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# Supreme Court's 2002 Term Employment Law Cases: Is This Justice Scalia's Court?

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# SUPREME COURT'S 2002 TERM EMPLOYMENT LAW CASES: IS THIS THE SCALIA COURT?

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## I. INTRODUCTION

In a recent article,[1] Erwin Chemerinsky argues that the Supreme Court's constitutional law decisions of the 2002 Term "cannot be explained by any overarching theory or underlying set of interpretative principles."[2] Instead, he argues, "constitutional law is

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1. *See* Erwin Chemerinsky, *October Term 2002: Value Choices by the Justices, Not Theory, Determine Constitutional Law*, 6 GREEN BAG 2D 367 (2003).

2. *Id.* at 368.

all about value choices made by the Justices."[3] Professor Chemerinsky also argues that given the current composition of the Court, "it is the value choices of the middle" – Justice O'Connor and Justice Kennedy – that matter the most.[4] Professor Chemerinsky ends his article with the assertion that "[f]or better or worse, this really is the O'Connor Court."[5]

In reviewing the cases decided by the Court during the 2002 Term, this article explores whether Professor Chemerinsky's assessment of the constitutional jurisprudence of the Supreme Court holds true in the employment law context. Unlike the situation described by Professor Chemerinsky, when it comes to employment law decisions, at least those involving statutory interpretation disputes, the Court often speaks with one voice, frequently reaching unanimous or nearly unanimous opinions. Value choices do not appear to be driving the Justices' behavior in these cases. Instead, employment law decisions can be explained in terms of a "text- and rule-based" approach,[6] most directly linked to Justice Scalia and the conservative block of the Court. Under this approach the Court first looks at the statute's text, interpreted in the light of "proper English" and related statutes.[7] If the text of the statute is unclear, the Court finds a rule to decide the case, and at least under Justice Scalia's interpretation of this approach, the chosen rule should be one that minimizes the opportunity for judicial lawmaking.[8] The various statutory interpretation decisions reviewed in this article fit this approach remarkably well and help us understand the outcome of these cases.

"Value choices" are not completely irrelevant in describing the employment law decisions of the Court, however. The unanimity of voice with which the Court speaks in statutory interpretation employment cases appears to be weaker in cases in which the Court is called to apply common law principles,[9] and in constitutional law

3. *Id.*

4. *Id.*

5. *Id.* at 377.

6. *See* William D. Popkin, *An "Internal Critique" of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1134 (1992).

7. *Id.* "Proper English" refers to the standard of what an "ideal drafter might produce, not what everyday English users might understand." *Id.* at 1160.

8. *Id.* at 1152.

9. See discussion of Norfolk & Western Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003), *infra* notes 101-43 and accompanying text.

disputes.[10]

## II. A LESSON ON STATUTORY INTERPRETATION

In the 2002 Term, the Court decided seven cases involving the interpretation of federal employment law related statutes.[11] While the subject matter of these cases was diverse (e.g., Title VII, Americans With Disabilities Act, Employment Retirement and Income Security Act, Fair Labor Standards Act), the way in which the Court went about deciding the cases was strikingly similar. This section provides a short description of the cases, and analyzes the Court's approach to solving these disputes.

### *A. The Leaders: Justice Scalia and Justice Thomas*

#### 1. *Desert Palace, Inc. v. Costa*[12]

The plaintiff in *Desert Palace*, Catharina Costa, filed a federal gender discrimination suit against her former employer for firing her in violation of Title VII of the Civil Rights Act of 1964.[13] Costa, a warehouse worker and heavy equipment operator, was the only woman in her job and in her local Teamsters bargaining unit.[14] At trial, Costa presented evidence that she had been "stalk[ed]" by a supervisor, received harsher discipline than men for the same conduct, was treated less favorably than men in the assignment of overtime, and was subjected to "stack[ing]" of her disciplinary record and sex-based slurs.[15] The employer, however, claimed that Costa was fired for her performance and because she was involved in a physical altercation in a warehouse elevator with a fellow union worker, a male.[16] The district court gave a mixed-motive jury

10. See discussion of Nevada Dept. of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003), *infra* notes 169-219 and accompanying text.

11. Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003); Black & Decker Disability Plan v. Nord, 123 S. Ct. 1965 (2003); Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882 (2003); Clackamas Gastroenterology Assocs. v. Wells, 123 S. Ct. 1673 (2003); Kentucky Ass'n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2003); Norfolk & Western Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003); Barnhart v. Peabody Coal Co., 537 U.S. 149 (2002).

12. 123 S. Ct. 2148 (2003).

13. *Id.* at 2152. The Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e – 2000e17 (2000).

14. *Desert Palace*, 123 S. Ct. at 2152.

15. *Id.*

16. *Id.* Because the male worker had a clean disciplinary record, he received only a five-day suspension.

instruction.

The employer objected to the district court's jury instruction, claiming that Costa had failed to adduce "direct evidence" that sex was a motivating factor in her dismissal or in any of the other adverse employment actions taken against her.[17] After initially agreeing with the defendant,[18] on rehearing the Ninth Circuit Court of Appeals affirmed the district court's judgment on the ground that the 1991 amendments to Title VII, impose no special evidentiary requirement.[19] Therefore a plaintiff may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played a "motivating factor."[20] The Supreme Court granted certiorari, to address the conflict between the statutory language and the decisions of various circuit courts, which, relying on Justice O'Connor's concurring opinion in the plurality decision of *Price Waterhouse v. Hopkins*,[21] have held that direct evidence is required to establish liability in mixed-motive cases under 42 U.S.C. § 2000e-2(m).[22]

The Court unanimously held that direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive instruction.[23] In an opinion by Justice Thomas, the Court concluded that to obtain such an instruction "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[24] The Court found it unnecessary to decide whether Justice O'Connor's concurrence in *Price Waterhouse* controlled, since

17. *Id.* at 2152-53. At trial, the district court judge gave the jury the following mixed motive instruction:

> If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. [I]f you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons . . . the plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

18. *Id.* at 2153.

19. *Id.*

20. *Id.*

21. 490 U.S. 228 (1989).

22. Fernandes v. Costa Bros. Masonry, Inc. 199 F.3d 572, 582 (1st Cir. 1999); *see Desert Palace*, 123 S. Ct. at 2153.

23. *Id.* at 2150.

24. *Id.* at 2155 (quoting 42 U.S.C. § 2000e-2(a)(1)). Title VII makes it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

the 1991 amendments abrogated the references to "direct evidence."[25]

More clearly than any other employment law opinion in the 2002 Term, the decision in *Desert Palace* reflects the Court's approach to statutory interpretation cases. Justice Thomas began by noting that the starting point of analysis should always be the statutory text, and where the words of the statute are unambiguous, the judicial inquiry is complete.[26] Because "Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrate[e]' that an employer used a forbidden consideration with respect to 'any employment practice,"' a plaintiff is not required to make a heightened showing through direct evidence.[27] Further, Justice Thomas added, Title VII defines the term "demonstrates" as to "mee[t] the burdens of production and persuasion," and if Congress intended to require these burdens be met by direct evidence it could have made that intent clear by including language to that effect as it has done when imposing heightened proof requirements in other circumstances.[28]

After looking at the text of the particular statute, Justice Thomas looked for supporting rationale in other relevant statutes. For example, Justice Thomas addressed the "conventional rule of civil litigation that generally applies in Title VII cases."[29] Relying on *Postal Service Bd. of Governors v. Aikens*,[30] Justice Thomas said that Title VII's silence on a special evidentiary requirement suggests that the Court should not depart from the rule requiring a plaintiff to prove his case "by a preponderance of the evidence."[31] In asserting that circumstantial evidence in discrimination cases "is not only sufficient, but may also be more certain, satisfying and persuasive

25. *Desert Palace*, 123 S. Ct. at 2153.

26. *Id.*

27. *Id.* at 2153.

28. *Id.* at 2153-54. Finally, the Court noted that Desert Palace conceded that another provision in the 1991 Act – Section 2000e-5(g)(2)(B), (Section 2000e-5(g)(2)(B) requires an employer to "demonstrate[e] that [it] would have taken the same action in the absence of the impermissible motivating factor" in order to take advantage of the statutes partial affirmative defense), which also uses the term "demonstrates," does not impose a heightened standard before a defendant could use the provision's partial affirmative defense. Faced with the counterintuitive option of giving the same term in the same Act a different meaning merely because the rights of the plaintiff and not the defendant are at issue, the Court opted to follow the "normal rule of statutory construction," there being no congressional indication to the contrary. Thus, the Court concluded that in order to obtain a mixed-motive instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Id.* at 2155.

