
Essay

A Century of Business in the Supreme Court, 1920–2020

Lee Epstein and Mitu Gulati[†]

I. THE PREMISE

Casual observers of the U.S. Supreme Court tend to associate the various iterations of the Court with their iconic decisions—*Plessy*, *Dred Scott*, *Brown*. For the Roberts Court, at least until *Dobbs*, an iconic decision was *Citizens United*—a decision widely seen as favoring the interests of big business over the little guy.¹

Legal academics who follow the Court are more nuanced in evaluating its performance. They tend to look to multiple important cases and analyze them in terms of not just who won, but the doctrines they set out and the likely impact of those doctrines on future cases. For example, one might examine the implications of Court decisions which conceptualize corporations as individuals to better understand the evolution of doctrines about corporate rights, including religious liberty and the right to engage in political spending.² And one might conclude, from a nu-

[†] Lee Epstein is the University Professor of Law & Political Science and the Charles & Romona I Hilliard Professor of Law at the University of Southern California; Mitu Gulati is Professor of Law at the University of Virginia. Copyright © 2022 by Lee Epstein and Mitu Gulati.

1. See, e.g., Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained> [<https://perma.cc/8PLC-KJCV>].

2. See Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 225–26 (2021) (noting the the Court’s expansion of corporate rights in certain areas); see also Elizabeth Pollman, *Wrong Turns with Corporate Rights*, 98 B.U. L. REV. ONLINE 44, 45–46 (2018) (describing the evolution of corporate constitutional rights).

anced reading of those opinions and predictions about the implications of the doctrines therein, that the Court was pro- or anti-corporate rights.³

Social scientists often engage in a similar exercise, except that they are more likely to examine the data a few years after a case to see whether predictions by others about the dire outcomes that would result from particular decisions by a Court have indeed had those impacts. For example, if there was a decision that upheld the legality of Congress negating certain contractual rights of those who had lent money to the federal government or corporate entities, a social scientist might empirically examine the impact of that decision on the rates charged for future government or corporate borrowing.⁴

But the U.S. Supreme Court does not just decide a few cases that set out paradigm shifting doctrines. It tackles scores of

3. See *supra* note 2. For other categorizations of the Roberts Court as especially business friendly, see 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), [nytimes.com/2008/03/16/magazine/16supreme-t.html](https://www.nytimes.com/2008/03/16/magazine/16supreme-t.html) [<https://perma.cc/48QL-2FN7>] (“The Supreme Court term that ended last June was, by all measures, exceptionally good for American business.”); William Greider, *Thanks to the Roberts Court, Corporations May Have More Constitutional Rights Than Actual People*, NATION (May 20, 2014), <https://www.thenation.com/article/archive/thanks-roberts-court-corporations-have-more-constitutional-rights-actual-people> [<https://perma.cc/6PV8-MLJN>] (“The Roberts Court has so far produced a slew of precedent-smashing decisions designed to hobble left-liberal reform movements before they can gain political traction.”); Brian R. Frazelle, *Big Business Powers Ahead with Another Successful Term at the Roberts Court (2019-2020 Term)*, CONST. ACCOUNTABILITY CTR. BLOG (Oct. 1, 2020), https://www.theusconstitution.org/think_tank/big-business-powers-ahead-with-another-successful-term-at-the-roberts-court-2019-2020-term [<https://perma.cc/P3BV-8M7J>] (“[B]ut one thing that did not change [in the Supreme Court’s 2019–2020 Term] was its propensity for decisions benefitting corporate interests.”). *But see* 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.”).

4. This example is in reference to the gold clause cases decided by the Court in 1935. For an analysis of the history and effects of the Court’s gold decisions, see SEBASTIAN EDWARDS, *AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD* (2018). For a similar analysis of the impact of the cases arising out of the Greek debt restructuring of 2012 where contract rights were abrogated by legislative action and the decision was upheld by the European Court of Human Rights, see Patrick Bolton, Mitu Gulati & Ugo Panizza, *Legal Air Cover*, 7 J. FIN. REG. 189 (2021).

cases every year and denies certiorari on thousands more. Many of these are on technical matters where there are splits in the circuits below or important federal statutes are implicated in a fashion that calls out for Supreme Court guidance.

The premise of this Essay is that there is insight to be gained by looking at these more ordinary cases as well as the paradigm shifting ones. By focusing on a single objective bottom line in each case and not over- or under-weighting any case by our estimation of the importance of the particular case, we keep a level of neutrality. The neutral bottom line that we use in the set of cases involving businesses versus non-businesses is who won and who lost. In 2013, in an article in this journal, Richard Posner, William Landes and one of us used the same method. We extend that analysis here with substantially more data.⁵

Our method of analysis strips out some valuable information from particular decisions. Chiefly, we lose the nuances in the individual opinions of the Justices where they set up doctrines that will impact future cases. But reading the texts of the Court's opinions and predicting how future courts will interpret doctrines is a subjective enterprise vulnerable to the researcher's biases. This is not to say that it should not be done. The point is that objective measures can add insight, particularly when most analyses being done are subjective.

We offer a different perspective on the same question that scholars using traditional methods of both legal and empirical analysis are asking: how business friendly is the Roberts Court compared to other Courts over history? The results of the different methods can be usefully combined. For example, if we find that businesses litigating against the Environmental Protection Agency (EPA) won 90% of their cases in the Roberts Court, but only won 30% of their cases against the same agency under the Rehnquist Court, we would look askance at legal commentators who claimed that the Rehnquist Court was equally protective of the environment as the Roberts Court. Further analysis, building on the initial findings, might then show that the reason for the difference is that the types of EPA rules being challenged in front of the Rehnquist Court were different from those before the Roberts Court and that explains the difference in outcomes. End result: we have a more nuanced understanding of what was going on.

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

Our approach of looking at win/loss rates is not the only useful neutral measure one could add to the traditional approaches. One could look at data on the cases where the Court declines review, in effect affirming what was done at the lower court level. Or how the Court treats the views of amici curiae such as industry groups advocating for particular doctrines rather than the parties trying to win a particular dispute. Or how the markets react to particular decisions of the Court.⁶ And so on and so forth. Each approach gives the viewer a different, and potentially valuable, perspective on what the Court has done.

Our inquiry is about how business has fared in the various iterations of the U.S. Supreme Courts over the past century. To compare apples to apples, we ask the same question across the different Courts. This is not a perfect comparison since the types of cases that show up—and those that are granted certiorari—will vary as a function of factors that differ across time periods, including the state of the US economy, global politics, the respect with which the public holds the Court, and so on.⁷ Our contention, though, is that there is value to examining, on an aggregate basis, who won and who lost across time.

