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PRIVATE SECTOR ISSUES IN A PUBLIC SECTOR RETRO-LUTION: THE SUPREME COURT'S BUSINESS-RELATED DECISIONS IN THE OCTOBER 1999 TERM

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INTRODUCTION

As is the case with other issues before the Supreme Court this term, business-related issues stand in the shadow of an overarching concern about the Court's revisionist federalism. While many of the contours of the Rehnquist Federalism are somewhat opaque,[1] what is now abundantly clear is that the dominant feature of the Rehnquistian legacy will be a federalism jurisprudence premised on pre-Constitutional, anti-federalist sensibilities – hence a "retro-lution."[2]

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1. In sum, resolution of the business-related preemption cases this term settles relatively little and serves as harbinger for a spate of future legal disputes.

2. *See, e.g.*, Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000), explaining that the developments of Rehnquistian Federalism began in (then) Justice Rehnquist's first two terms when his opinions in three cases signaled strong states' rights proclivities: Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Edelman v. Jordan, 415 U.S. 651 (1974); and Slater Land Co., v. Tulane Lake Basin Water Storage Dist., 410 U.S. 719 (1973). *Id.* at 204. Professor Shane goes on to identify *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled in, *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) as Rehnquist's most important opinion in that period of his tenure of the Court and Professor Shane notes that the *Usery* decision not only rolled back settled law on state sovereignty but also rested on uncertain authority. Professor Shane first explains the holding:

> [In *Usery*] Justice Rehnquist announced that states could henceforth not be subjected even to Commerce Clause legislation that would be valid if applied to private parties, if such legislation: (1) purposed to regulate the 'States qua States'; (2) would 'displace the states' freedom to structure integral operations in areas of traditional governmental functions'; and (3) was not justified by an exceptionally strong federal interest that overbalanced the States' interest in autonomy.

Id. at 204-205 (citations omitted).

Professor Shane, then, analyzes the holding:

> Justice Rehnquist's opinion was elusive on the source of this principle; although he mentioned the Tenth Amendment, he hardly discussed it. He seemed instead to rest on a background understanding of state sovereignty from late Eighteenth Century political thought, a version of state sovereignty that could not be impaired by federal legislation. Unfortunately for his thesis, the late Eighteenth Century political thought most consistent with Rehnquist's view of state sovereignty belonged to the Anti-Federalist's, for whom the Constitution was a significant political defeat precisely because it did not embody their

And, in those cases where business-related issues implicated federalism concerns, the Court often opted to pull the case within the orbit of its evolving doctrines.[3] In other respects, the Supreme Court decisions that impacted the business community in the October 1999 term were consistent with the Court's posture in previous terms: pragmatic, moderately pro-business[4] and inclined to apply traditional rules of statutory construction, rather than theoretical constructs[5] to resolution of the issues. On balance, it was a term characterized by clarification and fine-tuning of existing doctrine either by building on recent precedent[6] or by resolving Circuit Court disputes.[7]

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political philosophy.

Id. at 205 (citations omitted).

But see, Steven G. Calebresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH L. REV. 752 (1995) applauding the body of Supreme Court cases that have explicated Rehnquistian Federalism since *Usery*. As of the date of that article, 1995, those cases included, *New York v. United States*, 505 U.S. 144 (1992) (provision in Low-Level Radioactive Waste Policy Amendments Act violated Tenth Amendment by exceeding Article I powers); and *United States v. Lopez*, 514 U.S. 549 (1995) (Gun - Free School Zones Act exceeded Congressional Commerce Clause power) Judge Calabresi praised the *Lopez* decisions as a "shattering" "the notion that, after fifty years of Commerce Clause precedent, we can never go back to the days of limited national power." *Id.* at 752. In a subsequent article, Steven G. Calabresi, *Textualism and the Counter Majoritarian Difficulty*, 66 GEO. WASH L. REV. 1373, 1379-80 (1998) Calabresi celebrated the addition of new case law to the evolving jurisprudence and located its doctrinal roots, not in Anti-Federalist precepts but in pre-1937 case law:

> Commenting on the post-Lopez cases of *Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act exceeded Congressional authority under Section 5 of the 14th Amendment.); Seminole Tribe v. Florida 517 U.S. 44 (1996) (Congress couldn't abrogate states' 11th Amendment immunity to being sued in federal court in the Indian Gaming Regulatory Act.) and *Printz v. United States*, 521 U.S. 898 (1997) (provision in Brady Handgun Violence Prevention Act exceeds reach of Article I and is inconsistent with separation of powers and federalism precepts), Judge Calabresi opined, "[T]he U.S. Supreme Court is again policing textually-provided for structural jurisdictional lines in a way that has not occurred in this country since before 1937." *Id., quoted in*, Stevens, *supra* note 1 n.38.

Professor Shane concurs that Rehnquistian Federalism harkens back to pre-1937, concepts, calling this rebirth an "Old Deal" but he views it as somewhat less salubrious and beneficent:

> Since Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (overturning Usery), the Court has launched into a three-pronged attack on congressional regulatory power that goes well beyond the scope of Usery and suggests at least a potential return to what I would call the 'Old Deal' with regard to the Court's treatment of federalism. Under the Old Deal, the Court prior to 1937 had shown itself willing in the name of federalism to second-guess the justifiability of national legislation and to impose categorical limits on Congress' capacity to control interstate commerce.

Either way, the Rehnquistian Federalism amounts to a doctrinal Retro-lution, the reach and ramifications of which are still unclear.

3. *See infra* notes 235-252 and accompanying text. *But see infra* notes 59-73 and accompanying text.

4. See generally, Barbara K. Bucholtz, Taking Care of Business: A Review of Busness-Related Cases in the 1995-1996 Supreme Court Term., 32 TULSA L. J. 449 (1997).

5. See generally, Barbara K. Bucholtz, Sticking to Business: A Review of Business-Related Cases in the 1997-1998 Supreme Court Term, 34 TULSA L. J. 207 (1999).

6. *See, e.g., infra* notes 8-33 and accompanying text.

7. *See, e.g., infra* notes 135-143 and accompanying text. *See also*, Appendices A & B following this article.

GOVERNMENT CONTRACTS

The business community, especially in the "Oil Patch," had much to celebrate with the signal decision this term involving the private sector's contractual dealings with the federal government. In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[8] the Court ordered the federal government to pay Mobil Oil Exploration and Marathon Oil[9] restitution of $156 million for breaching its commitment to the oil companies under certain lease contracts. That breach, said the Court, substantially impaired the value of the contracts to the companies. Here is a clear example of the evolution and clarification of doctrine: the Court building on its recent precedent. In this instance, the precedent was *United States v. Winstar Corp.*[10] *Mobil* builds on *Winstar* in several respects. First, it reinforces and expands the concept of treating the federal government as party to a contract like any other contracting party: by applying settled contract rules to the facts of the case.[11] Second, it reinforces *Winstar's* holding that, in the absence of express contractual language to the contrary,[12]where the federal government contracts with a private party, the federal government bears the risk of legislative changes that significantly impair the bargained-for benefit to the private party.[13] And, finally, *Mobil* reinforces the doctrinal stability of those propositions by garnering an 8-1 majority, in contradistinction to *Winstar's* mere plurality.[14]

Recall that *Winstar* concerned three financial institutions that contracted with the federal government to participate in "supervisory mergers" with failing thrift institutions during the savings & loan crisis of the 1980's.[15] Under these contractual arrangements, certain healthy institutions agreed to become burdened with the assumption of failed thrifts' liabilities and, in exchange, the federal government, under the auspices of the Federal Savings and Loan Insurance Corporation (FSLIC), agreed to grant the healthy thrifts beneficial accounting treatment in the form of "supervisory good will" which the healthy institutions could count toward their reserve requirements and amortize over a maximum 40 year period.[16] That inducement to acquire failed thrifts, "supervisory goodwill," was eliminated by subsequent legislation: the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) which, *inter alia*, imposed uniform capital standards on all thrifts. This standard includes a minimum core capital of "3 percent of the savings association's total assets."[17] Further, they

8. Mobile Oil Exploration and Producing Southeast, Inc., v. United States, 120 S. Ct. 2423 (2000).
9. Marathon's case, No. 99-253, was consolidated with Mobil's case.
10. Unites States v. Winstar Corp., 518 U.S. 839 (1996) (plurality opinion).
11. *Mobil Oil*, 120 S. Ct. 2423. *Cf. Winstar*, 518 U.S. 839.
12. *See Winstar*, 116 S. Ct. at 2452-53. *Cf. Mobil*, 120 S. Ct. 2423.
13. *See Winstar*, 116 S. Ct. at 2452. *Cf. Mobil*, 120 S. Ct. 2423.
14. *Winstar*, 116 S. Ct. at 2440. (However, a seven member majority agreed the federal government was liable for damages under the same rules that a private breaching party would be).
15. *Id.* at 2442.
16. *See id.* at 2443-44 (internal footnotes omitted).
17. FIRREA, Pub. L. No. 101-73, 103 Stat. 183, section 1464 (t)(2)(A).

defined "core capital" to exclude goodwill.[18]

The financial institutions that lost their "supervisory goodwill" under these provisions of FIRREA[19] argued the provisions barred the government from meeting its obligations under the contracts; therefore, the government was liable in damages for breach of contract. The *Winstar* plurality agreed.[20] In so doing, it rejected the government's attempt to cast the case as implicating the sovereign acts doctrine,[21] finding that where, as in the legislative history of FIRREA, it is apparent that a substantial legislative purpose was to release the government from its obligations under the supervisory mergers,[22] the sovereign acts defense is not available. Applying general principles of contract law, Justice Souter concluded that the government bargained with respect to the risk allocation and bore the burden of liability for breach.[23]

Similarly, in *Mobil*, the private contracting parties paid the federal government roughly $158 million in exchange for 10-year renewable lease contracts which permitted exploration for and development of oil off the coast of North Carolina subject to compliance with a variety of environmentally friendly laws and regulations. These laws required the approval of the state in any Exploration Plan, but permitted a federal override of any state refusal to acquiesce.[24] During the compliance process, but before the Exploration Plan was submitted to North Carolina, the Outer Banks Protection Act (OBPA) became effective. Among other provisions, it prohibited the federal government from approving any Exploration Plan until certain new OBPA procedures had been followed. Thus, when North Carolina refused to acquiesce in the companies' Exploration Plans, the Secretary of Commerce, citing the OBPA, refused to override.[25] The companies sued, alleging breach of contract and the Supreme Court, in a resounding 8-1 decision agreed.

First, it reaffirmed basic principles relied upon in *Winstar*, "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[26] Specifically, the Court applied the following traditional common law rules: 1)

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18. *See id.* at 1464(t)(9)(A). (There was, however, a "transition rule" at §1464(t)(3)(A) which partially recognized supervisory goodwill for a 6-year period).

19. *See Winstar*, 116 S. Ct. at 2446.

20. *Id.* at 2440.

21. *See generally*, Horowitz v. United States, 267 U.S. 458 (1925) (explaining the doctrine in the following manner: "[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign"). Justice Souter explained the doctrine this way in *Winstar*: "Hence, governmental action will not be held against the government . . . so long as the action's impact upon public contracts is, as in *Horowitz*, merely incidental to the accomplishment of a broader governmental objective." *Winstar*, 116 S. Ct. at 2466.

22. *See Winstar*, 116 S. Ct. at 2467-69.

23. *See id.* at 2471.

24. *See* Mobile Oil Exploration and Producing Southeast, Inc., v. United States, 120 S. Ct. 2423 (2000).

25. *See id.* at 2431.

26. *Id.* at 2428 (*quoting Winstar*, 116 S. Ct. 2432).

"when one party to a contract repudiates that contract, the other party 'is entitled to restitution for any benefit conferred on' the repudiating party 'by way of part performance or reliance;'"[27] 2) "Repudiation is a 'statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach;'"[28] and 3) "'total breach' is a breach that 'so substantially impairs the value of the contract to the injured party... to allow him to recover damages....'"[29] Paraphrasing the Court's application of these contract principles to the case, the Court found that when the federal government said it would break a contractual promise to the oil companies that would have the effect of substantially impairing the value of the contract to them, then - because they did not waive a right to restitution – the oil companies are entitled to it.[30]

Following *Winstar* and *Mobil Oil*, there is no doubt that common law contract precepts will dominate the analysis of future government contracts with private parties. Three caveats, however, are in order. First, the Court was quick to emphasize that the federal government, like any private contracting party, is free to bargain for a shift of risk. Therefore, private parties can anticipate the development of stock provisions in government contracts, which limit the government's exposure to the restitution liability it faced in *Mobil Oil*.[31] Second, it would be a mistake to assume that contract law will apply across-the-board and in all respects. Recall, for example, that the government is not compelled to pay interest on a damage award.[32] And, finally notice how critical the restitution award is in *Mobil Oil*, and in similar cases where actual damages may not be available. In *Mobil Oil*, for example, the oil companies would have had a significant evidentiary problem in proving actual damages because they could not show that but for the government's breach they would have been permitted to drill.[33] Proving that the government breach was material, thus entitling the private party to restitution, will become the critical linchpin in similar cases.