29. *Id.* at 2154.

30. 460 U.S. 711, 714, n.3 (1983).

31. *Desert Palace*, 123 S. Ct. at 2154.

than direct evidence," the Court relied on *Rogers v. Missouri Pacific Ry. Co.*,[32] and on the common criminal court instruction that "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence."[33] Additionally, the Court said that neither Desert Palace nor its *amici* could point to any other circumstance in which the Court has restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.[34]

Notice the pattern followed by Justice Thomas. First, Justice Thomas looks at the statutory language, focusing on the text's ordinary meaning. Second, he considers the surrounding textual material, what has been referred to as the "internal context proper English" analysis.[35] Finally, Justice Thomas expands the analysis to include a larger group of relevant statutes passed by Congress, which are presumed to be part of an integrated body of law.[36]

Absent from this analysis is any discussion of a search for legislative intent. This alternative approach, which in the current Court is championed most intently by Justice Stevens, "seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."[37] Instead, Justice Thomas's opinion starts and finishes with textual analysis, leaving little room along the way for any discussion of intent.

### 2. *Kentucky Association of Health Plans Inc. v. Miller*[38]

An identical approach to statutory interpretation cases is observed in *Kentucky Association of Health Plans Inc. v. Miller*, where the Court considered whether Kentucky's "Any Willing Provider" (AWP) statutes, which prohibit health benefit plans from discriminating against providers "willing to meet the terms and conditions for [plan] participation," are saved from preemption under the Employment Retirement and Income Security Act (ERISA).[39]

32. 352 U.S. 500, 508 n.17 (1957).

33. 1A KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CRIMINAL § 12.04 (5th ed. 2000).

34. *Desert Palace*, 123 S. Ct. at 2154.

35. *See* Popkin, *supra* note 6, at 1142.

36. *Id.* at 1148.

37. West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 112 (1991) (Stevens, J., dissenting).

38. 123 S. Ct. 1471 (2003).

39. *Id.* at 1474.

The suit was brought by health maintenance organizations (HMOs) and a Kentucky-based association of HMOs, all of which claimed that Kentucky's AWP statutes frustrated their efforts at cost and quality control, and denied consumers the benefit of their cost-reducing arrangements with providers.[40] The HMOs asserted that ERISA preempts all state laws "insofar as they may now or hereafter relate to any employee benefit plan."[41] The HMOs further asserted that Kentucky's AWP laws fall outside the scope of ERISA's savings clause, which provides that "law[s] . . . which regulat[e] insurance, banking, or securities" are saved from preemption.[42] The district court disagreed, however, and concluded that although both AWP statutes "relate to" employee benefit plans under section 1144(a), each law "regulates insurance" and is therefore saved from preemption by section 1144(b)(2)(A).[43]

Relying on *UNUM Life Insurance Co. of America v. Ward*,[44] the Sixth Circuit affirmed and held that Kentucky's laws "regulat[ed] insurance" because they were "specifically directed toward 'insurers' and the insurance industry."[45] The Court of Appeals then considered, as "checking points or guideposts" in its analysis, the three factors used to determine whether the HMOs' practice fits within "the business of health insurance." In so doing, the Sixth Circuit followed the Supreme Court in its decisions construing section 1144(b)(2)(A), which "relied, to varying degrees, on [the Court's] cases interpreting the McCarran-Ferguson Act."[46]

The Court, in a decision written by Justice Scalia, began its analysis by focusing on the statutory language. The HMOs contended that Kentucky's AWP laws did not regulate insurers with respect to an insurance practice because they focused upon the relationship between an insurer and third-party providers – which in their view did not constitute an insurance practice.[47] The Court disagreed, stating

40. *Id.*

41. *Id.* (quoting 29 U.S.C. § 1144(a) (2000)).

42. *Id.* at 1474-75 (quoting 29 U.S.C. § 1144(b)(2)(A)).

43. *Id.* at 1474.

44. 526 U.S. 358 (1999).

45. *Kentucky Ass'n of Health Plans*, 123 S. Ct. at 1474 (internal quotations omitted).

46. *Id.* at 1478. "In determining whether certain practices constitute 'the *business of* insurance' under the McCarran-Ferguson Act . . . our cases have looked to three factors: '*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'" *Id.* (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)) (emphasis in original).

47. In order for a state law to be "covered by § 1144(b)(2)(A), which saves laws that

that it does not follow that a law mandating certain insurer-provider relationships fails to "regulate insurance."[48] Kentucky's statutes, prohibiting health insurers from discriminating against willing provider, "regulate" insurance by imposing conditions on the right to engage in the business of insurance. The Court stated, however, that whether or not an HMO's contracts with providers constitute "the business of insurance" is beside the point.[49] "ERISA's savings clause does not require that a state law regulate 'insurance *companies*' or even '*the business of insurance*' to be saved from pre-emption; it need only be a 'law . . . which regulates *insurance*.'"[50]

Justice Scalia then turned his attention to other provisions in the statutes. The petitioners argued that the Kentucky statutes were not "specifically directed toward" insurers because they applied to individuals not exempt from state regulation by ERISA.[51] According to Justice Scalia, the petitioner's interpretation would render superfluous the so-called "deemer clause" under ERISA.[52] Thus, Justice Scalia found support for his interpretation of the statutes by relying, not only on the text of the provision in question, but by placing it in the context of other ERISA provisions.

Finally, Justice Scalia discussed the preemption provision in ERISA in the context of the other potentially relevant statute – the McCarran-Ferguson Act. The Court noted that although its prior ERISA preemption decisions had referred to the McCarran-Ferguson factors, it had never held that the insurance savings clause required analysis of those factors. The Court observed that the McCarran-Ferguson factors were developed in cases that characterized *conduct* by private actors, rather than *state laws*.[53] The Court characterized the McCarran-Ferguson factors as only "checking points" and

regulate *insurance* . . . insurers must be regulated with respect to their insurance practices." *Id.* at 1475 (quoting Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 356 (2002)) (internal quotations omitted).

48. *Id.* at 1477.

49. *Id.* at 1479.

50. *Id.* at 1476 n.1. (emphasis in original).

51. *Id.* at 1476 n.1.

52. *Id.* Under the "deemer clause" an employee benefit plan covered by ERISA may not "be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . ." §1144(b)(2)(B).

53. "ERISA's savings clause . . . is not concerned (as is the McCarran-Ferguson Act provision) with how to characterize *conduct* undertaken by private actors, but with how to characterize *state laws* in regard to what they 'regulate.'" *Kentucky Ass'n of Health Plans*, 123 S. Ct. at 1476-77 (emphasis in original).

"guideposts" that were used to "confirm our conclusion" that a statute regulated insurance under section 1144(b)(2)(A).[54] The Court made "a clean break from the McCarran-Ferguson" analysis, and announced: "[F]or a state law to be deemed a 'law ... which regulate[s] insurance' under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured."[55]

### *B. The Court Follows*

That Justice Scalia and Justice Thomas are reading from the same script in their approach to statutory construction should not be surprising to any legal observer. What might be somewhat more surprising is that the rest of the Court is following the same approach.

#### 1. *Black & Decker Disability Plan v. Nord*[56]

*Black & Decker Disability Plan v. Nord* involved a denial of an employee's disability benefits claim by his employer's ERISA-governed employee disability benefit plan. In 1997, Nord consulted his physician about hip and back pain, and was diagnosed as suffering from a mild degenerative disc disease. After a week's trial on pain medication, Nord's condition remained unimproved. Nord's doctor, therefore, instructed him to cease work temporarily and recommended that Nord consult an orthopedist. Nord ceased working and submitted a claim for disability benefits under the Black & Decker Disability Plan (Plan), an ERISA-governed employee welfare benefit plan.[57]

After the Plan denied the claim, Nord sought further consideration by the plan administrator's "Group Claims Review." During this process, Nord's doctor and treating orthopedist sent letters and supporting documentation about Nord's condition.[58] The Plan then referred Nord for an independent examination by a neurologist, who concluded that, aided by pain medication; Nord could perform "sedentary work with some walking interruption in

54. *Id.* at 1479.
55. *Id.*
56. 123 S. Ct. 1965 (2003).
57. *Id.* at 1968.
58. *Id.*

between."[59] The administrator then made a final recommendation to deny Nord's claim. Accepting the recommendation, the Plan denied the claim and sent a notification letter to Nord.

