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The First Decade of the Roberts Court: Good for Business Interests, Bad for Legal Accountability

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THE FIRST DECADE
OF THE ROBERTS COURT:
GOOD FOR BUSINESS INTERESTS,
BAD FOR LEGAL ACCOUNTABILITY

Brianne J. Gorod[†]

CONTENTS

INTRODUCTION 721

I. THE CHAMBER’S SUCCESS 723

 A. *The Roberts Court* 724

 B. *John Roberts* 726

II. THE PRO-BUSINESS COURT: WHAT IT MEANS 729

 A. *Class Actions* 729

 B. *Arbitration* 732

 C. *Preemption* 735

III. LOOKING AHEAD 737

CONCLUSION 741

INTRODUCTION

When John Roberts was nominated to serve as Chief Justice, he was asked whether he disproportionately supported business interests while serving on the D.C. Circuit.¹ According to Roberts, that assertion

† Brianne J. Gorod is Chief Counsel at the Constitutional Accountability Center. This Article draws on the Constitutional Accountability Center’s ongoing work tracking the U.S. Chamber of Commerce’s success before the Roberts Court, located at *Corporations and the Supreme Court*, CONSTITUTIONAL ACCOUNTABILITY CENTER, <http://theusconstitution.org/corporations-and-supreme-court> [<https://perma.cc/L85J-R6XB>] (last visited Apr. 10, 2017), but the views expressed herein are solely the author’s own. The author would like to thank the editors of the Case Western Law Review for their excellent editorial assistance.

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 427 (2005), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf> [<https://perma.cc/LC9D-4CFG>] (statement of Sen. Dianne Feinstein) (“Duke Law School Professor Katherine Fisk examined nine cases heard by you while you have been on the court of appeals. Her review concluded that you ruled in favor of a business each time. Consequently, she made this prediction: you’re going to be a fairly reliable vote against workers’ rights across the board. Would you respond to that, please?”).

was “wrong.”² As he explained, “I know that I’ve ruled against corporations on a regular basis on the D.C. Circuit. I think I just saw a study . . . that suggested I tended to rule against corporations more than the average judge. . . . I like to think [my votes] depend[] upon the particular law and the particular facts.”³

Ten years later, one of the most significant debates about the Court that Roberts leads is whether it is pro-business, and what it even means to be pro-business.⁴ In this Article, I argue that the answer to the first question is yes—both the Roberts Court and John Roberts himself are decidedly pro-business. And while that term can have many meanings, one of the most important is quite simple: a pro-business Court makes it more difficult for individual consumers and employees to hold businesses accountable when they violate the law. And that is exactly what this Court has too often done, as Justice Elena Kagan acknowledged when she was asked whether the current Court is pro-business. As she explained it, the current Court has “made it more difficult for injured persons to come to court and to use federal and state law to hold business to account for injuries that they’ve done.”⁵

Since 2010, my organization, the Constitutional Accountability Center, has been studying, as a proxy for the success of business interests before the Roberts Court, the Chamber of Commerce’s success in merits cases in which it participates as either a party or an *amicus*. The results of that analysis are straightforward: the Chamber of Commerce has been remarkably successful. Indeed, it appears to have been more successful before the Roberts Court than it was before either of the two

2. *Id.*

3. *Id.* at 427–28.

4. Compare Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html> [<https://perma.cc/S4CG-YY46>] (noting that the Roberts Court’s general track record has been decidedly pro-business), and *Breaking: The Roberts Court Is Extremely Pro-Business*, THE AM. PROSPECT (Apr. 27, 2011), <http://prospect.org/article/breaking-roberts-court-extremely-pro-business> [<https://perma.cc/E5N9-V427>] (pointing out that conservatives on the Roberts Court prefer policies favoring business interests), with Jonathan H. Adler, *Introduction: In Search of the Probusiness Court*, in BUSINESS AND THE ROBERTS COURT 11–12 (Jonathan H. Adler ed., 2016) (viewing the Roberts Court’s propensity for pro-business decisions as a product of the Court’s unwillingness to “place its finger on the scales to assist non-business litigants,” rather than the product of an ideological agenda).

5. Aspen Inst., *Is the Roberts Court a Pro-Business Court?*, YOUTUBE (June 30, 2013), <http://youtu.be/oevJTy5kmcx> [<https://perma.cc/TQ24-RBMJ>].

Courts that preceded it.⁶ After discussing those results, I consider one of the most significant implications of that success: the greater difficulty individuals face in holding businesses accountable in court when they violate the law. Finally, I conclude by providing some thoughts on what lies ahead for the Supreme Court and the business docket in the near term.

I. THE CHAMBER'S SUCCESS

The U.S. Chamber of Commerce is the “world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.”⁷ The litigation wing of the U.S. Chamber, the National Chamber Litigation Center, is, by its own account, “the voice of business in the courts” and regularly files in the Supreme Court on issues of interest to the business community, even where no business is a party to the case.⁸

Since 2010, the Constitutional Accountability Center (CAC) has used the Chamber’s success in merits cases at the Court—as either party or *amicus*—as a window into determining how business interests have fared before the Roberts Court.⁹ And at the conclusion of Roberts’s first decade on the Court, CAC released a report designed to answer just that question based on the data produced by looking at every case in which the Chamber participated since Justice Samuel

