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The Roberts Court & The Business Cases

Kenneth W. Starr*

This is the Court, it is said, that Wall Street has fallen madly in love with.¹ It is an absolute bull market at the Supreme Court. In fact, as the Court rose for the summer recess, one leading member of the United States Chamber of Congress Litigation Division was heard uncorking the champagne and quoting, from the perspective of the American business community: “It’s our best Supreme Court term ever”² As usual, one journey is beneath the surface, and that is the course we will travel today. I see a less monolithic pattern—certainly a richer mosaic—in these business-related cases than the above quote implies.

It is my suggestion that this is a Court that is not so much pro-business as it is massively skeptical of civil litigation, especially nationwide civil litigation. Much of this civil litigation is seen by the Justices as challenging and clogging the judicial system, and as creating what are seen as enormous

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1. See Ben Winograd & Jess Bravin, *Justices Get Down to Business*, WALL ST. J., June 26, 2006, at A2; see also Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at C1.

2. Greenhouse, *supra* note 1, at C1. The Supreme Court’s October 2006 Term did demonstrate a business-friendly approach. For example, in *Philip Morris USA v. Williams*, the Court dismissed an \$80 million punitive damage verdict, ruling that juries cannot use a single victim’s suit to punish a company for harm done by its products to thousands of others. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). In *Credit Suisse Securities (USA), L.L.C. v. Billing*, the Court held that antitrust laws do not apply to the syndication and marketing techniques used in initial public offerings. *Credit Suisse Sec. (USA), LLC v. Billing*, 127 S. Ct. 2383 (2007). The *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* decision makes it easier for corporate defendants to seek and win dismissal of lawsuits filed by investors alleging securities fraud or market manipulation. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007). *Ledbetter v. Goodyear Tire & Rubber Co.* established that employment discrimination suits must be filed within the 180 day deadline set by Congress; otherwise they are time-barred, which means that new paychecks do not constitute new instances of pay discrimination. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). Another business-friendly victory was *Safeco Insurance Co. of America v. Burr*, in which the Court held that companies do not have to notify consumers that they are using the consumer’s credit ratings to influence rates. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201 (2007).

pressures (especially with publicly held companies) to settle the cases.³ This skepticism cuts across the usual ideological lines on the Court, as I hope to demonstrate very briefly.

It appears that the Court, in terms of commercially significant cases, is showing at least that it is trying to be sensitive to an overarching problem of arbitrariness and caprice that is the civil justice system.⁴

The courts continue to focus on punitive damages.⁵ To many this is deeply unsatisfying jurisprudentially and reflects quite openly the age-old judicial concern with the arbitrary deprivation of property and liberty. It is especially unsatisfying when the democratic process—through legislation—results in what is seen as more calibrated, more measured punishments, with one of the baselines being treble damages in the antitrust laws.⁶

The Court's focus in this area is an echo of Justice Breyer's book, *Active Liberty*—it is better for the people to participate through the representative process than for judicial power to be exercised.⁷ The concern, in short, is the confluence of very large class actions, which raise what are seen as Due Process concerns. These cases have been addressed by the Court in the years before Chief Justice Roberts and Justice Alito took the bench.⁸ These are constitutional concerns, but they are also basic equity issues.

Consider who profits at the end of a litigation day. Is it the clients who are prospering, or is it the legal class that is prospering? Consider also the concerns about the loosely regulated and relatively cumbersome civil justice system at the pretrial phase, and the concerns and even skepticism about the capacity of that system to bring about efficient and fair results. There is, in short, too much time, expense, and discovery if the system is unregulated, and too much pressure to settle.

Now, if this sounds like law and economics from a “conservative perspective,” fasten your seat belts, because you will soon hear some dramatic readings—brief ones—from Justices Ginsburg and Breyer. I could also read from Justice Souter, but time does not permit.

3. See *supra* note 2.

4. See *supra* note 2.

5. See *Philip Morris*, 127 S. Ct. at 1057.

6. See *id.* at 1065 (dismissing an \$80 million punitive damages verdict); *Credit Suisse*, 127 S. Ct. at 2397 (ruling that the Securities and Exchange Commission is in a better position to evaluate the propriety of an IPO offeror's behavior, thus preventing an award of treble damages); *Tellabs*, 127 S. Ct. at 2503 (raising the threshold of a plaintiff's pleadings to overcome dismissal in securities fraud cases).

7. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005).

