



March 16, 2008

## Supreme Court Inc.

By JEFFREY ROSEN

### I.

The headquarters of the U.S. Chamber of Commerce, located across from Lafayette Park in Washington, is a limestone structure that looks almost as majestic as the [Supreme Court](#). The similarity is no coincidence: both buildings were designed by the same architect, Cass Gilbert. Lately, however, the affinities between the court and the chamber, a lavishly financed business-advocacy organization, seem to be more than just architectural. The Supreme Court term that ended last June was, by all measures, exceptionally good for American business. The chamber's litigation center filed briefs in 15 cases and its side won in 13 of them — the highest percentage of victories in the center's 30-year history. The current term, which ends this summer, has also been shaping up nicely for business interests.

I visited the chamber recently to talk with Robin Conrad, who heads the litigation effort, about her recent triumphs. Conrad, an appealing, soft-spoken woman, lives with her family on a horse farm in Maryland, where she rides with a fox-chasing club called the Howard County-Iron Bridge Hounds. Her office, playfully adorned by action figures of women like Xena the Warrior Princess and [Hillary Rodham Clinton](#), has one of the most impressive views in Washington. “You can see the White House through the trees,” she said as we peered through a window overlooking the park. “In the old days, you could actually see people bathing in the fountain. Homeless people.”

Conrad was in an understandably cheerful mood. Though the current Supreme Court has a well-earned reputation for divisiveness, it has been surprisingly united in cases affecting business interests. Of the 30 business cases last term, 22 were decided unanimously, or with only one or two dissenting votes. Conrad said she was especially pleased that several of the most important decisions were written by liberal justices, speaking for liberal and conservative colleagues alike. In opinions last term, [Ruth Bader Ginsburg](#), Stephen Breyer and David Souter each went out of his or her way to question the use of lawsuits to challenge corporate wrongdoing — a strategy championed by progressive groups like [Public Citizen](#) but routinely denounced by conservatives as “regulation by litigation.” Conrad reeled off some of her favorite moments: “Justice Ginsburg talked about how ‘private-securities fraud actions, if not adequately contained, can be employed abusively.’ Justice Breyer had a wonderful quote about how Congress was trying to ‘weed out unmeritorious securities lawsuits.’ Justice Souter talked about how the threat of litigation ‘will

push cost-conscious defendants to settle.’ ”

Examples like these point to an ideological sea change on the Supreme Court. A generation ago, progressive and consumer groups petitioning the court could count on favorable majority opinions written by justices who viewed big business with skepticism — or even outright prejudice. An economic populist like William O. Douglas, the former New Deal crusader who served on the court from 1939 to 1975, once unapologetically announced that he was “ready to bend the law in favor of the environment and against the corporations.”

Today, however, there are no economic populists on the court, even on the liberal wing. And ever since [John Roberts](#) was appointed chief justice in 2005, the court has seemed only more receptive to business concerns. Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years. While the Rehnquist Court heard less than one antitrust decision a year, on average, between 1988 and 2003, the Roberts Court has heard seven in its first two terms — and all of them were decided in favor of the corporate defendants.

Business cases at the Supreme Court typically receive less attention than cases concerning issues like affirmative action, abortion or the death penalty. The disputes tend to be harder to follow: the legal arguments are more technical, the underlying stories less emotional. But these cases — which include shareholder suits, antitrust challenges to corporate mergers, patent disputes and efforts to reduce punitive-damage awards and prevent product-liability suits — are no less important. They involve billions of dollars, have huge consequences for the economy and can have a greater effect on people’s daily lives than the often symbolic battles of the culture wars. In the current Supreme Court term, the justices have already blocked a liability suit against Medtronic, the manufacturer of a heart catheter, and rejected a type of shareholder suit that includes a claim against Enron. In the coming months, the court will decide whether to reduce the largest punitive-damage award in American history, which resulted from the Exxon Valdez oil spill in 1989.

What should we make of the Supreme Court’s transformation? Throughout its history, the court has tended to issue opinions, in areas from free speech to gender equality, that reflect or consolidate a social consensus. With their pro-business jurisprudence, the justices may be capturing an emerging spirit of agreement among liberal and conservative elites about the value of free markets. Among the professional classes, many Democrats and Republicans, whatever their other disagreements, have come to share a relatively laissez-faire, technocratic vision of the economy and are suspicious of excessive regulation and reflexive efforts to vilify big business. Judges, lawyers and law professors (such as myself) drilled in cost-benefit analysis over the past three decades, are no exception. It should come as little surprise that John Roberts and Stephen Breyer, both of whom studied the economic analysis of law at Harvard, have similar instincts in business cases.

