Labor and the Supreme Court: significant issues of 1992–96

From 1992 to 1996, the High Court decided a number of cases in labor law and employment law; just as the work force and its protections for workers have evolved, so, too, have the Court and its docket

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What if the Supreme Court convened and no labor cases showed up? As unlikely as it may seem, that is precisely what happened during the High Court's 1994–95 term. This circumstance, while unusual, should not be completely surprising: over the last 30 years, the traditional conception of labor law—emphasizing labor-management relations, union organizing efforts, and internal union affairs—has evolved into a more sophisticated and expansive notion of "employment law" that encompasses a wide array of workplace-based legal protections. The Court's "workplace docket" has come to reflect this shift and occasionally has been dominated by employment law—not labor law—disputes.

A Supreme Court term without "labor" cases would have been unthinkable just three decades ago. During its 1964–65 term, for example, the Court issued approximately 100 published decisions, no fewer than 14 of which raised labor-management or internal union affairs issues.[1] The Court's emphasis on such cases at that time reflected a much different legal landscape than today, with the Court usually being asked to decide workplace issues under just a handful of Federal laws.[2] The nonagricultural work force also was more heavily unionized then, with nearly 3 in 10 workers being members of labor unions.[3]

Today, only about 15 percent of nonagricultural workers are members of unions,[4] and U.S. workers are protected from the cradle to the grave by a web of Federal laws that did not exist in the early 1960s. In many instances, the concerns that prompted Congress to enact these new laws extended far beyond the workplace itself, reflecting changes in the economy and society at large: concerns that not all Americans were being allowed to participate in the country's postwar prosperity led Congress to enact laws that barred discrimination on account of race, color, religion, sex, national origin, disability, and age;[5] concerns about the aging work force and workers' retirement security caused Congress to enact legislation to protect workers' pensions and benefits;[6] concerns regarding global competition helped increase sensitivities about dislocated workers and their communities, prompting Congress to pass legislation requiring many businesses to notify their workers and local officials of future plant closings;[7] concerns that workplaces had become too dangerous and unhealthy moved Congress to enact landmark occupational safety and health laws;[8] and concerns that workplace responsibilities should be more compatible with family life caused Congress to enact a family leave law.[9]

With the advent of these new laws, the Court's labor docket has yielded to a docket that usually includes a sprinkling of labor and employment law cases. Even so, this docket varies widely from year to year. The dearth of labor cases during the 1994–95 term is one example of this variability. Another example

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occurred when the Court decided five cases dealing with the Employee Retirement Income Security Act during its 1992–93 term, but just one the following term. One aspect of the Court's docket that has not changed during the last few years, however, is the downward trend in the number of full, signed opinions that are issued by the Court. Since its 1988–89 term, the Court has issued fewer opinions during each successive term. The 87 opinions that it issued during the most recent term was the Court's lowest output in at least 30 years and was exactly half the number of opinions that it had issued just a dozen years before.[10] Whether this trend will continue is anyone's guess. It stands to reason, though, that the Court will decide fewer labor and employment cases if its overall docket continues to shrink.

The Court itself, like the work force, has undergone changes in recent years, and no longer can be viewed as the "Nine Old Men." Two new justices—Ruth Bader Ginsburg and Steven G. Breyer—joined the bench since the end of the Court's 1992–93 term. Each of them previously had been Federal appeals court judges, Justice Ginsburg coming from the District of Columbia Circuit in August 1993 and Justice Breyer coming from the First Circuit in September 1994. Justice Ginsburg joined Justice Sandra Day O'Connor on the bench as the only two women ever to have served on the High Court. The new justices succeeded Justice Byron R. White, who sat on the Court for more than 30 years, and Justice Harry A. Blackmun, who served more than 20 years.

The *Monthly Labor Review* has not published a comprehensive report of the Supreme Court's labor and employment cases since the Court's 1991–92 term. To help bring readers up to date, this article briefly discusses cases decided by the Court since then. The discussions are divided into four broad categories: traditional labor relations, pensions and benefits, employment discrimination, and public-sector employment. These are not the only categories of labor and employment cases that the Court decided or that could have been covered. Additional categories, however, would have included disputes that arose under more industry-specific statutes; they are omitted because of their more limited applicability.[11]

Traditional labor relations

Employee status. During its 1995–96 term, the High Court decided two cases that raised questions about who should be considered an employee under the National Labor Relations Act. The answers to these questions were important because the protections afforded by the Act extend only to workers who qualify as employees.[12] In each of the cases, the Court followed its longstanding practice of deferring to what it found to be reasonable positions of the National Labor Relations Board and concluded that the workers were employees.

In the first case, *NLRB* v. *Town & Country Electric, Inc.*,[13] the Court was asked to decide whether a company's worker can be considered an employee if, at the same time, he or she is being paid by a union to organize the company's nonunion workers. Unions have long used this practice of "salting" to attempt to gain access to, and organize, nonunion worksites. Although the National Labor Relations Board ruled more than 20 years ago that union "salts" were employees, Federal appellate courts did not always agree.[14] Even so, with declining union membership rolls and a 1992 Supreme Court decision giving employers a freer hand to keep nonemployee organizers off their premises, innovative organizing tactics such as salting have become increasingly important to labor unions.[15]

The facts in *Town & Country* are typical of many salting cases. The employer was a nonunion Minnesota electrical company that advertised for licensed electricians through an employment agency. Eleven union members applied, but only one received an interview. Although the union member who was interviewed was hired, he lost his job several days later. The union complained to the National Labor Relations Board, claiming that the company committed unfair labor practices by refusing to interview the other 10 union applicants and by firing the union member it had just hired.[16] The Board agreed, but the Court of Appeals refused to enforce the Board's order, concluding that union organizers are not entitled to statutory protections because they are not employees.[17]

Justice Breyer, writing for a unanimous Court, agreed with the union and the Board. In his view, treating paid union organizers as employees under the National Labor Relations Act is consistent with broad statutory language that applies not just to some employees, but to all employees. Such an approach, he wrote, is consistent with two of the Act's key purposes: protecting an employee's right to organize without employer interference, and encouraging and protecting the collective bargaining process. Acknowledging that a worker may not generally serve two masters at the same time under the common law, Justice Breyer explained that a worker may nevertheless serve two masters "if the service to one does not involve *abandonment* of service to the other." [18] Thus, a paid union organizer may engage in union organizing activities during nonwork hours, as long as those activities do not interfere with the company's right to control that person's activities during work hours.

Justice Breyer downplayed the company's concern that salts might try to harm the company by quitting at key times, sabotaging the company, or bad-mouthing the company to others. This concern may be well founded in some

cases, he said, but workers who are not paid by the union can present similar risks, and yet they are treated as employees. A concerned employer, he wrote, can always address workers' legal, but undesirable, activities by adjusting its employment contracts, and it can notify law enforcement authorities if workers commit unlawful acts.

The *Town & Country* decision governs company and union practices across industry lines. A second Supreme Court decision, *Holly Farms Corp.* v. NLRB,[19] also concerns who is an employee under the National Labor Relations Act, but it will have a more limited effect. In *Holly Farms,* the Court deferred to the National Labor Relations Board's decades-old position that workers on "live-haul crews" who collect chickens from independent contract growers and then transport the chickens to their employer's processing plant are employees, not exempt "agricultural laborers."

The question of employee status in *Holly Farms* arose during a union representation dispute at the company's Wilkesboro, NC, poultry-processing plant. That plant is part of Holly Farms' vertically integrated poultry operations: the company hatches chicks at its own hatcheries, delivers the chicks to independent contractor growers who use Holly Farms' food and supplies to raise them, and reclaims the birds several weeks later for slaughtering and processing. The company argued that live-haul crewmembers should not be part of the proposed bargaining unit. In its view, crewmembers fit within the "agricultural laborer" exception to the National Labor Relations Act's definition of "employee,"[20] because their work is so closely associated with the contract growers' farming operations.

Justice Ginsburg, for a 5–4 majority, agreed with the Board and the lower appellate court that live-haul crewmembers are not agricultural laborers. The phrase "agricultural laborer," she explained, is not defined in the National Labor Relations Act, but is directly linked to the definition of "agriculture" in §3(f) of the Fair Labor Standards Act. Under that provision, agriculture encompasses both "primary" farming activities, which are specifically enumerated activities such as raising crops, livestock, and poultry, and "secondary" farming activities, which are activities that are "performed by a farmer or on a farm as an incident to or in conjunction with [primary] farming operations."[21] Because the parties did not argue that live-haul crewmembers were engaged in primary farming, Justice Ginsburg examined only whether they were engaged in secondary farming activities.

Applying the Fair Labor Standards Act test for secondary farming activities, Justice Ginsburg first examined whether the live-haul activities had been performed by a farmer, and she concluded that they had not been. Once Holly Farms and its live-haul crewmembers turned over the chickens to the contract growers, they were no longer involved in raising poultry and thereby shed their status as farmers. The crewmembers' activities, however, had been performed on a farm, so the case turned on whether those activities were incidental to or in conjunction with the contract growers' primary farming operations.

Justice Ginsburg answered this question in the negative, giving considerable deference to what she said was the reasonable position of the National Labor Relations Board. The Board's position, she wrote, was reasonable because the crewmembers' activities began only after an individual grower's contract obligations—and hence its primary farming activities—had ended. The crewmembers' activities, she said, are more appropriately viewed as being "conjoined" with Holly Farms' processing operations, because the workers begin and end their shifts at Holly Farm's processing plant and are "functionally integrated" into that plant's activities. Although Justice Ginsburg agreed that the employer had made a plausible argument, she declined to follow it because it was inconsistent with the National Labor Relations Board's reasonable position and it was contrary to Labor Department interpretive regulations.

Doubts about support for the union. Section 8(a)(5) of the National Labor Relations Act[22] requires an employer to bargain collectively with its workers' representatives; if it fails to do so, it commits an unfair labor practice. The employer's duty to bargain arises once the union is "designated or selected for the purposes of collective bargaining by the majority of the employees," either through the National Labor Relations Board's election and certification procedures or through more informal means, such as signed authorization cards.[23] In general, this duty continues indefinitely unless the employer expresses a reasonably grounded doubt, based on objective considerations, that the union no longer enjoys majority status in the bargaining unit.[24]

Despite this general rule, a union's majority status is conclusively presumed during the term of a collective bargaining agreement, and the employer must continue to recognize and bargain with the union while the agreement is in effect. What happens, though, if, soon after a collective bargaining agreement takes effect, the employer expresses reasonable doubts about whether the union enjoyed majority support at the time the agreement was made—a time during which no agreement was in effect and during which the union's majority status was not conclusively presumed? May the employer disavow the contract based on its doubts, or must it abide by the contract? The Supreme Court recently answered these questions in *Auciello Iron Works, Inc.* v. NLRB.[25]

The collective bargaining agreement at issue in *Auciello Iron Works* was negotiated after an earlier agreement had expired and union workers had gone on strike. During the

strike, 9 of the bargaining unit's 23 workers crossed the union's picket lines, 13 signed statements indicating that they would resign from the union, and 16 expressed dissatisfaction with the union. Although the employer was aware of these facts before it entered into the new agreement, it did not express doubts about the union's majority status until the day after the union accepted the new agreement.

In a unanimous decision, the Supreme Court held that the employer was bound to honor the latest agreement despite its doubts about the union's majority status. "The object of the National Labor Relations Act," Justice David H. Souter wrote, "is industrial peace and stability, fostered by collective-bargaining agreements providing for an orderly resolution of labor disputes."[26] Allowing an employer to upset this process unilaterally on the basis of precontract doubts would be just as harmful as if such actions were based on doubts that arose during the contract's term and hence should not be permitted.

Justice Souter pointed out that if the Court did not follow this "bright-line rule," an employer might be encouraged, first to negotiate the best agreement it could, and then to challenge the agreement, knowing that, at worst, its challenge would not be upheld and it would be bound by the terms of the favorable contract. Under the Court's approach in *Auciello Iron Works*, an employer would have no such incentive to subvert the process, because each of its options for acting on its doubts—withdrawing its contract offer during negotiations and either filing a petition for an election with the National Labor Relations Board, refusing to bargain with the union, or continuing to negotiate while conducting an investigation into the union's status—might strengthen the union's hand by resolving, up front, any doubts about its majority status.

Remedies. In three recent cases, the Court was asked to examine the propriety of imposing various remedies for allegedly unlawful actions that were committed during the collective bargaining process. One of these cases, *International Union, United Mine Workers* v. *Bagwell*,[27] was the outgrowth of a contentious labor dispute during which a Virginia trial judge levied more than $64 million in civil contempt fines against a union. The question before the Supreme Court was whether the steep fines were classified properly as civil fines or whether they should have been treated as criminal fines. The Court's answer—that the fines were criminal in nature—has important implications for all contempt proceedings, not just those that arise during labor disputes, because litigants in criminal contempt proceedings must be given a wide array of constitutional protections that litigants in civil proceedings need not receive.[28]

The trial judge in *Bagwell* imposed the contempt fines because the union continued to violate an injunction that barred it from engaging in various often-violent, strike-related activities and that required it to take all necessary steps to assure compliance with the injunction. At the first in a series of contempt hearings, the judge assessed fines against the union for violations that already had been committed, and he established a schedule of fines that was to apply to future violations. These prospective fines, the judge said, were "civil and coercive" in nature.[29] The vast majority of the case's $64 million in contempt fines were levied under this schedule.

The High Court reviewed its earlier contempt decisions and acknowledged that the distinction between civil and criminal contempt had been "somewhat elusive."[30] To complicate matters, the Court said that its oft-stated standard—that fines are civil if they are meant to coerce affirmative acts, but criminal if they are meant to punish conduct that is prohibited—is least helpful in cases like *Bagwell*, in which an injunction includes complex mandatory and prohibitory language, in which recurring, out-of-court conduct is involved, and in which "serious" fines are imposed.

A more useful way of looking at the issue, the Court decided, is to examine whether a trial court's need to preserve order and regulate its proceedings through the exercise of civil contempt powers outweighs any potential for arbitrariness. In cases of petty, direct contempt that can be immediately sanctioned, the court's need is at its peak, and civil procedural protections are adequate. But out-of-court instances of contempt of a complex injunction that the court itself has imposed and must interpret may require extensive factfinding and do not interfere with the court's inherent power to control its proceedings. Thus, the court's needs are minimal under such circumstances. On the other hand, the Court said, the risk of error due to the absence of a neutral factfinder may be substantial, so criminal procedural protections are required. Because the union did not receive such procedural protections in *Bagwell*, the fines could not stand.[31]

Employers were much more successful in *Brown* v. *Pro Football, Inc.*,[32] a case "at the intersection of the Nation's labor and antitrust laws."[33] Federal labor law permits a single employer to impose contract terms that it offered in good faith during collective bargaining talks once those talks reach an impasse.[34] The question before the Court in *Brown* was whether Federal antitrust law changes this rule when the employer is not a single employer, but a group of employers who, having properly banded together for collective bargaining purposes, agree, at the impasse, to impose contract terms unilaterally.

The multiemployer group in *Brown* was a group of professional football team owners. After 2 years of contract talks with the Players Association, the owners proposed a

plan in 1989 that permitted each team to establish a six-player "developmental squad" in addition to its regular roster of players. All developmental squad members were to be paid $1,000 per week under this plan. The Players Association balked at the proposal, contending that it conflicted with existing practices that permitted all players to negotiate their own salaries. When the owners and the union reached an impasse on the issue, the owners implemented their proposal unilaterally. The developmental squad members responded by suing the league, charging that the agreement among the owners to limit pay was an unlawful restraint of trade under the Sherman Act.[35] Although the players received a $30 million award from the trial court, that judgment was reversed by the court of appeals,[36] so they appealed to the Supreme Court.

