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Symposium: Business in the Roberts Court - Introduction: Still in Search of the Pro-Business Court

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—Symposium—

INTRODUCTION:
STILL IN SEARCH OF THE
PRO-BUSINESS COURT

Jonathan H. Adler[†]

It was not long after Chief Justice John Roberts and Associate Justice Samuel Alito joined the Supreme Court before journalists and legal commentators declared that the Roberts Court had a soft spot for business. “Business Reigns Supreme,” the *Washington Post*’s editorial page declared at the close of the first full term after both justices were confirmed.¹ “Much of corporate America was crowing last week after the Supreme Court ended a term notable for a string of rulings that generally favored businesses over consumers, employees, plaintiffs and investors,” the *Post* explained.² Other commentators made similar observations.³

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1. Editorial, *Business Reigns Supreme*, WASH. POST (July 1, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063001209.html> [<https://perma.cc/RX8Q-K7U5>].
2. *Id.*
3. See, e.g., E. Lee Reichert & Raymond L. Gifford, *Business-Friendly Supreme Court—Commerce Enjoyed Positive Outcomes Under Chief Justice Roberts*, ROCKY MOUNTAIN NEWS, July 14, 2007, § Wall St. West, at 2 (“Predictions that the additions of Justices John Roberts and Samuel Alito would create a more business-friendly Supreme Court have been validated this term . . . the net outcomes of this term’s cases are positive for business and commercial activity.”); Tony Mauro, *High Court Reveals a Mind for Business*, NAT’L L.J.: LEGAL TIMES (July 2, 2007), <http://www.nationallawjournal.com/id=900005484768/High-Court-Reveals-a-Mind-for-Business?slreturn=20170228153702> [<https://perma.cc/64HH-RT4E>] (same); Christopher S. Rugaber, *This Term, Supreme Court Has Been All Business—Conservatives and Liberals Find Common Ground on Cases Dealing with Financial Matters*, ST. LOUIS POST-DISPATCH, July 1, 2007, at B5 (same); Nick Timiraos, *Roberts Court Unites on Business*, WALL ST. J., June 30, 2007 (same); Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST (June 22, 2007), <http://www>.

The fullest explication of the pro-business Court hypothesis was presented by Jeffery Rosen in a lengthy article for *The New York Times Magazine*, “Supreme Court, Inc.”⁴ “[E]ver since John Roberts was appointed chief justice in 2005, the court has seemed only more receptive to business concerns,” Rosen argued.⁵ Among other things, the Court had begun to accept more business-related cases as a percentage of its docket,⁶ a trend only made more conspicuous by the Court’s ever-shrinking docket.⁷ Moreover, the Court seemed “surprisingly united in cases affecting business interests.”⁸

Initial claims of a pro-business Court were largely based upon the Court’s pattern of decisions and the notable success rate of the U.S. Chamber of Commerce, which has become an increasingly active amicus. In the 2006–07 term, for example, the Chamber of Commerce’s preferred side prevailed in thirteen of the fifteen cases in which it submitted a brief.⁹ While the Chamber has not sustained this level of success before the Court in subsequent terms, it nonetheless has an enviable success rate.¹⁰

washingtonpost.com/wpdyn/content/article/2007/06/21/AR2007062100803.html [https://perma.cc/EFE8-VT9X] (same).

4. Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html> [https://perma.cc/7C6T-YZK5].
5. *Id.*
6. *See id.* (noting that the Court granted twenty-six percent of the Chamber of Commerce’s petitions between 2004 and 2007).
7. *See id.* (noting that, as of 2008, the Court was accepting less than two percent of the 10,000 petitions received each year); *see also, e.g.*, Robert Barnes, *Justices Continue Trend of Hearing Fewer Cases*, WASH. POST (Jan. 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/06/AR2007010601094.html> [https://perma.cc/8EUV-8CAB] (noting that the trend of taking fewer cases extends back to the beginning of the Rehnquist Court); David M. O’Brien, *The Rehnquist Court’s Shrinking Plenary Docket*, 81 JUDICATURE 58, 58 (1997) (“In the 1995 and 1996 terms, the Court . . . decided just 90 cases by written opinions each term, half the number of a decade ago.”).
8. Rosen, *supra* note 4.
9. *Id.*
10. For a discussion of the Chamber of Commerce’s success rate before the Court during Chief Justice Roberts’s tenure, see Bradley W. Joondeph, *Business, the Roberts Court, and the Solicitor General: A Further Exploration*, in BUSINESS AND THE ROBERTS COURT 13 (Jonathan H. Adler ed., 2016). As Joondeph notes, the Chamber prevails in approximately two-thirds of the cases in which it files a brief, a win rate comparable to that of the Solicitor General. When the Chamber and Solicitor General are aligned, however, the Chamber’s win rate has exceeded eighty percent. *Id.* at 28–29.

The Chamber's court record is suggestive, but does it demonstrate that the Roberts Court has a soft spot for business? Perhaps, but perhaps not. The Chamber regularly files amicus briefs in cases of major importance to the business community, but it does not file in every such case. The Chamber's decision to file may be based upon a case's importance, but it might also be based upon the likelihood of victory. The higher the Chamber's success rate, the more valuable the Chamber's efforts may appear to its members. Notably the Chamber stayed its hand in some significant cases—cases in which the side favored by most business interests lost. Examples of such cases would include *Kasten v. Saint-Gobain Performance Plastics Corp.*,¹¹ a Fair Labor Standards Act case in which the Court sided against the employer, and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,¹² in which the Court rejected a Dormant Commerce Clause challenge to a local solid waste flow control plan opposed by other business groups.¹³

Focusing on a single interest group in order to determine whether the Court—or a given case outcome—is pro-business can also be problematic because business interests often lie on both sides of a case. Most antitrust cases, for example, pit one corporation against another, as do many other business law cases. Even cases in which one might think the business interest is abundantly clear may pit different business groups against each other. The lead plaintiff in the constitutional challenge to the Patient Protection and Affordable Care Act was the National Federation of Independent Business (NFIB).¹⁴ Yet it is well accepted that many business groups, including hospitals and insurance companies, benefitted from the statutory provisions NFIB sought to challenge. The Chamber of Commerce and numerous industry groups opposed claims that the Clean Air Act authorized regulation of greenhouse gas emissions in *Massachusetts v. EPA*, yet businesses that stood to benefit from such regulation took the other side.¹⁵

11. 561 U.S. 1 (2011).

12. 550 U.S. 330 (2007).

13. *Id.* Among the business groups filing briefs challenging the constitutionality of the ordinance in question were the American Trucking Associations and the National Association of Manufacturers.

14. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (challenging the constitutionality of the individual mandate provision of the Affordable Care Act).

15. Among those businesses and trade associations supporting the regulation of greenhouse gas emissions were the Aspen Skiing Corporation, Calpine, and Entergy. *See Massachusetts v. EPA*, 549 U.S. 497, 504, 510 n.15 (2007) (listing the organizations that filed amicus briefs in support of the regulations at issue). For a broader discussion on business support for climate-related

Accepting that the pro-business label may be problematic in some cases, it is often possible to identify which side in a given legal dispute is aligned with the prevailing interests of the business community. So, for example, whether the Court's decision will generally inure to the benefit of employers over employees, manufacturers over consumers, regulated industries over government agencies, and the like, may serve as useful proxies for whether a given outcome may be fairly characterized as "pro-business."

Quantitative studies have been generally supportive of the claim that the Roberts Court is at least somewhat more supportive of business than prior courts.¹⁶ The most comprehensive such study, by Lee Epstein, William Landes, and Judge Richard Posner, purported to show that the Roberts Court has been far more sympathetic to business concerns than has any Court of the past sixty to seventy years.¹⁷ This conclusion was based upon looking at the rate at which businesses prevailed in cases against individuals, interest groups, and governments.¹⁸ Using this methodology, the authors found that businesses

regulations, see Bruce Yandle & Stuart Buck, *Bootleggers, Baptists, and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177 (2002).

