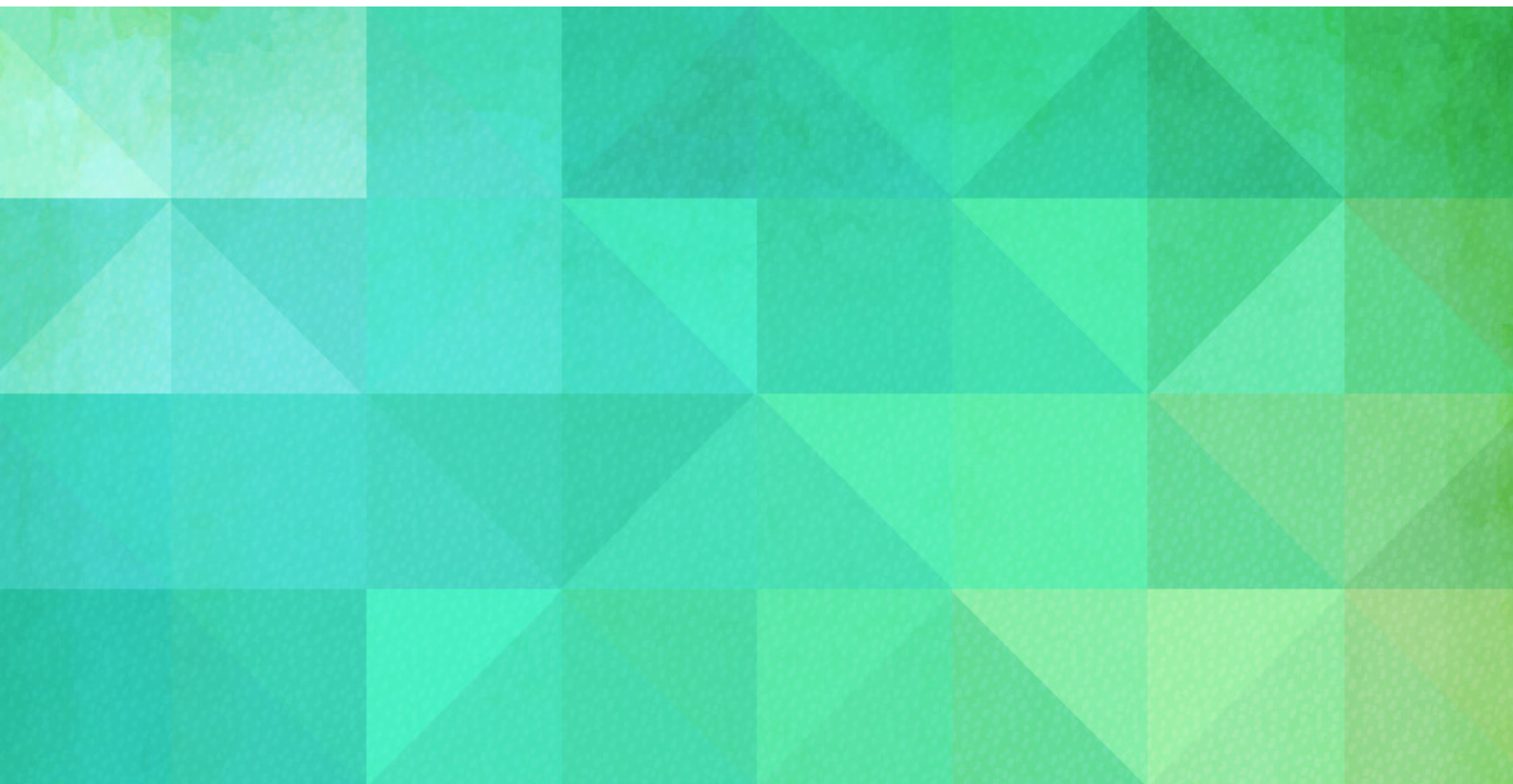




Toward a More Just Justice System:

How Open are the Courts to Social Justice Litigation?



LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Chief Counsel Jon Greenbaum

Project Directors Ray McClain, Joe Rich, Ezra Rosenberg, and Brenda Shum

WITH FOREWORD BY

Kristen Clarke President and Executive Director

Acknowledgements

The Lawyers' Committee and the authors gratefully acknowledge Atlantic Philanthropies, TCC Group, Arnold & Porter LLP, and Maddy Finucane, without whom this report would not have been possible.

This paper was commissioned as part of the Atlas Learning Project.



About the Lawyers' Committee for Civil Rights Under Law

The Lawyers' Committee, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The Lawyers' Committee celebrated its 50th anniversary in 2013 as it continued its quest of "Moving America Toward Justice." The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law, particularly in the areas of fair housing and fair lending, community development, employment, voting, and education.

For more information about the Lawyers' Committee, visit www.lawyerscommittee.org.

DISCLAIMER

The opinions expressed in this report are those of the Lawyers' Committee for Civil Rights Under Law and do not necessarily reflect those of sponsors or supporters.

© 2016 by the Lawyers' Committee for Civil Rights Under Law. This report may be reproduced in its entirety as long as the Lawyers' Committee for Civil Rights Under Law is credited, a link to the report's web page is provided, and no charge is imposed. The report may not be reproduced in part or in altered form, or if a fee is charged, without permission from the Lawyers' Committee for Civil Rights Under Law.

Foreword

The national Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) was chosen after a Request for Qualifications process to produce a report addressing the question of the openness of our courts to social justice litigation. The Lawyers' Committee was formed in 1963 to mobilize the private bar to combat issues of racial discrimination, and impact litigation has been a core component since the organization's inception. This report reflects the extensive experience of the Lawyers' Committee staff who has participated in some of the most significant social justice litigation in recent decades, as well as an expansive review of relevant cases, articles, studies, and reports that was done in conjunction with the law firm of Arnold & Porter LLP.

We found that over the past several decades, the courts, following the lead of the U.S. Supreme Court, have generally not been sympathetic to social justice claims and have become less sympathetic over time. Our determination is based on the numerous procedural and substantive decisions that negatively affect social justice litigation which have been erected over the last several decades. At the same time, social justice advocates have succeeded in circumventing barriers in some instances, minimizing their impact in others, and ultimately seeking ways to strike them down. Thus, this paper not only identifies obstacles; it also provides examples of tactics and strategies that have been used to overcome them and thereby make the courts more open to social justice litigation.

This report comes at a crossroads in American jurisprudence that will likely have profound effects on the future of social justice litigation. We currently face unprecedented resistance to filling a vacancy on the U.S. Supreme Court which jeopardizes the Court's ability to resolve some of the gravest civil rights cases and controversies across our nation. Regardless of what happens, social justice litigators, advocates, and funders must remain strategic, patient, and persistent as the progress toward social justice ebbs and flows and requires substantial long-term investment of resources.

I hope that readers of the report will find it useful as a tool in moving America toward justice.

Kristen Clarke

President and Executive Director

Lawyers' Committee for Civil Rights Under Law

kclarke@lawyerscommittee.org

Table of Contents

1. Executive Summary	6
2. Introduction	10
A. "Social Justice Litigation" Defined	10
B. Overview: Sympathy of the Courts to Social Justice Litigation	11
C. Authors' Reflections	13
3. What Moves Courts To Favor Social Justice Litigation?	15
A. Systematic Problems	15
B. Persistence Despite Judicial Intervention	15
C. Advances in Science and Social Science	16
D. Public Opinion	17
E. Changes in the Court's Composition	18
4. Strategic Considerations In Social Justice Litigation	20
A. Facts of the Case	20
B. Dealing with Bad Precedent	22
C. Suitability of the Issue for Judicial Resolution	24
Nature of the decision at issue	
Is the relief traditionally the province of the courts?	
D. Deciding Where to File	25
E. Obtaining Relevant Information	28
F. Use of Experts	29
G. Willingness to Accept Defeat	30
Minimizing the effect of bad precedent	
Learning from mistakes	
H. Resource and Funding Issues	32
Legal resources	
Experts	
Funding challenges	
Availability of attorneys' fees if plaintiffs prevail	
I. Private Firms as Outside Counsel	36
Methods of participation	
Limitations	

5. Obstacles To Social Justice Litigation	38
A. Pleading Hurdles <i>Twombly</i> and <i>Iqbal</i>	38
B. Barriers to Court Access	39
Arbitration clauses	
Standing	
Mootness	
Exhaustion of remedies	
<i>Title VII Employment Litigation; Disability Litigation; Prisoner Abuse Litigation</i>	
C. Obstacles to Class Actions	48
D. Summary Judgment	51
E. Substantive Law Challenges	52
Equal Protection claims	
Disparate impact claims	
<i>Title VII Claims; Title VI Claims; Fair Housing Act Claims; Voting Rights Act Claims</i>	
Disparate treatment/intent	
6. Conclusions	61
Glossary	63
Endnotes	66

Executive Summary

INTRODUCTION

This report addresses the question of the openness of U.S. courts to social justice litigation, also known as strategic litigation, impact litigation, or advocacy through the courts. These litigation cases are pursued on behalf of vulnerable and disadvantaged populations in order to root out policies and change institutions that systematically exclude or disadvantage them.

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") was formed in 1963 to mobilize the private bar to combat issues of racial discrimination. Impact litigation has been a core component of the Lawyers' Committee's work since its inception. The authors of this report—the Chief Counsel and four litigating Project Directors—collectively have more than 150 years of complex litigation experience, have participated in some of the most significant social justice litigation in recent decades, and have argued cases in various courts, including the Supreme Court. The report pulls from the authors' experiences and an expansive review of relevant cases, articles, and studies.

FINDINGS

Recent Context

Over the past several decades, the federal courts—following the lead of the U.S. Supreme Court—have become increasingly more conservative and less inclined to favor social justice. Piece by piece, they have issued numerous procedural and substantive decisions that have negatively affected social justice litigation. Despite these impediments, the courts mostly have remained open to social justice claims, which have made it possible for social justice advocates to circumvent these barriers in some instances, minimize their effect in other instances, as well as find ways to ultimately strike them down.

Factors Favoring Social Justice Litigation

Several factors may move courts to favor social justice litigation. Courts may be more inclined to act when the problem creating the need for litigation is large and persistent. Advances in science and social science, at times, have played a key role in persuading courts to rule in favor of social justice litigants and can be useful in showing the size and durability of the problem being litigated. There have been cases—particularly on very significant issues—where public opinion may have influenced the ultimate outcome of the case. The preexisting judicial or political philosophy of judges is more outcome determinative than public opinion. Consequently, social justice advocates need to tailor their arguments based on who is hearing those arguments.

Key Strategies for Social Justice Litigation

Any strategy for achieving a favorable outcome in social justice litigation must take several considerations into account. The importance of the facts in the case cannot be understated, particularly the significance of identifying a sympathetic plaintiff or plaintiffs. Consideration must also be given to any negative court precedent and how to overrule, distinguish, or narrow it. Where there are several cases challenging the same precedent, coordination is important in choosing the best positioned case or cases. There are times, however, after an unfavorable ruling when the best course of action is to terminate a case instead of pressing forward.

Before filing a case, litigators must conduct sufficient due diligence so an organization's limited resources are directed towards the best cases, and they must think ahead to possible remedies that can be imposed by a court. Identifying experts to introduce scientific and technical evidence and provide opinions on that evidence is often essential in social justice cases.

Another important consideration is where to file a case, which could involve a choice of state or federal court, as well as which state or federal court. Relevant considerations include which forum has the most favorable substantive law, the most favorable trial court and appellate court judges, the most favorable jury pools, if the case involves a jury trial, and the most favorable procedural rules.

Finally, social justice litigation tends to be resource-intensive, requiring lawyers, paralegals, experts, monitors, discovery costs, and travel expenses. While there are statutes that enable plaintiffs to recover attorneys' fees if they prevail on certain claims, judicial decisions have had a negative impact on the availability and amount of fees awarded. Private firms can serve as an important resource, often by donating their services and paying for out-of-pocket expenses. But there are limitations on what firms can, and are willing, to do.

Obstacles Hindering Social Justice Litigation

- **Pleading requirements and arbitration agreements:** Supreme Court cases have raised the requirement for what plaintiffs have to allege in their complaint (the first document plaintiffs file with the court describing the facts and law supporting their claim) from providing "notice" to setting forth a "plausible" claim. Research shows that the plausibility standard impacts social justice litigants disproportionately. The Supreme Court's interpretation of the Federal Arbitration Act in several cases has foreclosed litigation where contracts between the plaintiff and defendants included an arbitration clause. These decisions have had a particular significance in employment and consumer protection cases.
- **Standing, mootness, and exhaustion of administrative remedies:** Barriers to accessing the court often are erected through court doctrine. For example, in order to bring a case, a plaintiff must have "standing," which generally means the plaintiff must demonstrate how the conduct of the defendant caused the plaintiff harm. In cases through the 1970s, the Supreme Court has generally adopted a permissive view of standing, but more recent Court decisions have narrowed the doctrine. Another doctrine that can serve as a barrier is mootness, which comes into play when a court no longer has a case or controversy before it. Defendants in social justice litigation sometimes seek to moot out cases by changing the challenged policy. An additional challenge is exhaustion of remedies, which requires plaintiffs to exhaust administrative remedies before proceeding to litigation. This barrier applies to Title VII employment, disability, and prisoner abuse cases.

- **Class certification:** Class actions, cases brought on behalf of a group of individuals, have been an important vehicle in ensuring that the scope and remedy of a case has broad effect. Courts, however, have become less receptive to certifying classes. A prime recent example was the Supreme Court's recent decision in *Wal-mart v. Dukes*, where the Court heightened the standard for plaintiffs to satisfy "commonality," which is a requirement for class certification.
- **Summary judgment:** Summary judgment is a pretrial determination by the court that one of the parties has not set forth sufficient facts to prove or disprove a claim. Recent Supreme Court cases have made summary judgment more available to defendants in social justice cases, particularly in employment discrimination cases.
- **Substantive law:** Substantive law challenges to social justice litigation also impose a major barrier to these impact cases. The Supreme Court's treatment of the Equal Protection Clause of the Constitution, a key provision for social justice litigators, is illustrative. The Supreme Court has been reluctant to view racially neutral laws as violative of the Equal Protection Clause, even if they have a disparate impact on minorities. Moreover, a majority of the Court has treated as presumptively unconstitutional governmental efforts that on their face are designed to assist disadvantaged racial groups that have suffered discrimination. Many social justice cases involve the issues of discriminatory purpose or disparate impact. Courts are hesitant to find that defendants acted with discriminatory intent, and the Supreme Court has made it more difficult to prove disparate impact claims under various civil rights statutes, including housing, employment, education, and voting statutes.

Even though these numerous obstacles persist, the courts remain open to social justice litigation to a significant degree; but, because of these obstacles, successful social litigation is heavily dependent on careful planning and strategizing, persistence and patience, and sufficient resources.

RECOMMENDATIONS

Recommendations for Litigators

There are a number of key strategic implications for litigators and advocates who engage in social justice litigation. They include:

- A social justice litigation strategy requires both caution and willingness to take risks. Litigators who do not think through all of the options and obstacles do so at their own peril. Conversely, litigators waiting for the foolproof social justice case will probably never file one.
- Litigators should be willing to commit to a long-term timeframe. Individual cases can take years to resolve and often start with baby steps. Some remedies require lengthy post-litigation monitoring. Trying to create widespread or long-standing change can take a decade or more.
- Litigators need to consider all significant procedural and substantive opportunities and obstacles before proceeding; they need to identify and distinguish outright barriers from high impediments and develop strategies for reaching both shorter- and longer-term goals.
- Litigators need to make sure that they have adequate resources to be successful, including an appropriate legal team, qualified experts, and sufficient funds.

- On cutting-edge issues, litigators need to consider whether a particular case is the right vehicle. Issues such as the judicial forum (examining both the controlling case law and the judges likely to hear the case) and the factual context (looking at the strength of the facts and the persuasiveness of clients and key witnesses) should be considered. In this regard, coordination between and among different organizations with common goals is essential.
- Case presentation should be crafted with attention to the judges or justices that will hear the case. If the case has significant potential to get to the Supreme Court, litigators should seek to narrow the case if possible so that a loss does not have catastrophic effects on potential future cases.

Recommendations for Funders

- Social justice litigation takes time. Impact cases typically take several years; accordingly, funding them requires long-term investment.
- Social justice litigation is expensive. In addition to staffing the cases for the number of years required to litigate, most of the more complex cases have significant out-of-pocket costs including those for investigation, depositions, experts, other discovery costs, and communications.
- As discussed above, successful social justice litigation requires litigators who carefully think through all of the contingencies and potential obstacles. Funders should think through carefully which organizations to fund and should ask questions of potential grantees about their litigation strategies.
- Social justice litigation entails high risk and high reward, and progress on cutting-edge issues often has fits and starts. The first case or cases on a particular issue may be unsuccessful.

Like litigators and advocates, funders of social justice litigation need to be patient and persistent because progress usually takes time and occurs in increments.

CONCLUSION

Despite a difficult judicial environment and numerous other challenges, social justice litigation has made a substantial, positive difference for the disadvantaged. Absent a significantly more hostile judiciary, progress will continue. Indeed, given the number of 5-4 Supreme Court decisions that have created procedural and substantive obstacles, the change of one justice, perhaps the successor to the recently-deceased Justice Scalia, may result in courts that are more receptive to social justice claims. Critical to any sustained success will be the maintenance and enhancement of collaboration and investment by clients, advocates, litigators, and funders.

Introduction

This paper addresses the question of the openness of our courts to social justice litigation. Superficially, the question is answered quite easily: for several decades, the courts, following the lead of the U.S. Supreme Court, have generally not been sympathetic to social justice claims and have become less sympathetic over time. The simple answer is based on the numerous procedural and substantive decisions negatively affecting social justice litigation which have been erected piece by piece over a number of years.

The existence of these obstacles, however, does not in itself answer the question of how open the courts are to social justice litigation. Social justice advocates have succeeded in circumventing barriers in some instances, minimizing their impact in others, and ultimately seeking ways to strike them down. Thus, this paper not only identifies those obstacles, but also provides examples of tactics and strategies that have been used to diminish their effectiveness; thereby, making the courts more open to social justice litigation. It is also important to note that many of the Supreme Court decisions referenced in this report were decided by 5-4 votes and so the change of one justice could have a substantial impact on social justice litigation. In particular, if a justice that typically is less sympathetic to social justice advocates is replaced by one who is more sympathetic, the courts could become dramatically more open.

In so proceeding, this paper operates on several premises: first, that just as it took time to erect these barriers, it will take trial-and-error to minimize their impact and eventually eliminate them; second, that without the threat of social justice litigation, the situation of vulnerable and disadvantaged populations will deteriorate further; and third, without the availability of social justice advocates, those populations will have no meaningful voice.

A. “SOCIAL JUSTICE LITIGATION” DEFINED

Social justice litigation protects the rights of the vulnerable and disadvantaged.

This report defines “social justice” litigation as impact cases brought on behalf of vulnerable and disadvantaged populations to root out policies and change institutions that “systematically exclude or disadvantage” them.¹ The social justice advocate’s clients are typically people (or organizations representing people) who are disadvantaged because of their economic status, race, nationality, gender, age, disabilities, immigration status, sexual orientation, political affiliation, or religion.²

Because of this focus, social justice litigation is a subset of what is commonly viewed as “public interest” litigation. For example, while litigation involving the environmental consequences of constructing a highway may be the subject of public interest litigation, the social justice advocate views the issue primarily from the perspective—both positive and negative—of the highway’s effect on disadvantaged populations.

All social justice litigation seeks to effect “change on the ground,” through ending a specific unlawful practice, and with some social justice litigation also seeks to challenge more broadly practices “deemed to be part of the

‘natural order.’”³ The foundation of much social justice litigation is constitutional: most notably the Due Process and Equal Protection Clauses of the U.S. Constitution and cognate state constitutional clauses. Another large tranche of social justice litigation is statutory, such as litigation based on the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

While social justice litigation may take different forms—such as class actions or individual test cases—its goals are the broader social good and often permanent social change, rather than a monetary payout (although a suit for money damages may be used as leverage to produce social change).

B. OVERVIEW: SYMPATHY OF THE COURTS TO SOCIAL JUSTICE LITIGATION

Federal courts have become more hostile to social justice litigation over the past 40 years.

Despite this, they remain significantly open to social justice litigants.

Some state courts may provide a welcome forum for social justice cases.

Social justice litigation in federal courts may have peaked in the 1970s as Congress passed a number of statutes in the 1960s and 1970s that expanded litigation opportunities in areas such as civil rights. The passage of the Civil Rights Attorney’s Fees Award Act of 1976⁴ and other federal statutes which provided that prevailing plaintiffs could recover attorneys’ fees made a significant, practical difference in opening up the federal courts for social justice litigation. Now attorneys could be compensated for bringing social justice cases. Additionally, during the 1960s, the Supreme Court issued a number of decisions that created more expansive views of constitutional rights such as Equal Protection and Due Process. During the decades since, the Supreme Court has shifted in the composition of its political ideology and become more conservative. In many cases, this has negatively influenced the outcomes of social justice litigation as the Court has issued a number of decisions on both procedural and substantive grounds that have had an impact on social justice litigation as a tool for upholding rights and creating change. As discussed in the next subsection, in the past Congress had undone the negative effect of some of those decisions through legislation but the last several Congresses have declined to do so. It is important to emphasize, however, that even though the Court has generally become more conservative, in many respects the federal courthouse remains open to a significant degree to social justice litigants.

Using the results of decisions spanning decades, there have been multiple attempts to analyze how liberal/conservative the Court has been over time and how liberal/conservative the Court has been with respect to different types of cases.⁵ Two scholars, Andrew Martin and Kevin Quinn, have developed a method, “Martin-Quinn Scores,” for assessing the ideology of members of the Supreme Court over time, using data from 1937 to the present.⁶ In 2012, the statistician Nate Silver performed several analyses of all nine justices, the “median” justice, and the “fourth, fifth, and sixth most liberal justices.”⁷ The results showed that the Court composition was more liberal between roughly 1960 and 1970. Since then, the Court composition has leaned more conservative, with the Court becoming considerably more conservative after Justice Alito replaced Justice O’Connor.⁸ Another analysis of the ideology of the Supreme Court over time was last updated in 2015 by Professors Lee Epstein and William Landes and Federal Circuit Court Judge Richard Posner⁹ and used several measures to determine how conservative the 43 Supreme Court justices who served from 1937 to 2012 were relative to one another. The study found that Justice Thomas, Justice Scalia, Justice Alito, Justice Kennedy, and Chief Justice Roberts—a majority of the Court before Justice Scalia’s recent death—ranked as the fourth, fifth,

eighth, 12th, and 13th most conservative justices respectively in terms of their votes in non-unanimous cases.¹⁰ In contrast, Justices Breyer, Sotomayor, Ginsburg, and Kagan ranked 31st, 34th, 35th, and 40th respectively.¹¹ A study from the same authors with respect to business cases from 1946 to 2011 found that Justice Alito, Chief Justice Roberts, Justice Thomas, Justice Kennedy, and Justice Scalia ranked as the first, second, fifth, sixth, and ninth most pro-business justices respectively amongst the 35 justices during those years.¹² Justices Breyer, Ginsburg, and Sotomayor ranked twenty-first, twenty-second, and twenty-seventh respectively. Justice Kagan was not ranked because of the brevity of her tenure. These analyses suggest that if Justice Scalia's successor is similar in ideology to Justices Ginsburg, Breyer, Sotomayor, and Kagan, it will have a profound difference on the Court in favor of social justice advocates.

Results from another study suggest that, although the Court has become more conservative, it is not closed nor prohibitive to social justice litigants. Professor Harold Spaeth, later joined by other contributors, has created the Supreme Court Database, which classifies each Supreme Court opinion from 1946 using 247 pieces of information that fall into six categories: (1) identification variables, (2) background variables, (3) chronological variables, (4) substantive variables, (5) outcome variables, and (6) voting and opinion variables.¹³ Among other things, the database enables users to see within a particular subset of cases how many that the liberal and conservative sides won. Civil rights cases are a helpful example because they fall within the sphere of social justice cases and the Supreme Court decides a number of them in each term. During the 2006 to 2014 terms, the full terms that have included Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito, the "liberal" and "conservative" sides each won 60 civil rights cases.¹⁴ During a similar nine-term span from 1961 to 1969 with a more liberal Supreme Court, the liberal side won 205 civil rights cases, and the conservative side won 42.

A recent study examining four decades worth of data on employment discrimination cases and constitutional tort cases brought under 42 U.S.C. § 1983 made a number of findings that suggest that plaintiffs in these types of social justice cases are having increasing difficulty.¹⁵ This study found that the number of employment discrimination claims had been in steady decline since the late 1990s, which it attributed to the federal courts increasing disfavor for employment discrimination claims.¹⁶ The study found that constitutional tort cases had been decreasing since 2004, which it suggested may be attributable to "low settlement rates, low trial win rates, appellate level setbacks, and Supreme Court groups of five justices who have been unsympathetic to civil rights plaintiffs."¹⁷

More often than not, federal court is seen as more hospitable than state court for social justice litigants. But with respect to certain issues and in certain states, state courts may provide better opportunities for social justice litigants than federal court. The analyses of the ideology of state supreme courts are less developed than for that of the U.S. Supreme Court. A 2015 article from political scientists at Stanford University and New York University measured, among other things, the ideology of each state supreme court from 1990 to 2012.¹⁸ It found that overall, state courts drifted to the right during the time frame and are now ideologically similar to the public as a whole. More important, it found that most individual state courts are ideologically homogeneous.¹⁹ For social justice litigants, this tends to mean that some state courts are likely to be relatively hospitable and others hostile. State law may also provide for either broader or more restrictive remedies than federal court. Two examples are that most states recognize a fundamental right to a public education that does not exist under federal law and that most state constitutions have explicit language recognizing a fundamental right to vote whereas the United States Constitution does not.

C. AUTHORS' REFLECTIONS

Working on the report was a valuable experience for the authors.

This report is the first to look comprehensively at the degree to which courts are open to social justice litigation.

The authors are not surprised but are disappointed that the general jurisprudence trend is not positive.

The authors are inspired by the persistence and ingenuity of litigators and advocates in navigating a difficult judicial environment.

The authors were asked by our sponsors to share reflections on the experience of writing this report.

This report provided us with a rare funded opportunity to step back from our day-to-day work at the Lawyers' Committee for Civil Rights Under Law and spend the time to focus on a broader question that we have thought about but not had the time to study in depth: how open are the courts to social justice litigation? Exploring this issue has been valuable to us, and we thank Atlantic Philanthropies for recognizing the importance of this issue and dedicating resources to exploring it; TCC Group for selecting the Lawyers' Committee to author this report and collaborating with us on it; and Arnold & Porter LLP for providing insight from senior litigators who have worked on numerous social justice cases in a *pro bono* capacity and for doing substantial research on more than 20 topics.

The research done by Arnold & Porter LLP and us revealed that nobody has done a report that melds jurisprudential and practical litigation perspectives like this in the past. As the voluminous endnotes reflect, there are a number of articles, reports, and cases that inform the report, but we were not able to identify any source that studied the issue in its totality. We hope that the uniqueness of this report will contribute to its usefulness.

