1992

The Supreme Court's 1991–1992 Labor and Employment Law Term

Roger C. Hartley
The Catholic University of America, Columbus School of Law

The Supreme Court's 1991–1992 Labor and Employment Law Term

Professor Roger C. Hartley
Columbus School of Law
The Catholic University of America
Washington, D.C.

I. Private-Sector Labor-Management Relations (Taft-Hartley Act)

Lechmere v NLRB

Nonemployee Access to Employer Property

Thomas J.: **"[S]o long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to . . . balanc[e] the employees' and employers' rights. . . ."**

For the sixth time in thirty-five years, the Supreme Court this Term revisited the question of the employer's right to exclude nonemployees from its property.[1] In *Lechmere v NLRB*, the Court, for the fifth time in those six efforts, upheld the employer's property interest over the nonemployees' attempt to gain access. A pattern could be developing here.

Time will tell whether *Lechmere*, Justice Thomas's first labor law decision, becomes the most important labor and employment law case of the Court's 1991 Term. However, it certainly has been among the most celebrated in the newspapers,[2] in the law reviews,[3] and among lawyers at professional meetings.[4] The decision split the Court

1. See *Lechmere v NLRB*, 112 S Ct 841 (1992). See also, *Sears, Roebuck & Co. v San Diego County Dist. Council of Carpenters*, 436 US 180 (1978); *Hudgens v NLRB*, 424 US 507 (1976); *Central Hardware Co. v NLRB*, 407 US 539 (1972); *Food Employees v Logan Valley Plaza, Inc.*, 391 US 308 (1968); *NLRB v Babcock & Wilcox Co.*, 351 US 105 (1956).

2. See, for example, Ruth Marcus, *Court Relaxes Voting Act Restraints; In Separate Case, Union Organizers' Access to Workers Is Curbed*, Washington Post A6 (Jan 28, 1992).

3. See, for example, Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v NLRB*, 9 Hofstra Lab L J 1 (1991).

4. See, for example, R. Joy, *Lechmere Inc. v NLRB: The Return to Babcock & Wilcox*, paper delivered to the Committee on the Development of the Law Under the National Labor Relations Act of the ABA Section on Labor and Employment Law at its annual mid-winter meeting, Casa Marina Resort, Mar 1–5, 1992.

(6–3) and generated two dissents—one by Justice White (joined by Justice Blackmun) and one by Justice Stevens.

Commentators, as well as the dissents in *Lechmere*,[5] have evaluated whether the majority's decision (1) adhered to its rules of deferral to administrative agencies, and (2) adequately incorporated post-*Babcock & Wilcox* developments in the law of nonemployee access. I shall not address those issues again here. Existing scholarship on these questions is outstanding and, in any event, it is somewhat late in the day to be overly concerned with whether the Board's movement in 1986 into the rule of *Fairmont Hotel Co.*[6] or the subsequent adjustment two years later in *Jean Country*[7] represented a proper reading of *Babcock & Wilcox*[8] and its progeny.[9]

Rather, I shall attempt to clarify what *Lechmere* held, and did not hold, and discuss whether the majority, as it repeatedly declared, did nothing more than adhere to the Court's landmark decision in *NLRB v Babcock & Wilcox Co.*

In what Professor Karl Klare has termed the "judicial deradicalization of the Wagner Act,"[10] the Supreme Court in 1956 checked the NLRB's efforts to provide workers' access to nonemployee union organizers, *at their place of work*. The Board had taken the position in *Babcock & Wilcox* that employees have the right to receive information about the benefits of self-organization. To make that right meaningful, employees should not be required to receive self-organization information through "personal contacts on streets or at home, telephones, letters or advertised meetings. . . ."[11] In the Board's view, "the place of work [is] so much more effective a place for communication of information that . . . the employer is guilty of an unfair labor practice for refusing access to company property to union organizers."[12] Hence, in *Babcock & Wilcox*, the Board ordered the employer to give the union access to its property because the Board found that the only safe and practicable place for the distribution of union literature at the employees' place of work was the employer's parking lot and the walkway from it to the gatehouse.

Though recognizing that the right to self-organization includes the right to learn the advantages of self-organization from others,

---

5. See references cited in notes 2–4.
6. 282 NLRB 139 (1986).
7. 291 NLRB 11 (1988).
8. 351 US 105 (1956).
9. For a thorough review of the pre-*Lechmere* developments, see Ford, *The NLRB, Jean Country, and Access To Private Property: A Reasonable Alternative to Reasonable Alternative Means of Communication Under Fairmont Hotel*, 13 George Mason U L Rev 683 (1991).
10. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 Minn L Rev 265 (1978).
11. *Babcock & Wilcox*, 351 US at 111.
12. Id.

including nonemployee union organizers, the Supreme Court was not prepared to agree with the NLRB that this always required access to employees at their place of employment. The Board's view failed adequately to consider the employer's legitimate property interest in excluding trespassers. When employees are isolated from normal contacts, this property interest must yield. That had been recognized previously.[13] The challenge to the Court in *Babcock & Wilcox* was to decide if the employer's property interest must yield in other contexts.

It is here that the Court sowed the seeds of confusion that would perplex an entire generation of labor lawyers and adjudicators. The employer's property right must yield if the plants' location and the employees' living quarters "place the employees beyond the reach of reasonable union efforts to communicate with them."[14] However, the term "reasonable union efforts to communicate with them" is susceptible to at least two quite different interpretations.

It might mean that the Board and the courts are to examine only whether the union literally has the ability to gain access to the employees by exercising reasonable efforts. This inquiry would not examine the quality of the resulting communication. So read, the union would lose in all cases other than when employees literally are beyond the union's reach due to their isolation from normal contacts. *Babcock & Wilcox* contains language supporting this physical proximity view of the test.[15]

The concept "reasonable union efforts to communicate with [employees]" can have a quite different meaning, however. It can mean that the effort is a "reasonable one" only if the resulting communication is meaningful. At another point in *Babcock & Wilcox*, the Court clearly indicated that the "effectiveness" of the resulting communication would measure whether the union's effort to use alternative means was "reasonable."[16]

As too often is the case, *Babcock & Wilcox* was not a model of clarity. *Lechmere* edged the law toward the physical proximity view of *Babcock & Wilcox*, but did not abandon completely the notion that the effectiveness of the resulting communication is a relevant

---

13. See, for example, *NLRB v Lake Superior Lumber Corp.*, 167 F2d 147 (6th Cir 1948).

14. *Babcock & Wilcox*, 351 US at 113.

15. The Court at one point said that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. . . . " Id at 112.

16. The Court said in *Babcock & Wilcox* that "when inaccessibility makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." Id.

consideration. To be sure, the Court in *Lechmere* said that "[s]o long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to . . . balanc[e] the employees' and employers' rights. . . ."[17] Nothing in that language inquiring whether access is "infeasible" would suggest that the quality of the resulting communication is relevant.

Later in its decision, however, the Court cited with approval the *Babcock & Wilcox* language cited above[18] that makes relevant an inquiry into whether inaccessibility makes "ineffective" efforts to communicate through normal communication channels.[19] The Court again emphasized the importance of the effectiveness of the resulting communication when it stated that the union does not carry its burden "by mere conjecture or the expression of doubt concerning the *effectiveness* of nontrespassory means of communication."[20] Still later, the Court said that neither the cumbersomeness of alternative communication efforts nor that they are "less-than-ideally effective" will suffice to gain access to employer property. Finally, the Court advised that "direct contact" . . . is not a necessary element of "reasonably effective" communication.[21]

In short, *Lechmere* maintains the doctrinal integrity and ambiguity of *Babcock & Wilcox*. It speaks in terms of the feasibility of the union gaining physical access to those it seeks to inform but also makes plain that access alone is not determinative: the access must be such that the resulting communication is effective.

Clarifying *Lechmere*'s continuing commitment to meaningful, effective communication is important to future applications of the *Babcock & Wilcox/Lechmere* doctrine in union organizing contexts. Clarification also is important in a context not litigated in *Lechmere*: consumer picketing and handbilling. When the target of union communication efforts is an unknown group defined only by their presence at an employer's place of business to do business with the employer, the union, of course, cannot use home visits, telephone calls, and so forth. If the rules set out in *Lechmere* apply to consumer picketing and handbilling, then evaluation of whether access to the target is reasonable must include some evaluation of the effectiveness of using nontrespassory means of communication to reach consumers (e.g., newspaper advertisements, picketing on public spaces, and signs). The Board and the courts may well decide that

17. *Lechmere*, 112 S Ct at 848.
18. See discussion cited in note 16.
19. *Lechmere*, 112 S Ct at 848.
20. Id at 848 (emphasis added).
21. Id.

nontrespassory access to a finite group of employees, such as those involved in *Lechmere*, is reasonable because access is literally feasible and the resulting communication is effective. But the dynamics of communicating to consumers are quite different. Whether nontrespassory access to consumers is reasonable (effective) will no doubt be the subject of heated debate.

II. Internal Union Affairs

Wooddell v IBEW

Right to Jury Trial on LMRDA Cause of Action When Both Legal and Equitable Relief Sought

White J.: **"[A] union member who sues his local union for money damages under [LMRDA] Title I is entitled to a jury trial"**

LMRA Section 301 Jurisdiction for Union Member to Enforce Union Constitution in Federal Court

White J.: **"The District Court ha[s] jurisdiction [under LMRA section 301(a)] over the breach of contract suit brought . . . by a union member against his local union."**

In *Wooddell v IBEW*,[22] lawyers and others interested in the law of internal union affairs were treated to the resolution of two pressing issues in one opinion. The Court unanimously[23] held that (1) "a union member who sues his local union for money damages under Title I of the [LMRDA][24] is entitled to a jury trial," and (2) a "District Court ha[s] jurisdiction [under LMRA § 301(a)] over the breach of contract suit brought . . . by a union member against his local union."[25]

Both issues arose out of a union member's opposition to an announced dues increase by IBEW Local 71. The member alleged that as a result of his opposition, he was discriminated against in the operation of a hiring hall provided for in the Local 71 collective bargaining contracts with various electrical contractors. The member brought an action against the Local in federal court. It alleged a violation of LMRDA Title I rights; a breach of the international union's constitution and the Local 71 bylaws, redressable under LMRA section 301 and state law; a breach of the duty of fair representation; and various pendent state law claims. The member sought

22. 112 S Ct 494 (1991).
23. Justice Thomas did not participate.
24. Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat 519, as amended, 29 USC § 401 et seq.
25. *Wooddell*, 112 S Ct at 496.

equitable relief as well as compensatory and punitive damages and attorney fees.

The district court dismissed all claims. The court of appeals reversed the dismissal of the LMRDA Title I free speech claim but otherwise affirmed the district court, including the court's denial of a jury trial on the LMRDA claim.[26]

The Jury Trial Issue

Two Terms ago, in *Teamsters Local 391 v Terry*,[27] the Court addressed the Seventh Amendment right to a jury trial in a hybrid breach of contract/breach of the duty of fair representation case. There, the Court explained that if an action resolves legal rights, the Seventh Amendment guarantees a right to a jury trial. Courts are to examine both the nature of the action and the remedy sought and focus most heavily on the remedy. In *Terry*, the Court held that plaintiffs in hybrid actions have a constitutional right to a jury trial. Since money damages are available in hybrid actions, a traditional remedy available in the courts of law, and since "the damages sought were neither analogous to equitable restitutionary relief . . . nor incidental to or intertwined with injunctive relief, [the Court in *Terry*] concluded that . . . the remedy sought was legal."[28]

LMRDA Title I actions are closely analogous to personal injury actions.[29] The injunctive relief is incidental to the damage claim. And the back wages cannot fairly be seen as restitutionary incident to a reinstatement order because "the damages sought are for pay for jobs to which the union failed to refer [the Member]."[30] The member thus was entitled to a jury trial on his LMRDA cause of action.

The Section 301 Issue

In *Smith v Evening News*,[31] the Court adopted the now well-established principle that section 301 suits may be brought by individual employees for violation of collective bargaining agreements. In *Plumbers and Pipefitters v Plumbers and Pipefitters, Local 334*,[32] the Supreme Court stated that section 301 creates federal subject matter jurisdiction to consider suits alleging breach of an international union's constitution. The suit in *Plumbers Local 334* was brought by a local union against its parent international union. Left unresolved was the issue addressed in *Wooddell*: whether an indi-

26. Id at 495.
27. 495 US 558 (1990).
28. *Wooddell*, 112 S Ct at 498.
29. *Reed v United Transp Union*, 488 US 319, 326–27 (1989).
30. *Wooddell*, 112 S Ct at 499.
31. 371 US 195 (1962).
32. 452 US 615 (1981).

vidual union member may bring a section 301 action alleging breach of the international union constitution, just as *Smith* had held an individual employee may sue under section 301 alleging breach of a collective bargaining agreement.

In *Wooddell*, the member's theory on the merits was that his international union's constitution requires all local unions to "live up to" all collective bargaining agreements.[33] The union's discrimination against him in the enforcement of the hiring hall breached the collective bargaining agreement and, by extension, breached the union constitution.

The Court held that the member's suit, alleging a breach of the union constitution, was a suit alleging a breach of a contract cognizable under section 301 and that a member may bring an action alleging a breach of that contract.[34] A contrary holding would consign members' suits alleging a breach of a union's constitution to state court while a similar suit brought by a local union, for example, would be heard in federal court. That would create the unacceptable result of international union constitutions having different meanings under state and federal law and different meanings depending on the identity of the party suing.[35] This holding raises a host of issues.

In *Textile Workers Union v Lincoln Mills*,[36] the Court held that enactment of section 301 constituted a congressional invitation for the federal courts to create a federal common law of collective bargaining contract enforcement. The decisions in *Plumbers Local 334*, and now *Wooddell*, extend that invitation to the creation of a federal common law of union constitution enforcement. One early skirmish is likely to be the statute of limitations to apply in *Wooddell* suits.[37]

In *Teamsters Local 174 v Lucas Flour Co.*,[38] the Supreme Court,

---

33. *Wooddell*, 112 S Ct at 499.

34. The Court did not address whether a suit alleging a breach of the local union by-laws is within the subject matter jurisdiction of section 301. See discussion, *Wooddell*, 112 S Ct at 498 n3. No doubt, the issue will be addressed soon and may turn on whether the normal international union requirement that local bylaws be approved by the international union is sufficient to make bylaws a contract between labor organizations under section 301.

35. Id at 500. The Court was unimpressed with the prediction that permitting union member section 301 suits would inundate the federal courts with litigation. The Court noted that such suits have been recognized in the lower courts for years without any apparent inundation. Id.

36. 353 US 448 (1957).

37. The opening round already has been fought. See *Pruitt v Carpenters' Local 225*, 893 F2d 1216 (11th Cir 1990) (state four-year statute of limitations, rather than the six-month limitations period approved in *DelCostello v Teamsters*, 462 US 151 (1983), applicable to suit alleging breach of union constitution due to fraudulent refusal to instate a candidate selected as business representative).

