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WHAT KIND OF BUSINESS-FRIENDLY COURT? EXPLAINING THE CHAMBER OF COMMERCE'S SUCCESS AT THE ROBERTS COURT

David L. Franklin*

INTRODUCTION

The Chamber of Commerce of the United States ("Chamber") has been an exceptionally active participant in cases at the United States Supreme Court in recent years. Through its litigating affiliate, the National Chamber Litigation Center ("NCLC"), the Chamber occasionally submits briefs to the Court on its own behalf as a party, but much more often it files on behalf of the business community as amicus curiae, at both the certiorari and the plenary stages of review. More strikingly, in the less than three full Terms of the Roberts Court, the Chamber has been not only unusually active but unusually successful at both stages. Petitions for certiorari supported by amicus briefs from the Chamber are granted at an unusually high rate, and parties supported by the Chamber at the merits stage prevail more than two-thirds of the time. This article seeks to explain why the Chamber has been so successful at the merits stage.

The numbers are remarkable: since the current Roberts Court was formed in January 2006 with the elevation of Justice Samuel Alito, the Court has decided forty-three cases in which the Chamber filed a brief either as a party or amicus. In these forty-three cases, the party supported by

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1. The Chamber has been a party in one granted case before the Roberts Court thus far. See Chamber of Commerce of the United States v. Brown, 128 S. Ct. 2408 (2008).

2. The data set includes five cases decided after Justice Alito joined the Court but in which he did not participate. It excludes cases in which the writ of certiorari was dismissed. It also excludes Warner-Lambert Co. v. Kent, 128 S.
the Chamber ended up prevailing in thirty, for a winning percentage of almost seventy percent.\textsuperscript{3} This is a very impressive win/loss ratio for any amicus other than the United States.\textsuperscript{4} During some periods, the Chamber's win rate has been nothing short of extraordinary. For example, in the Court's October 2006 Term, the Chamber was on the winning side as an amicus in thirteen cases and on the losing side in only two, a win rate of almost eighty-seven percent.\textsuperscript{5} As of this writing, the Chamber has actually been on a bit of a slide,\textsuperscript{6} but the overall trend seems clear. Nor, it should be added, did the parties supported by the Chamber typically squeak by with narrow, five-to-four victories—twelve of the Chamber's thirty wins were by unanimous votes, and in eight more, the Chamber or the party it supported got seven or eight votes.\textsuperscript{7}

As the Chamber's success rate illustrates, there is little doubt that the Roberts Court is, broadly speaking, a business-friendly Court.\textsuperscript{8} The questions that remain have to do with

\textsuperscript{3} See infra app., tbl.1. I define the prevailing party as the petitioner (or appellant) in cases in which the judgment below was reversed or vacated and as the respondent (or appellee) in cases in which the judgment below was affirmed.

\textsuperscript{4} The Roberts Court has sided with the government in almost eighty percent of business-related cases in which the United States has participated. See Sri Srinivasan & Bradley W. Joondeph, Business, the Roberts Court, and the Solicitor General: Why the Supreme Court's Recent Business Decisions May Not Reveal Very Much, 49 SANTA CLARA L. REV 1103, 1114 (2009) (tbl. 2).

\textsuperscript{5} See infra app., tbl.1.


\textsuperscript{7} See infra app., tbl.1.

\textsuperscript{8} The media has picked up on this trend. See Michael Orey, The Supreme Court: Open for Business, BUS. WEEK, July 9, 2007, at 30; Jeffrey Rosen, Supreme Court Inc., N.Y. TIMES, Mar. 16, 2008, §5MM (Magazine) at 38; David G. Savage, High Court is Good for Business, L.A. TIMES, June 21, 2007, at A1.
what kind of a business-friendly Court it is. In what contexts is the Court especially receptive to the arguments and interests of business, and for what reasons? In what areas has the Court remained relatively unresponsive, and why? Are the Court’s pro-business leanings best explained in terms of legal doctrines or ideological preferences? This article does not purport to quantify the influence of the Chamber’s amicus briefs on the Court; for reasons described in Part I, such measurements of causal efficacy are notoriously difficult to make with any confidence, and in any case, the small data set would not yield statistically significant results. Instead, it uses the Chamber’s cases at the Court as a qualitative vehicle for exploring the nature and possible causes of the Roberts Court’s apparent pro-business orientation. By examining the Court’s opinions along with the Chamber’s briefs, we can get a sense of which arguments resonate with the justices in cases of interest to the business community and which themes emerge most forcefully in their decisions.

Because the Roberts Court has been in existence for less than three full Terms, any conclusions reached at this point must be tentative. With that proviso firmly in place, this article suggests that the Court’s decisions in business cases are characterized not so much by a bias in favor of business per se, but by a skepticism about litigation as a mode of regulation. Thus, businesses seem to fare especially well when they are defendants; even better when the justices appear to view the litigation in question as having broad regulatory goals as opposed to individualized remedial objectives; and better still when the justices view the litigation as lawyer-driven rather than party-driven. These are broad themes rather than rigid rules; they hold more weight for some justices than for others and, it bears repeating, they are asserted here provisionally rather than finally, absent further empirical testing. For now, though, it can be said that skepticism about litigation as a regulatory tool is a theme that features prominently in the Court’s business cases.

Part I of this article describes the Chamber’s litigation

efforts generally and its participation as amicus in the Supreme Court in particular, and canvasses the existing literature on amicus brief efficacy in order to put the Chamber's efforts and outcomes in perspective. Part II is the main part of the article; it examines the Court's decisions and the Chamber's briefs in five key areas—preemption, punitive damages, arbitration, pleading standards, and employment discrimination—and finds in these areas a consistent theme of skepticism about litigation as a mode of regulatory control. The article concludes with a brief comment about the implications of this preliminary finding for future research.

I. THE CHAMBER OF COMMERCE AS AMICUS CURIAE IN THE SUPREME COURT

The Chamber of Commerce of the United States is the world's largest business federation, with a membership that includes more than three million companies, both large and small. The role of the Chamber—and, indeed, of the organized business community in general—at the Supreme Court can be traced to a memorandum written in 1971. The memo's addressee was Eugene Sydnor, who was then the Chairman of the Chamber's Education Committee, and it carried a rather alarmist subject line: "ATTACK OF AMERICAN FREE ENTERPRISE SYSTEM." Today, however, the memo is remembered most for the identity of its author: Lewis F. Powell, Jr., a prominent Richmond lawyer who would be appointed to the Court by President Nixon two months later. As the subject header suggests, Powell concluded that "the American economic system [was] under... attack," not only from fringe elements such as "Communists, New Leftists, and other revolutionaries," but also from "perfectly respectable elements of society [such as] the college campus, the pulpit, the media, the intellectual and

12. Id.
13. Id.
14. Id.
literary journals, the arts and sciences, and . . . politicians." He recommended a wide range of responses, including an increased role for the Chamber in the courts:

[T]he Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation. The greatest care should be exercised in selecting the cases in which to participate or the suits to institute. But the opportunity merits the necessary effort.

In 1977, responding to Powell's call, the Chamber created the NCLC, its affiliated public policy law firm. The NCLC's six legal advisory committees, whose members include prominent corporate attorneys, help the NCLC craft its litigation strategy, in particular by helping decide which cases to participate in as amicus. The NCLC organizes moot courts and strategy sessions to support counsel for businesses that have cases before the Court. Most pertinent to this article, it files briefs on behalf of the Chamber both as plaintiff and amicus in a wide range of cases of interest to the business community in areas as diverse as preemption, punitive damages, arbitration, the dormant Commerce Clause, campaign finance reform, environmental law, securities law, and employment discrimination. As Powell urged, the Chamber regularly enlists prominent members of the appellate bar to appear as counsel of record on its amicus briefs. As a matter of policy, the Chamber does not participate in cases that pit one member business against another, which means that it sits out many of the patent and antitrust cases before the Court. Taken as a whole, though, NCLC's efforts in the Supreme Court and in lower courts substantiate Richard Lazarus's recent observation that over the past decade the private Supreme Court bar has

15. Id.
16. Id.
18. Id.
19. Id.
"persuade[d] the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine." 21

As noted in the Introduction, the raw numbers on the Chamber's results are striking. The Chamber's success rate in the Roberts Court has been 69.8% (30 wins in 43 cases). 22 If affirmances by an equally divided Court and cases resolved by vacatur and remand without opinion are added, the percentage rises to 71.1% (32 wins in 45 cases). By comparison, during the eleven years of the last Rehnquist "natural Court" (1994–2005), the Chamber's success rate as amicus was a somewhat less impressive 62% (47 wins in 76 cases). 23 The Chamber's total filings have also increased: during the Roberts Court, the Chamber has filed in an average of more than twelve cases per Term, compared to a rate of slightly less than seven cases per Term during the eleven years of the last Rehnquist natural Court.

