CHAPTER **2**

Appellate Practice

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CHAPTER **2**

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§ 2.1 Introduction: Is the Supreme Court Pro-Business?

This chapter highlights developments in the U.S. Supreme Court's 2012-2013 term that have particular significance for the business law community. The Roberts Court, which is often described as "pro-business," has received both praise and criticism for these decisions from commentators in academia, the legal profession, and the media.[1] This ongoing debate provides important context for the cases discussed in this chapter.

Adam Liptak, the Supreme Court correspondent for *The New York Times,* recently noted that "the Supreme Court's business decisions are almost always overshadowed by cases on controversial social issues."[2] Indeed, business cases before the U.S. Supreme Court often do not attract as much attention as the cases that feed the popular culture wars—but they are no less significant. As one commentator noted,

> Business cases at the Supreme Court typically receive less attention than cases concerning issues like affirmative action, abortion or the death penalty. The disputes tend to be harder to follow: the legal arguments are more technical, the underlying stories less emotional. But these cases—which include shareholder suits, antitrust challenges to corporate mergers, patent disputes and efforts to reduce punitive-damage awards and prevent product-liability suits—are no less important. They involve billions of dollars, have huge consequences for the

1. *See, e.g.*, Tony Mauro, *Is the Supreme Court Pro-Business? It depends how you define that*, Corporate Counsel (Oct. 1, 2010) ("Ever since the State of the Union message in January, the most persistent criticism of the U.S. Supreme Court from the left has been that it's pro-business.").

2. Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. Times (May 4, 2013) (hereafter, "Liptak, *Corporations Find a Friend*"), *available at* http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?_r=0.

> economy and can have a greater effect on people's daily lives than the often symbolic battles of the culture wars.[3]

The Court's most recent terms have been chock-full of controversial social issues, and the Court's current term is no exception. As Robert Barnes, the Supreme Court correspondent for *The Washington Post*, described the Court's 2013–14 term: "The Supreme Court on Monday resumes its role as the uneasy arbiter of America's intractable social conflicts with a new docket that features battles over affirmative action, campaign finance and abortion, among other divisive issues."[4]

But there is no doubt that the Roberts Court's recent business-related jurisprudence has attracted its share of attention and controversy: "Business groups say the Roberts Court's decisions have helped combat frivolous lawsuits, while plaintiffs' lawyers say the rulings have destroyed legitimate claims for harm from faulty products, discriminatory practices and fraud."[5]

The Court's critics find themselves in good company. Many commentators (including Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee[6]) have characterized the Roberts Court as business-friendly.[7] Citing

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3. Jeffrey Rosen, *Supreme Court Inc.*, N.Y. Times Magazine (Mar. 16, 2008) (hereafter "Rosen, *Supreme Court Inc.*"), *available at* http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html?_r=0.

4. *See, e.g.*, Robert Barnes, *Political gridlock puts Supreme Court at center of controversial social issues*, The Washington Post (Oct. 6, 2013), *available at* http://articles.washingtonpost.com/2013-10-06/politics/42771196_1_supreme-court-institute-campaign-finance-case-court-majority.

5. Liptak, *Corporations Find a Friend*, *supra* note 2.

6. See Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Judiciary Comm., 112th Cong. 1–2 (2011) (statement of Sen. Patrick Leahy) (arguing that several recent Court decisions have unfairly empowered corporations at the expense of American consumers and employees, particularly in the areas of fraud and discrimination), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-113srpt6/pdf/CRPT-113srpt6.pdf.

7. *See* Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 Wayne L. Rev. 947, 962 (2008) ("[T]he Roberts Court is the most pro-business Court of any since the mid-1930s."); *see also* Liptak, *Corporations Find a Friend*, *supra* note 2; Alan B. Morrison, *Saved by the Supreme Court: Rescuing Corporate America*, Issue Brief, American Constitution Society for Law & Policy (Oct. 4, 2011) (hereafter "Morrison, *Saved by the Supreme Court*"), *available at* http://www.acslaw.org/sites/default/files/Morrison_-_Saved_by_the_Supreme_Court.pdf (arguing that "[o]ne reason that profits have increased for Corporate America is that the Supreme Court has been a major ally. Since the late 1980s, on almost every occasion where big corporations have had a case of major significance in the High Court, the Court has ruled in their favor."); The Economist, *Corporations and the Court: America's Supreme Court is the Most Business-Friendly for Decades* (June 23, 2011), *available at* http://www.economist.com/node/18866873?story_id=18866873 (hereafter, "*Corporations and the Court*"); Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. Times (Dec. 18, 2010), *available at* http://www.nytimes.com/2010/12/19/us/19roberts.html?_r=1&partner=rss&emc=rss; Lee Epstein, William M. Landes & Richard A. Posner, *Is the Roberts Court Pro-Business* (Dec. 17, 2010), *available at* http://epstein.usc.edu/research/RobertsBusiness.pdf; Tony Mauro, *Supreme Court Continues Pro-Business Stance*,

a new study, Adam Liptak describes the Court as "far friendlier to business than those of any court since at least World War II."[8] The study to which Liptak refers, published in early 2013 in the Minnesota Law Review, was authored by intellectual powerhouses Judge Richard Posner of the Seventh Circuit Court of Appeals, Professor Lee Epstein of the University of Southern California, and William Landes, the Clifton R. Musser Professor Emeritus of Law and Economics at the University of Chicago Law School.[9] The study concludes that

> the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were. The Court is taking more cases in which the business litigant lost in the lower court and reversing more of these—giving rise to the paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed than one in which the lower court decision was pro-business. The Roberts Court also has affirmed more cases in which business is the respondent than its predecessor Courts did….[10]

The study further connects pro-business leanings to Republican appointees, concluding that "Justices appointed by Republican Presidents are notably more favorable to business than Justices appointed by Democratic Presidents," and that "Justices whose pre-appointment ideology was conservative also tend to be more favorable to business."[11] According to the study's findings, not only is the predominantly conservative court more business-friendly than its predecessors, but its Republican appointees are becoming even more so during their tenures:

> We find that after the appointment of Roberts and Alito, the other three conservative Justices on the Court became more favorable to business, and we conjecture that the three may not have been as interested in business as Roberts and Alito and decided to go along with them to forge a more solid conservative majority across a broad range of issues.[12]

Legal Times (February 21, 2008); Greg Stohr, *Alito Champions Business Causes in First Full High-Court Term*, Bloomberg (June 26, 2007) (referring to the 2006-2007 Supreme Court term as "what may have been the most pro-business U.S. Supreme Court term in decades"); Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews To Pattern of Roberts Court*, The Washington Post (June 22, 2007) (describing a case as another "victory for business in what has been a resoundingly successful year before the nation's highest court").

8. Liptak, *Corporations Find a Friend*, *supra* note 2.

9. Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 Minn. L. Rev. 1431 (2013) (hereafter, "*How Business Fares in the Supreme Court*"), *available at* http://www.minnesotalawreview.org/wp-content/uploads/2013/04/Epstein-LanderPosner_MLR.pdf.

10. *Id.* at 1471.

11. *Id.*

12. *Id.* at 1472.

The "pro-business" view is not always articulated in terms of consumer interests, but in terms of the positions taken by industry groups appearing before the Court.[13] Recent analyses have looked to the statistical success rates of business interests that weigh in on many cases as *amicus curiae*. Observers have noted, for example, the U.S. Chamber of Commerce's impressive success at the Court in recent years through direct litigation and amicus filings.[14] Many in the media have connected this shift to the recent retirement of Justice O'Connor, and the appointments of Chief Justice Roberts and Justice Alito.[15] One 2010 study by the Constitutional Accountability Center reported that the Court's five conservative justices side with the Chamber of Commerce at least two-thirds of the time, while the four liberal justices disagree with the Chamber's position more than half the time.[16]

The perception that the Roberts Court is pro-business is not, however, universally held.[17] For example, Ramesh Ponnuru, Senior Editor at National Review

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13. Supreme Court Rule 37 permits interested persons and entities to appear as *amicus curiae* and file briefs in cases even though they are not parties to the proceeding. *See* U.S. Supreme Court Rule 37 ("An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.").

14. David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019 (2009) (arguing that the Court's recent decisions are less about "pro-business" or "pro-defendant" jurisprudence, and more about "a broadly shared skepticism among the justices about litigation as a mode of regulation").

15. *Corporations and the Court*, *supra* note 7 ("The court's balance shifted in 2006, after George W. Bush picked John Roberts and Sam Alito (two conservatives) to replace William Rehnquist (a conservative) and Sandra Day O'Connor (a centrist). Since then, the kind of cases that the U.S. Chamber of Commerce supports have been more likely to succeed.").

16. *The Roberts Court and Corporations: The Numbers Tell the Story*, Constitutional Accountability Center (June 2010), *available at* https://theusconstitution.org/sites/default/files/briefs/Download%20The%20Roberts%20Court%20and%20Corporations%20Here.pdf; *see also A Tale of Two Courts: Comparing Corporate Rulings by the Roberts and Burger Courts*, Constitutional Accountability Center (Oct. 25, 2010), *available at* http://theusconstitution.org/sites/default/files/briefs/Download%20A%20Tale%20of%20Two%20Courts%20Here.pdf.

