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Father Knows Best: The Court's Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002-2003 Term

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FATHER KNOWS BEST: THE COURT'S RESULT-ORIENTED ACTIVISM CONTINUES APACE: SELECTED BUSINESS-RELATED DECISIONS FROM THE 2002-2003 TERM

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Business-related cases decided by the Rehnquist Court have typically comprised approximately one-half of the Court's docket each term.[1] The 2002-2003 Term was no exception.[2] "Business-related" cases obviously includes cases that resolve disputes among parties in the private sector and raise legal issues in various fields of business law (issues about contract law, intellectual property law, and securities law are, without question, examples of "business law" issues). But cases that deal with disputes resolved by rules beyond this narrow definition of business law can surely impact business interests. Therefore, "business-related" cases should also include disputes among parties outside the private sector that raise issues that may be entirely unrelated, or merely tangentially related, to those fields of law associated with business (examples include, but are certainly not limited to, federalism, civil procedure, and First Amendment issues). Under this broader description, business-related cases represent a significant portion of the Court's decisions and implicate many diverse fields of law. The advantage to the business community of viewing the Court's work from this perspective is that it illuminates the Court's jurisprudential strategies, and its approach to law and to its judicial role, generally. Shedding light on these underlying aspects of Rehnquistian dynamics should facilitate the business community's efforts to anticipate, predict, and plan for trends and currents in the law.

In that regard, the story of the 2002-2003 Term must be told as a cautionary tale. In its business-related cases, the Court gave every indication that it would continue to be an activist, result-oriented, conservative body. Businesses should, therefore, anticipate that Rehnquistian jurisprudence will cut both ways for business interests. While the Court's conservative ideology will sometimes favor

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1. *See e.g.* 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 (2000) (stating that thirty-seven of the Court's seventy-five cases decided during that Term were business-related).

2. *See* Marcia Coyle, *Follow the People*, 25 Natl. L.J. S1, S5 (Aug. 4, 2003) ("[T]he [C]ourt took a substantial number of cases of interest to business—nearly half the docket . . . .").

business interests, the Court's other conservative priorities will—in some cases—trump business interests. And while the Court's confrontational activism with regard to legislation may initially appear to favor business interests, the fact-specific totality of the circumstances approach this Court has taken to statutory interpretation often results in an increasingly burdensome flood of interpretive litigation. Finally, the result-oriented nature of this Court's decision-making unsettles extant rules in ways that are often unpredictable. Ultimately, what has become predictable about this Court is an increasingly evident insistence upon its own preeminence as a branch of government.

Decisions reached by the Rehnquist Court in its most recent Term lend additional credence to that description of the Court. What follows is a review of selected business-related cases from the 2002-2003 Term that further shaped the contours of Rehnquistian jurisprudence with regard to business-specific and business-related issues. Several of the Court's high profile decisions from the 2002-2003 Term have been reported by the media as evidence that the Court is modifying, even liberalizing, its conservative agenda and exhibiting more deference to the legislative branch of government. But a close look at the reasoning behind each of those decisions belies the media reports. This article begins with an overview of those cases because, media reports notwithstanding, they underscore the Court's unswerving commitment to its conservative, result-oriented activism.

I. UNIVERSITY ADMISSIONS, SEXUAL CONDUCT, AND BUSINESS LITIGATION

Gratz v. Bollinger,[3] *Grutter v. Bollinger*[4] (two affirmative action cases), and *Lawrence v. Texas*[5] (a due process challenge to a state sexual conduct statute) were undoubtedly the most highly publicized cases of the Term. The inclusion of affirmative action and sexual conduct cases in the category of "business-related" cases may seem a stretch. Nevertheless, their inclusion here is motivated neither by their subject-matter nor by the specific holding in each case, but rather by certain (markedly similar) aspects of the majority's reasoning in all three cases.

There is strong evidence in each case that the Court was simply catching up with public opinion about the issues in dispute. And, significantly, the Court relied upon conservative precedent (which had previously diluted the positions taken by their liberal antecedents) to justify its decision in each of the three cases. While media attention focused upon the reputedly liberal holdings in each of the cases,[6] the reasoning by which the Court reached those results is entirely consistent with and, in fact, dependent upon, conservative precedent.

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3. 123 S. Ct. 2411 (2003).

4. 123 S. Ct. 2325 (2003).

5. 123 S. Ct. 2472 (2003).

6. *See e.g.* Coyle, *supra* n. 2, at S2 (pointing out the unusual degree of deference the Court showed this Term to acts of Congress); Linda Greenhouse, *Steady Rationale at Court Despite Apparent Bend*, 152 N.Y. Times A22 (May 29, 2003) (noting that the Court this Term seemed to moderate its confrontational activism but emphasizing that the Court continues to insist upon a dominant position vis-à-vis Congress).

Additionally, in two of the cases, the Justices cited international and foreign legal norms as authority for the decisions the Court reached. Trial attorneys litigating business issues should be made aware that arguments on behalf of their clients—and arguments made by their opponents—can now draw upon international and foreign law to buttress claims premised on national and/or state law. These cases are seminal and watershed events in that regard alone. Indeed, the enduring legacy of these three cases may prove to be this path-breaking reliance upon international and foreign legal authority, rather than the purportedly liberal nature of their important holdings. A synopsis of the cases will further serve to highlight these aspects of the cases.

In *Lawrence*, the Court ruled that a Texas statute that criminalized certain sexual conduct between members of the same sex was unconstitutional. Writing for the majority, Justice Kennedy declared that the statute violated citizens' privacy and liberty interests protected by the Due Process Clause of the Fourteenth Amendment.[7] That holding compelled the majority to overrule *Bowers v. Hardwick*,[8] a case Kennedy acknowledged as having some similar facts.[9] *Bowers*, he explained, was wrongly decided because the Court improperly focused on whether the right to engage in same sex intimacy was fundamental.[10] The proper inquiry, Kennedy declared, is whether the state has the authority "to control a personal relationship" and "the most private human conduct, sexual behavior, . . . in the most private of places, the home."[11] The obvious question is what motivated the Court to shift its focus—to relocate the "proper inquiry"? Every first year law student understands that the phrasing of the question often dictates the way in which it is answered.

