1 Introduction: Supreme Court Membership Change and Its Consequences

> To successfully wage such a campaign, you need three things: Money, legal personnel and a judiciary that's receptive to strategically selected and timed legal arguments.
>
> Damien M. Schiff, Attorney for the Pacific Legal Foundation[1]

In the 2023–2024 term, the US Supreme Court is hearing a variety of cases on salient issues, from gun rights to racial gerrymandering to the availability of the abortion pill mifepristone. However, one of the less publicly salient topics that is being watched closely by legal observers involves multiple cases that challenge a long-standing administrative law doctrine known as *Chevron*. This doctrine, which requires courts to defer to administrative agencies' interpretations of ambiguous statutory language, has long been a target of the conservative legal movement (Green, 2021). Advocates for overturning the *Chevron* doctrine believe that the timing is right to finally achieve that goal, and, as the quote above suggests, the timing is right because they believe the judiciary – specifically, the current members of the US Supreme Court – will be receptive to their arguments.

Administrative law is not the only issue area in which conservative advocates think the current Supreme Court will be receptive. Starting in the early 2010s, many states and localities enacted bans on conversion therapy, also known as "sexual orientation change efforts." This practice seeks to reverse same-sex attraction and non-biologically conforming gender identity through counseling, and is controversial because it has "been deemed harmful and ineffective to people" (Flores, Mallory, & Conron, 2020, p. 2). Over the years, the conservative legal advocacy organization, Liberty Counsel, has brought numerous lawsuits on behalf of licensed counselors who feel these bans violate their constitutional right to free expression. They have won some cases and lost others. Liberty Counsel attorney and chairman, Mathew Staver, told reporters:

> It's not a matter of if; it's just a matter of when the Supreme Court will take one of these cases and strike [conversion therapy bans] down nationally. I was hoping earlier that our defendants would ask the Supreme Court for

[1] Hiroko Tabuchi, *New York Times*, "A Potentially Huge Supreme Court Case Has a Hidden Conservative Backer." https://www.nytimes.com/2024/01/16/climate/koch-chevron-deference-supreme-court.html?searchResultPosition=7

> review. But they decided to end the case at the U.S. Court of Appeals. They were concerned if they took the case to the Supreme Court, they would lose.[2]

While earlier plaintiffs feared losing at the Supreme Court, a more recent plaintiff was not deterred. In May 2023, Brian Tingley, a licensed marriage and family therapist in Washington state represented by another conservative legal advocacy organization, the Alliance Defending Freedom, filed a petition for certiorari asking the Supreme Court to review a 9th Circuit decision upholding Washington's conversion therapy ban.[3] Seven amicus briefs by conservative advocacy organizations and one by eleven states with Republican attorneys general were filed, all urging the Court to take the case. Although the Court ultimately rejected the petition, three justices – Brett Kavanaugh, Clarence Thomas, and Samuel Alito – dissented from the denial of certiorari, and both Justices Thomas and Alito took the unusual step of writing opinions arguing that Court should have taken the case and suggesting that the 9th Circuit decision should be overruled.[4] Even though the conservative advocacy groups did not prevail this time, these dissents suggest that these groups were right to think their arguments could find a receptive audience among some of the Court's justices.

Other groups are shifting their advocacy away from the US Supreme Court, anticipating that it will be less receptive to their positions. For example, litigation has long been a primary strategy of abortion rights advocates, who have regularly challenged restrictive laws passed by state governments in the federal courts. Even before *Dobbs* v. *Jackson Women's Health Organization*[5] overturned *Roe* v. *Wade*'s recognition of a federal constitutional right to abortion access,[6] advocates were moving the fight to state courts (Kim et al., 2023). Rather than rely on a federal right to privacy, they argued that their state constitutions protected abortion access.[7] In the aftermath of *Dobbs*, abortion rights advocates have been working to shore up these state constitutional claims by bringing ballot initiatives like Proposal 3 in Michigan that enshrine the right

[2] See Michael A. Mora, Law.com, "Florida Judge Slashes 70% of Attorney Fees Requested by Evangelical Litigation Organization." https://www.law.com/dailybusinessreview/2024/01/19/florida-judge-slashes-70-of-attorney-fees-request-by-evangelical-litigation-organization/.