17. *See, e.g.*, *How Business Fares in the Supreme Court*, *supra* note 9, at 1432 n.5 (citing *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Judiciary Comm.*, (statement of Robert Alt, Senior Fellow and Deputy Director, Center for Legal and Judicial Studies, The Heritage Foundation) (arguing that the story of the Roberts Court as "procorporatist" is "fictional" and that in many important cases the Court sided against business); Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 Santa Clara L. Rev. 943, 972 (2009) ("If the relative magnitude of the cases is taken into account, it is even more difficult to argue that the Roberts Court has been 'pro-business' in this area."); Richard A. Epstein, *Is the Supreme Court Tilting Right*?, Defining Ideas (Dec. 21, 2010), http://www.hoover.org/publications/defining-ideas/article/61206 ("To be pro-business today does not carry the same meaning that it did in earlier periods, when the scope of regulation was in general so much narrower."); Martin J. Newhouse, *Business Cases and the Roberts Supreme Court*, Engage: J. Federalist Soc'y Prac. Groups (Dec. 6, 2011), http://www.fed-soc.org/doclib/20111216_NewhouseEngage12.3.pdf ("In numerous cases these Justices have cast their votes for, and even written the majority opinions in, decisions in which business parties have lost and investors, consumers, or employees have won.").

and a Bloomberg View columnist, argues that the "protection of commerce should be among [the Court's] primary aims," but that its recent jurisprudence is not nearly pro-business enough.[18]

Justice Breyer—who often lands in the four-Justice minority—also takes issue with the generalized pro-business description of the Court. In a 2010 interview with Bloomberg Television, Justice Breyer rejected the notion that the Court has a pro-business slant, and took the position that the Court does not rule in favor of companies any more frequently now than it has historically.[19] Rather, in his view, businesses have "always done pretty well."[20] At least some Supreme Court practitioners concur with Justice Breyer's skepticism of popular sentiment:

> I don't think it makes sense to talk about a pro-business or anti-business court…. Two-thirds of the business decisions from last term cut in favor of business interests, but the justices often do not divide along ideological lines in business cases. In close cases, their votes come down to their judicial philosophies and not to any pro-business or anti-business bias.[21]

Indeed, the Court often divides in ways that do not comport with popular notions of liberal or conservative, pro-business or pro-plaintiff—and the Justices do not shy away from issuing opinions that surprise or disappoint the business community.

However the Justices' individual leanings and the Court's decisions are described philosophically, there is no doubt that the Court has decided—and is currently considering—a great number of cases that will significantly impact business interests now and in the future. These cases are discussed below.

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18. Ramesh Ponnuru, *Supreme Court Isn't Pro-Business, But Should Be*, BLOOMBERG (July 5, 2011), *available at* http://www.bloomberg.com/news/2011-07-05/supreme-court-isn-t-pro-business-but-should-be-ramesh-ponnuru.html.

19. Greg Stohr, *Breyer Says Supreme Court Doesn't Have Pro-Business Slant*, http://www.bloomberg.com/news/2010-10-07/breyer-rejects-the-notion-that-u-s-supreme-court-has-a-pro-business-bias.html (Oct. 7, 2010).

20. *Id.* (quoting Justice Breyer); *see also* Tony Mauro, *Is the Supreme Court Pro-Business? It depends how you define that*, CORPORATE COUNSEL (Oct. 1, 2010) (noting that some data indicates that the Court's docket of business cases has steadily remained at about 40 percent over the last 16 years).

21. Ashby Jones, *Your Early Guide to the Big Business Cases of the High Court Term*, WSJ LAW BLOG (Sept. 30, 2010), *available at* http://blogs.wsj.com/law/2010/09/30/your-early-guide-to-the-big-business-cases-of-the-high-court-term/ (quoting Lauren Rosenblum Goldman, a partner in Mayer Brown's Supreme Court and Appellate practice in New York).

§ 2.2 Class Actions

§ 2.2.1 The Court's recent class action cases have favored business defendants.

At the epicenter of the debate over whether the Supreme Court unfairly favors business interests is, somewhat ironically, not a "business law" issue per se, but a procedural litigation device: the class action. Governed by the various rules of civil procedure in federal and state courts,[22] class action procedure enables a small group of people—even just one person—to sue as the representative on behalf of a larger class of individuals who share common interests and suffered the same injuries.[23] If a trial court "certifies" that these commonalities exist, class representatives are empowered to seek relief on behalf of the entire class—which may include thousands or even millions of individuals who are entitled to a share of the recovery.

Aggregating thousands of individual claims in a single judicial proceeding has advantages. In addition to conserving judicial resources, class actions facilitate access to the judicial system, which is increasingly out of reach for most individuals due to the escalating cost of legal services and the complexity of modern commerce.[24] Even where a defendant's culpability is clear, there is little incentive to bring an individual lawsuit where damages are nominal, effectively resulting in a legal wrong without a realistic remedy. "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[25]

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22. In federal courts, class actions are governed by Federal Rule of Civil Procedure 23 and 28 U.S.C.A. § 1332(d). Class actions in state courts are governed by the procedural rules of each state, which may mimic or deviate significantly from the federal rules.

23. Although state rules vary, under Federal Rule of Civil Procedure 23(a), class members must share four characteristics: (1) commonality (one or more legal or factual claims common to the entire class); (2) adequacy (the individual representative parties must adequately protect the interests of the class); (3) numerosity (the class must be large enough to render individual suits impractical; and (4) typicality (the claims or defenses must be typical of the plaintiffs or defendants).

24. As frequent Supreme Court commentator Lyle Denniston eloquently put it:

> It is a fact of life in a complex industrial society that lawsuits can grow very complex, very expensive, and wearying in their length. It takes a particularly hardy, or well-heeled, individual who wants to sue in that environment to go it alone. And, often, what one person can gain by suing is not enough to make it worthwhile—for that person, or for the lawyers.

Lyle Denniston, *Argument Preview: Wal-Mart and Workers' Rights*, ScotusBlog.com (Mar. 28, 2011), *available at* http://www.scotusblog.com/2011/03/argument-preview-wal-mart-and-workers-rights/.

25. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotes and citations omitted).

Class actions thus help ensure that a defendant who engages in wrongful conduct that only minimally injures millions of individuals (e.g., a $2 dip in a public company's stock price affecting 20 million shareholders who own one share each) suffers the same consequences as a defendant whose conduct causes significant harm to only a few (same scenario, but five shareholders together own the 20 million shares). As one commentator summarized the issue:

> Sometimes businesses inflict injuries too small to sue over. How many people will sue when someone cheats them out of $100? How many lawyers will take a case worth $1,000? Not many. But, if people don't sue, businesses know they can cheat people out of small amounts with impunity. Class actions band individuals together so businesses cannot escape accountability, and they level the playing field of litigation by enabling plaintiffs to reap the same economies that defendants who face multiple suits can reap without class actions. When businesses face the threat of viable class actions, they are less likely to commit misdeeds in the first place.[26]

Perhaps most importantly, class actions often lead to injunctive relief that changes the offending behavior, relief that cannot be achieved through individual cases:

> Class action cases foster reform through injunctive relief that is not available in individual cases. Examples include requiring employers to post job opportunities, conducting pay equity studies, establishing equal employment opportunity complaint processes or establishing specific, job-related criteria to be used in making personnel decisions. Reforms like these have the power to transform corporate culture, policies and practices.[27]

The class action device thereby facilitates a remedy that would otherwise be unavailable, while at the same time deterring wrongful conduct.

Courts have also recognized the benefits defendants derive from the class action system. Defending a single representative lawsuit in one venue is more efficient and less costly than fending off thousands of individual lawsuits scattered throughout the country.[28] Presenting evidence and legal arguments to a

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26. Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, The San Francisco Chronicle (Nov. 7, 2010), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL.

27. Sarah Crawford, *The Supreme Court's One-Two Punch: Class Actions in the Wake of* Wal-Mart v. Dukes *and* AT&T v. Concepcion, Scotusblog.com (Aug. 31, 2011), *available at* http://www.scotusblog.com/2011/08/the-supreme-court's-one-two-punch-class-actions-in-the-wake-of-wal-mart-v-dukes-and-att-v-concepcion/.

28. As the preamble to the Class Action Fairness Act passed by Congress in 2005 states, "Class-action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.".

single court charged with finally resolving the claims of an entire class also precludes future claims, and reduces the risk of inconsistent rulings in parallel proceedings and jurisdictions that could create "incompatible standards" of conduct for defendants to follow.[29] The Chamber itself acknowledged these benefits as part of its lobbying effort in support of the Class Action Fairness Act of 2005, noting that "[c]lass action litigation is a necessary part of our legal system because it can bring efficiency and fairness to situations involving many people with similar claims."[30]

These benefits notwithstanding, the U.S. Chamber of Commerce and other major business interests bear no love for class actions:

> Corporate America, and other large targets, have a special grievance about the way they believe the class-action lawsuit has developed. Such lawsuits, the argument goes, can be so threatening in their cost and potential consequences that those who get sued will be driven to settle, even if they believe the claims lack merit and could not succeed, if only one or a few individuals had brought the case.[31]

Critics further argue that the class action system is "wrought with abuse" by plaintiffs' attorneys who "walk away with fees that are astronomical, especially when compared to the amount of damages that the plaintiffs receive."[32]

In addition to concerted lobbying efforts advocating for class action reform in Congress,[33] the Chamber and other entities representing business interests have pursued their grievances via a variety of substantive and procedural challenges in the courts. After years of winding through the court system for the last decade, these challenges have borne fruit in the form of a striking number of successive Supreme Court decisions refining the legal standards governing class actions. The most widely known and controversial of these decisions—*Wal-Mart Stores, Inc. v. Dukes*—has been described as a resounding victory for business interests, and strong evidence of the Court's pro-business leanings. Class action plaintiffs were unable to reverse the trend in 2012–13.

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29. *See* Fed. R. Civ. P. 23(b)(1)(A).

30. *Statement on The Class Action Crisis and S. 1712 – "The Class Action Fairness Act" to the United States Senate Committee on the Judiciary by the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform* (July 31, 2002), *available at* http://www.uschamber.com/issues/testimony/2002/class-action-fairness-act.

31. Lyle Denniston, *Argument Preview: Wal-Mart and Workers' Rights*, ScotusBlog.com (Mar. 28, 2011), *available at* http://www.scotusblog.com/2011/03/argument-preview-wal-mart-and-workers-rights/.

32. *Statement on The Class Action Crisis and S. 1712 – "The Class Action Fairness Act" to the United States Senate Committee on the Judiciary by the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform* (July 31, 2002), *available at* http://www.uschamber.com/issues/testimony/2002/class-action-fairness-act.

