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Analysis of U.S. Supreme Court Employment Law Decisions

Henry H. Perritt Jr.
IIT Chicago-Kent College of Law, hperritt@kentlaw.iit.edu

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I. Introduction

Ten cases with direct impact on labor and employment law were decided during the October 2000 term, and two other cases have potential indirect impact on labor and employment practice. Two of these cases involved the American with Disabilities Act (ADA), two cases involved title VII of the Civil Rights Act, one arose from a National Labor Relations Act (NLRA) representation dispute, four cases were related to arbitration, and one involved Employment Retirement Income Security Act (ERISA) preemption.

When I classify these cases as employee and union wins or employer wins—I am sure there is room for argument on this—I come up with five wins for employees and unions, four for employers, and one that defies classification. Let me start with the Americans with Disabilities Act, and a case that received wide publicity in the general press.

II. Americans with Disabilities Act

The court in *Board of Trustees of the University of Alabama v. Garrett*[1] held that the Eleventh Amendment of the U.S. Constitution barred application of title I of the ADA to states and their instrumentalities.[2] Chief Justice Rhenquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, delivered the court's opinion.[3]

The underlying litigation involved a registered nurse who was forced to give up her supervisory position after she had been treated for cancer and a security officer in the state department of youth services who was denied modification of his duties to accommodate his asthma and sleep apnea.[4] After the Equal Employment Opportunity Commission procedures were exhausted and suits were filed in the district court, the district court granted summary judgment on Eleventh

*Henry H. Perritt Jr. is a dean and professor of law at Chicago-Kent College of Law, Illinois Institute of Technology, and was secretary of the ABA's Section of Labor and Employment Law, 2000–2001. He is a member of the following bars: Virginia, Pennsylvania, District of Columbia, Maryland, Illinois, and U.S. Supreme Court.

1. 121 S. Ct. 955 (2001).
2. *Id.* at 967–68.
3. *Id.* at 960.
4. *Garrett*, 121 S. Ct. at 961.

Amendment grounds.[5] The Eleventh Circuit, disagreeing with other circuits, found that the ADA validly abrogated states' Eleventh Amendment immunity.[6]

It is important at the outset to note the limited scope of *Garrett*: It affected only title I of the ADA, and in fact, the court hinted in a footnote that the outcome might have been different under title II.[7] The decision related only to private damages actions against states and their instrumentalities, and the court suggested that the outcome might have been different in an action brought by the U.S. government.[8] The decision does not apply to municipalities because municipalities do not enjoy any immunity under the Eleventh Amendment.[9]

Here is the problem: The Eleventh Amendment divests federal courts of jurisdiction over cases brought by citizens against states.[10] The Eleventh Amendment also divests federal courts of the power to hear common law suits against states.[11] This amendment has been interpreted as a kind of savings clause for sovereign immunity recognized at the state level. For example, if a state gives up its sovereign immunity, the Eleventh Amendment does not come into play. If a state asserts sovereign immunity as a general matter, however, then the Eleventh Amendment preserves that sovereign immunity and disables federal courts from overriding it.

It is not quite as easy as that seems to suggest because Congress has the power, under the supremacy clause, to displace state law.[12] Many people think that congressional power to displace state law is plenary. Thus, if Congress had the power under the commerce clause or some other clause in Article I of the Constitution,[13] then it would be sufficiently clear that Congress could displace sovereign immunity and any Eleventh Amendment bar to lawsuits.

The Supreme Court in *Seminole Tribe of Florida v. Florida*[14] held that Congress did not enjoy power under the commerce clause to override Eleventh Amendment immunity.[15] The Court's reasoning was logical. The commerce clause had been adopted before the Eleventh Amendment; therefore, it was reasonable to infer intent in the Eleventh Amendment to override commerce clause power. However, it is not quite as simple as that might suggest either because the Fourteenth

5. *Id.*
6. *Id.*
7. *Id.* at 960 n.1 (explaining that lawsuit originally involved claims of violation of both title I and title II).
8. 121 S. Ct. at 968 n.9.
9. 121 S. Ct. at 965.
10. U.S. CONST. amend. XI
11. *Id.*
12. U.S. CONST. art. VI.
13. U.S. CONST. art. I
14. 517 U.S. 44 (1996).
15. 121 S. Ct. at 962.

Amendment was adopted—as its number suggests—after the Eleventh Amendment and therefore implicitly repealed portions of the Eleventh Amendment to the extent they irreconcilably conflicted with the Fourteenth Amendment. Section 5 of the Fourteenth Amendment explicitly gives Congress the power to implement and enforce the rights guaranteed by the Fourteenth Amendment. Under a long line of cases, the Supreme Court before *Garrett* had decided that Congress did enjoy the power under section 5 of the Fourteenth Amendment to override Eleventh Amendment immunity.[16]

There are two requirements for valid exercise of the Fourteenth Amendment's power to override the Eleventh Amendment.[17] The first is that Congress speak unequivocally of its intent to override Eleventh Amendment immunity.[18] The second requirement is that the legislation that purports to override Eleventh Amendment immunity must be congruent and proportional to the vindication of rights directly granted by the Fourteenth Amendment.[19] In *Garrett* there was no difficulty with the first requirement because Congress had been quite explicit in expressing its desire to override the Eleventh Amendment immunity for states and their instrumentalities that discriminate against the disabled.[20]