38. 369 US 95 (1962).

exercising the power conferred by section 301, created the federal common law rule that when a collective bargaining agreement does not contain a no-strike clause explicitly, an implied no-strike clause will be read into a collective bargaining agreement to make efficacious the parties' agreement to arbitrate disputes. Given this precedent of federal courts rewriting the parties' section 301 contracts, will federal courts now begin to read into union constitutions terms not literally there on the theory that certain implied terms are necessary to make efficacious certain explicit guarantees?[39]

Traditionally, union fines have been enforced judicially in state courts, applying state law. After *Wooddell*, are suits to enforce union fines section 301 suits controlled by federal law?[40] If yes, then when the reasonableness of a fine is at issue, *Wooddell* would seem to make that a federal substantive issue. Presumably, suits brought in state court to enforce the terms of a union constitution are removable to federal court. May a federal court enjoin a union from breaching its union constitution or is such an injunction barred by the Norris-LaGuardia Act?

The section 301 preemption implications of *Wooddell* are interesting to contemplate. The general rule of section 301 preemption is that section 301 extinguishes state causes of action that require as an element of proof an interpretation of a contract within the jurisdiction of the federal courts under section 301. When that contract is a collective bargaining agreement, the rule of *Lingle* preemption attaches.[41] By parity of reasoning, section 301 should be found to preempt any state law claim that depends upon the meaning of a union constitution.[42] State law claims alleging interference with contractual relations (the contract referred to being the union constitution) may well be extinguished by *Wooddell*. So also would

---

39. It is true that *Lucas Flour* is an aberration from the normal federal court reluctance to rewrite the parties' agreements. Compare *H.K. Porter Co. v NLRB*, 397 US 99 (1970). Yet, state court precedent offers a model for judicial rewriting of union constitutions to protect members from perceived arbitrariness. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L J 175 (1960). The open question is whether an increasingly conservative federal judiciary will draw from this state court precedent when called upon to interpret union constitutions.

40. See *Joinette v Hotel Employees Local 20*, 123 LRRM (BNA) 2159, 2162 (Wash S Ct 1986). See also *Charles Dowd Box Co. v Courtney*, 368 US 502 (1962) (state and federal courts have concurrent jurisdiction to hear section 301 suits (alleging breach of collective bargaining agreements) but such suits are controlled by federal substantive law).

41. See, for example, *Lingle v Norge Div of Magic Chef, Inc.*, 486 US 399 (1988) ("[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute.").

42. Accord *Pruitt v Carpenters Local 225*, 893 F2d 1216, 1218–19 (11th Cir 1990) (state law tort claim by union member alleging fraudulent refusal to instate member to business representative position preempted by section 301).

claims of intentional infliction of emotional distress if, in the circumstances, resolution should turn on an interpretation of the union constitution.

Finally, in the hands of an able lawyer, *Wooddell* offers some creative opportunities to enforce rights of union members. In *Wooddell* itself, the union constitution was used to bring what was essentially a suit against a local union for breach of the collective bargaining agreement. But because the action was styled as a breach of an intra-union contract, plaintiff conveniently avoided the normal rule that an employee may not sue under the authority of *Smith v Evening News* without first exhausting the grievance-arbitration procedures in the collective bargaining agreement.[43]

Promises in union constitutions of democratic procedures, such as the right to periodic union meetings, the right to have special meetings called, the right to ratify collective bargaining agreements, or the right to have a strike vote conducted are all now promises enforceable in federal court. So now are eligibility standards set forth in union constitutions to vote or be nominated for union office. *Wooddell* suits already have been brought against union officers to enforce officer's obligations found in the constitution.[44] In short, *Wooddell* soon will become a mainstay of the multicount complaint that the union bar has come to expect when unions are sued in controversies arising out of internal union disputes.

III. Employment Discrimination

A. *Title VII*

United States v Burke

Internal Revenue Code § 104(a)(2)—Treatment of Title VII Back Pay Settlements as Income

Blackmun J.: **"[W]e cannot say that a statute such as Title VII whose sole remedial focus is the award of backwages, redresses a tort-like personal injury within the meaning of [section] 104(a)(2). . . ."**

In *United States v Burke*,[45] the Court decided an important issue regarding the tax treatment of settlement payments of back pay claims under Title VII of the 1964 Civil Rights Act. Resolving a conflict among the Circuits, the Court held (7–2) that such payments are not excludable from the recipient's gross income pursuant to section 104(a)(2) of the Internal Revenue Code.[46]

---

43. See, for example, *Republic Steel Corp. v Maddox*, 379 US 650 (1965). Compare *Groves v Ring Screw Works*, ___ US ___, 111 S Ct 498 (1990).

44. See, for example, *Shea v McCarthy*, 953 F2d 29 (2d Cir 1992).

45. *Burke*, 112 S Ct 1867 (1992).

46. 26 USC § 104(a)(2). That section provides that "damages received . . . on account of personal injuries" are excludable from gross income.

This case arose out of a gender discrimination suit alleging that the employer, the Tennessee Valley Authority (TVA), violated Title VII when it increased salaries of male-dominated pay schedules but not those of female-dominated pay schedules. Settlement was reached. TVA agreed to pay $5 million to the affected employees. It withheld from them federal income taxes on the amounts allocated to each. The affected employees filed refund claims with the Internal Revenue Service (IRS) which disallowed the claims. In a refund action brought in federal district court, the court concluded that settlement payments do not constitute section 104(a)(2) excludable income because the affected employees sought and obtained only back wages due them as a result of the discrimination they alleged. The Sixth Circuit Court of Appeals, by divided vote, reversed. The court of appeals reasoned that the determinative consideration is whether the injury and claim are "personal and tort-like in nature."[47] The Court held that the employees' gender discrimination claim constituted a personal, tort-like injury, rejecting the government's argument that a contrary conclusion should be reached because Title VII did not then authorize compensatory or punitive damages.[48] The statutory construction issue was whether the settlement recovery was for "personal injuries" within the meaning of that phrase in section 104(a)(2).

The Supreme Court majority agreed that section 104(a)(2) is limited to a recovery based on tort or tort-type rights. The majority concluded, however, that the remedies available in any given case fix the character of the right that is asserted. Tort or tort-type rights are those whose invasion a court will remedy through a broad range of damages. Tort damages go beyond compensation to reimburse for actual monetary loss and include redress for "intangible elements of injury"[49] such as emotional distress and pain and suffering.

Title VII, the majority held, does not provide a remedy for a tort-like injury because Title VII provides only for injunctive relief, back pay, and other equitable relief. It does not provide for compensatory or punitive damages. Simply put, Title VII does not constitute a "personal injury" because the cause of action it creates does not "evidence[] a tort-like conception of injury and remedy."[50]

---

47. 929 F2d 1119, 1121 (1991).

48. Id at 1123.

49. *Burke*, 112 S Ct 1867 (1992).

50. Id at 1873. Justice Scalia concurred in the result but on much narrower grounds. In his view, a "personal injury" within the meaning of that term in section 104(a)(2) is limited to physical injuries to the person (possibly also including injury to one's mental health), thus excluding injury to dignity or nonphysical torts such as defamation. Under this view, only a Title VII discriminatee's recovery for psychological harm would constitute excludable income. Back pay, of course, would not.

Justice Souter also concurred. He argued that Title VII rights parallel many tort

Burke promises to complicate, and make more expensive, Title VII settlements. Plaintiffs can be expected to discount settlement offers by the taxes that will be deducted and, therefore, demand more. They may end up having to accept less.

The Court in *Burke* acknowledged that in 1991 Congress amended Title VII to permit recovery of compensatory and punitive damages by victims of intentional discrimination.[51] The tax treatment of back pay will remain unaffected by this development and the 1989 amendment to section 104(a)(2) precludes excluding punitive damages from gross income except for physical injury. Three issues come to mind.

First, *Burke* did not address whether a back pay recovery constitutes "wages" subject to taxation for Federal Insurance Compensation Act (FICA) purposes. This issue was recognized by the Court but explicitly avoided as neither party nor any court below had addressed it.[52]

Second, tax lawyers (as well as the IRS and the courts) have yet to resolve whether all compensatory damages constitute excludable income or only those compensating for physical injury and harm to mental health. The language of section 104(a)(2) is "personal injury or sickness." *Burke* decided only that this term does not include back pay. It did not consider the point Justice Scalia argued, that section 104(a)(2) excludes compensatory damages only for invasions of personal interests that harm a victim's physical or mental health. That view could strip section 104(a)(2) protection from recoveries for invasion of intangible elements of injury such as emotional distress, degradation, defamation, and pain and suffering.[53]

Finally, since back pay and punitive damages are not excludable but compensatory damages are, their mix in a settlement will have significant tax consequences. The structure of the claim and its settlement, accordingly, will be important. The IRS cannot be expected to accept that a claim for back pay and compensatory and

---

rights such as those at stake in a defamation action: both vindicate "an interest in dignity as a human being entitled to be judged on individual merit." Id at 1877–78 (Souter concurring). Yet the remedy here is very nontort-like: "Back pay . . . is quintessentially a contractual measure of damages." Id. On close questions, Justice Souter concluded, the taxpayer loses since income should not be deemed excluded "unless some provision of the Internal Revenue Code clearly so entails." Id.

Dissenting, Justice O'Connor (joined by Justice Thomas) viewed the Title VII cause of action as a tort-like right. Functionally, Title VII operates like a tort right with an "award [of] compensation for invasions of a right to be free from certain injury in the workplace." Id at 1879 (O'Connor dissenting). In addition, Title VII, like tort rights, vindicates certain preferred public purposes beyond offsetting specific losses.

51. Civil Rights Act of 1991, Pub L 102–166, 105 Stat 1073.

52. *Burke*, at 1869 n1.

53. The IRS and the Tax Court seem to disagree with Justice Scalia's view of the sweep of section 104(a)(2). See *Thelkeld v Commissioner*, 87 T C # 76, aff'd, 348 F2d 81 (6th Cir 1988).

punitive damages was settled solely for compensatory damages. How convenient for the taxpayer. Reasonably, the IRS will look to the claim that was settled to allocate the settlement. Hence, how the claim was structured originally may prove important. At least, some thought of the tax consequences of the claim may well-serve our clients.

One closing thought. None of *Burke* ultimately may make any sense. To say that back pay is not excludable but compensatory damages are is to treat similar things differently. As any lawyer knows, often the critical factor in computing compensatory damages is reduced earning capacity. Why is that excludable but back pay not excludable? The majority may not have a clue. Certainly its decision provides none.

B. *Section 1983*

Hafer v Melo

Liability of Public Officials Sued in Their Individual Capacities for Performing Official Duties

O'Connor J.: **"[S]tate officials, sued in their individual capacities, are 'persons' within the meaning of [section] 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under [section] 1983 by virtue of the 'official' nature of their acts."**

In 1989, the Court decided that a state is not a "person" as that term is used in section 1983.[54] Accordingly, it is not suable under that statute regardless of the forum in which the suit is maintained. Suits for damages against state officials "acting in their official capacities" are deemed suits against the state and, therefore, they also cannot be brought under section 1983.[55] *Hafer v Melo*[56] considered whether it thus follows that section 1983 excludes all suits against state officers for damages arising from official acts—including personal-capacity suits. The Court unanimously held that such a conclusion does not follow. State officials sued in their personal capacities are "persons" for purposes of section 1983 even if the alleged injury arose from actions taken in their official capacities.

Hafer, the newly elected Pennsylvania Auditor General, dismissed eighteen employees from their jobs in her office, allegedly

54. 42 USC § 1983.

55. *Will v Michigan Dep't of State Police*, 491 US 58 (1989). "[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under [section] 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state.' " Id at 71 n10 (quoting *Kentucky v Graham*, 473 US 159, 167 n14 (1985).

56. 112 S Ct 358 (1991).

in fulfillment of a campaign promise. They sued her under section 1983 raising a variety of claims, including that at least some had been discharged because of their political affiliation and support for her opponent in the election. Among the remedies sought were monetary damages. The district court dismissed all claims because under the Supreme Court's *Will* decision, "she could not be held liable for employment decisions made in her official capacity as Auditor General."[57]

The Third Circuit Court of Appeals reversed.[58] The circuit court held that in *Will* the Supreme Court had held that state officials sued for injunctive relief in their official capacities are "persons" subject to section 1983 liability.[59] As to the claims for monetary relief, the court of appeals held that plaintiffs had sued Hafer in her individual capacity for injuries arising from her official acts. This, the court of appeals held, made out a claim for relief under section 1983. The issue thus raised was whether section 1983 creates a cause of action for individual-capacity damage suits against state officials for actions taken under color of state law.

In *Hafer*, the Court reaffirmed its holding in *Will* that "[N]either a State nor its officials acting in their official capacities are 'persons' under [section] 1983."[60] But, as the Court explained in *Hafer*, "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury."[61]

A contrary conclusion, that state officials may not be held liable in their personal capacity for actions they take in their official capacity, would, in effect, absolutely immunize state officials from personal liability under section 1983. Yet, the Court has granted absolute immunity to only a very small class of public officials: the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions. "State executive officials are not entitled to absolute immunity for their official actions."[62]

The Court states that the distinction between official- and personal-capacity suits is "more than a pleading device."[63] It is a

---

57. See description of the district court's rationale recited by the Court in *Hafer*, 112 S Ct 358 (1991).

58. 912 F2d 628 (3d Cir 1990).

59. See discussion cited in note 55.

60. *Hafer*, 112 S Ct at 362 (quoting *Will v Michigan Dep't of State Police*, 491 US 58, 71 (1989)).

61. Id.

62. See id. The Court also held that personal-capacity suits under section 1983 may be brought in federal court. No Eleventh Amendment bar attaches because in such suits the state is not the real party in interest: Damages are not sought from the public treasury but from the individual defendant. Id at 364.

63. Id at 362.

distinction of substance. That is the core holding of *Hafer*. Yet, the case presents a ringing pleading lesson every lawyer needs to learn. This case was a consolidation of two suits. In one, the plaintiffs expressly sought damages from Hafer in her official capacity. In the other, they did not, but the court of appeals held that plaintiffs implicitly "signified a similar intent."[64] In a footnote, the Supreme Court noted that the circuits are split regarding whether in section 1983 damage actions the pleadings must explicitly state that the action is brought against the state official in his or her personal capacity.[65] The issue was not before the Court in *Hafer*. So it lingers unresolved. The pleading lesson is clear.

Finally, state officials sued in their personal capacities may assert personal immunity defenses, "such as objectively reasonable reliance on existing law."[66] Now that the Court has made plain that state officials may be sued in their personal capacity for actions taken in their official capacity, I suspect the courts will be deluged with creative pleas from state officials to expand the scope of personal immunity defenses. The Court in *Hafer* signaled as much. It stated: "To be sure, imposing personal liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence."[67] The Court seldom more clearly telegraphs an invitation for creative lawyering.

C. *Title IX*

Franklin v Gwinnett County Public Schools

Availability of a Damage Remedy in Action Brought under Title IX of the Education Amendments of 1972

White J.: **"[A]lthough we examine the text and history of a statute to determine whether Congress intended to create a right of action, . . . we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise."**

In *Canon v University of Chicago*,[68] the Court held that Title IX is enforceable through an implied private right of action. *Franklin v Gwinnett County Public Schools*[69] addressed the important question of what remedies are available in a suit brought pursuant to this implied right of action. Specifically, the issue was whether only

64. 912 F2d at 636.
65. *Hafer*, 112 S Ct at 362 n *.
66. Id at 364.
67. Id at 362.
68. 441 US 677 (1979).
69. 112 S Ct 1028 (1992).

equitable relief such as injunctive relief and back pay is available or whether compensatory and punitive damages also are available. In *Franklin*, the Court held unanimously that Title IX relief is not limited to equitable remedies.

