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Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases

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I. INTRODUCTION

It has become nearly commonplace to say that the Supreme Court under the leadership of Chief Justice John Roberts is a court of “incrementalism.”¹ This Term’s labor and employment decisions suggest that the Court’s conservative majority is willing in fact to be quite radical. In a series of sharply divided decisions, the Court reshaped the law that governs the workplace—or more specifically the law that governs whether and how employees will be permitted access to the courts to litigate workplace disputes.² At least as important as the Court’s changes to the substantive legal standards are the procedural hurdles the five justices in

* Associate Professor of Law, University of Colorado Law School. Many thanks to Rachel Arnow-Richman, Martin J. Katz, David Kaufman, Helen Norton, Louis Brands Savage, Charles Sullivan and Kevin Traskos for their helpful feedback and conversation.


2. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009); Ricci v. DeStefano, 129 S. Ct. 2658 (2009). One of these cases—Iqbal—was not an employment case. Its likely impact on employment litigation, however, warrants its inclusion in this list.
the majority were willing to sidestep or ignore to reach their desired outcomes. In two cases the Court ignored – and essentially overruled – long-settled precedent. In another, the Court took upon itself the role of fact-finder, resolving disputed facts in the underlying record as it applied a newly minted legal standard to the case. And in a fourth, the Court completed what was essentially a revision of the pleading rules, articulating a standard under Federal Rule of Civil Procedure that imposes particular burdens on plaintiffs – like those in employment discrimination disputes – whose claims include an element of intent. Together, these four opinions demonstrate that the Court’s current reputation for incrementalism – at least in this important area of civil rights – is unwarranted.

Of course, the Court decided other labor and employment cases last Term. These other cases – some wins for employees and some for employers – were fairly unsurprising, both in their outcomes and in their analyses. In Crawford v. Metropolitan Government of Nashville, for example, the Court held that a plaintiff may pursue a claim for retaliation under Title VII if she is fired because of the responses she gives to questions asked during an employer-initiated internal investigation of another employee’s sexual harassment allegation. The Sixth Circuit had concluded that an employee who was answering her employer’s questions was not in fact “opposing” sexual harassment. The Court strongly rejected that notion, explaining that:

6. The Court’s 2008-09 labor docket was particularly focused on questions about the limitations the First Amendment might apply to collection and use of union dues. In Locke v. Karass, 129 S. Ct. 798 (2009), the Court held that a local union can charge non-members for the costs of litigation activities of its national affiliate even when the local will not benefit directly from the litigation. Id. at 802. The Court held that if the litigation being financed was of a sort that was chargeable to non-members (related to collective bargaining rather than political action) and if the national would readily litigate on behalf of this particular local if similar need confronted it, then there is enough benefit inuring to the local union from the national activity that charges to non-members will not violate their rights. Id. at 807. In Ysursa v. Pocatello Education Ass’n, 129 S. Ct. 1093 (2009), the Court confronted an Idaho statute that permitted union members to elect automatic payroll deduction of their regular union dues, but banned automatic payroll deductions when the deductions would be used by the union’s political action committee. Id. at 1096. The Court concluded that the statute did not violate the First Amendment because it was not a restriction on the union’s speech but instead a decision not to promote that speech. Id.
8. Id. at 850.
9. Id. at 851.
a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.10

In AT&T v. Hulteen, the Court rejected claims by women who had received or would receive lower pensions because of the way their employer calculated seniority accrual during maternity leave before the 1978 passage of the Pregnancy Discrimination Act (PDA).11 The issue arose because of the Supreme Court's 1976 holding in General Electric Co. v. Gilbert, that pregnancy discrimination was not sex discrimination prohibited by Title VII.12 The Supreme Court's decision in Gilbert was contrary to the views of the Equal Employment Opportunity Commission (EEOC) and to every court of appeals to have considered the question, and was legislatively overruled by Congress in the PDA.13 Because of Gilbert, however, AT&T argued that it was not illegal sex discrimination to give less seniority accrual for maternity leave than for other forms of leave prior to 1978, when the PDA became law. Since the different treatment of maternity leave at that time had not been illegal, calculating pensions today using the leave accrued under the then-legal differential was similarly legal.14 The employees countered that the now-discredited Gilbert decision should not be used to justify lower pensions for female retirees, and further that the post-PDA calculation of their pensions to incorporate the old leave penalty was itself a separate act of illegal discrimination, even if the leave penalty was legal at the time.15 The Court, in an opinion authored by Justice Souter, sided with AT&T, concluding that because the employer's pre-PDA disparate treatment of pregnancy leave did not violate the law at the time it occurred, the company's pension plan was protected by Title VII's special rule for "bona fide seniority-based pension plan[s]."16 In dissent, Justice Ginsburg (joined by Justice Breyer) argued in part that treating AT&T's pension plan as "bona fide" under these circumstances ignored the plain intent of Congress to discredit Gilbert and to make clear that pregnancy should not be used to penalize women in matters such as

10. Id. The Court declined to consider whether Title VII's prohibition against retaliation for "participation" in an investigation would also cover the challenged conduct. Id. at 853.
13. See AT&T, 129 S. Ct. at 1974-75 (Ginsburg, J., dissenting) (describing the state of the law at the time the Supreme Court decided Gilbert).
14. Id. at 1968.
15. Id. at 1971-72.
16. Id. at 1968-69.
These two relatively predictable decisions were the wallflowers in the Court's 2008-09 employment cases. The cases likely to have broader and more lasting impact—at least rhetorically—split the Court five to four and involved overruling significant precedent and creating new legal standards. I am going to discuss four cases here, exploring both the substantive rules created by the majority decision, and also the procedural moves that led to the decisions. The long term impact of these cases may or may not be significant, depending on legislative responses and other possible limitations on their ultimate scope. What is significant is what they reveal about a Court willing to bend a few rules to get where it wants to go.

II. RICCI V. DESTEFANO

The employment case that received the most public attention this Term was Ricci v. DeStefano, in which the Court found that the City of New Haven had engaged in intentional discrimination against white firefighters when it declined to certify the results of a promotion test that had a disparate impact on minority firefighters. The Ricci decision is certainly notable for a number of reasons. It was the first time the Court has suggested that the disparate impact and disparate treatment provisions of Title VII needed to be "reconciled." In "reconciling" these two aspects of the law, the Ricci majority significantly reinterpreted Title VII, borrowing from Equal Protection Clause jurisprudence on affirmative action to create a new statutory standard for defending against a novel type of discrimination claim. The decision has generated a lot of work for lawyers and human resource professionals who advise employers about diversity and nondiscrimination in the workplace. But what is most significant about the decision—and most likely to have long-term consequences—is the tone of the four different opinions written in the case and what the Court's language says about whether a majority of the Justices feel race discrimination is a continuing problem and who they believe its victims are. Also extraordinary is the majority's willingness to ignore its traditional practice of giving lower courts an opportunity to apply new legal standards. Instead of following settled procedure, the majority reviewed the evidence

17. Id. at 1976–77.
19. Id. at 2672. As the Court acknowledged, there were "few, if any, precedents in the courts of appeals discussing the issue." Id. The absence of discussion in the lower courts is actually unsurprising because the suggestion that efforts to comply with disparate impact would be acts of intentional discrimination was novel.
in the record below itself and not only reversed summary judgment for the respondents but actually granted summary judgment for the petitioners.

The majority's decision to grant summary judgment to the petitioners was a startling departure from the Court's usual practice. As Justice Ginsburg noted in dissent, "[w]hen this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance."\(^{20}\) This usual approach allows the lower courts to determine whether further factual development is needed to apply the new rule. It permits the parties to the litigation to present arguments applying the new standard — arguments that they could not have made before as the standard did not exist. The Ricci majority was unwilling to allow these normal litigation processes to play themselves out in this case or even to explain why such an unusual course of action might have been appropriate in this circumstance.\(^{21}\)

At least as surprising as the Court's decision to apply its new rule to the factual record is the way that it applied Federal Rule of Civil Procedure 56, which sets the standards for summary judgment in federal courts. Rule 56 authorizes summary judgment where there is "no genuine issue as to any material fact."\(^{22}\) In Ricci, fully half of the lengthy majority decision and dissent, and nearly all of Justice Alito's concurring opinion, were taken up with setting out three very different versions of the facts presented in the record.\(^{23}\) Of course, not all of the facts that fill these opinions are necessarily material, but the vastly different perspectives offered in the opinions show considerable dispute as to many of the facts material to the legal questions the case presents.