Given our combined more than 150 years of experience, we are not surprised by the general jurisprudential trend. Nonetheless, it is disheartening to see it laid out in detail. Led by the Supreme Court, federal courts in the 1960s and 1970s tended to be hospitable to social justice cases, but in the decades since, they have become less open through a series of decisions touching a number of substantive and procedural issues. Co-author Joe Rich, who began his civil rights legal career at the Department of Justice in 1968, has experienced the arc of this change through the course of his career. Supreme Court decisions in the 1960s and early 1970s were transformative in enabling advocates to enforce the Constitution as well as the civil rights litigation enacted in the 1960s for the purposes of desegregating schools, integrating workplaces, and enabling citizens to fully and equally exercise their right to vote. Since that time, progress has been eroded by subsequent decisions that have left schools more segregated than they were in the 1970s, made it more difficult to successfully bring employment discrimination cases, and left minority citizens more vulnerable to discriminatory voting procedures. In the 1980s and 1990s, Congress passed legislation to address some setbacks in the courts, including establishing the results test in the 1982 renewal of the Voting Rights Act and reinvigorating Title VII of the 1964 Civil Rights Act in the 1991 Civil Rights Restoration Act. But the current and most recent Congresses have left the latest setbacks unaddressed—such as the inertia surrounding efforts to address the Supreme Court's 2013 decision in *Shelby County v. Holder*, which gutted a key provision of the Voting Rights Act.

On the positive side, we find inspiring the persistence and ingenuity of litigators and advocates in figuring out how to navigate a difficult judicial environment to achieve notable successes in social justice litigation, and the willingness of foundations to fund this important work. Sometimes this work has meant using state law as a vehicle where there are favorable state constitutional or statutory provisions and where state courts, particularly state supreme courts, are more hospitable. A good example of this was a successful state constitutional attack on the Pennsylvania's voter identification law in 2014 after the U.S. Supreme Court had upheld Indiana's voter identification law against a federal constitutional challenge. The litigators in the Pennsylvania voter identification case not only took advantage of a more favorable constitutional provision and a better judicial forum, but also learned from the Supreme Court's analysis of the facts in the Indiana case and developed a strong factual argument. At other times this has meant taking advantage of an emerging societal trend, like greater public support of same-sex marriage, to successfully challenge the denial of same-sex marriage on constitutional grounds. Almost always this has required a well-crafted strategy comprising many components: sympathetic plaintiffs; a strong and well-developed factual case; experienced, talented, and well-resourced legal teams; a coordinated *amicus curiae* effort; and a supportive public relations strategy. A good recent example of how all of these elements are critical to success is the Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, where the Supreme Court held by a 5-4 vote that disparate impact claims could be brought under the Fair Housing Act of 1968. The result was hardly novel, given that every circuit court had ruled the same way, but nevertheless social justice advocates saw victory as an uphill battle because of the conservative majority on the Supreme Court.

We also recognize that we have been standing on the shoulders of giants, who fought social justice battles for decades, and who taught us that success rarely comes overnight, but often takes decades of losses, reversals, and bitter defeats. We have learned that the fight is sometimes more important than the immediate outcome, that wisdom comes from failure, and that giving vulnerable and disadvantaged segments of this society a voice—a voice that itself sometimes leads to new public consensus and understanding—is sometimes the most important victory.

Working on this report has both reinforced our resolve to continue to work with our allies to use litigation as a means of advancing social justice and validated our approach of comprehensively thinking through all of the issues that can lead to victory or failure—such as forum, procedural obstacles, key legal issues, fact and expert witnesses, and a sufficiently resourced legal team—before and during a case.

What Moves Courts to Favor Social Justice Litigation?

- **The size and persistence of the problem may force courts to act in favor of social justice litigation.**
- **Changes in knowledge may influence the courts, but more recently social science has been invoked on both sides of the adversarial process. It has become unclear how much scientific conclusions influence, as opposed to corroborate, judicial decisions.**
- **Changes in public opinion may move courts to favor social justice litigation, particularly in cases of seismic proportion.**
- **Disadvantaged populations are not likely to engender public opinion support.**
- **In the typical social justice case, the largest factor is the judicial/political philosophy of the court, and advocates should tailor their cases and arguments to their specific court.**

In assessing the efficacy of social justice actions, it is instructive to analyze what moves courts—and the Supreme Court in particular—to look with favor on such cases.

A. SYSTEMIC PROBLEMS

Social justice litigation addresses systemic problems.

In the first instance, the problem sought to be addressed by social justice litigation must be systemic. Whether ingrained in social institutions, government policy, or commercial transactions, the social justice issue must be one that impacts a large segment of the population and does so systemically, so that remedy by judicial fiat is necessary. Thus, it has been observed that the Supreme Court looks for trends across states, as it appears to have done in both *Brown v. Bd. of Ed.*²⁰ and *Obergefell v. Hodges*,²¹ in order to determine “whether a national rule is necessary.”²²

B. PERSISTENCE DESPITE JUDICIAL INTERVENTION

Courts are apt to favor cases that address problems that persist despite previous judicial intervention.

Sometimes, but seldom, courts feel they have no choice but to look with favor on a piece of social justice litigation: a systemic problem has persisted so long despite previous judicial intervention, that courts finally must

take action. This typically occurs where the rights had been settled in previous litigation, and the issue before the court focuses on the failure to resolve the problem. Often, the issue reduces to a fundamental fight over the proper role of the court. A prime example—and one of the only clear examples at the U.S. Supreme Court level—is *Brown v. Plata*,²³ where the Court affirmed the district court's order of the release of 46,000 inmates in California's prisons because overcrowding and deficiencies in medical care violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. The record in that case showed that the conditions in California's prisons had persisted for years, with the State consistently failing to comply with remedial injunctions. Nevertheless, even that case was a close call. The vote was 5-4 and elicited a dissent by Justice Scalia that called into question what he called a constitutional violation based on "system-wide deficiencies,"²⁴ and "structural injunctions," i.e., injunctions designed, in Justice Scalia's words, to "restructure a social institution,"²⁵ which "invite judges to indulge incompetent policy preferences," because "assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials."²⁶

Not surprisingly, there are few other examples of as far-reaching judicial action at least at the U.S. Supreme Court level, although the post—*Brown v. Bd. of Ed.* desegregation cases may be said to fit this mold. There are examples in state courts, most notably in the public education financing arena, where, after establishing a state constitutional right to a thorough and efficient public education, courts have been faced with years of inaction by state legislatures to remedy the right. In a few cases, that has led to the highest court in the state ordering the state legislature to take specific action to fund school districts.²⁷

C. ADVANCES IN SCIENCE AND SOCIAL SCIENCE

Advances in knowledge may lead courts to favor social justice litigation.

Social science advances were crucial in early social justice litigation.

More recently, social science has been invoked on both sides of the adversarial process, and it is unclear how much scientific conclusions influence, as opposed to corroborate, judicial decisions.

Advances in non-legal fields often lead to changes in courts' perspectives.²⁸ The acceptance of DNA as a reliable tool of identification is a prime example of this phenomenon, as are other recent developments related to psychiatry, psychology, and behavioral science.²⁹ In the social justice arena, social science in particular has been an essential part of most cases, since Louis Brandeis ushered in the age of legal realism with his brief citing social science literature to explain the negative effects of longer working hours on women's health.³⁰ Today, it is unclear whether scientific literature moves courts to favor social justice claims or simply provides cover for their decisions.

Social science as a primary support for a change of precedent reached both its point of initial acceptability and its peak of acceptability simultaneously. In the famous footnote 11 of the opinion in *Brown v. Bd. of Ed.*, the Court cited social science literature that was unavailable at the time of *Plessy v. Ferguson*; the literature discussed the harm caused to children by school segregation.³¹ Although there has been a large increase in the use of social science since then, courts are still reluctant to incorporate it into decision-making.³²

One authority has postulated that, if the Court frames the issue as one of equality based on "new" understandings, the Justices will likely support it with social science.³³ Clearly, that was the case in *Brown v. Bd. of Ed.*, but other

examples are hard to find. The “new understanding” that underlays the decisions in notable equality cases like *United States v. Virginia* (invalidating the State’s exclusion of women from military schools),³⁴ *Lawrence v. Texas* (invalidating State’s sodomy laws),³⁵ and *Obergefell v. Hodges* (invalidating prohibitions against same-sex marriage)³⁶ was based on changed ideas about equality, not upon a social scientific study of the benefits or disadvantages of the discriminatory conduct in question, as was the case in *Brown v. Bd. of Ed.*

Unsettled and uncertain social science may lead the Court away from relying on social science, because findings later revealed to be wrong might undermine the legitimacy of the Court.³⁷ Indeed, as one authority has noted, because of this fear of uncertainty, changes in scientific theory do not necessarily lead to immediate revisions to judicial precedent.³⁸ Thus, for example, while death penalty cases have engaged scientific discussions about the reality of deterrence, conflicting conclusions drawn by different researchers have rendered the social science unhelpful in guiding the courts.³⁹

In this context, the recent politicization of *amicus curiae* practice before the Supreme Court has, somewhat incongruously, led to the Court’s declining to rely on social science as the foundation of its social justice decisions. As one authority has written, *amici* practice has fallen prey to “open partisanship.”⁴⁰ This partisanship undercuts the utility of social science from the historical role of social science, i.e., informing the Court of a body of new, essentially undisputed understandings such as that exemplified in *Brown v. Bd. of Ed.* The continuing battle of social scientists before the Supreme Court on issues of equality has rendered it less likely that a “new understanding” of social science will lead to a new constitutional rule in the social justice arena.

A prime example of this phenomenon is *Parents Involved in Community School v. Seattle School District No. 1*,⁴¹ which rejected Seattle’s argument that efforts to racially balance schools could be justified by a compelling state interest in the benefits of racial balance, as identified by the social science.⁴² Justice Breyer’s dissent cited to that social science in detail.⁴³ Justice Thomas’s concurrence cited to social science which he described as going in the other direction.⁴⁴ The Chief Justice, speaking for the 5-4 majority, eschewed all reliance on social science, noting the dispute among the *amici* on the issue, and that the school district’s plan was not narrowly tailored to meet whatever benefits might flow from racial balance.⁴⁵

D. PUBLIC OPINION

The Supreme Court appears to align itself with public opinion, particularly in cases of seismic proportion such as Brown v. Bd. Of Ed.

But, social justice advocates cannot wait for public opinion to shift, particularly when representing the disadvantaged in whose favor public opinion may never shift.

What moves the courts, and the Supreme Court in particular, to look with favor on social justice cases has been the subject of much scholarly debate. A recent consensus view is that the Supreme Court largely reacts to and aligns itself with public opinion.⁴⁶ Proponents of this theory typically cite to *Brown v. Bd. Of Ed.*, *Roe v. Wade*, and *Obergefell v. Hodges* as empirical examples of the theory in operation.⁴⁷ Others engage in complex regression analyses, which purport to control for such variables as the polarization of the Court, the effect of *amicus* briefs, and the political leanings of the Solicitor General so as to isolate the effect of public mood swings on jurisprudential shifts.⁴⁸

There are, of course, instances where the Court expressly acknowledges the effect and importance of public opinion. Death penalty cases present a prime example. In *Atkins v. Virginia*, the Court supported its prohibition of the death penalty for a mentally retarded defendant by indicating that a national consensus opposed the death penalty for such individuals.⁴⁹ When the Court acknowledges a consensus in national opinion like this, it is generally in a case of seismic proportion, like *Brown v. Bd. of Ed.*, i.e., cases that wreak wholesale changes in the social, political, or commercial landscape. By their intrinsic nature, “Cruel and Unusual Punishment” cases also appear to depend on public sentiment.⁵⁰

Some scholars assert that Justices generally respond to “majoritarian preferences”; specifically they “react to public opinion strategically and, therefore, tend not to veer too far from majoritarian preferences in their decision-making in order to amass and maintain a reservoir of good will with the public—so as to protect the legitimacy, independence, and vitality of the Court as a political institution.”⁵¹ A sub-theme of this theory is that the Justices typically align themselves with the public mood “because they, like most people, simply seek approval and want to be well thought of, both in their daily lives and in how history judges them.”⁵²

Authorities recognize that public opinion is not monolithic and argue that Justices are strongly influenced by their own “micro-publics,” i.e., the “myriad of social concerns and group identities upon which these individuals structure and process their experiences and develop and refine their personal schemas,” such as the liberalism of their home state and the liberalism of Washington D.C.⁵³

Our own view is that social justice advocates should not place too much stock in changing public sentiment as a precondition to effective impact litigation. That social justice advocates should not await shifts in public sentiment before pressing their agenda is particularly important when one’s object is to protect minority and/or marginalized members of society, whose interests may never engender widespread public support.

E. CHANGES IN THE COURT’S COMPOSITION

The ordinary political process of judicial appointments is most responsible for judicial shifts on social justice cases.

Social justice advocates must advocate in a way most likely to convince the court, given its judicial/political philosophy.

While large socio-cultural shifts may be a precondition for some decisions that serve as the bedrock of future litigation (e.g., *Brown v. Bd. of Ed.*, *Rowe v. Wade*, *Lawrence v. Texas*), the preponderance of social justice litigation turns simply on whether or not the case and the advocate can be sufficiently persuasive, given the Justice’s judicial/political philosophies. “[T]he impetus for jurisprudential shifts seems to be a change in [the Court’s] membership resulting from the ordinary political process of presidential appointment and Senate confirmation.”⁵⁴ The landmark constitutional case *Citizens United v. FEC* could scarcely be said to reflect a groundswell of public opinion, and other important decisions, such as *Comstock v. United States*, which allowed the Attorney General to order the civil commitment of individuals already in federal custody under the Necessary and Proper Clause, hardly registered in the public consciousness.⁵⁵ And, while the expansion of gay rights and gun rights and the concomitant expansion and retraction of abortion rights may reflect public opinion, none of the Justices who formed the majority in *Roe v. Wade* switched to become the controlling plurality in the more restrictive *Planned Parenthood of Southeastern Pennsylvania v. Casey*; none of the Justices who refused to uphold a statute banning

partial-birth abortions switched his or her vote to join the majority that upheld an indistinguishable statute in *Gonzalez v. Carhart* just seven years later.⁵⁶ It was the identity of the Justices that changed, not the views of the Justices reflecting a shift in public mood (assuming there was one).

This same pattern holds at the trial court level, where the important factual findings are made, which may bind upper courts. For example, in a study of all decisions on Section 2 of the Voting Rights Act issued by federal district and circuit courts between 1982 and 2004, Democratic appointees were 50 percent more likely to rule in favor of the plaintiffs than were Republican appointees.⁵⁷

Strategic Considerations in Social Justice Litigation

- **Social justice advocates may increase opportunities for the acceptance of their claims by strategic decisions as to:**
 - the selection of sympathetic plaintiffs,
 - how to deal with adverse precedent,
 - how to formulate the case to make it acceptable for judicial resolution,
 - choosing the best venue,
 - collection of information and data, and
 - choosing experts.
- **Accepting defeat and learning lessons from failure are intrinsic components of social justice litigation because these cases are necessary for the “long haul.”**
- **Civil rights litigation organizations are typically bare-bones operations, making funding issues of paramount importance and reliance on the use of the private bar essential.**

A. FACTS OF THE CASE

Identifying a sympathetic plaintiff may be crucial to the outcome.

One of the most important lessons that every trial lawyer learns, especially any social justice litigator, is the importance of the facts in every case that is brought—before, during, and after trial. They matter because they can be outcome determinative and impact legal principles. Two cases, indistinguishable as a strictly legal matter, can present very different sets of facts, facts that shed a different light on the competing interests involved.

Facts evoking sympathy and empathy are especially crucial in jury trials where the main work of a trial lawyer is to make a jury like his/her client or, at least, to feel sympathy for him/her. Clarence Darrow once observed that: “Jurymen seldom convict a person they like, or acquit one that they dislike.”⁵⁸ Judges are supposed to make more reasoned and dispassionate judgments, but they too are human and know that their decision can affect not only legal precedent, but also resolve the present dispute between the two parties. One study using over 1,800 state and federal trial judges as research subjects concluded that judges’ feelings about litigants influence their judgments.⁵⁹

Litigants are well aware of this phenomenon. Therefore, when interest groups initiate social justice litigation, it is important that it be strategically initiated and strategically managed, always with an eye to predicting what the relevant court will do. Significant resources are invested in identifying sympathetic plaintiffs and finding the most compelling and egregious case of discrimination.⁶⁰ One of the best examples of this can be found in the recent same-sex marriage cases *United States v. Windsor*⁶¹ and *Obergefell v. Hodges*.⁶²

The attorney who represented the plaintiff in *Windsor* portrayed the importance of facts in her description of the case, stating it “is unwise, if not foolish, to bring or defend any case without paying very close attention to every detail of the facts before, during and after trial.” In the context of *Windsor*, this meant first and foremost that “from the very beginning, to borrow a phrase from Bill Clinton’s first presidential campaign, that ‘It’s all about Edie, stupid.’”⁶³ To tell the plaintiff’s story in a detailed, deliberate, and interesting manner, the complaint was drafted to provide more substance and facts than civil procedure rules require.

The story was powerful and demonstrates the importance of strong facts. For instance, when Windsor was working for the Atomic Energy Commission in the 1950s and was called in by the FBI for an interview she (rightfully) feared that if the FBI were to ask her if she were a lesbian, she would lose her career as well as her job because for most of her career as a computer programmer, it was a felony to have any employment with the federal government if you were gay. When her partner asked Windsor to marry her in 1967, she proposed with a circular diamond brooch instead of a diamond ring because she was afraid of “outing” Edie as a lesbian at her job. Further, when her partner died from multiple sclerosis, Windsor was hit with a \$363,000 federal estate tax bill.⁶⁴ In interviews given after the decision, Justice Ginsburg described Edie Windsor as “a well-chosen plaintiff” and articulated the facts in a way that demonstrates their importance:

These were two people who lived together in a *grand partnership* and one of them was dying and wanted to have the official blessings of government on this union so they married ... and then ... one partner died and the other gets something like a \$360,000 estate tax bill from the government. She would have no bill at all if her marriage were recognized So that was the DOMA case.⁶⁵

The facts in *Obergefell* are similarly compelling. Plaintiff Obergefell and his partner Arthur had been in a committed relationship for over 20 years, and Arthur had developed Lou Gehrig’s disease. On July 11, 2013, just weeks after *Windsor* was decided, Obergefell and Arthur flew to Maryland in a special jet with medical staff and were legally married under Maryland law. They wanted Obergefell to be listed as the husband on the death certificate and otherwise treated as a surviving spouse when Arthur passed away. When they returned to Ohio the same day, Ohio did not recognize the Maryland marriage, and the litigation then was brought.

Conversely, a case with bad facts may lead to a bad result. This is demonstrated in the recent cases addressing the cognizability of disparate impact claims under the Fair Housing Act.⁶⁶ The first case to come before the Court was *Magner v. Gallagher* in 2012. The plaintiffs in *Magner* were landlords who claimed that aggressive code enforcement increased their costs and reduced the number of affordable housing units available for minority tenants in the City of St. Paul. The code violations were not disputed and included rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, broken or missing doors and screens, and broken or missing guardrails or handrails. Plaintiffs were viewed as slumlords represented by counsel who had no fair housing experience. In its *amicus* brief, the U.S. Department of Justice recognized the factual weakness of the case and, while arguing that disparate impact was cognizable, also argued that on the facts of this case disparate impact liability was not demonstrated.

Before oral argument in *Magner*, the City of St. Paul withdrew its petition and thus the Supreme Court never reached the crucial issue concerning the cognizability of disparate impact. This was a very fortunate development for social justice litigators, for had the case been decided, it is very possible that the Court would have issued a negative opinion on disparate impact. This is demonstrated by the recent decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project* which in 2015 upheld disparate impact claims as being

cognizable.⁶⁷ Justice Alito's scathing dissent criticized the majority decision, calling disparate impact a "serious mistake," and after discussing the facts in *Magner* in some detail, stated "something has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit."⁶⁸ Justice Kennedy's majority opinion found Justice Alito's principle well-stated and, while upholding disparate impact claims, questioned applying disparate impact to a government's efforts to ensuring compliance with health and safety codes as was the case in *Magner*.⁶⁹ Had this important question been decided on the facts in *Magner*, it is very possible that Justice Kennedy would have been persuaded to join the views set forth in the *Inclusive Communities Project* dissent and eliminated fair housing disparate impact claims.

B. DEALING WITH BAD PRECEDENT

Strategies for dealing with bad precedent include overruling, distinguishing, and narrowing it, with narrowing perhaps the best option when dealing with a conservative judiciary.

Showing impracticality of precedent may be key factor.

Strategic considerations include positioning case at trial court level to obtain decision supported by the best record, and coordinating with similar cases in other jurisdictions, as to which of similar cases presents the best opportunity for success at the highest level.

Focusing on swing Justices at the Supreme Court level is crucial, and appeals based on settled jurisprudential principles may be productive tacks.

"By definition, social reform lawyers seek to change the status quo. Judicial rulings tend generally to reflect existing social mores. Thus, social reform litigators must usually confront the challenge of maneuvering around hostile judicial precedent."⁷⁰

Generally speaking, precedent can be followed, overruled, distinguished, or narrowed.⁷¹ Social justice advocates have used each of these avenues to achieve their desired results. For example, the preliminary tack used by the proponents of racial desegregation in public schools was to argue that the hostile precedent, *Plessy v. Ferguson*,⁷² was violated because Missouri's provision of out-of-state scholarships to African Americans was not "substantially equal" to providing whites in-state scholarships.⁷³ Continuing this tack, plaintiffs argued in a subsequent case that a state's creation of a new law school for African Americans was not "substantially equal" because it denied African Americans the intangible benefits of long-standing white law schools.⁷⁴ Relying on precedent allowed social justice advocates to get their "foot in the door; then, pry it open" with *Brown v. Topeka Bd. of Ed.*⁷⁵

As noted in earlier sections of this report, proponents may rely on the change of public opinion or the forging of a public consensus to facilitate the Court's modification of prior rules, as happened with *Brown v. Bd. of Ed.*, *Lawrence v. Texas*, and *Obergefell v. Hodges*. Galvanizing and coordinating state legislative and legal actions may be important in persuading the Court that the time has come to jettison prior holdings.

Overruling hostile precedent as ultimately occurred in *Brown v. Bd. of Ed.* and *Lawrence* is, of course, the optimal result for the social justice advocate. In an extreme case, like *Plessy v. Ferguson*, the prying open of the door coupled with the passage of time before *Brown v. Bd. of Ed.* allowed for the Court to look to new social scientific principles as evidence of a "new understanding" of facts pertinent to the consequences of segregation.

In a situation like *Lawrence* or *Obergefell*, where the issue is one of general social acceptance, changing public opinion may be the key.

Beyond that, showing that the precedent has been impractical or unworkable over time, or that the doctrine underlying the precedent has been diminished, is a typical tool used by appellate advocates to attack precedent.⁷⁶ However, “even the best arguments for overruling precedent will tend toward failure, if raised at the wrong time, before the wrong panel, or on the wrong set of facts.”⁷⁷ Thus, a change in the composition of the court that had decided the adverse precedent may be the most important factor in deciding when and how to challenge the prior ruling.⁷⁸ An argument that the prior holding was “the result of a narrow majority’s view of the issue, or that the holding was incorrect and has not withstood the test of time,” even moved the Rehnquist Court to overrule an opinion of the Burger Court reaffirmed only two years earlier.⁷⁹

The clients of advocates for social justice may not have the luxury of waiting for the Court composition to change. Deciding how to tackle adverse precedent before a Supreme Court seemingly disinclined to deviate from precedent requires an array of strategies. First is choosing the case and the plaintiff carefully—issues that are addressed above. The Supreme Court is not averse to ducking a constitutional issue by throwing out a case on grounds such as standing or mootness (concepts that will be discussed in more detail below).

Second is picking the initial venue correctly, increasing the advocate’s odds of obtaining a jurist who is not only well-respected, but also is prone to provide a detailed, evidence-based recitation of her or his factual findings. Even conservative appellate courts are obliged to follow the dictates of Rule 52, and not substitute their fact-finding for that of the trial court. This is far from an iron-clad rule, however, and appellate courts are adept at couching their rejection of a trial judge’s fact-finding as based on errors of law, or on the improper consideration of irrelevant evidence. Nevertheless, the more cogent, detailed, and record-based the trial court findings, the more likely it is for the decision to withstand an appeal.

Third is to coordinate the challenge with other social justice advocates who may be litigating in other jurisdictions. Social justice advocates, joined in a common goal, should put aside their organizational and personal egos, and unite to ensure that the best possible case gets to the Supreme Court first.

At the Supreme Court level, attention must be paid to the factors that might move the Court to change the law. At the outset, authorities recognize that the barrier of *stare decisis* is lowered in constitutional cases, because the only alternative to the Court changing bad law is a constitutional amendment.⁸⁰ Nevertheless, the costs of not following precedent, most notably “the disruption that is likely to result from an overruling and the degree to which a precedent appears inconsistent with other lines of cases,” will bear on the Court’s inclination to change the law.⁸¹

In this context, one authority has posited that the Court is less likely to overrule precedent than to “narrow” it, i.e., interpret precedent in a way that is more limited in scope than the best available reading.⁸² Strategies to convince the Court to narrow bad precedent may include identifying ambiguities in the relevant precedents, “thereby creating room for reasonable disagreement as to how those precedents should apply to new facts.”⁸³ Advocates may not only distinguish the cases factually, but also offer a jurisprudential framework that comports with “background positions of law.”⁸⁴

Focusing on the Justice or Justices who are most apt to provide the swing vote to repudiate precedent is essential. Using doctrines espoused by such Justices in majority and concurring opinions provides an intellectual foundation for both the advocate and the Justices.

C. SUITABILITY OF THE ISSUE FOR JUDICIAL RESOLUTION

Courts are typically limited to judging the validity of government conduct, not to order relief that is legislative in nature.

To be effective, remedies in social justice cases may require institutional reform that is broad and requires continued oversight.

Many factors may influence how courts will view the suitability of a particular matter for court disposition. Aspects of the issues presented in a controversy that may be salient in many jurisdictions include the following, among other things.

1. Nature of the decision at issue

American jurisprudence has firmly established the role of the courts in determining whether a statute or executive action—particularly one that has been recently enacted to change the law — is authorized by or consistent with the federal and/or state constitution. The courts also have well established standards for determining whether the executive is authorized by existing statutes to take the disputed action.

On the other hand, there are many issues that are traditionally beyond the province of the relevant legislative body. The legislature traditionally has responsibility, without court review, for determining appropriations of funds for public purposes. Legislative judgment is, similarly, considered final in distributing the economic burdens of tax policy and in assessing the merits of regulation (or non-regulation) of economic activity. For example, the Ohio Supreme Court found the system of funding schools in Ohio to violate the Ohio Constitution but was unable to compel the Ohio General Assembly to conduct “the complete system overhaul” the Court thought was necessary to remedy the constitutional violation.⁸⁵

2. Is the relief traditionally the province of the courts?

Much social justice litigation has taken the form of “law reform,” of lawsuits that attack specific statutes, regulations, or government actions either as unconstitutional or as beyond the power of the legislature or executive. These are disputes that are well suited for courts to resolve in that these controversies present fairly narrowly defined issues of fact and/or law. Often such challenges are submitted for decisions on stipulated facts.

