

Is the Roberts Court Pro-Business?

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1 Preliminaries

1. Providing a thorough answer to this question would be a big project. E.g., we would need to isolate all cases of concern to business. Some would be obvious—say, an employment discrimination suit. Others, less so—say, *Iqbal* and *Twombly*.
2. For present purposes, we analyze cases in the U.S. Supreme Court Database that are categorized under “Economic Activity.” These cases involve antitrust, mergers, bankruptcy, regulation of public utilities, federal/state consumer protection, and other economic issues. (For more details, visit the Database’s website at <http://supremecourtdatabase.org/>.) We also look at cases in the Database related to two other business areas: labor arbitration and employment discrimination. We combine these with Economic Activity cases to create a new category called “Economic Activity Plus.”
3. For each case in the Economic Activity Plus category, the Database notes whether the Court reached a liberal or conservative decision. Liberal decisions are anti-business, anti-employer, pro-liability, pro-competition, pro-consumer, etc.¹

2 Number of Economic Activity Plus Cases

1. Figure 1 shows the fraction of orally argued cases in the Economic Activity Plus category, 1953-2009 terms. The raw data are in Appendix 1.
2. Over this period, about 23 percent of the cases fell into the Economic Activity Plus category (the red line). The minimum is 10 percent (in 1969); the maximum is 39 percent (in 1953).
3. There is a difference in the fraction for the last five years of the Rehnquist Court (.21) and the first five years of the Roberts Court (.27), though the difference is not statistically significant at the conventional level of .05 ($p=.06$).

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¹These are conventional definitions in the political science literature but they are nonetheless imperfect. Some conservatives, for example, would disagree that liberal decisions are always pro-competition and pro-consumer. This is particularly true in some areas of antitrust such as vertical restrictions and mergers where liberals have opposed efficiency enhancing and pro-consumer vertical restrictions and mergers.

