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# The Supreme Court 1997- 1998 Labor and Employment Law Term (Part II): The NLRA, Takings Clause, and ADA Cases

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## I. Introduction

The 1997-1998 Supreme Court term had more than its share of significant employment-related cases, and assessed as a whole, it signals some important trends indicative of future directions the Court may take in the field of labor and employment law. Out of fifteen decisions in cases raising at least one workplace law claim,[1] at least five merit

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1. The computation of fifteen errs on the side of generosity in characterizing cases as falling with the labor and employment law field. One is a *per curiam* decision in a suit alleging employment discrimination in violation of Title VII of the Civil Rights Act and 42 U.S.C. § 1983, which resolved a constitutional issue of generally applicability regarding the right to trial by jury and damage remedies, Hetzel v. Prince William County, 118 S. Ct. 1210 (1998). In two other cases with signed opinions, the Court resolved issues of broad applicability, which happened to have arisen in a labor and employment law context, but could just as easily have arisen in other settings: Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047 (1998) (federal removal jurisdiction when state asserts sovereign immunity in case arising under 42 U.S.C. § 1983 alleging unconstitutional termination of employment); Brogan v. United States, 118 S. Ct. 805 (1998) (rejecting "exculpatory no" defense in case arising out of criminal violation of Section 302 of the LMRA). The other twelve cases include: Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) (Title VII sexual harassment); Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998) (Title VII sexual harassment); Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) (constitutional challenge to application of Coal Industry Retiree Health Benefits Act); Geissal v. Moore Med. Corp., 118 S. Ct. 1869 (1998) (COBRA benefits coverage); Air Line Pilots Ass'n v. Miller, 118 S. Ct. 1761 (1998) (ability of RLA union to require non-members to exhaust arbitral procedures as precondition to litigation to review union's determination of amount assessable as fair share agency shop fees); Textron Lycoming Reciprocating Engine Div'n, Avco Corp. v. United Auto Workers, 118 S. Ct. 1626 (1998) (federal jurisdiction under § 301 of the LMRA for union claim of employer fraud in the inducement to enter into collective bargaining agreement); Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (Title VII sexual harassment); Bogan v. Scott-Harris, 118 S. Ct. 966 (1998) §§ 1983 action for wrongful termination based on racially discriminatory motive as well as in retaliation for exercise of First Amendment rights); Oubre v. Entergy Operations, 118 S. Ct. 838 (1998) (ADEA/OWBPA); Allentown Mack Sales & Serv., Inc.

extended consideration, along with a sixth, non-employment-based Americans with Disabilities Act (ADA)[2] case with many ramifications for workplace-related ADA actions. The three workplace sexual harassment cases arising under Title VII of the Civil Rights Act of 1964,[3] *Oncale v. Sundowner Offshore Services, Inc.*,[4] *Burlington Industries, Inc. v. Ellerth*,[5] and *Faragher v. City of Boca Raton*,[6] along with a case alleging sexual harassment in public education under Title IX of the Education Amendments of 1972,[7] *Gebser v. Lago Independent School District*,[8] have been addressed in detail in Part I of this article, published in the preceding issue of this journal.[9] Part II, presented here, will address the remaining decisions of the term, focusing in particular on the three non-sexual harassment cases of substantial significance to the field of labor and employment law: *Allentown Mack Sales & Service, Inc. v. NLRB*,[10] *Eastern Enterprises v. Apfel*,[11] and *Bragdon v. Abbott*.[12]

In *Allentown Mack*, the Court addressed the lawfulness under the National Labor Relations Act (NLRA) of employer polling of its employees' union sentiments, resolving issues of considerable substantive importance, legally and practically, in a decision carrying complicated and difficult administrative law implications. In *Eastern Enterprises*, the Court held unconstitutional a provision of the Coal Industry Retiree Health Benefits Act of 1992, which compelled former coal operator employers to make payments to a fund to ensure the benefits of their former coal mining employees. The statute itself is of interest to only a narrow segment of business and labor. However, the constitutional analysis of the four member plurality, finding the provision violative of the Takings Clause of the Fifth Amendment, and the concurring opinion of Justice Kennedy, finding the statute's retroactivity violative of Due Process, hold analytical significance for a broad array of labor and social legislation, as well as other types of enactments. The ADA case, *Bragdon v. Abbott*, while strictly speaking not an employment case at all, construes a series of pro-

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v. NLRB, 118 S. Ct. 818 (1998) (NLRA); LaChance v. Erickson, 118 S. Ct. 753 (1998) (propriety of discharge of federal civil servant for separate offense of lying to investigators in course of investigation into underlying alleged on-the-job misconduct); Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp., 118 S. Ct. 542 (1997) (ERISA/MPPAA withdrawal liability statute of limitations).

2. 42 U.S.C. §§ 12181-12189 (1998).
3. 42 U.S.C. §§ 2000e-2000e-17 (1998).
4. 118 S. Ct. 998 (1998).
5. 118 S. Ct. 2257 (1998).
6. 118 S. Ct. 2275 (1998).
7. 20 U.S.C. §§ 1681-1688 (1998).
8. 118 S. Ct. 1989 (1998).
9. Marley S. Weiss, *The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions*, 14 THE LABOR LAW. 261, 267-315 (1998).
10. 118 S. Ct. 818 (1998).
11. 118 S. Ct. 2131 (1998).
12. 118 S. Ct. 2196 (1998).

visions of the ADA that are equally applicable under Title I, the employment portion of the statute. As the first major Supreme Court construction of the ADA, its precedential importance may in retrospect come to resemble that of *Griggs v. Duke Power Co.*[13] under Title VII.

This article will review the labor and employment law-related cases decided during the 1997-1998 term. Next, it will briefly discuss the two labor and employment law cases settled on the steps of the Supreme Court, as well as several decided cases which arose under other laws, but resolved issues pertinent to labor and employment law. Thereafter, it will more closely scrutinize *Allentown Mack, Eastern Enterprises*, and *Bragdon v. Abbott*. The concluding portion of the article will present some general observations about the term as a whole, discerning some trends among the decisions, and in the opinions of particular justices.

## II. Overview of the Labor and Employment Law Decisions of this Term

### A. *The Employment Discrimination Cases*

Six cases before the Court had been pled in the trial court, in whole or in part, as employment discrimination cases. However, only in four did the Court on *certiorari* address substantive law issues on the merits. In two others, the Court focused on issues more peripheral to the substantive claims. Three of the employment discrimination law decisions have been discussed in detail elsewhere: *Oncale*,[14] *Faragher*,[15] and *Ellerth*,[16] each of which involved claims that arose under Title VII of the Civil Rights Act of 1964, addressing issues pertaining to sexual harassment in the workplace.[17]

The Court decided only one Age Discrimination in Employment Act (ADEA)[18] case, but one with considerable practical significance. *Oubre v. Entergy Operations, Inc.*[19] interpreted the waiver provisions created by the Older Worker Benefits Protection Act (OWBPA) amendments of 1990 to the ADEA[20] as precluding application of common law doctrines of ratification or equitable estoppel to require an ADEA plaintiff to tender back monies received from the employer in conjunction with an invalid waiver of ADEA claims. An ADEA plaintiff now cannot be required to tender back monies received in conjunction with a release

13. 401 U.S. 424 (1971).
14. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998).
15. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).
16. Burlington Indus., Inc. v. Ellerth, 118 S. Ct.2257 (1998).
17. Discussion of the sexual harassment decisions may be found in Part I of this review of the Supreme Court term, Weiss, *supra* note 9, at 267-315.
18. 29 U.S.C. §§ 621-634 (1998).
19. 118 S. Ct. 838 (1998).
20. 29 U.S.C. § 626(f).

as a condition of suit under the ADEA, if the waiver failed to strictly comply with the criteria set forth in the OWBPA.[21]

The Court also issued a per curiam decision in another employment discrimination case, *Hetzel v. Prince William County*,[22] in which the plaintiff had won a jury verdict under Title VII and 42 U.S.C. § 1983.[23] The district court reduced the jury award of damages from $750,000 to $500,000.[24] On appeal, the Fourth Circuit affirmed the imposition of liability, but held the amount of the award grossly excessive in light of the evidence, set it aside, and remanded for recalculation of the emotional distress component of damages.[25] The district court on remand awarded plaintiff $50,000. The plaintiff declined this award in her motion for a new trial, treating the ruling as the equivalent of a remittitur and asserting a Seventh Amendment right to a new trial.[26]

The district court granted the new trial on the issue of damages.[27] However, the defendant then sought and obtained a writ of mandamus in the Court of Appeals, ordering further recalculation of the damage award in light of two highly restrictive Fourth Circuit precedents on emotional distress damages.[28] The Fourth Circuit also ordered the district court, after recomputation of damages, to enter judgment without the option of retrial.[29] On *certiorari*, the Supreme Court accepted plaintiff's contention that this entry of judgment without the alternative of a new trial violated plaintiff's Seventh Amendment right to trial by jury, following precedents regarding remittitur.[30]

*Bogan v. Scott-Harris*[31] arose out of a municipal employee's civil rights action claiming discrimination based on race, as well as retaliation for exercise of First Amendment rights.[32] The Court recognized absolute legislative immunity as a defense available to municipal as well as state and local governmental officials when acting in their legislative capacity.[33] The Court then broadly construed "legislative capacity," and consequently legislative immunity, to apply to the develop-

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21. 118 S. Ct. at 841-42. The Court left open to employers, however, the possibility of asserting (counter)claims for restitution, recoupment, or setoff against employees. *Id.* at 842. The *Oubre* Court also acknowledged the potential complications entailed in a release that could be effective as to non-ADEA claims, but nugatory as to the ADEA claims arising from the same termination decision. *Id.*

22. 118 S. Ct. 1210 (1998).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1210-11.

28. *Id.* at 1211 & n.1.

29. *Id.* at 1211. Pursuant to the writ of mandamus, the district court thereupon recomputed damages and entered judgment for plaintiff in the amount of $15,000. *Id.* at 1211 n.1.

30. *Id.* at 1211-12.

31. 118 S. Ct. 966 (1998).

32. *Id.* at 969.

33. *Id.* at 969, 970-72.

ment and adoption of a provision included within budget legislation that was allegedly targeted to eliminate plaintiff's position because of the employee's race or protected speech.[34]

B. *Benefits Cases Under the MPPAA and COBRA*

*Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp of California, Inc.*[35] was the one Employee Retirement Income Security Act of 1974 (ERISA) case of the term. The decision addressed the problem of accrual and running of the statute of limitations in plan lawsuits to enforce employer liability for unpaid withdrawal contributions under the Multi-employer Pension Plan Amendments Act (MPPAA). Reading the statute in a literal fashion, the Court held that the cause of action does not accrue, hence the six year statute of limitations does not begin to run until the plan trustees calculate the employer's withdrawal liability, establish the installment payment schedule pertaining thereto, send the employer notice of the schedule and a demand for payment, and the employer fails to tender a payment by the date when it is due.[36] Drawing on common law installment contract doctrine, the Court further held that a new claim arises for each missed payment. The pension plan in the case before the Court, therefore, was time-barred only from recovering the first installment payment, due slightly more than six years before the plan had filed suit, but could recover all remaining overdue payments.[37]

In another employee benefits-related case, *Geissal v. Moore Med. Corp.*,[38] a unanimous Court again read a statutory provision in a straightforward and literal manner.[39] The Court held that only dependent or other health care coverage obtained by the former employee *after* he or she attains eligibility pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) permits the employer to avoid its COBRA obligation to provide continuing benefit coverage.[40] Preexisting spousal or other non-employment based coverage does not

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34. *Id.* at 972-73. "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *See also infra* note 348 and accompanying text (discussing *Bogan* as an instance of the Court's greater sensitivity this term to the concerns of public as opposed to private employer defendants).

35. 118 S. Ct. 542 (1997).

36. *Id.* at 549.

37. *Id.* at 551, 552-53.

38. 118 S. Ct. 1869 (1998).

39. 29 U.S.C. § 1162(2)(D)(i), which provides that an employer may cease providing COBRA continuation coverage as of "the date on which the qualified beneficiary first becomes *after* the date of election . . . covered under any other group health plan (as an employee or otherwise). . . ." (emphasis added).

40. COBRA amended ERISA to require employers to afford plan beneficiaries under the employer's group health insurance plan an opportunity to elect continuing coverage upon termination of employment or certain other "qualifying events" that would otherwise cause cessation of their health care coverage. The employee or other beneficiary must remit premiums to the employer, but continues coverage on the same terms as provided during the employment relationship. 29 U.S.C. § 1163.

affect the employee's eligibility for COBRA benefits. The effect of *Geissal* is to leave it up to the employee the make his or her own comparative assessment of benefits under alternatively available plans, and ascertain whether it is worth the cost of remitting to the former employer the premium payments necessary to maintain the COBRA benefits. A third benefits case, *Eastern Enterprises*,[41] will receive separate treatment as one of the more significant cases of this Term.[42]

C. *Collective Labor Relations*

Three cases can be classified as collective labor relations matters: *Air Line Pilots Association v. Miller*,[43] a union dues case, *Textron Lycoming Reciprocating Engine Div'n, Avco Corp. v. United Automobile Workers*,[44] a Section 301 suit claiming fraudulent misrepresentation by the employer in bargaining the labor contract, and *Allentown Mack*,[45] the employer polling case under the NLRA. Discussion of *Allentown Mack* will be deferred to a later portion of this work, where the decision will receive the in-depth consideration it merits.[46]

1. Union Dues

*Air Line Pilots Association v. Miller*[47] held that a Railway Labor Act (RLA) union cannot compel non-members to exhaust a union-devised arbitral remedy as a precondition to judicial litigation challenging the union's determination of the percentage of its expenditures attributable to collective bargaining and contract enforcement-related matters. This determination, in turn, establishes the amount of an agency shop "fair share" service fee in lieu of dues, lawfully chargeable to the non-member fee payers. Since the non-members are parties to no agreement with the union, much less one binding them to arbitrate the fee determination disputes, the Court reasoned, the non-members cannot be compelled to proceed in a purely voluntary, privately-established, arbitral forum. This remains the case, the Court concluded, even though, at least under the analogous line of public sector First Amendment-based caselaw,[48] the Court has held unions to be required to provide objecting non-members with a dispute resolution forum presided over by an impartial decisionmaker.[49]

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41. Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998).
42. *See infra* Part V.
43. 118 S. Ct. 1761 (1998).
44. 118 S. Ct. 1626 (1998).
45. Allentown Mack Sales & Serv., Inc. v. NLRB, 118 S. Ct. 818 (1998).
46. *See infra* Part IV.
47. 118 S. Ct. 1761 (1998).
48. *See* Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986).
49. *Miller*, 118 S. Ct. at 1766-69.

2. Fraud in the Inducement under Section 301

*Textron Lycoming Reciprocating Engine Div'n, Avco Corp. v. United Automobile Workers*[50] involved the UAW's unsuccessful effort to obtain federal jurisdiction under Section 301 of the Labor Management Relations Act (LMRA) to litigate a tort damage claim for fraud in the inducement to enter into a collective bargaining agreement. During bargaining for a new labor contract, Textron allegedly had been repeatedly asked by the union to provide information about the employer's plans to subcontract work performed by union-represented employees, and the employer had disclosed no such plans. Only a few months after signing the new agreement, however, Textron announced its intention to subcontract a sufficient volume of work to eliminate the jobs of about half of the members of the bargaining unit at the facility.[51]

Despite the long history of liberal construction of Section 301 to establish a common law of the labor contract,[52] the Court read the statute in accordance with its literal terms. "Suits for violation of contracts," the Court reasoned, cannot cover a claim alleging not that the contract has been breached, but that it is invalid.[53] This portion of the opinion commanded the support of all nine justices.[54]

The majority left open the possibility that the union could strike in violation of the contractual no-strike clause, and in a suit by the

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50. 118 S. Ct. 1626 (1998).

51. *Id.* at 1628.

52. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). "Section 301 is not to be given a narrow reading." Smith v. Evening News Ass'n, 371 U.S. 195, 199 (1962).

53. 118 S. Ct. at 1629. Several of the circuits, however, had previously reached the opposite statutory construction. *See, e.g.*, International B'hd of Teamsters Local 952 v. American Delivery Serv. Co., 50 F.3d 770, 773 (9th Cir. 1995) (claim by union of fraud in the inducement to enter into collective bargaining agreement is not preempted by § 301 and is cognizable thereunder); Rozay's Transfer v. Local Freight Drivers, Local 208, 850 F.2d 1321, 1325-26 (9th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (claim of fraud in the inducement to enter into collective bargaining agreement may be brought under § 301); Operating Engineers Pension Trust v. Wilson, 915 F.2d 535, 538-39 (9th Cir. 1990), *cert. denied*, 505 U.S. 1212 (1992) (same). *See also, e.g.*, IBEW Local 481 v. Sign-Craft, Inc., 864 F.2d 499 (7th Cir. 1988) (overruling NDK Corp. v. Local 1550, United Food and Commercial Workers, 709 F.2d 491 (7th Cir. 1983), a case holding fraud in the inducement not cognizable under § 301, in the course of holding that disputes over the validity of collective bargaining agreements may be litigated under § 301); Mack Trucks, Inc. v. International Union, UAW, 856 F.2d 579, 583, 587-90 (3d Cir. 1988) (§ 301 suit to hold collective bargaining agreement valid states a claim).

54. Justice Stevens joined in the majority opinion, although he filed a separate concurring opinion, discussed immediately *infra*, which asserted NLRA preemption as an additional ground for reaching the construction of Section 301 adopted by the Court. *Id.* at 1632. Justice Breyer was not a signatory to the majority opinion, but commenced his opinion concurring in part and concurring in the judgment with the statement, "I agree with pages 1 through 5 of the Court's opinion," and differed with the majority only as to its construction of the Declaratory Judgment Act. *Id.*

employer, interpose the invalidity of the contract.[55] The union, however, was plainly more interested in attaining federal jurisdiction in a suit to recover tort damages for the employer's wrongfully inducing the union to enter into the agreement in the first place, at a time when the union's bargaining leverage presumably could have been deployed to greater effect.