This elite consensus, however, is not necessarily shared by the country as a whole. If anything, America may be entering something of a populist moment. If you combine the groups of Americans in a recent Pew survey who lean toward some strain of economic populism — from disaffected and conservative Democrats to traditional liberals to social and big-government conservatives — at least two-thirds of all voters arguably feel sympathy for government intervention in the economy. Could it be, then, that the court is reflecting an elite consensus while contravening the sentiments of most Americans? Only history will ultimately make this clear. One thing, however, is certain already: the transformation of the court was no accident. It represents the culmination of a carefully planned, behind-the-scenes campaign over several decades to change not only the courts but also the country's political culture.

## II.

The origins of the business community's campaign to transform the Supreme Court can be traced back precisely to Aug. 23, 1971. That was the day when Lewis F. Powell Jr., a corporate lawyer in Richmond, Va., wrote a memo to his friend Eugene B. Snyder, then the head of the education committee of the U.S. Chamber of Commerce. In the memo, Powell expressed his concern that the American economic system was “under broad attack.” He identified several aggressors: the New Left, the liberal media, rebellious students on college campuses and, most important, [Ralph Nader](#). Earlier that year, Nader founded Public Citizen to advocate for consumer rights, bring antitrust actions when the Justice Department did not and sue federal agencies when they failed to adopt health and safety regulations.

Powell claimed that this attack on the economic system was “quite new in the history of America.” Ever since 1937, when President [Franklin D. Roosevelt](#) threatened to pack a conservative Supreme Court with more progressive justices, the court had largely deferred to federal and state economic regulations. And by the '60s, the Supreme Court under Chief Justice Earl Warren had embraced a form of economic populism, often favoring the interests of small business over big business, even at the expense of consumers. But what Powell saw in the work of Nader and others was altogether more extreme: a radical campaign that was “broadly based and consistently pursued.”

To counter the growing influence of public-interest litigation groups like Public Citizen, Powell urged the Chamber of Commerce to begin a multifront lobbying campaign on behalf of business interests, including hiring top business lawyers to bring cases before the Supreme Court. “The judiciary,” Powell predicted, “may be the most important instrument for social, economic and political change.” Two months after he wrote the memo, Powell was appointed by [Richard Nixon](#) to the Supreme Court. And six years later, in 1977, after steadily expanding its lobbying efforts, the chamber established the National Chamber Litigation Center to file cases and briefs on behalf of business interests in federal and state courts.

Today, the Chamber of Commerce is an imposing lobbying force. To fulfill its mission of serving “the unified interests of American business,” it collects membership dues from more than three million businesses and related organizations; last year, according to the Center for Responsive Politics, the chamber spent more than \$21 million lobbying the White House, Congress and regulatory agencies on legal matters. But its battle against the forces of Naderism got off to a slow start. In 1983, when Robin Conrad arrived at the chamber, the Supreme Court was handing Nader and his allies significant victories. That year, for example, the court held that [President Reagan’s](#) secretary of transportation, Andrew L. Lewis Jr., acted capriciously when he repealed a regulation, inspired by Nader’s advocacy, that required automakers to install passive restraints like air bags. In 1986, the chamber supported a challenge to the [Environmental Protection Agency’s](#) aerial surveillance of a Dow Chemical plant. The chamber’s side lost, 5-4.

But eventually, things began to change. The chamber started winning cases in part by refining its strategy. With Conrad’s help, the chamber’s Supreme Court litigation program began to offer practice moot-court arguments for lawyers scheduled to argue important cases. The chamber also began hiring the most-respected Democratic and Republican Supreme Court advocates to persuade the court to hear more business cases. Although many of the businesses that belong to the Chamber of Commerce have their own in-house lawyers, they would have the chamber file “friend of the court” briefs on their behalf. The chamber would decide which of the many cases brought to its attention were in the long-term strategic interest of American business and then hire the leading business lawyers to write supporting briefs or argue the case.

Until the mid-’80s, there wasn’t an organized group of law firms that specialized in arguing business cases before the Supreme Court. But in 1985, Rex Lee, the solicitor general under Reagan, left the government to start a Supreme Court appellate practice at the firm Sidley Austin. Lee’s goal was to offer business clients the same level of expert representation before the Supreme Court that the solicitor general’s office provides to federal agencies. Lee’s success prompted other law firms to hire former Supreme Court clerks and former members of the solicitor general’s office to start business practices. The Chamber of Commerce, for its part, began to coordinate the strategy of these lawyers in the most important business cases.

At times, the strategic calculations can be quite personal. Because Supreme Court clerks have tremendous influence in making recommendations about what cases the court should hear, Conrad told me, having well-known former clerks involved in submitting a brief can be especially important. “When Justice O’Connor was on the bench and we knew her vote was very important, we had a case where the opposition had her favorite clerk on the brief, so we retained her next-favorite clerk,” she said with a laugh. “We won.”

