The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg's Term*

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I. INTRODUCTION

Thirty-three years ago, I called the October 1980 term of the Supreme Court "Justice Brennan's Term," as he registered a number of important labor law dissents as well as authored some majority opinions. That term was just beginning to absorb the results of the 1968 elections, as a result of which President Richard M. Nixon was almost immediately able to appoint Chief Justice Warren Burger and soon thereafter Justice William Rehnquist. Justice Rehnquist, eventually Chief Justice when so nominated by President Reagan, was to push the Court far to the right from the beginning, even though he was sometimes at odds with the more moderate Justice Lewis Powell. The sharp shift to a conservative agenda unfolded anew at the beginning of the 1980s with a series of appointments by President Reagan and both Bushes in his wake.[1] The fairly uncontroversial appointments of Justices Ruth Ginsburg and Stephen Breyer by President Clinton were perceived to be judicial moderates or centrists.[2]

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[1] President Reagan's appointments to the Court included Justice Sandra Day O'Connor, Justice Antonin Scalia, and Justice Anthony Kennedy, although the nomination of Robert Bork was rejected by the Senate. *See* WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB--A MEMOIR 9-11 (2000); *see also Biographies of Current Justices of the Supreme Court*, SUPREME CT. OF THE U.S., http://www.supremecourt.gov about/biographies.aspx (last visited Feb. 1, 2014). President George H. W. Bush successfully nominated Justice Clarence Thomas, while President George W. Bush successfully nominated Chief Justice John Roberts and Justice Samuel Alito. *See id.*; *see also Bush Nominates Alito to Supreme Court*, CNN.COM (Nov. 1, 2005, 4:39 AM), http://www.cnn.com//2005/POLITICS/10/31/scotus.bush/index.html?section=cnn_world.

[2] *Cf.* Russell A. Miller, *Clinton, Ginsburg, and Centralist Federalism*, 85 IND. L.J. 225, 231-32 (2010) (stating that President Clinton's nominations of Justices Ginsburg and Breyer

But from 1980-1981, Justice William Brennan, along with Justice Thurgood Marshall, had begun to develop regular dissents, following in the footsteps of predecessors like Justices William Douglas and Hugo Black[3] and Justices Oliver Wendell Holmes and Louis Brandeis[4] before them. The pattern, which gathered momentum in the 1980s,[5] had begun to manifest itself at that juncture more than three decades ago. In discussing Justice Brennan's work, I quoted from Murray Kempton and what he had said of Cardinal Wyszynski: "The great lives are lived *against* the perceived current of their times."[6]

This term, that of October 2012, saw Justice Ginsburg playing a similar role, frequently with three colleagues joining her and at least one in solitary dissent. Though she had registered numerous earlier dissents, both persuasive and eloquent,[7] it seems as though she, as the senior Justice among the dissenters and thus able to assign herself the opinion, found her voice even more so in 2012-2013 as the Court drifted ever more to the right under the leadership of Chief Justice Roberts accompanied by Justice Alito.[8] For the most part, her dissents this term were in the areas of racial

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"reflected, with great precision, the moderate-to-liberal politics of the president").

[3] *See generally* HUGO L. BLACK, ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS (Irvin Dilliard ed., 1963); WILLIAM O. DOUGLAS, DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS (Vern Countryman ed., 2d ed. 1959); *see also* William B. Gould IV, Book Note, 45 CORNELL L.Q. 161 (1959) (reviewing DOUGLAS OF THE SUPREME COURT (Vern Countryman ed., 1959)).

[4] *See generally* SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS (1961); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1956); THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS (Max Lerner ed., 1943); *cf.* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882 (1963) (discussing Holmes's early years that would lay the foundation for his time on the Court).

[5] William B. Gould IV, *The Burger Court and Labor Law: The Beat Goes on—Marcato*, 24 SAN DIEGO L. REV. 51 (1987); *see also* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 25-26 (1993).

[6] Murray Kempton, *On Cardinal Wyszynski*, N.Y. REV. BOOKS (July 6, 1981), http://www.nybooks.com/articles/archives/1981/jul/16/on-cardinal-wyszynski/ (emphasis in original). *See also* William B. Gould IV, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 4 (1981).

[7] *See, e.g.*, Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1339 (2012) (Ginsburg, J., dissenting); Ricci v. DeStefano, 557 U.S. 557, 608 (2009) (Ginsburg, J., dissenting); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part and dissenting in part). *See generally* Pamela S. Karlan, *The Supreme Court, 2011 Term, Foreward: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012).

[8] *But see* Adam Liptak, *How Activist Is the Supreme Court?*, N.Y. TIMES, Oct. 13, 2013, at SR4, *available at* http://www.nytimes.com/2013/10/13/sunday-review/how-activist-

discrimination, e.g., a memorable case relating to voting rights and in a number of cases concerning job-bias matters as well.

The terrain of the Supreme Court docket has shifted considerably since the earlier period of Justice Brennan thirty-three years ago. The October 1979 term consisted of 152 cases, 122 discounting the per curiam opinions.[9] Twenty of those could be characterized as labor or employment.[10] October 1980 saw the Court's docket diminish further to 138 cases, 113 excluding per curiam opinions.[11] In the October 2012 Term, the Court decided merely seventy-eight cases, eleven of them consisting of employment cases and none of the traditional labor law variety.[12] But the latter have not completely disappeared given a number of important matters before the Court in the October 2013 term involving labor law issues.[13]

II. THE OCTOBER 2012 TERM

Though the focus here, when viewing the October 2012 term, is employment, some of the cases, though not explicitly employment, nonetheless have an impact on the employment arena.

The first of these are the same-sex marriage cases, where the Court held that in jurisdictions which have granted same-sex marriage, the refusal of the Defense of Marriage Act to grant benefits outside of marriages between a man and woman is unconstitutional,[14] and where the Court, in denying

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is-the-supreme-court.html?_r=0.

[9] William B. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 4 (1981)

[10] *Id.*

[11] *Id.*

[12] Kedar Bhatia, *Final October Term 2012 Stat Pack*, SCOTUSBLOG (Jun. 26, 2013, 6:36 PM), http://www.scotusblog.com/2013/06/final-october-term-2012-stat-pack/.

[13] *See, e.g.*, Canning v. N.L.R.B., 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (U.S. Jun. 24, 2013) (No. 12-281) (involving the validity of recess appointments to the NLRB); Harris v. Quinn, 656 F.3d 692 (7th Cir. 2011), *cert. granted*, 134 S. Ct. 48 (U.S. Oct. 1, 2013) (No. 11-681) (involving a challenge to mandatory dues requirements); UNITE HERE Local 355 v. Mulhall, 134 S. Ct. 594 (2013) (per curiam) (dismissing writ of certiorari as improvidently granted in a case involving the validity of neutrality agreements under section 302 of the NLRA). Justices Breyer, Sotomayor, and Kagan dissented from the Court's dismissal of the *Mulhall* writ of certiorari and argued that the Court should have instead requested additional briefing on whether the case was moot due to the pre-decision expiration of the contract between the union and employer, whether the sole plaintiff in the case lacked proper standing, and whether section 302 authorizes a private right of action in the first place. *See id.* at 594 (Breyer, J., dissenting).