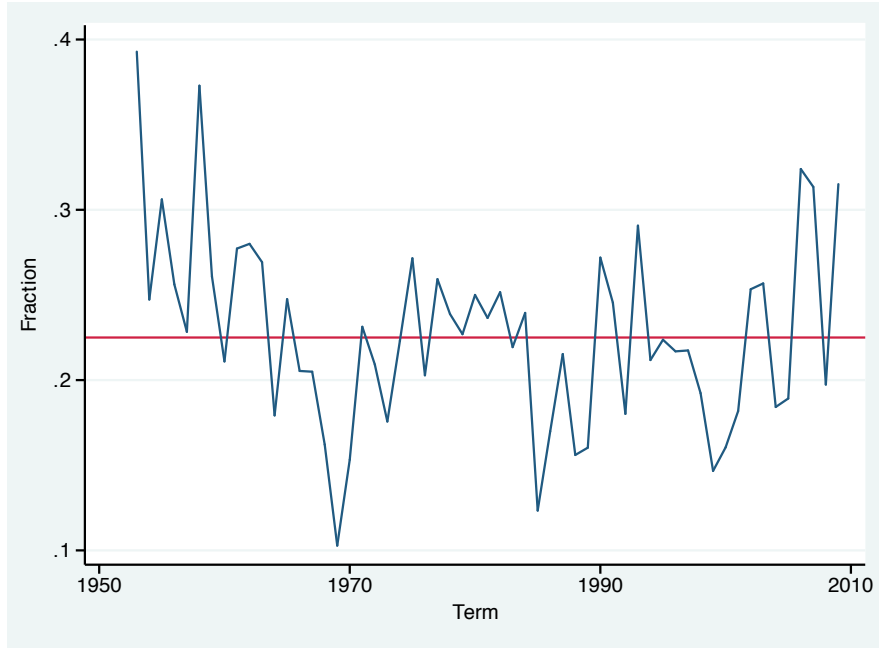


Figure 1: Fraction of Economic Activity Plus Cases, 1953-2009 Terms

3 Ideological Direction of the Economic Activity Plus Decisions

1. Figure 2 shows the fraction of cases in the Economic Activity Plus category that the Court decided in the liberal direction, 1953-2009 terms. The raw data are in Appendix 2.
2. The mean fraction (red line) is about .568—that is, 57 percent of the decisions since 1953 were liberal. The minimum is 27 percent liberal (in 1998 and 2008); the maximum is 87 percent liberal (in 1956).
3. There is a statistically significant difference in the fraction for the last five years of the Rehnquist Court (.54 liberal) and the first five years of the Roberts Court (.39 liberal). (But see point 8.) The difference is greater if we compare the mean of 2005-2009 terms (the Roberts Court) and all previous terms since 1953: 39 percent liberal versus 58 percent.
4. On the other hand, the same holds for a comparison of the Rehnquist Court (1986-1994 terms) and all earlier terms (1953-1985): 49 percent liberal versus 62 percent.
5. Still, in looking at the top 5 most conservative terms (see Appendix 2), two were during the Roberts years: 2008 (27 percent liberal) and 2006 (30 percent liberal). The 2009 term was the 7th most conservative.
6. We also estimated a simple regression that controlled for the direction of the lower court decision (this helps account for the Court’s propensity to reverse). The primary variable of interest was the Roberts Court (2005-2009 terms) versus all others (1953-2004 terms). Even after controlling for the lower court, the Roberts Court produced a statistically significant effect, meaning that the Roberts Court was significantly more likely to produce a conservative decision in Economic Activity Plus cases.

- (a) For a liberal lower court decision, the predicted probability of a conservative decision (i.e., the Court reverses) for all Courts prior to Roberts is .57. For the Roberts Court, it is .70.²
 - (b) For a conservative lower court decision, the predicted probability of a liberal decision is .73 for all Courts prior to Roberts. For the Roberts Court, it is only 60 percent.
7. But, again using regression, we find the same results in a comparison of the Rehnquist Court (1986-2004 terms) versus all prior Courts (1953-1985 terms): the Rehnquist Court was also significantly more conservative than Courts sitting between 1953-1985.
 8. Moreover, if we estimate a regression (again, controlling for the lower court) for the 1986-2005 terms only, we find that the Roberts Court is more likely to reach a conservative decision but the difference between the Roberts Court and the Rehnquist Court is not statistically significant at the conventional level.
 9. Still, it is worth noting that the Roberts Court grants cert to a larger fraction of liberal lower court decisions than the Rehnquist Court: 68 percent v. 60 percent. The difference is not statistically significant but neither is it small. Should this trend continue, and should the Roberts Court reverse a higher fraction of these liberal lower court decisions, it might be reasonable to conclude that the current Court is distinctly favorable toward business interests.

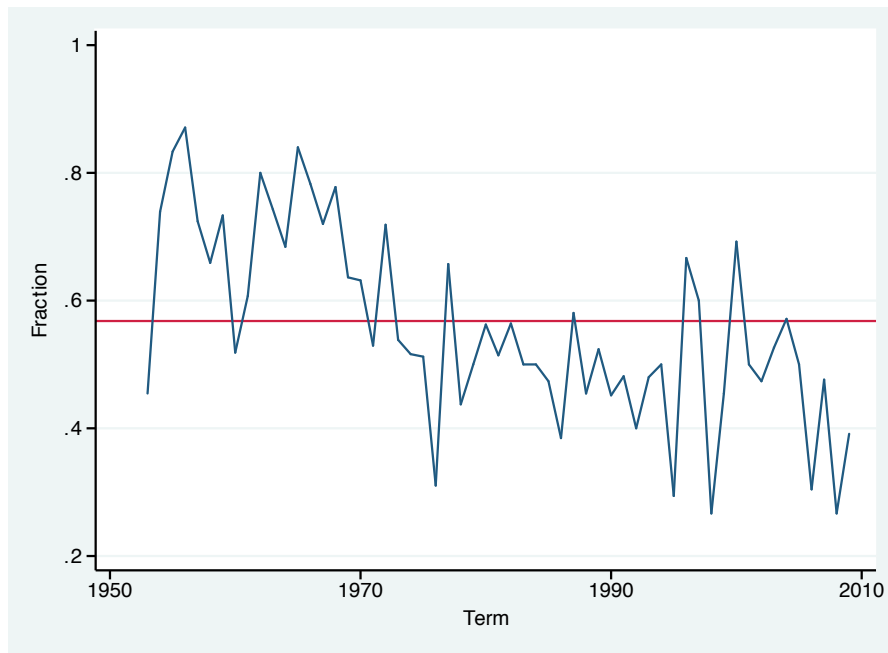


Figure 2: Fraction of Economic Activity Plus Cases Decided in the Liberal Direction, 1953-2009 Terms

4 Individual Justices

1. Appendix 3 contains data on the individual Justices: the fraction of liberal votes in Economic Activity Plus cases and the number of case participations. Because the data are for the 1953-

²Computed using S-Post.

2009 terms, they do not cover the entire career of justices appointed before 1953.

2. Of the top 10 most conservative justices, four are on the current Court (Alito, Roberts, Thomas, Scalia).
3. Of the 10 most liberal justices, only Ginsburg serves on the current Court.

