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Labor and Employment Discrimination Cases in the Supreme Court 1989 Term

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Survey

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EVERY YEAR the United States Supreme Court decides a number of labor and employment discrimination cases. The 1989 Term was no exception in that respect. This survey discusses 1989 cases of great interest to followers of labor and employment discrimination law.[1] Two things stand out about the 1989 Term. First, with the exception of the affirmative action, duty of fair representation, and withdrawal of recognition cases, most of the decisions were noncontroversial, in contrast to cases decided in other years. Second, it was Justice Brennan's last year on the Court. He was a major force in both labor and employment discrimination cases. His ability to mold majorities from divergent points of view, illustrated in the Term's affirmative action case, will be missed.

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1. Perhaps the most noted case we omit is Rutan v. Republican Party, 110 S. Ct. 2729 (1990), in which the Court found, by a five to four vote, that the first amendment bars public employers from basing decisions to hire, promote, transfer, or recall low level employees on political affiliation. Other cases include Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. 2668 (1990) (upholding involuntary post-termination restoration of an ERISA-covered pension plan imposed by the Pension Benefit Guaranty Corporation); English v. General Elec. Co., 110 S. Ct. 2270 (1990) (discharged employee's state law tort claim not preempted by federal whistleblower statute); Crandon v. United States, 110 S. Ct. 997 (1990) (severance payments made to defense contractor employees upon resignation to accept lower paying government positions did not violate conflict of interest statute); United States Dep't of Labor v. Triplett, 110 S. Ct. 1428 (1990) (Black Lung Benefits Act's regulation of attorney's fees does not violate due process); IRS v. FLRA, 110 S. Ct. 1623 (1990) (proposal to arbitrate disputes over contracting out agency work is not a mandatory subject of collective bargaining for federal agencies).

I. Labor Law Cases

A. *Breininger v. Sheet Metal Workers International Association Local Union No. 6.*[2]

In *Breininger*, the Court held that a union member's cause of action for breach of the duty of fair representation was not preempted by the National Labor Relations Board's ("NLRB") jurisdiction over unfair labor practice charges.[3] The Court also held that the plaintiff failed to establish a claim of unlawful union discipline under the Labor Management Reporting and Disclosure Act ("LMRDA"),[4] because he had not alleged discipline by the union as an entity, but rather only by individual union officials.[5]

The judicially created duty of fair representation requires that a union recognized as the exclusive representative of an employee bargaining unit fairly represent all employees in the unit, without hostile discrimination against any of them.[6] Typical claims alleging breach of the duty of fair representation arise in the context of positions taken by unions in collective bargaining or grievance processing. In addition to giving an employee a private cause of action, a breach of the duty of fair representation may be the basis of an unfair labor practice charge against the union.[7]

Generally, neither state nor federal courts may assert jurisdiction over claims comprising unfair labor practices as defined in the National Labor Relations Act ("NLRA")[8] because the NLRB has exclusive jurisdiction.[9] The United States Supreme Court has previously held, however, that breach of the duty of fair representation claims are not preempted by the NLRB's jurisdiction.[10]

In *Breininger*, the plaintiff alleged that the union breached its duty of fair representation by discriminating against him in making job referrals from a union hiring hall.[11] Under the union's job referral arrangement, an employer contacting the hiring hall was entitled to ask for

2. 110 S. Ct. 424 (1989).
3. *Id.* at 429-33.
4. 29 U.S.C. §§ 401-531 (1988).
5. *Breininger*, 110 S. Ct. at 440.
6. *See e.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).
7. *Breininger*, 110 S. Ct. at 429 (citing Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963)).
8. 29 U.S.C. §§ 151-169 (1988).
9. *Id.* (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959).
10. Vaca v. Sipes, 386 U.S. 171 (1967).
11. *Breininger*, 110 S. Ct. at 428.

individual union members by name.[12] The plaintiff alleged that the union had refused to honor such employer requests for his services, and had refused to process his internal grievances over this claim.[13] Plaintiff further alleged that he had been disciplined as a result of his political opposition to the union's officers, thus giving rise to a claim under the LMRDA.[14]

The district court dismissed the case, holding that discrimination in hiring hall referrals is an unfair labor practice, and therefore that plaintiff's claim for breach of the duty of fair representation was preempted by the NLRB's exclusive jurisdiction.[15] The Sixth Circuit affirmed, stating that fair representation claims must be brought to the NLRB as unfair labor practice cases, and that an employee cannot prevail in a duty of fair representation claim against a union unless he or she also claims that the employer breached the collective bargaining agreement.[16]

The Supreme Court reversed, reaffirming its view that a duty of fair representation claim is not preempted even though the conduct complained of might also be an unfair labor practice.[17] The Court observed that the duty of fair representation doctrine had been judicially created before the NLRB ever acquired jurisdiction over such claims.[18] The Court also questioned whether the NLRB had any more expertise on such problems than the courts.[19] The Court expressed a further concern that the NLRB's General Counsel could frustrate the policy of the fair representation doctrine by exercising its discretion to refuse to prosecute charges that a union had breached the duty.[20] Preserving the right of individual employees to be made whole for breaches of the duty was of paramount importance to the Court.[21]

As it had done in *Vaca v. Sipes*,[22] the Court noted that when it first recognized the doctrine of the duty of fair representation, there were no union unfair labor practices under the NLRA.[23] Further, nothing Congress had done in amending the NLRA to establish union unfair labor

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 428-29. The Sixth Circuit also dismissed the LMRDA portion of the complaint. *Id.*
17. *Id.* at 430.
18. *Id.* at 429.
19. *Id.* at 429-30.
20. *Id.* at 430.
21. *Id.* (citing Bowen v. United States Postal Serv., 459 U.S. 212, 222 (1983)).
22. 386 U.S. 171 (1967).
23. 110 S. Ct. at 429.

practices indicated that Congress had intended to divest courts of jurisdiction over duty of fair representation claims.[24]

The Court then addressed the contention that, in hiring hall cases, it should recognize an exception to its general view of duty of fair representation preemption, because hiring hall operations is an area with which the NLRB has substantial familiarity. The Court responded that it had never intimated that concurrent judicial jurisdiction over duty of fair representation claims was based on the extent of NLRB expertise on the subject matter of such claims.[25] Moreover, the Court stated, creating an exception in all areas of duty of fair representation law in which the NLRB has expertise or experience would remove an unacceptably large number of such cases from the federal courts.[26]

The Supreme Court also rejected the Sixth Circuit's holding that an employee could not maintain a successful duty of fair representation suit against a union unless the employee also alleged a breach of the collective bargaining agreement by the employer.[27] The Court noted simply that "[t]his is a misstatement of existing law."[28] There is, however, some justification for the lower court's confusion. Indeed, in another duty of fair representation case decided this term — *Chauffers, Teamsters & Helpers, Local v. Terry*[29] — the Court stated that in order to prevail in a duty of fair representation case against a union, the plaintiff does ordinarily need to prove that the employer violated the collective bargaining agreement.[30] This requirement only applies in certain types of duty of fair representation claims, however. The most common claim for breach of the duty of fair representation involves an allegation that the union has violated its duty in processing employee grievances, either by refusing to take an employee's grievance case to arbitration, or by mishandling a case at arbitration. In these cases, to establish that the union's conduct affects the employee, the plaintiff is required to prove both that the employer violated her contractual rights, and that the union breached its duty of fair representation by failing to adequately protect her rights.[31] Not every duty of fair representation case, however, depends on an allegation that an employer violated an employee's rights. In the case creat-

24. *Id.* at 430.
25. *Id.* at 431.
26. *Id.*
27. *Id.* at 432.
28. *Id.*
29. 110 S. Ct. 1339 (1990).
30. *Id.* at 1344.
31. *Id.*

ing the duty, *Steele v. Louisville & Nashville Railroad Co.*,[32] the union breached its duty in the collective bargaining process by negotiating contract terms which discriminated against black workers on the basis of race.[33]

In *Breininger*, the plaintiff did not claim that the employer violated any contractual obligation owed to him, but rather that the union's discriminatory operation of the hiring hall violated its duty of fair representation. The allegation did not implicate the employer. The Court found, therefore, that it was not necessary for the plaintiff to sue the employer in order prevail against the union.[34]

