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# The Roberts Court and Economic Issues in an Era of Polarization

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# THE ROBERTS COURT AND ECONOMIC ISSUES IN AN ERA OF POLARIZATION

*J. Mitchell Pickerill*<sup>†</sup> & *Cornell W. Clayton*<sup>††</sup>

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## INTRODUCTION

Over the last decade, numerous scholars and commentators have labeled the Roberts Court as a “pro-business” Court.<sup>1</sup> There are various reasons why the label seemed to stick, such as the success rate of the U.S. Chamber of Commerce in the Court as well as anecdotal evidence based on particular cases.<sup>2</sup> In addition, systematic empirical evidence suggests that the Roberts Court has decided in favor of business litigants more frequently than under previous Chief Justices going back to

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1. *E.g.*, 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/RBF9-X9CV>]; *see also infra* Part I.A (describing the emergence of the Roberts Court’s pro-business reputation).

2. *E.g.*, Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/19roberts.html> [<https://perma.cc/L8ZX-F8BC>] (describing the Roberts Court as an activist court that favors business interests); *see also infra* Part I.A.

at least the 1940s.<sup>3</sup> Despite the development of this conventional wisdom, some commentators question how pro-business the Court really is.<sup>4</sup> Various legal scholars have argued that when one actually analyzes the Court's doctrine, the impact for big business appears far less favorable.<sup>5</sup> Although we agree that close attention should be paid to doctrine and even different issue areas involving business and economics, we ultimately take a different approach. We draw from the "political regimes" (or "regime politics") in the political science literature on the Court to provide a more robust understanding of how it gradually became more business-friendly over time as a result of the influence of conservative politics, beginning long before John Roberts was installed as the seventeenth Chief Justice of the U.S. Supreme Court. However, while the Court has been influenced by the predominant values of a "New Right Regime," it also reflects another key characteristic of the regime—division and polarization.<sup>6</sup> To show how these changes have occurred over time, we analyze cases based on the issue areas of economic regulation and labor union activity, as opposed to whether a business entity won or lost as a party to the case. Although this approach cannot tell us the doctrinal effects of the Court's decisions, it at least provides a general picture of whether the Court favors government regulation of the economy and unions on the one hand, and businesses and employers on the other.

In Part I, we review the assessments of the Roberts Court's orientation toward business to provide some context for the debate. First, we discuss the emergence of the conventional wisdom that the Roberts Court is pro-business, and then we briefly review the arguments of those who are skeptical of those claims. In Part II, we summarize the political regimes approach for understanding Supreme Court decisions and legal change in the Court. We also discuss how the politics of a "New Right Regime" have been influenced by conservatism, but at the same time are characterized by a long period of divided government and polarization. In Part III, we analyze data from the Supreme Court's decisions involving economic regulation and union activity from 1946 through the end of the 2015 term of the Supreme Court. We conclude that since the beginning of the Burger Court, the Court has increasingly voted in

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3. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 U. MINN. L. REV. 1431, 1471 (2013).

4. *E.g.*, Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 1000 (2009) (arguing that favorable decisions for businesses under the Roberts Court are the product of "impartiality and fairness," not a bias toward businesses); *see also infra* Part I.B. (discussing detractors from the majority opinion that the Roberts Court is pro-business).

5. *See infra* note 32 and accompanying text.

6. For our discussion on the effects of the "New Right Regime" on the Supreme Court, *see infra* Part II.A.

what might be called the “conservative” direction—i.e., against economic regulations and labor. Additionally, the Court frequently divides along both ideological and partisan lines in these cases, reflecting the regime in which it is situated.

## I. ASSESSMENTS OF THE ROBERTS COURT AS “PRO-BUSINESS”

In this Part we briefly summarize the emergence of a new conventional wisdom about the Court—namely, that it is decidedly pro-business. Just a few years after John Roberts assumed the Chief Justiceship, journalists and scholars were writing about what seemed to be a new pro-business disposition in the Court. Part I begins by reviewing some of those claims. In the last section of this Part, we consider some of the critics or skeptics of those claims.

### *A. The Emergence of a Conventional Wisdom: The Roberts Court is Decidedly Pro-Business*

By now, the Roberts Court’s reputation as a pro-business Court has become something like the conventional wisdom for Supreme Court scholars and commentators. In 2008, Jeffrey Rosen wrote an article titled *Supreme Court, Inc.* in *New York Times Magazine*.<sup>7</sup> Rosen argued that, whereas the Court had embraced a form of “economic populism” throughout most the latter half of the twentieth century, by the 2000s it had transformed into a decidedly pro-business venue.<sup>8</sup>

A generation ago, progressive and consumer groups petitioning the court could count on favorable majority opinions written by justices who viewed big business with skepticism—or even outright prejudice. The economic populist William O. Douglas, a former New Deal crusader who served on the court from 1939 to 1975, once unapologetically announced that he was “ready to bend the law in favor of the environment and against the corporations.”<sup>9</sup>

Today, however, as Rosen pointed out, “there are no economic populists on the court, even on the liberal wing.”<sup>10</sup> In addition to quoting pro-business statements from members of the so-called liberal wing of the Roberts Court at the time, Rosen noted that, when compared to prior years, the proportion of cases involving business interests was up about ten percent during the early years of the Roberts Court.<sup>11</sup> Rosen

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7. Rosen, *supra* note 1.

8. *See id.* (arguing that while, historically, the Supreme Court “viewed big business with skepticism,” the birth of the Roberts Court in 2005 created a Court that was “more receptive to business concerns”).

9. *Id.*

10. *Id.*

11. *Id.*

also highlighted several cases involving antitrust law, corporate mergers, punitive damages, and product liability in which the interests of big business seemed to be faring well in the Court.<sup>12</sup>

These cases didn't seem to split the Roberts Court along conventional ideological lines. In a 2009 law review article, Rosen reported that, when he asked Justice Stephen Breyer about the Court's pro-business orientation, "he did acknowledge that there might be a difference between constitutional cases, where Justices have strong preconceptions and philosophical commitments, and more technical, statutory cases, where they are more open-minded and amendable to argument."<sup>13</sup>

Finally, Rosen explained the pro-business shift as a function of a decades-long effort by conservative and business groups to counter the effects of consumer groups and public interest litigation groups like Public Citizen.<sup>14</sup> In particular, he credited the U.S. Chamber of Commerce's lobbying efforts and the National Chamber Litigation Center, established in 1977, for advocating business interests in state and federal courts.<sup>15</sup> Various examples and statistics indicated that through filing amicus briefs on behalf of business interests, the Chamber was successful both in persuading the Court to grant certiorari and on the merits in particular cases.

Although Rosen's article garnered much attention, he was not the only journalist or commentator claiming the Court was "pro-business."<sup>16</sup> For example, writing for *Bloomberg Business*, Michael Orey declared that the Roberts Court was "open for business."<sup>17</sup> And in an article in the *Wall Street Journal*, Brent Kendall explained that the Supreme Court is "making it easier for companies to defend themselves

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12. See *id.* (emphasizing the important consequences of "shareholder suits, anti-trust challenges to corporate mergers, patent disputes and efforts to reduce punitive-damage awards and prevent product-liability suits").

13. Jeffrey Rosen, *Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 933 (2009).

14. Rosen, *supra* note 1.

15. *Id.*

16. See, e.g., Liptak, *supra* note 2 (discussing the role of the Chamber of Commerce and its success in state and federal courts); Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST (June 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/21/AR2007062100803.html> [<https://perma.cc/R76J-9XJP>] (finding a pattern of pro-business decisions by the Roberts Court).

