Some Recent Developments in Federal and State Labor and Employment Law

By Michael Evan Gold

I. The United States Supreme Court[1]

A. Cases with Opinions

1. Arbitration: Who Applies the Limitations Period?

Howsam v. Dean Witter Reynolds, 123 S. Ct. 588 (2002)

The Supreme Court held that whether a time limit for invoking arbitration had been satisfied was a question for an arbitrator, not a court, in the absence of a statement to the contrary in the arbitration agreement.

A stockbroker recommended certain investments to an investor. The investor came to believe that the broker had misrepresented the virtues of the investment. This controversy fell within an arbitration agreement between the broker and the investor. The agreement allowed the investor to choose the arbitration forum; she chose the National Association of Securities Dealers and agreed to abide by its rules. One rule was that a dispute had to be submitted for arbitration within six years of the event giving rise to the dispute.

The broker sued in federal court to enjoin the arbitration, arguing that the six-year limitations period had expired. The District Court dismissed the action, but the Court of Appeals for the Tenth Circuit reversed on the ground that the suit raised the question of arbitrability, which is presumptively a question for a court. The Supreme Court reversed the judgment of the Tenth Circuit.

Writing for seven Justices (Justice O'Connor not participating and Justice Thomas concurring in the judgment), Justice Breyer conceded that whether parties have agreed to arbitrate a dispute is a question for a court unless the parties have clearly provided otherwise. But he added that this rule applies only where the parties expect a court, not an arbitrator, to make the threshold decision. Parties expect a court to make the decision about whether they are bound by an arbitration agreement, as well as the decision about whether a particular dispute is covered by the agreement; but parties expect an arbitrator to make decisions about procedural questions that grow out of the dispute, for example, whether conditions precedent to arbitration (such as steps in a grievance procedure) have been satisfied, and whether defenses to arbitration like waiver and delay are valid. Time limits fall in the latter category and are for the arbitrator to apply, absent a statement to the contrary in the arbitration agreement.

One may wonder whether the parties have any genuine expectations on these issues, apart from the arbitration agreement and their understanding of the law.

2. Arbitration: Class Actions

Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402 (2003)

The contract between a lender and its customers contained a clause referring all contract-related disputes to arbitration. The arbitration clause did not expressly address whether a customer could pursue a claim on behalf of a class of customers. The lender argued in the courts of South Carolina that the clause impliedly prohibited class claims, but the Supreme Court of South Carolina disagreed; the court held that the contract was silent on class claims and that, in such a case, state law permitted them. The U.S. Supreme Court granted certiorari to determine whether this holding was consistent with the Federal Arbitration Act.

Justice Breyer, joined by Justices Scalia, Souter, and Ginsburg, relied on the basic rule that when parties agree to submit all disputes to arbitration, the parties should receive the decision of an arbitrator, not of a judge. It is true that an exception to this rule exists. Courts assume that parties intend that certain issues are for judges, viz., whether the arbitration clause is valid and whether a dispute is covered by the clause. However, the question of whether a clause allows or prohibits class claims is not one of those issues; rather, this question concerns contract interpretation and arbitration procedures, which arbitrators are well situated to decide. Therefore, the question of whether the arbitration agreement permitted class claims should have been answered by an arbitrator, not by the court, and for this reason the judgment below was vacated.

Justice Stevens concurred in order to create a controlling judgment of the Court. Nevertheless, he believed that the Federal Arbitration Act did not preclude either holding of the Supreme Court of South Carolina.

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, dissented in the belief that a court should decide whether an arbitration agreement allows class claims. "Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted," 123 S. Ct. at 2409. Therefore, if the arbitrability of a dispute is for a court to decide, so is how the arbitrator is to be selected—one arbitrator per dispute or one arbitrator for a class of disputes. Thus, the Federal Arbitration Act did not preempt the Supreme Court of South Carolina from deciding whether the arbitration clause permitted class claims; however, that court misinterpreted the clause. Read as a whole, the agreement prohibited class claims. For this reason, the dissenters would have reversed the judgment below.

