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Something Old, Something New - Something Borrowed, Something Blue

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SOMETHING OLD, SOMETHING NEW SOMETHING BORROWED, SOMETHING BLUE

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I. INTRODUCTION

Inherent in the question posed to this symposium is an inference that there is something unique or different about the Roberts Court in cases involving business interests. Much of the commentary on the Roberts Court depicts a scene in which the Roberts Court is walking down the aisle with big business. Indeed, commentaries on the first three years of the Roberts Court from the left and the right claim, with little equivocation, that the Court has established a friendly arena for business. Since John Roberts assumed the Chief Justiceship, the proportion of the docket devoted to business litigation appears to have increased; outcomes seem more likely to favor business interests; and the Court seems to be more consensual in its pro-business decisions, with divisions seemingly defying the expected conservative-liberal blocs.

If it is true that the Roberts Court is walking down the aisle with big business, then we must bring something old, something new, something borrowed, and something blue to the party. In the first section of this article, we find something old. I explore the ideological behavior of Justices Roberts and Alito compared to the justices they replaced, Rehnquist and O'Connor. All four justices have consistently voted in the conservative, or pro-business, direction in cases involving union activity and economic activity, which is exactly what the predominant model of Supreme Court decision making in political science—the Attitudinal Model—would predict. In the next section, I find something new. I show that despite the ideological similarities among Roberts,

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Alito, Rehnquist, and O'Connor, the Roberts Court as a whole is more likely than previous Courts to reach outcomes that favor business interests. The Attitudinal Model does not provide an adequate explanation for this shift, so next I find our something borrowed by borrowing from a different literature in political science.

Political Regimes theory, with its roots in the broader American Political Development and Historical Institutional literatures, suggests ways in which the Supreme Court operates as part of a political regime. Here, I explore how fundamental shifts in economic policy in national politics were a key feature of the New Right Regime, and Republican presidents sought to entrench a free market, deregulation agenda in the judiciary, and in the Supreme Court in particular. But a key to more fully understanding the long-term trend on the Court that has culminated in the pro-business Roberts Court can be found in the concept of "political time." While Republicans might have been expected to appoint justices who would support the New Right Regime's commitments to pro-business policies, what is less understood is the role Democratic President Bill Clinton played as a "preemptive president." I explain that as a preemptive president, Clinton's opportunities to oppose core values of the dominant lawmaking coalition were limited, and that much of his success was dependent upon his ability to neutralize, or preempt, cleavage issues between the parties. One of the issues Clinton successfully preempted was the differences between the parties in their approach to the economy and business. Clinton's appointees to the Court were therefore moderate to conservative on business and economic issues, while remaining committed to other core values of the Democratic Party. By the time President George W. Bush appointed Roberts and Alito, there was broad national consensus on approaches to business regulation, and most of the members of the Court had been influenced by the law-and-economics movement.

Lastly, I find our something blue and conclude the article by considering what the effect of the 2008 presidential election is likely to be for economic policy and the Supreme Court. As I conclude, much depends on whether President Barack Obama will be another preemptive president in the New Right Regime or whether he will be a reconstructive

president who creates a Blue State Regime.

II. SOMETHING OLD

What makes the Roberts Court the Roberts Court, and the reason we are examining it as a distinct unit of analysis in this symposium, is the departure and replacement of two justices from the Rehnquist Court, including Chief Justice Rehnquist. Therefore, an assessment of the judicial behavior on the Roberts Court in cases involving business interests should begin by asking how we should expect the Roberts Court to behave in these types of cases relative to earlier Supreme Courts. That is, if we were to go back to 2005, when the membership change was pending, what should our expectations have been? In this section, I examine the judicial behavior of the newest justices on the Court—John Roberts and Samuel Alito—compared to the justices they replaced—William Rehnquist and Sandra Day O'Connor—in decisions affecting business interests. As I will explain, theoretically we should expect that Roberts and Alito will vote in a pro-business direction in a manner similar to Rehnquist and O'Connor because all four have been identified as having conservative policy preferences. Empirical analysis comparing the votes of the four in decisions involving union activity and economic activity seemingly supports the theoretical expectations derived from the so-called "Attitudinal Model."

Among political scientists, the dominant theory of Supreme Court decision making has long been the old Attitudinal Model. The Attitudinal Model (the "AM") is by now familiar to, and well understood by, legal academics as well as political scientists. As the leading proponents of the AM, Jeffrey Segal and Harold Spaeth explain:

> This Model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist vote[d] the way he does because he [was] extremely conservative; Marshall voted the way he did because he was extremely liberal.[1]

The theoretical framework underlying the AM has its

1. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISTED 86 (2002).

roots in the legal-realism movement, but also it is formulated from insights derived from research from political science behavioralism, psychology, and economics.[2] In his book, *The Roosevelt Court*, C. Hermann Pritchett analyzed the justices' votes systematically, providing systematic evidence that the justices' votes appeared to be "motivated by their own preferences."[3] Although rich with quantitative data and empirical analysis, Pritchett's work was not particularly theoretical. In *The Judicial Mind*, Glendon Schubert began to scale justices' preferences along ideological and policy dimensions, developing a theoretical framework for understanding judicial behavior and measuring judicial ideology.[4] There were a number of other important developments along the way that built on the previous research by expanding on the theoretical reasons for why we should expect Supreme Court justices in particular to be free from constraints on their ability to vote their true policy preferences.[5] These culminated in the publication of Segal and Spaeth's *The Supreme Court and the Attitudinal Model* in 1993 and *The Supreme Court and the Attitudinal Model Revisited* in 2002.[6]

Segal and Spaeth provide a detailed theoretical explication of their model as well as rigorous empirical tests of the model. In short, Segal and Spaeth argue that the justices on the U.S. Supreme Court are free to vote their true policy preferences—or "attitudes"—because they (a) have life tenure and a guaranteed compensation and are therefore not beholden to the other branches of government or public opinion, (b) are at the top of their profession and are thus not seeking promotion, and (c) preside in the Court of last resort that cannot be overturned by a higher court, and that is unlikely to be overridden through other means, such as

2. *See id.* at 87–97; *see also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

3. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947, at xii (1948); *see also* SEGAL & SPAETH, *supra* note 1, at 89.

4. *See generally* GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963 (1965).

5. *See, e.g.*, DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); HAROLD J. SPAETH, AN INTRODUCTION TO SUPREME COURT DECISION MAKING: REVISED AND ENLARGED EDITION (1972).

6. *See* SEGAL & SPAETH, *supra* note 1; SEGAL & SPAETH, *supra* note 2.

constitutional amendments.[7] Therefore, legal rules and canons of interpretation, such as plain meaning and stare decisis, do not limit discretion in Supreme Court decision making. Judicial attitudes are usually conceptualized as falling along a single conservative-liberal dimension in which, among other things, conservative judges are more likely to favor the government in cases involving civil liberties and the individual or businesses in cases involving economic regulations; in contrast, liberal justices are more likely to vote in favor of the individuals and minorities in civil liberties and civil rights cases and in favor of government regulation in cases involving economic regulations.

Although there are a number of limitations to the AM, the empirical analysis of Segal and Spaeth, among many others, does indeed support the argument that, in general, the voting behavior of justices can oftentimes be explained by policy preferences, or something like ideology. Indeed, commentary about the Roberts Court oftentimes focuses on the ideological direction of the Court's decisions, and the Roberts Court has even been dubbed the most conservative Supreme Court since the New Deal Court.[8] For the purposes of this symposium, then, an important first cut at understanding the relationship between the Roberts Court and business interests is to examine the direction of the Roberts Court's decisions affecting business interests and to assess the power of the AM in these cases.

It is well documented that the judicial appointments by Richard Nixon began a shift to the right on the Court, and the appointments made by Ronald Reagan and George H.W. Bush solidified a conservative majority on the Court.[9] The Rehnquist Court was, on balance, a conservative court. The Roberts Court is composed of the same justices who served on the Rehnquist Court since 1994, less Sandra Day O'Connor and William Rehnquist, who were replaced by John Roberts and Samuel Alito. O'Connor was considered a moderate

7. SEGAL & SPAETH, *supra* note 1, at 92–96.

8. *See generally* Erwin Chemerinsky, *The Roberts Court at Age 3*, 54 WAYNE L. REV. 947 (2008).

