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Lee Modjeska
Ohio State University

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LABOR LAW DECISIONS OF THE SUPREME COURT—OCTOBER TERM, 1989

*Lee Modjeska**

* Joseph S. Platt-Porter, Wright, Morris & Arthur Professor of Law, the Ohio State University College of Law. B.A., Antioch College, 1955; J.D., University of Wisconsin, 1960.

PREFACE

The Supreme Court of the United States continues to face a diverse collection of cases that substantially affect many of the central issues in the field of labor law. The October, 1989 Term presented the Court with disputes concerning the proper scope of governmental involvement in matters of labor relations, employment discrimination, termination of employment and workers' compensation systems. The following is an exegesis of the major decisions of the last Term.

I. LABOR RELATIONS

A. Section 1983 Damages for Preempted Governmental Interference: Golden State Transit Corp. v. City of Los Angeles

Section 1983 of the Civil Rights Act of 1964 accords a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[1] The statute reaches federal statutory and constitutional claims.[2] Relief is available where the statute creates specific identifiable federal rights intended to benefit the puta-

1. 42 U.S.C. § 1983 (1988).
2. *See* Felder v. Casey, 487 U.S. 131, 139 (1988); Maine v. Thiboutot, 448 U.S. 1, 7 (1980).

tive plaintiff and where Congress has not expressly foreclosed relief.[3] In *Golden State Transit Corp. v. City of Los Angeles*[4] (*Golden State II*), the Court held that § 1983 authorizes a compensatory damage award for governmental interference with labor-management rights protected by the National Labor Relations Act (NLRA).[5] The original cause of action was first considered by the Court in *Golden State Transit Corp. v. City of Los Angeles (Golden State I)*.[6] In *Golden State I*, taxi drivers struck over labor contract negotiations when their employer's franchise renewal application was still pending.[7] The city conditioned franchise renewal upon settlement of the labor dispute before expiration of the franchise the following week.[8] Attempts to resolve the dispute failed and the franchise expired.[9]

In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,[10] the Court found that Congress intentionally prohibited some forms of economic pressure and left others unregulated; states may not impose additional restrictions upon permissible economic tactics such as the right to strike or the right to withstand the strike.[11] This is the so-called *Machinists* second line of labor preemption doctrine.[12] According to the *Golden State I* Court,

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3. *See* Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987); Smith v. Robinson, 468 U.S. 992, 1012 (1984); Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-20 (1981); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28 (1981).

4. 110 S. Ct. 444 (interim ed. 1989).

5. *Id.* at 448-52; *see* National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-97 (1988).

6. 475 U.S. 608 (1986).

7. *Id.* at 610.

8. *Id.* at 611.

9. *Id.*

10. 427 U.S. 132 (1976).

11. *Id.* at 153; Local 20, Teamsters Union v. Morton, 377 U.S. 252, 260 (1964); Garner v. Teamsters, 346 U.S. 485, 500 (1953). *But see* New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979) (upholding New York statute authorizing suspension of unemployment compensation claim when unemployment is due to strike).

12. The first labor preemption doctrine was established in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Under this so-called *Garmon* first line of labor preemption doctrine, based predominately upon the primary jurisdiction of the National Labor Relations Board (NLRB), the states lack jurisdiction when the activity is protected by section 7 or prohibited by section 8 of the NLRA. *Id.* at 236; Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon*, 359 U.S. at 244. Moreover, even where the activity is arguably, though not clearly, subject to sections 7 and 8, the state (and federal) courts must defer to the exclusive primary competence of the NLRB for determination of the activity's legal status. *Id.* at 246. "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.*; *see* Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986); Sears, Roebuck & Co. v. San Diego County Dist. Council of

the NLRA essentially leaves the bargaining process to the parties and imposes no time limits on bargaining negotiations or the economic struggle.[13] "The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help."[14] The *Golden State I* Court stated further that "[e]ven though agreement is sometimes impossible, government may not step in and become a party to the negotiations."[15]

According to the *Golden State II* Court, the *Machinists* preemption rule applied in *Golden State I* was designed to create a "free zone" from which all state or federal regulation was excluded.[16] The Court recognized Congress' intent that under the NLRA, employers and unions have the right to utilize economic weapons free of governmental interference. While section 7 protects certain rights against private interference, the NLRA also protects a range of conduct against governmental interference.[17] "The rights protected against state interference, moreover, are not limited to those explicitly set forth in § 7 as protected against private interference."[18] Although the *Machinists* rule originated in judicial interpretation rather than express statutory language, it does not diminish the federal right protected. The employer was "the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and . . . the NLRA gives it rights enforceable against governmental interference in an action under § 1983."[19]

B. Fair Representation in Job Referrals: Breininger v. Sheet Metal Workers International Association Local Union No. 6

The duty of fair representation was initially developed by the Su-

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Carpenters, 436 U.S. 180 (1978).

A third labor preemption doctrine was set out in Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). This third line of labor preemption doctrine concerns the preemptive effect of section 301 of the NLRA on the enforcement of collective bargaining agreements. *Id.* at 95; *see also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). *See generally* Modjeska, *Federalism in Labor Relations—The Last Decade*, 50 OHIO ST. L. J. 487 (1989).

13. 475 U.S. at 614, 616.

14. *Id.* at 615 (citation omitted).

15. *Id.* at 619.

16. 110 S. Ct. at 451 (citations omitted).

17. *Id.* at 450.

18. *Id.*

19. *Id.* The Court indicated that the comprehensive NLRB enforcement scheme protected by the *Garmon* preemption doctrine was not involved, because unlike *Machinists*, that scheme does not reach conduct protected from governmental interference. *Id.* The Court also noted, with regard to § 1983 analysis generally, that "[t]he availability of administrative mechanisms to protect plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy." *Id.* at 448-49.

preme Court in a series of racial discrimination cases arising under the Railway Labor Act (RLA) and was subsequently extended to the NLRA.[20] The duty of fair representation rises out of the grant of exclusive representation in collective bargaining given to the union selected by a majority of employees in a particular unit. This grant of exclusivity is accompanied by the concomitant duty to fairly represent all employees in the bargaining unit.[21] In *Miranda Fuel Co.*,[22] the NLRB announced the "novel, if not quite revolutionary" proposition that breach of the duty of fair representation was an unfair labor practice under the NLRA.[23] Thereafter, in *Vaca v. Sipes*,[24] the Supreme Court held that the Board's "tardy assumption of jurisdiction in these cases"[25] did not preempt federal or state court jurisdiction over suits for breach of the duty of fair representation under *San Diego Bldg. Trades Council v. Garmon*.[26] A principal basis for the *Garmon* preemption doctrine is the need to entrust primary administrative authority to the NLRB in order to avoid conflicting rules of law between courts and the Board.[27] In *Vaca*, the Court found no such basis because, in its view, the Board was simply adopting the fair representation doctrine as it had been judicially developed.[28] The Court "doubted [that] the Board brings substantially greater expertise to bear on these problems than do the courts."[29] Furthermore, because of the NLRB General Counsel's unreviewable discretion to decline to issue complaints, application of the *Garmon* preemption doctrine could disenfranchise individual employees protected by the fair representation doctrine and other remedies.[30]

In *Breininger v. Sheet Metal Workers International Association Local Union No. 6*,[31] the Court held that federal courts have jurisdiction over fair representation claims arising from hiring hall nonrefer-

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20. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); *see also* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). *See generally* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW §§ 7.5-.14 (2d ed. 1988).

