

THE FAVORITE 1% OF THE ROBERTS COURT

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INTRODUCTION

It is now common knowledge that economic inequality in the United States is on the rise, although there is little agreement as to the causes. Blame has been cast in many quarters, from tax policies that favor the rich, to the deregulation of industry, to education policy, to outrageous CEO compensation, among others. Too often left out of these conversations, however, is the role of the federal courts, and particularly the Supreme Court under Chief Justice John Roberts. With the appointments of Roberts in 2005 and Samuel Alito in 2006, the Supreme Court has accelerated its movement in a pro-business direction. The Court has come to play a significant role in reinforcing economic inequality between what many have taken to calling “the 99%” and “the 1%” by changing the rules of the game to favor big business and the wealthy at the expense of everyday Americans.

Over the past seven years, the conservative justices of the current Supreme Court have engaged in remarkable judicial activism across various areas of the law in an effort to reshape our polity and economy. The Court has cleared the way for monied interests to corrupt the American electoral process. It has made it more difficult for everyday Americans with legitimate grievances to stand up for their rights. It has created barriers preventing employees and consumers from banding together to press their claims. It has reinterpreted anti-discrimination statutes to create impossibly strict standards for proving discrimination on the basis of age, gender, race, or disability. It has made it easier for pharmaceutical companies to collect personal data to market more aggressively, thereby undermining the independent medical judgment of doctors, while absolving generic drug manufacturers from liability for failing to warn of known medical risks. In short, the Roberts Court has favored the interests of corporations and the people who run them, while giving short shrift to the rights of everyday Americans. While there are sundry examples, I will focus here on ten of the Roberts Court cases that have done the most to increase the power

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and wealth of the 1% at the expense of the 99%.

I. CITIZENS UNITED V. FEC: CORRUPTING THE AMERICAN ELECTORAL SYSTEM

In the most notorious decision of the Roberts Court – *Citizens United v. Federal Election Commission* – a narrow majority of five justices fundamentally changed the rules of federal election law.¹ Initially presented with a narrow question of whether the electioneering communications provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA” or the “McCain-Feingold Act”) applied to “pay-per-view” movies made by not-for-profit corporations, the Court reached beyond this question and invited reargument on whether to overturn its precedents upholding caps on corporate spending in federal elections.² In so doing, the Court unnecessarily reached out to address a constitutional question not raised by the parties.

Once the constitutional question was before the Court, it ruled that corporations have the same First Amendment rights as individuals to spend money to influence elections.³ This decision reversed a century of law and opened the floodgates for special interests and for-profit corporations to spend money in our elections.⁴ As Justice Stevens said in his long dissent, “Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”⁵ Indeed, the case has become a symbol of the conservative judicial activism of the Roberts Court.

Incredibly, the majority held that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”⁶ and “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”⁷ The Court’s prediction has already proven flatly wrong, as the case has unleashed a torrent of corporate money into the political system, leading to widespread disillusionment with the integrity of our democracy.

Of course, *Citizens United* was not the first time that the Supreme Court had batted down efforts at campaign finance reform. In fact, the *Citizens United* majority based its reasoning in large part on two cases decided some thirty years earlier: the 1976 case *Buckley v. Valeo*⁸ and the 1978 case *First National Bank of Boston v. Bellotti*.⁹ In *Buckley*, the Court struck down limits on campaign expenditures, on independent expenditures by individuals and groups, and on candidates spending their own personal wealth.¹⁰ In *Bellotti*, the Court struck down a Massachusetts state law ban on independent expenditures by corporations in the context of public referenda.¹¹ Thus, *Citizens United* is not the genesis of the Supreme Court’s hostility to campaign

¹ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

² *See id.* at 931-32 (Stevens, J., dissenting).

³ *See id.* at 897-9 (majority opinion).

⁴ *See id.* at 930 (Stevens, J., dissenting).

⁵ *Id.* at 932.

⁶ *Id.* at 909 (majority opinion).

⁷ *Id.* at 884.

