

INSTITUTIONAL GARDENING: THE SUPREME COURT IN  
ECONOMIC LIBERALIZATION

by  
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*What role has the U.S. Supreme Court played in the liberalization of the American economy over the last three decades? By examining more than 800 cases of judicial review on issues related to economic policy-making between 1946 and 2012, we show that the Court participated in the post-1980s shift to the market economy through disciplining non-complying governmental actors that refused to fall in line with the liberalization agenda. We term this process “institutional gardening”: the Court allowing some policies to flourish while weeding out others, gradually nudging governmental actors toward a particular political vision. This is a cumulative process, involving many routine Court decisions rather than a few landmark cases. We find that the frequency with which businesses are able to bring their cases before the Court, typically under the conditions of low media attention, drives the push toward economic liberalization.*

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## I. INTRODUCTION

Since the 1980s, Western democracies have experienced a shift to the market, which entailed a restructuring of political-economic institutions in favor of greater competition over goods, capital, and labor.<sup>1</sup> Literature in political economy defines “economic liberalization” as a multidimensional process that implicates deregulation, privatization of state services, welfare retrenchment, reduction of taxes and tariffs, and the erosion of organized labor.<sup>2</sup>

The move away from the post-war era of welfare state expansion was especially pronounced in the United States.<sup>3</sup> The American turn toward a winner-takes-all economy is often attributed to economic transformations, namely globalization and the rise of the knowledge economy.<sup>4</sup> Yet such an economy-centric account fails to explain why liberalization—and the contemporaneous increase in economic inequality—was so much more pronounced in the United States as compared with other advanced democracies.<sup>5</sup> These cross-national variations have spurred schol-

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<sup>1</sup> See generally *SOCIAL RESILIENCE IN THE NEOLIBERAL ERA* (Peter A. Hall & Michèle Lamont eds., 2013). Hall and Lamont examine the ways in which neoliberal reforms stimulated diverse responses across different societal groups and countries. They consider the neoliberal shift not as a process of convergence, but rather as an “open-ended stimulus that provoked a diversity of responses.” Peter A. Hall & Michèle Lamont, *Introduction to SOCIAL RESILIENCE IN THE NEOLIBERAL ERA*, *supra* note 1, at 1. The chapter by Evans and Sewell provides a useful cross-national survey of variations in the impact of neo-liberal reforms. Peter B. Evans & William H. Sewell, *Policy Regimes, International Regimes, and Social Effects*, in *SOCIAL RESILIENCE IN THE NEOLIBERAL ERA*, *supra* note 1 at 35–68.

<sup>2</sup> Peter A. Hall & Kathleen Thelen, *Institutional Change in Varieties of Capitalism*, 7 *SOC. ECON. REV.* 7, 22 (2009).

<sup>3</sup> See Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 *POL. & SOC’Y* 152, 153–54 (2010). Hacker and Pierson argue that the increase in economic inequality in the United States since the 1980s is a direct result of political maneuvering rather than an inevitable feature of globalization or technological changes. Hacker and Pierson emphasize the role of special interest groups, among them organized business groups, in mobilizing resources at different arenas of economic policy-making. *Id.*

<sup>4</sup> These economic explanations often fold into the broad category of skill-based technological change (SBTC). This body of literature is too large to be surveyed here in its entirety. See, e.g., David Autor et al., *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 *Q. J. ECON.* 1279, 1279–82 (2003).

<sup>5</sup> For a forceful presentation of this argument in the American context, see JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 38 (2010). See also

ars to shift their attention to the political dynamics behind liberalization, examining the institutional settings and political actors that may facilitate or hinder it.<sup>6</sup>

Social scientists have closely examined the role of different players in economic liberalization, focusing on political parties,<sup>7</sup> labor unions,<sup>8</sup> firms and business associations,<sup>9</sup> and bureaucrats.<sup>10</sup> So far, this literature

Kathryn M. Neckerman & Florencia Torche, *Inequality: Causes and Consequences*, 33 ANN. REV. SOC. 335, 336–38 (2007). These authors explain that economic-centric explanations were almost hegemonic during the 1990s, but have been challenged in the decades since. One of the reasons for that, as also noted by Hacker and Pierson, is the greater increase in inequality in the United States compared to other advanced democracies. *Id.* In addition, Neckerman and Torche note that inequality had begun to increase in the United States before the knowledge intensive sectors expanded. *Id.*; see also Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSP. ON POL. 449, 449–50 (2005).

<sup>6</sup> HACKER & PIERSON, *supra* note 5, at 40–41.

<sup>7</sup> The different chapters in the edited volume, *THE NEW POLITICS OF THE WELFARE STATE* (Paul Pierson ed., 2001), provide a broad overview on the welfare politics of the advanced democracies since the 1980s. Among other things, this book suggests that parties have become less relevant for policy-making since the 1980s, in the context of “permanent austerity.” *Id.* at 1–10. An opposite argument is put forth in Walter Korpi & Joakim Palme, *New Politics and Class Politics in the Context of Austerity and Globalization: Welfare State Regress in 18 Countries, 1975–95*, 97 AM. POL. SCI. REV. 425 (2003). Korpi and Palme argue that parties have remained a crucial actor in shaping the generosity and eligibility of welfare benefits, showing differences between the welfare reforms led by left-wing and right-wing parties. *Id.* at 425–26.

<sup>8</sup> On the role of labor unions in shaping the American political-economic landscape, see David Brady et al., *When Unionization Disappears: State-Level Unionization and Working Poverty in the United States*, 78 AM. SOC. REV. 872, 872 (2013); David Jacobs & Lindsey Myers, *Union Strength, Neoliberalism, and Inequality: Contingent Political Analyses of US Income Differences since 1950*, 79 AM. SOC. REV. 752, 753–54 (2014).

<sup>9</sup> For historical research on this topic, see Kim Phillips-Fein & Julian E. Zelizer, *Introduction to WHAT’S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II* 3, 3 (Kim Phillips-Fein & Julian E. Zelizer eds., 2012); see also KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN* (2009); see also Alexander Hertel-Fernandez, *Who Passes Business’s “Model Bills”? Policy Capacity and Corporate Influence in US State Politics*, 12 PERSP. ON POL. 582, 582–84 (2014) (discussing American business associations and their ties with conservative interests); see also Alexander Hertel-Fernandez & Theda Skocpol, *Asymmetric Interest Group Mobilization and Party Coalitions in U.S. Tax Politics*, 29 STUD. AM. POL. DEV. 235, 244 (2015) (discussing small businesses and their impact on tax policy). See generally CATHIE JO MARTIN & DUANE SWANK, *THE POLITICAL CONSTRUCTION OF BUSINESS INTERESTS* (2012) (providing a comparative-historical perspective on the political role of business associations); MARK S. MIZRUCHI, *THE FRACTURING OF THE AMERICAN CORPORATE ELITE* (Harvard Univ. Press, 2013) (discussing the changing political role of business elites in the United States).

<sup>10</sup> For a discussion of the role of bureaucrats and experts in facilitating neo-liberal reforms in the United Kingdom during Margaret Thatcher’s years at the premiership, see Peter A. Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 25 COMP. POL. 275 (1993).

has not explicitly considered the role of the judiciary in the process of economic liberalization.<sup>11</sup>

And while legal scholars have studied the Supreme Court very closely, they also have not focused on its role in economic liberalization. Legal scholars do provide rich accounts of the *Lochner* Court as a central player in economic policy-making, actively preventing legislators from intervening in the market.<sup>12</sup> Yet, a common assumption is that after the *Lochner* repudiation, the Court somewhat withdrew from the economic arena<sup>13</sup> and has maintained a degree of neutrality in economic issues ever since.<sup>14</sup> Therefore, the role of the Court in economic policy-making in recent times has received scant attention in the literature.<sup>15</sup> In particular, we lack the kind of narrative that is available in the context of the *Lochner* Court—an account of the role of the Court in shaping economic policy-making through its interactions with other government institutions. This is the type of account we set out to provide.

The timing for this intervention could not be more apt; as *Capital in the Twenty-First Century* hits number one on the *New York Times* best sellers list, and economic issues and judicial appointments dominated the 2016 presidential race,<sup>16</sup> a deeper understanding of the Court's involvement in liberalizing America's economy is called for. Increasingly, legal scholars are also beginning to recognize the need to consider the Court's influence on current economic realities.<sup>17</sup>

<sup>11</sup> “With few exceptions, courts have received relatively little attention from comparative historical institutionalist (HI) scholars interested in processes of state formation and the development of the welfare state.” Sarah L. Staszak, *Law and Courts*, in OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 325, 325 (Orfeo Fioretos et al. eds., 2016).

<sup>12</sup> During the *Lochner* era (1897–1937), the Court struck down economic regulations held to be infringing on economic liberties. See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003). The Court abandoned this form of judicial activism due to political backlash in the late 1930s. Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1452–53 (2015).

<sup>13</sup> Sherry, *supra* note 12, at 1453.

<sup>14</sup> See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 465 (2015).

<sup>15</sup> Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1466 (2016).

<sup>16</sup> See, e.g., Noam Scheiber, *As Americans Take Up Populism, the Supreme Court Embraces Business*, N.Y. TIMES (Mar. 11, 2016), [http://www.nytimes.com/2016/03/12/business/as-americans-take-up-populism-the-supreme-court-embraces-business.html?\\_r=0](http://www.nytimes.com/2016/03/12/business/as-americans-take-up-populism-the-supreme-court-embraces-business.html?_r=0); see also Eduardo Porter, *Next Supreme Court Justice Will Be Crucial to Climate Change*, N.Y. TIMES (Feb. 16, 2016), <http://www.nytimes.com/2016/02/17/business/economy/next-supreme-court-justice-will-be-crucial-to-climate-change.html?module=ArrowsNav&contentCollection=Economy&action=keypress&region=FixedLeft&pgtype=article>.

<sup>17</sup> For example, in January 2016, the University of Texas Law Review held a conference aimed at reviving the “discourse of constitutional political economy,” which today “lies dormant.” Joseph Fishkin & William Forbath, *Reclaiming*



In order to uncover the ways in which the Court played a role in economic policy-making in the era of liberalization, our analysis focuses on the more subtle modes of judicial action. We adopt an institutionalist approach, focusing on incremental change and continuous contestation between governmental actors and well-organized interest groups.<sup>18</sup> While political scientists interested in institutional change have developed this approach, it also strongly resonates with recent emphasis on sub-constitutional frameworks in studying judicial action.<sup>19</sup> Employing this analytic lens, the judicial activity we observe does not manifest in sudden transformations through landmark constitutional cases, but in a gradual process—the cumulative outcome of numerous routine Court decisions. Through its continuous interactions with other governmental actors, the Court's participation in the liberalization of the American economy is longstanding and systematic. We term this process “institutional gardening”: By carefully weeding out some policies and allowing others to persist, over time, the Court gently navigates governmental institutions towards a particular ideological position.<sup>20</sup>

Our findings fall into three main categories: the role of the Court vis-à-vis other governmental actors in liberalizing the American economy, the ability of political actors to use the Court as an arena for political contestation in cases that pertain to liberalization, and the doctrinal tools used by the Court.

First, we find that the Court participated in the pro-liberalization shift by assuming a disciplining role. Rather than clash with economically progressive legislators, the Court has increasingly enforced economically

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*Constitutional Political Economy*, BALKINIZATION (Jan. 22, 2016), <http://balkin.blogspot.com/> (emphasis omitted); see also Jack M. Balkin, *Symposium on the Constitution and Economic Inequality*, BALKINIZATION (Jan. 21, 2016), <http://balkin.blogspot.com/2016/01/symposium-on-constitution-and-economic.html>.

<sup>18</sup> Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 244 (2004); James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1, 4 (James Mahoney & Kathleen Thelen eds., 2010); James Conran Mahoney & Kathleen Thelen, *Institutional Change*, in OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 51 (Orfeo Fioretos, Tulia G. Falleti, & Adam Sheingate eds, 2016). For a call to adopt this approach to the study of the Court, see Staszak, *supra* note 11, at 332–33. This approach stands in contrast to the focus on what scholars of institutional change call “critical junctures,” or moments that “place institutional arrangements on paths or trajectories, which are then very difficult to alter.” Giovanni Capoccia & Daniel R. Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341, 341–42 (2007).

<sup>19</sup> WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1 (2013) (presenting the idea of “small-‘c’ constitutionalism” and arguing that sub-constitutional legal frameworks, rather than the “Large ‘C’ Constitution,” actually drive legal change in the U.S.); Sunstein, *supra* note 14; see also ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 29–37 (2011).

<sup>20</sup> We are grateful to Kathleen Thelen for suggesting this term to us.

conservative, pro-liberalization choices on administrative agencies when they refused to fall in line with the liberalization agenda.<sup>21</sup> We find this trend has been steadily picking up since the 1980s, under both Republican and Democratic presidents. The process of economic liberalization was not a smooth transition, but one ripe with political contestation—as is often the case, within the fractured American political landscape.<sup>22</sup> By systematically nudging government institutions in a neoliberal direction, the Court has helped to solidify this change over time.

In terms of the actors and interest groups, our analysis suggests that the Court's institutional gardening creates an arena which uniquely positions businesses to promote their own agendas. When the Court hears challenges against the government's economic policies, business interests (compared to consumer organizations or labor interests) bring the great majority of such challenges. Furthermore, cases initiated by businesses often receive little attention from the public—a condition that, as shown by previous research, often serves businesses' interests.<sup>23</sup> These findings suggest that the Court's push to the conservative economic right is driven, at least partially, by its selection of cases and by the systematic success of business interests in bringing progressive policies for review before the Court.<sup>24</sup>

In terms of doctrine, our analysis reveals a curious duality. While the Court's decisions constitute a systematic push to the economic right, the Court quite successfully preserves the appearances of judicial restraint<sup>25</sup>

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<sup>21</sup> To avoid confusion, it is worth clarifying what we mean by the terms “conservative” and “progressive” in the context of economic liberalization. In line with the standard in the literature, we use the term “economic liberalization” to denote the shift towards deregulation, privatization, welfare retrenchment, and decline in the power of organized labor. Liberalization is most clearly supported by the conservative right and opposed by the progressive left.

<sup>22</sup> See Adam Sheingate, *Institutional Dynamics and American Political Development*, 17 ANN. REV. POL. SCI. 461, 462 (2014).

<sup>23</sup> See generally PEPPER D. CULPEPPER, QUIET POLITICS AND BUSINESS POWER: CORPORATE CONTROL IN EUROPE AND JAPAN, at xv (2010) (discussing how business entities work behind the scenes and influence the political landscape on a wider scale than most people are aware of).

<sup>24</sup> See Section IV.B. This reflects the vast investment of American business groups in litigation and legal appointments. David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019 (2009). More generally, by improving their organizational and intellectual capabilities, legal conservative actors “have rendered competitive areas of the law that were once effectively monopolistic.” STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 273 (2008).