9. *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004); DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS (1999).

conservative ideologically and Rehnquist one of the most conservative members of the Court. Commentary on Roberts has suggested that he is generally conservative, although his jurisprudential approach also seems to be marked by pragmatism and "minimalism," suggesting some moderation in judicial attitudes.[10] On the other hand, when Alito was nominated, he was typically described as "undeniably a conservative whose presence on the Supreme Court is likely to produce more conservative results than we would like to see" and as "a thoughtful conservative, not a raging ideologue."[11] Indeed, one commonly used measurement of the ideology of the justices among political scientists, the Segal-Cover Scores, confirms those commentaries. The Segal-Cover Ideology Scores are based on a scale with a range from 0 (most conservative) to 1 (most liberal). O'Connor's score is a .415; Rehnquist's score is .045; Roberts's score is .120; and Alito's score is .100.[12] These scores indicate that we would expect that Rehnquist would be the most conservative justice, then Alito, followed by Roberts, and lastly O'Connor, who is considered moderately conservative. In short, we should expect the Roberts Court to act similarly to the Rehnquist Court, meaning that it should favor business interests over government regulation and over labor interests at least as often as the Rehnquist Court, and perhaps slightly more so.

In order to assess the behavior of the Roberts Court toward business interests, I analyzed data from the U.S. Supreme Court Database, compiled by Harold Spaeth (the "Spaeth Database").[13] The Spaeth Database codes numerous

10. *See* Ronald Dworkin, *Justice Roberts on Trial*, N.Y. REV. BOOKS, Oct. 20, 2005, http://www.nybooks.com/articles/article-preview?article_id=18330; Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan.–Feb. 2007, at 104–13; Cass R. Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11.

11. Editorial, *Confirm Samuel Alito*, WASH. POST, Jan. 15, 2006, at B06.

12. For a discussion of how the Segal-Cover Scores are operationalized and measured, see Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–61 (1989); for updated scores, see Perceived Qualifications and Ideology of Supreme Court Nominees, 1937–2005, http://www.sunysb.edu/polsci/jsegal/qualtable.pdf (last visited Feb. 1, 2009). *See also* LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 108–13 (2005).

13. The database and supporting documentation are maintained by political scientist Kirk Randazzo at the University of South Carolina. *See* The Judicial Research Initiative, U.S. Supreme Court Databases, http://www.cas.sc.edu/poli/juri/sctdata.htm (last visited Jan. 1, 2009).

variables for every Supreme Court decision from the beginning of the Warren Court through the last Term of the Roberts Court. Among the many variables included in the database are the type of issue involved in the case, the attitudinal, or ideological, direction of each decision, and the direction of individual justice's vote in each case. Votes in favor of business interests are coded as being in the "conservative" direction, and votes in favor of government regulation, unions, or labor interests are coded as being in the "liberal" direction.

I first selected from the Spaeth Database cases that had been orally argued and decided on the merits involving the issue areas of union activity and economic activity.[14] Union activity cases involve arbitration in the context of labor-management or employer-employees relations, union antitrust, closed-shop litigation, the Fair Labor Standards Act, the Occupational Safety and Health Act, union membership disputes, and a host of other labor-management disputes. The economic activity cases include antitrust, mergers, bankruptcy, liability, punitive damages, the Employee Retirement Income Security Act, and a wide range of other government regulations of the economy and business activity. Votes in these cases are coded as "conservative" for votes in favor of business interests and against government regulation or union authority, and conversely, they are coded as being in the "liberal" direction for votes in favor of government regulation of economic activity or union authority and against the interests of private businesses.

If we want to know what we should expect from the Roberts Court, and, importantly, whether or how it might differ from the Rehnquist Court, a logical starting point is to understand how the behavior of the two newest justices differs from their predecessors, if at all. I examined the individual votes of Rehnquist, O'Connor, Roberts, and Alito in these issue areas by computing the total number of votes in

14. In selecting a unit of analysis and decisions types for the analysis in this article, I followed the advice of Sara Benesh, *Becoming an Intelligent User of the Spaeth Supreme Court Databases*, 16 LAW & CTS. (Am. Political Sci. Ass'n, College Park, Md.), 2006, at 16–19, *available at* http://www1.law.nyu.edu/lawcourts/pubs/newsletter/Winter%202006.pdf (selecting cases for which "ANALU" = 0 and "DEC_TYPE" = 1, 2, 4, 6, OR 7). For the codebook and relevant documentation, see The Judicial Research Initiative, *supra* note 13.

the conservative and liberal directions for each justice. As the results in table 1 indicate, all four justices are more likely to vote in the conservative, or pro-business, direction in these cases.

Table 1. Direction of Votes by Justices Rehnquist, O'Connor, Roberts, and Alito in Union and Economic Activity Cases

	Union Activity		Economic Activity		Combined Total	
Justice	C	L	C	L	C	L
Rehnquist	87	63	434	323	521	386
	(58%)	(42%)	(57%)	(43%)	(57%)	(43%)
O'Connor	53	35	279	207	332	242
	(60%)	(40%)	(57%)	(43%)	(58%)	(42%)
Roberts	2	1	28	19	30	20
	(67%)	(33%)	(60%)	(40%)	(60%)	(40%)
Alito	2	0	25	17	27	17
	(100%)	(0.0%)	(60%)	(41%)	(61%)	(39%)

Note: Percentages may not add to 100 due to rounding errors.
C = Conservative
L = Liberal

Rehnquist and O'Connor each voted in the conservative direction in most of the decisions involving union activity and economic activity during their time on the Court. As the far-right-hand column of table 1 indicates, Rehnquist voted in the conservative direction in 521 of 907 decisions, or fifty-seven percent of the time, while O'Connor voted in the conservative direction in 332 of 574 decisions, or fifty-eight percent of the time, in cases involving union or economic activity. Given that the Roberts Court is delineated by the appointment of Roberts as Chief Justice in September 2005, and that Alito's nomination was confirmed a few months later in the same Term in January 2006, Roberts and Alito have voted in far fewer cases than Rehnquist and O'Connor. Thus, it is important to be cautious in drawing conclusions from their votes so far. Nevertheless, such is the sundry business of evaluating the Roberts Court so early in its existence. While we must be cautious in making inferences, these data do constitute the population of cases in these issue areas through the end of the 2007 Term; thus, we can, at minimum, draw some conclusions about the first two-and-a-half years of

the Roberts Court. Again, turning to the combined total votes in union and economic activity cases, we see that Roberts has voted in the conservative direction in thirty of fifty decisions, or sixty percent of the time, while Alito has voted in the conservative direction in twenty-seven of forty-four of these decisions, or sixty-one percent of the time. In other words, each has voted in the pro-business direction about sixty percent of the time compared to Rehnquist and O'Connor, who voted in the conservative direction just under sixty percent of the time.

The analysis in this section indicates that all four justices are, indeed, more likely to vote in a pro-business direction in cases involving the regulation of economic activity and union activity. Roberts and Alito voted in the conservative direction slightly more than the two justices they replaced. These results are thus consistent with the AM. We have our Something Old.

III. SOMETHING NEW

The individual voting records appear to confirm that, as expected, conservative Roberts and Alito are likely to vote in favor of business interests, perhaps even a little more so than the two conservative justices they replaced. As I concluded in the previous section, the fact that Roberts and Alito vote in the conservative direction in business cases, and that we should expect the Roberts Court to be more likely to hand down decisions in favor of—as opposed to against—business or economic interests, is not breaking news. The Rehnquist Court evolved into a fairly reliable conservative Court. Pro-business conservatives Rehnquist and O'Connor were replaced by Roberts and Alito, whose conservative bona fides were most certainly part of the criteria upon which President Bush appointed them. Nonetheless, the Roberts Court's conservative predisposition does not mean it has been a clone of the Rehnquist Court. This section will explore some important ways in which the Roberts Court has deviated from the behavior of the Rehnquist Court in cases involving or affecting business interests.

The next step of the inquiry is to ask how has the membership change on the Court affected *outcomes* in business-oriented cases? To these ends, it is necessary to move from comparing the votes of individual justices on the

Court to the outcomes of the Court's decisions. I next examined the outcomes of orally argued decisions for union and economic activity cases. Table 2 reports the direction of these decisions for the Warren, Burger, Rehnquist, and Roberts Courts. The results show that the Roberts Court's decisions have resulted in a higher proportion of pro-business outcomes. While only twenty-eight percent of the Warren Court decisions in union activity and economic activity cases were in the conservative, or pro-business, direction, the percentage increased in subsequent Courts, to forty-eight percent during the Burger Court, fifty-four percent in the Rehnquist Court, and finally, sixty-four percent in the Roberts Court.

Table 2. Direction of Supreme Court Outcomes in Union and Economic Activity Cases by Chief Justice

	Union Activity		Economic Activity		Combined Total	
Chief Justice	C	L	C	L	C	L
Warren Court	42 (32%)	90 (68%)	131 (27%)	361 (73%)	173 (28%)	451 (72%)
Burger Court	54 (46%)	63 (54%)	223 (48%)	239 (52%)	277 (48%)	302 (52%)
Rehnquist Court	31 (59%)	22 (42%)	187 (53%)	167 (47%)	218 (54%)	189 (46%)
Roberts Court	2 (67%)	1 (33%)	31 (63%)	18 (37%)	33 (64%)	19 (37%)

Note: Percentages may not add to 100 due to rounding errors.
C = Conservative
L = Liberal

Thus, although the evidence in the previous section indicates that the individual behavior of Justices Roberts and Alito is only marginally more pro-business than that of their predecessors, the Roberts Court as a whole appears to be more likely to vote in the conservative direction than the Court under the previous three Chief Justices. And therefore, the explanation for this shift would seem to be more complicated than simply replacing two conservative justices on the Court with two new conservative justices.