Justice Breyer, writing for an 8–1 majority of the Court, agreed with the owners and the appellate court that antitrust law had no role in the dispute. Federal labor law, he wrote, "sometimes welcomes anticompetitive agreements conducive to industrial harmony" and may be, at times, in tension with Federal antitrust law, which "forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them."[37] Thus, he explained, the Court has carved out a nonstatutory labor exemption from the antitrust law to resolve this tension and allow the collective bargaining process to work under certain circumstances. That exemption, Justice Breyer decided, should extend to the facts in Brown.

Multiemployer bargaining and the imposition of proposed contract terms during an impasse play significant roles in the collective bargaining process, he explained.[38] They also are subjects that are regulated by the highly specialized and expert National Labor Relations Board. Under such circumstances, permitting antitrust courts and antitrust principles to determine the outcome of collective bargaining disputes would make no sense. Furthermore, if antitrust laws were to apply in these circumstances, a multiemployer group might be placed in the untenable position of having to decide, during an impasse, which of two conflicting Federal laws to violate. If, for example, the group were to act as the owners did in Brown, it would risk committing an antitrust violation and running up treble damage liabilities. On the other hand, if group members each imposed their own contract terms, they would risk committing unfair labor practices for not bargaining in good faith. Applying the nonstatutory labor exemption, Justice Breyer wrote, will prevent employers from having to confront this dilemma and will assure continued stability and certainty in postimpasse, multiemployer collective bargaining situations.

The Supreme Court decided one other case involving remedies for an employer's allegedly unlawful actions in a collective bargaining context. In that case, *ABF Freight System, Inc.* v. *NLRB*,[39] the Court gave considerable deference to the National Labor Relations Board's conclusion that a victim of an unfair labor practice need not forfeit the remedy of reinstatement with backpay just because the person lied in an unfair labor practice proceeding. The worker in this case was fired for being late to work without good cause. He responded by filing an unfair labor practice charge with the Board because he believed that the real reason he was fired was that he had been party to an earlier successful grievance. At the hearing on this charge, though, he lied about why he had been late to work. The Board held that, although the company could have fired him for lying, it had not done so, but instead fired him for engaging in a protected activity. As a result, it ordered the company to reinstate him with backpay.[40]

The Supreme Court acknowledged that "false testimony in a formal proceeding is intolerable,"[41] but nevertheless concluded that countervailing concerns precluded it from imposing a rule that would bar a remedy. The National Labor Relations Board, the Court said, has primary responsibility for fashioning remedies that effectuate the National Labor Relation Act's policy goals, so the Board's remedial decisions must be followed unless they betray an abuse of discretion.

The Court cited three reasons why the Board did not abuse its discretion. First, the credibility of both the worker and his employer were suspect. Therefore, the Board reasonably decided that it would be unfair to reward the employer indirectly by denying the worker a remedy. Second, Board proceedings might become mired in collateral disputes about credibility if remedies were denied in such cases. Finally, the Court said that the Board has other civil and criminal remedies that it can pursue against witnesses who give false testimony.

Justice Antonin Scalia filed a separate concurring opinion to upbraid the Board for its "unseemly toleration of perjury in the course of adjudicative proceedings."[42] Although the Board's actions were within its discretion, they were "at the very precipice of the tolerable," he said.[43] Justice Scalia was particularly annoyed that the agency had not pursued other civil or criminal remedies for false testimony. In his judgment, the Board's lack of concern about false testimony in its proceedings undermines and dishonors not just its own adjudicative system, but the entire legal system as well.

Labor law preemption. The Court decided two cases that raised questions about when Federal labor laws preempt the policies or actions of State authorities. As a general matter, Federal law preempts, or supersedes, a State's activities in any of three circumstances: if Federal law expressly requires preemption, if the State's activities conflict with

Federal law, or if Federal law "occupies the field," leaving no room for the State to act.[44] The basis for Federal preemption is the supremacy clause of the United States Constitution, which provides that Federal laws are "the Supreme law of the land . . . any Thing in the Constitution or laws of any state to the Contrary notwithstanding."[45]

In *Livadas* v. *Bradshaw*,[46] the Court was asked to determine whether Federal law preempts a California policy of not enforcing its own prompt-payment law[47] when a worker is covered by a collective bargaining agreement that includes an arbitration clause. The worker who wanted the State to enforce her prompt-payment rights challenged the State's nonenforcement policy, arguing that it interfered with her right to bargain collectively under the National Labor Relations Act. In a 9–0 decision, the High Court agreed.

Forcing individuals to choose between receiving a benefit (the enforcement of State law) or engaging in conduct that is protected by Federal law (entering into a collective bargaining agreement that contains an arbitration clause) presents a special danger that congressional purposes will be thwarted, the Court said. By fashioning a Federal statutory scheme, two of whose central tenets are the right to bargain collectively and the desirability of resolving contract disputes through a collectively bargained arbitration process, Congress surely did not intend to force workers to make such an "unappetizing choice."[48]

The Court also rejected the State's argument that its nonenforcement policy was mandated by a provision in the Labor Management Relations Act[49] that vests Federal courts with the jurisdiction to resolve claims alleging breaches of collective bargaining agreements. The Court acknowledged that disputes involving such breaches must be resolved under Federal law, but concluded that the dispute in this case centered not on a collective bargaining agreement or its arbitration clause, but rather on whether the employee was paid promptly. That issue, the Court said, is purely a matter of State law, and just because the employee's rate of pay was set in a collective bargaining agreement that contained an arbitration clause does not mean that the State claim must yield to Federal law. The Court explained that workers covered by collective bargaining agreements with arbitration clauses should not be forced to negotiate what they would otherwise be entitled to receive under State law.

The second preemption case, *Building & Construction Trades Council* v. *Associated Builders & Contractors*[50] (also known as the *Boston Harbor* case), involved a State agency that sought to enforce a project labor agreement. The State agency in this case was the Massachusetts Water Resources Authority, which had been ordered by a Federal judge to clean up the polluted Boston Harbor. In ordering the State to undertake cleanup efforts—for an expected 10 years and $6.1 billion—the judge made no allowance for labor disputes, insisting that construction proceed without interruption. To help meet the agency's obligations, its project manager negotiated a project labor agreement that all successful bidders were expected to sign and follow.

A project labor agreement is an agreement between the owner or contractor and a labor union that is designed to ensure labor-management peace, cost certainty, and overall stability throughout the life of a project. These agreements have been used for many years in the construction industry to deal with that industry's unique nature and labor market.[51] The specific agreement in the *Boston Harbor* case recognized the Building and Construction Trades Council as the exclusive bargaining agent for all craft employees on the project; included a union promise not to strike for 10 years and to use specific, peaceful methods for resolving labor-related disputes; required all employees to become union members within 7 days of being hired; specified that hiring would be done primarily through union hiring halls; and applied to all contractors and subcontractors.

A group of contractors sued to block the State's efforts to enforce the *Boston Harbor* agreement. The group argued that those efforts were preempted by Federal labor law because the State was trying to regulate collective bargaining activities that Congress intended to be left unregulated. A unanimous Supreme Court disagreed. The National Labor Relations Act, it held, preempts a State's actions only when the State acts as a regulator, not when it acts in a proprietary capacity, as in the *Boston Harbor* case.[52] By enacting sections 8 (e) and (f) of that Act,[53] which expressly permit certain prehiring agreements in the construction industry, Congress recognized that special rules are appropriate for this unique industry. The industry is unique, the Court said, not because of the public or private nature of its employers, as the group of contractors argued, but rather because of such things as the short-term nature of employment in the industry and the need for predictable costs and available labor. A public employer who acts as a purchaser confronts these market realities to the same extent as a private employer and so should enjoy the same market freedoms.[54]

Plant closings. Unions have long sought to play a role when their members' employer is about to close a plant or lay off large numbers of workers. They have asserted, for example, that employers have committed unfair labor practices under section 8(a)(3) of the National Labor Relations Act[55] by firing workers in order to discourage union activity. This tactic, though, has significant limitations, because section 8(a)(3) does not apply when the company's motives are purely economic. In addition, this provision of the Act

has been interpreted as not affecting an employer's absolute right to shut down its entire business for any reason at all, including antiunion animus.[56] Unions also have attempted to play a role when plants are closed or large numbers of workers are laid off by asserting that employers have committed unfair labor practices under section 8(a)(5) of the Act[57] by not bargaining over the terms and conditions of employment. This approach, too, is limited by an owner's unfettered right to close its business.[58]

As a result of such drawbacks, organized labor turned to Congress for a legislative solution to its problem. Those efforts succeeded in 1988, when Congress enacted the Worker Adjustment and Retraining Notification Act, more commonly referred to as the WARN Act.[59] In general, this law requires employers to give 60 days' notice of a plant closing or a mass layoff to the workers' union (or, if there is no union, to the workers themselves) and to local government officials.[60] An employer who fails to give such notice is liable for backpay and benefits for each day during the 60-day period for which proper notice was not given.[61]

In *United Food and Commercial Workers* v. *Brown Group, Inc.*,[62] the Supreme Court was asked to decide whether the union's role under the WARN Act extends beyond simply receiving the 60-day notice. More specifically, the Court was asked whether the WARN Act authorizes unions to sue on behalf of their members for back wages and benefits and, if so, whether the Act would then meet constitutional requirements. The Court had little trouble concluding that Congress intended to permit unions to sue on behalf of their members, but it had a more difficult time deciding whether Congress had the authority to do so under the Constitution.

Article III, section 2, of the Constitution authorizes Federal courts to exercise their judicial power only when a "case" or "controversy" exists. A party is said to have "standing" to sue, thus meeting this requirement, when it can show that it has a bona fide stake in the outcome of the lawsuit. The Supreme Court has developed special rules for determining when an organization such as a labor union has standing to sue on behalf of its members.[63] Under these rules, the organization must show that its members would have standing to sue in their own right, that the interests the group seeks to protect are germane to its purpose, and that the claim made by the organization and the relief it seeks do not require the participation of individual members. This last requirement was at issue in *Brown Group* because, as the Court held in that case, the WARN Act authorizes unions to recover damages for individual workers even though the workers are not participants in the litigation.

The Court began its analysis by explaining that it had never clearly articulated whether the third prong of this standing test was a constitutional requirement or whether it was a court-created "prudential" standing requirement. This distinction is important because, if the requirement is not mandated by the Constitution, then Congress may override it through legislation such as the WARN Act. The Court examined the first two prongs of the test and concluded that an organization which meets them establishes sufficient "adversarial vigor" to satisfy the Constitution's "case" or "controversy" requirement. The third prong, on the other hand, the Court said, may promote adversarial intensity and judicial efficiency, but is not constitutionally required. Furthermore, a contrary result would call into question many existing statutory schemes that permit class action lawsuits. Thus, the Court held that Congress acted within its constitutional powers when it authorized unions to sue for back wages and benefits for their members under the WARN Act.[64]

Pensions and benefits

American workers are concerned as never before about security in retirement and access to affordable health care. The Supreme Court's docket over the last 4 years reflected these concerns, with a significant number of cases arising under the primary Federal law that regulates employee benefit programs, the Employee Retirement Income Security Act,[65] more popularly known as ERISA. Subchapter I of this law, entitled "Protection of Employee Benefit Rights," establishes disclosure and reporting requirements for benefit plan administrators and others,[66] and sets minimum participation, vesting, and funding standards.[67] It also prescribes the duties of those who control and manage the plan's operation and administration,[68] and creates a scheme that permits the Federal Government, plan participants, fiduciaries, and plans themselves to enforce the law's requirements.[69] Finally, subchapter I of ERISA requires certain sponsors of group health plans to allow beneficiaries to continue their coverage when events such as a worker's death or layoff might otherwise cause coverage to stop.[70]

Employers as fiduciaries. Several of the Court's recent cases raised questions about who should be considered a fiduciary under ERISA and what a fiduciary may or may not do. Under ERISA, a person is a fiduciary to the extent that he or she exercises discretionary authority, control, or responsibility over a plan's management, assets, or administration.[71] Among a fiduciary's most important legal duties is the duty to act "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to [them]."[72] The law, however, permits a person (defined to include corporations) to be a fiduciary and an employer; the tension between these roles has the potential to confuse plan participants and beneficiaries, who need to

know which hat the company is wearing at any given time. This problem was at the heart of the dispute in *Varity Corp.* v. *Howe*,[73] a case in which a company tricked workers into withdrawing from its plan and forfeiting benefits.

In the mid-1980s, the Varity Corporation was concerned that parts of its wholly owned subsidiary, Massey-Ferguson, Inc., were losing money, so it developed a business plan to deal with the problem. The company's plan was to transfer unprofitable divisions and certain liabilities to a new subsidiary, known as Massey Combines. One liability that Varity sought to transfer was its liability for medical and other nonpension benefits of workers in the poorly performing divisions. Varity could have eliminated this liability simply by terminating these benefits. However, it decided not to do this because, among other reasons, doing so would have upset workers who remained in the profitable divisions. Instead, Varity decided to coax workers into transferring voluntarily to the new company. To do this, it had to convince them that Massey Combines' prospects were bright, because the security of their benefits would be tied to the new company's success. The task was made more difficult by one particularly troubling fact: Massey Combines was insolvent.

Varity convened a special meeting of workers to provide them with detailed information about benefits, to assure them that Massey Combines had a promising future, and to answer their benefits-related questions. The effort was successful, as 1,500 workers voluntarily agreed to transfer.[74] The workers soon learned, though, that they should not have believed Varity's assurances: Massey Combines lost $88 million the first year and landed in receivership the second, causing many workers to lose benefits. These workers responded by filing suit to be reinstated into the plan from which they had withdrawn. They claimed that Varity, as plan administrator, had misled them and thereby breached its fiduciary duties under ERISA.

The Court first had to decide whether Varity was acting as an employer or as a fiduciary when it called the special meeting to convince workers to transfer to Massey Combines. The terms of the pension law limit fiduciary acts to discretionary acts of plan "management" and "administration," terms that Justice Breyer, for a 6–3 majority of the Court, said are not self-defining. For guidance, he looked to the common law of trusts, under which a fiduciary retains administrative powers to undertake all acts that are necessary or appropriate for carrying out a trust's purposes. Applying this principle, he concluded that giving information about the likelihood of future benefits so that beneficiaries can decide whether to participate in a plan is an act that is "appropriate" to carrying out an important purpose of the plan—particularly because ERISA directs administrators to provide beneficiaries with information about their plans. Further, in *Varity*, this plan-related information was provided by individuals who had the authority to communicate as fiduciaries. As a result, Justice Breyer found the company's misleading statements to be the statements of an ERISA fiduciary. He then concluded that a fiduciary such as Varity breaches its duty under ERISA to act solely in the interest of participants and beneficiaries when it deceives them in order to save money for the employer. In short, he agreed with lower courts that "lying is inconsistent with the duty of loyalty owed by all fiduciaries."[75]

Having shown that Varity was a fiduciary that breached its duty of loyalty, the participants and beneficiaries still needed to convince the Court that individual relief was available under ERISA. They believed that such relief was authorized by section 502(a)(3) of the statute, which allows participants and beneficiaries to obtain "other appropriate equitable relief" to redress ERISA violations.[76] Varity disagreed, arguing that individual actions for fiduciary breaches must be brought under a different ERISA provision, one that permits participants and beneficiaries to obtain plan-based, not individual, relief.[77]

Justice Breyer rejected Varity's argument. The two provisions for remedies, he wrote, address different circumstances. The plan-based provision is concerned only with the way in which fiduciaries manage the assets of a plan and therefore is narrowly tailored to preserving those assets. Section 502(a)(3), on the other hand, is a catchall provision that provides a safety net of relief for participants and beneficiaries, such as those in *Varity*, who do not have any other adequate ERISA remedy. To rule otherwise, he concluded, would immunize fiduciaries from liability when they commit breaches such as Varity's, a circumstance he said would be impossible to reconcile with the law's underlying purposes.

