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Do Conservative Judges Favor Wall Street? Ideology and the Supreme Court's Securities Regulation Decisions

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DO CONSERVATIVE JUSTICES FAVOR WALL STREET?
IDEOLOGY AND THE SUPREME COURT'S SECURITIES
REGULATION DECISIONS[†]

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Marco Ventoruzzo^{**}

The appointment of Supreme Court justices is a politically-charged process and the “ideology” (or “judicial philosophy”) of the nominees is perceived as playing a potentially relevant role in their future decision-making. It is fairly easy to intuit that ideology somehow enters the analysis with respect to politically divisive issues such as abortion and procreative rights, sexual conduct, freedom of speech, separation of church and state, gun control, procedural protections for the accused in criminal cases, and governmental powers. Many studies have tackled the question of the relevance of the ideology of the Justices or appellate judges on these issues, often finding a correlation between policy preferences and decisions. This Article fills a gap in the existing literature examining the correlation between ideology and judicial decision-making in the highly technical area of securities regulation. We address the question if “conservative Justices” are more “pro Wall Street,” and “liberal Justices” more “pro investors.” Our results confirm that, even using different definitions and measures of ideology, conservative Justices favor “free and less regulated markets,” and liberal Justices are more protective of investors, especially small investors, more concerned about market failures, and more in favor of private plaintiffs or government intervention. Two caveats are important. First, we do not

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associate any negative implication with the fact that ideology plays a role in deciding “hard cases.” Obviously our study does not in any way imply that the Justices distort the law in order to achieve predetermined policy goals, but simply that, when the law is ambiguous, different and legitimate interpretative approaches and policy considerations might lead to different outcomes. The best guarantee of good decision-making is not an abstract aspiration to a completely apolitical adjudicator, but in a diverse composition of our courts. Second, while the data indicate a meaningful correlation, the correlation does not entirely explain the positions of the Justices, therefore confirming the independence and prestige of the Supreme Court and its members.

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INTRODUCTION

President Ronald Reagan nominated Judge Robert Bork for Associate Justice of the Supreme Court in 1987.¹ Before his confirmation hearing at the Senate, Senator Ted Kennedy took the floor and delivered a statement that was a death knell to Judge Bork's appointment:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, and schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of Americans.²

The Senate did not confirm Judge Bork's nomination.³

A few decades earlier, in what was one of the first modern confirmation hearings, the Senate was discussing the nomination of then-Professor Felix Frankfurter by President Franklin Roosevelt.⁴ The year was 1939.⁵ The proposed appointment of a liberal judge of Jewish descent, who was born in Austria and co-founded the ACLU, was both a symbolic attack on the Nazi gangrene spreading in Europe and a spark for a controversy ready to flame in America.⁶ Several people testified before the Senate Judiciary Committee opposing Frankfurter.⁷ Allen Zoll, the executive vice president of the American Federation Against Communism, went on the record saying:

There are two reasons why I oppose the appointment of Prof. Felix Frankfurter to the Supreme Court of the United States. One is because I believe his record proves him unfit for the position, irrespective of his race, and the other is because of his race. . . . [T]he Jew has been fostering movements that

1. See John M. Broder, *Social Causes Defined Kennedy, Even at the End of a 46-Year Career in the Senate*, N.Y. TIMES (Aug. 26, 2009), <http://www.nytimes.com/2009/08/27/us/politics/27kennedy.html>.

2. *Id.*

3. For an account of Bork's failed appointment, see L. A. Powe Jr., *From Bork to Souter*, 27 WILLAMETTE L. REV. 781, 783–84 (1991); see also THE BORK HEARINGS: HIGHLIGHTS FROM THE MOST CONTROVERSIAL JUDICIAL CONFIRMATION BATTLE IN U.S. HISTORY 163 (Ralph E. Shaffer ed., 2005).

4. Lori A. Ringhand, *Aliens on the Bench: Lessons in Identity, Race and Politics from the First "Modern" Supreme Court Confirmation Hearing to Today*, 2010 MICH. ST. L. REV. 795, 797.

5. *Id.* at 797.

6. *Id.* at 798–99, 819.

7. *Id.* at 801.

are subversive to our Government.⁸

Notwithstanding the anti-Semitic rants of Mr. Zoll and other witnesses, the Senate confirmed Frankfurter, who went on to serve for twenty-three years on the Court.⁹

These two anecdotes corroborate, if necessary, that the appointment of Supreme Court Justices is a politically charged process and that the “ideology” of the nominees appears to play a potentially relevant role in their future decision-making. To clarify, this Article’s use of the term ideology does not in any way imply any negative connotation. A synonym could be “judicial philosophy,” referring to a vision of the world, a system of beliefs, and a policy perspective that combine to affect the way Justices interpret the law. It is not meant to imply a bias or an intentional distortion of the law to achieve a predetermined result. It simply means that when there is room for interpretation and reasonable minds can disagree, Justices and judges can reach different conclusions based on their values, understandings, and beliefs. In the last few decades, the process of nominating and confirming Justices appears to have become increasingly more partisan.¹⁰

Numerous jurists in the United States, especially up through the 1940s, argued that legal interpretation can and should be separated from, and not influenced by, politics or other ideological beliefs. According to this “legalist” perspective, *stare decisis* and the original interpretation of statutes constrain judges and prevent creative judicial decision-making.¹¹

Although somewhat out of fashion after the legal realism movement,

8. *Id.* at 797 (alteration in original).

9. Joseph Gumina, *From Austria to Sacco and Vanzetti: The Development of Frankfurter’s “Fundamental Rights” Theory*, 30 W. NEW ENG. L. REV. 389, 395–96, 400 (2008). Despite Justice Frankfurter’s liberal tendencies, his belief in judicial restraint often put him at odds with other Justices such as Hugo Black, William Douglas, and Chief Justice Earl Warren. See JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 80–81, 83 (1975); Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 81–83, 111, 105. For an insightful view of Justice Frankfurter’s positions, see generally LASH, *supra*.

10. See Joseph E. Frank, *Politics and Judicial Nomination: The Supreme Court from Reagan Through Bush*, 34 VT. B.J. 53, 53 (2008) (reviewing JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007)).

11. See Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. CAL. INTERDISC. L.J. 17, 19 (2008) (arguing that Supreme Court judicial decisions are “politics writ small”). For a description of this approach, see also Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 96–98 (2005) (asserting that legal scholars and judges believe the law influences the Court more than politics); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 258, 276 & n.95 (2005) (comparing positive and normative views of judicial decision-making).

these arguments still appear, particularly in the appointments process. For example, at his confirmation hearing, Chief Justice John Roberts proclaimed: “[J]udges are like umpires—umpires don’t make the rules; they apply them.”¹² This is an idea as old as the concept of separation of powers. In the early eighteenth century, Montesquieu famously remarked that “[m]ais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi,” invoking a slightly different metaphor than Justice Roberts’s but making the same point: the proper role of the judiciary is simply to “declare” what the law is.¹³

If legal interpretation was such a mechanistic activity, society would not need judges and lawyers at all; society could simply feed into a computer the existing laws and regulations along with the facts of a case, and it would spit back the “mathematically” infallible outcome.¹⁴ Even without subscribing to the battle cry of “critical legal studies” that “Law is Politics!”¹⁵ or without surrendering completely to the notion of legal indeterminacy, it is difficult to seriously argue that the cultural, social, racial, economic, religious, and political backgrounds and beliefs of judges (in one word, their ideologies) do not play some role in how they

12. Robert Schwartz, *Like They See ‘Em*, N.Y. TIMES (Oct. 6, 2005), <http://www.nytimes.com/2005/10/06/opinion/06schwartz.html>.

13. MONTESQUIEU, *DE L’ESPRIT DES LOIS* 305 (1834). The English translation of this phrase is, “But the nation’s judges are, as we said, the mouth that pronounces the words of the law.”

14. In a brilliant and entertaining book, Professor Jay Wexler illustrates how even the apparently more unequivocal legal rules are subject to a certain degree of indeterminacy. Take, for instance, Article II, Section 1 of the U.S. Constitution, providing that to be eligible for President of the United States you need to be at least thirty-five years of age. U.S. CONST. art. II, § 1, cl. 4. Several scholars, in an effort to demonstrate that there is always room for legal interpretation, have attempted to argue that the provision does not really mean “thirty-five.” See JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* 81 (2011). Proponents of legal realism started arguing in the 1920s that judges were subject to political and personal preferences that the binding value of precedents could not curtail. See JEROME FRANK, *LAW AND THE MODERN MIND* 148, 151 (reprinted 1936) (1930) (echoing a famous position expressed in OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 5 (1881)). A fundamental contribution in this field came in 1948 from C. Herman Pritchett, who noted the increasing use of dissenting opinions by Supreme Court Justices since the end of the 1930s. C. HERMAN PRITCHETT, *THE ROOSEVELT COURT* 25 (1948). One could argue that the mechanical view of decision-making could not be so obvious if different Justices could interpret the same provisions in sometimes radical and opposite ways. The debate juxtaposing textual interpretation as a mechanic activity to the desirability that judges also take into account other elements in disposing cases dates back to the German jurist Rudolph Ritter von Jhering (1818–1892) and his critique of the Pandectists. See MARIO G. LOSANO, *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 839 (David S. Clark ed., 2007), available at <http://dx.doi.org/10.4135/9781412952637.n380>.

15. For an overview of critical legal studies, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). For a classical work on how politics affect judging, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

interpret and apply the law.¹⁶ Independently of how conscious and deliberate the influence of a judge's personal "ideology" is on that judge's decision-making, such an influence likely exists, at least to some degree.¹⁷ Americans tend to agree because in a recent poll, only one in

16. See *infra* note 27; Section III.A. For an example of a work considering the role of religious beliefs on the selection of Justices, see Christine L. Nemacheck, *Have Faith in Your Nominee? The Role of Candidate Religious Beliefs in Supreme Court Selection Politics*, 56 DRAKE L. REV. 705, 705–06, 725 (2008) (arguing that "religion does not systematically affect a President's selection of a candidate from the short list of potential nominees"); see also Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507, 507 (1999) (suggesting that evangelical Justices are more conservative than their religious counterparts). Other works take a complementary but distinctive perspective, arguing that policy preferences do not simply motivate judges in casting their votes, but that—in the light of those preferences—they vote *strategically*, taking into account the opinion and possible alliances on the panel deciding the case, the risk of being reversed, the chances that the legislature, the executive power or other governmental officers might act to nullify a judicial decision, the possibility of being reelected or promoted to a higher court, etc. For a discussion of strategic voting, which is not central to this Article, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998), and Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 34, 35 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008). Walter F. Murphy made the pioneering work in this area. See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

17. Feldman, *supra* note 11, at 28. Erwin Chemerinsky observes: "[W]e all share the perception that the Court is 'objective' and decides questions based on the law, separate from the ideologies of the justices. There is thus a sense that it is the 'law,' not the justices, that is responsible for the Court's decisions. This is nonsense and has always been. The Court is made up of men, and now finally women, who inevitably base their decisions on their own values, views, and prejudices." ERWIN CHEMEKINSKY, *THE CASE AGAINST THE SUPREME COURT* 10 (2014). Of course, at least for the Authors of this Article, this does not necessarily mean that Justices or judges improperly bend legal interpretation and precedents to achieve desired policy results. There is ample evidence of Justices going against positions that they have previously expressed, or the explicit will of the president who appointed them, out of respect for binding precedent. Two good anecdotal examples concern *Miranda v. Arizona*, 348 U.S. 436 (1966) and *Dickerson v. United States*, 530 U.S. 428 (2000). The former was the famous case in which the Warren Court mandated police to provide suspects with warnings concerning the right to counsel during interrogation and the privilege against self-incrimination. *Miranda*, 384 U.S. at 498–99. As a reaction to the *Miranda* ruling, Congress enacted 18 U.S.C. § 3501, providing for the admissibility of voluntary statements made during an interrogation and when the *Miranda* warning is not given to suspects already in custody. 18 U.S.C. § 3501 (2012); JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 105 (2011). In 1980, the holding of the original 1966 *Miranda* decision was reaffirmed in *Rhode Island v. Innis*, 446 U.S. 291 (1980): Justice Potter Stewart wrote the majority opinion, joined by Justice Byron White, two dissenters in *Miranda*, and also by four appointees of President Nixon who opposed *Miranda* in his campaign. *Id.* at 302; STEVENS, *supra*, at 105. In *Dickerson*, Chief Justice William Rehnquist, who has often criticized *Miranda*, wrote the Court's opinion confirming the decision, and also holding that § 3501 was unconstitutional (although he might have simply realized that there were not enough votes to overturn *Miranda*, and voted strategically). 530 U.S. 428, 432 (2000); STEVENS, *supra*, at 106. Another landmark decision, *United States v. Nixon*, 418 U.S. 683 (1974), shows the independence

eight respondents said that Justices decide cases solely on legal grounds.¹⁸

Two prominent scholars that share this conviction are Judge Richard Posner¹⁹ and Professor Ronald Dworkin.²⁰ Although disagreeing on almost everything else, particularly on the implications of this tenet,²¹ both of these influential writers opine that judges' ideological and political views influence them, especially Supreme Court Justices in "hard cases," and that they *should* also decide cases on the basis of these views. Professor Lee Epstein is another author who has dedicated an impressive body of research to investigate (and largely demonstrate) the role of ideology in judicial decision-making.²² Most social scientists now easily concede that Justices and judges are policy seekers.²³ This is true in legal systems that select judges through purely nonpolitical, technical exams that test candidates' legal competency,²⁴ and even truer and more apparent in systems like that of the United States in which the election or

of the Justices from the President: Warren Burger, named Chief Justice by President Nixon, wrote the opinion holding that President Nixon had to produce the tape recordings that led to his resignation. *Id.* at 714; STEVENS, *supra*, at 113–14. Investigating—and even finding—a statistical correlation between the Justices' ideologies and their ruling does not in any way imply, at least in our perspective, that the Justices do not respect the law and stare decisis, but more simply that when there are objective ambiguities in the rules that need to be applied, and there is room for interpretation, Justices, as all human beings, are (also) influenced by their view of the world. Similarly, using the political affiliation of the appointing president as a proxy for the Justices' policy preferences in no way implies a subservient attitude toward the president or his party, but is simply a way to easily code the likely position of the Justice on the political spectrum, at least at the time of the nomination.

18. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.

19. See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 331–32 (2003); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 39 (2005).

20. See RONALD DWORKIN, JUSTICE IN ROBES 19 (2006).

21. For a discussion of the positions of Posner and Dworkin, see Feldman, *supra* note 11, at 18.

22. Among the vast scholarship of Epstein, in addition to the contributions cited throughout this Article, it is sufficient here to refer to two works: EPSTEIN & KNIGHT, *supra* note 16, at 10, and LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 2–3 (2013).

23. See EPSTEIN & KNIGHT, *supra* note 16, at 23.

24. This is the case in France, Italy, and Germany. For some comparative perspectives on the recruitment of judges, see John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1760–61 (1988); Daniel J. Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 JUDICATURE 16, 20 (1983); T. Leigh Anenson, Note, *For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America*, 4 SW. J.L. & TRADE AM. 261, 281–82 (1997). For a comparison of selection systems for the Supreme Court or constitutional courts of different jurisdictions, see Lee Epstein, Jack C. Knight Jr. & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 11 (2001).

appointment of the judiciary is an explicitly political process controlled by voters or politicians.²⁵

It is fairly easy to intuit that ideology somehow enters the analysis with respect to politically divisive issues such as abortion and procreative rights, sexual conduct, freedom of speech, separation of church and state, gun control, procedural protections for the accused in criminal cases, and governmental powers. Supreme Court Justices must often decide cases in light of an inevitably vague and old Constitution, framed in the very different sociopolitical context of the eighteenth century, which leaves latitude to different interpretations. Many studies have tackled the question of the relevance of the ideology of the Justices or appellate judges in these situations, often finding a correlation between policy preferences and decisions.²⁶

This Article fills a gap in the existing literature on the correlation between ideology and judicial decision-making in the highly technical area of securities regulation.²⁷ Since the enactment of the securities laws

25. See *infra* Section I.A.

26. See *infra* Section II.B. The existing empirical literature on the functioning of the courts, and of the Supreme Court in particular, is very vast. See Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 820. An excellent bibliography of the most important contributions is indicated in EPSTEIN, LANDES & POSNER, *supra* note 22, at 89–99. Other reviews of the literature are offered by Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 184, 232–33 (2008) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)) and Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 899–900 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007)). There are fewer cases on judicial behavior in foreign courts, but some are worth mentioning. See ASSAF MEYDANI, *THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS* (2011) (discussing the Israeli Supreme Court’s judicial behavior); Gila Stopler, *The Israeli Supreme Court—Between Law and Politics*, 48 TULSA L. REV. 257 (2012) (reviewing MEYDANI, *supra*); Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011) (discussing why the Japanese Supreme Court has developed such a “conservative constitutional jurisprudence”); Tokujin Matsudaira, *Judicialization of Politics and the Japanese Supreme Court*, 88 WASH. U. L. REV. 1559 (2011) (providing an overview of “judicial conservatism in Japan”). A fascinating study on the German Constitutional Court indicates that the justices take into account the position of the Parliament and of the public opinion in their decisions. See GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 121 (2005).

27. Some studies have investigated the correlation between Justices’ ideology and economic issues in general, see EPSTEIN, LANDES & POSNER, *supra* note 22, at 106–16, but no study specifically focuses on the regulation of financial markets. A recent work on the attitude of the Roberts Court toward securities litigation issues is A. C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105 (2011). Pritchard argues that even if the Roberts Court has heard more securities cases than in the past, the Court is quite indifferent to the substance of the securities laws and their policies. *Id.* at 135. He also contends that the Roberts Court has not shown a “pro-business” attitude favoring corporate defendants, but rather a preference for the conservation of the status quo. *Id.* at 128. This work, however, does not apply

in the 1930s, the Supreme Court has decided a significant number of cases in this field. Even if the regulation of financial markets might seem less politically-charged than some of the issues mentioned above, this Article argues that there is meaningful room for political ideology and policy preferences in deciding these cases for a couple of reasons.