The truly undisputed facts in Ricci are these: The City of New Haven's fire department was required to comply with federal, state, and local law in administering tests and selecting candidates for promotion to

\(^{20}\) Id. at 2702 (Ginsburg, J., dissenting).

\(^{21}\) The highly critical — even suspicious — way that the majority described the Second Circuit's handling of the case below, id. at 2672, may suggest that the Ricci majority simply didn't trust the lower courts to come out the right way.

\(^{22}\) FED. R. CIV. P. 56(c).

\(^{23}\) The majority decision starts at 129 S. Ct. 2664 and continues to 129 S. Ct. 2681. Of these seventeen pages, eleven (129 S. Ct. at 2665-72 and 2678-81) are taken up with a description of the facts that the majority believed were relevant. Justice Ginsburg's twenty-one-page dissent, 129 S. Ct. at 2689-2710, similarly includes eleven pages of factual evaluation. See 129 S. Ct. at 2690-26, 2703-08 (Ginsberg, J., dissenting). Justice Alito explained that he wrote "separately only because the dissent, while claiming that the Court's recitation of the facts leaves out important parts of the story, provides an incomplete description of the events that led to New Haven's decision to reject the results of its exam." 129 S. Ct. at 2683 (Alito, J., concurring) (internal quotation and citation omitted). His six-page concurring opinion (129 S. Ct. at 2683-89) was primarily occupied with setting out additional facts he believed were material to the case. See 129 S. Ct. at 2684-88 (Alito, J., concurring).
captain and lieutenant positions. In 2003, the City administered a written
test as part of the process for selecting promotion-eligible employees for
these positions. The test was developed to account for 60 percent of the
promotion process because the City’s contract with the union that
represented firefighters provided that promotion would be based 60 percent
on a written exam and 40 percent on an oral exam. The city charter
provided that, after the exam was administered, the Civil Service Board
(CSB) would rank a list of applicants, from which vacancies would be
filled. Candidates had to be chosen from among the top three scorers on the
list, and the list would remain valid for two years. Seventy-seven
candidates completed the 2003 lieutenant examination and forty-one
candidates completed the examination for promotion to captain. For the
lieutenant position, thirty-four candidates passed the test. Twenty-five were
white, six black and three Hispanic. The relative pass rates on the test were
58.1 percent for white test takers, 36.1 percent for black test takers and 20
percent for Hispanic test takers. Given the City’s system for filling
vacancies from among the top three scorers on an exam, the ten candidates
eligible for promotion to lieutenant were all white. Twenty-two
candidates passed the captain examination. Sixteen were white, three were
black and three were Hispanic. On this exam, the pass rate for white test
takers was 64 percent, while the pass rate for black and Hispanic test takers
was 37.5 percent. Under the City rules, the nine candidates eligible for
promotion included seven white and two Hispanic firefighters. These
numbers presented a racially adverse impact sufficient to make out a prima
facie case of disparate impact under Title VII. As soon as the exam
results were made publicly available,

[s]ome firefighters argued the tests should be discarded because the
results showed the test to be discriminatory. They threatened a
discrimination lawsuit if the City made promotions based on the tests.
Other firefighters said the exams were neutral and fair. And they, in turn,
threatened a discrimination lawsuit if the City did not certify the
results.

24. Id. at 2665 (2009); see also id. at 2691 (Ginsburg, J., dissenting).
25. Id. at 2666.
26. Id. at 2665.
27. Id.
28. Id.
29. Id. at 2678.
30. Id. at 2665.
31. Id. at 2678.
32. Id. at 2665.
33. Id. at 2677; see also id. at 2692 (Ginsburg, J., dissenting).
34. Id. at 2664.
In January 2004, the Civil Service Board (CSB) met to decide whether to certify the results of the exam. At the beginning of the meeting, the city’s director of human resources informed the board that she believed there was a “significant disparate impact” of the exams.\(^\text{35}\) The board heard testimony from firefighters who supported certifying the list and from those who opposed the certification. Over the course of five meetings, the board heard further testimony from the person who had developed the test for the city, from additional firefighters and New Haven community members, from other professional test developers, from individuals employed in fire departments in other cities, from the city’s legal counsel, and from a psychologist from Boston College.\(^\text{36}\) At the close of these meetings, the Civil Service Board voted on whether to certify the results; one member was recused, and the remaining four members deadlocked, two-to-two on whether to certify.\(^\text{37}\) The consequence was that the list was not certified.

Following the decision not to certify the results, seventeen white and one Hispanic firefighters filed suit, alleging violations of their constitutional rights.\(^\text{38}\) At the same time, they filed charges with the EEOC,\(^\text{39}\) and ultimately amended their complaint to include an allegation that the CSB’s decision not to certify the test results constituted race discrimination in violation of Title VII.\(^\text{40}\) The parties filed cross-motions for summary judgment. The city argued that the CSB’s good-faith belief that certifying the exam would expose it to liability for disparate impact discrimination shielded it from liability for disparate treatment. Petitioners argued that the city’s good faith belief was not a valid defense to their disparate treatment claims. The district court granted summary judgment for the city.\(^\text{41}\) The district court found that the “motivation to avoid making promotions based on a test with a racially disparate impact... does not, as a matter of law, constitute discriminatory intent.”\(^\text{42}\) The Second Circuit

\(^{35}\) Id. at 2667.
\(^{36}\) Id. at 2667-71.
\(^{37}\) Id. at 2671.
\(^{38}\) Id. The Supreme Court’s decision addressed only the statutory claim.
\(^{39}\) If there is any doubt as to whether the description of the facts in a judicial opinion matters, consider this: In both 14 Penn Plaza and Ricci the identical administrative event occurred – the complainants filed charges with the EEOC and the EEOC determined that it would not pursue the matter, but that the complainants were entitled to file in federal court. In Ricci, Justice Kennedy described this determination as “the [EEOC] issuing right-to-sue letters.” Id. at 2671. In 14 Penn Plaza, the identical event is described, again by Justice Kennedy, as follows: “[T]he EEOC issue a Dismissal and Notice of Rights, which explained that the agency’s ‘review of the evidence... fail[ed] to indicate that a violation ha[d] occurred’ and notified each respondent of his right to sue.” 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1462 (2009).
\(^{41}\) Id.
affirmed the decision of the district court.

Beyond those basic facts, there is a great deal of dispute about precisely what happened – or at least what mattered – in New Haven in the development and administration of the test and the evaluation of whether to certify the results. The majority opinion focused on the reliance interest of the firefighters who took and passed the test in having the results certified, emphasizing repeatedly the "considerable personal and financial cost" involved in studying for and taking the test. 43 The majority described the way the test was developed as a careful process that was highly solicitous of minority firefighters and extraordinarily professional. 44 Throughout its description of the facts, the majority emphasized the good motives of Chad Legel, the test developer whose test was being challenged. 45 By contrast, the majority dismissed the testimony of Christopher Hornick, the expert who questioned the validity of the challenged test and suggested that better alternative tests were available. 46

On the basis of its version of the facts, the majority concluded that "there is no genuine dispute that the examinations were job-related and consistent with business necessity." 47 For the majority, the story – the undisputed and indisputable story – of what happened in New Haven is this:

The record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair. The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. 48

But, while the majority may not dispute this story, the facts presented in the record below present at least one competing version of what happened in New Haven.