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6. As discussed in greater detail below, CAC’s study did not look at the Chamber’s success during the entire Burger and Rehnquist Courts, but instead looked at a multi-year period for each Court in which its membership was stable. *See infra* Part I(A).
 7. *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/about-the-us-chamber> [<https://perma.cc/C7AR-9W5T>] (last visited Feb. 9, 2017).
 8. U.S. Chamber Litig. Ctr., *NCLC Celebrates 30 Years of Advocacy on Behalf of the Business Community*, U.S. CHAMBER OF COMMERCE (Feb. 27, 2007), <http://www.chamberlitigation.com/news/releases/nclc-celebrates-30-years-advocacy-behalf-business-community> [<https://perma.cc/PA8Y-49FE>].
 9. TOM DONNELLY, CONSTITUTIONAL ACCOUNTABILITY CTR., *ROBERTS AT 10: CHIEF JUSTICE ROBERTS AND BIG BUSINESS* 5 (2015), http://theconstitution.org/sites/default/files/briefs/Roberts_at_10_10_Business.pdf [<https://perma.cc/AY8M-SQ63>] (last visited Feb. 17, 2017). For another study of the Chamber’s success before the Court, see David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019–20 (2009) (noting that the Chamber’s success rate at the merits stage indicates that the Roberts Court is a business-friendly Court); *see also id.* at 1019 (“[I]n the less than three full Terms of the Roberts Court, the Chamber has been not only unusually active but unusually successful at both [the certiorari and plenary stages of review].”).

Alito joined the Court in early 2006—a universe of 142 cases.¹⁰ In that same report, CAC also looked at the Chamber’s success over time, thus providing a basis for comparing its success before the Roberts Court to its success in prior periods. To do that, CAC examined the last five terms of the Burger Court, from Justice Sandra Day O’Connor’s joining the Court in 1981 until Justice Antonin Scalia joined in 1986, as well as the last eleven terms of the Rehnquist Court, from the beginning of October 1993 until the end of the 2004 October Term in June 2005.¹¹

To be sure, the results of this study provide only part of the story of business at the Roberts Court—they do not, for example, reveal anything about the types of questions that the Court is choosing to answer, or about the impact of the decisions the Court is reaching. Nor do they necessarily capture every single case in which business may have an interest. As Jonathan Adler has pointed out, the Chamber “at times . . . stays its hand, either because its membership is divided or it has determined limited resources are better spent in other cases—perhaps because the likelihood of winning a given case is too remote,”¹² which means, in his view, that “focusing solely on cases in which the Chamber participates may produce an incomplete picture.”¹³ Nonetheless, the Chamber’s success provides at least some indication of how business has fared before this Court. Indeed, unless there is some reason to think that the Chamber is systematically more likely to participate in cases in which it is likely to win now than it was in the past, its success over time should provide a good indication of how the Roberts Court compares to those that preceded it, as well as how John Roberts compares to other Justices, past and present.

A. *The Roberts Court*

CAC’s review of the Chamber’s success before the Court leaves no doubt: the Chamber is remarkably successful. As Tom Donnelly wrote in the report examining how the Chamber has fared during the first

10. See DONNELLY, *supra* note 9, at 5 (describing CAC’s analysis of the Chamber’s success before the Roberts Court). Notably this analysis does not consider the Chamber’s success in encouraging the Court to take up certain cases, even though there is strong evidence that amicus briefs can be particularly effective at the certiorari stage. See, e.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988) (“Without question, then, interested parties can have a significant and positive impact on the Court’s agenda by participating as amici curiae prior to the Court’s decision on certiorari or jurisdiction.”); see also Franklin, *supra* note 9, at 1024–25 (discussing the Chamber’s success at the certiorari stage of litigation).

11. DONNELLY, *supra* note 9, at 6–7.

12. Adler, *supra* note 4, at 4.

13. *Id.* at 4–5.

decade of the Roberts Court, “a cohesive five-Justice majority on the Court . . . has produced victories for the Chamber’s position in the vast majority of its cases.”¹⁴ Moreover, the Chamber is more successful now than it has been in the past. Indeed, the figures are striking. The Chamber enjoyed a sixty-nine percent success rate during the first decade of the Roberts Court, a success rate markedly higher than it enjoyed during the periods of the Rehnquist and Burger Courts that were also studied.¹⁵ Strikingly, during the five-year period of the Burger Court that was studied, the Chamber won fifteen of thirty-five cases, for a winning percentage of only forty-three percent.¹⁶ While the Chamber fared better during the Rehnquist Court, it still did not perform as well as it is currently performing before the Roberts Court; the Chamber’s winning percentage during the eleven terms of the Rehnquist Court was fifty-six percent, winning forty-five of eighty cases.¹⁷

The cause of the Chamber’s current success is also interesting: the Chamber is not benefitting from diverse coalitions of justices supporting it in different cases. Rather, there is (as most current Court watchers would suspect) a cohesive five justice majority that consistently votes for the Chamber. As Donnelly explained, “the members of the Court’s conservative majority are tightly bunched in their overall support for the Chamber.”¹⁸ Indeed, even Justice Anthony Kennedy, the conservative Justice most likely to vote with the Court’s more progressive members, voted for the Chamber seventy-two percent of the time, just below the Justice with the greatest support for the Chamber (i.e., Justice Samuel Alito, who voted for the Chamber seventy-four percent of the time).¹⁹

This is not to say, of course, that the Court’s conservative and relatively progressive Justices never see eye to eye on cases in which the Chamber has an interest. After all, the Court’s more progressive justices collectively “cast nearly half of their votes (47%) in favor of the Chamber’s position.”²⁰ And many decisions are not divided along ideological lines, with the Court finding it relatively easy to reach a consensus on the outcome.²¹ Yet in the twenty-nine percent of cases that sharply divided the Court (i.e., those decided 5–4 or 5–3), the

14. DONNELLY, *supra* note 9, at 5.

15. *Id.* at 6.

16. *Id.*

17. *Id.* at 7.

18. *Id.* at 5–6.

19. *Id.* at 6.