⁸ 424 U.S. 1 (1976).

⁹ 435 U.S. 765 (1978).

¹⁰ *Buckley*, 424 U.S. at 23-54.

¹¹ *Bellotti*, 435 U.S. at 795.

finance reform, but it is among the most destructive due to its unleashing of potentially vast corporate resources within the political system.

Nor is *Citizens United* the last time the Supreme Court has rendered a decision allowing democratic processes to be distorted by the influence of concentrated wealth. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court invalidated, again by a 5-4 margin, a state law designed to restrict the influence of big money on elections.¹² Arizona voters passed the Citizens Clean Election Act in 1998 after a major bribery scandal involving multiple members of the state legislature.¹³ The law established a public financing scheme, and set fundraising and expenditure limits on candidates who opted for public financing.¹⁴ But recognizing the possibility that a publicly-funded candidate could be swamped by an opponent with vast personal wealth, or by independent groups spending massive funds in opposition, the voters instituted another provision: candidates could receive additional funding scaled to the amount of money raised by opponents who refused public funding, or to spending by outside groups.¹⁵

The Court thus examined a law that increased speech by providing candidates with resources to communicate with voters, and inexplicably determined that this speech subsidy violated the First Amendment. The majority reasoned that the scheme "plainly forces the privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy."¹⁶ Justice Kagan, in a blistering dissent, countered that the statute does not hinder any speech at all, but rather encourages more speech.¹⁷ The law applies equally to all candidates of all viewpoints, so it should pass First Amendment muster.¹⁸ "What petitioners demand," she said, "is essentially a right to quash others' speech through the prohibition of a (universally available) subsidy program."¹⁹

By striking down the reforms at issue in these cases, the Court has closed off multiple attempted avenues to reduce the undue influence of corporate interests and personal wealth in political races. In doing so, the Court has ensured that the members of the 1% have disproportionate power to choose the government of their liking, drowning out the voices of the 99%.

II. AT&T MOBILITY V. CONCEPCION: THE FORCED RESOLUTION OF DISPUTES IN A BIASED SETTING

The dispute in *AT&T Mobility LLC v. Concepcion* arose because of fine print buried in a take-it-or-leave-it consumer contract that Americans enter into regularly.²⁰ AT&T advertised a

¹² 131 S. Ct. 2806 (2011).

¹³ *See id.* at 2813.

¹⁴ *See id.* at 2813-14.

¹⁵ *See id.* at 2813-15.

¹⁶ *Id.* at 2818.

¹⁷ *See id.* at 2829-45 (Kagan, J., dissenting).

¹⁸ *See id.*

¹⁹ *Id.* at 2835.

²⁰ 131 S. Ct. 1740, 1744 (2011).

free phone with a service contract.²¹ The Concepcions, residents of California, signed the contract only to discover that AT&T charged them a thirty-dollar sales tax on the supposedly “free” phone.²² The Concepcions filed a class action on behalf of themselves and other similarly situated consumers, but AT&T claimed that the Concepcions’ only recourse was to pursue individual arbitration, as the service agreement contained a mandatory arbitration clause and a class action waiver.²³

As a general matter, very few consumers file individual arbitration claims to recoup a sum on the order of thirty dollars. In fact, from 2003-2007, only 170 of AT&T’s ninety million customers filed arbitration claims.²⁴ Thus, AT&T was able to collect millions from its “free” phone deal. However, when the Concepcions pressed their case, the Ninth Circuit Court of Appeals invalidated the provision as unconscionable.²⁵ The Ninth Circuit applied the California Supreme Court’s rule in *Discover Bank v. Superior Court*, which invalidates as “unconscionable” class action waivers found in adhesion contracts between parties of vastly unequal bargaining power.²⁶