17. Michael Orey, *The Supreme Court: Open for Business*, BLOOMBERG BUS. WK. (July 8, 2007), <https://www.bloomberg.com/news/articles/2007-07-08/the-supreme-court-open-for-business> [<https://perma.cc/2KWH-C5JK>].

from the kinds of big lawsuits that have bedeviled them for decades.”<sup>18</sup> Some legal academics agreed. For instance, Erwin Chemerinsky wrote that “the Roberts Court is the most pro-business Court of any since the mid-1930s.”<sup>19</sup> All of this attention to the Roberts Court and its business decisions led to further academic research and scholarship examining whether and to what extent the Roberts Court could be considered “pro-business.”<sup>20</sup>

Much of the early characterization of the Roberts Court as “pro-business” has been based on specific Supreme Court decisions, such as *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>21</sup> and *Riegel v. Medtronic, Inc.*,<sup>22</sup> or specific Supreme Court terms, such as the 2006 term in which the U.S. Chamber of Commerce won in thirteen of the fifteen cases in which it had filed a brief.<sup>23</sup> Nonetheless, there have also been more systematic analyses of the Court and its disposition toward business interests. Lee Epstein, William Landes, and Richard Posner conducted one of the most well-known systematic empirical analyses of the Supreme Court and business interests.<sup>24</sup> In their study, Epstein, Landes, and Posner selected Supreme Court decisions from the 1946 term through the 2011 term of the Court in which a business entity was a litigant.<sup>25</sup> They analyzed the likelihood that business entities would prevail in the Court over time.<sup>26</sup> Controlling for numerous factors, they concluded:

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18. Brent Kendall, *Supreme Court Comes to Defense of Business*, WALL ST. J. (June 23, 2013), <https://www.wsj.com/articles/SB10001424127887323998604578563501419972228> [<https://perma.cc/NN3X-H689>].
  19. Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008).
  20. See, e.g., Rosen, *supra* note 13, at 929 (discussing the relationship between the Roberts Court’s pro-business decisions and the conservative legal movement); BUSINESS AND THE ROBERTS COURT (Jonathan H. Adler ed., 2016) (including writings from prominent legal scholars concerning the Roberts Court’s business-related jurisprudence).
  21. 550 U.S. 618, 642–43 (2007) (holding that the statute of limitations barred recovery from the corporate defendant in an employee’s sex discrimination lawsuit to recover lost wages for unequal pay).
  22. 552 U.S. 312, 330 (2008) (holding that a medical device manufacturer that satisfied federal Food and Drug Administration standards could not be sued under state tort law, because the federal regulations preempted the state tort law).
  23. E.g., Rosen, *supra* note 13, at 933.
  24. Epstein, Landes & Posner, *supra* note 3.
  25. *Id.* at 1434.
  26. *Id.* at 1437–48.

Whether measured by decisions or Justices' votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were. The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these—giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed than one in which the lower court decision was pro-business. The Roberts Court also has affirmed more cases in which business is the respondent than its predecessor Courts did.<sup>27</sup>

Thus, the Epstein, Landes, and Posner empirical study seems to confirm the conventional wisdom.

*B. Detractors and Skeptics Question the Conventional Wisdom*

Although there has been much commentary and analysis regarding the pro-business orientation of the Roberts Court, not everyone has jumped aboard the bandwagon. There are several different reactions to the conventional wisdom that the Robert Court is pro-business. For the sake of illustration, we consider just a few of those reactions here.

Some resist the characterization of the Roberts Court as pro-business altogether. For example, writing in 2009, Robin Conrad, while serving as the Executive Vice President of the National Chamber Litigation Center, called the “pro-business” characterization of the Roberts Court a “myth.”<sup>28</sup> She argued that none of the analysis showed that the Justices were trying to favor businesses, but rather, “the recent business victories are the byproduct of the Justices’ and business community’s shared preferences for uniformity over conflicting legal regimes and for predictable laws and regulations.”<sup>29</sup>

A more common reaction is to accept that, at a very general level, the Roberts Court can be characterized as pro-business insofar as it has accepted more cases involving economic and business issues.<sup>30</sup> At an aggregate level, the Court had ruled in favor of business interests more

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27. *Id.* at 1471.

28. Conrad, *supra* note 4, at 1000.

29. *Id.* at 997.

30. See James Surowiecki, *Courting Business*, NEW YORKER (Mar. 7, 2016), <http://www.newyorker.com/magazine/2016/03/07/antonin-scalias-corporate-influence> [<https://perma.cc/Y56B-XXD8>] (“The Roberts Court hasn’t just made a lot of pro-business rulings. It has taken a higher percentage of cases brought by businesses than previous courts, and it has handed down far-reaching decisions that have remade corporate regulation and law.”).

frequently than some past historical periods.<sup>31</sup> Acceptance of the general trends, however, may not tell much about specific areas of the law or doctrinal developments. For instance, in his analysis of environmental cases, Jonathan Adler concludes that the Roberts Court is just as likely to rule in favor of government regulation of the environment as it is in favor of business groups who oppose such regulations.<sup>32</sup> And in other areas of the law, the Court may be less interested in whether business wins than some other dimension of legal decision-making. For example, in his analysis of securities law, Adam Pritchard concluded that the justices in the Roberts Court were not particularly interested in the substantive legal issues involved in most securities litigation, but instead focused on other aspects of those cases: “There are vigorous debates among the justices in some of these cases, but they revolve around questions of statutory interpretation and the relationship between the judiciary and the administrative state.”<sup>33</sup>

Another issue involves more general limits to quantitative analysis. In particular, the Epstein, Landes, and Posner study has been viewed as problematic for some because of the methodology used to simply code whether a business entity won or lost a particular case and aggregate the results.<sup>34</sup> As Adler argues, such an approach “doesn’t account for the content of the decisions or the doctrinal baseline. As a consequence, a court may actually produce probusiness decisions that are less business friendly than decisions deemed ‘antibusiness.’”<sup>35</sup> Under this logic, one is compelled to ask if the Roberts Court is limiting a cause of action against businesses. But if that cause of action was only first recognized twenty years ago, how can anyone conclude that the Court is being more pro-business than the Court of twenty-five years ago?<sup>36</sup>

## II. THE ROBERTS COURT AND THE POLITICAL REGIME

This Part turns to a different approach to analyzing the Roberts Court and cases involving business or economics issues. Although we

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31. Epstein, Landes & Posner, *supra* note 3, at 1447–48.

32. See Jonathan H. Adler, *Business as Usual? The Roberts Court and Environmental Law*, in *BUSINESS AND THE ROBERTS COURT* 287 (Jonathan H. Adler ed., 2016) (discussing the Roberts Court at the intersection of environmental regulation and business interests).

33. A. C. Pritchard, *Securities Law in the Roberts Court*, in *BUSINESS AND THE ROBERTS COURT* 94, 95 (Jonathan H. Adler ed., 2016).

34. See Epstein, Landes & Posner, *supra* note 3, at 1435 (describing the methodology behind the creation of the dataset in the Epstein, Landes, and Posner study).

35. Jonathan H. Adler, *Introduction* to *BUSINESS AND THE ROBERTS COURT* 1, 7 (Jonathan H. Adler, ed., 2016).

36. *Id.*



agree with our academic lawyer colleagues that we should be ever mindful of the limitations of quantitative research in this area, as political scientists we think that having a general overview of trends on the Court is a good starting point for the analysis. However, we also take a different approach for our analysis of the Roberts Court than that of Epstein, Landes, and Posner. We draw from political regimes theory as a basis for understanding how legal change on the Supreme Court connects to broader political trends. As Pickerill has shown, trends on the Supreme Court in business and economics cases have occurred over several decades.<sup>37</sup> In short, as the American polity became more conservative after the elections of 1968 and 1980, so did the Supreme Court.<sup>38</sup> And, thus, we should expect the Court to reflect those broader conservative, and pro-business, forces. The period of time since 1968, however, has also been characterized by ideological and partisan polarization.<sup>39</sup> So, we argue the best way to understand the Roberts Court's decisions is as a function of a mostly conservative, but also highly polarized regime. In the first Section, we examine emergence of a New Right Regime, defined by the conservative economic policies of Republican Ronald Reagan and the moderation of the Democrats' approach to economic policy under Democrat Bill Clinton. In the second Section, we note that while the regime became more conservative over time, it also became more closely divided and polarized on ideological and partisan grounds, both of which influenced the direction of the Supreme Court in economics and business cases.