ENVIRONMENTAL LAW

Three environmental cases graced the Court's docket this term, presenting interesting, if not momentous, developments of doctrine that had been framed in prior cases.[34]

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27. *Id.* (*quoting* RESTATEMENT (SECOND) OF CONTRACTS § 250 (1979)).
28. *Id.* (*quoting* RESTATEMENT (SECOND) OF CONTRACTS § 250 (1979)).
29. *Id.* (*quoting* RESTATEMENT (SECOND) OF CONTRACTS § 243 (1979)).
30. *Mobil Oil*, 120 S. Ct. at 2423.
31. *See, e.g.*, Harvey Berkman, *Government Liability Upheld*, NAT'L L.J., July 10, 2000, at B1, col. 1 (*citing* Professor Joshua I. Schwartz for the insightful comparison with government procurement contracts, "Procurement contracts are down to a science, containing standard clauses that embody the collective wisdom of all mistakes made in the past century") (internal citations omitted).
32. *See id.*
33. *See* Berkman, *supra* note 31 (citing E. Edward Bruce at B4 col. 3).
34. Arguably, there were four cases dealing with regulation of conduct in an attempt to protect the environment. The fourth case, *United States v. Locke*, 120 S. Ct. 1135 (2000), is analyzed as a preemption case. *See infra* notes 279-96 and accompanying text.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, [35] the Court further delineated its views on the threshold issues of standing and mootness. Two terms ago, the Court declared in *Steel Co. v. Citizens for a Better Environment* [36] that a citizen suit provision does not confer standing on a private citizen to litigate violations of an environmental statute when those violations are entirely past violations and there is no evidence that they are either continuing at the commencement of the lawsuit or could continue in the future if not forestalled.[37] The Fourth Circuit attempted to extend that holding in *Friends of the Earth.* The Circuit ruled that even if the private litigants had standing at the commencement of the action, they lost standing when the case became moot. Mootness occurred after the defendant reached a settlement with the state agency which had charged the defendant with violating the terms of its discharge permit (a National Pollutant Discharge Elimination System [NPDES] permit). The Supreme Court found that the Fourth Circuit had misconstrued the Supreme Court's holding in *Steel Co.* and had mistakenly "conflated" its initial *standing* analysis in *Steel Co.* with post-commencement *mootness* issues also discussed in *Steel Co.* and other cases.[38]

Writing for the majority, Justice Ginsburg explained that while both threshold issues are rooted in Article III, Section 2 case-or-controversy considerations, standing analysis differs significantly from mootness analysis.[39] First, the Court considered the standing issue. In 1992, environmental groups sued Laidlaw Environmental Services for repeatedly exceeding the limits of its discharge permit (NPDES permit) under the provisions of the Clean Water Act (Federal Water Pollution Control Act).[40] Laidlaw's water waste treatment plant discharged several pollutants, including mercury.[41] After the environmental citizens groups notified Laidlaw of their intent to sue,[42] Laidlaw asked the state agency to preclude the citizen suit by filing suit first. The state agency obliged, Laidlaw's lawyer drafted the requisite filing documents on behalf of the agency, the agency commenced suit and, shortly thereafter, reached an out-of-court settlement with Laidlaw.[43] The environmental groups brought suit, following expiration of the statutory notification period. The District Court held that the groups had standing to sue; that the state agency settlement in the prior litigation did not preclude the action; and that Laidlaw, in fact, had continued to exceed its permit pollution discharge limitations during the pendency of both actions and

35. Friends of the Earth, Inc. v. Laidlaw Envtl. Services Inc., 120 S. Ct. 693 (2000).

36. Steel Co. v. Citizens for a Better Env't., 523 U.S. 83 (1998).

37. *Id.*

38. *See Friends of the Earth,* 120 S. Ct. at 699 (citing as an example of its post-commencement mootness analysis, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 285 (1982)).

39. *See id.* at 703.

40. 86 Stat. 816, as amended 33 U.S.C. § 1251 et seq. Section 402 of the Act covers the issuance of an NPDES permit; § 505 of the Act is the citizen suit provision.

41. *See Friends of the Earth,* 120 S. Ct. at 700.

42. As was required by Section 505(a) of the Act.

43. *See Friends of the Earth,* 120 S. Ct. 693.

had profited thereby in an amount exceeding one million dollars.[44] Nevertheless, the District Court found that a civil penalty of less than half that amount was adequate in light of Laidlaw's concomitant obligation to pay the environmental groups' costs and attorney fees.[45] The Fourth Circuit vacated that decision and remanded the case with instructions to dismiss on the grounds identified above that, pursuant to *Steel Co.:* Laidlaw's compliance with the law after suit was filed mooted the claims.[46] The Circuit also opined that the case was moot because the environmental groups lost the right to a redressable injury and, thus, lost standing by virtue of the fact that "the only remedy available . . . civil penalties payable to the government . . . would not redress . . . [any injuries of the environmental groups]."[47] The Circuit added that the groups had failed to obtain relief on the merits of the claim and, thus, were not prevailing parties for purposes of recouping litigation expenses.[48] The Supreme Court rejected the Circuit's analysis finding: that the environmental groups had satisfied Article III's standing requirements as delineated under the *Lujan*[49] 3-pronged test for ascertaining injury-in-fact to the plaintiffs.[50] The test requires an injury 1) that is concrete and specific; as well as, actual or imminent; 2) "fairly traceable" to defendant's conduct; 3)and likely to be redressed by a favorable ruling.[51] Second, it made clear the citizen groups had standing to seek civil penalties on behalf of the government. And in that regard, the Court alluded to Congressional findings that civil penalties deter future violations.[52] Third , it rejected the dissent's argument that it is the availability of civil penalties, rather than their imposition that deters future misconduct. Availability without actual imposition can become a hollow threat, suggested the majority.[53] Finally, the Court distinguished the facts in *Steel Co.*, where the violations were found to be entirely in the past, (hence citizens groups lacked standing to sue), from the instant case, where the incidence and threat of future violations established citizen group standing.[54]

Turning to the mootness issue, the Court, again, distinguished *Steel Co.* and stated that where, as here, the record indicates a reasonable expectation that defendant's misconduct could recur, defendant's voluntary compliance with the law during the litigation process does not moot the case.[55] Rather, voluntary compliance alone creates a "formidable burden" on the defendant to show the

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44. *See id.*
45. *See id.* at 703.
46. *See id.*
47. *Id.* (citations omitted).
48. *See id.*
49. Lujan v. Defenders of Wild Life, 504 U.S. 555, 560-561 (1992).
50. The Court emphasized that it was injury to plaintiff - membership, not as Laidlaw had asserted, injury to the environment that plaintiffs must demonstrate. *See Friends of the Earth,* 120 S. Ct. at 704.
51. *See Friends of the Earth, 120 S. Ct. at* 704 (citing 504 U.S. 555).
52. *See id.* at 706 (citing precedent, including *Hudson v. United States,* 522 U.S. 93, 102 (1997) and *Tull v. United States,* 412 422-423 (1987)).
53. *See id.*
54. *See id.* at 707.
55. *See id.* at 708-09. In so doing, the Court rejected ambiguous language in precedent characterizing mootness as analytically equivalent to "standing set in a time frame." *Id.* at 709.

alleged misconduct "could not reasonably be expected to recur."[56] *Friends of the Earth* provides important clarifications to standing and mootness doctrines and resolves some of the ambiguities that troubled the concurring justices in *Steel Co.* *Steel Co.* presented two issues: did the citizen suit provision in the statute at issue create citizen standing for entirely past violations of the statute and, if yes, did the citizen group (again, an environmental advocacy group) have Article III standing.[57] Because the case could have been resolved by analyzing the first question alone, the concurring justices found Justice Scalia's address of the Constitutional issue ill-advised.[58]

The *Steel Co.* standing issue was raised in another suit this past term which also implicated environmental issues. In *Vermont Agency of Natural Resources v. United States,* [59] a former employee of the state agency brought a qui tam action on behalf of the federal government alleging that the agency had submitted false claims to the Environmental Protection Agency (EPA) in connection with its grant programs.[60] One threshold issue and two issues on the merits were raised on certiorari to the Court.

First, the threshold issue of standing: did the employee-relator, have standing to sue on behalf of the EPA under the False Claims Act.[61] Citing *Steel Co.* and applying *Lujan's* [62] 3-pronged test,[63] the Court found that the employee-relator met the first prong of the test under a "representational standing" theory akin to standing in assignor-assignee and subrogor-subrogee contexts.[64] The injury-in-fact inflicted on the federal government by the false claims conferred standing on the employee-relator as a "partial assignee of the United States."[65] This extension of the representational standing doctrine to qui tam suits clarifies the Court's statement in *Steel Co.* that an interest in the mere "by product" of the suit (in *Steel Co.*, the Court was referring to the litigation costs reimbursement sought by the advocacy litigants) is insufficiently related to an injury in fact to confer standing.[66]

Having resolved the threshold issue of standing, the Court turned to the questions raised on the merits under the False Claims Act: was a state included in the class of "persons" who could be sued? And, if so, did the Act run afoul of 11th Amendment immunity considerations? Perhaps chastened by the results of his

56. *Id.* (citations omitted).

57. *See, e.g.*, Steel Co. v. Citizens for a Better Env't., 118 S. Ct. 1003, 1021 (1998). (Stevens, J., concurring).

58. *See id.* (Breyer, J., concurring).

59. Vermont Agency of Natural Resources v. United States, 120 S. Ct. 1858 (2000).

60. *Id.* at 1860.

61. *See* 31 U.S.C. §§ 3729-3733 (1994).

62. *See supra* note 36 as clarified by *Friends of the Earth*, 120 S. Ct. 693.

63. *See supra* notes 49-51 and accompanying text.

64. *See Vermont Agency*, 120 S. Ct. at 1863.

65. *Id.*

66. *See* Steel Co. v. Citizens for a Better Env't., 523 U.S. 83 (1998). The Court in *Vermont Agency* confirmed this standing analysis by reference to a tradition of *qui tam* actions as they evolved in England and were brought to the Colonies. *See Vermont Agency*, 120 S. Ct. at 1863-65.

analytical overreaching in *Steel Co.*,[67] Justice Scalia applied the presumption that statutorily-designated class of "persons," like the relevant class in the False Claims Act,[68] does not include the government. Justice Scalia found that the legislative history of the Act,[69]along with its provision for punitive damage awards, was inconsistent with statutes sanctioning government wrongdoing.[70] He found that an express exclusion of states as "persons" in a parallel statute ("sister scheme"), the Program Fraud Civil Remedies Act,[71] also supported the presumption that Congress did not intend that states be included in the term "persons." Because the state of Vermont was not a "person" for purposes of the Act, Justice Scalia was free to avoid the 11th Amendment issue but he could not resist a pointed constitutional aside: "[W]e of course express no view on the question whether an action in federal court by a qui tam relator against a state would run afoul of the Eleventh Amendment, but we note that there is 'serious doubt' on that score."[72]

And, just as Justice Scalia could not resist a sidebar comment on a Constitutional issue analytically unnecessary for the decision, so Justice Stevens in his dissenting opinion could not resist the opportunity, having decided that the majority's statutory analysis was in error, to reach the 11th Amendment issue and to condemn the plurality's burgeoning 11th Amendment analysis in toto: "I adhere to the view that *Seminole Tribe* . . . was wrongly decided."[73] Thus, even with regard to a clearly-defined textual issue of statutory interpretation, resting on a panoply of traditional canons of statutory construction, the overriding concern of this Court with the larger federalism issues is evident.

The third case on the docket implicating environmental concerns was *Public Land Council v. Babbitt.*[74] At issue were Department of Interior regulations promulgated under the Taylor Grazing Act of 1934[75] with respect to grazing rights on Western public lands. Several trade organizations representing ranching businesses challenged 1995 amendments to the existing regulations as exceeding the agency's authority under the Act. Specifically, the advocacy groups challenged new "grazing preference" regulations which undermined ranchers' expectations about their grazing rights and would, they argued, discourage lenders from taking future mortgages on ranching operations.[76] The advocacy group also challenged an amended regulation that no longer required grazing permittees to "be engaged in the livestock business." This amendment, the challengers argued, was part of a plot to eliminate grazing on public lands.[77] And the third challenge

67. *See Vermont Agency,* 120 S. Ct. at 1865. Justice Scalia's exegesis on considering jurisdictional issues first, a question that preoccupied him in *Steel Co.*

68. *See* 31 U.S.C. § 3729(a) (1994).

69. *See Vermont Agency,* 120 S. Ct. at 1867-68.

70. *See id.* at 1869.

71. *See id.* at 1870.

72. *Id.*

73. *Id.* at 1877 (Stevens, J., dissenting).

74. Public Land Council v. Babbit, 120 S. Ct. 1815 (2000).

75. 43 U.S.C. § 315 et seq. (1994).

76. *See Public Land Council,* 120 S. Ct. at 1822.