However, in a broad victory for corporate interests, the U.S. Supreme Court held that the Federal Arbitration Act (“FAA”) preempts California’s rule, even when the corporation is alleged to engage in widespread wrongdoing.²⁷ Justice Antonin Scalia, writing for the Court, reasoned that requiring the availability of class proceedings altered the “fundamental attributes of arbitration and [was therefore] inconsistent with the FAA.”²⁸ Specifically, Scalia wrote that the increased difficulty of keeping arbitration proceedings confidential when more people are involved, the procedural formality required in a class arbitration, the increased financial stakes for corporate defendants, and the lack of significant appeals (again, for corporate defendants) all interfere with the terms that corporations “bargained for” when writing forced arbitration contracts.²⁹ Essentially, the Court held that states may not stop corporations from writing their own “get out of jail free cards” because the FAA protects the corporate goal of escaping trial.

In dissent, Justice Breyer noted, “California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration.”³⁰ He noted that California applied “the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision.”³¹ Unfortunately, Justice Breyer’s reasoned dissent did not carry the day. The Court ratified fine-print provisions in consumer and employment contracts that compel binding arbitration and restrict the right to class action. It has effectively removed any incentive for corporations in such contracts to follow the rules. After all,

²¹ See *id.* at 1744-45.

²² See *id.* at 1744.

²³ See *id.* at 1744-45.

²⁴ Brief for Marygrace Coneff, et al. as Amici Curiae Supporting Respondents, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), at 9.

²⁵ See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009).

²⁶ See *id.* at 853-55 (9th Cir. 2009).

²⁷ *Concepcion*, 131 S. Ct. at 1753.

²⁸ *Id.* at 1748.

²⁹ *Id.* at 1750-53.

³⁰ *Id.* at 1760 (Breyer, J., dissenting).

³¹ *Id.*

as Justice Breyer noted, “only a lunatic or a fanatic sues for \$30.”³²

This is just one of a long string of pro-arbitration decisions issued by the Supreme Court in recent years. In fact, the Supreme Court has dramatically rewritten the law governing arbitration. The Federal Arbitration Act of 1925 (“FAA”) permits non-judges to settle business disputes.³³ Congress passed the FAA as a reaction to many judges’ hostility toward arbitration agreements.³⁴ The FAA states that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁵ In other words, Congress merely meant to place arbitration agreements “upon the same footing as other contracts.”³⁶

The underlying assumption was that these agreements would exist in negotiated contracts between parties with relatively equal bargaining power.³⁷ In the 1980s, however, the Supreme Court began radically expanding the scope of the arbitration law, applying it to a plethora of fine-print consumer and employment contracts that the FAA’s drafters never could have imagined.³⁸ The drafters also intended for the statute not to apply to employment contracts.³⁹ However, the Supreme Court has largely ignored this exemption.⁴⁰

The Roberts Court has been especially aggressive in using the FAA to rubber-stamp forced arbitration clauses and allowing big business to hide behind the fine print. In another recent case, *Rent-a-Center, West, Inc. v. Jackson*, the Roberts Court held that an arbitrator, not a court, is the appropriate entity to decide whether an arbitration clause in an employment contract is valid.⁴¹ In its hair-splitting holding, the Court found that, because the employee challenged the whole arbitration agreement rather than the arbitration clause alone, his challenge would be heard by an arbitrator.⁴² By forcing employees and consumers into arbitration proceedings in which they are at a fundamental disadvantage, the Supreme Court has radically restricted access to justice for everyday Americans, to the great benefit of corporate America.

³² *Id.* at 1761.

³³ 9 U.S.C. §§ 1-14 (2006).

³⁴ *See, e.g., Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting) (citing S. Rep. No. 536, 68th Cong., 1st Sess., 2 (1924)); *Circuit City Stores v. Adams*, 532 U.S. 105, 125 (2001) (Stevens, J., dissenting).

³⁵ 9 U.S.C. § 2 (2006).

³⁶ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

³⁷ *See Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting) (discussing collecting sources).

³⁸ *See, e.g., Alan Morrison*, “Saved by the Supreme Court: Rescuing Corporate America,” ACS Issue Brief, Oct. 3, 2011 (arguing that the Supreme Court has been a major ally of corporate interests since the 1980’s); *Allied Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995) (concerning home termite protection plan); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (discussing home loans).