The problem was with the congruent and proportional requirement of section 5 of the Fourteenth Amendment.[21] Congress may go beyond legislatively repeating the Supreme Court's constitutional jurisprudence under the Fourteenth Amendment.[22] It may both remedy and deter violation of rights guaranteed by the amendment "by prohibiting a somewhat broader range of conduct, including that which is not itself forbidden by the amendment's text."[23] Nevertheless, the language "appropriate legislation" in section 5 contains the limiting word *appropriate*.[24] That limitation means that legislation going beyond the Fourteenth Amendment's actual guarantees must be both congruent and proportional in linking the injury to be prevented with the remedy and the means adopted.[25]

To apply that requirement, the Supreme Court first determined the status of disability under the Fourteenth Amendment.[26] Was it a suspect classification, like race, that required strict scrutiny of state activ-

16. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
17. 121 S. Ct. at 962.
18. *Id.*
19. *Id.* at 963.
20. 121 S. Ct. at 962 (citing 42 U.S.C. § 12202 (1994)).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

ity? Or was it instead a non-suspect classification of which states are entitled to discriminate if they have a rational basis? The starting point for analysis was to define the rights recognized directly by the Fourteenth Amendment text.[27] That, in turn, necessitated classifying the categories used by the challenged legislation.[28] The first step in *Garrett* was for the Supreme Court to decide whether disability was a suspect or quasi classification warranting heightened scrutiny.[29] Earlier, in *Cleburne v. Cleburne Living Center, Inc.*,[30] the Court had declined to treat mental retardation as a "quasi suspect" classification for equal protection purposes, concluding instead that the city ordinance requiring a special use permit for operation of a group home for the mentally retarded incurred only "rational basis" review.[31] In that case, the Court had expressed reluctance to recognize an amorphous class of mentally retarded, the aging, the disabled, the mentally ill, and the infirm as "quasi suspect" under the Fourteenth Amendment.[32]

The Court determined that a disability was a non-suspect classification, entitling states to discriminate when they had a rational basis for doing so.[33] Under rational basis review, a state may act on distinguishing characteristics if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.[34] A state need not articulate its reasoning contemporaneously with a decision but is entitled to a presumption of constitutionality unless a challenging party can negate "any reasonable conceivable state of facts that could provide a rational basis for the classification."[35] The *Cleburne* Court found that states could make hardheaded decisions to maintain job qualification requirements "which [did] not make allowance for the disabled"[36]—absent some positive legislative duty.[37]

Given that classification of disability under the Fourteenth Amendment, the Court asked itself whether Congress could go beyond mere prohibition of irrational discrimination in the ADA and prohibit disparate impact policies and whether Congress could require reasonable accommodation of states as a private entity. The Court concluded that these additional requirements under title I of the ADA went beyond what would be congruent and proportional and thus authorized by the Fourteenth Amendment.[38] Assessment of the legitimacy of leg-

27. *Id.*
28. *Id.*
29. *Id.*
30. 473 U.S. 432 (1985).
31. *Garrett*, 121 S. Ct. at 963 (characterizing and quoting *Cleburne*).
32. *Id.* at 963 (quoting *Cleburne*, 473 U.S. at 445–46).
33. *Id.* (citing *Cleburne*, 473 U.S. at 441).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 967–68.

islation under section 5 of the Fourteenth Amendment requires reviewing the history and pattern of unconstitutional employment discrimination by the states against the disabled.[39] "Congress's section 5 authority is appropriately exercised only in response to state transgressions."[40]

Nevertheless, the legislative record of the ADA, the Court found, failed to show that Congress had identified a pattern of irrational state discrimination in employment against the disabled.[41] Crucially, the Court excluded from the equation evidence of discrimination by local governments.[42] While the local governments are state actors for purposes of the Fourteenth Amendment, the Eleventh Amendment does not extend its immunity to units of such a government: "These entities are subject to private claims for damages under the ADA without Congress's ever having to rely on section 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the states themselves, when only the states are the beneficiaries of the Eleventh Amendment."[43] In other words, there was no need to override Eleventh Amendment immunity with respect to local governments, and their conduct could therefore not be part of the case for overriding the immunity.

While Congress had identified instances of discrimination against the disabled by the states, these incidents, taken together, fell far short of suggesting the pattern of unconstitutional discrimination on which section 5 legislation must be based.[44] The Court rejected Justice Breyer's dissent on the grounds that many of them involved local government discrimination. Breyer's dissent contained a long list of anecdotal incidents of discrimination by states, and others pertained to alleged discrimination in providing public services and public accommodations, which were addressed in titles II and III of the ADA rather than in title I.[45]

Especially problematic, in the Court's analysis, were those provisions of the ADA that required reasonable accommodation, which could impose costs beyond those that would be rationally incurred by states, even when the undue hardship privilege was not satisfied,[46] and prohibitions on utilizing standards, criteria, or methods of administration that disparately impacted the disabled without regard to whether they have a rational basis.[47] This contrasted Congress's broad-brush ap-

39. *Id.* at 964.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 965.
44. *Id.*
45. *Id.* at 966.
46. *Id.* at 967.
47. *Id.*

proach of the ADA with its more careful approach to present evidence of racial discrimination in justifying the Voting Rights Act under section 2 of the Fifteenth Amendment.[48]

Justices Kennedy and O'Connor concurred.[49] They noted that a state's failure to revise policies then seen as incorrect under a new understanding of the need to afford opportunities to the disabled did not always constitute purposeful and intentional action required to make out a violation of the Equal Protection Clause: "That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation."[50] Moreover, the issue in Justice Kennedy's view was not whether Congress could compel states to act but only whether congress could subject the states to liability in private lawsuits.[51]

Justices Breyer, Stevens, Souter, and Ginsberg dissented.[52] They criticized the majority's review of the congressional record as resembling judicial review of an administrative agency record lacking sufficient evidence of unconstitutional discrimination.[53] Such an approach denied Congress its due. Justice Breyer thought that Congress had sufficient discretion to conclude that the remedies and duties of the ADA constituted an appropriate way to enforce the basic equal protection requirement.[54] He noted, and included in an appendix, 300 examples of discrimination by state governments from the legislative record.[55]

