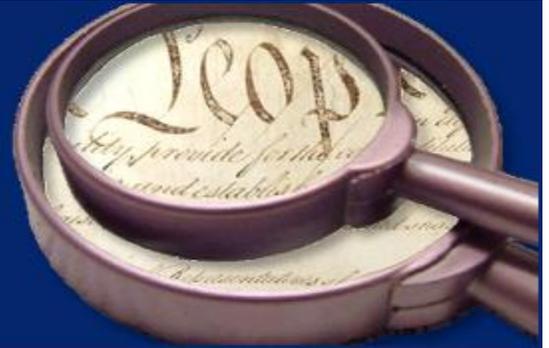




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Issue Brief

Judicial Hostility to Litigation and How It Impairs Legal Accountability for Corporations and Other Defendants

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Scott A. Moss*

I. Introduction

The Supreme Court once saw litigation as an important tool for redressing grievances, deterring wrongdoing, and spurring social reform. In holding that a business must pay the legal fees of workers who proved discrimination claims, the Court noted that “the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law,” so a plaintiff sues “not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”¹ In commercial cases, the Court was just as supportive of challenges to illegality. Rejecting the argument of a price-fixing defendant “that allowing class actions to be brought by retail consumers . . . will add a significant burden to the already crowded dockets of the federal courts,” the Court interpreted an ambiguous statute as allowing such lawsuits, because Congress enacted broad antitrust remedies “precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”² In short, the Court saw litigation as a positive force that empowered private parties to enforce public priorities.

But almost all the Justices from those decades-old decisions are gone, and now the Court regularly issues rulings based on a more negative view of litigation—a view that stresses litigation’s burdens on defendants rather than its importance to plaintiffs, to society, and to the vindication of policies Congress enacted. Fearing the “high cost of discovery” and the failure of courts “in checking discovery abuse,” the Court in 2007 reversed half-century-old precedent to expand the use of pre-trial, pre-discovery dismissals.³ “[C]oncern[ed] over the imprecise manner in which punitive damages systems are administered,” and that “[p]unitive damages pose an acute danger of arbitrary deprivation,” the Court in the 1990s and 2000s took on a new, aggressive federal role in cutting “excessive” state-court damages awards against businesses found guilty of malfeasances ranging from auto dealer fraud to insurance company fraud to oil company environmental destruction.⁴ And in a 2007 decision that Congress later remedied, the Court imposed a strict statute of limitations on pay discrimination claims, holding that an employer can indefinitely keep paying women less if an employee does not challenge the pay disparity in the first several months, because “it is unjust to fail to put the [employer] on notice to

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¹ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401–02 (1968).

² *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (holding that consumers suffering price-fixing could sue under statute allowing suit only for injury to “business or property”).

³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See infra* Part II.A.

⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). *See infra* Part II.C.

defend within a specified period of time . . . ‘[and defendants’] right to be free of stale claims in time comes to prevail over [plaintiffs’] right to prosecute them.’”⁵

Admittedly, the Court is never a monolithic bloc. Even in the heyday of the litigation-promotes-justice era, some Justices complained of plaintiffs “draining judicial resources.”⁶ Conversely, even today, when the Court takes a generally bleaker view of litigation, some Justices still argue that limiting lawsuits challenging statutory violations “obstructs congressional policy.”⁷ But as this Issue Brief notes, the trend toward more hostility and less support for litigation is noticeable, and the Court’s hostility to litigation disproportionately skews outcomes in favor of defendants, most commonly businesses sued by those claiming deprivations of various rights and protections, such as workplace anti-discrimination rights,⁸ consumer rights,⁹ wage rights,¹⁰ and protection against unlawful competition.¹¹

This briefing does not cover all decisions in all areas in which the Court has limited litigation’s ability to hold defendants accountable, such as the substantial caselaw limiting the circumstances in which plaintiffs can seek damages for constitutional violations by governmental entities under 42 U.S.C. § 1983.¹² Nor does it cover all Court decisions ruling for corporations outside the litigation context, such as campaign finance decisions allowing more expansive corporate spending in politics.¹³ Rather, Part II of this Issue Brief discusses in depth four areas— expanding the use of pre-discovery dismissals (Part II(A)), creating inconsistent rules for discrimination plaintiffs (Part II(B)), increasing federal reversals of state-court damages awards (Part II(C)), and allowing businesses to force lawsuits against them into private arbitration rather than public litigation (Part II(D)). These four areas illustrate two broad points. First, the problem with the Court’s jurisprudence is not a generalized “conservative” ideology, because hostility to litigation has trumped other conservative judicial values the same Justices have espoused.¹⁴ As detailed below, states’ rights federalism has given way when an anti-states’-rights ruling lets the

⁵ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007) (quoting *United States v. Kubrick*, 444 U. S. 111, 117 (1979)). See *infra* Part II.B.

⁶ One classic example is Chief Justice Burger’s “so many Title VII cases” tirade: “Like so many Title VII cases, this case has already gone on for years, draining judicial resources as well as resources of the litigants. Rather than promoting judicial economy, the ‘across-the-board’ class action has promoted multiplication of claims and endless litigation.” *General Telephone Co. v. Falcon*, 457 U.S. 147, 162 (1982) (Burger, C.J., concurring in part and dissenting in part from decision remanding for consideration of class action status).

⁷ *Twombly*, 550 U.S. at 597 (Stevens, J., dissenting).

⁸ *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Ledbetter*, 550 at 618; *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

⁹ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm*, 538 U.S. at 408.

¹⁰ *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

¹¹ *Twombly*, 550 U.S. at 544.

¹² Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints in Civil Rights Litigation*, 35 RUTGERS L.J. 483, 498 (2004) (“Financial concerns . . . play a role in delineating the contours of § 1983 itself. The Supreme Court has established limits on the liability of individual and government actors in response to concerns that subjecting defendants to unlimited financial liability would unduly hamper their ability to function effectively.”).

¹³ See, e.g., *Citizens United v. Federal Election Com’n*, 130 S. Ct. 876 (2010).

¹⁴ Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006); see Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 563–65 (2009); Tracy A. Thomas, *Proportionality and the Supreme Court’s Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 87 (2007).

Court limit litigation; originalism and textualism have given way when the Court reins in litigation on a constitutional theory absent from constitutional text and intent; and deference to the elected legislature gives way when the Court restricts litigation by broadly reinterpreting long-stable rules and statutory text the legislature had left intact. Second, and relatedly, the problem is not a simple left-versus-right issue. With almost all recent Justices holding substantial judicial experience, yet almost no experience with litigation for plaintiffs or with nonprofit law reform organizations, even the Justices commonly identified as the “left” of the Court have joined some of the Court’s most significant anti-litigation opinions, such as the decisions expanding pre-discovery dismissals and reversing punitive damages awards. The current anti-litigation jurisprudence promises to continue, and even strengthen, until the judiciary comes to include a new crop of judges whose views and backgrounds make them less hostile to litigation as a tool of private and public redress.