Starting with the observation that "[t]he Court's recitation of the facts leaves out important parts of the story," 49 the dissenting opinion described

43. See, e.g., Ricci, 129 S. Ct. at 2664, 2667, 2676, 2681.
44. See, e.g., id. at 2665-66.
45. See, e.g., id. at 2668, 2678-79.
46. See, e.g., id. at 2668-69, 2680-81.
47. Id. at 2678.
48. Id. at 2681.
49. Id. at 2690 (Ginsburg, J., dissenting).
the long history of race discrimination in the New Haven fire department and demonstrated how the record developed below could be read to suggest a very different process for developing the challenged test than that described by the majority. While the majority lauded the test development process, the dissent pointed out that there was no evaluation before hiring the test writer of what kind of test would best evaluate candidates for promotion. "Instead, the City simply adhered to the testing regime outlined in its two-decades-old contract with the local firefighters' union." After the test was administered, and the significant adverse impact became apparent, the city referred the question to the CSB. At this point, too, the dissenting opinion demonstrated that a very different story could be read in the record than the majority's view that only statistical racial disparities mattered in the Board's process. Instead, Justice Ginsburg pointed to evidence that the CSB members understood

their principal task was to decide whether they were confident about the reliability of the exams: Had the exams fairly measured the qualities of a successful fire officer despite their disparate results? Might an alternative examination process have identified the most qualified candidates without creating such significant racial imbalances? With those questions in mind, the CSB heard testimony from a range of sources. The dissent's description of the testimony pulled out passages entirely different from those relied on by the majority, pointing out that the testimony offered by the witnesses at the CSB included varied and sometimes inconsistent information. Justice Ginsburg concluded her initial description of the facts with the statements made by CSB members when they announced the decision not to certify. All of the Commissioners' statements, whether they ended in a vote to certify the results or not, focused on whether the evidence had demonstrated that the tests were truly job related and were better than available alternatives.

Justice Alito's concurring opinion focused on yet another story: he saw in the record evidence that the city's process for deciding whether to accept the test results was tainted by the political maneuvering of powerful members of New Haven's African-American community and the willingness of city officers to submit to that maneuvering. Alito concluded that

a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-

50. Id. at 2691 (Ginsburg, J., dissenting).
51. Id. at 2692 (Ginsburg, J., dissenting).
52. Id. at 2695 (Ginsburg, J., dissenting).
53. Id. at 2684-88 (Alito, J., concurring).
impact provision of Title VII but a simple desire to please a politically important racial constituency.\(^{54}\)

With that statement he (perhaps unintentionally) acknowledged that a “reasonable jury” might look at the facts in more than one way — thus making summary judgment for either party inappropriate.

These three opinions tell a set of stories that demonstrate genuine dispute as to many of the material facts in the case. There was evidence in the record that the test was developed with care and attention to whether it would best measure the skills needed for promotion in the New Haven fire department. And there was evidence in the record that the test was developed without sufficient attention to that question, and that the test was in fact not the best way to measure the relevant skill set. There was evidence in the record that the members of the CSB made their decision because of statistical disparity alone, and there was evidence in the record that they made their decision because they were unconvinced that the test satisfied business necessity. To conclude that that was “no genuine dispute of material fact,” the majority had to make multiple credibility determinations about the expert testimony it read, as well as about the veracity of the CSB members’ own statements about their motives. Perhaps a reasonable jury could have gone either way on these questions, but that is precisely why the standards for summary judgment were not met in this case.

The procedural extremism of the Ricci majority is remarkable. The rules the Court developed to apply to the facts of the case similarly give the impression of being straightforward, but in fact leave a great deal of uncertainty as to their reach and likely impact. As an initial matter, the Court seems to endorse a new kind of claim — before Ricci, an employer seeking to comply with its obligations under Title VII’s disparate impact provisions was not engaging in “race-based discrimination.” The majority, however, began its analysis “with this premise: The City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.”\(^{55}\) This statement could be read — and is being treated by many employment lawyers — to suggest that efforts to avoid disparate impact on minority employees will always present white employees with a cause of action for discriminatory disparate treatment and that employers will only be able to avoid liability in those cases where it can satisfy Ricci’s new “strong basis in evidence” defense.\(^{56}\)

\(^{54}\) Id. at 2688 (Alito, J., concurring).

\(^{55}\) Id. at 2673.

\(^{56}\) Justice Ginsburg seems to have understood this to be the majority’s new rule. See id. at 2700 (Ginsburg, J., dissenting) (“Employers may attempt to comply with Title VII’s disparate-impact
It could also, and I think should, be understood to depend on the specific facts in this case. The Court strongly believed that there was no dispute about the tests’ job relatedness. In the Court’s view, the only concern motivating the city once it had seen the statistical results was to get rid of those test results. Therefore, in the majority’s view, “the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.” The majority drew a line between: 1) voluntary compliance efforts that seek to avoid disparate impact in the creation and administration of employment tests; and 2) practices and the evaluation of test scores after the tests have been taken. The former are not subject to the Court’s new approach. Only after a test has been taken – when the actual racial make-up of the results is known – will an employer be at risk of disparate treatment liability.

At that point, of course, the risk may be significant. The “strong basis in evidence” defense, which the majority imports from its case law on affirmative action, may be a hard one to meet. The Court provides no guidance about what kind of information would be sufficient for an employer to demonstrate that after it had administered a test and seen the results, it had a strong basis in evidence for believing that it would be violating disparate impact law to use the test in making employment decisions.

In evaluating the long-term meaning of Ricci, it is important to keep in mind the things the case does not do. It does not necessarily change disparate impact law. Employers are still required to ensure that if their employment practices have an adverse impact they are job related and consistent with business necessity. The opinion does not suggest that every time an employer complies with its obligations to avoid disparate impact, it will face liability for disparate treatment. Indeed, Justice Kennedy writes that “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.” Thus, an employer may still design job tests and other practices with the
goal of avoiding a disparate impact.\textsuperscript{61}

But what \textit{Ricci} does do is to make voluntary diversity efforts less appealing to employers by casting a shadow of potential litigation over these efforts. Will an employer going through a reduction in force (RIF), for example, be sued by white employees if it seeks to ensure that the RIF is not unduly impacting minority employees? Will employers face claims of race discrimination if they participate in minority job fairs or other diversity efforts? \textit{Ricci} can certainly be read to suggest that any employer action taken to increase opportunities for formerly excluded minority employees constitutes intentional discrimination against white employees.

At base, the \textit{Ricci} opinion rests on the Court majority’s impatience with claims of discrimination by racial minorities, and some Justices’ view that, in today’s world, it is white employees who suffer discrimination. It is notable that the \textit{Ricci} majority’s description of the facts is replete with quotes explaining that “usually whites outperform some of the minorities on testing”;\textsuperscript{62} “[n]ormally whites outperform ethnic minorities on the majority of standardized testing procedures;”\textsuperscript{63} “regardless of what kind of written test we give in this country . . . we can just about predict how many people will pass who are members of under-represented groups. And your data are not inconsistent with what predictions would say were the case.”\textsuperscript{64} Of course, this was all testimony that was in fact presented to the CSB. But it is just a very small sample of the testimony offered during the course of the five meetings the CSB held about these tests. For a majority of the Justices on the Supreme Court, though, this was among the most important information presented in the case. That fact and what it says about the Court’s view of discrimination may be what is sadly most important about \textit{Ricci}.

III. \textsc{Gross v. FBL Financial Services}

In \textit{Gross v. FBL Financial Services}, Justice Clarence Thomas, writing for a five-Justice majority, held that employees bringing age discrimination claims are required to prove not only that age was a motivating factor in the challenged adverse action, but that it was the “but-for” cause of that action.\textsuperscript{65} In reaching this conclusion, the Court avoided the question on

\begin{itemize}
\item \textsuperscript{61} Indeed, Justice Scalia concurred separately to note that the decision did not conclude that Title VII’s disparate impact provision was constitutional. That question, in his view, is one the Court will likely address in the future. \textit{Id.} at 2681-82 (Scalia, J., concurring).
\item \textsuperscript{62} \textit{Id.} at 2669.
\item \textsuperscript{63} \textit{Id.} at 2668.
\item \textsuperscript{64} \textit{Id.} at 2669.
\item \textsuperscript{65} 129 S. Ct. 2343, 2351 (2009).
\end{itemize}
which it had actually granted certiorari, instead reaching out to announce a rule that will make age discrimination claims – and potentially retaliation and disability discrimination claims – harder to prove. Moreover, the Court overruled a twenty-year-old precedent in the process, barely acknowledging that it was doing so.