33. *See id.*

§ 2.2.2 The Court continues the trend in 2013 with Comcast Corp. v. Behrend and Standard Fire Insurance Co. v. Knowles.

The Supreme Court issued two defendant-friendly class action opinions in its 2012–13 term. One case held that a plaintiff must provide competent proof that the case is susceptible to awarding damages on a classwide basis, even if that proof overlaps with the merits of the underlying claim. The other held that a plaintiff cannot avoid federal jurisdiction under the Class Action Fairness Act by stipulating to less than $5 million in damages.

Comcast Corp. v. Behrend.[34] In a 5-4 opinion authored by Justice Scalia, the Supreme Court held that class certification was improper because the plaintiffs' expert's damages model failed to establish that damages could be measured on a classwide basis under the antitrust theory of liability certified by the district court. The Court did not resolve the broader question of whether expert testimony must satisfy *Daubert* standards at the class certification stage. The Court had suggested in *Wal-Mart Stores, Inc. v. Dukes* that such standards apply, but did not conclusively resolve the question in that case either.[35]

The plaintiffs in *Behrend* brought an antitrust suit alleging that Comcast attempted to monopolize the cable market in Philadelphia through a series of "swap" transactions with providers in other markets. Of the four different theories of antitrust injury urged by the plaintiffs, the district court granted certification on only one of the theories—that Comcast's conduct reduced the level of competition from companies that build competing cable networks in areas where an existing cable company operates ("overbuilders"). The district court held that the other three theories of antitrust impact could not be certified because they were incapable of classwide proof. The Third Circuit affirmed the district court decision.

The Supreme Court reversed, breaking along the usual 5-4 lines. Writing for the majority, Justice Scalia faulted the lower courts for refusing to consider arguments against the respondents' damages model on the grounds that such arguments also would be relevant to the merits determination. The Supreme Court held that such an approach is inconsistent with *Wal-Mart Stores, Inc. v. Dukes*.

In particular, the Court found that the plaintiffs had failed to satisfy the Rule 23(b)(3) predominance requirements because, although the district court had rejected three of the four antitrust impact theories offered by the respondents, the expert's damages model made no attempt to identify the damages attributable to the sole remaining theory. Therefore, the Court concluded that the expert's model did not establish that the putative damages of the proposed class related to that surviving theory were susceptible to classwide measurement.

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34. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013).
35. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011).

The dissenting justices, in an opinion jointly authored by Justices Ginsburg and Breyer, would have dismissed the case as improvidently granted based on Comcast's failure to object to the admissibility of the expert's damages testimony—the issue that was the focus of the briefing and oral argument. The dissenters also argued that the majority's substantive analysis was flawed because individualized damages calculations do not preclude class certification. They attempted to limit the impact of the majority holding to the facts of this case by emphasizing that the plaintiffs here had conceded that the amount of recoverable damages must be susceptible to classwide proof. Finally, they accused the majority of resolving complex and fact-intensive questions regarding the challenged damages model without the benefit of full briefing and contrary to the fact findings that were made by the district court and affirmed by the Third Circuit.

The Court's opinion makes clear that Rule 23 is far more than a pleading standard; rather, plaintiffs must satisfy each of the Rule's requirements by a preponderance of the evidence, a rigorous analysis that may require an examination of the merits of the plaintiffs' claims. It is also clear that a court's rigorous analysis must be directed not only to issues of liability, but also to causation and damages. Plaintiffs hoping to obtain class certification must also take great care in aligning their theories of liability with their damages model, particularly in the antitrust context.

Standard Fire Insurance Co. v. Knowles.[36] Justice Breyer, writing for a unanimous Court, held that a plaintiff in a putative class action could not stipulate that the class would receive less than $5 million in damages to avoid federal court jurisdiction under the Class Action Fairness Act of 2005 (CAFA). CAFA gives federal courts original jurisdiction over class actions when (among other grounds) the amount in controversy exceeds $5 million in sum or value, a calculation that must be made by aggregating the claims of the individual class members.

The plaintiff in this case filed his putative class action in Arkansas state court against Standard Fire Insurance Company, claiming that the company had unlawfully failed to include a general contractor fee in making certain homeowner's loss payments. His complaint, along with an attached affidavit, stipulated that the plaintiff would not seek in excess of $5 million in the aggregate. The Supreme Court granted certiorari after the case had been removed to federal court and remanded back to state court.

In the Court's eyes, the plaintiff's stipulation was ineffective because it could not bind other class members prior to certification. Thus, the plaintiff had not reduced the value of the putative class member's claims, and the district court, when aggregating the proposed class member's claims under CAFA, should have ignored the stipulation. The court's opinion constitutes another victory for class action defendants by circumscribing a plaintiff's ability to avoid federal court jurisdiction through a stipulation.

36. Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013).

§ 2.3 Securities Fraud

§ 2.3.1 The Court's recent securities fraud cases cannot be characterized as entirely "pro-business."

In the wake of Wall Street's 2008 meltdown, Congress enacted sweeping legislative reforms promulgated in the Dodd-Frank Wall Street Reform and Consumer Protection Act[37] ("Dodd-Frank"). Dodd-Frank subjects more financial companies to federal oversight, regulates derivatives contracts, and creates a panel charged with detecting risks to the financial system,[38] as well as a consumer protection regulator.[39] The Supreme Court's opinions in recent years provide some insight into how federal courts, including the Supreme Court, may review these new financial reforms in the judicial challenges that are sure to follow. These rulings reflect the Court's reluctance to endorse government intervention into business—but an equal reluctance to strike it down wholesale—and may well provide helpful analysis to parties seeking to undo some of Congress's financial reforms through litigation.

Significantly, unlike opinions in previous years, which have contributed to the Roberts Court's business-friendly reputation,[40] the Court's more recent securities-related decisions reveal a somewhat more ambiguous picture, and call into question the view that the Court is particularly "pro-defendant" in cases where substantial liability is involved.[41]

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37. Pub. L. No. 111-203, 124 Stat. 1376 (2010). The full text of Dodd-Frank is available at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

38. Dodd-Frank created a council of regulators called the "Financial Stability Oversight Council," which is led by the Treasury Secretary and is responsible for identifying threats to the financial system.

39. Dodd-Frank also created the "Consumer Financial Protection Bureau," which will be housed at the Federal Reserve and will oversee consumer products and services, from mortgages to credit cards to check cashing.

40. Greg Stohr, *U.S. Supreme Court Increasingly Favors Business, Study Says*, Bloomberg Businessweek (October 26, 2010), *available at* http://www.bloomberg.com/news/2010-10-26/u-s-supreme-court-increasingly-favors-business-in-decisions-study-says.html ; Jeffrey Rosen, *Supreme Court Inc.*, New York Times Magazine (March 16, 2008), *available at* http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html.

41. *See* 2012 Appellate Practice Chapter at § 3.3 (discussing the Court's 2011 decisions in Matrixx Initiatives, Inc. v. Siracusano and Janus Capital Group, Inc. v. First Derivative Traders) and 2011 Appellate Practice Chapter at §§ 3.2.1 – 3.2.2 (discussing Merck & Co., Inc. v. Reynolds and Morrison v. National Australia Bank Ltd.).

§ 2.3.2 Amgen Inc. v. Connecticut Retirement Plans and Trust Funds[42]

The Supreme Court issued a significant securities fraud case, holding that proof of materiality is not a prerequisite to certification of a securities-fraud class action. Instead, the Court held that it is sufficient for plaintiffs to plead materiality and establish the requirements of Federal Rule of Civil Procedure 23 at the certification stage. The Court also held that defendants are not entitled to present evidence rebutting a fraud-on-the-market theory at the class certification stage. Materiality is to be litigated after a class is certified.

In a 6-3 opinion authored by Justice Ginsburg, the Court held that plaintiffs who allege securities fraud under the Securities and Exchange Act, Section 10(b), do not need to prove the materiality of a defendant's alleged fraudulent statements and omissions to receive class certification, even when utilizing the fraud-on-the-market theory of reliance. The Court also held that defendants are not entitled to present evidence of an absence of materiality at the class certification stage to defeat certification.

Connecticut Retirement Plans and Trust Funds filed a securities-fraud complaint against Amgen Inc., a pharmaceutical company, and several of its officers (collectively, Amgen). The complaint alleged Amgen made misrepresentations and omissions regarding some of its products, which had the effect of artificially inflating Amgen's stock price. Once corrective disclosures were made, Amgen's stock price declined, causing financial losses to those who purchased the stock at the inflated price, including Connecticut Retirement.

Connecticut Retirement petitioned the district court to certify a class action under Federal Rule of Civil Procedure 23(b) on behalf of all investors who purchased Amgen stock between the date of the first alleged misrepresentation and the date of the last alleged corrective disclosure. Plaintiffs sought class-action certification, invoking the "fraud-on-the-market" theory endorsed in *Basic Inc. v. Levison*, 485 U.S. 224 (1988), which permits plaintiffs to "invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public." The district court certified the class, the Ninth Circuit upheld that ruling, and the Supreme Court affirmed the Ninth Circuit's decision.

The main issue before the Supreme Court was whether Connecticut Retirement had to prove materiality as a prerequisite to receiving class certification under Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." The Court held that proof of materiality is not required before a district court may certify a class of plaintiffs in a misrepresentation case under Rule 10b-5. The Court reasoned that, although materiality is an essential predicate of the fraud-on-the-market theory, proof of materiality is not required to show that common questions predominate over individual issue. This is so because materiality is tested under an objective standard, such that the materiality of Amgen's alleged misrepresentations and omissions is a question common to all

42. Amgen Inc. v. Conn. Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013).

members of the class. "The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class." Further, "the plaintiff class's inability to prove materiality would not result in individual questions predominating" because "a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims."

And, "just as a plaintiff class's inability to prove materiality creates no risk that individual questions will predominate, so even a definitive rebuttal on the issue of materiality would not undermine the predominance of questions common to the class." Such rebuttal evidence should be left for a summary judgment motion or for trial.