Sometimes the first phase of litigation on an issue establishes the legal principles that will govern subsequent cases seeking to enforce a right. If the initial phases of litigation on an issue establish that intentional discrimination may be inferred from circumstantial evidence under a specified framework for proof, a later phase of litigation on that issue may involve case after case where finders of fact (juries or judges) must apply the law to determine whether the proof in each case has established the prohibited discriminatory intent. Courts are well suited to judge controversies where the law is clear and well known but the facts are in dispute.

At the same time, however, social justice litigation seeking institutional reform often requires remedies that are extensive and require court oversight over an extended period of time. Perhaps the most common example of this is remedial plans in school desegregation cases, where remedies have been extensive, involve a degree of continued court oversight, and in some cases, have continued over several decades. The degree to which courts are authorized to institute broad-ranging remedies to reform an institution has been the subject of extensive scholarly debate.⁸⁶

D. DECIDING WHERE TO FILE

The initial choice of court may be outcome-determinative in social justice litigation.

When choosing to file in federal court, and there are choices as to where the case can be filed, a careful analysis should be made of the governing circuit court law and the judges in the district courts and the circuit courts that may hear the case.

Consideration should also be given as to how selection of the trial judge is made and who is likely to be selected, and, in jury cases, the jury pool, and the speed with which the case will proceed.

While traditionally, federal courts have been more solicitous of social justice claims, that is not always the case, and a comparison should be made of the standards of liability pertinent to state versus federal claims, any differences in remedies, and whether the state's highest court is more or less favorable to the claims than the Circuit Court or U.S. Supreme Court.

Abstention, where a federal court chooses to defer deciding a case pending resolution of issues in state forums, may defeat the social justice advocate's choice of a federal forum.

Forum shopping occurs when litigants seek to have their action heard in a specific forum.⁸⁷ Many courts disapprove of forum shopping and seek to ensure that parties who shop gain no procedural advantage as a result.⁸⁸ Even so, it is widely recognized that litigants can influence the outcome of their case by where they file their suit and under what laws.⁸⁹ The judge and jury, the procedural rules, and even the substantive law will all depend on the place a suit is filed.⁹⁰ Where there is flexibility in terms of where to file, social justice advocates should make sure to carefully research the available forum, choice of law, and judges. Attempts to control the venue—through motions to remove, transfer, or dismiss a case – recognize that the forum can be decisive in terms of the outcome of a case.⁹¹ Some recognize an inherent tension between the right of a plaintiff to select venue and the court's authority to change venue if the defendant requests such a change and the court deems it appropriate based on judicial management principles.⁹²

Venue describes which court, of all those which may have both personal and subject matter jurisdiction over a matter, will hear a dispute.⁹³ Although it is not a constitutional requirement, parties must comply with both state and federal law when filing.⁹⁴ Plaintiffs have a degree of choice in terms of selecting venue because the statutes have been drafted that way.⁹⁵ Under federal statute, a litigant may file in any district where any defendant resides; a district in which a substantial part of the events or omissions giving rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated; or, if there is no other district in which the action may be brought, any district where any defendant is subject to personal jurisdiction.⁹⁶ Furthermore, the courts have recognized that venue is a privilege created by federal statute.⁹⁷ At the same time, venue does not give a plaintiff the unfettered right to compel trial wherever she chooses.⁹⁸

On a more practical level, the decision to litigate in federal or state court involves a number of strategic and tactical considerations.⁹⁹ The determination of where a lawsuit may be filed will first depend on requirements discussed elsewhere in this report, including the obligation to exhaust administrative remedies or participate in mandatory arbitration. Some pre-filing considerations include the comparative standards and remedies available under federal and state law; the merits of federal, state, or local agencies; issues related to removal and remand; evidentiary and procedural differences between federal and state court; the implications of supplemental

jurisdiction; the availability of dispositive motions; and post-trial considerations. Related to these considerations are case-specific factors which may include the client's objectives, the timeliness of investigation, and different obligations in federal and state court to participate in mediation or settlement negotiations.

Depending on the circumstances (including where finding clients in the preferred venue is not an issue) social justice lawyers may have a number of options, including filing in state or federal court in a number of states, as well as choices on filing within one federal district court or another in a particular state or one state court division or another within a particular state. When they have options, litigators should look carefully at the governing law and the trial court and appellate judges. For example, on an issue of national application involving a federal claim, litigators should look at the law and the composition of the judges in each federal circuit court and the composition of the judges in each district court where the claim can be brought.

Assuming at least some jury claims, counsel must consider the potential jury pool in the available forums. In cases where state law does not permit a jury trial, filing federal and state claims in federal court may assure that a jury trial remains available for specific claims or issues. If the case involves a bench trial, attorneys should research whether it will be subject to an individual assignment or will be randomly assigned through the general pool of federal or state court judges, and whether those judges are elected or appointed. In general, many advocates believe that federal judges have more familiarity with the basics of anti-discrimination law. Many state judges may be strongly influenced by their personal opinions on more local matters.

There are specific procedural differences between federal and state court which litigants must also carefully consider. Even after filing, the parties may use procedural mechanisms in an effort to change venue. A defendant may move to transfer venue to a jurisdiction where the case could have been originally brought; however, the presumption that a plaintiff's choice in selecting venue is entitled to some deference has led to the majority of defendant motions to be denied.¹⁰⁰ In addition, while forum shopping frequently refers to a preference between federal and state court, it may also occur within the federal system (i.e. deciding which federal district to file in) or even a single state.

In federal court, case management is governed by the Federal Rules of Civil Procedure. In recent years, many believe that those rules have been amended to constrict the amount of discovery available to plaintiffs, which increases both the challenges and expense associated with bringing successful social justice litigation. These include efforts to narrow written discovery, reducing the number of interrogatories and narrowing the scope of document production. In federal court, depositions may be strictly limited whereas in many state rules there are no specific limitations on the number of depositions available. In many states, the courts do not necessarily exert the same level of "hands on" case management, relying instead on the parties to maintain the momentum necessary to move a case forward. In some jurisdictions, the failure to do so may allow a defendant to move for dismissal.

As discussed elsewhere in this report, expert testimony has become essential to successful social justice litigation in many different contexts. The procedural rules associated with the disclosure and use of expert testimony may also differ depending on the jurisdiction, although many states opt to follow the federal rules related to experts. Where there are differences, however, those may have a significant impact on a plaintiff's ability to develop, present, or challenge expert testimony. As one example, the Federal Rules of Civil Procedure allow a party to depose an opponent's expert after receiving that expert's report.¹⁰¹ But in Pennsylvania, for example, a party must first obtain court permission in order to depose an opponent's expert.¹⁰² In addition, whereas an expert does not have to first testify about the underlying facts or data supporting his position under the federal rules,¹⁰³ he or she

would have to do so in Pennsylvania.¹⁰⁴ The comments to the state rule notes that both the text and substance differ from the federal rule.¹⁰⁵

Historically, civil rights litigants have enjoyed greater protections in federal court. But in some instances, state court may be the preferred venue. Some state supreme courts may be considered more favorable to social justice litigation than the United States Supreme Court and the circuit court that would hear the case on appeal. In addition, there are certain areas in which state law offers more substantive protections or more expansive remedies than might be available at the federal level.

Education is one area in which this has certainly proven true. After massive state and local resistance to the mandates of both *Brown v. Bd. of Ed.*¹⁰⁶ and the Civil Rights Act of 1964, private litigants relied on the federal courts in order to dismantle segregated school systems. However, in the aftermath of *San Antonio Indep. Sch. Dist. v. Rodriguez*¹⁰⁷ which held that education is not among the rights explicitly or implicitly protected by the U.S. Constitution, school finance litigation was filed in almost every state pursuant to those states' constitutions. In many instances, those school funding cases have provided the case law which defines a student's right to education in a variety of contexts.

Voter identification laws are another example in which state court offered plaintiffs a greater opportunity for success. After the Supreme Court upheld the Indiana's voter identification law against a federal constitutional challenge, Pennsylvania advocates, in *Applewhite v. Commonwealth*, sought to enjoin the implementation of a Pennsylvania identification law based on a state constitutional argument.¹⁰⁸ The trial court denied the injunction because the state's efforts to compensate for the constraints on obtaining an identification card would "forestall the possibility of disenfranchisement." The Pennsylvania Supreme Court reversed and remanded to assess the actual availability of the alternate identification cards on the basis of a developed factual record.¹⁰⁹ Upon remand, the lower court issued the preliminary injunction of those parts of the law which would directly result in disenfranchisement and the state did not appeal that decision.¹¹⁰

In some cases, the doctrine of abstention requires that federal courts defer to state court proceedings.¹¹¹ Abstention¹¹² will be invoked in cases in which the federal court may have subject matter jurisdiction, but in which it will defer to state consideration of the issues presented for a variety of reasons.¹¹³ The various types of abstention represent an exception to the general principle that federal courts should exercise the jurisdiction granted them.¹¹⁴ While some believe that the expanded use of abstention is mandated by principles of federalism, social justice advocates have expressed concern that it threatens to deprive plaintiffs an effective forum for hearing their claims, forcing them to pursue their claims in state courts which may be hostile to class actions or institutional claims.¹¹⁵ One concern is whether the practical effect of abstention is to frustrate or unduly delay the adjudication of federal claims, especially those involving class wide or institutional claims.¹¹⁶

E. OBTAINING RELEVANT INFORMATION

Due diligence in factual investigation and data analysis are essential in effective social justice litigation.

Data, demonstrating the discriminatory impact of official action on minorities, are difficult to obtain in many instances.

Many of the most important issues addressed in social justice litigation are important because they concern the actual effect that institutional policies or practices have on minority constituents. Therefore, assessing the strength of a case addressing an issue of this type requires substantial preliminary inquiry into how existing policies affect minority populations, or how specific changes in policies will affect minorities.

Litigators are greatly aided when reliable documentation is available, prior to suit, to analyze relevant consequences of the policies or practices being questioned. The highly publicized “stop and frisk” litigation against New York City for the practices of the City police relied heavily on databases that stored information on tens of thousands of police encounters with citizens over more than a decade. These databases enabled expert consultants to perform extensive analysis of the ethnic composition of the citizens involved in encounters with the police and detailed analysis of the results of those encounters, by ethnicity. The patterns showing more frequent stops of minority citizens, particularly youth, and showing how infrequently the police found evidence of crime in such encounters very likely helped the litigators assess the strength of that case even before the suit was filed.

Unfortunately, many social justice cases lack readily available data for litigators to use in assessing the strength of cases prior to bringing suit. Where statistical analysis is critical to demonstrating either a violation or the right to relief, the lack of data makes intelligent assessment of the merits of a particular case extremely difficult, and thus presents a major strategic and logistical issue. Such challenges are acute in the following five areas:

1. Employment discrimination in hiring and/or promotions: Proving discrimination in individual promotions is very difficult, and proving discrimination in hiring is virtually impossible; disparate impact theory offers more power when the facts are clear. But because judges strongly prefer proof of disparate impact based on applicant flow, successful cases require proof of the composition of the pool of actual applicants, information that is not posted publicly. For private employers, this information can only be obtained in the course of the investigation by the EEOC of a formal charge of discrimination, but many EEOC investigators do not ask the right questions and others decline to share the information produced with claimants. For public employers, the Sunshine Laws in some states (e.g., Florida) can be used to obtain this information, but other states (e.g., Texas) allow employers to withhold it.
2. Educational policies: If access to student records is required to show the disparate impact of a policy, confidentiality of student records blocks challengers from obtaining relevant data.¹¹⁷
3. Testing of equal opportunity for employment or housing: Proving intentional discrimination against minority applicants by using a matched white applicant as a “tester” is well established in fair housing¹¹⁸ and has been tried in employment,¹¹⁹ but the testing process is very expensive in fair housing and extremely expensive in employment (since designing the matches and preparing the testers in employment requires much more expert consultation and training for testers).

4. Fair lending cases: Data available to the public are sufficient to establish whether a creditor's lending practices have a disparate impact on approval of credit and/or on the terms of credit for minority borrowers. But the available data do not include information sufficient to identify the specific policies that lead to the adverse credit consequences. Since identifying the policies that have the impact is critical to any disparate impact case, pre-suit evaluation of potential cases is hampered by the absence of this key information.
5. Voting rights cases: Sophisticated analysis of data is an essential part of voting rights cases, both those dealing with vote denial (such as challenges to voter identification statutes) and those dealing with vote dilution (cases concerned with whether minorities are getting an equal opportunity to elect candidates of their preference, because of the way election districts are drawn). For example, in voter ID cases, statisticians analyze voter, drivers' license, and other governmental data bases to compare possession rates with racial and ethnic demographics. In vote dilution cases, the Supreme Court has set preconditions requiring detailed analyses of election results, election district lines, and voter demographics.

F. USE OF EXPERTS

Expert witnesses are an important part of effective social justice litigation.

The Supreme Court's 1993 decision in Daubert appears to have broadened the range of experts useful in social justice litigation.

The use of scientific and technical evidence is a powerful tool in American civil and criminal trials. In 1923, the Circuit Court of Appeals for the District of Columbia developed the first test for determining the reliability of scientific expert testimony in *Frye v. United States*.¹²⁰ Under *Frye*, an expert's testimony had to be based on a theory or method "generally accepted" in the scientific community.¹²¹ Unfortunately, as one analyst has noted, under *Frye*, juries were easily manipulated by experts who based their testimony on "data dredging, wishful thinking, truculent dogmatism, and now and again, outright fraud."¹²² Consequently, the *Frye* "general acceptance" test was replaced in 1993 by the U.S. Supreme Court holding in *Daubert v. Merrell Down Pharmaceuticals, Inc.*¹²³

In *Daubert*, the Supreme Court held that *Frye* was superseded by Rule 702 of the Federal Rules of Evidence ("Rule 702"), governing expert testimony.¹²⁴ Subsequently, the Court created a new standard of admissibility that echoed Rule 702.¹²⁵ The Court held that expert testimony is admissible if: (1) the testimony is relevant, (2) the methods used to reach the opinion are reliable, and (3) the expert possesses the knowledge and skill to testify on the topic.¹²⁶ The Court also granted federal district judges broader discretion by allowing them to act as "gatekeepers," to determine the admissibility of such testimony before it reaches the jury.¹²⁷ The Supreme Court further articulated the *Daubert* standard in *General Electric Co. v. Joiner* and *Kumho Tire Company, Ltd., v. Carmichael*. In *Joiner*, the Court expanded the judge's "gatekeeper" role in holding that appellate courts, when reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*, should apply an "abuse of discretion"¹²⁸ standard of review.¹²⁹ Then, in *Kumho*, the Court held that the admissibility requirements of *Daubert* and Rule 702, apply to all experts providing testimony, not just experts relying on scientific theories.¹³⁰

Daubert and Rule 702 are applicable in all federal courts and the majority of state courts. Approximately 32 states have adopted some variation of *Daubert*.¹³¹ *Daubert* has had many positive and negative consequences. Some critics argue that *Daubert* resulted in the exclusion of critical data, thereby threatening justice.¹³² Moreover, critics contend that judges as "gatekeepers" has created "inconsistent and poorly reasoned decisions admitting

or excluding expert testimony.”¹³³ On the contrary, supporters of *Daubert* state that broad judicial discretion decreases the likelihood of “junk science” being exposed to the jury and influencing the outcome of trial.¹³⁴ Supporters maintain that *Daubert* prevents frivolous lawsuits from reaching trial.¹³⁵

Several conclusions can be drawn regarding the effects *Daubert* has had on civil litigation. The Federal Justice Center and the RAND Institute found evidence suggesting that under *Daubert*, judges were initially more likely to limit or exclude expert testimony.¹³⁶ However, over time, judges became more liberal in their admittance of expert testimony.¹³⁷ The RAND Institute credits this change to a higher quality of experts.¹³⁸ Nevertheless, *Daubert* has also resulted in a greater number of experts being unwilling to testify because of the risk of being deemed “unqualified.”¹³⁹

Although *Daubert* presents challenges, it can be an effective tool in presenting powerful testimony that influences the outcome of a case.

G. WILLINGNESS TO ACCEPT DEFEAT

Because social justice litigation often proceeds over years, if not decades, advocates must be willing to accept defeat, minimize the effect of bad precedent, and learn lessons from failure.

Social justice litigation, particularly cases that are complex or involve legal issues that are susceptible to Supreme Court review, can take years. For example, *Arizona v. ITCA*,¹⁴⁰ initially involved a number of claims challenging an Arizona voter initiative that created a documentary proof of citizenship requirement and a voter identification law. The case took seven years and included two Supreme Court opinions and three Ninth Circuit opinions. Plaintiffs prevailed on a single claim. The case spawned a related case under the Administrative Procedures Act that lasted another two years.¹⁴¹

Even with careful selection of cases, litigators who are pushing for significant change will lose a fair number of cases. Another strategic aspect of litigation is how to respond most constructively to defeat. Many of the considerations discussed elsewhere as relevant to the decision about what cases to bring are also important in deciding whether to continue pursuing a case when the court hands down an adverse ruling or judgment. An adverse ruling that prompts reflection about whether to continue a particular case may come at many points in the case, such as each of these:

- A strong negative opinion expressed by a federal magistrate or other mediator in an early settlement conference after production of discovery materials that were not available prior to suit; this early stage can be an opportunity to assess whether to end a suit that requires particular proof, proof which now appears unlikely to be found.
- A severely unfavorable preliminary ruling from the judge to whom the case has been assigned; the ruling may be on a motion for preliminary injunction, but it could also be an order denying key discovery.
- An order granting partial summary judgment dismissing the major claims in the case, leaving for trial only minor issues or issues without substantial benefit to the client or the group.

- A trial court order dismissing the case with finality, whether on some procedural ground or on the merits of all claims, on summary judgment or after full trial.
- An unfavorable appeals court ruling.

The major factors affecting the decision whether to continue pursuing a case will vary considerably. If the case depends on establishing particular facts as a predicate for relief, deciding to terminate a case will usually reflect only a determination that that particular case should not be pursued, leaving open the question of whether to seek broader changes in the law in other cases where a more favorable factual record can be developed. Inadequate factual basis can become a basis for ending a case at just about any stage—when initial discovery materials are produced, when the court denies access to discovery of facts critical to establishing the claim to relief, or when the jury or trial judge rules that the key facts necessary to prove the claim are not adequately proven by the evidence. It is worth noting that where the client is an individual who has suffered a loss there may be ethical restrictions on dismissing the case if the client is not willing to dismiss it.

If the adverse ruling is a legal determination, such as a ruling rejecting the plaintiff's view of the elements necessary to prove a violation of a statute, the strategic considerations may focus more on whether the appellate court is likely to be hospitable to the claim. If the issue was initially defined as one that was positioned for potential Supreme Court review, counsel may need to assess whether there has been any major change in decisional law that alters the prospects of review, or alters the prospects of favorable consideration.

1. Minimizing the effect of bad precedent

When a case results in an unfavorable judicial ruling, litigators seek to limit the damage in various ways. When a trial court has issued an opinion that resolves genuinely contested facts in favor of the adverse party, accepting that result without appeal may preserve the action to distinguish future cases making similar claims on the basis of the facts presented in the later cases. Foregoing an appeal of an adverse trial court ruling on the legal theory of the case leaves the case with limited value as a precedent, since even other judges who sit on the same trial court are not bound to follow the decision.

An adverse ruling by an appellate court that rejects a legal theory or holds that the facts found by the trial court—though compelling in the eyes of counsel—are not sufficient to establish a claim has impact throughout the jurisdiction of that court. Federal circuit courts of appeals have jurisdiction over cases from several states. The primary way counsel can seek to limit the effect of the ruling is to forego an appeal in that case and to focus on bringing similar claims in other federal circuits, where counsel may persuade the courts of appeals to reach a different result. Similarly, if the adverse decision is rendered by a state appellate court, counsel may best limit the scope of the result by leaving that decision intact, and focusing on bringing similar claims in other states.

2. Learning from mistakes

Litigators' mistakes can produce adverse case outcomes. When that happens, it is important for all counsel who are seeking progress in the subject area affected by that case to draw lessons from those mistakes. Often the error is in underestimating the necessity of a particular factual record to the outcome of the case.

A major example of this type of mistake has drawn comment from Judge Richard Posner, who wrote the opinion in *Crawford v Marion County Board of Elections*,¹⁴² where plaintiffs made a facial challenge to all aspects and

applications of an Indiana statute imposing a very strict photo identification requirement for in-person voting. There the plaintiffs presented anecdotal evidence of the impact of the photo ID requirement on minority voters, and evidence that a legislative supporter had partisan motives to disqualify voters who tended to vote for Democratic candidates. They also offered an expert report, but the district judge found it to be “utterly incredible and unreliable.”¹⁴³ Justice Stevens concluded in the opinion for the Supreme Court in 2008 that, “[i]n sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”¹⁴⁴

But in 2013, after many other voting rights cases had demonstrated the disparate impact in fact of the photo ID requirement in other jurisdictions, Judge Posner described the *Crawford* case in a book, *Reflections on Judging*, in striking terms: “I plead guilty to having written the majority opinion” in the case.¹⁴⁵ He noted that the Indiana law in the *Crawford* case is “a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.”¹⁴⁶ Judge Posner expanded on the case in a subsequent interview; asked whether the court had gotten its ruling wrong, Judge Posner responded, “Yes. Absolutely.”¹⁴⁷ Back in 2007, he said, “there hadn’t been that much activity in the way of voter identification,” and “we weren’t really given strong indications that requiring additional voter identification would actually disenfranchise people entitled to vote.”¹⁴⁸ The member of the three-judge panel who dissented from the majority decision, Terence T. Evans, “was right,” Judge Posner said.¹⁴⁹ Later in the interview, Judge Posner added that the case’s outcome shows that oftentimes, “judges aren’t given the facts that they need to make a sound decision ... We weren’t given the information that would enable that balance to be struck” between preventing fraud and protecting voters’ rights, he added.¹⁵⁰

H. RESOURCE AND FUNDING ISSUES

Social justice litigation requires significant resources: lawyers and paralegals, experts, payment of monitors and experts, and out-of-pocket expenses including travel.

The prospect of attorneys’ fee awards has been severely circumscribed by judicial decisions.

Private firms remain an important resource for the undertaking of significant social justice litigation, but there are limitations in terms of firms’ willingness to devote the necessary resources and possible conflicts of interest.

When social justice cases that address patterns of discrimination proceed even to the discovery phase at the trial court level, substantial resources are virtually always required. In cases involving claims of a few individuals seeking primarily to enforce relief for individuals, defendants may settle because they calculate that it will be cheaper to settle than to defend. Sometimes defendants even settle quickly because they become persuaded of the justice of the claims. Sometimes earlier cases have established clearly applicable legal principles that persuade defendants that the chances of defeating the claims are sufficiently remote that defending the case will be a waste of time, money, and other resources. But cases challenging a settled institutional policy or practice, or challenging a controversial statutory change, rarely settle; these cases will be resource-intensive, and the same is often true even for cases seeking to enforce settled rights for individuals.

It is important to assess the adequacy of the potential resources to meet the demands for every phase of the litigation contemplated: for investigation, for discovery, for trial, and for appeal. Complex cases often require two

phases of trial, one of liability, then a separate trial on remedies. Where the case seeks changes in institutional practices, resources will also be needed for post-remedy enforcement.

Three major types of resources are required for complex litigation: (1) attorney and paralegal time, (2) expert testimony, and (3) financial resources to pay the costs of experts, to support the time of non-profit legal staff, and to pay other out-of-pocket costs. The other out-of-pocket costs include the cost of obtaining and processing discovery materials, the cost of depositions, and the cost of travel. Trials before a judge may require obtaining transcripts of the trial proceedings to prepare briefs and/or proposed orders. In some cases, there will be costs for professional investigators. When appeals are involved, there are out-of-pocket costs for trial transcripts (if not previously obtained), and preparing and printing the Record on Appeal.

In some cases, such as employment discrimination cases under Title VII, enforcing systemic changes in the employer's policies and practices may require the appointment of a monitor who will establish a systematic review of the defendant's compliance with the relief the court has ordered. An experienced monitor is much more effective in achieving compliance than is the litigator, who would have to find the time to review periodic compliance reports and try to persuade the defendant to improve compliance or persuade the court to order more robust compliance. The monitor's fees and costs would normally be paid by the defendant, but the enforcement phase, even with a monitor, will require significant time and attention of counsel. If no monitor is in place, enforcement of institutional changes can require large amounts of professional time to review and respond to compliance reports.

1. Legal resources

The resources available must be adequate, both in terms of the number of personnel and the expertise they possess, to perform effectively at each phase of the litigation. In the discovery phase, if enormous documents will be produced (in some cases, hundreds of thousands of pages, or even more), the team must have access to document management software and sufficient paralegal time to process the documents into a searchable database. If a large number of depositions will be required in a relatively short period of time, are there enough attorneys on the team to coordinate, supervise, and examine the witnesses who need to be deposed? Are there members of the team who are sufficiently well-versed in the issues to select effective experts, to work with the experts in framing reports, to identify and challenge the experts on weaknesses in the reports, to prepare and defend the depositions of the plaintiffs' experts, and to take effective depositions of the expert witnesses presented by opposing counsel?

At the trial phase, it is critical to have on the team a trial lawyer who is experienced in making complex technical issues accessible to the finder of fact—usually a judge. Most judges who hear major civil rights cases will never have tried a case presenting a systemic civil rights challenge, and making the technical issues clear to them in ways that are both reasonably straightforward to understand and that demonstrate the justice and practicality of the relief requested by plaintiffs is often challenging.¹⁵¹

In planning major civil rights litigation, it is wise to anticipate that one side or the other will seek to appeal an adverse decision, often to the U.S. Supreme Court. Appellate litigation is increasingly a specialized area of practice, and it is critical for the litigation team to be able to call upon experts in framing and writing appeal briefs. If eventually either side seeks review in the Supreme Court, it is beneficial for the team to be able to call upon counsel who specialize in Supreme Court practice, particularly since in recent years the Court appears to favor granting review in cases where counsel of record is one of the attorneys who have argued many cases before the Court.¹⁵²

2. Experts

Expert witness reports and assistance in systemic litigation are typically very expensive, often costing tens of thousands of dollars. One major class action discrimination case currently pending has required approximately one million dollars in fees and expenses for the expert analyses. Sometimes, plaintiffs incur significant costs only to find that the available data, and/or the data likely to be available, do not support the claim the plaintiffs wish to pursue. But in cases seeking systemic relief where factual analysis is critical, expert witnesses are essential.

Here we address the question of availability of effective expert witnesses. Determining the availability of experts is part of the assessment of the adequacy of the resources in any systemic civil rights case where factual analysis will be required, e.g., all disparate impact cases and many cases where a *prima facie* case of intentional discrimination requires a statistical showing.