The issue arose in a gender discrimination suit brought by a student of a public high school who alleged she had been continually sexually harassed by a faculty member who was her sports coach and teacher. The alleged harassment consisted of sexually oriented conversations probing into the student's sexual experiences, forcible kisses, telephone calls to her home requesting that she agree to meet the teacher socially, and three episodes of coercive intercourse. The student further alleged that teachers and administrators at her high school were aware of the allegations but initiated no action to halt the teacher's behavior and discouraged the student from pressing charges against the teacher. The student sought damages in a Title IX action alleging sex discrimination.

The district court dismissed the action on the ground that Title IX does not authorize damage awards. The Eleventh Circuit Court of Appeals affirmed.[70] Among other arguments, the court of appeals reasoned that Title IX was enacted pursuant to Congress' Spending Clause power and, therefore, relief "frequently [is] limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction."[71] In addition, the circuit court argued no damage relief may be found absent express provision by Congress.

The Supreme Court noted a split in the circuits on this point. It observed that its modern precedent does require an explicit manifestation by Congress of an intent to create a private right of action—usually found by examining the text and history of a statute. But a private right of action having been found, the presumption is that all appropriate remedies are then available "unless Congress has expressly indicated otherwise."[72] In short, the availability of a right of action and the relief afforded under it are, analytically, very different questions. The Court viewed the basis for this difference as residing in important separation of powers values in our constitutional system. Congress has the primary responsibility to create rights of action. The Court has the primary responsibility to remedy invasions of those rights. Limitations on the courts' traditional remedial authority will not be presumed. Congress must make clear its intent to limit that authority.[73] When "Congress is silent on the question of remedies, a federal court may order any appropriate

70. 911 F2d 617 (11th Cir 1990).
71. *Franklin*, 911 F2d at 621.
72. *Franklin*, 112 S Ct at 1032.
73. Id at 1032–34.

relief."[74] Here, neither the text nor the history of Title IX revealed a congressional intent to limit available damages.[75] Thus, the normal remedies of monetary damages are available in Title IX actions.[76]

This case is of great importance in Title IX employment discrimination litigation, especially since in *Franklin*, the majority cited *Meritor Savings Bank, FSB v Vinson*[77] as applicable to Title IX actions: "[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."[78]

Otherwise, however, the case is likely to have limited impact. When Congress explicitly creates a right of action it normally also delineates the available remedies. The holding in *Franklin* is important when the courts find an implied right of action and the statute predictably is silent as to remedy. But, for the near future, it is unlikely that many implied rights of action will be found by this Court.[79]

One final point, this case is interesting for its subtext. The Court seems implicitly to be saying that it is not prepared to take the heat for the existence of a right without an adequate remedy. If Congress desires to limit remedy, let it do so and be accountable. The Court is institutionally ill-equipped to suffer the public opprobrium of such an outcome. The Court will not "abdicate [its] historic judicial authority to award appropriate relief in cases brought in our court system."[80]

Moreover, from a separation of powers viewpoint, to deny plain-

---

74. Id at 1034. Whether damages against the state may be obtained in a federal court raises yet another question—one that arises because of the Eleventh Amendment and the state sovereign immunity values in our constitutional system. That issue did not arise in this case because the Court has held that Congress has abrogated the states' sovereign immunity rights in the Civil Rights Equalization Amendments of 1986, 42 USC § 2000d-7.

75. That Title IX was enacted pursuant to Congress' Spending Clause power is significant but only to the extent that no damage remedy will be presumed for unintentional violations. See *Pennhurst State School and Hospital v Halderman*, 451 US 1, 28–29 (1981). The federal courts reserve their normal authority to remedy intentional violations by means of all appropriate remedies.

76. Justice Scalia (with the Chief Justice and Justice Thomas) concurred. He argued that the normal presumption that judicial power exists to provide all appropriate remedies should not attach when the right of action is implied. In such cases, Congress will always remain silent regarding remedies available in suits it never expressly considered. But here, congressional action subsequent to the Court's 1979 finding of an implied right of action in Title IX suits convinced the concurring judges that Congress intended that Title IX provides a remedy for monetary damages.

77. 477 US 57 (1986).

78. Id at 64.

79. See *Karahalios v National Federation of Federal Employees*, 489 US 527 (1989) (no implied right of action for federal employee to enforce a statutory right of fair representation); See also *Touche Ross & Co. v Redington*, 442 US 560, 575–76 (1979); *Transamerica Mortgage Advisors, Inc. v Lewis*, 444 US 11, 18, 23–24 (1979).

80. *Franklin*, 112 S Ct at 1037.

tiffs an adequate remedy in the face of congressional silence as to remedy risks eviscerating the right created. For those who followed the Court's disassembly of our civil rights statutes during the Court's 1988 Term, it may seem strange to argue that the Court would concern itself with undermining the efficacy of another federal civil rights law.[81] But, the combination of the 1987 Civil Rights Restoration Act,[82] which reversed the effect of *Grove City College v Bell.*[83] and the recently enacted 1991 Civil Rights Act.[84] which reversed the effect of seven of the Court's civil rights rulings, cannot have gone unnoticed by the court. These legislative responses to the judicial nullification of federal civil rights law may have had a salutary effect on the Court. Certainly, there is a limit to how often the Court, a countermajoritarian institution, can risk congressional revision of its decisions.

D. *Attorney Fees*

Burlington v Dague

Fee Enhancement for Contingency Fee Cases under Federal Fee-Shifting Statutes

Scalia J.: **"Contingency enhancement is . . . not consistent with our general rejection of the contingent-fee model for fee awards nor is it necessary to the determination of a reasonable fee."**

Meaningful enforcement of the nation's civil rights laws (and environmental laws) depends on competent legal representation. Recognizing this, Congress has authorized fee awards for prevailing parties in much of this litigation. Also known as fee-shifting provisions, this legislation is necessary because plaintiffs often have insufficient resources to retain counsel and the litigation typically generates too small a recovery to be shared with attorneys to justify a standard contingent fee arrangement. "The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation."[85]

Burlington v Dague[86] considered the issue of whether the award of attorney fees under federal fee-shifting statutes may factor in contingency, the risk of nonpayment due to not prevailing in the

81. See generally Murphy, *The 1988–89 Supreme Court Labor and Employment Law Term*, presented to the ABA Labor and Employment Law Section, Aug 7, 1989, reprinted in 131 Lab Rel Rep (BNA) 530 (Aug 21, 1989).

82. Pub L 100–259, 102 Stat 28 (1988).

83. 465 US 555 (1984).

84. Pub L 102–166, 105 Stat 1071.

85. *Burlington v Dague*, 112 S Ct 2638, 2644 (1992) (Blackmun dissenting).

86. Id at 2638.

case.[87] The majority held (6–3) that contingency already is a factor in the traditional "lodestar" formula used to compute attorney fees but contingency otherwise is not an appropriate consideration.

The identical issue was before the Court in 1987 in *Pennsylvania v Delaware Valley Citizens' Council for Clean Air (Delaware Valley II)*, but the Court then was unable to muster a majority rationale.[88] There four members of the Court held that fee enhancement to reflect contingent risk of nonpayment was never authorized,[89] four justices argued that enhancement for contingency is always statutorily required,[90] and Justice O'Connor argued that consideration of contingency is permitted when "the applicant can establish that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market."[91] Since *Delaware Valley II*, of course, Justices Brennan and Marshall have been replaced by Justices Souter and Thomas.

Under the "lodestar" formula, the majority in *Burlington* reasoned, contingency already is a factor. Contingent risk arises, in part, from the difficulty of establishing the merits. The "lodestar" considers this "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so."[92] Endorsement of contingency enhancement thus creates the risk of duplication of compensation.[93] The other factor contributing to contingency, the legal and factual merits of the claim, is not reflected in the "lodestar." Nor should it be, the majority argued: otherwise "attorneys [would have] the same incentive to bring meritless claims as relatively meritorious ones."[94]

Nor was the majority willing to find statutory authorization for contingency enhancement if the applicant can establish that without it, the prevailing party would have faced substantial difficulties obtaining counsel. Such an approach was seen as essentially an exercise in judging the risk in the particular case in which the party prevailed because the relative lack of merits of a particular case was seen to be the predominant reason why counsel would be unavail-

87. While this case arose under a fee-shifting provision contained in the Federal Water Control Act, its reasoning applies to fee-shifting provisions in Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Civil Rights Attorney Fees Act. Id at 2639.

88. *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 483 US 711 (1987) (*Delaware Valley II*).

89. Id at 723–27.

90. Id at 737–42, 754.

91. Id at 733.

92. *Burlington*, 112 S Ct at 2641.

93. Id.

94. Id.

able absent substantial economic incentive. This, the Court was unwilling to endorse.

In addition, the majority concluded that contingency enhancement would, in effect, provide compensation for meritless litigation, contrary to the command of fee-shifting statutes that provide reimbursement only to prevailing parties. The majority reasoned that "[a]n attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement . . . would in effect pay for the attorney's time . . . in cases where his client does *not* prevail.[95]

Finally, the majority argued that contingency enhancement is not necessary to the determination of a reasonable fee because "the lodestar model often (perhaps generally) results in a larger fee award than the contingent-fee model."[96] Moreover, its adoption would render "the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable."[97]

Writing for the dissent, Justice Blackmun argued that the effect of the majority opinion will be that the expected return from cases brought under federal fee-shifting statutes will be less than those brought in otherwise comparable private litigation. As a result, he argued, "[p]rudent counsel [will] tend to avoid federal fee-bearing claims in favor of private litigation, even in the very situations for which the attorney fee statutes are designed. This will be true even if the fee-bearing claim is more likely meritorious than the competing private claim."[98] After addressing each of the majority's arguments, Justice Blackmun argued that we can expect now that many meritorious claims will not be filed or, if filed, will be prosecuted by less experienced and able counsel—most notably civil rights and environmental cases.[99]

Eliminating the analytical ornamentation from the majority and dissenting opinions, the issue in *Burlington* remains whether a contingency enhancement is necessary to attract competent counsel to litigate claims in the selected federal statutes containing fee-shifting provisions. The majority and dissent view reality diametrically differently. The majority invites lawyers to expend (and add

---

95. Id (emphasis in the original).

96. Id (citing the Report of the Federal Courts Study Commission 104 (Apr 2, 1990)).

97. Id.

98. Id at 2645 (Blackmun dissenting).

99. Justice O'Connor filed a separate dissenting opinion. She reiterated her belief that federal fee-shifting statutes command that the fees awarded should be sufficient to attract competent counsel. In some markets, she argued, "this must include the assurance of a contingency enhancement if the plaintiff should prevail." Id at 2648 (O'Connor dissenting).

to their "lodestar" calculation) a higher number of hours to overcome the difficulty of establishing the merits in complex cases. The majority additionally offers the possibility of the award of a higher hourly rate, commensurate with that paid an attorney "skilled and experienced enough" to prove the merits of a difficult case.[100] District court judges, accordingly, are invited to approve as reasonable a higher number of billable hours and a higher hourly rate to reflect the time and skill needed to overcome the difficulty of prevailing in cases having a high loss risk due to the difficulty of proving the merits. Whether, and if so to what degree, the contingency of litigation is so factored into the lodestar will likely determine whether the majority's or the dissent's view of reality proves more accurate.

IV. Employee Safety and Health

Constitutional Protection

Collins v Harker Heights, Texas

Constitutional Protection against a Municipality's Custom and Practice of Deliberate Indifference Toward Workplace Safety

Stevens J.: **"Neither the text nor the history of the Due Process Clause supports petitioner's claim that a governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause."**

In *Collins v Harker Heights*,[101] the surviving spouse of a deceased municipal employee asked the Supreme Court to determine whether a municipality violates the Due Process Clause of the Fourteenth Amendment when it maintains a custom and policy of deliberate indifference toward the safety of its employees, by not providing the training and equipment necessary to preserve their workplace safety, when this custom and policy results in the death of the employee.

Larry Michael Collins, a municipal sanitation worker, lost his life in the course of his employment. Ordered to enter a manhole to unstop a sewer line, Larry Collins died of asphyxia. He died because his employer, Harker Heights, Texas, had a "custom and policy of deliberate indifference toward the safety of its employees."[102] The municipality, on notice of the risks of entering sewer lines, "systematically and intentionally failed to provide the equipment and training required by Texas statute."[103]

---

100. Id at 2641.
101. 112 S Ct 1061 (1992).
102. Id at 1064.
103. Such were the allegations in the complaint filed by the deceased employee's widow, allegations the Court considered true for the purposes of its decision. See id.

The deceased employee's widow raised the constitutional issue by means of a section 1983 action.[104] To prevail, plaintiff was required to demonstrate (1) that her spouse died as a result of a constitutional violation—that a constitutional tort had been committed, and (2) that the municipality was responsible for that violation.[105] The Court held that causation had been proved, but that the municipality's deliberate indifference to the deceased employee's safety did not violate constitutional rights.

As to the proof of causation, the Court, relying on previous cases, concluded that the constitutional deprivation must have been caused by "official municipal policy [or] government's . . . custom." Proof that government employed a constitutional tort-feasor is insufficient. "[I]n other words, a municipality cannot be held liable under [section] 1983 on a *respondeat superior* theory."[106] A failure to train municipal employees will satisfy the requirement that there be a causal link between a constitutional tort and some municipal policy or custom if the failure to train amounts to "'deliberate indifference' to the rights of persons with whom the [municipal agents] come into contact."[107]

In this case, the deceased employee's widow alleged the municipality's "deliberate indifference toward the safety of its employees."[108] That satisfied the "threshold for holding a city responsible for the constitutional torts committed by its inadequately trained

---

104. 42 USC § 1983.

105. *Collins*, 112 S Ct at 1065. See *Oklahoma City v Tuttle*, 471 US 808, 817 (1985) (opinion of Rehnquist); Id at 828–29 (opinion of Brennan concurring in part and concurring in judgment).

The Court rejected a third requirement imposed by the Fifth Circuit Court of Appeals—that plaintiff also must demonstrate an "abuse of governmental power separate and apart from the proof of a constitutional violation." See *Collins*, 112 S Ct at 1063. The Circuit Court had affixed this additional proof requirement because the civil rights suit was brought by a public employee. Id. See *Myra Jo Collins v City of Harker Heights, Texas*, 916 F2d 284, 287–88 and n3 (5th Cir 1990). The Supreme Court held that "the statute [section 1983] does not draw any distinction between abusive and nonabusive federal violations [and] the employment relationship . . . is not of controlling significance. [The] provisions of the Federal Constitution afford protection to employees who serve the government as well as those who are served by them, and [section] 1983 provides a cause of action for all citizens injured by an abridgement of those protections." *Collins*, 112 S Ct at 1066.

106. *Collins*, 112 S Ct at 1066. Compare *Oklahoma City v Tuttle*, 471 US 808 (1985) (Wrongful conduct by single police officer with no policymaking authority does not establish municipal liability); *Pembaur v Cincinnati*, 475 US 469, 483–84 (1986) (county responsible for unconstitutional conduct of county prosecutor and county sheriff because they were the "officials responsible for establishing final policy with respect to the subject matter in question"). See also *Monell v New York City Dep't of Social Services*, 436 US 658, 694–95 (1978) (neither vicarious liability nor respondeat superior will attach under section 1983).

107. Id at 1068. See *Canton v Harris* , 489 US 378, 388 (1989) (receipt of necessary medical attention while in police custody).