[14] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). *See also* Ashby Jones, *Judges Extend High Court Same-Sex Ruling*, WALL ST. J., Aug. 5, 2013, at A3, *available at* http://online.wsj.com/news/articles/SB10001424127887323971204578630261068093272.

standing to supporters of California's Proposition 8, left standing lower court decisions which had held that the denial of same-sex marriage under the circumstances of the case to be unconstitutional.[15]

Because of these landmark decisions, the United States Department of Labor, which oversees employer-based pension and health insurance plans, declared that same-sex spouses were entitled to the same protections as opposite-sex spouses.[16] Companies such as Exxon-Mobil Corporation, which provides benefits to 77,000 workers and retirees in the United States, have extended health insurance to married same-sex couples effective October 1, 2013, following the direction of the Internal Revenue Service, which has said that same-sex couples could be considered married for federal tax law purposes even if they do not live in a state that recognizes their union.[17]

The other backdrop against these cases is that twenty-two jurisdictions including the District of Columbia and twenty-one states now prohibit discrimination in the workplace on the basis of sexual orientation.[18] At

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[15] Hollingsworth v. Perry, 558 U.S. 183, 184-85 (2013). Seventeen states and the District of Columbia currently authorize same-sex marriages, including California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 14, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx. The recent Hawai'i marriage equality bill was signed into law in November 2013. *See Abercrombie Signs Same-Sex Marriage Bill into Law*, HONOLULU STAR ADVERTISER (Nov. 13, 2013, 9:54 AM), http://www.staradvertiser.com/news/breaking/20131113_Abercrombie_to_sign_samesex_marriage_bill_into_law.html. Litigation continues in Oklahoma, where a federal district court judge recently ruled the state's ban on same-sex marriage to be unconstitutional. *See* Bishop v. United States *ex rel.* Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). A federal district court judge similarly found Utah's ban on same-sex marriage to be unconstitutional, Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013), but the decision was stayed by Justice Sotomayor in January 2014 pending appeal to the Court of Appeals for the Tenth Circuit, *see* Herbert v. Kitchen, 134 S. Ct. 893 (2014) (mem.), *stay granted* No. 13A687, 82 USLW 3382 (U.S. Jan. 6, 2014)(stay previously denied in Utah District court on December 23, 2013).

[16] U.S. DEP'T OF LABOR, TECHNICAL RELEASE NO. 2013-04 (2013), *available at* http://www.dol.gov/ebsa/newsroom/tr13-04.html.

[17] Tara Siegel Bernard, *Exxon to Extend Health Care to Married Same-Sex Couples*, N.Y. TIMES, Sept. 28, 2013, at B1, *available at* http://www.nytimes.com/2013/09/28/business/exxon-to-extend-health-care-to-married-same-sex-couples.html?_r=0.

[18] *See* WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 390 (5th ed. 2013). In addition to the District of Columbia, statutory provisions regarding sexual orientation discrimination exist in California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *See* U.S.

least 163 cities and counties have similar bans.[19] The issue continues to be debated at the federal level, and the Senate has passed legislation banning sexual orientation discrimination in 2013,[20] notwithstanding House Speaker John Boehner's contention that its enactment into law would promote frivolous litigation.[21]

Beyond the same-sex marriage cases and their relationship to employment, the Court decided another important case involving race and voting, *Shelby County v. Holder*,[22] and ruled in a manner which illustrates its treatment of cases involving racial discrimination generally.

III. *SHELBY COUNTY* AND THE VOTING RIGHTS ACT OF 1965

In this case, a closely-divided Court examined the coverage formula and preclearance requirements contained in the Voting Rights Act of 1965, requirements providing for no change in voting procedures in covered jurisdictions prior to clearance.[23] Speaking on behalf of a sharply divided 5-4 Court, Chief Justice Roberts delivered an opinion holding that the Act, in relevant part, was unconstitutional.[24] The majority opinion, utilizing language that one would normally expect from Congress rather than the judiciary, declared that "conditions that originally justified these [preclearance] measures no longer characterize voting in the covered jurisdictions."[25] Though stating that no one doubted that "voting discrimination still exists,"[26] the Court stressed the "broad autonomy" that

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GOV'T ACCOUNTABILITY OFFICE, GAO-13-700R, UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA ON EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 2 n.4 (2013).

[19] GOULD, *supra* note 18, at 390 & n.194.

[20] Congress has been debating a bill prohibiting discrimination on the basis of sexual orientation or gender identity, the Employment Nondiscrimination Act, for the first time since a similar bill was rejected in 1996. *See* Jeremy W. Peters, *Bill Advances to Outlaw Discrimination Against Gays*, N.Y. TIMES, Nov. 5, 2013, at A10, *available at* http://www.nytimes.com/2013/11/05/us/politics/bill-on-workplace-bias-appears-set-to-clear-senate-hurdle.html; Jeremy W. Peters, *Senate Vote on Workplace Bias Against Gays Poses a Test for the G.O.P.*, N.Y. TIMES, Nov. 4, 2013, at A16, *available at* http://www.nytimes.com/2013/11/04/us/politics/senate-vote-on-workplace-bias-against-gays-a-test-for-the-gop.html.

[21] *See* Bob Egelko, *Boehner's Dismissal of Gay-Rights Bill: "Frivolous Litigation,"* SFGATE (Nov. 7, 2013), http://blog.sfgate.com/nov05election/2013/11/07/boehners-dismissal-of-gay-rights-bill-frivolous-litigation/.

[22] 133 S. Ct. 2612 (2013).

[23] *See generally id.*

[24] *Id.* at 2631.

[25] *Id.* at 2618.

[26] *Id.* at 2619.

the States possess in structuring government,[27] referenced the Tenth Amendment, which reserves powers to the States not "specifically granted to the Federal Government,"[28] and concluded that the 1965 statute's "disparate treatment" of the States was a sharp departure from state sovereignty.[29]

Said Chief Justice Roberts on behalf of the majority of the Court in reviewing practices that led to the Voting Rights Act of 1965: "Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force."[30]

Noting that the Voting Rights Act had "in large part" improved voting and the fact that the black voter turnout exceeded white voters in five of the six states originally covered, the Court observed that Shelby, Alabama, and Philadelphia, Mississippi, the locations of some of the most well-publicized civil rights demonstrations and their oppression, now had black mayors, concluding that "our Nation has made great strides."[31] Congress, said the Court, could not divide the states on the basis of data which did not comport with current conditions, and rejected the proposition that the procedures which result in the dilution of votes were those at which the statute was aimed, i.e., voting tests and access to the ballot.[32] Accordingly, the Court struck down as unconstitutional the statutory preclearance procedures requiring Justice Department approval before implementation of voting procedure changes, which, it claimed, it did not do "lightly" though it did not affect the permanent nationwide ban on racial discrimination in voting.[33]

Justice Ginsburg, in what can only be characterized as a tour de force, dissented on behalf of herself and three other Justices.[34] As she noted, the Voting Rights Act of 1965, the response to "rank discrimination against minority voting rights" a century after the Fourteenth and Fifteenth Amendments to the Constitution's right to vote free of discrimination, was more than a response to the ineffective legislation which preceded it.[35] Said Justice Ginsburg: "Early attempts to cope with this vile infection

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[27] *Id.* at 2623.

[28] *Id.* (citing U.S. CONST. amend. X).

[29] *Id.*

[30] *Id.* at 2625.

[31] *Id.* at 2626.

[32] *See generally id.* at 2628-31.

[33] *Id.* at 2631. Justice Thomas concurred. *Id.* (Thomas, J., concurring).

[34] Justices Breyer, Sotomayor, and Kagan joined in Justice Ginsburg's dissent. *See id.* at 2632 (Ginsburg, J., dissenting).

[35] *Id.* at 2633.

resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place."[36]

Her opinion noted that the Voting Rights Act had become "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history," predicated as it was on the federal preclearance to voting laws in covered jurisdictions where opposition to the Constitution's commands had been most "virulent."[37] The Ginsburg dissent noted that Congress had reauthorized the statutory scheme in light of the so-called "second generation barriers," and that in conducting hearings Congress had not taken its task lightly, engaging itself in extensive hearings of considerable length.[38] Congress had noted that racially polarized voting in the covered jurisdictions "increased the political vulnerability of racial and language minorities" there.[39]

Justice Ginsburg stressed the fact that in enacting legislation dealing with voting and racial discrimination, the question was not whether Congress had chosen the wisest means available, but rather had it employed "rationally selected means appropriate to a legitimate end,"[40] noting that the Court had repeatedly affirmed the statute's constitutionality and that Congress had adhered to that "very model."[41]

Thus emphasizing the power possessed by Congress, the Ginsburg dissent also noted the frequency of voting changes blocked based upon a determination that the changes were discrimination (700 between 1982 and 2006) and the success that both the Justice Department and private plaintiffs had possessed in obtaining 100 actions to enforce the preclearance requirements.[42] Justice Ginsburg noted that ordinary litigation "was an inadequate substitute for preclearance in the covered jurisdictions" because it "occurs only after the fact," when voting has already occurred and candidates have obtained positions and "gain[ed] the advantages of incumbency."[43] Concluding that Congress had been particularly concerned about the potential for backsliding, Justice Ginsburg noted that the "covered jurisdictions have a unique history of problems with racial discrimination in

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[36] *Id.*

[37] *Id.* at 2634. *See generally* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

[38] *Shelby Cnty.*, 133 S. Ct. at 2636 (Ginsburg, J., dissenting).