Furthermore, Justice Breyer thought that neither the burden of proof that favored states in rational basis litigation nor any other rule of restraint applicable to judges applied to Congress when it exercised section 5 power.[56] Indeed, he observed, "The court in *Cleburne* drew this very institutional distinction. We emphasized that 'courts have been very reluctant, as they should be in our federal system, and with our respect for the separation of powers, to closely scrutinize legislative choices.'"[57] Moreover, Justice Breyer also noted, "Unlike courts, Congress can readily gather facts from across the nation, access the magnitude of a problem, and more easily find an appropriate remedy."[58]

Justice Breyer defended the reasonable accommodation and disparate impact elements of the ADA by noting that disparate impact

48. *Id.*
49. *Id.* at 968 (Kennedy, J., concurring).
50. *Id.* at 969.
51. *Id.*
52. *Id* (Breyer, J., dissenting).
53. *Id.*
54. *Id.*
55. *Id.* at 970.
56. *Id.*
57. *Id.* at 973.
58. *Id.*

had been upheld in other contexts where it was not constitutionally required.[59] He found the court's "harsh review" of Congress's use of its section 5 power reminiscent of the now discredited limitation that the Court had once imposed on Congress's commerce clause power in cases such as *Carter v. Carter Cole*.[60]

Justice Breyer could understand such scrutiny of congressional findings if the statute discriminated, but the ADA neither discriminated nor threatened any basic liberty.[61] He lamented curtailment of Congress's capacity to deal with problems like discrimination through authorizing private damages action, which often were less intrusive than federal standards and court injunctions.[62] Justice Breyer noted, "The Court, through its evidentiary demands, its nondeferential review, and its failure to distinguish between judicial and legislative constitutional competence, improperly invades a power that the Constitution assigns to Congress."[63]

The Supreme Court held that Congress did not have that power. The Supreme Court reasoned that the Fourteenth Amendment recognized only certain rights. Those who perform constitutional litigation or who enjoyed constitutional law courses in law school may remember that there are several categories of rights or classifications protected by the Fourteenth Amendment. There are suspect classifications, such as race, to which courts apply strict scrutiny to any state action that differentially affects those classifications. There are quasi-suspect classes, and then there are classes outside the suspect or quasi-suspect categories.

The majority's analysis looked particularly at the reasonable accommodation requirement of the ADA and said that it imposed a special affirmative obligation on states that went beyond what might have been warranted to correct irrational discrimination against the disabled. Therefore, that part of the ADA requiring reasonable accommodation exceeded the powers conferred on Congress by section 5 of the Fourteenth Amendment.

An important implication from *Garrett* is that it puts additional stress on title II of the ADA because the court clearly failed to decide whether title II could validly be applied to states. There is conflicting court of appeals decisional authority as to whether title II covers employment discrimination. Those cases are described in the recent district court case *Currie v. Group Insurance Commission*.[64]

Another ADA case that received wide publicity was *PGA Tour, Inc.*

59. *Id.* at 974.
60. *Id.* (citing Carter v. Carter Cole Co., 298 U.S. 238 (1936)).
61. *Id.*
62. *Id.*
63. *Id.* at 975–76.
64. 147 F. Supp. 2d 30 (D. Mass. 2001).

v. Martin.[65] Casey Martin was a disabled golfer who established that he could not walk the golf course in a professional golf tournament and could compete only if he was allowed to use a golf cart.[66] The PGA denied his use of the golf cart, and he sued under title III of the ADA, which imposed an obligation on places of public accommodation not to discriminate against the disabled.[67] A long line of cases, and indeed title III of the ADA itself, explained that golf courses were places of public accommodation. Therefore the Supreme Court in *Casey Martin* had no difficulty concluding that a professional golf tournament was a place of public accommodation under title III.[68]

Places of public accommodation have a statutory duty to modify their practices and rules to the extent necessary to provide equal opportunity to the disabled unless the requested modification will "fundamentally alter" the nature of the activity provided.[69] The Professional Golf Association argued that to allow Casey Martin to use a golf cart as he competed would fundamentally alter the game of golf.[70] So the second question was whether requiring use of the cart would fundamentally alter the game of golf and thus be outside the requirements of title III. The Supreme Court noted that the rules for golf said nothing about walking, and that it was commonplace for ordinary people playing golf to use golf carts.[71] Indeed it was common in many professional golf tournaments for contestants to use golf carts.[72] Therefore, reasoned the Court, allowing Casey Martin to use a golf cart would not fundamentally alter the game of professional golf.[73]

The significance of *Martin* for labor and employment law is that in finding that Martin was covered by title III, the Supreme Court had to conclude that title III prohibited discrimination against employees—or at least against independent contractors. The PGA had argued that title III only granted rights to customers of places of public accommodation and not to employees or other providers of services.[74] The Supreme Court disagreed, stating that there was nothing explicitly in the statute, if read carefully, that limited title III rights to customers, which in turn might have included employees and other service providers.[75] Then it went on to say that because the competitors in this particular tournament had to pay a $3,000 entry fee to participate, one could indeed classify

65. 121 S. Ct. 1879 (2001).
66. *Id.* at 1884–85.
67. *Id.* at 1886.
68. *Id.* at 1890.
69. *Id.* at 1889–90.
70. *Id.* at 1886.
71. *Id.* at 1894.
72. *Id.*
73. *Id.* at 1895.
74. *Id.* at 1891.
75. *Id.* at 1891–92.

them as customers of the service.[76] The Court reasoned that Casey Martin, if he was not a customer, was an independent contractor as a provider of service. Thus, *Martin* suggests that disability discrimination cases involving employment may be justifiable under not only title II by virtue of *Garrett* but also under title III.

