When It Comes to Business, the Right and Left Sides of the Court Agree

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ABSTRACT

Although the conservatives (all Republican appointees) on the Roberts Court are more favorable to business than the liberals (all Democratic appointees), the liberals are hardly anti-business. We show that the four Democratic appointees serving on the Roberts Court are far more business-friendly than Democratic appointees of any other Court era. Even more surprising, the Democrats vote in favor of business at significantly higher rates than Republican appointees in all the other chief justice periods since 1946. Because the current Democratic and Republican appointees support business at record levels, the fraction of unanimous pro-business decisions—the "Business Favorability Index"—has never been higher. What with the left and right side of the bench favoring business at levels unprecedented in the last 70 years, it is fair to continue to characterize the Roberts Court as "pro-business."

INTRODUCTION

In an article published in 2013,[1] we identified several trends in the Supreme Court's treatment of business during its 1946–2011 terms. But one finding—that the Roberts Court was the most pro-business of the five Chief Justice eras in our dataset—received the lion's share of attention from scholars,[2] the media,[3] and politicians.[4]

Professor Mark Tushnet noticed that reactions to our study (and to others reaching a similar conclusion[5]), divide along ideological lines:

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[1]   Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–73 (2013).

[2] *E.g.*, MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 188 (2013); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1496 (2016); Stephen M. Feldman, *The Interpretation of Constitutional History, Or Charles Beard Becomes a Fortuneteller*, 29 CONST. COMMENTARY 323, 339 (2014).

[3]   *E.g.*, Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html; James Surowiecki, *Courting Business*, NEW YORKER (Mar. 7, 2016), http://www.newyorker.com/magazine/2016/03/07/antonin-scalias-corporate-influence; *Corporations and the Court*, ECONOMIST (June 23, 2011), http://www.economist.com/node/18866873; Noam Scheiber, *As Americans Take Up Populism, the Supreme Court Embraces Business*, N.Y. TIMES (Mar. 11, 2016), https://www.nytimes.com/2016/03/12/business/as-americans-take-up-populism-the-supreme-court-embraces-business.html?_r=0..

[4]   *E.g.*, Senator Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195, 209 (2015); Senator Elizabeth Warren, Speech to the American Constitution Society: The Corporate Capture of the Federal Courts (June, 13, 2013) (http://www.warren.senate.gov/files/documents/ACSSpeech_ElizabethWarren.pdf); Press Release, Senator Patrick Leahy, Senate Judiciary Comm. Chairman, Judiciary Committee Look At Impact of SCOTUS Decisions on Access to Justice, Corporate Accountability, (June 29, 2011) (https://www.leahy.senate.gov/press/leahy-judiciary-committee-look-at-impact-of-scotus-decisions-on-access-to-justice-corporate-accountability).

[5]   Even before our study, commentators pointed to the Roberts Court's justices' friendliness toward business. *E.g.*, A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 80 (2013) ("One way of posing the question about the Court and business is to ask how the United States Chamber of Commerce . . . fared . . . . The Chamber took a position in nine cases, and it was on the winning side of every case . . . ."); Arthur Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 302 (2013) ("[A] backlash has set in against the private enforcement of public policies—a backlash that favors corporate and governmental interests against the claims of individual citizens."); Corey Ciochetti, *The Constitution, the Roberts Court, and Business: The Significant Business Impact*

the critics tend to be conservatives or libertarians,[6] and the defenders, left-of-center. "Liberals," according to Tushnet, "want to be able to describe the Roberts Court as pro-business and conservatives want to describe it as neutral."[7]

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of the 2011-2012 Supreme Court Term, 4 WM. & MARY BUS. L. REV. 385, 385 (2013) ("The Court's opinions came out strongly on the side of business with business interests receiving sixty-one out of seventy potential votes."); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1020 (2009) ("[T]he Roberts Court is, broadly speaking, a business-friendly Court."). One scholar even labeled the current Court "Supreme Court Inc." Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG. (Mar. 16, 2008), http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html ("The Supreme Court term that ended last June was, by all measures, exceptionally good for American business."). *See also* Erwin Chemerinsky, Op-Ed., *Justice for Big Business*, N.Y. TIMES (July 1, 2013), http://www.nytimes.com/2013/07/02/opinion/justice-for-big-business.html ("[T]he court ruled in favor of big business and closed the courthouse doors to employees, consumers and small businesses seeking remedy for serious injuries.").

Since publication of our study, scholars have provided further evidence of the pro-business trend we observed. Ironically, many of their studies appear in a volume edited by Jonathan Adler (one of our critics). BUSINESS AND THE ROBERTS COURT, (Jonathan H. Adler ed., 2016). The volume contains 10 chapters, 7 of which provide confirmation, in part or in full, of the Roberts Court's tendency to favor business (Chapters 1, 2, 3, 5, 7, 9, and 10). *See also* Tushnet, *supra* note 2, at 213 ("The Roberts Court's overall balance sheet in business cases fits the 'pro-business' view of the Court reasonably well . . . ."); Adam Chandler, *Cert.-stage Amicus 'All Stars': Where Are They Now?*, SCOTUSBLOG (Apr. 4, 2013), http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/ ("Not only did the Chamber once again file the most briefs, but it had the second-highest success rate of the Sweet Sixteen."); Max N. Helveston, *Judicial Deregulation of Consumer Markets*, 36 CARDOZO L. REV. 1739, 1740 (2015) ("[A] strongly anti-consumer jurisprudence has taken root."); Martin H. Malin, *The Employment Decisions of the Supreme Court's 2012-13 Term*, 29 ABA JOURNAL LAB. & EMP. L. 203, 228 (2014) (The Epstein, Landes, & Posner study found that "the Roberts Court is significantly more pro-business" than its predecessors. "The Court's decisions [in employment law] . . . are consistent with the study's finding.").

