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The Roberts Court, the 2008 Election & the Future of the Judiciary*

Professor David Franklin

PROFESSOR FRANKLIN: Thank you very much for that introduction and thanks to the DePaul Business and Commercial Law Journal for inviting me and to Don Carrillo for coordinating this excellent event. I have to say that along with feeling honored and flattered by Don's invitation to speak today, I was also a little bit nervous.

I might as well tell you off the top why I was nervous. I'm not a business or commercial law specialist. I do constitutional law. And one thing that is sometimes true about constitutional law specialists is that we often don't know all that much about the business world. I became a little bit less nervous because Don explained to me that he wanted me to talk about the Supreme Court. This was a relief to me for two related reasons. First of all, I do know a little bit about the Supreme Court and, second, the justices of the Supreme Court are a little bit like me because they're also not business law specialists. I don't want to say they don't know very much about the real world, but it's possible.

Think for just a moment about the nine highly distinguished people that currently serve on the Supreme Court. Of the nine, only three have any significant experience as private practitioners—that would be Justice Stevens, and this was a long time ago, Justice Kennedy, also a fairly long time ago, and Chief Justice Roberts, who was in private practice more recently. But Roberts's practice was a very specialized appellate practice, largely—though not entirely—devoted to constitutional issues.

So there is really nobody on the current Supreme Court who was a titan of private practice, accustomed to working with business clients on the highest levels, like, say, the second Justice Harlan or Abe Fortas. The rest of the current justices came to the bench having been government lawyers (that would be Scalia, Thomas, Alito, Roberts as well, and to a lesser extent, Breyer and Souter) or public interest law-

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yers (Ginsburg) or most distressingly of all, law professors (Scalia, Breyer, Ginsburg, and Kennedy). And all of them were judges before becoming justices.

Incidentally, I think I'm correct in saying that the current Supreme Court is the first Court ever, now that Rehnquist has died and O'Connor has retired, on which all nine justices served as judges before joining the Court. And this may well be the first Court ever on which none of the justices was an elected official before becoming a justice. At any rate, the result of all this background and experience is that this is, I think, not a Court that is particularly attuned to, or for that matter particularly interested in, business law as such or the day-to-day concerns of the private bar in particular.

Now, it's true that John Roberts, during his confirmation process, said some things to indicate that he would try to make the Court more responsive to the concerns of practitioners. For example, Roberts said he would try to increase the number of cases the Court grants for plenary review through its certiorari process. Part of the reason for that, he said, was that private practitioners need a little bit more guidance, particularly ones that represent clients that do business nationally and that are facing unclear or non-uniform law from the various circuits.

Well, it hasn't worked. Last term the Court decided sixty-eight cases that had been fully briefed and argued. That is the lowest number in recent history. Twenty or twenty-five years ago the number was twice as high, if not more. So we've got a Court that has not taken many cases, that has members who have a background in public law, constitutional law, that is not especially interested in business law, and now you've got a constitutional law professor talking to you about the Court.

What I thought I would do is try to turn this comparative disadvantage of mine into some kind of advantage by talking for ten or fifteen minutes about ways in which the Supreme Court's approach to business law cases can be understood through the lens of constitutional law because I think the Court largely views all of its cases through the lens of constitutional law, for better or for worse.

More specifically, I'm going to outline three themes that have played themselves out throughout the work of the Roberts Court over its two and a half or three terms. These are three themes that, I think, have their origin or find their fullest expression in constitutional law, but that have also revealed themselves and have been echoed in the Court's commercial law docket. The three themes I want to focus on are these: first, a preference for rules over standards; second, an inter-

est in narrowing access to courts, particularly federal courts; and third, the unsettled question of federalism, the relation between the federal and state governments.

Rules versus standards. We are obviously still very early in the career of Chief Justice John Roberts, two and a half terms into it, but it's already clear that one way in which Roberts is similar to Justices Scalia and Thomas is that he has a strong preference for what he views as clear, bright-line, judicially imposed rules as opposed to what he views as broad, fuzzy, manipulable, open-ended standards. This comes across very clearly in the constitutional area in a whole series of cases from the First Amendment to the Dormant Commerce Clause and beyond.

One of the most interesting manifestations of this trend for me came in a recent case called *Medellin v. Texas*.¹ It would take us too far afield from business law to talk at any length about this case, but it was fascinating if only because it involved the Bush Administration weighing in on the side of a Mexican immigrant in Texas who was convicted of murder and on the side of the idea that an international court's judgment should be given effect in Texas criminal courts.² Incidentally, the Bush Administration lost that case.³ The current Court tends to rule in favor of the current administration, but this was just asking too much.