16. See, e.g., *The U.S. Chamber of Commerce Continues Its Winning Ways*, CONSTITUTIONAL ACCOUNTABILITY CTR. (June 30, 2014), <http://theconstitution.org/text-history/2753/us-chamber-commerce-continues-its-winning-ways> (last visited Mar. 28, 2017) [<https://perma.cc/MF9K-RKQN>] (“[S]ince Samuel Alito succeeded Sandra Day O’Connor on the Court in January 2006, the Chamber has won 70% of its cases [] compared with only 43% in the late Burger Court [] and 56% in the stable Rehnquist Court.”); J. Mitchell Pickerill, *Is the Roberts Court Business Friendly? Is the Pope Catholic?*, in BUSINESS AND THE ROBERTS COURT, *supra* note 10, at 35, 62 (“At an aggregate level, the empirical analysis in this chapter indicates that the Roberts Court can be accurately characterized as business friendly.”).
17. See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (finding that the Roberts Court “is taking more cases in which the business litigant lost in the lower court and reversing more of these” and also “affirming more cases in which business is the respondent than its predecessor Courts did”). A follow-up to this study, including more recent data, reports similar findings. See Nick Wells & Mark Fahey, *The US Supreme Court Is More Friendly to Businesses Than Any Time Since World War II*, CNBC (Mar. 1, 2017), <http://www.cnbc.com/2017/03/01/supreme-court-very-business-friendly-data-show.html> [<https://perma.cc/AX33-TFZG>] (finding that the current Roberts Court “has decided in favor of business litigants over 60 percent of the time”).
18. For a critique of the authors’ methodology, see Jonathan H. Adler, *Business and the Roberts Court Revisited (Again)*, VOLOKH CONSPIRACY (May 6, 2013, 11:20 PM), <http://volokh.com/2013/05/06/business-and-the-roberts-court-revisited-again/> [<https://perma.cc/2SFU-R6SF>]. See also Epstein et al., *supra* note 17, at 1433 (describing the authors’ methodology).

prevail more often in the Roberts Court than in any of its post-war predecessors.¹⁹

Quantitative studies, such as that conducted by Epstein, Landes, and Posner, have their value, but they also have their limitations. One particular concern is that quantitative assessments fail to account for the substance of the decisions, and do not differentiate between ordinary cases and those with major ramifications. Nor do such analyses typically account for whether a given case marks a departure from prior precedent or paves new ground, nor do they consider the broader context in which a case occurs.

Failure to account for the content of the decisions and doctrinal baseline means that a quantitative analysis may find a “pro-business” trend when analyzing decisions that, when taken together, actually shift the law in a less business-friendly position. The Roberts Court’s three climate change cases provide a simple example of this result. In *Massachusetts v. EPA*,²⁰ the Court decided 5–4 that states could sue the federal government for failing to take action to curb global warming, and that the Clean Air Act authorized the Environmental Protection Agency to regulate greenhouse gases as “air pollutants” under the Clean Air Act.²¹ In *American Electric Power v. Connecticut*,²² the Court decided 8–0 that (due to the *Massachusetts* decision) the Clean Air Act displaced nuisance actions against greenhouse gas emitters under the federal common law of interstate nuisance.²³ Finally, in *Utility Air Regulatory Group v. EPA*,²⁴ the Court largely affirmed the EPA’s authority to regulate greenhouse gas emissions from large emitters, subject to some limitations, splitting 7–2 and 5–4 on different issues.²⁵

From a business perspective, the three climate cases are best scored as a win (*American Electric*), a loss (*Massachusetts*), and tie (*UARG*), with the “pro-business” positions attracting a slight majority of the available votes in these cases. Thus, as a quantitative matter, it appears that business has fought climate regulation to a draw in the Supreme Court. The reality on the ground, however, is quite different.

Massachusetts is potentially the most consequential business-related case of the past two decades. For starters, the decision made it easier for states and interest groups to sue the federal government for

19. Epstein et al., *supra* note 17, at 1471–72.

20. 549 U.S. 497 (2007).

