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I. INTRODUCTION

The 1990 Supreme Court term, as usual, produced several cases that had an impact on the employment relationship. Some cases were of great importance. The Court, for example, approved the first ever significant use of administrative rule-making power by the National Labor Relations Board. It again considered the extent to which unions can charge non-members for services rendered; and, in a landmark case, it struck down an employer's discriminatory policy aimed at protecting fetuses from work-place hazards. These and other important employment law cases from the last term are reviewed below.[1]

II. 1990-91 SUPREME COURT EMPLOYMENT LAW DECISIONS

A. National Labor Relations Act and Duty of Fair Representation Cases

1. *Litton Financial Printing Division v. NLRB*

Labor law produces few neutrals. The nature of the business is that most labor professionals line up according to the side they are on, or at least the side they are paid to be on. Because of the partisan nature of the business, most advocates will view *Litton Financial Printing Division v. NLRB*[2] according to its effect on their representational interests. Labor law not only produces few neutrals, it also produces little certainty. Previous Supreme Court decisions provide what certainty does exist. Although the National Labor Relations Board (NLRB or Board)[3] may fluctuate with the political winds of the administration, the Court *usually* abides by its prior opinions. The Court's response in *Litton*, however, demonstrates that even this is not always true.

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1. This article is not an exhaustive summary of cases that affected the employment relationship. Some cases were omitted either because of their limited importance or because they are not of significant general interest. *See, e.g*, Martin v. Occupational and Health Review Comm., 111 S. Ct. 1171 (interim ed. 1991); Norfolk & Western R.R. v. American Train Dispatchers Assoc., 111 S. Ct. 1156 (interim ed. 1991); Air Courier Conf. of Am. v. American Postal Workers, AFL-CIO, 111 S. Ct. 913 (interim ed. 1991).

2. 111 S. Ct. 2215 (interim ed. 1991).

3. The NLRB is the administrative agency charged with enforcement of the National Labor Relations Act. *See* 29 U.S.C. §§ 154-55 (1988).

There were two principal issues in the case, one of which should have been non-controversial. The case arose following expiration of a collective bargaining agreement between the employer and the Printing Specialties and Paper Products Union in 1979. In August of that year the union barely survived a decertification election. The Board finally certified the results of the election the following July and the employer decided to test that decision by refusing to bargain. This was the only way to obtain judicial review of the NLRB's action.[4] During the pendency of the proceedings, the employer eliminated part of its operation and, accordingly, laid off 10 employees, including 6 of the most senior workers in the plant.[5]

Although both the Supreme Court and the NLRB found special significance in the terms of the layoff clause in the expired contract, in fact there was nothing very special about it. As is fairly common, the clause said that seniority would "be the determining factor if other things such as aptitude and ability are equal."[6] The union filed a grievance protesting the employer's action but, the contract having expired, the employer refused to process the grievance or arbitrate the dispute. The union filed unfair labor practice charges with the Board, alleging that the employer's refusal to process the grievances to arbitration violated section 8(a)(5).[7]

The General Counsel[8] issued a complaint in November 1980, but it was more than six years later before the Board issued its opinion. The Board said the employer had a duty to bargain about the layoffs and, of more importance to the issue before the Court, held that unilateral abandonment of the grievance procedure violated section 8(a)(5). In addition, the Board said a wholesale repudiation of the arbitration process violated section 8(a)(5).[9] The Board relied on the Supreme Court's opinion in *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers Union*[10] where, in a different context, the Court said that arbitration could survive contract expiration.[11] Although

4. Employers cannot obtain direct review of NLRB orders in representational cases since they are not "final orders." *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 59-61 (1976).

5. *Litton*, 111 S. Ct. at 2219.

6. *Id.*

7. 29 U.S.C. § 158(a)(5) (1988).

8. The general counsel is not the attorney for the NLRB. The statutory responsibilities are set out in 29 U.S.C. section 153(d). The general counsel acts as prosecutor in unfair labor practice cases. *Id.* § 153(d).

9. *Litton*, 111 S. Ct. at 2221-22.

10. 430 U.S. 243 (1977).

11. *Id.* at 252-53.

Nolde Brothers did not involve interpretation of section 8(a)(5), in subsequent cases the NLRB had extended the Court's rationale to aspects of its section 8(a)(5) analysis.[12]

Despite its finding that the employer had violated the Act by its abrogation of the contractual grievance-arbitration procedure, the Board refused to order the employer to arbitrate the layoff grievances as part of its remedial order. The Board reasoned that the grievances had not arisen under the contract, as the Court had defined the test in *Nolde* and as the Board had adopted it in *Indiana and Michigan Electric Company*.[13] The court of appeals rejected the Board's conclusion that the grievances were not arbitrable.[14] The Supreme Court agreed to review the decision.

The Court began its review by discussing *NLRB v. Katz*,[15] and interpreted the case to mean that an employer cannot act unilaterally with respect to matters covered by the contract even following contract expiration, absent impasse. Although this interpretation does not exactly comport with the language of the *Katz* opinion,[16] the Board has consistently interpreted it in this fashion and the Court has deferred to the Board's prior interpretations. Nevertheless, even though unilateral change can violate section 8(a)(5), the Court said that some contract provisions fall outside the doctrine, including arbitration clauses. The Board has adhered to this view since 1970.[17] The union attacked the rule in *Litton* but the Court deferred to the Board's judgment, finding it rational and consistent with the Act.[18] Thus, the Court resolved the dispute using the analysis it ordinarily applies to the Board's statutory

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12. *See, e.g.*, Indiana and Michigan Elec. Co., 284 N.L.R.B. 53 (1987). Typically, the NLRB has no role to play in determining the arbitrability of grievances. Whether a party has agreed to arbitrate is a matter of contract interpretation. These substantive arbitrability determinations are reserved for the courts, although they, too, play only limited roles. *See, e.g.*, United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960).

13. 284 N.L.R.B. 53 (1987). In *Indiana and Michigan Electric*, the Board declared that it would order arbitration as a remedy for an employer's 8(a)(5) violation "only when the grievances at issue arise under the expired contract." *Indiana and Michigan Elec.*, 286 N.L.R.B. at 821. In *Litton*, however, the Board determined that the grievances did not arise under the contract because the layoffs occurred after expiration of the agreement and because layoff by seniority was a right to be found only in the contract. *Id.*

14. 893 F.2d 1128, 1137 (9th Cir. 1990). The Ninth Circuit Court of Appeals declared that the right to be laid off in the order of seniority did arise under the contract. *Id.* at 1139.

15. 369 U.S. 736 (1962).

16. The Court did say "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal." *Id.* at 743. But the Court did not necessarily hold that it was necessary to reach impasse before an employer could act unilaterally. Thus, in a significant footnote, the Court implied that it might be sufficient for an employer to act "after notice and consultation." *Id.* at 745 n.12.

17. *See* Hilton-Davis Chem. Co., 185 N.L.R.B. 241 (1970).

18. Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215, 2222 (interim ed. 1991).

interpretations. The result is that arbitration agreements survive expiration under the *Katz* rationale only if the parties expressly agree that they survive, an eventuality that seems unlikely.

The Court then turned to the more controversial part of the opinion which involved the union's contention that, having found an unfair labor practice, the Board should have ordered the employer to arbitrate the grievances as a remedy. In *Litton*, the union had not sought a court order to arbitrate under section 301 of the Labor Management Relations Act.[19] Nevertheless, in resolving the remedy issue, both the Board and the Court premised much of their discussion on *Nolde Brothers*, which was a section 301 case.

The Court has held that the NLRB has both the right and the obligation to structure remedies. Moreover, the Court has often observed that courts owe considerable deference to the remedies fashioned by the Board.[20] Even so, the Court said it owed no such obligation in this case. The Board's remedy, the Court said, was not based on the policy of the Act but rather was influenced by the Board's interpretation of the contract. But, the Court recognized that the Board is not an expert in the interpretation of collective bargaining agreements; rather, interpretation of these agreements is the province shared by courts and arbitrators.[21]

The Court noted that section 8(a)(5) was not the only source of power to order reluctant employers into arbitration. In addition, federal as well as state courts have the power to make substantive arbitrability determinations under their section 301 jurisdiction.[22] Typically, such determinations have little to do with the court's view about the substance of the claim. Rather, the court's function, according to the *Steelworkers' Trilogy*,[23] is to see whether the arbitration clause is susceptible to an interpretation that would include the union's grievance. If so, the court orders the employer to arbitrate and the arbitrator decides the merits of the contractual claim.[24]

Orders to arbitrate under section 301 are not necessarily precluded simply because the contract that contains the arbitration agreement

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19. 29 U.S.C. section 185 authorizes suits by and against unions for violation of labor contracts. The basics of so-called 301 actions are reviewed in GORMAN, *supra* note 4, at 543-51.

20. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

21. *Litton*, 111 S. Ct. at 2223.

22. *Id.*

23. What is popularly known as the *Steelworker's Trilogy* is a group of cases about labor arbitration decided on the same day in 1960. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

24. For a review of the *Steelworkers' Trilogy*, see GORMAN, *supra* note 4, at 551-61.

has expired. The Court recognized as much when it decided *Nolde* in 1977.[25] There, the union sought arbitration of its claim that contractual severance benefits survived expiration of the contract.[26] The Court said that the union's claim required interpretation of the severance pay article of the contract, given the union's assertion that severance payments were vested benefits that survived expiration.[27]

In order to decide *Litton* as the Court did, Justice Kennedy, writing for the five justice majority, had to do two things; first, he had to distort what the Court had said in *Nolde* and second, he had to ignore much of what the Court said about arbitrability determinations in the *Steelworkers Trilogy*. Justice Kennedy read *Nolde* quite narrowly. He said it justified a post contract order to arbitrate in only three instances: (1) where the case actually arose before expiration, a matter that has never really been in controversy; (2) where something the employer does after expiration infringes on accrued or vested rights, which is how Justice Kennedy viewed the situation in *Nolde*; and (3) where the clause survives under normal principles of contract interpretation, which was not at issue in *Litton* or *Nolde*.[28]

Justice Kennedy said the question was whether the layoff clause at issue — or more aptly, the seniority provisions of it — amounted to the kinds of vested rights which could be assumed to survive contract expiration. Justice Kennedy said they could not. He surmised that a clause based solely on seniority might survive, but that the clause in *Litton* was not of that type. As evidence, he pointed to language accepted by labor practitioners as boiler plate language referring to seniority as determinative when ability and aptitude are equal.[29]

Such provisions are commonplace in collective bargaining agreements. Although Justice Kennedy's opinion made much of the reference to ability and aptitude, labor arbitrators have typically not required a union to show equality of skill among employees in order to invoke the seniority provisions of the such clauses. In the ordinary case, a union need show nothing more than that employees are qualified to perform the work. Seniority is usually the determining factor.

Justice Kennedy's focus on the wording of the layoff clause was prompted by his reading of *Nolde*, an opinion which he said was narrowly crafted so as to apply only to vested rights.[30] This narrow focus is

25. Nolde Bros. Inc. v. Local 358, 430 U.S. 243 (1977).

26. *Id.* at 247. The employer had announced its decision to close following expiration of the contract and the parties' inability to reach a new agreement. *Id.*

27. *Id.* at 249.

28. Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215, 2225 (interim ed. 1991).

29. *Id.* at 2227.

30. *Id.* at 2225.

simply not justified by any fair reading of *Nolde*. It is true that *Nolde* involved severance pay rights which the union claimed were vested, but Chief Justice Burger's majority opinion was quite broad. He said the severance pay claim clearly would have been arbitrable had it arisen under the contract and there was nothing in the arbitration clause which indicated that similar occurrences after expiration were to be excluded.[31] This omission was important, the Court said, because "the parties must be deemed to have been conscious" of the Court's strong preference for arbitration of disputes over collective bargaining agreements.[32] Their failure to exclude such disputes from the arbitration process, then, was significant. "In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication."[33]

Whatever one may think of this reasoning, it is at least clear that it was not merely the nature of the claim that made the *Nolde* dispute arbitrable. The *Nolde* opinion said clearly that, the union having raised a claim to contract rights, the interpretation of the contract was up to the arbitrator.[34] It was the breadth of the arbitration *clause* that made the difference, not the union's assertion that the employees' rights were vested.