II. The Modern Court’s Jurisprudence: Sacrificing Other Jurisprudential Values to Protect Defendants from Lawsuits, Litigation Costs, and Damages Verdicts

A. Authorizing More Dismissals Before Any Fact Discovery – and Doing So by Changing Longstanding Dismissal Standards

The Supreme Court recently declared that more cases should be dismissed before any fact discovery, reversing half-century-old precedent to do so. In *Bell Atlantic Corp. v. Twombly*, the Court dismissed a class action claim that large phone companies colluded to exclude competitors because, in the court’s view, the collusion was insufficiently “plausible.”¹⁵ Pre-discovery dismissal for insufficient plausibility was forbidden by 1957’s *Conley v. Gibson*, under “the accepted rule that 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.”¹⁶ Under *Conley*, pre-discovery dismissal was proper only in limited circumstances, mainly where the complaint, even if assumed true, fell short on a required element—for example, by alleging an injury that preceded the limitations period¹⁷ or that was insufficiently severe to qualify for statutory coverage.¹⁸ Otherwise, regardless of the judge’s view of the claim’s plausibility, plaintiffs could proceed to discovery. “[D]iscovery . . . is the battleground where civil suits are won and lost”¹⁹ is a quotation from the patent litigation context, but it is just as true in various other fields. “Discovery is the most crucial phase” in employment litigation,²⁰ for example: “Because employers rarely leave a paper trail—or ‘smoking gun’—attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the

¹⁵ 550 U.S. 544, 557 (2007).

¹⁶ 355 U.S. 41, 46–47 (1957).

¹⁷ See, e.g., *Weeks v. New York State Div. of Parole*, 273 F.3d 76, 84–86 (2d Cir. 2001).

¹⁸ See *id.* at 84–87.

¹⁹ Joseph D. Steinfield & Robert A. Bertsche, *Recent Developments in the Law of Access – 1998*, 540 PLI/PAT. 53, 107 (1998).

²⁰ Jon W. Green & Kyle M. Francis, *Age Discrimination in Employment: A Plaintiff’s Perspective*, 522 PLI/LIT. 227, 238 (1995).

employer.”²¹ In short, pre-discovery dismissals eliminate plaintiffs’ ability to gather evidence supporting their claims, which is a key rationale for the *Conley* rule limiting pre-discovery dismissals.

The *Twombly* rule allowing dismissal of insufficiently “plausible” claims expressly replaced the *Conley* standard (dismissal only if no possible facts could support the plaintiff) with the new standard allowing pre-discovery dismissal whenever a judge does not find the claim plausible enough.²² The *Twombly* Court asserted with little documentation (beyond recitation of others’ opinions) that there exists a systemic “problem of discovery abuse,” that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases,” and that “[j]udges can do little about impositional discovery” beyond more freely dismissing cases before discovery.²³

Twombly has drawn varied criticism. For one, the assumption that more dismissals are proper to save discovery costs may be factually unfounded and normatively questionable. As a factual matter, district courts have broad discretionary power over “controlling and scheduling of discovery,”²⁴ and some courts already order that discovery occur in stages.²⁵ Many courts issue scheduling orders at early Rule 16 court conferences requiring a certain order of discovery devices;²⁶ other courts begin by allowing partial “sampling” of data to determine the likelihood that comprehensive searching will be worthwhile; and more broadly, courts could postpone especially expensive discovery until the earlier discovery sheds light on whether the case may be meritorious enough to warrant expensive discovery (*e.g.*, whether the early discovery yields some useful evidence or none).²⁷ Thus, the Court was too quick to depict dismissals as the only way to limit discovery costs. Normatively, and perhaps more fundamentally, even if discovery costs can be substantial, Justice Stevens lambasted the Court for giving top priority to protecting wealthy corporations from those costs: “The transparent policy concern that drives the decision is the interest in protecting . . . some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.”²⁸

Another criticism of *Twombly* is that the majority Justices departed from their usual methods of judicial interpretation to reach their litigation-limiting result. Dismissal standards are

²¹ *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (internal citations omitted); *see also id.* (holding that denial of discovery prevented plaintiff from “assembl[ing] such a quantum of circumstantial evidence” as he needed).

²² *Twombly*, 550 U.S. at 562–63 (“Conley’s ‘no set of facts’ language . . . has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss . . .”).

²³ *Id.* at 559.

²⁴ FED. R. CIV. P. 16(c)(2)(F).

²⁵ *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L. J. 857, 937–38 (2009) (discussing these rules).

²⁶ *See* FED. R. CIV. P. 16 advisory committee’s note (“[T]he initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, [and] the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference.”).

²⁷ Moss, *supra* note 25, at 936–43 (2009) (noting ways judges can allow high-cost discovery only when more affordable discovery proves inadequate and when case merits prove sufficient).

²⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting).

set by various Federal Rules of Civil Procedure (mainly Rules 8 and 12) set by a rulemaking committee and reviewed by Congress;²⁹ some dismissal standards also are heightened by statutes such as the Private Securities Litigation Reform Act.³⁰ In adopting a new dismissal standard, the *Twombly* majority displaced the prevailing *Conley* rule that Congress and congressionally authorized rulemakers had left in place for decades, even while (as just noted) the same legislators and rulemakers amended various other procedural rules, including dismissal standards. Abrogating a long-established judicial interpretation of non-constitutional provisions (*i.e.*, statutes or rules) is improper under such circumstances, the *Twombly* majority Justices have explained in other cases. The year after *Twombly*, all Justices in the *Twombly* majority joined a decision reasserting the rule that “*stare decisis* in respect to statutory interpretation has ‘special force,’ for ‘Congress remains free to alter what we have done’[,]” making abrogation of an established interpretation improper where “Congress has long acquiesced in the interpretation we have given.”³¹ And the same year as *Twombly*, Justice Scalia wrote, joined by Chief Justice Roberts and Justice Thomas, that judicial reinterpretation of duly enacted provisions is an illegitimate “system of judicial amendatory veto over texts duly adopted by Congress.”³² *Twombly*’s repudiation of a half-century-old interpretation of federal civil procedure rules violates this principle of preserving rule interpretations in which generations of legislators and rulemakers have acquiesced.