Why change the question? The evidence from Kennedy's opinion suggests that it was predominately the Court's dawning awareness of public sentiment on the issue, made apparent by current state statutes, that caused it to recast not only the *Bowers* issue, but also *Bowers*' rendition of the historical evolution of public opinion on the subject. That awareness inspired the Court to find support for its revised view of the issue in three separate sources of authority: (1) public opinion—both historical and contemporary—as memorialized in the state statutes of many jurisdictions, which put the Texas statute in an "outlier" posture; (2) post-*Bowers* precedent on related issues that undercut the *Bowers* rationale; and (3) international and foreign norms that contradicted the *Bowers* rationale. In short, Kennedy's opinion evinces a concern that following *Bowers* would thrust the Court itself into an "outlier" position; a position that it was unwilling to accept.

At the outset, Kennedy challenged *Bowers*' rendition of history, pointing out that "there is no longstanding history in this country of laws directed at

7. *Lawrence*, 123 S. Ct. at 2483-84.
8. 478 U.S. 186 (1986).
9. *Lawrence*, 123 S. Ct. at 2477.
10. *Id.* at 2478.
11. *Id.*

homosexual conduct as a distinct matter."[12] In fact, "early American sodomy laws were not directed at homosexuals . . . but [at] nonprocreative sexual activity. . . ."[13] "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."[14] More recently, Kennedy continued, states have moved away from criminalizing any consensual sexual conduct between adults.[15] And, he added, only four states have statutes comparable to the Texas statute at issue, while five states have refused to follow *Bowers* in interpreting parallel due process provisions in their own constitutions.[16]

Having rejected *Bowers*' interpretation of past and present public opinion, a rejection that pointedly undermined the credibility of *Bowers*' rationale and demonstrated its distinctly minority position, Kennedy turned to other authority for support of the *Lawrence* decision. With regard to domestic authority, it is instructive that Kennedy cited two cases: *Planned Parenthood of Southeastern Pennsylvania. v. Casey*,[17] an opinion rendered by a moderately conservative plurality in 1992 by which the distinctly liberal *Roe v. Wade*[18] only tenuously survived, and *Romer v. Evans,*[19] an opinion which "eroded" but did not overrule *Bowers*.[20] The rationale in *Lawrence* is thus merely an extension and application of these opinions.

Justice Kennedy also turned to the legal norms of other countries in support of the *Lawrence* decision. He cited the British Parliament's repeal of its criminal sodomy law in 1967.[21] He also referenced a case decided by the European Court of Human Rights that found Northern Ireland's sodomy laws in violation of the European Convention on Human Rights,[22] as well as other similar decisions reached by the European Court.[23] It is in this aspect of the opinion that *Lawrence* achieves landmark status. It ushered in a new authoritative source from which to develop and deploy legal argument: the authority of other sovereignties.

A similar assessment can be made of the two affirmative action cases, *Gratz* and *Grutter*. There is strong evidence that the Court's decision in each of the cases was informed, if not influenced, by its perception of public opinion; the decisions expressly relied on and applied conservative precedent, and one opinion cited international legal norms as authority. Again, a brief synopsis of the cases will demonstrate the essentially conservative, rear-guard nature of these affirmative action opinions.

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12. *Id.*
13. *Id.* at 2479.
14. *Lawrence*, 123 S. Ct. at 2479.
15. *Id.* at 2480.
16. *Id.* at 2481, 2483.
17. 505 U.S. 833 (1992).
18. 410 U.S. 113 (1973).
19. 517 U.S. 620 (1996).
20. *Lawrence*, 123 S. Ct. at 2481-83.
21. *Id.* at 2481.
22. *Id.* (discussing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).
23. *Id.* at 2483.

In *Gratz*, the Court found that the university's undergraduate admissions program for its College of Literature, Science, and the Arts violated the Equal Protection Clause of the Fourteenth Amendment, as well as Title VI of the 1964 Civil Rights Act[24] and 42 U.S.C. § 1981.[25] Writing for the Court, Chief Justice Rehnquist opined that because the program "automatically distribute[d] 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, . . ."[26] the program violated the guidelines laid down in *Regents of University of California v. Bakke*[27] for permissible affirmative action programs.[28]

Bakke, like *Casey* in *Lawrence*, served as precedential authority in *Gratz* and *Grutter*. And *Bakke*, like *Casey*, was a plurality opinion; a conservative opinion that diluted its more liberal antecedents.[29] Thus, when Chief Justice Rehnquist declared that the admissions program at issue in *Gratz* failed to comply with *Bakke* guidelines, he imposed a restrictive view on the program at the outset. Moreover, as Justice Souter implicitly observed in dissent, the Chief Justice's application of *Bakke* was even more restrictive than *Bakke* itself.[30]

In *Bakke*, Justice Powell famously declared that consideration of race could be a compelling state interest that trumped equal protection rights if the affirmative action program instituted to serve that interest was "narrowly tailored."[31] The *Bakke* Court struck down the University of California's racial quota or "set aside" program "in which race [was] the *sole* fact of eligibility for certain places in a class,"[32] and which thereby "insulate[d] all nonminority candidates from competition [for] certain seats."[33]

By contrast, Justice Souter contended, the Michigan undergraduate admission plan in *Gratz* was not a quota system:

> The plan . . . lets all applicants compete for all places and values an applicant's offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay.[34]

Therefore, the Michigan undergraduate program arguably fit within Justice Powell's prescription of individualized assessment, which considers "all pertinent elements of diversity in light of the particular qualifications of each

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24. Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964).
25. 123 S. Ct. at 2430.
26. *Gratz*, 123 S. Ct. at 2427.
27. 438 U.S. 265 (1978).
28. *Gratz*, 123 S. Ct. at 2427.
29. *See* Coyle, *supra* n. 2, at S2 (citing Theodore Shaw, associate director-counsel of the NAACP Legal Defense and Educational Fund).
30. *See Gratz*, 123 S. Ct. at 2440-41 (Souter & Ginsburg, JJ., dissenting).
31. 438 U.S. at 316-18.
32. *Gratz*, 123 S. Ct. at 2440 (Souter & Ginsburg, JJ., dissenting) (emphasis added).
33. *Id.* (internal quotations omitted).
34. *Id.*

applicant...."[35] Nothing in the record indicated that the "20 points [system] convert[ed] race into a decisive factor,"[36] as opposed to the quota system in *Bakke*. As a result, the undergraduate program in *Gratz* could have been upheld as being consistent with *Bakke*. Clearly, then, *Gratz* is a conservatively restrictive reading of a conservative precedent.