The Court rejected an alternative argument for federal jurisdiction, based on the union's reading of the Declaratory Judgment Act[56] together with Section 301. In light of the posture of the case, the Court viewed the matter as failing to present a live case or controversy to support a declaration of voidability of the agreement on grounds of fraud.[57] As the Court noted, the real interests of each party were adverse to those entailed in litigating the voidability of the labor contract. The employer vigorously disputed the underlying fraud allegations but had "no interest in defending the binding nature of the contract," while the union had no real "interest in establishing the *nonbinding* nature of the contract."[58]

> As far as it appears, the company that had just eliminated the work of half its Williamsport employees would have been perfectly willing to be excused from a contract negotiated when the Union was in a stronger bargaining position, and the Union had no intent or disposition to exercise a theoretical option to avoid a contract that was better than what it could negotiate anew. The fact that the fraud damages claim, if successful, would establish a voidability that (as far as appears) no one cared about, does not make the question of voidability a "case of actual controversy". . . .[59]

Eight justices declined, therefore, to resolve the question of whether there would be federal jurisdiction over a similar action had the union threatened a strike in protest against the subcontracting decision, thereby creating a potentially live case or controversy as to whether the union was bound by the no-strike provision of the agreement.[60]

Unlike the majority, Justice Breyer, concurring only in the judgment on this point, would have reached the issue. He would have permitted suit, seeking a declaration of invalidity of the contract, had a strike been imminent. His opinion is vague about whether and on what basis such an action could support a claim for a tort damage remedy. His concurrence does state the view, however, that had the union shown that a strike and consequent breach of contract suit at the behest of the *employer* was "imminent . . . the Declaratory Judgment Act . . . would have authorized the District Court to adjudicate this contro-

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55. *Id.*
56. 28 U.S.C. § 2201.
57. *Id.* at 1631.
58. *Id.*
59. *Id.*
60. *Id.*

versy."[61] Justice Breyer may well contemplate that coupling a claim pursuant to the Declaratory Judgment Act with Section 301 jurisdiction would support a tort damage remedy in addition to a declaration that the collective bargaining agreement is invalid.[62] The majority opinion, on the other hand, in extended *dicta*, expresses considerable skepticism about the assumptions required to reach this result.[63]

At least so long as a union fails to demonstrate any intention imminently to strike over the subcontracting, all nine justices hold no federal cause of action will lie under Section 301 and the Declaratory Judgment Act.[64] The Court declined to address the union's conclusory assertion in a footnote of its brief, not presented in the petition for *certiorari*, that an alternative source of federal jurisdiction might be found under 28 U.S.C. § 1331 which provides for general federal question jurisdiction.[65]

The underlying question, however, remains unaddressed in *Textron*: is an intentional tort damage action based on fraud in the inducement to enter into a collective bargaining agreement consistent with the federal labor relations scheme? Dismissal for lack of federal court jurisdiction pretermits the substantive construction of Section 301, the federal common law of the labor agreement, as well as federal labor policy arising from the LMRA, to either support or preclude the tort cause of action. It may be, however, that without ever reaching this policy issue on the merits, the holding in *Textron* on a formal, doctrinal level precludes a holding that the LMRA preempts the state tort claim.

The Court's implicit construction of Section 301 is that it has no applicability to claims based on the negotiation rather than the implementation of the collective bargaining agreement. Assuming there is no federal jurisdiction over claims based on fraud in the bargaining process, it would follow that if filed in state court, such claims cannot be removed to federal court. Logic might also suggest that there is no basis to assert complete or other preemption under the LMRA as to such tort allegations, since the *Textron* Court's construction of Section

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61. *Id.* at 1632.

62. Were a majority of the Court to adopt this position in a subsequent case, it might assure the union of the ability to litigate the claim for intentional tort damages for the alleged fraud. The implication of the Supreme Court decision in Kaiser Steel Corp. v. Mullens, 455 U.S. 72 (1982), is that where necessary to determine the merits of a defense to a Section 301 action, the courts may construe the NLRA to establish the lawfulness thereunder of the contract provision whose enforcement is sought. Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1952), holds that where a claim of violation of a provision of the collective bargaining agreement also constitutes a violation of the NLRA, federal courts retain Section 301 jurisdiction, and the NLRB's jurisdiction is not exclusive. *See generally* II THE DEVELOPING LABOR LAW 1208-11 (3d ed. 1992) (Patrick Hardin, ed.-in-chief) [hereinafter cited as DEVELOPING LABOR LAW]; *id.*, 1997 Supp. at 601-13.

63. *Textron*, 118 S. Ct. at 1630-31.

64. *Id.* at 1631 (majority opinion); *id.* at 1632 (Breyer, J., concurring).

65. *Id.* at 1629 n.1. Apart from the NLRA itself, however, it is difficult to imagine another source for federal question jurisdiction in such a case, and direct reliance on the NLRA would certainly highlight the NLRA preemption problem.

301 makes it clear that claims of fraud in the inducement to enter into the agreement fall wholly outside the scope of the statute.[66]

One must question whether the Court should resolve such fundamental issues of federal labor policy, however, through literal statutory construction, inconsistent with the more generous interpretative approach the Court's precedents have taken with the same statute, as well as without consideration on the merits of the competing policy considerations. It is also ironic that the Court's decisions may well have vitiated the line of lower court cases holding Section 301 to preempt intentional tort claims based on allegations such as fraud in the inducement to enter into the collective bargaining agreement;[67] the union no doubt consciously framed the *Textron* case so as to avoid that line of decisions, as well as those arising under the NLRA.

The NLRA's *Garmon*[68] preemption, it should be noted, may still apply to tort litigation of this type, although the defense would be adjudicable only through the state courts. Indeed, Justice Stevens, concurring, found the Section 301 pleading to so clearly state a claim for employer breach of the duty to bargain in good faith that he relied on the Board's primary jurisdiction as a further ground for rejecting the construction

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66. *Cf.* Voilas v. General Motors Corp., _____ F.3d _____, 1999 U.S. App. LEXIS 3339, *18 n.1 (3d Cir. March 3, 1999) (noting that Textron's narrow construction of § 301 jurisdiction "suggests a correspondingly narrow scope for preemption," because "jurisdiction under § 301 is the obverse of preemption."). One should note in addition that no construction of the agreement is necessary to determine whether the employer intentionally misrepresented or concealed facts material to its bargaining partner in negotiating the labor contract. These cases therefore fall outside the rationale of the line of LMRA preemption cases stemming from Allis-Chalmers v. Lueck, 471 U.S. 202 (1985). *See* Lingle v. Magic Chef, Norge Div'n, 486 U.S. 399 (1988); United Steelworkers v. Rawson, 495 U.S. 362 (1990). *See also* Hawaiian Airlines v. Norris, 512 U.S. 246 (1994) (RLA).

67. *Compare, e.g.*, Smith v. Colgate-Palmolive Co., 943 F.2d 764, 768-71 (7th Cir. 1991) (§ 301 preempted suit by 22 former employees claiming that employer had fraudulently induced them to move from New Jersey to Indiana under collective bargaining agreement transfer option provision, by false assurances of stable employment); *with, e.g.*, Voilas v. General Motors Corp., _____ F.3d at _____, 1999 U.S. App. LEXIS 3339, at *19-29 (3d Cir. March 3, 1999) (following Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987), to hold that § 301 preemption does not apply to individual retired employee plaintiffs' claims that GM fraudulently induced them to accept early retirement package by falsely asserting plant would soon close); Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 231-32 (3d Cir. 1995) (employee fraud claims based on employer promise that employees would retain jobs if they decertified union held not preempted under § 301); Wells v. General Motors Corp., 881 F.2d 166, 172-75 (6th Cir. 1989) (individual employees' claims that employer fraudulently induced them to accept voluntary termination plan by false assurances regarding future reemployment prospects held not preeempted under § 301); International B'hd of Teamsters Local 952 v. American Delivery Serv. Co., 50 F.3d 770, 774 & n. 4 (9th Cir. 1995) (union claims of fraudulent inducement to enter collective bargaining agreement not preempted by § 301); Rozay's Transfer v. Local Freight Drivers, Local 208, 850 F.2d 1321, 1325-26 (9th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (employer's claims of fraud in the inducement not preempted by § 301).

68. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

of Section 301 urged by the union.[69] Given the turns and twists the Court has taken with preemption doctrine, however, speculation about labor preemption matters not specifically decided by the Court must be regarded as just that—speculation.

D. *Other Labor and Employment Law Decisions: No "Exculpatory No" Either in Federal Criminal Law or in Federal Employment*

In *LaChance v. Erickson*,[70] addressing the consolidated cases of several terminated federal employees, the Court rejected the employees' contention that the Fifth Amendment Due Process clause precluded federal agencies from not only charging their employees with misconduct on the job, but separately further charging them and eventually discharging them for making false statements in the course of the agency's investigation into the alleged original, underlying misconduct.

In *Brogan v. United States*,[71] a union representative had made false statements to a federal investigator in the course of an investigation into allegations that the union official had received payments from an

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69. *Id.* at 1631-32 (Stevens, J., concurring). *But cf., e.g.*, Belknap, Inc., v. Hale, 463 U.S. 491 (1983) (state has a "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm," holding replacement workers' state tort claim against employer for fraudulent misrepresentation of their "permanent" status not preempted by NLRA); Sears, Roebuck & Co. v. Carpenters Dist. Council, 436 U.S. 180, 193-94 (1978) (*Garmon* "arguably protected" rationale "has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer," rather than "laws of general applicability which are occasionally invoked in connection with a labor dispute," such as common law intentional torts doctrine). Among the many circuit court decisions, compare, *e.g.*, Voilas, _____ F.3d at _____, 1999 U.S. App. LEXIS 3339, at 29-36 (no NLRA preemption of retired employees' claims of fraudulent inducement to accept early retirement package by falsely asserting plans to imminently close the plant); Wells v. General Motors Corp., 881 F.2d at 170-72 (individual employees' claims that employer fraudulently induced them to accept voluntary termination plan held not preempted by NLRA); *with, e.g.*, Parker v. Connors Steel Co., 855 F.2d 1510, 1516-18 (11th Cir. 1988) (claim of fraudulent inducement of union to enter into concessionary agreement held preempted by NLRA), *cert. denied*, 490 U.S. 1066 (1989); Kolentus v. Avco Corp., 798 F.2d 949, 960-62 (7th Cir. 1986) (claim based on fraudulent failure to disclose intent to close plant in the course of negotiations for a new collective bargaining agreement held preempted under *Garmon* preemption rationale); Serrano v. Jones & Laughlin Steel Co., 790 F.2d 1279, 1286-88 (6th Cir. 1986) (claims of fraud in the inducement to enter concessionary collective bargaining agreement based on employer promises to keep plant open held subject to NLRA *Garmon* preemption). Following precedent set in William E. Arnold Co. v. Carpenters Dist. Council of Jacksonville, 417 U.S. 12, 15-18 (1974) and Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962), some circuits had treated allegations of NLRA *Garmon* preemption as no obstacle to § 301 jurisdiction over such claims. *See, e.g.*, American Delivery Serv. Co., 50 F.3d at 773-74; Rozay's Transfer, 850 F.2d at 1326, IBEW, Local 481 v. Sign-Craft, Inc., 864 F.2d 499, 503 (7th Cir. 1988); Mack Trucks, Inc. v. International Union, UAW, 856 F.2d 579, 585-86 (3d Cir. 1988). This line of reasoning will no longer shelter claims of fraud in the inducement from NLRA preemption, however, in light of *Textron*, although it remains open to the courts to rely on *Belknap* and draw sufficient distinction between the nature of the potential NLRA claim and the nature of the state tort theory to contend that *Garmon* preemption is inapplicable.

70. 118 S. Ct. 753 (1998).

71. 118 S. Ct. 805 (1998).

employer in violation of Section 302[72] of the LMRA. The union representative was convicted of making false statements, in violation of 18 U.S.C. § 1001, in addition to his conviction of the underlying criminal violation of Section 302.[73] In a five to four decision authored by Justice Scalia, with Justice Kennedy providing the fifth vote, the Court rejected the "exculpatory no" exception to the federal criminal statute for mere denial of wrongdoing,[74] a doctrine developed and concurred in by several Circuit Courts.[75] The Supreme Court held that targets may either remain silent or assert their Fifth Amendment right against self-incrimination, but may not deliberately lie, even if not under oath, without risking prosecution.[76] Neither the statute, nor Fifth Amendment due process, the majority concluded, was violated by such a statutory construction.[77] The holding in Brogan may be seen as the criminal law analogue to *LaChance v. Erickson*.[78]

## III. The Penumbra around the Labor and Employment Law Decisions: Settled Cases and Non-Employment Cases

### A. *The Term That Might Have Been—Settled Cases*

Fifteen out of ninety-one cases, or 16% of the Court's docket this year, grew out of cases in which labor and employment issues had been pled in the trial court. If one counts only the thirteen cases in which the Supreme Court actually decided labor and employment-related issues, twelve of the cases, or 13% qualify as labor and employment law decisions. By historical standards, this year's percentage pales in comparison to the 20% or 25% of the Court's docket typically occupied by labor cases twenty or thirty years ago. On the other hand, compared to recent years, the proportion of labor and employment matters this year was rather large.[79] Moreover, the high visibility and social as well as legal

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72. 29 U.S.C. § 186 (1997).

73. 118 S. Ct. at 808.

74. *Id.* at 808-10. Chief Justice Rehnquist and Justices O'Connor and Thomas were also in the majority. Justices Souter and Ginsburg concurred in the judgment on the basis that "a false denial fits the unqualified language of 18 U.S.C. § 1001," but urged Congress to reconsider the provision in light of its potential for abuse by prosecutors "to manufacture crimes." *Id.* at 812.

75. *Id.* at 808. *See* Moser v. United States, 18 F.3d 469, 473 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801, 805 (8th Cir. 1990); United States v. Equila-Juarez, 851 F.2d 122, 1224 (9th Cir. 1988); United States v. Tabor, 788 F.2d 714, 717-19 (11th Cir. 1986), United States v. Fiztgibbon, 619 F.2d 874, 880-81 (10th Cir. 1980); United States v. Chevoor, 526 F.2d 178, 183-84 (1975).

76. *Id.* at 810.

77. *Id.* at 808-10.

78. 118 S. Ct. 753 (1998).

79. A review of my predecessors' presentations at the annual meeting provides some appropriate comparison data. In 1990-1991, twenty-two out of 112 cases on the Supreme Court's docket, or about twenty per cent were labor and employment law cases. Stephen Mazurak, *The Status of the Employment Relationship: The 1990-1991 Supreme Court Term*, 7 THE LABOR LAW. 849, 853 (1992). In 1991-1992, eighteen cases raised labor and employment law questions. Roger A. Hartley, *Foreword: The Supreme Court's 1991-1992*

significance of the sexual harassment cases, the precedential importance of *Allentown Mack*, the constitutional implications of *Eastern Enterprises*, and the strong employment discrimination law implications of the ADA public accommodations case, *Bragdon v. Abbott*, make this a Supreme Court term to remember for labor and employment lawyers.

Had the parties not settled two additional cases in which the Court had already granted *certiorari*, the proportionate significance of this term would have been greater still. The UAW and Caterpillar, in the course of settling the hundreds of unfair labor practices cases as well as other litigation still unresolved between them when they finally concluded a new collective bargaining agreement, also settled a case before the Supreme Court.[80] Caterpillar had sought a declaratory judgment that its long-standing collective bargaining agreement provision providing paid leave of absence for full-time union committeepersons and grievance chairpersons, in which the union officials were paid the equivalent of the regular wages and fringe benefits they would have earned had they remained on the job, violated the criminal prohibition of Section 302 of the LMRA.[81] Besides the potential implications of such a decision for criminal law enforcement, such a declaratory judgment could have allowed employers with similar contract provisions to claim they were void as against public policy, and hence unenforceable, in labor arbitration and Section 301 suits. In addition, employers could have resisted union efforts to negotiate or maintain such provisions during bargaining for new collective bargaining agreements by raising their illegality as a defense to any claim that the employer had refused

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*Labor and Employment Law Term*, 8 THE LABOR LAW. 739, 745 n.27 (1992). In 1992-1993, labor and employment law cases dropped both as an absolute number and as a percentage of the docket. Only ten out of 125 rulings and 108 full opinions dealt with matters in this field. Janice R. Bellace, *The Supreme Court 1992-1993 Term: A Review of Labor and Employment Law Cases*, 9 THE LABOR LAW. 603, 603 (1993). The 1993-1994 docket included eleven workplace-related disputes, *see* Joseph R. Grodin, *1993-1994 Supreme Court Labor and Employment Law Term*, 10 THE LABOR LAW. 693, 693 (1994). In 1995-1996, twelve out of seventy-five cases decided by the Court involved workplace-related matters. Michael Gottesman, *Labor, Employment, and Benefits Decisions of the Supreme Court's 1995-1996 Term*, 12 THE LABOR LAW. 325, 327 (1997). In 1996-1997, the Court's overall caseload bottomed out at seventy-four, *see* Keith N. Hylton, *Labor and the Supreme Court: Review of the 1996-1997 Term*, 13 THE LABOR LAW. 263, 264 (1997), of which at least twelve are fairly categorized as labor and employment cases. *Id.* at 297 (counting a total of seven decisions arising under Title VII, NLRA, and ERISA); *id.* at 272-95 (discussing eleven cases arising under various workplace-related laws, together with several public sector cases, only two of which involved an employee-employer dispute; the others involved immunity issues pertaining to the liability of public employers or public employees to third parties).

80. Caterpillar v. International Union, United Auto Workers, 107 F.3d 1052 (3d Cir. 1997) (*en banc*), *cert. granted*, 118 S. Ct. 31 (1997), *cert. dismissed pursuant to Supreme Court Rule 46.1*, 118 S. Ct. 1350 (1998).

81. *Id.* at 1053.

to bargain in good faith in violation of Section 8(a)(5) of the NLRA,[82] and by charging the union with violating Section 8(b)(3) of the NLRA if it demanded inclusion of such an illegal provision in an agreement, or bargained for or reached impasse over its inclusion.

Of far broader significance, however, would have been a Supreme Court decision in *Piscataway Township Board of Education v. Taxman*.[83] The settlement of the *Piscataway* case eliminated what would have been a seventh employment discrimination case from the Court's docket. Observers widely regarded that case as having the potential to produce a landmark judicial re-examination of *United Steelworkers v. Weber*[84] and *Johnson v. Transportation Agency, Santa Clara County*.[85] These precedents had interpreted Title VII as permitting moderate forms of race and sex-based affirmative action preferences so long as they were not intended to attain rather than maintain racial or gender balance, and did not "unnecessarily trammel the interests" of non-preferred employees. Dismissals based on settlement by the parties pursuant to Supreme Court Rule 46.1 are relatively unusual; the fact that there were two this term within the labor and employment law field, including one of such an exceptionally high profile, is extraordinary. Together with the fifteen decided cases, they may also suggest a renewed and heightened interest among the Justices in issues arising in the labor and employment field.

B. *Non-Labor Cases of Special Significance to Labor and Employment Law Specialists*

In addition to the cases litigating claims of violations of labor or employment laws or defenses thereto, there were several Supreme Court cases this term in which other types of claims were alleged, but which nevertheless hold considerable significance for labor and employment lawyers. I have already mentioned the Title IX sexual harassment vicarious liability case, *Gebser v. Lago Vista Independent School District*.[86] Another important case, *Baker v. General Motors Corp.*,[87] involved the company's unsuccessful effort to apply the Full Faith and Credit clause of the Constitution to enforce a Michigan court injunction obtained in the course of settlement of a former employee's wrongful

82. *See* 107 F.3d at 1054. Indeed, a precipitating factor behind Caterpillar's institution of federal court litigation was the union's filing of Section 8(a)(5) refusal to bargain in good faith charges when the employer unilaterally ceased making such payments, after a nationwide collective bargaining dispute between the parties resulted in the union members working without a labor contract.

83. 91 F.3d 1547 (3d Cir. 1996) (*en banc*), *cert. granted*, 117 S. Ct. 2506 (1997), *cert. dismissed pursuant to Supreme Court Rule 46.1*, 118 S. Ct. 595 (1997).

84. 443 U.S. 193 (1979).

85. 480 U.S. 616 (1987).

86. 118 S. Ct. 1989 (1998). This decision is discussed in Weiss, *supra* note 9, at 275-88.