The impact of *Twombly* and *Iqbal* has been substantial in various fields of litigation. Initially, some suggested that *Twombly* might represent a crackdown only on antitrust cases.³³ But in *Ashcroft v. Iqbal*, the Court held that the *Twombly* expansion of pre-discovery dismissal applied to other kinds of lawsuits, including individual rights claims.³⁴ Even before *Iqbal*, courts had applied *Twombly* to dismiss a wide variety of claims, such as breach of contract and securities fraud,³⁵ and one study showed that *Twombly* led courts to dismiss employment discrimination claims at an accelerated rate.³⁶ Some appellate courts have started to rein in excessive district court *Twombly/Iqbal* dismissals. In one such case, D.C. Circuit Judge Janice Rogers Brown wrote as follows:

[T]he district court interpreted *Twombly* as establishing a new threshold for complaints: enough facts to ‘clarify the grounds’ on which each claim

²⁹ As to the rulemaking process, *see generally* Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002); *see, e.g.*, *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (recounting 2000 amendment narrowing scope of discovery: “Rule 26, which stated a party may obtain discovery on any matter ‘relevant to the subject matter,’ . . . was amended . . . to state that the material must be ‘relevant to the claim or defense of any party[.]’”).

³⁰ 15 U.S.C. § 78u-4(b)(2) (2006) (imposing heightened requirement that complaint can survive dismissal only if it pleads facts giving rise to “strong inference” defendants made misleading statements with intent to deceive).

³¹ *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008).

³² *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting, joined by Thomas, J. and Roberts, C.J.); *see Twombly*, 500 U.S. at 595–596 (Stevens, J., dissenting) (criticizing majority in this vein).

³³ *See, e.g.*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009).

³⁴ *Iqbal*, 129 S. Ct. at 1953 (2009).

³⁵ *See, e.g.*, *S. Cherry St. LLC v. Hennessee Group LLC*, 573 F.3d 98 (2d Cir. 2009).

³⁶ *See Seiner, supra* note 33, at 1029.

rests and ‘nudge[] their claims across the line from conceivable to plausible.’ Many courts have disagreed about . . . *Twombly*. We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact.³⁷

Such plaintiff’s appellate rulings, however, show how aggressively some district courts are using *Twombly* and *Iqbal* to clear their dockets.

In sum, *Twombly* and *Iqbal* have substantially limited plaintiffs’ ability to sue to redress a wide range of illegalities, and they did so by taking two bleak views of litigation: stressing the burdensomeness to defendants of discovery and expressing a lack of faith in district judges’ ability to manage discovery so as to minimize discovery excess.

B. Raising the Discrimination Burden of Proof for Only Age Claims – and Creating Other Inconsistencies Among Different Kinds of Discrimination Claims

In a ruling that surprised most Court observers, *Gross v. FBL Financial Services*³⁸ required age discrimination plaintiffs to show that age was the but-for cause, not just a “motivating factor,” of the employer’s decision. The latter had been the general rule: an employee proves discrimination by proving discrimination was one of the employer’s motivations.³⁹ Under this “motivating factor” standard, the employer can counter-argue that even though it had discriminatory motivation, it would have taken the same action anyway for nondiscriminatory reasons – but such a defense just limits the employee’s damages, by establishing (for example) that even without the discrimination, the job loss would have occurred anyway.⁴⁰ In contrast, under the *Gross* but-for standard, age discrimination plaintiffs now must prove not only discriminatory motivation, but also that all nondiscriminatory reasons the employer asserts did not play any relevant part in the termination, demotion, etc.

Gross was not just tinkering with burden-of-proof minutiae; lawyers representing employees and employers alike agree that *Gross* is “likely to make it more difficult for plaintiffs to prove age discrimination claims.”⁴¹ *Gross* protects employers from liability when there is both good evidence of age discrimination but also enough plausibility of other nondiscriminatory motivations to complicate a jury finding that discrimination was the sole “but-for” cause.

³⁷ Aktieselskabet Af 21 November 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008).

³⁸ 129 S. Ct. 2343, 2351 (2009).

³⁹ Desert Palace, Inc. v. Costa, 539 U.S. 90, 101–02 (2003).

⁴⁰ *Id.* at 94–95.

⁴¹ Roy A. Ginsburg & Ambrea Bigley, *Gross v. FBL Financial Services, Inc.: Age Discrimination Cases Are a Different Breed*, DORSEY & WHITNEY LLP, June 26, 2009, http://www.dorsey.com/age_discrimination_cases_different_breed/ (article by attorneys representing employers as defendants); see also Ellen Simon, *Congress Introduces Age Discrimination Bill To Fix Supreme Court’s Gross Decision*, TODAY’S WORKPLACE, October 22, 2009, <http://www.todayworkplace.org/2009/10/22/congress-introduces-age-discrimination-bill-to-fix-supreme-courts-gross-decision/> (describing *Gross* as imposing “more difficult standard of proof” on plaintiffs).

Gross reflects three troubling phenomena in the Court’s discrimination jurisprudence. First, the Court has used inconsistent statutory interpretation methods, in each case using whatever method reins in litigation. Second, it has created inconsistencies among different types of claims, wreaking havoc upon “dual-claim” plaintiffs alleging discrimination on both age and another ground (*e.g.*, discrimination against older women also involves a sex discrimination ground). Third, the Court’s several pro-plaintiff decisions warrant mention but reflect mainly that many lower courts are unusually willing to defy precedent and statutory text to dismiss lawsuits, requiring the Court to rule for plaintiffs just to police rogue lower courts.

1. Inconsistency in Statutory Interpretation: Reining in Litigation By Whatever Interpretive Methods Helps in Each Case

Gross created an unintuitive split: age discrimination claims face a “but-for” burden of proof, not the “motivating factor” standard applicable to race, sex, religion, and disability discrimination claims. This age-versus-other-discrimination difference is not explicable by any differences between the discrimination statutes. In *Price Waterhouse v. Hopkins*, the Court rejected the “but-for” standard for Title VII (the sex, race, and religious discrimination statute), even though the statute then featured the same wording as the age discrimination statute that the Court now says requires the “but-for” standard.⁴²

Gross thus displays inconsistent, arguably results-oriented use of statutory interpretation principles. On the one hand, *Price Waterhouse* rejected the “but-for” standard, and the Court commonly refuses to change its statutory interpretations because “Congress’ failure to disturb a consistent judicial interpretation of a statute” is evidence it “at least acquiesces in, and apparently affirms, that [interpretation]”⁴³—a quotation two of the Justices in the *Gross* majority joined. On the other hand, the Court also has held, in an opinion the same two Justices joined, that “Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.”⁴⁴ In the latter case, the Court frankly admitted its inconsistency on this point of statutory interpretation, conceding that “our cases have not been consistent in rejecting arguments such as these.”⁴⁵ This admission parallels the classic observation by Karl Llewellyn that canons of statutory construction are indeterminate because there exist varied, inconsistent rules:⁴⁶ “there are two opposing canons on almost every point,” Llewellyn documented, so “[p]lainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon.”⁴⁷ To be sure, some, such as Cass Sunstein, have argued that “[Llewellyn’s] claim of indeterminacy and mutual contradiction was greatly overstated.” because “canons of construction continue to be

⁴² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989).