In *Litton*, however, Justice Kennedy did exactly what the Court had instructed lower courts not to do for more than a quarter of a century. Rather than look to see whether the arbitration clause was susceptible to an interpretation that made the claim arbitrable — indeed, he barely looked at the clause — Justice Kennedy simply decided the merits of the dispute. The union essentially claimed that certain seniority rights were intended by the parties to survive expiration, a grievance that it said was arbitrable under *Nolde* since the clause did not exclude post termination arbitrations.[35]

Having advanced a plausible, although debatably correct, interpretation of the contract and having shown that the claim on its face was arbitrable, the Court should simply have ordered the case into arbitration and let an arbitrator decide it. Arbitrators may well have agreed with Justice Kennedy's conclusion that the contract furnished no relief. The point, however, is that such a decision should have been made in the proper forum and previous Supreme Court decisions had made it clear that the forum was arbitration. As the Supreme Court has said,

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31. *Nolde*, 430 U.S. at 252.
32. *Id.* at 255.
33. *Id.*
34. *Id.*
35. Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215, 2223 (interim ed. 1991).

the courts are not to review the merits of a controversy in making arbitrability decisions, but there is no other way to describe what Kennedy did.

Whether this approach will have any effect outside post expiration claims is the real question raised by *Litton*. Although the Court did not admit it, the analysis used here was not only different from that applied in previous cases, but it was what the Court consistently had instructed courts not to do.

2. *American Hospital Association v. NLRB*

Like most administrative agencies, the NLRB has the full range of administrative rule-making power.[36] Unlike most administrative agencies, however, the Board has seldom employed its rule-making authority, at least for issues other than procedural issues. Rather, the NLRB has acted principally through its adjudicative power, preferring to define general principles through litigation. It has thereby fashioned what amounts to a common law system operating under the general framework of the National Labor Relations Act.

Students of the Board's work have come to accept this system as the norm; and, practitioners have learned to live with — indeed, even to profit from — the Board's periodic and fairly frequent shifts in position.[37] The Board has never fully explained its preference for litigation over the legislative rule-making process used by most other agencies. But there is no doubt that the power such course of action affords individual Board members to influence and change legal rules in relatively rapid fashion is among the considerations.

Despite this history, the Board departed from its usual practice in 1990 when it adopted 29 CFR section 103.30, a substantive rule defining appropriate bargaining units in the health care industry. This was an issue previously settled exclusively in adjudication in every industry, including health care.[38] The Board had tried the adjudicative process in health care as well, but, after a decade and a half of haggling with federal courts of appeals, who typically defer to Board unit determinations in *other* industries, the Board opted for rule-making.[39]

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36. 29 U.S.C. § 156 (1988).

37. For a review of how NLRB doctrine can change rapidly (often after a change in the administration), see Terry A. Bethel, *Recent Decisions of the NLRB — The Reagan Influence*, 60 IND. L.J. 227 (1985).

38. Section 9(b) of the National Labor Relations Act empowers the Board to decide "in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . . " 29 U.S.C. § 159 (1988). Courts of appeals typically defer to the Board's unit determinations. *See* GORMAN *supra* note 4, at 67.

39. For a review of the Board's early experience in health care unit determinations, and the reactions of the courts of appeals, see T. Merritt Bumpass, Jr., *Appropriate Bargaining Units in*

The particular terms of the rule were not really at issue in *American Hospital Association v. NLRB*.[40] In brief, the Board's new rule sets a limit of eight appropriate bargaining units in acute care hospitals, subject to three exceptions.[41] The exceptions are cases that present extraordinary circumstances, cases in which nonconforming units already exist, and cases in which labor organizations seek to combine units, which obviously would lead to fewer than eight.[42]

The American Hospital Association (AHA) along with hospital labor counsel, which had used this issue to delay and frustrate collective bargaining ever since the 1974 Health Care Amendments[43] became effective, attacked the Board's new rule on three grounds. First, the petitioners claimed that rule-making itself was inappropriate because the express terms of section 9(b) require unit determinations "in each case," which the petitioners essentially read to mean "on a case by case basis." A unanimous Supreme Court rejected that challenge.[44]

Justice Stevens, writing for the majority, observed that initiative for selection of the bargaining unit comes from the employees or, more accurately, from the union. The union petitions the Board for an election for the unit it desires.[45] Thereafter, employers can resist by claiming that the unit described in the petition is inappropriate. The matter then falls to the Board which is obligated to decide if the unit requested is appropriate. Accepting several decades of Board decisions, the Supreme Court said that the Board need not determine the most appropriate unit; rather, the question is if the union has petitioned for *an* appropriate unit.[46]

Historically, these distinctions have been made following adjudicative hearings in so-called R cases, conducted before hearing officers from the Board's regional offices. The Court said, however, that the Act does not require that procedure, and the words "in each case" cannot be read to prevent the implementation of industry wide bargaining unit rules.[47] Rather, the words mean the Board will settle disputes

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Health Care Institutions: An Analysis of Congressional Intent and its Implementation by the National Labor Relations Board, 20 B.C.L. REV. 820 (1979).

40. 111 S. Ct. 1539 (interim ed. 1991).

41. *Id.* at 1541.

42. *Id.*

43. The NLRA excluded non profit hospitals from coverage until 1974 by expressly excluding them from the Act's definition of "employer." 29 U.S.C. § 152(2) (1988). The exemption was removed in 1974 simply by deleting from the definition the language concerning non-profit hospitals.

44. *American Hosp.*, 111 S. Ct. at 1547.

45. *Id.* at 1542.

46. *Id.*

47. *Id.*

"whenever necessary" or "in any case in which there is a dispute," using for guidance not only the policies of the statute but also rules developed in adjudication and rule-making.[48]

In addition, the Court said, nothing in the statute prohibits delineating rules for specific industries.[49] In that regard, the Court noted that the Board had not, contrary to the employef's contention, developed an irrebuttable presumption.[50] Rather, the rule contained an exception for "extraordinary circumstances" and the Board still had to apply its rules "in each case."[51]

The AHA's second attack was more familiar and had enjoyed particular success in the courts of appeals,[52] whose opinions the Supreme Court completely ignored. Nonprofit hospitals had been expressly exempted from NLRB jurisdiction as part of the Taft Hartley Amendments of 1947, a situation that prevailed until the 1974 Health Care Amendments. In form, those amendments did little more than remove the exemption from the Act's definition of employer. In particular, Congress did not change the provisions of Section 9 that deal with appropriate unit determinations.

That does not mean, however, that Congress had no concern about unit determination issues in the health care industry. Indeed, hospital lobbyists, pointing to the multitude of crafts and professions in every hospital, cautioned that a multiplicity of units increased the risk of strife which, in turn, might affect patient care. An attempt in 1973 to remove the nonprofit hospital exemption would have limited hospital bargaining units to no more than five.[53] The bill that passed the following year had no such provision but it was accompanied by a very important sentence of legislative history: "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."[54] The same history noted committee approval of three NLRB decisions concerning unit determinations in for-profit hospitals.[55]

It is fair to make two observations about what came to be known as the congressional admonition. First, in its early health care decisions, the Board paid no attention to it, other than to claim that it had

48. *Id.* at 1542-43.
49. *Id.* at 1543.
50. *Id.*
51. *Id.*
52. *See, e.g.*, Bumpass, *supra* note 39, at 898-900.
53. *American Hosp.*, 111 S. Ct. at 1544.
54. *Id.* at 1545 (quoting S. REP. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. REP. No. 1051, 93d Cong., 2d Sess. 6-7, *reprinted in* 1974 U.S.C.C.A.N. 3946, 3950).
55. *Id.*

duly considered the matter. Second, the courts of appeals treated this legislative history as though it were part of the statute.[56]

Neither of these reactions, perhaps, was justified, but the Board at least had the wording of the statute on its side. By the time the Health Care Amendments were passed, the Board had been making unit determinations for 39 years and its views on the matter, though perhaps no more consistent than the Board's views on anything else, were at least not a secret. With this as background, Congress knew how to limit the Board's discretion if it had wanted to do so. In fact, the bill introduced the previous year limited the Board's discretion, but, the limitations did not appear in the version that became the Health Care Amendments. The Board could argue with some force, then, that while it was supposed to give "consideration" to the number of health care bargaining units, it was not disabled from applying to hospitals the same criteria it applied to other industries.

The federal appellate courts, however, did not subscribe to this view. They frequently pointed to the congressional admonition and scolded the Board for failing to heed it. None of this was lost on hospital labor counsel. Because Board unit determinations can only be reviewed following unfair labor practice proceedings,[57] hospitals that resisted NLRB unit determination could often delay bargaining indefinitely.

Somewhat surprisingly, the Supreme Court spent little time detailing the battleground over the congressional admonition. No doubt because the American Hospital Association used the legislative history primarily to bolster its argument that section 9(b) required a case by case analysis, an approach which the Court rejected. The Court merely said that the petitioners did not "and obviously could not contend that this statement in the Committee reports has the force of law."[58] The Court's declaration effectively razed the actions of several courts of appeals. The Court viewed the admonition, *not* as a statute, but rather, as a warning from Congress that Board intransigence might result in further congressional action.[59] The AHA did "suggest" that the admonition was an "authoritative statement of what Congress intended."[60] The Court, however, said that the extensive rule-making proceedings were themselves the "due consideration" desired by Congress.[61]

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56. *See, e.g.*, St. Vincent's Hosp. v. NLRB, 567 F.2d 588 (3d Cir. 1977). "The legislative history of the health care amendments . . . makes it quite clear that Congress has directed the Board to apply a standard in this field that was not traditional." *Id.* at 592.

57. For an explanation of the circuitous route a party must travel to obtain review of an NLRB representation decision, see GORMAN, *supra* note 4, at 59-61.

58. *American Hosp.*, 111 S. Ct. at 1545.

59. *Id.* at 1545-46.

60. *Id.* at 1545.

61. *Id.*

The third line of attack was the AHA's claim that the rule was arbitrary because it applied alike to all acute care hospitals and ignored "critical differences."[62] To support its concern, the AHA pointed to a previous Board opinion that said the hospital industry was too diverse to warrant generalizations about unit determination. The Court managed to say that this case was not necessarily inconsistent with the new rules, but said it would not be troubled even if it were. Rather, it pointed to the rule-making procedures and to the Board's well reasoned justification for its action. It also observed, as it had in cases reviewing NLRB adjudicative action, that as an agency's expertise evolves, which for the Board usually means when its politics change, the agency is free to change its rules as long as its action is based on substantial evidence and a reasoned analysis. Those criteria were satisfied in this case.[63]

3. *Groves v. Ring Screw Works*

The conventional wisdom, supported by ample Supreme Court precedent, is that labor arbitration is a substitute for industrial strife.[64] Even casual observers of labor relations recognize the favored treatment the Court has shown to arbitration. One principal manifestation of the Court's preference for arbitration is its policy with respect to litigation brought by individual employees under collective bargaining agreements. Despite the language of section 301, employees typically cannot sue their employers for breach of contract unless they can show exhaustion of, or at least an attempt to exhaust, their contractual remedies and a breach of the duty of fair representation by the union.[65] Typically, employees cannot sue their employers if they have previously arbitrated the case or if the union in good faith decided not to arbitrate, even though the contract contained such a procedure.