The union, however, had another argument. In *Vaca*, the Court had established that suits against an employer and a union that relate to the same claim should be heard in the same forum. In the hiring hall situation in *Breininger*, the union contended that a claim against the employer would not be tried as a breach of contract, but instead on an unfair labor practice claim, alleging discrimination on the basis of union membership under the NLRA's section 8(a)(3).[35] If the union violated section 8(b)(1)(A) by its improper referral practices, and the employer violated 8(a)(3), they would then be held jointly and severally liable, but only in an action before the NLRB.[36] Since the 8(a)(3) claim is clearly within the exclusive jurisdiction of the NLRB, the union argued, the breach of duty of fair representation against it should be preempted in favor of NLRB jurisdiction since that would serve the interest advanced in *Vaca* of keeping similar actions in the same forum.[37]

The Court rejected this argument, stating that the union misperceived the reasoning of *Vaca*, which does not require that a plaintiff sue the union in order to prevail against an employer in a contract action.[38] It merely holds that one cannot win against the employer without also proving a breach of the duty of fair representation. This requirement is not based on a policy of implicating unions in the suit but rather is in deference to arbitration as the agreed-upon exclusive remedy.[39] In essence, an employee cannot sue the employer successfully unless the arbitration process has broken down. Proving a breach of the duty of fair

32. 323 U.S. 192 (1944).
33. *Id.* at 195, 202-03.
34. Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 110 S. Ct. 424, 433 (1989).
35. *Id.*
36. *Id.*
37. *Id.* at 434.
38. *Id.*
39. *Id.*

representation is how one establishes a break-down of the arbitration process. Thus, proof of the breach of the duty is an integral part of the action against the employer. In the hiring hall case, however, there is no requirement that the employee proceed against both the employer and the union; the employee can proceed against either or both. And, unlike the situation in *Vaca*, proof of a violation by one is not a necessary component in a case against the other.[40]

The Court also held, seven to two, that the plaintiff had not established an LMRDA claim.[41] Sections 101 and 609 of the LMRDA make it unlawful for a union to fine, suspend, expel or "otherwise discipline" a member for exercising rights protected by the LMRDA.[42] The plaintiff contended that by failing to refer him to jobs in retaliation for his political opposition of the union leadership, the union had disciplined him within the meaning of sections 101 and 609.[43] The Court found, however, that the plaintiff had not alleged that the union, as an entity, had taken action against him, but rather only that the union's business manager and business agent had retaliated against him.[44] The Court read the words "otherwise discipline" in the LMRDA action narrowly, as not encompassing all actions taken by a union officer that might disadvantage a member of the union.[45] Rather, relying on the structure of the Act and its legislative history, the Court found that what is banned is punishment authorized by the union *as an entity*,[46] to enforce its rules. In this case, the plaintiff was not punished by a union tribunal and had not been the subject of proceedings convened by the union itself. What he really alleged was a vendetta undertaken by two officers of the union. That was not, the Court concluded, what Congress meant by use of the term "discipline" in the LMRDA.[47]

Justices Stevens and Scalia dissented.[48] They found that punishment imposed by someone in control, with a view toward correcting behavior that is thought to be deviant, is discipline within the meaning of the LMRDA.[49] The plaintiff's allegation, they concluded, was within this definition as the punishment was imposed under color of union au-

40. *Id.*
41. *Id.* at 440.
42. Labor Management Reporting and Disclosure Act § 101, 29 U.S.C. § 411 (1988); *id.* § 609, 29 U.S.C. § 529 (1988).
43. *Breininger*, 110 S. Ct. at 428.
44. *Id.* at 440.
45. *Id.*
46. *Id.* at 439-440.
47. *Id.* at 440.
48. *Id.* at 440-44.
49. *Id.* at 441.

thority, and because operation of the hiring hall fell to the union as a result of its status as exclusive representative.[50] They considered perverse the majority's assertion that the alleged conduct was not discipline because there had been no union tribunal or proceedings involved.[51] They further observed that the majority's construction deprived the employee and union member of his rights at the very time when he needed them most — when the union acts secretly and without advance notice.[52]

B. *Chauffers, Teamsters & Helpers, Local 391 v. Terry*[53]

Terry was another duty of fair representation case which ultimately, like *Breininger*,[54] involved an action against a union only. In *Terry*, however, the Court's concern was with whether the plaintiffs were entitled to a jury trial. Affirming decisions of the district court and the Fourth Circuit, the Court held that plaintiffs were entitled to a jury trial under the seventh amendment to the United States Constitution.[55]

The *Terry* case arose from a change of operation by the McLean Trucking Company that involved closing several terminals and displacing union-represented drivers. Pursuant to the change of operation, the plaintiff drivers were transferred to a terminal in North Carolina and granted special seniority rights over drivers who were then on temporary lay-off from the terminal.[56] The plaintiffs were subsequently also laid off, and filed a grievance alleging the company had abused the applicable layoff and recall procedures.[57] Their first grievance was successful, and the plaintiffs were ordered reinstated with backpay.[58] A second grievance, also alleging improper layoffs, was denied by the joint grievance committee.[59] The union declined to process the plaintiffs' third grievance to the joint committee, on the ground that it presented the same issues that had been decided adversely to plaintiffs in the second grievance.[60] The plaintiffs then sued both the employer, claiming breach of contract, and the union, claiming a breach of the duty of fair representation.[61]

50. *Id.* at 443.
51. *Id.*
52. *Id.*
53. 110 S. Ct. 1339 (1990).
54. 110 S. Ct. 424 (1989).
55. *Terry*, 110 S. Ct. at 1349.
56. *Id.* at 1343.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

Again, they sought backpay and reinstatement.[62] They also demanded a jury trial.[63]

The employer subsequently declared bankruptcy, and plaintiffs voluntarily dismissed their action against it.[64] That left the union as the only defendant, and the backpay claim as the only remedy sought.

The district court denied a motion by the union to strike the jury trial demands, and the Fourth Circuit affirmed.[65] Granting review to resolve a conflict among courts of appeals, the Supreme Court affirmed the lower courts' decisions.

Initially, the Court noted that the seventh amendment preserves a party's right to a jury trial with respect to actions in which *legal*, as opposed to *equitable*, rights are to be determined.[66] To determine whether an action is one involving legal rights, entitling a party to a jury trial, or equitable rights, the Court employs a two step analysis.[67] First, the Court looks to the nature of the issues involved, to determine whether they are legal or equitable.[68] Second, the Court considers the nature of the remedy sought.[69] The second inquiry — into whether the remedy is legal or equitable — is more important than the first.[70]

In addressing the first inquiry, the Court was unable to reach a consensus on whether the nature of the plaintiffs' cause of action was legal or equitable.[71] Eight justices agreed that the Court should compare the cause of action for breach of duty of fair representation to causes of action that pre-existed the merger of courts of law and equity, and then determine whether the most comparable pre-merger action was legal or equitable in nature.[72] Seven justices agreed the duty of fair representation action against a union most closely resembled an action by a trust beneficiary against a trustee for breach of fiduciary duty, an equitable action that does not carry the right to trial by jury.[73] Justice Stevens thought the breach of the duty of fair representation claim most closely resembled a malpractice action against an attorney, an action at law to

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1344.
67. *Id.* at 1345.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1347.
72. *Id.* at 1345.
73. *Id.* at 1346.

which the right to a jury trial does attach.[74] Justice Brennan did not think the Court should attempt the comparable action inquiry at all, and questioned the Court's competence to make such determinations.[75]

While seven justices thought the breach of the duty of fair representation action most closely resembled an equitable action, a plurality of four decided that this characterization was not the end of the inquiry.[76] The right to a jury trial, they said, depends on the nature of the specific issues to be tried rather than the character of the overall action.[77] The issues to be tried in this case were not only whether the union had breached its duty, but also whether the employer had breached the contract.[78] Because the breach of contract claim is a legal action, not an equitable one, these four justices found the inquiry into the nature of the action inconclusive, as the relevant issues were both equitable and legal.[79]