³⁹ 9 U.S.C. § 1 (2006); Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923).

⁴⁰ The Court has taken a cramped reading of the scope of the employment carve out, holding that it only excludes transportation workers. *See generally Adams*, 532 U.S. at 105 (holding that only transportation workers’ employment contracts are exempted under the FAA).

⁴¹ 130 S. Ct. 2772, 2779-81 (2010).

⁴² *See id.*

III. WAL-MART V. DUKES: THE DEMOLITION OF CLASS ACTIONS

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, gender, or national origin.⁴³ When Title VII was passed, women working full-time were paid 59% of what men were paid; even today, women are paid 77% of what men are paid.⁴⁴ This results in total losses over a lifetime of \$700,000 for a woman with a high school degree, \$1.2 million for a college graduate, and \$2 million for a professional graduate.⁴⁵ Working women and their children, including those women working at Wal-Mart, experience higher rates of poverty than men, and have a greater need for public assistance to obtain health care.

Against this background, female employees brought a claim against Wal-Mart for gender discrimination in pay and promotion, and sought class certification on behalf of all female employees of Wal-Mart. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court ruled unanimously that the plaintiffs could not sue under Federal Rules of Civil Procedure 23(b)(2) because they sought back pay in addition to injunctive relief.⁴⁶ But the more fundamental aspect of the Court's holding was a narrow 5-4 victory for Wal-Mart. With four justices forcefully dissenting, the Court raised the bar for class certification, making it much more difficult to hold large businesses accountable for discrimination.

First, the Court set a higher "commonality" threshold for class action plaintiffs, who must prove that common issues "predominate."⁴⁷ Second, the Court announced its view that "proving that [a] discretionary system has produced a . . . disparity is not enough," even though the plaintiffs provided evidence that the disparities in pay and promotion across all of Wal-Mart's 41 regions "can only be explained by gender discrimination."⁴⁸ The Court's reasoning could devastate disparate-impact cases where employers' subjective decisions have led over time to widespread gender or racial disparities in the workforce. It also undermines the incentive for employers to set up objective pay and promotion practices, based on published criteria and clear merit-based evaluations of applicants to posted jobs.

Third, the Court held that "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's," and "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."⁴⁹ This suggests that classes of women or minorities suffering the effects of gender or racial discrimination may be unable to proceed absent proof that conscious, intentional discrimination from on high directs the employment decisions made below. If this proves true, it could have far-reaching, insulating effects on subjective employment systems, like Wal-Mart's, that yield discriminatory effects.

In her dissent, Justice Ginsburg first pointed out that the majority decided an issue not

⁴³ See Civil Rights Act, 42 U.S.C. § 2000e (1964).

⁴⁴ U.S. Census Bureau, Historical Income Tables – People, Table P-40, available at http://www.census.gov/hhes/www/income/data/historical/people/P40_2009.xls.

⁴⁵ National Committee on Pay Equity, The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap, <http://www.pay-equity.org/info-time.html> (last visited May 24, 2011).

⁴⁶ 131 S. Ct. 2541, 2557-59 (2011).

⁴⁷ See *id.* at 2551-57.

⁴⁸ *Id.* at 2555.

⁴⁹ *Id.* at 2554-55.

before it.⁵⁰ She wrote that the Court should have remanded the case instead of “disqualify[ing] the class at the starting gate”⁵¹ Ginsburg noted that “[t]he plaintiffs’ evidence, including class members’ tales of their own experiences, suggests that gender bias suffused Wal-Mart’s company culture.”⁵² While the three female Supreme Court justices, along with Justice Breyer, could readily see how pervasive gender bias infused Wal-Mart’s subjective pay and promotion system, the all-male majority simply failed to see it. Through this case, the Supreme Court significantly eroded the procedural rights of all American employees, while delivering a huge win for big business by limiting corporate liability.