Justice Thomas dissented on the ground that the Federal Arbitration Act does not apply to proceedings in state courts and, therefore, cannot be the ground for preempting a state court's interpretation of an arbitration agreement.

One's first thought might be that lenders, employers, and their ilk can simply include a provision in the arbitration agreement specifying that class claims are not allowed. Based on Justice Breyer's opinion, we think this tactic will probably succeed, though it would have to overcome the argument that the provision is unconscionable. A possible risk of such a provision would be the decision of a sympathetic judge to permit a class action in court on the ground that the class claim could not be pursued in arbitration.

3. Late Assignment of Retirees, Coal Industry Retiree Health Benefit Act

Barnhart v. Peabody Coal Co., 123 S. Ct. 748 (2003)

The Coal Industry Retiree Health Benefit Act of 1962 required that the Commissioner of Social Security "shall, before October 1, 1993," assign each retiree who is eligible for benefits to an operating company, which became responsible for funding the retiree's benefits. Eligible retirees who were not assigned were not to lose benefits; rather, their benefits would be paid by other sources. The Commissioner assigned approximately 10,000 retirees after the deadline. Two of the companies to which these retirees were assigned sued in order to be relieved of funding benefits for the tardily assigned retirees. The District Court ruled for the companies, and the Court of Appeals for the Sixth Circuit affirmed. The Supreme Court reversed.

Justice Souter, joined by Chief Justice Rehnquist and Justices Stevens, Kennedy, Ginsburg, and Breyer, ruled that a statement that the government "shall" act within a specified time is not a jurisdictional limit that precludes later action. A requirement that a detention hearing shall be held immediately after a person's first appearance before a judicial officer did not bar detention following a tardy hearing, and a mandate that the Secretary of Health and Human Services make a report within a certain time did not deprive the Secretary of power to act thereafter. In general, wrote Justice Souter, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 123 S. Ct. at 755, quoting from *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (following footnote omitted).

Justice Scalia, joined by Justices O'Connor and Thomas, dissented, asserting in his usual diplomatic manner that the majority's holding "makes no sense. When a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power. If a landowner authorizes someone to cut Christmas trees 'before December 15,' there is no doubt what happens when December 15 passes: The authority to cut terminates. And the situation is not changed when the authorization is combined with a mandate—as when the landowner enters a contract which says that the other party 'shall cut all Christmas trees on the property by December 15.'"

Given the opportunity, one might wish to ask Justice Scalia whether the federal courts remain courts of equity as well as courts of law. The Secretary's delay in assigning retirees caused no prejudice to the companies; and, as the majority pointed out, Congress did not provide the Secretary with sufficient funds to complete the assignments before the deadline.

4. Damages for Fear of Developing Cancer: Federal Employers' Liability Act

Norfolk & Western Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003)

Under the Federal Employers' Liability Act (FELA), a common carrier is liable in damages to employees for work-related injuries caused, in whole or in part, by the carrier's negligence. The plaintiffs contracted asbestosis and brought suit in a Circuit Court of West Virginia against the railroad for which they had worked. Two unrelated issues of law arose. DAMAGES: Under the FELA, may a worker's recovery for pain and suffering for a work-related disease include dam-

ages for the worker's genuine fear that cancer will later result from the disease? The trial court held yes and so instructed the jury. APPORTIONMENT: When third parties who are not before the court may have contributed to a worker's injury, is an employer in an FELA suit answerable in full to an injured worker, or is the employer liable only for the harm that it caused? The trial court held the railroad liable in full and refused to instruct the jury to apportion damages among the plaintiffs' employers. The jury returned a verdict for the plaintiffs, and the trial court entered a judgment of approximately five million dollars. The Supreme Court of Appeals of West Virginia declined to review the judgment. The U.S. Supreme Court affirmed the judgment on both issues.

APPORTIONMENT: The FELA makes a common carrier liable for occupational injuries "resulting in whole or in part from the negligence of the carrier." This text, along with consistent judicial application, convinced all of the justices that the railroad was liable to the plaintiffs for the full amount of their damages.