Turning to the second inquiry, the Court noted that the only remedy sought in the case was backpay, because the claim against the employer had been dismissed.[80] Ordinarily, an action seeking only money damages is considered legal in nature. It is true, the Court said, that backpay is sometimes seen as an equitable remedy, but those are situations where the remedy is restitutionary.[81] That was not the case here, because the union had not wrongfully withheld pay and was not being asked to disgorge.[82] A claim for damages may also be regarded as an equitable remedy where it is closely intertwined with, or incidental to, a demand for injunctive relief, but that was not the case here either.[83]

The union argued that because Congress had characterized backpay as an equitable remedy in Title VII,[84] the Court should afford it the same status in a breach of the duty of fair representation action.[85] The Court rejected this argument, observing that Congress had not passed any legislation in which it referred to backpay as an equitable remedy in the context of claims for breach of the duty of fair representation.[86] Further, in

74. *Id.* at 1353.
75. *Id.* at 1350.
76. *Id.* at 1347.
77. *Id.*
78. *Id.*
79. *Id.* at 1347.
80. *Id.*
81. *Id.* at 1348.
82. *Id.* at 1348.
83. *Id.*
84. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2000e17 (1988).
85. *Terry*, 110 S. Ct. at 1348.
86. *Id.* at 1349.

Title VII cases, backpay is generally sought from the employer, and is therefore restitutionary.[87] The Court concluded that "certainly" it was not required to find a parallel connection between Title VII damages and damages for breach of the duty of fair representation.[88] Because the Court concluded that the backpay remedy sought was legal in nature, it found the plaintiffs were entitled to a jury trial on their claim against the union.[89]

C. *Golden State Transit Corp. v. City of Los Angeles* [90]

In *Golden State Transit*, the Court held that damages may be awarded under 42 U.S.C. section 1983 ("section 1983")[91] against government bodies that regulate aspects of collective bargaining relationships that are intended to be left unregulated under the NLRA.[92]

An earlier phase of the *Golden State Transit* litigation had been heard by the Court in 1986 ("*Golden State I*").[93] The dispute in *Golden State I* had arisen when the Los Angeles city council conditioned extension of a taxi cab franchise to the employer on its success in settling a labor dispute with its striking drivers.[94] The franchise ultimately lapsed when the employer and the Teamsters Union failed to reach agreement. The employer thereafter brought suit against the city council.[95]

In *Golden State I*, the Court held that the city's action in conditioning extension of the franchise on the strike settlement was prohibited under the so-called *Machinists* preemption line of cases, which preempts state or local regulation of those aspects of union-employer relations that Congress intended to be left unregulated.[96] The NLRA is intended to provide for a system of free collective bargaining in which government

87. *Id.*

88. *Id.*

89. *Id.*

90. 110 S. Ct. 444 (1989).

91. Section 1983 was originally passed as part of the Civil Rights Act of 1871. It provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding. . . ." 42 U.S.C. § 1983 (1988).

92. *Golden State Transit*, 110 S. Ct. 448-52.

93. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).

94. *Id.* at 611.

95. *Id.*

96. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1972). In *Machinists*, the Court held that federal labor policy preempts local government efforts to regulate peaceful economic action by parties to a labor dispute, and reversed a Wisconsin state labor agency order enjoining a union's concerted refusal to work overtime.

has no substantive role in determining particular terms of employment. Towards this end, the NLRA allows the parties to engage in economic actions such as strikes and lockouts in support of the positions they take at the bargaining table. Although states remain free to regulate violence and certain other forms of misconduct, under the *Machinists* preemption doctrine they cannot restrict the parties' peaceful economic actions.

On remand following the Court's *Golden State I* decision, the district court ordered the city to reinstate the employer's franchise.[97] The district court denied the employer's damage claim, however, holding that there was no cause of action under section 1983.[98] The Ninth Circuit affirmed.[99]

In *Golden State Transit*, the Supreme Court reversed. The Court initially reviewed the history of its prior application of section 1983, which creates state and local government liability for actions that are carried out under the color of law and which deprive citizens of "rights, privileges, or immunities secured by the Constitution and laws . . . ."[100] The Court noted that to establish section 1983 liability, a plaintiff must show the violation of a federal right.[101] The employer, the Court said, satisfied that requirement in this case, because it was the intended beneficiary of a federal statutory scheme intended to prevent government interference with the collective bargaining processes.[102] Moreover, there was no administrative enforcement scheme to protect that right under the NLRA, since the NLRB has jurisdiction only over employers and unions, and cannot address government interference.[103]

Justice Kennedy dissented, and was joined by Justices O'Connor and Rehnquist.[104] The dissent argued that it is one thing to hold that federal law preempts local regulation, but quite another to hold that preemption also creates a damage action where the actions of the local government were not in derogation of a specifically enumerated federal statutory right. Congress, Justice Kennedy said, did not intend to create liability when the state's only sin was "misapprehending the precise location of the boundaries between state and federal power."[105]

97. Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444, 447 (1989) (citing Golden State Transit Corp. v. City of Los Angeles, 660 F. Supp. 571 (C.D. Cal. 1987)).

98. *Id.*

99. *Id.* at 448.

100. 42 U.S.C. § 1983 (1988).

101. *Golden State Transit Corp.*, 110 S. Ct. at 448.

102. *Id.* at 450.

103. *Id.*

104. *Id.* at 452.

105. *Id.* at 453.

Golden State Transit may limit the practical ability of labor organizations to bring pressure on employers doing business with government entities by appealing to those governments for support. The case does not preclude a local government from refusing to do business with an employer that has a dispute with a union, but it does limit the ability of local governments to take actions that could be considered coercive of a party's bargaining position. It will also cause caution among state and local governments that are pressured by either employers or unions to take a stand about their labor disputes.

D. NLRB v. Curtin Matheson Scientific, Inc.[106]

The Supreme Court has long held that employers can permanently replace workers who strike in support of bargaining demands, and that such replacements need not be displaced to accommodate strikers wishing to return to work at the conclusion of a strike.[107] The Court has also long recognized that employers can withdraw recognition of a union based on a "good faith doubt" that the union enjoys the continued support of a majority of employees.[108] In *NLRB v. Curtin Matheson Scientific, Inc.*, the Court considered an important aspect of how these two rules interact.

The *Curtin Matheson* court upheld an NLRB ruling in which the NLRB refused to presume that strike replacements oppose union representation when evaluating an employer's alleged "good faith doubt" of majority union status.[109] As a result, the mere fact that a majority of workers in a post-strike workforce were hired as strike replacements will not be sufficient to justify an employer's withdrawal of recognition.

Employers typically assert the good faith doubt withdrawal of recognition doctrine at the expiration of a collective bargaining agreement. At that point, an employer might refuse to bargain with the union and, when charged with an unfair labor practice under NLRA section 8(a)(5), defend itself by claiming that it doubts about the union's majority status.[110] For this defense to be effective, the asserted doubt must be based on objective considerations and cannot represent merely the employer's opinion that the employees do not support the union.[111]

106. 110 S. Ct. 1542 (1990).

107. *Id.* at 1551.

108. *Id.* at 1545.

109. *Id.* at 1554.

110. *See e.g.*, Station KKHI, 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989).

111. *Curtin Matheson*, 110 S. Ct. at 1545.

The NLRB generally presumes that new employees hired into a bargaining unit support the union in the same proportion as the employees already there.[112] That presumption has not always held true for strike replacements. For as many as twenty-five years, the NLRB presumed that replacements did *not* support the union.[113] In 1975, however, the NLRB held that strike replacements, like new employees generally, should be presumed to support the union in the same ratio as the strikers they replaced.[114] In *Station KKHI*,[115] the NLRB recently decided to reject altogether the use of presumptions in determining strike replacements' union sentiments.[116] Rather, the NLRB decided it would thereafter assess replacement workers' union sentiments on a case-by-case basis.[117] The validity of the *Station KKHI* approach was the central issue in *Curtin Matheson*.