20. *Id.*

21. *Id.*

ideological divide between the Justices is evident.²² In the forty-one Chamber cases decided by just one or two votes, eighty percent were Chamber victories, and in those cases, the conservatives collectively voted for the Chamber seventy-nine percent of the time, while the Court's relatively progressive members only did so twenty-two percent of the time.²³ Interestingly, the ideological division during the last five terms of the Burger Court was not nearly as strong—then, there was only a twelve point divide between conservatives and liberals (49% to 37%), not the twenty-four point difference in support for the Chamber's position that exists now.²⁴ Likewise, during the Rehnquist Court, the difference in support between the Court's conservatives and its more liberal members was only thirteen points (61% to 48%).²⁵

Significantly, these conclusions are consistent with a comprehensive study of business's success before the Roberts Court conducted by Lee Epstein, William Landes, and Judge Richard Posner.²⁶ As part of their study, they looked at all Supreme Court cases decided between October Term 1946 and October Term 2011 in which a business was a party on only one side of the case.²⁷ Based on their examination of those cases—1,759 in total—they concluded that the Roberts Court was “much friendlier to business than either the Burger or Rehnquist Courts.”²⁸

B. John Roberts

That John Roberts is leading the most pro-business Supreme Court in the modern era is perhaps unsurprising: according to CAC's research on the Chamber's success, John Roberts himself votes for business interests far more often than he does not.²⁹ According to CAC's report, Roberts votes for the Chamber's position in seventy percent of all cases, making him the fourth most supportive Justice on the Court as of 2015.³⁰ Interestingly, his support for the Chamber climbed even higher—to eighty-three percent—in closely divided cases (second only

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 7.

26. See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013) (analyzing the Supreme Court's “pro- and anti-business decisions” relative to the ideological divide and individual voting behavior of the Justices).

27. *Id.* at 1434.

28. *Id.* at 1472.

29. DONNELLY, *supra* note 9, at 8.

30. *Id.*

to Justice Alito in his support for the Chamber).³¹ This is consistent with Epstein, Landes, and Posner's study, which concluded that *all five* of the conservatives on the Roberts Court would appear on a list of the ten most pro-business Justices since 1946, and that Justices Alito and Roberts would rank at the very top.³²

It is worth noting that, as those numbers reflect, Roberts does not always vote in favor of the Chamber's position.³³ Indeed, there are even some Chamber cases in which Roberts has parted ways with some of his fellow conservatives. For example, he joined the Court's more progressive members in rejecting the business community's efforts to weaken the federal law prohibiting pregnancy discrimination,³⁴ and he also voted with Justice Kennedy and the Court's more progressive members to uphold EPA regulations designed to address interstate air pollution.³⁵ But, as the numbers also reflect, the Chief Justice votes for the Chamber's position far more often than he does not, and he has done so on a wide variety of issues.³⁶

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31. *Id.* The conservative Justices' voting records were highly concentrated overall, ranging from just 69.5% to 73.6%, but were slightly more spread out in the closely divided cases, ranging from 70.7% to 87.5%. *Id.*
 32. Epstein et al., *supra* note 26, at 1449. Alito and Roberts ranked first and second for all cases, and first and third for 5–4 decisions. *Id.*
 33. DONNELLY, *supra* note 9, at 8.
 34. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).
 35. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014). Although the Chief Justice also famously parted ways with his fellow conservatives in upholding the Affordable Care Act's individual mandate, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), the Chamber did not file a brief on the constitutionality of the mandate. Instead, it filed only on the separate question whether the mandate was severable from the remainder of the law. Brief of Chamber of Commerce of the United States of America as Amicus Curiae in Support of Reversal as to the Severability Issue, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (No. 11-393).
 36. *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (establishing what constitutes a timely filing for EEOC complaints related to sex-based pay discrimination); *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding unconstitutional a federal law that prohibited "corporations and unions from using their general treasury funds" to engage in political speech); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that "a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery"); *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that the EPA must consider the costs of compliance when deciding what to regulate under the Clean Air Act); *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013) (holding federal law preempted a design defect claim against a pharmaceutical company for injuries caused by a generic drug).

Interestingly, while Roberts may have developed a record as one of the most pro-business Justices in recent history, he hasn't led the charge through written opinions. Indeed, in his first decade on the Court, he wrote only four majority opinions in the Chamber's cases, and most of those were in relatively low-profile cases.³⁷ Indeed, in perhaps the highest profile majority opinion written by the Chief Justice in a Chamber case, Roberts made the classic Roberts move, giving the business community some, but not all, of what it wanted. As Donnelly described it, the "opinion is quintessential John Roberts—a model for his preferred method of moving the law."³⁸

In *Halliburton Co. v. Erica B. John Fund*,³⁹ the Court was asked whether to overrule a 1988 decision, which made it easier for investors who bought stock based on materially misleading information to bring class actions.⁴⁰ Had the Court done so, it would have been "one of the most important business-law cases of the decade."⁴¹ But the Court didn't do so: Chief Justice Roberts put together a six-Justice majority in favor of a result that didn't overrule *Basic*, but still made it easier for businesses to challenge securities class actions at the class certification stage.⁴² In other words, he moved the law in his desired direction, while adopting a posture of restraint, especially as compared to Justices Thomas, Scalia, and Alito, who would have overruled *Basic*.⁴³

In sum, in the first decade of his tenure as Chief Justice, Roberts—like the Court he leads—has had a decidedly pro-business record, as reflected in his votes in support of the Chamber of Commerce's position in merits cases. The consequences of this pro-business shift have been

37. DONNELLY, *supra* note 9, at 9. He also wrote a number of concurrences and dissents. *See id.* at 9–11 (discussing those opinions).

38. *Id.* at 11.

39. 134 S. Ct. 2398 (2014).

40. The Court's 1988 decision in *Basic Inc. v. Levinson* had allowed investors to proceed as a class on the presumption that "anyone who buys or sells the stock at the market price may be considered to have relied on those misstatements." *Halliburton*, 134 S. Ct. at 2405 (discussing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)).

