

Selecting on the Economy? Economic Issues, Public Opinion and the Supreme Court

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ABSTRACT

Discretionary jurisdiction is an essential feature of the modern Supreme Court of the United States. With very few exceptions, the Court's justices choose whether to hear appeals or let lower courts' judgments stand without further proceedings. This feature of the Supreme Court's decision making process means that justices' decisions on the merits of a particular case is nested in a previous decision to hear the case in the first place. This two stage decision process creates numerous opportunities for strategic behavior on the part of lower court judges, litigants, other interested parties, and the justices themselves. In particular, I argue here that the justices have incentives to structure the composition of the docket in order to signal approval or disapproval of the president's economic program. Specifically, the justices will hear a larger number of cases in economic policy domains as economic performance declines. Conversely, the justices will hear a smaller number of economic cases as national economic performance improves. I test this theory by estimating a statistical model of the number of cases involving economic policies as a function of indicators of national economic performance. The data show that higher unemployment is associated with greater attention to the economy in the Supreme Court's dockets over several years and that the Supreme Court's attention is significantly associated with other macroeconomic conditions at longer lags. Together, the results indicate an association between the state of the national economy and the linked political processes that bring cases to the Court.

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Discretionary jurisdiction is an essential feature of the modern Supreme Court of the United States. That the justices of the Supreme Court have the ability to “set their own table,” or decide which cases to hear in a given term, has allowed scholars of judicial politics to examine what influences the justices in decide how to decide. However, to date, literature in political science has focused on examining the impact of discretionary jurisdiction almost exclusively at the merits stage. And while scholars have noted the importance of the certiorari process for understanding how the justices decide cases, a deeper and more thorough examination of the implications of certiorari have largely been ignored. In particular, less focus has been given to how the Court selects cases that can serve its own political and ideological ends once they advance to the merits stage is dependent on the strategic choices of litigants, lawyers, and lower court judges. In other words, the deciding to decide is nested in the decision *whether* to decide, which is nested in the decision of external actors to petition the Court for a writ a certiorari.

Much of the literature on the Supreme Court has treated the certiorari process¹ and the decision making process as two separate, but linked components of the Supreme Court. By not examining these processes as a two stages of decision making that rely heavily on one another, our understanding of judicial strategy and the certiorari process is incomplete. However, there is a growing movement to consider these linked processes simultaneously, both theoretically and empirically (see Baird, 2007; Beim and Rader, 2016; Beim, Clark and Patty, 2016; Black and Boyd, 2012; Hall and Ura, 2015). Considering the strategic behavior of Supreme Court justices, lower court judges and litigants in conjunction with the justices’ preferences for weighing in on policy made by Congress or the president allows for a more thorough examination of the two stages of decision making: the justices decision of whether to decide and the decision on the merits.

¹The process of having a case decided by the U.S. Supreme Court begins when a litigant asks the Court to hear its case, most frequently by filing a “writ of certiorari” (i.e., a petition for certiorari). For more information on the cert process, see Perry (1991).

Here, I consider the linked processes of strategic behavior by the justices, lower court judges and litigants and certiorari by arguing that the justices have incentives to manipulate the composition of the docket in order to signal approval or disapproval of the president's economic program. This paper joins and extends that literature by considering how justices' ambitions to shape economic policy influences and shapes their decision on the volume of economic cases to add to their docket in any given term.

Building on Brennan, Epstein and Staud (2009 a,b), I argue that the Court resembles the mass public in terms of how they interact with and evaluate the economy in that *perceptions* of the state of the economy have more influence on behavior than the real state of the economy. Specifically, if the justices, like other policymakers and the public, use economic performance as a signal of policy competence then the Court is more likely to reject (support) the federal government's policies when the economy is performing poorly (well). Unlike voters who can directly express their support or lack thereof by retaining incumbent politicians or voting them out of office, the justices only have indirect means of responding to the government's policies. The Court can either support or reject the government's policies through the judicial decision making process. It is logical then, that during the certiorari process, if the Court seeks to render judgment on economic policy then they accept those cases for review which give them the opportunity to render judgment on the economy. In other words, the justices pay attention to the state of the macroeconomy and the public's perception of the state of the national economy in order to potentially step in and influence the government's economic policy, albeit indirectly. Therefore, the economy and macroeconomic conditions matter for the Court similar to how they matter for voters.

I test this theory of the impact of the macroeconomy on the Supreme Court's decision making processes by estimating a statistical model of the number of economic cases involving economic policies decided by the Court as a function of national macroeconomic indicators, such as unemployment, growth and inflation. The decision to model the volume of economic decisions made by the Supreme Court rather than the proportion of economic cases in rela-

tion to all issue areas considered by the Court in any given year was made in attempts to distinguish between terms of the Court that are similar in their proportion of economic cases while being quite different in their net volume of economic decisions. The results indicate that higher unemployment is associated with greater attention to the economy in the Supreme Court's docket over several years and that the Court's attention to economic cases is significantly associated with other macroeconomic conditions at longer lags. In short, the economy matters for how the Supreme Court sets its own agenda.

This paper unfolds as follows. First, I review the current treatment and understanding of certiorari within the Supreme Court decision making process. Next, I consider the relationship between economic and politics as it applies to the Court, following Brennan, Epstein and Staud; Brennan, Epstein and Staud's (2009a; 2009b) claim that the justices resemble the mass public in how they interact with the economy and use it as a signal of policy making competence of the elected branches of government. I then present a theory of a two stage nested process of judicial decision making that accounts for strategic behavior during the certiorari process and the decision on the merits. I proceed to describe the results of my empirical assessment, which indicates that the justices rely on the economy as a signal of policy making competence. I conclude by discussing the implications of these findings, as well as future directions of my theoretical approach.