First, and obviously with some simplification, this Article assumes that conservative-leaning people have a stronger belief in the efficiency of markets and their capacity to police themselves, as well as the desirability of deregulation. They are also less inclined to conclude that differences in bargaining power and information asymmetries between investors, on one hand, and issuers and financial institutions, on the other hand, require stronger protections for the former. This Article also assumes that more liberal Justices may put a stronger emphasis on market failures and the need to protect investors perceived as unable to fend for themselves, and they support more extensive government intervention in regulating the securities industry and enforcing the law. This simplified classification might need some qualification. For example, conservatives might be less sympathetic to procedural protections for people accused of criminal violations of the securities laws, such as insider trading. Overall, however, this Article proposes that this classification is a fair and reasonable hypothesis to test.

Second, most securities regulation cases that come before the Supreme Court deal with the interpretation of the federal securities laws: statutes enacted approximately eighty years ago (even if often updated) that apply to one of the more rapidly evolving and innovative industries. Often the statutes are vague or ambiguous, leaving room for different interpretations. In fact, the Supreme Court often grants certiorari to resolve a split among circuit courts. In addition, several of the most important liability provisions designed to protect investors are implied private causes of actions (section 10(b) of the Securities Exchange Act of 1934 for example), which are judge-created provisions that also present a certain degree of indeterminacy. In a limited number of cases, the Supreme Court has examined the constitutionality of a statute, in particular state antitakeover statutes. Even with respect to these problems, the Justices have few constraints on their interpretation activity. For these reasons, securities regulation cases represent an interesting opportunity

empirical analysis instruments. The present Article offers an additional perspective on these issues, not limited to the most recent years of the Court's jurisprudence in the area of financial markets, largely based on an empirical analysis. Concentrating on the specific field of securities regulation allows for a more precise judgment on the policy preferences of the Justices vis-à-vis their overall political views. Aggregating votes in cases from a broad set of areas can in fact hide some information. For example, a Justice inclined to constrain government intervention in economic and social issues might, at the same time, be against tight regulation of financial markets and pro-choice on abortion.

to test the hypothesis of the influence of political ideology in judicial decision-making in a crucial area of the economy that no one has previously examined from this perspective.

This Article is organized as follows: Part I offers a brief overview of the different systems used for the selection of the judiciary, focusing in particular on the appointment of Supreme Court Justices, but also considering other systems adopted for the states' judiciary (including some comparative insights from other jurisdictions). This Article underlines the relevance of political considerations in the selection process, which could influence the ideology of selected Justices and judges. Part I also discusses more analytically the influence that judicial interpretation can have in the area of securities regulation. Part II contains an overview of the existing literature on the correlation between the ideology of Justices and judges and their positions on the bench. Part II also explains the most common measures of the elusive concept of "political ideology" used by social scholars.

The core of this Article's study, and its most important contribution, is Part III. Section III.A focuses on the methodological approach followed in collecting and coding the data used in this study, explaining issues such as the selection of the cases considered for the empirical analysis and the coding of the decisions and positions of the Justices on the political spectrum. Section III.B presents the major empirical results. The key question that this Article attempts to answer is the one anticipated in its title in a catchphrase: whether conservative Justices are more supportive of Wall Street and the free market, and liberal Justices more supportive of investors and regulated markets.

In a recent book, Professor Erwin Chemerinsky observed that "the Supreme Court usually sides with big business and government power and fails to protect people's rights. Now, and throughout American history, the Court has been far more likely to rule in favor of corporations than workers or consumers."²⁸ In the area of securities regulation, the distinction is not always as clear because what this Article defines as "investors" are often also large business enterprises. In addition, this Article's empirical evidence shows a certain inclination to rule in favor of business, but also a significant degree of independence of single Justices who often vote in favor of investors. Professor Chemerinsky's words, however, offer an interesting commentary on this Article's findings.

Sections III.B and III.C also use the data collected to explore other interesting inquiries. For example, Section III.B examines if and how the "pro-market" attitude of the Court correlates with the evolution of some general economic variables (i.e., if in times of economic growth and

28. CHEMERINSKY, *supra* note 17, at 6.

bullish markets Justices tend to be more “free-marketers”). Section III.B also considers if Justices are more consistent in their decisions in this area when the Court is more divided. Section III.C explores which U.S. Courts of Appeals the Supreme Court most often overrules.

I. SELECTION OF JUSTICES AND JUDGES IN THE UNITED STATES AND IDEOLOGY IN THE SUPREME COURT'S SECURITIES REGULATION DECISIONS

This Part compares different approaches to the selection of members of the judiciary, primarily focusing on the distinction between politically-based and merit-based selection processes. It then outlines the appointment process of Justices to the U.S. Supreme Court and the role that candidates' ideologies play in this. Lastly, this Part examines the specific role that ideology plays in the area of securities regulation.

A. *An Overview of Different Models for the Selection of the Judiciary*

There are many different possible ways to select judges. One major distinction, from a comparative perspective, is between systems in which the election or appointment is to some degree “political” (in the sense that either voters, elected legislatures, or executives play a role in the selection of the judiciary) and systems that are based solely or primarily on a technical examination of the legal knowledge of the candidates. Many different versions of these approaches exist, and the systems often present both “political” and “technical” elements.

Many countries around the world follow the latter “technical” approach. This is the case in many civil-law continental European countries, such as France, Spain, Germany, and Italy.²⁹ French judge Jean-Marc Baissus, interviewed by the *New York Times* a few years ago, said that the four-day written test to access the French judiciary “gives you nightmares for years afterwards.”³⁰ It is usually rather young law-

29. For a comparative overview of some of these systems, see Luis Muñoz-Argüelles & Migdalia Fraticelli-Torres, *Selection and Training of Judges in Spain, France, West Germany, and England*, 8 B.C. INT'L & COMP. L. REV. 1 (1985); Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363 (2007). In the United States, there is scant literature on the selection of judges and justices in other legal systems. Among the few works that offer some comparative perspectives, see Epstein, Knight Jr. & Shvetsova, *supra* note 24; more dated, but still-interesting short accounts can be read in Wolfgang H. Kraus, Book Review, 48 HARV. L. REV. 873 (1935) (reviewing R. C. K. ENSOR, *COURTS AND JUDGES IN FRANCE, GERMANY, AND ENGLAND* (1933)); and William H. Wynne, Book Review, 43 YALE L.J. 862 (1934) (same). Probably the best recent comparative analysis of different systems to elect judges is: *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* (Kate Malleson & Peter H. Russell eds., 2006).

30. Adam Liptak, *Rendering Justice, with One Eye on Re-Election*, N.Y. TIMES (May 25, 2008), <http://www.nytimes.com/2008/05/25/us/25exception.html>.

school graduates intending to enter the judiciary just a few years after completing their JDs who take this exam.³¹ Ostensibly, in this case the selection of judges is less political: a judge's future career often depends on other more senior judges and, to some extent, on members of the executive branch, such as the Minister of Justice.³² Even in systems where the selection of judges is accomplished purely through a technical exam, the election of members of the Constitutional Court is often different and more political.³³ Italy is a good example. The President of the Republic elects one-third of the fifteen justices sitting on the Constitutional Court; the Parliament elects one-third; and other judges elect one-third.³⁴

Often in these systems—again Italy is an illustrative case—the Constitutional Court only decides issues concerning the constitutionality of statutes and is the only court with the power of constitutional review; if lower courts have doubts on the constitutionality of a law, they must submit a certified question to the Constitutional Court.³⁵ In addition, specific requirements in terms of actual legal experience are frequently a condition for appointment on the Constitutional Court.³⁶

Justices and judges in the United States also have their nightmares, but they are of a different fabric than the ones of Judge Jean-Marc Baissus and his French colleagues. Even if different procedures for selecting state and federal judges coexist in the United States, they all share a significant political element: “To the rest of the world, the American adherence to judicial elections is as incomprehensible as our rejection of the metric system.”³⁷

Historically, after the American Revolution, the greatest concern in the colonies was to avoid the possible distortions of the English system in which an absolute monarch could single-handedly appoint and influence the judiciary.³⁸ In the early years of the new nation, states generally opted for judges appointed by elected officials, namely either

31. See Muñoz-Argüelles & Fraticelli-Torres, *supra* note 29, at 14.

32. See *id.* at 23 (noting that superiors rarely remove judges once they have been appointed).

33. Volcansek, *supra* note 29, at 367–68.

34. William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 6 n.14 (1999).

35. See, e.g., *id.* at 6–8.

36. Epstein, Knight Jr. & Shvetsova, *supra* note 24, at 18.

37. Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996 (1988). For a short but witty historical account of the resistance to the adoption of the metric system in the United States also from a legal point of view, see WEXLER, *supra* note 14, at 27–38.

38. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1081–82 (1966).

the legislature or the governor of the state.³⁹ Some states, however, began to shift toward popular election of judges in the early nineteenth century.⁴⁰ This shift was in part a result of the Populist Movement, which believed that the people had to elect all public officials and wanted to open the judiciary to a broader class of citizens.⁴¹

After New York switched to election of judges in 1846, most states entering the Union had an electoral system.⁴² For obvious reasons, however, widespread dissatisfaction with popular elections developed, focusing especially on the lack of legal skills of the elected judges and possible episodes of corruption in the elections.⁴³ Some states tried to limit the influence of politics on the judiciary by opting for a “nonpartisan-ballot system,” but soon enough this system also showed its limits.⁴⁴

In the 1930s and 1940s, some states began to adopt a version of the appointment system known as the “merit plan” articulated three decades earlier by Albert Kales, a professor at the Northwestern University School of Law.⁴⁵ Under this approach, even if different variations exist, a nominating commission (generally composed of both lawyers and nonlawyers appointed by a variety of sources, such as the governor, the legislature, the judiciary, and bar associations, among others) provides a short list of candidates from among which the governor might choose the actual nominees.⁴⁶

These candidates are often subject to a “retention” election by popular vote after a limited term like one year in which the voters can choose if the judge can continue to hold the office.⁴⁷ Nowadays approximately two-thirds of the states have adopted a merit-selection system, even if it often coexists with other selection systems sometimes applied for lower courts.⁴⁸ There is an extensive debate on the relative pros and cons of this

39. Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609, 619 (2010); see also Winters, *supra* note 38, at 1082.

40. Winters, *supra* note 38, at 1082.

41. See *id.* For example, Georgia adopted election of judges for some lower courts in 1812, as did Mississippi in 1832. See *id.*

42. *Id.*

43. *Id.* at 1083.

44. *Id.*

45. *Id.* at 1084–85.

46. *Id.* at 1084.

47. *Id.*

48. See Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 178 (1980) (noting that thirty-one states use commission plans, which assist the governor in selecting judges); see also Charles McElwee, *Merit Selection of Judges*, W. VA. LAW., Mar. 1995, at 21, 21; Schneider, *supra* note 39, at 624. See, e.g., generally Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 421 (2012) (describing the history of judicial merit retention elections in Florida and the issues related to that process).

system versus popular elections.⁴⁹

For Article III federal judges and Justices, on the other hand, the Constitution implements a regime of appointment by the President and confirmation by the Senate, and grants life tenure to the members of the federal judiciary.⁵⁰ This system appears to share some features with the merit system, and we believe that it might be a de facto merit system because even if the President does not formally have to choose among a preselected list of qualified candidates, political pressure creates a strong incentive to appoint people with impeccable legal credentials, especially for the higher courts.

All these different methods to appoint Justices and judges share a crucial element: they follow an inherently political process. In some instances the political element might be more explicit, but it is always present. It is inevitable that popular voters, executives, and legislatures—all political actors—choose judicial candidates based on their ideology, expecting or at least hoping that their decisions on the bench will reflect their views as much as possible and contribute to advancing their political agenda.⁵¹ Ideology, in other words, has always played and will always play a significant role in the selection of the judiciary in the United States.⁵² If ideology plays a role in the selection of the judges, it may also play a role in their judicial decision-making.⁵³

Of course Supreme Court Justices, in light of life tenure and the prestige of the position, are among the most independent (and least accountable) existing public officers. Even if some nineteenth-century

49. For a recent defense of the merit system, see Frank Sullivan Jr., *Assuring Due Process Through Merit Selection of Judges*, 46 IND. L. REV. 123 (2013). For a critique, see Schneider, *supra* note 39, at 660, who also questions the constitutionality of merit selection systems; see also Robert L. Brown, *Selection of Judges*, 64 ARK. L. REV. 71 (2011); Clifford W. Taylor, *Merit Selection: Choosing Judges Based on Their Politics Under the Veil of a Disarming Name*, 32 HARV. J.L. & PUB. POL'Y 97 (2009).

50. See U.S. CONST. art. II, § 2, cl. 2 (containing the Appointment Clause); U.S. CONST. art. III (discussing life tenure). For a discussion of what judicial independence requires in addition to secure salary and tenure, see Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835 (1995); see also Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1 (1983). Of course there are some federal judges appointed in different ways, and without life tenure: consider, for example, bankruptcy courts.

51. See Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 626 (2003).

52. See *id.* at 621 (arguing that “Presidents and Senates always have considered ideology in the judicial selection process,” and that “the consideration of ideology, by Presidents and Senates, is desirable”); see also Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1146 (1988) (arguing that “other dominant factors [in the judicial selection process] have shifted from sectional and party affiliations to social and judicial philosophy”).

53. See Chemerinsky, *supra* note 51, at 621.

Justices might have used, or tried to use, the Supreme Court as a stepping stone for further political ambitions;⁵⁴ such behavior has been extremely rare in the last century.⁵⁵ The very independence of Supreme Court Justices, however, in many ways allows them to more freely follow their personal convictions—often the very convictions for which the President selected them in the first place. Certainly those convictions can evolve or even change dramatically over time, something to consider in this analysis. However, the take-away point here is that the very systems used in the United States to select the members of the judiciary, and of the Supreme Court in particular, should reasonably be expected to inject a political and ideological element into the jurisprudence of the courts.

B. *Supreme Court Appointments*

Article II, Section 2 of the Constitution provides that the President “shall nominate, and by and with the Advise and Consent of the Senate, shall appoint . . . Judges of the supreme Court.”⁵⁶ More precisely, after the President has made a nomination, the Senate Judiciary Committee conducts hearings and either rejects or reports the nomination to the full Senate for a final confirmation vote.⁵⁷ The procedure set forth in the Constitution was a last minute compromise at the Constitutional Convention.⁵⁸ Initially, the framers intended to grant the legislature the power to elect Supreme Court Justices, and only in September 1787 was the current provision adopted.⁵⁹

Scholars widely debate the precise scope of the Senate’s powers under the “Advise and Consent” clause, and the Constitution does not offer much guidance on this issue.⁶⁰ Some scholars, jurists, and politicians advocate a restrained role for the Senate, which should only include inquiring about the candidate’s credentials and her professional ethics,

54. Consider, for example, the case of Justice John McLean (one of the two dissenters in *Dredd Scott v. Sandford*, 60 U.S. (19 How.) 393, 455 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV) who, while on the Court, sought three different presidential nominations from three different parties, as reported by EPSTEIN & KNIGHT, *supra* note 16, at 38.

55. EPSTEIN & KNIGHT, *supra* note 16, at 39.

56. U.S. CONST. art. II, § 2, cl. 2.

57. Orrin G. Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each Is Entitled to His Own Opinion, but Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 473 (2003).

58. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1496 (1992).

59. *Id.* at 1496, 1498.

60. See generally Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 WASH. & LEE L. REV. 1053 (2001).

deferring to the judgment of the President; others argue the possibility and desirability of a more active and independent inquiry by the Senate, which should also consider the political and ideological views of the nominee.⁶¹ Should even the most restrictive opinion on the role of the Senate prevail, it would be very difficult to imagine its implementation⁶² because the boundary between issues relating to a candidate's professional credentials and his ideology is often blurred. The very existence of this debate, in any case, seems to confirm the political nature of the appointment process. In fact, depending on the convenience of the situation, both liberals and conservatives have argued for either one or the other approach.⁶³

Since the founding of the United States, the Senate has not been shy in using its veto power to block Justices due to their judicial ideology. As early as 1795, the Senate rejected President George Washington's recess appointment of John Rutledge as Chief Justice primarily because Rutledge opposed the "Jay Treaty" with England approved by the Senate.⁶⁴ According to some analysis, during the nineteenth century the Senate rejected twenty-one presidential nominations and, of these

61. *Id.* at 1055–56. Proponents of a limited Senate role include Bruce Fein. Bruce Fein, Commentary, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989). Conversely, one advocate of a more active investigation is William G. Ross. See William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109 (1987) (offering an extensive account of Senate confirmation hearings in the twentieth century and a classification of typical questions). Professor Donald E. Lively also favors an assertive role for the Senate. Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 554 (1986) (favoring an assertive role for the Senate). Professor Bruce Ackerman defended the nomination of Robert Bork on the grounds of his professional qualifications, arguing that Bork should have been evaluated only in this respect. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988). Supreme Court nominees can elude senators' questions in a number of ways, often by refusing to answer on the grounds that the issue could come up before the Court. Refusal to respond is actually grounded in 28 U.S.C. § 455, which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455 (2012).

62. Yates & Gillespie, *supra* note 60, at 1067–68.

63. One additional indicator that the appointment process is highly political is the attempt by some presidents to sidestep the Senate through the controversial use of recess appointments, at least for lower federal judges. Presidents Bill Clinton and George W. Bush, for example, used this power. WEXLER, *supra* note 14, at 40, 46. However, the Senate rarely has the opportunity to inquire deeply into the nomination of lower federal judges in light of the growing number of judges. Strauss & Sunstein, *supra* note 58, at 1508 (noting that, in 1968, there were eighty-three court of appeals judges; in 1978, ninety-five; and in 1992, one hundred and fifty-four).