[39] *Id.*

[40] *Id.* at 2637 (citing Katzenbach v. Morgan, 384 U.S. 641, 653 (1966)).

[41] *Id.* at 2638.

[42] *Id.* at 2639.

[43] *Id.* at 2640.

voting" and that "[c]onsideration of this long history, still in living memory, was altogether appropriate."[44]

Contrasting the "great care and seriousness" of Congress in its reauthorization with the Court's majority *Shelby County* opinion, Justice Ginsburg derided the Court for disregarding precedent and "hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments" without even "grappl[ing] with the legislative record."[45] Her opinion cites Alabama's "sorry history" of voting rights violations, some of them in evidence in 2010-2011 based upon FBI investigations of the state senate, where members had referred to blacks as "Aborigines" and talked openly of the need to quash a particular referendum because it might increase black voter turnout.[46] Said Justice Ginsburg: "These conversations occurred not in the 1870s, or even in the 1960s, they took place in 2010. . . . Hubris is a fit word for today's demolition of the [Voting Rights Act]."[47] Said Justice Ginsburg, in a passage that will surely be quoted for generations to come: "Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[48]

Again, Justice Ginsburg stressed the voluminous history of recent discrimination relating to Alabama and its counties, and the fact that it still had a "substantial real-world effect."[49] Curiously, there is hardly a word in Chief Justice Roberts's opinion that is in any way responsive. He had the votes and no need to engage in argument based upon facts, and thus Justice Ginsburg's conclusion that the Court erred "egregiously" by substituting its determination for that of Congress in declaring the statute unconstitutional goes unrebutted.[50] In the wake of *Shelby County*, the Justice Department has now embarked upon a much more formidable and burdensome process than the preclearance procedures previously provided.[51] Additionally, new legislation has been introduced to fill some of the *Shelby County* void.[52]

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[44] *Id.* at 2642.

[45] *Id.* at 2644.

[46] *Id.* at 2646-74.

[47] *Id.* at 2647-48.

[48] *Id.* at 2650.

[49] *Id.* at 2651.

[50] *Id.* at 2652.

[51] *See* Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, WASH. POST (July 25, 2013), http://www.washingtonpost.com/politics/justice-department-to-challenge-states-voting-rights-laws/2013/07/25/c26740b2-f49b-11e2-a2f1-a7acf9bd5d3a_story.html (discussing Attorney General Eric Holder's intention to "blunt the effect" of *Shelby County* through more active litigation to enforce voting laws). Since *Shelby County*, Attorney

IV. *VANCE V. BALL STATE UNIVERSITY*:[53] THE NEXT CHAPTER IN HARASSMENT CASES

Vance v. Ball State University, presenting new issues arising under the hostile work environment line of authority, represents an important interpretation of Title VII of the Civil Rights Act of 1964,[54] the most comprehensive workplace antidiscrimination legal instrument, which now spans a half-century period. The statute is the major law aimed at the prohibition of discrimination on account of race, sex, religion, national origin, or color;[55] other statutes intervene in both age and disability discrimination issues.[56] In *Vance*, a sharply divided 5-4 Court addressed a supervisory harassment issue not explicitly resolved in precedent,[57] the question of what standard should be applied in defining a supervisor who could speak on behalf of the employer.[58] If such an individual fashioned a "tangible employment action," the employer was strictly liable—but if no tangible action was taken, the employer might escape liability by establishing as an affirmative defense that: (1) "the employer exercised

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General Holder has adopted an "aggressive approach" to attack discriminatory voting practices, including the use of section 3 of the Voting Rights Act, a previously "rarely used provision of the act," in place of the old preclearance procedures undermined by the Supreme Court's decision. The Editorial Board, *A New Defense of Voting Rights*, N.Y. TIMES, July 28, 2013, at SR10, *available at* http://www.nytimes.com/2013/07/28/opinion/sunday/a-new-defense-of-voting-rights.html?_r=0; *see also* Charlie Savage, *U.S. Is Suing in Texas Cases over Voting by Minorities*, N.Y. TIMES, Aug. 23, 2013, at A12, *available at* http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html; The Editorial Board, *The Dishonesty of Voting ID Laws*, N.Y. TIMES, Oct. 1, 2013, at A18, *available at* http://www.nytimes.com/2013/10/01/opinion/the-dishonesty-of-voter-id-laws.html; Adam Liptak, *Judge Reinstates Some Federal Oversight of Voting Practices for an Alabama City*, N.Y. TIMES, Jan. 15, 2014, at A11, *available at* http://www.nytimes.com/2014/01/15/us/judge-reinstates-federal-oversight-of-voting-practices-for-alabama-city.html.

[52] *See* Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. (2014); *see also* The Editorial Board, *A Step Toward Restoring Voting Rights*, N.Y. TIMES, Jan. 19, 2014, at SR10, *available at* http://www.nytimes.com/2014/01/19/opinion/sunday/a-step-toward-restoring-voting-rights.html.

[53] 133 S. Ct. 2434 (2013).

[54] 42 U.S.C. §§ 2000e to 2000e-17 (2012).

[55] *Id.* § 2000e-2(a).

[56] *E.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213.

[57] *See Vance*, 133 S. Ct. at 2439 (stating that Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) left open the question of "who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment?").

[58] *Id.*

reasonable care to prevent and correct . . . any . . . harassing behavior"; and (2) the plaintiff "unreasonably failed to take advantage of the preventive or corrective opportunities" that the employer provided.[59]

Vance, the plaintiff in this case, filed internal complaints and charges with the Equal Employment Opportunity Commission ("EEOC"), prior to commencement of Title VII litigation, alleging harassment at work.[60] The district court held that because of the finding that the white employee alleged to have engaged in harassing conduct was not a supervisor and could not "hire, fire, demote, transfer, or discipline" the plaintiff, the defendant, Ball State University, could not be held vicariously liable for the alleged racial harassment, and as the employer, could not be "liable in negligence because it responded reasonably to the incident[]."[61] The Court of Appeals for the Seventh Circuit affirmed,[62] and the majority of the Supreme Court held likewise.[63]

Here, with Justice Alito writing for five of the nine Justices, the Supreme Court rejected what it characterized as the "nebulous definition" of a supervisor advocated by the EEOC in its Guidance, as well as several courts of appeals.[64] The Court noted that Title VII does not contain a definition of supervisor[65] and that the issue could be resolved more easily and clearly if the test was whether the employee had the power to take tangible employment actions.[66] Said the Court, speaking through Justice Alito:

> The ability to direct another employee's tasks is simply not sufficient. Employees with such powers are certainly capable of creating intolerable work environments . . . but so are many other co-workers. Negligence provides the better framework for evaluating an employer's liability when a harassing employee lacks the power to take tangible employment actions.[67]

The majority was of the view that the "strong implication" of the use of the words "tangible employment actions" means that the supervisor possessed official powers to bear on subordinate employees.[68] This approach, which requires hiring, firing, etc. authority, said Justice Alito, would provide more precision so that it would be known before litigation

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[59] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

[60] *Vance*, 133 S. Ct. at 2439.

[61] *Id.* at 2440.

[62] *Id.* (citing Vance v. Ball State Univ., 646 F. 3d 461 (7th Cir. 2010)).

[63] *Id.* at 2454.

[64] *Id.* at 2443.

[65] *Id.* at 2446 ("'Supervisor' is not a term used by Congress in Title VII.").

[66] *Id.* at 2443-44.

[67] *Id.* at 2448.

[68] *Id.*

who was a supervisor, whereas, in his view, the EEOC approach would be "very often . . . murky."[69] The Court contended that this would not leave employees unprotected against harassment inasmuch as they could establish liability by showing that the employer was negligent in permitting the harassment to occur.[70]

Justice Ginsburg dissented on behalf of three other Justices.[71] Said Justice Ginsburg:

> The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions. The limitation the Court decrees diminishes the force of [precedent on employer liability], ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces.[72]

Justice Ginsburg noted that "[w]orkplace realities fortify my conclusion that harassment by an employee with power to direct subordinates' day-to-day work activities should trigger vicariously employer liability" and then proceeded to detail examples from cases where a person vested with authority to control employment conditions had used that to aid harassment.[73] Justice Ginsburg derided the idea that the majority view had established a clear and workable definition.[74] She emphasized that

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[69] *Id.* at 2449.

