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Today in the Community we discuss cameras at the Supreme Court. Although the lower courts have experimented with televising their proceedings, and the practice is longstanding in some courts in other countries, the Court has thus far resisted suggestions that it should televise its own oral arguments. Testifying before Congress in 2009, Justice Breyer summarized some of the Justices' concerns. On the one hand, he noted, "it would help people see how in some of these difficult issues we struggle with them, as do you." But "[o]n the other hand," he continued, "would they know that this is two-percent of the matter, what they're seeing, and would they, in fact, understand that most of what we do does not involve the two people in front of us, the lawyers on either side? It involves the 300 million people who are not there physically in the courtroom." We take up this open question today in the Community. If you're just joining us, information on how to participate in the Community is here.

Several comments from yesterday that we liked are below.

Bradley Joondeph –

Many use the adjective "business-friendly" to characterize the Roberts Court. This may well be true, but the claim is extremely difficult to validate empirically. While the Chamber of Commerce may have a very high "success rate" at the Court, that fact alone hardly establishes that the Roberts Court has a pro-business slant. First, it fails to account for the varying significance of the different decisions. Second, it fails to control for the nature of the questions presented. Given the strategic behavior of

litigants, as well as the Court's own certiorari process, the issues up for decision may not represent a random cross section of business-related legal disputes. The pool of cases the Court ultimately decides may well be biased. As a result, there is no neutral baseline against which to measure business's "winning percentage" in cases the Court resolves on the merits.

One thing we can measure, though, is the success of business vis-à-vis the Solicitor General. And doing uncovers some interesting facts. First, over the life of the Roberts Court, when the Chamber of Commerce and the Solicitor General have taken opposing positions, the Court has sided more often with the government, but not by much (55% to 45%). Second, the Roberts Court has particularly favored the government's position when the Solicitor General has participated as amicus curiae (69% to 31%), and even more so in the Court's decisions on certiorari petitions (83% to 17%). Third, and perhaps most interesting, the Roberts Court's tendency to side with the Solicitor General over the Chamber has declined during President Obama's tenure in office. Indeed, since January 2009, the Court has sided more often with the Chamber than the Solicitor General in cases where they have opposed one another (53% to 47%).

These figures thus suggest a noteworthy (if not terribly surprising) evolution in the Roberts Court's approach to business-related cases. During the Obama administration, the Chamber of Commerce and the federal government have clashed more frequently than during the Bush administration. And perhaps as a result, the interests of business have gained at the Court relative to the Solicitor General. This does not establish that the Roberts Court is "pro-business." But it reveals a small shift in the comparative standing of arguably the two most influential litigants at the Court.

Ilya Shapiro –

Without reprising Jeffrey Rosen's Sunday Times article from March 2008 and the commentary that followed it (see Eric Posner's particularly trenchant critique in Slate and Hans Bader's longer piece in the Cato Supreme Court Review), let me just say that the oft-repeated claim that the Roberts Court is "pro-business" is both false and beside the point.

It is false because the Court's rulings go every which way: pro- and anti-business, unanimous to 5-4 (and everything in between), majority opinions running pro- and

anti-business written by everyone from Justice Ginsburg to Justice Thomas. Yes, certain rulings favoring business interests that split 5-4 acquire a high profile (Ledbetter v. Goodyear, Citizens United, Walmart v. Dukes), but others go the other way (Wyeth v. Levine), and still others (particularly antitrust and telecom cases) feature businesses on both sides. Even the "evil triumvirate" of Ledbetter, Citizens United, and Walmart is less than it seems: the first was a narrow ruling on a poorly drafted statute of limitations—which Congress subsequently changed, as the process is supposed to work—not a ratification of sex discrimination (and indeed employment discrimination claims have fared exceedingly well in recent times); the second helps political advocacy groups, small business associations, and unions much more than Fortune 500 companies; and the third actually went 7-2 on the key point regarding class action procedure. If this is a pro-business Court, or at least if the conservative majority is hell-bent on serving corporate masters, it has an odd way of showing it.

But the falsity of the claim is beside the point, for three basic reasons: (1) the small and selective nature of the Court's docket makes statistical analysis impossible (is the Court really biased or did it just get a bunch of really egregious anti-business cases to correct?); (2) whatever it's doing, it's possible that the Court is getting the law right (as then-Judge John Roberts said at his confirmation hearings, the "big guy" will win when he has the law on his side); and, most fundamentally, (3) it's completely unclear what being "pro-business" even means (pro-investor? pro-management? pro-free-market? [I can assure you that's not it] pro-defense bar?).

In short, we need to set aside this tired debate and refocus on whether the Court "got it right" in any particular case.

Melissa Hart –

As Ilya Shapiro's post demonstrates, framing the question as whether the Roberts Court is "pro-business" prompts immediate resort to counting outcomes – and if the number of cases in which businesses lose is stacked up against the number of cases in which they win, it is indeed weak evidence to show that the Court is "pro-business." Looking at the success rate of the Chamber of Commerce presents a more compelling argument, but the more relevant focus is not on who wins a particular case and who loses, but instead on the pattern of rules the Court is creating with the cases it does take.