64. Lively, *supra* note 61, at 552.

rejections, at least seventeen were based on ideological preferences.⁶⁵

There are also twentieth-century examples of candidates rejected because of their political views. The Senate rejected John Parker in 1930 largely because of his anti-labor and anti-civil rights positions.⁶⁶ Forty years later, the Senate rejected two Nixon nominees, Clement Haynsworth and Harrold Carswell, based on their ideological positions regarding issues such as unions and civil rights.⁶⁷ Similarly, in 1987 there was the famous case of Robert Bork, mentioned at the beginning of this Article.⁶⁸ In some instances, the nomination was withdrawn due to filibustering.⁶⁹ Sharp and sometimes bitter political divisions have often surrounded the nomination process, even when the Senate eventually approved nominees. Two symmetrical examples are the appointment by President Woodrow Wilson in 1916 of Justice Louis Brandeis, opposed by conservative and pro-business constituencies for his challenges to corporate practices and his favorable attitude toward laws protecting employees; and the appointment by President Herbert Hoover in 1930 of Charles Hughes, chastised by progressives and Democrats because people viewed him as a lawyer too closely associated with the interests of large corporations and utility companies.⁷⁰

Presidents are obviously well aware of the legacy they can create through a Supreme Court appointment and of how a carefully selected Justice can continue to project executive policies into the future, long after the presidents' terms expire. The court-packing plan of President Franklin Roosevelt, aimed at protecting New Deal legislation from the prevailing *laissez-faire* doctrines of the early twentieth century, is a vivid illustration of this basic insight.⁷¹ President Richard Nixon provided another example by explicitly stating that his desire to shift the Court on criminal procedural issues motivated his appointment of Justices Warren Burger and Harry Blackmun.⁷² Several authors have expressed the

65. Grover Rees III, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 944 (1983).

66. Chemerinsky, *supra* note 51, at 625.

67. *Id.*

68. *Id.*; *supra* notes 1–3 and accompanying text.

69. This was the case, for example, with the promotion of Abe Fortas to Chief Justice proposed by Lyndon Johnson, and of nominees Homer Thornberry and, more recently, Harriet Miers. Jeff Bleich, *Advice and Dissent: The Role of Politics in the U.S. Supreme Court Appointments*, OR. ST. B. BULL., Feb.–Mar. 2006, at 19, 19–21 (2006).

70. See Freund, *supra* note 52, at 1151, 1153.

71. See PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 313 (1999).

72. *Conversation with Newsmen on the Nomination of the Chief Justice of the United States May 22, 1969*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 396 (1971) [hereinafter *Conversation with Newsmen*]; Herman Schwartz, *Justice Blackmun*, 43 AM. U. L. REV. 737, 739 (1994).

opinion that presidents have been generally successful in shaping the attitudes of the Court.⁷³

Of course the independence granted to Supreme Court Justices by life tenure and the prohibition of salary reductions allows some Justices to become “turn coats.” The result is that some appointments do not fulfill the expectations of the appointing president, but these cases, at least anecdotally, are quite rare. Probably the most prominent example is Chief Justice Earl Warren, whose ability to steer the Court toward liberal positions disappointed President Dwight Eisenhower so much that he supposedly defined his appointment as “the biggest damnfool mistake I ever made.”⁷⁴ In more recent years, Justice Anthony Kennedy, as the swing vote on the Court, has attracted the ire of conservatives with some of his votes on gay rights and reproductive issues.⁷⁵ Justices Harry Blackmun, Sandra Day O’Connor, and David Souter, among others, have also received similar criticism. The possibility that appointed Justices shift their position on the political spectrum during their tenure is an important element that this Article presents with its statistical analysis, and it suggests some caution in using their positions at the time of nomination as a proxy for their ideology.⁷⁶

The fact that very often in the recent past the party of the nominating president was different from the party controlling the Senate might explain the perception that the appointment of Justices has become

73. *E.g.*, Yates & Gillespie, *supra* note 60, at 1064; Lively, *supra* note 61, at 555. An interesting empirical study is Jeffrey A. Segal, Richard J. Timpone & Robert M. Howard, *Buyer Beware?: Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557 (2000), according to which presidents are generally successful in fostering their agenda through the Justices they put on the Court, but that over time the position of the Justices often tends to change from that of the appointing president. *Id.* at 557. Furthermore, presidents must sometimes compromise, so they might select a Justice who is expected to vote in a certain way on some relevant political issues, but might not be aligned with the appointing president on all issues that come before the Court. One example is Justice Blackmun, appointed by President Nixon also in light of his positions on criminal law issues, who however did not vote conservatively on abortion issues. *Compare Conversation with Newsmen*, *supra* note 72 (stating President Nixon’s hopes with regard to Justice Blackmun’s stance on criminal procedure issues), with Linda Greenhouse, *The Supreme Court: The Legacy; Justice Blackmun’s Journey—From Moderate to a Liberal*, N.Y. TIMES (Apr. 7 1994), <http://www.nytimes.com/1994/04/07/us/supreme-court-legacy-justice-blackmun-s-journey-moderate-liberal.html> (discussing Justice Blackmun’s liberal stance on abortion).

74. The story is reported by several sources, with slightly different wording. *See* JOHN J. PATRICK, RICHARD M. PIOUS & DONALD A. RITCHIE, *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 690 (2d ed. 2001).

75. *See* Jeffrey Toobin, *Swing Shift*, THE NEW YORKER (Sept. 12, 2005), <http://www.newyorker.com/magazine/2005/09/12/swing-shift>.

76. *See infra* Section II.A.

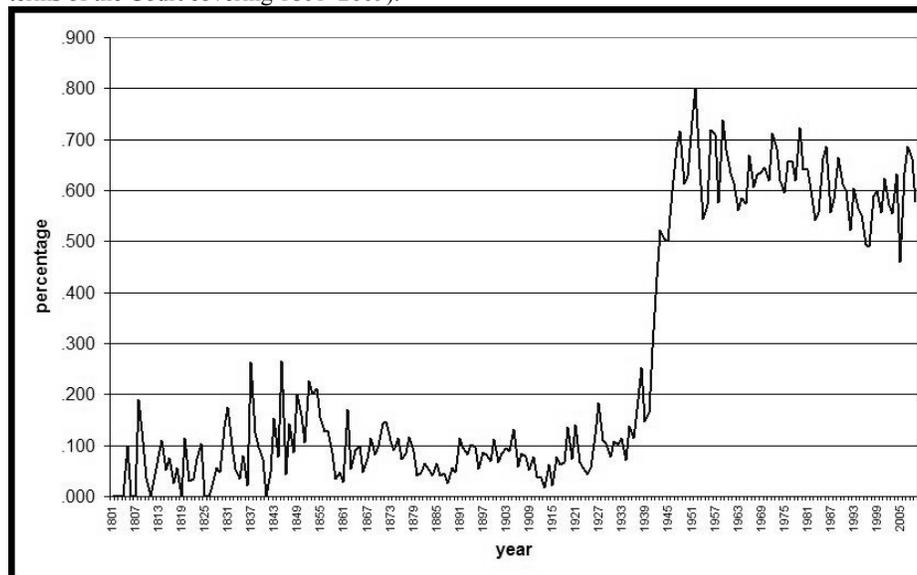
increasingly divisive and partisan.⁷⁷

Not only has the appointment process seemingly become more and more politically charged, but the internal functioning of the Court has also become more divisive. At least two meaningful pieces of evidence corroborate this perception. The first is the significant increase in the proportion of decisions containing at least one dissenting opinion since the 1930s, as clearly illustrated in the empirical literature.⁷⁸ The second is the political polarization of judicial clerkships starting in the 1990s, as indicated in a fascinating study on Supreme Court clerks.⁷⁹

The appointment process of Supreme Court Justices has always been politically charged, and the perceived judicial ideology of the nominees

77. See Chemerinsky, *supra* note 51, at 625–26. Moreover, as indicated by Professors David A. Strauss & Cass R. Sunstein, between 1969 and 1992 there were eleven consecutive appointments by Republican presidents, and in eight of these cases the Democratic party strongly controlled the Senate. Strauss & Sunstein, *supra* note 58, at 1493.

78. The following chart indicates the percentage of Supreme Court decisions containing at least one dissenting opinion from 1801 to 2009. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 250–55 tbl.3-2 (5th ed. 2012) (containing data on dissenting opinions for the terms of the Court covering 1801–2009).



It is worth noting that there is also evidence of significant disagreement in the nineteenth century in the private conference of the Court, but back then, the Justices were more reluctant to publish their dissent. EPSTEIN, LANDES & POSNER, *supra* note 22, at 67.

79. William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749, 1775 (2009); see also Adam Liptak, *A Sign of Court's Polarization: Choice of Clerks*, N.Y. TIMES (Sept. 7, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9D00E4DB1531F934A3575AC0A9669D8B63>.

has always played a crucial role in their ascension to the highest Court. In the last few decades, the process seems to have become even more divisive, and the Court itself more polarized along political lines. Against this background, it is interesting to test if, in the area of financial markets regulation, conservative Justices have shown a pro-business inclination in their decisions.

C. *Ideology in the Supreme Court's Securities Regulation Decisions*

Probably the best evidence that political ideology can play a role in the area of securities regulation is the set of rules concerning the composition of the Securities and Exchange Commission (SEC). Section 4(a) of the 1934 Exchange Act sets forth that the SEC should be composed of five members appointed by the President with the “advice and consent” of the Senate, but also requires that “[n]ot more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as may be practicable.”⁸⁰ The statutory call for a bipartisan SEC indicates that regulation and enforcement activities concerning the financial markets can be subject to diverging philosophies along political lines.⁸¹

It is obviously impossible here to fully discuss the general economic tenets of conservative and liberal policies with respect to the regulation of financial markets. General intuition, noted above, is that “conservative” views of economic policy emphasize the efficacy of markets over government intervention and regulation, while for liberals the position is reversed. The consequence is that conservatives tend toward deregulation based on the conviction that market failures rarely justify protections for perceived weaker parties in a private transaction. Liberals, on the other hand, are more skeptical about the virtues of free markets and believe that regulation should curb the possible inefficient

80. Securities Exchange Act of 1934, Pub. L. No. 73-281, 48 Stat. 881 (codified at 15 U.S.C. § 78(d) (2012)).

81. See Dan Jamieson, *A New Bipartisan SEC?*, INVESTMENTNEWS (May 26, 2013, 3:31 PM), <http://www.investmentnews.com/article/20130526/reg/305269978/a-new-bipartisan-sec> (discussing the politics behind selecting candidates for the Commission).

and inequitable outcomes of *laissez-faire* market operation.⁸² In short, the former tend to be more “pro-business,” the latter more “pro-investor.”⁸³

An illustration of this possible political divide is the legislative history of the so-called Private Securities Litigation Reform Act of 1995.⁸⁴ In the 1990s, there was a growing concern that frivolous securities lawsuits could arise as attorney-driven class actions, in particular invoking section 10(b) and Rule 10b-5 of the Exchange Act, forcing defendants to settle in light of the potential costs of discovery.⁸⁵ Congress created this piece of legislation to curb such a phenomenon through different measures like raising the pleading standards.⁸⁶

In order to survive a motion to dismiss, a plaintiff had to plead false statements “with particularity,” and that pleading had to create a “strong inference” of scienter, one of the elements of a Rule 10b-5 cause of

82. The literature supporting this assumption is so vast and well-known that it is neither possible nor necessary here to indicate a complete bibliography. A good in-depth discussion of how the ideas of Harold Laski (1893–1950), John Maynard Keynes (1883–1946), and Friedrik Hayek (1899–1992) contributed to shape respectively the left, center-left, and right economic beliefs in Western countries can be found in KENNETH R. HOOVER, *ECONOMICS AS IDEOLOGY: KEYNES, LASKI, HAYEK, AND THE CREATION OF CONTEMPORARY POLITICS* (Rowman & Littlefield 2003). See also JAMES K. GALBRAITH, *THE PREDATOR STATE: HOW CONSERVATIVES ABANDONED THE FREE MARKET AND WHY LIBERALS SHOULD TOO* 50–53, 113, 120–21 (2008) (discussing the role that Keynes and Hayek had in the economic policies of many presidents in the latter half of the twentieth century); JAMES J. GOSLING & MARC EISNER, *ECONOMICS, POLITICS, AND AMERICAN PUBLIC POLICY* 8, 11–12 (2d ed. 2013); JOHN A. ORR, *ECONOMIC CONSERVATISM: AMERICAN POLITICAL IDEOLOGY* (2013). More to the point of this Article’s focus, see, for example, Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 949 (2013) (arguing that the current structure of pension funds has made middle-class Americans increasingly dependent on the capital gains market).

83. It is important to highlight again that “pro-business” and “pro-investor” are labels used to simplify the analysis. Perhaps one additional way to explain the different positions would be distinguishing between pro-free market and pro-regulation. We hold however (and the cases examined seem to confirm this intuition) that generally a position that broadens the scope of the regulation, extends private causes of action, and allows more extensive regulatory powers to the SEC is favorable to investors. In addition, increased regulation represents both a threat and an opportunity for business. For example, rules prescribing the use of certain environmental-friendly materials might be a cost for some firms, but a great opportunity for producers of those materials.

84. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.). For an account of the major innovations introduced and of the legislative history of the Act, see Jason L. Fowell, Comment, *The Private Securities Litigation Reform Act of 1995 Writ for Certiorari*, 44 S. TEX. L. REV. 809, 815–17 (2003). See also generally Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913 (2003); Marc I. Steinberg, *Symposium: Securities Laws After the Private Securities Litigation Reform Act—Unfinished Business*, 50 SMU L. REV. 9 (1996); and the other contributions published in that symposium issue of the *Southern Methodist University Law Review*.

85. See Perino, *supra* note 84, at 915; Fowell, *supra* note 84, at 809.

86. See Perino, *supra* note 84, at 915; Fowell, *supra* note 84, at 810.

action; in addition, the court granted a “stay of discovery” before the decision on the motion to dismiss.⁸⁷ Congress enacted the bill into law over a veto by President Bill Clinton.⁸⁸ Numerous Democratic representatives voted in favor of the law,⁸⁹ but the diverging views of President Clinton and Congress evoke the traditional dividing line between liberals and conservatives in this area.

This Section briefly addresses the room for policy consideration—politics—in the enforcement of the securities laws. The intent is not to offer a comprehensive account of the degree of freedom that courts have in the interpretation of all the provisions of the securities laws, but more simply to give a flavor of the possible different interpretations of the relevant statutes that a particular set of beliefs concerning the proper scope of the regulation might influence.

To begin, note that the U.S. securities laws enacted in the 1930s were among the first modern regulations of the financial industry, and they have served as a model for several foreign jurisdictions.⁹⁰ These laws, however, apply to one of the most dynamic and innovative industries. Inevitably, enforcing the existing rules to the ever-evolving factual circumstances that characterize this sector leaves wiggle room for different policy considerations.

A good starting point is the scope of the securities laws. The definition of “security” that triggers the obligation to register and disclose information, as well as the availability of specific private causes of action designed to protect investors, is broad but also vague. For example, consider the notion of what constitutes an “investment contract” set forth

87. 15 U.S.C. § 78u-4(b)(2)(A), (b)(3) (2012).

88. Fowell, *supra* note 84, at 819.

89. Ann Morales Olazábal, *False Forward-Looking Statements and the PLSRA’s Safe Harbor*, 86 IND. L.J. 595, 616 n.79 (2011) (noting that eighty-nine House Democrats and twenty Senate Democrats voted to override President Clinton’s veto).

90. See Roberta S. Karmel, *The EU Challenge to the SEC*, 31 FORDHAM INT’L L.J. 1692, 1711 (2008) (arguing that “[s]ince the SEC has served as the gold standard of securities regulation, it is not surprising that as the EU has striven to improve and integrate European capital markets, it has looked to U.S. securities litigation as a model,” but also observing that recent economic developments, and the growth of the financial markets in London, now give more power to the European Union to influence the SEC); see also Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1508 (2004) (mentioning that Korea has looked to the U.S. model to regulate its securities markets). But consider also what has been correctly pointed out by David He, Note, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws After Morrison v. N.A.B.*, 2013 COLUM. BUS. L. REV. 148, 204: “U.S. securities laws--and especially the antifraud provisions under Section 10(b)--are viewed by many nations as exceedingly intrusive and burdensome, and numerous governments have openly rejected the U.S. private securities class-action model.”

in section 2 of the Securities Act (and section 3 of the Exchange Act) that the Supreme Court had to define on various occasions.⁹¹

Another crucial area concerns the availability of private causes of action to plaintiff-investors allegedly harmed by false, misleading, or incomplete statements in the purchase or sale of securities and the burden of proof that they must satisfy to prevail.⁹² Furthermore, in several cases, the remedies granted to plaintiffs are based on private causes of action implied by the courts and not explicitly regulated by the legislature, most notably section 10(b) and Rule 10b-5 of the Exchange Act. In these instances, significant interpretative latitude exists. Consider, for example, problems such as the need to prove reliance vis-à-vis the fraud-on-the-market theory, the scienter requirement, or the extension of liability to aiders and abettors.⁹³ The extension of the insider-trading prohibition, a rule largely created by courts, is another area in which different ideological perspectives might affect the decision-making process.⁹⁴

Conservatives and liberals also often have divergent views about the powers of the government (i.e., the SEC) to enforce the law, particularly the securities laws. For example, some interesting cases in this respect deal with the burden of proof that the SEC must satisfy to establish a violation of the securities laws.⁹⁵

Rulings on takeover regulation also might indicate different policy preferences of the Justices. These cases, however, show the difficulty of properly coding certain decisions as pro-business or pro-investor, a

91. Leading cases on this issue are *SEC v. Edwards*, 540 U.S. 389, 391, 395, 397 (2004); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685–87, 697 (1985); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 556, 558 (1979); *United Housing Foundation, Inc. v. Foreman*, 421 U.S. 837, 847, 851–52, 859–60 (1975); *SEC v. W. J. Howey Co.*, 328 U.S. 293, 297, 301 (1946).

92. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 564, 567, 584 (1995) (discussing the private cause of action given to plaintiffs when there are misstatements or omissions in a prospectus and denying that right of action to plaintiffs because recitations in a purchase agreement did not equate to a prospectus); *Pinter v. Dahl*, 486 U.S. 622, 632–33 (1988) (discussing the use of the *in pari delicto* defense in a private right of action under the federal securities laws).

93. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 177 (1994) (discussing aiding and abetting liability); *Basic, Inc. v. Levinson*, 485 U.S. 224, 245–47 (1988) (discussing the fraud-on-the-market theory); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (discussing the scienter requirement); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 150–53 (1972) (discussing fraud-on-the-market).

94. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 652–54 (1997) (describing a broad understanding of what constitutes fraud); *Dirks v. SEC*, 463 U.S. 646, 658–60 (1983) (limiting the scope of liability for insider trading); *Chiarella v. United States*, 445 U.S. 222, 229, 232–33 (1980) (discussing the common law and declining to broaden insider trading liability).

95. *E.g.*, *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (holding that the SEC has the burden of proving scienter in certain civil enforcement actions but not others).

problem that more generally affects the analysis undertaken later in this Article.⁹⁶ On one hand, it is possible to argue that takeovers, and more specifically hostile tender offers, favor investors by allowing them to sell their shares at a premium over market prices. On the other hand, some tender offers may not be value-maximizing, and in this case to allow the target corporation, as well as its controlling shareholders and managers, to resist an inadequate or coercive offer could be in the best interest of shareholders.

In any case, the proper role of the market for corporate control and how to create a level playing field for bidders and targets in the takeover context are also areas where there is room for competing policy considerations.⁹⁷ In addition, litigation concerning the constitutionality of state antitakeover statutes is instructive as to the position of the Supreme Court on issues relating to the relative powers of the federal government and the states in regulating commerce, an area that implicates the politically charged question of the role of the federal government.⁹⁸

The legislature resolved some of the controversies mentioned above, and the Court unanimously finds this easy solution. Even assuming that ideological preference might be embedded in their decision-making, judges and, to a lesser but not unsubstantial extent, Supreme Court Justices face several constraints while speaking from the bench: Sometimes statutes and regulations are fairly straightforward and do not leave room for policy considerations; Lower judges might desire not to be reversed on appeal;⁹⁹ Fear of “government retaliation” might play a role (in the sense, for example, that striking down a statute might lead the legislature to introduce other measures that the Justice opposes); And public opinion might unconsciously influence them.

There are, however, several “hard cases” where the solution does not seem to appear in either the Constitution or in statutory or case law. These hard cases leave room for the different policy approaches of the decision maker, as also indicated by the practice of dissenting opinions. This Article proposes that by examining a significant number of cases, it is

96. See *infra* Section III.A; see also *supra* note 83.

97. See, e.g., *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8–9, 11–12 (1985) (relying on the legislative history and purpose of the Williams Act to limit its application); *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 26–30 (1977) (looking at the legislative history and purposes of the Williams Act to determine that shareholders are the intended beneficiaries of the Act); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57–59 (1975) (discussing the purpose of antitakeover provisions in the Williams Act).

98. E.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 643–46 (1982).

99. Of course this element is irrelevant for Supreme Court decisions. As was famously remarked by Justice Robert Jackson, “We are not final because we are infallible . . . we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

possible to detect economic policies preferred by the Justices. In short, there are problems in the area of securities regulation in which ideology can play a role, considering the indeterminacy of the applicable laws.

II. AN OVERVIEW OF EXISTING LITERATURE ON THE ROLE OF IDEOLOGY IN JUDICIAL DECISION-MAKING

This Part begins by discussing the different ways to measure the elusive concept of ideology. Then, after considering the ideology of the Justices, this Part explores the correlation between that Justices' ideology and the way they vote on different decisions.

A. *Measures of Justices' Ideology*

One of the interesting and challenging problems of any study that investigates the correlation between the "ideology" of Supreme Court Justices and their voting patterns is how to precisely code such an ambiguous and elusive concept as the ideology of each Justice. There are three major techniques used in the political and legal literature to attribute a position to Justices (and lower court judges) on the political spectrum: (1) the party of the appointing president; (2) the Segal–Cover scores; and the (3) Martin–Quinn scores. The first two are "ex ante" measures because they classify the Justices based on proxies for their ideology measured *before* their tenure on the bench, and they remain static for the entire period the Justices work on the Court. The last one is an "ex post" measure, ranking Justices from liberal to conservative based on their actual voting in published opinions.

The party of the appointing president is probably the most common measure used to code the political affiliation of Justices. This measure is based on the assumption that Republican presidents will appoint conservative Justices and Democratic ones will appoint liberal Justices. It has several advantages: "it is unambiguous, . . . easy to [apply and] understand."¹⁰⁰ It also raises a separate issue: to what extent presidents are able to effectively influence the activity of the Court.

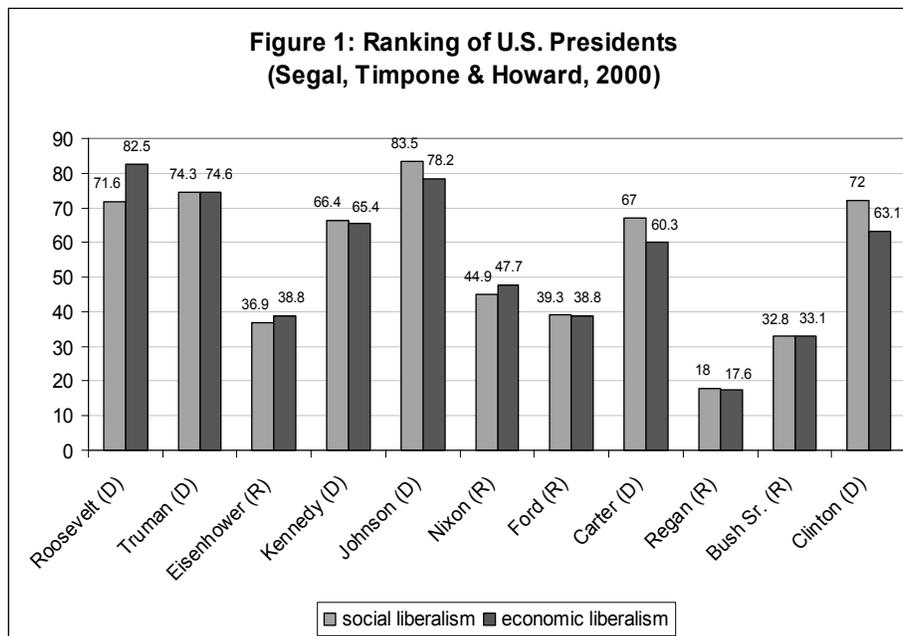
This measure, however, also has some clear drawbacks. The first drawback is that, as with all ex ante measures, the measure is static and does not take into account the possibility (indeed, the likelihood) that some Justices might change their ideological position during their often long tenure, as mentioned above.¹⁰¹ In fact, empirical literature suggests

100. EPSTEIN, LANDES & POSNER, *supra* note 22, at 74.

101. *See supra* text accompanying notes 74–76.

that most Justices “drift” in their position on the ideological spectrum throughout their years on the bench.¹⁰²

This variable is also problematic because it assumes that all Republican presidents are conservative and that all Democratic ones are liberal, or at least that they are all conservative or liberal in the same way, which is clearly not true. An interesting study ranked the U.S. presidents from Franklin Roosevelt to Bill Clinton based on their social and economic liberalism.¹⁰³ The ranking is based on a 1995 survey of a random group of political scientists, and the results—used in this Article’s empirical analysis—are as follows (100 being extremely liberal and 0 extremely conservative):



In addition, not all presidents want or can appoint a Justice who precisely mirrors their views.¹⁰⁴ Other considerations might affect the decision, such as the need to take into account the geographical origins of the candidate and—especially in more recent years—the need to create

102. Lee Epstein, Andrew D. Martin, Kevin Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1485–86 (2007); see also Segal, Timpone & Howard, *supra* note 73, at 567, 569.

103. Segal, Timpone & Howard, *supra* note 73, at 560.

104. Consider the case of William H. Taft (1857–1930), a Republican, who, besides being the only person who served as both President and Chief Justice, was a president who appointed three Democrats to the Supreme Court. See IRONS, *supra* note 71, at 261. They were southern conservatives with which President William Taft had a better relationship than with the progressives within his own party. *Id.*

a diverse Court in terms of gender and race to appeal to part of the electorate (consider President Ronald Reagan's appointment of Justice Sandra Day O'Connor or President Barack Obama's appointment of Justice Sonia Sotomayor). Political and party necessities can influence the President: for example, senators can play a role in the selection, especially the senator of the same party as the President from the state of the nominee, though this is more likely to occur in the selection process for the lower federal courts and is probably less relevant in Supreme Court nominations. Finally, the President can make a mistake in assessing the position of the appointee on the political spectrum,¹⁰⁵ or simply may not care so much. Notwithstanding these caveats, this Article uses the party of the appointing president as one proxy for the ideology of the Justices, for the reasons indicated above.

A second very common measure for the ideology of Supreme Court Justices is the so-called Segal–Cover index.¹⁰⁶ This is also an ex ante measure that ranks Justices on a conservative-to-liberal spectrum based on a content analysis of editorials published in two liberal and two conservative newspapers about the nominees in the period from their nomination to their confirmation.¹⁰⁷ In its original formulation, to determine the Segal–Cover index, each paragraph of an article receives a score: +1 if it indicates a liberal attitude of the candidate, 0 if a moderate one, or -1 if a conservative one. The position of the Justice is measured according to the following formula:

$$\frac{l - c}{total}$$

In the above formula, “*l*” is the number of paragraphs indicating a liberal ideology, “*c*” is the number of paragraphs indicating a conservative ideology, and “*total*” is the total number of paragraphs. Results can vary between -1 (extremely conservative) and +1 (extremely

105. For a description of these possible mistakes of the ideology classification based on the party of the appointing president, see EPSTEIN, LANDES & POSNER, *supra* note 22, at 71.

106. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989) [hereinafter *Ideological Values*]; Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995) [hereinafter *Ideological Values Revisited*].

107. *Ideological Values*, *supra* note 106, at 559; *Ideological Values Revisited*, *supra* note 106, at 813.

liberal). In line with other studies, this Article has renormalized the score from 0 (conservative) to 1 (liberal).¹⁰⁸

However, the Segal–Cover index is not devoid of shortcomings. Like the Republican/Democratic appointing president variable, the Segal–Cover index is static and does not consider changes in the Justice’s attitudes. A specific bias of this index is that the policies and preferences of the newspaper influence op-ed pieces on prospective Justices. For example, there are certain issues that might receive more emphasis than others, e.g., social issues versus economic ones. In addition, the newspaper can influence the length of the article and therefore affect the balance between paragraphs emphasizing a conservative or a liberal inclination.¹⁰⁹

This methodology does not take into account other possible important sources that indicate the ideology of a Justice, from scholarly articles to books published before the nomination.¹¹⁰ Professors Lee Epstein, William Landes, and Richard Posner have created a more comprehensive index that also considers these elements, but this Article does not use it in this analysis.¹¹¹

Another possible bias of the Segal–Cover index is that, in the period between nomination and confirmation, the authors of the editorials might write “strategically”—trying to make a candidate appear more liberal and less self-restrained to enrage Republican Senators, for example. The Segal–Cover index is, however, popular in the literature, and it has the advantage of comporting with general scholarly evaluations of the Justices.¹¹² In addition, unlike the party of the appointing president, the Segal–Cover index ranks the Justices on a continuous scale from -1 to +1 (or from 0 to +1), offering a more nuanced measure of the position of the Justices and allowing for more precise correlations.

The most important ex post proxy of the ideology of the Justices is the Martin–Quinn index.¹¹³ It is based on a classification of the actual votes

108. The normalized measure is that provided in Jeffrey Segal & Albert Cover, *Perceived Qualifications and Ideology of Supreme Court Nominees 1937–2012*, STONY BROOK U., <http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf> (last visited May 1, 2015), and given by $L=1-(C/T)$, $0 \leq L \leq 1$, where C denotes the paragraphs coded as indicating that the nominee is liberal, and T, the total number of paragraphs devoted to the Justice. *Ideological Values*, *supra* note 106, at 560 tbl.10.

109. See EPSTEIN, LANDES & POSNER, *supra* note 22, at 73.

110. *Id.* at 73–74.

111. *Id.* at 205.

112. Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideology and the Study of Judicial Behavior*, in IDEOLOGY, PSYCHOLOGY, AND LAW 705, 709–10 (Jon Hanson ed., 2012).

113. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 135 n.1, 145

of the Justices during their terms, adjusted to take into account possible alignments among Justices, and it returns an “ideal point” representing a Justice’s ideology in a space ranging from very liberal (-6.656) to very conservative (3.884).¹¹⁴ This proxy is useful because it accurately positions the Justices’ ideology in different terms and therefore does not suffer from the static nature of *ex ante* measures.

The major problem with this approach is its circularity or endogeneity. Arguably, this measure only shows that a Justice who usually votes conservative is more likely to vote conservative; it does not provide any information on the cases in which a Justice, perceived as liberal at the time of her appointment, voted more conservatively than expected.¹¹⁵ Removing cases on the particular issue researched and evaluating the correlation between the votes cast in other cases and those the research focuses on can partially mitigate this problem. For example, if one intends to test how Justices vote on First Amendment issues, one can factor in the votes cast in cases *not* dealing with First Amendment claims and verify if these votes predict how Justices will vote on First Amendment controversies.

This Article’s analysis of securities regulation decisions uses all these variables (the party of the appointing president, economic liberalism of the appointing president, Segal–Cover scores, and Martin–Quinn scores) to test the existence of a correlation between Justices’ ideologies and their voting behavior. Combining the most commonly used measures will offer important and interesting insights on this Article’s query.¹¹⁶

(2002) [hereinafter *Dynamic Estimation*]. See generally Andrew D. Martin & Kevin M. Quinn, Can Ideal Point Estimates Be Used as Explanatory Variables? (Oct. 8, 2005) (unpublished manuscript), available at <http://mqscores.berkeley.edu/media/resnote.pdf>.

114. See *Dynamic Estimation*, *supra* note 113, at 145. Professor Corey Yung elaborated on an adjusted variant of the Martin–Quinn index for court of appeals judges. See Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133 (2010).

115. EPSTEIN, LANDES & POSNER, *supra* note 22, at 75–76.

116. A final observation is that other elements besides the “political position” of the judge or Justice can play a relevant role in her judicial attitude. For example, Professor and Judge Guido Calabresi indicated that previous professional experiences might be more relevant than other considerations: looking at the reversals of criminal convictions by judges of the Second Circuit, he pointed out how judges who reversed least had come to the bench from the U.S. Attorney’s Office, while judges coming from private practice or academia before appointment reversed more criminal convictions. Background, sometimes, can trump ideology. Email from Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit, to Authors (Nov. 12, 2013, 5:51 PM) (on file with authors).

B. *Studies on the Correlation Between Ideology (and Other Factors) and Decisions*

As examined above, the empirical literature of judicial behavior is vast.¹¹⁷ It would be difficult to provide here a complete account of the numerous studies published by political scientists and legal scholars in this broad area. This Article therefore limits its overview to some select works, pointing out in particular how the studies generally indicate a correlation between the ideology of Justices and judges and the way they vote.¹¹⁸

One of the forerunners of empirical legal studies in this area was Professor C. Herman Pritchett, who in the 1940s started to keep track of the votes of the Supreme Court Justices, noting in particular the number of dissents and the allegiances among Justices sharing a political view.¹¹⁹ The work of Professor Pritchett attracted a lot of interest as well as criticism, while several studies have confirmed his intuition that ideology plays a role in judicial behavior.

The work of Professors Jeffrey Segal and Albert Cover offers a good illustration of the major results of this line of research. In their study, they find that ideology explains in a robust way (the correlation coefficient is 0.80) the aggregate voting behavior of the Justices.¹²⁰

Many other studies indicate a relationship between the policy preferences of the Justices and their voting. Ideology might play a role in the very selection of cases that the Supreme Court will hear. Studies have found that liberal Justices tend to grant certiorari more often when the lower court rendered a conservative opinion, and vice versa for conservative Justices.¹²¹ This is particularly interesting considering that

117. See *supra* note 26 and accompanying text.

118. One excellent summary of the existing literature in this area can be found in EPSTEIN, LANDES & POSNER, *supra* note 22, at 76–79. The following pages draw much from the overview they provide.

119. C. Herman Pritchett, *Divisions of Opinions Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890, 891, 893–94 (1941).

120. *Ideological Values*, *supra* note 106, at 561. For an illustration of this work in the larger context of the studies on judicial behavior, see Jeffery A. Segal, *Judicial Behavior*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 20, 26–27 (Keith E. Wittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008). Of course statistics imply, by definition, some degree of simplification and synthesis. More analytical qualitative studies on the behavior of specific Justices often reveal a more complex picture, and not infrequently contradictory views and positions expressed by one Justice or judge. An interesting example of such a study is a 1973 article on Justice Douglas's decisions in the area of taxation: Bernard Wolfman, Jonathan L. F. Silver & Marjorie A. Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235, 236–37 (1973).