DAMAGES: Harkening to common law principles, Justice Ginsburg, joined by Justices Stevens, Scalia, Souter, and Thomas, pointed out that recovery is permitted under the FELA for pain and suffering resulting from a negligently inflicted physical injury. An occupational disease like asbestosis counts as a physical injury for this purpose. Emotional distress is an element of pain and suffering. Therefore, emotional distress resulting from an occupational disease is compensable. Fear of developing cancer from an occupational disease is an element of emotional distress. It follows that a worker's genuine fear of developing cancer from an occupational disease like asbestosis is compensable as part of the worker's damages for the pain and suffering resulting from asbestosis.

The Court noted that compensation for fear of developing a disease is distinct from compensation for the increased risk of developing a disease. Damages for increased risk are not allowed. Note also that, should a plaintiff actually develop lung cancer in the future, one would be entitled to compensation for a separate occupational injury.

The parties agreed that asbestosis is a cognizable injury under the FELA, and the evidence showed that asbestosis develops into mesothelioma, a deadly lung cancer, in about 10 percent of cases. The plaintiffs testified to their fear of developing mesothelioma, and the railroad did not challenge the sufficiency of the evidence to support the jury's verdict that this fear was genuine. Thus, the Court allowed the plaintiffs to recover, as part of their damages for having contracted asbestosis, compensation for the fear that asbestosis was a precursor of cancer.

The Court distinguished the plaintiffs' claim from claims for "stand-alone emotional distress," in which the distress was not brought on by a physical injury. Recovery is permitted for stand-alone claims only if the common law "zone-of-danger" test is satisfied. The zone-of-danger test allows damages for emotional distress if the plaintiff sustained a negligently inflicted physical impact, or if, though not physically impacted, the plaintiff was within the zone of danger of physical impact.

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Breyer, dissented on this issue. The dissenters were concerned that the fund for compensating victims of asbestosis was limited, and that, by the time cancer actually develops in some of the victims, the fund will have been exhausted. In addition, the dissenters believed that the plaintiffs' fear of cancer was not the direct result of their injury and that, although a correlation may exist between asbestosis and cancer, no causal connection was established.

Causation was perhaps the most interesting issue in the case. Mesothelioma, which otherwise occurs rarely, follows asbestosis in 10 percent of cases. Does asbestosis cause mesothelioma, or do they have a common cause in these cases? The dissenters answered no, and one may wish that the majority had addressed this significant question in depth.

5. Preemption of Any Willing Provider Statutes: Employee Retirement Income Security Act

Kentucky Ass'n of Health Plans v. Miller, 123 S. Ct. 1471 (2003)

Health maintenance organizations (HMOs) in Kentucky maintained exclusive provider networks of doctors and hospitals. In exchange for reducing the price they charged for services rendered to patients belonging to the HMO, providers in the network received an increased volume of patients. Kentucky statutes required that health insurers, including HMOs, accept into their exclusive networks any provider who was willing to meet the terms and conditions of membership. HMOs claimed that these statutes were preempted by the Employee Retirement Income Security Act of 1974. ERISA preempts all state laws that relate to employee benefit plans, but does not preempt state laws that regulate insurance. The District Court rejected the HMOs' claim, holding that the statutes regulated insurance and were not preempted. The Court of Appeals for the Sixth Circuit affirmed, as did a unanimous Supreme Court.

The central question was whether the statutes regulated insurance. In previous ERISA cases, the Court had looked to the McCarran-Ferguson Act, under which three criteria determined whether practices constituted the business of insur-

ance: whether the practice transferred or spread the policyholder's risk; whether the practice was an integral part of the relationship between the insurer and the insured person; and whether the practice was limited to entities in the insurance industry. Breaking with this precedent, the Court announced a new standard for ERISA. A state law regulates insurance under ERISA if the law is specifically directed toward insurers and the law substantially affects the risk-pooling arrangement between insurers and insured persons. The Kentucky statutes satisfied the first element of the standard because the statutes were aimed at insurers. The statutes also satisfied the second element of the standard because, said the Court, they expanded the number of providers in the insurers' networks. Insured persons in Kentucky could no longer seek insurance from an exclusive network in exchange for lower premiums, and thus the statutes affected the type of risk pooling arrangements that insurers could offer.