21. L. MODJESKA, *supra* note 20, § 7.5.

22. 140 N.L.R.B 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

23. 326 F.2d at 177. *See generally* Modjeska, *The Uncertain Miranda Fuel Doctrine*, 38 OHIO ST. L. J. 807 (1977).

24. 386 U.S. 171 (1967).

25. *Id.* at 183.

26. *Id.*; *see* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (states lack jurisdiction when activity in question is protected by § 7 or prohibited by § 8 of the NLRA); *see also* cases cited *supra* note 12.

27. *Vaca*, 386 U.S. at 180-81.

28. *Id.* at 181.

29. *Id.*

30. *Id.* at 182-83.

31. 110 S. Ct. 424 (interim ed. 1989).

rals.[32] The Court also held that ad hoc retaliatory nonreferral by individual union officers, because of the member's political opposition to the union leadership, did not constitute "discipline" under sections 101(a)(5) and 609 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).[33] *Vaca* made clear that state and federal court jurisdiction were not preempted by the fact that breach of the duty of fair representation constituted an unfair labor practice subject to NLRB jurisdiction.[34] The Court in *Breininger* determined that the Board's alleged hiring hall expertise did not warrant an exception to *Vaca*.[35] According to the *Breininger* Court, the *Vaca* nonpreemption doctrine does not turn on the nature of the particular claim.[36] The Court reasoned that it was "unwilling to begin the process of carving out exceptions now, especially since [it saw] no limiting principle to such an approach."[37]

The Court noted that NLRB jurisprudence extended to many areas encompassed by the duty of fair representation, and that "[a]dopting a rule that NLRB expertise bars federal jurisdiction would remove an unacceptably large number of fair representation claims from federal courts."[38] While certain state law claims arising from hiring hall arrangements and entailing tort, contract, and other substantive nonfederal labor law claims might be preempted, the duty of fair representation "is part of federal labor policy" and creates no substantive conflicts.[39]

Moreover, the suit against the union was not barred by failure to allege an employer breach of the labor contract.[40] Although a substantial jurisprudence has developed concerning a hybrid fair representation/breach of contract claim where the employee elects to sue both employer and union,[41] nothing in that jurisprudence requires that an

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32. *Id.* at 430-31.
33. *Id.* at 440; *see* 29 U.S.C. §§ 411(a)(5), 529 (1988).
34. 386 U.S. at 188.
35. 110 S. Ct. at 431.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 432; *cf.* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (state court tort action alleging retaliatory discharge for asserting rights under workers' compensation laws, by employee covered by just cause provisions of labor contract, not preempted by federal labor contract law under § 301 of the NLRA). *But see* International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987) (state court negligence action against union, predicated upon alleged duty of care arising from labor contract's safety and working requirement, preempted by § 301); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (state tort action against employer and insurer for bad faith handling of claim under nonoccupational disability insurance plan preempted by § 301).
40. 110 S. Ct. at 434.
41. An employee's independent action against the employer under § 301 of the NLRA for

independent fair representation claim contain a concomitant claim of employer breach.[42] Similarly, potential bifurcation of claims between the court and the NLRB does not diminish independent federal jurisdiction under 28 U.S.C. § 1337(a) for the fair representation claim arising from the NLRA grant of exclusive representational status.[43] Such bifurcation also does not give the NLRB exclusive jurisdiction over "any fair representation suit whose hypothetical accompanying claim against the employer might be raised before the Board."[44]

The Court also held that fair representation claims were not delimited by unfair labor practice conduct (e.g., union-related discrimination under sections 8(a)(3) and 8(b)(2)) but rather were potentially broader in scope.[45] Flexibility and adaptability were virtues of the doctrine for protecting employees. "The duty of fair representation is not intended to mirror the contours of § 8(b); rather, it arises independently from the grant under § 9(a) . . . of the union's exclusive power to represent all employees in a particular bargaining unit."[46]

The Court further held that the union was not relieved of its fair representation duty because the hiring hall allegedly entailed employer-like, not representational, functions.[47] Union hiring hall authority is derived from representational status with its fair representation responsibility.[48] "The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation."[49] If the union stands alone and wields additional power as joint employer/union in the hiring hall context, "its responsibility to exercise that power fairly *increases* rather than decreases."[50]

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breach of contract is not barred by an otherwise exclusive grievance and arbitration contractual remedy where that contract procedure has been tainted by the union's breach of the duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 181 (1967). Establishment of union breach of duty is thus a precondition to the NLRB § 301 employer action, regardless of joinder. *Id.*; *see* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 556-67 (1976); *see also* Clayton v. UAW, 451 U.S. 679 (1981) (additional requirement that employee exhaust any internal union review procedures which could reactivate the grievance or award complete relief).

42. *Vaca*, 386 U.S. at 186-87.

43. 110 S. Ct. at 434.

44. *Id.* at 435.

45. *Id.* at 436. The Court cited Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). *Miranda Fuel* established that a breach of the duty of fair representation could also be considered an unfair labor practice. *Id.* at 183. The *Breininger* Court pointed out, however, that a finding that the conduct was not an unfair labor practice did not mean that there was not a breach of the duty of fair representation. 110 S. Ct. at 436. Fair representation claims were broader in scope. *Id.*

46. 110 S. Ct. at 436.

47. *Id.* at 436-37.

48. *Id.* at 437.

49. *Id.*; *see* Communications Workers v. Beck, 487 U.S. 735 (1988); Humphrey v. Moore, 375 U.S. 335 (1964).

50. 110 S. Ct. at 437.