*A. The Roberts Court and the "New Right Regime"*

Law and court scholars have shown that elected political elites often support judicial power for many strategic purposes.<sup>40</sup> Thus, the Court is not simply a counter-majoritarian institution that thwarts the will of democratically elected officials.<sup>41</sup> Borrowing from the original insights of Robert Dahl, these scholars have identified numerous ways in which the Court is fundamentally connected to the elected branches of the federal government, demonstrating that the role of the Court in the

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37. See J. Mitchell Pickerill, *Something Old, Something New—Something Borrowed, Something Blue*, 49 SANTA CLARA L. REV. 1063 (2009) (discussing reasons for the Supreme Court's trend toward hearing more business and economic-based cases).

38. *Id.* at 1084–99.

39. See *id.* at 1067–68 (“[C]ommentary about the Roberts Court oftentimes focuses on the ideological direction of the Court's decisions.”).

40. See, e.g., *id.* at 1064.

41. See generally Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001) (analyzing the counter-majoritarian perspective on legal scholarship and judicial review).

U.S. political system cannot properly be characterized as counter-majoritarian.<sup>42</sup> Instead, during any given historical period, the Court

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42. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (“To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system.”). For a normative defense of a “political Court” that plays an active role in national policy-making, see generally TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999). In expanding on Dahl’s research, scholars have shown, for example, that elected officials might promote judicial policy-making in order to avoid responsibility for making controversial policy choices. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37–45 (1993) (discussing legislative deference to the judiciary); see also GEORGE I. LOVELL, LEGISLATIVE DEFERRALS 42–67 (2003) (providing examples of judicial policymaking, where the legislative process fails). Moreover, elected officials might also benefit from judicial review as a way to overcome entrenched interests or legislative obstructionists. Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 583–86 (2005) (explaining one purpose of judicial review is to overcome an obstructionist legislature). The Court may also manage divisions or cleavages within their own political coalition, such as when Democratic presidents during the 1940s–1960s encouraged the Court to reform American race relations as a way to circumvent opposition from powerful southern Democrats who controlled Congress. See generally LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000) (analyzing the Supreme Court at the intersection of American politics as a truly co-equal branch of government); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004) (discussing how civil liberties and individual rights relate to political reform); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004) (describing judicial appointments as a means to meet a legislative end). Finally, elected officials might also want to empower courts as a way of entrenching policies and programs that they believe are becoming vulnerable to new or emerging electoral majorities. See generally Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to Revolution? Precursors to the Supreme Court’s Federalism Revolution*, 34 PUBLIS: J. OF FEDERALISM 85 (2004) [hereinafter Clayton & Pickerill I] (rejecting portrayals of the Supreme Court as an autonomous entity that is independent from the effects of broader political dynamics); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385 (2006) [hereinafter Clayton & Pickerill II] (describing judicial review as a tool to repeal outdated legislation); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002) (explaining the historic use of federal courts to entrench economic policies that were otherwise vulnerable to electoral politics); THOMAS KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004) (tracing the origins of contemporary judicial conservatism); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997)

operates as part of the political regime in which it exists. At a macro-level, then, we should expect the Court's outcomes to be consistent with the dominant values and policy preferences of the regime. In doing so, the Court assures the commitments of the political branches are generally credible.<sup>43</sup> The political regimes literature has shown how Supreme Court decisions are often connected to specific patterns of party politics, group coalition building, critical elections, the policy agenda of elected officials, and other features of the regime.<sup>44</sup> For example:

A political regime is identified as existing during a discrete historical period in which institutional arrangements and processes have distinct characteristics and remain relatively stable. Most notably, the period is characterized by a dominant electoral coalition associated with a particular political party as well a [sic] coherent policy agenda . . . . The life of a regime is marked by the construction of a new regime that replaces an old regime, reaches a zenith, and then unravels until another new regime replaces it . . . . At the beginning of a regime, presidents and other political leaders define and articulate the major values of the regime . . . .<sup>45</sup>

Part of this process involves constructing new constitutional and legal meanings to validate the new agenda.<sup>46</sup> Not surprisingly, the Supreme Court may eventually be called on to advance and extend these values.<sup>47</sup>

Although a political regime is characterized by stability in institutional arrangements and political order, regimes are dynamic, and

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(criticizing the use of judicial review to undermine majority rule). For a comparative perspective, see generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (arguing that political elitism and judicial power, not commitments toward democracy, drive constitutionalism).

43. See generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (explaining the judiciary's relationship with other branches of government through empirical analysis).
44. For an overview of "political regimes" or "political construction" literature, see Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005) (discussing the evolution and emergence of modern-day judicial review); see also Howard Gillman, *Courts and the Politics of Partisan Coalitions*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 644 (Keith E. Whittington et al. eds., 2008) (discussing new approaches to understanding how the law organizes, exercises, and protects political power).
45. J. Mitchell Pickerill, *Is the Roberts Court Business Friendly? Is the Pope Catholic?*, in BUSINESS AND THE ROBERTS COURT 50–51 (Jonathan H. Adler ed., 2016).
46. *Id.* at 51.
47. *Id.*

political and legal changes occur within—as well as across—regimes. Political change is often the result of a process of what Carmines and Stimson have called “issue evolution.”<sup>48</sup> According to issue evolution theory, changes in the political system are rarely created by the swift, seismic event; political change often takes place more gradually through “dynamic evolution of new issues.”<sup>49</sup>

The historical course of change evolves during a political regime and can be thought of as occurring during a cycle in which political institutions and actors find themselves in different inter-relationships in the regime, and with varying opportunities, levels of power, and constraints or limitations on that power—Stephen Skowronek labels as this cycle “political time.”<sup>50</sup> For example, *reconstructive* presidents stand in opposition to the agenda and values of a declining regime, and they possess greater opportunities to articulate and reconstitute the political order.<sup>51</sup> *Articulation* presidents are from the same party as the dominant party of the regime and are committed to regime values at a time when the regime remains dominant.<sup>52</sup> *Preemptive* presidents are opposed to the dominant political party, agenda, and values at a time when the regime remains strong.<sup>53</sup> They are therefore constrained in their abilities to effect change. They will often find themselves having to find ways to neutralize key cleavage issues between their party and the dominant party, and much of their success may be defined by their ability to moderate the more extreme policies and stances in the existing regime.<sup>54</sup> Lastly, *disjunctive* presidents hold office during the twilight of a declining regime.<sup>55</sup> They are usually blamed for political, economic,

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48. See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989) (introducing the theoretical framework of “issue evolution” to understand political changes through the biological theory of natural selection).

49. *Id.* at 158.

50. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 49–52 (2d ed. 1997).

51. *E.g., id.* at 62–85, 130–54, 198–227, 288–324, 414–29 (discussing the presidencies of Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan).

52. *E.g., id.* at 86–109, 155–76, 228–59, 325–60, 429–42 (discussing the presidencies of James Monroe, James Polk, Theodore Roosevelt, Lyndon Johnson, and George H.W. Bush).

53. *E.g., id.* at 43–45 (discussing the presidencies of John Tyler, Andrew Johnson, Woodrow Wilson, and Richard Nixon).