77. *See id.* at 1825-26.

was to a 1995 regulation conferring federal government title to all future permanent improvements on public grazing lands.[78] Using traditional rules of statutory construction,[79] a unanimous Court found all three regulations to be well-within the regulatory authority of the agency under the Act and consistent with Congressional objectives reasonably to safeguard grazing privileges while "preventing overgrazing and soil deterioration [and] provid[ing] for... orderly use, improvement and development of the public range."[80]

TAXATION

In another unanimous decision, the Court in *Hunt-Wesson* a case reminiscent of *Allied-Signal, Inc.*,[81] held that while a state may tax a ratable share of the "unitary income" of nondomiciliary corporations, it may not tax the nonunitary business enterprise of a nondomiciliary.[82] To do so, said the Court violates the Due Process and Commerce Clause requirements of a minimum nexus between interstate business activities and the State imposing the tax. In *Hunt-Wesson*, the tax at issue was in fact, an exception to the general business expenses deduction from gross income under California's taxing system.[83] The system permitted multi-state corporations to deduct interest cost but only the amount that exceeded the nondomicilary's income from nonunitary businesses unrelated to its California operations. In other words, income that California could otherwise not tax.[84] Justice Breyer writing for the Court, directed California legislators to ratio-based formulas used by other taxing jurisdictions for making a reasonable attribution, not an across-the-board inclusion, of nonunitary income to unitary business enterprises.[85]

The other tax case this term that impacts business interests identified the date on which estimated income and withholding taxes are "paid" for purposes of ascertaining whether taxpayer's payment was timely and therefore entitled him to overpayment credit on tax obligations.[86] In the case of *Baral v. U.S.*, taxpayer remitted estimated tax payments for his 1988 tax year in addition to the withholding tax attributable to the employer. However, he did not file a return or his claim of overpayment until nearly 4 years later. The Service rejected his overpayment credit claim on the grounds that no payment was made during the (roughly) 3-year "look-back" period prescribed by statute.[87] The Court agreed with the Service that estimated and withholding taxes are deemed "paid" on the

78. *See id.* at 1826.
79. *See id.*
80. *Id.* at 1823.
81. Allied-Signal, Inc. v. Directors, Division of Taxation, 504 U.S. 768, 772 (1992).
82. Hunt-Wesson, Inc. v. Franchise Tax Board of California, 120 S. Ct. 1022 (2000).
83. *Id.* at 1025.
84. *See id.* at 1024-26.
85. *See id.* at 1028.
86. Baral v. United States, 120 S. Ct. 1006 (2000).
87. *See id.* at 1007-08.

closing date of the relevant taxable year (in this case, April 15, 1989),[88] rather than when the Service assesses tax liability (when the taxpayer files his return).[89]

BANKRUPTCY

The Court expeditiously resolved two bankruptcy cases last term. In *Hartford Underwriters Insurance Co. v. Union Planters Bank*[90] a unanimous Court used the "plain meaning" rule in interpreting the Code to preclude administrative costs to be charged against unrelated secured claims. In *Hartford*, the bankrupt corporation first filed for Chapter 11 status and during the attempted reorganization, it obtained workers' compensation insurance from Hartford. When the reorganization failed and the case was converted to a Chapter 7 liquidation, Hartford attempted to charge the unpaid premiums of the policy to Union Planters, a secured creditor.[91] Using plain meaning analysis, the Court declared that 11 U.S.C. §§ 503(b) and (c) do not give administrative costs a priority over secured claims.[92]

In the other bankruptcy case, *Raleigh v. Illinois Dept. of Revenue*,[93] the Court relied on the well-established rule that in bankruptcy proceedings, the state law which created the underlying substantive claim governs those claims.[94] In *Raleigh* the underlying state claim was created by Illinois tax law. The case arose in connection with the lease-purchase agreement under which a corporation, Chandler Enterprises, purchased an airplane. Illinois tax law provides that if the seller does not remit the sales tax on the transaction then the buyer is obligated to pay it, or in default of payment, the obligation devolves personally to "any corporate officer... who willfully fails to file the return...."[95] The burden of both production and persuasion also devolves to the officer.[96] The Circuits have been deeply divided over whether the general rule applying state substantive law to state claims in bankruptcy also includes state allocation of the burden of proof.[97] The Court expressly granted certification to resolve the division; it concluded that because "the burden of proof is an essential element of the claim itself" state substantive law includes allocations of burdens of proof.[98]

PATENT/TRADEMARK

An important patent case this term dealt with the growing trade in "knock-

88. *See id.* at 1008. *See also* §§ 6513(b)(1) and (2) of the I.R.C.
89. The taxpayer relied on the Fifth Circuit for this interpretation. *See*, Ford v. United States, 618 F. 2d 357, 360-61 n.4 (1980). The Court took the case to resolve a split in the circuits.
90. Hartford Underwriters Insurance Co. v. Union Planters Bank, 120 S. Ct. 1942 (2000).
91. *See id.* at 1945-46.
92. *See id.* at 1946-47.
93. Raleigh v. Illinois Dept. of Revenue, 120 S. Ct. 1951 (2000).
94. *Id.* at 1952.
95. *Id.* at 1953.
96. *See id.* at 1954 (citing Branson v. Dept. of Revenue, 659 N.E.2d 961, 966-68 (Ill. 1995)).
97. *See id.* at 1955.
98. *Id.*

off copies" of protected intellectual property. *Wal-mart Stores, Inc. v. Samara Bros., Inc.*,[99] raised a statutory construction issue under the Lanham Act.[100] Under contract, a producer of clothing supplied Wal-Mart with a line of children's clothes that intentionally copied the design of an upscale designer/producer ("knock-offs").[101] The designer/producer, Samara, sued alleging, *inter alia*, unregistered trade dress infringement. Samara prevailed at trial. Wal-Mart challenged the verdict on the grounds that the clothing was insufficiently distinctive to entitle it to trade dress coverage. Section 43(a) of the Lanham Act, as construed by case law, protects "trade dress" - a class which includes not only labeling and packaging but also design, where the trade dress is sufficiently distinctive so that a knock-off would be likely to create consumer confusion.[102] Trade dress can be distinctive either because it is "inherently distinctive" (the trade dress is universally associated with the product, as in, for example, Camel cigarettes)[103] or distinctive in the sense that it has acquired a "secondary meaning" for consumers, which identifies the producer of the product for them (rather than inherently linking the trade dress to the product itself)[104] and, it was this latter category of "secondary meaning" that framed the trade dress issue in this case.[105] Product-design trade dress, like the children's clothing line developed by Samara, can only have Langham Act protection if the designer/producer can demonstrate the "secondary meaning" association for consumers - a fact-intensive proof problem.

Applying this statutory framework to the case required a reversal of the Second Circuit's affirmance of the plaintiff's verdict as a matter of law and a remand for development of a record on the issue of whether Samara's product-design had acquired the requisite "secondary meaning."[106] The Supreme Court's imposition of a fact-specific determination in this case is certainly good news for knock-off producers of designer clothes.

The only other patent case to come before the Court this term is more properly classified as a civil practice case.

CIVIL PRACTICE

In *Nelson v. Adams, Inc.*,[107] a licensee company sued Adams, Inc. for patent

99. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 120 S. Ct. 1339 (2000).

100. Lanham Trademark Act of 1946, *See, esp.*, 15 U.S.C. §§ 2, 43, 45, 1127, 1052, 1114, 1057, 1065, 1125.

101. *See Wal-Mart*, 120 S. Ct. at 1341.

102. *See id.* The Court specifically stated that while § 43 (a) does not expressly require that the trade-dress be "distinctive" courts have, without exception, imposed a showing of distinctiveness as an unavoidable predicate to demonstrating the confusion identified at § 43(a).

103. *See id.* at 1343.

104. *See id.* The Court demonstrated that this case law categorization between the two kinds of "distinctiveness" finds support in the Lanham Act at § 2. "Section 2 required that registration be granted to any trademark 'by which the goods of the applicant may be distinguished from the goods of others . . . .'" *Id.*

105. The Court opined that clothing design, at issue in *Wal-Mart* is not inherently distinctive; hence, to be protected the trade-dessing must identify the designer/producer in the public's mind.

106. *Wal-Mart*, 120 S. Ct. at 1345.

107. Nelson v. Adams, Inc., 120 S. Ct. 1579 (2000).

infringement. The trial court dismissed the suit and awarded litigation expenses to the defendant, Adams, Inc. Fearing that the losing party, the licensee company, would be unable to pay the award, Adams moved to amend under Rule 15 to add the licensee's sole shareholder, individually, and under Rule 59(e) to include the shareholder as a judgment defendant. The trial court granted the motions and that judgment was affirmed by the Federal Circuit.[108] A unanimous Supreme Court reversed. Writing for the Court, Justice Ginsburg summarily explained that the lower courts' decisions short-circuited adequate procedural safeguards of due notice and the opportunity to be heard.[109] The case was reversed and remanded to afford the shareholder an adequate hearing.[110]

A more far-reaching resolution was reached in *Weisgram v. Marley Co.*,[111] surely the Court's most important civil practice case in the 1999 term. Proving, again, that its *Daubert*[112] precedent has real teeth, a unanimous Court fine-tuned *Daubert* to hold, in *Weisgram*, that where a favorable verdict was reached on the basis of unreliable expert testimony, subsequently found inadmissible, then - in the proper case - a court may enter judgment for the opposing party without further proceedings on the merits.[113] *Weisgram* was a products liability case in which decedent's estate alleged that a residential fire was caused by a defective electric heater. The estate proffered the testimony of three alleged experts in support of the claim. Defendant manufacturer objected, unsuccessfully, on the basis that Federal Rules of Evidence 702, as explicated by *Daubert*, rendered the expert testimony inadmissible. The trial court overruled defendant's *Daubert* objections each time they were raised: pre-trial, during trial and post-trial. The Eighth Circuit reversed, finding the expert testimony speculative and unscientific. It found the remaining evidence against defendant insufficient to support the estate's verdict and directed judgment for the defendant.[114] Because of a split in the circuits on the issue of whether Fed. R. Civ. P. 50 permits a directed verdict in this context, the Court granted certification and ruled that *Weisgram* was an appropriate case for a Rule 50 directed judgment as a matter of law.[115] Where, as here, the Court said, the verdict winner has notice of a substantial challenge to the probative strength of his expert witness testimony, it behooves him to buttress that testimony with supplementary evidence during trial.[116] Moreover, said the Court, since *Daubert* "parties relying on expert evidence have had notice of exacting standards of reliability such evidence must meet."[117]

Business litigants now have a substantial body of law on the issue of expert

108. *See id.* at 1580-83.
109. *See id.* at 1583-85.
110. *See id.* at 1586-87.
111. Weisgram v. Marley Co., 120 S. Ct. 1011 (2000).
112. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
113. *Weisgram*, 120 S. Ct. 1011 (2000).
114. *See id.* at 1015-16.
115. *Id.*
116. *See id.* at 1020.
117. *Id.*

witnesses. In rapid succession, cases have developed this new evidentiary doctrine. Beginning with *Daubert*, the Court declared that the trial court's duty as "gatekeeper" requires it to evaluate the admissibility of expert testimony on the basis, not only of its relevancy, but also its reliability.[118] In *General Electric Company v. Joiner,*[119] the first of the *Daubert* progeny, the Court held that a trial court's *Daubert* rulings would be reviewed under an abuse of discretion standard.[120] In *Kumho Tire Co. v. Carmichael,*[121] the Court extended the reach of *Daubert's* application to include not only scientific testimony, but all expert testimony.[122] Now *Weisgram* adds that litigants are ill-advised to rely too heavily on expert testimony even where challenges to reliability are overruled at trial.

CIVIL RICO

The Court addressed two interesting civil RICO cases last term. In *Beck v. Prupis,*[123] the Court held that employment termination for refusal to participate in a RICO conspiracy was not the kind of injury to "business or property" envisioned by § 1964(c) of RICO.[124] Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962" has standing to bring a civil RICO action.[125] And section of 1962 identifies racketeering and conspiracy to racketeer as predicate acts.[126] Racketeering is defined at § 1961(1) to include extortion, and mail and wire fraud.[127] The former president of an insurance company (Southeastern Insurance Group) alleged that certain officers and directors of the company were engaged in racketeering activity and that he was fired in furtherance of that conspiracy because he refused to join it.[128] By a majority of 8-2, the Court resolved a split in the circuits [129] by holding that the allegations did not provide the former president with a RICO action because the termination, the "overt act", was not, itself, a "racketeering activity."[130] The majority relied on the rule of statutory construction that, in the absence of express language to the contrary, courts must infer that Congress incorporated common law definitions and settled meanings of the terms it employs. The term "conspiracy" at common law requires more than a common plan, "there must be acts of a tortious character in carrying it into execution."[131] This fundamental common law principle which limits the reach of civil conspiracy

118. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589 (1993).
119. General Electric Co. v. Joiner, 118 S. Ct. 512 (1997).
120. *Id.* at 517.
121. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1998).
122. *Id.*
123. Beck v. Prupis, 120 S. Ct. 1608 (2000).
124. *Id.* at 1617.
125. *Id.* at 1610 (quoting 18 U.S.C. § 1964(c)).
126. *See id.* (quoting 18 U.S.C. § 1962).
127. *See id.* at 1608 n.2 (quoting 18 U.S.C. § 1961(1)).
128. *See id.* at 1612.
129. *See Beck,* 120 S. Ct. at 1613.
130. *See id.*
131. *Id.* at 1614 (quoting RESTATEMENT (SECOND) OF TORTS § 876, cmt. b (1977)).

was deemed incorporated into civil RICO. Hence the majority concluded that "injury [here, termination] caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO... is not sufficient...."[132] In a strongly-worded and cryptic dissent, Justice Stevens, with whom Justice Souter joined, reached the opposite conclusion, arguing the plain meaning rule: to require the conclusion that because RICO does not expressly require the overt act to be racketeering activity, the Court may not read that requirement into the statute.[133] Furthermore, said the dissent, the majority relied on case law precedent which was inapposite and not relevant to the analysis required in the case.[134]

The other civil RICO case this term, *Ratella v. Wood,*[135] gave a unanimous Court the opportunity to clarify the boundaries of RICO's 4-year statute of limitations. Rotella, former patient at a psychiatric facility, sued the facility some 8 years after he was discharged when the facility was implicated in a criminal fraud scheme.[136] Rotella alleged that he was retained as a patient not for medical reasons but solely in connection with this fraudulent scheme to maximize profits.[137] The District Court invoked the "injury discovery rule" and held that equitable tolling applied his claim when he discovered his injury (eight years before he brought suit). The 5th Circuit upheld the District Court's ruling. Other circuits had adopted "the injury and pattern discovery" rule which states that the period begins to run when plaintiff knew or should have known of his injury and the pattern of racketeering that caused it.[138] In *Rotella*, the Court found that an injury and discovery rule would preserve a cause of action for an unreasonable period of time and therefore rejected it.[139] *Rotella*, completes the Court's development of an applicable statute of limitations under civil RICO.