In most civil rights matters where systemic cases have been litigated for a number of years, there are established experts who have experience—sometimes over decades—both in identifying the necessary data for analysis, in supervising the preparation of the appropriate statistical (or other) analysis, in writing persuasive expert reports, in weathering deposition examination without fatal concessions or gaffes, and in presenting court testimony. Few experts are equally strong in all these phases of the work, but experienced civil rights litigators either have worked with appropriate experts in the past or have networks through which they can identify experts who are known to have a good track record of developing and presenting effective reports and testimony in a litigation setting. Assessing resources for the case includes obtaining a commitment that the appropriate experts do not have conflicts that would preclude their testifying against the adverse party and are able to assure that they will have sufficient time available to prepare reports within the likely court discovery schedule.

There are times when existing experts are not sufficient for the task, and the legal team will have to investigate how to obtain the necessary expertise. The only answer may be for the lawyers to plan to spend the additional time needed to shepherd a professor or other researcher who has special subject matter knowledge through the process of developing the special skills needed to become an effective expert witness.¹⁵³

Litigators may need to use a brand new expert for a variety of reasons. Experts who have been testifying in certain cases for many years may retire or die; expertise in the subject may go through a spike in demand—experts typically do a variety of types of consulting, so that serving as expert witnesses in court cases may be overshadowed by other demands for the needed expertise. If a social justice topic is particularly prominent and popular (e.g., new voter identification requirements enacted at about the same time in many different states), litigators may be filing similar challenges—and needing similar expertise—in many different states at the same time. For example, there are at least ten pending challenges to voter identification laws in various states.¹⁵⁴

On occasion, new areas of social science research will provide important new types of data on an issue relevant to assessing questions of bias or discrimination. It takes time for new research findings to become extensive enough and sufficiently well known for litigators to consider using the social scientists who have done the research as expert witnesses to address issues relevant to a case in court. Two recent examples of new areas of expert knowledge applied in employment discrimination are “implicit bias” research (social psychology) and “redemption research” (criminology).¹⁵⁵

3. Funding challenges

Social justice litigation that seeks systemic reform is extremely expensive. The costs of expert witness fees alone can be prohibitive to bringing a case, unless there are sufficient funding resources to meet those expenses. The authors have found no surveys that provide general information about the magnitude of expert witness fees in social justice litigation, but the magnitude is illustrated by some examples of litigation under civil rights statutes. Over 25 years ago in *West Virginia University Hospitals v. Casey*,¹⁵⁶ the district court awarded the plaintiff \$500,000 in statutory attorney's fees and costs, including \$150,000 allocated "\$45,867 to disbursements, and \$104,133 to expert witness fees." The Supreme Court ultimately found that the expert witness fee award was limited by 28 U.S.C. Sec. 1821(b) to the \$30 per day of attendance at trial allowed for any witness. Thereafter, when Congress amended civil rights statutes to authorize recovery of expert witness fees,¹⁵⁷ the House Report noted that "[e]xpert witness fees can be as high as \$600 per hour or \$5,000 per day to testify at trial."¹⁵⁸ Congressman Sensenbrenner observed that, from the perspective of defendants, "it literally costs tens and even hundreds of thousands of dollars in lawyers' fees, expert witness fees, deposition fees, pretrial motions, trial briefs, motion expenses and the like, to get the case to the jury for its decision."¹⁵⁹ These were figures from more than 25 years ago. In a more recent case under the Individuals with Disabilities Education Act, the parents of a single child with educational disabilities incurred \$29,350 for the services of an educational consultant.¹⁶⁰

4. Availability of attorneys' fees if plaintiffs prevail

In the Civil Rights Act of 1964, Congress recognized the importance of encouraging private enforcement of discrimination laws by including provisions to impose liability on defendants for attorney's fees when plaintiffs prevail in an action to enforce statutory rights.¹⁶¹ In 1975, the federal courts of appeals recognized the public policy benefit from fee-shifting and adopted the policy by judicial decision in numerous cases until the Supreme Court held that, due to the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees, fee-shifting could only be imposed by statute.¹⁶² Congress responded the very next year by authorizing fee-shifting in a broad class of civil rights cases.¹⁶³

Initial decisions by the Supreme Court authorized district judges to award, in the court's discretion, substantial fees. Particularly important were decisions that non-profit organizations could recover "market rates" for staff time¹⁶⁴ and that the time that was reasonably required to pursue multiple theories of recovery could be fully compensated, if the plaintiffs prevailed on any of the theories presented.¹⁶⁵

After that promising beginning, the effectiveness of fee-shifting statutes has been greatly limited by court decisions over the last 30 years. The first blow occurred in *Evans v. Jeff D.*,¹⁶⁶ when the Supreme Court held that the availability of fees in a law reform case that did not seek substantial actual damages could be undermined by the defendants by simply offering very attractive institutional relief on the condition that the defendant would pay no fees or costs. Such an offer provided a strong incentive in most cases seeking institutional change for the client to accept the offer. Even though the circumstances pitted the interest of the client in relief against the policy of the fee-shifting statute to promote effective private enforcement, the Supreme Court held that there was nothing in the language of the statute that required the protection of the policy objective.¹⁶⁷

The Supreme Court further limited the effectiveness of fee-shifting statutes in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,¹⁶⁸ when it rejected the approach of all but one federal court of appeals to construing fee-shifting statutes, and held that a court judgment was required to support any award of fees to a plaintiff. With the exception of the Fourth Circuit, all courts of appeals to consider the matter

had adopted the “catalyst theory,” which held that fees were recoverable if the plaintiff could show that bringing the lawsuit brought about a voluntary change in the defendant’s conduct. The rejection of the “catalyst theory” gave defendants yet another means of avoiding the cost of the plaintiffs’ attorney’s fees and further undermined the policy of fee-shifting statutes.

Other factors have reduced the effectiveness of fee-shifting statutes. The “case-by-case” emphasis of the Supreme Court’s 1983 decision in *Hensley v. Eckerhart*¹⁶⁹ created a judicial environment where the views of individual federal judges potentially became a critical factor in fee awards. After 1985, as more and more conservative judges were appointed to the federal bench, both at the appellate and district court levels, even when plaintiffs prevailed in social justice cases they were subject to fees being reduced, often dramatically. These reductions could be based on many theories, including but not limited to the following examples:

- Large reductions in hourly rates, often based on the “forum” rates in predominantly rural states or southern states where low rates prevail locally, even though counsel with the expertise—and often the willingness to bring a locally unpopular case—could be found only in distant metropolitan communities where the cost of operating a law practice is considerably higher.¹⁷⁰
- Large reductions, sometimes based on the proportion of theories presented in the initial complaint, for prevailing on only one or a few of the claims presented.¹⁷¹

In addition, when a case involves defense counsel or defendants who are inclined to be particularly aggressive and/or vindictive, there is always the risk that the defendant will seek to obtain an award of statutory costs and enforce it against the plaintiff.¹⁷² In extreme cases, a prevailing defendant can even recover some or all of its attorney’s fees from the plaintiff. This, however, is limited to cases where the plaintiff’s action is shown to have been frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.¹⁷³

I. PRIVATE FIRMS AS OUTSIDE COUNSEL

1. Methods of participation

Private law firms have often played a major role in social justice litigation. A well-publicized recent example is the “right-left” partnership of Theodore Olson and David Boies (the attorneys who opposed each other before the Supreme Court in arguing *Bush v. Gore*¹⁷⁴) in successfully attacking the result of California’s Proposition 8, the 2008 state constitutional amendment that eliminated rights of same-sex couples to marry.¹⁷⁵

In social justice litigation the most helpful participation of private law firms takes place when highly successful private law firms not only provide professional legal services on a *pro bono* basis, but also advance the funds required to cover the costs of expert witnesses, travel, depositions and transcripts, database management of large volumes of documents produced by defendants in discovery, and other costs incurred. As discussed above, these out-of-pocket costs can be massive, and the potential sources of funds are few.¹⁷⁶

2. Limitations

Funding by private law firms is limited by the willingness of law firm management committees to approve participation in a particular controversy or on a particular issue. As a consequence, any time that a management

committee deems that undertaking representation in a matter will adversely affect the firm's general reputation, or its prospects of maintaining current corporate business or of obtaining desired future business, that firm will decline representation. This limits the participation of many firms to cases seeking relief that is widely viewed as socially acceptable; it is much harder to obtain representation for matters in which the client is unsympathetic or the objective is highly controversial in the prevailing public dialogue.

In some areas of practice, large law firms with major corporate clients are simply never available. In employment discrimination litigation, major private law firms have become completely unavailable for representing employees in any type of claim against any type of employer. These firms have determined that because they represent management in employee disputes, they cannot sue other employers because such suits would create "positional conflicts" on broad issues.¹⁷⁷ A large number of private law firms have added management departments that advise corporations and represent corporate interests in all aspects of labor-management relations, employee benefit plans, and state and federal discrimination laws protecting employees.¹⁷⁸

Obstacles to Social Justice Litigation

- **Obstacles to effective social justice litigation can be both procedural and substantive.**
- **Recent Supreme Court decisions have curtailed access to the courts by social justice litigants by making pleading, standing, and mootness requirements stricter; compelling arbitration and exhaustion of remedies; and making it more difficult to obtain certification as a class action.**
- **The Court has also made it more difficult to meet standards of proof as to equal protection claims, disparate impact claims, and discriminatory intent claims.**

A. PLEADING HURDLES: TWOMBLY AND IQBAL

Plaintiffs must now show that their claim is plausible in order to survive a motion to dismiss.

This new standard impacts social justice litigants disproportionately because of the need to spend resources up-front to establish plausibility.

One of the major barriers to initiating social justice litigation was erected by the Roberts' Supreme Court when it created a new pleading regime in *Bell Atlantic v. Twombly*¹⁷⁹ and *Ashcroft v. Iqbal*.¹⁸⁰ This change fundamentally altered the pleading standard in Federal Rules of Civil Procedure Rule 8(a). From the time the Federal Rules of Civil Procedure were first adopted in 1938 until these two decisions, Rule 8(a) was interpreted to require only notice pleadings to initiate a case, a standard which emphasized simplicity and brevity in pleadings intended simply to give "notice" of the claims. *See, e.g., Conley v. Gibson*.¹⁸¹ *Twombly* explicitly rejected the *Conley* standard and *Iqbal* clarified that a "plausibility" analysis applies to all Rule 12(b)(6) motions for failure to state a claim.¹⁸² Now, a claim will be dismissed if, after taking as true all non-conclusory allegations, no plausible entitlement to relief can be shown on the face of the complaint.¹⁸³

Twombly and *Iqbal* have had a dramatic, adverse impact on social justice litigation. In the most thorough study of this impact, Alexander Reinert, one of the attorneys in *Iqbal*, analyzed opinions and orders from more than 3,100 post-*Iqbal* cases in which the parties had attorneys and 1,000 *pro se* cases from 15 different judicial districts, representing all 12 general jurisdiction circuit courts of appeal, concluding that dismissal rates have increased significantly.¹⁸⁴ According to the study, social justice litigation has been hit the hardest: dismissals of employment discrimination and civil rights cases have risen the most. As the Reinert study points out, "while one should not be shocked by the observation that civil rights and employment discrimination claims suffer under the plausibility pleading regime, one should still be troubled by it given the historical role that federal courts have played in such cases."¹⁸⁵ The study also concludes that individual litigants have fared worse under the plausibility regime than have corporate and governmental litigants, exacerbating the inequality in access to the courts.¹⁸⁶ This is not

surprising, because social justice plaintiffs often lack the resources to develop facts necessary to meet the strict plausibility burden before filing a complaint, and have relied on discovery to ferret out that information.

The effect of *Twombly/Iqbal* may be exacerbated in discrimination cases based on disparate impact as a result of the decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.¹⁸⁷ As discussed in more detail below, the Court upheld disparate impact claims brought under the Fair Housing Act. However, in *dicta*, the Court cautioned trial courts to examine pleadings in disparate impact complaints with “care” to determine whether a plaintiff has made out a *prima facie* case of disparate impact.¹⁸⁸ This *dicta* may lead to a further increase in the burden plaintiffs face in developing facts needed to initiate a social justice impact case.

Twombly/Iqbal do not present an insurmountable barrier to social justice litigation. Ultimately, a social justice advocate will have to meet a plausibility standard in order to prevail in any case. The new standard, however, increases the importance of choice of venue and the assignment of the judge to the case, as certain judges are more apt to follow the new rule more strictly than others. Also, *Twombly/Iqbal* shifts the up-front cost burden of gathering sufficient information to support claims, necessitating sufficient resources for social justice advocates to do necessary factual investigation and data analysis, prior to filing suit. These issues are explored in greater detail below.

B. BARRIERS TO COURT ACCESS

Recent Supreme Court decisions have subjected many kinds of consumer actions, including class actions, to mandatory arbitration.

1. Arbitration clauses

Over the past decade, thousands of businesses across the country have created an “alternate system of justice,”¹⁸⁹ by inserting arbitration clauses into a proliferating number of consumer and employment contracts. This has allowed them to circumvent the courts and prevent individuals from successfully challenging illegal or deceitful business and employment practices.¹⁹⁰ Some believe that “arbitration has largely displaced the civil justice system for most disputes involving ordinary people”¹⁹¹ who have lost an essential tool to uncover and challenge systemic patterns of abuse and unfair practices.¹⁹² This dynamic has been validated by a number of cases upholding the application of arbitration clauses to prevent litigation of claims once a dispute arises.

The Federal Arbitration Act (FAA) governs the enforcement of agreements to arbitrate controversies arising in contracts involving interstate commerce or maritime transactions, and makes such agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁹³ The Supreme Court has consistently found that by enacting the FAA, Congress intended a national policy favoring arbitration,¹⁹⁴ thereby restricting the power of individual states to protect employees and consumers by requiring a judicial forum for the resolution of claims in certain circumstances, even when the parties have specifically agreed to resolve disputes through arbitration.¹⁹⁵ Accordingly, the Supreme Court has extended the application of the FAA to include claims-enforcing, statutorily created rights in ways that imperil categories of social justice litigation.¹⁹⁶

For example, in *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempted a state judicial rule that had found certain class arbitration waivers unconscionable and unenforceable under state law.¹⁹⁷ Ignoring the

overwhelming financial benefits defendants incur by inflicting small financial costs upon an extremely large number of individual claimants, each of whom is individually disincentivized from pursuing their individual claims, the Court focused instead on the fact that class arbitration might increase risk to defendants.¹⁹⁸

In *CompuCredit Corp. v. Greenwood*, the Supreme Court narrowly applied specific “right to sue” and nonwaiver provisions of the consumer protection Credit Repair Organizations Act (CROA).¹⁹⁹ The Court concluded that, because CROA was “silent” on the specific issue of arbitration, the FAA required the arbitration clause to be enforced.²⁰⁰

American Express Co. v. Italian Colors Restaurant addressed the question of whether a contractual waiver of class arbitration is enforceable under the FAA where the individual costs of each plaintiff’s pursuit of her/his statutory claim exceeds the potential recovery.²⁰¹ The Court held that antitrust laws do not reveal a congressional intent to preclude a waiver of class arbitration and that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”²⁰² As Justice Kagan noted in her strongly worded dissent, the effect of the *Italian Colors* decision was to significantly narrow the “effective vindication” doctrine. By upholding the class waiver, the majority ignored previous holdings that significantly increasing a plaintiff’s costs may effectively foreclose the ability to vindicate a claim,²⁰³ leaving the protections for collective action in the employment context vulnerable, as well.²⁰⁴ That decision may require both employees and consumers to submit to arbitration of both their contractual and statutory claims even when mandatory arbitration is included in an adhesion contract that effectively deprives them of meaningful recourse.²⁰⁵

In spite of these challenges, some argue that it remains possible for those saddled with unfair arbitration clauses to continue to demonstrate that they are unconscionable. Plaintiffs may still assert traditional state contract grounds such as unconscionability despite the Court’s holding in *Concepcion*.²⁰⁶ However, plaintiffs must be prepared to identify specific terms within the clause that are unconscionable, and courts must consider all circumstances surrounding the transaction to determine if meaningful choice is present.²⁰⁷

Other challenges may be made to the substantive provisions of arbitration clauses themselves, which may allow only one party to select the arbitrator, designate the venue, or seek judicial resolution of all or some of the claims. As a result, some courts have tried to mediate the unfair consequences of certain clauses by refusing to enforce certain provisions based “upon grounds as exist at law or in equity for the revocation of any contract,”²⁰⁸ such as fraud, duress, or unconscionability.²⁰⁹ For example, courts have refused to enforce an arbitration agreement that shortened the statute of limitations, limited attorney fees, and prohibited punitive damages.²¹⁰ Regulators have also attempted to respond to the inequities often produced by mandatory arbitration. For example, the Equal Employment Opportunity Commission issued a policy statement that described pre-dispute arbitration clauses as inconsistent with federal civil rights laws given the ability of employers to manipulate arbitration.²¹¹

Another possible strategy is to challenge arbitration provisions if they effectively limit a claimant’s ability to enforce a statutorily created right. In *Mitsubishi Motors v. Soler Chrysler-Plymouth*, the Supreme Court recognized that not all controversies implicating statutory rights may be “suitable” for arbitration, but still accepted that arbitration could be enforced against statutorily created claims unless Congress indicates otherwise.²¹² Even so, the Court acknowledged that “by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”²¹³ Therefore, an arbitration clause is enforceable only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”²¹⁴

Finally, there is some, albeit scant, hope for a legislative fix. The ability of large corporations to impose mandatory arbitration and ban collective litigation or arbitration threatens to unravel the achievements of many decades of legislative and judicial efforts to protect consumers and employees.²¹⁵ Legislative efforts to address these concerns have been largely unsuccessful and have been largely embodied in the Arbitration Fairness Act, a bill that has been placed in front of the Senate Judiciary Committee in a variety of iterations since 2007. The 2015 Arbitration Fairness Act seeks to render unenforceable pre-dispute arbitration agreements in claims under consumer and employment contracts, or claims for violations of statutory rights in antitrust and civil rights cases although parties could agree to arbitrate after a dispute arises.²¹⁶ However, a meaningful legislative fix should, at a minimum, require mutuality of obligation and have equal rights and remedies, as well as preventing the preemption of state and federal consumer or employee protections and the unfair or harshly one-sided provisions embedded in the arbitration clauses regularly inserted into adhesion contracts.²¹⁷

2. Standing

A litigant has the right to bring a case if the litigant has “standing.”

Broadly speaking, a litigant has standing if the litigant has suffered injury traceable to the conduct of the defendant.

Organizational groups can have standing to sue for injury to their members and themselves.

Through the 1970’s, the Supreme Court had broadly construed the doctrine of standing to allow social justice litigants to bring actions as “private attorneys general.”

More recently, the Supreme Court has narrowed the doctrine of standing, and limited private rights of action under statutes of particular importance to social justice litigants.

Basic to social justice litigation is access to the courts. Article III of the Constitution confines the federal courts to adjudicating actual “cases” and “controversies,” and doctrines growing from this requirement of Article III include standing, mootness, ripeness, and political question doctrines, all of which place limitations on access to the courts. Perhaps the most important of these doctrines is the standing of a plaintiff to invoke the power of the federal court, a concept which has never been defined with complete consistency but has been created over time in a number of Supreme Court decisions. Under this doctrine, to establish standing, the Constitution requires at a minimum, that a plaintiff must allege (1) having suffered an actual or threatened personal injury as a result of the alleged illegal conduct of the defendant, (2) that the injury can fairly be traced to this conduct, and (3) that the injury is likely to be redressed by a favorable decision from the court.²¹⁸ Apart from these minimum constitutional requirements, the courts have created another set of standing requirements called prudential principles. These include (1) a requirement that a plaintiff assert his own legal rights and interests and cannot rely on the legal rights and interests of third parties;²¹⁹ (2) the clarification that, even where there is an injury that can be redressed, “abstract questions of wide public significance” that amount to “generalized grievances” are not enough to establish standing;²²⁰ and (3) a requirement that the interest the plaintiff seeks to protect falls within the “zone of interests to be protected or regulated by the statute or constitutional principle in question.”²²¹

Importantly, organizations can have standing on their own behalf²²² or associational standing on behalf of their members.²²³ In cases in which organizations bring cases on their own behalf, courts conduct the same standing

inquiry as they do for individuals. Organizations must demonstrate a “concrete and demonstrable injury” to its activities, which the Supreme Court has held to require a showing of a diversion of resources and/or a frustration of the organization’s mission fairly traceable to the acts of defendants.²²⁴ Such standing is important because organizations are able to efficiently and effectively conduct investigations that individuals may have difficulty maintaining. Further, they are able to gain the trust of disenfranchised community members who may not feel comfortable lodging a complaint with a government entity. These organizations remain steadfast in their enforcement and on the cutting edge of identifying and addressing the changing targets and modes of discrimination regardless of current political sentiment.²²⁵ At the same time that these standing principles were being developed, the Supreme Court also held that Congress had authority to identify and define new classes of injuries, the invasion of which would create injury for purposes of Article III standing without a further showing of harm. Moreover, prudential standing limits are not applicable in cases where Congress has designated a private right of action to parties. In short, the Court affirmed that “[t]he actual or threatened injury required by Article III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing’”²²⁶

The 1970s are considered by some to have been the golden era for enforcement of civil rights statutes through social justice litigation,²²⁷ and this standing principle—which broadly granted plaintiffs access to the courts based solely on the fact that Congress had created a statutory right that was subsequently violated—was crucial to such enforcement. A prime example is found in a trilogy of Fair Housing Act (FHA) cases that explicitly created a private right of action for any party “aggrieved” by conduct it makes unlawful.²²⁸ In the first major FHA case, *Trafficante v. Metropolitan Life Insurance*, the Court held that the FHA authorizes, and Article III permits, challenges to discriminatory practices brought by plaintiffs beyond those directly excluded from housing, stating that the “language of the FHA [is] broad and inclusive”; standing under the FHA was defined “as broadly as is permitted under Article III of the Constitution.”²²⁹ In defining this broad standing principle, the Court recognized that complaints by private persons were the primary method for obtaining compliance with the FHA and, because of the enormity of assuring compliance, the main generating force for such compliance was private suits brought by private attorneys general.²³⁰

Next, in *Gladstone, Realtors v. Vill. of Bellwood*, the Court recognized standing for plaintiffs to challenge racial steering practices and reaffirmed that statutory standing under the FHA is as broad as is permitted under Article III of the Constitution,²³¹ holding that both a village and its current residents could challenge racial steering practices that excluded would-be new residents. Then, in *Havens Realty Corp. v. Coleman*,²³² the Court allowed a suit by a fair housing organization and housing “testers” who had no actual intent to purchase a home. In clear and unambiguous terms, the Court reiterated that “Congress intended that standing under [the FHA] to extend to the full limits of Article III and the courts. . . accordingly lack authority to create prudential barriers to standing in suits brought under [the FHA]. In other contexts, this Court similarly has acknowledged that a broad range of harms will support Article III standing without abandoning the requirement of injury.”²³³

At the same time that this broad standing principle was established in these FHA cases, limitations on the scope of enforcement of the FHA were also being created. For example, exclusionary zoning is a significant impediment to the development of affordable housing, and cases attacking such zoning were recently designated the “heartland” fair housing cases in *Texas Dep’t of Housing and Community Affairs v. Inclusive Communities Project*.²³⁴ Yet, in *Warth v. Seldin*,²³⁵ the Court dismissed a challenge to the exclusionary zoning policies of a predominantly white suburb on standing grounds because the plaintiffs had not alleged that any specific, viable developments had been blocked by the zoning policies and therefore could not establish the required injury. This and subsequent decisions have made it effectively impossible to bring an exclusionary zoning case in the absence of a specific development proposal that has been blocked by virtue of an ordinance.

Of greater concern to social justice litigators is a string of more recent cases that have significantly narrowed and threatened standing created by federal statutes, thereby limiting access to the courts to enforce civil rights statutes. One decision that sharply abridged the ability to bring social justice litigation is *Alexander v. Sandoval*,²³⁶ where the Court held there was no private right of action to enforce the disparate impact regulations promulgated under Title VI of the 1964 Civil Rights Act prohibiting discrimination in federally funded programs and activities.²³⁷ Of particular concern in the Court's decision is the change in its view of the importance of congressional powers and the importance of vindicating civil rights claims. Demonstrating a hostility to implied private rights of actions, the Court dismissed decisions from what it negatively terms the "*ancien regime*" that had found it was the duty of the courts to interpret statutes to effectuate congressional purpose.²³⁸

The Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife*²³⁹ had a similar negative impact on standing. In this environmental law "citizens' suit," the Court held that Congress could only grant standing to plaintiffs who had an injury in fact. *Lujan* dramatically impacted standing and access to the courts, especially in the enforcement of environmental laws.²⁴⁰ One commentator opined that "the decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated." More than just a mere tightening of standing doctrine, *Lujan* was openly hostile to the notion that Congress can play a large role in establishing rights for standing purposes. Read expansively, the holding of *Lujan* threatened the broad standing created by the FHA in *Trafficante*, *Gladstone* and *Havens* where standing was granted based on violation of a statutory right created by Congress. Moreover, while post-*Lujan* courts have continued to uniformly recognize that organizations have standing to enforce FHA violations, there has been a lack of clarity in organizational standing jurisprudence that has resulted in some variation between courts on the type and extent to which resources need to be diverted in order to establish harm to the organization. In some cases, a diversion of any resources was found sufficient for standing;²⁴¹ in others, the court required an expenditure of resources on organizational activities independent of litigation costs;²⁴² and still other courts have chosen a middle ground in which resources expended on legal efforts were considered but not decisive.²⁴³

Although *Lujan* expressed hostility to the rationale for these cases, it did not overrule them; post-*Lujan* courts have continued to uniformly recognize the broad standing principle in FHA cases and the principle that the violation of a statutorily created right, on its own, could sustain standing, remains. However, a recent Supreme Court case has further damaged the broad interpretation of statutory standing and has intensified the threat to standing based on language in civil rights statutes. This case, *Thompson v. North American Stainless*,²⁴⁴ is an employment discrimination case in which the Court considered whether an employee had a retaliation cause of action under Title VII as a "person aggrieved." Previously, in *Trafficante*, the Court had stated that the FHA's nearly identical "person aggrieved" provision eliminated prudential limitations in considering standing and suggested in *dicta* that "person aggrieved" was the same in the Title VII context. In *Thompson*, however, the Court characterized this *dictum* as "too expansive" and "ill considered," and rejected it in holding that a more exacting prudential zone of interest standard applied to Title VII standing, a standard not met in that case.²⁴⁵

Despite *Thompson's* negative impact on Title VII standing, the broad interpretation of standing under the FHA hangs on, albeit, very tenuously. Most recently, in *City of Miami v. Bank of America*,²⁴⁶ the Eleventh Circuit found that *Trafficante*, *Gladstone*, and *Havens* still have not been overruled, but conceded that *Thompson's* narrow interpretation of Title VII may signal that the Supreme Court is prepared to do so in the future.

