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How Business Fares in the Supreme Court

Lee Epstein, William M. Landes, & Richard A. Posner[†]

A number of scholars,[1] journalists,[2] and at least one member of Congress[3] claim that the current Supreme Court (the "Roberts Court") is more favorable to business than previous

1. *See, e.g.*, Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) ("[T]he Roberts Court is the most pro-business Court of any since the mid-1930s."); Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008 (Magazine), at 38 ("The Supreme Court term that ended last June was, by all measures, exceptionally good for American business.").

2. *See, e.g.*, *Corporations and the Court*, ECONOMIST, June 25, 2011, at 75; Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1; Alicia Mundy & Shirley S. Wang, *In Drug Case, Justices to Weigh Right to Sue*, WALL. ST. J., Oct. 27, 2008, at B1.

3. *See Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Judiciary Comm.*, 112th Cong. 1–2 (2011) (statement of Sen. Patrick Leahy, Chairman, S. Judiciary Comm.) (arguing that several recent Court decisions have unfairly empowered corporations at the expense of American consumers and employees, particularly in the areas of fraud and discrimination).

Supreme Courts have been.[4] Other commentators disagree,[5] while acknowledging that the Roberts Court is "less hostile to enterprise than the Warren Court" was;[6] one of these commentators calls *Wyeth v. Levine*,[7] a decision that business lost, "one of the most significant decisions of the Roberts Court."[8] An intermediate position is that it may be too soon to assess "the Roberts Court's responsiveness to American business,"[9] in part because the Court tends to agree with the positions taken by the Solicitor General of the United States, who during the first several years of the Roberts Court was the appointee of a Republican President and so tended to support business. The debate raises the larger issue, which we address in this Article along with the issue of the relative pro-business orientation of the Roberts Court, of the role of ideology in decisions of the Su-

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4. Mundy & Wang, *supra* note 2, at B1.

5. *See, e.g.*, *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Judiciary Comm.*, *supra* note 3, at 9–11, 53 (statement of Robert Alt, Senior Fellow and Deputy Director, Center for Legal and Judicial Studies, The Heritage Foundation) (arguing that the story of the Roberts Court as "pro-corporatist" is "fictional" and that in many important cases the Court sided against business); Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 972 (2009) ("If the relative magnitude of the cases is taken into account, it is even more difficult to argue that the Roberts Court has been 'pro-business' in this area."); Richard A. Epstein, *Is the Supreme Court Tilting Right?*, DEFINING IDEAS (Dec. 21, 2010), http://www.hoover.org/publications/defining-ideas/article/61206 ("To be pro-business today does not carry the same meaning that it did in earlier periods, when the scope of regulation was in general so much narrower."); Martin J. Newhouse, *Business Cases and the Roberts Supreme Court*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS (Dec. 6, 2011), http://www.fed-soc.org/doclib/20111216_NewhouseEngage12.3.pdf ("In numerous cases these Justices have cast their votes for, and even written the majority opinions in, decisions in which business parties have lost and investors, consumers, or employees have won.").

6. *Corporations and the Court*, *supra* note 2, at 75.

7. 555 U.S. 555 (2009).

8. "The Court's decision [in *Wyeth*] abruptly ended the efforts of the Bush administration to block private tort actions attacking the warnings which appear on drug labels and that are issued and approved by the FDA." Epstein, *supra* note 5.

9. Sri Srinivasan & Bradley W. Joondeph, *Business, the Roberts Court, and the Solicitor General: Why the Supreme Court's Recent Business Decisions May Not Reveal Very Much*, 49 SANTA CLARA L. REV. 1103, 1105 (2009).

preme Court, a focus of our recent book on judicial behavior,[10] though the book does not emphasize business cases.

In assessing the role of ideology in the Supreme Court, there is value in looking at a subset of cases, such as business cases. For there is no uniform conservative or uniform liberal ideology. Instead there are multiple imperfectly overlapping ideologies. For example, "Cold War liberals" (the standard example was Senator Henry Jackson of Washington; another was Justice Abe Fortas) are liberal in all respects except national defense and (sometimes) internal security. Libertarians are hostile to government in all respects, and therefore are conservative in business cases but liberal in most other cases. Social conservatives may be liberal with respect to the regulation of business but conservative in all other respects; that is, they may be pro-regulation across the board. Such differences can make it difficult or even impossible to distinguish between "liberal" and "conservative" Justices. However, it should be possible (and we endeavor in this Article) to distinguish between business-liberal and business-conservative Justices.

The Article is organized as follows. Part I describes the databases we use to study the Court's business decisions. Part II uses these databases to study the pattern over time of the Court's pro- and anti-business decisions, the ideological implications of the pattern, and, related to ideology, the correlation between coding decisions as conservative or liberal and coding them as business wins or business loses. Part III analyzes the voting behavior of the individual Justices, as distinct from the Court's actual decisions. We rank the Justices in terms of how favorable or unfavorable they are toward business, and relate each Justice's leaning for or against business to his pre-appointment ideology, the lower-court decision in the cases the Justice voted on, the federal government's participation in the case, and the filing of amicus curiae briefs for or against business. The conclusion summarizes our findings.

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10. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013).

I. DATA

We mainly use two databases that we created. The first, the Business Litigant Dataset, consists of the 1759 cases that were orally argued in the Supreme Court's 1946 through 2011 Terms in which a business entity was either a petitioner or a respondent but not both. The party opposing the business litigant may have been an employee or job applicant, a shareholder or other stakeholder, a nonbusiness organization (such as a union or an environmental group), or a government agency.

The second dataset, the Business versus Business Dataset, consists of the 255 cases orally argued in the Supreme Court's 1946 through 2011 Terms in which there was a business entity on both sides of the case. It might seem odd to use cases in which both adversaries are business entities to measure pro-business sentiment; whatever the outcome, business wins. But business is not an undifferentiated mass from an ideological standpoint. Liberals tend to support small business and conservatives big business, at least when small and big businesses are on opposite sides of a case. If a small firm sues a large one, accusing it of using predatory pricing in an effort to destroy the small one, a decision in favor of the small firm will be a liberal decision and a decision in favor of the large firm a conservative one. Or both parties might be small or both large yet one might be espousing a position that would generally favor small or large firms and the other espousing the opposite position. We have classified decisions in our Business versus Business Dataset as liberal when they favor small business or oppose business interests in general and conservative when they favor big business or favor business interests in general.

We also use a subset of the Business Litigant Dataset that consists of 465 cases in which the *New York Times* published a story about the Court's decision either on the front page or in the business section; we call this subset *NYT*.[11] Of those 465 cases, 189 were covered only on the front page, 250 only in the business section, and 26 in both places. We expect the *Times* to

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11. This is a variant of Epstein and Segal's measure of overall salience, which considers only whether the *New York Times* gave the case front-page coverage on the day the Court decided it. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72 (2000).

cover the most important business cases, and the most important Supreme Court case in any field is likely to involve an ideological division—otherwise either the Court would not have bothered to take the case or the readership of a newspaper would be uninterested in the outcome.

To create our datasets we started with the U.S. Supreme Court Database, originally created by the lawyer and political scientist Harold J. Spaeth. The "Spaeth Database"—or "Spaeth" as we will usually call it—contains hundreds of pieces of information about every Supreme Court case decided in or since the 1946 Term.[12] Information from the Spaeth Database that we use in our study includes the votes of each Justice, the decision of the lower court, the subject matter of the case, and whether a business entity was the petitioner or the respondent.[13] From the Spaeth Database and other sources we obtained data on additional factors likely to influence decisions and votes, such as ideology, whether the Solicitor General participated in the case, and whether the Chamber of Commerce filed an amicus curiae brief.

Classifying the cases in the Business Litigant Dataset as for or against business is complicated by the fact that a decision favoring (disfavoring) the business party does not necessarily favor (disfavor) the overall interest of the business community. Suppose a generic-drug manufacturer sues the FDA because manufacturers of patented drugs have persuaded the agency that the generic manufacturers are not doing enough testing of their drugs before putting them on the market. If they lose, the decision would be coded as anti-business but actually it would be pro-big-business. Rather than analyze separately each of the 1759 decisions in the Business Litigant Dataset, however, we classify every decision in favor of the business litigant as a decision in favor of business.

As shown in Figure 1, there has been a modest but statistically significant average decline of 0.3% per Term in the fraction of cases in the Business Litigant Dataset and a smaller but still significant average decline of 0.2% per Term in a broader

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12. Harold Spaeth et al., THE SUPREME COURT DATABASE, http://supremecourtdatabase.org (last visited Mar. 13, 2013).

13. We exclude cases within the Court's original jurisdiction, such as cases concerning boundary disputes between states.

All Business Dataset of 2479 cases.[14] There has also been (though it is not shown in Figure 1) a decline in the absolute number of cases in the Business Litigant Dataset, and in the broader business dataset as well, that is consistent with the overall decline in the Supreme Court's caseload. For example, the number of business cases in the Business Litigant Dataset averaged 36.6 per Term in the 1946 to 1952 Terms, compared to only 11 per Term since 2005; in the broader business dataset the decline is from an average of 46.1 to an average of 22.1.