The Teamsters union represented twenty-seven employees of the Curtin Matheson Scientific Company in May 1979 when it began a strike in support of bargaining demands.[118] Five employees immediately crossed the picket line, leaving twenty-two employees on strike.[119] About two weeks later, the employer hired twenty-nine permanent replacements.[120] Three weeks later, the union announced that it was ending the strike and offered to accept unconditionally the last offer made before the strike began.[121] The employer informed the union that the offer had been withdrawn, and then withdrew recognition from the union, saying it doubted the union's continued majority status.[122] The union filed an unfair labor practice charge against the employer, challenging the withdrawal of recognition. An administrative law judge found no violation, but the NLRB reversed, concluding that the employer did not have a sufficient objective basis on which to doubt the union's majority status.[123]

The NLRB refused to presume that the five striking employees who crossed the picket line had forsaken the union, noting that their failure to support the strike might have been based on economic concerns rather

112. *Id.*
113. *Id.* (discussing status of Board rule from 1959 to 1974 and citing cases).
114. *Id.* at 1546 (citing Cutten Supermarket, 220 N.L.R.B. 507 (1975)).
115. 284 N.L.R.B. 1339 (1987).
116. *Id.* at 1344.
117. *Id.*
118. *Curtin Matheson*, 110 S. Ct. at 1547.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

than opposition to the union.[124] The employer claimed that other incidents also supported its good faith doubt of the union's majority status. Two employees, including the chief shop steward, had resigned from their jobs after the strike began,[125] and six other employees had made statements during the strike that were critical of the union.[126] The NLRB, however, found that these facts did not necessarily indicate opposition to the union; the resignations did not evidence declining union support at all, and the employee statements criticizing the union were " 'ambiguous at best.' "[127]

The employer's primary evidence supporting its good faith doubt was the fact that strike replacements comprised more than half of the post-strike bargaining unit. Applying its *Station KKHI* approach, the NLRB refused to presume replacements opposed the union.[128] Instead, the NLRB required that the employer submit evidence of their lack of support for the union.[129] The only such evidence presented was a report by a company official of a conversation with one replacement worker. The NLRB found this insufficient.[130] Because the employer failed adequately to support its contention of good faith doubt of the union's continued majority status, it failed to rebut the NLRB's general presumption of continuing majority support for the union. The NLRB held therefore that the employer's withdrawal of recognition violated sections 8 (a)(1) and 8(a)(5) of the NLRA, and ordered the Company to resume bargaining.[131] The Fifth Circuit denied enforcement of the NLRB's order, and specifically rejected the NLRB's presumption about replacement workers.[132]

The Supreme Court noted initially that it has long accorded considerable deference to the NLRB's rules. In recognition of the NLRB's "primary responsibility for developing and applying national labor policy," the Court generally upholds NLRB rules as long as they are "rational and consistent with the Act."[133] Such deference is afforded, the Court stated, even where an NLRB rule departs from the NLRB's prior

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1548.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1549.

policy, for an evolutionary approach is appropriate in administrative rulemaking.[134]

The Court found that the NLRB's rejection of an antiunion presumption was rational as an empirical matter, because replacements do not inevitably oppose unions.[135] Replacement workers may be forced by economic necessity "to work for a struck employer even though [they] otherwise support[ ] the union and want[ ] the benefits of union representation."[136]

The Court acknowledged that unions' goals in strike situations are often hostile to the interests of replacements, as unions often seek discharge of replacements to assure reinstatement of strikers.[137] The employer argued that replacement workers will therefore most likely not support a union, and that a presumption of union opposition is therefore appropriate.[138] The Court noted, however, that unions do not invariably demand displacement of all replacement workers.[139] A union may, the Court stated, lack the necessary bargaining power to obtain that goal.[140] A post-strike workforce may consist in part of replacements who, though not supportive of the past strike, nonetheless desire the union's ongoing representation in grievance processing and future bargaining.[141] Although replacements often will not support the union, the Court concluded, it was "not irrational for the NLRB to conclude that the probability of . . . opposition is insufficient to justify an antiunion presumption."[142]

The Court also noted that the NLRB's approach is consistent with the "Act's 'overriding policy' of achieving 'industrial peace.' "[143] The refusal to adopt a presumption that replacements are antiunion promotes industrial peace, the Court reasoned, because by limiting "the employers' ability to oust a union without adducing any evidence of . . . employees' union sentiments [it] encourages negotiated solutions to strikes."[144] Adoption of an antiunion presumption, by contrast, would allow employ-

134. *Id.* (citing NLRB v. J. Weingarten, 420 U.S. 251, 265-66 (1975)).
135. *Id.* at 1550.
136. *Id.*
137. *Id.* at 1551.
138. *Id.*
139. *Id.*
140. *Id.* at 1551-52.
141. *Id.*
142. *Id.* at 1553.
143. *Id.*
144. *Id.*

ers to "eliminate the union merely by hiring a sufficient number of replacement employees."[145]

In his dissenting opinion,[146] Justice Scalia criticized the Court for not addressing the employer's contentions that it had established a reasonable good faith doubt about the union's majority status, and that there was no substantial evidence to support the NLRB's contrary conclusion.[147] The majority only addressed whether the NLRB *must presume* that striker replacements oppose the union in determining whether an employer has sufficient objective evidence of good faith doubt.[148]

Scalia noted that in another case dealing with a slightly different issue, the NLRB had characterized the interest of the strikers and replacement employees as "diametrically opposed."[149] In recognition of this tension, the NLRB had in one case decided that an employer did not need to negotiate with an incumbent union about the terms and conditions of employment for replacements.[150] In another instance, the NLRB had relieved a union of its duty of fair representation for replacement employees when the union demanded that replacements be fired to make way for returning strikers.[151]

Scalia found it anomalous that the NLRB would recognize the conflict between strikers and replacements in these earlier cases, yet deny that it existed for purposes of determining majority support in *Curtin Matheson*.[152] Scalia asserted that Curtin Matheson did not have to demonstrate an absolute assurance that a majority of the bargaining unit did not support the union. Rather, it merely needed to advance a "reasonable doubt."[153] Scalia concluded "[i]t seems absurd to . . . deny that it sustained that burden."[154]

E. *United Steelworkers v. Rawson*[155]

In *Rawson*, the Court found that state wrongful death claims against a union were preempted by federal law under section 301 of the Labor

145. *Id.*
146. *Id.* at 1557.
147. *Id.*
148. *Id.* at 1544.
149. *Id.* at 1559 (quoting Beacon Upholstery Co., 226 N.L.R.B. 1360, 1368 (1976)).
150. *Id.* (citing Service Elec. Co., 281 N.L.R.B. 633, 641 (1986)).
151. *Id.* (citing Leveld Wholesale, Inc., 218 N.L.R.B. 1344, 1350 (1975)).
152. *Id.* at 1563.
153. *Id.* at 1557.
154. *Id.* at 1562.
155. 110 S. Ct. 1904 (1990).

Management Relations Act ("section 301").[156] *Rawson* also found that the plaintiffs had not presented valid claims for breach of contract,[157] or breach of the duty of fair representation.[158]

To understand *Rawson*, it is helpful to return to the Court's 1987 decision in *International Brotherhood of Electrical Workers v. Hechler*.[159] In that case, an injured employee sued her union in tort, claiming that it had breached its duty to provide a safe workplace.[160] The *Hechler* court found that this claim was preempted by section 301 because its resolution depended substantially on an analysis of a labor contract's terms.[161] The Court pointed out that typically the employer owes a duty to provide a safe workplace,[162] and that unions assume such a duty only when specifically mentioned in a contract. Because a court would have to interpret the contract in order to consider the plaintiff's state claim, it was preempted by federal law under section 301.

At the time when the Supreme Court decided *Hechler*, the union had filed its petition for certiorari in *Rawson*.[163] The Supreme Court of Idaho had concluded that the plaintiffs' claims were not preempted by federal law.[164] The United States Supreme Court vacated that judgment and remanded for reconsideration in light of *Hechler*.[165] On remand, the Idaho court reconsidered, but, distinguishing *Hechler*, again decided that the plaintiffs' claims were not preempted, and the United States Supreme Court again granted certiorari.[166]

Rawson involved wrongful death claims brought on behalf of four miners who were killed in a mine fire in 1972.[167] The plaintiffs alleged

156. Labor Management Relations Act § 301, 29 U.S.C. § 185(a) (1988). Section 301 provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

157. *Rawson*, 110 S. Ct. at 1912.

