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# What Do We Mean By a “Pro-Business” Court—And Should We Care?

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# WHAT DO WE MEAN BY A “PRO-BUSINESS” COURT—AND SHOULD WE CARE?

*James R. Copland*<sup>†</sup>

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## INTRODUCTION

A consistent theme in recent years in Supreme Court reporting—at least that of the “mainstream media” that skews to the left side of the American political debate<sup>1</sup>—has been the notion that the Roberts Court<sup>2</sup> is unusually “pro business.”<sup>3</sup> For example, Adam Liptak, the

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1. See Tim Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 4 Q.J. ECON. 1191, 1191 (2005) (finding a “strong liberal bias” across most major media news reporting, with only the *Washington Times* and *Fox News’ Special Report* more conservative than the median member of Congress, when measured among twenty media outlets studied).
2. For these purposes, the “Roberts Court” is defined as the era since John Roberts replaced William Rehnquist as Chief Justice of the United States.
3. See, e.g., Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), <https://www.nytimes.com/2008/03/16/magazine/16supreme-t.html> [<https://perma.cc/BA4H-QHWH>] (“Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years.”); Alicia Mundy & Shirley S. Wang, *In Drug Case, Justices to Weigh*

lead Supreme Court reporter for *The New York Times*, reported in 2013:

The business docket reflects something truly distinctive about the court led by Chief Justice John G. Roberts Jr. While the current court's decisions, over all, are only slightly more conservative than those from the courts led by Chief Justices Warren E. Burger and William H. Rehnquist, . . . its business rulings are another matter. They have been, a new study finds, far friendlier to business than those of any court since at least World War II.<sup>4</sup>

Liptak's story was based on an academic study by Lee Epstein, William Landes, and Richard Posner published in the *Minnesota Law Review*.<sup>5</sup> The Epstein, Landes, and Posner study examined all Supreme Court cases from 1946 through 2011.<sup>6</sup> Rather than coding specific cases as "liberal" or "conservative," the study principally examined cases that had one and only one business party and looked at case outcomes.<sup>7</sup> In addition to concluding that the Roberts Court is friendlier to business interests than its predecessors,<sup>8</sup> the study also concluded that Chief Justice John Roberts and Justice Samuel Alito are likelier to vote in favor of business interests than any other justices to have served on the Court during the past sixty-five years.<sup>9</sup>

In this Article, I advance three main observations about these claims. In Part I, I argue that there is nothing inherently wrong about the Supreme Court being pro-business, at least to the extent that it is not favoring "crony capitalism" or the fruits of big-business lobbying

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*Right to Sue*, WALL ST. J. (Oct. 27, 2008), <https://www.wsj.com/articles/SB122506300017470355> [<https://perma.cc/V2PC-BJ6F>] ("The business lobby isn't hiding its anticipation that the current Supreme Court, one of the most pro-business ones in 50 years, will rule in Wyeth's favor."); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <https://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-redefining-this-supreme-court.html> [<https://perma.cc/WV6J-PGA2>] ("[The Roberts Court] ha[s] been, a new study finds, far friendlier to business than those of any court since at least World War II.").

4. Liptak, *supra* note 3.
5. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).
6. *Id.* at 1434.
7. In addition to the principal "Business Litigant Dataset," the authors also constructed a "Business versus Business Dataset" with two business litigants, then compared outcomes for "big business" and "small business" litigants. *Id.*
8. *See id.* at 1456 tbl.8 (displaying the percent of pro-business votes under the Vinson, Warren, Burger, Rehnquist, and Roberts Courts).
9. *See id.* at 1451–52 tbl.7 (ranking Supreme Court justices from 1946–2011 based on their fraction of votes for pro-business litigants).

that generate barriers to entry, but rather reaching decisions that are generally applicable and pro-free-market, expanding the economic opportunity set for Americans over time. In Part II, I outline some of the methodological problems underlying the evidentiary claim that the Roberts Court is, in fact, pro-business and give a summary evaluation of the Court's recent docket with respect to business. Finally, in Part III, I question the premise and ask if we are placing undue emphasis on the Supreme Court, when so much government enforcement power over business today exists essentially outside of judicial review.

### I. WHAT'S WRONG WITH A PRO-BUSINESS COURT?

*If I should ask you what kind of economic order the Founding Fathers contemplated when they established the constitutional order, you would doubtless reply capitalism or a market economy. If I addressed that question to a similar number of professional American historians, the answer would be the same, the difference being that most of you would add "Thank God" and most of them would add "unfortunately."*

—Forrest McDonald, *Address to the Economic Club of Indianapolis, 2006*<sup>10</sup>

*[It's] the economy, stupid.*

—Bill Clinton Campaign Board, 1992<sup>11</sup>

*[T]he chief business of the American people is business.*

—President Calvin Coolidge, *Address to the Society of American Newspaper Editors, 1925*<sup>12</sup>

To begin, I want to make the normative claim that a pro-business orientation for the Supreme Court—at least as I think pro-business should be rightly construed—is something to be applauded, not lamented. That I should take this normative stance is perhaps unsurprising,

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10. Forrest McDonald, Professor of History, Univ. of Ala., *The Founding Fathers and the Economic Order* (Apr. 19, 2006) (transcript available online at <http://oll.libertyfund.org/pages/forrest-mcdonald-the-founding-fathers-and-the-economic-order> [<https://perma.cc/THN5-Q6ZE>]).
  11. Michael Kelly, *The 1992 Campaign: The Democrats—Clinton and Bush Compete to be Champion of Change; Democrat Fights Perceptions of Bush Gain*, N.Y. TIMES (Oct. 31, 1992), <https://www.nytimes.com/1992/10/31/us/1992-campaign-democrats-clinton-bush-compete-be-champion-change-democrat-fights.html> [<https://perma.cc/5NRS-KYAR>].
  12. Calvin Coolidge, President of the U.S., *Address to the American Society of Newspaper Editors* (Jan. 17, 1925) (transcript available online at <http://www.presidency.ucsb.edu/ws/?pid=24180> [<https://perma.cc/85KF-6VR6>]).

given that I have worked for over a decade as a scholar at a think tank with a stated mission “to develop and disseminate new ideas that foster greater economic choice and individual responsibility.”<sup>13</sup>

But this normative posture should hardly be controversial in light of our national history: the interests of business clearly underlie the American experiment in self-government itself. When the Declaration of Independence lists affronts to the colonies in Parliamentary laws affirmed by the crown, it lists—after only the quartering of troops and trials exonerating the military execution of colonists—trade and taxation; and among the powers claimed for the declared independent states—after only matters of war, peace, and treaty—is “establish[ing] Commerce.”<sup>14</sup>

Similarly, the Constitution of the United States centrally affirms not only the right to self-government and the need for a stronger national government, but also limitations on that government oriented around property and contractual rights. The substantive powers of Congress laid out in Article I, Section 8 lay out in sequential order taxation, debt, commerce, bankruptcy, money, counterfeiting, infrastructure, and intellectual property—before turning to matters of adjudicatory tribunals, war, and military matters.<sup>15</sup> Article I, Section 9 lays out specific substantive limitations on federal taxation, commercial regulations, and appropriations.<sup>16</sup> Article I, Section 10 limits states’ ability to levy taxes and impair contracts.<sup>17</sup> Article VI consolidates in the federal government state governments’ debts.<sup>18</sup> The Fifth Amendment to the Constitution, proposed through a joint resolution of Congress in 1789 and ratified in 1791, prohibits the government from depriving persons of property without due process of law or from taking “private property . . . without just compensation.”<sup>19</sup> And in keeping with the pro-business focus of the early republic, the economic plans laid out by the first U.S. Treasury Secretary, Alexander Hamilton, centered around government debt, taxation, money, banking, and manufacturing. It would be incongruously ahistorical to argue that the American project itself and the U.S. Constitution are not suffused with property and

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13. MANHATTAN INST., <https://www.manhattan-institute.org> [<https://perma.cc/E8BZ-J97R>] (last visited Mar. 4, 2017).

14. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

15. U.S. CONST. art. I, § 8.

16. U.S. CONST. art. I, § 9.

17. U.S. CONST. art. I, § 10.

18. U.S. CONST. art. VI.

19. U.S. CONST. amend. V.

business interests—just as anti-business critics of the document have long lamented.<sup>20</sup>

To be sure, the Fourteenth Amendment to the Constitution “does not enact Mr. Herbert Spencer’s *Social Statics*,”<sup>21</sup> and judges and justices are charged with interpreting laws—not with seeking to maximize business profits or economic utility. Still, courts have at least some discretion in resolving cases of constitutional and statutory interpretation; and it would seem to be consistent with American constitutional design that they resolve these cases—controlling for ideological and methodological tenets of constitutional and statutory interpretation—in keeping with free-market wealth maximization norms. Indeed, common-law judges regularly reached “efficient” legal outcomes, as Posner and Landes themselves helped to chronicle decades ago.<sup>22</sup>

A pro-business outcome and an efficient outcome are not necessarily the same thing. A business litigant may win in litigation—or a business’s lobbying team may win in the policy arena, achieving legislative or regulatory outcomes—yet achieve inefficient outcomes. Most obviously, such results can happen when a business secures some sort of special favoritism from government or barriers to entry reinforcing an existing business’s market power. Indeed, the notion that there is a significant distinction between pro-business and efficiency undercuts the salience of efforts to draw inferences from pro-business “wins.” Cases in which businesses interests are adverse to those of organized labor, for example, may be those in which a pro-business outcome is deemed a pro-market-efficiency outcome. But in other cases, the success of a business litigant is less informative about the ideological and market-conforming valence of a decision, as I discuss in more detail in Part II.