In the 43 cases that form the primary Roberts Court data set for this article, the party supported by the Chamber received a total of 234 votes, compared to 142 votes for the opposing party. 24 The justice who sided with the Chamber most often was Scalia (33 times in 43 cases, or 77% of the time), with Chief Justice Roberts a close second (32 times in 43 cases, or 74%). The justices who sided with the Chamber least often were Ginsburg (18 times in 43 cases, or 42%) and Stevens (19 times in 43 cases, or 44%). In all of these cases, the Chamber sided with a business defendant (or declaratory judgment plaintiff), usually one that had been sued by an individual plaintiff. Thus, the important pattern to be explained in the Court's decisions is the relative success of business defendants, not business parties in general. 25

It is worth noting that the Chamber has been, if

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22. See infra app., tbl.1.
23. See infra app., tbl.1. The author made these calculations after searching the Westlaw "All U.S. Supreme Court Cases (SCT)" database for cases in which the Chamber was involved. Westlaw, http://www.westlaw.com (last visited Mar. 27, 2009).
24. See infra app., tbl.1.
25. This pattern of business defendant success bears itself out as well in the business-vs.-business cases in which the Chamber does not participate.
anything, even more successful at the certiorari stage of review in the Court than at the plenary stage. A recent study showed that the Chamber has filed more amicus briefs at the certiorari stage in recent years than any other nongovernmental entity.\textsuperscript{26} The Chamber filed fifty-five such briefs during between May 2004 and August 2007; the second-place finisher, the National Association of Criminal Defense Attorneys, filed thirty-three.\textsuperscript{27} When the Chamber filed as an amicus in support of a petition for certiorari, the study found, the petition was granted twenty-six percent of the time—a rate far higher than that for all petitions (less than one percent) or for all paid petitions (less than five percent).\textsuperscript{28} The Chamber's high levels of activity and success at the certiorari stage reflect its strategically sophisticated effort to shape the Court's shrinking docket.

There is another pattern that must be mentioned here as well. As Sri Srinavasan and Bradley Joondeph describe in their article for this symposium, the statistics support the conclusion that the Roberts Court's pro-business orientation is trumped by an even stronger pro-federal government orientation.\textsuperscript{29} Out of the fifteen cases in the data set in which the Chamber and the United States were on the same side as amicus, the party they supported won fourteen.\textsuperscript{30} Just as strikingly, the party supported by the Chamber lost eleven of the thirteen cases in which the Chamber and the United States were on opposite sides as amici.\textsuperscript{31} And, as important as the Chamber may have been in helping to win grants of certiorari as an amicus, the Office of the Solicitor General's recommendations at the certiorari stage continue to carry even more weight.

Experienced members of the Supreme Court bar view the Chamber's participation at the Court as not only successful

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Srinivasan & Joondeph,\textsuperscript{ supra note 4, at 1118.}
\item The two victories came in\textit{ Allison Engine Co. v. United States ex rel. Sanders}, 128 S. Ct. 2123 (2008), a False Claims Act case in which the Office of the Solicitor General filed a brief as amicus in support of\textit{ qui tam} relators who had initiated an action in the name of the United States, and\textit{ 14 Penn Plaza LLC v. Pyett}, 129 S. Ct. 1456 (2009).
\end{enumerate}
\end{footnotesize}
but influential. Carter Phillips of Sidley Austin, for instance, one of the most prominent and successful members of the Supreme Court bar, submitted these words of praise on the occasion of the NCLC’s thirtieth anniversary:

The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. . . . Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the National Chamber Litigation Center.\(^3\)

Phillips’s conclusion about the Chamber’s influence is a subjective one, albeit based on an exceptionally broad reservoir of personal experience. Objectively, any attempt to measure the efficacy of amicus briefs on Supreme Court decision-making is bound to be less definitive. While past studies have found that amicus participation is correlated with increased success at both the certiorari and merits stages, they caution that correlation is not the same as causation.\(^3\) It is very difficult to determine, for instance, whether the greater number of amici supporting a particular party helped that party to prevail, or whether more amici simply judged that party likely to succeed and therefore jumped on what they correctly predicted would be a winning bandwagon.\(^3\) To be sure, some organizations file amicus briefs without much caring whether their side will win: as Justice Scalia and his co-author Bryan Garner have written,

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33. See, e.g., Paul M. Collins, Jr., Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs, 60 POL. RES. Q. 55, 56 (2007) (“Illustrating a simple correlation between interest group involvement and the Court’s decisions does not provide support for a causal relationship between the two.”).

34. See, e.g., Kearney & Merrill, supra note 9, at 770–71 (noting that institutional litigants “might seek to build up their credibility with the Court by filing frequently on the side they would predict to be more likely to win”). One study that used regression analysis in an attempt to eliminate this problem concluded in general that “while amicus briefs do increase litigation success, even when controlling for other more established influences, this influence is only marginal.” Paul M. Collins, Jr., Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 LAW & SOC'Y REV. 807, 827 (2004).
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"Perhaps the most common purpose [of amicus briefs], at least in courts of last resort, is to enable the officers of trade associations to show their members that they are on the ball."35 But sophisticated repeat players like the Chamber no doubt have an interest in presenting themselves to their constituents and to the Court as winners that exceeds their interest in merely presenting themselves as active participants.36 Another variable that would need to be controlled in any quantitative study is the tendency of "top-side" parties (petitioners or appellants) to enjoy a higher success rate in the Supreme Court than "bottom-side" parties (respondents or appellees). This tendency is borne out in the present data set: out of the twenty-nine cases in which the Chamber was or supported the top-side party, that party won twenty-two (76%). Bottom-side parties supported by the Chamber prevailed in eight cases out of fourteen (57%).37 In sum, any data set based on cases in which an organization chose to file as amicus presents a significant problem of selection bias.

Moreover, even if there were some way to measure the causal influence of amicus briefs, it would be difficult to determine whether the causal factor was the content of the briefs. Indeed, according to the pure interest group model of amicus brief efficacy, "[t]he fact that the organization saw fit to file the brief is the important datum, not the legal arguments or the background information set forth between

35. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 103 (2008). On the other hand, repeat players like the Chamber surely recognize that duplicative, "me too" briefs—even if filed on the side likely to prevail—are perceived as an irritant by justices and their law clerks, and they accordingly resist filing unless there is really something new to say. See id. at 105-06; Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & POL. 33, 69-70 (2004).

36. See Collins, supra note 33, at 64 ("[I]t is reasonable to expect that organized interests might file amicus briefs in cases they are predisposed toward ‘winning,’ to appear influential to their members and patrons (but without actually influencing the Court’s decision making."); Kearney & Merrill, supra note 9, at 771. Some law firms may perceive a gain in prestige merely from filing as amicus, on either side of the case. See id. at 826-27.

37. Interestingly, one study found that amicus briefs in support of respondents were in general somewhat more effective than those in support of petitioners, perhaps because petitioners already have to be represented by able counsel in order to convince the Court to grant review, so respondents may benefit more from a boost by experienced counsel filing as amicus. See Kearney & Merrill, supra note 9, at 816-17.
the covers of the brief." Nor are citation counts a reliable measurement of the efficacy of amicus briefs: briefs are often cited simply to describe, or even rebut, an argument, and at any rate a citation tells us little about whether the justices would have arrived at the same idea independently.  

For all of these reasons—and because the Roberts Court simply has not decided enough cases yet to create a robust statistical sample—this article will not attempt any quantitative assessment of the Chamber's influence on the Court. Rather, it will examine the Court's decisions in cases in which the Chamber has participated, along with the Chamber's briefs, to identify a theme that runs through those decisions: skepticism about litigation as a vehicle for regulation.

II. THE ROBERTS COURT'S DECISIONS IN CASES IN WHICH THE CHAMBER PARTICIPATED

The theme of skepticism toward litigation as a regulatory tool emerges clearly in five key categories of cases in which the Chamber has participated: preemption, punitive damages, arbitration, pleading standards, and employment discrimination. In the first four of these categories, the Chamber has fared quite well at the Roberts Court. In the final category—employment discrimination cases—the Chamber has been much less successful thus far, but its failures in this area may yield as much insight into the justices' attitudes toward business cases as do its successes in the others.