41. Ronald Mann, *Argument Recap: Justices Not Quite Ready to Jettison Landmark Securities Decision, Seeking Middle Ground*, SCOTUSBLOG (Mar. 7, 2014, 4:45 PM), <http://www.scotusblog.com/2014/03/argument-recap-justices-not-quite-ready-to-jettison-landmark-securities-decision-seeking-middle-ground/> [<https://perma.cc/2Q4D-FKAY>].

42. DONNELLY, *supra* note 9, at 12.

43. *Halliburton*, 134 S. Ct. at 2418 (Thomas, J., concurring) ("Logic, economic realities, and our subsequent jurisprudence have undermined the foundations of the *Basic* presumption, and *stare decisis* cannot prop up the façade that remains. *Basic* should be overruled.").

significant in a number of different ways, but perhaps the most significant is the extent to which it has made it more difficult for individuals to hold businesses accountable when they violate the law, as I discuss in the next Part.

II. THE PRO-BUSINESS COURT: WHAT IT MEANS

A. Class Actions

When the Framers drafted the Constitution, they departed from the Articles of Confederation that then governed the fledging nation in a number of respects. One of the most significant of these was to establish the judiciary as an independent, co-equal branch of government.⁴⁴ In doing so, the Framers sought to ensure that federal courts would have the power to protect individual rights secured by federal law.⁴⁵ Well-steeped in English common law, the Framers strongly believed that for each legal right there is a legal remedy⁴⁶—and the new federal courts were to be the forum in which injured parties could seek redress when their legal rights were violated.⁴⁷

Federal Rule of Civil Procedure 23, which allows a representative party to sue on behalf of a class of similarly situated claimants where certain specified conditions are met,⁴⁸ was designed, in part, to help ensure that the Framers' vision for the federal courts was realized. By ensuring that injured parties can seek redress in the federal courts even when their individual claims are too small to make individual litigation economically feasible, the Rule helps ensure that the federal courts really are a forum in which all legal wrongs can be remedied.⁴⁹

44. DAVID H. GANS, CONSTITUTIONAL ACCOUNTABILITY CTR., THE KEYSTONE OF THE ARCH: THE TEXT AND HISTORY OF ARTICLE III AND THE CONSTITUTION'S PROMISE OF ACCESS TO COURTS 5 (2016), http://theconstitution.org/sites/default/files/Keystone_of_the_Arch.pdf [<https://perma.cc/F4PV-5G6K>].

45. *Id.* at 7.

46. *Id.* at 13–14; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

47. GANS, *supra* note 44, at 14.

48. FED. R. CIV. P. 23 (requiring numerosity, commonality, typicality, and adequate representation as threshold prerequisites for any class).

49. *See, e.g.*, John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 336–37 (2005) (explaining that the rule was amended in 1966 to “create a procedural vehicle capable of . . . ‘enabling small people with small claims to vindicate their rights when they could not otherwise do so’”) (quoting Memorandum from the Advisory Comm. on Civil Rules to the Chairman and Members of the Standing Comm. on Practice and Procedure of the Judicial Conference of the U.S.,

Despite the important role served by the Rule 23 class action, the Roberts Court has, on the whole, made it more difficult to bring class actions. Perhaps the most significant example of the Roberts Court's antipathy to the class action device is *Wal-Mart Stores, Inc. v. Duke*,⁵⁰ in which the Court held, 5–4, that female employees who alleged they had been the victims of sex discrimination could not bring a class action.⁵¹ According to the Court, the plaintiffs did not satisfy the “commonality” requirement of the Federal Rules of Civil Procedure, that is, the requirement that there be “questions of law or fact common to the class.”⁵² As the Court explained:

[T]he only corporate policy that the plaintiffs' evidence convincingly establishes is [the employer's] “policy” of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.⁵³

In her dissent, Justice Ginsburg disagreed sharply with the Court's majority, noting that the Court gave “no credence to the key dispute common to the class: whether Wal-Mart's discretionary pay and promotion policies are discriminatory.”⁵⁴ She also discussed workplace realities that the Court's majority ignored, arguing that the Court's decision would prevent women from redressing “[t]he practice of delegating to supervisors large discretion [that] . . . has long been known to have the potential to produce disparate effects,” and that the “risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.”⁵⁵

Two years later, the Court issued another class action decision that made it more difficult for individuals to bring class actions. In *Comcast*

Summary Statement of the Civil Rules Amendments Recommended for Adoption 7 (June 10, 1965), http://www.uscourts.gov/sites/default/files/fr_import/CV06-1965.pdf [<https://perma.cc/6TTG-M72S>].

50. 564 U.S. 338 (2011).

51. *Id.*

52. *Id.* at 349 (quoting FED. R. CIV. P. 23(a)(2)). The Court also held that another aspect of plaintiffs' claims was improperly certified under a different provision of Rule 23, *id.* at 360, but the dissenters agreed with the majority on that point. *Id.* at 367–68 (Ginsberg, J., concurring in part and dissenting in part).

53. *Id.* at 355.

54. *Id.* at 374 (Ginsburg, J., concurring in part and dissenting in part).

55. *Id.* at 372–73 (Ginsburg, J., concurring in part and dissenting in part).