Nord sued in federal district court "to recover benefits due to him under the terms of his plan."[60] The district court granted summary judgment for the Plan, concluding that the denial of Nord's claim was not an abuse of the plan administrator's discretion.[61] The Ninth Circuit reversed on the ground that when making benefit determinations, ERISA plan administrators must follow the "treating physician rule" requiring an administrator "who rejects [the] opinion [of a claimant's treating physician] to come forward with specific reasons for his decision, based on substantial evidence in the record."[62] In finding for Nord, the Ninth Circuit held that the Plan had not provided adequate justification for rejecting opinions held by Nord's doctors.[63] The Supreme Court granted certiorari because of the split among the circuits on the "propriety of judicial installation of a treating physician rule for disability claims within ERISA's domain."[64]

In an opinion penned by Justice Ginsburg, the Court first noted that nothing in ERISA "instruct[s] plan administrators to accord extra respect to treating physicians' opinions."[65] The Court, therefore, held that "courts have no warrant to require plan administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on plan administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation."[66]

Having found no support in the statutory language for the claimant's position, the Court looked to other relevant provisions or statutes. The Court agreed with the argument advanced by the Department of Labor, to the extent that the Ninth Circuit had "erred in equating ERISA and the Social Security Act."[67] In support of that conclusion, the Court noted critical differences between the Social

59. *Id.*

60. *Id.* (internal quotations omitted).

61. *Id.*

62. *Id.* at 1968-69 (quoting Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1139-44 (9th Cir. 2001)) (internal quotations omitted).

63. *Id.*

64. *Id.*

65. *Id.* at 1970.

66. *Id.* at 1972.

67. *Id.* at 1969 (quoting Brief for United States as *Amicus Curiae* 23).

Security disability program and ERISA benefit plans that "caution against importing a treating physician rule from the former area into the latter."[68] First, the presumptions employed in the Social Security regulations "grow out of the need to administer a large benefits system efficiently."[69] The treating physician rule fosters uniformity and regularity in the service of that need, the Court said. Second, in contrast to the obligatory, nationwide Social Security program, "[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."[70] Under ERISA, employers have large leeway to design disability and other welfare plans as they see fit, the Court said.[71] Finally, while Social Security benefits are determined by measuring the claimant's condition against a uniform set of federal criteria, "[t]he validity of a claim under an ERISA . . . plan is . . . likely to turn . . . on the interpretation of terms in the plan at issue."[72] Thus, the Court deferred to the Secretary of Labor's view that ERISA is best served by "preserving the greatest flexibility possible for operating claims processing systems consistent with a plan's prudent administration."[73]

In sum, the Court found that the treating physician rule should not be applied in the ERISA context because the needs and requirements of the two statutory regimes differ to such degree that more investigation would be required to establish that routine deference to the opinion of a claimant's treating physician would, as the Ninth Circuit believed, "increas[e] the accuracy of disability determinations" under ERISA plans.[74] The Court found it significant that the treating physician rule was not supported by the language of the ERISA statute, was opposed by the United States Department of Labor, and was conspicuously not incorporated by the Secretary of

68. *Id.* at 1971.

69. *Id.* (quoting Cleveland v. Pol'y Mgmt. Sys. Corp., 526 U.S. 795, 803 (1999)) (internal quotations omitted).

70. *Id.* (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996)).

71. *Id.*

72. *Id.* (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)) (internal quotations omitted).

73. *Id.* at 1966. The Court found that the most recent version of the Secretary of Labor's regulations does not install a treating physician rule, despite being issued more than nine years after the Social Security Administration codified the rule in that agency's regulations. Moreover, the Court said, an *amicus* brief by the United States reflecting the position of the Department of Labor "opposes adoption of such a rule for disability determinations under plans covered by ERISA." *Id.* at 1970.

74. *Id.* at 1971 (quoting *Regula*, 266 F. 3d at 1139).

Labor even though the Social Security Administrator had codified the rule more than nine years before the most recent version of the Secretary's regulations was issued.[75]

Absent from the Court's discussion is any reference to legislative intent or broader social policy. The question whether routine deference to the opinion of a claimant's treating physician would yield more accurate disability determinations under ERISA plans is "one the Legislature or superintending administrative agency is best positioned to address" and one whose resolution "might be aided by empirical investigation of the kind courts are ill equipped to conduct," the Court reasoned.[76]

### 2. *Breuer v. Jim's Concrete of Brevard, Inc.*[77]

In *Breuer v. Jim's Concrete of Brevard, Inc.*, the Court considered the question whether the provision of the Fair Labor Standards Act of 1938 (FLSA),[78] that suit under the Act "may be maintained . . . in any Federal or State court of competent jurisdiction," bars removal of such suit from state to federal court. Phillip T. Breuer brought suit in state court against his former employer alleging violations of Section 216(b) of the FLSA.[79] Jim's Concrete removed the case to federal court under 28 U.S.C. § 1441(a).[80] Breuer then sought an order remanding the case to state court on the ground that removal was improper under the FLSA's provision that an action "may be maintained" in any state court. Breuer argued that the FLSA's provision is an express exception to the general authorization of removal under section 1441(a). The district court disagreed and denied Breuer's motion, yet certified the issue for interlocutory appeal. The Eleventh Circuit affirmed on the

75. *Id.*

76. *Id.* The Court so concluded despite conceding that, as compared to consultants retained by a plan, an employee's treating physician may have a greater opportunity to know and observe the patient as an individual. The Court also did not dispute that physicians repeatedly retained by benefit plans may have an "incentive to make a finding of 'not disabled' in order to save their employers money and to preserve their own consulting arrangements." *Id.* (quoting *Regula*, 266 F.3d at 1143) (internal quotations omitted).

77. 123 S. Ct. 1882 (2003).

78. 29 U.S.C. § 216(b) (2000).

79. *Breuer*, 123 S. Ct. at 1884.

80. 28 U.S.C. § 1441(a) (2000) reads, "[E]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

ground that Congress had expressly barred removal in "direct, unequivocal language" in other statutes, but was not comparably prohibitory in Section 216(b).[81] The Supreme Court held that Breuer's case was properly removed under 28 U.S.C. § 1441.[82]

Statutory language came first, according to the Court. In delivering the Court's opinion Justice Souter noted that, because the FLSA permits actions to be maintained in any Federal or State Court of competent jurisdiction and the district court would have original jurisdiction over FLSA claims under 28 U.S.C. §§ 1331 and 1337(a), removal of FLSA actions is prohibited only if Congress expressly provided as much. The Court first noted that "nothing on the face of [the statute] looks like an express prohibition of removal."[83] Further, the Court said that an ambiguous term like "maintain" cannot qualify as an express provision as Congress has shown itself capable of prohibiting removal in unmistakable terms in a number of other statutes,[84] but did not do so in the case of Section 216(b).[85] The Court noted that since Congress' 1948 amendment of the removal statute, there has been no question that whenever the subject matter of an action qualifies for removal, the burden is on a plaintiff to find an express exception. The Court said that Breuer's reliance on the malleability of the term "maintain" did not satisfy his burden of demonstrating that an express exception exists.[86]

### *C. Unanimity Under Stress*

In the cases discussed above, the Court followed an astonishingly uniform approach to interpretation. This uniformity was somewhat fractured in two of the remaining statutory interpretation cases, and completely shattered in the last one.

#### 1. *Clackamas Gastroenterology Associates v. Wells*[87]

In *Clackamas Gastroenterology Associates v. Wells*, the plaintiff was terminated from her job with the defendant, a medical clinic

81. Breuer v. Jim's Concrete of Brevard Inc., 292 F.3d 1308, 1310 (11th Cir. 2002).

82. *Breuer*, 123 S. Ct. at 1884.

83. *Id.*

84. *Id.* at 1885 citing 29 U.S.C. §§ 1445(a)-d (2000); 15 U.S.C. §§ 77v(a), 1719 (2000); 3612 (2000)).