87. 118 S. Ct. 657 (1998).

termination lawsuit in a Missouri products liability action. The Michigan injunction would have precluded the former employee from testifying against the employer.[88] The Supreme Court held that the interest of the second state in full access to potential evidence in its judicial search for the truth outweighed Michigan's interest in enforcing its injunction prohibiting the former employee's testimony.[89] The Court recognized this situation as entailing an exception to the usual Full Faith and Credit clause requirement that such foreign judgments be enforced as though they were the second state's own.[90]

*General Electric Co. v. Joiner*[91] arose out of a products liability action against producers of chemicals and equipment used in the workplace by an employee who allegedly suffered cancer from on-the-job exposure. The Supreme Court granted *certiorari* to resolve issues of appropriate expert witness testimony in such a context, and upheld broad discretion vested in the district court regarding such rulings.[92]

In *Crawford-el v. Britton*,[93] a Section 1983 prisoner's rights case, a five to four majority of the Court rejected a clear and convincing evidence standard or other heightened burden of proof for plaintiffs seeking to establish constitutional tort claims against government officials where motive is the gravamen of the claim. Because many cases of unconstitutional government action turning on motives are employment cases, this holding is an important one for labor and employment law specialists.

Likewise significant are this term's ADA cases. In *Bragdon v. Abbott*,[94] a suit by an HIV-infected patient against her dentist under the public accommodations provisions of the ADA, the Court rendered a series of interpretations which, while technically involving another portion of the statute, will be followed under the employment provisions contained in Title I. This opinion is likely to become a landmark ADA decision, and will be addressed in depth below.

A second, non-employment ADA case, *Pennsylvania Dep't of Corrections v. Yeskey*,[95] should also be mentioned. There, in an opinion written by Justice Scalia, a unanimous Court held that the Title II ADA prohibition against disability-based discrimination by a "public entity" against a "qualified individual with a disability" applies to state prisons as public entities and to prison inmates. Reasoning literally from the text of the statute, the Court concluded that prison inmates may be deemed "qualified individuals with a disability," hence protected against dis-

88. *Id.*
89. *Id.* at 667-68.
90. *Id.* at 668.
91. 118 S. Ct. 512 (1997).
92. *Id.* at 515.
93. 118 S. Ct. 1584 (1998).
94. 118 S. Ct. 2196 (1998).
95. 118 S. Ct. 1952 (1998).

crimination, provided they are qualified or eligible to participate in the particular prison benefit or opportunity. In *Yeskey*, the plaintiff had been refused admission to a motivational bootcamp, which could have substantially shortened his period of incarceration, because of his medical history of hypertension. The Court, however, expressly declined to reach the question of whether application of the ADA to state prisons is a constitutional exercise of congressional power under the Interstate Commerce clause or Section 5 of the Fourteenth Amendment to the Constitution.[96]

This article now turns to a deeper examination of the most significant cases: the NLRA case, *Allentown Mack*, the employee benefits unconstitutional takings case, *Eastern Enterprises*, and the ADA case, *Bragdon v. Abbott.*

## IV. *Allentown Mack*

In *Allentown Mack Sales & Services, Inc. v. National Labor Relations Board*,[97] the Court addressed the NLRB's requirement that an employer have a "good faith reasonable doubt, based on objective considerations," that the incumbent union continued to enjoy the support of a majority of the employees before the employer could permissibly poll the employees' union sentiment. The Board's standard was upheld, but its application to the facts in the case at bar was overturned.[98]

The case arose after Mack Trucks sold its Allentown, Pennsylvania operations to a group of its managers who founded Allentown Mack Sales and Service, Inc. The Mack Truck service and parts employees had been represented by Machinists Local Lodge 724 and the newly created employer hired thirty-two of the forty-five employees who had constituted the bargaining unit under Mack Trucks.[99]

Because Allentown Mack was a successor employer to Mack Trucks,[100] the union was entitled to be treated as an incumbent union

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96. *Id.* at 1956.

97. 118 S. Ct. 818 (1998).

98. *Id.* at 829.

99. *Id.* at 820-21. Every employee initially hired was a former Mack employee. Allentown Mack Sales and Serv., Inc. v. NLRB, 83 F.3d 1483, 1484 (D.C. Cir. 1996).

100. After trial on the union's unfair labor practice charges, the Administrative Law Judge (ALJ), affirmed by the Board, found Allentown Mack to be a successor employer. 316 N.L.R.B. 1199, 1199, 1204 (1995). This finding was not challenged before the Court of Appeals, *see* 118 S. Ct. at 834 (Breyer, J., concurring in part and dissenting in part), hence was not at issue before the Supreme Court. The employer satisfied both the "hired a majority of the predecessor's employees" test, *see* Howard Johnson Co. v. Hotel Employees, Detroit Local Joint Exec. Bd., 417 U.S. 249, 263 (1974), and the "majority of the employees hired by the new employer" test. *See* NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 281 (1972); Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 41 (1987). *See generally* DEVELOPING LABOR LAW, *supra* note 62, at 781-851.

which had no collective bargaining agreement in effect.[101] Allentown Mack was required to assume its predecessor's duty to bargain in good faith with the union, and the union was entitled to the benefit of a rebuttable presumption of continued majority status.[102]

Soon after Allentown Mack rehired a majority of the bargaining unit employees and commenced operations, the union demanded recognition and requested commencement of bargaining for a new labor contract.[103] The employer, in a written reply, refused to bargain, asserted a good faith doubt as to the union's majority status, and advised the union of its arrangements for "an independent poll by secret ballot of its hourly employees to be conducted under guidelines prescribed by the National Labor Relations Board."[104]

Allentown Mack arranged for a Catholic priest to conduct a poll of the employees' support for the union. The union lost by a vote of 19 to 13.[105] The employer then relied on the outcome to reiterate its refusal to bargain with the union, claiming a demonstrated lack of majority status. The union filed unfair labor practice charges. The Administrative Law Judge (ALJ), affirmed by the Board, found the employer to have conducted the poll in procedural compliance with the NLRB's *Struksnes* requirements,[106] but held that the employer had lacked a reasonable doubt, based on objective considerations, that the union retained the support of a majority of employees in the bargaining unit.[107] The polling, and the refusal to bargain based on its results, were therefore held to have violated §§ 8(a)(1) and 8(a)(5).[108]

The D.C. Circuit panel, with one member in dissent, enforced the Board's order.[109] The Court of Appeals rejected the employer's challenge to the Board's standard for polling, despite conflicting precedent in three other Circuits.[110] The Fifth, Sixth, and Ninth Circuits had adopted a weaker predicate for employer polling, that polls are permitted if the

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101. *See Fall River Dyeing and Finishing Corp.*, 482 U.S. at 38-40 (same policies in favor of preserving industrial peace, stability of the bargaining relationship, and avoiding providing the employer with incentives to delay bargaining in hopes of undermining support for the union apply in incumbent union setting and in successorship context, and lead to application of duty to bargain in good faith based on presumption of continued majority status).

102. *See id.* at 41 & n.8. *See generally* DEVELOPING LABOR LAW, *supra* note 62, at 790-97.

103. *Allentown Mack*, 118 S. Ct. at 821.

104. *Id.*

105. *Id.*

106. Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967).

107. *Allentown Mack*, 316 N.L.R.B. at 1199.

108. *Id.*

109. 83 F.3d at 1488.

110. 83 F.3d at 1485-87 (citing NLRB v. A.W. Thompson, Inc., 651 F.2d 1141 (5th Cir. 1981); Thomas Indus., Inc. v. NLRB, 687 F.2d 863 (6th Cir. 1982); Mingtree Restaurant, Inc. v. NLRB, 736 F.2d 1295 (9th Cir. 1984)).

employer has "substantial, objective evidence of a loss of union support" as opposed to loss of union majority status.[111] The Court of Appeals likewise found substantial evidence on the record as a whole to support the Board's conclusion that only seven of thirty-two bargaining unit employees had been shown to have declined to support the union, prior to the polling, an insufficient number to support a good faith, reasonable doubt of continued majority status.[112] A narrowly divided Supreme Court reversed, upholding the traditional formulation of the polling standard, but overturning its application.[113]

The majority decision was written by Justice Scalia, with two separate groups of four Justices joining in each of the two key holdings, to produce a majority opinion whose entirety was subscribed to only by Justice Scalia. The portion of the opinion upholding the NLRB standard, Part II, was joined in by Justices Stevens, Souter, Ginsburg, and Breyer; the portion rejecting the Board's application of the standard, and holding that the employer had a sufficient objective basis to poll the workforce, Parts III and IV of the opinion, was joined in by Chief Justice Rehnquist, along with Justices O'Connor, Kennedy, and Thomas.

A. *The NLRB Standard*

Justice Scalia's reasoning upholding the NLRB polling standard starts with the recitation of conventional formulae requiring judicial deference to the NLRB's construction of the Act: "courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' "[114] and provided that "the Board's 'explication is not inadequate, irrational or arbitrary.' "[115]

The NLRB has applied the same criteria to employer polling, employer petitions for a representation election (RM petition) when there is an incumbent union, and unilateral employer withdrawal of recognition and refusal to bargain with an incumbent union when no collective bargaining agreement is in effect.[116] In all three situations, absent a contract bar, certification bar, or recognition bar,[117] the Board treats the employer as having to overcome the incumbent union's rebuttable

111. 83 F.3d at 1485-86 & 1486 n.3 (citing *A. W. Thompson*, 651 F.2d at 1145; *Thomas Indus., Inc.*, 687 F.2d at 869; *Mingtree Restaurant, Inc.*, 736 F.2d at 1299).

112. *Id.* at 1487-88.

113. 118 S. Ct. at 829.

114. *Id.* at 822 (quoting Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987)).

115. *Id.* (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)).

116. *See* Texas Petrochemicals Corp., 296 N.L.R.B. 1057 (1989), *enf'd as modified*, 923 F.2d 398 (5th Cir. 1991).

117. The three year contract bar, the one year bar following certification, and the bar for "a reasonable period" of time to negotiate an initial contract after voluntary recognition of the union by the employee each entitle the union to the benefit of an *irrebuttable* presumption of majority status for the duration of the bar period. *See generally* I DEVELOPING LABOR LAW, *supra* note 62, at 571-73.

presumption of continued majority support. The employer must rely on objective evidence sufficient to raise a good faith reasonable doubt of the union's majority status.[118]

The five members of the Supreme Court who were in accord on this point found the Board's application of a single standard to polling, RM petitions, and withdrawals of recognition to be rational, hence entitled to deference, despite the fact that it was less than a model of logical consistency.[119] The employer had argued that if the same showing was required to poll as to withdraw recognition, polling was rendered useless for the only purpose for which it is permitted by the NLRB: to establish the union's loss of majority support as a defense to a bad faith bargaining charge when the employer withdraws recognition. The Court, however, accepted the reasonableness of the Board's view that polling is "disruptive" to established bargaining relationships as well as "unsettling to employees." The Court also recognized that there are other reasons to justify polling, even when polling is limited to ascertaining employee union sentiment. Such reasons may include preserving good employee morale and a semblance of employee freedom of choice, and avoiding a pyrrhic victory for the employer of validly withdrawing recognition followed by the union winning a victory in an NLRB election.[120]

The core of the employer's argument was that the test for polling should be lower than that for unilateral employer withdrawal of recognition. This contention was deemed less persuasive when juxtaposed with a comparison between the standard for polling and that for seeking an RM election. As the Court of Appeals elaborated more explicitly than the Supreme Court, it is difficult to reject the logic of the argument that the employer should not be allowed to conduct a poll—which has the same purpose as an RM election, but lacks the procedural protections—when the Board would refuse to conduct an RM election.[121] The Supreme Court majority acknowledged that the RM election/polling comparison could yield competing arguments for either higher or lower standards for one versus the other, and concluded: "if it would be rational for the Board to set the polling standard either higher or lower than the threshold for an RM election, then surely it is not irrational for the Board to split the difference."[122]

The four dissenters on this issue, in an opinion by Chief Justice Rehnquist, disputed the statutory textual basis for the Board's standard which they asserted in fact operates to interfere with employee free

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118. *See generally* Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to an Incumbent Union*, 1991 WIS. L. REV. 653.

119. A useful discussion of the competing comparisons and their rationales may be found in Flynn, *supra* note 118, at 660.

120. 118 S. Ct. at 809.

121. *Allentown Mack*, 83 F.3d at 1486 (following Texas Petrochemical Corp., 296 N.L.R.B. at 1060).

122. 118 S. Ct. at 823.

choice.[123] Alternatively, the dissent as to this part of the decision reasoned that, in light of the gravity of the consequences, the application of an identical standard to polling, RM elections, and unilateral employer withdrawal of recognition is irrational. The dissenters contended that because of the one year election bar, the consequences of a lost RM election for the union are more severe than that of polling. They conclude, therefore, that the polling standard should be set lower than that for either RM elections or withdrawal of recognition.[124] Chief Justice Rehnquist's opinion alludes to *NLRB v. Gissel Packing Co.*[125] to advance a suggestion that employer polling may be subject to § 8(c) and First Amendment free speech protections, based on the employer's right to receive information, by analogy to the union's similar right in other contexts.[126] The mere presence of a constitutional concern, these four justices would hold, renders "the Board's interpretation of the Act . . . not entitled to deference."[127]

The dissent, however, mentions neither *Gissel* nor *Linden Lumber*[128] when it impliedly equates the reliability of a unilateral instrument, the employer-conducted poll, with that of an election conducted by a neutral governmental agency.[129] Only when the employer's unfair labor practices "impair the electoral process" are a union's authorization cards accepted as a second-best measure to ascertain and effectuate employee representation wishes and bind the employer to a duty to bargain.[130] Neither union authorization cards, nor a ballot conducted independently at the behest of the union, will bind an unconsenting employer to bargain.[131] Four justices, however, would permit an employer's unilaterally-conducted poll to bind an unconsenting union and employees, to the extent that the employer would be entitled to terminate the bargaining relationship without prior invocation of NLRB processes.

The fifth Justice, Scalia, seemingly felt duty bound by administrative law precepts to defer to the NLRB's judgment to the contrary on the matter of statutory interpretation embodied in the text of the polling standard. Along with these four dissenters, however, in the remainder

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123. *Id.* at 831.

124. *Id.* at 832.

125. 395 U.S. 575, 616-17 (1969).

126. 118 S. Ct. at 832-33.

127. *Id.* at 833 (citing, *inter alia*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council, 485 U.S. 568, 574-77 (1988); and NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 506-07 (1979)).

128. Linden Lumber v. NLRB, 419 U.S. 301 (1974).

129. *See Allentown Mack*, 118 S. Ct. at 831-32.

130. *Linden Lumber*, 419 U.S. at 304, 306, 310. *See also Gissel*, 395 U.S. at 601-609 (despite inferiority of cards to Board-conducted election as a reliable indicator of employee sentiment, cards are sufficiently valid to provide a substitute measure of employee sentiment when employer unfair labor practices have substantially reduced the possibility of a fair election).

131. *Linden Lumber*, 419 U.S. at 310. *See generally* I DEVELOPING LABOR LAW, *supra* note 62, at 558-60; *id.*, 1997 Supp. at 214.

of his opinion he overturns in practice the polling standard he purports to approve in theory.

B. *Rejection of Application of the Polling Standard: The Dictionary as Primary Interpretative Source*

In Parts III and IV of the opinion, Justice Scalia, this time joined by the Chief Justice, along with Justices O'Connor, Kennedy, and Thomas, overturns the Board's finding that the employer had failed to demonstrate its good faith doubt of the union's majority status based on objective evidence. Justice Scalia rejected the Board's own construction of its use of the phrase "good faith doubt," to mean "disbelief." He relied on Webster's New International Dictionary to support instead the interpretation of "uncertainty," rather than affirmative denial of belief in the truth of the assertion.[132] One could characterize the approach of the majority opinion to interpretation of the Board's test, which the Board had articulated through the adjudicatory process, as akin to Justice Scalia's strict, literal method of construction of a congressionally-enacted statute.

Justice Scalia couples the reinterpretative analysis of the "good faith doubt" standard with a recasting of the judicial review test of *Universal Camera Corp.*[133] "Substantial evidence on the record as a whole" is transmuted into "whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion."[134] Courts of Appeals have treated this as a standard of review of fact-finding highly deferential to the agency.[135] However, under this approach, the Board's expertise in the field of industrial relations is written out of any role in evaluating evidence.[136] Moreover, the Court's language construing the "substantial evidence" standard of judicial review to require that the Board not ignore or underweight pertinent record evidence[137] lends itself to expansive judicial reassessment of NLRB fact-finding determinations and evaluative judgments.[138]

In the course of a few lines, the opinion restates and transforms the basis for the NLRB ruling against Allentown Mack. In the original,

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132. *Allentown Mack*, 118 S. Ct. at 823.

133. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

134. 118 S. Ct. at 823.

135. *See, e.g.*, Capital Cleaning Contractors, Inc. v. NLRB, 147 F.3d 999, 1004 (D.C. Cir. 1998) ("[T]his is a highly deferential standard of review.")

136. *See Allentown Mack*, 118 S. Ct. at 834 (Breyer, J., concurring in part and dissenting in part).

137. *Id.* at 828. *See infra* text accompanying notes 179-187.

138. *See, e.g.*, Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 519 (4th Cir. 1998) (citing *Allentown Mack* to support its reasoning that "the Board interpreted the evidence in the light most favorable to the Union. The Board is not at liberty to accept only those evidentiary inferences that support the union's position and reject all of those that support the employer. Based upon the evidence before the Board, no reasonable person could have concluded that the membership of the union struck over the employer's alleged threat of discharge if the employees exercised their right to strike.").

the employer is held to have violated the Act because it "ha[d] not demonstrated that it held a reasonable doubt, based on objective considerations, that the union continued to enjoy the support of a majority of the bargaining unit employees."[139] As the Board understood its own formulation, the employer had to actually disbelieve that the union had maintained majority support, that disbelief had to have been based on objective evidence, and had to have been reasonable under all the circumstances.[140]

Justice Scalia's interpretation transforms the question before the Court into "whether, on the evidence presented to the Board, a reasonable jury could have found that Allentown lacked a genuine, reasonable uncertainty about whether Local 724 enjoyed the continuing support of a majority of the unit employees,"[141] a question the Court immediately answers, "No."[142] In addtion, the Part III majority explicitly interprets its rewritten standard *not* to require disavowals of the union by half or more of the employees.[143]

In particular, the Court weighed quite differently from the Administrative Law Judge and the Board the representations made to the employer by two employees, one of them a former union shop steward, of not only their own dissatisfaction with the union, but that of their co-workers. The majority concluded that as a matter of law, a sufficient basis existed to establish "uncertainty whether a majority in favor of the union existed," that is, in the majority's translation, the employer had an objective basis to support a good faith doubt of continued majority status.[144]

This portion of the opinion is troublesome in several respects. In the first place, however appropriate Justice Scalia's literal interpretation approach to rules that are the product of legislative or regulatory formulation, it seems misplaced when applied to adjudicatorily developed

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139. *Id.* at 823 (citing 316 N.L.R.B. at 1199).

140. *See* Transcript of Oral Argument in Allentown Mack Sales & Serv. v. NLRB, 1997 U.S. TRANS LEXIS 45, *26 ("The board's standard means the employer must have a solid, reasonable basis for believing that the union has lost majority support. The board is not using the term doubt here to mean uncertainty. It is using that term to mean disbelief); *id.* at *27 (Mr. Chief Justice, the term doubt does have two different meanings. One of them means vague uncertainty, and that is the way in which we use it in the criminal law context. I think the board has been quite clear that that's not what it means when it uses the term. Here, doubt means disbelief, and what the employer has to show is a solid basis for believing.").

141. 118 S. Ct. at 823.

142. *Id.* at 823-24. The dissent shines a brilliant spotlight on this sleight of hand. *See id.* at 834 (Breyer, J., concurring in part and dissenting in part).

