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GESTALT FLIPS* BY AN ACROBATIC SUPREME COURT AND THE BUSINESS-RELATED CASES ON ITS 2000-2001 DOCKET

Barbara K. Bucholtz**

"[I]t appears . . . that 'in this [case, the majority] . . . changed positions as nimbly as if dancing a quadrille.'"[1]

I. INTRODUCTION

It is impossible to consider the business-related cases on the Supreme Court's October 2000 term in isolation from its unprecedented involvement in the Presidential election of 2000, famously culminating in two judicial opinions, which had the effect of appearing to decide that election.[2] Not only are the opinions a radical departure from Supreme Court precedent, historically, but they also dramatically undermine the Rehnquist Court's reputation as a restraintist Court and its doctrinal stance on Federalism

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* The title is suggested by Professor Step Feldman's description of postmodernist paradigm shifts. *See infra* n. 11.

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1. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 539-40 (1978). The quoted statement is from (then) Justice Rehnquist's opinion, in which he describes the arguments of opposing parties in a nuclear power plant licensing procedure. Justice Rehnquist's quip reads, in full, "[I]t appears here, as in *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953), that 'in this Court the parties changed positions as nimbly as if dancing a quadrille.'" A quadrille is a version of the minuet. I have previously used Rehnquist's quip to describe opposing parties' positions with regard to cases implicating the Rehnquist Court's burgeoning Federalism doctrine, which the Court has demonstrated, can cut two ways in business-related cases. *See* Barbara K. Bucholtz, *Private Sector Issues in a Public Sector Retro-lution: The Supreme Court's Business-Related Decisions in the October 1999 Term*, 36 Tulsa L.J. 153, 187 (2000). Here I enlist the quip reflexively, suggesting that the Rehnquist majority itself, in *Bush v. Gore*, 531 U.S. 98 (2001), "nimbly" switched sides from what was previously considered its entrenched position on Federalism issues.

2. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2001); *Bush v. Gore*, 531 U.S. 98 (2001). *Palm Beach*, a unanimous, unsigned (per curiam) decision, reviewed the Florida Supreme Court's twelve-day extension of the deadline to certify the Florida vote. The decision vacated and remanded the state court's ruling and requested clarification of the grounds on which it was reached. When the Florida Supreme Court ordered a recount of ballots statewide, the Bush Campaign appealed the order. In *Bush v. Gore*, the Supreme Court ruled that the Florida Supreme Court's recount order did not provide standards sufficient to secure Fourteenth Amendment equal protection rights and that there was no time to correct the problem. *Bush v. Gore* was also an unsigned (per curiam) order, but there was a strenuous dissent. Hence, the slim majority that Bush had garnered gave him Florida's Electoral College votes and, thus, the presidency.

issues that the election cases call into question the Court's jurisprudential identity and perhaps even its credibility.

Early in its tenure, the Rehnquist Court acquired the reputation of being restraintist and centrist. This image was reflected, first, in the cases it selected for review. Commentators noted a distinct proclivity in the early years for avoiding cases that might exacerbate underlying ideological splits on the Court or in society.[3] Second, the Court was viewed as only moderately conservative in its doctrinal approach and it was also seen as moderately conservative in its apparent commitment to retain established, even liberal, precedent on a broad spectrum of issues.[4] Third, the Court exhibited a clear preference for resolving disputes by rigorous textual analysis rather than by reference to broad policy considerations. All of these characteristics led to a perception of the Court as centrist, a Court with "a very real preoccupation with forming and maintaining a stabilizing consensus."[5] Its decisions with respect to legal issues that impacted the business community were entirely consistent with that image. The Court produced moderately pro-business results that were reached, primarily, by methodical application of traditional rules of statutory construction.[6]

However, that image was somewhat altered when, in 1992, the majority laid the groundwork for what emerged by the 1996-1997 term as a full-fledged revisionist federalism.[7] The seminal Federalism cases, now recognized as a defining feature of Rehnquist jurisprudence, also opened up a clear ideological fault line that the Court previously appeared at pains to avoid.[8] Nevertheless, the Court's business-related cases in the aftermath of its federalism offensive maintained a centrist, moderately pro-business posture consistent with its reputation as a restraintist Court.[9]

Insofar as the Court's burgeoning federalism implicated business cases, business interests lost almost as many cases as they won.[10] On balance, the Court's track record on business-related cases remained the same.

The Court's decision to intervene in, and to determine the outcome of,

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3. *See* Barbara K. Bucholtz, *Business as Usual in a "Dollar Democracy:" A Review of Business-Related Cases in the 1998-1999 Supreme Court Term*, 35 Tulsa L.J. 485, 486 n. 4 (2000) [hereinafter Bucholtz, *Dollar Democracy*]; Barbara K. Bucholtz, *Taking Care of Business: A Review of Business-Related Cases in the 1995-1996 Supreme Court Term*, 32 Tulsa L.J. 449, 462 nn. 140-41 (1997).

4. *See* Barbara K. Bucholtz, *Sticking to Business: A Review of Business-Related Cases in the 1997-98 Supreme Court Term*, 34 Tulsa L.J. 207, 208 (1999).

5. *Id.* at 227.

6. *Id.* at 207.

7. *See* Bucholtz, *Dollar Democracy*, *supra* n. 3, at 485 nn. 2-3.

8. The ideological split in the Court's Federalism cases now consistently pits Justices Rehnquist, O'Connor, Scalia, Thomas, and Kennedy against Justices Souter, Stevens, Ginsburg, and Breyer. *See e.g. Alden v. Me.*, 527 U.S. 706 (1999); *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 646 (1999).

9. *See* Bucholtz, *supra* n. 1, at 154.

10. *See id.* at 187.

last fall's election must be seen as an abrupt departure from its moderate, restraintist posture and an astonishing contradiction to its evolving federalism. The *Bush* cases created such a precipitate reversal in the majority's doctrinal position that it amounts to what my colleague Professor Step Feldman, in another context, has aptly described as a "gestalt switch."[11] This doctrinal *pas de deaux* leaves in its wake important questions. Principally, these questions focus on the ramifications of the *Bush* cases in various venues.

We await the outcome, for example, of repercussions from the *Bush* cases, which are being felt in the political arena with a reassessment of the electoral process.[12] And we know that *Bush v. Gore* now reverberates in the lower courts in the form of litigation spawned by its reliance on Fourteenth Amendment analysis.[13] But this article focuses on a narrower line of questions. What change, if any, do these cases signal in the Court's approach to issues that affect the business community? Are the *Bush* decisions harbingers of a paradigm shift toward a more ideologically pro-active and ideologically divided Court? Or were the *Bush* decisions anomalies, which will have no discernible impact on the Rehnquist oeuvre?

Perhaps it is too early to draw firm conclusions from this term's seventy-nine decisions, which were reached within a politicized maelstrom

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11. Professor Feldman used the term to describe a postmodernist dexterity or conceptual acuity in being able to reposition or view a text (or doctrine) through different prisms and thereby, uncover more and different understandings of it. He says, "[a] postmodern flip is a gestalt switch or paradigm move that reverses our prior approach to a text . . . and, in so doing, reveals previously unrecognized features of that text." Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With An Emphasis on the League Rule Against New Rules in Habeas Corpus Cases)*, 88 Nw. U. L. Rev. 1046, 1047 (1994). Here I co-opt the term and "nimbly" give it an ironic spin. *See* Win McCormack, *Deconstructing the Election: Foucault, Derrida and GOP Strategy*, The Nation 25 (Mar. 26, 2001). McCormack explains that while conservative intellectuals have been unrelentingly critical of all ideas they view as "postmodern," the Republican strategy in Florida, including the successful attempt to involve the Supreme Court in the resolution of political issues during the electoral process, did just that.

12. *See* Katharine Q. Seelye, *Divided Civil Rights Panel Criticizes Florida Election*, N.Y. Times A1 (June 5, 2001) (reporting that, although deeply divided, the United States Commission on Civil Rights had released information on the election process in Florida which calls the process into question and noting, among other things, the disenfranchisement of many, primarily African-American, voters in Florida—one of the problems addressed in *Palm Beach and Bush v. Gore.* The article also reported that the Commission has asked the Justice Department for an investigation into whether voting irregularities violated the national Voting Rights Act). *See* Dana Canedy, *Florida Governor Calls Commission Report on Election Biased*, N.Y. Times A20 (June 6, 2001) (reporting Governor Jeb Bush's criticism of the Commission's findings).

13. *See e.g.* B.J. Palermo, *Rights Groups Latch Onto Bush v. Gore*, 23 Natl. L.J. A1 (May 21, 2001) (reporting on cases filed in Georgia, Florida, Illinois, and California by minority groups asserting unconstitutional disenfranchisement and applying the equal protection analysis of the majority in *Bush v. Gore* to their allegations). Palermo writes, "In lawsuits across the country, civil rights plaintiffs are seeking to use the legal reasoning that put George W. Bush into the White House to attack error-prone balloting procedures." *Id.* In *Bush v. Gore*, the Court's per curiam opinion states that the Florida Supreme Court's ballot recount order lacked sufficient specificity to ensure non-arbitrary and uniform treatment of the ballots and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment. *Bush*, 531 U.S. at 106.

created by the *Bush* decisions. But evidence in the form of the thirty-six business-related cases the Court decided is certainly a better predictor of the post-*Bush* Court than available alternatives (reading tea leaves, for example). Those thirty-six business-related decisions from the October 2000 term suggest that, following the imbroglio of the presidential election cases, the Court may not return to its status quo.[14] Certainly, the increase in 5-4 decisions, which split the Court between its more conservative and less conservative wings, suggests an ideological turn.[15] This is the same split that we witnessed in the Federalism cases and that reasserted itself in *Bush v. Gore*. This term, six out of the thirty business-related cases were decided by the ideological 5-4 vote. Six of the nine civil rights cases were also resolved with the same 5-4 split. Across the docket, twenty out of seventy-nine cases (twenty-seven percent) were decided by the same 5-4 split. That twenty-seven percent compares unfavorably with twenty-one percent in 1998-1999 and sixteen percent in 1997-1998.[16] Comparing the business-related cases in prior years with the twenty percent (six out of thirty) this year, the contrast is stark: only two 5-4 decisions of thirty-six business-related cases in the 1998-1999 term and only one 5-4 ideological split in the twenty-six business-related cases decided in the 1999-2000 term.

On the other hand, other statistics suggest that the division of the Court, while significant, may not be radically destabilizing in future terms. For example, more than forty percent of the business-related cases this term were decided without dissents. While the percentage of no-dissent business-related decisions was slightly higher in previous terms, this term's slight increase in dissents was not a radical change. For example, in the 1998-99 term, forty-four percent of business-related decisions were no-dissent; in the 1997-1998 term, forty-eight percent; in the 1996-1997 term, forty-three percent; and in the 1995-1996 term, forty-eight percent.[17] Moreover, as was the case in previous terms, most business-related decisions this term were reached by applying technical rules of statutory construction. These technical rules certainly constitute a narrower ground for resolving disputes than policy-driven or theoretical grounds. Thus, the statistical evidence is ambiguous, giving us some reason to believe that we can anticipate a widening ideological gap and more winner-take-all split decisions, but also some reassurance of continuing efforts to build a consensus either by selecting less divisive issues for review or by finding narrow grounds for resolution. Putting statistical evidence to one side,

14. For a complete list of the business-related cases decided in the 2000-2001 term, *see* Appendix A.

15. The make-up of the split replicates the same ideological division of the Court in its Federalism cases, *see supra* n. 8.

16. *See* Linda Greenhouse, *In Year of Florida Vote, Supreme Court Also Did Much Other Work*, N.Y. Times A12 (July 23, 2001).

17. *See* Bucholtz, *Dollar Democracy*, *supra* n. 3, at 486 n. 5.

however, and taking a closer look at the substantive issues raised by the business cases this term, we are left with the distinct impression that the Court has executed a gestalt flip.

II. FEDERALISM AND PREEMPTION

Because the Federalism Revolution first signaled the Rehnquist Court's ideological divide, it seems appropriate to begin a discussion of the Court's gestalt flip with that issue and the related issue of preemption, which offers the Court an alternative basis to consider the tension between state and federal authority. With one exception, these cases all implicate the labor and employment issues that are typically the largest category of business-related cases in any Supreme Court term.

In the Federalism case, *Board of Trustees of the University of Alabama v. Garrett*,[18] the majority extended its evolving Eleventh Amendment doctrine to rule that states enjoy sovereign immunity against suits for damages brought by state employers under the Americans With Disabilities Act ("ADA"). This result was reached by a deeply divided Court, which is typical in federalism cases. In *Garnett*, Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas broadened the base of their Eleventh Amendment federalism doctrine.[19] At issue were several sections of the ADA which mandated that employers "make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business."[20] The Court considered the application of the rule in two consolidated cases. In the first case, Patricia Garrett, a nurse employed by the University of Alabama, was demoted from her former position to a lower-paying job when she returned to work following an extended sick leave for a lumpectomy and rehabilitation treatment.[21] In the second case, the Alabama Department of Youth Services denied Milton Ash's requests for accommodations to

18. 121 S. Ct. 955 (2001).