Certiorari in the Textbook Supreme Court

There is a large literature that discusses the many influences on the behavior of Supreme Court justices. Among these is that the justices desire to create legal policy, either by the justices' particular preference about specific policy questions or general preferences about society (Epstein and Knight, 1998, p. 23). Additionally, the Court is thought to be influenced by legal considerations, such as resolving conflicts between lower courts and the legal importance of a particular issue (see Perry, 1991), which require that the Court works closely with

both Congress and the Executive branch. The literature on the influences of Supreme Court decision making has largely evolved to consider the policy, political and legal motivations in concert with one another (Black and Owens, 2009; Hansford and Spriggs, 2006; Johnson, Wahlbeck and Spriggs, 2006), which has provided a more comprehensive understanding of the dynamic process of judicial decision making.

Textbook treatments of the Supreme Court are unanimous in recognizing that the Court's discretionary jurisdiction is an important feature of its institutional arrangements. Through a number of bills passed over the years, Congress has altered the Supreme Court's jurisdiction, changing the Court from one which was largely required to hear most of its cases (via mandatory jurisdiction) to one that could set its own agenda (via discretionary jurisdiction). When Congress passed the Judiciary Act of 1891, it began to ease the Court's workload burden by, first, creating the United States Courts of Appeals to hear all cases appealed from federal district courts and, second, carving out a small discretionary docket for the Supreme Court. As a result, with circuit courts hearing all appeals, justices had more power to select the cases they wanted to hear. The Judiciary Act of 1925 further removed much of the Court's remaining mandatory jurisdiction, leaving justices with even more power to set their own agenda. Finally, in 1988, Congress paved the way to granting the Court almost complete control over their docket when it passed legislation that removed virtually all the Court's mandatory jurisdiction. Accordingly, today's justices can choose the cases they wish to hear, with little to no direction as to the types—or numbers—of cases before the Court (see Owens and Simon, 2012).

Further, this treatment acknowledges that decisions on the merits are nested in decisions to hear cases which are nested in the decision of strategic litigants to pursue adjudication at the Supreme Court. Generally, though, political scientists study certiorari and decision making separately, although these literatures are often speaking to one another and recognize that the certiorari process, agenda-setting and decision making all influence one another (see Baird, 2007; Beim and Rader, 2016; Beim, Clark and Patty, 2016; Black

and Boyd, 2012; Hall and Ura, 2015; Lax, 2003). Part of the communication between these literatures lies in the recognition that justices have policy preferences which are expressed at various stages in the decision making process. While most research has focused on the policy implications of decisions handed down by the Court, particularly in terms of the voting coalitions formed by the justices and the text of the opinions they authored (see Gely and Spiller, 1990; Johnson and Martin, 1998; Owens and Wedeking, 2011), scholars have recognized that the justices' preferences may be expressed at earlier stages in the decision making process, including the decision of whether to decide (see Caldeira and Wright, 1988). Additionally, justices are motivated, at least in part, by their perception of the political or legal impacts of the cases when they make their decision on whether to grant or deny certiorari. However, the contextual and dynamic considerations of the decision to grant certiorari are often overlooked by studies of the agenda-setting process.

Therefore, if the justices care about the political impact of their decisions, then they will set their table in such a way to advance their policy preferences once a case reaches the merits stage. In other words, in order to enter into the conversation about economic policy, the justices need to take cases that allow them to pass judgment on the economy. By selecting cases that enable them to advance their preferences at the merits stage, the justices effectively express their preferences at an earlier stage in the decision making process. This then speaks to the importance of considering the decision to grant certiorari and the decision on the merits as a set of nested process, which allows for the expression of preferences at multiple stages in the decision making process.

The Political Economy of Judging

The connection between economics and politics has long been acknowledged by scholars, particularly in regards to how voters use their perception of the state of the economy to evaluate the policymaking competence of elected officials. The strongest link between economic

evaluations and politics has emerged in understanding and evaluating the ways in which voters reward or punish the president (e.g., Alvarez and Nagler, 1995, 1998; Clarke et al., 2005; Conover, 1985; Conover, Feldman and Knight, 1986, 1987), however, this connection has also emerged in congressional elections as well (see Lewis-Beck and Rice, 1992; Owens and Olson, 1980). Despite the well-documented accounts of the effect of macroeconomic conditions and voters' perceptions of those conditions on different branches of the federal governments, little attention has been paid to the third branch, the United States Supreme Court. Perhaps scholars have not anticipated to observe any effects of the macroeconomy on the unelected branch of the federal government, as the justices have "no authority whatsoever to adopt fiscal or monetary policy intended to relieve the economic pressures facing the nation" (Brennan, Epstein and Staud, 2009*b*, p.1505). However, while the justices might not be able to directly adopt or implement economic policy designed to bolster the national economy, they are not isolated from the effects of the macroeconomy either. In particular, the Court routinely hears and decides cases and controversies that implicate the national economy, which provide a way in which the Court can play a minor role in the recovery or maintenance of the national economy.

Brennan, Epstein and Staud (2009*a*) argue that "rational Justices will look to the economy as a signal of policymaking competence in the elected branches of government *and* will use their decisionmaking power to support (or impede)" legislative or executive policies (p. 1203, emphasis in original). If the justices truly believe that they have a role in shaping economic prosperity, then

judicial refusal to implement perceived policy failures could work to limit possible damage to the economy, thereby advancing the interests of the Justices. Similarly, in times of crisis, we simply argue that the Court's progovernment bias will assist Congress and the president in the recovery effort, again, promoting the Justices' interests in economic growth and stability.²

²Brennan, Epstein and Staud (2009*a*, p.1023).

This seems to suggest that Supreme Court justices deliberately vote to punish, reward, or assist the government depending on the state of the economy. And Brennan, Epstein and Staud conclude not that judicial decisions simply correlate with economy trends, but that a causal link exists between the economy and the decisions of the Court because the justices purposely decide cases to shape the economy, albeit at the margins. In other words, the state of the economy matters both for how the justices will decide a case in the economic issue area, but which cases the justices are likely to accept for review. However, the decision to grant review to certain types of cases is not included in either of Brennan, Epstein and Staud's empirical examinations of the connection between the state of the economy and judicial decision making, which is something this article hopes to more clearly address.

