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## Justice Roberts' court tilts toward big business

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John Roberts has been chief justice of the United States since 2005.

I've frequently seen the Roberts court described as pro-business, which got me wondering whether it was really true. But my attempt to find an answer immediately ran up against the fundamental problem of definition. What does it mean to say a court is pro-business?

A New York Times article by Adam Liptak argued the Roberts court was exceptionally pro-business and included a long list of cases to prove the point. But by "pro-business," Liptak didn't mean the decisions on his list contributed to the bottom line of the typical small business. Far from it.

"The most important business decision of the (2012-13) term," Liptak wrote, came in a case in which a Shell subsidiary was accused of conspiring with the Nigerian military to commit atrocities against environmental activists. The court "severely limited human-rights suits against corporations based on charges of complicity in abuses abroad." It's safe to say that few New Mexico businesses benefited from that decision. Thankfully.

Another allegedly pro-business decision prevented AT&T customers from bringing a class-action lawsuit when the company charged money for phones advertised as free. That decision was certainly pro-AT&T, and AT&T is a business. But small-business owners stuck with hidden phone fees who find the courthouse doors shut against them might not agree their side won that case.

Professor Jonathan H. Adler writes that "the Roberts court can be called 'pro-business' insofar as it ... has adopted a skeptical view of antitrust complaints." Antitrust law prohibits companies from monopolizing trade or leveraging their market dominance in one area to gain an unfair advantage elsewhere. The object of antitrust litigation is to restore free competition. Rulings in favor of monopolists are rulings against their would-be competitors.

In short, Liptak and Adler seem to be saying that the Roberts court is pro-big business. But most businesses in America aren't big.

Two law professors and a federal judge teamed up to do a quantitative analysis of every business decision issued by the Roberts court. Writing in the *Minnesota Law Review*, they found that, compared to its predecessors, the Roberts court is indeed "taking more cases in which the business litigant lost in the lower court and reversing more of those." Nonetheless, "over the span covered by our study, business litigants have generally fared worse in the Supreme Court than

their nonbusiness opponents, receiving only 40 percent of the justices' votes and winning only 38 percent of the cases."

The study was based on a database of Supreme Court opinions maintained by political scientists that classifies opinions as either "liberal" or "conservative." But when one of the study's authors, since-retired federal Judge Richard A. Posner, independently analyzed 147 of the cases, he disagreed with the political scientists' classifications 38.8 percent of the time. Which is to say, when very sophisticated evaluators attempt to categorize business cases as liberal or conservative, their rate of agreement is not much better than chance.

The study states, without supporting data: "Liberals tend to support small business and conservatives big business, at least when small and big businesses are on opposite sides of a case." Assuming that's true, it's not self-evident how the relative market capitalizations of two business litigants determines the ideological stakes of their battle. As used in connection with judicial decisions, it would seem, "liberal" and "conservative" mean something considerably different than they do in political campaigns.

A recent front-page story in the Journal illustrated this last point vividly. The article reported that the Cato Institute, a think tank founded by the Koch brothers, has intervened in civil-rights litigation arising from a police shooting in New Mexico. Cato advocates a reexamination of the doctrine of "qualified immunity" which largely shields officers and their departments from civil liability for shootings. As protests around the country remind us, the Black Lives Matter movement also seeks to use the courts to hold police accountable for the use of force. If forces on both the right and left seek to achieve the same courtroom goal, is that goal conservative or liberal?

My own view is that we only confuse ourselves when we try to evaluate judicial decisions using categories borrowed from the campaign trail. Instead of describing the Roberts court as pro-business, I would say the justices seem comfortable with an increasing concentration of economic and political power in large corporations, with long-term consequences for the business world (and our political culture) that no one, not even the justices themselves, can foresee.