19. *See e.g. Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996) (holding that Congress has no authority under Commerce Clause to abrogate a state's Eleventh Amendment immunity from private suit in federal courts); *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bld.*, 527 U.S. 666 (1999) (holding that the Trademark Remedy Clarification Act impermissibly abrogated state sovereign immunity). The majority's Eleventh Amendment analysis was somewhat embellished in *Seminole Tribe* because the majority acknowledged there that where the Commerce Clause does not give Congress authority for a particular piece of legislation, Section 5 of the Fourteenth Amendment might lend it sufficient constitutional support. Then, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the majority said that it was within the purview of the Court to determine whether Congressional legislation designed to remedy violations of federal rights laws was "appropriate" pursuant to Section 5. That determination was to be made, said the majority, by application of a "congruence and proportionality test." *Id.* at 520.

20. *Garrett*, 121 S. Ct. at 961 (citations and quotations omitted).

21. *Id.* at 961.

alleviate medical problems.[22] The two state employees filed separate lawsuits, which were consolidated on the pivotal issue of Alabama's sovereign immunity.[23] Chief Justice Rehnquist began his analysis of the issues by quoting the Eleventh Amendment;[24] and he acknowledged that the Court's recent federalism precedents[25] had extended application of the Amendment beyond its language to include not only federal suits against states by citizens of other states but also by citizens of the subject state.[26] He also recognized that the Eleventh Amendment's sovereign immunity bar is limited by legislation unequivocally expressing a Congressional intent to abrogate the Eleventh Amendment "pursuant to a valid grant of constitutionality."[27] Noting that there could be no question of Congressional intent to abrogate state sovereign immunity in the provisions of the ADA, Chief Justice Rehnquist narrowed the question to whether the abrogation passed constitutional muster. Building on his own recent precedents[28] and quoting a 1976 case,[29] Chief Justice Rehnquist held that the constitutional predicate is to be found in Section 5 of the Fourteenth Amendment.[30] Section 5 gives Congress the power to enforce the prohibitions against the unconstitutional exercise of state power identified in Section 1. Casting the Section 5 analysis as one that implicates the Equal Protection Clause of Section 1, Chief Justice Rehnquist invoked the rational basis test as the proper standard for evaluating a state law, which has allegedly violated an individual's equal protection rights.[31] That test states that absent a showing that (1) Congressional attempts to abrogate the Eleventh Amendment were supported by evidence of a history and pattern of discrimination by the states in violation of Section 1 of the Fourteenth Amendment and (2) the

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22. *Id.*

23. *Id.*

24. The full text of the of the Eleventh Amendment reads as follows: "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." U.S. Const. art. XI.

25. *Kimel*, 528 U.S. 621, *Fla. Prepaid*, 527 U.S. 666, and *Seminole Tribe*, 517 U.S. 44.

26. Chief Justice Rehnquist also cited a nineteenth century case, implying that his decision was dictated by the venerable precedent: *Hans v. La.*, 134 U.S. 1 (1890). *Garrett*, 121 S. Ct. at 962. It is perhaps instructive to note that beyond the cases decided recently (and fractiously) in his own Court, the Chief Justice was able to cite only one precedent in support of extending the words of the Eleventh Amendment text.

27. *Garrett*, 121 S. Ct. at 958 (citations and quotations omitted).

28. *Kimel*, 528 U.S. 621, *Fla. Prepaid*, 527 U.S. 666, and *Seminole Tribe*, 517 U.S. 44.

29. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

30. *Garrett*, 121 S. Ct. at 962. Section 1 of the Fourteenth Amendment precludes State laws which "abridge the privileges and immunities . . ." of U.S. citizens or "deprive any person of life, liberty or property without due process of law . . ." or deny any person "equal protection of the laws" and section 5 of the Amendment gives Congress the power to enforce the constraints of Section 1. U.S. Const. amend. XVI.

31. *Garrett*, 121 S. Ct. at 963 ("Under rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation" (citations and quotations omitted).

Congressional response was "congruent and proportional to the targeted violation," the presumption of rational basis conferred on state action would not be overcome.[32] Here, wrote Chief Justice Rehnquist, Congressional evidence of a pattern of discrimination against the disabled was too generalized and anecdotal to meet the evidentiary burden and in any case, the remedy provided under the ADA was not proportional to any transgressions by the states.[33]

In dissent, Justices Breyer, Stevens, Souter, and Ginsburg asserted that the majority's analysis failed to show proper deference for the Congressional findings that led to enactment of the ADA. The majority, said the dissent, was holding Congress to an inappropriately high standard of evidentiary proof.[34] It is interesting that the dissent chose to challenge this fact-driven application of the majority's newly-minted Eleventh Amendment doctrine rather than the doctrine itself.[35] Be that as it may, *Garrett*, by a one-vote majority, continues to shift power to the states at the expense of Congressional authority and individual rights granted by that authority.

Commentators on both sides of the ideological divide forecast that this shift in the balance of power will continue unabated and they expect *Garrett's* expanded sovereign immunity doctrine to be applied to other sections of the ADA as well as to federal civil rights laws in the near future.[36] Henceforth, litigants seeking to enforce similar federal rights pursuant to similar federal statutes must survive the one-two punch of *Garrett's* assault: first, they must show a legislative record documenting a discernible pattern of discrimination by the states themselves and not by the public at large; second, they must convince the Court that the legislative remedies provided by Congress are proportionate to the harm. In the latter regard, the majority has made it abundantly clear that it will not defer to Congressional evaluation of what is "appropriate legislation" to remedy state violations of any federal law that was enacted pursuant to Section 5 of the Fourteenth Amendment.[37] And because the majority has

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32. *Garrett*, 121 S. Ct. at 966.

33. *Id.* at 965-67.

34. *Id.* at 969-72.

35. Alternative grounds for assailing the majority's analysis in *Garrett* include the argument that the privileges and immunities clause of the Fourteenth Amendment was included for the express purpose of foreclosing state nullification of federal law. "Privileges and immunities" have been consistently defined to mean rights granted by Congress within the scope of its authority. Therefore, argues Professor William J. Rich, "Once the Court determines whether Congress acted within its powers . . . [here, to grant federal rights to citizens under the ADA the Court] has no basis for striking down remedies Congress adopts to protect newly established privileges or immunities." William J. Rich, *Court Got Wrong Number*, 23 Natl. L.J. A21 (June 25, 2001).

36. *See e.g.* Linda Greenhouse, *Justices Give the States Immunity from Suits by Disabled Workers*, N.Y. Times A1 (Feb. 22, 2001). Greenhouse discusses imminent Supreme Court review of the ADA rule requiring governments to make their services and facilities accessible to the disabled.

37. *Garrett*, 121 S. Ct. at 974-76 (Breyer, J., dissenting).

taken for itself the exclusive authority to decide what is sufficient proof of a discriminatory practice and what is "appropriate remedial legislation," it seems certain that virtually every state action which violates similar federal statutes will evade Congressional sanctions. Chief Justice's Rehnquist's words support that prediction:

> States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational and [t]hey could quite hard headedly—and perhaps hard heartedly—hold to job-qualification requirements which do not make allowance for the disabled.[38]

Clearly, the rational basis test articulated by Chief Justice Rehnquist will prevail in most cases. But other venues for expanding Rehnquistian federalism are also available. Commentators generally agree that to complete its federalism retro-lution, the Court will have to curtail the spending clause power of Congress.[39] As a matter of fact, *Garrett* offered the Court an opportunity to do just that, because the respondents brought the case under the ADA and section 504 of the Rehabilitation Act of 1973.[40] The Rehabilitation Act, and similar statutes, tie receipt of federal funds to state compliance with the Act's provisions. This gives Congress significant leverage to regulate state conduct. The fact that *Garrett* declined the opportunity to evaluate the case on power-of-the-purse grounds is some indication that it is reluctant to attempt an extension of its federalism doctrine in that direction, at least at this juncture. As one commentator has stated, the stakes on this constitutional issue are extremely high:

> If plaintiffs can sue the states under spending conditions enacted by Congress, the Court's recent federalism rulings can be rendered meaningless. On the other hand, if the justices knock down Congress' power over the purse strings, they will have completed a revolutionary change in the balance of power between Washington and the states.[41]

The last time the Court heard a spending clause case, it upheld the Congressional use of its purse strings leverage.[42] However, Justice O'Connor dissented in that case because she felt that the spending clause did not give Congress authority, through its purse string leverage, to compel the states to conform to a uniform drinking age statute.[43] The O'Connor dissent may signal the majority's strategy: to wait for a case with a broad disconnect between the Constitutional spending clause provision

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38. *Id.* at 964.
39. *See e.g.* David G. Savage, *The Next Federalism Frontier*, 87 ABA J. 30 (2001).
40. *Id.*
41. *Id.*
42. *S.D. v. Dole*, 483 U.S. 203 (1987).
43. *See id.* at 212.

and the federal law for which it serves as regulatory leverage.[44] Then, having established a beachhead on the basis of a factual disconnect, the majority may find it easier to make inroads into Congressional spending clause power.

While *Garrett* a case involving a public sector employee, has no direct impact on private sector business interests, it is part of an expanding panorama threat does not impact the private sector: an evolving federalism doctrine and the contiguous realm of preemption. The Court addressed four preemption cases this term; two of them, like *Garrett*, were also employment issues cases. The exceptions were *Lorillard Tobacco Company v. Reilly*[45] and *Buckman Company v. Plaintiff's Legal Committee*.[46] At issue in *Lorillard* were regulations promulgated by the Massachusetts Attorney General with regard to the sale and advertising of cigarettes, cigars, and smokeless tobacco.[47] The tobacco industry challenged the regulations arguing, among other things, that some of the regulations were preempted by less stringent standards in federal law: the Federal Cigarette Labeling and Advertising Act ("FCLAA"). The industry also argued that other regulations infringed on the industry's commercial free speech rights under the First Amendment.[48] Because the FCLAA covers only cigarette products, the preemption challenge focused exclusively on regulations with respect to the sale and advertising of cigarettes. Regulations covering the sale and advertising of tobacco products were addressed under First Amendment analysis.[49] With respect to both preemption and the First Amendment, the majority's analysis covered several kinds of regulations and the result was a structurally complex decision.

With regard to the preemption issue, the Court split ideologically 5-4, with the majority agreeing with the cigarette industry that the FCLAA preempted Massachusetts's more stringent regulations. In response, the dissent chided the majority for contradicting its own precedent. In *Lorillard*, the majority held that outdoor and point-of-sale advertising for cigarettes was preempted by federal law. But preemption analysis was rejected in an arguably similar case, *United States v. Lopez*,[50] where the Court struck down federal law that attempted to regulate gun possession in close proximity to schools. The *Lorillard* majority rejoined that because the target of the regulations in *Lorillard* was cigarette advertising in *any*

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44. *Id.*
45. 121 S. Ct. 2404 (2001).
46. 531 U.S. 341 (2001). The *Lorillard* case covered multiple classes of tobacco products; however, the preemption ruling covered only the cigarette industry, while First Amendment analysis covered smokeless tobacco and cigar products. *Id.* at 2413-14. For an analysis of *Buckman*, *see infra* nn. 235-37.
47. *Lorrillard*, 121 S. Ct. 2404.
48. *Id.* at 2410-11.
49. *Id.*
50. *U.S. v. Lopez*, 514 U.S. 549 (1995) (holding that Congress had exceeded its authority under the Commerce Clause by enacting the Gun Free School Act).

location which implicates the health concerns of the FCLAA, the case was factually distinguishable from *Lopez*, where the state challenged the authority of federal law to institute what amounted to zoning regulations and thereby to co-opt traditional police power authority.[51] Nevertheless, the entire Court agreed that Congress did not intend to foreclose state regulation of cigarette sales to minors or local zoning restrictions on advertising in order to address traffic safety issues or other traditional police power concerns.[52]

The *Lorillard* preemption decision this term favored the tobacco industry, just as the business-related preemption cases last term,[53] favored business interests. Last term all four preemption cases that affected business ruled that state regulation of a particular industry was preempted by a federal regulatory scheme and that result shielded the business interests from more stringent state regulation. Thus far, the Court's preemption analysis has served business interests well and continues to serve the Court as an alternative ground for resolving states' rights issues. It should be noted that, ideologically speaking, conservative and liberal wings of the Court tend to "dance the quadrille" in these preemption cases; the more conservative wing has consistently found preemption and has given its imprimatur to the less rigorous Federal regulations while the less conservative wing has often found no preemption and weighed in on the side of states' rights. Preemption cases this term evidenced no facial change in the Rehnquist Court's preemption doctrine. However, they may be harbingers of a widening ideological split, as the 5-4 vote tally extends from federalism cases to include preemption cases as well.

