

1990-1991 ANNUAL SURVEY OF LABOR AND EMPLOYMENT LAW

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LABOR LAW

I. PROCEDURAL DEVELOPMENTS

A. * *The Right to a Jury Trial in a Duty of Fair Representation Suit:* *Teamsters Local 391 v. Terry*¹

In 1967, in *Vaca v. Sipes*, the United States Supreme Court held that a labor union has a duty of fair representation to its members that is implied from the union's role as the exclusive bargaining representative.² The *Vaca* Court further ruled that the duty of fair representation encompasses a duty on the part of the union to act honestly and in good faith, to represent its members without hostility or discrimination, and to avoid arbitrary conduct.³ Finally, the *Vaca* Court stated that a labor union's duty of fair representation extends to its enforcement of collective bargaining agreements.⁴

Since the *Vaca* decision, a conflict has arisen among the United States courts of appeals concerning whether plaintiffs in a duty of fair representation suit have a right to a jury trial.⁵ Specifically, courts are divided over whether claims for breach of duty of fair representation are legal or equitable.⁶ One view is that such claims are equitable and therefore do not entitle claimants to a jury trial. The Eleventh Circuit adopted this position in the 1988 case of *Leach v. Pan American World Airways*, holding that employees had no right to a jury trial in a suit against their union for breach of fair representation.⁷ The *Leach* court analyzed the question of whether the Seventh Amendment of the U.S. Constitution afforded the employees the right to a jury trial by first determining whether the nature of the plaintiffs' claim was legal or equitable.⁸ The court

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¹ 494 U.S. 558, 110 S. Ct. 1339, 133 L.R.R.M. 2793 (1990).

² 386 U.S. 171, 177, 64 L.R.R.M. 2369, 2371 (1967).

³ *Id.*

⁴ *Id.*

⁵ See, e.g., *United Transp. Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282, 286, 131 L.R.R.M. 3145, 3147-48 (6th Cir. 1989) (allowing plaintiff the right to jury trial); *Leach v. Pan American World Airways*, 842 F.2d 285, 288, 128 L.R.R.M. 2126, 2128 (11th Cir. 1988) (denying plaintiff the right to jury trial).

⁶ See *Consolidated Rail*, 881 F.2d at 289, 131 L.R.R.M. at 3150 (breach of duty of fair representation claim is legal); *Leach*, 842 F.2d at 288-90, 128 L.R.R.M. at 2128-30 (breach of duty of fair representation claim is equitable).

⁷ 842 F.2d at 286, 128 L.R.R.M. at 2126-27.

⁸ *Id.* at 286-87, 128 L.R.R.M. at 2127-28.

then examined whether the nature of the plaintiffs' remedy was legal or equitable.⁹

Examining the nature of the claim, the Eleventh Circuit stated that a claim of breach of duty of fair representation most closely resembles a charge of unfair labor practice, which is statutorily denied the right to a jury trial.¹⁰ The court refused to consider state law analogies in making its decision, reasoning that such analogies do not sufficiently resemble the right of a labor union's duty of fair representation.¹¹ Instead, the court stated that it would examine analogies to labor law.¹² The court justified this choice by stating that the need for uniformity in labor law is a fundamental national interest permitting courts to ignore state law analogies in favor of federal labor law analogies.¹³

With respect to the nature of the remedy, the *Leach* court held that the employees' request for monetary damages against the labor union was "inextricably intertwined" with their equitable request to vacate an arbitration decision involving their employer, Pan American.¹⁴ The court stated that the plaintiffs' attempt to distance the damages claim, which is a legal remedy entitled to a jury trial, from the equitable request to nullify the arbitration, was inconsistent, and refused to allow a jury trial based on the remedy sought.¹⁵ Thus, the *Leach* court held that neither the nature of the claim nor the nature of the remedy afforded a plaintiff the right to a jury trial in a suit against a labor union for breach of duty of fair representation.¹⁶

Several circuit courts of appeals have adopted a view contrary to the *Leach* court's, including the Sixth Circuit in the 1989 case of *United Transportation Union, Local 74 v. Consolidated Rail Corp.*¹⁷ In *Consolidated Rail*, the court held that plaintiffs who seek compen-

⁹ *Id.*

¹⁰ *Id.* at 289-90, 128 L.R.R.M. at 2129.

¹¹ *Id.* at 289, 128 L.R.R.M. at 2129.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 290, 128 L.R.R.M. at 2130.

¹⁵ *Id.* at 290-91, 128 L.R.R.M. at 2130.

¹⁶ *Id.* at 288-91, 128 L.R.R.M. at 2128-30.

¹⁷ 881 F.2d 282, 289, 131 L.R.R.M. 3145, 3150 (6th Cir. 1989) (granting plaintiff a jury trial in action for breach of duty of fair representation); see also *Terry v. Chauffeurs, Teamsters and Helpers, Local 391*, 863 F.2d 334, 339, 130 L.R.R.M. 2179, 2183 (4th Cir. 1988) (same); *Quinn v. DiGiulian*, 739 F.2d 637, 646, 116 L.R.R.M. 3321, 3328 (D.C. Cir. 1984) (same); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 220, 119 L.R.R.M. 3372, 3374 (5th Cir. 1984) (same).

satory damages in a suit for breach of duty of fair representation are entitled to a jury trial.¹⁸ The *Consolidated Rail* court focused on the nature of the remedy sought, stating that a claim for damages which properly encompasses both legal and equitable elements is entitled to a jury trial.¹⁹ The court also pointed out that the mere absence of a close analogy to state law does not support the conclusion that a duty of fair representation action is equitable in nature for Seventh Amendment purposes.²⁰ Thus, the Sixth Circuit rejected the view that a hybrid action containing both equitable and legal elements compels a rejection of the right to a jury trial.²¹ Instead, the court held that a claim which involves at least a partial legal remedy is entitled to a trial by jury.²²

During the *Survey* year, in *Teamsters Local 391 v. Terry*, the United States Supreme Court examined the issue of an employee's right to a jury trial in a suit for breach of a labor union's duty of fair representation.²³ The Supreme Court settled the split in the circuit courts by holding that employees who sue for injunctive relief and compensatory damages based on a labor union's alleged breach of fair representation are entitled to a jury trial.²⁴

The plaintiffs in *Teamsters Local 391* were truck drivers employed by McLean Trucking Company ("McLean") and were members of the Chauffeurs, Teamsters, and Helpers Union No. 391 (the "union").²⁵ As part of a change in operations, McLean transferred the truck drivers to a new terminal, agreeing that in return the truck drivers would have special seniority rights over "inactive" employees of the new terminal who had been temporarily laid off.²⁶ Subsequently, the *Teamsters Local 391* plaintiffs were laid off and recalled many times, each time subject to McLean's policy of stripping laid-off drivers of their special seniority rights.²⁷

The truck drivers filed a grievance with the union, challenging the order of layoffs and recalls, as well as McLean's policy of nullifying seniority rights upon rehiring laid-off workers.²⁸ The union's

¹⁸ 881 F.2d at 289, 131 L.R.R.M. at 3150.

¹⁹ *Id.* at 286, 131 L.R.R.M. at 3148.

²⁰ *Id.* at 288, 131 L.R.R.M. at 3149.

²¹ *Id.* at 289, 131 L.R.R.M. at 3149.

²² *Id.*

²³ 110 S. Ct. 1339, 1344, 133 L.R.R.M. 2793, 2795 (1990).

²⁴ *Id.* at 1343-44, 133 L.R.R.M. at 2794.

²⁵ *Id.* at 1342, 133 L.R.R.M. at 2793.

²⁶ *Id.* at 1343, 133 L.R.R.M. at 2793-94.

²⁷ *Id.* at 1343, 133 L.R.R.M. at 2794.

²⁸ *Id.*

grievance committee ruled for the truck drivers.²⁹ A later grievance filed by the truck drivers, however, failed to show that new layoffs by McLean had circumvented the initial decision of the grievance committee.³⁰ When the truck drivers sought to file a third grievance, based on McLean's continued layoffs and recalls, the union refused to refer the charges to the grievance committee on the ground that the relevant issues had been determined in the two prior proceedings.³¹

The truck drivers then sued in federal district court, alleging that McLean had breached its collective bargaining agreement with the union and the truck drivers in violation of section 301 of the Labor Management Relations Act.³² The truck drivers also contended that the union had violated its duty of fair representation.³³ The truck drivers sought injunctive relief and compensatory damages for lost wages and health benefits, and also requested a jury trial.³⁴ Subsequently, the action against McLean and the request for injunctive relief were dismissed after McLean petitioned for bankruptcy, leaving the union as sole defendant to the suit.³⁵ The union then moved to strike the request for a jury trial, arguing that no right to a trial by jury exists in a suit for breach of duty of fair representation.³⁶ The district court denied the motion to strike and, after an interlocutory appeal, the United States Court of Appeals for the Fourth Circuit affirmed, holding that the Seventh Amendment afforded the truck drivers a right to trial by jury on their claim for money damages.³⁷

The Supreme Court granted the union's petition for certiorari and affirmed the Fourth Circuit decision.³⁸ Writing for the majority, Justice Marshall first noted that the Seventh Amendment of the United States Constitution preserves the right to a jury trial in suits at common law where the amount in controversy exceeds twenty dollars.³⁹ The Court interpreted "suits at common law" as encom-

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Teamsters Local 391*, 110 S. Ct. at 1343, 133 L.R.R.M. at 2794.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Teamsters Local 391*, 110 S. Ct. at 1343, 133 L.R.R.M. at 2794.

³⁷ *Id.*

³⁸ *Id.* at 1343-44, 133 L.R.R.M. at 2794.

³⁹ *Id.* at 1344, 133 L.R.R.M. at 2795. The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury,

passing those suits in which legal, as opposed to solely equitable, rights and remedies are involved.⁴⁰ Applying this interpretation, the Court engaged in a two-pronged analysis to determine whether an action for breach of duty of fair representation involves legal rights.⁴¹ First, the Court examined the nature of the plaintiffs' claim to determine whether the claim was equitable or legal.⁴² The Court stated that this determination could only be made by comparing the action at hand to actions brought in colonial courts in the 1700s, before the courts of law and equity were merged.⁴³ The second question, which the Court noted was most important to its decision, concerned whether the remedy the truck drivers sought was legal or equitable in nature.⁴⁴

Applying the first prong of the test, the Court noted that, because the action for breach of duty of fair representation did not exist in eighteenth century England, the Court must look toward an analogous cause of action that existed at that time to determine whether the nature of the claim was legal or equitable.⁴⁵ The Court held that the fair representation action most closely resembled an action by a trust beneficiary against a trustee for breach of fiduciary duty, an action traditionally in the exclusive jurisdiction of courts of equity.⁴⁶ The Court compared a trustee's duty to act in the best interest of the trust beneficiaries to a union's duty to act in good faith on behalf of its members.⁴⁷ In addition, the Court observed that, just as a beneficiary cannot directly control a trustee's actions, an employee does not directly control a union's actions.⁴⁸ Finally, the Court likened the broad discretion of a trustee to choose when to sue third parties on behalf of a beneficiary to a union's exclusive authority to decide when and how to pursue a member's grievance against an employer.⁴⁹

shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. AMEND. VII.

⁴⁰ *Teamsters Local 391*, 110 S. Ct. at 1344, 133 L.R.R.M. at 2795.

⁴¹ *Id.* at 1345, 133 L.R.R.M. at 2795.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1346, 133 L.R.R.M. at 2796.

⁴⁷ *Teamsters Local 391*, 110 S. Ct. at 1345, 133 L.R.R.M. at 2795.

⁴⁸ *Id.*

⁴⁹ *Id.*

The Court rejected plaintiffs' argument that their action for breach of duty of fair representation most closely resembled an attorney malpractice action, which was historically an action at law.⁵⁰ The Court held that although an attorney malpractice suit is similar to a breach of fair representation action, it does not resemble the relationship between the union and the plaintiff-employees as fully as the trust analogy does.⁵¹ The Court stated that, unlike members of a union, a client controls the important decisions made by an attorney on his or her behalf and can fire the attorney if unhappy with the attorney's performance.⁵² The Court thus held that a breach of duty of fair representation action most closely resembles the equitable action for breach of a trustee's fiduciary duty.⁵³

The Court, however, stated that the trust analogy was not enough to characterize plaintiffs' claim as wholly equitable.⁵⁴ The Court noted that to prove a breach of fair representation by the union, the truck drivers also needed to prove that McLean's action violated the terms of the collective bargaining agreement.⁵⁵ The Court thus determined that while the duty of fair representation was analogous to a trustee's fiduciary duty, the violation of the collective bargaining agreement most closely resembled a breach of contract, which was a legal issue.⁵⁶ Therefore, because the plaintiffs' action encompassed both equitable and legal issues, the first prong of the Seventh Amendment analysis left the Court undecided on the jury trial issue.⁵⁷

Applying the second prong of the test, the Court held that the remedy sought by the truck drivers was legal in nature.⁵⁸ The Court pointed out that the only remedy sought by the truck drivers was compensatory damages.⁵⁹ The Court acknowledged that the mere fact that the damages were in the form of monetary relief did not automatically characterize the remedy as legal in nature.⁶⁰ The Court held, however, that the compensatory damages sought by the

⁵⁰ *Id.* at 1346-47, 133 L.R.R.M. at 2796-97.

⁵¹ *Id.* at 1346-47, 133 L.R.R.M. at 2797.

⁵² *Id.*

⁵³ *Id.* at 1346, 133 L.R.R.M. at 2796.

⁵⁴ *Id.* at 1347, 133 L.R.R.M. at 2797.

⁵⁵ *Teamsters Local 391*, 110 S. Ct. at 1347, 133 L.R.R.M. at 2797.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1348, 133 L.R.R.M. at 2797.

⁵⁹ *Id.* at 1347, 133 L.R.R.M. at 2797.

⁶⁰ *Teamsters Local 391*, 110 S. Ct. at 1347, 133 L.R.R.M. at 2797.

truck drivers did not have the equitable attributes that need to be present for the Court to label the damages equitable.⁶¹ The Court noted that the compensatory damages representing backpay and benefits were neither restitutionary, nor incidental to injunctive relief, and thus lacked the attributes commonly associated with equitable relief.⁶²

In addition, the Court rejected the union's argument that, because the Court had previously labeled backpay awarded under title VII as equitable, the backpay sought in a fair representation suit was equitable.⁶³ Justice Marshall distinguished the title VII cases, pointing out that Congress specifically labeled title VII backpay awards as equitable relief but that it has never made a similar legislative pronouncement with respect to awards in fair representation suits.⁶⁴ Thus, the Court concluded that the remedy sought in the truck drivers' suit for breach of duty of fair representation was legal in nature, and therefore the suit was a legal action, triable by a jury.⁶⁵

Justice Brennan concurred, in part, with the majority decision.⁶⁶ Justice Brennan agreed with the Court's holding that the remedy sought was legal in nature and that the Seventh Amendment grants plaintiffs a right to trial by jury in legal actions, but he disagreed with the Court's use of historical analysis to find a cause of action that was analogous to the breach of duty of fair representation suit.⁶⁷ Justice Brennan asserted that Seventh Amendment questions should be decided solely on the basis of the remedy sought.⁶⁸ Justice Brennan noted that the majority's use of the two-pronged historical test has repeatedly discounted the first prong and emphasized the importance of the second prong.⁶⁹ He reasoned that, because the existence of a right to a jury trial already turns on the nature of the remedy, there is little purpose in holding on to an analysis of the nature of the claim.⁷⁰ Thus, absent congressional delegation to a specific decisionmaking body, Justice Brennan in-

⁶¹ *Id.* at 1347-48, 133 L.R.R.M. at 2797.

⁶² *Id.* at 1348, 133 L.R.R.M. at 2797-98.

⁶³ *Id.* at 1348-49, 133 L.R.R.M. at 2798.

⁶⁴ *Id.*

⁶⁵ *Teamsters Local 391*, 110 S. Ct. at 1349, 133 L.R.R.M. at 2798.

⁶⁶ *Id.* at 1349, 133 L.R.R.M. at 2799 (Brennan, J., concurring).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1350, 133 L.R.R.M. at 2799 (Brennan, J., concurring).

⁶⁹ *Teamsters Local 391*, 110 S. Ct. at 1350, 133 L.R.R.M. at 2799 (Brennan, J., concurring).

⁷⁰ *Id.*

licated that he would hold that a right to a jury trial exists when the relief sought is the kind historically sought in courts of law.⁷¹

Justice Stevens also concurred in part, but reasoned that a breach of duty of fair representation suit more closely resembles an attorney malpractice action than an action for a trustee's breach of fiduciary duty.⁷² Justice Stevens distinguished the fair representation action from a trust action because trustees are appointed to protect beneficiaries from their own judgment, whereas a union's duty, like an attorney's duty to a client, is to advance its members' interests against adverse parties.⁷³ In addition, Justice Stevens noted that the doctrine of a union's duty of fair representation developed through suits tried to juries, and that in most actions involving a duty of fair representation the issues are "typical grist" for a jury decision.⁷⁴ Justice Stevens therefore concluded that the truck drivers were entitled to a jury trial in their suit for breach of duty of fair representation.⁷⁵

Justice Kennedy, joined by Justices O'Connor and Scalia, dissented.⁷⁶ Justice Kennedy approved of the majority's use of the two-pronged historical analysis, and further agreed with the majority's conclusion that the nature of the breach of duty of fair representation claim most closely resembles an equitable trust action.⁷⁷ Justice Kennedy disagreed, however, with the majority's holding that the truck drivers were entitled to a jury trial.⁷⁸ First, Justice Kennedy argued, the fact that the plaintiffs' claim contains both legal and equitable elements does not justify granting them the right to a jury trial.⁷⁹ Justice Kennedy pointed out that the action for breach of duty of fair representation is an equitable claim, and that the Supreme Court has never "parsed legal elements out of equitable claims" without specific procedural justifications, which were absent in this case.⁸⁰

Second, Justice Kennedy disagreed with the majority's finding that money damages are necessarily characterized as legal relief.⁸¹

⁷¹ *Id.*

⁷² *Id.* at 1353, 133 L.R.R.M. at 2802 (Stevens, J., concurring).

⁷³ *Id.* at 1354, 133 L.R.R.M. at 2802 (Stevens, J., concurring).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1354-55, 133 L.R.R.M. at 2803 (Stevens, J., concurring).

⁷⁶ *Id.* at 1355, 133 L.R.R.M. at 2803 (Kennedy, J., dissenting).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1357, 133 L.R.R.M. at 2804 (Kennedy, J., dissenting).

⁷⁹ *Teamsters Local 391*, 110 S. Ct. at 1358, 133 L.R.R.M. at 2805 (Kennedy, J., dissenting).

⁸⁰ *Id.*

⁸¹ *Id.* at 1359, 133 L.R.R.M. at 2806 (Kennedy, J., dissenting).

