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James J. Brudney*

I. Introduction and Overview

A British novelist famous in his time once observed that a lawyer without history is a mere mechanic, but, with some knowledge of history, he may call himself an architect.¹ At the dawn of a new century of Supreme Court workplace law, it seems especially appropriate to offer some perspective on the recent and relatively recent past. Before addressing the seven cases involving labor and employment issues decided by the Supreme Court in the Term just ended, I want briefly to describe (in what I hope are not mechanical terms) how the Court’s interests in labor and employment law have evolved from the start of the Burger Era in 1969 to the current, mature stage of the Rehnquist Court.

Reviewing the Supreme Court’s decisions over the past three decades, I identified nearly 600 opinions dealing directly with some aspect of the relationship between employee and employer, union and employer, or union and employee.² Compilation of the database required making occasional subjective judgments, but the vast majority of cases were not borderline. Further, I benefited from the fine work of my predecessors in this position. By relying on the annual review of workplace law decisions, published in THE LABOR LAWYER since the early 1980s, I was able to cross-check as well as supplement my electronic search.

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² The database includes 587 cases decided from the 1969 through 1999 terms. For each term, I reviewed published opinions (signed and per curiam) through a series of searches in the Westlaw FLB-SCT database keyed to numerous titles and sections of the U.S. Code. The search yielded far more than 587 decisions; review of Westlaw summaries allowed me to eliminate cases citing the searched-for code sections that did not directly involve the employment relationship.
Figure 1
Labor and Employment Decisions as a Percentage of Total Decisions: Three Year Trends

Workplace law issues have been an important component of the Court's docket throughout the Burger and Rehnquist eras. A look at three year trends from the 1969 through 1999 Terms reveals two distinct storylines. First, there was a noticeable jump in the proportion of workplace cases in the early Burger years. Labor and employment decisions comprised less than 10 percent of the Court's total decisions at the start of the Burger Court; the percentage rose to 17 percent by the mid-1970s. An increase from one-tenth to one-sixth of the Court's decision docket represents a substantial change.

The other noteworthy theme is that since the mid-1970s, the percentage of labor and employment cases has remained remarkably stable at around 16 percent. The Court's consistent level of interest in the workplace law area over 25 years is impressive in light of changes that have occurred in congressional and presidential agendas, major economic and social developments outside the workplace, and shifting ideological priorities among the Justices. Further, the labor and employment law share of the Court's opinion docket has held constant while the Supreme Court's overall number of decisions has plunged 40 percent since the early 1980s. This area of law evidently is regarded by

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3. The precise percentages were 9.0% of 379 total opinions in 1969–1971; 11.4% of 440 total opinions in 1972–1974; and 17.0% of 429 opinions in 1975–1977.

4. Following the rise to 17.0% in 1975–1977, the precise percentages were 15.4% of 403 opinions in 1978–1980; 18.3% of 458 opinions in 1981–1983; 17.0% of 448 opinions in 1984–1986; 16.6% of 415 opinions in 1987–1989; 13.7% of 335 opinions in 1990–1992; 15.7% of 248 opinions in 1993–1995; and 15.7% of 345 opinions in 1996–1999. Data for the total number of decisions, including signed opinions and orally argued per curiams, came from Lee Epstein et al., The Supreme Court Compendium: Data, Decisions & Developments 90–93 (2d ed. 1996). Epstein's data covers the 1969 through 1994 terms. For the 1995–1999 terms, I relied on United States Law Week, which published a Table of all argued cases decided by opinion at the conclusion of each term.
the Court as essential rather than expendable; it has retained its one-sixth share even as the Court has scaled back to a far leaner caseload.

When examining subject matter composition within workplace law, one can see more dramatic shifts and upheavals over these three decades. During the first six terms of the Burger era (1969–1974), labor-management relations cases comprised over one-half of the Court's labor and employment opinions. The proportion dropped to around 30 percent in the later Burger years, but much of this decline resulted from a change in the "denominator." The actual number of labor-management relations cases decreased modestly during the 17 year period, while the total number of labor and employment decisions more than doubled between the start and finish of the Burger Court.

For the nine terms from 1975–83, covering the middle and later Burger Court era, controversies involving race or sex discrimination generated one-third of the Court's labor and employment opinions.

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5. The labor-management relations category includes The National Labor Relations Act of 1935, the Labor-Management Relations Act of 1947, the Labor-Management Reporting and Disclosure Act of 1959, the Railway Labor Act, the Norris-LaGuardia Act, the Federal Service Labor Management Relations Act of 1978, and a smattering of other cases in which labor-management or union-employee conflicts arose. Labor-management relations decisions comprised 76.5% of the 34 labor and employment decisions in 1969–1971 and 54% of the 50 labor and employment decisions in 1972–1974.

6. There were 26 labor-management relations decisions in the 1969–1971 terms and 27 such decisions in the 1972–1974 terms. The Court decided 31 labor-management relations cases in the 1981–1983 terms and 20 such cases in the 1984–1986 terms.

7. The race/sex discrimination category includes Title VII of the 1964 Civil Rights Act, the Equal Pay Act, the Civil War era statutes (42 U.S.C. §§ 1981, 1983, 1985) when they implicate race or sex discrimination, and also race or sex discrimination cases invoking or relying on constitutional provisions (chiefly 14th Amendment and 5th Amendment). Race or sex discrimination decisions were 34.2% of the 73 labor and employment opinions in 1975–1977, 35.5% of the 62 labor and employment opinions in 1978–1980, and 32.1% of the 84 labor and employment opinions in 1981–1983.
This proportion remained at one-third during the peak period of overall labor and employment law decisionmaking by the Court. The priority given to these two areas—labor-management relations and race or sex discrimination—is not surprising when one considers the prominent status of unions in the private sector through the 1970s, as well as the commanding role played by civil rights matters in the political and constitutional arenas during the late 1970s and early 1980s.

In the Rehnquist era, both labor-management relations and race or sex discrimination have come to occupy a distinctly less prominent place in the Court’s decision docket. The decline has been especially steep from the Burger years with respect to labor-management relations. (Figure 4)
In addition to the proportion having fallen by more than half during the Burger period itself (from 75 percent to about 30 percent), the labor-management relations percentage has been halved again over the course of the Rehnquist years (from 30 percent to 13 percent). The latter decrease is more palpable, as it has occurred during a sizeable falloff in the number of total labor and employment law cases heard by the Court. Thus, the early Rehnquist Court decided 21 labor-management relations cases in the 1987–1989 Terms but has decided only seven such cases in its last four Terms.

The waning of Supreme Court attentions is noticeable for issues of race and sex discrimination as well. Notwithstanding a recent modest upturn, the share of labor and employment decisions addressing race or sex discrimination has receded from 30 percent to less than 15 percent since the early 1980s. Once again, the decline is more dramatic in absolute terms given the Court’s diminished workload; from 27 race or sex discrimination decisions in 1981–83 to 18 such decisions in 1987–89, to eight race or sex discrimination decisions in the past four Terms (1996–1999). The current Term serves as an exclamation point with regard to each of these trends. For the second time since 1994,
the Court’s labor and employment law decisions do not include a single labor relations or race/sex discrimination case.

What has replaced these stalwarts in the Court’s favor? The answer is statutory suitors from a variety of subject matter realms. The Rehnquist Court has paid more attention to laws addressing other forms of discrimination, such as the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). (Figure 6) There has been some increase in focus on statutes addressing the right to minimum levels of compensation, benefits, or safety and health protection. (Figure 7) This minimum standards category includes the Fair Labor Standards Act (FLSA), the Longshore and Harbor Workers’ Compensation Act, the Occupational Safety and Health Act, the Mine Safety and Health Act, and other laws that set floors with respect to terms and conditions of employment. Cases under the Employee Retirement Income Security Act (ERISA) or other retirement-oriented statutes also have occupied more of the Court’s attention since the mid-1980s. (Figure 8)

10. In addition to cases arising under the ADEA or ADA, the other-discrimination category includes § 504 of the Rehabilitation Act, the Civil War era statutes when parties invoke them to allege discrimination based on factors other than race or sex, and also statutes addressing discrimination against veterans. Percentages went from 7.2% of 69 labor and employment decisions in 1987–1989 to 20.4% of 54 decisions in 1996–1999.

11. There are a myriad of statutes in this category that arose only once or twice as the focus of Court decisions. Examples include the Worker Adjustment and Retraining Notification Act (WARN), Agricultural Workers Protection Act, Seaman’s Wage Act, Hours of Service Act, and Surface Transportation Act. Percentages for this full category of minimum protection statutes increased from 10.1% of 69 labor and employment decisions in 1987–1989 to 23.1% of 39 decisions in 1993–1995 before dropping back to 14.8% of 54 decisions in 1996–1999.

12. Besides ERISA, the Court has construed specialized federal retirement statutes affecting civil service employees, railroad employees, coal industry employees, and mili-
The current Term amply illustrates this changing complexion in workplace law. The Court’s seven labor and employment law decisions include two cases addressing the ADEA,\textsuperscript{13} two reviewing statutes that regulate minimum standards for employees,\textsuperscript{14} and two involving the meaning of ERISA.\textsuperscript{15}

\begin{itemize}
  \item \textsuperscript{13} See Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000); Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097 (2000).
  \item \textsuperscript{14} See Christensen v. Harris County, 120 S. Ct. 1655 (2000) (addressing claims for compensatory time under FLSA); United States v. Locke, 120 S. Ct. 1135 (2000) (addressing claims based on state laws that impose minimum training requirements).
\end{itemize}
The Court's more diverse diet of workplace law cases probably reflects the influence of numerous legal and policy changes. A sharp decline in union density has diminished the level of labor-management controversy competing for the Court's attention. The resolution of many major interpretive battles under the now middle-aged Title VII has similarly diminished the urgency of Supreme Court litigation in that area. Perhaps more important than these first two factors, there has been a proliferation of federal workplace enactments since the early 1970s, mostly in the areas of minimum standards, retirement, and disability discrimination. Congress's greater reliance on government regulation as a means of ordering employment relations has presented the Court with a range of new interpretive issues. Finally, there have been major changes in the demographics and structure of the labor market. An increasingly older workforce has given rise to pervasive concerns with respect to matters of retirement eligibility and benefits as well as age discrimination by employers. Corporate downsizing, the rise of the contingent workforce, and the related fragmentation in job markets means that millions of employees change careers more frequently than in the past, a change often accompanied by real or perceived mistreatment in diverse occupational and jurisdictional settings. Whatever weight one assigns to these different explanations, the result is that

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issues other than labor-management relations and race or sex discrimination now occupy the bulk of the Court's attention when it comes to workplace law. Since the early 1990s, these non-labor-management relations, non-race/sex cases have comprised over 70 percent of the Court's workplace law decisions. (Figure 9)

Amidst the ebb and flow of different subject matter areas, one might wonder how employees and unions are faring against employers. The short answer is, employees' and unions' won-loss record against employers is pretty consistent over time. There is no substantial difference between the Burger and Rehnquist eras; employees and unions won slightly over 50 percent of the time before the Burger Court (53.2 percent) and they have won just under 50 percent of their cases in the Rehnquist Court (47.5 percent).  

![Figure 10](image)

Employees Versus Employers as Prevailing Parties

<table>
<thead>
<tr>
<th>% Wins</th>
<th>Burger</th>
<th>Rehnquist</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wins</td>
<td>53.2</td>
<td>47.5</td>
</tr>
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17. Apart from the statutes mentioned at notes 10–12 supra and accompanying text, this category also includes a series of cases arising under negligence-based federal statutes that apply mostly to workers in the railroad or maritime industries (e.g., Jones Act and Federal Employers' Liability Act (FELA)) as well as miscellaneous statutes (e.g., immigration, antitrust, civil service, social security) in which employee interests or concerns were presented. The seventh case from the just-ended term falls in this miscellaneous category. See Beck v. Prupis, 120 S. Ct. 1608 (2000) (raising claims under the Racketeer Influenced and Corrupt Organizations Act (RICO)). Percentages for all cases other than labor relations and race/sex discrimination went from 14.7% of 34 labor and employment cases decided in 1969-1971 and 26% of 50 cases decided in 1972-1974 to 43.5% of 69 cases decided in 1987-1989, 71.8% of 39 cases decided in 1993-1995, and 72.2% of 54 cases decided in 1996-1999.

18. There is also a smaller group of decisions, less than 60 altogether, pitting employees against unions. These cases involve duty of fair representation or union security claims, Landrum Griffin Act claims, and also claims of race or sex discrimination by employees against their union. Here employees have done slightly better in the Rehnquist era (45% wins in Burger years v. 52.9% wins in Rehnquist years). The number of decisions is quite small, however, averaging about two per term. The difference in win rates be-
These results may strike some as counterintuitive. The Burger Court, while more conservative than the Warren Court on employee rights issues, is viewed as distinctly less conservative than the Rehnquist Court in the workplace law area. I am at an early stage in my analysis of the database, but a more realistic view of these results is that they are incomplete rather than counterintuitive. As a general proposition, disputes are more likely to be litigated (rather than settled) in close cases; this is true at the appellate as well as trial court levels.