It has been suggested by contributors to this symposium,

among others, that the Roberts Court is also accepting more business cases.[15] Table 3 reports the total number of Supreme Court decisions and the proportion of those decisions that were union or economic activity cases by Chief Justice. Of the Warren Court's 2344 decisions, 132 (six percent) involved union activity and 492 (twenty-seven percent) involved economic activity; of the Burger Court's 2912 decisions, 117 (four percent) involved union activity and 462 (sixteen percent) involved economic activity; of the Rehnquist Court's 2096 decisions, fifty-three (just under three percent) involved union activity and 354 (seventeen percent) involved economic activity; and of the Roberts Court's 240 decisions through the end of the 2007 Term, three (one percent) involved union activity and 492 (a little over twenty percent) involved economic activity.

Table 3. Union and Economic Activity Cases as Proportion of Court Agenda

Chief Justice	Union Activity (% of total)	Economic Activity (% of total)
Warren Court (N = 2344)	132 (5.6%)	492 (27%)
Burger Court (N = 2912)	117 (4.0%)	462 (15.9%)
Rehnquist Court (N = 2096)	53 (2.5%)	354 (16.9%)
Roberts Court (N = 240)	3 (1.2%)	49 (20.4%)

Note: unit of analysis = case citation and multiple issues

In addition to these more traditional issue areas involving business interests before the Court, it has been noted that the Roberts Court appears to be deciding more cases in other issue areas that have important implications for economic policy and big business.[16] One issue area in which the Roberts Court appears to deviate from the Rehnquist Court is federalism. The reinvigoration of doctrines that draw lines between federal and state power

15. *See, e.g.*, Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine) at 38.

16. *See id.*

was one of the hallmarks of the Rehnquist Court.[17] Beginning in the early 1990s, the Rehnquist Court handed down decisions that limited federal power under the Commerce Clause[18] and Section 5 of the Fourteenth Amendment,[19] and protected state powers under the Tenth Amendment[20] and the Eleventh Amendment.[21] The cases were nearly all decided in five-to-four votes, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority supporting states' rights and limited federal power, and Justices Stevens, Souter, Ginsburg, and Breyer in dissent.

Whereas the Rehnquist and Roberts Courts behaved similarly in the labor and economic activity cases analyzed in the previous section, the Roberts Court appears to be taking a different tact than the Rehnquist Court in federalism cases. One indication of a new direction can be seen in the comparison of votes by Roberts and Alito, and the justices they replaced, as I reported with union activity and economic activity cases in the previous section. I selected cases coded as "federalism cases" in the Spaeth Database, and computed the number and proportion of votes for federal power. For these cases, the Spaeth Database codes votes for federal power as "liberal" and conversely, votes for state power as "conservative." The results are reported in table 4.

17. *See, e.g.*, Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to the Revolution? Precursors to the Supreme Court's Federalism Revolution*, 34 PUBLIUS 85 (2004) [hereinafter Clayton & Pickerill, *Guess What Happened*]; J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPS. ON POL. 233 (2004) [hereinafter Pickerill & Clayton, *The Rehnquist Court*].

18. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

19. *See, e.g.*, Kimel v. Fl. Bd. of Regents, 528 U.S. 62 (2000); *Morrison*, 529 U.S. 598; City of Boerne v. Flores, 521 U.S. 507 (1997); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

20. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

21. *See, e.g.*, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); *Kimel*, 528 U.S. 62; Alden v. Maine, 527 U.S. 706 (1999); Coll. Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Seminole Tribe of Fl. v. Florida, 517 U.S. 44 (1996).

Table 4. Direction of Votes by Justices Rehnquist, O'Connor, Roberts, and Alito in Federalism Cases

	Federalism Votes	
Justice	Conservative	Liberal
Rehnquist	141	99
	(59%)	(41%)
O'Connor	87	93
	(48%)	(52%)
Roberts	3	8
	(27%)	(73%)
Alito	1	5
	(17%)	(83%)

Over the course of their careers, Rehnquist voted for state authority over federal power fifty-nine percent of the time, and O'Connor was about evenly split in her votes for federal and state power. On the other hand, Roberts and Alito have been much more likely to vote *for* federal power in cases pitting federal power against state power—Roberts voting for federal power seventy-three percent of the time and Alito voting for the federal government over states eighty-three percent of the time. Given the small number of votes, we must be cautious in the conclusions we draw—but again, that is a problem inherent in analyzing the Roberts Court after only three years. Still, it is striking that Roberts and Alito seem to have behaved very similarly to their predecessors in cases in the union- and economic-activity categories, but, at least in the first handful of cases in the area, they have diverged in an area in which conservatives on the Rehnquist Court had been deemed so successful.

The federalism cases are not direct measures of support for business interests by the Roberts Court, but the nature of those cases generally presents a challenge to the federal government's regulatory authority. As I will explore in the remainder of this section and in the next, a closer look at these cases may suggest a new direction for the Court and confirm that the Roberts Court has found new ways to support business interests. One subset of the federalism decisions worth considering in a little more depth are cases involving federal preemption of state power. These are instances in which federal and state law regulate the same activity, and the Court must determine whether there is room

for the state and the federal government to regulate the activity concurrently, or whether the federal law is so pervasive, or such a conflict exists between the laws, that the federal law preempts the state from regulating. A number of commentators have observed that, at least anecdotally, the Roberts Court appears to be taking the side of federal regulation over state law in cases with significant implications for business interests.[22] For instance, in *Riegel v. Medtronic, Inc.*,[23] the Court held that a manufacturer of a medical device that had satisfied federal Food and Drug Administration standards could not be sued under state tort law because the federal regulations preempt the state tort law. The vote was eight-to-one, with Justice Ginsburg lodging the sole dissent.

Again, using the Spaeth Database, I selected preemption cases from the federalism cases and compared the outcomes of those cases during the first three Terms of the Roberts Court to earlier Courts. The results are reported in table 5.

Table 5. Direction of Supreme Court Outcomes in Preemption Cases

	Preemption Decisions	
Chief Justice	Conservative	Liberal
Warren Court	17	34
	(33%)	(67%)
Burger Court	25	29
	(46%)	(54%)
Rehnquist Court	37	43
	(46%)	(54%)
Roberts Court	1	6
	(14%)	(86%)
Total	80	112
	(42%)	(58%)

22. 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 (2009); Jeffrey Rosen, *Keynote Address, Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929 (2009). For specific cases, see, e.g., Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989 (2008); Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008); Massachusetts v. EPA, 549 U.S. 497 (2007); Envtl. Def. v. Duke Energy Corp., 549 U.S. 561 (2007); United States v. Atl. Research Corp., 551 U.S. 128 (2007); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007); Rapanos v. United States, 547 U.S. 715 (2006).

23. *See Reigel*, 128 S. Ct. 999.

As table 5 shows, the Warren Court voted for federal power sixty-seven percent of the time, and state power only thirty-three percent of the time. The Burger and Rehnquist Courts shifted a little, each voting for federal power in fifty-four percent of their preemption decisions, and forty-six percent in favor of state power. Although the Roberts Court had only handed down seven preemption decisions by the end of the 2007 Term, it voted for federal power in six, or eighty-six percent, of those cases.

The Roberts Court appears to have turned from what is often characterized as a conservative disposition towards state authority in federalism cases to supporting the federal government over the states, especially in cases involving preemption where the federal regulation would appear to be more favorable to businesses than the state regulations in question. It appears that the federalism cases have presented the Court with competing conservative values—in other words, conflicts between the values of federalism and business. But federalism is not the only area in which such a conflict is presented to the Court, or where we seem to be witnessing such a divergence, at least anecdotally.

There are also a number of other Roberts Court decisions that have had implications for big business. For example, as others in this symposium discuss in more detail, the Roberts Court has limited punitive damages in lawsuits against big business under maritime law[24] and a mixture of procedural and substantive due process arguments.[25] It has struck down portions of campaign finance laws that restrict the ability of corporations, among others such as unions, to sponsor so-called issue-ads near federal elections.[26] And it reversed the white-collar-criminal conviction of Arthur Andersen for its shredding of documents in the Enron scandal.[27]

Based on the analysis of the Roberts Court's decisions in this section, as well as other contributors to this symposium, there does seem to be something new afoot regarding the Court's decisions and big business, or business interests broadly defined. The Roberts Court is hearing more cases in the traditional business-related issue areas of union activity

24. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).
25. *See* Philip Morris USA v. Williams, 549 U.S. 346 (2007).
26. *See* FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).
27. Arthur Andersen, L.L.P. v. United States, 544 U.S. 696, 708 (2005).

and economic activities, and it appears to be deciding a higher proportion of those cases in the conservative or pro-business direction. In addition, the Court seems to be deciding more cases in favor of business interests that involve a range of legal issues outside traditional union activity and economic activity issues. The Court's federalism decisions, and especially those involving preemption, seem to be favoring federal regulation over state regulation where that result may have positive consequences for big business. And as others in this symposium have elucidated, the Court has favored business punitive damages cases, white-collar crime, and campaign finance reform, to name a few. We have our Something New.