<sup>25</sup> Much like “judicial activism,” “judicial restraint” is also an elusive concept; it usually implicates adherence to the legislator, a lesser willingness to hear cases and grant access to the court, and a lesser willingness to innovate and change settled legal practices. See, e.g., Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 166 (1992). “Judicial minimalism” relates to these ideas, calling on judicial decision-making to be narrow—pertaining

and ideological neutrality,<sup>26</sup> not appearing (at least to the casual observer) to be explicitly promoting any particular view on economic matters. Thus, our discussion of doctrine (and of the academic literature) indicates that the Court resists calls to recreate a *Lochner*-style libertarian constitutional order, in which the Court would have an explicit role of protecting economic liberties against government intervention.<sup>27</sup>

To recapitulate, our results show how the Court's *institutional gardening* operated within the context of economic liberalization—that the Court participated in the post-1980s shift to the market by slowly and consistently disciplining rebellious government institutions that diverged from the dominant liberalization program. The Court participated in this move to the right without explicitly adopting economically conservative doctrines, but by selecting cases in which business interests challenged governmental policies.<sup>28</sup>

These findings include the analysis of over 800 Court decisions on economic issues<sup>29</sup> from the 1940s to the 2010s.<sup>30</sup> We pursue a descriptive research agenda and refrain from direct causal claims.<sup>31</sup> As social science methodologists have noted, “it is hard to develop [causal] explanations before we know something about the world and what needs to be explained on the basis of what characteristics.”<sup>32</sup> This approach is justified

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only to a specific case rather than generally. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT*, at ix (2001) [hereinafter SUNSTEIN, *JUDICIAL MINIMALISM*].

<sup>26</sup> “Judicial neutrality” refers to the idea that the Court does not “take sides” in the political process. While scholars are typically skeptical of this possibility (or this pretense), the notion of judicial neutrality is still featured in public discourse about the judiciary. See generally Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217 (2003); Charles P. Kocoras, *Judicial Neutrality and Independence: Current Challenges*, 29 LITIG. 3 (2003).

<sup>27</sup> See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 338 (2014); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* I, 213–14 (2004).

<sup>28</sup> For one such case, see *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 442–48 (2002), in which the Court repeals the progressive policy of the Commissioner of Social Security, in response to a challenge by a mining company. We find cases of this general type (government policies successfully challenged by business interests) to be relatively common.

<sup>29</sup> As we explain in Section III.B below, we follow Segal and Spaeth's classification for economic activity (including, among other things, issues such as bankruptcy, environmental protection, zoning, antitrust, financial regulation, regulation more generally, and so on), unions, and taxation. *Infra* note 90.

<sup>30</sup> Cf. Sunstein, *supra* note 14, at 399–400 (describing more recent temporal shifts to “Lochnerian” administrative law in the D.C. Circuit).

<sup>31</sup> For a defense of such an approach, see Mitchell J. Pickerill & Cornell W. Clayton, *The Rehnquist Court and The Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004).

<sup>32</sup> GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 34 (1994).

in light of the scarcity of existing research on the role of the Court in the American post-1980s shift to the market.<sup>33</sup> Since we are interested in examining the interactions between the Court and other governmental actors, we focus on judicial review cases,<sup>34</sup> where private actors challenge government policies before the Court. We classify Court opinions using a two-by-two matrix: For each decision, we note if the Court's disposition is progressive or conservative in terms of economic ideology,<sup>35</sup> and also if the Court repealed or upheld the policy brought before it.<sup>36</sup> This allows us to observe the ideological direction in which the Court is steering other governmental actors (by repealing and upholding their decisions). We then examine which actors are more successful in challenging economic governmental acts before the Court, which government agencies are being challenged, and with what results. We also study variations in media coverage of decisions, briefly characterize the doctrinal tools used by the Court, and note the reversal rates of lower court decisions.

The paper proceeds as follows. Part II establishes the motivation for the research in light of existing literature. We show that conventional wisdom recognizes the economically conservative tendencies of Justices, but also tends to assume that the Court limited its involvement in economic issues after the *Lochner* repudiation. Part III presents our research strategy, establishing the theoretical framework and describing the data and methods used in the analysis. We employ a dual classification of decisions, classifying each decision as economically conservative or progressive, and as repealing or upholding a previous governmental policy. Part IV presents our findings in several Sections. We first describe

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<sup>33</sup> See John Gerring, *Mere Description*, 42 BRIT. J. POL. SCI., 721, 733 (2012) ("where knowledge of a topic is minimal, description must proceed independently of causal propositions").

<sup>34</sup> We use the term "judicial review" in a broad sense, to include not only cases where the Court decides on the constitutionality of legislation, but also any case where the Court reviews acts and decisions by other governmental agents. For other possible definitions of judicial review, see Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2220–24 (2014) (describing judicial review in the narrow sense, referring only to the review of legislative decisions and their possible invalidation as unconstitutional. This is the strongest form of judicial review, and is more politically controversial than other forms). See, e.g., Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Linda Greenhouse, *Because We Are Final: Judicial Review Two Hundred Years After Marbury*, 56 SMU L. REV. 781 (2003).

<sup>35</sup> See *infra* Section III.B.

<sup>36</sup> Note that we are more interested in the output of the Court than in the ideological tendencies of specific Justices. Although not currently the norm in legal scholarship, the viability of this type of study is increasingly acknowledged. See, e.g., ROBERT HOWARD & AMY STEIGERWALT, JUDGING LAW AND POLICY: COURTS AND POLICYMAKING IN THE AMERICAN POLITICAL SYSTEM 1 (2012) (studying the ability of the courts to influence public policy); see also MATTHEW HALL, THE NATURE OF SUPREME COURT POWER (2010).

the distribution of decisions in the typology developed in Part III, and then move on to consider the main actors involved in producing these results, as well as changes in the distribution of cases over time. We use decisions involving the National Labor Relations Board as a case study to illustrate more concretely some of our findings. This Part then proceeds to analyze media coverage (or salience) of decisions, and to briefly comment on the doctrine used by the Court and on the reversal rates of lower court decisions. Part V concludes.

## II. THE COURT AND ECONOMIC POLICY-MAKING

Scholars of law and politics have repeatedly noted that the American Supreme Court is a “policy-making institution.”<sup>37</sup> As noted by de Tocqueville, “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>38</sup> Political process theory insists that, as a normative matter, in deciding such political questions Justices should refrain from enforcing their own substantive policy preferences and should generally respect the decision of the political majority.<sup>39</sup> Along similar lines, partisan regime theory suggests that, as a matter of fact, the Court indeed tends to follow popular majorities and ruling partisan coalitions (albeit with a time lag).<sup>40</sup> This reflects the process of Justices’ appointments,<sup>41</sup> and their awareness of the possibility of political backlash.<sup>42</sup>

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<sup>37</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279, 281 (1957). Arguably, the Supreme Court once ultimately decided the presidential election this way. See generally Linda Greenhouse, *Thinking About the Supreme Court after Bush v. Gore*, 35 IND. L. REV. 435 (2002); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (1998).

<sup>38</sup> As cited in Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 684 (2006).

<sup>39</sup> See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 433 (4th ed. 2000); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

<sup>40</sup> In an early and oft-cited harbinger of the partisan regime thesis, Dahl asserts that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.” Dahl, *supra* note 37, at 285. Dahl was among the first to assert that since partisan majorities appoint Justices with ideological inclinations similar to their own, in the long run there should be congruence in views between the Judiciary and other branches of government. The partisan view of the Court has gained traction in recent years, perhaps due to the conservative shift of the Rehnquist and Roberts Courts. See Pickerill, *supra* note 31, at 236; see also Cornell W. Clayton & J. Mitchell J. Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L. J. 1385, 1386–87 (2006).

<sup>41</sup> Dahl concludes that “the Court is almost powerless to affect the course of national policy.” Dahl, *supra* note 37, at 293; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 13 (2d ed. 2008); see also Paul

It remains somewhat unclear, based on these theoretical perspectives, how the Court should be expected to operate within prolonged periods of “intercurrence,” in which competing authorities simultaneously operate under conflicting agendas.<sup>43</sup> More specifically, under circumstances of divided government and increasing partisan polarization,<sup>44</sup> when it is not clear what the “majoritarian” view actually is,<sup>45</sup> the Court is well-positioned to serve as an active arbiter between political power-holders with competing agendas (including both interest groups and governmental actors).<sup>46</sup> In such situations, Justices have some flexibility in choosing the “majoritarian” baseline to which they adhere; they can fol-

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Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 483 (2003). For a critical discussion, see Thomas M. Keck, *Party, Policy, or Duty: Why does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321 (2007). See also Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511 (2007). Similarly, Balkin and Levinson discuss “partisan entrenchment,” in which governing electoral coalitions solidify their hold of the Court through the appointment of ideologically-committed Justices. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489 (2006).

<sup>42</sup> Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 103–05 (2010).

<sup>43</sup> KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 133 (2004); Sheingate, *supra* note 22, at 464. This stands in contrast to the “punctuated equilibrium” account of political change, in which one partisan regime replaces another in specific identifiable historical moments. See generally BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* 290–311 (1998).

<sup>44</sup> Divided government and partisan polarization oftentimes lead to gridlock and obstruction, as evident in the growing usage of filibuster in the Senate. Under divided government and a polarized partisan arena, it is harder for policy-makers to construct broad bipartisan majorities in support of legislative initiatives. Mark Tushnet, *Forward: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 52–56 (1999). On the political reasons for that, see Jacob S. Hacker & Paul Pierson, *Presidents and the Political Economy: The Coalitional Foundations of Presidential Power*, 42 PRESIDENTIAL STUD. Q. 101, 112–13 (2012).

<sup>45</sup> Pildes, *supra* note 42, at 103.

<sup>46</sup> As acknowledged by scholars within the partisan regime approach in legal scholarship, governing coalitions are never fully monolithic. This point has also been extensively discussed by scholars of institutional change. See, e.g., BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 9–16 (Wolfgang Streeck & Kathleen Thelen eds., 2005); Mahoney & Thelen, *supra* note 18, at 13–14. For instance, while the Roberts Court is assumed to be operating under a conservative regime (but at times also a Democratic president during 2008–2016) it may face difficulties giving a unified voice to the ideological cacophony of the Republican Party. Graber, *supra* note 38, at 677–78. Thus, whereas claims on the death of the Warren Court seem rather self-evident, it is less clear whether a coherent set of constitutional ideas and judicial practice replaced it. See Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 205 (1991); Tushnet, *supra* note 44, at 30.

low “mainstream public opinion,”<sup>47</sup> Congress,<sup>48</sup> the dominant political coalition at the time of their appointment,<sup>49</sup> the president,<sup>50</sup> or consensus among the “lawmaking elite.”<sup>51</sup> These loyalties do not always point in the same direction, and it is not entirely clear which “majoritarian view” the Court is supposedly following. The Court thus operates as one actor among many, partially limiting the power of other institutions while also being partially constrained itself.

From a historical perspective, in this environment of ongoing political controversy, the Court famously played a key role in economic policy-making during the *Lochner* era<sup>52</sup> in the early decades of the 20<sup>th</sup> century.<sup>53</sup> Under substantive due process jurisprudence,<sup>54</sup> the Court systemati-

<sup>47</sup> BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 369 (2009).

<sup>48</sup> Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 562–63 (2009).

<sup>49</sup> Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001).

<sup>50</sup> Or “the presidential wing” of the dominant party, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 195–229 (2007).

<sup>51</sup> Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 364 (2008).

<sup>52</sup> For many, the *Lochner* Court represents the dangers of judicial dictatorship and Justices’ attempts to read their own laissez-faire ideologies and biases into the constitution. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 30–31 (1995); PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 129 (1998); FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 95 (1986); WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 121 (1988). Others believe the Court’s jurisprudence was a natural continuation of existing judicial and political practices, and therefore more legitimate. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 789–90; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 313–14 (1985). See generally Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 SUP. CT. HIST. SOC’Y Y.B. 20. For our purposes, it is enough to note that the *Lochner* Court played an economically conservative role in the political order, regardless of questions of legitimacy or desirability of such actions.

<sup>53</sup> The “*Lochner* era” is usually considered to cover the years 1887–1937. Some scholars describe three separate sub-periods: 1887 to 1911, 1911 to 1923, and 1923 to the mid-1930s. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10 (2003); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 n.9 (1991).

<sup>54</sup> Although substantive due process is most commonly associated with the *Lochner* Court, the term itself is anachronistic, as the explicit distinction between substantive and procedural due process in fact postdates the *Lochner* years. See JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF*

cally struck down legislative acts held to infringe on economic liberties, and the freedom of contract in particular.<sup>55</sup> This constitutional jurisprudence explicitly called for economically conservative results in the name of the protection of economic liberties, and defined a clear role for the Court in economic policy-making.<sup>56</sup> The *Lochner* Court stalled state expansion by invalidating legislative attempts to regulate economic activities.<sup>57</sup> This judicial policy did eventually lead to political backlash and to the New Deal compromise in the late 1930s.<sup>58</sup> The Court's 1937 term represents an iconic turning point in American constitutional history, with the Court upholding significant parts of the New Deal program.<sup>59</sup> The shift in the role of the Court was finalized a year later, with the Court abandoning economic substantive due process jurisprudence.<sup>60</sup> This created a new constitutional order, in which legislative intervention with economic liberties was allowed as long as it was supported by some "rational basis."<sup>61</sup>

At the same time, the Court established its ability to invalidate legislation in order to protect personal rights.<sup>62</sup> This marks a shift in the history of the Court, from economic substantive due process jurisprudence (protecting private property from government coercion) to equal protection jurisprudence (assuring equal status under the law).<sup>63</sup> In this post-

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PROPERTY RIGHTS 103-04 (1998); G. EDWARD G. WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000).

<sup>55</sup> See, e.g., *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926) (declaring consumer protection legislation unconstitutional); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down a minimum wage law as unconstitutional); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal child labor regulation); *Adair v. United States*, 208 U.S. 161 (1908) (declaring law protecting unionization unconstitutional).

<sup>56</sup> Cass R. Sunstein, *Reply: Lochnering*, 82 TEX. L. REV. 65, 70-71 (2003).

<sup>57</sup> Sunstein, *supra* note 12, at 877; see also Bernstein, *supra* note 12, at 32-33.

<sup>58</sup> Sherry, *supra* note 12, at 1452-53.

<sup>59</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47-49 (1937) (holding that labor has a sufficient impact on interstate commerce for Congress to have the authority to regulate labor issues. As a result, the Court upheld the National Labor Relations Act.); see also *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 413-14 (1937). In describing this change, Richard Kluger famously wrote, "[t]hirty-seven years into it, the Supreme Court of the United States decided by a narrow vote that the twentieth century was constitutional." RICHARD KLUGER, *SIMPLE JUSTICE* 210 (1976).

<sup>60</sup> Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36.

<sup>61</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>62</sup> Christopher S. Dodrill, *In Defense of "Footnote Four": A Historical Analysis of the New Deal's Effect on Land Regulation in the U.S. Supreme Court*, 72 L. & CONTEMP. PROBS. 191, 191 (2009).

