if one member defected. In order for a Supreme Court opinion to be the "majority opinion" a majority of the justices voting in the case have to sign it. Unfortunately, using this measure I do not have observations on cases where there was not a majority opinion. While this may not be a direct or perfect way of measuring the amount of bargaining that is going on over the content of the opinion, it should do a reasonable

job. Before moving on to a fuller multivariate analysis, I looked quickly at some descriptive statistics about bargaining and minimum winning coalitions. Using the data that Epstein and Knight (1998) collected on bargaining statements, I found that cases that hard larger than minimum winning coalitions were about 59% likely to have bargaining statements. Approximately 55% of cases that were decided by a minimum winning coalition had bargaining statements. Though this gives a small amount of evidence that there may be more bargaining going on when the majority is larger, this difference is not statistically significant and it is difficult to draw any conclusions without controlling for other important determinants of bargaining.

The independent variables that are of most interest in these analyses are the ones measuring the health of the national economy. For the analysis in this chapter, I am using the same indicators of the health of the national economy that I used in prior chapters. These include the Index of Consumer Sentiment, the unemployment rate, the GDP growth rate, and a dummy variable measuring whether or not the United States is in a recession, as defined by the National Bureau of Economic Research. All of these were aggregated to be term-level data. For ICS, unemployment, and GDP growth this involved aggregating quarterly data up into terms from the quarters that fell within those terms. For the recession variable this was simply whether or not at any time during that term the country was in a recession.

One thing that I would like to control for in these models is the salience of the case. When looking at an outcome such as the assignment of the majority opinion, it could be the case that the assigner will wish to write the opinions in more visible or "important" cases or at least make sure the opinion is written by a member of the Court who has preferences reasonably close to their. To measure salience, I will use the measure Epstein and Segal suggested where a case

will be coded “1” if it has been mentioned in the New York Times and “0” if it has not (2000). Another reason to control for salience is because of previous work that indicated case salience as having a significant impact on the bargaining process between justices (Spriggs, Maltzman, and Wahlbeck 1999), which ties in with the third hypothesis that I am testing in this chapter.

I also include a few other case-level measure that potentially capture the importance or visibility of the case. I also included some other variables that may have an influence on the size of opinion majorities. These are dummy variables for whether or not the decision is a formal alteration of precedent and whether or not the case makes a declaration of unconstitutionality (taken from the Spaeth dataset). These are “big” decisions that the court makes, so perhaps the assignment of the opinion and the formation of coalitions is impacted by them. Previous work has indicated that when it comes to decisions in important cases, the Court prefers to make its decision as a large majority and less likely as minimum winning (Brenner, Hagle, and Spaeth 1990; Rohde 1972; Rohde and Spaeth 1976; Stearns and Zywicki 2009). One last measure I include in the models is whether or not the United States or one of its agencies is a party in the case. This is done for similar reasons as these other variables. Cases that the government are involved in could be seen as being bigger and more visible than other cases.

In the models predicting the assignment of the opinion, I control for the size of the majority. This control is done for purely practical reasons. If a justice who is assigning the opinion has only four other options apart from herself, she should be less likely to assign that opinion to herself than if she has eight other options. Because of the "organizational needs" of the Court discussed in the literature earlier in this chapter, each justice who is a part of the majority should have some non-zero probability of being assigned the opinion and the more of

those justices there are the lower the probability of self assigning the opinion or assigning the opinion to one of the justices who is ideologically the closest to the preferences of the assigner.

One other control for the models predicting the size of the opinion coalition is to look at the ideology of the justice writing the opinion compared to the ideology of the Court. If one of the more "extreme" justices is writing the opinion of the Court, it may be more difficult to bargain with all of the justices in order to get a larger coalition. To measure this, I looked at the difference between the ideological scores of the writer of the opinion and the justice who was the median in that term.

One thing that would be potentially useful to control for would be various final idiosyncratic characteristics of a court. For example, what value does a certain Court put on collegiality? Collegiality is an important concept that is difficult to measure, but may impact judicial decision making. Richard Posner includes collegiality in his judicial/justice utility function that justices want to maximize (1973; 1993). Collegiality, as well as other Court specific factors are difficult to measure directly. However, the specification of these models as a multilevel model that allows the constant to vary randomly across terms should help to capture these factors. This is a similar strategy to dealing with clustered or nested data as clustering standard errors. However, modeling this as a multilevel model with a varying slope to deal with this heterogeneity is preferred to alternative strategies, such as clustering because clustering only adjusts the standard errors and not the estimates (Gelman and Hill 2007).

