

Assessing the Supreme Court's Business Docket



Corporate Counsel Roundtable



Almost 45 years ago, as a law student, I had the opportunity to work on my first Supreme Court brief. At the time, there was little indication that so many briefs would follow. Since then, decades of experience litigating Supreme Court cases in government service and private practice added insights into new perspectives on analyzing the Court's docket. One subject of special interest is fashioning a

more discerning way of understanding the Court's impact on the business community.

Business lawyers and their clients have numerous techniques for categorizing Supreme Court decisions. For some, the most illuminating method is to classify developments in specific areas of law: What trends are emerging in patent litigation? Is the Court reading the Sherman Act broadly or narrowly? What are the latest developments in employment discrimination cases? For others, a useful approach is to track cases in their industry: How do recent decisions affect railroads? Insurers? Tech companies? And others prefer a more

simplistic analysis (which can vary widely depending on the definitions): Is the Court pro-business or anti-business?

None of these approaches is inherently good or bad. If it works for you, that's fine. If it answers the questions you need to address, keep using it. If it helps you adapt to changing legal standards, that may be all you need. But you may benefit from supplementing your traditional analytical models with an additional new approach that assesses where the practical impact of a decision is most likely to be felt. To that end, I have found it useful to develop a classification system that divides cases into three general categories:

- Decisions that affect broad legal, social, or political issues;
- Decisions that affect how companies conduct business; and
- Decisions that affect how business disputes are litigated.

Before providing a thumbnail sketch of each category, some preliminary comments are indicated. First, the categories are not mutually exclusive. An individual case may well satisfy the definitions of two categories (and in rare instances all three categories). Second, the framework is readily adaptable to non-business contexts. Simply delete or replace the words "companies" (in the second category) and "business" (in the second and third categories) with a new defining factor, *e.g.*, "Decisions that affect consumers/the media/religious institutions in their daily lives"; "Decisions that affect how disputes are litigated." Third, this mode of analysis covers both substantive legal questions as well as procedural and jurisdictional questions, all of which can have a powerful effect on busi-



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ness clients and their lawyers. Fourth, this classification system has implications not only for assessing the practical ramifications of decided cases, but also for deciding on the optimal strategies and staffing for ongoing cases. These points will be clarified as we consider each category separately.

Category 1: Cases That Affect Broad Legal, Social, or Political Issues

These cases address large, structural questions and define basic principles of American government: federalism, separation of powers, equal protection, due process. Among the cases in Category 1 are those regarded as “blockbuster” cases. The cases that make headlines. The cases that grab attention. The cases that garner immediate and extended discussion in social media. Think *Bush v. Gore*, *Roe v. Wade*, as well as major cases addressing affirmative action, voting rights, marriage equality, the Affordable Care Act, and so on.

But the category is not limited to decisions that immediately make a big splash. We know that some cases that eventually had profound importance on the fabric of American law were initially well under the radar. For example, history teaches that the Supreme Court’s issuance of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), went largely unnoticed at first. Over time, of course, its impact became clear to all. Even if deemed arcane or obscure when handed down, such cases have the potential to effect major changes in the law. Structural issues of constitutional law (federalism and separation of powers, for example) often fall into this category—even if not on “hot button” subjects.

The practical ramifications of these cases vary substantially, especially when viewed from the vantage point of the business community. For some cases, the impact is direct, enormous, and immediately apparent. For others, the potential impact is more remote or indirect. Consider, for example, preemption decisions that favor the federal government over the states or, conversely, that uphold state power. The specific regulation at issue may have no application to your business, but the approach to federalism and the analysis of federalism concerns could be applicable to the regulatory regime within

which your business operates. Consider, as another example, decisions involving electoral districting or voting rights that could make the election of officials with views more (or less) beneficial to business interests more (or less) likely. And a third type of case that falls within this category is one expressing an approach to constitutional

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analysis or statutory construction (originalism, textualism, etc.) that would have significant impact on cases that affect you more directly.