85. *Breuer*, 123 S. Ct. at 1885-86.

86. *Id.* at 1886.

87. 123 S. Ct. 1673 (2003).

organized as a professional corporation under state law.[88] Plaintiff sued, alleging unlawful discrimination on the basis of disability under the Americans with Disability Act (ADA).[89] The defendant moved for summary judgment arguing that it was not an "employer" and thus, not a "covered entity," within the meaning of the ADA because it did not have the requisite fifteen or more employees for the twenty weeks required by the statute.[90] The basis for this argument, according to the defendant, was that its four physician-shareholders should not be counted as employees for purposes of determining whether the defendant was a covered entity. Relying on the "economic realities" test, the defendant successfully argued before the district court, that its four physician-shareholders should be regarded as "partners" and not as "employees" within the meaning of the ADA.[91]

The United States Court of Appeals for the Ninth Circuit reversed, adopting instead what it referred to as the "literal" test. The court was troubled by the possibility of permitting professional corporations to secure "'the best of both possible worlds' by allowing [a professional corporation] both to assert its corporate status advantages and to argue that it is like a corporation in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination."[92] The court said that "while the shareholders of a corporation may or may not be 'employees,' they can never be partners in that corporation because the roles are 'mutually exclusive.'"[93] The Supreme Court reversed and remanded, rejecting the Ninth Circuit's adoption of the literal test.[94]

In an opinion authored by Justice Stevens, and joined by six other justices, the Court found the literal test inconsistent with Congress' decision to exempt small firms (i.e., firms with fewer than fifteen employees) from the ADA, and with Congress' expectation

88. *Id.* at 1676.

89. 42 U.S.C. §§ 12101-12117 (2000).

90. *Clackamas Gastroenterology Assocs.*, 123 S. Ct. at 1676. "The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ." 42 U.S.C. § 12111 (5)(a).

91. *Clackamas Gastroenterology Assocs.*, 123 S. Ct. at 1676.

92. Wells v. Clackamas Gastroenterology Assocs., 271 F.3d. 903, 905 (2d Cir. 2001) (internal quotations omitted).

93. *Id.* (quoting Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1968)).

94. *Clackamas Gastroenterology Assocs.*, 123 S. Ct. at 1681.

that courts will fill in the gaps left as the result of congressional silence, by referring to common law rules on the specific subject matter.[95]

Having rejected the literal test, the Court adopted the EEOC's guidelines on the issue of who is an employee and when partners qualify as employees. The EEOC guidelines, which as the Court noted, properly focus on the "touchstone" issue of control, identify the following six factors:

> [1.] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> [2.] Whether and, if so, to what extent the organization supervises the individual's work;
>
> [3.] Whether the individual reports to someone higher in the organization;
>
> [4.] Whether and, if so, to what extent the individual is able to influence the organization;
>
> [5.] Whether the parties intended that the individual, be an employee, as expressed in written agreements or contracts; and
>
> [6.] Whether the individual shares in the profits, losses, and liabilities of the organization.[96]

In adopting the EEOC's approach, the Court noted that neither individual job titles, nor the existence of an "employment agreement" will be determinative, and that, "all the incidents of the relationship" ought to be considered.[97] The Court remanded the case to the Ninth Circuit, noting that while several of the factors considered under the EEOC guidelines supported the finding that the four physician shareholders were not employees, contrary evidence existed on the record.[98]

At first glance, it would appear that the court's decision in *Clackamas*, written by Justice Stevens, the nemesis of the textual approach to statutory interpretation cases, is inconsistent with the approach followed by the Court in the other four statutory cases discussed above. This conclusion is unwarranted, however. The rationale is twofold. First, Justice Stevens began by acknowledging the statute and making the point that in this case the statute was completely useless. Justice Stevens pointed out that the ADA defines

95. *Id.* at 1678-79.
96. *Id.* at 1680-81 (quoting EEOC Compliance Manual § 605:0009).
97. *Id.*
98. *Id.* at 1681.

"employee" as "an individual employed by an employer,"[99] indicating that such a "nominal definition" is "completely circular and explains nothing."[100] Thus, having found no guidance in the statutory language, Justice Stevens was free to move to other sources to determine the meaning of the term employee under the ADA. Second, Justice Stevens' opinion did not open the door for unfettered judicial discretion, the main concern of the textualist approach, since it then relied on the interpretation by the agency to determine the outcome of the dispute.

Both of these arguments are consistent with the textualist approach, at least as advanced by Justice Scalia in a number of earlier cases. Indeed, both Justices Scalia and Thomas joined Justice Stevens' majority opinion.[101]

### 2. *Norfolk & Western Ry. Co. v. Ayers*[102]

The same dynamics observed in *Clackamas* were operating in *Norfolk & Western Ry. Co. v. Ayers.* This case, better than any other case this term, reflects the dichotomy I argue exists in the way the current Court decides statutory, as opposed to common law, cases. Six former employees brought suit against Norfolk & Western Railway Co. under the Federal Employers'' Liability Act (FELA).[103] The claimants alleged that Norfolk negligently exposed them to asbestos, which caused them to contract the occupational disease

99. *Id.* at 1677 (quoting 42 U.S.C. § 12111(4)).

100. *Id.* (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)) (internal quotations omitted).

101. Justice Ginsburg, joined by Justice Breyer, dissented, accusing the majority of unnecessarily shrinking the inquiry as to who is an employee under the ADA by unduly focusing on the issue of control in the employment relationship. Justice Ginsburg would have found the physician-shareholders to be employees under the ADA, and thus the defendant to be covered under the Act. The reasoning of her opinion is, however, somewhat unclear. At first, it appears that Justice Ginsburg agreed with the majority's decision to use the common law test. While criticizing the manner in which the common law (functional test) was applied, Justice Ginsburg argued that a broader application – an application that did not narrowly focus on control – would have resulted in a different outcome. Justice Ginsburg, though, then appeared to change directions, by arguing that in deciding who is an employee under the ADA (and arguably in other cases involving anti-discrimination laws) the courts should look at the corporate form chosen by the employer. In a discussion more consistent with the "literal test," Justice Ginsburg, noted that the effect of having selected to organize the medical practice as a corporation, was to establish a "separate and distinct" entity in order to reap the advantages of limited liability. Accordingly, Justice Ginsburg pointed out that there is "no reason to allow the doctors to escape from their choice of corporate form when the question becomes whether they are employees for purposes of federal antidiscrimination statutes." *Id.* at 1681-83 (Ginsburg, J., dissenting).

102. 123 S. Ct. 1210 (2003).

103. 45 U.S.C. §§ 51-60 (2000).

asbestosis.[104] As an element of their occupational disease damages, the claimants sought recovery for mental anguish based on their fear of developing cancer. The trial judge instructed the jury that any plaintiff demonstrating a reasonable fear of cancer related to proven physical injury from asbestos is entitled to compensation for that fear as a part of his pain and suffering damages award.[105] The jury returned total damages awards for each claimant ranging from $770,000 to $1.2 million.[106] Norfolk appealed, but the Supreme Court of Appeals of West Virginia denied discretionary review.[107]

The United States Supreme Court granted certiorari to resolve the following issues: (1) Whether a worker suffering from asbestosis, who was exposed to asbestos while on the job, may recover damages for fear of developing cancer for his asbestosis-related "pain and suffering;" and, (2) Whether the railroad is initially entitled to apportionment – a division of damages among injury-causing tortfeasors, which would limit the railroad's liability to the injured employee to a proportionate share.[108]

The latter issue, which the Court treated as a statutory construction issue, was resolved swiftly and unanimously by the Court. The Court held that the railroad may be held jointly and severally liable for injuries caused in part by its own negligence, and that the defendant has the burden of seeking contribution from other tortfeasors.[109] Under the FELA, the Court noted, "[E]very common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of . . . such carrier . . . ."[110] In interpreting this provision, as it did in other statutory interpretation cases, the Court first looked at the particular statutory language, and held that the two "while" phrases ("[w]hile engaging in [interstate commerce]" and "while he is employed by such carrier in such commerce") should be read together to limit an employer's liability to cases in which the injury is sustained by "railroad employees while

104. *Ayers*, 123 S. Ct. at 1215.
105. *Id.* at 1216.
106. *Id.*
107. *Id.*
108. *Id.* at 1214.
109. *Id.* at 1225.
110. 45 U.S.C. § 51.

the employees are themselves involved in such commerce."[111] The provision, said the Court, "does not speak to cases in which an injury has multiple causes, some related to railroad employment and others unrelated to that employment."[112] Because the asbestosis claimants suffer an "injury," caused in whole or in part by the defendants, the Court held that the trial court's instruction to the jury was not erroneous.[113] The Court then briefly looked at the particular provision in the context of the remainder of the statute,[114] and finally in the context of other similar disputes.[115]

The former issue – whether a worker suffering from asbestosis, who was exposed to asbestos while on the job, may recover damages for fear of developing cancer for his asbestosis-related pain and suffering – presented a more contentious issue for the Court. In a discussion more consistent with Professor Chemerinsky's values choice approach than with a strict adherence to statutory text, both the majority and dissents engaged in a policy debate regarding the propriety of expanding the type of injuries that will trigger employer liability.