54. *E.g., id.* at 45–49 (discussing the presidencies of Woodrow Wilson, Dwight Eisenhower, Calvin Coolidge, and Grover Cleveland).

55. *E.g., id.* at 110–27, 177–96, 260–85, 361–406 (discussing the presidencies of John Quincy Adams, Franklin Pierce, James Buchanan, Herbert Hoover, and Jimmy Carter).

or social problems as the once-dominant coalition is falling apart, and they provide an easy target for reconstructive presidents as they build a new dominant electoral coalition, shatter the old regime, and reconstitute the regime.<sup>56</sup>

The Supreme Court exists within political time, too. According to Keith Whittington, “[t]he Court does not exist outside of political time, but rather both helps determine political time and occupies a position within it.”<sup>57</sup> Reconstructive presidents often face a hostile Court, appointed by the previous regime, and are thus committed to that regime’s agenda and values.<sup>58</sup> In time, reconstructive presidents will successfully transform the Court through appointments or other mechanisms and reorient it to support new regime values.<sup>59</sup> As Whittington acknowledges, “[t]he politics of reconstruction hinges on the ability of the president to bolster his authority to define the new regime and to wrest control over the definition of the constitutional order from other political actors, including the judiciary.”<sup>60</sup>

On the one hand, the Court may even “be used as a foil to enhance the president’s own authority,” in part because “[p]olitically isolated, judges make a particularly good representative of the old, discredited commitments and entrenched interests.”<sup>61</sup> On the other hand, preemptive presidents find themselves in a very different position relative to the Court. Preemptive presidents are not usually “in a position to launch the reconstructive project. Preemptive presidents will instead have to pick their shots.”<sup>62</sup> These presidents often are “reformers within their own party,” finding ways to neutralize cleavage issues that have hurt their party’s electoral bids “by blurring party distinctions and offering themselves up as a moderate administrator of the consensus ideology.”<sup>63</sup> Therefore, these presidents will not be in a very strong position to challenge the Court, but may find ways to support the Court in the name of consensus or moderation.

Elsewhere, we have argued that a “New Right Regime” emerged over a period of time beginning in the late 1960s, solidifying itself with

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56. *Id.* at 39–41.

57. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 75 (2007).

58. *Id.* at 72.

59. *Id.* at 73.

60. *Id.* at 76.

61. *Id.* at 77.

62. *Id.* at 161.

63. *Id.* at 162.

the election of Ronald Reagan in 1980.<sup>64</sup> A full review of the rise of the New Right regime is unnecessary here. In sum, as the New Deal coalition of northern and southern Democrats became increasingly fragmented, especially over civil rights in the 1960s, the Republican Party capitalized on those divisions and seized on issues intended to poach some members of that coalition, especially southern Democrats.<sup>65</sup> Beginning with Richard Nixon's "southern strategy," and culminating in the election of Ronald Reagan, Republicans were able to exploit the fissures in the Democratic party, begin defining several emerging cleavage issues, sharpen the differences between themselves and the Democrats, and court the voters who eventually became known as "Reagan Democrats."<sup>66</sup> Reagan was elected and is viewed as a reconstructive president—replacing many of the values and commitments of the New Deal Regime with more conservative values and commitments.

What is important for our purposes here is that Reagan advocated a pro-business agenda that included deregulation, tax relief, and supply-side economics as a core component of the New Right Regime.<sup>67</sup> Reagan and his Republican allies sought to replace what they viewed as an anti-business agenda with a more business-friendly agenda.<sup>68</sup> Although much of Reagan's agenda was opposed by Democrats in the 1980s, Democratic elites' views on economic regulation and business shifted to a more moderate and consensus position by the 1990s; it was a key issue that had been a cleavage issue between Democrats and Republicans and which Clinton—a preemptive president—managed to neutralize.<sup>69</sup>

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64. See Clayton & Pickerill I, *supra* note 42 (describing the revival of federalism in the 1960s as a result of shifting politics and party platforms); Clayton & Pickerill II, *supra* note 42, at 1386.

65. See Clayton & Pickerill II, *supra* note 42, at 1395–99 (explaining how "the GOP [drove] a wedge deep into the New Deal Democratic political coalition, separating its southern Democratic congressional base from its more progressive presidential electoral party").

66. *Id.* at 1395–1403.

67. See Clayton & Pickerill II, *supra* note 42, at 1390–91 (describing how Republicans expanded federal court power "to protect pro-business, laissez-faire economic policies that were threatened by the rise of Progressive political power").

68. See *id.* at 1389–90 (describing the Supreme Court under President Reagan as a mechanism to codify conservative business principles that favored businesses).

69. Jon F. Hale, *The Making of the New Democrats*, 110 POL. SCI. Q. 207, 207 (1995).

In 1992, Bill Clinton ran as a “New Democrat,”<sup>70</sup> and the unofficial campaign slogan was “It’s the economy, stupid.”<sup>71</sup> Clinton attempted to neutralize several key cleavage issues that seemed to plague the Democrats’ presidential candidates in three successive presidential elections. One of those was the perception that Democrats were for “big government” and anti-business. As the 1992 Democratic Platform made clear, Clinton and his supporters advocated for a new economic policy:

Just as we have always viewed working men and women as the bedrock of our economy, we honor business as a noble endeavor . . . . We believe in free enterprise and the power of market forces. But economic growth will not come without a national economic strategy to invest in people.<sup>72</sup>

Thus, in 1992, Clinton set out to neutralize what had been a losing issue for the Democrats, and, by the end of his presidency, deficit reduction and the promotion of free trade were widely regarded as two of Clinton’s most significant accomplishments.<sup>73</sup>

And so by the 1990s, a type of consensus had emerged across party lines on economic policy.<sup>74</sup> Excessive government regulation of the economy and business was disfavored; economic growth, deficit reduction, and free trade had become widely agreed upon objectives of political elites in the national government.<sup>75</sup> There is good reason to believe this political consensus might influence law and migrate to the Court.

Scholars have chronicled the rise of conservatism as a political force influencing the direction of the Supreme Court’s jurisprudence, mostly as a result of judicial appointments.<sup>76</sup> As far as the Supreme Court is

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70. *Id.* at 224–28 (describing Bill Clinton’s presidential campaign as a movement against Raegan economics, designed to unify the Democratic party).

71. Jerry Jasinowski, *It’s the Economy, Stupid*, HUFFINGTON POST: THE BLOG (Nov. 5, 2016, 9:12 AM), [https://www.huffingtonpost.com/jerry-jasinowski/presidential-debates\\_b\\_8478456.html](https://www.huffingtonpost.com/jerry-jasinowski/presidential-debates_b_8478456.html) [<https://perma.cc/UM6T-LW7C>].

72. *Political Party Platforms: 1992 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/ws/index.php?pid=29610#axzz1b7MdZItj> [<https://perma.cc/4LWX-6GCD>] (last visited Mar. 3, 2017).

73. See ALEX WADDAN, CLINTON’S LEGACY? A NEW DEMOCRAT IN GOVERNANCE 44–68 (2002) (describing the Clinton Administration’s approach to economic reform). For a broader range of perspectives on the Clinton legacy, see generally THE CLINTON LEGACY (Colin Campbell & Bert A. Rockman eds., 2000) (chronicling economic policies under the Clinton Administration).

74. See WADDAN, *supra* note 73, at 46–59 (describing Clinton’s efforts to craft an economic policy that prioritized deficit reduction).