21. *Id.* at 526, 532.

22. 564 U.S. 410 (2011).

23. *Id.* at 424.

24. 134 S. Ct. 2427 (2014).

25. *Id.* at syllabus.

failing to regulate business activity.²⁶ More significantly, in holding that greenhouse gases are “air pollutants” subject to regulation under the Clean Air Act, the Court triggered the most dramatic expansion of federal environmental regulation in well over a decade.²⁷ Although the precise question before the Court was whether the EPA could regulate greenhouse gas emissions from motor vehicles,²⁸ the logic of the decision effectively authorized regulation of greenhouse gas emissions from stationary sources as well, including those at issue in *UARG*.²⁹

By comparison, the *American Electric Power* and *UARG* opinions were relatively small potatoes. In *American Electric Power*, the Court did no more than reaffirm long-standing precedent that when Congress enacts a statute regulating cross-boundary pollution, such enactments displace suits alleging interstate nuisances under federal common law. As a consequence, there was little doubt that, insofar as the Clean Air Act authorizes the regulation of greenhouse gas emissions, it displaces federal common law nuisance suits against greenhouse gas emitters.³⁰ This decision was dependent upon the authorization of regulation in *Massachusetts*, and did nothing to undermine it.

26. *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007). For more on the Court’s standing holding, see Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1071–78 (2009).

27. *Id.* at 532. For a discussion of the expansion of regulation triggered by the *Massachusetts* decision, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J. L. & PUB. POL’Y 421 (2011).

28. *Massachusetts*, 549 U.S. at 528.

29. Some have sought to dismiss *Massachusetts v. EPA*’s significance. Mark Tushnet, for example, argues that the case “was no more than a loss in a minor skirmish far away from the larger battlefield,” see MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 204 (2013), and that “no one really expects the standards to take effect—ever.” *Id.* at 203; see also *id.* at 213 (“Carmakers are unlikely ever to have to do anything to comply with the EPA’s proposed tailpipe emission standards.”). As it happens, the relevant motor vehicle regulations were *already* in place when Tushnet’s book was published. The vehicle emission standards at issue begin with the 2012 Model Year. See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010) (issuing a final rule on new emissions standards for light-duty vehicles model years 2012 through 2016). Other regulatory measures were already promulgated, or well on their way as well. See generally Adler, *supra* note 27 (summarizing the regulatory initiatives authorized or otherwise made possible by *Massachusetts v. EPA*). Tushnet’s analysis also does not account for the standing holding in *Massachusetts*, and its potential effect on citizen suits.

30. *Am. Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011).

UARG was more significant than *American Electric Power*, but it likewise reaffirmed the *Massachusetts* holding. Stripped of the particulars, *UARG* merely trimmed EPA's greenhouse gas regulation around the edges, limiting only its most expansive applications. *UARG* prevented the EPA from asserting regulatory authority over smaller stationary source greenhouse gas emitters, but left the vast bulk of the EPA's greenhouse gas regulations in place.³¹

The net result of these three decisions is a dramatic expansion of federal environmental regulation over motor vehicles, utilities, and industrial sources.³² Whether or not one believes such regulations are justified, their costs are dramatic. By any measure, the resulting regulatory environment is vastly less business-friendly than before the cases were decided.³³ Yet under a quantitative assessment, nothing meaningful has changed. In this way, a quantitative assessment of the effect of the Court's climate decisions on business grossly misrepresents what has actually occurred.