A. Preemption

The Chamber has generally been quite successful in cases in which it has supported corporate defendants who

38. Id. at 786.
39. For studies counting citations, see id. at 757–61; Karen O'Connor & Lee Epstein, Court Rules and Workload: A Case Study of Rules Governing Amicus Participation, 8 JUST. SYS. J. 35, 42–43 (1983). Citations can plausibly be taken as an indication of the amicus's prestige, or the Court's interest in signaling the seriousness with which it takes the amicus (or even counsel for amicus). This is a good explanation for the unusual attention paid by the Court, both at oral argument and in its decision, to the amicus briefs filed by corporate and retired military leaders in Grutter v. Bollinger, 539 U.S. 306 (2003). Interestingly, no member of the Court has cited an amicus brief filed by the Chamber since the Roberts Court began in January 2006.
assert that federal statutes or regulations either expressly or implicitly preclude enforcement of state regulatory or common law (often tort law). As federal statutes and agency rules have become increasingly deregulatory, the Chamber has mounted an extensive nationwide campaign to persuade courts around the country, and the Supreme Court in particular, to take a more aggressive pro-preemption stance. These efforts have already borne fruit in the Roberts Court: a plausible count of preemption cases yields five victories for the Chamber before the Roberts Court and three losses.

It is always hazardous to attempt to discern patterns in the Court's preemption jurisprudence, because every statutory scheme is distinctive and because the Court's task is to determine legislative intent rather than to inscribe its own legal or political preferences on a blank slate. Nonetheless, an examination of the Roberts Court's preemption decisions yields a consistent theme: distrust of litigation as a regulatory mechanism. The Chamber's amicus briefs, for their part, have hammered this theme home in two very different ways, sometimes with an emphasis on real-world consequences and sometimes through ambitious doctrinal argumentation.

A good example is Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, in which the Court held that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") preempted state-law securities fraud class actions brought by holders of securities. Justice Stevens quite candidly

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40. See U.S. Chamber of Commerce, supra note 17.
42. Another theme, consistent with the Court's pro-federal government orientation but beyond the scope of this article, is deference to federal agencies with respect to their determinations concerning preemption. See, e.g., Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DEPAUL L. REV. 227 (2007).
grounded his opinion for a unanimous eight-justice Court in policy considerations, most importantly that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." These considerations had led the Court, more than thirty years ago, to limit the private right of action under Rule 10b-5 to plaintiffs who were themselves injured in connection with the purchase or sale of securities. With the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the Court explained, Congress enacted this policy concern into law, aiming to reduce rampant "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers of the clients whom they purportedly represent." In response to the PSLRA, "some members of the plaintiffs' bar" began to file class actions under state law, often in state court. To head off this end-around, Congress enacted SLUSA.

In the Dabit litigation, the Second Circuit had held that SLUSA preempted only those actions in which a private right of action under Rule 10b-5 would lie, i.e., in which the plaintiff was a purchaser or seller. But the Supreme Court held that the narrower interpretation was relevant only to the question of private rights of action; the rule's substantive scope, and therefore its preemptive effect, had always been broader. Adopting the narrower reading for preemption purposes would frustrate Congress's purposes by failing to preempt class actions brought by holders of securities, which "pose a special risk of vexatious litigation," and by allowing duplicative class actions to unfold simultaneously in state and federal courts. "Finally," the Court added, "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims."

The Chamber's brief in Dabit nicely anticipated Justice

45. Justice Alito did not participate.
46. Dabit, 547 U.S. at 80 (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975)).
47. Id. at 80-81 (citing Blue Chip Stamps, 421 U.S. at 751).
49. Id. at 82.
50. Id. at 84.
51. Id. at 86 (quoting Blue Chip Stamps, 421 U.S. at 739).
52. Id.
53. Id. at 88.
Stevens's eventual opinion in the case by emphasizing the practical consequences of permitting state-law shareholder actions to proceed. Indeed, after lingering only briefly over a plain-language argument for preemption (which the Court did not pick up on at all), the Chamber devoted the bulk of its brief to depicting securities fraud class actions in general as an economic horror show. Hence the following heading in the brief: "The Pressure To Settle Even Meritless Securities Class Actions Imposes An Enormous Toll On The National Economy." Citing a dozen books and articles from the law and economics literature, the brief argued that "the costs and risks of litigation [make] the merits of securities suits largely irrelevant to the decision to settle." Instead, the best predictors of whether plaintiffs will file suit are the severity of the decline in the stock price and the size of the defendant's insurance policy. Such suits cause ripple effects throughout the economy, as the plaintiffs' bar targets the most innovative (and thus the most volatile) firms, and competent auditors and directors flee the marketplace. Fear of fraud liability chills disclosure, and mandatory disclosure leads issuers to "bury the shareholders in an avalanche of trivial information." U.S. markets lose ground to global competitors as capital migrates elsewhere. And "holder" cases, the Chamber argued, are the most likely of all to be speculative. Indeed, "[a]s a logical matter, holders of securities, viewed as a class, cannot be injured," because the very fraud that caused the holder not to sell also caused the price inflation that would have made selling a profitable option. In the end, if holder class actions are allowed to go forward, "the only winners in this system of blackmail suits and windfall settlements will be the lawyers."

The Court's skepticism about tort litigation as a vehicle
of safety regulation comes across forcefully in *Riegel v. Medtronic, Inc.* In *Riegel*, the Court construed the Medical Device Amendments of 1976 ("MDA") to mean that premarket approval of a medical device by the Food and Drug Administration ("FDA") preempts state common-law causes of action alleging defective design, labeling, and manufacturing. Writing for an eight-justice majority, Justice Scalia asserted that enforcement of state tort law would disrupt the FDA's objectives by rendering medical devices "safer, but hence less effective." He reasoned that, as a regulatory mechanism, tort law was inferior to state statutes or state agency rules because the latter could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

Although Justice Scalia, as usual, professed apathy on the subject of legislative intent, he was willing to infer from the text of the MDA that "solicitude for those injured by FDA-approved devices . . . was overcome in Congress's estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations." Somewhat surprisingly for such a significant case, the Chamber's brief in *Riegel* is pitched rather narrowly, devoting itself primarily to arguing that federal preemption was required by the reasoning of a majority of justices in the earlier case of *Medtronic, Inc. v. Lohr*. This may have been a calculated bid for the vote of Justice Breyer, whose separate

64. *Riegel*, 128 S. Ct. at 1006.
65. *Id.* at 1008.
66. *Id.*
67. *Id.* at 1009.
opinion in \textit{Lohr} comes in for a lot of attention in the brief.\textsuperscript{69} If so, the tactic succeeded: Justice Breyer ended up siding with the majority opinion in \textit{Riegel}, which in turn relied heavily on the reasoning of a majority of justices in \textit{Lohr}.\textsuperscript{70}

By contrast to its brief in \textit{Riegel}, several of the Chamber's amicus briefs in the preemption area—particularly those on which the counsel of record is Alan Untereiner of the Washington law firm of Robbins, Russell, Englert, Orseck & Untereiner—take an ambitious doctrinal approach that aims to provide the Court with the intellectual foundation for a newly muscular preemption jurisprudence. An example is the brief in \textit{Watters v. Wachovia Bank, N.A.},\textsuperscript{71} which concerned the preemptive effect of the National Banking Act with respect to state inspection and registration requirements. The issue in \textit{Watters} was even narrower than this description suggests: The state banking regulator in \textit{Watters} conceded that its regulations were preempted as applied to the banks themselves; the only question was whether that preemption extended to the banks' "operating subsidiaries" such as mortgage lending operations; and all of the courts of appeals as well as the relevant federal agency, the Office of the Comptroller of the Currency, agreed that it did. The Court, in a five-to-three decision by Justice Ginsburg, agreed as well.\textsuperscript{72}

Despite—or perhaps because of—the narrowness of the issue and the likelihood of the bank's success in the case, the Chamber's brief in \textit{Watters} took the opportunity to engage in a kind of bird's-eye reconnaissance of the entire doctrine of preemption. In particular, the Chamber argued that preemption is a run-of-the-mill by-product of the Supremacy Clause;\textsuperscript{73} that it is particularly unremarkable in an "area of

\textsuperscript{69} See \textit{id.} at 5, 6, 10, 17 (citing \textit{Lohr}, 518 U.S. at 503–08 (Breyer, J., concurring)).