III. Title VII of the Civil Rights Act

The court decided two title VII cases during its 2000 term. *Clark County School District v. Breeden*[77] did not take much judicial energy. Breeden was part of a three-person team whose responsibility was to review employment applications.[78] The material associated with one of these applications made a reference that could have been construed as offensive on the basis of gender.[79] One of Breeden's colleagues on the review panel said, "I don't know what that means";[80] the other colleague on the review panel said, "Well maybe I better tell you later."[81] Breeden claimed that she was quite offended by this not only by the reference in the written materials but also by the brief exchange among her co-panelists.[82] She claimed sexual harassment.[83] Subsequent employment decisions were taken, which she claimed were retaliatory because of her assertion of title VII rights to be free of offensive harassment.[84] The Supreme Court said, in effect, that this was "nonsense." The Supreme Court—not reaching the question whether 42 U.S.C. § 2000e-3(a) protected employee opposition and not just practices that actually were unlawful by title VII but also practices that the opposing employee reasonably believed were unlawful—held that "no reasonable person could have believed that the incident . . . violated Title VII."[85] In order to have been protected against retaliation, a protestor must have had a reasonable belief that the conduct violated title VII.[86] On these facts, said the Supreme Court, no reasonable person could have thought that the conversation in the review team constituted sexual harassment.[87] Simple teasing, offhand comments, and isolated incidents (unless they were extremely serious) could not amount to discriminatory changes in the terms and conditions of employment.[88] A second claim of retaliation, premised on a planned transfer allegedly

76. *Id.* at 1892.
77. 121 S. Ct. 1508 (2001).
78. *Id.* at 1508.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1510.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* (quoting Faragher v. Boca Raton, 524 U.S. 775, 788 (1998)).

because of her filing the charge with the EEOC and her receipt of a right to sue letter, similarly was rejected.[89] The Court found no indication of a causal link between the protected activity and the allegedly harmful employment decision.[90] The Supreme Court reversed the Ninth Circuit in a per curiam opinion.[91]

A case with much broader implications than *Breeden* that also involved title VII and, by implication, the ADA was *Pollard v. E. I. du Pont*,[92] decided by a unanimous Court, with Justice O'Connor recanting. In *Pollard,* the plaintiff successfully sued her employer for failing to eliminate a hostile work environment, thereby violating the sex discrimination provisions of title VII.[93] The trial court, after a bench trial, found that she was entitled to about $100,000 in back pay and $250,000 in attorney fees and wanted to give her more than $300,000 in front pay and compensatory damages.[94] The problem was that a Sixth Circuit decision, *Hudson v. Reno*,[95] held that front pay is included in the statutory caps under section 1981a.

Section 1981a was added to title 42 to allow compensatory and punitive damages to successful plaintiffs in title VII cases. Before 1981a was enacted, one could get compensatory and punitive damages for race discrimination under section 1981 of title 42 but could not get compensatory and punitive damages for sex, religious, and national origin discrimination under title VII. Section 1981a was intended to equalize the treatment, but it did include statutory caps on the amount of the combined compensatory and punitive damages. The maximum cap, depending on employer size, is $300,000.

Pollard argued that front pay had been available under the original title VII and was therefore not capped by the $300,000 limit under section 1981a.[96] The employer said, "Sure it is, because the text of 1981a explicitly refers to 'future pecuniary losses' as a type of compensatory damages subject to the cap." The term *front pay* seemed to suggest compensation for future pecuniary loss. It seemed like an uphill battle for Pollard.

The Supreme Court, however, agreed with Pollard that front pay was outside the damage caps.[97] Its reasoning is important. The Court looked closely at the practice under section 706(g) of the Civil Rights Act of 1964 before enactment of section 1981a.[98] Section 706(g) and

89. *Id.*
90. *Id.*
91. *Id.*
92. 121 S. Ct. 1946 (2001).
93. *Id.* at 1948.
94. *Id.*
95. 130 F.3d 1193 (6th Cir. 1997).
96. *Pollard*, 121 S. Ct. at 1947.
97. *Id.*
98. *Id.*

other provisions of the pre-1991 title VII had not authorized compensatory and punitive damages.[99] The original provisions of title VII had been modeled on the NLRA. The NLRA had long been interpreted to allow front pay—only, said the Court, it was called back pay (confusingly enough) under the NLRA.[100] Under both acts, the question related to a category of monetary relief meant to account for loss of pay between the time a case was decided by the National Labor Relations Board (NLRB) or a court and the time at which the employee was reinstated, if that ever occurred. That was encompassed by the term *back pay* under the NLRA, but it was not entirely irrational to call it front pay under some other statute. Since reinstatement may not have occurred or may never occur, this kind of relief well may look forward into the future. Indeed, almost by definition it looks forward because it postdates the judgment. The majority of the courts of appeals had interpreted 706(g) as allowing what came to be called front pay. They did so by drawing analogies to the NLRA where monetary relief for the period of time between an administrative or judicial decision and reinstatement had been allowed as a form of equitable relief. NLRA back pay and title VII front pay are really the same kind of relief. Because front pay had been authorized before section 1981a was enacted and because Congress made clear that 1981a was meant to complement rather than to supplant section 706(g) relief, front pay was not subject to the caps.

Thus, a title VII plaintiff who claims sex, religious, national origin discrimination, or retaliation can get not only the compensatory and punitive damages awarded by the fact finder and attorney fees, she can also get substantial front pay without worrying about the $300,000 (or lower) cap with respect to the front pay.