II. THE DATA

The dataset for this project was developed from the Supreme Court Database.⁸ We started with the 11,121 orally argued cases resulting in a signed opinion or judgment between the 1920 and 2020 terms.⁹ In 43% (4,756/11,121) of these cases a business was the named party on one side or both. We identified a business

6. See, e.g., Daniel Martin Katz, Michael J. Bommarito II, Tyler Soellinger & James Ming Chen., *Law on the Market: Abnormal Stock Returns and Supreme Court Decision Making*, SSRN (Dec. 19, 2017), <https://ssrn.com/abstract=2649726> [<https://perma.cc/YMW4-MDZ6>] (finding that, between 1999 and 2013, seventy-nine Supreme Court cases have resulted in approximately \$140 billion in changes in wealth); see also Nicole Hong, *Do Supreme Court Cases Move Markets*, WALL ST. J. (Aug. 26, 2015), <https://www.wsj.com/articles/BL-LB-51963> [<https://perma.cc/6AEZ-UCYX>] (discussing the Katz et al. study).

7. See James R. Copland, *What Do We Mean by a “Pro-Business” Court—and Should We Care?* 67 CASE W. RESV. L. REV. 743, 753 (2017) (“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.”).

8. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *2020 Supreme Court Database, Version 2021 Release 1*, WASH. U. L., <http://supremecourtdatabase.org> [<https://perma.cc/C23C-Y7MM>].

9. *Id.* (decision Type= 1 or decision Type= 7).

party using the petitioner and respondent variables in the Database.¹⁰ For most analyses, we focus only on those 4,070 cases (35,173 votes) in which business was the petitioner (appellant) or respondent (appellee). That is, we eliminate cases in which business was on both sides.

Even limiting the cases in this way leaves us with 37% of all orally argued cases (4,070/11,121) over the last century—almost as high as the percentage of cases in which the US government was a petitioner (appellant) or respondent (appellee): 42%.¹¹ Clearly, business has played a significant role in the Court. But our question is different: how have businesses fared over the different iterations of the Court?

III. SUPPORT FOR BUSINESS

Over the last 100 years, businesses won 41% of their cases¹²—that is, business loses more than it wins. To put this rate in context, it is slightly lower than the win rate for criminal defendants (42%) and substantially lower than the win rate for plaintiffs in civil rights cases (54%).¹³

Then again, as Figure 1 shows, business's win rate has varied considerably, from 29% in the Warren Court to 63% in the Roberts Court.

10. The data are available from the authors upon request and from their websites. See <https://epstein.usc.edu/centurybusinessincourt> [<https://perma.cc/CR3W-WMT6>].

11. Spaeth et. al, *supra* note 8.

12. *Id.* (1,669/4,069). The denominator excludes one case in which the Court did not resolve the underlying dispute, *Herb v. Pitcairn*, 324 U.S. 117 (1945).

13. *Id.*

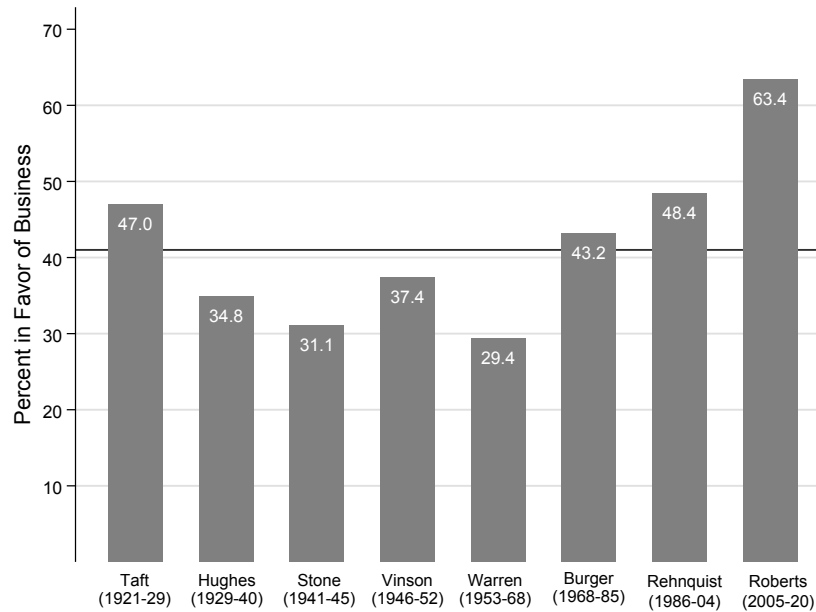


Figure 1: Business Win Rate in the U.S. Supreme Court by Chief Justice Era. The dark horizontal line is the average (mean) business win rate of 41%. This graph includes only cases in which business was the named party on one side or the other but not both. The number of cases meeting this criterion for each Chief Justice era is: Taft= 677; Hughes= 775; Stone= 319; Vinson= 297; Warren=530; Burger= 643; Rehnquist= 479; Roberts=273. For the overlap between Taft and Hughes in the 1929 term, see *supra* note 13. We do not show the one term of the White Court (77 decisions) in our dataset.

If we define business winning as “business friendly,” the Taft Court (1921–1929)¹⁴ was the most business friendly Court through the 1960s. Statistically speaking, it was significantly more pro-business than the Hughes, Stone, Vinson, and Warren Courts (at $p \leq .05$).

This squares with conventional wisdom suggesting that the Taft Court (full of former business lawyers) launched a new “age of *laissez faire*” that would dominate the Justices’ approach to

14. During the 1929 term, there were two Chief Justices: Taft left the Court on February 3, 1930; Hughes took his place on February 24, 1930. For purposes of this analysis, we count cases decided before February 3 as “Taft Court” cases; cases decided thereafter are “Hughes Court” cases. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, THOMAS G. WALKER., *THE SUPREME COURT COMPENDIUM*, 411–21 tbl. 5-2 (7th ed. 2021).

economic regulation for nearly two decades¹⁵ and “launch the Court on its epic course of collision with the New Deal.”¹⁶

Zachariah Chafee tells the story this way: The Taft Court was a throwback to courts sitting at the turn of the 20th century, when economic regulation was met with “suspicion from [Justices] trained in the individualism of the simpler days of their youth.”¹⁷ That period (the “Lochner era”) ended with the White Court (1910–1921), during which Court accepted “without question far more drastic regulatory legislation than it had previously overthrown. The under-dog had his day.”¹⁸ But with Taft’s appointment the “upper-dogs” once again prevailed.¹⁹

Zechariah Chafee, Felix Frankfurter, Robert Galloway, Robert Post, and others²⁰ suggest that the Taft Court’s preference for employers over unions was quickly apparent in cases like *Truax v. Corrigan*²¹ and *United Mine Workers v. Coronado Coal Co.*²² Regulations favored by progressives and disfavored by business—minimum wage, maximum hours, and child labor—went by the wayside too.²³ Tax laws also were overturned.²⁴ It was these and other decisions that led Felix Frankfurter to claim that “views that were antiquated twenty-five years ago have been resurrected.”²⁵

15. Russell W. Galloway, Jr., *The Taft Court* (1921–29), 25 SANTA CLARA L. REV. 1, 3 (1985).

16. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1493 (1998); see also Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, 32 CURRENT HIST. 235 (1930) (discussing how the Court in the early 1900s invalidated legislation and imported personal opinions into its decisions); Zechariah Chafee Jr., *Liberal Trends in the Supreme Court*, 35 CURRENT HIST. 338 (1931).