The law school admissions program in *Grutter* fared much better and passed the Rehnquist Court's restrictive test because of the more amorphous technique the law school employed to consider race.[37] Nevertheless, while the decisions in *Gratz* and *Grutter,* like *Lawrence*, came as a relief to supporters of human rights and liberties, the decisions are merely applications of—and in the *Gratz* case, a *restrictive* application of—conservative precedent.

Moreover, these University of Michigan decisions, like the *Lawrence* decision, seem to be responses to public opinion. In *Lawrence*, public opinion was reflected in the history of state laws chronicled by Justice Kennedy. In the Michigan cases, public opinion was made apparent through the unprecedented number of amicus briefs filed in the cases.[38] As a result of the Court's references to the amici of large corporations and the military establishment, who wrote on behalf of affirmative action, one can infer that the amicus curiae submissions had a salutary effect in persuading the Court to give its imprimatur to affirmative action.[39] Thus, *Gratz* and *Grutter* must take their place alongside *Lawrence* as fundamentally conservative decisions spurred by public opinion, and constrained by conservative precedent.

Moreover, *Grutter*, like *Lawrence*, opened the door to international legal norms as authority for domestic disputes. In *Lawrence*, the majority opinion referenced those norms. In *Grutter*, the concurring opinion of Justice Ginsburg cited The International Convention on the Elimination of All Forms of Racial Discrimination, to which the United States is a signatory.[40] Like *Lawrence*, *Grutter*'s precedential value may lie more in its path-breaking use of international norms than in its rear-guard support of affirmative action. In any event, these three cases, which received the most media attention of the 2002-2003 Term and were widely touted as evidence of a moderating or liberalizing trend on the Rehnquist Court, in fact offer no indication that the Court has revised or modified its conservative agenda. Other cases this Term carry the same message.

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35. *Bakke*, 438 U.S. at 317.

36. *Gratz*, 123 S. Ct. at 2441 (Souter & Ginsburg, JJ., dissenting).

37. 123 S. Ct. at 2343-44.

38. *See* Ronald Dworkin, *The Court and the University,* 50 N.Y. Rev. of Bks. 8, 8 (May 15, 2003) (noting that "amicus curiae... briefs were filed... by universities, colleges, students, political and military officials, corporations, political action groups, and other interested citizens," and that "[e]normous crowds demonstrated in favor of affirmative action outside the Court during the oral argument....").

39. *See Grutter*, 123 S. Ct. at 2340 (citing briefs submitted by 3M, General Motors, and military spokespersons).

40. *Id.* at 2347 (Ginsburg & Breyer, JJ., concurring).

II. PUNITIVE DAMANGES

The Court's decision to reverse an award of punitive damages significantly extended the majority's efforts to limit what it considers to be excessive awards, as well as its reliance on a due process rationale. The case was *State Farm Mutual Automobile Insurance Co. v. Campbell.*[41] In dissent, Justice Ginsburg set out a chronology of this Court's increasingly activist approach to punitive damage awards. She demonstrated that the Court has, in rapid succession, moved from a stance of deference and judicial restraint (1989), to a declaration that the Due Process Clause of the Fourteenth Amendment acts as a bar against unreasonably excessive punitive awards (1991), to affirmance of an award "526 times greater than the actual damages awarded by the jury,"[42] the asserted constitutional bar notwithstanding (1993), to an actual application of its due process bar in a reversal of a punitive award on due process grounds (1996).[43]

In the 1996 case *BMW of North America, Inc. v. Gore*,[44] the Court established three guidelines for determining when a punitive award exceeds constitutional limitations: (1) the reprehensibility of the defendant's conduct; (2) the difference between the plaintiff's harm and the punitive award against the defendant; and (3) the difference between the punitive award and the civil penalties available in that jurisdiction in similar contexts.[45] Applying the *Gore* guidelines to the facts in *State Farm*, the Court, while acknowledging that State Farm's conduct in the case "merit[ed] no praise,"[46] found that the $145 million in punitive damages awarded against State Farm was constitutionally impermissible.[47] In so doing, the Court elaborated and extended the *Gore* guidelines.

While the business community has celebrated *State Farm* as a great victory against the vicissitudes and uncertainties of punitive damage exposure,[48] the majority opinion has been criticized on both theoretical and practical grounds.[49] As a theoretical matter, three Justices (Scalia, Thomas, and Ginsburg)[50] and a host of commentators[51] have argued that neither the Due Process Clause nor any other

41. 123 S. Ct. 1513 (2003).

42. *Id.* at 1527 (Ginsburg, J., dissenting) (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993)) (internal quotations omitted).

43. *Id.*

44. 517 U.S. 559 (1996).

45. *Id* at 575.

46. *State Farm*, 123 S. Ct. at 1523.

47. *Id.* at 1526.

48. Marcia Coyle, *New Battles to Come over Punitives Ruling*, 25 Natl. L.J. A1, A1 (Apr. 14, 2003).

49. *See infra* nn. 50-53 and accompanying text.

50. *State Farm*, 123 S. Ct. at 1526 (Scalia, J., dissenting); *id.* (Thomas, J., dissenting); *id.* at 1527 (Ginsburg, J., dissenting).

51. *See e.g.* James J. Kilpatrick, *Back to O'Connor's Eyebrow*, Tulsa World A22, A22 (Apr. 25, 2003) (asserting that Justices Ginsburg, Scalia, and Thomas got it right because the issue is one for state legislatures); George Will, *Tort Reform Seems Unobtainable*, Tulsa World A18, A18 (Apr. 17, 2003) (agreeing with the dissenting Justices and arguing that while tort reform is a desirable goal—even if currently unobtainable—the Court should not substitute its judgment for that of state legislators).

provision of the Constitution gives the Court purchase to determine the reasonableness of punitive damage awards. As a practical matter, experts and practitioners point out that *State Farm* solves nothing and invites a flood of litigation to further clarify the *Gore* guidelines.[52] In principle, the case is surely an important win for business interests; but as a practical matter it may prove to be something of a Pyrrhic victory: one that compels much more litigation and, consequently, more uncertainty with respect to litigation exposure. That has certainly been true of other recent Supreme Court decisions that the press hailed as business victories.[53]

State Farm joins an increasingly alarming list of activist decisions by the Rehnquist Court. It is beyond argument that the Court's confrontational stance with regard to congressional legislation has redrawn the boundary between the Court and Congress.[54] *State Farm* is one indication that this Court similarly lacks a sense of deference and restraint when addressing the legislative branch at the state level. Indeed, the Court's activism in relation to congressional enactments continued apace in the 2002-2003 Term, its apparent "deference" in isolated cases notwithstanding.[55]

III. FEDERALISM AND PREEMPTION

Much of the Rehnquist Court's distinctive jurisprudence is to be found in the limitations it has placed on the jurisdictional reach of federal statutes through the various strands of its federalism doctrine. Nevertheless, its reputation as a "states' rights" Court is an oversimplification.