Because other articles will deal with the First Amendment aspects of the *Lorillard* case, this article will focus on only two points regarding the Court's First Amendment analysis. First, the Court reached a pro-industry result, finding that the state's restrictions on outdoor advertising violated the industry's commercial free speech rights.[54] Thus, *Lorillard* is indisputably a pro-business result on both preemption and First Amendment grounds. And, without doubt, the tobacco industry will feel confident in challenging similar regulations in other states.[55]

Second, the tobacco industry had hoped to achieve more than a favorable result in *Lorillard*. It had hoped to win decisively on free speech doctrine as well: to expand commercial free speech rights, as other

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51. *Lorillard*, 121 S. Ct. at 2419-20.

52. *Id.*

53. *Crosby v. Nat. For. Trade Council*, 530 U.S. 363 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Norfolk So. R.R. Co. v. Shanklin*, 529 U.S. 344 (2000) and *U.S. v. Locke*, 120 S. Ct. 1135 (2000). These four cases set forth the Rehnquist Court's preemption doctrine.

54. *Lorillard*, 121 S. Ct. at 2413-14.

55. *See* Linda Greenhouse, *Justices Rein In Local Regulation of Tobacco Ads*, N.Y. Times A1 (June 29, 2001) (stating that similar tobacco regulations in New York City, Chicago, and Baltimore are now in jeopardy following the result in *Lorillard*).

industry litigants had in recent cases,[56] by convincing the Court to abandon its four-pronged *Central Hudson* test.[57] This test distinguishes between commercial speech and other kinds of speech and offers less protection to the former. But the Court refused to abandon the *Central Hudson* test, finding for the industry on much narrower grounds: that the states' regulation was not a reasonable fit with its goal of combating use of tobacco products by minors. The regulations at issue, therefore, failed the fourth step in the *Central Hudson* test.[58] Thus, the *Lorillard* case was a win for the tobacco industry, but it was only moderately pro-business and made no changes in either preemption or commercial speech doctrine. There was, however, some evidence of a widening ideological split in the application of the Court's preemption analysis.

The other two cases decided on preemption grounds this term could be categorized as employment cases. The first, *Egelhoff v. Egelhoff*,[59] was an employment benefit case. There, the Court ruled that Employee Retirement Income Security Act ("ERISA") preempted a Washington statute that nullifies prior beneficiary designations in benefit plans due to divorce, because the Washington statute was "related to" an ERISA plan.[60] Engelhoff had named his second wife as beneficiary of his life insurance and pension plans under his employer's ERISA benefit plan. Subsequently, Engelhoff and his second wife were divorced, but before he changed his beneficiary, he died intestate. His children, by a previous marriage, argued that the statute entitled them to the proceeds of the plans. His former spouse argued that ERISA, which provides that a plan administrator must comply with the beneficiary designations made by the employee, entitled her to the proceeds.

The Court granted certiorari to resolve a division in the circuits on this issue. And, on grounds of express preemption, it found that ERISA preempted the state statute. In so doing, the majority looked specifically at section 1144(a) of ERISA which mandates preemption whenever a state

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56. The majority noted that similar challenges were mounted recently in *Greater New Orleans Broad. Assn., Inc. v. U.S.*, 527 U.S. 173 (1999) and *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996).

57. The *Central Hudson* test imposes a less-than-strict scrutiny test for analyzing the constitutionality of commercial speech regulation. Its four-part test asks: 1) was the commercial speech legal and not misleading? If so, it passes the first hurdle of First Amendment protection. 2) Did the governmental regulation seek to protect a substantial government interests? If so; 3) did the regulation directly advance the interest? And, if so, 4) did the regulation evince a reasonable fit between ends and the means of regulation? In *Lorillard*, only the third and fourth parts of the test were at issue. The majority found that while the regulations at issue met the requirements of the third prong, they failed to satisfy the fourth prong. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed by the regulations." *Lorillard*, 121 S. Ct. at 2453 (citations omitted).

58. *Lorillard*, 121 S. Ct. at 2425.

59. 121 S. Ct. 1322 (2001).

60. *Egelhoff*, 121 S. Ct. at 1327.

law "relate[s] to" an ERISA plan.[61] The Court also considered precedent that has determined that "relates to" means "has a connection with" in the sense that it affects the objectives of ERISA and has an impact on its provisions.[62] Because the automatic revocation provided by the statute negatively impacted ERISA's goal of providing uniform administrative rules for plans by placing administrators at risk of liability for distributing plan assets to the wrong beneficiary, the state statute "relates to" ERISA and is preempted by it.[63] The case was decided by a majority of seven. Two dissenters argued that the majority defined "related to" too broadly.[64]

III. ARBITRATION

The third business-related preemption case this term implicates not only employment issues, but also arbitration, which is one of the most important categories of cases decided this term. And it was, notably, decided by the ideological 5-4 split. *Circuit City Stores, Inc. v Adams*[65] is ostensibly a case decided on the narrow grounds of statutory interpretation. At issue was the class of contracts covered by the Federal Arbitration Act ("FAA"). Specifically, the Court was asked to decide what kinds of contracts were excluded from its coverage. Section 2 of the FAA compels courts to enforce arbitration clauses included in contracts covered by it. Section 2 reads in part, "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such ground as exist at law or in equity for the revocation of any contract."[66] Section 1 of the FAA expressly excludes from the Act's coverage, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[67] In *Circuit City*, Adams signed an employment contract containing a mandatory binding arbitration clause when he accepted a job as a sales counselor at Circuit City.[68] When he subsequently filed a discrimination suit under California law against Circuit City, it sought to enjoin the suit and compel arbitration. Justice Kennedy, writing for the majority, pointed out that all the other circuits to consider the issue had construed the language of section 1 more narrowly, finding that it only excluded employment contracts in the transportation industry.[69] Enlisting one of the traditional rules of statutory construction, *ejusdem*

61. *Id.*
62. *Id.*
63. *Id.* at 1328.
64. *Id.* at 1330 (Breyer, J., joined by Stevens, J., dissenting).
65. 121 S. Ct. 1302 (2001).
66. *Cir. City*, 121 S. Ct. at 1307.
67. *Id.*
68. *Id.*
69. *Id.*

generis, Kennedy looked at the language of section 1 and found that the general term of "contracts of employment" was followed by and therefore limited to the specific kinds of employment listed therein: seamen, railroad employee or any other class of workers engaged in foreign or interstate commerce. The majority concluded the limiting language applied only to transportation workers engaged in interstate commerce. . . ."[70]

A vigorous dissent, however, took issue with the application of *ejusdem generis* and found instead that construing the term "contracts of employment" in light of the legislative history of the FAA leads to the conclusion that Congress did not intend the Act to cover employment contracts. Rather, in 1925 when the FAA was passed, Congress was concerned with the Courts' refusal to enforce arbitration clauses in commercial maritime contracts.[71]

If nothing else, the case points to an obvious characteristic of the ostensibly narrow and technical invocation and application of the traditional rules of statutory construction: often application of the rules is not merely technical because, as in this case, the rule selected determines the outcome reached. Strictly speaking, it may be improper to look beyond the express terms of the statute to resolve the meaning of the terms unless they are somehow ambiguous. But ambiguity, as in *Circuit City*, may be in the eyes of the beholder.[72] Furthermore, statutory construction rules, despite their apparently narrow focus, lead to broad results. At issue here was whether the FAA covers the entire universe of employment contracts. The majority found that it does. *Circuit City* was one of several arbitration cases considered this term. It joins a growing body of Supreme Court case law that seeks to encourage private resolution of various disputes by enforcement of arbitration provisions in commercial, consumer, and employment contracts. *Circuit City* accomplished a pro-arbitration result by giving a broad reading to the FAA. And in the wake of similarly pro-arbitration decisions in recent terms, big business has responded by requiring new hires to agree to mandatory arbitration for work-related disputes. Obviously, arbitration is viewed by business as a significant cost saver in terms of time and litigation expenses.[73] Therefore, *Circuit City* is a clear win for business.

Not only does the current Court's majority reflect a distinct preference for private dispute resolution through arbitration but a growing body of its decisions reinforces the preference by exhibiting a

70. *Id.* at 1306.

71. *Id.* at 1314 (Stevens, J., joined by Ginsburg, Breyer & Souter, JJ., dissenting).

72. *See* Bucholtz, *supra* n. 4, at 207 n. 3.

73. *See* Linda Greenhouse, *Court Says Employers can require Arbitration of Disputes*, N.Y. Times L1 (Mar. 22, 2001). *But see* Darryl Van Duch, *No Arbitration "Green Light*," 23 Natl. L.J. B9 (Apr. 9, 2001).

definite inclination to defer to an arbitrator's decision. This term, *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*[74] joined that trend in a unanimous decision that held an arbitrator's reinstatement of a truck driver, who had tested positive for marijuana use twice, should not be reversed.[75] The arbitrator found that termination under the circumstances of the case did not meet the "just cause" standard required for employee discharge under the Collective Bargaining Agreement ("CBA") and therefore the arbitrator reinstated the employee.[76] The Court disagreed with the company's argument that the arbitrator's award contravened important public policy considerations with regard to safety and it affirmed the award. The Court said the public policy grounds for overruling an arbitrator's findings are narrow and must rest on "an explicit, well-defined and dominant public policy."[77] The Company had argued that the Omnibus Transportation Employee Testing Act of 1991 ("Testing Act") evinced an explicit public policy against use of illicit drugs in situations where safety is vital, "[including] the operation of trucks. . . ."[78] However, the Court found the goals of the Testing Act to be more "complex," noting that a strong component of the act is "rehabilitation."[79] Writing for the Court, Justice Breyer concluded, "neither the act nor the regulation forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice."[80] Relying on public policy favoring CBA's[81] and demonstrating the Court's distinct preference for arbitration, the Court deferred to the arbitrator's award. The case obviously stands for the proposition that while arbitration as a system may favor business interests; a particular arbitration award may not.

In the third arbitration case considered this term, *Green Tree Financial Corp.-Alabama v. Randolph*,[82] the Court, by another ideological 5-4 split, held that an arbitration clause in a consumer contract was not rendered unenforceable on the grounds that it was silent on the issue of which party pays the arbitration costs and fees.[83] Citing the FAA, the Court reiterated its intention pro-actively to follow the Act's directive to enforce arbitration agreements. The subject matter of the consumer

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74. 531 U.S. 57 (2000).
75. *Id.* at 59.
76. *Id.* at 60.
77. *Id.* at 63.
78. *Id.* (citations and quotations omitted).
79. *Id.*
80. *E. Assoc. Coal*, 531 U.S. at 68.
81. *Id.* (citing *Calif. Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980), which stated "it is this Nation's longstanding labor policy to give employers and employees the freedom through collective bargaining to establish conditions of employment") (citations and quotations omitted).
82. 531 U.S. 79 (2000).
83. *Id.* at 80-81.

contract in this case was the purchase of a mobile home. The installment contract and security agreement, which were executed with the mandated binding arbitration agreement, expressly waived all rights to a jury trial.[84] Consumers sued, asserting that the arbitration clause violated the Equal Credit Opportunity Act ("ECOA") because costs and fees associated with arbitration might prove prohibitively expensive and force her to forego enforcement of her statutory rights.[85] Citing its increasingly long line of cases favoring enforcement of arbitration clauses, the majority upheld the arbitration clauses and ruled that a party seeking to avoid enforcement of an arbitration clause on the grounds of prohibitive costs has the "burden of showing the likelihood of incurring such costs."[86] Justice Ginsburg, writing for the dissent, declared that the appropriate action for the Court would be to vacate and remand to develop the record on the issue of arbitration costs. Relying on the contract principle that contracts should be construed against the drafter and noting that the company in this case "as a repeat player in the arbitration required by its form contract . . . had superior information about the cost to consumers of pursuing arbitration,"[87] the dissent found the majority's approach to be premature.[88]

Two other business-related arbitration cases were reviewed this term. In *Major League Baseball Players Association v. Garvey,*[89] the Court, by a 7-1 per curiam, again expressed its preference for enforcement of private dispute resolution mechanisms when it declared that courts have very limited grounds for overturning an arbitrator's award, as long as the arbitrator acted within the scope of his authority under the CBA.[90] At issue in *Garvey* was an arbitrator's ruling that Garvey, a retired first baseman, had not offered sufficient proof of his claim against the San Diego Padres.[91] In reversing the district court's order refusing to vacate the arbitrator's ruling against the ballplayer, the Ninth Circuit held that in situations like Garvey's, where the arbitrator had rendered an "inexplicable" decision which "border[ed] on the irrational" and amounted to "dispensing his own brand of industrial justice," then a court was authorized to review the case on its merits and to vacate the arbitrator's award.[92] But the Supreme Court reversed the Ninth Circuit, reminding it that courts may not review an award on the

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84. *Green Tree,* 531 U.S. at 83.
85. *Id.*
86. *Id.* at 92.
87. *Id.* at 96 (Ginsburg, J., joined by Breyer, Souter & Stevens, JJ., dissenting in part, concurring in part).
88. *Id.*
89. 121 S. Ct. 1724 (2001).
90. *Id.* at 1729.
91. *Id.* at 1726.
92. *Id.* at 1727.

merits even in response to "factual errors or misinterpretations of the parties" agreement.[93] Referring to its decision this term in *Eastern Associated Coal*, which had relied on an earlier precedent, *Paperworkers v. Misco, Inc.*,[94] the Court declared, "if an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision."[95] *Garvey* is, thus, another brick in the wall protecting arbitration from judicial review.