158. *Id.* at 1913.

159. 481 U.S. 851 (1987).

160. One assumes that at least one motive for litigation of this type is to find a defendant, since the employer will typically be liable only under the state's worker compensation scheme, where damages are not generous.

161. *Hechler*, 481 U.S. at 862 (relying on Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)).

162. *Id.*

163. *Rawson*, 110 S. Ct. at 1908.

164. *Id.*

165. *Id.*

166. *Id.* at 1908-09.

167. *Id.* at 1907.

that the union had inspected the mine, as allowed by the terms of the collective bargaining agreement, but had not exercised due care in conducting those inspections.[168]

The Idaho Supreme Court recognized a state cause of action, reasoning that if one renders services to another, "even gratuitously," that he recognizes are necessary to the other's protection, he is subject to liability if he fails to exercise reasonable care.[169] The state court distinguished *Hechler* by asserting that whether the union in *Hechler* had been bound by a duty to provide a safe workplace had depended primarily on the scope of the union's responsibilities under the contract.[170] In *Rawson*, according to the Idaho Supreme Court, the scope of the union's duty was not an issue.[171] The union had inspected the workplace, and the plaintiffs claimed that it had done so negligently; the cause of action was premised on that negligent conduct.[172] The Idaho Supreme Court found no reason to look to the collective bargaining agreement to determine the scope of the union's duty, since it could resolve the negligence issue without interpreting the contract.[173]

The Supreme Court reversed. The majority began its preemption discussion by reiterating its previous holding that if a duty is owed employees only because of a collective bargaining agreement, then the scope of the duty is a matter of federal law.[174] The Court said that the only possible interpretation of the plaintiffs' pleadings was that the duty assumed by the union depended on the collective bargaining agreement.[175]

The Idaho court had said that it made no difference *why* the union had inspected the mine, because under Idaho law, even volunteers could be held liable if they have negligently undertaken certain actions.[176] Under this view, there is no reason to look at the collective bargaining agreement at all. The Supreme Court disagreed, holding that the duty the union was alleged to have violated was *not* independent of the collective bargaining agreement.[177] The union was not alleged to have acted in a way that would violate a duty of reasonable care to every member of society, meaning that the alleged duty was owed only to employees repre-

168. *Id.*
169. *Id.* at 1908-09.
170. *Id.* at 1908.
171. *Id.* at 1910.
172. *Id.*
173. *Id.*
174. *Id.* at 1909.
175. *Id.* at 1910.
176. *Id.*
177. *Id.*

sented by the union.[178] Moreover, the Idaho court had not said that any visitor to the mine had a duty to report a dangerous condition.[179] Only the collective bargaining agreement can impose such a duty on a union; whether an agreement imposes this duty is a federal law question.[180] In short, the preemptive force of federal law could not be avoided, the Court said, by characterizing the union's duty as one growing out of state law.[181]

The Court determined that if the claim was to proceed, it could do so only as a matter of federal law.[182] The union asserted that the claim was invalid because under federal law the only duty it had to the employees was the duty of fair representation, which it could not breach by mere negligence.[183] The union also urged that its members could not sue it for breach of contract under section 301 since the duty of fair representation has statutory, not contractual, origins. In any event, the union claimed that it had made no enforceable promise to the bargaining unit employees when it inspected the mine.[184]

The Supreme Court first endorsed the view accepted by most appellate courts that mere negligence is not enough to violate the duty of fair representation.[185] The Court did not agree, however, that the union's sole responsibility to employees is the duty of fair representation. It noted that it had never held that a union cannot assume additional duties to represented employees. Unions may, in the Court's view, assume duties which have traditionally been viewed as management responsibilities.[186]

The Court emphasized caution, however, "lest courts be precipitate in their efforts to find unions contractually bound to employees by collective bargaining agreements."[187] To establish that a union owes a duty greater than the duty of fair representation, the Court stated, the employee must point to language in the collective bargaining agreement specifically indicating an intent to create obligations enforceable by individual employees against the union.[188]

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 1911.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1912.
188. *Id.*

The contract in *Rawson* provided only that a committee of union members and supervisors "shall inspect" the mine.[189] The Court found that this promise was not made to employees and was not enforceable by them. Rather, it was a promise solely between the union and the employer, and enforceable only by them. The Court stated that to confer employee rights enforceable against the union, a contract must include some indication that the right was to be enforceable by individual employees. That the contract imposes a duty on the union merely by saying it "shall" act is, presumably, not enough.[190]

The Court also suggested that unions could be held liable by employees as third party beneficiaries of promises made by unions to employers.[191] In *Rawson* there was no such liability, however, because third party beneficiaries have no greater rights than the promisee, and the union had made no promise to the employer.[192] Rather, the effect of the inspection provision was merely for the employer to surrender to the union part of its responsibility for safety.[193]

Rawson is a significant victory for the union. The Supreme Court rejected a state court's attempt to allow recovery against a union through clever pleading. And the Court held that negligent conduct is not enough to violate the duty of fair representation. But the Court also raised the possibility of union liability on other theories that clearly will not escape the attention of the plaintiffs' bar. There is no question that in the not-too-distant future, the Court will have to revisit some of the issues it raised in *Rawson*.

II. Employment Discrimination Cases

In its 1988 term, the Court decided several controversial employment discrimination cases. Those decisions became catalysts for Congressional enactment of the Civil Rights Act of 1990, which was vetoed by President Bush. Most of the 1989 term's employment discrimination cases, by contrast, were noncontroversial, technical in nature, and unanimous. The one exception is *Metro Broadcasting v. Federal Communications Commission*, an affirmative action case that was decided on the last day of the term.

189. *Id.*
190. *Id.*
191. *Id.* at 1912-13.
192. *Id.* at 1913.
193. *Id.*

A. *Hoffman-La Roche, Inc. v. Sperling*[194]

In *Hoffman-La Roche*, the Court held that district courts may act to facilitate notice to absent class members of class actions brought under the Age Discrimination in Employment Act ("ADEA").[195] The Court approved a district court order directing a defendant employer to produce names and addresses of absent class members, and authorizing plaintiffs to send a notice to them.[196]

The ADEA allows employees to bring an action on behalf of themselves and other employees similarly situated, but requires that individual class members file written consents with the court to become party to such an action.[197] In *Hoffman-La Roche*, the employer ordered a reduction in force and discharged or demoted some 1200 workers.[198] Richard Sperling, a discharged employee, filed an age discrimination charge with the Equal Employment Opportunity Commission.[199] He and other employees mailed a letter to some 600 employees whom they had identified as potential members of the protected class.[200] Sperling and others then filed an ADEA action in federal district court and received over 400 consents. The plaintiffs moved for discovery of the names and addresses of all similarly situated employees and for the court to send notice to all potential plaintiffs who had not yet filed consents.[201]

The district court ordered the employer to produce the names and addresses of the discharged employees.[202] The court also authorized the plaintiffs to send to all employees who had not yet joined the suit a notice and a consent document.[203] At the end of the notice was a statement that it had been authorized by the district court, but that the court had taken no position on the merits of the case.[204] The Third Circuit affirmed the discovery order and the order for further notice, ruling that "there is no legal impediment to court-authorized notice in an appropriate case."[205]

194. 110 S. Ct. 482 (1989).
195. *Id.* at 486-88.
196. *Id.*
197. *Id.* at 486 (citing Age Discrimination in Employment Act § 16, 29 U.S.C. § 216(b) (1982) (amended 1988)).
198. *Id.* at 485.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 486.