The hiring hall nonreferral resulted from the actions of an individual officer, not the institutional union, and was therefore not proscribed "discipline"[51] under the LMRDA.[52] The complaint alleged that the union business manager and business agent denied job referrals as personal vendettas for the member's support of their political rivals.[53] "The opprobrium of the union *as an entity* . . . was not visited upon petitioner. He was not punished by any tribunal, nor was he the subject of any proceedings convened by respondent."[54] The statutory prohibitions "denote only punishment authorized by the union as a collective entity to enforce its rules [and] imply some sort of established disciplinary process rather than ad hoc retaliation by individual union officers."[55]

C. *Jury Trial in Fair Representation Cases: Teamsters Local 391 v. Terry*

In *Teamsters Local 391 v. Terry*,[56] the Court held that the seventh amendment entitled employees to a jury trial on their compensatory damages claim for lost wages and health benefits filed against their union for breach of the duty of fair representation.[57] The claim arose from special seniority agreements for drivers involved in a series of layoffs and recalls and the union's refusal to process certain complaints to the grievance committee level on the ground that the issues were determined in prior committee proceedings.[58]

While the search for an historic analog reveals that a fair representation claim is both legal and equitable in nature,[59] the particular

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51. It is unlawful for a union to "fine, suspend, expel or otherwise discipline" members for exercising protected LMRDA rights. 29 U.S.C. §§ 411(a)(5), 529 (1988); *see* Finnegan v. Leu, 456 U.S. 431, 438 n.9 (1982) ("otherwise discipline" has same meaning in both sections).

52. 110 S. Ct. at 440.

53. *Id.*

54. *Id.*

55. *Id.* at 439. The procedural protections of 29 U.S.C. § 411(a)(5) include such process as predisciplinary notice, defense, and hearing. Such processes are inapplicable to unofficial or hiring hall discrimination. *See* Boilermakers v. Hardeman, 401 U.S. 233 (1971) (trial process and review). "Congress envisioned that 'discipline' would entail the imposition of punishment by a union acting in its official capacity." 110 S. Ct. at 439. *See generally* Beaird & Player, *Union Discipline of its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383 (1975); Etelson & Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727 (1969).

56. 110 S. Ct. 1339 (interim ed. 1990).

57. *Id.* at 1344.

58. *Id.*

59. Justice Marshall, joined only by Chief Justice Rehnquist and Justices White and Blackmun, found that a fair representation claim is analogous to an equitable claim against a trustee for breach of fiduciary duty, and not to actions for vacation of arbitration awards (equitable), or attorney malpractice (legal). *Id.* at 1341-42. Justice Marshall found rather, that the related section 301 claim was related to a breach of contract claim and was, therefore, legal in nature. *Id.*

money damages remedy is legal in nature. The backpay sought was neither restitutionary[60] nor incidental to injunctive relief.[61] The backpay represented wages and benefits otherwise due from the employer, not money wrongfully withheld by the union. Backpay relief under Title VII of the Civil Rights Act of 1964,[62] which the Court has characterized as equitable,[63] was distinguishable since such backpay was specifically deemed "equitable relief" by Congress and was restitutionary in nature.[64] NLRA unfair labor practice backpay relief was also distinguishable since the duty of fair representation concerns individual, not public, wrongs and therefore "vindicates different goals."[65] The Court assumed but did not decide that Title VII plaintiffs are not entitled to jury trials.[66]

D. Striker Replacement Union Sentiments: NLRB v. Curtin Matheson Scientific, Inc.

Bargaining representatives enjoy an irrebuttable presumption of majority support for one year following certification or for a reasonable period following recognition.[67] The presumption is rebuttable thereafter.[68] The employer may successfully rebut the latter presumption and withdraw recognition without violating sections (1)(5) and 8(a) of the NLRA[69] by showing that the union in fact lacks majority support or that the employer has a good faith doubt, supported by objective evidence, that the union lacks a majority.[70]

These Justices were thus left in "equipoise" on the first part of the seventh amendment inquiry, i.e., the search for an issue (action) analog. *Id.* at 1347.

60. *See, e.g.*, Tull v. United States, 481 U.S. 412, 424 (1987) ("Restitution is limited to 'restoring the status quo' "; civil penalties under Clean Water Act not solely restitutionary in nature (quoting Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946)); *see also* Curtis v. Loether, 415 U.S. 189, 197 (1974) (Title VII cases characterize back pay as restitutionary in nature); Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946) (restitution is equitable remedy—not legal—concerned with "restoring status quo and ordering the return of that which rightfully belongs to the purchaser or tenant").

61. *See Tull*, 481 U.S. at 424 (court may order "monetary restitution as an adjunct to injunctive relief"); Mitchell v. Demario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) (court, under its equitable powers, may order such relief as is necessary to effect justice).

62. 42 U.S.C. §§ 2000e-2000e-17 (1988).

63. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-18 (1975).

64. 42 U.S.C. § 2000e-5(g).

65. 110 S. Ct. at 1349.

66. *Id.*

67. 29 U.S.C. § 159(c)(3) (1988); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37 (1987).

68. *Fall River*, 482 U.S. at 38.

69. 29 U.S.C. §§ 158(a)(1), (5) (1988).

70. *See Fall River*, 482 U.S. at 37 (1987); Ray Brooks v. NLRB, 348 U.S. 96 (1954); Bartenders Ass'n of Pocatello, 213 N.L.R.B. 651, 651-52 (1974); Terrell Mach. Co., 173 N.L.R.B. 1480, 1480-81 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970), *cert. denied*, 398 U.S.

In *NLRB v. Curtin Matheson Scientific, Inc.*,[71] the Court endorsed the refusal of the NLRB to presume that striker replacements either oppose or support the union[72] and upheld the Board's finding that a replacement majority did not alone warrant withdrawal of recognition.[73] The employer withdrew recognition during a strike in the instant case when the bargaining unit was comprised of twenty-two strikers, twenty-nine permanent replacement workers, and five employees who crossed the picket line at the strike's inception.[74] Crossover or replacement employment may be caused by economic pressures or strike policy disagreements and need not reflect union rejection.[75] Striker and replacement worker interests are not always diametrically opposed because unions do not always demand or obtain displacement of permanent replacements,[76] and interests may converge after the strike.[77] The Court noted that while replacements often do not support the union, strike circumstances and union leverage vary greatly from case to case and therefore "it was not irrational for the Board to conclude that the probability of replacement opposition to the union is insufficient to justify an antiunion presumption."[78] According to the Court, industrial peace is furthered by nonpresumption because an antiunion presumption might encourage union elimination by massive replacement, and chill the right to strike. The Court stated:

> [i]f an employer could remove a union merely by hiring a sufficient number of replacements, employees considering a strike would face not only the prospect of being permanently replaced, but also a greater risk that they would lose their bargaining representative,. thereby diminishing

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929 (1970). *See generally* Weeks, *The Union's Mid-Contract Loss of Majority Support: A Wavering Presumption*, 20 WAKE FOREST L. REV. 883 (1984); Comment, *Application of the Good-Faith-Doubt Test to the Presumption of Continued Majority Status of Incumbent Unions*, 1981 DUKE L. J. 718; Note, *Employee Postcertification Polls to Determine Union Support*, 84 MICH. L. REV. 1770 (1986).

71. 110 S. Ct. 1542 (interim ed. 1990).