When both parties can invest substantial resources and present reasonable legal arguments to a Court that has purely discretionary jurisdiction, the parties' win rates may tend to be comparable over time.

Further, a simple win-loss evaluation does not account for the magnitude or impact of a decision. For example, a union loss in a major case like *Lechmere, Inc. v. NLRB* and a union win in a minor case like *Auciello Iron Works, Inc. v. NLRB* count the same. Finally, and perhaps most important, using individual case outcomes to measure changes in Supreme Court ideology or policy fails to take account of changes in the content and difficulty of cases brought before the Court. Conservative Justices can appear more liberal if they accept and then
decide cases in which pro-civil rights votes were relatively easy to cast. In the labor relations and civil rights areas, the employer community may well play a much larger role in presenting "hard cases" than it did 20 years ago. Employers may push the envelope of what they view as a sympathetic Court; their win-loss rate would perhaps be higher if they had sought less ambitious results.

Looking at outcomes from some different vantage points, it is noteworthy that public employees fare significantly worse against employers than their private counterparts; this applies for both the Burger and Rehnquist Courts (Burger 44.0 percent v. 56.7 percent; Rehnquist 36.1 percent v. 51.9 percent). Preliminary analyses indicate the difference does not seem to be attributable to the constitutional nature of public employees' claims; it may instead reflect the Court's deferential view toward state and local governments though more study is needed here.

Another interesting feature involves the role played by Supreme Court deference to administrative agencies. Agency deference is an im-

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25. See Lawrence Baum, Measuring Policy Change in the Rehnquist Court, 23 Am. Pol. Q. 373 (1995) (concluding that early Rehnquist Court's record of outcomes in civil liberties cases overstated support for civil liberties because Court increasingly accepted cases in which pro-civil liberties votes were relatively easy to cast). See generally, Gregory A. Caldeira and John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109 (1988) (finding that Justices are significantly more likely to grant review when interest groups file amicus curiae briefs in support of a certiorari petition).

26. The use of significant refers to results that are statistically significant using the chi-square statistic (Pearson's coefficient). The difference between public employee and private employee win rates was significant (p = .049) for the 301 Burger Court cases pitting employees or unions against employers (217 private, 84 public). The difference also was significant (p = .035) for the 217 Rehnquist Court cases (156 private; 61 public) involving employees or unions against employers. Finally, the difference was significant (p = .004) for the 518 total cases.
important element of statutory construction, one that in theory should have become more prominent since the Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*. Many workplace law statutes, as well as applicable provisions of the Constitution, are enforceable through private rights of action and involve little or no agency presence. Agencies therefore have not been players in most of the Court's labor and employment cases. Of the approximately 175 cases in which an agency rule, adjudication, or guidance was at issue, there is no significant difference between the success of agency positions before and after *Chevron* (68.5 percent v. 62.1 percent). The majority of cases in which the Court addressed an agency's legal position involved either the National Labor Relations Board or the Department of Labor. Agency win rates were virtually identical for these two repeat players: 67 percent for the Labor Board and 63 percent for the Labor Department.

A final component of this brief overview involves the Court's attention to workplace law cases that present constitutional issues. The constitutional share of the Court's labor and employment decisions has ranged from 15 percent to 25 percent for most of our 30 year period; it was highest between 1975 and 1986, and it has been relatively consistent since the Rehnquist era began. (Figure 13)

Once again, however, the substantive details of the Court's constitutional workplace law decisions reveal patterns not apparent from the broad picture. During the second half of our three decade period, the

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Court has shifted its relative focus of attention from cases in which individual employees contest governmental action under the First, Fifth, or Fourteenth Amendments to cases in which state governments challenge federal regulation of the public employment relationship under the Tenth or Eleventh Amendments. (Figure 14)

Three-fifths of the cases in which employees claimed that a federal or state employer or a union denied their rights to freedom of speech or association, due process, or equal protection were decided between 1969 and 1983; only two-fifths have been decided since 1984. But when examining workplace law cases that implicate federalism and matters of dual sovereignty, the emphasis is quite the opposite. The Court decided just over 30 percent of these cases between 1969 and 1983 and...
has decided nearly 70 percent since 1984. While the overall number of employee rights constitutional cases greatly exceeds the number of states' rights decisions (91 to 13), the two categories have grown closer in recent years even in terms of absolute numbers. Over the past six Terms, including the one just completed, the Court has decided nine employment law cases involving the free speech, equal protection, or due process claims of employees under the Constitution and four workplace law cases involving Tenth or Eleventh Amendment claims by States. In this respect among others, we have surely come a long way from the early Burger era.

II. Sovereign Immunity and Age Discrimination

In the highest profile labor and employment case of this Term, Kimel v. Florida Board of Regents, the Court extended its recently developed Eleventh Amendment jurisprudence into the heart of Congress's civil rights agenda. The Court in Kimel held that Congress had exceeded its authority under section five of the Fourteenth Amendment when it subjected States to monetary damages suits by their employees as part of the 1974 amendments to the ADEA.

A. Background to the Kimel Decision

1. The Court's Recent Eleventh Amendment Appetite

Since the mid-1990s, the Court has displayed a keen interest in vindicating Eleventh Amendment challenges to federal statutory authority. On five separate occasions between 1996 and 1999, Court decisions have limited congressional power to authorize private rights of action against the States. A brief review of two of those decisions provides necessary context for Kimel.

The lead case, Seminole Tribe of Florida v. Florida, held that Congress lacked the power under the Commerce Clause of Article I to abrogate state sovereign immunity under the Eleventh Amendment. In overruling its own 1989 decision to the contrary, the Court concluded that nothing in Article I can be used to escape the limitation on Article

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29. 120 S. Ct. 631 (2000).
30. The Eleventh Amendment states, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Historically, the Court has interpreted the 11th Amendment to bar private suits for monetary relief against a State unless either (a) the State itself has consented to be so sued or (b) Congress has subjected the States to such private actions through a legitimate exercise of its supervening federal authority. See Pa. v. Union Gas Co., 491 U.S. 1 (1989), overruled on other grounds by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
31. 120 S. Ct. at 650. Section five states, "(t)he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.
II jurisdiction that was embodied in the Eleventh Amendment. After *Seminole Tribe*, the Court's decisions left open section five of the Fourteenth Amendment as a permissible means for Congress to abrogate the sovereign immunity of the States.

The following Term, in *City of Boerne v. Flores*, the Court held that Congress had exceeded its powers under section five when it enacted the Religious Freedom Restoration Act of 1993 (RFRA). In RFRA, Congress had responded to a 1990 Supreme Court ruling that under the Fourteenth Amendment a State need not demonstrate a compelling interest in order to justify laws of general applicability that incidentally burden the free exercise of religion. The 1993 Act required use of a strict scrutiny test in such circumstances and the *Boerne* Court—reaffirming the remedial nature of Congress's power under section five—concluded that Congress had engaged in substantive rather than enforcement legislation. The Court readily acknowledged that Congress has the authority under section five to enact laws enforcing the constitutional right to free exercise of religion. But in creating a strict scrutiny standard for state legislation where the Court had previously applied a deferential standard of review, Congress had gone too far, in essence "determin[ing for itself the nature of] what constitutes a constitutional violation." Notwithstanding its emphatic distinction between permissibly remedial and impermissibly substantive legislation, the *Boerne* Court recognized that the line between the two is not easy to draw. Seeking to provide guidance as to when preventive federal legislation may qualify as an appropriate section five remedial measure, the Court set forth a somewhat elusive "congruence and proportionality" test. With respect to "congruence between the means used and the ends to be achieved," the Court noted the importance of examining the legislative record. The mischief addressed by Congress must itself be constitu-

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33. *Id.* at 72–73, overruling *Union Gas*, 491 U.S. 1. The *Union Gas* decision dealt with the Commerce Clause, whereas *Seminole Tribe* involved the parallel provisions of the Indian Commerce Clause. The Court in *Seminole Tribe* found the two clauses were indistinguishable for Eleventh Amendment purposes, and overruled *Union Gas*. See 517 U.S. at 62–63, 66.
34. 521 U.S. 507 (1997).
39. 521 U.S. at 519.
40. *Id.*
41. *Id.*
42. *Id.* at 520.
43. *Id.* at 530.
tionally cognizable under the Fourteenth Amendment. In the Court's view, a section five initiative can be justified only if Congress has identified or pointed to unconstitutional behavior engaged in by the States. The RFRA fell short on this score, in marked contrast to the Voting Rights Act of the 1960s which responded to intentional discrimination by Southern States.\(^\text{44}\) The legislative history for RFRA simply lacked evidence that States were passing laws of general application motivated by religious bigotry that would justify strict scrutiny review.\(^\text{45}\)

The Boerne Court's analysis also pointedly suggested that without congruence there could be no proportionality. The Court assessed RFRA's broad reach and scope, and concluded that the Act imposed heavy burdens on the States' traditional general regulatory powers.\(^\text{46}\) In reasoning that these burdens "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause," the Court again relied on the importance of Congress's failure to identify constitutionally cognizable misconduct by the States.\(^\text{47}\)

2. Facts and Lower Court Rulings

Perhaps not surprisingly, many States viewed the Court's invalidation of RFRA as inviting similar challenges to federal civil rights legislation that exposed them to monetary liability. A prime target immediately became the 1974 amendments to the ADEA, extending the scope of that landmark employment discrimination statute to include state and local governments.\(^\text{48}\) Between April and December of 1998, within 18 months of the City of Boerne decision, eight circuits decided cases in which a state employer challenged older employees' right to

\(^{44}\) Id. at 530 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).
\(^{45}\) Id. at 534–35.
\(^{46}\) Id. at 534. The unconstitutional conduct at issue in this portion of the Court’s opinion was the possible action by states that would have been at odds with the RFRA, i.e., laws motivated by religious bigotry. Thus, the Court’s proportionality discussion is not entirely independent in analytical terms: it also relies in part on the Court’s earlier conclusion that RFRA is per se a change in the substantive constitutional standard that only the Court can prescribe.

In the 1998 term, the Court applied its City of Boerne approach to invalidate two federal laws outside the civil rights arena. See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) [Florida Prepaid] (holding Congress lacks power to abrogate States' immunity from patent infringement claims under section five); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding Congress did not validly abrogate States' immunity from trademark misrepresentation claims under section five). The Court's analysis reaffirmed the important role it has assigned to legislative history. The inadequate record Congress had made regarding constitutionally cognizable State misconduct figured prominently in the Court's determination that a patent infringement statute lacked proportionality as applied to the States. See Fla. Prepaid, 527 U.S. at 640–47. A third Eleventh Amendment defeat for Congress in the 1998 term was Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress lacks power under Article I to abrogate States' sovereign immunity in state court as well as federal court).

sue for damages under the ADEA.\textsuperscript{49} Two aspects of these cases caught my attention. First, plaintiffs in all eight circuits were university employees. Most of them were professors, and some were even employees of a state law school. It is rare that a middle-aged legal academic at a state university gets to combine theory and practice in such a directly personal setting.

The second noteworthy aspect of these eight decisions is that most were \textit{not} prepared to limit Congress's Fourteenth Amendment powers with respect to the ADEA. Six of the eight appellate courts concluded that Congress had acted in congruent and proportional fashion when extending ADEA protections to state employees.\textsuperscript{50} Indeed, the long and thoughtful lead decision from the Seventh Circuit was authored by a Reagan appointee.\textsuperscript{51} The lower courts were applying the \textit{Boerne} test, but they did not view \textit{Boerne}'s holding as determinative on this issue.

The \textit{Kimel} case, one of the two appellate court decisions to come down against Congress during this period, stems from three separate actions brought within the Eleventh Circuit. Senior university faculty members in Alabama and Florida alleged they were victims of a range of discriminatory practices, including an age-based evaluation system and a refusal to pay certain previously agreed upon salary adjustments.\textsuperscript{52} Plaintiffs in each case sought back pay and liquidated or punitive damages.\textsuperscript{53} Both the university in Alabama and the Board of Regents in Florida moved to dismiss, contending the suits were barred by the Eleventh Amendment.\textsuperscript{54} The district courts split on the Eleventh Amendment issue and the court of appeals consolidated the cases for review.\textsuperscript{55}

By a 2-to-1 majority, the Eleventh Circuit held, on a divided rationale, that the ADEA did not abrogate the states' sovereign immunity. Judge Edmondson took the position that Congress in the text of the

\textsuperscript{49} See \textit{Kimel v. Fla. Bd. of Regents}, 139 F.3d 1426 (11th Cir. 1998); \textit{Goshtasby v. Bd. of Trs. of Univ. of Ill.}, 141 F.3d 761 (7th Cir. 1998); \textit{Scott v. Univ. of Miss.}, 148 F.3d 493 (5th Cir. 1998); \textit{Keeton v. Univ. of Nev. Sys.}, 150 F.3d 1055 (9th Cir. 1998); \textit{Humenansky v. Regents of Univ. of Minn.}, 152 F.3d 822 (8th Cir. 1998); \textit{Coger v. Bd. of Regents of the State of Tenn.}, 154 F.3d 296 (6th Cir. 1998); \textit{Migneault v. Peck}, 158 F.3d 1131 (10th Cir. 1998); \textit{Cooper v. N.Y. State Office of Mental Health}, 162 F.3d 770 (2d Cir. 1998).