An issue that has arisen on occasion is whether section 301 litigation is precluded if the collective bargaining agreement contains no arbitration clause. That was the situation in *Groves v. Ring Screw Works, Ferndale Fastener Division*,[66] decided by the Court on December 10, 1990. The contracts at issue contained a four-step grievance procedure which, in discharge cases, could culminate in arbitration only by mutual agreement.[67] Both agreements prohibited strikes or lockouts while grievances were processed, but did not ban them after "negotiations have failed through the grievance procedure . . . ."[68]

62. *Id.* at 1546.
63. *Id.* at 1546-47.
64. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
65. Vaca v. Sipes, 386 U.S. 171 (1967).
66. [illegible] (Interim ed. 1990).
67. *Id.* at 500-01.
68. *Id.* at 501.

The litigation arose following the discharge of two employees whose cases were not settled in the grievance procedure. Nor did the parties agree to arbitration. Clearly, under the contract, the union *could* have gone on strike. Instead, both employees sued for breach of contract under section 301. The district court granted summary judgment, relying on a Sixth Circuit opinion that the existence of grievance-arbitration machinery precludes judicial action, even if the dispute machinery, by contract, is not final and binding.[69] The Sixth Circuit affirmed, holding that the collective bargaining agreement made a strike the exclusive remedy for the alleged breach of contract, thus precluding other forms of dispute settlement.[70]

The district court decision was fairly typical of a result arrived at when the contracts involved contain arbitration clauses. The difficulty in *Groves* was that the parties had not agreed to resolve their disputes through arbitration. The issue was actually two-fold: first, whether the parties had established the strike as an exclusive remedy; and second, given the national labor policy favoring peaceful resolution of labor disputes, whether the parties *could* establish a strike as an exclusive remedy. The Court's short opinion does not clearly answer the second question.

The Court noted a strong presumption favoring access to a neutral forum — a court — for peaceful resolution of disputes. But, it said that the presumption *could* be overcome when the parties have agreed on a different method of adjustment, like binding arbitration.[71] That arrangement is consistent with section 203(d) of the Taft Hartley Act which provides that "final adjustment by a method agreed upon by the parties is the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[72]

The Court said that the "desirable method" envisioned by section 203(d) was not merely an agreement to resolve disputes. Rather, the statute contemplated the "peaceful resolution of disputes."[73] The parties *could* agree to resolve differences through economic warfare, but the Court said "the statute surely does not favor such an agreement"[74] which is not really a way of resolving the merits of a controversy.

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69. *Id.* (relying on Fortune v. National Twist Drill & Tool Div., Lear Siegler, Inc., 684 F.2d 374 (6th Cir. 1982)).

70. Groves v. Ring Screw Works, 882 F.2d 1081 (6th Cir. 1989), *rev'd*, 111 S. Ct. 498 (Interim ed. 1990).

71. *Groves*, 111 S. Ct. at 502.

72. 29 U.S.C. § 173(d) (1988).

73. *Groves*, 111 S. Ct. at 502.

74. *Id.* at 503.

The Court then quoted at length from a Seventh Circuit opinion[75] in which, like this case, the union had a right to strike over grievances. That fact by itself, the Seventh Circuit had said, did not establish that the parties had adopted a strike as "an exclusive or even desirable method for settling deadlocked grievances."[76] The contract permitted strikes but did not compel them as a way of settling grievances. Thus, the Seventh Circuit concluded that "an agreement to forbid any judicial participation . . . would have to be written more clearly . . . ."[77] The Supreme Court said the same reasoning applied in *Groves*.[78]

The inference, then, is that parties *could* provide economic action as the exclusive means of settling disputes over the meaning of collective bargaining agreements. This seems true regardless of the Court's observation that such an agreement is not within the spirit of section 203(d). Any such agreement, however, has to be clear and unambiguous. It is not sufficient merely to reserve the right to strike, which is what the parties had done in *Groves*, even when the contract contains no arbitration clause. In *Groves*, the parties had not agreed to economic warfare as the exclusive remedy and the employees could file suit under section 301.

4. *Airline Pilots v. O'Neill*

Airline Pilots v. O'Neill[79] involved a subject the Court had not often considered, the scope of the duty of fair representation in the context of the union's obligation to negotiate labor contracts on behalf of the employees it represents. Today, most discussion of the duty of fair representation (DFR) proceeds from *Vaca v. Sipes*,[80] an important case decided by the Court in 1967.

In language that has become quite familiar, the Court defined a union's duty by saying that a breach consisted of an action that was "arbitrary, discriminatory, or in bad faith."[81] *Vaca*, like most DFR cases considered by the Court, involved a claim by an individual employee who was dissatisfied with the way the union had handled his grievance. In fact, in *Vaca*, the union, without breaching the duty of fair representation, refused to arbitrate the case.

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75. Associated Gen. Contractors of Illinois v. Illinois Conference of Teamsters, 486 F.2d 972 (7th Cir. 1973).
76. *Id.* at 976.
77. *Id.*
78. *Groves*, 111 S. Ct. at 503.
79. 111 S. Ct. 1127 (interim ed. 1991).
80. 386 U.S. 171 (1967).
81. *Id.* at 190.

In another famous case predating *Vaca*, the Court considered the union's duty in collective bargaining and, in *Ford Motor Company v. Huffman*,[82] the Court's opinion contained language which has been quoted often. It said the union must be allowed "a wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose."[83]

Language from both *Vaca* and *Huffman* was implicated in the Court's decision in *O'Neill*. The case grew out of the airline pilots association strike against Continental Airlines in 1983. The strike was a reaction to the airline's chapter 11 reorganization petition and its repudiation of its collective bargaining agreement with the union. When the strike began, the bargaining unit included about 2,000 pilots and all but about 200 supported the strike. Over time, some 400 employees crossed the picket line, and when added to 1000 new hires, joined a total pilot force of about 1600 employees. The strike was "acrimonious" and included a purported withdrawal of recognition by Continental and a lawsuit by the union.[84]

In September of 1989, Continental announced its posting of a "supplementary base vacancy bid 1985-5," which the Court referred to as the 85-5 bid.[85] Historically, pilots bid system-wide and vacant positions were assigned by seniority. The 85-5 bid was unusually large, covering more than 400 vacancies for captain and first officer positions alone. The union was concerned that the bid might effectively freeze out striking pilots, so it authorized them to submit bids. Ultimately, Continental expressed concern about the sincerity of these bids and announced that all of the 85-5 bids would go to working pilots.[86]

This action prompted the union to negotiate an end to the strike. The parties came up with three options for striking pilots: first, those who settled all claims with the airline could participate in the bid; second, pilots could elect severance pay under a formula that resulted in average pay-outs of about $47,000 to the 366 pilots who participated; and third, pilots who refused to settle claims could return to work only after those pilots who did settle.[87]

The problem was that the company had not allotted all of the jobs according to seniority, as it had traditionally done. Striking pilots who took the first option received some jobs that had already been allocated to working pilots, but the company used a formula which allotted all of

82. 345 U.S. 330 (1953).
83. *Id.* at 338.
84. Airline Pilots v. O'Neill, 111 S. Ct. 1127, 1130 (interim ed. 1991).
85. *Id.*
86. *Id.* at 1130-31.
87. *Id.* at 1131.

the first 100 jobs to working (non-striking) pilots, the next 72 jobs to returning pilots, and the remaining jobs to each group on a one-to-one basis. Thus, the strikers fared worse than if they had chosen jobs strictly on the basis of seniority.[88]

Apparently, it was this realization that prompted a group of former strikers to file suit against the union claiming breach of the duty of fair representation on several grounds, including arbitrary treatment. The district court granted summary judgment for the union, although it characterized the settlement achieved by the union as "atrocious in retrospect."[89] The Court of Appeals for the Fifth Circuit reversed. The appellate court applied an arbitrariness standard to the union's action and concluded that a jury could find its actions to be arbitrary because the settlement seemingly left the striking pilots worse off than capitulation by the union would have. This conclusion depended on an assumption that Continental would have filled all vacancies solely on the basis of seniority had the union merely surrendered. The court of appeals also said there was a material issue of fact about whether favored treatment of working pilots constituted discrimination against strikers.[90]

The union's position in the Supreme Court is not the sort it raises during organizational campaigns. Relying principally on *NLRB v. Insurance Agents' International Union*[91] and on a line of cases stressing the need to disassociate the government from the substance of collective bargaining, the union argued that the duty of fair representation did not obligate it to provide adequate representation.[92] The Court, however, likened the union's duty to that of a fiduciary, and said there was a "critical difference" between government scrutiny of collective bargaining to determine fairness and adequacy of representation, and government action that seeks to impose contract terms.[93]

The Court also rejected the union's contention that the wide range of reasonableness admonition in *Ford Motor Company v. Huffman*[94] exempted the union from review of its collective bargaining performance. In fact, some courts of appeals distinguished between the duty owed in collective bargaining and the duty owed in contract administration, imposing heavier burdens on the union in the latter context.[95]

88. *Id.*
89. *Id.* at 1132.
90. *Id.* at 1132-33.
91. 361 U.S. 477 (1960).
92. *O'Neill*, 111 S. Ct. at 1133.
93. *Id.* at 1133-34.
94. 345 U.S. 330 (1953).
95. *See generally*, JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS, THE BASIC PROCESSES LAW AND PRACTICE 186-90 (1988).

The Court said, however, that none of *its* decisions had suggested such a double standard. Moreover, the Court said it doubted whether a bright line *could* be drawn between the union's two principal functions of contract administration and negotiation. Thus, the Court said that the tripartite standard of *Vaca* — arbitrariness, capriciousness, and bad faith — applied both to contract administration and to contract negotiation.[96]

Even though it agreed with the Fifth Circuit about which standard of review applied, the Court reversed the appellate court's decision because its analysis of the union's conduct was too intrusive into the substance of negotiations. Although courts have some responsibility to scrutinize union conduct, the Court viewed this power as clearly limited, likening the relationship to that existing between courts and legislatures.[97] Thus, "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a wide range of reasonableness . . . that it is wholly irrational and arbitrary."[98] In particular, the Court cautioned that the courts of appeals should remember the strong federal policy favoring peaceful resolution of labor disputes. It also stressed that the rationality of the union's conduct had to be evaluated "in the light of both the facts and the legal climate that confronted the negotiators at the time the decision was made."[99]

In the final section of the opinion the Court specifically addressed the court of appeals finding that the union's action was arbitrary because its settlement with Continental was worse for the employees than the effects of an outright surrender. In language that will no doubt become important to unions, the Court said that a settlement is "not irrational merely because, it turns out *in retrospect*, to have been a bad settlement."[100] Rather, the Court said it was necessary to look at the "legal landscape" at the time the union acted.[101]

In this case, the legal landscape included litigation in another federal court. The problem, however, was that the Northern District of Illinois, in a case involving the same union and United Airlines, had ruled in the union's favor.[102] Moreover, the court of appeals had observed that previous Supreme Court decisions about the importance of

96. *O'Neill*, 111 S. Ct. at 1135.
97. *Id.*
98. *Id.* at 1136.
99. *Id.*
100. *Id.*
101. *Id.*
102. Air Line Pilot's Ass'n Int'l v. United Air Lines, Inc., 614 F. Supp. 1020, 1051 (N.D. Ill. 1985).

seniority in dealing with replacements and returning strikers (the *Erie Resistor*[103] line of cases) should have alerted the union to the weakness of the company's position.[104] Thus, the "legal landscape" seemed as if it were groomed to favor the union and therefore raised questions about how it could abandon rights seemingly already conferred by judicial action.