[3] Supreme Court docket number 22-942.

[4] See, https://www.supremecourt.gov/opinions/23pdf/22-942_kh6o.pdf.

[5] 142 S.Ct. 2228 (2022).

[6] 410 U.S. 113 (1973).

[7] See, e.g., *Hodes & Nauser* v. *Schmidt*, 440 P.3d 461, 502 (Kan. 2019), in which the Kansas Supreme Court held that the Kansas constitutional bill of rights guarantees the right to decide whether to continue a pregnancy.

to abortion care in state constitutions. As Michigan State Senator Mallory McMorrow remarked:

> I remember telling organizers that day that we're not powerless in Michigan. We have elections coming up; we would have Prop 3. We had the ability, unlike many other states, to do something about this. If the Supreme Court is going to say it's a state issue, let's make it our issue. And we did that.[8]

These examples suggest that there may have been changes in how litigants perceive the US Supreme Court's receptivity to their claims, and that those changes are shifting potential litigants' strategic calculations, and, by extension, their choices about whether to bring cases to the Court. Litigant strategy is changing for groups across the ideological spectrum and changing behavior in a variety of ways, with some groups bringing *more* cases to the Court anticipating a friendly reaction and some bringing *fewer* cases and shifting efforts elsewhere in anticipation of an unsympathetic audience at the Court. These changes happened during a time in which the make-up of the Supreme Court has shifted from a 5-4 conservative majority to a 6-3 conservative supermajority. Just how widespread are these changes? And what might they mean for who is represented – and thus, whose voices are heard – in this critical policymaking venue?

We examine how the changing composition of the US Supreme Court affects who participates in advocacy before it. Specifically, we focus on how the three Supreme Court justices nominated and confirmed during Donald Trump's presidency – Neil Gorsuch, confirmed on April 7, 2017; Brett Kavanaugh, confirmed on October 6, 2018; and Amy Coney Barrett, confirmed on October 26, 2020 – have changed the behavior of both litigants and amicus curiae participants at the Court. We argue that the growing conservatism of the Court radically reshaped the incentives of interested parties and, as a result, their participation in litigation activity. These changes in incentives have both normative and substantive importance. Normatively, if politically disadvantaged groups withdraw from or reduce advocacy before the Supreme Court, their voice in government is further marginalized. The most politically disadvantaged groups do not expect positive outcomes in the elected branches (Schneider & Ingram, 1997) and have traditionally turned to courts for relief (Cortner, 1968; Epp, 1998). If they come to believe the Supreme Court is hostile to their interests, they may choose to forgo advocacy before the courts,

[8] Anna Guftason, *Michigan Advance*, "'A beacon of hope': One year after *Dobbs*, advocates say Michigan leads on abortion rights." https://michiganadvance.com/2023/06/24/a-beacon-of-hope-one-year-after-dobbs-advocates-say-michigan-leads-on-abortion-rights/.

and, as a result, forgo opportunities for substantive policy change. Conversely, groups who expect a positive reception at the Court are likely to turn to it as a policymaking venue more often. Substantively, this shapes both the issues the Court takes up and the arguments it hears, both of which ultimately shape the law it creates.

This section describes the significant impact President Trump had on the federal courts generally, and the US Supreme Court in particular. It outlines what we know about how membership changes on the Supreme Court shape its docket and its decisions. It then explores what we know (and do not know) about how the Court's membership shapes the incentives and actions of litigants and amicus curiae. We lay out a theory of how we expect the increasing conservatism of the Supreme Court to affect these incentives and actions of legal groups in relation to the Court, and then describe the data we use to test those expectations. This section ends by providing a preview of the sections to come and our key findings. Our results suggest that the most disadvantaged groups are turning away from the Court, whereas favored groups are relying on the Court more for relief. These changes in participation rates will impact the kinds of cases the Court hears and its ultimate decisions – suggesting another way in which the divide between the "haves" and "have-nots" may be growing in America.