17. Chafee, *supra* note 16, at 338–39.

18. *Id.* at 339.

19. *Id.*

20. See sources cited *supra* notes 15 and 16.

21. 257 U.S. 312 (1921) (holding that a law granting immunity to picketing employees from tort claims by their employer deprive the employer of property rights without due process).

22. 259 U.S. 344 (1922) (holding that all members of a labor union engaged in unlawful activities may be liable to suit and recovery).

23. *E.g.*, *Bailey v. Drexel Furniture Co.* 259 U.S. 20 (1922) (invalidating the Child Labor Tax Act which required companies employing children under fourteen to pay a penalty of 10% of their net profits).

24. *Id.* For other examples, see Galloway, *supra* note 15.

25. See Frankfurter, *supra* note 16, at 239.

If, in 1925, “the chief business of the American people [was] business,”²⁶ as President Coolidge declared, the same can be said of the Taft Court. In 65% of the cases on its merits docket in the 1925 term, business was on one side or both. That’s the highest percentage of the 100 terms in our dataset. Of the nine Taft Court terms (1921–1929 terms), business cases occupied over 60% of the docket in six. Overall, as Figure 2 shows, about 60% of the Taft Court’s merits docket was devoted to business cases. By contrast, businesses are not on the docket much during the Roberts Court era (33.8%). The Taft Court also invalidated more laws “than in fifty years preceding”—most of which were attempts by government to rein in business.²⁷

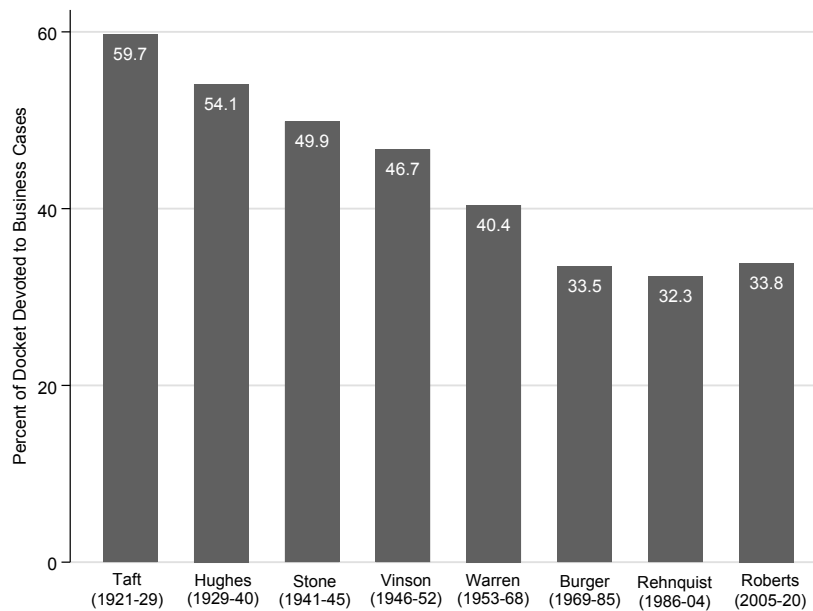


Figure 2: Percentage of U.S. Supreme Court Cases in which Business was a Party on Either Side or Both Sides, by Chief Justice Era. This figure excludes the White Court, which was in place for only one term in our dataset (1920). For the overlap between Taft and Hughes in the 1929 term, we count cases decided before February 3 as “Taft Court”

26. Ellen Terrell, *When a Quote is Not (Exactly) a Quote*, LIBR. CONG. (Jan. 17, 2019), https://blogs.loc.gov/inside_adams/2019/01/when-a-quote-is-not-exactly-a-quote-the-business-of-america-is-business-edition [<https://perma.cc/ZC8Q-GJRE>].

27. See Frankfurter, *supra* note 16, at 239.

cases, and cases decided thereafter are “Hughes Court” cases. The total number of orally argued cases for each Chief Justice era is: Taft= 1,336; Hughes= 1,662; Stone= 690; Vinson= 715; Warren= 1,522; Burger= 2,203; Rehnquist= 1,781; Roberts=1,040.

Returning to business’s win rate (shown in Figure 1): until the Burger Court era, support for business fell to under 35%, reaching its low mark during the Warren Court (29%). The Burger Court’s and the Rehnquist Court’s support for business is statistically indistinguishable from the Taft Court’s.

But the Roberts Court is distinguishable: It is significantly more likely to favor business than the Taft Court or, for that matter, any Court era in the last 100 years, including its immediate predecessor; and it is the first Court in the last 100 years that rules in favor of business more often than not. This result is consistent with, albeit stronger than, the results presented in Epstein, Landes & Posner (2013), with data from a shorter time period (sixty-five years, instead of a hundred) and less data on the Roberts Court itself (they examine the first six terms of the Roberts Court; we examine sixteen).²⁸

In response to the Epstein, Landes & Posner (2013) paper and other characterizations of the Roberts Court as especially pro-business,²⁹ some commentators pushed back.³⁰ The Epstein, Landes & Posner work, among others, was too reductionist, they argued.³¹ Nuanced readings of the cases by experts in particular

28. See Epstein, Landes & Posner *supra* note 5.

29. See sources cited *supra* note 3 (establishing the Roberts Court as pro-business).

30. See, e.g., BUSINESS AND THE ROBERTS COURT (Jonathan H. Adler ed. 2016) (collection of papers examining the Roberts Courts’ jurisprudence in the business area); Richard A. Epstein, *The Myth of a Pro Business Supreme Court*, HOOVER INST. (July 9, 2013), <https://www.hoover.org/research/myth-pro-business-scotus> [<https://perma.cc/W5CQ-AZ8V>] (“More polarized seems like a much better descriptor of American society, especially in light of the direction of the Obama administration’s legislative agenda, which systematically calls for expanded government control over business activities.”); Glenn G. Lammi, *A Simplistic Compliment Endures: The Roberts Court as “Pro-Business”*, FORBES (June 27, 2013), [<https://www.forbes.com/sites/wlf/2013/06/27/a-simplistic-compliment-endures-the-roberts-court-as-pro-business>] [<https://perma.cc/CNY4-LPHC>] (“The ‘pro-business’ bromide is a trite and woefully simplistic by-product of the need to label a thing.”).

31. See e.g., Lammi, *supra* note 30; Ronald Collins, *Ask the Author: Adler and Others on “Business and the Roberts Court”*, SCOTUSBLOG (Nov. 28, 2016), <https://www.scotusblog.com/2016/11/ask-the-author-adler-and-others-on-business-and-the-roberts-court> [<https://perma.cc/84FJ-9CY5>] (“But such labels, like ‘pro-business,’ often obscure as much as they reveal.”).

areas claimed that the Court was not as, or not at all, pro-business.³² Others suggested that Epstein, Landes & Posner got it right.³³

We have no quarrel with nuanced analyses of particular subsets of the Court's decisions.³⁴ Or, for that matter, analyses that control for other influences such as the involvement of the administration, or powerful amici, or better lawyers, or what types of cases the Court grants certiorari on.³⁵

The foregoing types of analyses help us see where the pro-business outcomes are coming from and why. They may also show us areas where the Court is anti-business. For example, the Court might be hostile to unions or class actions but might not care a whit about what sorts of theories of efficient markets underlie the securities markets. The raw number of wins and losses do not tell us that. But, if they give us a starting point to do the next level of inquiry, they have added value.