⁴³ *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979)).

⁴⁴ *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

⁴⁵ *Id.* at 188.

⁴⁶ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

⁴⁷ *Id.*

a prominent feature in the federal and state courts.”⁴⁸ Sunstein may be correct that statutory construction canons can be useful, but cases such as *Gross* still show a Court using those canons badly, to reach whatever inconsistent results it thinks best—here, a pro-employer raising of the evidentiary threshold for proving age discrimination.

2. Inconsistency Among Different Discrimination Claims: Creating Confusion and Ignoring Dual-Claim Plaintiffs.

Even if a higher burden on age claims were to be justified, it risks confusion for a type of case the *Gross* Court never considered: “dual-claim” plaintiffs,⁴⁹ such as an employee jointly claiming age and sex discrimination when her employer stereotyped her as an older woman.⁵⁰ In such a case, the jury must decide whether the same evidence met one burden of proof for sex discrimination, and another for age discrimination—a quantum-of-evidence differential that easily could befuddle judges and lawyers, much less lay jurors.

The Court rarely considers the litigation reality that dual-claim plaintiffs are common. For example, several of the same Justices ruled (a) that pay discrimination claims must be filed immediately (*Ledbetter v. Goodyear*⁵¹) but (b) that sex harassment lawsuits must be delayed until employees pursue internal remedies (*Faragher v. Boca Raton*⁵² and *Burlington Industries v. Ellerth*⁵³). Consequently, “a plaintiff claiming that the same sexist supervisor harassed her and paid her less would face competing demands to file promptly and to delay filing.”⁵⁴ In these timing-of-suit decisions, as in *Gross*, the Court seems not even to consider the fact that some plaintiffs, like women in a pervasively sexist workplace, face more than one single, discrete form of discrimination at a time.

3. The Court’s Rulings for Plaintiffs: Illustrations that the Lower Courts Can be Even More Hostile to Litigation.

Any discussion of the Court’s employment caselaw, though, cannot focus on only pro-defense rulings. The Court has ruled for plaintiffs too – but those rulings reflect that many circuit decisions have been so startlingly pro-defense that they require correction from even a generally litigation-hostile Supreme Court.

⁴⁸ Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989).

⁴⁹ Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 985 (2007).

⁵⁰ See, e.g., *Brennan v. Metro. Opera Assoc.*, 192 F.3d 310, 317–18 (2d Cir. 1999) (claim of hostile work environment and discharge based on age, gender, and sexual orientation); *White v. Baxter Healthcare Corp.*, No. 89-C-4468, 1990 WL 114478, at *4 (N.D. Ill. July 31, 1990) (claim of discharge based on being an older African American woman and a Jehovah’s Witness). “[A] fixture of current employment discrimination litigation . . . [is] for opinions to begin with some variation of the following litany: ‘Plaintiff brings this claim under Title VII and the ADEA for race, age, and gender discrimination.’” Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1443 (2009).

⁵¹ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

⁵² *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁵³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁵⁴ Moss, *supra* note 49, at 985.

Since the late 1990s, while issuing pro-defense rulings on harassment (*Faragher*⁵⁵ and *Burlington Industries*⁵⁶), on whistleblowing rights (*Garcetti v. Ceballos*⁵⁷), on deadlines to sue for promotion or pay discrimination (*National Railroad Passenger Corp. v. Morgan*⁵⁸ and *Ledbetter*⁵⁹), and on age discrimination burdens of proof (*Gross*⁶⁰), the Court also has issued four unanimous rulings relaxing employment plaintiffs' pleading and proof burdens. Ruling for plaintiffs, the Court has held that: (a) proving the employer's explanation is pretextual can suffice for a finding of discrimination without direct evidence of discriminatory bias (*Reeves v. Sanderson Plumbing Products, Inc.*⁶¹); (b) circumstantial rather than direct evidence can suffice to prove discrimination a motivating factor (*Desert Palace, Inc. v. Costa*⁶²); (c) arguably ambiguous evidence of bias can suffice to prove discrimination (*Ash v. Tyson Foods, Inc.*⁶³); and (d) a wide range of retaliation, not just ultimate actions like termination or demotion, is unlawful (*Burlington Northern & Santa Fe Railway Co. v. White*⁶⁴).

While this mix of plaintiffs' and defendants' victories shows that the Court does not reflexively rule for one side,⁶⁵ it bears note that the Court's pro-plaintiff rulings are mainly policings of rogue pro-defense circuit decisions. The Court's rulings for plaintiffs in *Reeves*, *Ash*, and *Desert Palace*, for example, were unanimous precisely because there was little to be said for the lower court decisions. For example, the Fifth Circuit in *Reeves* flatly violated Supreme Court precedent when it reversed a plaintiff's victory on the rationale that proof the employer lied about the firing is insufficient to support a discrimination verdict:

[A] plaintiff must prove not only that the employer's stated reason . . . was false, but also that age discrimination "had a determinative influence" Age-related . . . comments which are "vague and remote in time" . . . are insufficient Reeves failed . . . to prove both that this reason is untrue *and* that age is what really triggered Reeves's discharge. . . . Reeves [argues] a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. . . . Even so, . . . [w]e must . .

⁵⁵ 524 U.S. 775 (1998).

⁵⁶ 524 U.S. 742 (1998).

⁵⁷ 547 U.S. 410 (2006).

⁵⁸ Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 107 (2002).

⁵⁹ 550 U.S. 618 (2007).

⁶⁰ 129 S. Ct. 2343 (2009).

⁶¹ 530 U.S. 133 (2000) (rejecting pretext-plus rule of circuits holding that disproving defendant's proffered reason for a firing is insufficient evidence of discrimination).

⁶² 539 U.S. 90 (2003) (reversing circuit holdings that only plaintiffs with "direct" (not circumstantial) evidence can use rule that plaintiffs need prove discrimination only one "motivating factor" of employer's decision)

⁶³ 546 U.S. 454, 456–57 (2006) (holding, contrary to lower court, the following probative of discrimination: (1) calling an African-American "boy," and (2) evidence plaintiff was more qualified than others even where the difference is not "so apparent as virtually to jump off the page and slap you in the face" – several circuits' standard) (quoting *Cooper v. S. Co.*, 390 F.3d 695, 732 (11th Cir. 2004)).

⁶⁴ 126 S. Ct. 2405, 2409–10 (2006) (holding actionable any retaliatory act that would deter a reasonable employee, rejecting holdings that only a materially adverse or "ultimate" employment change is actionable).