1.1 The Unusual Influence of Donald Trump on the Courts

> Over the next four years, America's President will choose hundreds of federal judges, and, in all likelihood, one, two, three, and even four Supreme Court justices. The outcome of these decisions will determine whether we hold fast to our nation's founding principles or whether they are lost forever.
>
> Donald Trump, September 9, 2020[9]

The presidency of Donald Trump will be remembered for many reasons, but perhaps its most enduring legacy will be its impact on the federal judiciary. Trump appointed more Supreme Court justices than any president since Ronald Reagan, and the most in a single term since Richard Nixon. His influence was not limited to the Supreme Court. In just four years, he appointed 27% of active district court judges, and 30% of active courts of appeals judges. His appointees are significantly more conservative and less diverse than those of both his Republican and Democratic predecessors.[10] They are also young – at

[9] See https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-judicial-appointments/.

[10] See: https://fivethirtyeight.com/features/trump-made-the-federal-courts-whiter-and-more-conseravative-and-that-will-be-tough-for-biden-to-reverse/.

47, the average age of Trump's nominees was lower than that of any president in at least a century.[11] Their youth ensures that many of them will serve for decades. These appointments have the potential to dramatically reshape the types of cases that come before the courts, the legal doctrine the courts create, and which litigants view the courts as a viable policymaking venue for many years to come.

Who holds both elected and appointed public office is consequential. Research on the composition of government shows that who is in office affects everything from citizens' trust in our institutions (see, e.g., Gay, 2002) to the issues that make it on to those institutions' agendas (see, e.g., Reingold, Haynie, & Widner, 2020) to the substantive policy decisions made by those institutions (see, e.g., Boyd, 2016). Less is known, however, about whether and how characteristics of those who hold office in a particular institution affect who participates in advocacy before that institution.

Representation and participation are particularly important with respect to the courts. While all branches of the US government are responsive to public pressures to some degree, officials in the legislative and executive branches are able to initiate policy activities based on their own interests, life experiences, or policy preferences (Burden, 2007). Federal courts, on the other hand, are limited by the "case or controversy" requirement of Article III of the Constitution. This requirement limits courts' decision-making authority to situations in which someone has suffered or will imminently suffer an injury or legal impairment, and courts can only weigh in once that party properly files before the correct court. This makes the judicial branch a reactionary institution, rather than a proactive one (see, e.g., Bandes, 1990). Because courts' policymaking opportunities are dependent on litigants to present issues for them to resolve, litigants play an essential role in agenda-setting for the judicial branch. However, this agenda-setting influence flows in both directions. Although courts can only take case litigants bring to them, judges can signal to potential litigants their interest in taking up a particular type of case (Baird, 2004). Further, the very presence on the bench of judges whose policy preferences are known or presumed can lead litigants to expect the Court to be a more or less receptive audience for their claims.[12]

[11] See: https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age/.

[12] For example, we see this in repeated filings by conservative interests in the Amarillo Division of the Northern District of Texas, where the only judge is known to be extremely conservative. See, e.g., Alexandra Hutzler, *ABC News*, "Unprecedented Texas abortion pill ruling sparks debate about 'judge shopping,'" https://abcnews.go.com/Politics/unprecedented-texas-abortion-pill-ruling-sparks-debate-judge/story?id=98531203.

While a complete accounting of Trump's influence on the judiciary would consider judicial confirmations at all levels of the federal judicial hierarchy, we focus our attention here on Supreme Court confirmations during Trump's presidency. Supreme Court confirmations have become highly partisan, contentious affairs (Armaly & Lane, 2023; Cameron, Kastellec, & Park, 2013; Collins, Ringhand, & Boyd, 2023). They capture the attention of the public and the media. Moreover, particularly during the Trump presidency, controversial confirmations substantially eroded public support for the Court and the nominees specifically (Carrington & French, 2021; Rogowski & Stone, 2021). Because Supreme Court confirmations are salient political affairs that are well-covered by the media, interested parties in litigation are likely to pay attention to confirmations as signals of the Supreme Court's receptiveness to particular policy areas or legal strategies. The interaction of these strategies and the justices' preferences have significant implications for national policymaking.