Because civil RICO itself did not provide a limitations period, the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Associates,*[140] established a 4-year statute of limitations for the action, reasoning that a RICO claim was analogous to a Clayton Act claim.[141] Subsequently, the Circuits split three ways in applying the limitations period: 1) some circuits (like the 5th Circuit in *Rotella*) adopted a strict injury discovery rule (the period starts to run when plaintiff should have discovered the injury); 2) some invoked the injury and pattern discovery rule discussed above; and 3) the Third Circuit fashioned a "last predicate act" rule (the clock starts to run again after each predicate act in the

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132. *Id.* at 1616.
133. *See id.* at 1617. (Stevens, J., dissenting). This is an interesting example of Karl Llewellyn's insight that statutory construction rules always cut two ways. *See generally,* Karl. N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules on Canons About How Statutes are to be Construed,* 3 VAND. L. REV. 395 (1950).
134. *See Beck,* 120 S. Ct. at 1616.
135. Rotella v. Wood, 120 S. Ct. 1075 (2000).
136. *See id.* at 1078.
137. *See id.*
138. *See id.*
139. *Id.* at 1079.
140. Agency Holding Corp. v. Malley-Duff and Associates, 483 U.S. 143, 156 (1987).
141. *Id.* at 143.

pattern).[142] In *Klehr v. A.O. Smith Corp.*, the Supreme Court rejected the Third Circuit's "last predicate act" rule as creating actions so remote in time as to be "beyond any limit that Congress could have contemplated."[143] For the same reason, in *Rotella*; the Court rejected the "injury and pattern" discovery rule. Thus, it is now beyond dispute that the injury discovery rule applies to civil RICO's court-fashioned 4-year statute of limitations.

OTHER FEDERAL STATUTES

The Supreme Court was asked to construe provisions in four other federal statutes that merit at least a cursory review.

In *Adarand Constructors, Inc. v. Slater,*[144] a subcontractor challenged the constitutionality of the Small Business Act when his low bid in a highway construction project was rejected in favor of a company that had been certified as a disadvantaged business. A business was deemed disadvantaged if it was owned and controlled by socially or economically disadvantaged groups which include, "black, Hispanic, Asia Pacific, Subcontinent Asian, and Native American ... and in addition presume that women are socially disadvantaged."[145] The rejected bidder in this case was a white male and he alleged that the race-based priorities violated his 5th Amendment right to equal protection. The Small Business Act at § 8(d)(i) expresses a federal policy favoring contracts with small "disadvantaged" businesses.[146] The applicable law which effectuated the policy in this case, the Intermodal Surface Transportation Efficiency Act of 1991, gives a priority to disadvantaged business.[147] Under the Act, the Small Business Administration and state highway agencies certify businesses as "disadvantaged" for purposes of these statutes.[148] In *Adarand Contractors*, the Tenth Circuit analyzed petitioner's constitutional challenge to the laws by applying an intermediate scrutiny test and upheld them. The Supreme Court ruled that because race-based classifications were involved, a strict scrutiny test was mandated. The Court, therefore, reversed and remanded. On remand, the District Court held that the preferential measures failed the strict scrutiny test. In response to this ruling, the state (Colorado) amended its certification rules to include, under the rubric "disadvantaged" company, majority owners who have "experienced social disadvantage based on ... [race] ...."[149] Under this new classification scheme, the white petitioner was certified as "disadvantaged." In the interim, respondents appealed the District Court's strict scrutiny ruling to the Tenth Circuit. And finding that petitioner had now been certified, the Tenth Circuit dismissed the case as moot. The Supreme Court granted certiorari and, again, found the Tenth Circuit in

142. *See* Klehr v. A.O. Smith Corp., 521 U.S. 179, 185-86 (1997).
143. *Id.* at 187.
144. Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000).
145. *Id.* at 723.
146. Pub. L. 87-305, 75 Stat. 667, *as amended*, 15 U.S.C. § 637(d)(1) (1994, Supp. IV).
147. Publ L. 102-240, § 1003(b), 105 Stat. 1919.
148. *See Adarand Contractors*, 120 S. Ct. at 723.
149. *Id.* at 724.

error. This time on the grounds of confusing mootness and standing (the same confusion it sought to resolve in *Friends of the Earth*).[150] The distinction is critical, said the Court, because of the appropriate burdens of proof that attach to each threshold issue. Here, a proper ruling of mootness would require a finding by the court that the voluntary cessation of the improper conduct, in this case, on the part of the government) would not recur. This is the government's heavy burden to prove. Because the Department of Transportation's regulations do not yet comport with the State's new certification procedures, the government can not meet its burden.[151] Once again, the case has been reversed and remanded.

The Court reviewed the venue provisions of the Federal Arbitration Act (Act) in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*[152] Viewing arguably conflicting venue provisions in the Act, the Court analyzed the provisions through the prisms of their "history and function" and ruled that they were permissive; thereby allowing a motion to confirm, vacate or modify an arbitration award to be brought "in any district proper under the general venue statute."[153] *Cortez Byrd* follows the pattern of many business related cases this term: a unanimous (or strong majority) opinion premised on traditional rules of statutory construction, that resolve an ongoing split among the Circuits on the issue.

Fischer v. United States,[154] directed the Court's attention to the federal bribery statute[155] and its application to the Medicare program. The class of putative defendants covered by the federal bribery statute includes organizations which "receiv[e], in any, one year period, benefits in excess of $10,000 under a federal program."[156] The issue in *Fischer* was whether the term "benefits" in the statute includes Medicare disbursements to health care organizations for the express benefit of qualifying patients. By an 8-2 majority, the Court ruled that it did.[157] In so doing, the Court distinguished healthcare providers who receive the "benefits" as reimbursement for their participation in a highly regulated government assistance program and other private sector companies who contract with the government outside of such a structure.[158] Not every payment by the government for services rendered under contract qualities as a "benefit" for purposes of the bribery statute.

A high profile case, *FDA v. Brown & Williamson Tobacco Corporation,*[159] which split the Court in a 5-4 decision, used traditional rules of statutory construction to determine that the FDA had no authority to regulate tobacco

150. *See supra* notes 35-58 and accompanying text.
151. *See Adarand Contractors*, 120 S. Ct. at 725.
152. Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., 120 S. Ct. 1331 (2000).
153. *Id.* at 1334.
154. Fischer v. United States, 120 S. Ct. 1780 (2000).
155. 18 U.S.C. § 666(b) (1994).
156. *Fischer*, 120 S. Ct. at 1782 (quoting 18 U.S.C. § 666(b)).
157. *See id.* at 1782.
158. *See id.* at 1787.
159. Food and Drug Administration v. Brown & Williamson Tobacco Corp., 120 S. Ct. 1291 (2000).

products under the FDCA.[160] The Food, Drug and Cosmetic Act (Act) gives the Food and Drug Administration (FDA) jurisdiction to regulate "drugs" "devises"[161] and "combination products."[162] In 1996, the FDA determined that nicotine was a drug and that cigarettes are devises for delivering drugs; therefore the agency had authority to regulate them. Accordingly, the FDA promulgated two kinds of regulations with regard to tobacco products: access regulations (aimed at curtailing access to tobacco by children and adolescents)[163] and promotion regulations (proscribing certain kinds of advertising).[164] Justice O'Connor, writing for the Chief Justice and Justices Scalia, Kennedy and Thomas ruled that these regulations were beyond the purview of the agency's authority. In support of that ruling, Justice O'Connor, citing *Chevron*[165] and its ubiquitous progeny, declared that where, as in the instant case, Congress had not expressly stated whether it had granted an agency authority in a particular area, then the statute at issue must be read as a whole in order to infer Congressional intent.[166]

From that perspective, Justice O'Connor inferred that a basic objective of the FDA was to "ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use."[167] And because the agency had "exhaustively documented that tobacco products were unsafe for their intended use,[168] the agency's only logical recourse under the Act was to remove them from the market as "misbranded devices." A drug or devise is "misbranded" if it is dangerous when used in the manner prescribed by the producer.[169] But, said Justice O'Connor, the FDA is precluded from removing tobacco products from the market by 7 U.S.C. § 1311(a).[170] Analyzing section 1311 in conjunction with six other statutes that deal with health issues related to tobacco use reveals an implicit Congressional intent to regulate tobacco products on health issues rather than remove them from the market.[171] The dissent challenged the result, calling Justice O'Connor's reading of the "misbranding" provision unpersuasive. "[S]urely wrote Justice Breyer (with whom Justices Stevens, Souter and Ginsburg joined) the agency can determine that a substance is comparatively 'safe' (not 'dangerous') [for its intended use and, therefore, misbranded] whenever it would be *less*

160. *See*, applicable Sections of the Food, Drug and Cosmetic Act at 52 Stat. 1040, *as amended*, 21 U.S.C. §§ 301; 321 (g)-(h); 353 (g)(1), 393 (1994 and Supp. III).

161. *Id.* at § 321(g)-(h) and § 393.

162. *Id.* at § 353 (g)(i).

163. *See Brown & Williamson*, 120 S. Ct. at 1298.

164. *See id.* at 1298-99.

165. Chevron U.S.A., Inc. v. Natural Resources Council, Inc., 467 U.S. 837 (1984).

166. *See Brown & Williamson*, 120 S. Ct. at 1300-01.

167. *Id.* at 1301 (citing 21 U.S.C. § 393(b)(2) (1999, Supp. III)).

168. *Id.* at 1302.

169. *See id.* (quoting 21 U.S.C. § 352(j) (1994)).

170. Which states in relevant part, "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." 7 U.S.C. § 1311(a) (1994).

171. *See Brown & Williamson*, 120 S. Ct. at 1304. The Court also noted the agency's longstanding refusal to regulate tobacco products prior to 1996, as beyond its authority. *See id.* at 1296-97.

dangerous to make the product available (subject to regulatory requirements) than suddenly to withdraw it from the market."[172] And further, "[t]he statute's language... permits the agency to choose remedies consistent with its basic purpose - the overall protection of public health."[173] The 5-4 decision lobs this political ball back into the legislative court for a definitive resolution.

EMPLOYMENT BENEFITS

Three cases involving employment benefits; two ERISA cases and one brought under the Fair Labor Standards Act, were decided this term. Of the two ERISA cases, the one with the most far-reaching consequences was *Pegram v. Hendrich*.[174]

Pegram involved a physician incentive program under a health maintenance plan. As the public has become aware, one principal way that health maintenance organizations (H.M.O.'s) hold down health care costs is by giving physicians a financial incentive (a share in net profits) for rationing or limiting medical care.[175] In simplified form, a health maintenance plan rather than charging (directly or by way of traditional health insurance coverage) on a fee-for-service basis, charges a fixed fee up front for all treatment rendered over a fixed period of time. In order to glean a profit from this fixed fee arrangement, HMO's have instituted a variety of cost-cutting measures. A financial incentive arrangement with treating physicians is one of those measures and it was just such an arrangement that was at issue in *Pegram*.[176] Mrs. Hendrich was covered by a pre-paid health plan offered by State Farm, her husband's employer. The contracting HMO was physician-owned and Pegram was the treating physician/owner in Mrs. Hendrich's case. Hendrich suffered a ruptured appendix under Pegram's care when Pegram delayed a critical diagnostic procedure after discovering a large inflammation in Hendrich's abdomen.[177] Hendrich sued Pegram and the HMO in state court and the case reached the Supreme Court in a significantly roundabout way. Hendrich sued under state law claims of medical malpractice and fraud. Pegram and the HMO responded with a preemption argument pursuant to ERISA, removed the case to federal court where it sought summary judgment. Hendrich, then, amended her complaint to include a claim under ERISA that the HMO breached its fiduciary duty to act "solely in the interest of the participants and beneficiaries...."[178] And, as the Court notably points out, it was Hendrich's ERISA claim in her amended complaint and not the defendants' removal to federal court on ERISA preemption grounds that brought the case to the Court's

172. *Id.* at 1323 (Breyer, J., dissenting) (citations omitted).
173. *Id.* at 1324.
174. Pegram v. Hendrich, 120 S. Ct. 2143 (2000).
175. Indeed, so significant is the issue in the minds of the public that the decision in *Pegram* was awarded front page coverage in the N.Y. Times. *See*, Linda Greenhouse, *HMO's Win Crucial Ruling on Liability for Doctor's Acts*, NY TIMES, June 13, 2000, at A1.
176. *Pegram*, 120 S. Ct. at 2145.
177. *See id.* at 2146-47.
178. *Id.* at 2151 (quoting 29 U.S.C. § 1134(a)(i)).

attention.[179] Hence, the issue of whether removal was proper, like many other contiguous issues in this case, was left for another day, and-perhaps-another forum.[180]

Justice Souter, writing for a unanimous Court, fashioned the specific issue before it this way: "The question in this case is whether treatment decisions made by a health maintenance organization, acting through its physician employees, are fiduciary acts within the meaning of the Employee Retirement Income Security Act of 1974."[181] In deciding that they were not, the Court first explained its reversal of the Seventh Circuit which had held that, while financial incentive plans do not "automatically" breach ERISA fiduciary obligations, the facts in this case did constitute a breach.[182] That distinction, on a fact-specific basis, wrote Justice Souter, thrusts the Court into an arena where it is not well-suited to perform.