Justice Alito wrote a short concurring opinion, noting that he joined the opinion of the Court "with the understanding that the petitioners did not ask us to revisit *Basic's* fraud-on-the-market presumption." He agreed with the dissent that "more recent evidence suggests that the presumption may rest on a faulty economic premise, in light of which "reconsideration of the *Basic* presumption may be appropriate."

Justices Thomas, Scalia, and Kennedy dissented and would have required that plaintiffs prove materiality at the class certification stage as a predicate element of the fraud-on-the-market theory.

§ 2.4 Labor and Employment

In recent years, the Supreme Court's employment jurisprudence has been a mixed bag, with a fair number of decisions favoring employees. However, in the 2012-13 term, the two most significant employment law decisions favored the employer, albeit by narrow 5-4 margins. The decisions narrowly construe vicarious employer liability and retaliation under Title VII of the Civil Rights Act of 1964—the federal act that prohibits employment discrimination. In one decision, the Court held that an employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim. The other decision addresses the causation standard in a Title VII retaliation claim; the Court held that plaintiffs must prove that the unlawful retaliation would not have occurred in the absence of the employer's alleged wrongful action.

Vance v. Ball State University.[43] In a 5-4 majority opinion authored by Justice Alito, the Supreme Court narrowly defined who qualifies as a "supervisor" in a Title VII claim for workplace harassment—a question left unresolved in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). The majority held that, for purposes of vicarious employer liability under Title VII, a supervisor is one who is authorized to "take tangible employment actions" against the complainant.

43. Vance v. Ball State University, 133 S. Ct. 2434 (2013).

The plaintiff in *Vance* filed suit against a university, alleging that she had been subjected to a racially hostile work environment in violation of Title VII. The plaintiff claimed that the university was liable for creating such an environment because the person the plaintiff complained of was her supervisor. Both parties agreed that the harasser did not possess "the power to hire, fire, demote, promote, transfer, or discipline" the plaintiff.

The majority observed that the term "supervisor" is not used in Title VII, but the Court had adopted it in *Ellerth* and *Faragher* to characterize those employees whose misconduct may give rise to vicarious employer liability. Consistent with the framework set forth in *Ellerth* and *Faragher*, *Vance* holds that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the complainant, such that "a significant change in employment status" has resulted. Such actions include "hiring, firing, failing to promote, reassignment with significantly different responsibility, or a decision causing a significant change in benefits."

Not encompassed within the concept of "supervisor" is one who possesses authority to assign daily tasks. That does not necessarily leave employees unprotected against harassment from those charged with such responsibilities. As the majority reiterated, if the harasser is the complainant's co-worker, an employer is liable only if it is negligent in controlling working conditions.

A different standard applies, however, when the harasser is the complainant's supervisor. If a supervisor undertakes a tangible employment action, then the employer is strictly liable. But if no tangible employment action is taken, then an employer may escape or mitigate liability by establishing, as an affirmative defense, that "(1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."

Justice Ginsburg, along with Justices Breyer, Sotomayor, and Kagan, dissented. The dissent views the authority to "direct an employee's daily activities" as establishing "supervisory status under Title VII."

The majority opinion views the concept of "supervisor," as set forth in *Vance*, as one that is "easily workable." That remains to be seen. But *Vance* does appear to make it more difficult for employees to sue their employers over harassment in the workplace.

University of Texas Southwestern Medical Center v. Nassar.[44] In this case, a divided Court held that, in Title VII retaliation claims, plaintiffs must prove that the "unlawful retaliation would not have occurred" but for the employer's "alleged wrongful action." The result is a stricter standard of proof than other types of discrimination claims.

The plaintiff in *Nassar* sued an academic institution within a university, alleging that his superior's racially and religiously motivated harassment resulted in his constructive discharge from the university. He also claimed that the efforts

44. University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013).

of his superior's supervisor to prevent the institution from hiring him were in retaliation for complaining about his superior's harassment.

The Court's analysis was informed by its previous decision in *Gross v. FBL Financial Services, Inc.*, which involved employer discrimination under a separate but similar statute, the Age Discrimination in Employment Act of 1967.[45]

Justice Kennedy's majority opinion reasoned that the Court's view was practical given the increase in retaliation claims over the last 15 years. The majority expressed its concern that, under a lesser causation standard, plaintiffs would file frivolous claims.

The dissent, authored by Justice Ginsburg, and joined by Justices Breyer, Sotomayor, and Kagan, concluded that the but-for test is "ill-suited" to employment discrimination cases because it requires a fact-finder to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different."

§ 2.5 Preemption

§ 2.5.1 Why Preemption Matters to Corporate America

Preemption cases are often at the center of the debate over whether the Supreme Court favors business interests. As one commentator pointedly wrote,

> Big Business in America loves to use the somewhat obscure legal doctrine of "federal preemption" to thwart state and local efforts to do all sorts of good things, such as protecting public health and safety, ensuring consumers have a remedy when they are harmed by corporate misconduct, and preserving the environment. "Preemption" is based on the Constitution's declaration that federal law is supreme over conflicting state law. This provision makes sense – except that the doctrine of preemption has been twisted by corporate interests in an attempt to insulate their conduct from people-friendly state laws.[46]

The Supreme Court has accorded the preemption doctrine special attention in recent terms, during which the Court has issued a stream of key opinions refining federal preemption jurisprudence and applying it in the context of recent legislative reforms. For business lawyers and the clients we serve, the importance of developments in the Supreme Court's federal

45. Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009).

46. Elizabeth B. Wydra, *Occupy the Barnyard: Meat Industry Asks Supreme Court to Help Crush Anti-Cruelty Law*, Huffington Post (Nov. 8, 2011), *available at* http://www.huffingtonpost.com/elizabeth-b-wydra/national-meat-association-v-harris_b_1081781.html.

preemption jurisprudence should not be underestimated. Preemption can be an effective way for industries to maintain uniformity and predictability in multistate operations and insurance matters, to avoid substantial liability under state product liability and negligence laws, and to thwart state efforts to impose burdensome regulations on local business activities. Hundreds of millions of dollars are often at stake for the nationwide industries in which preemption tends to arise—a sampling of which includes food, agriculture, healthcare, e-commerce, communications, utilities, employment, banking, pharmaceuticals, the automotive industry, securities, and immigration.

Congress's power to preempt state law is derived from the U.S. Constitution, Article VI, Clause 2—the Supremacy Clause—which provides as follows:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Although the states possess sovereignty concurrent with that of the federal government, state sovereignty is subject to limits imposed by the Supremacy Clause.[47] In effect, the Supremacy Clause gives Congress the power to exclude—or "preempt"—state law in a field as Congress defines it, as long as Congress is acting within the powers granted to it under the Constitution.

Predicting the preemption doctrine's application to, or effect upon, a particular business activity or area of state law is no simple task—and the consequences of a prediction later proven to be mistaken can cost a business dearly. As many of the cases discussed in this subchapter illustrate, litigating these issues can take years and cost millions, and a defendant's victory at the district court or circuit court level cannot necessarily be relied upon as a predictor of what a higher appellate court might later decide. Moreover, a preemption decision in a case involving an individual business could have dramatic consequences for all businesses in the same or related industries—or it may be limited to the narrow facts of the case. In light of the stakes involved and the Supreme Court's recent focus on the subject, a review of the special challenges presented in preemption cases is warranted.

First, preemption standards are complex and hard to navigate. Preemption jurisprudence is arcane, fact-specific, and can vary significantly depending on the laws alleged to be in conflict and the jurisdiction in which the lawsuit is filed. Preemption can be express or implied, complete or partial. State law can be preempted by federal inaction or action, including the U.S. Constitution, congressional actions, federal common law and judicial precedent, executive actions, or agency regulations. Federal laws giving rise to preemption arguments may be mooted by legislative amendment or judicial review on nonpreemption grounds.

47. Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

Whether a particular federal law preempts a specific state action often depends heavily on statutory language, express or implied congressional intent, and legislative history—any of which can be sparse, ambiguous, and subject to conflicting interpretations by different courts. A preemption argument can qualify as a claim or defense, which impacts a party's ability to invoke federal removal jurisdiction or to keep a case in state court. These variables make preemption jurisprudence difficult to navigate for even the most devoted Supreme Court scholars and talented litigators.

Second, like all common law doctrines, preemption is constantly evolving and can thus prove to be unpredictable over time. The rules governing the application of preemption doctrines can vary significantly depending on the area of law and the industry in question, and are constantly subject to interpretation and refinement in subsequent cases. Although legal authorities often describe three general tests for determining whether state law is preempted (express preemption, field preemption, and implied conflict preemption[48]), there are many nuances to these tests that impact strategy in a particular case. As the Supreme Court has described,

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, … when there is outright or actual conflict between federal and state law, … where compliance with both federal and state law is in effect physically impossible, … where there is implicit in federal law a barrier to state regulation, … where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, ... or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[49]

48. There are three distinct types of federal preemption: express preemption, implied conflict preemption, and field preemption. Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985); Bruesewitz v. Wyeth Inc., 561 F.3d 233, 238-39 (3d Cir. 2009), *aff'd* 131 S. Ct. 1068 (2011). Express preemption occurs when a federal law contains express language providing for the preemption of any conflicting state law. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001). Implied conflict preemption occurs when it is either "impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (citation omitted)). The final category of preemption, field preemption, arises when a state law or regulation intrudes upon a "field reserved for federal regulation." United States v. Locke, 529 U.S. 89, 111 (1990); *see also*16A Am. Jur. 2d *Constitutional Law* § 234 (reciting tests and citing cases).