75. *Id.*

76. See, e.g., Clayton & Pickerill II, *supra* note 42, at 1388–94 (chronicling the political construction of judicial power).

concerned then, we would expect Reagan-Bush judicial appointees to support at a general level the commitments and policies of the New Right Regime. It is well documented that Reagan and his advisors, to whom Reagan delegated great authority over judicial appointments, “had a more coherent and ambitious agenda for legal reform and judicial selection than any previous administration.”<sup>77</sup> According to David O’Brien, “[i]ndisputably, Reagan’s Justice Department systematically and effectively infused its legal policy goals into the judicial selection process.”<sup>78</sup> The appointment of conservative judges was greatly facilitated by the growing conservative legal movement, which promoted conservative legal values through various conservative foundations, think tanks and related groups, such as the Olin Foundation, the Federalist Society, the Law and Economics Center, the Center for Individual Rights, and the Institute for Justice.<sup>79</sup>

Reagan’s judicial appointments have been deemed his “best legacy,” in large part because federal courts gradually became more conservative and supported the conservative legal agenda.<sup>80</sup> The Reagan judicial strategy has mostly been identified with an effort to reverse the liberal activism in the Warren and early Burger Courts, and especially with salient social issues, such as prayer in public schools, abortion, and crime.<sup>81</sup>

It is important to remember, however, that a key part of Reagan’s legal policy agenda was related to his economic policy agenda. According to Steven Teles, the “first conservative public interest law firm, the Pacific Legal Foundation” which was founded in 1973 in California while Reagan was Governor was an effort to counter liberal Public Interest Law Firms (PILFs).<sup>82</sup> This was because “[c]onservatives

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77. David M. O’Brien, *The Reagan Judges: His Most Enduring Legacy?*, in *THE REAGAN LEGACY: PROMISE AND PERFORMANCE* 60, 62 (Charles O. Jones ed., 1988).

78. *Id.* at 67.

79. See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008) (explaining the history of the conservative legal movement and the impact of law and economics on the creation of governmental and nongovernmental organizations); AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015) (detailing the impact of the Federalist Society on public policy and the role of the judiciary).

80. O’Brien, *supra* note 77, at 60.

81. See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 133–35 (1999) (describing Reagan’s efforts to cultivate conservative decision making within the courts).

82. TELES, *supra* note 79, at 60–61.



in government, especially Ronald Reagan during his stint as governor of California from 1967–1975, found their agenda obstructed by liberal PILFs.”<sup>83</sup> The law and economics movement emerged as an approach to law in which the primary objective of law is economic efficiency, which then migrated into elite law schools such as the University of Chicago, Yale University, Harvard University, and beyond.<sup>84</sup> Not surprisingly, Supreme Court appointments by Reagan and both Bushes could be expected to subscribe to these views on law and economics.

But what may be just as important for thinking about the Supreme Court and cases involving economic policy is the place that President Clinton occupied in the regime. Clinton was a preemptive president who moderated the positions of his party in order to neutralize or preempt important cleavage issues that had disadvantaged Democrats at the polls in three previous national elections. Clinton appointed Ruth Bader Ginsburg to replace Justice White, and a year later Stephen Breyer to replace Justice Harry Blackmun.<sup>85</sup> Both of these selections were considered “safe” in the sense that they were viewed as judicial moderates, and both were acceptable to Orrin Hatch, Republican of Utah, the ranking member of the Senate Judiciary Committee.<sup>86</sup> According to Michael Gerhardt, Clinton decided not to pursue nominees on ideological grounds, but instead “on the grounds of their appeal to certain constituencies, age and health, and likelihood for confirmation.”<sup>87</sup> Although both of Clinton’s nominees were easily confirmed, Silverstein notes that “[t]he ease with which both Ginsburg and Breyer gained Senate approval must not obscure the degree to which their appointments were the product of political conflict and weakness.”<sup>88</sup> Clinton’s appointments to the Supreme Court, Ruth Bader Ginsburg and Stephen Breyer, reflected his more moderate position on the issues he had worked to preempt and avoided difficult partisan fights.

And thus, by the time John Roberts was appointed to replace Chief Justice Rehnquist in 2005, issues involving business and economic regulation were not significant cleavage issues in national politics. Given the GOP legal and judicial strategy to transform law to reflect conservative

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83. *Id.* at 60.

84. *Id.* at 181–216.

85. YALOF, *supra* note 81, at 199–205.

86. ORRIN HATCH, *SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR* 180 (2002).

87. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 76 (2000). *See also* YALOF, *supra* note 81, at 196–205 (explaining President Clinton’s appointment strategy for both Justice Breyer and Justice Ginsburg).

88. MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 121 (2d ed. 2007).

policy priorities, and both Clinton's more moderate approach to economic policy and the appointment of more centrist justices to the Supreme Court, we should expect over this time period the Court would adopt positions less favorable to government regulation of the economy, and thus more favorable toward businesses and employers. Although it is possible to trace the development of a New Right Regime as an explanation for trends in economics and business cases as a function of that regime, there's another fact of American government during the New Right Regime that must be accounted for: division and polarization.

*B. The Regime and the Court in an Era of Divided Government  
and Polarization*

While American electoral history is generally understood as a series of "party systems" or "political regimes" brought about by "critical" or "secular" realignments that produce a dominant party coalition that governs for a period of time and then declines to be replaced by a new electoral order,<sup>89</sup> the period since 1968 is different. During the 1960s, the New Deal electoral coalition, which dominated American politics since the 1930s, slowly unraveled over a series of issues including race and civil rights reforms.<sup>90</sup> As we discussed in the previous Section, beginning with Nixon's "southern strategy" in 1968, and culminating in the "Reagan Revolution" in the 1980s, the GOP capitalized on fragmentation within the Democratic Party and brought disaffected southern Democrats, religious evangelicals, and other groups into a more conservative coalition which consequently became a more competitive force in national elections.<sup>91</sup> As we explained in the previous Section, the "New Right" has had important impacts on the direction of political and policy agendas, including on attitudes toward the regulation of the economy and business.

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89. See generally WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970) (analyzing critical elections in U.S. history where a critical realignment predicated an abrupt coalitional change among the electorate); SKOWRONEK, *supra* note 50 (analyzing the impact of various U.S. presidents on the evolution of modern politics); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (analyzing the interplay between the legislature, the executive, and the judicial branches, as well as the subsequent impact on U.S. policies).

90. See generally CARMINES & STIMSON, *supra* note 48 (considering the transformation of the American political order based on the emergence of racial politics).

91. GARY C. JACOBSON, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946–1988* (1990) (detailing the rise of the GOP, as well as growing partisanship in a divided government).

In hindsight, however, it is clear that neither 1968 nor 1980 were anything like classic realigning elections.<sup>92</sup> Rather than the emergence of a party coalition that was as stable and dominant as previous coalitions (such as the New Deal Coalition), electoral politics during this period have remained closely divided for an extended period and the parties have become ideologically more sorted and polarized.<sup>93</sup> This has led to alternating partisan control of electoral institutions and divided government. Indeed, between 1968 and 2016, Democrats have won five presidential elections and Republicans seven.<sup>94</sup> Divided government, where one party controls the presidency and the other controls one or both houses of Congress, has prevailed in thirty-eight of the past forty-eight years.<sup>95</sup>

Although control of the presidency has been split between the parties, opportunities to fill vacancies on the Supreme Court have not. Of the sixteen justices appointed since 1968, twelve were appointed by Republicans and only four by Democrats.<sup>96</sup> While partisanship has not