But what's interesting to me about *Medellin* is that Chief Justice Roberts, who wrote the majority opinion, took great pains to say that he was laying down a relatively clear rule on a very difficult issue in constitutional law having to do with treaty interpretation.⁴ And he took equal pains to excoriate Justice Breyer's dissent for failing to provide a clear rule and instead offering what Roberts mockingly called a grab bag of seven different reasons for the dissent's outcome.⁵

This same trend of favoring formal rules, let's call them, over pragmatic, functional, multi-factor standards comes across in the Court's business cases as well. One prominent example which I'm sure many of you are familiar with is the *Stoneridge* case, in which the Court held, five-to-three with Breyer not participating, that securities fraud claims are not allowed against third parties who don't directly mislead

1. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1361-63.

investors but are in partnership in one way or another on a business level with those who did.⁶

The primary effect of *Stoneridge* is to put an end to what some circuits had been calling scheme liability, where participating in a deceptive scheme exposed you to liability even if you didn't make any direct statements yourself.⁷ The Court, Kennedy writing, clearly viewed scheme liability as too open-ended, too unclear, too broad, and chose instead to favor what it viewed as a clear rule of reliance which led to a dismissal in that case.⁸

Now, there are some exceptions to this trend toward rules over standards. The most interesting exception, I think, is the Court's treatment of the federal circuit in the patent area where it seems to me and to many others that the Supreme Court is getting fed up with the federal circuit's bright-line rules, which happen to be very patent-friendly, and is actually interested in replacing them with open-ended standards in some areas. But that is an exception. The general trend is clear.

Access to courts. This is probably the clearest and strongest theme that has emerged from the Roberts Court, even more than the Rehnquist Court. This is a Court that seems determined to make it more difficult in a variety of contexts for plaintiffs to get into federal court in the first place, to survive motions to dismiss, motions for summary judgment, and to get certified as a class.

We've been seeing this for many, many years in the constitutional area. A very interesting recent constitutional case on this theme is called *Hein v. Freedom from Religion Foundation*, in which the Court held that taxpayers did not have standing to get into federal court to challenge the Bush Administration's so-called faith-based initiatives program, but there are many, many other constitutional cases that follow this trend.⁹

There are an enormous number of cases already in just two and a half terms of business law at the Court that follow the trend as well. Many of you are familiar with the *Ledbetter* case, in which the Court held that a female employee alleging pay discrimination had to file a lawsuit within 180 days of the very first time she got a smaller paycheck because that was the single, discrete act of discrimination that was actionable, even if she didn't know she was getting paid

6. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

7. *Id.*

8. *Id.*

9. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

less.¹⁰ (It will be interesting to see if this leads to more discrimination claims being filed, at least in the short term, as plaintiffs rush to make sure they don't miss the deadline, even if they have no evidence of discrimination.)

And the same pattern holds true in other areas. In securities law, I already mentioned the *Stoneridge* case as an example of my first theme, but it is also a great example of this second theme.¹¹ And there are a number of other securities cases, including *Tellabs*,¹² in which the Court made it somewhat more difficult to allege fraud; the *Merrill Lynch* case,¹³ in which the Court made clear that the federal statutory bar against class actions alleging misrepresentation in connection with the purchase or sale of securities also precludes class actions alleging fraud in connection with the holding of securities; and *Credit Suisse*,¹⁴ in which the Court barred antitrust claims in the context of IPO underwriting practices.

Two cases decided together last term, *Safeco* and *GEICO*, cut back on the ability of consumers to sue insurance companies under a federal credit-reporting law.¹⁵ In two other cases, *Buckeye Check Cashing*¹⁶ and *Hall Street Associates*,¹⁷ the Court continued to uphold arbitration agreements that take cases outside the federal and state court system.

And then there is the case that those of you who are litigators are probably most familiar with, *Bell Atlantic v. Twombly*,¹⁸ in which the Court, in an antitrust case, swept aside *Conley v. Gibson*,¹⁹ a case that had established for half a century the pleading standard on a motion to dismiss.

This was a seven-to-two decision written by Justice Souter, not by one of the so-called conservatives.²⁰ The Court held that *Conley's* language ("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") has been questioned and criticized and explained away for long

10. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

11. *Stoneridge*, 128 S. Ct. 761.