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20. See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 73–151 (1913) (detailing the economic interests at issue at the Constitutional Convention). Beard’s simplistic neo-Marxist interpretation got many of the facts and much of the analysis wrong; see generally FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958) (finding that an economic interpretation of the constitution does not work), but it is unambiguously the case that the Founding Fathers sought to establish a pro-business or free-market economic order. See McDonald, *supra* note 10 (noting that some of the Founding Fathers used the freedoms of the Constitution and its protections to create a capitalistic, free-market economy).

21. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

22. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 98–102 (7th ed. 2007) (discussing the economic underpinnings of contract jurisprudence); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) (using economic theory and statistics to analyze the criminal justice system).

Before turning to a discussion of the methodological difficulties in assessing whether the Roberts Court (or any Supreme Court) is pro-business, I would like to emphasize that the normative case for efficient, pro-business outcomes rests not only on ideology or history, but also empirically demonstrable current trends that mitigate against “anti-business” policies or case outcomes. Notably, U.S. productivity growth has slowed down over the last forty-five years—and even more in the current business cycle, in which productivity growth and hours worked have trended well below other business cycles in the post-WWII period.<sup>23</sup> Alongside these trends, the number of publicly traded companies in the United States has fallen dramatically, down from 8,025 in 1996 to 4,102 in 2012.<sup>24</sup> The number of U.S. public-company listings in 2012 were fourteen percent below the number in 1975; non-U.S. listings increased 219% over the same period.<sup>25</sup> Smaller businesses have found it increasingly difficult to list publicly;<sup>26</sup> the number of U.S. initial public offerings valued at less than \$75 million fell from 168 in 1997 to seven in 2012.<sup>27</sup> Although there is disagreement about the underlying causes of these trends, there is little doubt that they have a significant effect on the broader economy.<sup>28</sup> And in light of these trends, it would be troubling if the Supreme Court were lurching in an anti-business direction.

## II. METHODOLOGICAL DIFFICULTIES IN ASSESSING WHETHER THE ROBERTS COURT IS PRO-BUSINESS

Empirically assessing judicial behavior is hard. To begin with, it is often hard to determine what counts as a “win” in a legal case. Of course, one party wins and the other loses. But a legal win may result

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23. See Shawn Sprague, *Below Trend: The U.S. Productivity Slowdown*, U.S. BUREAU OF LAB. STATS. (Jan. 2017), <https://www.bls.gov/opub/btn/volume-6/below-trend-the-us-productivity-slowdown-since-the-great-recession.htm> [<https://perma.cc/6YYC-DY58>] (studying labor productivity and the business cycle in the post-World War II era).

24. See Craig Doidge, G. Andrew Karolyi & René M. Stultz, *The U.S. Listing Gap* 2, 9 (Nat'l Bureau of Econ. Research, Working Paper No. 21181, 2015) (discussing the rise and fall of U.S. listings).

25. *Id.* at 9.

26. *Id.* at 17–20.

27. Paul Rose & Steven Davidoff Solomon, *Where Have All the IPOs Gone?: The Hard Life of the Small IPO*, 6 HARV. BUS. L. REV. 83, 84 (2016).

28. See Jonathan Macey, Opinion, *As IPOs Decline, the Market is Becoming More Elitist*, L.A. TIMES (Jan. 10, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-macey-ipo-democracy-20170110-story.html> [<https://perma.cc/QT2W-NVHS>] (explaining how both initial public offerings and small institutional investors will begin fading in importance).

in an effective loss—and a win in a given piece of litigation may nevertheless entail the creation of a legal rule that disadvantages a litigant's "side" in prospective litigation. Merely counting cases and assessing whether outcomes are "pro-business" or "anti-business" based on whether a business litigant wins the case misses many steps of necessary analysis.

In addition, not all cases are of equal importance. A court may rule for business in nine out of ten cases, but the tenth case's legal rule could be vastly more harmful to business prospects than the nine cases combined. And narrowing the scope of cases to those with a business litigant omits many important cases; cases that do not involve a business litigant may have vastly broader implications for business than most—or all—that do.

Finally, intertemporal comparisons of judging are extremely suspect. Judges resolve disputes, but they do not set the terms of those disputes. Rather, judges react to cases that come before them. If the government is increasing regulations in one period and scaling them back in another, the mix of cases coming before the courts reflects those differences. A Court may hold the exact same legal position but rule in opposite sides in a case in which a business challenges a government action—the only difference being the underlying action itself. Moreover, over time, judges set precedents that establish new baselines for the law. A court in period two may hold the exact same legal position as a court in period one, but the court in period one votes to expand liability and the court in period two not to expand it further. In short, doctrinal direction matters, not the outcomes of given cases.

Given this backdrop, the Epstein, Landes, and Posner study used an innovative methodology and underscored some of the weaknesses in earlier research that had relied on "liberal" and "conservative" scoring of Supreme Court decisions.<sup>29</sup> But the Epstein, Landes, and Posner study's careful critiques of prior classifications in the often-used Spaeth Database only serves to highlight the problems in any such classification—including their own.<sup>30</sup> All empirical studies of judging behavior necessarily make simplifying methodological assumptions, which can lead to results that are incomplete, if not misleading.

#### *A. How Do You Count "Wins?"*

Students of statistical analysis in other disciplines understand that a "win" is not, in and of itself, particularly informative. In sports, the best-quality models tend to look not just—or at all—at wins or losses, which contain much statistical noise and a heavy element of random chance. Team A and Team B may have identical records, but if Team A has a much larger average margin-of-victory, then—controlling for

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29. See Epstein et al., *supra* note 5, at 1437–73.

30. *Id.* at 1435.



other factors such as schedule strength, location of matches, or injuries and lineup changes—it is pretty safe to say that Team A is a better team and is likely to beat Team B in future contests. Similarly, in electoral polling data, if one wants to have an accurate prediction of future outcomes, it is important to look not only at who's up and who's down but projected margins of victory, margins of error, and other indicators of uncertainty—something pundits assessing the 2016 British referendum on the European Union (“Brexit”) and the 2016 U.S. presidential election often ignored.<sup>31</sup>

The same holds true in assessing litigation. The seminal case in U.S. constitutional jurisprudence, *Marbury v. Madison*,<sup>32</sup> highlights the complications in assessing who wins and who loses.<sup>33</sup> A more modern case, involving the newly inaugurated president of the United States, highlights the difficulty in assessing “who wins?” in the business litigation context. In 1986, the upstart United States Football League (USFL)—prompted by the owner of the league's New Jersey Generals, a young Donald Trump<sup>34</sup>—litigated an antitrust action against the venerable National Football League.<sup>35</sup> Although the USFL “won” its case, it was a pyrrhic victory: the jury awarded the USFL only \$1 in damages, trebled.<sup>36</sup> The league promptly dissolved, never playing another down of football.<sup>37</sup>

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31. David Millward, *How the Pollsters Got the US Election Wrong—Just Like Brexit*, TELEGRAPH (Nov. 16, 2016), <http://www.telegraph.co.uk/news/2016/11/09/how-the-pollsters-got-the-us-election-wrong---just-like-brexit/> [<https://perma.cc/UT22-S46C>] (considering polling errors that may explain why pollsters inaccurately predicted the results of the 2016 “Brexit” referendum and 2016 U.S. presidential election).

32. 5 U.S. (1 Cranch) 137 (1803).

33. The Supreme Court found that Mr. Marbury did have a legal right to his commission to office but that Congress had exceeded its constitutional authority in granting the Supreme Court the power to issue Mr. Marbury's sought-for writ. *Id.* at 168, 176. The Court for the first time clearly asserted its power of judicial review over the federal government—while nominally granting a win to the new Jefferson administration. *Id.* at 177.

34. Jeff Horwitz, *Donald Trump Once Sued the NFL as an Owner of a Largely Forgotten Football Team*, BUS. INSIDER (Feb. 8, 2016), <http://www.businessinsider.com/donald-trump-sued-nfl-as-usfl-team-owner-2016-2> [<https://perma.cc/449T-FQJR>].

35. See Richard Hoffer, *USFL Awarded Only \$3 in Antitrust Decision: Jury Finds NFL Guilty on One of Nine Counts*, L.A. TIMES (July 30, 1986), [http://articles.latimes.com/1986-07-30/sports/sp-18643\\_1\\_jury-finds-nfl-guilty](http://articles.latimes.com/1986-07-30/sports/sp-18643_1_jury-finds-nfl-guilty) [<https://perma.cc/YWN5-QQ44>] (discussing the United States Football League's case against the National Football League over antitrust violations).

36. *Id.*

37. Joe Nocera, *Donald Trump's Less-Than-Artful Failure in Pro Football*, N.Y. TIMES (Feb. 19, 2016), <https://www.nytimes.com/2016/02/20/sports/>

In short, a simple assessment of which party in a given piece of litigation “wins” is not always illustrative. The nominal winner of the case, as in the USFL action, may be the effective *loser*. Moreover, even a significant win for a single business litigant in a single case may mask a shift in doctrine that undercuts broader business interests. The new Jefferson administration technically won the case in *Marbury v. Madison*; but the far more significant shift in the law was the Court’s assertion of judicial review, which limited the scope of future actions by the Congress and executive branch.<sup>38</sup>

*B. Equal Weighting of Unequal Cases.*

Any methodology that counts unequal results equally is necessarily skewed. In the investment context, this is easy to see. If an investor loses his money in nine out of ten cases but reaps a hundredfold profit on the tenth investment, he is doing very well indeed. This is indeed very much the business model venture capitalists and other “home run” focused investors use. The converse is also very true. A family might make strong returns on its retirement pension plan, scattered across scores of companies’ securities, but if it loses its house or closely held business—with an equity valued at many multiples of the whole pension portfolio—its overall investment position has worsened, not improved, even if it’s won in the majority of “investment” cases.