The Supreme Court was unmoved. It observed that at the time the union acted, the decision from the Northern District of Illinois was on appeal and could have been overturned.[105] Moreover, *Erie Resistor* and similar cases were constructions of the National Labor Relations Act, which did not necessarily apply to *O'Neill* since *O'Neill* arose under the Railway Labor Act.[106] This was not a particularly convincing observation.[107] Nevertheless, the Court said the union reasonably could have thought that any attempt to concede the strike and seek immediate reinstatement could have provoked litigation. Thus, it was not unreasonable to negotiate for a share of the available work in order to avoid that result.[108]

As further evidence of reasonableness, the Court pointed to those employees who elected lump sum payments in lieu of a return to work, an advantage that would not have been available to them had the union merely surrendered. Given its construction of the legal landscape and the financial benefit to the pilots who settled, the Court concluded that the union's conduct was within the "wide range of reasonableness" standard of *Ford Motor Company v. Huffman*.[109]

Finally, the Court rejected the appellate court's observation that the union's action discriminated against striking employees.[110] Because the Court found it reasonable for the union to agree to a compromise between the class of striking pilots and those who worked during the strike, it said that "some form of allocation was inevitable."[111] Moreover, the Court observed that under *Erie Resistor*, the union would have understood that the agreement did nothing more than allocate the

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103. N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221 (1963).

104. *O'Neill*, 111 S. Ct. at 1137.

105. *Id.* at 1136.

106. 45 U.S.C. §§ 151-188 (1988).

107. The Court created the duty of fair representation in a Railway Labor Act case. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). It extended the same rationale to the NLRA eleven years later. Syres v. Oil Workers Int'l Union Local No. 23, 350 U.S. 892 (1955).

108. *O'Neill*, 111 S. Ct. at 1137.

109. *Id.*; Ford Motor Co. v. Huffman, 345 U.S. 330, 330 (1953).

110. *O,Neill*, 111 S. Ct. at 1137.

111. *Id.*

method of reintegration; once back on the job, the striking pilots would enjoy the benefits of their greater seniority.[112]

The lessons of *O'Neill* are not easily understood. The Court *does* say that the arbitrariness standard of the duty of fair representation applies to unions in their collective bargaining role.[113] Moreover, and obviously of concern to unions, it allows courts to scrutinize the results of collective bargaining as a way of determining whether the union's decision was arbitrary. But, it is hard to see how any union that acts in good faith could ever act in an arbitrary manner, thus raising a question about whether this decision has any effect at all since bad faith negotiation already was acknowledged as a breach of the duty of fair representation. In this case, for example, if one assumes as the Court did, that the settlement hurt the employees more than a surrender would have, the "legal landscape" provided scant support for the union's conduct. The law seemed clearly favorable to the union. Thus, the inference is that, *if* the union reasonably believes the employer will litigate, regardless of the strength of its claim, it is rational for the union to buy peace, even at the expense of other employees.

The principal effect of the case will be to encourage litigation by disgruntled employees and their lawyers who want to test the limits of the Court's decision. After all, the Court said that the arbitrariness standard applies in collective bargaining and authorized at least some review of negotiation results in making that determination.[114] Granted, the Court's opinion tried to limit the scope of judicial review, but appellate courts sometimes exercise the power granted by Supreme Court opinions without grasping the accompanying limitations. Therefore, unions then should be legitimately concerned about the extent to which the product of bargaining will be used as evidence of the adequacy of their representation.

B. Discrimination Cases

1. *UAW v. Johnson Controls*

Although the Court unanimously assented to the judgment, one of the most controversial cases before the Court in 1991 was *UAW v. Johnson Controls*,[115] which concerned the company's fetal protection policy. The Court struck down the policy by a vote of 9-0, but only 5 members joined in all aspects of the majority opinion.

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112. *Id.* Interestingly, this was the same *Erie Resistor* whose application the union could reasonably have doubted when agreeing to make the deal in the first place. *Id.*

113. *Id.* at 1136.

114. *Id.*

115. 111 S. Ct. 1196 (interim ed. 1991).

Johnson Controls produces batteries and exposure to lead is an inevitable consequence of the production process.[116] Prior to the enactment of Title VII,[117] the company refused to employ women in battery manufacturing jobs. In 1977, however, the company eased the restriction, though it continued to discourage women from such employment and it required them to sign a waiver.[118] In 1982, the company returned to its policy of exclusion, which applied to "all women capable of bearing children." This included every woman save those whose inability to bear children was "medically documented."[119]

The plaintiffs — which included a woman who chose to be sterilized, a woman who was transferred to a lower-paying job, and a man who wanted a leave of absence to reduce his lead level in order to become a father — filed a class action in 1984.[120] The district court applied a three-part business necessity test and granted summary judgment for the company.[121]

In the trial court's view, the appropriate test asked whether there was a health risk to the fetus, whether transmission of the risk could occur only among women, and whether there was a less discriminatory alternative. The trial court granted summary judgment for the employer, finding the existence of a threat to the fetus from lead exposure and the failure of petitioners to establish an alternative policy that would protect the fetus. Because the company had mounted its defense successfully, the trial court said it was unnecessary to consider whether the company's practice was a bona fide occupational qualification.[122]

The Seventh Circuit, by a 7-4 decision, agreed that Johnson Controls had satisfied the three-part business necessity test. But unlike the district court, the court of appeals found that the fetal protection policy also satisfied the more stringent bona fide occupational qualification defense. Observing that more was at issue than the individual woman's decision to bear the risk, the court said that industrial safety was an essential part of defendant's business and that the fetal protection policy was reasonably necessary to further safety concerns.[123] This decision put the Seventh Circuit squarely in conflict with the Fourth and Eleventh circuits, thus leading to the Supreme Court's grant of certiorari.[124]

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116. *Id.* at 1197.
117. 42 U.S.C. §§ 2000e - 2000e-17 (1988).
118. *Johnson Controls*, 111 S. Ct. at 1199.
119. *Id.* at 1199-1200.
120. *Id.* at 1200.
121. *Id.*
122. *Id.*
123. *Id.* at 1200-01.
124. *Id.* at 1202.

The Court considered first the proper method of analyzing the case. The Seventh Circuit assumed that the business necessity defense was the appropriate vehicle because the employer's policy was not discriminatory on its face; rather, the fetal protection policy was facially neutral, but had a disparate impact on the employment of women. A majority of the Supreme Court said this analysis was incorrect. It said the policy *was* facially discriminatory because it applied only to women. Despite at least some evidence of risk, men were not required to produce evidence of infertility before being allowed to work.[125]

The Court found support for its conclusion in the Pregnancy Disability Act of 1978 (PDA).[126] The PDA states that discrimination on the basis of sex, as those terms are used in Title VII, includes discrimination "because of or on the basis of pregnancy . . . ."[127] The Johnson Controls policy, which applied to all women capable of bearing children, was thus explicit sex discrimination since the employer had chosen to treat all women as potentially pregnant. It was also no defense that the employer had no evil motive. The Court said disparate treatment depends not on motivation but rather on the "explicit terms of the discrimination."[128]

The Court's classification of the employer's action as disparate treatment effectively removed the business necessity defense. The only possible defense left to Johnson Controls was bona fide occupational qualification (BFOQ), which the court of appeals said the employer had established. The Supreme Court disagreed. It noted that the defense is narrowly written and narrowly construed. It also placed particular significance on the term "occupational" as modifying qualification. The Court said this construction made it clear that the defense could be used only for job-related skills and abilities.[129]

Relying principally on *Dothard v. Rawlinson*,[130] Johnson Controls argued that its policy fell within a safety exception under the BFOQ.[131] In *Dothard*, the Court observed the potential danger to other guards and to inmates if female guards were unable to maintain security.[132] The defense was also present in *Western Airlines, Inc. v. Criswell*,[133] a 1985 ADEA case involving the forced retirement of flight engineers. Focusing on the concern evidenced for third parties in both *Dothard*

125. *Id.* at 1203.
126. *Id.*; *see also* 42 U.S.C. § 2000e(k) (1988).
127. *Johnson Controls*, 111 S. Ct. at 1203.
128. *Id.* at 1203-04.
129. *Id.* at 1204.
130. 433 U.S. 321 (1977) (the prison guard case).
131. *Johnson Controls*, 111 S. Ct. at 1204.
132. *Dothard*, 433 U.S. at 335.
133. 472 U.S. 400 (1985).

and *Criswell*, Johnson Controls asserted that it was permissible to consider the safety of fetuses, who are, or could be, endangered third parties.[134]

Again, the Court disagreed. The third parties in *Dothard* (the inmates) and *Criswell* (the passengers) were "indispensable to the particular business at issue."[135] Thus, the concern about safety was clearly job-related. Indeed, it *was* the employer's business to provide for the safety of inmates in *Dothard* and passengers in *Criswell*. The same could not be said for a fetus whose mother manufactures batteries. Rather, the Court said the BFOQ safety exception was limited to situations in which sex actually interfered with a woman's ability to perform the job: "The BFOQ . . . is not so broad that it transforms this deep social concern into an essential aspect of battery-making."[136]

The Court found more support for its interpretation of Title VII in the PDA, which requires that pregnant employees be treated like all others, unless their condition affects their ability to do the work.[137] The Court said that both Title VII and the Pregnancy Disability Act prevent an employer from excluding women from employment opportunities because of their capacity to become pregnant, unless "reproductive potential prevents her from performing the duties of the job."[138] There was no evidence that fertile women were less able to manufacture batteries than anyone else.[139]

The majority closed its opinion with a short discussion about the potential for tort liability, which undoubtedly played a role in Johnson Controls' decision to adopt its fetal protection policy. The Court noted that OSHA had not excluded women from jobs involving lead exposure. The Court said that, barring negligence, employers should be shielded from liability since Title VII bans sex-specific policies, especially if the employer fully informs women of the risk. The Court acknowledged that employment of fertile women *could* lead to financial exposure and thus impose an extra cost on employers. But, it said it had previously held that "the incremental cost of hiring women cannot justify discrimination against them."[140]

Justice White wrote a separate opinion which was joined by Chief Justice Rehnquist and Justice Kennedy.[141] Justice White agreed with

134. *Johnson Controls*, 111 S. Ct. at 1205.
135. *Id.*
136. *Id.* at 1206.
137. *Id.*
138. *Id.* at 1207.
139. *Id.* at 1206-07.
140. *Id.* at 1208-09.
141. *Id.* at 1210 (White, J., concurring).

the majority's conclusion that Johnson Controls could justify its policy only as a bona fide occupational qualification. He disagreed, however, that the defense was so narrow that it could never justify a sex-specific fetal protection policy.[142] In particular, Justice White disagreed with the majority's conclusion that cost was irrelevant. In that regard, he refused to accept the majority's assumption that the possibility of employer tort liability was remote.[143] Nevertheless, Justice White agreed with the majority's conclusion that the specific policy under review was invalid.

2. *Equal Employment Opportunity Commission v. Arabian American Oil Company*

In *Equal Employment Opportunity Commission v. Arabian American Oil Company*,[144] the Court decided that Title VII of the Civil Rights Act of 1964[145] does not protect American citizens who work for American employers abroad.[146] The plaintiff was a United States citizen who had been born in Lebanon. At the time of his discharge, he was employed by Arabian American Oil Company in Saudi Arabia. He claimed that his employer's action against him was motivated by discrimination on account of race, religion and national origin.[147]

The Court acknowledged that Congress has the authority to require enforcement of statutes beyond U.S. boundaries. The Court, however, cited what it called the long standing principle that, unless a contrary intent is apparent, laws are "meant to apply only within the territorial jurisdiction of the United States."[148] That presumption can be overcome only by the "affirmative intention of Congress clearly expressed."[149] The plaintiff and the EEOC argued that two provisions of Title VII demonstrated a Congressional intent to legislate beyond territorial boundaries. The first concerned the statutory definitions of the terms "employer" and "commerce."[150]

The plaintiffs argued that because the statute defined commerce to include trade "between a state and any place outside thereof," the terms of the statute itself revealed a congressional intent to protect Americans working for U.S. employers abroad. The Court found this

142. *Id.*
143. *Id.* at 1213-14.
144. 111 S. Ct. 1227 (interim ed. 1991).
145. 42 U.S.C. §§ 2000e - 2000e-17 (1988).
146. *Arabian*, 111 S. Ct. at 1227.
147. *Id.* at 1230-31.
148. *Id.* at 1230 (quoting Foley Bros. Inc. v Filardo, 336 U.S. 281, 285 (1949)).
149. *Id.* (quoting Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957)).
150. *Id.* at 1231.

reading "plausible, but no more persuasive than that."[151] The Court dismissed the statutory language as "boiler plate" which appeared in several statutes and which had never been held to apply outside the United States. Moreover, the Court noted previous decisions in which even references to "foreign" commerce had not indicated an intention to provide extraterritorial coverage.[152] It also distinguished a 1952 decision[153] in which a statute *was* held to apply outside the United States by noting that in that case, the term commerce was defined as "all commerce that may lawfully be regulated by Congress,"[154] a definition the Court found significantly broader.