Figure 1
Fraction of Orally Argued Cases Involving Business

<hr>
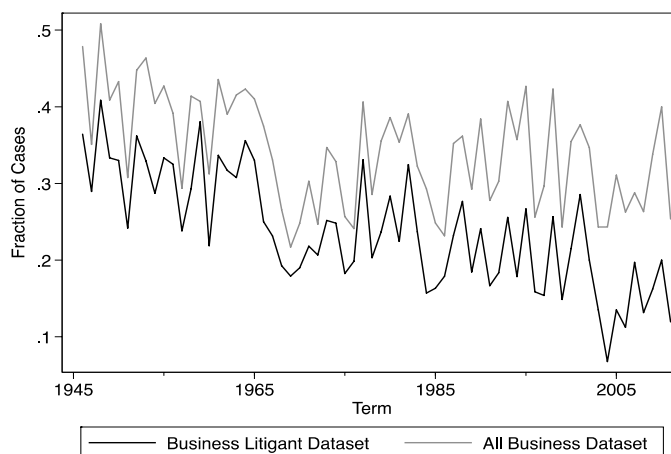
14.   The All Business Dataset includes 1759 cases in the Business Litigant Dataset plus 255 cases in the Business versus Business Dataset plus 465 other business cases in which the non-business party was not one of the covered categories in the Business Litigant Dataset. The regressions of fraction of business cases on term for the 1946–2011 Terms are:

Bus. Litigant Dataset = 5.92 - .0029 *Term*
                               (9.00) (8.63)
All Bus. Dataset = 3.77 - .0017 *Term*
                            (4.63) (4.21)

where *Bus. Litigant Dataset* = the number of cases in the Business Litigant Dataset as a fraction of all orally argued cases; *All Bus. Dataset* = the number of cases involving business (without regard to the opposing party) as a fraction of all orally argued cases; and *Term* = Term of the Court by year. The difference between the regression coefficients on the *Term* variable in the two equations is statistically significant.

The business litigant prevailed in 38% of the cases in the Business Litigant Dataset—27% of the 951 cases in which business was the respondent and 52% of the 808 cases in which it was the petitioner. Of the individual Justices' votes, as distinct from decisions, 40% were in favor of business and 60% opposed. Business litigants fared worse than the average non-business litigant in the Supreme Court: petitioners won 63% of the non-business cases (versus 52% of the business cases) and respondents won 37% (versus 27%); these differences between the two groups of litigants are statistically significant. The differences are correlated with the fact that, as will be noted in Part III, the Court is less likely to grant certiorari to a business petitioner than to a non-business petitioner.

II. BUSINESS DECISIONS AND IDEOLOGY CODING

The Business Litigant Dataset departs from the approach that political scientists have taken to analyzing the Supreme Court's attitude toward business.[15] The departure enables a more precise understanding of that attitude.

Political scientists tend to select for study cases identified in the Spaeth Database as involving "economic activity,"[16] and to treat whether the Court reached a liberal or a conservative decision as a proxy for the Court's attitude towards business.[17]

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15. The genesis is Glendon Schubert, *The 1960 Term of the Supreme Court: A Psychological Analysis*, 56 AM. POL. SCI. REV. 90 (1962). *See also* Harold J. Spaeth, *Warren Court Attitudes Toward Business: The "B" Scale*, *in* JUDICIAL DECISION-MAKING (Glendon Schubert ed., 1963). More recent examples are Timothy M. Hagle & Harold J. Spaeth, *The Emergence of a New Ideology: The Business Decisions of the Burger Court*, 54 J. POL. 120 (1992); Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801 (2009); Jeffrey A. Segal et al., *Buyer Beware: Presidential Success through Supreme Court Appointments*, 53 POL. RES. Q. 557 (2000) [hereinafter Segal, *Buyer Beware*]; Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) [hereinafter Segal, *Ideological Values*]; Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797 (2006).

16. *E.g.*, Segal, *Ideological Values*, *supra* note 15, at 813–15; C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions*, *1946-1978*, 75 AM. POL. SCI. REV. 355, 356–58, 362–63 (1981).

17. *E.g.*, Sag et al., *supra* note 15, at 804–09; Segal, *Buyer Beware*, s*upra* note 15, at 562–68; Staudt, Epstein & Wiedenbeck, *supra* note 15, at 1812–15.

The idea is that a conservative vote in the economic-activity subset is pro-business and a liberal vote anti-business.

But many business cases are not in Spaeth's "economic activity" category. An example is *Adarand Constructors, Inc. v. Pena*,[18] a challenge to the federal provision of financial incentives to induce general contractors to hire minority subcontractors. While the cases comprising the economic activity category form the modal category in our Business Litigant Dataset, 60% of them are in other categories in the Spaeth Database, as shown in Table 1. Even when we combine cases identified in the Spaeth Database as involving economic activity, unions, and federal taxation into a single category (which we call the "core economic category"), 44% of the cases in our Business Litigant Dataset are outside it. (And even the Business Litigant Dataset has omissions, because it is limited to cases in which a business is the *first* named party, and so excludes cases like *Alaska Department of Environmental Conservation v. EPA*,[19] where the EPA was trying to block a state's grant of a mining permit to a business.)

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18. 515 U.S. 200, 204 (1995).
19. 540 U.S. 461, 468–69 (2004).

	Table 1	
Issue Coverage in the Business Litigant Dataset, 1946–2011 Terms		
Issue Area	**Cases**	**Votes of Justices**
Core Economic Areas	56.0% (985)	56.0% (8831)
Economic Activity	39.9 (702)	39.9 (6301)
Unions	12.6 (221)	12.5 (1975)
Federal Taxation	3.5 (62)	3.5 (555)
Non-Core Economic Areas	43.9% (774)	44.0% (6951)
Criminal Procedure	2.6 (46)	2.6 (412)
Civil Rights	7.7 (135)	7.7 (1219)
First Amendment	6.8 (119)	6.8 (1069)
Due Process	2.4 (42)	2.4 (378)
Privacy	1.5 (27)	1.5 (243)
Attorneys	0.5 (9)	0.5 (81)
Judicial Power	15.0 (263)	14.9 (2356)
Federalism	7.2 (126)	7.2 (1130)
Miscellaneous/ Unidentified	0.4 (7)	0.4 (63)
Total Number of Cases/Votes	1759	15,782

Note: Number of cases and number of votes are in parentheses. Miscellaneous includes one case involving interstate relations.

We can obtain an idea of the significance of the Spaeth omissions from data on the 178 amicus curiae briefs filed in the Supreme Court by the Chamber of Commerce in the 1979 through 2006 Terms (the only period for which such data are available). Of these, 140 were in cases in which a business entity was a named party, leaving 38 (21.4%) in which a business was not a named party and so the case was not included in our Business Litigant or Business versus Business datasets. But the business community must have had an interest in those 38 cases as otherwise the Chamber would not have filed a brief.

Although 21.4%is a substantial percentage number of misses, the percentage of the 178 cases that fall outside Spaeth's economic activity category is more than three times as great—69.7%.

It is natural to expect decisions in favor of the business litigant to be conservative and those in favor of the non-business litigant liberal. Yet as Table 2 shows, in 67.5% of the cases in our Business Litigant Database either the business litigant wins and Spaeth classifies the decision as conservative or the business litigant loses and Spaeth classifies it as liberal.[20] The last two columns in the table show similar results for Justices' votes.

Table 2 **Overlap of Pro-Business/Anti-Business with Spaeth Coding of Conservative /Liberal in the Business Litigant Dataset**				
Ideology of Decisions/Votes	*Decision*		*Justices' Votes*	
	Business Wins	*Business Loses*	*Business Wins*	*Business Loses*
Liberal	35.9% (241)	69.6% (754)	37.0% (2267)	70.4% (6360)
Conservative	64.1 (430)	30.4 (329)	63.0 (3861)	29.6 (2680)
Total	(671)	(1083)	(6128)	(9040)
Notes: (a) Number of cases or votes in parentheses. (b) The table includes 1754, not 1759, cases because Spaeth was unable to code 5 cases (45 votes) in the Business Litigant Dataset as either liberal or conservative.				

The overlap varies across case categories. In what we are calling the core economic category in the Spaeth Database, 87% of the cases are business wins-conservative, business loses-liberal. But this figure drops to 48% of business cases that Spaeth places in the civil liberties category (cases involving criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys (because many attorney cases involve either commercial speech or disbarment because of political

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20. Spaeth was unable to classify as conservative or liberal 5 of the 1759 cases that turn up in our Business Litigant Dataset. These cases involved a boundary dispute between two states and property disputes (including wills and estates) that have no clear liberal or conservative side.

views)). If we combine civil liberties, judicial power, and federalism cases (plus seven cases in a miscellaneous category) into a non-core business category (consisting of 774 cases, which is 44% of the cases in the Business Litigant Dataset that we noted earlier were not in either Spaeth's economic activity category or our core economic category), a business win is more likely to have been coded liberal (55%) than conservative by Spaeth and a business loss more likely to have been coded conservative (59%) than liberal. This is a puzzling result. While some business wins are liberal—for example, a media business winning a First Amendment case—others, including many that Spaeth codes as liberal, such as a tobacco company obtaining invalidation of a state law limiting cigarette advertising, would be challenged by many liberals.

These results led us to question the accuracy of Spaeth's ideological classifications of business cases. Spaeth himself has acknowledged that the terms "liberal" and "conservative" are more difficult to apply to such cases.[21] In an effort to assess the accuracy of those classifications, Judge Posner read a random sample of 48 cases in the non-core areas of the Spaeth Database that Spaeth coded as either a liberal decision when business won or a conservative decision when business lost. Posner, who was not informed beforehand how Spaeth had coded them, turned out to disagree with Spaeth in a surprisingly high 79% of these cases. Posner decided that 27 cases that Spaeth had coded liberal should have been coded conservative, or vice versa, and that 11 cases that Spaeth had coded liberal or conservative were unclassifiable—that is, had no discernible ideo-

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21. "The term liberal represents the voting direction of the justices across the various issue areas. It is most appropriate in the areas of civil liberties, criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys where it signifies pro-defendant votes in criminal procedure cases, pro-women or pro-minorities in civil rights cases, pro-individual against the government in First Amendment, due process, and privacy cases and pro-attorney in attorneys' fees and bar membership cases. In takings clause cases, however, a pro-government/anti-owner vote is considered liberal. The use of the term is perhaps less appropriate in union cases, where it represents pro-union votes against both individuals and the government, and in economic cases, where it represents pro-government votes against challenges to federal regulatory authority and pro-competition, anti-business, pro-liability, pro-injured person, and pro-bankruptcy votes." LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 277 (5th ed. 2012).

logical valence.[22]

To create a more balanced sample, Posner, again without looking up Spaeth's classifications in advance, read 99 additional cases in the Business Litigant Dataset, 50 from the core economic category and 49 from the non-core category, that Spaeth had coded conservative when business won and liberal when business lost.[23] The percentage of disagreement between Spaeth and Posner in the 99 cases was 19.2%. Posner decided that 9 of the 99 should have been deemed unclassifiable and 10 should have been coded, whether conservative or liberal, opposite to Spaeth's coding.