\textsuperscript{70} See \textit{Riegel}, 128 S. Ct. at 1003–11.


\textsuperscript{72} \textit{id.} at 10–17. The three dissenters were an unusual lineup: Justices Stevens and Scalia along with Chief Justice Roberts. \textit{See id.} at 18–41 (Stevens, J., dissenting). Justice Thomas did not participate.

\textsuperscript{73} Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents at 6–10, \textit{Watters v. Wachovia Bank, N.A.}, 550 U.S. 1 (2007) (No. 05-1342) [hereinafter \textit{Watters Brief}]. The brief advances the interesting argument, made by Stephen Gardbaum, that Congress's power to regulate preemptively does not flow from the Supremacy Clause itself but from its enumerated Article I powers. \textit{See id.} at 9; \textit{see also
traditional federal concern" like banking;\textsuperscript{74} and, most provocatively, that the so-called presumption against preemption should be repudiated.\textsuperscript{75} In support of this last argument, the Chamber pointed to criticisms of the presumption in opinions by Justices Scalia and Thomas,\textsuperscript{76} in law review articles by conservative legal scholars,\textsuperscript{77} and in the Chamber's own prior amicus briefs.\textsuperscript{78} The Chamber made its own policy arguments in favor of preemption quite clear: preemption lowers the cost of doing business nationwide, ensures that rules will be made by federal experts rather than parochial state regulators, and "is the sine qua non of any effective policy of deregulation carried out by the political branches of government at the national level."\textsuperscript{79} Besides, the Chamber argued, Congress often takes into account the prerogatives of state and local governments in crafting federal regulatory schemes, so there is no need for the Court to put a thumb on the scales against preemption.\textsuperscript{80}

More recently, the Chamber's pro-preemption crusade experienced a setback in \textit{Altria Group, Inc. v. Good},\textsuperscript{81} but that case's lasting significance is uncertain. At issue was whether the Federal Cigarette Labeling and Advertising Act preempted state-law claims under a Maine anti-fraud statute. The plaintiffs alleged that a tobacco company misled them into believing that "light" cigarettes delivered less tar and nicotine than ordinary cigarettes.\textsuperscript{82} Sixteen years earlier, in \textit{Cipollone v. Liggett Group, Inc.},\textsuperscript{83} the Court splintered badly

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Stephen Gardbaum, \textit{The Nature of Preemption}, 79 CORNELL L. REV. 767 (1994). The brief also asserts, however, that "‘implied’ preemption . . . flow[s] directly from the Supremacy Clause" while "‘express’ preemption . . . occurs when Congress elects to regulate preemptively pursuant to its enumerated powers." \textit{Watters Brief, supra}, at 4. This seems needlessly confusing: while Gardbaum may be right that the source of Congress's power to enact express preemption provisions is not obvious, surely both forms of preemption occur only "when Congress elects to regulate preemptively pursuant to its enumerated powers." \textit{Id.}

\textsuperscript{74} \textit{Watters Brief, supra} note 73, at 10.
\textsuperscript{75} \textit{Id.} at 11–14.
\textsuperscript{76} \textit{Id.} at 12.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 13–14.
\textsuperscript{79} \textit{Id.} at 17.
\textsuperscript{80} \textit{Id.} at 17–21.
\textsuperscript{81} \textit{Altria Group, Inc. v. Good}, 129 S. Ct. 538 (2008).
\textsuperscript{82} \textit{Id.} at 541.
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over this issue and several others concerning the interaction between the federal labeling statute and state-law tobacco litigation. Writing for a four-justice plurality in *Cipollone*, Justice Stevens concluded that fraud claims were not preempted because they rested on a general duty not to deceive, while claims more closely tied to smoking and health—"failure to warn" and "warning neutralization" claims—were preempted. In *Altria*, Justice Stevens managed to convert his earlier plurality into a narrow, five-justice majority. Justice Thomas filed a strongly worded dissent, joined by Chief Justice Roberts and Justices Scalia and Alito, accusing the majority of rejecting the clear rule proposed by Justice Scalia in *Cipollone*—that state-law claims ought to be preempted whenever they would as a practical matter impose requirements on the defendant because of the effect of smoking upon health—in favor of a confusing test that invites continued litigation. *Altria* may not prove to be a particularly significant case in its own right—it was largely a replay of *Cipollone* and dealt with the interpretation of a fairly narrow and poorly drafted preemption clause in a particular statute. What is most striking about the case is that the majority embraced the presumption against preemption, while the dissent contended that "[i]n light of *Riegel*, there is no authority for invoking the presumption against pre-emption in express pre-emption cases." But *Altria Group* does not present powerful evidence against this article's hypothesis that the Roberts Court is suspicious of the use of litigation as a stand-in for regulation. The plaintiffs' state-law fraud claims survived preemption, according to the narrow five-justice majority, precisely because they rested on a general duty not to deceive, and not on a rule of law that purported to regulate smoking, safety, or health. The broader trend toward the primacy of federal statutes and rules over state tort litigation as a means of achieving regulatory objectives remains intact after *Altria Group*.

More significant, and more difficult to explain, is the

84. *Id.* at 530–31.
85. *Altria Group, Inc.*, 129 S. Ct. at 552 (Thomas, J., dissenting).
86. *Id.* at 543.
87. *Id.* at 558 (Thomas, J., dissenting).
Chamber’s subsequent setback in *Wyeth v. Levine*. In *Wyeth*, the Court held by a six-to-three vote that the federal drug labeling statute does not preempt state-law causes of action alleging that drug manufacturers placed inadequate warnings on their labels. The labeling statute (unlike the medical device statute in *Riegel*) lacks an express preemption clause, and the Court concluded that the case did not present either form of implied preemption: “impossibility preemption” (which exists when the defendant cannot simultaneously comply with both state and federal law) or “obstacle preemption” (which exists when enforcement of state law would hinder federal objectives). Most notably, as in *Altria Group*, Justice Stevens wrote for the Court and prominently invoked the presumption against preemption.

The outcome in *Wyeth* certainly represents a rejection of the primary arguments advanced by the Chamber’s amicus brief in the case. In the brief (which again lists Alan Untereiner as counsel of record) the Chamber traced the pedigree of implied preemption all the way back to Chief Justice Marshall’s decisions in *Gibbons v. Ogden* and *McCullough v. Maryland*. Pursuing an originalist approach, it cited a law review article for the proposition that the Supremacy Clause is a “non obstante” (“notwithstanding”) provision, meaning that it calls upon judges to abandon their usual practice of construing federal statutes narrowly to avoid conflicts with state laws. As a result, the brief contended, the presumption against preemption was never meant to apply in obstacle preemption cases. This contention attracted only three votes in *Wyeth*, and the majority specifically repudiated it.

More broadly, the Chamber’s brief in *Wyeth* attempted to
make the obstacle preemption argument as attractive as possible for key justices. Thus, the brief acknowledged that carrying out the ongoing task of performing obstacle preemption analysis would require judges to identify the purposes that animate federal statutes, but contended that this was nothing new: judges are often called upon to exercise discretion in close cases, just as the Framers contemplated they would be.  

By emphasizing that the Framers delegated the task of identifying obstacle preemption to judges, the brief tried to strike chords that would resonate both with stout-hearted originalists like Justice Thomas, who are willing to overrule precedent in order to return to founding-era practices, and with judicial supremacists like Justice Kennedy, who often seek to cement the Court’s interpretive primacy. This gambit failed. Justice Kennedy joined the majority opinion, and Justice Thomas wrote an extraordinary concurrence in which he condemned the entire doctrine of obstacle preemption as “inherently flawed” because it gives binding force to policies and pronouncements that were never actually enacted into law and “encourages an overly expansive reading of statutory text.” This concurrence was not a departure for Justice Thomas: as I have written elsewhere, he is the only conservative justice whose solicitude for state law in constitutional federalism cases is matched by his voting pattern in preemption cases.

It is too early to gauge the long-term significance of Wyeth. There are three reasons to believe, however, that it does not signal a major change in the Roberts Court’s orientation towards business defendants. First, because the federal statute in Wyeth contained no express preemption provision, the case will not disturb the Court’s general tendency to read broadly those that do. Second, the plaintiff in Wyeth—a professional musician who developed gangrene as a result of an improperly administered anti-nausea medication and ultimately had to have her right arm amputated—was unusually sympathetic, and consequently

97. Id. at 24–26.
98. Id. at 1211 (Thomas, J., dissenting).
99. Id. at 1215 (Thomas, J., dissenting).
The case may have struck most justices as a discrete request for compensation rather than a lawyer-driven attempt at regulation via litigation. Third, and perhaps most important, although the government sided with the defendant in the Wyeth litigation, the FDA for many years had taken the position that its regulation of drug labeling could peacefully coexist with state tort claims. The agency's position changed only in 2006, well after the jury had rendered its verdict in the Wyeth trial, and Justice Stevens went out of his way to characterize the change as not only dramatic but inadequately reasoned and procedurally irregular. Wyeth, therefore, may tell us little about how the Court will treat cases in which the government's support for implied preemption has been longstanding and consistent.