To understand what happened in Gross, it helps to keep in mind a basic timeline of legal development. In the 1989 decision in *Price Waterhouse v. Hopkins*, six Justices, in a plurality and two concurring opinions, agreed that Title VII’s prohibition on discrimination “because of” sex meant that when a plaintiff has shown that sex (or some other protected characteristic) was a “motivating factor” in the employment decision, the plaintiff has shown a violation of the statute. In reaching this conclusion, the plurality rejected the argument put forward by the employer that the statute’s prohibition on discrimination “because of” sex imposed a burden on the plaintiff to prove that sex was the “but-for” cause of the adverse employment action.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words “because of,” Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

The plurality decision, Justice White’s concurrence, and Justice O’Connor’s concurrence all concluded, however, that a defendant should be able to avoid liability if the employer could show that it would have made the same decision in the absence of the impermissible factor. Thus, a majority of the Justices agreed that after a plaintiff demonstrated that the impermissible factor played a role in the decision, the burden would shift to the employer to avoid liability by showing that it would have reached the same decision. Justice White concurred to express his view that a plaintiff would only prevail in its initial showing if the impermissible factor was “a

66. 490 U.S. 228, 241 (1989); id. at 259-60 (White, J., concurring); id. at 265 (O’Connor, J., concurring).

67. Id. at 241-42; see also id. at 241 (“The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words ‘because of’ do not mean ‘solely because of,’ we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of’ sex and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.”)

68. Id. at 258, 259-60, 276.
substantial" motivating factor in the decision. Justice O'Connor agreed with that position, and further took the view that the plaintiff should only be entitled to the burden-shifting benefit of a mixed-motive instruction if the plaintiff presented direct evidence of the impermissible factor. The dissenting opinion in Price Waterhouse, authored by Justice Kennedy, strongly disagreed with the majority's interpretation of the words "because of" in the statute, asserting that the language required a plaintiff to prove "but-for" causation.

At the time Price Waterhouse was decided, and before and since, courts have interpreted identical language in the Age Discrimination in Employment Act (ADEA) and Title VII to have the same meaning. Thus, since the ADEA, like Title VII, prohibits discrimination "because of" a protected characteristic, courts around the country immediately began applying the Price Waterhouse approach to age discrimination cases. In cases under both statutes, courts generally applied the direct evidence requirement suggested by Justice O'Connor's concurrence, treating that decision as controlling because it offered the narrowest ground for the Court's decision.

In 1991, Congress responded to several Supreme Court decisions, including Price Waterhouse, in the Civil Rights Act of 1991 (CRA). With regard to mixed motives, the CRA amended Title VII, but did not amend the ADEA. The amendments on mixed motives provided that 1) a plaintiff has proved a Title VII violation when he has shown that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice," and that 2) although the defendant is liable for violating Title VII once that showing is made, the defendant may still avoid certain damages by showing that it would have reached the same decision in the

69. Id. at 259 (White, J., concurring).
70. Id. at 275-76 (O'Connor, J., concurring).
71. Id. at 281-82 (Kennedy, J., dissenting).
72. See, e.g., Smith v. City of Jackson, 544 U.S. 228, 233-34 (2005) ("[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. We have consistently applied that presumption to language in the ADEA that was derived in haec verba from Title VII." (internal citations and quotations omitted)).
73. See Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2354-55 & n.5 (2009) (Stevens, J., dissenting) (noting that "the Courts of Appeals to have considered the issue unanimously have applied Price Waterhouse to ADEA claims" and citing cases).
absence of the protected factor.\textsuperscript{76} In the wake of the CRA, a circuit split developed as to whether Justice O’Connor’s direct evidence requirement should be applied when plaintiffs sought the benefit of the statutory mixed-motive structure.\textsuperscript{77} In Desert Palace v. Costa, the Supreme Court put that split to rest, observing that there was no statutory language suggesting a heightened evidentiary burden, and that absent such language normal rules of evidence would apply.\textsuperscript{78} A plaintiff could prove that a protected characteristic was a motivating factor in an adverse action using either circumstantial or direct evidence.\textsuperscript{79}

Because the 1991 CRA did not amend the ADEA, courts after 1991 continued to apply the Price Waterhouse mixed-motives burden-shifting framework to age discrimination cases.\textsuperscript{80} Some courts applying the framework continued to apply the direct evidence requirement derived from Justice O’Connor’s concurring opinion in Price Waterhouse.\textsuperscript{81} Other courts, particularly after the Court’s decision in Costa, concluded that, because the statute did not specify a heightened evidentiary standard, a plaintiff was required simply to offer enough evidence – of whatever sort – to prove by a preponderance of the evidence that age was a motivating factor.\textsuperscript{82} Jack Gross happened to live in a circuit that took the former view.

Gross worked for FBL Financial Group (FBL) for over thirty years.\textsuperscript{83} In 2001, he held the title “claims administration director.”\textsuperscript{84} In 2003, the company reassigned Gross to a new position and transferred many of his job responsibilities to a new position – “claims administration manager.”\textsuperscript{85} Gross received the same salary as the younger woman who was given the claims administration manager position, but he considered the position a demotion in light of the reallocation of his job responsibilities to a younger employee formerly under his supervision.\textsuperscript{86} He filed suit against FBL,
alleging that the demotion violated the ADEA, which prohibits job discrimination "because of . . . age." At trial, Gross produced evidence that the decision to reassign his job responsibilities was based, at least in part, on his age. FBL defended against the claim by asserting that the reassignment was part of a larger corporate restructuring and that the new job responsibilities were better suited to Gross's skills.

At the close of the evidence, the district court instructed the jury that it must return a verdict for Gross if it concluded that he had proved by a preponderance of the evidence that age was "a motivating factor" in the decision. The court defined "motivating factor" to mean that "[i]t played a part or a role" in the decision. The court also instructed the jury that it should find for FBL if the employer proved by a preponderance of the evidence that it would have reached the same decision even if age had played no role at all. After the jury ruled for Gross, FBL appealed the jury instructions. The Eighth Circuit reversed and remanded, observing that precedent in the circuit permitted a Price Waterhouse motivating factor (or mixed-motives) jury instruction only when the plaintiff had presented "direct evidence" of discrimination. Because Gross had presented no such evidence, the court concluded, he was not entitled to the instruction.

The Supreme Court granted certiorari on the question whether an age-discrimination plaintiff is entitled to a mixed-motives instruction only if he presents direct evidence that age played a role in the adverse decision. In deciding the case, the Court avoided that question entirely by deciding that age-discrimination plaintiffs were never entitled to mixed-motive jury instructions and that instead the burden on an age plaintiff was to demonstrate that age was the "but-for" cause of a challenged action. This

87. Id. (quoting 29 U.S.C. § 623(a) (2006)).
88. Id.
89. Id.
90. Id.
91. Id.
92. Id. at 2347-48.
93. Id. at 2348.
94. Id. Justice Stevens, joined by Justices Breyer, Ginsburg, and Souter, dissented both from the Court's decision to decide a question different from that on which it had granted certiorari and also from the answers the majority gave to the question it did decide. On that question, the dissent focused on the fact that "[t]he relevant language in the two statutes is identical and we have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.'" Id. at 2354 (Stevens, J., dissenting) (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978))). Price Waterhouse correctly decided that prohibiting action "because of" a protected characteristic meant "that [the protected characteristic] must be irrelevant to employment decisions," id. (Stevens, J., dissenting) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) and that same definition should apply to the same words in the ADEA. Id. at 2355-56 (Stevens, J., dissenting).
substitution of the question presented with an entirely different one was remarkable for a number of reasons. First, the possibility that an age discrimination plaintiff would never be entitled to a mixed-motives instruction was not raised at all until respondent, FBL, filed its brief on the merits.95 Reaching out for a question of such significance raised at this late point in the case is contrary to regular Court procedure for good reason.96 When the Court grants certiorari on a particular question presented, not only the parties to the particular case, but other individuals and organizations with possible interests in the matter will consider whether to present arguments as amici curiae to assist the Court in reaching the best decision. Those arguments should ensure that the Court is considering a range of perspectives and positions on the issues it decides. Moreover, in theory, when the Court considers a question, it will be one fully considered by at least the court below and perhaps by other courts as well.97 Here, the question ultimately answered by Gross was not briefed by the petitioners or any of the amici curiae supporting their position to the Court,98 and no lower court had considered the question.