A. *Eleventh Amendment*

Nevada Department of Human Resources v. Hibbs[56] is a case that seemed to modify the Court's "states' rights" federalism and is emblematic of cases that appear to evince a new benign deference to Congress this Term. In fact, the case merely consolidates the Court's predilection for claiming preeminence over legislative enactments or, in other words, its result-oriented activism.[57]

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52. *See e.g.* Cynthia T. Andreason, *State Farm v. Campbell: What Happens Next?*, 71 U.S.L. Week 2691, 2691-92 (2003); Coyle, *supra* n. 48, at A8; Linda Greenhouse, *Justices Limit Punitive Damages in Victory for Tort Revision*, 152 N.Y. Times A16 (Apr. 8, 2003); Eric Peters, *High Court Takes Step to Rein in Awards*, Tulsa World G3, G3 (May 25, 2003).

53. *See* Barbara K. Bucholtz, *Employment Rights and Wrongs: ADA Issues in the 2001-2002 Supreme Court Term*, 38 Tulsa L. Rev. 363, 367, 371-78 (2002).

54. For a discussion of the Court's result-oriented activism, *see* Barbara K. Bucholtz, *Negative Hallucinations: How Application of Facially Neutral Rules of Statutory Construction Successfully Masked Rehnquistian Activism in Employment Decisions and Secured a Conservative Victory in the 2001-2002 Supreme Court Term* (unpublished manuscript) (copy on file with *Tulsa Law Review*).

55. *But see* Coyle, *supra* n. 2, at S2 (citing one conservative commentator, Mark Levy, who acknowledges that the Rehnquist Court has struck down more federal statutes than any other Supreme Court, but who finds this Term's decisions relatively "deferential").

56. 123 S. Ct. 1972 (2003).

57. For a more general discussion of the Court's burgeoning result-oriented activism, see Bucholtz, *supra* n. 54. For an example of commentators who view the case as deferential, see *Upholding Family Leave*, 152 N.Y. Times A22, A22 (May 28, 2003) (stating that "the Supreme Court's decision in

The question to be resolved in *Hibbs* was whether Congress had effectively abrogated states' Eleventh Amendment sovereign immunity with respect to the Family and Medical Leave Act of 1993 (FMLA).[58] The FMLA permits employees to receive up to twelve weeks of unpaid leave each year for any of several specified reasons, including certain personal and family member health reasons.[59] Both money damages and equitable relief are available under the provisions of the FMLA.[60]

The case arose when a state employee sued Nevada in federal district court alleging that the State failed to comply with FMLA.[61] The case, then, triggered the Rehnquist Court's federalism jurisprudence and, in particular, that strand of federalism premised upon the Eleventh Amendment. Over a period of seven years, the Rehnquist Court has made it clear that it has no reluctance about interposing the Eleventh Amendment, in the broadest interpretation of its text, as a bar against enforcement of federal law against the states.[62] At the same time, it has drawn a distinction between federal legislation crafted pursuant to § 5 of the Fourteenth Amendment and legislation grounded in other legislative authority, especially the Interstate Commerce Clause of Article I. With regard to the former, the Rehnquist Court has determined that "Congress may . . . abrogate [states' Eleventh Amendment sovereign] immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment."[63] Because there was no dispute over the congressional intent to abrogate in the FMLA, the issue devolved into a question of the legitimacy of the legislature's use of § 5 of the Fourteenth Amendment in the FMLA.

The Rehnquist Court's test for proper § 5 abrogation, as stated in its 1997 decision, *City of Boerne v. Flores*,[64] is whether there is sufficient "congruence and proportionality" between the asserted injury to a constitutional right and the "prophylactic legislation" designed to prevent or remedy the injury.[65] Furthermore, and this is the key to understanding the Court's "Father Knows Best," result-oriented activism in § 5 cases, it is within the Court's purview to decide not only the nature of the right asserted, but also whether the legislation passes the "congruence and proportionality" test. That is to say, not only does the Court—not Congress—have the sole authority to define the class to be protected

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Hibbs . . . may . . . signal that the [C]ourt is beginning to moderate its destructive use of the doctrine it calls 'federalism' to invalidate or limit laws passed by Congress").

58. Pub. L. No. 103-3, 107 Stat. 6 (1993).

59. 29 U.S.C. § 2612(a)(1)(C) (2000).

60. *Id.* at § 2617(a)(1)-(2).

61. *Hibbs*, 123 S. Ct. at 1976.

62. *See e.g. Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996) (initiating the Rehnquist Court's Eleventh Amendment jurisprudence). Most recently, in the 2001-2002 Term, the majority extended the reach of the Eleventh Amendment to cover adjudication of claims against non-consenting states in executive branch administrative agency tribunals. *Fed. Mar. Commn. v. S.C. St. Ports Auth.*, 535 U.S. 743, 760-61 (2002).

63. *Hibbs*, 123 S. Ct. at 1976.

64. 521 U.S. 507 (1997).

65. *Id.* at 520; *see Hibbs*, 123 S. Ct. at 1977-78.

by a federal statute, but it also has authority to substitute its own judgment for that of Congress in reviewing the weight of the congressional findings about the need for prophylactic legislation and the appropriate statutory remedy for the asserted injury. Under that test, even when the Court decides that Congress has legislated appropriately, the Court's imprimatur can hardly be labeled "deference" or judicial restraint.