B. Punitive Damages

The Chamber has been on the winning side in both of the Roberts Court's punitive damages cases, and both reflect the Court's skepticism about regulation by litigation. Philip Morris USA v. Williams provides an especially telling lens through which to view the justices' attitudes toward tort law. In Philip Morris, the Court held that the Due Process Clause precludes juries from basing punitive damage awards on the harm caused by the defendant to nonparties. Justice Breyer wrote the majority opinion for himself, Chief Justice Roberts, and Justices Kennedy, Souter, and Alito, while Justices Stevens, Scalia, Thomas, and Ginsburg dissented. This unusual lineup, especially among the dissenters, was consistent with past cases, in which Justices Scalia and Thomas have refused to sign onto the doctrine of substantive due process while Justice Ginsburg has expressed her unwillingness to tamper with state-court jury awards. Perhaps in order to keep the Chief Justice and Justice Alito from defecting, Justice Breyer took pains in Philip Morris to

102. Id. at 1201–02.
103. Id. at 1201–03.
105. Id. at 349.
106. Id. at 348.
ground his opinion in the procedural rather than the substantive aspect of the Due Process Clause: large punitive awards based on harm to nonparties, he reasoned, deprive defendants of fair notice and inject a component of arbitrariness into the trial process. In a confusing passage, however, the majority stated that evidence of harm to nonparties can still be relevant to the punitive damages calculus to the extent it reflects the overall blameworthiness of the defendant’s conduct—so long as the jury does not use such evidence as grounds for actually punishing the defendant.

The *Philip Morris* dissenters were right to label this attempted distinction elusive at best. At trial, the defendant had sought a jury instruction that would have tried to articulate this difference between the two potential uses of evidence of nonparty harms but, as Justice Ginsburg pointed out, the proposed instruction surely would have confused the jurors more than it enlightened them. Indeed, the Oregon Supreme Court appeared to agree with the dissenters on this point: after remand, it rejected the proposed instruction as a matter of state law. The Court granted certiorari once again, but later dismissed the writ as improvidently granted.

What could have motivated the Court’s oápquely Solomonic analysis in *Philip Morris*? A simple pro-business bias or a blanket antipathy to punitive damages could easily have yielded an opinion precluding all consideration of harm to nonparties—and such an opinion would have been more coherent than the one Justice Breyer produced. Maybe Justice Breyer’s solution was the appellate equivalent of a compromise verdict: the best he could do without losing a majority. But a more compelling explanation for the majority’s reasoning is that it reflects a distinctive judicial attitude, one that accepts tort law as a method of remedying

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109. *Id.* at 355.
110. *See id.* at 360 (Stevens, J., dissenting); *id.* at 362–64 (Ginsburg, J., dissenting).
111. *Id.* at 363 (Ginsburg, J., dissenting).
the effects of discrete wrongful conduct but is skeptical about its use as a vehicle for achieving optimal safety regulation more generally. On this view, tort damages—punitive damages included—are constitutionally unobjectionable insofar as they reflect the blameworthiness of the discrete act under consideration, but to permit a single jury to assume the regulator's prerogative of penalizing a corporation for its overall course of conduct would be standardless and fundamentally unfair.

The Chamber's brief in *Philip Morris* provided a helpful springboard for just such concerns. It began by critiquing the "practice of using a single-plaintiff lawsuit as a vehicle for punishing a defendant broadly for uncharged, unadjudicated conduct." The brief drew a parallel between such a lawsuit and the class action mechanism stripped of the requirement of typicality. It argued, with citation to a concurrence by Justice Kennedy, that juries assessing punitive damages for harms to nonparties violate separation of powers norms by acting in a legislative capacity; raised the specter of multiple punishments for a single tortious act; and cited social science research suggesting that juries face cognitive limitations on their ability to translate blameworthiness into dollar amounts in all punitive damages cases, not just ones involving claims of harm to nonparties. The brief assembled these concerns about uncharged conduct, multiple punishment, and erratic juries under the doctrinal rubric of procedural due process, while making clear the Chamber's view that the problem of large punitive awards is "not only a due process problem—it is an economic and social problem of broad dimension." It is not a stretch to suggest that the concerns articulated in the Chamber's *Philip Morris* brief found a voice in the Court's ultimate disposition of the case.

115. Id. at 5–8.
117. Id. at 10–14.
118. Id. at 19–21 (citing CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 12, 19, 20, 21 (2002)).
119. Id. at 13–14.
Exxon Shipping Co. v. Baker presented a different angle on the punitive damages issue, but the Court's basic orientation remained the same. Because Exxon was a federal admiralty case, the Court was able to address the punitive damages issue in a common-law rather than a constitutional mode, which meant that Justices Scalia and Thomas could come on board. Writing for a five-justice majority, Justice Souter took the opportunity to express broad doubts about punitive damages, but rather than reject such damages outright, he insisted on proportionality. Citing empirical studies, the Court concluded that although punitive damage awards have not been increasing in recent years, they have become more unpredictable. In particular, studies suggest that juries in cases featuring similar facts arrive at quite disparate results when it comes to punitive damages. (In an odd footnote that Pamela Karlan focused on in her contribution to this symposium, the Court noted a series of studies that reached a similar conclusion using mock juries, but then tried to put the toothpaste back in the tube: "Because this research was funded in part by Exxon, we decline to rely on it.") In light of this unpredictability, the Court decreed that the ratio of punitive damages to compensatory damages should not exceed 1:1 in admiralty cases, or at least in admiralty cases like the Exxon case, by which the Court seemed to mean cases in which the tortious conduct was reckless but not intentional or malicious and in which the compensatory award was large.

121. Id. at 2619–34. Justice Alito did not participate.
122. Id. at 2624–26.
123. Id. at 2625–26.
125. Exxon, 128 S. Ct. at 2633. The Chamber devoted more than half its Exxon brief to arguing that punitive damages were preempted by the Clean Water Act, but the Court had little difficulty in determining that this issue was raised too late and, in any event, lacked merit. Brief of Amicus Curiae the
Morris and Exxon reflect a deep suspicion on the part of most of the justices about the use of punitive damages to control, or send a message about, the defendant's conduct beyond the confines of the discrete case being litigated.

C. Arbitration

The party supported by the Chamber has prevailed in three of the four arbitration cases decided by the Roberts Court. In Buckeye Check Cashing, Inc. v. Cardegna, the Court held by a seven-to-one vote that when a contract contains an arbitration clause, issues concerning the validity of the contract as a whole must be resolved in the first instance by the arbitrator, not by a state court. Prior case law established that questions of validity should be resolved by a court only when those questions go to the validity of the arbitration clause in particular; the Court concluded in Buckeye that this case law applied in state as well as federal court. In short, the Court held that arbitration clauses are independently enforceable in state court even if other provisions in a contract are challenged as invalid.