49. Louisiana Public Service Comm'n v. Fed. Commc'n Comm'n, 476 U.S. 355, 368-369 (1986) (case citations omitted).

In the quarter century since the Supreme Court outlined these three preemption categories in the *Louisiana Public Service Commission*[50] case, the Court has issued dozens of preemption opinions further revising and honing preemption tests, which have in turn been interpreted and applied in thousands of lower federal and state cases. Conflicts have emerged between federal courts in different circuits, among the 50 states, as well as between federal and state courts. Conflicts are resolved by judicial review in the courts or by federal or state legislation, after which other conflicts eventually emerge for renewed debate and eventual resolution among the assorted courts and jurisdictions. This constant evolution of preemption doctrines makes it virtually impossible to predict with long-term reliability how preemption will apply to a particular business activity or regulation. This uncertainty is particularly problematic when legislative revisions and industry innovations outpace the "deliberate" speed of judicial decision-making.

Third, modern crises and shifting national priorities have provoked sweeping legislative reforms at both the federal and state level that will give rise to uncharted preemption issues. In the last few years, the United States has experienced dramatic political shifts in Congress and the White House, a growing national healthcare emergency, and the worst financial crisis since the Great Depression of the 1930s. After decades of gradual banking deregulation, the federal government was suddenly forced to undertake an unprecedented government bailout of major banking institutions to avoid national economic calamity. As the financial crisis detonated and swelled, businesses and state governments alike struggled with paralyzing liquidity and credit scarcities, suffered dramatic losses in the stock market, pension funds, and real estate, and faced bankruptcy (if they could afford the financing needed for the process) or financial ruin.

Major financial institutions, insurance companies, and accounting firms—many of which had enjoyed unparalleled profits during the period of deregulation—were forced to defend exorbitant executive compensation packages as their customers and employees lost their life savings and jobs. Executives and institutions alike faced massive lawsuits and criminal prosecutions alleging Ponzi schemes, securities fraud, and expanding lender liability theories predicated on the wrongful conduct of others. The consumer lending industry, after enjoying a prolonged period of relatively minimal regulation and strong consumer appetite to spend beyond one's means, was charged with predatory consumer lending practices that contributed to insurmountable debt and home foreclosures as real estate prices plummeted and unemployment shot up.

This economic upheaval, transpiring at the same time the United States is engaged in the costly effort to protect its borders and citizens from terrorist threats at home, abroad, and online, has understandably given rise to local and vocal anti-immigration movements, tougher consumer finance protection rules, sweeping healthcare reform, demands for greater transparency and accountability for financial institutions and their executives, and stricter divides between

50. *Id.*

banking and investing activities.[51] Whether arising from state or federal law, all of these legislative actions are likely to give rise to preemption issues as new federal priorities conflict with state laws.

§ 2.5.2 Mutual Pharmaceutical Co. v. Bartlett[52]

The Supreme Court once again returned to the subject of preemption—specifically, FDA preemption of state law tort claims as related to pharmaceutical drug labels. This decision—the third in the last five terms to address the interplay of prescription drugs federal regulation and state tort law—distinguishes a "brand" pharmaceutical drug and "generic" pharmaceutical drug for preemption purposes.

Justice Alito delivered the opinion of a divided 5-4 Court, which found that state law is preempted where otherwise it would be impossible for a generic pharmaceutical drug manufacturer to comply with both state and federal requirements.[53] The plaintiff was prescribed the nonsteroidal, anti-inflammatory brand-named drug Clinoril, but received from her pharmacist the generic form, Sunlindac. She developed toxic epidermal necrolysis, which Sunlindac's label did not (at the time) list as a potential side effect, and suffered severe disfigurement, physical disabilities, and near blindness. A New Hampshire federal district court jury found the drug manufacturer liable and awarded $21 million in damages, which the First Circuit affirmed.

In reversing the First Circuit, the Supreme Court found that New Hampshire design-defect law conflicted with federal law and was, therefore, preempted under the Supremacy Clause. The Supreme Court recognized that the drug manufacturer could not be liable for a state law design-defect claim because it is *federal regulations* that prohibit the drug manufacturer from altering the composition of the drug or changing its product label. In support of its decision, the Court relied on its earlier ruling in *PLIVA, Inc. v. Mensing*, which held that federal law prevents generic drug manufacturers from changing the drug's label and, therefore, a generic drug manufacturer cannot be liable for a state law failure-to-warn claim.

The Court also expressly rejected the First Circuit's rationale that the drug manufacturer could choose to stop selling Sunlindac to avoid the impossibility

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51. Major legislative initiatives passed by Congress and signed into law by President Obama include the Lilly Ledbetter Fair Pay Act; the Children's Health Insurance Reauthorization Act; the American Recovery and Reinvestment Act; the Credit Card Accountability, Responsibility, and Disclosure Act of 2009; the Worker, Homeownership, and Business Assistance Act of 2009; the Patient Protection and Affordable Care Act; the Dodd-Frank Wall Street Reform and Consumer Protection Act; the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010; and the Food Safety and Modernization Act. Each of these legislative actions is likely to give rise to preemption issues as they come into conflict with state law and regulate businesses that would otherwise be subject to state law.

52. Mutual Pharmaceutical Co. v. Bartlett, 133 S. Ct. 2466 (2013).

53. The prior two decisions of the Court are *Wyeth v. Levine*, 555 U.S. 555, 573 (2009) and *PLIVA Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

of complying with both federal and state law. The Court reasoned that to require a pharmaceutical drug manufacturer to stop selling its product would render "impossibility preemption" essentially meaningless, which it cannot do.

§ 2.6 Arbitration

§ 2.6.1 Why Corporate America Loves Arbitration

The enforceability of arbitration clauses is one of the most hotly debated subjects in the ongoing discussion about the Supreme Court's alleged pro-business leanings. Arbitrability is a critical issue to Corporate America as well as consumers: arbitration clauses now infuse virtually every aspect of business conduct, including large business deals, employment agreements, and consumer contracts. As one media report described,

> [i]n the past 20 years it has become a dominant feature in the legal relationship between American corporations, their employees and their customers. If you use credit cards, have a cell phone contract, bought a house from a builder or put your mother or father in a nursing home, you have very likely signed away your right to be heard in court if there's a problem. It's called pre-dispute mandatory binding arbitration.[54]

Corporate America's fondness for the arbitration device is no secret. As one interest group associated with the U.S. Chamber of Commerce summarized,

> As court dockets have exploded and the costs of litigation have risen, alternative dispute resolution techniques, including arbitration, have served as an essential release valve for the country's overburdened civil justice system. It has provided a cheaper, faster, more effective forum for a variety of disputes, a reality that the Supreme Court routinely has recognized. Consequently, companies in many industries have come to rely on arbitration as an important method of resolving disputes with their business partners, their employees, and their customers.[55]

Citing the significant disparity in resources and bargaining power between consumers and corporations, consumer advocates criticize arbitration clauses

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54. Wade Goodwyn, *Rape Case Highlights Arbitration Debate*, National Public Radio (June 9, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=105153315.

55. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers (A Response to Public Citizen)*, U.S. Chamber Institute for Legal Reform (April, 2008), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/200804ArbitrationGoodForConsumers-Rutledge.pdf.

as unfair to individuals who likely have no idea they have waived their right to pursue remedies in court. A 2007 study by the consumer advocate group Public Citizen described mandatory arbitration clauses as "a rigged game in which justice is dealt from a deck stacked against consumers."[56] The study found that corporations chose arbitration 99.6 percent of the time, and that 94 percent of those arbitrations were decided in favor of the corporations.

Public Citizen attributed these statistics to a variety of factors, including business-friendly arbitrators who have a financial incentive to favor companies, a lack of procedural safeguards, disparity in bargaining power, limited remedies and rights to appeal in arbitration, lack of access to legal counsel, and the secrecy of the process. The Public Citizen study scathingly concluded that "the privatization of our justice system" through pre-dispute arbitration "is a deliberate strategy to substitute a secret, pro-business kangaroo court for an open trial on the merits."

Other studies refute Public Citizen's claim. For example, the U.S. Chamber Institute for Legal Reform (an advocacy group affiliated with the U.S. Chamber of Commerce) issued a response to Public Citizen's study arguing that arbitration "is a good deal for individual consumers" because it improves access to justice, increases likelihood of recovery, delivers speedier results, and keeps costs down.[57]

Another study focusing on debt collection cases refutes the notion that arbitration is inherently business-friendly, arguing that "a high win rate for business claimants does not alone show bias" and concluding that "creditors prevailed less often in arbitrations than in court, refuting a common assertion by arbitration critics that the process is biased in favor of businesses."[58]

The Supreme Court has, in recent terms, figured prominently in this debate, issuing a series of significant opinions clarifying the rules governing arbitration clauses. Almost all of the Court's recent arbitration decisions behoove business interests defending claims against plaintiffs, whether in class actions or individual lawsuits. The Court's October 2013 term is no exception. Perhaps more than any other area of law, the Supreme Court's recent arbitration decisions have the potential to dramatically restrict plaintiffs' access to the courts by enforcing arbitration clauses that, in the view of many, inure largely to the benefit of businesses defending lawsuits, particularly class actions.

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56. Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf; *see also* Pubic Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* (July, 2008), *available at* http://www.citizen.org/documents/Arbitration DebateTrap%28Final%29.pdf.

57. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers (A Response to Public Citizen)*, U.S. Chamber Institute for Legal Reform (April, 2008), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/200804ArbitrationGoodFor Consumers-Rutledge.pdf.

58. Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and In Court*, Hastings Business Law Journal (Nov. 19, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1508545.

§ 2.6.2 In the 2013 term, the Court focused on the availability of class arbitration.

As discussed in prior versions of this chapter, in nearly every recent term, the Supreme Court has issued several decisions impacting arbitration practice. This term is no different, as the Court issued two significant opinions involving the availability of class arbitration.

American Express Co. v. Italian Colors Restaurant.[59] In a 5-3 opinion authored by Justice Scalia,[60] the Court held that arbitration agreements containing class action waivers are enforceable even if the result is that it becomes economically unfeasible for a plaintiff to assert a federal statutory claim (such as one under U.S. antitrust laws). This opinion comes on the heels of two other recent cases in which the Court had shown a hostility toward class arbitration: *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[61] and *AT&T Mobility LLC v. Conception*.[62]

The plaintiffs in this case were merchants who accepted American Express cards. They claimed that American Express used its alleged monopoly power in the charge card market to force merchants to accept credit cards at excessive rates in violation of the antitrust laws. The plaintiffs argued they should be able to proceed as a class, presenting evidence that the cost of proving an antitrust violation would vastly exceed the recovery sought by any individual plaintiff. American Express invoked an arbitration clause in its form merchant contract which contained a class action waiver stating that the merchant would "not have the right to participate in a representative capacity or as a member of any class of claimants pertaining to any claim subject to arbitration."