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92. See BYRON E. SHAFER, *THE TWO MAJORITIES AND THE PUZZLE OF MODERN AMERICAN POLITICS* 26–38 (2003) (contrasting the elections from 1948 through the 1990s to identify which elections reflected a “new political order” of partisan loyalties).
93. See generally ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* (2010) (finding that party loyalty today is based more on ideological beliefs rather than social group identification, resulting in increased political polarization and higher voter turnout); MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* (2009) (explaining how American voters have rapidly realigned themselves based on ideological commitments); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006) (examining voter polarization in recent decades and its relationship with wealth disparity, immigration, and other social forces).
94. The GOP won presidential elections in 1968 and 1972 (Richard M. Nixon), 1980 and 1984 (Ronald Reagan), 1988 (George H. W. Bush), and 2000 and 2004 (George W. Bush). Democrats won in 1976 (Jimmy Carter), 1992 and 1996 (Bill Clinton), and 2008 and 2012 (Barack Obama). *1789–2016 Presidential Elections*, NAT. ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/federal-register/electoral-college/votes/> [<https://perma.cc/97MJ-9QD4>] (last visited Mar. 25, 2017).
95. See *Party Divisions of the House of Representatives*, U. S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [<https://perma.cc/3BK2-285B>] (last visited Mar. 26, 2017) (detailing party divides in the U.S. House of Representatives over time); *Party Division*, U. S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/86RH-CMFP>] (last visited Apr. 6, 2017) (chronicling party divisions in the U.S. Senate).
96. GOP appointments include: Warren Burger (1969–86); Harry Blackmun (1970–94); Lewis Powell (1972–87); William Rehnquist (1972–2005); John Paul Stevens (1975–2010); Sandra Day O’Connor (1981–2006); Antonin

always been a predictor of a justice's behavior on the bench, the current era's more ideologically rigorous nomination process has produced a Court where justices vote predictably along partisan/ideological lines.<sup>97</sup> The GOP's advantage in filling vacancies on the Court, including the appointment of the last three chief justices, has thus led to a more conservative Court, but, at the same time, the alternating control of government has created one that is deeply divided and polarized. Indeed, the Roberts Court in 2016 consisted of four Democratic appointees who voted in a liberal direction, four Republican appointees who voted in a conservative direction, and a ninth seat that remained vacant and was the subject of fierce partisan conflict in the 2016 presidential election.<sup>98</sup>

And so this extended period of divided government and polarization overlapped with the emergence of a New Right Regime that sought to replace the old New Deal Regime.<sup>99</sup> The upshot of this overlap is that Reagan conservatives were able to influence law and politics in a conservative direction, but the New Right coalition was fragile from the beginning.<sup>100</sup> It was never able to fully consolidate power in the ways majority coalition in previous regimes (such as the New Deal coalition and regime) had.<sup>101</sup>

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Scalia (1986–2016); Anthony Kennedy (1987–present); David Souter (1990–2009); Clarence Thomas (1991–present); John Roberts (2005–present); and Samuel Alito (2006–present). The Democratic appointees include: Ruth Bader Ginsburg (1993–present); Stephen Breyer (1994–present); Sonia Sotomayor (2009–present); and Elena Kagan (2010–present). *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/45KJ-YAF4>] (last visited Mar. 25, 2017).

97. See Lee Epstein & Jeffrey A. Segal, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 60–65, 130–37 (2005) (explaining how recent presidential appointments ensure that the appointee's ideological beliefs align with the appointing president's political persuasions); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. (forthcoming 2017), <http://ssrn.com/abstract=2432111> [<https://perma.cc/97ST-2B5T>] (examining the effects of party polarization on the Supreme Court over time).
98. Joan Biskupic, *John Roberts Gets Another Chance for a Conservative Legacy*, CNN (Nov. 10, 2016, 2:42 PM), <https://www.cnn.com/2016/11/09/politics/us-supreme-court-john-roberts/> [<https://perma.cc/NF9X-V5Q5>].
99. See *supra* Part II.A.
100. See Clayton & Pickerill II, *supra* note 42, at 1403–06 (describing Reagan's influence on drug laws).
101. See *supra* Part II.A.

### III. ANALYSIS

In this Part, we replicate much of Pickerill's analysis of the votes and outcomes of cases involving economic regulations and labor issues through the 2015 term of the Court.<sup>102</sup> However, we also analyze the Court's 5-4 decisions in order to assess the impact of polarization on the Court. In order to assess the behavior of the Roberts Court toward business interests, we analyzed data from the *U.S. Supreme Court Database* (the "Database").<sup>103</sup> The Database codes numerous variables for every Supreme Court decision from the beginning of the Vinson Court through the end of the 2015 term of the Roberts Court.<sup>104</sup> Among the many variables included in the database are the type of issue involved in the case, the attitudinal, or ideological, direction of each decision, and the direction of individual justice's vote in each case.<sup>105</sup> Votes in favor of business interests are coded as being in the "conservative" direction, and votes in favor of government regulation, unions, or labor interests are coded as being in the "liberal" direction.<sup>106</sup>

We selected cases that were argued before the Court, decided on the merits, and involved the issue areas of "union activity" and "economic activity."<sup>107</sup> Union activity cases involve arbitration in the context of labor-management or employer-employee relations, union antitrust, closed shop litigation, the Fair Labor Standards Act, the Occupational Safety and Health Act, union membership disputes, and a host of other labor-management disputes. Economic activity cases include antitrust, mergers, bankruptcy, liability, punitive damages, the Employee Retirement Income Security Act, and a wide range of other government regulations of the economy and business activity. Votes in

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102. See Pickerill, *supra* note 37 (exploring the Court's decisions based on its ideological composition); Pickerill, *supra* note 45 (analyzing the Court's decisions and voting patterns in business-oriented cases).

103. *The Supreme Court Database*, WASH. UNIV. SCH. OF LAW, <https://scdb.wustl.edu/index.php> [<https://perma.cc/53CD-ZRPW>] (last visited Mar. 4, 2017).

104. *Id.*

105. *Id.*

106. We understand that some may object to the use of these ideological labels in this manner, but this approach follows the conventions of analysis of judicial behavior in political science and provides a simple and fairly clear way for readers to understand the results of our analysis.

107. The union activity issue area includes, among other issues, cases involving the Fair Labor Standards Act, the Occupational Safety and Health Act, and a range of labor-management disputes. The economic activity code includes a wide range of economic regulations, and includes antitrust, bankruptcy, mergers, patents, the Employment Retirement Income Security Act, and liability and punitive damages.

these cases are coded as “conservative” for votes in favor of business interests and against government regulation or union authority, and conversely, they are coded as being in the “liberal” direction for votes in favor of government regulation of economic activity or union authority and against the interests of private businesses.<sup>108</sup>

If we want to know if and how the Roberts Court compares to previous courts, a logical starting point is to examine how the behavior of the newest justices differs from their predecessors, if at all. We analyze the individual votes of Rehnquist and Roberts, O’Connor and Alito, Souter and Sotomayor, and Stevens and Kagan in these issue areas by computing the total number of votes in the conservative and liberal directions for each justice. As the results in Table 1 indicate, four justices have been more likely to vote in the conservative, or pro-business, direction in these cases, while four have been slightly more likely to vote against business interests.

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108. The Supreme Court database has been criticized, especially with respect to the coding of legal provisions. *See, e.g.*, Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2009) (discussing the shortcomings of the Supreme Court database). While we agree with some of the criticisms of the way law is treated (and sometimes ignored) in the database, it remains a useful tool for analyzing general trends in Supreme Court *outcomes* in broad issue areas. It is possible, indeed probable, that the issue areas of economic and union activity are both under inclusive and over inclusive (that is, they may not include every case the Court has ever decided with business implications, and they may include some cases that do not directly implicate pro- or anti-business legal analysis). However, given that much of the commentary—by both Court supporters and Court detractors—on the relationship between the Roberts Court and (big) business is indeed based on outcomes, analysis of those outcomes at an aggregate level is still useful. We understand it is almost certainly true that not all cases analyzed here are equally as important as one another, and that interpretive analysis is necessary to tease out which, if any, of the Roberts Court decisions are likely to have significant implications for future doctrinal development. Nonetheless, the database is useful for our purposes here because it codes the Supreme Court outcomes in a consistent manner *over time*.