What explains this apparent shift? These cases cannot be explained adequately by the AM. The AM would predict that the replacement of Rehnquist and O'Connor by Roberts and Alito would have minimal impact on the Court's agenda and on the direction of its decisions. Yet there has been a shift. Most certainly, the explanation is a complex confluence of factors. As some commentators have noted, the U.S. Chamber of Commerce appears to be more active in its participation in Supreme Court adjudication.[28] And many of the decisions identified as pro-business decisions involved cross-cutting issues among those whose ideological predispositions are viewed as conservative, such as state autonomy versus tort reform, limiting substantive due process versus tort reform, or crime control versus business in white-collar-crime cases. A unidimensional and ahistorical understanding of ideology is unlikely to provide a very satisfying explanation for these types of cases involving cross-cutting issues. In the next section, I suggest that the Court's apparent pro-business orientation can best be understood at the aggregate level by borrowing from the insights of a growing literature on political regimes.

IV. SOMETHING BORROWED

The analysis in the previous two sections, especially when taken together with the other articles in this symposium, indicates that the Roberts Court is indeed a pro-

28. *See generally* Franklin, *supra* note 22; *see also* Rosen, *supra* note 15, at 38.

business conservative Court. In many respects this should not be surprising. The Rehnquist Court was a conservative court, the members of which were mostly appointed by Republican presidents with pro-business sympathies—but the increasing number and proportion of pro-business decisions from the Rehnquist Court to the Roberts Court is somewhat puzzling. In this section, I argue that the Roberts Court's decisions are best understood through the lens of a growing literature, primarily in political science, but also crossing over to numerous academic lawyers. Borrowing from the American Political Development ("APD") and Historical Institutionalism literatures, I argue that the Roberts Court's pro-business positions are best explained by regime politics theory and an understanding of the Supreme Court in political time.

A. Political Regimes, Political Time, and Political Change

Law and courts scholars (primarily from political science, but increasingly including legal academics) have shown that elected political elites often support judicial power for many strategic purposes. Thus, the Court is not simply a counter-majoritarian institution that thwarts the will of democratically elected officials.[29] Borrowing from the insights of Robert Dahl from a half-a-century ago, these scholars have identified ways in which the Court is fundamentally connected to the elected branches of the federal government, demonstrating that the role of the Court in the U.S. political system cannot properly be characterized as counter-majoritarian.[30] For example, elected officials might promote judicial policymaking in order to avoid responsibility for making controversial policy choices.[31] They might also use judicial review as a way to overcome entrenched interests or

29. *See generally* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001).

30. *See generally* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For a normative defense of a "political Court" that plays an active role in national policymaking, see generally TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

31. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993); *see also* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 42–67 (2003).

legislative obstructionists.[32] The Court may also manage divisions or cleavages within an elected official's own political coalition, such as when Democratic presidents during the 1940s–1960s encouraged the Court to reform American race relations in cases such as *Brown* as a way of circumventing opposition from powerful southern Democrats who controlled Congress.[33] Finally, elected officials might also want to empower courts as a way of entrenching policies and programs that they believe are becoming vulnerable to new or emerging electoral majorities.[34] And in so doing, as the Court extends the values of old electoral coalitions, it may bring a controversial issue to the fore that can evolve into a cleavage issue among the parties as minority parties attempt to redefine coalitions for political and electoral gains. For example, Republicans were able to exploit Court decisions on abortion and prayer in school to develop the values agenda and to court evangelicals and other voters who identified with the Religious Right and conservative social values.[35]

In effect, then, the exercise of judicial power can be understood in many ways other than as a counter-majoritarian power. Thus, while the Court might occasionally act in a manner counter to the policy preferences

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32. *See generally* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 85 AM. POL. SCI. REV. 821 (2005).

33. *See generally* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004); KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN (2004); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

34. *See generally* Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385 (2006); Clayton & Pickerill, *Guess What Happened*, *supra* note 17, at 85; Pickerill & Clayton, *The Rehnquist Court*, *supra* note 17, at 233. *See also* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 511–24 (2002); KECK, *supra* note 9; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997). For a comparative perspective, see generally RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

35. *See generally* J. Mitchell Pickerill & Cornell W. Clayton, The Supreme Court and the Political Regime: The New Right Regime and Religious Freedom (Sept. 2, 2006) (unpublished manuscript, on file with author); J. Mitchell Pickerill & Cornell W. Clayton, The New Right Regime and Privacy Rights, (April 22, 2006) (unpublished manuscript, on file with author).

of a particular majority, the relationship between the Court and democratic politics is more nuanced than is often appreciated or portrayed. Judicial power is just as often employed as a mechanism for repealing outdated legislation from previous constitutional periods, for extending the values of the current political regime to recalcitrant local jurisdictions, for protecting the policy commitments of a current majority that are becoming democratically vulnerable, for managing cross pressures within the dominant governing coalition, or for many other reasons that further or advance policy agendas of the dominant political coalition—but not necessarily as an agent of the majority coalition. Indeed, scholars adopting this "political regimes" approach have developed a large body of research that ties judicial decision making to specific patterns of party politics, group coalition building, critical elections, the policy agenda of the governing elites, and other features of the political regime.[36]

A political regime is identified as existing during a discrete historical period in which institutional arrangements and processes have distinct characteristics and remain relatively stable during that period. Most notably, the period is characterized by a dominant electoral coalition associated with a particular political party, as well as a coherent policy agenda that can be identified with the dominant coalition and party. The life of a regime is marked by the construction of a new regime that replaces an old regime, reaches a zenith, and then unravels until another new regime replaces it; this constitutes a temporal process that can be conceptualized as "political time." At the beginning of a regime, presidents and other political leaders define and articulate the major values of the regime, which are, in effect, the values and policy preferences of the electoral coalition that brought the new leader to office. In so doing, they also construct new constitutional and legal meanings for legitimating their values and preferences. The Supreme Court may eventually be expected to exercise power in ways that advance and

36. For an overview of "political regimes" or "political construction" literature, see generally Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425 (2005). *See also* Howard Gillman, *Courts and the Politics of Partisan Coalitions*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 644 (Keith E. Whittingon, R., Daniel Keleman & Gregory A. Caldeira eds., 2008).

extend these values—but not necessarily as an agent of the majority. Rather, legal interpretation often has its roots in antecedent political construction of law, although it is also the case that political change may occur in response to controversial judicial decisions, particularly during the decline of an existing regime.[37]

Although a political regime is characterized by stability in institutional arrangements and political order, the life of the regime is not a static one; rather, regimes are dynamic and fluid, and political regimes can emerge and decline in various ways. Political change is often the result of a process that Carmines and Stimson label "issue evolution."[38] According to issue evolution theory, changes in the political system are rarely created by the sharp, tectonic-style shifts posited by realignment and related theories. Change occurs in a more gradual fashion through "dynamic evolution of new issues" and "the continuous replacement of the electorate" around one or more issue cleavages.[39] As theorized by Carmines and Stimson, the process of issue evolution is a four-stage process: (1) political elites clarify and frame an issue in partisan terms, often for strategic electoral purposes; (2) taking cues from elite partisan actors, the mass public alters its perceptions of the parties with respect to the new issue dimension; (3) the issue evokes a strong emotional or affective reaction on the part of voters that destabilizes the inertia of existing partisan identifications; and (4) mass partisan realignment transpires.[40]

The historical course of a regime and political change can be characterized by what political scientist Stephen Skowronek labels as "political time": a cycle during which political institutions and actors find themselves in different inter-relationships in the regime, and with varying opportunities, levels of power, and constraints or limitations on that power.[41] For example, Skowronek has identified four types of Presidents in political time: *reconstructive presidents*,

37. *See generally* Graber, *supra* note 36.

38. EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 159 (1989).

39. *Id.* at 158.

40. *Id.* at 160–61.