In our conversation, Conrad was especially enthusiastic about Maureen Mahoney, a former clerk

for Chief [Justice Rehnquist](#) and one of the top Supreme Court litigators who coordinate strategy with the chamber. When Mahoney agreed in 2005 to represent an appeal by the disgraced accounting firm Arthur Andersen, which was convicted in 2002 of obstructing justice by shredding documents related to the audit of Enron, few people thought the Supreme Court would take the case. “The climate was very anti-Enron,” Mahoney told me, “and it was viewed as a doomed petition.”

Mahoney rehearsed her Supreme Court argument in a moot court sponsored by the chamber. (“She was absolutely dazzling,” Conrad recalls.) On April 27, 2005, Mahoney stood calmly before the justices and delivered one of the best oral arguments I’ve ever seen at the Supreme Court. She argued that because Arthur Andersen’s accountants had followed a standard document-destruction procedure before receiving the government’s subpoena, they couldn’t be guilty of a crime; they weren’t aware what they were doing was criminal. The Supreme Court unanimously agreed and reversed the conviction, 9-0.

The Arthur Andersen case is a good example of how significantly the Supreme Court has changed its attitude about cases involving securities fraud — and business cases more generally — from the Warren to the Roberts era. In a case in 1964, the court ruled that aggrieved investors and consumers could file private lawsuits to enforce the securities laws, even in cases in which Congress hadn’t explicitly created a right to sue. In the mid-1990s, however, Congress substantially cut back on these citizen suits, and the court today has shown little patience for them. Mahoney says she sees her victory in the Arthur Andersen case as significant because it applied the same principle in criminal cases involving corporate wrongdoing that the court had already been recognizing in civil cases: namely, “refusing to create greater damage remedies or criminal penalties than Congress has explicitly specified.” She describes the case as “a very important win for business.”

This term, the Supreme Court has continued to cut back on consumer suits. In a ruling in January, the court refused to allow a shareholder suit against the suppliers to Charter Communications, one of the country’s largest cable companies. The suppliers were alleged to have “aided and abetted” Charter’s efforts to inflate its earnings, but the court held that Charter’s investors had to show that they had relied on the deceptive acts committed by the suppliers before the suit could proceed. A week later, the court invoked the same principle when it refused to hear an appeal in a case related to Enron, in which investors are trying to recover \$40 billion from Wall Street banks that they claim aided and abetted Enron’s fraud. As a result, the shareholder suit against the banks may be dead.

### III.

In addition to litigating cases before the court, the Chamber of Commerce also lobbies Congress

and the White House in an effort to change the composition of the court itself. (Unlike many other government officials, the justices themselves are not, of course, subject to direct corporate lobbying.) The chamber's efforts in this area were inspired by [Robert Bork's](#) thwarted nomination to the court in 1987. Business groups were enthusiastic about Bork — not because of his conservative social views but because of his skepticism of vigorous antitrust enforcement. “In reaction to the Bork nomination, it struck us that we didn't even have a process in place to be a player,” Conrad said.

So the chamber set up a formal process for endorsing candidates after their nominations. The process was designed to be bipartisan; and the chamber has encouraged Democratic as well as Republican presidents to appoint justices. Nominees are evaluated solely through the prism of their views about business. “We're very surgical in our analysis,” Conrad said.

After the election of [Bill Clinton](#), for example, the chamber endorsed Ruth Bader Ginsburg, who in addition to her pioneering achievements as the head of the women's rights project at the A.C.L.U. had specialized, as a law professor, in the procedural rules in complex civil cases and was comfortable with the finer points of business litigation. The chamber was especially enthusiastic about Clinton's second nominee, Stephen Breyer, who made his name building a bipartisan consensus for airline deregulation as a special counsel on the judiciary committee; and who, as a Harvard Law professor, advocated an influential and moderate view on antitrust enforcement.

During Breyer's confirmation hearings his sharpest critic was Ralph Nader, who testified that his pro-business rulings were “extraordinarily one-sided.” Another critic, Senator Howard Metzenbaum of Ohio, said that the fact that the chamber was the first organization to endorse Breyer indicated that “large corporations are very pleased with this nomination” and “the fact that Ralph Nader is opposed to it indicated that the average American has a reason to have some concern.” The chamber's imprimatur helped reassure Republicans about Breyer, and he was confirmed with a vote of 87 to 9. “Frankly, we didn't feel like we had anyone on the court since Justice Powell who truly understood business issues,” Conrad told me. “Justice Breyer came close to that.”

The Breyer and Ginsburg nominations also came at a time when liberal as well as conservative judges and academics were gravitating in increasing numbers to an economic approach to the law, originally developed at the [University of Chicago](#). The law-and-economics movement sought to evaluate the efficiency of legal rules based on their costs and benefits for society as a whole. Although originally conservative in its orientation, the movement also attracted prominent moderate and liberal scholars and judges like Breyer, who before his nomination wrote two books on regulation, arguing that government health-and-safety spending is distorted by sensational media reports of disasters that affect relatively few citizens.