The Supreme Court held that the arbitration agreement was enforceable even if the cost of proving a claim in individual arbitration exceeded its potential recovery. The Court emphasized that arbitration is a matter of contract and, therefore, that the courts must "rigorously enforce" arbitration agreements according to their terms. Against this baseline, the Court's holding turned on three rationales.

First, the Court concluded that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." While Congress has facilitated antitrust lawsuits by provisions such as treble damages, the Court reasoned that no legislation "pursues its purpose at all costs" and noted that the antitrust statutes were originally enacted before the advent of the class device.

Second, the Court rejected the application of an "effective vindication" exception to the enforceability of arbitration agreements. It noted that several of its prior decisions had indicated a willingness, in dictum, to invalidate on public

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59. Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

60. Justice Sotomayor, who was originally a member of the panel that heard the case in the Second Circuit, took no part in consideration of the case.

61. 130 S. Ct. 1758 (2010).

62. 131 S. Ct. 1740 (2011).

policy grounds arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies. However, the Court concluded that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."

Finally, the Court concluded on a practical note, observing that the process of weighing, on a case-by-case basis, the costs of proving each claim against the damages recoverable would "destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." It observed that the Federal Arbitration Act (FAA) would not "sanction such a judicially created superstructure."

The decision in *Italian Colors* confirms that companies may avoid class arbitration through waiver provisions—even if the cost of proving a claim in individual arbitration exceeds its potential recovery. It gives companies that include class action waiver clauses in their standard arbitration agreement additional assurance that those agreements will be strictly enforced.

Oxford Health Plans LLC v. Sutter.[63] A unanimous Court led by Justice Kagan held that an arbitrator's decision to allow class arbitration cannot be overturned if the decision was based on the arbitrator's interpretation of the parties' contract, even if the interpretation is incorrect. The Court found that the limited scope of review available under § 10(a)(4) of the FAA does not permit a substantive review of such a decision on the merits.

The case was brought as a putative class action by Sutter, a pediatrician, on behalf of other doctors under contract with health insurance company Oxford Health Plans. After Oxford successfully moved to compel arbitration, both parties agreed that the arbitrator should decide whether their contract authorized class arbitration. The arbitrator determined that it did. Oxford moved to vacate this decision on the grounds that the arbitrator exceeded his powers under § 10(a)(4) of the FAA. The district court denied the vacatur motion and the Third Circuit affirmed.

The Supreme Court ruled that the arbitrator did what the parties had asked—he interpreted the contract and decided it permitted class arbitration. As long as an arbitrator "even arguably" construes or applies the contract, his decision must stand regardless of whether his interpretation is correct. The Court distinguished its earlier opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[64] where it vacated an arbitral decision, finding that the arbitration panel in that case imposed its own "policy choice" in ordering class arbitration despite the absence of any contractual basis for the order.

Justice Alito, writing for himself and Justice Thomas, concurred in the judgment. He noted that had the Court reviewed the arbitrator's decision de novo, it would have likely found the decision to allow class arbitration erroneous. He further warned that it would be unlikely that the arbitrator's potentially incorrect interpretation to conduct class proceedings would bind absent class members who did not authorize the arbitrator to make that determination.

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63. 133 S. Ct. 2064 (2013).
64. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

This decision suggests that if there is any doubt as to whether class arbitration is permitted, defendants should consider arguing that the availability of class arbitration poses a question of arbitrability. The Court in *Oxford* stated that questions of arbitrability are "gateway matters" that are presumptively for the courts to decide and may be the subject of de novo review.

§ 2.7 Copyright

The Supreme Court issued two decisions addressing copyright law during the 2012-13 term. In a unanimous decision addressing the voluntary cessation doctrine, the Court held that a plaintiff's broad covenant not to sue mooted the defendant's counterclaim to have plaintiff's trademark declared invalid. The other is a 6-3 decision, in which the Court addressed the importation provision of the Copyright Act to decide whether it is legal to purchase copyright materials outside of the United States to then resell in the United States, without the permission of the copyright owner. The Court held that the "first sale" doctrine, which exhausts a copyright holder's exclusive distribution rights after a product's first sale, allows a domestic repurchaser to sell within the United States copyrighted material that has been lawfully manufactured and initially sold abroad with the copyright owner's permission. The decision is a significant victory in favor of consumers of copyrighted content.

Already, LLC v. Nike, Inc.[65] Writing for a unanimous Court, Chief Justice Roberts held that Nike, Inc.'s broadly worded covenant not to enforce a trademark against its competitor's existing products and future "colorable imitations" moots the competitor's counterclaim to have Nike's trademark declared invalid. Invoking the voluntary cessation doctrine, under which Nike bore the burden to show—with absolute clarity—that the allegedly wrongful behavior could not reasonably be expected to recur, the Court held that the federal district court lost jurisdiction over a competitor's trademark cancellation claim once Nike, as the trademark holder, unconditionally and unilaterally promised not to assert its trademark against that competitor.

This case began as a suit brought by Nike against its competitor, Already, LLC, for trademark infringement. Nike alleged that a line of Already shoe products infringed Nike's registered trademark for the design of the company's popular-selling shoe, the Air Force 1. Already counterclaimed, contending that the Air Force 1 trademark was invalid.

But a year after filing suit, Nike issued a "Covenant Not to Sue," in which Nike promised that it would not raise against Already or any affiliated entity any trademark or unfair competition claim based on any of Already's existing footwear designs, or any future Already designs that constituted a "colorable imitation" of the competitor's current products. Nike then dismissed its trademark infringement claim and moved to dismiss Already's counterclaim on the ground that the covenant had extinguished the court's Article III jurisdiction,

65. Already, LLC v. Nike, Inc., 133 S. Ct. 721 (2013).

thereby mooting the case. Already opposed the dismissal, arguing that its counterclaim gave rise to an ongoing case or controversy. The Second Circuit sided with Nike.

The Supreme Court unanimously affirmed the Second Circuit, in a decision having less to do with trademark law and more to do with constitutional law. The Court recognized its precedent that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. According to the Court, however, the voluntary cessation doctrine acted as a workaround because it authorized Nike to moot the case upon establishing with absolute clarity that it "could not reasonably be expected" to resume a trademark enforcement action against Already. Nike easily satisfied that "formidable burden," the Court held, because the language of the covenant was so broad that the Court could not conceive a shoe that would fall outside its scope—nor could the parties point to any—absent an overt counterfeit. Already was thus "free to sell its shoes without any fear of a trademark claim."

The Court rejected each of Already's public policy arguments in favor of its Article III standing: that investors will be apprehensive about investing in Already if Nike remains free to assert its trademark; that a continued threat of litigation with Nike remains; and that competitors inherently have standing to challenge Nike's intellectual property. The presence of a covenant promising no invasion of Already's activities would allay investor concerns. Already was the only one of Nike's competitors with a judicially enforceable covenant protecting it from litigation relating to the Air Force 1 trademark. And industry-wide standing would encourage parties to employ litigation as a weapon against their competitors rather than as a last resort for settling disputes.

The Court did not end without noting, however, that executing broad-based covenants, like Nike's, can be a risky business strategy for trademark holders, too. Covenants permitting third parties to manufacture trademark knockoffs could dilute the trademark's significance, as well as demonstrate an absence of confusion by the public between the trademarked and nontrademarked products.

Justice Kennedy's concurring opinion, written on behalf of four justices, suggests that the Court's decision is not a foolproof victory for trademark-rights holders. Courts should proceed with caution before ruling that covenants not to sue can be used to terminate litigation, Justice Kennedy said. A holder's offensive use of covenants not to sue would be inequitable if the process "allow[ed] the party who commences the suit to use its delivery of a covenant not to sue as an opportunity to force a competitor to expose its future business plans or to otherwise disadvantage the competitor and its business network, all in aid of deeming moot a suit the trademark holder itself chose to initiate." The burden imposed upon defendants to demonstrate mootness should take that consideration into account.

Kirtsaeng v. John Wiley & Sons, Inc.[66] In a 6-3 decision authored by Justice Breyer, the Court held that the "first sale" doctrine, which exhausts a copyright

66. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013).

owner's exclusive distribution rights after a product's first sale, allows a domestic repurchaser to sell within the United States copyrighted material that has been lawfully manufactured and initially sold abroad with the copyright owner's permission. The Court rejected the argument that the "first sale" doctrine does not apply to "foreign-manufactured goods" that are originally sold abroad but are later brought into and resold domestically. In sum, the first-sale doctrine does not impose geographic limitations, so long as the copyrighted material was lawfully made.

The issue in this case addresses the type of protection a copyright holder has once its product, made outside of the United States, is sold for the first time. By way of background, the "exclusive rights" that a copyright owner has "to distribute copies … of [a] copyrighted work," 17 U. S. C. § 106(3), are qualified by, *inter alia*, the "first sale" doctrine, which provides that "the owner of a particular copy or phonorecord lawfully made under this title … is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord," § 109(a). Importing a copy made abroad without the copyright owner's permission is an infringement of § 106(3). *See* § 602(a)(1). In *Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 145 (1998), the Supreme Court held that § 602(a)(1)'s reference to § 106(3) incorporates, among other limitations, § 109's "first sale" doctrine limitation. But note that the copy at issue in *Quality King* was initially manufactured in the United States and then sent abroad and sold.