41. *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 29–32 (1997).

articulation presidents, *preemptive presidents*, and *disjunctive presidents*. *Reconstructive presidents* stand in opposition to the agenda and values of a declining regime, and they possess greater opportunities to articulate and reconstitute the political order (Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan). *Articulation presidents* are from the same party as the dominant party of the regime and are committed to regime values at a time when the regime remains dominant. They may have opportunities to become "orthodox innovators" as they attempt to extend and expand on current regime values (e.g., James Madison, Theodore Roosevelt, Harry Truman, Lyndon Johnson, and George H.W. Bush). *Preemptive presidents* are opposed to the dominant political party, agenda, and values at a time when the regime remains strong. They are therefore constrained in their abilities to effect change. They will often find themselves having to find ways to neutralize key cleavage issues between their party and the dominant party, and much of their success may be defined by their ability to moderate the more extreme policies and stances in the existing regime (e.g., Grover Cleveland, Woodrow Wilson, Dwight Eisenhower, Richard Nixon, and Bill Clinton). Lastly, *disjunctive presidents* hold office during the twilight of a declining regime. They are usually blamed for political, economic, or social problems as the once-dominant coalition is falling apart, and they provide an easy target for reconstructive presidents as they build a new dominant electoral coalition, shatter the old regime, and reconstitute the regime (e.g., John Adams, John Quincy Adams, Franklin Pierce, James Buchanan, Herbert Hoover, and Jimmy Carter).

Presidents are not the only political institutions or actors whose authority is defined in some part by regime politics and political time. As Keith Whittington claims, "The Court does not exist outside of political time, but rather both helps determine political time and occupies a position within it."[42] Reconstructive presidents will oftentimes face a hostile Court, which has been constituted by the appointment process in the

42. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 75 (2007).

previous regime, and thus is committed to the agenda and values of the previous regime. In time, reconstructive presidents will successfully transform the Court through appointments or other mechanisms and reorient it to support new regime values. As Whittington acknowledges, "The politics of Reconstruction hinges on the ability of the president to bolster his authority to define the new regime and to wrest control over the definition of the constitutional order from other political actors, including the judiciary."[43] The Court may even "be used as a foil to enhance the president's own authority," in part because "[p]olitically isolated, judges make a particularly good representative of the old, discredited commitments and entrenched interests."[44] On the other hand, preemptive presidents find themselves in a very different position relative to the Court. Preemptive presidents are not usually "in a position to launch the reconstructive project. Preemptive presidents will instead have to pick their shots."[45] These presidents will often be "reformers within their own party" who are finding ways to neutralize cleavage issues that have hurt their party's electoral bids "by blurring party distinctions and offering themselves up as a moderate administrator of the consensus ideology . . . ."[46] These presidents will therefore not be in a very strong position to challenge the Court, but may find ways to support the Court in the name of consensus or moderation. The stability and relative independence of the judiciary will likely make it a more consistent, less partisan, and perhaps even friendlier institution for the preemptive president than Congress, at least one house of which is likely to be dominated by partisans committed to the dominant regime values. That is, the Court may reflect the core values of the regime over time, but it is not a "mere instrument" of the regime—a characteristic that can be useful to preemptive presidents, especially in periods of divided government.[47]

B. The New Right Regime, Economic Policy, and Big Business

As Cornell Clayton and I, among others, have described

43. *Id.* at 76.
44. *Id.* at 77.
45. *Id.* at 161.
46. *Id.* at 162.
47. *Id.* at 169–70.

elsewhere, the New Right Regime emerged over a period of time beginning in the late 1960s, solidifying itself with the election of Ronald Reagan in 1980.[48] A full review of the rise of the New Right Regime is beyond the scope of this article. But in short, it is a familiar story that as the New Deal coalition of northern and southern Democrats became increasingly fragmented, especially over civil rights in the 1960s, "political entrepreneurs" in the Republican Party capitalized on that fragmentation and seized on issues intended to bring portions of that coalition, especially more conservative southern Democrats, into a new Republican Party. Beginning with Richard Nixon's "southern strategy," and culminating in the election of Ronald Reagan, Republicans were able to exploit the fissures in the Democratic Party, begin defining several emerging cleavage issues, sharpen the differences between themselves and the Democrats, and court the voters who eventually became known as "Reagan Democrats." Reagan was elected and is viewed as a reconstructive president—replacing many of the values and commitments of the New Deal Regime with more conservative values and commitments.

In this section, I review how one of the key regime values articulated by Reagan was a pro-business agenda that included deregulation, tax relief, and supply-side economics. As a reconstructive president, Reagan opposed the redistributive, pro-regulation, Keynesian-based economic policies of the New Deal–Great Society regime. Reagan sought to replace what he and other Republicans labeled an anti-business agenda with a more pro-business, free market one. Although opposed by Democrats in the 1980s, by the time Bill Clinton was elected to the presidency, Democratic elites' views on economic regulation and business had shifted to a more moderate and consensus position; it was a key issue that had been a cleavage issue between Democrats and Republicans and which Clinton—a preemptive president—managed to neutralize.

The economic woes of the 1970s played a central role in Ronald Reagan's ascension to the presidency. The United

48. *See* Clayton & Pickerill, *Guess What Happened*, *supra* note 17, at 94–102; Pickerill & Clayton, *The Rehnquist Court*, *supra* note 17, at 237–38; Clayton & Pickerill, *supra* note 34, at 1386–87.

States was plagued by high unemployment, high inflation, and low economic growth. Reagan was successful in blaming the country's economic problems on the economic policies of then-President Jimmy Carter and the Democratic Party. Since the New Deal, Democrats' approach to economic policy had been rooted in Keynesian economics and espoused a positive "role for government regulation in managing the economy and redistributing incomes [to take] the hard edge off laissez-faire capitalism."[49] Early in his campaign, Reagan campaign officials had consulted libertarian economists like Milton Friedman, making economic policy a key campaign issue and formulating a new economic policy that would address international financial problems and take the country in a new direction.[50] As observers of the 1980 campaign have noted, Reagan took office pledging to "restore prosperity to American business."[51] Presidential election scholar Stephen Wayne notes how Reagan emphasized the poor economy and the need for a new economic policy: "Ronald Reagan drove the economic problem home in 1980 with the question he posed at the end of his debate with Jimmy Carter, a question directed at the American people: 'Are you better off now than you were four years ago?' "[52] Reagan's campaign pledges to a free market, pro-business economic policy are exemplified in these excerpts from the 1980 Republican Party platform:

> Elsewhere in this platform we discuss the benefits, for society as a whole, of reduced taxation, particularly in terms of economic growth. But we believe it is essential to cut personal tax rates out of fairness to the individual.
>
> Presently, the aggregate burden of taxation is so great that the average American spends a substantial part of every year, in effect, working for government.
>
> . . . .
>
> Tax rate reductions will generate increases in economic growth, output, and income which will

49. Isabel V. Sawhill, *Reaganomics in Retrospect*, *in* PERSPECTIVES ON THE REAGAN YEARS 91, 91 (John L. Palmer ed., 1986).

50. Kirk Victor, *The Braintrusters*, NAT'L J., Feb. 13, 1988, at 394–95.

51. Perry D. Quick, *Business: Reagan's Industrial Policy*, *in* THE REAGAN RECORD 287, 287 (John L. Palmer & Isabel V. Sawhill eds., 1984).

52. STEPHEN J. WAYNE, THE ROAD TO THE WHITE HOUSE 1996: THE POLITICS OF PRESIDENTIAL ELECTIONS 216 (1997).

> ultimately generate increased revenues. The greater justification for these cuts, however, lies in the right of individuals to keep and use the money they earn.
>
> . . . .
>
> . . . First and foremost, we are committed to a policy of economic expansion through tax-rate reductions, spending restraint, regulatory reform, and other incentives.[53]

Although Reagan won in a landslide, the economy remained an important cleavage issue between the two major parties. In the 1984 presidential election, Democratic nominee Walter Mondale opposed what had become known as "Reaganomics" and indicated that if elected, he would raise taxes as a means of deficit reduction; Reagan countered by opposing tax increases but supporting "tax simplification."[54] The 1984 Democrats continued to adhere to a policy agenda involving a more activist government in the regulation of the economy in the tradition of the New Deal and Great Society, as evidenced in their national platform that year:

> For the economy, the Democratic Party is committed to economic growth, prosperity, and jobs. For the individual, we are committed to justice, decency, and opportunity. . . .
>
> In the future we propose, young families will be able to buy and keep new homes—instead of fearing the explosion of their adjustable-rate mortgages. Workers will feel secure in their jobs—instead of fearing layoffs and lower wages. Seniors will look forward to retirement—instead of fearing it. Farmers will get a decent return on their investment—instead of fearing bankruptcy and foreclosure.
>
> . . . .
>
> We believe in the inspiration of American dreams, and the power of progressive ideals. We believe in the dignity of the individual and the enormous potential of collective action. We believe in building, not wrecking. We believe in bridging our differences, not deepening them. We

53. Platform for the Republican Party, 1980 (July 15, 1980), http://www.presidency.ucsb.edu/ws/index.php?pid=25844.

54. *See* Henry A. Plotkin, *Issues in the Campaign*, *in* THE ELECTION OF 1984: REPORTS AND INTERPRETATIONS 35, 44 (Marlene Michaels Pomper ed., 1985).