The plaintiff's second argument was more difficult and, in fact, was never really addressed by the Court. The plaintiffs contended that Title VII's alien exception provision manifested a clear intention by Congress to protect United States citizens working abroad for American employers. The exemptions provide that Title VII "shall not apply to an employer with respect to employment of aliens outside any state."[155] Obviously, there would be no reason to exempt aliens working abroad if the statute had no extraterritorial application. Thus, the inference, argued the plaintiffs, is that Congress must have intended extraterritorial coverage from which only aliens were exempted.[156]

Chief Justice Rehnquist, writing for the majority, did not address this argument directly. He merely said that, should plaintiffs be correct in their assertion that the statute applies overseas, "we see no way of distinguishing in its application between U.S. employers and foreign employers."[157] But, he added that attempting to regulate the employment practices of foreign employers would "raise difficult issues of international law."[158] By raising a shadow argument, the Court was able to argue that it should interpret the statute to avoid such international entanglements, at least absent clearer evidence of congressional intent. The Court buttressed this conclusion by pointing to several parts of the statute that suggested "a purely domestic focus."[159]

Finally, the EEOC argued that the Court should defer to its consistent interpretation of Title VII as applying extraterritorially. Unlike the NLRB, the EEOC has no administrative rule-making power,[160] a

151. *Id.*
152. *Id.* at 1232.
153. Steele v. Bulova Watch Co., 344 U.S. 280 (1952).
154. 15 U.S.C. § 127 (1988).
155. 42 U.S.C. § 2000e-1 (1988).
156. *Arabian*, 111 S. Ct. at 1123.
157. *Id.* at 1234.
158. *Id.*
159. *Id.*
160. *Id.* at 1235-36.

limitation that has not prevented it from issuing "interpretive guidelines" that resemble regulations.

The Court has said that the EEOC guidelines do not necessarily receive the same deference as regulations promulgated by other agencies. Rather, their persuasive effect depends on several factors, including the thoroughness and consistency of the reasoning. But, that standard was of no value to the EEOC in this case since its interpretation had not been consistent. Initially, the EEOC suggested that the scope of the statute was domestic only. Its opinion did not change for twenty-four years and, importantly, the EEOC offered "no basis in its experience for the change."[161]

The Court concluded that Congress knew how to extend the reach of its statute when it wanted to do so. It found insufficient evidence of such an intention in this case.[162]

3. *Irwin v. Veterans Administration*

In *Irwin v. Veterans Administration*,[163] the plaintiff contended that his discharge from federal government service was motivated by race and physical disability discrimination. Initially, he filed charges with the EEOC, which dismissed the charge by letter of March 19, 1987. The letter was sent both to Irwin and to his attorney, who appeared for him in the EEOC investigation.[164]

As required by law, the dismissal letter informed Irwin of his right to sue under Title VII within 30 days of receipt. Irwin claimed that he did not receive the letter until April 7, 1987. The letter was delivered to his attorney's office, however, on March 23, 1987. His attorney did not actually see the letter until April 10, 1987 when he returned from a trip out of the country. Irwin's complaint was filed in federal district court on May 6, 1987.[165]

One issue in the case, consequently, was whether the complaint was timely filed within the 30-day period following receipt of the EEOC dismissal notice. Irwin argued that the 30 days should be counted from the time *he* actually received the letter. The district court disagreed, an action that the Fifth Circuit affirmed.[166] The Supreme Court agreed. The statute, the Court observed, requires only that the

161. *Id.* at 1235.

162. *Id.* at 1235-36. Justice Scalia concurred with all but that part of the opinion dealing with the deference owed EEOC interpretive guidelines. Justice Marshall dissented, in an opinion joined by Justices Blackmun and Stevens.

163. 111 S. Ct. 453 (interim ed. 1990).

164. *Id.* at 455.

165. *Id.*

166. Irwin v. Veterans Admin., 874 F.2d 1092 (5th Cir. 1989).

notice be "received." It does not say that receipt by an attorney of record will not suffice. Moreover, the Court said that requiring actual receipt by the litigant would render notification of counsel a "meaningless exercise."[167] Finally, the Court said the crucial time was the date of delivery to the attorney's office, not the date when the notice actually came to the lawyer's attention.[168]

A finding that the action had not been filed within the 30-day statutory period did not, however, resolve the matter. Irwin contended that his late filing could be excused through equitable tolling principles. Both the district court and the court of appeals had rejected that argument. Because the portion of Title VII authorizing suits against the federal government is a waiver of sovereign immunity, the court of appeals said that strict compliance with statutory time limits was essential. Indeed, the appellate court said that the limit was jurisdictional and failure to observe it precluded the court from even considering an equitable claim.[169]

The Supreme Court disagreed, thus resolving what it acknowledged were inconsistent pronouncements on the issue. In fact, the Court said it was promulgating a "general rule to govern the applicability of equitable tolling in suits against the government."[170] The rule is easy to state — the Court said that in suits against the government the same rebuttable presumption of equitable tolling applies that applies in suits against private parties.[171]

Even so, the new rule was of no help to Irwin. The Court said that such equitable relief had been extended only sparingly and generally had not been available when the claimant merely failed to exercise diligence. Describing the facts at issue as "a garden variety claim of excusable neglect," the Court found no warrant for tolling the 30-day filing period.[172]

4. *Gregory v. Ashcroft*

The Missouri Constitution requires that most of the state's judges retire at age seventy.[173] Seemingly in conflict with that provision is the Age Discrimination in Employment Act, which makes it unlawful for

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167. *Irwin*, 111 S. Ct. at 456.
168. *Id.*
169. *Id.*
170. *Id.* at 457.
171. *Id.*
172. *Id.* at 458. Justice White, joined by Justice Marshall, concurred by separate opinion. *Id.* at 458-60. Justice Stevens dissented from the Court's holding that the thirty day period began to run when Irwin's lawyer received the EEOC letter. *Id.* at 460-61.
173. MO. CONST. art. V, § 26. The Missouri Constitution provides, in part: "All judges other than municipal judges shall retire at the age of seventy years." *Id.*

an employer to discharge any individual who is forty or older because of his or her age.[174] States and their political subdivisions are included within the term "employer" as defined in the ADEA.[175] In *Gregory v. Ashcroft*,[176] the Supreme Court considered and rejected a challenge by state judges to the enforceability of the state constitution's mandatory retirement provision.

Although seven justices concurred in the judgment, only four others joined Justice O'Connor in her majority opinion. In a concurring opinion, Justice White, joined by Justice Stevens, asserted that the Court granted certiorari only to decide whether Missouri state judges are "appointees on the policymaking level"[177] as that terminology is used in the ADEA.[178] If so, they are excluded from the Act's reach. Although he agreed with the majority's resolution of the case, Justice White asserted that Justice O'Connor's opinion did not resolve that issue of statutory construction.[179] Instead, the majority concentrated on issues of federalism, which it said required an analysis of whether Congress actually meant the ADEA to embrace state court judges.

The first part of Justice O'Connor's opinion reviews much of the history of what she called "a system of dual sovereignty."[180] She observed that the federal government is one of limited powers and that, pursuant to the Tenth Amendment, powers not delegated to the federal government are reserved to the states. This dual system, she said, "preserves to the people numerous advantages," the principal one of which "is a check on the abuses of government power."[181] The separation of powers between the federal and state governments reduces the risk of tyranny by either.

For this system to work, Justice O'Connor said, there must be a "proper balance" between federal and state governments, though admittedly, "the federal government holds a decided advantage."[182] Ironically, it was that statement of obvious fact that made the difference in this case. Because the supremacy clause of the federal constitution affords such "extraordinary power," the assumption is that Congress acts

174. 29 U.S.C. §§ 623(a), 631(a) (1988).

175. *Id.*, § 630(b)(2).

176. 111 S. Ct. 2395 (interim ed. 1991).

177. The ADEA definition of "employee" excludes from the Act's coverage, among others, "an appointee on the policymaking level" of state or local governments. 29 U.S.C. § 630(f) (1988).

178. *Gregory*, 111 S. Ct. at 2408.

179. *Id.*

180. *Id.* at 2399.

181. *Id.* at 2399-2400.

182. *Id.* at 2400.

with considerable caution, at least when it intrudes on matters ordinarily left to the states.[183]

The provision at issue in this case — who should sit as judges in the state's courts — was "of the most fundamental sort for a sovereign entity."[184] Intervention in such matters by the federal government would interfere with the balance Justice O'Connor viewed as essential for a federalist system to survive. Thus, before applying the ADEA to invalidate a provision of the Missouri Constitution, Congress must make its intention to do so "unmistakably clear."[185] In short, Justice O'Connor and a five person majority required a "plain statement" from Congress that it intended the ADEA to apply to the forced retirement of state court judges.[186]

There is no such "plain statement" in the ADEA. Moreover, the majority cites no part of the legislative history of the ADEA, unlike Justice White in his concurring opinion[187] and Justice Blackmun in his dissenting opinion.[188] Instead, the majority merely parses the language of the statute, which it conceded was ambiguous.[189] That fact, however, assured the exclusion of state judges from the ADEA.

The Act excludes from the definition of "employee" elected public officials, personal staff members of such officials, and appointees at the policy making level of state or local government. One issue the Court did not resolve is whether Missouri judges — most of whom are appointed by the governor and stand periodically for unopposed retention votes — are elected public officials for purposes of the ADEA. The Court did not reach that issue because it found that state judges are policy making officials and, therefore, are exempt from coverage in any event.

Petitioners contended that, as state judges, they do not make policy; rather, they merely apply state policy in particular cases. Moreover, in a contention the Court recited but never addressed, petitioners claimed that the structure of the Act revealed that the only policy makers who are "employees" under the Act are those chosen for the staff of an elected official or those who otherwise work as advisors for such officials.[190] The state countered by claiming that in a common law state

183. *Id.* at 2401.
184. *Id.* at 2400.
185. *Id.* at 2395 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).
186. *Id.* at 2401.
187. *Id.* at 2412-14 (White, J., concurring).
188. *Id.* at 2416-18 (Blackmun, J., dissenting).
189. *Id.* at 2404.
190. The petitioners noted that the exemption for policymakers was contained in a listing of such exemptions, all of which were seemingly related to elected officials. Thus, petitioners claimed that the Court should apply a maxim of statutory construction called *noscitur a sociis*, which the Court described as "a word is known by the company it keeps." *Id.* at 2403.

like Missouri, judges *do* make policy. Moreover, some state judges play significant roles in the supervision of inferior courts and the state bar.[191]

The Court said it did not matter whether state judges actually *made* policy. The statute does not refer expressly to policymakers. Rather, it speaks to those on the "policymaking level," a description satisfied by state court judges. The Court conceded that use of the terminology "appointee[s] on the policymaking level" was an unusual way for Congress to exclude state judges from the reach of the ADEA.[192] Nevertheless, the question was not so much whether Congress meant to exclude judges; it was whether it meant to *include* them. Because most important state officials are excluded from the ADEA, and because appointees on the "policymaking level" *could* embrace state judges, the Court was satisfied that there was no congressional intent to include judges within the scope of the ADEA.[193]