One might question whether the Court applied its new standard with the proper facts in mind. It seems doubtful that the Kentucky legislature passed the statutes out of fear that the method of risk pooling reflected in exclusive provider networks was unsound. More likely, the legislature was responding to pressure from two sources: providers who wanted access to the networks in order not to lose patients, and patients who wanted to be covered for services rendered by their favorite providers. Viewing the case in light of these facts might have influenced its outcome. The statutes may have been directed more toward the practices of health care providers and the freedom of choice of patients, and less toward the pooling of risks.

6. Who Counts as an Employee?: Americans with Disabilities Act

Clackamas Gastroenterology Assoc. v. Wells, 123 S. Ct. 1673 (2003)

The Americans with Disabilities Act of 1990 covers employers of fifteen or more employees. A medical clinic, organized as a professional corporation, had fifteen employees only if its four physicians, who owned the shares of the corporation and constituted its board of directors, were counted as employees. When a worker sued the clinic, alleging disability discrimination, the clinic moved to dismiss because it had too few employees to be covered by the Disability Act. The District Court granted the motion, finding the physicians to be analogous to partners in a partnership. The Court of Appeals for the Ninth Circuit reversed on the ground that a professional corporation should not be allowed to claim corporate status for some purposes and partnership status for other purposes. The Supreme Court reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.

Justice Stevens, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, ruled that, because Congress had used the term "employee" essentially without defining it (the act defines "employee" as "an individual employed by an employer"), the common law test should be used to determine the status of an individual. The Court endorsed the guideline in EEOC Compliance Manual §§ 605:0008–605:00010 (2000), which the Commission uses to determine whether partners, officers, members of boards of directors, and major shareholders are employees. The guideline, which appears to be an adaptation of the right-of-control test to contemporary organizational structures, lists several factors that should be taken into account. The factors include whether the organization can hire or fire the individual in question; whether the organization supervises or oversees the individual's work; whether the individual can influence the organization; whether the individual shares in the profits, losses, and liabilities of the organization; and whether the organization and the individual intend the individual to be an employee. Other factors may be relevant as well.

The Court specifically noted that the EEOC guideline on this score asserts that it is applicable to other federal anti-discrimination statutes. The Court also stated that it had applied the common law test to the Employee Retirement Income Security Act of 1974, which, like the Disability Act, defines "employee" as "any individual employed by an employer." It seems likely that the Court will apply the common law test, as illuminated by the EEOC guideline, to other civil rights statutes with similar definitions of "employee," such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.

Applying the common law test to persons in the place of the physicians, the Court wrote that one is an employer who owns and manages the enterprise, hires and fires employees, assigns tasks to employees and supervises their performance, and decides how profits and losses are to be distributed. Titles and documents are not controlling. No single factor dominates the others; rather, the determination of an individual's status depends on all of the incidents of the relationship. The Court remanded the case so that this standard could be applied to the facts.

Justices Ginsburg and Breyer dissented. They argued that one could be both a proprietor and an employee. They also noted that the physicians claimed status as employees for some purposes, such as the Employee Retirement Income Security Act and the state's workers' compensation law, and that, by incorporating, the physicians enjoyed the benefit of limited liability. As the Ninth Circuit said, they were not entitled to secure the best of both possible worlds.

The dissent brings to mind *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947), in which the Court said, in effect, that a worker could be a supervisor at some times and an employee at other times, and therefore supervisors were employees under the National Labor Relations Act. Congress disagreed and amended the act to provide that a supervisor is not an employee under the act.

7. Removal from State to Federal Court: Fair Labor Standards Act

Breuer v. Jim's Concrete of Brevard, 123 S. Ct. 1882 (2003)

A worker sued his former employer for unpaid wages under the Fair Labor Standards Act (FLSA) in state court. The employer removed the case to federal court pursuant to 28 U.S.C. § 1441(a), which allows removal of any civil action of which federal district courts have original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress." The worker sought an order remanding the case to state court, arguing that the FLSA contained an express provision barring removal. The provision on which the worker relied was section 216(b) of the FLSA, which provides, in relevant part, "An action to recover . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction." The District Court denied the motion to remand and certified the issue for interlocutory appeal. The Court of Appeals for the Eleventh Circuit affirmed, as did the Supreme Court.