Justice Kennedy conceded that the presence of money damages may cause some actions to resemble legal suits, but stated that the presence of monetary relief in a duty of fair representation suit does not make the action more legal than equitable.⁸² In addition, Justice Kennedy asserted that, while the nature of the remedy is an important factor in Seventh Amendment analysis, the Court should look at the remedy together with all other relevant factors to determine whether an action is legal or equitable in nature.⁸³ According to Justice Kennedy, when all rights and remedies are considered, an action for breach of duty of fair representation resembles an equitable suit more than a legal action and the Court should not grant the truck drivers a right to trial by jury.⁸⁴

The *Teamsters Local 391* decision establishes that workers who sue their union for allegedly denying them fair representation are entitled to a jury trial if they seek monetary compensation such as backpay.⁸⁵ The Supreme Court's reasoning reflected its concern that a jury trial, as a fundamental constitutional right, should be carefully preserved, and that any apparent curtailment of the right should be critically analyzed with the utmost care.⁸⁶ Thus, the decision is compatible with the Court's stated policy favoring jury trials.⁸⁷

The *Teamsters Local 391* decision benefits workers who seek to recover from their union for breach of duty of fair representation in two ways. First, the decision gives workers flexibility in choosing whether to try their case before a judge or a jury. Depending on the particular circumstances of each case, workers can elect to be heard before the trier of fact who would be most sympathetic to their case. Second, assuming that employees do choose to exercise the jury option authorized by *Teamsters Local 391*, a jury trial might produce a more favorable outcome. Juries are arguably more empathetic than judges toward employee claims of unfair treatment. Jury members may be able to relate better to the workers' situation, and thus be more apt to find for the employees. The more egregious

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1357, 133 L.R.R.M. at 2804 (Kennedy, J., dissenting).

⁸⁵ *Id.* at 1349, 133 L.R.R.M. at 2798-99.

⁸⁶ *Id.* at 1344-45, 133 L.R.R.M. at 2795 (quoting *Beacon Theatres, Inc. v. Westover*, 339 U.S. 500, 501 (1959)). In *Beacon Theatres*, the Supreme Court had noted that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." 339 U.S. at 501.

⁸⁷ See *Teamsters Local 391*, 110 S. Ct. at 1344-45, 133 L.R.R.M. at 2795.

the facts, the more advantageous a jury trial would be to the workers. Trial by jury, however, poses no danger that workers will receive excessive damage payments because punitive damages are not allowed in a breach of duty of fair representation suit.⁸⁸

The *Teamsters Local 391* decision should also have a positive impact on union activity. By allowing a favorable forum for workers to seek relief from unions who have allegedly breached their duty of fair representation, the decision will encourage better representation by unions. The decision thus may have a powerful deterrent effect on union misconduct with respect to its duty of fair representation.

Because the Supreme Court's analysis in *Teamsters Local 391* was fact-specific, it is not clear whether the Court's holding applies to all breach of duty of fair representation claims or only those seeking backpay damages. Because the monetary nature of the relief sought was so important to the Supreme Court's decision, employees suing their union will probably emphasize compensatory damages and downplay requests for equitable relief in their complaints. Even if the decision is interpreted narrowly, plaintiffs who request backpay relief in their complaint should be able to argue successfully for a jury trial in an action for breach of duty of fair representation.

In conclusion, the Supreme Court held in *Teamsters Local 391* that employees who seek backpay against a union based on alleged breach of duty of fair representation have a constitutional right to a jury trial. Although the Court held that a breach of fair representation claim contains both legal and equitable elements, the Court concluded that the compensatory damages such as backpay are a form of legal relief and therefore entitle a plaintiff to a jury trial. Thus, the Supreme Court settled a split in the circuits and expanded the options of workers who seek relief for their union's alleged breach of duty of fair representation.

II. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. * *Collective Bargaining Units in Acute Health Care Facilities:* *American Hospital Ass'n v. NLRB*¹

The National Labor Relations Act of 1935 ("Act") encourages collective bargaining and protects employees' freedom of associa-

⁸⁸ See *United Transp. Union, Local 74 v. Consolidated Rail Corp.*, 881 F.2d 282, 286, 131 L.R.R.M. 3145, 3148 (6th Cir. 1989).

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¹ 111 S. Cl. 1539, 137 L.R.R.M. 2001 (1991).

tion, self-organization and designation of representatives for employment negotiations.² Under section 6 of the Act, the National Labor Relations Board ("Board") has the authority to make, amend and rescind rules and regulations that are necessary to implement these policy objectives.³ When disagreement arises between labor and management over the appropriateness of a collective bargaining unit, the Board is authorized by section 9(b) of the Act to decide the controversy.⁴

When labor and management disagree over the appropriateness of a collective bargaining unit, the Board typically has decided the particular controversy on a case by case basis.⁵ When faced with the need to determine the appropriateness of a collective bargaining unit for an acute health care hospital, however, the Board eventually abandoned this case by case approach.⁶ Instead, the Board chose to invoke its substantive rule-making power.⁷ The Board's first industry-wide unit classification rule specified eight employee units appropriate for collective bargaining purposes in acute health care facilities: physicians, registered nurses, other professional employees, medical technicians, skilled maintenance workers, clerical workers, guards and other non-professional employees.⁸ The Board recognized three exceptions to the general eight-unit rule: extraordinary circumstances; pre-existing, non-conforming units; and the combining of two or more units by labor.⁹

² *Id.* at 1541, 137 L.R.R.M. at 2003. See National Labor Relations Act § 1, 29 U.S.C. § 151 (1989).

³ *American Hosp.*, 111 S. Ct. at 1542, 137 L.R.R.M. at 2003. See National Labor Relations Act § 6, 29 U.S.C. § 156.

⁴ National Labor Relations Act § 9(b), 29 U.S.C. § 159(b). The pertinent language of § 9(b) states:

The Board shall decide in each case whether, in order to ensure employees the full benefit of their right of self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Id.

⁵ See *American Hosp. Ass'n v. NLRB*, 718 F. Supp. 704, 705, 132 L.R.R.M. 2033, 2034 (N.D. Ill. 1989), *rev'd*, 899 F.2d 651, 133 L.R.R.M. 3073 (1990), *cert. granted*, 111 S. Ct. 242 (1990), *aff'd*, 111 S. Ct. 1539, 137 L.R.R.M. 2001 (1991).

⁶ *Id.* at 708, 132 L.R.R.M. at 2037.

⁷ *Id.*

⁸ *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 653, 133 L.R.R.M. 3073, 3074 (7th Cir. 1990), *cert. granted*, 111 S. Ct. 242 (1990), *aff'd*, 111 S. Ct. 1539, 137 L.R.R.M. 2001 (1991).

⁹ *American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1541, 137 L.R.R.M. 2001, 2002 (1991).

During the *Survey* year, in *American Hospital Ass'n v. NLRB*, the United States Supreme Court, in a unanimous opinion written by Justice Stevens, held that the Board's exercise of its rule-making authority under section 6 was valid and legitimate.¹⁰ The Court addressed and dismissed three arguments advanced by the American Hospital Association: that section 9(b) of the Act requires case by case determination as to the appropriateness of bargaining units; that the rule disregards a congressional admonition against undue proliferation of collective bargaining units; and that the rule is arbitrary and capricious.¹¹ As a result, the Board's authority to promulgate a substantive, industry-wide rule was affirmed.¹²

The controversy resolved by the Court in *American Hospital Ass'n* originated in a dispute known as *Saint Francis Hospital*.¹³ The regional director of the NLRB had determined that a bargaining unit consisting of the hospital's maintenance personnel was appropriate.¹⁴ The hospital filed a request for review with the Board protesting that all the service and maintenance employees, together, comprised the appropriate bargaining unit.¹⁵ Following its usual procedure for appeals of a director's decision, the Board used a two-tier process to evaluate the appropriateness of collective bargaining units.¹⁶ First, the Board determined whether the petitioned-for unit fell within one of the "potentially appropriate" bargaining units.¹⁷ Second, the Board determined whether the traditional "community of interest" existed within the ranks of the unit.¹⁸ The community of interest test is satisfied when the concerns and interests of the petitioned-for unit are sufficiently separate from other employee units to justify certification of the proposed unit.¹⁹ Using

¹⁰ *Id.*

¹¹ *See id.* at 1541, 137 L.R.R.M. at 2002-03.

¹² *See id.* at 1547, 137 L.R.R.M. at 2007.

¹³ *See generally* *St. Francis Hosp.*, 265 N.L.R.B. 1025, 112 L.R.R.M. 1153 (1982), *vacated*, 271 N.L.R.B. 948, 116 L.R.R.M. 1465 (1984), *enforcement denied*, 814 F.2d 697, 124 L.R.R.M. 2994 (D.C. Cir. 1987).

¹⁴ *Id.*

¹⁵ *See id.* at 1025, 112 L.R.R.M. at 1154.

¹⁶ *See id.* at 1029, 112 L.R.R.M. at 1158.

¹⁷ *See id.* at 1031, 112 L.R.R.M. at 1160. There are eight potentially appropriate units: physicians, registered nurses, other professional employees, technical employees, business office clerical employees, skilled maintenance employees, guards, and other non-professional employees. *See id.*

¹⁸ *See id.* at 1029, 112 L.R.R.M. at 1158.

¹⁹ *Id.* at 1025-26, 112 L.R.R.M. at 1154-55. The criteria evaluated when determining "community of interest" include the following: same supervision, skill level, work integration, location and interaction with other departments. *Id.*

this two-tier process, the Board in *Saint Francis* determined that a collective bargaining unit for maintenance personnel was appropriate.²⁰

Despite the Board's affirmation of the hospital's maintenance employees as an appropriate bargaining unit, however, the hospital refused to bargain with the unit's bargaining representative, the International Brotherhood of Electrical Workers.²¹ The union filed charges against the hospital with the NLRB.²² In response, the hospital denied that the unit, determined to be appropriate by the Board in *Saint Francis*, was actually an appropriate unit for collective bargaining.²³ Upon reviewing its decision, the Board decided to vacate its earlier decision and chose to adopt a "disparity of interest" test.²⁴ This test emphasizes the dissimilarity of employee interests and requires greater disparities for approval of unit certification.²⁵ The Board adopted this test because it believed the disparity of interest standard best comported with congressional intent to prevent proliferation of collective bargaining units in acute care hospitals.²⁶

The union appealed the issue to the Court of Appeals for the District of Columbia.²⁷ The court found the disparity of interest test within the Board's authority but not mandated by the Act or congressional admonition.²⁸ It remanded the case for further clarification of the test.²⁹ On remand, the Board proclaimed its intention to exercise its rule-making powers instead of further utilizing its disparity of interest approach.³⁰ In announcing its intention, the Board stated that it would review the empirical evidence and lessons

²⁰ *Id.* at 1033-34, 112 L.R.R.M. at 1161-62.

²¹ *St. Francis Hosp.*, 271 N.L.R.B. 948, 116 L.R.R.M. 1465 (1984), *remanded*, 814 F.2d 697, 124 L.R.R.M. 2994 (D.C. Cir. 1987).

²² *See id.*

²³ *See id.*

²⁴ *See id.* at 950, 116 L.R.R.M. at 1468.

²⁵ *See id.* at 935, 116 L.R.R.M. at 1470.

²⁶ *Id.* Using this approach, the Board seemed to restrict the appropriate bargaining units to "professional" and "non-professional" unless labor could justify additional units. *See IBEW, Local Union 474 v. NLRB*, 814 F.2d 697, 709, 124 L.R.R.M. 2993, 2995 (D.C. Cir. 1987).

²⁷ *See IBEW v. NLRB*, 814 F.2d at 698, 124 L.R.R.M. at 2995.

²⁸ *See id.* at 708, 124 L.R.R.M. at 3002. The court stated that Congress did not alter the Board's power of bargaining unit certification under § 9(a) of the Act when enacting the Health Care Amendment of 1974. This amendment brought the health care industry within the Board's power. *Id.*

²⁹ *See id.* at 715, 124 L.R.R.M. at 3008.

³⁰ *See St. Vincent Hosp.*, 285 N.L.R.B. 365, 125 L.R.R.M. 1329, 1330 (1987).

learned through its unsuccessful doctrinal approaches in order to arrive at an informed judgment as to the appropriate bargaining units.³¹

The American Hospital Association, however, reacted to the NLRB's decision by seeking an injunction against the Board.³² The United States District Court for Illinois enjoined enforcement³³ but the Court of Appeals for the Seventh Circuit reversed.³⁴ The United States Supreme Court granted certiorari because of the importance of the case and affirmed the Board's authority to promulgate an industry-wide, substantive rule under section 6 of the Act.³⁵ In reaching its decision, the Court first held that the "in each case" requirement of section 9(b) did not prohibit the Board from promulgating general rules to define appropriate bargaining units.³⁶ Second, it held that the Board gave extensive consideration to congressional concern for undue proliferation.³⁷ Finally, the Court determined the Board's exercise of its power was based on appropriate, reasoned analysis, and therefore was not arbitrary or capricious.³⁸

The petitioner's first argument in *American Hospital Ass'n* was that the "in each case" requirement of section 9(b) prohibited the Board from promulgating an industry-wide rule under section 6.³⁹ The Court disagreed, stating that a more natural interpretation, consistent with past interpretations of similar regulatory statutes, was that the Board must resolve the issue whenever a dispute arises

³¹ See *id.* at 365-66, 125 L.R.R.M. at 1330. The court cited the following reasons from the Board's notice of proposed rule-making: reduction of costly and time-consuming "case-by-case" adjudication by providing predictability, utilization of recurring patterns of needs within the industry, and the improbability of agreement among the circuits concerning the standard to be applied. *Id.*

³² See *American Hosp. Ass'n v. NLRB*, 718 F. Supp. 704, 705, 132 L.R.R.M. 2033, 2034 (N.D. Ill. 1989), *rev'd*, 899 F.2d 651, 133 L.R.R.M. 3073 (1990), *cert. granted* 111 S. Ct. 242 (1990), *aff'd*, 111 S. Ct. 1539, 137 L.R.R.M. 2001 (1991).

³³ See *id.* at 716, 132 L.R.R.M. at 2043.

³⁴ *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 660, 133 L.R.R.M. 3073, 3079 (7th Cir. 1990), *cert. granted*, 111 S. Ct. 242 (1990), *aff'd*, 111 S. Ct. 1539, 137 L.R.R.M. 2001 (1991). The court stated that the case by case adjudication process proved to be ineffective. The Board could experiment with rule-making given this failure and the lack of any statutory obstacle. *Id.*

³⁵ *American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1541, 137 L.R.R.M. 2001, 2003 (1991).

³⁶ See *id.* at 1543, 137 L.R.R.M. at 2005.

³⁷ See *id.* at 1545, 137 L.R.R.M. at 2006.

³⁸ See *id.* at 1546, 137 L.R.R.M. at 2006-7.

³⁹ See *id.* at 1542, 137 L.R.R.M. at 2003.

concerning the appropriateness of a unit.⁴⁰ In rejecting the "case by case" argument, the Court furthermore stated that even if a statute prescribed individualized determinations, an agency still has the power to decide issues of general application by rule-making unless Congress clearly expresses a contrary intent.⁴¹ The Court found no such intent within the legislative history of the Health Care Amendment.⁴² Additionally, the Court noted that the Board may be guided not only by the Act's policies but by the rules the Board develops to guide the exercise of its discretion in disputed cases.⁴³ Finally, the Court held that the rule reflected the Act's policy of facilitating labor organization and recognition because it defines in advance the groups that may be properly organized.⁴⁴

The second argument advanced by the hospital was that the Board failed to give "due consideration" to the congressional admonition against undue proliferation of collective bargaining units when enacting the rule.⁴⁵ Congress believed that proliferation of units could result in heavy bargaining costs and could thus further increase the rising costs of health care.⁴⁶ Additionally, fragmentation of the labor force could result in a number of small bargaining units that frequently strike and consequently impair the ability of the health care facility to respond to patients' needs.⁴⁷ The Court, upon examining the record of the Board's rule-making proceedings, held that the Board gave "extensive consideration" to congressional concerns.⁴⁸ Additionally, the Court declared the admonition merely a warning that Congress may legislate if the Board fails to give due consideration to the concern about undue proliferation.⁴⁹

The third and final argument advanced by the petitioner was that the Board's rule was arbitrary and capricious because it ignored the critical differences that exist among acute health care facilities.⁵⁰

⁴⁰ See *id.* at 1542-43, 137 L.R.R.M. at 2004.

⁴¹ See *id.* at 1541, 137 L.R.R.M. at 2004.

⁴² See *id.* at 1544, 137 L.R.R.M. at 2004-5.

⁴³ See *id.*

⁴⁴ See *id.* at 1543-44, 137 L.R.R.M. at 2004.

⁴⁵ *Id.* at 1541, 137 L.R.R.M. at 2002.

⁴⁶ See *St. Francis Hosp.*, 265 N.L.R.B. 1025, 1026, 112 L.R.R.M. 1153, 1155 (1982), *vacated*, 271 N.L.R.B. 948, 116 L.R.R.M. 1465 (1984), *enforcement denied*, 814 F.2d 697, 124 L.R.R.M. 2994 (D.C. Cir. 1987).

⁴⁷ See *American Hosp.*, 111 S. Ct. at 1545, 137 L.R.R.M. at 2006.

⁴⁸ See *id.* at 1545, 137 L.R.R.M. at 2006.

⁴⁹ See *id.*

⁵⁰ See *id.* at 1546, 137 L.R.R.M. at 2006. The differences cited by the hospital include "size, location, operations, and work-force organization." *Id.*

Although the Board initially rejected application of the rule-making approach to the health care industry, it noted certain recurring trends concerning the appropriateness of units within the acute care branch of health care.⁵¹ The Court found no inconsistency with earlier decisions that anticipated the emergence of typically appropriate units from recurring fact patterns.⁵² The Court stated that even if there were inconsistencies, section 6 contemplates the Board's reshaping of policies based on its experience and that a change of viewpoint does not undermine the validity of the rule founded on "substantial evidence" and "reasoned analysis."⁵³ Additionally, the Court stated that the "extraordinary circumstance" exception allowed for departure from the rule when its application would be arbitrary or capricious.⁵⁴

The major impact of the *American Hospital* decision may be the rise in effective labor organization within the health care industry. Labor organizers can now classify their workforce into the eight prescribed units, confident that such units are appropriate and will be recognized by employers without administrative or courtroom battles.⁵⁵ This will undoubtedly increase efficiency and the strength of labor mobilization efforts.

Additionally, a rise in union membership can most likely be expected. By specifying eight units instead of relying upon the statutory minimum of three,⁵⁶ the Board has facilitated the differentiation of the distinct facets of the workforce. Because laborers are grouped with others who share their concerns and needs, it will be easier for them to agree on goals and strategies that will lead to more effective bargaining.⁵⁷ This solidification of needs and power will increase the lure of unionization to workers.

Finally, given the unanimity of the Court and the deference it showed, the Board may expand its use of regulation to supplement or replace its prior decisions. The Board may once again use its authority under section 6(a) to bring order out of chaos in industries plagued by inconsistent or challenged decisions regarding unit clas-

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*, 137 L.R.R.M. 2006-07.

⁵⁴ See *id.* at 1547, 137 L.R.R.M. at 2007.

⁵⁵ See *American Hosp.*, 111 S. Ct. at 1543-44, 137 L.R.R.M. at 2004.