121. See Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828, 828–29 (1989) (observing that numerous studies have determined that Justices sometimes engage in an “error correcting” strategy and will grant certiorari because they believe the court of appeals’ judgment was wrong); Gregory Caldeira & John Wright,

according to other studies, Justices want to hear cases they intend to reverse, and in fact empirical evidence indicates that between 1953 and 1994 the Supreme Court reversed the majority of the decisions it reviewed (61.3 %).¹²²

Especially since the 1960s, conservative Justices have been proportionately voting to overturn more liberal precedents and strike down more liberal statutes, and the opposite is true for liberal Justices.¹²³ Other studies have shown an inclination of some Justices to vote for the defendants in criminal law cases if the litigation involves either statutory interpretation or Constitutional issues, which suggests coherence with a particular ideological view.¹²⁴

At least one empirical study has also examined the interpretative techniques employed by the Justices—in particular their use of legislative history. According to its authors, not only are liberal Justices more likely than conservative ones to use this interpretative technique, but Justices are more inclined to refer to legislative history “when it favors their ideologically preferred outcomes.”¹²⁵

Another line of research investigates the sensitivity of the Supreme Court to external pressures, whether real or perceived. While these studies do not examine the role of ideology in the Supreme Court’s decisions, they are relevant because they seem to confirm that Justices pay attention to extra-legal considerations, which might be a way that politics influence them. For example, one research study shows that when there is an ideological difference between the Court and Congress, the Court is less likely to invalidate a federal statute, which might be a concern for possible “retaliations” from Congress—either enacting a new statute with similar effects or other possible actions such as a reduction

Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 AM. POL. SCI. REV. 1109, 1112–14 (1988) (expanding on the idea that Justices are more likely to grant certiorari for a case they disagree with ideologically and asserting that amicus briefs help Justices determine when they disagree with a lower court decision for ideological reasons); see also Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 424 n.26 (2010) (observing that Justice White frequently dissented from the Court’s denials of certiorari because of ideological disagreements with the lower courts).

122. EPSTEIN & KNIGHT, *supra* note 16, at 27.

123. See Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 45 (2007); Jeffrey A. Segal & Robert M. Howard, *How Supreme Court Justices Respond to Litigant Requests to Overturn Precedent*, 85 JUDICATURE 148, 157 (2001).

124. See Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 67, 96–98 (2005).

125. David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1740 (2010).

of the Court's budget.¹²⁶ More generally, other works find that the Justices are responsive to changes in the public opinion.¹²⁷ Even more central to the topic of this Article is the finding that the Supreme Court reacts to the business cycle, for example by siding with the government in times of economic growth and tending to rule against it during economic downturns, but deferring to government efforts in times of crisis.¹²⁸ The instant empirical analysis has tested the hypothesis that Court decisions in securities regulation cases have some correlation with economic conditions.¹²⁹

Scholars have conducted extensive research on lower court decisions, focusing on decisions of the federal courts of appeals. Of course, the institutional context is different in such cases. Federal judges can face more constraints than Supreme Court Justices in their decision-making for reasons that this Article has already mentioned (fear of reversal, hopes of elevation to a higher court, etc.). It is important to note, however, that even with respect to lower federal judges, there are strong indicia that ideology affects judicial decision-making.

For example, judges close to the Democratic Party vote more consistently against corporations in antitrust cases and for unions in labor disputes.¹³⁰ An article on the *Chevron* doctrine claims that “panels controlled by Republicans were more likely to defer to conservative agency decisions (that is, to follow the *Chevron* doctrine) than were the panels controlled by Democrats.”¹³¹ Similarly, “Democrat-controlled panels were more likely to defer to liberal agency decisions than were those controlled by Republicans.”¹³² In addition, according to a study of the U.S. Court of Appeals for the Second Circuit, conservative Justices tend to align their votes with conservative judges, and liberal Justices and judges similarly align.¹³³

126. Jeffrey A. Segal, Chad Westerland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 90 (2011).

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

128. Thomas Brennan, Lee Epstein & Nancy Staudt, *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L. J. 1191, 1196–97, 1219 (2009).

129. See *infra* Figure 7.

130. See Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961–1964*, 60 AM. POL. SCI. REV. 374, 376 tbl.1, 380 tbl.5 (1966).

131. Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998).

132. *Id.*

133. MARVIN SCHICK, LEARNED HAND'S COURT 345–46 (1970).

There is also evidence of constraints on judicial behavior and of strategic voting. District court judges are adverse to reversal, or at least to a high frequency of reversals, and in their voting they seem to take into account the policy preferences of the court that will hear an appeal. On average, judges appointed by a Democratic president tend to impose lower prison sentences if a mostly liberal court of appeals reviews them and longer ones if the appellate judges are mostly Republican.¹³⁴ Also, researchers have tested “panel effects”: male judges seem more likely to vote for women in employment discrimination disputes if a woman is on the panel,¹³⁵ while white judges more frequently vote in favor of voting rights if a black judge sits on the panel.¹³⁶

Researchers have also conducted important studies on state judges, especially to investigate the behavior of elected judges. Elected judges rule more frequently in favor of in-state plaintiffs and against out-of-state businesses than appointed judges, especially when the decision transfers wealth to the state.¹³⁷ Additionally, sentences in violent criminal cases are more severe if the judge is approaching reelection.¹³⁸ Statistically, state supreme court justices are more likely to confirm death sentences when the electorate supports them.¹³⁹

This brief overview of some contributions indicates evidence that ideology informs judicial decisions and that judges take into account external variables like the panel composition, public opinion, Congress's political composition, fear of reversal, and economic cycles. The results of previous research make interesting and relevant the questions that this empirical analysis investigates in the next Part, in particular whether the ideology of the Justices plays a role in securities regulation disputes.

134. Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 52–53 (2007). See generally Kirk A. Randazzo, *Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts*, 36 AM. POL. RES. 669, 669 (2008) (discussing whether district courts are influenced by anticipated responses of courts of appeals).

135. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Casual Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010).

136. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 45 (2008).

137. Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 367 (2002).

138. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004).

139. See Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 496–97 (1995); cf Richard R. W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 611–12, 637 (2002) (stating that trial judges are more likely to impose the death penalty in election years than in nonelection years).

III. AN EMPIRICAL EVALUATION OF THE ROLE OF IDEOLOGY IN THE SUPREME COURT'S SECURITIES REGULATION DECISIONS

This Part discusses the empirical research that is the focus of this Article, including the methodologies used to collect the data. In addition to a general discussion of the methods and findings, it also analyzes the correlation between the ideology of Justices and their decision-making based on the data. Finally, this Part ends by considering the Justices rate of reversal of different cases depending on the court of appeals from which the case originates. This discussion paves the way for further research.

A. Methodological Issues: The Data

This Section explains the major methodological underpinnings of the empirical research that follows. The table in the Appendix of this Article contains the most important data that we have used; hereinafter we discuss how we selected, collected, and coded that data.

The first—and a most important—issue that we faced was the selection of cases. We selected forty-eight Supreme Court decisions, listed in the Appendix in alphabetical order by the name of the parties, from the 1930s through 2011—a time span that covers almost the entire existence of the securities laws. We did not select a random sample of cases but rather included what we consider the most significant cases decided by the Supreme Court in that period of time.¹⁴⁰ From a statistical point of view, therefore, our response to the objection that we did not work on a random sample is that we considered the *entire population* of the most important decisions. Of course, to single out a decision as particularly important, and warranting of inclusion in our data, is a judgment call. Possible criticisms of our selection are that we neglected some other important decisions or that we included some cases that are not particularly relevant. Those criticisms are helpful to update this Article's list of cases in the future. However, our selection seems at least partially validated by the generally significant number of citations to the selected cases,¹⁴¹ by the fact that major securities regulation casebooks include an excerpt or discussion of most of them,¹⁴² and leading treatises

140. We had to exclude from the empirical analysis, however, *Jones v. SEC*, 298 U.S. 1 (1936), because some of the proxies for the Justices' ideologies are not available for that year.

141. According to a search on Westlaw, courts have cited the cases in this Article's data an average of 824 times per case, and legal journals have cited them an average of 590 times per case.

142. *E.g.*, JOHN C. COFFEE JR. & HILLARY A. SALE, *SECURITIES REGULATION: CASES AND MATERIALS* (12th ed. 2009); JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, *SECURITIES REGULATION: CASES AND MATERIALS* 1271–80 (3d ed. 2001); LARRY D. SODERQUIST

refer to them.¹⁴³ We have also informally submitted the list of cases to several securities regulation scholars and experts who have confirmed that the selection covers the most important cases.¹⁴⁴ We believe that focusing on the most relevant cases can lead to more useful insights on the issues this Article investigates. Even more importantly, we must note that even considering the most complete lists of securities regulation cases decided by the Supreme Court, depending on the database considered, our selection covers in between 75% and 94% of the total number of decisions. This makes the selection extremely significant and basically excludes possible bias.

We did, however, include cases that resulted in a split Court or had some dissents as well as cases that were unanimously decided, contrary to other studies that only focus on decisions with some dissents, assuming that those are the “hard cases” that leave more room for judicial activism and are more politically divisive. We believe that ignoring unanimous decisions might cause a bias that tends to undervalue the situations in which all Justices share one interpretation independently of their political position when the law is less ambiguous.

One objection to the analysis could be that we analyzed a limited number of cases. We have several responses to this criticism. First, as mentioned, we examined the entire (or almost) population of relevant cases. Second, forty-eight cases is a statistically significant number. Third and more importantly, the number of single observations is in fact significantly higher because for each case there were typically nine votes (sometimes slightly less if not all of the Justices participated in the decision).

The table in the Appendix provides, after the citation and date, a very short holding of the case, often taken almost verbatim from the actual decision. This has sometimes raised a difficult issue because some cases have more than one holding, and the different holdings might not go in the same direction (for example, when they are not both pro-business). A good example is *Basic Inc. v. Levinson*,¹⁴⁵ which ruled both on the

& THERESA A. GABALDON, *SECURITIES REGULATION* xxv–xxviii (6th ed. 2006); THOMAS LEE HAZEN, *SECURITIES REGULATION: CASES AND MATERIALS* ix–xx (7th ed. 2006).

143. *E.g.*, THOMAS LEE HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* (6th ed. 2009); MARC I. STEINBERG, *UNDERSTANDING SECURITIES LAW* (5th ed. 2009); STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* (2d ed. 2008); LARRY D. SODERQUIST & THERESA A. GABALDON, *SECURITIES LAW* 205–07 (4th ed. 2011).

144. We have informally shared our list of cases with Professors Franklin A. Gevurtz, Joan MacLeod Heminway, Marc I. Steinberg, and Steven Thel, and they have all indicated that the list appears to include all the most important cases decided by the Supreme Court in the area of securities regulation (emails on file with the Authors). Obviously, their consideration of the list is just one additional element to validate it, but all errors and omissions are entirely ours.

145. 485 U.S. 224 (1988).

concept of materiality of information (adopting, in cases of merger negotiations, the “probability-magnitude” test and rejecting the “agreement-in-principle” test) and on the proof of reliance (adopting the “fraud-on-the-market” theory) in 10b-5 actions.¹⁴⁶ In these limited cases, depending on the circumstances, we have either taken into account the different holdings or concentrated on the most important one by which the Court has affected the law, for instance in resolving a split among circuit courts, deciding an issue of first impression, or reversing or distinguishing from a precedent decision.

The sixth column indicates our coding of the case as pro-business or pro-investor. This coding decision is extremely delicate. Generally speaking, we coded a decision as pro-business where the Court ruled in favor of the business defendant and against private investor-plaintiffs or the SEC. In most of the pro-investor decisions, the Court has interpreted broadly the scope of application of the securities laws, for example requiring the registration of a specific transaction (see *SEC v. W. J. Howey Co.*¹⁴⁷). In other decisions, the Court has ruled in favor of investors on liability issues, for example implying a private cause of action (see *J. I. Case Co. v. Borak*,¹⁴⁸ establishing a cause of action for misstatements in a proxy solicitation¹⁴⁹), or it has eased the burden of proof for the plaintiff (consider again *Basic*, facilitating the proof of reliance¹⁵⁰). The opposite is true for pro-business decisions. A recent example of a pro-business decision is *Morrison v. National Australia Bank*,¹⁵¹ which, excluding the extraterritorial application of the securities laws, has barred foreign-cubed securities class actions.¹⁵²

Some cases are either particularly difficult to code as pro-business or pro-investor or at least require adopting a controversial thesis (or some simplifying hypothesis, or both) to code them. This is particularly true in two areas: takeover regulations and insider trading. For example, the Court in one famous case held that a state antitakeover statute was constitutional because it did not violate the Commerce Clause and the

146. *Id.* at 249–50. This second holding of *Basic* is an interesting example in terms of possible ideological underpinnings of the Court’s reasoning. The majority opinion uses a theory generally embraced by supporters of free markets to reach a result that is protective of investors. To simplify, by arguing that the efficiency of the market allows all publicly available information to be incorporated and reflected in market prices, it concludes that plaintiff-investors do not need to prove actual reliance on misstatements because in trading in securities they rely on market prices affected by the misstatement. *Id.*

147. 328 U.S. 293, 301 (1946).

148. 377 U.S. 426 (1964).

149. *Id.* at 431–32.

150. *Basic*, 485 U.S. at 250.

151. 130 S. Ct. 2869 (2010); *id.* at 2894 n.11 (Breyer, J., concurring).

152. *See id.* at 2884–85, 2888 (majority opinion); *id.* at 2894 n.11 (Breyer, J., concurring).

securities laws—specifically the Williams Act—did not preempt it.¹⁵³ Upholding antitakeover statutes might be pro-business if one subscribes to the idea that hostile tender offers tend to favor shareholders, allowing them to pocket a premium over market prices. On the other hand, some scholars argue that at least some antitakeover defenses can help management to fend off takeovers that are not value-maximizing, thereby allowing state legislatures to provide for stronger protections of the corporate bastion that can, at least in some situations, favor investors.¹⁵⁴

This Article generally takes the position that decisions favoring an active market for corporate control are favorable to investors, but some cases proved not to fit this conclusion. A good illustration is *Piper v. Chris Craft Industries, Inc.*,¹⁵⁵ decided in 1977. In that case, the Court held that a defeated tender offeror has no private cause of action for damages against a competitive bidder and the target corporation for fraudulent, deceptive, or manipulative acts or practices in connection with a tender offer under section 14(e) of the Securities Exchange Act of 1934.¹⁵⁶ We considered this case not favorable to investors because reducing protections for a competitive bidder might negatively affect the possibility of a price-maximizing auction among bidders. More generally, strict scrutiny of possible misstatements in the takeover context is at least indirectly beneficial to investors. We acknowledge, however, that there might be different interpretations of the effects of the decision. For example, one might argue that the decision favors investors because the target can escape liability, and therefore there is no payment of damages to third parties reducing the value of the target's shares. Professor Harold J. Spaeth's coding of the case as conservative supports our view.¹⁵⁷

153. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987).

154. Classical works considering the effects of takeovers and discussing whether the market for corporate control should be facilitated are Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 975 (2002); Lucian Arye Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1030 (1982); Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885, 887 (2002); John C. Coffee Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605, 607 (1997); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1164 (1981); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 862 (1981); Ronald J. Gilson, *Unocal Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 492 (2001); Jeffrey N. Gordon, "Just Say Never?" *Poison Pills, Deadhand Pills, and Shareholder Adopted Bylaws: An Essay for Warren Buffet*, 19 CARDOZO L. REV. 511, 514 (1997); Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 105 (1979).

155. 430 U.S. 1 (1977).

156. *Id.* at 47.

157. *Data*, SUP. CT. DATABASE, <http://scdb.wustl.edu/data.php> (last visited May 1, 2015).

Insider trading cases might also be ambiguous because some scholars have famously argued that to allow some trading by insiders actually increases the information efficiency of the market.¹⁵⁸ A delicate decision in this respect is *Dirks v. SEC*¹⁵⁹ in which the Court denied insider-trading liability in a situation where the tipper acted with the goal of exposing a fraud and derived no personal gain from the tip.¹⁶⁰ We have, however, generally followed the rationale that cases reducing the scope of application of insider trading favor business and that investors are better off with strict enforcement of the prohibition.¹⁶¹ For this reason, we have coded *Dirks* as a pro-business decision, and once again we find support in Professor Spaeth's database, the Supreme Court Database that lists the decision as conservative.¹⁶²

Other cases present some element of ambiguity. One last example is a decision holding that predispute agreements to arbitrate controversies between investors and financial intermediaries are enforceable,¹⁶³ a decision we coded as pro-business because, if nothing else, the investor was claiming that the arbitration clause was not enforceable.¹⁶⁴ It is questionable that arbitration is less effective in protecting investors than litigation in federal courts, but this Article's hypothesis is that leaving investors the choice of suing in court or arbitration is more favorable to them.

It would be impossible to discuss all the cases in the list here. The general point this Article makes is that while most decisions are easy to classify as either pro-business or pro-investor, there are some controversial cases that required a judgment call on which reasonable minds can disagree. We are relatively confident, however, that our coding

158. See, e.g., Dennis W. Carlton & Daniel R. Fishel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 861 (1983); Henry G. Manne, *Insider Trading and the Law Professors*, 23 VAND. L. REV. 547, 565 (1970). Empirical studies, however, seem to indicate that insider trading does not significantly affect market prices. Joel Seligman, *The Reformation of Federal Securities Law Concerning Nonpublic Information*, 73 GEO. L.J. 1083, 1096 (1985). For a recent and comprehensive overview of insider trading regulation in the United States, and the underlying theories on which it is based, see WILLIAM K. S. WANG & MARC I. STEINBERG, *INSIDER TRADING* (3d ed. 2010).

159. 463 U.S. 646 (1983).

160. *Id.* at 665–67.

161. See Laura Nyantung Beny, *Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence*, 7 AM. L. & ECON. REV. 144, 144 (2005) (“[C]ountries with more prohibitive insider trading laws have . . . more accurate stock prices, and more liquid stock markets. These findings are generally robust to controlling for measures of disclosure and enforceability and suggest that formal insider trading laws (especially their deterrent components) matter to stock market development.”).

162. *Data*, *supra* note 157.

163. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989).

164. *Id.* at 479.

is fairly accurate. Furthermore, even if the classification is debatable in a small number of cases, this should not significantly affect the results of the empirical analysis.