IV. ASHCROFT V. IQBAL: PROVING YOUR CASE BEFORE GETTING INTO COURT

In *Bell Atlantic Corp. v. Twombly*⁵³ and *Ashcroft v. Iqbal*,⁵⁴ the Supreme Court radically altered the standards by which litigants’ claims are reviewed in federal court. The Court erected new procedural barriers that keep victims of unlawful conduct from seeking redress in our courts and immunize lawbreakers from appropriate sanctions. These decisions have created an unnecessarily heightened burden for the plaintiff during the pleading phase to prove yet-unknown facts. In these decisions, the Court abandoned the standard that had been set forth half a century ago in *Conley v. Gibson* (1957) to give plaintiffs the opportunity to have their day in court.⁵⁵ After *Iqbal*, all civil claimants must plead “factual content,” rather than just a “short and plain statement of the claim,” and the trial judge, according to Justice Kennedy’s ruling, should “draw on its judicial experience and common sense” to evaluate whether the claim is plausible.⁵⁶ A trial judge now has enormous leeway to determine the merits of a claim before a plaintiff has had an opportunity to uncover vital facts in the discovery process. Dissenting, Justice Souter (who authored the *Twombly* decision) called out the majority for deciding an issue not properly briefed or argued.⁵⁷ Without adequate briefing and argument, “[t]he attendant risk is palpable.”⁵⁸

In the last three years, federal courts have relied on the new standards to dismiss thousands of lawsuits involving the environment, medical malpractice, dangerous drugs, investor protection, disability rights, civil rights, and employment discrimination. Once again, it is everyday Americans with legitimate grievances who suffer, while corporate defendants benefit from their new procedural advantages.

⁵⁰ See *id.* at 2561-66 (Ginsburg, J., dissenting).

⁵¹ *Id.* at 2561.

⁵² *Id.* at 2563.

⁵³ 127 S. Ct. 1955, 1961 (2007).

⁵⁴ 129 S. Ct. 1937, 1942-43 (2009).

⁵⁵ See *Conley v. Gibson*, 78 S. Ct. 99, 103 (1957) (holding that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.” Rather, the Court held that the Rule’s requirement of a “short and plain statement of the claim” is sufficient if it “give[s] the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).

⁵⁶ *Iqbal*, 129 S. Ct. at 1950, 1952.

⁵⁷ See *id.* at 1955-61 (Souter, J., dissenting).

⁵⁸ *Id.* at 1957.

V. LEDBETTER V. GOODYEAR TIRE & RUBBER CO.: BARRING RECOVERY FOR DECADES OF UNEQUAL PAY

Sometimes the Supreme Court renders decisions so shocking that the notoriously gridlocked U.S. Congress kicks into gear to undo the damage.

Lilly Ledbetter worked at Goodyear Tire from 1979 to 1998.⁵⁹ During this time, she alleges, she was subject to discrimination in the progress of her raises and promotions based upon her sex.⁶⁰ Though her contemporaries started at the same pay level, by the time she retired, she was earning between \$500 and \$1500 per month less than her male counterparts.⁶¹ She filed charges against her employer for discrimination under the Civil Rights Act and Equal Pay Act.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court overturned a jury's finding that Goodyear had systematically paid Lilly Ledbetter less than her male co-workers.⁶² Ignoring precedent, the five conservative justices held that Ledbetter could not bring legal action for pay discrimination despite being paid less than men in the same position for twenty years.⁶³ The Court reasoned that Ledbetter should have brought the case within 180 days of the first act of pay discrimination, even though she both had no way of learning of the discrepancy until much later and the discrimination continued for two decades.⁶⁴ In her dissent, Justice Ginsburg pointed out that the majority's holding contravened past Supreme Court precedent that previously held that an employer violates the law each time an employee receives discriminatory pay.⁶⁵

Fortunately, in this case, Congress responded. The Lilly Ledbetter Fair Pay Act was signed by President Obama in 2009, amending the relevant statutes to ensure that the statute of limitations resets with each discriminatory paycheck.⁶⁶ It must not be forgotten, however, that this action was necessitated by the Court's outrageous, activist reinterpretation of established discrimination law.