That made a total of 57 cases in the full sample of 147 in which Posner disagreed with Spaeth—38.8%. But that figure falls to 28.7% when the three constituent samples are weighted by their percentage of the cases in the Business Litigant Dataset. The 28.7% figure is made up of 19.8% disagreement over whether the outcome was liberal or conservative and 8.9% disagreement over whether the outcome could be classified either way.

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22. Originally it was a random sample of 50 cases, but we excluded two because in each the "business" litigant was a health organization (Planned Parenthood) that was not a business. Since only 9 of the 1759 cases in the dataset were in the health organization category, errors from including such cases (some of which, moreover, *are* businesses, such as community hospitals) in the dataset would be negligible.

23. The original sample was 100 cases, but we excluded one that did not involve business.

Table 3 presents a summary analysis of the dataset, where "Epstein-Landes-Posner" or "ELP" denote Posner's coding of the cases.

Table 3
Ideological Coding of Cases in the Business Litigant Dataset

Business Litigant Dataset	Core Economic Category	Non-Core Economic Category	
		Business Wins/Conservative or Business Loses/Liberal	*Business Wins/Liberal or Business Loses/Conservative*
	(1)	*(2)*	*(3)*
Number of Cases	50	49	48
Spaeth			
Unclassifiable	0	0	0
Classifiable	50	49	48
Epstein-Landes-Posner			
Unclassifiable	0	9	11
Classifiable	50	40	37
ELP Disagreement with Spaeth in Classifiable Cases	7	3	27
Total ELP Disagreement with Spaeth Cases (% Disagreement)	7 (14%)	12 (24%)	38 (79%)

Notes:
(a) Core Economic Category includes economic, union, and tax cases.
(b) The Non-Core Categories include criminal procedure, civil rights, first amendment, due process, privacy, attorneys, judicial power, federalism, and a miscellaneous category (consisting of only 7 cases in the Business Litigant Dataset.
(c) Total Disagreement with Spaeth is the sum of the unclassifiable and classifiable disagreements.
(d) There are 48 rather than 50 cases in column (3) because two cases did not involve a business entity.

We expect an even higher rate of disagreement with the Spaeth codings in our Business versus Business Dataset, since the cases in that dataset lack the obvious though potentially misleading marker of a business win as conservative and a business loss as liberal. Cutting against this expectation, however, is that often the fact that one party to a lawsuit is a business may have little to do with issues of interest to business. For example, the issue in a case in the dataset might be whether a litigant should have access to grand jury testimony;

though the issue arose in a case in which a business was a criminal defendant, the case would probably be significant for criminal cases in general rather than for anything peculiar to the prosecution of a business.

Posner read 149 of the 255 cases in the Business versus Business Dataset, again without knowing beforehand how Spaeth had coded them. The other 106 cases that he did not read were cases that Spaeth, our research assistants, and Posner on the basis of brief summaries of the cases prepared by the research assistants had all coded the same way. Table 4 summarizes the disagreement between Posner and Spaeth.

Table 4		
Ideology Coding in Business versus Business Cases		
	Spaeth	**Epstein-Landes-Posner**
Total Cases	255	255
Unclassified	1 (0.4%)	44 (17.3%)
Coded as Conservative	115 (45.1%)	96 (37.6%)
Coded as Liberal	139 (54.5%)	115 (45.1%)
Agree with Spaeth	—	176
Disagree with Spaeth	—	79
Unclassified by ELP but Classified by Spaeth	—	43
Classified by ELP but Spaeth Classifies the Opposite	—	36
Disagreement Rate	—	31.0%
Agreement Rate	—	69.0%

The table reveals a trivially higher rate of disagreement with Spaeth (31%) in the Business versus Business Dataset than the 28.7% weighted disagreement rate in the Business Litigant Dataset. The principal disagreement regarding cases in the Business versus Business Dataset concerns unclassifiable cases. Spaeth found only one; Posner found 44.

Table 5 examines one possible source of disagreement with the Spaeth: Spaeth's tendency to classify relatively more outcomes in business cases as liberal than as conservative (54.7% liberal (= 139/254) in cases in our Business versus Business Dataset and 57.1% liberal (= 84/147) in cases in our Business Litigant Dataset). The data in Table 5 require us reject this

hypothesis. In the Business versus Business Dataset we dis-
agreed with the Spaeth Database's conservative coding 32.2%
of the time and his liberal coding 30.2% of the time. In the
Business Litigant Dataset we disagreed with Spaeth's conser-
vative coding 58.7% of the time and its liberal coding only
23.8% of the time.

Table 5 Ideological Coding Disagreements								
	Spaeth Coding							
	Conservative				Liberal			
Business versus Business	C	L	U	N	C	L	U	N
Epstein-Landes-Posner	67.8% (78)	15.7% (18)	16.5% (19)	115	12.9% (18)	69.8% (97)	17.3% (24)	139
Business Litigant Dataset								
Epstein-Landes-Posner	41.3% (26)	41.3% (26)	17.5% (11)	63	13.1% (11)	76.2% (64)	10.7% (9)	84

Notes:
(a) *C*, *L*, and *U* refer to the classification by Epstein-Landes-Posner as a conservative,
liberal, or unclassifiable decision.
(b) *N* denotes the number of cases that Spaeth classified as either conservative (115) or
liberal (139).
(c) There are 254 cases (115 + 139) in the Business versus Business Dataset that
Spaeth coded as either conservative or liberal. He coded 1 case as unable to classify.
(d) There are 147 cases in the sample from the Business Litigant Dataset because we
determined that 3 cases did not involve businesses.

We do not expect a Justice's ideological preferences to in-
fluence his vote in cases in which there are no ideological
stakes. Because ideological disagreement increases the likeli-
hood of dissent,[24] we expect greater unanimity in such cases.
Table 6 tests this hypothesis by comparing the fraction of
unanimous decisions in unclassifiable cases to the fraction in
cases that we classified as either liberal or conservative. The
fraction is between 10 and 21% greater in the unclassifiable
cases. In spite of the small sample size, the results are still sta-
tistically significant in the Business Litigant Dataset.[25]

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24.   *See* EPSTEIN, LANDES & POSNER, *supra* note 10, at 256–72.
25.   The significance level with respect to the fraction of cases in the Busi-
ness versus Business Dataset with 0 dissents is p > .27.

Table 6
Dissent in Classifiable versus
Unclassifiable Decisions

Dissenting Votes	Business versus Business Dataset		Business Litigant Dataset	
	Epstein-Landes-Posner		*Epstein-Landes-Posner*	
	C/L	U	C/L	U
	(1)	(2)	(3)	(4)
0	43.1%	52.3%	44.8%	70.0%*
1	10.0%	13.6%	13.4%	—
2	18.5%	13.6%	15.0%	5.0%
3	17.1%	11.4%	14.2%	20.0%
4	11.4%	9.1%	12.6%	5.0%
N	211	44	127	20

Notes:
(a) *N* is the number of cases.
(b) *C/L* denotes the case classified as either liberal or conservative.
(c) *U* denotes the case is unclassifiable.
(d) The asterisk * indicates that fraction of cases with 0 dissents is significantly different at the .05 level between classified (C/L) and unclassifiable (U) cases.

Figure 2 presents data on Justices' voting in business cases. In the next Part of the Article we use those votes to determine the attitude toward business of the individual Justices; here we consider whether to use decisions or Justices' votes to determine changes over time in the Supreme Court's attitude.

For each of the 36 Justices who voted in cases in our Business Litigant Dataset, we calculated the fraction of the Justice's votes in favor of business and the fraction of votes coded conservative by Spaeth, in core and non-core business cases. In the core category a Justice's ideology as measured by conservative votes turns out to be positively related to the fraction of cases in which the Justice votes in favor of a business entity. But there is no correlation in non-core cases.[26] This implies that ideology is a good proxy for measuring a Justice's preference for

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26. We regressed the fraction of business wins against the fraction of conservative votes for the core and non-core categories. The 36 observations in the regressions (one for each Justice) are weighted by the number of votes of each Justice in the particular category. The regression results are:

*Core Categories*: *Fr. Bus. Win* = .039 + .901(*Fr. Con. Votes*) R^2 = .97
                          (3.49) (32.13)

Non-Core Categories: *Fr. Bus. Win* = .441–.011(*Fr. Con. Votes*) R^2 = 0
                          (10.47) (0.14)

business only in the core category. In fact the non-core cases reveal a negative, though not statistically significant, relation between the fraction of votes in favor of the business entity and the fraction of conservative votes.