        [6]   In Part II we respond to a, perhaps the, chief criticism of our 2013 study: that we treat cases as fungible, failing to consider whether they are especially weighty or upset the status quo. *E.g.*, Richard A. Epstein, *The Myth of a Pro-Business SCOTUS*, HOOVER INSTITUTION (July 9, 2013), http://www.hoover.org/research/myth-pro-business-scotus ("All cases are not created equal . . . the counting of cases . . . gives no information about the relative importance that the cases have in the long run . . . ."); Ramesh Ponnuru, *More Misleading Attacks by Elizabeth Warren*, BLOOMBERG (Sept. 16, 2013, 2:32 PM), https://www.bloomberg.com/view/articles/2013-09-16/more-misleading-attacks-by-elizabeth-warren (counting "equal weight to every vote by a justice, even though decisions plainly vary in importance for businesses . . ."); Jonathan H. Adler, *Business and the Roberts Court Revisited (Again)*, VOLOKH CONSPIRACY (May 6, 2013), http://volokh.com/2013/05/06/business-and-the-roberts-court-revisited-again/. Adler repeats many of his criticisms in Jonathan H. Adler, *Business as Usual? The Roberts Court and Environmental Law*, *in* BUSINESS AND THE ROBERTS COURT, *supra* note 5, at 287.

        [7]   Tushnet, *supra* note 2, at 190. There are exceptions, though. *See, e.g.*, Michael S.

That makes sense—except that it does not apply to the current Justices. Although the conservatives (all Republican appointees) on the Roberts Court are more favorable to business than the liberals (all Democratic appointees), the liberals are hardly anti-business. We show that the four Democratic appointees serving Justices on the Roberts Court are far more business-friendly than Democratic appointees of any other Court era. Even more surprising, the Democrats on the Roberts Court vote in favor of business at significantly higher rates than Republican appointees in all the other chief justice periods since 1946. Because the current Democratic *and* Republican appointees support business at record levels, the fraction of unanimous pro-business decisions—what we call the Business Favorability Index—has never been higher.

We develop these and other results in Parts II and III of the Article. Part I explains how we amended and extended the dataset we used in our 2013 paper.

I. THE DATASET

For our 2013 article,[8] we used the U.S. Supreme Court Database[9] to create the Business Litigant Dataset (BLD). The BLD consisted of all Supreme Court cases orally argued between the 1946 and 2011 terms in which business was either the petitioner or the respondent but not both. We limited the parties opposing the business to governments, employees, shareholders or other stakeholders, and non-business organizations (such as unions or environmental groups).[10]

Greve, formerly of the conservative American Enterprise Institute and now a Professor of Law at George Mason University, who coauthored an article finding that the Roberts Court's "preemption decisions supports the perception of a distinctly business-friendly Roberts Court—but only up to a point . . . ." Michael S. Greve, et al., *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 23 S. CT. ECON. REV. 353, 358 (2015).

[8]   Epstein, Landes & Posner, *supra* note 1.

[9]   Harold J. Spaeth, Lee Epstein, et al., *2016 Supreme Court Database, Version 2016 Release 01*, http://supremecourtdatabase.org.

[10]   We also built a second dataset, which consisted of 255 cases in which a business entity was on both sides. On one side was a large business and on the other a small business. In that dataset, we tested the hypothesis that conservatives tend to favor big business and liberals tend to favor small business. To conserve space, this Article focuses only on cases with a business on one side or the other.

Annual changes and corrections to the U.S. Supreme Court Database, along with the improper exclusion and inclusion of particular cases in our original dataset,[11] prompted us to rebuild the Business Litigant Dataset from scratch. (We should note that replicating our earlier study with the revised BLD leads to no major changes in the original results.) As in the original, the new BLD begins with the 1946 term but now ends with the 2015 term. In all other ways, the revised and extended BLD is the same as the dataset we used in the original article[12]—meaning that the new BLD has all the advantages and disadvantages of the original. Falling in the latter category is the omission of cases in which business is a named party. Professor Adler suggests that excluding such cases may affect our results, especially cases in environmental law.[13] A deeper look at the relevant data, however, suggests little cause for concern.[14]

In all, the BLD contains 1,866 cases for a total of 16,123 votes, or about 25% of all orally cases (and votes) between the 1946 and 2015 terms.[15] The sheer number of cases suggests that business has been a major player in the Supreme Court for the last seven decades, participating in nearly the same fraction of cases as the executive branch whose outsized role, and importance, has been well

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[11]   We included several cases involving organizations that we should have excluded. Improper exclusions were cases in which a public utility or a bankrupt business (not person) was a party.

[12]   For more details, including the problems with the BLD, see Epstein, Landes & Posner, *supra* note 1.

[13]   Adler, *supra* note 6. Adler reiterated his concern in an email to us (March 12, 2017; on file with the authors).

[14]   The Supreme Court Database's natural resources-environmental protection issue code (80130) retrieves 107 cases; 46 (43%) are in the BLD. For the remaining 61, we looked to see how many were decided during each Chief Justice era, and whether the Court ruled for ("liberal") or against ("conservative") environmental protection. The results are as follows. Vinson Court: 1 case, decided anti-environment; Warren Court: 6 cases, 33% anti-environment; Burger Court: 28 cases, 60.7% anti-environment; Rehnquist Court: 16 cases, 62.5% anti-environment; Roberts Court: 10 cases, 60% anti-environment.
These results show, on the one hand, that the Burger and Rehnquist Courts are somewhat more anti-environment than anti-business (see Table 1), while the Roberts Court is about the same. On the other hand, the Ns are so small that they don't produce any meaningful change in the interpretation of the results. Including the (excluded) environmental cases increases the Burger Court's pro-business fraction from 0.426 to 0.434; the Rehnquist Court's from 0.440 to 0.448; and decreases the Roberts Court's from 0.605 to 0.604.

[15]   For cases, 1,866/7,516=24.8%; for votes, 16,123/65,573=24.6%.

documented.[16] (And recall that we do not include all business cases—only those with business on one side or the other and with particular opponents.)