As we noted at the start, roughly a handful of years into the Roberts Court, a number of articles suggested that the Court looked to be strongly pro-business.³⁶ And as noted, there was

32. See e.g., Jonathan H. Adler, *Still in Search of the Pro-Business Court*, 67 CASE W. RES. L. REV. 681, 687 (2017) (examining the Roberts Court's environmental cases and finding little systematic evidence of a pro-business slant); A. C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 107 (2011) (concluding that the Roberts Court has shown itself to largely be indifferent to securities laws); Johannes W. Fedderke & Marco Ventoruzzo, *Do Conservative Judges Favor Wall Street? Ideology and the Supreme Court's Securities Regulation Decisions*, 67 FLA. L. REV. 1211, 1211 (2015) (finding that conservative judges on the Roberts Court are more pro-Wall Street and liberal ones are more pro-investor).

33. See e.g., Pollman, *supra* note 2.

34. See e.g., Richard D. Freer, *The Roberts Court and Class Litigation: Revolution, Evolution and Work to be Done*, 51 STETSON L. REV. 285 (2022) (analyzing the Roberts Court's extensive engagement with the rules on class actions, without making any conclusions about whether these were pro- or anti-business).

35. See e.g., Sri Srinivasan & Bradley 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 (2009) (isolating the impact of the Solicitor General's advocacy in cases in front of the Roberts Court); Bradley W. Joondeph, *Business, the Roberts Court, and the Solicitor General: A Further Exploration*, in BUSINESS AND THE ROBERTS COURT, *supra* note 30, at 15 (comparing the success of the Solicitor General and the Chamber of Commerce when they are opposing parties throughout the Roberts Court).

36. See Rosen, *supra* note 3; Chemerinsky, *supra* note 3; see also James Surowiecki, *Courting Business*, NEW YORKER (Feb. 28, 2016), <https://www.newyorker.com/magazine/2016/03/07/antonin-scalias-corporate-influence>

pushback from some commentators and agreement from others. Those discussions, though, took place primarily with data under President George W. Bush. Today, with data on a decade and a half of the Roberts Court, where there have been two other administrations (two terms of President Obama and one of President Trump), we have a fuller picture. It is time to take stock again.

When we dig into the term-by-term figures for the rate of business victories for the decade and a half of the Roberts Court, we see that the rate of business wins has increased since the first years of the Roberts Court. For the first six terms, the rate of business wins was 53% (2005), 63% (2006), 47% (2007), 44% (2008), 44% (2009) and 62% (2010)—for an average of 53%. And it is worth remembering that this was a period during which the Roberts Court was already being labeled as “business friendly.”³⁷ For the next ten terms, the numbers are higher: 73% (2011), 69% (2012), 65% (2013), 68% (2014), 71% (2015), 79% (2016), 69% (2017), 65% (2018), 70% (2019) and 83% (2020)—for an average of 71%. The highest percentage of business wins in the first six terms (63%) is lower than the lowest percentage in the next ten terms (65%).

There are other comparisons one could make here, such as comparing the Taft Court’s so-called “Lochnering” to the Roberts Court supposedly weaponizing the First Amendment to favor business.³⁸ Or one could analyze the hostility that commentators

[<https://perma.cc/7ZLR-BT6F>] (“The Roberts Court hasn’t just made a lot of pro-business rulings. It has taken a higher percentage of cases brought by businesses than previous courts, and it has handed down far-reaching decisions that have remade corporate regulation and law.”); Tony Mauro, *High Court Reveals a Mind for Business*, NAT’L L.J.: LEGAL TIMES (July 2, 2007); Michael S. Greve, Jonathan Klick, Michael Petrino & J.P. Sevilla, *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 23 SUP. CT ECON. REV. 353, 357 (2015) (“A particular focus of attention, especially after the appointment of Chief Justice John Roberts and, subsequently, Justice Samuel Alito, has been the Court’s supposed ‘pro-business’ orientation.”).

37. See sources cited *supra* note 36.

38. See Chafee, *supra* note 16 (discussing the Lochner-ism of the Taft Court); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html> [<https://perma.cc/C8AG-H9XS>] (“A new analysis prepared for The New York Times found that the Supreme Court under Chief Justice John G. Roberts Jr. has been far more likely to embrace free-speech arguments concerning conservative speech than liberal speech.”).

have claimed both Courts have had towards unions.³⁹ We, however, do not discuss either in this Essay. Instead, we focus on explanations for the degree to which the Court and its Justices tend to support business.

IV. EXPLANATIONS FOR VARIATION IN SUPPORT FOR BUSINESS

In this section, we address two questions: (1) What explains the Court's/the Justices' support for business? and (2) Why does the Roberts Court, in particular, seem so business friendly?

We consider four explanations: (A) The Justices' partisanship, (B) U.S. government opposition, (C) expert corporate counsel, and (D) public opinion/climate.

A. PARTISANSHIP

Lamenting the activist pro-business tendencies of the Taft Court, Felix Frankfurter offered an explanation in the form of a criticism: the Court "is putting constitutional authority behind the personal opinion of its members in disputed and difficult questions of social policy."⁴⁰

Contemporary studies of judicial behavior concur, although in more explicit terms. The studies suggest that Republican judges, like Republican citizens, are more inclined to favor business than Democrats.⁴¹

The data support this suggestion in several ways. Beginning with Figure 3, we see that during the pro-business Taft, Burger,

39. See Scott A. Budow, *How the Roberts Court Has Changed Labor and Employment Law*, 2021 ILL. L. REV. ONLINE 281, 282 ("Over the last sixteen years, the Roberts Court has reshaped the balance of power between employers and employees through these closely divided decisions, often in measurable ways.").

40. Frankfurter, *supra* note 16, at 239–40.

41. See *e.g.*, Chelsea Liu, *Judge Political Affiliation and Impacts of Corporate Environmental Litigation*, 64 J. CORP. FIN. 1, 2 (June 16, 2020) ("The presence of a Republican-appointed judge in a corporate environmental lawsuit is associated with an average reduction of approximately 12% in the likelihood of the lawsuit reaching a settlement."); Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship Between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161, S176 (2015) ("Compared with Democratic judges, Republican judges are more likely to vote in favor of business litigants, employers, doctors and hospitals, original defendants in torts cases, and the state in criminal appeals.").

