



## Does the Court Mean Business?

By Michael S. Greve

*Many Supreme Court watchers have noted the Roberts Court's striking preoccupation with "business cases"—that is, cases in which broad segments of the business community have an interest. Many have also found a supposedly "pro-business" pattern of outcomes in those cases and have interpreted it as a reflection of the post-O'Connor Court's conservative orientation. This Federalist Outlook presents a different and more ambitious interpretation. The Supreme Court may at last have hit upon an urgent and genuinely judicial program—the reconstruction, after decades of neglect, of a workable legal and constitutional infrastructure.*

Conventional wisdom has it that the appointments of Chief Justice John Roberts and especially Justice Samuel Alito have tipped a closely divided Court to the conservative side, with Justice Anthony Kennedy holding what balance remains. Much evidence points that way. The 2005 term featured twelve 5–4 decisions, nine of which conform to an ideological 5–4 or 4–1–4 pattern (liberals against conservatives, with Justice Kennedy or, in the early cases, Justice O'Connor in the middle). The 2006 term brought twenty-five 5–4 decisions, nineteen of them pitting four conservatives against four liberals, with Justice Kennedy in the majority in all those cases (often with a hand-wringing concurrence). By historical standards, that is a very high level of judicial dissension. All but six of the 2006 cases (four of them death penalty cases) went to the conservatives, suggesting that perceptions of a shift to the right are not entirely fanciful.

The media commentariat has interpreted the Roberts Court's preoccupation with business cases—and the "pro-business" outcomes in those cases—as further evidence of a rightward lurch.<sup>1</sup> That, too, is understandable. The Court's decisions over more than three decades on abortion, the

death penalty, women's rights, affirmative action, and other high-voltage issues rarely pretended to have much to do with the law. It looked as if the Court was simply enacting the agenda of favored political constituencies. It is natural to suspect that the Roberts Court has not really shifted gears, but that it is simply trying to make new friends among a "discrete and insular minority"<sup>2</sup> of CEOs.

This political interpretation of the Roberts Court's business docket is demonstrably wrong. The Court's business cases are *not* the products of an ideologically divided, bloc- and swing-vote-driven Court. To the contrary, they display a remarkable degree of judicial consensus. Even when the consensus breaks, the fault line rarely follows ideological expectations. Foremost among the reasons for this remarkable phenomenon is that the business cases are actually about that endangered species: *law*.

### The Business Docket

The Court's increased attention to business-related cases—even as its overall docket has continued to shrink—is indeed eye-catching. The 2005 term featured twenty such cases of a total of seventy-two decided by signed opinions. In the 2006 term, twenty-five of sixty-seven cases dealt with business-related issues. And ten of the

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twenty-six certiorari grants issued to date for the 2007 term involve such issues.<sup>3</sup>

The cases run the gamut—from Title VII of the Civil Rights Act to ERISA to the 1947 Portal to Portal Act, and from profound constitutional questions over the dormant Commerce Clause to federal preemption to arcane questions of federal removal jurisdiction (an important matter for corporate defendants, who often seek to “remove” cases into federal court from hostile, plaintiff-selected state courts). A few overlapping areas, though, have drawn sustained judicial attention. My colleague Ted Frank discussed several of those areas and the 2006 cases in a July 2007 *Liability Outlook*;<sup>4</sup> I will make do here with a bare-bones summary.