The Court's validating test mandates its activism in second-guessing Congress and opens the door to result-driven judicial analysis. And so it was in *Hibbs*. The Court decided that the constitutional injury targeted in the FMLA was discrimination against female employees. And because gender-based discrimination by a state permits the Court to engage in heightened scrutiny to ascertain whether the state's actions serve "important government objectives," the evidence Congress garnered in its legislative findings about gender-based employment discrimination led—apparently ineluctably, albeit over the vociferous dissents of Justices Scalia, Kennedy, and Thomas—to the Court's conclusion that the FMLA was a reasonable piece of prophylactic legislation.[66] While this is undoubtedly an important and unusually employee-friendly decision given the Court's recent record in employment cases, it can hardly be considered evidence of a newly-minted deference to Congress or a nascent pro-employee attitude, as some commentators have suggested in their analysis of *Hibbs*.[67] Nothing about this case modified the astonishingly (and still disputed[68]) broad interpretation this Court has given to the Eleventh Amendment. Indeed, the majority opinion in *Hibbs* expressly relies on that interpretation; and nothing in the case modifies the Court's recent decisions severely restricting employee rights.[69] *Hibbs* does, however, demonstrate one way in which the Rehnquist Court arrogates for itself the authority to legislate.[70]

B. Preemption

Preemption is another analytical approach to state-federal jurisdictional disputes. The Court decided several business-related cases during this Term on the basis of its preemption doctrine. While each of these cases is important in its own right, the cases add little to our understanding of trends in the Court's strategies and will, therefore, receive only brief mention here.

The Court rendered an important healthcare decision in *Kentucky Association of Health Plans, Inc. v. Miller*,[71] where a consortium of health

66. *Hibbs*, 123 S. Ct. at 1978-79 (internal quotations omitted).

67. *See e.g.* Lisa J. Banks & Debra S. Katz, *A Pro-Employee Trend*, 25 Natl. L.J. S7, S7 (Aug. 4, 2003) (declaring that *Hibbs* "constitutes a notable departure from [the Court's] recent trend of shielding states from the reach of anti-discrimination statutes"); Coyle, *supra* n. 2, at S1-S2.

68. *See e.g. Hibbs*, 123 S. Ct. at 1984 (Souter, Ginsburg & Breyer, JJ., concurring) (evidencing a hesitance to fully concede to the majority's position); *id.* at 1984-85 (Stevens, J., concurring) (stating that the Eleventh Amendment was not an obstacle under the facts of the case).

69. *See* Bucholtz, *supra* n. 53 (reviewing employment related issues from the 2001-2002 Term); Bucholtz, *supra* n. 54 (reviewing recent employment decisions).

70. For an analysis of another technique, see Bucholtz, *supra* n. 54.

71. 123 S. Ct. 1471 (2003).

maintenance organizations (HMOs) argued, to no avail, that a Kentucky statute was preempted by the Employment Retirement Income Security Act (ERISA).[72] The Kentucky law required HMOs to include "any willing healthcare provider" in its health benefit plan as long as the provider agreed to the terms of the plans.[73] The Court found that the statute was "saved" from preemption because, pursuant to ERISA's savings clause, it was "specifically directed toward" the regulation of insurance practice in the state.[74] *Miller* joins a recent line of cases that appears to narrow the reach of ERISA, and is seen as evidence of this Court's states' rights proclivities.[75]

In two cases, however, the Court ruled that federal regulation preempted state law. In *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*,[76] the Court decided that the Federal Energy Regulatory Commission (FERC) regulation of wholesale electricity sales preempted a state utility commission's determination of cost allocation among related operating utilities.[77] Similarly, in *Beneficial National Bank v. Anderson*,[78] the Court held that a state court action involving usury laws could be removed to federal court under the well-pleaded complaint rule because the National Bank Act preempted state usury laws and, therefore, provided the sole cause of action in the case.[79]

The Court decided a high-profile case about pharmaceuticals on both preemption and Commerce Clause grounds. In *Pharmaceutical Research and Manufacturers of America v. Walsh*,[80] the Court held that challengers of Maine's prescription drug law had not met their burden of showing likely success on the merits and, therefore, were not entitled to injunctive relief.[81]. They did not show that the Maine Rx Program—designed to provide citizens with less expensive prescription drugs—was either preempted by the federal Medicaid program under Title XIX of the Social Security Act, or was an attempt to regulate out-of-state commerce in violation of the negative Commerce Clause.[82]

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72. Pub. L. No. 93-406, 88 Stat. 829 (1974); *see Miller*, 123 S. Ct. at 1474.

73. *Miller*, 123 S. Ct. at 1473-75.

74. *Id.* at 1475-77.

75. In the most recent case, decided during the 2001-2002 Term, the Court held that an Illinois HMO Act was saved from preemption because it regulated the insurance industry through its dispute resolution boards. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 372-73 (2002). The Court also found no preemption in *Sprietsma v. Mercury Marine*. 537 U.S. 51, 63-64 (2002) (holding that the Federal Boat Safety Act did not preempt state common law tort claims).

76. 123 S. Ct. 2050 (2003).

77. *Id.* at 2057-58.

78. 123 S. Ct. 2058 (2003).

79. *Id.* at 2064.

80. 123 S. Ct. 1855 (2003).

81. *Id.* at 1870-71.

82. *Id.* at 1869-1871.

C. *Commerce Clause*

A third strand of federalism cases implicates the Commerce Clause. In two cases decided during the 2002-2003 Term, the Court held that Congress legislated pursuant to its legitimate authority under the Commerce Clause.[83]

IV. ARBITRATION

An important business-related aspect of the Rehnquist Court's jurisprudence has been its broad reading of the Federal Arbitration Act (FAA),[84] a reading that has been received with some enthusiasm in the business community. The arbitration decisions in the Court's 2000-2001 Term established the basic parameters of the Court's pro-arbitration doctrine. A review of those cases and the sole arbitration case in the 2001-2002 Term will serve as a preface for the arbitration decisions of the 2002-2003 Term.

In *Circuit City Stores Inc., v. Adams*,[85] by a five-to-four ideological split, the Court gave a broad reading to the FAA, finding that it applied to all contracts of employment except those involving transportation workers.[86] The case represented a strong imprimatur for mandatory arbitration agreements in the workplace. In *Eastern Associated Coal Corporation v. United Mine Workers of America*,[87] a unanimous Court deferred to an arbitrator's award that arguably contravened important public policy.[88] In *Green Tree Financial Corp.-Alabama v. Randolph*,[89] by another ideologically split vote, the Court held that an arbitration clause in a consumer contract was enforceable in spite of its failure to address which parties should pay arbitration costs.[90] In *Major League Baseball Players Association v. Garvey*,[91] the Court, by a vote of seven-to-one per curiam, ruled that an arbitrator's award, however erroneous or irrational, is unreviewable as long as the arbitrator acts within the scope of authority.[92] Finally, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,[93] the Court held that a tribe waived its sovereign immunity when it signed a construction contract that contained a binding arbitration clause.[94]

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83. *See Hillside Dairy Inc. v. Lyons*, 123 S. Ct. 2142, 2147 (2003) (holding that state milk pricing and pooling regulations may be scrutinized by the federal government pursuant to the Commerce Clause); *Pierce County v. Guillen*, 537 U.S. 129, 146-48 (2003) (holding that the Public Disclosure Act, 23 U.S.C. § 409 (2000), which protects certain federal highway safety information from discovery, is a valid exercise of Commerce Clause power).