\textsuperscript{50} See \textit{Goshtasby}, 141 F.3d at 769–72 (7th Cir.), \textit{Scott}, 148 F.3d at 501–03 (5th Cir.), \textit{Keeton}, 150 F.3d at 1057–58 (9th Cir.), \textit{Coger}, 154 F.3d at 305–07 (6th Cir.), \textit{Migneault}, 158 F.3d at 1136–39 (10th Cir.), \textit{Cooper}, 162 F.3d at 777–78 (2d Cir.).

\textsuperscript{51} See \textit{Goshtasby}, 141 F.3d at 764–72. Judge Kanne, the author of the \textit{Goshtasby} decision, was appointed by President Reagan in 1987. His fellow panel members were Judge Rovner (a Reagan district judge appointee elevated by President Bush) and Judge Evans (a Carter district judge appointee elevated by President Clinton).

\textsuperscript{52} See \textit{Kimel}, 120 S. Ct. at 638. The third district court case involved a Florida Corrections Department employee who alleged he was not promoted due to his age. \textit{Id.} at 639.

\textsuperscript{53} \textit{Id.} at 638–39.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} at 639.
ADEA had not expressed an unmistakably clear legislative intent to abrogate, an intent that was required under the Supreme Court's earlier precedents. He therefore did not reach the question of whether the ADEA could have been properly enacted under section five, although he expressed doubt on that score as well. Judge Cox declined to rely on Judge Edmondson's "no clear intent to abrogate" analysis. He concluded that "[w]hether or not Congress clearly expressed its intent, it lacks the power to abrogate the states' immunity... under the ADEA." Applying the City of Boerne standard, Judge Cox expressed the view that the ADEA came up short, both because Congress conferred rights "far more extensive than those the Fourteenth Amendment provides" and because the statute was not "a proportional response to any widespread violation of the elderly's constitutional rights."

B. The Supreme Court's Reasoning in Kimel

The Supreme Court in Kimel considered both the Edmondson and Cox justifications. Writing for seven members of the Court (all except Justices Thomas and Kennedy), Justice O'Connor concluded that the language of the ADEA does make Congress's intention to abrogate the States' immunity unmistakably clear. The Court focused on the ADEA's statement in section 626(c) that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in" certain specified sections of the FLSA. These incorporated provisions included section 216(b) authorizing employees to bring actions for back pay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." The Court in several prior cases had construed the language of these two provisions—sections 626(c) and 216(b)—to mean that the ADEA plainly incorporated FLSA remedies. Respondents and Justices Thomas and Kennedy maintained that specific language in the two provisions

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56. 139 F.3d at 1430–33 (citing and relying on Dellmuth v. Muth, 491 U.S. 223 (1989)).
57. Id. at 1430 & n.8.
58. Id. at 1445.
59. Id. at 1446–47. Judge Hackett, the third member of the panel, dissented from the panel's holding. He concluded that Congress's intent to abrogate the States' immunity from ADEA claims was stated with unmistakable clarity in the statute and that the ADEA is a valid exercise of Congress's section five powers. Id. at 1434–40.
60. Kimel, 120 S. Ct. at 640–42.
61. Id. at 640 (quoting 29 U.S.C. § 626(b)).
62. Id. at 640 (quoting 29 U.S.C. § 216(b)). The term public agency is defined to include "the government of a State" and "any agency of... a state." Id. (quoting 29 U.S.C. § 203(x)).
was not clear enough to pass muster under the Court's stringent test, but the majority indicated its unwillingness to find ambiguity where none had previously existed. The Court also was influenced by the fact that Congress in 1974 had added the specific references to "public agencies" and "Federal or State" courts in direct response to a 1973 Supreme Court holding that the original language of section 216(b) was not clear enough to abrogate States' immunity.

Having determined that the ADEA manifested Congress's intent to abrogate, the Court went on to hold that Congress lacked the constitutional power to effectuate this plain intent. Writing for the same slender five-person majority that had formed in Seminole Tribe, Justice O'Connor offered a two-pronged analysis in concluding that the ADEA is not "appropriate legislation" under section five.

First, the majority focused on the nature of unconstitutional conduct that could be addressed by Congress. The Court insisted that the substantive requirements not to discriminate that are imposed by the ADEA on State governments are "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." Here, the Court relied on its trilogy of earlier decisions applying the deferential rational basis standard to uphold mandatory retirement of public employees under several statutes. The Court in Murgia, Bradley, and Gregory had determined that reliance by legislatures on broad and imperfect generalizations with respect to age did not violate the Equal Protection Clause. In the Kimel Court's view, the mandatory retirement trilogy made clear that from a constitutional standpoint, a State may invoke old age as a proxy for physical or mental deterioration, or for any other quality related to the State's legitimate interests as an em-

64. Id. at 640–41 (addressing argument that the remedies accorded under § 626(c)(1) render incorporation of § 216(b) ambiguous); id. at 641–42 (addressing argument that phrase "court of competent jurisdiction" in § 216(b) makes Congress's intent to abrogate less than clear).

65. Id. at 641.

66. 120 S. Ct. at 642 (discussing Congress's language additions to overcome the Court's concerns expressed in Employees of Dept't of Pub. Health and Welfare v. Dept't of Pub. Health and Welfare, 411 U.S. 279, 283 (1973)).

67. The five members of the Kimel majority, Justices Rehnquist, O'Connor, Kennedy, Scalia, and Thomas, voted together in Seminole Tribe, Florida Prepaid, College Savings Bank, and Alden. Justices Stevens, Souter, Ginsburg, and Breyer dissented in each case, often in heated terms. The alignment in Boerne was somewhat different; there, Justices Stevens and Ginsburg joined the majority while Justice O'Connor joined the dissenters.

68. Kimel, 120 S. Ct. at 645 (emphasis added).

ployer, even if the proxy is starkly inaccurate. It followed, said the majority, that the ADEA, which limits or conditions the use of age as a proxy in a wide range of employment settings, necessarily prohibits substantially more state employer conduct than would be held unconstitutional under the rational basis standard. Thus, the ADEA as a conceptual matter “cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”

The second prong of the Court’s reasoning addressed the particulars of States’ actual misconduct as employers in the age discrimination area. Having virtually closed the door in principle on Congress’s Fourteenth Amendment powers to address age discrimination by the States, the Court hesitated before shutting that door in practice. Even if the ADEA does prohibit little conduct that a court would hold unconstitutional, the majority recognized there is more to the section five inquiry. Congress possesses authority to enact “reasonably prophylactic legislation” under the Fourteenth Amendment in response to “[d]ifficult and intractable problems” that Congress itself has identified. The Court therefore examined the legislative record of the ADEA to determine whether Congress had identified patterns or practices of age discrimination by state employers. The Court’s review led it to find no such evidence had been presented in congressional hearings or elsewhere in the legislative history. Given that Congress lacked a reasonable basis for believing prophylactic legislation was needed to address States’ misconduct, the ADEA was not, as a practical and evidentiary matter, a valid exercise of Congress’s section five powers.

The Court closed by observing that its decision was not “the end of the line” for state employees who are victims of age discrimination. All 50 states have passed age discrimination laws, and avenues of recovery from state employers remain available under these statutes.

C. Disrespecting Congress

1. Section Five and Rational Basis

Unlike City of Boerne, where Congress in the RFRA had legislated strict scrutiny to override the Court’s rational basis test, the two branches agree that age-based classifications warrant rational basis review under the Equal Protection Clause. One possible implication

70. See Kimel, 120 S. Ct. at 645–47.
71. See id. at 647–48.
72. Id. at 647 (quoting City of Boerne, 521 U.S. at 532).
73. Id. at 648.
74. Id. at 648–50.
75. Id. at 650.
of the Court's opinion is that Congress's powers under section five should not—perhaps even can not—abrogate Eleventh Amendment immunity when states' legislative or administrative judgments are subject only to minimal scrutiny. That implication, however, is at odds with relatively recent Court decisions upholding exercises of the section five power when the classifications Congress prohibited were reviewable under a rational basis standard. In 1980, the Court in *Maher v. Gagne* sustained Congress's abrogation of Eleventh Amendment immunity for attorneys' fees claims stemming from unlawful denials of welfare benefits, denials subject only to rational basis scrutiny.\(^77\) Four years earlier, the Court in *Fitzpatrick v. Bitzer* upheld the Eleventh Amendment abrogation contained in the 1972 legislation extending Title VII's ban on gender discrimination to the states.\(^78\) The Court in *Fitzpatrick* acted at a time when rational basis review was still applicable to gender classifications.\(^79\)

Governmental distinctions subject to rational basis review are not, of course, immune from invalidation. The Court has a respected and still vibrant tradition of holding States in violation of the Equal Protection clause if the challenged classification's relationship to State objectives "is so attenuated as to render the distinction arbitrary or irrational."\(^80\) The Court chose to ignore that line of cases, presumably because of its belief that most if not all arbitrary age discrimination is not unconstitutionally arbitrary.\(^81\) By doing so, the Court made it

\(^{77}\) 448 U.S. 122, 124–25 & n.5, 132 (1980) (reciting non-suspect class nature of equal protection claim and stating that Congress acts within section five authority in allowing fee awards where "plaintiff prevails on a wholly statutory, non-civil-rights claim" that is pendent to the aforementioned constitutional claim).


\(^{79}\) See *Reed v. Reed*, 404 U.S. 71, 75–77 (1971). It was not until the Term following *Fitzpatrick* that a majority of the Court held gender classifications were subject to heightened scrutiny. *Craig v. Boren*, 429 U.S. 190, 197–99 (1976). A plurality of the Court had so held in *Frontiero v. Richardson*, 411 U.S. 677, 682–91 (1973) (Opinion of Brennan, J., joined by Douglas, White and Marshall, JJ). *But see id.* at 691 (Stewart J., concurring in judgment, based on *Reed*); *id.* at 691 (Powell, Burger and Blackmun JJ, concurring in judgment but refusing to hold that classifications based on sex must be subject to heightened scrutiny). Justice Rehnquist, the lone dissenter in *Frontiero*, was the author of *Fitzpatrick*; that opinion does not cite *Frontiero*, and indeed does not discuss which equal protection standard should apply.


\(^{81}\) *Kimel*, 120 S. Ct. at 647 (reaffirming *Gregory*'s conclusion that even if no judges suffered significant deterioration in performance at age 70, a law mandating their retirement would not be unconstitutionally arbitrary or irrational). *See also Kimel*, 139 F.3d at 1447 (Cox, J. concurring) (noting that "ADEA was enacted to combat all arbitrariness, unconstitutional or not").
much harder for Congress to regulate State employers with respect to classifications not subject to heightened scrutiny.

2. Section Five and Section One

An even more troubling implication of the *Kimel* reasoning is that Congress's powers under section five are in effect limited to conduct that the Court has already declared unconstitutional—or would very likely invalidate—under section one. Although the Court's opinion recites the traditional bromides about Congress being entitled to special respect in this area, the majority's heavy reliance on the mandatory retirement trilogy strongly suggests that a State's use of broad and unsubstantiated generalizations when classifying or evaluating employees is as protected from section five congressional regulation as it is from section one judicial invalidation.

There are historical and conceptual reasons to question this line of analysis. As the Court itself has long recognized, the framers and ratifiers of the Fourteenth Amendment were principally concerned to broaden the power of Congress, not the judiciary. In the wake of the Court's failure to protect the rights of fugitive slaves or freed former slaves before the Civil War, the amendment's sponsors and supporters would not have tethered congressional enforcement authority under section five to a possibly reluctant judiciary's enforcement approach. The modern Court has repeatedly acknowledged Congress's central role in enforcing the amendment's guarantees and has often equated the scope of section five authority with the broad powers set forth in the Necessary and Proper Clause of Article I. In short, Congress's powers would seem to go well beyond the invalidation or prohibition of conduct already labeled unconstitutional, to encompass prevention and deterrence of conduct that Congress could rationally have determined would threaten the right to equal protection.