In a 5-4 decision, the Court held that damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos.[116] The Court began its analysis by noting that because the FELA is a federal negligence statute, the Court was required to look to common-law principles to determine "what injuries are compensable under the statute."[117] Specifically, the Court's precedents required application of the zone-of-danger test, a limiting test designed to protect defendants from "the possibility of nearly infinite and unpredictable liability."[118]

111. *Ayers*, 123 S. Ct. at 1225 (quoting The Employers' Liability Cases, 207 U.S. 463, 504 (1908)) (internal quotations omitted).

112. *Id.*

113. *Id.*

114. "The statutory context bolsters our reading, for interpreting §1 to require apportionment would put that provision in tension with the rest of the statute." *Id.*

115. *Id.* at 1226 (discussing various other FELA cases, as well as distinguishing similar federal statutes).

116. *Id.* at 1215.

117. *Id.* at 1217.

118. *Id.* (quoting Consol. Rail Corp. v. Gotshall, 512 U.S. 532, 546 (1994)) (internal quotations omitted). The zone-of-danger test "confines recovery for stand-alone emotional distress claims to plaintiffs who: (1) sustain a physical impact as a result of a defendant's negligent conduct; or (2) are placed in immediate risk of physical harm by that conduct – that is, those who escaped instant physical harm, but were within the zone of danger of physical impact." *Id.* (quoting *Gotshall*, 512 U.S. at 547-48) (internal quotations omitted).

The zone-of-danger test was applied in the FELA context in *Metro-North Commuter Ry. Co. v. Buckley*,[119] in which two categories of emotional distress claims were described: "Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is circumscribed by the zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted."[120] Using *Metro-North's* categorical approach, the Court said that the case at bar could not be considered a stand-alone emotional distress claim because the claimants were not disease and symptom free.[121] The Court noted that the parties agreed that asbestosis, an occupational disease caused by exposure to hazardous dust, is a cognizable injury under the FELA. Since Norfolk did not dispute that the claimants suffered from asbestosis, and given that "common-law courts . . . *do* permit a plaintiff *who suffers from a disease* to recover for related negligently caused emotional distress,"[122] the Court concluded that the claimants' emotional distress was brought on by a "physical injury," and therefore recovery was not circumscribed by the zone-of-danger test.[123]

Relying on the *Restatement (Second) of Torts*,[124] the Court asserted that "once found liable for 'any bodily harm,' a negligent actor is answerable in damages for emotional disturbance 'resulting from the bodily harm *or from the conduct which causes it.*'"[125] According to the Court, a plaintiff suffering bodily harm need not allege physical manifestations of his or her mental anguish, provided that such complainant prove that his or her alleged fear was genuine and serious.[126]

The Court rejected the defendant's argument that cancer fears are too remote from asbestosis to be included in pain and suffering

119. 521 U.S. 424 (1997).

120. *Ayers*, 123 S. Ct. at 1218.

121. *Id.*

122. *Id.* (quoting Metro-North Commuter R. Co. v. Buckley, 521 U.S. 424, 432 (1998)) (emphasis in original) (internal quotations omitted).

123. *Id.*

124. The Restatement (Second) of Torts provides:

> "If the actor's negligent conduct has so caused any bodily harm to another as to make him liable for it, the actor is also subject to liability for
>
> (a) fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it."

RESTATEMENT (SECOND) OF TORTS § 456 (1963-1964).

125. *Ayers*, 123 S. Ct. at 1221-22 (emphasis in original) (quoting RESTATEMENT (SECOND) OF TORTS § 436(a)).

126. *Id.* at 1223.

damages.[127] The defendant argued that since the asbestosis claimants may bring a second action if cancer develops, cancer-related damages are unwarranted in the asbestosis suit.[128] In response, the Court noted that "the asbestos claimants did not seek, and the trial court did not allow, discrete damages for their *increased risk* of future cancer." Instead, the Court said, "the claimants sought damages for their *current* injury .... a *present* fear" that the toxic exposure which caused the asbestosis may later cause cancer.[129] Moreover, the Court said, defendant's argument had a large gap because it excluded recovery for the fear experienced by an asbestosis sufferer who never gets cancer.[130]

Justice Kennedy's dissent emphasized that the Court must endeavor "to develop a fair and workable rule of decision," bound only by the terms of the FELA and its own precedent giving meaning to the Act, not the majority rule or the *Restatement* rule.[131] In Justice Kennedy's view, the Court has the responsibility "to adopt a rule that reconciles the need to provide compensation for deserving claimants with the concerns that speculative damages awards will exhaust the resources available for recovery."[132] Justice Kennedy argued that the majority's decision "is not employee-protecting;" rather, it is "employee-threatening," as "it is more likely that those with the worst injuries from exposure to asbestos will find they are without remedy because those with lesser ... injuries [i.e., fear of future illness] will have exhausted the resources for payment."[133] In support of this argument he cited a report indicating that asbestos litigation has driven fifty-seven companies, which employed hundreds of thousands of people, into bankruptcy.[134]

Clearly, the majority and dissenters have starkly different ideas about the policies the Court should credit in developing a federal

127. *Id.* at 1221.

128. *Id.* This position was supported by the United States as *amicus curiae*, which referred to the separate disease rule, under which most courts have held that the statute of limitations runs separately for each asbestos-related disease. *Id.* (quoting Brief for United States as *Amicus Curiae* 12) (internal quotations omitted).

129. *Id.* (emphasis in original).

130. *Id.*

131. *Id.* at 1234 (Kennedy, J., dissenting).

132. *Id.* at 1236 (Kennedy, J., dissenting).

133. *Id.* at 1230 (Kennedy, J., dissenting), Justice Breyer's dissent expressed concern with the "legal uncertainty" of interpreting the common-law, and stated that the Court should refer to the "underlying factors that have helped to shape related 'emotional distress' rules." *Id.* at 1236-37 (Breyer, J., dissenting).

134. *Id.* at 1230 (Kennedy, J., dissenting) (citation omitted).

common-law that administers the FELA. The majority credits the intent of Congress in enacting the FELA in 1908, which it said was to "shif[t] part of the human overhead of doing business from employees to their employers."[135] "To further [the Act's] humanitarian purposes," the Court said, "Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers."[136] Following a policy of opening the way for employee recoveries, the Court said that it "must resist pleas . . . to reconfigure established liability rules [just] because they do not serve to abate today's asbestos litigation crisis."[137] Such action "defies customary judicial administration and calls for national legislation," the Court said.[138]

The dissenters, however, did not agree that the rule the Court adopted has been settled by the common law.[139] "The rule the majority derives does not comport with our responsibility to develop a federal common law that administers FELA in an effective, principled way," Justice Kennedy argued.[140] His dissent urged that a stronger liability limiting policy is more consistent with changes already underway in common-law rules for compensating victims of a disease with a long latency period.[141] Justice Kennedy pointed to the crisis in asbestos litigation caused by verdicts which bankrupt employers and deplete victim compensation funds by awarding damages for "unrealized fear."[142] Justice Breyer argued that it would be "perverse to apply tort law's basic compensatory objectives in a way that compensated less serious injuries at the expense of more serious harms."[143] The dissenters, therefore, urged the Court to limit liability to the worse injuries from exposure to asbestos in order to "permit future cancer victims to recover for their injuries, . . . even if that recovery comes at the expense of limiting the recovery for fear of cancer available to those suffering some present harm."[144]

135. *Id.* at 1217 (quoting *Gotshall*, 512 U.S. at 542) (internal quotations omitted).