Rehnquist, and Roberts Courts, Justices appointed by Republican presidents cast more than 2.5 times the number of votes for business parties as Democratic appointees.⁴²

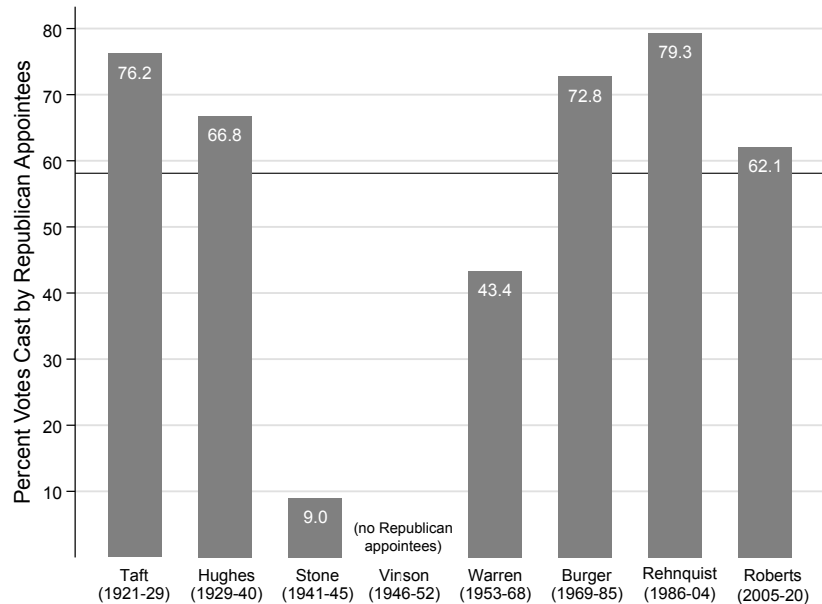


Figure 3: Percentage of Votes Cast by Republican Appointees in Business Cases, by Chief Justice Era. The dark horizontal line is at 58%, which is the average percentage of votes cast by Republican-appointed Justices in cases in which business was the named party on one side or the other but not both. That percentage includes the 1920 term of the White Court (666 votes). The number of total votes for the other eras are: Taft= 5,957; Hughes= 6,575; Stone= 2,670; Vinson= 2,555; Warren= 4,562; Burger= 5,552; Rehnquist=4,251; Roberts= 2,385.

The percentages shown in Figure 3 matter because Republicans are more supportive of business than Democrats. A logistic regression shows that Republican appointees are about seven percentage points more likely to vote in favor of business than Democrats—a statistically significant difference.⁴³

42. 13,437 Republican votes versus 4,708 Democratic votes.

43. Based on model 1 in Table 1 the predicted probability for a Republican appointee is 0.41[0.38, 0.45]; for Democrats it is 0.34 [0.30, 0.39].

| | (1) | (2) | (3) |
|-----------------------------|--------------------|--------------------|--------------------|
| Justice Party [0=R, 1=D] | -0.288* (-3.12) | -0.255* (-2.85) | -0.378* (-2.92) |
| Business is Petitioner [=1] | 0.286* (2.58) | 0.246* (2.26) | 0.858* (8.69) |
| OSG is Opponent [=1] | | -0.392* (-9.39) | |
| Experienced Lawyer [=1] | | | 0.461* (5.34) |
| Constant | -0.353* (-4.55) | -0.201* (-2.78) | -0.830* (-6.72) |
| <i>N</i> | 35173 | 35173 | 1889 |

Table 1: Logistic regressions of the Justices' votes in business cases [1= pro-business]. *t* statistics in parentheses. * $p < 0.05$. For all models, standard errors (not shown) are clustered on Justice: 57 Justices in Models (1) and (2); 21 in Model (3).

The seven percentage-point difference is for all the cases in our dataset. But the Roberts Court is different on a couple of dimensions. Notably, as Figure 4 shows, the Republicans on the Roberts Court are even more supportive of business than in any other era. But so are the Roberts Democrats. They voted in favor of business in 50% of the cases—a percentage higher than the Republicans in all other Court eras (with the exception of the Stone Court, on which only one Republican (Owen Roberts) served).

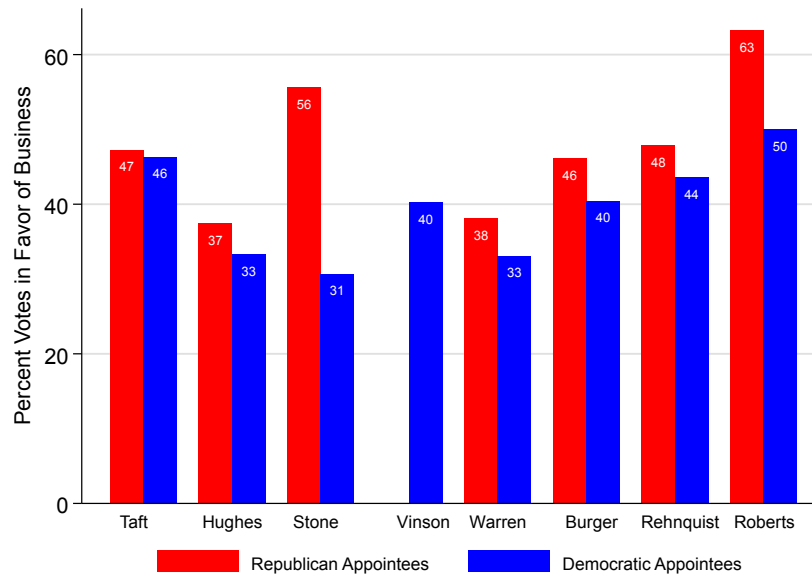


Figure 4: Percentage of Pro-Business Votes Cast by Republican and Democratic Appointees, by Chief Justice Era. The number of votes are: Taft= 4,541 Republican (R) votes and 1,416 Democratic (D) votes; Hughes= 4,394 R votes and 2,181 D votes; Stone= 241 R votes and 2,429 D votes; Vinson= 2,555 D votes; Warren= 1,978 R votes and 2,584 D votes; Burger= 4,042 R votes and 1,510 D votes; Rehnquist= 3,373 R votes and 878 D votes; Roberts= 1,481 R votes and 904 D votes.

Digging deeper into the comparison with prior Courts and their voting, we find four interesting features:

First, during the business-oriented Taft Court era, the three Democrat appointees (McReynolds, Brandeis, and Clarke) voted in favor of business at roughly the same rate as the ten Republican appointees.

Second, that changed over time, with the Democrat appointees in each subsequent era far less pro-business than the Republicans. On the Hughes Court, which was roughly evenly divided between Democrats and Republicans, support for business declined overall but the Republicans remained significantly more business friendly. The same holds for the Warren Court. The partisan split is less informative on the Stone and Vinson eras. The sole Republican appointee on the Stone Court, Owen Roberts, cast just 241 votes; and there were no Republican appointees on the Vinson Court.

Third, as the Court grew more business friendly under the Burger, Rehnquist, and Roberts Courts, gaps continued to emerge between the Democrat and Republican appointees—with the largest (13 percentage points) during the Roberts Court.

Fourth, nonetheless, as noted above, Democratic appointees on the Roberts Court are more favorable toward business than Republicans on most all other Court eras.