143. "The Board did not specify how many express disavowals would have been enough to establish reasonable doubt, but the number must presumably be less than 16 (half of the bargaining unit), since that would establish reasonable *certainty*." *Id.* at 824.

144. *Id.* at 825. This evidentiary conclusion is also intertwined with the majority's redefinition of "objective evidence" discussed *infra* text accompanying notes 146-169, 178.

standards. The portion of the decision advocating deference to reasonable agency interpretation of the statute it is charged to administer (Part II) is in considerable tension with the highly non-deferential, formalistic analysis of the objectively based, good faith reasonable doubt standard in the subsequent part (Part III) of the opinion. Justice Breyer characterizes the second half of Justice Scalia's opinion baldly: "It has rewritten a Board rule without adequate justification. . . . The only authority cited for the transformation [is] the dictionary."[145]

Second, based on what the Court does, rather than what it says it does, it is as if the different majority in Parts III and IV of the decision overrules or at least saps of all vitality the reasoning of the majority in Part II. The formulation adopted by the majority in Part III is operationally a much weaker standard than that expressed and applied by the Board, supposedly accepted by the Court in Part II. In addition, the Part III and IV majority's rewriting of the NLRB "objective reasonable doubt" standard may render it functionally indistinguishable from the more relaxed standard of the Fifth, Sixth, and Ninth Circuits, firmly rejected by the majority in Part II.

The employer's argument urging adoption of the Circuit Courts' alternative standard was rejected by the Board and Court of Appeals in *Allentown Mack*, and ostensibly was rejected by a majority of the Court in Part II of Justice Scalia's opinion on behalf of the opposite line-up of Justices to those signing on to this later segment of the opinion. Nevertheless, whether it is harder for an employer to demonstrate that it "lacked a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees"[146] (the *Allentown Mack* majority's rewritten version of the NLRB standard) as compared to showing that it had "substantial, objective evidence of a loss of union support" (the Fifth/Sixth/Ninth Circuit standard rejected by the Board and ostensibly the Court in *Allentown Mack*) is highly questionable. The answer depends on what evidence counts as "substantial" and "objective,"[147] as well as on whether "uncertainty" as to a union majority means a greater, smaller, or equivalent decline in union adherents compared to "loss of union support." What seems clear is that Courts of Appeals may now revisit NLRB fact-finding, applying a facially unchanged standard of "objective reasonable doubt," whenever in the judges' view the employer had a "genuine, reasonable uncertainty" about the union's continuing majority status. It is difficult to reconcile this test with Part II's adoption by the Court of the existing Board formula, as well as its proclamation of continued deference to the Board's non-arbitrary elaboration of such interpretations of the Act.

145. *Id.* at 833, 834 (Breyer, J., concurring in part and dissenting in part).

146. *Id.* at 823.

147. For the *Allentown Mack* Part III and IV majority's loose definition of "objective," *see infra* text accompanying note 147.

Whatever this reinterpreted standard of good faith doubt of majority support means, it may well be applied to all three areas to which the Board has heretofore traditionally applied the "objective reasonable doubt" standard. The employer's threshold appears by this decision to have been lowered not only as to polling, but also as to the filing of an RM petition, and as to unilateral withdrawal of recognition from an incumbent union. Both on the merits and on the Court's peculiar and uneven approach to deference to agency interpretation of the statute it is charged to administer, the decision is highly significant.

C. *The "Objective" Nature of Three Key Pieces of Evidence*

That is not, however, the end of the matter. Justice Scalia's reasoning about proper assessment of the evidence appears to overturn a good bit of additional NLRB precedent. *Allentown Mack* may presage a hostile judicial attitude toward long-standing Board rules about evaluating evidence regarding employee attitudes, sentiments, or reactions, in contexts other than determining union majority status. The majority's "genuine reasonable uncertainty" version is based on more than simple replacement of "honest disbelief" in interpreting "good faith doubt."[148] "Objective evidence" is also effectively reevaluated by the Court, again with the dictionary as virtually the only source cited in support, to mean "evidence external to the employer's own (subjective) impressions."[149] The idea that the evidence should be minimally subject to employer taint or manipulation, implicit in the NLRB's several pertinent lines of precedent about evaluating and weighting indirect evidence of employees' union sentiments, is thereby sucked out of the phrase without debate on the merits.

A review of the pertinent evidence is in order. To support its entitlement to poll, the employer pointed to comments by seven bargaining unit members, during pre-hire interviews, individually disavowing support for the union.[150] On the ALJ's accounting, express disavowals of

148. *See id.* at 823.

149. Responding to Justice Breyer's dissent, the majority defines "objective" in a footnote: "[T]he meaning of the word has nothing to do with the *force*, as opposed to the *source*, of the considerations supporting the employer's doubt. . . . Requiring the employer's doubt to be based on 'objective' considerations reinforces the requirement that the doubt be 'reasonable,' imposing on the employer the burden of showing that it was supported by evidence external to the employer's own (subjective) impressions." *Id.* at 823 n.2 (emphasis added) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1679 (2d ed. 1949)).

150. *Compare id.* at 821 (contention that eight employees had expressed anti-union sentiment) *with* 83 F.3d at 1487-88 (accepting the Board's contention that only seven out of thirty-two bargaining unit employees as of the date the employer announced the poll had expressed anti-union sentiment to management) *and* 118 S. Ct. at 835 (Breyer, J., concurring in part and dissenting in part) (citing the ALJ's decision as identifying only six or seven employees with suitable statements, explaining the differences in computation). The employer originally also attempted to rely on statements of employees hired subsequent to the date of announcement of its plan to conduct the poll, but the Board

the union by "7 of 32, or roughly 20 percent of the involved employees" was insufficient to support the employer's claim of good faith doubt.[151] The *Allentown Mack* Parts III and IV majority opinion first notes that a sufficient number of employee disavowals of the union "must presumably be less than 16 (half of the bargaining unit), since that would establish reasonable *certainty*."[152] Next, the majority concedes, "we would not say that 20% first-hand confirmed opposition (even with no countering evidence of union support) is alone enough to *require* a conclusion of reasonable doubt."[153] Additional evidence of the union sentiments of the remainder of the unit must therefore decide the outcome.

Allentown Mack had cited three additional, critical pieces of evidence: (1) a statement by a mechanic working on the night shift who claimed that no one on that shift's complement of five or six workers supported the union; (2) one employee's statement expressing dissatisfaction with the representation afforded him by the union; and (3) a statement by one of the union's shop stewards that the employees did not want the union, and that if an election were held, the union would lose.[154]

The Supreme Court differed sharply with the lower tribunal in evaluating these three pieces of evidence. The ALJ, the Board, and the Court of Appeals had applied three or perhaps four lines of NLRB case law discrediting the evidentiary value of specific types of employee statements other than express disavowals of support for the union, when relied on by the employer as "objective" evidence to support a claim of good faith doubt of union majority status. They therefore placed little or no weight on any of the three additional employee statements, and found the evidence insufficient to support the employer's claimed good faith doubt. The difference in treatment of this evidence by the Supreme Court majority may be every bit as significant an outcome of *Allentown Mack* as the Court's reconstruc-

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held that the objective, reasonable doubt had to be determined as of the date of the decision to conduct the poll, hence disregarded those other employee's alleged attestation of nonsupport for the union. 316 N.L.R.B. at 1206-07. The Court does not comment on the propriety of this well established Board precedent.

151. 316 N.L.R.B. at 1207, quoted in *Allentown Mack*, 118 S. Ct. at 824.

152. 118 S. Ct. at 824 (emphasis added). This proposition, of course, is premised on the earlier holding interpreting "reasonable doubt" to mean "reasonable uncertainty" rather than actual and reasonable disbelief in the union's majority support. *See supra* text accompanying notes 132-139.

153. *Id.* (emphasis added). The rather remarkable negative implication of that sentence might be understood to mean that confirmed, first hand evidence of opposition to the union on the part of 20 per cent of the bargaining unit could suffice to support a Board decision permitting the employer to unilaterally poll, or even withdraw recognition. Absent the one year election bar, this theory would allow the great majority of employers whose employees have just, by majority vote, chosen union representation, to withdraw recognition and refuse to bargain, since the union rarely wins 80 per cent of the vote in modern Board-conducted elections.

154. 118 S. Ct. at 821.

tion of the Board's objective, reasonable doubt standard, replacing affirmative "disbelief" with mere "uncertainty."

In the first line of precedents, in the Court's words, "the Board has consistently questioned the reliability of reports by one employee of the antipathy of other employees toward their union."[155] In fact, the weight the Board gives to second or third hand testimony about other employees' sentiments depends on the extent to which the witness can provide details about the direct and intermediate sources of the information, the circumstances under which it was gathered, and other assurances of its reliability and accuracy. The second body of Board precedent "holds that an employee's statement of dissatisfaction with the quality of union representation may not be treated as opposition to union representation."[156] The third line of "Board precedent holds that an employer may not rely on an employee's anti-union sentiments, expressed during a job interview in which the employer has indicated that there will be no union. Such employee expressions are unlikely to be sincere."[157]

The Supreme Court treats the three pieces of evidence, and the three related bodies of NLRB precedent, in two different portions of the opinion. In Part III, the Court in effect evaluates the testimony about each of the three employee statements as though the NLRB precedents regarding their weight and credibility did not exist. The Court treats as the only issue the question of whether the employer, presented with such employee statements, could reasonably and in good faith doubt the union's majority status. The notion of objectiveness of the evidence, in the sense that the evidence be of a sort that an outside, neutral observer would believe reliable, uninfluenced by the employer's own, expressed or unexpressed desire that the union majority disappear, has vanished from the analysis. Naturally, the Court finds the evidence sufficient to support the employer's right to conduct the poll.[158]

The ALJ evaluated the words of the employee who expressed dissatisfaction with his union representation as "more an expression of a desire for better representation than one for no representation at all."[159] The Court, noting the ambiguity, assesses the statement as creditable toward establishing the employer's good faith doubt: "the statement would assuredly engender an uncertainty whether the speaker supported the union, and so could not be entirely ignored."[160]

Hearsay testimony by an Allentown Mack manager, attributing to one night shift employee the assertion that "the entire night shift did

155. *Id.* at 829 (quoting *Allentown Mack*, 83 F.3d at 1488, citing three NLRB decisions and two Court of Appeals precedents dating back as far as 1978).
156. *Id.* (quoting *Allentown Mack*, 83 F.3d at 1488).
157. *Id.* (quoting *Allentown Mack*, 83 F.3d at 1488).
158. *See id.* at 825.
159. 316 N.L.R.B. at 1207, *quoted in Allentown Mack*, 118 S. Ct. at 824.
160. 118 S. Ct. at 824.

not want the union," was disregarded by the lower tribunals.[161] The Supreme Court majority acknowledged that "[u]nsubstantiated assertions that other employees do not support the union certainly do not establish the fact of that disfavor with the degree of reliability ordinarily demanded in legal proceedings."[162] The Court, however, reasoned that it is not the fact of employee disaffection from the union that is at issue, "but rather the existence of a reasonable uncertainty on the part of the employer regarding that fact."[163] Similarly, while there was no evidence of any factual foundation for the union steward's "feeling that the employees did not want a union," and that the union would lose a vote, if one were taken,[164] the majority deemed it surely a contributing factor "to a reasonable uncertainty whether a majority in favor of the union existed. . . . Allentown would reasonably have given great credence to Mohr's assertion of lack of union support since he was not hostile to the union, and was in a good position to assess anti-union sentiment."[165]

Nearly all of the statements were made either in the context of a potential successor employer drawn from incumbent management deciding whether to buy the plant and save some of the employees' jobs or, shortly thereafter, in the course of interviews by the successor employer, hiring employees who were well aware of the employer's desire to operate without a union. This fact plays no role in the Court's analysis. It has no bearing on the "objectivity" of the evidence, in so far as real employees, external to the employer's imagination, actually did make the statements attributed to them. However, if "objectivity" has something to do with the quality of the evidence, and if "objectivity" connotes an unbiased, accurate ascertainment of what the employees really wanted, rather than what they thought the successor employer wanted to hear, one would have to regard every bit of the evidence as too tainted to be relied upon.[166] The Board's position did not go nearly this far, occupying a middle ground in weighting evidence of doubtful reliability.

Nor did the Court majority deem it significant that the two most important pieces of evidence were testified to before the ALJ by members of management rather than the employees quoted as having made the statements. Managerial witnesses testified about night shift worker Bloch's statement about the night shift workers' wish to leave the union,

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161. *Id.* at 821.
162. *Id.* at 824.
163. *Id.*
164. 316 N.L.R.B. at 1207-08.
165. 118 S. Ct. at 825.
166. The extreme position rejecting employee statements made under such inherently coercive conditions as invariably unreliable, on the other hand, might tend to disenfranchise the voice of workers unhappy with union representation, even when a solid majority, or even supermajority wished to be rid of the union entirely apart from the hiring or successorship context in which the statements were made.

as well as about the statement about widespread employee disaffection with the union, attributed to Mohr, the union steward. Precisely because this was second-hand testimony, no details were provided which might have permitted an assessment of the accuracy and reliability of the circumstances under which the intermediary employees, quoted as to their understanding of the group sentiment, gathered their information.[167] In so far as the issue was the truth of the underlying matter, the real views of the employees, this was third hand, not even second hand testimony. Worse still, the evidence was based on testimony by a member of management, whose employment position creates an anti-union self-interest susceptible of influencing the witness' recollection of the wording of statements about employees' union sentiments.[168]

To the Court, however, the NLRB's routine application of its precedents limiting the value of each of the three pieces of indirect evidence was a "refusal to credit probative circumstantial evidence."[169] The majority opinion gives some weight to the equivocal statement of the employee who was dissatisfied with the representation he was getting in return for his union dues,[170] concludes that the statement by the employee that his night shift co-workers did not want the union should "be given considerable weight,"[171] and that the union steward's statement to the effect that the employees, if given the chance, would vote out the union, "has undeniable and substantial probative value on the issue of 'reasonable doubt.' "[172]

Finally, the majority presented its mathematical analysis of this situation: since seven employees expressly disavowed support for the union, the other "25 would have had to support the union by a margin of 17 to 8—a ratio of more than 2 to 1" for the union to have maintained majority status.[173] The night shift employees' disaffection and the steward's statement, the Court reasons, "would cause anyone to doubt that

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167. *See* Allentown Mack Sales & Serv., Inc., 316 N.L.R.B. 1199, 1200, 1207-08. *See also Allentown Mack*, 83 F.3d at 1488.

168. At least some of the Administrative Law Judges applying the NLRA, however, seem to have avoided following *Allentown Mack* to its logical conclusion. *See, e.g.*, Transpersonnel, Inc., 1998 NLRB LEXIS 316, at *32-34 (May 27, 1998), distinguishing *Allentown Mack* and declining to credit manager's testimony quoting employee as to co-workers' disaffection with the union, where manager was well aware employee was a non-member, long opposed to the union, and where manager had induced employee's further statements).

169. *Allentown Mack*, 118 S. Ct. at 824.

170. *Id.* ("The statement would assuredly engender an uncertainty whether the speaker supported the union, and so could not be entirely ignored.").

171. *Id.* (As to the Allentown manager's testimony regarding his recollection of what Bloch, the night shift worker, said to the manager about disaffection for the union among the night shift employees, the Court held, "absent some reason for the employer to know that Block had no basis for his information, or that Block was lying, reason demands that the statement be given considerable weight.").

172. *Id.* at 825.

173. *Id.*

degree of support . . ."[174] The Court concludes that "giving fair weight to Allentown's circumstantial evidence, we think it quite impossible for a rational factfinder to avoid the conclusion that Allentown has reasonable, good faith grounds to doubt—to be *uncertain about*—the union's retention of majority support."[175]

As the majority accuses the ALJ, NLRB, and Court of Appeals either of not "giving fair weight to Allentown's circumstantial evidence" or of not being "rational" in their fact-finding, or both, one should pause to unpack the Court's own arithmetic. First, the Court is characterizing as "circumstantial evidence" of the real union sentiments of the employees something not usually accorded that label—third hand evidence, based on second hand statements, with no explicit testimony about the first hand statements of the employees whose views are in issue. Second, the statement by the one employee who was not sure he was getting his dues money's worth in union representation could perhaps be labeled circumstantial evidence of the employee's own union sentiments. It is, however, hard to label arbitrary or irrational the interpretation of the NLRB that standing alone, statements of dissatisfaction with the quality of an incumbent union's representation are not probative of a desire to get rid of the union, rather than change its leadership or practices. Were there additional information suggesting the employee's desire to work without a union, one could treat the at-most ambiguous statement as corroborative or probative of that individual employee's desires about union representation.

The *Allentown Mack* Part III and IV majority is largely composed of those members of the Court—the Chief Justice, and Justices O'Connor, Kennedy, and Scalia—who have been extremely reluctant to interpret stray remarks, statements by managers not directly involved in the employment decisionmaking process, or other forms of indirect as well as circumstantial evidence, as probative of the employer's unlawful motive under Title VII in making a particular employment decision.[176] It is hard to avoid the conclusion that the members of the *Allentown Mack* Part III and IV majority apply a double standard in their assessment of second hand testimony, off-handed comments, and indirect expressions of union sentiment.

Arithmetically, the Court's reasoning here is dubious as well. Whenever the union's majority is less than unanimous, if one presents infor-

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174. *Id.*

175. *Id.*

176. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice"); *id.* at 280 (dissenting opinion of Kennedy, J., Rehnquist, C.J., and Scalia, J.) (shifting burden of persuasion as to employer's motives "not for every case in which plaintiff produces evidence of stray remarks in the workplace").

mation only about the employees opposed to the union, a super-majority will be required for the union to have overall majority support among the bargaining unit. The Court's approach effectively eliminates the continuing presumption of majority support, not after considering all the evidence, but after considering the evidence that 20 percent of the employees expressly disavowed the union to the employer, mainly during job interviews.[177] Yet the Court earlier concluded that 20 percent was too low a number, on its own, to dictate a reasonable doubt, much less the actual conclusion that the union had lost its majority.[178]

D. *Administrative Law and Three Lines of NLRB Precedent Regarding the Reliability of Evidence of Employees' Support for the Union*

Having concluded that on its own view of the evidence, examined without consideration of the Board's rules for weighting it, it would have been impossible for a rational fact finder not to find that the employer had satisfied the Board's polling standard, the majority had already implicitly suggested that the three lines of Board precedent as to treatment of evidence were no longer viable. In the fourth and final section of the opinion, however, the Court went much further. It explicitly declared it to be error for the ALJ and the Board to rely on any of these lines of authority, rather than ad hoc "logic and sound inference from all the circumstances" in assessing evidence of good faith reasonable doubt, or presumably anything else.[179] Accusing the Board of systematically using words and phrases to mean something other than what is stated, both in connection with the polling standard and otherwise, the Court held that this had to stop.[180] Henceforth, it instructed, reviewing courts would examine stated NLRB standards as verbally expressed, and apply ordinary evidentiary rules to examine the record for support of the NLRB's findings of fact to support their conclusions.[181]

The reasoning of the majority opinion in Parts III and IV appears to be constructed to obscure inferential gaps by conflating what were, in the original Board standard, two separate criteria the employer had to meet: (1) the employer had to actually possess a real, good faith doubt of the union's majority status based on actual evidence and not mere wishful thinking; and (2) the nature of that supporting evidence had to be not only external from the employer's imagination, but to a reasonable degree, of a sort that an objective observer would see as sufficiently verifiable, accurate, and reliable to support such a judgment if, say, it were in opposition to the employer's wishes. The second criteria was expressed through the separate lines of NLRB precedent addressing

177. *Allentown Mack*, 118 S. Ct. at 824.
178. *Id.*
179. *Id.* at 829.
180. *Id.* at 826-28.
181. *Id.* at 828-29.

evidentiary issues, but nevertheless, was an implicit part of the formulation of the polling standard. By effectively judicially overruling these criteria, without squarely addressing them on their merits, the Court does exactly what it disavows in Part II of its the opinion: substitutes its judgment for the Board's expertise in matters vouchsafed to the Board by Congress. Ironically, the majority's approach closely resembles that of the Board the Court heavily criticizes as disingenuous, if not deliberately misleading.