Further, as Brennan, Epstein and Staud (2009*b*) note, a significant portion of the Court's docket is comprised of legal disputes that are both directly and indirectly associated with the financial well-being of the federal government, business entities, and private individuals. Specifically, from 1978 through 2015, approximately twenty five percent of the cases before the Court involved some economic issue.³ Further, "litigants are not shy about bringing the state of the economy to the Court's attention: their briefs are replete with references to macroeconomic issues such as "economic crisis," "banking crisis," "housing crisis," "high inflation," "serious unemployment," and so forth. The parties consistently refer to these issues and to national economic factors in presenting their legal arguments in hopes of convincing the Justices that they are well-positioned to ease existing economic problems—and should use their power for this purpose" (Brennan, Epstein and Staud, 2009*b*, p.1506).

Whether or not the Court pays heed to these references made by litigants and responds to them is a question that has largely gone unanswered. Brennan, Epstein and Staud (2009*b*) determined that the Court acts in much the same way as the voter in that

³Using the coding from the Spaeth et al. (2014) database, "economic issue" is defined as any case concerning Unions, Economic Activity, or Federal Taxation (issue codes 7,8, and 12 respectively).

the justices use their decision making power to punish elected federal officials in recessionary periods and reward them in times of prosperity. In particular, when the macroeconomic indicators are performing well (periods of low inflation, low unemployment and high productivity), then the Court is more likely to decide cases in favor of the federal government and help facilitate the economic policies that are currently being pursued and implemented. Conversely, during periods of high inflation, high unemployment and low productivity, the Court is more likely to frustrate the current economic policies in hopes of promoting economic recovery. In this sense, the macroeconomy serves as a signal for the justices in a similar way in which voters take cues from their perceptions of the state of the economy to reward or punish elected officials, and indicates that the justices are not as isolated from the public or from both political and economic reality.

A Theory of Pre-Certiorari Processes, Economic Conditions and Judicial Decision Making

The process of certiorari is a complicated series of dynamic interactions that much of the literature only examines once certiorari has been granted and the court of last resort makes a decision on the merits of the case (Perry, 1991). However, it is a more complex and interesting set of nested processes. The Supreme Court justices have preference that matter for whether or not a case receives certiorari. However, those preferences matter inasmuch as litigants and lower court judges have preferences as well, and are strategically anticipating what the Supreme Court might choose to do in terms of granting or denying certiorari. This then helps to structure the preferences expressed by the litigants and lower court judges at the stages preceding applying for certiorari at the Supreme Court.

When a case is at a lower court, the judge(s) make a decision regarding the case. The loser then decides whether to accept that court's decision or appeal to a higher court. As each course of action has various costs associated with the decision made by the litigant, the

calculation made by the litigant depends on whether or not the cost of appealing outweighs the cost of accepting the lower court's decision. The court of last resort (here, the U.S. Supreme Court) can choose to deny the appeal and let the decision of the lower court stand, or take the case and proceed to decide the outcome in a series of nested processes.

Because the Court exercises discretionary jurisdiction, the composition of the docket varies from term to term, it is reasonable to assume that litigants have incentives to act strategically in deciding whether to bring a case to the Court. Furthermore, the Court itself has incentives to be strategic in setting its own tab;e and placing certain cases on its agenda. In other words, understanding Supreme Court agenda setting can be thought of as a process of supply and demand. Broadly, litigants are more likely to bring cases to the Court under conditions where the justices are more likely to take those certain types of cases. For economic cases, I argue that the number of economic cases on the Court's docket is negatively associated with consumer sentiment.⁴ When consumer sentiment is low, the public support for standard forms of economic policymaking (i.e., legislative ad executive policy making) should be low. Therefore, the public should be more likely to support judicial intervention into economic policy when consumer sentiment is low. However, the focus here is not on whether or not the public supports the intervention of the Supreme Court into economic policymaking. Rather, it is using the state of the economy as a signal for when litigants are more likely to appeal cases concerning economic issues to the Court.

Justices, like almost all other policymakers and citizens, prefer national economic prosperity to an economy that is suffering from high unemployment, high inflation, and low productivity. Additionally, the justices on the Court signal disapproval of economic policy by deciding cases in such a way to constrain the incumbent policy maker's economic

⁴Consumer sentiment is the aggregate movements of economic optimism and pessimism over time. It is an index with five constituent parts that are both retrospective and prospective, and considers expected changes in personal financial situations and national business conditions in one and five years (University of Michigan Survey of Attitudes and Behavior.

policies. I hypothesize that during periods of economic prosperity, the Court is less likely accept economic cases for review and the number of economic cases litigants appeal will be lower than during economic downturns. When the economy is in a recessionary period, the Court will be more receptive to cases in the economic issue dimension and litigants are more likely to appeal economic cases, due to increased prospects for success in terms of receiving a writ of certiorari. In other words, the justices use the economy as a signal to take more economic cases in order to constrain the economic policies of incumbent politicians. Specifically, the Court seeks to foster competent economic management and stability by expressing support for executive and legislative policies during times of economic prosperity, and disapproval during recessionary periods. I expect that when the economy is expanding or stable, the Court will favor the government's position and policies and take fewer economic cases, but as the economy contracts, I expect that the justices will accept more economic cases for review and decide against the policies of the federal government.