All three of the models presented to test these hypotheses will follow this similar multilevel strategy. The first model I will estimate has a dichotomous dependent variable, therefore I will estimate the model using a logit link function. The second model has a dependent variable that is continuous, so the coefficients it produces can be interpreted in a similar fashion

to standard regression coefficients. The third model will also use a logit link function because it uses a dichotomous dependent variable—though a different dichotomous dependent variable than the first model

Results

To test the first hypothesis presented in this chapter, the dependent variable is a dichotomous variable that represents whether or not the justice assigning the opinion decided to write it him or herself. Since this is dichotomous, I am employing a multilevel logistic regression. Because the logit model is nonlinear and non-additive, the coefficients presented in the table below are not as easily interpretable as OLS coefficients. Just as in Chapter 4, I will employ the "divide by four" rule of Gelman and Hill (2007) to give a quick interpretation of the significant coefficients estimated impact on the predicted probability of the dependent variable equaling "1"—in this case indicating that the assigner of the majority opinion assigned it to herself.

Table 5.1. Multilevel Logit Predicting Whether Assigner Writes Opinion

	β (S.E)	β (S.E)	β (S.E)	β (S.E)
Term Level Effects				
Change in ICS	.013(.0100)	-	-	-
Change in Unemp.	-	.064(.078)	-	-
Change in GDP Growth	-	-	.032(.026)	-
Recession	-	-	-	.131(.205)
Case Level Effects				
Majority Size	-.157(.052)*	-.153(.051)*	.-.162(.053)*	-.152(.052)*
Salient Case	.543(.239)*	.562(.239)*	.521(.243)*	.553(.239)*
US is a Party	.517(.178)*	.522(.178)*	.526(.181)*	.523(.178)*
Alteration of Precedent	-.849(.742)	-.834(.743)	-.808(.743)	-.817(.742)
Declare Unconst.	.137(.193)	.148(.193)	.102(.205)	.142(.192)
Intercept	-1.37(..437)*	-1.43(.437)*	-1.32(.446)*	-1.45(.439)*
χ^2(Pr> χ^2)	26.3(.000)	25.4(.000)	26.2(.000)	25.2(.000)
N (Cases)	1,382	1,707	1,707	1,707
Groups (Term)	57	61	61	61

Notes: Dependent variable is a dummy variable where "1" indicates that majority opinion assigner wrote the opinion. Coefficients are unstandardized logit coefficients. Hypothesis tests are two-tailed *p<.05 †p<.1

As can be seen in the table, none of the economic indicators used in this model had a significant impact on whether or not the opinion assigner decided to write the opinion.[52] Because of this, I cannot reject the null hypothesis of no relationship for Hypothesis 5.1.

Looking at the other results in the table, we do see that some of the control variables were significant and in the expected direction. For instance, the coefficient for salient cases was significant in all four models with a coefficient of around .5. This would indicate that holding all else equal, the assigning justice is about 12.5% more likely to write the opinion him or herself than in a non-salient case. When the United States was a party in the case, that increased the

[52] The coefficients reported here represent the first differenced changes in those variables if they were continuous. I also ran the models using the ARFIMA filtering technique on those variables—as described in Chapter 4—without that changing the results. Looking at the variables in level-form also did not yield any different results, though finding results with those variables in level-form would have potentially been unreliable because of autocorrelation.

probability of the assigner writing the opinion also by about 12%. This could be an indication, along with the significant coefficient on salient cases, that when as case is seen as being bigger or more important that the opinion in that case is more desirable for the assigning justice to write. However, the other two variables included in the model that are meant to capture how "big" the decision is were not significant. Neither cases that declared something unconstitutional nor cases that altered precedent were significant here. This could potentially just be due to their being so few cases in the dataset that make these type of decisions that it was difficult to get any leverage from them.[53]

The size of the majority also had a significant impact. This makes sense. When the majority is larger, the assigning justice has more options in terms of who to assign the opinion to and should be less likely to assign it to themselves. Finally, the large negative coefficient for the constant is indicative of the low baseline for how often the assigner writes the opinion. For the type of cases looked at here, the assigner only wrote the opinion a little more than ten percent of the time.