For all their jurisprudential or political significance, some cases in this category may have minimal practical effect on how companies conduct business. Among the most recent examples are the cases arising from presidential appointments to the National Labor Relations Board: *New Process Steel v. NLRB*, 560 U.S. 674 (2010), and *NLRB v. Noel Canning*, 573 U.S. ____ (2014). In both cases, employers petitioned for review of NLRB findings of unfair labor practices; and in both cases the companies challenged the composition of the Labor Board. The Supreme Court eventually decided undeniably momentous issues of presidential and legislative authority, holding that the Board cannot function without a quorum of three members (*New Process Steel*) and that the President’s authority to make recess appointments is limited to Senate recesses of sufficient length (*Noel Canning*). There is little doubt that these decisions—particularly *Noel Canning*—will have far-reaching consequences for all

three branches of the federal government. But there is little likelihood that either decision will have a measurable impact on how any company conducts core business operations or even how it manages labor relations. After all, in neither case did the Supreme Court address whether the employers had committed unfair labor practices. Accordingly, nothing in the Court’s opinions would preclude a properly constituted board from reaching the same conclusions on the merits of the violations found in these cases.

Because Category 1 cases can modify the foundational architecture of our system of government, scholars and knowledgeable observers of the Court can help place the latest decisions in historical context. They can also help detect patterns and potential directions for future decisions, as well as identify broader political, cultural and economic implications. But for anticipating the potential practical impact of decisions, if any, on your industry or your business sector, the views of practitioners with real-world experience in the relevant field can deliver additional value.

Category 2: Cases That Affect How Companies Conduct Business Operations

Some decisions directly impact business in significant practical ways. The ramifications of these cases range from fundamental industry-wide issues (Do common practices violate the law? Is a critical component or process subject to federal regulation?), to more mundane specific concerns (What labeling requirements apply to a product? How stringent or lenient a regulation will apply?). The common denominator is a real-world effect on day-to-day business operations or on long-range business strategies and planning. For precisely this reason, understanding how the targeted industry functions should lead to more informed assessments of a decision’s impact and more astute perceptions of how best to respond. Can you meet the new environmental standard that has just been upheld? If so, at what cost? And, how does that option compare to alternative technologies? The answers to these questions require expertise beyond mere legal analysis.

Far in advance of final disposition by the Supreme Court, attentive general counsel will likely be aware of Category 2 cases that arise from their industry or that raise legal issues of common interest. Knowing that these cases are in the pipeline, clients can plan for how they will deal with the range of possible results. While the outcome of the case may be difficult to predict, the fact that an important decision is on its way—likely with immediate practical consequences—should not come as a surprise.

In anticipating the full spectrum of probable outcomes, two distinct thought processes should be paramount: (1) understanding how the Court has dealt with the governing legal issues (this will aid in assessing the probability of alternative rulings); and (2) understanding how to best accommodate the practical ramifications of the most likely outcomes (this will aid in preparing for changes in how business is conducted). For the former, experts in the relevant field of law, especially those who follow the Supreme Court closely, may provide sound analysis. For the latter, the ideal credential is real-world experience in the industry. An individual lawyer's skill set may include both—but not always.

A greater challenge is presented by cases that fall outside a client's direct area of interest. The issues, facts, and circumstances may seem remote from the day-to-day world in which your company operates. For example, you may never need to know when, or under what circumstances, a permit or clearance is required under the Clean Water Act or the Clean Air Act. But the standards of administrative agency deference that the Court applies to these environmental issues may have a powerful practical impact on decisions of the regulatory agencies with which you deal. Similarly, you may never need to know when, or under what circumstances, federal labeling requirements for generic drugs displace state tort law. But the preemption principles that the Court applies in the FDA context may well apply to the intersection of state and federal regulations that your business faces every day.

Of course, when issues are remote from your principal area of interest, the potential ramifications for your business are less likely to be noticed in advance. If not detected, an

adverse result can produce shock waves. The lesson is to maintain vigilant peripheral vision. Here, too, the same dual approach is indicated: (1) knowledge of the Court and the area of law will help prioritize the prospects for various potential outcomes; and (2) knowledge of your business will help assess the potential practical effects.