In this case, John Wiley & Sons, Inc., an academic textbook publishing company, manufactured and sold a foreign edition of its English-language textbooks abroad. While studying in the United States, Supap Kirtsaeng, a citizen of Thailand, asked his friends and family in Thailand to purchase copies of Wiley's foreign edition textbooks sold in Thai shops at low prices and to mail them to him in the United States. Kirtsaeng would, in turn, sell the textbooks domestically, reimburse his family and friends, and then keep the profit.

Wiley sued Kirtsaeng for copyright infringement, alleging that Kirtsaeng's unauthorized importation of and subsequent resale of its books amounted to an infringement of Wiley's exclusive right to distribute. Kirtsaeng countered that the "first sale" doctrine permitted him to resell or otherwise dispose of the books without the copyright owner's further permission.

The federal district court and the Second Circuit rejected Kirtsaeng's first sale defense, ruling that an ambiguous term in the Copyright Act limited first sale to works "lawfully made" under the Act, which had no application outside the United States and thus did not apply to foreign-made goods. The Supreme Court disagreed, concluding that the "first sale" doctrine did not impose such geographic limitations. Justice Breyer, writing for the majority, held that the "first sale" doctrine applies to copies of copyright works that are lawfully made in a foreign country. The language of the Act and common-law history support a nongeographic reading. And because Kirtsaeng's family and friends lawfully purchased copyrighted materials abroad, the "first sale" doctrine permitted Kirtsaeng to resell those books domestically without repercussion.

Justice Kagan, joined by Justice Alito, wrote a concurring opinion in which she supported the application of the first sale doctrine to works manufactured abroad and wrote to "suggest that any problems associated with that limitation come not from our reading of [the first sale doctrine provision], but from *Quality King's* holding that [the first sale doctrine] limits § 602(a)(1)." From their perspective, "the Court today correctly declines the invitation to save § 602(a)(1) from *Quality King* by destroying the first-sale protection that § 109(a) gives to every owner of a copy manufactured abroad"—a result which would "swap one (possible) mistake for a much worse one, and make our reading of the statute only less reflective of Congressional intent."

Justice Ginsburg dissented, joined by Justice Kennedy and Justice Scalia (but note that Justice Scalia did not join certain portions of the dissent addressing legislative history or Justice Ginsburg's assertion that her opinion would not preclude application of foreign-made goods from the first sale doctrine forever). The dissent views the majority opinion as improperly precluding copyright owners from segmenting markets with different price points. Justice Ginsburg looked to two congressional aims: "Congress intended to grant copyright owners permission to segment international markets by barring the importation of foreign-made copies into the United States[,]"; and "as codification of the first sale doctrine underscores, Congress did not want the exclusive distribution right … to be boundless." She thus concluded that "[r]ather than adopting the very international-exhaustion rule the United States has consistently resisted in international trade negotiations, I would adhere to the national-exhaustion framework set by the Copyright Act's text and history."

§ 2.8 Patent

Rapid innovations in the technology private sector easily outpace the "deliberate" stride of the law, but the Supreme Court has made great efforts to keep up. As *The New York Times* highlighted in its Pulitzer-prize winning feature *The iEconomy*,[67] technological developments have far-reaching global and cultural implications, many of which percolate up to the Court in the form of intellectual property disputes. Nowhere are the Court's efforts more evident than in the area of patent law,[68] where an increase in litigation[69] has given rise to a number of

67. Articles in *The New York Times* 2012 series *The iEconomy* are *available at* http://www.nytimes.com/interactive/business/ieconomy.html.

68. *See, e.g.*, Ronald Mann, *Is the new economy driving the Court's docket?*, SCOTUSBLOG.COM (Oct. 15, 2012), *available at* http://www.scotusblog.com/2012/10/is-the-new-economy-driving-the-courts-docket/ (observing "that the number of intellectual property cases [on the Supreme Court's docket] has been increasing in recent decades, even as the Court's docket has shrunk").

69. *See, e.g.*, Charles Duhigg & Steve Lohr, *The iEconomy, Part 7: The Patent, Used as a Sword*, THE N.Y. TIMES (Oct. 7, 2012), *available at* http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html.

significant opinions that define patent rights in the modern world where genetic modification is increasingly commonplace—and highly lucrative—in agriculture and healthcare. At issue is nothing less than the convergence of modern bio-science, private property rights, and the laws of nature.

Association for Molecular Pathology v. Myriad Genetics.[70] In a case that garnered significant coverage, in part due to actress Angelina Jolie's voluntary double mastectomy after discovering through an expensive test that confirmed she had an extremely high genetic risk of breast cancer, the Court struck down a patent that Myriad Genetics held on naturally mutated human genes that had been isolated from the bloodstream and found to evidence a high risk of breast and ovarian cancer.

The challenge to Myriad's patent was driven in large part by the high cost of the test (over $3,000) required to identify the presence of the gene in patients, many of whom (unlike Jolie) could not afford it. Myriad argued that by locating the mutated genes in the bloodstream and extracting them for study, it had achieved a true invention that did not occur naturally, rendering the isolated genes patentable.

In an opinion by Justice Thomas, the Court held that the isolated genes fell into the well-settled exception to patentability that "laws of nature, natural phenomena, and abstract ideas are not patentable." The Court concluded that because the patent holder had merely isolated the genes—instead of developing a synthetic form that could be eligible for a patent—its innovation was not patentable. "It is undisputed that Myriad did not create or alter any of the genetic information encoded in the [mutated] genes. The location and order of the nucleotides existed in nature before Myriad found them. Nor did Myriad create or alter the genetic structure of DNA." "To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention. Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the [patent law] inquiry." In short, "Myriad did not create anything."

The Court did, however, concede that synthesized DNA engineered to produce gene clones, referred to as "complementary DNA," or cDNA, probably is patentable. Challengers had argued that the cDNA had also been dictated by nature. That may be so, Justice Thomas said in reaction, "but the lab technician unquestionably creates something new when cDNA is made."

Bowman v. Monsanto Co.[71] In a case that garnered international attention for its potential impact on genetic and self-replicating technologies,[72] the Court unanimously held in *Bowman* that farmers cannot reproduce patented seeds through planting and harvesting without the patent holder's permission. As a

70. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

71. Bowman v. Monsanto Co., 133 S. Ct. 1761 (2013).

72. As a side note, *Bowman* is also notable for political concerns over the fact that Justice Clarence Thomas, who previously served as a lawyer for Monsanto, declined to recuse himself from the case (although being unanimous, his contribution made no difference in the ultimate result).

result, farmers must pay Monsanto each time they replant crops derived from the Monsanto seed.

The *Bowman* case involved a genetically modified soybean, developed and patented by Monsanto, which is resistant to a weed-killing herbicide called Roundup. The case turned on the exhaustion doctrine, under which a patent holder's rights are largely "exhausted" by an authorized sale of the patented item. In other words, the purchaser has a free right to use and resell the purchased copy of the invention. The defendant farmer argued that he did not did not violate Monsanto's patent because he did not produce the soybeans planted in subsequent crops—it was the seeds themselves that replicated. He argued that the exhaustion doctrine applied, and that his right to "use" the Monsanto seed necessarily included the right to replant the progeny of crops grown from that seed.

In a fairly brief opinion by Justice Kagan that emphasized the high up-front costs for companies like Monsanto (which was supported by numerous *amici* on appeal), the Court rejected what it called the farmer's "blame-the-bean defense," and held that there is no "seeds-are-special" exception in patent law. The Court noted that "[i]f the purchaser of [the patented] article could make and sell endless copies, the patent would effectively protect the invention for just a single sale"—to which the exhaustion doctrine does not apply. In other words, the fact that the seed self-replicated did not exhaust Monsanto's patent rights. "Were the matter otherwise, Monsanto's patent would provide scant benefit. After inventing the Roundup Ready trait, Monsanto would, to be sure, receive its reward for the first seeds it sells. But in short order, other seed companies could reproduce the product and market it to growers, thus depriving Monsanto of its monopoly."

But Justice Kagan was careful to narrowly craft the Court's opinion to the facts presented. "We recognize that such inventions are becoming ever more prevalent, complex, and diverse," she wrote. "In another case, the article's self-replication might occur outside the purchaser's control. Or it might be a necessary but incidental step in using the item for another purpose." Therefore, the Court left open for a later date the question of whether and how the patent exhaustion doctrine would apply to crops that can be traced back to genetically modified seeds in part, but which have undergone their own natural modification that sets them apart from the genetically modified seed.

§ 2.9 Other Significant Cases

While the sections above discuss cases that will have a significant impact on business and commerce, the 2012–13 term will likely be remembered for significant cases on hot-button issues, including same-sex rights, affirmative action, and the viability of the Voting Rights Act.

The Supreme Court decided two watershed cases involving same-sex rights, which implicated the Due Process and Equal Protection Clauses, one under the Fifth Amendment and the other under the Fourteenth Amendment.

United States v. Windsor.[73] Justice Kennedy delivered the opinion of a divided 5-4 court that struck down as unconstitutional a central provision of the 1996 Defense of Marriage Act (DOMA). The Respondent is the surviving spouse in a same-sex marriage recognized by the State of New York, who was denied the benefit of a federal tax deduction on her deceased partner's estate. She challenged Section 3 of DOMA, which defined "marriage" as between persons of the opposite sex only, as a violation of the Due Process and Equal Protection Clauses as guaranteed by the Fifth Amendment.

The Court declared Section 3 unconstitutional as "writing inequality into the entire U.S. Code." The majority observed that domestic relations have long been regarded as an essentially exclusive province of the States and that, in this particular case, the State of New York had previously recognized the validity of and authorized same-sex marriages to protect members within the same-sex class of persons. Acknowledging that the purpose and practical effect of the DOMA provision deprived same-sex couples of the benefits afforded by federal regulation and caused them to be unequal, the Court concluded that the federal statute served no legitimate state purpose that overcame the purpose and effect of disparaging and injuring those whom the State sought to protect.

Notably, the Court declined to articulate the correct standard of judicial review that is applicable in same-sex rights cases or to address Section 2 of DOMA, which leaves to the states the right to refuse to recognize same-sex marriages that are performed in other states.