Second, while the Court’s decision never explicitly overruled Price Waterhouse, its reasoning directly contradicts the reasoning of that opinion and it is hard to imagine what is left of Price Waterhouse after Gross. Most significantly, the Gross majority adopted the causation standard pressed unsuccessfully by the Price Waterhouse dissenters. This is no small change in the law. “The specification of the standard of causation under [a statute] is a decision about the kind of conduct that violates that statute.”99 The Gross majority’s somewhat casual, one-paragraph redefinition of what it means for an action to be taken “because of” a protected characteristic may well have consequences beyond the age discrimination context.

95. See, e.g., id. at 2353 (Stevens, J., dissenting).
96. See, e.g., Ala. v. Shelton, 535 U.S. 654, 661 n.3 (2002) (“We do not entertain this contention, for Shelton first raised it in his brief on the merits. We would normally expect notice of an intent to make so far-reaching an argument in the respondent’s opposition to a petition for certiorari, cf. this Court’s Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.”) (quotation and citation omitted); S. Cent. Bell Tel. Co. v. Ala., 526 U.S. 160, 171 (1999) (observing that it is the Court’s “practice” not to entertain arguments about overruling precedent when they had not been raised in the brief in opposition to the certiorari petition).
Moreover, the majority opinion used a startling sleight of hand to make it seem as if the causation standard expressed in the words “because of” was an entirely open question. First, Justice Thomas noted that the Court had never held that “this burden-shifting framework applies to ADEA claims.” In fact, it was true that, although every circuit court to consider the question had applied the Price Waterhouse framework to the ADEA, the Supreme Court had not considered the question. But Justice Thomas’s opinion then shifted the frame (and the framework) by focusing instead on the 1991 Act’s burden-shifting approach. Although neither party had argued that the framework in 703(m) and 706(g) of Title VII – the provisions added in 1991 – should be applied to the ADEA, that is the question the Gross majority selected to answer. With that shift in place, Justice Thomas reasoned, “[u]nlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.”

By focusing on the language added to Title VII in 1991, the majority in Gross made the question it answered an easy one. As the majority explained in a footnote: “In this instance, it is the textual differences between Title VII and the ADEA that prevent us from applying Price Waterhouse and Desert Palace to federal age discrimination claims.” And, of course, it is true that the language added in 1991 to Title VII is different from the term “because of” employed in the ADEA. But that comparison is not the relevant comparison when the question presented and argued was how the burden-shifting framework established in Price Waterhouse applies to the ADEA. In 1989, when the Court interpreted the term “because of” in Title VII, the language of that statute was identical to the language in the age discrimination statute. The question, therefore, was whether the Court was going to respect its own precedent as to the meaning of the term “because of” or whether the new members of the Court were going to reject settled statutory interpretation in favor of a new interpretation of the same words.

The majority in Gross chose the second option. And it chose to replace the interpretation of the Price Waterhouse majority with that of the Price Waterhouse dissent in a one-paragraph analysis. First, the Court observed that several dictionaries define “because of” to mean “by reason of” or “on account of.” Therefore, the Court concluded

100. Gross, 129 S. Ct. at 2349 (emphasis added).
101. See id. at 2354-55 & n. 5 (Stevens, J., dissenting).
102. Id. at 2349.
103. Id. at 2349 n.2.
104. Id. at 2350.
the ordinary meaning of the ADEA’s requirement that an employer took adverse action “because of” age is that age was the “reason” that the employer decided to act. To establish a disparate treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the “but-for” cause of the employer’s adverse decision.\footnote{Id. (internal citations omitted).}

This assertion cannot possibly be squared with the statement from \textit{Price Waterhouse} that “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation,’ . . . is to misunderstand them.”\footnote{Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).} And the Court did not try to square the two cases. Instead, \textit{Gross} brushes off \textit{Price Waterhouse} with the observation that “it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.”\footnote{Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2351 (2009); see also id. at 2532 (“[E]ven if \textit{Price Waterhouse} was doctrinally sound, the problems associated with its applications have eliminated any perceivable benefit to extending its framework to ADEA claims.”).}

It seems in fact to be no coincidence that the interpretation of “because of” adopted in \textit{Gross} was the interpretation preferred by the dissenting Justices in 1989.\footnote{See, e.g., \textit{Price Waterhouse}, 490 U.S. at 281 (Kennedy, J., dissenting) (“Title VII liability requires a finding of but-for causation.”).}

It is hard to predict what the substantive consequences of \textit{Gross} will be for age discrimination litigants. The most obvious, of course, is that plaintiffs currently in litigation who might have wanted to make a mixed-motive argument will not have that choice. On that issue, though, the case may not have a long shelf-life, as several members of Congress have already announced their intent to introduce legislation providing for a mixed-motive age discrimination claim.\footnote{Democrats Move to Counter High Court on Age Discrimination, CQ POLITICS, Oct. 6, 2009, <http://www.cqpolitics.com/wmspage.cfm?docID=cqmidday-000003217230&utm_source=twitterfeed&utm_medium=twitter&utm_campaign=top-stories> (last viewed Nov. 23, 2009).}

More seriously, the decision will likely make it harder for any age discrimination plaintiff to succeed in court.\footnote{This seems particularly likely in light of the Court’s decision in \textit{Ashcroft v. Iqbal}, 129 S. Ct. 1937 (2009), discussed infra Part V. Because \textit{Iqbal} urges courts to examine complaints alleging intent with a critical eye, and \textit{Gross} sets a higher causation bar for age discrimination plaintiffs, the cases together send a message to lower courts evaluating whether a claim should go forward that plaintiffs have their work cut out for them.}

The “but-for” standard of causation puts a burden on the plaintiff that will be extremely difficult to meet. Most employment decisions — most decisions of any sort — are in fact taken for more than one reason. Proving that any one of those reasons was the “but-for” cause of the decision “requires the mental construction of a non-existent world — one in which the defendant’s action did not occur.”\footnote{Martin J. Katz, \textit{The Fundamental Incoherence of Title VII: Making Sense of Disparate Treatment Law}, 94 GEO. L. J. 489, 515 (2006).} Furthermore, in the context of
discrimination litigation, the fact that the plaintiff is being asked to prove is one that the defendant has unique access to information about: what, precisely, motivated his actions.\textsuperscript{112}

Other areas of discrimination law may also be affected by the Court’s redefinition of the causation standard implied by use of the words “because of.” When Congress amended Title VII to add § 703(m) and § 706(g), it excluded not only age, but also retaliation and disability from the list of claims covered by the new statutory approach.\textsuperscript{113} As they did with the ADEA before Gross, courts have applied the Price Waterhouse framework to retaliation claims.\textsuperscript{114} Title VII’s prohibition on retaliation, similar to its prohibition against discrimination based on certain protected characteristics, forbids taking action “because” of action taken by the plaintiff.\textsuperscript{115} Without some reason to do otherwise, courts will usually interpret the same language used in two different parts of a statute the same way. With the Court’s new interpretation of the meaning of the words “because of,” defendants are likely now to argue that motivating factor and mixed motive arguments are not available in retaliation cases. Of course, since the Court did not specifically overrule Price Waterhouse, a plaintiff might counter that the Gross interpretation of “because of” in the ADEA does not change the Price Waterhouse interpretation of the words “because of” in Title VII, so that for Title VII retaliation claims, the old rule should still apply.

Like the ADEA, the Americans with Disabilities Act (ADA) does not contain a specific mixed-motive provision. And the ADA defines discrimination as action taken “because of” or “on the basis of” an employee’s disability.\textsuperscript{116} Thus, the Court’s decision in Gross may suggest that a plaintiff in an ADA case must show that disability was the “but-for”

\textsuperscript{112} See id. It was on this point that Justice Breyer focused his separate dissenting opinion in Gross. See Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2358-59 (2009) (Breyer, J., dissenting) ("[T]o apply ‘but-for’ causation is to engage in a hypothetical inquiry about what would have happened if the employer’s thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer. All that a plaintiff can know for certain in such a context is that the forbidden motive did play a role in the employer’s decision.")

\textsuperscript{113} See 42 U.S.C. § 2000e-2(m) (2006); see also Martin J. Katz, Unifying Disparate Treatment Law (Really), 59 HASTINGS L.J. 643, 647-48 & n. 22 (2008) (discussing the relationship between the 1991 CRA and other statutes and noting that courts have not applied the CRA’s structure to other statutes).