II. GENERAL TRENDS IN THE COURT'S BUSINESS DECISIONS

Our earlier study[17] found that the Roberts Court was the most pro-business of the five Chief Justice eras in the Business Litigant Dataset; correcting and extending the data does not change that conclusion, as Table 1 shows. Here, we report the fraction of all decisions and votes (cols. 1 and 2) in favor of business by Chief Justice era. We further break the cases into three subsets. "Closely Divided" cases are those decided by a 5-4 vote except during the seven "natural courts" (periods of stability in Court membership) with 8 justices and the one natural court with only 7 justices. For an 8-person Court, closely divided cases are 5-3; for a 7-person Court, they are 4-3. "NYT" are decisions covered on the front page or in the business section of the *New York Times* on the day after the Court handed them down. When the authority for the decision, as coded in the Supreme Court Database, is "judicial review" at the federal, state, or local level, we identify the case as "Constitutional."[18] "Unanimous" decisions are those without a dissenting vote or opinion. ("Closely Divided," "NYT," and "Constitutional" cases allow us to explore trends in important decisions and partly respond to critics that contend that we treated all cases as fungible; "Unanimous" decisions are useful for considering the Court's overall favorability toward business, as we show in the next section.)

Table 1. Fraction of Decisions and Votes in Favor of Business by Chief Justice Era in the Business Litigant Dataset (BLD)

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[16]   A dataset developed by Lee Epstein and Eric Posner shows that the executive branch was the petitioner or respondent in 39.8% of the cases between the 1946-2015 terms. But the percentage was only 33.3% during the Roberts Court era (2005–2015 terms). *See* Lee Epstein & Eric Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401 (2016).

[17]   Epstein, Landes & Posner, *supra* note 1.

[18]   To identify constitutional cases, we use the *authorityDecision1* variable (=1 or 2) in the Supreme Court Database.

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Chief Justice (Terms)	All Cases in BLD		Closely Divided (Usually 5-4)		*NYT*		Constitutional		Unanimous	
	Decisions (1)	*Votes* (2)	*Decisions* (3)	*Votes* (4)	*Decisions* (5)	*Votes* (6)	*Decisions* (7)	*Votes* (8)	*Decisions* (9)	*Votes* (10)
Vinson Court (1946-52)	0.368 (269)	0.391 (2,303)	0.486 (35)	0.498 (315)	0.353 (51)	0.393 (440)	0.315 (54)	0.384 (469)	0.286 (98)	0.292 (837)
Warren Court (1953-68)	0.284 (532)	0.345 (4,552)	0.326 (43)	0.481 (385)	0.256 (129)	0.349 (1,098)	0.485 (66)	0.529 (577)	0.259 (216)	0.261 (1,849)
Burger Court (1969-85)	0.426 (550)	0.430 (4,726)	0.487 (78)	0.500 (698)	0.409 (186)	0.399 (1,593)	0.455 (145)	0.459 (1,259)	0.333 (234)	0.335 (1,995)
Rehnquist Court (1986-04)	0.440 (386)	0.439 (3,418)	0.545 (55)	0.505 (495)	0.426 (108)	0.459 (954)	0.511 (88)	0.489 (783)	0.345 (200)	0.345 (1,762)
Roberts Court (2005-15)	0.605 (129)	0.575 (1124)	0.600 (20)	0.514 (179)	0.735 (34)	0.620 (297)	0.769 (13)	0.670 (115)	0.612 (67)	0.612 (585)
Average (Total)	0.392 (1,866)	0.411 (16,123)	0.481 (231)	0.499 (2,072)	0.390 (508)	0.414 (4,382)	0.464 (366)	0.475 (3,203)	0.333 (815)	0.336 (7,028)

Note: The numbers in parentheses are the total number of cases or votes in the Business Litigant Dataset.

Beginning with "All Cases," we note the secular increase in support for business from the Warren Court to the Roberts Court, regardless of whether the focus is on decisions (col. 1) or votes (col. 2). The Roberts Court is significantly more likely to reach decisions or vote in favor of business than the Justices in the Vinson and Warren Courts, of course, and even the Rehnquist and Burgers Courts. In other words, the four additional terms of data confirm our original conclusion about the Roberts Court's unique treatment of business.[19] (See also Appendix A, which uses regression analysis to assess whether this conclusion holds when we add other relevant variables. It does.)

The data in the "Closely Divided," "NYT, " and "Constitutional" columns allow us to consider a criticism of our earlier study: that we treated cases as fungible, failing to distinguish between important and unimportant disputes.[20] The critics say that although the Roberts

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[19]   We should also note that the Roberts Court has hardly "bucked" its pro-business trend in recent terms, as some contend. *E.g.*, Lawrence Hurley, *U.S. High Court Bucks Pro-Business Trend This Term*, REUTERS (June 25, 2014), http://www.reuters.com/article/usa-court-business-idUSL2N0P61K320140625. The Roberts Court's justices' support for business in the last four terms is greater than in the previous seven—from 55.3% in 2005–2011 to 70.5% in 2012-2015, though the difference is not statistically significant.

[20]   *See* commentary cited in *supra* note 6. This is the same criticism that Cass R. Sunstein, *Moneyball for Judges: The Statistics of Judicial Behavior*, NEW REPUBLIC (Apr. 8, 2013), http://www.newrepublic.com/article/112683/moneyball-judges, leveled at the rankings in our book, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES (2013), and that we addressed by examining decisions in closely divided cases and in cases reported in the *New York Times* [hereinafter *NYT*]. Lee Epstein, William M.

Court may be more favorable to business overall it has been less friendly in weighty cases; and more supportive in cases with less at stake for business or decisions that are "limited in scope."[21] Adler, for example, points to *Chamber of Commerce v. Whiting*[22] as "hardly [an] outcome[] favored by business";[23] and both he and Roderick Hills claim that *Massachusetts v. EPA*[24] and *Wyeth v. Levine*[25] were equally devastating.[26] To them, victories in a few minor cases are far less consequential for business than losing one blockbuster.[27]

Landes & Richard A. Posner, *Revisiting the Ideology Rankings of Supreme Court Justices*, 44 J. LEGAL STUD. S295 (2015).

We take the same general approach here but refine both measures. In previous studies, we defined "closely divided" as cases decided by a 5-4 vote (or 5-3 during the 1969 term when only 8 justices served). It now occurs to us that this approach is too blunt. As we saw in 2016 after Scalia's death, short courts can occur, and in fact have occurred, in the middle of a term. For this reason, we consider the size of the Court in determining whether a case was closely divided using the procedure we outline in the text. The refinement we made to the *NYT* measure is simple: Instead of including only front-page stories, as most political scientists do (*see* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 75 (2000)), for obvious reasons we add decisions covered in the business section of the *NYT*.