*Table 1. Direction of Votes by Justices Rehnquist, O'Connor, Roberts, Alito, Souter and Sotomayor in Union and Economic Activity Cases*

JUSTICE	UNION ACTIVITY		ECONOMIC ACTIVITY		COMBINED TOTAL	
	<u>conser</u> <u>vative</u>	<u>liberal</u>	<u>conserv</u> <u>ative</u>	<u>liberal</u>	<u>conser</u> <u>vative</u>	<u>liberal</u>
<b>Rehnquist</b>	85 (58%)	61 (42%)	387 (53%)	337 (47%)	472 (54%)	398 (46%)
<b>Roberts</b>	12 (63%)	7 (37%)	97 (55%)	79 (45%)	109 (56%)	86 (44%)
<b>O'Connor</b>	51 (59%)	36 (41%)	248 (53%)	217 (47%)	299 (54%)	253 (46%)
<b>Alito</b>	13 (72%)	5 (28%)	99 (58%)	71 (42%)	112 (60%)	76 (40%)
<b>Souter</b>	16 (44%)	20 (56%)	140 (46%)	166 (54%)	156 (46%)	186 (54%)
<b>Sotomayor</b>	6 (40%)	9 (60%)	55 (50%)	56 (50%)	61 (48%)	65 (52%)
<b>Stevens</b>	47 (37%)	80 (63%)	307 (44%)	391 (56%)	354 (43%)	471 (57%)
<b>Kagan</b>	4 (36%)	7 (56%)	48 (48%)	49 (52%)	52 (48%)	56 (52%)

Rehnquist and O'Connor each voted in the conservative, or pro-business, direction in most of the decisions involving union activity and economic activity during their time on the Court. As the far right-hand column of Table 1 indicates, Rehnquist voted in the conservative direction in 472 of 870 decisions, or fifty-four percent of the time, while O'Connor voted in the conservative direction in 318 of 551 decisions, also fifty-four percent of the time, in cases involving union or economic activity. Roberts has voted in the conservative direction in 109 of 195 decisions, or fifty-six percent of the time, while Alito has voted in the conservative direction in 112 of 188 of these decisions, or sixty percent of the time; in other words, Roberts and Alito were slightly more likely to vote in a pro-business than the justices they replaced. Unlike these four more conservative justices, Souter, Sotomayor, Stevens, and Kagan voted in the liberal direction, against business interests, a little more than half the time. Souter voted in the liberal direction in 156 of 342 decisions, or about fifty-four percent of the time, and Sotomayor voted

in the liberal direction in 61 of 126 decisions, or about fifty-two percent of the time. Similarly, Stevens voted in the liberal direction in 471 of 825, or fifty-seven percent of the time, and Kagan voted in the liberal direction 56 of 108 decisions, or about fifty-two percent of the time.

Given that the Roberts Court was initially delineated by the appointment of Roberts as Chief Justice in September 2005, and Alito's nomination was confirmed a few months later in the same term in January 2006, Roberts and Alito have voted in fewer cases than Rehnquist and O'Connor. And Sotomayor and Kagan have cast even fewer votes. Thus, it is important to be cautious in drawing conclusions from their votes so far. While we must be cautious in making inferences, these data points do constitute the population of cases in these issue areas through the end of the 2016 term; thus, we can, at a minimum, draw some conclusions about the first decade of the Roberts Court, including President Obama's appointments to the Court. The analysis in this Part indicates that Roberts and Alito were slightly more likely to vote in the conservative direction than the two justices they replaced; Sotomayor and Kagan voted in the liberal direction a little less than the justices they replaced, but they were still more likely to vote in the liberal rather than conservative direction.

Based on the analysis of the newest justices to the Court, the ideological balance of the Court does not seem to have shifted much as a result of the membership changes. The next step of the inquiry is to ask how the membership change on the Court has affected *outcomes* in business-oriented cases. Therefore, our analysis moves from comparing the votes of individual justices on the Court to the outcomes of the Court's decisions over time.

Table 2 reports the direction of these decisions for the Vinson, Warren, Burger, Rehnquist, and Roberts Courts. The results show that the Roberts Court's decisions have resulted in a higher proportion of pro-business outcomes than previous periods, as demarcated by chief justice. While only forty-four percent of Vinson Court decisions and twenty-seven percent of the Warren Court decisions in union activity and economic activity cases were in the conservative direction, the percentage increased in subsequent Courts, to forty-seven percent during the Burger Court, fifty-one percent in the Rehnquist Court, and finally, fifty-nine percent in the Roberts Court. In the economic activity issue area alone, the Roberts Court has decided fifty-eight percent of cases in the conservative direction, compared to fifty percent during the Rehnquist Court, forty-eight percent during the Burger Court, twenty-seven percent during the Warren Court, and forty-one percent during the Vinson Court.



*Table 2. Direction of Supreme Court Outcomes in Union and Economic Activity Cases by Chief Justice (through the 2015 term)<sup>109</sup>*

CHIEF JUSTICE	UNION ACTIVITY		ECONOMIC ACTIVITY		COMBINED TOTAL	
	conserv ative	liberal	conserv ative	liberal	conserv ative	liberal
<b>Vinson Court</b>	23 (56%)	18 (44%)	93 (41%)	132 (59%)	116 (44%)	150 (56%)
<b>Warren Court</b>	41 (32%)	89 (68%)	134 (27%)	355 (73%)	170 (27%)	453 (73%)
<b>Burger Court</b>	48 (44%)	61 (56%)	211 (48%)	230 (52%)	259 (47%)	291 (53%)
<b>Rehnquist Court</b>	31 (57%)	23 (43%)	171 (50%)	171 (40%)	202 (51%)	194 (49%)
<b>Roberts Court</b>	12 (63%)	5 (37%)	105 (58%)	75 (42%)	117 (59%)	82 (41%)

And so the Roberts Court as a whole appears to be more likely to vote in the conservative direction than the Court under the previous four chief justices, which is consistent with much of the conventional wisdom about the Roberts Court becoming more business-friendly than Courts in previous eras. It has also been suggested by some commentators that the Roberts Court is also accepting more business cases.<sup>110</sup> Table 3 reports the total number of Supreme Court decisions and the proportion of those decisions that were union or economic activity cases by chief justice. As Table 3 indicates, the proportion of the Court's docket involving union activity has been on the decline for decades, and the Roberts Court has followed suit, constituting only about two percent of its docket. Twenty-one percent of the Roberts Court decisions have been in the economic activity issue area, which is only slightly up from seventeen and sixteen percent in the Rehnquist and Burger Courts, respectively, but is still less than the Warren and Vinson Courts, at twenty-two and twenty-nine percent, respectively.