The Court construed the Administrative Procedures Act (APA) to apply to the NLRB's adjudicatorily developed rules, including in particular these rules about the treatment of evidence, and then in effect construed the requirement that agency rules not be arbitrary to require that they conform to plain English (perhaps for lawyers) definitions. This was necessary both to ensure proper judicial review, the Court suggested,[182] and to meet administrative due process provisions embedded in the APA, requiring a "scheme of 'reasoned decisionmaking.' "[183] To comply with the APA, Justice Scalia wrote, the agency's action not only "must be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[184]

Courts set aside notice and comment regulations if not adequately supported by the reasons advanced by the agency, even if the rule would be within the agency's scope of authority. Where used like it is by the NLRB, the Court held, agency adjudication must be subjected to the same requirement. "It is hard to imagine a more violent breach of [the reasoned decision making] requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced."[185] Moreover, the Court reasoned, "[a]n agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding,"[186] a thinly-veiled contention that this was exactly what the Board had intended to accomplish.

> Because reasoned decisionmaking demands it, and because the systemic consequences of any other approach are unacceptable, the Board must be required to apply in fact the clearly understood legal standards that it enunciates in principle, such as good faith reasonable doubt and preponderance of the evidence. Reviewing courts are entitled to take those standards to mean what they say, and to conduct substantial-evidence review on that basis. Even the most consistent . . . departure from proper application of those standards will not alter the legal rule by which the agency's factfinding is to be judged.[187]

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182. *Id.* at 828.

183. *Id.* at 826 (quoting Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 52 (1983)).

184. *Id.*

185. *Id.* at 827.

186. *Id.* at 828.

187. *Id.*

As a result of this decision, deference to the agency's construction of its own statutory interpretations could be held to be inappropriate whenever the interpretation does not comply with ordinary legal or standard language usage. This is a rather dramatic shift away from cases like *Chevron*[188] and *Auer v. Robbins*,[189] counseling great deference to agency interpretations, formal or informal, of the statutes they administer and the regulations they have promulgated thereunder. In the space of two years, the Court has moved quite a distance from Justice Scalia's opinion for a unanimous Court, holding that it must sustain the Secretary of Labor's informal construction of its salary-basis executive, administrative, and professional exemption test under the Fair Labor Standards Act, so long as the Secretary's approach is "based on a permissible construction of the statute," where Congress has not "directly spoken to the precise question at issue."[190] While the *Allentown Mack* Court was clearly irate at what it perceived to be perverse administrative adjudicatory practices by the NLRB,[191] the holding here is likely to trouble many other agencies as well.

The result will surely produce problems for the Board extending beyond the polling issue, or even the objective, reasonable doubt issue in connection with withdrawals of recognition, refusals to bargain, and filing of RM petitions.[192] While one may differ with the Court or the employer in its insinuations about the illegitimacy of the Board's mode of delineating adjudicatory rules governing virtually all aspects of NLRB practice, it is certainly true that to those not among the cognoscenti, NLRB decisions often use terminology that seems impenetrable. Political differences aside, and without regard to which political party

188. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

189. Auer v. Robbins, 519 U.S. 452 (1997).

190. *Id.* at 457 (quoting *Chevron*, 467 U.S. 837 (1984)).

191. "Reasoned decision making, in which the rule announced is the rule applied, promotes sound results, and unreasoned decision making the opposite. The evil of a decision that applies a standard other than the one it enumerates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably administrative law judges), and effective review of the law by the courts. . . . [A] series of cases that exemplify in practice the divorcing of the rule announced from the rule applied . . . frustrates judicial review. If revision of the Board's standard of proof can be achieved thus subtly and obliquely, it becomes a much more complicated enterprise for a court of appeals to determine whether substantial evidence supports the conclusion that the required standard has or has not been met." 118 S. Ct. at 812-28.

192. The decision almost immediately began consequences in these directly affected areas. *See, e.g.*, Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 519-21 (4th Cir. 1998) (rejecting § NLRB 8(a)(5) finding where employer withdrew recognition and refused to bargain after employees submitted decertification petition that court concluded was untainted by unfair labor practices, because following *Allentown Mack* reasoning, it had already rejected other NLRB factfinding and overturned ruling that strike had been caused by employer unfair labor practices, rendering employer's unilateral changes based on implementation of its last offer lawful); Alcon Fabricators, Div'n of Alcon Indus., 1998 NLRB LEXIS 411 (1998) (following *Allentown Mack*, crediting secondhand testimony regarding employee sentiment and upholding employer withdrawal of recognition).

dominated the Board in a given period of time, the case law has consistently relied on a high level of jargon, insider terminology and eccentric usage. The rigid use of highly specialized, often atypical usage-based terminology in its decision making, however, has been ameliorated by the consistency of the usage, in the sense that NLRB officials and employer and union representatives who were frequent participants in NLRB processes understood the usage, and the NLRB internal hierarchy remained faithful to the substance of the precedents because of the strong constraints imposed by the terminology.

The *Allentown Mack* decision will encourage litigants to challenge many bodies of NLRB precedent that they may find inconvenient in a given case, on review in the Courts of Appeals.[193] This may help ensure full employment for labor lawyers, but it is unlikely to result in an improvement in the administration of the NLRA or effectuation of the policies of the Act.

The Court's criticism may be valid to the extent that outsiders, especially the courts and Congress, have additional hurdles to overcome to accurately assess NLRB rulings, but the Court's construction of the APA as applying to require more transparent usage by the Board seems highly questionable. It is not clear that the adversarial judicial review system is incapable of remedying any confusion on the part of reviewing courts. Parties before the Board rarely claim that they have been misled or confused by the Board's obscure usage of terminology and pyramiding of precedents to construct fully integrated rules on particular topics.

The employer in *Allentown Mack* did not claim that it had in any way misunderstood the Board's standards, or that it had in fact acted in reliance on the standards governing polling, as formally stated, rather than on the basis of a full review of the applicable doctrine and advice of counsel competently revealing the evidentiary precedents as well as the objective, good faith doubt test. Such a contention would verge on an admission of legal malpractice by counsel.

Rather, the employer wanted the Board to be bound by the policy stated in the express standard, read without integrating the evidentiary policies stated in other precedents, if it could not get the standard itself overturned. Whether the employer's argument represented sound policy under the NLRA, it is hard to see why the APA should affect the analysis, except to constrain the Court from doing exactly what it did: second-guessing the Board's standards, in areas left open under the Act,

193. *See, e.g.*, Mid-America Care Foundation v. NLRB, 148 F.3d 638, 642-43 (6th Cir. 1998) (rejecting the NLRB interpretation of the § 2(11) phrase "independent judgment" regarding the supervisory status of LPN charge nurses, on grounds, *inter alia*, that "[a]s in *Allentown Mack*, here the NLRB has divorced the rule announced from the rule applied" as well as that there was not "substantial evidence" to support the NLRB application of the rule).

and falling well within the Board's special expertise and authority to administer the law.

The Court also accuses the Board of being obscure for the purpose of misdirecting congressional oversight and confusing the political process. This is not, as far as my reading of the APA reveals, covered under the statutory concerns, unlike administrative due process for litigants and reasonable transparency for reviewing courts.[194] Congress is fully capable of vindicating its own interests through the legislative and appropriations process, if it shares the Court's perception. The Court's devotion to the statutory text may have suffered a momentary lapse here.

The Board is, as the Court itself noted in *Allentown Mack*, free to modify or restate its existing precedents in the form of rules that more accurately express the substance of the standard. Such a restatement of principles would be responsive to the *Allentown* majority's criticism and would impose less of a burden on the practitioner to master multiple lines of Board case law and integrate them to discern the entirety of the Board's approach to the area in question. Construing the APA to require the regulatory agency to perform the integrative legal work, rather than the legal practitioner, however, seems itself to lack mooring in the statutory text. Such a requirement has more in common with continental European civil law methods and evidences a departure from the traditional common law interpretative approach.

The General Counsel has already urged the Board to reconsider its objective, good faith doubt standard, proposing in a pending case that the employer's unilateral withdrawal of recognition be flatly forbidden, but that either Board-conducted elections or employer polling be allowed on a showing of direct evidence of actual loss of union support among at least 30 percent of the unit, together with objective evidence providing the employer with "reasonable grounds for believing that

194. 5 U.S.C. § 553 provides for notice and public comment in the course of administrative agency rulemaking. 5 U.S.C. §§ 554-557 sets forth notice and due process requirements applicable to agency adjudicatory proceedings, including notice to litigants of the allegations and a fair opportunity to contest them, including the right to be represented by counsel, to present evidence and legal argument, to confront and cross-examine opposing witnesses, that the agency official presiding over the hearing be impartial and not have participated in a prosecutorial capacity in the same or related matter, and that the agency render a written decision if the matter is not settled. Rulings both on the main and on collateral matters must be accompanied by a statement of the grounds for the decision. Findings of fact and conclusions of law must be expressed in writing in the initial or recommended decision, if any, as well as in the agency's final adjudicatory decision. 5 U.S.C. §§ 701-706 provide for judicial review of agency adjudication. While 5 U.S.C. §§ 801-808 contains special provisions regarding congressional oversight of agency rulemaking, there is no provision for oversight of adjudicatory actions, apart from the general legislative oversight process. Legislative oversight of administrative adjudicatory decisions would implicate significant separation of powers issues.

the union has lost its majority."[195] The Courts will have to examine any change in prevailing Board rules for consistency with the Act. However, whether this or some other rule is adopted by the Board, it is likely that the holding in *Allentown* will lead to some form of modification by the Board of its rules, since the version reconstructed by the Court certainly expresses a far different policy for polling than any ever adopted by the Board.

The larger problem for the Board is its long history of proceeding by adjudication rather than formal rulemaking proceedings. There is a large web of common law-like interpretation of the Act, which is construed in a quasi-common law-like method, and it is difficult to envision the Board thoroughly overhauling its large corpus of precedent, whether through formal rulemaking or a rejuvenated adjudicatory process in which the Board members focus on framing their holdings in a rule-like fashion.

The Board's method of developing rules through adjudication, and the attendant indeterminacy and uncertainty, are neither unique to it as a regulatory agency nor substantially different from the interpretative methods employed by American courts. If the Board's methods fail the Allentown Mack critique of adjudicatory interpretation, similar criticism could be levelled at the courts themselves. Like the Board, courts interpret statutes such as, for example, Title VII through common law jurisprudential methods, based on accumulated judicial precedents, integrated, reconciled, and made mutually consistent with each other and the statutory text. Moreover, Congressionally-enacted statutes would seem to often run afoul of *Allentown Mack*'s insistence that words speak clearly and employ their plain English. One cannot help doubting, for example, whether the disparate impact provisions of Title VII of the Civil Rights Act of 1964, as amended by the 1991 Civil Rights Act to incorporate *Griggs v. Duke Power Co.*[196] and its progeny, incorporating statutory textual language partially inconsistent with *Griggs* or one or more of its progeny, would pass Justice Scalia's stringent test for compliance with the requirements of reasoned decision making and transparency for judicial review.

Given the Justices' repeated references to the dictionary as primary interpretative authority, not only in this case but in several others this

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195. *See NLRB Acting General Counsel Fred Feinstein's Report on Cases Decided from March 31, 1996, to June 30, 1998*, 172 Daily Lab. Rep. (BNA) E-4 (September 4, 1998). *See also* Susan J. McGolrick, Federal Agencies, 06 Daily Lab Rep (BNA) S-5 (January 11, 1999) (NLRB has under submission Chelsea Indus., Inc. (7-CA-368465) and Levitz Furniture Co. of the Pacific, Inc. (20-CA-26596), in which it is considering General Counsel Feinstein's proposed changes in Board practice); *NLRB's Notice and Invitation to File Briefs in Chelsea Indus., Inc. and Levitz Furniture Co. of the Pacific, Inc.*, 1998 Daily Lab. Rep. (BNA) 71 at D26 (April 14, 1998).

196. 401 U.S. 424 (1971).

term,[197] the NLRB may not be the only administrative tribunal under pressure to change its habits.[198] Furthermore, one could question whether the Court itself practices the strict, formal construction that it preaches. One rather obvious example is the interpretation of Title VII this term to impose liability on employers for their supervisors' sexual harassment of subordinates, subject to a judicially crafted affirmative defense.[199] While this holding in *Ellerth*[200] and *Faragher*[201] may faithfully reflect the purposes of the statute, it is the antithesis of literalistic, statutory textual analysis.[202]

At bottom, it is the very method of common law adjudicatory interpretation of statutes, with its indeterminacy and shifting details of construction, to which Justice Scalia seems to object. He obliquely accepts the Supreme Court precedent abjuring any requirement that the Board develop its rules through rulemaking rather than the adjudicatory process.[203] The gist of the holding announced in *Allentown Mack*, however, seems to require that the Board interpret its statute in a fashion more like an agency rulemaking process, and less like a common law court.[204] This result, too, seems hard to find explicitly, or even implicitly in the text of the APA. Perhaps the Court's interpretative method in this portion of the opinion suffers from a flaw similar to that of which the majority accuses the Board.

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197. The other two labor and employment law cases include Textron Lycoming Reciprocating Engine Div'n, Avco Corp. v. United Auto Workers, 118 S. Ct. 1626, 1629 (1998); and Brogan v. United States, 118 S. Ct. 805, 808 (1998). All three majority opinions were authored by Justice Scalia. In two non-employment ADA cases, producing decisions that have a bearing on ADA employment litigation, Justices also relied upon the dictionary as authority: Bragdon v. Abbott, 118 S. Ct. 2196, 2215 (1998) (Rehnquist, C.J., Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part); and Pennsylvania v. Yeskey, 118 S. Ct. 1952, 1955 (1998) (Scalia, J.). In addition, the dictionary was cited in at least one opinion in the following three cases last term: Clinton v. City of New York, 118 S. Ct. 2091, 2098 n.13 (1998) (Stevens, J.); National Endowment v. Finley, 118 S. Ct. 2168, 2180-81 (1998) (Scalia and Thomas, JJ., concurring in the judgment); and Feltner v. Columbia Pictures TV, Inc., 118 S. Ct. 1279, 1288 (1998) (Scalia, J., concurring in the judgment).

198. *See, e.g.*, Biddulph v. Callahan, 1 F. Supp. 2d 12, 21 (D.D.C. 1998) (following *Allentown Mack* to hold that Social Security Administration determination of facts was lacking requisite support of "substantial evidence" based on how a reasonable factfinder, rather than an eccentric agency, would interpret the evidence).

199. *See generally* Weiss, *supra* note 9.

200. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).

201. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

202. The dissent in *Ellerth* rather accurately labels the affirmative defense "a piece of judicial legislation." 118 S. Ct. at 2271.

203. *See id.* 118 S. Ct. at 827 ("The National Labor Relations Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking") (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974). *Bell Aerospace* holds, *inter alia*, that "the choice between rulemaking and adjudication lies in the first instance in the Board's discretion." 416 U.S. at 294.

204. *See id.* at 827 (purporting to apply similar standards to judicial review of NLRB policy, whether developed through the rulemaking or the adjudicatory process).

## V. *Eastern Enterprises v. Apfel*

Another noteworthy decision is *Eastern Enterprises v. Apfel*[205] in which the Court split four-one-four over whether a provision of the Coal Industry Retiree Health Benefits Act of 1992[206] violated either the Takings Clause of the Fifth Amendment or the Due Process clause. The challenged section of the statute imposed liability on the plaintiff employer for the funding of a portion of the health care benefits of coal miners who had worked for the company many years earlier.[207] The fact that this employer had left the industry in 1965 played a major role in persuading the four member plurality, in an opinion written by Justice O'Connor, that the legislation was severely retroactive, hence unconstitutional.[208]

In the plurality's analysis, the disruption of settled expectations rendered the imposition of a legal duty to contribute to the statutorily-created fund a taking of the assets of the employer, still operating in other business fields.[209] As the plurality viewed it, Congress in essence imposed a duty to fund the equivalent of a defined benefit plan, despite the fact that the employer, at the time it left the industry, was only funding a defined contribution plan that limited benefits payable to those benefits fundable based on then-existing contributions.[210] The substantiality of the financial burden imposed on the employer, and its disproportionality to the employer's funding obligations when active in the industry under its own plan, were also key factors in the holding. The law was therefore deemed to "attach new legal consequences to [an employment relationship] completed before its attachment,"[211] hence to "substantially interfere with Eastern's reasonable investment expectations."[212] Imposing such a retroactive burden upon Eastern, the plurality holds, would violate "fundamental principles of fairness underlying the Takings Clause."[213]

The four dissenters, Justices Breyer, Souter, Stevens, and Ginsburg, viewed the Coal Act as falling within the scope of permissible social regulation and taxation. The dissenters were particularly influenced by their view that there had been an unwritten, perhaps legally unenforceable but nevertheless implicit commitment on the part of the entire coal industry, including the plaintiff former coal

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205. 118 S. Ct. 2131 (1998).
206. 26 U.S.C. §§ 9701-9722 (1998).
207. 26 U.S.C. § 9706(a)(3).
208. *See* 118 S. Ct. at 2143.
209. *See id.* at 2153 ("severely retroactive," "far in the past"); *id.* at 2152 ("The distance into the past that the Act reaches back to impose liability . . . raise[s] substantial questions of fairness.").
210. *Id.* at 2152.
211. *Id.* at 2151 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994)).
212. *Id.*
213. *Id.* at 2153.

employer, to ensure the promised pension and health care benefits to retired coal miners.[214]

Justice Kennedy, casting the decisive vote, took an extremely careful approach to the problem. His opinion leans toward formalism in rejecting the dissenters' contention that moral or implicit promises and representations about miners' benefits by the industry could support legislated imposition of such a greatly expanded liability compared to that undertaken in writing during the period when Eastern Enterprises had been mining coal.[215] On the other hand, Justice Kennedy viewed the doctrinal slippery slope problem posed by an expansion of takings doctrine as extremely dangerous, and preferred to rest his analysis on the substantive due process violation that he perceived to ensue from retroactive imposition of liability based on acts many years in the past. Despite the legacy of New Deal substantive due process decisions, he regarded the narrow and specific context of retroactive legislation as one carrying its own historical legacy of opprobrium within the United States and other democracies, and on that basis attempted to craft a narrowly bounded application of substantive due process doctrine.[216]

It thus seems clear that a majority of this Court will overturn social and labor regulation if it unduly and retroactively disrupts settled employer expectations.[217] However, the lack of a majority for any given doctrinal basis, and the fact that both bases articulated—substantive due process and Takings Clause doctrine—are extremely malleable and open to subjective judgment about the extent of disruption of expectation, the legitimacy of expectation, and the justification for the disruption, make predictions about future cases extremely difficult. On the one hand, the decision appears to suggest that a majority of the Court will resist expansive development of the Takings Clause or any other constitutional provision to protect entrepreneurial rights against regulation in a manner reminiscent of the old substantive due process cases. On the other hand, the sanguine reading of a bounded approach to constitutional invalidation of economic legislation may have suffered

214. *Id.* at 2160 (Stevens, J., dissenting); *id.* at 2165-68 (Breyer, J., dissenting).