[70] *Id.* at 2451.

[71] Justices Breyer, Sotomayor, and Kagan joined Justice Ginsburg's dissent. *Id.* at 2454 (Ginsburg, J., dissenting).

[72] *Id.* at 2455.

[73] *Id.* at 2459-60.

[74] *Id.* at 2461-62 ("A supervisor, the Court holds, is someone empowered to 'take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' . . . Whether reassignment authority makes someone a supervisor might depend on whether the reassignment carries economic consequences. . . . The power to discipline other employees, when the discipline has economic consequences, might count, too. . . . So might the power to initiate or make recommendations about tangible employment actions. . . . And when an employer 'concentrates all decisionmaking authority in a few individuals' who rely on information from 'other workers who actually interact with the affected employee,' the other workers may rank as supervisors (or maybe not; the Court does not commit one way or the other). . . . Someone in search of a bright line might well ask, what counts as 'significantly different responsibilities'? Can *any* economic consequence make a reassignment or disciplinary action 'significant,' or is there a minimum threshold? How concentrated must the decisionmaking authority be to deem those not formally endowed with that authority nevertheless 'supervisors'?" (emphasis in original) (internal citations omitted)).

supervisors, like workplaces, "come in all shapes and sizes."[75] Said Justice Ginsburg:

> Whether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly different responsibilities?), or a law firm associate supervises the firm's paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches. One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim.[76]

The dissent noted the fact that many in the workforce can control and have an impact on the employees' employment status and not fit the definition of a supervisor which the Court established—one that is akin to that provided by the National Labor Relations Act,[77] where the determination involves not only what kind of liability the employer possesses but also which individuals will vote in NLRB-conducted secret ballot box elections.[78] The example provided is that of the law professor whose judgments might affect the status of secretaries or administrative assistants, yet retains no power to hire, fire, etc., as set forth in the Alito opinion.[79] Justice Ginsburg's opinion recites other typical controversies as well.

In one example Justice Ginsburg subsequently provided: The case involved a female highway maintenance worker given assignments by

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[75] *Id.* at 2463.

[76] *Id.*

[77] 29 U.S.C. §§ 151-169 (2012).

[78] The NLRA statutory provision, section 2(11), is part of the Taft-Hartley Amendments, which arose from the Supreme Court's holding in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), *superseded by statute*, 61 Stat. 137-138, 29 U.S.C. § 152(3), *as recognized in* NLRB v. Town & Country Elec. Inc., 516 U.S. 85 (1995). *See* GOULD, *supra* note 18, at 56. Over Justice Douglas's dissent, the Court held that supervisors were protected by the Act. *Packard Motor Car Co.*, 330 U.S. at 489. Justice Douglas observed that protection of such individuals would create divided loyalties and conflicts of interest, *id.* at 493-501 (Douglas, J., dissenting), and his suggestion that Congress had intended to excluded such individuals from statutory protection, *id.* at 500, was confirmed by the 80th Congress. Congress defined "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (2012).

[79] *See Vance*, 133 S. Ct. at 2439-54.

employees called "lead workers."[80] Sex-based incentives were hurled at the female worker and a pornographic image was taped to her locker.[81] The lead worker forced her to wash his truck in sub-zero weather, assigned her to undesirable yard work instead of road-crew work, and directed other employees to give her no aid in fixing a malfunctioning heating system in her truck.[82] Harassing conduct? Concededly yes. Was the lead worker in charge of the harassed employee's daily work activities? Certainly. But the lead worker lacked authority to hire, fire, or take other tangible employment actions. So under the Court's decision, the lead worker would rank merely as a coworker, not a supervisor. Consequently, the maintenance worker would be left without an effective remedy unless she could prove that the employer knew or should have known of the harassment.[83]

The dissent emphasized that under the *Vance* Court's reasoning and holding, the harassment victims will be without an effective remedy, and that Title VII's "capacity to prevent workplace harassment" will be substantially limited.[84] Dismissing the majority's contention that it could all be resolved by establishing negligence, Justice Ginsburg noted that it is not:

> uncommon for employers to lack actual or constructive notice of a harassing employee's conduct. . . . An employee may have a reputation as a harasser among those in his vicinity, but if no complaint makes its way up to management, the employer will escape liability under a negligence standard.[85]

Thus, the *Vance* holding shifted the framework of harassment cases in a more "employer friendly" direction, and the limited scope of vicarious liability, i.e., to those supervisors "formally empowered" to take tangible employment actions, would diminish the incentive to "train those who control their subordinates' work activities and schedules . . . ."[86] In essence, the approach taken in *Vance* seems to have promoted a kind of "see no evil, hear no evil," though much evil could nonetheless be done.

Finally, Justice Ginsburg noted the frequency with which Congress has had to intervene to correct the Court's "wayward interpretations of Title

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[80] *Id.* at 2459 (Ginsburg, J., dissenting).

[81] *Id.*

[82] *Id.*

[83] Justice Ruth Bader Ginsburg, Address at Stanford Law School, Constitution Day 2013: Highlights of the Court's 2012-2013 Term (Sept. 17, 2013), *available at* http://www.youtube.com/watch?v=5ZcLY4rAQOo.

[84] *Vance*, 133 S. Ct. at 2463 (Ginsberg, J., dissenting).

[85] *Id.* at 2464 (citations omitted).

[86] *Id.* at 2463-65.

VII,"[87] the most recent illustration being the adoption of her dissenting opinion in the *Ledbetter*[88] decision involving discriminatory pay for women.[89] Similarly, as she had noted,[90] Congress was called upon to reverse the Court in numerous instances through the Civil Rights Act of 1991.[91] As Justice Ginsberg concluded: "The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."[92] The difficulty is that, as one can see in countless illustrations, the House of Representatives as presently constituted is unlikely in the near future to remedy this error.[93]

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[87] *Id.* at 2466.

[88] *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 643 (2007) (Ginsberg, J. dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[89] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[90] *Vance*, 133 S. Ct. at 2466.

[91] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The legislation was passed by Congress in direct response to a series of Supreme Court decisions. *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* Burrage v. U.S., No. 12-7515, 2014 WL 273243 (Jan. 27, 2014); Martin v. Wilks, 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991, *as recognized in* Landgraf v. USI Film Products, 511 U.S. 244 (1994). For a general discussion of the 1991 amendments, see for example, William B. Gould IV, *The Law and Politics of Race: The Civil Rights Act of 1991*, 44 LAB. L.J. 323 (1993); Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993); Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993); Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305 (2001); *see also* William B. Gould IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990); Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583 (1991); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

[92] *Vance*, 133 S. Ct. at 2466.

[93] Even prior to the more recent Supreme Court decisions, Congress has never taken action to alter the Court's error in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *see also* WILLIAM B. GOULD IV, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 66-98 (1977); George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective*

V. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR*:[94] WHAT CONSTITUTES PROOF OF DISCRIMINATION?

In this case, which involved how discrimination can be proved, the Court, again divided 5-4, noted the congressional mandate contained in the 1991 amendments that where lawful motives are causative in the employer decision along with those that are unlawful, i.e., the so-called "mixed motive" cases, and refused to extend this "lessened causation standard" to similar claims of retaliation under Title VII.[95] Here a majority of the Court, speaking through Justice Kennedy, relied upon an age discrimination ruling of four years ago, which had required proof that the employee must show that the unlawful motive would have caused the discrimination, under the so-called "but for" test, such that "but for" the unlawful reasons the employee would have been retained, promoted, or hired—a standard more difficult for plaintiffs to pursue successfully.[96] In the case before the Court, the University of Texas Southwestern Medical Center, an academic institution within the University of Texas system, affiliated with a hospital which had permitted students to gain clinical experience working in its facilities, and had an agreement with the hospital that required the hospital to offer empty staff position posts to the University's faculty members.[97]

The plaintiff was a medical doctor of Middle Eastern descent, who specialized in internal medicine and infectious diseases, hired to work as a member of the University's faculty and in a staff position at the hospital.[98] His ultimate superior, he alleged, was biased against him on account of his religion and ethnic heritage.[99] The plaintiff tried to arrange to continue working on a hospital assignment without continuing his position as a faculty member.[100] When it appeared that this may be possible, the plaintiff resigned his teaching post, sending a letter alleging harassment stemming from religious, racial, and cultural bias against Arabs and Muslims.[101]

Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969); William B. Gould IV, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967); William B. Gould IV, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*, 47 TEX. L. REV. 1039 (1969). *Cf.* William B. Gould IV, *The High Court Discriminates Between Sex and Race*, N.Y. TIMES, June 12, 1977, at 153.