⁵⁶ See National Labor Relations Act § 9(b), 29 U.S.C. § 159(1)(b). Professional, non-professional and guards are the statutory minimum bargaining units prescribed by the Act. *Id.*

⁵⁷ See *American Hosp. Ass'n v. NLRB*, 899 F.2d 651, 654, 133 L.R.R.M. at 3073, 3074-75 (1990).

sification. In addition, the Board may use its newly-found power to solidify its prior decisions in industries where it has consistently applied a well-developed standard. Health care is a highly controversial industry given the fear of rising costs and work stoppages and given the Board's lackluster performance record in this area.⁵⁸ With the Court's approval of a rule pertaining to this industry, it is unlikely that the Board would face judicial opposition in well-settled, non-controversial industries.

The Court's well-reasoned opinion in *American Hospital Ass'n* confirms the Board's power to promulgate a substantive, industry-wide rule regarding appropriate bargaining units. Labor organizations within the acute health care industry benefit from the decision because they can effectively organize their bargaining within fixed and legitimate units. In addition, their fear of being limited to the statutory minimum of three bargaining units (professional, non-professional and guards) has been eliminated. The Board will likely further experiment with its rule-making authority to define appropriate units in other industries.

B.* *Social Policy v. Credible Fact Finding: NLRB v. Curtin Matheson Scientific Inc.*¹

Under section 8(a)(1) of the National Labor Relations Act ("Act"), it is an unfair labor practice to interfere with, coerce or restrain employees when they are exercising the rights guaranteed to them by the Act.² In addition, under section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of his or her employees.³ In interpreting this statutory language, the United States Supreme Court has ruled that an employees' union, upon certification by the National Labor Relations Board ("Board") as such employees' exclusive bargaining representative, has an irrebuttable presumption of majority support for one year.⁴ Throughout this year, an employer's refusal to bargain with a certified union is a per se unfair labor practice under section 8(a)(5) of the Act.⁵

⁵⁸ See *id.* at 655, 660, 133 L.R.R.M. at 3075, 3079.

* By Andree Saulnier, Editor, BOSTON COLLEGE LAW REVIEW.

¹ NLRB v. Curtin Matheson Scientific, Inc., 110 S. Ct. 1542, 133 L.R.R.M. 3049 (1990).

² 29 U.S.C. § 158(a)(1), (5) (1988).

³ *Id.* § 158(a)(5) (1988).

⁴ Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37, 125 L.R.R.M. 2441, 2445 (1987).

⁵ See *Celanese Corp.*, 95 N.L.R.B. 664, 672 (1951).

The Board has determined, subsequent to the expiration of this protected year, that this presumption continues but may be rebutted by employers.⁶ To rebut this presumption, an employer must show that, at the time of the employer's refusal to bargain, the union did not in fact have majority support.⁷ An employer may also rebut this presumption by showing that the employer had a good faith doubt, based on objective evidence, that the union no longer enjoyed majority support.⁸

Whether employers may establish a good faith doubt of union majority support, by assuming that permanent replacements do not per se support the union, has long troubled the Board.⁹ Early Board decisions determined that strike replacements did not support the union.¹⁰ In later cases, however, the Board changed its position and determined that strike replacements may in fact support the union.¹¹ By the late 1980s, several United States Courts of Appeals had rejected the Board's union support approach.¹² Thus, in the 1987 decision of *Station KKHI*, the Board again changed its position, ruling that it would not adopt either an anti-union or pro-union presumption, but instead would determine its views on a case-by-case basis.¹³

⁶ See *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 38, 125 L.R.R.M. at 2445.

⁷ *Station KKHI*, 284 N.L.R.B. 1339, 1340, 125 L.R.R.M. 1281, 1282 (1987), *enforced*, 891 F.2d 230, 230, 133 L.R.R.M. 2175, 2175 (9th Cir. 1989).

⁸ *Id.*

⁹ See *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1545-46, 133 L.R.R.M. 3049, 3049-51 (1990).

¹⁰ See *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215, 49 L.R.R.M. 1466, 1469 (1962) (concluding that employer had good cause to doubt the union's majority support because replacements had not authorized the union to represent them); *Stone Rubber Co.*, 123 N.L.R.B. 1440, 1444, 44 L.R.R.M. 1133, 1134 (1959) (asserting that employers might reasonably assume that strike replacements did not support the union).

¹¹ See *Windham Community Memorial Hosp.*, 230 N.L.R.B. 1070, 1070, 95 L.R.R.M. 1565, 1570 (1977) (strike replacers are presumed to support the union in same proportion as the workers they have replaced), *enforced*, 577 F.2d 805 (2d Cir. 1978); *Cutten Supermarket*, 220 N.L.R.B. 507, 509, 90 L.R.R.M. 1250, 1251 (1975) (assuming that strike replacements support the union in the same ratio as the employees they replace); *Peoples Gas System, Inc.*, 214 N.L.R.B. 944, 947, 87 L.R.R.M. 1430, 1434 (1974) (stating that it was possible that strike replacements did in fact favor union representation).

¹² *Curtin Matheson*, 110 S. Ct. at 1546, 133 L.R.R.M. at 3051.

¹³ 284 N.L.R.B. 1339, 1344, 125 L.R.R.M. 1281, 1286 (1987). The Board determined that the pro-union presumption was not logical, because replacement workers often knew that the union's primary concern was for the welfare of the strikers, and not for the welfare of the replacements. *Id.* The Board determined, however, that an anti-union presumption was also illogical. *Id.* The Board reasoned that strike replacements may have personal financial concerns that force them to cross the picket line, but these replacements may nevertheless support the union. *Id.* Furthermore, the Board maintained that the adoption of an anti-

In the 1987 case of *Curtin Matheson Scientific, Inc.*, the Board applied the *Station KKHI* case-by-case approach for the first time.¹⁴ Specifically, the Board determined that the employer had failed to present sufficient evidence to prove the existence of anti-union sentiment among replacement workers, and thus had committed an unfair labor practice under sections 8(a)(1) and (5) of the Act.¹⁵ The employer appealed the Board's decision to the Fifth Circuit Court of Appeals.¹⁶

The Fifth Circuit declined to enforce the Board's decision.¹⁷ Instead, the *Curtin Matheson* court adopted the presumption of anti-union support among replacement workers.¹⁸ The court noted that the number of replacement workers now exceeded the number of strikers.¹⁹ Therefore, based on the anti-union presumption, the *Curtin Matheson* court held that the employer had established a good faith doubt of continued majority support for the union.²⁰ A circuit split developed on the question of whether the Board must adopt a presumption of pro-union or anti-union sentiment among replacement workers.²¹

During the Survey year, in *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, the United States Supreme Court upheld and adopted the no presumption case-by-case approach.²² In *Curtin Matheson*, the Court enforced the Board's decision that the employer's refusal to bargain with its employee's union was an unfair labor practice under sections 8(a)(1) and (5) of the Act.²³ In reaching this conclusion, the Court rejected the presumption that strike replacers

union presumption may impair the strikers' ability to strike by increasing the chances that they would lose their bargaining representative. *Id.*

¹⁴ *Curtin Matheson Scientific, Inc.*, 287 N.L.R.B. 350, 352, 127 L.R.R.M. 1114, 1116-17 (1987), *cert. granted*, 859 F.2d 362, 129 L.R.R.M. 2801 (5th Cir. 1988).

¹⁵ *Id.* at 353-54, 127 L.R.R.M. at 1117. First, the Board determined that the five workers who had crossed the picket line may have done so for personal economic reasons rather than because they opposed the union. *Id.* Second, the Board determined that the resignation from their jobs of two original bargaining unit employees, after the strike began, also did not indicate opposition to the union. *See id.* Third, the Board dismissed the statements of several employees, which might have indicated the existence of anti-union sentiment, as inconclusive. *Id.*

¹⁶ *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362, 362, 129 L.R.R.M. 2801, 2801 (5th Cir. 1988), *cert. granted*, 110 S. Ct. 1542, 133 L.R.R.M. 3049 (1990).

¹⁷ *Id.* at 367-68, 129 L.R.R.M. at 2804-05.

¹⁸ *Id.*

¹⁹ *Id.* at 365, 129 L.R.R.M. at 2804.

²⁰ *Id.* at 367, 129 L.R.R.M. at 2804-05.

²¹ *Curtin Matheson*, 110 S. Ct. at 1548-49, 133 L.R.R.M. at 3052-53.

²² *Id.* at 1550, 133 L.R.R.M. at 3054.

²³ *See id.* at 1554, 133 L.R.R.M. at 3057.

never support the union.²⁴ Consequently, after *Curtin Matheson*, an employer must prove that its strike replacements have actually rejected the union's protection before the employer can withdraw recognition from the union. Employers cannot rely on the pro-union or anti-union presumption previously adopted by their circuit.

In *Curtin Matheson*, the one-year period guaranteeing a presumption of majority support for the union had elapsed.²⁵ At this time, the employer had refused to continue negotiations with the employees' union.²⁶ Prior to the expiration of the one-year period, several strikers had crossed the picket line, and the employer had hired permanent replacement workers.²⁷ At the time the employer withdrew its recognition of the employees' union, the bargaining unit contained nineteen strikers, twenty-five replacement workers and five strikers who had crossed the picket line.²⁸ The employer argued that it was reasonable to assume that neither the strikers who had crossed the picket line nor the replacement workers supported the union.²⁹ Thus, the employer maintained that because the union no longer enjoyed majority support, it did not have to recognize the union.³⁰

The Supreme Court rejected Curtin Matheson's argument.³¹ To support its position, the *Curtin Matheson* Court cited to and adopted the factual findings of the Board.³² In its review of the case, the Board refused to adopt the anti-union presumption, and consistent with *Station KKHI*, conducted an individual analysis of the facts of the instant case.³³ After its review, the Board concluded that the respondent had not clearly established that the union lacked majority support.³⁴ The *Curtin Matheson* Court maintained that the Court should accord a high degree of deference to Board findings, and thus it was appropriate for the Court to adopt their findings.³⁵

²⁴ See *id.*

²⁵ See *id.* at 1547, 133 L.R.R.M. at 3051.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *id.* at 1550, 133 L.R.R.M. at 3054.

³⁰ See *Curtin Matheson*, 110 S. Ct. at 1550, 133 L.R.R.M. at 3054.

³¹ *Id.* at 1550-51, 133 L.R.R.M. at 3054.

³² *Id.* at 1547-48, 133 L.R.R.M. at 3051-52.

³³ *Id.*

³⁴ *Id.* at 1548, 133 L.R.R.M. at 3052.

³⁵ *Id.* at 1554, 133 L.R.R.M. at 3057. In previous cases, the United States Supreme Court has consistently ruled that courts should extend deference to Board rules. See *Fall River*

Furthermore, the *Curtin Matheson* Court concluded that the no presumption rule was rational as an empirical matter.³⁶ The Court noted that the circumstances of each strike and the strength of each union vary greatly.³⁷ Hence, the Court reasoned that a case-by-case analysis was the only logical way to determine if any employer's belief that the union had lost majority support was reasonable.³⁸

Next, the Court rejected the employer's argument that strike replacements never support the union because the union is acting contrary to their interests.³⁹ The employer argued that strike replacers are always pitted against the union because they know they will lose their jobs if the union is successful.⁴⁰ To rebut this position, the *Curtin Matheson* Court noted that unions do not always demand that employers fire strike replacements after the strike ends.⁴¹ Moreover, the Court maintained that even if the interests of strike replacements and the union conflict during the strike, their interests may converge after the strike.⁴² In the Court's opinion, strikers are able to look beyond the circumstances of the strike and determine that in the future they may want the representation of the union.⁴³ These reasons were sufficient to cast doubt on the anti-union presumption and to require an ad hoc analysis of the facts of each case.⁴⁴

In addition, the *Curtin Matheson* Court maintained that its refusal to adopt the anti-union presumption is consistent with the Act's overarching policy of achieving industrial peace.⁴⁵ The Court

Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42, 125 L.R.R.M. 2441, 2447 (1987) (stating that courts should accord Board rules considerable deference and uphold Board rules as long as they are rational and consistent with the Act); NLRB v. Weingarten, Inc., 420 U.S. 251, 256-66, 88 L.R.R.M. 2689, 2694 (1975) (asserting that deference should be given to Board rules even if such rules depart from prior Board decisions).

³⁶ *Curtin Matheson*, 110 S. Ct. at 1550, 133 L.R.R.M. at 3054.

³⁷ *Id.* at 1552, 133 L.R.R.M. at 3055.

³⁸ *Id.*

³⁹ *See id.* at 1551-52, 133 L.R.R.M. at 3054-55.

⁴⁰ *Id.* at 1551, 133 L.R.R.M. at 3054-55.

⁴¹ *Id.* at 1552, 133 L.R.R.M. at 3054-55.

⁴² *Id.*

⁴³ *Id.* Note that the *Curtin Matheson* Court maintained that strike replacements can see beyond the immediate concerns of the strike. *Id.* Because replacements potentially hold this long term view, the Court believed that the Board's position in the case at bar did not conflict with the Board's holdings in *Leveld Wholesale and Service Electric Co. Id.*; see *Service Elec.*, 281 N.L.R.B. 633, 641, 124 L.R.R.M. 1318, 1318 (1986) (concluding that there is an inherent conflict of interest between strikers and their replacements); *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1345, 89 L.R.R.M. 1889, 1889 (1975) (stating that strike replacers can reasonably predict that if the union is successful they will lose their jobs).

⁴⁴ *Curtin Matheson*, 110 S. Ct. at 1552, 133 L.R.R.M. at 3055-56.

⁴⁵ *Id.* at 1552, 133 L.R.R.M. at 3056.

asserted that the case-by-case approach allows unions to negotiate without worrying that they need a prompt settlement to remain bargaining representatives.⁴⁶ The Court also stated that this approach limits the ability of employers to oust unions without showing clear evidence of lack of support for these unions.⁴⁷ Accordingly, the Court concluded that the case-by-case approach rule encourages negotiated solutions to strikes.⁴⁸

Finally, the Court insisted that if it adopted the anti-union presumption, it would allow employers to oust unions through hiring practices.⁴⁹ Such hiring practices would mean that the workers would have less of a chance of reinstatement after the strike because they would lose their bargaining representative.⁵⁰ Furthermore, the Court stated that the fear of permanent loss of employment would negatively impact the ability of workers to strike.⁵¹

In a concurring opinion in *Curtin Matheson*, Justice Rehnquist argued that the no presumption rule stretches, but does not exceed, the limits of deference to which the Board is due.⁵² Justice Rehnquist recognized that the no presumption rule sharply limits the ability of employers to establish a good faith doubt of union support.⁵³ He also asserted that the assumption that replacement workers might support the union is contrary to common sense.⁵⁴ Nevertheless, as Justice Rehnquist believed that the Court should extend a great deal of deference to Board decisions, he concurred with the decision of the Court.⁵⁵

Writing in dissent, Justice Scalia maintained that the Court logically could not conclude that replacement workers would support the union.⁵⁶ According to Justice Scalia, the economic interests of replacement workers inevitably conflict with the interests of strikers.⁵⁷ To support his position, Justice Scalia noted that the Board, in other contexts, consistently had ruled that the interests of strikers and replacement workers were at odds.⁵⁸ Furthermore, he stated

⁴⁶ *Id.* at 1553-54, 133 L.R.R.M. at 3056.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ *Curtin Matheson*, 110 S. Ct. at 1554, 133 L.R.R.M. at 3056.

⁵¹ *Id.*

⁵² *Id.* at 1554-55, 133 L.R.R.M. at 3057 (Rehnquist, J., concurring).

⁵³ *Id.* at 1555, 133 L.R.R.M. at 3057 (Rehnquist, J., concurring).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1554, 133 L.R.R.M. at 3057 (Rehnquist, J., concurring).

⁵⁶ *Id.* at 1557, 133 L.R.R.M. at 3059 (Scalia, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1561, 133 L.R.R.M. at 3062 (Scalia, J., dissenting); *see Service Elec.*, 281 N.L.R.B.

that he did not find anything in the record of the case at bar which indicated that these replacements had shown support for the union.⁵⁹ Thus, Justice Scalia believed that the employer in *Curtin Matheson* had a good faith doubt of the union's majority support.⁶⁰

In addition, Justice Scalia maintained that the majority was imposing too high a burden of proof on the respondents.⁶¹ He asserted that an employer does not have to establish with one hundred percent certainty that the union lacked majority support. Instead, the employer has to establish that there existed a reasonable doubt of such support.⁶²

Finally, Justice Scalia rejected the policy reasons the majority offered for their conclusions.⁶³ First, Justice Scalia argued that the Court should not ignore the facts to promote policy.⁶⁴ Second, he maintained that the majority opinion allowed the Board's order to be upheld on the grounds that it was counterfactual to assume that replacements do not support the union.⁶⁵ Justice Scalia stated that prior to the Court's review, lower courts had reviewed the Board decisions to determine whether given the facts of the instant case, there existed a reasonable doubt of majority support.⁶⁶ Thus, he believed that the majority was ruling on issues different from those the Board and lower courts had decided.⁶⁷ To allow this different decision, Justice Scalia opined, would be to deprive the respondent of potential legal defenses that it had no opportunity to present to the lower courts.⁶⁸

Justice Blackmun wrote a second dissenting opinion in *Curtin Matheson*.⁶⁹ In his dissent, Justice Blackmun accepted Justice Scalia's

633, 641, 124 L.R.R.M. 1318, 1323 (1986) (determining that unions cannot represent the best interests of strike replacements because they likely will be negotiating for strikers to take their jobs); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360, 1365, 94 L.R.R.M. 1334, 1340 (1976) (asserting that the interests of strikers and strike replacements during negotiations are diametrically opposed); *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350, 89 L.R.R.M. 1889, 1890 (stating that strike replacements can reasonably predict that if the union is successful they will lose their jobs).

⁵⁹ *Curtin Matheson*, 110 S. Ct. at 1562, 133 L.R.R.M. at 3063 (Scalia, J., dissenting).

⁶⁰ *Id.* at 1557, 133 L.R.R.M. at 3059 (Scalia, J., dissenting).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1565, 133 L.R.R.M. at 3065 (Scalia, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Curtin Matheson*, 110 S. Ct. at 1565, 133 L.R.R.M. at 3065 (Scalia, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1565-66, 133 L.R.R.M. at 3065 (Scalia, J., dissenting).

⁶⁸ *Id.* at 1565, 133 L.R.R.M. at 3065 (Scalia, J., dissenting).