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

13. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

14. *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

15. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201 (2007).

16. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

17. *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

18. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

19. *Conley v. Gibson*, 355 U.S. 41 (1957).

20. *Bell*, 127 S. Ct. 1955.

enough.²¹ “[A]fter puzzling the profession for 50 years,” said Justice Souter, “this famous observation has earned its retirement. The phrase is best forgotten. . . .”²² Quite a way to treat a fifty-year-old case that’s been cited thousands of times! And of course *Twombly* makes it harder for plaintiffs to survive motions to dismiss.²³ It will be interesting to see whether the case is followed or distinguished by lower courts. Judge Posner in the Seventh Circuit has already said it needs to be viewed somewhat narrowly.²⁴

But the trend there is again clear. There are exceptions, of course—the State of Massachusetts was allowed standing to challenge the EPA’s refusal to regulate greenhouse gases—but the exceptions are few and the trend is clear.²⁵

Federalism. This theme is in many ways the most puzzling and interesting to me. As many of you know, the Rehnquist Court seemed, for about a decade, say from 1995 to 2005, to be embarked on a federalism revolution—striking down federal laws as exceeding Congress’s power under the Commerce Clause or Congress’s power to enforce the Fourteenth Amendment or Congress’s power to abrogate state sovereign immunity—but then around the middle of the first decade of this millennium the Rehnquist Court seemed to get cold feet, right at the end of Rehnquist’s life. There were cases that went in the other direction, and some thought the federalism revolution was over.

So one key question about the Roberts Court, at least from a constitutional law observer’s standpoint, was: Where is Roberts going to take the Court on federalism? Is the federalism revolution—returning power to the states, striking down federal laws—going to pick up steam again, or would the replacement of Rehnquist and O’Connor by Roberts and Alito not make much of a difference? At this point I think it’s still too soon to know. But there are some early signs that there is no revolution in the offing.

Those of you who do bankruptcy law may have noticed a case that very few other people seem to have noticed, which is *Central Virginia Community College v. Katz*, in which the Court rather astoundingly declared that Congress’s Article I bankruptcy power was sufficient to overcome state sovereign immunity.²⁶ So that points in the opposite

21. *Id.* at 1959-69 (quoting *Conley*, 355 U.S. at 45-46).

22. *Id.* at 1969.

23. *Id.*

24. *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797 (2008) (declining to extend *Bell*, 127 S. Ct. 1955).

25. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

26. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

direction from the Rehnquist federalism revolution, but O'Connor was still on the Court and maybe Alito would have tilted it the other way. (It was a five-to-four decision.)

It's true that there have been some cases in which the Court has sided with state governments against the federal government—*Gonzales v. Oregon*,²⁷ in which the Court invalidated the Justice Department's attempt to stop doctors from assisting suicides in Oregon, *Massachusetts v. EPA*²⁸ and *Medellin v. Texas*,²⁹ both of which I mentioned earlier—but all of those cases are sort of idiosyncratic and they weren't really dominated by federalism issues.

Much more important, I think, on the federalism question have been a series of cases from the Roberts Court on preemption. And these really are business law cases. They're essentially tort law cases with business defendants. The preemption issue is, of course, whether federal law nullifies contrary or otherwise applicable state law.

Three cases from earlier this term are worth mentioning: a case called *Preston*³⁰ about the Federal Arbitration Act, a case called *Rowe*³¹ about tobacco, and most interestingly, a case called *Riegel*.³² In the *Riegel* case, the Court decided by a vote of eight-to-one that state law tort claims, product liability claims, are preempted by the federal law that gives the Food and Drug Administration the authority to grant pre-market approval to medical devices.³³ Now, that sounds somewhat technical, but it's extraordinarily important to manufacturers of medical devices.

The preemption cases are still all over the lot. Some of them go one way, some of them go the other, but there does seem to be this very interesting trend on the part of the Court towards a broad reading of federal law to preempt state law that attempts to impose more restrictive requirements on defendants. I'm not going to pretend there is a clear-cut pattern yet in the Supreme Court's approach to preemption cases. Some studies have shown that over the past twenty to twenty-five years preemption claims have been about a 50-50 bet in the Court. What we can say is that the old presumption against preemption, which was never consistently followed, is now dead. If the Court

27. *Gonzales v. Oregon*, 546 U.S. 243 (2006).