Table 2, a ranking of the 57 Justices in the dataset, also shores up the rather anomalous voting patterns of the Roberts Democrats. Note that three of the four Democrats who serve(d) on the Roberts Court are among the top twenty most business-favorable since 1920. Then again, the ranking also highlights the overall difference between Democrats and Republicans—especially the business friendliness of the Republicans on Roberts Court. Of the top ten most pro-business Justices over the past century, nine serve(d) on the Roberts Court. A decade ago, when Epstein, Landes & Posner published their 2013 paper using the same methods that we use, they found that Justices Roberts and Alito were among the most pro-business voting Justices in sixty-five years of Court history. Today, as Table 2 shows, and with the caveat that these are among the justices for whom we have the least amount of data, Justices Barrett, Kavanaugh, and Gorsuch are putting Justices Alito and Roberts to shame.

| Justice (N Votes) | Percent Pro-Business |
|----------------------|-------------------------|
| 1. Barrett (10) | 90.0 |
| 2. Kavanaugh (37) | 73.0 |
| 3. Gorsuch (64) | 70.3 |
| 4. Alito (259) | 68.0 |
| 5. Roberts (270) | 66.3 |
| 6. Thomas (568) | 58.3 |
| 7. Kennedy (652) | 56.0 |
| 8. Kagan (177) | 55.9 |
| 9. Scalia (658) | 54.7 |
| 10. Whittaker (168) | 54.2 |
| 11. O'Connor (669) | 52.0 |

| | Justice (N Votes) | Percent Pro-Business |
|-----|------------------------------|---------------------------------|
| 12. | Powell (561) | 50.8 |
| 13. | Breyer (490) | 49.6 |
| 14. | Burger (641) | 48.5 |
| 15. | Harlan (514) | 48.2 |
| 16. | Stewart (795) | 48.2 |
| 17. | Sotomayor (198) | 48.0 |
| 18. | McKenna (370) | 47.8 |
| 19. | Taft (675) | 47.3 |
| 20. | RJackson (547) | 47.0 |
| 21. | McReynolds (1470) | 46.7 |
| 22. | Rehnquist (1049) | 46.7 |
| 23. | Sanford (558) | 45.9 |
| 24. | Butler (1201) | 45.7 |
| 25. | Van Devanter (1263) | 45.6 |
| 26. | Pitney (172) | 45.3 |
| 27. | Sutherland (1119) | 45.0 |
| 28. | Souter (396) | 44.9 |
| 29. | EDEWhite (65) | 44.6 |
| 30. | Stevens (973) | 44.3 |
| 31. | Holmes (881) | 43.6 |
| 32. | Day (155) | 43.2 |
| 33. | OJRoberts (950) | 42.9 |
| 34. | Frankfurter (1034) | 42.7 |
| 35. | Ginsburg (517) | 42.7 |
| 36. | Vinson (291) | 41.9 |
| 37. | Burton (490) | 41.2 |
| 38. | Blackmun (854) | 40.7 |
| 39. | Byrnes (62) | 40.3 |
| 40. | BRWhite (1094) | 39.8 |
| 41. | Marshall (844) | 39.6 |
| 42. | Brandeis (1351) | 38.5 |

| Justice (N Votes) | Percent Pro-Business |
|----------------------|-------------------------|
| 43. Stone (1375) | 37.2 |
| 44. Brennan (1210) | 35.7 |
| 45. Hughes (753) | 35.3 |
| 46. Minton (218) | 35.3 |
| 47. Reed (909) | 35.0 |
| 48. Clarke (149) | 34.9 |
| 49. Goldberg (101) | 34.7 |
| 50. Douglas (1429) | 32.8 |
| 51. Clark (584) | 31.7 |
| 52. Cardozo (376) | 30.1 |
| 53. Rutledge (366) | 27.0 |
| 54. Murphy (540) | 26.1 |
| 55. Warren (526) | 25.3 |
| 56. Black (1419) | 24.7 |
| 57. Fortas (106) | 19.8 |

Table 2: Justices Ranked by Percentage Votes in Favor of Business, 1920–2020. 2020 term Justices highlighted in red (Republicans) and blue (Democrats).

B. GOVERNMENT (OSG) OPPOSITION

A good deal of literature points to the success of the U.S. government—specifically, the Office of the Solicitor General (OSG)—in Supreme Court litigation.⁴⁴ This raises the question of whether, in the context of a pro-business administration in the

44. Of special relevance is Srinivasan & Joondeph, *supra* note 35, suggesting that the Roberts Court’s business decisions are more “pro-government” than “pro-business.” For prior discussions of this interactive dynamic between the Court and the SG, see REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 145 (1994) (noting the high success rate of the party supported by the government’s amicus brief); JEFF YATES, *POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT* 96 (John Kenneth White ed., 2002) (same).

White House, the pro-business outcomes from the Court are more a function of the SG being pro-business than the Court being so. Two questions therefore are: (1) When the OSG (as a party) opposes business, is business more likely to lose? And (2) Does the OSG's participation help explain the trends shown in Figure 1 as well as the Roberts Court's special solicitude toward business?

The answer to both questions is, mostly, yes.

First, as Figure 5 below shows, OSG participation as the party opposing business (i.e., business was on one side and the OSG on the other) varied from 57.6% during the Vinson Court to 20.5% during the Roberts Court.

Second, business's win rate seems to ebb and flow with OSG participation. During the Taft Court and again during the later Republican Court eras (under Chief Justices Burger, Rehnquist, Roberts), the federal government less frequently opposed business, whereas the government was a more frequent opponent during the less business-friendly Stone, Vinson, and Warren eras.

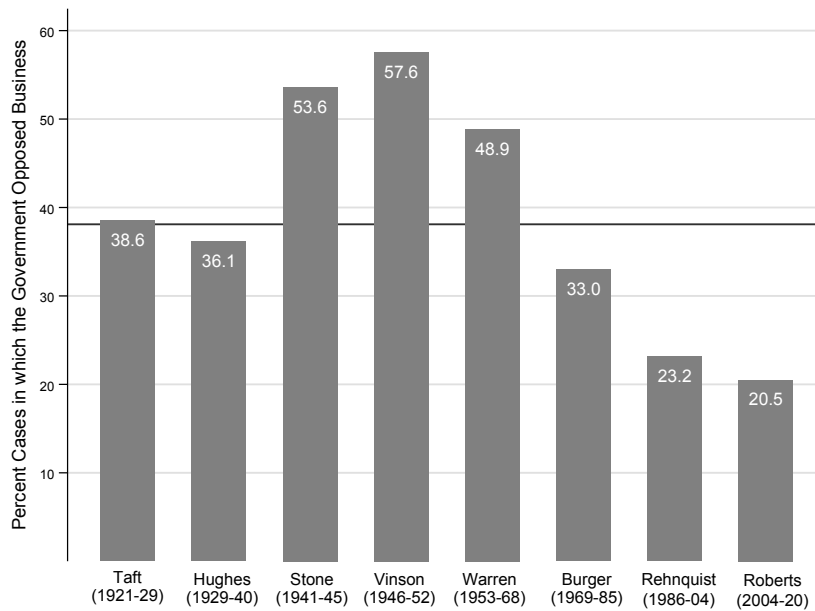


Figure 5: Percentage of Business Cases in which the U.S. Government, as a Party, Opposed Business, by Chief Justice Era. The dark horizontal line is the average percentage (38%).