108. Id at 1064.

agents."[109] Plaintiff's case was dismissed notwithstanding, for the complaint did not allege a constitutional violation.

Plaintiff's constitutional theory was that an employee is deprived due process of law (substantive due process) when a municipality by "custom and policy of deliberate indifference toward the safety of its employees [and on notice of the hazards to which employees are exposed] systematically and intentionally fail[s] to provide the equipment and training required [to protect employee lives]."[110]

The Court disagreed. In an exercise of judicial group therapy, the Court acknowledged that the true grounds for decision turn on fundamental choices: (1) about the Court's own institutional competence to federalize (constitutionalize) a ban on a local government's disregard for its worker's safety and health; (2) about the intersection of the majoritarian political process with individual rights enshrined in the Constitution; and (3) about changing the power balances between Washington and the states. Implicitly, the case also is about changing the power relationships between public employees and their employers.

First, citing the need to exercise "judicial self-restraint" "in this unchartered area" where "guideposts for responsible decisionmaking are scarce and open-ended," the Court held that "[n]either the text nor the history of the Due Process Clause supports petitioner's claim that a governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause."[111] The unanimous Court reasoned that due process is a guarantee that government will not exercise its various powers "as an instrument of oppression" to deprive persons of life, liberty, or property without due process of law. The due process clause does not guarantee " 'certain minimal levels of safety and security [or otherwise] impose an affirmative obligation on the state to ensure that [life, liberty or property] do not come to harm through other means.' "[112]

---

109. Id at 1068.

110. Id at 1064.

111. Id at 1069.

112. Id (citing *DeShaney v Winnebago County Dep't of Social Services*, 489 US 189, 196 (1989)). It is, of course, absurd to argue that the text of the due process clause does not support the claim. It never does in any substantive due process case. As to the history of due process clause, clearly the social contract's terms it enshrines never granted government the right to act arbitrarily or capriciously. To conclude no capriciousness here by mere assertion is clumsy.

The Court observed that the complaint never alleged willful or deliberate harm to the deceased by the city or any of its agents. Id. This observation raises the suggestion that a policy or practice of willful or deliberate harm to employees implicates substantive due process rights but "deliberate indifference" to employee safety does not. The difference seems to be one of subjective intent. If it could be shown the

The Court distinguished this case from cases involving the right to minimum safety standards of persons who are in custody (already deprived of liberty by government). There, the "process" due "includes a continuing obligation [by government] to satisfy certain minimal custodial standards."[113] Here, the Court envisioned the deceased as a volunteer: he accepted an offer of employment and had the freedom to leave that employment at will.[114]

One wonders whether Larry Collins, the sewer worker who cleared clogged sewers for a living, considered himself a volunteer. Or was he in economic custody, an economic detainee with a detainee's normal entitlement to the benefit of government's "continuing obligation to satisfy certain minimal custodial standards."[115] Acknowledging the deceased as economically trapped would have been monumental, unprecedented, and, probably, institutionally impossible. How many others in the society also are trapped as economic detainees? Might they also not make constitutional claims on the public coffers as they seek relief from their hunger, homelessness, and ill-health? In our constitutional system, the vicissitudes attendant to a hard life are not of constitutional moment. Plus, one is pressed to ask whether the Court did not also have institutional concerns about creating false hopes, should it assume responsibility to " 'regulate liability for injuries that attend living together in society.' "[116] Putting false promises in the Constitution is risky business.[117]

Addressing plaintiff's alternative argument, the Court stated that a custom and policy of deliberate indifference toward the safety of a municipality's employees cannot "properly be characterized as arbitrary, or conscience-shocking in a constitutional sense" and for that independent reason constitute a violation of due process.[118] The

---

supervisor knew that entering a manhole without breathing equipment meant instant death, why should the law not acknowledge that sending a worker to such a death is a willful and deliberate act?

113. Id at 1070. See, for example, *Turner v Safley*, 482 US 78, 94–99 (1987) (convicted felons); *Revere v Massachusetts General Hospital*, 463 US 239, 244–45 (1983) (persons under arrest); *Youngberg v Romeo*, 457 US 307, 315–16 (1982) (persons in mental institutions); *Bell v Wolfish*, 441 US 520, 535, n16, 545 (1979) (pretrial detainees).

114. Id.

115. Id.

116. Id (citing *Daniels v Williams*, 474 US 327, 332 (1986)).

117. Professor Walter Dellinger, of Duke University, argues that

> [I]t would be wonderful if we could simply declare by constitutional amendment that henceforth the air would be clean, the streets free of drugs and the budget forever in balance. But merely saying those things in the Constitution does not make them happen. Putting false promises in the Constitution is not a trivial matter. It breeds disrespect for the rule of law.

Eric Pianin, *A Balanced Budget Amendment: The Dream and the Debate*, Washington Post A17 (June 2, 1992) (speaking about the balanced budget amendment).

118. *Collins*, 112 S Ct at 1070.

Court recited numerous reasons. They are worth examination as they expose other concerns of the Court, particularly concerns over changing the balance of power between Washington and the states and the interaction of representative government and the right of individuals to impose themselves on the majority.

The Court saw in the death of this worker nothing more than a "fairly typical" state law tort claim. The due process clause, the Court reasoned, " 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.' "[119] Limiting the scope of due process clause protection is especially compelling, the Court argued, when claims are asserted against public employers because state law, rather than the federal Constitution, generally governs the substance of that employment relationship.[120]

Beyond traditions of local governance of tort claims and establishing municipal labor relations policy, the death of Larry Michael Collins summons for the Court concerns about the accommodation of what it describes as questions of "allocation of resources" and "the competing social, political, and economic forces" implicated by " 'incorrect or ill-advised personnel decisions.' "[121] The Court believes that elected bodies have the responsibility to make such accommodations through what the Court considers the "rational decisionmaking process" of the political branches of government. These decisions are not to be made by judges interpreting the Constitution.[122]

The Court is unwilling to be the instrument that shifts new costs on to the states, preferring that "locally elected representatives" should resolve the "host of policy choices that must be made" including "[d]ecisions about allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees. . . ."[123]

A differently configured Supreme Court rationally could have resolved the power allocation issues surrounding the *Collins* case differently. It would be necessary to view this case as about more than "ill-advised" personnel policies and the allocation of scarce resources and see it as about the right to life. To be sure, sewer workers throughout the United States would be empowered at the expense of their government employers. So also would tens of thousands of other public employees.

Probably no Supreme Court in the history of the Republic ever

119. Id (citing *Daniels v Williams*, 474 US 327, 332 (1986)).
120. Id.
121. Id (citing *Bishop v Wood*, 426 US 341, 350 (1976)).
122. Id.
123. Id.

had the will or the power necessary to reconfigure the constitutional values as would have been necessary to grant the plaintiff a victory in this case. For here the plaintiff sought judicial regulation of work place standards, seriously testing the judiciary's institutional competence to craft solutions and the political branches' willingness to tolerate interference.[124] Compared to Larry Michael Collins's widow, Don Quixote was a realist. But some, holdovers from the 1960s, might see the effort as ennobling.

B. *OSHA*

Gade v National Solid Wastes Management Ass'n

Section 18(b)—State's Obligation to Submit State Plan before Licensing Certain Occupations

O'Connor J.: **"[OSHA] pre-empts all [nonapproved] state 'occupational safety and health standards relating to any occupational safety and health issue with respect to which a federal standard has been promulgated.' "**

In its first Occupational Safety and Health Act (OSHA) preemption case, the Court upheld OSHA's strong preemptive power over state licensing laws and, implicitly, over a wide range of other state regulations that might affect workplace safety and health. In the process, however, the Court splintered into several curious factions, eroded states' rights to a considerable degree while preserving much of the states' legislative power within traditional spheres of local interest, and opened issues that it inevitably will revisit. The Court did all of this in *Gade v National Solid Wastes Management Ass'n*[125] without ever mentioning what may have been a driving force in the case—the almost transparent attempt by the state to preserve in-state jobs and discriminate against out-of-state employees and employers.

Prompted by Congress in 1986 in the Superfund Amendments and Reauthorization Act (SARA),[126] the secretary of labor promulgated standards "for the health and safety protection of employees engaged in hazardous waste operations."[127] These included detailed regulations on training requirements for workers engaged in an

124. In this regard, if the behavior here violated the Fourteenth Amendment Due Process Clause, then similar behavior by the federal government would violate the Fifth Amendment Due Process Clause.

125. 112 S Ct 2374 (1992).

126. SARA, Pub L 99-499, Title I, § 126, 100 Stat 1690–92, codified at note following 29 USC § 655.

127. *Gade*, 112 S Ct 2379.

activity that may expose them to hazardous wastes.[128] Those satisfying these training requirements are certified to work in hazardous waste operations. Working without certification is unlawful.

The state of Illinois enacted an overlapping licensing scheme. Its "stated aim" is to "protect both employees and the general public by licensing hazardous waste equipment operators and laborers working at certain facilities."[129] Unlicensed persons working in hazardous waste operations, and employers who knowingly employ them, may be fined.

An employer group sought to enjoin enforcement of the Illinois licensing act, alleging that it was preempted or, in the alternative, that it violated the Constitution's Commerce Clause. The district court held that "dual impact" state laws, those that may regulate workplace safety and health but have a substantial purpose apart from promoting job safety, are not preempted by OSHA. The Illinois licensing acts protected public safety in addition to promoting job safety. They, therefore, were not preempted, except for the requirement that the employee training be conducted within the state of Illinois. This limitation was seen as not contributing to Illinois's "stated purpose" of protecting public safety.[130]

The Seventh Circuit Court of Appeals reversed by split vote the portion of the district court's opinion upholding the Illinois statute.[131] The majority held that unless the state has submitted an approved state plan, OSHA preempts state laws that "constitute[] in a direct, clear, and substantial way, regulation of worker health and safety."[132] The state may not avoid preemption simply by asserting

128. Such employees must receive a minimum of 40 hours of off-site instruction and three days of supervised field experience. On-site managers and supervisors of hazardous waste operations must, in addition, receive eight additional hours of specialized training. Id at 2380. Other employees that frequent hazardous waste facilities infrequently or work at sites only marginally hazardous are required to receive somewhat less training. Id. The federal regulations also require eight hours of annual refresher training.

129. Id. Its training requirements for licensing to work on hazardous waste equipment are considerably more stringent than are the above-mentioned federal requirements. Workers must (1) receive at least forty hours of approved training conducted within the state of Illinois; (2) pass a written examination; (3) complete an eight-hour annual refresher course; and (4) for a crane operator's license, the employee must have 4,000 hours (500 days) of experience with equipment used in hazardous waste handling.

130. Id at 2381. The Commerce Clause issue was dismissed for lack of ripeness.

131. *National Solid Wastes Management Ass'n v Killian*, 918 F2d 671 (7th Cir 1990).

132. Id at 679. Section 18(b) of OSHA permits a state, if it wishes, to "assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated [by the Secretary of Labor under OSHA]." The process for assuming this responsibility is to submit for the secretary of labor's approval a "state plan for the development of such standards and their enforcement."

that the regulation was intended as an environmental regulation or that the rule might advance public safety. Here, Illinois had not submitted a state plan. The case was remanded to the district court to apply the Court's "direct, clear, and substantial" regulation of job safety test.

Writing separately, Judge Easterbrook offered that OSHA preempts only state law that conflicts with OSHA, but that if OSHA does preempt state law more broadly than that, the majority test is appropriate.

Thus, *Gade* presented two issues: First, does OSHA preempt nonconflicting state law, of states that have not obtained approved state plans, when that state law establishes an occupational safety and health standard on an issue for which OSHA has already promulgated a standard? Second, did Congress intend to preempt all nonapproved state occupational safety and health regulations whenever a federal standard is in effect, including preempting "dual impact" laws that address public safety as well as occupational safety?

As to the threshold question regarding the preemptive capacity of OSHA, one would have thought that no real issue existed. Since its enactment in 1970, OSHA has been widely, almost universally, understood to preempt the state regulation of workplace safety and health if (1) a federal standard regarding that workplace safety or health issue has been promulgated, and (2) the state has not had approved, by the secretary of labor, a plan authorizing it to promulgate its own standards.[133]

By the slim margin of 5–4 the Court agreed with this overwhelming view of the lower courts. The majority reasoned that nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect "is impliedly preempted as in conflict with the full purposes and objectives of [OSHA because] the design of [OSHA is] that Congress intended to subject employers and employees to only one set of regulations, be it federal or state. . . ."[134]

Only by securing an approved state plan, the majority continued, may a state "regulate an OSHA-regulated occupational safety and health issue. . . ."[135] Otherwise, there would be no purpose for

---

133. As the majority of the Court in *Gade*, stated,

> [e]very . . . federal and state court confronted with an [OSHA] pre-emption challenge has reached the . . . conclusion [that OSHA] pre-empts any state law or regulation that establishes an occupational health and safety standard on an issue for which [the OSH Administration] has already promulgated a standard, unless the State has obtained the Secretary's approval for its own plan.

112 S Ct at 2386.

134. Id at 2383.

135. Id.

Congress to have provided in OSHA for approved state plans. Moreover, the secretary of labor may approve a state plan only if state standards that affect interstate commerce "are required by compelling local conditions" and "do not unduly burden interstate commerce."[136] If states could enforce job safety standards without filing state plans, thereby circumventing the secretary of labor's approval process, there would be no means to enforce Congress' intent that the states be permitted to set job safety and health standards only if they do not unduly burden commerce and are required by compelling local conditions. In short, any nonapproved state regulation of a job safety or health issue to which a federal standard has been promulgated is preempted.

A surprising four dissenting members of the Court disagreed with the above preemption analysis that had universally been accepted by the courts since the enactment of OSHA—the moderates, Justices Blackmun and Stevens and also Justices Souter and Thomas. They would find preemption only if state regulation conflicts with a federal standard "in the sense that enforcement of one would preclude application of the other."[137] The dissent's reasoning was that Congress preempts either the entire field touched by a federal statute or Congress preempts state regulation that conflicts. Here, Congress did not occupy the field as readily seen by the states' legitimate presence when (1) there is no federal job safety standard, and (2) by the provision for approved state plans. Accordingly, OSHA only preempts conflicting state law.[138] State law conflicts either when it cannot coexist with federal law or when it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[139] Here, state job safety standards do not impede congressional objectives because nothing in the text of OSHA suggests that employers and employees must be subject only to one set of regulations. Congress may well have provided for approved state plans in order to permit states to preempt federal law. Otherwise, nonconflicting nonapproved state law was intended to coexist with federal law.[140] Setting conditions for the secretary's approval of State plans does not require a contrary result. While the secretary would not be able to guard against state standards that burden commerce unduly, except when a state submits a state plan, the Courts would

136. Id at 2384. See OSHA § 18(c)(2).
137. Id at 2391 (Souter dissenting).
138. See id at 2392–93 (Souter dissenting).
139. Id (quoting *Hines v Davidowitz*, 312 US 52, 67 (1941)).
140. Id at 2392.

provide that protection through the dormant Commerce Clause doctrine.[141]

Finding that OSHA preempts nonapproved state standards of OSHA-regulated job safety issues did not end the analysis. The question remained whether the Illinois licensing act, a "dual impact" statute, fell within OSHA's preemptive sweep.