IV. National Labor Relations Act

An NLRA case, *National Labor Relations Board v. Kentucky River Community Care, Inc.*,[101] involved an effort to organize a developmental complex in Kentucky. The union thought that there were 110 people in the bargaining unit.[102] The employer thought that six registered nurses were outside the bargaining unit because they qualified as supervisors under the act.[103] The Supreme Court decided two issues. First, it agreed with the NLRB that the burden was on the employer to establish supervisor status.[104] Second, it rejected the board's reasoning that supervisors qualified for statutory exclusion from bargaining units only when they exercised a measure of discretion not limited by

99. *Id.*
100. *Id.* at 1949.
101. 121 S. Ct. 1861 (2001).
102. *Id.* at 1865.
103. *Id.* Only statutorily defined employees are includable in a bargaining unit. The definition of *employee* excludes supervisors. 29 U.S.C. § 152(3) (1994).
104. *Id.* at 1866.

professional guidelines.[105] Under the NLRA, employees are statutory supervisors if (1) they have authority to engage in any one of twelve statutorily defined supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer."[106] The union had argued—and the NLRB agreed—that registered nurses did not exercise independent judgment under the second part of this test when they directed lower level personnel to take a patient's temperature or to do certain other kinds of routine activities. Instead the nurses simply put into action what was required of them by their training and their professional guidelines. Although detailed employer rules might have reduced supervisory discretion below the statutory threshold, the Court was unwilling to accept the board's extension of this reasoning to exclude "ordinary professional or technical judgment in directing less-skilled employees to deliver services."[107] To accept this logic, the Court thought, would exempt a broad class of professionals from the definition of supervisor, depending on their experience and adherence to professional standards.[108] The Supreme Court rejected that reasoning and held that merely because professional employees in supervisory positions exercised discretion limited by their training or professional guidelines, they were not outside the supervisor exemption from the statutory definition of *employee.*[109] Earlier, in *NLRB v. Health Care & Retirement Corp. of America,*[110] the Court had rejected the board's reasoning in a similar case, which centered on whether the exercise of discretion pursuant to professional standards vitiated the third "in the interest of the employer" test for supervisory status.[111]

V. Arbitration

There were four arbitration cases during the Court's 2000 term. The first was *Circuit City Stores Inc. v. Adams.*[112] *Circuit City* involved the scope of the Federal Arbitration Act (FAA).[113] The FAA exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[114] The Supreme Court held that this exemption extended only to transportation workers, thereby allowing federal statutory en-

105. *Id.* at 1871.
106. *Id.* at 1867.
107. *Id.* (quoting Brief for Petitioner at 11).
108. *Id.* at 1868.
109. *Id.* at 1868–69.
110. 511 U.S. 571 (1994).
111. 121 S. Ct. at 1869.
112. 121 S. Ct. 1302 (2001).
113. 9 U.S.C. § 1 (1994).
114. 9 U.S.C. § 1 *et seq.* (1994).

forcement of individual arbitration agreements and preempting state law that might limit arbitration of individual employment disputes.[115]

Justice Kennedy, writing for the Court in an opinion joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, used the statutory interpretation maxim ejusdem generis to limit the statutory phrase "any other class of workers engaged in . . . commerce" to refer only to other types of transportation workers rather than to all employees within the reach of Congress's legislative power.[116] The ejusdem generis maxim required that the phrase "any other class of workers engaged in foreign and interstate commerce" be interpreted in light of the things that preceded it on the list: seamen and railroad employees.[117]

The Court construed the phrase "engaged in commerce" used in the section 1 exception more narrowly than the phrase "involving commerce" used in the operative provisions of section 2.[118] Similarly, it contrasted the phrase "engaged in" with the term "affecting."[119] It found that the phrase "involving commerce," like the phrase "affecting commerce," was intended to reach as far as the outer limits of congressional authority under the commerce clause[120] and that the phrase "engaged in commerce" had a more limited reach, shaped by the limited understanding of commerce clause authority in 1925, when the FAA had been enacted.[121] The Court held that the exclusion of the FAA applied only to employees engaged in transportation and light industries, thus leaving the broad range of employees covered by the act. Because the Court based its holding on textual analysis, it declined to address the legislative history of the exclusion.[122] Notwithstanding its lack of interest in legislative history, the Court rationalized its conclusion by noting that Congress had already enacted in 1925, or soon would enact, legislation aimed at specific categories of transportation employees, justifying excluding them from the FAA.[123]

The Court also rejected the argument that the statutory term "transaction" in section 2 limited the reach of the statute only to commercial contracts, negating any necessity to interpret the exemption language at all.[124] The dissenters used legislative history to explain that the exemption language of section 1 had been added after trade unions opposed the original bill and that it was crafted to make it clear

115. *Circuit City*, 121 S. Ct. at 1306.
116. *Id.* at 1308–09.
117. *Id.*
118. *Id.* at 1308.
119. *Id.* at 1309–10.
120. *Id.*
121. *Id.*
122. *Id.* at 1311.
123. *Id.* at 1312.
124. *Id.* at 1308.

that the original language had not been intended to refer to anything other than commercial contracts.[125]

The Court rejected arguments by the attorneys general of twenty-two states that reading the employment exclusion narrowly would limit the power of states to adopt law that would restrict or limit employment law arbitration. In *Southland Corp. v. Keating*,[126] the Court held that Congress intended the FAA to apply in state courts and to preempt state anti-arbitration laws to the contrary. The combination of *Southland* and *Circuit City* removes arbitration of individual employment claims from the reach of state law. Individual employment claims, whether premised on contract, tort, or statute, can be arbitrated—no matter what state law says.