While looking at this as a dummy variable for when the assigner writes the opinion did not yield any significant results indicating an effect of the economy, the assigning justice can also choose to assign the opinion to other justices that are ideologically close to them or distant from them. To look at this, I reran the models above but instead used as the dependent variable a measure of the ideological distance between the assigning justice and the writing justice. As these hypotheses state that during times when the economy is doing worse the magnitude of policy concerns as a determinant of behavior should be diminished, the expectation is that when

[53] In the entire Supreme Court Database, less than 2% of the total cases are coded as being alterations of precedent.

the economy is doing worse the distance between the writer and the assigner will increase. These results are presented in Table 5.2 below.

Table 5.2. Predicting Ideological Difference Between Assigner and Writer

	β (S.E)	β (S.E)	β (S.E)	β (S.E)
Term Level Effects				
Change in ICS	-.012(.011)	-	-	-
Change in Unemp	-	.029(.094)	-	-
Change in GDP Growth	-	-	.038(.169)	-
Recession	-	-	-	-.008(.032)
Case Level Effects				
Majority Size	.127(.029)*	.127(.029)*	.162(.053)*	.125(.030)*
Salient Case	-.187(.154)	-.189(.154)	-.189(.154)	-.185(.156)
US is a Party	-.243(.108) †	-.243(.108)*	-.243(.108)*	-.247(.110)*
Alteration of Precedent	.136(.311)	.133(.310)	.132(.311)	.125(.313)
Declare Unconst.	-.202(.115) †	-.203(.115) †	-.204(.115) †	-.187(.119)
Intercept	1.54(.269)*	1.54(.269)*	1.54(.272)*	1.57(.275)*
χ^2(Pr> χ^2)	30.3(.000)	29.26(.000)	26.2(.000)	29.2(.000)
N (Cases)	1,382	1,707	1,707	1,707
Groups (Term)	57	61	61	61

Notes: Dependent variable is the absolute distance in the ideology scores between the Majority Opinion Assigner and the Majority Opinion Writer. Coefficients are unstandardized regression coefficients. Hypothesis tests are two-tailed *p<.05 †p<.1

The results of this model do not differ too much from the models presented in table 5.1. Again none of the variables measuring the economic performance of the country have a significant impact on whether the opinion gets assigned to someone ideologically close or distant to the assigning justice. Another consistency between the two models is that when the United States is involved in a case, the assigning justice is seemingly more likely to assign to someone close to his or her own preferences.

These models taken together do not give any evidence in support of the first two hypotheses and cannot reject the null hypothesis that the economy does not impact the opinion

assignment practice of the Court. One potential reason we do not see a pattern here is the impact that the economy has on the salience of issues. As the models have shown, the assigner is more likely to assign the opinion to herself or to someone ideologically close if the case is salient. Since this model is restricted to economic cases, maybe during times when the economy is doing poorly these cases are seen as more salient even if they are not necessarily measured as salient.

In order to test Hypothesis 5.3, I run similar models to the ones that were run above. However, this time the dependent variable is whether or not the majority opinion coalition was minimal. Similar to the models in Table 5.1 the models here were estimated using a logit link function because the dependent variable was a dichotomous outcome.

Table 5.3. Multilevel Logit Predicting Probability of Minimum Winning Coalition

	β (S.E)	β (S.E)	β (S.E)	β (S.E)
Term Level Effects				
Change in ICS	-.010(.010)	-	-	-
Change in Unemp	-	-.069(.073)	-	-
Change in GDP Growth	-	-	.023(.024)	-
Recession	-	-	-	.362(.171)*
Case Level Effects				
Ideo. Dist. of MOW from Median	-.113(.042)*	-.111(.042)*	-.103(.042)*	-.115(.042)*
Salient Case	.578(.205)*	.562(.205)*	.597(.205)*	.557(.205)*
US is a Party	-.243(.172)	-.242(.172)	-.205(.172)	-.240(.172)
Alteration of Precedent	.504(.395)	.497(.394)	.511(.394)	.522(.394)
Declaration of Unconstitutional	.102(.156)	.092(.156)	.045(.166)	.092(.155)
Intercept	-1.58(.208)*	-1.57(.209)*	-1.56(.217)*	-1.64(.209)*
$\chi^2(Pr> \chi^2)$	22.7(.001)	21.7(.001)	20.4(.002)	25.1(.000)
N (Cases)	1,382	1,707	1,707	1,707
Groups (Term)	57	61	61	61