Workers were not as successful in another ERISA case that was decided in 1996, *Lockheed Corp.* v. *Spink*.[78] The primary issue in that case was whether an employer engages in a "prohibited transaction" under ERISA when it offers an early retirement program that is open only to workers who agree to waive all employment-related claims that they may have against the company.

Paul Spink, the plaintiff in this case, was eligible to participate in Lockheed's early retirement program, but did not wish to waive certain age-based claims against the company under ERISA and the Age Discrimination in Employment Act.[79] Because the Lockheed program permitted workers to receive early retirement benefits only if they waived their employment-related claims against the company, Spink retired without receiving extra benefits. His reason for not waiving his job-based claims stemmed from changes in the law that expanded the rights of older workers to participate—or to participate more fully—in their employers' pen-

sion plans. Before these changes, employers could exclude older workers from participating in their plans, which is what happened to Spink. When the law was amended, Lockheed changed its plan to allow Spink and other older workers to participate, but refused to give them credits toward their pensions for the years that they were not members of the plan.

Spink filed suit under ERISA, alleging that, by paying early retirement benefits, Lockheed and the pension plan administrators misused the plan's assets to obtain a significant benefit for the company: the elimination of job-related liabilities. In more technical terms, he asserted that plan fiduciaries violated section 406(a)(1)(D) of ERISA when they adopted the early retirement amendments to their plan, because doing so caused the plan to engage in a "transaction [that] constitutes a direct or indirect transfer [of the plan's assets] to, or use [of those assets] by or for the benefit of a party in interest," namely, Lockheed.[80] The Supreme Court, however, found that Lockheed had done nothing wrong.

Section 406(a)(1) of ERISA regulates the conduct of plan fiduciaries, the Court explained, and a violation of this provision will be found only if a fiduciary caused a plan to engage in an illegal transaction. The key question here, the Court said, is whether Lockheed was acting in a fiduciary capacity when it amended its pension plan. In concluding that it was not so acting, the Court relied on its 1995 decision in *Curtiss-Wright Corp.* v. *Schoonejongen*.[81] In that case, the Court held that employers and plan sponsors do not act as fiduciaries when they adopt, modify, or terminate a welfare benefit plan. Because ERISA's definition of "fiduciary" does not differentiate between those who oversee welfare plans and those who oversee pension plans, and because the law's fiduciary duty provision is similarly general in nature, the Court concluded that the rule in *Curtiss-Wright* should apply with equal force to cases in which a pension plan is amended.

The Court dodged the question of whether the plan's administrators were acting as fiduciaries when they paid benefits according to the amended plan's terms. The payment of benefits, the Court held, is not a "transaction" that section 406(a) was intended to prohibit, so it makes no difference whether the administrators were acting as fiduciaries at that time. As a general matter, section 406(a) prohibits commercial bargains that are struck with plan insiders and that thereby pose a special risk that the plan will end up without enough funds to pay benefits; it does not address what an employer may ask an employee to do in exchange for benefits. The Court thus concluded that paying early retirement benefits was the result of a legitimate quid pro quo between the sponsor of the plan, who promised to pay additional benefits, and the participants, who agreed not to assert employment-related claims in exchange for such benefits.

Prohibited transactions and the tax laws. The question of whether an employee benefit plan and the plan's sponsor participated in a prohibited transaction can also arise under the Federal tax laws. Such was the case in *Commissioner* v. *Keystone Consolidated Industries*.[82] At stake were millions of dollars in excise tax liabilities if the transactions in question were found to be prohibited under the tax code.

An employer who sponsors a tax-qualified pension plan must fund the plan in accordance with ERISA's minimum funding requirements. The tax code, in turn, permits the employer to deduct, for tax purposes, current contributions that it makes to fund the plan.[83] Through a two-tier excise tax, however, the code, in effect, prohibits transactions between a pension plan and certain "disqualified persons," including the employer of workers who are covered by a pension plan.[84] One of those transactions is a "direct or indirect . . . sale or exchange . . . of any property between a plan and a disqualified person."[85] The question in *Keystone* was whether a sponsor of a plan engaged in a prohibited sale or exchange of property when it contributed five truck terminals and a piece of Key West, FL, property to its pension plan. If so, the company improperly deducted its contributions and owed excise taxes of more than $10.8 million.

In an 8–1 decision, the Court ruled against the company. The transfer of property to satisfy a monetary obligation has long been considered to be a "sale or exchange" for income tax purposes, Justice Blackmun explained. By using the same phrase for purposes of delineating the excise tax on the prohibited transaction, he said, Congress is presumed to have been aware of that phrase's settled meaning. Further, prohibiting such transfers in the context of pensions is consistent with the congressional goal of blocking transactions that are likely to injure plans. Injuries are likely, he wrote, in cases in which a sponsor contributes property to a plan because the property may be overvalued or difficult to sell; the contribution also may have the effect of allowing the sponsor, and not the plan, to set the plan's investment policy.

The company argued that although Congress was concerned about contributions of property by a plan's sponsors, it intended only to bar contributions of encumbered property. In support of its argument, the company pointed to section 4975(f)(3) of the tax code, which provides that an employer's transfer to a plan "shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien."[86] According to Keystone, this provision would not have been necessary if Congress intended to treat each and every transfer of property to a plan as a sale or exchange.

Justice Blackmun rejected the company's analysis, however. The excise tax provision, he said, applies only to property transfers that satisfy a sponsor's funding obligation. Section 4975(f)(3), on the other hand, serves the additional purpose of barring contributions of encumbered property that are made for purposes other than meeting statutory funding duties. Thus, the latter provision does not limit the reach of the excise tax to encumbered property.

Insurance companies as fiduciaries. Another pension case that the Court decided in 1993 was *John Hancock Mutual Life Insurance Co.* v. *Harris Trust and Savings Bank.*[87] At issue was whether ERISA's fiduciary standards apply to an insurance company when it manages assets in its general account pursuant to a participating group annuity contract with a pension plan. Under such a contract, also known as a general account contract, the plan's trustee deposits pension funds into the insurer's general corporate account to secure retiree benefits. Amounts in this account may then be converted, at a later time, into guaranteed benefits for individual retirees. Amounts that are not converted—so-called free funds—continue to be commingled with the insurer's general account assets. As a result, the account balance of the free funds reflects the insurer's overall investment performance.[88]

As a general matter, one who exercises control over "plan assets" is considered a fiduciary under ERISA. The pension law's "guaranteed benefit policy exception," however, excludes from ERISA's fiduciary standards any assets that are held pursuant to an insurance contract "to the extent that such . . . contract provides for benefits the amount of which is guaranteed by the insurer."[89] John Hancock, the insurer in this case, argued that it managed the free funds as part of a guaranteed benefit policy and therefore was not managing the assets of the plan. Harris Trust, on the other hand, as the plan's trustee, argued that the guaranteed benefit policy exception did not apply to the free funds because John Hancock did not guarantee that those funds would receive any particular rate of return or generate a fixed level of benefits.

Siding with the trustee, a divided Court held that John Hancock was subject to ERISA's fiduciary standards when it managed the free funds. Justice Ginsburg, writing for the six-justice majority, explained that because the guaranteed policy exception applies "to the extent" that benefits are guaranteed, only those components of a contract that provide such a guarantee are subject to the statutory exclusion. She then directed courts to look at how each component allocates investment risks in determining whether benefits are guaranteed. In the case of contract components that involve free funds, she said that two factors must be examined: whether the insurer guarantees a reasonable rate of return for those funds and whether the contract sets a rate at which free funds may be converted into guaranteed benefits.

Justice Ginsburg concluded that John Hancock had not guaranteed that the free funds would produce even a modest rate of return. Instead, the plan's income on these funds was tied only to the performance of John Hancock's general account assets. Just as important, she wrote, was that John Hancock, not the contract, set the price for converting free funds to guaranteed benefits. Thus, the plan's participants, and not John Hancock, bore the investment risk for the free-funds portion of the general account contract, meaning that the guaranteed policy exception did not apply.

Justice Clarence Thomas, in a dissenting opinion, chastised the majority for "abruptly overturn[ing] the settled expectations of the insurance industry" without a firm statutory basis for doing so.[90] In his judgment, a contract can "provide for" guaranteed benefits—and thereby meet the exclusion's express requirements—before payouts are actually guaranteed. Thus, a contract can become guaranteed for purposes of the exclusion before the investment risk ever shifts. Justice Ginsburg acknowledged the industry's substantial practical concerns, but said that they had been presented to Congress and that it was up to Congress to respond to them.[91] She also suggested that the Labor Department could take administrative action to address some of those concerns.[92]

Liability of nonfiduciaries. Plan participants, beneficiaries, plans, and the Secretary of Labor are not always able to obtain satisfactory remedies from fiduciaries who violate ERISA. In two recent cases, *Mertens* v. *Hewitt Associates*[93] and *Peacock* v. *Thomas*,[94] the Court considered whether nonfiduciaries also may be held liable for such violations. In each case, the Court held that they may not be.

In *Mertens*, the question was whether a nonfiduciary who knowingly participated in a fiduciary breach may be held liable under ERISA for monetary losses that resulted from that breach. The nonfiduciary in this case was an actuary who, in setting the plan's actuarial assumptions, did not properly take into account the cost of a wave of early retirements among participants. This oversight caused the plan's sponsor to underfund the plan. The Pension Benefit Guaranty Corporation eventually was forced to terminate the plan and pay benefits to participants and beneficiaries. The amount of benefits, though, was only what ERISA guarantees, not the higher amount that would have been payable under the plan if it had not been terminated. The participants sought to recover the difference between these amounts from the actuary.

The participants argued that a court's authority to grant "other appropriate equitable relief" permits it to award

money damages against an actuary. Acknowledging that equitable relief usually does not include compensatory damages, the participants suggested that special rules should apply under ERISA because the Act's roots lie in the common law of trusts, under which courts of equity could award money damages against persons who knowingly participated in a trustee's breach of duty.

Justice Scalia, for a five-justice majority, rejected this analysis. In his view, the problem with reading the phrase "other equitable relief" to include any relief that a court of equity might be empowered to grant in a particular case is that it gives no meaning to the modifier "equitable." Courts of equity could, after all, grant legal and equitable relief in some cases. A far better interpretation of the phrase, he decided, is that it includes only relief that typically was available in equity, such as injunctive or restitutive relief. Not only is such an interpretation more consistent with the historical distinction between equitable and legal remedies, he said, but it also is consistent with the way in which the Court interpreted similar language in Title VII of the Civil Rights Act of 1964.[95]

Justice Scalia brushed aside an additional argument of the participants, which was that Congress would not have used ERISA to strip them of a remedy that they retained under the common law of trusts, because its primary purpose in enacting that law was to protect beneficiaries. To begin with, Justice Scalia explained, vague notions of a statute's central purpose cannot trump the law's text. Even if they could, he said, the pension law was a legislative compromise between competing interests, not all of which favored participants. Moreover, Congress expanded the definition of "fiduciary" when it enacted ERISA, thereby diminishing the need to continue to permit a remedy against nonfiduciaries.[96]

The worker in the second case, *Peacock* v. *Thomas,* was equally unsuccessful in imposing liability against a nonfiduciary. That worker, Jack Thomas, had obtained a judgment against his former employer, Tru-Tech, Inc., for breaching ERISA-imposed fiduciary duties, but had not been able to collect on the judgment. He blamed his lack of success on D. Grant Peacock, a Tru-Tech officer and shareholder, claiming that Peacock illegally diverted company assets to other creditors and to himself. Thomas eventually filed a second suit to hold Peacock individually liable for the corporation's debt, and it was that suit which reached the Supreme Court.

Thomas did not assert in his second suit that Peacock was liable under ERISA as a plan fiduciary, because the earlier lawsuit had resolved that question in Peacock's favor. Instead, Thomas argued that ERISA contains an exception to the general rule that individuals may not be held liable for a corporation's debt and that Peacock could be held liable under that exception. In his view, a court may impose liability in this way—by "piercing the corporate veil," as it is known—through its authority to grant "appropriate equitable relief." The High Court, however, was not persuaded.

An 8–1 majority held that ERISA does not provide an independent cause of action for piercing the corporate veil. If piercing the veil is permitted at all, the Court said, it is permitted solely as a means of imposing liability in a separately supported cause of action. In other words, a party may not receive an ERISA remedy against an adversary unless it proves that the adversary committed an ERISA violation. In the case at hand, Thomas did not allege that Peacock committed an ERISA violation, but instead asserted only that Peacock prevented the satisfaction of an ERISA judgment against a third party. Because this latter allegation—even if proved—is not actionable under ERISA, the lower court lacked subject matter jurisdiction over the suit against Peacock.

Thomas also argued that the lower court could assert jurisdiction over the second suit because that suit was related, or ancillary, to the first suit. The High Court rejected this claim, too. A court may exercise ancillary jurisdiction of claims for which subject matter jurisdiction is lacking only under one of two circumstances: if the claims in the second suit are factually interdependent with claims over which the court retains subject matter jurisdiction, or if exercising ancillary jurisdiction will enable the court to vindicate its authority and effectuate its decrees. The claims in Thomas' second suit, the Court said, were based on conduct that occurred *after* the first suit had been tried and the pension plan had been terminated. As a result, those claims were not sufficiently related to the first suit to support ancillary jurisdiction. In addition, the Court explained that it had never before permitted ancillary jurisdiction to be used to impose an obligation for an existing judgment on someone who was not already liable for that judgment, and in fact, it had expressly forbidden ancillary jurisdiction to be used in that way.[97] Thus, the Court concluded that Thomas had not met either prerequisite for invoking a lower court's ancillary jurisdiction.

Health care and ERISA preemption. Rising health care costs and concerns about access to high-quality, affordable health care have fueled a lively national debate in recent years. This debate has taken place not only on the Federal and State levels, but also in the workplace, because employers have been the most prevalent source of health care benefits for working-age Americans.[98] ERISA plays an important role in the debate in each of these arenas, covering work-based employee welfare plans that provide medical, surgical, or hospital care or benefits,[99] and preempting, or superseding, State

laws to the extent that they "relate to" an employee benefit plan and do not regulate insurance.[100]

Litigants have swamped courts in recent years with cases in which they assert that State regulatory schemes are preempted by ERISA because they "relate to" employee benefit plans.[101] The Supreme Court considered two such cases during its last four terms. The first was *District of Columbia* v. *Greater Washington Board of Trade*,[102] in which the Court was asked to strike down a District of Columbia workers' compensation law on the grounds that ERISA preempted it. The local law in that case required employers who provide health insurance coverage to extend equivalent coverage to injured workers receiving or eligible to receive workers' compensation benefits.[103]

By an 8–1 margin, the Court held that ERISA preempts the District of Columbia law. The District law's coverage and benefit level requirements are tied specifically to the coverage and benefit levels of ERISA-covered plans, the Court said, and on that basis alone "relate to" those plans for preemption purposes. In addition, ERISA's exemption from coverage of any plan that is maintained solely for the purpose of complying with a workers' compensation law does not come into play if the plan is maintained pursuant to a State law—like the District's—that "relates to" an ERISA-covered plan. Thus, it made no difference that the District's law was enacted as part of its workers' compensation laws; it still was preempted.