Of course, the Supreme Court cannot react in real time to the current state of the economy (Brennan, Epstein and Staud, 2009*a,b*). Nor can they directly seek out certain types of cases in order to support or oppose the policies instituted by Congress or the executive. Rather, the Court must wait for a case to work its way up through the lower court system and then be appealed to the Supreme Court. This process does take time, and it is possible that by the time a case that originated during one economic period reaches the Court, the state of the economy has changed. As the Court cannot react in real time, but are strategic regarding which cases are placed on the Court's agenda, we expect that when the economy is perceived to be bad, the Court grants certiorari to more economic cases. The increase in the number of economic cases on the Court's docket suggests that the justices anticipate deciding against the incumbent's policies, even if the economy improves in the period between when a case was granted certiorari and when the case advances to a decision on the merits. Therefore, anticipating a lagged effect of macroeconomic indicators on Supreme Court deci-

sion making for certiorari makes more sense than anticipating a lag structure for decisions on the merits.

Often, it is not clear if the Court evaluates the competence of the federal government and economic policy at the time the policy was enacted or if the Court rewards or punishes the federal government and evaluates the claim raised in a case based on the current economic climate. However, these temporal dynamics are useful for understanding the influences on Supreme Court justices' behavior when deciding which cases to accept for review and how to decide the case. Earlier in the process (i.e., concurrently with current events and perceptions of the state of the economy), the justices' decision to grant certiorari to a certain case are more directly affected by consumer sentiment and the public's perception of the state of the economy. Whereas by the time the case arrives before the Court, the influences on justices' behavior may be more affected by other actors nested within the decision making process, such as lawyers or litigants.

These antecedent actors might have cause for studying the preferences and patterns of behavior of the justices, so they have developed some sense of when the justices are more or less likely to accept certain types of cases for review. Anticipating judicial behavior might then allow litigants to start the process of appealing their case before the Supreme Court. Specifically, in current periods of economic decline, litigants anticipate that the Court will be more sympathetic towards their petition for a writ of certiorari and appeal to the Supreme Court, even knowing that the current economic period will likely not persist into the period where they appear before the Court if granted certiorari. Therefore, the dynamics of the macroeconomy are important for understanding both when the Court is more likely to grant certiorari to economic cases and when and why litigants choose to initiate the certiorari process.

Assessment

I am interested in the way that macroeconomic factors and the public's perception of the economy influences judicial decision making. The dependent variable is the count of the number of economic cases decided by the Supreme Court from 1978 through 2015. The decision to model the volume of economic decisions made by the the Supreme Court's rather than proportion of economic cases in relation to all issue areas considered by the Court in any given year (as is generally the case in the literature concerning the liberalism of the Court's outputs, e.g. Casillas, Enns, and Wohlfarth 2010, McGuire and Stimson 2004, Mishler and Sheehan 1993) was made in attempt to distinguish between terms of the Court that are similar in their proportion of economic cases while being quite different in their net volume of economic decisions.

Hypothetically, a term in which the Court resolved each of its one hundred cases in a liberal direction may accomplish much more policy liberalism than a term in which the court decides each of fifty cases in a liberal direction, although each term would be scored as one hundred percent liberal. In terms of the net number of cases, the 1984 term of the Court contained eighteen more decisions on economic cases than the 2009 term. Yet, the two terms produced similar percentages of economic cases, 24.8 percent and 25 percent, respectively. Economic cases routinely constitute approximately one quarter of all types of cases the Court decides in any given term, however the overall number of cases does differ across terms and provides additional leverage for understanding how macroeconomic conditions influence the types of cases the Court selects for review.

Moreover, reducing information about the numbers of cases in a particular direction to a percentage imposes substantive assumptions that the volume of the Supreme Court's workload is fixed over time and exogenously given. However, the Supreme Court's workload has varied substantially over time during the post-World War II Era and is largely set by the Court itself. Focusing on the volume of economic cases rather than the percentage of economic cases relaxes these implicit assumptions and allows for a more direct test of theories

which involve the decisions of both litigants and the Supreme Court during the certiorari stage.

By using the number of cases rather than the percentage, I am able to incorporate more of the certiorari process into a model of decision-making as this modeling strategy takes into consideration the supply of potential cases that the Court can choose from and the decision of which case to accept simultaneously. However, a limitation of this modeling strategy is that I cannot tell who in the system is doing what. In other words, I am still limited by the black box that has obfuscated more insight into the earlier stages of the decision making process. Despite not knowing what is occurring in the system, my initial results provide circumstantial evidence about the nature of the black box by combining the supply of potential cases with the cases that are accepted for review.

The data on Supreme Court decisions are drawn from the Supreme Court database (Spaeth et al 2014). I rely on its compilers' identification of cases within the scope of economic issues. The cases considered economic issues include economic activity (i.e.,), unions, and federal taxation.⁵ I also make use of their coding for the ideological direction of case outcomes. For economic activity and unions, liberal decisions are decided in favor of the government and unions. For federal taxation, liberal decisions are pro-United States.

Measuring Macroeconomic Factors

Because I am interested in the effect of the public's perceptions of economic conditions on judicial decision-making, I need a measure of macroeconomic perceptions. Following Brennan, Epstein and Staud (2009b), I make use of the Survey of Consumer Attitudes and Behavior conducted by the Survey Research Center at the University of Michigan. Two variables will be used to ascertain the general "mood" of the public with respect to the economy. The first is a measure of consumer confidence, making use of the Index of Consumer Sentiment, which

⁵These issue areas are coded as 7 "unions," 8 "economic activity," and 12 "federal taxation" according to the Supreme Court database.

is based on a series of questions from this survey and includes a mixture of prospective and retrospective items, as well as questions concerning both personal and national economies.⁶ The second measures consumer expectations with respect to changes in prices.⁷

This analysis attempts to tap into the business cycle: the repeated sequence of economic expansion, followed by decline, and then followed by recovery. Previous research has suggested that following macroeconomic variables are associated with this cycle: industrial production, consumption, investment, employment, inflation and stock prices (Brennan, Epstein and Staud, 2009b).⁸ Nearly all of these “business cycle facts” are procyclical in that they move in the same direction as the aggregate economic activity. However, unemployment is countercyclical and real interest rates are acyclical. Timing of these variables is important and should be noted that investment activity is considered to move in advance of the business cycle, or is a leading variable. Others, such as consumption and employment

⁶These components include: current financial situation compared with a year ago; expected change in financial situation in a year; expected change in business conditions in a year; expected change in business conditions during the next five years; and buying conditions for large household durable goods.