Digging deeper, more analysis confirms the visual inspection. Controlling for whether the Justice was appointed by a Republican or Democrat, and whether business was the petitioner or respondent (and clustering on the Justice in question), we run a logistic regression. Table 1 (column 2) reports the results and shows that government opposition significantly reduces the probability of a Justice voting for business.

Using the numbers in Table 1, both Democrat and Republican appointees are about nine percentage points less likely to vote for business when the OSG is on the side of the opposing party, all else equal. Getting more granular, if business is the petitioner and a Democrat appointed the Justice, the probability of voting in favor of business is 0.45 [0.41, 0.49] when the government does not oppose business. The probability declines to 0.35 [0.32, 0.39] when government opposes business. For Republicans appointees, when business is petitioner and government doesn't oppose business, the probability of voting in business's favor is 0.51 [0.48, 0.55]. The probability declines to 0.42 [0.38, 0.45] when government opposes business.

The foregoing suggests that part of the explanation for why both Republicans and Democrats are uniquely favorable toward business during the Roberts Court is that OSG opposed business in only 20% of the Roberts Court's cases.⁴⁵ We do not know why, but this is a matter worthy of further exploration.

C. EXPERIENCED (CORPORATE) LAWYERS

An alternate hypothesis for the success of business in the Roberts Court is the rise of a specialized, elite Supreme Court bar—mostly lawyers working in Washington, D.C. corporate law firms.⁴⁶ To quote Justice Ginsburg, “Business can pay for the

45. Because we include only those cases in which business is on one side or the other, we can analyze only the government's participation, as a party, when the government opposes.

46. On this topic, see Lee Epstein & Michael Nelson, *Human Capital in Court*, 10 J.L. & CTS 61, 72 (2022) (“[A]ttorneys with litigation experience were significantly more likely to have worked in a Washington, D.C. law firm, served as a U.S. Supreme Court law clerk, and attended an elite law school.”); Yvette Borja, *How Elite Lawyers Took Over the Supreme Court's Docket*, BALLS & STRIKES (Feb. 2, 2022), <https://ballsandstrikes.org/legal-culture/elite-supreme-court-lawyers-docket-takeover> [<https://perma.cc/UA3H-QYJP>] (“For the most part, these ‘repeat players’ of the Supreme Court bar have a lot in common: They went to elite law schools, clerked for a justice, and now work at some of the legal profession's most prestigious private firms.”); Adam Liptak, *Just Ideology? A Study Finds Another Predictor of Supreme Court Decisions*, N.Y. TIMES

best counsel money can buy. The average citizen cannot. . . . That's just a reality."⁴⁷

To fully test this hypothesis, we would need data on whether lawyers representing business (1920–2020 terms) had prior experience litigating in the Supreme Court. We have yet to develop that dataset. However, we were able to obtain data for a part of the period: cases where the OSG opposed business for the 1980–2017 terms (N=214 cases; 1,889 votes).

Given these data limitations we can only conduct a mini-test of the lawyer hypothesis on decisions issued between the 1980–2017 terms, in which business was on one side and the OSG was on the other. The data suggest the plausibility of this explanation.

First, the percentage of attorneys representing business with Supreme Court experience increased markedly from 25% and 36% in the Burger and Rehnquist years to 77% during the Roberts era. As Figure 6 shows, these percentages are higher—even for the Roberts Court—than in non-business cases (in which the OSG was on one side).

(July 22, 2019), <https://www.nytimes.com/2019/07/22/us/politics/supreme-court-expert-lawyer.html> [<https://perma.cc/VG7U-WKVU>] (“The rise of the elite Supreme Court bar has been rapid. In the early 1980s, fewer than a quarter of lawyers arguing before the justices had ever done so before. In recent years, some 60 percent had.”); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1490 (2008) (“[W]hat has gone wholly unrecognized by all . . . is how the re-emergence of a Supreme Court Bar of elite attorneys . . . is quietly transforming the Court and the nation’s laws.”); Joan Biskpuic, Janet Roberts & John Shiffman, *The Echo Chamber*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus/#sidebar-clerks> [<https://perma.cc/BH8T-H7SY>] (“The lawyers are the most influential members of one of the most powerful specialties in America: the business of practicing before the Supreme Court.”).

47. Biskpuic et al., *supra* note 46 (quoting Justice Ginsburg).

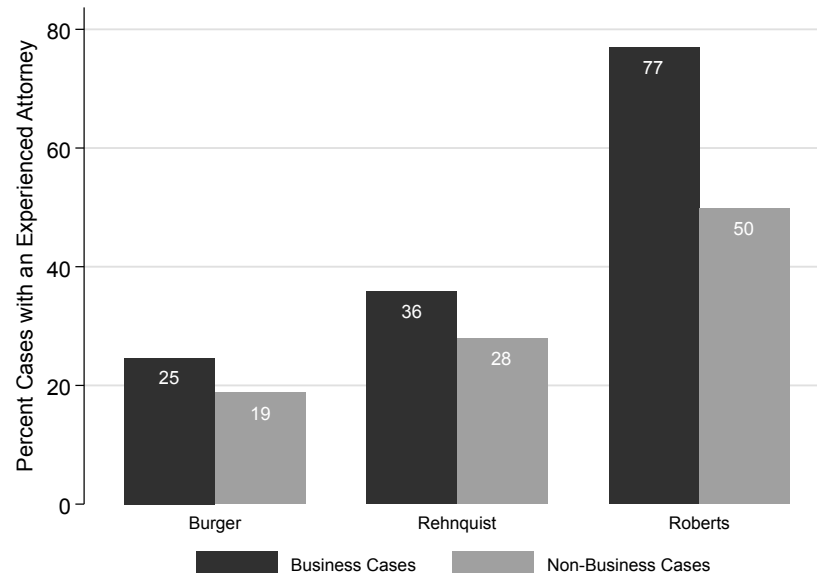


Figure 6: Percentage of Business and Non-Business Cases in which the Attorney (Opposing the OSG) was Experienced, Burger, Rehnquist, and Roberts Courts. Experienced attorneys are those who argued at least one prior case. Comparison is between cases in which business and the government were opposing parties and cases in which a non-business and the government were opposing parties.

Second, as we see in Column 3 of Table 1, estimating a model that controls for the party of the Justice's appointing president and whether business was the petitioner, shows that attorney experience has a large and statistically significant effect on votes.

Drilling down further, we note that both Democrat and Republican appointees are more likely to vote for business when an experienced attorney (one or more prior arguments) represents business. The effect size is large: over an eleven percentage-point difference between experienced and non-experienced attorneys. We break this down into two scenarios:

- **D Scenario:** Democratic appointee, Business Petitioner, Non-expert attorney: 0.41 [0.35, 0.47] probability of voting for business. With an expert attorney, the probability jumps to 0.53, [0.47, 0.58].
- **R Scenario:** Republican appointee, Business Petitioner, Non-expert attorney: 0.51 [0.46, 0.55] probability of voting

for business. With an expert attorney, the probability jumps to 0.62 [0.57, 0.66].