8. See *Philip Morris*, 127 S. Ct. at 1059-60; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

This perspective cuts across the usual ideological divides, as I said before. But it does not seem to me that law and economics are really driving the agenda. Rather, it is skepticism and concern about fundamental fairness in the civil justice system, as well as a deepening sense that it is not appropriate for the judiciary to construct new causes of action or to improve upon causes of action created by Congress.⁹ It is, in this sense, a restrained Court cutting across ideological lines. We saw this in the case that we will talk about later, *Credit Suisse v. Billing*, which has been described as perhaps the most important securities law case in the last thirty years.¹⁰

No one can be in favor of fraud, but let me quote Justice Ginsburg. She said, “Private securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”¹¹

Consider Justice Breyer in *Credit Suisse*.¹² The question before the Court was whether an antitrust action may be brought when the allegation is that a number of investment banking firms formed syndicates in connection with technology initial public offerings?¹³ We remember those technology IPOs that enjoyed great success and then typically crashed and burned. A nationwide class action was brought by very able lawyers, and the Supreme Court of the United States would have none of it.¹⁴

Consider these words of Justice Breyer: “[A]ntitrust plaintiffs may bring lawsuits throughout the nation in dozens of different courts with different nonexpert judges and different nonexpert juries.”¹⁵ Do you see the “nonexpert”? He had previously talked about the expertise of a designated agency created by Congress—the SEC.¹⁶ According to Justice Breyer and a majority of the Court, we need to centralize evaluation in an expert agency and ask what the investment bankers did when they did it.¹⁷

In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will

9. See *Credit Suisse*, 127 S. Ct. at 2383.

10. See Linda Greenhouse, *Justices Back Underwriters on New Issues*, N.Y. TIMES, June 19, 2007, at C1.

11. *Tellabs*, 127 S. Ct. at 2504.

12. *Credit Suisse*, 127 S. Ct. at 2383.

13. *Id.* at 2387.

14. *Id.* at 2383.

15. *Id.* at 2395.

16. *Id.* at 2394-95.

17. *Id.*

prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar factual circumstances differently.¹⁸

Consistency has a value. This is law and economics. Justice Breyer continued: “[T]he threat of antitrust mistakes . . . means that underwriters [that is, Wall Street] must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law [actually] encourages.”¹⁹

A majority of the Supreme Court believes that courts are likely to get these cases wrong.²⁰ Therefore, they do not fit in the judicial sphere.

As my time expires, let us turn to my final case, *Philip Morris v. Williams*.²¹ Again Justice Breyer expresses concern about the arbitrary deprivation of property, this time focusing on punitive damages from a big tobacco company.²² Here Justice Breyer is joined by Justice Souter, and when you look at the configuration in the 5-4 opinion, the usual ideological lines break down.²³ Also note that there is an enormous fault line with both Justices Scalia and Thomas, both with respect to punitive damage awards²⁴ and the dormant Commerce Clause (an area of law in which Dean Kathleen Sullivan and I have co-labored on behalf of the wine industry in California).²⁵

The dormant Commerce Clause doctrine provides that states should not discriminate against interstate commerce, nor pose undue burdens on interstate commerce.²⁶ Justices Thomas and Scalia will simply have none of this.²⁷ Why? Are they against commerce? No.²⁸ Are they anti-business?

18. *Id.* at 2395.

19. *Id.* at 2396.

20. *Id.* at 2397.

21. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

22. *Id.* at 1062.

23. *Id.* at 1065 (Stevens, J., dissenting); *see also id.* at 1068 (Ginsburg, J., dissenting).

24. *See id.* at 1067 (Thomas, J., dissenting); *id.* at 1068 (Ginsburg, J., dissenting, joined by Scalia, J., and Thomas, J.).

25. *See Granholm v. Heald*, 544 U.S. 460 (2005).

26. *See, e.g., id.* at 472 (“[S]tate laws violate the commerce clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” (internal citation omitted)); *Am. Trucking Ass’n, Inc. v. Mich. Public Servs. Comm’n*, 545 U.S. 429 (2005) (stating that the Court has invalidated under the dormant Commerce Clause “state regulations that unjustifiably discriminate on their face against out-of-state entities, or that impose burdens on interstate trade that are clearly excessive in relation to the putative local benefits.” (internal citations omitted)).

27. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 596-609 (1997) (Scalia, J., dissenting). The majority found, over vigorous dissents by Justices Scalia and

No.²⁹ Do they trust judicial power to make these kinds of assessments?
No.³⁰ Do they think it is legitimate for judges to make these kinds of assessments? No.³¹ Rather, it is for Congress to decide.

Thomas, that the town's tax exemption for local charitable organizations violated the dormant Commerce Clause. *Id.* at 595.

28. *See id.* at 596.

29. *See id.* at 596-609.

30. *See id.*; *see also* Credit Suisse Sec. (USA), LLC v. Billing, 127 S. Ct. 2382, 2395 (2007).

31. *See Camps Newfound/Owatonna*, 520 U.S. at 596-609 (Scalia, J., dissenting); *see also Credit Suisse*, 127 S. Ct. at 2395.