⁶⁵ See generally Moss, *supra* note 49 (disagreeing with those who depict the Court as uniformly pro-defense).

. determine whether Reeves presented sufficient evidence that his age motivated Sanderson[]⁶⁶

This reasoning directly contravened a Supreme Court decision from just six years prior, *St. Mary's Honor Center v. Hicks*.⁶⁷ Unanimously, the *Reeves* Court explained that under *St. Mary's Honor Center*, proving the employer's reason is pretextual can, without more, prove discrimination – so a case cannot be dismissed (as Reeves's was) simply for lack of direct evidence of bias:

St. Mary's Honor Center . . . [held] it is permissible for the trier of fact to infer . . . discrimination from the falsity of the employer's explanation. . . . “The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer . . . discrimination.” . . . [T]he Court of Appeals erred in . . . [holding] that a plaintiff must always introduce additional, independent evidence of discrimination.⁶⁸

Even though the Fifth Circuit had gone far enough astray to earn a unanimous reversal, four circuits had applied the same surprisingly erroneous “pretext plus” rule.⁶⁹ Worse, a Second Circuit panel defensively responded to *Reeves* by declaring, “[w]ith all respect the Court was mistaken” in its depiction of the circuit caselaw *Reeves* abrogated⁷⁰—flouting *Reeves* just as the pre-2000 circuit caselaw featured dismissals in defiance of *St. Mary's Honor Center*. The Court's other unanimous pro-plaintiff rulings similarly reflect not that the Court is pro-plaintiff, but that many lower courts are so egregiously anti-plaintiff as to require unanimous reversals. Like the Fifth Circuit's decision in *Reeves*, various appellate decisions so badly strain precedent and statutory text to rule against plaintiffs that the Supreme Court, despite its general hostility to litigation, must police these rogue appellate courts with unanimous reversals. In short, whatever may be said of the Supreme Court's hostility to litigation, the same hostility runs even deeper among a substantial portion of the lower courts.

- C. Announcing a broad, largely corporate-enjoyed right against large punitive damages awards – and a broad role for federal courts to reverse state court damages awards.

Generally, state court verdicts are appealable only in state, not federal, court. Yet the same 1990s-2000s Court that has aggressively expanded states' rights, and criticized overly

⁶⁶ *Reeves v. Sanderson Plumbing Prods.*, 197 F.3d 688, 692–693 (5th Cir. 1999) (internal citation omitted).

⁶⁷ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

⁶⁸ *Reeves*, 530 U.S. at 147–49 (quoting *St. Mary's Honor Center*, 509 U.S. at 511).

⁶⁹ *Id.* at 140–41 (citing, as the side of the circuit split being abrogated, cases from four circuits: *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997) (en banc); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996); *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994)).

⁷⁰ *James v. New York Racing Ass'n*, 233 F.3d 149, 157 n.3 (2d Cir. 2000).

aggressive judicial review, also has increased federal court review of state court damages awards.

Effectively imposing a nationwide state court damages cap, the Court has declared a presumption that punitive damages must be less than ten times, and perhaps no more than four times, compensatory damages—a cap that hampers trial courts’ ability to award damages sufficiently large to deter widespread consumer fraud. *BMW of North America, Inc. v. Gore* reversed a \$2 million punitive damages award for fraudulently selling repainted cars as mint new cars, finding the punitive award disproportionate to the plaintiff’s \$4,000 in compensatory damages.⁷¹ The Court rejected a high punitive-to-compensatory ratio despite the established principles: (a) that punitive damages aim not just to punish wrongdoing, but also “to deter its future occurrence,”⁷² and (b) that a violation consistently repeated, but “hard to detect,” warrants a punitive award many times the amount of the damages needed to compensate the one plaintiff who filed suit.⁷³

State Farm Mutual Automobile Insurance Co. v. Campbell then went further, all but imposing a numerical damages cap. State Farm consistently defrauded policyholders to deny coverage, yet the Court reversed a \$145 million punitive award because the plaintiff’s compensatory damages were only \$1 million.⁷⁴ The Court denied imposing a “concrete” cap but in effect did so, declaring that “in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages,” and that “an award of more than *four times* the amount of compensatory damages might be close to the line of constitutional impropriety.”⁷⁵ This requirement of a certain ratio between punitive damages and the actual injury compensation directly contravened the Court’s declaration, just fifteen years earlier, that “[p]unitive damages are not measured against actual injury, so there is no objective standard that limits their amount.”⁷⁶

What flexibility the Court expresses with its four-or-ten-times cap is mainly *tightening* of that cap for especially large damages awards. The Court has suggested that perhaps a greater than ten-to-one ratio might be permissible for a particularly egregious but low-compensatory damages case,⁷⁷ but the one low-compensatory case the Court has decided (*BMW v. Gore*) disallowed a greater ratio. Conversely, *State Farm* described a maximum one-to-one ratio as “perhaps . . . the outermost limit” where compensatory damages are high,⁷⁸ and in *Exxon Shipping v. Baker*, the Exxon Valdez oil spill case, the Court reduced punitive damages to the same amount as compensatory damages (\$500 million) from a trial award of five times greater (\$2.5 billion).⁷⁹

⁷¹ 517 U.S. 559, 585–86 (1996).

⁷² See, e.g., *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (citation omitted).

⁷³ *Gore*, 517 U.S. 559, 582 (1996).

⁷⁴ 538 U.S. 408, 429 (2003).

⁷⁵ *Id.* at 425 (emphases added).

⁷⁶ *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988).

⁷⁷ *State Farm*, 538 U.S. at 425.

⁷⁸ *Id.*

⁷⁹ 128 S.Ct. 2605, 2634 (2008). Technically, *Exxon Chipping Co.* was a maritime law rather than Due Process Clause ruling, but as litigation scholar Keith Hylton observed, “the whole discussion was largely unnecessary if the

In addition to these reported decisions reversing particular verdicts, the Supreme Court has limited far more state court awards. For example, in deciding *State Farm*, the Court also issued short orders in ten other cases vacating punitive damages awards for reconsideration by the state court.⁸⁰ While a state court could reaffirm its prior award,⁸¹ it often opts for the safer path of “perceiving that it had been overruled by the Supreme Court and . . . fearing that it would be overruled again unless it drastically revised its earlier decision” by lowering the punitive award.⁸² Additionally, the Supreme Court’s damages-limiting jurisprudence is by now well known to state court judges and litigators, so it likely influences what awards courts allow in run-of-the-mill trials that never yield appellate decisions.