Figure 2
Business Wins Versus Ideology Coding
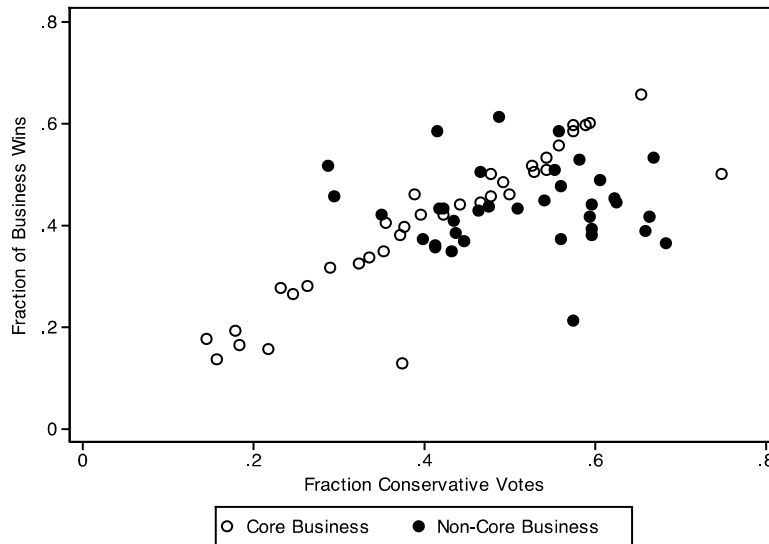
To analyze whether one Supreme Court era is friendlier to business than another, we could use either the percentage of decisions or the percentage of Justices' votes that favored business. But the former is the better choice. Imagine that businesses win 90% of the cases in the Roberts Court by a vote of 5 to 4 and in the remaining 10% the vote is 9 to 0 against business. Then 50% of the total votes would favor business even though businesses won 90% of the cases. And if businesses won 70% of the cases in the Rehnquist Court 7 to 2 and lost 30% 5 to 4, they would have won 68% of the votes compared to 50% in the Roberts Court, yet a business party would have a 20% greater chance of winning in the Roberts Court (90% versus 70%).

But the fractions of votes and of decisions supporting business per Term turn out to be highly correlated (= .91), so that, as shown in Figure 3, both series yield identical results con-

cerning the Court's support for business. Both indicate a large drop in support for business during the 1960s, the era of the Warren Court, and a large rise in the Roberts Court. The plunge in the early 2000s is a puzzle. But it may just be a statistical fluke. Two Terms, 2004 and 2005, account for the entire drop, and there were only 5 cases in the first of these Terms in the Business Litigant Dataset and 10 in the second Term. Of the 15, the business litigant lost 10.

Figure 3
Fraction of Votes and Decisions in Support of Business
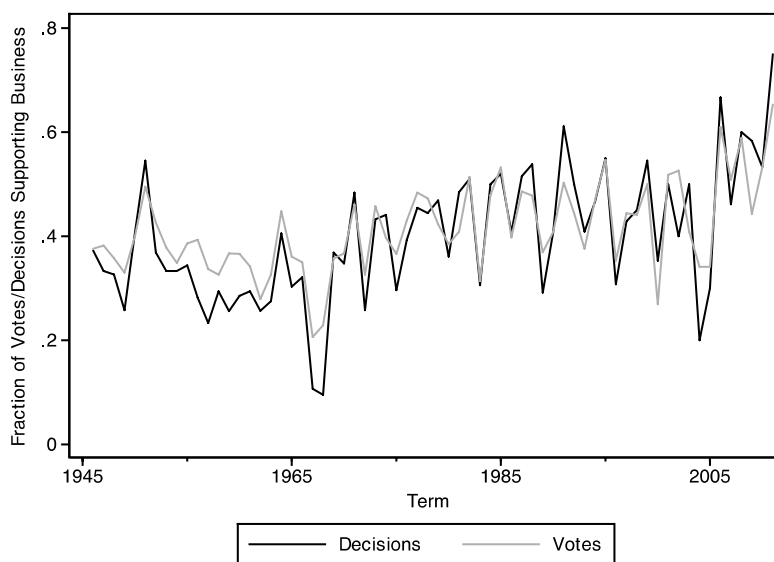
III. ANALYSIS OF INDIVIDUAL JUSTICES' VOTES IN THE BUSINESS LITIGANT AND BUSINESS VERSUS BUSINESS DATASETS

Table 7 ranks the Justices' friendliness toward business (column (1)) in the Business Litigant Dataset. We present separate results for 5-4 decisions (5-3 in the 1969 Term, when the Court had only eight Justices[27]) and for the *NYT* sample. We

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27.   *See* EPSTEIN ET AL., *supra* note 21, at 439.

present our own coding (not Spaeth's) of the fraction of conservative votes (column (4)) in the Business versus Business Dataset.

Column (1) reveals that five of the ten Justices since 1946 friendliest to business are serving currently and that two of them—Alito and Roberts—rank first and second both for all cases in the Business Litigant Dataset and the *NYT* subset and first and third for 5-4 decisions.[28] Of the current Justices, only Sotomayor is among the ten Justices least favorable to business, but she has cast relatively few votes (31, as shown in Table 7). Justices Breyer and Ginsburg are only slightly more liberal than the median Justice (Reed) but are among the six most liberal Justices in 5-4 decisions. Justice Kagan has too few votes to be included.

These rankings suggest, consistent with Figure 3, that the Roberts Court is indeed highly pro-business—the conservatives extremely so and the liberals only moderately liberal.[29] We find similar results for 5-4 decisions (column (2)), *NYT* decisions (column (3)), and decisions in the Business versus Business Dataset.[30] But Roberts replaces Alito as the Justice most favor-

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28. At the time of their nominations, the media deemed both Roberts and Alito "good for business." *Critics, Supporters Battle over Roberts*, CNN.COM (Aug. 25, 2005, 1:17 PM), http://www.cnn.com/2005/POLITICS/08/24/roberts .nomination/index.html; Shaheen Pasha, *Business will Support Alito*, CNNMONEY (Oct. 31, 2005, 11:24 AM), http://money.cnn.com/2005/10/31/news/ economy/alito_nomination/.

29. A word of caution about the rankings: small differences in rankings among the Justices are generally not statistically significant. For example, although the difference in ranking between Alito (#1) and Reed (#18) is significant, the difference between Alito and Thomas (#5) is not. Similarly, the difference between Reed and Clark (#30) is significant but not the difference between Reed and Douglas (#26). And the difference between Scalia (#9) and Rehnquist (#14) is significant but not the difference between Scalia and O'Connor (#12). The rankings are even more suspect for 5-4, *NYT*, and business versus business cases because a number of Justices cast only a few votes in such cases so that even large differences in ranking in those categories of case are often not statistically significant.

30. The Spearman rank-order correlations across the four datasets are very high and significant: .84 between columns (1) and (2), .85 between (1) and (3), and .83 between (2) and (3), and .75 between columns (1) and (4). We exclude Goldberg from rankings involving 5-4 decisions because he cast only 2 votes and exclude Sotomayor from the business versus business rankings because she cast only 4 votes. Kagan is excluded from all comparisons because she had very few votes (16 votes in column (1), 4 in columns (2) and (3), and 2 in column (4)).

able to business in the Business versus Business Dataset (column (4)) followed by Thomas, Whittaker, Scalia, Alito, and O'Connor, the last two being tied for fifth place.

Table 7
Rankings of Justices During The 1946–2011 Terms Based on the Fraction of Votes for Business in the Business Litigant and Business versus Business Datasets

Justice	*Business Litigant Dataset* (1)	*5-4 Cases* (2)	*NYT* (3)	*Business versus Business* (4)
Alito	.630 (73)	.929 (14)	.750 (12)	.600 (15)
Roberts	.587 (75)	.857 (14)	.692 (13)	.750 (16)
Jackson	.570 (263)	.861 (36)	.565 (46)	.474 (19)
Whittaker	.557 (158)	.846 (26)	.529 (34)	.632 (19)
Thomas	.549 (295)	.696 (46)	.632 (68)	.692 (52)
Kennedy	.507 (412)	.722 (72)	.552 (116)	.556 (63)
Frankfurter	.501 (499)	.788 (66)	.511 (94)	.558 (52)
Powell	.501 (457)	.662 (74)	.487 (152)	.592 (49)
Scalia	.499 (455)	.667 (69)	.465 (127)	.606 (71)
Harlan	.478 (572)	.674 (46)	.512 (123)	.593 (59)
Stewart	.474 (700)	.671 (79)	.488 (209)	.595 (79)
O'Connor	.472 (529)	.595 (79)	.451 (153)	.600 (70)
Burger	.461 (529)	.587 (75)	.449 (176)	.554 (56)
Rehnquist	.435 (837)	.545 (123)	.410 (261)	.584 (101)
Stevens	.423 (759)	.402 (112)	.446 (249)	.430 (107)
Burton	.420 (407)	.723 (47)	.451 (71)	.514 (37)
Vinson	.412 (250)	.588 (34)	.468 (47)	.267 (15)
Reed	.410 (349)	.575 (40)	.322 (59)	.406 (32)

Blackmun	.403 (704)	.456 (103)	.377 (231)	.487 (78)
Souter	.401 (284)	.349 (43)	.446 (74)	.560 (50)
Breyer	.397 (232)	.205 (39)	.415 (53)	.535 (43)
Ginsburg	.391 (261)	.214 (42)	.475 (61)	.447 (47)
Marshall	.383 (702)	.449 (98)	.339 (233)	.375 (80)
White	.377 (942)	.495 (111)	.327 (300)	.411 (107)
Minton	.360 (203)	.462 (13)	.345 (29)	.391 (23)
Douglas	.358 (902)	.359 (103)	.337 (193)	.219 (96)
Sotomayor	.355 (31)	0 (7)	.400 (5)	— —
Goldberg	.339 (109)	.5 (2)	.290 (31)	.538 (13)
Brennan	.328 (1064)	.362 (130)	.290 (321)	.290 (124)
Clark	.310 (564)	.306 (49)	.317 (120)	.270 (63)
Warren	.242 (513)	.146 (41)	.205 (122)	.191 (68)
Murphy	.238 (126)	.231 (26)	.185 (27)	.143 (7)
Black	.236 (798)	.207 (82)	.257 (179)	.184 (87)
Rutledge	.233 (133)	.192 (26)	.259 (27)	.571 (7)
Fortas	.174 (92)	.143 (7)	.133 (30)	.333 (15)
AVERAGE (Total Votes)	.404 (15,213)	.503 (1978)	.397 (4050)	.452 (1826)

Notes:
(a) We exclude Kagan from table because she had only 16 votes in the Business Litigant Dataset and 1 vote in the Business versus Business Dataset; and we exclude Sotomayor from the Business versus Business Dataset because she had only 4 votes.
(b) *AVERAGE* is the mean of the individual Justice weighted by the number of votes for each Justice. Note that the Average includes the votes of all Justices including Kagan and Sotomayor.
(c) Justices serving in 2012 are in bold.
(d) Number of votes by each Justice in parentheses.