Presently pending in the Supreme Court is another case with potential to negatively impact statutory standing in social justice litigation: *Spokeo, Inc. v. Robins*. In this case, the plaintiff sued an internet database company

alleging that it published inaccurate information about him in violation of the Federal Credit Reporting Act (FCRA). Plaintiff's "allegations of injury were sparse," but the Ninth Circuit granted standing based solely on the alleged violation of a statutory right created under the FCRA.²⁴⁷ An issue that the Court might address, therefore, is whether plaintiff must show some other type of harm, in addition to a violation of the right created by Congress, in order to establish standing under Article III. The Court has never required such a showing, and such a requirement would limit further Congress's authority to identify and define rights previously unrecognized by the law and to create private rights of action to remedy violations.

3. Mootness

Federal courts can decide only "cases and controversies."

The doctrine of mootness comes into play when a case no longer presents an actual controversy for the court to decide.

Defendants in social justice litigation sometimes try to moot out a case by changing the policy being challenged. Under these circumstances, courts may allow the case to proceed if they find the challenged conduct capable of repetition. But courts have recently narrowed application of this exception in constitutional cases.

Defendants also have attempted to moot out potential class actions before the class is certified, and the validity of this tactic is pending before the Supreme Court.

Like standing, the concept of mootness derives from Article III: a federal court has no jurisdiction over matters that are no longer cases or controversies. In the area of social justice litigation, mootness comes into play in two significant areas.

The first is where a defendant—usually a governmental entity—moots out a case by changing the policy that is under challenge in the litigation. Typically, this happens through legislation. Although this is a beneficial result, and usually the prime goal of the social justice litigation, it can have a chilling effect on such litigation, because of its effect on the advocate's obtaining of attorneys' fees. In *Buckhannon Board and Care Home v. West Virginia Department of Health & Human Resources*,²⁴⁸ the Court held that the mooting of a case prior to the plaintiffs' securing judgment on the merits or a consent decree precludes an award of attorneys' fees.

The defendant bears the burden of proving mootness under these circumstances, and the mere voluntary cessation of conduct is insufficient. The defendant must show that there are no "reasonable expectations" that the wrong will recur.²⁴⁹ Particularly, where there is a strong public interest in the dispute, the burden on the defendant will be heavy.²⁵⁰

Additionally, the plaintiff might defeat a mootness claim by showing that the conduct was capable of being repeated, yet evading review. This doctrine has been applied somewhat inconsistently by the Supreme Court in *City of Los Angeles v. Lyons*²⁵¹ (rejecting argument because the plaintiff challenging a choke hold policy could not show he was likely to be subject to it again) and *Honig v. Doe*²⁵² (setting the standard that all that need be shown is a "reasonable expectation" of recurrence). More important for social justice advocates is the Court's implication that the doctrine might not apply with full force in constitutional litigation because of the Court's duty to avoid deciding constitutional issues unless necessary.²⁵³ Nevertheless, the Court has applied the

“capable of repetition” rule in social justice cases dealing with abortion, most notably *Roe v. Wade*,²⁵⁴ and challenges to ballot access restrictions.²⁵⁵

Because a claim is not moot so long as the plaintiff has any claim for relief remaining, the mooting out of prospective injunctive relief will not moot out a case, so long as there remains either claims for retrospective injunctive relief or for money damages. Thus, social justice advocates should pay particular attention to the framing of the relief requested in the complaint, where there is a threat of mootness, which could preclude a fee award even if the advocate was the catalyst for the change in policy.²⁵⁶

The second, and evolving, area of concern for social justice advocates relating to mootness is in the class action arena. In *Sosna v. Iowa*,²⁵⁷ the Court held that the mooting out of a class representative plaintiff’s claim after class certification did not moot out the entire case because the class had a legal status and interest separate from that of the class representative. Similarly, in *Franks v. Bowmans Transportation Company*,²⁵⁸ the Court held that a race discrimination class action was not moot, so long as there were members of the certified class with claims.

The major area for concern for social justice advocates is the mooting of a case when a class has not been certified. In *U.S. Parole Commission v. Geraghty*,²⁵⁹ the Court held that a plaintiff whose challenge to parole guidelines was mooted upon his release on parole, still had standing to challenge the judgment on appeal because the trial court had wrongly denied class certification. But in *Genesis Healthcare Corp. v. Smczyk*,²⁶⁰ the Court limited *Geraghty* to cases where the plaintiff’s claim remains live at the time of denial of class certification. In holding that an offer of judgment to the named plaintiff in a suit brought under the Fair Labor Standards Act of 1938, the Court mooted out an action where the class had not yet been certified. In *Genesis*, the plaintiff had conceded that the offer would moot out her claim during argument before the Supreme Court. The issue of whether an offer is moot is now before the Supreme Court in *Campbell-Ewald Co. v. Ewald*, which was argued in October 2015. Oral argument would appear to raise the prospect that the Court will find that the offer of judgment does moot out the case, and that, following *Genesis*, it does not matter that the action is an as yet uncertified class action.

Allowing defendants to “pick off” class representatives threatens the viability of class actions, particularly in the employment field. Again, careful pleading is necessary to ensure that all forms of remedy are preserved. Additionally, social justice advocates should seek to join, initially or by amendment, as many plaintiff/class representatives as is feasible in order to forestall the improper mooting of social justice claims.

4. Exhaustion of remedies

The doctrine of exhaustion of remedies requires federal litigants to exhaust available administrative remedies before proceeding to litigation.

This doctrine has been held applicable in Title VII employment litigation, disability litigation, and prisoner abuse cases.

In recent years, a number of important decisions related to exhaustion of remedies represent significant obstacles for some of our most vulnerable citizens seeking relief for violations of federal statutes and civil rights laws. This has been particularly true for employment discrimination, disability discrimination cases, and prisoner abuse cases.

The doctrine of exhaustion of remedies requires those asserting a federal claim to exhaust administrative remedies prior to litigating those issues in district court. Federal courts typically require exhaustion for one of two reasons. First, exhaustion may be a function of Congress' power to define the scope of federal subject matter jurisdiction and thereby mandated by statute.²⁶¹ In that event, exhaustion is not waivable.²⁶² Second, exhaustion may require parties who challenge agency action to exhaust administrative remedies before bringing their case in federal court.²⁶³ But unless exhaustion is required by statute as a matter of jurisdiction, some courts have held that exhaustion may be waived if the litigant's interest in immediate judicial review outweighs the government's interests in efficiency or administrative autonomy.²⁶⁴

a. Title VII employment litigation

Title VII of the Civil Rights Act provides for private rights of action for employment discrimination and retaliatory conduct.²⁶⁵ In order to enforce Title VII, Congress created the Equal Employment Opportunity Commission (EEOC) and granted it statutory authority to investigate and bring civil enforcement actions against employers.²⁶⁶ If the EEOC finds reasonable cause that a discriminatory act has occurred, it must endeavor to informally eliminate the unlawful practice²⁶⁷ or file a civil action on behalf of the employee.²⁶⁸ But if the EEOC dismisses a charge, opts not to initiate a lawsuit, or has not facilitated a conciliation agreement within 180 days of filing, the EEOC must provide a Notice of Right to Sue to the employee.²⁶⁹ Under such circumstances, an employee may seek judicial relief. However, employees must exhaust administrative remedies prior to bringing a Title VII claim in federal court.²⁷⁰ In order to do so, plaintiffs must: (1) file a timely charge with the EEOC; and (2) receive a Notice of Right to Sue.²⁷¹

Therefore, exhaustion offers an affirmative defense to Title VII claims. If a plaintiff neglects to file a charge with the EEOC, an employer is likely to succeed on a motion to dismiss for the failure to state a claim.²⁷² In theory, this encourages the settlement of disputes through the EEOC process instead of litigation.²⁷³ The Supreme Court has also observed that exhaustion "place[s] the EEOC on notice that someone . . . believes that an employer has violated Title VII," which permits the informal resolution of allegations of employment discrimination.²⁷⁴ Yet over the past decade, the courts have interpreted exhaustion in a way that make it increasingly difficult for plaintiffs to successfully challenge certain discriminatory practices. Specifically, the courts have constrained the ability of litigants to challenge retaliation against employees who assert a charge of unfair employment practices or employment discrimination.

This represents a fundamental shift in the way that the courts analyzed such claims. Before 2002, the circuits unanimously held that a post-charge claim of retaliation may constitute a "continuing violation" that could be raised for the first time in district court, so long as it related to the allegations contained in the underlying charge or grew out of such allegations during the pendency of the case before the EEOC.²⁷⁵ Unfortunately, it is now unclear whether plaintiffs must also exhaust administrative remedies with respect to the retaliation claim by filing a separate charge with the EEOC.²⁷⁶ While courts previously allowed plaintiffs to assert retaliation for the first time in district court so long as it is "like or reasonably related" to the discrete acts for which administrative remedies have already been exhausted,²⁷⁷ the courts have split on this question following the 2002 U.S. Supreme Court in *National Railroad Passenger Corp. v. Morgan*.²⁷⁸

Morgan considered whether a plaintiff in a Title VII action may file a federal lawsuit and include alleged acts of discrimination beyond the statute of limitations.²⁷⁹ There, the Court found that Title VII does not convert related, discrete acts into a single unlawful practice for the purposes of analyzing whether a claim has been timely filed. "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"²⁸⁰ Since then, some federal courts have extended that rule by

holding that plaintiffs must exhaust remedies for claims of retaliation, while others permit plaintiffs to bring such claims without exhausting so long as the retaliation is related to the alleged discrimination in the original charge. The Tenth Circuit held that *Morgan* requires exhaustion of post-EEOC filing acts, including retaliation.²⁸¹ The Eighth Circuit agreed, holding that an employee's retaliation claim was not exempt from the requirement of exhaustion.²⁸²

On the other hand, the Sixth Circuit found *Morgan* inapplicable to certain retaliatory acts and held that retaliation does not require a separate charge.²⁸³ The Fourth Circuit limited *Morgan*'s application to its analysis of the statute of limitations under Title VII.²⁸⁴ Similarly, Ninth Circuit also found that so long as claims fall within the scope of the EEOC's actual investigation or can be "reasonably expected" to grow out of the charge of discrimination, they may be "like or reasonably related" to those contained in the original charge.²⁸⁵ Meanwhile, the Eleventh and Second Circuits both maintained their pre-*Morgan* rules finding that retaliation does not warrant the filing of a separate charge with the EEOC.²⁸⁶ Thus, in some jurisdictions exhaustion may still be excused for claims of retaliation. To ensure the ongoing viability of such claims, however, it may be necessary to amend the language of Title VII to specifically exempt exhaustion for retaliation arising from allegations of the original charge.²⁸⁷

b. Disability litigation

Similar barriers exist in other contexts, as well. For example, the Individuals with Disabilities Education Act (IDEA) is a comprehensive federal statute that confers a substantive right to a free appropriate public education to students with a qualifying disability.²⁸⁸ To guarantee parents the opportunity to participate in decisions related to their child's educational program, the IDEA prescribes an elaborate system of procedural safeguards.²⁸⁹ In addition, IDEA specifically requires that states provide an administrative complaint process for any matter related to the identification, evaluation, educational placement, or provision of special education services to a child.²⁹⁰ These include access to a due process hearing and a state complaint procedure.²⁹¹ Consequently, judicial review is unavailable until those proceedings have been completed.²⁹² Parents are not required, however, to file a state complaint prior to enforcing a due process decision in court.²⁹³

Students with disabilities are also protected by federal anti-discrimination statutes, although claims filed under Section 504 of the Rehabilitation Act or Title II of the Americans with Disabilities Act are subject to IDEA's exhaustion requirement if the relief sought is also available under the IDEA,²⁹⁴ such as an injunction, order for future conduct, compensatory education, reimbursement for placements or services, rescission of diploma, record expungement, or an independent evaluation.²⁹⁵ In effect, exhaustion applies whenever there are claims that relate to a child's educational placement or plan within the meaning of the IDEA or where the injury could be redressed to any degree by IDEA's administrative procedures.²⁹⁵ On the other hand, courts have determined that compensatory or punitive damages are *not* available under the IDEA.²⁹⁷ But if *some* form of relief is available under that statute, then exhaustion may be required even if the *specific* relief requested is different or otherwise unavailable.

Advocates should remember that even if exhaustion is required under the IDEA, it may be excused.²⁹⁸ Courts have found that where students assert a systemic violation of the IDEA, exhaustion is not required.²⁹⁹ If a state or local education agency has adopted a policy or practice of general applicability that is contrary to the law, exhaustion may not apply.³⁰⁰ Other courts have found that if exhaustion is futile or inadequate it is not required by the IDEA. For example, the failure to provide a forum to resolve disputes has excused exhaustion.³⁰¹ Similarly, courts found exhaustion futile where the hearing officer lacked the authority to provide a remedy³⁰² or the administrative process could not fashion the requested remedy.³⁰³ In addition, if a plaintiff seeks non-educational remedies unavailable through the IDEA administrative process,³⁰⁴ or, if a plaintiff may be subject to

irreparable harm, exhaustion is unwarranted.³⁰⁵ However, the plaintiffs bear the burden of demonstrating that an exemption applies.³⁰⁶

c. Prisoner abuse litigation

Prisoners are another uniquely vulnerable population in terms of their ability to assert their rights under federal law. The Prison Litigation Reform Act (PLRA) was passed to lower frivolous prisoner litigation and protect prison autonomy.³⁰⁷ In addition to limiting the relief available to prisoners, the statute places direct limitations on lawsuits by prisoners.³⁰⁸ No action may be brought pursuant to Section 1983 or other federal laws to challenge conditions of confinement without first exhausting administrative remedies.³⁰⁹ In 2006, the Supreme Court interpreted this to require “proper” exhaustion through compliance with the statute’s procedural requirements in *Woodford v. Ngo*³¹⁰ even when the administrative complaint process has the potential of being difficult for complainants to satisfy.

Some believe that this allows serious abuses to go unaddressed, identifying special concerns for cases involving juveniles, sexual abuse, or religious freedom.³¹¹ Others counter that exhaustion in this context prevents prisoners from bypassing administrative grievance procedures.³¹² Either way, social justice advocates have proposed both litigation and legislative strategies to mediate some of the harsher outcomes associated with the rule in *Woodford*. Justice Breyer’s concurrence in *Woodford* allows litigants to focus on recognized exceptions to exhaustion.³¹³ Some circuits have held that exhaustion may be excused where administrative remedies are unavailable, the defendants have inhibited exhaustion, or special circumstances justify the failure to comply.³¹⁴ In terms of a legislative fix, under the Prison Abuse Remedies Act, which was never enacted, a prisoner who missed a deadline for filing an administrative complaint would not be precluded from filing a federal lawsuit; the federal court would be required to direct prison officials to consider the complaint through administrative channels and to stay the federal lawsuit in the interim.³¹⁵

C. OBSTACLES TO CLASS ACTIONS

Class actions are important vehicles for the prosecution of social justice claims, particularly in the employment arena.

Recent Supreme Court precedent has made it very difficult for plaintiffs to prove the required commonality of claims to support certification of a class action.

The Supreme Court has also made it more difficult to bring class actions, an essential vehicle for achieving “public protection and social change in the United States.”³¹⁶ Class certification allows plaintiffs to establish class-wide liability, which may justify systemic relief designed to alter the defendant’s behavior in addition to providing individual monetary damages in certain circumstances.³¹⁷ In this way, class actions are one of the most effective means of allowing individuals with relatively little power or resources to hold employers and institutions accountable for their actions.³¹⁸ Rule 23 allows them to pool their resources to challenge discriminatory or illegal practices inflicted by large corporations or government defendants.³¹⁹ In combination with a number of decisions related to arbitration discussed earlier in this report, the U.S. Supreme Court’s decision in *Wal-Mart v. Dukes* threatened to undermine one of the most important weapons in the social justice advocate’s arsenal.³²⁰ There remain, however, a variety of strategies to preserve the effectiveness of class actions as a litigation tool for social justice.

Wal-Mart rejected a proposed class of 1.5 million current and former employees alleging widespread sex discrimination at the nation's largest private employer.³²¹ Dukes and the other named plaintiffs alleged that Wal-Mart's delegation of discretion to local store managers resulted in widespread gender discrimination in promotion and pay in violation of Title VII; the plaintiffs also alleged that Wal-Mart was aware of and tolerated these practices.³²² The Court overturned the denial of a class for injunctive relief that had been certified pursuant to Rule 23 (b)(2). In this landmark opinion, the Court demanded rigorous analysis of requests for certification, one it acknowledged would overlap with the inquiry into the merits.³²³

"The crux of this case is commonality," observed the Supreme Court, noting that the plaintiffs must show common questions of law and fact.³²⁴ The majority held that Rule 23 requires class members to have suffered the same injury, not just a violation of the same law.³²⁵ Commonality requires plaintiffs to assert some policy or procedure that affects all class members or reveals discrimination.³²⁶ The majority also wanted more explicit evidence of discrimination.³²⁷ What matters after *Wal-Mart* is not the raising of common questions, but the capacity of a class to generate common answers that will drive the resolution of the litigation.³²⁸ Here, the majority concluded that, for certification of a company-wide class, the plaintiffs had to identify a common mode of exercising discretion that pervades the entire company and implied that this will only be possible for specific practices that guide all of the discretionary decision makers.³²⁹

While *Wal-Mart* did not signal the death knell for class actions, scholars have concluded that "an aggressive defense bar and an uncertain legal landscape will make such actions increasingly burdensome to litigate."³³⁰ Analysis shows that at the pleading stage, after *Wal-Mart*, more defendants sought to terminate class actions through motions to dismiss or strike class claims. However, these efforts were largely unsuccessful as many districts courts proved unwilling to conduct a full hearing on those claims prior to discovery.³³¹ Some assert that while *Wal-Mart* may not establish a new standard of pleading or persuasion, it *does* subject plaintiffs to heightened scrutiny that reflects a broader trend across all stages of litigation of forcing litigants to bring more to the table in order to get to trial; this may have the combined effect of limiting access to justice for certain claims.³³² But the Supreme Court decision in *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds* tempered the review of the merits prior to discovery.³³³

In spite of the heightened standard on commonality, plaintiffs have been surprisingly successful in pursuing certification in civil rights cases where they identify a policy or practice unaffected by discretionary decision making. *McReynolds v. Merrill Lynch* marks the first major victory for plaintiffs in the wake of *Wal-Mart*.³³⁴ There, African American employees challenged as racially discriminatory the decisions of 135 supervisors that controlled several of the company's 600 branch offices.³³⁵ Each had a good deal of autonomy, but that autonomy was limited to the framework established by the company. It was this framework that convinced the court that the case was eligible for class treatment as the employees were challenging two specific policies affecting pay and promotions.³³⁶ *McReynolds* therefore demonstrated that where plaintiffs seek an injunction, class actions remain available where a centralized policy impacts a large class of plaintiffs.

Similarly, female employees secured class certification in *Ellis v. Costco Wholesale Corp.*³³⁷ There, the district court focused on a few factors to distinguish this case from *Wal-Mart*, such as the smaller class size, the narrower scope of the challenged policies, and the identification of specific employment practices that the plaintiffs alleged led to gender discrimination.³³⁸ Plaintiffs in *Ellis* presented evidence of the authority of high-level central management throughout the promotion process.³³⁹ The court then relied on *McReynolds* to find common causes and effects and approved certification of the disparate treatment claims.³⁴⁰ Therefore, class actions would seem to remain appropriate where high level decision making is demonstrated.

McReynolds has proven persuasive outside of the employment context, as well. In *Floyd v. City of N.Y.*, another district court relied on that case to certify a class in a case against the New York City Police Department that alleged the defendant's stop-and-frisk policy had a disparate impact on minorities. The court determined that *McReynolds* clarified that after *Wal-Mart*, Rule 23(b)(2) suits remain "appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member." Because the city had a single policy that generated from a centralized source and was enforced through a hierarchical supervisory structure, the court was unpersuaded that the discretion of individual officers destroyed commonality.³⁴¹

In the special education context, the courts have also addressed the impact of *Wal-Mart* on the ability of students with disabilities to bring class actions. In 2012, the Seventh Circuit overturned a class action settlement in *Jamie S. v. Milwaukee Public Schools*, a case challenging the Milwaukee Public Schools and the State Department of Public Instruction for violations of a required program called Child Find under the IDEA. The district court had certified a class of students eligible to receive special education. Plaintiffs eventually settled with the state education agency, but the local education agency appealed the imposition of the remedial decree to which it was also bound. In vacating the lower court's order, the Seventh Circuit identified a number of problems with the plaintiff class: definiteness, commonality, appropriateness of unitary injunctive relief, and the imposition of settlement on a non-settling party. Moreover, the court of appeals found the class indefinite because there was no way to readily ascertain who was a member of the class, even though this was neither a requirement under Rule 23 nor discussed in *Wal-Mart*.

The court of appeals further found that the class failed the commonality prerequisite in Rule 23. While all of the students may have asserted violations of IDEA, whether and how their specific rights had been violated was necessarily individualized. As a result, the court found no common policy or practice. Moreover, the appellate court rejected injunctive relief as inappropriate for the class, because individual determinations of special education eligibility would be required.

On the other hand, in *D.L. v. District of Columbia*, the court of appeals also vacated the class of special education students but with a very different outcome. When it vacated the decree, the D.C. Circuit noted that a slightly revised or refined class or set of subclasses might satisfy Rule 23 as defined by *Wal-Mart*. While the broad class definition originally approved by the lower court lacked a single or unified policy or practice bridging all class members' claims, the court of appeals noted that *Wal-Mart* does not stand for the proposition that widespread policies and practices in violation of IDEA could never satisfy Rule 23(a)(2). On remand, the district court granted certification of four subclasses that were limited to specific legal violations alleging a uniform practice or procedure.³⁴² In addition, the district court specifically rejected the concern raised in *Jamie S.* that "precise ascertainability" is required for class certification under Rule 23.

Are individual damages available today within the context of class actions? Scholars note that the question of damages remains difficult and unresolved.³⁴³ The Supreme Court rejected "Trial by Formula" and suggested that defendants must be permitted to present individual defenses. But even after *Wal-Mart*, courts have permitted certification in Rule 23(b)(3) cases where individual plaintiffs seek damages. Some courts are willing to certify a mandatory (b)(2) class, which has the power to request injunctive relief, and then certify an additional (b)(3) class that class members can opt into if they want to pursue individual monetary relief.³⁴⁴ Others may not be.

Courts hearing other matters have also certified classes since *Wal-Mart*, even on the basis of policies or practices that were not closely specified. The key, it would seem, is the ability of plaintiffs to demonstrate a systemic

policy or practice that affects them all. One scholar determined that outside of the employment context, in particular, courts have been willing to certify a class where a common policy is applied uniformly and there are no discretionary decisions by supervisors at issue. In the pursuit of social justice, advocates might also consider other alternatives to class litigation should their jurisdiction seem more hostile to such claims. For example, even individual actions can seek broad relief in certain circumstances. In some contexts, group-based administrative proceedings, such as a collective complaint to the U.S. Department of Education Office for Civil Rights, might be an option. Finally, government-initiated litigation may also be effective in demanding systemic relief.

D. SUMMARY JUDGMENT

Recent Supreme Court cases have made it easier for defendants to obtain summary judgment and have adversely impacted civil rights employment cases.

Beginning with the *Liberty Lobby Trio* of cases in 1981, the Supreme Court began indicating to federal district judges that the Court wanted to change the post-World War II federal practice in which summary judgment was discouraged. In those cases,³⁴⁵ the Court's explicit language did not substantially change the standard for evaluating a motion for summary judgment; all disputed facts favorable to the party opposing summary judgment were still to be credited. But the lower courts quickly got the message that the standard was changing: the Supreme Court was giving the green light for district courts to clear cases from their dockets without trial—and without the public agencies and corporations that were sued having to pay any settlements.

The new approach to dismissing cases did not greatly affect the disposition of traditional negligence cases for injuries to persons or property, but district courts embraced the approach in civil rights cases of all types. The trend has been documented by several studies of dispositions in employment discrimination cases³⁴⁶ and was particularly devastating to persons bringing suits alleging employment discrimination under the Americans with Disabilities Act prior to the Act's amendment in 2008.³⁴⁷ After the 1991 Civil Rights Restoration Act established a right to recover damages in a jury trial in Title VII employment discrimination cases, federal judges were particularly creative in developing doctrines that established *per se* defenses that resolved, in favor of employers, issues of credibility that were routinely submitted to juries in traditional negligence cases. The Supreme Court has gradually corrected some of the most extreme examples of these practices, but even after the Court has directed judges to let juries resolve certain issues, the lower courts have often ignored that direction.³⁴⁸ The objective of reducing dockets has clearly been achieved. For example, between 1997 and 2005 the number of civil rights employment cases filed in federal district declined by 29 percent.³⁴⁹

E. SUBSTANTIVE LAW CHALLENGES

The Supreme Court has been reluctant to view racially neutral laws as violative of the Equal Protection Clause, even if they have a disparate impact on minorities. Moreover, a majority of the Court has treated as presumptively unconstitutional governmental efforts that on their face are designed to assist racial groups that are disadvantaged and have suffered discrimination.

The Court has also made it more difficult to prove disparate impact claims under various civil rights statutes, including housing, education, employment, and voting statutes.

The Court has eliminated main protections of the Voting Rights Act, and has set difficult criteria to meet in order to enforce surviving protections.

Proving discriminatory intent is very difficult.