In a seven to two decision, with Justice Kennedy writing for the majority, the Supreme Court affirmed.[206] The Court found that district courts have discretion to decide whether to play any role in prescribing the terms and conditions of communication from named plaintiffs to the potential members of the class on whose behalf a collective action has been brought.[207] According to Justice Kennedy, trial courts are always involved in the notice process multi-plaintiff cases requiring mass written consent. Thus, district courts have the discretion to begin their involvement at the notice stage.[208] "By monitoring preparation and distribution of the notice, a court can ensure that it is timely, accurate, and informative."[209] District courts must take care, however, to avoid even the appearance of judicial endorsement of the merits of the case.[210]

Justice Scalia, joined by Chief Justice Rehnquist, dissented.[211] For them, there is "no authority for such an extraordinary exercise of the federal judicial power."[212] They concluded that while it is not unusual for courts to supervise and regulate parties to an existing action, these orders were not designed to facilitate the adjudication of any claim currently before the court.[213]

This case resolves an important practical question on which the courts of appeals had ruled inconsistently, but its underlying facts are quite narrow. In other cases, the court itself sent out the notice,[214] or the attorney did so,[215] both approaches are more problematic than the action authorized in *Sperling*. Here, the court approved the text of the notice but the plaintiff sent it. No appellate court reviewed the content of the form in *Sperling*, although the Supreme Court's caution about the appearance of judicial endorsement suggests that the employer's worry is that the uneducated public will be easily swayed by a notice it knows a court has endorsed. It is a difficult to predict whether this notice procedure will make ADEA class actions easier to bring. Certainly it will expand the number of people likely to recover against an employer.

206. *Id.* at 488.
207. *Id.* at 486.
208. *Id.* at 487.
209. *Id.*
210. *Id.* at 488.
211. *Id.*
212. *Id.* at 488.
213. *Id.* at 488-489.
214. *Id.* at 484 n.1.
215. *Id.*

B. *University of Pennsylvania v. Equal Employment Opportunity Commission*[216]

In *University of Pennsylvania*, the Court affirmed enforcement of an Equal Employment Opportunity Commission ("EEOC") investigatory subpoena.[217] In so doing, the Court refused to create a qualified common law privilege for university peer review documents[218] and rejected a claim that the subpoena infringed on academic freedoms protected by the first amendment.[219]

The University of Pennsylvania denied tenure to Rosalie Tung, an associate professor in the Wharton School of Business.[220] Tung filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination on the basis of race, gender, and national origin.[221] The EEOC undertook an investigation of her charge and requested a variety of information from the University.[222] The University asked the EEOC to exclude from its request materials that it called "confidential peer review information," specifically: (1) confidential letters of evaluation; (2) the department chair's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure; and (4) comparable portions of tenure-review files of five successful males.[223] The EEOC denied the University's request, and applied to the district court for enforcement of its subpoena.[224] The district court enforced the subpeona, and the Third Circuit affirmed.[225]

In a unanimous opinion by Justice Blackmun, the Supreme Court affirmed. In its defense, the university raised two claims. First, it urged the Court to create a qualified common law privilege against disclosure of confidential peer review materials.[226] The university argued that a court must first determine that the particular access is necessary beyond a showing of mere relevance, should be required before it orders those materials to be disclosed to the EEOC.[227] In rejecting the common law

216. 110 S. Ct. 577 (1990).
217. *Id.* at 589.
218. *Id.* at 582-85.
219. *Id.* at 585-88.
220. *Id.* at 580.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 580-81.
225. *Id.* at 581.
226. *Id.*
227. *Id.*

privilege, the Court relied on Title VII and the fact that when Congress amended it in 1972 to cover educational institutions, it did not grant any exemptions or protections in the name of confidentiality.[228]

Second, the university asserted a first amendment right of "academic freedom" against wholesale disclosure of the contested documents.[229] It argued that disclosing peer review materials violates the first amendment because it undermines the confidentiality which is central to the tenure process. In turn, the university argued, disclosure would stifle determination of who will teach, a means by which universities exercise their asserted academic-freedom right.[230] In rejecting this argument, the Court noted that in a typical academic freedom case, the government attempts to control or direct the *content* of speech.[231] Here, the injury is remote, attenuated, and speculative.[232] As Justice Blackmun noted, to state the claim is to recognize how distant the burden is from the asserted right.[233]

This decision addresses the narrow issue of the power of the government to enforce a statutory right to investigate and to issue subpoenas. It does not involve disclosure to the employee either as part of a lawsuit or at some earlier stage, although some states may have laws requiring such disclosure from public institutions.[234] On these facts, the university had a very difficult argument to make, asking essentially for the courts to read precedent expansively and to create a protection. The decision would have had a major impact if the Court had granted a qualified privilege. Then the question would have been whether other employers are entitled to the same privilege because confidentiality plays an important role in their employment decisions. The Court stated, "[w]e perceive no limiting principle in [the university's] argument."[235] In not creating a privilege or expansively reading precedent, the Court suggests that educational institutions do not deserve special treatment in terms of their employment decisions.

228. *Id.*
229. *Id.* at 583.
230. *Id.* at 586.
231. *Id.* at 587-88.
232. *Id.* at 586.
233. *Id.* at 588.
234. *See, e.g.*, IND. CODE § 5-14-3-4(b)(8) (Supp. 1990).
235. *University of Pa.*, 110 S. Ct. at 585.

C. *Lytle v. Household Manufacturing*[236]

In *Lytle*, the Court held that a district court's denial of relief on the plaintiff's Title VII claim could not collaterally estop litigation of a related claim under 42 U.S.C. section 1981 ("section 1981"),[237] which the district court had erroneously dismissed.[238] The Supreme Court found that the seventh amendment entitled the plaintiff to a jury trial in litigating the erroneously dismissed section 1981 claim.[239]

John Lytle, an African-American, worked as a machinist for Household Manufacturing.[240] The employer fired him following a purportedly "unexcused" two-day absence under a company rule providing that more than eight hours of "unexcused absences" within a twelve month period was grounds for dismissal.[241] Lytle filed an action seeking damages and injunctive relief under both Title VII of the Civil Rights Act of 1964 and section 1981.[242] He alleged that he had been treated differently from white workers who had missed work and that, by providing inadequate references to prospective employers, the employer had retaliated against him for filing a charge with the EEOC.[243] He requested a jury trial on all triable issues.[244]

The district court dismissed the section 1981 claim by concluding that Title VII was the exclusive remedy for Lytle's alleged injuries.[245] The court then conducted a bench trial of Lytle's Title VII claims. At the close of Lytle's case, the court granted the employer's motion to dismiss the discharge claim; at the end of all the evidence, the court entered a judgment in favor of the employer on the retaliation claim.[246]

The Fourth Circuit affirmed but noted that the district court erred in dismissing the section 1981 claim.[247] Nonetheless it ruled that the district court's findings with respect to the Title VII claim now collaterally estopped Lytle from relitigating his section 1981 claim in the district

236. 110 S. Ct. 1331 (1990).

237. Section 1981 provides, in pertinent part, that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (1988).

238. *Lytle*, 110 S. Ct. at 1338.

239. *Id.*

240. *Id.* at 1334.

241. *Id.*

242. *Id.*

243. *Id.* at 1334-35.

244. *Id.* at 1335.

245. *Id.*

246. *Id.*

247. *Id.*

court.[248] According to the Fourth Circuit, the seventh amendment, which preserves the right to trial by jury, did not invalidate the lower court's ruling on the collateral estoppel issue.[249]

The Supreme Court, in a unanimous opinion by Justice Marshall, reversed. The employer did not dispute that, had the court not dismissed the section 1981 claim, the plaintiff would have been entitled to a jury trial. The jury trial would also have proceeded before the court considered the Title VII claims and would have included all issues common to both claims. The Supreme Court reasoned that it would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim.[250]

Lytle is in fact a very narrow holding on very specific facts. While it resolves an inconsistency among federal courts of appeals, it does not add importantly to employment discrimination law. Rather, *Lytle* is interesting for two things the Court does not decide. First,since Lytle does not argue that the seventh amendment entitles him to a jury trial of the Title VII claims, the Court in a footnote stated "express no opinion on that issue here."[251] In this footnote the Court cites *Teamsters v. Terry*,[252] where the Court held six to three that an employee seeking relief in the form of backpay for a union's alleged breach of its duty of fair representation (under Section 301 of the Labor Management Relations Act) is entitled to a jury trial. *Terry* at least raises the possibility of the Court reaching a similar conclusion in Title VII. The right to a jury trial under Title VII is also relevant to the employment discrimination amendments currently before Congress.