Congress has two distinctive institutional virtues that buttress its broad section five role. First, congressional enforcement is democratic, whereas judicial review—especially strict scrutiny review of statutes—is the opposite. When the Court eschews heightened scrutiny and upholds statutes that mandatorily retire police officers, judges, and for-

82. *Kimel*, 120 S. Ct. at 644.
83. *See* Katzenbach v. Morgan, 384 U.S. 641, 648 & n.7 (1966) (citing to historical evidence); Ex Parte Virginia, 100 U.S. 339, 345 (1879).
85. *See* Colker, *supra* note 38 at 663–64.
eign service employees, it is in essence deferring to legislative limits placed on groups with adequate access to the political process. Even here, the deference accorded in the trilogy was not the virtual invitation to arbitrary treatment that is described in *Kimel.* Still, this deference does reflect the Court's understanding that its section one role is fundamentally antidemocratic and should be invoked with caution. It is quite another matter, however, for the Court to apply such reservations to Congress's politically accountable role under section five. Yet, that is what the *Kimel* Court in essence has done by reasoning that Congress should be constitutionally unable to prevent or deter arbitrary state action against older persons who are not sufficiently "discrete and in-

Congress's second institutional virtue, the capacity to gather and evaluate information in both structured and informal settings, also contributes to a distinctive section five role. When it enacted the ADEA, Congress amassed a powerful record illustrating the pervasive nature of age-based stereotypes and discriminatory generalizations in the American workplace. Its statutory response, which seeks to prohibit, prevent, and deter such arbitrary employer conduct, applies in the public sector not only to laws enacted by state legislatures but also to more individualized and even routine decisionmaking by personnel managers, supervisors, and government agencies. State legislative rules sanctioning the arbitrariness of mandatory retirement have survived rational basis review, but the Equal Protection Clause need not as a result permit individual state employers to invoke such stereotypes

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90. See supra note 76 (reciting congressional finding and purpose).

and generalizations whenever they fix terms and conditions of employment for older workers. More than three decades after the ADEA's enactment, common sense and social science research support Congress's initial conclusions that arbitrary stereotypes and generalizations—not hostile or negative feelings towards older people—are at the root of unequal treatment in the workplace. The Court in Kimel was unwilling to accord meaningful recognition to Congress's special legislative competence in identifying this threat to equality and then acting to limit its consequences.

3. Section Five and Legislative History

As indicated, a key part of the majority's analysis involved reviewing the legislative record to determine whether Congress has sufficiently identified a problem justifying preventive section five action. The Court's tone in conducting this review is one of deep skepticism. The majority dismisses petitioners' arguments from the legislative record as no more than "isolated sentences" that are "cobble[d] together from a decade's worth of congressional reports and floor debates." The Court concludes that the extension of the ADEA to millions of state government employees was "an unwarranted response to a perhaps inconsequential problem." In concluding that age discrimination by state employers was "perhaps inconsequential" in the 1970s, the Court expressly challenges statements to the contrary by a key legislative proponent in Congress and documented findings to the contrary by the state of California.

Kimel's skeptical scrutiny of the ADEA legislative record signals a remarkable change in perspective. The Court in prior decades has sustained section five legislation without expecting Congress to produce the kind of legislative findings demanded in Kimel.


93. Kimel, 120 S. Ct. at 649.

94. Id. at 648–49.

95. See id. at 649 (questioning validity of Senator Bentsen's statements on the floor that state and local governments were discriminating against the elderly in their employment practices).

96. See id. (questioning findings on age discrimination in public agencies reported to the House in a study commissioned by California legislature). See Ray, supra note 38 (manuscript at 10–11, on file with author).

97. See Katzenbach, 384 U.S. at 652–56, 669 & n.9 (upholding congressional invalidation of state statutes that required literacy in English as a condition of voting, based on hypothesized discrimination against Spanish-speaking minority which dissent noted was without any support in legislative record); Maher v. Gagne, 448 U.S. 122, 132 (1980) (upholding Congress's power to require states to pay attorneys' fees in certain
Boerne, where Congress's creation of new substantive rights under the Fourteenth Amendment triggered a closer review of the RFRA legislative record, the Court noted that legislative findings are not typically required in the section five setting.  

To be sure, the 1974 legislative record contains few detailed findings of arbitrary age discrimination by state employers. That, however, is hardly surprising: the Court's section five decisions at the time did not encourage—much less, demand—the creation of such a record, and the ADEA extension was but a small part of a larger statute dealing with wage and hour matters. In this regard, the ADEA legislative record addressing unconstitutional discrimination by state employers is at least comparable to the record made two years earlier that supported extending Title VII's ban on gender discrimination to the States.

Moreover, the absence of a detailed record for 50 States' employers does not mean Congress acted on a whim in 1974. The extensive legislative findings of arbitrary discrimination by private employers were less than a decade old when Congress extended coverage, and half the states still had no age discrimination laws at all for public employers. Yet the Court in Kimel asserts that the ADEA private sector findings are simply irrelevant to the posited existence of arbitrary discrimination circumstances with no reference to congressional findings of a pattern of unconstitutional state conduct).

98. See City of Boerne, 521 U.S. at 531–32.
99. See Pub. L. No. 93-259, § 28(a)(1)-(4), 88 Stat 55, 78–80 (1974) (featuring 29 sections, of which 28 address FLSA wage and hour issues). Indeed, the legislative history suggests that the omission of government workers from the ADEA seven years earlier was due primarily to the fact that most government employees were not covered by the FLSA at that time and responsibility for ADEA enforcement was to be carried out by the same agency personnel who enforce the FLSA. See S. REP. No. 93-690, at 55 (1974).
101. See Kimel, Appendix to Brief for Respondents, 1a-25a (reporting that 24 states had no age discrimination laws applicable to public employers when Congress extended the ADEA).
nation by state employers. This assertion is especially hard to swallow. In the 1960s and 1970s, union strength in the private sector meant that collectively bargained seniority systems provided substantial protections to millions of older blue collar employees. Arbitrary age discrimination was a more threatening presence in the white collar workforce, principally among professionals, managers, and bureaucrats. These occupational categories are equally if not more prevalent for public employers, and it would surely have been reasonable for Congress to conclude that state employers mistreated their older workers in many of the same ways as private employers.

As a policymaking body, Congress legislates repeatedly in areas of national concern such as age discrimination in employment. Committees and members draw on their institutional and individual experiences to justify more efficient lawmaking without resorting to redundant hearings or extended debate. To regard the brief 1974 legislative history as the entire "record" underlying the ADEA's extension "is essentially . . . [to] treat Congress as if it were a lower federal court," and thereby "erect an artificial barrier to full understanding of the legislative process." 105

In the end, it is hard to escape the conclusion that the *Kimel* Court viewed the ADEA legislative record as a straw man. The majority's distinctly unsympathetic approach to legislative history in the Eleventh Amendment setting is consistent with views expressed by many of the same Justices when resolving disputes over statutory meaning. Several members of the *Kimel* majority have voiced grave doubts about relying on legislative history at all when interpreting statutes. 106 Over

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102. *Kimel*, 120 S. Ct. at 649 (dismissing argument that Congress found substantial age discrimination in private sector as "beside the point").


104. See, e.g., EEOC v. Wyoming, 460 U.S. 226 (1983) (involving mid-level manager in state agency); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) (involving public school teacher). In 1979, state and local governments employed nearly 2.8 million administrators, professionals, technicians, paraprofessionals, and office/clerical workers, comprising 60.9% of their combined workforce. In 1997, these five categories of white collar workers comprised 63.3% of the state and local government workforce, a total of 3.3 million employees. See *Statistical Abstract of the United States* 1981 (102d ed.) at 308; *Statistical Abstract of the United States* 1999 (119th ed.) at 339.


the last 15 years, the Court as a whole has become heavily focused on parsing the literal terms of each statute while minimizing the role of legislative intent. 107 Such individual reservations and collective intentions may have contributed to the harshness of the Court's position toward Congress.

D. The Consequences of Kimel
   1. ADEA Litigation

What does the Court's decision mean for the future of ADEA litigation? To begin with, Kimel leaves a number of matters unaffected. ADEA claims brought against private employers remain fully justified under the Commerce Clause. Further, the Eleventh Amendment does not protect local governments or school boards; unlike the "state action" concept under the Fourteenth Amendment, immunity applies only to the States themselves. 108 As for state defendants, under the Court's venerable Ex Parte Young 109 decision, private individuals may continue to sue state officials for prospective injunctive relief from a violation of federal law. 110 They may even bring an action against state officials for monetary damages, provided the officials are sued in their individual capacities and the relief is sought from them personally rather than from the state treasury. 111

In addition, the Eleventh Amendment protects only against private actions; the federal government may still sue state agencies or employers under the ADEA. 112 This raises interesting policy questions. The EEOC would need an enormous increase in resources to enable it to take up all damages actions against the States that currently are brought by private individuals. Such an increase seems unlikely to ma-

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108. See Alden, 527 U.S. at 756.
110. See Seminole Tribe, 517 U.S. at 73; Alden, 527 U.S. at 756–57.
111. See Hafer v. Melo, 502 U.S. 21, 29–31 (1991); Scheuer v. Rhodes, 416 U.S. 232, 237–38 (1974). In Luder v. Endicott, 86 F. Supp. 2d 854, 865–66 (W.D. Wis. 2000), a district court recently held that state penitentiary officials engaged in employer-type activities could be sued in their individual capacities for monetary relief under the FLSA and that the Eleventh Amendment does not bar such claims against individuals when they act as state employers. In such circumstances, individuals acting as employers who are found liable and who do not possess official capacity qualified immunity may also lack sufficient assets to satisfy the judgment. Assuming that a state statute provides for indemnification, the lower court's holding in Luder raises the prospect that a State would pay the same amount it is precluded from paying directly under the Eleventh Amendment. But see Daniel J. Meltzer, State Sovereign Immunity: Five Authors in Search of a Theory, 75 Notre Dame L. Rev. 1011, 1016–21 (2000) (discussing ways in which injunctions, damage actions against state officials in their individual capacities, and indemnification statutes all provide considerably less relief than a regime premised on direct governmental liability).
terialize even in today's era of budget surpluses.\textsuperscript{113} Yet, if state law protections turn out to be inadequate, an ironic result of \textit{Kimel} could be more intrusive federal enforcement in matters affecting state sovereignty. Moreover, should Congress decide that it wants to encourage states' compliance with federal age discrimination standards, it may have other means at its disposal besides litigation. One possibility would be to condition access to certain related federal funds on a State's agreement to abide by all ADEA requirements.\textsuperscript{114}

Finally, the \textit{Kimel} Court noted that state employees remain able to recover money damages from their employers under age discrimination laws enacted by the states themselves.\textsuperscript{115} These state statutes, however, provide uneven protections to older state employees. Kentucky's statute authorizes age-related reductions in employee benefits that are not permitted under federal law.\textsuperscript{116} Minnesota law permits mandatory retirement at age 70, pursuant to an employer's published retirement policy.\textsuperscript{117} Mississippi law makes no provision for attorneys' fees when state employees prevail in an age discrimination action.\textsuperscript{118}

Such disparities in state law protections were considerably greater before the ADEA extension of 1974. Of the 26 states that had laws covering public employees,\textsuperscript{119} some provided for modest fines but no damages,\textsuperscript{120} others wholly exempted certain state practices,\textsuperscript{121} and still others established a higher standard of proof than is required under the ADEA.\textsuperscript{122} It remains to be seen whether states will revert to earlier

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\item \textsuperscript{113} Direct funding of litigation against the states would not appear to be politically popular. In addition, the EEOC has never been especially well regarded or trusted by Congress.
\item \textsuperscript{114} See South Dakota v. Dole, 483 U.S. 203 (1987). Congress might, for instance, withhold federal training grants or grants to assist older Americans until a state provides sufficient evidence that it is substantially complying with the ADEA.
\item \textsuperscript{115} \textit{Kimel}, 120 S. Ct. at 650, n.* (listing statutes).
\item \textsuperscript{116} KY. REV. STAT. ANN. § 344.110(2)(e) (1998) (language allowing employers to "observe[ ] the terms of a bona fide . . . employee benefit plan . . . which is not a subterfuge"; identical language removed by Congress from the ADEA in 1990).
\item \textsuperscript{117} MINN. STAT. ANN. §§ 363.02 subd.6, 181.81 (1998). See Dorn v. Peterson, 512 N.W.2d 902, 904–05 (Minn. Ct. App. 1994) (applying mandatory retirement exception to private employee claims).
\item \textsuperscript{118} MISS. CODE ANN. § 25-9-131 – 132 (1992) (permitting judicial review by state workers from appeals board decisions "in the manner provided by law," i.e., with no attorney fee awards).
\item \textsuperscript{119} See supra note 101 (reporting that 24 states had no laws applicable to public employees).
\item \textsuperscript{120} See, e.g., DEL. CODE ANN. title 19, § 710 (1970) (prohibiting age-based discrimination against employees between 45 and 65 years of age; violators fined $200 for first breach and $500 for second). See also FLA. STAT. ANN. § 112.043 (1992) (prohibiting age-based employment discrimination by state boards or officials without providing for any enforcement).
\item \textsuperscript{121} See, e.g., FLA. STAT. ANN. § 112.043 (1992) (prohibiting State from engaging in age discrimination in employment "unless age restrictions have been specifically established through published specifications for a position, available to the public").
\item \textsuperscript{122} See, e.g., CAL. LAB. CODE § 1420.1 (1972) (prohibiting discrimination against employees between the ages of 40 and 64 "solely on the ground of age"); FLA. STAT. ANN. § 112.043 (1992) (prohibiting age discrimination against state employees "solely on the...
practices that are plainly inconsistent with the ADEA, such as extending mandatory retirement to most state workers or excluding older employees from certain fringe benefits.\textsuperscript{123} Seniors in general are a formidable political constituency, but this may be less true when the voting bloc is seniors who are public employees. Further, states face many weighty demands on their fiscal resources, and economizing on the backs of state bureaucracy would seem to be harmless—perhaps even popular—in political terms.