Finally, the Court unanimously held in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe* [96] that by executing a construction contract with a mandatory binding arbitration clause, the tribe had waived its sovereign immunity from a lawsuit to enforce the arbitrator's award against it.[97]

This Court is pro-actively pro-arbitration. In the 2000 term alone, arbitration withstood challenges premised on (1) the reach of the FAA;[98] (2) proper deference to arbitrator's awards;[99] (3) the burden of prohibitive costs associated with arbitration; [100] and (4) the shield of sovereign immunity.[101] Without doubt, much of the impetus for the Rehnquist Court's position lies in its affinity with the private sector: the tendency to favor it as a preferred venue for resolving societal issues, generally, and in particular, its preference for private dispute resolution of legal issues. And its preferences with regard to the latter are supported by a longstanding public policy shift in favor of arbitration, as is evidenced by the Federal Arbitration Act of 1925. The express purpose of the Act was to "reverse . . . judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . . ."[102] Since that time, an expanding body of case law has struggled with the appropriate jurisdictional reach and the proper balance of authority between arbitration and judicial oversight. [103] Undoubtedly, the Rehnquist Court's decisions in the last ten years have had a major impact in resolving the tension in favor of arbitration. And

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93. *Id.* at 1728.
94. 484 U.S. 29 (1987).
95. *Garvey*, 121 S. Ct. at 1728 (citations and quotations omitted).
96. 121 S. Ct. 1589 (2001).
97. *Id.* at 1594-95.
98. *Cir. City*, 121 S. Ct. 1302.
99. *Potowatomi Indian Tribe*, 121 S. Ct. 1589; *Garvey*, 121 S. Ct. 1724.
100. *Green Tree*, 531 U.S. 79.
101. *Potowatomi Indian Tribe*, 121 S. Ct. at 1598.
102. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991).
103. *See e.g. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding arbitration contracts involving the Sherman Act enforceable); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 200 (1987) (holding arbitration contracts involving section 10(b) of the Securities Exchange Act enforceable); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (holding arbitration contracts involving RICO enforceable).

the business community has reacted positively to the trend, viewing arbitration as a cost-efficient way of resolving disputes.[104] Nevertheless, it would be a mistake to assume that the evolution of arbitration doctrine is nearly complete or that its defining features will ineluctably follow a pro-arbitration pattern. In fact, major issues in arbitration doctrine remain to be resolved, and the uncertainty of the outcome on many issues gives the business community pause, and makes many businesses reluctant to opt for arbitration agreements across the board. As examples of the remaining indeterminacies of the doctrine, it is still unknown how the Court will resolve: (1) the problem of what limits might still be placed on arbitration with respect to disputes involving Title VII, the ADA, and other civil rights statutes; (2) the extent to which arbitration might limit punitive damage awards; (3) or curtail the use of class actions involving federal anti-discrimination laws; (4) the enforceability of arbitration clauses which require prospective employees to accede to arbitration as a pre-condition of employment; (5) federal preemption of state employment law on arbitration issues; and (6) the applicability of the Seventh Amendment to arbitration clauses purporting to waive jury trials.

Thus, while many big businesses had opted for arbitration clauses in employment contracts even before the *Circuit City* decision was rendered; these remaining open questions counsel caution and a "wait and see stance" for other businesses.[105] Finally, on the other side of the ledger, issues of basic fairness will continue to cast a shadow on the *Circuit City* decision and the Court's other arbitration decisions, not only with regard to employees' interests but also those of individual consumers.

In his dissent in *Circuit City*, Justice Stevens reiterated several of the points he made in his dissent to the majority opinion in the earlier case of *Gilmer*. There, he chided the majority for ducking the issue finally resolved in *Circuit City*: whether Congress intended the FAA and its policy favoring enforcement of arbitration agreements, to cover employment contracts between employers and employees or only commercial agreements between business enterprises. In his *Gilmer* dissent, Justice Stevens made two major points: first, that Congress did not intend the FAA to cover employment contracts, as was evidenced by the Act's legislative history;[106] and, second, that to do so would have

104. *See* Greenhouse, *supra* n. 73; Suzette M. Maleveaux & Joseph M. Sellers, *Justices Deal Blow to Court System*, 23 Natl. L.J. A22 (May 7, 2001); Marcia Coyle, *"Arbitration Heaven" Ahead*, 23 Natl. L.J. 31 (Apr. 2, 2001).

105. Greenhouse, *supra* n. 73 (quoting a partner at New York's Brown & Wood, noting that a resolution unfavorable to business might render an employment arbitration program "a futile exercise").

106. *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting). Justice Stevens declared, "[t]here is little dispute that the primary concern animating the FAA was the perceived need by the

been patently unfair because of the unequal bargaining power between employers and employees.[107] That dissent and the dissenting opinion in *Circuit City* join a host of statements by detractors who allege that "the steady erosion of the court system in favor of privatized dispute resolution" threatens basic procedural and substantive rights "that most Americans take for granted."[108] Based on the foregoing, it seems clear that while the development of the arbitration doctrine developed by the Rehnquist Court has met with favor in the business community, its structure is incomplete and tentative in many important respects, and so its final contours may modify its current pro-business form. Therefore, the wait-and-see attitude of many businesses has substantial merit.

IV. OTHER LABOR AND EMPLOYMENT CASES

In addition to employment cases resolving the preemption and arbitration issues discussed above, the Court considered various other employment disputes.

In *Pollard v. E.I. Dupont de Nemours & Company*,[109] a unanimous court held, in a Title VII sexual harassment case, that "front pay"[110] was not a part of "compensatory damages" as described in the Civil Rights Act of 1991 and, consequently, was not subject to the compensatory damage cap. The resolution of this issue, clearly a loss for business, was hotly disputed because the import of the applicable sections of the statute was not readily apparent. At the center of the dispute were two facially conflicting sections of the law. Section 1981a(a)(1) expands the remedies available under the 1964 Civil Rights Act at section 706(g) (injunction and monetary remedies including "but not limited to reinstatement with or without back pay")[111] and as the Act was amended in 1972 (to include, in addition "any other equitable relief as the court deems appropriate").[112] Section 1981a(a)(1) under the 1991 Act expressly adds compensatory and punitive damage awards to the list of previously available remedies but

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business community to overturn the common law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities." *Id.*

107. *Id.* at 41-43. Stevens also argued that use of binding arbitration in resolving civil rights legislation like the ADEA and Title VII would frustrate "the essential purpose" of these statutes,

> to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetrated invidious discrimination would have made the foxes guardians of the chickens.

Id. (citations and quotations omitted).

108. Maleveaux & Sellers, *supra* n. 104, at A22.

109. 121 S. Ct. 1946 (2001).

110. "Front pay," according to Justice Thomas, is "simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Id.* at 1948.

111. *Id.* at 1950.

112. *Id.*

caps them, pursuant to the provisions of section 1981a(b)(3),[113] on a variable scale depending on the size of employer's work force. The question was whether the cap at section 1981a(b)(3) applied to front pay under the compensatory damages, permitted at section 1981a(a)(1). The Court said it did not. Rather, said the Court, "front pay" was an element of "equitable relief" available to employees since the 1972 Amendments. "Front pay" had been used by Courts to "effectuate fully the make whole purposes of Title VII." [114] Thus, it was used to make an employee "whole" when reinstatement was not feasible or where litigation of the claim took so long that plaintiff moved on to take other employment. In the *Pollard* case, the front pay award was $800,000 in addition to $107,364 in backpay and benefits, $252,997 in attorneys' fees, and $300,000 in compensatory damages (the maximum amount permitted under the § 1981a(b)(3) cap). Commentators noted than an $800,000 front pay award in this factual context would not harm a large corporation like DuPont, but could have a seriously negative impact on small businesses.[115] On the other hand, front pay may be the only way of making plaintiffs "whole" in situations where prompt reinstatement is not possible. Furthermore, the threat of uncapped front pay is a strong "incentive not to let discriminatory acts occur."[116] In any event, the business community's only recourse now is to lobby Congress to amend the Act.[117]

Another Title VII case was on the Court's docket this term, and, in another unanimous decision, the Court held that a single incident of sexual harassment did not give rise to a Title VII claim. In *Clark County School District v. Breeden*,[118] the Court declared, per curiam, that sexual harassment must be "severe and pervasive" to a degree that "create[s] an abusive working environment" in order to create a Title VII claim.[119] A "mere offensive utterance," like the one alleged in *Breeden*, was insufficient and, "no reasonable person could have believed that the single incident [at issue] . . . violated Title VII's standard."[120] *Breeden* is a clear win for business but hardly a path breaking case.

NLRB v. Kentucky River Community Care [121] was a case that raised the issue of the proper deference owed agency interpretation. But it also involved an issue of statutory construction. The dispute concerned a determination as to whether nurses in a mental health facility were

113. *Id.*
114. *Id. See* Marcia Coyle, *Damages Issue at High Court*, 23 Natl. L.J. B1 (Apr. 30, 2001); Marcia Coyle, *Pay Ruling Will Hurt Business*, 23 Natl. L.J. A1 (June 18, 2001) [hereinafter Coyle, *Pay Ruling*].
115. *See* Coyle, *Pay Ruling*, *supra* n. 114, at A1.
116. *Id.*
117. *Id.*
118. 121 S. Ct. 1508 (2001).
119. *Id.* at 1509 (citations and quotations omitted).
120. *Id.*
121. 121 S. Ct. 1861 (2001).

"supervisors" pursuant to the National Labor Relations Act ("NLRA"). "Supervisors" are not protected by the NLRA if "they exercise independent judgment in directing the work of other employees on behalf of the employer."[122] The NLRB, by its Regional Director, ruled (1) that the health care facility had the burden of proving that certain registered nurses employed by the facility were "supervisors;" (2) that the facility failed to meet its burden; and (3) that, therefore, the nurses should be included in the bargaining unit for purposes of a union election. The Court unanimously agreed that the burden of proof falls on the party who asserts that an employee is a "supervisor," but it split 5-4 on the issue of whether the facility-employer met its burden. Writing for the majority, Justice Scalia ruled that the NLRB exceeded its agency authority to interpret arguably ambiguous provisions in the NLRA, because it inserted language in the textual test for supervisor status when the text itself was not ambiguous. However, the dissent opined that the Board's interpretation of supervisory status was consistent with the Act, because the interpretation limited the status "only [to] supervisory personnel vested with genuine management prerogatives . . . not straw bosses, lead man, set-up man and other minor supervisory employees."[123] The case was a win for business interests over union interests because it will expand the reach of the supervisor exception in the NLRA.

In addition to *Garrett*, the Court decided two other ADA cases this term. The more publicized of the two was, of course, *PGA Tour, Inc. v. Martin*,[124] where the Court, by a vote of 7-2, ruled that the protected class under the ADA, "clients or customers," includes individuals (in this case, golfers) who pay the organization (PGA) a fee in order to participate in tournaments. Therefore, the plaintiff-golfer, was entitled to disability accommodations as long as the accommodations did not "fundamentally alter the nature" of the tournaments. The majority concluded that the accommodation of permitting Casey Martin to ride in a motorized golf cart while other contestants were required to walk the course was an appropriate accommodation.[125] Most commentators noted that this widely publicized and hotly contested issue is limited to the facts of the case, and therefore *sui generis*. Nevertheless, the case joins a line of cases that demonstrates the ambiguities in a number of ADA provisions[126] and it

122. *Id.* at 1864 (citations and quotations omitted).