72. *See* Buckley Broadcasting Corp., 284 N.L.R.B. 1339 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989). *cert. denied*, 110 S. Ct. 2619 (interim ed. 1990). *See generally* Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMP. L. REV. 691 (1988).

73. 110 S. Ct. at 1544.

74. *Id.* at 1547.

75. *Id.* at 1550.

76. *Id.* at 1551. The Court noted that, "[t]he extent to which a union demands displacement of permanent replacement workers logically will depend on the union's bargaining power." *Id.*

77. The replacement may oppose the strike, for example, but "nevertheless want the union to continue to represent the unit because of the benefits that will accrue to him from representation after the strike." *Id.* at 1552, n.10.

78. *Id.* at 1563.

their chance of obtaining reinstatement through a strike settlement.[79]

E. Negotiability of Federal Contracting Out Grievances: I.R.S. v. FLRA

In *I.R.S. v. FLRA*,[80] the Court held that the employer was not required to bargain under the Federal Service Labor-Management Relations Statute (FSLMRS)[81] concerning the Grievance & Arbitration Provisions in violation of an Office of Management and Budget (OMB) Circular.[82] OMB Circular A-76 directs federal agencies to contract out to the private sector certain nongovernmental activities, subject to certain conditions, and requires agency administrative appeals procedures for complaints by employees and others.[83] The employer refused to consider the union's proposal that the contractual grievance procedure of the OMB circular constituted the internal appeals procedure for complaints concerning contracting-out activities.[84] The employer viewed the circular not as law but as an internal managerial matter that was immunized from contractual controls.[85]

Section 7121 of the FSLMRS requires that labor contracts contain grievance and arbitration procedures covering "complaint[s] . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."[86] This provision is qualified by the reservation to management of authority "in accordance with applicable laws . . . to make determinations with respect to contracting out" as found in section 7106(a).[87] According to the Court, the reserved management rights of section 7106(a) supersede the negotiated grievance requirements of section 7121, so that alleged noncompliance with OMB obligations does not automatically concern a "law, rule or regulation" negotiable under section 7121.[88] "[A]ny law, rule or regulation" and "applicable laws" were thus not entirely synonymous.

The Court did not decide whether the "applicable laws" management rights qualification encompassed the OMB circular, or whether the circular constituted a "rule" or "regulation." The Court also de-

79. *Id.* at 1554 (also stressing the deference owed the Board).
80. 110 S. Ct. 1623 (interim ed. 1990).
81. Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-35 (1988).
82. 110 S. Ct. at 1625.
83. *Id.* at 1625-26.
84. *Id.* at 1626.
85. *Id.* at 1626-27.
86. 5 U.S.C. § 7103(a)(9)(c)(ii) (1988).
87. *Id.* § 7106(a)(2)(B).
88. 110 S. Ct. at 1627.

clined to decide whether the union's proposal covered a nonnegotiable subject of a government-wide rule or regulation.[89] The FLRA confined its position to the argument that "the management rights provisions of § 7106 do not trump § 7121."[90]

F. Preemption of Negligence Action Against Union: United Steelworkers v. Rawson

In *United Steelworkers v. Rawson*,[91] the Court held that federal labor contract law under section 301 of the Labor Management Relations Act (LMRA)[92] preempted a state court negligence action alleging negligent mine inspection by the union.[93] Any union duty entailed in the allegedly negligent mine inspection arose from the labor contract safety committee provisions and was governed by federal law.[94] The Court also held that mere negligence would not support an independent fair representation claim and that no independent contractual undertaking existed to warrant a third-party beneficiary section 301 contract claim against the union.[95]

The Court noted that the duty of fair representation is an important but limited check on arbitrary union power because a union must be accorded a wide range of representational reasonableness.[96] "If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees."[97] The instant labor contract ran between and was enforceable by the employer and union, not individual employees. Furthermore, the safety provisions did not even involve promises by the union to the employer, which might theoretically create third-party beneficiary rights.[98]

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89. *See* 5 U.S.C. § 7117(a)(1).

90. 110 S. Ct. at 1627.

91. 110 S. Ct. 1904 (interim ed. 1990).

92. 29 U.S.C. § 185(a) (1988).

93. 110 S. Ct. at 1909.

94. *See* International Bhd. of Electrical Workers v. Hechler, 481 U.S. 851 (1987) (third party beneficiary contract claim preempted by § 301 of the LMRA); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (tort claims intertwined with contract interpretation preempted by § 301 of the LMRA).

95. 110 S. Ct. at 1912.

96. *Id.*

97. *Id.*

98. *Id.*

G. Federal Service Wage Negotiability: Fort Stewart Schools v. FLRA

In *Fort Stewart Schools v. FLRA*,[99] the Court held that wages and fringe benefits related to "conditions of employment" were within the mandatory bargaining scope of the Federal Service Labor-Management Relations Statute (FSLMRS).[100] The employer refused to bargain over union proposals concerning mileage reimbursement, various types of paid leave, and a salary increase.[101] While the wages and fringe benefits of most executive branch employees are fixed by law[102] and thus nonnegotiable,[103] employees of schools established for children living on federal property are exempted from such civil service schedules.[104]

The statutory exclusion from bargaining and reservation to management of budget determinations found within section 7106[105] of the FSLMRS was inapplicable because no evidence was proffered to show that the union proposals would result in significant and unavoidable increases in costs.[106] The Court also rejected a challenge to negotiability based on the "compelling need" exception[107] and agreed that no compelling need existed for the particular Army regulation.[108]

II. EMPLOYMENT DISCRIMINATION

A. Facilitation of Notice in ADEA Class Actions: Hoffman-La Roche, Inc. v. Sperling

In *Hoffman-La Roche, Inc. v. Sperling*,[109] the Court held that federal district courts have discretion in appropriate cases to facilitate notice to potential plaintiffs in class actions under the Age Discrimination in Employment Act (ADEA).[110] The case arose from the employer's

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99. 110 S. Ct. 2043 (interim ed. 1990).

100. *Id.* at 2046; *see* Civil Service Reform Act of 1978, 5 U.S.C. §§ 7102(2), 7103 (1988).

101. 110 S. Ct. at 2045.

102. *Id.* at 2048; *see* General Schedules of the Civil Service Act, 5 U.S.C. § 5332 (1988).

103. 110 S. Ct. at 2048; *see* 5 U.S.C. § 7103(a)(14)(C) (excluding "matters . . . specifically provided for by Federal statute" from negotiable "conditions of employment").

104. 110 S. Ct. at 2048.

105. 5 U.S.C. § 7106(a)(1).

106. 110 S. Ct. at 2049; *see* American Federation of Government Employees, 2 F.L.R.A. 604 (1980), *enforced on other grounds sub nom*, Dep't of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

107. 5 U.S.C § 7117 (a)(2).

108. 110 S. Ct. at 2052.

109. 110 S. Ct. 482 (interim ed. 1989).