The same is true, of course, in business litigation. Although the Supreme Court’s certiorari review ensures that cases considered by the Court have at least some broad import—the Court is likely to turn away low-stakes cases—that does not mean that all the Court’s cases are of *equal* import.<sup>39</sup> The Roberts Court’s decisions in *Bell Atlantic v. Twombly*<sup>40</sup> and *Ashcroft v. Iqbal*,<sup>41</sup> which heightened pleading standards in federal civil litigation, obviously have broad business impacts (though *Iqbal* notably lacks a business litigant—and thus would not be counted in the Epstein, Landes, and Posner methodology). But so too

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football/donald-trumps-less-than-artful-failure-in-pro-football.html [https://perma.cc/7B7Z-BS7E].

38. See, e.g., Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1066 (2009) (“Where the rights of individuals are at stake, the judiciary is within its element and properly exercises the authority of judicial review, even if that means second-guessing or over-ruling the actions of a coordinate branch.”).

39. *Supreme Court Procedures*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [https://perma.cc/T93X-M4X2] (last visited Mar. 27, 2017) (explaining that the Court only grants a *writ of certiorari* where “the case could have national significance”).

40. 550 U.S. 544 (2007).

41. 556 U.S. 662 (2009).

would *Halliburton Co. v. Erica P. John Fund*,<sup>42</sup> a “business on business” case in which the Court left intact the basic system of “fraud-on-the-market” securities class action litigation, and *Wyeth v. Levine*,<sup>43</sup> in which the Court refused to preempt a state-law failure-to-warn claim based on FDA labeling input. Each of these cases has far greater business impact than most considered by the Supreme Court. Considering each equal to all others, in the context of business impact, is the equivalent of weighing Apple and a small-capitalization company equally in measuring the movement of a market index.<sup>44</sup>

### *C. Doctrinal Direction Matters*

As the *Marbury* example illustrates, doctrinal direction matters much more than “wins” or “losses.” Consider a newly recognized, judicially created cause of action that makes it easier for individuals to sue a business. If lower courts improperly apply the doctrine—either narrowing its scope or expanding it—the Supreme Court may grant certiorari to clarify the new doctrine. If the lower courts have been too narrow, the Court’s decision—which represents no change—would generate a false pro-business negative; and if the lower courts have been expanding the doctrine, the Court’s decision—which again represents no change—would generate a false pro-business positive. If even one lower appellate court is issuing rulings that aggressively push the envelope on new avenues for litigation, that expand regulatory authority, or the like—say, for instance, the Ninth Circuit Court of Appeals—then the Supreme Court may be saying “no” but merely reflecting the status quo. In other words, a pro-business reading on the Supreme Court at any given point in time may merely reflect an *anti-business* sentiment on a court of appeals. The same could be true of variations in propensity to grant certiorari on business-related cases: the number of Supreme Court cases that may reflect the Court’s desire to move the law in a pro- or anti-business direction, but it also may reflect the desire of a lower court to do so.

Similarly, different sessions of Congress and different presidencies act differently. Although modern constitutional jurisprudence gives Congress a very wide berth to pass commercial laws,<sup>45</sup> Executive

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42. 134 S. Ct. 2398, 2425 (2014).

43. 555 U.S. 555, 581 (2009).

44. Epstein, Landes, and Posner do attempt to weight for important cases somewhat by separating out a dataset involving only cases reported on by *The New York Times*. Epstein et al., *supra* note 5, at 1434–35. This effort, though laudable, does not eliminate the broader problem.

45. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress can regulate purely intrastate, but noncommercial, activity); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress could regulate under the Commerce Clause if it exerts a substantial economic effect on interstate commerce).

Branch power in this sphere is more cabined.<sup>46</sup> But presidencies may vary over time in their propensity to act through executive actions and orders without clear Congressional authorization, through agency rulemaking, and through enforcement actions. Again, it is not clear if the Supreme Court taking business-related cases reflects a change in *judicial* policy or a change in policies undertaken by the elected branches of government. (The same analysis holds for state-related policy decisions subject to federal review.)

*D. Review of Methodological Concerns*

In summary, I am skeptical of empirical efforts to characterize Supreme Court decision-making—certainly that which makes intertemporal comparisons. Epstein, Landes, and Posner, as well as other scholars undertaking such efforts, have labored mightily to measure objectively that which is not, in my view, objectively measurable. Their erudition is impressive, but I fear that it tends to paint an inaccurate picture. In the final sentence of their article, they make the following claim:

We find that after the appointment of Roberts and Alito, the other three conservative Justices on the Court became more favorable to business, and we conjecture that the three may not have been as interested in business as Roberts and Alito and decided to go along with them to forge a more solid conservative majority across a broad range of issues.<sup>47</sup>

Perhaps—though such strategic voting behavior would seem very odd for Justice Thomas, at a minimum. An alternative explanation—and to me, the far more likely one—is that the qualitative mix of cases changed from one period to the other.<sup>48</sup>

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46. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President did not have the authority to issue an executive order that took possession of and operated national steel mills).

47. Epstein et al., *supra* note 5, at 1473.

48. Elsewhere in their paper, Epstein, Landes, and Posner offer what seems to me a more plausible hypothesis for the pro-business “shift” of the “conservative” justices Scalia, Kennedy, and Thomas in the Roberts Court era—one much more along the lines I posit, i.e., a different case mix before the Court. *Id.* at 1448–70. Under the authors’ methodology, not only do the “conservative” legacy justices become more pro-business in the Roberts Court era, but the “liberal” justices become more anti-business. *Id.* at 1470. The authors posit: “A possible explanation is that the increasing conservatism of the Court resulted in the Court’s taking cases in which the conservative position was weaker than previously, leading to more opposition by liberal Justices and hence to a higher percentage of liberal votes by those Justices in business cases.” *Id.* Setting aside the normative claim that a case is definitionally “weaker” if it draws opposition from Ruth Bader Ginsberg or Stephen Breyer, it certainly may be the case that the Supreme Court’s docket over the Roberts Court period drew a different mix of cases that explains those

*E. A Holistic Discussion of the Roberts Court's Business Doctrine*

Stepping back from the empirical efforts to characterize the Roberts Court's behavior, how might we assess the Court's decision-making with respect to business? Looking at the more significant cases on the docket, it is rather clear that the Court has taken steps to pare back perceived civil-litigation abuses in some areas—notably pleading standards, class certification, and substitution of private arbitration for consumer class-action enforcement. More broadly, however, the case is quite mixed. The Court declined to pare back securities class action litigation (but also declined to broaden it), largely resisted Executive Branch efforts to preempt state failure-to-warn claims that underlie most mass tort product liability claims, left relatively unfettered the scope of Congressional power, and expanded the scope of regulatory authority without limiting agency rulemaking authority.

**Pleading standards.** Perhaps the broadest-reaching decisions of the Roberts Court era favoring business are *Twombly*<sup>49</sup> and *Iqbal*,<sup>50</sup> which at least in theory affect every civil suit by clarifying minimum pleading standards.<sup>51</sup> In reality, these cases are “outer bound” cases—litigants in the broad run of cases will not find their causes of action dismissed under Rule 12(b)(6)—but they do afford businesses to weed out the most frivolous causes of action pre-discovery and thus represent a clear business win. Notably, the business case *Twombly* was a 7–2 decision written by Justice David Souter—a Republican appointee deemed “liberal” by most scholars—and joined by Clinton appointee Stephen Breyer.<sup>52</sup> In the non-business case *Iqbal*—which involved a suit against federal officials in the prosecution of the “war on terror”—the justices split 5–4, with Souter and Breyer both in dissent.<sup>53</sup>

**Class certification.** In a pair of cases, *Wal-Mart v. Dukes*<sup>54</sup> and *Comcast v. Behrend*,<sup>55</sup> the Supreme Court clarified minimum class-certification standards. Although the Court ruled unanimously in *Wal-*

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justices' shifting votes. Of course, that shift could be attributable to changes in lower-court decision-making—or changes in the scope of Congressional, Executive Branch, or state actions—rather than strategic decisions on the part of the Court's right-leaning justices.

49. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

50. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

51. See William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 694–96 (2016) (describing the impact of the *Twombly* and *Iqbal* decisions on everyone within the legal community).

52. *Twombly*, 550 U.S. at 547.

53. *Iqbal*, 556 U.S. at 665.

54. 564 U.S. 338 (2011).

55. 133 S. Ct. 1426 (2013).

*Mart* that the class action did not meet minimal commonality requirements for a monetary class claim, the Court split 5–4 over whether an injunctive class claim might proceed.<sup>56</sup> The broader implications of this holding are to charge district courts with making some fact-related inquiries that also involve the merits of the case, at the certification stage, to determine whether Rule 23's certification standards are met. Clearly, these cases represent a significant win for business defendants facing prospective class litigation.

**Arbitration.** In a pair of cases, *AT&T Mobility v. Concepcion*<sup>57</sup> and *American Express v. Italian Colors*,<sup>58</sup> a divided 5–4 Court interpreted the 1925 Federal Arbitration Act (FAA) to require courts to enforce private arbitration clauses in consumer contracts, even when such clauses foreclosed class litigation or arbitration.<sup>59</sup> *Concepcion* held that the FAA preempted California state law precluding enforcement of arbitration clauses that did not leave open a class remedy and *Italian Colors* enforced an arbitration class waiver under the FAA in the context of federal antitrust law.<sup>60</sup> Again, these cases represent clear wins for business—although also, at least arguably, for consumers.<sup>61</sup>

**Securities class actions.** Although the Supreme Court's Roberts-era class certification and arbitration decisions have helped business defendants avoid at least some class-action litigation, in *Halliburton Co. v. Erica P. John Fund*,<sup>62</sup> the Court declined to revisit the "fraud on the market" theory it had articulated in *Basic v. Levinson*,<sup>63</sup> a theory underlying most federal securities class actions. It also, however, declined to *expand* securities class action liability by creating aiding and abetting liability in *Stoneridge v. Scientific-Atlanta*.<sup>64</sup> Thus, the Roberts Court has been essentially a status quo court in this area of law.