[21]   Jonathan H. Adler, *Business as Usual? The Roberts Court and Environmental Law*, *in* BUSINESS AND THE ROBERTS COURT, *supra* note 5, at 289. A related criticism is that we do not distinguish between "decisions that ratify the status quo and those that alter the law and upset settled expectations." Jonathan H. Adler, *Business as Usual? The Roberts Court and Environmental Law*, *in* BUSINESS AND THE ROBERTS COURT, *supra* note 5, at 287. *See also* Ponnuru, *supra* note 6; Stephen Richer, *The Alleged Pro-Business Bias of the Supreme Court... Sigh...*,   FORBES   (Oct.   15,   2012,   2:30   PM), http://www.forbes.com/sites/stephenricher/2012/10/15/the-alleged-pro-business-bias-of-the-supreme-court-sigh/#2ce0a7e1475c.

This is a variant of the criticism that our earlier study treated all decisions as fungible, and there is a simple test to determine whether it has any merit. A large fraction of reversals when the Court rules for business would indicate a change in the law, while a high fraction of affirmances would suggest a ratification of the status quo, assuming lower courts follow Supreme Court precedent (and there are many empirical studies suggesting they do. *See, e.g.*, Chad Westerland, et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 896 (2010) (categorizing 10,244 U.S. Court of Appeals' citations to Supreme Court cases as "Deviate," "Neutral," and "Comply" and finding that "Comply" was the modal category.)) It turns out that the Roberts Court has the highest reversal fraction of all five eras when it rules for business (73% versus 61% for all other eras), and the comparison between its fraction and the others is statistically significant for all but the Burger Court.

[22]   563 U.S. 582 (2011).

[23]   Ponnuru, *supra* note 6.

[24]   549 U.S. 497 (2007).

[25]   555 U.S. 555 (2009).

[26]   Roderick M. Hills, Jr., *Preemption Doctrine in the Roberts Court*, *in* BUSINESS AND THE ROBERTS COURT, *supra* note 5, at 195, 219. *See also* Adler, *supra* note 6.

[27]   Tushnet, *supra* note 2, at 199 makes the same point: "Businesses might win five or ten minor cases but still come out behind if they lose one really important case. It's one thing to

Maybe. But "expert judgment" is hardly foolproof. While Ponnuru and Adler highlight *Whiting* and *EPA* as major defeats, Tushnet's analysis suggests otherwise: that they weren't losses for business after all.[28] Tushnet instead points to *Ledbetter v. Goodyear Tire & Rubber Co*,[29] *AT&T Mobility v. Concepcion*,[30] and *Wal-Mart Stores, Inc. v. Dukes*[31] as those with higher stakes for business. To Tushnet, these decisions "capture[] the Roberts Court's way of being pro-business: the use of procedural rules that favor the big guys. The conservatives shut down cases against big business; the liberals want them to go forward."[32] Then there's *Wyeth,* which Adler and others deem a "significant business loss."[33] If so, why neglect *PLIVA, Inc. v. Mensing*[34] in which the Court reached the opposite conclusion on the question of preemption (and in the process "re[wrote]"[35] or ignored "tension"[36] with *Wyeth*).

Our point isn't to take sides in debates over the importance (or lack thereof) of particular cases. It is rather to suggest that cherry-picking by and disagreement among even knowledgeable commentators only underscore a meta-analysis conducted by the

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get the Court to say that Big Pharma doesn't have to pay its detailers overtime wages…but something quite different when the Court upholds Obamacare." But unlike the critics, Tushnet's analysis points to the success of business in the major cases. Tushnet, *supra* note 2, at 213.

[28]   Tushnet, *supra* note 2, at 204 ("But from a business point of view, losing the global warming case in the Supreme Court was no more than a loss in a minor skirmish far away from the larger battlefield.").

[29]   550 U.S. 618 (2007).

[30]   563 U.S. 333 (2011).

[31]   564 U.S. 338 (2011).

[32]   Tushnet, *supra* note 2, at 204. Other scholars have also noted that the Roberts (and Rehnquist) Courts, interpreted federal rules in ways that "burdened plaintiffs while protecting corporate and governmental defendants." Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1742 (2014).

[33]   Adler, *supra* note 6. *See also* Martin J. Newhouse, *Business Cases and the Roberts Supreme Court*, ENGAGE (DEC. 6, 2011), http://www.fed-soc.org/publications/detail/business-cases-and-the-roberts-supreme-court.

[34]   564 U.S. 604 (2011).

[35]   *Id.* at 627 (Sotomayor, J. dissenting) ("The Court strains to reach the opposite conclusion. It invents new principles of pre-emption law out of thin air to justify its dilution of the impossibility standard. It effectively rewrites our decision in *Wyeth v. Levine* . . . .").

[36]   Roderick M. Hills, Jr., *Preemption Doctrine in the Roberts Court*, *in* BUSINESS AND THE ROBERTS COURT, *supra* note 5, at 195, 220.

clinical psychologist Paul Meehl more than six decades ago.[37] Meehl found that expert judgment is almost always inferior to systematic scientific assessment; it may be even worse than novice evaluations. Many subsequent studies have endorsed his conclusions.[38]

Following the lessons of Meehl et al., we opt for the more systematic route assessing the importance of decisions by looking at "Closely Divided" and "NYT" cases—two measures we've used in earlier work (though with refinements here[39]). In response to a suggestion by Professor Adler we also consider Constitutional decisions. We do so with a touch of reluctance because social scientists have yet to validate this as a measure of case importance (as they have with the *NYT* measure, in particular). But Adler makes the plausible claim that the outcomes in constitutional decisions are probably longer-lasting and more entrenched than statutory decisions because Congress can't overturn them by simple legislation. If the commentators are correct, we should observe the Roberts Court ruling for business less frequently in closely divided, *NYT*, and constitutional decisions. But we do not.

Compared with the four other Court eras, the Roberts Justices decide more—not less—often for business in closely divided decisions, as cols. 3 and 4 of Table 1 show (except for the Warren

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[37] PAUL E. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND REVIEW OF THE EVIDENCE (1954). Meehl has been called "the most influential clinical psychologist of the second half of the 20th century." Eric Jaffe, *Paul Meehl: A Legend of Clinical Psychological Science*, ASS'N FOR PSYCHOL. SCI. (July 8, 2013), http://www.psychologicalscience.org/observer/paul-meehl-a-legend-of-clinical-psychological-science (quoting Scott O. Lilenfield).