The plurality held that a "dual impact" law is an occupational safety and health standard preempted by OSHA.[142] The OSHA definition of an "occupational safety and health standard" is broad enough to include "dual impact" laws.[143] Moreover, a federal statute's preemptive field is defined not only by a state law's "professed purpose" but also by its effect. If the effect of a "dual impact" law is regulation of job safety and health, then the specter of duplicative regulation looms, contrary to congressional intent. Otherwise, a state could always defeat OSHA preemption by enacting a nonconflicting job safety or health standard and articulating some nonoccupational purpose.[144]

In one final paragraph, however, the plurality delivered states' rights from virtually unbridled federal preemption. Only unapproved state law that " 'constitutes, in a direct, clear and substantial way, regulation of worker health and safety' " is preempted.[145] Accordingly, "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and non-workers alike would generally not be preempted. Although some laws of general applicability may have a 'direct and substantial' effect on worker safety, they cannot fairly be characterized as 'occupational' standards because they regulate workers simply as members of the general public."[146] The Illinois law, by contrast, was directed at workplace safety. That it may have had some salutary effect outside the workplace did not save it from preemption.

Three thoughts come to mind. First, we all can expect some close questions to arise as courts attempt to discern between state laws that regulate job safety and health and laws of general applicability that "regulate the conduct of workers and non-workers alike," (i.e., regulate workers qua members of the public). This principle may be

---

141. Id. Justice Kennedy, concurring, agreed with the plurality on the preemptive scope of OSHA but found express, not implied, preemption. See id at 2389–90 (Kennedy concurring in part and concurring in the judgment).

142. Id at 2386.

143. Id.

144. Id at 2387.

145. Id (quoting with approval the Seventh Circuit Court of Appeals decision in *Gade*, 918 F2d at 679).

146. Id at 2387–88. The Court cited as an example, "licensing practitioners and regulating the practice of professions." Id at 2388.

more easily announced than applied. However it is applied, it is clear that *Gade* will stand as a bulwark against state protective labor legislation in the area of workplace safety and health, at least in those states that do not have state plans.

Second, I am unaware of any OSHA section 18(c)(2) case involving the secretary asserting that approval of a state plan should be denied or revoked because the state is *too aggressively* protecting worker job safety interests. Normally one thinks of the opposite problem. But *Gade* suggests that the secretary may be able to come to the aid of employers suffering from perceived overzealousness of state legislatures in states that have approved plans when state regulation of job safety or health creates an "undue burden on commerce." If *Gade* opens that role for the secretary, that may be the first judicial invitation the secretary has received to throttle workplace safety and health initiatives of states with approved plans.

Finally, throughout the plurality opinion, Justice O'Connor repeatedly argued that the state of Illinois's "stated reason" for enacting its licensing acts should not control. One has to wonder whether the Court credited the state's representation that these were intended to protect workers and the public from adverse effects of improper handling of hazardous materials. This question fairly arises because the clear effect of, for example, requiring 500 days of experience prior to licensing, of requiring successful completion of a written examination approved by Illinois officials, and of requiring substantial training in a course approved by the State of Illinois and held in an Illinois training facility is to give a clear competitive advantage to Illinois residents seeking jobs as hazardous waste handlers. Few, outside the state of Illinois, would likely have accumulated the training credentials necessary for licensing in the Illinois. In short, this statute places an undue burden on the free flow of commerce by discriminating in effect against non-Illinois residents. So viewed, *Gade* is more akin to a section 10(k) determination assigning work jurisdiction than it is a preemption case. It answers the question of who will determine whether a licensing scheme, such as Illinois's, effects an undue burden on commerce: the secretary of labor if asked to approve a state plan incorporating the Illinois scheme (the plurality's choice) or the federal courts through dormant Commerce Clause adjudication (the dissent's choice)? Informing Illinois that its law discriminates against out-of-state residents and, thus, is an undue burden on commerce is as unpleasant as it is necessary. The task is a hot potato that the Court seems happy to throw into the lap of the secretary, the federal institution best able to take the heat. *Gade*, ostensibly a federalism case, may thus be viewed as

a fascinating exercise in separation of powers politics. But, none of the opinions ever acknowledged this.

V. Employee Benefits

A. *ERISA*

Patterson v Shumate

ERISA § 1056(d)(1)—Applicability of Nonalienability Provision in Bankruptcy Proceedings

Blackmun J.: **"[a]n anti-alienation provision in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under 'applicable nonbankruptcy law' for purposes of the . . . exclusion of property from the debtor's bankruptcy estate."**

The federal courts have long been divided over the issue of whether a bankruptcy debtor's interest in an ERISA-qualified pension plan should be included or excluded from estate property available to creditors.[147]

The issue arises because an ERISA-qualified pension plan must contain an anti-alienation provision and the Bankruptcy Code (Code) excludes from the bankruptcy estate the debtor's property that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law."[148] In *Patterson v Shumate*,[149] the Court unanimously held that the ERISA anti-alienation requirement is an "applicable nonbankruptcy law." Therefore, ERISA-qualified pensions are protected from being lost in a bankruptcy proceeding.

The focus of the controversy was whether the Code's reference to "applicable nonbankruptcy law" incorporated only state spendthrift trust law and not federal law such as ERISA. If it did only include state law, as the district court in this case held, the ERISA-qualified pension benefits of the bankruptcy debtor, Joseph Shumate, would have been lost in bankruptcy. For in Virginia, Shumate's home state, Shumate's interest in his pension did not qualify under the state's spendthrift trust law. The Fourth Circuit Court of Appeals reversed the district court. It held that Shumate's interest in his pension should be excluded from his bankruptcy estate because ERISA's anti-alienation requirement for ERISA-qualified plans constitutes a limit on transfer in an "applicable nonbankruptcy law."

Rejecting the district court's crabbed interpretation of the Bankruptcy Code and affirming the court of appeals, the Supreme Court reasoned (1) that nothing in the "plain meaning" of the Code suggests

147. See collected cases in *Patterson v Shumate*, 112 S Ct 2242, 2246 n1 (1992).
148. 11 USC § 541(c)(2).
149. *Patterson*, 112 S Ct at 2248.

that the phrase "applicable nonbankruptcy law" is limited to state law; (2) that when Congress desired to restrict a reference to nonbankruptcy law in other portions of the Code to state law, it did so explicitly; (3) that the legislative history of the Code does not compel a reading of the Code different from its "plain meaning;" (4) that giving the phrase its plain meaning does not make nugatory any other provision of the Code; (5) that protecting ERISA-qualified plans from bankruptcy advances ERISA's goal of providing workers promised defined pension benefits upon retirement if the those benefits have vested; and (6) that the Court's holding here ensures national uniform treatment of pension benefits rather than leaving their protection to the vagaries of state spendthrift trust law.

To be sure, the Court's unanimous opinion limits the inclusion of assets in the bankruptcy estate. Moreover, "isolated excerpts from the legislative history [of the Bankruptcy Code]" somewhat support limiting "applicable nonbankruptcy law" to state spendthrift law, but these considerations could not overcome the "clarity of the statutory language at issue"[150] and the pernicious impact on ERISA policy arising from a holding allowing ERISA-qualified pensions to be lost in bankruptcy in some states but not in others.[151]

Nationwide Mutual Insurance Company v Darden

Definition of Employee—Independent Contractors

Souter J.: **"[W]e adopt a common-law test for determining who qualifies as an 'employee' under ERISA[,] . . . 'the general common law of agency, rather than . . . the law of any particular state.' "**

The scope of the term "employee" in section 3(6) of ERISA[152] is the question answered in *Nationwide Mutual Insurance Company v Darden*.[153] The Court held unanimously that the term "incorporate[s] traditional agency law criteria for identifying master-servant relationships."[154]

Robert Darden brought an ERISA action against Nationwide after Nationwide disqualified him from receiving retirement plan benefits

150. Id.

151. Justice Scalia filed a concurring opinion. He found it "mystifying" that three courts of appeal could have come to a conclusion different from the Court's and scolded them for "depart[ing] from attention to text" and not adhering to "agreed-upon methodology for . . . interpreting text." He saw in such "legal culture" a possible lack of commitment the notion of "'a government of laws, not of men.' " Id at 2250 (Scalia concurring). Only through application of "neutral and rational interpretive methodology" can the legal profession, in his view, maintain as its symbol the "scales, not the see-saw." Id at 2251.

152. Employee Retirement Income Security Act of 1974 (ERISA) § 3(6), 29 USC § 1002(6).

153. 112 S Ct 1344 (1992).

154. Id at 1346.

he had earned over eighteen years of service working as an insurance agent selling Nationwide's insurance policies. The employment contracts included various covenants not to compete following termination of the relationship. These contracts provided that Darden would forfeit his interest in retirement plan benefits Nationwide otherwise was contractually bound to provide Darden should he breach the covenants not to compete. Nationwide ended its relationship with Darden in 1980 and he thereupon, allegedly, breached the covenants not to compete. Nationwide reacted by disqualifying Darden from receiving retirement plan benefits. He sued, alleging an ERISA violation on the theory that his interest in the retirement plan could not lawfully be forfeited because that interest had vested under the terms of ERISA.[155]

Darden sued as a "participant" to enforce the substantive terms of ERISA. To be a "participant" one must be an employee or former employee eligible to receive a benefit of any type from an employee benefit plan.[156] The district court found Darden was not an employee—thus not a "participant": He was an independent contractor. The Fourth Circuit reversed.[157] Acknowledging that Darden would not be viewed an employee under common law principles, the Court, nevertheless, concluded that Darden met the ERISA definition of employee. Examination of the congressional purposes of ERISA, the circuit court reasoned, suggests that one is an employee if that person has a reasonable expectation of receiving pension benefits, if that person relied on this expectation, and if that person "lacked the economic bargaining power to contract out of the benefit plan's forfeiture provisions."[158] On remand, the district court found that Darden met this definition of employee and the court of appeals affirmed.[159]

Reversing the court of appeals, the Supreme Court first summarized the many contexts that it previously had interpreted the word "employee" in federal law and had concluded that Congress intended to incorporate the " 'conventional master-servant relationship as understood by common-law agency doctrine.' "[160] Absent evidence to the contrary, the Court stated, it will assume that when Congress adopts terms with common law meaning its intent is to give those

---

155. 29 USC § 1053(a).

156. *Nationwide*, 112 S Ct at 1347.

157. 796 F2d 701 (1986).

158. *Darden v Nationwide Mutual Ins. Co.*, 922 F2d 203, 205 (4th Cir 1991) (*Darden II*) (summarizing *Darden I*).

159. *Darden II*, 922 F2d at 205.

160. *Nationwide*, 112 S Ct at 1348 (quoting *Community for Creative Non-Violence v Reid*, 490 US 730, 739–40) (1989)). The Court distinguished its more expansive definition of employee in the Fair Labor Standards Act (FLSA). Certain language appearing in FLSA is absent in ERISA. See discussion, id at 1350.

terms their common law definition.[161] While it is true that in the past the Court has announced that statutory terms should be interpreted in light of a statute's purpose, too often when that rule of construction has been applied to give the term "employee" a meaning other than its common law meaning, the Congress has responded by amending the statute so construed to incorporate the common law definition.[162] As the Court concluded, "a principle of statutory construction can endure just so many legislative revisitations."[163]

At common law, the hiring party's "right to control the manner and means by which the product is accomplished" is the critical factor for determining whether one is an employee.[164] The Court remanded this case to the court of appeals to apply this "right to control" test, that is, by " 'assessing all of the incidents of the relationship.' "[165]

Nationwide promises to become a very important ERISA case as those of you who practice regularly in the ERISA area no doubt readily recognize. Even without the benefit of that expertise, I can see several significant issues.

First, Darden's difficulty was that, arguably, he was an independent contractor. Others might be found not to be employees under common law master-servant doctrine because, for example, they are the masters—the owners of companies, the chief executive officers of companies, lower ranking officers of companies, managerial personnel, or supervisors. Literally thousands of ERISA-qualified plans cover such persons. Does *Nationwide* mean that none of these persons may enforce rights secured by ERISA?[166]

For example, in *Patterson*, the other ERISA case decided this term and discussed immediately above, Shumate, the person whose retirement benefits were put at risk by bankruptcy proceedings, was the president and chair of the board of directors of the Coleman Furniture Corporation when it filed for bankruptcy and when Shumate himself filed for bankruptcy. At the Supreme Court, the issue of whether he was an ERISA "employee" of Coleman was never raised. If he were not an "employee," his pension could not be shielded from bankruptcy by ERISA's anti-alienation provisions. If, on the other hand, the president and chair of the board of directors

---

161. Id at 1348.

162. See discussion, id at 1349.

163. Id.

164. Id at 1348 (quoting *Reid*, 490 US at 751–52).

165. Id at 1349 (quoting *NLRB v United Ins. Co. of America*, 390 US 254, 258 (1968)). See also id at 1348 (listing authoritative sources for identifying a master-servant relationship).

166. Compare *Kwatcher v Massachusetts Service Employees Pension Fund*, 879 F2d 957 (1st Cir 1989) (sole shareholder/employee of corporation ineligible to receive benefits from ERISA plan due to anti-inurement provision of ERISA).

has ERISA protection because that person is found to be a common law servant but Darden, who sold insurance exclusively for Nationwide for eighteen years, is found to be a common law master, then some might conclude that in a kinder and gentler America the law protects the masters by calling them servants and harms the servants by calling them masters. Some may see an unacceptable irony in such an application of labor protective legislation and call for legislative "revisitation."

Second, ever since the Eighth Circuit Court of Appeals' 1965 decision in *Blassie v Kroger Co.*,[167] drafted by Justice Blackmun while he served on that court, owners and chief executive officers of corporations have been permitted to participate in Taft-Hartley trusts even though such trusts must be created for the sole and exclusive benefit of "employees." Will the constricted definition of employee in ERISA now drive the definition of "employee" for purposes of Taft-Hartley section 302(c)(5) trusts? If yes, every Taft-Hartley trust that includes persons who are not "employees" under common law master-servant doctrine is in violation of Taft-Hartley section 302(c)(5), a criminal statute. In certain industries (e.g., the construction industry) participation by owners and supervisors in pension and welfare plans is quite common.[168] If Congress did not intend the term employee in section 302(c)(5) to be limited to common law definitions of employee, then why did Congress choose a narrower definition of employee in ERISA? Justice Blackmun was not heard from in *Nationwide* and the Court had no reason to address the section 302(c)(5) issue. At a minimum, *Nationwide* opens for reexamination the scope of permissible participation in Taft-Hartley section 302(c)(5) trusts.

B. *Intergovernmental Tax Immunity*

Barker v Kansas

Validity of State Tax on Pensions of Retired U.S. Military Personnel While Exempting from Taxation Retirement Income of Retired State and Local Employees

White J.: **"[T]he Kansas Supreme Court's conclusion that, for purposes of state taxation, military retirement benefits may be characterized as current compensation for reduced current services does not survive analysis in light of the manner in which these benefits are calculated, our prior cases, or**

---

167. 345 F2d 58 (8th Cir 1965)("[T]he president of a corporation is its employee[[s]]"). Id at 73.

168. [U]nions may have a strong interest in permitting employers to participate in their employees' pension and welfare trusts as a way of investing the employer in the long-term health of the trust.

congressional intent as expressed in other provisions treating military retirement."