One caveat is necessary: we have used the labels pro-investor and pro-business because they convey the underlying idea of this Article's analysis. A different expression, however, could be more accurate, such as "pro-regulation" and "anti-regulation." In several cases, the plaintiff is itself a business organization, such as an investment fund or another corporation, and some decisions coded "pro-investor" might be favorable to particular kinds of businesses that can also be "investors."¹⁶⁵ Notwithstanding this observation, the pro-investor/pro-business distinction captures in a brief and somehow catchy label the distinctions explained in this paragraph. Like all labels, however, one should not read this one too literally.

The pro-business/pro-investor distinction often overlaps with the conservative/liberal one. For example, a position favoring the expansion of the powers of the federal government or judiciary vis-à-vis the states might be considered liberal but may actually favor business. Consider legislation limiting the ability of private plaintiffs to bring securities claims in state courts.¹⁶⁶ As a control variable in our analysis, next to the column coding for pro-business or pro-investor in the table in the Appendix, we have indicated the coding of the decision as liberal or conservative based on the Supreme Court Database created by Professor Spaeth.¹⁶⁷

In the overwhelming majority of the cases, our classification of a decision as pro-investor coincides with the Supreme Court Database's coding as liberal; similarly decisions we considered pro-business are usually deemed to be conservative in the Supreme Court Database, but there are some limited exceptions. One such case is *Chiarella v. United States*,¹⁶⁸ a leading case in which the Supreme Court reversed a criminal conviction for an insider-trading violation, reasoning that the mere possession of nonpublic, price-sensitive information is not sufficient to

165. In some pro-investor cases, the Court found in favor of a small investor against a large corporate defendant; however, in many cases the investor is a large financial institution or business entity.

166. We refer to the Securities Litigation Uniform Standards Act of 1998, enacted to prevent the circumvention of the Private Securities Litigation Reform Act of 1995; on this piece of legislation, see David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1, 2-4 (1998). For a more recent evaluation of the effects of the statute, see Gregory Kendall, Comment, *The Artful Dodgers: Securities Fraud, Artful Pleading, and Preemption of State Law Causes of Action Under the Securities Litigation Uniform Standards Act*, 81 U. CIN. L. REV. 657, 657-58 (2012).

167. See *Data*, supra note 157.

168. 445 U.S. 222 (1980).

impose liability and that a breach of a fiduciary duty is also a necessary element of the violation.¹⁶⁹ In other words, the holding in *Chiarella* rejected the “parity-of-information” theory of insider trading.¹⁷⁰ This decision, favorable to a criminal defendant, has understandably been labeled liberal in the Supreme Court Database, but we find that limiting the scope of the insider trading liability can, at least generally, favor managers or employees who are insiders, hurt the general public of investors, and diminish their confidence in financial markets. We therefore treat some of these decisions as pro-business.¹⁷¹ Of course, this is yet another judgment call. We are in any case comforted by the fact that only seven cases involve discrepancies between our coding and Professor Spaeth’s.

The Appendix contains the data described above for the reader’s convenience. To avoid making the Appendix too cumbersome, it does not include the data discussed below,¹⁷² which are easily obtainable from publicly available sources.

For each decision, we have listed the Justices and indicated the three variables used to classify their ideology: the party of the appointing president, the Segal–Cover scores, and the Martin–Quinn scores. We have already discussed these measures and their pros and cons, and therefore do not need to further elaborate on those measures here.¹⁷³ Note, however, that next to each president we have also indicated—when the data is available—their position on the conservative to liberal spectrum on economic issues according to the previously cited study by Professors Jeffrey Segal, Richard Timpone, and Robert Howard.¹⁷⁴ We will use this measure to examine more precisely the possible connection between the economic policy preferences of the appointing presidents and the behavior of their appointees.

For each Justice in each decision, we have indicated whether that Justice voted with the majority (taking either a pro-business or pro-investor position), has dissented, or has not taken part in the decision. We have not distinguished between regular and special concurring

169. *Id.* at 224, 226–28, 235; Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1, 17 n.68 (1982); Anthony Michael Sabino & Michael A. Sabino, *From Chiarella to Cuban: The Continuing Evolution of the Law of Insider Trading*, 16 FORDHAM J. CORP. & FIN. L. 673, 693–94, 718 (2011).

170. *See Chiarella*, 445 U.S. at 235.

171. *See supra* note 161 and accompanying text.

172. *See, e.g., Data, supra* note 157 (containing data of the aforementioned Supreme Court Database); EPSTEIN, SEGAL, SPAETH & WALKER, *supra* note 78; MARTIN-QUINN SCORES, <http://mqscores.berkeley.edu> (last visited May 1, 2015).

173. *See supra* Section II.A.

174. Segal, Timpone & Howard, *supra* note 73, at 560.

opinions,¹⁷⁵ but simply listed the votes as supporting the majority or plurality decision or dissenting from it based on data from the Supreme Court Database. While this choice disregards valuable information for a more in-depth legal analysis of the relevance of the decision and its binding value as precedent, considerations of simplicity in the empirical analysis prevailed.

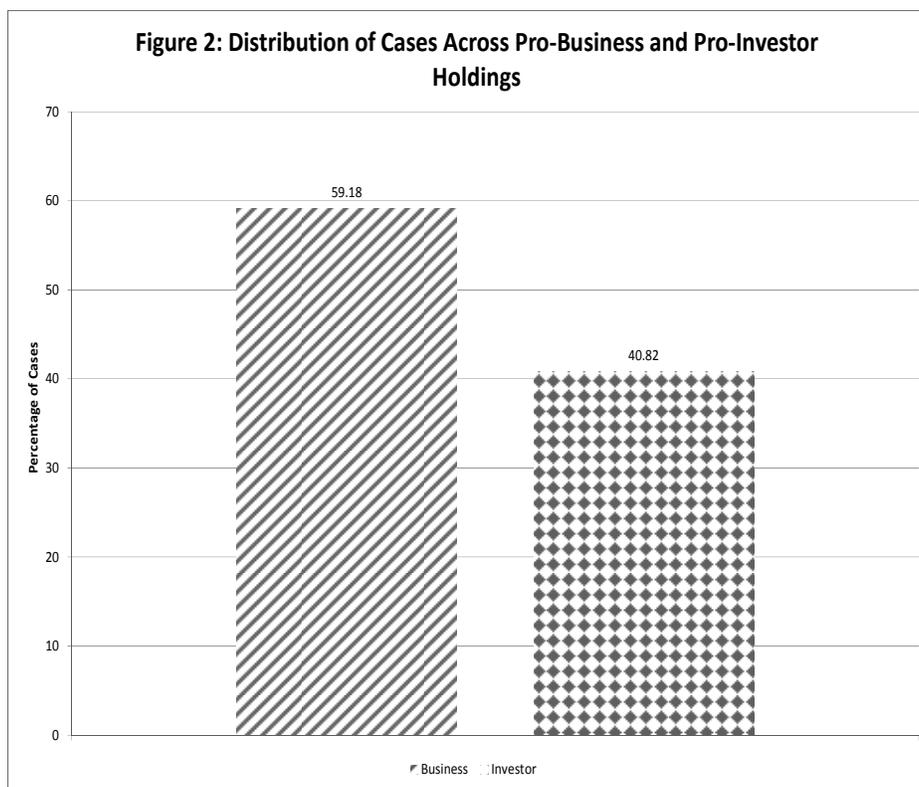
We then collected information concerning the Chief Justice to consider to what extent different Chief Justices were able to influence or steer the Court toward their positions or, more simply, under which Chief Justices the Court leaned more toward a pro-business or pro-investor agenda. The Chief Justice is a *primus inter pares*. He is the first one to speak at the Justices' conference discussing the cases after oral argument and, if he is in the majority, he assigns the opinion. But besides that and his ability to persuade his colleagues, his vote has exactly the same value as the votes of the other Justices.

Finally, we considered the circuit court from which the case arose and whether the Supreme Court reversed, affirmed, or vacated and remanded the case. The data are taken from the Supreme Court Database and Westlaw. This study focuses on Supreme Court Justices and therefore does not consider the ideological composition of the lower courts. It would be interesting, however, to confirm whether the Court reverses some circuits more often than others in securities disputes. Such a correlation might be a first step for future research into related questions. One such related question might be whether the Supreme Court is more deferential to the Second Circuit in light of the significant number of cases concerning financial markets regulation that this court decides.

B. Results: General Patterns

In the following pages, this Article provides the results of the analysis. This Section discusses some general empirical findings. The next Section focuses on the correlation between the Justices' ideology and their voting patterns. In the final Section, this Article offers some information on the rate of reversal correlated to the circuit court from which the case arose. Figure 2 below simply indicates the overall number of cases decided that were pro-business and pro-investor in the period considered.

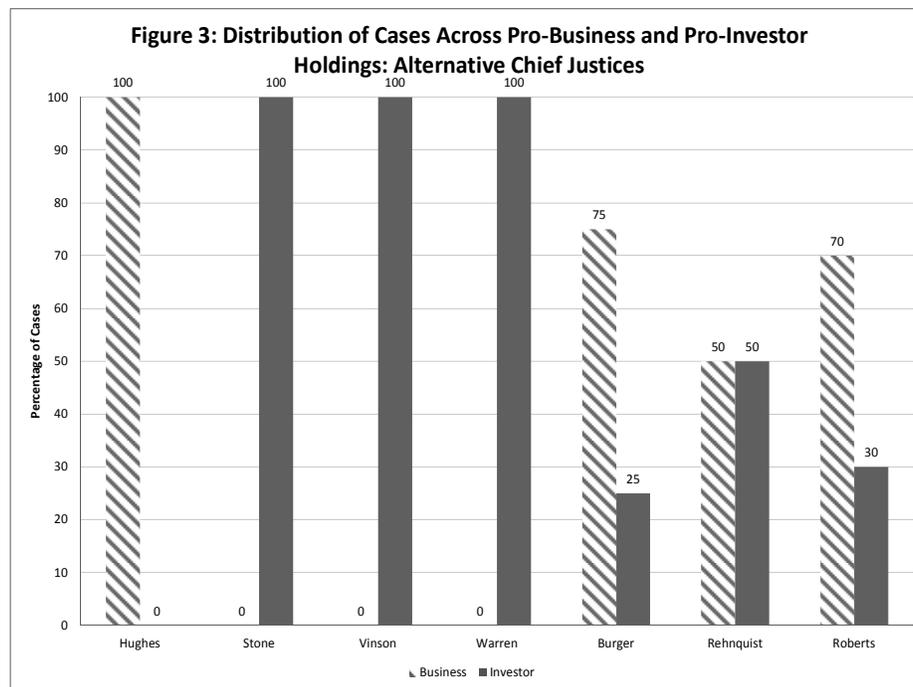
175. A special concurring opinion is written when the Justice agrees with the disposition of the case by the majority, but not with its reasoning.



While not particularly telling with respect to the key questions this Article raises, it is interesting that the Court has ruled more often in favor of business by a ratio of three to two. In this perspective, the data seem to confirm the concerns of Professor Chemerinsky mentioned in the Introduction.¹⁷⁶

The distribution of pro-business and pro-investor decisions over time is also thought provoking. Figure 3 breaks down the data in terms of the tenures of the Chief Justices.

176. See *supra* note 28 and accompanying text.

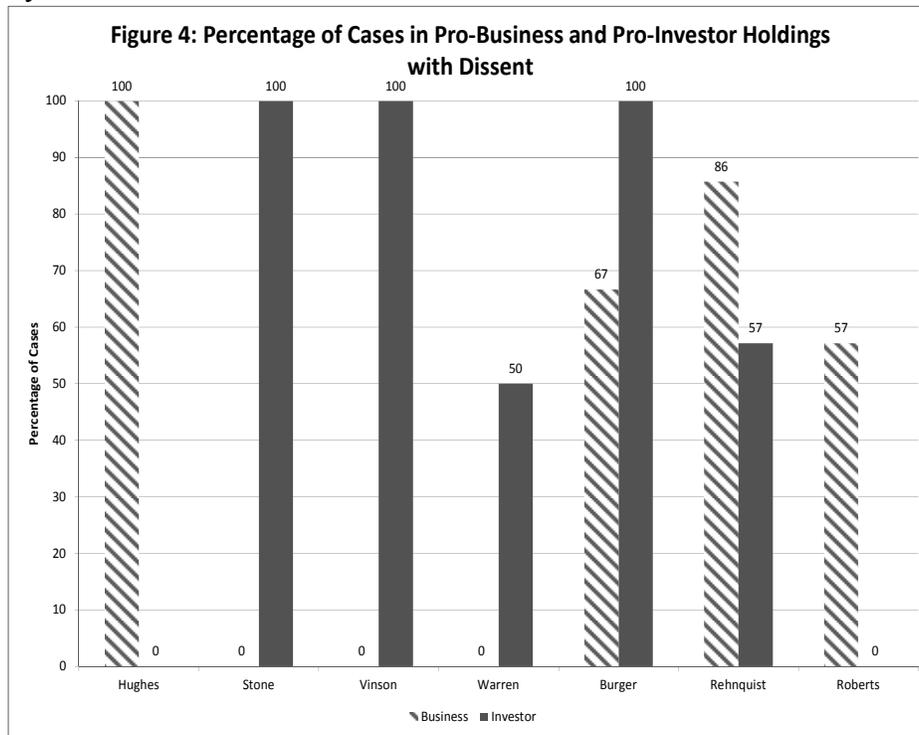


Two important caveats are necessary. First, Chief Justice Warren Burger's Court decided few securities regulation cases, making the percentage less meaningful. Therefore, the data are more interesting for the last three periods, meaning from the Burger, Rehnquist, and Roberts Courts. Second, as this Article mentioned before, the Chief Justice is simply a first among peers: each time the President appoints a new Justice to the Court, the Court changes ideological composition. For this reason, it might make sense to divide the timeline into as many periods as different compositions of the Court have occurred. Nonetheless, the division by Chief Justices' tenures gives a sense of the evolution of the Court and is a common and accepted means to distinguish different "periods" of the life of the Court (for example, commentators speak of the "Roberts Court" and the "Warren Court").

Given the limited number of cases decided during the tenure of Chief Justice Burger, let us focus on the last three periods. Here, it is intriguing to observe that, in securities regulation issues, the Rehnquist Court appears to be less conservative—less pro-business—than the Burger Court, which has a record similar to that of the pre-2011 Roberts Court. Looking at the general trend, it seems that over time the Court shifted to a more pro-business position, starting approximately in the early 1970s. This evolution seems consistent with the appointment of Justices Harry Blackmun, Lewis Powell, and William Rehnquist by President Richard Nixon in 1970 and 1971 and the shift of the Court to more conservative

positions. We are cautious, however, in drawing any particular inference from these still-aggregate data.

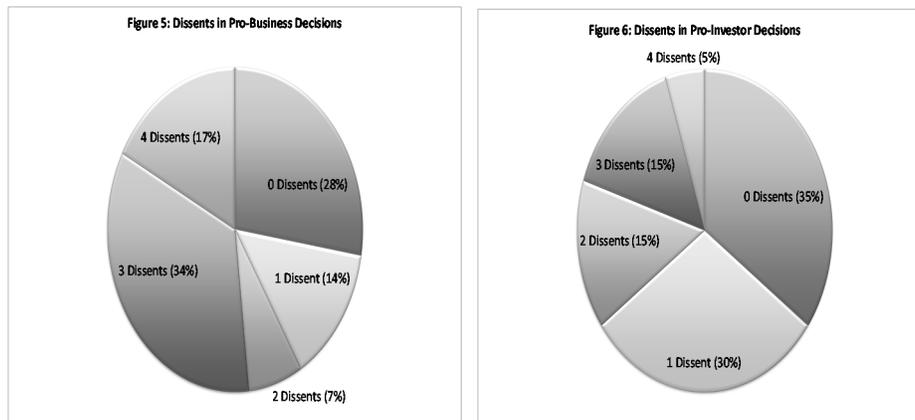
Figure 4 indicates the percentage of cases (separating pro-business and pro-investor decisions) with at least one dissenting opinion during the tenures of the seven Chief Justices who served in the period covered by our research.



This graph confirms, by the significant number of dissents, that securities regulation cases are often controversial, or at least that Justices are likely to voice their dissents. This might also be partially due to the fact that the Court has been deciding relatively fewer cases in total in recent decades, and therefore Justices might simply have more time to write separate opinions.¹⁷⁷ But the finding is not inconsistent with the perception of a divided Court.

In this perspective, it is also interesting to look at the percentage of dissents in pro-business and pro-investor decisions. Figures 5 and 6 offer insights in this respect.

177. LAWRENCE BAUM, *THE SUPREME COURT* 107 (1985); GERHARD CASPER & RICHARD A. POSNER, *THE WORKLOAD OF THE SUPREME COURT* 79–80 (1976).

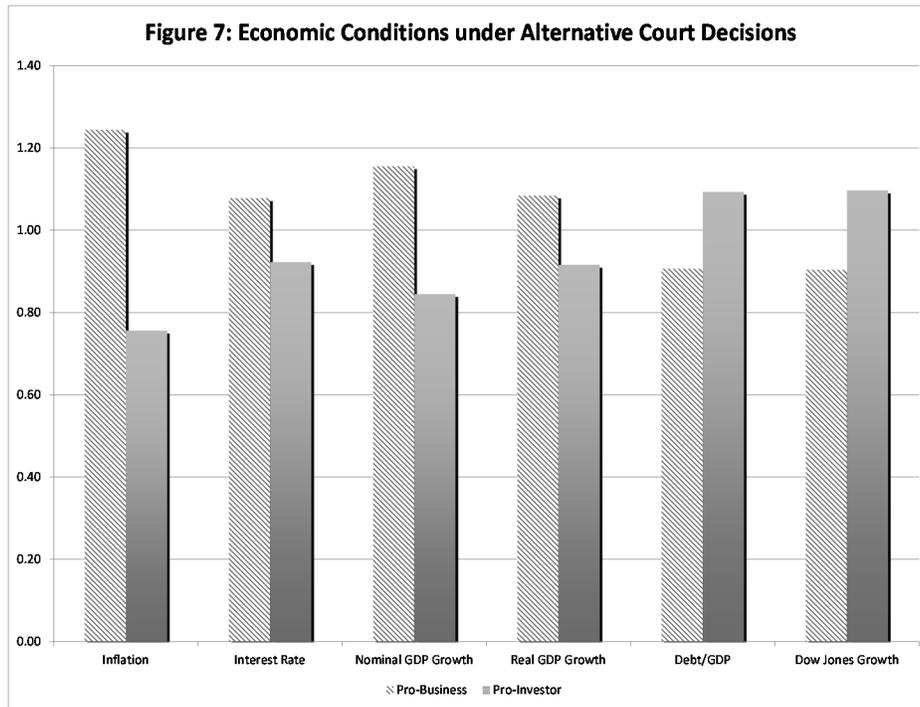


The pie charts indicate, interestingly enough, that pro-business decisions appear to be more controversial: in pro-business decisions, Justices have prepared three or four dissents in fifty-one percent of the cases, while only twenty percent of the cases in pro-investor decisions have three or four dissents.