<sup>63</sup> See generally Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 789



Lochnerian constitutional order, the role of the Court in economic policy-making is less clear. Thus, while during the first half of the 20th century the Court was defined by its protection of economic liberties in *Lochner*, during the second half of the 20th century, it was defined by its stance on personal rights in cases like *Brown v. Board of Education*,<sup>64</sup> *Miranda v. Arizona*,<sup>65</sup> and *Roe v. Wade*.<sup>66</sup>

As noted by Cass Sunstein, “Constitutional law tends to define itself through the reaction to great cases.”<sup>67</sup> As the focus of landmark cases shifted from economic issues to personal rights, the focus of academic legal scholarship shifted accordingly.<sup>68</sup> Staszak similarly notes that the “tendency to focus on grand acts of politics (whether from the Supreme Court or Congress) limits the types of institutional change that are addressed in the literature.”<sup>69</sup> This is probably one reason that the role of the Court in economic policy-making in the second half of the 20th century (and in the process of economic liberalization since the 1980s in particular) is under-studied.<sup>70</sup> Similarly, as argued by Sunstein and Vermeule, administrative law doctrines do not point to an obvious role for the Court in economic policy-making.<sup>71</sup> Statutory interpretation by the

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(2009) (describing the shift from the Court promoting general welfare to promoting fundamental rights).

<sup>64</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>65</sup> *Miranda v. State of Arizona*, 384 U.S. 436 (1966).

<sup>66</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>67</sup> Sunstein, *supra* note 12, at 873; J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 975–76 (1998) (arguing that constitutional law follows a canon of key cases); see also Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830, 830 (1987) (“too much attention has been given to following up a very few dramatic Supreme Court decisions.”).

<sup>68</sup> For instance, in describing the Court’s recent conservative-activist trend, Thomas Keck focuses on issues of abortion rights, gay rights, racial equality, and presidential elections. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 289 (2004). Similarly, scholars writing on the Court during the progressive post-war era also focus on minority rights in issues such as racial integration within labor unions and the education system, Frymer, *supra* note 41, at 483, or women’s rights and access to abortion, ROSENBERG, *supra* note 41, at 203.

<sup>69</sup> Staszak, *supra* note 11, at 327.

<sup>70</sup> See Songer, *supra* note 67, at 830–31 (“While substantively important, the Court’s economic decisions have rarely generated the degree of passion and controversy that have followed some of its decisions on race relations and criminal procedure.”).

<sup>71</sup> Sunstein and Vermeule argue administrative law is neither libertarian nor progressive in nature:

The consequence is that the APA and surrounding doctrines cannot be counted as libertarian in any general or systematic way . . . Nor is administrative law generally and systematically progressive, or proregulatory, or anything else—though here as well, we could imagine a statute, or a set of implementing doctrines, that tilted in that direction. As the Supreme Court understands it, administrative law,

expert administrative agency is given priority,<sup>72</sup> and judicial decision-making is guided by conceptions of procedural regularity and rational decision-making. Overall, the *Lochner* repudiation left a lasting impression, pushing economic issues out of the spotlight, and leaving scholars content to generally assume that the Court has to some degree limited its role in the economic arena.<sup>73</sup> The precise role of the Court in this institutional field of constrained action is less clear.

From the attitudinal literature,<sup>74</sup> we know that the Court mostly remained economically conservative. The Court has traditionally been a

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as law, has no systematic and general valence that can be explained in terms of any identifiable political theory or any single theory of regulation. In that modest sense, it is a genuinely, although only partly, autonomous body of rules, standards, and principles—autonomous in the sense that it has not been systematically captured by any one political or ideological approach.

Sunstein, *supra* note 14, at 465.

<sup>72</sup> For the main doctrinal tools, see, e.g., *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 143 (1983); *Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). For a discussion of the differences between the different doctrines, see Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77 (2011).

<sup>73</sup> Why haven't contemporary constitutional theorists paid greater attention to economic power? . . . First, with the triumph of the New Deal, a widespread consensus emerged on the constitutionality of regulating the economy. Since that time legal scholars have generally accepted that economic regulation is subject to a lower standard of judicial review, per *Carolene Products*' famous footnote. The New Deal seems to have been so strong that, as Professor Suzanna Sherry has persuasively shown, this foundational proposition of modern constitutional law has never been thoroughly defended. The breadth of the consensus is also visible when it comes to the Commerce Clause. Many commentators—perhaps even most—would likely have thought it unthinkable that Congress did not have the power to regulate health insurance under the Commerce Clause. That debate was settled during the New Deal.

Sitaraman, *supra* note 15, at 1491–92; see also ACKERMAN, *supra* note 43, at 280; LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 13–59 (1996). In the context of administrative law, see Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 736 (2002). Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994). The assumption that protection of economic liberties was abandoned leads libertarian scholars to call for the readopting of original constitutional values. See generally EPSTEIN, *supra* note 27, at 338; BARNETT, *supra* note 27, at 1.

<sup>74</sup> For an overview, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). The main argument advanced here is that judicial decisions are primarily, if not solely, determined by the political ideology of individual Justices. This is, of course, a highly debated issue. For recent evidence suggesting judges base their decisions on more than just political preferences, see

supporter of conservative economic policies, and after the temporary shift to the left during the New Deal and the Warren Court, it began drifting back to the economic right.<sup>75</sup> Thus, attitudinal scholars agree that the Court has become increasingly conservative in the economic domain since the 1980s; that is, the Court has become more pro-business (and in particular, more pro-*big* business) and less pro-consumer, pro-labor, and pro-*small* business.<sup>76</sup> Yet, these attitudinal insights do little to situate the Court within an institutional field. Attitudinal research mostly focuses on the ideological dispositions of individual Justices<sup>77</sup> and the internal dynamics within the Court,<sup>78</sup> and not on the role of the Court relative to other institutions in political processes unfolding outside its walls.<sup>79</sup>

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Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11 (2013).

<sup>75</sup> Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–71 (2013); J. Mitchell Pickerill, *Something Old, Something New, Something Borrowed, Something Blue*, 49 SANTA CLARA L. REV. 1063, 1072 (2009).

<sup>76</sup> According to Epstein, Landes and Posner, “the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were.” Epstein et al., *supra* note 75, at 1471. Similarly, Pickerill identifies a shift to the right in economic decisions of the Court. Pickerill, *supra* note 75, at 1072–73. *But see* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 944 (2009). Stories in the popular press have echoed claims about the increased receptiveness of the Court to businesses interests, as suggested in a series of New York Times articles. *See, e.g.*, Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/19roberts.html?pagewanted=all>; 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?pagewanted=all>.

<sup>77</sup> *See, e.g.*, Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007). The authors find almost all Justices serving since 1937 have at least somewhat altered their political attitudes during their tenure on the Court. *See* Linda Greenhouse, *Change and Continuity on the Supreme Court*, 25 WASH. U. J.L. & POL’Y 39 (2007). Greenhouse follows a bipolar story, studying the effect new Justices have on the Court, as well as the effect that the appointment to the Court makes on Justices as individual political agents. *See* Linda Greenhouse, *Colloquy, Justices Who Change: A Response to Epstein et al.*, 101 NW. U. L. REV. 1885, 1888 (2007).

<sup>78</sup> *See* Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C.L. REV. 1275, 1279 (2005) (developing and improving methods for identifying the Justice most essential to secure a majority in the Court); *see also* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 49–55 (2008).

<sup>79</sup> Ran Hirschl notes that legal scholarship “rarely entails discussion of . . . the real life impact of constitutional jurisprudence and its efficacy in planting the seeds of social change.” RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 153 (2014).

Thus, the Court's attitudinal shift to the economic right tells us little of its role (if any) in liberalizing the U.S. economy.<sup>80</sup> The ideological transformation that has taken place since the 1980s is evident in a general movement toward a market-based approach, including among legal elites.<sup>81</sup> The Court's conservative agenda fits with the pattern of judicial appointments, and its shift to the right is to be expected, as it closely follows the general transition from the New Deal alliance to establishment Republicans,<sup>82</sup> to the conservative right-wing partisan coalition.<sup>83</sup>

The fact that the Court has moved to the right, together with most other key political players, tells us almost nothing of its role in supporting or hindering liberalization. For instance, in its rightward movement, has the Court become more or less conservative than other governmental actors? When has the Court been an active force, leading other institutions to the right, and when has it mainly been following the lead of other governmental actors? To adjudicate between these different dynamics, it would be necessary to examine the modes of judicial action used by the Court in economic policy-making, and to understand the form of its involvement in the decisions of other political players. This is our goal in developing the analytical framework in Part III.

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<sup>80</sup> While Justice-centric ideological analysis may shed light on important questions regarding the internal dynamics within the Court, it does not explicitly consider the broader institutional context in which the Courts operate and thus leaves unanswered the role of the court in the political field. Thus, attempts to identify the "median Justice" or to describe ideological drift in Justices' decisions help explain how conservative or progressive decisions are created, and why. It does not tell us how those conservative or progressive opinions interact with the decisions of other institutions.

<sup>81</sup> See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER 2* (2003). It should not come as a surprise if there has been a conservative tilt in the Court's economic ideology. The great ideological transformation that took place since the 1980s is evident in a general shift of ideas and language toward a market-based imaginary and vocabulary among both political and judicial actors. See MARK BLYTH, *GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY* 5–6 (2002). Blyth develops a constructivist argument, according to which ideational shifts of key actors may facilitate important changes in political institutions and modes of economic policy-making. It is only reasonable to expect that the Court is no exception; nevertheless, the Court could have moved in this direction in a stronger or weaker manner compared to other actors. One can imagine a scenario in which the Court shifted to the economic right but to a lesser extent than partisan elites, and have therefore played a moderating role in economic liberalization in spite of becoming more pro-market over time. Therefore, rather than asking whether the Court is economically-conservative or progressive in any a-historical way, we want to shift the focus to the position of the courts relative to the actions of other governmental actors.

<sup>82</sup> See Mark Tushnet, *The Burger Court in Historical Perspective: The Triumph of Country-Club Republicanism*, in *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?* 213 (Bernard Schwartz ed., 1998).

<sup>83</sup> See Balkin & Levinson, *supra* note 49, at 1062–64.

### III. RESEARCH STRATEGY

This Part describes our research strategy, informed by the literature review in Part II. To study the role of the Court in economic liberalization, we focus on decisions on core economic issues, and analyze cases where the Court reviews the actions of other governmental actors (not necessarily legislators).

This is a particularly fitting strategy in the present context of economic liberalization. First, we explicitly shift the focus to economic issues, instead of searching for the indirect economic implications of the better-studied Court decisions on personal rights. Second, instead of concentrating on a handful of landmark constitutional cases, we cast a wider net, and look also for the more subtle ways by which the Court influences policy in its routine interactions with other political actors. We do not exclusively search for instances of “judicial activism” and the spectacular clashes between the Court and legislators,<sup>84</sup> but simply seek to characterize the results of the Court’s interactions with governmental institutions. This also helps us situate the Court within a broader political-institutional field,<sup>85</sup> instead of studying its internal dynamics and the Justices’ ideology in isolation.<sup>86</sup>

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<sup>84</sup> In studying the Court in the political context, legal scholars tend to focus on the notion of “judicial activism”; this term typically implies an exercise of judicial authority beyond the established parameter of judicial decision making (most commonly the invalidation of legislation as unconstitutional). See Whittington, *supra* note 34, at 2219–20. Often “judicial activism” is an empty pejorative term, used to describe any judicial decision the speaker objects to. See, e.g., Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases*, 73 U. COLO. L. REV. 1275, 1276, 1290 (2002); Stephen O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 688 (1998); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1217 (2002). We argue the focus on judicial activism (and controversial constitutional cases) distracts scholars from more fundamental questions: Regardless of questions of legitimacy, or the degree of “activism” by the Court—what is the ideological direction in which the Court is pushing other institutions? The Court can participate in such processes through “non-activist” practices, and limiting the scope only to “activist” behavior results in a partial understanding of the Courts involvement in the political field. See, e.g., CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT*, at ix (1984) (“[i]n focusing on the extraordinary, we have forgotten the ordinary. We believe a complete understanding of the process in the implementation and impact of judicial policies must also include data about cases less heralded but nonetheless still important.”).

<sup>85</sup> For a discussion of field theory and the theoretical reasoning behind considering the Court as part of a larger institutional field, see NEIL FLIGSTEIN & DOUG MCADAM, *A THEORY OF FIELDS* 9–12 (2012). Fligstein and McAdam develop an integrated theory of social stability and change, attributing both to the actions of social actors attempting to dominated and collaborate under existing social constraints.

<sup>86</sup> For a general defense of such an approach, see Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch*

In the following Sections, we first develop a framework of analysis appropriate to our research strategy, and then describe the dataset used in the analysis.

*A. Analytical Framework: Decision Types and Actors*

Our goal is to provide a systematic analysis of the interactions between the Court and other governmental actors in the process of economic liberalization. To account for the variety of these interactions, we classify cases on economic issues along two dimensions: *economic ideology* and *mode of judicial action*. In the context of economic disputes, decisions are considered progressive if the Court ruled in favor of an employee, a labor union, or a consumer, and conservative if the Court ruled in favor of a large corporation or an employer.<sup>87</sup> By limiting the analysis to a specific issue domain (economic issues), we are able to consider only one facet of the multi-dimensional conservative-progressive continuum. This assures consistency in our typology:<sup>88</sup> cases are classified as economically conservative or progressive based on their economic implications (based on being pro-business or pro-consumer, etc.), regardless of questions of federalism or the exercise of judicial power, which do not feed into this classification.

The classification on the axis of economic ideology alone is insufficient to describe the role of the Court in the process of economic liberalization. For instance, an increase in economically conservative decisions does not tell us if other governmental actors are promoting economically conservative measures and the Court merely upholds them, or if the Court is imposing economically conservative policies on other governmental actors. In all these different cases, Court decisions are simply coded as economically conservative, though they represent different judicial modes of action.<sup>89</sup> We therefore supplement the economic ideolo-

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*Dialogue*, 42 WM. & MARY L. REV. 1575, 1583–84 (2001). Coenen emphasizes the role of judges as participants in a dialogue between different organs of government.

<sup>87</sup> See Epstein et al., *supra* note 75, at 1434; see also SEGAL & SPAETH, *supra* note 74, at 86, 312.

<sup>88</sup> By limiting ourselves to the economic realm, we follow the advice of Epstein, Landes and Posner: “In assessing the role of ideology in the Supreme Court, there is value in looking at a subset of cases, such as business cases. For there is no uniform conservative or uniform liberal ideology. Instead there are multiple imperfectly overlapping ideologies. . . . Social conservatives may be liberal with respect to the regulation of business but conservative in all other respects; that is, they may be pro-regulation across the board. Such differences can make it difficult or even impossible to distinguish between ‘liberal’ and ‘conservative’ Justices. However, it should be possible (and we endeavor in this Article) to distinguish between business-liberal and business-conservative Justices.” Epstein et al., *supra* note 75, at 1433.