Appendix 1. Percentage of Cases in the Economic Activity Plus Category, 1953-2009 terms

term of the court	EconomicPlusCategory		Total
	no	yes	
1953	51	33	84
	60.71	39.29	100.00
1954	70	23	93
	75.27	24.73	100.00
1955	68	30	98
	69.39	30.61	100.00
1956	90	31	121
	74.38	25.62	100.00
1957	98	29	127
	77.17	22.83	100.00
1958	74	44	118
	62.71	37.29	100.00
1959	85	30	115
	73.91	26.09	100.00
1960	101	27	128
	78.91	21.09	100.00
1961	73	28	101
	72.28	27.72	100.00
1962	90	35	125
	72.00	28.00	100.00
1963	95	35	130
	73.08	26.92	100.00
1964	87	19	106

	82.08	17.92	100.00
1965	76	25	101
	75.25	24.75	100.00
1966	89	23	112
	79.46	20.54	100.00
1967	97	25	122
	79.51	20.49	100.00
1968	93	18	111
	83.78	16.22	100.00
1969	96	11	107
	89.72	10.28	100.00
1970	105	19	124
	84.68	15.32	100.00
1971	113	34	147
	76.87	23.13	100.00
1972	121	32	153
	79.08	20.92	100.00
1973	122	26	148
	82.43	17.57	100.00
1974	108	31	139
	77.70	22.30	100.00
1975	110	41	151
	72.85	27.15	100.00
1976	114	29	143
	79.72	20.28	100.00
1977	100	35	135
	74.07	25.93	100.00
1978	102	32	134
	76.12	23.88	100.00
1979	109	32	141
	77.30	22.70	100.00
1980	96	32	128

	75.00	25.00	100.00
1981	113	35	148
	76.35	23.65	100.00
1982	116	39	155
	74.84	25.16	100.00
1983	121	34	155
	78.06	21.94	100.00
1984	108	34	142
	76.06	23.94	100.00
1985	135	19	154
	87.66	12.34	100.00
1986	127	26	153
	83.01	16.99	100.00
1987	113	31	144
	78.47	21.53	100.00
1988	119	22	141
	84.40	15.60	100.00
1989	110	21	131
	83.97	16.03	100.00
1990	83	31	114
	72.81	27.19	100.00
1991	83	27	110
	75.45	24.55	100.00
1992	91	20	111
	81.98	18.02	100.00
1993	61	25	86
	70.93	29.07	100.00
1994	67	18	85
	78.82	21.18	100.00
1995	59	17	76
	77.63	22.37	100.00
1996	65	18	83

	78.31	21.69	100.00
1997	72	20	92
	78.26	21.74	100.00
1998	63	15	78
	80.77	19.23	100.00
1999	64	11	75
	85.33	14.67	100.00
2000	68	13	81
	83.95	16.05	100.00
2001	63	14	77
	81.82	18.18	100.00
2002	56	19	75
	74.67	25.33	100.00
2003	55	19	74
	74.32	25.68	100.00
2004	62	14	76
	81.58	18.42	100.00
2005	60	14	74
	81.08	18.92	100.00
2006	48	23	71
	67.61	32.39	100.00
2007	46	21	67
	68.66	31.34	100.00
2008	61	15	76
	80.26	19.74	100.00
2009	50	23	73
	68.49	31.51	100.00
Total	4,972	1,447	6,419
	77.46	22.54	100.00

Appendix 2. Percentage of Liberal and Conservative Decisions in the Economic Activity Plus Category, 1953-2009 terms

term of the court	direction of Court's decision		Total
	conservative	liberal	
1953	18	15	33
	54.55	45.45	100.00
1954	6	17	23
	26.09	73.91	100.00
1955	5	25	30
	16.67	83.33	100.00
1956	4	27	31
	12.90	87.10	100.00
1957	8	21	29
	27.59	72.41	100.00
1958	15	29	44
	34.09	65.91	100.00
1959	8	22	30
	26.67	73.33	100.00
1960	13	14	27
	48.15	51.85	100.00
1961	11	17	28
	39.29	60.71	100.00
1962	7	28	35
	20.00	80.00	100.00
1963	9	26	35
	25.71	74.29	100.00
1964	6	13	19
	31.58	68.42	100.00
1965	4	21	25
	16.00	84.00	100.00