\textsuperscript{114} See, e.g., Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001); Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000); Kubicko v. Ogden Logistics Servs., 181 F.3d 544, 552 n.7 (4th Cir. 1999); McNutt v. Bd. of Tr., 141 F.3d 706, 707-08 (7th Cir. 1998).


\textsuperscript{116} See 42 U.S.C. § 12112(a) (2006) ("on the basis of"); id. § (b)(1) ("because of").
cause of a challenged employment act, and that the mixed-motives analysis does not apply to disability claims.

The analysis in this context, however, might be complicated by the fact that the ADA specifies that the remedies provisions under Title VII apply to claims brought under the ADA. Part of the 1991 Civil Rights Act’s mixed motives structure – the “same-decision” limitation on available damages – is codified within the referenced remedies provisions. But the part of Title VII that defines an unlawful employment practice as established when a protected characteristic was a motivating factor in the decision is not specifically applicable to the ADA. Some courts have held, nonetheless, that the entire 1991 Act burden-shifting framework applies to the ADA. There is good reason to conclude that these courts must be correct – even more so after Gross. It is impossible to reconcile the tension between a definition of “because” that requires that plaintiff to prove that disability was the “but-for” cause of an employment action and a damages limitation that permits the employer to show that it would have made the same decision in the absence of the disability. If the plaintiff proves the first, it would not be possible for the defendant to prove the second. Therefore, if the ADA’s unconditional directive that the remedies provisions of Title VII apply in disabilities claims is to include § 706(g)(B), the motivating factor provision contained in § 703(m) must apply to disability claims. Whether courts will accepts that argument or will simply follow Gross’s lead and conclude that mixed-motive claims exists only for those characteristics listed explicitly in 703(m) remains to be seen.

Whatever the consequences of Gross for age discrimination claimants or others, the Court’s willingness to skip the question presented in favor of a late-in-the-day request to overrule long-standing precedent was a radical choice that risks encouraging litigants in other cases to press their more aggressive arguments through procedurally irregular approaches. Moreover, it is hard to see how the Court in Gross did not overrule Price Waterhouse; and yet it refused to acknowledge that it was doing so. This silent rejection of settled law leaves confusion about the scope of the current decision and the possibility of continued life in the older one. The

117. See id. § 12117(a). (“The powers, remedies and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies and procedures this subchapter provides . . . ”).


119. See, e.g., Buchanan v. San Antonio, 85 F.3d 196, 200 (5th Cir. 1996); Pedigo v. P.A.M. Transp., Inc., 60 F.3d 1300, 1301 (8th Cir. 1995); see also Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 25 & n.2 (1st Cir. 2002) (noting that the First Circuit had not decided the question, but assuming that the 1991 amendments applied to ADA cases).
substantive outcome in *Gross* is not good for employment discrimination plaintiffs. The way the Court got there is not good for the law.

IV. 14 PENN PLAZA V. PYETT

In *14 Penn Plaza LLC v. Pyett*, the same majority again essentially overruled significant precedent while steadfastly refusing to acknowledge its departure from *stare decisis* principles. And again, the Court took this approach as it cut into the core of federal antidiscrimination laws – in this case concluding a collective bargaining agreement that provides for mandatory arbitration of antidiscrimination claims by union members can be enforced to deny those union members their preferred federal forum. To reach this conclusion, the Court reinterpreted its thirty-five-year old decision in *Alexander v. Gardner-Denver Co.*, limiting the meaning of that case so completely that it could be ignored. The only acknowledgement the Court gave to the *stare decisis* arguments presented in the dissenting opinions was to observe in a footnote:

> Because today’s decision does not contradict the holding of *Gardner-Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions. But given the development of this Court’s arbitration jurisprudence in the intervening years, *Gardner-Denver* would appear to be a strong candidate for overruling if the dissents’ broad view of its holding were correct.

The case arose when respondents, both members of the Service Employees International Union 32BJ (Union), which represented employees in the building-services industry in New York City, complained that they had been reassigned to new positions in violation of the ADEA. The two men had been night lobby watchmen, but were reassigned as light duty cleaners and night porters when their employer contracted to hire licensed security guards for the building. Because of the resulting loss of income and status, respondents complained to the Union, which filed grievances on their behalf. The grievances complained of age discrimination, but also included other contractual claims arising out of the collective bargaining agreement (CBA) between the Union and employer. The grievance process yielded no resolution, so the Union

120. 129 S. Ct. 1456 (2009).
121. *Id.* at 1474.
123. *14 Penn Plaza*, 129 S. Ct. at 1469 n.8.
124. *Id.* at 1461-62.
125. *Id.* at 1462.
126. *Id.*
requested arbitration of the claims. During the arbitration process, the Union withdrew the ADEA claim; because the Union had consented to the contract with the security company, it was unwilling to continue to pursue a claim that the reassignments were age-discriminatory.\textsuperscript{127}

Respondents filed a complaint with the EEOC and thereafter filed suit in federal court, alleging violations of the ADEA.\textsuperscript{128} Their employer filed a motion to compel arbitration, arguing that the CBA specified arbitration as the exclusive forum for resolution of all discrimination claims, including those arising under federal statute. The district court denied the arbitration demand on the ground the Supreme Court’s decision in \textit{Gardner-Denver} controlled, and meant that a union-negotiated contract could not waive an individual employee’s statutory right to pursue ADEA claims in federal court.\textsuperscript{129} The Second Circuit affirmed on the same ground. The Supreme Court reversed.

\textit{14 Penn Plaza} answered a question that has been open for nearly two decades. The majority of Courts, Congress, and most commentators understood \textit{Gardner-Denver} to stand for the principle that “a collective bargaining agreement could not waive covered workers’ rights to a judicial forum for causes of action created by Congress.”\textsuperscript{130} In 1991, the Court held in \textit{Gilmer v. Interstate/Johnson Lane Corp.} that an individual employee could prospectively waive his right to a federal forum and agree to compelled arbitration of an ADEA claim.\textsuperscript{131} Every court of appeals that had considered the matter, except the Fourth Circuit, had reconciled the two cases with the conclusion that “an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him.”\textsuperscript{132}

The \textit{14 Penn Plaza} majority agreed that there was no conflict between the two cases, but it took a completely different path to reconciling the

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Pyett v. Penn. Bldg. Co., 498 F.3d 88, 91-92 (2007); see also 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1479 (2009) (Souter, J., dissenting) (noting broad agreement among lower courts about the meaning of \textit{Gardner-Denver}); id. at 1481 (Souter, J., dissenting) (observing that “Congress has unsurprisingly understood \textit{Gardner-Denver} the way we have repeatedly explained it and has operated on the assumption that a CBA cannot waive employees’ right to a judicial forum to enforce antidiscrimination statutes.”)
\textsuperscript{132} Air Line Pilots Ass’n, Int’l v. Nw. Airlines, Inc., 199 F.3d 477, 484 (D.C. Cir. 1999); see also Albertson’s, Inc. v. United Food & Com. Workers Union, 157 F.3d 758, 761-62 (9th Cir. 1998); Penny v. United Parcel Service, 128 F.3d 408, 413-14 (6th Cir. 1997); Brisentine v. Stone & Webster Eng’g Corp., 117 F.3d 519, 526 (11th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 365 (7th Cir. 1997); but see E. Assoc. Coal Corp. v. Massey, 373 F.3d 530, 533 (4th Cir 2004).
opinions. The supposed conflict, the majority asserted, was the result of an overly broad reading of *Gardner-Denver*. The holding in that case was not, as courts had been assuming for thirty-five years, that a union could not negotiate away the individual statutory rights of its members. Instead, the *14 Penn Plaza* majority determined, all that *Gardner-Denver* held was that a collective bargaining agreement could not waive an individual’s right to pursue a statutory claim in a federal forum unless it did so explicitly. On this view of the *Gardner-Denver* holding, the case was inapplicable to the facts presented in *14 Penn Plaza*, since the CBA arbitration provision at issue in this dispute did expressly include statutory discrimination claims.