⁶⁹ *Id.* at 1555, 133 L.R.R.M. at 3057 (Blackmun, J., dissenting).

arguments, but stated that his own approach was to emphasize the decision-making processes.⁷⁰ According to Justice Blackmun, courts should review agency decisions carefully.⁷¹ He asserted that this review should not be an attempt to substitute the Court's judgment for that of an expert agency, but that courts should make sure the agency has adequately explained its decision.⁷² Justice Blackmun maintained that courts should insure that various agency policies are consistent with each other.⁷³ He also opined that that courts must exercise control over non-elected agency officials.⁷⁴ Ultimately, Justice Blackmun concluded that the Board's decision in *Curtin Matheson* did not survive this kind of review, and thus he dissented.⁷⁵

The decision in *Curtin Matheson* is weak and likely to be overturned. First, the Court split five to four. Justice Rehnquist's concurring opinion reveals that he was not as impressed with the merits of the no presumption argument as with the idea of deference to the Board and its decisions. Furthermore, Justices Brennan and Marshall were among the majority in the instant case, and it is questionable whether Justices Souter and Thomas will vote to uphold this decision in the future. Second, lower courts and previous Board decisions have been divided on whether to adopt either a pro-union or an anti-union presumption. The *Station KKH* approach was, in many ways, a compromise designed to avoid a problematic issue.⁷⁶ Finally, the inference that strike replacers do not support the union is strong. Not only did the dissenting Justices support this theory, but noted labor scholar Robert Gorman believes it to be true.⁷⁷ In fact, this anti-support presumption has become so closely associated with Gorman's labor writings and theories that courts often refer to it as the "Gorman" presumption.⁷⁸

There are also strong factual reasons why courts might want to adopt the anti-union presumption. For example, if a strike is

⁷⁰ See *id.* at 1555-56, 133 L.R.R.M. at 3057-58 (Blackmun, J., dissenting).

⁷¹ *Id.* at 1556, 133 L.R.R.M. at 3058 (Blackmun, J., dissenting).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1557, 133 L.R.R.M. at 3058 (Blackmun, J., dissenting). Justice Blackmun, however, did not offer an explicit analysis as to why he reached this conclusion. *Id.*

⁷⁶ By adopting this approach the Board avoided the factually illogical pro-union presumption, but also avoided the policy pitfalls of the anti-union presumption. *Station KKH*, 284 N.L.R.B. 1339, 1340, 125 L.R.R.M. 1281, 1282, enforced 891 F.2d 230, 133 L.R.R.M. 2175 (9th Cir. 1989).

⁷⁷ See *Curtin Matheson*, 110 S. Ct. at 1548 n.6, 133 L.R.R.M. at 3052-53 n.6 (citing ROBERT GORMAN, *LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING* 112 (1976)).

⁷⁸ See, e.g., *id.*

successful and strikers go back to work, employers are unlikely to keep both the strikers and their replacements on the payroll. Therefore, for the replacement, the union's success will likely lead to the elimination of his or her job. Even if the replacement workers want long-term union support, as Justice Scalia suggests in his dissenting opinion, they can accomplish this goal without having to support the current union. For after the collapse of the current negotiations, when the replacements' jobs are secure, they can vote in and recertify the union.⁷⁹

Thus, in addressing this problem, courts are faced with the situation of having a problematic and illogical factual inference pitted against a desirable social policy. The *Curtin Matheson* majority correctly noted that if employers are allowed to establish reasonable doubt based on the existence of replacement workers, then they can effectively hire their way out of a strike.⁸⁰ Employers could drag negotiations out beyond the one-year irrebuttable presumption period, hire replacements, withdraw recognition of the union, and thus circumvent the union and the strike. To allow such a result would greatly jeopardize the ability of employees to organize and negotiate successfully with their employers, and more importantly, would violate the overarching policy of the Act to promote and encourage negotiated settlements of labor disputes.

Several possible solutions to this problem exist. The courts could determine that hiring replacements after the lapse of the one-year irrebuttable presumption period violates the overall goals of the Act. This is in substance the position adopted by labor commentator Joan Flynn.⁸¹ Flynn argues that the courts should adopt an economic strike bar.⁸² In other words, the courts should prohibit either the withdrawal of recognition of union support by employers or elections by employees while the strike is ongoing.⁸³ Such a position promotes industrial peace and bargaining stability by forcing employers to negotiate with unions until either a settlement is reached or the strike ends.⁸⁴ Although no language of the Act specifically authorizes this position, Flynn contends that it is per-

⁷⁹ Justice Scalia also relied on these arguments in his dissenting opinion. *Id.* at 1562, 133 L.R.R.M. at 3063 (Scalia, J., dissenting).

⁸⁰ *Id.* at 1553-54, 133 L.R.R.M. at 3056.

⁸¹ See Joan Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements*, 61 TEMP. L. REV. 691, 711 (1988).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

missible under section 9(c)(3) of the Act.⁸⁵ Flynn notes that despite the lack of specific language authorizing the Board to do so, the Board has sanctioned bars on elections and withdrawals of recognition in other contexts,⁸⁶ including the 1954 Supreme Court case of *Brooks v. NLRB*.⁸⁷

The implementation of Flynn's economic strike bar is highly desirable. This proposal would protect the ability of workers to strike by preventing employers from hiring their way out of strikes. Thus, consistent with the overarching policy of the Act, the adoption of an economic strike bar would promote industrial peace. Moreover, this position would allow the courts to achieve their policy goals, but also would avoid the smoke and mirrors of illogical factual presumptions.

In addition, Flynn offers two "lesser alternative" solutions. In alternative one, Flynn argues that the courts could prohibit employer withdrawal of recognition but allow employee decertification elections.⁸⁸ If adopted, this system would, through employee decertification elections, provide a more accurate measure of continued union majority support. In her second alternative, Flynn maintains that the courts again should prohibit employer withdrawal of recognition of the union during an economic strike, and subsequently, require employers to file for an election if they wish to challenge the union.⁸⁹ The second alternative, like the first, seeks to measure union support through employee elections. Both of these methods, however, are less desirable than the economic strike bar solution as they require administratively burdensome and time-consuming procedures.

In conclusion, in *Curtin Matheson*, five United States Supreme Court Justices ruled that an employer had failed to establish that it had a good faith doubt of union support, and thus that it had engaged in an unfair labor practice under sections 8(a)(1) and (5)

⁸⁵ *Id.* at 712, 715. Specifically, Flynn argues that the language in the legislative history of section 9(c)(3) of the Act supports her position. *Id.* at 715. She maintains that the language in the history of section 9(c)(3), which rejected bans on incumbent unions during strikes, also prohibits the Board from either disallowing elections or withdrawing recognition while a strike is ongoing. *Id.*

⁸⁶ See Flynn, *supra* note 81, at 717. In particular, Flynn noted that the Board has prohibited challenges to an incumbent union's status either during a "reasonable period" after its informal recognition by the employer or during the term of a written, signed collective bargaining agreement of three years' length or less. *Id.*

⁸⁷ *Id.* at 717 (citing *Brooks v. NLRB*, 348 U.S. 96 (1954)).

⁸⁸ *Id.* at 719.

⁸⁹ *Id.* at 720.

of the Act. In so ruling, these Justices explicitly upheld and validated the Board's holding in *Station KKHI* that the determination of whether replacement workers supported the union should be made on a case-by-case basis. In dissent, four Justices argued that employers should be able to establish they had a good faith doubt by arguing that replacement workers do not support the union. These Justices believed that employers should be able to presume anti-union sentiment among strike replacements. Although the anti-union inference is logical, it threatens to jeopardize the overriding policy of the Act. Such a policy would clearly inhibit the ability of employees to organize and negotiate with their employers. Hopefully, the courts instead will adopt one of Flynn's solutions, and thus secure the integrity of the Act.

III. DUTY OF FAIR REPRESENTATION

A. **The Right of Fair Representation: The Meaning of Arbitrary Conduct Under the Vaca Standard: Air Line Pilots Ass'n, Int'l v. O'Neill*¹

The Supreme Court of the United States has established that under the Railway Labor Act ("RLA")² and the National Labor Relations Act ("NLRA"),³ labor unions have an implied statutory obligation to provide fair representation to all union members.⁴ In the 1967 case of *Vaca v. Sipes*, the United States Supreme Court set forth the standard for fair representation when it prohibited labor unions from bad faith, discriminatory or arbitrary conduct toward members of the collective bargaining unit.⁵ In applying the *Vaca* standard, subsequent courts have had difficulty determining what

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¹ 111 S. Ct. 1127, 136 L.R.R.M. 2721 (1991).

² Railway Labor Act, 45 U.S.C. §§ 151-188 (1990). The duty of fair representation was first established in *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 204, 15 L.R.R.M. 708, 713 (1944). See *infra* note 8 and accompanying text for a discussion of *Steele*.

³ National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988). The Supreme Court applied the doctrine of fair representation to a claim under the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 332, 31 L.R.R.M. 2548, 2549 (1953). See *infra* note 8 and accompanying text for a discussion of *Huffman*.

⁴ *Vaca v. Sipes*, 386 U.S. 171, 177, 64 L.R.R.M. 2369, 2371 (1967) (fair representation duty is implied from the labor union's statutory role as exclusive bargaining agent).

⁵ *Id.* at 190, 64 L.R.R.M. at 2376.

constitutes "arbitrary" conduct.⁶ In addition, it has remained unclear whether the duty of fair representation that the *Vaca* standard represents applies to all union activity, or only to a union's disparate treatment of an individual or group of individuals.⁷

Initially, the Supreme Court interpreted the RLA to require that a union fairly represent employees in order to protect the union minority's interests.⁸ Subsequently, the courts struggled to define what behavior breached the duty of fair representation.⁹ In 1967, the Supreme Court, in *Vaca v. Sipes*, defined the duty of fair representation using a three part standard.¹⁰ The *Vaca* Court held that a union did not breach its duty of fair representation when it failed to pursue an individual employee's unfair discharge claim after a private medical report failed to support the employee's allegation that he was fit for work.¹¹ The Court reasoned that the union had

⁶ See, e.g., *Galindo v. Stoodly Co.*, 793 F.2d 1502, 1514, 123 L.R.R.M. 2705, 2713 (9th Cir. 1986) (stating that various cases have elaborated different possible standards); *Dutrisac v. International Ass'n of Machinists*, 749 F.2d 1270, 1272, 113 L.R.R.M. 3532, 3534 (9th Cir. 1983) (stating that the standard for "arbitrary" is still evolving).

⁷ See, e.g., *Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 917, 132 L.R.R.M. 3052, 3057 (7th Cir. 1989) (reasoning that the discretion given to unions under the duty of fair representation varies with different functions); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519, 129 L.R.R.M. 2539, 2545 (11th Cir. 1988) (reasoning that the nature of the duty is dependent on context). The duty of fair representation has virtually always been applied only to allegations that individuals or minority groups of individuals have made against a union regarding a union's conduct in an administrative capacity, such as grievance arbitration, rather than claims the union membership as a whole has made based on union conduct in a contract negotiation capacity. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127, 1135, 136 L.R.R.M. 2721, 2725 (1991).

⁸ *Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 204, 15 L.R.R.M. 708, 713 (1944). In *Steele*, the Supreme Court considered an employee's allegation that a union had bargained for more favorable contract terms for white employees than for black employees. *Id.* at 194-95, 15 L.R.R.M. at 709-10. In holding that the union had breached the duty of fair representation, the Court concluded that pursuant to the union's statutory authority as exclusive bargaining representative under the RLA, the duty of fair representation required union actions to be in good faith and without discrimination on behalf of all employees, not only union members. *Id.* at 204, 15 L.R.R.M. at 713.

In the 1953 case of *Ford Motor Co. v. Huffman*, the Supreme Court redefined the duty of fair representation to allow a wide range of conduct. See 345 U.S. 330, 338, 31 L.R.R.M. 2548, 2551 (1953). *Huffman* involved employees' allegations that their union had agreed to special seniority concessions for military personnel, which had lowered the seniority of many non-military employees. *Id.* at 332, 31 L.R.R.M. at 2549-50. In holding that the union had not breached its duty, the Court reasoned that although the duty of fair representation required unions to act with good faith, the union was allowed a wide range of reasonableness. *Id.* at 338, 31 L.R.R.M. at 2551.

⁹ *Steele*, 323 U.S. at 204, 15 L.R.R.M. at 713 (requiring union conduct to be in good faith without discrimination); *Huffman*, 345 U.S. at 338, 31 L.R.R.M. at 2551 (requiring the union to act in good faith within a wide range of reasonableness).

¹⁰ 386 U.S. 171, 190, 64 L.R.R.M. 2369, 2376 (1967).

¹¹ *Id.* at 174-76, 64 L.R.R.M. at 2370-71.

a duty to act without discrimination, with good faith and to avoid arbitrary conduct.¹² Nevertheless, because the private report justified the union's conduct, the Court concluded that the union had not acted in bad faith and had legitimate non-discriminatory reasons for abandoning the claim.¹³ Thus, after *Vaca*, a breach of the duty of fair representation occurs only when a "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."¹⁴

Although the *Vaca* test established broad prohibitions on certain union conduct, the *Vaca* Court failed to clarify what constituted arbitrary behavior.¹⁵ Consequently, following *Vaca* the lower courts have created their own definitions of "arbitrary." One circuit has determined that arbitrary conduct exists where a union has acted negligently.¹⁶ Other circuits have stated that union actions that inadequately represent an individual union member breach the duty.¹⁷ Several other circuits have determined that where a union fails to act rationally, it has acted arbitrarily.¹⁸ Another circuit requires a showing of a union's intentional misconduct.¹⁹ Still another

¹² *Id.* at 190, 64 L.R.R.M. at 2376.

¹³ *See id.* at 194-95, 64 L.R.R.M. at 2378.

¹⁴ *Id.* at 190, 64 L.R.R.M. at 2376.

¹⁵ *See* cases cited *supra* note 6. For a general discussion of the courts' treatment of the duty of fair representation, see generally Steinhauer, *IBEW and Foust: A Hint of Negligence in the Duty of Fair Representation*, 32 HASTINGS L.J. 1041 (1981); Lea S. VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983).

¹⁶ *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 310, 90 L.R.R.M. 2497, 2500 (6th Cir. 1975) (union's negligent handling of claim constituted breach of duty). The negligence approach to the duty of fair representation appears to have been eliminated by a recent United States Supreme Court case. *See United Steelworkers, AFL-CIO-CLC v. Rawson*, 110 S. Ct. 1904, 1913, 134 L.R.R.M. 2153, 2158 (1990) (stating that union negligence is not sufficient for a breach of the duty of fair representation).

¹⁷ *See, e.g., NLRB v. Local 282, Int'l Brotherhood of Teamsters*, 740 F.2d 141, 147, 116 L.R.R.M. 3292, 3297 (2d Cir. 1984) (union's omissions may be so egregious as to be arbitrary); *NLRB v. American Postal Workers Union*, 618 F.2d 1249, 1255, 103 L.R.R.M. 3045, 3048 (8th Cir. 1980) (a union's lack of effort or inadequate notice may constitute a breach).

¹⁸ *See, e.g., O'Neill v. Air Line Pilots Ass'n, Int'l*, 886 F.2d 1438, 1444, 132 L.R.R.M. 2876, 2881 (5th Cir. 1989) (union decision must be a rational result of the consideration of various factors), *rev'd*, 111 S. Ct. 1127 (1991); *Galindo v. Stooddy Co.*, 793 F.2d 1502, 1514, 123 L.R.R.M. 2705, 2713 (9th Cir. 1986) (stating that a breach of duty may occur where there is no rational and proper basis for the union's conduct); *NLRB v. General Truck Drivers*, 545 F.2d 1173, 1175, 93 L.R.R.M. 2747, 2749 (9th Cir. 1976) (stating that unions must adhere to rational decision making processes). The Ninth Circuit has differentiated between situations where union procedure was arbitrary and situations where union conclusions were arbitrary. *See, e.g., Burkevich v. Air Line Pilots Ass'n, Int'l*, 894 F.2d 346, 349, 133 L.R.R.M. 2433, 2436 (9th Cir. 1990); *Salinas v. Milne Truck Lines, Inc.*, 846 F.2d 568, 569, 128 L.R.R.M. 2365, 2366 (9th Cir. 1988).

¹⁹ *See, e.g., Grant v. Burlington Indus.*, 832 F.2d 76, 79, 126 L.R.R.M. 2486, 2488 (7th

court has held that perfunctory handling of a claim is arbitrary conduct.²⁰ In sum, few courts agree on what constitutes arbitrary conduct.

In addition to the difficulty of defining "arbitrary" within the *Vaca* standard, it was not completely clear if all union activity should be subject to the duty of fair representation that the standard sets forth.²¹ Several commentators and courts have advocated that union actions involving individuals or small groups should be distinguished from actions involving the union membership as a whole.²² These opinions suggest that although the duty of fair representation should extend to all union activity, a higher standard should be applied to individual grievance claims than to union conduct when negotiating on behalf of the whole membership.²³ Thus, although the *Vaca* Court established a standard for the duty of fair representation, it failed to clarify whether it is the proper standard for evaluating all union activity.²⁴

During the *Survey* year, in *Air Line Pilots Ass'n, Int'l v. O'Neill*, the Supreme Court attempted both to define "arbitrary" behavior under the *Vaca* standard and to clarify the standard's applicability to all union activity.²⁵ Confronted with a pilots' claim alleging that their union had settled a contract dispute on potentially worse terms than if the pilots themselves had unilaterally ended the strike, the Court held that the duty of fair representation applies to all union

Cir. 1987) (plaintiff must show union's intentional misconduct); *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 523, 108 L.R.R.M. 2311, 2314 (7th Cir. 1981) (breach of duty is limited to instances of intentional misconduct).

²⁰ See, e.g., *Findley v. Jones Motor Freight*, 639 F.2d 953, 960, 106 L.R.R.M. 2420, 2424 (3d Cir. 1981) (perfunctory conduct may constitute a breach of the duty).

²¹ See, e.g., *Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 917, 132 L.R.R.M. 3052, 3057 (7th Cir. 1989) (stating that a union needs more latitude under the duty when negotiating than when arbitrating grievances); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519, 129 L.R.R.M. 2539, 2545-46 (11th Cir. 1988) (concluding that the standard for negotiations may be different than for processing grievances).

²² See, e.g., *NLRB v. Local 299, Int'l Board of Teamsters*, 782 F.2d 46, 51-52, 121 L.R.R.M. 2378, 2483 (6th Cir. 1986) (stating that the duty of fair representation is implicated only when an individual or group is treated differently than the collective); see also Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 197-98 (1980) (arguing that the standard for fair representation applied to union conduct in individual grievances should be more restrictive than the standard applied to union conduct in its negotiating capacity).

²³ See *supra* note 22 and accompanying text.

²⁴ See *Air Line Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127, 1134, 136 L.R.R.M. 2721, 2725 (1991) (Supreme Court notes that an ambiguity existed whether or not the duty of fair representation applies to both contract administration and contract negotiation).

²⁵ *Id.* at 1130, 136 L.R.R.M. at 2721-22.

activity, including contract negotiation.²⁶ In addition, the Court concluded that an action is "arbitrary" only if it "is so far outside a wide range of reasonableness, as to be irrational."²⁷ Applying the *Vaca* standard, the Court reasoned that the union had reasonably believed that it was making a fair settlement for the pilots and had not acted arbitrarily under the *Vaca* standard.²⁸ Consequently, *Air Line Pilots* settled that all union activity is subject to the duty of fair representation that the *Vaca* standard sets forth, and will be evaluated within a wide range of reasonableness.²⁹

Air Line Pilots involved a contract dispute between Continental Air Lines ("CAL") and its pilots' union, Air Line Pilots Association, International ("ALPA").³⁰ In September, 1983, after CAL was unable to negotiate major financial concessions from ALPA, the airline filed a petition for reorganization under Chapter 11 and unilaterally cut the pilots' benefits and wages by more than half.³¹ Because the Chapter 11 filing repudiated CAL's existing collective bargaining agreement with ALPA, the pilots began a legal strike and ALPA filed suit to enforce the agreement.³² The bankruptcy court approved CAL's repudiation of the prior agreement and ordered ALPA and CAL to negotiate a new agreement.³³

By employing numerous cross-over strikers and hiring replacement pilots, CAL was able to continue business.³⁴ CAL and ALPA met numerous times but were unable to agree on new terms, and in August, 1985, CAL announced that it would no longer recognize ALPA as the pilots' exclusive bargaining agent.³⁵ ALPA responded with a lawsuit charging that CAL was unlawfully refusing to negotiate a new agreement.³⁶ Subsequently, CAL announced a large number of available positions in its Supplementary Base Vacancy

²⁶ *Id.*

²⁷ *Id.* at 1130, 136 L.R.R.M. at 2722.