136. *Id.* (quoting *Gotshall*, 512 U.S. at 542) (internal quotations omitted).

137. *Id.* at 1228.

138. *Id.* (quoting Oritz v. Fibreboard Corp., 527 U.S. 815, 821 (1999)) (internal quotations omitted).

139. *Id.* at 1230 (Kennedy, J., dissenting).

140. *Id.* (Kennedy, J., dissenting).

141. *Id.* at 1233 (Kennedy, J., dissenting).

142. *Id.* at 1229 (Kennedy, J., dissenting).

143. *Id.* at 1238 (Breyer, J., dissenting).

144. *Id.*

### D. *It's Just a Theory, Anyway:* Barnhart v. Peabody Coal Co.[145]

As usually happens when one tries to explain Supreme Court decisions with an overarching jurisprudential theory, there are exceptions. With regard to the Court's approach to statutory interpretation cases, the oddball case is *Barnhart v. Peabody Coal Co.* In *Barnhart*, the Court faced a challenge to an agency action made pursuant to Section 9706(a) of the Coal Industry Retiree Health Benefit Act of 1992. Section 9706(a) provides that "the Commissioner of Social Security *shall,* before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business."[146] The controversy in *Barnhart* stemmed from the Commissioner's assignment of beneficiaries to the respondents, employers in the coal industry, after the statutory date.[147] Several coal companies challenged the Commissioner's untimely assignments, claiming that the statutory "deadline" sets a time limit on the Commissioner's authority to assign, so that a beneficiary not assigned on October 1, 1993, must be left unassigned for life.[148] The coal companies obtained summary judgment, and the judgment was affirmed by the Sixth Circuit.[149] Because the Sixth Circuit's holding did not agree with the Fourth Circuit on the issue, the Supreme Court granted certiorari to resolve the conflict. The Court held that the October 1, 1993, language in the statute is not a jurisdictional deadline, and thus the Commissioner was not precluded from making initial assignments after such date.

Had the Court followed the approach it followed in all the other employment law statutory cases decided this term, the outcome might have been different. This indeed, was the argument raised by both Justice Scalia and Justice Thomas in their dissenting opinions. Justice Thomas reminded the Court, "Unless Congress explicitly states otherwise, 'we construe a statutory term in accordance with its

145. 537 U.S. 149 (2002).

146. 42 U.S.C. §§ 9706(a) (2000) (emphasis added). A "signatory operator," as defined by the Act, is an employer in the coal industry that has signed a coal wage agreement requiring provision of health benefits to retirees of such employer or contributions to one of several enumerated benefit plans. 26 U.S.C. §§ 9701(b)(1), 9701 (c)(1), 9706(a) (2000). Assignment to a signatory operator binds the operator to pay the premiums of the assigned beneficiary's benefits. *Barnhart*, 537 U.S. at 153.

147. *Barnhart*, 537 U.S. at 152, 156.

148. *Id.* at 156.

149. *Id.* at 157.

ordinary or natural meaning.'"[150] According to Justice Thomas the word "shall" must be construed as a mandatory command.[151] Absent any explicit congressional directive to the contrary, the Court's inquiry must have ended there.[152]

The majority, however, disregarded the approach to statutory interpretation discussed above, and held that an initial assignment made after October 1, 1993, is valid despite its untimeliness. Instead of starting the discussion by focusing on the statutory language, the Court, in an opinion by Justice Souter, began by looking at other cases, and by focusing on the elusive issue of congressional intent.

The Court began its analysis by stating that it misses the point to argue that the October 1, 1993, date was "mandatory," "imperative," or a "deadline."[153] The Court said that the failure to act on schedule merely raises the real question, which is "what the consequence of tardiness should be." The Court relied on *United States v. James Daniel Good Real Property*,[154] for the proposition that "if a statute does not specify a consequence for noncompliance with statutory timing provisions the federal courts will not in the ordinary course impose their own coercive sanctions."[155]

Additionally, the Court said that the statute's goal of ensuring that benefits are funded, as much as possible, by those most responsible is best served by reading the statutory date as a spur to prompt action, not as a bar to tardy completion.[156] The coal companies, which called the Commissioner's failure to observe the time limit "jurisdictional," argued that the consequence is that the affected beneficiaries may never be assigned, but instead must be

150. *Barnhart* 537 U.S. at 184 (Thomas, J., dissenting) (citing FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

151. *Id.* (Thomas, J., dissenting).

152. Justice Scalia made a similar argument. He first argued that these cases were not about letting the Commissioner complete a little unfinished business that barely missed the deadline, as the vast majority of late assignments were made years after the statutory deadline had passed. *Id.* at 173-74 (Scalia, J., dissenting). He stressed that Congress never "conferred upon the Commissioner the power that she claims – an unexpiring authority to assign retired coal miners to signatory operators." *Id.* at 172 (Scalia, J., dissenting). Further, he insisted that "the scope of an agency's power is determined by the text of the statutory grant of authority," that "the temporal scope of the Commissioner's authority is ... defined according to a clear and unambiguous date," *Id.* at 175 n.1 (Scalia, J., dissenting), and that section 9706(a) "does not establish the Court's proposition that time-limited mandates include continuing authority," *id.* at 177 (Scalia, J., dissenting).

153. *Id.* at 157.

154. 510 U.S. 43 (1993).

155. *Barnhart*, 537 U.S. at 159 (citing *James Daniel Good*, 510 U.S. at 63).

156. *Id.* at 172.

permanent wards of the UMWA Pension Plan, the AML Fund, and, potentially, of coal operators without prior relationships to these beneficiaries.[157] The Court, however, interpreted the coal companies' argument to mean "that as to tardily assigned beneficiaries who were, perhaps, formerly [respondents'] own employees, they go scot free."[158] The issue and arguments framed in this way, the Court rejected as unsupportable and counterintuitive the coal companies' argument that the mandatory "shall" language together with a specific deadline leaves the Commissioner with no authority to make an initial assignment on or after October 1, 1993.[159] "Hence the oddity of the claim that late official action should shift financial burdens from otherwise responsible private purses to the public fisc, let alone siphon money from funds set aside expressly for a different public purpose . . . ."[160]

The coal companies argued that another textual feature of the Act, the provision for unassigned beneficiary status, indicated inability to assign beneficiaries after the statutory date.[161] The companies argued that the provision for unassigned beneficiaries is a "consequence" for failure to assign in a timely manner, that it reflects a legislative preference for finality over accurate initial assignments, and that it creates a right on the part of the companies to rely permanently on the state of affairs as they were on October 1, 1993.[162] In response, the Court referred to legislative history which indicates that the "unassigned" would be true orphans, by reason that "no operator remains in business."[163] Additionally, the Court noted that the Act's "purpose is to assure that any beneficiary, once assigned, remains the responsibility of a particular operator, and that the number of unassigned beneficiaries is to be kept to an absolute

157. The premiums that signatory operators are required to pay include a "health benefit premium" a "death benefit premium," and possibly, an "unassigned beneficiaries premium." *Id.* at 153-54. "Before signatory operators may be compelled to contribute for the benefit of unassigned beneficiaries, however, funding from two other sources must run out: The United Mine Workers of America Pension Plan (UMWA Pension Plan) . . . [and] the Abandoned Mine Land Reclamation Fund (AML Fund), established for reclamation and restoration of land and water resources degraded by coal mining." *Id.* at 154 (citing 26 U.S.C. § 9705(a)(1) (2000)).

158. *Id.* at 158.

159. *Id.* at 158-59.

160. *Id.* at 160.

161. *Id.* at 163.