Since joining the Supreme Court, Breyer has also been an intellectual leader in antitrust and patent disputes, which often pit business against business, rather than business against consumers. In those cases, many liberal scholars sympathetic to economic analysis have applauded the court for favoring competition rather than existing competitors, innovation rather than particular innovators. “The court deserves credit for trying to rationalize a totally irrational patent system, benefiting smaller new competitors rather than existing big ones,” says [Lawrence Lessig](#), an intellectual-property scholar at Stanford.

Clinton’s nominations of Ginsburg and Breyer may have been welcomed by the chamber, but with the election of [George W. Bush](#), the chamber faced a dilemma. Ever since the Reagan administration, there had been a divide on the right wing of the court between pragmatic free-market conservatives, who tended to favor business interests, and ideological states-rights conservatives. In some business cases, these two strands of conservatism diverged, leading the most staunch states-rights conservatives on the court, [Antonin Scalia](#) and [Clarence Thomas](#), to rule against business interests. Scalia and Thomas were reluctant to second-guess large punitive-damage verdicts by state juries, for example, or to hold that federally regulated cigarette manufacturers could not be sued in state court. As a result, under Conrad’s leadership, the chamber began a vigorous campaign to urge the Bush administration to appoint pro-business conservatives.

When it came time to replace Chief Justice William Rehnquist and Justice [Sandra Day O’Connor](#), the candidate most enthusiastically supported by states-rights conservatives, Judge Michael Luttig, had a record on the Court of Appeals for the Fourth Circuit that some corporate interests feared might make him unpredictable in business cases. (“One of my constant refrains is that being conservative doesn’t necessarily mean being pro-business,” Conrad told me.) The chamber and other business groups enthusiastically supported John Roberts, who had been hired by the chamber to write briefs in two Supreme Court cases in 2001 and 2002. At the time of Roberts’s nomination, Thomas Goldstein, a prominent Supreme Court litigator, described him as “the go-to lawyer for the business community,” adding “of all the candidates, he is the one they knew best.” When Roberts was nominated, business groups lobbied senators as part of the campaign for his confirmation.

The business community was also enthusiastic about [Samuel Alito](#), whose 15-year record as an appellate judge showed a consistent skepticism of claims against large corporations. Ted Frank of the American Enterprise Institute predicted at the time of the nomination that if Alito replaced O’Connor, he and Roberts would bring about a rise in business cases before the Supreme Court. Frank’s prediction was soon vindicated.

“There wasn’t a great deal of interest in classic business cases in the last few years of the

Rehnquist Court,” Carter Phillips, a partner at Sidley Austin and a leading Supreme Court business advocate, told me. In 2004, Judge Richard Posner, a founder of the law-and-economics movement, argued that the Rehnquist Court’s emphasis on headline-grabbing constitutional cases had politicized it, and called on the court to hear more business cases. The Roberts court has unambiguously answered the call. As Phillips told me, Roberts “is more interested in those issues and understands them better than his predecessor did.”

#### IV.

Exactly how successful has the Chamber of Commerce been at the Supreme Court? Although the court is currently accepting less than 2 percent of the 10,000 petitions it receives each year, the Chamber of Commerce’s petitions between 2004 and 2007 were granted at a rate of 26 percent, according to Scotusblog. And persuading the Supreme Court to hear a case is more than half the battle: Richard Lazarus, a law professor at Georgetown who also represents environmental clients before the court, recently ran the numbers and found that the court reverses the lower court in 65 percent of the cases it agrees to hear; and when the petitioner is represented by the elite Supreme Court advocates routinely hired by the chamber, the success rate rises to 75 percent.

Faced with these daunting numbers, the progressive antagonists of big business are understandably feeling beleaguered and outgunned. “The fight before the court is generally not an even one,” said David Vladeck, who once worked for the Public Citizen Litigation Group and now teaches law at Georgetown. “There’s us on one side, with a brief or two, and industry on the other side, with a well-coordinated campaign of 10 or 12 briefs, with each one written by a member of the elite Supreme Court bar that address an issue in enormous depth.” He added, ruefully, “You admire their handiwork, but it’s frustrating as hell to deal with.”

To gauge the degree of the frustration, I recently paid a visit to Ralph Nader, a few weeks before he announced his most recent campaign for president of the United States. It was a surprise to find that his office, the Center for Study of Responsive Law, shares an address in a grand building with the Carnegie Institution for Science. But the office itself, reassuringly, is buried on the ground floor, where Nader received me at a conference table surrounded by file cabinets stuffed with faded back issues of Mother Jones and The Nation.