> [N]o HMO organization could survive without some incentive connecting physician reward with treatment rationing. The essence of an HMO is that salaries and profits are limited by the HMO's fixed membership fees, [therefore any factual distinction based on treatment decisions compels the Court to]... draw a line between good and bad HMO's... a judgment about socially acceptable medical risk.[183]

Souter concluded, "[b]ut such complicated fact-finding and such a debatable social judgment are not wisely required of courts... '[C]ongress is far better equipped than the judiciary...'" to make these fact-intensive public policy decisions.[184] Thus, the Seventh Circuit's fact-based distinction was rejected by the Court. All HMO's and their financial-incentive tinged treatment decisions are to be treated alike, for purposes of the ERISA issue.

Turning to ERISA, Justice Souter was at pains, first, to distinguish ERISA fiduciaries, who may have financial interests adverse to their beneficiaries, [185] and common law trustee fiduciaries,[186] who must act solely in the beneficiaries' financial interest.[187] That is, ERISA principals owe a fiduciary duty to beneficiaries when acting in their role in making "treatment decisions."[188] But "treatment decisions" are inextricably bound to "eligibility decisions" under

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179. *See id.*

> Hendrich does not contest the propriety of removal before us, and we take no position on whether or not the case was properly removed. As we will explain, Hendrich's amended complaint alleged ERISA violations, over which the federal courts have jurisdiction, and we therefore have jurisdiction regardless of the correctness of the removal.

Id. at 2148 n.2 (citations omitted).

180. Indeed, a major concern in this case, whether the current health care delivery system should permit the kind of financial incentive arrangement that can conflict with a physician's professional obligations, was pointedly referred to the legislative forum. *See id.* at 2157.

181. *Id.* at 2146.

182. *See Pegram,* 120 S. Ct. at 2148.

183. *Id.* at 2150.

184. *Id.* (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 665-666 (1994)).

185. *See id.* at 2151.

186. As Justice Souter explains, however, the ERISA fiduciary concept is derived from common law trust law regarding fiduciaries. *See id.* at 2151-2152.

187. *See id.* (*quoting* 2A A Scott & W. Fratcher, Trusts § 170, 311 (4th ed. 1987)).

188. *Pegram,* 120 S. Ct. at 2154.

HMO plans. Eligibility decisions are non-fiduciary administrative decisions that unapologetically implicate the financial interests of the doctors and their HMOs.[189] Indeed, these eligibility questions are another principal cost-controlling device under the current health maintenance system.[190] Justice Souter concluded that treatment decisions (like the one in *Pegram*) which are unavoidably mixed with eligibility decisions, were not intended by Congress to be cast as fiduciary decisions because to conclude otherwise would serve to eliminate profit from the health maintenance system.[191] And, not to belabor the point, he added, "[i]t is enough to recognize that the Judiciary has no warrant to precipitate the upheaval that would follow a refusal to dismiss Hendrich's ERISA claim."[192] In the larger scheme, Souter's opinion leaves more questions unanswered than answered. What about removal? Is it appropriate? The opinion expressly declined to answer.[193] And as to the related question of pre-emption, does ERISA pre-empt an "unmixed" or "pure" case of eligibility decision-making by HMOs and their doctors?[194] And what legal significance can we attach to footnote eight where the Court alludes to a possible fiduciary duty to disclose features of an HMO plan including physician incentive/profit sharing provisions that may serve to limit treatment?[195] Undoubtedly, we can anticipate that subsequent cases will raise these unanswered questions.[196] One question, however, was unambiguously answered in *Pegram*: the Court has resolved - unanimously, unabashedly and deftly - to use judicial restraint to avoid becoming the fall guy with regard to major public policy health care issues in this high stakes, high profile arena that ostensibly pits corporate profits against patient care.[197]

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189. *See id.*

190. *See id.* at 2148 ("HMOs, like traditional insurers, will . . . make coverage determinations . . . to make sure that a request for care falls within the scope of covered circumstances . . . or that a given treatment falls within the scope of care promised").

191. Hendrich's fiduciary theory would result in "nothing less than elimination of the for-profit HMO . . . [and] might well portend the end of nonprofit HMOs as well, since those HMOs can set doctors' salaries." *Id.* at 2156 & n.11.

192. *Id.* at 2156.

193. *See supra* notes 179, 180 and accompanying text.

194. *See Pegram*, 120 S. Ct. at 2158 (Souter dubs it the "puzzling issue" of preemption).

195. *See id.* at 2154 n.8:

> Although we are not presented with the issue here, it could be argued that Carle [the HMO in *Pegram*] is a fiduciary insofar as it has discretionary authority to administer the plan, and so it is obligated to disclose characteristics of the plan and of those who provide services to the plan, if that information affects beneficiaries' material interests.

196. *See, e.g.* Greenhouse, *supra*, note 175, identifying litigation premised on a disclosure duty theory and quoting plaintiff's lawyer, Jerome Marcus, for the proposition that nondisclosure can be shown to result in unjust enrichment for HMOs.

197. To drive the point home one more time, Justice Souter opines, near the end of the decision:

> If Congress wishes to restrict its approval of HMO practice to certain preferred forms, it may choose to do so. But the Federal Judiciary would be acting contrary to the congressional policy . . . if it were to entertain an ERISA fiduciary claim portending wholesale attacks on existing HMOs solely because of their structure . . . .

Pegram, 120 S. Ct. at 2157.

One thing, however, that the opinion does do is to put the unadorned issue before the American people: should our national health care system structurally endorse physician incentive plans that pit the physician's financial well-being against his/her patients' health care. As Justice Souter points out,

The other ERISA case this term, *Harris Trust and Savings Bank v. Salomon Smith Barney*,[198] while important was less dramatic. It, too, concerned the role of fiduciaries under ERISA's provision, but it specifically addressed the issues of whether a nonfiduciary which is party to transactions prohibited by ERISA might be sued under its provisions.[199] In another unanimous decision, the Court said that it could. The case arose when an ERISA pension plan enlisted the broker-dealer services of Salomon. Assuming that Salomon became a "party-in-interest"[200] pursuant to § 3(14)(B) of ERISA,[201] because it acted as broker-dealer, it was precluded from engaging in certain transactions with the plan.[202] Salomon allegedly engaged in a prohibited transaction with the plan, when it sold several motels it owned to the plan. When it became apparent that the motels were worthless, Harris Bank as plan trustee, and other fiduciaries sued Salomon under 502(a)(3) of ERISA. Section 502(a)(3) authorizes a fiduciary to bring suit to enjoin or to obtain "appropriate equitable relief" for violations of ERISA.[203] Salomon argued, and the Seventh Circuit agreed, that the prohibited transaction at issue was covered by § 406(a) of the Act and it expressly authorizes suit for redress only against a fiduciary, not a nonfiduciary 3rd party or party-in-interest which described Salomon's status in the case.[204] Justice Thomas, writing for the Court, agreed that § 406 provides sole redress against fiduciaries, [205] but he added that § 502(a)(3)[206] is not similarly constrained.

It provides that "(a) A civil action may be brought... (3) by a... fiduciary (A) to enjoin any act... which violates... [ERISA]... or (B) to obtain other appropriate equitable relief (i) to redress such violations...."[207] Thus, "§ 502(a)(3) admits of no limit... on the universe of possible defendants."[208] Accordingly, the trustee's suit against Salomon seeking rescission of the prohibited transaction, restitution of the motels purchase price and disgorgement of Salomon's profits in the proscribed motel transaction were well with the purview of a § 502(a)(3) civil action.[209]

The other case involving employee benefits law this term fell under the provisions of the Fair Labor Standards Act and the issue before the Court was whether a public employer, consistent with FLSA, could compel its employees to use accrued compensatory time-off ("compensatory time") in lieu of over-time

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that is precisely what the current structure does.

198. Harris Trust and Savings Bank v. Salomon Smith Barney, Inc., 120 S. Ct. 2180 (2000).

199. *See id.* at 2184.

200. *Id.* at 2185.

201. 29 U.S.C. § 1002(14)(B) which defines party-in-interest as "'a person providing services to'... an ERISA plan." *See Harris Trust*, 120 S. Ct. at 2185.

202. 29 U.S.C. § 1106 (a); Section 406(a) of ERISA.

203. *See Harris Trust*, 120 S. Ct. at 2184 (citing 29 U.S.C. § 1132(a)(3)).

204. *See id.* at 2185.

205. *See id.* at 2186.

206. *See id.* at 2186-87.

207. *Id.* at 2186.

208. *Id.*

209. *See Harris Trust*, 120 S. Ct. at 2185.

pay. By a vote of 6 to 3 the Court in *Christensen v. Harris County*,[210] held that it could.

FLSA requires that "hourly employees who work in excess of 40 hours per week must be compensated for the excess hours at a rate not less than 1½ times their regular hourly wage."[211] The "compensatory time" dispensation to public employers, however, was limited by the following constraints: 1) employers must permit employees to use their compensatory time within a reasonable period following an employee request; 2) a cap of maximum overtime hours that could be "paid" in time rather than cash was established; and 3) an employee could cash-out accrued compensatory time upon termination.[212]

The issue before the Court in *Christensen* was whether a sheriff's department could avoid the effects of the cap (once the statutory cap of compensatory hours was reached, employees must be compensated in cash for overtime) by compelling overtime employees to use accrued "compensatory time."[213] Sheriff employees and the United States in an amicus brief, argued that FLSA implicitly precludes that practice because it grants employees at § 207 the right to use compensatory time within a reasonable period after they request it.[214] Rejecting what the Court asserted was petitioners attempt to cast the section under the canon "expressio unis est exclusio alterius" (that because the section puts control of compensatory time use primarily in the hands of employees, employers are precluded from compelling its use),[215] the Court simply found that FLSA at § 207 does not state an exclusive method for instigating the use of compensatory time. It concluded, on that basis, that the sheriff's department plan at issue did not violate FLSA.[216]

EMPLOYMENT DISCRIMINATION

While the results of the employment benefits cases this term were moderately pro-business, a major employment discrimination case this term was distinctly bad news for the business community *Reeves v. Sanderson Plumbing Products* [217] was a case involving age discrimination but its ramifications touch all manner of discrimination-in-the-workplace issues. Developing and clarifying its 1993 decision in *St. Mary's Honor Center v. Hicks*,[218] the Court addressed the issues of shifting burdens of proof and of going forward with the evidence in discrimination cases. Specifically, whether plaintiffs' prima facie case coupled with evidence sufficient to show that an employer's proffered reason for

210. Christensen v. Harris County, 120 S. Ct. 1655, 1658 (2000).
211. *Id.* at 1659.
212. *See id.* at 1660-63.
213. *Id.*
214. *See id.* at 1666. Justice Stevens, in dissent, said that canon mischaracterized petitioners argument. He argued that a proper reading of § 207 in this context is that, absent an agreement with its employees granting the power, public employers have no right under FLSA to compel use of compensatory time.
215. *See id.* at 1661.
216. *See Christensen,* 120 S. Ct. at 1661.
217. Reeves v. Sanderson Plumbing Products, 120 S. Ct. 2097 (2000).
218. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

discrimination was pretextual is sufficient to meet plaintiff's ultimate burden of proof of age discrimination.[219]

In *Reeves*, plaintiff filed an age discrimination suit in federal court alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[220] He prevailed at the District Court level but the Fifth Circuit reversed, explaining that, while plaintiff had offered evidence sufficient to establish his *prima facie* case and that he also "'very well may' have offered sufficient evidence... [that the employer's proffered reason was pretextual] this was 'not dispositive' of the ultimate issue... 'whether Reeves presented sufficient evidence that his age motivated... [the discharge].'"[221]

The Circuits have been split on the issue presented in *Reeves*. However, all Circuits have analyzed the issue within the *McDonnell Douglas* [222] framework of shifting and ultimate burdens. Therefore, the Court assumed, without deciding, that *McDonnell Douglas* presented the proper analytical structure for framing the issue.[223] *McDonnell Douglas* and its progeny have stated that, once plaintiff has made out a prima facie case of discrimination, the burden of going forward with the evidence shifts to defendant to produce evidence of a nondiscriminatory reason for discharge.[224] If defendant meets its burden of production, as in *Reeves*, then "[t]he presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture."[225] And it was at this point that some confusion arose among Circuits applying the shifting burden model. It was clear that plaintiff bore the ultimate burden of proof and that, "in attempting to satisfy this burden, [plaintiff must be given] 'the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were... a pretext for discrimination.'"[226] And it was also clear from precedent that proof of pretext alone may not be enough to compel judgment as a matter of law.[227] But some courts, including the Court of Appeals in *Reeves*, had construed precedent to require additional proof of discrimination, disregarding plaintiff's evidence which established his prima facie case. In making its finding with regard to plaintiff's ultimate burden of proof, "the Court of Appeals ignored the evidence supporting petitioner's prima facie case and... confined its review of evidence favoring petitioner to that evidence showing... [that employer's proffered reasons were pretext]."[228] This was an error. In ruling as a matter of law, the court must look to all the evidence on the record (including plaintiff's prima facie case) and ask whether a reasonable jury could ultimately conclude that

219. *See Reeves*, 120 S. Ct. at 2103.
220. *Id.* at 2103 (citing 29 U.S.C. § 621 et seq.).
221. *Id.* at 2104.
222. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
223. *See Reeves*, 120 S. Ct. at 2104.
224. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).
225. *Id.* at 2748 (citations omitted).
226. *Reeves*, 120 S. Ct. at 2105.
227. *See id.* at 2107.
228. *Id.* at 2108.

the employer intentionally discriminated.[229]

Reeves does several things. First, it clarifies Justice Scalia's somewhat confusing opinion in *Hicks*.[230] Second, it makes it clear that discrimination cases are penultimately cases to be decided by the trier of fact.[231] That, in turn, means that employer summary judgment motions, will, in most cases be viewed with disfavor. Practitioners of employment discrimination law also forecast that, following *Reeves*, legal issues will be primarily evidentiary in nature: how much weight should be given to statistical evidence used by plaintiff to show pretext? And how should courts assess the probative value of derogatory, discriminatory remarks (dubbed "stray comments") by managers?[232] There is little doubt, however, that the prospect of lengthy trials, and the severely diminished expectation of summary rulings will encourage settlements in these cases.

