

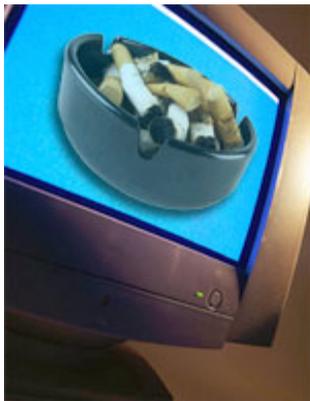


Big Business's Big Term

VICTORIES FOR THE CHAMBER OF COMMERCE AT THE SUPREME COURT.

By Doug Kendall

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The high court struck down rules to prevent kids from getting cigarettes

With the Supreme Court term moving past the halfway mark, corporate America's long-term investments in the federal judiciary are yielding impressive returns. The U.S. Chamber of Commerce's Robin Conrad gushed about a "hat trick" of Supreme Court victories one day in February, telling the *Legal Times*, "I don't think I've ever experienced a day at the Supreme Court like that."

Thirty-seven years ago, future Justice Lewis Powell, then a lawyer in private practice, penned a now-famous memorandum alerting the Chamber of Commerce to a "neglected opportunity in the courts." Powell explained that "the judiciary may be the most important instrument for social, economic and political change," and he urged the chamber and its corporate benefactors to invest heavily in this "vast area of opportunity." In the wake of Powell's memo, the business community seeded a vast body of scholarship and created a nationwide network of [pro-business legal organizations](#). This investment has quietly borne fruit for decades—and, this term in particular, landed corporate America the wins that thrilled Conrad, and more besides.

On that hat-trick day in February, the court issued three pro-business decisions, striking down state rules designed to prevent children from receiving cigarettes via the Internet (*Rowe v. New Hampshire Motor Transport Association*), blocking state courts from holding manufacturers liable for the harms caused by defective medical devices (*Riegel v. Medtronic*), and using a federal arbitration statute to protect corporations against state jury trials in contract disputes (*Preston v. Ferrer*). These were all "pre-emption" decisions, which means that the court found a conflict between a federal law and a state statute or decisions reached by state courts. In such a conflict, federal law trumps, and this led the court in these three cases to free corporations from state limits on their conduct.

Earlier this term, the court gave the chamber another win when it ruled broadly against "scheme liability" lawsuits, which hold accountable everyone involved in an effort to defraud securities investors. As a direct result of that case, [Stoneridge v. Scientific-Atlanta](#), the financial institutions that enabled Enron to perpetrate the largest corporate fraud in U.S. history won the dismissal of a \$40 billion lawsuit brought by the investors in Enron whose retirement security was decimated by this fraud.

It's not just particular cases that the chamber is winning, but also foundational issues that set the course of the law. *Stoneridge* is what lawyers call a "cause of action" case; it was about whether the plaintiffs could get into the courthouse to ensure the enforcement of the obligations that the federal Securities Exchange Act of 1934 imposes on corporations. Decades ago, the court ruled that the Exchange Act necessarily implied that victims of corporate misconduct could sue corporations for flouting the clear legal obligations that this law imposes. But starting in 1975, the court began a steady retreat from the idea that judges could "imply" a cause of action, forcing Congress to state clearly that it wants people to be able to sue. In *Stoneridge*, the court took this a big step further, saying in effect that people cannot sue companies to enforce an obligation under the Exchange Act that the court has not approved in a prior case. This ruling essentially freezes the enforceability of the Exchange Act.

Another cause-of-action case in which a decision is still pending is the biggest civil-rights case this term, [a suit by a black employee fired by Cracker Barrel](#). The law at issue here is the historic, if long under-enforced, Civil Rights Act of 1866, which gave freed slaves equal rights in making and enforcing contracts. The question before the court is whether this Reconstruction-era statute bars employers from retaliating against workers who complain of racial bias on the job. At oral argument last week, a number of justices, perhaps a majority, seemed poised to rule that even if the law covered retaliation, the court would not allow a victim of discrimination to go to court and enforce this mandate, even though he or she could sue to enforce other violations of the law. Without the ability to sue, any protection provided by the Civil Rights Act against retaliation becomes essentially useless.

It is extremely hard to reconcile what the court has done in cause-of-action cases like *Stoneridge* with its approach to pre-emption cases like *Rowe*, *Riegel*, and *Preston*. In the cause-of-action cases, the court says Congress must unmistakably express its intention to allow people to go to court to enforce federal mandates. If Congress isn't crystal-clear, potential plaintiffs are out of luck. But in the pre-emption cases, the court seems untroubled by a lack of clarity on Congress' part, ruling that federal law pushes aside state actions or remedies when it's not at all certain that's what Congress so intended. There's one thing these approaches do have in common: They both favor business interests.

The Chamber of Commerce also appears to have won the day in disputes over the role of the jury in deciding contract and liability disputes that might be costly for businesses. The *Preston* decision this term caps a long line of rulings, dating from 1984, in which the court has interpreted the Federal Arbitration Act effectively to displace state juries in a vast number of contractual disputes. And in a [suit against Exxon argued at the end of February](#), the court seemed [poised](#) to substitute for the jury's view its own idea of the appropriate level of punitive damages for the worst oil spill in U.S. history, as the justices have repeatedly done in punitive damage cases over the past decade.

The court's disdain for jury trials was especially evident at oral argument in *Riegel*, the case about manufacturer liability for medical devices. Justice Scalia responded to Riegel's argument about the importance of preserving the judgment of the state jury by declaring "extraordinary" the very notion that a "single jury" could find a company liable for a defective product when the "scientists at the FDA have said [the product] is OK." This is a remarkable statement for a justice who professes to be bound by the Constitution's original meaning. Many things are obscure about the framing era, but this we know for certain: The framers of our Constitution loved juries. In siding with the chamber and viewing the jury more as a threat to the modern economy and less as a bulwark of our system of justice, the court is departing sharply from what our framers would have wanted.

There will surely be other cases this term that the Chamber of Commerce loses. The game is not rigged. Rather, by investing heavily in legal strategy and working patiently in case after case, the chamber has won victories that have gradually shifted the ground rules in its favor. For that, the chamber can thank Justice Powell's advice and deep corporate pockets. For ordinary Americans and the victims of corporate misconduct, there is much less to celebrate.