<sup>89</sup> This is the general reason the attitudinal studies we mention in Part II do not explicitly contribute to our understanding of the involvement of the Court in economic liberalization.

gy distinction with the observation of the Court’s mode of operation, in upholding or repealing the governmental policy being reviewed.

Brought together, the economic ideology dimension and the judicial action distinction generate four ideal types of decisions, as presented in Table 1. The vertical axis divides Court decisions between economic conservatism and economic progressivism, and the horizontal axis distinguishes between cases where the Court repeals decisions by other institutions and cases in which it upholds such decisions.

Table 1: Analytic Model

<div>Court Action</div> <div>Court Ideology</div>	Repealing Existing Policy	Upholding Existing Policy
Conservative Court Decision	1	2
Progressive Court Decision	3	4

This framework helps us distinguish different roles the Court may play in economic policy-making. Decisions in cell 1 (conservative & repealing) indicate that the Court steers other governmental actors towards economic liberalization, as it annuls their economically progressive acts. Decisions in cell 2 (conservative & upholding) are also economically conservative, but here the Court merely upholds economically conservative decisions made by other governmental actors. Conversely, decisions in cell 3 (progressive & repealing) indicate that the court actively promotes economically progressive solutions, repealing economically conservative policies and thus attempting to work against liberalization efforts initiated by other governmental actors. Finally, decisions in cell 4 (progressive & upholding) indicate the Court refuses to repeal progressive decisions by other institutions, passively upholding government intervention in the economy.

This classification is closely connected to the ability of different actors to bring their case to Court. Business-related groups are expected to challenge progressive government policies. In response to such challenges, the Court can either repeal the economically progressive policy (cell 1), or uphold it (cell 4). Symmetrically, labor and consumer organizations are likely to challenge economically conservative acts, leaving the Court to decide between repealing such acts (cell 3) or upholding them (cell 2).

After we classify each relevant Court decision into one of our four categories, we examine the identity of the government actor whose decision is being challenged, as well as the identity of the private actor making the challenge before the Court. We also examine the salience of the different decisions in the popular press, comment briefly on the doctrinal tools used by the Court, and consider the reversal rate of lower court

decisions. Through this series of analyses, we examine different aspects of the ways in which the Court plays a role in economic policy-making through routine institutional interactions.

### B. Data

The empirical analysis utilizes the Supreme Court Database, which includes all Supreme Court cases from the year 1946 until 2012. We examine only cases that are classified as dealing with economic activity,<sup>90</sup> labor unions, and federal taxation,<sup>91</sup> and in which some governmental actor was a party to the litigation. We further reduce the number of cases by selecting those initiated following administrative action or a decision by a government actor, excluding those in which government actors were on both sides of the litigation. This results in a database of 803 cases<sup>92</sup> (mostly administrative law cases and “as applied”<sup>93</sup> constitutional challenges) that fit into one of our four ideal types: the Court reached a decision that is either conservative or progressive in the economic sense, and it either upheld or repealed an action by another governmental actor.

Our coding of decisions on the economic ideology axis is based on the Supreme Code Database, which codes the ideological direction of

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<sup>90</sup> The category of “economic activity” is defined in the dataset documentation in the following way: “Economic activity is largely commercial and business related; it includes tort actions and employee actions vis-a-vis employers.” Harold Spaeth et al., *Supreme Court Database Code Book*, (July 12, 2016) [http://scdb.wustl.edu/\\_brickFiles/2016\\_01/SCDB\\_2016\\_01\\_codebook.pdf](http://scdb.wustl.edu/_brickFiles/2016_01/SCDB_2016_01_codebook.pdf).

<sup>91</sup> Our database can be expanded by adding cases categorized in the Supreme Court database under other categories, such as federalism, civil rights, or due process. Currently, decisions categorized under these issue areas are classified as progressive or conservative based on other considerations, and regardless of economic implications. Each decision in the database is categorized only under one issue area, and classified as conservative or progressive solely based on considerations relevant to cases in this specific issue area, which prohibits us from using cases in other categories in our analysis. This feature of the coding scheme has been previously recognized as problematic. See Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 *HASTINGS L. J.* 477, 481–82 (2009).

<sup>92</sup> The total number of Court cases is in decline in recent years. See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 *WASH. & LEE L. REV.* 737, 750 (2001); Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 *SUP. CT. REV.* 403, 403 (1996); David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 *CONST. COMMENT.* 151, 152 (2010); David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 *TEX. L. REV.* 947, 964–65 (2007). This trend is also reflected in our data, but does not affect our results as we aggregate case outcomes since the 1980s, before this recent decline in the number of cases.

<sup>93</sup> For a discussion of the (sometimes blurry) distinction between as-applied and facial challenges, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 *HARV. L. REV.* 1321, 1336–37 (2000).



each case on economic issues.<sup>94</sup> We surveyed a sample of 120 cases coded in this manner to verify that this classification correlates with our understanding of Court decisions as being economically conservative (pro-business and pro-employer) or progressive (pro-consumer and pro-labor).

To code the mode of judicial action, we identify which party represents a government agency whose policy is being reviewed, and then check to see if this party won or lost the case. As the database also includes information regarding the identities of petitioners and respondents, we are able to examine which actors bring which types of cases before the Court, and which governmental actors' decisions are being repealed or upheld.

#### IV. RESULTS

The results in this Part unfold in stages. First, we present the distribution of all cases in the database over the four decision types defined above. Second, we examine the identity of the key actors—both the private actors who brought these cases to Court and the governmental actors whose acts have been challenged. Third, we report change in the results over time. Fourth, we examine challenges against the National Labor Relations Board to illustrate the disciplining role of the Court in its push toward economic liberalization. Fifth, we survey the salience of decisions in our database. Sixth, we comment on the doctrinal tools used

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<sup>94</sup> Note that we do not discuss here the multi-dimensional nature of the terms “conservative” and “liberal.” As discussed by others, these terms often refer to a variety of positions on multiple issue-domains that are loosely clustered together. Furthermore, these terms are inter-dependent and have considerably changed over time. See HANS NOEL, *POLITICAL IDEOLOGIES AND POLITICAL PARTIES IN AMERICA* 9 (2014); Stephanie L. Mudge, *What's Left of Leftism?: Neoliberal Politics in Western Party Systems, 1945–2004*, 35 *SOC. SCI. HIST.* 337, 356 (2011). The terms “conservative” and “progressive” may often be misleading when used without caution, as it is easily possible to imagine individuals, including Supreme Court Justices, who would have conservative positions on some issues but also progressive attitudes on others. In this paper we focus on economic liberalization, and therefore restrict the interpretation of these terms to their economic meaning. When considering the multi-dimensionality of conservative politics within the context of judicial policy-making in the United States, it is relevant to mention that economic conservatives found a stronger ally in the Rehnquist Court compared to social conservatives, according to Tushnet. See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 49, 68 (2006). Tushnet points to divisions within the Republican Party between economic conservatives and social conservatives. He argues that on cultural issues such as abortion and gay rights the Court has not sided with socially conservative political actors. He explains that economic conservative goals found support in the Court because they also were supported by a strong political coalition; in contrast, cultural conservatism was losing politically and therefore also lost in the Court. However, since we focus on economic liberalization, this question remains outside the scope of our analysis.

by the Court, and finally, we review the reversal rate of lower Court decisions.

A. *The Four Modes of Court Operation*

Table 2 below shows the distribution of all rulings in our dataset across our quadruple typology.

Table 2: *Summary of Results*

Court Action Court Ideology	Repealing Existing Policy	Upholding Existing Policy
Conservative Court Decision	(1) 189	(2) 85
Progressive Court Decision	(3) 70	(4) 459

The largest group of cases, and a clear majority, is that in which the Court made an economically progressive decision and also upheld a decision by another government actor (459). Together with progressive decisions in which the Court repeals a prior governmental decision (70) this means a total of 529 economically progressive decisions as compared with only 274 economically conservative ones. Of course, this total number of 529 progressive Court decisions groups together two very different modes of operation by the Court.

Out of 529 economically progressive decisions, only in 70 cases (or 8.7% of the decisions in our full dataset) was the Court economically progressive *and also repealed a decision by some other governmental institution*. This means the Court only quite rarely pushes other institutions in the direction of economic progressiveness (even though this does sometimes happen).

Conversely, the number of economically conservative Court decisions in which the Court repeals policies by other governmental actors is significantly higher: 189 (23% of cases in our dataset, and 73% of the 259 cases in which an existing policy was repealed). Thus, *when the Court actively operates in shaping economic policy-making, it pushes for liberalization in 73% of the cases*. If we consider the Court as having a more direct impact on political processes through those cases in which it exercises judicial power to change the actions of other actors,<sup>95</sup> then its main effect is a push in the economically conservative direction.

<sup>95</sup> That being said, we acknowledge that Court decisions to uphold actions by other government institutions also carry an effect on other political actors, for instance by legitimizing certain practices or norms. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 36–38 (1969).

### B. Actors

The distribution of outcomes we observe is closely related to the identity of the private actors able to bring their challenges before the Court.<sup>96</sup>

First, we find that business interests and employers are most able to bring their cases before the Court. As shown in Figure 1, out of 803 cases in our dataset, the identity of the private actors challenging government action is as follows: 270 are businesses (energy industry, financial sector, pharmaceutical companies, etc.); 178 are taxpayers; 99 are employers; 45 are employees, unions, or union members; and 26 represent consumer interests (including consumers, tenants, environmental organizations, and public interest groups).<sup>97</sup>

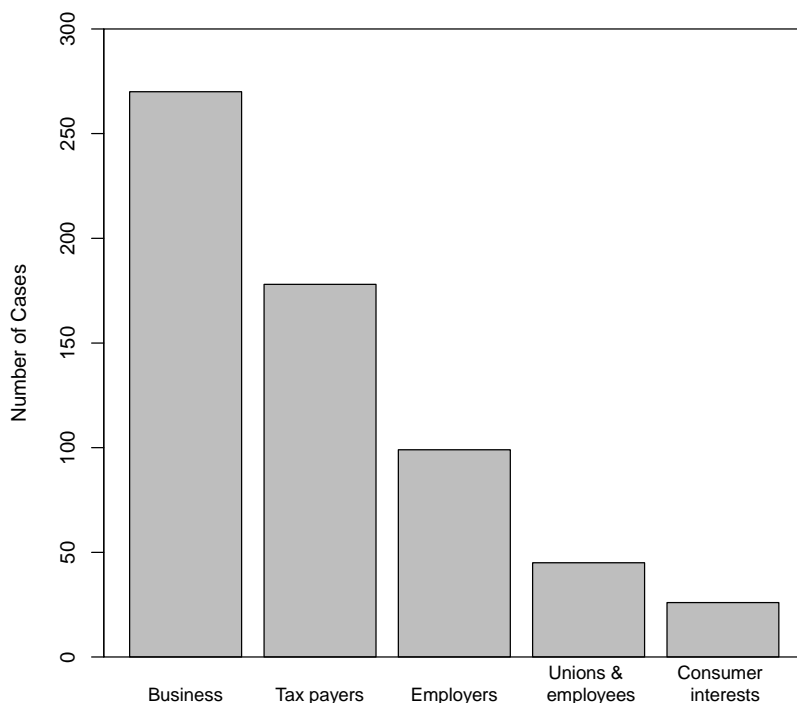
Perhaps as expected, business groups, more than other organized interests, have the resources and capacity to use the Court as an arena of continuous contestation of policies they seek to repeal or reshape. This is also aligned with recent findings showing that “[a] cadre of well-connected attorneys has honed the art of getting the Supreme Court to take up cases—and business is capitalizing on their expertise.”<sup>98</sup>

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<sup>96</sup> The Court operates not only through its final decision, but also by selecting cases for review. While we have no data on the selection process, we observe its end result. By tracking the identity of litigating parties, we can see what types of challenges against government actions are ultimately selected for hearing by the Court.

<sup>97</sup> In other cases in our database the party challenging a government decision cannot be easily classified as either a progressive or a conservative actor. Such parties are, for instance, persons accused or convicted of crimes, aliens, or persons whose citizenship is revoked, authors, children, private clubs, spouses, parents and so on.

<sup>98</sup> Joan Biskupic et al., *At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus>; see also Sitaraman, *supra* note 15, at 1448; Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 69 (1991).



*Figure 1: Actors Appearing Before the Court*

Second, once their case is brought before the Court, both business interests and non-business interests have similar success rates in convincing the Court to repeal a government policy; they are successful in approximately one-third of the cases (120 cases out of 369 cases brought by businesses and employers, and 23 out of 73 for cases brought by employees and consumers). Yet, business interests naturally challenged different types of government policies as compared with non-business interests. In particular, when business interests succeeded in repealing a government action, this overwhelmingly resulted in a conservative Court decision (101 decisions in cell 1 as opposed to only 19 in cell 3). This means, unsurprisingly, that business actors tend to challenge progressive government policies, and try to change them in the conservative direction. Symmetrically, when consumers and employees successfully challenged government policies, in most of the cases this brought about progressive Court decisions (18 decisions in cell 3 and only six in cell 1). Again, unsurprisingly, those actors challenged conservative policies, and progres-

sive Court decisions were created as a result of their success. This—in combination with the fact many more cases brought before the Court are presented by business interests—explains the results presented in Table 2.

To recapitulate this point: First, the high number of economically progressive decisions we found (529 economically-progressive decisions as opposed to only 274 economically conservative ones) does not indicate any progressive tendencies by the Justices, but rather the Court's willingness to hear cases brought forth by economically conservative private actors, together with an overall low rate of repealing government policies. Second, the high number of conservative decisions in which the Court repealed government policies (189 cases as opposed to only 70 cases in which the Court produced a progressive decision that also repealed some government policy) results again from the fact the Court is more willing to hear challenges by business interests, and because such actors more often challenge progressive government policies. Thus, most challenges in our database are against progressive government policies, reflecting the fact that most policies challenged before the Court are brought there by conservative business interests.

This means that *the Court's push toward greater economic liberalization is motivated by its selection of cases* and by businesses' ability to continually challenge in the Court progressive decisions made by governmental actors.<sup>99</sup> The Court's rightward intervention is not driven by a higher rate of repealing progressive acts made by governmental actors (once those are challenged before the Court), but rather by the fact that a larger number of progressive decisions are being chosen for review in the first place.<sup>100</sup>

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<sup>99</sup> The Court enjoys great liberty in choosing its cases and is not often required to justify its choices. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1644–46 (2000). Each year, the Court selects for review approximately 100 cases, out of more than 5,000 petitions submitted. See Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 728–29 (2001). Smith notes: "The Court's . . . complete discretion to decide which of the many cases properly placed before it using a petition for a writ of certiorari will be decided on the legal merits—is ignored." Studies on the ability of the Court to choose its cases usually focus on the way the Court gathers information to base its choice on. See David C. Thompson & Melanie Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 242 (2009).