The Court then turned to whether its analysis would differ if it assumed that Congress had extended the ADEA to state and local employees pursuant to its power under the Fourteenth Amendment rather than the Commerce Clause. The Court conceded that, because the Fourteenth Amendment was intended to intrude on the exercise of state power, congressional actions under that provision are less "attenuated" than when Congress acts pursuant to the Commerce Clause.[194] Even so, the Court said that congressional power under the Fourteenth Amendment could not be applied without regard for a state's constitutional powers: "[previous cases] demonstrate the Fourteenth Amendment does not override the principles of federalism."[195]

The Court reviewed its previous decision in *Parkhurst State School and Hospital v. Halderman*[196] in which the federal government argued that the Developmentally Disabled Assistance and Bill of Rights Act[197] was adopted pursuant to congressional power under the Fourteenth Amendment and therefore applied to all states, whether or not they received federal funds. The Court observed that such legislation could impose the federal will in violation of traditional state authority. Thus, the Court said it would find that Congress acted pursuant to section 5 of the Fourteenth Amendment only when its intent to

191. *Id.* at 2403-04.
192. *Id.* at 2404.
193. *Id.*
194. *Id.* at 2405.
195. *Id.*
196. 451 U.S. 1 (1981).
197. 42 U.S.C. § 6010 (1988).

do so was clear.[198] There was, however, no such clarity in whether state judges were to be covered under the ADEA. [199]

In the final section of its opinion, the majority rejected petitioners' claim that, even if they were not protected by the ADEA, the state's mandatory retirement rule violated the equal protection clause. The Court noted, as it has held before, that age is not a suspect classification.[200] Thus, the appropriate test was whether there was a rational basis for the state's action:

> [W]e will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of legitimate purposes that we can only conclude that the [people's] actions were irrational.[201]

Having announced the test, the Court had little difficulty justifying the Missouri rule. Indeed, the Missouri Supreme Court had thoughtfully supplied numerous justifications in a 1978 opinion upholding a similar challenge to a state statute that applied to magistrates and probate judges.[202] Justice O'Connor wrote delicately for a court several of whose own members were past age seventy. It is an unfortunate fact, she said, that age is sometimes an accurate barometer of physical and mental ability. Not all judges face significant deterioration after age seventy — indeed, maybe none do. But the people of Missouri, who were less able to ensure continued competence in judges than in other more visible state officials, could reasonably believe that *some* of them would be affected by age. Thus, they could rationally require all of them to retire at age seventy.[203]

5. *Astoria Federal Savings & Loan Association v. Solimino*

In *Astoria Federal Savings & Loan Association v. Solimino*,[204] the Court considered whether judicially unreviewed findings of a state administrative agency had a preclusive effect in a subsequent Age Discrimination in Employment Act action filed in federal court. The plaintiff was a sixty-three year old Astoria employee who claimed that his discharge violated the ADEA. The plaintiff filed a timely charge of age discrimination with the EEOC. In accordance with a working agreement, the EEOC referred the charge to the New York State Division of Human Rights, which held an evidentiary hearing at which both employer and employee were represented by counsel.[205]

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198. *Gregory*, 111 S. Ct. at 2405-06.
199. *Id.* at 2406.
200. *Id.*
201. *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).
202. O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978).
203. *Gregory*, 111 S. Ct. at 2407-08.
204. 111 S. Ct. 2166 (interim ed. 1991).
205. *Id.* at 2168-69.

The state agency found no probable cause to believe that the employer's action was prompted by age discrimination. The state Human Rights Appeals Board affirmed this finding. The plaintiff apparently could have sought judicial review in state court, but elected instead to file in federal district court an ADEA action grounded on the same allegations. Relying on the common law presumption of administrative estoppel, the district court granted summary judgment for the employer. The Second Circuit reversed and the Supreme Court granted certiorari to resolve a conflict between the circuits.[206]

The Court began by noting its longstanding recognition of the common law doctrines of collateral estoppel and res judicata. Such deference, it said, was justified because "a losing litigant deserves no rematch after a defeat fairly suffered."[207] Whether the doctrine applies to statutory actions, however, is not merely a matter of federal policy. Rather, the question is one of congressional intent. Even here, however, Congress should be assumed to have acted against a background of common law adjudicatory principles. Thus, the principle of preclusion applies, absent some congressional intention to the contrary. That does not mean, however, that Congress must "state precisely" its intention to reject the principle of collateral estoppel.[208]

The Court compared the issue in *Astoria* to the one it had decided five years previously in *University of Tennessee v. Elliot*.[209] In that case, the Court found a congressional intent to avoid the common law rules of preclusion because the statute said in express terms only that the EEOC should accord "substantial weight" to findings made by state and local agencies.[210] Since the agency itself was not precluded by state administrative action, the Court reasoned that federal courts could not be precluded either.[211]

There is no similar "substantial weight" language in the ADEA, but the Court found that the statute "carries an implication" that federal courts are not to recognize preclusion for state administrative agency findings.[212] The Court based this conclusion on the filing requirements established by the ADEA. When states have their own age discrimination laws, section 14(b)[213] requires claimants to first pursue

206. *Id.* at 2169.
207. *Id.*
208. *Id.* at 2169-70.
209. 478 U.S. 788 (1986).
210. *Id.* at 795.
211. *Id.*
212. *Astoria*, 111 S. Ct. at 2171.
213. 29 U.S.C. § 633(b) (1988).

the claim through that avenue before going to federal court. No such action can be filed until 60 days after the initiation of state review. Moreover, complainants can file with the EEOC within 300 days of the alleged discrimination or within 30 days after termination of state proceedings.[214] Both provisions, the Court said, contemplated the possibility of consideration by federal agencies or federal courts after state review was finished.[215]

The Court observed that, in most cases, those who sought federal relief after termination of state proceedings would be complainants who had failed at the state level. If the state proceedings were preclusive, however, the federal action would be merely pro forma. The employer would enjoy an "airtight defense" since the state would already have decided the case on the merits. This would "reduce to insignificance" the volume of federal cases. The Court said that it would not construe the statute so as to render it superfluous.[216]

Thus, the Court decided that the presumption in favor of administrative estoppel had no application to state administrative findings in subsequent ADEA litigation. A contrary holding would leave claimants at the mercy of bureaucratic chance, since not all states have state proceedings. Moreover, it would induce claimants to file federal actions at the earliest opportunity, thus denying the states their legitimate role in trying to settle cases outside the federal system.[217]

Finally, the Court noted the limitations of its decision. The decision applies only to state agency determinations which are not reviewed judicially. Moreover, while not preclusive, the state agency's findings are at least admissible in evidence.[218]

6. *Gilmer v. Interstate/Johnson Lane Corporation*

Although the holding itself may not be of great significance to traditional labor law, the Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*[219] may result in the use of arbitration for new claims arising out of the employment relationship. The case concerned the relationship between arbitration and actions under the Age Discrimination in Employment Act.[220] The kind of arbitration at issue in *Gilmer*, however, is not traditional labor arbitration, so often found

214. *Id.* §§ 7(d)(2), 626(d)(2).
215. *Astoria*, 111 S. Ct. at 2171.
216. *Id.* at 2171-72.
217. *Id.* at 2172.
218. *Id.*
219. 111 S. Ct. 1647 (interim ed. 1991).
220. 29 U.S.C. §§ 621-634 (1988).

in collective bargaining agreements and so frequently the subject of Supreme Court decisions. Instead, the case involved a commercial arbitration held pursuant to the Federal Arbitration Act,[221] although the agreement to arbitrate appeared in an employment contract.

The case involved a sixty-two year old securities firm employee who, as a condition of employment, had signed an agreement to arbitrate any dispute that arose out of his employment. He was fired in 1987 and thereafter filed an ADEA charge with the EEOC. He then filed an age discrimination action in the Western District of North Carolina. The employer responded by filing a motion to compel arbitration, relying on the plaintiff's signed agreement and the Federal Arbitration Act (FAA). The district court denied the motion, but the Court of Appeals for the Fourth Circuit reversed,[222] an action affirmed by the Supreme Court.

The Court said that Congress had adopted the FAA as a way of erasing the traditional hostility between common law courts and arbitration and as a way of making arbitration agreements enforceable.[223] Moreover, the Court reviewed previous decisions which made clear that a statutory claim could be made the subject of an arbitration under the FAA. Although all statutory claims may not be appropriate for arbitration, the plaintiff who seeks to avoid arbitration must prove that Congress did not intend to allow the federal courts to be divested of jurisdiction in ADEA cases.[224]

The Court agreed that the ADEA was intended to further important social policies, but said there was no inconsistency between that goal and the use of arbitration. In addition, the use of arbitration did not undermine the EEOC's role. Individuals are still free to file charges and, even if they do not, the EEOC can investigate based on information received from other sources. Perhaps more important, the Court said "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes."[225] This language undoubtedly will find its way into employers' briefs in other cases.

The Court then rejected a number of specific attacks on the arbitration process itself, including a claim that arbitrators might not be impartial. Citing its 1985 opinion in *Mitsubishi Motors Corp. v. Soler*

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221. 9 U.S.C. §§ 1-15 (1988). This statute does not govern arbitration agreements contained in labor contracts. Rather, the law regulating what has come to be known as labor arbitration is fashioned by the federal courts pursuant to section 301 of the Labor Management Relations Act. 29 U.S.C. § 185 (1988); *see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

222. *Gilmer*, 111 S. Ct. at 1651.

223. *Id.*

224. *Id.*

225. *Id.* at 1653.

Chrysler Plymouth,[226] the Court said it would not assume that arbitrators would be either biased or incompetent. The parties would have ample opportunity to inquire into the background of potential arbitrators, and the arbitrators were required to disclose any potential conflicts.[227] The Court also discounted the possibility that inequality between the employee and the employer might effectively force employees into arbitration agreements against their will. The Court said there was no showing that plaintiff was coerced into the agreement.[228] Moreover, "mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[229]

The Court then addressed the plaintiff's principal argument. In *Alexander v. Gardner-Denver Co.*,[230] the Court held that losing a labor arbitration case on the merits did not preclude an employee from litigating the same facts in federal court in a subsequent Title VII proceeding. Although courts might elect to give weight to arbitral findings, they are not required to defer. Nor are the parties precluded from relitigating factual matters already resolved by the arbitrator.

In *Gilmer*, the plaintiff argued that it made no sense to require him to arbitrate his age discrimination case since he could later file an action in federal court.[231] In that event, citing *Gardner-Denver*,[232] the previous arbitration would be meaningless. The Court, however, disagreed. It distinguished labor arbitration — the subject of *Gardner-Denver* — and the arbitration procedures that apply under the FAA, which does not apply to labor arbitration cases.

Labor arbitrators, the Court observed, are confined to contractual issues. Although parties might presumably agree to let arbitrators resolve other claims, in the typical case their authority is confined to interpretation of the collective bargaining agreement. Thus, in *Gardner-Denver* and the cases that followed, the unsuccessful employee who had lost a contract dispute in arbitration was not precluded from pursuing his statutory claim in court.[233] Arbitration under the FAA, however, is not labor arbitration and the parties have not agreed to limit the arbitrator's authority to contractual claims. Moreover, the FAA reflects a

226. 473 U.S. 614 (1985).

227. *Gilmer*, 111 S. Ct. at 1654. The court also dismissed or disagreed with plaintiff's contentions that discovery is limited in arbitration, that arbitration awards may not be in writing, and that arbitrators cannot issue broad equitable relief. *Id.* at 1654-55.

228. *Id.* at 1656.

229. *Id.* at 1655.

230. 415 U.S. 36 (1974).

231. *Gilmer*, 111 S. Ct. at 1647.

232. *Gardner-Denver*, 415 U.S. at 36.

233. *Gilmer*, 111 S. Ct. at 1656-57.

" 'liberal federal policy favoring arbitration agreements.' "[234] Presumably, this policy includes arbitration of statutory claims, unlike the Court's frequent reference to the broad federal policy favoring arbitration of disputes arising under collective bargaining agreements.