215. *See id.* at 2159 (Kennedy, J., concurring in the judgment and dissenting in part).

216. *See id.* at 2154-59 (Kennedy, J., concurring in the judgment and dissenting in part).

217. In this regard, one can view the *Eastern Enterprises* Court's reasoning as fitting within the line of Takings Clause cases that overturn legal provisions "inconsistent with the classical requirement of rules that are certain and knowable in advance." *See* Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 650 (1998). One may also read the decision as fitting the established category Takings Clause cases overturning laws which unfairly single out and burden a handful of economic actors to accomplish a social goal benefitting many, where the actors are viewed as "no more responsible for the harm the regulation seeks to remedy, and no more benefitted by its relief, than other individuals who bear none of its economic costs." *Id.* at 652.

a major blow through the *Eastern Enterprises* decision, even though no new body of doctrine commanded majority support.

Professor Molly McUsic, for example, has read the Court's Takings Clause approach until now as one that largely confined itself to real property-related restrictions, particularly environmental regulation, land use limitations, and other forms of regulation burdening a handful of property owners to benefit the entire community.[218] On her institutionally-based analysis, the Court has until now carefully skirted the post-substantive due process body of doctrine upholding economic regulatory legislation.[219] If so, *Eastern Enterprises v. Apfel* may constitute an important breach in the dike, and signal a shift in direction by the Court. In particular, the "ascendancy of dominion interests in land" which McUsic discerns in recent Takings Clause decisions,[220] may be at an end.

The *Eastern Enterprises* case does, in any event, evidence Justice Kennedy's increasingly independent frame of mind, as well as his somewhat idiosyncratic brand of judicial conservatism. His opinion for the majority in *Bragdon v. Abbott* further signals Justice Kennedy's inclination and ability to chart his own course, and in that case, he succeeded in carrying a majority of the Court with him.

## VI. "Disability" and "Direct Threat" under the ADA: *Bragdon v. Abbott*

The non-employment law case this term likely to have the greatest effect on employment law is certainly *Bragdon v. Abbott*,[221] a case that arose under the ADA provision addressing disability-related discrimination in the provision of public accommodations.[222] This Title III decision interprets the meaning of "impairment," "major life activities," and "substantially limits," which together control the meaning of the statutory term "disability."[223] In addition, the opinion discusses appropriate methods of proving or rebutting a claim that the individual with a disability poses a "direct threat" to the health or safety of others.[224] These are all terms with identical or similar formulations under Title

218. *See id.* at 595-606 (1998); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 608-09 (1996).

219. *See* McUsic, *supra* note 217, at 601, 607, 633-45; McUsic, *supra* note 218, at 608-10.

220. *See* McUsic, *supra* note 217, at 598. Prof. McUsic explains that the current Court has "assembled nearly an equally potent arsenal of doctrinal tools" compared to the *Lochner*-era Court's instruments for analyzing substantive due process; "[i]t has adopted for the Takings Clause similar nexus requirements as the *Lochner*-era Court while incorporating a form of their expansive property definition. It is this combination that makes the Takings Clause a formidable tool against liberal economic policy." *Id.* at 624.

221. 118 S. Ct. 2196 (1998).

222. 42 U.S.C. § 12182.

223. 118 S. Ct. at 2204.

224. *Id.* at 2216.

I of the ADA. The Supreme Court's approach in *Bragdon* therefore will provide important precedent for the lower courts in deciding ADA employment cases. *Bragdon* also provides the lower courts with a schematic for the order in which they should analyze contested allegations that the plaintiff meets the statutory definition of "disability."

By loosening up on important aspects of the "disability" definition, *Bragdon* will greatly simplify plaintiffs' overall task in typical ADA employment cases. Until now, plaintiffs have often found themselves caught between the need to show that they are severely enough impaired and their life activities sufficiently limited to qualify as "disabled," while still remaining sufficiently non-impaired to be able to perform, with or without reasonable accommodation, the essential functions of the job at issue in the litigation.[225] Defendants have successfully whipsawed plaintiffs in many cases, as the employees have struggled to avoid being impaled on either horn of the dilemma. By easing up on the requirements to prove disability, and especially by permitting plaintiffs to rely on major life activities unrelated to employment or economic gain, the *Bragdon* decision has made it much easier for certain categories of disability discrimination plaintiffs to establish claims.

A. *The Majority Opinion*

Plaintiff Sidney Abbott went to defendant Randon Bragdon's dental offices for an examination. The patient disclosed her HIV-infected status, although she was then asymptomatic. When the dental examination revealed a cavity, Dr. Bragdon refused to fill it in his office. He did offer to treat the condition at a hospital at no additional charge for his professional services, but with the patient bearing the extra costs for use of the hospital's facilities.[226] The district court granted summary judgment for plaintiffs,[227] and the First Circuit Court of Appeals affirmed, holding that asymptomatic HIV-infected status was sufficient to satisfy the ADA definition of "disability."[228] The lower courts also rejected the dentist's defense that treating Abbott in Dr. Bragdon's office would have "posed a direct threat to the health and safety of others," a statutory defense under Title III of the ADA.[229]

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225. *See, e.g.*, Halperin v. Abacus Technology Corp., 128 F.3d 191 (4th Cir. 1997) (employee who suffered back injury either was only temporarily impaired, hence not sufficiently limited in major life activity to be "disabled," or not available and able to work, hence not "qualified"); Foreman v. Babcock & Wilcox, 117 F.3d 800 (5th Cir. 1997) (former employee's evidence tending to show ability to perform many types of work, with or without reasonable accommodation, held to preclude possibility of finding substantial limitation in major life activity of work, hence employee held not to be "disabled.").

226. 118 S. Ct. at 2201.

227. 912 F. Supp. 580, 585-87 (D.Me. 1995). The United States and the Maine Human Rights Commission had intervened as enforcement agency plaintiffs. *Id.* at 584.

228. 107 F.3d 934, 939-43 (1st Cir. 1997).

229. 912 F. Supp. at 587-91, *aff'd*, 107 F.3d at 943-48 (citing 42 U.S.C. § 12182(b)(3)).

The Supreme Court, by a five to four vote, upheld the courts below in concluding that HIV infection constitutes a "disability" as defined under the ADA.[230] The statutory definition of "disability" is contained in the "general provisions" of the statute, applicable identically to Title I, prohibiting discrimination in employment.[231] The construction adopted by the Court in *Bragdon* is therefore binding in ADA employment cases, as well as in public accommodations cases and other types of disability-based discrimination cases. In particular, the Court held plaintiff's HIV infection satisfied the first prong of the disability definition, i.e., that it constituted "a physical or mental impairment that substantially limits one of more of the major life activities of"[232] the individual claiming to have a disability.[233] It was therefore deemed unnecessary to consider the second prong, "a record of such an impairment,"[234] or the third prong, "being regarded as having such an impairment."[235]

The methodology employed by Justice Kennedy, writing for the Court, in analyzing the definitional question, will undoubtedly become hornbook law, routinely recited in ADA employment discrimination cases as well as other types of ADA claims. While not dissimilar to that developed in the ADA regulations and in Circuit Court decisions, Justice Kennedy's formulation will crystallize the formula:

> Our consideration of subsection (A) of the definition proceeds in three steps. First, we consider whether respondent's HIV infection was a physical impairment. Second, we identify the life activity upon which respondent relies (reproduction and child bearing) and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity.[236]

1. Impairment

Turning to physical impairment, the Court held that "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease."[237] This result will control the question of impairment in future disability discrimination cases involving the AIDS virus. The Court's reasoning, moreover, takes a broad construction of the term "impairment" which may smooth the path for plaintiffs claiming many other types of disabilities.

The current Department of Justice regulations applicable to *Bragdon* as a Title III ADA action are virtually identical in their first two paragraphs to the EEOC's ADA Title I employment discrimination reg-

230. 118 S. Ct. at 2207.
231. 42 U.S.C. § 12102(2).
232. *Id.* § 12102(2)(A).
233. 118 S. Ct. at 2201, 2207.
234. 42 U.S.C. § 12102(2)(B).
235. *Id.* § 12102(2)(C). *See* 118 S. Ct. at 2201.
236. 118 S. Ct. at 2202.
237. *Id.* at 2204.

ulations defining "physical or mental impairment."[238] Both were drawn verbatim, save for minor punctuation changes, from the 1977 Department of Health, Education and Welfare (HEW) regulations, issued to implement the Rehabilitation Act of 1973.[239] The original regulations included a commentary containing a representative but not exhaustive list of disorders qualifying as physical impairments under the statutes.[240] In 1980, when enforcement authority for Section 504 of the Rehabilitation Act was transferred to the Department of Justice, the agency reissued the same regulations, this time incorporating the illustrative listing into the text of the definitional regulation.[241] The fact that HIV was not identified as the cause of AIDS until after the DOJ's regulations were issued perhaps facilitated the Court's recognition that the absence of HIV from the enumerated illnesses was of no significance, since the listing was merely illustrative, and "HIV infection does fall well within the general definition set forth by the regulations . . ."[242]

At least by implication, the Court construed "impairment" as encompassing all disorders that fit within the broad regulatory definition, whether or not the condition is listed and without any need to compare the disorder to those on the list.[243] In holding that even asymptomatic HIV infection falls squarely within the physical impairment definition in the regulation, the Court applied a literal reading of the provision, which defines "impairment" as including "any physiological disorder or condition . . . affecting one or more of the following body systems: . . . hemic and lymphatic. . . ."[244] Because HIV causes abnormalities in the blood and lymph systems from the onset of infection, as well as because of the severity of the effects, the Court concluded that "HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection," hence it satisfies the definition in the statute and regulations of a "physical impairment" throughout the course of the disease.[245]

This portion of *Bragdon* would appear to put to rest restrictive interpretations of "impairment" either relying on the detailed listing rather than the general rule, or restrictively interpreting which body systems' impairment satisfies the definition, heightening the extent of the effect necessary to qualify as "impairment." The Court's acceptance of cellu-

238. *Compare* Department of Justice ADA Title III Public Accommodation Regulations, 28 C.F.R. § 36.104(a)(1) *with* EEOC ADA Title I Employment Regulations, 29 CFR § 1630.2(h) (1997).

239. Now codified as reissued, without amendment, by the Department of Health and Human Services, 45 C.F.R. § 84.3(j)(2)(i). *See* Bragdon v. Abbott, 118 S. Ct. at 2202.

240. 42 Fed. Reg. 22685 (1977), *codified at* 45 C.F.R. pt. 84, app. A, p. 334 (1997), *discussed in Bradgon*, 118 S. Ct. at 2202.

241. *See* 118 S. Ct. at 2203 (citing 28 C.F.R. § 41.31(b)(1)).

242. *Id.* at 2202-03.

243. *See id.*

244. *Id.* at 2202 (citing 45 C.F.R. § 84.3(j)(2)(i).

245. *Id.* at 2204.

lar and biochemical changes as sufficient, despite the lack of symptomatic consequences, will strongly militate in favor of finding impairment in other types of cases in which the patient suffers from a disorder that plainly "affects" a bodily system, and in fact causes physical symptoms albeit not as severe as those some courts have until now deemed necessary. Even more important, however, than the Court's interpretation of "impairment" is the majority's broad construction of "major life activity," as well as its interpretation of what relation between impairment and major life activity constitutes the requisite "substantial limitation" of the individual's activity sufficient to qualify as disabled.

2. Major Life Activity

The Court accepted the case at bar as having been litigated and presented for *certiorari* as though the only major life activity limited by the impairment was reproduction. Accordingly, the Court analyzed the issue as though reproduction were the *only* potential major life activity altered by the disease, while acknowledging that for many HIV infected persons, many other life activities are deeply affected.[246]

Rejecting the defendant's argument that major life activities include only "aspects of a person's life which have a public, economic, or daily character," and carefully construing the regulatory definition listing "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," as "illustrative, not exhaustive," the Court found no basis in the text of either statute or regulations to infer such a limitation.[247] Because the listing of functions such as "caring for oneself, . . . and performing manual tasks" in fact cuts against any requirement of economic or public character, the Court held that reproduction is a major life activity for purposes of the ADA.[248] Moreover, the court's "plain meaning" analysis adopts that of the First Circuit below, holding that "the plain meaning of the word 'major' denotes comparative importance. . . ."[249]

Reasoning that "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself," the Court concluded that "[r]eproduction falls well within the phrase 'major life activity.' "[250] Under this rubric, lower court decisions narrowly limiting major life activities to those with economic purpose plainly are no longer viable.[251]

3. Substantially limits

The third element of the Court's disability analysis, the "substantially limits" requirement, is likewise certain to have repercussions

246. 118 S. Ct. at 2204-05.
247. *Id.* at 2205 (citing 45 C.F.R. § 84(B)(i)(2)(ii) (1997); 28 C.F.R. § 41.3(b)(2) (1997)).
248. 118 S. Ct. at 2205.
249. *Id.*
250. *Id.*
251. For an example of such a case, see Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 677 (8th Cir. 1996), *cited in Bragdon*, 118 S. Ct. at 2205.

going well beyond the HIV area. Noting that the regulations provide little guidance on the nature and degree of impact of the impairment on the major life activity, the Court nonetheless pointed to two "independent ways" in which it found plaintiff had established that her impairment "substantially limited" her major life activity of reproduction.[252] First, the Court noted, the substantial risk of transmission of the fatal disease to one's unprotected sexual partner, "substantially limits an HIV-infected individual's major life activity of sexual intercourse with a view to reproduction.[253] Second, the significant risk an infected mother bears of transmitting the infection to her offspring during pregnancy and childbirth likewise was held to constitute a substantial limitation on reproduction.[254]

The Court noted, but left for another day, the very important question of the validity of the regulations that require "the substantiality of the limitation to be assessed without regard to mitigating measures."[255] According to the Court, even after anti-retroviral therapy, the risk of perinatal transmission is about 8 percent. Justice Kennedy dryly concluded for the majority, "It cannot be said as a matter of law that an 8% risk of transmitting a dread and fatal disease to one's child does not represent a substantial limitation on reproduction."[256]

Relying heavily on notions of probability of harm and magnitude of loss, the majority reasoned that the ADA covers "substantial limitations" not merely "utter inabilities" to engage in major life activities.[257] This reasoning implicitly rejects the distinction between a partial defect or limitation present in 100 percent of the individual's activity, and the risk of up to 100 percent defect in a small but substantial percentage of the individual's attempts to perform the activity. Both are equated as constituting a substantial limitation. The Court concluded that "when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."[258] The fact that the substantial limitation may result from the "choice" of the impaired individual to forego the activity in light of the probability of harm and the magnitude of the risk, here, of an HIV-infected child, does not prevent the limitation of the major life activity from qualifying as one causally flowing sufficiently directly from the impairment to satisfy the ADA definition of "disability."[259]

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252. 118 S. Ct. at 2206.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 2206-07.

The Court's reasoning relies both on the risks of transmission and on the economic and legal consequences of a decision to reproduce while HIV-infected as producing substantial limitations on the infected individual's major life activity of reproduction.[260]

4. HIV as *Per Se* Disability—An Open Question

The Court reached its holding in the case at bar without addressing another issue presented in the petition for certiorari, "whether HIV infection is a per se disability under the ADA."[261] However, the majority bolstered its reasoning by reciting the consistent course of Rehabilitation Act and ADA agency interpretation, which had uniformly found statutory coverage for asymptomatic individuals infected with HIV.[262] The *Bragdon* majority also looked to the courts' uniformly similar stance in interpreting the Rehabilitation Act prior to enactment of the ADA.[263] Congress' adoption of the same definition in amending the Fair Housing Act,[264] and parallel Department of Housing and Urban Development (HUD) regulations adopted pursuant to that statute, were viewed as further confirmation of the correctness of this interpretation.[265] In light of the uniformity of pre-ADA legislative, regulatory, and judicial interpretation of the definition of disability, the Court construed the ADA definition as constituting congressional incorporation of the uniform prior construction.[266] In addition, the Court pointed to implementing regulations and administrative guidance issued under each title of the ADA by the pertinent agency or agencies, including the Equal Employment Opportunity Commission's (EEOC) interpretation issued under Title I governing employment, in support of its holding that even in its asymptomatic phase, HIV infection "is an impairment which substantially limits the major life activity of reproduction."[267] While the Court declined to hold HIV-infection to be a "per se disability" under the Act, it is difficult to discern how a defendant in a future case involving an HIV-infected plaintiff could argue to the contrary.[268]

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260. *Id.*

261. *Id.* at 2207.

262. *Id.* at 2207-08 (citing *inter alia*, Application of Section 504 of the Rehabilitation Act to HIV-infected Individuals, 12 Op. Off. Legal Counsel 264-65 (Sept. 27, 1988)(preliminary print); 5 C.F.R. § 1636.103 (1997); 7 C.F.R. § 15e.103 (1998); 22 C.F.R. § 1701.103 (1997); 24 C.F.R. § 9.103 (1997); 34 C.F.R. § 1200.103 (1997); 45 C.F.R. §§ 2301.103, 2490.103 (1997)).

263. *Id.* at 2208.

264. 42 U.S.C. § 3602(h)(1).

265. 118 S. Ct. at 2208 (citing 42 U.S.C. § 3602(h)(1), 54 Fed. Reg. 3232, 3245 (1989), codified at 24 C.F.R. § 100.201 (1997)).

266. *Id.*

267. *Id.* at 2208-09.

268. *Id.* at 2209. Were the Court in another case to reach the issue it avoided in *Bragdon* and overturn the regulations which hold that the substantiality of the limitation is to be evaluated without regard to mitigating measures, a defendant could conceivably

5. Direct Threat

Finally, the Court addressed the asserted defense that the defendant had the right not to treat the plaintiff because her condition "posed a direct threat to the health or safety of others," meaning "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."[269] As the Court recognized, this Title III public accommodations defense is similar to the Title I employment discrimination defense that an alleged "application of qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity," where "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[270] Title I, in turn, defines "direct threat" in parallel with Title III. The term means "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[271] The ADA, the amended Rehabilitation Act,[272] and the amended Fair Housing Act,[273] all contain language incorporating a similar concept, stemming from the Court's 1987 Rehabilitation Act decision in *School Board of Nassau County v. Arline*.[274]

The *Bragdon* Court explained that "[b]ecause few if any activities in life are risk free," the direct threat inquiry does "not ask whether a risk exists, but whether it is significant."[275] The degree of risk "must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence."[276] The test is one of objective reasonableness "in light of the available medical evidence of the actions of the party refusing services on the basis of an alleged direct threat."[277] No special deference is due to the health care provider's professional judgment,[278] hence none would be due either to an employer's or the

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argue that medical advances had rendered the impairment caused by HIV-infection one that did not "substantially impair" a major life activity. Even this, however, is hard to imagine, absent a cure for AIDS or at least a vaccine that effectively prevents the spread of the disease through sexual intercourse or pregnancy. Perhaps a sexually and reproductively inactive person could be found, under such circumstances, not to be disabled.