<sup>100</sup> In fact, the rate by which the Court repeals progressive policies is even lower than the rate by which it reverses conservative policies. When a conservative policy is reviewed by the Court, the Court repealed it almost half of the time (70 decisions in cell 3 as opposed to 85 in cell 2). Conversely, when progressive decisions are being reviewed, less than a third are repealed (189 decisions in cell 1 decisions as opposed to 459 in cell 4). This difference is significant for  $p < 0.01$ , and suggests that in cases granted certiorari conservative government acts are more likely to be repealed. This, of course, should not be taken to mean that conservative government actions are

Even if the rate by which the Court repeals policies by other governmental actors is quite low, the fact that many more economically progressive policies are being reviewed makes it likely that many more economically progressive policies will be repealed.

Equally important is the identity of the government actors whose policies are being challenged before the Court. Mostly, the government actors in our dataset were federal agencies: the Interstate Commerce Commission (57 cases), the Internal Revenue Service (221 cases), National Labor Relations Board (136 cases), the Federal Trade Commission (33 cases), and the Federal Power Commission (40 cases) featured most prominently. Other agencies, such as the Securities and Exchange Commission (19 cases), the Federal Communications Commission (18 cases) and the Federal Energy Regulatory Commission (nine cases) also made occasional guest appearances, as did several environmental protection agencies (20 cases total) and multiple state agencies (127 cases total).

The Court is much busier policing the actions of these agencies—or disciplining them—than it is concerned with Congress’s legislation. Compared to the total of 259 cases in our database where the Court chose to repeal the actions of different agencies (189 cases in the conservative direction and 70 in the progressive direction), it only chose to directly declare congressional legislation unconstitutional (in the area domain of our inquiry) in six cases (four in the conservative direction<sup>101</sup> and two in the progressive direction<sup>102</sup>). This is in line with post-*Lochner* jurisprudence, limiting judicial intervention with legislative acts based on the protection of economic liberties.<sup>103</sup>

Our findings highlight the main mode in which the Court has been operating in the economic domain during the later decades of the 20<sup>th</sup> century. The Court accepts cases brought forth by conservative interest groups—cases that challenge progressive government policies. The Court then (sometimes) chooses to discipline these agencies when they stray too far from the dominant economically conservative liberalization agenda. We further demonstrate this point when surveying the change in the Court’s decisions over time.

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generally more likely to be repealed by the Court. As the number of progressive decisions chosen for review is much greater, this is enough to assure an overall greater number of cases where the Court is repealing a progressive, rather than a conservative, economic act by another government actor.

<sup>101</sup> United States v. U.S. Shoe Corp., 523 U.S. 360 (1998); United States v. Int’l Bus. Machs. Corp., 517 U.S. 843 (1996); Nat’l League of Cities v. Usery, 426 U.S. 833 (1976); R.R. Labor Execs.’ Ass’n v. Gibbons, 455 U.S. 457 (1982).

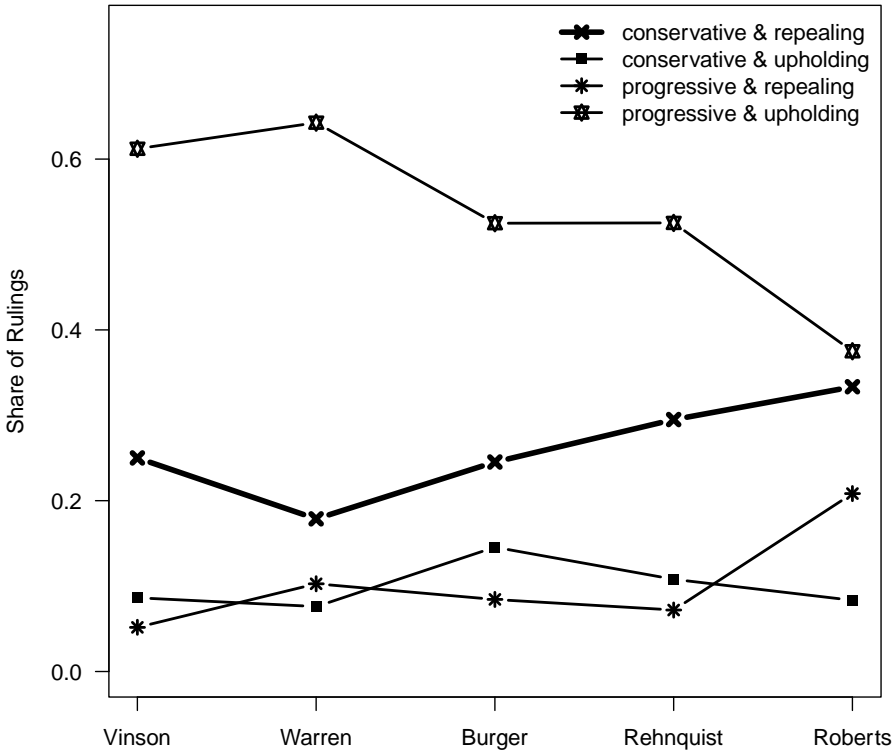
<sup>102</sup> United States v. Hatter, 532 U.S. 557 (2001); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998).

<sup>103</sup> Sherry, *supra* note 12, at 1469–70.

C. *Change over Time: The Rise of the Disciplining Court*

So far, our analysis has aggregated Court decisions from over five decades. But has the role of the Court in economic policy-making changed over this period? In order to answer this question, we examine variations in the distribution of Court decisions by Chief Justices, presented in Figure 2.

Figure 2: *Changes over Time in Types of Rulings*



We find evidence for the contemporaneous decline of the Court’s tendency to uphold progressive policies, and an increase in its willingness to repeal them. Cases representing affirmation of progressive policies decreased from around 64% during the Warren Court to only 37% under Chief Justice Roberts. Interestingly, within the Warren Court—often con-

sidered as actively pushing for progressive causes<sup>104</sup>—we find mostly *passive* support for economically progressive acts promoted by other governmental actors. This result challenges the mythology surrounding the forceful activism of the Warren Court,<sup>105</sup> at least with regard to economic policy-making. In contrast to the decline in the share of cases in which the Court upholds progressive actions, the share of cases in which it repeals them has almost doubled, going from 17% of all cases during the Warren Court to a third of the cases under Roberts.

These changes in the distribution of cases in our quadruple typology may be driven by shifts on the economic conservatism/progressivism dimension, the willingness of the Court to repeal government actions, or both. In order to examine this point, Figure 3 presents shifts in the share of rulings on each dimension separately.

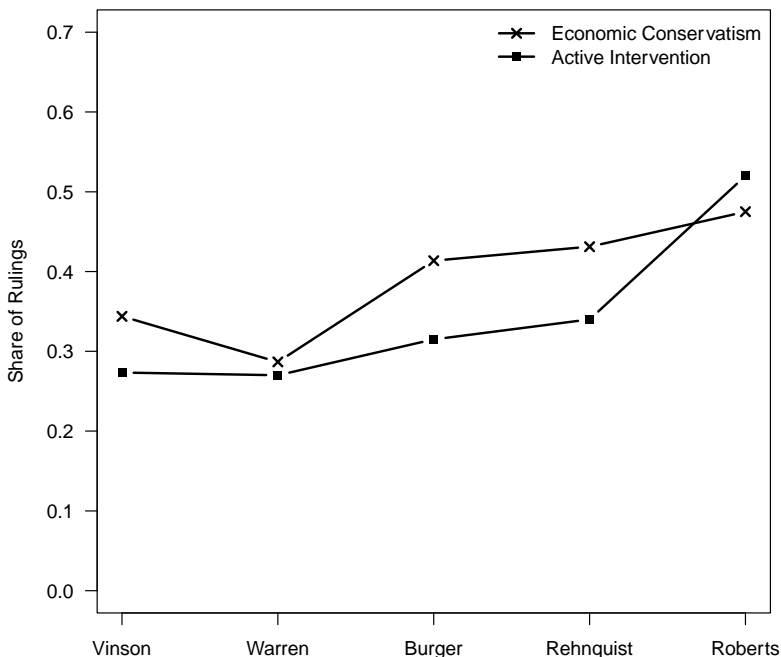


Figure 3: Share of Rulings by Economic Direction and Judicial Action

<sup>104</sup> See Robert G. McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229, 1253–54 (1965).

<sup>105</sup> See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 31 (2d ed. 2013); Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters)*, 69 OHIO ST. L.J. 255, 275–78 (2008).



Over time, the Court has become both more economically conservative and more willing to repeal government actions in cases related to economic activities. The share of economically conservative rulings has increased from less than 30% during the Warren Court to almost 50% under Chief Justice Roberts. The turn toward more judicial reversal of government policies is even starker: from 27% of the cases under Warren to 52% under Roberts. This suggests that the rise of the Court as an agent of liberalization is driven by a simultaneous shift toward both economic conservatism and an active mode of judicial behavior in the relevant cases.

This result is telling, considering that other scholars find a decrease in judicial activism over time regarding both federal and state statutes.<sup>106</sup> While the Court may have generally become more reserved in exerting its power of judicial review of legislation, within the field of economic policy-making it has become more willing to effect policy at the administrative level. This stresses the need to closely consider variations between issue domains and modes of judicial action when analyzing the Court's role as a policy-making institution.

We interpret these findings as reflecting the disciplining role of the Court. Within the fractured American political landscape, conflicting ideological tendencies may simultaneously reside in different governmental institutions. Under these conditions, the Court is well-positioned to discipline institutional islands of rebellion that refuse to fall in line with the dominant ideology.<sup>107</sup> Since moments of muddied transitions and frictions between sources of political authority may be the norm rather than the exception, the degree to which the Court is willing to play its disciplining role could be consequential to its impact on major societal and political transformations.<sup>108</sup> The Court can continuously quash opposition from governmental actors that defy the ruling ideology and nudge them toward that ideology.

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<sup>106</sup> Whittington, *supra* note 34, at 2220.

<sup>107</sup> We do not explore here the question of which governmental actors are more likely to follow their own agenda, yet this is an important issue for future research. It seems reasonable to hypothesize that agencies in which specific interests are entrenched, or which are dedicated to a specific issue, would be less susceptible to influence from the governing partisan coalition at the federal level. As discussed in this Section, the NLRB—where labor unions' interests are represented—is one such case. Other “immediate suspects” may be the Environmental Protection Agency or the Wage and Hour Division in the Department of Labor.

<sup>108</sup> Note the differences between the argument presented here and Keck's argument, according to which the Court can serve the ruling elite through repealing policy remnants of the previous partisan majority. See Keck, *supra* note 41, at 513–14, 539–40. Keck points to temporal tensions between legacies of the old regime and the political interests of the new ruling majority. We complement this diachronic view with the observation that overlapping and conflicting sources of authority often co-exist at the same point in time.

In our case, this is reflected in the gradual increase in cases where the Court repealed progressive economic acts. Through this continuous “institutional gardening”—repealing economically progressive acts and upholding conservative ones—the Court played a role in rejecting the progressive initiatives of governmental actors that refused to fall in line with the liberalization agenda. This trend is consistent and has been increasing over time;<sup>109</sup> the Court is playing its disciplining role both under Republican and Democratic presidents, which suggests some degree of freedom for the Court in defining the “majoritarian consensus” it is supposedly following. In the next Section, we use decisions involving the National Labor Relations Board as a case study illustrating these dynamics.

#### *D. The Rise of the Disciplining Court: The NLRB as a Case Study*

In this Section, we use the example of the National Labor Relations Board (“NLRB”) to show the Court’s disciplining role, and how it employs institutional gardening to push governmental actors in the ideological direction of the ruling partisan coalition.

The NLRB was established by the National Labor Relations Act of 1935<sup>110</sup> as an arena for remedying unfair labor practices. Part of the New Deal legislative effort, it was intended to protect workers’ right to unionization and collective bargaining.<sup>111</sup> Since the Board deals directly with the relationship between organized labor and organized businesses (a power struggle that has stood at the heart of the move to the market since the 1980s),<sup>112</sup> it serves as a useful arena for examining modalities of judicial action by the Court in key questions of economic liberalization.

The five members of the Board are nominated by the President and confirmed by the Senate for five years, subject to reappointment.<sup>113</sup> This relatively short appointment period could potentially increase career incentives and responsiveness to the goals of the nominating President.<sup>114</sup>

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<sup>109</sup> See Sunstein, *supra* note 14, at 399–400. Sunstein and Vermeule describe more recent temporal shifts to “Lochnerian” administrative law in the D.C. Circuit. The push to the right we identify, while arguably more subtle, is also more systematic.

<sup>110</sup> National Labor Relations Act, 29 U.S.C. §§ 151–166 (Supp. I 1935).

<sup>111</sup> Henry S. Farber & Bruce Western, *Ronald Reagan and the Politics of Declining Union Organization*, 40 BRIT. J. INDUS. REL. 385, 386 (2002).

<sup>112</sup> See *Troubles of U.S. Labor Unions Eased in 1986*, N.Y. TIMES (Feb. 14, 1987), <http://www.nytimes.com/1987/02/15/us/troubles-of-us-labor-unions-eased-in-1986.html>.

<sup>113</sup> *Who We Are*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are/board>.

<sup>114</sup> Thus, as part of the Republican offense against organized labor, President Reagan appointed in the 1980s a series of anti-labor officials to the NLRB, an act that was reflected in growing number of pro-business decisions by the NLRB since the early 1980s. See MIZRUCHI, *supra* note 9. While the NLRB was originally established as a pro-union institution, over time it has become “notoriously” known for “flip-flopping its positions on important industrial relations issues with each change in the

That being said, there is evidence to suggest that notwithstanding short-term fluctuations, the NLRB tends to side with workers rather than employers.<sup>115</sup>

Within this context, we find that the Court played a role in disciplining the NLRB and pushing it to comply with the post-1980s dominant conservative pro-liberalization agenda once the original political setting in which the NLRB was created (the New Deal coalition) ceased to exist. Before turning to the full data, consider the following decisions as an illustration.

In *NLRB v. Bildisco*,<sup>116</sup> a general partnership filed a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Bankruptcy Code.<sup>117</sup> The partnership was then authorized to operate as a debtor-in-possession,<sup>118</sup> and rejected its collective bargaining agreement with the approval of the Bankruptcy Court.<sup>119</sup> In response, the union filed unfair labor practices charges with the NLRB, arguing the partnership was not allowed to reject its collective bargaining agreement, and in any event was obligated to negotiate with the union first.<sup>120</sup> The NLRB found the partnership had violated the National Labor Relations Act by unilaterally changing the terms of the collective bargaining agreement and by refusing to negotiate with the union.<sup>121</sup> The NLRB then ordered the partnership to make pension, health, and welfare payments to employees and to pay dues to the union, as required under the collective-bargaining agreement.<sup>122</sup>

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White House,” a practice which “has bred confusion, uncertainty, and operational inefficiencies.” Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1887 (2002).