Second, the Court did not decide whether Lytle's allegations of discriminatory discharge and retaliation concerned conduct within the scope of section 1981, as redefined by the Court's 1988 decision *Patterson v. McLean Credit Union*.[253] *Patterson* was decided after Lytle filed his petition for certiorari but before the Court granted his petition. According to the record in *Lytle*, neither side made arguments based on *Patterson* to the courts below. On remand, therefore, the parties have the chance to argue, and the court the opportunity to consider, whether dis-

248. *Id.*
249. *Id.*
250. *Id.* at 1336-37.
251. *Id.* at 1335 n.1.
252. 110 S. Ct. 1339 (1990).
253. 109 S. Ct. 2363 (1989).

criminatory discharge or retaliation claims relate to the formation or enforcement of contracts, the type of claim *Patterson* held are actionable under section 1981, or relate only to "postformation conduct" unrelated to enforcement of contracts, and therefore outside the scope of section 1981 as defined by *Patterson*.

D. *Employment Division, Oregon Department of Human Resources v. Smith*[254]

In *Smith*, the Court held that the first amendment does not preclude state prohibition of the sacramental use of peyote, and therefore that unemployment benefits may be denied to persons discharged for its use.[255]

Alfred Smith and Galen Black were fired from their jobs at a drug rehabilitation organization because they used peyote for sacramental purposes at a ceremony of the Native American Church. Their applications for unemployment compensation were denied because they were fired for misconduct.[256] The state court originally held that this denial of benefits violated the first amendment.[257] The United States Supreme Court remanded for a determination whether sacramental peyote use came within the state criminal drug law.[258] Subsequently, the state court held that such use did come within the state drug law but that the prohibition was invalid under the free exercise clause.[259] The United States Supreme Court reversed, holding that the first amendment permits states to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged because of its use.[260]

Previous cases held that states could not condition the availability of unemployment benefits on an individual's willingness to forgo conduct required by his religion.[261] However, unlike the earlier cases, the law prohibited the conduct in *Smith*. So, the question for the Supreme Court was whether a state's inclusion of peyote in criminal law is constitutional and the answer is yes. The Court refused to use the test in *Sherbert v. Verner*[262] — government action that substantially burdens a religious

254. 110 S. Ct. 1595 (1990).

255. *Id.* at 1606. Justice Scalia wrote the majority opinion. Justice O'Connor concurred in the judgment but not in the opinion. *Id.* Justices Brennan, Marshall, and Blackmun dissented. *Id.* at 1615.

256. *Id.* at 1598.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 1606.

261. *Id.* at 1598.

262. 374 U.S. 398, 402-03 (1963).

practice must be justified by a compelling governmental interest.[263] Instead, the Court leaves *Sherbert* as an unemployment compensation case, stating that the free exercise clause does not apply to "generally applicable criminal law."[264] While some states exempt religious use of peyote, a state is not constitutionally required to do so. *Smith* is not a Title VII case but does suggest that states have the power to enact legislation which in other situations would amount to discrimination on the basis of religion.

E. *Yellow Freight v. Donnelly*[265]

In *Donnelly*, the Court held that state and federal courts have concurrent jurisdiction of claims brought under Title VII.[266]

Colleen Donnelly repeatedly applied for work with the defendant employer, Yellow Freight.[267] Over a period of one and one-half years, the company claimed it had no vacancies, while it was in fact hiring men.[268] Donnelly filed a complaint with the EEOC.[269] The EEOC issued a right to sue letter, which did not specify the forum but did state that she had to file suit within ninety days.[270] Donnelly filed an action in Illinois state court, alleging a violation of the Illinois Human Rights Act.[271] The employer filed a motion to dismiss on the grounds that she had failed to exhaust her state administrative remedies.[272] She moved to amend her complaint to include Title VII as a basis for her action.[273] The employer then removed the case to federal court and filed a motion to dismiss because the amendment had not been sought within the ninety day period.[274] The employer argued that filing in state court could not toll the ninety day limitation period because the state court did not have jurisdiction over the Title VII claim.[275] Rejecting the exclusive jurisdic-

263. *Smith*, 110 S. Ct. at 1603.
264. *Id.*
265. 110 S. Ct. 1566 (1990).
266. *Id.* at 1570.
267. *Id.* at 1567.
268. *Id.*
269. *Id.* at 1567-68.
270. *Id.* at 1568.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*

tion claim, the district court decided for the plaintiff on the merits.[276] The Seventh Circuit affirmed.[277]

In a unanimous opinion by Justice Stevens, the Supreme Court affirmed, resolving a split in the circuits in favor of nonexclusive jurisdiction of Title VII claims. According to the Court, concurrent jurisdiction lies at the core of our federal system and Congress must make explicit its decision to limit jurisdiction to federal courts.[278] Nothing in the language of Title VII precludes state court jurisdiction; nothing in the enforcement procedures is incompatible with state court jurisdiction.[279] It is fairly clear that most informed observers of Title VII *expected* litigation to proceed exclusively in federal court, but this expectation does not overcome the presumption of concurrent jurisdiction.[280]

The *Donnelly* ruling expands the initial choices of fora for plaintiffs in Title VII actions. This choice is limited however, as a practical matter, by the ease with which the defendant can remove the case to federal court. If the case stays in state court, there are a host of problems like the availability of damages or trial by jury if provided by state law.

F. *Venegas v. Mitchell*[281]

In *Venegas*, the Court held unanimously that 42 U.S.C. section 1988 ("section 1988") does not preclude collection of additional fees under a contingent fee agreement.[282]

Juan Venegas entered into a contingent fee contract with defendant Mitchell to bring a civil rights action against Long Beach police officers for false arrest.[283] Under the contract Mitchell was entitled to forty percent of the gross amount recovered.[284] Venegas obtained a judgment of $2.08 million.[285] Mitchell moved for attorney's fees under the Civil Rights Attorneys Fee Act, now codified as section 1988,[286] and the district court awarded Venegas $117,000 in attorneys' fees payable by the losing defendant.[287] Mitchell then moved to intervene so he could attach

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 1569-70.
280. *Id.* at 1570.
281. 110 S. Ct. 1679 (1990).
282. *Id.* at 1682-84.
283. *Id.* at 1681.
284. *Id.*
285. *Id.*
286. Civil Rights Act of 1964 § 2, 42 U.S.C. § 1988 (1988).
287. *Venegas*, 110 S. Ct. at 1681 n.3.

Venegas's recovery to satisfy the remainder of the contingent fee.[288] The district court denied intervention.[289] The Ninth Circuit ruled that the district court had erred in denying intervention but agreed with the court that section 1988 does not prevent a lawyer from collecting under a contingent fee arrangement even if it exceeds the statutory award.[290]

The Supreme Court affirmed, in an unanimous opinion by Justice White, agreeing with a majority of the courts of appeals. Only the Tenth Circuit had held that section 1988 placed a ceiling on an attorney's permissible recovery under a contingent fee contract.[291] The Supreme Court acknowledged that in construing section 1988 it had rejected the contingent fee model in favor of a model based on hours reasonably expended compensated at reasonable rates.[292] The Court also assumed that a district court would not have been authorized to enhance the statutory attorneys' fees based on the contingency of nonrecovery in this particular litigation.[293] But, according to the Court, it is still a "mighty leap" from these propositions to the conclusion that section 1988 invalidates a private agreement.[294] In sum, section 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay her lawyer.

G. *Metro Broadcasting v. Federal Communications Commission*[295]

In the only truly controversial civil rights case of the term, the Court upheld an affirmative action plan in *Metro Broadcasting v. Federal Communications Commission*, a case concerned with the constitutional limitations on affirmative action, as was last term's decision in *Richmond v. J.A. Croson*.[296]

While *Metro Broadcasting* is not an employment or Title VII case, it is important to employment discrimination law because the Court's view of the relevant constitutional issues has an impact on both voluntary and court-ordered affirmative action efforts under Title VII. The case is also noteworthy in that, because Congress authorized the affirmative action efforts at issue, Justice White voted with the majority to uphold the plan, and Justice Brennan, who has since resigned from the Court, molded the five-justice majority.