Next, this Article investigates economic conditions under alternative Court decisions, looking at some economic indicators at the time of pro-business or pro-investor decisions.¹⁷⁸ Figure 7 below illustrates the results. In Figure 7, each bar indicates the average value of the economic variable below when either pro-business or pro-investor decisions were rendered. For example, with “Inflation,” the graph indicates that, on average, when the Court handed down pro-business decisions, inflation was higher than when pro-investor decisions were rendered. More precisely, to avoid scale differences across the economic variables, for each economic variable that prevails under pro-business or pro-investor decisions, Figure 7 reports the average ratio of the full sample. Where the ratio is greater than 1, the implication is that, on average, the economic variable for that class of court decision (pro-business or pro-investor) assumes a value higher than the full sample average for that economic variable. Conversely, where the ratio is less than 1, the implication is that, on average, the economic variable for that class of court decision (pro-business or pro-investor) assumes a value lower than the full sample

178. Economic data sources are as follows: inflation data for the consumer price index is obtained from the Bureau of Labor Statistics; GDP data was sourced from the U.S. Bureau of Economic Analysis; the public (domestic and foreign) debt to GDP ratio was sourced from CARMEN M. REINHART & KENNETH ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009); the Dow Jones Index was sourced from the Federal Reserve Bank of St. Louis historical data series; and long term interest rates were obtained from Lawrence H. Office, *What Was the Interest Rate Then?*, MEASURING WORTH, <http://www.measuringworth.com/interestrates/> (last visited May 1, 2015).

average for that economic variable. For instance, in the case of “Inflation,” the first two bars indicate that, on average, when pro-business decisions were rendered, inflation was approximately 20% higher than



the full sample average inflation rate; when pro-investor decisions were rendered, inflation was approximately 20% below the full sample average.

Because we are employing economic averages across substantial time periods, the analysis aggregates away any nuances that may attach to subperiods in the sample—an unavoidable constraint given the relatively small number of cases per subperiod.

The results indicate that the Court is more likely to rule in favor of business when inflation, interest rates, and gross domestic product (GDP) growth (both nominal and real) are high, and the ratio of public debt to GDP and growth rate in the Dow Jones index is low.

First, conditions of relatively high inflation, associated economic policy responses in the form of higher interest rates, and low growth rates in the Dow Jones index all indicate conditions of pressure (though not necessarily crisis) on asset markets and on net wealth positions of voters. Under these conditions, the Court appears to favor business in its rulings.¹⁷⁹ Second, the increasing propensity of the Court to favor

179. This has an immediate counterpart in the idea that concerns over inflation influence Republican voters more, while Democratic voters are more susceptible to concerns over unemployment.

investors under a rising ratio of public debt to GDP is consistent with at least two explanations.

Increased public debt levels could be indicative of a more interventionist economic policy environment—either as an expression of countercyclical stimulatory fiscal policy (as was in place post-2007, for example) or by virtue of a greater commitment to the public provision of goods and services. The Court may simply be reflecting this broader policy preference. Alternatively, a rising debt to GDP ratio implies that the future expected tax burden has to increase symmetrically. The Court's favoring of investors may reflect a concern for this increased expected tax burden.

Finally, the finding that pro-business decisions correspond to periods of high economic growth is consistent with the finding in the literature that the Court reacts to the business cycle.¹⁸⁰ It appears that where economic conditions are improving more rapidly, the Court is less disposed to impose additional regulation on the operation of business than it may be under less favorable economic conditions.

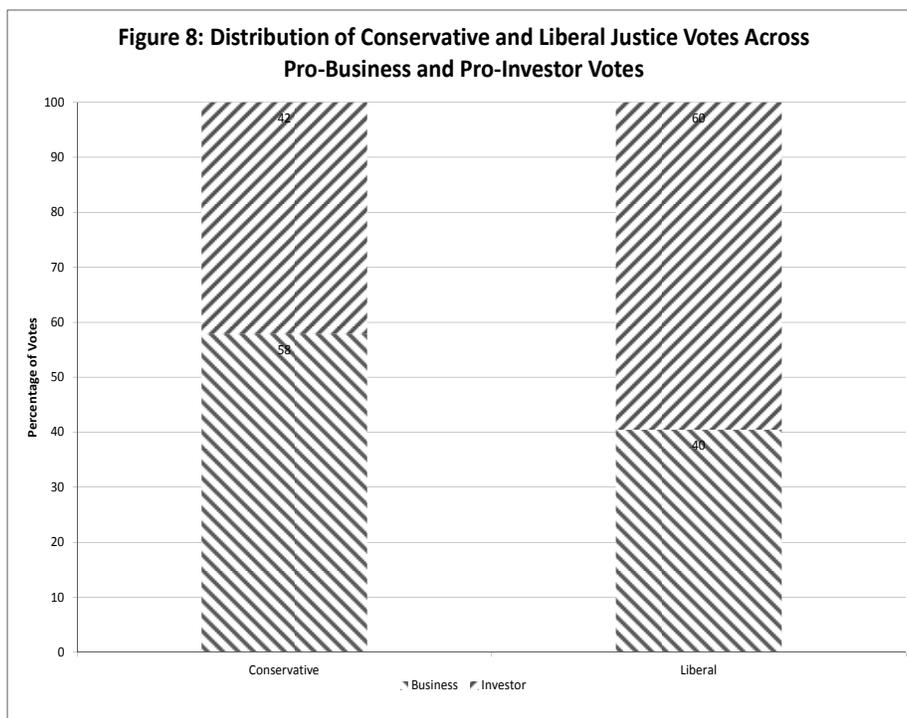
There might be different ways to interpret the data that do not imply that economic conditions affect Justices when they render their decisions. For example, a higher percentage of pro-investor decisions at times of higher Dow Jones growth could simply mean that in periods of market euphoria more investors are lured to invest in securities, and statistically it is more likely that some of them are victims of illegal practices.¹⁸¹

C. *Correlations Between Justices' Ideology and Voting*

This Article finally addresses the key issue: whether conservative Justices are more pro-business and liberal Justices more pro-investor. The following graph, Figure 8, offers an important insight.

180. *See supra* note 128 and accompanying text.

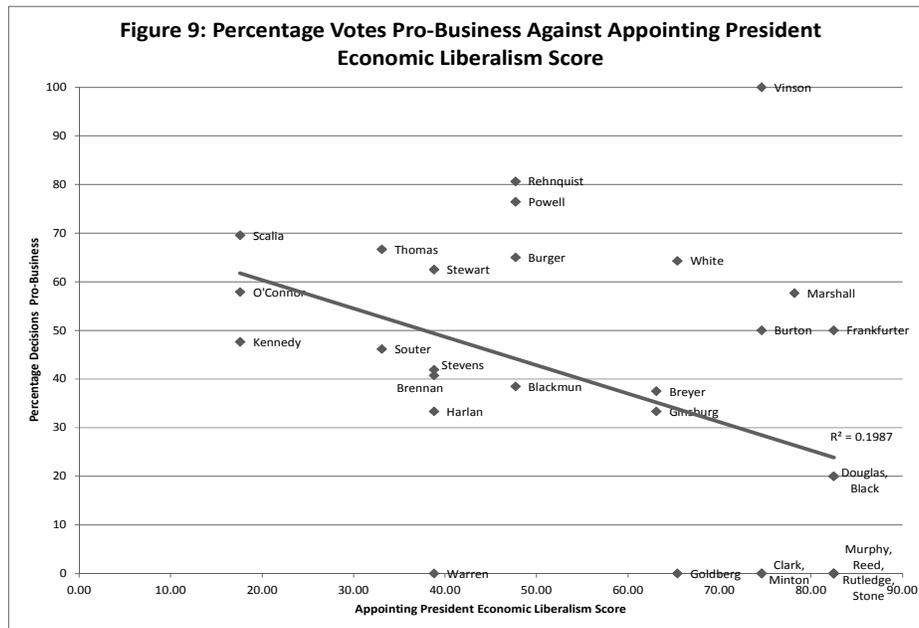
181. Admittedly, to argue that Justices take into account, for example, the level of inflation when deciding a case might seem questionable because some of the cases decided present very unique factual patterns that are difficult if not impossible to link to general economic conditions. It seems interesting however, that the evidence indicates—consistent with previous literature—that there is a correlation between general economic conditions and the propensity of the Court to rule in favor of business or investors.



In this case, we have classified Justices as conservative or liberal based on the party of the appointing president, a coding that—for the reasons discussed above—is somewhat rough and simplistic, but still compelling. The results strongly support our hypothesis: conservative Justices vote consistently more pro-business (in 58% of the cases) than liberal Justices (in 60% of the cases, they vote pro-investor).

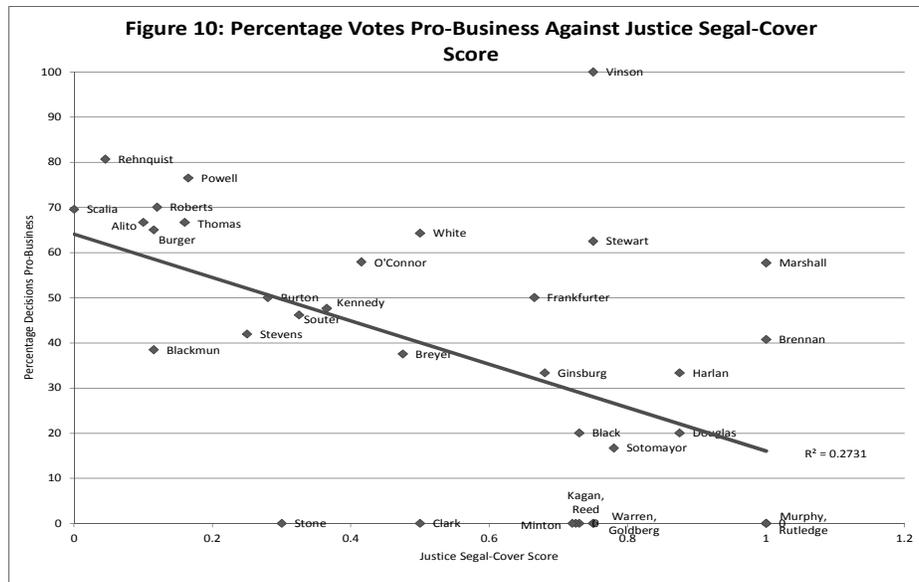
Figure 9, below, refines this inquiry by coding the Justices based on the position of the appointing president on the liberal to conservative continuum for those presidents for which this information is available, as discussed above.¹⁸²

182. See *supra* Figure 1; *supra* note 103 and accompanying text.



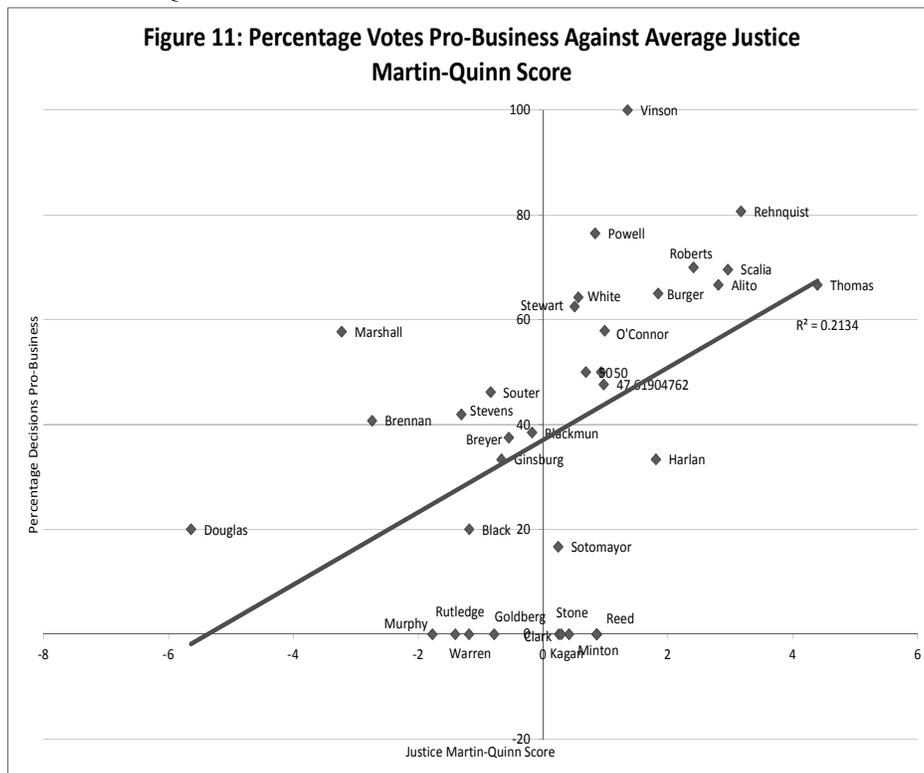
A meaningful correlation appears. Justices appointed by more economically liberal presidents tend to vote more consistently in favor of investors, and appointees of more economically conservative presidents rule more often for businesses.

The next plot, in Figure 10 below, examines the correlation between the Justices' ideology as measured by the Segal–Cover scores and the voting patterns of the Justices.



As discussed above, the Segal–Cover score varies between 0 (very conservative) and +1 (very liberal). The graph indicates a meaningful correlation: more conservative Justices more frequently voted pro-business, and more liberal Justices more often voted in favor of investors. Moreover, variations in the Segal–Cover score account for approximately 27% of the variation in the percentage of pro-business decisions across all Justices in the sample. Considering the constraints that even the Supreme Court faces in judicial decision-making in terms of precedents and statutory interpretation, this is a rather strong indicator of a correlation between ideology and voting.

Figure 11 examines the percentage of pro-business decisions against the Martin–Quinn scores of each Justice at the time of the decision.



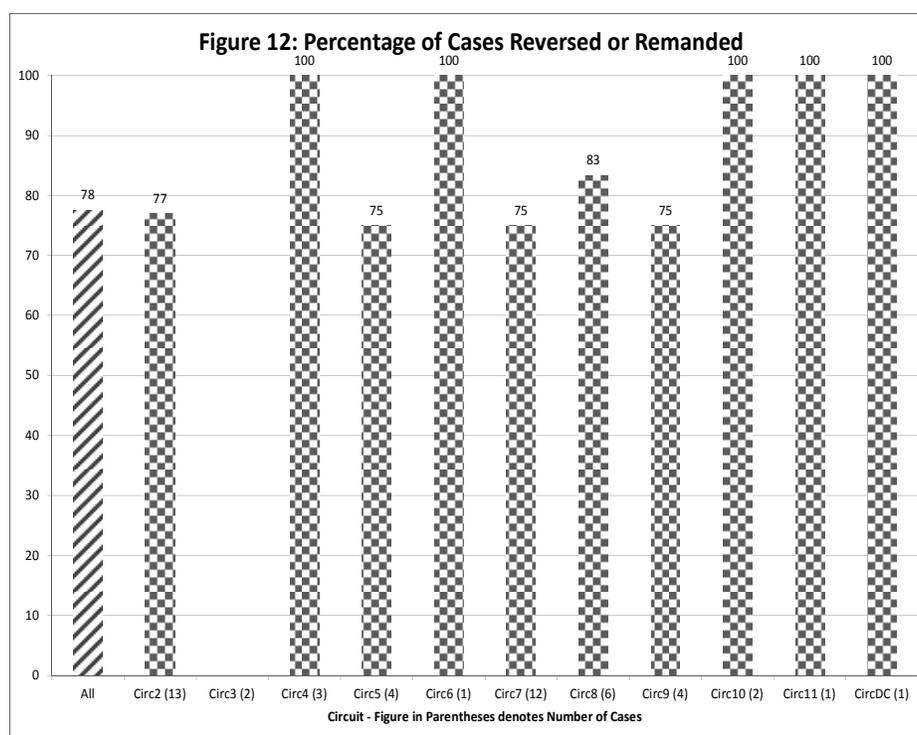
For this analysis, we used the average Martin–Quinn score over the relevant period for each Justice because we needed to correlate that data with the percentage of pro-business votes of the Justice. Bearing in mind that the Martin–Quinn score varies from very liberal (−6.656) to very conservative (+4.3999),¹⁸³ we find a positive correlation between the position of the Justice on the ideology spectrum and their voting: more conservative Justices vote more often in favor of business. In this case,

183. See *supra* notes 113–14.

the R^2 value indicates that the ideology score explains over 20% of the likelihood to vote pro-business or pro-investor, a quite meaningful result.

D. Reversal of Different Circuits

The last graph, Figure 12 below, does not address the correlation between Justices' ideology and voting, but considers the total percentage of cases reversed or remanded, and breaks this percentage down by the circuit from which the case arose. These findings offer some basis for further research.