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56. *Wal-Mart*, 564 U.S. at 340.

57. 563 U.S. 333 (2011).

58. 133 S. Ct. 2304 (2013).

59. *Id.* at 2312; *Concepcion*, 563 U.S. at 344.

60. *Concepcion*, 563 U.S. at 352.

61. See TED FRANK, MANHATTAN INST., CLASS ACTIONS, ARBITRATION, AND CONSUMER RIGHTS: WHY *CONCEPCION* IS A PRO-CONSUMER DECISION (2013), [http://www.manhattan-institute.org/pdf/lpr\\_16.pdf](http://www.manhattan-institute.org/pdf/lpr_16.pdf) [<https://perma.cc/SA8H-AP87>] (finding claims that mandatory arbitration agreements deny consumer protections overwrought).

62. 134 S. Ct. 2398 (2014).

63. 485 U.S. 224, 241–42 (1988).

64. 552 U.S. 148, 163–64 (2008).

**Preemption.** In a pair of cases, *Riegel v. Medtronic*<sup>65</sup> and *Wyeth v. Levine*,<sup>66</sup> the Supreme Court reached different outcomes in claimed federal preemption of state product liability litigation. Because *Riegel* involved only a subset of medical devices and *Levine* involved the much broader class of pharmaceutical products, the *Levine* case was far more significant. *Levine* held that federal law did not preempt a state-law failure-to-warn product-liability claim even when a long-existing pharmaceutical product had a label that had been extensively reviewed by the Food and Drug Administration for three decades.<sup>67</sup> In the preemption drug and device space—which constitutes a large fraction of the mass-tort docket in and out of federal multidistrict litigation courts—the Supreme Court’s decisions have been on balance anti-business in the Roberts Court era.<sup>68</sup>

**Government regulatory power.** In the Court’s most significant case involving Congressional power in the Roberts Court era, it upheld most of the Affordable Care Act in response to a Commerce Clause challenge in *NFIB v. Sebelius*.<sup>69</sup> Interestingly, a 5–4 Court majority determined that the law’s individual mandate to purchase health insurance, as a form of compelled commerce, exceeded Congress’s authority under the Commerce Clause; but Chief Justice Roberts “saved” the statute by construing a regulatory penalty as a tax, invoking the doctrine of constitutional avoidance.<sup>70</sup> The Chief Justice’s reasoning, however, appears to belie his Epstein, Landes, and Posner rank as one of the two most pro-business justices in the history of the postwar Court, given the share of the U.S. economy affected by the health care sector broadly impacted by the law and the fact that four of his colleagues dissented from the holding.<sup>71</sup> Similarly, in interpreting executive agency power under longstanding statutory law, the Supreme Court in *Massachusetts v. EPA*—a case again without a business litigant—ruled that the Environmental Protection Agency is compelled to consider carbon dioxide as a pollutant under the Clean Air Act.<sup>72</sup> This was an expansive statutory reading affecting much of the U.S. economy. Thus, in

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65. 552 U.S. 312 (2008).

66. 555 U.S. 555 (2009).

67. *Id.* at 561–62, 81.

68. Victor E. Schwartz & Cary Silverman, *The Rise of “Empty Suit” Litigation: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 630–33 (2015) (explaining the basis for mass tort litigation against pharmaceutical manufacturers in the United States).

69. 132 S. Ct. 2566 (2012).

70. *Id.* at 2608.

71. *Id.* at 2575.

72. 549 U.S. 497 (2007).

the two cases with perhaps the broadest economic reach in the Roberts Court, business interests lost.

### III. IS THE EMPHASIS ON THE SUPREME COURT MISSING A BIG PART OF THE PICTURE?

Assuming *arguendo* that there *has* been a pro-business shift in Supreme Court jurisprudence under the Roberts Court, I would argue that the significance of such a shift—and indeed of Supreme Court jurisprudence itself—can be overstated. The Supreme Court and the judiciary more broadly have indeed inserted themselves into a broader array of government decision-making than in the past—certainly vis-à-vis the elected federal branches, in comparison with the pre-twentieth-century era. But vast swathes of legal activity occur essentially “unseen” by the courts, actually or effectively immune from judicial review. Two areas of my research—the rise of federal deferred prosecution agreements governing large business enterprises and the increasing use of shareholder proxy proposals under guidelines promulgated by the Securities and Exchange Commission—highlight this reality.<sup>73</sup>

#### A. *The Rise of the Shadow Regulatory State*

*Who runs the world's most lucrative shakedown operation? The Sicilian mafia? The People's Liberation Army in China? The kleptocracy in the Kremlin? If you are a big business, all these are less grasping than America's regulatory system. The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company.*

—The Economist, August 2014<sup>74</sup>

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73. See generally JAMES R. COPLAND, MANHATTAN INST., THE SHADOW REGULATORY STATE: THE RISE OF DEFERRED PROSECUTION AGREEMENTS (May 5, 2012), <https://www.manhattan-institute.org/html/shadow-regulatory-state-rise-deferred-prosecution-agreements-5895.html> [<https://perma.cc/48HH-VKU6>] (describing the growing reliance on deferred prosecution agreements between the Department of Justice and U.S. businesses); see also James R. Copland, *Against an SEC-Mandated Rule on Political Spending Disclosure: A Reply to Bebchuk and Jackson*, 3 HARV. BUS. L. REV. 381 (2013) (discussing the drawbacks of SEC-mandated disclosures of corporate political spending).

74. Editorial, *The Criminalisation of American Business*, ECONOMIST (Aug. 28, 2014), <http://www.economist.com/news/leaders/21614138-companies-must->



One of the remarkable features of the law since 2004 is the rise in what I and my colleagues have dubbed the “shadow regulatory state”<sup>75</sup>—the federal practice of negotiating deferred prosecution agreements (DPA) and non-prosecution agreements (NPA) with businesses.<sup>76</sup> To understand DPAs and NPAs:

[DPAs and NPAs are] pretrial diversion programs that the federal government has increasingly used to resolve criminal allegations against large publicly traded companies. NPAs are entered into before a charge is formally levied; DPAs are entered into after a charge has been filed. Although DPAs may generally be more complex and involve higher fines and penalties, the principal distinction between the two types of agreements is nomenclature and procedure, rather than substance.<sup>77</sup>

DPAs and NPAs give government attorneys tools to modify, control, and oversee corporate behavior that they would never achieve by taking the companies to court.<sup>78</sup> Notwithstanding these extraordinary powers, these agreements lack transparency and judicial oversight.<sup>79</sup>

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be-punished-when-they-do-wrong-legal-system-has-become-extortion [<https://perma.cc/869T-ZRWU>].

75. See COPLAND, *supra* note 73 (“Over the last decade, a novel form of federal government regulation has emerged, prompted not by new congressional legislation or administrative agency action but rather by aggressive assertion of prosecutorial authority over business.”); see also JAMES R. COPLAND & RAFAEL A. MANGUAL, MANHATTAN INST., JUSTICE OUT OF THE SHADOWS: FEDERAL DEFERRED PROSECUTION AGREEMENTS AND THE POLITICAL ORDER 5 (June 2016), <https://www.manhattan-institute.org/html/justice-out-shadows-federal-deferred-prosecution-agreements-8980.html> [<https://perma.cc/656X-GCQ9>] (recognizing the federal practice of using deferred prosecution agreements and non-prosecution agreements to control corporate behavior as the defining feature of “the shadow regulatory state”); JAMES R. COPLAND & ISAAC GORODETSKI, MANHATTAN INST., WITHOUT LAW OR LIMITS: THE CONTINUED GROWTH OF THE SHADOW REGULATORY STATE 1–3 (Mar. 2015), <https://www.manhattan-institute.org/html/without-law-or-limits-continued-growth-shadow-regulatory-state-5899.html> [<https://perma.cc/UBZ8-BHB7>] (explaining the emergence of prosecution and, subsequently, settlements, as a force to regulate business); JAMES R. COPLAND & ISAAC GORODETSKI, MANHATTAN INST., THE SHADOW LENGTHENS: THE CONTINUING THREAT OF REGULATION BY PROSECUTION 1–2 (Feb. 2014), <http://www.manhattan-institute.org/html/shadow-lengthens-continuing-threat-regulation-prosecution-5898.html> [<https://perma.cc/LKB2-LGZS>] (“[O]ver the last decade, the DOJ and other federal agencies have entered into at least 278 [DPAs and NPAs].”).
76. COPLAND, *supra* note 73.
77. COPLAND & MANGUAL, *supra* note 75, at 5.
78. COPLAND & GORODETSKI, *supra* note 75, at 2.
79. *Id.* at 14.

The shadow regulatory state covers a vast swathe of American business. Since the beginning of 2010, the federal government has entered into DPAs or NPAs with the parent companies or subsidiaries of 17 of the 100 largest U.S. companies by revenues, as ranked by *Fortune* magazine: Archer Daniels Midland, CVS Health, Fannie Mae, Freddie Mac, General Electric, General Motors, Google/Alphabet, Hewlett-Packard, Johnson & Johnson, JPMorgan Chase, Merck, MetLife, Pfizer, Tyson Foods, United Parcel Service, United Technologies, and Wells Fargo.<sup>80</sup> In 2015, the federal government entered into 100 such agreements, a record.<sup>81</sup>

Federal DPAs and NPAs with corporations are novel. The first was entered into between the DOJ and Salomon Brothers in 1992, the last year of the George H.W. Bush administration.<sup>82</sup> “Since then, their numbers have grown dramatically. Eleven DPAs and NPAs were entered into during the first Clinton administration, 130 during the George W. Bush administration, and 290 during the first seven years of the Obama administration.”<sup>83</sup>

Why do companies enter into DPAs and NPAs, given the severity of the terms that they often include? In many cases, they have little choice: various federal statutes contain collateral consequences in the event of a corporate criminal conviction, or even indictment—including debarment from government contracts, exclusion from reimbursement under government-run health programs, or loss of licenses required to operate<sup>84</sup>—that would constitute an effective corporate death sentence for the company facing prosecution. After the federal government indicted the former “Big Five” accounting firm Arthur Andersen in 2002 in a prosecution related to its bookkeeping for the defunct energy firm Enron, the partnership quickly collapsed;<sup>85</sup> that the U.S. Supreme Court

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80. Compare Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, UNIV. OF VA. SCH. OF LAW, [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements](http://lib.law.virginia.edu/Garrett/prosecution_agreements) [<https://perma.cc/76EK-ZNYC>] (cataloguing federal organizational prosecution agreements) with List, FORTUNE 500, <http://beta.fortune.com/fortune500/list> [<https://perma.cc/U4Q2-TNYF>] (last visited Apr. 1, 2017) (listing the companies on the Fortune 500 list for 2015).