There are a couple of anomalies in Table 7. One is Jackson's strong support for business; he ranks third highest in all cases in the Business Litigant Dataset and second highest in 5-4 cases. As FDR's Attorney General, he prosecuted businesses

vigorously, in sync with the New Deal's general hostility to business interests. Even more surprising is that Ginsburg jumps to 11 (above Scalia and just below Powell and Stewart) in *NYT* cases. Nevertheless, Justices appointed by Republican Presidents are on average considerably more likely to favor business than Democratic appointees. In the Business Litigant Dataset (column (1)), Republican Presidents appointed 13 of the 15 Justices most favorable to business (Jackson and Frankfurter are the two in this group who were appointed by Democratic Presidents), and Democratic Presidents appointed 13 of the 15 least business-friendly Justices, Brennan and Warren being the two Justices in this group who were appointed by a Republican President. On the current Court, no Justice appointed by a Republican President is less favorable to business than any Justice appointed by a Democratic President. The results for the other three datasets are similar.

Two factors correlated with the high business-friendly rankings of the Justices of the Roberts Court are the increase in the number of business petitioners relative to the number of business respondents (Figure 4) and the higher win rates for business petitioners and business respondents (Figure 5). When a business petitioner wins in the Supreme Court it means that the Court has reversed an anti-business decision, so the more pro-business the court, the more petitions by business litigants it can be expected to grant. And since business petitioners have a higher win rate than business respondents, the granting of more petitions by business litigants increases the overall win rate of business even if the win rates of the two groups are held constant.

Figure 4
Fraction of Business Petitioners and Business Respondents

Figure 5
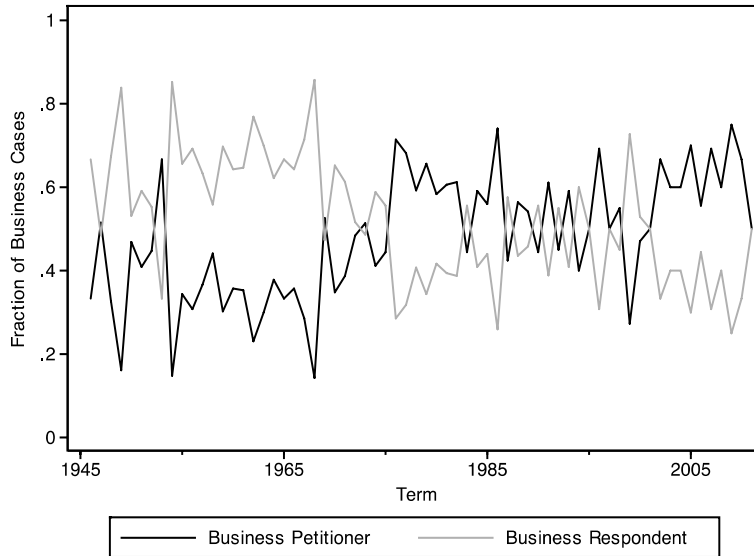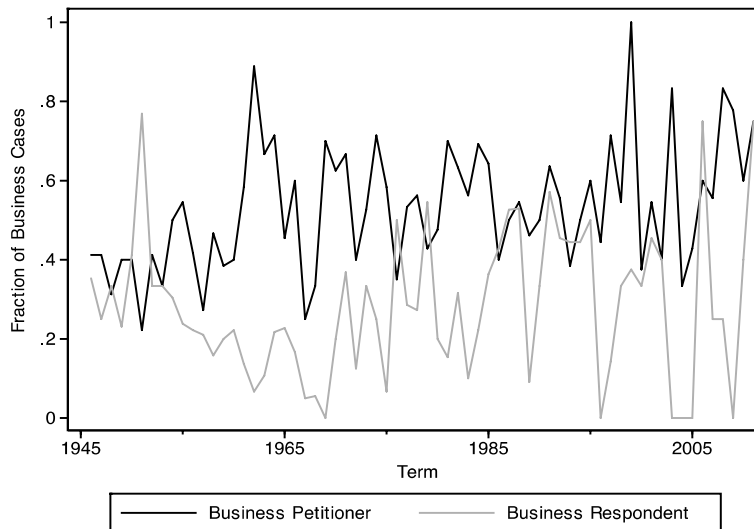**Fraction of Wins for Business Petitioners and Business Respondents**

Business petitioners accounted for 34.7% of the Business Litigant Dataset from 1946 to 1968 (the Vinson and Warren Courts), 54.0% from 1969 to 2004 (the Burger and Rehnquist Courts), and 64.9% since 2005 (the Roberts Court).[31] The increases in the separate win rates for business petitioners and business respondents (Figure 5) have been more modest. For business petitioners, the win rate is 45.0% in the Vinson and Warren Courts, 54.4% in the Burger and Rehnquist Courts, and 64.0% in the Roberts Court. For business respondents, the win rates in those three Courts are 23.3%, 30.5%, and 37.0%, respectively.[32]

Table 8 classifies Justices as either appointed by a Republican President (*R*) or appointed by a Democratic President (*D*) and as conservative (*C*), moderate (*M*), or liberal (*L*).[33] We expect the difference in favor toward business between *C*s and *L*s to be greater than the difference between *R*s and *D*s because Republican Presidents have sometimes appointed liberal Justices (Brennan, Warren, Stevens, and Souter) and Democratic Presidents have sometimes appointed conservative ones (Reed, Burton, Vinson, Clark, and Minton).[34]

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31. A regression of the fraction of business petitioners on a time trend variable over the 1946 to 2011 Terms yields a highly significant positive trend of .005 per year (and a t-ratio of 5.95), while a regression of business respondents yields a negative coefficient of -.005 per year and a t-ratio of 7.49.

32. For the 1946 to 2011 time period, there is a positive and significant trend in the win rate for business petitioners (.003 per year with a t-ratio of 3.44) and a positive but insignificant trend for business respondents (.001 per year with a t-ratio of 1.01).

33. The conservative, moderate, and liberal classifications are based on an assessment we developed from secondary sources and reported in chapter 3 of *The Behavior of Federal Judges*. *See* EPSTEIN, LANDES & POSNER, *supra* note 10, at 101–51.

34. Republican Presidents appointed five of the eight moderates (Whittaker, Stewart, Blackmun, Powell, and O'Connor) and Democratic Presidents three (Frankfurter, Jackson, and White).

	Table 8						
	Fraction of Pro-Business Votes of Republican and Democratic						
	Appointees and of Conservative, Moderate, and Liberal						
	Justices,						
	1946–2011 Terms						
	All (1)	*R* (2)	*D* (3)		*C* (4)	*M* (5)	*L* (6)
Business Litigant Dataset	.404 (15213)	.434** (8334)	.367 (6879)		.444** (4941)	.456** (4250)	.335 (6022)
5-4	.502 (1978)	.548 (1146)	.438 (832)		.615** (642)	.620** (574)	.316 (762)
NYT	.397 (4050)	.428* (2441)	.350 (1609)		.453** (1222)	.428* (1219)	.331 (1609)
Business versus Business	.452 (1826)	.512** (1077)	.369 (749)		.534** (603)	.529** (473)	.340 (750)
Vinson	.389 (2195)	—	.389 (2195)		.402** (975)	.540** (487)	.271 (733)
Warren	.345 (4446)	.371 (1898)	.325 (2548)		.395* (1250)	.442** (1010)	.271 (2186)
Burger	.426 (4586)	.441** (3326)	.387 (1260)		.442* (1036)	.447* (1967)	.390 (1583)
Rehnquist	.441 (3313)	.449* (2634)	.408 (679)		.476** (1302)	.445 (784)	.400 (1227)
Roberts	.519 (673)	.563** (476)	.411 (197)		.614** (378)	—- (2)	.399 (293)

Notes:
(a) One asterisk signifies statistical significance at the .05 level and two asterisks at the .01 level. The statistical comparisons are between *R*s and *D*s; *C*s and *L*s; and *M*s and *L*s.
(b) Standard errors are clustered by Justice.
(c) The conservative Justices are Kennedy, Scalia, Thomas, Vinson, Burton, Roberts, Harlan, Alito, Reed, Minton, Clark, Burger, and Rehnquist; the moderates are White, Whittaker, Frankfurter, Blackmun, Powell, Stewart, Jackson, and O'Connor; and the liberals are Fortas, Goldberg, Souter, Kagan, Warren, Murphy, Black, Stevens, Ginsburg, Breyer, Sotomayor, Marshall, Rutledge, Brennan, and Douglas.
(d) The number of votes is in parentheses.
(e) Since we cannot use a business win as a measure of a pro-business votes in the Business versus Business Dataset, we use our Epstein-Landes-Posner conservative/liberal coding instead.
(f) Although the Business versus Business Dataset contains 255 cases, the number of votes and the fraction of conservative votes are based on the 211 cases we were able to classify as conservative or liberal (see Table 4).