**Antitrust.** In its 2005 term, the Court decided three significant antitrust cases. In its 2006 term, the Court handed down four such cases. What connects the decisions is a profound judicial skepticism, informed by economic reasoning, of an antitrust law that tries to do too much. Beyond a narrow class of plainly anti-competitive conspiracies such as horizontal price fixing, judges—and regulators, for that matter—are not good at separating anti-competitive from pro-competitive conduct, and the costs of litigation and judicial error are very high. This healthy skepticism cuts against rigid per se rules that might block competitive practices.<sup>5</sup> It also calls for meaningful pleading requirements, lest hapless defendants be subjected to vexatious litigation and ignorant juries.<sup>6</sup>

**Patents.** The Roberts Court has decided five patent cases over the past two terms.<sup>7</sup> These decisions have uniformly—and nearly unanimously—reversed rulings by the U.S. Court of Appeals for the Federal Circuit, which has appellate jurisdiction over virtually all patent cases. The tenor of the decisions is that the Federal Circuit should ease up on its enthusiasm for rules that tend to generate more patent litigation and instead adhere to the procedural and pleading rules that apply in all other civil litigation.<sup>8</sup>

**Securities Litigation.** With increased urgency, the Roberts Court has labored to rein in securities litigation, especially class actions. In *Merrill Lynch v. Dabit*, a unanimous Court held that a federal statutory bar against class actions alleging misrepresentation “in connection with the purchase or

sale” of securities also barred class actions alleging fraud in connection with an investor’s *holding* of securities (a made-up trial lawyers’ cause of action calculated to circumvent the plain intent of the federal act). In 2006,

the Court tightened pleading requirements under the Private Securities Litigation Reform Act, making it easier for corporate defendants to obtain dismissals of certain class actions prior to expensive discovery proceedings.<sup>9</sup> The 2007 term will feature the closely watched *Stoneridge v. Scientific-Atlanta*. The central, multibillion dollar question in that case is whether securities class actions under federal law may be brought not only against corporate defendants who perpetrated fraud but also against deep-pocketed third parties who had

some (in this case, arm’s-length) degree of relationship with the defendant. The correct answer will be no.

**Access to Court.** In cases spanning over two decades, Justice Antonin Scalia has insisted that federal court jurisdiction presumes an actual “case or controversy” and a plaintiff with “standing to sue”—that is, with an imminent, particularized injury that is caused by government misconduct and, moreover, can be redressed through a favorable judicial ruling. The Roberts Court has applied those precepts in *DaimlerChrysler Corp. v. Cuno*, a dormant Commerce Clause case, and again in *Hein v. Freedom From Religion Foundation*, where it sharply curtailed the idiosyncratic doctrine of “taxpayer standing” for Establishment Clause plaintiffs. However, the Court remains ideologically divided over Justice Scalia’s standing doctrine (as it was in *Hein*), and plaintiff-friendly rulings may result at least when the planet is in peril. Thus, in *Massachusetts v. Environmental Protection Agency* (EPA), Justice Kennedy joined the four liberal members of the Court in holding that states may complain of allegedly imminent harms from global warming, said to be redressable through EPA regulation of motor vehicle emissions.

No such ambivalence and ideological disagreement, however, characterize the Roberts Court’s distaste for lawyer-driven civil litigation. That disposition is evident in the securities class action cases and in antitrust cases. It also takes hold—notwithstanding the Court’s disagreement over standing to sue the federal government—when the government effectively deputizes—but does not adequately supervise—private attorneys general who

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sue other private parties under the False Claims Act, RICO, or the Fair Credit Reporting Act.<sup>10</sup> It is evident in the justices' long-standing, consistent defense of private arbitration agreements against end runs, typically under state law.<sup>11</sup>

**Federal Preemption.** While cases over the federal preemption of state law are hardly an *emerging* issue of Supreme Court concern (they have been a steady diet), an inventory of the Court's business-related docket would be incomplete without them. The 2005 and 2006 term each featured one important preemption case: *Merrill Lynch v. Dabit* (2005) and *Watters v. Wachovia* (2006), the latter of which saw a narrow majority of justices holding that the National Bank Act precludes the imposition of state registration and consumer protection requirements on federally chartered financial institutions. For the 2007 term, the Court has already agreed to decide three preemption cases. The most important of these cases will address the scope of the Food and Drug Administration's preemption of claims under state tort law.<sup>12</sup>

## Counting Votes

Neither the expanding size of the Roberts Court's business docket nor its superficially "pro-business" pattern of decisions signify, or are part of, an ideological shift to the right. The voting alignments in business cases provide firm evidence in support of that seemingly perplexing contention.