123. *Id.* at 1873 (Stevens, J., dissenting, joined by Breyer, Souter & Ginsburg, JJ.) (arguing, among other things, that deference is owed agency interpretation when the statutory language is ambiguous and finding that the Board's construction was consistent with legislative intent).

124. 121 S. Ct. 1879 (2001).

125. *Id.* at 1894.

126. One of the major disputes in the *Martin* case, for example, was the proper understanding of a place of "public accommodation" for purposes of Title III of the Act. One could reasonably argue that it is counter-intuitive to consider the PGA tournament a place of public accommodation. Nevertheless, the issue has risen in other arenas where

highlights the difficulty businesses encounter in anticipating how the courts will resolve the ambiguities.[127]

An ADA case with much more far reaching consequences than *Martin* was the *Buckhannon* case. In *Buckhannon Board and Care v. West Virginia Department. of Health and Human Services*,[128] the question was what is a "prevailing party" for purposes of federal fee-shifting statutes that reverse the "American Rule" (each party bears its own costs of litigation) and impose on the "losing party" in litigation not only its own costs and attorneys fees but also those of the "prevailing party." At issue was the "prevailing party" provision in the Fair Housing Amendments Act of 1988 ("FHAA") and the ADA. An assisted living facility filed suit against the state alleging that the state's "self-preservation" law violated the FHAA and the ADA. But before the litigation was complete, the state changed the law, eliminating the "self-preservation" provision. Buckhannon then filed for "prevailing party" costs and fees under a "catalyst theory" which designates a party as prevailing "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."[129] All circuits that have considered the issue have adopted the "catalyst theory" except the Fourth Circuit.[130] Nevertheless, Chief Justice Rehnquist in *Buckhannon* opted in favor of this distinctly minority position, holding that "prevailing party" status is reached only when the desired change in the defendant's conduct is achieved through some kind of court order so that the change is enforceable by the Court. Examples cited by Chief Justice Rehnquist include judgments on the merits and "settlement agreements enforced through a consent decree."[131] Relying on precedent for these examples, the Chief Justice declared, "[t]hese decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration' of the legal relationship of the parties necessary to permit an award of [costs and] attorneys fees."[132]

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the description of public seems vague. *See e.g. Jankey v. Twentieth Century Fox Film Corp.*, 12 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd*, 213 F.3d 1159 (9th Cir. 2000) (holding that a film studio is not a place of public accommodation, even though it admitted employee guest); *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000) (holding that shops on cruise ships were places of public accommodation); *Louie v. Ideal Cleaners*, 1999 WL 1269191 (N.D. Cal. Dec. 14, 1999) (holding that a private bathroom in a business is not a place of public accommodation). These cases were reported in Richard M. Goldstein & Christopher J. Collier, *Contentious Issues Emerge from Title III Cases*, 23 Natl. L.J. B12 (Feb. 19, 2001). This article also points to other ambiguous, heavily litigated terms in Title III: what does it mean to "fundamentally alter" the nature of an activity, service, or product; who bears the burden of showing that a particular modification of accommodation is or is not "readily achievable;" and so forth.

127. *See* Goldstein & Collier, *supra* n. 126, at B12 (recommending businesses survey their facilities for barriers to use by patrons with disabilities and make modifications that are not expensive and do not interfere with their business on their own).

128. 121 S. Ct. 1835 (2001).

129. *Id.*

130. *Id.* at 1838 n. 3.

131. *Id.* at 1840.

132. *Id.*

By contrast, he opined, "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."[133]

This case, another 5-4 decision, is also another illustration of the widening ideological gap on the Court and of the new battleground where it finds expression, statutory interpretation (formerly the locus for narrow consensus-building decisions). In dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer made three principal points. First, that the majority's decision reverses a longstanding interpretation of the prevailing party statutes.[134] Second, that the consequences of the new rule will be to deny court access to private litigants seeking to enforce federal law and it will thereby weaken the leverage against misconduct that Congress intended the fee-shifting statutes to have. And, third, that the Chief Justice's opinion is not supported by any of the traditional rules of statutory construction. Whatever its merits, this decision is surely to be counted as a win for the business community. Its ramifications in society could be quite large because it implicates all federal statutes with fee-shifting provisions. Inside the narrower universe of Court-watchers, it will undoubtedly be remembered as a case of broad ideological proportions achieved on narrow technical grounds. In many respects, *Buckhannon* is one of the most important cases this term. Its undoubtedly far-reaching consequences have yet to be assessed.

The final labor and employment case, *Lujan v. G & G Fire Sprinklers, Inc.*,[135] a unanimous decision, ruled that a California statute, which authorized the state to withhold monies owed contractors on a public works project if a subcontractor violates certain provisions of the state labor code, did not violate the Due Process Clause of the Fourteenth Amendment.[136] Even though the law entitled the state to withhold the monies, without notice and the opportunity to be heard, and even though the monies represented a protected property interest of the contractor, there was no constitutional violation because the state code permits the contractor or his assignee, subcontractor to sue. "We hold that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process."[137] There can be no question that this result represents a loss for the construction industry in California.

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133. *Id.*
134. According to the dissent, the Court "upsets long prevailing Circuit precedent applicable to scores of federal fee-shifting statutes." *Buckhannon*, 121 S. Ct. at 1850 (Ginsburg, J., dissenting).
135. 121 S. Ct. 1446 (2001).
136. *Id.* at 1451.
137. *Id.*

V. TAXATION

The Court decided several interesting tax cases this term. In *United Dominion Industries, Inc. v. United States*,[138] the Court decided, with only one dissenting opinion, that the "net operating loss" ("NOL")[139] provision of the Internal Revenue Code ("Code") could be applied in the aggregate to an affiliated group of corporations that filed consolidated tax returns, thus entitling the group to a ten-year carryback for product liability loss ("PLL").[140] This, in spite of the fact that some of the individual corporations in the group with product liability expenses had positive taxable income.[141] Justice Souter, writing for the Court, explained that section 1501 of the Code, and the Treasury regulations promulgated thereunder, permit affiliated groups of corporations to file a consolidated group's taxable income ("CTI") and its operating loss ("CNOL") must take into account the individual taxable income ("STI") of each corporate member but disregard certain items (capital gains and losses, dividend and charitable deductions) which are aggregated as a group calculation).[142] Using section 1501 and its accompanying regulations, the consolidated group aggregated its members' product liability expenses ("PLEs") and, because they were exceeded by the aggregate operating losses of the group, concluded it could treat the PLEs as PLLs, thus entitling the group to the ten-year carryback.[143] The government responded that an affiliate with a positive taxable income in a given year could not contribute its PLEs to the aggregate PLL. This is known as the "single entity" approach.[144] The government argued, *among other things*, that its interpretation of section 1501 was justified by the fact that PLEs were not included in the items to be disregarded in calculating a separate entity's taxable income but aggregated with the group's ("*expressio unius est exclusio alterius*").[145] But the Court rejected that rule of statutory construction as inappropriate in this context. It declared that if Treasury "could not live with [the Court's interpretation]" it was free to amend its regulations accordingly.[146]

The decision, while a "win" for the business group in the lawsuit, was not necessarily a "windfall" for business, generally. In response to the government's argument that the decision opens the door to "significant tax avoidance abuses," the Court reminded the government that neither the

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138. 121 S. Ct. 1934 (2001).
139. 26 U.S.C. § 172(c) (1994).
140. 26 U.S.C. § 172(b)(1)(I) (1994). PLL is "the lesser of (1) the taxpayer's net operating loss for such year and (2) its allowable deductions attributable to product liability expenses." *United Dominion*, 121 S. Ct. at 1937.
141. *United Dominion*, 121 S. Ct. at 1937.
142. *Id.*
143. *Id.* at 1938.
144. *Id.* at 1942.
145. *Id.* at 1943.
146. *Id.*

separate member approach of the government nor the single-entity treatment adopted by the Court is a panacea for tax avoidance. And, in any case, the Code at section 269 gives the government authority to sanction tax avoidance behavior, by disallowing deductions and credits at its discretion.[147]

In *Gitlitz v. Commissioner of Internal Revenue*,[148] the Court again, over one dissent, ruled in favor of taxpayers (Sub S corporation shareholders). Subchapter S's "pass-through" treatment[149] includes discharged debt as an item of income that passes through to shareholder.[150] In this case, shareholders of an insolvent Sub S corporation, included the discharge on a ratable basis of indebtedness excluded as gross income by the corporation.[151] The inclusion increased their individual bases in the corporation, thereby permitting them to pass through and deduct, pro rata, the full amount of the corporation's losses.[152] Based on traditional rules of statutory construction, and especially the plain meaning rule, the Court concluded the tax-payers/shareholders were entitled to the tax treatment they claimed.

United States v. Cleveland Indians Baseball Company[153] posed another statutory construction issue. This time with regard to back wage provisions in two federal statutes. With one concurrence, a unanimous Court held that Federal Insurance Contribution Act ("FICA") and Federal Unemployment Tax Act ("FUTA") taxes should be calculated according to the year in which wages are actually paid, rather than the year they should have been paid.[154] In so ruling, it deferred to the Internal Revenue Service's statutory interpretation of the applicable sections finding it to be "reasonable, consistent and longstanding."[155] To the extent that the case clarifies the issue and lends uniformity and predictability to tax calculations on back wages, the case must be seen as a win for business.

Two other taxes cases of more limited application were decided this term. In *Atkinson Trading Company, Inc. v. Shirley*,[156] the Court revisited the general rule set forth in *Montana v. United States*, that Native American tribes do not have legal authority over non-tribe members on non-Indian

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147. *United Dominion*, 121 S. Ct. at 1943 (citing 26 U.S.C. § 269(a) (1994)).
148. 531 U.S. 206 (2001).
149. 26 U.S.C. § 1366(a)(1)(A) (1994).
150. *See* 26 U.S.C. §§ 61(a)(12) (1994), 108(a) (1994).
151. *Gitlitz*, 531 U.S. at 209-10 (pursuant to § 108(a)).
152. *Id.* (Pursuant to § 1366(d)(1), a shareholder's pass-through of company losses cannot exceed her basis in the stock and debt of the corporation. By including the discharge of debt, the shareholders increased their bases and, therefore, the amount of debt they were entitled to deduct.).
153. 121 S. Ct. 1433 (2001).
154. *Id.* at 1436.
155. *Id.*
156. 121 S. Ct. 1825 (2001).

fee land within the reservation.[157] This rule is derived from the limited jurisdiction tribes are deemed to have: "[f]or powers not expressly conferred them by federal statute or treaty, Indian tribes must rely on their retained or inherent sovereignty."[158] There are two exceptions to the Montana rule: (1) "A tribe may regulate through taxation, licensing or other means, the activities of non-members who enter consensual (commercial) relationships with the tribe . . ." and (2) "[a] tribe may . . . exercise civil authority over the conduct of non-Indians . . . when the conduct threatens . . . the political integrity, the economic security or the health or welfare of the tribe."[159] In the instant case, the tribe sought to impose a tax on a nonmember owner of a hotel located on non-Indian fee land within the tribal reservation.[160] The attempted taxation did not fall within either exception; therefore the tribe lacked authority to impose the tax under the *Montana* rule.[161]

Finally, in *Director of Revenue of Missouri v. CoBank ACB*,[162] a unanimous Court ruled that the federally-chartered National Bank for Cooperatives (and its successor) was not exempt from state income taxation. The result was derived from the Court's interpretation of the Farm Credit Act. The Bank had argued that, because the current version of the Act is silent on the issue, the federal government and its instrumentality had not waived their immunity from state taxation; therefore the Bank was exempt.[163] But the Court ruled that even though the current version of the Act is silent on the issue of state tax exemption, earlier versions expressly stated the institutions were not immune from state taxation.[164] Furthermore, the applicable sections were eliminated by "technical and conforming amendments" in the 1985 Act.[165] The technical nature of these amendments, said the Court, is insufficient evidence of Congressional intent to make a substantial change in the Act on the issue of state tax immunity.[166] In a narrow field of law, on a narrow statutory issue, this case is a loss for the banking industry.