The Court’s aggressiveness in reversing state-court damages awards under substantive Due Process doctrine is strikingly at odds with two major philosophies espoused by Justices in the Court majorities. First, it conflicts with contemporaneous jurisprudence citing “principles of state sovereignty” as prohibiting federal courts from interfering with states. In a line of cases contemporaneous with this punitive damages caselaw, the Court has held that federal courts cannot hear various kinds of lawsuits against states.⁸³ This holding was discretionary because it was not based on a clear constitutional command: the Eleventh Amendment prohibits only federal lawsuits “against one . . . State[] by Citizens of *another* State,”⁸⁴ but the Court applies it as prohibiting suits against states by their *own* state citizens, admitting in several decisions that, “[a]lthough today’s cases concern suits brought by citizens against their own States, this Court has long ‘understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’”⁸⁵ These rulings barring federal courts from hearing cases against states drew three of the same Justices who have supported federal court reversals of state-court damages awards.⁸⁶ These rulings seem inconsistent in their view of the proper federal court role over states, but consistent in their hostility to litigation—both litigation opposed by states (in the sovereign immunity cases) and litigation favored by states (in the punitive damages awards cases).

Second, the constitutional basis for this punitive damages review—substantive Due Process—has an interesting history, as at least one Justice in the *Gore* and *State Farm* majority has rejected the doctrine in virtually all other cases. On and off, the Court long has held that the

court really wanted to limit its decision to maritime cases. The court’s majority appears to be trying to make the case for imposing the one-to-one ratio as a default rule in ordinary civil cases.” Associated Press, *Exxon Valdez: An end to long trek through courts*, USA TODAY, June 25, 2008, available at http://www.usatoday.com/news/washington/2008-06-25-1187291094_x.htm.

⁸⁰ Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages Cases*, 36 ARIZ. ST. L.J. 513, 513–14 (2004).

⁸¹ *Id.* at 525.

⁸² *Id.*

⁸³ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91–92 (2000).

⁸⁴ U.S. CONST. amend. XI (emphasis added).

⁸⁵ *Kimel*, 528 U.S. at 72–73 (quoting *Seminole Tribe of Fl v. Florida*, 517 U.S. 44, 54 (1996)).

⁸⁶ Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy all joined all of the state sovereign immunity decisions and state punitive damages award reversals listed above.

Due Process clause⁸⁷ protects not only “process” rights to fair hearings,⁸⁸ but also “substantive” rights against laws that infringe protected liberties. For the past several decades, the main such holdings are rejections of statutes excessively restricting private personal matters such as abortion⁸⁹ or homosexual relationships.⁹⁰ Yet the Court’s earliest, and most frequent, uses of substantive due process protected the economic rights of businesses and property owners. *Dred Scott v. Sanford* infamously declared that slaveowners’ property rights trumped the Missouri Compromise’s limits on slavery.⁹¹ *Lochner v. New York* held that a maximum ten-hour bakery workday violated the due process “liberty” of a business to have employees “contract” for long hours;⁹² on identical reasoning, *Adkins v. Children's Hospital* struck down a minimum wage law.⁹³

The Court, in decisions joined by several Justices of the *Gore* and *State Farm* majorities, has long since rejected economic substantive due process under *Lochner* for having improperly “sought to impose a particular economic philosophy upon the Constitution.”⁹⁴ But the recent Due Process cases reversing punitive damages awards represent a similar economic substantive due process right. After all, litigation and legislation are just two different means to the same end; some corporate misdeeds are penalized by legislation, others by litigation verdicts.⁹⁵ Just as the early 1900s Court struck down legislation-imposed regulation of business practices, the 1990s-2000s Court has struck down litigation-imposed regulation of business practices.

Amidst this controversial history of economic substantive due process, one of the supporters of its application to punitive damages was Chief Justice Rehnquist, who dissented from virtually all other decisions recognizing any substantive Due Process rights, including reproductive rights and gay rights. As Justice Rehnquist stated in *Planned Parenthood v. Casey*, where he called for overturning the *Roe v. Wade* abortion right, partly based on caselaw rejecting gay rights:

“Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it

⁸⁷ U.S. CONST. amend. XIV (“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ”).

⁸⁸ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (declaring right to hearing on termination of entitlements).

⁸⁹ See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁹⁰ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹¹ See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁹² See *Lochner v. New York*, 198 U.S. 45 (1905).

⁹³ See *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

⁹⁴ *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (opinion by Scalia, J., joined by several Justices from the *Gore* and/or *State Farm* majorities – Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy).

⁹⁵ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1122 n.62 (1972) (noting that pollution control “could be administered by decentralized damage assessment as in litigation, or it could be effected by techniques like effluent fees charged to polluters”).

deals with judge made constitutional law having little or no cognizable roots in the language or design of the Constitution.”⁹⁶

Yet despite decades of opposition to other substantive due process rights, Rehnquist joined the *State Farm* majority’s use of substantive due process to reverse a punitive damages award: “[d]espite the broad discretion that States possess with respect to . . . punitive damages, the Due Process Clause . . . imposes substantive limits on that discretion.”⁹⁷

The dissonance between the Justices’ damages-limiting jurisprudence and their other jurisprudence is striking. The same Justices issuing decisions protecting states from federal court interference to stop litigation, also issue decisions subjecting states to federal court review when necessary to curb litigation awards. And at least one of the Justices who issues decisions rejecting substantive due process doctrine also issues decisions applying substantive due process doctrine to curb litigation awards. In short, Justices’ views on major constitutional issues, such as state sovereignty and substantive due process, give way to the Justices’ desire to curb litigation.

D. Allowing employers to make consumers and employees waive their right to challenge violations of federal law in court

Over the past two decades, the Court has held that businesses can require employees not to sue in court for discrimination, harassment, or other workplace violations, but instead to file any such claims only in private arbitration, to be heard by a private arbitration service typically selected by the employer. The Court previously had held in *Alexander v. Gardner-Denver Co.* that a business cannot use an arbitration policy to prevent an employee from filing a discrimination lawsuit in federal court.⁹⁸ Preserving the right to sue in court, rather than just in private arbitration, was important because, the Court explained, “the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.”⁹⁹ Accordingly, “there can be no prospective waiver of an employee’s rights” to sue rather than arbitrate a statutory discrimination claim, the Court held.¹⁰⁰

Yet in the past two decades, the Court has issued several decisions allowing businesses to compel employees to arbitrate, and never litigate, any workplace rights claims. The Court first so held in *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁰¹ undercutting the prior decades of decisions disallowing employers from making employees give up their right to use public courts to challenge illegalities. In *14 Penn Plaza LLC v. Pyett*,¹⁰² the Court went further, holding that

⁹⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, J., concurring in part and dissenting in part) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

⁹⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001)). Chief Justice Rehnquist joined both this *State Farm* opinion and the *Cooper Industries* opinion it quoted.

⁹⁸ 415 U.S. 36 (1974).