1. Equal Protection claims

Not only has the Supreme Court created challenges to social justice litigants on procedural issues, but also in its substantive interpretation of key constitutional and statutory provisions. This is perhaps best illustrated in how the Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment was ratified not long after the Civil War with one of its primary purposes being to enable African Americans to have the same rights as whites. One of the central provisions of the Fourteenth Amendment is the Equal Protection Clause, which provides that no state “shall deny to any person within its jurisdiction the equal protection of the laws.”³⁵⁰

A critical question of interpretation is what does “equality” mean? The most common definitions in this context are “formal equality” and “substantive equality.” Formal equality focuses on equality of treatment—everybody should be treated alike. “Substantive equality” examines equality of results and takes into account past discrimination.³⁵¹

The current Supreme Court has typically interpreted the Equal Protection Clause as consistent with a formal equality definition, particularly reflected in the views of the “swing” justice, Justice Kennedy. For example, in 2015, Justice Kennedy wrote the majority opinion in *Obergefell v. Hodges*,³⁵² where the Supreme Court held that laws preventing gay and lesbian partners from marrying violated the Equal Protection Clause and Due Process Clause. The Court held that treating same-sex couples differently from heterosexual couples “abridge[d] central precepts of equality.”³⁵³

Consistent with a “formal equality” approach, as opposed to a “substantive equality” approach, a majority of the Court has treated governmental efforts designed to assist racial groups that are disadvantaged and have suffered discrimination with its most rigorous standard of “strict scrutiny” in challenges brought under the Equal Protection Clause of the Constitution. In a series of 5-4 decisions, this standard has been applied to cases involving the use of race as one of many factors in higher education admissions,³⁵⁴ the “minimal” use of race in making student assignments to schools to achieve greater racial balance in school districts with a history of segregation,³⁵⁵ and the use of race as a factor in government contracting decisions.³⁵⁶ Conversely, the Supreme Court has been hesitant to find intentional discrimination against non-whites, which is necessary in Equal Protection Clause challenges, in laws that are racially neutral on their face but have a racially disparate effect and where there is circumstantial evidence of discriminatory intent. There is more discussion below on court treatment of intentional discrimination cases.³⁵⁷

Perhaps the case where formal equality and substantial equality were most in tension was *Ricci v. DeStefano*.³⁵⁸ In *Ricci*, the City of New Haven, which had a history of discriminatory hiring practices with respect to firefighters, had decided to disregard a testing process it had used for firefighter promotions, which included a written test and an oral test, because of a disparate effect on racial minorities. The City thought that using the test would subject it to disparate impact liability under Title VII of the Civil Rights Act. Eighteen white and one Latino firefighter who would have been promoted if the system had been used filed a disparate treatment (intentional discrimination) claim under Title VII. The Court, in a 5-4 vote, found in favor of the white firefighters, holding that the City did not have a strong basis in evidence for believing it would have been subject to a successful Title VII disparate impact claim had it certified the test. In his concurring opinion, Justice Scalia stated that the Equal Protection Clause and Title VII disparate impact claims were in tension and that “the war between disparate impact and equal protection will be waged sooner or later.”³⁵⁹

Beginning with *City of Boerne v. Flores*³⁶⁰ nearly 20 years ago, the Court has also begun to closely scrutinize federal legislation enacted pursuant to the Fourteenth and Fifteenth Amendments, which authorize Congress to enact legislation to enforce those amendments.³⁶¹ Because the Court has interpreted Fourteenth Amendment equal protection violations and Fifteenth Amendment violations to require intentional discrimination, the Court has found it is constitutional for Congress to pass legislation enforcing those amendments that enables the government or aggrieved citizens to sue for violations of intentional discrimination.³⁶² The Court has also found that Congress can go beyond this if it has a sufficient record to do so but in several cases has found that Congress has exceeded its enforcement authority. These cases include *Board of Trustees of the Univ. of Alabama v. Garrett*,³⁶³ where the Court held that a provision of the Americans with Disabilities Act (“ADA”) which enabled employees to sue state governments for money damages under the ADA was unconstitutional. Most notably, in 2013, the Court, in a 5-4 decision, effectively immobilized Section 5 of the Voting Rights Act, which required jurisdictions with a history of discrimination to obtain federal approval of voting changes before they could be implemented.³⁶⁴ The Court found that the formula used to determine which jurisdictions were subject to Section 5 was unconstitutional.

In addition to decisions made on constitutional grounds, the Supreme Court has also issued a series of decisions that narrowly interpreted statutes frequently used by social justice litigants. As discussed in further detail below, the Supreme Court held in *Alexander v. Sandoval*³⁶⁵ that private litigants could not bring disparate impact claims under the federal regulations implementing Title VI of the Civil Rights Act of 1964. Another example is the several decisions adverse to plaintiffs brought under Title VII of the Civil Rights Act of 1964. For example, the Court issued two Title VII decisions on the same day, June 24, 2013, one of which held that a person who directed the day-to-day activities of an employee but did not have hiring and firing authority was not a supervisor,³⁶⁶ the other held that an employee alleging retaliation had to demonstrate that the retaliation was the “but-for” cause of an adverse employment action as opposed to only a “motivating factor.”³⁶⁷

2. Disparate impact claims

As noted above, historically, social justice litigation addressing racially discriminatory governmental conduct was brought pursuant to the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. Proof of intentional discrimination was required to prove violations of these provisions of the Constitution and relying solely on disproportionate impact of the law or action was not enough. At the same time, it became well-established that discriminatory purpose may be proved by the “totality of the relevant facts,” including the fact that the challenged action “bears more heavily on one race than another.”³⁶⁸

Social justice litigation significantly expanded beyond constitutional cases after Congress passed three historic civil rights laws in the 1960s: the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. Important to the vigorous enforcement of these laws has been the ability of plaintiffs to prove violations through evidence of the unjustified disparate impact of facially neutral policies or practices—the disparate impact standard. Since the late 1980s, however, several Supreme Court decisions have further refined disparate impact analysis, most often increasing the difficulty of proving such claims. We discuss below how these decisions have impacted these civil rights statutes.

a. Title VII claims

Disparate Impact was initially recognized as a basis for proving unlawful discrimination in *Griggs v. Duke Power Company*³⁶⁹ and *Albermarle Paper Company v. Moody*³⁷⁰—both cases brought under Title VII to challenge racially discriminatory practices. The basic idea was simple. These employers had traditionally segregated their workforces by race, but when Title VII was enacted, they imposed new requirements for promotion (i.e., high school diploma, levels of achievement on standard tests of general mental ability) that were not met by many of the persons already employed in the jobs. The new requirements did not exclude all African American candidates, but they greatly favored white workers. In each case the trial court found at trial that the employers did not adopt the new requirements with any racial animus—they simply wanted to get the best candidates.

The Supreme Court held in each case that it did not matter if the employer had no discriminatory intention: since the new requirements excluded most African Americans from the available jobs, each requirement was a discriminatory employment practice, unless the employer could demonstrate that the score or diploma was job related. Since many incumbents working in the jobs did not meet the requirements, the employers could not prove that the requirements were job related, and the practices were held to be racially discriminatory in violation of Title VII.

Over the past 40 years, the difficulty of prevailing in disparate impact cases has increased substantially. The major challenges include the following:

- The courts require that the plaintiffs either (a) identify the component or combination of components in the selection process that are causing the disparate impact, or (b) show that the selection process must be treated as a whole; this requirement makes it difficult or impossible to make a “disparate impact” challenge to a selection process that has a series of qualifications that each have disparate impact (i.e., educational attainment, written test score, physical qualification, driving record, criminal history check, credit history check, general “background” check), but that the employer treats as distinct. The cumulative effect can be devastating as the candidate pool becomes “whiter” after each step, but often no single step in the process has sufficiently marked impact to show a statistically significant adverse impact on minority candidates.
- Initially plaintiffs were allowed to compare the success of minority candidates against a benchmark of the proportion of minority candidates in the general population, or in the working age population, or in the vocational group in the relevant labor market; since 1989, many courts have required that the success of minority candidates be compared to the pool of candidates who have actually applied. Even though EEOC regulations require employers to maintain this “applicant flow” data, compliance is sporadic; plaintiffs must file a lawsuit to obtain the relevant data for comparison, and even then the data may be so incomplete that the “applicant flow” analysis cannot be assumed to be fully revealing.

When the plaintiffs can find substantial admissible evidence to make a *prima facie* case that a test, criminal history, or other selection criterion has a disparate impact on minority candidates, the standards for showing “job relatedness” or “business necessity” for a criterion are expressed in such general terms that district judges and appellate judges often accept extremely thin evidence as sufficient to meet the employer’s burden to justify using the criterion.

b. Title VI claims

Section 601 of Title VI of the 1964 Civil Rights Act is a very broad anti-discrimination provision that prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance.³⁷¹ Initially, the Court interpreted Section 601 to proscribe disparate impact discrimination in *Lau v. Nichols*.³⁷² However, shortly after *Lau*, the Court held in *Regents of Univ. of California v. Bakke* that Section 601 prohibits only intentional discrimination.³⁷³

Section 602 of Title VI authorizes federal agencies to effectuate Section 601 by issuing rules and regulations.³⁷⁴ In the exercise of this authority most federal agencies have promulgated regulations that forbid recipients of federal funding from administering their programs in manner that has the effect of discriminating on the basis of race, color, and national origin.³⁷⁵ Such regulations that proscribe disparate impact discrimination have been assumed by the Supreme Court to be valid.³⁷⁶

The Court has made clear that private individuals may sue to enforce Section 601.³⁷⁷ But the question of whether there was a private right of action to enforce Section 602 disparate impact regulations remained unresolved until *Alexander v. Sandoval* was decided in 2001. In this case involving a U.S. Department of Transportation’s disparate impact regulation, the Court’s 5-4 decision concluded that Title VI does not “display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”³⁷⁸

This decision essentially eliminated the ability of social justice litigants to utilize Title VI to fight discrimination because of the difficulty, and often impossibility, of proving intentional discrimination. It left enforcement of disparate impact regulations in the hands of the federal agencies that administer the regulations they have promulgated. Social justice litigants can file Title VI administrative complaints, but effective Title VI enforcement by federal agencies has been lacking.

The *Sandoval* decision has had a particularly negative effect on cases challenging environmental decision-making where proof of intentional discrimination is almost always impossible. For example, just prior to *Sandoval*, a group of citizens from Camden, New Jersey, brought a Title VI lawsuit based on the Environmental Protection Agency’s disparate impact regulation challenging a state agency’s decision to grant a permit to a cement plant that would have spewed more air pollution into a minority neighborhood already burdened with intensive industrial uses. The district court held that Section 602 and the disparate impact regulation contained an implied private right of action and granted plaintiffs a preliminary injunction.³⁷⁹ *Sandoval* was decided shortly thereafter and eliminated the basis for the preliminary injunction.³⁸⁰

c. Fair Housing Act claims

Since disparate impact claims under the Fair Housing Act were first recognized in 1974 in *United States v. City of Black Jack*, every circuit to consider the question—eleven in all—has held that the FHA prohibits housing practices that have a disparate impact on a protected group, even in the absence of discriminatory intent. Unlike disparate

impact analysis in employment discrimination cases, courts have recognized two ways to establish disparate impact in FHA cases, and FHA cases include both fair lending and fair housing cases.

If pursuing a disparate impact claim the first way, a plaintiff may show that the practice imposes a disproportionate harm on members of a protected class or, in other words, that it has a “greater discriminatory impact on members of a protected class” or causes an “adverse impact.” This type of analysis is similar to that utilized in employment discrimination cases. If proving disparate impact in the second way, a plaintiff may show that the challenged practice tends to create, reinforce, or perpetuate patterns of segregation. Perpetuation of segregation claims are typically included in exclusionary zoning cases in which zoning or other land-use decisions by municipalities result in blocking construction of integrated housing developments in predominantly white areas.

When considering the first type of disparate impact claims, the courts of appeals have employed flexible approaches. Most circuits employed a burden-shifting analysis similar to that used in employment discrimination cases, whereby the plaintiff has the initial burden of proving that a challenged practice or policy caused or predictably will cause a discriminatory effect. If the plaintiff satisfies that requirement, then the burden shifts to the defendant to show that the challenged practice is justified by a substantial, legitimate, nondiscriminatory objective. If such a showing is made by the defendant, most circuits also required the defendant to show the absence of any less discriminatory alternative that could achieve that objective. A minority of the circuit courts of appeals have utilized a multifactor balancing test that considers a series of different factors, including how much proof of intentional discrimination has been produced. In 2013, the U.S. Department of Housing and Urban Development issued a disparate impact regulation that was designed to establish a uniform standard for disparate impact analysis and adopted the standard three-prong approach used in most circuits, but placed the burden for proving the third prong—that there is no less discriminatory alternative to the practice or policy—on the plaintiff.

During the over 40-year history of disparate impact claims in fair housing cases, courts have applied the disparate impact standard to a wide range of practices, including exclusionary zoning ordinances, the administration of Section 8 vouchers, lending practices, mortgage insurance policies, landlord and housing provider reference policies, occupancy restrictions, and the demolition and siting of subsidized housing. The difficulty of plaintiffs prevailing on disparate impact claims is significant, and the success rate of such cases has not been high.³⁸¹ Nonetheless, for fair housing litigators, disparate impact claims have been a critical tool for overcoming barriers to housing opportunity and for redressing unjustified disparities in access to housing opportunities, whether or not intentional, which sustain existing structural inequalities that remain prevalent in our still deeply segregated society.³⁸² In other types of cases, such as those challenging fair lending discrimination by financial institutions or discrimination in the policies of property insurance providers, proof of intentional discrimination can rarely be shown.

During the four decades in which federal circuits have unanimously held that the Fair Housing Act creates disparate impact liability, there have been efforts to challenge this principle. Such challenges increased after the Supreme Court’s 2005 decision in *Smith v. City of Jackson*,³⁸³ in which the Court held that the text of the Age Discrimination in Employment Act (ADEA) supports disparate impact liability. Because the text of the FHA is different from the ADEA’s, defendants in disparate impact cases, especially in fair lending cases in which financial institutions were defendants, sought to dismiss cases on the basis that disparate impact claims were not cognizable under the FHA. All such efforts failed, primarily because of the unanimity in courts of appeals’ decisions on the issue, and, for various reasons, the issue was not resolved by the Court until this year. In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project (“ICP”)*,³⁸⁴ the Supreme Court held in a 5-4 decision that violations of the FHA can be proven under a disparate impact standard of liability.³⁸⁵

ICP has been celebrated by fair housing advocates and all social justice litigators. In one way, it is not a remarkable decision because it upholds a standard of proof unanimously recognized by the lower courts for over 40 years. But, other aspects of the decision are of extreme importance to all social justice litigators:

- First, it halts over three decades of movement away from the broad availability of disparate impact claims under civil rights statutes and gives new life to a doctrine that is uniquely well-suited to the challenges of addressing structural racism in the 21st century.
- Second, Justice Kennedy's majority opinion importantly interprets the text of the statute and its similarity to Title VII to permit disparate impact liability and finds the fact that in amending the FHA in 1988, Congress had recognized the unbroken string of appellate decisions that endorsed disparate impact liability as being of "crucial importance."³⁸⁶ Most important, it goes beyond this type of reasoning in an historical and inspirational way by relying heavily on the need for an expansive reading of the FHA to help accomplish the FHA's goal of replacing a residentially segregated society with a more integrated one. Initially, the opinion reviews the nation's long history of housing discrimination and segregation and emphasizes that the FHA was passed in 1968 against a background of racial violence, including the assassination of Dr. Martin Luther King, Jr., and that those urban riots that had led the Kerner Commission to observe that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal."³⁸⁷ It closes the opinion with an inspirational recognition of the core purpose of the FHA: "Much progress remains to be made in our Nation's continuing struggle against racial isolation.... The FHA must play an important part in avoiding the Kerner Commission's grim prophecy.... The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."³⁸⁸
- Third, the Court recognizes that the disparate impact theory "plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."³⁸⁹ This reference to "unconscious prejudices" recognizes the concept of implicit bias, which has become well entrenched in psychological and sociological literature. This is the first major judicial recognition of the concept of implicit bias and could have ramifications throughout civil rights law and bolster the status of the disparate impact standard where it is under attack.

While the *ICP* decision is a significant victory for social justice litigation, it is important to recognize that the Court's opinion also articulates several "cautionary standards" concerning disparate impact liability. It emphasizes that, like Title VII employment discrimination claims, such liability mandates only the "'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."³⁹⁰ A plaintiff's mere showing of racial imbalance would "not, without more, establish a prima facie case of disparate impact," and a plaintiff must prove a "robust" causal connection between the defendant's challenged practice and any statistical disparities.³⁹¹ Further, "courts must examine with care whether a plaintiff has made out a prima facie case and prompt resolution of these cases is important."³⁹² It also raises a question as to what policies and practices are covered by disparate impact analysis by questioning whether a "one-time decision" is a policy at all.³⁹³ While nothing in this cautionary language necessarily deviates from what disparate impact analysis has always required, the emphasis on these issues may result in making it more difficult to successfully prove a disparate impact violation in the future.

Justice Kennedy also distinguishes between what he refers to as legitimate "heartland" impact cases, such as those alleging exclusionary zoning practices by white suburbs, and less sympathetic claims, such as challenges to municipal housing code enforcement and the plaintiff's "novel theory" in this case.³⁹⁴ Indeed, the *ICP* opinion expresses skepticism about whether the plaintiff's claim should succeed on remand.³⁹⁵ As a result, on remand

the district court in *ICP* is re-examining its early finding that plaintiffs had established a prima facie case of disparate impact. Moreover, since the *ICP* decision, lower courts have dismissed cases alleging discriminatory code enforcement³⁹⁶ and discriminatory predatory lending.³⁹⁷

In sum, because it preserves disparate impact claims in fair housing cases, *ICP* is a very positive decision for social justice advocates, especially fair housing litigators. But the new issues it raises with respect to disparate impact analysis have already given rise to litigation, which may increase the difficulty of proving such violations.

d. Voting Rights Act claims

The primary basis of disparate impact litigation in the voting rights arena is the Voting Rights Act of 1965 (VRA).³⁹⁸ The VRA is a landmark piece of legislation, originally enacted in 1965, which was intended to remedy the systemic disenfranchisement of racial and ethnic minorities. By any measure, the VRA has been an astounding success.³⁹⁹ Its work is far from done, however, as even a cursory review of recent headlines reveals. Nevertheless, over time, the courts have made it more difficult to prove disparate impact voting cases, despite—until recently—congressional resistance to the narrowing of remedies against discriminatory voting practices.

The VRA's two primary weapons against discriminatory voting practices have been Section 2 and Section 5.⁴⁰⁰ Section 5 required certain jurisdictions, identified by a formula based on a history of discriminatory practices found in Section 4 of the Act,⁴⁰¹ to obtain preclearance—or pre-approval—either from the Attorney General or a federal court before effecting any change in voting practices; jurisdictions were required to prove that the change would not have a discriminatory effect.⁴⁰² The standard of proof required for preclearance as to discriminatory effect was one of “retrogression,” i.e., the jurisdiction had to prove that the change would not make things worse for the minority groups.⁴⁰³ Thus, if the jurisdiction were unable to rebut proof of a disproportionate impact on minorities, preclearance could be denied for that reason alone, rendering disparate impact a complete obstacle to any voting change in specified jurisdictions.⁴⁰⁴ That all changed on June 25, 2013, when the Supreme Court issued its opinion in *Shelby County v. Holder*,⁴⁰⁵ effectively gutting Section 5,⁴⁰⁶ and thereby leaving Section 2 as the primary statutory means of challenging discriminatory voting practices.

There are two categories of claims cognizable under Section 2: (1) vote denial claims, which deal with practices limiting access to the ballot, including voter registration, voter identification, precinct locations, polling hours, and availability and changes in early voting and (2) vote dilution claims, which challenge practices weakening minority voting strength. Section 2 claims can be proved two ways, by showing that the voting practice “results” in the discriminatory denial or abridgment of the right to vote on account of race, ethnicity, or membership in a language minority group, or by showing a discriminatory purpose behind the voting practice.

While proof of discriminatory intent is not, today, required for a Section 2 “results” claim,⁴⁰⁷ a “results” claim cannot be proven on the basis of disparate impact alone. After undertaking “a searching practical evaluation of the ‘past and present reality,’ and on a ‘functional’ view of the political process,”⁴⁰⁸ the plaintiff must show that the challenged voting practice “interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by” the affected minority.⁴⁰⁹ Proof that this interaction creates unequal opportunity is established by examining the “totality of circumstances,”⁴¹⁰ which is a set of factors related to the significance of race in the electoral process that the Senate Judiciary Committee added to Section 2 in 1982.⁴¹¹ Because of these burdens of proof, plaintiffs in Section 2 cases, including both vote denial and vote dilution cases, are typically required to retain a number of expert witnesses: for example, experts in statistics and political science to opine on disparate impact and racially polarized voting; historians to opine on the history and effects of past discrimination; geographic

information scientists where issues of the distances between minority neighborhoods and polling places or registration facilities are relevant.

The difficulty of prevailing in results vote denial cases is illustrated in voter ID litigation. In *Frank v. Walker*,⁴¹² the Seventh Circuit overturned a district court's judgment that Wisconsin's photo ID law violated the "results" prong of Section 2, despite detailed findings that 9 percent of Wisconsin's registered voters lacked the required photo ID and that African American and Latino voters were two to three times less likely to possess the photo ID than white voters. Among other things, the Seventh Circuit faulted the district court for not making findings about what happened to voter turnout when the photo ID law was enforced, a factor of dubious probative value given the inherent difficulty in comparing one election to another in terms of voter turnout.

Plaintiffs in vote dilution cases face additional obstacles. They must meet strict pre-conditions for suit, set forth in *Thornburg v. Gingles*: (1) proof that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) proof that the minority group is politically cohesive, and (3) proof that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.⁴¹³ Meeting these prerequisites typically entails sophisticated statistical analyses and, necessarily, the retention of expensive expert consultants and testifying witnesses to show how a district can be drawn with minorities constituting a majority of residents and to assess the degree of racially polarized voting.

Voting rights results cases also present opportunities for the use of evolving and solidifying scientific approaches to prove discrimination. For example, geographical information scientists (GIS) cannot only map proposed new district lines in vote dilution cases, but also analyze the travel burdens on voters to register, vote, or obtain required ID in order to vote. In *Veasey v. Perry*, for instance, a GIS expert provided key testimony on the travel times between census block tracts and every motor vehicle facility in Texas to demonstrate the burden on minorities who had to get the required photo ID.⁴¹⁴ Another opportunity for evolving science to inform disparate impact litigation in voting is captured by recent literature that supports the introduction of evidence of implicit bias as part of "totality of circumstances" analyses in Section 2 "results" cases.⁴¹⁵

3. Disparate treatment/intent

As noted above, voting discrimination cases may also be proven by showing discriminatory intent behind the challenged voter practice under Section 2 of the VRA⁴¹⁶ or under the First, Fourteenth, or and Fifteenth Amendments.⁴¹⁷ The standards applied by the courts is the same, whether the claim is statutory or constitutional: the plaintiff must prove that discriminatory purpose was one of the motivating factors, not necessarily the primary one, for the challenged conduct.⁴¹⁸

Although proof of discriminatory purpose does not require proof of invidious racial animus,⁴¹⁹ proving discriminatory intent is difficult. For starters, those intending to limit minorities' participation in the electoral process are often sufficiently savvy to avoid leaving a paper trail.⁴²⁰ The courts have, accordingly, allowed discriminatory intent to be proven by circumstantial as well as direct evidence.⁴²¹ In *Arlington Heights*, the Court provided examples of the sorts of proof that might shed light on the issue. The "starting point" in any intent analysis is disparate impact: whether the governmental action affects negatively and disproportionately a minority group. Other evidence that may be relevant includes the historical background of the decision, particularly if it reveals a series of events that appear to be similarly discriminatory; the legislative and administrative history of the government action, including contemporaneous statements by the involved governmental officials; and,

evidence of procedural or substantive deviations from standard operations in the enactment or implementation of the challenged government action.⁴²²

Veasey v. Perry provides a vivid example. There, the district court had found that the Texas Legislature had a discriminatory purpose in enacting SB 14, the photo ID law. In reaching that ruling, the court relied on several of the *Arlington Heights* factors, including statements by proponents of the legislation indicating their awareness that the law would have a disproportionate effect on minorities, a history of racial discrimination in voting in Texas, the passage by the same legislature of re-districting plans that had been ruled to have been enacted with a discriminatory purpose by other courts, testimony by opponents of the legislation describing the highly charged anti-immigrant environment in the legislature that they said contributed to the passage of the bill, significant departures from established procedures used to steam-roll the bill through the legislature, and the summary dismissal of amendments that would have ameliorated the impact on minorities.⁴²³

On appeal, the Fifth Circuit reversed the district court's findings on intent (but affirmed the court's findings on the "results" prong of Section 2), explaining that the trial judge had relied too heavily on "unreliable" evidence, including the history of discrimination in voting (which the court of appeals described as too old or, in the case of the re-districting cases, too "thin"), the contemporaneous statements of proponents of SB 14 (as to which the court stated that mere awareness of discriminatory consequences is insufficient), the testimony of opponents of SB 14 (which the court said was "unreliable"), and the evidence of procedural and substantive departures (which the court described as simply business as usual).⁴²⁴

If other courts follow the Fifth Circuit's lead in deconstructing the evidence of discriminatory intent, it will make it increasingly difficult to show the "big picture" of a discriminatory purpose.

Conclusions

Despite the numerous obstacles identified in this report, the courts remain open to social justice litigation to a significant degree. But because of these obstacles, successful social litigation is heavily dependent on careful planning and strategizing, persistence and patience, and sufficient resources.

There are a number of key strategic implications for litigators and advocates who engage in social justice litigation. They include:

- A social justice litigation strategy requires both caution and willingness to take risks. Litigators who do not think through all of the options and obstacles do so at their own peril. Conversely, litigators waiting for the foolproof social justice case will probably never file one.
- Social justice litigation is a long-term commitment. Individual cases can take years to resolve and often start with baby steps. Some remedies require lengthy post-litigation monitoring. Trying to create widespread or long-standing change can take a decade or more.
- Litigators need to consider all significant procedural and substantive opportunities and obstacles before proceeding; they need to identify and distinguish outright barriers from high impediments and develop strategies for reaching both shorter- and longer-term goals.
- Litigators need to make sure that they have adequate resources to be successful, including an appropriate legal team, qualified experts, and sufficient funds.
- On cutting-edge issues, litigators need to consider whether a particular case is the right vehicle. Issues such as the judicial forum (examining both the controlling case law and the judges likely to hear the case) and the factual context (looking at the strength of the facts and the persuasiveness of clients and key witnesses) should be considered. In this regard, coordination between and among different organizations with common goals is essential.
- Case presentation should be crafted with attention to the judges or justices that will hear the case. If the case has significant potential to get to the Supreme Court, litigators should seek to narrow the case if possible so that a loss does not have catastrophic effects on potential future cases.

In addition, there are several key strategic implications for funders of social justice litigation. They include:

- Social justice litigation takes time. Impact cases typically take several years; accordingly, funding them requires long-term investment.

- Social justice litigation is expensive. In addition to staffing the cases for the number of years required to litigate, most of the more complex cases have significant out-of-pocket costs including those for investigation, depositions, experts, other discovery costs, and communications.
- As discussed above, successful social justice litigation requires litigators who carefully think through all of the contingencies and potential obstacles. Funders should think through carefully which organizations to fund and should ask questions of potential grantees about their litigation strategies.
- Social justice litigation entails high risk and high reward, and progress on cutting-edge issues often has fits and starts. The first case or cases on a particular issue may be unsuccessful.

Like litigators and advocates, funders of social justice litigation need to be patient and persistent because progress usually takes time and occurs in increments.

There are several ways for funders to address change on a larger scale that do not involve lobbying. These include the following:

- Funders can convene a series of meetings to discuss strategies to overcome specific obstacles identified in this report, such as challenges in bringing class actions and the difficulty of proving discriminatory intent and disparate impact.
- Funders can support a common pool of social science experts for consultation in preparation for litigation.
- With the express purpose of influencing public opinion, funders can support a series of reports and communications on obstacles identified in this report.

For the past several decades, social justice litigation has done much to create positive change in our society by helping citizens exercise their voting rights, remedying discriminatory employment practices, barring formal discrimination, and generally creating a fairer society. Though the current judicial environment is far from optimal, litigators who are adequately resourced and approach social justice litigation strategically have achieved some notable successes. Future success will not only be dictated by the composition of the judiciary and of legislators who can increase or decrease litigation opportunities through policy changes but also on litigators and funders forging partnerships to target social problems that litigation has the realistic potential to resolve.

Glossary

ADHESION CONTRACT: a standard form contract where one party has set all of the terms and the other has negligible bargaining power; also called a boilerplate contract.

AMICUS BRIEF: a brief submitted by a person or entity who is not a party to the case in question as an *amicus curiae*, or friend of the court. Such a brief is usually submitted in support of one party to bring other information and arguments to the attention of the court.