Soon following the Court's decision in *Davis v Michigan Dep't of Treasury*,[169] two class actions were filed. Together they comprised 14,000 military retirees. These actions sought declaratory and injunctive relief against the state of Kansas, which taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees. The actions, consolidated in *Barker v Kansas*,[170] also sought a refund of any taxes paid on military retirement benefits by class members for the tax years 1984 through 1989.

Plaintiffs primarily advanced two theories: (1) that the Kansas tax was inconsistent with 4 USC § 111, which authorizes states to tax pay received by United States employees "if the taxation does not discriminate against the . . . employee because of the source of the pay. . . ."; and (2) that the tax violated constitutional principles of intergovernmental tax immunity.

Just three Terms previously, in *Davis*, the Court had invalidated under section 111 the Michigan income tax imposed on federal civil service retirees. The issue in *Barker* was whether, applying the approach of *Davis*, the Kansas scheme also was unlawful. The trial court had granted summary judgment for the State of Kansas and the Kansas Supreme Court had affirmed.[171] Other state courts had found that similar taxing systems were invalid under the approach adopted by the Supreme Court in *Davis*. The Supreme Court reversed and found the Kansas law invalid.

In *Davis*, the Court made the pivotal finding that section 111 paralleled the prohibition against discriminatory taxation embodied in the modern constitutional doctrine of intergovernmental tax immunity: that the Court will inquire "whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.' "[172]

In *Barker*, the state proffered a variety of significant differences between military retirees and state and local retirees to justify the discriminatory tax treatment of their retirement benefits.[173] The principal argument Kansas raised was that " 'federal miliary retirement benefits are not deferred compensation but current pay for continued readiness to return to duty.' "[174] The Supreme Court,

---

169. 489 US 803 (1989).
170. 112 S Ct 1619 (1992).
171. See id at 1623.
172. Davis, 489 US at 813 (quoting *Phillips Chemical Co. v Dumas Independent School Dist.*, 361 US 376, 383 (1960)).
173. See discussion, *Barker*, 112 S Ct at 1622–23.
174. Id at 1622 (quoting *Barker*, 249 Kan 186, 196, 815 P2d 46, 53 (1991)).

acknowledging that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall,"[175] concluded, nevertheless, that military retirement pay bears the most important features of deferred compensation: The amount is calculated on the basis of years of service and not present duties. Moreover, the Court's precedents suggest that military retirement pay has been viewed as deferred compensation, and the Act's legislative history shows Congress intended to treat military retirement pay as deferred compensation.[176]

The Court ended its analysis with an extraordinary suggestion of duplicity by the state of Kansas. The Court stated that "[t]he State's position is weakened further by another fact, that Kansas tax law considers military retirement benefits as current compensation under its general income tax provision but it does not for IRA deductibility purposes."[177] The Court concluded: "[A]s the United States persuasively contends, 'The State's failure to treat military retired pay consistently suggests that the State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimination against federally funded benefits.' "[178]

VI. Workers' Compensation

A. *Federal Employers' Liability Act (FELA)*

Hilton v South Carolina Public Railways Commission

Coverage of State-Owned Railroads for Suits Brought in State Court

Kennedy J.: **"[M]aking the States' liability or immunity [under federal statutes] the same in both federal and state courts has much to commend it. . . . [B]ut symmetry [should not] override just expectations which themselves rest upon the predictability and order of *stare decisis*."**

Extension of federal workers' compensation statutes to the state governments acting as employers has been the source of considera-

---

175. Id at 1623.

176. See discussion, id at 1623–25. The Court pointed out that Congress has given the states the option of applying their community property laws to military retirement benefits. "To extend to states the option of deeming such benefits as part of the marital estate as a matter of state law would be inconsistent with the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services." Id at 1625.

177. Id at 1626.

178. Id (quoting Brief for the United States as *Amicus Curiae* 22). Justice Stevens (joined by Justice Thomas) concurred. He recited the essence of his dissent in *Davis* but, concurring here, stated that he wrote separately "because what I regard as this Court's perverse application of the nondiscrimination principle is subject to review and correction by Congress." Id.

ble litigation over the years.[179] *Hilton v South Carolina Public Railways Commission*[180] represents the most recent chapter of that controversy. Here, the Court reaffirmed that the Federal Employees Liability Act (FELA)[181] creates a cause of action against a state-owned railway, enforceable in state court. A contrary holding would have stripped all FELA (and probably Jones Act) protection from workers employed by the states.

Thirty years ago in *Parden v Terminal Railway of Alabama State Docks Dep't*[182] the Court held that the FELA authorizes damage suits against state-owned railways and by entering the railroad business a state waives its Eleventh Amendment immunity from suit in federal court. Subsequently, the Court decided *Welch v Texas Dep't of Highways and Public Transportation.*[183] There it held that the Jones Act does not abrogate state's Eleventh Amendment immunity. It did not reach the question of whether the Jones Act (or the FELA) creates a cause of action against the states enforceable in state court.

Since the Jones Act incorporates the remedial scheme of the FELA, *Welch* raised the question whether *Parden* had in effect been overruled by *Welch*. *Hilton* resolved that uncertainty, holding (6–2)[184] that *Parden* remains, in part, good law.

In *Hilton*, an employee of the South Carolina Railway Commission suffered a job-related injury. He filed a FELA action in federal court. After the Supreme Court's decision in *Welch*, however, the employee withdrew his federal court action and refiled his FELA claim in a South Carolina state court. That eliminated the Eleventh Amendment infirmity of the prior suit but left intact the issue of whether in FELA Congress intended to create a cause of action against the states—the issue left unresolved in *Welch vis à vis* the Jones Act.

The South Carolina court dismissed the FELA action. It relied on a recent decision of its state supreme court, *Freeman v South Carolina Public Railways Commission.*[185] In *Freeman*, the South Carolina Supreme Court found that, contrary to the statutory construction of the United States Supreme Court in *Parden*, Congress did not intend in FELA to create a cause of action against the states.

---

179. See, for example, *Welch v Texas Dep't of Highways and Public Transportation*, 483 US 468 (1987) (Jones Act did not abrogate state's Eleventh Amendment immunity—discussing the ongoing controversy); *Parden v Terminal Railway of Alabama State Docks Dep't*, 377 US 184 (1964) (FELA authorizes an action for money damages against an agency of the state, even if the suit is maintained in a state forum.).

180. 112 S Ct 560 (1991).

181. 45 USC §§ 51–60.

182. 377 US 184 (1964).

183. 483 US 468 (1987).

184. 112 S Ct 560. Justice Thomas did not participate in this decision.

185. 302 SC 51, 393 SE2d 383 (1990).

It found "determinative" a section 1983 decision of the Supreme Court[186] holding that the state is not suable under section 1983, either in a state or federal forum, absent a clear statement in that statute manifesting a congressional intent to impose liability on a state.[187] From this reasoning, the South Carolina Supreme Court synthesized a general rule: A statute will not be interpreted to create a cause of action for money damages against a state unless it contains "unmistakenly clear language" manifesting a congressional intent to do so. The *Freeman* court found no such clear language in FELA.

The so-called "plain statement" rule, applied as a rule of statutory construction in *Will*, conforms to the current methodology in Eleventh Amendment cases to determine whether Congress abrogated the states' immunity from suit in federal court.[188] The decision of the South Carolina Supreme Court implicitly argued that symmetry must be achieved by imposing the "plain statement" rule both when the issue is whether Congress abrogated the states' Eleventh Amendment rights not to be sued in a federal court and also whether Congress intended to create a cause of action against the states enforceable in state courts.

In *Hilton*, the United States Supreme Court majority, speaking through Justice Kennedy, noted that FELA covers "[e]very common carrier by railroad" and expressed reluctance to reverse *Parden*, a twenty-eight year old precedent which had interpreted that language to include state-owned railroads. *Stare decisis*, the Court mused, is of " 'fundamental importance to the rule of law.' "[189] It "promotes stability, predictability, and respect for judicial authority."[190] Precedent should not be disturbed absent compelling reasons. Relying on notions of separation of powers, the Court offered that *stare decisis* in the context of statutory interpretation raises considerations having " 'special force [because] the legislative power is implicated, and Congress remains free to alter what we have done.' "[191] Noting that Congress has for almost thirty years chosen not to correct the statutory interpretation in *Parden*, and noting that many persons have relied on it and that a reversal "would dislodge settled rights

186. 42 USC § 1983.

187. *Will v Michigan Dep't of State Police*, 491 US 58 (1989).

188. See, for example, *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985).

189. *Hilton*, 112 S Ct at 563 (quoting *Welch*, 483 US 468, 494 (1987)).

190. Id at 564. See *Vasquez v Hillery*, 474 US 254, 265–66 (1986).

191. *Hilton*, 112 S Ct at 564 (quoting *Patterson v McLean Credit Union*, 491 US 164, 172–73 (1989)). The negative implication, of course, is that *stare decisis* is less compelling in the context of constitutional interpretation.

and expectations or require an extensive legislative response," the majority refused to reverse *Parden*.[192]

The symmetry achieved by using the "plain statement" rule both as a rule of constitutional law and as a canon of statutory construction is appealing, but "symmetry is not an imperative that must override just expectations which themselves rest upon the predictability and order of *stare decisis*."[193]

Protecting the reliance interests created here by "longstanding statutory construction"[194] generates certain federalism costs. The most significant, perhaps, is federal appropriation of state courts as the exclusive forum for enforcing FELA rights against an unwilling state government. This cost can be halted should Congress choose to amend FELA and by "plain statement" abrogate the states' Eleventh Amendment immunity from FELA suits in federal court. Until then, federal FELA rights of state employees will be left to the care and protection of state court judges, some of whom may prefer not to be so imposed upon by the federal government.

Finally, it does seem clear, as it has since the decision in *Will*, that absent the buildup of substantial reliance interests from well-entrenched precedent, the Court will refuse to find a congressional intent to create a cause of action against the state, absent a "clear statement" to that effect. *Hilton*, nevertheless, produces understandable anxiety in those fearing that certain objectionable Warren Court precedent will be frozen into current jurisprudence. Whether *Hilton* will have that effect, will depend on how the lower courts divine the amount of congressional silence that manifests concurrence with precedent and how much reliance, and by whom, will be deemed necessary to implicate the *Hilton* exception to the general rule set out in *Will*. On the answer to these questions may rest the continued viability of Warren Court precedent applying labor and social legislation to the states.

---

192. Id at 564. The court noted that many state workers' compensation statutes exclude railway employees on the assumption that FELA provides adequate coverage. Id. The Court also expressed concern that a reversal of *Parden* would raise doubt regarding the application of other federal railway legislation to the states, such as the Safety Appliance Act and the Railway Labor Act. Id.

193. Id at 566. The dissent (O'Connor joined by Scalia) somewhat bitterly disagreed. The dissent argued that the constitutional balance between the States and the Federal Government is upset just as much when the federal government forces the state to entertain a damage suit against itself in its own courts as when it is forced to defend those suits in federal court. Both implicate the states' sovereign immunity, which Congress has the power to abrogate. The dissent saw no reason to apply the "plain statement" rule to ascertain abrogation as to one aspect of state sovereign immunity but not to the other. Id at 566–70.

194. *Hilton*, 112 S Ct at 566.

B. *Longshore and Harbor Workers' Compensation Act*

Southwest Marine v Gizoni

Exclusion from Jones Act Coverage Because Occupation is within LHWCA

White J.: **"[T]he [Longshore and Harbor Workers Compensation Act] preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. . . . 'It is not the employee's particular job that is determinative [of LHWCA rather than Jones Act coverage], but the employee's connection to a vessel. . . .' Because a ship repairman may spend all of his working time aboard a vessel in furtherance of its mission,—even one used exclusively in ship repair work—that worker may qualify as a Jones Act seaman."**

Estate of Cowart v Nicklos Drilling Co.

Effect of Compromise by Employee with Third-Party Tort-Feasor on Employer/Carrier Liability

Kennedy J.: **"The [Longshore and Harbor Workers Compensation Act] is unambiguous in providing forfeiture whenever an LHWCA claimant fails to get written approval from his employer of a third-party settlement."**

The Longshore and Harbor Workers' Compensation Act (LHWCA or the Act)[195] requires employers to provide compensation, "irrespective of fault," for injuries and death of workers while employed upon the navigable waters of the United States. In return, the Act grants the employer immunity from tort liability, regardless of the egregiousness of its fault. Benefits under the LHWCA are set out in schedules in the Act and are limited, generally, to medical benefits and two-thirds of lost earnings.

This term the Court considered two LHWCA cases: *Southwest Marine, Inc. v Gizoni*,[196] and *Estate of Cowart v Nicklos Drilling Co.*[197] *Southwest Marine* settled a circuit split regarding exclusion from Jones Act[198] coverage because a worker's occupation is within the scope of the LHWCA. *Estate of Cowart v Nicklos Drilling Co* entailed no circuit split but reversed a longstanding and widely accepted interpretation of the LHWCA that concerns the effect of compromise by an employee with a third-party tort-feasor on an employer's liability under the LHWCA.

In *Southwest Marine*, a rigging foreman was injured seriously

195. 33 USC §§ 901 et seq.
196. 112 S Ct 486 (1991).
197. 112 S Ct 2589 (1992).
198. 46 USC App § 688.

while working on a towed floating platform used to transport a ship's rudder from the shipyard to a dry dock. He submitted a claim and received medical and compensation benefits voluntarily from Southwest Marine pursuant to the LHWCA. He later sued Southwest Marine under the Jones Act alleging he was a seaman injured as a result of his employer's negligence.

In the Jones Act claim, the district court held, as a matter of law and based solely on the employee's job title and occupation, that he was not a Jones Act seaman.[199] The district court also found that since the employee was a harbor worker, his Jones Act action was precluded by the exclusive remedy provisions in the LHWCA.[200] The Ninth Circuit reversed, holding that status as a seaman under the Jones Act is a jury question. It cannot be determined as a matter of law, based on job title and occupation. In *Southwest Marine*, the Supreme Court affirmed the court of appeals unanimously.[201] It reasoned that certain occupations engaged in by harbor workers clearly are covered by the LHWCA. The ship rigger occupation, for example, is one. But the LHWCA excludes "a master or member of a crew of any vessel" (a " 'refinement' of the term 'seaman' in the Jones Act")[202] from its definition of employees covered by the LHWCA.[203] Thus, "the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard" because "it is not the employee's particular job that is determinative [of LHWCA rather than Jones Act coverage], but the employee's connection to a vessel."[204] Because a ship repairman may spend all of his working time aboard a vessel in furtherance of its mission—even one used exclusively in ship repair work—that worker may qualify as a Jones Act "seaman." Accordingly, in each case, a factual question arises whether a harbor worker also has seaman status. " '[I]t will depend on the nature of the vessel, and the employee's precise relation to it . . . [A] seaman must be doing the ship's work.' "[205]

---

199. *Southwest Marine*, 112 S Ct 486, 490. The district court reinforced the conclusion that plaintiff was not a Jones Act seaman by also finding that the floating platforms on which he worked were not "vessels in navigation." Id.

200. Id. Under the LHWCA, the liability provided by that statute "shall be exclusive and in place of all other liability of such employer to the employee. . . ." 33 USC § 905(a).

201. 112 S Ct 486. Justice Thomas did not participate in the decision.

202. Id at 491 (citing *McDermott Int'l v Wilander*, 111 S Ct 807, 813 (1991)).

203. 33 USC § 902(3)(G). See *Southwest Marine*, 112 S Ct at 491.