FEDERALISM

The other employment discrimination case to come before the Court in the 1999 term was also an extremely important one, but I have catalogued it with the federalism cases because that is primarily where its significance lies. *Kimel v. Florida Board of Regents*[233] joins that line of cases that continues to develop and will finally explain Rehnquistian Federalism. And while most of the business-related cases in recent terms have reflected the moderately pro-business consensus of previous terms, and entail incremental doctrinal development premised largely on traditional modes of statutory construction, in the federalism arena, business-related issues have yielded highly-conflicted dramatic decisions.[234] Writing for the Court in *Kimel*[235] Justice O'Connor pitted the 11th Amendment against the 14th Amendment to rule that while Congress clearly intended to abrogate the state's immunity in the Age Discrimination in Employment Act, (ADEA),[236] section 5 of the 14th Amendment did not include discrimination based on age so that the attempted abrogation must fail.[237] The ADEA forbids employers from making

229. *See id.*

230. *St. Mary's*, 509 U.S. 502 (1993).

231. From the plaintiff bar's point of view this is decidedly positive outcome. *See, e.g.*, Marcia Coyle, *Dismissal of Bias Suits Harder*, NAT'L. L. J., June 26, 2000, B1 col 1 (quoting Paul Mollica, for the proposition that *Reeves* should "discourage companies from filing 'groundless' summary judgment motions. That is really the scourge of the employment field - lengthy, exhibit - heavy summary judgment motions that have to be responded to just to decide whether you get to the jury") (citations omitted).

232. *Id.* (quoting, Jay W. Walks, predicting that *Reeves* enhances the weight of statistical evidence and that "stray comments" may often be viewed as "too remote" to be probative).

233. Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).

234. *See, e.g.*, College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999).

235. Parts I, II and IV were joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas, Part III joined by the Chief Justice and Justices Stevens, Scalia, Souter, Ginsburg and Breyer. Justice Stevens, dissenting in part, concurring in part was joined by Justices Souter, Ginsburg and Breyer. Justice Thomas' dissent to Part III was joined by Justice Kennedy.

236. 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq. (1994 ed).

237. *Kimel*, 120 S. Ct. at 637.

employment decisions on the basis of age unless age[238] constitutes a bona fide job qualification (b.f.o.q.).[239] In 1974 Congress extended coverage of the ADEA to include public employers.[240] In *Kimel*, plaintiffs alleged that their public employer had violated ADEA strictures.[241] Ultimately, the Supreme Court granted certiorari to consider whether the ADEA validly abrogates the States' Eleventh Amendment immunity.[242]

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by Citizens of another State,* or by *Citizens or Subjects of any Foreign State.* (emphasis added)

In *Seminole Tribe*[243] the Court extended the reach of the amendment's text to include preclusion of suits by *any* private citizens against *any* state (even his/her own state). *Seminole Tribe* went on to declare that Article I does not confer Congressional authority to abrogate states' sovereign immunity "'Even when the Constitution vests in Congress complete lawmaking authority over a particular area....'"[244] Thus, while the Court had previously ruled that the 10th Amendment is not a bar to ADEA suits against state employers,[245] the ADEA must also clear the 11th Amendment hurdle. This it can do, opined Justice O'Connor, only if Section 5 of the Fourteenth Amendment applies to age discrimination. Section 5 expressly grants Congress the authority to enforce the provisions of the 14th Amendment which, at Section 1 precludes states from abridging the "privileges or immunities" of U.S. citizens or depriving "any person" of due process or denying "any person" equal protection of the laws. Age classifications, however, do not rise to Section 1 protected rights. The Court reached this conclusion by relying on its "congruence and proportionality" test, fashioned in *City of Boerne*,[246] that there must be a congruent and proportional relationship between the interest sought to be protected and the legislation designed to protect it.

Applying that test in *Florida Prepaid*[247] the Court found that Congress had not identified a pattern of patent infringement by the States, hence the legislation at issue, the Patent and Plant Variety Protection Remedy Clarification Act, was

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238. ADEA, *supra* note 236 at 29 U.S.C. § 623(a)(1).
239. *Id.* at § 623(f)(1).
240. *See Kimel*, 120 S. Ct. at 637.
241. *Id.* at 638.
242. *Id.* at 639.
243. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1991) (citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)). *See also*, Hans v. Courscana, 134 U.S. 1, 15 (1890) all of which are cited in support of the recent rendering of the 11th Amendment.
244. *Kimel*, 120 S. Ct. at 642 (quoting *Seminole Tribe*, 517 U.S. at 72).
245. *See* EEOC v. Wyoming, 460 U.S. 226, 243 (1983) which "held that the ADEA constitutes valid exercise of Congress' power... [under the Commerce Clause] Art I, § 8, cl. 3. and that the Act did not transgress any external restraints imposed on the commerce clause by the Tenth Amendment."
246. City of Boerno v. Flores, 521 U.S. 507, 536 (1997).
247. Florida Prepaid Post-Secondary Ed. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199, 2207 (1999).

out of proportion to the wrong it sought to remedy. The legislation was unconstitutional under § 5 of the 14th Amendment. Since the legislation could not avail itself of 14th Amendment justification, it must fail under the Eleventh Amendment.

Similarly, said the *Kimel* Court, the ADEA's application to states is not justified by the 14th Amendment because age does not describe the kind of "discrete and insular minority" deserving of Equal Protection classification. "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[248] The ADEA's b.f.o.q. test is out of proportion to the rational basis test because it imposes a much stricter burden of proof on state employers.

While *Kimel* becomes one more brick in the wall of Rehnquistian federalism, it may also draw attention to the analytical inconsistencies and ambiguities of the emerging doctrine. If *Florida Prepaid* ran afoul of the "congruence and proportionality"[249] test because the legislative history of the patent statute at issue failed to reveal a pattern of state violations, then why did not the Court address the parallel issue in *Kimel*? Did the legislative history of the ADEA, as amended to include state employees, uncover a pattern of age discrimination by states? If so, why was that not at least germane to *Kimel* analysis if it was pivotal in *Florida Prepaid*?[250] But whatever its analytical flaws, *Kimel* and its predecessors clearly teach that private litigants including business interests seeking redress against state action will have significantly diminished legal territory in which to maneuver. Beyond that indisputable fact, there is much ambiguity in the emerging doctrine. Indeed, commentators even differ on how to categorize the various theoretical constructs on which the federalism doctrine is premised. Each of the cases that have contributed to the doctrine have been premised on one or more of the following Constitutional theories: exercises of Congressional power pursuant to asserted 1) Commerce Clause or 2) 14th Amendment authority and limitations on that power pursuant to 3) the 10th Amendment or the 4) 11th Amendment. Each theoretical construct has resulted in sharply divided opinions that are arguably doctrinally opaque, if not inconsistent. However, as the 1999 term illustrates, federalism issues are not limited to the foregoing analytical theories but must surely include preemption analysis as well. In addition, preemption may emerge as less divisive venue for developing doctrinal clarity and consensus in the appropriate federalism cases. With that in mind, I have classified this term's

248. *Kimel*, 120 S. Ct. 631 (2000).

249. *Id.* at 646-47.

250. Some commentators view *Kimel* in conjunction with *United States v. Morrison* as an unhealthy trend barring federal protection of human rights. *See*, Walter Dellinger and Jonathon Hacker, NAT'L L.J., August 7, 2000, at A28, col. 1. *See also*, United States. v. Morrison, 120 S.Ct. 1578 (2000) (striking down key provision of Violence Against Women Act on Commerce Clause and 14th Amendment grounds). Legislative history in support of federal legislation does not, it would seem, cut both ways with the Court. In *United States v. Morrison* for example, Congress assiduously documented the distinctive effect of gender-based violence on interstate commerce to no avail. *See* Brzonkala v. Virginia Polytech Inst. & State Univ., 169 F.3d 820, 913 (4th Cir. 1999) (cited in Shane, *supra* note 2 at 214-216).

business-related preemption cases as federalism cases.

Geier v. American Honda Motor Co.[251] involved an interesting application of preemption and an interesting split of judicial opinion as to that application. While it was a 5-4 decision, the Justices in the majority and in dissent reveal a different make-up than the kind of 5-4 split which has characterized recent federalism cases.[252] However, as Justice Stevens declares at the beginning of his dissenting opinion, "This is a case about federalism . . . that is, about respect for the constitutional role of the states as sovereign entities."[253] But, as Stevens has consistently argued in recent federalism cases, state sovereignty interests are preserved in the Constitutional structure by their representation in the federal legislature. His most recent statement on the issue appears in his dissent in *Kimel* where he said:

> The Framers did not, however, select the Judicial Branch as the constitutional guardian of . . . state interests. Rather, the Framers designed important structural safeguards . . . [within] the normal operation of the legislative process [that] itself would adequately defend state interests from undue infringement . . . [Specifically], it is the Framers' compromise giving each State equal representation in the Senate that provides the principal structural protection for the sovereignty of the several States.[254]

In the National Traffic and Motor Vehicle Safety Act (Act)[255] at issue in *Geier*, Justice Stevens and his dissenting colleagues found that the states opted to protect their sovereignty over tort actions. Stevens wrote that the states' attempt to protect state remedies is reflected in the "cumulative force"[256] of several aspects of the statute taken in conjunction with controlling precepts with regard to preemption issues. First, the express preemption clause, § 1392(d) in the Act is relatively narrow[257] because it does not expressly exempt state common law tort actions.[258] Second, the savings clause, § 1397(k) "expressly preserves common law claims"[259] hence, the state claims are not expressly preempted. Third, because state law tort remedies are "within the scope of the states' historic police powers" there is a presumption of no preemption unless it appears clearly the Congress intended to pre-empt.[260] Fourth, in *Geier*, the safety standard at issue was

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251. Geier v. American Honda Motor Co., 120 S. Ct. 1913 (2000).

252. The voting configuration in *Geier* was: Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy joining Justice Breyer's opinion; and Justices Souter, Thomas and Ginsburg joining Justice's Stevens dissent.

253. *Id.* at 1928 (Stevens, J., dissenting) (citations omitted).

254. Kimel v. Florida Bd. Of Regents, 120 S. Ct. 631, 651 (2000) (Stevens, J., dissenting) (citations omitted).

255. 15 U.S.C. § 1381 *et seq.*

256. Geier, 120 S. Ct. at 1934 (Justice Stevens dissenting).

257. *See id.* at 1933 (comparing § 1392(d) with other express preemption in statutes construed in recent case law and deemed "broad" because they expressly pre-empt otherwise applicable state law).

258. *See id.* at 1934.

259. *Id.* at 1932.

260. *Id.* at 1932 (citing Justice Souter's dissent in *Gade v. National Solid Waste Management*, 505 U.S. 88, 116-117 (1992) ("If the [federal] statute's terms can be read sensibly not to have preemptive effect, the presumption controls and no preemption can be inferred").

expressly defined by the statute as a "minimum" standard[261] and under controlling precepts of implied preemption, the states' common law stricter standards should be preserved. And fifth, in this situation, the party arguing for implied preemption bears "a special burden" to show either that the federal government intended to occupy the field entirely or that "state law is in actual conflict with federal law" so that either it would be impossible for a private party to comply with both or the state law would frustrate the purpose and objectives of the federal scheme.[262]

Thus, for the dissent, the balance between states' sovereignty interests and competing interests had been struck in the proper forum, the Congress, - in this case - in favor of state tort claims which were not, according to the dissent, preempted by the statute. But, the prevailing Justices, finding that Honda had met "the special burden" of implied preemption, ruled that imposition of state tort actions would indeed frustrate the purpose and objectives of the federal scheme. That scheme was reflected in The Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation pursuant to the Motor Vehicle Safety Act at issue. The standard, FMVSS 208 "required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints [including airbags]."[263] The Court found that FMVSS 208 was consistent with the purpose and objectives of the Act: it promoted safety while providing vehicle manufacturers "with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time;... thereby lower[ing] costs, overcom[ing] technical safety problems, encourag[ing] technological development, and win[ning] widespread consumer acceptance...."[264] Geier's lawsuit, premised on state common law negligence, for injuries she sustained in a Honda that did not have airbags or other passive restraint devices, presented an obstacle to these purposes and objectives, said the Court, because it would impose a duty on manufacturers to install airbags in all cars (thereby posing an obstacle "to the gradual passive restraint phase") and "could have made less likely the adoption of a state mandatory buckle-up law."[265]

The immediate results of *Geier* include a victory for automobile manufacturers and encouraging news for other business interests similarly situated. In the long-view, the case offers some insights as to how the Court will use the preemption doctrine to analyze state sovereignty issues. And, as the business community saw in *Florida Prepaid*, when it comes to federalism issues, these cases can cut either way for business interests.