Corp. v. Behrend,⁵⁶ the Court held, again 5–4, that current and former Comcast subscribers could not seek damages from Comcast for alleged violations of the federal antitrust laws because they had not shown that damages could be measured on a classwide basis.⁵⁷ The dissenters on the Court not only disagreed with the Court on the merits,⁵⁸ but again faulted the majority for having decided the case at all.⁵⁹

To be sure, there have been a couple of class action decisions that did not go business's way. In *Campbell-Ewald v. Gomez*,⁶⁰ the Court held, 6–3, that a defendant cannot moot a plaintiff's case by making an offer of judgment that the plaintiff does not accept.⁶¹ That same term, in *Tyson Foods, Inc. v. Bouaphakeo*,⁶² the Court held, 6–2, that plaintiffs can use "a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records."⁶³ While both cases were losses for the business community, they reflect as much as anything else *overreach* by the business community. In *Tyson Foods*, for example, the Court needed only to rely on a long-standing precedent to reach its decision.⁶⁴

In sum, while not every decision by the Roberts Court has been pro-business, there have been enough significant decisions that have been that it is now more difficult to bring a class action than it used to

56. 133 S. Ct. 1426 (2013).

57. *Id.*

58. *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting) ("Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals.").

59. *Id.* at 1435 (Ginsburg & Breyer, JJ., dissenting) ("This case comes to the Court infected by our misguided reformulation of the question presented. For that reason alone, we would dismiss the writ of certiorari as improvidently granted."); *id.* at 1437 (Ginsburg & Breyer, JJ., dissenting) ("The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, is a further reason to dismiss the writ as improvidently granted." (citation omitted)).

60. 136 S. Ct. 663 (2016).

61. The Court made explicit, however, that it "need not . . . decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at 672.

62. 136 S. Ct. 1036 (2016).

63. *Id.* at 1047.

64. *Id.* at 1047 ("This Court's decision in *Anderson v. Mt. Clemens*[, 328 U.S. 680 (1946).] explains why [the expert's] sample was permissible in the circumstances of this case.").

be.⁶⁵ And that, in turn, makes it more difficult for individuals to have their day in court and hold businesses accountable when they violate the law.

B. Arbitration

The Constitution guarantees a right to jury trial,⁶⁶ but increasingly in recent years, individuals who have tried to sue to redress injuries they have suffered have found themselves barred from going to court and forced to arbitrate instead. The Federal Arbitration Act, which provides that written arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,”⁶⁷ was passed in 1925 in response to Supreme Court “hostility” toward private arbitration agreements;⁶⁸ nearly a century later, a Court favorably disposed toward such agreements has used the FAA to expand arbitration and limit access to the courts. Although this trend began in the 1980s,⁶⁹ it is one that has continued consistently during the Roberts Court.

Two of the Court’s significant arbitration decisions came in 2010. In *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*,⁷⁰ the Court held, 5–3, that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”⁷¹ In other words, the Court made it more difficult for individuals to bring class claims in an arbitral forum. According to Justice Ginsburg, the Court’s decision was wrong, “allowing [the defendant] essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in

65. See, e.g., Georgene Vairo, Symposium, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477, 479 (2014) (“It is no secret that the United States Supreme Court has made obtaining class certification and group dispute resolution more difficult.”); Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 594 (2012) (“One reason is that class actions seeking group-based civil rights remedies may be difficult to bring. This is no surprise to observers of the Supreme Court’s recent class action decisions . . .”).

66. U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

67. 9 U.S.C. § 2 (2012).

68. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3059–60 (2015) (citations omitted).

69. See *id.* at 3061 (“[T]he Supreme Court abandoned its prior skepticism regarding arbitration of federal claims and held that arbitration agreements could be enforced with respect to a broad range of federal statutes . . .”).

70. 559 U.S. 662 (2010).

71. *Id.* at 684.

place of the arbitrators' judgment, [the Supreme Court's] *de novo* determination."⁷² She also recognized the real-world consequences the decision would have. As Justice Ginsburg explained: "When adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights."⁷³

In *Rent-A-Center, West, Inc. v. Jackson*,⁷⁴ the Court held, 5-4, that a litigant who challenges the validity of an arbitration agreement cannot bring that challenge in court unless he has objected to the specific line in the arbitration agreement that purports to assign such challenges to the arbitrator.⁷⁵ In other words, even if an individual believes an arbitration agreement is invalid under state law, he must arbitrate that challenge. Thus, the result of the Court's decision was to make it more difficult for individuals to bring all kinds of claims in court where they have signed an arbitration agreement, even if that agreement is invalid. What made the Court's decision all the more stunning was that, as Justice Stevens pointed out in dissent, neither party "urged [the Court] to adopt the rule the Court does today."⁷⁶

The next year the Court doubled down on its opposition to class claims in arbitral forums, holding, again 5-4, that a state could not "condition[] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."⁷⁷ Thus, California's rule requiring that classwide arbitration procedures be available was preempted by the FAA.⁷⁸ As Justice Breyer explained in dissent, class arbitration was not only "consistent with the use of arbitration," it was also a "form of arbitration that is well known in California and followed elsewhere."⁷⁹ He also made the same point about the importance of class proceedings that Justice Ginsburg did: "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate."⁸⁰

Finally, in 2013, the Court again made clear that, in its view, there was no exception to its staunch opposition to class claims in arbitral

72. *Id.* at 693 (Ginsburg, J., dissenting).

73. *Id.* at 699 (Ginsburg, J., dissenting); *see also id.* (Ginsburg, J., dissenting) ("[D]isallowance of class proceedings severely shrinks the dimensions of the case or controversy a claimant can mount . . .").

74. 561 U.S. 63 (2010).

75. *Id.*

76. *Id.* at 76 (Stevens, J., dissenting).

77. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

78. *Id.* at 352.

79. *Id.* at 361 (Breyer, J., dissenting).