The Court reviewed the benefits of arbitrating employment disputes, including reduced cost of litigation, avoidance of choice-of-law questions, and avoidance of the necessity of bifurcating proceedings if state law were not preempted; the Court also precluded arbitration of certain types of employment claims.[127] The Court additionally noted, "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum."[128]

The net effect of *Circuit City* is to deprive collective bargaining of an advantage by making judicial deference to arbitration roughly coequal between collectively bargained arbitration and individual arbitration. This parity of both types of employment arbitration is assured by preempting state power to limit arbitration of state statutory rights.

First, *Circuit City* says nothing about collectively bargained arbitration because collectively bargained arbitration agreements are not enforced under the FAA; instead, they are enforced under section 301 of the Labor Management Relations Act (LMRA). Collectively bargained arbitration was unaffected by *Circuit City* because the Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*[129] held that section 301 of the LMRA authorized federal judicial enforcement of collectively bargained arbitration agreements.[130] Under the *Lincoln Mills* analysis, section 301 is an independent source of federal court jurisdiction, creating the power to develop a body of common law to interpret obligations under labor contracts. The FAA comes into play in the employment arena only in connection with arbitration of individual employee claims premised on some source of individual employee right other than a collective bargaining agreement.

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125. *Id.* at 1314–15.
126. 465 U.S. 1 (1984).
127. *Circuit City*, 121 S. Ct. at 1313.
128. *Id.* (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).
129. 353 U.S. 448 (1957).
130. *Adams*, 121 S. Ct. at 1317 (Stevens, J., dissenting).

Second, *Circuit City* means that states are denied the power to regulate individual employment arbitration because in an earlier case—and indeed on the facts of *Circuit City*—the Supreme Court had rejected a state attempt to say that this particular category dispute could not be subjected to final and binding arbitration or to impose particular requirements on the arbitration procedure that could be used for that type of case. It had been established already in *Southland Corporation v. Keating* that the supremacy clause deprives states of the power to regulate any arbitration that was covered by the FAA.[131] *Circuit City* itself also involved an unsuccessful effort by the state of California to regulate individual employment arbitration. Individual employment arbitration is a federal issue and only a federal issue. The federal courts have the power under the FAA to enforce arbitration agreements and arbitration awards. The terms of the act are quite similar to the terms under the *Steelworkers Trilogy* for judicial review of arbitration awards. Under both statutes, the courts are very deferential to what the arbitrator has decided.

The second arbitration case was *Eastern Associated Coal Corp. v. United Mine Workers.*[132] In that case, the Supreme Court rejected a claim by the employer that a collectively bargained arbitration award requiring the reinstatement of a drug-abusing employee was unenforceable as against public policy.[133] The Supreme Court's reasoning was that when looking closely at the arbitration award, the employee hardly received a free ride. The employee had to pay the cost of preceding arbitrations, he was on a last chance agreement, and a there was a random drug testing requirement. When the Supreme Court looked at the expression of public policy in regard to drug abuse expressed by the U.S. Department of Transportation (DOT), it found that the DOT had, in fact, embraced the idea of flexible remedies for employees caught engaging in drug use and had indeed at one point considered the very kind of last chance agreement awarded by the arbitrator.[134] Thus, the Court found that it was hard to say that the arbitrator's award violated a clear public policy, let alone a command of positive law.[135]

Eastern Associated Coal Corporation v. United Mine Workers[136] involved collectively bargained arbitration, so the statutory framework was not the FAA but section 301 of the LMRA under *Lincoln Mills*. The case also addressed the common issue of when arbitration awards should not be enforced judicially because to do so would violate public policy. This issue extended to all employment arbitration.

131. *Southland Corp.*, 465 U.S. at 10–16.
132. 531 U.S. 57 (2000).
133. *Id.* at 60.
134. *Id.* at 67
135. *Id.*
136. 531 U.S. 57 (2000).

In *Eastern Associated Coal Corp.*, the Supreme Court agreed with the Fourth Circuit and the district court and enforced a collectively bargained arbitration award ordering reinstatement of an employee who had tested positive for marijuana, notwithstanding potential jeopardy to federal drug testing statutes and regulations. James Smith worked for Eastern Associated Coal Corp. as a driver of heavy vehicles on the public highways.[137] Because he was a truck driver, he was subject to a DOT regulation requiring random drug testing.[138] Smith passed four random drug tests but failed two: one in 1996 and another in 1997.[139] In each case, the coal company tried to fire him, and the union took the dismissal to arbitration. In both cases, the arbitrator concluded that a positive drug test did not amount to just cause for discharge under the collective bargaining agreement.[140]

The second arbitration award ordered reinstatement subject to five provisos: (1) acceptance of a three-month suspension without pay; (2) payment by the employee of the cost of both arbitration proceedings; (3) continued participation in a substance abuse program; (4) continued random drug testing; and (5) signing an undated letter of resignation to take effect if Smith again tested positive within the next five years.[141] The employer sued unsuccessfully in district court, seeking to have the award vacated because it contravened public policy. A court of appeals affirmed in an unpublished opinion based on the reasoning of the district court.[142] The Fourth Circuit decision created a circuit split with the First Circuit, motivating the Supreme Court to grant certiorari.[143]

Most lawyers remember from their first-year law-school course in contracts that contracts which violate public policy are not enforceable. It is an extension of that general rule of contract law that precludes the enforcement of arbitration awards that owe their legitimacy to contracts that violate public policy. Of course, the question is how serious does the violation need to be.