Writing for a unanimous Court, Justice Souter found that section 216(b) was not an express prohibition of removal. The FLSA does not mention removal, and the phrase "may be maintained" is too ambiguous to be an express prohibition; for example, the phrase can mean to continue (as opposed as to commence) an action, or to bring or file an action. In contrast, unambiguous prohibitions on removal occur in other statutes, one being 28 U.S.C. § 1445(a) ("[a] civil action in any State court against a railroad . . . may not be removed to any district court of the United States"). In addition, a number of other statutes use the same phrase as section 216(b), for example, the Employee Polygraph Protection Act of 1988 and the Family and Medical Leave Act of 1993, and it is unlikely that Congress intended the right to "maintain" all such actions to displace the right to remove them.

The worker argued that removal would effectively kill many legitimate claims that are too small to litigate in federal court. One who sympathizes with this argument may find hope in another source. Increasingly, employers are requiring workers to agree to arbitrate all employment disputes, and the courts are enforcing such agreements. Although probably designed with discrimination claims in mind, the agreements may well cover FLSA claims, thereby providing the worker with a forum less costly than a federal court.

8. Eleventh Amendment Immunity: Family Medical and Leave Act

Nevada Dep't of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003)

The state of Nevada discharged an employee who sued it in federal court for violating his rights under the Family and Medical Leave Act of 1993 (FMLA). The District Court awarded the state summary judgment on the ground that the claim was barred by the Eleventh Amendment. The Court of Appeals for the Ninth Circuit reversed the judgment, and the Supreme Court affirmed the Ninth Circuit's ruling.

Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. The Eleventh Amendment, wrote the Chief Justice, immunizes states from suits in federal court by citizens of another state or subjects of a foreign state; however, Congress may abrogate this immunity if Congress makes its intent to abrogate unmistakably clear and is validly exercising the power created by section 5 of the Fourteenth Amendment. The intent to abrogate in the FMLA was clear beyond debate. Therefore, the issue became whether Congress acted within its authority under section 5.

The Chief Justice continued that Congress may enforce the guarantee of equal protection of the laws, not only by proscribing violations of the Fourteenth Amendment, but also by deterring and remedying conduct that is not itself forbidden by the Amendment. (One is reminded of the penumbra of the Bill of Rights cited by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), to invalidate a state law against using contraceptives.) "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." 123 S. Ct. at 1977. An example is the Voting Rights Act, which bans literacy tests and requires pre-clearance for changes in voting procedures. Such prophylactic legislation must satisfy a three-step test. First, Congress must identify violations of the Constitution by the states. Second, Congress must enact legislation with the goal of remedying those violations; Congress may not attempt to redefine the states' legal obligations. Third, the legislation must be an appropriate remedy for the identified violations; that is, the "legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" 123 S. Ct. at 1978, quoting from

City of Boerne v. Flores, 521 U.S. 507 at 536 (1997). (Query from a former student of geometry: if one object is congruent with another, are they not, by necessity, proportional as well?)

The first step of the test was to identify constitutional violations by the states. States frequently limited women's employment opportunities in the past, such as by prohibiting women from tending bar or practicing law. Similar discrimination continued to the date of the FMLA. For example, fifteen states offered mothers up to one year of extended maternity leave, but only four granted fathers a parallel benefit. This difference was not attributable to the different physical needs of women and men, but to the pervasive stereotype that caring for family members is women's work. Congress was also aware that states applied facially neutral policies in discriminatory ways. In addition, gender discrimination was rampant in the private sector.