²⁸ *See id.* at 1137, 136 L.R.R.M. at 2727.

²⁹ *Id.* at 1130, 136 L.R.R.M. at 2722.

³⁰ *Id.*

³¹ *O'Neill v. Air Line Pilots Ass'n, Int'l*, 886 F.2d 1438, 1440, 132 L.R.R.M. 2876, 2877-78 (5th Cir. 1989).

³² *Id.* at 1440, 132 L.R.R.M. at 2877.

³³ *Id.*

³⁴ *Air Line Pilots*, 111 S. Ct. at 1130, 136 L.R.R.M. at 2722. Initially, all but 200 of the 2,000 CAL pilots supported the hostile strike, but as it continued, approximately 400 abandoned the strike and agreed to return to work on the airline's terms (crossed over). *Id.* These pilots were accepted for reemployment in order of reapplication. *Id.*

³⁵ *Id.*

³⁶ *Id.*

bid ("85-5 bid").³⁷ Because the bid was unusually large,³⁸ and all bids had to be submitted within nine days, ALPA authorized the strikers to bid while continuing to strike.³⁹ CAL challenged the striking pilots' willingness to return to work and announced that all of the positions had been awarded to working pilots.⁴⁰

After intensified negotiations, ALPA's negotiations committee and CAL reached an agreement that the bankruptcy court entered as an order.⁴¹ The agreement provided for an end to the strike, reallocation of the 85-5 bid and disposition of all pending litigation.⁴² Striking pilots were offered three options.⁴³ First, pilots who waived all claims against CAL could become eligible with modified seniority for some of the positions previously awarded to the working pilots.⁴⁴ Second, the pilots could elect not to work for CAL and receive severance pay.⁴⁵ Third, the pilots could retain their individual claims against CAL and become eligible to return to work only after all the pilots choosing the first option were reinstated.⁴⁶

Several months after this settlement, the former striking pilots brought suit in the United States District Court for the Southern District of Texas against ALPA, claiming that the union had breached its duty of fair representation in negotiating and accepting the settlement.⁴⁷ The district court granted ALPA's motion for sum-

³⁷ *Id.* at 1130-31, 136 L.R.R.M. at 2722. For years CAL had used a procedure to fill vacancies where pilots could submit bids specifying preferred position, base of operation, and aircraft type for available positions. *Id.* at 1131, 136 L.R.R.M. at 2722. The bids were normally posted well in advance to allow the required training time for any equipment changes. *Id.*

³⁸ *Id.* at 1131, 136 L.R.R.M. at 2722. The bid offered 441 future captain and first officer positions and an undetermined number of second officer vacancies. *Id.* Seniority was established as of the date the pilot first flew with CAL. *Id.*

³⁹ *Id.* This authorization was to protect the strikers from being permanently locked out of the jobs. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* CAL assigned the initial base and aircraft type for a returning striker, but for working pilots, base and aircraft type were determined by their bids. *Id.* Seniority determined future changes in bases and equipment, and striking pilots who were in active service when the strike began received seniority credit for the period of the strike. *Id.*

⁴⁵ *Id.* Severance pay was \$4,000 per year of service or \$2,000 per year if the pilot had been furloughed before the strike began. *Id.*

⁴⁶ *Id.* at 1131, 136 L.R.R.M. at 2722-23.

⁴⁷ *Id.* at 1131-32, 136 L.R.R.M. at 2723. The complaint included four total counts: breach of the duty of fair representation, violation of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411 breach of fiduciary duty in violation of LMRDA, and breach of contract. *Id.* at 1131 n.2, 136 L.R.R.M. at 2723 n.2.

mary judgement, stating that although the settlement looked atrocious in retrospect, it was not a breach of duty to settle the strike badly.⁴⁸

The United States Court of Appeals for the Fifth Circuit reversed, ruling that the *Vaca* standard applies to contract negotiation.⁴⁹ In addition, the court concluded that for a union action not to be "arbitrary" it must have been based upon permissible union factors, a rational result of consideration of these factors, and impartial consideration of all the employees' interests.⁵⁰ Despite ALPA's claim that there were no vacancies, the appellate court reasoned that at the time of the settlement, the 85-5 bid positions were still available because the working pilots had not yet been trained for the positions.⁵¹ Thus, the appellate court reasoned that the settlement allowed the striking pilots access to less than half of the available positions and was therefore not a positive gain for the union.⁵² Moreover, the appellate court accepted the pilots' assertion that CAL would have retained all prior seniority for the striking pilots, which was more favorable than the modified seniority in the ALPA settlement.⁵³ Therefore, the appellate court concluded that the settlement was not a rational consideration of all factors because it left the pilots worse off than if they had completely surrendered to the airline.⁵⁴ Because the court held that a jury could find that the union had acted arbitrarily, it vacated and remanded the district court's ruling.⁵⁵

A unanimous Supreme Court reversed, holding that although the appellate court correctly applied the *Vaca* standard to the pilots' complaint, its interpretation of "arbitrary" within the standard was too narrow.⁵⁶ The Court reasoned that the *Vaca* standard was applicable because previous opinions discussing fair representation suggested that all union activities, including contract negotiations, fell under the standard.⁵⁷ In addition, because it reasoned that

⁴⁸ *Id.* at 1132, 136 L.R.R.M. at 2723. The district court gave only a verbal opinion and did not discuss its reasoning. *O'Neill v. Air Line Pilots Ass'n, Int'l*, 886 F.2d 1438, 1442-43, 132 L.R.R.M. 2876, 2880 (5th Cir. 1989).

⁴⁹ *Air Line Pilots*, 111 S. Ct. at 1132, 136 L.R.R.M. at 2723.

⁵⁰ *Id.* (quoting *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957, 92 L.R.R.M. 2990, 2994-95 (5th Cir. 1976)).

⁵¹ *Id.* at 1132, 136 L.R.R.M. at 2723-24.

⁵² *See id.*

⁵³ *See id.* at 1132 n.4, 136 L.R.R.M. at 2722 n.4.

⁵⁴ *See id.* at 1132, 136 L.R.R.M. at 2723.

⁵⁵ *Id.* at 1132, 136 L.R.R.M. at 2724.

⁵⁶ *See id.* at 1135, 136 L.R.R.M. at 2726.

⁵⁷ *Id.* at 1135, 136 L.R.R.M. at 2725.

union functions are not easily categorized as either contract negotiation or contract administration or enforcement, but often involve aspects of each, the Court concluded that contract negotiations are included within the standard.⁵⁸

On the issue of what constitutes "arbitrary" conduct, the Supreme Court stated that the standard the appellate court had used was too restrictive of a union's activity.⁵⁹ Reasoning that a union's role is similar to that of other fiduciaries, the Court stated that a union has a duty to its members beyond merely acting in good faith.⁶⁰ Nevertheless, the Court also reasoned that because Congress had intended the unions to have wide latitude in their bargaining ability, judicial evaluation of union actions must be highly deferential.⁶¹ Therefore, the *Air Line Pilots* Court stated that a union action is arbitrary under the *Vaca* rule only if "it can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary."⁶²

The Supreme Court interpreted the facts differently than had the appellate court, reasoning that given the hostility between ALPA and CAL, it was possible that CAL would not have retained the pilots' prior seniority or given them access to the 85-5 bid positions.⁶³ The Court stated that the appellate court's conclusion that the positions were technically vacant was not a settled issue when ALPA was negotiating with CAL.⁶⁴ Also, the Court reasoned that the option of not returning to work and receiving severance pay would not have existed had ALPA not settled.⁶⁵ Therefore, the Court concluded that ALPA's decision to settle with CAL had been reasonable and not arbitrary.⁶⁶ In sum, the Supreme Court agreed with the Fifth Circuit that the *Vaca* standard should be applied to all union activity including contract negotiation.⁶⁷ Nevertheless, based on its interpretation of the facts, the Supreme Court reversed the lower court and held that the union had not acted arbitrarily, but

⁵⁸ *Id.*

⁵⁹ *Id.* at 1135, 136 L.R.R.M. at 2726.

⁶⁰ *Id.* at 1134, 136 L.R.R.M. at 2724.

⁶¹ *See id.* at 1135, 136 L.R.R.M. at 2725.

⁶² *Id.* at 1136, 136 L.R.R.M. at 2726.

⁶³ *Id.* at 1136-37, 136 L.R.R.M. at 2726-27.

⁶⁴ *Air Line Pilots*, 111 S. Ct. at 1136-37, 136 L.R.R.M. at 2726-27.

⁶⁵ *Id.* at 1137, 136 L.R.R.M. at 2727.

⁶⁶ *Id.*

⁶⁷ *See supra* notes 57-58 and accompanying text.

instead was well within the requirements for fair representation under the *Vaca* standard.⁶⁸

Air Line Pilots potentially creates a less restrictive standard for the union's duty of fair representation.⁶⁹ Although *Air Line Pilots* established that all union activity is subject to the duty of fair representation,⁷⁰ the Supreme Court stated that actions must reach the level of irrationality to qualify as arbitrary under the *Vaca* standard.⁷¹ Plaintiffs alleging breach of the duty of fair representation may find it difficult if not impossible to show irrationality in union conduct. Consequently, the high threshold of irrationality put forth in *Air Line Pilots* may diminish the fair representation doctrine as a tool for policing union conduct.

In addition, by including all union activities under the *Vaca* standard for determining the duty of fair representation, the Supreme Court extends the *Air Line Pilots* "irrational" definition of "arbitrary" to individual arbitration cases as well as contract negotiation cases.⁷² This expansion essentially ignores earlier arguments that unions should be more accountable to individual members with grievances than to group allegations in negotiation representation.⁷³ Apparently the Supreme Court failed to consider the impact that the new definition of arbitrary might have on individual complaints when it lessened union accountability.

Finally, the Supreme Court's definition of arbitrary under *Vaca* may cause more confusion than clarity among the lower courts. *Air Line Pilots* failed to address directly the different definitions of arbitrary used by the lower courts; thus, ambiguity remains whether the "reasonableness standard" replaces the standards the circuit courts had previously adopted. Although some circuits have applied the irrationality standard set forth in *Air Line Pilots*, at least one circuit court refused to hold that *Air Line Pilots* preempts. The Seventh Circuit, although acknowledging *Air Line Pilots*, continues

⁶⁸ See *supra* notes 59-62 and accompanying text.

⁶⁹ See *supra* notes 56-62 and accompanying text for a discussion of *Air Line Pilot's* interpretation of the duty of fair representation.

⁷⁰ *Air Line Pilots*, 111 S. Ct. at 1129, 1126 L.R.R.M. at 2722.

⁷¹ *Id.*

⁷² See e.g., *Brown v. International Brotherhood of Electrical Workers, Local Union No. 58*, 936 F.2d 251, 255, 137 L.R.R.M. 2747, 2750 (6th Cir. 1991) (applying the "irrational" standard of *Air Line Pilots* to a contract ratification issue); *Papavaritis v. Communication Workers of America, AFL-CIO*, 772 F. Supp. 604, 606 (S.D. Fla. 1991) (applying the "irrational" standard of *Air Line Pilots* to individual grievance action).

⁷³ See *supra* note 22-23 and accompanying text.

to equate arbitrary, discriminatory or bad faith conduct with intentional misconduct.⁷⁴ Thus the lack of uniformity among the circuits in defining "arbitrary" will continue. In sum, the Supreme Court in *Air Line Pilots* makes it more difficult to show "arbitrary" conduct under the *Vaca* standard, while at the same time failing to resolve the ambiguity of the definition. In addition, by extending the application of the *Vaca* standard for fair representation to include all union activity, the Court has lessened the power of the doctrine to regulate union conduct with respect to individual employee claims.

IV. ARBITRATION

A. * *Interpreting the Scope of the Taft-Hartley Act's Federal Remedy Provision: Groves v. Ring Screw Works, Ferndale Fastener Division*¹

Section 301(a) of the Labor Management Relations (Taft-Hartley) Act ("LMRA") provides a remedy in federal court for breach of a collective bargaining agreement.² The United States Supreme Court has held that section 301 authorizes federal actions by and against individual employees as well as actions between employers and unions.³ Access to the courts, however, can be denied where the parties to a collective bargaining agreement have agreed on an alternative method for settling disputes.⁴ The statutory authority for a judicial remedy becomes somewhat less clear where the col-

⁷⁴ *Richardson v. Kraft-Holleb Food Serv. Inc.*, 774 F. Supp. 1108, 1111 (N.D. Ill. 1991) (stating that the duty is not breached without substantial evidence of fraud, deceitful action or dishonest conduct); *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474, 492, 137 L.R.R.M. 2586, 2599 (N.D. Ill. 1991) (stating that a union only breaches duty of fair representation if it intentionally causes harm to an employee).

* By Timothy J. Fallon, Editor, BOSTON COLLEGE LAW REVIEW.

¹ 111 S. Ct. 498, 135 L.R.R.M. 3121 (1990).

² Labor Management Relations (Taft-Hartley) Act (hereinafter "LMRA"), § 301(a), 29 U.S.C. § 185(a) (1988). Section 301(a) provides:

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

Id.

³ *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562, 91 L.R.R.M. 2481, 2484 (1976).

⁴ LMRA, § 203(d), 29 U.S.C. 173(d) (1988). Section 203(d) of the Act states: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *Id.*

lective bargaining agreement does not provide a final, compulsory and binding alternative but does include language authorizing a strike or a lockout.⁵ Federal courts of appeal have been divided on the issue of whether such an authorization of economic pressure represents the exclusive remedy for labor disputes and thus bars any action in federal court.⁶

In the 1973 case *Associated General Contractors v. Illinois Conference of Teamsters*, the United States Court of Appeals for the Seventh Circuit held that a contract provision reserving the parties' right to use economic warfare could not be interpreted as an agreement to strip the court of jurisdiction to resolve labor disputes absent explicit exclusive remedy language.⁷ The court recognized that the right to strike is protected by the Norris-LaGuardia Act.⁸ In addition, the court acknowledged that the United States Supreme Court had held that the dispute resolution mechanisms chosen by the parties to a collective bargaining agreement are required to be "given full play."⁹ The court reasoned, however, that even though the parties had not agreed to compulsory arbitration and had reserved the right to use economic warfare, the parties were not thereby limited to the use of force as their only means of resolving disputes.¹⁰ The court noted that any attempt to bar judicial action in favor of economic action would have to be set forth explicitly in the collective bargaining agreement.¹¹ The court, therefore, concluded that the mere authorization of economic warfare, without an explicit provision mandating a final non-judicial remedy, could not be read to prevent the court from exercising jurisdiction under section 301.¹²

⁵ See generally *Groves*, 111 S. Ct. at 501-04, 135 L.R.R.M. at 3122-24.

⁶ Compare *Dickeson v. Daw Forest Prods.*, 827 F.2d 627, 629-30, 126 L.R.R.M. 2249, 2250 (9th Cir. 1987) (holding that the lack of language indicating that the agreement's grievance procedures would be the exclusive remedy means that a judicial remedy should be available); *S.J. Groves & Sons v. International Bhd. of Teamsters, Local 627*, 581 F.2d 1241, 1243-44, 99 L.R.R.M. 2623, 2624-25 (7th Cir. 1978) (same) and *Associated Gen. Contractors v. Illinois Conference of Teamsters*, 486 F.2d 972, 976, 84 L.R.R.M. 2555, 2557-58 (7th Cir. 1973) (same) with *Fortune v. National Twist Drill & Tool Div., Lear Siegler*, 684 F.2d 374, 375-76, 111 L.R.R.M. 2189, 2190-91 (holding that the existence of grievance procedures in the agreement, whether exclusive or not, precludes a judicial remedy).

⁷ 486 F.2d 972, 976, 84 L.R.R.M. 2555, 2557-58 (7th Cir. 1973).

⁸ *Id.*

⁹ *Id.* at 976, 84 L.R.R.M. at 2557 (citing *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960)).

¹⁰ *Id.* at 976, 84 L.R.R.M. at 2557-58.

¹¹ *Id.* at 976, 84 L.R.R.M. at 2558.

¹² *Id.* at 976, 84 L.R.R.M. at 2557; see also *Dickeson v. Daw Forest Prods.*, 827 F.2d 627, 629, 126 L.R.R.M. 2249, 2250 (9th Cir. 1987) (holding that the right to strike, while being a

Conversely, in the 1982 case *Fortune v. National Twist Drill & Tool Division*, the United States Court of Appeals for the Sixth Circuit held that where a collective bargaining agreement fails to provide for final arbitration but allows the parties to resort to economic weapons in the event of a failure of the grievance procedure, the only available recourse in the event of such a failure is economic.¹³ The court reasoned that because the employees who were seeking review of their discharges had not claimed that the union had in any way breached its duty of fair representation, their only recourse was that provided for in the agreement.¹⁴ The court also noted the strong judicial policy favoring deference for the dispute resolution methods agreed upon by the parties.¹⁵ Unlike the *Associated General Contractors* court, the *Fortune* court concluded that even in the absence of explicit language, a reservation of the right to resort to economic recourse represents the exclusive remedy available to the parties upon failure of the grievance procedure.¹⁶

Similarly, the United States Court of Appeals for the Fifth Circuit, in the 1966 case *Haynes v. United States Pipe & Foundry Co.*, concluded that an employee's wrongful discharge suit was barred from federal court by the provisions of the collective bargaining agreement.¹⁷ Unlike *Fortune*, however, *Haynes* involved an agreement which specifically provided that the result of the grievance procedure was to be final and binding.¹⁸ The agreement made clear that the only available option after exhaustion of the grievance procedure was for the union to strike.¹⁹ On these facts, the Fifth Circuit concluded that the decision arrived at under the grievance procedure was final and that the employee was barred from federal court absent a showing that the procedure was infected in some way.²⁰

During the *Survey* year, the United States Supreme Court, in *Groves v. Ring Screw Works*, held that a collective bargaining agree-

protected right, is not the preferred method of dispute resolution and should not be the exclusive remedy available to the parties absent explicit contractual language to that effect).

¹³ See *Fortune v. National Twist Drill & Tool Div.*, Lear Siegler, 684 F.2d 374, 375, 111 L.R.R.M. 2189, 2190 (6th Cir. 1982).

¹⁴ See *id.* at 375-76, 111 L.R.R.M. at 2190-91.