80. *Id.* at 365 (Breyer, J., dissenting).

forums. In *American Express Co. v. Italian Colors Restaurant*,⁸¹ the Court held, yet again 5–3, that a contractual waiver of class arbitration was enforceable even if the plaintiff’s cost of individually arbitrating his claim was greater than the maximum amount he could hope to recover.⁸² According to the majority, “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”⁸³

As Justice Kagan explained in dissent, “if the [contract’s] arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law.”⁸⁴ She then gave the Court’s majority credit for not hiding its attitude about that result: “here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.”⁸⁵ She went on: “[t]o a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”⁸⁶

In short, during the first decade of the Roberts Court, the Court—with Chief Justice Roberts on board every step of the way—has consistently made it more likely that individuals will have to arbitrate rather than have their day in court, and it has limited the ability of injured parties forced into arbitral parties to vindicate their rights there.

What does this trend mean? While a full discussion of the consequences of this shift is beyond the scope of this Article, there is a rich literature that describes the numerous ways in which this shift has harmed injured individuals, as well as the legal system. David Schwartz, for example, has written that “displacing adjudication through pre-dispute arbitration clauses systematically reduces the legal liability of corporate defendants.”⁸⁷ And Maria Glover has explained that by “handing this quasi-lawmaking power to private parties and by reducing substantive statutory rights to mere formalities—to little more than empty rights—the Court has eroded the substantive law itself.”⁸⁸

81. 133 S. Ct. 2304 (2013).

82. *Id.*

83. *Id.* at 2311.

84. *Id.* at 2313 (Kagan, J., dissenting).

85. *Id.* (Kagan, J., dissenting).

86. *Id.* at 2320 (Kagan, J., dissenting).

87. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 (1997).

88. Glover, *supra* note 68, at 3059.

C. Preemption

Another area in which the Roberts Court, while not always pro-business, has markedly shifted the law in a pro-business direction is preemption. The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”⁸⁹ It is well-established that where state law conflicts with federal law, that state law is preempted by the federal law.⁹⁰ There has been considerable controversy, however, over when and how courts should determine whether a state law is preempted by federal law.

One of the biggest Chamber losses before the Roberts Court was in *Wyeth v. Levine*,⁹¹ a case about a plaintiff’s state-law claim that the warning label of a drug she had received was insufficient.⁹² The Court, 6–3, held that the plaintiff’s state law claim was not preempted.⁹³ According to the Court’s majority (Justice Kennedy joined the Court’s more progressive members, and Justice Thomas concurred in the judgment), the “manufacturer bears responsibility for the content of its label at all times” because nothing in federal law prohibited manufacturers from strengthening their warning labels even before receiving FDA approval.⁹⁴ In reaching this result, the majority applied a presumption against preemption,⁹⁵ and also rejected the notion that state consumer laws posed an obstacle to the federal regulatory scheme.⁹⁶ As the Court explained, “the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation.”⁹⁷ To the dissenters, the Court’s view impermissibly sent mixed messages to businesses like Wyeth: “The FDA told Wyeth that [the manufacturer] label renders its use ‘safe.’ But the State of Vermont, through its tort law, said: ‘Not so.’”⁹⁸

89. U.S. CONST. art. VI, cl. 2.

90. See, e.g., *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (“Where state and federal law ‘directly conflict,’ state law must give way.” (citation omitted)).

91. 555 U.S. 555 (2009).

92. *Id.*

93. *Id.* at 581.

94. *Id.* at 570–71.

95. *Id.* at 565 n.3.

96. *Id.* at 573.

97. *Id.* at 579.

98. *Id.* at 628 (Alito, J., dissenting).

Two years later, the Court took a different path on preemption. In *PLIVA, Inc. v. Mensing*,⁹⁹ the Court, this time 5–4, held that the injured plaintiffs’ failure-to-warn claims were preempted by federal drug laws.¹⁰⁰ According to the Court’s majority, even though *Wyeth* held that federal drug laws did not preempt state consumer safety laws when it came to brand-name drugs, the same did not hold true with respect to generic drugs; rather, with respect to generics, so long as the manufacturer complied with federal law, an injured party could not sue under state tort law.¹⁰¹ In the Court’s view, federal law limits a generic drug manufacturer’s authority to unilaterally change its label to address newly discovered risks.¹⁰²

But as the dissenters pointed out, even though generic drug manufacturers cannot unilaterally change their labels, they can—and must—approach the FDA to seek to revise a drug’s label when they have reasonable evidence of a serious problem with the drug.¹⁰³ Thus, “federal law affords generic manufacturers a mechanism for attempting to comply with their state-law duties to warn, . . . [and] does not categorically pre-empt state-law failure-to-warn claims against generic manufacturers.”¹⁰⁴ In dissent, Justice Sotomayor also noted the “absurd consequences” of the Court’s ruling—namely, that a consumer’s rights to sue a drug manufacturer under state law over an inadequately labeled drug would turn on whether the pharmacist filled it with a brand name or a generic.¹⁰⁵

Two years later, the Court’s conservative majority again made it more difficult for individuals to bring state law claims for injuries caused by a generic drug. In that case, the plaintiff suffered rare (but known) side-effects of a generic drug she was taking for shoulder pain: the drug “caused two-thirds of her skin to slough off, damag[ing] her lungs and esophagus and render[ing] her legally blind.”¹⁰⁶ She was

99. 564 U.S. 604 (2011).

100. Notably, the Chamber did not participate in this case. *Summary of PLIVA, Inc. v. Mensing*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/pliva-inc-v-mensing/> [<https://perma.cc/YVH4-SN4R>] (last visited Feb. 18, 2017).

101. *See PLIVA*, 564 U.S. at 626 (“It is beyond dispute that the federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers.”).

102. *Id.* at 613–15.

103. *Id.* at 631–32 (Sotomayor, J., dissenting).

104. *Id.* at 645 (Sotomayor, J., dissenting).

105. *Id.* at 643 (Sotomayor, J., dissenting).