In a paragraph, the Supreme Court reiterated the basics of federal court review of labor arbitration awards. Eastern had not claimed that the arbitrator acted outside the scope of his contractually delegated authority; thus, the Supreme Court was obligated to treat the arbitrator's award "as if it represented an agreement between Eastern and the union as to the proper meaning of the contract's words 'just

137. *Id.* at 60.
138. *Id.* (citing 49 C.F.R. §§ 382.301, 382.305 (1999)).
139. *Id.*
140. *Id.* at 60.
141. *Id.* at 60–61.
142. *Id.* at 61.
143. *Id.* (referring to circuit split and citing Exxon Corp. v. Soesso Worker's Union, 118 F.3d 841, 852 (1st Cir. 1997) (public policy prevents enforcement of arbitration award similar to that involved in *Eastern Coal*)).

cause.'"[144] The Court therefore had to decide whether such a contractual reinstatement requirement would be unenforceable because it violated public policy. "To put the question more specifically, does a contractual agreement to reinstate Smith with specified conditions run contrary to an explicit, well defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?"[145]

Importantly, "neither the act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice."[146] Rather, these sources of positive law have a complex set of requirements for detection of drug use, counseling, rehabilitation, return to duty testing, and certifications. Also, a *Federal Register* notice evidenced the DOT's intent to leave certain details to management/driver negotiation.[147]

There were several relevant policies: policies against drug use by truck drivers and in favor of drug testing, policies of rehabilitation of employees who use drugs, and a labor law policy that favored determination of disciplinary and termination questions through arbitration when it had been collectively bargained. Taken together, those policies were not, in the Court's view, subverted by the arbitration award. In particular, the award did not condone Smith's conduct. The arbitration award did indeed order his reinstatement, but it subjected his reinstatement to five conditions: (1) he had to accept a three-month suspension without pay; (2) he had to pay the costs of both this and a previous arbitration proceeding; (3) he had to continue to participate in a substance abuse program; (4) he had to continue random drug testing; and (5) he had to sign an undated letter of resignation to take effect if he ever again tested positive within the next five years.[148] In other words, this arbitration award was like a fairly stringent "last chance agreement."[149] The DOT itself had once proposed a rule that would have punished two failed drug tests with suspension rather than dismissal.[150] Not only had the DOT, which had rulemaking authority in this area, not say ever that reinstating an employee who had failed a drug test would violate federal policy but, on the contrary, when it wrote its own regulations, the DOT seriously considered an approach for people who failed drug tests quite like what the arbitrator ordered in this case. If the DOT and the arbitrator were thinking the same

144. *Id.* at 62.
145. *Id.* at 63.
146. *Id.* at 65.
147. *Id.* (citing 59 Fed. Reg. 7502 (1994)).
148. *Id.* at 60–61.
149. *Id.*
150. *Id.*

about reinstatement of people who had failed drug tests, how could there have been any conflict with public policy? There was not any conflict with public policy, concluded the Court; therefore, the arbitration award was enforceable.

Justices Scalia and Thomas concurred in the judgment, agreeing that no public policy prevented Smith's reinstatement but disagreeing with the majority's flexible definition of the public policy exception to enforcement of labor arbitration awards. The justices believed that the public policy exception should have been limited solely to cases where the arbitration award violated positive law, concerned that the language used by the majority would open the door to judicial intuition of public policy that went beyond prohibitions of positive law.[151]

In *Major League Baseball Players v. Garvey*,[152] the Supreme Court reversed a court of appeals decision, holding that it was wrong for that court to decide the merits of an arbitrable dispute after it had concluded that the arbitrator's finding was not supported by the record in the arbitration proceeding.[153]

The fourth arbitration case did not involve an employment dispute; nevertheless, it is important because under *Circuit City*, the FAA now applies to employment arbitration. In *Green Tree Financial Corp v. Randolph,*[154] the Supreme Court held that a judicial order to arbitrate was appealable under the FAA. It also held that a bare bones arbitration agreement silent on the cost of arbitration and who was to bear those costs did not divest the arbitration agreement of the entitlement to be enforced under the FAA.

Green Tree[155] involved a consumer credit agreement with an arbitration clause. The arbitration clause was vague: It did not specify who would pay the costs, and it did not say much about who could be selected as an arbitrator; it was a simple arbitration agreement. There was a problem with a consumer paying back the money, the creditor trying to collect it, and the debtor suing, alleging various violations in truth and lending laws and consumer protection legislation. The creditor sought to compel arbitration. The district court granted a motion to compel arbitration. A court of appeals held that it had jurisdiction to review the district court's order because the order was a final decision under 9 U.S.C. § 16.[156] The court of appeals also held that because the arbitration agreement was silent with respect to fees and the cost of arbitration, it was unenforceable.[157]

The Supreme Court approved appellate review of the order to ar-

151. *Id.* at 68. (Scalia, J., concurring in the judgment).
152. 121 S. Ct. 1724 (2001).
153. *Id.* at 1729.
154. 531 U.S. 79 (2000).
155. *Id.*
156. *Id.* at 84.
157. *Id.*

bitrate. It rejected the argument that allowing appeals from orders to compel arbitration would interfere with the speed that arbitration was meant to accomplish.[158] It held that because the order compelling arbitration was a final order in the usual sense of the term, it was appealable,[159] noting, however, that if the district court had entered a stay instead of a dismissal, the outcome might have been different.[160] The court noted that the rules of finality and appeal had been less settled when section 16 of the FAA was enacted.[161]

The Supreme Court reversed the other prong of the court of appeals decision. The court reviewed its recent decisions allowing arbitration of statutory claims,[162] noting that "the existence of large arbitration costs *could* preclude a litigant from effectively vindicating her federal statutory rights in the arbitral forum."[163] However, the record did not show that the debtor in the *Green Tree* case would bear such costs. Accordingly, the risk that the debtor would be saddled with prohibitive costs was too speculative to justify invalidation at the arbitration agreement.[164]

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, would have remanded for further proceedings to more fully develop the record of who would bear the costs of arbitration.