1966	5	18	23
	21.74	78.26	100.00

1967	7	18	25
	28.00	72.00	100.00

1968	4	14	18
	22.22	77.78	100.00

1969	4	7	11
	36.36	63.64	100.00

1970	7	12	19
	36.84	63.16	100.00

1971	16	18	34
	47.06	52.94	100.00

1972	9	23	32
	28.12	71.88	100.00

1973	12	14	26
	46.15	53.85	100.00

1974	15	16	31
	48.39	51.61	100.00

1975	20	21	41
	48.78	51.22	100.00

1976	20	9	29
	68.97	31.03	100.00

1977	12	23	35
	34.29	65.71	100.00

1978	18	14	32
	56.25	43.75	100.00

1979	16	16	32
	50.00	50.00	100.00

1980	14	18	32
	43.75	56.25	100.00

1981	17	18	35
	48.57	51.43	100.00

1982	17	22	39
	43.59	56.41	100.00

1983	17	17	34
	50.00	50.00	100.00

1984	17	17	34
	50.00	50.00	100.00

1985	10	9	19
	52.63	47.37	100.00

1986	16	10	26
	61.54	38.46	100.00

1987	13	18	31
	41.94	58.06	100.00

1988	12	10	22
	54.55	45.45	100.00

1989	10	11	21
	47.62	52.38	100.00

1990	17	14	31
	54.84	45.16	100.00

1991	14	13	27
	51.85	48.15	100.00

1992	12	8	20
	60.00	40.00	100.00

1993	13	12	25
	52.00	48.00	100.00

1994	9	9	18
	50.00	50.00	100.00

1995	12	5	17
	70.59	29.41	100.00

1996	6	12	18
	33.33	66.67	100.00

1997	8	12	20
	40.00	60.00	100.00

1998	11	4	15
	73.33	26.67	100.00

1999	6	5	11
	54.55	45.45	100.00

2000	4	9	13
	30.77	69.23	100.00

2001	7	7	14
	50.00	50.00	100.00

2002	10	9	19
	52.63	47.37	100.00

2003	9	10	19
	47.37	52.63	100.00

2004	6	8	14
	42.86	57.14	100.00

2005	7	7	14
	50.00	50.00	100.00

2006	16	7	23
	69.57	30.43	100.00

2007	11	10	21
	52.38	47.62	100.00

2008	11	4	15
	73.33	26.67	100.00

2009	14	9	23
	60.87	39.13	100.00

Total	625	822	1,447
	43.19	56.81	100.00

Appendix 3. Percentage of Liberal and Conservative Votes in the Economic Activity Plus Category, 1953-2009 terms

justice last name	direction of justice's vote		Total
	conservative	liberal	
AFortas	22 29.33	53 70.67	75 100.00
AJGoldberg	31 35.63	56 64.37	87 100.00
AMKennedy	237 54.61	197 45.39	434 100.00
AScalia	277 58.32	198 41.68	475 100.00
BRWhite	365 42.25	499 57.75	864 100.00
CEWhittaker	99 65.56	52 34.44	151 100.00
CThomas	206 60.23	136 39.77	342 100.00
DHSouter	154 44.13	195 55.87	349 100.00
EWarren	89 19.82	360 80.18	449 100.00
FFrankfurter	149 61.83	92 38.17	241 100.00
HABlackmun	295 42.69	396 57.31	691 100.00
HHBurton	71 48.97	74 51.03	145 100.00
HLBlack	75 15.82	399 84.18	474 100.00

JGRoberts	57	37	94
	60.64	39.36	100.00
JHarlan2	256	157	413
	61.99	38.01	100.00
JPStevens	317	493	810
	39.14	60.86	100.00
LFPowell	243	194	437
	55.61	44.39	100.00
PStewart	343	285	628
	54.62	45.38	100.00
RBGinsburg	117	182	299
	39.13	60.87	100.00
RHJackson	17	11	28
	60.71	39.29	100.00
SAAlito	54	34	88
	61.36	38.64	100.00
SDOConnor	288	240	528
	54.55	45.45	100.00
SFreed	47	52	99
	47.47	52.53	100.00
SGBreyer	112	152	264
	42.42	57.58	100.00
SMinton	31	56	87
	35.63	64.37	100.00
SSotomayor	8	10	18
	44.44	55.56	100.00
TCClark	104	290	394
	26.40	73.60	100.00
TMarshall	203	453	656
	30.95	69.05	100.00
WEBurger	295	215	510
	57.84	42.16	100.00

WRehnquist		484	350		834
		58.03	41.97		100.00
-----+-----+-----					
WJBrennan		268	697		965
		27.77	72.23		100.00
-----+-----+-----					
WODouglas		91	500		591
		15.40	84.60		100.00
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Total		5,405	7,115		12,520
		43.17	56.83		100.00