Although *Gilmer* is important in cases in which there are individual employment agreements containing arbitration clauses, it would seem to have little effect in unionized workplaces. Employees in the protected class under the ADEA may arbitrate claims under collective bargaining agreements, but given the distinctions drawn between FAA arbitration and labor arbitration, it is unlikely that those decisions will preclude further litigation. *Gardner-Denver* still applies to arbitration under collective bargaining agreements.

That does not mean, however, that the case is of only limited utility. As the employment-at-will doctrine continues to erode, occasionally with statutory assistance, some have suggested that the resulting employment litigation be funneled into arbitration instead of the courts. *Gilmer* certainly does not require any such result, but it does provide what may prove to be a significant endorsement of arbitration for disputes between employers and individual employees.

7. *Stevens v. Department of the Treasury*

In *Stevens v. Department of Treasury*,[235] the Court discussed some of the procedural requirements for filing suits under the Age Discrimination and Employment Act.[236] The plaintiff was Charles Stevens, an IRS employee who, at age sixty-three, was accepted into the revenue officer training program. In April of 1987, after approximately eight months in the program, the IRS demoted Stevens for unsatisfactory service. In September of 1987, Stevens tried to invoke the agency's administrative procedure for age discrimination complaints. Pertinent regulations, however, provided that any such action had to be taken within thirty days after the alleged discrimination. Stevens had waited five months.[237]

In October of 1987, 176 days after his demotion, Stevens filed a formal administrative complaint of age discrimination with the Department of the Treasury. Included in the complaint was a statement of his intention to sue if the matter was not resolved. The complaint was rejected because he had not initiated the proceedings within thirty days. In May of 1988, Stevens filed an ADEA action in federal district court.[238]

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234. *Id.* at 1657 (quoting Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614, 625 (1985)).

235. 111 S. Ct. 1562 (interim ed. 1991).

236. *Id.* at 1563 (discussing 29 U.S.C. §§ 621-634 (1988)).

237. *Id.* at 1565.

238. *Id.*

The case required the Court to construe section 15(d) of the Age Discrimination and Employment Act:

> When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission *not less than* thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.[239]

The district court said that employees who believe they have been discriminated against have two avenues for relief. First, they may proceed directly to federal court, or second, they may file an administrative complaint with the appropriate federal agency and appeal an adverse finding to the EEOC. In that case, the court said employees could bring a federal civil action only after exhausting administrative remedies. Because Stevens had tried to invoke his administrative remedies, and because his filing was untimely, the district court said that it was without jurisdiction to hear the case.[240]

The Fifth Circuit affirmed, but on different grounds. The district court had said that any action based on the ADEA had to be filed not later than 180 days from the alleged discrimination, relying on the last sentence of section 15(b). The court of appeals correctly observed that the statute did not require initiation of an action within 180 days of the alleged discrimination. Rather, it required only that a complainant serve notice of an intent to sue during that time period. However, the court of appeals said the action had to be filed within thirty days.[241]

The Supreme Court called this a clear misreading of the statute. It agreed that there are two alternative routes for pursuing claims of age discrimination; federal employees can invoke the EEOC's administrative process or, alternatively, petition federal court in the first instance. If they pursue their action in court in the first instance, they are required to file a notice with the EEOC within 180 days of the alleged discrimination.[242] Stevens did that here since he filed such a notice 176 days after the discrimination. Employees are not, however, required to sue within thirty days. Rather, the notice has to be filed not less than thirty days before the suit. Here, the plaintiff filed the notice on October 19, 1987 and filed his lawsuit on May 3, 1988. Thus, the case was properly before the trial court.[243]

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239. 29 U.S.C. § 633(a)(d) (1988).
240. *Stevens*, 111 S. Ct. at 1565.
241. *Id.* at 1566-67.
242. *Id.* at 1566.
243. *Id.* at 1567.

The Court noted that the Age Discrimination in Employment Act does not contain any statute of limitations. Therefore, the Court assumed, as it has done with other federal statutes, that Congress intended to borrow an appropriate limitations period from either federal or state law. The Court said, however, that it did not need to decide what the limitations period would be in this case because the plaintiff, having filed his case only one year and six days after the alleged discrimination, would be well within whatever statute might apply.[244]

The court of appeals also considered the issue of whether the plaintiff was required to exhaust his administrative remedies before filing a civil action. Other federal courts have so held. The government abandoned that position before the Supreme Court, however, which accordingly refused to consider the matter.[245] Justice Stevens, who concurred in all other parts of the opinion, dissented from that part. He asserted that the ADEA contains no requirement of administrative exhaustion.[246]

C. *Other Significant Cases*

1. *International Organization of Masters, Mates, and Pilots v. Brown*

In *International Organization of Masters, Mates and Pilots v. Brown*,[247] the Court considered the reasonableness of a union's restriction on the distribution of campaign literature. The union represents 8500 members in the maritime industry. It conducts elections every four years by mail ballot. The union's election rules prohibit mailing of campaign literature prior to the candidate's official nomination at the union's nominating convention.[248]

About three months before the 1988 convention, Timothy Brown notified the secretary-treasurer of the union that he planned to be a candidate for union office and he requested mailing labels to conduct a mailing at his own expense prior to the nominating convention. Following a further exchange of correspondence, the union advised Brown that its rules authorized mailing of campaign literature only *after* the nominating convention. In particular, candidates were not allowed access to union mailing lists until after the convention. Such access was crucial in this case because union members work on board a ship and realistically can be reached only by mail.[249]

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244. *Id.*
245. *Id.* at 1657-68.
246. *Id.* at 1569.
247. 111 S. Ct. 880 (interim ed. 1991).
248. *Id.* at 883.
249. *Id.* at 883-84.

Brown filed suit under section 401(c) of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA)[250] which provides that unions are to comply "with all reasonable requests of any candidate to distribute by mail . . . at the candidate's expense campaign literature in aid of such persons candidacy to all members in good standing . . . ."[251] The district court entered a preliminary injunction, ordering the delivery of the names and addresses to a mailing service acceptable to the parties. Its decision was based on alternative grounds.

First, the court said Brown's request was clearly reasonable and any rule that resulted in its denial was invalid. Second, the district court held that even if the standard of review was the reasonableness of the union rule, the rule was unreasonable because preconvention campaigning was essential.[252] The United States Court of Appeals for the Fourth Circuit affirmed the decision. The majority, whose opinion was adopted en banc, held that only the reasonableness of the request was at issue, not the reasonableness of the union rule.[253]

Justice Stevens delivered the opinion for a unanimous court. Three important issues were undisputed. First, the case was not moot despite the fact that the election was over and Brown had lost. Second, Brown qualified as a bona fide candidate under the meaning of the statute when he made his request. Third, there was no basis for contending that Brown's request was unreasonable within the meaning of section 401(c) *except* Brown's failure to comply with the union's rule.[254]

The primary argument advanced by the union was the reasonableness of its rule restricting distribution of literature until after the nominating convention. The Court dispensed with that claim quite easily, however, by holding that the text and purpose of the statute required consideration of the reasonableness of the candidate's request, not examination of the union's rule. The statute, for example, required the union to comply with "all reasonable requests"; it said nothing about requiring candidates to comply with reasonable union rules.[255]

The Court also found significance in other sections of the LMRDA that *did* authorize promulgation of reasonable union rules. Failure to enact such a provision governing the distribution of union literature led the Court to conclude that the candidate's rights were "unqualified."

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250. 29 U.S.C. §§ 401-581 (1988).
251. *Id.* § 481(c).
252. *Brown*, 111 S. Ct. at 884-85.
253. *Id.* at 885.
254. *Id.* at 885-86.
255. *Id.* at 886-87.

The Court also noted that its construction was consistent with the statute's purpose of reducing the communication advantages enjoyed by incumbent union officers.[256]

The union also advanced three other arguments in support of its position: (1) that rules like the one at issue were necessary to ensure a fair election; (2) that the rule at issue helped avoid discrimination; and (3) that the government should avoid unnecessary intervention in the internal affairs of labor unions. The Court was unconvinced. Although rules are essential to govern the election process, that did not justify prohibiting candidate mailings before nomination. The Court also felt that open communication was more likely to thwart discrimination than to cause it. Finally, the Court noted that unlike some other provisions of the LMDRA, section 401(c) was specifically designed to be intrusive to unions' election proceedings.[257]

In the Court's view, the test was straightforward under section 401(c) and it hinged on the reasonableness of the candidate's request. Since the union advanced no argument that the request was unreasonable — other than the fact that it violated the union's rule — the Court found that the request was reasonable and should have been granted.[258]

2. *Lehnert v. Ferris Faculty Association*

In *Lehnert v. Ferris Faculty Association*,[259] the Court returned to a much litigated subject — the extent to which nonmembers can be charged for activities of unions obligated by law to represent them.[260] In particular, the case concerned the constitutionality of certain contributions authorized pursuant to state statute for public employees.[261] The plaintiffs in *Lehnert* were faculty members at Ferris State College, a public institution in Michigan. Although represented by the Ferris Faculty Association, an NEA and MEA affiliate, plaintiffs chose not to join. Thus, they were required to pay a service fee equivalent in amount to the dues required for union members.[262] Such agency shops are expressly authorized by the Michigan statute, the constitutionality of which was upheld by the United States Supreme Court in 1977 in *Abood v. Detroit Board of Education*.[263]

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256. *Id.* at 887.

257. *Id.* at 887-88.

258. *Id.* at 888.

259. 111 S. Ct. 1950 (interim ed. 1991).

260. *See, e.g.*, Communications Workers v. Beck, 487 U.S. 735 (1988); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

261. The statue is part of the Michigan Public Employment Relations Act. MICH. COMP. LAWS ANN. § 423.210 (West 1978). The particular provision at issue was section 423.210 which authorized so-called agency shops under which non members must pay a service fee to the union.

262. *Lehnert*, 111 S. Ct. at 1955-56.

263. 431 U.S. 209 (1977).

In a separate opinion, Justice Scalia charged that the Court's approach to union service fee cases perpetuated "give-it-a-try litigation."[264] This case may produce more of the same. Although it is possible to view *what* the Court said as permissible, it is more difficult to provide a coherent — or at least a unified — explanation for its action.

The only member of the Court who was never in doubt was Justice Marshall, who would have approved each expenditure the union made and who obviously joined the majority for those expenditures the Court approved.[265] The rest of the Court split into two camps on most issues, with Justice Blackmun writing the principal opinion and Justice Scalia authoring another significant opinion. Justice Blackmun wrote the opinion for the Court on most issues and was joined in all respects by Chief Justice Rehnquist, Justice White, and Justice Stevens. Justice Scalia's opinion, which was joined by Justice O'Connor, Justice Souter, and Justice Kennedy (on all but one issue), agreed with Justice Blackmun's in some respects, but most often applied a different test to the matters under review.