269. *Id.* at 2210 (citing 42 U.S.C. § 12182(b)(3)).
270. 118 S. Ct. at 2210 (citing 42 U.S.C. §§ 12111(3), 12113(b) (1997)).
271. 42 U.S.C. § 12111(3) (1997).
272. 29 U.S.C. § 706(8)(D) (1997).
273. 42 U.S.C. § 3604(f)(9) (1997).
274. 480 U.S. 273, 286-87 (1987).
275. 118 S. Ct. at 2210 (citing *Arline*, 480 U.S. at 288).
276. *Id.* at 2210-12 (citing *Arline*, 480 U.S. at 287).
277. *Id.* at 2210.
278. *Id.*

employer's experts' medical judgment in a Title I employment discrimination case.

The Court nevertheless reversed the summary judgment for plaintiff on this point.[279] The Court upheld the Court of Appeals' careful disavowal of the district court's reliance on material in a Center for Disease Control affidavit that may not have been published at the time the dentist refused to fill his patient's cavity outside of a hospital.[280] In the absence of any scientific evidence that treating the patient in a hospital would have been an effective preventative measure against the risk of HIV transmission, the Court further held, the Court of Appeals correctly disregarded the dentist's offer to fill his HIV-infected patient's cavity in a hospital.[281] Nevertheless, the Court reversed the summary judgment for plaintiff on the direct threat question, regarding the two main pieces of evidence relied on by the Court of Appeals as insufficiently unambiguous in assessing the level of risk entailed in office treatment of HIV-infected patients, rather than either identifying sufficient feasible practices or ethical and professional obligations to treat such patients.[282] Because the limited grant of *certiorari* had restrained the parties from canvassing the record as a whole on this issue, the Court, despite recognizing that other evidence in the record might be sufficient to sustain the summary judgment for plaintiff, vacated and remanded the matter to the Court of Appeals on the direct threat issue, while affirming the summary judgment for plaintiff on the coverage of her HIV-infected status as a "disability" under the ADA.[283]

Justices Stevens and Breyer would have affirmed the decision below in toto, including on the "direct threat" issue, but voted with Justice Kennedy to produce a judgment commanding majority support.[284] Justice Ginsburg, in a brief concurring opinion, noted her agreement with *both* of the majority holdings. She affirmed on plaintiff's disability status while "erring . . . on the side of caution" and remanding the "direct threat" question.[285] She reasoned that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible. . . ."[286] She also highlighted the pervasive effect of HIV infection on "life's choices: education, employment, family and financial undertakings."[287] Justice Gins-

279. *Id.* at 2213.
280. *Id.* at 2211.
281. *Id.*
282. *Id.* at 2211-12.
283. *Id.* at 2212-13.
284. *Id.* at 2213 (Stevens and Breyer, JJ., concurring).
285. *Id.* at 2214 (Ginsburg, J., concurring).
286. *Id.* at 2213-14.
287. *Id.* at 2213.

burg appears implicitly to be urging per se recognition of HIV infection as a covered disability.[288]

B. *Rejected Alternative Interpretations of "Major Life Activities," "Substantially Limits," and "Direct Threat"*

Close examination of the reasoning of the dissent in this case is especially useful in fully appreciating more subtle aspects of the holdings of the majority, as well as on its own terms.

1. "Major Life Activities"

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented from the Court's ruling that held that the plaintiff was a covered individual with a disability under the ADA; Justice O'Connor, writing separately, did likewise. The Chief Justice assumed *arguendo* that HIV infection qualified as an "impairment."[289] His dissenting opinion then read the phrase "physical or mental impairment that substantially limits one or more of the major life activities of such individual" as requiring an individualized inquiry not only as to the nature and extent of the limitation, but also as to the extent to which the curtailed activity, but for the impairment, would have been a major activity in the daily life of the plaintiff.[290]

This analysis was predicated on a narrower view of the meaning of "major life activity." Chief Justice Rehnquist's dissent rejected the majority's understanding of "major" as indicating "comparative importance." His opinion favored, instead, the alternative dictionary definition of "greater in quantity, number, or extent." It emphasized that the second definition is more similar in type to the items listed as major life activities: "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[291] Acknowledging that the list was explicitly designed to be merely illustrative, the dissent nevertheless looked to the listed functions for a "common thread" running through the identified exemplars of major life activities, extracted the idea that these activities "are repetitively performed and essential in the day-to-day existence of a normally functioning individual" and hence "quite different from the series of activities leading to the birth of a child."[292] Justice O'Connor, separately dissenting in part, adopted a similar understanding of "major life activi-

288. *See id.* at 2213-14 (Ginsburg, J., concurring).

289. *Id.* at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

290. *Id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice O'Connor summarily "agree[d] . . . that [the] claim of disability should be evaluated on an individualized basis. . . ." *Id.* at 2217 (O'Connor, J., concurring in the judgment in part and dissenting in part).

291. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994)).

292. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

ties," to hold that the "act of giving birth to a child" does not constitute a "major life activity" under the ADA. In her view, no further inquiry about "impairment" and "substantially limits" was required.[293]

Chief Justice Rehnquist, however, deemed it necessary to express his disagreement with the majority holding going beyond his view that reproduction and childbirth are not a statutorily covered "major life activity." He reasoned that there was "not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction. . . ."[294] The most the record would support, the Chief Justice asserted, was that the plaintiff had now, "whatever her previous inclination, conclusively decided that she would not have children."[295]

While the dissenting Justices avoided saying so explicitly, they would apparently require an ADA plaintiff, seeking to establish "major life activity," to prove the counterfactual assumption—that absent the disability, the limited activity would in fact have been a major life activity for the plaintiff. Thus, in the case at bar, they would have required plaintiff to prove that had she not suffered the impairment, she would have engaged in reproductive activity to a sufficient extent to warrant labeling it a "major life activity" for her individually. In light of the dissent's notion that only activities "repetitively performed and essential in the day to day activities of a normally functioning individual" constitute "major life activities,"[296] it is unclear whether even a woman attempting to produce a very large family and nearly continuously pregnant or seeking to become so would qualify if she suddenly became medically infertile. Whether Justice Rehnquist's "normally functioning individual" could include one whose childrearing activities are both "repetitively performed" and "essential in [his or her] day to day activities"[297] is also far from certain.

While such a narrow view of the scope of statutory coverage has been embraced by a number of lower courts, it is difficult to square such a view with a statute that identically covers persons disabled from birth, from prior to commencement of gainful employment, or only after completion of a portion of the worker's wage earning career. Even as to a given individual, daily life activities usually vary over time. The dissent's "individualized inquiry" does not seem to take this truism into account. A woman's discovery that she is infertile when she is sixteen may simply mean to her that she need not be concerned about

293. *Id.* at 2217-18 (O'Connor, J., concurring in the judgment in part and dissenting in part).

294. *Id.* at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

295. *Id.* at 2215.

296. *Id.*

297. *See id.*

contraception if she chooses to engage in heterosexual intercourse. Her interest in bearing children may be quite different a decade or two later. Childrearing is for many people an absorbing activity, but only for about two decades out of a possible four or more decade long working career. Many other activities are more pervasive, as well as more important, in individuals' daily lives at different points in the life cycle. Some people engage in far more learning when they are younger, far more working in their middle years, and less of both in retirement. Both learning and working, nevertheless, are activities whose listing in the regulation supports the interpretation that they must be treated as "major" without regard to how often or how much time a particular individual actually spends engaged in their performance.

For somebody who has never been able to perform a particular function, it is especially difficult to determine whether—always, never, or during a particular phase in the person's life—had she or he not been disabled, the activity would have been engaged in routinely. For example, suppose an employee grows up illiterate because of inadequate access to education, and then when attempting as an adult to learn to read, discovers that she or he suffers from a reading impairment such as dyslexia. Under the dissent's analysis, the impairment would not affect a major life activity of the employee, since she or he has yet to learn how to do it, and has not until that point spent much time engaged in the activity.

The dissenters' construction would require those who have never been able to perform a given life activity to show it is a major one in their lives, on an individualized basis.[298] This seems plainly at odds with the statutory coverage of congenitally as well as subsequently disabled persons. Moreover, by limiting the term to essential, repetitively performed daily activities of a normally functioning individual,[299] the dissenters' interpretation would seem to exclude activities irregularly performed, intermittently daily performed, or performed daily only in certain stages of adulthood. Finally, the dissent's definition seems internally contradictory, or at least doubly restrictive, without any basis to believe Congress so intended to multiply or curtail the reach of the anti-discrimination protection. On the one hand, the individualized inquiry requirement demands that the person prove the impaired or wholly precluded activity was or would have been essential in her or his own life. On this interpretation, activities important in most people's lives are irrelevant if they are not crucial in the life of the person claiming disability status. On the other hand, the "essential in the day to day activities of a normally functioning individual" test[300] would preclude activities from qualifying, even if dominant in the life

298. *See* 118 S. Ct. at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

299. *See id.* at 2215.

300. *See id.*

of the putatively disabled individual, if a "normally functioning individual" could operate without needing to perform the activity repetitively and from day to day.

Chief Justice Rehnquist's dissent, joined in by Justices Scalia and Thomas, took an extremely narrow view of what constitutes a major life activity, while Justice O'Connor reserved judgment on the issue except to treat childbirth as falling outside of the scope of the term. All four justices declining to join the majority, however, suggested that the major life activity must be "major" in the plaintiff's own life, assessed individually.

A solid, five member majority of the Court, led by Justice Kennedy, squarely rejected the dissent's narrow construction. Instead, the Court explicitly embraced the broader "comparative importance" interpretation of the provision, with a looser link to the plaintiff's own actual individual activities.[301] From a broad ADA policy perspective, the difference in construction is extremely important. Many impairments affect life activities that may qualify as "comparatively important," even if some or many people, at a given point in their lifetimes, do not perform them "repetitively" or daily.

From a feminist point of view, the difference in analysis is especially significant. Pregnancy, when it occurs, changes a woman's physical situation for nine months at a time, and childbirth and early childrearing entail further drastic changes in how parents organize their lives and spend their time. Most feminists, male or female, would therefore describe reproduction as a major life activity. This is true, despite the fact that nobody engages in these activities daily throughout the course of their lifetime. Indeed, one salient difference between the biology of adult women and men is that women undergo physically-related, functional changes, including reproductive capacity and hormonal changes, to a greater degree than men during the course of their working lives. Moreover, in social practice, far more women than men take years out of their paid working careers that they devote to unpaid childrearing activity. Women's paid labor force participation has historically been far more likely than men's to be intermittent.

A definition of "major life activity" that limits it to daily functions prevalent throughout the worker's adult life or working career is one that by definition assumes a male rather than female worker as the norm. Since individual reproductive choices are so closely linked to social and national reproduction, the very notion that childbirth and childrearing is not a major life activity also seems peculiarly American; it is hard to imagine any of the other western industrialized countries taking such a position seriously. In enacting the Family and Medical Leave Act,[302] Congress appears to have recognized that childbirth,

301. *Id.* at 2205.
302. 29 U.S.C. §§ 2601-2654.

childcare, and care of ailing elders and close family members are a major life activity, at one point or another, during the working careers of a great many Americans.

One could hail the analysis in Justice Kennedy's majority opinion as the beginnings of judicial reconceptualization, defining the American citizen with a dual gender norm, one that recognizes that in this generation of workers' lives, men and women alike are both workers and parents. Justice O'Connor, in her categorical exclusion of reproduction from the major life activity category, even more than Chief Justice Rehnquist, in his individualized analysis of how much daily time or repetitive activity is involved in the process, implicitly adheres to the contrary tradition. Justice O'Connor's reasoning, and certainly the employer's proposed interpretation covering only "aspects of a person's life which have a public, economic, or daily character,"[303] could be viewed as reflecting the old, one dimensional view of the citizen and worker, the stereotyped male breadwinner, and the public-private conceptual divide between individuals' public, economic, and commercial lives, on the one hand, and their household private lives that remain their own, on the other. Private family activities, on this view, are insufficiently socially important to warrant ADA protection if an impairment limits the individual's ability to continue to perform the function. The traditionally female sphere, it is implicitly presumed, was not of concern to Congress in enacting workplace-related legislation. Of course, one could turn this around and suggest that it is Justice O'Connor who is the true feminist, since she refuses to treat childrearing as a central, defining characteristic of womanhood.

2. "Substantially Limits"

The third argument of the dissent is that, assuming *arguendo*, reproduction were a major life activity of the plaintiff, asymptomatic HIV infection does not "substantially limit" the activity.[304] Those infected remain, at least for a time, physically able to engage in the activity, including sexual relations, childbirth, and childrearing. The dissenters would confine the "substantially limits" term to physical—or in the case of mental or emotional disabilities, presumably mental or emotional—limitations on the ability to engage in the identified major life activity, which limitations must be directly caused by the impairment.[305]

In effect, the dissent writes a narrowly defined causation requirement into the statutory text. When the limitation is a "voluntary" reaction or a "choice" of the victim of the impairment to avoid engaging in the activity, the gap in the physical causation chain would, in the view

303. *See* 118 S. Ct. at 2205.

304. *Id.* at 2215-16 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (emphasis added).

305. *Id.* at 2216.

of these members of the Court, preclude a finding that the impairment "substantially limits" the activity.[306] On this analysis, whenever the impairment itself does not directly limit the ability to perform the activity, but instead greatly multiplies the odds that it will not merely be unsuccessful but will also cause severely harmful consequences, the individual whose "choices" are severely constrained by the impairment is not disabled.[307] Nor apparently, may the victim of an impairment take the *future* effects of her own disease on herself into account in deciding whether she is rendered incapable of raising the child to adulthood: according to the literal reading of the dissent, a disability may be established only to the extent that an "impairment substantially *limits* (present tense) a major life activity."[308]

Here, too, the majority squarely rejects the statutory construction espoused by the dissent. The majority reasons that Abbott's HIV infection "substantially limited her ability to reproduce in two independent ways": first, because of the risk of infection of her partner which would be entailed by the unprotected sexual intercourse necessary to conceive; and second, because of the risk of perinatal transmission of the infection to any child she might conceive during pregnancy or delivery.[309] The majority concludes: "Conception and childbirth are not impossible for an HIV victim, but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation."[310] Economic and legal consequences, including health care costs for HIV-infected mother and child and state law prohibitions against sexual intercourse by infected individuals, are also cited as bases supporting the substantial limitation finding.[311] In summary, normal human responses by the infected individual to consequences of the impairment count as sufficiently directly and causally linked to the impairment if they entail substantial limitation of a major life activity. When the infected person substantially limits her or his major life activities to avoid significant risks, caused by the impairment, of extremely adverse health consequences to third parties, or economic or legal consequences to him or herself, this satisfies the statutory definition of disability.

Interestingly, while the dissent speaks of the need to individually examine the plaintiff's activities and the effect on them of the impairment, the dissent's overall approach would generically and categorically exclude as many impairments from the protective ambit of disability discrimination laws as the majority's approach will categorically include.

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306. *Id.*
307. *Id.*
308. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (emphasis added).
309. *Id.* at 2206.
310. *Id.*
311. *Id.*

3. Direct Threat

The final portion of Chief Justice Rehnquist's dissenting opinion, joined in by Justice O'Connor, addresses the "direct threat" issue.[312] The dissenters would give no extra weight to the views of public health authorities in assessing the scientific reasonableness of the dentist's actions.[313] As a result, while the majority remands leaving open the possibility that reexamination of the record by the Court of Appeals will lead to its affirmance of the summary judgment for plaintiff on the direct threat issue,[314] the dissent regards the evidence as sufficiently disputed to preclude summary judgment for plaintiff.[315]

C. *Future Implications*

In an ADA employment discrimination case, a plaintiff must prove that she is a "qualified individual with a disability" who suffered discrimination on the basis of disability as to a term or condition of employment.[316] Some ADA cases raise simple claims of disparate treatment, that is, adverse, differential treatment of the disabled individual compared to the treatment of able-bodied workers.[317] A few raise claims of disparate impact, challenging facially neutral employment practices that disproportionately and disadvantageously affect persons with disabilities or with a particular disability, compared to the able-bodied.[318] Most employment-related disability discrimination cases, however, in-

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312. *Id.* at 2216-18.

313. *Id.* at 2216-17 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (emphasis added).

314. *Id.* at 2213.

315. *Id.* at 2217 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

316. 42 U.S.C. §§ 12102(2), 12111(8), 12112. *See, e.g.*, Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir. 1998).

317. *See* 42 U.S.C. §§ 12112(a), 12112(b)(1). *See, e.g.*, Palmer v. Circuit Court of Cook County, 117 F.3d 351, 352 (7th Cir. 1997) (mentally impaired employee fired for violent threats was held to have been fired because of conduct, not mental disability, even if employee's conduct stemmed from disability, hence no disability-based disparate treatment occurred); Katz v. City Metal Co., Inc. 87 F.3d 26, 33 (1st Cir. 1996) (employee discharged because employer perceived plaintiff's heart attack as disabling condition); McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992) (Rehabilitation Act) (disparate treatment in application of leave of absence policy against employee whose disability was inability to bear children); Carter v. Casa Central, 849 F.2d 1048 (7th Cir. 1988) (Rehabiliation Act) (failure to reinstate employee to job after disability-related leave of absence found unlawful because motivated by employee's disability); Price v. S-B Tool, 75 F.3d 362 (8th Cir. 1996) (epileptic employee terminated for violating employer's 3 per cent no-fault absenteeism ceiling when she failed to resort to employer's generous leave of absence policy, held not terminated because of her disability but because of her absenteeism).

318. *See* 42 U.S.C. §§ 12112(a), 12112(b)(1), 12112(b)(3), 12112(b)(6), 12112(b)(7). For example, see Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042 (6th Cir. 1998) (challenging employer's one year ceiling on medical leaves of absence on theory it had a disparate impact on individuals with disabilities). *See also* Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1196 (7th Cir. 1997) (discussing potential ADA disparate impact theory, but noting that plaintiff had waived it).

volve disputes over the employer's duty to provide the worker with "reasonable accommodation," so long as it can be done "without undue hardship" to the employer.[319]

A "qualified individual with a disability" is a worker who suffers a physical or mental impairment that substantially limits one or more of the worker's major life activities and who can, with or without reasonable accommodation, perform the essential functions of the job the worker holds or seeks to hold.[320]

The courts have until now usually proceeded by requiring plaintiff to: (1) prove she suffers from an "impairment"; (2) point to one or more activities which the worker contends are her affected "major life activities"; (3) demonstrate that the activity is "substantially limited" because of the impairment; and (4) show that she is capable of performing the essential functions of the job at issue, identifying suitable reasonable accommodations if necessary.[321]

Narrow lower court interpretations of one or more of the first three elements have constrained many plaintiffs to identify "work" as their substantially limited major life activity. For many plaintiffs, relying on "work" is an error fatal to their lawsuit. Unlike other major life activities, as to which partial but significant impairment is sufficient, when "work" is the activity, the regulations impose more demanding requirements on plaintiffs. Either the worker must be unable to perform a fairly narrow occupational category, say, surgeon, electrician, or typist, across a range of businesses and industries, or the worker must be unable to perform a wide range of jobs, e.g., most unskilled or semiskilled operative positions within a given industry.[322] The intent of the regulations is to preclude the professional track and field runner, whose knees deteriorate to the point where he or she can no longer produce Olympic-caliber performances, from claiming that her ability to "work"

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319. *See* 42 U.S.C. §§ 12112(a), 12112(b)(5)(A), 12111(9), 12111(10). *See, e.g.*, Borkowski v. Valley Central School Dist., 63 F.3d 131, 135-40 (2d Cir. 1995) (collecting cases regarding allocation of evidentiary burdens as to reasonable accommodation without undue hardship); Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130, 1135 (3d Cir. 1996) (employer held liable for failure to provide reasonable accommodation only when it bears responsibility for breakdown of interactive process of identifying suitable forms of accommodation for employee); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86 (11th Cir. 1997) (employer found to have offered employee five types of reasonable accommodation, held not required to provide further accommodation; employee not entitled to form of accommodation of her choice); Chiari v. City of League City, 920 F.2d 311, 318 (5th Cir. 1991) (when constuction inspector's disability rendered his gait unsteady so he could no longer perform an essential element of his job, climbing buildings, reasonable accommodation did not encompass requiring the city to create a new position including only tasks he was able to perform).