¹⁵ *Id.* at 375, 111 L.R.R.M. at 2190 (citing *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 416 (5th Cir. 1966)); *Harris v. Chemical Leaman Tank Lines*, 437 F.2d 167, 171, 76 L.R.R.M. 2257, 2258-59 (5th Cir. 1971)).

¹⁶ See *id.* at 375-76, 111 L.R.R.M. at 2190-91.

¹⁷ 362 F.2d 414, 418 (5th Cir. 1966).

¹⁸ *Haynes*, 362 F.2d at 415.

¹⁹ *Id.* at 415-16.

²⁰ *Id.* at 418.

ment provision reserving the parties' right to use economic weapons could not preclude a court from exercising jurisdiction under section 301 absent explicit language providing an exclusive and final remedy.²¹ The *Groves* court endorsed the *Associated General Contractors* court's holding, reasoning that the LMRA was intended to favor the peaceful resolution of labor disputes over the use of strikes or lockouts.²² As a corollary to its holding, the Court said it will defer to the dispute resolution methods decided upon by the parties only in those situations where it is clear that the parties intended to foreclose judicial action.²³

The *Groves* case focused on two essentially identical collective bargaining agreements between the respondent, Ring Screw Works, and the petitioner union to which petitioners Groves and Evans belonged.²⁴ Groves was terminated by Ring Screw Works for allegedly excessive, unexcused absences.²⁵ The company terminated Evans for allegedly falsifying company records.²⁶ The petitioners, contending that their dismissals were in violation of their respective collective bargaining agreements, invoked the grievance procedures provided for in the agreements.²⁷ These procedures involved a voluntary, multi-step process, but neither agreement required compulsory final arbitration.²⁸ In addition, the agreements prohibited

²¹ 111 S. Ct. 498, 503, 135 L.R.R.M. 3121, 3124 (1990) (citing *Associated Gen. Contractors v. Illinois Conference of Teamsters*, 486 F.2d 972, 976, 84 L.R.R.M. 2555, 2557-58 (7th Cir. 1973)).

²² *Id.* at 502-03, 135 L.R.R.M. at 3123.

²³ *See id.*

²⁴ *Id.* at 500, 135 L.R.R.M. at 3121. The union involved was the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) Local #771. *Id.* at 500 n.2, 135 L.R.R.M. at 3121 n.2.

²⁵ *Id.* at 501 n.5, 135 L.R.R.M. at 3122 n.5.

²⁶ *Id.*

²⁷ *Id.* at 501, 135 L.R.R.M. at 3122.

²⁸ *Id.* at 500, 135 L.R.R.M. at 3121-22. One of the agreements provided:

Section 1. Should a difference arise between the Company and the Union or its members employed by the Company, as to the meaning and application of the provisions of the agreement, an earnest effort will be made to settle it as follows:

Step 1. Between the employee, his steward and the foremen of his department. If a satisfactory settlement is not reached, then

Step 2. Between the Shop Committee, with or without the employee, and the Company management. If a satisfactory settlement is not reached, then

Step 3. The Shop Committee and/or the Company may call the local Union president and/or the International representative to arrange a meeting in an attempt to resolve the grievance. If a satisfactory settlement is not reached, then

Step 4. The Shop Committee and the Company may call in an outside

strikes or lockouts until all other methods of recourse had been exhausted.²⁹ Upon failure of the grievance procedures in the cases of Groves and Evans, the company chose not to call for arbitration and the union chose not to strike.³⁰ Thereafter, petitioners brought suit in federal court pursuant to section 301 of the LMRA.³¹

The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision to grant the company's motion for summary judgment.³² The appeals court noted that courts have favored the use of arbitration to resolve labor disputes where the collective bargaining agreement provides for it.³³ The Sixth Circuit also noted that the parties to a collective bargaining agreement must exhaust all such procedures provided in the agreement before bringing an action under section 301.³⁴ In addition, the court stated that if the agreement provides exclusive and final grievance procedures, the aggrieved party's right to bring an action under section 301 can be "severely restricted."³⁵ Moreover, relying on the *Fortune* case, which was binding authority, the court reasoned that even in the absence of language indicating that the grievance procedure is

representative to assist in settling the difficulty. This may include arbitration by mutual agreement in discharge cases only.

Id. at 500 n.3, 135 L.R.R.M. at 3122 n.3.

²⁹ *Id.* at 500, 135 L.R.R.M. at 3122. The clause limiting strikes and lockouts provided:

The Union will not cause or permit its members to cause, nor will any member of the Union take part in any strike, either sit-down, stay-in or any other kind of strike, or other interference, or any other stoppage, total or partial, of production at the Company's plant during the terms of this agreement until all negotiations have failed through the grievance procedure set forth herein. Neither will the Company engage in any lockout until the same grievance procedure has been carried out.

Id. at 501, 135 L.R.R.M. at 3122. Further, one of the collective bargaining agreements contained a provision stipulating that any unresolved disputes "shall be handled as set forth in [the grievance procedure above at note 28]." *Id.* at 501 n.4, 135 L.R.R.M. at 3122 n.4. The parties never contended that this clause distinguished the agreement from the other agreement and required different treatment. The Court, therefore, did not address this possibility. *Id.*

³⁰ *Id.* at 501, 135 L.R.R.M. at 3122.

³¹ *Id.* The petitioners brought their actions separately, and the two were consolidated on appeal. *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 882 F.2d 1081, 1082, 132 L.R.R.M. 2306, 2306 (6th Cir. 1989), *rev'd*, 111 S. Ct. at 503, 135 L.R.R.M. at 3124 (1990).

³² *Groves*, 882 F.2d at 1087, 132 L.R.R.M. at 2310.

³³ *Id.* at 1084, 132 L.R.R.M. at 2307.

³⁴ *Id.*

³⁵ *Id.* With regard to such restrictions upon the availability of a judicial remedy, the *Dickeson* court noted that where an employee has unsuccessfully exhausted the grievance procedures intended under the collective bargaining agreement to be final, he or she cannot bring a federal action under section 301 absent some showing that the grievance procedure was infected (for example, where the union has breached its duty of fair representation). *Dickeson v. Daw Forest Prods.*, 827 F.2d 627, 629, 126 L.R.R.M. 2249, 2250 (9th Cir. 1987).

to provide a final and exclusive remedy, such a procedure can be deemed exclusive.³⁶ Nevertheless, the court did express some ambivalence about the soundness of the *Fortune* court's reasoning.³⁷ In addition, the court noted that other circuits had decided that a judicial remedy under section 301 was appropriate under similar circumstances.³⁸ The court, nonetheless, was bound by its previous decision in *Fortune* and concluded that the action had been appropriately barred by the district court.³⁹

On grant of certiorari to resolve this conflict among the circuit courts, the United States Supreme Court reversed the Sixth Circuit's holding and held that the lack of an explicit exclusive remedy provision precludes the barring of a judicial remedy under section 301.⁴⁰ Writing for the *Groves* majority, Justice Stevens began by recognizing the strong presumption favoring judicial enforcement of labor agreements.⁴¹ The Court also agreed with the company, however, that this presumption can be overcome where the collective bargaining agreement provides an alternative, binding method of resolution.⁴² Thus, the Court reiterated its policy, and the policy of section 203(d) of the LMRA, of deferring and giving meaning to the intent of the parties as expressed in the agreement.⁴³

The Court, however, did not agree that this policy of deference was applicable to the situation in *Groves*.⁴⁴ The Court reasoned that section 203(d)'s reference to "the desirable method for settlement

³⁶ See *Groves*, 882 F.2d at 1084, 132 L.R.R.M. at 2308.

³⁷ *Id.* at 1086-87, 132 L.R.R.M. at 2309-10. The court stated:

Such resolution, by work "stoppage or other interference" is not a happy solution from a societal standpoint of an industrial dispute, particularly as it relates to the claim of a single employee that has been wrongfully discharged. Were we deciding the issue with a clean slate, we might be disposed to adopt the rationale of *Dickeson* . . .

Id. at 1086, 132 L.R.R.M. at 2309.

³⁸ *Id.* at 1085, 132 L.R.R.M. at 2308.

³⁹ *Id.* at 1087, 132 L.R.R.M. at 2310. The court concluded, "[t]he only means to reexamine this policy would be by *en banc* consideration of the *Fortune* holding and rationale. We are compelled by the authority herein set out to [affirm] the decision of the district court as to both *Groves* and *Evans*." *Id.*

⁴⁰ *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 111 S. Ct. 498, 500, 503, 135 L.R.R.M. 3121, 3121, 3124 (1990).

⁴¹ *Id.* at 502, 135 L.R.R.M. at 3122 (citing *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562, 91 L.R.R.M. 2481, 2483-84 (1976)). The *Groves* Court noted, "under § 301, as in other areas of the law, there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes." *Id.* at 502, 135 L.R.R.M. at 3123.

⁴² *Id.* at 502, 135 L.R.R.M. at 3123.

⁴³ *Id.*; see also *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); LMRA, § 203(d), 29 U.S.C. § 173(d) (1988).

⁴⁴ See *Groves*, 111 S. Ct. at 502-03, 135 L.R.R.M. at 3122-24.

of grievance disputes" was intended to favor peaceful methods of dispute resolution and not strikes or lockouts.⁴⁵ The Court supported this conclusion by noting that strikes and lockouts do not end a dispute by looking to the merits of each party's position; rather, such methods involve one party's use of economic muscle designed to compel the other party to accept the first party's demands.⁴⁶ The Court concluded that resort to economic weapons was not the kind of peaceful solution favored by Congress when it passed the LMRA.⁴⁷

The Court, therefore, favored the reasoning of those courts that had chosen to provide a judicial remedy under section 301 in these circumstances.⁴⁸ Expressing approval of the *Associated General Contractors* decision, the Court noted that the employer was seeking a judicial remedy in *Associated General Contractors*.⁴⁹ Nevertheless, the Court concluded that where the employee is seeking such a remedy rather than the employer, the issue is the same.⁵⁰ The *Groves* Court quoted the Seventh Circuit's reasoning approvingly and concluded that *Groves* and *Evans* should not have been denied access to a federal forum.⁵¹ Thus, the Supreme Court held that the mere reservation of a right to resort to economic weapons, unaccompanied by any provision indicating that the parties intended to foreclose judicial relief, cannot preclude a court from exercising jurisdiction under section 301.⁵²

The Court's decision in *Groves* restricts section 203(d)'s policy of deference for the dispute resolution methods agreed upon by the parties to those situations in which it is clear that the parties intended an alternative, binding method.⁵³ Thus, parties to collective bargaining agreements attempting to foreclose the possibility of having to litigate in federal court must make that intention explicit in their agreement. This limitation reasserts the Court's previously articulated policy of providing a neutral forum for the

⁴⁵ *Id.* at 502, 135 L.R.R.M. at 3123 (citing LMRA, § 203(d), 29 U.S.C. § 173(d) (1988)). See *supra* note 4 for the language of section 203(d).

⁴⁶ *Id.* at 503, 135 L.R.R.M. at 3123.

⁴⁷ *Id.*

⁴⁸ *Id.* at 503, 135 L.R.R.M. at 3124.

⁴⁹ *Id.* at 503, 135 L.R.R.M. at 3123-24.

⁵⁰ *Id.* at 503, 135 L.R.R.M. at 3123.

⁵¹ *Id.* at 503, 135 L.R.R.M. at 3123-24.

⁵² *Id.* at 500, 135 L.R.R.M. at 3121.

⁵³ See LMRA, § 203(d), 29 U.S.C. § 173(d) (1988). See *supra* note 4 and accompanying text for a discussion of section 203(d)'s policy of deference for the parties' agreed upon method of dispute resolution.

peaceful resolution of labor disputes.⁵⁴ Thus, in *Groves*, the Court struck a delicate balance between two important policy considerations: the need to give meaning to the parties' intentions under the agreement, on the one hand, and the need to provide a neutral forum in which to resolve labor disputes on the other.

In addition to providing a federal forum for those cases in which the parties have not explicitly agreed to some variety of binding arbitration, the *Groves* decision will undoubtedly serve to encourage parties engaged in labor negotiations to include such final and binding mechanisms in their agreements. Thus, more disputes are likely to be resolved in a peaceful manner (either in federal court, or in arbitration or mediation) based upon the merits of the dispute rather than upon the ability of one side or the other to exercise superior economic muscle. The Court's decision, therefore, allows those parties who would be disadvantaged in an economic struggle, often individual employees, to have their claims heard on their merits.

The *Groves* case also serves to resolve a conflict among the circuit courts as to this issue.⁵⁵ Close analysis of the case law in this area, however, suggests that the *Groves* decision is less of a departure from previous federal case law than it would first appear. The Supreme Court's decision essentially reinforces the rationale that most federal courts had previously employed in this area.

First, it is important to keep the facts of *Groves* in mind when comparing it to previous federal cases. The agreement in *Groves* was silent as to whether a strike or lockout would be the exclusive option available to the parties upon failure of the grievance procedure.⁵⁶ The intended remedy of the parties was ambiguous and it was, therefore, difficult, if not impossible, for the court to give meaning to that intent.

By contrast, where a court is presented with an agreement calling for a final and exclusive remedy, whatever that remedy might be, the situation is distinguishable from that in *Groves*.⁵⁷ For example, the Fifth Circuit's decision in *Haynes* involved a collective bargaining agreement under which the union and employer had expressly agreed upon an exclusive method for dispute resolution that

⁵⁴ *Hines v. Anchor Motor Freight*, 424 U.S. 554, 562, 91 L.R.R.M. 2481, 2483-84 (1976).

⁵⁵ *Groves*, 111 S. Ct. at 500, 135 L.R.R.M. at 3121.

⁵⁶ *Groves v. Ring Screw Works, Ferndale Fastener Div.*, 882 F.2d 1081, 1085, 132 L.R.R.M. 2306, 2308 (6th Cir. 1989), *rev'd*, 111 S. Ct. at 503, 135 L.R.R.M. at 3124 (1990).

⁵⁷ See, e.g., *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414 (5th Cir. 1966).

would be final unless the union notified the employer that the union intended to strike.⁵⁸ The Court's holding in *Groves* does not reach the factual situation presented in *Haynes* because the parties in *Haynes* had stated their intentions as to dispute resolution clearly in the agreement. Presumably, section 301 suits under collective bargaining agreements containing an explicit provision as to the exclusivity and finality of the grievance procedures will continue to be barred absent a showing that the grievance procedures were infected in some way. Thus, cases such as *Haynes* are reconcilable with the Court's opinion in *Groves*.

Moreover, even where there is no final and binding dispute resolution method in the agreement, the only court that had reached an opposite result from that in *Groves* later expressed its uncertainty as to its result.⁵⁹ That court, the Sixth Circuit Court of Appeals in *Groves*, did choose not to overrule its *Fortune* rationale.⁶⁰ The Supreme Court's decision in *Groves* reversing that result, therefore, resolves the immediate conflict over this issue. In terms of policy, however, there really was no sharp conflict among the circuits prior to the Supreme Court's opinion in *Groves*, given the Sixth Circuit's ambivalence as to its prior holding. Rather, it appears that in *Groves*, the Sixth Circuit felt compelled by *stare decisis* and not by any strong policies that would favor denying a judicial remedy in this situation. Thus, given the narrow factual setting in *Groves* (namely, the lack of an explicitly final and binding dispute resolution mechanism in the agreement) and given the Sixth Circuit's ambivalence over its own decision in *Fortune*, the Supreme Court's decision in *Groves* does not significantly alter the law that had prevailed among the circuit courts on this issue.

In sum, during the *Survey* year, the United States Supreme Court in *Groves v. Ring Screw Works* held that where the parties to a collective bargaining agreement have failed to provide for an exclusive and final method of dispute resolution, the mere authorization of economic warfare does not represent the exclusive remedy avail-

⁵⁸ *Id.* at 415-16. See *supra* notes 17-20 and accompanying text for a discussion of the terms of agreement in the *Haynes* case.

⁵⁹ Compare *Fortune v. National Twist Drill & Tool Div., Lear Siegler*, 684 F.2d 374, 375-76, 111 L.R.R.M. 2189, 2190-91 (6th Cir. 1982) (court held that judicial remedy is foreclosed even in the absence of an alternative, final and binding method of resolution) with *Groves*, 882 F.2d at 1086-87, 132 L.R.R.M. at 2309-10 (court expressed uncertainty as to its holding in *Fortune*). See *supra* notes 37-39 and accompanying text for a discussion of the Sixth Circuit's uncertainty as to the result it had reached in *Fortune*.

⁶⁰ *Groves*, 882 F.2d at 1087, 132 L.R.R.M. at 2310.

able and does not foreclose judicial relief under section 301 of the LMRA. While the Court did succeed in overruling the *Fortune* rationale that had prevailed in the Sixth Circuit, this result was not, in any real sense, revolutionary given the essential agreement among the circuits regarding judicial intervention in labor disputes. What is more important about the *Groves* decision, however, is its admonition to those engaged in labor negotiations that the Supreme Court takes seriously its policy of providing for the peaceful resolution of labor disputes in a judicial forum unless the parties have been absolutely clear in providing for a final and exclusive alternative method. After *Groves*, parties wishing to foreclose the possibility of having to litigate labor disputes in federal court must make this intention clearly known in their collective bargaining agreement.

B. A More Rigorous Standard for Post-Expiration Enforcement of Arbitration Clauses: Litton Financial Printing v. NLRB*¹

In the 1977 case of *Nolde Bros., Inc. v. Bakery Workers*, the Supreme Court held that a collective bargaining agreement's broad arbitration clause could be used to compel arbitration of a post-expiration dispute which arose under the agreement.² In *Nolde Bros.*, the Court required an employer to arbitrate a dispute over severance pay owed to workers laid off after a collective bargaining agreement had expired.³ The Court stated that the expired agreement's broad arbitration clause created a presumption that the clause would survive and that it would apply to post-expiration disputes arising under the agreement.⁴ The Court found that this presumption was not rebutted by any express language in the agreement.⁵ The Court then reasoned that severance pay was a right which vested prior to the expiration of the agreement, and that therefore a dispute over such pay arose under the agreement and should be forced into arbitration.⁶

Since the United States Supreme Court's decision in *Nolde Bros.*, courts have been widely split on the proper standard to be applied

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¹ 111 S. Ct. 2215, 137 L.R.R.M. 2441 (1991).

² 430 U.S. 243, 255, 94 L.R.R.M. 2753, 2757 (1977).

³ *Id.*

⁴ *See id.*

⁵ *See id.* at 252-53, 94 L.R.R.M. at 2756-57.