84. Pub. L No. 80-392, 61 Stat. 670 (1947).

85. 532 U.S. 105 (2001).

86. *Id.* at 119. For a more detailed description of the arbitration decisions in the 2000-2001 Term, see Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-Related Cases on its 2000-2001 Docket*, 37 Tulsa L. Rev. 305, 316-22 (2001).

87. 531 U.S. 57 (2000).

88. *Id.* at 66-67.

89. 531 U.S. 79 (2000).

90. *Id.* at 90-93.

91. 532 U.S. 504 (2001).

92. *Id.* at 509-10.

93. 532 U.S. 411 (2001).

94. *Id.* at 418-21.

In its 2001-2002 Term, the Court confined itself to one arbitration case; an employment case. At first glance, the ruling seemed to suggest that the Court had trimmed its pro-arbitration sails. A closer look leads to the opposite conclusion. The case, *EEOC v. Waffle House, Inc.*,[95] involved a claim brought by the EEOC on behalf of an employee who alleged violations of his rights under the Americans with Disabilities Act of 1990 (ADA).[96] The question before the Court was whether the employer's mandatory arbitration agreement barred the EEOC lawsuit.[97] Writing for the majority, Justice Stevens said a lawsuit which "pursu[ed] victim-specific judicial relief, such as back pay, reinstatement, and damages, in an enforcement action alleging . . . violat[ions] . . . of the [ADA]" was not foreclosed by the arbitration agreement.[98]

As noted above, the Court has recently given a broad reading to the coverage of the FAA;[99] thus, the corollary issue in *Waffle House* was whether the FAA protected an employer's arbitration agreement from an EEOC enforcement suit. The Court explained that the Fourth Circuit had previously ruled that an FAA-sanctioned mandatory arbitration agreement permitted the EEOC to seek only injunctive relief.[100] The majority rejected the Fourth Circuit's approach because the EEOC was not a party to the arbitration and because the EEOC's enforcement powers have, since the 1991 amendments, granted the agency broad authority to seek not only equitable relief but also compensatory and punitive damages.[101] Therefore, Justice Stevens found the EEOC's enforcement powers were not precluded by the arbitration agreement.[102] Moreover, according to the majority, the statutory role of the EEOC envisioned by Congress—as expressed in the relevant statutes—goes beyond the enforcement of the rights of a particular employee to encompass a "public function," as well. Thus:

> [P]ursuant to Title VII and the ADA, whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.[103]

While the Court's pro-arbitration jurisprudence may seem to have suffered a setback in *Waffle House*, ramifications of the case will only serve to advance that jurisprudence. Implicitly, the *Waffle House* decision stands foursquare behind the *Circuit City* position that arbitration can be the exclusive forum for resolving disputes over federal statutory rights. The limited role of the EEOC in the

95. 534 U.S. 279 (2002).
96. Pub. L. No. 101-336, 104 Stat. 337 (1990).
97. *Waffle House*, 534 U.S. at 282.
98. *Id.* at 282, 297-98.
99. *See Cir. City*, 532 U.S. 105.
100. *Waffle House*, 534 U.S. at 284-85.
101. *Id.* at 288, 294, 297-98.
102. *Id.* at 297-98.
103. *Id.* at 296.

process[104] serves ultimately to reinforce the pro-arbitration position. This is so because the EEOC's "public function" role in the arbitration process seems to answer two of the strongest arguments levied against mandatory arbitration. First, the EEOC can still bring important unresolved workplace-discrimination issues into federal courts to establish new case precedent. No matter how ubiquitous arbitration agreements become, this power guarantees court-directed guidance on important public policy. Second, for the cases that involve a defective ADR policy, the employee has access to the EEOC.[105]

Thus, the EEOC may well become the handmaiden of mandatory arbitration, enhancing its aura of legitimacy while protecting it from all but rare judicial incursions. Ultimately, it is entirely possible that *Waffle House* will be considered a pro-employer case.

With that background, we turn to the most recent Supreme Court arbitration decisions. In the 2002-2003 Term, the Court decided three arbitration cases. The Green Tree Financial Company was again before the Court, this time pursuant to a homeowner class action.[106] Green Tree argued that class arbitration was impermissible; but the Court, by a narrow five-to-four vote, reasoned that because the arbitration clause in the home improvement loan at issue did not expressly preclude class arbitration, there was no contractual bar to the class action.[107] However, neither did the contract clearly permit an arbitration class action. Therefore, the issue was one of contract interpretation—an issue within the purview of the arbitrator, not the court.[108] On that basis, the case was remanded "so that the arbitrator [could] decide the question of contract interpretation . . . ."[109]

The resolution of the case is entirely consistent with the Court's pro-arbitration doctrine, deferring almost all disputes to the arbitrator, but the slim plurality vote by which it was reached—over several strenuous dissents—indicates that there is more to the doctrine than an overweening concern to defer to arbitrators. For example, the Chief Justice dissented on the ground that the issue was not one of contract interpretation (a determination to be made by the arbitrator), but one of what the parties intended to submit to the arbitrator (a determination to be made by the courts). And the Chief Justice read the contract to preclude arbitration by class action; therefore, he argued, the issue was not within the arbitrator's authority, and was not covered by the terms of the arbitration agreement.[110] The plurality opinion can be seen as a win for consumers

104. The EEOC currently participates in litigation involving less than one percent of the employee charges that are filed. *See id.* at 290 n. 7.

105. *See Waffle House*, 534 U.S. at 295-96.

106. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003) (plurality).

107. *See id.* at 2406-08; *id.* at 2408 (Stevens, J., concurring in the judgment and dissenting in part).

108. *Id.* at 2407-08.

109. *Id.* at 2408.

110. *Id.* at 2409-11 (Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting).

and employees who have previously signed standardized contracts with businesses, because class action status would give them more leverage.[111]

In her dissent in *Randolph*, Justice Ginsburg expressed her concern about the superior power of businesses in drafting and enforcing arbitration agreements.[112] Class action arbitration would level the playing field, of course, by giving consumers and employees additional resources in arbitration cases. However, their tenuous victory in *Bazzle* is, quite obviously, short-lived because by the reasoning of the plurality decision, a revision in standardized arbitration clauses clearly precluding class actions will make the ruling virtually moot. In the long run, *Bazzle* leaves the Court's pro-arbitration doctrine substantially intact.