<sup>115</sup> Bodah and Schneider find that between the years 1955 and 2011 the NLRB found employers to be committing unfair labor practices in more than 80% of the cases. This high number could be explained by the procedural processes of the NLRB, where weak cases against employers are likely to be dropped before they reach a discussion by the Board members. Matthew M. Bodah & Martin R. Schneider, *Political Bias in Labor Adjudication?: German Federal Labor Court and U.S. National Labor Relations Board*, SASE ANNUAL CONFERENCE, CAMBRIDGE, MA, 6, 7 (2012). Even under Republican administrations, the majority of NLRB decisions are against employers. For instance, 70% and 72% of the cases were ruled against employers under the administrations of Reagan and Bush II respectively; in contrast, 84% and 91% of cases were ruled against employers under Presidents Clinton and Obama, respectively. *Id.* at 9.

<sup>116</sup> 465 U.S. 513 (1984).

<sup>117</sup> 11 U.S.C. § 1101 (1982).

<sup>118</sup> 11 U.S.C. § 1107 (1982).

<sup>119</sup> Pursuant to 11 U.S.C. § 365(a) (1982).

<sup>120</sup> *Bildisco*, 465 U.S. at 518–19.

<sup>121</sup> National Labor Relations Act § 8(1), (5); 29 U.S.C. § 158(1), (5) (Supp. I 1935).

<sup>122</sup> *Bildisco*, 465 U.S. at 519.

The Supreme Court repealed the NLRB decision.<sup>123</sup> The NLRB maintained that Bildisco failed to show that rejecting its collective bargaining agreement was necessary to prevent it from going into liquidation.<sup>124</sup> The Court ruled, however, that this was not necessary, and that Bildisco only had to show that the agreement burdened the estate and could impede a successful reorganization.<sup>125</sup> The Court preferred this more lenient standard as a matter of policy, since it better fits with the purposes of Chapter 11 of the Bankruptcy Code.<sup>126</sup> The Court further concluded that a collective bargaining agreement is unenforceable from the time the petitioner files for bankruptcy. The Court thus found that the partnership did not commit an unfair labor practice, and ordered the partnership released from the collective bargaining agreement with no penalty.<sup>127</sup>

In *Lechmere v. NLRB*,<sup>128</sup> a union started a campaign to organize 200 retail store employees. In response, the employer barred non-employee union members from its parking lot and prevented them from leaving their pamphlets on employees' cars parked there.<sup>129</sup> The union then filed an unfair labor practices charge with the NLRB, claiming the employer was interfering with the employees' right to form or join a labor organization.<sup>130</sup> The NLRB ordered the employer to allow distribution of the union material to its employees, and to permit access to the parking lot by non-employee union members.<sup>131</sup>

The Supreme Court maintained that while employers cannot interfere with employees' efforts to organize, it is not necessarily obligated to allow access to its property to non-employee union members.<sup>132</sup> In partic-

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<sup>123</sup> Justice Rehnquist, writing for the majority, was joined by Chief Justice Burger and Justices Powell, Stevens, and O'Connor. Justice Brennan wrote an opinion concurring in part and dissenting in part, to which Justices White, Marshall, and Blackmun joined.

<sup>124</sup> *Bildisco*, 465 U.S. at 524.

<sup>125</sup> *Id.* at 525–26.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 534. Justice Brennan's dissent found the majority opinion to be wrong and internally inconsistent by rendering a collective bargaining agreement unenforceable from the moment a petition in bankruptcy was filed. Instead, Justice Brennan believed the agreement was unenforceable only after the Bankruptcy Court has authorized its rejection. Justice Brennan therefore found the partnership to be in violation of fair labor practices, as it unilaterally altered the terms of the agreement before its rejection was authorized. *Bildisco*, 465 U.S. at 554 (1983) (Brennan, J., dissenting).

<sup>128</sup> 502 U.S. 527, 528 (1992). Justice Thomas delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter. Justice Stevens wrote a dissent, and Justice White offered his own dissent, joined by Justice Blackmun.

<sup>129</sup> *Id.* at 529–30.

<sup>130</sup> *Id.* at 531.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 532.

ular, employers may bar non-employee union members from its property, unless the union has no other reasonable way of communicating with the employees.<sup>133</sup> While the NLRB asserted this was the case here, the Court sustained that the NLRB erred in applying this test and interpreted the rule too broadly.<sup>134</sup> Thus, while the NLRB supposed that access to non-employee union members should be allowed if there is no other reasonable way for the union to effectively communicate its message to the employees, the Court provided that access is to be allowed only if the employees would otherwise remain beyond the reach of reasonable communication efforts by the union, due to the remote location of the employer's facility and the location of the employees' residence.<sup>135</sup> In this case, in a response to a challenge by an employer, the Court rejected the NLRB's interpretation and limited the union's power.<sup>136</sup>

In *Allentown Mack Sales v. NLRB*,<sup>137</sup> the company managers decided to buy the company, and subsequently renamed it and dismissed all 45 employees, all organized in the same union for 17 years.<sup>138</sup> The new owners then rehired 32 of the workers, and refused to recognize the union.<sup>139</sup> The NLRB decided that the union is presumed to have majority status amongst employees in the new company, which was a successor to the old one.<sup>140</sup> The employer then tried to revoke this presumption, which is only permissible if the employer can demonstrate genuine uncertainty regard-

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 538.

<sup>135</sup> *Id.* at 540.

<sup>136</sup> *Id.* at 539. Interestingly, Justice White's dissent calls on the Court to exercise judicial restraint, and refrain from substituting its own judgment for that of the NLRB. White cites *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990), which asserts the Court will: "uphold a Board rule so long as it is rational and consistent with the Act, . . . even if we would have formulated a different rule had we sat on the Board." And continues to cite *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978), saying: "The judicial role is narrow: The Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." White concludes by writing that "[b]y leaving open the question of how §7 and private property rights were to be accommodated under the NLRA, Congress delegated authority over that issue to the Board, and a court should not substitute its own judgment for a reasonable construction by the Board." *Lechmere*, 502 U.S. at 541 (White, J., dissenting) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) and *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978)).

<sup>137</sup> 522 U.S. 359 (1998). Justice Scalia wrote the opinion of the Court, and was joined, in most of his opinion, by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justice Breyer wrote a dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg.

<sup>138</sup> *Id.* at 359, 362 (1998).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 363; *see also* *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987).

ing union support by a majority of the employees.<sup>141</sup> To demonstrate such uncertainty, the employer reported statements by 14 employees saying they did not support the union.<sup>142</sup> The NLRB only considered six of these statements to be relevant as the rest were given by employees other than the 32 rehired, were given long before the events of the case, were not sufficiently clear, or were given during the employees' rehiring job interviews.<sup>143</sup> The NLRB's general policy was not to allow employers to refuse recognition of an existing union unless substantial evidence indicated the union indeed did not have majoritarian support; the NLRB found the employer failed to demonstrate this was the case here, and therefore ordered the employer to recognize the union.<sup>144</sup>

The Supreme Court took issue with the NLRB's factual findings and sustained that the evidence presented by the employer was sufficient to demonstrate uncertainty regarding union support among employees.<sup>145</sup> In particular, the Court asserted that the NLRB erred in ignoring those statements of rehired employees given during their job interviews.<sup>146</sup> The Court admitted that such statements were not entirely reliable (as during interviews, employees have increased incentive to appease employers), but nevertheless concluded that such statements can be used to demonstrate uncertainty regarding union support.<sup>147</sup> The Court therefore concluded that the employer was free to refuse union recognition.<sup>148</sup>

These three Supreme Court decisions are all economically conservative decisions in which the Court repeals NLRB decisions, and they all demonstrate the disciplining function of the Court. In each of them, the NLRB sets more progressive standards, protecting employees' right to organize and empowering unions, while the Court rejects the NLRB's decision and creates rules more convenient for employers. In instituting its progressive policies, the NLRB is revealing itself to be out of sync with the pro-liberalization agenda; the Court brings the NLRB policies in line with the agenda of economic liberalization by consistently repealing its progressive decisions. To appreciate this trend more generally, consider Table 3 and Figure 4 below.

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<sup>141</sup> *Allentown*, 522 U.S. at 371.

<sup>142</sup> *Id.* at 390 (Breyer, J., dissenting).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 363.

<sup>145</sup> *Id.* at 371.

<sup>146</sup> *Id.* at 368.

<sup>147</sup> *Id.* at 368–69.

<sup>148</sup> *Id.* at 380. In his dissent, Justice Breyer argued the Court has departed here from the accepted legal standard, by interfering with the NLRB's factual findings. Breyer writes the Court "has failed to give the kind of leeway to the Board's fact finding authority that the Court's precedents mandate." *Id.* at 391 (citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 504 (1978)). This is again a call for less intervention in the NLRB's policy, in response to the majority's position.

Table 3: Number of NLRB decisions by Chief Justice

	conservative repealing	&	conservative upholding	&	progressive repealing	&	progressive upholding
Vinson	3		4		1		8
Warren	4		9		11		36
Burger	13		11		1		21
Rehnquist	6		0		1		6

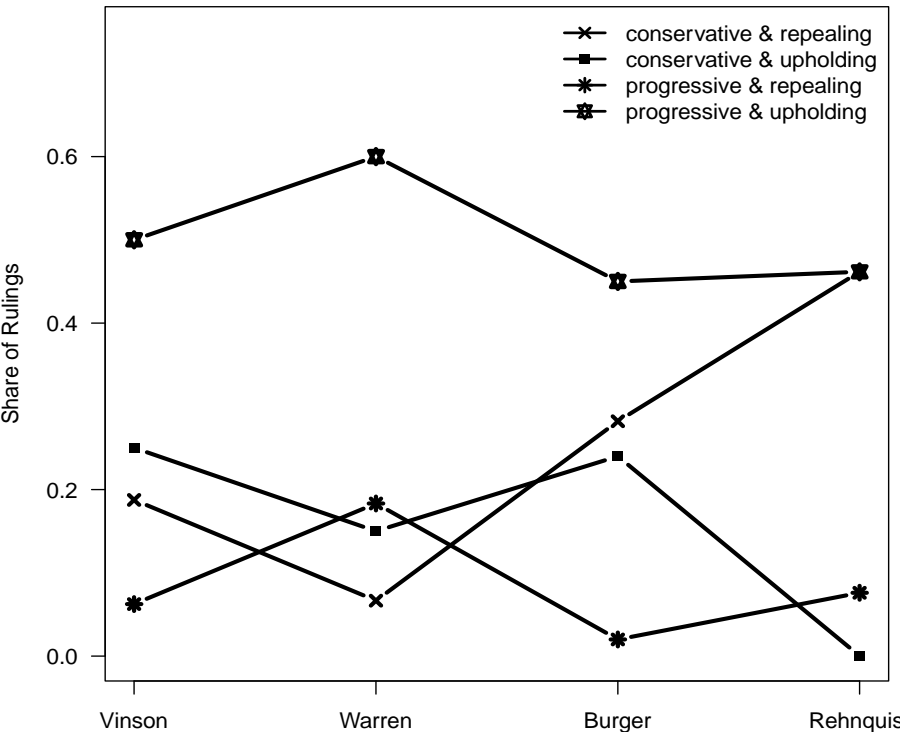


Figure 4: Distribution of NLRB Cases by Chief Justice

Figure 4 traces the dramatic change in the dynamics between the Court and the NLRB since the 1940s. Consider progressive policies promoted by the NLRB. The Warren Court overwhelmingly upheld NLRB’s progressive policies: 36 upholding decisions as opposed to only four repealing decisions. Yet during the Rehnquist era, a progressive policy by

the NLRB had a 50% chance of being repealed (six decisions upheld and six repealed).

This analysis illustrates the role of the Court in a shifting political field. During the 1960s, when American political institutions were mostly governed by the New Deal pro-labor coalition,<sup>149</sup> the Warren Court reinforced progressive initiatives by the NLRB. As this national consensus slowly lost its dominance, the Court gradually relaxed its passive support of NLRB progressive initiatives until it reached a stage where the court systematically repealed the initiatives. Under Rehnquist, the NLRB was treated as a rebellious governmental actor and was called into (the liberalization) order.

Considering the fragmentation of political authority in American politics, and the frictions that emerge from non-synchronized shifts in partisan dominance across institutional domains, the Court is well-suited to serve as a disciplining tool, imposing ideological order on governmental actors that diverge from the policy-making agenda that the Court perceives to be dominant at the time. As this agenda changes, so does the direction of the Courts' disciplining effect. While the NLRB itself has shifted in a pro-market direction since the 1980s,<sup>150</sup> following Reagan's appointments to the Board, the Rehnquist Court pushed it still further to the right and, to a lesser degree, so did the Burger Court.<sup>151</sup>

#### *E. Salience of Court Decisions*

In this Section, we study the salience of Court cases in our database in the popular press. We measure the salience based on media coverage, which both indicates and reinforces the importance of a Court decision. Legal scholars have previously suggested that the Court plays a crucial role in pushing some issues higher or lower on the public agenda.<sup>152</sup> With its decisions and their justifications, the Court may enhance the public legitimacy of some political measures while dampening that of other acts. In addition, Court decisions provide signals to interest groups about whether and how they can pursue their interests through judicial channels.<sup>153</sup> As explained by Collins and Cooper, "issues or events deemed

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<sup>149</sup> See Pickerill, *supra* note 75, at 1085.

<sup>150</sup> See MIZRUCHI, *supra* note 9, at 190.

<sup>151</sup> See *id.* Interestingly, there are no NLRB decisions issued by the Roberts Court in our dataset. This may reflect the general low number of Roberts Court decisions, or the fact that the move to restrain the NLRB was already completed under Burger and Rehnquist.

<sup>152</sup> TUSHNET, *supra* note 94, at 49.

<sup>153</sup> See VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 147, 149 (2007); Vanessa Baird & Tonja Jacobi, *Judicial Agenda-Setting Through Signaling and Strategic Litigant Responses*, 29 WASH. UNIV. J.L. & POL'Y 215, 217 (2009). For an empirical analysis and theoretical



highly salient are more likely to influence decisions of individual citizens and elite actors.”<sup>154</sup>

While the salience of judicial decisions has been operationalized in a variety of ways, scholars seem to converge around a media-based measurement for the public salience of judicial decisions.<sup>155</sup> Epstein and Segal introduced a measurement of salience based on whether *The New York Times* discussed the decision on its front page.<sup>156</sup> The reasonable and widely accepted assumption behind this measurement is that media coverage reflects the contemporaneous (in contrast to retrospective) importance assigned to Supreme Court cases by highly informed elites.<sup>157</sup> In order to address possible biases of this measurement, Collins and Cooper have also coded cases that have received non-front page coverage in *The New York Times*, as well as in *The Washington Post*, *Los Angeles Times*, and *Chicago Tribune*.<sup>158</sup>

In order to examine possible variations in the salience of cases in our analysis, we rely on the coding of Collins and Cooper, which covers the period of 1954–2004.<sup>159</sup> We merge their data with our classification of the cases. Table 4 presents the results, which shows the number of cases that

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refinement of this argument, see Douglas Rice, *The Impact of Supreme Court Activity on the Judicial Agenda*, 48(1) L. & SOC’Y REV. 63 (2014). Rice refers to this argument as ‘the interest groups perspective’ for studying the effect of Supreme Court decisions and explains that “because some litigants, and particularly groups, are policy-minded, these litigants pay attention to the signals in Supreme Court decisions about how arguments could be framed in future cases.” *Id.* at 68.