Of the twenty business cases during the 2005 term, thirteen were decided unanimously. That includes the most important business cases, such as the antitrust decisions and *Merrill Lynch*. An additional five cases were decided with only one or two dissenting votes. Only one business case of that term (*Rapanos v. Corps of Engineers*, a Clean Water Act case) conforms to the conventional ideological divide with Justice Kennedy in the middle).

The 2006 term featured twenty-five business cases, ten of which were decided unanimously and another eight with only one or two dissenting votes. Only three cases fit the ideological 4-1-4 pattern. Two of these are *Massachusetts v. EPA*, best understood as a bout of eco-correctness, and *Ledbetter v. Goodyear*, a Title VII sex discrimination dispute better read as a civil rights case than a "business case." The only unambiguous ideological 5-4 split in a

"pure" business case was the Court's June 2007 decision in *Leegin v. PSKS*, a remarkable antitrust case in which Justice Kennedy, writing for the conservative majority, overruled a century-old precedent and held that retail price maintenance agreements should be subject to a

judicial "rule of reason" analysis, rather than per se invalidation.

Two additional cases in 2006 featured divided votes but no ideological splits. *Philip Morris v. Williams* held that state juries may not punish corporate defendants for harm caused to non-litigant parties, although they may take such harms into account. Justice Stephen Breyer's majority opinion was joined by the chief justice and by Justices Alito,

Souter, and Kennedy. If that is a "conservative" majority, conservatives are in bigger trouble than first suspected (and dissenting Justices Scalia and Thomas have some explaining to do). *Watters v. Wachovia*, the bank preemption case, broke along similarly quirky lines. Justice Ruth Bader Ginsburg wrote for the pro-preemption, "pro-business" majority, with Justices Stevens and Scalia and Chief Justice Roberts in dissent (Justice Thomas did not participate). The case involved messy questions and subtle, yet firm, disagreements over statutory interpretation, *Chevron* deference, and preemption analysis. Any notion that the sophisticated analysis on both sides was a smokescreen for the justices' pro- or anti-business ideology is ludicrous.

Tempting though it is to view the Court's business docket as part of a conservative surge, the justices themselves evidently do not see it that way. No justice has protested the Roberts Court's alleged "pro-business" agenda. Not one has hinted that there might even *be* such an agenda. If there is, we are in the throes of a truly vast judicial conspiracy.

## Lo, Law!

If the rest of the world views business cases through a class warfare prism, why doesn't the Court? Part of the reason is that those cases are *inherently* less ideological and more law-like than the Court's culture-war fare.

First, business is a "they," or perhaps even an "us"—and certainly not an "it." Patent cases pit firms against one another. Antitrust law has often served as a sword for business firms whose attitude toward competition is that there is altogether too much of it. Most regulatory cases will sport corporate losers against winners. And while no

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one at the Chamber of Commerce likes trial lawyers, some of the most creative class actions in recent memory have been the products of corporate entities and their white-shoe law firms.<sup>13</sup> In many cases, of course, it is clear what “business” wants. But in the many important cases where that is not so, the justices could not do corporate America’s bidding even if they wanted to.

Second, demagogic denunciations of purportedly “pro-business” rulings ignore the legal and economic substance of the decisions. The Court’s antitrust rulings, for example, shield (some) corporate defendants only incidentally. Their declared purpose, firmly agreed upon by all justices, is to enhance *consumer* welfare. By the same token, the notion that the Court’s limitations on securities class actions are “pro-business” and “anti-investor” assumes that the welfare of investors is somehow separate from, and opposed to, the welfare of the businesses in which they invest. The identification of corporations—legal constructs in whose real-world welfare the public shares—with entrenched management is a staple of anti-business rhetoric. For example, it is the crux of the *Stoneridge* plaintiffs’ case (and, shamefully, the Securities and Exchange Commission’s position). The justices have consistently seen through and rejected this posturing.