Having disposed of the need to overrule *Gardner-Denver* in order to reach its conclusion, the majority opinion went on to criticize at some length what it described as the “broad dicta” of that case and its progeny. Specifically, the Court emphasized that the skepticism about “the use of arbitration for the vindication of statutory antidiscrimination rights” that was a central element of *Gardner-Denver* “rested on a misconceived view of arbitration that this Court has since abandoned.” Further, the majority argued that *Gardner-Denver* “confused an agreement to arbitrate [ADEA] claims with a prospective waiver of the substantive right.” While the *14 Penn Plaza* majority characterized this portion of *Gardner-Denver* as dicta, and therefore not necessary to overrule, it emphasized the current Court’s strong disagreement with *Gardner-Denver*’s treatment of a right to a federal forum as a central part of the rights granted in federal antidiscrimination laws. An agreement to resolve discrimination claims in arbitration “does not waive the right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.”

It is hard to assess how substantial an impact the Court’s decision in *14 Penn Plaza* will have. As Justice Souter pointed out in his dissenting opinion,

> the majority opinion may have little effect, for it explicitly reserves the question whether a CBA’s waiver of a judicial forum is enforceable

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133. *14 Penn Plaza*, 129 S. Ct. at 1466.
134. *Id.* at 1467.
135. *Id.* at 1459. This was the central focus of Justice Stevens’ dissenting opinion. He observed that there had been no change in the relevant statutory provisions between 1974 and 2009, and that the majority “ignore[d] our earlier determination of the relevant provisions’ meaning” because of its “preference for arbitration.” *Id.* at 1475 (Stevens, J., dissenting). “In the absence of an intervening amendment to the relevant statutory language, we are bound by that decision. It is for Congress, rather than this Court to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views.” *Id.* at 1476 (Stevens, J., dissenting).
136. *Id.* at 1469.
when the union controls access to and presentation of the employees' 
claims in arbitration, which "is usually the case."\textsuperscript{137}

Viewed as a part of this Term's labor and employment decisions, the case is significant as a further demonstration of the majority's willingness to overrule settled law and its reluctance to acknowledge that it is doing so.

V. ASHCROFT V. IQBAL

The case from last Term that could have the most significant impact on employment litigation was not, itself an employment case. Instead, it was a civil rights suit in which the Court essentially rewrote the rule governing the standards district courts should apply in evaluating a motion to dismiss a complaint early in litigation.

In \textit{Ashcroft v. Iqbal}, a Pakistani imprisoned during a sweeping investigation following the attacks on September 11, 2001 sued, among others, former Attorney General John Ashcroft and FBI Director Robert Mueller.\textsuperscript{138} His complaint alleged that these men approved the unconstitutional detention and treatment of Arab Muslim men who they unconstitutionally designated as "of high interest."\textsuperscript{139} Specifically, he alleged that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to" the unconstitutional treatment of certain prisoners "as a matter of policy, solely on account of [their] religion, race and/or national origin and for no legitimate penological interest"; that Ashcroft was the "principal architect" of the policy and that Mueller was "instrumental in [the policy's] adoption, promulgation, and implementation."\textsuperscript{140}

The defendants moved to dismiss, arguing that they were entitled to qualified immunity.\textsuperscript{141} While the case was still at the Second Circuit, the Supreme Court decided \textit{Bell Atlantic Corp. v. Twombly}.\textsuperscript{142} In \textit{Twombly}, the Court found that the plaintiffs' antitrust complaint did not contain sufficient "credible" or "plausible" facts to survive a motion to dismiss.\textsuperscript{143} In reaching this conclusion, the Court's opinion sent "several, not entirely

\textsuperscript{137} \textit{Id.} at 1481 (Souter, J., dissenting); \textit{see also id.} at 1474 ("Thus, although a substantive waiver of federally protected civil rights will not be upheld we are not positioned to resolve in the first instance whether the \textit{CBA} allows the Union to prevent respondents from effectively vindicating their federal statutory rights in the arbitral forum." (internal quotations and citations omitted)).

\textsuperscript{138} 129 S. Ct. 1937, 1942 (2009).

\textsuperscript{139} \textit{Id.} at 1943.

\textsuperscript{140} \textit{Id.} at 1944.

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} 550 U.S. 544 (2007).

\textsuperscript{143} \textit{Id.} at 554.
consistent, signals" about whether its decision marked a new reading of Federal Rule of Civil Procedure 8 that would be applicable in all cases, or whether its new "plausibility standard" would apply only in certain cases.144 The Second Circuit considered the application of Twombly and concluded that the case established a "flexible" standard that might require "amplification" in some types of claims "to render the claim 'plausible,'" but that this standard would not require Iqbal to provide any additional facts given the claims he was making.145 The Second Circuit concluded that Iqbal had pled sufficient facts to survive a motion to dismiss and that he was entitled to limited discovery to "probe" the allegations.146 The Supreme Court reversed, in a decision authored by Justice Kennedy.

The five-Justice majority explained that Twombly's interpretation of Rule 8 – which requires "sufficient factual matter" to state a "plausible" claim for relief – applies to all civil actions.147 Of particular importance for civil rights cases alleging discrimination, the Iqbal majority emphasized the need for factual context to support an allegation of intent.148 Applying this standard, the Court concluded that Iqbal's complaint did not contain enough "factual content" to "plausibly suggest" that Ashcroft and Mueller adopted the challenged detention policies for the purpose of discrimination.149 In reaching this conclusion, the Court applied the two-step process that it suggested courts might choose to apply in evaluating complaints.

The Court first "identif[ied] the allegations in the complaint that are not entitled to the assumption of truth."150 The opinion included in that category allegations that Mueller and Ashcroft "knew of, condoned and willfully and maliciously agreed to subject" Mr. Iqbal to terrible conditions of confinement "as a matter of policy, solely on account of his religion, race and/or national origin." It included the allegation that Mueller was "instrumental" in adopting these policies and that Ashcroft was the policy's "principal architect." All of these allegations, the Court concluded, were "bare assertions" that "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."151 These

144. See Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (describing the potential inconsistencies in the Court's Twombly decision and noting the Court's repeated reference to the "plausibility standard" being established by the decision).
145. Id. at 157-58.
146. Id. at 178.
148. Id. at 1952.
149. Id.
150. Id. at 1950.
151. Id. at 1951 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
allegations the court described as "conclusory" and therefore not entitled to an assumption of truth in evaluation of the defendants' motion to dismiss.\footnote{152}

Next the Court turned to the remaining allegations in the complaint – those that plainly did more than state the elements of the claim. The Court included in this category allegations that the FBI arrested and detained thousands of Arab Muslim men, that they held those detainees under harsh conditions of confinement, and that Mueller and Ashcroft approved this policy. As to those allegations, the Court conceded that, "taken as true" they would establish Iqbal's claim.\footnote{153} However, they did not save Iqbal's complaint because the Court concluded that "given more likely explanations, they do not plausibly establish" the purpose he attributed to the defendants.\footnote{154} The majority accepted these factual allegations as true, but dodged the inference of unconstitutional conduct by observing that there was an "obvious alternative explanation" for the arrest of Iqbal and other Arab Muslims after the September 11 attacks.\footnote{155} "On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts."\footnote{156} And the majority concluded that, as between this "obvious" explanation for the conduct complained of and the invidious discrimination suggested by the plaintiff, "discrimination is not a plausible conclusion."\footnote{157}

The dissenting Justices argued that the majority misapplied the pleading rule articulated in \textit{Twombly}, rejecting many of Mr. Iqbal's allegations as "conclusory" when in fact they were not.\footnote{158} The difficulty, Justice Souter pointed out, was that the approach suggested by the Iqbal opinion -- looking at the facts one by one, eliminating those not entitled to a presumption of truth -- puts a court in the position of looking at each assertion in isolation.\footnote{159} Allegations that may look conclusory or formulaic when isolated from their broader context may look quite different when viewed as part of an entire story. Moreover, it is hard to find a "principled
basis" for describing some claims as conclusory and others as nonconclusory.\footnote{Id. at 1961 (Souter, J., dissenting).}

The difficulty with applying the \textit{Iqbal} approach in employment discrimination cases can be illustrated by considering a pleading case that the Court decided only a few years ago but did not mention in its \textit{Iqbal} decision.\footnote{Swierkiewicz v. Sorema, 534 U.S. 506 (2002).} The radical shift in the Court's approach to pleading standards becomes clear in looking at \textit{Swierkiewicz v. Sorema} first as it appeared when decided and then through the lens of \textit{Iqbal}.