⁷The analysis in this chapter ranges from January 1978 through December 2015, due to data availability for consumer sentiment from the SCA.

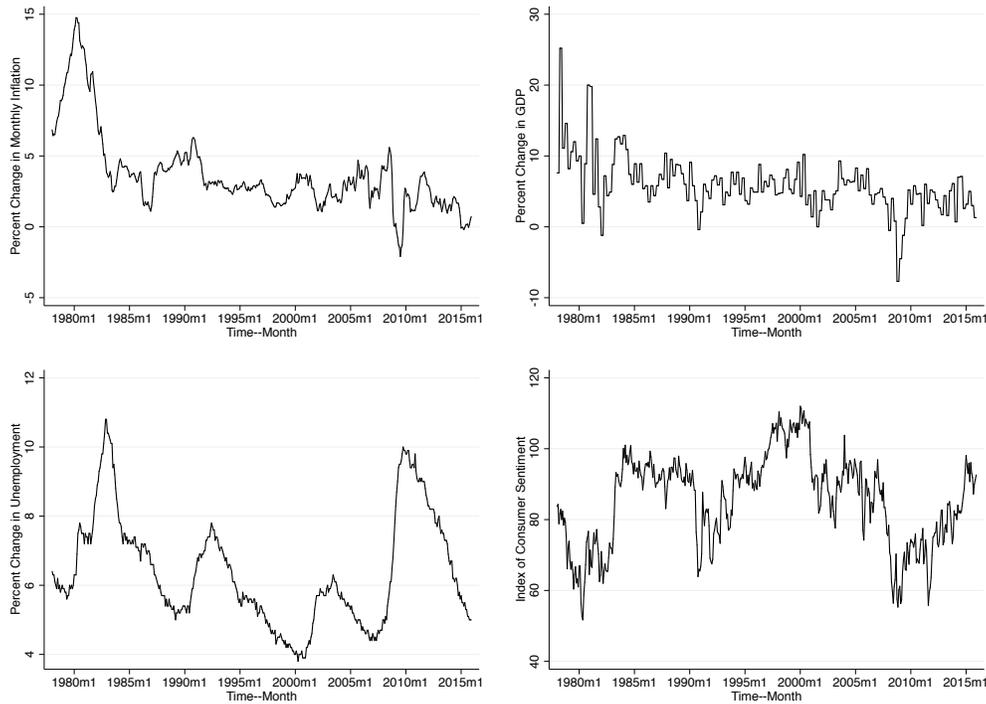
⁸In the literature on consumer sentiment, which often leverages the public’s perceptions of the state of the national economy for understanding presidential approval rates, rather than a crude measure of the national economy as the best information of future economic benefit to expect from the incumbent, economic indicators which provide voters with information about economic growth and how it will be distributed are used. By examining these economic indicators, the literature argues that there is more leverage to understanding the relationship between public opinion, presidential approval, and policy outcomes (see Alvarez, Nagler and Willette, 2000; Barberà et al., 2014; Clarke et al., 2005; DeBoef and Kellstedt, 2004; Linn and Nagler, 2005).

are coincident economic indicators, and inflation is considered a lagging indicator.⁹ For the purpose of this analysis, I follow the selection of macroeconomic variables put forth by Brennan, Epstein and Staud (2009b) and focus on the economic peaks and troughs identified by the National Bureau of Economic Research (NBER) Dating Committee: the percentage change in inflation from month to month¹⁰, the percentage change in unemployment from

⁹While these variables can be individually included into the analysis, there are also leading, coincident, and lagging indicators that can be obtained from “FRED,” a public database made available by the Federal Reserve in St. Louis. The coincident indicators include non-farm payroll employment, the unemployment rate, and average hours worked in manufacturing and wages and salaries. The trend for each state’s index is set to match the trend for the gross state product. The lagging index components include: average duration of unemployment, ratio of manufacturing/trade inventories to sales, change in labor cost per unit output in manufacturing, average prime rate charged by banks, ratio of consumer installment credit outstanding to personal income, and change in the consumer price index for services. The benefit to using individual components of these series rather than the series as is from “FRED” is that I have more control over the business cycle facts included in the analysis and can directly test the effects of these facts on whether or not a case is granted certiorari.

¹⁰U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index: All Urban Consumers. The percent change in inflation is calculated by subtracting the subsequent month’s CPI from the current month’s CPI, dividing by the current month’s CPI, and finally multiplying by 100: $\frac{CPI_{t+1}-CPI_t}{CPI_t} \times 100$

Figure 1: Macroeconomic Indicators, 1978 - 2015



month to month¹¹, and the percentage change in real quarterly Gross Domestic Product (GDP).¹²

Figure 1 shows the change in macroeconomic indicators, including the Index of Consumer Sentiment (ICS), inflation, GDP, and unemployment from 1978 through 2015. From these figures, the monthly variation in these indicators over time is evident. Inflation and GDP are both measures that tend to increase over time, with occasional subtle periods of decrease followed by longer periods of continual increase. However, when these measures are disaggregated from annual to monthly measures, the existing variation is more easily observed. Unemployment and the ICS do appear to follow the same pattern of ebb and flow,

¹¹U.S. Department of Labor, Bureau of Labor Statistics, Current Population Survey Unemployment Rate—Civilian Labor Force