Nader was uncontrite about his 2000 run against [Al Gore](#) — which is often credited with helping George W. Bush win the presidency — and he insisted that because Clinton appointed justices like Breyer, Gore would have done the same. “Breyer hasn’t been worse than I feared, because I had real concern when he was nominated,” Nader told me. He conceded that, like Breyer, Democratic justices appointed by President [John Kerry](#) would presumably have been better on civil rights and liberties than John Roberts and Samuel Alito. Nevertheless, he disparaged Breyer as a “deregulation quasi-ideologue” who was able to weave a “tapestry of illusion” in his arguments by



dealing in abstractions.

The main casualty of the 2000 run, Nader said, is that he is no longer collaborating with America's trial lawyers. They would ordinarily be his natural allies in representing consumer interests, but they donated heavily to Gore's campaign. After 2000, the trial lawyers "have been vitriolic," Nader explained. He blames them for not using their money to help counteract the influence of the Chamber of Commerce and other business groups before the federal courts. In part as a result of their stinginess, he said, his colleagues at Public Citizen are underfinanced and worn down. "There were some lawyers who left Public Citizen because they got tired of losing," he said. "Everyone is desperately trying to hold on to whatever issues are left, and then they become demoralized and discouraged."

Thirty years after the Chamber of Commerce founded its litigation center to counteract his influence, Nader all but conceded defeat in the battle for the Supreme Court. With the decline of economic populism in Congress, the weakening of trade unions and the rise of globalization, the political climate, he lamented, was passing him by. "I recall a comment by Eugene Debs," Nader said, looking at me intensely. "He said: The American people live in a country where they can have almost anything they want. And my regret is that it seems that they don't want much of anything at all."

Nader chuckled quietly and shook his head. "I say ditto."

## V.

If there is an anti-Nader — a crusading lawyer passionately devoted to the pro-business cause — it is Theodore Olson. One of the most influential Supreme Court advocates and a former solicitor general under President George W. Bush, Olson is best known for his winning argument before the Supreme Court in *Bush v. Gore* in 2000. But Olson has devoted most of his energies in private practice to changing the legal and political climate for American business. According to his peers in the elite Supreme Court bar, he more than anyone else is responsible for transforming the approach to one of the most important legal concerns of the American business community: punitive damages awarded to the victims of corporate negligence.

Punitive damages — money awarded by civil juries on top of any awarded for actual harm that victims have suffered — are designed to penalize especially egregious acts of corporate misconduct resulting from malice or greed, and to deter similar wrongdoing in the future. In the 19th century, courts generally demanded a clear assignment of fault in cases where victims sued for injuries caused by malfunctioning products. It was hard for plaintiffs to recover in personal-injury cases unless the corporation was obviously at fault. But in the 20th century, in liability cases involving a rapidly expanding class of potentially dangerous products like cars, drugs and medical devices,

courts increasingly applied a standard of “strict liability,” which held that manufacturers should pay whether or not they were directly at fault.

The animating idea was that manufacturers were in the best position to prevent accidents by improving their products with better design and testing. They and their insurance companies (rather than society as a whole) would shoulder the costs of accidents, thus giving them an incentive to make their products safer. Encouraged by Ralph Nader’s book, “Unsafe at Any Speed,” published in 1965, courts began to see car accidents as predictable events that better car design could have prevented. In 1968, for example, a federal court held that car manufacturers could be sued for failing to make cars safe enough for drivers to survive crashes, even if the driver was at fault for the crash.

A series of well-publicized awards in the 1980s and ’90s culminated in the largest punitive damage award in American history the \$5 billion levied against Exxon after the Exxon Valdez oil spill in 1989. This was hardly typical: the median punitive award actually fell to \$50,000 in 2001 from \$63,000 in 1992. Nevertheless, critics like Olson claimed that multimillion-dollar punitive-damage verdicts were threatening the health of the economy. They resolved to fight back on several fronts. In his first Supreme Court argument, in 1986, Olson set out the broad contours of his argument: for most of English and American history, private litigants were entitled to be compensated for whatever damages they suffered, including pain and suffering, but any public wrongs like the failure of American business to make cars safer by adopting air bags should be addressed by legislation or regulation, not by the courts.

Olson decided that his clients deserved not just a lawyer who could argue a case but a lawyer who could change the political culture. “You had to attack it in a broad-scale way in the legislatures, in the arena of public opinion and in the courts,” he told me recently. “I felt the business community had to approach this in a holistic way.” He set out, in lectures and op-ed pieces, to publicize especially egregious examples. The poster child for punitive-damage abuse, widely derided in TV and radio ads paid for by the business community, was a New Mexico grandmother who, in 1994, was awarded \$2.7 million in punitive damages when she scalded herself with hot McDonald’s coffee. Consumer advocates countered that she had originally asked for \$20,000 for medical expenses, which McDonald’s refused to pay, and the award appeared to have the effect of persuading McDonald’s to serve its coffee at a safer temperature. Nonetheless, the campaign to vilify plaintiffs’ lawyers has been effective enough that the American Association of Trial Lawyers recently changed its name to the fuzzier American Association for Justice.