110. *Id.* at 486; *see* 29 U.S.C. §§ 621-634 (1988). Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates by reference the enforcement procedures of the Fair Labor Standards Act (FLSA). Section 216(b) of the FLSA provides in part:

> [An action] may be maintained against any employer . . . in any Federal or State court of

discharge or demotion of 1,200 employees.[111] The district court ordered the employer to produce the names and addresses of the discharged employees, authorized that notice and consent documents approved by the court be sent to all employees not yet joined, and stated in the notice that this approval by the court did not indicate any judicial position on the merits.[112] The Supreme Court declined to review the propriety of the particular notice.[113]

The Court held that judicial involvement promotes the congressional policy favoring collective ADEA actions by providing accurate and timely information concerning potential participation as well as early and efficient management of major litigation.[114] In exercising its discretion in the notice-giving process, the court "must be scrupulous to respect judicial neutrality [and] take care to avoid even the appearance of judicial endorsement of the merits of the action."[115]

B. EEOC Investigatory Subpoena and Academic Privilege: University of Pennsylvania v. EEOC

In *University of Pennsylvania v. EEOC*,[116] the Court held that neither common law nor first amendment academic freedom privileges justified a university's refusal to produce confidential peer review or tenure process materials[117] in response to an Equal Employment Opportunity Commission (EEOC) subpoena. The underlying EEOC charge alleged a denial of tenure based on race, sex, and national origin in violation of section 703(a) of Title VII of the Civil Rights Act of 1964.[118] The university contested that portion of the subpoena seeking confidential letters from evaluators, the department chairman's evaluation letter, the internal deliberations and summaries of faculty committees, and comparable portions of tenure-review files of five male faculty who allegedly received more favorable treatment.[119]

While federal rules permit flexible development of evidentiary

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competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

111. 110 S. Ct. at 485.

112. *Id.*

113. *Id.* at 486.

114. *Id.* at 488.

115. *Id.*

116. 110 S. Ct. 577 (interim ed. 1990).

117. *Id.* at 582-89; *see* 42 U.S.C. § 2000e-2(a) (1988).

118. 110 S. Ct. at 580.

119. *Id.*

privileges,[120] no statutory or historical basis warranted creation of a new privilege for peer review material.[121] Indeed, the effect of the 1972 congressional elimination of a statutory exemption for educational institutions[122] was to treat tenure decisions like other employment decisions.[123] The Court stated:

> [t]his extension of Title VII was Congress' considered response to the wide-spread and compelling problem of invidious discrimination in educational institutions. . . . Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members. Petitioners therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption for educational institutions.[124]

Congress provided a "modicum of protection" for confidentiality in the statutory prohibition against EEOC prelitigation investigatory disclosure[125] but did not otherwise restrict the broad right of EEOC investigatory access to relevant evidence.[126] Disclosure of confidential peer review materials may have some institutional cost, but "the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial [and] ferreting out this kind of invidious discrimination is a great if not compelling governmental interest."[127] The Court continued, "[i]ndeed, if there is a 'smoking gun' to

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120. Section 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution . . . or provided by Act of Congress or in rules prescribed by the Supreme Court . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience.

121. The Court noted that although Rule 501 vested the courts with flexibility in developing the rules on privileges, "we are disinclined to exercise this authority expansively." 110 S. Ct. at 582.

122. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-1).

123. 110 S. Ct. at 582.

124. *Id.* (footnote omitted).

125. *Id.* at 584; *see, e.g.*, 42 U.S.C. §§ 2000e-2(b), 2000e-8(e) (1988); EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981) (propriety of prelitigation disclosure of information in EEOC investigatory file).

126. 110 S. Ct. at 584; *see* 42 U.S.C. § 2000e-8(a).

> In connection with any investigation of a charge . . . the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Id.; *see also* EEOC v. Shell Oil Co., 466 U.S. 54 (1984) (EEOC subpoena power limited by standard of relevance to charge under investigation but not conditioned on validity of charge or probable cause).

127. 110 S. Ct. at 584.

be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files."[128]

The Court reasoned that to require the EEOC to demonstrate specific reasons for disclosure in the academic context would create a substantial obstacle to litigation and otherwise frustrate the EEOC's mission.[129] Furthermore, such a requirement has no limiting principle and "would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society [such as] writers, publishers, musicians, lawyers."[130]

With due regard for first amendment academic freedom protections and considerations, particularly where government attempts to control speech content,[131] the content-neutral impact of peer review disclosure upon tenure selection and the university's academic mission (e.g., quality instruction and scholarship) is too attenuated and speculative to support a first amendment claim.[132] "We doubt that the peer review process is any more essential in effectuating the right to determine 'who may teach' than is the availability of money."[133] Not all peer review systems are confidential, disclosure may foster caution but also specific evaluations, and, at any rate, "[n]ot all academics will hesitate to stand up and be counted when they evaluate their peers."[134] The EEOC investigative subpoenas neither direct nor influence the content of academic speech or faculty selection. The potentiality of redaction was not before the Court.

C. State Court Jurisdiction Over Title VII Litigation: Yellow Freight System, Inc. v. Donnelly

In *Yellow Freight System, Inc. v. Donnelly*,[135] the Court held that federal courts do not have exclusive jurisdiction over litigation brought under Title VII of the Civil Rights Act of 1964.[136] Rather, the Court found that state courts have inherent authority and presumptive competence to exercise concurrent jurisdiction.[137] Neither the statutory lan-

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128. *Id.*

129. *Id.*

130. *Id.* at 585.

131. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Adler v. Board. of Educ., 342 U.S. 485, 511 (1952), *overruled by*, Keyishan v. Board of Regents, 385 U.S. 589 (1967); *see also*, Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

132. 110 S. Ct. at 588.

133. *Id.*; *cf.* Buckley v. Valeo, 424 U.S. 1, 19 (1976) (relationship of money and first amendment rights).

134. 110 S. Ct. at 588.

135. 110 S. Ct. 1566 (interim ed. 1990).

136. *Id.* at 1570; *see* 42 U.S.C. §§ 2000e-1—2000e-17 (1988).