Third, business-related cases are typically multi-dimensional—chiefly because they arise from real contests over real dollars, as opposed to staged, set-piece battles over cultural and constitutional symbolism. Any given business case will involve more than one question of constitutional interpretation, statutory interpretation, common law construction, judicial deference *vis-à-vis* administrative agencies, or federalism. Those foundational principles all apply well beyond the “business” context, and they do not always run in harmony. Hence, even if the justices tried to align their legal rulings with their supposed policy preferences, they would find it impossible to do so. While a justice’s ideology, temperament, and perceptions of the broader political and economic climate undoubtedly play *some* role in business cases, those sentiments do not drive the decisions and opinions.

## The Fix Is In

If not ideology or shilling for corporations—which can fend for themselves—then what explains the Roberts

Court’s business jurisprudence? The most plausible explanation is that the Court is attempting to restore a legal environment in which corporations and their shareholders, investors, customers, and workers can operate. Behind the Court’s striking consensus on “the business agenda” lies a consensus that the civil justice system is badly broken.

One wonders what gave the justices that idea. Perhaps they read the newspapers. Or perhaps their summer junkets abroad exposed them not only to the marvels of the Zimbabwean constitution but also to the worldwide contempt for America’s so-called civil justice system. Regardless, the Court’s expansive business docket is plainly a repair project. The remedial effort is reflected, for example, in the extraordinary reversal rate in business cases: in upwards of 85 percent of those cases, the Roberts Court has overturned the lower courts’ rulings.<sup>14</sup>

No single concern, let alone a unified field theory, appears to drive the Court. The *seriatim* reversals of the Federal Circuit indicate that the Supreme Court has come to view the concentration of patent litigation in that venue as a failed institutional experiment—or at least as an experiment that demands Supreme Court monitoring.<sup>15</sup> The antitrust decisions, as Ted Frank and others have pointed out, seek to revamp outdated doctrines in light of modern economic understanding. The securities cases reflect a clear judicial awareness—well predating the Roberts Court—that securities class actions have gotten out of hand. What unites those individual concerns is a general sense that the legal system is in need of some restraint, and that only the Supreme Court can provide it.

## Beyond Goldilocks?

The Roberts Court’s business docket reflects a determination to fix the worst excesses and irrationalities of a civil justice system unattended for far too long. At this point, it is dicey to read more than that most welcome orientation into the Court’s decisions. Still, it may not be too early to speculate about the possibility—and opportunity—of a broader shift of the Supreme Court’s political and institutional role.

For more than four decades, the Supreme Court has principally acted as an arbiter of our collective moral

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choices. For two of those decades, Justice Scalia has warned of this role's dangers. A Court that panders to political constituencies or to a public craving impartial authority will eventually cease to be—and cease to be perceived as—impartial or authoritative on anything. It will merely become another partisan in the culture wars.

The Court's response to Scalia's challenge has been the Goldilocks Constitution. That Constitution is colorblind—but not totally so, or at any rate not yet. It enshrines a right to abortion at any time, for any reason—except when the people wish to register their distaste for a procedure that looks too unseemly. It commands equal concern and respect for homosexuals—but not (yet) for same-sex marriage, for which the country is not ready. And it demands respect for the states' "dignity" and for federalism's "etiquette"—except when some poorly brought-up Southern states insist on their own death penalty procedures, in which case the Court must enforce "evolving" standards of decency.<sup>16</sup> The Court maintains its authority by superintending, and occasionally nudging, an enlightened consensus. This bizarre "popular constitutionalism" has been embraced by the media, which now publish opinion polls on whether the Court is too conservative, too liberal, or just right. It has been championed by scholars who, with apparent seriousness, celebrate the Court as "the most democratic branch" of government.<sup>17</sup>