[94] 133 S. Ct. 2517 (2013).

[95] *Id.* at 2523.

[96] *Id.*; *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[97] *Nassar*, 133 S. Ct. at 2523.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 2523-24.

When the offer to work at the hospital was withdrawn, the plaintiff brought an action alleging both unlawful harassment as well as retaliation for complaining about the harassment.[102]

The jury found for the plaintiff on both claims, awarding damages on both constructive discharge grounds as well as retaliation.[103] The Court of Appeals for the Fifth Circuit, affirming in part and vacating in part, affirmed on the retaliation finding, holding that retaliation required only a showing that it was a "motivating factor for the adverse employment action, rather than its but-for cause"—the same standard adopted for liability purposes in the 1991 amendments to the Civil Rights Act.[104]

The Supreme Court majority noted that the Civil Rights Act of 1991 affirmed liability in mixed motive cases where the prohibited reason was simply one of a number of motivating factors, and simultaneously limited the remedy of both monetary damages and reinstatement where the employer proved that "it would still have taken the same employment action."[105] In so doing with regard to remedies, Congress codified the so-called *Price Waterhouse* test, which had established that where the discrimination was a "motivating" or "substantial" factor in the employer's adverse employment decision,[106] the employer could avoid liability by simply proving that it would have taken the same action in the absence of discriminatory animus.[107] The employer would be required to show that the discrimination was not a "but-for" cause of the action taken.[108]

Nonetheless, the 5-4 majority in *Nassar* concluded that notwithstanding the fact that *Gross* stood for the proposition that a different standard should apply to the Age Discrimination in Employment Act ("ADEA") since it provided for a separate statutory scheme, that standard was now

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[102] *Id.* at 2524.

[103] *Id.*

[104] *Id.*; *see also* Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 454 (5th Cir. 2012).

[105] *Nassar*, 133 S. Ct. at 2526-28.

[106] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994). However, there may be a different interpretation of the "but-for causation" requirement imposed by the Court. *See* Burrage v. U.S., 134 S. Ct. 881, 889 n.4 (2014) ("*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is not to the contrary. The three opinions of six Justices in that case did not eliminate the but-for-cause requirement imposed by the 'because of' provision of 42 U.S.C. § 2000e–2(a), but allowed a showing that discrimination was a 'motivating' or 'substantial' factor to shift the burden of persuasion to the employer to establish the absence of but-for cause. See *Nassar*, 133 S. Ct. 2517, 2525–2527 (2013). Congress later amended the statute to dispense with but-for causality. Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)).").

[107] *Nassar*, 133 S. Ct. at 2526.

[108] *Id.*

appropriately incorporated into the antiretaliation cases of Title VII because the 1991 "motivating factor" standard relating to liability did not explicitly incorporate any provisions other than the substantive unlawful employment practices themselves, as opposed to the retaliation provisions of the statute.[109]

The majority seemed particularly concerned with the fact that antiretaliation charges had risen so appreciably in recent years,[110] a phenomenon caused, in substantial part, by the Court's decisions themselves (though the majority opinion did not allude to this).[111] The Court stressed that the causation issue involved has:

> central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency. . . . Indeed, the number of retaliation claims filed with the EEOC has now outstripped those for every type of status-based discrimination except race.[112]

Said the Court:

> [L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer [sic], administrative agencies, and courts to combat workplace harassment. Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation. If respondent were to prevail in his argument here, that claim could be established by a lessened causation standard, all in order to prevent the undesired change in employment circumstances. Even if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage. . . . It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent. . . . Yet there would be a

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[109] *Id.* at 2526-27 (citing Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 178 n.5 (2009)).

[110] *Id.* at 2531 ("This is of particular significance because claims of retaliation are being made with ever-increasing frequency.").

[111] *Id.; see, e.g.*, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005); Gomez-Perez v. Potter, 553 U.S. 474 (2008); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011).

[112] *Nassar*, 133 S. Ct. at 2531.

> significant risk of that consequence if respondent's position were adopted here.[113]

Justice Ginsburg, in her dissenting opinion, stressed the fact that a leading reason for employee silence about discrimination is the fear of retaliation,[114] and that retaliation complaints were "tightly bonded to the core prohibition [of discrimination] and cannot be disassociated from it."[115] Next the dissent pointed out that there is "scant reason" to accept the view that Congress intended to exclude retaliation claims from the newly enacted 1991 amendment's "motivating factor" provision, and that the 1991 amendments were focused upon "any employment practice."[116] Justice Ginsburg also relied upon the EEOC guidance that was contrary to the *Nassar* majority, referring to precedent in which retaliation had been prohibited under the antidiscrimination prohibitions even when the statute did not mention it.[117] Justice Ginsburg said: "It is strange logic indeed to conclude that when Congress homed in on retaliation and codified the proscription, as it did in Title VII, Congress meant protection against that unlawful employment practice to have *less* force than the protection available when the statute does not mention retaliation."[118]

The Ginsburg dissent noted that, on the one hand *Gross* had been decided because the age discrimination prohibitions were made under a different statutory scheme, and yet in *Nassar* the majority had concluded that there was no "meaningful textual difference" between the ADEA and Title VII.[119] Said the dissent: "What sense can one make from this, other than 'heads the employer wins, tails the employee loses'?"[120]

Penultimately, Justice Ginsburg noted that jurors would be confused by two different standards, i.e., one for status-based discrimination, and the

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[113] *Id.* at 2531-32. This, of course, is the same mantra put forward by Speaker Boehner, *see supra* note 21 and accompanying text, the difference being that Congress has already enacted the statute here, but that the Court nonetheless found this policy consideration relevant to its interpretation of the statute. For an excellent critique of *Nassar* and the Court's reasoning, see Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. (forthcoming 2014).

[114] *Nassar*, 133 S. Ct. at 2534-35 (Ginsburg, J., dissenting) (citing Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271 (2009)).

[115] *Id.* at 2535.

[116] *Id.* at 2539.

[117] Id. at 2541 (citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005)).

[118] *Id.* (emphasis in original).

[119] *Id.* at 2544-45.

[120] *Id.* at 2545.

other for retaliation, where both were at issue.[121] This would inevitably, noted the dissent, "sow confusion."[122]

Finally, the dissent noted that the majority opinion not only lacked "sensitivity to the realities of life at work," but also "appear[ed] driven by a zeal to reduce the number of retaliation claims filed against employers. . . . Congress had no such goal in mind when it added [the 1991 amendments] to Title VII."[123] At a minimum, a policy aimed at discouraging frivolous litigation is not at the core of the statute and has little to do with its overriding objectives.[124] Accordingly the dissent here again, as in *Vance*, called for another Civil Rights Restoration Act along the lines that Congress was called upon to enact more than two decades ago. In this arena, *Shelby County*, *Vance*, and *Nasser*, Justice Ginsberg's views were discounted for the moment—but the passage of time may render another verdict by Congress as well as the public.

VI. AFFIRMATIVE ACTION: *FISHER V. UNIVERSITY OF TEXAS*[125]

This case involved the University of Texas's affirmative action plan.[126] As Justice Ginsburg has recently said: "Indicative of the contentiousness of the case, more than thirty-six weeks [257 days] elapsed from oral argument to decision."[127]

Texas had two procedures, the first of which guaranteed admission to students ranking in the top ten percent of any Texas high school graduating class—and the policy that triggered the litigation before the Court in *Fisher* was one in which the university counted race as a plus factor for applicants rankings below the top ten percent.[128] The plaintiff did not fall within the top ten percent, and when denied admission she attacked the University's policy as an unconstitutional racial preference.[129]

The most immediate backdrop to this litigation was the Supreme Court's decade-old decision in *Grutter v. Bollinger*,[130] where the Court had rejected a challenge to the University of Michigan's law school admission plan. The 8-1 *Fisher* Court, with Justice Ginsburg dissenting and Justice

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[121] *Id.* at 2546.
[122] *Id.*
[123] *Id.* at 2547 (citations omitted).
[124] *See* Sperino & Thomas, *supra* note 113.
[125] 133 S. Ct. 2411 (2013).
[126] *Id.* at 2415-17.
[127] Ginsburg, *supra* note 83.
[128] *Fisher*, 133 S. Ct. at 2415-17.
[129] *Id.* at 2417.
[130] 539 U.S. 306 (2003).