[38] For a review relevant to law, see Gregory A. Caldeira, *The Supreme Court Forecasting Project: Prediction Versus Explanation and Statistical Models versus Expert Judgments*, 2 PERSP. ON POL. 777 (2004). Caldeira was commenting on a competition between a statistical model and legal experts over predicting Supreme Court decisions. That the model generally outperformed the experts hardly surprised Caldeira. Considering a long line of literature demonstrating that "[h]uman judges are not merely worse than optimal regression equations; they are worse than almost any regression equation," Caldeira would have been astonished had the competition come out any other way. *Id.* at 778 (quoting RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 141 (1980)).

[39] In Epstein, Landes & Posner, *supra* note 1, we ranked the justices on these measures but not Court eras. *See also supra* note 20 for the refinements we made to these measures for this study. Almost needless to write, neither measure is perfect but so many scholars have deemed the *NYT*, in particular, reliable and valid (see *supra supra* note 16 that it would be against the interests of good social science to ignore it.

Court, the differences are not statistically significant). As for the *New York Times* measure, no Court supported business in more than 50% of the decisions covered in the *Times* (cols. 5 and 6 of Table 1) until the Roberts Court. Of its 34 decisions in the *NYT* category, 74% were in favor of business, as were 62% of the 297 votes—significant increases over each of the four previous eras. Although the numbers are small, the story is similar for constitutional decisions. Relative to the other eras and even to itself, the Roberts Court more often supports business in these cases.

These results suggest that when the Roberts Court hears an important case, it more often holds for business than did its predecessors. But does the Roberts Court rule less frequently for business in the weightier cases on its docket, as some commentators maintain? Not really. When the Roberts Court found for business it was less often by a 5-4 (or 5-3) vote but the difference is quite small and statistically meaningless: 60% (col. 3 of Table 1) for closely divided decisions versus 61% (col. 1 of Table 1) for all others. In cases covered in the *Times*, the reverse pattern emerges: the Roberts Court was more favorable toward business (74% versus 61%) but again the difference is not significant at conventional levels ($p = .07$). The gap is quite similar for constitutional decisions (77% versus 59%) but, again, not statistically significant.

Taken collectively the findings do not support the view that business is losing high profile disputes and winning those of lesser importance. More in line with our results is that the Roberts Court tends to rule for business both the weighty and less weighty cases.

III. PRO-BUSINESS REPUBLICANS (AND DEMOCRATS) ON THE ROBERTS COURT

What's driving these results? Why is the Roberts Court significantly more favorable to business than its predecessors? Ideology—or, more precisely, partisanship—is an obvious answer. Justices appointed by Republican presidents are significantly more likely to vote for business than Democratic appointees, as Table 2 shows; and Republicans have held a majority of seats on the Roberts Court since Day 1. Just as Tushnet noticed that liberal commentators like to claim that the Roberts Court is pro-business and conservatives

say otherwise, the Roberts justices too seem to express their attitudes toward business in their votes. (Constitutional decisions in column 4 are the exception; only the Roberts justices show a substantial— though not significant—gap in the expected direction. Without further analysis, we are not quite sure why.)

Table 2. Fraction of Votes in Favor of Business, by Republican and Democratic Appointees

	All Cases (1)		Closely Divided (2)		NYT (3)		Constitutional (4)	
	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.
Warren Court (1953-1968 Terms)	0.326* (2,609)	0.371 (1,943)	0.444 (207)	0.522 (178)	0.316* (614)	0.390 (484)	0.519 (335)	0.541 (242)
Burger Court (1969-1985 Terms)	0.391* (1,298)	0.444 (3,428)	0.448 (194)	0.520 (504)	0.344* (416)	0.419 (1,177)	0.506 (332)	0.440 (927)
Rehnquist Court (1986-2004 Terms)	0.404 (705)	0.441 (2,713)	0.388* (103)	0.536 (392)	0.437 (199)	0.465 (755)	0.500 (158)	0.486 (625)
Roberts Court (2005-2015 Terms)	0.514* (391)	0.607 (733)	0.230* (61)	0.661 (118)	0.491* (112)	0.697 (185)	0.605 (38)	0.701 (77)
Average (Total)	0.369* (5,003)	0.441 (8,817)	0.412* (565)	0.539 (1,192)	0.357* (1,341)	0.447 (2,601)	0.514 (863)	0.479 (1871)

Notes:

1. Dem.= votes of justices appointed by Democratic presidents; Rep.= votes of justices appointed by Republican presidents.

2. We do not include the Vinson Court because all its members were appointed by Democratic presidents.

3. Ns in parentheses are the total votes. *p < .01.

There are several problems, however, with this explanation. First, Republican appointees have been in the majority since the 1969 term and, in fact, they held more seats in earlier eras. Table 2 makes this clear. During the Burger and Rehnquist years, Republican appointees cast over 75% of the votes in the Business Litigant Dataset, compared to 65% for the Roberts Court.

A second problem traces to the voting patterns of the four Democratic (Clinton and Obama) appointees on the Roberts Court. On the one hand, they are significantly less likely to support business than the Roberts Republicans, as Table 2 shows. On the other, the Clinton/Obama appointees are not only more pro-business than the Democratic appointees of any other Court era; they also support business significantly more often that the Republican appointees in all other eras. (This is true of the Republicans on the Roberts Court

too.) Looking at col. 1 of Table 2, the Democratic appointees on the Roberts Court voted in favor of business in over 50% of the cases; under none of the other chiefs did Republicans or Democrats favor business at this rate. The same holds for cases covered in the *Times* (col. 3). Only in closely divided cases were the Clinton-Obama appointees at the very low end of support.

The upshot is that that contemporary commentary pointing to the pro-business posture of the Republicans on the Roberts Court is correct; they are more favorable than Republican appointees of all other eras. What much of the commentary has missed (or ignored) is that the Roberts Democrats are quite pro-business too.

Three pieces of additional evidence support this conclusion.