Alas, that absurd perception has a self-reinforcing tendency. Any attempt to limit the Court's morals monopoly and make room for a more democratic politics meets with shouts of "conservative activism," a "radical break with precedent," a shocking departure from "minimalism," or whatever slogan *du jour* legal elite opinion has decided to serve up. Appeals to originalism, judicial restraint, or "strict construction" have no purchase because people do not care about meta-theories of interpretation. They care about results. (Academics who profess to argue over hermeneutics care more than anyone else about results.) After four decades of results-driven adjudication, no one should blame the public. When many of our most consequential collective decisions will invariably be made by a body of unelected lifetime appointees, no one should blame people for being risk-averse and wanting those decisions and that body to be moderate.

So what is a responsible jurist to do? The answer is to change the subject. Decide a ton of business cases—some unanimously, others with confounding judicial coalitions, all of them incomprehensible, all of them forcing the justices to act like lawyers rather than culture warriors.

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No one should expect the relative unanimity, respectful argument, and legal rigor that characterize the Court's business cases to spill over onto its ideological docket. (The opposite is far more likely.<sup>18</sup>) Over time, however, a solid business docket may help restore a public awareness of a meaningful difference between law and politics, between a legal argument and mystery-of-life burble. It may even sink in that the United States Supreme Court is a *court*, not an oracle—a very special court, to be sure, but nonetheless a court whose

obligation is to make a complicated constitutional architecture work.

### And Now for Something Completely Different

Such an agenda would mark a break with recent practice and a return to the historical norm. For the first 150 years of its existence, the Supreme Court concerned itself chiefly—and at times almost exclusively—with the business of making the constitutional architecture work. Its docket contained an occasional blockbuster case—and literally hundreds of now-obscure cases over negotiable instruments, wills and estates, state taxation, bond obligations, and, in the days before firmly established regulatory agencies, utility rates. A century ago, the largest part of the Court's work was its diversity docket—that is, the adjudication of private, mostly business disputes among parties from different states.

This orientation drew a lot of fire. It was said then, as it is being said now, that the Court's business—especially its diversity docket—was a corporate stalking horse. It was said then, and it will soon be said again, that the business cases were a waste of the Court's precious time. Prominently, Felix Frankfurter argued that the Supreme Court should drop the quotidian stuff and instead devote itself to the statesman's contemplation of grand federal issues. Of course, the mechanics of a complex economy and a complicated federal system command attention. But that attention should come from Congress and expert

administrative agencies, not from federal courts, said Professor Frankfurter.<sup>19</sup>

Justice Frankfurter got his wish. During his tenure, the Court preached judicial subservience to Congress, throttled back and eventually abandoned the enforcement of constitutional rules that had earlier helped to regularize private transactions and expectations within the federal system, and developed a “cooperative federalism” that freed state regulators and courts from obnoxious federal oversight. With all that out of the way, the justices turned into statesmen. And as it turns out, Justice Frankfurter did not like it one bit. In his later years on the Court, he lamented the justices’ forays into “political thickets” such as reapportionment and demanded judicial humility. On account of those opinions, Frankfurter became an unlikely conservative patron saint.

The enduring appeal of Frankfurter’s paeans to judicial restraint has clouded the utter implausibility of his institutional theory of the Court. One can ask for a court of statesmen or for judicial restraint, but one cannot have both. Statesmen are not given to the restrained “contemplation” of grand federal questions. They march into political thickets and make straight the way for justice. Equally far-fetched is Frankfurter’s counsel that the Court ought to leave the humdrum business of jurisdiction—indeed the entire complicated federal machinery—to Congress and expert agencies. That machinery, all agree, cannot work without fairly detailed, context-sensitive rules, which the Constitution itself—being a Constitution, not a code—cannot provide. What should have been clear to Frankfurter—and what is at any rate painfully clear now—is that Congress cannot provide those rules, either. To insist on system maintenance by Congress alone is to opt for disintegration and eventual mayhem.