2. Eleventh Amendment Developments

With respect to the constitutional implications of Kimel, the Court has crossed the Rubicon into core civil rights territory, and states have begun lining up to claim additional Eleventh Amendment immunities. The Court agreed to decide next term whether Congress has the section five authority to lift States' immunity from cases brought under the Americans with Disabilities Act.\textsuperscript{124} The circuits are split on the validity of ADA abrogation,\textsuperscript{125} though a post-Kimel decision authored by Judge Easterbrook in the Seventh Circuit concluded that Kimel's ADEA analysis controls.\textsuperscript{126} Specifically, Judge Easterbrook emphasized that ADA proscriptions on employer conduct go well beyond what would be prohibited under Fourteenth Amendment rational basis analysis and also that the ADA legislative record does not demonstrate States were engaged in irrational discrimination.\textsuperscript{127}

The constitutionality of abrogation under the Equal Pay Act (EPA) and the Family and Medical Leave Act (FMLA) are being litigated in the lower courts. Congress’s section five authority under the EPA was recently upheld by the Eleventh Circuit as a congruent and propor-

\begin{itemize}
\item \textsuperscript{123} For an example of the latter, see Pub. Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989) (upholding Ohio's disability retirement scheme, which provided \textit{inter alia} that public employees who became disabled before age 60 received at least 30% of their final average salary while those 60 and over who became disabled were not similarly protected). Congress overrode Betts in 1990 when it passed the Older Workers Benefit Protection Act.

\item \textsuperscript{124} See Garrett v. Univ. of Ala. at Birmingham Bd. Of Trs., 193 F.3d 1214 (11th Cir. 1999), cert. granted, 68 U.S.L.W. 3491 (U.S. Apr. 17, 2000) (No. 99-1240). The Court granted certiorari on this issue in two other cases this term; the grants were dismissed after the parties settled. See Alsbrook v. Ark., 120 S. Ct. 1285 (2000); Florida Dep't of Corrections v. Dickson, 120 S. Ct. 1236 (2000).


\item \textsuperscript{126} Erickson v. Bd. of Governors of State Colleges and Univs. for Northeastern Ill. Univ., 207 F.3d 945 (7th Cir. 2000).

\item \textsuperscript{127} See 207 F.3d at 948–52.
\end{itemize}
tional response to the problem of wage discrimination. Although the Court acknowledged that Congress had made no findings with respect to wage discrimination in the public sector, it opined that "such [absence of] findings [is] not fatal because gender discrimination is a problem of national import." Congress, of course, thought that age discrimination was a problem of national import, but the court of appeals may be forgiven for absorbing from *Kimel* the teaching that courts alone should decide which forms of status discrimination engaged in by state employers are important enough to warrant section five protection.

While the EPA has fared well in the lower courts, the FMLA has not. The Second Circuit and a number of district courts have concluded that application of the FMLA to the States exceeded Congress's enforcement powers under section five; several of these cases have been decided since *Kimel*. These recent cases found a lack of congruence and proportionality based in part on Congress's failure to identify "widespread and pervasive evidence of gender-based leave discrimination in the workplace."

One should expect the Supreme Court in the next several years to rule on the constitutionality of abrogating states' immunity under each of these civil rights statutes and perhaps Title VII as well. At the same time, given the practical and constitutional importance of *Kimel*, it is worth noting the thinness of the Court's majority and the vehemence of the four dissenters. In *Kimel*, Justice Stevens (for himself and Justices Souter, Ginsburg, and Breyer) made clear his continuing profound disagreement with the Court's recent forays in the Eleventh Amendment area. The dissenters set forth a very different conception of federalism, grounded in the procedural and political safeguards accompanying national legislation rather than the judge-made doctrine than the judge-made doctrine.

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128. Hundertmark v. Florida Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000).
129. See 205 F.3d at 1276. The per curiam opinion in *Hundertmark* was issued by a panel that included Judge Cox, who had concluded in *Kimel* that Congress lacked section five power to abrogate immunity under the ADEA. See supra n.58 and accompanying text.
130. In addition to *Hundertmark*, cases decided after *Boerne* but before *Kimel* include O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Anderson v. State Univ. of N.Y., 169 F.3d 117, 118 (2d Cir. 1999), vacated, 120 S. Ct. 929 (2000); Ussery v. State of La., 150 F.3d 431, 437 (5th Cir. 1998); Varner v. Ill. State Univ., 150 F.3d 706, 717 (7th Cir. 1998), vacated, 120 S. Ct. 928 (2000). Of course, the circuits heavily favored the validity of ADEA abrogation during this period as well.
of sovereign immunity.\textsuperscript{134} It is apparent that Justice Stevens and his three colleagues will overrule the \textit{Seminole Tribe} line of cases if they are able to secure a fifth vote. This issue has yet to resonate with the general public, but the next President should have a key role in determining whether the Court will continue on its controversial Eleventh Amendment journey or instead abandon the enterprise.\textsuperscript{135}

\section*{III. Minimum Workplace Standards Cases}

The Court decided two cases this Term interpreting statutes that provide certain basic workplace standards protections for employees. In both instances, the Court ruled against the employees' legal position.

A. Christensen v. Harris County\textsuperscript{136}

The dispute in \textit{Christensen} concerned public employees' right to control their own use of compensatory time (comp time) under the FLSA Amendments of 1985.\textsuperscript{137} The amendments were a direct response to the Supreme Court's decision in \textit{Garcia v. San Antonio Metropolitan Transit Authority}.\textsuperscript{138} \textit{Garcia} had reinstated the FLSA as fully applicable to state and local governments, and in the process had removed the Tenth Amendment from the federalism dialogue. The Court reasoned that because "[t]he political process ensures that laws that unduly burden the States will not be promulgated," the judiciary had "no license to employ freestanding conceptions of state sovereignty" based on the Tenth Amendment.\textsuperscript{139}

The political process worked rather well in this instance. While the Executive Branch twice deferred its enforcement of the newly appli-

\footnotesize{134. Id. at 652.}

\footnotesize{135. See, e.g., Tony Mauro, \textit{Split Branches, Little Deference to Congress as the Court Curbs Federal Power}, LEGAL TIMES, May 22, 2000 at 1, 8 (suggesting that Rehnquist Court's attacks on congressional authority are likely to be important in future confirmation battles, but for now there has been little political or public attention paid to these matters).}

\footnotesize{136. 120 S. Ct. 1655 (2000).}


\footnotesize{138. 469 U.S. 528 (1986) (overruling prior precedent and holding that the Tenth Amendment does not prohibit or restrict extension of the FLSA to state and local employers).}

\footnotesize{139. Id. at 550, 556. The Court's recent Eleventh Amendment jurisprudence, culminating for the moment in \textit{Kimel}, may be seen in important respects as an end-run around the reasoning if not the holding of \textit{Garcia}. See Vicki C. Jackson, \textit{Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity}, 75 NOTRE DAME L. REV. 953, 1006–08 (2000) (arguing for a return to reliance on the political and procedural safeguards of the national lawmakers' process to protect States' sovereign immunity); John C. Yoo, \textit{The Judicial Safeguards of Federalism}, 70 S. CAL. L. REV. 1311, 1353–56 (1997) (arguing that \textit{Garcia} has been effectively overruled and \textit{Seminole Tribe} played a central role in this development). Cf. Deborah Jones Merritt, \textit{The Guarantee Clause and State Autonomy: Federalism for a Third Century}, 88 COLUM. L. REV. 1 (1988) (positing an autonomy theory of federalism that would reject both \textit{Garcia} and the Court's previous Tenth Amendment jurisprudence).}
cable overtime requirements for a total of over six months,\(^\text{140}\) representatives of public employer and public employee constituencies negotiated with members of Congress to produce a statute that received overwhelming bipartisan support.\(^\text{141}\)

The employer groups had urgently sought relief from the fiscal pressures of having to make overtime payments, especially with respect to public safety employees who typically work long shifts.\(^\text{142}\) The employee groups had worried that creating a statutory comp time exception to the FLSA's basic rules guaranteeing premium pay for overtime might well invite employer abuse, as employees could accrue endless hours of compensatory time and never be able to use them.\(^\text{143}\) The FLSA amendments addressed both sides' concerns by allowing public employers to award comp time in lieu of overtime pay provided that certain specified conditions were met.\(^\text{144}\) Compensatory time may be provided only pursuant to an agreement reached between employer and employee.\(^\text{145}\) In addition, the 1985 amendments furnish specific protections for employees, giving them the rights to use accrued comp time within reasonable limits,\(^\text{146}\) to be paid in cash for any hours accrued

\(^{140}\) See S. Hrg. 450, Before Subcommittee on Economic Goals and Intergovernmental Policy of the Joint Economic Committee, 99th Cong. 4–5 (1985) (statement of Deputy Undersecretary Susan R. Meisinger) (reporting that the Department of Labor was deferring initiation of FLSA investigations with respect to state and local government employers for six months—from April 15, when Supreme Court issued its mandate in Garcia until October 15—to allow government employers time to bring their pay practices into compliance); 131 CONG. REC. 28986 (1985) (Sen. Wilson) (referring to the Department of Labor's further extension of implementation date until November 1).

\(^{141}\) See 131 CONG. REC. 28983–84 (1985) (Sen. Nickles) (introducing letters of support for legislative compromise on October 24, 1985 from U.S. Conference of Mayors, National League of Cities, National Association of Counties, National Conference of State Legislators, and AFL-CIO); id. at 28983 (Sen. Nickles); id. at 28984 (Sen. Metzenbaum); id. at 28988 (Sen. Hatch and Sen. Ford); id. at 29218–19 (Rep. Murphy); id. at 29219–20 (Rep. Jeffords). The bill passed by voice vote in the Senate and on the suspension calendar in the House. Id. at 28992, 29226.


\(^{143}\) See 1985 Senate Hearings, supra note 142, at 156–57, 160 (statement of Al Bilik, Executive Director, State and Local Division, AFL-CIO Public Employee Department); id. at 375, 377 (statement of Steve McCain, Treasurer, Fraternal Order of Police, Oklahoma City); id. at 561, 568–69 (statement of Edward J. Blasie, President, Detectives Endowment Association, New York City).

\(^{144}\) See 29 U.S.C. § 207(o)(1) (allowing employees to receive compensatory time at a rate of one and one-half hours for every hour of overtime worked); id. at § 207(o)(2) to (5) (setting further conditions governing receipt and use of compensatory time).


\(^{146}\) Id. at § 207(o)(5) (authorizing employees' use of comp time upon request, so long as "the use does not unduly disrupt the operations of the public agency").
above a fixed ceiling, and to cash out all accrued comp time upon termination of employment.

In Christensen, 127 deputy sheriffs employed by a county in Texas had agreed to accept compensatory time in lieu of cash. Later, in an effort to reduce accumulated comp time, the county set certain limits on how much could be accrued, and required its deputy sheriffs to take time off whenever they approached these limits. The county's compelled use policy was not contained in the employer-employee agreements, and the Labor Department had advised the county by letter that such a policy was only permissible under the FLSA if included in the agreements. The Supreme Court sided with the county, holding that nothing in the FLSA or its implementation regulations prohibited a public employer from adopting a policy that requires employees to use up their compensatory time.

Christensen nicely illustrates the potential for indeterminacy in formal language arguments that recently have shaped the Court's approach to statutory interpretation. The 1985 amendments expressly restrict employers' ability to prohibit the use of accrued comp time, but are silent as to the permissibility of employers compelling such use. The majority through Justice Thomas and the dissent through Justice Stevens each sought to take advantage of this congressional silence, asserting divergent default rules.

For the majority, the appropriate background norm was that an employer should be able to prescribe workplace rules absent specific authority to the contrary. In promoting this norm, Justice Thomas relied heavily on the inclusio unius canon as applied to section 207(o)(5) governing employee use of comp time. The canon's application signified to the majority that an employer may not deny an employee's request to use comp time for any reason other than the one expressed in section 207(o)(5), i.e., that the use would unduly disrupt operations. The dis-

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147. Id. at § 207(o)(3) (requiring employers to pay cash for all overtime hours worked once employees have accrued either 240 or, for specified occupations, 480 hours of unused comp time).