In a footnote to the majority opinion, the Court noted that a State law will not be preempted under ERISA if it refers to or is connected with a covered benefit plan in a tenuous, remote, or peripheral way.[104] Two terms later, in *New York Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*,[105] the Court was asked to decide whether a New York scheme that levied surcharges on the rates of hospital patients based on the patient's insurance coverage had such an indirect connection with ERISA-covered plans.

The New York law at issue in *Travelers* was the product of that State's attempt to control hospital rates and the cost of caring for indigent patients. The law imposed a surcharge on the bills of patients who were covered by commercial insurers, but not on the bills of those who were covered by Blue Cross/Blue Shield; it also imposed a surcharge on health maintenance organizations that was based on the number of Medicaid recipients they enrolled. The State justified the differential surcharge scheme—in particular, its favorable treatment of Blue Cross/Blue Shield patients—largely on the ground that the health insurer's open enrollment practice provides coverage to many costly subscribers who cannot obtain coverage from commercial insurers. Commercial insurers who administered ERISA plans sued to invalidate the scheme, arguing that it "related to" the plans they administered and was thereby preempted by ERISA.

A unanimous Court held that ERISA does not co-opt a State health care law like New York's just because it produces an indirect economic effect on ERISA plans. Such an effect does not bind the plan's administrators or dictate their choices, and so does not constitute a forbidden regulation of ERISA plans. Preemption under ERISA, the Court explained, was designed to enable plans to adopt uniform administrative practices and to provide national benefit packages, not to promote uniformity of cost. The New York law, the Court said, interferes with neither of these permissible legislative purposes because it does not manipulate the structure or administration of ERISA plans.

The Court concluded by explaining that if ERISA were construed to preempt the New York surcharge law, it would thereby bar any State regulation of hospital costs. Such a result, the Court said, would be "unsettling" and "startling." States, after all, regulated hospital costs at the time that ERISA was enacted, and yet the pension law's legislative history contains no suggestion that Congress intended to curtail that practice. To the contrary, "Congress never envisioned ERISA preemption as blocking state health care cost control, but rather meant to encourage and rely on state experimentation like New York's."[106] At least one commentator suggests that this result may be a sign that the Court is prepared to take a somewhat more relaxed approach to ERISA preemption.[107]

Multiemployer plans. The High Court decided two ERISA cases in 1993 that involved multiemployer pension plans. Employers that participate in such a plan make contributions to the plan, and those contributions—along with the contributions of other participating employers—are pooled so as to fund the payment of benefits to participants and beneficiaries. Workers are free to move from one participating employer to another without losing benefits or credits under the plan.

Multiemployer plans usually are established to meet the terms of collective bargaining agreements; they are found most often in industries in which individual employers are least likely to establish their own plans, either because their businesses are too small or their work forces too mobile. Companies and workers in these industries generally benefit from such collective arrangements: companies that offer them to workers are better able to compete in the labor market, and workers are able to move between employers without jeopardizing their pensions. Despite these advantages, an employer may decide at some point that it cannot or will not continue to participate in the plan. In such cases, questions arise about how the employer's share of the plan's liabilities should be apportioned and paid for. That was the case in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*

for Southern California,[108] in which a withdrawing employer challenged the statutory process by which its liability was determined.

The Multiemployer Pension Plan Amendments of 1980[109] amended ERISA to provide a means by which multiemployer plans can recover a withdrawing employer's share of a plan's liabilities. Under this law, the plan's actuary calculates the present value of the plan's liability for vested benefits and then subtracts the plan's assets from the resulting figure to arrive at the amount of the plan's "unfunded" liability. The withdrawing employer's share of this liability is then determined in one of several ways.[110] In *Concrete Pipe & Products,* the actuary used the "presumptive method" for determining liability, under which the employer's share of the plan's unfunded liability is presumed to be proportional to the share of its contributions to the plan.[111] Regardless of the method used, once the actuary determines the amount of the employer's withdrawal liability, the plan's trustees or its administrator notifies the employer and demands payment. An employer who disputes its withdrawal liability may ask that the matter be referred to arbitration; any party may appeal the arbitrator's decision to the appropriate Federal district court.[112]

The employer in *Concrete Pipe & Products* mounted several attacks on this procedure. First, it argued that the statute does not provide for an impartial adjudication of its withdrawal liability. More specifically, it argued that trustees may be biased in favor of finding large withdrawal liabilities because they have fiduciary responsibilities to the plan and may incur personal liability for any breach of those responsibilities. The Court did not dispute this point, but concluded that the potential for bias was not a problem because trustees do not have an adjudicative role in the process. Their role, the Court said, is more like that of a prosecutor or a civil plaintiff, and does not demand strict neutrality.

The Court also rejected the employer's contention that a statutory presumption in favor of the trustees' factual findings[113] transported bias on the part of the trustees into the arbitrator's decisionmaking process, thus rendering the adjudicative process unconstitutional. Conceding that the presumption in question is "incoherent" and that its legislative history sheds little light on its "odd language,"[114] the Court struggled to resolve the statute's ambiguity and eventually adopted an interpretation that it said avoided constitutional problems. The presumption in question, the Court held, merely shifts the burden of persuasion from the trustees to the employer—a burden that requires the employer to show only that its view of the facts is supported by a preponderance of the evidence. Thus, the presumption does not withdraw adjudicative independence from the arbitrator.

The employer objected to a second presumption as well. That presumption provides that the amount of a plan's unfunded vested benefits, as determined by the plan's actuary, is presumed to be correct, unless the contesting party shows that the actuarial assumptions that were used were unreasonable or that the actuary made a significant error in applying those assumptions.[115] In rejecting the employer's argument, the Court said that actuaries are not especially vulnerable to charges of bias, because of the technical nature of their role and their professional status. In addition, the statute does not require the employer to show that the actuary's prediction was wrong; rather, it merely demands that the employer demonstrate that the methods and assumptions the actuary used would not be acceptable to a reasonable actuary. With little inherent potential for bias, and a reasonable allocation of the burden of proof, the Court found that the actuarial presumption presented no constitutional problem.[116]

The Supreme Court's second case involving multiemployer plans, *Local 144 Nursing Home Pension Fund* v. *Demisay,*[117] involved a group of employers who had withdrawn from two multiemployer union health and welfare plans and established two new ones. These employers were concerned that the new plans lacked funds to pay all of the benefits they had promised during the collective bargaining process. In particular, they had guaranteed that workers would be credited with service time they had earned under the old plans, and they promised that workers would not lose any benefits as a result of the switch in plans. To address these concerns, the employers sued the old plans, seeking, in essence, a share of the assets of those plans that was proportional to contributions the employers had made.

Under section 186 of Title 29 of the U.S. Code, employers may not make payments to unions and union officials, and unions and their officials may not receive such payments. Employers may, however, contribute to union pension and welfare benefit plans, but only if the plans are established for the sole benefit of workers. The employer group in *Demisay* argued that this "sole benefit" requirement could not be met by the old plans if they retained assets that were attributable to withdrawing employers' contributions, and so it had asked the lower court to exercise its injunctive authority by ordering the old plans to transfer assets to the new plans.

Justice Scalia, writing for the High Court, took a narrow view of the jurisdiction of Federal courts to enjoin violations under section 186. A violation of that provision, he said, occurs when moneys are paid into or accepted by the fund, not when the fund administers them. Furthermore, the "sole benefit" requirement refers to the purposes for which the plan was established and for which payments are held in trust, not the purposes toward which the plan ultimately is

used. Thus, although a trustee might breach its contractual or fiduciary obligations by failing to make payments in accordance with the trust's purposes, doing so does not violate section 186.[118] Because a violation of section 186 had not been committed, Justice Scalia found that the lower court lacked statutory authority to issue an injunction.

Employment discrimination

Job-bias amendments. One of the most contentious issues in employment discrimination litigation in recent years was the question of whether the Civil Rights Act of 1991 applies to cases that were pending on the date the legislation was enacted, or whether it applies only prospectively.[119] This issue was important because, among other things, the new law made it easier for some victims of employment discrimination to prove their cases and to recover larger judgments. A major impetus for enacting the bill was a series of Supreme Court decisions that interpreted portions of existing civil rights laws in ways that Congress found did not adequately protect victims of job discrimination.[120] In 1994, the Supreme Court issued a pair of opinions that announced and applied a framework for deciding whether portions of the new legislation should be applied retroactively.

In the first case, *Landgraf* v. *USI Film Products*,[121] a worker had filed a sex discrimination suit in 1989 under Title VII of the Civil Rights Act of 1964,[122] alleging that a fellow employee's inappropriate remarks and improper physical contact created a sexually hostile work environment. Her case was tried before a judge, who concluded that the worker had been sexually harassed. The law at that time, though, authorized courts to grant only equitable relief, such as backpay or reinstatement. Because the sexual harassment at issue did not cause the worker to lose her job, and because the company took adequate steps to eliminate the abusive environment, the judge concluded that equitable relief was not warranted.

The worker appealed the trial judge's decision, and her appeal was pending when the Civil Rights Act of 1991 became law. The new law made two changes that, if applicable to her claim, might have allowed her to receive a monetary recovery for sexual harassment. Those changes permitted victims of intentional sex discrimination to recover compensatory[123] and punitive damages, not just backpay or other equitable relief, and they permitted parties to such suits to demand jury trials. The worker in *Landgraf* asked that the new law be applied retroactively and that her case be remanded for a jury trial on the question of damages.[124]

In an 8–1 decision, the Supreme Court held that the new law's provisions on jury trials and damages do not apply to pending cases. Writing for the majority, Justice John Paul Stevens first noted that the law's terms do not answer the question of retroactivity, providing only that "except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[125] Furthermore, the existence of two unrelated and "comparatively minor and narrow provisions" that prohibit the law from having retroactive effect in certain limited circumstances does not justify an inference that the rest of the "long and complex statute" should have such effect.[126] Instead, Justice Stevens decided that Congress probably had left the retroactivity question to be resolved by the courts, because it could not reach agreement itself.

Justice Stevens explained that, in the absence of express statutory language, a new law will not apply to pending cases if doing so would produce a "retroactive effect." Such an effect will be found, he wrote, if applying the law to pending cases would impair rights that a party had when he or she acted, would increase liabilities for past conduct, or would impose new duties for past conduct. Employing this analytical framework, he found that the damages provisions of the 1991 civil rights law do not apply to pending cases because any other result would increase liabilities for past conduct. The punitive damages provision, he wrote, is of particular concern because, as its very name implies, it is similar to a criminal sanction, and criminal sanctions may not be imposed retroactively without raising serious constitutional questions. The compensatory damages provision, too, is "quintessentially backward-looking," because it creates a new cause of action—and new liabilities—for past acts. Finally, Justice Stevens said that the law's new provision for a trial by jury cannot be applied to pending cases either: although doing so would not upset settled rights, liabilities, or duties, jury trials are available only when compensatory or punitive damages are.

The other retroactivity case, *Rivers* v. *Roadway Express, Inc.*,[127] involved two workers who believed that they had been fired because of their race. They sued their employer for violating 42 U.S.C., section 1981, which guarantees that all persons in the United States shall have the same right to make and enforce contracts. Before their case reached trial, the Supreme Court issued a decision in *Patterson* v. *McLean Credit Union*[128] that limited section 1981's applicability to conduct which occurs before a contract is made or to conduct which interferes with the right to enforce contract obligations. The trial court in *Rivers*, relying on the *Patterson* decision, dismissed the worker's claims under section 1981 because only racial discrimination that allegedly occurred after the contract was agreed to was at issue. The workers appealed, and their appeal was pending when the Civil Rights Act of 1991 took effect.

Section 101 of the 1991 law redefined what it means to "make and enforce contracts" under section 1981 by mak-

ing clear that section 1981's protections extend beyond the formation of contracts to the "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." [129] The question in *Rivers* was whether section 101 applied to the worker's pending case. An 8–1 majority of the Court ruled that it did not.

The presumption against retroactive application is even stronger in *Rivers* than in *Landgraf*, the Court explained, because section 101 expanded an entire category of proscribed conduct, not just the amount of liability. The Court rejected the worker's argument that an exception to the presumption against retroactivity should apply because Congress intended to restore the Court's pre-*Patterson* understanding of the meaning of the phrase "make and enforce contracts." Such an exception, the Court decided, has never been recognized or followed, and even if it had been, Congress did not clearly express an intent that the provision be applied retroactively.

Affirmative action. Perhaps because it has been so difficult to achieve a consensus on what the phrase "affirmative action" can or should mean, the topic continues to attract widespread attention from the media, elected officials, and the general public.[130] In 1995, it also grabbed the attention of the Supreme Court, in the case of *Adarand Constructors, Inc.* v. *Pena.*[131] At issue in that case was a Federal contracting scheme that rewarded prime contractors on federally funded construction projects who entered into subcontracts with companies controlled by "socially and economically disadvantaged" individuals. The particular aspect of this scheme that prompted the lawsuit was a presumption that members of certain racial and ethnic minority groups were socially disadvantaged, thus providing them with advantages in the contracting process over equally qualified members of nonminority groups.

Adarand Constructors, a nonminority-owned construction company, had submitted the lowest bid on a subcontract to install guardrails on a Federal highway project. The prime contractor, however, accepted a higher bid from a minority-controlled firm because doing so enabled it to secure additional compensation under its contract with the Federal Department of Transportation. Adarand Constructors believed that the subcontracting system's race-based presumptions violated its constitutional right to equal protection under the law and sued to block the use of those presumptions through so-called contractor compensation clauses.

The specific issue addressed by the High Court involved the standard by which courts assess the constitutionality of Federal race-based rules. In 1989, the Court had held, in *City of Richmond* v. *J.A. Croson Co.,*[132] that the validity of State and local government race-based affirmative action programs must be judged under the difficult-to-meet "strict scrutiny" standard of review. The next year, it held, in *Metro Broadcasting, Inc.* v. FCC,[133] that so-called benign Federal racial classifications—in that case, a system of diversity preferences that were used to award broadcasting licenses—must be judged by a more lenient "intermediate" standard of review. This legal double standard between Federal and non-Federal schemes proved to be short lived because the closely divided *Adarand* Court overruled *Metro Broadcasting*, holding that Federal racial classifications—benign or otherwise—are subject to strict judicial scrutiny.

Writing for the Court's majority, Justice O'Connor said that the same strict-scrutiny test must be applied to all government racial classifications and that the mere fact that the scheme is a Federal one makes no difference under the Constitution. To meet this test, she said, a governmental scheme must be "narrowly tailored" so as to further "compelling" government interests. She then explained that strict scrutiny need not be "strict in theory, but fatal in fact," because the Federal Government may, under certain circumstances, have a compelling interest to enact race-based schemes that address "pervasive, systematic, and obstinate discriminatory conduct." [134] What those circumstances may be, however, is less clear. Not only did Justice O'Connor decline to explain how the strict-scrutiny standard should be applied to affirmative action programs in general, but she opted not to rule on the constitutionality of the specific subcontracting scheme that was at issue in the case. Instead, she remanded the case and directed the lower court to conduct the strict-scrutiny review.

The decision in *Adarand* leaves many unanswered questions, and further litigation will be needed to determine whether particular governmental programs are "narrowly tailored" and further "compelling interests." Even so, *Adarand* clearly establishes that courts are to examine carefully Federal race-based programs, to "smoke out illegitimate uses of race." Thus, the Court's ruling will affect not just Federal contracting efforts, as was the case in *Adarand* itself, but also any Federal employment or education program that uses race or ethnicity preferences as a basis for making decisions. The *Adarand* decision, however, should not affect Federal programs that use or mandate outreach and recruiting methods that target racial and ethnic minorities, as long as those methods are designed to increase the pool of individuals who are to be considered. The decision also should not apply to voluntary affirmative action programs in the private sector.