In Preston v. Ferrer, the question was whether an agreement to arbitrate supersedes state law requiring disputes over contract validity to be referred initially to an administrative agency. The Court, by a vote of eight to one, held that Buckeye was controlling: the Federal Arbitration Act ("FAA") dictated that the arbitration agreement prevailed over the contrary state law and, as in Buckeye, the dispute over the validity of the contract had to be resolved in the first

Indeed, not a single justice wrote in support of the preemption argument.
127. Id. at 446.
128. The Chamber's brief in Buckeye was almost exclusively doctrinal in nature, setting forth the precedent-driven arguments that the Court ultimately embraced in its opinion; the sole policy argument in the brief came at the end and asserted that litigation over contract validity would hinder Congress's objective of facilitating arbitration. Brief for the Chamber of Commerce of the United States of America and the American Financial Services Ass'n as Amici Curiae in Support of Petitioner at 13, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (No. 04-1264).
instance by the arbitrator.\textsuperscript{130} The Court emphasized the need to respect Congress's intent to move arbitrable disputes quickly out of court and into arbitration, where they can be resolved more expeditiously.\textsuperscript{131}

In \textit{14 Penn Plaza LLC v. Pyett},\textsuperscript{132} the Court held enforceable a collective bargaining agreement ("CBA") that required union members to submit claims under the federal Age Discrimination in Employment Act ("ADEA") to arbitration. The biggest obstacle for the employer was the 1974 \textit{Gardner-Denver} case, which seemed to hold that employees' rights to a judicial forum under federal antidiscrimination laws may not be waived through collective bargaining.\textsuperscript{133} Writing for a five-member majority, Justice Thomas limited that precedent to its facts, reasoning that the CBA in \textit{Gardner-Denver}, unlike the one in the instant case, had not unmistakably encompassed statutory claims.\textsuperscript{134} At the same time, though, the majority left little doubt concerning its views of \textit{Gardner-Denver}, saying that it "rested on a misconceived [skeptical] view of arbitration that this Court has since abandoned,"\textsuperscript{135} "reveal[ed] a distorted understanding of the compromise made when an employee agrees to compulsory arbitration,"\textsuperscript{136} and, if read broadly, "would appear to be a strong candidate for overruling."\textsuperscript{137}

The Chamber's sole loss in an arbitration-related case in the Roberts Court thus far, \textit{Vaden v. Discover Bank},\textsuperscript{138}
revolved around a fairly technical question of federal jurisdiction. The case concerned § 4 of the FAA, which empowers federal district judges to entertain a petition to compel arbitration if, in the absence of the arbitration agreement, the court "would have jurisdiction [over] the controversy between the parties." All nine justices agreed that a federal district court, faced with a § 4 petition, may "look through" the petition to determine whether the underlying controversy supports federal jurisdiction. The five-justice majority, however, concluded that because the particular dispute at bar was triggered by the filing of a state-law complaint, the controversy as a whole would not ordinarily have been subject to federal jurisdiction, and therefore the petition to arbitrate should not have been entertained.

The arbitration decisions have received relatively little scholarly and media attention, but they are of great interest to the business community. Although Pyett revealed fissures on the Court with respect to the interaction among arbitration, collective bargaining, and employment discrimination, it seems clear that no justice on the current Court harbors substantial misgivings about the enforceability of arbitration clauses in standard form contracts or about the propriety of arbitration as an alternative to traditional litigation. That counts as tremendous progress for the Chamber.

D. Pleading Standards

Perhaps nowhere do the Roberts Court's doubts about the

139. Id. at 1269 (quoting 9 U.S.C. § 4 (2006)).
140. Id. at 1273-75; id. at 1279 (Roberts, C.J., dissenting). The dissenters in Vaden formed an unusual lineup: joining Chief Justice Roberts's dissent were Justices Stevens, Breyer, and Alito.
141. Id. at 1275-79. The Chamber's brief in Vaden focused almost entirely on policy arguments, emphasizing that the judicial hostility to arbitration that gave rise to the FAA's enactment continues to exist around the country. See Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents at 6-24, Vaden v. Discover Bank, 129 S. Ct. 1262 (2009) (No. 07-773).
efficacy of litigation come across more clearly than in its
decisions making it easier for business defendants to get
cases dismissed at the pleading stage. The most potentially
far-reaching of these is *Bell Atlantic Corp. v. Twombly*.143

*Twombly* was a massive class action brought against the
regional "baby Bell" telephone companies on behalf of "all
subscribers of local telephone and/or high speed internet
services . . . from February 8, 1996 to present."144 The
complaint alleged that the phone companies had engaged in
"parallel conduct" that implied an antitrust conspiracy.145

Writing for a seven-justice majority, Justice Souter held that
the complaint failed to state a claim.146 He cited the Court's
own precedents and a leading antitrust treatise for the
proposition that parallel conduct, without more, is
ambiguous: it is "consistent with conspiracy, but just as much
in line with a wide swath of rational and competitive business
strategy unilaterally prompted by common perceptions of the
market."147 The Court went further, calling discovery in
antitrust cases unusually time-consuming and expensive,148
and pointedly characterizing the *Twombly* litigation as
involving

a putative class of at least 90 percent of all subscribers to
local telephone or high-speed Internet service in the
continental United States, in an action against America's
largest telecommunications firms (with many thousands of
employees generating reams and gigabytes of business
records) for unspecified (if any) instances of antitrust
violations that allegedly occurred over a period of seven
years.149

An opinion that stopped there would have sent a strong
message to the antitrust plaintiff's bar—but the Court forged
ahead, going out of its way to jettison one of the most oft-cited

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144. *Id.* at 1962.
145. *Id.* at 1962–63.
147. *Id.* at 1964.
holdings in all of civil procedure: the statement from Conley v. Gibson that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley's "no set of facts" test, wrote Justice Souter, "has been questioned, criticized, and explained away long enough. After puzzling the profession for 50 years, this famous observation has earned its retirement." In its place, the Court appeared to substitute a requirement that the allegations in a complaint, in order to survive dismissal, must add up to a "plausible" entitlement to relief.

It is too early to tell whether lower courts will interpret Twombly as a mandate to stiffen pleading standards across the board. But what is clear is that the Chamber won an even bigger victory in the case than it had asked for. The Chamber's brief in Twombly did anticipate the Court's eventual opinion by describing the case as sprawling, discovery-intensive, and lawyer-driven, and by emphasizing that parallel conduct does not imply illegality, but nowhere did it invite the Court to establish a global "plausibility" threshold for pleadings under the Federal Rules of Civil Procedure.

Another defendant-friendly decision came in the Tellabs case, in which the Court reversed the Seventh Circuit and outlined a relatively strict definition of the PSLRA's requirement that securities fraud complaints "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Writing for an eight-justice majority, Justice Ginsburg noted that one of Congress's goals in enacting the PSLRA was "to curb

152. See, e.g., id. at 1974.
153. Some early indications are to the contrary. See, e.g., Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 803 (7th Cir. 2008) (Posner, J.) (cautioning that Twombly should not be read too broadly).
155. Id. at 12–15.
frivolous, lawyer-driven litigation," and that the statute's heightened pleading standards were "but one constraint among many the PSLRA installed to screen out frivolous suits." She concluded that, to produce the necessary "strong inference," the facts in the complaint must be considered in their entirety and must give rise to an inference of scienter that is at least as strong as any competing non-culpable inference. Justices Scalia and Alito would have gone even further and required plaintiffs to allege facts from which an inference of scienter was more compelling than any inference of a non-culpable state of mind. Justice Alito also stated that he would have subjected the allegations in the complaint to the even more demanding "test that is used at the summary-judgment and judgment-as-a-matter-of-law stages." Only Justice Stevens would have imposed a less stringent standard, and even he agreed that "[t]he basic purpose of the heightened pleading requirement in the context of securities fraud litigation is to protect defendants from the costs of discovery and trial in unmeritorious cases," and that discovery is intrusive and can invade the privacy of corporations and their executives.

Like its brief in Dabit, the Chamber's brief in Tellabs painted a dire panorama of securities litigation as a dystopian realm in which "plaintiffs wield[] abusive discovery demands and the threat of massive class action jury awards to coerce defendants into settling meritless claims," while litigation costs cause workers to be laid off, foreign investors to move their capital elsewhere, and companies to stay mum about their future prospects lest overly rosy forecasts invite strike suits. Drawing heavily on judges and scholars such as Frank Easterbrook, Ralph Winter, John Coffee, and Janet Cooper Alexander, the Chamber argued that lawsuits brought under Section 10(b) consume an undue proportion of judicial

158. Tellabs, 551 U.S. at 321.
159. Id. at 323.
160. Id. at 323–24.
161. Id. at 329 (Scalia, J., concurring); id. at 333 (Alito, J., concurring).
162. Id. at 334 (Alito, J., concurring).
163. Id. at 335 (Stevens, J., dissenting).
resources and are "an Achilles' heel for our economy." The result in *Tellabs* indicated that the Court was inclined to share this bleak assessment of securities fraud litigation.

### E. Employment Discrimination

One category of cases presents a conspicuous exception to the Chamber's record of success thus far in the Roberts Court: cases involving employment law, and those involving employment discrimination in particular. Out of eight cases arising under federal workplace antidiscrimination statutes, the party supported by the Chamber has won only two. These cases complicate the picture of the Roberts Court as a reflexively pro-business or anti-plaintiff Court.