148. Id. at § 207(o)(4) (requiring that employees leaving employment be paid for unused comp time at their final regular rate of pay, or their average regular rate over last three years of employment, whichever is higher).

149. Christensen, 120 S. Ct. at 1659.

150. Id.

151. Id.

152. Id. at 1661–63.

153. The canon of construction inclusio unius est exclusio alterius (the inclusion of one thing means the exclusion of alternative things) has been invoked more often by the Court since the late 1980s. See William N. Eskridge and Philip J. Frickey, Cases and Materials on Legislation 639 (2d ed. 1996); William N. Eskridge, The New Textualism, 37 UCLA L. REV. 621, 664 (1990).

154. 120 S. Ct. at 1661.
sent, on the other hand, viewed the applicable background norm as giving employees the right to overtime pay absent specific terms to the contrary in an employer-employee agreement.\textsuperscript{155} The agreement, according to Justice Stevens, is what governs both availability and use of compensatory time; the statutory protections found in section 207(o) address certain anticipated threats to the operation of a comp time regime, but any further conditions or qualifications must be contained in the agreement.\textsuperscript{156} Consistent with this background understanding, the dissent's position with respect to section 207(o) was essentially that an employer may not limit an employee's use of comp time on grounds other than those set forth in the section, unless done pursuant to the terms of an agreement with the employee.

The plausibility of these competing linguistic perspectives might have led a different Court to seek guidance from contextual sources. Congress in 1985 created a narrow exception to an overtime pay rule that had been national law for nearly half a century. The thrust of the three statutory conditions accompanying this exception was to provide employees with certain freedom or control over their newly created comp time accounts.\textsuperscript{157} It was at least puzzling under these circumstances for the Court to conclude that residual power over the accounts rests with employers.

The legislative history accompanying this compromise statute suggests that employee control was precisely what Congress had in mind. For example, in discussing an employee's right to cash out accrued comp time upon termination, the Senate Report observed that rates of pay tend to increase over time, and, accordingly, "it is anticipated that many employers will have a fiscal incentive to allow for the use of accrued compensatory time."\textsuperscript{158} One wonders why the committee would bother to adopt such permissive language if employers could always compel employees to use up comp time because of fiscal constraints. During floor debate, the principal House sponsor expressed his understanding that the bill's accrual provisions would enable employees to bank their comp time "and claim it at any later time . . . during the course of their employment."\textsuperscript{159} The Senate and House proceedings contain numerous other statements from members of both parties reflecting a determination to protect employee flexibility, with no suggestion that unilateral employer action

\textsuperscript{155} Id. at 1665 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting).
\textsuperscript{156} Id. at 1666.
\textsuperscript{157} Compare Heaton v. Moore, 43 F.3d 1176, 1179–80 (8th Cir. 1994) (referring to employees' "bank[ing]" compensatory time in what amounts to an employee-owned savings account of compensatory time").
\textsuperscript{158} S. REP. NO. 99-159, at 12 (1985) (emphasis added).
\textsuperscript{159} 131 CONG. REC. 30989 (1985) (Rep. Murphy) (emphasis added).
was contemplated. As previously suggested, however, the current Court is disinclined to use legislative history or purpose analysis to help resolve the interpretive uncertainties that accompany a silent text.

The Christensen decision has important economic consequences in light of the budgetary pressures traditionally faced by state and local governments. Public employers now have considerable power to limit their employees' accrual of comp time, and thereby to minimize the prospect of delayed cash payments made at inconvenient (not merely "unduly disrupt[ive]" times or at higher late-career wage rates.

Yet the Court, intriguingly, left open the possibility that its holding could be overturned by subsequent executive branch action. Justice Thomas's majority opinion acknowledged that Chevron-style deference would be owed to a Labor Department regulation that limited forced use of comp time in the absence of an employer-employee agreement. The majority was not prepared to accord similar deference to the Department's opinion letter issued outside formally delegated lawmaking powers. Justice Souter, in a short concurrence, joined the majority's opinion on the assumption that it allowed the Secretary to prepare regulations taking the very position set forth in its opinion letter. Thus, the Court has in effect invited the Labor Department to codify in regulatory form the position adopted by the dissent.

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160. See, e.g., H.R. REP. No. 99-331, at 23 (1985) (emphasis added) (stating that employees should not be forced to accept more compensatory time "than an employer realistically and in good faith expects to be able to grant to that employee if he or she requests it"); 131 CONG. REC. 28984 (Sen. Metzenbaum, Democrat from Ohio, stating bill "provides public employees with meaningful FLSA protections for any overtime worked"); id. at 29219 (Rep. Jeffords, Republican from Vermont, stating "accrued time would be limited, largely as a protection for employees" and that "within the limits set by the bill, employers and employees would be free [together] to design or maintain their own compensatory time systems"). The FLSA amendments were enacted by a Republican-controlled Senate and a Democrat-controlled House.

161. 29 U.S.C. § 207(o)(5) (allowing employers to limit employee comp time use that unduly disrupts operations).

162. 120 S. Ct. at 1662.

163. Id. at 1662–63. The letter was entitled only to respect insofar as it had persuasive force under the Court's decision in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Id. at 1663

This subsidiary but important administrative law question of whether Chevron applies to less formal agency interpretations created additional divisions within the Court. Justice Scalia concurred only in the judgment, expressing his view that Chevron deference had superseded Skidmore as a general matter, but that the Secretary's position here was unreasonable under Chevron. Id. at 1663–65. Justice Breyer and Justice Ginsburg (but not Justice Stevens) wrote a separate dissent, arguing that the Skidmore doctrine retained vitality even after Chevron, but that the agency's position was persuasive under Skidmore as well as being reasonable under Chevron. Id. at 1667–68.

164. Id. at 1663.

165. Justice Scalia obviously would reject such a rule (see n.163 supra), but it would enjoy support from the three dissenters and Justice Souter. Given that Justice Thomas and the three other Justices who joined his opinion (Rehnquist, Kennedy, O'Connor) chose to rely on the lesser deference due a letter in rejecting the executive branch position, it seems likely that one or more of them would conclude that a duly
B. United States v. Locke\textsuperscript{166}

A controversy involving federal anti-pollution statutes that regulate oil tankers appears an unlikely candidate for inclusion as a labor and employment decision. \textit{Locke}, however, may be seen as an example of the growing interface between environmental and labor interests on national policy matters, and also of the developing tendency by the states to extend regulatory labor standards beyond what the national government has prescribed.

Responding to highly publicized oil spills at sea, Congress in 1972 and again in 1990 enacted legislation providing for detailed regulation of oil tanker design and operations, including personnel qualifications and staffing of these vessels.\textsuperscript{167} The state of Washington, following the massive Exxon Valdez spill in 1989, enacted regulations that were in many respects more stringent than comparable federal law.\textsuperscript{168} Of particular relevance here, the new state regulations imposed a series of training requirements, work hours limitations, and English language proficiency standards on tanker crews navigating within Washington's waters.\textsuperscript{169}

These state regulations were challenged by a trade association representing most of the world's independently owned tanker fleet.\textsuperscript{170} The district court and Ninth Circuit held that Washington's laws were not preempted by the federal anti-pollution statutes and did not conflict with international agreements relating to tanker safety.\textsuperscript{171} By the time the case reached the Supreme Court, the United States had intervened on the side of the trade association, and 15 countries had submitted amicus briefs arguing that Washington's regulations were endangering reciprocity agreements and thereby threatening global maritime commerce.\textsuperscript{172} On the other side, 20 states submitted an amicus brief insisting that prevention of oil pollution is at the heart of the States' police power and should be preserved as appropriately supplementing federal efforts.\textsuperscript{173}

\textsuperscript{166} 120 S. Ct. 1135 (2000).
\textsuperscript{168} \textit{Id.} at 1140, 1142.
\textsuperscript{169} \textit{Id.} at 1153 (listing personnel policies in Appendix to Court's opinion).
\textsuperscript{170} \textit{Id.} at 1142.
\textsuperscript{171} \textit{See} Int'l Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053, 1058, 1061–69 (9th Cir. 1998).
\textsuperscript{172} \textit{See} Amicus Brief of the Governments of Belg., Den., Fin., Fr., F.R.G., Greece, Italy, Japan, Neth., Nor., Port., Spain, Swed., and U.K., 3–4 (summarizing argument); Amicus Brief of the Government of Canada, 5 (summarizing argument).
The dispute in *Locke*, like those in *Kimel* and *Christensen*, required the Court to address an aspect of ongoing tensions between state and federal interests. This time the Court came down firmly on the side of the national government. Without reaching questions of international law, a unanimous Court held that the State's employment-related regulations were preempted by the Ports and Waterways Safety Act.\(^{174}\) Congress, in certain parts of that statute, had preserved the States' traditional power to regulate conditions in local ports and waters absent conflict with federal rules.\(^{175}\) But the directly applicable provisions of the Act, governing tanker "operation, equipping, personnel qualification, and manning;" reflected Congress's determination to impose uniform national rules and thereby oust the states altogether from the field.\(^{176}\)

The Court's holding and analysis based on "field preemption" are not terribly surprising from a labor law perspective. Congress in the NLRA and ERISA sought to impose uniform national standards regulating aspects of the private workplace. When faced with preemption challenges premised on the putative reach of those regulatory schemes, the Supreme Court has generally viewed the two statutes as substantially occupying their respective fields, and has foreclosed many state law actions and remedies pertaining to labor relations and retirement or welfare benefits.\(^{177}\)

The Court in *Locke* remanded most of Washington's tanker safety regulations so that the lower courts could decide which, if any, might not be preempted.\(^{178}\) State laws may survive only if they are determined to be "of limited extraterritorial effect and necessary to address the peculiarities" of the State's own waters.\(^{179}\) Basic training and language proficiency requirements obviously did not meet this test, as they inevitably affect tanker operations outside territorial waters. One

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174. 120 S. Ct. at 1150–51.
175. *Id.* at 1148–49.
176. *See id.* at 1144, 1149 (quoting PWSA, §3703(a)).
178. 120 S. Ct. at 1152.
179. *Id.*
should not expect other workplace standards regulation by the states to fare better under this federal statutory scheme.

IV. ADEA and Proof Requirements in Employment Discrimination Actions

In Reeves v. Sanderson Plumbing Products, Inc.,¹ the Court gave employees an important victory. Addressing a substantial split in the circuits regarding how much circumstantial evidence a plaintiff needs in order to prevail in an employment discrimination action, the Court made it considerably easier for employees who establish a prima facie case of discrimination to get to a jury.

A. Background to the Reeves Decision

Litigated disputes involving alleged age, race, or sex bias on the job seldom include “smoking gun” evidence of discriminatory motive. Moreover, because employers rarely admit to such bias, the majority of employment discrimination cases are resolved on the basis of circumstantial evidence from which a fact finder might reasonably infer that an employer intended to discriminate. Since the early 1970s, these discriminatory treatment cases have been tried under the Court’s McDonnell Douglas evidentiary framework, which allows employees to prove their case through inferences drawn from circumstantial evidence.¹⁻²

Under the three-stage McDonnell Douglas approach, a terminated employee alleging an ADEA violation must first establish a prima facie case, demonstrating that he was a member of the protected class when fired, that he was otherwise qualified for the position he had held, and that the employer replaced him with someone substantially younger.¹⁻³ The burden then shifts to the employer to produce evidence that the employee was discharged for a legitimate nondiscriminatory reason.¹⁻³ In reply, the employee retains a chance to prove that the legitimate reason offered by the employer was not the real reason he was fired, but rather a mere pretext.¹⁻⁴

¹ 120 S. Ct. 2097 (2000).
² McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court has established and refined its burden-shifting inferential model through a series of cases, starting with McDonnell Douglas. See Tex. Dep’t of Cnty. Affairs v. Burdine, 450 U.S. 248 (1981); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993). While the model has been developed through decisions applying Title VII, lower courts have routinely applied it to ADEA and ADA cases as well. The Court in Reeves, as it had done several terms earlier, acknowledged this widespread practice and assumed arguendo that the McDonnell Douglas framework was fully applicable in the ADEA context. See 120 S. Ct. 2105–06 (citing O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996)).
³ See Reeves, 120 S. Ct. at 2106; O’Connor, 517 U.S. at 313.
⁴ See Reeves, 120 S. Ct. at 2106; Burdine, 450 U.S. at 254. This is a burden of production, not persuasion. 450 U.S. at 256–60.
⁵ See Reeves, 120 S. Ct. at 2106; Hicks, 509 U.S. at 507–08.
The principal question presented in *Reeves* was, what next? Assuming an employee demonstrates that the employer's stated reason for discharging him was pretextual, may the trier-of-fact find unlawful discrimination based on that showing of pretext combined with the employee's *prima facie* case? Or, must the employee produce additional evidence that his age motivated the adverse employment decision? This matter of what follows from proof of pretext had been previously addressed by the Court on several occasions. With the benefit of hindsight, those discussions take on a distinctly pendulum-like quality.