Sexual harassment. When does an employer's work environment become so bad that it constitutes sexual harassment under Title VII of the Civil Rights Act of 1964? Must

it be so abusive that it affects a worker's psychological well-being or leads to some other type of injury? Courts grappled with these questions for several years after the Supreme Court issued its landmark 1986 decision in *Meritor Savings Bank* v. *Vinson*,[135] in which the Court held that sexual harassment in the workplace violates Title VII's ban on sex discrimination if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[136] In 1993, the High Court ended this debate when it decided *Harris* v. *Forklift Systems, Inc.*,[137] holding that a worker need not suffer psychological injury in order to establish a case of sexual harassment under Title VII.

Conduct that is merely offensive or that a reasonable person would not find hostile or abusive does not violate Title VII, wrote Justice O'Connor for a unanimous Court. On the other hand, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[138] A sexually hostile workplace, she explained, can detract from a worker's job performance, prevent career advancement, and discourage a worker from staying with a firm. Thus, it can alter the terms, conditions, or privileges of employment without inflicting psychological harm. As a result, Justice O'Connor directed courts to pursue what she called "the middle path," by looking at all relevant circumstances—not just psychological harm—to determine whether an abusive or hostile work environment existed. The courts must therefore examine, among other things, whether the conduct was frequent or severe, whether it was physically threatening or humiliating, and whether it unreasonably interfered with the employee's work performance.

Justice O'Connor's opinion in *Harris* answered clearly the question of whether a plaintiff must show a psychological injury in a Title VII sexual harassment case; however, her opinion created confusion about how to determine whether sexual harassment occurred in the first place. Before the Court's decision in *Harris*, some lower courts held that a work environment was sexually hostile if a "reasonable woman" would find it abusive.[139] Such an approach, they argued, took into account the experiences of women and was best able to protect against hostile work environments that occur when employers are not sensitive to those experiences. Other courts applied a gender-neutral "reasonable person" standard for determining whether particular actions constituted sexual harassment.[140] Although Justice O'Connor employed "reasonable person" language in her opinion, she failed to indicate whether, by doing so, she intended to reject the reasonable-woman standard. In fact, she failed even to address this contentious issue. Courts and commentators disagree over the significance of Justice O'Connor's choice of words, so the issue will no doubt arise in a future Supreme Court case.[141]

Proof of discrimination. Over the last three decades, the Supreme Court and Congress have fashioned a variety of procedural rules to help lower courts decide whether an employer engaged in unlawful employment discrimination. These rules establish a rough order in which evidence is presented and analyzed, and they apportion the evidentiary burdens that the parties bear at trial. Proof of discrimination, though, varies, depending on the type of discrimination that is alleged. Thus, the rules that courts apply must vary with the nature of the cases themselves. The rules in a case in which the employer is alleged to have committed intentional discrimination,[142] for example, differ from the rules in a case in which the employer is alleged to have used an employment practice that is neutral on its face, but that, in practice, has a disparate and negative impact on a protected category of persons.[143]

In an important 1993 decision, *St. Mary's Honor Center* v. *Hicks*,[144] the Supreme Court clarified the rules that apply in certain types of intentional discrimination cases brought by individuals. The plaintiff in that case was Melvin Hicks, who had worked as a correctional officer for more than 5 years when his supervisor changed. His job performance had been acceptable before this time, and he even had received a promotion. During the first 4 months of his new supervisor's tenure, Hicks was involved in several infractions of his employer's rules, for which he was reprimanded, suspended, demoted, and eventually fired. He was suspended and demoted for violations that his subordinates committed; he was fired, at least according to his employer, for threatening his new supervisor. Hicks filed suit under Title VII, alleging that these adverse actions were taken not for work-related reasons, but because he was black.

After hearing the evidence, the district court applied the well-established rules for deciding cases like Hicks'. Those rules require the plaintiff to establish a prima facie case of discrimination by showing that he or she is a member of a protected class, was qualified for the job, and was demoted or fired, as well as that his or her job remained open and later was filled by a white worker.[145] Under these rules, a plaintiff like Hicks who establishes a prima facie case creates a presumption that he was the victim of discrimination. His employer must then rebut this presumption by offering a legitimate, nondiscriminatory reason for its actions. If the employer meets this burden, the plaintiff must prove that the employer's reason is a pretext and that the real reason for its action was the plaintiff's race.

The district court found that Hicks had established a prima facie case, that the employer had offered a legitimate nondiscriminatory reason for its actions, and that the employer's stated reason was not the real reason that it demoted and fired Hicks. Still, the court concluded that Hicks had not proven that the employer's actions were

motivated by race, and it entered judgment for the employer.[146] The court of appeals reversed the trial court's decision, holding that once a plaintiff shows that the employer's stated reasons are not true, the plaintiff is presumed to have been a victim of discrimination and does not need to offer further proof that the employer discriminated against him or her.[147]

Writing for a closely divided Supreme Court, Justice Scalia sided with the district court. "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer."[148] As he explained, the employer's burden to offer a legitimate nondiscriminatory reason is only a "burden of production," which is met by offering an explanation that might reasonably be believed. If such an explanation is forthcoming, the factfinder may, as in *Hicks,* choose not to believe it, and this disbelief may justify an inference that race was the employer's true reason. Such an inference, though, is not required. In short, once the employer produces an explanation, the presumption of discrimination disappears, and the plaintiff must persuade the factfinder that race motivated the employer. If the plaintiff fails to meet this burden, he or she loses the case.

Will the decision in *Hicks* significantly affect the outcome of intentional discrimination cases filed under Title VII? Some, such as Justice Souter, in his dissent in *Hicks,* argue that the majority's decision needlessly destroys a longstanding procedural framework and that many plaintiffs will lose their cases as a result.[149] Others argue that the decision properly focuses courts' inquiries on the real issue: did the plaintiff show that he or she was the victim of intentional discrimination?[150] In either case, plaintiffs will be forced to develop additional evidence that their employers intended to discriminate against them—even in cases in which the employer has not offered a credible explanation for its actions[151]—and employers will find it easier to meet their burden of producing a legitimate, nondiscriminatory reason for their actions.

Hazen Paper Co. v. *Biggins,*[152] an age discrimination case decided the same term as *Hicks,* shows just how light the employer's burden may now be. Walter Biggins, age 62, was fired just weeks before his 10-year employment anniversary. This anniversary was important to Biggins because it would have meant that his pension rights had become fixed, or "vested." Biggins believed that his employer fired him because he was too old and because his pension was about to vest, so he filed suit under the Age Discrimination in Employment Act[153] and the Employee Retirement Income Security Act.[154] By the time his case reached the Supreme Court, there was no question that the company had interfered improperly with Biggins' pension law rights, because a district court jury found such a violation, the court of appeals affirmed the district court's decision,[155] and the employer did not appeal the issue. However, the employer continued to question whether the actions that violated the pension law also violated the Age Discrimination in Employment Act. This issue was of more than theoretical interest, because the age discrimination law—unlike the pension law—permits the employer's liability to be doubled under certain circumstances.[156]

A unanimous Court held that the age-bias law is violated only if age played a determinative role in the decisionmaking process. In *Biggins,* the Court explained, the employer's decision was based on the employee's years of service, not his age. For the Court, this meant that the employer had a legitimate, nondiscriminatory reason for its action under the age-bias law—even though that action was illegal under the pension law. Perhaps foreshadowing its decision 2 months later in *Hicks,* the Court noted that "inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present."[157] It acknowledged, however, that an employer would violate the age discrimination law if it used a worker's pension status as a proxy for age or if it fired a worker because he or she was about to meet an age-based vesting requirement.[158] Those situations, the Court said, did not arise in *Biggins.*

Choosing among older workers. Three years after it decided *Biggins,* the Court was asked to examine another important question under the Age Discrimination in Employment Act: must a plaintiff who alleges age discrimination show, as part of the prima facie case, that he or she was replaced by someone from outside the statute's protected age group? In *O'Connor* v. *Consolidated Coin Caterers Corp.,*[159] the Court ruled that an employer may be liable for age discrimination even if it replaced one older worker with another.

Section 4 of the Age Discrimination in Employment Act bars employers, employment agencies, and labor organizations from making certain decisions and engaging in certain practices on the basis of an individual's age.[160] Section 12(a) of the Act provides that these prohibitions protect only workers who are at least 40 years of age.[161] The Court in *O'Connor* read these two statutory provisions together and concluded that their "language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older."[162] The fact that a protected class member lost out to another protected class member, the Court held, is irrelevant if the reason the individual lost out was that he or she was too old. Thus, just because the 56-year-old plaintiff in *O'Connor* was replaced with a 40-year-old does not mean that he was not a victim of age discrimination. The Court then remanded the case so that the trial court

could determine whether the plaintiff had, in fact, lost his job because of his age.[163]

Public-sector employment

Employee privacy. Access to workers is crucial for public- and private-sector labor unions alike if they are to pursue their collective bargaining activities successfully. The tactics that they use to gain such access, though, sometimes differ, because the rules that apply in the public sector do not always apply in the private sector. One such situation occurs when a union tries to obtain the names and home addresses of a group of workers from their employer. The National Labor Relations Act requires a private-sector employer to give this information to the union as long as it is relevant and necessary for the performance of the union's duties.[164] That law does not, however, govern labor-management relations in the Federal sector, where the Federal Service Labor-Management Relations Statute,[165] the Privacy Act,[166] and the Freedom of Information Act[167] come into play. In one recent case, *Department of Defense* v. *Federal Labor Relations Authority,*[168] the Supreme Court was asked to navigate what it said was a "somewhat convoluted path of statutory cross references" and to decide whether a Federal agency must disclose such information to two of its local unions.

The Federal Service Labor-Management Relations Statute, which the Court referred to simply as the Labor Statute, requires Federal agencies to give their unions any information that is necessary for their collective bargaining activities, but only "to the extent not prohibited by law."[169] One law that contains just such a prohibition is the Privacy Act, which bars agencies from disclosing certain personal records. This prohibition does not come into play, however, if disclosure is required under the Freedom of Information Act. As a general matter, this Act requires agencies to make full disclosure of any information requested, unless that information is expressly exempt under the terms of the Act. The specific question before the Court in *Department of Defense* v. *Federal Labor Relations Authority* was whether the Freedom of Information Act's Exemption 6 applies to the disclosure of workers' names and addresses. Exemption 6 bars the government from disclosing "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[170]

Writing for eight members of the Court, Justice Thomas concluded that the privacy of workers would be compromised if their agency disclosed their home addresses to unions. He reached this result after balancing the public's interest in disclosure against the worker's privacy interests. In his view, the public's only relevant interest under the Freedom of Information Act is its interest in learning about the government's operations and activities. Because information about private citizens that is contained in government files reveals little or nothing about an agency's conduct, Justice Thomas found the union's interest in obtaining the worker's addresses to be negligible, at best. On the other hand, he said, the worker's interest in avoiding such things as union mailings, telephone calls, and home visits is "nontrivial" and outweighs whatever interest the union might have in obtaining such information.

The Federal Labor Relations Authority argued that the guiding policy of the Labor Statute, which favors collective bargaining, should also be factored into the Court's equation. In the Authority's view, the union's request furthered a significant public interest because the union sought to vindicate the Labor Statute's overarching, probargaining purpose. Justice Thomas dismissed this argument, saying, in essence, that if Congress had intended such a result, it would have addressed the issue through the terms of at least one of the three relevant Federal laws.

Free speech. Union organizing is not the only workplace issue that is subject to one set of rules for public employers and a different set for private employers. Another is the extent to which employers are allowed to regulate what their employees may or may not say. Public employers who seek to punish or ban their employees' speech must take care not to run afoul of one of the Constitution's most important restrictions on governmental power: the free-speech clause of the first amendment.[171] Private employers, on the other hand, have a freer hand to regulate workplace speech because the first amendment limits only the government's actions.

Nearly 30 years ago, the Supreme Court recognized that first amendment restrictions on the government's actions may vary, depending on whether the government is regulating the speech of its employees or the speech of the general public.[172] As the Court later explained in *Connick* v. *Myers,*[173] government restraints on its workers' speech will be permissible if its interest, as an employer, in promoting the efficiency of public services outweighs the workers' interest in commenting on matters of public concern. Twice in recent years, the Supreme Court has been asked to apply this balancing test to government efforts to limit the speech of its employees.[174]

The first case, *Waters* v. *Churchill,*[175] involved a nurse at a public hospital who was alleged to have made derogatory statements about her department and her superiors to a prospective employee. Before finally deciding to fire the nurse for making those comments, the hospital interviewed the prospective employee and one of the three workers who overheard the conversation. Each confirmed the negative

nature of the nurse's statements. The hospital also spoke with the nurse herself; her somewhat different version of the conversation emphasized that she had been speaking about the public health consequences of the hospital's practices. The hospital, however, was not persuaded that the nurse's comments were appropriate, and it fired her.

The nurse challenged her termination in court, contending that it violated her first amendment right to speak freely on a matter of public concern. The question before the Supreme Court was whether the *Connick* balancing test should be applied to the facts as the hospital believed them to be or whether that test should be applied to the facts as a court found them to be. The High Court ultimately decided that the *Connick* test applied to the hospital's version of the facts, but a majority of the justices could not agree on a supporting rationale.

Justice O'Connor began her four-justice plurality opinion by explaining that the Court's case law makes clear that procedural safeguards must sometimes be erected to protect first amendment interests, even though the government honestly believes that the speech it seeks to regulate is not protected under the Constitution. That same case law, however, provides little guidance for determining when such procedures are required in employment cases, and Justice O'Connor was forced to concede that the Court in *Waters* could not agree on any workable general rule. Instead, she suggested that courts examine the propriety of any proposed procedural safeguard on a case-by-case basis, paying particular attention to the "cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase.[176]

Justice O'Connor rejected the nurse's suggestion that her first amendment rights could be protected only if a court determined whose version of the facts was true. Such a procedure, Justice O'Connor said, would not give sufficient weight to the government's interest in making efficient personnel decisions. Instead, it would force public employers to adopt procedures that mirror those used by courts, and such procedures are ill suited to the employment context. Even so, she wrote, courts should not accept the facts as the employer found them without at least looking into whether the employer's conclusions were reasonably reached. Thus, before it may conclude that a public employer permissibly suppressed otherwise protected speech, a court must make sure that the employer exercised "the care that a reasonable manager would use before making an employment decision." [177]

Turning to the facts of the case, Justice O'Connor said that the hospital's process satisfied constitutional requirements because a hypothetical reasonable manager would not have conducted a more searching inquiry. Furthermore, she said that the nurse's speech, as reasonably found by the hospital, was not protected under the Connick test: discouraging others from coming to work is sufficiently disruptive to the employer's mission that it outweighs any interest the public may have in hearing the remarks.[178]

Justice Scalia agreed with the Court's result, but not its analysis.[179] He objected to what he said was a broad new first amendment procedural right and predicted that the Court would spend decades staking out the limits of that right. "It seems to me clear," he said, that "that game is not worth the candle." [180] Justice Scalia focused on the difficulties that the Court's decision may create for courts in future litigation. Others outside the Court fear that the decision will provide "government employers with a potent means for further stifling employee speech within the workplace," [181] frustrating attempts to reform public institutions.[182]

The second case in which the Court was asked to balance public workers' first amendment interests against their employer's interest in suppressing speech was *United States v. National Treasury Employees Union.*[183] In that case, the Federal Government sought to prevent its lower level workers from speaking and writing after hours on non-work-related issues. The Government based its restrictions on a provision in the Ethics Reform Act of 1989, as amended, known as the "honoraria ban." [184] That law was enacted in response to a special report to Congress which noted that its own Members and other high-level Federal Government officials often were supplementing their incomes by accepting substantial fees, known as honoraria, for making speeches or writing articles or books for outside groups. The report suggested that this practice be curtailed because it created the appearance that honoraria were used to improperly influence those who accepted them.