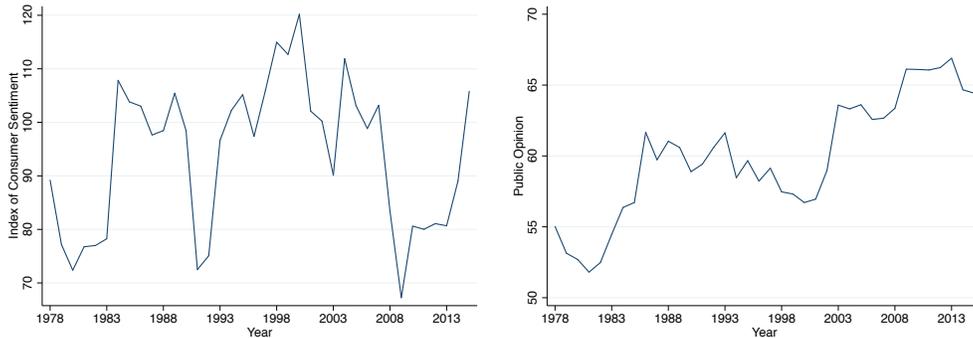
¹²U.S. Bureau of Economic Analysis. The monthly growth rate is taken from the quarterly growth rate from the same source and is the quarterly rate three months in a row, which follows the convention/approach used in previous research.

which follows as these macroeconomic indicators move in a cyclical nature in relation to perceptions of the state of the national economy.

Additionally, because I am interested in public perceptions and overall mood, I also make use of Stimson's (2004) global mood measure. This measure represents the nation's aggregate preference for more or less liberalism in public policy across a broad spectrum of issue dimensions. The use of mood in this analysis is a supplement to the use of different macroeconomic indicators to ascertain the nation's overall "mood" regarding the economy.¹³ I argue that as the public's preference for more liberalism increases, the Court is more likely to accept economic cases for review and decide those cases in a liberal direction. Further, as the economy worsens, the public will prefer more liberalism, more harshly evaluate the performance of the president and Congress, and the Court will hand down more liberal decisions concerning economic cases. Figure 2 contains the measures of both policy mood

¹³While the public mood measure is an aggregation of how amount of public support for government programs on the liberal conservative spectrum. In this aggregation, several questions on macroeconomic indicators are included, such as questions about unemployment. Because of this, it is possible that the effect of unemployment on public preferences may already be accounted for in the mood measure. Running a correlation on mood and unemployment yields a correlation coefficient of 0.0918, suggesting that these two variables are not highly correlated with one another and can be used separately to leverage overall public preferences as well as the impact of unemployment on the number of economic cases take up by the Court in any given year. However, examining some of the other macroeconomic indicators shows that inflation and GDP are more correlated with mood than unemployment, with coefficients of 0.85 and 0.86 respectively. While these are indicative of stronger correlations between these macroeconomic indicators and mood, I am still confident in my decision to include them as separate predictors in order to leverage the independent effects of those macroeconomic indicators on the number of economic cases decided by the Court.

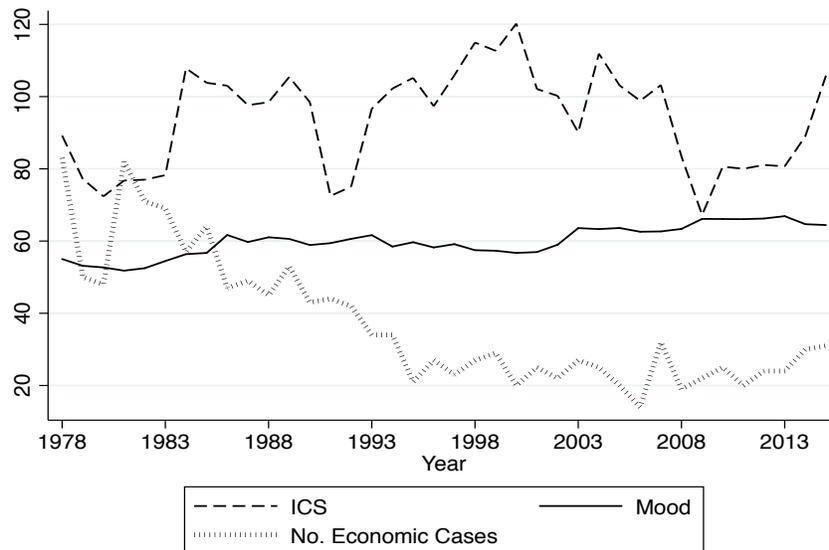
Figure 2: Index of Consumer Sentiment and Public Mood, 1978 - 2015



and ICS, both of which are used to determine the public's overall mood when it comes to evaluating the state of the national economy. As we observe from the figure, there are more ebbs and flows in both series. Periods of lower evaluations on the ICS align with periods of increased liberalism in the public, suggesting that when the economy is perceived to be poor, the public prefers more government involvement in promoting economic growth and stability.

Figure 3 adds the count of the number of economic cases decided by the Court from 1978 through 2015 to the observation of the relationship between public mood and the ICS. From this figure, we observe that as the evaluations of macroeconomic indicators as measured by the ICS increases, which suggests that the public perceives the state of the economy to be improving, the number of economic cases taken by the Court decreases. However, in more recent years, as the ICS evaluations increase, the number of economic cases has increased as well, suggesting that it is not just economic conditions that are motivating the Court to take cases within the economic issue domain, further supporting DeBoef and Kellstedt's (2004) claim that understanding consumer sentiment requires consideration of both political and non-political factors.

Figure 3: Index of Consumer Sentiment and Public Mood and Number of Economic Cases, 1978-2015



Estimation

Because I want to be able to identify the components of judicial decision-making that are due to economic conditions and the components that are due to something else, I follow the modeling strategy of DeBoef and Kellstedt (2004) in my modeling choices. First, I saturate the models of economic sentiment by including two lags of highly collinear economic time series; and second, I do not include a lagged dependent variable. By not lagging the dependent variable, I am able to eliminate as much of the effects from the real economy from both the public’s evaluations and justices interpretation of those perceptions as possible. In other words, I am able to focus on the perceptions of the state of the economy, as the real economy matters insomuch as perceptions of the state of the economy influence interactions of the mass public with the economy. Or, perceptions carry more weight in terms of public evaluations than the state of the real economy.