*R*s are significantly more favorable to business than *D*s in three of the four sets of cases (all, *NYT*, and Business versus

Business);[35] and likewise *C*s and *M*s vis-à-vis *L*s. As expected, the difference between *R*s and *D*s is smaller than between *C*s (or *M*s) and *L*s, but the relative difference is slight and not statistically significant. And notice that *C*s and *M*s are equally (to each other) more favorable to business, which suggests that hostility to business is strictly a liberal position. The ideological division between *C*s (or *M*s) and *L*s in the Business Litigant Dataset is, not surprisingly, greater in the *NYT* cases.

The bottom half of Table 8 breaks down the differences in friendliness to business in the Business Litigant Dataset by the terms of the five Chief Justices since 1946. Notice the big increase in pro-business results since the Warren Court among both liberals and conservatives and *D*s and *R*s, but not among moderates (we have no explanation—we would expect moderates' increase in pro-business sentiment to lie between the *C* and *L* growth).

Table 9 differentiates support for business among Justices of different ideologies prior to their appointment (the Justice's ex ante ideology).[36] Using secondary sources, we classified Justices at the time of appointment as strongly conservative (*SC*), moderately conservative (*MC*), moderately liberal (*ML*), or strongly liberal (*SL*). This four-fold classification eliminates errors from using the party of the appointing President as a proxy for ideology and corrects several anomalies in the widely used Segal-Cover scores, which measure a Justice's ideology at the time of his appointment. Our results indicate that as expected the more conservative Justices tend to be friendlier to business. The friendliest are the *SC*s, followed by *MC*s, then *ML*s, and *SL*s, except that *SL*s are friendlier to business than *ML*s in 5-4 cases. Not all the differences are statistically significant, however.[37]

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35. We hypothesize that, for 5-4 decisions, *R*s are only marginally significantly more favorable to business than *D*s (p > .09) because there are fewer observations for 5-4 decisions.

36. We developed this measure in EPSTEIN, LANDES & POSNER, *supra* note 10, at app. at 149–51.

37. *SC*s are significantly more favorable to business than *ML*s or *SL*s for all cases, 5-4 decisions, *NYT* cases, and business versus business cases; *SC*s are more favorable to business than *MC*s, but this difference is never significant; *MC*s are more favorable to business than *ML*s or *SL*s, but this is significant only in *NYT* and business versus business cases; and *ML*s are more supportive than *SL*s in three comparisons and less in one, but none of the

Table 9 **Fraction of Pro-Business Votes of Strongly Conservative,** **Moderately Conservative, Moderately Liberal,** **and Liberal Justices, 1946–2011 Terms**			
	SC *(1)*	*MC* *(2)*	*ML* *(3)*	*SL* *(4)*
Business Litigant Dataset	.462* (2968)	.422 (5365)	.375 (3256)	.357 (3624)
5-4 Decisions	.588* (444)	.542 (676)	.413 (412)	.435 (446)
NYT	.443** (888)	.441* (1436)	.338 (866)	.336 (860)
Business versus Business Dataset	.586** (389)	.477* (660)	.404 (401)	.325 (376)

Notes:
(a) SC, MC, ML, and SL denote strongly conservative, moderately conservative, moderately liberal, and strongly liberal Justices.
(b) One asterisk signifies statistical significance at the .05 level and two asterisks at the .01 level. The statistical comparisons are between *SC*s and *SL*s and between *MC*s and the *SL*s.
(c) Standard errors are clustered by Justice.
(d) The number of votes is in parentheses.

Table 10 uses the fraction of votes coded conservative by Spaeth as a proxy for friendliness toward business. If Spaeth's coding is accurate, we should find, as in Table 8, that the fraction of conservative votes is about the same for *C*s and *M*s and greater than the fraction of such votes by *L*s, and that the difference in the fraction of conservative votes between *C*s and *L*s or *M*s and *L*s should be of similar magnitude to the differences in the fraction of their votes in favor of business. Table 10 rejects both propositions except in the Business versus Business cases, where Spaeth's coding of ideology is very similar to ours (see the rows labeled Business versus Business in Tables 8 and 10). In both Tables 8 and 10, *C*s and *M*s vote significantly more conservatively than *L*s, *C*s and *M*s vote about the same, and the differences between *C*s (or *M*s) and *L*s are also the same. Although we disagreed with Spaeth's coding in 36 of the 211

differences is significant.

cases we classified, Tables 8 and 10 show that the disagreements largely cancel out, with the result that the mean fraction of conservative votes for Cs, Ms, and Ls is nearly the same using either our or Spaeth's ideology coding.

Table 10			
Fraction of Conservative Votes of Conservative, Moderate, and Liberal Justices, 1946–2011 Terms			
	C	*M*	*L*
	(1)	*(2)*	*(3)*
Business Litigant Dataset	.530**	.486**	.312
	(4924)	(4237)	(6007)
5-4 Decisions	.743**	.650**	.222
	(642)	(574)	(762)
NYT	.540**	.455**	.282
	(1215)	(1213)	(1604)
Business versus Business Dataset	.526**	.529**	.328
	(603)	(473)	(750)
Notes: (a) Standard errors are clustered by Justice. (b) The number of votes is in parentheses. (c) The statistical tests are between *C*s (or *M*s) and *L*s.			

Other factors may bear on a Justice's vote in a business case besides attitude toward business, such as whether the lower court ruled for or against the business party and whether the federal government is supporting or opposing that party. To control for these and other possibly relevant factors, we estimate logit regressions in which the dependent variable is 1 if the Justice voted for the business party and 0 if he voted against it. The independent variables are the party of the appointing President; whether the Justice is conservative, moderate, or liberal; the lower court decision; whether the federal government is supporting or opposing the business party; the subject area of the case; the Chief Justice at the time of the decision; and a set of dummy variables for whether the Solicitor General filed an amicus curiae brief and if so on which side of what kind of case. Since some of the independent variables are

highly correlated with each other, we do not include all of them in the same regression.

We include the identity of the Chief Justice as an independent variable for the following reason: The Chief Justice assigns the preparation of the majority opinion in any case in which he is in the majority. Justices might try to court favor with the Chief Justice in the hope of being rewarded with plum assignments, and if so the appointment of a strongly pro-business or anti-business Chief Justice might influence fence-sitters. Otherwise the only effect on the ideological slant of the Court's decisions from the appointment of a new Chief Justice would be the ideological difference between him and his predecessor (or in Rehnquist's case—since he was already a Justice when he was appointed Chief Justice—between his predecessor as Chief Justice and the Justice appointed to fill the vacancy created by Rehnquist's elevation to the Chief Justiceship: that is, between Burger and Scalia). The arbitrary convention of regarding as analytically meaningful the period in which the Court has the same Chief Justice may lead to an exaggerated expectation of the Chief Justice's influence on the other Justices.[38]

Table 11 defines the variables and states the mean value of each one, and Tables 12 through 14 report the regression results.[39]

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38. There are historical exceptions, such as John Marshall, of course, but also Charles Evans Hughes.

39. We report the marginal effects of each variable at the mean values of all variables because those effects are easier to interpret than logit coefficients. The marginal effects measure the change in the probability of business winning per unit change in the independent variable, whereas logit coefficients measure the change in the log of the ratio of the probability of business winning to the probability of business losing per unit change in the independent variable.

| Table 11 | | |
| **Definitions of Variables in Regression Analysis** | | |
Variable	Definition	Mean
Pro-Business	1 if Justice voted in favor of business and 0 if Justice opposed business	.404
R	1 if Justice appointed by Republican President	
C	1 if Justice Conservative	.322
M	1 if Justice Moderate; the omitted category is if Justice Liberal	.284
L	Liberal Justice (the omitted dummy variable)	.395
LCT Pro-Business	1 if lower court reached a pro-business decision	.541
Federal Govt	1 if federal government party opposed business	.429
SG pro-Business Petitioner	1 if Solicitor General filed amicus brief on behalf of business petitioner	.057
SG anti-Business Petitioner	1 if Solicitor General filed amicus brief on behalf of non-business petitioner	.060
SG pro-Business Respondent	1 if Solicitor General filed amicus brief on behalf of Business Respondent	.018
SG anti-Business Respondent	1 if Solicitor General filed amicus brief on behalf of Non-Business Respondent	.051
Term	Term of Court	—
Core Economic Category	Defined as before in Table 1	.562
Chief Dummies	Dummy Variables for terms of each Chief Justice, with Warren as the omitted category	—
Note: Mean is calculated for all cases in the Business Litigant Dataset. The mean for Core Economic Category differs from the mean in Table 1 because this table is based on the number of observations we include in the regression analysis (15,114, not 15,213). We exclude 99 votes because we are missing information for some of the variables.		

Several points about the variables are noteworthy:

(1) About 40% of the votes of the Justices are in favor of the business litigant, compared to 54% of the votes of the judges in the lower court. Since petitioners in the Supreme Court lost in the lower court, this means that non-business petitioners are 54%, and business petitioners 46%, of the petitioners in the cases in the Business Litigant Dataset.[40] Given the Supreme

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40. Non-business petitioners constitute 46% of the cases that are decided by a 5-4 vote and 51% of the *NYT* cases.

Court's tendency to reverse the lower court, we expect a negative sign on the regression coefficient of the lower court variable.

(2) The federal government is the party opposing the business litigant in 43% of our cases. Since the government tends to do better than other litigants in the Supreme Court, we expect a negative coefficient on this variable too.