VI. SECURITIES REGULATION

In the only securities law case on the Court's docket this term, the Court unanimously held that a stock option in a cable television system

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157. *Id.* at 1828-29 (citing *Mont. v. U.S.*, 450 U.S. 544 (1981).
158. *Id.* at 1830.
159. *Id.* at 1830-31 (quoting *Mont.*, 450 U.S. at 565-66).
160. The hotel was located on land directly purchased from the United States by a non-Indian but the land was part of a parcel later added to the reservation by federal law. *Id.* at 1829.
161. *Id.*
162. 531 U.S. 316 (2001).
163. *Id.* at 319 (citing *McCulloch v. Md.*, 17 U.S. 316 (1819), for its Supremacy Clause argument).
164. *Id.* at 324 (citing the Farm Credit Act of 1933).
165. *Id.*
166. *Id.*

was a "security" pursuant to section 10 of the Securities Exchange Act of 1934 and Rule 10b-5; therefore a sale of the option with the undisclosed intent not to honor its terms violated Rule 10b-5. The case, *The Wharf (Holdings), Ltd. v. United International Holdings, Inc.*[167] involved a straightforward application of the statute's plain meaning to the facts in the case. Section 10(b) of the 1934 Act "prohibits using any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security"[168] and section 78c(a)(10) of Title 15 of the United States Code defines security to include "both any . . . option . . . on any security and any . . . right to . . . purchase stock."[169] The Court found defendant's argument, that the 1934 Act does not cover oral agreements,[170] unpersuasive and it also rejected the defendant's argument that fraud was inapplicable to the facts in the case. Section 10(b) of the 1934 Act "prohibits using any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security."[171]

VII. COPYRIGHT, PATENT AND TRADEMARK

Three intellectual property cases made their way to this term's docket. Of the three, *TrafFix Devices, Inc. v. Marketing Displays, Inc.*,[172] is by far the most consequential and far-reaching, adding to the body of case law describing and circumscribing trade dress protection. Last term, the Court held in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*,[173] that 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, so that the design, itself, identifies its source. In so ruling, the Court did away with the "inherently distinctive test" which was much easier to prove and the Court, in *Wal-Mart*, made it clear that it was intentionally limiting the reach of trade dress protections with this more rigid test. Following the imposition of *Wal-Mart's* new "secondary meaning" test, litigants have had a much more difficult time garnering trade dress protection.[174] The negative impact of the "secondary meaning" tests on

167. 121 S. Ct. 1776 (2001).
168. *Id.* at 1778 (citations and quotations omitted).
169. *Id.* at 1780 (citations and quotations omitted).
170. *Id.* at 1781.
171. *Id.* at 1782.
172. 121 S. Ct. 1255 (2001).
173. 529 U.S. 205 (2000).
174. *See* William D. Coston & Martin L. Saad, *Boundaries of Trade Dress May Soon Be Realigned*, 23 Natl. L.J. C8 (Feb. 5, 2001) (citing several cases where lower courts, following *Wal-Mart*, denied trade-dress protection under the more stringent "secondary meaning" test: *Don Post Studios, Inc. v. Cinema Secrets, Inc.*, No. 99-5731, 2000 U.S. Dist. Lexis 17403 (E.D. Pa., Dec. 1, 2000) (no secondary meaning for Halloween mask); *Bretford Mfg., Inc. v. Smith System Mfg. Co.*, 116 F. Supp. 2d 951 (N.D. Ill. 2000) (no secondary meaning for V-shaped desk legs); *Yankee Candle Co. v. Bridgewater Candle Co.*, 99 F. Supp. 2d 140 (D. Mass. 2000) (no secondary meaning for candles); *Diamond Direct L.L.C. v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525 (S.D.N.Y. 2000) (no secondary meaning for jewelry

trade dress claims contrasts sharply with the successful use made of the "inherently distinctive" test that it replaced.[175] Ever since the Supreme Court's decision in 1992, *Two Pesos Inc. v. Taco Cabana, Inc.*,[176] product designers had used the latter test to achieve protection of allegedly distinctive packaging of the products, even though protection was probably not available under patent law alone.[177] The effect of *Two Pesos*, the Court believed, was that "expansive trade dress protection disrupted the careful balance between innovation and competition, a balance found in the constitutionally-based U.S. patent laws."[178] *Wal-Mart* made a concerted effort to right the balance by ratcheting up the requirements for proving entitlement to trade dress protection. This term, the Court continued that effort in *TrafFix* by holding, unanimously, that where the subject-matter of the trade dress protection suit is also covered by an (in this case) expired utility patent, claimant has the burden of proving that the trade dress is not functional.[179] The burden is a heavy one, given that there are over "600 million functional features claimed in the U.S. patent database."[180] While trade dress remains protected by federal law,[181] the Court is quite clearly attempting to make its protection more difficult to obtain and thereby to rebalance the interests of the producer with those of the public and we can anticipate more trade dress cases will make their way to the Court, as the Court reconfigures its trade dress doctrine.

The Court also addressed a copyright issue, holding 7-2, in *New York Times Co., Inc. v. Tasini*,[182] that the Copyright Act did not confer on publishers the right to reproduce, on the , copies of articles for which the publishers had originally received only a copyright for publication in print periodicals. At issue was section 201(c) of the Act which states that copyright of an individual article vests in the author and is to be distinguished from the copyright on the collective work in which the article appears. Further, the holder of the "copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the individual work as a part of that collective [*and*] any revision of [or] . . . later collective . . . in the same series."[183] The publishers

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designs); *McKernan v. Burek*, 118 F. Supp. 2d 119 (D. Mass. 2000) (no secondary meaning for bumper stickers)).

175. *Id.*

176. 505 U.S. 763 (1992).

177. Cotson & Saad, *supra* n. 174, at C8.

178. *Id.*

179. *TrafFix*, 121 S. Ct. at 1259-60.

180. Vincent P. Tassinari, *Held up by "TrafFix,"* 23 Natl. L.J. C1 (Apr. 30, 2001).

181. 15 U.S.C. § 1125(a)(1)(A) (1994). This section of the Lanham Act gives a cause of action to one who is injured when a person uses "any word, term, name, symbol, or device, or any combination thereof . . . which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods." *Id.*; *TrafFix*, 121 S. Ct. at 1259.

182. 121 S. Ct. 2381 (2001).

183. *Id.* at 2388-89.

argued that reproducing individual articles from a print collective in databases on the Internet is merely a "revision" of the collective and falls within the purview of section 201(c). The District Court agreed, reasoning that "[t]o qualify as revisions . . . works need only preserve some original aspect of [collective works] . . . . [and] [t]his criterion was met . . . because the Databases preserved the Print Publishers selection of articles by copying all of the articles originally assembled in the periodicals' daily or weekly issues.[184] On appeal, the Second Circuit reversed, reasoning that the transfer of the articles to the databases was not merely a "revision" but, because the articles were individually retrievable by individual users of the databases, "the Databases might fairly be described as containing new antholog[ies] of innumerable editions or publications . . . which would not be protected against charges of infringement of the authors' individual copyrights under 201(c)."[185] A majority of the Supreme Court agreed with the Second Circuit, adding that the 1976 revision of the Copyright Act, (of which section 201 is a part), was expressly designed to protect the copyrights of individual authors as against those of the publisher and that section 201 should be read with that purpose in mind:

> Essentially, § 201(c) adjusts a publisher's copyright in its collective work to accommodate a freelancer's copyright in her contribution. If there is a demand for a freelance article standing alone or in a new collection, the Copyright Act allows the freelancer to benefit from that demand; after authorizing initial publication the freelancer may also sell the article to others.[186]

Under the facts in this case, explained the majority, the individual articles that first appeared in the print collective are individually accessed through search engines, appear "as a separate item within the search result" and may appear without the graphics, formatting, or other articles with which the articles were initially published." Hence, they are neither "revisions" nor "part of" the original collective, but "individual articles presented individually."[187] The dissent agreed with the district court's analysis and argued that the majority decision made a distinction without articulating a difference. It argued that transferring the print collectives to databases could be seen as a "revision" and that that interpretation of section 201 was entirely consonant with the purposes of the 1976 Act to protect the copyright interests of individual authors:

> [N]either the publication of the collective works by the Print Publishers, nor their transfer to the Electronic Databases had any impact on the legal status of the copyrights of the respondents' individual contributions [only the individual authors] . . . could authorize the publication of their articles

184. *Id.* at 2386-87.
185. *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 167-70 (2d Cir. 1999).
186. *Tasini*, 121 S. Ct. at 2389-90 (citations omitted).
187. *Id.* at 2391.

in different periodicals or in new topical anthologies . . . .[188]

While both textual interpretations of section 201 are reasonable, the difficulty of resolving this issue lies, as both the majority and dissent point out, beyond the purview of statutory interpretation: to public policy and Congress. Congress has the ultimate responsibility of reassessing the Act in light of the sea changes wrought in the universe of intellectual property rights by information technology. Both the majority and the dissent conceded that in drafting section 201(c) the members of Congress did not consider the questions posed by the case. Thus, in both intellectual property cases this term, the Court was asked to address the meaning of statutory provisions in the context of a rapidly changing societal environment but *Tasini* creates a much more difficult challenge than *TrafFix* because both the words of the text and the public policy they were intended to effectuate seem outdated and out-of-step with the information technologies revolution. Therefore, without a reassessment by Congress of policy and law in light of that revolution, Supreme Court decisions on these issues will be inconclusive and tenuous. The Third Branch is ill-equipped to develop law under these circumstances.

VIII. PROPERTY AND ENVIRONMENTAL LAW

The Court split ideologically on an important eminent domain case, which adds to the Court's "takings" jurisprudence. At issue in *Palazzolo v. Rhode Island*[189] was an eighteen-acre tract consisting of coastal wetlands and a parcel of uplands. The landowner wanted to fill the land and construct a beach club on the wetland site. The Rhode Island Coastal Resources Management Council ("Council") denied his application, pursuant to its wetlands regulations. The landowner filed an inverse condemnation suit in state court, arguing that the Council's actions violated the Takings Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment.[190] Writing for the majority, Justice Kennedy declared that landowner's claim was ripe; and that his purchase of the tract after the applicable regulations were enacted did not bar his claims. Building on an earlier decision[191] and distinguishing *Lucas v. South Carolina Costal Council*,[192] the Court declared, "[i]t would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the

188. *Id.* at 2396 n. 6 (Stevens, J., joined by Breyer, J., dissenting).
189. 121 S. Ct. 2448 (2001).
190. *Id.* at 2451.
191. *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825 (1987).
192. 505 U.S. 1003, 1029 (1992) (holding that a land owner's takings claim is subjected to "restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

claim ripe were not taken . . . by a previous owner."[193] Having dispensed with these threshold hurdles, the Court addressed the merits of the takings claim, which the Court declared must fail. The landowner argued the council's ruling created a total deprivation of the enjoyment and value of his property. Since the State had persuasively shown that the uplands portion of his property could be developed, he was not deprived of all economically beneficial uses of his tract.[194] And, as has been the case generally with the Court's takings decisions, the 5-4 split represented a difference of opinion as to how to balance the rights of the owner with those of the public at large: contemporary interests and those of future generations.[195] But there was also a great deal of discussion in both the concurring and dissenting opinions about the doctrinal confusion *Palazzolo* may create, especially with regard to determining at what point a taking has occurred.[196]

Another 5-4 vote split emerged in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[197] where the justices debated the definition of "navigable water" pursuant to the Clean Water Act ("Act"). Section 404(a) of the Act gives the Army Corps authority to issue permits "for the discharge of dredged or fill material into . . . . navigable waters . . . ."[198] "Navigable waters" is defined at section 1362(7) of the Act as "'waters of the United States.'"[199] The Corps has interpreted waters of the United States to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation or destruction of which could affect interstate . . . commerce."[200] And in 1986, the Corps added a "Migratory Bird Rule" describing its 404(a) permit authority to include "intrastate waters" if they serve as habitants for birds protected by the Migratory Bird Treaties, or for migratory birds that cross state lines, or for endangered species or if the waters are used "to irrigate crops sold in interstate commerce."[201] In the instant case, the Corps invoked this authority to deny a discharge permit at abandoned sand and gravel pits on the grounds that it was a habitat for migratory birds.[202] Permit applicant challenged both the authority of the Corps in this context

193. *Palazzolo*, 121 S. Ct. at 2463.
194. *Id.* at 2464-65. The Court expressly refused to discuss the fine points of an argument that could have been raised (and had been raised in other cases): at what point does a fractional economically beneficial use become so small as to amount to a taking. *Id.*
195. *See id.* at 2472 (Ginsburg, J., joined by Souter & Breyer, JJ., dissenting).
196. *See id.* at 2468 (Stevens, J., concurring in part, dissenting in part).
197. 531 U.S. 159 (2001).
198. *Id.* at 678 (citations and quotations omitted).
199. *Id.* (citations and quotations omitted).
200. *Id.* (citations and quotations omitted).
201. *Id.* (citations and quotations omitted).
202. *Id.*

and the merits of its denial of the permit.[203] Chief Justice Rehnquist, writing for the majority, agreed with the applicant that the Migratory Bird Rule was not authorized by Congress and struck it down. In so doing he distinguished the Court's precedent, *United States v. Riverside Bayview Homes*,[204] explaining that in that case the wetlands at issue "abutted . . . a navigable waterway, and, therefore, the Corps was entitled to agency deference pursuant to *Chevron*."[205] He also refuted the Corps' argument that Congress had acquiesced in the Corps' Migratory Bird Rule. Rehnquist declined to view Congressional refusal to limit the Corps' jurisdiction in 1977 as adequate proof of Congressional acquiescence in the 1985 Rule.[206] He also suggested that because the Migratory Bird Rule tests the reach of Congress' power under the Commerce Clause, the Court would require a more explicit indication that Congress intended to assert its Commerce Clause jurisdiction to the extent claimed by the Rule. In other words, he intimated that clear evidence that Congress intended the jurisdictional reach of the Migratory Bird Rule would shift the analysis to Federalism: to an inquiry as to whether the Rule exceeds the jurisdictional limits of the Commerce Clause.[207] The four dissenting justices took issue with the majority opinion, finding the Migratory Bird Rule well within the three categories of Congressional Commerce Clause authority as they had already been articulated in the *Lopez* case;[208] and declaring that the Court had previously found Congressional acquiescence in the Corps' interpretation of Commerce Clause jurisdiction in *Riverside Bayview Homes:*

> Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream.[209]

Therefore, concluded the dissent, the Corps' Migratory Bird Rule was entitled to *Chevron* deference.[210]

The Court also heard a Clean Air Act ("CAA") case this term and resolved it on much less contentious grounds. With no dissenting opinions, the Court, in *Whitman v. American Trucking Associations*[211]

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203. *Solid Waste Agency*, 531 U.S. at 678.
204. 474 U.S. 121 (1985).
205. *Riverside*, 531 U.S. at 167.
206. *Id.* at 169-70 ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a poor statute") (citations and quotations omitted).
207. *Id.* at 173.
208. *Id.* at 193 (Stevens, J., joined by Breyer, Souter & Ginsburg, JJ., dissenting) (stating that Congress has the power to regulate activities that substantially affect interstate commerce Congress, and that the Migratory Bird Rule passes constitutional muster under Lopez's analytical framework).
209. *Id.* at 173.
210. *Id.* at 191.
211. 531 U.S. 457 (2000).

rejected industry arguments that the Environmental Protection Agency's ("EPA") final rules revising national ambient air quality standards ("NAAQS") for ozone and particulate matter (or soot) should include considerations of the cost of implementation. In an opinion authored by Justice Scalia, the Court ruled that the EPA is limited to public health and safety considerations by the CAA and may not temper those considerations with cost-benefit considerations.[212] In the other major ruling in the case, Scalia declared that Congressional delegation to the EPA to set NAAQS was not unconstitutional.[213] Commentators agree that the importance of the case lies in the fact that the trucking industry, in this case, mounted what many consider to be "one of the most powerful judicial attacks since the New Deal on the legal foundations of the modern administrative state."[214] That attack was decisively defeated not only in *Whitman* but in an analogous case in which the Court denied *certiorari* the week after *Whitman* was decided. In that case, the Court rejected challenges to new EPA regulations that required significant reductions in ozone emission from power plants. The effect of the denial of writ of *certiorari* is to allow enforcement of those rules to proceed in 2004.[215] These cases represent important losses for industries affected by the new regulations. However, on balance, business remains in a relatively strong position under the Court's previously established property and environmental law doctrines.

IX. ADMIRALTY, MARITIME, AND INTERNATIONAL TRADE

The Court's rulings on global trade-related issues were largely reached by consensus. *Lewis v. Lewis & Clark Marine, Inc.*[216] juxtaposed the savings clause of the Judiciary Act of 1789 with the Limitation of Liability Act of 1851.[217] The savings clause is an exception to exclusive federal jurisdiction in admiralty and maritime cases and allows for some state law claims.[218] The Liability Act permits ship owners to limit their liability for damage or injury to the value of the owners' interest in the vessel.[219] In *Lewis*, an injured seaman invoked the savings clause to sue in state court for injuries he received on the vessel of his employer. The employer sued in federal court under the Liability Act to enjoin the state suit. The question for the Court was whether the federal court abused its discretion in

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212. *Id.* at 464-70.
213. *Id.* at 472.
214. Linda Greenhouse, *E.P.A.'s Authority on Air Rules Wins Supreme Court's Backing*, N.Y. Times A1 (Feb. 28, 2001).
215. *Appalachian Power Co. v. E.P.A.* 121 S. Ct. 1225 (2001), cited in Linda Greenhouse, *Court to Consider Right to Sue Company Running Halfway House for Federal Agency*, N.Y. Times A17 (Mar. 6, 2001).
216. 531 U.S. 438 (2001).
217. *Id.* at 444.
218. *Id.*
219. *Id.* at 441.

granting the sailor's motion to dissolve the injunction so that he could proceed with his state court action.[220] Relying on precedent, the Court agreed that the federal court properly exercised its discretion by dissolving the injunction.[221]

In *Norfolk Shipbuilding & Drydock Corp. v. Garris*,[222] the Court construed federal maritime law to permit a wrongful death action by extending its precedent, *Moragne v. States Marine Lines, Inc.*,[223] to permit not only a tort action premised on the issue of vessel sea worthiness but also a tort action for negligence.[224] Given the rule enunciated in *Moragne*: "We . . . hold that an action does lie under general maritime duties,"[225] and the fact that the development of maritime law has recognized the tort of negligence for more than a century, the Court saw no reason for barring the wrongful death action.[226]

United States v. Mead Corporation[227] was a tariff classification case. Over one dissent, the Court ruled that a *Chevron*-type deference to the agency's classification was not appropriate where, as in *Mead*, it appeared that Congress had not intended to delegate rulemaking to the United States Customs Service to prescribe tariff classifications. Nevertheless, while Customs' letter ruling classifications are not strictly entitled to *Chevron's* binding deference that does not mean they are not entitled to any judicial deference. In dissent, Scalia charged that the Court had significantly weakened the mandates of *Chevron*. But, clearly, because agency determinations can cut either way for business interests, *Mead* and the other international trade cases this term have no significant impact on the business community.

X. FEDERAL STATUTES

Last term the Court considered the provisions of The Racketeer Influenced and Corrupt Organizations Act ("RICO") in two cases.[228] This term the Court reviewed and clarified RICO's provisions again. This time, the disputed language was found in section 1962(c), making it unlawful for "[a]ny person employed by or associated with any enterprise. . . to conduct or participate . . . in the conduct of such enterprise's affairs . . . in the

220. *Id.*
221. *Id.* at 451.
222. 121 S. Ct. 1927 (2001).
223. 398 U.S. 375 (1970).
224. *Norfolk*, 121 S. Ct. at 1933.
225. *Id.* at 1930 (citations and quotations omitted).
226. *Id.* at 1933.
227. 121 S. Ct. 2164 (2001).
228. *Beck v. Prupis*, 529 U.S. 494 (2000) (holding that termination for refusal to participate in alleged racketeering activity is not an injury caused by RICO) and *Rotella v. Wood*, 528 U.S. 549 (2000) (holding that RICO's 4-year statute of limitations is not tolled by injury and pattern discovery rule).

commission of a pattern of racketeering activity."[229] Courts typically call this provision the "distinctness rule." When a boxing promotions corporation sued another promoter, alleging that he engaged in racketeering activity, the question was whether an individual ("any person employed") could be distinguished analytically from his corporation ("any enterprise") if, as here, he was both president and sole shareholder of the closely-held enterprise. Invoking traditional principles of corporate law, a unanimous court in *Cedric Kusher Promotions Ltd. v. Don King*[230] ruled that he could. Conceding that plaintiff in a RICO suit must allege and prove these two separate entities, a person and an enterprise, the Court went on to find that here, the "distinctness" rule was met by the conceptual framework of traditional corporate law. "After all, incorporation's basic purpose is to create a distinct legal entity, with rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[231]

In *Central Green Co. v. United States*[232] the Court considered the proper construction of certain provisions of the Flood Control Act of 1928. The case arose when a farm owner alleged that a federal irrigation canal that flowed through his property was negligently designed. When it overflowed and flooded his land, he sued the federal government under the Federal Tort Claims Act. But the federal government claimed that it was immune from suit and that its immunity derived from the Flood Control Act. The relevant text of the Act reads, "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."[233] A unanimous Court decided that a determination as to whether water in the canal were "flood waters" required the lower court to develop the record on whether the waters that flooded the canal were actually occasioned by flood, on the one hand, or by irrigation projects or electricity generation projects on the other. The fact that the canal itself was part of a flood control system was not relevant. "[T]he scope of the immunity . . . [is determined] . . . not by the character of the federal project but by the character of the waters that caused the . . . damage and the purposes behind their release." The case was reversed and remanded.[234]

In a major victory for the medical equipment industry, the Court unanimously dismissed a "fraud-on-the FDA" claim. The state law claim was brought in *Buckman Company v. Plaintiffs' Legal Committee*[235] alleging that orthopedic bone screws which injured a patient's spine in which they

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229. 18 U.S.C. § 1962(c) (1994).
230. 121 S. Ct. 2087 (2001).
231. *Id.* at 2091.
232. 531 U.S. 425 (2001).
233. 33 U.S.C. § 702 (1994).
234. *Central Green*, 531 U.S. at 434.
235. 531 U.S. 341 (2001).

were implanted, gained FDA approval through fraudulent representations by their manufacturer. The Court took a close look at the Federal Food Drug and Cosmetic Act ("FDCA") and found that while the FDCA might not expressly preempt state law claims, like the ones at issue, these claims would conflict both with the FDA's authority to punish fraud and with its objective of achieving "a somewhat delicate balance of statutory objectives."[236] The statutory framework of the FDCA, said the Court, directs the agency both to insure that medical devices that reach the market are reasonably safe and effective and, simultaneously, to insure that if they are, they reach the market at an early date. State law actions could upset the mandated statutory balance and, therefore, said the Court, federal law impliedly preempts them.[237]

While the case was obviously an important win for the medical device industry, the preemption holding in the case was narrowly constrained to that industry and to the FDCA and, therefore, adds nothing of broader significance to the Court's developing preemption doctrine.[238]

Finally, in an interesting challenge to the Mushroom Promotion, Research and Consumer Information Act, the Court decided that a mandatory fee assessed against mushroom producers violated their First Amendment rights. The case, *United States v. United Foods*,[239] involved the issue of compelled commercial speech. Justice Kennedy, writing for the majority, began his analysis by noting that while commercial speech is entitled to some First Amendment protection, it is generally not entitled to the same degree of protection accorded other speech. Identifying *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[240] and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[241] as the seminal cases establishing the framework for commercial speech doctrine, he went on to add that, under the facts of this case, the compelled speech was constitutionally impermissible. At issue was a provision in the Act imposing a mandatory assessment on "all handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported."[242] The assessment was used primarily "for generic advertising to promote mushroom sales."[243] United Foods, a large producer and distributor of foodstuffs including mushrooms, objected to the statutory assessment on the grounds that it compelled speech with which United Foods strenuously disagreed. United Foods contended that

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236. *Id.* at 348.
237. *Id.* at 347-46.
238. *See e.g.* Marcia Coyle, *Big Win for Big Business*, 23 Natl. L.J. B1 (Mar. 5, 2001).
239. 121 S. Ct. 2334 (2001).
240. 425 U.S. 748 (1976) (commercial speech is protected by First Amendment).
241. 447 U.S. 557 (1980) (setting forth test which offers commercial speech less protection than other speech).
242. *United Foods*, 121 S. Ct. at 2337.
243. *Id.*

its own brand of mushrooms was superior to those of competitors. But the assessment supported an advertising "message that [all] mushrooms are worth consuming whether or not they are branded."[244] Agreeing with United Foods, the Court concluded that the statutory assessment impermissibly infringed on its First Amendment rights. In so doing the Court was careful to distinguish the facially similar facts in *Glickman v. Wileman Bros & Elliott, Inc.*,[245] where the Court reached the opposite result. In *Glickman*, the Court found that a statutory assessment imposed on producers of California tree fruit for generic advertising did not violate the producers' First Amendment rights because the assessment was part of a "comprehensive statutory marketing program for the produce."[246] Of pivotal importance, said the Court, the program "displaced many aspects of independent business activity . . . the program was characterized by [c]ollective action, rather than the aggregate consequences of independent choices.'"[247] By contrast, the statutory program in *United Foods* did not establish a comprehensive program. "Mushroom producers are not forced to associate as a group which makes cooperative decisions. [With the exception of the mandatory assessment] . . . the mushroom growing business . . . is unregulated. . . ."[248] Therefore, the mushroom producers were distinguishable from groups, like the California tree fruit producers[249] or like attorneys in a state bar association,[250] who may be compelled to pay fees in support of the association's mission. Without a comprehensive associational scheme, which the fee assessment serves, the mandatory fees constitute compelled speech, which violates First Amendment rights. However, a dissenting opinion took issue with Justice Kennedy's attempt to find a principled way of distinguishing *United Foods* from *Glickman* and its antecedents. First, said the dissent, like *Glickman*, the mandatory assessment in the instant case was merely a part of an economic regulatory scheme devised by Congress. "[T]he advertising here relates directly . . . to the regulatory program's underlying goal of maintain[ing] and expand[ing] existing markets and uses for mushrooms."[251] Hence, like the fees in *Glickman*, the assessments should have been viewed as "nothing more than additional economic regulation, which did not raise First

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244. *Id.* at 2338.
245. *Id.* at 2337-38.
246. *Id* at 2336.
247. *Id.* at 2339 (citations and quotations omitted).
248. *United Foods*, 121 S. Ct. at 2359 (citations and quotations omitted).
249. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997).
250. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (approving, in part, imposition of bar association fees as long as they were used to support the mission of the association). However, as the Court has noted, "objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *United Foods*, 121 S. Ct. at 2340. The Court also cited the seminal case on this issue, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).
251. *United Foods*, 121 S. Ct. at 2344 (Breyer, J., dissenting, joined in parts I, III by Ginsberg & O'Connor, JJ.).