In *Texas Department of Community Affairs v. Burdine*, a unanimous Court appeared to say that a plaintiff has met her burden of persuasion when she has shown that the employer's proffered explanation for terminating her was "unworthy of credence." In *United States Postal Service Board of Governors v. Aikens*, the Court began to edge away from this conclusion. The majority opined that once a *prima facie* case has been rebutted by the employer's proffered explanation, the factfinder must then treat discrimination just like any other ultimate question of fact, "decid[ing] which party's explanation of the employer's motivation it believes." Justice Blackmun in concurrence, joined by Justice Brennan, tried to bend the majority back toward the Court's statement in *Burdine*, which for him reflected a proper understanding that "the *McDonnell Douglas* framework requires that a plaintiff prevail when" he has proved pretext. The six Justices in the *Aikens* majority notably failed to respond.

Several years later, however, in *St. Mary's Honor Center v. Hicks*, a sharply divided Court held that proof of pretext did not entitle plaintiff to judgment as a matter of law. For the *Hicks* majority, the fact that an employment discrimination plaintiff bears the ultimate burden

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186. Id. at 256. The Court's exact words were as follows:

> This burden [of proving pretext] now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at 256 (emphasis added). This statement was technically only dicta; the case holds that an employer rebutting a *prima facie* case has a burden of production, not persuasion. Id. at 256–57.

188. Id. at 716.
189. Id. at 717–18 (emphasis added). Justice Blackmun joined the opinion as well as the judgment in *Aikens*, thus giving him some standing to comment on its meaning and scope. Justice Marshall concurred only in the judgment.
of persuasion meant that a factfinder must determine whether unlawful discrimination had occurred, not simply whether the employer's explanation for its actions was credible.\footnote{See 509 U.S. at 519.} In holding that proof of pretext was not automatically enough to warrant a finding of discrimination, the Court in Hicks triggered a new debate: whether proof of pretext alone could ever be enough to justify such a finding. The Court's opinion included language that pointed in both directions on this issue.\footnote{Compare, e.g., id. at 511 (stating that "the factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination"), with id. at 515 (emphasis in original) (stating that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason").} Over the ensuing six years, a number of circuits adopted the "pretext-plus" position, i.e., that a plaintiff seeking to prove discriminatory treatment cannot prevail unless his evidence is sufficient for a jury to find both that the employer's reason was false and that the true reason was discrimination.\footnote{Reeves, 120 S. Ct. at 2105 (discussing holdings of First, Second, Fourth, and Fifth Circuits).} The pretext-plus standard became a source of reassurance to employer groups determined to resist unnecessary litigation costs from weak claims of discrimination, and a cause for alarm among employee representatives who feared an undermining of the inferential model that was essential to vindicate congressional antidiscrimination policies.

B. The Court's Decision and Its Consequences

The Supreme Court's lengthy treatment of the evidence in Reeves reflects the intensely fact-based nature of this legal issue. The case involved a 57 year old supervisor who had worked for the company for 40 years when he was discharged.\footnote{Id. at 2103.} At trial, he established a prima facie case of age discrimination and his employer offered testimony that it had fired him because he failed to maintain accurate attendance records for his department.\footnote{Id. at 2103–04.} Mr. Reeves introduced evidence that his employer's explanation was pretextual, showing that he had kept accurate records for the employees he supervised, and also showing that a key management official had made age-biased statements toward him in the past.\footnote{Id. at 2104.} Specifically, Reeves testified that several months before his termination, the manager had told him on one occasion that he "was so old [he] must have come over on the Mayflower," and, when criticizing his performance on another occasion, said that he "was too damn old to do [his] job."\footnote{Id. at 2110.} The jury returned a verdict in Reeves's favor, including a finding of willful age discrimination by the employer; the court awarded compensatory damages, liquidated dam-
ages, and front pay totaling nearly $100,000. In reversing, the Fifth Circuit held that although the employee had probably offered sufficient evidence of pretext, this was not dispositive on the ultimate issue of whether age had motivated the decision. The court went on to discount the age-biased comments by the employer on the ground that they “were not made in the direct context of Reeves's termination,” and concluded that Reeves's evidence was not sufficient for a rational jury to find that he had been fired because of his age.

The Supreme Court, in a unanimous opinion by Justice O'Connor, reversed the court of appeals’ decision and reinstated the jury verdict. The Court dismissed the pretext-plus standard as “misconceiving the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.” The uncertainties and tensions that had divided the Justices in Hicks were nowhere to be seen. In the Reeves Court’s view, demonstrating the unworthiness of an employer’s proffered explanation is not only a permissible basis from which a factfinder may infer discriminatory treatment, “it may be quite persuasive.” The majority explained that a judge or jury may reasonably conclude from the falsity of the explanation that the employer is lying to cover up its true discriminatory purpose. In addition, discrimination may become the likely explanation because one always assumes some reason for an employer’s action and the most plausible source for a reason—the employer itself—has been removed.

The Court was careful to preserve the holding in Hicks that a showing of pretext may not always be adequate to sustain a finding of liability. But the majority’s examples of how a court or jury might find against liability are not terribly persuasive. A record that features a “conclusive... nondiscriminatory reason” not presented by the employer, or “abundant and uncontroverted independent evidence” that discrimination had not occurred, is certainly conceivable, but it is unlikely to arise often in practice. Justice Ginsburg, in a short concur-

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198. Id. at 2104.
199. 120 S. Ct. at 2104.
200. Id.
201. Id. at 2108.
202. Hicks featured vehement clashes between Justice Scalia (for himself and Justices Rehnquist, O'Connor, Kennedy, and Thomas) and Justice Souter (for himself and Justices White, Blackmun, and Stevens). Since 1993, Justices White and Blackmun have been replaced by Justices Ginsburg and Breyer, changes that presumably would not have altered the vote in Hicks. The Hicks dissent's insistence that the majority had "destroyed" the McDonnell Douglas framework (509 U.S. at 540) now seems hyperbolic, but it may have had some chastening effect on one or more members of that majority.
203. 120 S. Ct. at 2108.
204. See id.
205. See id. at 2108-09.
206. See id. at 2109.
207. Id. A conclusive nondiscriminatory reason for the employer's decision would surely have been presented at trial by competent counsel. A nondiscriminatory reason
rence, seemed to capture the Court's true meaning on this score. She anticipated that it "will be uncommon" for plaintiffs to have to submit any evidence beyond establishing a *prima facie* case and pretext in order to reach a jury or sustain a finding of liability.\(^{208}\)

Having disposed of the pretext-plus standard, the *Reeves* Court addressed a subsidiary matter regarding what evidence a court may consider when ruling on a motion for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure.\(^{209}\) The Court held that review should encompass all evidence in the record, but added that the reviewing court is required to "draw all reasonable inferences in favor of the nonmoving party" and must also "disregard all evidence favorable to the moving party that the jury is not required to believe."\(^{210}\) The Fifth Circuit had failed to meet this test in several respects. Notably, the court did not draw all reasonable inferences in Mr. Reeves's favor when it discounted the age-biased comments of the employer's key manager and then discredited the role that manager played in the discharge decision.\(^{211}\)

Whether or not the Supreme Court's detailed critique of one circuit's overreaching was meant as a signal to other lower courts, the employee-sensitive tone of the Court's discussion may well enhance plaintiffs' prospects for sustaining favorable jury verdicts. The *Reeves* opinion also reaffirmed that a lower court's approach to the evidence when considering a motion for summary judgment must be identical to the standard for review of the record under Rule 50.\(^{212}\) This direct linkage should make it easier for employees to defeat summary judgment motions and present their cases to a jury. Given that the *Reeves* decision further refines the Court's *McDonnell Douglas* framework, its lowering of evidentiary burdens applies to employees alleging discriminatory treatment under Title VII and the ADA as well as the ADEA.

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\(^{208}\) Id. at 2112. Justice Ginsburg elaborated that because "conclusive demonstrations" that discrimination could not have been the employer's true motive will be "atypical" once pretext has been shown, "the ultimate question of liability ordinarily should not be taken from the jury." \(^{Id.}\)

\(^{209}\) Rule 50 provides that before submission of the case to the jury, a court should grant a motion for judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." \(^{Fed. R. Civ. P. 50(a)(1).}\) The circuits had diverged as to what evidence could be considered when applying this Rule in the employment discrimination context, though the Supreme Court concluded that the divergence was more apparent than real. \(^{120}\) S. Ct. at 2110.

\(^{210}\) \(^{120}\) S. Ct. at 2110.

\(^{211}\) \(^{See id.}\) at 2111.

\(^{212}\) \(^{See id.}\) 2110 (citing \(^{Anderson v. Liberty Lobby, Inc., 477 U.S., 242, 250–51 (1986)\).\)
V. ERISA and the Fiduciary Status of Health Maintenance Organizations

In *Pegram v. Herdrich*, a unanimous Court held that a health maintenance organization (HMO) and its physicians do not act as fiduciaries under ERISA when they decide how to diagnose and treat a patient's condition. HMOs have financial incentives to keep costs down when making such mixed treatment and eligibility decisions, and a contrary result could have dealt a fatal blow to the current managed health care system. While the Court's holding is obviously a victory for HMOs against plan beneficiaries seeking relief under a certain theory in federal court, litigation against health care plans is likely to continue on other theories and in alternative venues. The Court's analysis and discussion are therefore important both for the issue actually decided and for the questions that were left open until another day.

A. What the Pegram Court Decided

*Pegram* has an extended procedural history. The case was originally brought in 1992 in state court, by a woman who was covered under her husband's employee benefit plan. Herdrich's appendix had ruptured after she was forced to wait eight days and travel 50 miles for a diagnostic procedure that was available immediately, though at higher cost, at her local hospital. Herdrich sued her physician, Pegram, and her HMO for medical malpractice and eventually recovered $35,000 following a jury trial on the state law claims. During the litigation, Herdrich added two counts of state law fraud against the HMO. The defendants argued that ERISA preempted the new claims and removed the case to federal court. Herdrich then amended her complaint to allege that her physician-owned and administered HMO rewarded its physician owners for limiting medical care, and that such an arrangement—creating an incentive to make medical decisions in physicians' self-interest rather than the exclusive interest of plan participants—constituted a breach of the ERISA fiduciary duty of undivided loyalty. This fiduciary claim was dismissed by the district court, reinstated by the Seventh Circuit, and then dismissed again by the Supreme Court for failure to state a claim under ERISA.

213. 120 S. Ct. 2143 (2000).
214. See id. at 2150, 2154–55.
215. Id. at 2147. See Herdrich v. Pegram, 154 F.3d 362, 365 (7th Cir. 1998).
216. 120 S. Ct. at 2147.
217. Id. at 2147–48. See 154 F.3d at 365.
218. 120 S. Ct. at 2147.
219. See id. at 2147–48. ERISA provides that persons acting as fiduciaries with respect to a benefit plan must discharge Plan duties solely in the interest of participants and beneficiaries, and are liable for breach of fiduciary duty if they fail to do so. See 29 U.S.C. §§ 1104(a), 1109, 1132 (1999).
220. See id. at 2148, 2158–59.
The Court began its discussion by boldly recognizing a reality that HMOs seldom if ever proclaim: rationing of health care is the defining feature of an HMO system.\textsuperscript{221} Cost-control measures such as limitations on covered forms of treatment or medical conditions, and requirements for advance approval by an outside decisionmaker respecting certain types of care, reflect the bottom-line objectives of all HMOs.\textsuperscript{222} In the Court's view, the fact that some plans—like the one here—supplement those measures with year-end financial rewards to physicians for minimizing treatment costs did not make them different in kind from HMOs in general. Justice Souter, writing for the Court, delicately acknowledged that an organizational scheme of annual payments to physician owners "is not subtle" and he added that it may not be socially desirable.\textsuperscript{223} The Seventh Circuit, though, had determined that a fiduciary breach occurred based on the explicit incentive structure built into this doctor-owned and administered HMO.\textsuperscript{224} The Supreme Court rejected as legally unsupportable any such distinction between good and bad HMO incentive schemes, and determined to treat all HMOs alike for purposes of its ERISA review.\textsuperscript{225}