Business and the Roberts Court was an effort to get beyond pure quantitative analysis and unpack the ways in which the Roberts Court is—and is not—pro-business. Among other things, the book highlighted how exogenous factors, including the increased specialization of the Supreme Court bar and broader political trends, have influenced the Supreme Court's approach to business issues. The collected essays also unpacked the Court's handling of specific types of cases in an effort to understand why it has ruled the way it does.³⁴

Once one looks closely at the cases there is little evidence that the Roberts Court cares much about business interests, as such. Were this

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31. *United Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442–44 (2014).
 32. For a more detailed discussion of these decisions, see Jonathan H. Adler, *Business as Usual? The Roberts Court and Environmental Law*, in *BUSINESS AND THE ROBERTS COURT*, *supra* note 10, at 297–304.
 33. At the time of this writing, the fate of the Clean Power Plan, another greenhouse gas regulatory initiative made possible by the *Massachusetts* decision, is unknown. A challenge to the regulations is pending before the *en banc* U.S. Court of Appeals for the D.C. Circuit and there are reports that the Trump Administration may try to unwind the program through a new rulemaking. Linda Tsang & Alexandra M. Wyatt, *Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA*, CONG. RES. SERV. 1–4 (Mar. 8, 2017) (summarizing the procedural history of the pending case); see also *EDF Urges D.C. Circuit to Continue Judicial Review of the Clean Power Plan*, ENVTL. DEF. FUND (Apr. 5, 2017), <https://www.edf.org/media/edf-urges-dc-circuit-continue-judicial-review-clean-power-plan> [<https://perma.cc/8RN2-ZXWZ>] (discussing the Trump Administration's motion to indefinitely suspend challenges to the Clean Power Plan).
 34. See generally *BUSINESS AND THE ROBERTS COURT*, *supra* note 10 (compiling a qualitative analysis of the ways in which the Roberts Court is and is not pro-business).

the case, one would expect business to win all the “big” cases—at least all the big cases that are close calls—and to only lose the relatively small or insignificant ones, or those in which the merits are clear. Here *Massachusetts v. EPA* is again Exhibit A, but it is hardly an isolated example.

There is also little evidence that the Court is seeking to create and entrench a more pro-business legal environment. Most of the cases in which business interests prevail involve questions of statutory interpretation or process. Relatively few involve constitutional questions.³⁵ So, for example, when business groups sought to rein in punitive damages in *Exxon Shipping v. Baker*,³⁶ the Court went along but on the narrowest of grounds, imposing a limit on the ratio of compensatory to punitive damages only for purposes of the federal maritime common law.³⁷ Although prior Court decisions had found that excessive punitive damages violated the Due Process Clause, the Court did not rule for Exxon on this basis—a point emphasized by two justices in the majority.³⁸ While sometimes amenable to finding federal preemption, the Roberts Court also appears to have backed away from the aggressive use of the Dormant Commerce Clause to invalidate state-level regulations opposed by business groups.³⁹

In resting the vast majority of its business law decisions on statutory grounds, the Roberts Court appears to be taking its cues from Congress. Insofar as Congress enacts statutes that are amenable to business interests, the Roberts Court will not stand in the way. Yet insofar as Congress enacts laws with a more populist streak, or that otherwise constrain business activity, the Roberts Court will enforce these provisions as well.

35. A conspicuous counter-example is *Citizens United v. Federal Election Commission*. This case, however, is best understood as part of the Court's broader First Amendment jurisprudence, and not as a business case. See Joel M. Gora, *In the Business of Free Speech: The Roberts Court and Citizens United*, in BUSINESS AND THE ROBERTS COURT, *supra* note 10, at 227, 228 (“Not only was *Citizens United* well grounded in the Court's First Amendment doctrine, but also it was a landmark for free speech and political freedom in our democracy.”).

36. 554 U.S. 471 (2008).

37. *Id.* at 481, 514.

38. See *id.* at 514 (Scalia, J., concurring) (“I join the opinion of the Court, including the portions that refer to constitutional limits that prior opinions have imposed upon punitive damages . . . [but] I continue to believe the prior holdings were in error.”).

39. See, e.g., *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (upholding local government solid waste flow control policy against Dormant Commerce Clause challenge). Cf. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (invalidating local government solid waste flow control policy under Dormant Commerce Clause).