By way of illustrating that central point: The Supreme Court held in 1941 that federal courts must follow state courts’ decisions on the “choice of law”—that is to say, on questions of *which* state law to apply in cases among parties from different states.<sup>20</sup> This so-called *Klaxon* rule, a key part of the Court’s “cooperative federalism,” means that the choice of law will in all events be the plaintiff’s.<sup>21</sup> When plaintiffs get to choose their own state law, litigation will gravitate to the most plaintiff-friendly jurisdictions. Firms operating in a national economy must then adjust to the law of those jurisdictions.

The destructive consequences of this race to the bottom soon dawned even on *Klaxon*’s defenders. Brainerd Currie, the most ardent defender of the view that federal courts had no business declaring independent choice of

law rules that would constrain state courts’ (and plaintiffs’) opportunistic choices, nonetheless implored Congress to enact such rules.<sup>22</sup> Judge Henry Friendly, another influential *Klaxon* defender (though not a fan), likewise called for a federal choice-of-law statute.<sup>23</sup> That, mind you, was in 1964—before the invention of the modern, migrating, multistate class action; before “hellhole jurisdictions”; before the rise of a well-organized litigation industry. Those depredations—*Klaxon*’s long-term but ineluctable consequences—have since prompted increasingly urgent calls for a federal choice-of-law statute.<sup>24</sup> Needless to say, Congress has never seriously contemplated that step, and it never will. *Klaxon* will haunt us until the Supreme Court drives a stake through its heart.

## Go to It

Such a fundamental reorientation of the Court’s jurisprudence is a long way off. For the time being, the Roberts repair crew is tackling door jambs and drywall, not the foundations, and that may be just as well. What matters is the Court’s dawning recognition that the disrepair of the civil justice system is not a random event but a result of the Court’s prolonged, deliberate inattention to “business cases.” What matters, moreover, is that the justices are past the point of begging Congress to fix this or that “elephantine mess.”<sup>25</sup> The dog that isn’t barking in the Court’s business cases is the “let Congress legislate” mutt. The Court has come to recognize its own remedial obligation.

It will be said that federal courts are ill-equipped to provide sensible rules of the road. Rubbish: no area of the law is as thoroughly judge-made as is antitrust law, and none is in better shape. Federal courts are cleaning up the asbestos mess; the prospect of federal legislation on that subject is a menace.

It will be said, too, that the Court’s expansive business docket is “judicial activism,” but that is trial lawyer trash talk. The hallmark of the Roberts Court’s business decisions is not defiance of Congress but rather the sober, belated, but all the more welcome recognition that a workable legal and constitutional order demands sustained, conscientious judicial attention. A fair measure of devotion to that task is not a judicial hobbyhorse, let alone a plutocratic agenda. It is the Court’s constitutional responsibility.

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*AEI research assistant Harriet McConnell and editorial assistant Evan Sparks worked with Mr. Greve to edit and produce this Federalist Outlook.*

## Notes

1. See, e.g., Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1; Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, June 22, 2007, at D1; Adam H. Charles & James J. Heffernan Jr., *Friendly to Corporations*, NAT'L L.J., Aug. 1, 2007, at 10.

2. *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938).

3. My counts here and throughout are higher than the widely used Chamber of Commerce counts (but lower than those of other Court watchers). That is because the Chamber does not participate in many business-related cases, often because its members are on opposite sides.

4. Ted Frank, *The Roberts Court and Liability Reform*, AEI LIABILITY OUTLOOK NO.3, July 2007.

5. See *Texaco v. Dagher*, 547 U.S. 1 (2006) (a joint venture's pricing decisions are not impermissible collusion); *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006) (patents do not necessarily confer market power); *Leegin Creative Leather Products v. PSKS*, 127 S.Ct. 2705 (2007) (resale price maintenance agreements are not illegal per se).