1. We ranked the 36 justices (from most to least supportive of business) in all cases in the Business Litigant Dataset and in four subsets: non-unanimous, closely divided, and *NYT* decisions. (see Appendix B). In the "All Cases" category, six of the Roberts Justices are in the top 10—including the two Obama appointees, Kagan and Sotomayor.

The two Clinton appointees, Breyer and Ginsburg, are at #16 (44% of all votes in favor for business) and #21 (42% in favor) respectively—some distance from the anti-business stalwarts of earlier years (*e.g.*, Warren at #33, casting 25% of his votes in favor of business; Fortas ranked last at 19%); and Breyer's and Ginsburg's support for business has only grown since the 2005 term. As a member of the Rehnquist Court, Breyer favored business in 39% of the cases, which would have put him neck-and-neck with Thurgood Marshall (#25). Between 2005 and 2015, Breyer's support jumped significantly ($p < .05$) to 51%, which puts him in the top 10. Ginsburg's pattern is much the same: from 38% support before the 2005 term to 47% support thereafter (but significant only at $p < .10$).[40]

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[40]   A possible explanation for Ginsburg's and Breyer's increasing support for business during the Roberts Court is that the Justices became more conservative in general not just in

2. Underlying these results for the Democratic appointees is the large fraction of unanimous decisions on the Roberts Court that went business's way.[41] Returning to Table 1 (columns 7 and 8), we see that when *the Roberts Court speaks with one voice, that voice favors business* in over 60% of decisions. Especially striking is the difference between the current Court and its immediate predecessor. Even though both reached unanimous decisions in roughly half their business cases,[42] the Roberts Court held for business nearly two times as often as the Rehnquist Court (61% versus 35%, a statistically significant difference). One factor that may temper the pro-business inference of the Roberts Court is that it was less active in the business area compared to other Chief Justices. The percentage of business cases dropped steadily over the five Chief Justice eras: 35.3% in the Vinson Court, 30% in the Warren Court, 25.3% in the Burger Court, 20.9% in the Rehnquist Court and 16.6% in the Roberts Court.[43]

3. The Court's tendency to favor business in unanimous decisions has increased, not decreased, over time. In Figure 1, we show the number of unanimous cases each term that were

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business cases. The data do not support this hypothesis. The fraction of conservative votes for Ginsburg and Breyer in cases outside the Business Litigant Dataset were roughly unchanged in the Rehnquist and Roberts Courts (0.381 and 0.377 for Ginsburg and 0.429 and 0.422 for Breyer during the Rehnquist and Roberts Courts, respectively).

[41] The rankings of the Democratic appointees fall dramatically in non-unanimous and closely divided cases. Kagan ranks #3, and Sotomayor #7 for all cases but #30 and #27 respectively for non-unanimous decisions (and Sotomayor is near the bottom too in closely divided cases). *See* Appendix B.

[42] 51.8% and 51.9% for the Rehnquist and Roberts Courts respectively. *See supra* Table 1.

[43] Overall, there were 9.1% fewer business cases as a percent of all cases in the Roberts Court than for the other Chief Justices combined and this difference was highly significant. The fraction of business cases was also significantly lower when comparing the Roberts Court with each of the other Chief Justice Courts (including the Rehnquist Court which was the next lowest to the Roberts Court). Also note that the term "business cases" refers only to cases in the Business Litigant Dataset and therefore exclude business versus business cases. *See supra* Table 1.

in support of business as a fraction of the total number of cases in the Business Litigant Dataset in that term or what we called the Business Favorability Index (BFI). Across the 70 terms there were 1866 cases in the Business Litigant Dataset, 815 were decided unanimously (43.7%) and 272 of these were decided in favor of business. (33.4% of the 815 unanimous decisions but only 14.6% of all cases in the Business Litigant Dataset). But notice the variation over time. A linear regression of the BFI on the term variable shows that the BFI is flat during the Vinson years (1946-1952) and dips slightly (though significantly so) during the Warren Court era (1953-1968),[44] dropping by about 0.6% with each passing term. Unanimous support for business grows almost from the start of the Burger Court. Regressing the BFI on the Burger Court terms (1969-85) returns a positive and significant coefficient showing an increase of about 1% over the course of this era.[45] (The coefficient is also positive for the Rehnquist Court but not significant.[46]) As Figure 1 suggests, the largest increase in the BFI occurs over the course of the Roberts Court: over 3% per term.[47] Growth is especially noticeable (and secular) since the 2011 term: from 0.33 in 2011 to 0.50 by 2015.[48]
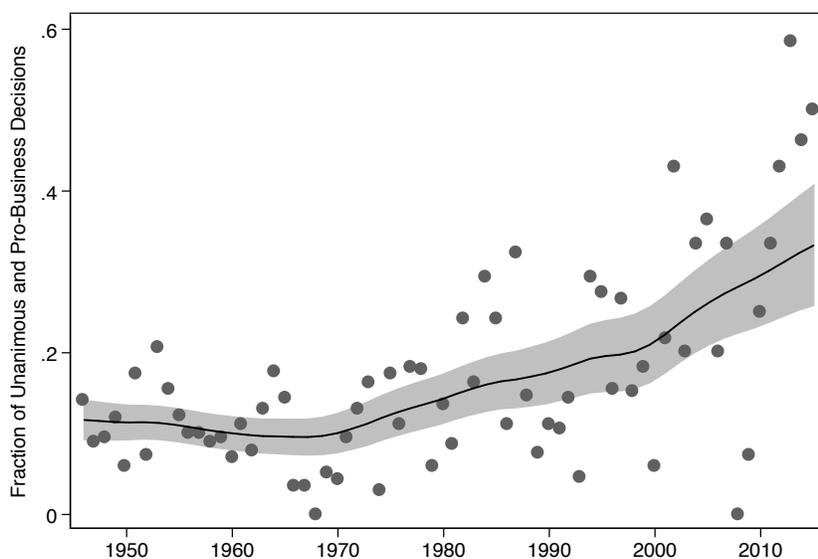
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[44]   A logistic regression of whether or not the case was a unanimous win for business on term (with standard errors clustered on term) also shows a decline during the Warren years but the coefficient on term is not significant at $p < .05$. *See infra* Fig. 1.

[45]   Logistic regressions produce the same results. *See supra* note 44.

[46]   Logistic regressions produce the same results. *See supra* note 44.