⁶ *Id.* at 248, 249, 94 L.R.R.M. at 2755.

in determining whether a dispute arises under an expired collective bargaining agreement and thus becomes arbitrable. The National Labor Relations Board ("NLRB"), the Eighth and Tenth Circuits and the Michigan Supreme Court, for example, have found that only disputes involving rights vested prior to an agreement's expiration "arise under" the agreement and are arbitrable.⁷ The Third, Fifth and Ninth Circuits, however, have not applied this vested-rights standard. These circuits have instead concluded that if the arbitration clause of an expired agreement can be plausibly interpreted so as to cover a dispute, the dispute arises under the agreement and is arbitrable.⁸ The Seventh Circuit Court of Appeals has stated that a dispute is arbitrable if it occurs within a limited period following the collective bargaining agreement's expiration.⁹

During the *Survey* year, the United States Supreme Court, in *Litton Financial Printing v. NLRB*, reviewed the substantial disagreement over what constitutes a dispute that arises under an expired

⁷ See, e.g., *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026, 133 L.R.R.M. 2765, 2769 (10th Cir. 1990) (right to be discharged for just cause, right of seniority and right to exclude supervisors from performing work reserved under contract for bargaining unit employees are not vested rights, and therefore dispute over such rights do not arise under the contract); *Chauffeurs Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403-04, 122 L.R.R.M. 2993, 2995-96 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 1007, 123 L.R.R.M. 3192 (1986) (right to be discharged for cause did not vest prior to agreement's termination and so dispute over such right did not "arise under" terminated agreement); *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53, 60, 125 L.R.R.M. 1097, 1103 (1987) (dispute based on post-expiration events "arises under" the contract within the meaning of *Nolde Bros.* only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires); *County of Ottawa v. Jaklinski*, 423 Mich. 1, 7, 120 L.R.R.M. 3260, 3261 (1985) (right to be discharged only for just cause is not vested right and therefore dispute over such right does not arise under the agreement).

⁸ See, e.g., *Seafarers Int'l Union v. National Marine Servs., Inc.*, 820 F.2d 148, 154-55, 125 L.R.R.M. 3069, 3074 (5th Cir.), *cert. denied*, 484 U.S. 953, 126 L.R.R.M. 2960 (1987) (dispute over recognition clause of collective agreement "arose under" agreement and was arbitrable because arbitration clause of agreement was susceptible to interpretation that covered the dispute); *Local Joint Executive Bd. v. Royal Ctr., Inc.*, 796 F.2d 1159, 1162-63, 123 L.R.R.M. 2347, 2349 (9th Cir. 1986) (dispute over union rights under collective bargaining agreement after employer sold business is arbitrable because arbitration clause was susceptible to interpretation that covered the dispute); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 861, 107 L.R.R.M. 2271, 2275-2276 (3d Cir.), *cert. denied*, 454 U.S. 1031, 108 L.R.R.M. 2924 (1981) (dispute over disability and pension rights "arose under" contract not because rights were vested, but because dispute concerned interpretation of agreement).

⁹ See, e.g., *Local 703, Int'l Bhd. of Teamsters v. Kennicott Bros.*, 771 F.2d 300, 304, 120 L.R.R.M. 2306, 2308 (7th Cir. 1985) (grievances not arbitrable because dispute occurred more than six months after expiration of the collective bargaining agreement).

collective bargaining agreement.¹⁰ In *Litton*, the Court held that a post-expiration dispute is arbitrable where it concerns rights vested or accrued prior to the termination of the agreement.¹¹ In so doing, the Court expanded on its previous decision in *Nolde Bros.*¹²

Litton involved a dispute over the interpretation of a collective bargaining agreement ("Agreement") between petitioner Litton Financial Printing Services and the union which represented Litton's employees. The Agreement between Litton and its employees' union set out a grievance procedure and required that if this procedure was unsuccessful in resolving any dispute arising under the Agreement, the parties were to submit to binding arbitration.¹³ The Agreement also provided that individual layoffs be determined by the length of an employee's continuous service, if other criteria such as aptitude and ability were equal.¹⁴ This Agreement expired on October 3, 1979.¹⁵ By late August, 1980, no new agreement had been reached.¹⁶

The dispute between Litton and the union arose after the expiration of their collective bargaining agreement.¹⁷ Shortly after the Agreement had expired, Litton, the operator of a check printing plant in California,¹⁸ decided to eliminate its increasingly inefficient cold-type printing presses.¹⁹ In the process, Litton laid off ten of the forty-two workers at the plant.²⁰ These workers were either primarily or exclusively involved with the cold-type press operation,²¹ and included six of the plant's ten most senior employees.²²

¹⁰ 111 S. Ct. 2215, 2221, 137 L.R.R.M. 2441, 2444 (1991).

¹¹ *Id.* at 2227, 137 L.R.R.M. at 2449.

¹² *See id.* at 2225, 137 L.R.R.M. at 2447-48. The Court's interpretation of *Nolde Bros.* confirmed the interpretation given to "arises under" by the Eighth and Tenth Circuits and the NLRB. *See id.* at 2221 n.1, 2225, 137 L.R.R.M. at 2444 n.1, 2447-48.

¹³ *Id.* at 2219, 137 L.R.R.M. at 2443. Section 19 of the Agreement, the arbitration provision, stated: "[d]ifferences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, the construction to be placed on any clause or clauses of the Agreement shall be determined by arbitration in the manner hereinafter set forth." *Id.* Section 21 set out the two-step grievance procedure. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2219, 137 L.R.R.M. at 2442-43.

¹⁶ *Id.* at 2219, 137 L.R.R.M. at 2443.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

The union filed grievances on behalf of these employees,²³ but Litton refused to submit to the grievance procedure or to arbitration.²⁴

The union petitioned the NLRB to compel Litton to arbitrate the dispute.²⁵ An administrative law judge declared that Litton had to submit to arbitration because the arbitration clause could be plausibly interpreted to cover the dispute. The administrative law judge thus held that the dispute "arose under" the Agreement.²⁶ Six years later, the Board found that Litton had no contractual obligation to arbitrate the layoff dispute.²⁷ The Board applied its interpretation of *Nolde Bros.* to the case and concluded that the dispute did not arise under the Agreement because the type of employee seniority rights discussed in the Agreement did not vest prior to its termination.²⁸

On review, the Court of Appeals for the Ninth Circuit ordered that Litton submit the layoff dispute to arbitration.²⁹ The court rejected the Board's vested-rights interpretation of *Nolde Bros.*' "arising under" standard of arbitrability.³⁰ The court held that the layoff dispute arose under the contract, and was thus arbitrable, because the expired arbitration clause could be plausibly interpreted as covering the dispute.³¹

The United States Supreme Court reversed the Ninth Circuit Court of Appeals to the extent that it disagreed with the Board's

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 2219-2221, 137 L.R.R.M. at 2443-44.

²⁶ *Id.* at 2219, 137 L.R.R.M. at 2443. The ALJ based his decision upon a previous NLRB interpretation of *Nolde Bros.*, *American Sink Top and Cabinet Co.*, in which the Board argued, like the Third, Fifth and Ninth Circuit Courts, that a dispute "arose under" the agreement if some plausible interpretation of the agreement's arbitration clause made it applicable to the dispute. See *American Sink Top*, 242 N.L.R.B. 408, 408, 101 L.R.R.M. 1166, 1166-67 (1979). The Board later changed its interpretation of *Nolde Bros.*, in *Indiana & Michigan Elec. Co.*, to make vested rights the standard for arbitrability. See 284 N.L.R.B. 53, 60, 125 L.R.R.M. 1097, 1103 (1987).

²⁷ *Litton Business Sys., Inc.*, 286 N.L.R.B. 817, 821-22, 126 L.R.R.M. 1339, 1344 (1987).

²⁸ *Id.* at 821-22, 126 L.R.R.M. at 1344. The interpretation of *Nolde Bros.* that the Board applied was the one arrived at in its previous decision in *Indiana & Michigan*. *Id.* (applying *Indiana & Michigan*, 284 N.L.R.B. at 60, 125 L.R.R.M. at 1103).

²⁹ *NLRB v. Litton Printing Div.*, 893 F.2d 1128, 1139, 133 L.R.R.M. 2354, 2362 (9th Cir. 1990).

³⁰ *Id.* at 1138-39, 133 L.R.R.M. at 2361-62. The court based its decision upon a previous interpretation of *Nolde Bros.* by the Ninth Circuit in *Royal Center*. *Id.* at 1138, 133 L.R.R.M. at 2361-62 (citing *Local Joint Executive Bd. v. Royal Center*, 796 F.2d 1159, 1163, 123 L.R.R.M. 2347, 2350 (9th Cir. 1986)).

³¹ See *Litton*, 893 F.2d at 1138, 133 L.R.R.M. at 2361-62.

interpretation of *Nolde Bros.*³² The Court first found that arbitration clauses of expired collective bargaining agreements are not subject to the statutory duty to bargain imposed on employers by the National Labor Relations Act.³³ Because the Court found that these clauses constitute a consensual surrender of the parties' freedom to utilize their economic powers to reach a favorable agreement, the Court argued that the proper mode of analysis for arbitration clauses was contractual interpretation.³⁴ The Court therefore concluded that only disputes that concern post-expiration contractual obligations created by the collective bargaining agreement arise under the agreement.³⁵

The Supreme Court enumerated three bases upon which a dispute could be judged to concern a post-expiration contractual obligation created by a collective bargaining agreement.³⁶ First, the dispute could stem from facts or occurrences that arose prior to the termination of the agreement.³⁷ Second, the dispute could stem from an infringement of a right which, under normal principles of contract interpretation, was intended to survive the expiration of the agreement itself.³⁸ Third, the dispute could stem from post-expiration actions by the employer that infringe on rights which vested or accrued before the agreement's expiration.³⁹

The Court applied this interpretation of *Nolde Bros.* to the facts of *Litton*.⁴⁰ After finding that the presumption of arbitrability created by the broad arbitration clause was not rebutted by any express language in the Agreement,⁴¹ the Court stated that the first two

³² *Litton Fin. Printing v. NLRB*, 111 S. Ct. 2215, 2227-28, 137 L.R.R.M. 2441, 2449-50 (1991).

³³ *Id.* at 2222, 137 L.R.R.M. at 2445. This statutory duty to bargain in good faith requires that an employer bargain to impasse over terms or conditions of employment before making any unilateral changes to them. 29 U.S.C. § 158(a)(1), (5) (1947); *Litton*, 111 S. Ct. at 2221, 137 L.R.R.M. at 2444. The Supreme Court has construed a breach of this duty to bargain in good faith to be an unfair labor practice within the meaning of 29 U.S.C. §§ 158(a)(1) and (5). *NLRB v. Katz*, 369 U.S. 736, 736, 50 L.R.R.M. 2177, 2178 (1962). In its brief to the Supreme Court, the Union in *Litton* argued for reversal of *Katz*'s construction of the duty to bargain in good faith. *Litton*, 111 S. Ct. at 2222, 137 L.R.R.M. at 2445.

³⁴ *Litton*, 111 S. Ct. at 2222, 137 L.R.R.M. at 2445 ("[A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." (quoting *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 242, 75 L.R.R.M. 1036, 1038 (1970))).

³⁵ *Id.* at 2225, 137 L.R.R.M. at 2447.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2227, 137 L.R.R.M. at 2449.

⁴¹ The Court held that the Agreement's provision that its stipulations "shall be in effect

bases of arbitrability it had enumerated were inapplicable in this case.⁴² First, the layoffs occurred after the expiration of the Agreement. Second, the language of the agreement did not expressly create rights which would survive the expiration of the Agreement itself.⁴³ The Court therefore concluded that the *Litton* dispute could only have arisen under the Agreement if the seniority rights ignored by Litton in its layoff decisions were rights that had accrued or vested prior to the Agreement's expiration.⁴⁴

The Supreme Court then held that the kind of seniority described in the Agreement was not an accrued or vested right.⁴⁵ Under the Agreement, seniority would not factor into layoff decisions unless layoff candidates' abilities and aptitudes were equal.⁴⁶ The Court argued that, as Litton no longer needed cold-type press operators, these employees' abilities and aptitudes were not equal to those of the hot-type operators, and that therefore seniority would not have factored into Litton's decision to lay off the cold-type operators.⁴⁷ The Court held that because this type of seniority right did not accrue before the contract had expired,⁴⁸ the dispute did not arise under the contract.⁴⁹ Litton therefore could not be forced to arbitrate the layoffs.⁵⁰

Justice Marshall, in dissent, agreed with the majority's view that the broad arbitration clause created a presumption of arbitrability unrebutted by the express language of the contract,⁵¹ but disagreed with the majority's interpretation of *Nolde Bros.*' "arising under" standard.⁵² Justice Marshall agreed with the Ninth Circuit Court of Appeals and argued that the layoff dispute did arise under the Agreement because the Agreement's arbitration clause could be plausibly interpreted so as to cover the dispute.⁵³

for the time hereinafter specified," its limiting of the no-strike clause to the term of the agreement, and its provision for interest arbitration did not rebut the presumption of the Agreement's unlimited arbitration clause, by which parties agreed to arbitrate all differences that may arise between the parties. *Id.* at 2224-25, 137 L.R.R.M. at 2447.

⁴² See *id.* at 2227, 137 L.R.R.M. at 2449.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *id.* at 2228, 137 L.R.R.M. at 2450 (Marshall, J., dissenting).

⁵² *Id.* at 2228-29, 127 L.R.R.M. at 2450-51 (Marshall, J., dissenting).

⁵³ See *id.* at 2229, 137 L.R.R.M. at 2450-51 (Marshall, J., dissenting).

Justice Marshall also argued that the majority's interpretation of *Nolde Bros.*'s "arising under" standard resulted in poor labor policy.⁵⁴ He stated that this interpretation would discourage arbitration's efficient resolution of disputes,⁵⁵ because it would require a case by case determination of when and if a disputed right vested.⁵⁶ Justice Marshall also contended that such a case by case determination by the judiciary could increase the likelihood of error in the resolution of disputes,⁵⁷ because unlike arbitrators, judges do not have extensive expertise in the analysis of arbitration clauses.⁵⁸

In a separate dissent, Justice Stevens argued for a somewhat different interpretation of *Nolde Bros.*⁵⁹ Justice Stevens wrote that the "arising under" issue itself should be arbitrable.⁶⁰ He argued that the majority should therefore only have required that a grievance allege an accrued right for it to satisfy *Nolde Bros.*⁶¹ An arbitrator could then decide whether a right had accrued and therefore whether the dispute arose under the agreement, as well as deciding the outcome of the dispute itself.⁶² Justice Stevens partially agreed with Justice Marshall in that the dispute in *Litton* should have been submitted to arbitration rather than have the Court reach its merits.⁶³

The *Litton* decision has several consequences for practitioners. First, *Litton*'s vested-rights-based standard for determining whether a dispute arises under an expired collective bargaining agreement must now be applied in all circuit courts. It is no longer enough for practitioners to show that a dispute is arguably covered by some plausible interpretation of the expired arbitration clause, or that the dispute occurred within a certain period after expiration of the agreement. Instead, practitioners will have the much more difficult task of showing that the disputed right accrued or vested prior to the agreement's expiration.

Second, the *Litton* decision may have created a new basis for litigation over arbitration of post-expiration disputes. No clear standard emerges from *Litton* as to what rights accrue or vest before an

⁵⁴ See *id.* at 2228, 137 L.R.R.M. at 2450 (Marshall, J., dissenting).

⁵⁵ See *id.* at 2229, 137 L.R.R.M. at 2451 (Marshall, J., dissenting).

⁵⁶ *Id.*

⁵⁷ *Id.* at 2229-30, 137 L.R.R.M. at 2451 (Marshall, J., dissenting).

⁵⁸ *Id.*

⁵⁹ See *id.* at 2231, 137 L.R.R.M. at 2452-53 (Stevens, J., dissenting).

⁶⁰ *Id.* at 2231-32, 137 L.R.R.M. at 2453 (Stevens, J., dissenting).

⁶¹ See *id.* at 2232, 137 L.R.R.M. at 2453 (Stevens, J., dissenting).

⁶² See *id.*

⁶³ See *id.* at 2231-32, 137 L.R.R.M. at 2453 (Stevens, J., dissenting).

agreement expires. The Board and the courts must therefore first determine on a case by case basis whether a right has vested or accrued prior to expiration of a collective bargaining agreement before they can decide whether that particular dispute did or did not arise under the agreement.

The two other standards for determining arbitrability announced by the Court in *Litton* may also spawn new litigation. The Court stated clearly that a dispute can arise under an agreement if the dispute stems from facts or occurrences that arise prior to termination of the agreement. Yet the Court did not decide how long a party can wait after the expiration of an agreement to demand arbitration of a dispute stemming from pre-expiration facts or occurrences. In theory at least, the existence of such pre-expiration facts or occurrences could create a right to arbitration in the aggrieved party that could last for years.

The Court also clearly stated that a dispute could arise under the expired agreement if the dispute stemmed from infringement of a right that, under normal principles of contract interpretation, was intended to survive the expiration of the agreement itself. Yet the Court did not enumerate the decisionmaking principles covered by the umbrella term "normal principles of contract interpretation." Thus the first two bases of arbitrability enumerated by the Court, although seemingly clear, may require that their meaning be determined through extensive litigation.

Given that *Litton* was decided five to four, however, a dramatic increase in arbitrability-determining litigation might prompt the Supreme Court to re-evaluate its decision. For this to occur, the prophecies of the dissenters must come true. The increased use of litigation to refine the meaning of the arbitrability standards announced in *Litton* would have to create a corresponding decrease in the viability of arbitration as an efficient means of dispute resolution. Also, the courts and administrative law judges would have to make increasing numbers of errors in their determinations of arbitrability.

Third, practitioners should note that a union might achieve favorable results by alleging that an employer committed an unfair labor practice, if an attempt to compel post-expiration arbitration under the *Litton* standards does not succeed. Parties can still argue that the employer's post-expiration actions in some way unilaterally changed a term or condition of employment and so constituted an unfair labor practice that must be remedied. This remedy could be

constructed so as to achieve the same results as enforcement of post-expiration arbitration.

The Supreme Court's decision in *Litton Financial Printing v. NLRB* has settled the substantial disagreement among lower courts over the proper application of *Nolde Bros.*'s requirement that a dispute "arise under" a collective bargaining agreement for it to be arbitrable after the agreement's expiration. In *Litton*, the Court held that where a broad arbitration clause creates an un rebutted presumption of post-expiration arbitrability, an employer is only contractually obligated to submit to arbitration in situations where the dispute concerned rights that had accrued or vested prior to the agreement's termination. The Court also held post-expiration disputes arbitrable where the disputes stem from facts or occurrences that arose prior to the agreement's termination or from infringement of a right that, under normal principles of contract interpretation, was intended to survive the expiration of the agreement itself. In interpreting *Nolde Bros.* this way, the Court rejected the idea that a dispute arises under an expired agreement merely if the agreement's arbitration clause can be plausibly interpreted so as to cover the dispute.

The Court's imposition of more rigorous standards in *Litton* nonetheless leaves several questions open for future cases. What constitutes an accrued or vested right? For how long after an agreement's expiration does a party have the right to arbitrate a dispute that stems from pre-expiration facts or occurrences? What contract principles are considered "normal" for purposes of determining post-expiration arbitrability? The resolution of these questions may provide new bases for litigation and new opportunities for attorneys to delay or thwart determinations of arbitrability.

V. OCCUPATIONAL SAFETY AND HEALTH ACT

A. * *Deference in the Interpretation of OSHA Regulations: Martin v. Occupational Safety and Health Review Commission*¹

The enactment of the Occupational Safety and Health Act (the "Act") in 1970 created two independent administrative actors responsible for the regulatory activity under the Act.² The Occupa-

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¹ 111 S. Ct. 1171 (1991).