137. 110 S. Ct. at 1577; *cf.* Tafflin v. Levitt, 110 S. Ct. 792 (interim ed. 1990) (discussing

guage nor legislative history exclude state authority, and state court jurisdiction is not incompatible with the dual-track state and federal pre-litigation administrative processes of Title VII.[138]

The Court held that "[t]o give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction."[139] The Court further stated that "[w]hen the right to sue under Title VII arises, the fact that both a state agency and the EEOC have failed to resolve the matter does not affect the question of what judicial forum should or may entertain the action."[140] While most legislators, judges and administrators involved in Title VII may have expected federal exclusivity, "such anticipation does not overcome the presumption of concurrent jurisdiction that lies at the core of our federal system."[141]

III. EMPLOYMENT

A. OMB Review of OSHA Disclosure Rules: Dole v. United Steelworkers

In *Dole v. United Steelworkers*,[142] the Court held that the Office of Management and Budget (OMB) lacked authority under the Paperwork Reduction Act of 1980 (PRA)[143] to review or set aside a Hazard Communication Standard.[144] This standard had been promulgated by the Department of Labor (DOL) pursuant to the Occupational Safety and Health Act of 1970 (OSHA),[145] which required employer notification to employees, consumers and others concerning potentially hazardous chemical substances in the workplace.[146] The PRA protects the public against unnecessary paperwork requirements by requiring OMB approval of agency information-gathering rules.[147] This does not extend to third-party disclosure rules that do not result in

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concurrent jurisdiction under RICO); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (preclusivity of state court decisions in Title VII federal court actions).

138. 110 S. Ct. at 1568-69.

139. *Id.* at 1568.

140. *Id.* at 1570; *cf.* Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) (similarity of concurrent jurisdictional scheme for ADEA).

141. 110 S. Ct. at 1570.

142. 110 S. Ct. 929 (interim ed. 1990).

143. 44 U.S.C. §§ 3501-20 (1988). *See generally* Caudle, *Federal Information Resources Management After the Paperwork Reduction Act*, 48 PUB. ADMIN. REV. 790 (1988); Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 HARV. J. ON LEGIS. 1 (1987).

144. 29 C.F.R. § 1910.1200 (1990).

145. 29 U.S.C. §§ 651-78 (1988).

146. 29 C.F.R. § 1910.1200.

147. 44 U.S.C. §§ 3504, 3505, 3511.

information becoming available for agency use.[148]

By its terms, the PRA applies to "information collection requests," which are defined as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information."[149] "Collection of information" is defined as "the obtaining or soliciting of facts or opinions by an agency" through various means including "reporting or recordkeeping requirements."[150] Congress was concerned with agency-collection burdens, not those of third-party disclosure.[151] The OMB determined that several of the OSHA rules were of little benefit to employees, but the PRA confines the OMB to the "practical utility for the agency"[152] of the collected information.[153]

The Court noted that an agency charged with protecting employees from hazardous chemicals "chooses to impose a warning requirement because it believes that such a requirement is the least intrusive measure that will sufficiently protect the public, not because the measure is a means of acquiring information useful in performing some other agency function."[154] The Court concluded that "there is no indication in the Paperwork Reduction Act that OMB is authorized to determine the usefulness of agency-adopted warning requirements to those being warned."[155]

B. Workers' Compensation and Migrant Worker Protection: Adams Fruit Co. v. Barrett

In *Adams Fruit Co. v. Barrett*,[156] migrant farmworkers filed a Migrant and Seasonal Agricultural Workers Protection Act (AWPA)[157] action in federal court after receiving benefits under Florida's workers' compensation law for severe injuries received while traveling in the employer's van.[158] Florida law states that its workers' compensation remedy "shall be exclusive and in place of all other liability of such employer to . . . the employee."[159] The Court held that exclusivity

148. 110 S. Ct. at 935; *see* 44 U.S.C. §§ 3501-20.
149. 44 U.S.C. § 3502(11).
150. *Id.* § 3502(4).
151. 110 S.Ct. at 935.
152. 44 U.S.C. § 3504(c)(2).
153. 110 S. Ct. at 936.
154. *Id.* at 933-34.
155. *Id.* at 936.
156. 110 S. Ct. 1384 (interim ed. 1990).
157. 29 U.S.C. §§ 1801-72 (1988).
158. 110 S. Ct. at 1386.
159. FLA. STAT. § 440.11 (1989).

provisions in state workers' compensation laws do not bar migrant workers' private rights of action under the AWPA for injuries attributable to a violation of the AWPA's motor vehicle safety provision.[160] The fact that the insurance policy and liability bond requirements of the AWPA's motor vehicle safety provisions may be satisfied by state workers' compensation coverage in no way limits AWPA's separate enforcement provisions that create a private action.[161]

While AWPA's insurance requirements may be limited, the employer remains liable for the entire claim.[162] Absent any evidence to the contrary, Congress' authorization of private action to vindicate a federal right is presumed to supplement, not depend upon, state rights.[163] Neither the Florida legislature nor courts have construed the Florida exclusivity provision to preclude a federal remedy. Thus, no federal-state conflict in fact exists.[164] Furthermore, the AWPA does not authorize states to replace or supersede its remedies, whatever the regulatory balance.[165] The Court stated:

> [t]hat congressional authorization of a federal remedy may affect the balance struck in state regulatory schemes does not suggest that Congress intended its remedial provisions to be effective only in certain States. Federal legislation applies in all States, and in cases of conflict

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160. 110 S. Ct. at 1391. Section 1854(a) of Title 29 provides:

> [a]ny person aggrieved by a violation of this chapter or any regulation under this chapter by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

29 U.S.C. § 1854(a). Section 1854(c)(1) provides:

> [i]f the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief . . . .

Id. § 1854(c)(1). *See generally* Carnes, *Migrant and Seasonal Workers' Protection Act*, 9 J. AGRIC. TAX'N & L. 170 (1987); Pedersen, *The Migrant and Seasonal Agricultural Workers Protection Act: A Preliminary Analysis*, 37 ARK. L. REV. 253 (1984); Quisenberg, *A Labor Law for Agriculture: The Migrant and Seasonal Agricultural Workers' Protection Act*, 30 S.D.L. REV. 311 (1985).

161. "Congress' sole express limitation on the availability of relief is found in AWPA's enforcement provisions . . . (authorizing a court '[i]n determining the amount of damages to be awarded . . . to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation')." 110 S. Ct. at 1388 (quoting 29 U.S.C. § 1854(c)(2)).

162. 110 S. Ct. at 1388; *see* 29 U.S.C. § 1854(c)(1) (damages awarded "up to and including an amount equal to the amount of actual damages").

163. *See* Gomez v. Toledo, 446 U.S. 635, 639 (1980) (interpreting 42 U.S.C. § 1983 as broad, remedial legislation); Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944) (interpreting Fair Labor Standards Act as remedial with broad application).

164. 110 S. Ct. at 1389.