Entirely consistent with the doctrine was the decision in *Howsam v. Dean Witter Reynolds, Inc.*[113] At issue was the National Association of Securities Dealers' rule that disputes between investment bankers and their clients could not be brought to arbitration six years or more after the incident giving rise to the dispute.[114] The Court found that the applicable provision for arbitration in the client service contract under which the parties operated required the issue to be settled by the arbitrator.[115]

An important damages issue implicating arbitration was raised in the case of *PacifiCare Health Systems, Inc. v. Book.*[116] However, the issue remains open, even after a virtually unanimous decision (Justice Thomas recused himself) was reached by the Court. In *PacifiCare*, physicians sued a managed care organization for its failure to reimburse the physicians for their services. The physicians alleged, among other legal theories, violations of the Racketeer Influenced and Corrupt Organization Act (RICO),[117] which famously permits an award of treble damages.[118] The agreements between the parties, however, mandated dispute resolution by arbitration, and two of the arbitration provisions precluded punitive awards.[119] Arguing that the preclusion eviscerated the "meaningful relief" provided by RICO, the physicians asserted that the arbitration provision was unenforceable as to that claim.[120] Under apposite precedent, the trial court and the Eleventh Circuit agreed, but the Supreme Court reversed, finding the issue premature.[121]

The Supreme Court reasoned that because RICO treble damages *might* be viewed by the arbitrator as remedial rather than punitive, arbitration might not

111. *See* Marcia Coyle, *Court Eyes Arbitration Class Actions,* 25 Natl. L.J. A1, A14 (Jan. 20, 2003); Georgene M. Vairo, *Classwide Arbitration*, 25 Natl. L.J. B6 (Feb. 17, 2003).

112. 531 U.S. at 93-94 (Ginsburg, Stevens, Souter & Breyer, JJ., concurring in part and dissenting in part).

113. 537 U.S. 79 (2002).

114. *Id.* at 81.

115. *Id.* at 84-85.

116. 123 S. Ct. 1531 (2003).

117. Pub. L. No. 91-452, 84 Stat. 941 (1970).

118. *PacifiCare*, 123 S. Ct. at 1533.

119. *Id.* at 1535.

120. *Id.* at 1533.

121. *Id.* at 1534.

have any preclusive effect on the RICO claim; therefore, in the first instance, the dispute should be submitted to the arbitrator.[122] Undoubtedly, this will be a closely watched case as it makes its way up the judicial hierarchy again. The stakes are extremely high, and this case, like *Bazzle*, is an example of attempts by consumers and employees to gain some leverage in the expanding arena of mandatory alternate dispute resolution.

V. EMPLOYMENT

In addition to *Hibbs*, discussed above as an Eleventh Amendment case, the Court decided two employment discrimination cases. One case, *Desert Palace, Inc. v. Costa*,[123] is similar to *Hibbs* in that its pro-employee result illustrates the Rehnquist Court's sensitivity to Title VII cases and, in particular, cases that evidence workplace discrimination against women. Additionally, like *Hibbs*, it illustrates that the Court's pro-business conservatism can be trumped by its other priorities.[124] *Desert Palace* is a Title VII evidentiary case that makes it easier for a plaintiff-employee to sustain its burden of persuasion, and more difficult for a defendant-employer not only to prevail ultimately, but also to forestall the litigation by summary judgment resolution. Thus, *Desert Palace* joins a similar pro-Title VII employee case, *Reeves v. Sanderson Plumbing Products, Inc.*,[125] which also eased the plaintiff-employee's burden of proof.[126]

In *Desert Palace*, the Court revisited the issue of discriminatory motives under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.[127] Title VII, in relevant part, prohibits employment discrimination "because of . . . sex."[128] The evidentiary problem in dispute was the proper interpretation of the phrase "because of" in a situation where there was evidence of both permissible and impermissible motives for an employment decision (the "mixed-motive" situation).[129] Congress attempted to resolve that vexing question in the 1991 amendments to Title VII. One amendment provided that a plaintiff-employee meets its burden by showing that sex or any other impermissible reason—race, color, religion, or national origin—constituted "a motivating factor for any employment practice, even though other factors also motivated the practice."[130] If the plaintiff meets that burden, another amendment in the 1991 Act permits the defendant-employer to limit the plaintiff's relief to equitable relief

122. *Id.* at 1535-36.

123. 123 S. Ct. 2148 (2003).

124. Another significant example of business interests taking a back seat to another priority of the Supreme Court was the Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*. 527 U.S. 666 (1999) (holding that the Court's states' rights federalism doctrine trumped the business interests at issue). For a more complete discussion of this case, see Bucholtz, *supra* n. 1, at 503.

125. 530 U.S. 133 (2000).

126. *See* Marcia Coyle, *High Court Gives Workers a Win*, 25 Natl. L.J. A1, A1 (June 16, 2003).

127. Pub. L. No. 102-166, 105 Stat. 1074 (1991).

128. 42 U.S.C. § 2000e-2(a)(1) (2000).

129. *Desert Palace*, 123 S. Ct. at 2150.

130. *Id.* at 2151 (quoting 42 U.S.C. § 2000e-2(m)) (internal quotations omitted).

and costs if it can show it would have engaged in the same conduct even in the absence of an impermissible motivation.[131] But the lower courts continued to be perplexed by the evidentiary problem of impermissible motivation. Must that motivation be proved by direct evidence, or was circumstantial evidence sufficient?