Notes: Dependent variable is a dummy variable where "1" indicates that the Supreme Court opinion was signed by the minimum amount of justices to still count as a majority opinion. Coefficients are unstandardized logit coefficients. Hypothesis tests are two-tailed *p<.05 †p<.1

The first thing to discuss in these models is how they differ from each other. The clear difference between the four models is that in the first three models there is no significant impact of the economic indicator on whether or not the opinion coalition was minimal. However, when the economic indicator that is used is whether or not there was a recession that term the coefficient is significant and at .362 is in the expected direction. Dividing the coefficient by four, we would say that the upper bound on a change in the predicted probability of Y=1 is about 9% when looking at terms with recessions versus terms without recessions. To get a more precise estimate of how this changed the predicted probability, I calculated out some predicted probabilities and put them in table 5.4 below. In the table, we see that the probability of an opinion coalition being minimum in size increases from .15 to .20 when a case is not salient. When it is a salient case, it increases from .23 to .30. For the purposes of generating these predicted probabilities, the other variables in the model were held at their modal category—if dichotomous—and at their mean—if continuous.

Table 5.4. Predicted Probabilities of Y=1 During Recessions and Non-Recessions

	Non-Recession	**Recession**
Non-Salient Case	.15	.20
Salient Case	.23	.30

Notes: The entries in the table are the predicted probabilities that each model gives when the variables are held at values indicated in table. Other dichotomous predictor variables were held at their modal categories while the continuous predictor variable was held at its mean level.

Looking at some of the other coefficients in the table, we can see that the control for the ideological extremity of the justice writing the opinion was significant. As the justice writing the opinion of the Court becomes more ideologically extreme than the median justice of the Court, it

becomes less likely that more justices will bargain with each other to make the opinion coalition larger. The salience of a case was also significant across the models. Holding all else equal, if a case was salient it was about fifteen percent more likely to have a minimal coalition sign the opinion than if the case was not salient. Again, the other indicators of "big decisions"—whether the case overturned precedent or declared something unconstitutional—were not significant. Whether the United States appeared in the case as a party was also mostly not significant across the models, though it was marginally significant in one of the models.

The biggest discussion point to emerge out of these models is that recessions were a significant predictor of minimum opinion coalitions while other economic indicators were not significant. In the previous chapters of this dissertation, a fairly consistent result was that consumer sentiment was a significant predictor of other behaviors of the Supreme Court while other economic indicators—including recessions—were not. In the models presented in Chapter 4, I was somewhat surprised that recessions did not have a stronger relationship given that a variable like ICS had a fairly robust impact on the magnitude of ideology in the Court's voting. In my estimation, being in a recession was a drastic situation that I thought the justices would potentially be more responsive to. Before running the models, I could imagine recessions being a serious state of the world similar to a wartime environment where we would expect the economic news to be so salient the Court almost could not help but be influenced by it if they were going to be influenced by economic news at all. However, we do not see it be a significant predictor until this final model predicting whether or not opinion coalitions are minimum size. This could be because this is in the later stage of the decision making process while the opinion is actually being written and policy is being crafted. However, I would take results of this model with a

little grain of salt as the dependent variable in this case—as mentioned—is not an exact measure of bargaining but is just a proxy measure.

Perhaps another mechanism at work in explaining why we are more likely to see minimum opinion coalitions during recessions is the impact of negative economic conditions on the individual justice's willingness to move away from their ideal point. Perhaps being in a recession or negative economic environment makes justices less willing to endorse legal policy that is further away from their own preferences and subsequently leads to them being less likely to negotiate and sign the opinion.

Summary of Results and Conclusions

After the Court hears oral arguments for a case, the public is not given any more access to what the Court is doing with regards to that case until it announces the decision and releases the opinions. In between those two points in time, the Court is making a series of interesting decisions that have important implications for how the law is going to be interpreted. In this chapter, I examined two aspects of the decision making going on at this time. First, I looked at the assignment of the majority opinion. The majority opinion is what establishes legal precedent and is what binds lower courts in similar decisions, so the decision of who gets to write this opinion and craft the law is hugely important one. The other part of the decision I looked at was the forming of the majority opinion coalition. A majority of justices need to join this opinion for it to officially become the opinion of the Court. Based on some prior literature I assumed that the smaller the opinion coalition was, the less bargaining that went on behind the scenes.