In \textit{Swierkiewicz}, the Court held that a Title VII plaintiff was not required to plead specific facts that established a prima facie case of discrimination. This kind of heightened pleading standard, the Court said, is not contained in the Federal Rules of Civil Procedure, and the courts cannot create additional requirements beyond those in the Rules themselves.\footnote{Id. at 514-15.} The district court in \textit{Swierkiewicz} had dismissed the complaint because the plaintiff had not "adequately alleged circumstances that support an inference of discrimination."\footnote{Swierkiewicz, 534 U.S. at 509.} The Supreme Court took the view that "Rule 8(a) establishes a pleading standard without regard to whether the claim will succeed on the merits. 'Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test.'"\footnote{Id. at 515 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). The language and tone of \textit{Swierkiewicz} are so different from \textit{Iqbal} that it seems reasonable to assume that \textit{Iqbal} largely overruled the earlier decision. See, e.g., Joseph Seiner, \textit{After Iqbal}, 45 WAKE FOREST L. REV. (forthcoming 2010) ("[A] strong argument can be made that \textit{Iqbal} runs counter to (and implicitly overrules) \textit{Swierkiewicz}.")}

While the rule the district court applied in dismissing the case was a Second Circuit rule that framed a plaintiff's pleading requirement in terms of the prima facie case, the practical impact of that rule is hard to distinguish from the likely effects of the \textit{Iqbal} standard. The facts alleged in \textit{Swierkiewicz} provide an interesting opportunity to contrast the two cases. The plaintiff alleged that he had been terminated because of his age and national origin. His allegations included his own age and national origin (Hungarian), along with those of some of the people involved in the events leading to his firing (many were younger and were French).\footnote{Id. at 508.} He alleged that he was isolated and not involved in business decisions that he thought he should be involved with; that he listed his complaints to his supervisor and demanded a severance; and that he was ultimately dismissed.
The Swierkiewicz Court held that these allegations “easily” met the pleading requirements because they put the defendant on notice as to the nature of the suit, which was all that Rule 8 required the plaintiff to do.\(^{167}\)

The Swierkiewicz Court focused its attention on the liberality of the pleading standard and its relationship with other parts of the Federal Rules, particularly discovery and summary judgment. The Court emphasized that cases should not be thrown out when discovery might flesh out claims that were not yet fully developed in the complaint.\(^{168}\) “This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”\(^{169}\) Taking a very different tack in \textit{Iqbal}, the Court proclaimed that “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”\(^{170}\) If Mr. Swierkiewicz’s claim had come before the \textit{Iqbal} Court, it is difficult to imagine the Justices reaching the conclusion they had reached seven years earlier.

Some of Mr. Swierkiewicz’s allegations were simply the “recitals of the elements of a cause of action”\(^{171}\) — his age and national origin, his qualification for his position, that he was terminated, and the ages and national origins of the people he claimed were less qualified and were given positions he should have received.\(^{172}\) Others can certainly be characterized as “conclusory”: the allegations that he was “isolated,” that he was “excluded,” that he “was denied the opportunity to reach his true potential.”\(^{173}\) Nowhere in his complaint did Swierkiewicz provide the “factual allegation sufficient to plausibly suggest [the employer’s] discriminatory state of mind,”\(^{174}\) unless the judge reading the complaint was willing to read into these fairly limited facts the possibility that a French employer will prefer French employees to a Hungarian employee, or that a younger supervisor might prefer a younger cohort. While I doubt that the \textit{Iqbal} Justices would see a plausible claim of discrimination in Mr. Swierkiewicz’s story, some judges might. The significance of \textit{Iqbal} for employment discrimination may well depend on exactly that.

\(^{166}\) Id. at 509.
\(^{167}\) Id. at 514.
\(^{168}\) Id. at 511-12.
\(^{169}\) Id. at 512.
\(^{171}\) \textit{Id.} at 1949.
\(^{173}\) Id. at 509.
\(^{174}\) \textit{Iqbal}, 129 S. Ct. at 1952.
Even before Iqbal made it clear that the Twombly standard would apply to all civil actions, lower courts were confronting arguments that Twombly should apply in evaluation of employment discrimination complaints.\footnote{175} After Iqbal, it seems reasonable to assume that defendants will file motions to dismiss as a matter of course in employment discrimination litigation. The question then will be, what will the lower courts do with Iqbal’s statements about the standards for pleading intent?

Iqbal asks district court judges to review motions to dismiss with an eye for whether the allegations contained in the complaint are reasonable in light of alternative explanations for the events described. “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”\footnote{176} The risk of applying this standard in employment discrimination litigation is that it will bring to the fore the experiences and assumptions ("common sense") of the reviewing judge about whether discrimination is a continuing problem in the workplace as a general matter.

The debate over the nomination of Justice Sonia Sotomayor centered, at least in public discussion, on whether a judge’s personal experiences did or should influence her perspective on the cases before her.\footnote{177} The reality is that they do. As the Iqbal majority recognized, “experience” and “common sense” will play a role in judicial assessment of whether a claim is “plausible.”\footnote{178} The available research about the views of the federal judiciary as to the likelihood that discrimination is a plausible explanation for employer action offers little comfort for plaintiffs. A number of scholars have observed that courts often presume that personal animosity, rather than discriminatory animus, influenced an employer’s decision to take a particular adverse action.\footnote{179} As well, after the early days of federal


\footnote{176. Iqbal, 129 S. Ct. at 1950.}


\footnote{178. Iqbal, 129 S. Ct. at 1950.}

anti-discrimination law, empirical research has shown that courts generally became more receptive to the so-called "lack of interest" defense, which poses the plaintiffs' lack of interest in a particular job or job level as a better explanation than discrimination for job segregation. All of these phenomena are part of a larger picture: the federal judiciary, on average, does not believe that discrimination is a persistent problem. Faced, then, with an "obvious alternative explanation" for an adverse employment action, many judges may simply not view allegations of discriminatory intent as "plausible."

The new rule created by the Supreme Court in Twombly and Iqbal puts tremendous discretion in the hands of district courts—arguably, indeed, puts pressure on the courts—to filter cases involving intent out of the litigation system at the early motion-to-dismiss stage. And, as in Gross, Ricci and 14 Penn Plaza, the Court's five-justice majority arrived at its conclusion by disregarding procedural constraints on its ability to change the law—in this instance the institutional responsibility for modifying the Federal Rules of Civil Procedure. The Supreme Court has in the past recognized that courts are not free to amend the Federal Rules of Civil Procedure with the addition of hurdles not contained in the text. In Iqbal, the Court ignores its own admonitions, expanding Rule 8's "short and plain statement" requirement well beyond the boundaries of what the text off the rule demands.

VI. CONCLUSION

In addition to sharing a procedural radicalism that deserves greater public scrutiny, the Court's 2008-09 cases share the common thread of a particular attitude about employment discrimination. For the Roberts' Court majority, employment discrimination is not a problem—or, at the least, employment discrimination litigation is a larger problem. This Court looks at an employer trying to ensure that its tests do not unduly burden minority employees and sees that employer trying to hurt its white employees. This vision is a very different one from that of the Supreme Court that decided Griggs v. Duke Power Company and recognized that employers who ignore the unnecessary burdens placed on minorities are a central part of the problem of inequality. This Court looks at the claims of

plaintiffs alleging discrimination and seeking access to discovery to prove their claims and concludes that courts will be able to ascertain without any discovery at all whether discrimination is more likely than the host of other possible explanations for adverse action. This approach is inconsistent with the structure and purposes of the Rule of Civil Procedure and it ignores the imbalance in access to information that makes discovery important in employment litigation. This Court believes that an elderly employee who is terminated should have to prove not simply that age played a role in her employer’s decision, but that age was the reason for the decision. This perspective is not only impossible to square with the Court’s own precedent, it also makes proving discrimination a Sisyphean task. This Court believes that the substantive right provided in a federal employment discrimination statute is separable entirely from the plaintiffs’ right of access to the federal courts to protect that right. All of these decisions rest on the assumption that discrimination is less of a problem than discrimination plaintiffs and that the laws should be interpreted to decrease or eliminate entirely the burden that discrimination litigation imposes on the courts.