288. *Id.* at 1681.
289. *Id.*
290. *Id.* at 1682.
291. *Id.* at 1681 n.1.
292. *Id.*
293. *Id.*
294. *Id.*
295. 110 S. Ct. 2997 (1990).
296. 488 U.S. 469 (1989).

The Court actually decided two cases, with different affirmative action measures. In *Metro Broadcasting*, the Court considered the FCC's policy of granting "qualitative enhancements" to minority license applicants in comparative licensing proceedings. In such proceedings, the Commission compares mutually exclusive applications for a new radio or television station and looks principally at six factors: (1) diversification of control of mass media communications; (2) fulltime participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient use of the frequency; and (6) the character of the applicant.[297] Under the affirmative action component, the FCC considered minority ownership and participation a "plus" to be weighed with the other factors, here awarding the license to Rainbow Broadcasting, a minority license applicant.[298] A competitor, Metro Broadcasting, sought review of the FCC's order in the United States Court of Appeals for the District of Columbia. A divided court affirmed the Commission's order, upholding the "plus factor" as an appropriate affirmative action effort.[299]

Astroline Communications v. Shurberg Broadcasting[300] concerned the FCC's "distress sale" program under which a broadcast licensee whose license the FCC had indicated might be terminated or not renewed could sell its assets and transfer the license to a qualified minority enterprise below the market value.[301] Here, too, the competitor Shurberg Broadcasting challenged the FCC's approval of a distress sale before a different panel of the Court of Appeals for the District of Columbia. A divided court invalidated the Commission's distress sale policy because it was not narrowly tailored to remedy past discrimination or to promote program diversity and it unduly burdened an innocent nonminority.[302]

In upholding both affirmative action policies, a five-member majority of the Court relied extensively on its 1980 decision in *Fullilove v. Klutznick*,[303] allowing a congressionally-mandated minority set aside program, and distinguished quickly its 1989 decision in *Richmond v. J.A. Croson*,[304] striking down a minority set aside program adopted by the

297. *Metro Broadcasting*, 110 S. Ct. at 3004-3005.

298. *Id.* at 3005.

299. *Id.* at 3006-07.

300. 110 S. Ct. 2997 (1990).

301. Under ordinary rules, a licensee cannot sell its license when the FCC has indicated it may terminate the license or not renew it.

302. *Id.* at 3007.

303. 448 U.S. 448 (1980).

304. 488 U.S. 469 (1989).

city council of Richmond, Virginia.[305] In these FCC cases, the Court rejected the strict scrutiny standard of review as well as the notion that "remedying effects of past discrimination" was the only interest to meet the strict scrutiny standard.[306] Instead, the Court held that

> benign race-conscious measures authorized by Congress — even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination — are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[307]

The Court found the FCC's goal—to promote programming diversity—was a sufficiently important governmental objective to provide a constitutional basis for its affirmative action policies.[308] The Court also deferred to the determinations of the FCC and Congress that increased minority participation in broadcasting would promote programming diversity.[309] Justice Stevens wrote separately to note his agreement derived from the Court's rejection of the proposition that a racial classification is only permissible as a remedy for a past wrong.[310] Since 1986, in *Wygant v. Jackson Board of Education*, he has argued that the Court should focus on the future benefit, rather than remedial justification, of race-conscious measures.[311]

Justice O'Connor, author of the majority opinion in *Croson* last term, wrote for the four dissenting justices.[312] Not surprisingly, she argued (1) that the appropriate standard of review is strict scrutiny; (2) that a remedial interest is necessary; (3) that an interest in program-

305. *Metro Broadcasting*, 110 S. Ct. at 3008-28.

306. *Id.* at 3008.

307. *Id.* at 3008-09 (footnote omitted).

308. *Id.* at 3009-11.

309. *Id.* at 3016-17. Even Congress's approval of the affirmative action effort shows how controversial affirmative action plans are. In 1986, the FCC began an inquiry regarding the validity of its minority and female ownership policies, including the minority enhancement credit. Before the FCC completed this inquiry, Congress enacted the FCC appropriations legislation for fiscal 1988. The measure prohibited the Commission from spending any appropriated funds to examine or change its minority ownership policies. *Id.* at 3006 & n.9. Congress has twice extended the prohibition on the use of the appropriated funds. *Id.* at 3016 & n.30.

310. *Id.* at 3028 (Stevens, J., concurring).

311. 476 U.S. 267, 313-315 (Stevens, J., dissenting). *See also* Richmond v. J.A. Croson, 488 U. S., 469, 511-513 (1989) (Stevens, J., concurring in part and concurring in the judgment).

312. *Metro Broadcasting*, 110 S. Ct. at 3028. Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice O'Connor's dissenting opinion. Justice Kennedy wrote a separate dissenting opinion in which Justice Scalia joined. Justice White was the fifth Justice for the *Croson* majority, striking down a minority set aside program; here Justice White is the fifth Justice upholding the FCC affirmative action efforts.

ming diversity is not sufficiently important even if a lower level of scrutiny is used; (4) that other less discriminatory means are available to the FCC, and finally; (5) that the FCC policies unduly burden and stigmatize innocent nonminority applicants.[313] Justice Kennedy wrote a separate dissenting opinion,[314] expanding Justice O'Connor's point about burdens and stigmas. He argued that racial classifications stigmatize both the preferred and the excluded, that "benign" discrimination is not easily identified, and that "broadcast diversity" is too trivial an interest to support the FCC's race-conscious policy.[315]

What is most interesting about the FCC cases, however, are the opinions not written. Justice Scalia, the outspoken literalist who has been harshly critical of affirmative action, did not write a new scathing attack on affirmative action. The fact that the fifth amendment does not contain an equal protection clause he would probably have bothered the literalist in him; therefore have to agree with the majority that this federal governmental action did not violate the fifth amendment. More unexplainable is why Justice White, who sided with the majority in *Croson* votes with the majority here. The simple explanation is that these FCC cases are on all fours with *Fullilove* in which Justice White voted to uphold the set aside program. *Fullilove*, however, was the last time Justice White voted to uphold a race-conscious plan. In 1984, he authored the majority opinion in *Firefighters Local 1784 v. Stotts*,[316] rejecting a district court's attempt to revise a voluntary affirmative action plan. In doing so he implied that affirmative action was limited to identifiable victims of proven discrimination.[317] Since then he has always voted to strike down race-conscious measures, almost always with a separate opinion.[318] These opinions suggest that his position is not an absolutist's and perhaps the answer to his vote in the FCC cases is that he finally found another race conscious measure he could endorse. But this seems an odd case in

313. *Id.* at 3029-44.

314. *Id.* at 3044.

315. *Id.* at 3045.

316. 467 U.S. 561 (1984) (an opinion in which Chief Justice Burger and Justices Rehnquist, O'Connor, and Powell joined).

317. *Id.* at 579-80. The meaning of *Stotts* has been the subject of great controversy. *See* Lamber, *Observations on the Supreme Court's Recent Affirmative Action Cases*, 62 IND. L.J. 243, 246-47 (1987); Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models for Racial Justice*, 1984 SUP. CT. REV. 1.

318. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 294 (1986) (White, J., concurring); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 531 (1986) (White, J., dissenting); Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 499 (1986) (White, J., dissenting); United States v. Paradise, 480 U.S. 149, 196 (1987) (White, J., dissenting); Johnson v. Transportation Agency, 480 U.S. 616, 657 (1987) (White, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

which to do so. Justice O'Connor is right in her critique of the affirmative action effort of the FCC: it is not limited, not very particularized, not based on persuasive evidence, and not remedial. For Justice White, it must be the difference between Congress and local government imposing the affirmative action obligation.

In other ways, these FCC cases are no different from the Court's other affirmative action cases. Most of the Court would agree that race seldom provides a relevant basis for disparate treatment and that classifications based on race are potentially harmful to everyone. But, the Court remains deeply divided over crucial issues inherent in affirmative action examinations, such as the appropriate standard of review, and what governmental interests might justify race-conscious measures, under what circumstances, and in spite of what alternatives. Justice Brennan's resignation signals the loss of a strong proponent of affirmative action measures. But other Justices, such as White and O'Connor, might help form a majority upholding race conscious measures in particular cases.