106. Adam Liptak, *Justices Explore Fine Line on Generic Drug Injuries*, N.Y. TIMES (Mar. 19, 2013), <http://www.nytimes.com/2013/03/20/business/>

awarded a \$21 million verdict by a New Hampshire jury.¹⁰⁷ According to the Court's majority, *PLIVA* controlled, and the plaintiff's claim was preempted.¹⁰⁸ In dissent, Justice Sotomayor explained why the Court's decision was at odds with precedent and noted that "the Court has left a seriously injured consumer without any remedy despite Congress' explicit efforts to preserve state common-law liability."¹⁰⁹

Thus, as others have noted, "by siding with the business community, Chief Justice Roberts and his conservative colleagues closed the courthouse doors to certain patients who have been severely injured by generic drugs."¹¹⁰ And several members of the Court, including the Chief Justice, would have "gone even further, eliminating these state-law claims even in the case of brand-name drugs."¹¹¹

III. LOOKING AHEAD

Ever since the 2016 election results came in, there has been a lot of talk about what those results will mean for the Supreme Court. In the short term, the answer seems clear: a return to the Court that existed before Justice Antonin Scalia passed away, namely, one that is very conservative, but in which some progressive victories are possible.¹¹² What that means with respect to the Court's business docket, in particular, is that despite Donald Trump's populist campaign rhetoric,¹¹³ the Supreme Court will likely remain decidedly pro-business¹¹⁴—to the detriment of consumers and employees who are seeking to ensure that businesses comply with the law.

justices-explore-fine-line-on-generic-drug-injuries.html [https://perma.cc/9BEX-J4EW].

107. *Id.*

108. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2470 (2013).

109. *Id.* at 2496 (Sotomayor, J., dissenting). Justice Breyer wrote a separate dissent, explaining why he could not "give special weight to the FDA's views." *Id.* at 2481 (Breyer, J., dissenting).

110. DONNELLY, *supra* note 9, at 17–18.

111. *Id.* at 18.

112. See Jonathan H. Adler, *Business and the Roberts Court Without Scalia*, WASH. POST (Sept. 21, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/21/business-and-the-roberts-court-without-scalia/> [https://perma.cc/WMV7-8BA8] (describing the Supreme Court's future concerning business decisions without Justice Scalia on the bench).

113. See, e.g., Geoff Dyer et al., *Trump and Clinton Focus Frantic Final Push on Battleground States*, FIN. TIMES (Nov. 6, 2016), <http://www.ft.com/content/1d69272a-a446-11e6-8898-79a99e2a4de6> [https://perma.cc/R5CN-UGBD] (discussing Trump's campaign rhetoric).

114. Cf. JUDITH E. SCHAEFFER, CONSTITUTIONAL ACCOUNTABILITY CTR., SUPREME COURT NOMINEE NEIL GORSUCH: EXPECTED BY BIG BUSINESS

Notably, the Supreme Court has not had to wait long before returning to issues like class actions and arbitration. Currently on the Court's merits docket, for example, is *Microsoft Corp. v. Baker*.¹¹⁵ Although the Court granted cert in the case in January 2016,¹¹⁶ the Court did not hold oral argument until March 2017. The question in the case is "whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice."¹¹⁷ Although the Court had not yet issued an opinion in this case as of the time this Article went to print, post-argument commentary suggests that this case is likely to represent a win for business.¹¹⁸

To be sure, this case will not decide issues at the heart of the Rule 23 class action, but it is nonetheless important; the Chamber of Commerce urged the Court to hear the case, explaining that "the Ninth Circuit has allowed class-action plaintiffs to take immediate appeals of orders denying class certification even in cases where the requirements for interlocutory appeals . . . have not been met. The Chamber and its members have an interest in seeing this practice end."¹¹⁹ But as others have argued in merits briefs before the Court, the Supreme Court's own precedents "ensure that, when a district court erroneously denies class certification, the court of appeals is able to review and reverse that denial, regardless of whether the passage of time, acts of defendants, or impracticalities of litigating small claims lead to the final termination of the named plaintiffs' individual claims."¹²⁰

TO BE ANOTHER RELIABLE VOTE ON THE ROBERTS COURT 1 (2017), <http://theconstitution.org/sites/default/files/CAC-Gorsuch-And-Business.pdf> [<https://perma.cc/XNG9-LN8G>] (explaining that "[a]dvocates for business interests . . . proclaim[ed] the Gorsuch nomination a big win for corporate America").

115. *Summary of Microsoft Corp. v. Baker*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/microsoft-corp-v-baker/> [<https://perma.cc/37RK-DA3N>] (last visited Feb. 19, 2017).

116. *Id.*

117. Petition for Writ of Certiorari at i, *Microsoft Corp. v. Baker*, 136 S. Ct. 890 (2015) (No. 15-457).

118. Ronald Mann, *Argument Analysis: Justices Dubious about Free Review of Decisions Denying Class Certification*, SCOTUSBLOG (Mar. 21, 2017), <http://www.scotusblog.com/2017/03/argument-analysis-justices-dubious-free-review-decisions-denying-class-certification/> [<https://perma.cc/D2RD-CZ7J>].

119. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 2, *Microsoft Corp. v. Baker*, 136 S. Ct. 890 (No. 15-457) (Nov. 12, 2015).

120. Brief of Public Citizen, Inc. as Amicus Curiae in Support of Respondents at 3, *Microsoft v. Baker*, 136 S. Ct. 890 (2016) (No. 15-457). *See also id.* ("The Court's precedents help make certain that a district court's erroneous denial of class certification does not irrevocably deprive the courts of the efficiency

The Supreme Court also recently decided to hear three cases, all of which raise the question whether an employer can force an employee to resolve employment-related disputes through individual arbitration and waive class proceedings. As two courts of appeals have concluded, such agreements violate the National Labor Relations Act (NLRA),¹²¹ which provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,”¹²² and then makes it an “unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the” aforementioned rights.¹²³ According to these courts, the Federal Arbitration Act (FAA) does not preempt the NLRA because of the FAA’s savings clause, which, as the Supreme Court has recognized, “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses.’”¹²⁴ As these courts explain, illegality is such a defense.¹²⁵ One court of appeals came out the other way, relying on a prior opinion of that court which held that the “‘use of class action procedures . . . is not a substantive right’” under the NLRA.¹²⁶ It is too early to know what the Supreme Court will do, but if it holds that these agreements are valid, it will make it that much more difficult for employees to hold their employers accountable if they try to violate the law.