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.* at 51.

¹⁰¹ 500 U.S. 20 (1991).

¹⁰² 129 S.Ct. 1456 (2009).

even where the employer's arbitration "agreement" was with only the union, not with the individual workers themselves, the workers still are precluded from ever filing any claims in court. In *14 Penn Plaza*, a group of employees claiming workplace discrimination had their claims dismissed from court because of the arbitration policy the employer claimed forbade litigation. Accordingly, an employer now can opt out of the public courts either by imposing a policy on employees, such as by inserting it in an "employee handbook," or by forcing it into a broader deal it strikes with a labor union that may by necessity focus on other negotiation points (wages, benefits, etc.), rather than on lawsuit rights that only some employees will need in the future.

Allowing businesses to opt out of the legal system, by mandating arbitration of all disputes against them, is one of the best illustrations of the Court's changed view of litigation. The Court once praised plaintiffs who brought employment rights lawsuits as serving the function of a "private attorney general," vindicating a policy that Congress considered of the highest priority."¹⁰³ But now it says, in approving mandatory arbitration rather than federal litigation of the same types of claims, that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."¹⁰⁴ On such arguments, the Court has "pushed the pendulum far beyond a neutral attitude" toward arbitration, and instead "endorsed a policy that strongly favors private arbitration" over traditional public court litigation.¹⁰⁵

The Court's approval of business-mandated arbitration has had a substantial impact. As many as 25% of employers may be imposing policies mandating arbitration of all employee claims;¹⁰⁶ mandating arbitration of *consumer* claims may be even more common, covering as much as one-third of all consumer purchases.¹⁰⁷ By forcing claims out of the courts, businesses have successfully opted out of the reams of caselaw protecting plaintiffs' rights to various litigation procedures that arbitration typically disallows, such as the right to question key witnesses at pretrial depositions,¹⁰⁸ common law and constitutional rights to public hearings and court filings,¹⁰⁹ and statutory and constitutional rights to jury trials.¹¹⁰

III. The Road Ahead: Impending Litigation Rights Controversies, and the Future Composition of the Judiciary

¹⁰³ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968).

¹⁰⁴ *14 Penn Plaza LLC*, 129 S. Ct. at 1464 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)).

¹⁰⁵ *Circuit City*, 532 U.S. at 131–32 (Stevens, J., dissenting).

¹⁰⁶ Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007).

¹⁰⁷ Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: *The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 62 (2004).

¹⁰⁸ FED. R. CIV. P. 30(a)(1)-(2) (presumptively allowing each party to depose up to 10 witnesses).

¹⁰⁹ *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (noting "the common law right of access" and that "the public and the press have a 'qualified First Amendment right to attend judicial proceedings and to access certain judicial documents'") (citation omitted).

¹¹⁰ *See, e.g.*, U.S. CONST. amend. VII (protecting jury right for certain common-law claims); 42 U.S.C.A. § 1981a(c) (2006) (providing jury right for Title VII employment discrimination claims).

More disputes about the proper role of litigation are raging in the lower courts and likely will reach the Supreme Court soon. Without undertaking a comprehensive survey of cases the Court might hear, examples include aberrational circuit decisions suggesting that “maybe neither *Bell Atlantic* nor *Iqbal* governs” in cases lacking especially high risk of burdensome discovery,¹¹¹ the circuit split about whether employment discrimination claims can be class actions,¹¹² and whether a plaintiff’s “unclean hands” preclude a civil racketeering claim.¹¹³ Consequently, we likely will continue to see decisions implicating the Supreme Court’s and lower courts’ desire to protect even the largest corporate defendants from the burden of lawsuits, litigation costs, and damages verdicts. The question is whether and for how long the judiciary will retain its hostility to litigation and pro-defense perspective—and the current composition of the federal judiciary gives little reason to suspect imminent change.

Preliminarily, this briefing takes issue with a broad pattern of jurisprudence not limited to Justices commonly identified as the Court’s “conservatives,” but instead extending to most of the four-Justice “liberal” wing of the recent Court.¹¹⁴ Justice Souter wrote *Twombly*, and Justices Stevens, so critical of the Court’s other anti-litigation decisions, authored *BMW v. Gore*, joined by Justices Breyer and Souter—and the same three joined the *State Farm v. Campbell* majority. Thus, the debate is not a simple one between the political or jurisprudential “left” and “right.” Rather, the problem is that however varied their ideologies and philosophies, the Justices largely share a negative perception of civil litigation—a shared perspective that may reflect their largely homogenous professional background and experiences.

Admittedly, tracing a Justice’s decisionmaking to his/her professional or personal history is an imprecise art, and some Justices transcend their backgrounds. Chief Justice Earl Warren famously led the Court’s aggressive foray into civil rights after supporting the internment of Japanese-Americans as Attorney General of California.¹¹⁵ But the modern Court that regularly expresses hostility to litigation as a tool of dispute resolution and social reform consists of Justices largely homogeneous in their professional background of civil litigation defense, of policy work rather than litigation, of serving institutional rather than individual clients, and of not working on affirmative public interest civil litigation. The current Justices’ backgrounds, while impressive in many ways, are also surprisingly similar.

¹¹¹ See, e.g., *Smith v. Duffey*, No. 08-2804, 2009 U.S. App. LEXIS 17211, at *11–13 (7th Cir. Aug. 3, 2009) (opinion by Posner, J.). *Contra* *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 258 n.29 (5th Cir. 2009) (holding that the *Twombly* standard “generally applies to all complaints . . . [and] areas of the law”) (collecting cases).

¹¹² *Compare Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (disallowing employment discrimination class actions as entailing individualized inquiries precluding a finding of predominance of common issues (Rule 23(b)(3)) or classwide equitable relief (Rule 23(b)(2)), *with Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) (allowing such class actions, rejecting *Allison*).

¹¹³ *Compare Roma Construction Co. v. Russo*, 96 F.3d 566, 571–75 (1st Cir. 1996) (suggesting that unclean hands doctrine is inapplicable to RICO claims), *with Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 n. 41 (11th Cir. 2002) (finding unclean hands doctrine applicable to RICO claims).

¹¹⁴ Leigh Anne Williams, *Measuring Internal Influence on the Rehnquist Court: An Analysis of Non-Majority Opinion Joining Behavior*, 68 OHIO ST. L.J. 679, 693 (2007) (noting that for over a decade starting in 1994, “Stevens, Ginsburg, Souter and Breyer are considered to be the liberal bloc of Justices”).

¹¹⁵ Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1606 (1987).