Kennedy writing the majority opinion, vacated a court of appeals' holding that denied the plaintiffs' challenge.[131]

The Court stated that the court of appeals had erred by not holding the University to the "demanding burden of strict scrutiny" articulated in the earlier *Grutter* decision, and that of Justice Powell in *Bakke*.[132] Accordingly, the decision was vacated and the case remanded for further proceedings.[133] In the Court's opinion, Justice Kennedy seemed to assume that the program first promulgated, i.e., the top ten percent procedure, did not consider race, even though "a more racially diverse environment" had been the result of it.[134] But this description was disingenuous inasmuch as the program had taken account of the segregated nature of Texas neighborhoods, thus providing for the admission of the top students in black and Latino schools, who might not qualify if considered in a pool of all students.

Regarding the second and more explicitly race conscious policy, the Court nonetheless said that it required a "searching examination" inasmuch as "strict scrutiny" assumed that the government would carry the burden to establish that the racial classification was "unquestionably legitimate."[135] The judicial deference to education authorities undertaken in *Grutter* seemed now forgotten.[136]

Justice Scalia concurred, noting that no party had suggested the overruling of the *Grutter* decision, but suggesting that he would seriously entertain this position if advanced.[137] Justice Thomas, not as concerned with what had been argued or advanced in *Fisher* itself, issued a lengthy concurring opinion stating that a "State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."[138] Justice Ginsburg dissented.[139]

Justice Ginsburg's opinion noted that the top ten percent rule was hardly race neutral, inasmuch as the "persistence of . . . segregation . . . [meant that] admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority

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[131] *Fisher*, 133 S. Ct. at 2411.

[132] *Id.* at 2415.

[133] *Id.* at 2421.

[134] *Id.* at 2416.

[135] *Id.* at 2419.

[136] Of course, whatever its rationale, the Court has lacked empathy for affirmative action. *See, e.g.*, *Bakke*, 438 U.S. 265; City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[137] *Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring).

[138] *Id.* at 2422 (Thomas, J., concurring).

[139] *See id.* at 2432-34 (Ginsburg, J., dissenting).

students was admitted to Texas universities."[140] Stating that she would not send the case back for a "second look," the dissenting opinion stated that Justice Powell's opinion in *Bakke* and the Court's holding in *Grutter* required "no further determinations."[141] The essence of Justice Ginsburg's position is that which she expressed a decade ago: "Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."[142] Nonetheless, given the present composition of the Court, the earlier opinions of Justice Kennedy,[143] the views of Justices Scalia, Thomas, and Alito,[144] as well as Chief Justice Roberts,[145] it would seem as though affirmative action is imperiled,[146] and that acceptance of Justice Ginsburg's view is for a future more distant than the civil rights cases of this past Term involving statutory interpretation.

VII: CLASS ACTIONS

The Court continued its handiwork involving interpretations of the Federal Arbitration Act of 1925, which provides in relevant part that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[147] by utilizing short-form arbitration clauses devised by companies for frequently unsuspecting employees and consumers, to trump

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[140] *Id.* at 2433 (quoting H. COMM. ON HIGHER EDUC., BILL ANALYSIS, H.B. 588, 75th Leg., R.S. 4-5 (1997)).

[141] *Id.* at 2434.

[142] *Id.* at 2434 n.4 (quoting Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting)).

[143] *E.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring).

[144] *E.g.*, Ricci v. DeStefano, 557 U.S. 557, 597, 602 (2009) (Alito, J., concurring) (accusing the defendants of discriminating in order to "placate" racial minorities, and emphasizing alleged attempts to "exacerbate[] racial tensions").

[145] *E.g.*, *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[146] Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 49 (mem.) (2013) (involving a challenge to a Michigan constitutional amendment prohibiting racial preferences by government institutions). The Court of Appeals for the Ninth Circuit has upheld a similar amendment in California. *See, e.g.*, Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012); Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

[147] 9 U.S.C. § 2 (2012). Beyond those cases discussed in the text, the Court also held that arbitrators are to decide in the first instance the validity of covenants not to compete, and that the prohibition is "outright" displaced by the Federal Arbitration Act. Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam).

litigation commenced by them. The question that arose in *American Express Co. v. Italian Colors Restaurant*,[148] involved the so-called effective vindication rule, which emerged in the 1980s to the effect that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum" arbitration may be maintained as a substitute for litigation.[149]

Until the 1980s arbitration had been perceived as inapplicable to public law statutory claims, though the Supreme Court in *Alexander v. Gardner-Denver Co.*[150] had held the view that "great weight" could be given to the arbitral award under some circumstances in a labor arbitration proceeding involving an employment discrimination complaint.[151] But beginning in the 1980s and eventually with the *Gilmer* decision the following decade,[152] the Court regarded arbitrators as capable to consider public law (specifically in antidiscrimination matters in the case of *Gilmer*[153]). The Court began to equate labor arbitration, which its earlier decisions had viewed as unique,[154] with commercial arbitration even though in contrast to the labor arbitration cases involving procedures negotiated between unions and employers where parties bargain in arms-length relationships, much of the arbitration in the commercial arena was of the adhesive short-form variety.

In the term preceding the past one, the Court, which in the 1980s and early 1990s had viewed arbitrators as public law experts,[155] now shifted

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[148] 133 S. Ct. 2304 (2013).

[149] *Id.* at 2310 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

[150] 415 U.S. 36, 60 n.21 (1974).

[151] *Id.* at 60 n.21 (noting that "[w]here an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight"). Initially, the Court in part relied upon some of the ideas I had put forward in William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PENN. L. REV. 40 (1969). In a rather confusing opinion, the Court seems to have repudiated much of the *Gardner-Denver* reasoning in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). *See* William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, *in* ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50, PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Paul D. Staudohar & Mark I. Lurie eds., 2011).

[152] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[153] *Id.* at 30 (rejecting plaintiff's "host of challenges to the adequacy of arbitration" and suggesting that arbitrators are generally competent to decide statutory discrimination claims).

[154] *See* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterp. Wheel & Car Corp., 363 U.S. 593 (1960).

[155] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989); Mitsubishi Motors

gears and held that arbitrators were ill-equipped to devise class action procedures and that, in any event, class actions would be inconsistent with the informality involved with arbitration.[156] Class actions, of course, were a major motivating consideration for employers that sought to avoid liability through the substitution of commercial arbitration for jury trials in courts of general jurisdiction.[157] On the other hand, class actions, regardless of the forum in which they are maintained, provide employees with leverage.[158]

Confronted with California's prohibition against arbitration that barred class actions as unconscionable,[159] the Court held that such a policy was inconsistent with the Federal Arbitration Act of 1925, which preempted state law and thus prohibited state policies in conflict with it.[160] In *AT&T v. Concepcion*, the Court stressed that class actions would undercut "confidentiality" and that arbitrators are "not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties,"[161] notwithstanding its previous pronouncement that arbitrators would be capable of handling public law issues.[162] Justice Scalia, speaking for the 5-4 majority, said (1) that class actions would sacrifice the "principal advantage of arbitration—its informality—and [would] make[] the process slower, more costly, and more likely to generate procedural morass than final judgment;"[163] (2) that it was unlikely that Congress, in passing the Federal Arbitration Act, had meant to leave these matters to arbitrators;[164] (3) that class actions would

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Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985).

[156] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 665 (2010); *cf.* Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) (holding that a Rule 68 offer to an individual employee moots Fair Labor Standards Act claims for collective relief); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (holding that class action was improperly certified since the lower court's damages model did not consider whether damages could be shown on a classwide basis).

[157] William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPL. REL. L.J. 404 (1988); ADHOC COMMITTEE ON TERMINATION AT WILL AND WRONGFUL DISCHARGE, EMPLOYMENT LAW SECTION, STATE BAR OF CALIFORNIA, TO STRIKE A NEW BALANCE 8-9, *reprinted in* LABOR & EMP. L. NEWS (Spec. Ed. Feb. 8, 1984), *available at* http://www.law.stanford.edu/sites/default/files/publication/259017/doc/slspublic/gould_strikeanewbalance.pdf.