The dependent variable for this analysis is the number of economic cases taken by the Court between 1978 and 2015, a count with a lower bound of zero. In the absence of strong autocorrelation or overdispersion, this type of “event count” data is typically modeled

Table 1: Poisson Regression Model of the Number of Economic Cases Taken by the Supreme Court, 1978-2015

Predictor	Contemporaneous Effects	S.E.	One Year Lagged Effects	S.E.	Two Year Lagged Effects	S.E.
Macroeconomic Indicators						
Unemployment	0.06*	(0.02)	-0.17*	(0.02)	0.11*	(0.01)
Inflation	-0.01	(0.01)	-0.01	(0.26)	-0.02*	(0.02)
GDP	0.01	(0.02)	-0.08	(0.08)	0.15*	(0.01)
Public Opinion						
ICS	0.00	(0.00)	-0.01*	(0.01)	-0.01	(0.219)
Policy Mood	-0.02	(0.02)				
Liberal Decisions	0.01*	(0.0)				
Conservative Decisions	-0.00	(0.00)				
Constant and Fit						
Constant	4.08*	(0.71)				
AIC	6.67					

Note: Poisson regression estimates, robust standard errors in parentheses.

* = p -value ≤ 0.05 ; one-tailed tests. $N = 38$

with a Poisson regression model (Brandt *et al* 2000). The annual count of federal laws invalidated since 1973 shows only weak autocorrelation ($r_{t, t-1} = 0.15$), and the time series's estimated dispersion parameter (α) in a negative binomial regression is zero. Therefore, I estimate a Poisson regression model of the annual number of economic cases decided by the Supreme Court expressed as a function of a combination of macroeconomic and public opinion variables. These variables include the Index of Consumer Sentiment, percent change in inflation from the previous year, percent change in GDP from the previous year, percent change in unemployment from the previous year, public mood, and the overall number of both liberal and conservative decisions issued by the Court.

Results

The initial results from this model in Table 1 indicate that while most of the macroeconomic indicators are not significantly related to the number of economic cases decided by the Court, unemployment has a significant relationship to the number of economic decisions. The model provides three estimates of unemployment on the number of cases accepted for review by the Supreme Court: a contemporaneous effect, a one-year lag, and a two-year lag. What is particularly interesting is that a change in unemployment (either a decrease or increase in aggregate levels) indicates that the Supreme Court is more likely to accept economic cases for review.

Specifically, in the current time period, when unemployment increases, the Court is more likely to take notice of the public's reaction to the negative change. The way in which the Court responds to changes in unemployment contemporaneously is by granting more cases in the economic issue area certiorari. In other words, even though the Court will not be hearing those economic cases in the same term in which they are granted certiorari, the justices indicate that they are responding to changes in overall unemployment levels by accepting more economic cases for review.

Interestingly, when considering the one year lag, the effect on unemployment remains statistically significant, but is now negative instead of positive. Put differently, when the Court considers the unemployment level from one year prior, they are less likely to accept economic cases for review. However, the sign switches yet again when considering unemployment rates from two years ago. When the Court evaluates unemployment rates from two years prior, the Court is more likely to accept economic cases for review. Taken together, these results indicate that a change in unemployment is a meaningful predictor for how many economic cases the Court agrees to hear.

Further, these results suggest an interesting temporal puzzle: the economy (as it pertains to the aggregate levels of unemployment) two years ago influenced lower court judges to decide economic cases in a particular way *or* litigants were preparing for an appeal of a

lower court decision to the Supreme Court. However, as noted above, while this effect is observed contemporaneously and two years prior, a change in unemployment one year prior to the Court issuing a decision, the Court is less likely to accept an economic case for review. This oscillation suggests that the Court is monitoring the changes in unemployment and attempting to match the public's interpretations of the role of the unemployment rate for their perceptions of the state of the national economy. Part of what makes this result interesting is that even with no measure of ideology in the model, the effects of unemployments are still significantly related to the number of economic cases decided by the Supreme Court in any given year.

In addition to unemployment, inflation and GDP are also statistically significant predictors of the number of economic cases granted review at two lags. In other words, the inflation rate and GDP from two years prior help determine the number of economic cases decided by the Court in any given term. The negative coefficient on inflation suggests that as inflation increases¹⁴, the Court is less likely to accept an additional economic case for review. However, the substantive effect of inflation is much smaller than the other macroeconomic indicators. GDP, on the other hand, has a positive and statistically significant effect on the number of economic cases granted review by the Supreme Court. An increase in GDP is associated with an increase in the number of economic cases. Together with unemployment, these macroeconomic indicators suggest that the Supreme Court is attentive to shifts in the state of the macroeconomy *and* the public's perception of the overall state of the economy.

Additionally, liberal decisions for all cases is another significant predictor of the number of economic cases decided by the Court. As I argued above, the Court is more likely to render liberal decisions when the public perceives the economy as weak in an attempt to help promote and regulate economic stability. These model estimates suggest that a the

¹⁴For the time period evaluated here, 1978-2015, the inflation rate has been monotonically increasing

Court is more likely to decide economic cases in favor of the unions and the government when there is a change in unemployment. In other words, the Court is more likely to exercise restraint and protect the policies of the federal government in order to promote and encourage economic stability and growth. However, the two variables used to measure the public's overall "mood" about the economy are not significantly related to the number of economic cases decided by the Court.¹⁵

Discussion and Conclusions

The literature has long argued that the Supreme Court seeks to advance legal, political and strategic goals in the decision-making process, but has overlooked the role of the macroeconomy in structuring those goals. That macroeconomic conditions have been overlooked for so long is surprising considering the large portion of the Court's docket in any given term that is comprised of economic cases, as well as the role that economic evaluations have in the interactions between the public, the president and Congress.