(3) The Solicitor General filed an amicus curiae brief in 18.6% of the cases in the Business Litigant Dataset (the sum of the means of the four *SG* variables in Table 11). We expect a positive coefficient on the *SG* variable when he supports the business litigant and a negative coefficient when he opposes. This hypothesis derives from the Solicitor General's record of success as an amicus curiae,[41] though it is unclear whether that success results from his ability to influence the Justices, from a political or personal motive of wanting to seem to influence them which inclines him to file briefs only in cases he expects to win, or from the fact that the Supreme Court favors the federal government in most cases. We can shed a little light on this question, however, by comparing the Solicitor General's success rate in all cases to his success rate in just the 5-4 cases. Assuming that he finds it harder to predict who will be the winners in such cases, we should find smaller and less significant effects of the Solicitor General's amicus filings in those cases if causation runs primarily from the predicted outcome of the case to Solicitor General's decision to file an amicus brief. If on the other hand his amicus curiae briefs have a significant impact on a Justices' vote, we should find that he is equally successful in 5-4 as in other decisions.

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41.   *See, e.g.*, RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE INFLUENCE AND JUDICIAL DECISIONS 23–28 (2012).

Table 12
Logit Regressions of Justices' Votes for Business in All Cases in the Business Litigant Dataset, 5-4 Decisions, *NYT* Cases, and Cases in the Business versus Business Dataset, 1946–2011 Terms

Variable	Business Litigant Dataset		5-4	NYT	Business versus Business
	(1)	(2)	(3)	(4)	(5)
President's Party	.054 (1.74)	—	—	—	—
Conservative	—	.108** (4.38)	.299** (6.13)	.111** (3.52)	.200** (5.36)
Moderate	—	.124** (3.62)	.317** (4.79)	.104* (2.42)	.204** (3.79)
Lower Court	-.155** (8.18)	-.155** (8.04)	-.024 (0.68)	-.124** (4.26)	-.108** (3.61)
U.S. Opposition	-.096** (5.05)	-.096** (5.08)	-.004 (0.09)	-.061* (2.05)	—
SG Amicus Business Petitioner	.151** (5.55)	.155** (5.60)	-.022 (0.34)	.184** (3.45)	—
SG Amicus Non Business Petitioner	-.204** (7.56)	-.204** (7.36)	.043 (0.81)	-.069 (1.43)	—
SG Amicus Business Respondent	.219** (7.41)	.222** (7.68)	.007 (0.10)	.323** (6.09)	—
SG Amicus Non Business Respondent	-.194** (5.96)	-.194** (5.70)	-.001 (0.01)	-.127 (1.77)	—
SG Amicus Liberal Position	—	—	—	—	-.105** (3.47)
SG Amicus Conservative Position	—	—	—	—	.155** (5.31)
Chief Dummies	Yes	Yes**	Yes	Yes	Yes**
Core Business	-.040 (1.95)	-.041 (1.93)	.015 (0.27)	-.061** (3.09)	-.045 (1.74)
R^2	.05	.06	.06	.06	.08
Number of Votes	15114	15114	1960	4032	1817

Notes:
(a) One asterisk signifies statistical significance at the .05 level and two asterisks at the .01 level (t-statistics are in parentheses).
(b) Standard errors clustered on Justice (36 clusters).
(c) In the Business vs. Business regression (column (5)) we use our ideology coding of the decision for the Justice's vote and Spaeth's ideology coding for the lower court decision and for the two SG amicus variables.

The regression results in Table 12 indicate that *R*s are more likely than *D*s to vote in favor of business (column (1)). But the effect is modest—an increase of .05 or 12.5% relative to

the mean probability of .40—and only marginally significant (p > .083). We experimented with two other measures of ex ante ideology: Segal-Cover scores and our fourfold ideology measure (*SC*, *MC*, *ML*, *SL*). The regression coefficient for Segal-Cover indicates that the probability of voting for business increases by .086 (or nearly 22% relative to the mean probability of .40) as one moves from the Justice most confidently expected to be liberal (a Segal-Cover score of zero for Justices Brennan, Marshall, Rutledge, Murphy, Fortas, and Jackson—whose Segal-Cover score, consistent with our earlier observation about Jackson's anomalous business votes, did not accurately predict those votes, indicating the limitations of an ex ante measure of ideology as a predictor of judicial behavior) to the most conservative Justice (a Segal-Cover score of 1, achieved only by Justice Scalia). Substituting our fourfold ex ante ideology measure, we find that strongly and moderately conservative Justices are equally likely to support business and both are more favorable to business than moderately and strongly liberal Justices; but none of the regression coefficients is statistically significant.

In the next set of regressions in Table 12 (columns (2)–(5)), we classify each Justice as conservative, moderate, or liberal on the basis of secondary literature that covers the period both before and after the Justice's appointment and so combines assessments of ex ante and ex post ideology.[42] This measure is superior to Segal-Cover scores and our fourfold ex ante classification because it utilizes more information and eliminates errors in cases in which judges' ex ante and ex post ideologies differ.[43] Using this measure we find that conservatives and moderates are significantly more likely to vote in favor of business than liberals (the omitted dummy variable). For all cases in the Business Litigant Dataset (column (2)) and *NYT* cases (column (4)), we find a .10 to .12 increase in the probability of favoring business for conservatives and moderates compared to liberals (a 25 to 30% increase relative to the mean probability of favoring business) and no significant difference

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42. *See supra* note 33 and accompanying text.
43. For example, Justice Blackmun was predicted to be strongly conservative but turned out to be a moderate; Justices Souter and Stevens were predicted to be moderately conservative but turned out to be liberals; and Justices Frankfurter and Jackson were predicted to be strongly liberal but turned out to be moderate.

between conservatives and moderates. The difference between conservatives and moderates on the one hand and liberals on the other is substantially greater in 5-4 decisions (column (3)) than in all cases or *NYT* cases—a .30 to .32 increase in the probability of supporting business for conservatives and moderates than liberals (more than a 60% increase relative to the mean probability of .49). The gap is about .19 (the difference between the probabilities of .30 and .11), indicating that conservatives and moderates are three times more likely to favor business in 5-4 cases than in other cases.

Regarding the other variables in Table 12:

(1) A business win in the lower court significantly decreases the probability that business will win in the Supreme Court except in 5-4 cases. Holding constant the other variables at their mean values, the probability of a Justice's voting in favor of business decreases by .12 to .16 (between 32 and 42% relative to the mean probability of .38) if business won in the lower court. The relation is not causal but rather reflects the fact that the Court reverses more cases than it affirms. Unlike other courts, it does not have to hear all appeals, and it prefers to take cases to reverse than to affirm because reversal corrects what the Court considers an error and affirmance does not, unless the affirmance eliminates a conflict among lower courts, the conflict implying that one or more courts have erred.

(2) When the federal government opposes the business party (*U.S. Opposition*), a Justice is significantly less likely (in the range of -.06 to -.10) to vote for business except in 5-4 cases. This holds in each of the separate regressions for liberal, moderate, and conservative Justices, though we would have expected conservative Justices to be less sympathetic than the other Justices to the federal government in business cases.

(3) The four Solicitor General amicus curiae variables have the predicted signs and are significant in all regressions except for 5-4 decisions. Apart from those decisions, when the Solicitor General files an amicus curiae brief supporting the business petitioner the probability of business winning increases by .15 to .18 (or 34 to 53% relative to the 38% mean probability that business wins). When he supports the business respondent, the increases are larger (ranging from .22 to .33), but the difference is not statistically significant. The Solicitor General is equally successful when he files an amicus curiae brief opposing the business party. The probability of business winning declines

(although the coefficients are significant in only nine of the twelve cases and marginally significant for the other three) and the declines are not significantly different in absolute magnitude from when the Solicitor General favors the business party.

The absence of any significant effects of the *SG* variable in 5-4 decisions is consistent with the Solicitor General's not influencing a Justice's vote.[44] Another implication of no influence however is that the Solicitor General would be less likely to file amicus curiae briefs in cases that turn out to be decided 5-4 than in other cases, in order to minimize losses. The data do not support this hypothesis. The Solicitor General filed amicus briefs in 20% (44 cases) of 5-4 cases and in 18% (283 cases) of all other cases.

A complication, however, is that about 28% of the amicus briefs filed by the Solicitor General (64 of the 227 amicus briefs in cases in the Business Litigant Dataset in the 1971 to 2009 Terms) are requested by the Court and so do not reflect the Solicitor General's choice to file briefs in cases he expects to win. If we eliminate the requested briefs from the analysis, the Solicitor General filed amicus briefs in 21% of 5-4 cases (28 of 133 cases) and 17% of all other cases (135 of 785 cases) in the Business Litigant Dataset in the 1971 to 2009 Terms (the only Terms we have data on requested briefs). Thus the adjustment in the data to distinguish requested from volunteered amicus briefs does not disturb our rejection of the hypothesis that the Solicitor General is more likely to file an amicus brief in cases he expects to win.

(4) The regression results for whether the case is core or non-core indicate less judicial favor for business in the core, although the regression coefficient is significant only in the *NYT* cases. The Chief Justice dummy variables are jointly significant in two of the five regressions, and that significance is attributable to the significant positive coefficient on the Roberts Court dummy. We explore this issue shortly.

(5) None of the independent variables except the Justice's

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44. The regression equations (1), (2), and (4) in Table 12 include both 5-4 cases and all other cases although 5-4 cases make up less than 13% of the decisions in the Business Litigant Dataset. A cleaner test of the causation would compare 5-4 cases to all other cases rather than to all cases. To do this, we re-estimated equations (1), (2), and (4) without the 5-4 cases. The results are essentially unchanged from the regressions reported in Table 12.

ideological identity is significant in 5-4 decisions. This confirms the proposition that when the Justices divide closely in a case, it is because the case has significant ideological stakes.