The business community made other inroads against punitive damages. Corporations financed campaigns against pro-punitive-damage state judges who had been elected with the assistance of large contributions from plaintiffs’ lawyers. The business community also helped persuade more

than 30 states to either impose caps on punitive-damage awards or direct substantial portions of the awards to be paid into special state funds. In 1996, it helped persuade the Republican Congress, led by [Newt Gingrich](#), to pass legislation that would cap punitive-damage awards in product-liability cases in every state court in the country. But in 1996, President Clinton, with what must have been perverse pleasure, vetoed the bill on the grounds that it violated principles of federalism and states rights to which conservatives claimed to be devoted.

Thwarted by Clinton, and unable to persuade Congress to override the veto, opponents of punitive damages turned their attention back to the Supreme Court, looking for a victory they were unable to win in the political arena. Here, they were remarkably successful. As late as 1991, the court had refused to impose limits on a large punitive-damage award. But in a case in 1996, the court held for the first time that punitive-damage awards had to be proportional to the actual damage incurred by the plaintiff. The case involved a man who said he was deceived by [BMW](#) when it sold him a supposedly “new” car that was, in fact, used and had received a \$300 touch-up job. The court, in a 5-4 opinion, overturned a \$2 million punitive-damage award as “grossly excessive.” In 2003, the court clarified what it meant: a single-digit ratio between punitive damages and compensatory damages was likely to be acceptable.

Last year, the business community watched with anticipation as Roberts and Alito revealed their views about punitive damages. The case involved the estate of a heavy smoker who sued Philip Morris for deceitfully distributing a “poisonous and addictive substance.” A jury had awarded the estate \$821,000 in compensatory damages and \$79.5 million in punitive damages — a ratio of about 100 to 1. In a 5-4 opinion written by Breyer, the court held that it was unconstitutional for a jury to use punitive damages to punish a company for its conduct toward similarly affected individuals who are not party to the lawsuit.

This spring, the court will decide the Exxon Valdez punitive-damage case, which many consider the culmination of the business community’s decades-long campaign against punitive damages. In 1989, the Exxon Valdez tanker, whose captain had a history of alcoholism, ran into a reef and punctured the hull; 11 million gallons of oil leaked onto the coastline of Prince William Sound. A jury handed down a \$5 billion punitive-damage award.

After the verdict, Exxon began providing money for academic research to support its claim that the award for damages was excessive. It financed some of the country’s most prominent scholars on both sides of the political spectrum, including the Nobel laureate Daniel Kahneman and Cass Sunstein, a law professor at the University of Chicago. (Sunstein says he accepted only travel grants, not research support, from Exxon; and Kahneman stresses that the financing had no influence on the substance of his work.) In a 2002 book, “Punitive Damages: How Juries Decide,” Sunstein studied hundreds of mock-jury deliberations and concluded that jurors are unpredictable

and often irrational in punitive-damage cases. Jury deliberations, he found, increase the unpredictability, as well as the dollar amount of the final awards. Sunstein concluded that a system of civil fines determined by experts, rather than punitive damages determined by juries, might be more sensible. When Exxon appealed the \$5 billion verdict in 2006, it was reduced by an appellate court to \$2.5 billion. The reduced verdict is once again being challenged as excessive.

Walter Dellinger, the lawyer now arguing Exxon's case before the Supreme Court, is no Republican activist. Like Sunstein, he is one of the most respected Democratic constitutional scholars, as well as a former acting solicitor general for President Clinton. Last month, in his argument before the court, Dellinger argued that because Exxon has already paid \$3.4 billion in fines, cleanup costs and compensation connected with the Exxon Valdez spill, and because it didn't act out of malice or greed in failing to monitor the alcoholic captain, additional punitive damages would serve no "public purpose."

During the argument, Breyer noted that the \$2.5 billion punitive damage award represents a less than 10-to-1 ratio between punitive damages and compensatory damages, which is in the single-digit range that the Supreme Court has considered acceptable in the past. But Breyer also seemed concerned at other points that punitive-damage awards have not been routine in maritime cases like this one, and that the award might create "a new world for the shipping industry." Alito, who owns Exxon Mobil stock, did not participate, and because a tie would affirm the \$2.5 billion punitive-damage award, the plaintiffs who are opposing Exxon need only four votes to prevail. But whether Dellinger gets five votes, a significant triumph is already behind him: he persuaded the court to take the case in the first place.