28. *Massachusetts*, 549 U.S. 497.

29. *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

30. *Preston v. Ferrer*, 128 S. Ct. 978 (2008).

31. *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989 (2008).

32. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

33. *Id.*

was really focused on federalism as a constitutional value, one might think it would embrace the presumption.

Riegel goes the opposite way.³⁴ Take a listen to some of the broad language of Justice Scalia's opinion. He says,

State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme. . . . A jury . . . sees only the cost of a more dangerous design, and is not concerned with its benefits. . . .³⁵

And Scalia went on to speculate that Congress's intent was one of "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."³⁶

So here we've got a case that cuts against the federalism revolution in favor of strong and broad federal power in a business law context or at least a business defendant context, a result that is totally consistent with narrowing access to court for state-law plaintiffs.³⁷ I think it exemplifies a profound skepticism on the part of most of the justices about tort law as an efficient means of regulation, but it's also part of a pattern of decisions favoring business defendants.

I'll close by just noting some broad statistics over the first two terms of the Roberts Court. And maybe this is the strongest trend of all: business defendants—and I'm including here business declaratory judgment plaintiffs who are essentially in a defendant's posture—win something like eighty-eight percent of the time (fifteen cases out of seventeen). The Chamber of Commerce, when it enters a case as an amicus, wins twelve times out of fourteen, eighty-six percent of the time. When a business defendant has the solicitor general of the United States on their side, then they win, again, some eighty to ninety percent of the time.

So what we've got is a business-friendly Supreme Court, not necessarily a Supreme Court that's interested in the concerns or issues surrounding commercial law, but that is friendly to business, that is interested in cutting back on access to courts, that seems to favor bright-line rules over open-ended standards, and that is not as interested in federalism as it is in deregulation more generally. Those are some themes. I'll end there, and I'd be happy to take questions that you all may have about the Supreme Court.

34. *Id.*

35. *Id.* at 1008.

36. *Id.* at 1009.

37. *Riegel*, 128 S. Ct. at 1009.

A PARTICIPANT: Would you say that the Supreme Court's decisions in the last ten years or so favoring commercial speech also relate to this theme of the Court favoring business?

PROFESSOR FRANKLIN: Absolutely. The status of the speech of corporations, particularly the speech of corporations that is in the course of their business, was for a long time pitched at a lower level of protection under First Amendment law than core political speech or other highly-favored First Amendment speech. But, in recent decades the Court's trend has been to elevate the status of commercial speech relative to other speech and to remove restrictions on the ability of corporations and unions to spend money in election campaigns.

The recent decision of the Court in the *Wisconsin Right to Life* case is very much a business-favoring decision.³⁸ And, yes, in the constitutional area you see the sort of broad pro-business trend combining with the Court's other trends in the First Amendment area, very much in lock-step, absolutely.

A PARTICIPANT: Is the Roberts Court willing to scrap its own precedent with regard to statutes like the Sherman Act?

PROFESSOR FRANKLIN: Let me repeat the question for those who couldn't hear it. The Court recently held that vertical resale price maintenance is not a per se violation of the Sherman Act, which it had held for many decades, in fact for the better part of a hundred years, and was henceforth going to be governed by the so-called rule of reason, which doesn't mean that it can't be grounds for liability under the Sherman Act but certainly makes it much, much harder for plaintiffs to prevail.³⁹ And the question is: Does that indicate that the Roberts Court is willing to scrap its own precedent at the drop of a hat?

I think the answer, broadly speaking, without sounding too cynical about it, is: Not if lots of people are watching. What you've got is a Court that is certainly interested in dispensing with a number of precedents. This was an unusual case because the precedent was so old and it was in the area of antitrust, which is not politically salient in the way that abortion or capital punishment or affirmative action are, but in that case the Court did overrule precedent.⁴⁰ It did the same thing with *Conley* in the Civil Procedure context, which is also not an area that attracts a lot of front-page headlines,⁴¹ but when you move over to the hot button issues, the First Amendment, abortion rights,

38. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

39. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

40. *Id.* (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

41. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)).

constitutional law more generally, what you find in the Roberts Court is a chipping away or a gradual distinguishing of precedent without actually overruling it.