6. See *Volvo Trucks v. Reeder-Simco GMC*, 546 U.S. 164 (2006) (Robinson-Patman Act does not reach price competition for special order products); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007); *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). See also *Credit Suisse v. Billing*, 127 S.Ct. 2383, 2386 (2007) (holding that antitrust laws do not apply to certain federally regulated securities offerings, partially on account of the "serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results.")

7. *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006); *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, 546 U.S. 394 (2006); *KSR Int'l Co. v. Teleflex*, 127 S.Ct. 1727 (2007); *MedImmune Inc. v. Genentech*, 127 S.Ct. 764 (2007); *Microsoft Corp. v. AT&T*, 127 S.Ct. 1746 (2007).

8. See especially *eBay*, 126 S.Ct. 1837; *MedImmune*, 127 S.Ct. 764.

9. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499 (2007).

10. False Claims Act, 31 U.S.C. § 3729; Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. § 1961-1968p; Fair Credit Reporting Act, 15 U.S.C. § 1681. See, respectively, *Rockwell Intern. Corp. v. U.S.*, 127 S.Ct. 1397 (2007); *Anza v. Ideal Steel Supply Corp.*, 126 S.Ct. 1991 (2006); *Safeco Ins. Co. of America v. Burr*, 127 S.Ct. 2201 (2007).

11. Cf. most recently *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

12. *Riegel v. Medtronic, Inc.*, 451 F.3d 104 (2nd Cir. 2006), cert. granted, 127 S.Ct. 3000 (2007); *Rowe v. New Hampshire Motor Transport Ass'n*, 448 F.3d 66 (1st Cir. 2006), cert. granted, 127 S.Ct. 3037 (2007); *CSX Transportation, Inc. v. Georgia Board of Equalization*, 472 F.3d 1281 (11th Cir. 2006), cert. granted No. 06-1287 (2007).

13. See, e.g., *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2003).

14. The reversal rate for the entire 2006 term (including the business cases) was 74 percent. Marcia Coyle, *Supreme Court Review*, NAT'L L.J., Aug. 1, 2001, at 1, 6.

15. Justice Scalia, for one, knows all about the perils of an unsupervised appellate body with a de facto monopoly over an area of the law. See Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 371 (1978) (lamenting the Supreme Court's "absentee landlord" role vis-à-vis the D.C. Circuit and its administrative law decisions).

16. See *Grueter v. Bollinger*, 539 U.S. 306 (2003) (racial preferences in student admissions are laudable until 2028, unconstitutional thereafter). Compare the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) with *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Kennedy, J., diss.) (states may legislate to register voters' disapproval of certain abortion procedures, without restricting abortion per se) and with *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007) (Congress may prohibit partial birth abortions). And see *Roper v. Simmons*, 543 U.S. 551, 560–561 (2005).

17. Jeffrey Rosen, *The Most Democratic Branch* (Oxford Univ. Press 2006).

18. *Leegin*, the only unambiguous ideological split in a 2006–07 business case, may be suggestive in that regard. The case was decided at the very end of the term, when judicial tempers were undoubtedly fraying over still-pending cases on race-based school assignments and other equally contentious matters. The surprisingly harsh tone of Justice Breyer's dissent, if not the 5–4 split, may have to do with those atmospherics. *Leegin*, 127 S.Ct. 2705.

19. See, e.g., Felix Frankfurter, *Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 HARV. L. REV. 1046 (1926).

20. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

21. Justice Scalia has correctly described forum shopping as "a privilege that the *Klaxon* regime reserved for plaintiffs." *Ferens v. John Deere Co.*, 435 U.S. 516, 534 (1990).

22. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 84 (1958).

23. Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964).

24. See, e.g., Bruce Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 GEO. L.J. 617 (1992); Patrick Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993).

25. Cf. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Compare that plea for Congressional intervention to (among many other cases) the Court's cavalier de facto repeal of the Robinson-Patman Act in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).