## VI.

Ted Olson and the Chamber of Commerce aren't only trying to persuade the Supreme Court to cut back on large punitive-damage awards; they're also arguing that consumers injured by dangerous or defective medical devices and drugs in some cases shouldn't be able to file product-liability suits at all. Because there is no national product-liability law that allows federal suits for personal injuries, consumers who are injured by, say, defective heart valves or artificial hips have to sue in state courts under state tort law. By asking the Supreme Court to prevent injured consumers from suing in state court, the business community, supported by the Bush administration, is trying to ensure that these consumers often have no legal remedy for their injuries. And the Supreme Court has been increasingly sympathetic to the business community's arguments.

In a Supreme Court case Olson argued in December, he stood before the justices and argued that the manufacturers of defective medical devices — like heart valves, breast implants and [defibrillators](#) — should be immune from personal-liability suits because the federal [Food and Drug Administration](#) had approved the devices before they were marketed and the manufacturers had

complied with all federal requirements. The case involved Charles Riegel, who had an angioplasty in 1996 during which the catheter used to dilate his coronary artery burst. Riegel, who needed advanced life support and emergency bypass surgery, eventually sued the manufacturer of the catheter, Medtronic. The company is colloquially referred to in the business community as “the pre-emption company” because of its practice of arguing that the Food and Drug Administration’s “premarket approval” of its products pre-empts product-liability suits in state courts.

The lawyer representing Riegel’s estate before the Supreme Court, Allison Zieve of Public Citizen, countered that Congress never intended to ban state product-liability suits when Senator [Edward Kennedy](#) sponsored a bill regulating medical devices in 1976. (Kennedy himself filed a brief in the case noting that he indeed intended no such thing.) “Lawyers think this is a close issue, but any time I talk to a nonlawyer about it, they’re shocked,” Zieve told me after the argument. “People think: of course, if somebody makes a defective product you can sue.”

It’s one thing to argue that the federal government’s “premarket approval” of food, drugs and medical devices should pre-empt clearly inconsistent state laws and regulations. After all, if states imposed safety requirements that conflicted with the federal standard, the resulting regulatory confusion would make a national (and global) market impossible. But Olson’s claim that federal regulation of medical devices and drugs should also pre-empt product-liability suits under state tort law is one of the more creative and far-reaching legal arguments of the business groups that litigate before the Supreme Court.

This type of argument arose out of the tobacco litigation of the 1980s and ’90s, which culminated in a \$206 billion settlement paid by the top tobacco companies to a consortium of 46 state attorneys general in exchange for dropping tort suits against the companies. The tobacco litigation began modestly: in 1983, Rose Cipollone, a New Jersey woman dying of lung cancer, sued several of the country’s largest tobacco companies for their failure to give adequate warnings about the dangers of smoking. After spending tens of millions of dollars fighting the verdict, the companies decided to take their defense to the next level. They argued that because the federal government required cigarette companies to have warning labels, tobacco companies couldn’t be subject to tort suits in state courts. Jury verdicts, they argued, are no less a form of regulation than laws explicitly adopted by state legislatures.

In a decision in 1992, the Supreme Court endorsed part of the companies’ argument. The decision unleashed a torrent of similar “pre-emption” claims by the manufacturers of dangerous drugs, defective medical devices and cars without air bags. And after the election of President Bush in 2000, the business community’s crusade was aggressively supported by the White House. At the same time that the White House was scaling back on federal health-and-safety enforcement, it insisted that consumers should not be able to sue federally regulated industries in state court.

Bush appointed as the general counsel of the Food and Drug Administration a former drug- and tobacco-company lawyer named Daniel Troy. With Troy's support, the F.D.A. reversed its position, held for 25 years, and argued for the first time that its premarket approval of medical devices should prevent injured consumers from bringing product-liability suits in state court.

After her Supreme Court argument in the Medtronic case, Zieve told me she wasn't sure what to expect. Until the arrival of Chief Justice Roberts, groups like Public Citizen had found that they had a better chance of winning pre-emption cases before the Supreme Court than in the lower courts. But during the first two years of the Roberts Court, the justices had decided two pre-emption cases in favor of the corporate defendants.

The trend has continued. On Feb. 21, the Supreme Court handed Zieve a crushing defeat: an 8-1 opinion immunizing the makers of defective medical devices from product-liability suits. The lone dissent was written by Ruth Bader Ginsburg, who objected that Congress could not have intended such a "radical curtailment" of state personal-injury suits when it regulated medical devices in 1976. Ginsburg, who is devoted to liberal judicial restraint, has consistently opposed efforts to second-guess punitive-damage awards or expand federal pre-emption. I called Zieve soon after the Supreme Court issued its opinion, and she sounded shocked. "It's really unfathomable to me," she said. "I wasn't sure that this was a business-friendly court, but now I'm finding it harder not to view it that way." Zieve said that, as a result of the decision, "I think the industry will keep unsafe devices on the market longer and be slower to improve products."