<sup>154</sup> Todd A. Collins & Christopher A. Cooper, *Case Salience and Media Coverage of Supreme Court Decisions Toward a New Measure*, 65 POL. RES. Q. 396, 397 (2012). Note that we focus on public salience. We follow previous research on the salience of judicial decisions, according to which the factors that make an issue legally salient also make it politically salient (Tom S. Clark, Jeffrey R. Lax & Douglas Rice, *Measuring the Political Salience of Supreme Court Cases*, Forthcoming J.L. & Ct.). A more legalistic approach might consider cases often cited by courts to be legally salient. While this may be true, we do not see this saliency measurement as particularly relevant to our study. The fact that a case is useful for the Court in judicial decision making marks its role within the world of legal doctrine, and does not necessarily indicate influence on social and political processes outside the court.

<sup>155</sup> Epstein and Segal mention seven ways in which salience has been operationalized in the literature: cases reprinted in textbooks, cases included in Congressional Quarterly’s list, cases included in the Supreme Court Compendium’s list, cases with a substantial number of Supreme Court citations, cases that are discussed in a substantial number of academic texts, cases discussed in the headlines of the Lawyer’s Edition, and cases generating a substantial number of amicus curiae participation. See Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 69 (2000).

<sup>156</sup> *Id.* at 72; see also Collins & Cooper, *supra* note 154, at 398.

<sup>157</sup> Collins & Cooper, *supra* note 154, at 398.

<sup>158</sup> *Id.* at 399.

<sup>159</sup> Note that the Collins and Cooper’s dataset covers only a subset of the cases included in our analysis.

received front page and non-front page coverage in absolute numbers as well as in percentages out of the total number of cases in each category. We present here only the results from *The New York Times*, as they are not substantially different from those received when examining other newspapers.

Table 4: Public Salience of Court Decisions

	Non-Front Page Coverage	Front Page Coverage
All cases	3387 (54.1%)	1224 (19.5%)
Economic cases	1119 (64%)	200 (11.4%)
Economic case with judicial review	412 (64%)	82 (12.7%)
conservative & repealing	91 (61.5%)	20 (13.5%)
conservative & upholding	39 (54.2%)	16 (22.2%)
progressive & repealing	33 (61.1%)	13 (24.1%)
progressive & upholding	249 (67.5%)	33 (8.9%)

First, it is evident that economic cases in the time period of our research drew less public attention than the full sample of cases. In particular, cases on economic issues were almost 50% less likely to receive front-page coverage than all cases in general.<sup>160</sup> This finding reinforces our initial intuition that in the second half of the 20<sup>th</sup> century, public awareness of the role of the Court in economic policy was relatively low. This is probably one reason that academics understudied the role of the Supreme Court in the liberalization of the economy.

Second, when comparing different categories within our typology, we found that cases categorized as *conservative & upholding* and as *progressive & repealing* are more likely to receive front page coverage (22.2% and 24.1%).<sup>161</sup> As we show in Part IV.A, those cases are mainly cases where a *non-business* actor is challenging a conservative government policy. Cases categorized as *conservative & repealing* or *progressive & upholding* (mainly cases initiated by *business interests*) draw less media attention (only 13.5% and 8.9% receive front page coverage). In short, cases initiated by businesses generally receive less attention compared to other cases.

<sup>160</sup> We also find that economic cases that involve judicial review (the universe of cases for our analysis) have slightly higher levels of salience compared to general population of economic cases.

<sup>161</sup> The emphasis on these cases may stem from the New York Times’ progressive stands, which could potentially lead its editors to dedicate more coverage to cases in which non-business actors challenge conservative policies before the Court. This certainly has a better potential as an interesting personal story (and indeed, these types of cases received more coverage compared to other types of cases also in the Chicago Tribune, which some consider more conservative than the New York Times).

The low salience of decisions that we observed in our universe of economic cases as compared with all Supreme Court decisions may be connected to the success of businesses before the Court. Previous research shows that business interests benefit from the conditions of “quiet politics,” under which organized business groups “dominate the policy process in arenas shielded from public view.”<sup>162</sup> As explained by Culpepper, businesses perform better in achieving their long-term goals when operating through non-public and informal venues of policy-making, rather than when working through highly publicized clashes in the partisan arena.<sup>163</sup> Based on research from the United States and Britain, Culpepper concludes that “if voters are not paying attention to an issue of great concern to business leaders, then business leaders will almost always get their way.”<sup>164</sup> Our analysis suggests, at least tentatively, that the legal arena may be one venue where low salience benefits business’ strategies. Our results also stress the need for scholarship on the Court to focus on more subtle modes of judicial operation—for instance, the ‘institutional gardening’ we propose here—in order to understand the interactions between business interests and judicial tools for affecting policy-making.

#### *F. Note on the Doctrine*

In this Section we briefly comment on some of the doctrinal tools used by the Court in playing its disciplining role. Note that we make no doctrinal claims, and do not presume to criticize the Court’s legal reasoning. Nor do we attempt a comprehensive description of the full variety of doctrines used by the Court in the 803 cases in our database. We limit ourselves to describing a handful of cases that we see as capturing important characteristics of the Court’s mode of operation. The general theme here is that the ‘institutional gardening’ we observe takes place through doctrines that aspire to ideological neutrality, and with the use of modest judicial rhetoric. This again illustrates the need to look beyond landmark constitutional cases in order to observe the sources of long-term political change.

In the great majority of cases in our database, the Court upholds administrative actions by deferring to the discretion of the administrative agency,<sup>165</sup> or rejects claims regarding the unconstitutionality of govern-

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<sup>162</sup> CULPEPPER, *supra* note 23, at xv.

<sup>163</sup> *Id.* at xvi.

<sup>164</sup> *Id.*

<sup>165</sup> For example, in *Robertson v. Methow Valley Citizens Council*, four environmentalist organizations challenged a decision by the United States Forest Service to allow the opening of a major destination Alpine ski resort in Okanogan National Forest in Okanogan County, Washington. 490 U.S. 332 (1989). The Forest Service approved a plan submitted by Methow Recreation, the developer of the proposed resort that would make use of approximately 3,900 acres of yet unspoiled

ment policies.<sup>166</sup> This is doctrinally straightforward, as the Court does not need to invoke any specific authority in order to uphold government actions. The more interesting cases, on which we focus in the following paragraphs, are those in which the Court justifies intervention in existing government policies. In such cases, we also observe that the Court employs politically neutral doctrinal mechanisms and emphasizes compliance to legislative authority.

Consider first the Court's decision in *Barnhart v. Sigmon Coal*.<sup>167</sup> In this case, Jericol Mining Inc., a coal mining company, challenged the decision of the Commissioner of Social Security to assign to the company health premium responsibility for retired miners of an out-of-business operator.<sup>168</sup> The Coal Industry Retiree Health Benefit Act of 1992<sup>169</sup>

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mountain area. Environmentalists claimed this approval did not meet the legal requirements set by the National Environmental Policy Act (42 U.S.C. § 4332 (1970)), as the proposal did not include a "worst case" analysis of potential environmental harm and a fully developed plan to mitigate environmental harms. The Supreme Court rejected these claims and upheld the Forest Service decision. In an opinion by Justice Stevens, the Court supported the interpretation adopted by the service, that the National Environmental Policy Act does not require a "worst case" analysis and a fully developed harm mitigation plan. *Id.* at 359. This decision by the Court is an economically-conservative one, as the Court rules in favor of the developer rather than the environmentalist organizations. This is also a case of passive support by the Court: the Forest Service made its decision, and the Court upheld it.

<sup>166</sup> Consider for example the Court's decision in *FCC v. Beach Communications* with regards to the interpretation of the Cable Communications Policy Act of 1984, 98 Stat. 2779, 508 U.S. 307 (1993). The Cable Communications Policy Act provides a national framework for regulating cable television. "Private cables" are exempt from regulation; this exemption is designed primarily to exempt cable systems in private households. The question before the Court in this case was whether SMATV (Single Master Antenna Television) cable systems, often used in hotels, motels, dormitories, hospitals, and other commercial properties with multiple tenants, were exempt from FCC regulation under the Act, and to what extent. In particular, prior to the legislation of the Act, cable systems that only served dwelling units under common ownership, control, or management, were exempt from regulation. The Act however narrowed the exemption, by providing that cable systems that use public rights-of-way shall not be exempt from regulation, even if they otherwise serve dwelling units under common control. The operators of several SMATV systems claimed that narrowing the exemption in this way violated the Equal Protection Clause (U.S. CONST. amend. V.) and was unconstitutional absent a rational basis for distinguishing between different networks in this manner. The Court rejected the private companies' claims of unconstitutionality and supported the FCC's interpretation of the statute, explaining that a distinction made in legislation must generally be upheld as long as it is in any way possible to imagine a factual situation that might justify it. This is in line with the post-*Lochner*ian interpretation of the theory of substantive due process. See ELY, *supra* note 39, at 18; John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 552 (1997); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557, 1566 (2004).

<sup>167</sup> *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002).

<sup>168</sup> *Id.* at 448–49.

charged the Commissioner of Social Security with assigning retirees of inactive employers to current industry members connected to the original employer.<sup>170</sup> In this framework, between the years 1993 and 1997, the Commissioner assigned to Jericol 86 retired coal miners, originally Shackleford Coal Company, Inc. Jericol purchased the coal mining operating assets of Shackleford during the 1970s and assumed responsibility for Shackleford's outstanding contracts, including its collective bargaining agreement.<sup>171</sup>

Justice Thomas, writing the opinion of the Court, adopted Jericol's arguments and maintained that the Act did not authorize the Commissioner to assign Shackleford retirees to Jericol.<sup>172</sup> In particular, Jericol was a *successor in interest* to Shackleford, and while the Act explicitly charged the Commissioner with assigning responsibility for retirees to businesses under the same control as their original employer, it did not allow assignment to successors.<sup>173</sup> Justice Thomas stated that the language of the Act was unambiguous, and the omission of successors in interest presumed to reflect congressional intent.<sup>174</sup> As the statute was unambiguous, the Court did not consider deference to the agency's interpretation.<sup>175</sup> Therefore, it decided that the Commissioner had no authority to assign Shackleford retirees to Jericol.<sup>176</sup>

Justice Stevens, writing the dissent, adopted the Commissioner's interpretation.<sup>177</sup> Stevens noted that the Act allowed assignment of retirees to any businesses under the same control as their original employer, *as well as to successors of such businesses*.<sup>178</sup> Therefore, it would be an absurd result if the Court interpreted the Act not to allow assignment of retirees to the successors of the original employer. Justice Stevens also highlighted the existence of evidence for congressional intent to allow this.<sup>179</sup> Howev-

<sup>169</sup> Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701–9722 (1994).

<sup>170</sup> *Id.* §§ 9706(a), 9701(c)(2), (7).

<sup>171</sup> *Barnhart*, 534 U.S. at 447–48.

<sup>172</sup> *Id.* at 451.

<sup>173</sup> *Id.* at 452.

<sup>174</sup> *Id.* at 454. “If Congress meant to make a pre-enactment successor in interest like Jericol liable, it could have done so clearly and explicitly.” *Id.* For similar reasoning, see *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *United States v. Brown*, 333 U.S. 18, 24–25 (1948) (The fact that Congress includes particular language in one section of a statute but omits it in another is presumed to indicate legislative intent.).

<sup>175</sup> See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–462 (2002); see also *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

<sup>176</sup> *Barnhart*, 534 U.S. at 462.

<sup>177</sup> *Id.* at 463 (Stevens, J., dissenting).

<sup>178</sup> *Id.* at 464 (Stevens, J., dissenting).

<sup>179</sup> *Id.* at 463–64. Justices O'Connor and Breyer joined Justice Stevens's dissent.

er, as Chief Justice Rehnquist—as well as Justices Scalia, Kennedy, Souter and Ginsburg—agreed with Justice Thomas’ opinion, the Court sided with Jericol, the employer business interest, and rejected the progressive policy implemented by the Commissioner (extending healthcare benefits).<sup>180</sup> Rejection of the Commissioner’s policy was justified by the Court in the name of adherence to congressional intent.<sup>181</sup>

For another example, consider the Court’s decision in *Director, Office of Workers’ Compensation Programs, etc. v. Rasmussen*.<sup>182</sup> This case originated with the death of William Rasmussen, a Geo Control, Inc. employee performing work for the United States in South Vietnam.<sup>183</sup> Rasmussen was killed in a landmine explosion while riding a vehicle during the course of his employment.<sup>184</sup> Rasmussen’s surviving widow and son were entitled to death benefits under the Defense Base Act,<sup>185</sup> which incorporates the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act.<sup>186</sup> However, the Director of the Office of Workers’ Compensation Programs in the Department of Labor determined that death benefits to the dependents of the deceased are to be capped.<sup>187</sup> The position of the Director, together with the employer and the employer’s insurer, was that limitations on disability payments in § 906(b)(1) of the Longshoremen’s and Harbor Workers’ Compensation Act applied also to benefits following the death of the employee payable under § 909 of the Act.<sup>188</sup> Rasmussen’s widow challenged this interpretation.

In a decision similar to the one given in *Barnhart*, the Court ruled against the interpretation of the government agency. The Court found the language of the Act to be clear, thereby rejecting the solution offered by the Director.<sup>189</sup> The fact that § 906(b)(1) does not mention a cap on compensation was deemed to reflect legislative intent, and therefore there was no justification in supplementing it with elements from § 909.<sup>190</sup> The Director tried to argue that this would be an absurd and discriminatory result, but the Court rejected these claims, stating that the omission

<sup>180</sup> *Id.* at 462.

<sup>181</sup> *Id.* at 454.

<sup>182</sup> 440 U.S. 29 (1979).

<sup>183</sup> *Id.* at 31.

<sup>184</sup> *Id.*

<sup>185</sup> Defense Base Act, 42 U.S.C. §§ 1651–54 (1970). The Act provides disability or death compensation to persons employed at military, air, and naval bases outside the United States.

<sup>186</sup> Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901–950 (1970).

<sup>187</sup> *Rasmussen*, 440 U.S. at 31–32.

<sup>188</sup> *Id.* at 34.

<sup>189</sup> *Id.* at 44.

<sup>190</sup> *Id.* at 37–38.

was intentional.<sup>191</sup> The important difference between this case and *Barnhart*, of course, is that in this case the reviewed government policy is economically conservative rather than progressive, as the Director attempted to limit welfare benefits. The Court's rejection of the Director's policy was therefore a push in the progressive direction.