The new law addressed this problem in two ways. First, it increased the pay of Members of Congress, Federal executives, and Federal judges by 25 percent, thus addressing the report's conclusion that honoraria had become attractive because salaries had not kept pace with inflation during the previous two decades. Second, it prohibited those who received the pay hike—and almost all other Federal employees—from accepting honoraria. The National Treasury Employees Union challenged the law on behalf of executive branch employees who did not receive the raise and who would have received honoraria if the law had not been enacted.

A closely divided Court agreed with the union that the ban on honoraria violated the first amendment rights of lower level Federal workers. Justice Stevens, for the majority, noted first that Nathaniel Hawthorne and Herman Melville, among others, had been Federal workers and that he was loathe to deprive the public "marketplace of ideas" of the works of their modern-day counterparts, unless there

was good reason to do so. He said that the Federal Government's burden to justify the ban is particularly heavy in the case before the Court because the ban chills the exercise of speech before it ever happens, thereby raising the risk that the ban sweeps too broadly. As a result, "the Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." [185]

The interests of the public and the workers themselves are significant, Justice Stevens wrote. Citing Boswell's *Life of Samuel Johnson* for the proposition that "no man but a blockhead ever wrote, except for money," Justice Stevens said that prohibiting workers from being paid for writing and speaking will induce them not to write or speak in the first place. This not only will penalize the interests of individual writers and speakers, but also will impose a significant burden on the public's interest in knowing what would have been written or said.

On the other side of the ledger, he said, is the Federal Government's interest in not interfering with the efficiency of the public service. The particular problem that Congress sought to address by enacting the ban was that the integrity of Federal decisionmaking processes was being questioned because its decisionmakers—Members of Congress and, to a lesser extent, high-level Federal officials—were seen as being influenced improperly by the acceptance of honoraria. The ban itself, though, extends far beyond such decisionmakers, touching more than 1.6 million lower level workers. Because the law sweeps so broadly, and because the Federal Government could point to no evidence of honoraria-related misconduct by lower level Federal workers, Justice Stevens said that whatever the Government's interest might be, it was not furthered by a law that suppressed the speech of so many employees.

Justice Stevens also noted that the Government's argument that the ban was needed to promote efficiency was undercut by anomalies in the law. For example, he remarked that the law prohibits workers from receiving honoraria for a single article that is not work related, yet it permits pay for a series of such articles. It also singles out fees for expressive activities, but not for other activities, such as travel and entertainment, that present similar risks of improper appearances. In sum, Justice Stevens and a majority of the Court held that the ban may not be applied to lower level workers because it is not a reasonable response to the problems that Congress sought to cure.

Overtime pay. The Fair Labor Standards Act, as a general matter, requires employers to pay nonexempt workers 1-½ times their regular rate of pay for every hour of overtime work they perform.[186] Public employers, unlike their private-sector counterparts, may, if they meet certain requirements, pay this premium in the form of "compensatory time" off from work. Under such an arrangement, workers may take off from work 1-½ hours for every hour of overtime they have worked.[187] In a 1993 decision in *Moreau* v. *Klevenhagen,*[188] the Court examined whether the law's conditions for establishing such a pay scheme had been met.

The workers in *Moreau* were Harris County, TX, deputy sheriffs who each had an agreement with the county permitting compensatory time off. Although a union represented the deputies in grievance and workers' compensation matters, it had not negotiated the compensatory time agreements because Texas law forbids collective bargaining in the public sector. These facts were important, as section 7(o)(2)(A) of the Fair Labor Standards Act permits a public agency to use compensatory time only if it does so pursuant to "(i) applicable provisions of a collective bargaining agreement . . . between the public agency and representatives of such employees; or (ii) in the case of employees not covered by subclause (i), an agreement . . . arrived at between the employer and the employee before the performance of the work." [189]

The workers argued that they must be paid in cash—not compensatory time off of work—for their overtime hours because the county did not establish a valid compensatory time program. In their view, the county could not enter into agreements with individual workers because the workers had a representative and therefore were "covered" under subclause (i)—even though collective bargaining agreements were illegal under State law. The county, on the other hand, contended that the workers were *not* covered under subclause (i), precisely because there was no collective bargaining agreement, and that this permitted the county to enter into individual agreements with its workers under subclause (ii).

In a unanimous decision, the Court permitted the individual agreements to stand. The Court decided that the most plausible reading of the law—and one that is supported by a Labor Department regulation [190]—is that employees are covered by subclause (i) as long as they have designated a representative who has the authority to negotiate a compensatory time provision. Because the representative of the deputies in this case had no such authority, the Court held that subclause (i) did not apply, leaving the county free to enter into compensatory time agreements with individual deputies under subclause (ii).

Government immunity. The question before the Court in *Lane* v. *Peña*[191] was whether the Federal Government is immune to certain suits for money damages under section 504(a) of the Rehabilitation Act of 1973,[192] or whether Congress waived the Government's "sovereign immunity" when it enacted that law. Parsing a statutory scheme that it

found to be "somewhat bewildering," the Court held that Congress had not waived the Government's immunity to such suits.

The outcome in this case turned on how the Court interpreted two provisions in the Rehabilitation Act. The first, section 504(a), bars programs or activities that receive Federal financial assistance—or that are conducted by an executive branch agency itself—from discriminating against otherwise qualified individuals with disabilities. The second provision, section 505(a)(2), makes available certain remedies, including money damages, "to any person who is aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance" under section 504(a).[193] Unlike section 504(a), section 505(a)(2) does not expressly mention programs that are conducted by a Federal agency. This distinction was important in *Lane* because the Federal Government was alleged to have committed an unlawful act of discrimination in a program that it was conducting itself.

The Court first cited the well-established rule that any waiver of the Government's sovereign immunity must be stated clearly in the text of the applicable statute and that any ambiguity is to be resolved in favor of immunity. Justice O'Connor and six other justices concluded that section 502(a)(2) was, indeed, ambiguous. First, she noted the different statutory language in the two provisions and said that the phrase "Federal provider" of financial assistance could not be construed to include an agency that conducts a program or activity itself. Then she contrasted the lack of clarity in these provisions with language that Congress used in another part of the Rehabilitation Act that clearly waived the Government's immunity.[194] If Congress had intended to waive its immunity in section 505(a)(2), said Justice O'Connor, it would have employed a similar textual scheme.

The importance of the *Lane* decision in the employment context is not clear. The case itself involved a student at the federally operated Merchant Marine Academy, and not a Federal worker. To the extent that Federal workers allege that their employers have violated section 504, the decision in *Lane* will limit the remedies they may obtain. Such workers, however, also are protected from disability discrimination under section 501 of the Rehabilitation Act, and, as the Court explained in *Lane*, the Federal Government is not immune to a suit for damages under that provision. In addition, Federal workers are more likely to allege violations of section 501 than violations of section 504, because under the former provision they need show that disability was just one factor—as opposed to the only factor—that motivated their employer.

Scope-of-employment certification. A Federal worker who is sued for committing a negligent act may ask the Attorney General to certify that the act was within the scope of the worker's employment. If the Attorney General issues this certification, the United States is substituted as a defendant, the employee is dismissed from the suit, and the case proceeds against the Federal Government. This certification process was established pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, more commonly known as the Westfall Act.[195] In *Gutierrez de Martinez* v. *Lamagno*,[196] the Court was asked to decide whether the process permits a lower court to review an Attorney General's certification that a worker was acting within the scope of his or her employment at the time of an accident. The answer to this question was important to the plaintiffs because they would have been left with nobody to sue if the Attorney General's decision was allowed to stand.

The accident in this case occurred in the middle of the night in Colombia when a car that was driven by a Drug Enforcement Administration agent collided with a car whose passengers were Colombian citizens. The Colombians, who alleged that the agent was drunk at the time of the accident, could not sue the agent in a Colombian court because the agent asserted diplomatic immunity, so they filed suit in the United States. The Attorney General certified that the agent had been acting within the scope of his employment, so the United States was substituted as a defendant. Fearing that the next step in the litigation would be that the Government, too, would be dismissed from liability—Congress, after all, has not waived the Government's immunity from claims that arise in foreign countries[197]—the plaintiffs asked the court to review the certification and prevent the Federal agent from being dismissed as a defendant. The district court refused to do so, and the appellate court summarily affirmed the trial court's ruling.

In a 5–4 decision, the Supreme Court held that the Attorney General's certification is reviewable by a court. According to Justice Ginsburg, who wrote the majority's opinion, two considerations are particularly important. First, the Attorney General herself recognized that her interests could color her certification decisions in such cases, and she argued in favor of judicial review. Second, Justice Ginsburg noted that courts usually may review Government decisions that, if allowed to stand, will dispose of a court controversy. Moreover, she explained that at the time the Westfall Act passed, courts routinely reviewed the Government's scope-of-employment certifications under that law's predecessor, and the history and structure of the new law does not indicate that Congress was interested in changing this arrangement. In light of these considerations—and because a contrary result would place Federal judges in the role of "petty functionaries" who would simply rubber-stamp the decisions of executive branch officials—Justice Ginsburg said that courts may review the Attorney General's certification.

State immunity. Sometimes the Court's decision in a particular case will have important implications for employment law, even though the case itself has nothing to do with that branch of the law. This occurred during the Court's most recent term in the case of *Seminole Tribe of Florida* v. *Florida*.[198] The case itself raised questions only about Congress' authority to permit Indian tribes to sue States in Federal court pursuant to section 11 of the Indian Gaming Regulatory Act.[199] The Court's expansive, Constitution-based decision, however, could present problems for State workers who want to sue their employer in Federal court under certain other Federal laws.

The focus of the Court's attention in *Seminole Tribe* was the 11th amendment to the Constitution, which provides that "the Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The State of Florida argued that the Indian gaming law violated the 11th amendment because it permitted Indian tribes to sue States in Federal court. The tribe countered by arguing that the Constitution's Indian commerce clause grants authority to Congress to override a State's 11th-amendment immunity from suit. That clause authorizes Congress "To regulate Commerce . . . among the several States and with the Indian Tribes."[200]

Chief Justice William H. Rehnquist and four other justices sided with the State. To reach its conclusion that the Indian commerce clause does not authorize Congress to abrogate States' 11th-amendment immunity to private suits in Federal court, the High Court overruled its 1989 decision in *Pennsylvania* v. *Union Gas Co.*[201] In that case, the Court held that a State's 11th-amendment interests must yield to Federal legislation that is enacted pursuant to Congress' authority to regulate under a different, and more expansive, provision of the Constitution, the interstate commerce clause.[202] The decision to overrule *Union Gas* could have far-reaching consequences, because Congress has relied on the interstate commerce clause—as previously understood—to enact many laws that regulate States and subject them to suits in Federal court by private individuals.

Litigation under at least four widely known Federal labor laws—the Fair Labor Standards Act,[203] the Age Discrimination in Employment Act,[204] the Equal Pay Act,[205] and the Family and Medical Leave Act[206]—could be affected by the decision in *Seminole Tribe*. If this case is found to apply, State workers would not be permitted to sue their employer in Federal court and would, instead, be forced either to sue in State court or to rely on Federal enforcement efforts.

THE COURT'S 1996–97 TERM is now well under way, and once again, "employment," and not "labor," cases dominate the docket. In fact, at the time this article was prepared, the Court had yet to agree to hear a single traditional labor-management relations case. It had, however, agreed to look at questions arising under Title VII of the Civil Rights Act of 1964 concerning who is a covered "employer"[207] and whether Title VII's antiretaliation provision protects former, as well as current, employees.[208] The Court also had agreed to explore further the contours of ERISA preemption by examining whether the Federal pension and benefits law preempts a California prevailing-wage law,[209] a New York tax on medical centers that are owned and operated by an ERISA plan,[210] or certain aspects of a State's community property laws.[211] In addition, a State's immunity to suit under the 11th amendment will again be a subject that the Court entertains,[212] as will a State's compliance with the Fair Labor Standards Act.[213] The Court also will look at whether the first amendment to the Constitution protects State workers who run afoul of an Arizona constitutional provision that forbids them from speaking a language other than English while on the job.[214] Finally, the Court will hear three maritime employment cases[215] and a case involving questions about an Oklahoma county's decision to hire a deputy sheriff without first conducting a background check of his criminal records.[216] □

Footnotes

[1] See Frank J. Dugan, *Labor-Law Decisions of the Supreme Court, 1964 Term,* 1965 Labor Relations Yearbook (BNA) at 69; see also Clyde Summers, *Labor Law in the Supreme Court: 1964 Term,* 75 Yale L.J. 59 (1965). The following term was even dubbed "the year of the pause" by one commentator because the Court decided only 10 labor cases. See Sanford H. Kadish, *Labor-Law Decisions of the Supreme Court, 1965–66 Term*, 1966 Labor Relations Yearbook (BNA) at 104.

[2] The most prominent of these laws were the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 101 (1994)); the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C.A. § 151 (West 1973 & Supp. 1996)); the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86–257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. § 401 (1994)); the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C.A. § 151 (West 1986 & Supp. 1996)); and the Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C.A. § 201 (West 1978 & Supp. 1996)).

[3] *National and International Unions—Membership: 1940–1964*, 1966 Labor Relations Yearbook (BNA) at 497.

[4] See "Union affiliation of employed wage and salary workers by occupation and industry," *Employment and Earnings*, vol. 43 (Bureau of Labor Statistics, 1996), p. 212.

[5] See Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, tit. VII, 78 Stat. 253 (1964) (current version at 42 U.S.C.A. § 2000e (West 1994 & Supp. 1996)); the Equal Pay Act of 1963, Pub. L. No. 88–38, § 3, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (1994)); the Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1994)); Title V of the Rehabilitation Act of 1973, Pub. L. No. 93–112, tit. V, 87 Stat. 390 (1973) (codified as amended at 29 U.S.C. § 791 (1994)); the Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (current version at 42 U.S.C.A. § 12101 (West 1995 & Supp. 1996)); and the Age Discrimination in Employment Act of 1967, Pub. L. No. 90–202, § 2, 81 Stat. 602 (1967) (current version at 29 U.S.C.A. § 621 (West 1985 & Supp. 1996)).

[6] See Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 832 (1974) (labor provisions found at 29 U.S.C.A. § 1001 (West 1985 & Supp. 1996 & Supp. Nov. 1996)).

[7] See Worker Adjustment and Retraining Notification Act, Pub. L. No. 100–379, 102 Stat. 890 (1988) (codified at 29 U.S.C. § 2101 (1994)).

[8] See Occupational Safety and Health Act of 1970, Pub. L. No. 91–596, § 2, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § 651 (1994)); and the Federal Coal Mine Safety and Health Act of 1969, Pub. L. No. 91–173, § 2, 83 Stat. 742 (1969) (codified as amended at 30 U.S.C. § 801 (1994)).

[9] See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (current version at 29 U.S.C.A. § 2601 (West Supp. 1996)).