[158] *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (involving sexual discrimination claims by female employees).

[159] Discover Bank v. Super. Ct., 36 Cal. 4th 148 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)).

[160] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

[161] *Id.* at 1751.

[162] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[163] *Concepcion*, 131 S. Ct. at 1751.

[164] *Id.*

"greatly increase[] risks to defendants," i.e., a "small chance of a devastating loss" would pressure defendants into "settling questionable claims."[165] Though the *Concepcion* issue involved preemption, the decision, along with an earlier one,[166] indicated substantial hostility to class actions and to the difficulties that they pose to defendant companies, which might be "pressured" into settlements to which they otherwise would not agree.[167]

Last term, the Court decided three cases involving arbitration, two of them involving important policy issues regarding class actions under the 1925 Act.[168] In the first of these cases, *Oxford Health Plans LLC v. Sutter*,[169] in an opinion authored by Justice Kagan, the Court addressed an agreement where it was clear that the arbitrator *should* decide whether the contract authorized class action arbitration, and he had resolved the issue affirmatively.[170] The Court, noting that its jurisprudence allowed an arbitral award to be vacated "only in very unusual circumstances," held that the parties had bargained for the arbitrator's construction of the agreement.[171] The Court noted that the arbitrator had concluded that class actions were authorized and that the Act permitted "courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly."[172] Said the Court, without dissent:[173] "All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough.... The arbitrator's construction holds . . . good, bad, or ugly."[174]

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[165] *Id.* at 1752.

[166] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

[167] *Concepcion*, 131 S. Ct. at 1752.

[168] *See, e.g.*, Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam); *see* also *supra* note 149 and accompanying text.

[169] 133 S. Ct. 2064 (2013).

[170] *Id.* at 2066-67.

[171] *Id.* at 2068 (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).

[172] *Id.* at 2070.

[173] *Cf. id.* at 2064 (Alito, J., concurring).

[174] *Id.* at 2070-71. The language employed here under the Federal Arbitration Act is more colorful and thus memorable, and perhaps more ambitious, than that contained in the Court's leading decisions involving section 301 of the National Labor Relations Act. *See e.g.*, United Steelworkers v. Enterp. Wheel & Car Corp., 363 U.S. 593 (1960). The Court reversed the lower court's refusal to enforce an arbitration award since it was not clear that the arbitrator had exceeded his authority, and instead the lower court "merely disagreed with the arbitrator's construction" of the contract. *Id.* at 598. The Court stated: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599; *cf.* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001) (noting the impropriety of courts

But a more important ruling was handed down in the above-noted *American Express Co. v. Italian Colors Restaurant.*[175] Here, the Court, 5-3,[176] upheld a waiver of class arbitration on the grounds that, notwithstanding the effective vindication rule, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim,"[177] and that antitrust law itself did not indicate a prohibition against the waiver of class action procedures, relying in part upon *Concepcion.*[178] The Court, acknowledging the point that if the plaintiff was forced to stand alone, its costs as an individual would far exceed any recovery, and conceding that high filing and administrative fees constituting a prerequisite to arbitration could act as a bar to a remedy, nonetheless concluded that "the fact that [the claim] is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy,"[179] and that class actions were not suddenly required by virtue of the effective vindication rule, noting that *Concepcion* "[t]ruth to tell . . . all but resolves this case."[180]

Justice Kagan, in a stinging dissent—one joined by Justice Ginsburg and Justice Breyer—rendered in an informal vernacular prose, said:

> Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. . . . And here is the nutshell of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.[181]

Justice Kagan's opinion emphasizes that if class actions cannot implement the effective vindication rule, the sharing or shifting of costs

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weighing the merits of the grievance when hearing an arbitration appeal); E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000) (holding that public policy considerations did not preclude upholding of arbitrator's decision); W.R. Grace & Co. v. Local 759, 461 U.S. 757 (1983) (holding, inter alia, that upholding of arbitrator's award would not be counter to public policy requiring obedience of court orders). Further, the Court noted in *Sutter* that it would be confronted with a "different issue" if the availability of class arbitration could be viewed under the rubric of a "question of arbitrability," and that under such circumstances courts could review the matter "*de novo* absent 'clear[] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve this dispute." *Sutter*, 133 S. Ct. at 2068 n.2 (alterations in original) (citation omitted).

[175] 133 S. Ct. 2304 (2013).

[176] Justice Sotomayor did not participate in the decision. *See id.* at 2304.

[177] *Id.* at 2309.

[178] *Id.* at 2312.

[179] *Id.* at 2311 (emphasis in original).

[180] *Id.* at 2312.

[181] *Id.* at 2313 (Kagan, J., dissenting).

can.[182] The fact of the matter is that *Italian Colors* leaves corporations with little incentive to provide such procedures given the fact that corporate defendants, through fashioning arbitration clauses, have given themselves such a broad de facto immunity from liability under public law. Noting that the agreement in question cut off not simply class arbitration, but also the reallocation of costs, the dissent would have refused to compel arbitration under these circumstances.[183]

Again, as in *Shelby County*, there was little if any response from the majority opinion to all of this. The business of the Court is business,[184] and *Italian Colors* represents how arbitration, initially promoted in the context of labor-management relations where the parties had truly bargained for it and costs were generally shared, made the Federal Arbitration Act a roadmap to the elimination of the implementation of statutory rights.[185]

VIII. GLOBALIZATION: THE ALIEN TORT CLAIMS ACT OF 1789

Nearly a decade ago, the Supreme Court had placed its imprimatur upon causes of action brought under the 1789 statute enacted by the First Congress involving violations of the "law of nations" or the norms of international law against parties that have engaged in such conduct abroad.[186] A 5-4 majority of the Court, in an opinion authored by Chief

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[182] *Id.* at 2316-17.

[183] *Id.* In support of the majority view, see *Class Actions—Class Arbitration Waivers—*American Express Co. v. Italian Colors Restaurant, 127 HARV. L. REV. 278, 285-86 (2013) [hereinafter *Class Actions*].

[184] Undoubtedly, this fact prompted the National Football League, for instance, to enter into a fairly favorable settlement with plaintiffs' attorneys in the concussion cases, very much weighted toward the interests of the NFL. *See* Ken Belson, *N.F.L. Agrees to Settle Concussion Suit for $765 Million*, N.Y. TIMES, Aug. 30, 2013, at A1, *available at* http://www.nytimes.com/2013/08/30/sports/football/judge-announces-settlement-in-nfl-concussion-suit.html?pagewanted=2&_r=0; Ken Belson, *Many Ex-Players May Be Ineligible for Payment in N.F.L. Concussion Settlement*, N.Y. TIMES, Oct. 18, 2013, at B10, *available at* http://www.nytimes.com/2013/10/18/sports/football/many-ex-players-may-be-ineligible-to-share-in-nfl-concussion-settlement.html. It may be that plaintiffs' attorneys were legitimately concerned about their prospects in this area on the issue of preemption as it relates to labor arbitration as much as on the merits. *Cf.* William B. Gould IV, *Football, Concussions, and Preemption: The Gridiron of National Football League Litigation*, 8 F.I.U. L. REV. 55 (2012). For a further discussion of the Roberts Court, see generally MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION (2013).

[185] For a sensible legislative answer, see *Class Actions*, *supra* note 183, at 287.

[186] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *cf. Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171 (2005); William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401, 409 (2010) (discussing cases utilizing the 1789 Act);

Justice Roberts, was of the view that nothing in the text of the statute provided a basis for the belief that Congress intended to recognize causes of action that had extraterritorial reach.[187] Seemingly forgotten was the Court's above-mentioned earlier ruling that under some circumstances international norms in the form of the law of nations could apply abroad under a statute that was jurisdictional and not regulatory.[188] To the argument that Congress obviously intended the law of nations to be applicable to piracy, the Court was of the view that piracy was different from conduct occurring in sovereign states inasmuch as it occurs "on the high seas, beyond the territorial jurisdiction of the United States or any other country," and that the law relating to pirates did not typically involve the imposition of American "sovereign will . . . onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences."[189] The Court stressed the point that there was "no indication" that Congress intended the United States to be a "uniquely hospitable forum for the enforcement of international norms."[190]

William B. Gould IV, *Fundamental Rights at Work and the Law of Nations: An American Lawyer's Perspective*, 23 HOFSTRA LAB. & EMP. L.J. 1, 22-28 (2005) (discussing the impact of *Sosa* on the use of the 1789 Act on subsequent labor cases). Lower courts had begun to protect some constitutional claims involving, for instance, freedom of association where labor organizations attempt to recruit workers and were thwarted by violence and the like abroad. *See* Gould, *Fundamental Rights*, *supra*, at 27-38.