204. See id at 492.

205. Id (citing *McDermott*, 111 S Ct at 817–18).

The Court rejected several rebuttal arguments. First, the Court rejected as inapposite that it previously had held that the LHWCA provides the exclusive remedy for certain injured rail workers otherwise permitted by the Federal Employees' Liability Act (FELA), 45 USC §§ 51 et seq to pursue a negligence cause of action. The LHWCA does not contain an exemption for rail workers as it does for "a member of a crew of any vessel," the Court reasoned. *Southwest Marine*, 112 S Ct at 492–93. The Court

Estate of Cowart v Nicklos Drilling Co.[206] presented a much more contested question of statutory construction. Here, the Court confronted a provision in the LHWCA that permits injured workers, without forgoing compensation under the LHWCA, to pursue claims against third parties. LHWCA section 33(g) provides that, under certain circumstances, if a third-party claim is settled without written approval of the worker's employer, all future benefits under LHWCA are forfeited.[207] The issue presented was whether the forfeiture provision applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act.

Briefly, Floyd Cowart suffered an injury to his hand in 1983 while working on an oil platform. The injury was covered by the LHWCA. The Department of Labor notified Cowart's employer, Nicklos Drilling Co., that Cowart was owed permanent disability payments in the amount of approximately $35,000 plus penalties and interest. This was an informal notice that did not constitute an award. No payments were made.

Meanwhile, Cowart sued the owner of the oil drilling platform, Transco Exploration Company (Transco), alleging that its negligence caused his injury. Cowart received approximately $29,000 from a $45,000 settlement with Transco, the remainder going to attorney fees and other expenses. Nicklos had actual notice of the settlement because Nicklos funded it under an indemnification agreement with

---

also rejected Southwest Marine's primary jurisdiction argument, holding that Congress did not intend that district courts stay Jones Act litigation pending a final LHWCA "administrative agency" determination that the Jones Act plaintiff is, in fact, a "master or member of a crew." Id at 493. Finally, recognizing that the employee here, prior to initiating his Jones Act claim, had received voluntary LHWCA benefits from his employer, the Court held that it is " 'universally accepted' " that the employee is not for that reason also barred from seeking Jones Act relief. Id. The LHWCA provides that "any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA." Id at 494.

206. 112 S Ct 2589 (1992).

207. Section 33(g) provides, in part:

> (g) Compromise obtained by person entitled to compensation
>
> (1) If the person entitled to compensation . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed. . . .
>
> (2) If no written approval of the settlement is obtained . . . or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

Transco. Cowart, however, did not secure from Nicklos a formal, prior, written approval of the Transco settlement.

After settling, Cowart sought the remaining disability payments owed by Nicklos under the LHWCA. Nicklos denied liability, alleging that Cowart had forfeited his benefits by failing to secure approval of the settlement from Nicklos and its insurance carrier. "Counsel for [Nicklos] stated during oral argument [before the Supreme Court] that he had used the Transco settlement as a means of avoiding Nicklos' liability under the LHWCA."[208]

For more than fourteen years, the director of the Office of Workers' Compensation Programs (OWCP) interpreted section 33(g)'s forfeiture provisions as applying only to injured employees whose employers were making permanent compensation payments, whether voluntary or pursuant to an award. This view first was adopted in 1977 by the Benefits Review Board (Board or BRB) in *O'Leary v Southeast Stevedoring Co.*[209] and endorsed unanimously by the Ninth Circuit Court of Appeals.[210] Section 33(g) was amended in 1984. Congress redesignated section (g) as subsection (g)(1) and added the current subsection (g)(2).[211] Subsequent to that revision, the BRB, in 1986, held in *Dorsey v Cooper Stevedoring Co.* that the 1984 amendments had not altered the Board's previous view that section 33(g)'s forfeiture language had no applicability except in cases when an employer is making voluntary payments under the Act or has been found liable for benefits by a judicial determination.[212] This view was affirmed unanimously by the Eleventh Circuit Court of Appeals.[213] Congress was presumed to have adopted the Board's previous interpretation and nothing in the legislative history of the 1984 amendments disclosed an intent to overrule the BRB's interpretation.

Cowart's claim fell within this well-established precedent. The administrative law judge and the BRB in his case each so held. The Department of Labor's Director of OWCP also agreed, and indeed entered an appearance on behalf of Cowart when the matter came first before a panel of the Fifth Circuit Court of Appeals and then before that Court rehearing the case *en banc*.[214] The Fifth Circuit Court of Appeals, nevertheless, reversed.[215]

After certiorari was granted in this case, and after Cowart's

---

208. *Cowart*, 112 S Ct at 2598.
209. 7 Ben Rev Bd Serv (MB) 144 (1977).
210. 622 F2d 595 (9th Cir 1980).
211. See text of the section as presently constituted, cited in note 213.
212. 18 Ben Rev Bd Serv (MB) 25 (1986).
213. See *Cooper Stevedoring Co. v US Dep't of Labor*, 826 F2d 1011 (11th Cir 1987).
214. *Cowart*, 112 S Ct at 2593; id at 2598–99 (Blackmun dissenting).
215. 907 F2d 1552 (5th Cir 1990).

opening brief was filed, the United States reversed positions. The director of the OWCP informed the Court that after "reexamin[ing]" its position, it now was of the firm view that the position it had advocated for fourteen years and had advocated before the court of appeals was contrary to the Act's "plain meaning."[216] A divided Supreme Court (6–3) agreed with the Labor Department's newly discovered interpretation of section 33(g). This conclusion threatens to strip LHWCA claims from thousands of injured employees.[217]

The majority examined the language of section 33(g) and agreed with the government that its "plain meaning" left no room for interpretation.[218] The LHWCA, the Court held, is unambiguous in providing forfeiture whenever a LHWCA claimant fails to get written approval from his employer of a third-party settlement. Cowart, Justice Kennedy wrote for the majority, "made a mistake" that cost him and his estate his LHWCA benefits.[219]

As might be expected, the majority's statutory interpretation arguments are rational. But so are the dissent's.[220] That is the nature of statutory interpretation arguments: There usually are plenty to go around. The one thing eminently plain in this case, however, is that the "plain language" of section 33(g) is anything but plain.[221] One need only focus briefly at the Labor Department's fourteen-year effort to understand the section, consider that the BRB interpreted section 33(g) twice in a manner rejected as contrary to "plain meaning," further consider that two unanimous courts of appeals decisions also missed this "plain meaning" when they concurred with the BRB's interpretation, and concentrate on the director of the OWCP's shifting stance in this very case. It is pure fantasy to think that what this case is about is a majority helplessly compelled to an outcome driven by the "plain language" of the LHWCA section at issue.

Clarity can begin to emerge by considering the practical effect of the majority's holding in *Cowart*.

The aspiration of the LHWCA is that employers liable for benefits will pay compensation "promptly," "directly," and "without an

---

216. *Cowart*, 112 S Ct at 2594; id at 2599, 2602 (Blackmun dissenting).

217. Id at 2598; id at 2599 (Blackmun dissenting).

218. Id at 2593–94. The Court found support also in the structure of the Act as a whole and in the fact the Department of Labor's lack of consistent understanding of the sweep of section 33(g). Id at 4694–95.

219. Id at 2592.

220. Compare id at 2594–98 with id at 2598–2608 (Blackmun dissenting).

221. See text of section, cited in note 213.

award" having to be issued.[222] Under the BRB's view of section 33(g), rejected by the majority in *Cowart*, this goal would be encouraged.

When both an employer owing compensation under the LHWCA and a third party are liable for an employee's injury, the LHWCA does not require the employee to make an election. The employee may sue to recover from a third party. The amount of any recovery (including any settlement) is set off against the amount the employer owes under the LHWCA.[223] Accordingly, the employer has an interest in not having to pay excessive compensation because of an employee's "lowball" settlement.[224] Section 33(g) is the statutory vehicle for protecting that legitimate interest.

The BRB interpretation of section 33(g) advances the statutory goal of prompt payment of compensation without the necessity of a formal award because only an employer currently making compensation payments would be protected by section 33(g). Employers thus are provided an incentive to provide compensation payments voluntarily if they desire the section 33(g) protection against their employee's "lowball" settlements with third parties.

The view of the majority in *Cowart* has the opposite effect of encouraging employer delay. It also strengthens an employer's hand in negotiating with an injured employee and promises to relieve employers of all LHWCA liability. The BRB explained this well in *O'Leary*.[225]

> If a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons. . . . This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without [an] employer's consent to obtain money.

The majority acknowledged the "harsh effects" of its ruling and the "stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary. It also provides a powerful tool to employers who

---

222. See LHWCA § 14(a). The "underlying concept" of the LHWCA is that "the employer upon being informed of an injury will voluntarily begin to pay compensation." *O'Leary v Southeast Stevedoring Co.*, 7 Ben Rev Bd Serv (MB) 144, 147 (1977).

223. See LHWCA §§ 33(a), (b) & (f).

224. See discussion, *Cowart*, 112 S Ct at 2599 (Blackmun dissenting).

225. 7 Ben Rev Bd Serv (MB) at 149.

resist liability under the Act."[226] The dissent summarized these adverse policy implications:

> As *O'Leary* made clear, allowing employers to escape all LHWCA liability by withholding approval from any settlement, while refusing to pay benefits or acknowledge liability, could hardly be thought consistent with the purpose of encouraging prompt, voluntary payment of LHWCA compensation.[227]

Citing not one statutory purpose advanced by its decision, the majority disclaims responsibility for these "harsh effects." What could the majority do? After all, the "plain meaning" (and the government's newly discovered interpretation) compelled the outcome.

C. *State Workers' Compensation Statutes—Constitutional Issues*

General Motors Corp. v Romein

Contracts Clause and Due Process Protection against State Modification of Employer Liability under State Workers' Compensation Statute

O'Connor J.: **"[P]etitioner's suggestion that we should read every workplace regulation into the private contractual arrangements of employers and employees would . . . severely limit the ability of state legislatures to amend their regulatory legislation. Amendments could not take effect until all existing contracts had expired. . . ."**

In what qualifies as the most mystifying grant of certiorari of the Term, given the result, the Court unanimously upheld the Michigan Supreme Court on an issue that appears never to have been litigated previously, and certainly one that had not generated a split among the federal or state courts. Why the Court granted certiorari only to uphold the lower court on an issue that had generated no split may be the subtext story of *General Motors Corp. v Romein*.[228]

In 1980, after several years of legislative wrangling, the Michigan legislature amended its workers' compensation statute in two ways: It raised compensation benefits for workers injured after 1980 and it authorized an annual supplemental adjustment to workers injured prior to 1980.

In 1981, the Michigan legislature enacted another workers' compensation statute. It provided for what became known as "benefit coordination": An employer was permitted to decrease workers' compensation payments to disabled workers eligible to receive wage-

226. *Cowart*, 112 S Ct at 2598.
227. Id at 2602 (Blackmun dissenting).
228. 112 S Ct 1105 (1992).

loss compensation from other employer-funded sources. The 1981 statute was effective March 31, 1982. It did not state whether the benefit coordination provisions were applicable to all disability payment periods after the statute's effective date, irrespective of when the disabled worker first qualified for workers' compensation or whether it applied only to those qualifying for workers' compensation after the statute's effective date. Some employers in Michigan applied benefits coordination to all disabled workers irrespective of when they were injured; some applied it only prospectively.

A judicial battle in state court finally resolved the question. The Michigan Supreme Court sided with those who argued that the 1981 statute's benefit coordination provisions apply to all payment periods after its effective date, regardless of the date the disabled worker had been injured.[229] Many Michigan employers who had not applied benefit coordination retroactively soon demanded reimbursement from employees. Before the Michigan Supreme Court ruled on a motion for reconsideration, however, legislation was introduced in the Michigan legislature to reverse the effect of *Chambers*. Enacted in 1987, this legislation provided (1) that employers who had not coordinated benefits prior to *Chambers* could not now seek reimbursement from affected employees, and (2) that employers who had coordinated benefits of previously disabled workers under the 1981 law must refund the benefits withheld.

As a result of the 1987 statute, petitioners in this case were ordered to refund nearly $25 million. They alleged that the refund order was unconstitutional: The retroactivity of the 1987 statute was alleged to have impaired the obligation of contract, in violation of the Constitution's Contract Clause,[230] and violated the Due Process Clause.

In Contract Clause cases, the threshold issue is whether there was a contract that state law substantially impaired. Here the Court held there was not.

General Motors argued that implicit in every employment contract is a promise, required by the state's workers' compensation law, that the employer promises to pay the amount of workers' compensation legally required for each payment period. Having performed this obligation, by making payments for any disability

---

229. *Chambers v General Motors Corp.*, 375 NW2d 715 (1985). This ruling was contrary to a concurrent resolution of both houses of the Michigan legislature that declared that the benefit coordination provisions of the 1981 statute "was 'not designed' to disrupt benefits which were already being received by date." *Cowart*, 112 S Ct at 1108 (quoting Senate Concurrent Resolution 575, adopted by the Senate on Apr 1, 1982, and by the House on May 18, 1982. 1982 Senate J 626, 706–07; 1982 House J 1262).

230. Article I, section 10 of the Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

period, the employer argued, it has "a settled expectation that cannot be undone by later state legislation."[231]

The Court disagreed. "[T]he contracting parties here in no way manifested assent to limiting disability payments in accordance with the 1981 law allowing coordination of benefits."[232] The employer, moreover, may not rely on past payment periods as being closed, regardless of assent, because "the alleged right to rely on past payment periods as closed was [not] part of the Michigan law at the time of the *original contract*."[233] Nor is there anything else in Michigan workers' compensation law that may fairly be seen as creating an implied "contractual term allowing an employer to depend on the closure of past disability compensation periods."[234]

A contrary conclusion in *General Motors* would have had the effect of making all state regulations implied terms of every contract entered into while they are in effect.[235] This broad proposition exceeded the Court's willingness to protect established interests through the Contracts Clause. "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts."[236] Michigan's 1987 statute requiring refund of withheld employee benefits served none of these functions, according to the Court. With specific reference to its affecting the enforceability of the employment contracts here, the Court ruled that "[t]he parties still have the same ability to enforce the bargained-for terms of the employment contracts that they did before the 1987 statute was enacted."[237]

Most telling, perhaps, was the Court's rejoinder.

> [P]etitioner's suggestion that we should read every workplace regulation into the private contractual arrangements of employers and employees would expand the definition of contract so far that the constitutional provision would lose its anchoring purpose [—the private ordering of personal and business affairs]. Instead, the Clause would protect against all changes in legislation, regardless of the effect of those changes on bargained for agreements. The employment contract, in petitioners' view, could incorporate workplace safety regulations, employment tax obligations, and laws prohibiting workplace discrimination, even if these laws are not intended to affect private contracts . . . between the employer and employees . . . [P]etitioners' construction would severely limit the ability of

231. *General Motors*, 112 S Ct at 1110.
232. Id.
233. Id (emphasis added).
234. Id.
235. Id.
236. Id.
237. Id.

> state legislatures to amend their regulatory legislation. Amendments could not take effect until all existing contracts [had] expired. . . .[238]

All of this leaves somewhat unanswered the question of why the Court granted certiorari in the first place. Clearly, some group on the Court was sufficiently alarmed that the Michigan legislature could enact legislation having the effect of costing a major American corporation $25 million. More fundamentally, this certiorari grant could signal a new era for protecting established expectations through the Contract Clause. Here, there was no assent to the terms General Motors attempted to have inferred into each of its employment contracts. Plus, its implied contract theory would have shackled state legislative reform excessively. But what if an employer were to add to its employment contracts explicitly what General Motors creatively attempted to have added to them implicitly? Would a later change in state law such as Michigan's 1987 law then substantially impair the bargained-for conditions of employment? *General Motors* raises that issue to be sure. That may have been a sufficient reason to vote to grant certiorari in this case.