Norfolk Southern Railway Co. v. Shanklin,[266] was another preemption case in

261. *See id.* at 1929 (citing § 1392 (2)).
262. *Geier*, 120 S. Ct. at 1934.
263. *Id.* at 1916 (Justice Breyer, delivering the opinion of the Court).
264. *Id.* at 1921.
265. *Id.* at 1925. *See also id.* at 1919 (asserting the notion that a savings clause does not preclude implied preemption under "ordinary preemption principles" and rejecting the notion that those principles place a "special burden" on the party asserting implied preemption).
266. Norfolk Southern Ry. Co. v. Shanklin, 120 S. Ct. 1467 (2000).

which the business interest (railway companies) prevailed. By an 8-2 margin, the Court held that the Federal Railroad Safety Act of 1970 [267] in conjunction with the Highway Safety Act of 1973, and regulations promulgated pursuant to its Highway Crossing Program,[268] expressly preempted state common law claims. The case was brought by decedent's estate. The estate claimed that warning signs at the crossing where decedent was killed were insufficient to warn motorists of oncoming trains.[269] Because the warning signs were installed by federal funds, pursuant to the statutes cited above, and because the regulation at issue had mandatory effect, the federal law "covered the subject matter" and preempted state tort actions.[270] Citing its previous holding in *CSX Transp., Inc. v. Easterwood* [271] and building on precepts developed there, the Court held that *Norfolk So. RR*, presented a case where the federal regulations at issue "substantially subsume the subject matter of the relevant state law"[272] because they apply to all warning devices installed with the participation of federal funds. *Easterwood* established that the preemption clause in the Federal Railroad Safety Act[273] preempts state law claims only where the federal regulation "covers" the subject-matter of the state law and does not merely "touch upon" or "relate to" that subject-matter.[274]

Applying the rule to the facts in *Easterwood*, the Court found no preemption when the regulation was couched in general terms and provided "a description . . . not a prescription . . . ."[275] But where, as in *Norfolk*, the regulations "establish a standard of adequacy," the federal requirement is prescriptive, covers the subject-matter and its preemptive.[276]

Preemption also served business interests in *United States v. Locke,*[277] where the oil tanker industry was saved from the effects of Washington State's regulations which imposed "best achievable protection"[278] (BAP) from oil spills standards on the design and maintenance of oil tankers operating in state waters. Writing for a unanimous Court, Justice Kennedy construed the Ports and Waterway Safety Act 1972 (PWSA)[279] as amended by the Oil Pollution Act of 1990 (OPA)[280] finding that these statutes had a partial pre-emptive effect on

267. 84 Stat. 971, *as amended*, 49 U.S.C. § 20101 *et seq.*
268. 87 Stat. 283, 23 U.S.C. § 130; 23 U.S.C. § 130; 23 C.F.R. § 646 214(b).
269. *See Norfolk Southern. Ry. Co.*, 120 S. Ct. at 1471.
270. *Id.* at 1473.
271. CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).
272. *Norfolk So. Ry. Co.*, 120 S. Ct. at 1476.
273. The preemption clause reads in pertinent part:

> Laws, . . . related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue to enforce a law . . . related to railroad safety until the secretary . . . prescribes a regulation . . . covering the subject matter of the State requirement.

49 U.S.C. § 20106.
274. *See Norfolk So. Ry. Co.*, 120 S. Ct. at 1473 (quoting *Easterwood*, 507 U.S. 658, 664 (1993)).
275. *Id.*
276. *Id.* at 1475.
277. United States v. Locke, 120 S. Ct. 1135 (2000).
278. *Id.* at 1142.
279. 33 U.S.C. § 1221 et seq *as amended* by the Port and Tanker Safety Act of 1978, 42 Stat. 1471.
280. 104 Stat. 2375, 33 U.S.C. § 2701 *et seq* (1994 ed. and Supp. III).

Washington's maritime regulations. In so doing, Justice Kennedy clarified the Court's holding in the applicable precedent of *Ray v. Atlantic Richfield*[281] where the Court addressed the issue of federal preemption of interstate navigation regulation under the PWSA. The *Ray* Court held that PWSA reflected a comprehensive federal and international regulatory scheme which pre-empted Washington's tanker regulations with regard to pilotage, size, design and construction.[282] Justice Kennedy declared that the OPA did not change the preemptive effect of PWSA; thus, *Ray* retained its precedential validity.[283] While the OPA did contain savings clauses, those clauses - found in Title I of the OPA - had no relevance to Washington's tanker design and operations regulations - the regulations which were at issue in *Ray* and in the instant case. To be sure, Title I's savings clauses provide, in pertinent part that:

> Nothing in this Act . . . shall . . . be construed . . . as preempting the authority of any State . . . from imposing any additional liability or requirements . . . with respect to - the discharge of oil. . .[and]
>
> Nothing in this Act . . . or section 9509 of [the Internal Revenue Code of 1986 (26 U.S.C. § 9509)] shall . . . be construed to affect the authority of the United States or any State . . . to impose additional liability or . . . requirements . . . relating to the discharge of oil.[284]

But, these savings clauses are to be read in the context of Article I of the OPA, an Article that deals exclusively with matters of assessing liability and other financial requirements. "The evident purpose of the savings clause is to preserve state laws which, rather than imposing substantive regulation of a vessel's primary conduct, establish liability rules and financial requirements relating to oil spills."[285] But insofar as the state regulations at issue in this case concerned the construction and operation of oil-bearing vessels, they are covered by Title II of the OPA, a Title which does not contain a savings clause. Thus, as a matter of traditional statutory construction, in conjunction with relevant legislative history, a Congressional Conference Report stating that the OPA "does not disturb the Supreme Court's decision in *Ray. . .*" - the OPA did not disturb *Ray's* interpretation of the preemptive effect of the PWSA.[286] In both *Ray* and in *Locke* the state regulations with regard to construction and maintenance of oil tankers were preempted.

Justice Kennedy also placed the relevant statutes in the larger context of longstanding preemption doctrine. First, there is an assumption in Supremacy Clause issues that "the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of

281. Ray v. Atlantic Richfield, 435 U.S. 151 (1978).
282. *See Locke*, 120 S. Ct. at 1145.
283. *See id.*
284. *Id.* at 1146.
285. *Id.* (citations omitted).
286. *Id.* at 1147.

Congress."[287] Second, the assumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence."[288] Third, "the federal interest [in maritime regulation] has been manifest since the beginning of our Republic...."[289] Fourth, therefore in the area of interstate navigation, state concurrent regulatory authority is merely residual.[290] It is valid only if it is shown to be consistent with a federal regulation that is not of comprehensive and exclusive design ("purpose - conflict" or "conflict preemption"). In *Locke*, the Court held that "conflict preemption" analysis was applicable to OPA Title I issues).[291] If, however, the federal regulatory scheme is comprehensive and exclusive ("field preemption") which the Court held was applicable to OPA Title II issues of vessel design and construction)[292] then even state rules that parallel, supplement or duplicate federal rules are pre-empted.[293] The case was remanded for consideration of the state regulatory scheme under the foregoing analytical framework.[294]

The final business-related preemption case this term was *Crosby v. National Foreign Trade Council,*[295] where a trade association representing companies engaged in international commerce challenged a Massachusetts law precluding state entities from doing business with any private company engaged in commercial activities with Burma (now Mynamar). As in *Locke* and *Norfolk*, the case presented the issue of the preemptive effect of federal law, in this case, the Foreign Operations, Export Financing and Related Programs Appropriations Act (Act)[296] and an Executive Order [297] promulgated pursuant to it. In pertinent part, the Act banned non-humanitarian aid to and opposed international support for Burma. It authorized the President to impose additional sanctions against Burma and, most notably, to impose sanctions against "United States persons" engaging in "new investments" in Burma. It also authorized the President to develop a "comprehensive multilateral strategy to bring democracy to... Burma." And, finally, the authorization included Presidential power "to waive... any sanction [under the federal Act] [in the]... national security interests of the United

287. *Id.* (citations and internal quotations omitted).

288. *Locke,* 120 S. Ct. at 1147 (citations omitted).

289. *Id.* at 1143 (citing the Federalist Nos. 44, 12, 64; Act of the First Congress in 1789 establishing federal navigation certificates, *See,* Act of Sept 1. 1789, ch. 11 § 1, 1 Stat. 55; Cooley v. Board of Warden of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots, 12 How. 299, 13 L. Ed. 996 (1852) (in some instances, state regulation of interstate navigation is precluded even where the federal government has not entered the field); Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824) (invalidating state maritime law on preemption grounds); and Sinnot v. Davenport, 22 How 227, 16 L. Ed 243 (1859) (federal maritime regulation was exclusive)).

290. *See id.* at 1148 (citing McCulloch v. Maryland, 4 Wheat, 316, 4 L. Ed. 579 (1819)).

291. *Id.* at 1148-49.

292. *See id.* at 1149.

293. *Id.* at 1151. (*citing,* Sinnot v. Davenport, 22 How 227, 16 L. Ed 243 (1859)).

294. *See Locke,* 120 S. Ct. at 1152.

295. Crosby v. National Foreign Trade Council, 120 S. Ct. 2288 (2000).

296. 110 Stat 3009-166.to 3009-167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009-121 to 3009-172).

297. Burman Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp.).

States.[298]

Crosby undisputedly implicated foreign policy issues, issues which have been historically dominated by federal regulation, as were the maritime issues in *Locke*. Hence, the assumption of no preemption absent statutory evidence of express Congressional intent did not apply and - under the traditional preemption framework, as outlined in *Locke*, the issue devolved either to "field preemption" scrutiny or, if Congress did not evince an intent to occupy the issue comprehensively and exclusively, then to "conflict preemption" (or "purpose-conflict preemption") analysis.[299] Noting, as did the Court in *Locke*,[300] that analysis under each rubric ("field" preemption and "conflict" or "purpose-conflict" preemption) is not hermetically sealed,[301] the Court concluded that the Massachusetts law at issue here was pre-empted because it conflicted with the Federal Act in at least three respects: delegation of discretionary powers to the Executive to add or eliminate sanctions in the national interest; delegation to the President of authority to develop a comprehensive scheme; and limitation of commercial sanctions to "United States persons" engaged in "new investment" in Burma. Thus, Massachusetts law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[302] because it curtails Presidential authorization by Congress "to achieve a political objective." Therefore, the Massachusetts law was struck down on purpose-conflict preemption grounds.

Crosby joins *Locke* and *Norfolk So. RR* and *Geier* in establishing the analytical frame for current preemption theory.[303] Taken together they form a primer of modern preemption analysis. *Crosby* adds to the frame by making it clear that even in a situation where, as there, federal law was enacted after conflicting state law, the Court will not require that preemption be express:[304]

> The State stresses that Congress was aware of the State Act in 1996, but did not preempt it explicitly when it adopted its own Burma statute. The State would have us conclude that Congress continuing failure to enact express preemption implies approval, particularly in light of occasional instances of express preemption of state sanctions in the past.... [T]he argument is unconvincing on more than one level. A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.[305]

The other aspect that *Crosby* adds to our understanding of contemporary

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298. *Crosby*, 120 S.Ct. 2292 (citations omitted).
299. *See supra* notes 284-295 and accompanying text.
300. *Locke*, 120 S. Ct. at 1149.
301. *See Crosby*, 120 S. Ct. at 2294 n.6.
302. *Id.* at 2294 (citations and internal quotations omitted).
303. *Id.* (citations and internal quotations omitted).
304. *Id.*
305. *Id.* (citations and internal footnotes omitted).

preemption jurisprudence arises in the context of laws implicating international commerce where the argument for uniformity may take on additional weight. In this context, the *Crosby* Court clarified its opinion in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*[306] where the Court said that opinions of foreign countries and of the Executive Branch were irrelevant in determining Congressional intent on the issue of preemption. In *Barclays*, the evidence was irrelevant because "Congress had taken specific actions rejecting the positions both of foreign governments . . . and the Executive . . . ."[307]

By contrast, in *Crosby* the Congress had expressly authorized the Executive to use discretionary power to develop a multinational policy agenda on the issue (what the Court calls a "plentitude of Executive authority" because it includes not only Executive authority "plus all the Congress can delegate").[308] And, the Executive had made clear its sensitivity to the strenuous opposition of foreign nations to the Massachusetts law.[309] Similarly, the Court in *Locke* did not disdain evidence of the concerns of foreign governments with regard to the Washington tanker regulations.[310] *Locke* and, especially *Crosby* limit the evidentiary force of *Barclays* and make it clear that in the international arena, particularly where commerce questions trigger issues of foreign policy, the concern of foreign powers will reinforce preemption arguments premised on the need for uniformity.

But, *Crosby* also leaves several questions unanswered. Among them are the Court's silence on the issue of field preemption and its failure to address the lower court's rulings on the foreign affairs power and the dormant Foreign Commerce Clause power.[311] The Court acknowledged the omissions, stating simple that because the case was resolved on purpose-conflict preemption grounds, the Court did not need to reach those issues.[312] A similar justification was proffered for its failure to address the burgeoning issue of the presumption against preemption in the context of international commerce and to sort out the complexity of judicial approaches in that regard. On that issue, *Crosby* echoes *Locke* where the Court began by assuming no preemption unless clearly manifest by Congress or by "a history of significant federal presence," but explicitly declined to elucidate the presumption issue in greater detail.[313] These and other doctrinal ambiguities with respect to preemption the Court, in its 1999 term, left for another day.