Where the Roberts Court appears to most deserve the “pro-business” label is in its apparent hostility to policy-driven litigation and entrepreneurial efforts by trial lawyers to expand corporate liability. As former Solicitor General Kenneth Starr observed, the Roberts Court’s handling of business cases suggests the Court “is not so much pro-business as it is massively skeptical of civil litigation, especially nationwide civil litigation.”⁴⁰ This may explain why the Roberts Court has been particularly stingy in recognizing implied causes of action,⁴¹ expressed skepticism of expansive class-action theories,⁴² strictly enforced arbitration provisions,⁴³ and tightened pleading requirements.⁴⁴

Business and the Roberts Court was not the last word on the Roberts Court’s approach to business issues. Instead, it sought to encourage a more thoughtful and nuanced discussion of how the Court approaches issues of importance to business. Accordingly, in September 2016, the Center for Business Law & Regulation at the Case Western Reserve University School of Law hosted a symposium to further explore these issues and continue the conversation about business and the Roberts Court.⁴⁵ Articles from the conference are included in this Issue.

If the Roberts Court is, indeed, favorable to business, this did not occur overnight. The justices that make up the current court were selected by five separate presidents over a period of thirty years.⁴⁶ As a consequence, the Supreme Court, at any given moment, is the product of long-term political forces and changes in the political landscape. For

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40. Kenneth W. Starr, *The Roberts Court & the Business Cases*, 35 PEPP. L. REV. 541, 541 (2008).
 41. See, e.g., *Stoneridge Inv. Partners v. Sci.-Atlanta, Inc.*, 552 U.S. 148 (2008) (holding that an implied cause of action for securities fraud does not exist because the underlying statute cannot be interpreted to show that Congress intended to create one).
 42. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding that common claims for monetary relief that is not incidental to injunctive or declaratory relief is not sufficient to certify a class).
 43. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that a California rule classifying collective-arbitration waivers as unconscionable and therefore unenforceable violated the Federal Arbitration Act).
 44. See Brian T. Fitzpatrick, *Civil Procedure in the Roberts Court*, in BUSINESS AND THE ROBERTS COURT, *supra* note 10, at 143 (arguing that the Court’s recent decisions to impose heightened pleading requirements are not as revolutionary as some commentators predicted).
 45. To see an archived video of the conference, see The Ctr. for Bus. Law & Regulation, *Business in the Roberts Court*, CASE W. RESERVE UNIV. (Sept. 23, 2016), <http://law.case.edu/Lectures-Events/EventId/5/e/business-in-the-roberts-court-23-sep-2016> [<https://perma.cc/HG54-552R>].
 46. At the time of this writing Justice Neil Gorsuch had not yet been confirmed to the Supreme Court. Upon his confirmation, the Court includes justices that were nominated by each of the past six Presidents.

this reason, Mitch Pickerill and Cornell Clayton argue that to understand the Court, we must understand “political regimes” and how the Court approaches economic questions over a longer period of time.⁴⁷ In their view, the Court has become more favorable to business interests, at least as measured by outcomes in cases involving economic regulation and union activity, largely as a result of conservative politics, which have also influenced the Court in other ways.⁴⁸

As Brianne Gorod of the Constitutional Accountability Center notes, the Chamber of Commerce has been “remarkably successful” as a party and amicus in the Supreme Court over the past ten years.⁴⁹ Using the Chamber as a “proxy” for business interests more generally, this represents good news for the business community. At the same time, Gorod fears, the Chamber’s success indicates that individuals have a more difficult time “holding businesses accountable in court when they violate the law.”⁵⁰

As this Introduction indicates, not all accept the claim that the Roberts Court is pro-business. James Copland of the Manhattan Institute for Policy Research challenges the assumption that the Roberts Court is pro-business and, more provocatively, suggests that “there is nothing inherently wrong” with a pro-business Court, “at least to the extent that it is favoring not ‘crony capitalism’ or the fruits of big-business lobbying that generate barriers to entry, but rather reaching decisions that are generally applicable and pro-free-market.”⁵¹ Copland further suggests that analysts place “undue emphasis” on the Supreme Court, given the extent to which the legal forces that constrain corporate activity, including much regulatory enforcement and shareholder activism, often operate outside the bounds of judicial review.⁵²

For judicial review to operate, courts must have jurisdiction, and the bounds of personal jurisdiction in federal courts is in a bit of flux. As Cassandra Robertson and Rocky Rhodes observe, in four cases decided within three years, the Roberts Court has “significantly changed

47. See J. Mitchell Pickerill & Cornell W. Clayton, *The Roberts Court and Economic Issues in an Era of Polarization*, 67 CASE W. RES. L. REV. 693 (2017) (“We draw from . . . political science literature on the Court to provide a more robust understanding of how the Court gradually became more business friendly *over time*.”).