109. Percentages may not add to 100 due to rounding errors.

110. Rosen, *supra* note 1.

*Table 3. Union and Economic Activity Cases as Proportion of Court Agenda*

<b>CHIEF JUSTICE</b>	<b>UNION ACTIVITY</b> (% of N)	<b>ECONOMIC ACTIVITY</b> (% of N)	<b>TOTAL</b> (% of N)
<b>Vinson Court</b> (N=786)	41 (5%)	225 (29%)	266 (34%)
<b>Warren Court</b> (N=2189)	130 (6%)	479 (22%)	609 (28%)
<b>Burger Court</b> (N=2798)	109 (4%)	441 (16%)	550 (20%)
<b>Rehnquist Court</b> (N=2029)	54 (3%)	342 (17%)	396 (20%)
<b>Roberts Court</b> (N=867)	17 (2%)	180 (21%)	197 (23%)

Although the analysis so far does suggest that the Roberts Court has ruled against government regulation of the economy and labor more frequently than its predecessors, the political regimes approach for understanding shifts on the Court requires a different analytical approach. Rather than adopt the chief justice as the unit of analysis, we demarcate time periods based on presidents and their first appointment to the Court. Thus, we analyzed outcomes during periods beginning with the first Supreme Court appointment of Harry S. Truman (Fred Vinson in 1946), Dwight Eisenhower (Earl Warren in 1953), Richard Nixon (Warren Burger in 1969), Ronald Reagan (Sandra Day O'Connor in 1981), Bill Clinton (Ruth Bader Ginsburg in 1993), George W. Bush (John Roberts in 2005), and Barack Obama (Sotomayor in 2009). Each period—until the appointment of John Roberts in 2005—spans roughly the same amount of time, twelve or thirteen years.<sup>111</sup>

As Table 4 shows, the trend in the Court's pro-business orientation began with President Nixon's appointments. While the Court decided fifty-six percent of union and economic cases in a liberal (pro-union or pro-government regulation) direction from Truman's appointment of Vinson in 1946 until Eisenhower's appointment of Warren in 1953, and seventy-three percent in the liberal direction from Warren's appointment until Nixon's appointment of Burger in 1969, it decided only fifty-three percent in the liberal direction from the appointment of Burger until Reagan's appointment of O'Connor in 1981. After 1981, the Court continued to trend in a pro-business direction in these cases, and be-

111. SUPREME COURT OF THE U.S., *supra* note 96.

tween 1981 and Clinton’s appointment of Ginsburg, the Court was almost evenly split, deciding forty-nine percent in the liberal direction and fifty-one percent conservative (or pro-business) direction. From Clinton’s appointment of Ginsburg in 1993 until Bush’s appointment of John Roberts in 2005, the Court continued the trend and decided fifty-four percent of these cases in the conservative direction. From the appointment of Roberts until Obama’s appointment of Sotomayor in 2009, the Court decided sixty-one percent in the conservative direction, and since Sotomayor’s appointment, the Court has decided fifty-seven percent of these cases in the conservative direction.

*Table 4. Direction of Supreme Court Outcomes in Union and Economic Activity Cases based on first Supreme Court Appointment of Presidents<sup>112</sup>*

President (Justice appointed)	UNION ACTIVITY		ECONOMIC ACTIVITY		COMBINED TOTAL	
	<u>conserv ative</u>	<u>liberal</u>	<u>conserv ative</u>	<u>liberal</u>	<u>conserv ative</u>	<u>liberal</u>
<b>Truman- 1946</b> (Vinson)	23 (56%)	18 (44%)	93 (41%)	132 (59%)	116 (44%)	150 (56%)
<b>Eisenhower- 1953</b> (Warren)	42 (32%)	89 (68%)	128 (26%)	364 (74%)	170 (27%)	453 (73%)
<b>Nixon- 1969</b> (Burger)	38 (49%)	39 (51%)	146 (46%)	168 (54%)	184 (47%)	207 (53%)
<b>Reagan- 1981</b> (O’Connor)	30 (45%)	36 (55%)	158 (53%)	142 (47%)	188 (51%)	178 (49%)
<b>Clinton- 1993</b> (Ginsburg)	11 (55%)	9 (45%)	99 (54%)	84 (46%)	110 (54%)	93 (46%)
<b>Bush-2005</b> (Roberts)	2 (50%)	2 (50%)	37 (62%)	23 (38%)	39 (61%)	25 (39%)
<b>Obama-2009</b> (Sotomayor)	10 (67%)	5 (33%)	66 (56%)	52 (44%)	76 (57%)	57 (43%)

112 Percentages may not add to 100 due to rounding errors.

Although it may be tempting by some to attribute the evolution of a pro-business Supreme Court solely to something unique about the Roberts Court, the evidence suggests that would be an oversimplification. An underlying cause of the shift is best explained by nature of regime politics over time. And thus, the key lesson here is to understand that while the Roberts Court has, in the aggregate, trended in a pro-business direction, it is not true that the Court's pro-business orientation is a dramatic departure from its predecessors. This fact is amplified when we analyze the Court's decisions using theoretically motivated historical periods as our unit of analysis instead of the chief justice, as Table 4 demonstrates. It is almost certainly the case that justices' views over time came to reflect the growing political consensus among the presidents who appointed them over time.

Although we think the Roberts Court's cases involving economic and labor issues can largely be explained by political developments, in the previous section we noted while the American regime became more conservative as a result of the 1968 and 1980 elections, the period has also been characterized by divided government as well as ideological and partisan polarization. In Table 5 we analyze decisions in economic and union cases in which the Court was divided 5-4.

*Table 5. Direction of decisions in 5-4 cases from the Vinson Court to the Roberts Court*

CHIEF JUSTICE	UNION ACTIVITY		ECONOMIC ACTIVITY		COMBINED TOTAL	
	conserv ative	liberal	conserv ative	liberal	conserv ative	liberal
<b>Vinson Court</b>	2 (50%)	2 (50%)	93 (41%)	132 (59%)	95 (41%)	134 (59%)
<b>Warren Court</b>	3 (38%)	5 (63%)	134 (27%)	355 (73%)	137 (28%)	360 (74%)
<b>Burger Court</b>	15 (63%)	9 (38%)	28 (54%)	23 (44%)	43 (66%)	32 (34%)
<b>Rehnquist Court</b>	6 (55%)	5 (46%)	28 (70%)	12 (30%)	34 (67%)	17 (33%)
<b>Roberts Court</b>	4 (100%)	0 (37%)	15 (83%)	3 (17%)	19 (86%)	3 (14%)

While fifty-nine and seventy-four percent of the 5-4 decisions in the Vinson and Warren Courts, respectively were in the liberal direction, sixty-six and sixty-seven percent of 5-4 decisions in the Burger and Rehnquist Courts, respectively, were in the conservative direction. And eighty-six percent of the 5-4 decisions in the Roberts Court were in the conservative direction. This suggests that while the Court's shift in a pro-business direction over time mirrors the influence of conservatism

over the past four or five decades, the Court is also divided in a way that reflects broader political divisions in the country.

### CONCLUSION

We agree with conclusions that in general, the Roberts Court seems to be more “pro-business” than previous Courts. At an aggregate level, our empirical analysis is consistent with that of Epstein, Landes, and Posner.<sup>113</sup> Whether one analyzes cases based on business entities as litigants or based on the issue areas of economic and union activity, the Roberts Court has been more likely to rule in a direction that favors business interests than previous courts. However, we also agree that the aggregation of outcomes and votes cannot tell the complete story. We agree with legal scholars that not all legal doctrine is created equally, and the outcomes and votes of the justices cannot explain whether the Court’s holdings in particular doctrinal areas will have favorable effects for business interests in the future. Both types of analyses are essential for a fuller understanding of the Court’s decisions involving economic issues, or any other issues for that matter.

We also argue that it is a mistake to use the chief justice as the unit of analysis for understanding legal change on the Court. Because legal change is often a function of political change and regime politics, it makes more sense to analyze the Court’s decisions across and within political regimes and political time. Our analysis indicates that as the New Right Regime emerged, the Court gradually adopted a more business-friendly position—and that trend began long before John Roberts was appointed Chief Justice. Moreover, although the Court gradually embraced regime values regarding economic policy over time, it also reflects the divisions and polarization that characterized the U.S. federal government during the same time period.

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113. See Epstein, Landes & Posner, *supra* note 3, at 1469–72 (summarizing Epstein, Landes, and Posner’s findings concerning the Roberts Court’s favorability to business).