VI. EXXON SHIPPING V. BAKER: LIMITING PUNITIVE DAMAGES FOR EGREGIOUS CORPORATE BEHAVIOR

In *Exxon Shipping Co. v. Baker*, the Supreme Court held that punitive damages may not exceed compensatory damages in maritime cases.⁶⁷ This decision left tens of thousands of Alaskans affected by the Exxon Valdez oil spill of 1989 with only a tenth of what the jury had awarded them.⁶⁸

The spill was one of the worst man-made environmental disasters in history, pouring many millions of gallons of crude oil into the Prince William Sound. A group of Alaska residents who suffered financial loss because of the spill brought suit against Exxon. Exxon was found

⁵⁹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

⁶⁰ *Id.*

⁶¹ *See id.* at 643 (Ginsburg, J., dissenting).

⁶² *Id.* at 621, 623 (majority opinion).

⁶³ *See id.* at 621, 641-43.

⁶⁴ *See id.* at 628-29.

⁶⁵ *See id.* at 645 (Ginsburg, J., dissenting).

⁶⁶ Lilly Ledbetter Fair Pay Act, 42 U.S.C. 2000e-5(e) (2009).

⁶⁷ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513-15 (2008).

⁶⁸ *Id.* at 515.

liable for negligent maintenance of the vessel and for the recklessness of the intoxicated captain. An Anchorage jury awarded \$5 billion in punitive damages, which was cut in half by the 9th Circuit Court of Appeals.⁶⁹

The Supreme Court dramatically reduced the punitive damages even further, from \$2.5 billion to \$500 million.⁷⁰ In a 5-3 decision in *Exxon Shipping Co. v. Baker*, the Court held that punitive damages may never exceed compensatory damages in maritime cases, creating a “1:1 ratio” and leaving tens of thousands of people affected by the oil spill with only a tenth of the original award made by a jury of their peers.⁷¹ Dissenting in part, Justice Stevens wrote that “Congress, rather than this Court, should make the empirical judgments” expressed in the majority’s opinion.⁷² His dissent chastises the Court for “embarking on a new lawmaking venture,” arguing that evidence that Congress had affirmatively chosen not to restrict the punitive damages in this kind of case “favors adherence to a policy of judicial restraint.”⁷³ Justice Ginsburg wrote a separate opinion dissenting in part, echoing Justice Stevens’ comment on the “venturesome character of the Court’s decision.”⁷⁴ Justice Ginsburg also inquired, “In the end, is the Court holding only that the 1:1 is the maritime-law ceiling, or is it also signaling that any ration higher than 1:1 will be held to exceed the ‘constitutional outer limit?’”⁷⁵ This question has particular resonance in light of the 2010 Deepwater Horizon spill in the Gulf of Mexico. Once again, the Supreme Court has limited corporate liability while leaving everyday Americans uncompensated when they suffer the consequences of reckless corporate activity.

VII. PLIVA, INC. V. MENSING: IMMUNIZING GENERIC DRUG MANUFACTURERS FROM LIABILITY

In *PLIVA, Inc. v. Mensing*, the Supreme Court’s pro-business majority held that a generic-drug manufacturer cannot be held liable under state law for failing to inform the FDA that its label inadequately warns consumers of health risks.⁷⁶ Gladys Mensing sued PLIVA in state court for failure to warn and misrepresentation after a generic drug that PLIVA manufactured caused her to develop a severe and irreversible neurological movement disorder.⁷⁷ Mensing claimed that PLIVA failed to take steps to change the warning labels despite mounting evidence that the drug carried a far greater risk of the disorder than initially indicated.⁷⁸ PLIVA argued that federal law implicitly preempts Mensing’s state claims because federal law requires generic labels to be identical to FDA-approved name brand labels.⁷⁹ Thus, PLIVA claimed that unilaterally strengthening the warning on the generic label to avoid state law liability would violate federal law requiring identical labels.