There are at least two important observations from this data. First, in securities regulation issues, the Supreme Court tends to grant certiorari in cases that the Justices want to reverse or with which they disagree to some extent. The overall percentage of cases reversed or remanded is 78%—a high number. Second, the Court appears to be more “deferential” to certain courts of appeals. For some circuits, the number of cases is too small and not very statistically significant: take, for example, the U.S. Court of Appeals for the Third Circuit, which was never reversed but only decided two cases, leaving the potential for this absence of reversal to be a mere aberration. More significant is the data for the U.S. Courts of Appeals for the Second and Seventh Circuits. These two circuits decide a high number of securities lawsuits because they include New York and

Chicago, the two principal U.S. financial centers. As a result, their judges have a particular expertise in issues of financial regulation, and the Supreme Court is less inclined to overrule them than it is other courts.

Of course from the point of view of this Article, which investigates primarily the correlation between ideology and voting patterns, it would also be interesting to test if a “conservative” Supreme Court more often overruled “liberal” courts of appeals, and vice versa. This question can be the subject of future research.

CONCLUSION

According to Justice John Paul Stevens’s memoir about his years at the Supreme Court, in 1946 the gym was situated directly above the courtroom.¹⁸⁴ A law clerk shooting basketballs during a hearing disturbed the Justices, and Chief Justice Fred Vinson introduced an unwritten rule that no basketball was allowed during oral arguments.¹⁸⁵ Most likely, the Justices unanimously agreed on this decision independent of their ideological preferences.

When the Justices meet to decide cases dealing with financial regulation issues, however, their ideology appears to have a seat at the conference table. This Article has demonstrated that more conservative Justices vote more often in favor of business, and more liberal ones vote more often in favor of investors. In other words, there is a correlation between the voting of the Justices and their position on the political spectrum, and this appears to be consistent using different measures of the ideology or political affiliations of the Justices.

Of course, there are exceptions to this general statistical trend, and this confirms the independence of Supreme Court Justices. However, this Article’s findings do not in any way imply that the Justices distort the law to pursue a personal agenda, that they favor certain defendants, or even that they are “activists.” The observation that ideology plays a role in their decision-making might simply mean that when the law is ambiguous, or does not clearly resolve an issue, the Justices’ views concerning the underlying policy of the securities laws affect their reading of complex legal issues, as should be the case.

This Article also offers additional insights on the work of the Court in securities disputes. For example, it appears that in more recent years the Court has become increasingly divided—at least considering the number of dissents published—and more conservative (i.e., more pro-business). This is especially evident when comparing the Roberts Court to the

184. STEVENS, *supra* note 17, at 61–62.

185. *Id.* The clerk causing the disturbance was Byron White, the first former law clerk who a President (Kennedy) later appointed as a Justice. *Id.*

Rehnquist Court. The empirical evidence in this Article offers a different perspective than the findings of Professor Pritchard in an article already mentioned on securities laws under the Roberts Court, according to which the Roberts Court appears less pro-business and more inclined to maintain the status quo with respect to Rule 10b-5 class actions.¹⁸⁶ The different outcomes are not necessarily in conflict, however, considering the different scope and methodology of his research and that presented in this Article.

The data also indicate that pro-business decisions seem more controversial, again considering the number of dissents. This result might suggest that liberal Justices are more active than are conservative ones in voicing their positions when they are not satisfied with a decision.

Finally, this Article's evidence suggests that the Court may take into some account, at least implicitly and maybe unconsciously, the general economic conditions in its decisions in the area of financial markets.

186. See Pritchard, *supra* note 27, at 135.

Appendix 1						
#	Case	Citation	Date of Decision	Decision	Pro	SC Database
1	Aaron v. S.E.C.	446 U.S. 680	6/2/1980	SEC must prove scienter in actions under section 10(b) of the 1934 Act.	business	conservative
2	Affiliated Ute Citizens v. U.S.	406 U.S. 128	4/24/1972	Investor-sellers may recover damages, from the bank and its employees only, for failure of the employees to disclose that they are in a position to gain financially from the sales and that the shares are selling for a higher price on a different market.	investors	conservative
3	Basic Inc. v. Levinson	485 U.S. 224	3/7/1988	Information concerning merger discussions that could be significant to trading can be material for purposes of 10b-5 (probability-magnitude test). Agreement-in-principle test for materiality is rejected. Plaintiff-investors do not need to show reliance on the statements made by defendants; there is a rebuttable presumption of reliance based on the fraud-on-the-market theory. Investors rely on the market price.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
4	Blue Chip Stamps v. Manor Drug Stores	421 U.S. 723	6/9/1975	In a Rule 10b-5 action, only "purchasers" and "sellers" have standing to sue, not someone who alleges that they were dissuaded from accepting an offer (in this case, pursuant to antitrust consent decree) due to a misleadingly pessimistic prospectus.	business	conservative
5	Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.	511 U.S. 164	4/19/1994	Private plaintiff cannot maintain aiding and abetting suit under Securities Exchange Act, section 10(b).	business	conservative
6	Chiarella v. United States	445 U.S. 222	3/18/1980	In insider trading cases under 10(b), there is a duty to speak only if there is a fiduciary relationship. The duty to disclose does not arise only from possession of nonpublic information.	business	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
7	Credit Suisse Securities (USA) LLC v. Billing	551 U.S. 264	6/18/2007	Securities laws are incompatible with antitrust laws and they preclude antitrust claims against underwriters for violating antitrust provisions.	business	conservative
8	CTS Corp. v. Dynamics Corp. of America	481 U.S. 69	3/2/1987	The Williams Act does not preempt a state (Indiana) antitakeover statute that delays consummation of tender offer, and the statute does not violate the Commerce Clause.	business	liberal
9	Dura Pharmaceuticals, Inc. v. Broudo	544 U.S. 336	4/19/2005	To prove loss-causation in a 10(b) action under the Exchange Act, it is not sufficient to prove that the price of the security at the time of the purchase was inflated. It is also necessary to prove that the discovery of the truth made the price drop and that it caused the loss.	business	conservative

#	Case	Citation	Date of Decisio	Decision	Pro	SC Database
10	Dirks v. S.E.C.	463 U.S. 646	7/1/1983	Private information received by the insider-tippee in the absence of a connection with the tipper, when the tipper has no monetary benefit and the tippee has no duty to disclose, is not adequate basis for an insider trading violation.	business	conservative
11	Edgar v. Mite	457 U.S. 624	6/23/1982	Illinois antitakeover statute imposing a waiting period on any tender offer and a hearing to determine the fairness of the offer is unconstitutional because it conflicts with the Commerce Clause and the Williams Act.	investors	conservative
12	Erica P. John Fund, Inc. v. Halliburton	131 S. Ct. 2179	6/6/2011	Plaintiffs in a private securities fraud action need not prove loss-causation to obtain class certification.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
13	Ernst & Ernst v. Hochfelder	425 U.S. 185	3/30/1976	There is no liability under section 10(b) of the Exchange Act if the plaintiff does not allege scienter, which is an intent to deceive, manipulate, or defraud; negligence is not sufficient.	business	conservative
14	Gordon v. New York Stock Exchange, Inc.	422 U.S. 659	6/26/1975	Fixed commission rates of stock exchanges are beyond the reach of the antitrust laws because the antitrust laws would interfere with the Exchange Act.	business	conservative
15	Gustafson v. Alloyd Co., Inc.	513 U.S. 561	2/28/1995	The term "prospectus" in the Securities Act refers only to the prospectus used in a public offer, not to private agreements to sell securities. As a consequence, actions under section 12 of the Securities Act cannot be brought in the case of a private sale agreement with respect to alleged misstatements in the private agreement.	business	conservative

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
16	International Broth. Of Teamsters, Chaffeurs, Warehousemen and Helpers of America v. Daniel	439 U.S. 551	1/16/1979	A noncontributory mandatory pension plan is not a security and is not covered by the antifraud provisions of the securities laws.	business	conservative
17	Janus Capital Group, Inc. v. First Derivative Traders	131 S. Ct. 2296	6/13/2011	When investment fund makes false statements in a mutual fund prospectus, investment advisers and the parent capital group cannot be held liable in private action under section 10(b) of the Exchange Act.	business	conservative
18	J. I. Case Co. v. Borak	377 U.S. 426	6/8/1964	The Exchange Act authorizes a federal cause for rescission or damages to a corporate stockholder with respect to a consummated merger that the corporation authorized pursuant to a proxy statement alleged to contain false and misleading statements violative of the Act.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
19	Jones v. Harris Associates L.P.	130 S.Ct. 1418	11/2/2009	To face liability under the Investment Company Act of 1940 for breach of fiduciary duty with respect to the receipt of compensation for services, an investment advisor for a mutual fund must charge a fee that, under all the circumstances, is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining.	business	conservative
20	Jones v. S.E.C.	298 U.S. 1	4/6/1936	Registrant withdrew registration statement before effectiveness. After that, SEC cannot enforce a subpoena. The statute does not confer arbitrary power to forbid withdrawal of registration statements upon the SEC.	business	n/a
21	Kern County Land Co. v. Occidental Petroleum Corp.	411 U.S. 582	5/7/1973	First corporation acquired more than 10% of outstanding stock of target corporation by cash tender offer but a defensive merger between the target corporation and acquiring corporation blocked its takeover efforts. First corporation became irrevocably entitled to exchange its shares of the target corporation for shares of acquiring corporation's preference stock when the corporations signed the merger agreement. First corporation was not an insider when it made its stock tender offer. The transactions did not constitute "sales" within meaning of the statute relating to recovery of short-swing profits.	business	conservative

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
22	Landreth Timber Co. v. Landreth	471 U.S. 681	5/28/1985	Sale of all the outstanding stock of a business is a sale of a security; the federal securities laws might protect the purchasers.	investors	liberal
23	Lowe v. S.E.C.	472 U.S. 181	6/10/1985	Publishers could not be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they were not registered as investment advisers in that the newsletters fell within the Investment Advisers Act's exclusion for the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation.	business	conservative
24	Mastrobuono v. Shearson Lehman Hutton, Inc.	514 U.S. 52	3/6/1995	The contract between a securities brokerage firm and customers permitted arbitration panel to award punitive damages to customers.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
25	Matrixx Initiatives, Inc. v. Stracusanano	131 S. Ct. 1309	3/22/2011	Under section 10(b) of the Exchange Act, lack of statistical significance in adverse event reports does not necessarily preclude the reports from being material to a reasonable investor. Investors sufficiently alleged materiality and scienter.	investors	liberal
26	Merck & Co., Inc. v. Reynolds	130 S.Ct. 1784	4/27/2010	Discovery of the facts constituting the violation, for purposes of statute of limitations for a private right of action for securities fraud, occurs when the plaintiff actually discovers the facts constituting the violation or when a reasonably diligent plaintiff would have discovered the facts, whichever comes first. Scienter is a "fact constituting the violation," for purposes of the statute of limitations. Manufacturer's receipt of a warning letter from Food and Drug Administration did not constitute the time at which a reasonably diligent plaintiff would have discovered the facts constituting the manufacturer's scienter. Availability to investors of statements in products liability complaints filed against manufacturer, referring to manufacturer's knowledge of risks of heart attacks accompanying the use of its drug, did not establish the time at which a reasonably diligent plaintiff would have discovered the facts constituting the manufacturer's scienter.	investors	liberal
27	Merill Lynch, Pierce, Fenner & Smith Inc. v. Dabit	547 U.S. 71	3/21/2006	Securities Litigation Uniform Standards Act applies broadly to preempt state-law class-action claims brought by holders of securities, as well as by purchasers and sellers of securities, alleging the fraudulent manipulation of stock prices.	business	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
28	Mills v. Electric Auto-Lite Co.	396 U.S. 375	1/20/1970	A sufficient causal relationship can exist between proxy statement that is materially false or misleading, and a corporate merger accomplished through use of such statement to establish cause of action based on violation of Securities Exchange Act, where a substantial number of votes obtained by the proxy from minority stockholders was necessary and indispensable to approval of merger. The Court further held that petitioners who have established a violation of the securities laws by their corporation and its officials have a right to reimbursement from the corporation or its survivor for the costs of establishing the violation.	investors	liberal
29	Morrison v. National Australia Bank Ltd.	130 S.Ct. 2869	6/24/2010	Section 10(b) of the Exchange Act only applies to transactions on securities listed on domestic exchanges and domestic transactions in other securities; foreign-cubed actions are not admissible.	business	conservative
30	United States v. O'Hagan	521 U.S. 642	6/25/1997	A defendant who purchased stock in target corporation prior to its being purchased in tender offer, based on inside information he acquired as member of law firm representing tender offeror, could be guilty of securities fraud in violation of Rule 10b-5 under misappropriation theory.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
31	Pinter v. Dahl	486 U.S. 622	6/15/1988	In pari delicto defense is available under section 12(1) of the Securities Act. Being merely a “substantial factor” in causing sale of unregistered securities is insufficient to render an individual liable as a “seller.”	business	liberal
32	Piper v. Chris Craft	430 U.S. 1	2/23/1977	A defeated tender offeror has no implied private right of action for damages against another bidder and the target for a violation of section 14(e) of the Exchange Act.	business	conservative
33	Randall v. Loftsgaarden	478 U.S. 647	7/2/1986	Amount returned to investor obtaining rescission under section 12(2) is not subject to offset for tax benefits received while holding the investment. Limit to “actual damages” does not limit rescission recovery also under section 10(b).	investors	conservative

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
34	Reves v. Ernst & Young	494 U.S. 56	2/21/1990	Notes can be securities under the family resemblance test.	investors	liberal
35	Rodriguez de Quijas v. Shearson/American Exp., Inc.	490 U.S. 477	5/15/1989	Predispute agreement to arbitrate claims between investors and broker-dealers under the Securities Act is enforceable.	business	conservative
36	Rondeau v. Mosinee Paper	422 U.S. 49	6/17/1975	Issuer has no cause of action against a shareholder who violated section 13(d) of the Exchange Act and must show irreparable harm for injunctive relief.	business	conservative

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
37	Santa Fe Industries, Inc. v. Green	430 U.S. 462	3/23/1977	Instances of corporate mismanagement and corporate unfair treatment are not within Rule 10b-5.	business	conservative
38	Schreiber v. Burlington Northern	472 U.S. 1	6/10/1985	Shareholders of target cannot recover damages from bidder for cancellation of hostile takeover substituted with a friendly one at a lower price because there is no misrepresentation, nondisclosure, or deception; section 14(e) of the Exchange Act imposes only disclosure.	business	conservative
39	S.E.C. v. Edwards	540 U.S. 389	1/13/2004	In an investment scheme offering contractual entitlement to a fixed rate return can be an investment contract and thus a security subject to federal securities laws.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
40	S.E.C. v. W.J. Howey Co.	328 U.S. 293	5/27/1946	“Investment contract,” for defining the notion of a security, includes agreements or schemes whereby a person invests his money in a common enterprise and expects profits solely from the efforts of a third party, being immaterial if formal certificates evidence shares in an enterprise.	investors	n/a
41	S.E.C. v. Zandford	535 U.S. 813	6/3/2002	Broker’s alleged conduct of selling customers’ securities with undisclosed intent to misappropriate the proceeds constitutes fraud in connection with the purchase or sale of any security.	investors	liberal
42	S.E.C. v. Capital Gains Research Bureau, Inc.	375 U.S. 180	12/9/1963	The SEC may obtain an injunction compelling a registered investment adviser to disclose to his clients a practice of purchasing shares of security for his own account shortly before recommending that security for long-term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation.	investors	liberal

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
43	S.E.C. v. Ralston Purina Co.	346 U.S. 119	6/8/1953	The exemption from registration requirements afforded to transactions by an issuer not involving any public offering is to be considered in light of the design of the statute to protect investors by promoting full disclosure of information thought necessary to make informed investment decisions, and in the absence of a showing that employees to whom a corporation offered its common stock had knowledge obviating the need for protection under the act, the corporation should be required to register in accordance with the Act.	investors	liberal
44	Stoneridge Inv. Partners, LLC v. Scientific-Atlanta	552 U.S. 148	1/15/2008	Under section 10(b) of the Exchange Act, a rebuttable presumption of reliance by investors does not apply to alleged deceptive conduct of a corporation's vendors and customers; vendors and customers could not be liable as primary actors under section 10(b).	business	conservative
45	Tellabs, Inc. v. Makor Issues & Rights, Ltd.	551 U.S. 308	6/21/2007	In determining whether a securities fraud complaint gives rise to "strong inference" of scienter within meaning of PSLRA, the court must consider competing inferences, and plaintiff alleging fraud in section 10(b) action must plead facts rendering inference of scienter at least as likely as any plausible opposing inference.	business	conservative

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
46	TSC Industries, Inc. v. Northway, Inc.	426 U.S. 438	6/14/1976	An omitted fact is "material" if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote, that the issue of materiality is a mixed question of law and fact, and that, under that standard, none of the omissions claimed to have been in violation of the rule against incomplete or material and misleading proxy statements were materially misleading as a matter of law.	business	conservative
47	United Housing Foundation, Inc. v. Forman	421 U.S. 837	6/16/1975	Shares entitling purchasers to lease an apartment in a state-subsidized and supervised nonprofit housing cooperative were not 'securities' within the purview of Securities Act of 1933, and Securities Exchange Act of 1934. In addition, the Court dismissed a vague and conclusory allegation under the Civil Rights Act.	business	conservative

#	Case	Citation	Date of Decision	Decision	Pro	SC Database
48	Virginia Bankshares, Inc. v. Sandberg	501 U.S. 1083	6/27/1991	(1) Statements of reasons, opinions, or beliefs are statements with respect to material facts, so as to fall within the SEC rule prohibiting solicitation of proxies by means of materially false or misleading statements; (2) proof of mere disbelief or undisclosed motivation will not suffice for liability under the Securities Exchange Act and SEC rule; and (3) directors' desire to avoid bad shareholder or public relations that might occur if merger proceeded without approval of minority shareholders was insufficient to demonstrate causation of damages that would allow implied private right of action under the Act by minority shareholders whose votes were not required by law or corporate bylaw to authorize merger.	business	conservative