320. 42 U.S.C. § 12111(8).

321. *See, e.g.*, Halperin v. Abacus Technology Copr., 128 F.3d 191, 198 (4th Cir. 1997). This formulation differs little from that adopted by the Court in *Bragdon*. *See supra* text accompanying note 232.

322. 29 C.F.R. § 1630.2(j)(3)(i) (1997). *See, e.g.*, Siemon v. AT&T Corp., 117 F.3d 1173, 1176 (10th Cir. 1997).

is "substantially limited" when she can still walk, run faster than most people, and perform non-athletic jobs.[323] Courts often insist, however, that plaintiffs claiming their activity of "work" is "substantially limited" demonstrate that absent reasonable accommodation, they are incapable of carrying out the responsibilities in quite a broad range of positions.[324] Even if a plaintiff can surmount this hurdle, she is likely to do so in a fashion that will work against her success at the next step, in showing that with or without reasonable accommodation, she can perform the essential functions of her job.[325] It is little wonder than only a relative handful of plaintiffs survive their attempt to run this gauntlet. This is one, if not the only, explanation for the remarkable statistic of the recent ABA study finding that employers have been winning about ninety-two percent of fully-litigated ADA employment discrimination cases.[326]

*Bragdon* assists plaintiffs in several ways to escape from this bind. First, the decision adopts the broad "comparative importance" defini-

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323. *See* 29 C.F.R. Pt. 1630.2(j), App. (professional baseball pitcher). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). The second portion of the provision interpreting "substantially limits" as it applies to the major life activity of work focuses on the range of other jobs from which the individual is excluded because of her or his impairment. *See id.*

324. *See, e.g.*, Sherrod v. American Airlines, Inc., 132 D.3d 1112, 1120 (5th Cir. 1998) (employee's inability to perform lifting twenty pounds on a frequent basis, or forty-five pounds occasionally along with evidence that employee "will need . . . retraining into a position where he does not have to stand for prolonged periods, held insufficient to support a finding of substantial limitation of major life activity of work or of lifting); Bolton v. Scrivner, Inc., 36 F.3d 939, 943-44 (10th Cir. 1994) (evidence of nature, severity, duration and impact of employee's impairment, plus workers' compensation finding of 9 per cent permanent partial disability in one foot and 29 per cent permanent partial disability in the other, does not suffice to show employee significantly restricted from performing either a class of jobs or a broad range of jobs in various classes); McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369, 371-73 (6th Cir. 1997) (holding that employee's carpal tunnel syndrome does "not significantly restrict her ability to perform the class of jobs at issue, manufacturing jobs; at [most] . . . her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than two pounds;" she is therefore not substantially limited in her major life activity of work). *See also id.* at 374 ("The majority . . . holds that an individual who provided competent and unimpeached expert testimony that her physical impairment disqualifies her from performing *all* heavy duty jobs, *all* medium duty jobs, as well as those light and sedentary jobs requiring repetitive motion, does not, as a matter of law, have a substantial impairment of the major life activity of working. . . . I am unable to reconcile this conclusion with the facts or with what I view as a reasonable interpretation of the ADA . . .") (Hillman, J., dissenting) (emphasis in original).

325. *See, e.g.*, Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997) (employee either not disabled, because could perform too many types of work, or not qualified, because even with accommodation, could not perform essential functions of his existing position, or both).

326. *See Disabilities Discrimination: Overwhelming Majority of ADA Job Suits Fail in Court, American Bar Association Survey Finds*, 1998 Daily Lab. Rep. (BNA) No. 119, at D7 (June 22, 1998).

tion of major life activity, making it easier for plaintiffs to point to other non-work activities, even if not listed in the regulations. Second, the Court relaxes both the tightness and the directness of the causal link the plaintiff must show between the impairment and the limitation of a major life activity. Cessation of the life activity to avoid serious economic or legal harm to plaintiff, or to avoid physical risks of grave bodily harm whether to plaintiff or to third parties, will suffice. This is true, even if plaintiff is not directly, physically incapacitated from performing the major life activity, in whole or in part, by the impairment itself. Not only does this ease plaintiff's burden in showing "substantial limitation," indirectly it further broadens the range of non-work major life activities to which a plaintiff with a given impairment can successfully point.

Finally, the *Bragdon* Court has clarified the definition of "physical impairment" by adopting a broad, literal interpretation of the regulation[327] that includes any disorder affecting at least one of the following body systems: "neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine."[328]

The Court accepts "impairments" at the molecular and cellular level that demonstrably, biochemically affect a major body system long before the damage manifests itself in palpable physical symptoms. This, too, further broadens ADA plaintiffs' possibilities of identifying impairments that physically or behaviorally limit substantially a major life activity of the plaintiff's. Moreover, such impairments help plaintiffs avoid contributing to their own demise via evidence tending to prove that the worker's impairment is likely to interfere with her ability to perform essential functions of the job, even with reasonable accommodation.

The Court's "direct threat" holding, on the other hand, will have only minor equivocal impact on the case law as it has heretofore developed. The *Bragdon* Court thoroughly rejected the dentist's medical professional deference argument:

> As a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability. . . . [P]etitioner receives no special deference simply because he is a health care professional.[329]

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327. 118 S. Ct. at 2202.

328. 45 C.F.R. § 84.3(j)(2)(i) (1997), *quoted in Bragdon*, 118 S. Ct. at 2202. 29 C.F.R. § 1630.2(h), the Title I regulation, contains virtually identical wording. *See supra* notes 234-238 and accompanying text.

329. *Id.* at 2210.

Medical deference arguments, however, had not previously gained any broad acceptance in the lower courts. Likewise, little change was made in prevailing law by the majority holding,[330] accepted by the dissenters as well,[331] that the existence of a "significant risk to the health or safety of others that cannot be eliminated by" reasonable accommodation[332] "must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence."[333]

In instances where the scientific evidence regarding risk of transmission or contagion, or regarding the effectiveness of preventative measures, is uncertain or conflicting, the majority's remand on this point may modestly expand the scope of the potential defense. The defendant's actions must be shown to be "reasonable in light of the available medical evidence"; the views of public health authorities on the matter receive special deference, but are not controlling.[334] "A health care professional [and presumably, an employer acting on the basis of advice of a health care professional] who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating form the accepted norm."[335] All evidence must be judged based on its availability to the medical decision-maker at the time of the challenged decision.[336] The Court remanded to permit the Court of Appeals to reexamine whether, carefully focusing on information available at the appropriate time to the defendant, enough credible, objective scientific evidence had been presented to support a dispute of material fact as to the "direct threat" defense.[337] This fact-dependent analysis may nevertheless suggest a slight broadening of summary judgment standards in favor of those asserting the defense. Nevertheless, the fact remains that by its own terms, the defense can only be raised in an extremely narrow category of cases.

*Bragdon v. Abbott* is the Court's shakedown cruise under the ADA. Because the Court construes several key provisions, and resolves nearly all interpretative disputes in favor of plaintiffs, the decision will almost certainly be perceived in future years as a seminal disability rights case, governing discrimination in employment as well as public accommodation.

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330. *See id.* at 2201.

331. *Id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 2218 (O'Connor, J., joining in this portion of Chief Justice Rehnquist's opinion).

332. 42 U.S.C. §§ 12182(b)(3) (Title III); 12111(3) (Title I).

333. 118 S. Ct. at 2210.

334. *Id.* at 2211.

335. *Id.*

336. *Id.* at 2211-12.

337. *Id.* at 2212.

## VII. Unexpected Observations: Private Employers as Losers, Public Employers as Winners, and Justice Kennedy's Pivotal Role in this Term's Decisions

### A. *Winners and Losers*

Some peculiarities may be observed about this term's labor and employment law rulings. Private employers lost all cases in which they were defendants against individual employee[338] or pension plan administrator[339] plaintiffs. General Motors could not even manage to enforce the injunctive provisions of its prior wrongful termination lawsuit settlement agreement to prevent its former employee from testifying against it.[340] On the other hand, unions fared even worse than employers, winning *no* cases in which they were parties.[341] When private employers litigated opposite unions or government agencies, their chances of success therefore improved mightily. They won both cases involving labor-management relations issues.[342] The former coal company's challenge to government-mandated payments into the governmentally-administered benefits trust fund was similarly successful.[343]

Public employers and their officials as employment decision-makers fared far better than private sector employers. In the cases where rules applicable to all employment discrimination defendants, public or private, were applied to a public employer, it suffered the same types of losses as its private sector counterparts. A public employer lost one of the sexual harassment Title VII cases, *Faragher v. City of Boca Raton*,[344] as well as *Hetzel v. Prince William County*,[345] requiring a retrial option to satisfy Seventh Amendment concerns when an appellate court imposes remittitur on a plaintiff who has won a substantial jury verdict in employment discrimination (or any other type) of litigation.

On the other hand, when public employers or their officials litigated defenses to liability specific to governmental actors, they were highly successful. Thus, in *Bogan v. Scott-Harris*,[346] municipal government officials were able to wrap themselves in the mantle of absolute legislative immunity to preclude any pretext or mixed motives inquiry into the reasons underlying their ostensibly legislative decision to eliminate the employee's position from the city budget, thereby effectively terminating the plaintiff's employment.

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338. *Ellerth*, 118 S. Ct. 2257 (1998); *Geissal*, 118 S. Ct. 1869 (1998); *Oncale*, 118 S. Ct. 998 (1998); *Oubre*, 118 S. Ct. 838 (1998).

339. *Bay Area Laundry Pension Trust Fund*, 118 S. Ct. 542 (1997).

340. Baker v. General Motors, 118 S. Ct. 657 (1998).

341. Air Line Pilots Ass'n v. Miller, 118 S. Ct. 1761 (1998); *Textron*, 118 S. Ct. 1626 (1998); *Allentown Mack*, 118 S. Ct. 818 (1998).

342. *Textron*, 118 S. Ct. 1626 (1998); *Allentown Mack*, 118 S. Ct. 818 (1998).

343. Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998).

344. 118 S. Ct. 2275 (1998).

345. 118 S. Ct. 1210 (1998).

346. 118 S. Ct. 966 (1998).

In *LaChance v. Erickson*,[347] the federal government persuaded the Court that there was no due process or statutory problem in punishing a government employee with discharge for the misconduct of lying during a government investigation into an underlying allegation of misconduct. The criminal case against union defendants, *Brogan v. United States*,[348] is roughly analogous to permitting government use of criminal sanctions to coerce those under investigation for criminal violations to respond truthfully or remain silent under government investigator's questioning, on pain of criminal punishment despite the lack of formal oath and inapplicability of criminal perjury law.

One could also see evidence of a trend protective of government interests in the Court's Title IX ruling, *Gebser v. Lago Vista Independent School District*,[349] narrowly restricting circumstances under which a local school board or other educational institution may be held liable on vicarious liability grounds for sexual harassment of students by school employees, their teachers. *Gebser* imposed a requirement that the students complain to school system authorities empowered to respond to such complaints as a precondition to imposing private damage liability on the school board. The Court further precluded liability if the authorities respond to a complaint with more than "deliberate indifference" to the teacher's reported misconduct.[350] One may profitably contrast *Gebser* with this term's Title VII sexual harassment imputed liability precedents, *Ellerth*[351] and *Faragher*.[352] It is clear that the Court took an approach under Title IX far more protective of public education institutional interests than would be the case in employment litigation, which may be brought against private as well as public employers under Title VII.[353] All in all, at least in matters related to the employment relationship, the Court has displayed considerably more solicitude for the perceived special needs of government employers and their officials as opposed to private sector employers.

Another public employment case, *Wisconsin Dep't of Corrections v. Schacht*,[354] runs partially counter to this trend. However, in the Supreme Court, the Schacht case probably was not perceived as an employment law matter. While the case arose as an employment termination cause of action, substantive wrongful discharge law was not before the Court on *certiorari*. Before the Supreme Court, *Schacht* solely concerned issues of general applicability to all cases involving state defendants

347. 118 S. Ct. 753 (1998).
348. 118 S. Ct. 805 (1998).
349. 118 S. Ct. 1989 (1998).
350. *Id.* at 1993.
351. 118 S. Ct. 2257 (1998).
352. 118 S. Ct. 2275 (1998).
353. The comparison between the Court's approach under Title IX and Title VII is spelled out in greater detail in Weiss, *supra* note 9, at 279-87.
354. 118 S. Ct. 2047 (1998).

sued for federal constitutional violations in state courts. The *Schacht* Court addressed the issue of how to apply federal removal jurisdiction law when one of the removing defendants is a state entitled to assert Eleventh Amendment sovereign immunity.

Plaintiff, a prison guard, had been terminated, allegedly for workplace theft, and had sued in state court under 42 U.S.C. § 1983, both the State, as his former employer, and several prison officials in both their official and personal capacities. The defendants removed the case to federal court, and there the defense of Eleventh Amendment sovereign immunity was asserted on behalf of both the State and the officials as to claims against them in their official capacities. The district court dismissed those claims, and in addition granted summary judgment on the remaining claims against the officials acting in their personal capacities.

On appeal, the Seventh Circuit held that the district court had lacked jurisdiction over the entire action. The presence of the claims subject to the Eleventh Amendment bar, the Court of Appeals reasoned, not only divested the court of authority to resolve those claims, but precluded the entire case from being removable. The Supreme Court, in a unanimous opinion by Justice Breyer, reversed. The Court held that the fact that the state defendants had the right to waive the sovereign immunity defense indicated that at the time of removal, the entire case was removable as to all defendants; the district court's jurisdiction was not impaired until the defendants after removal asserted the sovereign immunity defense. Justice Kennedy filed a separate concurring opinion in which he pointed out that the difficult, partially circular problem of whether sovereign immunity is in the nature of an affirmative defense or an outright deprivation of federal jurisdiction could be best avoided by construing the defendant's participation in the removal as equivalent to a waiver of the defense. Again displaying that independent cast of mind that appears to be the hallmark of his decisions this term related to labor and employment law, Justice Kennedy in effect invited future litigants to present a sovereign immunity waiver argument in a future removal case.

B. *The Pivotal Role of Justice Kennedy*

It would not be an exaggeration to say that Justice Kennedy dominated the Court's decision-making in the labor and employment law field this term. Many of this term's employment-related cases pivot on Justice Kennedy's position. Justice Kennedy wrote the majority opinions in *Ellerth*,[355] one of the two Title VII sexual harassment vicarious liability decisions, *Bragdon*,[356] the major ADA case, and *Oubre*,[357] the

355. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).
356. Bragdon v. Abbott, 118 S. Ct. 2196 (1998).
357. Oubre v. Entergy Operations, 118 S. Ct. 838 (1998).

ADEA waiver case. He provided the critical fifth vote, concurring in the judgment but declining to support the plurality on the takings theory in *Eastern Enterprises v. Apfel*,[358] his concurring opinion in *Wisconsin Department of Corrections v. Schacht*[359] issued an important invitation to future litigants, and in *Gebser*,[360] the Title IX sexual harassment case, he provided the fifth vote in support of the Court's position severely restricting school systems' vicarious liability for sexual harassment of students by teachers. Only in *Allentown Mack*[361] was he in the dissent, and then only on the portion of Justice Scalia's decision accepting as rational and consistent with the Act the NLRB's good faith reasonable doubt standard for employer polling of employee union sentiment; he was with the five member majority on the later portion of the opinion overturning the NLRB's factual finding that the employer lacked an objective basis to support its good faith doubt.

This term, Justice Kennedy voted frequently in labor and employment-related cases with Justices Stevens, Souter, Ginsburg, and Breyer to form a majority. In the two 7-2 cases, *Ellerth*[362] and *Faragher*,[363] the paired sexual harassment vicarious liability cases, the Chief Justice and Justice O'Connor joined the other five. Justice Kennedy wrote the Court's opinion in *Ellerth*, in moderating tones, while plainly heavily influencing Justice Souter's somewhat less restrained majority opinion in *Faragher*. The two decisions are mutually cross-referenced and incorporate identical language as to the employer's affirmative burden of proof regarding hostile environment claims involving supervisor's activities. Only Justices Thomas and Scalia did not find the middle ground defined by Justice Kennedy (and Souter) to be acceptable.

In several cases, the vote was 5-4, with Justice Kennedy casting the decisive choice between two rather stable blocks consisting of Justices Stevens, Souter, Ginsburg, and Breyer, on the (very loosely defined) left, and the Chief Justice, together with Justices O'Connor, Scalia, and Thomas on the right. The tone of the opinions, as well as the growing stability of these voting blocks, suggests an increasing polarization between the two wings of the Court, with the middle ground frequently mediated by Justice Kennedy.

In assessing the term's overall corpus of labor and employment decisions, Justice Scalia's role this year was also noteworthy. He wrote the majority opinion in two very important decisions: *Allentown Mack*,[364] the NLRA polling case, and *Oncale*,[365] the Title VII same sex sexual

358. 118 S. Ct. 2131 (1998).
359. 118 S. Ct. 2047 (1998).
360. Gebser v. Lago Independent School District, 118 S. Ct. 1989 (1998).
361. Allentown Mack Sales & Serv., Inc. v. NLRB, 118 S. Ct. 818 (1998).
362. Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998).
363. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).
364. 118 S. Ct. 818 (1998).
365. Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998).

harassment case. Justice Scalia's literal interpretivist approach to construing statutes was on display in the labor and employment law decisions he wrote for a majority of the Court, as well as in his separate concurring and dissenting opinions.[366] Resort to the dictionary as authority for interpretation of positive law is well on the way to becoming habitual on this Court.

While other Justices authored two or more majority opinions in the labor and employment law field, these were typically technical decisions in which the Court was unanimous or nearly so. Without undervaluing the significance of key decisions written by other Justices, particularly Justice Souter's majority opinion in *Faragher*[367] and Justice Breyer's large corpus of important concurring or dissenting opinions this term in *Textron*,[368] *Allentown Mack*,[369] *Oubre*,[370] *Eastern Enterprises v. Apfel*,[371] and *Air Line Pilots Association v. Miller*,[372] one would have to say that Justice Kennedy was the dominant figure in labor and employment law for this Supreme Court term. Given the division within the Court, it would appear likely that his role will persist in years to come.

366. *See* note 197 *supra* and accompanying text, identifying Justice Scalia's opinions last term that cited the dictionary as authority.

367. Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

368. Textron Lycoming Reciprocating Engine Div'n, Avco Corp. v. United Auto Workers, 118 S. Ct. 1626, 1632 (1998) (Breyer, J., concurring in part and concurring in the judgment).

369. Allentown Mack Sales & Serv., Inc. v. NLRB, 118 S. Ct. 818, 833 (1998) (Breyer, J., concurring in part and dissenting in part).

370. Oubre v. Entergy Operations, 118 S. Ct. 838, 843 (1998) (Breyer, J., concurring).

371. 118 S. Ct. 2131, 2161 (1998) (Breyer, J., dissenting).

372. 118 S. Ct. 1761, 1769 (1998) (Breyer, J., dissenting).