VI. ERISA

The ERISA case is *Egelhoff v. Egelhoff*.[165] When David A. Egelhoff died in an automobile accident, his employer-provided life insurance policy and pension plan named his ex-wife as beneficiary.[166] Washington state—where the Egelhoffs had lived and divorced, where Mr. Egelhoff had been employed, and where he had died—had a statute that invalidated designation of a former spouse as a beneficiary for a "nonprobate asset" upon divorce.[167] The former wife took the position that ERISA preempted this provision of state law, and the other beneficiaries took the position that state law governed.

In disagreeing with the Washington Supreme Court,[168] the U.S. Supreme Court held that the state statute was preempted under the ERISA's express preemption provision.[169] "The administrators must pay benefits to the beneficiaries chosen by state law, rather than to

158. *Id.* at 85–86
159. *Id.* at 86–87.
160. *Id.* at 87 n.2 (declining to decide whether district court should have entered stay instead of dismissal, but concluding that stay would not have been appealable).
161. *Id.* at 88.
162. *Id.* at 88–89.
163. *Id.* at 90.
164. *Id* at 91.
165. 121 S. Ct. 1322 (2001).
166. *Id.* at 1326.
167. *Id.*
168. *Id.* at 1326–27.
169. *Id.* at 1327 (the ERISA's preemption section, 29 U.S.C. § 1144(a) states that the ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan").

those identified in the plan documents. . . . This statute governs the payment of benefits, a central matter of plan administration."[170] The Washington statute also had a prohibited connection with ERISA plans, the Court found, because it interfered with a national, uniform plan administration. Plan administrators were required to go beyond identifying the beneficiary specified in the plan document; they had to consult state law to determine whether the named beneficiary status had been revoked by operation of law.[171]

Justices Scalia and Ginsburg concurred, agreeing that the state law contradicted the ERISA's requirement that plans be administered according to plan documents.[172] They thought, however, that the Court could bring coherence to ERISA preemption only by interpreting the ERISA's "relate to" clause as a reference to ordinary preemption jurisprudence.[173]

Justices Breyer and Stevens dissented.[174] They agreed with Justices Scalia and Ginsburg that normal conflict and field-preemption analysis would apply to the ERISA preemption when an arguably preempted state statute covered ERISA and non-ERISA documents alike.[175] They did not agree, however, that the ERISA preempted the Washington state statute. The dissenters noted that the state statute only provided a default rule, allowing conveyance to a former spouse if the plan document expressly provided so.[176] They argued that plan administrators frequently had to consult state law to determine whether a designation had become invalid,[177] whether an employee was legally dead, who was a spouse, or who qualified as a child.[178] Beyond administrative burdens, they thought the Washington statute posed no obstacle to, but instead furthered, the ERISA's ultimate objective by giving effect to likely plan participant desires.[179] The dissenters also offered the specter of broader preemption of many state laws regulating family property issues.[180]

The broadest significance of the *Egelhoff* case may be that four members of the present Court wanted to replace complex and uncertain

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170. *Id.* at 1327–28.

171. *Id.* (noting also possibility of choice of law problems when employer is in one state, plan participant lives in another, and former spouse lives in third).

172. *Id.* (Scalia, J., concurring).

173. *Id. at* 1330–1331. The "relate to" language appears in 29 U.S.C. § 1144 (a)—the basic preemption clause.

174. *Id.* at 1331 (Breyer, J., dissenting).

175. *Id.* at 1331.

176. *Id.* (quoting Washington State statute).

177. *Id.* at 1332.

178. *Id.* at 1333.

179. *Id.* at 1333–34 (citing authority for proposition that divorced workers more often prefer that child rather than divorced spouse receive assets).

180. *Id.* at 1334–35.

ERISA preemption analysis with traditional analytical frameworks drawn from conflict and field preemption.

VII. Other Cases

The two cases that have indirect impact on labor and employment law involve the status of apparently private associations under the Fourteenth Amendment and whether there is a private right of action to enforce Title VI obligations.

In *Brentwood Academy v. Tennessee Secondary School Athletic Association,*[181] the Supreme Court held that the apparently private statewide Interscholastic Athletic Association was a state actor under section 1983 because its activities were so intertwined with decisions of state officials. That suggests that an apparently private association engaged in some kind of justiciable employment decision making might be subject to suit under section 1983 as well as the laws applying the private sector actors.

In *Alexander v. Sandoval*[182] the Supreme Court decided that there was no private right of action to enforce title VI of the Civil Rights Act. Title VI did not apply to the full range of employment decisions except where a primary objective of the federal financial assistance was to provide employment. In that narrow set of cases, *Sandoval* suggests that any remedy for discrimination violating title VI would be administrative and not through private damages actions.

VIII. Conclusion

Finally, there are three major loose ends left by this term's decisions: First, much more case law is necessary to know how employment disputes should be treated under titles II and III of the ADA because of the reasoning of *Garrett* and *Martin*. Second, because *Pollard* widely opened the door to front pay under title VII and the ADA, undoubtedly more cases involving claims for front pay will surface, and more judicial guidance will materialize on what kind of evidence suffices to support front pay awards now uncapped under *Pollard*. More experience will be gained on how the FAA applies to individual employment arbitration.

181. 121 S. Ct. 924 (2001).
182. 121 S. Ct. 1511 (2001).