One pattern that suggests a pro-business edge is the limiting of access to the court system by plaintiffs. This trend has been reflected in decisions such as Ashcroft v. Iqbal (and its precursor, Twombly), Wal-Mart v. Dukes, J.McIntyre Machinery Ltd. V. Nicastro and AT&T v. Concepcion. All of these decisions were sharply divided and warrant sharp criticism. These are not cases in which the Court's majority was "getting the law right" (to quote Shapiro). Instead, each suffers from its own kind of overreaching and all are highly contestable legal decisions.

While Iqbal was not a "business" case, businesses are certainly more often defendants than plaintiffs, and so Iqbal's revision of Rule 8 benefits businesses considerably. In earlier decisions like Swierkiewicz v. Sorema (2004), the Court had made it clear that alterations to the pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Iqbal (and earlier Twombly) abandoned that appropriate division of labor. The resulting rule – that a plaintiffs' claim must include specific facts that persuade a judge that the plaintiff has a "plausible" claim– puts judges in the uncomfortable position of making merits determinations on whatever facts a plaintiff is lucky enough to have before any discovery has been done and based on what the Iqbal majority referred to as the judges' "common sense." If plaintiffs' claims are thrown out of court before they are permitted to engage in any fact discovery, whether companies engaged in prohibited conduct that harmed the plaintiffs will never be known.

Like Iqbal, the Wal-Mart decision will make it less likely that plaintiffs will be able to challenge misconduct by businesses. If claims cannot be pursued through class litigation, some are unlikely to be pursued at all. In many situations, the low value of the individual claim weighed against the risk of pursuing that claim as a lone plaintiff will lead a person actually injured by misconduct to conclude that seeking redress is not worth it. Class actions have provided an important vehicle for fair and efficient resolution of alleged systematic injuries of this sort – the kinds that large businesses may cause. Justice Scalia's scathing opinion finding that the plaintiffs' claims lacked "a common question of law or fact" is the section of the Wal-Mart decision most likely to make class certification more difficult for plaintiffs in the future. As with the Iqbal decision, this part of Wal-Mart imported novel requirements into a procedural rule and thus essentially re-wrote that rule.

Concepcion also limited the availability of collective resolution of claims, this time in the context of arbitration. In refusing to respect California's state contract law, which

found limitations on collective resolution of small-value claims when the claims arose out of an adhesion contract, the Court significantly decreased the likelihood that injured consumers will pursue their claims. (Concepcion is also part of the large number of recent cases in which the Court has expanded the ability of companies to require arbitration of claims, thus moving much dispute resolution out of the court system entirely.)

In J. McIntyre, Justice Kennedy's decision for a plurality of the Court articulated an extremely restrictive rule for determining when a company could be subject to the jurisdiction of a state in a suit for injuries that occurred in that state from use of the company's products. Kennedy's proposed rule, which asks whether the corporate entity manifested "an intention to submit to the power of a sovereign," harkens back to jurisdictional rules that were abandoned more than 60 years ago in part because they permitted too much corporate manipulation of which forums would be available to injured plaintiffs seeking redress.

With these and other decisions, the Court is gradually decreasing access to the legal system as a forum for seeking redress of injuries. These cases together set up procedural barriers to litigation that are more significant than any individual decision's "pro" or "anti" business outcome might be. It is this kind of decisional pattern that gives the Roberts Court its pro-business reputation – not a tally of decisions by which party won or lost.

Neil Weare –

While the "correctness" of any individual decision of the Supreme Court for or against business is certainly open for debate, the numbers are simply the numbers. And what are the numbers? Constitutional Accountability Center has put together several empirical studies addressing this very question, using the success of the U.S. Chamber of Commerce before the Court as a proxy for business. Overall, the Chamber's position has prevailed in 65% of the cases it has participated in before the Roberts Court (53 of 81), significantly higher than its 56% rate of success (45 of 80 cases) before the conservative Rehnquist Court (1994-2005), and dramatically higher than its 43% rate of success (15 of 35) before the Burger Court (1981-1986).

Moreover, in close cases (those decided by a five-Justice majority) the Court has become more divided than ever. During the Roberts Court the conservative bloc's

average level of support for the Chamber's position in close cases has been 83%, compared to 15% for the liberal bloc. This divide was substantially less during the Rehnquist Court, at 68%/31%. The percentage of close cases has also increased, from 18% during the Rehnquist Court to 28% during the Roberts Court. In short, the question of whether the Court "got it right" in any given Chamber case is becoming increasingly divisive.

Marco Simons –

I agree that the courts generally should not be concerned with the foreign policy implications of their decisions, except when the strict conditions of a doctrine such as political question or the act of state are satisfied. But, even in cases that arguably have foreign policy implications, I don't think it's the ATS that actually creates any foreign policy problems.

What the ATS does is allow many cases involving international issues to be heard in the federal courts. Kiobel could have been filed as an ordinary state court lawsuit, and in fact most ATS suits – including Wiwa v. Royal Dutch Petroleum, to which Kiobel is a companion – include ordinary domestic law common law claims alongside ATS claims.

The choice, therefore, is not between having such cases heard in U.S. courts or not, but having them heard in federal courts which may be better equipped to analyze any foreign policy concerns which may arise, or having them heard in state courts as ordinary transitory tort cases.

I also wouldn't agree that anything under the ATS is determined by law external to the United States. As the Supreme Court reiterated in Sosa, international law is in fact part of U.S. law. And the nature of the norms in ATS cases – that they must be universally recognized as obligatory rules – means that it would be very difficult to bring an ATS case where the U.S. has not already recognized (in the abstract) the rule of international law at issue.