Amendment concerns."[252] The dissent found the First Amendment precedent cited by the majority to be inapposite, because those cases involved political speech; speech about beliefs. In the instant case, the assessment was merely "a species of economic regulation."[253] Thus, the mandatory assessment did not trigger First Amendment analysis. "It does not significantly interfere with protected speech interest," "it does not compel speech itself;" it furthers, rather than hinders, the basic First Amendment 'commercial speech' objective . . . the free flow of truthful commercial information;" [and it presents] . . . no special risk of other forms of speech-related harm. But perhaps the most incisive critique by the dissent was its declaration that the Court's analysis in *United Foods* conflates economic regulation with free speech doctrine to such a degree that it calls into question any number of statutory regulations. As examples, the dissent mentions assessments against tobacco companies for advertising the dangers of smoking and the imposition of entry fees at museums to be used to advertise the value of art to society.[254] Given the analysis in *United Foods*, it is difficult to predict how the Court might handle these questions. The legacy of the majority opinion in United Foods may be increased doctrinal uncertainty, rather than enhanced doctrinal clarity.

XI. CIVIL PRACTICE

Finally, several civil practice decisions that impact business litigation should be mentioned. In *Becker v. Montgomery*,[255] a unanimous Court gave litigants some procedural latitude, ruling that failure to sign a notice of appeal in federal court violated federal rules but the violation was curable, because it did not involve a jurisdictional issue. Consequently, the Court did not mandate dismissal of the case.[256] In *New Hampshire v. Maine*[257] the Court ruled that the equitable doctrine of judicial estoppel was properly invoked by a lower court that held that a litigant state (New Hampshire) was barred from asserting a position contrary to its position in early litigation. The Court reiterated the rule that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who acquiesced in the position formerly taken by him."[258] In the *New Hampshire* case, the Court expressly refused to hear Maine's contentions

252. *Id.* at 2340.
253. *Id.* at 2346 (citations omitted).
254. *Id.* at 2347.
255. 121 S. Ct. 1801 (2001).
256. *Id.* at 1807.
257. 121 S. Ct. 1808 (2001).
258. *Id.* at 1814 (citations and quotations omitted).

on "the res judicata doctrines called claim and issue preclusion," finding judicial estoppel a better fit with the facts in that case.[259] But in *Semtek International Inc. v. Lockheed Martin Corp*,[260] the Court addressed the claim preclusive effect of a judgment and unanimously concluded that the effect of the judgment (in this case a dismissal premised on California's statute of limitations) in a diversity case subsequently brought on the same issues in Maryland was, pursuant to federal rules pertaining to diversity cases, governed by the applicable res judicata rule in the state where the diversity action was brought. On that basis, the case was remanded to the federal district court. In an interesting if somewhat counter-intuitive opinion, Justice Scalia (no fan of federal common law generally) wrote on behalf of the Court that the issue was governed by federal common law rules. Applying federal common law, Scalia found that in a diversity case the rules of the forum state apply.[261]

Finally in one of the most important business-related cases this term, the Court considered the proper standard for review of a punitive damages award. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[262] the losing defendant in a suit alleging trade dress infringement and false advertising, "passing off" and unfair competition challenged the jury award of $50,000 in compensatory damages and $4.5 million in punitive damages. Specifically, the defendant corporation charged that the punitive damage award was so excessive that it violated the defendant's Constitutional rights. Thus, the case raised one of the most important issues for business interests this term: to what extent can (or must) higher courts monitor what businesses accurately describe as the always unpredictable and occasionally excessive arena of punitive awards? In *Cooper Industries*, the Court of Appeals affirmed the lower court's findings that the punitive damages were reasonable under the facts by applying an abuse of discretion standard. The defendant appealed arguing, among other things, that the proper standard of review was *de novo*. Thus, the battle lines were clearly drawn. The plaintiff argued that the standard of review of jury awards is properly premised on a factual analysis, hence deference to the trial court and the finder of fact is in order and the appropriate standard is the relatively deferential abuse of discretion standard. Weighing in on the other side of the theoretical divide, defendant and business interests like the United States Chamber of Commerce argued that the standard of review of jury awards is properly premised on an "inquiry" into "legal principles," hence *de novo* review is the proper

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259. *Id.*
260. 531 U.S. 497 (2001).
261. For a thorough discussion of the ramifications of Justice Scalia's opinion, *see* Georgene Vairo, *Forum Selection: Preclusion Priorities*, 23 Natl. L.J. A12 (May 7, 2001).
262. 532 U.S. 424 (2001).

standard.[263] And, each side drew on a different line of antecedent case law to support their respective positions. Plaintiff and its amici pointed to the 1996 case of *Gasperini v. Center for Humanities*,[264] where the Court analyzed compensatory damages under the Seventh Amendment and ruled that in reviewing a jury award of allegedly excessive compensatory damages, the proper standard of review was abuse of discretion. While defendant and the amicus business interests pointed to the 1996 case of *BMW v. Gore*,[265] where the Court reviewed *de novo* an allegedly excessive punitive damage award and found it violative of defendant's Due Process rights. The specific questions addressed to the Supreme Court were: (1) whether the Court of Appeals' abuse of discretion standard was the proper standard of review, and (2) if it was not, then did the appellate court's affirmance of the jury award violate the standards set forth in *Gore*. Resolving a split in the circuits, the Court addressed the first issue and, over one dissent, ruled that the proper standard of review was *de novo*; therefore the Court of Appeals had applied the wrong standard of review. As a consequence of its findings of error as to the first issue, the Supreme Court remanded on the second issue so that the Court of Appeals could reassess the jury's punitive damage award under *Gore's* guidelines. Facially, this is a tremendously important win for the business community. But the inevitable question arises: how much difference will it make in the real world of litigation practice? All sides concede that, realistically, the denominations of questions of law versus questions of fact are dubious categories at the outset. Therefore, to delineate analysis of jury awards as exclusively one or the other is somewhat misleading and tends to mask the way trial courts address issues in the real world of litigation. Moreover, plaintiffs' bar has commented in the aftermath of *Coopers Industries* that the outcome is hardly momentous and will have little impact on reviews of jury awards in future cases. Plaintiffs' attorneys explain their conclusion this way: given the porous nature of the boundary between law and fact, appellate courts have increasingly scrutinized large punitive damage awards, *de novo*, whether they acknowledge it expressly or not.[266] Plaintiffs' bar, thus, anticipates little change in the real world of jury awards. However, the business bar is perhaps more insightful and has made a better predictive "call" on the impact of *Coopers Industries*. It argues that the definitive rule laid down in *Coopers Industries* will reverberate down the judicial hierarchy even to state trial judges, who (anticipating *de novo Gore* review) will now view jury punitive awards more

263. *See* Marcia Coyle, *Justices Look at Punitives*, 23 Natl. L.J. B1 (Feb. 19, 2001).
264. 518 U.S. 415 (1996) (cited in Coyle, supra n. 263).
265. 517 U.S. 559 (1996).
266. Coyle, supra n. 263, at B1; Margaret Cronin Fisk, *Punitives Ruling*, 23 Natl. L.J. A1 (May 28-June 4, 2001).

critically.[267] If that is so, then *Cooper Industries* may be, pragmatically speaking, the most beneficent ruling for the business community on the 2000-2001 docket.

XII. CONCLUSION

The *Bush v. Gore* decisions left the Court open to the charge that it was more result-oriented than rule-driven. Those decisions contradicted the Rehnquist Court's reputation as a centrist Court and an advocate of judicial restraint. They were also contrary to the majority's evolving federalism doctrine. A review of the business-related cases this term suggests that the election decisions were not anomalous. Rather they, in conjunction with the most important business cases this term, reflect a decisive turn toward conservative activism on the part of the majority.

While many of the business cases this term do evince the centrism and analytical restraint of a consensus-building Court, almost without exception[268] those cases will have only a marginal impact on the nation's businesses, either because they deal with narrow issues, or pertain only to discrete industries or because the result reached was entirely predictable given existing precedent. On the other hand, with the few exceptions identified above, the decisions that will have the most significant and far-reaching impact on the nation's business community were reached by the ideological 5-4 split to which we are becoming inured. While most of these decisions favored business interests, they may also exacerbate underlying divisions in society and they will surely have a destabilizing effect on the doctrines they sought to construe. In any event, these cases signal a gestalt flip by the Court's majority—a rejection of its former centrist paradigm.

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267. *See* Fisk, *supra* n. 266, at A1.

268. Notable exceptions were: *TrafFix*, 121 S. Ct. 1255 (unanimous decision); *Tasini*, 121 S. Ct. 2381 (7-2); *Whitman*, 531 U.S. 457 (unanimous decision); and *Leatherman*, 532 U.S. 454 (8-1). All of these extremely important decisions represented a consensus of the justices.

Appendix A

Labor & Employment

Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans With Disabilities Act).

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (arbitration).

Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (Title VII).

E. Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17, 532 U.S. 57 (2000) (arbitration).

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) (ERISA).

C & L Enter., Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411(2001) (arbitration).

Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001) (due process).

Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504 (2001) (arbitration).

N.L.R.B. v. Ky. River Community Care, Inc., 532 U.S. 706 (2001) (National Labor Relations Act).

P.G.A. Tour, Inc. v. Martin, 532 U.S. 661 (2001) (ADA).

Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001) (Title VII).

Taxation

Dir. of Revenue of Mo. v. CoBank A.C.B., 531 U.S. 316 (2001) (Farm Credit Act).

Gitlitz v. Commr. of Internal Revenue, 531 U.S. 206 (2001) (Subchapter S passthrough treatment).

United Dominion Indus., Inc. v. U.S., 532 U.S. 822 (2001) (income tax computations for affiliated companies).

U.S. v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (F.I.C.A. and F.U.T.A. tax calculations).

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (tribal taxation of non-Indian commerce).

Federal Courts/Civil Practice

Becker v. Montgomery, 532 U.S. 757 (2001) (notice of appeal).

Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Resources, 532 U.S. 598 (2001) (ADA and other fee-shifting statutes).

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (standard of review for punitive damage awards).

N. H. v. Me., 532 U.S. 742 (2001) (judicial estoppel).

Semtec Intl., Inc. v. Lockheed Martin Corp, 531 U.S. 497 (2001) (res judicata).

Intellectual Property

N.Y. Times v. Tasini, 121 S. Ct. 2381 (2001) (Copyright Act).

TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23 (2001) (trade dress protection).

Consumer Law

Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79 (2000) (arbitration).

Admiralty/Maritime Law and International Trade

U.S. v. Mead Corp., 533 U.S. 218 (tariff classifications).

Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) (state tort liability under the Limitation of Liability Act).

Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001) (tort actions/maritime law).

Securities Law

The Wharf (Holdings) Ltd. v. United International Holdings, Inc., 532 U.S. 588 (2001) ("Security" under SEA § 10 and Rule 10b-5).

Environmental Law; Property Law

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs., 531 U.S. 159 (2001) ("navigable water," Clean Water Act).

Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457 (2001) (NAAQS under the Clean Air Act).

Palazzolo v. R. I., 121 S. Ct. 2448 (2001) (eminent domain "takings").

Federal Statutes

Central Green Co. v. U.S., 531 U.S. 425 (2001) (Federal Tort Claims Act/Flood Control Act).

Cedrick Kusher Promotions Ltd. v. Don King, 533 U.S. 158 (2001) (civil RICO).

Buckman v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001), (Federal Food Drug and Cosmetic Act).

U.S. v. United Foods, 121 S. Ct. 2334 (2001) (Mushroom Promotion, Research and Consumer Information Act/commercial speech).

Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001) (Federal Cigarette Labeling and Advertising Act/commercial speech).