[10] For recent statistics on the Supreme Court's docket, see *Statistical Recap of Supreme Court's Workload*, 65 U.S.L.W. 3100 (July 6, 1996); 62 U.S.L.W. 3124 (July 17, 1993); 59 U.S.L.W. 3064 (July 24, 1990); 56 U.S.L.W. 3102 (July 11, 1987); and 53 U.S.L.W. 3028 (July 24, 1984).

[11] Cases decided during this period that were specific to the railway industry were *Norfolk & Western Ry.* v. *Hiles*, 116 S.Ct. 890 (1996) (Safety Appliance Act, 42 U.S.C. § 20302(a)(1)(A) (1994)); *Brotherhood of Locomotive Engineers* v. *Atchison, Topeka & Santa Fe Ry.*, 116 S.Ct. 595 (1996) (Hours of Service Act, 49 U.S.C. § 21101 (1994)); *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994) (Federal Employers' Liability Act, 45 U.S.C. § 51 (1994)). Cases that were specific to the maritime industry included *Chandris, Inc.* v. *Latsis*, 115 S.Ct. 2172 (1995) (Jones Act, 46 U.S.C. App. § 688(a) (1994)); *Metropolitan Stevedore Co.* v. *Rambo*, 115 S.Ct. 2144 (1995) (Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1994)); *Director, OWCP* v. *Newport News Shipbuilding and Dry Dock Co.*, 115 S.Ct. 1278 (1995) (Longshore Act); *Howlett* v. *Birkdale Shipping Co.*, 512 U.S. 92 (1994) (Longshore Act); *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153 (1993) (Longshore Act). Cases that were specific to the coal-mining industry included *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994) (Black Lung Benefits Act, 30 U.S.C. § 901 (1994) (the Court's opinion also disposed of a related issue under the Longshore Act)); and *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994) (Federal Mine Safety and Health Act, 30 U.S.C. § 801 (1994)). The Court decided one whistle-blower case that is important to the airline industry, *Hawaiian Airlines* v. *Norris*, 512 U.S. 246 (1994) (Railway Labor Act, 45 U.S.C.A. § 151 (West 1986 & Supp. 1996)).

[12] An employee's basic rights under the National Labor Relations Act are the right to self-organize, the right to form, join, or assist labor organizations, the right to bargain collectively through his or her own representatives, and the right to engage in other concerted activities for the purpose of collective bargaining. See 29 U.S.C. § 157 (1994). Employees also have the right to refrain from engaging in any of these activities, except under certain limited circumstances. *Id.* Individuals who are employed as supervisors are not considered to be employees under the National Labor Relations Act. See 29 U.S.C. § 152(3) (1994). As a result, they do not retain the rights that are afforded to employees. The Supreme court decided one case in 1994, *NLRB* v. *Health Care & Retirement Corp.*, 511 U.S. 571, that raised questions about when nurses should be considered to be supervisors. This decision was reported by Constance B. DiCesare in "The Law at Work," *Monthly Labor Review*, July 1995, pp. 78-79.

[13] 116 S.Ct. 450 (1995).

[14] For an overview of how the National Labor Relations Board and the various courts of appeals have dealt with issues of salting, see Gregory A. Rich, Note, *A Balancing of Interests: The Status of Professional Union Organizers under the NLRA*, 73 Wash. U.L.Q. 1429, 1437-49 (1995).

[15] See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992) (an employer does not commit an unfair labor practice by enforcing a general no-solicitation policy that excludes union organizers from its property if the union has reasonable alternative means of communicating with the employer's nonunion workers); Alan L. Zmija, *Union Organizing after* Lechmere, Inc. v. NLRB*—a Time To Reexamine the Rule of* Babcock & Wilcox, 12 Hofstra Lab. L.J. 65 (1994). For a general discussion of this subject, see Note, *Organizing Worth Its Salt: The Protected Status of Paid Union Organizers*, 108 Harv. L. Rev. 1341, 1348 (1995).

[16] The union alleged that the company violated two provisions of the National Labor Relations Act: § 8(a) (1), 29 U.S.C. § 158(a)(1) (1994) ("it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of [their rights under the Act]"), and § 8(a) (3), 29 U.S.C. § 158(a)(3) (1994) ("it shall be an unfair labor practice for an employer [to discriminate] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

[17] *Town & Country Electric, Inc.*, 309 N.L.R.B. 181, 1992-1993 NLRB Dec. (CCH) ¶ 17,642 (Dec. 16, 1992), *enforcement denied*, 34 F.3d 625 (8th Cir. 1994).

[18] 116 S.Ct. at 456 (citing Restatement (Second) of Agency § 228 at 498).

[19] 116 S.Ct. 1396 (1996).

[20] 29 U.S.C. § 152(3) (1994).

[21] 29 U.S.C. § 203(f) (1994).

[22] 29 U.S.C. § 158(a)(5) (1994).

[23] 29 U.S.C. § 159(a) (1994); see also NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

[24] See *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805 (2d Cir. 1978), *enforcing 230* NLRB No. 156, 1977-1978 *NLRB* Dec. (CCH) ¶ 18,413 (July 22, 1977).

[25] 116 S.Ct. 1754 (1996).

[26] *Id.* at 1758.

[27] 114 S.Ct. 2552 (1994).

[28] In *Bagwell*, the Supreme Court noted that a litigant in a criminal contempt proceeding retains the right to notice of the charges that are being brought, the right to counsel, the right to remain silent, and the right against being tried twice for the same offense. The Court also noted that the standard of proof in a criminal proceeding is "proof beyond a reasonable doubt." Finally, the High Court indicated that a contemnor retains the right to a trial by jury if imprisonment of more than 6 months is possible. See *id.*, at 2556-57.

[29] *Id.* at 2555. Under the prospective fine schedule, the union would be fined $100,000 for each violent breach of the injunction and $20,000 for each nonviolent breach.

[30] *Id.* at 2559; see also *id.* at 2557 & n.3.

[31] Justice Antonin Scalia, in a concurring opinion, wrote that the facts in *Bagwell* were so extreme that criminal procedural protections would have been required under any test that the Court had ever articulated. 114 S.Ct. at 2563 (Scalia, J., concurring). That being the case, he suggested that *Bagwell* was a poor vehicle for establishing a test for determining whether an instance of contempt is civil or criminal in nature. For a further discussion of the *Bagwell* decision, see *The Supreme Court, 1993 Term—Leading Cases*, 108 Harv. L. Rev. 139, 201 (1994).

[32] 116 S.Ct. 2116 (1996).

[33] *Id.* at 2119.

[34] *Id.* at 2121.

[35] 15 U.S.C. § 1 (1994).

[36] 50 F.3d 1041 (D.C. Cir. 1995).

[37] 116 S.Ct. at 2122.

[38] Justice Breyer cited unpublished data from the Bureau of Labor Statistics which showed that more than 40 percent of all major collective bargaining agreements are the product of multiemployer bargaining. 116 S.Ct. at 2127, Appendix, Table A.

[39] 510 U.S. 317 (1994).

[40] 304 N.L.R.B. No. 75, 1991-1992 NLRB Dec. (CCH) ¶ 16,865 (Aug. 27, 1991).

[41] 510 U.S. at 323.

[42] *Id.* at 326, 327 (Scalia, J., concurring).

[43] *Id.* at 329.

[44] See *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

[45] U. S. Const. art. VI, cl.2.

[46] 512 U.S. 107 (1994).

[47] See Cal. Labor Code § 201 (West 1996) ("If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately"); see also Cal. Labor Code § 203 (West 1996) (workers who are not paid wages promptly upon discharge shall continue to receive wages at the "same rate" until they are paid).

[48] 512 U.S. at 117.

[49] 29 U.S.C. § 185 (1994).

[50] 507 U.S. 218 (1993).

[51] Employment levels in the construction industry fluctuate widely due to changes in the economy and because construction firms typically hire workers only for a specific project. Collective bargaining is particularly difficult under such circumstances, which increase the potential for labor instability. In addition, construction projects generally involve workers of different crafts who work side by side, but are employed by different employers. This arrangement can be another source of friction, especially if each craft is subject to different work rules. Owners, contractors, and organized labor have long used project labor agreements to mitigate, or even forestall, some of these instabilities. See Henry H. Perritt, Jr., *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's* Boston Harbor *Decision*, 12 Labor Law. 69, 71-76 (1996).

[52] Although the Federal Government filed an *amicus curiae* brief arguing that States may negotiate and enforce project labor agreements when they are acting in a proprietary capacity, this issue became a political hot potato when then-President Bush issued an Executive order banning such agreements on Federal and federally funded construction projects. See Exec. Order No. 12,818, 3 CFR 318 (1992). Just 3 months later, President Clinton revoked that Executive order. See Exec. Order No. 12,836, 3 CFR 588 (1993).

[53] 29 U.S.C. §§ 158 (e), (f) (1994).

[54] President Clinton employed such an analysis when he issued a 1995 Executive order that barred the Federal Government from contracting with employers that hire permanent replacement workers during a lawful economic strike. See Exec. Order 12,954, 3 CFR 329 (1995), reprinted in 40 U.S.C.A. § 486 note at 27-28 (West Supp. 1996). In the President's judgment, the Federal Property and Administrative Services Act, 40 U.S.C. § 471 (West 1986 & Supp. 1996), authorized him, as a purchaser, to issue the order. The Court of Appeals for the D.C. Circuit struck down this Executive Order, distinguishing what the President was attempting to do from what the State did in the *Boston Harbor* case. See *Chamber of Commerce* v. *Reich*, 74 F.3d. 1322 (D.C. Cir. 1996), reh'g

denied, 83 F.3d 439 (D.C. Cir. 1996). The President's order, the appellate court said, was based upon "a substantive policy view as to the appropriate balance of bargaining power between organized labor and management" and therefore was regulatory—not proprietary—in nature. 83 F.3d at 440. Thus, the court held that the President's order was preempted. Two appellate judges, however, questioned whether preemption analysis was even appropriate, because the clash was between two Federal laws and not between State actions and Federal law. See *Chamber of Commerce* v. *Reich*, 83 F.3d 442 (Wald, J., dissenting) (on suggestion for rehearing *en banc*), and *id.* at 444 (Tatel, J., dissenting) (on suggestion for rehearing *en banc*).

[55] 29 U.S.C. § 158(a) (3) (1994).

[56] See *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 253 (1965).

[57] 29 U.S.C. § 158(a) (5) (1994).

[58] See *First Nat'l Maintenance Corp.* v. NLRB, 452 U.S. 666 (1981).

[59] Pub. L. No. 100–379, 102 Stat. 890 (1988) (codified at 29 U.S.C. § 2101 (1994)).

[60] 29 U.S.C. § 2102 (1994).

[61] 29 U.S.C. § 2104(a) (1994). For a more detailed overview of the WARN Act, see Ethan Lipsig, *A* WARN *Act Road Map*, 11 Lab. Law. 273 (1995–96).

[62] 116 S.Ct. 1529 (1996).

[63] See *Hunt* v. *Washington State Advertising Comm'n*, 432 U.S. 333 (1977).

[64] The Court decided one other WARN Act case during the last 4 years: *North Star Steel Co.* v. *Thomas*, 115 S.Ct. 1927 (1995). It held in that case that analogous State law statutes of limitations govern when an aggrieved party must file suit under the WARN Act. (The Act contains no statute of limitations of its own.) The decision in *North Star Steel Co.* was reported by Constance B. DiCesare in "The Law at Work," *Monthly Labor Review*, October 1995, pp. 48–49.

[65] Pub. L. No. 93–406, 88 Stat. 832 (1974) (labor provisions found at 29 U.S.C.A. § 1001 (West 1985 & Supp. 1996 & Supp. Nov. 1996).

[66] 29 U.S.C.A. §§ 1021–1031 (West 1985 & Supp. 1996 & Supp. Nov. 1996).

[67] 29 U.S.C. §§ 1051–1061 (1994) (participation and vesting standards); and 29 U.S.C. §§ 1081–1086 (1994) (funding standards).

[68] 29 U.S.C.A. §§ 1101–1114 (West 1985 & Supp. 1996 & Supp. Nov. 1996).

[69] *Id.* §§ 1131–1145.

[70] *Id.* §§ 1161–1169.

[71] 29 U.S.C. § 1002(21) (A)(i), (iii) (1994). A person also is a fiduciary to the extent that he or she renders investment advice to the plan for a fee. *Id.* § 1002(21) (A) (ii) (1994).

[72] 29 U.S.C. § 1104(a) (1) (A) (i) (1994).

[73] 116 S.Ct. 1065 (1996).

[74] See *id.* at 1069. The company also assigned to Massey Combines the obligation to pay benefits to 4,000 Massey-Ferguson retirees. Those retirees were given no say in this assignment. *Id.*

[75] *Id.* at 1074 (citations omitted).

[76] 29 U.S.C. § 1132(a) (3) (B) (i) (1994).

[77] See 29 U.S.C. § 1132(a) (2) (1994).

[78] 116 S.Ct. 1783 (1996).

[79] 29 U.S.C.A. § 621 (West 1985 & Supp. 1996).

[80] 29 U.S.C. § 1106(a) (1) (D) (1994).

[81] 115 S.Ct. 1223 (1995). The decision in this case was reported by Constance B. DiCesare in "The Law at Work," *Monthly Labor Review*, July 1995, pp. 78–79.

[82] 508 U.S. 152 (1993).

[83] See 26 U.S.C. § 402(a) (1) (1994).

[84] 26 U.S.C. §§ 4975 (a), (b) (1994).

[85] 26 U.S.C. § 4975(c) (1) (A) (1994).

[86] *Id.* § 4975(f) (3) (1994).

[87] 510 U.S. 86 (1993).

[88] For a more detailed description of the contract in this case, see Rosalie A. Hailey, John Hancock v. Harris Trust: *ERISA and the General Account*, 29 Torts & Ins. L.J. 833, 834–35 (1994).

[89] 29 U.S.C.A. § 1101(b) (2) (B) (West 1985 & Supp. 1986).

[90] 510 U.S. at 111 (Thomas, J., dissenting). At least one commentator argues that, by upsetting those expectations, the Court has created fundamental and far-reaching practical problems for the industry. See Caroline J. Carucci, Comment, John Hancock v. Harris Trust: *Should Insurers' General Accounts Be Subject to ERISA?* 68 St. John's L. Rev. 557 (1994).

[91] Responding, in part, to Justice Thomas' concerns about how the *Harris Trust* decision would upset the insurance industry's settled expectations, Congress recently amended ERISA to provide, among other things, that the decision is not to be applied retroactively, except under very narrow circumstances. See Pub. L. No. 104–188, § 1460, 110 Stat. 1820 (1996).

[92] In July of 1995, the Labor Department did just that when it issued a class exemption from its prohibited transaction rules for "certain transactions engaged in by insurance company general accounts in which an employee benefit plan has an interest." 60 Fed. Reg. 35925 (1995).

[93] 508 U.S. 248 (1993).

[94] 116 S.Ct. 862 (1996).

[95] 508 U.S. at 255 (citing *United States* v. *Burke*, 504 U.S. 229 (1992) ("any other equitable relief" under 42 U.S.C. § 2000e–5(g) does not include compensatory damages)).

[96] In addition to rejecting the participants' arguments on the remedies issue, Justice Scalia questioned whether a nonfiduciary's participation in a fiduciary's breach constituted a violation of ERISA in the first place. 508 U.S. at 253–55. He declined to rule on this issue, though, because the parties had not asked the Court to do so. For an analysis of the issues left unresolved by the *Mertens* Court, see Andrew T. Kusner, Mertens v. Hewitt Associates, *and the ERISA Liability of the Professional Service Provider*, 15 Berkeley J. Empl. & Lab. Law 273 (1994).