81. COPLAND & MANGUAL, *supra* note 75, at 4.

82. *Id.*

83. *Id.*

84. See, e.g., Causes for Debarment, 48 C.F.R. § 9.406-2 (2015) (explaining how a contractor can be debarred from a government contract); 42 U.S.C. § 1320a-7 (2012) (detailing how individuals are excluded from participating in Medicare and State health care programs); 7 U.S.C. § 252 (2012) (outlining when the government may suspend or revoke a license).

85. Jeffrey S. Kinsler, *Arthur Andersen and the Temple of Doom*, 37 SW. U. L. REV. 97, 99–107 (2008).

ultimately overturned the accountancy's conviction<sup>86</sup> offered little solace to its displaced employees, customers, and creditors.

Prosecutors find DPAs and NPAs especially appealing “because they avoid the risk of an Andersen-style corporate collapse and avoid the risk of trial but also because these agreements afford government attorneys tools to modify, control, and oversee corporate behavior that they could never achieve through actual adjudication of criminal claims.”<sup>87</sup> During a question-and-answer session at the Launch of the Organization for Economic Co-operation and Development Foreign Bribery Report, U.S. Assistant Attorney General Leslie R. Caldwell admitted as much:

Companies cannot be sent to jail, so all a court can do is say you will pay “x.” We can say: “you will also have a monitor and will do all sorts of other things for the next five years, and if you don't do them for the next five years then you can still be prosecuted.” . . . In the United States system at least it is a more powerful tool than actually going to trial.<sup>88</sup>

In 2015, companies paid out more than \$6 billion to the federal government under DPAs and NPAs, without any adjudication or judicial oversight, but the “fines” are the least-unusual parts of these agreements.<sup>89</sup>

Were DPAs and NPAs limited to extracting monies from the corporate coffers, they would approximate normal criminal-law practices in which defendants regularly agree to avoid prosecution through paying civil penalties or various other types of trial diversion or plea arrangements. DPAs and NPAs that the government reaches with companies, however, involve significant oversight and supervision— even dramatic restructurings of business practice.<sup>90</sup>

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86. *Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 698 (2005).

87. COPLAND & GORODETSKI, *supra* note 75, at 2.

88. Thomas R. Fox, *DPAs and NPAs – Powerful Tools in the Fight Against Corruption*, FCPA COMPLIANCE AND ETHICS BLOG (Dec. 8, 2014), <https://tfoxlaw.wordpress.com/2014/12/08/dpas-and-npas-powerful-tools-in-the-fight-against-corruption/> [https://perma.cc/UWY7-EE7A] (citing Rahul Rose, *Caldwell: Settlement a “More Powerful Tool” than Convictions*, GLOBAL INVESTIGATIONS REV. (Dec. 3, 2014), <http://globalinvestigationsreview.com/article/2121/caldwell-settlement-more-powerful-tool-convictions> [https://perma.cc/3SZ7-M3GY]).

89. COPLAND & MANGUAL, *supra* note 75, at 4.

90. *Id.*

Among the changes the DOJ has required of companies through DPAs and NPAs are:

- Firing key employees, including chief executives and directors;
- Hiring new corporate officers;
- Hiring corporate “monitors” independent of the company and reporting to the prosecutor;
- Modifying existing compensation plans;
- Redesigning sales and marketing practices;
- Implementing new training programs;
- Adopting exhaustive reporting requirements to the prosecutor; and
- Limiting corporate speech and litigation strategies.<sup>91</sup>

As discussed in earlier writings, “[n]o such changes to business practice are authorized by statute. Nor would they be a punishment available to the government after a corporate conviction.”<sup>92</sup>

The federal government’s shadow regulatory state effected through DPAs and NPAs obviously departs from the normal administrative process, in which regulation is cabined by carefully defined rulemaking procedures, with notice and comment periods and clear channels for judicial review.<sup>93</sup> In contrast, “modifications to corporate conduct enabled through DPAs and NPAs . . . accord prosecutors powers that they would lack, were they able to convict a company at trial—and lack any mechanism for judicial oversight to the agreements’ substantive terms.”<sup>94</sup>

The lack of judicial review over DPAs was clarified in a recent decision by the D.C. Circuit Court of Appeals, which in April 2016 granted a *writ of mandamus* vacating a district court order that had rejected a DPA between the government and Fokker Services B.V., a Dutch aerospace services provider.<sup>95</sup> Although the company fired its president and demoted or reassigned other employees who had been involved in self-disclosed illegal transactions, the district court judge had objected that its 18-month DPA term was too short and its \$21-million monetary penalty (the gross income from all the involved transactions) was too lenient.<sup>96</sup> The appellate decision determined that the Speedy Trial Act’s review power “did not empower the district court to disapprove the

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91. *Id.* at 4, 6.

92. *Id.*

93. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2012) (requiring notice and comment for administrative rulemaking).

94. COPLAND & MANGUAL, *supra* note 75, at 14.

95. *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

96. *Id.* at 166, 167.

DPA based on the court's view that the prosecution had been too lenient,<sup>97</sup> and the court emphasized the "constitutionally rooted principles" that protected the executive branch's "exercise of discretion over the initiation and dismissal of criminal charges."<sup>98</sup>

Finally, it is worth emphasizing that the federal government's use of extraordinary settlements to resolve cases through DPAs and NPAs parallels similar aggressive use of civil settlements—often with higher sums involved, and usually with the threat of potential criminal actions lurking. Many of the most extreme such cases in recent years emanated out of the 2008 financial crisis, including an August 2014 agreement reached between the Department of Justice and Bank of America, for a record \$16.65 billion.<sup>99</sup> The agreement, as with similar large settlements with JPMorgan Chase (\$13 billion) and Citigroup (\$7 billion), resolved claims alleging that Bank of America improperly concealed the risks of mortgage-related securities when it sold them to large institutional investors before and after the financial meltdown.<sup>100</sup> In sum, in resolving claims stemming from the crisis, the Department of Justice reached unadjudicated civil settlements with banks totaling \$60 billion.<sup>101</sup>

The Bank of America settlement not only pays out almost \$10 billion to the federal and state governments,<sup>102</sup> but forces the bank to allocate \$7 billion to "consumer relief" credits, including:

- Loan principal write-downs, with a minimum of \$2.15 billion for nonperforming loans and a cap of \$3 billion for performing and home-equity loans ("extra" credits can be awarded under certain conditions);<sup>103</sup>
- Loans underwriting new "affordable housing" developments, with a minimum of \$100 million allocated (and substantial

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97. *Fokker Servs.*, 818 F.3d at 741.

98. *Id.* at 738.

99. Press Release, U.S. Dep't of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading> [https://perma.cc/6SRP-YMCR].

100. Alanna Petroff, *DOJ vs Big Banks: \$60 Billion in Fines for Toxic Mortgages*, CNN MONEY (Dec. 23, 2016), <http://money.cnn.com/2016/12/23/investing/banks-fines-mortgages/> [https://perma.cc/LR8S-ZZNF].

101. *Id.*

102. Press Release, U.S. Dep't of Justice, *supra* note 99.

103. Settlement Agreement Between U.S. Dep't of Justice along with the States and Bank of America annex 2 at 2, 5 (Aug. 21, 2014), <https://www.justice.gov/iso/opa/resources/8492014829141239967961.pdf> [https://perma.cc/5KU5-9CYV].

extra credits awarded on a dollar-for-dollar basis to discharge toward the \$7 billion consumer-relief total);<sup>104</sup> and

- Grants to community-development and housing groups; the bank must give a minimum of \$50 million to community-development funds or institutions, \$30 million to legal-aid groups fighting foreclosures, and \$20 million to various government-sanctioned housing-activist groups.<sup>105</sup>

As these breakdowns suggest:

[A]lmost half the “fines” imposed on Bank of America in its civil settlement are not payments to the government but rather “consumer relief” payments directed by the DOJ. These distributions are not restitution payments to victims of Bank of America’s alleged conduct, the array of sophisticated institutional investors that the bank was accused of misleading when selling them securities packaging bundles of home mortgages. Instead, Bank of America’s consumer-relief money under the settlement agreement goes to forgiving principal on consumers’ home loans, for giving money to various administration-favored nonprofit groups (including housing and other community-activist and legal-aid organizations), and for funding “affordable” housing developments for low-income families.<sup>106</sup>

The extraordinary powers assumed by the federal government through DPAs and NPAs, and their civil-settlement analogues, highlight just how much power the government has assumed over business outside the purview of the courts. Like the well-known rise in plea bargaining in ordinary criminal cases, the government’s novel use of threatened criminal-enforcement powers to modify wholesale business practices—a use that has veritably exploded in the Roberts Court era—is a dramatic shift in how the law is shaping businesses completely beyond the scope of Supreme Court case resolution.

*B. The Rise of Social Activism by Proxy*<sup>107</sup>

Eliot Spitzer, former New York Governor and Attorney General, stated,

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104. *Id.* at 8.