Did this evidence suffice to demonstrate unconstitutional behavior by the states? The answer depended on the standard for judging the evidence. In stating the standard, the Court distinguished its rulings that Congress could not abrogate the states' Eleventh Amendment immunity regarding age and disability discrimination. Like most other acts of government, acts that classify by age or disability are judged by the rational basis test: has the government taken a rational step toward a legitimate objective? This, the most permissive test under the Equal Protection Clause, leaves the least room for Congress to enact prophylactic legislation under section 5 of the Fourteenth Amendment. "Congress must identify, not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria." 123 S. Ct. 1982, quoting from *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62 at 89 (2000). Congress had no such evidence regarding age and disability discrimination by the states, and, therefore, the attempts to abrogate the states' immunity were unconstitutional in the Age Discrimination in Employment Act of 1967 and in Title I of the Americans with Disabilities Act of 1990.

In contrast, acts of government that classify by gender are judged by the intermediate scrutiny test: is the act substantially related to an important objective of government? This test affords Congress greater scope than the rational basis test for enacting prophylactic legislation under section 5 of the Fourteenth Amendment. The Court held that the states' record of participation in, and tolerance of, gender discrimination in leave benefits justified the enactment of prophylactic legislation under section 5 of the Fourteenth Amendment.

The second step of the test was easily satisfied. The aim of the FMLA was to protect workers from gender discrimination in the workplace.

The third step of the test was also satisfied. For two reasons, "the FMLA is 'congruent and proportional to the targeted violation.'" 123 S. Ct. at 1983, quoting from *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 at 374 (2001). The first reason is that Congress outlawed gender discrimination and abrogated the states' immunity in Title VII of the Civil Rights Act of 1964, but gender discrimination by states did not cease. Congress addressed the issue again in the Pregnancy Discrimination Act of 1978, and still gender discrimination persisted. A statute that mirrored Title VII and simply mandated gender equality in the administration of leave benefits would not have achieved Congress's remedial objective, for states could have satisfied the statute by providing no family leave at all; because two-thirds of non-professional caregivers are women, a policy of no leave would have excluded far more women than men from the workplace. Added prophylactic measures were therefore in order. The measure Congress chose was congruent and proportional for two reasons: (1) the FMLA provides a benefit for men as well as women; thus, the act combats the stereotype that only women are responsible for caregiving in the family and ensures that employers cannot not evade their obligations by hiring only men, and (2) the scope of the FMLA is limited. It requires only unpaid leave, applies only to employees who have worked at least 1,250 hours within the preceding year, and excludes high-ranking employees and employees in sensitive positions (such as elected officials and their staffs and policymakers). In addition, employees must give advance notice of foreseeable leaves; employers may require certification of the need for leave by a health care provider; and the act requires only twelve weeks of leave. And damages for violations of the act are restricted to actual monetary losses, limited by a two-year limitations period.

Justice Scalia dissented on the ground that a violation of the Constitution by one state does not justify abrogating the immunity of another state. Justice Kennedy, joined by Justices Scalia and Thomas, also dissented. Justice Kennedy did not believe that Congress had identified a pattern of gender discrimination by the states, and he argued that the FMLA was not a remedial measure, but an entitlement program.

We find the dissenters' points hard to answer, but two other points are even more interesting. In addition to rational basis and intermediate scrutiny, the Court discussed the third test of equal protection. Citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which upheld the Voting Rights Act of 1965, the Court alluded to the strict scrutiny test, which is used regarding acts of government that classify by race or alienage or that burden fundamental interests like voting. Such acts

must be narrowly tailored to accomplish a compelling objective of government and, said the Court, they are "presumptively invalid," 123 S. Ct. at 1982. Based on the Court's discussion of the relationship of the level of equal protection scrutiny to the scope of permissible prophylactic legislation, one may readily infer that the strict scrutiny test leaves Congress the greatest room for prophylactic legislation. In addition, one might think that the prophylactic legislation approach would be applicable to deciding the constitutionality of another kind of governmental action that is judged under equal protection, namely, affirmative action. This approach, however, was not used in *Grutter v. Bollinger* or *Gratz v. Bollinger*, which dealt with affirmative action by government and were decided this term; they are discussed below.