1.2 Judicial Turnover, Case Selection, and Outcomes

Judicial turnover can be impactful at all levels of the federal judiciary, but it has the most significant effect at the Supreme Court. While lower courts have mandatory jurisdiction – meaning that they must respond to all properly filed cases – the US Supreme Court, for the most part,[13] chooses the cases it wishes to hear. The Court is very selective; each year it receives between 5,000 and 7,000 requests for review and grants only about 80 of these a full hearing (E. Lane & Black, 2017).[14] After reviewing petitions for certiorari, which are parties' official requests for the Court to hear a case, members of the Court meet and vote on whether to grant review. It takes four members of the Court to grant review.[15] As new justices come onto the Court, they inevitably affect this process. Justices vote independently, bringing their own preferences and beliefs about what cases are important, but they also vote strategically, considering how their colleagues might vote at the merits stage (Black & Owens, 2009; Perry, 1991). Thus, a new justice affects the Court's agenda both through their own votes and through their impact on the strategic calculus of other justices.

[13] Under 28 U.S.C. 1253, the Court is required to hear direct appeals from cases required by Congress to be heard by three-judge district court panels. This is most commonly cases involving legislative apportionment.

[14] See also, Supreme Court of the United States, "The Court at Work," https://www.supremecourt.gov/about/courtatwork.aspx. An additional 100 or so requests are disposed of summarily, without full hearing.

[15] United States Courts, Supreme Court Procedures, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

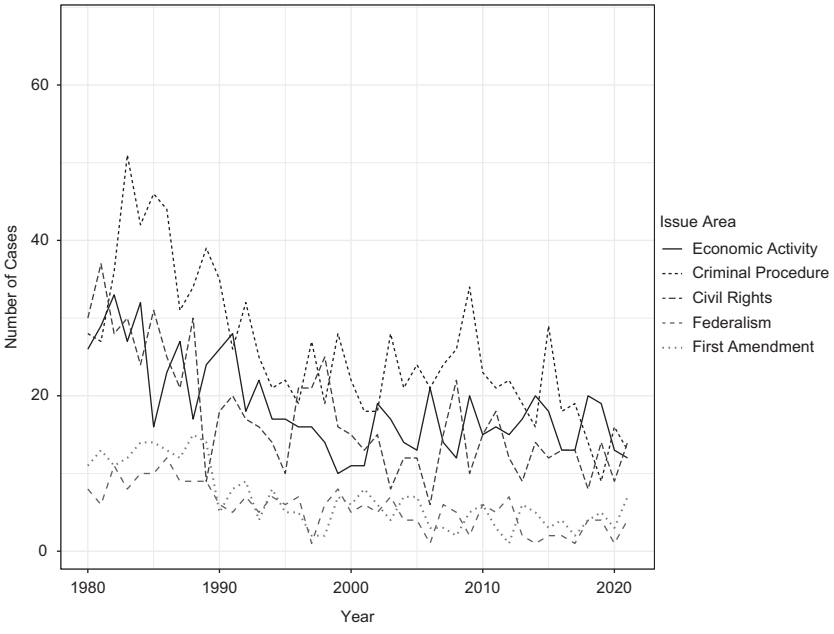

Figure 1 Issue area of SCOTUS cases granted cert over time, 1980 to 2021

Figure 1, which is drawn from the Supreme Court Database (Spaeth et al., 2021), shows the number of cases that the Supreme Court has reviewed in key issue areas over time. The most obvious trend is the general decline in the number of cases the Court has taken. In the 1980 term, the Supreme Court heard 150 cases, but starting in the mid-1980s, its caseload declined sharply. By 2000, the number of cases the Court took in a term had fallen to 86. Since then, the number has consistently been even lower, and has often been under 70 cases a term.[16] A closer look at the figure also reveals some interesting changes in the types of cases the Court takes. While all issue areas decline and all have occasional spikes over time, issue areas like criminal procedure and federalism show a steep and fairly consistent decline, whereas economic activity cases decline with other case types until the late 1990s and then rebound and level off at a higher proportion of the docket in the 2000s. The rebound happens right around the time that Chief Justice John Roberts – a justice who worked for Ronald Reagan and championed economic deregulation – took the bench. In the past decade, the number of economic activity cases per year has frequently surpassed the number of criminal procedure cases, the issue area that had traditionally dominated the Court's docket.