As I argued in this dissertation that the health of the national economy is something that the Court is interested in and can have an impact on the decision making of the Court, I sought to

examine how these "post-merits" decisions may have been influenced by the economy. I hypothesized that during times of economic downturn, the assignment of the majority opinion is more likely to go to someone other than—or more ideologically distant from—from the assignee. I also hypothesized that during times of economic downturn, the Court was less likely to bargain about the policy content of the opinion and we would thus see smaller opinion coalitions form.

The first two hypotheses tested in this chapter did not receive any empirical support from the models presented here. One potential reason why this hypothesis was unable to overturn the null hypothesis of no relationship has to do with what happens to the stature of economic cases during times of economic downturn. Through the models, I found a pretty robust result that cases that had some signals of being important or salient were cases that the opinion assigner was more likely to assign the opinion to herself. Perhaps during times of economic downturn, economic cases in a way become "more important" in the eyes of the justices even if they are not measured as being salient or important by some of the other measures of how important a case is.

The models testing the third hypothesis, concerning bargaining and the size of the opinion coalition of the Court, yielded some potentially interesting results. When the continuous measures of the economic performance were the independent variables of interest in the models, there was no significant effect on the likelihood of a minimum opinion coalition. However, when the economic indicator was a dummy variable indicating the country was in a recession during that term, the null hypothesis could be overturned. When the country was in a recession, the predicted probability of an opinion coalition being minimum size increased about 5% (in non-salient cases) and 7% (in salient cases) holding everything else constant.

One of the limitations of these models is that we are not privy to exactly what is going on behind the scenes during Supreme Court conferences and during the opinion circulation phase.

While some scholars have done work on collecting data about what is going on "behind closed doors" from the private papers of the justices (Epstein and Knight 1998; Wahlbeck, Spriggs, and Maltzman 2009), it is still difficult to get true measures of things like "bargaining" and thus have to make assumptions about what the final coalition says about bargaining.[54] Perhaps as more justices make available documents to add to the corpus of data we have on this process, there will be ways to better measure and specify models that look at this act of bargaining.

While the models in this chapter examined some aspects of the "post-merits" process of the Supreme Court, there are many other decisions that are happening during this period of time that may be of interest to scholars. While examining who wrote the opinion is important, there could be interesting insights derived from looking at the opinions themselves. Recent advances in methodologies that are suited for reading and analyzing text in order to turn it into data that may be used for quantitative research questions may open up this line of research in the near future.

[54] As discussed earlier, Epstein and Knight (1996) do present some data on the cases in which there were bargaining statements, but this was restricted to the 1983 term.

Chapter 6

Concluding Remarks

What impact does the health of the national economy have on Supreme Court decision making? This relatively basic sounding question was the underlying premise of this dissertation. A long line of research in the field of judicial politics has focused on how legal, attitudinal, and strategic concerns influence the decision making of the Court. In addition to these classic models, there has also been some scholarship dedicated to looking at how environmental factors may shape the decision making of the Court.

The key theoretical connection between the behavior of the Court and these environmental concerns—such as the economy—lie mainly in the impact that context has on decision making. The Court and its justices should not be assumed to be immune from these types of environmental and contextual influences just because the Court was designed as an institution to be relatively separate from these types of concerns. Others have argued that the Court prefers a stable national economy to a flagging one and that judges—and justices—are arguable responsive to the same type of stimuli that average citizens are (Epstein, Brennan, and Staudt 2009b; Posner 2008).

The motivation for looking at the economy as having some influence on the Supreme Court motivation came out of wanting to have a more complete understanding of what exogenous or environmental influences there are on the Court's decision making. This is of interest to me and to other scholars of the Court because of the way the Court is designed to be isolated from these types of influences. Those who drafted the Constitution designed the judiciary, in particular the Supreme Court, to be isolated from things like public pressure by making them unelected and giving them lifetime tenure. While the Court is designed to be free

from partisan constraints, we still see that many of its decisions happen in a partisan manner. Overall, I think it is important to think about the other ways that the Court may act contra to its institutional design and I believe this work looking at the economy helps to shed a light on this aspect of the Court's decision making.