In the regression involving the 211 cases in the Business versus Business Dataset that we were able to classify as conservative or liberal (column (5)), we add two new independent variables: a dummy variable equal to 1 if the Solicitor General filed a brief in support of a liberal lower court decision and 0 otherwise, and a dummy variable equal to 1 if the Solicitor General filed a brief supporting a conservative lower court decision and 0 otherwise.[45] We again find that conservative and moderate Justices are equally likely to vote conservative and significantly more likely to vote conservative than liberals are. We also find that probability of the petitioner's winning is .11 higher if the lower court decision was in favor of the respondent, confirming the propensity of the Supreme Court to reverse in the cases it agrees to review. And both Solicitor General variables are highly significant and in the predicted direction—an amicus brief supporting a party increases that party's probability of winning by between .11 and .16.

Table 13 presents separate logit regressions for conservative, moderate, and liberal Justices. Each regression includes the same independent variables as in Table 12. We estimate separate regressions for the Business Litigant and Business versus Business Datasets. We do not present the full regressions but only the results for the Chief Justice dummy variables (the Warren Court is the omitted Chief Justice variable in the regressions).[46] The regressions do not test the personal influence of the Chief Justice, but instead the hypotheses suggested by Table 8 that conservatives and liberals have become more favorable to business over time while moderates have not changed. The Chief Justice variable simply denotes the different Court eras since 1946.

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45. The Solicitor General filed 61 amicus briefs of the 199 cases in the Business versus Business dataset, 38 supporting a liberal and 23 supporting a conservative lower court decision. Note that we use Spaeth's conservative/liberal classification of the lower court decision.

46. The results for the other independent variables in the regressions are very similar to those in Table 12.

Table 13
Logit Regressions of Votes for Business of Conservative, Moderate, and Liberal Justices, 1946–2011 Terms

Business Litigant Dataset	C (1)	M (2)	L (3)
Vinson	.022 (0.40)	.106* (1.98)	-.09 (0.35)
Burger	.023 (0.43)	-.042 (1.49)	.077** (3.02)
Rehnquist	.064 (1.26)	-.048 (1.00)	.086** (3.37)
Roberts	.143** (3.07)	—	.048 (1.81)
No. Observations	4890	4242	5980
Business versus Business Dataset			
Vinson	-.199* (2.58)	-.233** (3.87)	.151* (2.36)
Burger	.114 (1.13)	-.009 (0.18)	.183** (6.68)
Rehnquist	.044 (0.47)	-.104 (1.42)	.215** (3.74)
Roberts	.255* (2.52)	—	.289** (7.14)
No. Observations	599	471	746

Notes:
(a) Warren is omitted Chief Justice Variable.
(b) One asterisk signifies statistical significance at the .05 level and two asterisks at the .01 level (t-statistics are in parentheses).
(c) Standard errors clustered on Justice (36 clusters).

In the cases in the Business Litigant Dataset, conservative Justices have, beginning with the Burger Court, been on the whole more favorable to business than conservative Justices in the Warren Court. This tendency, however, is significant only in the Roberts Court, where a conservative Justice has a .14 higher probability of voting for business (a 32% higher probability relative to the mean probability of winning of .44) than a conservative Justice in the Warren Court (holding constant the other variables in Table 12). Although neither the Burger nor the Rehnquist dummy variable is significant, they are jointly significant, implying that conservative Justices in those Courts were .02 to .06 more likely to favor business than conservatives

in the Warren Court. Liberal Justices have also become significantly more supportive of business (.05 to .09) since the Warren Court, although the Roberts variable is only marginally significant (p > .07). There has been no shift in support for business among moderate Justices since the Warren Court. Although the regression coefficients for moderates in the Burger and Rehnquist Courts are negative, neither coefficient is significant and they are jointly insignificant. As in Table 8, moderates in the Vinson Court are significantly more supportive of business than moderates in the Warren, Burger, and Rehnquist Courts (there have been no moderates as yet in the Roberts Court).

The second part of Table 13 presents regressions for the Business versus Business Dataset. We have only 599 votes for conservatives, 471 for moderates, and 746 for liberals in this dataset, and these numbers are too small to enable strong conclusions. Still, the regressions do confirm that both conservatives and liberals have become more favorable to business starting with the Burger Court, while there have been no comparable changes among moderate Justices.

Last we analyze the votes of the five Justices who served in both the Rehnquist and Roberts Courts: Scalia, Kennedy, Thomas, Ginsburg, and Breyer. Because these Justices all heard the same cases (except for the occasional recusal), we can test whether their support for business increased between the two periods (1986–2004 and 2005–2010). This allows us to explore whether the more favorable results for business during the Roberts Court than during the Rehnquist Court was caused by just the addition of Alito and Roberts (who—remember—rank in Table 7 as the most favorable to business of all Justices since 1946) or also by other conservative Justices' becoming friendlier to business during the Roberts Court. Maybe though conservative they were not as interested in business cases as Roberts and Alito and were thus content to go along with them in order to cement a conservative majority by minimizing disagreement within the majority coalition.

Table 14 presents separate logit regressions for the three conservative and two liberal Justices using the same independent variables as in Table 13 but including a dummy variable to denote the Chief Justice (= 1 if Roberts and 0 if Rehnquist) and excluding the Term variable. Since our interest is in whether the five Justices' regard for business changed between the Rehnquist and Roberts Court, we report only the results for the

Chief Justice variable. Table 14 reveals that the three conservative Justices have become significantly more favorable to business—the probability of their voting in favor of business increased from .52 to .56. In contrast, the two liberal Justices became significantly less favorable to business; their probability of voting for business fell from .38 to .32. 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.

Table 14 **Logit Regressions of Votes for Business of Scalia, Kennedy, Thomas, Ginsburg, and Breyer During Rehnquist's and Roberts's Tenures,** **1994–2011 Terms**		
	Scalia, Kennedy & Thomas	*Ginsberg & Breyer*
Chief Dummy	.038** (3.45)	-.068** (8.86)
Number of Votes	697	453
Notes: (a) Two asterisks signify statistical significance at the .01 level (t-statistics in parentheses). (b) Standard errors are clustered by Justice. (c) Other independent variables in each regression include the lower-court decision, whether the federal government opposed the business party, four *SG* amicus variables, and whether the case was in the core or non-core economic category.		

CONCLUSION: WHAT WE HAVE FOUND

The United States has become a more conservative country since the 1960s. One manifestation of this trend has been a relaxation of regulatory controls over business that began with the deregulation movement of the late 1970s and gathered momentum in the Reagan Administration, the two Bush Administrations, and the Clinton Administration. One of our concerns in this article has been the extent to which the pro-business trend has manifested itself in decisions by the Supreme Court and in votes of the individual Justices (which are not the same thing). Another has been to explore the ideological

implications of pro-business decisions, and in particular to de-
termine whether they are invariably conservative. That en-
deavor has caused us to raise questions about the ideological
classifications of Supreme Court business decisions in the in-
fluential Spaeth Database of Supreme Court decisions.

Our key empirical tool has been the creation of two new
datasets, one, the Business Litigant Dataset, consisting of all
1759 Supreme Court decisions in the 1946 through 2011 Terms
of Court in which a business entity was on one side of the case
and a non-business entity expected to have an adverse view of
business, such as a union or the government, was on the other
side; and the other (and much smaller) Business versus Busi-
ness Dataset, consisting of the 255 cases in which there were
business entities on both sides of the case. Although these
datasets are subsets of Spaeth's Supreme Court database, most
previous studies of the Court's business cases have been limited
to cases classified by Spaeth as "economic activity" cases, which
account for only 40% of the cases in our Business Litigant
Dataset and 43% of the cases in that dataset plus our Business
versus Business Dataset. Moreover, more than two-thirds of
the cases in which the Chamber of Commerce has filed an
amicus curiae brief are outside Spaeth's economic activity cate-
gory, though this figure drops to 50% if tax and labor cases are
added to that category to form a larger category that we call the
"core economic category."

In the sample of cases (147 + 255 = 402) that we classified
ideologically, we found ourselves disagreeing with Spaeth's
classifications in about 34% of the cases, because we disagreed
about the classifications or about whether a case could be clas-
sified ideologically.

Over the span covered by our study, business litigants
have generally fared worse in the Supreme Court than their
nonbusiness opponents, receiving only 40% of the Justices'
votes and winning only 38% of the cases.

We find that decisions in favor of a business litigant over a
non-business litigant are not uniformly conservative or the op-
posite decisions uniformly liberal; only 67.5% of the decisions
(and 67.4% of the Justices' votes) fit the pattern of business
wins-conservative and business loses-liberal. And in subsets
consisting for example of business cases involving civil liberties
(such as a suit against a business for libel), the percentage is
substantially lower.

We expected, and found, that a higher proportion of unanimous or near-unanimous decisions were unclassifiable ideologically because they were less likely to involve ideological stakes; but the difference was not statistically significant. We also found that within the core economic category business wins are highly positively correlated with conservative voting, but the sign is reversed in the case of business wins in the non-core business areas.

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

We are interested not only in the Court's decisions but also in the attitudes toward business of the individual Justices, and we use data on their general ideological leanings to relate their ideological priors to their votes in business cases. We also consider the relation of their votes to such factors as the participation in the case of the Chamber of Commerce or the U.S. Solicitor General.

We find that five of the ten Justices who, over the span of our study (the 1946 through 2011 Terms), have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices in our study. Justices appointed by Republican Presidents are notably more favorable to business than Justices appointed by Democratic Presidents, and on the current Court no Republican-appointed Justice is less favorable to business than any Democrat. Justices whose pre-appointment ideology was conservative also tend to be more favorable to business. Over time, Justices appointed by Democratic Presidents—not only those appointed by Republican Presidents—have become more favorable to business, consistent with the general growth in the public's favorable attitude toward business.

We used regression analysis to isolate additional factors

that are correlated with (and might influence) Justices' votes in business cases. We find for example that the Solicitor General's position in a business case is highly correlated with the Justices' votes in the case, though we do not know whether the relation is a causal one; it may just be that the Solicitor General is good at picking winners. 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.