> believe in a fair society for working Americans of average income; an opportunity society for enterprising Americans; a caring society for Americans in need through no fault of their own—the sick, the disabled, the hungry, the elderly, the unemployed; and a safe, decent and prosperous society for all Americans.
>
> . . . .
>
> We have a proud legacy to build upon: the Democratic tradition of caring, and the Democratic commitment to an activist government that understands and accepts its responsibilities.[55]

Mondale's willingness to raise taxes was likely a contributing factor in the Reagan landslide victory that year.[56] And in any event, Reagan and the Republican Party successfully exploited the differences in economic and tax policy between themselves and Mondale and the Democrats.[57]

In 1992, Bill Clinton ran as a "New Democrat." Within the campaign, "it's the economy, stupid" became a mantra. Clinton attempted to neutralize several key cleavage issues that seemed to plague the Democrats' presidential candidates in three successive presidential elections. One of those was the perception that Democrats were for "big government" and were anti-business. As the 1992 Democratic Platform made clear, Clinton and his Democratic supporters argued that they did not want to return to pre-Reagan regulatory policies, but that there was a "third way" of approaching economic policy, one that moderated the extremes:

> The Revolution of 1992 is about restoring America's economic greatness. We need to rebuild America by abandoning the something-for-nothing ethic of the last decade and putting people first for a change. Only a thriving economy, a strong manufacturing base, and growth in creative new enterprise can generate the resources to meet the nation's pressing human and social needs. An expanding, entrepreneurial economy of high-skill, high-wage jobs is the most important family policy,

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55. Platform for the Democratic Party, 1984 (July 16, 1984), http://www.presidency.ucsb.edu/ws/index.php?pid=29608.

56. *See, e.g.*, NELSON W. POLSBY & AARON WILDASKY, PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES IN AMERICAN POLITICS 97–98 (9th ed. 1996); Gerald M. Pomper, *The Presidential Election*, *in* THE ELECTION OF 1984: REPORTS AND INTERPRETATIONS, *supra* note 54, at 74.

57. *See* Pomper, *supra* note 56, at 74.

> urban policy, labor policy, minority policy and foreign policy America can have.
>
> . . . .
>
> Our Party's first priority is opportunity—broad-based, non-inflationary economic growth and the opportunity that flows from it. Democrats in 1992 hold nothing more important for America than an economy that offers growth and jobs for all.
>
> . . . .
>
> We reject both the do-nothing government of the last twelve years and the big government theory that says we can hamstring business and tax and spend our way to prosperity. Instead we offer a third way. Just as we have always viewed working men and women as the bedrock of our economy, we honor business as a noble endeavor, and vow to create a far better climate for firms and independent contractors of all sizes that empower their workers, revolutionize their workplaces, respect the environment, and serve their communities well.
>
> We believe in free enterprise and the power of market forces. But economic growth will not come without a national economic strategy to invest in people. For twelve years our country has had no economic vision, leadership or strategy. It is time to put our people and our country first.[58]

Thus, in 1992, Clinton set out to neutralize what had been a losing issue for the Democrats.[59] That he was successful in doing do is evidenced by the results of Gallup Polls that asked Americans which party they thought would best handle the economy: in 1980, thirty-five percent responded that the Republicans would best handle the economy, and thirty-six percent that the Democrats would be the best custodians of the economy; in 1984, forty-eight percent responded that the Republicans would best handle the economy, and thirty-six percent that the Democrats would be the best custodians of the economy; in 1988, fifty-two

58. Platform for the Democratic Party, 1992 (July 13, 1992), http://www.presidency.ucsb.edu/ws/index.php?pid=29610.

59. As others have noted, Clinton was helped by the fact that the country experienced a slowing economy and at least a mild recession during the last year of George H.W. Bush's presidency. *See, e.g.*, WAYNE, *supra* note 52, at 217.

percent responded that the Republicans would best handle the economy, and thirty-four percent that the Democrats would be the best custodians of the economy; however by 1992, the trend had reversed, and only thirty-six percent responded that the Republicans would best handle the economy compared to forty-five percent who responded that the Democrats would be the best custodians of the economy.[60]

Once in office, the Clinton administration developed an economic policy that centered on deficit reduction and free trade.[61] In the first year, his economic plan was enacted, after Vice President Al Gore cast a tie-breaking vote for the plan in the Senate, on August 6, 1993.[62] And although he risked alienating organized labor and being seen as abandoning traditional Democratic commitments, Clinton chose to support the bipartisan passage of the North American Free Trade Agreement ("NAFTA"), reportedly telling staff, "I have to be a President beyond borders."[63] In assessing Clinton's legacy, Peter Baker wrote in the *Washington Post* just last year:

> As a New Democrat, he aimed to govern more from the center, declaring that "the era of big government is over," pushing a deficit-reduction package through Congress by a single vote, winning approval of the North American Free Trade Agreement and overhauling the welfare system. He presided over the longest peacetime economic expansion in American history to date.[64]

Undoubtedly, two of the most significant accomplishments of Clinton's presidency were deficit reduction and the promotion of free trade.[65] Clearly, Clinton had been successful in

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60. NELSON W. POLSBY & AARON WILDASKY, PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES IN AMERICAN POLITICS 149 (11th ed. 2004).

61. The third prong of the Clinton economic agenda was based on Robert Reich's theory of human capital and the need for substantial amounts of government "investment" in policies such as job training. BOB WOODWARD, THE AGENDA: INSIDE THE CLINTON WHITE HOUSE 95–162 (1995). As Woodward points out, however, while there was some additional investment in infrastructure in Clinton's economic policies, the emphasis would become deficit reduction and free trade. *Id.*

62. *See id.* at 356–67 (describing the passage of the plan).

63. *Id.* at 374.

64. Peter Baker, *Bill Clinton's Legacy: How Former President is Viewed Could Affect Vote*, WASH. POST, Feb. 3, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/story/2008/02/03/ST2008020300011.html.

65. *See generally* ALEX WADDEN, CLINTON'S LEGACY?: A NEW DEMOCRAT IN

preempting these economic issues as significant cleavage issues between the parties.

C. The Supreme Court, the New Right Regime, and Economic Policy

Scholars have chronicled the rise of conservatism as a political force influencing the direction of the Supreme Court's jurisprudence. The key mechanism for doing so has involved judicial appointments. As far as the Supreme Court is concerned, then, we would expect Reagan-Bush judicial appointees to support, at a general level, the commitments and policies of the New Right Regime. Reagan, as a reconstructive president, had replaced the old regime values with new ones. Moreover, he made appointments to the Supreme Court designed to entrench those values. Indeed, it is well documented that Reagan and his legal advisors, such as Attorneys General William French Smith and Edwin Meese III, and other members of the administration to whom Reagan delegated great authority over judicial appointments, "had a more coherent and ambitious agenda for legal reform and judicial selection than any previous administration."[66] The Reagan team's strategy was clear; as David O'Brien claims, "Indisputably, Reagan's Justice Department systematically and effectively infused its legal policy goals into the judicial selection process."[67] They did so by implementing a rigorous and organized screening process that involved interviews and in-depth background investigations to assure that potential nominees were ideologically in tune with the New Right agenda.[68] The appointment of conservative judges was greatly facilitated by "the rise of the conservative legal movement," which involved the promotion of conservative legal values through various

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GOVERNANCE (2002). For a broader range of perspectives on the Clinton legacy, see generally THE CLINTON LEGACY (Colin Campbell & Bert A. Rockman eds., 2000).

66. David M. O'Brien, *The Reagan Judges: His Most Enduring Legacy?*, *in* THE REAGAN LEGACY: PROMISE AND PERFORMANCE 60, 62 (Charles O. Jones ed., 1988).

67. *Id.* at 67.

68. *Id.* at 67–71; DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 133–35 (1999); Sheldon Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 315 (1985).

conservative foundations, think tanks, and related groups, such as the Olin Foundation, the Federalist Society, the Law and Economics Center, the Center for Individual Rights, and the Institute for Justice.[69]

Reagan's appointments were successful in the sense that the federal courts gradually became more conservative and supported the conservative legal agenda. Reagan's judicial appointments have been deemed his "best legacy."[70] As the New Right gradually consolidated its control over the elected branches of the national government and appointed more federal judges—and Supreme Court justices more specifically—it extended its control over the Supreme Court and significantly altered many areas of law. In federalism, for example, the Rehnquist Court reasserted the idea of state sovereignty under the Tenth and Eleventh Amendments and, for the first time since the establishment of the New Deal Regime in the 1930s, restricted congressional authority under the Commerce Clause and Section 5 of the Fourteenth Amendment.[71] Similarly, in the areas of criminal justice and criminal procedure, the post-1968 Court has narrowed the applicability of the Court's *Miranda v. Arizona* and *Mapp v. Ohio* precedents, limited the exclusionary rule more generally, and consistently upheld the constitutionality of the death penalty.[72] Indeed, the changes to law and legal doctrines made by the Court reflected closely the political views and electoral positions articulated by the Republican Party after 1964 at both the general level and in many particulars.[73]

In each of these instances, the Republican Party pursued an explicit strategy aimed at implementing and entrenching core New Right policy goals by altering the Court's jurisprudence. While the Rehnquist Court's federalism revival reflected New Right antipathy for the New Deal regulatory state and a normative commitment to limiting federal power, the Court's criminal justice decisions reflected

69. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

70. O'Brien, *supra* note 66, at 60.

71. *See* Clayton & Pickerill, *Guess What Happened*, *supra* note 17, at 85–86; Pickerill & Clayton, *The Rehnquist Court*, *supra* note 17, at 240–41.