Finally, there will no doubt be other significant issues affecting business on the Court’s docket in the near term. One of the biggest may be the continuing validity and scope of doctrines of administrative

and economy of scale served by the class-action device or keep plaintiffs with meritorious claims from being able to join together to vindicate their rights.”).

121. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (holding that an employer who requires its employees to sign an agreement that precludes them from bringing a legal claim in any forum regarding working conditions violates the National Labor Relations Act); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (holding that requiring employees to bring wage-and-hour claims through individual arbitration violated the National Labor Relations Act and the Federal Arbitration Act).

122. 29 U.S.C. § 157 (2012).

123. *Id.* § 158(a)(1).

124. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

125. *Morris*, 834 F.3d at 988 (“[B]ecause a substantive federal right is waived by the contract . . . it is accurate to characterize its terms as ‘illegal.’”); *Lewis*, 823 F.3d at 1159 (“Illegality is a standard contract defense contemplated by the FAA’s saving clause.”).

126. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015) (quoting *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013)).

deference, which provide that where statutes are ambiguous, courts should defer to reasonable interpretations of the agencies charged with interpreting them.¹²⁷ A related doctrine provides that courts should also defer to agencies' reasonable construction of their own regulations.¹²⁸

Conservatives have long questioned these doctrines. Chief Justice John Roberts has been at the forefront of these efforts, making clear his disdain for the administrative state and *Chevron*. For example, dissenting in a case in which the majority applied *Chevron* deference, the Chief Justice wrote that “[t]he Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities. . . . ‘[T]he administrative state with its reams of regulations would leave them rubbing their eyes.’”¹²⁹ In that opinion, Roberts made clear his distaste for *Chevron* deference, noting that “*Chevron* is a powerful weapon in an agency’s regulatory arsenal” because it means agency interpretations often have “the full force and effect of law.”¹³⁰ He went on: “It would be a bit much to describe the result as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”¹³¹ To the Chief Justice (and Justices Kennedy and Alito who joined his dissent), it was inappropriate to accord the agency interpretation at issue in that case *Chevron* deference. According to Justice Scalia, who wrote for the Court, the Chief Justice’s approach would have resulted in a “massive revision of [the Court’s] *Chevron* jurisprudence.”¹³²

More recently, in *King v. Burwell*,¹³³ Chief Justice Roberts similarly took aim at *Chevron*. In that case, Roberts acknowledged that courts

127. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

128. *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997).

129. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) and *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)); see also *id.* at 1879 (noting the “hundreds of federal agencies poking into every nook and cranny of daily life”).

130. *Id.* at 1879.

131. *Id.*

132. *Id.* at 1874. Justice Thomas has also questioned *Chevron* deference. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (stating that the EPA’s “request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes”).

133. 135 S. Ct. 2480 (2015).

will normally apply *Chevron* when considering an agency's interpretation of a statute.¹³⁴ But, Roberts cautioned, “[i]n extraordinary cases . . . there may be reason to hesitate before [applying *Chevron*].”¹³⁵ According to the Court, *King* was “one of those cases” because the question at issue was one “of deep ‘economic and political significance’ that is central to [the] statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”¹³⁶ This view, if applied in the future, could create a major hole in the long-standing doctrine of *Chevron* deference.¹³⁷ It's not difficult to imagine the Court soon taking up cases that could give it the opportunity to further define these doctrines, which in turn will affect how readily agencies can regulate business.¹³⁸

CONCLUSION

Over ten years ago, there was debate about whether John Roberts would be a pro-business Justice. While that debate will no doubt continue, one thing is clear: it's been a good decade for business at the Roberts Court. And, unfortunately, a good decade for business has meant a bad decade for consumers and employees who want to be able to hold businesses accountable in court when they violate the law. While no one can say for certain what the next decade will hold, it's likely to be more of the same, at least in the near term.

134. *Id.* at 2488 (“When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in *Chevron* . . .”).

135. *Id.* at 2488 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

136. *Id.* at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

137. Conservative Justices on the Court had begun questioning *Auer* deference, as well. *See, e.g.*, Adam White, *Scalia and Chevron: Not Drawing Lines, but Resolving Tensions*, YALE J. REG.: NOTICE & COMMENT (Feb. 23, 2016), <http://yalejreg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/> [<https://perma.cc/JK2B-3UYA>] (noting that “recent years had seen Justice Scalia expressing serious doubts about [*Auer* deference]”).

138. Significantly, the Court’s newest member, Justice Neil Gorsuch, criticized *Chevron* while he was serving on the court of appeals, “suggest[ing] that [it is] contrary to the Constitution’s principle of separation of powers.” SCHAEFFER, *supra* note 114, at 5; *see also* DAVID H. GANS, CONSTITUTIONAL ACCOUNTABILITY CTR., THE SELECTIVE ORIGINALISM OF JUDGE NEIL GORSUCH: A REVIEW OF THE RECORD 16 (2017), <http://theusconstitution.org/sites/default/files/briefs/CAC-Selective-Originalism-of-Gorsuch.pdf> [<https://perma.cc/GH2V-R9C5>] (explaining that “Gorsuch’s claim that [*Chevron*] rests on an unconstitutional delegation of legislative and judicial power to agencies is wrong”).