VII. Miscellaneous

A. *Veteran's Reemployment Rights Act*

King v St. Vincent's Hospital

Reasonableness Limitation on the Amount of Leave Time Employer Must Provide under the Statute

Souter J.: **"[T]he simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service."**

Less than a year after the United States military victory in Operation Desert Storm, an employer came to the Court asking that it read the Veterans' Reemployment Rights Act (Act)[239] as implicitly limiting the length of military service after which a member of the armed forces no longer retains a right to civilian reemployment. To the astonishment of probably none, the Court unanimously[240] refused to find such implicit limits on the rights of returning military veterans.

---

238. Id. Nor did the retroactive effect of the 1987 Michigan statute violate the due process clause: It was a rational means of "preserving the delicate legislative compromise [of] giving workers injured before 1982 their full benefits without coordination, but not the greater increases given to subsequently injured workers. . . . Having now lost the battle in the Michigan Legislature, petitioners wished to continue the war in court. Losing a political skirmish, however, in itself creates no ground for constitutional relief." Id at 1112.

239. 38 USC § 2024(d).

240. *King v St. Vincent's Hospital*, 112 S Ct 570 (1991). Justice Thomas did not participate.

William "Sky" King,[241] while a member of the Alabama National Guard, applied to become a Command Sergeant Major in the Active Guard/Reserve (AGR). Under Army regulations, senior noncommissioned officers of that rank are required to undertake a commitment to serve a three-year tour of duty as a condition of joining the AGR program.[242] King requested a three-year leave of absence from his employer, St. Vincent's Hospital. His request was denied. The hospital advised him that the request was unreasonable and, therefore, beyond the protections afforded by the Veterans' Reemployment Rights Act.

King brought a declaratory judgment action in federal district court to ascertain whether the Act provided reemployment rights following tours of duty as long as three years or whether there was, implicitly, a reasonableness limitation to the rights the Act preserved. The district court held that the Act imposed a reasonableness test and that King's three-year request exceeded it per se. The Eleventh Circuit Court of Appeals affirmed, two judges agreeing that a three-year leave is per se unreasonable and the third judge concluding that Congress intended no per se rule but King's request here was unreasonable.

Resolving a split in the circuits on the question whether the Act imposes a reasonableness limitation, the Supreme Court reviewed the "plain meaning" of the Act's text. Section 2024(d) of the Act states that "[any covered employee] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training." Nothing in the text suggests any time limitation on the leave of absence that employer's must provide.

The employer argued that those entitled to a leave under the authority of section 2024(d) are "returned" to their positions following training, according to the text of the Act, while reservists protected under other provisions of the section 2024 are "restored" to their employment position.[243] The employer argued that Congress must have intended that section 2024(d) leaves of absence would be granted to those who maintain an employer-employee relationship to which they "return." Accordingly, Congress must have intended a reasonableness limitation: "[T]he very notion of such a continuing relationship is incompatible with absences as lengthy as King's."[244] Second, section 2024(d) requires veterans "to 'report to work at the

---

241. Writing for the Court, Justice Souter stated, perhaps a little peevishly, that "[h]ow and why petitioner's nickname claimed a place in the caption of this case is a mystery of the record." *King v St. Vincent's Hospital*, 112 S Ct 570, 572 n1 (1991).

242. Id at 572.

243. Id at 573.

244. Id.

beginning of the next regularly scheduled work period' " following expiration of their military tour of duty.[245] This requirement, the employer argued, is impractical for those who have been absent from their jobs as long as King anticipated being absent. Congress could not have intended, therefore, that section 2024(d) leaves apply to workers away so long. Finally, the employer argued that filling positions with responsible replacements would be difficult if "incumbents could be turned out so abruptly after serving for so long, upon the prior incumbent's equally abrupt return."[246]

Justice Souter and the Court would have none of this. A leave provision for veterans without a reasonableness limitation might be "ungainly" and impose burdens on both employers and workers, "[b]ut to grant all this is not to find equivocation in the statute's silence, so as to render it susceptible to interpretative choice."[247] When Congress desired to place a time limit on veterans rights under the Act, moreover, it placed those limits explicitly in the statute.[248] "Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service."[249]

Perhaps the most striking evidence of Congress' intent not to limit the duration of section 2024(d) leaves of absence was its placing the AGR program under the protection of section 2024 in 1980. It would seem to make little sense to require King, and those of his high rank, to serve three years as a condition of participating in the AGR program, place that program under section 2024's protection, but limit the protection to something less than the period King was required to serve.[250]

It is difficult to measure the impact of this case on day-to-day administration of personnel policy. As this nation decreases the size of its active military, it can be expected that the reserve components

---

245. Id.

246. Id.

247. *King v St. Vincent's Hospital*, 112 S Ct at 573.

248. See discussion of sections 2024(a) and 2024(b)(1), each of which explicitly contains time limits on veterans' rights. Id at 574.

249. Id. The Court reminded that the "cardinal rule" is to read the statute as a whole. It quoted Judge Learned Hand's famous observation that "[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . ." Id (quoting *NLRB v Federbush Co.*, 121 F2d 954, 957 (2d Cir 1941)). The Court also cited *United States V Hartwell*, 73 US (6 Wall) 385, 396 (1868) for the rule that "in construing statute court should adopt that sense of words which best harmonizes with context and promotes policy and objectives of legislature." Id at 574 n10.

250. See id at 575 n14.

will assume increased importance. Programs like AGR, that provide active duty training for reservists, may well proliferate. The Court was not prepared to be the grinch here. Nor was it prepared to take responsibility for disrupting business. Again, rules of statutory construction were sufficient for the Court to avoid responsibility.

B. *Immigration and Naturalization Act*

Immigration and Naturalization Service v National Center for Immigration Rights

Attorney General's Authority under the INA to Limit Work Opportunities of Undocumented Aliens Released on Bond Pending Deportation Hearing

Stevens J.: **"The contested regulation is wholly consistent with [the] established concern of immigration law . . . 'to protect against displacement of workers in the United States.' "**

Section 242(a) of the Immigration and Naturalization Act (INA) authorizes the attorney general to arrest excludable aliens and, pending a deportability determination, either to hold them in custody or release them on bond "containing such conditions as the Attorney General may prescribe."[251] *Immigration and Naturalization Service v National Center for Immigration Rights*,[252] resolved the "narrow question of statutory construction"[253] of whether INA section 242(a) prohibits promulgation of a rule generally requiring that release bonds contain a condition forbidding unauthorized employment pending determination of deportability.

Since 1983, Immigration and Naturalization Service (INS) regulations have contained the following provision regarding release bonds of deportable aliens:[254]

> (ii) *Condition against unauthorized employment. A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding or bond posted for the release of an alien in exclusion proceedings, unless the District Director determines that employment is appropriate.*

Several individuals and organizations challenged the lawfulness of this regulation. Based on the assumption that the regulation constituted a blanket bar against working, applicable to aliens authorized to work as well as those having no such authority, these groups argued that the regulation exceeded the attorney general's statutory authority and violated the due process clause of the Constitution. On a broader front, they argued that any limitation on

---

251. 8 USC § 1252(a)(1).
252. 112 S Ct 551 (1991).
253. Id at 553.
254. 8 CFR § 103.6(a)(2)(ii) (1991).

employment in the release bond would be unlawful as such bonds may only contain conditions tending to insure the aliens' appearance at future deportation proceedings. Concern with an alien working while on bond is peripheral and insufficient to be placed in every release bond.

The district court entered summary judgment, agreeing that the regulation exceeded the attorney general's statutory authority. The Ninth Circuit Court of Appeals affirmed: The regulation bars all employment; it is overbroad since the attorney general's statutory authority to impose release conditions must relate either to securing the alien's appearance at a subsequent hearing or to protecting the nation from active subversives; and bond conditions, in any event, must be individualized and, therefore, any "blanket rule" promulgated by the attorney general is invalid.[255]

The Supreme Court unanimously reversed. As a threshold matter the meaning of the regulation needed to be clarified. Though not without some substantial ambiguity, it was found to bar only unauthorized employment—as the government represented to the Court was its understanding and its policy.[256]

The Court further found that the attorney general acted within his statutory authority in promulgating such a narrow regulation because his authority extends both to securing an alien's appearance at a subsequent hearing and protecting the Nation from any "unacceptable threats."[257] The purpose of the regulation was "to protect against the displacement of workers in the United States."[258] This being one of the primary purposes in restricting immigration,[259] the contested regulation is within the attorney general's statutory authority.[260]

Finally, the Court agreed that release bond conditions need be individualized, but found that the regulation, construed in light of the INS administrative procedures, contemplates individual determinations: whether the alien is authorized to perform work because of a colorable claim of citizenship or because the alien has applied for asylum, or some other reason.

This case implicates a core interest: the opportunity to work pending deportation procedures. Without work, the alien would find "it difficult, if not impossible," to provide necessary food and shelter and employ counsel for representation in the upcoming hearing

---

255. *National Center For Immigration Rights, Inc. v INS*, 913 F2d 1350, 1353–74 (9th Cir 1990).
256. *INS*, 112 S Ct at 556–57.
257. Id at 558.
258. 48 Fed Reg 51142 (1983).
259. See *Sure-Tan, Inc. v NLRB*, 467 US 883, 893–94 (1984).
260. *INS*, 112 S Ct at 558.

to determine deportability.[261] If this case stands for the unspectacular proposition that the attorney general may bar an alien from working only when the alien already is barred from working under our immigration laws, this case may be the biggest nonevent of the Term. The district court and the court of appeals certainly believed, however, that the regulation, in practice, had the effect of barring employment more broadly. To the extent that this case caused the INS to commit itself to barring unauthorized employment, and no other, the outcome seems to have been worth the effort.

C. *Rule 11 Sanctions*

Willy v Coastal Corporation

Rule 11 Applicability When Court Lacks Subject Matter Jurisdiction

Rehnquist C.J.: **"[T]he District Court acted within the scope of the Federal Rules and . . . the sanction may constitutionally be applied even when subject-matter jurisdiction is eventually found lacking. . . ."**

In 1990, the Court held that a district court may impose Rule 11 sanctions for filing a frivolous complaint even though the sanction order was entered after the plaintiff voluntarily dismissed the suit.[262] In *Willy v Coastal Corporation*,[263] a related issue was addressed: whether a district court's exercise of judicial power to grant Rule 11 sanctions is an unconstitutional act in the absence of subject-matter jurisdiction. The Court unanimously held that the lack of subject-matter jurisdiction does not render the imposition of Rule 11 sanctions unlawful.

Willy sued the Coastal Corporation (Coastal) in a Texas state court raising a variety of claims arising out of his having been dismissed as "in-house" counsel. In particular, Willy alleged that he had been terminated due to his refusal to violate various federal and state environmental laws and that the termination thus violated the "whistle-blower" provisions of those statutes.

Over Willy's objection the suit was removed to federal court. Willy argued that the action did not "arise under" federal law and, therefore, the district court lacked subject-matter jurisdiction. The district court disagreed and subsequently granted Coastal's motion to dismiss for failure to state a claim, dismissed all pendent state claims, and imposed Rule 11 sanctions, in the form of attorney fees,

261. See id at 557 n6.
262. *Cooter & Gell v Hartmarx Corp.*, 496 US 384 (1990).
263. 112 S Ct 1076 (1992).

against Willy and his attorney.[264] None of the sanctionable conduct was related to the initial effort opposing the Court's subject-matter jurisdiction.[265]

The Fifth Circuit Court of Appeals concluded that the district court lacked subject-matter jurisdiction, agreeing with Willy that his action raised no claims arising under federal law. But the court of appeals affirmed the imposition of sanctions and remanded the case to the district court to recompute their amount. On remand, the district court imposed sanctions in the amount of $19,307, the attorney fees incurred in responding to the sanctionable conduct.[266]

Before the Supreme Court, Willy argued that Congress did not authorize Rule 11 sanctions against parties who prevail on jurisdictional grounds and if it did, such authorization would be unconstitutional. The constitutional argument was that if the district court lacks Article III judicial authority to hear a matter, it also lacks constitutional power to assert judicial authority over a party in that action by imposing sanctions.

Rejecting this argument, a unanimous Supreme Court reasoned that Congress did intend that Rule 11 operate in cases such as this. The Federal Rules of Civil Procedure "apply to all district court civil proceedings," limited only by the command that they "not 'abridge, enlarge or modify any substantive right.' "[267] This limitation includes the charge that the Federal Rules may not be applied so as "to extend or restrict the jurisdiction conferred by a statute."[268] Imposing Rule 11 sanctions in the absence of subject-matter jurisdiction does not extend the district court's statutory jurisdiction, the Supreme Court held, because the district court thereby makes no judgment on the merits of the underlying dispute.

Nor is Congress' conferral of judicial authority unconstitutional, the Supreme Court further reasoned. Congress is empowered by Article III of the Constitution to establish lower federal courts and this power includes authority to make all laws "necessary and proper" to their establishment. This constitutional power authorizes Congress to "enact laws regulating the conduct of [district] courts [including] . . . 'prescrib[ing] housekeeping rules for federal

---

264. The Court found that plaintiff's counsel " 'create[d] a blur of absolute confusion' " by, among other things, including "a 1,200 page, unindexed, unnumbered pile of materials." This was viewed by the Court to constitute a " 'conscious and wanton affront to the judicial process, this Court, and opposing counsel.' " Id at 1078 (quoting the district court opinion). The district court concluded that the conduct was " 'irresponsible at a minimum and at worst intentionally harassing.' " Id.

265. Id.

266. Id.

267. Id at 1079 (quoting the Rules Enabling Act, 28 USC § 2072).

268. *Willy v Coastal Corp.*, 112 S Ct at 1079. See *Sibbach v Wilson*, 312 US 1 (1941).

courts.' "[269] Rule 11 falls within this constitutional grant of congressional authority, just as Congress may authorize "that a judgment rendered in a case in which it was ultimately concluded that the District Court was without jurisdiction was nonetheless res judicata on collateral attack made by one of the parties."[270] The rationalizing principle is that "the maintenance of orderly procedure, even in the wake of a jurisdiction ruling later found to be mistaken—justifies the conclusion that the sanction ordered here need not be upset."[271]

269. *Willy*, 112 S Ct at 1080 (quoting *Hanna v Plummer*, 380 US 460, 473 (1965)).

270. See *Chicot County Drainabe District v Baxter State Bank*, 308 US 371 (1940). The Court also cited *United States v United Mine Workers*, 330 US 258 (1947) (contempt citation upheld although district court lacked subject-matter jurisdiction).

271. *Willy*, 112 S Ct at 1088. The Court distinguished *United States Catholic Conference v Abortion Rights Mobilization, Inc.*, 487 US 72 (1988), that had reversed a contempt order by a district court lacking subject-matter jurisdiction over the case from which the contempt order arose. There, the contempt order was to coerce compliance with an order—a document subpoena—the district court lacked jurisdiction to enter. Here, the Rule 11 sanction was to punish a party for conduct prejudicial to orderly procedure.