72. *See* Clayton & Pickerill, *supra* note 34, at 1416–17.

73. *Id.* at 1411–18.

the New Right's antipathy toward the liberal corrective idea of rehabilitation and its preference for policies emphasizing retributive punishment and strengthened law enforcement authority. The Reagan legal and judicial strategy was most overtly aimed at liberal activism in the Warren and early Burger Courts, and the salient social issues that arose associated with some of the more controversial Supreme Court decisions, such as prayer in public schools, abortion, pornography, and crime.[74]

Part of Reagan's legal policy agenda, however, also included an economics and pro-business component. As Steven Teles chronicles in his definitive work on the conservative legal movement, the "first conservative public interest law firm, the Pacific Legal Foundation" was founded in 1973 in California—while Reagan was Governor—in an effort to counter liberal public interest law firms ("PILFs").[75] According to Teles, "Conservatives in government, especially Ronald Reagan during his stint as governor from 1967–1975, found their agenda obstructed by liberal PILFs . . . ."[76] Teles carefully explains how the law-and-economics movement then emerged as an approach to law in which the primary objective of law is economic efficiency, and how the approach migrated into elite law schools such as the University of Chicago, Yale University, Harvard University, and beyond.[77] It is not surprising, then, that Reagan's judicial appointments would bring with them to the Court a law-and-economics, pro-business outlook on the law. Nor should it be surprising that subsequent Republican presidents would, as articulation presidents, also appoint justices with the same sort of commitment.

On the other hand, it might have been assumed that a Democratic president would appoint judges—and Supreme Court justices specifically—who would be friendly toward government regulation of business and oppose the Reagan economic agenda. But recall that Clinton was a preemptive president who quite consciously moderated the positions of his party in order to neutralize or preempt important cleavage issues that had disadvantaged Democrats at the

74. YALOF, *supra* note 68, at 133.
75. TELES, *supra* note 69, at 61.
76. *Id.* at 60.
77. *Id.* at 181–216.

polls in three previous national elections. When Clinton's first opportunity arose to appoint a Supreme Court justice by nominating a successor to Justice Byron White in 1993, Clinton is said to have wanted to hit a "home run," and was interested in nominating former New York Governor Mario Cuomo.[78] However, Cuomo publicly withdrew his name.[79] According to White House adviser George Stephanopoulos, Clinton described the characteristics he was looking for in a Supreme Court nominee: "fine mind, good judgment, wide experience in the law and in the problems of real people, and someone with a big heart."[80] While Clinton had hoped to find a nominee with some political experience, like Cuomo or Secretary of the Interior Bruce Babbitt, Clinton chose to avoid "engaging in another messy confirmation struggle with Republicans," especially in the wake of his failed nomination of Lani Guinier to the Department of Justice.[81] Clinton eventually selected Ruth Bader Ginsburg to replace Justice White, and a year later, Stephen Breyer to replace Justice Harry Blackmun. Both of these selections were considered "safe" in the sense that they were viewed as judicial moderates, and both were acceptable to Orrin Hatch (R-UT), the ranking member of the Senate Judiciary Committee.[82] According to Michael Gerhardt, Clinton decided not to pursue nominees on ideological grounds, but instead "on the grounds of their appeal to certain constituencies, age and health, and likelihood for confirmation."[83]

Although Ginsburg supported some core values of the Democratic Party, such as abortion rights, freedom of speech, and efforts to fight sex discrimination, she had "acquired a reputation as a cautious centrist on an appellate court with deep ideological divisions."[84] And she had attended a law-and-economics conference put on for federal judges by

78. MARK SILVERSTEIN, JUDICIOUS CHOICES: THE POLITICS OF SUPREME COURT CONFIRMATIONS 114–15 (2007).

79. *Id.*

80. *Id.* at 114; GEORGE STEPHANOPOLOUS, ALL TOO HUMAN: A POLITICAL EDUCATION 167 (1999).

81. YALOF, *supra* note 68, at 199.

82. *Id.*

83. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 76 (2000); *see also* YALOF, *supra* note 68, at 196–205.

84. SILVERSTEIN, *supra* note 78, at 117.

conservative foundations.[85] As Silverstein observes, "The moderating impact of her years on the federal bench, her gender, her religion (she would be the first Jewish justice since Abe Fortas) made her, in the words of Republican Senator Charles Grassley of Iowa, a 'Democrat even Republicans can support.' "[86] Indeed, Jeffrey Rosen would come to refer to Ginsburg as the "avatar, in most cases, of judicial minimalism" and "the antithesis of William Brennan, the liberal lion of the Warren Court."[87]

Breyer, too, was seen as a centrist. According to Michael Comiskey,

> Although his views on some issues were unknown, he was widely described by his acquaintances and the many members of the legal community familiar with his work as pro-choice (as he acknowledged at his confirmation hearings), skeptical toward business regulation (the subject of his four books), moderate to conservative on crime . . . and a defender of the use of legislative history to interpret statutes.[88]

He was also well known to members of the Senate Judiciary Committee because he had served as chief counsel to the committee, and in particular, Senators Ted Kennedy (D-MA) and Orrin Hatch (R-UT) supported him.[89] In addition to the conventional wisdom espoused that Ginsburg and Breyer were moderate or centrist judges, the Segal-Cover Scores of perceived ideology (discussed earlier) supports the assessment and places both in the middle of the ideological scale.[90]

Both of Clinton's nominees were easily confirmed. But as Silverstein notes, "The ease with which both Ginsburg and Breyer gained Senate approval must not obscure the degree to which their appointments were the product of political conflict and weakness."[91] Indeed, Clinton's appointments to the Supreme Court, Ruth Bader Ginsburg and Stephen

85. TELES, *supra* note 69, at 113.

86. SILVERSTEIN, *supra* note 78, at 118 (citation omitted).

87. Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine) at 60.

88. MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 143 (2004).

89. *Id.*; *see also* YALOF, *supra* note 68, at 198.

90. *See* EPSTEIN & SEGAL, *supra* note 12, at 110.

91. SILVERSTEIN, *supra* note 78, at 121.

Breyer, reflected his more moderate position on the issues he had worked to preempt and avoided difficult partisan fights. And thus, by the time John Roberts was appointed to replace Chief Justice Rehnquist in 2005, issues involving business and economic regulation were not significant cleavage issues in national politics. The Court could comfortably follow a law-and-economics approach to legal interpretation that was consistent with consensual political values.

In order to examine further the record of the Court in business-related cases, and the effects of Clinton's preemptive presidency on the Court, I computed the outcomes of the Court decisions involving union activity and economic activity across periods not determined by who was Chief Justice, but rather by key points in political time. Because I am interested in the evolution of the pro-business issue across the New Right Regime and the impact of the appointments during Clinton's preemptive presidency, I analyzed outcomes during periods beginning with the first Supreme Court appointment of Dwight Eisenhower (Earl Warren in 1953), Richard Nixon (Warren Burger in 1969), Ronald Reagan (Sandra Day O'Connor in 1981), Bill Clinton (Ruth Bader Ginsburg in 1993), and George W. Bush (John Roberts in 2005). Each period—until the appointment of John Roberts in 2005—spans roughly the same amount of time: twelve or thirteen years.

Table 6. Direction of Supreme Court Outcomes in Union and Economic Activity Cases in Political Time

President (First Appoint.)	Union Activity		Economic Activity		Combined Total	
	C	L	C	L	C	L
Eisenhower 1953 (Warren)	42 (32%)	90 (68%)	131 (27%)	361 (73%)	173 (28%)	451 (72%)
Nixon 1969 (Burger)	23 (52%)	21 (47%)	65 (43%)	87 (57%)	88 (45%)	108 (55%)
Reagan 1981 (O'Connor)	51 (48%)	55 (52%)	241 (51%)	232 (49%)	292 (50%)	287 (50%)

. . . . . .