This effect is big, and comparable to the OSG effect we noted earlier. This adds another potential reason the Roberts Court ends up giving victories to business so very often. The best lawyers and the government have tended to line up on the business side, and that influences votes from both Democrat and Republic judges. The end result? The Roberts Court will quite likely end its run as the most pro-business Court in history.

D. MORE PRO-BUSINESS CLIMATE

Research in law and political science has observed that Court decisions and public sentiments often go hand in hand.⁴⁸ Causation is hard to entangle, but correlation is there.⁴⁹ Some commentators, including Judge Richard Posner, have speculated that trends in the Court's business decisions might reflect more positive public sentiment toward business.⁵⁰ Using data on public opinion that matches a portion of our data set, we conduct a partial test of this hypothesis. For reasons we explain below, the partial test results in little support for Judge Posner's speculation.

First, the General Social Survey (GSS) asks respondents whether they have a great deal, only some, or hardly any confidence in major companies. As Figure 7 shows, those responding "only some" has not changed much since 1973.

Next, in the other categories, we do see changes—but they don't explain why the Roberts Court is more pro-business. In 1973 31.1% of respondents had a great deal of confidence in business (the high was 32.4% in 1974); in 2021 that percentage fell to 16.7 (the lowest was 13.3% in 2010). And the percentage with

48. See e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009) (observing that the decisions of the Supreme Court on contentious issues align with popular approval and public understanding of the Constitution).

49. See Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010).

50. 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-defining-this-supreme-court.html> [https://perma.cc/BY6U-PS4Y] (quoting Richard A. Posner).

hardly any confidence nearly doubled from 12 in 1973 to 23.1 in 2021.

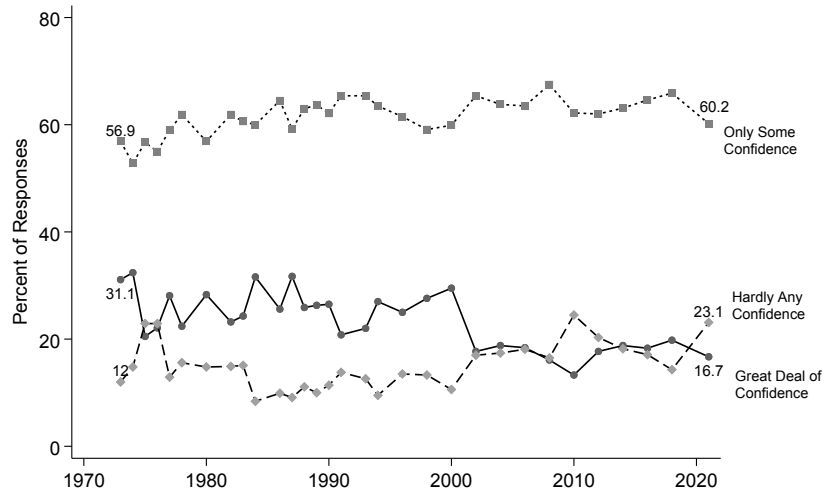


Figure 7: Respondents Expressing a Great Deal, Only Some, or Hardly Any Confidence in Major Companies, various years (1973- 2021). Calculated from the General Social Survey.

It is worth noting that the decline in confidence in business is not a function of party identity. GSS data (1973–2021) show that Republicans, in general, are more supportive of business than Democrats or Independents. But regardless of party identity, support for business has declined.⁵¹ As Figure 8 shows, that decline is especially noticeable for Strong Republicans: from 50.4% in 1973 to 20% in 2021.

51. These results are not unique to the General Social Survey. A 2022 Gallup Poll shows that although Democrats and Republicans “differ in their preferences for government regulation, they . . . find common ground in their mutual desire to strip major corporations of their vast influence.” Megan Brenan, *Low Satisfaction with U.S. Gov’t Regulation of Businesses*, GALLUP (Feb. 7, 2022), <https://news.gallup.com/poll/389519/low-satisfaction-gov-regulation-businesses.aspx> [<https://perma.cc/2MKV-MAXJ>].

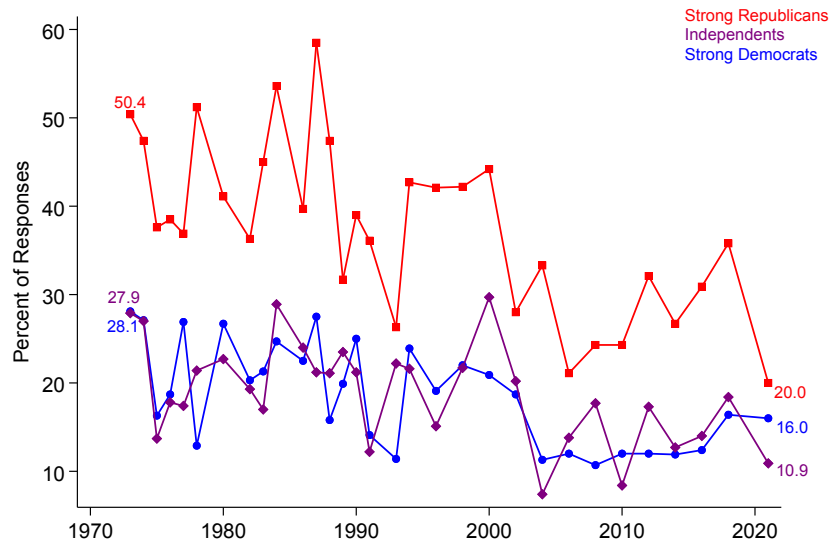


Figure 8: Respondents Expressing a Great Deal of Confidence in Major Companies, by Party Identity, various years (1973–2021). Calculated from the General Social Survey.

The decline hasn't gone unnoticed. The *New York Times* reports that “Republicans in Washington and around the country have soured on big business, joining Democrats in expressing concern that corporations wield too much influence. The shift has left corporate America with fewer allies in a tumultuous period for American society and the global economy.”⁵² The Court, however, in this area, looks to be charting its own path as opposed to following or mirroring public opinion (much as it seems to have done in the area of reproductive freedom).

CONCLUSION

The answer to the question “How pro-business is the Roberts Court?” is both straightforward and complicated. Business fares better in the Roberts Court than it ever has before. But why? Is it that the Republican Justices have so much control? Is it that government is strongly pro-business? Is it the types of lawyers who businesses hire as compared to their opponents? Is

52. Ben Casselman & Jim Tankersley, *Looking for Bipartisan Accord? Just Ask About Big Business*, *N.Y. TIMES* (May 14, 2021), <https://www.nytimes.com/2021/05/14/business/economy/big-business-politics-economy.html> [<https://perma.cc/FWV8-EUHJ>].

it the types of business cases that are characteristic of the modern era?

There is more to be investigated. One could look deeper into how different types of businesses fare in the Court. Activist hedge funds versus more staid investment firms? Environmentally friendly companies versus heavy polluters? Tech companies versus traditional manufacturing? Domestic taxpayers versus tax dodgers? Or one might look at how the Court treats business cases coming up from the different circuits, and whether the circuits with business expertise get more deference or less.