For the rest of this chapter, I will give a summary of the empirical results from earlier in the dissertation. This will involve running through each chapter at giving a quick summary of what the core results were. I will conclude with a discussion about avenues for future research.

Summary of Results

Chapter 3

In Chapter 3 of the dissertation, I examined changes in the aggregate agenda of the Supreme Court. While the bulk of Supreme Court agenda setting research has looked at case-level attributes, this followed in line with Pacelle (1991) who argued that the aggregate agenda was an important entity of interest for scholars to examine because it could give information about what policy areas the Supreme Court feels are particularly important at any given time. Here I am particularly interested in on issue area that the Court hears cases about—economic activity.

Using time series methods, I found that as the economy is doing worse the Court will respond by deciding to hear a greater percentage of economic cases. This comes with the caveat that this finding is only present when the economic indicator that is used for the analyses is consumer sentiment, measured by the Index of Consumer Sentiment. Other economic predictors—unemployment rate and GDP growth—did not significantly predict changes in the aggregate agenda, though the sign of the coefficient was in the expected direction.

The second hypothesis I tested about agenda setting said that the Court would devote a higher proportion of the agenda to economic cases when the public felt that it was a more important issue. To measure this, I utilized a question asked by Gallup that asked what people thought the most important problem in the country is. Here, the results did not support the hypothesis. There may be more indirect ways of looking at this, but this direct measure of how important the public thinks a particular problem is did not influence the Court.

Chapter 4

In Chapter 4, I examined the voting stage of Supreme Court decision making. The question of "who won?" or, in other words, was the decision rendered a liberal decision or an conservative decision has gotten arguably the most attention from political scientists interested in the Court. Here, I hypothesized that in a context where the economy was doing worse the magnitude of the economy on the decision of the Court would be diminished though not necessarily negated. I also hypothesized that when the United States was a party in Court their policies would be punished by the Court voting against them in economic cases.

Similar to the findings of Chapter 3, there was some marginal support for these hypotheses in this chapter. When looking at the economy as measured by the ICS, the coefficient for ideology in the voting models was smaller when the ICS was shrinking than when it was growing. Other economic indicators did not appear to have as much of an impact, though an indicator such as whether or not the country was in a recession during that term still showed a pattern of having a strong significant effect of ideology when there was not a recession and a statistically insignificant effect of ideology when there was a recession.

ICS, meaning changes in the ICS, also significantly predicted the United States success in the Court in economic cases. Controlling for other factors such as the ideology of the Court compared to the government, as the ICS was better the government had a higher probability of winning an economic case. This effect did not "spill over" into other issue areas. With this effect not spilling over into other areas, this gives some credence to earlier work that theorized that the Court may punish the economic policy making of the federal government during downturns (Brennan, Epstein, and Staudt 2009b).

Chapter 5

In this chapter, I examined some of the decisions that happen in the "post merits" stage of Supreme Court decision making. Drawing on the hypotheses and results of Chapter 4—which hypothesized that in times of economic downturn ideology is not as important of a determinant of decisions—I looked at how that may impact the opinion writing and coalition formation decisions of the Court. I hypothesized that during times of economic downturn, the justice charged with assigning the majority opinion would be less likely to assign it to his or herself or would be less likely to assign it to someone who has policy preferences relatively similar to his or her own. This was an extension of the findings of the previous chapter with the idea that if ideology mattered to a lesser extent during times of downturn this would manifest itself in the assignment decision.

In this chapter, I also looked at how the economic situation in the country may influence bargaining on the Supreme Court. To do this, I looked at how large the opinion coalition for a decision was. Prior research has suggested that to move beyond a minimum sized coalition required some bargaining amongst the justices over the content of the opinion. Again, building

off the idea that during times of economic downturn ideology and personal preferences matter less, I hypothesized that during these downturns the size of the coalitions was more likely to be minimum sized, as justices were less likely to bargain over the policies in the opinion.