162. *Id.*

163. *Id.* at 165 (quoting 138 Cong. Rec. 34,003 (1992) (statements of Sen. Wallop)) (internal quotations omitted).

minimum."[164] Thus, the Court said that Congress did not consider "that the category of the 'unassigned' would include beneficiaries, let alone a lot of beneficiaries, who could be connected with an operator, albeit late."[165] The Court said that the better inference is that this is nothing more than a case for which Congress made no provision.[166]

Referring again to legislative history, the Court noted that the statute is "designed to allocate the greatest number of beneficiaries in the Plans to a prior responsible operator."[167] Thus, the Court concluded that it could not read the Act as jurisdictional because "it would allocate not the greatest, but the least number of beneficiaries to a responsible operator."[168] The way to reach the congressional objective, the Court said, "is to read the statutory date as a spur to prompt action, not as a bar to tardy completion of the business of ensuring that benefits are funded, as much as possible, by those identified by Congress as principally responsible."[169]

## III. THE FMLA: *NEVADA DEPT. OF HUMAN RESOURCES V. HIBBS*[170]

No one jurisprudential theory completely explains every decision issued by the Court, and as the Court's decision in *Barnhart v. Peabody Coal Co.* illustrates, this maxim holds true even when one limits the analysis to only one type of decision, in our case employment law decisions involving matters of statutory construction. The slim chances of having one unifying theory grow even slimmer when one broadens the analysis to include other types of cases. This section discusses the Supreme Court's decision in *Nevada Dept. of Human Resources v. Hibbs,* dealing with the constitutionality of the Family and Medical Leave Act. Unlike the statutory interpretation cases discussed above, the Court's decision in *Hibbs* does not fit into any one specific framework. Perhaps as Professor Chemerinsky has argued, "value choices" are all that we are left as a possible explanation.

In *Hibbs*, respondent, William Hibbs, sought damages and injunctive relief to enforce his alleged rights under the Family and

164. *Id.*
165. *Id.* at 166.
166. *Id.* at 169.
167. *Id.* at 171-72 (quoting 138 Cong. Rec. 34,001 (1992)) (internal quotations omitted).
168. *Id.* at 172.
169. *Id.*
170. 123 S. Ct. 1972 (2003).

Medical Leave Act of 1993 (FMLA).[171] Hibbs was a state employee of the Nevada Department of Human Resources (Department) who sought leave to care for his ailing wife, who was recovering from a car accident and neck surgery.[172] The Department granted his request for twelve weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Eventually, the Department informed Hibbs that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report back to work. Hibbs was terminated after failing to return to work by the specified date.

The district court awarded the Department summary judgment on the grounds that the FMLA claim was barred by the Eleventh Amendment and that respondent's Fourteenth Amendment rights had not been violated. Hibbs appealed, and the United States intervened to defend the validity of the FMLA's application to the states. The Ninth Circuit reversed, and the Supreme Court granted certiorari to resolve a split among the courts of appeals on the question whether an individual may sue a State for money damages in federal court under the FMLA.

Affirming the Ninth Circuit, the Supreme Court, in a decision penned by Chief Justice Rehnquist, held that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.[173] The Court's decision was based on precedents interpreting section 5 of the Fourteenth Amendment,[174] which authorize Congress to abrogate the states' Eleventh Amendment immunity if it makes its intention to do so "unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment."[175] The Court said the Act clearly authorizes suits against public employers.[176] Thus, the only issue was whether Congress acted within its constitutional authority under section 5, "to

171. 29 U.S.C. §§ 2601-2654 (2000).

172. *Id.* at 1977.

173. *Id.*

174. "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

175. *Hibbs*, 123 S. Ct. at 1977.

176. "The Act enables employees to seek damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction,' 29 U.S.C. § 2617(a)(2), and Congress has defined 'public agency' to include both 'the government of a State or political subdivision thereof' and 'any agency of . . . a State, or a political subdivision of a State.' [29 U.S.C.] §§ 203(x), 2611(4)(A)(iii)." *Id.*

enforce" the substantive guarantees of section 1 – among them, equal protection of the laws – by enacting "appropriate legislation."[177]

Relying on *City of Boerne v. Flores*,[178] the Court said that section 5 of the Fourteenth Amendment grants Congress authority to enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to remedy and to deter unconstitutional conduct that undermines the substantive guarantees of section 1 of that Amendment.[179] The Court also relied on *Kimel v. Florida Board of Regents*,[180] for the proposition that section 5 legislation reaching beyond the scope of section 1's actual guarantees must be an appropriate remedy for identified constitutional violations, and not an attempt to substantively redefine the states' legal obligations.[181] These precedents, the Court stated, require that the test set forth in *City of Boerne* be applied to distinguish appropriate prophylactic legislation from substantive redefinition of Fourteenth Amendment rights. Specifically, valid section 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end."[182] Applying this test, the Court held that the evidence Congress had before it of the states' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits was "weighty enough to justify the enactment of prophylactic § 5 legislation."[183] The Court further held that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation."[184]

In reaching its judgment, the Court defined the right at issue under the FMLA as "the right to be free from gender-based discrimination in the workplace."[185] The Court then noted that state gender discrimination triggers a heightened level of scrutiny beyond the rational basis review the Court applies to age- and disability-based claims.[186] The Court said that it is more difficult to justify

177. *Id.*
178. 521 U.S. 507, 536 (1997).
179. *Hibbs*, 123 S. Ct. at 1977.
180. 528 U.S. 62, 88 (2000).
181. *Hibbs*, 123 S. Ct. at 1977-78.
182. *Id.* (quoting *City of Boerne*, 521 U.S. at 520) (internal quotations omitted).
183. *Id.* at 1981.
184. *Id.* at 1982 (quoting Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001)) (internal quotations omitted).
185. *Id.* at 1978.
186. *Id.* at 1982.

gender-based classifications, which must "serve important governmental objectives" and be "substantially related to the achievement of those objectives," and, therefore, "it was easier for Congress to show a pattern of state constitutional violations."[187]

The Court noted that Congress had evidence before it that States "had continued to rely on invalid gender stereotypes in the administration of leave benefits."[188] Specifically, Congress considered a 1990 Bureau of Labor Statistics survey which stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies.[189] The Court also noted a fifty-state survey which demonstrated that the proportion and construction of leave policies available to public sector employees differed little from those offered to private sector employees.[190] The Court, therefore, endorsed the conclusion that "differential leave policies for men and women were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[191] The Court also noted that Congress had evidence that even where state laws and policies were not facially discriminatory they were applied in discriminatory ways.[192] The Court held that because of the persistence of such unconstitutional discrimination by the States, Congress was justified in enacting the FMLA as remedial legislation.[193]

In holding that the FMLA is a congruent and proportional remedy, the Court first noted that Congress had tried unsuccessfully to address the problem of unconstitutional gender discrimination through Title VII and the Pregnancy Discrimination Act.[194] Under *Kimel*, the Court had said, such problems may justify added prophylactic legislation. Second, the Court asserted that Congress' chosen remedy "is narrowly targeted at the fault line between work

187. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)) (internal quotations omitted).

188. *Id.* at 1979.

189. *Id.*

190. *Id.* at 1979 n.3.

191. *Id.* at 1979.

192. *Id.* at 1980. Congress was "aware of the 'serious problems with the discretionary nature of family leave,' because when 'the authority to grant leave and to arrange the length of that leave rests with individual supervisors,' it leaves 'employees open to discretionary and possibly unequal treatment.'" *Id.* (quoting H.R. Rep. No. 103-8, pt. 2, at 10-11 (1993).

193. *Id.* at 1979.

194. *Id.* at 1982.

and family – precisely where sex-based overgeneralization has been and remains strongest – and affects only one aspect of the employment relationship."[195] Third, the Court was further assured of the validity of the FMLA because of the limitations of its remedial scheme.[196] Thus, the Court concluded, the FMLA is "congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'"[197]

In sum, the Court held that the FMLA is a valid abrogation of states' immunity from suit because Congress acted within its constitutional authority under section 5 of the Fourteenth Amendment. Therefore, employees of the State of Nevada may recover money damages in the event of the state's failure to comply with the family-care provision of the Act.

In dissent, Justice Kennedy framed the issue as whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury.[198] Arguing that the states' "immunity cannot be abrogated without documentation of a pattern of unconstitutional acts by the States,"[199] Justice Kennedy noted that "[t]he paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct.[200] Justice Kennedy reminded the Court of its duty to "separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its § 5 authority."[201] In concluding that Congress enacted a substantive entitlement program, Justice Kennedy insisted that "Congress did not 'act to accomplish the legitimate end of enforcing judicially recognized Fourteenth Amendment rights, but instead pursued an object outside the scope of Section Five by imposing new non-remedial legal obligations on

195. *Id.* at 1983.