In this analysis, I have sought to fill the gap in the literature and expand on the work conducted by Brennan, Epstein and Staud (2009) by arguing that the Court strategically evaluates macroeconomic conditions, the public's perception of the state of the real economy, and uses those evaluations to influence which cases are granted certiorari and help to promote economic stability and regulation during periods of perceived economic distress. To do this, I consider variables designed to take note of the state of the economy—inflation, GDP, unemployment and consumer confidence—as well as a measure of public liberalism and the amount of liberalism in Court decisions. I expected to find that public perceptions of the state of the economy matter for the Court the same way they matter for the president or Congress. Specifically, when the economy is perceived of as being good, presidential ap-

¹⁵A table containing the same estimation strategy for all cases decided by the Court in this time period can be found in the appendix.

proval ratings are higher, but when the economy is perceived of as being bad, the president is punished with lower approval ratings. I expected this to manifest for the Court through an increase in the number of economic decisions issued by the Court when the economy is perceived as bad.

The results of this analysis indicate that only some macroeconomic conditions have persistent effects, mainly unemployment. More specifically, higher unemployment is associated with greater attention to the economy in the Supreme Court's docket over several years. That there is an effect of unemployment contemporaneously, one year prior and two years prior suggests that the Court is sensitive to changes in macroeconomic conditions that have more of a direct and immediate impact on the public. Further, these results indicate that growth and inflation are significant predictor's of the number of economic cases decided by the Court at longer lags. Together, these results point to an interesting temporal dynamic within the Supreme Court's decision making process: because the Court cannot immediately react to changes in political or economic conditions and have to wait for a case to work itself up through the legal system, the justices take into consideration the state of the economy contemporaneously and at the time a case was first brought to court for evaluating whether or not to reward or punish the economic policies enacted by the other branches of government.

The significance of macroeconomic indicators at shorter lags indicate the Court's instantaneous response to economy, turning perceptions of the state of the economy into a signal for determining when to take more economic cases in order to constrain the economic policies of incumbent policy makers. However, significant macroeconomic indicators at longer lags possibly accounts for the strategic behavior of litigants and lower court judges in anticipating how the Court will react to changes in the macroeconomy and structure their docket. The data I analyze cannot adjudicate between these differences. Further research is necessary to examine the temporal dynamics of the effect of the economy on the structure of the Court's docket.

Interestingly, these results indicate that economic conditions and the public's perceptions of economic conditions matter to the Court in a similar way in which they matter to elected members of the government. While the justices are not directly affected by elections and the public rewarding or punishing incumbents based on the state of the economy, the public's response still matters for the Court. It matters in that who the public elects into office is charged with creating and implementing economic policy, and that policy has the potential to be brought to the attention of the Supreme Court, which the justices must choose to either engage and potentially rewrite parts of the policy through the opinion of the Court or let stand unchanged. Additionally, the public's perception of the state of the economy also influences when and what types of cases litigants are likely to appeal for certiorari. Therefore, the Court, like Congress and the president, is influenced by changes in the public's perception of the state of the economy.

What does this mean for certiorari? These results indicate that there is a meaningful association between the state of the national economy and the linked political processes that bring cases before the Supreme Court. More specifically, when the economy contracts (an increase in unemployment and inflation and a decrease in GDP), the Court is more likely to accept more economic cases for review and decide against the policies implemented by the legislative or executive branches. In other words, a litigant who initiates an economic case during a period of economic recession has more reason to expect that their case will be granted certiorari by the Supreme Court than if the same cases was initiated during a period of economic prosperity. Further, a lower court judge who rules in favor of the policies of the federal government during a period of economic decline can expect a higher likelihood of having their ruling overturned by the Supreme Court than during a period of economic prosperity or stability.

Thus, these results also point to another puzzle: de-tangling litigants strategic anticipation of Supreme Court decision making. Because so much goes on in the black box of judicial decision making, I know that my next steps involve being very careful and explicit

about how I develop and articulate my theory regarding the nested processes involving the certiorari process. The number of unobservables within this process suggests that a useful next step would be to formalize my theory of strategic litigant and Supreme Court interaction to get a better understanding of how the decision to appeal for a writ of certiorari influences the final decision on the merits.

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Appendix

The table below indicates that macroeconomic indicators do not matter for cases across all issue dimensions, as there is no significant relationship between the number of cases the Court decides and the macroeconomy. This suggests that there is a relationship worth investigating between the macroeconomy and Supreme Court decision making for the subset of economic cases the Court decides in any given year. In other words, evaluating Supreme Court decision-making for economic issues without considering macroeconomic indicators results in an incomplete picture of the external factors influencing the decisions issued by the Court as well as the types of cases taken for review.

Table 2: Poisson Regression Model of All Cases Decided by the Supreme Court, 1978-2015

Predictor	Contemporaneous Effects	S.E.	One Year Lagged Effects	S.E.	Two Year Lagged Effects	S.E.
Macroeconomic Indicators						
Inflation	0.00	(0.00)	-0.00	(0.90)	0.00	(0.85)
Unemployment	-0.01	(0.01)	0.02	(0.49)	-0.02	(0.25)
GDP	-0.02	(0.42)	-0.01	(0.88)	0.01	(0.77)
Public Opinion						
ICS	-0.00	(0.58)	0.00	(0.00)	-0.00	(0.75)
Policy Mood	0.00	(0.01)				
Liberal Decisions	0.01	(0.00)				
Conservative Decisions	0.01	(0.00)				
Constant and Fit						
Constant	4.18*	(0.34)				
AIC	7.85					

Note: Poisson regression estimates, robust standard errors in parentheses.

* = p -value ≤ 0.05 ; one-tailed tests. $N = 38$