[16] Much of this decline can be attributed to the Supreme Court Case Selections Act of 1988 (E. Lane, 2022).

Table 1 Percent of cases at SCOTUS granted cert in each opinion year by issue area

Issue Area	2016	2017	2018	2019	2020	2021
Attorneys	0.00	1.50	1.50	1.30	0.00	0.00
Civil rights	21.60	12.30	16.40	18.40	17.30	18.40
Criminal procedure	23.50	21.50	16.40	18.40	15.40	19.70
Due process	5.90	6.20	3.00	2.60	5.80	2.60
Economic activity	19.60	20.00	23.90	28.90	15.40	17.10
Federal taxation	0.00	0.00	3.00	1.30	1.90	1.30
Federalism	3.90	1.50	4.50	5.30	3.80	2.60
First amendment	7.80	3.10	4.50	7.90	1.90	10.50
Interstate relations	0.00	1.50	0.00	0.00	0.00	0.00
Judicial power	15.70	23.10	16.40	6.60	15.40	3.90
Miscellaneous	2.00	0.00	3.00	2.60	3.80	0.00
Privacy	0.00	1.50	0.00	3.90	1.90	2.60
Private action	0.00	0.00	1.50	0.00	1.90	1.30
Unions	0.00	4.60	3.00	1.30	0.00	5.30

Table 1 focuses in on our period of study, 2016 to 2021, and displays the proportion of cases the Court decided each year that involved each of the fourteen specific issue areas in the Supreme Court Database (Spaeth et al., 2021). Some areas are more variable than others, but civil rights, criminal procedure, and economic activity predominate, with each making up the largest proportion of cases in at least one year. Judicial power is the only other issue area that constitutes the highest proportion in any given year (2017), but the number of cases in this area is much more variable.

New justices not only bring preferences over issues areas to the bench, they also bring preferences over the policy outcomes they would like to see in the cases they hear (Segal & Spaeth, 2002) and the legal reasoning that should be used (Liebell, 2023). Using coding from the Supreme Court Database, Figure 2 shows trends in the ideological direction of the Court's decisions over time in all cases (left panel) and only nonunanimous cases (right panel).[17] For most of the last four decades, the Court has made a greater proportion of conservative decisions (between approximately 50 and 60%, depending on the year) than liberal ones (between 40 and 50%). When the cases in which all members of the Court agreed are removed, we see that the rate of conservative decisions is

[17] See Figure A1 in the Appendix for this graph for the time period of our study only, 2016 to 2021.

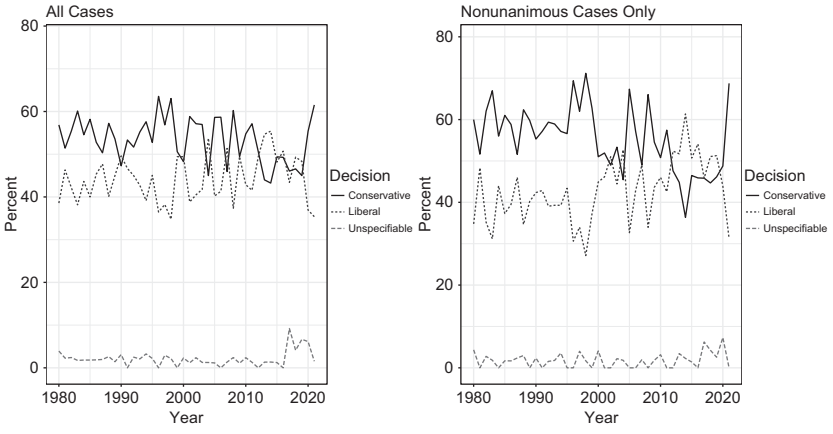

Figure 2 The ideological direction of SCOTUS cases over time, 1980 to 2021. Left panel reflects all cases and right panel reflects only the nonunanimous cases

generally higher, and has leaped to nearly 70% of nonunanimous cases since Trump's third appointee, Amy Coney Barrett, took the bench.