The Court's analysis then led it to conclude on two grounds that medical treatment decisions were not fiduciary actions of the type covered under ERISA. First, the Court explored the context in which Congress had created fiduciary status. In defining the scope of fiduciary obligations, Congress had relied on the common law of trusts. The legislative focus was on duties that traditionally were linked to "decisions about managing assets and distributing property to beneficiaries."\textsuperscript{226} The ERISA legislative history confirmed that when considering the issue of fiduciary responsibility, Congress was principally concerned with financial decisions regarding pension plans, more specifically with the potential for mismanagement of plan assets and for incompetent plan administration.\textsuperscript{227} Given Congress's initial concerns about fiduciary authority, the Court "doubt[ed]" that the law was meant to cover "the sorts of decisions made by licensed medical practitioners millions of times every day, in every possible medical setting."\textsuperscript{228}

\begin{footnotes}
\footnotetext{221. See id. at 2149. Unlike the fee-for-service system, in which doctors have financial incentives to provide more care rather than less, the Court opined that "a physician's financial interest [in an HMO system] lies in providing less care, not more." Id. The check on financial incentives under either system, according to the Court, is the physician's professional and ethical obligation "to exercise reasonable medical skill and judgment in the patient's interest." Id.}
\footnotetext{222. See id.}
\footnotetext{223. Id. at 2150.}
\footnotetext{224. 154 F.3d at 370, 372–73.}
\footnotetext{225. 120 S. Ct. at 2150–51.}
\footnotetext{226. See id. at 2155 (describing fiduciary duties at common law).}
\footnotetext{227. See id. at 2156 (discussing ERISA legislative history).}
\footnotetext{228. Id. at 2155–56.}
\end{footnotes}
The Court's doubt about congressional intent "harden[ed] into conviction" when it reviewed the consequences of permitting suits by patients challenging particular health care decisions in an HMO setting.\footnote{229. Id. at 2156.} Allowing patients to sue under ERISA based on a decision to delay or withhold certain medical services would inevitably require federal courts to determine whether such decisions were based solely on reasonable medical judgment or were in part related to financial self-interest. The Court was loathe to approve what it regarded as a "federaliz[ation of] malpractice litigation in the name of fiduciary duty."\footnote{230. Id. at 2158.} Looking beyond ERISA, the Court also noted that Congress for nearly three decades had enacted statutes encouraging the formation of HMO practices.\footnote{231. See id. at 2156–57.} It would thoroughly undermine this policy were the Court to entertain fiduciary claims that would become a virtual battering ram against the HMO business form approved by Congress.\footnote{232. See id. at 2157.}

B. What Pegram Did Not Decide

Although the Court unequivocally rejected the possibility that HMOs can be held liable as ERISA fiduciaries for mixed treatment and eligibility decisions, a number of important questions remain unanswered. One involves the status and scope of state law claims that patients may bring against HMOs. In \textit{New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company}, the Court had narrowly construed ERISA's express preemption language in upholding the validity of state law surcharges imposed on certain HMOs.\footnote{233. 514 U.S. 645 (1995).} Justice Souter, who also authored the Court's unanimous opinion in \textit{Travelers}, characterized that earlier decision as establishing a strong presumption favoring state regulation of the health care field.\footnote{234. 120 S. Ct. at 2158.} Based on the Court's determination in \textit{Pegram} that mixed treatment and eligibility decisions fall outside the scope of ERISA, it seems likely that state malpractice claims are beyond the reach of ERISA preemption. When HMOs arrange and provide treatment, either directly or through contracts with physicians and hospitals, \textit{Pegram} strongly suggests that they may be sued under state law for negligence or comparable misconduct that pertains to their role as provider or arranger of medical services. Many HMOs operate in multiple states, and even those that do not may well be perceived by jurors as deeper pockets than their physician co-defendants in malpractice actions. The Court's decision may therefore herald an increase in state malpractice litigation against HMOs in state courts. The Court tacitly encouraged such a prospect when—acting one week after \textit{Pegram}—it left undis-
turbed a Third Circuit decision rejecting HMO assertions that various state malpractice claims were preempted.\textsuperscript{235}

A second area that bears watching involves the possibility that HMOs may act as fiduciaries outside of the treatment setting. The \textit{Pegram} Court emphasized that unlike a trustee at common law, an ERISA fiduciary may wear several different hats at once, and the Court refrained from saying that HMOs could never owe a duty of undivided loyalty under the Act.\textsuperscript{236} The ERISA count in this case did not address pure eligibility determinations or other administrative decisions separable from the exercise of medical judgment.\textsuperscript{237} Plan enrollees may well be able to state a federal claim for relief with respect to the HMO's determination not to cover a certain medical procedure at all, or allegations that it did an inadequate job of monitoring available funds and keeping records. These types of decisions are more like the judgments made at common law by trustees managing or administering plan assets. Assuming that HMOs may be sued for fiduciary breach under ERISA with respect to such non-treatment-related decisions, the Court will at some point have to decide whether state law claims based on this type of HMO activity are preempted.

Even within the treatment context, the Court in a lengthy footnote left the door open to HMOs being sued for not disclosing the existence of the physician incentives to limit care that were an explicit feature of this health plan's structure.\textsuperscript{238} The Court previously had made clear that ERISA plan administrators may be required to disclose information about plan prospects that they have no fiduciary duty to change.\textsuperscript{239} The complaint in \textit{Pegram} did not allege failure to disclose, but the Court seemed to anticipate if not invite future litigation under this theory. Yet the Court's reasoning also invoked the special status of HMOs, relying heavily on Congress's persistent 27 year effort to promote the formation of such organizations. Health plans will presumably use the Court's broad language to argue that any federal duty that might compromise the financial well-being of HMOs should be imposed by Congress, not the judiciary.

That argument leads into what is probably the largest unanswered question after \textit{Pegram}. The Court's refusal to hold HMOs accountable under ERISA for their sometimes harsh rationing of health care leaves it to Congress to create such accountability through a new statute. Con-
gress has been struggling to define patients' rights and remedies in a managed care system for a number of years. By making clear that patients have no such rights under the most relevant federal statute, and that Congress rather than the judiciary retains the power "to restrict . . . approval of HMO practice to certain preferred forms," the Court has turned up the heat. It is possible that a deal will be struck in the next several months, especially if the managed care lobby decides that the risks of becoming bogged down in 50 different state court systems are simply too great. Still, it would be remarkable if Congress can rise to the challenge of crafting broadly acceptable patients' rights legislation in a presidential election year.

VI. Wrongful Discharge and RICO Conspiracies

The final workplace decision, *Beck v. Prupis*, concerns whether a wrongfully discharged whistleblower may assert a civil conspiracy claim under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO). The Court in recent years has regularly tackled issues presented by RICO's complex civil and criminal provisions. The *Beck* case illustrates the growing extent to which controversies involving such statutes of general application have piqued the Court's interest in the context of employer-employee relations.

The facts before the Court are based on petitioner's evidence. While serving as president and CEO of an insurance holding company,

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241. 120 S. Ct. at 2157.

242. The other ERISA case decided this term, *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180 (2000), involved a dispute between a pension plan and a securities broker dealer that executed equity trades at the direction of plan fiduciaries, trades that later proved worthless. See *id.* at 2185. Section 406 of ERISA prohibits a plan fiduciary from causing the plan to engage in certain transactions with a "party in interest," but that section imposes no specific duties on the nonfiduciary party in interest. A unanimous Court concluded that even absent such express duties, the nonfiduciary party may be held liable under the language of section 502(a)(3), one of ERISA's remedial provisions. See *id.* at 2186–91. Not every case receives its just recognition in a survey presentation of this kind. The Court's decision in *Harris Trust* enhances the power of plan participants and beneficiaries, as well as trustees, to recover from nonfiduciary actors that knowingly participated in the fiduciary's violation of the Act.

243. 120 S. Ct. 1608 (2000).


245. See *supra* at n.17 and accompanying text (discussing how Court's labor and employment law decisions increasingly involve miscellaneous statutes primarily addressed to non-workplace regulation but giving rise to controversy in particular workplace settings).

246. See 120 S. Ct. at 1612 n.3 (noting that when reviewing the appellate court's affirmance of summary judgment against Beck, the Court accepts as true the evidence that he presented at the district court level).
petitioner discovered that several directors and officers had engaged in illegal activities, including diverting corporate funds for personal use and submitting false financial statements to regulators and shareholders.\(^{247}\) He informed law enforcement officials about the illegal conduct, and was subsequently discharged in retaliation for his whistleblowing.\(^{248}\) In federal court, petitioner alleged various forms of racketeering activities and also a conspiracy to engage in such activities.\(^{249}\) Critically for this case, petitioner alleged that his wrongful termination was itself in furtherance of the conspiracy and therefore gave rise to a cause of action for violation of RICO's civil conspiracy provision, 18 U.S.C. §1962(d).\(^{250}\)

The circuit courts had split on the issue of whether a terminated whistleblower had standing to bring a claim under RICO's conspiracy provisions even though the overt act in furtherance of the conspiracy (i.e., the termination) was not a prohibited racketeering activity under 18 U.S.C. §1962(a), (b), or (c).\(^{251}\) The Supreme Court held against the whistleblowers, ruling that RICO provides a cause of action for conspiracy only to individuals injured by reason of an act that is independently unlawful under the statute.\(^{252}\) Wrongful termination is not an act of racketeering as defined in RICO and thus does not qualify.

The Court relied primarily on the common law of civil conspiracy to reach this result. Justice Thomas, writing for the majority, took the position that when Congress enacted RICO in 1970, it was well established at common law that a plaintiff's civil conspiracy claim depended upon the existence of an underlying tortious act.\(^{253}\) Drawing on the "benign fiction"\(^{254}\) that an enacting Congress is aware of and means to

\(^{247}\) Id. at 1612.

\(^{248}\) Id.

\(^{249}\) Id. § 1962 sets forth the conduct prohibited under RICO. 18 U.S.C. § 1962 (1994). "Racketeering activity" is defined by cross-reference to a long list of criminal prohibitions in Title 18, including mail fraud, wire fraud, and extortion. Subsections (a), (b), and (c) of § 1962 make it unlawful to use or invest income derived from racketeering activity, to acquire or maintain an interest in an enterprise by means of racketeering activity, or otherwise to participate in an enterprise's affairs through a pattern of such racketeering activity. Id.

\(^{250}\) 120 S. Ct. at 1612–13.

\(^{251}\) See id. at 1613 (summarizing split between majority of circuits denying standing—First, Second, Eighth, Ninth, Eleventh—and minority of circuits allowing RICO conspiracy claims where only overt action was employment termination—Third, Fifth, Seventh).

\(^{252}\) 120 S. Ct. at 1616.

\(^{253}\) Id. at 1613–15. The dissenters, Justices Stevens and Souter, disputed at some length the majority's characterization of the common law precedent and argued that RICO's plain language supported petitioner's right of action for conspiracy. Id. at 1617–20.

\(^{254}\) See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (emphasis added) (stating that statutory interpretation involves looking for "which meaning is ... most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind"). See also Astoria Fed. Sav. & Loan Ass'n v. Solimine, 504
incorporate the surrounding body of law, the Court concluded that civil conspiracy claims under RICO were likewise derivative of the underlying substantive law prohibitions contained in the statute.255

RICO's textual provisions and legislative history suggest that Congress meant to sweep broadly when it entered the new domain of combating organized criminal activity,256 and the Court has often relied on that text and history to construe the act in rather broad terms.257 The Beck case, however, presented the Court with the prospect of extending RICO into an area of civil law that has traditionally been governed by state legislative and judicial initiatives. The Court was not willing to take such a step toward federalization of wrongful discharge law. While the decision constitutes a victory for employer interests, a narrowing construction of RICO's conspiracy provisions may also be relevant for unions, which at times have been the target of RICO actions in connection with routine organizing campaigns or strikes.258 Federal courts have often expressed reluctance to let RICO draw them into ordinary labor disputes259; the Beck decision doubtless reflects such judicial caution regarding RICO's impact on workplace controversies.

VII. Conclusion

Although somewhat light in volume, the labor and employment law product this term included several decisions of considerable importance. The Court's choice of which cases to decide punctuated two general trends: attention to workplace law statutes enacted after the NLRA and Title VII (Kimel, Christensen, Reeves, Pegram, Harris Trust), and an increased focus on laws of general application that give rise to

U.S. 104, 108 (1991) (stating that Congress should be understood to legislate with the expectation that the common law principle of preclusion will apply).

255. See 120 S. Ct. at 1615–17.
256. See, e.g., Turkette, 452 U.S. at 586–87.


workplace rights disputes (Locke, Beck). A recurring substantive theme was the preservation of state law jurisdiction and state sovereignty and an unwillingness to construe broadly the scope of federal law or congressional authority (Kimel, Christensen, Pegram, Beck; but see Locke). Consistent with this theme, public employers continue to fare especially well before the Court (Kimel, Christensen). Finally, the Rehnquist Era is now entering its fifteenth Term (the Burger Court had 17), with several Justices rumored to be considering retirement following the presidential election. In the Eleventh Amendment area, and others as well, the Court’s future course seems at best uncertain. Charting that course, however, would begin a whole new story, one that requires someone other than a mere mechanic, or even an architect, as narrator.