105. *Id.* at 7.

106. COPLAND & GORODETSKI, *supra* note 75, at 16–17.

107. Portions of this Section are reprinted from my previous testimony before Congress. *Hearing on Corporate Governance: Fostering a System that Promotes Capital Formation and Maximizes Shareholder Value, Statement to the House Comm. on Fin. Servs. Subcomm. on Capital Mkts. and Gov’t Sponsored Enters.*, 114th Cong. 2 (2016) (testimony of James R. Copland, Director

Ownership trumps regulation. And yet we haven't seen shareholder activism. We have not seen shareholders stand up and collectively say: "Wait a minute. We own the companies. Let's see if we can not [sic] just rein in [chief executive] compensation, which is a piece of it, but also more importantly, make wise decisions about management and participation."<sup>108</sup>

Another legal mechanism increasingly reshaping corporate America—completely unreflected in the Supreme Court's docket—is social activism by shareholder proxy. Under proxy rules promulgated by the SEC, publicly traded companies must include shareholders' proposals on their proxy ballots—to be voted on by all shareholders at corporate annual meetings—if such proposals conform to certain procedural and substantive requirements.<sup>109</sup> Under the SEC's rules,

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and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research).

108. Karen Tumulty, *Eliot Spitzer Looks for Political Redemption in New York City*, WASH. POST (July 8, 2013), [https://www.washingtonpost.com/politics/eliot-spitzer-looks-for-political-redemption-in-new-york-city/2013/07/08/e3d1ee66-e805-11e2-8f22-de4bd2a2bd39\\_story.html?utm\\_term=.50bfbcb08b41b](https://www.washingtonpost.com/politics/eliot-spitzer-looks-for-political-redemption-in-new-york-city/2013/07/08/e3d1ee66-e805-11e2-8f22-de4bd2a2bd39_story.html?utm_term=.50bfbcb08b41b) [<https://perma.cc/3CV8-LY46>].

109. Stockholders of publicly traded companies who have held shares valued at \$2,000 or more for at least one year can introduce proposals for shareholders' consideration at corporate annual meetings. 17 C.F.R. § 240.14a-8 (2007). The federal Securities and Exchange Commission determines the procedural appropriateness of a shareholder proposal for inclusion on a corporation's proxy ballot, pursuant to the Securities Exchange Act of 1934, Ch. 404, 48 Stat. 881, 894-95, 899-901 (1934) (current version at 15 U.S.C. §§ 78m, 78n, 78u (2012)) and the Investment Company Act of 1940, Ch. 686, 54 Stat. 789, 841 (1940) (current version at 15 U.S.C. § 80a-37 (2012)) but the substantive rights governing such measures and how they can force boards to act remain largely a question of state corporate law. As the Supreme Court emphasized in its 1987 decision in *CTS Corp. v. Dynamics Corp.*, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders." 481 U.S. 69, 89 (1986). The section of the Securities Exchange Act upon which Rule 14a-8 is promulgated, § 14(a), is principally designed to ensure corporate disclosures to shareholders to afford investment information and prevent deception. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964) ("The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation."). In its 1990 *Business Roundtable* decision, the D.C. Circuit Court of Appeals explained further:

That proxy regulation bears almost exclusively on disclosure stems as a matter of necessity from the nature of proxies. Proxy solicitations are, after all, only *communications* with potential absentee voters. The goal of federal proxy regulation was to improve those communications and thereby to enable proxy voters to control the corporation as effectively as they might have by attending a shareholder meeting.

sponsoring shareholders may hold very small stakes: a shareholder need only own \$2,000 of stock for one year to introduce a proposal.<sup>110</sup>

In recent years, and to an unprecedented degree, “a small subset of shareholders has been turning to this shareholder-proposal process to pursue social and political changes outside normal legislative and administrative channels.”<sup>111</sup> Even though long-standing corporate-law doctrines seek to align the incentives of companies’ boards and managements exclusively with share value,<sup>112</sup> the SEC specifically allows shareholders to introduce proposals focusing on social or political issues with an attenuated—if any—relationship to share value.<sup>113</sup> “In 2016,

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Bus. Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990) (“While the House Report indeed speaks of fair corporate suffrage, it also plainly identifies Congress’s target—the solicitation of proxies by well informed insiders ‘without fairly informing the stockholders of the purposes for which the proxies are to be used.’” (citing H.R. REP. NO. 1383, at 14 (1934))). See also S. REP. NO. 792, at 12 (1934) (characterizing purpose of proxy protections as ensuring stockholders’ “adequate knowledge” about the “financial condition of the corporation”).

110. 17 C.F.R. § 240.14a-8 (2007).

111. JAMES R. COPLAND & MARGARET M. O’KEEFE, MANHATTAN INST., AN ANNUAL REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 5 (2016), [http://www.proxymonitor.org/pdf/pmr\\_13.pdf](http://www.proxymonitor.org/pdf/pmr_13.pdf) [<https://perma.cc/DDR3-BVGL>].

112. Traditionally, corporate law has oriented corporate boards and managers’ fiduciary duties around a single variable, share value, see *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683–84 (Mich. 1919) (holding that corporate fiduciary duties flowed to shareholders, not employees or other interests), which avoids the ownership costs—chiefly conflicts of interest that arise among various owners—inherent in non-corporate ownership forms. See generally HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 35–49 (1996) (arguing that the costs of collective decision making best explain the predominance of the corporate equity-ownership form in large-scale for-profit enterprise); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 *UCLA L. REV.* 601 (2006) (arguing that increasing shareholder power imposes significant costs and reduces managerial authority). Since shortly after *Dodge v. Ford* was decided, an academic debate has proliferated between those arguing for a social responsibility for corporations, see, e.g., E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 *HARV. L. REV.* 1145, 1148 (1932) (arguing for the view that “the business corporation [i]s an economic institution which has a social service as well as a profit-making function”), and those supporting the traditional rule centered on share value. See Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 *HARV. L. REV.* 1365, 1367 (1932) (discussing theories directing corporate motivations).

113. In 1976, the SEC issued an interpretive release stating that companies could invoke the “ordinary business exclusion” rule to exclude shareholder proposals only if these proposals “involve business matters that are mundane in nature



fully half of all shareholder proposals introduced at publicly traded Fortune 250 companies involved social or policy concerns.”<sup>114</sup>

For each of the last eleven years tracked in the Manhattan Institute’s Proxy Monitor database,<sup>115</sup> a small group of shareholders has dominated the process of introducing shareholder proposals:

First, a few individuals and their family members—often referred to as “corporate gadflies”<sup>116</sup>—repeatedly file substantially similar proposals across a broad set of companies. Typically, these individuals own

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and do not involve any substantial policy or other considerations.” See Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release, 41 Fed. Reg. 52,994, 52,998 (Dec. 3, 1976).

114. COPLAND & O’KEEFE (2016), *supra* note 111, at 5.

115. The Proxy Monitor database contains all shareholder proposals for the 250 largest publicly traded companies by revenues, as listed by *Fortune* magazine. *Hearing on Corporate Governance*, *supra* note 107, at 2. These companies constitute a substantial majority of the total stock market capitalization held by diversified investors. *Id.* Notwithstanding this fact, some shareholder activists and their supporters have objected to Proxy Monitor data on the grounds that many companies that receive shareholder proposals are not included in the database. See, e.g., Heidi Welsh, *Accuracy in Proxy Monitoring*, HARVARD LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Sept. 16, 2013), <https://blogs.law.harvard.edu/corpgov/2013/09/16/accuracy-in-proxy-monitoring-2/> [<https://perma.cc/8S7A-YV6Z>] (“[T]he Proxy Monitor database has significant limitations and does not present a comprehensive picture of corporate engagement by investors.”). A broader dataset, however, risks obscuring the impact of shareholder-proposal rules on the average diversified investor, given the broad variance in market capitalization among companies. Even among the large companies comprising the Proxy Monitor dataset, there are significant variations in market capitalization; the five largest companies in the Fortune 250 have a combined market capitalization almost eighteen times as large as companies 246 through 250 on Fortune’s list. (The five largest companies by revenues in the 2015 Fortune 500 list—Walmart, Exxon Mobil, Chevron, Berkshire Hathaway, and Apple—had a combined market capitalization of more than \$1.7 trillion on September 1, 2016, which constitutes 7.6% of the U.S. total stock market capitalization, based on the Wilshire 5000 Price Full Cap Index. The companies listed as 246 through 250 on the list—DTE Energy, Ameriprise Financial, VF, Praxair, and J.C. Penney—had a combined market capitalization of \$96 billion, or 0.4% of the U.S. total stock market capitalization. Overall, the S&P 100 alone contains more than 54% of the U.S. total market capitalization.) *Id.* Thus, from the average shareholder’s perspective, the Proxy Monitor data set paints a significantly more accurate picture than do the vote tallies of most shareholder activists, who simply straight-line-average votes across a much larger data set of companies, without regard to market capitalization.

116. See Charles M. Yablon, *Overcompensating: The Corporate Lawyer and Executive Pay*, 92 COLUM. L. REV. 1867, 1895 n.78 (1992) (providing a definition for “corporate gadflies”); Jessica Holzer, *Firms Try New Tack Against Gadflies*, WALL ST. J. (June 6, 2011), <http://online.wsj.com/article/SB10001424052702304906004576367133865305262.html> [<https://perma.cc/>

very small percentages of a company's stock. For instance, John Chevedden, the most-active sponsor of shareholder proposals dating back to 2006, has made substantially the same proposal at Ford Motor Company each of those years, individually or through a family trust.<sup>117</sup> In its 2016 proxy statement, Ford disclosed that Mr. Chevedden owned 500 shares of the company's stock—an investment valued at \$6,750 at the close of trading on the company's March 16 record date—approximately 0.00001% of the company's market capitalization.<sup>118</sup> “All told, Mr. Chevedden and four individual gadfly investors and their family members sponsored 29% of all shareholder proposals from 2006–15.”<sup>119</sup>

Second, institutional investors focusing on “socially responsible” investing, which expressly concern themselves with social or political issues apart from solely share-price maximization, are very active in sponsoring shareholder proposals.<sup>120</sup> Such investors include special-purpose social-investing funds, as well as policy-oriented foundations

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647Q-TXTX] (describing certain shareholder activists, including John Chevedden, as a corporate gadfly).