The *Desert Palace* Court found that circumstantial evidence was sufficient to invoke the mixed-motives analysis. In so doing, it mapped the following interpretive path: (1) the relevant section of the amendments, (§ 2000e-2(m)), "unambiguously states that a plaintiff need only 'demonstrat[e]'"[132] a discriminatory motive; (2) the term "demonstrates" is defined in the amendments as "meet[ing] the burdens of production and persuasion";[133] (3) a liberal interpretation of plaintiff's evidentiary burden comports with similar "rules of civil litigation [that] generally apply in Title VII cases";[134] and (4) this interpretation is consistent with the use of the term "demonstrates" in other parts of Title VII.[135] Finally, without specific statutory directive, the Court has generally never required direct evidence in civil cases, or even in criminal cases.[136]

This generous, liberal reading of the statute comes as a welcome relief to plaintiffs' bar, but it also comes in stark contradistinction from the Court's recent restrictive readings of other employment discrimination statutes[137] and thus serves to highlight the Court's special preference for Title VII and sex discrimination issues, rather than a uniform deference to anti-discrimination or pro-employee law generally. In that regard, the Court's approach here is in accord with the approach it took on the social issues raised in *Lawrence*, *Gratz*, and *Grutter*. These decisions seem to demonstrate the Court's deference to its sense of prevailing public opinion rather than to constitutional or statutory norms.[138] That is to say, while conservative federal courts at the district court and appellate court levels have consistently interpreted the anti-discrimination statutes narrowly,[139] the Supreme Court has taken a nuanced approach that clearly favors the longstanding and more widely accepted anti-discrimination rules and the protected classes of Title VII over rules and classes delineated in other anti-discrimination statutes.

The Supreme Court's preference can be explained as a recognition of contemporary societal assumptions about employment rights law, and therefore serves as an exception to its otherwise conservative agenda. *Desert Palace*, then, is another example that the Court's multi-faceted conservative priorities may trump

131. *Id.* (citing 42 U.S.C. § 2000e-5(g)(2)(B)).
132. *Id.* at 2153.
133. *Id.* at 2154 (quoting 42 U.S.C. § 2000e(m)) (internal quotations omitted).
134. *Desert Palace*, 123 S. Ct. at 2154 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989)) (internal quotations and alterations omitted).
135. *Id.* at 2154-55.
136. *Id.* at 2154.
137. *See generally* Bucholtz, *supra* n. 54.
138. *Id.* at 46 n. 197 (citing Reva Siegel and Jack Balkin's anti-subordination theory).
139. *See generally Desert Palace*, 123 S. Ct. at 2152 (noting that some lower courts had previously held that direct evidence was required to proceed under 42 U.S.C. § 2000e-2(m)).

business interests in significant ways. If the Court had affirmed the Ninth Circuit panel's insistence upon direct evidence in Title VII cases, a large number of cases could have been terminated on summary judgment motions because employment discrimination rarely asserts itself in the bold and unequivocal ways it did before *McDonnell Douglas Corp. v. Green*.[140] Thus, *Desert Palace* indisputably expands employers' liability and financial exposure in Title VII litigation.

The other employment discrimination case of the 2002-2003 Term was brought under the Americans with Disabilities Act (ADA).[141] *Clackamas Gastroenterology Associates, P.C. v. Wells*, sheds some light on the proper interpretation of the class covered by the ADA: what is an "employee"?[142] Following its holding in *Nationwide Mutual Insurance Co. v. Darden*,[143] the Court declared that common law agency rules should be applied to resolve the issue.[144] Echoing the approach taken by the EEOC, the Court noted that the common law focuses on the issue of control.[145] The EEOC identified sixteen "non-exhaustive" factors that should be considered in resolving the issue of whether a particular plaintiff is within the covered class of employees.[146] Of those factors, six addressed the problem at issue in *Clackamas*: whether the shareholder-director in the medical clinic was an employee. These six factors included: (1) the organization's control over the individual's employment tenure; (2) the organization's supervision over the individual's work; (3) whether the individual reports to a supervisor; (4) the individual's authority to influence the organization; (5) whether the individual has a written employment contract; and (6) the individual's entitlement to, and liability for, the organization's profits and losses.[147]

Commentators have considered this doctrinal approach to be middle-of-the-road[148] because it rejects both the restrictive and formalistic interpretation of "employee" offered by the employer in the case, and the more liberal position taken by the dissenting Justices, who argued that courts should be required to look beyond control factors (with their concomitant concern about organizational structure) to the broader concerns about the ADA's purpose.[149] Whether this case is considered moderately pro-business (because it did not follow the employer's approach) or not, its resolution works against businesses' interests in avoiding protracted litigation. Indeed, the case joins other recent cases, including the decidedly pro-business decision last Term in *Toyota Motor Manufacturing,*

140. 411 U.S. 792 (1973) (establishing the evidentiary framework of shifting burdens in the "pretext" case, whereby a plaintiff's prima facie showing of discriminatory motive must be countered by an employer's proffer of a legitimate motive, and plaintiff must show that the proffered reason is mere pretext).

141. *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 123 S. Ct. 1673 (2003).

142. *Id.* at 1676.

143. 503 U.S. 318, 322-23 (1992).

144. *Clackamas Gastroenterology*, 123 S. Ct. at 1677-78.

145. *Id.* at 1679.

146. *Id.* at 1679-80 (citing EEOC, Compl. Man. §§ 605:0008-00010 (2000)).

147. *Id.* at 1680.

148. *See generally* Banks & Katz, *supra* n. 67, at S10.

149. *Clackamas Gastroenterology,* 123 S. Ct. at 1681-83 (Ginsburg & Breyer, JJ., dissenting).

Kentucky, Inc. v. Williams,[150] in requiring fact-specific litigation, which precludes summary judgment resolution of disputes and adds to the unpredictability (and expense) of their outcomes.

VI. CONCLUSION

The Supreme Court's jurisprudence is of critical concern to businesses. Over half the decisions each term are business-related.[151] This article has selected key business-related cases that best exhibit trends and currents in the Court's jurisprudence. The business-related cases of the 2002-2003 Term merely underscore what we have learned about the Court's proclivities. And what we have learned is that the Rehnquist Court is, at best, a mixed blessing for the business community.

The Rehnquist Court has proven itself to be a conservative court, given to result-oriented activism. But the complex interplay of its often conflicting priorities makes it difficult to predict, in a particular case, which of its conservative priorities will prevail. This Term, for example, the Court reached apparently liberal decisions in a few high profile cases about individual civil rights, but it is important to see that these decisions are rare exceptions to the Court's conservative agenda (and its pre-existing doctrine), which remains inexorably intact. While that agenda sometimes works to the advantage of business, as it did in *State Farm*, it often works to the detriment of business interests. And, whether the decisions are facially pro-business or not, a growing number of business-related cases increase the litigation expense and exposure of businesses by requiring fact-specific resolution of disputes. At the levels of both theory (rule interpretation) and practice (rule application), the Rehnquist Court has introduced significant legal uncertainties into business-related law. Simply put, the Court's "Father Knows Best" activism is not dependably business-friendly.

150. 534 U.S. 184 (2002).
151. *See* Bucholtz, *supra* n. 1, at 486.