Also, one might have been startled by some of the evidence which Chief Justice Rehnquist cited. He wrote that a statute that merely ordered gender equality in leave benefits would not have achieved Congress's objective, as the states could have complied by providing no family leave for either gender; because—here is the startling part—two-thirds of caregivers are women, a no-leave policy would have excluded many more women than men from the workplace. In other words, a no-leave policy would have had a disparate impact on women! Recall that the Court's standard required Congress to find violations of the Fourteenth Amendment by the states. Recall as well that the Court has steadfastly held that acts of government with a disparate impact do not violate the Constitution. *Washington v. Davis*, 426 U.S. 229 (1976). Yet the Chief Justice declared that the disparate impact of no-leave policies by states justified prophylactic legislation aimed at remedying unconstitutional discrimination. One might draw some fine lines here. For example, the Chief Justice used this evidence in the portion of his opinion in which he was discussing whether the FLMA was congruent and proportional to the violation, not in the portion of his opinion in which he discussed the record of the states' discriminatory practices. Even if we have not stumbled upon evidence that disparate impact is creeping its way into the Court's constitutional discourse, we may wonder whether the Court allowed Congress to use disparate impact to re-define the states' obligations.

9. Direct Evidence in Mixed-Motive Cases: Title VII of the Civil Rights Act of 1964

Desert Palace v. Costa, 123 S. Ct. 2148 (2003)

The Civil Rights Act of 1991 sets forth the standard for mixed-motive cases under Title VII of the Civil Rights Act of 1964. An unlawful employment practice occurs when race, sex, etc. is a motivating factor in the defendant's decision, even though other factors also motivated the decision. Thus, the defendant is liable if the decision was motivated, in whole or in part, by race or sex. Relief, however, is subject to an affirmative defense. After liability is established, the burden shifts to the defendant to prove that it would have taken the same action in the absence of the unlawful reason. If the defendant carries this burden, the remedy may not include damages, back pay, or an order to hire, reinstate, or promote the plaintiff.

A woman who had been discharged sued her employer for sex discrimination under Title VII of the Civil Rights Act of 1964. She offered circumstantial evidence that an unlawful reason motivated her discharge; the employer responded with evidence of lawful reasons. The District Judge proposed to instruct the jury that if it found the employer had been motivated by both lawful and unlawful reasons, the plaintiff was entitled to damages unless the employer proved that it would have treated her similarly in the absence of the unlawful reason. Based on Justice O'Connor's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the employer objected, arguing that the burden should shift to the defendant only when the plaintiff establishes liability with direct, not merely circumstantial, evidence. The District Judge overruled this objection, and the jury returned a verdict for the plaintiff. A panel of the Court of Appeals for the Ninth Circuit agreed with the employer, but the Ninth Circuit en banc affirmed the District Court. The Supreme Court unanimously affirmed the Ninth Circuit.

Justice Thomas delivered the opinion of the Court. He wrote that the relevant text of Title VII is unambiguous. It states that the defendant's liability is established by a plaintiff who "demonstrates" that race or sex was a motivating factor in the decision; the statute does not require a heightened showing like direct evidence for this purpose. Also, section 701(e) states, "The term 'demonstrates' means meets the burdens of production and persuasion," again without reference to a heightened showing. In addition, the conventional rules of civil litigation apply to Title VII cases, and they recognize the equal utility of direct and circumstantial evidence. Finally, the statute uses the word "demonstrates" in describing the defendant's affirmative defense. Sauce for the goose is sauce for the gander, yet counsel for the defendant did not concede that the defendant must meet a heightened burden of proof; absent congressional indication to the contrary, a term in a statute should not vary in meaning depending on whether the rights of the plaintiff or the defendant are at stake.

Although we find the result of this case unimpeachable (the contrary decisions in the lower courts seem to have been driven more by ideology than law), we must observe that Justice Thomas flirted with what we consider to be a serious error. Defense counsel's unwillingness to concede a point (that if the word "demonstrates" requires a heightened show-

ing of a plaintiff, the word requires the same of a defendant) was altogether irrelevant. What a single party concedes, or refuses to concede, should not control the interpretation of a statute that applies to all persons. A party may present inconsistent arguments, and the inconsistency may be a good reason for rejecting them; but a party does not own a statute, and the party's refusal to acknowledge an inconsistency (or any other point, for that matter) is of no consequence. Thus, neither a plaintiff nor a defendant need satisfy a heightened burden, not because the defendant in this action refused to make a concession, but because the statute does not mention such a burden, the conventional rules of civil litigation apply to Title VII, and so forth.