117. JAMES R. COPLAND, PROXY MONITOR, COMPANIES FIGHT BACK AGAINST CHEVEDDEN; UNIONS AND SOCIAL INVESTORS RAMP UP PUSH ON CORPORATE POLITICAL SPENDING (2014), [http://proxymonitor.org/forms/pmr\\_07.aspx](http://proxymonitor.org/forms/pmr_07.aspx) [<https://perma.cc/3NCE-KAMP>].

118. Ford Motor Co., Proxy Statement (14A), Proposal No. 5 (Apr. 1, 2016), <https://www.sec.gov/Archives/edgar/data/37996/000104746914003150/a2218659zdef14a.htm> [<https://perma.cc/UVQ6-P56H>].

119. *Hearing on Corporate Governance*, *supra* note 107, at 8.

120. See Michael Chamberlain, *Socially Responsible Investing: What You Need to Know*, FORBES (Apr. 24, 2013), <http://www.forbes.com/sites/feonlyplanner/2013/04/24/socially-responsible-investing-what-you-need-to-know> [<https://perma.cc/8CKJ-S6UR>] (“In general, socially responsible investors are looking to promote concepts and ideals that they feel strongly about.”). The modern push for “corporate social responsibility” generally traces to a pair of 1970s books. See CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975) (discussing the societal effects of corporation's behaviors); RALPH NADER ET AL., *TAMING THE GIANT CORPORATION* (1976) (exploring the power of large corporations and what options exist to control them). For a critique of the early concept of corporate social responsibility advocated by these authors, see David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 98 (1979) (“Any mandatory governance reforms intended to spur more corporate altruism are almost sure to have general institutional costs within the corporate system itself . . . . But the proponents of ‘more’ corporate social responsibility have never bothered to analyze or examine, from any clearly defined starting point, even just the benefits they anticipate from reform . . . .”).

and various retirement and investment vehicles associated with religious or public-policy organizations.<sup>121</sup> Such investors sponsored 27% of all shareholder proposals across the ten-year period from 2006 through 2015.<sup>122</sup> Many of these investors, like corporate gadflies, sponsor shareholder proposals in companies in which they have very small investments. For instance, in 2016, a social investor known as Holy Land Principles, Inc. sponsored shareholder proposals, relating to employment practices in areas governed by Israel and the Palestinian Authority, on the ballots of seven of the 231 Fortune 250 companies to hold annual meetings by the end of August. In each case, its investment was a miniscule percentage of the company's outstanding market capitalization; in Pepsico, it owned a reported 55 shares,<sup>123</sup> worth \$5,932.85 on the company's February 26 record date—approximately 0.000003% of the company's market capitalization.

Finally, apart from investors with a social or policy orientation, the principal institutional investors involved with sponsoring shareholder proposals are labor-affiliated pension funds—including “multiemployer” plans affiliated with labor unions such as the American Federation of Labor–Congress of Industrial Organizations (AFL–CIO) or American Federation of State, County, and Municipal Employees (AFSCME), as well as state and municipal pension plans, particularly those representing New York City and State. Overall, labor-affiliated investors sponsored 32% of all shareholder proposals from 2006–15. Typically, these plans have substantial investment stakes in the companies at which they file shareholder proposals, though the private labor unions have been known to file such proposals from investment vehicles with small holdings. For example, in 2016, the AFL–CIO sponsored a human-rights-related proposal at Mondelez International, but reportedly held only 925 shares,<sup>124</sup> valued at \$38,803.75 on the March 9 record date, approximately 0.00006% of the company's outstanding market capitalization.<sup>125</sup>

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121. Religious organizations' pension plans are generally exempt from the fiduciary requirements of the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1003(b) (2012).

122. *Hearing on Corporate Governance*, *supra* note 107, at 8.

123. PEPSICO, NOTICE OF 2016 ANNUAL MEETING OF SHAREHOLDERS AND PROXY STATEMENT 77 (Mar. 18, 2016), [https://www.pepsico.com/docs/album/Investor/297606\\_pepsico\\_webready\\_w8xpqnznaxknax.pdf?sfvrsn=0](https://www.pepsico.com/docs/album/Investor/297606_pepsico_webready_w8xpqnznaxknax.pdf?sfvrsn=0) [<https://perma.cc/PS88-7CMB>].

124. Mondelez Int'l, Inc., Proxy Statement (14A), Proposal No. 6 (Mar. 28, 2016), [https://www.sec.gov/Archives/edgar/data/1103982/000119312516518809/d119433ddef14a.htm#toc119433\\_57](https://www.sec.gov/Archives/edgar/data/1103982/000119312516518809/d119433ddef14a.htm#toc119433_57) [<https://perma.cc/7VJE-7HV8>].

125. Labor unions may choose to engage in socially oriented shareholder activism through small-investment vehicles rather than multiemployer private pension plans to avoid fiduciary strictures of ERISA, which govern their investment approaches, unlike state and municipal plans or religious plans. *See* 29 U.S.C.

Only 1% of shareholder proposals introduced in the decade between 2006 and 2015 involved institutional investors without a labor affiliation or social, religious, or policy focus.

Although shareholder proposals are commonly introduced at large publicly traded companies, they very rarely garner majority shareholder support.<sup>126</sup> Among the companies in the Fortune 250, not a single

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§ 1003(b) (2012) (detailing the exceptions from ERISA). This approach may or may not shift going forward, given the Department of Labor's Interpretive Bulletin 2015-01, an October 2015 rule broadening the fiduciary scope for private pension plans' investments in "economically targeted investments." Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65,135 (Oct. 26, 2015).

126. In determining shareholder support for shareholder proposals, the Manhattan Institute counts votes consistent with the practice dictated in a company's bylaws, consistent with state law. Some companies measure shareholder support by dividing the number of votes for a proposal by the total number of shares present and voting, ignoring abstentions. Other companies measure shareholder support by dividing the number of favorable votes by the number of shares present and entitled to vote—thus including abstentions in the denominator of the tally. Neither practice necessarily skews shareholder votes in management's favor: whereas the latter method makes it relatively more difficult for shareholder resolutions to obtain majority support, it also makes it more difficult for management to win shareholder backing for its own proposals, such as equity-compensation plans.

Although shareholder-proposal activists prefer to exclude abstentions consistently in tabulating vote totals, without regard to corporate bylaws—which necessarily inflates apparent support for their proposals—such a methodology is inconsistent with federal law. The SEC's Schedule 14A specifies that for "each matter which is to be submitted to a vote of security holders," corporate proxy statements must "[d]isclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and by-law provisions"—clearly indicating that corporations can adopt varying counting methodologies in assessing shareholder votes and that state substantive law governs the parameters of vote calculation. 17 C.F.R. § 240.14a-101 (2015).

Under the state law of Delaware, in which most large public corporations are chartered, "the certificate of incorporation or bylaws of any corporation authorized to issue stock may specify the number of shares and/or the amount of other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business." Del. Gen. Corp. L. § 216. As a default rule, absent a bylaw specification, Delaware law specifies that "in all matters other than the election of directors," companies should count "the affirmative vote of the majority of shares of such class or series or classes or series present in person or represented by proxy at the meeting," *Id.*, —the precise inverse of shareholder-proposal activists' preferred counting rule.

The SEC staff proposed but did not adopt a rule that for the very limited purpose of determining whether a proposal has met the "resubmission threshold" to qualify for inclusion on the next year's corporate ballot—a permissive

shareholder proposal involving social or policy concerns won majority shareholder support over board opposition over the entire 2006–15 period. In 2016, one of 155 shareholder proposals with a social or policy purpose won majority (52%) shareholder backing: a politics-related proposal at Fluor Corporation that sought disclosure of “[p]olicies and procedures for making, with corporate funds or assets, contributions and expenditures (direct or indirect) to (a) participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public, or any segment thereof, with respect to an election or referendum,” as well as disclosure of amounts given to each identified recipient and the corporate officer responsible for decision-making.<sup>127</sup>

The success of the shareholder proposal on political spending at Fluor is the exception, in receiving majority shareholder support, but make no mistake: activists have been able to influence corporate behavior through shareholder proposals of this sort. As previously reported:

In 2003, Bruce Freed, a former Democratic congressional staffer, founded an organization, the Center for Political Accountability (CPA), exclusively to “campaign for corporate political disclosure and accountability.” Dating back to 2006, the first year covered in the Proxy Monitor database, at least 19 shareholder proposals on companies’ political engagements have been placed on Fortune 250 corporations’ proxy ballots each year.<sup>128</sup>

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standard requiring merely a minimum 3%, 6%, or 10% vote, respectively, in successive years, *see* Amendments to Rules on Shareholder Proposals, 63 Fed. Reg. 29,106, 29,108 (May 28, 1998) (codified at 17 C.F.R. pt. 240) (describing the proposed threshold updates),— “[o]nly votes for and against a proposal are included in the calculation of the shareholder vote of that proposal,” ignoring abstentions. S.E.C. Division of Corporate Finance: Staff Legal Bulletin No. 14 (July 13, 2001), <http://www.sec.gov/interps/legal/cfslb14.htm> [<https://perma.cc/A7RX-XB4J>]. Because this is a staff rule not voted on by the Commission; because it exists for a limited purpose (with multiple rationales, including reducing workload in processing 14a-8 no-action petitions and adopting a permissive standard for ballot inclusion); and because it contravenes clear and longstanding deference to substantive state law in the field of corporate governance, the notion that this limited SEC staff vote-counting rule should dictate counting methodology, irrespective of state law and governing corporate bylaws, is untenable.