APPELLATE: related to an appeal of a case, when a party seeks review of a decision made by the trial court or a lower appeals court.

ARBITRATION CLAUSE: a clause in a contract that requires the parties to resolve disputes through arbitration rather than through legal proceedings.

CIRCUIT COURT: a federal appellate court which reviews trial court decisions in its geographical area.

CLASS ACTION: a suit either brought or defended by a group of people who have identical or nearly identical claims and are represented by one or a few members of the group; also called a class suit or a representative action.

COGNIZABLE: the characteristic of a claim or legal theory that is recognized by courts. A claim is said to be cognizable under a particular statute if it can be brought under that statute.

DAUBERT ANALYSIS: the consideration by a court of an expert witness and her/his testimony pursuant to the standard styled by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*. Through *Daubert* analysis, the court determines whether or not the testimony by someone claiming to be an expert in an issue in the case is appropriate for admission as evidence.

DEPOSITION: the taking and transcribing of sworn oral testimony outside of court proceedings of persons with information about a case. Depositions are part of discovery, which is the process of gathering information about a case before trial. See description below.

DICTA: short for *obiter dicta*; incidental or illustrative comments by a judge in written judicial decisions. *Dicta* do not constitute binding precedent but can often be cited as supportive of a legal argument.

DISCOVERY: the pre-trial process of amassing information from the opposing party or third parties. Discovery can include interrogatories, requests for production of documents, and depositions, among other things.

DISTRICT COURT: in the federal system, the trial court or the venue where cases are initiated and tried.

EXPERT WITNESS: a person who is selected to offer testimony setting forth an opinion about an issue in a case because of her/his relevant expertise concerning the issue rather than first-hand knowledge of the facts in the case; also called a professional witness or judicial expert.

HOLDING: a court's ruling on a matter of law based on the facts of a specific case.

INJUNCTION: a court order that compels a person to do or not do something.

INTERROGATORY: a formal document used in the discovery process where one party requests information from the opposing party via written questions.

JURISPRUDENCE: a legal system and body of case law.

LIABILITY: actual or potential legal responsibility for one's acts or omissions. Establishing liability involves a determination of legal responsibility for an alleged injury and may result in an order to pay damages or to undertake or avoid specific actions in the future.

LITIGATION: lawsuits or judicial action to determine a legal question or resolve a legal dispute; adversarial legal proceedings.

MOOTNESS: a determination that there is no actual legal controversy; the quality of having no legal significance or not presenting an open and relevant legal question.

NOTICE PLEADING: the first phase in civil litigation wherein the basic claims and defenses are made known. Later pleadings involve evidence and motions, but notice pleadings do not.

PLAINTIFF: the person(s) or entity/ies that initiate a lawsuit to demand damages or an order that defendant engage in or avoid specific conduct, or a judicial determination of rights.

PLEADING STANDARD: the standard by which a plaintiff's initial complaint is assessed in order to determine whether it asserts a valid legal claim and/or a factual dispute about an enforceable legal right. Meeting the pleading standard means that a case will survive a motion to dismiss.

POLITICAL QUESTION DOCTRINE: the principle that only legal questions—not political questions—are the domain of the court system. Political questions are those deemed more appropriately resolved by the legislature or executive branch than by the courts.

PRECEDENT: a previous judicial decision that serves as a guiding principle for and may be binding authority for similar subsequent cases.

PRELIMINARY INJUNCTION: a temporary injunction or court order that is imposed before a full trial on the facts and legal issues in a case in order to maintain the *status quo* until there is a final resolution of a case. Before a preliminary injunction is granted, one party must show both that they are highly likely to succeed in a full trial and that irreparable harm is likely if the injunction is not imposed.

PRIMA FACIE: at first sight. A *prima facie* case is one that, if all evidence is substantiated and not effectively rebutted, will be decided in favor of the plaintiff or will result in an indictment.

PROTECTED CLASS: a category of characteristics where discrimination based on those characteristics is prohibited by law. An example is sex: discrimination based on any characteristic in this category (male, female, other) is disallowed by federal law.

RELIEF: the way a court enforces a right, imposes a penalty, or otherwise imposes its will; remedy; benefits imposed by a court including damages, restitution, or injunctions.

REMAND: the action by which an appellate court sends a case back down to a lower court for additional action or consideration.

REMEDY: the way a court enforces a right, imposes a penalty, or otherwise imposes its will; relief. A remedy may be imposed by a court following a trial or hearing or may be achieved through a negotiated settlement.

RIGHT OF ACTION: the right to bring a lawsuit; standing to initiate a lawsuit to enforce a right.

RIPENESS: the readiness of a case for litigation or judicial consideration; the extent to which the facts of a case constitute a controversy that warrants judicial attention.

SETTLEMENT: the adjusting or resolving of a legal dispute prior to the relevant court issuing its final judgment. Most settlements are achieved by negotiation.

STANDING: the right to bring a lawsuit to resolve a case or controversy; right of action. Standing requirements may differ between federal and state courts.

STARE DECISIS: to stand by that which has been decided; the principle of adhering to precedent. Standing makes appellate decisions binding on lower trial courts hearing the same legal issue or question.

STATUTORY RIGHT: rights derived from statute enacted by a legislature or other governing body. This category excludes rights derived from administrative action or the Constitution.

SUMMARY JUDGMENT: a court order that disposes of a case without a trial because there are no factual issues in dispute.

TEST CASE: a case designed to test the validity of a law or legal principle.

TORT: a violation of civil law that causes intentional or accidental injury to another person.

VENUE: forum; the proper or most convenient court in which a case will be litigated.

Endnotes

- ¹ The Atlantic Philanthropies, 2008 Annual Report 10 (2008).
- ² *Id.*
- ³ Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 Colum. L. Rev. 2087, 2089 (2014).
- ⁴ 42 U.S.C. § 1988.
- ⁵ For purposes of this report, we are assuming that the “liberal” position is aligned with the position of social justice litigants.
- ⁶ Martin-Quinn Scores, <http://mqscores.berkeley.edu/press.php> (last visited Nov. 10, 2015).
- ⁷ N.Y. Times, *Supreme Court May Be Most Conservative in Modern History*, FiveThirtyEight (Mar. 29, 2012, 8:06 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history>.
- ⁸ *Id.*
- ⁹ Lee Epstein, William M. Landes and Richard A. Posner, *Revisiting the Ideology Rankings of Supreme Court Justices*, 44 J. Legal Studies S295 (2015).
- ¹⁰ *Id.* at S302.
- ¹¹ *Id.*
- ¹² Lee Epstein, William M. Landes and Richard A. Posner, *How Business Fares in the Supreme Court*, 97 Minn. Law Rev. 1431, 1451-52 (2013).
- ¹³ Harold Spaeth, et al., Supreme Court Database, www.supremecourtdatabase.org (last visited Nov. 10, 2015).
- ¹⁴ *Id.*
- ¹⁵ Theodore Eisenberg, *Four Decades of Civil Rights Litigation*, 12 J. Empirical Legal Stud. 4 (March 2015). Examples of constitutional tort claims offered by the author include employment claims, due process claims, First Amendment claims, other actions against police, and nonemployment discrimination claims. *Id.* at 26.
- ¹⁶ *Id.* at 12.
- ¹⁷ *Id.* at 22.
- ¹⁸ Adam Bonica and Michael Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J. L., Econ., & Org. 472 (Aug. 2015).
- ¹⁹ *Id.*
- ²⁰ 347 U.S. 483 (1954).
- ²¹ 135 S. Ct. 2584 (2015).
- ²² Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law*, 19 Duke J. Gender L. & Pol’y 179, 212 (2011).
- ²³ 563 U.S. 493 (2011).
- ²⁴ *Id.* at 1951 (Scalia, J., dissenting, quoting the majority opinion at 1925, n.3).
- ²⁵ *Id.* at 1955.
- ²⁶ *Id.*
- ²⁷ See, e.g., *Abbott v. Burke* 153 N.J. 480 (1998).
- ²⁸ J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority* 59 U. Miami L. Rev. 341, 373 (April 2005).
- ²⁹ *Id.* at 374.
- ³⁰ See *Muller v. Oregon*, 208 U.S. 412, 419-421 (1908) (discussing Brandeis’ brief).
- ³¹ *Brown v. Bd. of Ed.*, 347 U.S. 483, 494-95 and n.11.
- ³² Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. Penn. L. Rev. 1409, 1410-11, n.12 (2013).
- ³³ Rublin, *supra* note 22, at 181.
- ³⁴ 518 U.S. 515 (1996).
- ³⁵ 539 U.S. 558 (2003).
- ³⁶ 135 S. Ct. 2584 (2015).

- ³⁷ Rublin, *supra* note 22, at 220.
- ³⁸ Grunwald, *supra* note 32, at 1434-1435 (using examples of continued use of discredited factors to determine reliability of eyewitness procedures in *Neil v. Biggers*, 409 U.S. 188 (1972)).
- ³⁹ Grunwald, *supra* note 32, at 1437-1439.
- ⁴⁰ *Id.* at 1441 (quoting Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 96-97 (1993)).
- ⁴¹ 551 U.S. 701 (2007).
- ⁴² See John Monahan and Laurens Walker, *Twenty Five Years of Social Science in Law*, 35 L. & Hum. Behav. 72 (2011).
- ⁴³ 551 U.S. at 839-841.
- ⁴⁴ *Id.* at 761-765.
- ⁴⁵ *Id.* at 704.
- ⁴⁶ See Jeff Yates et al., 'For the Times they Are A-Changin': Explaining Voting Patterns of U.S. Supreme Court Justices through Identification of Micro-Publics, 28 BYU J. Pub. L. 117, 123 nn.19-20.
- ⁴⁷ See generally, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009) (citing *Brown v. Bd. of Ed.* and *Roe v. Wade*); Cass Sunstein, *The Supreme Court Follows Public Opinion*, in *Legal Change: Lessons from America's Social Movements* 21, 21-23 (Brennan Ctr. For Justice, Jennifer Weiss-Wolf & Jeanine Plant-Chirlin, eds., 2015) (citing *Roe v. Wade* and *Obergefell v. Hodges*).
- ⁴⁸ I. Unah, et al., *U.S. Supreme Court Justices and the Public Mood*, 30 J. L. & Pol. 293 (2015).
- ⁴⁹ 536 U.S. 304, 316 n.21 (2002).
- ⁵⁰ See Rublin, *supra* note 22, at 206 (postulating that the result in *Atkins* exemplifies "that the Court's jurisprudence may shift with the tides of public opinion").
- ⁵¹ Yates et al., *supra* note 46, at 119-120.
- ⁵² *Id.* at 120 (discussing this theory as set forth in Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (2006)).
- ⁵³ *Id.* at 121.
- ⁵⁴ Tom Goldstein and Amy Howe, *But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 Mich. L. Rev. 963, 967 (2011).
- ⁵⁵ *Id.* at 969.
- ⁵⁶ *Id.* at 970-971.
- ⁵⁷ Monahan & Walker, *supra* note 42, at 73-74 (discussing Adam Cox & Thomas Miles, *Judging the Voting Rights Act*, 108 Columbia L. Rev. 1 (2008)).
- ⁵⁸ There is a considerable amount of literature making this point. See e.g., Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 57 (2001) ("Too often, to capture the jury's emotion is to win the case."); James Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 Colum. L. Rev. 197, 221 (1963) ("If a juror feels more sympathy for one party, or takes a strong dislike to a witness, that emotional response will affect, if not wholly determine, the weight he gives to the evidence."). See generally Dennis J. Devine, *Jury Decision Making: The State of the Science*, 91-121 (2012) (reviewing empirical literature on trial participant characteristics, and recognizing that certain characteristics have been shown to influence juror verdicts).
- ⁵⁹ Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex. L. Rev. 855 (2015).
- ⁶⁰ Part of this planning is long term strategy. The best example of such strategic planning is the NAACP's carefully orchestrated attack against school segregation. Before seeking judicial review of public school segregation, the NAACP launched several lawsuits seeking to force the admission of African Americans into state law schools, demonstrating that since "most Southern states did not even attempt to maintain a façade of equality in professional educational facilities," the NAACP was able to cast doubt on the "separate but equal" defense to racial segregation. See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education* (1975). For a general treatment of interest group sequencing, see Stephen L. Wasby, *Race Relations Litigation in an Age of Complexity*, 193-218 (1995).
- ⁶¹ *United States v. Windsor*, 133 S.Ct. 2675 (2013).
- ⁶² *Obergefell v. Hodges*, 135 S.Ct. 1039 (2015).
- ⁶³ Roberta A. Kaplan, "It's All About Edie, Stupid": Lessons from Litigating *United States v. Windsor*, 29 Colum. J. Gender & L. 85, 86 (2015).
- ⁶⁴ *Id.* at 87-88.
- ⁶⁵ *Id.* at 90-91.
- ⁶⁶ This issue is discussed at greater length in Section V, Subsection E (2)(c), *infra*.
- ⁶⁷ 135 S.Ct. 2507 (2015).
- ⁶⁸ *Id.* at 2532.
- ⁶⁹ *Id.* at 2530-32.
- ⁷⁰ Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 Harv. J.L. & Gender 251, 275 (Summer 2009).
- ⁷¹ Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum. L. Rev. 1861, 1862-1863 (2014).
- ⁷² 163 U.S. 537 (1896).

- ⁷³ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).
- ⁷⁴ *Sweatt v. Painter*, 339 U.S. 629 (1950).
- ⁷⁵ Klarman, *supra* note 70, at 277.
- ⁷⁶ Allyson Ho & Bahar Ahariati, *Thoughts on Challenging Existing Precedent*, 37 Litig. 39 (Spring 2011).
- ⁷⁷ Sullivan, *supra* note 28, at 344.
- ⁷⁸ *Id.* at 361.
- ⁷⁹ See *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991), overruling *South Carolina v. Gathers*, 490 U.S. 805 (1989), and *Booth v. Maryland*, 482 U.S. 496 (1987), on issue of admissibility of victim impact evidence in capital prosecutions, discussed by Sullivan, *supra* note 28, at 362.
- ⁸⁰ Brian C. Kalt, *Three Levels of Stare Decisis: Distinguishing Common-law, Constitutional, and Statutory Cases*, 8 Tex. Rev. L. & Politics 277 (2003-04).
- ⁸¹ Re, *supra* note 71, at 1875.
- ⁸² *Id.* at 1868.
- ⁸³ *Id.* at 1902.
- ⁸⁴ *Id.*
- ⁸⁵ *DeRolph v. State*, 97 Ohio St. 3d 434, 436 (Ohio 2002).
- ⁸⁶ Susan Poser, *What's a Judge to Do? Remediating the Remedy in Institutional Reform Litigation*, 102 Mich. L. Rev. 1307 (May 2004).
- ⁸⁷ Kimberly Jade Norwood, *Shopping for Venue*, 50 U. Miami L. Rev. 267, 268 (Jan. 1996).
- ⁸⁸ *Id.*
- ⁸⁹ Antony L. Ryan, *Principles of Forum Selection*, 103 W. Va. L. Rev. 167, 167 (Winter 2000).
- ⁹⁰ *Id.*
- ⁹¹ *Id.*
- ⁹² *Id.*
- ⁹³ Norwood, *supra* note 87, at 270.
- ⁹⁴ *Id.*
- ⁹⁵ Ryan, *supra* note 89, at 170.
- ⁹⁶ 28 U.S.C. § 1391(a) (Supp. V 1993) as amended by Pub. L. No. 104-34, 109 Stat. 293 (1995).
- ⁹⁷ Ryan, *supra* note 89, at 170.
- ⁹⁸ *Id.* (citing *Leroy v. Great Western United Corp.*, 433 U.S. 173, 185 (1979)).
- ⁹⁹ Norwood, *supra* note 87, at 268.
- ¹⁰⁰ Ryan, *supra* note 89, at 176-177.
- ¹⁰¹ Fed. R. Civ. Pro. 26(b)(4)(A). "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2) (B) requires a report from the expert, the deposition may be conducted only after the report is provided."
- ¹⁰² Pa. R. Civ. P. 4003.5.
- ¹⁰³ Fed. R. Evid. 705 ("[u]nless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.>").
- ¹⁰⁴ Pa. R. Evid. 705 ("[i]f an expert states an opinion the expert must state the facts or data on which the opinion is based.>").
- ¹⁰⁵ Pa. R. Evid. 705. ("[t]he Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule.>").
- ¹⁰⁶ 347 U.S. 483 (1954).
- ¹⁰⁷ 411 U.S. 1 (1973).
- ¹⁰⁸ *Applewhite v. Commonwealth of Pa.*, 617 Pa. 563, 567-68 (2012).
- ¹⁰⁹ *Id.* at 570.
- ¹¹⁰ *Applewhite v. Commonwealth of Pa.*, 2012 WL 4497211, at *8 (M.D. Pa. Oct. 2, 2012).
- ¹¹¹ *The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, The Committee on Federal Courts of the New York State Bar Association, 122 F.R.D. 89, 93 (Aug. 30, 1988).
- ¹¹² There are four different types of abstention: *Pullman*, *Buford*, *Colorado River* and *Younger*. The policies behind each form may be different but the effect is the same—deference by the federal court to state litigation. See 122 F.R.D. at 93-94.
- ¹¹³ *Id.* at 93.
- ¹¹⁴ *Id.*
- ¹¹⁵ *Id.*
- ¹¹⁶ *Id.* at 102.

- ¹¹⁷ Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.
- ¹¹⁸ Fair Housing Institute, Testing for Housing Discrimination, <http://www.fairhouse.net/library/article.php?id=35> (last visited Dec. 14, 2015).
- ¹¹⁹ EEOC Notice: Enforcement Guidance: Whether “testers” can file charges and litigate claims of employment discrimination (May 22, 1996).
- ¹²⁰ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) *superseded by* S. Ct. 2786 (1993).
- ¹²¹ *See id.*
- ¹²² Peter W. Huber, Galileo’s Revenge: Junk Science in the Courtroom 3 (1991) (further defining junk science as a “hodgepodge of biased data, spurious inferences, and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill”).
- ¹²³ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
- ¹²⁴ *Id.* at 587.
- ¹²⁵ *See id.* at 589-90.
- ¹²⁶ *See id.* at 588.
- ¹²⁷ *Id.* at 597.
- ¹²⁸ A judgment will be termed an abuse of discretion if the adjudicator has failed to exercise sound, reasonable, and legal decision-making skills. This is a very difficult standard of review to overcome, thus a party arguing that the trial court abused its discretion will almost always lose.
- ¹²⁹ *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).
- ¹³⁰ *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
- ¹³¹ Stephen J. McConnell & Sean P. Wajert, *Daubert/Frye Motions in Product Liability Litigation: Bringing or Defending Challenges to Expert Witness Evidence*, July 10, 2015, available at <http://media.straffordpub.com/products/daubert-frye-motions-in-product-liability-litigation-2015-06-10/presentation.pdf>.
- ¹³² *See* Lisa Heinzerling, *Doubting Daubert*, 14 J. L. & Pol’y 65, 75-77 (2006).
- ¹³³ *See* Kenneth R. Berman, *Daubert Turning 20: Junk Science Replaced By Junk Rulings?*, ABA Section of Litigation Annual Conference, 13 (April 18-20, 2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/18-2_daubert_turning.authcheckdam.pdf.
- ¹³⁴ Arizona Chamber Foundation: Policy Brief, *The Case for Daubert: Ensuring Sound Science in Arizona Courts*, (Jan. 2010) <http://www.azchamber.com/assets/files/Foundation/Tort%20Reform/Daubert.pdf>.
- ¹³⁵ *See id.*
- ¹³⁶ *See* Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 Psychol. Pub. Pol’y L. 309 (2002); *see* Lloyd Dixon and Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, (2001).
- ¹³⁷ *See id.*
- ¹³⁸ *See id.*
- ¹³⁹ Margaret A. Berger, *What Has a Decade of Daubert Wrought?*, 25 Am. J. of Pub. Health 1, 64 (2005) available at <http://www.defendingscience.org/sites/default/files/upload/BergerDAUBERTWROUGHT.pdf>. “On the remand of Daubert, Judge Kozinski of the Ninth Circuit added as a factor for courts to consider in assessing reliability whether the expert’s research was conducted expressly for the purpose of testifying and suggested that unless science is conducted independently of litigation, it is not likely to amount to “good science.” This assessment pushed away good scientists who did not want to gamble their reputation with a judge who was not well versed on scientific theory.
- ¹⁴⁰ 133 S.Ct. 2247 (2013).
- ¹⁴¹ *Kobach v. United States Election Assistance Commission*, 772 F.3d 1183 (2014), cert. denied.
- ¹⁴² 472 F.3d 949 (7th Cir. 2007), *aff’d*, 553 U.S. 181, 128 S.Ct. 1610 (2008).
- ¹⁴³ 458 F.Supp. 2d 775, 803 (2006).
- ¹⁴⁴ 553 U.S. 181, 201 (2008).
- ¹⁴⁵ John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, The New York Times (Oct. 15, 2013) available at <http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>.
- ¹⁴⁶ *Id.*
- ¹⁴⁷ *Id.*
- ¹⁴⁸ *Id.*
- ¹⁴⁹ *Id.*
- ¹⁵⁰ *Id.*
- ¹⁵¹ Most federal judges will have tried Title VII cases brought by one or several employees and will be conversant both with the issues presented and the management of trials in such cases, but systemic challenges, particularly those based on disparate impact liability, present completely different issues.
- ¹⁵² Joan Biskupic, Janet Roberts, and John Shiffman, *At America’s court of last resort, a handful of lawyers now dominates the docket*, Reuters (Dec. 8, 2014).
- ¹⁵³ Although some experts readily pick up the special skills needed by testifying experts, most newly minted experts will one or more rough experiences before they can negotiate the litigation process smoothly. The special court-oriented skills include writing clear, thorough reports that adequately cover all points needed to show the judge that the research is recognized, the results on which the expert relies are reliable, and there is a factual showing that requires the court to have a full trial. *See* Section IV, Subsection F, *infra*, on *Daubert* challenges to plaintiffs’ expert witnesses. Other skills include testifying

at depositions without making damaging concessions and without creating other glaring questions about the testimony that can undermine the expert's conclusions, and learning how to establish rapport with judges and how to educate them effectively when providing testimony on technical issues at a hearing or trial.

¹⁵⁴ Election Law at Moritz, Major Pending Election Administration Cases, <http://moritzlaw.osu.edu/election-law/major-pending-cases/?sort=topic&active=yes> (last visited Dec. 14, 2015).

¹⁵⁵ "Redemption research" assesses the "clean time" needed for a person who has a felony to remain arrest free to demonstrate his risk of future arrest is equivalent to a person in the general population. This research has been offered in disparate impact cases alleging that African Americans and other minorities are victims of discrimination when, for example, employers exclude qualified workers from employment because of arrest and conviction records that are many years old. *See, e.g., Houser v. Pritzker*, Case No. 10-cv-315 (S.D.N.Y.), deposition of Dr. Kimori Nakamura.

¹⁵⁶ 885 F.2d 11, 32 (3d Cir. 1989), *aff'd*, 499 U.S. 83 (1991). According to the district court opinion awarding expert costs, reported at 701 F. Supp. 496, 498 (M.D. Pa. 11/30/1988), the action was filed in July 1986.

¹⁵⁷ The Civil Rights Restoration Act of 1991, P.L. 102-166, 1991 S 1745, Section 113.

¹⁵⁸ H.R. Rep. 102-40 (II).

¹⁵⁹ 137 Cong. Rec. H9505-01.

¹⁶⁰ *See* Leslie Reed, *Is a Free Public Education Really Free? How the Denial of Expert Witness Fees will Adversely Impact Children with Autism*, 45 San Diego L. Rev. 251, 274 (2008), citing the lower court decision that was reversed in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). The authors are familiar with a pending Title VII class action case in which the plaintiffs' counsel have incurred approximately \$1 million in costs, in large part expert witness fees, through the class certification phase.

¹⁶¹ *See, e.g.*, 42 U.S.C. § 2000a-3(b) (public accommodations); § 2000e-5(k) (employment). *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968).

¹⁶² *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

¹⁶³ Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, amending 42 U.S.C. Sec. 1988.

¹⁶⁴ *Blum v. Stenson*, 465 U.S. 886 (1984).

¹⁶⁵ *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

¹⁶⁶ 475 U.S. 717 (1986).

¹⁶⁷ *Id.* at 741-42.

¹⁶⁸ 532 U.S. 598 (2001).

¹⁶⁹ 461 U.S. 424 (1983).

¹⁷⁰ The district court does have discretion to award "home-town" rates. *See e.g. Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313, 317-18 (4th Cir. 1988) (affirming decision to award D.C. rates even though case was litigated in Raleigh, North Carolina where rates were lower, noting that local counsel with sufficient expertise was not willing or available to take the case and that plaintiffs acted reasonably in retaining D.C. counsel).

¹⁷¹ *Supra* note 169 at 436.

¹⁷² As to statutory costs, see 28 U.S.C. § 1920. Even in a straightforward case the costs of trial and/or appeal can be large enough to be burdensome to individuals who are plaintiffs. And in a case where there is a protracted trial and transcripts of trial proceedings or of depositions entered into evidence mount up, costs can reach levels that are potentially ruinous to individual social justice plaintiffs and a serious financial burden to organizational parties.

¹⁷³ *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978). Though such awards are rare against private parties plaintiff, some federal courts have proved willing to enter huge attorney's fee awards against the E.E.O.C. *See, e.g., EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013) (circuit court upheld award of \$751,942.48 against EEOC based on the determination that the EEOC continued pursuing a legal claim beyond the time it was reasonable to do so).

¹⁷⁴ 531 U.S. 98 (2000).

¹⁷⁵ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

¹⁷⁶ A few mass membership organizations are able to raise substantial amounts of money to fund litigation costs from membership contributions. *Cf.* Paul D. Reingold, *Requiem for Section 1983*, 3 Duke J. Const'l L. & Pub. Pol'y 1, 30, n.99 (2008). But most law reform organizations do not have a large base of individual members. In the absence of a large base of contributing members, social justice organizations must rely on foundation support, endowment income, or on more concentrated sources of private funds, such as the ability of successful law firms to advance costs in cases where they act as co-counsel.

¹⁷⁷ Rules protecting clients from conflicts of interest prohibit counsel from suing a present client or former client. A "positional conflict" precludes counsel from ever attacking a practice that some client might ask counsel to defend, now or in the future.

¹⁷⁸ This process has occurred as firms broadened their practices to become "full-service" law firms for major corporations, a part of the evolution of the phenomenon of "Big Law" that has created law firms with offices in states throughout the U.S. and/or throughout the world.

¹⁷⁹ 550 U.S. 54 (2007).

¹⁸⁰ 556 U.S.62 (2009).

¹⁸¹ 355 U.S. at 45-47.

¹⁸² *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 561-63.

¹⁸³ *Iqbal*, 556 U.S. at 678.

¹⁸⁴ Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117 (Dec. 2015).

¹⁸⁵ *Id.* at 2123.

¹⁸⁶ *Id.* at 2122.

¹⁸⁷ 135 S. Ct. 2507 (2015).