That said, several of the Chamber's losses in the employment discrimination domain came in technical cases that turned on statutory interpretation and whose broader importance seems marginal. One case in this category is *Arbaugh v. Y&H Corp.*, in which the Court unanimously held that Title VII's requirement that the defendant have at least fifteen people on its payroll is not jurisdictional and therefore cannot be raised for the first time at trial. *Arbaugh* may reflect the justices' suspicion of litigation tactics, as its outcome is consistent with concerns raised by both the plaintiff and the United States that small business defendants might "sandbag" plaintiffs by waiting until after trial to raise a jurisdictional numerosity defense. Another case whose significance seems limited is *Meacham v. Knolls Atomic Power Laboratory*.

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165. Id. at 9, 12.


168. Id. at 514–16. Justice Alito did not participate.

Atomic Power Laboratory,\textsuperscript{170} in which the Court unanimously held that the exemption under the ADEA for actions taken by an employer based on reasonable factors other than age creates an affirmative defense as to which the defendant bears the burdens of production and persuasion.

A third case in this category is Federal Express Corp. \textit{v. Holowecki},\textsuperscript{171} which dealt with the necessary ingredients of a "charge" filed with the Equal Employment Opportunity Commission ("EEOC") under the ADEA. The plaintiff contended that any document containing an allegation of discrimination and the name of the employer was a charge; the defendant, supported by the Chamber, argued that any document not acted upon by the EEOC (as in the Federal Express case itself) could not be a charge.\textsuperscript{172} The government's position in the case, which the Court adopted, was an intermediate one—a charge is any document that can reasonably be construed as a request for relief.\textsuperscript{173} As if to emphasize the narrowness of the Court's holding, Justice Kennedy took care at the outset of his opinion to note that the EEOC's rules and practices under the ADEA differ from those under Title VII and the Americans with Disabilities Act ("ADA"), and that "employees and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."\textsuperscript{174} A final employment discrimination case in this peripheral category technically counts as a "win" for the Chamber. Sprint/United Management Co. \textit{v. Mendelsohn}\textsuperscript{175} raised the important question of the admissibility of nonparty or "me, too" evidence in ADEA cases, but the Court chose to punt. In a unanimous opinion by Justice Thomas, the Court held that such evidence is neither per se admissible nor per se

\textsuperscript{170} See Meacham \textit{v. Knolls Atomic Power Lab.}, 128 S. Ct. 2395 (2008). Justice Breyer did not participate; Justice Thomas dissented in part based on his view that disparate impact claims are not available under the ADEA. \textit{Id.} at 2407–08 (Thomas, J., concurring in part and dissenting in part).


\textsuperscript{172} \textit{Id.} at 1154–55.

\textsuperscript{173} \textit{Id.} at 1155.

\textsuperscript{174} \textit{Id.} at 1153. In his dissent, joined by Justice Scalia, Justice Thomas complained that, by defining a charge as "whatever the [EEOC] says it is," the Court had departed from a sensible understanding of the statutory language and had failed to provide guidance to complainants, employers, or the agency. \textit{Id.} at 1161 (Thomas, J., dissenting).

inadmissible, leaving resolution of the issue to the discretion of district court judges—and ultimately, no doubt, to the decision of a less-than-unanimous Supreme Court in some future case.176 In its amicus brief, the Chamber had urged the Court to adopt a rule of per se inadmissibility, but the Court's disposition of the case by vacatur and remand nonetheless registers in the data set as a victory for the Chamber.

Four more losses for the Chamber came in cases involving retaliation. In *Burlington Northern & Santa Fe Railway Co. v. White*,177 an employee was reassigned to a different job within the company, and temporarily suspended, allegedly in response to filing a sexual harassment complaint. The Court held that Title VII's prohibition on retaliation is not limited to employer actions that are themselves related to employment or occur at the workplace.178 Writing for eight members of the Court, Justice Breyer began by noting that the language of the anti-retaliation provision contains no such limitation, but also concluded that the provision's purpose was to deter retaliation in all its forms, whether or not it affects the terms or conditions of employment.179 The Court, however, went on to limit the retaliation cause of action to employer conduct that is "materially adverse," in the sense that it would deter the reasonable employee or applicant from pressing a claim of discrimination.180

In *CBOCS West, Inc. v. Humphries*,181 an employee alleged that he was fired in part because he complained that another employee was fired because of her race. He failed to pay timely filing fees on his Title VII claim, so the question that remained for the Court was whether 42 U.S.C. § 1981, a civil rights statute enacted just after the Civil War, encompasses claims for retaliation.182 The plaintiff relied on two prior decisions of the Court allowing claims for retaliation under comparable statutes. The Chamber's brief outlined

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176. *Id.* at 1143.
178. *Id.* at 64.
179. *Id.* at 62–64. Justice Alito would have insisted that actionable retaliation be related to the terms or conditions of employment. See *id.* at 79 (Alito, J., concurring in the judgment).
180. *Id.* at 68.
182. *Id.* at 1954.
several rationales for denying recovery: first, the language of § 1981 makes no mention of retaliation; second, the first case upon which the plaintiff relied\textsuperscript{183} was decided in 1969, before the Court adopted a stricter approach to implied causes of action; and third, allowing retaliation cases to go forward under § 1981 could frustrate Title VII's remedial scheme.\textsuperscript{184} Even the more recent case cited by the plaintiff—a five-to-four decision from 2005 finding a right to recover for retaliation under Title IX\textsuperscript{185}—could be distinguished on the ground that protection against retaliation is essential under Title IX because third parties are often best situated to vindicate students' rights, whereas employees alleging racial discrimination are already protected against retaliation by Title VII, assuming they don't forget to pay their filing fees. In the end only two justices—Thomas and Scalia—were swayed by these arguments.\textsuperscript{186} The other seven justices signed on to an opinion in the employee's favor by Justice Breyer that largely rested on stare decisis.\textsuperscript{187} Probably in order to retain seven votes, Justice Breyer's opinion for the Court in Humphries says virtually nothing about whether protection against retaliation is generally called for as a prophylactic measure to fully effectuate broadly worded anti-discrimination statutes.

Most recently, in Crawford v. Metro. Gov't of Nashville and Davidson Cty.,\textsuperscript{188} the Court held that Title VII's prohibition on retaliation protects employees who complain about workplace discrimination in response to questions during an employer-initiated investigation, and not just those who complain on their own initiative. The Court's unanimous ruling reflected a commonsense understanding of the statute that had been adopted by the EEOC and several Courts of Appeals; indeed, the Court appears to have granted certiorari largely in order to reverse the contrary interpretation reached

\textsuperscript{186} See CBOCS West, Inc., 128 S. Ct. at 1961–70 (Thomas, J., dissenting).
\textsuperscript{187} See id. at 1955–61.
\textsuperscript{188} Crawford v. Metro. Gov't of Nashville and Davidson Cty., 129 S. Ct. 846 (2009).
The most prominent employment discrimination case of the Roberts Court era thus far resulted in a win for the Chamber, though even here the practical fruits of its victory were short-lived. The question at issue in Ledbetter v. Goodyear Tire & Rubber Co.\(^\text{190}\) appears rather technical at first glance: whether an EEOC charge in a Title VII lawsuit alleging pay discrimination on the basis of sex must be filed within 180 days of the initial act of alleged discrimination. Much of the argumentation in Ledbetter revolved around the interpretation of the Court's precedents in related areas of employment law. Justice Alito's opinion for a five-member majority leaned heavily on stare decisis, right from its opening sentence: "This case calls upon us to apply established precedent in a slightly different context."\(^\text{191}\) The Court held that the plaintiff was seeking a remedy for the continuing effects of a discrete, time-barred act of discrimination rather than for any current actionable violation, and that precedent foreclosed claims based on later consequences of earlier, uncharged discriminatory acts.\(^\text{192}\) In her unusually strongly worded dissent, Justice Ginsburg took issue not only with the Court's analysis of precedent, but more fundamentally with its formalistic approach. She emphasized instead the practical realities of the situation: that pay discrimination often takes a long time to detect and that each disparate paycheck causes tangible harm.\(^\text{193}\) "Once again," Justice Ginsburg concluded, "the ball is in Congress' court"\(^\text{194}\)—and Congress recently returned her serve by enacting a statute to overturn the result in Ledbetter in future cases.\(^\text{195}\)

\(^{189}\) See, e.g., id. at 850, 851.


\(^{191}\) Id. at 620.


\(^{193}\) Id. at 648–50 (Ginsburg, J., dissenting).

\(^{194}\) Id. at 662 (Ginsburg, J., dissenting).