For example, the *Hein* case that I mentioned earlier in which the Court said no standing for taxpayers who want to challenge the faith-based initiatives program, it took a forty-year-old precedent from the dying days of the Warren Court and distinguished it almost to the point of invisibility without overruling it.⁴²

It was a case that said taxpayers should have standing if their claim arises under the Establishment Clause, which deals with separation of church and state.⁴³ And the Court in *Hein* said, well, we don't want to overrule that, but it only applies to cases where Congress has violated the Establishment Clause by specifically appropriating money that may go to religious organizations.⁴⁴ Here all we've got is Congress giving a lump sum of money to the executive branch out of which the executive branch is running a faith-based initiative and feeding lunches like this to people in order to tell them how wonderful churches are in delivering social services.⁴⁵

So that expedient of distinguishing earlier cases, defining them narrowly, restricting them to their facts, is I think a much more common way that the current Court goes about dealing with *stare decisis* when it doesn't like the precedent that it's facing.

A PARTICIPANT: Justice Scalia was recently on 60 Minutes, and I think Leslie Stahl thought he was a nice guy and originally I think was intimidated by him. What's going on now, are all the justices going to go out and promote their own personalities? Is the Court now an entrepreneur? Do they want to make money?

PROFESSOR FRANKLIN: So the question is about Justice Scalia's recent interview on 60 Minutes, but more broadly about whether the Justices are taking on a more public role. Each of the nine of them has his or her own approach to this. I don't know Justice Scalia personally. He seems to be a genuinely nice guy. My sense is that he has become increasingly frustrated with the fact that he often cannot get a majority of the Court to go along with his rather bold vision of constitutional law.

And you know, it's nice to have a job for life, but you're also stuck with these other eight people for life. Was it Justice Holmes who

42. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (distinguishing *Flast v. Cohen*, 392 U.S. 83 (1968)).

43. *Flast*, 392 U.S. 83.

44. *Hein*, 127 S. Ct. 2553 (distinguishing *Flast*, 392 U.S. 83).

45. *Hein*, 127 S. Ct. 2553.

called them nine scorpions in a bottle? It's not necessarily the most fun environment after fifteen or twenty or thirty years.

So yes, Scalia has been doing more and more speaking out. Thomas has his memoir. But on the other hand, we've got Justice Souter who is absolutely allergic to any kind of public notoriety. And I think the same largely can be said of Justice Ginsburg, for instance; she's not interested at all in speaking out.

I think it will be interesting to see what happens on the question of cameras in the courtroom. There is some movement in Congress to try to require the Court to videotape their sessions. The Justices have resisted this very, very strongly. On the part of someone like Scalia, the argument is that if you start putting sound bites of our arguments on the nightly news, it will all be caricatured and reduced to meaningless or non-representative sorts of discussions. If you talk to someone like Justice Souter, he doesn't want to be videotaped because he doesn't want people to know what he looks like. But on the other hand, Chief Justice Roberts, I think, is himself more media-savvy. I think Roberts probably favors the idea of cameras in the courtroom. But that will be an issue that tests your question of how interested the Court is in public scrutiny or public notoriety.

A PARTICIPANT: It seems to me from what you've been saying though in terms of what has been going on is something perhaps that one could have expected from the Court in a shifting towards a conservative-based Court that is going to favor business over the individual rights of consumers and in many ways all across the board. Isn't that the case?

PROFESSOR FRANKLIN: Yes. I don't think there's anything particularly unexpected about any of the sort of trends or trajectories that I've been talking about. One of the myths about Supreme Court Justices is that they're kind of a black box, that the president appoints and the Senate confirms a justice, but you never really know how they're going to evolve or change when they get onto the Court. And I think it's a myth.

There are certainly examples of justices who disappointed the people who appointed them. Harry Blackmun is one example. To some degree David Souter is another example, although anyone who knew David Souter would know what they were getting, which was a basically moderate, old-fashioned, thorough, careful jurist.

But for the most part, you know, what you see is what you get. And particularly, I think, when presidents appoint justices who've spent a significant amount of time working for the executive branch, in the White House, in the Justice Department, as a prosecutor, they can

usually count on having a justice on the Supreme Court who, broadly speaking, will share their ideology on the important issues of the day.

Now, the issues of the day today will not be the issues of the day twenty or thirty years from now. I don't presume to know how Roberts or Alito will vote on issues that, because of evolving technology, we can't even predict. But on issues we can predict, we knew they were going to be conservative and they are. We knew that Scalia and Thomas were going to be conservative, and they are. We knew that Kennedy was somewhat less conservative, but largely conservative, and he is. So absolutely predictable, yes.

Thank you all very much. Enjoy the rest of the day.