¹⁸⁸ *Id.* at 2512.

¹⁸⁹ Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times (Oct. 31, 2015) available at <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

¹⁹⁰ *Id.*

¹⁹¹ Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. Rev. Discourse 164, 168 (2013).

¹⁹² Greenberg, *supra* note 189.

¹⁹³ 9 U.S.C. § 2.

¹⁹⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

¹⁹⁵ *Southland Corp. v. Keating*, 465 U.S. 1, 10-12 (1984) (finding nothing in the FAA to indicate that enforceability is subject to limitations under state law in order to hold that the FAA creates a body of federal substantive law applicable in both state and federal court).

¹⁹⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (holding that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act].”).

¹⁹⁷ *AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740, 1746 (2011) (finding that the FAA preempts the rule adopted by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 76 (2005), which found an arbitration clause unconscionable if part of a consumer adhesion contract in which disputes between the parties predictably involve small amounts of damages and it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money).

¹⁹⁸ *AT&T Mobility LLC v. Conception*, 131 S. Ct. 1740, 1752 (2011) (noting that “when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable”).

¹⁹⁹ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (finding that the Consumer Repair Organizations Act (CROA) provision requiring disclosure of the right to sue for violations of CROA and prohibiting waiver of any right pursuant to CROA did not prevent the enforcement of an arbitration clause).

²⁰⁰ *Id.* at 673.

²⁰¹ *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

²⁰² *Id.* at 2311 (emphasis in original).

²⁰³ *Id.* at 2318 (Kagan, J. dissenting) (“Our decision there made clear that a provision raising a plaintiff’s costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule”) (citing *Green Tree Fin. Corp. Atl. v. Randolph*, 531 U.S. 79 (2000)).

²⁰⁴ Stone, *supra* note 191, at 179-80.

²⁰⁵ *Id.* at 180.

²⁰⁶ Megan Barnett, *There is Still Hope for the Little Guy: Unconscionability is Still a Defense Against Arbitration Clauses Despite ATT&T v. Conception*, 33 Whittier L. Rev. 651, 651-52 (2012).

²⁰⁷ *Id.* at 659.

²⁰⁸ See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

²⁰⁹ *Doctor’s Assocs., Inc., v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that generally applicable contract defenses such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements consistent with the FAA).

²¹⁰ *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994) (refusing to enforce an entire arbitration clause rather than the specific provisions which limited exemplary damages, attorney fees and the statute of limitations as compelling the surrender of important statutorily mandated rights established under other federal legislation).

²¹¹ EEOC Notice: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997).

²¹² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (observing that “we must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history”).

²¹³ *Id.*

²¹⁴ *Id.* at 637.

²¹⁵ Stone, *supra* note 191, at 180.

²¹⁶ H.R. 2087, 114th Cong. (1st Sess. 2015).

²¹⁷ See Brad Reid, *Fundamental Fairness Reform of Arbitration Agreements is Essential*, Huff. Post Bus. (Jul. 29, 2015).

²¹⁸ See e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1972).

²¹⁹ *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

²²⁰ *Id.* at 499-500.

²²¹ *Ass’n of Data Processing Serv. Orgs., Inc., v. Camp*, 397 U.S. 150, 153 (1970).

²²² *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

²²³ *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

²²⁴ *Havens*, 455 U.S. at 379.

²²⁵ Organizational standing is especially important for enforcement of the Fair Housing Act. See Melissa Robinson, Megan K. Whyte De Vasquez, *Teeth in the Tiger: Organizational Standing as a Critical Component of Fair Housing Enforcement*, 7 DePaul J. Soc. Just. 179 (Spring 2014).

²²⁶ *Warth*, 422 U.S. at 500-01 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973) and *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)).

²²⁷ Michael Waterstone, A New Vision of Public Enforcement, 92 Minn. L. Rev. 434, 443 (2007).

²²⁸ 42 U.S.C. § 3613(a)(1)(A).

²²⁹ 409 U.S. 205, 209 (1972), *declined to follow by* 565 U.S. 170 (2011).

²³⁰ *Id.* at 211.

²³¹ 441 U.S. 91, 109 (1979).

²³² 455 U.S. 363 (1982); See also, *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997).

²³³ *Sierra Club*, 405 U.S. at 738 (1972).

²³⁴ 135 S. Ct. 2507 (2015).

²³⁵ *Warth*, 422 U.S. at 516-17.

²³⁶ 532 U.S. 275 (2001).

²³⁷ The impact of *Sandoval* on disparate impact claims is discussed in Section V, Subsection E (2)(b), *infra*.

²³⁸ *Sandoval*, 532 U.S. at 287 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

²³⁹ 504 U.S. 555 (1992).

²⁴⁰ Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 165 (1992) ("[T]he decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.").

²⁴¹ See, e.g., *Ragin v. MacKlowe Real Estate Co.*, 6 F.3d 898, 903-05 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990).

²⁴² See *Fair Hous. Council v. Montgomery Newspapers*, 141 F.3d 71, 74 (3rd Cir. 1998); *Ass'n for Retarded Citizens v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241 (5th Cir. 1994); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

²⁴³ See *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490, 493-94 (D.Md. 1996); *Saunders v. Gen. Servs. Corp.*, 659 F.Supp. 1042, 1051-52 (E.D. Va. 1986); see also Dash Douglas, *Standing on Shaky Ground Under the Fair Housing Act*, Akron L. Rev. (2001).

²⁴⁴ 562 U.S. 270 (2011).

²⁴⁵ *Id.* at 176.

²⁴⁶ 800 F.3d 1262 (11th Cir. 2015).

²⁴⁷ 742 F.3d 409, 410 (9th Cir. 2014).

²⁴⁸ 532 U.S. 598 (2001).

²⁴⁹ See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

²⁵⁰ See, e.g., *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000) (holding that the closing of a polluting facility did not moot out a claim for civil penalty fees against the polluter, because of the public interest in deterring polluters).

²⁵¹ 461 U.S. 95 (1983).

²⁵² 484 U.S. 305 (1988).

²⁵³ See *Kremens v. Bartley* 431 U.S. 119, 134, n.15 (1977) ("We accordingly decline to pass on the merits of appellees' constitutional claims.").

²⁵⁴ 410 U.S. 113, 124 (1973).

²⁵⁵ See, e.g. *Norman v. Reed*, 502 U.S. 279 (1992).

²⁵⁶ See Shriver Center National Center on Poverty Law, Federal Practice Manual for Legal Aid Attorneys, Section 3.3, <http://federalpracticemanual.org/node/21>.

²⁵⁷ 419 U.S. 393 (1975).

²⁵⁸ 424 U.S. 747 (1976).

²⁵⁹ 445 U.S. 388 (1980).

²⁶⁰ 133 S.Ct. 1523 (2013).

²⁶¹ Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require that Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 Geo. Mason U. Civ. Rts. L.J. 213, 220 (Spring 2011).

²⁶² *Id.* (citing *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004)).

²⁶³ *Id.* at 220-221.

²⁶⁴ *Id.* at 221.

²⁶⁵ Title VII is to eliminate employment discrimination by prohibiting “unlawful employment practices.” This includes discrimination on the basis of race, color, religion, sex or national origin in decisions related to hiring, firing, compensation, the terms, or the conditions or privileges of employment. 42 U.S.C. § 2000e-2(a) (2006). Title VII also prohibits retaliation against employees who oppose unlawful action or participate in the investigation or proceedings related to such claims. 42 U.S.C. § 2000e-3(a) (2006). Otherwise, employers could avoid liability by simply terminating employees who allege discriminatory conduct or seek relief pursuant to Title VII. Some refer to the Title VII prohibition against retaliation for opposing unlawful acts of employment as the “opposition clause,” and the provisions prohibiting retaliation for participation in a Title VII investigating or proceeding as the “participation clause.” See Brandon Wheeler, *Amending Title VII to Safeguard the Viability of Retaliation Claims*, 98 Minn. L. Rev. 775, 777-78 (Dec. 2013).

²⁶⁶ See Equal Employment Opportunity Act of 1972. 42 U.S.C. § 2000e-4(g)(6), 2000e-5(f)(1) (2006).

²⁶⁷ 42 U.S.C. § 2000e-5(b) (2006).

²⁶⁸ Wheeler, *supra* note 265, at 780-81.

²⁶⁹ 42 U.S.C. § 2000e-5(f)(1) (2006). The employee then has 90 days to file a civil lawsuit against the employer.

²⁷⁰ Jordan J. Feist, *Discrimination, Retaliation, and the EEOC: The Circuit Split Over the Administrative Exhaustive Requirement in Title VII Claims*, 118 Penn. St. L. Rev. 169, 173-74 (Summer 2013) (citing *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011); *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1317 (10th Cir. 2005)).

²⁷¹ Wheeler, *supra* note 265, at 778.

²⁷² *Id.* at 782.

²⁷³ *Id.*

²⁷⁴ Macfarlane, *supra* note 261, at 236 (citing *EEOC v. Shell Oil*, 466 U.S. 54, 68 (1984)).

²⁷⁵ Wheeler, *supra* note 265, at 78.

²⁷⁶ Feist, *supra* note 270, at 174 (referencing *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992), *Wentz v. Md. Cas. Co.*, 869 F.2d 1153 (8th Cir. 1989)), *abrogated by* 686 F.3d 847 (8th Cir. 2012).

²⁷⁷ Feist, *supra* note 270, at 174 (citing *Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994) (“when an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge.”).

²⁷⁸ *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

²⁷⁹ *Id.* at 109.

²⁸⁰ *Id.* at 114.

²⁸¹ *Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003) (holding that *Morgan* abrogates the continuing violation doctrine such that retaliation constitutes a separate incident of discrimination requiring exhaustion under Title VII).

²⁸² *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851-52 (8th Cir. 2012) (finding that *Morgan* found that the challenged “practice” cannot refer to an ongoing violation that can endure or recur over time and that retaliation claims are not reasonably related to underlying claims of discrimination).

²⁸³ *Delisle v. Brimfield Twp. Police Dep’t*, 94 F. App’x 247, 254 (6th Cir. 2004) (unpublished).

²⁸⁴ *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 303 (4th Cir. 2009).

²⁸⁵ *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002).

²⁸⁶ Wheeler, *supra* note 265, at 787-88.

²⁸⁷ *Id.* at 800-01.

²⁸⁸ Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts’ Jurisdiction Under the Individuals with Disabilities Education Act: Lessons From the Case Law and Proposals for Congressional Action*, 29 J. Nat’l Ass’n Admin. L. Jud. 349 (Fall 2009); see 20 U.S.C. §§ 1400-1482 (2006).

²⁸⁹ Wasserman, *supra* note 288, at 356 (citing *Honig v. Doe*, 484 U.S. 305, 311 (1988)).

²⁹⁰ 20 U.S.C. § 1415(b)(6)(A) (2006).

²⁹¹ *Id.*

²⁹² *Honig v. Doe*, 484 U.S. 305 (1988).

²⁹³ Wasserman, *supra* note 288, at 360.

²⁹⁴ 20 U.S.C. § 1415(l) 2004 (providing that “before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) [related to administrative exhaustion] shall be exhausted to the same extent as would be required had the action been brought under this part”).

²⁹⁵ Wasserman, *supra* note 288 at 364-65.

²⁹⁶ *Id.* at 366 (referencing *Kutasi v. Las Virgenes Unified Sch. Dist.*, 446 F.3d 1162, 1164-67 (11th Cir. 2007); *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 921 (9th Cir. 2005); *M.G. v. Crisfield*, 547 F. Supp. 2d 399, 413 (D.N.J. 2008)).

²⁹⁷ *Blanchard v. Morton School Dist.*, 509 F.3d 934 (9th Cir. 2007).

²⁹⁸ *K.S. ex rel. C.S. v. R.I. Bd. of Educ.*, 2014 WL 4243619 (D.R.I. Aug. 26, 2014).

²⁹⁹ *J.S. ex rel. N.S. v. Attica Cent. Sch. Dist.*, 386 F.3d 107, 114 (2d Cir. 2004). A claim may be systemic if it implicates the “integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act.” However, a claim is not systemic if it involves a substantive claim related to the components of an individual education program, or if the administrative process is capable of correcting the violation. *Doe v. Ariz. Dep’t of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997).

³⁰⁰ *Marc M. ex rel. Aidan M. v. Dep’t of Educ.*, 762 F. Supp. 2d 1235 (D. Haw. 2011).

³⁰¹ *Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548 (E.D. Pa. 2008) (finding that the state failure to provide a forum where parents could challenge the state’s failure to ensure compliance with the IDEA made exhaustion futile even though the state provided a process to resolve disputes between a parent and local education agencies).

³⁰² *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987).

³⁰³ *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir. 1982).

³⁰⁴ *Hall v. Memphis City Sch.*, 764 F.3d 638 (6th Cir. 2014).

³⁰⁵ *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. 2014).

³⁰⁶ *Jennifer B. v. Chilton Cty. Bd. of Educ.*, 2012 WL 416580 (M.D. Ala. Feb. 7, 2012).

³⁰⁷ Anna Rapa, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. Cooley L. Rev. 263, 266 (Trinity Term 2006) (citing to 141 Cong. Rec. 27,042 (1995) (statement of Sen. Hatch) (explaining that the purpose of the PLRA was to do away with frivolous lawsuits), 141 Cong. Rec. 27,045 (statement of Sen. Kyl) (explaining that the PLRA would prevent federal courts from controlling state institutions)).

³⁰⁸ Rapa, *supra* note 307, at 268.

³⁰⁹ 42 U.S.C. § 1997 (2011).

³¹⁰ *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) (noting that the PLRA strengthened the exhaustion requirement by making it mandatory, even where the relief sought cannot be granted through the administrative process).

³¹¹ Giovanna Shay, *Exhausted*, 24 Fed. Sent. Rptr. 4, 2012 WL 3288692 (Apr. 1, 2012).

³¹² *Id.*

³¹³ *Woodford*, 548 U.S. at 104-05 (Breyer, J. concurring) (identifying a number of well-established exceptions to exhaustion).

³¹⁴ Shay, *supra* note 311, at *289.

³¹⁵ *Id.* at *287-88. The proposed legislation never left conference. In 2010, the ABA proposed Standards on the Treatment of Prisoners that would permit courts to stay proceedings for 90 days if a prisoner had failed to exhaust but did not specifically provide that presentment satisfied this requirement within the statute of limitations.

³¹⁶ Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 Harv. C.R.-C.L. L. Rev. 153 (Winter 2015).

³¹⁷ *Id.* at 157.

³¹⁸ *Id.* at 153.

³¹⁹ *Id.* at 155.

³²⁰ John M. Husband and Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 Colo. Law. 53 (Sept. 2011).

³²¹ *Id.* at 53.

³²² *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546-47 (2011).

³²³ *Id.* at 2551-52.

³²⁴ *Id.* at 2550.

³²⁵ *Id.* at 2551. Under Rule 23 of the Federal Rules of Civil Procedure, plaintiffs may file a class action where they can demonstrate (1) numerosity; (2) commonality of factual or legal questions; (3) typicality of claims and (4) adequacy of representatives to proceed on behalf of the class. A court must also find that either the party opposing certification has either acted or refused to act on grounds generally applicable to the class as a whole so that injunctive or relief is appropriate, or that common questions predominate over individual ones such that a class action is a superior method of adjudicating all of the claims where individual monetary damages are requested. F.R.C.P. 23.

³²⁶ *Wal-Mart*, 131 S. Ct. at 2553.

³²⁷ Lamm, *supra* note 316, at 161.

³²⁸ *Wal-Mart* 131 S. Ct. at 2551.

³²⁹ Michael C. Harper, *Class-Based Adjudication of Title VII Claims in the Age of the Roberts Court*, 95 B.U. L. Rev. 1099, 1110-11 (May 2015).

³³⁰ Lamm, *supra* note 316, at 163.

³³¹ *Id.* (citing *Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 12961 at *13-14 (S.D.N.Y. Jan. 19, 2012) (noting whether plaintiffs can obtain certification depends on facts obtainable in discovery), *aff’d in part, rev’d in part* 877 F. Supp. 2d 113 (July 17, 2012)).

³³² Lamm, *supra* note 316, at 166.

³³³ *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013).

³³⁴ *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).

³³⁵ *Id.*

336 N. Jill Yazii, *The Post-Wal-Mart v. Dukes World: Class Actions with a Twist*, 49 Hous. Law. 38 n.5 (March/April 2012).

337 *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012).

338 Lamm, *supra* note 316, at 171.

339 Harper, *supra* note 329, at 1111-12.

340 Lamm, *supra* note 316, at 171 (citing *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 531 (N.D. Cal. 2012)).

341 *Id.* at 171-72 (citing *Floyd v. City of New York*, 283 F.R.D. 153, 173-74 (S.D.N.Y. 2012)).

342 *DL v. District of Columbia*, 302 F.R.D. 1 (D.D.C. Nov. 8, 2013), *cert. denied*, No. 13-8009, 2014 U.S. App. LEXIS 1919 (D.C. Cir. Jan. 30, 2014).

343 Lamm, *supra* note 316, at 174.

344 Harper, *supra* note 329, at 1111-12 (citing *Gulino v. Bd. of Educ.*, 907 F. Supp. 2d 492 (S.D.N.Y. 2012); *Johnson v. Flakeboard Am. Ltd.*, No. CA 4:11-2607-TLW-KDW, 2012 WL 2237004, at *7 (D.S.C. Mar. 26, 2012); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, (N.C. Cal. 2012)).

345 *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

346 *E.g.*, in a study of employment discrimination cases in federal courts from 1988 through 2003, it was shown that defendants won summary judgment in more than 55% of cases that made it to the summary judgment stage — 18% of cases filed were dismissed on summary judgment, in addition to 19% of cases that were classed as early dismissals. Of the cases that did not settle, only 25% (6% of filed cases) survived to trial, and only a third of the cases tried prevailed at trial (2% of cases filed). Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (2010). A study of appeals of employment discrimination cases over the same period showed that plaintiffs only won 10 per cent of their appeals, while defendants prevailed almost 40 per cent of the time when the employer appealed. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 110 (2009). See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555 (2001); cf. Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. Empirical Legal Stud. 4 (2015).

347 Stephen F. Befort, *An Empirical Examination of Case Outcomes Under The ADA Amendments Act* 70 Wash. & Lee. L. Rev. 2027 (2013).

348 Selmi, *supra* note 346.

349 Reingold, *supra* note 176, at 42 n. 152.

350 U.S. Const., amend, XIV. § 1.

351 Leslie Gielow Jacobs, *Adding Complexity to Confusion and Seeing the Light: Feminist Legal Insights and the Jurisprudence of the Religion Clauses*, 7 Yale J.L. & Feminism 137, 151 (1995). Another way the distinction between formal equality and substantive equality in Equal Protection Clause jurisprudence has been described as “anti-classification” v. “anti-subordination.” Reva B. Siegel, *The American Civil Rights Tradition: Anti-Classification v. Anti-Subordination*, 58 U. Miami L. Rev. 9 (2004).

352 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

353 *Id.* at 2604.

354 *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

355 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

356 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

357 A recent law review article explored both of these trends and concludes that the Supreme Court has essentially equated the Equal Protection Clause with a “color-blindness” standard. Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779 (2012).

358 *Ricci v. DeStefano*, 557 U.S. 557 (2009).

359 *Id.* at 595-96 (Scalia, J., concurring).

360 *City of Boerne v. Flores*, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)).

361 U.S. Const. amend XIV, § 5 and U.S. Const. amend XV, § 2.

362 *United States v. Georgia*, 546 U.S. 151 (2006).

363 *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

364 *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

365 *Alexander v. Sandoval*, 532 U.S. 275 (2001).

366 *Vance v. Ball St. Univ.*, 133 S. Ct. 2434 (2013).

367 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

368 *Washington v. Davis*, 426 U.S. 229, 239, 242 (1976), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.A. J 1981 (West Supp. 1992)). A year later the Court set forth in more detail the factors relevant to proving discriminatory intent, again emphasizing that while discriminatory impact was an important factor to consider, it alone was not enough to prove intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). While *Arlington Heights* is still widely utilized in efforts to prove intent in social justice impact cases, see *infra*, subsequent decisions have increased the difficulty of proving intent in other factual settings. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (discriminatory purpose implies more than intent as volition or intent as awareness of the consequences; it implies that an action was taken “because of” not “in spite of” its adverse consequences on an identifiable group); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting challenge to Georgia’s

death penalty despite in depth evidence of the statistical disproportionate impact of such sentencing on African Americans and of Georgia's long history of willingness to execute African-Americans).

³⁶⁹ 401 U.S. 424 (1971).

³⁷⁰ 422 U.S. 405 (1975).

³⁷¹ 42 U.S.C. § 2000d.

³⁷² *Lau v. Nichols*, 414 U.S. 563, 566 (1974), *abrogated by Alexander v. Sandoval*, 532 U.S. 275 (2001).

³⁷³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Thereafter, in *Guardians Ass'n. v. Civ. Serv. Comm'n of New York City*, 463 U.S. 582 (1983), the Court created some confusion. Justice White's plurality opinion concluded that Bakke had not overruled *Lau*, and that Title VI prohibits unintentional disparate impact discrimination. 463 U.S. at 593. However, Justice Powell's concurring opinion concluded that *Bakke* did overrule *Lau* and that Title VI only prohibited intentional discrimination and was supported by a majority of the Court, 463 U.S. at 610-11. When *Alexander v. Sandoval* was decided nearly twenty years later, the Court stated that it was "beyond dispute" that Title VI prohibited only intentional discrimination, citing Powell's concurring opinion. 532 U.S. at 280.

³⁷⁴ 42 U.S.C. § 2000d-1.

³⁷⁵ See e.g., 28 C.F.R. §42.104(B)(2) (Department of Justice).

³⁷⁶ See *Sandoval*, 532 U.S. at 280, where the Court noted that five justices in *Guardians* had voiced that view. 463 U.S. at 591-92.

³⁷⁷ *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

³⁷⁸ *Sandoval*, 532 U.S. at 293.

³⁷⁹ *S. Camden Citizens in Action v. N. J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 473-84 (D.N.J. 2001).

³⁸⁰ *S. Camden Citizens in Action v. N. J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 776 (3d Cir. 2001).

³⁸¹ One study that did an in depth review of appellate decisions concerning fair housing disparate impact claims showed that (1) plaintiffs have received positive decisions in only 20%, or eighteen of the ninety-two FHA disparate impact claims considered on appeal; (2) although defendants were able to have 83.8% of their positive fair housing disparate impact outcomes affirmed on appeal, plaintiffs were able to hold onto only 33.3% of their positive outcomes; and (3) plaintiffs have been able to reverse only four summary judgments in forty years. Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact?*

An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act, 63 Am. U. L. Rev. 357, no. 2 (2013).

³⁸² See Michael G. Allen, Jamie L. Crook, and John P. Relman, *Assessing HUD'S Disparate Impact Rule: A Practitioner's Perspective*, 49 Harv. C.R.-C.L. L. Rev. 155 (Winter 2014).

³⁸³ *Smith v. City of Jackson*, 544 U.S. 228 (2005).

³⁸⁴ *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 2519-20.

³⁸⁷ *Id.* at 2516.

³⁸⁸ *Id.* at 2525-26.

³⁸⁹ *Id.* at 2522.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 2523.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 2522-24

³⁹⁵ *Id.* at 2523.

³⁹⁶ *Ellis v. City of Minneapolis*, Case No. 0:14-cv-03045-SRN-JJK, Doc. 37 (D. Minn. Aug. 24, 2015).

³⁹⁷ *City of Los Angeles v. Wells Fargo*, Case No. 2:13-cv-09007-ODW-RZ, Doc. 116 (C.D. Cal. July 17, 2015).

³⁹⁸ 52 U.S.C.A. § 10305 (West 2015). Disparate impact cases in the voting rights arena may be brought also under the 14th and 15th Amendments. However, liability for constitutional claims requires a finding of discriminatory purpose, which is not a prerequisite under the Voting Rights Act, although discriminatory purpose may be an independent ground for liability under Section 2 of the VRA. Issues relating to the proof of discriminatory intent claims in voting cases, both constitutional and statutory, will be discussed below.

³⁹⁹ See *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2626 (2013) ("The [Voting Rights] Act has proved immensely successful at redressing racial discrimination and integrating the voting process.").

⁴⁰⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C.A. §§ 10101, 10301 to 10314 (West 2015)).

⁴⁰¹ See *id.* at § 10304.

⁴⁰² *Id.*

⁴⁰³ *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁴⁰⁴ See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113 (2012), *vacated and remanded in consideration of Shelby Cnty., Ala. v. Holder*.

⁴⁰⁵ *Shelby Cnty.*, 133 S. Ct. 2612.

⁴⁰⁶ The *Shelby County* Court ruled that the coverage formula in Section 4(b) of the Voting Rights Act, was unconstitutional, because it was outdated, thereby leaving no jurisdictions subject to Section 5. 133 S. Ct. at 2629.

⁴⁰⁷ The Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that discriminatory purpose was an essential element of any action under Section 2 of the VRA was expressly overridden by Congress in its 1982 amendment to the VRA. "Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." S. Rep. No. 97-417, at 16 (1982). See also *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

⁴⁰⁸ *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 30).

⁴⁰⁹ 478 U.S. at 35.

⁴¹⁰ *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 27) (internal citation omitted).

⁴¹¹ S. Rep. No. 97-417, at 28-29 (1982). The Senate factors include:

1. the "history of official voting-related discrimination in the state or political subdivision";
2. "the extent to which voting in the elections of the state or political subdivision is racially polarized";
3. the extent to which the "state or political subdivision" has used "voting practices or procedures" that tend to "enhance the opportunity for discrimination against the minority group," such as "unusually large election districts, majority-vote requirements," and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the "effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process";
6. the use of "overt or subtle racial appeals" in political campaigns; and
7. "the extent to which members of the minority group have been elected to public office in the jurisdiction."

The Senate Judiciary Committee made clear that the factors listed are not exclusive and that courts could consider additional factors in assessing Section 2 claims.

⁴¹² 768 F.3d 744 (7th Cir. 2014), *cert. denied*.

⁴¹³ *Gingles*, 478 U.S. at 51-52.

⁴¹⁴ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *affirmed in part, vacated in part in Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

⁴¹⁵ Arusha Gordon & Ezra Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21.1 Mich. J. Race & Law – (Fall 2015).

⁴¹⁶ See, e.g., *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990).

⁴¹⁷ See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

⁴¹⁸ *Arlington Heights*, 429 U.S. at 265.

⁴¹⁹ *Garza*, 918 F.2d at 778 n.1 (Kozinski, J., concurring in part and dissenting in part); see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (noting that taking away political opportunity because a minority group is about to exercise it "bears the mark of intentional discrimination that could give rise to an equal protection violation").

⁴²⁰ See *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record . . . so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this.").

⁴²¹ *Lodge*, 458 U.S. at 618.

⁴²² *Arlington Heights*, 429 U.S. at 266-68.

⁴²³ *Veasey*, 71 F. Supp. 3d 627.

⁴²⁴ *Veasey*, 796 F.3d 487.

Notes

1401 New York Avenue, NW, Suite 400
Washington, D.C. 20005
202-662-8600
www.lawyerscommittee.org