48. *Id.*

49. Brianne Gorod, *The First Decade of the Roberts Court: Good for Business Interests, Bad for Legal Accountability*, 67 CASE W. RES. L. REV. 721 (2017).

50. *Id.*

51. James R. Copland, *What Do We Mean by a “Pro-Business” Court—And Should We Care?* 67 CASE W. RES. L. REV. 743 (2017).

52. *Id.*

the shape of personal jurisdiction doctrine” establishing a “new equilibrium” for the doctrine.⁵³ While aspects of this change are favorable for business defendants, they find “little evidence” that these changes were “motivated by a desire to favor business interests.”⁵⁴ Instead, Robertson and Rhodes suggest, these changes were “driven . . . by a commitment to formalist evaluation of individual cases and a generalized resistance to allowing United States courts to serve as a magnet forum for transnational litigation.”⁵⁵

Just as corporate defendants may favor limitations on personal jurisdiction, many large corporations favor broad federal preemption of state tort law. Thus, some business groups have supported agency edicts asserting federal rules preempt conflicting state laws. At the same time, business groups have become increasingly hostile to the doctrine of *Auer* deference, under which courts defer to agency interpretations of their own regulation. As Catherine Sharkey observes, these commitments are occasionally in conflict, as when a federal agency asserts that its regulations should be interpreted to have preemptive effect.⁵⁶ Thus far, the Roberts Court appears to be more supportive of preemption claims than it is hostile to *Auer* deference, but that could change. Business groups are increasingly united in their opposition to *Auer* and several justices have raised questions about its desirability.

No discussion of business law in the Supreme Court is complete without some consideration of securities law, an area in which the Roberts Court has been particularly active.⁵⁷ While the Roberts Court has considered a comparatively large number of securities law cases, it has not shown much interest in the underlying subject matter, leading Eric Chaffee to suggest the Court has adopted the role of “museum curator” for securities law: “maintaining historical relics from bygone eras, doing minor restoration work as needed, limiting access to these relics through statutory interpretation, and occasionally offering an

53. Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775 (2017).

54. *Id.*

55. *Id.* at 777.

56. See Catherine M. Sharkey, *The Anti-Deference Pro-Preemption Paradox at the U.S. Supreme Court: The Business Community Weighs In*, 67 CASE W. RES. L. REV. 805 (2017) (discussing the apparent paradox of business groups “advocating in favor of more preemption, including preemption by agency action, while simultaneously pushing for reconsideration of *Auer* deference”).

57. See A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, in BUSINESS AND THE ROBERTS COURT, *supra* note 10, at 94, 95 (noting that the Roberts Court decided fifteen securities cases in its first seven years, whereas the Rehnquist Court decided just twenty during 1986–2005).

exhibition involving issues at the periphery of securities law.”⁵⁸ The result is that securities law has been “relatively stable” and Chief Justice Roberts seems to be the Chief Curator of this museum, having been in the majority of all twenty-one securities law cases decided since he has joined the Court.⁵⁹

Whatever one concludes about the Roberts Court’s approach to business issues, the Court is still a work in progress. At 62, John Roberts is likely to remain the Chief Justice for some time to come. In the interim, the Court’s composition will change, as will the constellation of issues presented for its review. As a consequence, whatever conclusions we reach about the Roberts Court’s relationship to business is subject to revision, and this is a subject that will be worth revisiting.

58. Eric Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court*, 67 CASE W. RES. L. REV. 847 (2017).

59. *Id.* at 893.