Although the ideological directions are different, the doctrinal aspects of *Barnhart* and *Rasmussen* are strikingly similar. In both cases, the Court repealed the policies of government actors as wrongly interpreting the unambiguous language of legislative acts. This defines a narrow justification for court action, in line with established practices of *Chevron* deference.<sup>192</sup> In this framework, the Court largely avoids interfering with administrative discretion. Simultaneously, when the Court does reject standing government policies, it is able to do so using politically neutral judicial reasoning.<sup>193</sup> In fact, the Court's reasoning makes it seem as if there is no judicial decision to be made at all, as the Court is simply bound by legislative authority. Avoiding any semblance of controversial "judicial activism" is helpful in lowering the risk of political controversy.<sup>194</sup> The Court uses a similar judicial tone in the NLRB decisions mentioned above.

The Court is limited doctrinally (or is limiting itself), but the outcome of judicial action nevertheless has clear ideological characteristics, as evidenced by the 803 cases examined in our database. This manner of

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<sup>191</sup> *Id.* at 46–47.

<sup>192</sup> *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

<sup>193</sup> *See, e.g., Rasmussen*, 44 U.S. at 29–30.

<sup>194</sup> "Judicial activism" tends to be a highly salient argument in public debates about Court decisions. Thus, conservative politicians often voice concerns of a progressive "judicial dictatorship." KECK, *supra* note 68, at 287–89. Charges from the right often accuse the Court in promoting progressive goals through excessive judicial activism and interference with the operation of elected politicians, who supposedly have a stronger claim for democratic accountability than the appointed judges. Whittington, *supra* note 34, at 2222. For instance, during the Republican primaries for the 2012 elections, Newt Gingrich received applause arguing that "the courts have become grotesquely dictatorial, far too powerful, and I think, frankly, arrogant in their misreading of the American people." Joe Palazzolo, *Republican Debate: 'Grotesquely Dictatorial' Courts and More*, WALL STREET J.L. BLOG (Dec. 16, 2011), <http://blogs.wsj.com/law/2011/12/16/the-republican-debate-grotesquely-dictatorial-courts-and-more/>. A similar argument can be found in the Republican platform from 2012, according to which judicial activism poses a "threat to the U.S. constitution"; during the 2004 campaign, George W. Bush noted he wants to appoint federal judges who "know the difference between personal opinion and the strict interpretation of the law" (Michael Kinsley, *The Right's Kind of Activism*, WASH. POST (Nov. 14, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A46798-2004Nov12.html>); years earlier, Senator Bob Dole argued that if Democrats win the elections they "could lock in liberal judicial activism for the next generation." Katharine Q. Seelye, *Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton*, N.Y. TIMES (Apr. 20, 1996), <http://www.nytimes.com/1996/04/20/us/dole-citing-crisis-in-the-courts-attacks-appointments-by-clinton.html>.

legal justification raises an important question regarding our findings in Part IV.A: If the Court merely enforces legislative intent on administrative agencies using ideologically neutral doctrines, then what explains this push to the right?

A first possible answer could be that Congress's move to the economic right was sharper than that of administrative agencies. This assumes that administrative agencies drift to the left in their interpretation of legislation, and that the Court, as the enforcer of congressional intent, pushes them to the right. A second answer might focus on the Court's ability to choose its own cases. Even if the Court is indeed bound by legislative language, it does not actually repeal *all* administrative decisions that diverge from this language. Rather, it does so (at the most) only in cases it actually hears. As these cases are mostly challenges initiated by business interests and directed against economically progressive policies, the near-unavoidable outcome of the Court's seemingly neutral policy is a push to the economic right. Third, it is also important to note that the Court does indeed have some choice in enforcing legislative language to the letter. This is apparent, for example, from Justice Steven's dissent in *Barnhart* and from the arguments made by the administrative agencies in both cases mentioned above.<sup>195</sup> Thus, while we have no data on this particular issue, it is entirely possible that the Court would be less inclined to find legislation ambiguous in order to uphold an economically progressive (rather than conservative) administrative action.

The actions of the Court can be understood in light of the notion of bureaucratic drift.<sup>196</sup> If its rhetoric is to be believed, the Court operates here to bind administrative agencies to original legislative acts in order to assure that the democratic mandate is implemented as intended. In this way, the Court operates to limit bureaucratic drift and insure that policy is not changed as it is being implemented by non-elected agencies.<sup>197</sup> On

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<sup>195</sup> See *Barnhart*, 534 U.S. at 471–72 (Stevens, J., dissenting); see also WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION, 260–63 (2000); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508 (1989); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454–55 (1989); *Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 432 (1986); *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

<sup>196</sup> David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 699 (1994); Jonathan Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 94 (1992); Ethan Bueno De Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCI. REV. 605, 605 (2007); Jonathan Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 672 (1992); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 471–72 (2007).

<sup>197</sup> This fits with claims of the burgeoning literature on the democratic failings and the counter-majoritarianism of non-judicial institutions. See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 4 (2006) ("How did we get to this odd moment in American history where unelected Supreme Court justices



the other hand, if the arguments of the administrative agencies (and the dissent in *Barnhart*) are to be believed, the Court is insisting on an absurd and overly literal implementation of congressional legislation, thereby frustrating actual congressional intent. Under this view, the Court is not preventing drift, but creating it.<sup>198</sup>

Whatever the case, the point we wish to highlight in this Section is that the tendency of the Court towards conservative and repealing decisions is not clearly connected to a doctrinal shift, nor to the adoption of an explicitly libertarian constitutional order. Rather, the decisions we observe adopt politically neutral rhetoric of deference to legislative intent, and the push to the right is achieved by some more implicit mechanism. This theme is relevant also to our findings in the next Section.

### *G. The Supreme Court vis-à-vis Lower Courts*

In the previous Sections we focused our analysis on the interactions between the Supreme Court and other, non-judicial, governmental actors.<sup>199</sup> In this Section, we briefly shift the focus to study the role of the Court within the judicial branch, and examine the reversal rate of lower court decisions by the Supreme Court across the different case types in our typology. This is important for our project, as we aim to tease out the way the Supreme Court interacts with other institutions in relation to the process of economic liberalization. Our main finding here is that the Supreme Court acts to restrain lower courts from intervening in the policies of administrative agencies.<sup>200</sup> This is closely connected to our analysis of the Court's use of judicially modest doctrinal tools. The Court not only

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sometimes express the views of popular majorities more faithfully than the people's elected representatives?"); Neal Devins, *The D'oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1347 (2007); FRIEDMAN, *supra* note 47, at 358 ("It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people."); Graber, *supra* note 51, at 362; Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 145–46 (2012).

<sup>198</sup> This is the more classic concern of *judicial* counter-majoritarianism. Under this view, the Court is a central source for the introduction of un-majoritarian results into the political system. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 727 (2009); Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 65 (2008) ("The countermajoritarian difficulty is probably the dominant theme in contemporary legal scholarship about judicial review."); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–91 (2004).

<sup>199</sup> Thus, for instance, we classify the decision in *Barnhart* by noting the Court repeals the policy promoted by the Commissioner of Social Security, regardless of whether the Court at the same time reverses the prior decision on this case by the federal circuit court.

<sup>200</sup> The Supreme Court is known to occasionally act to restrain the activism of lower courts. *See, e.g.*, Sunstein & Vermeule, *supra* note 14, at 396.

refrains from obvious displays of judicial power, but it also acts to assure that lower courts do not over-engage in judicial activism. The Court's doctrinal neutrality and its restraint of lower courts create an environment of reduced political controversy. Whether this is a strategic choice by Justices or sincere preference for judicial restraint, the result (reduced controversy) is similar.<sup>201</sup>

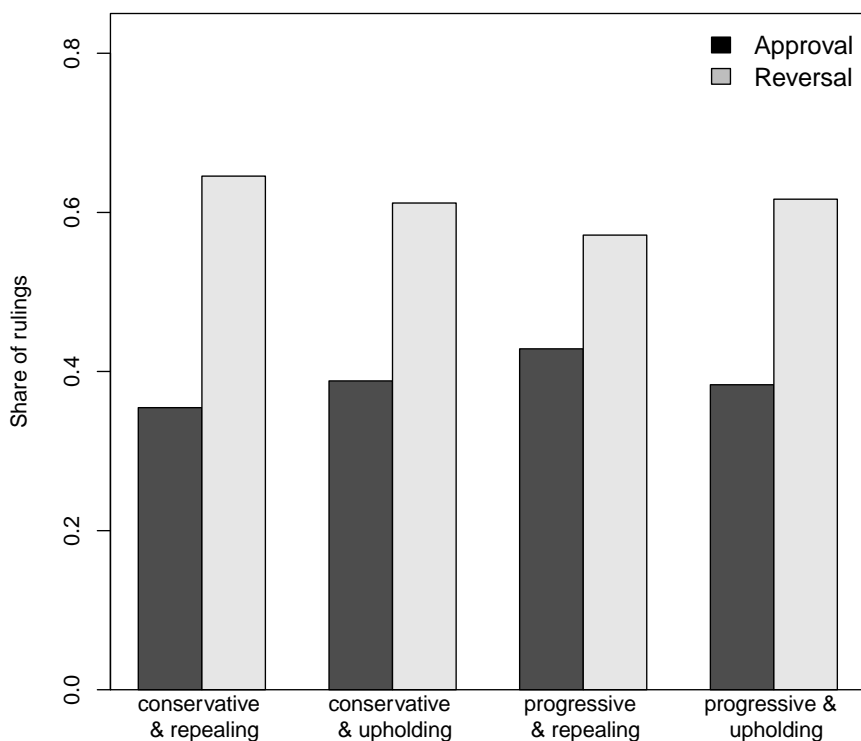


Figure 5: Reversal and Approval Rate by Decision Type

<sup>201</sup> See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 157 (2007). Exercise of judicial restraint is generally thought to be helpful in securing judicial legitimacy. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1930 (2001); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 16-23 (2d ed. 1962).

As demonstrated in Figure 5, the reversal rate in each of the four categories of our analytical framework is approximately 60%.<sup>202</sup> This result—though in itself quite predictable, as this reversal rate is not markedly different from the general reversal rate typically observed in Supreme Court decisions<sup>203</sup>—has interesting implications for our analysis. The reason for this is the large number of cases in our dataset in which the Supreme Court upholds the policies of non-judicial government actors. As noted in the previous Sections, in the great majority of its decisions, the Court chose to uphold the decisions of other government actors (544 upholding decisions as opposed to only 259 repealing decisions). Furthermore, as we show here, in about 60% of these 544 upholding decisions, the Court was in fact active in reversing a decision by a lower court. This means that in 60% of the 544 cases in which the Court affirmed the action of another government actor, a lower court actually sought to repeal it.

In this sense, the Court appears to be more judicially restrained than lower courts, and less willing to intervene in the actions of other agencies. In fact, the Court is acting to discipline lower courts, reining them in and restraining them from intervening in economic policy-making by other institutions.<sup>204</sup> In this way, the involvement of the Court lessens inter-branch friction, which is probably helpful in lowering the risk of political backlash (recall the circumstances leading to the New Deal compromise and the *Lochner* repudiation).

## V. CONCLUSIONS

At the beginning of this Article, we posed a question that has not yet been answered in the academic literature: What role has the U.S. Supreme Court played in the liberalization of the American economy since the 1980s? In terms of political-economic institutional change, we invoke

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<sup>202</sup> We would actually expect the reversal rate here to be lower than the general: Justices tend to pick cases for review either because they want to reverse the result of a lower court, or because they believe the case is important and cannot be ignored. Hartnett, *supra* note 99, at 1720–21. The cases in our database are cases in which a government action is being reviewed, and often already repealed by a lower court. This in itself might make many cases cert worthy, regardless of the willingness of justices to reverse the lower court. If those are indeed cases more likely to be chosen for review for their obvious importance, and not for the will to reverse them, this can account for the slightly lower than usual reversal rate we observe here.

<sup>203</sup> The reversal rate of cases reviewed by the Court is quite high. See Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE 8 (2010). However, federal circuit court decisions reversed by the Supreme Court are less than one percent of the total number of cases decided by the federal circuit courts. This is so due to the very low number of cases reviewed by the Court.

<sup>204</sup> This is in line with the strong judicially conservative rhetoric now common amongst Supreme Court Justices.

the metaphor of *institutional gardening* to describe the interactions between the Court and other governmental actors within the fractured American political field. Mostly, the Court allows government policies to grow independently; occasionally, it finds it appropriate to cut down specific initiatives. In this slow process, the Court gradually nudges governmental institutions towards its ideal vision of the garden.

In the context of the post-1980s shift to the market, the Court nudged other governmental actors rather consistently towards a pro-liberalization stance. It did this by disciplining governmental agencies that were out-of-sync with the pro-market shift and by encouraging them to comply with the liberalization agenda, all while preserving a strong semblance of judicial neutrality and restraint. Thus, the Court operates through the cumulative effect of numerous decisions, and not through landmark controversial constitutional cases.

In terms of political actors, our findings show that the Court is attentive to the claims of business interests and hears many more cases brought by such actors (as compared with cases brought by other interest groups). This, together with a relatively low (but steady) rate of rejection of government policies, explains both the large number of progressive decisions by the Court (529 economically progressive decisions as opposed to 274 economically conservative ones), as well as the fact that in the great majority of cases where the Court actually interferes with the policies of other institutions, it is pushing them in the economically conservative direction (189 economically conservative decisions repealing a governmental action, as compared with 70 progressive decisions repealing a governmental action). We also showed that the Court provides business with an environment of relatively low public salience, which has been proven to be advantageous to organized business.

In terms of legal doctrine, the Court employs judicially modest and ideologically neutral doctrinal tools and does not adopt “Lochnerian,” explicitly conservative doctrines. These factors suggest that the Court’s push to the right is more modest than it otherwise could have been, had the Court chose to openly adopt a Lochnerian or libertarian judicial stance. Yet, this probably also makes the Court’s push more sustainable, precisely because it succeeds in being less controversial and maintaining low public salience.<sup>205</sup> Overall, the Court’s decisions generate a push to the right not (only) because of the way the Court decides its cases, but due to how it chooses which cases to hear. In terms of doctrinal analysis, this process is virtually unnoticeable,<sup>206</sup> as the Court usually chooses its

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<sup>205</sup> Judicial restraint is key to the Court’s legitimacy. See, e.g., BICKEL, *supra* note 201, at 20; ELY, *supra* note 39, at 1; SUNSTEIN, MINIMALISM, *supra* note 25, at 166.

<sup>206</sup> Recall Smith: “The Court’s . . . complete discretion to decide which of the many cases properly placed before it using a petition for a writ of certiorari will be decided on the legal merits—is ignored.” Smith, *supra* note 99, at 728.

cases without commenting on its choices.<sup>207</sup> In this way, the Court's tendency to produce more *conservative & repealing* decisions is hard to detect by the casual observer.

Yet, despite the general semblance of judicial neutrality, a structured aggregation of the Court's decisions does reveal a significant push in an economically conservative direction. When our results regarding the institutional dynamics, the key actors, and the doctrinal aspects are combined, they point to the importance of focusing on long-term processes of political contestation, rather than on landmark cases, in studying the Court's contribution to institutional change in general and political-economic transformations in particular.

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<sup>207</sup> Hartnett, *supra* note 99, at 1723–24.