⁶⁹ See *Baker v. Exxon Mobile Corp.*, 490 F.3d 1066, 1073 (9th Cir. 2007).

⁷⁰ *Exxon Shipping Co.*, 554 U.S. at 476, 515.

⁷¹ *Id.* at 512-13.

⁷² *Id.* at 516 (Stevens, J., dissenting).

⁷³ *Id.*

⁷⁴ *Id.* at 524 (Ginsburg, J., dissenting).

⁷⁵ *Id.*

⁷⁶ *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2581 (2011).

⁷⁷ *Id.* at 2573.

⁷⁸ *Id.*

⁷⁹ *Id.*

The Supreme Court sided with *PLIVA* and held that a generic drug manufacturer may escape state tort liability even if the manufacturer refused to contact the FDA about newly discovered health risks.⁸⁰ Because the FDA must first approve a change to a label, the Court held that manufacturers “cannot independently satisfy those state duties for preemption purposes” while adhering to federal law.⁸¹ As a result, the Court stated that the Supremacy Clause requires that federal law preempt state law claims made by victims of inadequate generic-drug warning labels.⁸²

In dissent, Justice Sotomayor accused the majority of “invent[ing] new principles of preemption law out of thin air,” and identified three “absurd consequences” that will result from the Court’s decision.⁸³ First, generic drug consumers will have no access to compensation when they are injured by inadequate warnings. This creates an “arbitrary distinction” between brand-name drugs and generics that Congress did not intend to create.⁸⁴ Second, generic-drug manufacturers will no longer have the same state-law incentives to monitor and disclose safety risks that brand-name manufacturers have.⁸⁵ Third, the decision undercuts the goals of the Hatch-Waxman Amendments to increase the consumption of less expensive generic drugs.⁸⁶ Doctors will be more hesitant to prescribe generic drugs – which currently comprise 75% of the prescription drug market – and patients will be less likely to take them because generic drug manufacturers will now face weaker safety incentives.⁸⁷

Once again, the Supreme Court limited corporate liability, while American consumers suffer the financial and medical consequences of corporate negligence.

VIII. SORRELL V. IMS HEALTH: INCREASING CORPORATE POWER AT THE EXPENSE OF PRIVACY AND PUBLIC HEALTH

The federal and state governments require pharmacies to maintain certain prescription records, including the name of the physician, the dosage of drugs prescribed, and information about the physician’s prescription practices.⁸⁸ Pharmacies have begun selling information in these records to data mining companies that repackage the data for pharmaceutical companies to use in targeting sales pitches to physicians.⁸⁹ Vermont chose to restrict pharmacies from selling this sort of detailed marketing profile on individual physicians unless the prescribing physician consents.⁹⁰ A group of data mining companies and a pharmaceutical trade group challenged the law, claiming that they had a First Amendment right to use the information or sell it, and that Vermont’s law discriminated against speech by pharmaceutical companies.⁹¹ The trial court

⁸⁰ *Id.* at 2576-78.

⁸¹ *Id.* at 2581.

⁸² *See id.* at 2586.

⁸³ *See id.* at 2582, 2592 (Sotomayor, J., dissenting).

⁸⁴ *See id.* at 2592.

⁸⁵ *See id.*

⁸⁶ *See id.* at 2593.

⁸⁷ *See id.* at 2593-93.

⁸⁸ *Sorrel v. IMS Health*, 131 S. Ct. 2653, 2660 (2011).