[97] 116 S.Ct. at 868 (citing *H.C. Cook Co.* v. *Beecher*, 217 U.S. 497 (1910)).

[98] See William J. Wiatrowski, "Who really has access to employer-provided health benefits?" *Monthly Labor Review*, June 1995, pp. 36–44. Wiatrowski cites statistics showing that employers provided health care benefits for 6 of every 10 workers earlier in the decade.

[99] 29 U.S.C. § 1002(l) (1994).

[100] 29 U.S.C. §§ 1144(a), (b) (2) (A) (1994).

[101] In a dissenting opinion in *District of Columbia* v. *Washington Bd. of Trade*, 506 U.S. 125, 133 n.3 (Stevens, J., dissenting) (1992), Justice John Paul Stevens observed that the rising number of judicial opinions in this area—then numbering more than 2,800—threatened to preempt reliance even on common sense.

[102] *Id.* at 125.

[103] D.C. Code Ann. § 36–307(a–1) (l) (1993).

[104] 506 U.S. at 130 n.1.

[105] 115 S.Ct. 1671 (1995).

[106] *Id.* at 1682 n.6.

[107] See Karen A. Jordan, Travelers Insurance: *New Support for the Argument to Restrain ERISA Pre-emption*, 13 Yale J. on Reg. 255 (1996).

[108] 508 U.S. 602 (1993).

[109] Pub. L. No. 96–364, 94 Stat. 1208 (1980).

[110] See 29 U.S.C. § 1391 (1994).

[111] *Id.* § 1391(b).

[112] *Id.* §§ 1401(a) (l), (b) (2).

[113] 29 U.S.C. § 1401(a) (3) (A) (1994) ("any determination made by a plan sponsor . . . is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous").

[114] 508 U.S. at 627–28.

[115] 29 U.S.C. § 1401(a) (3) (B) (1994).

[116] The Court also rejected the employer's substantive due process argument that the withdrawal liability assessment was not rational and that it resulted in an unconstitutional "taking" of the employer's property. 508 U.S. at 636–47.

[117] 508 U.S. 581 (1993).

[118] The Court remanded the case to the court of appeals so that the lower appellate court could decide whether other ERISA violations had occurred.

[119] Pub. L. No. 102–166, 105 Stat. 1071 (1992) (codified in scattered sections of 42 U.S.C.). One commentator notes that questions concerning the retroactive application of the 1991 law were raised in thousands of cases. See *The Supreme Court, 1993 Term—Leading Cases*, 108 Harv. L. Rev. 139, 315 (1994). Another indication of the importance of the issue was the large number of scholarly articles written about it. See Leonard Charles Presberg, Comment, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of* Landgraf v. USI Film Products *and* Rivers v. Roadway Express, 28 U. Rich. L. Rev. 1363, 1314 n.8 (1994) (listing many scholarly articles on the topic).

[120] See Pub. L. No. 102–166, § 3(4), 105 Stat. 1071 (1992), reprinted at 42 U.S.C. § 1981 note (1994). Congress sought to reverse the following decisions: *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) (clarified the burdens of proof in cases in which an employer's apparently neutral work practices are alleged to have a disparate impact on a protected class); *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989) (the right to make and enforce contracts free from racial bias under 42 U.S.C. § 1981 does not extend to conduct that occurs after an employment contract is formed); *Martin* v. *Wilks*, 490 U.S. 755 (1989) (persons who were not parties to litigation in which a court approves a consent decree may challenge employment decisions that are based on that decree in a separate, later action); *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (the time for filing challenges to an intentionally discriminatory seniority system begins when the system is adopted, not when it adversely affects the complainant); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) (a plaintiff in a Title VII "mixed-motive" case loses if the employer shows that it would have taken the same action for nondiscriminatory reasons); *West Virginia Univ. Hosp.* v. *Casey*, 499 U.S. 83 (1991) (expert witness fees are not a part of a reasonable attorney's fee and may not be shifted to the losing party in civil rights litigation); and *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991) (Title VII does not protect a U.S. worker who is employed overseas by a U.S. company).

[121] 511 U.S. 244 (1994).
[122] 42 U.S.C.A. § 2000e (West 1994 & Supp. 1996).
[123] Compensatory damages under the 1991 Act include monetary damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." Pub. L. No. 102-166, § 102, 105 Stat. 1072, 1073 (1992) (codified at 42 U.S.C. § 1981a(b) (3) (1994)).
[124] The new law also amended existing law to permit any party to demand a jury trial if the plaintiff seeks compensatory and punitive damages. *Id.* (codified at 42 U.S.C. § 1981a(c) (1994)).
[125] *Id.* § 402(a), 105 Stat. 1099 (1992) (reprinted at 42 U.S.C. § 1981 note (1994)).
[126] The first of the two provisions limiting the law's retrospective reach made the 1991 changes inapplicable to any case of disparate impact that was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983. *Id.* § 402(b), 105 Stat. 1099 (1992) (reprinted at 42 U.S.C. § 1981 note (1994)). This unusual provision had the effect of making the new law inapplicable to one specific case, *Wards Cove*, 490 U.S. 642 (1989). Thus, although the 1991 law, in effect, overruled the Supreme Court's holding in *Wards Cove*, the litigants in that case were not allowed to benefit from the legislative fix.

The second provision that curbed the law's retrospective reach made clear that American workers employed overseas by American companies are covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1994), and by the Americans with Disabilities Act, 42 U.S.C. § 12111(4) (1994), but only for conduct that occurs after the effective date of the 1991 law. Pub. L. No. 102-166, § 109(c), 105 Stat. 1078 (1994) (reprinted at 42 U.S.C. § 20003 note (1994)).
[127] 511 U.S. 298 (1994).
[128] 491 U.S. 164 (1989).
[129] Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072 (1992) (codified at 42 U.S.C. § 1981(b) (1994)).
[130] For a discussion of how various interests have participated in and affected the affirmative action debate, see Neal Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 Wm. & Mary L. Rev. 673 (1996).
[131] 115 S. Ct. 2097 (1995).
[132] 488 U.S. 469 (1989).
[133] 497 U.S. 547 (1990).
[134] 115 S. Ct. at 2117.
[135] 477 U.S. 57 (1986). Compare *Rabidue* v. *Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (plaintiff in a sexual harassment case must show that the harassment caused psychological harm), *cert. denied*, 481 U.S.1041 (1987), with *Ellison* v. *Brady*, 924 F.2d 872 (9th Cir. 1991) (plaintiffin a sexual harassment case is not required to show psychological harm).
[136] 477 U.S. at 67.
[137] 510 U.S. 17 (1993).
[138] *Id.* at 22.
[139] See *Ellison*, 924 F.2d at 878–91.
[140] See *Rabidue*, 805 F.2d at 620.
[141] See Susan Collins, Note, Harris v. Forklift Systems: *A Modest Clarification of the Inquiry in Hostile Environment Sexual Harassment Cases*, 1994 Wisc. L. Rev. 1515, 1537–1542; *The Supreme Court, 1993 Term—Leading Cases*, 108 Harv. L. Rev. 139, 327–31 (1994).
[142] The rules in cases of intentional discrimination also vary, depending on whether the alleged discrimination is directed toward an individual or a class of individuals, as well as on whether the employer had more than one motive. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) (individual allegation of single-motive discrimination); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) (mixed motive), as modified by 42 U.S.C. § 2000e-2(m) (1994); and *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977) (class-based allegations of a pattern and practice of discrimination).
[143] See 42 U.S.C. § 2000e-2(k) (1994); *Wards Cove Packing Co.*, 490 U.S. at 642; *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).
[144] 509 U.S. 502 (1993).
[145] See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); and *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).
[146] 756 F.Supp. 1244 (E.D. Mo. 1991).
[147] 970 F.2d 487 (8th Cir. 1992).
[148] 509 U.S. at 524.
[149] 509 U.S. at 543 (Souter, J., dissenting); see also Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 Conn. L. Rev. 997 (1994).
[150] See Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 Mich. L. Rev. 2229 (1995).
[151] See *EEOC Enforcement Guidance on* St. Mary's Honor Center v. Hicks, EEOC Compliance Manual (BNA) N:3361, N:3363 n.6 (Apr. 12, 1994).
[152] 507 U.S. 604 (1993).
[153] 29 U.S.C.A. § 621 (West 1985 & Supp. 1996).
[154] 29 U.S.C. § 1140 (1994) ("it shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant for . . . the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA]").
[155] 953 F.2d 1405, 1416 (1st Cir. 1992).
[156] 29 U.S.C. § 626(b) (1994) (incorporating the liquidated, or double, damages provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 216(b), (c) (1994)).
[157] 507 U.S. at 613.
[158] For a discussion about how courts may continue to find age discrimination in "age-proxy" cases, see Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory after* Hazen Paper Co. v. Biggins, 11 Hofstra Lab. L.J. 391 (1994).
[159] 116 S.Ct. 1307 (1996).
[160] 29 U.S.C.A. § 623 (West 1985 & Supp. 1996).
[161] 29 U.S.C. § 631(a) (West Supp. 1996).
[162] 116 S.Ct. at 1310.
[163] The Court decided two other age discrimination cases during this period. In *Commissioner* v. *Schlier*, 115 S.Ct. 2159 (1995), the Court held that backpay and liquidated damages that are recovered under the Age Discrimination and Employment Act are not excludable from gross income under the Internal Revenue Code, 26 U.S.C. § 104(a) (2) (1994). This decision was reported by Constance B. DiCesare in "The Law at Work," *Monthly Labor Review*, October 1995, pp. 48–49. In *McKennon* v. *Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995), the Court held that an age-bias claim should not be dismissed simply because the employer later unearths another reason that supports its employment decision, such as employee misconduct, but that is not related to the plaintiff's age. This decision also was reported by Constance B. DiCesare, in "The Law at Work," *Monthly Labor Review*, May 1995, pp. 62–63.
[164] See *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108 (1st Cir. 1975).
[165] This statute actually is Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 701, 92 Stat. 1191 (1978) (codified as amended at 5 U.S.C. § 7101 (1994)).
[166] 5 U.S.C. § 552a (1994).
[167] 5 U.S.C. § 552 (1994).
[168] 510 U.S. 487, 495 (1994).
[169] 5 U.S.C. § 7114(b) (4) (1994).
[170] 5 U.S.C. § 552(b) (6) (1994).
[171] U. S. Const. amend. I ("Congress shall make no law abridging the freedom of speech").
[172] *Pickering* v. *Board of Educ.* 391 U.S. 563, 568 (1968).
[173] 461 U.S. 138 (1983).
[174] The Court also has been asked to apply the test to a case in which a contractor alleged that the government abridged its free speech rights. That case, *Board of County Commissioners* v. *Umbehr*, 116 S.Ct. 2342 (1996), was reported by Constance B. DiCesare in "The Law at Work," *Monthly Labor Review*, October 1996, pp. 83–84.
[175] 511 U.S. 661 (1994).
[176] *Id.* at 671. While this guidance may help courts to determine, after the fact, whether a government employer's investigation meets constitutional standards, it likely will provide little guidance to employers, who will not be able to determine whether the worker's speech raises first amendment issues—and therefore whether the employers must provide first amendment procedural protections—until *after* they conduct their investigations.
[177] *Id.* at 678.
[178] Although the public employer prevailed in the Supreme Court on the one legal issue that was raised, the High Court remanded the case so that the lower court could determine whether the employer's true reason for firing the nurse was in fact her disruptive speech.
[179] *Id.* at 686 (Scalia, J., concurring).
[180] *Id.* at 694.
[181] Edward J. Velazquez, Note, Waters v. Churchill: *Government-Employer Efficiency, Judicial Deference, and the Abandonment of Public-Employee Free Speech by the Supreme Court*, 61 Brook. L. Rev. 1055, 1058 (1995).
[182] See Bruce Bodner, Recent Decisions, *United States Supreme Court Gives Public Employers Greater Latitude to Curb Public Employee Speech*, 68 Temple L. Rev. 461 (1995).
[183] 115 S.Ct. 1003 (1995).
[184] See 5 U.S.C. app. § 501 (1994).
[185] 115 S.Ct. at 1014 (citing *Pickering*, 391 U.S. at 571).
[186] 29 U.S.C.A. § 207 (West 1965 & Supp. 1996).
[187] 29 U.S.C.A § 207(o) (West Supp. 1996).
[188] 508 U.S. 22 (1993).
[189] 29 U.S.C. §§ 207(o) (2) (A) (i)–(ii) (1994).
[190] See 29 CFR § 553.23(b) (1995); and 52 Fed. Reg. 204–15 (1987) (Labor

Department's discussion of major comments received from the public during the agency's rulemaking process).

[191] 116 S.Ct. 2092 (1996).

[192] 29 U.S.C. § 794(a) (1994).

[193] 29 U.S.C. § 794a(a) (2) (1994).

[194] 29 U.S.C. § 791 (1994) (remedies available with repect to *any* complaint under § 791).

[195] Pub. L. No. 100–694, § 6, 102 Stat. 4564 (1988) (codified at 28 U.S.C. § 2679(d) (1994)).

[196] 115 S.Ct. 2227 (1995).

[197] See 28 U.S.C. § 2680(k) (1994).

[198] 116 S.Ct. 1114 (1996).

[199] 25 U.S.C. § 2710 (1994).

[200] U.S. Const. art. I, § 8, cl. 3.

[201] 491 U.S. 1 (1989).

[202] U.S. Const. art. I, § 8, cl. 3.

[203] 29 U.S.C.A. § 201 (West 1978 & Supp. 1996).

[204] 29 U.S.C.A. § 621 (West 1985 & Supp. 1996).

[205] Pub. L. No. 88–38, § 3, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206 (d) (1994).

[206] 29 U.S.C.A § 2601 (West Supp. 1996).

[207] EEOC v. *Metropolitan Educ. Enter.*, 60 F.3d 1225 (7th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3623 (U.S. Mar. 18, 1996) (Nos. 95–259 and 95–779).

[208] *Robinson* v. *Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3707 (U.S. Apr. 22, 1996) (No. 95–1376).

[209] *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N.A., Inc.*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3689 (U.S. Apr. 15, 1996) (No. 95–789).

[210] *De Buono* v. *NYSA-ILA Medical and Serv. Fund*, 74 F.3d 28 (2d Cir. 1996), *cert. granted*, 65 U.S.L.W. 3292 (U.S. Oct. 15, 1996) (No. 95–1594).

[211] *Boggs* v. *Boggs*, 82 F.3d 90 (5th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3338 (U.S. Nov. 1, 1996) (No. 96–79).

[212] *Regents of Univ. of California* v. *Doe*, 65 F.3d 771 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3837 (U.S. June 17, 1996) (No. 95–1694).

[213] *Auer* v. *Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3854 (June 24, 1996) (No. 95–897).

[214] *Arizonans for Official English* v. *Arizona*, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3639 (U.S. Mar. 25, 1996) (No. 95–974).

[215] *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 65 F.3d 460 (5th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3762 (U.S. May 13, 1996) (No. 95–1081); *Harbor Tug and Barge Co.* v. *Papai*, 67 F.3d 203 (9th Cir. 1995), *cert. granted*, 65 U.S.L.W. 3254 (U.S. Oct. 1, 1996) (No. 95–1621); and *Metropolitan Stevedore Co.* v. *Rambo*, 81 F.3d 840 (9th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3396 (U.S. Nov. 27, 1996) (No. 96–272).

[216] *Board of County Commissioners* v. *Brown*, 67 F.3d 1174 (5th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3707 (U.S. Apr. 22, 1996) (No. 95–1100).

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