Justice Blackmun first reviewed the Court's decisions on similar issues, some of them constructions of the Railway Labor Act. Even though those were cases of statutory construction, Justice Blackmun said they were relevant to the constitutional question presented in *Lehnert*. In particular, he declared that expenses "germane" to the collective bargaining role of unions can constitutionally be assessed against public employees.[266]

In *Abood*, the Court had acknowledged that forcing public employees to support collective bargaining representatives "has an impact upon their First Amendment interests."[267] The impact is ordinarily not sufficient to violate First Amendment rights, although the union clearly could not force employees to contribute to political or ideological causes. In *Abood*, the Court pointed to two considerations that justified the First Amendment impact, namely the desirability of maintaining labor peace and the elimination of free-riders.[268]

In the same case, the Court acknowledged that it did not draw a "precise line" between legitimate and illegitimate assessments. In fact, it asserted that the line for public sector employees might be "somewhat hazier" than for private sector workers, principally because of the

264. *Lehnert*, 111 S. Ct. at 1975 (Scalia, J.).
265. *Id.* at 1966-1975 (Marshall, J., concurring in part).
266. *Id.* at 1956-57.
267. 431 U.S. at 222.
268. *Id.* at 225-26.

union's desire to influence legislative budgetary decisions that are part of the bargaining process.[269]

In *Ellis v. Railway Clerks*,[270] decided after *Abood*, the Court found no First Amendment impediment to assessments intended to support various expenses in connection with conventions, publications, and social events. None of the challenged charges supported ideological causes. Moreover, none added significantly to the burden on First Amendment rights already imposed, and constitutionally sanctioned by the Court, by virtue of compulsory dues assessment.[271]

Justice Blackmun, speaking on behalf of only five justices, declared that chargeable union costs must meet a three prong test: first, they must be germane to the union's collective bargaining actions; second, they must be justified by the elimination of free-riders and by the government policy of ensuring labor peace; and third, they must not add significantly to the burden of free speech "inherent in the allowance of a union or agency shop."[272]

Justice Scalia and his group of justices had harsh criticism for this test. As already noted, they charged that it was calculated to engender further litigation, in large part because of the imprecise language chosen by the majority. How is one to know, Justice Scalia asked, what is "germane" or whether an expense is "justified" by government policy? And, how does one recognize a "significant additional burden" to First Amendment rights? Justice Scalia concluded that the majority's three prong test provided little guidance either to the Court or to litigants.[273] He proposed what he viewed as a simpler test and one that would ordinarily be more restrictive than that adopted by the Court. He said that the only charges a union can constitutionally levy against nonmembers are those that arise from performance of statutory duties: "A union cannot arbitrarily charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged."[274]

The majority asserted that the statute was too imprecise to make this a workable test. Indeed, it claimed that the legislature deliberately used general language in order to give unions "flexibility and discretion." Thus, the majority concluded that the statute was a "poor criterion" to determine the constitutionality of assessments.[275]

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269. *Id.* at 236.
270. 466 U.S. 435 (1984).
271. *Id.* at 456.
272. Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1959 (interim ed. 1991).
273. *Id.* at 1975-76 (Scalia, J., concurring).
274. *Id.* at 1979.
275. *Id.* at 1969.

After detailing the test it would apply, the majority noted that the petitioners had proposed two limitations on the use of public sector contributions. First, they claimed that funds from nonmembers could not constitutionally be used for lobbying that did not involve legislative ratification of or appropriation for a collective bargaining agreement.[276] None of the justices questioned the appropriateness of union expenditures calculated to influence legislative action in support of a negotiated contract. In *Lehnert*, however, the union had used nonmember funds to support lobbying for teachers or for public employees generally.

Such lobbying, Justice Blackmun said, would not serve the interest of labor peace nor would it eliminate free-riders. More important, such conduct creates additional interference with a dissenter's First Amendment rights.[277] Justice Marshall dissented from this part of the opinion,[278] but Justice Scalia's group concurred because such lobbying was not actually part of the collective bargaining process.[279] Thus, the Court voted eight to one to disallow the assessment, although there was no majority rationale.

The second limitation urged by the petitioners was a prohibition against using nonmember fees for activities not on behalf of their own bargaining unit, even though the activities might support collective bargaining generally. In particular, petitioners objected to assessments for NEA and MEA who, in fact, received the bulk of the money paid by members and nonmembers alike.[280] The Court rejected this limitation unanimously. Justice Blackmun's group observed that the affiliation fee created a "pool of resources," economic, political, and informational, that was always available to the local units, even if it was not used every year. This was enough to justify the charges, although Justice Blackmun warned that there were limits.[281] Justice Scalia agreed with this resolution and commented that such affiliations and the expert consulting services they entailed were tangible benefits to local units, even when not used.[282]

The Court then turned to several expenditures that had been challenged by the petitioners. The Justice Blackmun and Justice Scalia groups agreed that the union could not constitutionally assess nonmembers to support a program designed to procure increased education

276. *Id.* at 1959.
277. *Id.* at 1959-60.
278. *Id.* at 1967-68.
279. *Id.* at 1980.
280. *Id.* at 1961.
281. *Id.*
282. *Id.* at 1980-81.

funding in Michigan. Justice Blackmun said this activity was not "oriented toward gratification . . . of petitioner's collective bargaining agreement."[283] Justice Scalia, agreeing with the result but applying a different rationale, found the activity not to be part of the statutory bargaining duties of the union.[284]

The petitioners also challenged assessments to support collective bargaining and litigation in other states. Justice Blackmun's group and Justice Marshall formed a majority which said that such collective bargaining support was permissible as part of the contribution to NEA.[285] But Justice Blackmun's and Justice Scalia's group both disallowed the assessment for litigation expenses or for the expense of union literature reporting about such litigation. Justice Blackmun compared this activity to "general lobbying" and found that it was not "germane" to collective bargaining.[286] Justice Scalia found no provision for it in the union's statutory responsibilities. With Justice Blackmun's and Justice Scalia's groups applying their consistent rationales, the Court reached a similar result about union public relations expenditures that were calculated to enhance the stature of the teaching profession generally.[287]

Although Blackmun and Scalia sometimes reached the same result, albeit using different rationales, they parted company over charges for a teacher's publication that concerned teaching, professional development, job opportunities, and other topics of interest to public school teachers. Justice Scalia found dissemination of such information to be outside the union's statutory responsibilities. This did not mean the activity was improper, but it did mean the union could not assess nonmembers who were unwilling to pay.[288] Justice Blackmun's group and Justice Marshall, however, formed a majority approving the expense. They said the expenses of this publication did not impose any additional infringement on First Amendment rights which were already burdened by the requirement of service fees. The amount of money at issue here was simply de minimis.[289]

The same five person majority upheld the assessment of nonmembers in support of delegates to MEA and NEA conventions.[290] Justice Scalia complained that these conventions did not relate solely to the collective bargaining responsibilities of the local union,[291] but Justice

283. *Id.* at 1963.
284. *Id.* at 1980.
285. *Id.* at 1963 (Blackmun, J.); *id.* at 1972-73 (Marshall, J., concurring in part).
286. *Id.* at 1963-64.
287. *Id.* at 1964.
288. *Id.* at 1980.
289. *Id.* at 1964.
290. *Id.* at 1964-65.
291. *Id.* at 1980 (Scalia, J., dissenting).

Blackmun said this was not required by the First Amendment. Rather, he said participation was "an important benefit of affiliation" particularly since at least some of the meetings included programs on bargaining strategies.[292]

Finally, the Court addressed whether nonmembers could be assessed for the expense of preparation for what would have been an illegal strike. This issue produced the only six to three split, with Justice Kennedy deserting Justice Scalia to join Justice Blackmun's group and Justice Marshall.[293] The majority acknowledged that the expenses of an illegal strike could not be charged to nonmembers. But while the legislature had outlawed strikes, it had not restricted *preparation* for strikes, a somewhat peculiar distinction. Nevertheless, the Court said that a threat of a strike was a legitimate bargaining tool and was, therefore, germane to the bargaining process.[294] Justice Scalia was unable to find that preparing for an unlawful strike was part of a union's representational duty.[295]

3. *Ingersoll Rand v. McClendon*

Ingersoll Rand v. McClendon[296] involved a law suit by a discharged Texas salesman who claimed that his employer fired him shortly before his pension plan vested, in order to avoid making pension contributions. Texas is an employment-at-will state, but the Texas Supreme Court said the public policy exception to that doctrine limited the employer's freedom of action.[297] Employment-at-will to the contrary, the Texas Supreme Court decided that employers cannot fire employees merely to avoid pension plans.

The real issue, of course, was not the status of Texas employment law, but the contention that the Employment Retirement Security Act of 1974[298] (ERISA) preempted the employee's claim. The Texas Supreme Court asserted that the claim was not preempted because the case had nothing to do with collection of pension benefits, which the employee had not claimed.[299] Rather, the question as framed by the Texas court was not whether the employee could collect his pension, but whether his discharge entitled him to pursue lost wages and other damages, including mental anguish and punitive damages.[300]

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292. *Id.* at 1965.
293. *Id.* at 1981-82 (Kennedy, J., concurring).
294. *Id.* at 1965-66.
295. *Id.* at 1981 (Scalia, J., dissenting).
296. 111 S. Ct. 478 (interim ed. 1990).
297. *Id.* at 481.
298. 29 U.S.C. §§ 1001-1461 (1988).
299. *Ingersoll*, 111 S. Ct. at 481.
300. *Id.*

Despite the Texas court's attempts at circumvention, the Supreme Court, in a unanimous decision, found the state claim preempted by ERISA. The Court said the plaintiff's claim was preempted under either of two arguments. First, the lawsuit was expressly preempted by section 514(a),[301] which provides that the federal statute supersedes "any and all state laws insofar as they . . . relate to any employee benefit plan . . . ."[302] The Court noted the breadth of this language and said that it was possible for a state law to "relate to" a benefit plan for purposes of ERISA, even if that had not been the intent. Moreover, the fact that the state claim might be consistent with ERISA is of no relevance.[303]

The Court had little difficulty concluding that the Texas cause of action "related to" an ERISA covered benefit plan. The plaintiff claimed that the pension plan itself was irrelevant since its sole function was to establish the employer's improper motive for the discharge. Damages for the employer's conduct, however, would not, under the plaintiff's theory, include lost pension benefits. The Court said that the plaintiff's theory missed the point. The key point was that, without the plan, there was no cause of action. In order to recover, the plaintiff had to plead and prove the existence of an employer motive to defeat an ERISA covered plan. It was not possible, then, to conclude that the claim did not relate to a plan covered by the statute.[304] This result, the Court said, was consistent with its understanding of the statute's purpose, which was to minimize the administrative and financial burdens of complying with the ERISA.[305]

In addition to its holding that the state claim was expressly preempted, the Court said it was also impliedly preempted because it conflicted with the cause of action created under ERISA. Section 510[306] of the statute makes it unlawful for an employer to discharge a plan participant for the purpose of interfering with the attainment of any benefit under the plan. That language covered the plaintiff's allegations in this case, and section 502(a)[307] created exclusive federal jurisdiction for civil actions to enforce these rights.[308]

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301. 29 U.S.C. § 1144(a) (1988).
302. *Id.*
303. *Ingersoll*, 111 S. Ct. at 483.
304. *Id.* at 483-84.
305. *Id.* at 484.
306. 29 U.S.C. § 1140 (1988).
307. *Id.* § 1132(a)(3)(e).
308. *Ingersoll*, 111 S. Ct. at 484-85.

The Court acknowledged that the mere existence of a federal cause of action does not necessarily preclude parallel state claims, *unless* Congress so intended. The Court said that such intent existed here. The Court compared section 510 of ERISA to section 301 of the Labor Management Relations Act,[309] after which it said section 502(a) was modeled. Although section 301 does not preclude the jurisdiction of state courts, federal law controls, no matter where the action is filed.[310] State court actions are not possible under section 502 of ERISA. Moreover, the Court said that an independent state action would undermine the federal enforcement scheme.[311]

The Court concluded that when it is clear or may fairly be assumed that activities which a state purports to regulate are protected by section 510 of ERISA, due regard for the federal enactment requires that state jurisdiction must yield. That was true even though the plaintiff did not seek pension benefits in his state claim. The Court noted that the relief plaintiff sought was within the power of the federal courts to provide under ERISA.[312]

III. CONCLUSION

The 1990 term ends the chapter of the Court's history that includes Justice Thurgood Marshall who, along with recently retired Justice William Brennan, helped shape American labor law in significant ways. By 1990, most of Justice Marshall's traditional liberal support in labor cases was gone. Nonetheless, his separate opinion in *Lehnert* produced at least a partial victory for the union and he joined a unanimous Court in *Johnson Controls*. Moreover, he was with the majority in *American Hospital Association*, a decision that will make resisting unionization more difficult for hospitals. These are not the cases for which Justice Marshall will be remembered. They are, nevertheless, significant contributions from an illustrious career.

309. 29 U.S.C. § 185 (1988).

310. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

311. *Ingersoll*, 111 S. Ct. at 485-86 (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)).

312. *Id.* at 486.