In the eyes of advocates like Zieve and Public Citizen, the public is now caught in a Catch-22: at the very moment that agencies like the F.D.A. are being strongly reproved by critics — including the agency's own internal science board — for being unwilling or unable to protect public health, the court is making it harder for people to receive compensation for the injuries that result. On rare occasions, the Roberts Court has held that the Bush administration's deregulatory efforts circumvent the will of Congress — like the 5-4 decision last year holding that the Environmental Protection Agency acted capriciously when it adopted a rule that said it had no legal authority to regulate greenhouse gases. But by and large, the Supreme Court defers to agencies that refuse to regulate public health and safety. "The industry has a lot of money, and they can routinely hire the biggest names in the biggest firms, while we're doing it on our own," Zieve told me. "We don't charge anything — we're free. It didn't cost \$250,000 to get us to write the brief."

## VII.

The Supreme Court is unlikely to reconsider its pro-business outlook anytime soon. Nevertheless, there are several currents in American political life that run counter to the court, even if they may not be strong enough, or suitably directed, to reverse it. There are, for example, economic populists in both political parties — [John Edwards](#) Democrats and [Mike Huckabee](#) Republicans, to

cite just two types — who express concern about growing economic inequality and corporate corruption, and blame unchecked corporate power for America’s escalating economic problems. These populists tend to be from the working and middle classes rather than the professional classes, and their numbers may be growing. In recent Pew surveys, 65 percent of Americans agreed that corporations make excessive profits — the highest number in 20 years. Moreover, about half the country now asserts that America is divided on economic lines into two groups — the “haves” and “have nots” — up from only 26 percent two decades ago. And the number of Americans who view themselves as “have nots” has doubled to 34 percent today from 17 percent in 1988. Responding to pressures from this demographic, a Democratic Congress — bolstered by states-rights conservatives — might well try to pass legislation to counteract the court’s recent decisions barring product-liability suits for defective medical devices.

What about the executive branch? It seems unlikely that [John McCain](#), if he were elected president, would push back against the court: he has already pledged to appoint “judges of the character and quality of Justices Roberts and Alito,” rather than justices more devoted to states rights, like Scalia and Thomas. As for [Barack Obama](#) and Hillary Clinton, both have sounded increasingly populist notes in an effort to attract union and blue-collar supporters, ratcheting up their attacks on corporate wealth and power, singling out the drug, oil and health-insurance industries and promising to renegotiate the North American Free Trade Agreement. But despite their rhetoric, it is not clear that either candidate would actually appoint justices any more populist than Bill Clinton’s nominees. “I would be stunned to find an anti-business appointee from either of them,” Cass Sunstein, who is a constitutional adviser to Obama, told me. “There’s not a strong interest on the part of Obama or Clinton in demonizing business, and you wouldn’t expect to see that in their Supreme Court nominees.”

Still, the possibility does exist. If the economy continues to decline and blue-collar voters end up being crucial in the election, a Democratic president might appoint an economic populist to the Supreme Court as a kind of payback. Earlier this month, on the campaign trail in Ohio, Obama mentioned Earl Warren, who served as governor of California before becoming chief justice, as a model of the kind of justice he hoped to appoint. “I want people on the bench who have enough empathy, enough feeling, for what ordinary people are going through,” Obama said. He praised Warren for understanding that segregation was wrong because of the stigma it attached to blacks, rather than because of the precise nature of its sociological impact. Appointing a former politician to the court would almost certainly introduce a more populist element: the Supreme Court that in 1954 decided *Brown v. Board of Education* included, in addition to a former governor, three former senators, a former Securities and Exchange Commission member and two former attorneys general. (By contrast, the Roberts court is composed of nine former judges.)

Whatever happens in November, Robin Conrad says the Chamber of Commerce is prepared to

lobby as hard as ever for the appointment of pro-business justices. “If we do have a Democrat president, and that president has opportunities to nominate to the court,” she said in our meeting as I glanced at her Hillary Clinton action figure, “we want to be able to express ourselves and work with that president.” Regardless of how many justices retire in the next presidential term, Conrad is confident that, having helped to transform the Supreme Court in less than 30 years, she and her colleagues can assure American business of a sympathetic hearing for decades to come.

When I told Conrad that Ralph Nader told me that lawyers were leaving Public Citizen because they were tired of losing, she achieved a look of earnest concern. “I hope if they feel they’ve lost,” she said, “they lost for a good reason — not because they’ve been overpowered or muscled by the big, bad business community, but they’ve lost because reason won.”

Conrad looked at me squarely, and then added, “I guess if Ralph Nader wants to say we did him in” — she paused to weigh her words — “so be it.”

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