165. *Id.*

between federal law and the policies purportedly underlying some state regulatory schemes, the scope of federal law is not curtailed.[166]

The Court further noted that "[m]ore generally, we refuse to adopt Adams Fruit's 'reverse' pre-emption principle that would authorize States to withdraw federal remedies by establishing state remedies as exclusive."[167] Assuming statutory ambiguity, deferral to the Department of Labor's (DOL) contrary view was deemed inappropriate since DOL authority is limited to promulgation of motor vehicle standards and the judiciary, not DOL, adjudicates the private statutory rights.[168]

C. Legal Fees Limitations for Black Lung Claimants: United States Department of Labor v. Triplett

In *United States Department of Labor v. Triplett*,[169] the Court held that the attorney fee system and its limitations provided for in the Black Lung Benefits Act of 1972 (BLBA)[170] as administered by the Department of Labor (DOL) did not deprive claimants of legal representation or violate due process of law.[171] The BLBA provides a "reasonable attorney's fee" for disabled pneumoconiosis claimants subject to appropriate agency or court approval.[172] DOL regulations invalidate all contractual fee arrangements and deny fees to unsuccessful claimants.[173] The respondent attorney represented claimants on a contingent-fee basis, collected fees without the requisite approval, and was disciplined by the petitioner Committee on Legal Ethics of the West Virginia State Bar.[174] The Court found Committee standing predicated on the government prosecutorial interest in defending the underlying law and third-party standing for the attorney upon his clients' alleged constitutional deprivation.[175]

According to the Court, the Government has an obvious and legitimate interest in administering an informal and nonadversarial benefit scheme which ensures claimants the entire award and that scheme is

166. *Id.*
167. *Id.*
168. *Id.*
169. 110 S. Ct. 1428 (interim ed. 1990).
170. 30 U.S.C. §§ 901-45 (1988). *See* Pittston Coal Group v. Sebben, 488 U.S. 105 (1988). *See generally* Johnson & Perkins, *The Black Lung Battle—Procedural Ingenuity and Substantive Conflict*, 21 CREIGHTON L. REV. 1181 (1988); Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665 (1989); Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W. VA. L. REV. 763 (1981).
171. 110 S. Ct. at 1435.
172. 30 U.S.C. § 932(a).
173. 20 C.F.R. §§ 725.365, 802.203(f) (1989).
174. 110 S. Ct. at 1431.
175. *Id.* at 1432.

entitled to a heavy presumption of constitutionality.[176] The Court noted that the fee limitations scheme protects claimants and their families against improvident contracts; assures fairness to the employer, carrier, or trust fund; protects the security of the fund; and precludes the refund problems entailed in intermittent payments.[177] No showing was made that claimants could not obtain qualified legal representation, much less that any unavailability of counsel was attributable to the fee system as administered by the DOL.[178] The Court noted that the statutory requirement that "reasonable" fees are reviewable in court protects the dissatisfied attorney and that risk of nonpayment may be a compensable factor.[179]

D. Unemployment Compensation Denial for Religious Peyote Use: Employment Division v. Smith.

In *Employment Division v. Smith* (Smith II),[180] the Court held that the first amendment permitted the State to include religiously inspired peyote use within its general criminal prohibition on drug use, and, accordingly, to deny unemployment compensation to Native Americans discharged for such use.[181] The respondent Native Americans were discharged from their employment with a private drug rehabilitation organization for sacramental ingestion of peyote at a Native American Church ceremony and were denied unemployment compensation on grounds of work-related misconduct.[182] In *Employment Division v. Smith* (Smith I),[183] the Court remanded the case for determination of the legality of the religious use of peyote in Oregon.[184] The Oregon Supreme Court held that such use was proscribed by the state's controlled substance law and that the criminal statute "makes no exception for the sacramental use" of the drug, but that the first amendment precluded the unemployment compensation denial.[185] The *Smith II* Court found that the first amendment does not preclude the prohibition or burdening of religious activity as an incidental effect of a generally applicable and otherwise valid law.[186] "We have never held that an

176. *Id.* at 1429; *see* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985); Yeiser v. Dysart, 267 U.S. 540 (1925).

177. 110 S. Ct. 1432-33.

178. *Id.* at 1435.

179. *Id.* at 1434-35.

180. 110 S. Ct. 1595 (interim ed. 1990).

181. *Id.* at 1606.

182. *Id.* at 1597-98.

183. 485 U.S. 660 (1988).

184. *Id.* at 673-74.

185. Smith v. Employment Division, 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988), *cert. granted*, 489 U.S. 1077 (1989), *rev'd*, 110 S. Ct. 1595 (interim ed. 1990).

186. 110 S. Ct. at 1600.

individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[187] The Court distinguished hybrid situations where the free exercise claim was connected to some other constitutional protection such as freedom of speech, press, or parental rights.[188]

The Court also held that the compelling governmental interest test was not applicable because that requirement would produce the "constitutional anomaly" of "a private right to ignore generally applicable laws."[189] The compelling governmental interest balancing test applied in such cases as *Sherbert v. Verner*,[190] *Thomas v. Review Board*,[191] and *Hobbie v. Unemployment Appeals Commission*,[192] is confined to the unemployment compensation field, where state rules entailed individualized governmental assessment of reasons underlying particular conduct, i.e., unavailability to work for religious reasons.[193] In such cases, only a "compelling reason" justifies failure to extend an exemption to an individual based on religious hardship.[194] Whatever the *Sherbert* test limits, the Court held that it was irrelevant to "an across-the-board criminal prohibition on a particular form of conduct."[195] "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[196]

E. Energy Act Preemption of Whistleblower Claims: English v. General Electric Co.

In *English v. General Electric Co.*,[197] the Court held that a nuclear facility employee's state law claim for retaliatory (intentional) infliction of emotional distress was not preempted by the Energy Reorganization Act of 1974 (the Act)[198] because the claim did not significantly relate to nuclear safety.[199] The complaint alleged inten-

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187. *Id.*

188. *Id.* at 1601; *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute); Cantwell v. Connecticut, 310 U.S. 296 (1940) (discretionary licensing system for religious solicitation).

189. 110 S. Ct. at 1604.

190. 374 U.S. 398 (1963).

191. 450 U.S. 707 (1981).

192. 480 U.S. 136 (1987).

193. 110 S. Ct. at 1603.

194. *Id.*

195. *Id.*

196. *Id.* at 1606.

197. 110 S. Ct. 2270 (interim ed. 1990).

198. 42 U.S.C. §§ 5801-91 (1988).

199. 110 S. Ct. at 2270; *cf.* Pacific Gas & Elec. Co. v. State Energy Resources Conserva-

tional infliction of emotional distress in retaliation for nuclear safety complaints filed with the employer and the Nuclear Regulatory Commission (NRC).[200] The employee's complaint to the Secretary of Labor alleging retaliation violative of section 210(a) of the Act[201] was dismissed by the Secretary as untimely after an administrative law judge had found the employee's transfer and ultimate discharge unlawful.[202]

"[F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels."[203] This allowance of the tort claim did not conflict with the federal administrative remedy accorded whistleblowers under section 210 of the Act.[204] Congressional preclusion of relief under the Act, and perhaps even for deliberate violators of nuclear safety requirements (section 210(g)) was inapplicable because, contrary to the employer's contentions, the administrative law judge found that the employee had committed no such violations.[205] The failure of the statutory scheme to accord exemplary damages did not warrant the conclusion that state exemplary damages were preempted.[206] The fact that state remedies might be available beyond section 210 limitations periods would not significantly detract from nuclear safety monitoring because most retaliatory incidents follow employee federal complaints. Furthermore, it is not clear whether employees will forego section 210 options.[207]

F. Patronage Practices in Government Employment: Rutan v. Republican Party

In *Elrod v. Burns*,[208] the dismissal of certain non-civil service employees such as sheriff's office process servers, a juvenile court bailiff and a security guard were invalidated because they had been based on their political affiliation.[209] The Court held that the first and fourteenth amendments protect nonpolicymaking, nonconfidential government employees against discharge based upon their political beliefs.[210] *Branti v.*

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tion & Dev. Comm'n, 461 U.S. 190 (1983) (general federal preemption of nuclear safety field).