- ***Private civil practice mainly representing institutions as defendants.*** Six current Justices had private law practice experience, but all were at a firm representing primarily businesses (Roberts, Scalia, Sotomayor, Kennedy, and Stevens) or at a major corporation as an in-house counsel (Thomas). Justice Ginsburg, former Director of the ACLU Women’s Rights Project, is the only Justice with substantial litigation experience (a) representing plaintiffs or (b) at an issue-oriented nonprofit organization. This background may explain why she is the sole Justice who has dissented from all the litigation-limiting Court decisions detailed above.
- ***Extensive political experience.*** In contrast to their limited-breadth civil litigation experience, six of the current Justices had held high federal political appointments.¹¹⁶ Even those who worked on progressive causes have pursued change through policy, not litigation—a distinction that may explain how a progressive like Justice Breyer can support *Twombly* and all three of the Court’s major decisions limiting punitive damages for proven illegality.
- ***Substantial pre-Court judicial experience.*** All nine current Justices previously were federal appellate court judges, eight of them (all except Thomas) for many years before the Supreme Court—making their practice experience, already of limited breadth, relatively distant.

The lower courts show similar homogeneity, with little change in the professional profile of the judicial nominees of the Clinton administration and the George W. Bush administration. An identical 88% of President Bush’s and President Clinton’s nominees had private practice experience; while over half of each administration’s nominees had been government attorneys (prosecutors or otherwise), only a small percentage were public defenders (5% of Bush and 12% of Clinton nominees), and an even smaller number held elected office (4%, both administrations).¹¹⁷ For all their differences, the past two administrations appointed nominees from similar backgrounds.

The Supreme Court was not always so homogeneous. The presidencies prior to those that appointed the current Court (*i.e.*, prior to President Ford, who appointed Justice Stevens) each added Justices with markedly different backgrounds.

- ***A lifelong practitioner.*** Justice Powell (a Nixon appointee) had no prior judicial experience, having spent his career as a practicing lawyer prominent enough to be President of the American Bar Association.

¹¹⁶ In short: Roberts and Alito held policy-making posts in the Department of Justice; Scalia and Thomas held various high-level Executive branch positions, and Thomas was a Senate staffer as well; Breyer spent many years as a Senate staffer and also had held a policy post in the Department of Justice; a sixth Justice, Stevens, also held political posts but in less depth, serving briefly as a Senate staffer and then for two years on the U.S. Attorney General’s National Committee to Study Antitrust Law.

¹¹⁷ Scott A. Moss, *The Courts under President Obama*, 86 DENVER U. L. REV. 1 (2009).

- **A union-side labor lawyer.** Justice Goldberg (a Kennedy appointee) represented unions and their member workers in labor disputes.
- **A civil rights lawyer.** Justice Marshall (a Johnson appointee) served a few years as an appellate judge and U.S. Solicitor General, but the vast majority—and most formative—of his professional background was as the NAACP’s Chief Counsel and lead attorney on most of its major civil rights cases, including at the Supreme Court, of the 1940s and 1950s.
- **A medical nonprofit lawyer:** Justice Blackmun (a Nixon appointee) for a decade represented the Mayo Clinic, a large entity, but a nonprofit, focused on health issues—a background seen as influencing his surprising authorship of *Roe v Wade* in the early years of his Court tenure when he was still a conservative in many ways.¹¹⁸

More broadly, in the past century, many of the Court’s progressive giants came to the job with varied backgrounds; none of the following Justices were appointed primarily because they were accomplished federal appellate judges.

- **Louis Brandeis** was a crusading practicing lawyer, litigating progressive causes such as challenges to railroad mergers and defenses of early wage-and-hour laws, as well as advocating at public hearings for the rights of the poor.
- **William Douglas** was a legal scholar who became a founding member and then Chair of the Securities and Exchange Commission after President Franklin Roosevelt created the agency as a corporate watchdog.
- **Thurgood Marshall** was, as discussed above, arguably the leading civil rights attorney of the Twentieth Century.
- **William Brennan** came closest to the modern mold, but arguably his greatest asset was the political sensibility honed by his range of judicial experience on a New Jersey trial court, and then appellate and Supreme Courts.

To be sure, not all Justices with admirably broad backgrounds became leading lights on the Court. Some of the Court’s most poorly regarded Justices had backgrounds similar to the four listed above: Justice Rufus Peckham had almost exactly the same background as William Brennan—private practice, state court trial judge, then state high court judge, just in New York rather than New Jersey; Chief Justice Fred Vinson’s impressive political background as elected City Attorney, member of Congress, and Secretary of the Treasury far overshadowed his brief judicial tenure. And the modern practice of appointing mainly able appellate judges has assured

¹¹⁸ See, e.g., Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 1075, 1087 (2005) (noting that for *Roe*, “Blackmun repaired to the library at the Mayo Clinic to research the medical history of abortion”); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 13 (1990) (suggesting Blackmun’s Mayo Clinic work influenced his *Roe* opinion).

a high level of talent unusual in Court history. Harriet Miers in 2005 stood out as insufficiently qualified because it no longer is common for Presidents to appoint cronies to the high court, as it was during (for example) the Truman Administration, which, according to one scholar's ranking, gave us two of the ten worst Justices ever—Vinson and Minton, both political loyalists of President Truman.¹¹⁹ So there is some quality assurance in the Court's current homogeneity.

Yet there is troubling uniformity of perspective on the Court when Justices all arrive from the federal appellate bench and, before the bench, mainly represented corporations or served in policymaking, rather than litigation, posts. That uniformity of perspective risks privileging the portion of the legal profession from which the justices came (*i.e.*, lawyers for corporate clients and for the government), to the disadvantage of those who use the law to serve different interests—such as lawyers challenging malfeasance by the sort of corporations and governmental entities almost all of the current Justices represented as lawyers.

IV. Conclusion

Hostility to litigation is an overriding theme in the modern Supreme Court's jurisprudence. Though the Court often is described as "conservative," that label is too blunt, because hostility to litigation trumps other conservative values, such as federalism, judicial restraint, and originalism. On the other side of the ideological divide, a number of the notionally progressive Justices came to the Court with little or no background in affirmative civil litigation—all but Justice Ginsburg—and, perhaps for that reason, have proven willing to join various of the modern court's decisions that have aggressively curtailed litigation. This acquiescence has had very real consequences for workers, consumers, and other individuals trying to use litigation to protect their rights against, and to police, powerful institutions such as employers, businesses, and government entities. With the Supreme Court's most strongly anti-litigation Justices unlikely to be replaced anytime soon, the Court may remain hostile to litigation for the foreseeable future. That fact, along with the even deeper hostility to litigation the lower federal courts exhibit, makes lower court judicial nominations an especially important battleground for the forces most committed to reining in litigation further and, on the other side, the forces most committed to preserving litigation as a tool for redressing grievances, deterring wrongdoing, and spurring social reform.

¹¹⁹ BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW 28–43 (1999).