196. "Congress chose a middle ground, a period long enough to serve the needs of families but not so long that it would upset the legitimate interests of employers. Moreover, the cause of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses and the accrual period for back pay is limited by the Act's 2-year statute of limitations." *Id.* at 1984. (internal citations and quotations omitted).

197. *Id.* (quoting *City of Boerne*, 521 U.S. at 532).

198. *Id.* at 1986 (Kennedy, J., dissenting).

199. *Id.* at 1994 (Kennedy, J., dissenting).

200. *Id.* at 1992 (Kennedy, J., dissenting).

201. *Id.* at 1993 (Kennedy, J., dissenting).

the States.'"[202]

Justice Scalia went further in dissent, arguing that the sovereignty of one State cannot "be abridged under Section 5 because of violations of another State, or by most other States, or even by 49 other States."[203] Nevada is entitled in an as-applied challenge "to assert that the mere facts that (1) it is a State, and (2) some States are bad actors, is not enough; it can demand that it be shown to have been acting in violation of the Fourteenth Amendment."[204]

What does *Hibbs* tell us about the Court's approach in deciding this type of case, as compared to the statutory cases discussed earlier?[205] Is there a jurisprudential theory explaining the outcome in *Hibbs*? Before *Hibbs*, when deciding whose unconstitutional conduct Congress was allowed to consider when deciding whether to establish a section 5 remedy, the Court had required Congress to show a demonstrated record of *state-level* violations,[206] and had also reminded Congress that section 5 remedies could only be applied to "the State where the evil found by Congress existed."[207] The Court has also imposed strict requirements on the type and detail of the evidence used by Congress in documenting unconstitutional behavior by the states. For example, in *Board of Trustees of University of Alabama v. Garrett*, the Court required Congress to show that states have engaged in discrimination against individuals with a disability in the employment context, not in other areas, such as zoning ordinances.[208] Similarly, in prior cases the Court had required detailed illustrations of State unconstitutional conduct.[209]

In *Hibbs*, the Court appears to ignore all these requirements. As Justice Kennedy pointed out, there was little evidence that states, as opposed to private sector employers, were engaged in family leave discrimination.[210] At best eleven states were identified as having engaged in unconstitutional conduct, and still, as Justice Scalia pointed out, the Court attributed discriminatory conduct to all other

202. *Id.* at 1994 (Kennedy, J., dissenting).

203. *Id.* at 1985 (Scalia, J., dissenting).

204. *Id.* at 1986 (Scalia, J., dissenting).

205. *See* Vikram David Amar, *The New "New Federalism"* 6 GREEN BAG 2D 349 (2003); Chemerinsky, *supra* note 1, at 367.

206. *Garrett*, 531 U.S. at 369.

207. United States v. Morrison, 529 U.S. 598, 626-27 (2000).

208. *Garrett*, 531 U.S. at 369.

209. *See e.g., City of Boerne,* 521 U.S. at 531; Kimel v. Florida Bd. Of Regents, 528 U.S. 62 (2000).

210. *Hibbs*, 123 S. Ct. at 1987 (Kennedy, J., dissenting).

states.[211] Finally, to the extent that discrimination by states was proven, it was with regard to the allocation of *parental*, as opposed to *family* leave, weakening the Court's argument that Congress has acted in a congruent and proportional manner in enacting the FMLA.[212]

The Chief Justice attempted to reconcile *Hibbs* with prior case law on the basis that in enacting the FMLA Congress was dealing with gender discrimination. Classifications by government based on gender are considered "suspect" and thus subject to a heightened standard of review, since they implicate the core of the Fourteenth Amendment Equal Protection Clause. Accordingly, concluded Chief Justice Rehnquist, "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations [in the case of the FMLA]."

It is not clear, however, what is the relevance of the Chief Justice's argument. The key questions in prior section 5 cases were how often were states violating the Fourteenth Amendment, and how tailored was Congress' response?[213] That Congress was addressing gender discrimination through the FMLA, tells us nothing about the frequency of unconstitutional conduct by the states.[214]

Observers of the Court have raised doubts about the validity of the Chief Justice's attempt to reconcile *Hibbs* with prior cases, and have proposed alternative explanations. One account suggests that given that Justice O'Connor was likely to abandon the conservative majority on federalism issues, because of her concerns with women's rights and discrimination issues, the Chief Justice crossed over as well to be able to control the writing of the opinion, which otherwise would have gone to Justice Stevens.[215] The *New York Times*' Linda Greenhouse advanced an alternative theory. In a recent article, she questioned the Chief Justice's "solicitude for the usefulness of the

211. *Id.* at 1980-81 & nn.6-9.

212. *Hibbs*, 123 S. Ct. at 1979.

213. *See* Amar, *supra* note 205, at 353.

214. *Id.*

215. *See* Jon D. Bible & Donald Sanders, Nevada Dept. of Human Resources v. Hibbs: *Is the Supreme Court Backtracking on State Sovereign Immunity?*, 54 LAB. L. J. 153, 165 (2003) (citing Edward Lazarus, *A Single Day's Decisions Illustrate Deep Fault Lines In the Supreme Court*, at <http://writ.corporate.findlaw.com/lazarus/20030612.html> (June 12, 2003)). Lazarus is a former Supreme Court law clerk and author of CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998).

FMLA in erasing the pervasive sex-role stereotype that caring for family members is women's work."[216] The article suggested that this new-found interest might have something to do with the Chief Justice's family situation: when his daughter experienced childcare problems, the Chief Justice often "left work early to pick up his granddaughters from school."[217]

It is hard, to reconcile the holding in *Hibbs* with the other most recent Court decisions in this area. As one commentator has noted in reference to the *Hibbs* decision: "Ralph Waldo Emerson is quoted for having said: 'Foolish consistency is the hobgoblin of little minds.' That is one criticism the current Court is scrupulously avoiding."[218] While the decision clearly shows that the "Court's receptiveness to federalism arguments has limits, and that there are instances in which even the five pro-federalism justices will rule in favor of federal power,"[219] it is less clear how those limits are determined.

## IV. CONCLUDING REMARKS

Professor Chemerinsky notes that understanding constitutional cases requires us to look at the two Justices in the middle of the political spectrum – Justice O'Connor and Justice Kennedy – since these Justices' votes are determinative in most cases. He concludes his analysis by branding the current Court as "O'Connor's Court." Whose court is this regarding employment law cases?

While frequently writing for the Court, particularly in 5-4 cases, neither Justice O'Connor, nor Justice Kennedy wrote any of the employment law majority opinions in this term. Indeed, Justice O'Connor only wrote a short concurring opinion in *Desert Palace*, while Justice Kennedy penned a dissenting opinion regarding one of the issues discussed in *Norfolk*.

Justice Scalia's influence in the approach the Court follows in deciding employment law cases, reveals the important role he plays in this area. It is somewhat astonishing that a Court that is considered to be so ideologically divided, was able to achieve such a remarkable degree of unanimity in employment law cases. Of the eight cases reviewed in this article, four were decided without dissent and three

216. *See* Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, at § 4 p. 3.

217. *Id.*

218. *See* Amar, *supra* note 205, at 351 (footnotes omitted).

219. *See* Chemerinsky, *supra* note 1, at 375.

others by a comfortable margin. This near perfect unanimity is remarkable given the fact that, substantively, the outcome of the cases is not necessarily consistent with the liberal/conservative preferences one would expect from the members of the Court. The outcomes in the four 9-0 employment law cases decided by the Court were evenly divided: *Desert Palace* and *Kentucky Association of Health Plans* favor plaintiffs/employees, while *Black & Decker* and *Breuer* favor defendants/employers.

The fact that the Court showed such a high degree of unanimity in the statutory cases might be attributable to the approach that the Court appears to have adopted in deciding those cases. Unlike, constitutional law cases, for which no clear overarching theory appears to exist,[220] and where the Justices have allowed themselves a free decision-making hand, in statutory interpretation cases, the Justices' chosen approach appears to be outcome determinative. Arguably by convincing the Court to follow the text- and rule-based approach in deciding statutory cases, Justice Scalia has accomplished his objective of limiting the role of judicial review, making the decisions more likely to be a function of process, as opposed to value choices. So maybe, in employment cases, and paraphrasing Professor Chemerinsky, "for better or worse, this really is the" Scalia Court.

220. *See* Chemerinsky, *supra* note 1, at 368.