[47]   Logistic regressions produce the same results. *See supra* note 44.

[48]   Two contrary data points standout during the Roberts Court. There were 0 unanimous cases in favor of business in 2008 and 1 in 2009. The number of unanimous cases in the Business Litigant Dataset was also very small in those two years: 0 in 2008 and 6 in 2009.

Figure 1. The Business Favorability Index, 1946-2015 Terms

Notes:

The Business Favorability Index (BFI) is the fraction of all decisions in the Business Litigant Dataset that were unanimous and in support of business (Upb).

The solid circles represent the BFI each term; the solid line is a loess line; and the grey band are the 95% confidence intervals.

IV. DISCUSSION

What with the left and right side of the bench favoring business at levels unprecedented in the last 70 years, it is fair to characterize the Roberts Court as "pro-business." But the question of why remains unanswered. Lazarus suggests that the emergence of an "elite Supreme Court" bar explains the "remarkable success recently enjoyed by the business community in both obtaining [Supreme] Court review and then in prevailing on the merits."[49] Perhaps, but

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[49]   Richard J. Lazarus, *Advocacy Matters: Transforming the Court by Transforming the Bar*, *in* BUSINESS AND THE ROBERTS COURT, *supra* note 5, at 65, 66. *See also* Joan Biskupic et. al., *The Echo Chamber*, REUTERS (Dec. 8, 2014), http://www.reuters.com/investigates/special-

there are other possibilities. One of us (Posner) has said that the Roberts Court's support of business reflects broader trends: "American society as a whole is more pro-business than it was before Reagan."[50]

Posner's observation seems downright prescient considering uber-businessman Donald Trump's victory in 2016. And Trump's victory, in turn, may guarantee a "Supreme Court, Inc."[51] for decades to come.

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report/scotus/.

[50] Liptak, *supra* note 3, at 6.
[51] Rosen, *supra* note 5, at 1.

Appendix A. Multivariate (Logistic) Regressions

We present raw data in the text. To assess whether our findings hold when we add other relevant variables, we estimated four logistic regressions. In each the dependent variable is the vote of the justice (for business=1 or against=0). And the chief independent variable of interest in the eqs. in cols. 1–3, is *Roberts Court,* which indicates whether the Roberts Court handed down the decision (=1) or not (=0). Col. 1 uses all terms; col. 2 allows for a comparison between the Burger/Rehnquist Courts versus the Roberts Court; and col. 3 between the Rehnquist and Roberts Courts. In col. 4 the key independent variable is *Term* because there we model only the Roberts Court. A positive coefficient would indicate increasing pro-business votes from the 2005 through 2015 terms.

Appointing President Party helps us to determine whether justices appointed by Republican presidents are more likely to support business. We expect a positive coefficient (Republicans=1 and Democrats=0). To capture the Supreme Court's tendency to reverse the lower court, we include *Lower Court Pro-Business*. Because 1= a pro-business lower court decision (and 0=anti-business), the coefficient should be negative. Finally, we include a series of variables to indicate the federal government's involvement in the litigation. If the federal government was the litigant opposing the business, *US Opposition* (=1), we expect that business is less likely to prevail. The same holds for *US Amicus Opposition* (=1), which indicates whether the Solicitor General filed an amicus curiae brief on behalf of the non-business litigant. For *US Amicus Support* (=1), we expect the opposite: When the SG files in favor of business, business should be more likely to win.

The results, displayed below, confirm these expectations. Most relevant here are the coefficients on the *Roberts Court*. That they are positive and significant suggests that justices' votes in the 2000–2015 terms are significantly more pro-business than in all other terms (col. 1), the Burger/Rehnquist terms (col. 2) and the Rehnquist terms (col. 3). For example, using the equation in col. 3 (and all else equal): The

probability of a business-friendly vote during the Rehnquist Court is 0.43 (the 95% confidence interval is [0.40, 0.46]) ; during the Roberts Court, it is 0.59 [0.54, 0.63]. *Term* shows that the odds of a pro-business vote increased significantly with each passing term of the Roberts Court; for example, the predicted probability is 0.65 [0.62, 0.68] for the 2011 term (the last in our original article) and is now (2015 term) 0.79 [0.75, 0.82], all else equal.

    Two other results are notable.

    (1) Except for col. 1, Republican appointees are significantly more likely to vote for business than Democratic appointees. (Re-estimating the eq. in col. 1 without the all-Democratic Vinson years yields a significant coefficient on *Appointing President Party*.) Using eq. 2 (1969–2015 terms), the predicted probability of a Republican appointee supporting business is 0.46 [0.44, 0.49]; the probability reduces to 0.41 [0.39, 0.42] for the Democrats, all else equal.

    (2) The U.S. government can steer the justices toward supporting or opposing business—except during 2005-2015 terms (col. 4). Though the amicus variables are significant, *US Opposition* (as a party) is not. This fits with other work reporting the Obama administration's poor showing in the Roberts Court.[52]

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[52]   Epstein & Posner, *supra* note 16, at 412.

Variable	All Terms	1969-2015 Terms	1986-2015 Terms	2005-2015 Terms
	(1)	(2)	(3)	(4)
Roberts Court	0.642*	0.644*	0.629*	___
	(6.31)	(6.93)	(7.84)	
Term	___	___	___	0.174*
				(10.29)
Appointing President Party	0.179	0.222*	0.245*	0.696*
	(1.47)	(3.49)	(2.52)	(5.69)
Lower Court Pro-Business	-0.636*	-0.587*	-0.500*	-1.022*
	(7.85)	(7.65)	(6.74)	(6.16)
US Opposition	-0.464*	-0.531*	-0.449*	-0.347
	(5.83)	(4.96)	(6.10)	(1.66)
US Amicus Opposition	-0.749*	-0.863*	-0.798*	-0.715*
	(7.28)	(7.32)	(6.54)	(4.48)
US Amicus Support	0.762*	0.580*	0.784*	1.121*
	(7.24)	(5.81)	(5.92)	(5.74)
N of Votes	16,009	9,162	4,462	1,062
N of Clusters	36	23	18	12

Notes:
1. Cells are logit coefficients (t-statistics are in parentheses). *$p < .01$.
2. Standard errors clusters on Justice