10. Race as a Selection Criterion: Title VI of the Civil Rights Act of 1964; 42 U.S.C. § 1981; Fourteenth Amendment

Grutter v. Bollinger, 123 S. Ct. 2325 (2003)

A white applicant was denied admission to the law school of the University of Michigan. She sued, claiming the school's affirmative action program discriminated against her because of her race. The District Court ruled that the school's policy flunked both parts of the strict scrutiny test: the goal of attaining a racially diverse student body was not a compelling interest, and the school's policy was not narrowly tailored to further that interest. Sitting en banc, the Court of Appeals for the Sixth Circuit disagreed on both parts of strict scrutiny and reversed the District Court's judgment. The Supreme Court affirmed the judgment of the Sixth Circuit.

Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, took guidance from the reasoning of Justice Powell in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), which has become the touchstone for applying strict scrutiny to race-conscious admissions policies. On the first part of strict scrutiny, Justice Powell had written that attaining a diverse student body was a compelling interest because a university may select students who will contribute to the robust exchange of ideas; such exchange is paramount to the university's mission of training the future leaders of the nation. Race may be one—but not the only—"element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body." 123 S. Ct. 2337, quoting from *Bakke*, 438 U.S. at 314 (Justice Powell).

Strict scrutiny is sensitive to context, and so Justice O'Connor turned to whether the precise goal of the law school was compelling. That goal was to attain "the educational benefits that flow from a diverse student body." 123 S. Ct. at 2338. Noting that the school's judgment of the value of this goal was entitled to a degree of judicial deference, the Court agreed with the school that a diverse student body lies at the heart of the mission of the school. Diversity promotes cross-racial understanding and helps to break down racial stereotypes. Diversity enables spirited and enlightening discussions (both inside and outside the classroom, we may add), thereby enhancing learning outcomes and preparing students for the increasingly diverse society in America and the increasingly global marketplace. In addition, universities and law schools are the training ground for many of the nation's leaders. In order for those leaders to be legitimate in the eyes of the citizenry, the path to leadership must be "visibly open to talented and qualified individuals of every race and ethnicity." 123 S. Ct. at 2341.

Having found the law school's goal to be a compelling interest, Justice O'Connor turned to the second part of strict scrutiny, whether the school's means were narrowly tailored to achieve diversity. Justice Powell in *Bakke* had written that a race-conscious admissions program must consider all the elements of diversity and, in doing so, may treat an applicant's race as a "plus." In pursuit of diversity, the weight placed on race may vary from candidate to candidate. Diversity that passes muster as a compelling interest comprises many factors, including having lived abroad, possessing fluency in foreign languages, having overcome adversity in one's life, having performed extensive community service, having pursued a career in another field, as well as being an under-represented minority. Diversity of this breadth does not unduly burden an applicant who is not a minority, for this person may contribute to diversity in several other ways.

A critical mass of minority students is necessary to achieve racial diversity. According to the law school's Director of Admissions, "critical mass means . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." 123 S. Ct. at 2333 (internal quotation marks omitted). A race-conscious admissions program may not use quotas to achieve a critical mass, but may use a flexible goal. A goal allows for individual consideration of each candidate and does not insulate a candidate from comparison with all other candidates. The law school had a goal and not a quota. Between 1993 and 2000, the representation of African-American, Native American, and Latino students in each class varied from 13.5 to 20.1 percent.

The plaintiff and the United States argued that the law school's plan was not narrowly tailored because the school's objectives could have been achieved without taking race into account. The Court responded, "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." 123 S. Ct. at 2344. Narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." 123 S. Ct. at 2345. (We note that narrow tailoring differs from the earlier version of strict scrutiny, under which the means