The Court's opinion in *Ledbetter* was remarkably similar in its reasoning, and even its structure, to the Chamber's amicus brief in the case. To be sure, the Chamber's brief was more tendentious in its statement of the facts than Justice Alito's opinion for the Court: it suggested that the plaintiff deliberately waited until she retired to file a charge, by which time some of the employer's records had been destroyed and a manager she had accused of discrimination had died; it repeatedly pointed out that the manager in question died "of cancer"; and it described the typical plaintiff's testimony in a pay discrimination case as "often tear-stained." Aside from these over-the-top moments, though, the brief—like the Court's opinion—was a very conventional precedent-based example of legal argumentation.

What are we to make of the Chamber's comparative failure in employment discrimination cases before the Roberts Court? Three conclusions suggest themselves. First, the by-now-familiar caveat concerning small sample size, as well as the predominance of cases raising technical or marginal issues, caution against reading too much into the Chamber's track record in this category just yet. Second, it is worth repeating that the Court sided with the Office of the Solicitor General in all eight of the employment cases in the data set. Had the government taken a different stance in these cases—particularly in a case like *Federal Express*, in which a federal agency administers the relevant statute—the results might well have been different.

Third, and most intriguing, the Court's decisions in this area may suggest that employment discrimination lawsuits do not raise the same concerns about regulation by litigation that arise in other areas. Perhaps employment discrimination cases do not typically strike the justices as covert attempts at regulation by other means. Because these cases usually involve individual plaintiffs who have suffered discrete and tangible harm, they may not appear to be lawyer-driven in the way that, say, securities class actions or contingency fee tort cases seeking large amounts of punitive damages often do. Moreover, the nature of the harm—

intentional denial of equal treatment—may resonate especially well with the justices' basic conceptions of fair play. This vision of employment discrimination cases would help explain why a majority of the Court viewed the injury in Ledbetter as flowing from a discrete wrongful act rather than a structural disparity in pay based on sex. And even a justice who is generally suspicious of litigation, for example, may bridle at the notion of an employer retaliating against an employee for initiating litigation, as was alleged in Burlington Northern and Humphries. Some cases may break this mold—disparate impact claims, like the upcoming case of Ricci v. DeStefano, could be one example—but the pattern of cases thus far indicates that the Roberts Court does not view employment discrimination suits with quite the same skepticism it brings to other forms of litigation, and that this may help account for the Chamber's less-than-stellar track record in this area.

III. CONCLUSION

This article suggests that the Roberts Court's decisions in cases involving the Chamber of Commerce of the United States can best be explained not by a generalized pro-business (or even pro-defendant) orientation but by a broadly shared skepticism among the justices about litigation as a mode of regulation. The concept of "regulation through litigation" is not a new one; the coinage has been traced to a 1999 online commentary by Robert Reich, and an edited volume carrying that title appeared in 2002. Critics have used the concept to raise concerns about the use of tort law by government plaintiffs, the use of litigation by state

attorneys general, and the use of large class actions to achieve broad regulatory goals. More empirical work remains to be done, however, to substantiate this article's hypothesis that such concerns play a key role in determining outcomes at the Supreme Court merits stage.

Another area at the intersection of the Supreme Court and business law that deserves further attention is the concept of issue salience. While there is no easy way to measure the salience of the issues that come before the justices, it is reasonable to assume that business cases generally involve low-salience issues from the justices' perspective. While the Roberts Court may be a business-friendly Court, it does not seem exceptionally interested in business or business-law issues as such. To be sure, the Court has granted certiorari in more cases that are of interest to the business community in the last few Terms than in previous years, and a few justices may have a strong interest in some business-related matters. But most of the justices are former academics or public-sector employees, and all served as judges before becoming justices. For them, as for the general public, the most salient issues are likely to be constitutional issues: abortion rights, free speech, affirmative action, and the like. Business cases have a lower profile in the media and tend to turn on statutory or regulatory rather than constitutional issues. One study based on interviews

202. See Schwartz & Lorber, supra note 198; Linda A. Willett, Litigation as an Alternative to Regulation: Problems Created by Follow-On Lawsuits with Multiple Outcomes, 18 GEO. J. LEGAL ETHICS 1477 (2005); but see David Rosenberg, The Regulatory Advantage of Class Action, in REGULATION THROUGH LITIGATION, supra note 199, at 244-304.
203. Andrew Siegel has argued at length that hostility to litigation explains many of the Rehnquist Court's decisions. See Andrew M. Siegel, The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence, 84 TEX. L. REV. 1097 (2006). My thesis, in addition to focusing on the Roberts Court rather than the Rehnquist Court, is narrower than Siegel's: rather than arguing that the Court is motivated by a blanket hostility to litigation, I suggest that the Court is skeptical of litigation when it appears to be used as a substitute for regulation.
204. For one attempt, see Lee Epstein & Jeffrey A. Segal, Measuring Issue Salience, 44 AM. J. POL. SCI. 66, 72-77 (2000).
205. Justice Breyer, for example, has a longstanding interest in regulatory affairs, and Chief Justice Roberts's near-decade in private practice no doubt attuned him to the interests of the corporate bar.
with former Supreme Court law clerks concluded that "amicus briefs were most helpful in cases involving highly technical and specialized areas of law,"\textsuperscript{206} and that clerks believed amicus briefs were least influential in "hot-button" cases.\textsuperscript{207} If business cases are low in salience compared to most constitutional cases, then this might be an area in which the legal arguments presented in amicus briefs like the Chamber's are relatively influential and the justices' broad ideological commitments are relatively less dispositive.

Finally, if this article is correct that the Roberts Court is motivated in business cases by a skepticism about regulation via litigation, it has implications for the ongoing debate between those scholars, typically legal academics, who explain judicial decisions largely in terms of legal doctrine and those, typically political scientists, who explain judicial decisions largely in terms of ideological preferences.\textsuperscript{208} What this article suggests is that neither of these global explanations—neither doctrinalism nor attitudinalism—fully captures how the justices decide cases. Instead, the truth is somewhere in between. The Roberts Court's business cases indicate that the justices' decisions are driven most of all by a set of factors that are neither rigidly doctrinal nor merely attitudinal. It would be unrealistic to believe that the justices approach every case with a totally open mind: their votes can usually be predicted in advance based on a set of inputs that are less fine-grained than the particular arguments made by parties or their amici. Individual justices, in other words, have attitudes. But what this article's examination of the Chamber of Commerce's cases in the Roberts Court suggests is that scholars seeking to understand the Court should be focusing not on attitudes in the crudest political sense, but instead on attitudes \textit{about the law}.

\begin{itemize}
\item \textsuperscript{206} Lynch, \textit{supra} note 35, at 41.
\item \textsuperscript{207} \textit{Id.} at 42.
\item \textsuperscript{208} For the attitudinal model, see JEFFREY A. SEGAL & HAROLD J. SPAETH, \textit{THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED} (2002). For the doctrinal model, see just about any student-edited law journal. The professional tendencies described in the text are only tendencies, not iron laws. Increasing numbers of legal academics have embraced aspects of the political scientists' model, and some political scientists emphasize other factors in addition to ideological preferences.
\end{itemize}
Table 1. Outcomes and Voting Patterns in Roberts Court Cases in which the Chamber of Commerce Participated

<table>
<thead>
<tr>
<th>Case</th>
<th>Subject matter</th>
<th>Chamber Result</th>
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<td>Tellabs, Inc. v. Makor Issues &amp; Rights, Ltd., 551 U.S. 308 (2007)</td>
<td>PSLRA; pleading</td>
<td>Win</td>
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<td>Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007)</td>
<td>Securities law</td>
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<td>Beck v. Pace Int'l Union, 551 U.S. 96 (2007)</td>
<td>ERISA</td>
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<td>Ledbetter v. Goodyear Tire &amp; Rubber Co., 550 U.S. 618 (2007)</td>
<td>Title VII; filing requirements</td>
<td>Win</td>
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<td>False Claims Act; qui tam</td>
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<td>Loss</td>
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<td>Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006)</td>
<td>Civil RICO; fraud; reliance</td>
<td>Win</td>
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<td>DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006)</td>
<td>Dormant Commerce Clause; state taxation</td>
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<td>Merrill Lynch, Pierce, Fenner &amp; Smith Inc. v. Dabit, 547 U.S. 71 (2006)</td>
<td>Securities law; preemption</td>
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<td>Texaco Inc. v. Dagher, 547 U.S. 1 (2006)</td>
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<td>Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006)</td>
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