127. Fluor Corp., Proxy Statement (14A), Proposal No. 4 (Mar. 10, 2016).

128. COPLAND & O’KEEFE (2016), *supra* note 111, at 5; *see also About Us*, CTR. FOR POL. ACCOUNTABILITY, <http://politicalaccountability.net/about/about-us> [<https://perma.cc/78ZU-ZVJ5>] (last visited Mar. 6, 2017) (highlighting CPA’s mission and achievements).

The number of such proposals started to increase after the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*,<sup>129</sup> which determined that independent political expenditures were speech protected by the First Amendment, even if funded by for-profit corporations. The number of political-spending-related shareholder proposals peaked in 2014, when sixty-seven Fortune 250 companies faced a proposal on this topic.<sup>130</sup>

Across the 2006–16 period, fully 53% of shareholder proposals related to corporate political spending have been sponsored by labor-affiliated pension funds—representing interests that themselves spend heavily on the political process, often in opposition to corporations. State and municipal pension funds—including the two most-active sponsors of these types of proposals, the funds for public employees in New York City and State—are often wholly or significantly controlled by partisan elected officials whose political interests may be adverse to corporations' interests. Indeed, my prior research has shown that labor-affiliated pension funds' sponsorship of such shareholder proposals has tended to target companies whose executives and political action committees gave disproportionately to Republicans.<sup>131</sup> Aside from labor-affiliated investors, most political-spending-related shareholder proposals have been sponsored by social-investing funds, which by definition are not oriented solely around share value and may have social or policy goals opposed to the corporations they are targeting.

The public record amply demonstrates that many of the same sponsors of shareholder proposals seeking additional corporate disclosures of political spending also seek to influence corporations to disassociate from trade associations or to dissuade such groups from taking positions contrary to the special-interest sponsors' particular political preferences. For instance, in January 2011, leaders of the AFL-CIO Office of Investment, Domini Social Investments, Green Century Capital Management, the Nathan Cummings Foundation, and Trillium Asset Management—each a regular sponsor of political-spending-disclosure shareholder proposals—all co-signed a letter sent to thirty-five companies serving on the board of the U.S. Chamber of Commerce

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129. 558 U.S. 310, 365–66 (2010).

130. *Hearing on Corporate Governance*, *supra* note 107, at 25.

131. See JAMES R. COPLAND & MARGARET M. O'KEEFE, MANHATTAN INST., PROXY MONITOR: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 2 (2014), [http://www.proxymonitor.org/pdf/pmr\\_09.pdf](http://www.proxymonitor.org/pdf/pmr_09.pdf) [<https://perma.cc/A8ZN-KDR3>] (“The 43 Fortune 250 companies facing shareholder proposals sponsored by labor-affiliated investors in 2014 were twice as likely to orient their political efforts to support Republicans than was the average Fortune 250 company. A majority of shareholder proposals sponsored by labor-affiliated investors in 2014 have involved corporate political spending or lobbying, and only one company targeted by these proposals gave more money to Democrats than Republicans.”).

urging the companies “to evaluate” their role with the trade association and objecting to the Chamber’s “education and lobbying efforts to defeat legislative [sic] and regulation related to climate change, consumer protection and financial reform.”<sup>132</sup> Former New York City Comptroller John Liu, who manages the city’s five pension funds for retired public employees, sent a similar letter to at least one company in which the funds invested.<sup>133</sup> Bruce Freed’s CPA has both led and joined coalition letters pressuring companies to vocalize disagreement with trade association political positions.<sup>134</sup> It is hard to escape the conclusion that the highly politicized push for greater corporate disclosures surrounding political spending and lobbying is about political rather than financial goals. And judging from the CPA’s assessments of its impact, it is succeeding in changing companies’ behavior, even if not winning shareholder proxy votes themselves: “More than 150 large companies—including more than half of companies in the influential S&P 100—have struck political disclosure agreements with CPA and/or its shareholder partners.”<sup>135</sup>

Of course, the role of corporate money in politics is one of the most hotly debated issues in the public sphere today. My point is not to weigh in on the merits of one side or the other of the debate in this Article, but rather to point out that the terms of the debate—as with many others—are affected profoundly through use of legal processes outside the sphere of cases that ever reach the Supreme Court’s docket. And social activism by shareholder proxy, like the shadow regulatory state, is having a significant impact on company behavior.

Also, as with DPAs and NPAs, social activism by shareholder proxy seems to be adversely affecting companies—and impacting share value.<sup>136</sup> To assess this specific empirical claim, the Manhattan Institute commissioned an econometric study by Tracie Woidtke, a professor at

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132. Letter from Timothy Smith, Senior Vice President, Walden Asset Mgmt., to James Mulva, Chief Exec. Officer, ConocoPhillips (Jan. 18, 2011), [http://mercyinvestmentservices.org/storage/documents/Chamber\\_of\\_Commerce\\_letter.pdf](http://mercyinvestmentservices.org/storage/documents/Chamber_of_Commerce_letter.pdf) [<https://perma.cc/BM7Z-SGX6>].

133. Press Release, John C. Liu, N.Y.C. Comptroller, Comptroller Liu Calls on Siemens AG to Cut Ties to U.S. Chamber of Commerce (Jan. 24, 2011 1:06 AM) (available from LexisNexis Academic).

134. *See CPA Leads Effort to Press Companies on Climate Change Misalignment; Company Cuts Chamber Dues*, CTR. FOR POL. ACCOUNTABILITY NEWSLETTER (Nov. 2009) (on file with Case Western Reserve Law Review) (describing CPA’s efforts to address trade association’s positions on climate change).

135. *Our Impact*, CTR. FOR POL. ACCOUNTABILITY, <http://politicalaccountability.net/impact> [<https://perma.cc/4ZSD-NJ2W>] (last visited Mar. 6, 2016).

136. *See supra* note 112 and accompanying text.

the Haslam College of Business at the University of Tennessee.<sup>137</sup> Building on a research methodology initially developed for her doctoral dissertation, Woidtke examined the valuation effects associated with pension fund influence, measured through ownership, on Fortune 250 companies, from 2001 to 2013.<sup>138</sup> Firm value was assessed through industry-adjusted Tobin's Q, with various controls added to the analysis, including firm leverage, research and development expenses, advertising expenses, index membership, assets, positive income, stock transaction costs, insider ownership, and year fixed effects.<sup>139</sup> Woidtke found that "public pension funds' ownership is associated with lower firm value" and, more particularly, that "[s]ocial-issue shareholder-proposal activism appears to be negatively related to firm value."<sup>140</sup>

### CONCLUSION

In this Article, I have advanced three arguments concerning whether the Roberts Court is pro-business in orientation. First, I make the normative claim that a pro-business orientation is not a negative, but rather something to be applauded in light of U.S. productivity and financial-market trends. Of course, not all pro-business decisions are alike, and those that affirm government-erected barriers to entry or other examples of crony capitalism should not be applauded, notwithstanding that they affirm a "win" for a business litigant. But whether or not the "chief business of the American people is business,"<sup>141</sup> a pro-business or pro-market orientation is in keeping with our national founding and constitutional order.

Second, I raise methodological critiques of the effort to measure the Supreme Court's orientation vis-à-vis business over time. Although the Supreme Court has control over its docket, it does not have direct control over the decisions of lower courts, of Congress, of the Executive Branch, or of states. Moreover, not all cases are of equal import—and counting them equally biases any empirical inquiry into the Court's orientation, even if there is no non-subjective way to weight cases differently. Weighing major cases in the Roberts Court era holistically paints

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137. For the professor's biography, see *Department of Finance: Tracie Woidtke*, U. TENN. KNOXVILLE, <http://finance.bus.utk.edu/Faculty/TWoidtke.asp> [<https://perma.cc/M9U9-MXMT>] (last visited Apr. 2, 2017).

138. TRACIE WOIDTKE, MANHATTAN INST., PUBLIC PENSION FUND ACTIVISM AND FIRM VALUE 3 (Sept. 2015), [https://www.manhattan-institute.org/sites/default/files/lpr\\_20.pdf](https://www.manhattan-institute.org/sites/default/files/lpr_20.pdf) [<https://perma.cc/5HHA-FVC6>].

139. *Id.* at 7.

140. *Id.* at 16.

141. Coolidge, *supra* note 12.



a mixed picture. In cases involving pleading standards, class certification, and arbitration clauses, businesses have scored significant wins, but there was little change in the law involving securities class actions, and business lost major litigation involving the preemption of pharmaceutical product liability claims that constitute a large fraction of the mass-tort MDL docket.<sup>142</sup> Business interests lost what were perhaps the two most significant business cases in the Roberts era—granting the EPA authority to regulate carbon emissions and affirming the Affordable Care Act that reshaped the health-care sector.<sup>143</sup>

Finally, I challenge the premise of the question presented by arguing that much government legal and regulatory power over business occurs outside the Supreme Court's purview. By invoking the threat of prosecution and exploiting the massive collateral consequences facing large corporations under indictment, the federal government since 2004 has established a "shadow regulatory state" outside the substantive review of the judiciary.<sup>144</sup> Through shareholder-proposal rules under the auspices of the SEC—but never reviewed by the Supreme Court—social-issue activists have seized upon the corporate proxy process to reform large publicly traded companies' behavior.<sup>145</sup> The focus on the Supreme Court is an understandable conceit of professors who think themselves ideally suited for the nation's highest bench, but it misses a great deal of the real-world legal action.

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142. *See supra* Part II.D.

143. *Id.*

144. *See supra* Part III.A.

145. *See supra* Part III.B.