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Cases in Category 2 span a wide spectrum. Some directly involve core aspects of your business: key products, vital components, basic processes, essential distribution channels. Some directly involve aspects of your business that, although important, are less fundamental to the company's operations in their present form. For many companies, these can include substantive labor law and tax issues, regulation of aspects of the business that are not central to ongoing functions, and issues that arise infrequently and generally without substantial consequence. The relative importance of a case or legal issue will vary depending on your specific business.

Category 3: Cases That Affect How Business Disputes Are Litigated

In contrast to Category 2, which focuses on business operations, Category 3 focuses on how litigation is conducted. Several examples from the recent years illustrate the types of cases that fall within Category 3. Consider the full range of issues that arise in arbitration, from whether a dispute is arbitrable, to whether a predicate question is to be decided by a court or an arbi-

trator, to whether the arbitration can be conducted as a class action, to whether the arbitrator's award satisfies the standards for confirmation under the Federal Arbitration Act. Similarly, consider the range of issues that arise in class action litigation, from the standards for class certification, to the procedures for determining whether a class should be certified, to the procedures for providing notice and other essential information to class members, to the standards for determining whether the case should proceed in federal court or be remanded to state court, to the standards for determining whether a proposed settlement should be approved. Further examples: standards for admissibility of expert testimony; availability of interlocutory appeal; standards for awarding punitive damages; questions of justiciability and standing to sue; procedural issues arising from removal of cases to federal court or remand of removed cases to state court; jurisdictional issues (*e.g.*, standards for determining the domicile of a corporation for assessing diversity of citizenship jurisdiction). The list could be much lengthier.

Decisions in Category 3 cases may have enormous practical effects, particularly on litigation strategy and cost. But, for the most part, Category 3 cases will have minimal impact on core business operations. For that reason, corporate decision makers would be well advised to recognize the differences between Category 2 cases and Category 3 cases. While substantive legal experts and hands-on business experts may constitute the ideal team for developing a plan for dealing with Category 2 decisions, you could well conclude that the optimal team for assessing a Category 3 case should include experts in trial practice as well as risk assessment professionals, among others.

When Your Company Is Involved

My earlier comments focused on anticipating and reacting to decisions in cases in which you and your company are not directly involved. But this system of classifying cases can also be a valuable tool in litigating cases in which your company is a party. For present purposes, let's consider two areas of potential benefit: overall strategy and staffing.

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Being perceptive enough to recognize early in the proceedings that you have a potential Category 1 case can be an indispensable tool in developing a long-term strategy. You will want to develop the record in a way that not only preserves the key appellate points, but also that presents the critical issues in the best possible light. Since these major structural issues can arise in otherwise simple and pedestrian cases, you will benefit from timely detection measures that enable you to start making that record at the earliest possible point in the case. As the recognition grows that you are litigating an issue that has serious potential for Supreme Court review, you would be well advised to act on that knowledge. Although your case may have all the attributes of a routine, run-of-the-mill personal injury case, if you realize that you may be following the tracks of *Erie Railroad* you would be smart to start planning immediately for the monumental federalism issue you will soon be facing. For staffing purposes, you will want your team to include people who can win the blockbuster federalism issue in the highest appellate courts as well as people who can win the factual battle in front of the jury.

Similar considerations are implicated in Category 2 cases. For example, consider the important antitrust case that targets a key business practice. The optimal skill set will include trial savvy and substantive antitrust expertise. But you should also incorporate experts in the industry who understand and can persuasively explain why the challenged conduct is actually procompetitive, why barriers to entry are low, why the breakneck pace of advances in technology precludes the exercise of monopoly power.

Much the same is true for Category 3 cases. When presenting arguments on procedural and case management issues to appellate judges (many of whom were trial court judges) the best arguments are often those that can be implemented successfully at trial. Why press for a technically perfect recitation of a legal standard that is far, far too prolix and convoluted to be presented to a jury? Why urge an appellate

court to require a procedural step that will be impossible for trial judges to implement?

In short, what have you gained by winning on appeal in a way that is unlikely to produce much real benefit at trial?

Understanding where the practical ramifications of a judicial decision will be felt can play a pivotal role in litigating such cases and in adjusting to their results. The Three Category described in this thumbnail sketch can be a useful tool in attaining that understanding. 