This is consistent with the make-up of the Court and other research that finds the Court is increasingly more conservative than the public (Jessee, Malhotra, & Sen, 2022). In every term since 1970, the Court has had at least five justices appointed by Republican presidents, and every chief justice during the same period has been appointed by a Republican. Given this consistent conservative majority, it is perhaps more surprising that there have been brief periods, most notably in the early 2010s, in which liberal decisions outpaced conservative ones.

However, looking at trends for all cases can be misleading. As noted earlier, the issues on the Court's docket vary from year to year. Even when cases are in the same issue area, some cases are closer calls than others, making year-to-year comparisons imprecise (Baum, 1988; Clark & Lauderdale, 2010). Experts suggest that reversals are more accurate reflections of the Court's ideology than affirmances because the Court most often grants review to reverse a lower court decision with which it disagrees. Affirmances, then, represent a miscalculation on behalf of the litigants, the justices, or both, about how the case aligns with the majority of justices' preferences (McGuire et al., 2009).

Figure 3 displays the percent of affirmances and reversals by ideological direction during the time period of our study, 2016 to 2021.[18] Interestingly, we

[18] Following McGuire et al., (2009) these are measured using the Supreme Court Database code for the Winning Party, with cases the petitioner won coded as reversals and cases the respondent won coded as affirmances.

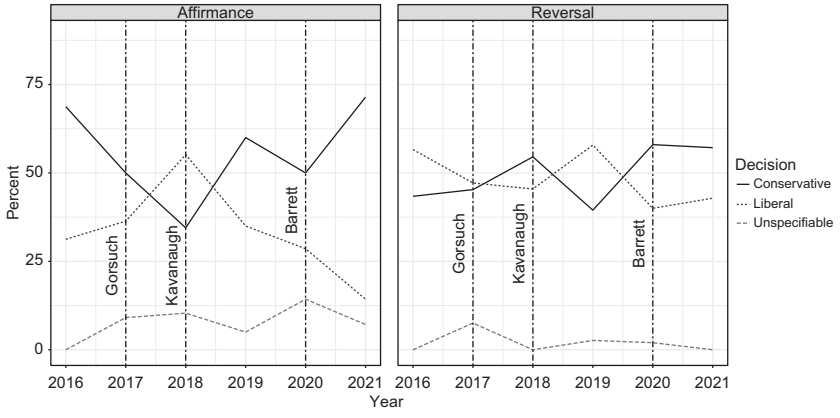

Figure 3 The ideological direction of SCOTUS cases over time, 2016 to 2021. This graph splits by case disposition, whether they are affirmances (left) or reversals (right). Cases with other dispositions were excluded

do not see the differences McGuire et al. (2009) documented between affirmances and reversals during this period. Instead, affirmances actually seem *more* conservative, particularly after Justice Kavanaugh's confirmation. This could indicate a change in the justices' behavior, in which they are granting more appeals of lower court decisions they want to affirm and make national precedents. It could also be a result of the way liberal and conservative decisions are coded in the Supreme Court Database, which regards decisions favoring plaintiffs alleging violations of their rights to free exercise of religion or free expression as liberal decisions. In prior periods, these claims often involved small, unpopular groups, but in the Court's recent decisions, they have tended to involve mainstream, conservative religious groups – for example, a Christian coach who prayed on a public school football field,[19] a Christian organization that wanted to fly their flag in front of Boston City Hall,[20] and parents who wanted the state to pay for tuition for their children to attend Christian religious schools.[21] These decisions – all of which were decided in the 2021–2022 term and resulted in Supreme Court victories for the religious plaintiffs – confound traditional definitions of liberal decisions by intermixing issues of free exercise, free expression, and the Establishment Clause and favoring majority rather than minority interests.[22]

[19] *Kennedy* v. *Bremerton School District*, 142 S.Ct. 2407 (2022).
[20] *Shurtleff* v. *City of Boston*, 142 S.Ct. 1583 (2022).
[21] *Carson* v. *Makin*, 142 S.Ct. 1987 (2022).
[22] See Figure A2 in the Appendix for the ideological direction of affirmances and reversals for the full period from 1980 to 2021. It suggests that the pattern found by McGuire et al. (2009) does not seem to hold from approximately 2010 on.