Table 6. Direction of Supreme Court Outcomes in Union and Economic Activity Cases in Political Time (*continued*)

President (First Appoint.)	Union Activity		Economic Activity		Combined Total	
	C	L	C	L	C	L
Clinton 1993 (Ginsburg)	11 (55%)	9 (45%)	104 (55%)	87 (46%)	115 (55%)	96 (46%)
Bush 2005 (Roberts)	2 (67%)	1 (33%)	31 (63%)	18 (37%)	33 (64%)	19 (37%)

Note: Percentages may not add to 100 due to rounding errors.
C = Conservative
L = Liberal

As table 6 shows, the trend in the Court's pro-business orientation began with President Nixon's appointments. While the Court decided seventy-two percent of union and economic cases in a liberal (pro-union or pro-government regulation) direction from Eisenhower's appointment of Warren in 1953 until Nixon's appointment of Burger in 1969, it decided only fifty-five percent in the liberal direction from the appointment of Burger until Reagan's appointment of O'Connor in 1981. After 1981, the Court shifted to the right in these cases, and between 1981 and Clinton's appointment of Ginsburg, the Court was evenly split, deciding fifty percent in the liberal direction and fifty percent conservative (or pro-business) direction. From 1993 until Bush's appointment of John Roberts in 2005, the Court continued the trend and decided an even higher proportion—fifty-five percent—of these cases in the conservative direction. And as we saw earlier, in the short time since Roberts was appointed, the Court has become even more conservative in these cases, deciding sixty-four percent in the conservative direction.

Although it may be tempting by some to attribute the evolution of a pro-business Supreme Court solely to conservative justices appointed by Republican presidents, the evidence suggests that would probably be an oversimplification. An underlying cause of the shift has been attributed to the nature of regime politics, taking into account the role of preemptive presidents in political time. How a

preemptive president influences issue evolution on the Court will depend on the issues that those presidents choose to preempt and which they choose exploit, as well as the strength of the existing regime. Clinton's choice to preempt the past divisions between Republicans and Democrats over economic policy, and a relatively weak political position, led to moderate justices who remain committed to core values of the Democratic Party that Clinton did not preempt, but who hold more moderate, or even conservative, views on economic and business-related issues.

By elaborating on the connection between regime politics, political time, and the evolution of commitments in the broad area of economic policy and business regulation, I do not mean to suggest that no other factors were at work here. As Teles has shown quite persuasively, the conservative legal movement mobilized successfully and had a significant influence in bringing law-and-economics approaches to law students, scholars, practitioners, and judges.[92] Indeed, Rosen and others in this symposium have argued that the role of the U.S. Chamber of Commerce has been important in bringing more business cases before the Court and in the pro-business outcomes on the Court.[93] Moreover, it has been suggested that one of Roberts's goals in assuming the Chief Justiceship was to try to reach more consensual decisions for the sake of legal stability and institutional legitimacy, and to avoid fragmented controversial decisions.[94] It may be that business cases, especially statutory interpretation cases, involve less salient, more narrow, and technical legal issues that evoke less ideological passion and result in more consensus on the Court. Moreover, in the area of statutory construction, a larger proportion of the statutes or statutory provisions being interpreted by the Court today are likely to have been passed or amended by Congress during the New Right Regime by Republicans, usually during periods with a Republican president or a Republican Congress, or both. Hence, those

92. *See generally* TELES, *supra* note 69.

93. Jeffrey Rosen, Professor of Law at George Washington Univ., Legal Affairs Editor of the New Republic, Keynote Address at Santa Clara Law Review Symposium: Big Business and the Roberts Court (Jan. 23, 2009); Brian Wolfman, Dir., Pub. Citizen Litig. Group, Address at Santa Clara Law Review Symposium: Big Business and the Roberts Court (Jan. 23, 2009).

94. *See* JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 7–8 (2006); Rosen, *supra* note 10, at 105–13.

provisions may well have been intended to be applied in a manner that might be considered business friendly.

While it is most certainly true that some or all of these additional factors have probably contributed in some way to the increasingly pro-business orientation of the Roberts Court, the Court's pro-business decisions are best understood as the culmination of a long issue evolution during the New Right Regime. Importantly, the evolution was facilitated by a Democratic president, who—because he was a preemptive president—chose to neutralize cleavages between the parties over economic policy. We have our Something Borrowed.

V. SOMETHING BLUE

If, indeed, Democratic President Bill Clinton facilitated the evolution of the New Right's economic policies, it is appropriate to conclude this inquiry by asking: what should we expect after the 2008 presidential election? There has been speculation about the possibility that President Barack Obama could have as many as three vacancies on the Court to fill in his first term alone.[95] What should we expect from Obama then? Should we expect Clinton-like appointments who are similar to Justices Ginsburg and Breyer and who act moderately conservative in business cases, but who still support abortion rights, affirmative action, and civil rights; a decidedly liberal, pro-regulatory activist; or a new type of non-conservative? It is obviously too early to predict with much confidence, but the answer would seem to hinge on where we are in political time and what type of president Obama will be. On the one hand, Obama could turn out to be another preemptive president in the New Right Regime. On the other hand, perhaps he will turn out to be a reconstructive president who will bring about a new Blue State Regime.

There are certainly indications that Obama could be a reconstructive president. President George W. Bush left office with the lowest public approval ratings of any president

95. *See, e.g.*, Tom Goldstein, *The Court and the 2008 Election*, SCOTUSBLOG, May 18, 2007, http://www.scotusblog.com/movabletype/archives/2007/05/analysis_the_co_3.html.

in the history of approval ratings.[96] The Republicans lost big in the 2006 congressional elections, and the Democrats gained control of both houses of Congress for the first time since 1994. Clayton and Christensen observe that "Barack Obama's election in 2008 came with victories in states the Democrats had not carried in forty years and significantly expanded majorities in both houses of Congress."[97] And therefore, "[i]f Bush is a disjunctive president, then Obama comes into office, with an opportunity at least, to become a reconstructive one."[98] If Obama were to seize that opportunity, we would expect a bold policy agenda that breaks with the commitments of the New Right Regime in fundamental ways. And if the new president does so, we would expect his nominees to the Court to reflect new commitments made by President Obama. Obama's stated reasons for voting against the nominations of Justices Roberts and Alito while in the Senate might suggest the types of values that would guide the commitments and agenda in a Blue State Regime; in each instance, Obama acknowledged the nominee's qualifications, but stated that he would vote against them because they had records of supporting the "strong over the weak" and the "powerful against the powerless."[99] Moreover, Obama has stated that Earl Warren might serve as a model for his ideal justice.[100] These statements suggest that Obama might indeed pursue a transformative agenda, and he might try to appoint justices who support redistributive economic policies and more extensive regulations of corporations and business activities.

On the other hand, it is not a foregone conclusion that Bush was indeed a disjunctive president. Skowronek has labeled him an articulation president who has engaged in

96. Paul Steinhauser, *Belief the Country is Heading in the Right Direction at an All Time Low*, CNN.COM, Nov. 10, 2008, http://www.cnn.com/2008/POLITICS/11/10/bush.transition.poll.

97. Cornell W. Clayton & Ericka Christensen, *Whither the Roberts Court?*, 6 THE FORUM: ARTICLE 10, 21 (2008), *available at* http://www.bepress.com/forum/vol6/iss4/art10.

98. *Id.*

99. For Obama's speech opposing John Roberts in 2005, see 151 CONG. REC. S10365–66 (2005) (statement of Sen. Obama). For his speech opposing Samuel Alito in 2006, see 152 CONG. REC. S190 (2006) (statement of Sen. Obama).

100. *See* Michael Powell, *Strong Words in Ohio as Obama and Clinton Press On*, N.Y. TIMES, Mar. 3, 2008, at A16, *available at* http://www.nytimes.com/2008/03/03/us/politics/03campaign.html.

extending the commitments of Reagan and the New Right Regime.[101] Bush's unpopularity, which surely has its roots in the extended and increasingly unpopular Iraq War, may not mean that the New Right Regime has run its course. The regime may be in decline, to be sure, but it is not clear that voters voted for a full-fledged abandonment of the conservative principles brought to bear by Ronald Reagan less than thirty years ago. Obama faces a number of constraints that may limit his opportunities to be transformative. For example, the most pressing matter for Obama is the economic collapse suffered in the United States and abroad, and it is not clear that his approach to addressing these economic woes will differ significantly from the course set by Bush in the Fall of 2008. Obama also inherited wars in Iraq and Afghanistan, as well as the broader war on terror. And while his approach to conducting those wars will most certainly differ from his predecessor, his options for addressing them are not unlimited. In terms of the Supreme Court, it is the case that his party controls the Senate, but they do not have the sixty votes it takes to break a filibuster, and therefore, controversial nominees or those perceived as extreme might take a lot of political capital. And of course, Obama himself has expressed an interest in "changing the way Washington does politics" by pursuing a bipartisan and consensual approach to policymaking. If Obama turns out to be more preemptive than reconstructive, the future of the Court will depend on which issue he preempts and which issues remain at the core of the Democratic Party's agenda. We may or may not have our Something Blue.

101. *See generally* Stephen Skowronek, *Leadership by Definition: First Term Reflections on George W. Bush's Political Stance*, 3 PERSPS. ON POL. 817 (2005).

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