[187] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[188] *Sosa*, 542 U.S. at 719-20.

[189] *Kiobel*, 133 S. Ct. at 1667.

[190] *Id.* at 1668; *see also* Balintulo v. Daimler AG, 727 F.3d 174, 189-90 (2d Cir. 2013) ("The Supreme Court's *Kiobel* decision, the plaintiffs assert, 'adopted a new presumption that ATS claims must 'touch and concern' the United States with 'sufficient force' to state a cause of action.' . . . The plaintiffs read the opinion of the Court as holding only that 'mere corporate presence' in the United States is insufficient for a claim to 'touch and concern' the United States, but that corporate citizenship in the United States is enough. . . . Reaching a conclusion similar to that of Justice Breyer and the minority of the Supreme Court in *Kiobel*, the plaintiffs argue that whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national. . . . We disagree. The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. . . . The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant 'conduct' or 'violation,' at least eight more times in other parts of its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because 'all the relevant conduct took place outside the United States . . . .' Lower courts are bound by that rule and they are without authority to 'reinterpret' the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants. . . . Accordingly, if all the relevant conduct occurred abroad, that is simply the

Accordingly, the Court looked back to *EEOC v. Arabian American Oil Co.*,[191] a holding almost immediately repudiated by Congress,[192] where Title VII's prohibition against discrimination, in this case against Jews by American companies in Saudi Arabia, was beyond the scope of antidiscrimination law.[193] Again, not only was the holding which *Kiobel* relied upon reversed by Congress, but its reasoning seems to have been undercut by a wide variety of decisions by the Supreme Court applying antitrust and securities laws beyond our national boundaries.[194]

Justice Breyer, on behalf of Justices Ginsburg, Sotomayor, and Kagan, concurred in the judgment, but concluded that the presumption against extraterritoriality should not be invoked where:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind.[195]

The concurrence stressed the fact that a "modest number of claims" were contemplated by the Court's decision of a decade ago interpreting the 1789 statute, and stated that a ship is like land for the purpose of relevant international law.[196] Though Justice Breyer concurred in the judgment given that plaintiffs were not United States nationals, that the conduct took place abroad, and that those who helped defendants were not American nationals either, with regard to the statute's general multinational application he continued:

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end of the matter under *Kiobel*." (citations omitted)).

[191] 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1071, *as recognized in* Arbaugh v. Y&H Corp., 546 U.S. 500 (2006).

[192] *See* Renee S. Orleans, *Extraterritorial Employment Protection Amendments of 1991: Congress Protects U.S. Citizens Who Work for U.S. Companies Abroad*, 16 MD. J. INT'L L.J. 147, 147 n.4 (2013) ("The Civil Rights Act of 1991 reversed the following cases: EEOC v. Arabian Oil Co., 11 S. Ct. 1227 (1991) . . . .").

[193] *Arabian Am. Oil Co.*, 499 U.S. at 246-47.

[194] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010); *cf.* Cal. Gas Transp., Inc., 347 NLRB 1314 (2006), *enforced*, 507 F.3d 847 (5th Cir. 2007) (declining to rule on extraterritoriality issue); Int'l Longshoremen's Ass'n, AFL-CIO, 323 NLRB 1029, 1031 (1998) (Gould, Chairman, concurring). *See generally* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

[195] *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

[196] *Id.*

> [W]ho are today's pirates? Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are 'fair game' where they are found. Like those pirates, they are 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.' . . . And just as a nation that harbored pirates provoked the concern of other nations in past centuries . . . so harboring 'common enemies of all mankind' provokes similar concerns today.[197]

The Breyer concurrence emphasized that there is no support for a presumption against extraterritoriality in the 1789 statute's jurisprudence, given the equivalence between the high seas and foreign soil for the exercise of jurisdiction, a feature which the Roberts majority opinion scarcely acknowledges.[198] The reasoning of the Court's opinion in *Kiobel* creates a kind of safe harbor for those who engage in conduct violative of the most "fundamental international norms."[199]

Though Justice Ginsburg[200] simply concurred in Justice Breyer's opinion, as she did with regard to Justice Kagan's position in *Italian Colors*, her previous writings make it clear that she is a staunch proponent of international norms that should be taken into account in constitutional adjudication as a general proposition.[201] The holding, a significant setback for international human rights,[202] leaves only a few relatively unappetizing escape valves through which to establish liability.[203]

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[197] *Id.* at 1672-73 (citations omitted).

[198] *Id.* at 1673.

[199] *Id.* at 1674.

[200] Subsequently, Justice Ginsburg has written the Court's opinion in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), holding that it was error "to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California," and that the Ninth Circuit had "paid little heed to the risks to international comity its expansive view of general jurisdiction posed[,]" since "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case." *Daimler AG*, 134 S. Ct. at 763. *See generally* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457 (2007).

[201] *See e.g.*, Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004); Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address to the Annual Meeting of the American Society of International Law (Mar. 30 – Apr. 2, 2005), *in* 99 AM. SOC'Y. INT'L. L. PRO. 351 (2005).

[202] *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 18, 2013, at A24, *available at* http://www.nytimes.com/2013/04/18/opinion/the-supreme-courts-setback-for-human-rights.html.

[203] Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After* Kiobel, MICH. B.J., Nov. 2013, at 44.

IX. CONCLUSION

The one area where this Court seems to have developed protection in the civil rights arena relates to homosexuality and, in particular, same-sex marriage—a development which is both fostered by and which will perhaps promote legislation comparable to that already afforded to race, sex, religion, national origin, age, disability, and the like. The changes in corporate behavior antedating the Court's 2013 rulings in this arena are even more startling and profound. The Court seems a step away from a judicial analogue to its ruling in *Loving v. Virginia*,[204] the last of the major desegregation cases of the 1960s, declaring prohibitions against interracial marriages unconstitutional, and one rendered subsequent to the eradication of job bias through Title VII. The most recent initiative regarding job-bias against gays has been undertaken as the result of congressional debate in 2013.[205]

But the broad themes of the Roberts Court all push in the opposite direction. *Shelby County*, *Vance*, and *Nassar* represent the erosion of civil rights protections provided a full century after the great post-Civil War constitutional amendments.[206] Here Justice Ginsburg took the lead in opposition to them, assigning these eloquent and farseeing dissents to herself.

"The great lives are lived *against* the perceived current of their times."[207] As we saw three decades earlier with Justice Brennan, this applies to Justice Ginsburg, most especially during the October 2012 term. She has already been successful in obtaining the reversal of the Court by Congress in civil rights cases, a phenomenon that irritates the Court's pro-business majority profoundly.[208] In contrast to the flag-salute cases, where the Court reversed itself within a few years,[209] it is unlikely that her dissents will become a majority in the next year or two. But given the always-possible composition of a new Court in the years to come, as was the case with the

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[204] 388 U.S. 1 (1967).

[205] *See* Peters, *Senate Vote on Workplace Bias*, *supra* note 18; *see also* Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 7, 2013, *available at* http://www.nytimes.com/2013/11/05/us/politics/bill-on-workplace-bias-appears-set-to-clear-senate-hurdle.html; 159 CONG. REC. S7,907-09 (daily ed. Nov. 7, 2013), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2013-11-07/pdf/CREC-2013-11-07.pdf.

[206] *See* Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1627 n.86 (2012).

[207] Kempton, *supra* note 6 (emphasis in original).

[208] Vance v. Ball State Univ., 133 S. Ct. 2434, 2452 (2013) (Alito, J.) (accusing Justice Ginsburg of "[i]mportuning Congress" in her dissent).

[209] *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Warren Court,[210] her views may well see the light of day and become transformed into those of the majority in the years to come.

[210] Harry Kalven, Jr., *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289 (1968); *see also* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965).