CONCLUSION

The 1999 term unmistakably signals the Court's proactive interest in applying preemption analysis to federalism issues in the business context. And, perhaps, that was the big news for business-related cases this term: the notable use

306. Barclays Bank PLC v. Franchise Tax Bd. Of Cal., 512 U.S. 298, 327-329 (1994).
307. *Crosby*, 120 S. Ct. at 2301 (citations omitted).
308. *Id.* at 2295. (citations and internal quotes omitted).
309. *See id.* at 2295-96.
310. *Locke*, 120 S. Ct. at 1149-50.
311. *See generally*, *Crosby*, 120 S. Ct. 2288.
312. *See id.*
313. *Locke*, 120 S. Ct. at 1147 (citations and internal quotes omitted).

of preemption as an alternative battleground for litigating Supremacy Clause versus state sovereignty issues which implicate commercial interests. In that regard, the four preemption cases discussed above present an exegesis on contemporary preemption doctrine that is certainly worthy of our attention. The Court's special focus this term entailed the two species of implied preemption: field preemption (*Norfolk So RR Co.* and - with regard to Title II of the OPA - *Locke*) and purpose-conflict preemption (*Geier*, *Cosby* and - with regard to Title I of the OPA - *Locke*). Each of these cases served the business interests well - shielding them in every instance from more stringent state standards.

Obviously, it would be specious to conclude that this beneficent result will always abide. To coopt Chief Justice Rehnquist's apt remarks in another context, we can anticipate that in subsequent cases, business interests and their opposing parties may find themselves changing positions "as nimbly as if dancing the quadrille."[314] And it is certainly not out of the question to predict that business interests and state sovereignty interests will occasionally coincide, or that - when they conflict - state interests will prevail over business interests, as they did in *Florida Prepaid* for example. In that eventuality, business interests may need to consider what recourse they have, what alternative strategies they might pursue. As an illustration, proponents of the Massachusetts Burma Laws, following *Crosby*, were left to pursue their unquestionably worthy objectives against heinously repressive governments and the private companies which do business with them,[315] through extrajudicial means - including lobbying pension funds to divest stock in those companies and lobbying Congress for non-preemptive legislation.

In sum, resolution of the business-related preemption cases this term settles relatively little and serves as harbinger for future legal disputes.

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314. Vermont Yankee Nuclear Power Corp. v. NROC, 435 U.S. 519, 539-540 (1978) (discussing the positions taken by the parties in the case with respect to the licensing procedure for nuclear reactors, (then) Rehnquist opined, "[I]t appears here, as in *Orloff v. Willoughby*, 345 U.S. 83, 87, 73 S. Ct. 534, 537, 97 L. Ed. 842 (1953) that in this Court the parties changed positions as nimbly as if dancing a quadrille").

See Locke, 120 S. Ct. at 1147 (citations and internal quotes omitted).

315. It is at least worthy of a footnote to identify some of the salient facts in *Crosby*. Unocal was the putatively bad actor in the dispute, having had a significant and ongoing business relationship with the repressive and corrupt Myanmar government. Unocal is, in fact, reputed to be the largest private investor in Myanmar. Unocal is also a board member of the trade organization (the National Foreign Trade Council), which initially sued Massachusetts. The Massachusetts case was dubbed by the trade group to be a test case against state and local (what the group identifies under the subtly pejorative label of "subfederal units,") legislative attempts to sanction doing business with repressive regimes. The trade group especially Unocal, viewed the federal law as being relatively benign because it was limited to sanctioning "new investments" thus, grand fathering in Unocal's prior dealings with Myanmar including a recent and mammoth oil exploration and development project there. *See*, Janus Resen, *Trade Ruling is Victory for Oil Giant*, NY TIMES, June 20, 2000, at A23 col 4.

APPENDIX A

CASE CITATIONS

I. Government Contracts

1. *Mobil Oil v. U.S.*, 2000 WL 807187 (2000)

II. Environment

2. *Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*, 120 S.Ct. 693 (2000)

3. *Public Lands Council v. Babbitt*, 120 S. Ct. 1815 (2000).

4. *Vermont Agency of Natural Resources*, 120 S. Ct. 1858 (2000)

III. Taxation

5. *Hunt-Wesson, Inc. v. Franchise Tax Board of California*, 120 S. Ct. 1022 (2000)

6. *Baral v. U.S.*, 120 S. Ct. 1006 (2000).

IV. Bankruptcy

7. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 120 S. Ct. 1942 (2000)

8. *Raleigh v. Illinois Dept. of Revenue*, 120 S. Ct. 1951 (2000)

V. Patent/Trademark

9. *Wal-Mart Stores, Inc. v. Samara Bros. Inc.*, 120 S. Ct. 1339 (2000)

VI. Civil Procedure

10. *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579 (2000)

11. *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000)

VII. Civil RICO

12. *Beck v. Prupis*, 120 S. Ct. 1608 (2000)

13. *Ratello v. Wood*, 120 S. Ct. 1075 (2000)

14. *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000)

15. *Adarand Constructors, Inc. v. Slater*, 120 S. Ct. 722 (2000)

16. *Cortez Byrd Chips,. Inc. v. Bill Harbert Construction Co.*, 120 S. Ct. 1331 (2000)

17. *Fischer v. U.S.*, 120 S. Ct. 1780 (2000)

18. *Pegram v. Hedich*, 120 S. Ct. 2143 (2000)

19. *Harris Trust and Savings Bank v. Salomom Smith Barney, Inc.*, 120 S. Ct. 2180 (2000)

20. *Christensen v. Harris County*, 120 S. Ct. 1655 (2000)

21. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000)

VIII. Federalism

22. *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000)

23. *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000)

24. *Geier v. American Honda Motor Company*, 120 S. Ct. 1913 (2000)

25. *Norfolk Southern RR Co. v. Shanklin*, 120 S. Ct. 1467 (2000)

26. *U.S. v. Locke*, 120 S. Ct. 1135 (2000)

APPENDIX B
1999-2000 SUPREME COURT CASES IMPACTING THE BUSINESS COMMUNITY

Field/Rule of Law Cases	Author	Business Interest Involved	Competing Interest Involved	Synopsis of Holding/Issue
I. Government Contracts - Outer Continental Shelf Act 1. *Mobil Oil*	Breyer	Oil Companies	Federal Government	Federal Government communication to oil companies that it intended to repudiate certain provisions of its contract with oil companies because of the terms of a newly-enacted statute constituted a breach which substantially impaired the value of the contract to oil companies and therefore entitled them to restitution.
II. Environment - Clean Air Act 2. *Friends of the Earth*	Ginsburg	Waste water treatment company	Environmental advocacy organizations	Environmental groups' citizen suit against polluter was not rendered moot where violations were occurring when suit was brought and could recur if not sanctioned. Environmental groups had standing where members (not the environment) suffered injury-in-fact.
- Taylor Grazing Act 3. *Public Lands Council*	Breyer	Ranching advocacy groups	Federal Government	Interior Department's 1995 amendments to grazing regulations were authorized by the 1934 Taylor Grazing Act and did not significantly modify its provisions.
- False Claims Act/Art. III 4. *Vermont Agency*	Scalia	State agency	Federal Government	Former state employee had standing to bring qui tam claim against state employer under False Claims Act but state is not a "person" subject to qui tam liability under the Act.
III. Taxation 5. *Hunt-Wesson*	Breyer	Nondomiciliary	California	State may not tax, directly or indirectly (by way of an adjusted deduction), income from a discrete business of a nondomiciliary corporation that is not related to business carried on both within and without the taxing state.
- Internal Revenue Code 6. *Baral*	Thomas	Taxpayer	Federal Government	Remittances of withholding and estimated income tax are deemed "paid" on the due date of the applicable calendar year for purposes of overpayment claims.

Field/Rule of Law Cases	Author	Business Interest Involved	Competing Interest Involved	Synopsis of Holding/Issue
IV. Bankruptcy - Bankruptcy Code				
7. *Hartford*	Scalia	Secured Creditor	Insurer	Administrative expenses, such as workers compensation insurance premiums, do not have priority over secured claims under the Code.
8. *Raleigh*	Souter	Trustee of debtor	Illinois	Because creditor entitlements in bankruptcy arise under substantive law creating debtor's obligation where substantive law puts the burden of proof on debtor, the burden generally remains with debtor's Trustee in bankruptcy.
V. Patent/Trademark - Lanham Act				
9. *Wal-mart*	Scalia	Clothing manufacturer	"Knock-off" copier	Unregistered trade dress (such as clothing design) is protected from infringement under the Lanham Act only if it has acquired "secondary meaning" in the minds of the public that the design identified the source (producer) of the trade dress.
VI. Civil Practice - Rules 15/59				
10. *Nelson*	Ginsburg	Patent Holder	Alleged infringer	In granting prevailing defendant in patent infringement case leave to add President and sole shareholder of plaintiff corp. as 3rd party defendant and in immediately assessing costs and attorney fees against him, trial court violated President shareholder=s due process rights to notice and to be heard.
- Rule 50 11. *Weisgram*	Ginsburg	Manufacturer/ tort feasor	Estate of injured party	Appellate Court did not abuse its discretion in entry of judgment for losing party where it found that without inadmissable testimony of expert witness, plaintiff could not sustain his burden of proof.

Field/Rule of Law Cases	Author	Business Interest Involved	Competing Interest Involved	Synopsis of Holding/Issue
VII. Civil RICO 12. *Beck*	Thomas	Corporate Insiders	Corporate President	Termination of employment because of employee's refusal to engage in alleged racketeering conspiracy is not injury caused by an act of RICO and does not give rise to a RICO action.
13. *Rotella*	Souter	Physicians / Healthcare facilities	Patient	For purposes of equitable tolling, RICO's 4-year statute of limitations does not include an "injury and pattern discovery rule"
VIII. Other Federal Statutes - Small Business Act - Federal Food Drug and Cosmetic Act 14. *FDA v. Brown & Williamson*	O'Connor	Tobacco Companies	Federal Agency	FDA did not have jurisdiction under FDCA to regulate tobacco products.
15. Adarand Constructors	O'Connor	Highway Construction Company	Federal Government	Tenth Circuit erred in finding white-owned business's suit challenging constitutionality of "disadvantaged business enterprises" DOT regulations was moot because DOT's acceptance of Colorado's certification of plaintiff as "disadvantaged." DOT's challenged conduct under the regulations could reasonably recur.
- Federal Arbitration Act 16. *Cortez Byrd Chips*	Souter	Corporation	Corporation	Venue provisions of the Federal Arbitration Act are permissive, allowing a motion to confirm, vacate or modify an arbitration award to be filed in any district proper under the general venue statute.
- Medicare 17. *Fischer*	Kennedy	Debtor Corporation	Federal Government	For purposes of bringing an action under the federal bribery statute, "benefits" of healthcare organizations that participate in Medicare program include Medicare payments made through these organizations to cover patients' care.

Field/Rule of Law Cases	Author	Business Interest Involved	Competing Interest Involved	Synopsis of Holding/Issue
IX. Employment Compensation - ERISA 18. *Pegram*	Souter	HMO	Beneficiary	HMOs do not breach any fiduciary duty to patients under ERISA when they induce physicians to limit healthcare by offering them financial incentives.
19. *Harris Trust*	Thomas	Broker/dealer of pension trust	Trustee	ERISA authorizes the institution of a civil action not only against a fiduciary that enters into a prohibited transaction with a nonfiduciary party in interest but also against the nonfiduciary party.
-FLSA 20. *Christensen*	Thomas	Employees	Public employer	FLSA permits public employees to compel their employees to use their accrued compensatory in order to avoid the necessity of paying overtime compensation.
X. Employment Discrimination - ADEA 21. *Reeves*	O'Connor	Employer	Discharged employee	Employee's prima facie coupled with a showing that employer's proffered reason for firing him was pretextual are sufficient evidence to sustain a jury's verdict in employee's favor.

Field/Rule of Law Cases	Author	Business Interest Involved	Competing Interest Involved	Synopsis of Holding/Issue
XI. Federalism -Employment Discrimination -ADEA 22. *Kimel* - Pre-emption - National Traffic/Motor Vehicle Safety Act	O'Connor	Employees	State university system	While ADEA contains a clear statement of Congressional intent to abrogate State sovereign immunity in the age discrimination context, the intended abrogation exceeds Congressional authority under the 14th Amendment.
23. *Grier* - Foreign Trade	Breyer	Vehicle manufacturer	Injured motorist	While the Vehicle Safety Act's express pre-emption clause in conjunction with the savings clause argue against pre-emption of the instant tort action, ordinary pre-emption principles compel a finding that the lawsuit is precluded because it conflicts with a statutory scheme designed to induce manufacturers and the public to accept more effective passive restraints.
24. *Crosby* - Federal Railroad	Souter	Trade advocacy	Massachusetts	Massachusetts' statutory ban on doing business with Myanmar (Burma) violates the Supremacy clause and is pre-empted by subsequent federal legislation pursuant to ordinary (implied) pre-emption principles.
25. *Norfolk So RR* - Ports and Waterways Safety Act	O'Connor	Railroad Company	Estate of deceased motorist	The Federal Railroad Safety Act pre-empts wrongful death actions premised on railroad's negligence with regard to warning devices at railroad crossings.
-26. *Locke*	Kennedy	Oil Transport	Washington state	Title II of the Ports and Waterways Safety Act pre-empts state regulations of staffing and operation of tankers.