There was not statistical support for the first hypothesis presented in this chapter. The health of the national economy had no significant impact on the likelihood an assigning justice wrote the opinion or on the distance between the assigning justice and the writing justice ideologically. For the hypothesis concerning bargaining and coalition size, there was support of the hypothesis but only when using whether or not the country was in a recession as the economic indicator. While this finding is potentially interesting and raises questions about why recessions was a significant predictor of it but not a significant predictor in other models, because the measure in the model of bargaining was only a proxy measure perhaps it would be better to take these results with a grain of salt.

Avenues for Future Research

While this dissertation has sought to bring a greater understanding to how the Supreme Court is impacted by the economic environment, this is still a field of study that is relatively underdeveloped and ripe for researchers to examine. Here, I examined the aggregate Supreme Court agenda and showed evidence that it was responsive to the economy. This could potentially be more fully studied by taking the question back to the case level or individual level justice votes on whether or not to hear a case. Perhaps certain justices are more likely to respond to the economy. Because of the "Rule of Four" there is still a good deal of power each individual justice has in deciding to hear a particular case.

Also in further examining the aggregate agenda of the Supreme Court, it might be interesting for future scholars to look at what impact these changes in the aggregate agenda have on subsequent decision making. Does the Court hearing a greater number of economic cases in one time period lead to them deciding those cases in a different manner than they would have if that case was decided at a different time point? Overall, the idea of whether or not the other cases that are being argued around the same time as Case X in some way correlate with the outcome of Case X is something that should be sorted out more in future studies.

In looking at the voting stage of the Court's decision making, future work could make the studies more focused on the individual justice level. This dissertation was concerned with court level outcomes, but there are potentially interesting hypotheses that could be tested about individual justices and how they are impacted by the economy. Perhaps things like ideology may change the way individual justices respond.

Another potential avenue for future research is to look at the potential of the economy as having an indirect effect on Court outcomes. The studies tested in this dissertation posited a direct effect. More work can be done to more fully flesh out the other ways the economy can matter through various mechanisms. For instance, the consistent finding in these models that consumer sentiment was a better predictor of Court outcomes than another economic variable such as unemployment may imply that there is some role that the public at large is playing in this relationship. Sentiment is a bit more of a subjective measure of economic performance. Why the Court is seemingly more responsive to this subjective measure than some of the objective measures is something that can be sorted out with additional work.

In looking at all that happens after the decision has been made, there is also room for further analysis. With each passing year, there are more and more tools available to social

scientists to be able to analyze text. These tools have the potential to be of monumental use for scholars of the Supreme Court as they may be able to take the text of Supreme Court opinions and scale them in interesting ways for use in a more data analytic way. With these type of tools, we could examine how the actual text of Supreme Court opinions changes in interesting ways do to things going on in the exogenous environment.

Similarly, recent work has also began placing Supreme Court decisions in policy space using cutting edge methods (see Clark and Lauderdale 2010). With more advancements in this type of data, we can potentially use that as a dependent variable instead of the usual liberal/conservative dummy variable approach to get a more nuanced take on Supreme Court outcomes. We could use that to answer questions about not just the direction of Supreme Court decisions, but also the polarity of those decisions.[55]

Overall, though this dissertation is concerned in particular with the impact of the economy on the Supreme Court decision making, I believe this dissertation makes a case for there to be more work done on other environmental models of the Court's behavior and integrating these environmental models into the more well-established classic models. Existing literature that I discussed earlier in the dissertation sought to examine a direct connection between an environmental factor such as public opinion and the decisions that the Court makes. Using a similar methodological framework to what I use here, we can look at how the public opinion—and other environmental factors—can have a moderating or constraining influence on the behavior of the Court.

[55] If these point estimates of Supreme Court decisions are also estimated with a certain amount of variance, the variance of those point estimates could also become an interesting focus of study. Questions such as "What impacts the clarity of Supreme Court decisions?" could potentially lead to some interesting insights into the Court's decision making.

Similar to the previous suggestion for future research, this dissertation hopefully makes the point that examining environmental factors is of interest to scholars of the Court. Though this is a growing field of research that has looked at public opinion, interest groups, etc., there are still many potential environmental factors out there that can be looked at. For example, what impact does the polarized political environment that the Court finds itself in—particularly in modern times—have on Supreme Court outcomes? Are there any potential avenues where the media can have an impact on the Court? More research into areas such as this can answer important questions we have about the Court and just how "isolated" the Court really is from the external pressures that we believe elected officials to be influenced by.

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