Appendix B. Updated Rankings of the Justices, 1946-2015 Terms

We ranked the 36 justices (from most to least supportive of business) in all cases in the Business Litigant Dataset (1946–2015 terms), non-unanimous decisions, closely divided decisions (usually 5-4), and decisions covered on the front page or in the business section of the *New York Times* on the day after the Court announced them. Current justices are in **bold.**

Correlations between the subsets of cases for the raw fractions are high (from 0.95 for All Cases/NYT to 0.66 for All Cases/Closely Divided and Closely Divided/NYT); and the Spearman rank correlations between each subset are significant ($p < 0.01$) (*i.e.*, they reject the null hypothesis of independence). But there are some clear deviators—notably, Kagan and Sotomayor. Kagan ranks #3, and Sotomayor #7 for all cases but #30 and #27 respectively for non-unanimous decisions (and Sotomayor is near the bottom too in closely divided cases). Although Sotomayor's and Kagan's Ns remain small—and so we should be cautious in interpreting the results—their overall rankings likely reflect the strong pro-business bent of the Roberts Court, while their rankings in non-unanimous decisions may provide a better indicator of their partisan/ideological inclinations.

All Cases		Non-Unanimous		Closely Divided		*New York Times*	
Alito	0.664 (122)	Jackson	0.719 (171)	Jackson	0.865 (37)	**Alito**	0.774 (31)
Roberts	0.622 (127)	**Alito**	0.712 (59)	Whittaker	0.846 (26)	**Roberts**	0.676 (34)
Kagan	0.597 (62)	**Thomas**	0.684 (171)	**Alito**	0.842 (19)	**Thomas**	0.674 (89)
Jackson	0.571 (275)	Whittaker	0.676 (111)	Frankfurter	0.791 (67)	Jackson	0.580 (50)
Thomas	0.566 (355)	**Scalia**	0.634 (243)	**Roberts**	0.750 (20)	**Scalia**	0.543 (138)
Whittaker	0.553 (161)	Powell	0.629 (267)	Burton	0.729 (48)	**Kennedy**	0.535 (129)
Sotomayor	0.519 (77)	**Roberts**	0.623 (61)	Harlan	0.694 (49)	Whittaker	0.529 (34)
Scalia	0.515 (501)	Frankfurter	0.622 (320)	Powell	0.662 (74)	**Kagan**	0.522 (23)
Kennedy	0.506 (468)	Harlan	0.616 (310)	**Thomas**	0.647 (51)	Frankfurter	0.520 (102)
Powell	0.501 (469)	O'Connor	0.605 (263)	Stewart	0.643 (84)	Harlan	0.508 (128)
Frankfurter	0.499 (517)	Kennedy	0.601 (228)	Scalia	0.622 (74)	**Sotomayor**	0.500 (22)
O'Connor	0.476 (546)	Stewart	0.587 (445)	**Kennedy**	0.614 (70)	Powell	0.494 (156)
Harlan	0.471 (503)	Burger	0.556 (315)	O'Connor	0.613 (80)	Stewart	0.488 (215)
Stewart	0.471 (720)	Rehnquist	0.508 (455)	Vinson	0.600 (35)	**Ginsburg**	0.488 (82)
Burger	0.463 (546)	Burton	0.498 (261)	Reed	0.585 (41)	O'Connor	0.481 (158)
Breyer	0.444 (288)	Vinson	0.491 (167)	Burger	0.577 (78)	**Breyer**	0.479 (73)
Rehnquist	0.431 (865)	Stevens	0.483 (410)	Rehnquist	0.524 (124)	Burger	0.457 (184)
Stevens	0.425 (788)	Reed	0.470 (219)	White	0.504 (117)	Stevens	0.455 (257)
Burton	0.421 (423)	Blackmun	0.463 (406)	Marshall	0.466 (103)	Vinson	0.451 (51)
Vinson	0.418 (263)	White	0.444 (538)	Minton	0.462 (13)	Souter	0.447 (76)
Ginsburg	0.417 (319)	Marshall	0.436 (406)	Blackmun	0.449 (107)	Burton	0.443 (79)
Reed	0.405 (365)	Souter	0.432 (146)	Stevens	0.421 (114)	Rehnquist	0.415 (270)
Blackmun	0.404 (727)	Douglas	0.421 (570)	Souter	0.395 (43)	Blackmun	0.385 (239)
Souter	0.402 (296)	Goldberg	0.403 (62)	Brennan	0.390 (136)	Minton	0.382 (34)
Marshall	0.387 (723)	Minton	0.394 (132)	Douglas	0.361 (108)	Marshall	0.351 (242)
White	0.379 (971)	**Breyer**	0.392 (130)	Clark	0.300 (50)	Douglas	0.341 (205)

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Minton	0.364 (214)	**Sotomayor**	0.382 (34)	**Ginsburg**	0.277 (47)	White	0.341 (311)
Douglas	0.360 (929)	Brennan	0.361 (634)	**Breyer**	0.273 (44)	Clark	0.331 (127)
Goldberg	0.342 (111	**Ginsburg**	0.356 (149)	Murphy	0.222 (27)	Goldberg	0.313 (32)
Brennan	0.335 (1097)	**Kagan**	0.333 (27)	Black	0.198 (86)	Brennan	0.305 (334)
Clark	0.311 (582)	Clark	0.322 (354)	Rutledge	0.185 (27)	Reed	0.299 (67)
Murphy	0.246 (130)	Warren	0.234 (312)	**Sotomayor**	0.167 (12)	Black	0.267 (191)
Warren	0.245 (526)	Black	0.229 (507)	Warren	0.140 (43)	Rutledge	0.241 (29)
Black	0.238 (825)	Murphy	0.221 (77)			Warren	0.225 (129)
Rutledge	0.235 (136)	Fortas	0.218 (55)			Murphy	0.172 (29)
Fortas	0.188 (96)	Rutledge	0.213 (80)			Fortas	0.156 (32)
Average (Total)	0.411 (16,123)		0.470 (9,095)		0.499 (2,072)		0.414 (4,382)

Notes:
1. Ns are in parentheses.
2. We eliminated Goldberg, Fortas, and Kagan from the Closely Divided column because each participated in fewer than 10 cases. But we include them in the column total.