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *Id.* at 2661.

found that the law was a permissible regulation of commercial speech, but the Second Circuit reversed.⁹²

In *Sorrell v. IMS Health*, the Supreme Court reviewed the case under heightened scrutiny and held that the Vermont law illegitimately burdened free speech.⁹³ The majority said the law does not serve the declared state interest of ensuring that pharmacies will only use prescriber-identifying information to process and fill prescriptions.⁹⁴ The majority also insisted that “creation and dissemination of information are speech within the meaning of the First Amendment,” rejecting Vermont’s argument that free speech was not at issue in the matter.⁹⁵

Justice Breyer’s dissent contended that this case did not warrant heightened scrutiny.⁹⁶ He stated that Vermont was merely preventing the pharmaceutical companies from improving their “sales messages” and that “this effect on expression is inextricably related to a lawful government effort to regulate a commercial enterprise.”⁹⁷ The dissent argued that the burden on commercial speech is not great, and the statute substantially furthers the important state interests of public health, privacy, and lower private health care costs.⁹⁸

Because the Supreme Court sided with the pharmaceutical industry, corporations enjoy First Amendment protection to use and sell prescription information collected from doctors without their consent. Furthermore, by increasing pharmaceutical companies’ marketing power, the Court has contributed to undermining the independent medical judgment of doctors.

IX. GROSS V. FBL SERVICES: CHANGING EVIDENCE STANDARDS IN AGE DISCRIMINATION CASES

In *Gross v. FBL Services*, the Court made it considerably more difficult for victims of age discrimination to prevail in court.⁹⁹ A fifty-four year old man claimed that his employer had discriminated against him on the basis of age, and a jury agreed.¹⁰⁰ The Supreme Court was presented with the narrow question of whether a plaintiff in an age discrimination case had to produce direct evidence of discrimination in order to obtain a “mixed motive” instruction to a jury.¹⁰¹ But the five conservatives on the Court took it upon themselves to untether the Age Discrimination in Employment Act from Title VII of the 1964 Civil Rights Act and impose a new, tougher standard for ADEA plaintiffs.¹⁰² A plaintiff alleging age discrimination now has to prove that age was the “but for” cause of the discrimination and bears the evidentiary burden of producing evidence to support each element. This is a far more stringent standard for a plaintiff to meet, especially when going up against a well-financed corporate defendant. Justice Stevens,

⁹² *Id.* at 2662.

⁹³ *See id.* at 2672.

⁹⁴ *Id.* at 2671-72.

⁹⁵ *Id.* at 2667.

⁹⁶ *See id.* at 2673 (Breyer, J., dissenting).

⁹⁷ *Id.* at 2673.

⁹⁸ *See id.* at 2685.

⁹⁹ *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177 (2009).

¹⁰⁰ *See id.* at 170-71.

¹⁰¹ *See id.* at 169-70.

¹⁰² *See id.* at 176-80.

in dissent, called this decision “an unabashed display of judicial lawmaking.”¹⁰³ Again, the Court limited corporate liability, while making it harder for everyday Americans to prove they have suffered discrimination.

X. CONCLUSION

Through a variety of rulings – including, but not limited to, those featured above – the Roberts Court has succeeded in creating a legal environment hospitable to the interests of big business and the wealthy, while hostile to the interests of everyday Americans. The Court has limited access to justice for the 99% of Americans by, among other maneuvers, forcing consumers and employees into biased arbitration proceeding; creating new hurdles to class certification; shifting the burdens of litigation onto the weaker party by reinterpreting and narrowly construing discrimination statutes; and raising pleading standards across the board.

Many of these changes to the law have been effected through the Roberts Court’s consistent overreaching. This Court has decided to hear cases about legal issues that do not currently warrant Supreme Court review; has answered questions not presented to the Court, thereby issuing broad new legal rules without consistency, logic, or fairness to the parties involved; and has ruled on factual issues more properly left to the lower courts to review and decide.

For many years, conservatives have leveled charges of judicial activism against federal judges perceived as liberal. But at the Supreme Court, it is the conservative justices who have been the most aggressively activist in their interpretations of the law. Through this activism, they have become the protectors and promoters of the wealthy and corporate America. Meanwhile, the rest of us – the 99% – have been increasingly shut out. Under the Roberts Court, the definitions of justice, equality, and fairness have become progressively more circumscribed, with harmful consequences for American society.

¹⁰³ *Id.* at 190 (Stevens, J., dissenting).