200. 110 S. Ct. at 2271-72.

201. 42 U.S.C. § 5851(a).

202. 110 S. Ct. at 2271.

203. *Id.* at 2278; *cf.* Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (nonpreemption of state punitive damages tort claim for radiation-based injuries).

204. 110 S. Ct. at 2280; *see* 42 U.S.C. § 5851(a).

205. *Id.*

206. *Id.*

207. *Id.* at 2281.

208. 427 U.S. 347 (1976).

209. *Id.* at 351.

210. *Id.* at 372-73.

Finkel[211] subsequently held that the first and fourteenth amendments protected assistant public defenders from discharge based solely upon their political affiliation.[212] The *Branti* Court rejected the contention that *Elrod* prohibited only dismissals resulting from an employee's failure to capitulate to political coercion.[213] According to the Court, "there is no requirement that dismissed employees prove they . . . have been coerced into [actually] changing [or pretending to change] their political allegiance."[214] Rather, it was sufficient to prove that the discharge was based on party affiliation or sponsorship.[215]

The *Branti* Court recognized the principle that party affiliation may be an acceptable requirement for those types of government employment in which the employee's private political beliefs would interfere with the discharge of the employee's public duties.[216] Such a situation might find first amendment interests subordinated to a state's "vital interest in maintaining governmental effectiveness and efficiency."[217] The Court stated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[218] The Court also observed that some positions might be deemed political even if not confidential or policymaking in character, and, conversely, that party affiliation is not necessarily relevant to policymaking or confidential positions.[219]

In *Rutan v. Republican Party*,[220] the Court held that the first amendment proscription against political patronage dismissals extends to promotion, transfer, recall and hiring decisions in low level, nonpolicymaking public employment positions where party affiliation is not job relevant.[221] The positions involved were rehabilitation counselor, road equipment operator, prison guard, dietary manager, and temporary garage worker. "[T]here are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their be-

211. 445 U.S. 507 (1980).
212. *Id.* at 519-20.
213. *Id.* at 516-17.
214. *Id.* at 517.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 518.
219. *Id. See generally* Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982); Note, *Patronage and the First Amendment After Elrod v. Burns*, 78 COLUM. L. REV. 468 (1978).
220. 110 S. Ct. 2729 (interim ed. 1990).
221. *Id.* at 2734-2739.

liefs and associations to some state-selected orthodoxy."[222]

The significant employment penalties imposed for exercise of first amendment beliefs were not narrowly tailored to further vital interests and were unconstitutional, even though the employees had no legal entitlement to the opportunities.[223] Discipline of employees whose work is deficient can protect governmental interests in effective employment and selectivity in high-level positions can protect governmental interests in loyal policy implementation.[224] The Court stated:

> [t]he First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.[225]

IV. POSTSCRIPT

It is interesting to note the extent to which most of the Term's decisions, some rather significant, were rendered with little or no guidance from Congress. Damages for preempted interference, jury trials in fair representation cases, negligence actions against unions, state court Title VII jurisdiction—these issues entail fundamental policy questions with substantial pragmatic impact. With due regard for Justice Holmes' observation that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions,"[226] some of these congressional crevices filled by the Court required giant steps.

It is also interesting to note that seven of the Term's labor decisions involved the NLRA and FSLMRS, dealing with fundamental issues of bargaining subjects, strikers' rights, fair representation, and preemption. Whatever the future of unionism, and labor law,[227] the last

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222. *Id.* at 2737.

223. *Id.* at 2736; *see* Perry v. Sindermann, 408 U.S. 593, 596-98 (1972) (lack of contractual or tenure rights immaterial to first amendment claim that "[t]here are some reasons upon which the government may not rely . . . especially, his interest in freedom of speech").

224. 110 S. Ct. at 2737.

225. *Id.* at 2737-38.

226. Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

227. *See generally* Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633; Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986); Modjeska, *Reflections on the House of Labor*, 41 VAND. L. REV. 1013 (1988); Raskin, *Organized Labor—A Movement in Search of a Mission: Implications for Employers and Unions*, 3 LAB. LAW. 41 (1987); Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

Term reflects Congress' continuing commitment to collective bargaining as the core of national labor policy for the private and federal sectors.[228] While it is not for the Court to change that policy, the Court must grapple with the cumulative complexity, disarray and inequity inherent in that policy.

However much collective bargaining may benefit or protect employees, at most only one-fifth of the private workforce is unionized. Courts and legislatures are increasingly seeking to protect non-union workers with protective labor doctrines that give due regard to the limitations and failures of the collective bargaining system. In a particular case, the legislative or judicial doctrine may end up being more beneficial to a union employee than the employee's contractual remedy. It is unclear to what extent basic fairness will continue to tolerate preclusion, particularly for the nonconsenting minority in the bargaining unit, and support the principle of majority rule in national labor policy despite its often unsatisfactory results.

Exclusivity principles that give the union awesome power to control the working lives and fortunes of the entire bargaining unit are balanced, according to national labor policy, by the duty of fair representation. Yet that duty tolerates negligence and demands neither reasonableness nor fairness, merely a lack of hostility. Moreover, the arbitral remedy is essentially nonreviewable and preclusive. The argument that collective bargaining processes, including union coffers, must not be unduly burdened is also unsatisfactory, particularly for the nonconsenting minority.

Perhaps the relationship, if any, between collective bargaining and the proliferation of protective labor law is essentially irrelevant. Whatever the impetus, the evolving legal guardianship reflected in the Term's decisions renews fundamental questions concerning continued justification for subjugation of the individual employee to the collective ideal. The exclusive representational philosophy may have so outlived its day as to warrant expanded concepts of individual free choice among competing models of representational theory.

Harmonization of employee options will continue to challenge the Court until, and probably after, Congress lends new vision and direction to a comprehensive national labor policy. The present *ad hoc* allo-

228. *See* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions." *Id.* at 180.

cation of benefits and burdens grows more unsatisfactory, inefficient, and sometimes unjust each Term, however great the stoutness of the Justices' hearts.