As a direct result of the *Windsor* decision, the Internal Revenue Service (IRS) issued Revenue Ruling 2013–17, which provides that all same-sex marriages legally entered into will enjoy the same federal tax benefits as all legally married opposite-sex couples. The state of celebration is the relevant state, as opposed to the state in which the couple currently resides; meaning, a couple whose marriage was legally recognized in the state they married, but later move to a state that does not recognize same-sex marriage, will still be able to enjoy the federal benefits. Businesses should continue to monitor future IRS rulings for further guidance on *Windsor*'s application to employee benefits and employee benefit plans.

Hollingsworth v. Perry.[74] Chief Justice Roberts delivered the 5-4 opinion of the Court that effectively reinstated the right of same-sex couples to marry in California by holding that the official proponents of California's Proposition 8 lacked standing to appeal a ruling that the proposition was unconstitutional.

The plaintiffs in this case were two same-sex couples who challenged Proposition 8, a voter-enacted ballot initiative that amended the California state constitution to limit marriage to opposite-sex couples only, on the basis that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Proponents of the initiative intervened to defend the initiative when the named defendants, state and local officials, refused to defend the proposition, but continued to enforce it.

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73. United States v. Windsor, No. 12-307 (June 26, 2013).
74. Hollingsworth v. Perry, No. 12-144 (June 6, 2013).

The Court concluded that proponents of the initiative lacked standing, reasoning that the proponents did not have a judicially cognizable interest of their own because they did not suffer any direct injury or have a direct stake in the outcome of the appeal for purposes of Article III, which limits federal courts to decide actual cases or controversies. The Court also rejected the arguments that the proponents were authorized to assert the state's interests under general agency principles and that the California Supreme Court's decision—that the proponents had standing pursuant to state law—could confer upon the proponents standing in the federal courts.

While the far-reaching implications of these decisions on businesses remain to be seen, some immediate impacts have come to fruition, including: the Family and Medical Leave Act will now allow qualifying same-sex partners time off to care for their sick spouses; employers who have operations in more than one state should review the state law of each state in which they operate and the federal law to ensure they are fully apprised of what constitutes a "spouse" for purposes of employee benefits; and businesses should continue to review their employee benefit plans in accordance with new state and federal regulations.

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In perhaps the most controversial decision of the term, the Supreme Court struck down a crucial section of the Voting Rights Act in a 5-4 decision, garnering a sharply worded dissent from Justice Ginsburg.

Shelby County v. Holder.[75] Chief Justice Roberts authored the majority opinion that struck down Section 4 of the Voting Rights Act of 1965, in a decision that was telegraphed by the Court's 2009 opinion in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193, 203-04 (2009).

Section 4 of the Voting Rights Act provides the "coverage formula" that determines what jurisdictions are subject to Section 5's pre-clearance requirements for any change to their voting procedures. Chief Justice Roberts concluded that the Act's infringements on state sovereignty could no longer be justified under the current factual record. Justice Ginsburg's dissent took issue with the majority's view of the factual record and argued that the Court should have deferred to congressional findings in 2006 when Congress last reauthorized the coverage formula. She criticized the majority with the memorable line: "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."

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The Supreme Court also returned to the hot-button subject of affirmative action, but the decision was not nearly as groundbreaking as some had predicted.

Fisher v. University of Texas at Austin.[76] Justice Kennedy delivered the 7-1 opinion of the Court,[77] which held that the Fifth Circuit's affirmance of the

75. Shelby County v. Holder*,* 133 S. Ct. 2612 (2013).
76. Fisher v. University of Texas at Austin, No. 11-345 (June 24, 2013).
77. Justice Kagan took no part in the consideration or decision of the petition.

District Court's grant of summary judgment was in error because it did not apply the correct standard for strict scrutiny as articulated in *Grutter v. Bollinger*.[78]

In *Fisher*, the petitioner, a white female, challenged the university's consideration of race as part of its admission policy after being rejected for admission, alleging that the policy violated the Equal Protection Clause. The Fifth Circuit deferred to the university's good faith, which the Supreme Court deemed too narrow of a standard and made clear that, on judicial review, courts should not merely rubber-stamp a university's admissions process.

A number of Fortune 100 and other leading American businesses submitted an amici curiae brief in support of the University and its admissions policy, asserting that the pursuit of diversity in higher education remains a compelling state interest, because the skills needed in today's marketplace can only be developed by exposure to diversity.

Justice Ginsburg, the lone dissenter, read her dissent aloud when the Court announced its decision to highlight her disagreement with the majority's opinion and reiterated that "only an ostrich could regard" the alternatives presented as race-blind.

§ 2.10 The 2013–14 Supreme Court Term: More of the Same?

In previewing the Supreme Court's 2013–14 docket, the media and other commentators have focused most of their attention on hot-button cases dealing with abortion, campaign finance, affirmative action,[79] legislative prayer, and the scope of the President's recess authority, among others.

But beyond the media glare, the Supreme Court will consider and adjudicate—as it does in every term—a host of cases that will have a substantial impact on businesses and consumers. These cases will focus on many of the same topics addressed in this chapter—intellectual property, labor and employment, class actions, etc.—as well as some new issues that have not yet received significant review by the high court. Some of the key cases that will be of interest to the business community are highlighted below. The first case below was decided just before the deadline to submit this chapter. The others remained pending at that time.

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78. Grutter v. Bollinger, 539 U.S. 306 (2003).

79. In *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, the Supreme Court is considering whether a state violates the Equal Protection Clause by amending its constitution to prohibit race and sex-based discrimination or preferential treatment in public university admissions decisions. The Court is reviewing the decision of a sharply divided Sixth Circuit, sitting en banc, which held that Proposal 2—a proposal that amended Michigan's Constitution to prohibit the consideration of race, sex, ethnicity, or national origin in public education, government contracting, and public employment—violated the Equal Protection Clause under the seldom used political-restructuring doctrine.

Procedure. In *Atlantic Marine Construction Co.*,[80] Justice Alito, writing for a unanimous court, held that 28 U.S.C. § 1404(a) is the exclusive mechanism for enforcing a forum selection clause that points to another federal forum, and that a *forum non conveniens* motion is the appropriate way to enforce such a clause that points to a state or foreign forum. Moreover, the Court held that when a valid forum selection clause exists, the traditional § 1404 analysis changes and the parties' choice of forum should be given controlling weight unless there are extraordinary circumstances unrelated to the convenience of the parties that clearly disfavor a transfer. In such circumstances, the plaintiff's choice of forum merits no weight, the Court should not consider the parties' private interests aside from those embodied in the forum selection clause, and the burden is on the plaintiff so show why the public-interest factors overwhelmingly disfavor a transfer.

Intellectual Property. In *Medtronic Inc. v. Boston Scientific Corp.*, 12-1128, the Court is poised to decide—in cases where a patent licensee seeks a declaration of noninfringement—whether the licensee bears the burden of proving noninfringement or whether the patentee bears the burden of proving infringement. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, No. 12-1315, the Court will review the intersection of the nonstatutory defense of laches with the Copyright Act's three-year statute of limitations for civil copyright claims. The Supreme Court is being asked to resolve a 3-2-1 circuit split among the courts of appeals as to whether the equitable defense of laches can bar a civil copyright suit brought within the Act's express three-year statute of limitations. Finally, in *Lexmark International, Inc. v. Static Control Components, Inc.*, No. 12-873, the Court must resolve another three-way circuit split regarding the appropriate analytical framework for determining a party's standing to bring an action for false advertising under the Lanham Act.

Securities Law/Class Actions. In *Halliburton Co. v. Erica P. John Fund*, No. 13-317, the Court will revisit its holding in *Basic Inc. v. Levinson*, 485 U.S. 224 (1987) that securities class action plaintiffs are entitled to a presumption of class reliance derived from a "fraud-on-the-market" theory, and should the presumption stand, whether the defendant may rebut the presumption by introducing evidence that the alleged misrepresentations did not distort the market price of its stock. The Court's decision could have huge implications on investors' ability to recover damages in securities fraud cases. In three consolidated cases, the Court will resolve a circuit split over the type of state law class action claims that are precluded under the Securities Litigation Uniform Standards Act.[81] And in *Mississippi ex rel. Hood v. AU Optronics Corp.*, No. 12-1036, the Court will decide whether an action is removable to federal court under the Class Action Fairness Act when it is brought by a state (not a class), under state law, based on injuries that the defendants' products caused to a large number of its residents.

80. *Atl. Marine Constr. Co. v. United States Dist. Court for the W. Dist. of Tex.*, No. 12-929, 2013 WL 6231157 (U.S. Dec. 3, 2013).

81. *See* Chadbourne & Park LLP v. Troice, No. 12-88, Proskauer Rose LLP v. Troice, No. 12-88, and Willis of Colorado Inc. v. Troice, No. 12-86.

Labor and Employment. The Court will decide, in *Madigan v. Levin*, No. 12-872, whether the Age Discrimination in Employment Act (ADEA) precludes state and local government employees from bringing constitutional age discrimination claims under 42 U.S.C. § 1983.

Arbitration. In *BG Group PLC v. Republic of Argentina*, No. 12-138, the Court is reviewing a dispute resolution provision embedded in a bilateral investment treaty between Argentina and the United Kingdom, which provides that a foreign investor must litigate any dispute with the host State in that State's courts for at least 18 months before pursuing arbitration. The question presented is whether a court or the arbitration panel is authorized to determine whether the litigation requirement is enforceable. The D.C. Circuit, concluding that the decision was for a court to decide, vacated the arbitration tribunal's ruling that deemed the requirement enforceable and reached the merits.

Environment. In *Utility Air Regulatory Group v. Environmental Protection Agency*, No. 12-1146, consolidated with five other petitions, the Court will consider the question of whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

Other cases of import to the business community will be added throughout the 2013–14 term. Be sure to consult next year's edition of the *Annual Review of Developments* publication to see if the Supreme Court further enhanced its "business-friendly" reputation in the 2013–14 term.