² See 29 U.S.C. § 651(a)(3) (1988).

tional Safety and Health Administration ("OSHA"), a Department of Labor agency that the Secretary of Labor (the "Secretary") heads, sets and enforces standards designed to assure safe and healthful working conditions.³ The Occupational Safety and Health Review Commission (the "Commission"), an independent agency, adjudicates any challenges to the standards that the Secretary sets.⁴

This division of responsibility was a political compromise reached in the Senate,⁵ designed to preserve due process and to instill confidence in the two communities that the legislation most significantly affected, business and labor.⁶ At least one commentator has noted that Congress failed, however, to provide a clear delineation of policy responsibilities between the Secretary and the Commission.⁷ This ambiguity resulted in institutional conflicts between the two agencies over statutory and regulatory interpretation.⁸

Various circuits have decided differently the issue of which agency's interpretation is entitled to greater weight. Some circuits have favored the Commission⁹ and have concluded that Congress

³ See 29 U.S.C. §§ 655, 658, 659, 666; see also George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).

⁴ 29 U.S.C. §§ 651(b)(3), 659(c), 660(a)-(b), 661.

⁵ Johnson, *supra* note 3, at 318.

⁶ *Id.* at 319 (citing S. REP. NO. 1282, 91st Cong., 2d Sess., (1970), reprinted in SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 195 (Comm. Print 1971)).

⁷ See Neil Sullivan, *Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 ADMIN. L. REV. 177, 183 (1979). Contrast this omission with the inclusion of the following statement in the Senate Report that accompanied the Federal Mine Safety and Health Act of 1977 (which similarly divided the administrative functions between two agencies): "Since the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." *Id.* at 203 n.122 (citing SENATE COMM. ON HUMAN RESOURCES, FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 REPORT, S. REP. NO. 181, 95th Cong., 1st Sess. (1977)).

⁸ See Sullivan, *supra* note 7, at 183-94; Johnson, *supra* note 3, at 323-25.

⁹ A 1985 First Circuit Court of Appeals decision surveyed the circuits and delineated their positions at that time. See *Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 64-65 (1st Cir. 1985). The Fourth, Sixth, Eighth and possibly the Second Circuits favored the Commission. *Id.* at 64; see also *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978) (Commission's ruling is entitled to great deference); *Marshall v. Western Electric, Inc.*, 565 F.2d 240, 244 (2d Cir. 1977) (reviewing court should decide whether the Commission's interpretation of the regulation is unreasonable and inconsistent with its purpose); *Brennan v. Occupational Safety and Health Review Comm'n*, 513 F.2d 713, 716 (8th Cir. 1975) (Commission's plain meaning interpretation of a regulation cannot be seen as unreasonable); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974) (Commission was designed to have a policy role); *Brennan v. Occupational Safety and Health Review*

intended the Commission to utilize its independent judgment, and not merely to accede to the Secretary's regulatory interpretations.¹⁰ In contrast, other circuits have favored the Secretary, concluding that final policy determinations had to reside with the Secretary, as the rulemaking agency, provided its interpretation was reasonable.¹¹

In 1985 the United States Supreme Court decided a case that considered in dicta the conflict between the two administrative entities and the accompanying split in the circuits.¹² In *Cuyahoga Valley Railway Co. v. United Transportation Union*, a per curiam decision, the Supreme Court held that the Secretary's decision to withdraw a citation charging an employer with a violation of the Act was not reviewable.¹³ In dicta, the Court noted the Act's detailed statutory scheme, and stated that enforcement of the Act is the sole responsibility of the Secretary.¹⁴ The Court further stated that the Commission is to act only as a neutral arbiter.¹⁵ The Court concluded that the commingling of the roles of prosecutor and adjudicator that had occurred was the very problem Congress had sought to avoid in creating the Commission.¹⁶

In a 1986 decision, the Court of Appeals for the Ninth Circuit construed the *Cuyahoga* holding to be limited to the Secretary's discretion to issue or to withdraw a citation.¹⁷ In *Brock v. Bechtel Power Corp.*, the Ninth Circuit rejected the *Cuyahoga* dicta and held that deference is owed the Commission because of its expertise in exercising the independent adjudicatory function that the Act assigned it.¹⁸ The *Bechtel* court stated that the Supreme Court did not specifically discuss the deference owed the Secretary's interpretation

Comm'n, 491 F.2d 1340, 1344 and n.12 (2d Cir. 1974) (simplistic to regard the meaning of a regulation as best understood by its author, the Secretary).

¹⁰ See Johnson, *supra* note 3, at 334-38.

¹¹ In 1985 the First, Fifth and Tenth Circuits favored the Secretary. See *Donovan*, 761 F.2d at 66 (Secretary speaks with greater authority when interpreting own rules); *Brennan v. Occupational Safety and Health Review Comm'n*, 513 F.2d 553, 554 (10th Cir. 1975) (Secretary's interpretation should be accepted if reasonable); *Brennan v. Southern Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974) (Secretary's interpretation is controlling as long as it is one of several reasonable interpretations).

¹² *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6-8 (1985) (per curiam).

¹³ *Id.* at 6. In *Cuyahoga*, the Commission declared that as a general rule it could review the Secretary's decision to withdraw a citation, even though the administrative law judge had previously allowed the Secretary to do so. *Id.* at 4-5.

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1001 (9th Cir. 1986).

¹⁸ *Id.* at 1000.

of the meaning and application of a regulation when it conflicts with that of the Commission.¹⁹

Two months after the *Bechtel* decision the Administrative Conference of the United States²⁰ issued a report on "The Split-Enforcement Model for Agency Adjudication."²¹ The report noted that Congress's failure to specify the respective responsibilities of the Secretary and the Commission had resulted in conflicts between the agencies, and in confusion among the reviewing courts over which agency's views were entitled to deference.²² It recommended that Congress resolve these two issues, and specifically suggested that the adjudicatory agency accept the rulemaking agency's interpretation of a standard.²³ To date Congress has taken no action.

During the *Survey* year, in *Martin v. Occupational Safety and Health Review Commission*, the United States Supreme Court, in a unanimous opinion that Justice Marshall wrote, held that a reviewing court should defer to the Secretary when both the Secretary and the Commission present reasonable but conflicting interpretations of an ambiguous regulation that the Secretary promulgated.²⁴ Consequently, after *Martin*, the conflict between the different circuits should be resolved.²⁵ In the future, a reviewing court need only inquire into the reasonableness of the Secretary's regulatory interpretation, and defer to it, regardless of the position that the Commission advanced.²⁶

In August, 1979, an OSHA compliance officer visited the CF&I Steel Corporation's ("CF&I") facility in Pueblo, Colorado, to ensure

¹⁹ *Id.* at 1001.

²⁰ The Administrative Conference of the United States is an independent agency created by the Administrative Conference Act, 5 U.S.C. §§ 571-576 (1988). See 1 C.F.R. § 301.1 (1991). Its purpose is to "develop improvements in the legal procedures by which Federal agencies administer regulatory, benefit, and other Government programs." 1 C.F.R. § 301 (1991).

²¹ 1 C.F.R. § 305.86-4 (1991).

²² *Id.* The Administrative Conference's report followed a study of the split-enforcement model. *Id.* The study was unable to determine whether the split-enforcement model achieved greater fairness in adjudication than the traditional structural model. *Id.*

²³ *Id.* This recommendation is the second of three that the Conference made. *Id.* It recognized deference to the rulemaking agency's interpretation so long as that interpretation is not arbitrary, capricious or otherwise not in accordance with the law. *Id.* In the other two recommendations, the Conference stated that Congress should act to resolve questions of deference for existing agencies operating under the split-enforcement model, and that Congress, in the future, should always specify which agency has overall responsibility for a statutory program, thus justifying a reviewing court's deference. See *id.*

²⁴ 111 S. Ct. 1171, 1173-74 (1991). In *Martin* the Secretary and the Commission differed over the interpretation of coke-oven emission standards. *Id.* at 1174.

²⁵ *Id.* at 1175.

²⁶ See *id.* at 1179-80.

compliance with the Secretary's coke-oven emissions standards.²⁷ The inspector issued a citation which claimed that because twenty-eight employees failed an atmospheric test,²⁸ CF&I had not ensured the proper fit of respirators on those employees.²⁹ As a result, the employees were exposed to carcinogenic, coke-oven emissions exceeding the regulatory limit.³⁰ This citation assessed a penalty of \$10,000.³¹

The administrative law judge ("ALJ") affirmed the Secretary's citation in September, 1981.³² More than five years later, however, the Commission reversed the ALJ's decision.³³ The Commission found that the cited regulation was a training standard and did not require the employer to assure proper fit of an employee's respirator.³⁴ The Commission asserted that the Secretary should have cited a different regulation.³⁵

²⁷ *Id.* at 1174; C.F.&I. Steel Corp., 1986 O.S.H. Dec. (CCH) ¶ 27,691 at 36,135.

²⁸ An atmospheric test is used "to determine whether a respirator provides a sufficiently tight fit to protect its wearer from carcinogenic emissions." *Martin*, 111 S. Ct. at 1174. In a 1977 inspection of the CF&I plant the same OSHA inspector had instructed CF&I to fit the employees' respirators in a test atmosphere in which a test contaminant of low toxicity was placed. C.F.&I. Steel Corp., 1986 O.S.H. Dec. (CCH) ¶ 27,691 at 36,142 & n.9. If an employee detected any of the substance surrounding the respirator, it was deemed to have failed the test. *Id.*

²⁹ *Martin*, 111 S. Ct. at 1174.

³⁰ *Id.* The Secretary's compliance officer cited CF&I for a violation of 29 C.F.R. § 1910.1029(g)(3), which requires the employer to "institute a respiratory protection program in accordance with § 1910.134." *Id.* at 1174. The Court noted that the reference to § 1910.134 included, most relevantly, § 1910.134(e)(5):

For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for long familiarity period, and, finally, to wear it in a test atmosphere.

Id. at 1174 n.2.

³¹ *Id.* at 1174.

³² *Id.*; CF&I Steel Corp., 1981 O.S.H. Dec. (CCH) ¶ 25,688 (digest of ALJ's decision).

³³ *Martin*, 111 S. Ct. at 1174-75; C.F.&I. Steel Corp., 1986 O.S.H. Dec. (CCH) ¶ 27,691.

³⁴ *Martin*, 111 S. Ct. at 1175; C.F.&I. Steel Corp., 1986 O.S.H. Dec. (CCH) ¶ 27,691 at 36,143.

³⁵ *Martin*, 111 S. Ct. at 1175. The Commission asserted that 29 C.F.R. § 1910.1029(g)(4)(i) pertained to the use and proper fit of respirators: "the employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." *Id.* at 1175 & n.3. Furthermore, the Commission's view was that the Secretary's interpretation of § 1910.1029(g)(3) as requiring the employer to assure proper respirator fit would deny any real meaning to § 1910.1029(g)(4)(i). *See id.* at 1175; C.F.&I. Steel Corp., O.S.H. Dec. ¶ 27,691 at 36,143.

One commissioner dissented. C.F.&I. Steel Corp., O.S.H. Dec. ¶ 27,691 at 36,146. The commissioner did not think that the question of whether § 1910.134(e)(5) was a training

The Court of Appeals for the Tenth Circuit heard the Secretary's appeal of the Commission's decision, and concluded that the Act was unclear as to whether the Commission or Secretary is empowered with final interpretive authority over OSHA regulations.³⁶ The Court of Appeals therefore looked to the legislative history and determined that Congress had sought to endow the Commission with the normal aggregate of adjudicative powers that traditional administrative agencies possessed.³⁷ Furthermore, the court reasoned that such an adjudicative function necessarily encompassed the power to declare the law.³⁸ Thus, the Tenth Circuit deferred to the Commission's interpretation, and affirmed the Commission's action.³⁹

On review, the Supreme Court in *Martin* acknowledged that the Act presented an unusual regulatory structure that was designed to achieve a greater separation of functions than the traditional unitary agency provided.⁴⁰ The Court agreed with the court of appeals that the Act failed to address the issue of deference.⁴¹ The Court reasoned, however, that the power to render authoritative regulatory interpretations is a necessary adjunct of the Secretary's powers to establish and to enforce standards.⁴² The Court further reasoned that this power can be inferred from the Act's structure and history.⁴³

The Court noted two structural advantages of deferring to the Secretary.⁴⁴ First, the Secretary, as rulemaker, creates the standards

standard or a use standard was a valuable distinction and noted that clearly there had been a violation. *Id.* According to this commissioner, the evidence demonstrated that the employees were not provided with respirators that fit and were not trained to comprehend the proper fit of respirators, or to use the respirators properly. *Id.* at 36,147. The commissioner did not deny the applicability of § 1910.1029(g)(4), the respirator usage standard. *Id.* The commissioner went on to assert, however, that the Secretary had a legitimate concern with the initial fit of respirators, and that it was within the Secretary's prosecutorial discretion to allege that the employees were not trained properly under § 1910.134(e)(5). *Id.*

³⁶ *Dole v. Occupational Safety and Health Review Comm'n*, 891 F.2d 1495, 1497-98 (10th Cir. 1989), *rev'd sub nom.* *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991).

³⁷ *Id.* at 1498.

³⁸ *Id.*

³⁹ *Id.* at 1499.

⁴⁰ *Martin*, 111 S. Ct. 1171, 1176 (1991). Justice Marshall distinguished a "traditional unitary agency," which combines rulemaking, enforcement and adjudication within one administrative agency, and the split-enforcement model which has split the adjudicative function into a separate agency. *Id.*

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1176-77.

and is therefore better able to understand their purpose than the Commission.⁴⁵ Second, the Court stated that the Secretary, as enforcer, has much greater exposure to the regulatory environment and to regulatory problems, and can, therefore, better appraise the impact of his or her interpretations.⁴⁶ In contrast, the Court noted that the Commission deals only with that small subset of citations that are challenged.⁴⁷

In reviewing the legislative history, the *Martin* Court focused primarily on the report of the Senate committee responsible for the administrative split-enforcement structure ultimately implemented.⁴⁸ In its analysis of the report, the Court noted that the legislature intended to create a single administrative actor that Congress could hold accountable for the overall implementation of the program.⁴⁹ Consequently, the Court reasoned that whatever adjudicatory powers Congress had conferred on the Commission had to be by definition qualified and limited in scope to avoid having two actors responsible for implementing the Act's policy objectives.⁵⁰

Based on this structural and historical analysis, the *Martin* Court rejected the court of appeals' assertion that the normal array of adjudicative powers were conferred on the Commission.⁵¹ The Court stated that these powers could only be delegated to an adjudicative entity through the traditional unitary structure.⁵² The Court reasoned that Congress's choice not to explicitly delegate lawmaking or policymaking mechanisms to the Commission precluded any court from inferring that Congress meant the Commission to have autonomous policymaking powers.⁵³ The Court further reasoned that Congress intended the Commission merely to have nonpolicymaking adjudicatory powers.⁵⁴ The Court asserted that Congress had empowered the Commission to review the Secretary's

⁴⁵ *Id.*

⁴⁶ *Id.* at 1177.

⁴⁷ See *id.* (citing Jonathan J. Nadler, Note, *Employee Participation in Occupational Safety and Health Review Commission Proceedings*, 85 COLUM. L. REV. 1317, 1331 & n.90 (1985) (reporting small percentage of Occupational Safety and Health Act citations contested between 1979 and 1985)).

⁴⁸ *Martin*, 111 S. Ct. at 1177.

⁴⁹ *Id.* (citing S. REP. NO. 1282, 91st Cong., 2d Sess. 8 (1970), reprinted in SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 148 (Comm. Print 1971)).

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² *Id.*

⁵³ See *id.* at 1177-78.

⁵⁴ *Id.* at 1178.

regulatory interpretations only for consistency with the regulatory language and for reasonableness.⁵⁵

The Court rejected CF&I's two primary due process arguments.⁵⁶ CF&I first claimed that the separation of enforcement and interpretive powers was the only way to protect employers from regulatory bias.⁵⁷ The Court conceded that allowing the Commission to substitute its reasonable interpretations for the Secretary's might slightly increase regulated parties' protection from overzealous interpretations.⁵⁸ The Court noted, however, that such an independent policymaking role would clearly frustrate Congress's intent to make a single agency accountable for the overall implementation of the Act's objectives.⁵⁹

The Court next responded to CF&I's second claim, that judicial deference should not be accorded to a regulatory interpretation given subsequent to the alleged violation.⁶⁰ The Court noted that its own precedents denying judicial deference have applied to instances when that interpretation has been introduced for the first time in a reviewing court.⁶¹ The Court held that the Secretary's interpretation had been advanced in the midst of administrative adjudication, and thus was not a *post hoc* rationalization.⁶² The Court

⁵⁵ *Id.*

⁵⁶ *Id.* at 1178-79; see also Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, Brief for Respondent, CF&I Steel Corporation, at 20-22, *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991) (No. 89-1541).

⁵⁷ *Martin*, 111 S. Ct. at 1178. In its brief CF&I states:

The Commission was designed to be an adjudicator in order to preclude the Secretary from being investigator, prosecutor, judge and jury Requiring a circuit court of appeals to defer to the Secretary's interpretation over the Commission's would eliminate the intent of Congress to make the Commission an autonomous and independent adjudicatory body, and would be paramount to ordering a district court to accord deference to a prosecutor's interpretation of a criminal statute.

Respondent's Brief at 20, *Martin*, (No. 89-1541).

⁵⁸ *Martin*, 111 S. Ct. at 1178-79.

⁵⁹ *Id.* at 1179.

⁶⁰ *Id.* In its brief CF&I states:

[D]eference to the Secretary's interpretation of a regulatory standard over that of the Commission would create the danger of rulemaking by adjudication The enumerated procedures and the statutory framework of the Act are designed to protect employers from being penalized by after-the-fact interpretations of regulatory standards which were ambiguous in the first instance.

Respondent's Brief at 21, *Martin*, (No. 89-1541).

⁶¹ *Martin*, 111 S. Ct. at 1179 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁶² *Id.* The Court further noted that the Secretary's regulatory interpretation was docu-

noted, however, that the reasonableness of a regulatory interpretation offered for the first time in an administrative adjudication could be challenged based on the adequacy of notice to regulated parties, the quality of the Secretary's elaboration of pertinent policy considerations, and other undefined factors.⁶³

Finally, the *Martin* Court explicitly narrowed its holding to the division of powers between the Secretary and the Commission under the Act.⁶⁴ It further stated that its holding did not provide any judgment with respect to any other agencies operating under the split-enforcement model.⁶⁵ Determining that the Tenth Circuit had not previously considered the reasonableness of the Secretary's interpretation, the Supreme Court remanded the case for consideration of that question.⁶⁶

The Supreme Court's unanimous decision in *Martin* is straightforward, and appears at first glance to have a predictable, restricted impact. It will certainly resolve the conflict between the circuits regarding which agency is owed deference when there are reasonable but differing interpretations of OSHA regulations, and thereby will eliminate forum shopping.⁶⁷ Moreover, to the extent that the Secretary's regulations further the Act's purpose of ensuring greater worker health and safety, the decision is a victory for labor, the constituency seeking stricter compliance, and a defeat for business, the constituency seeking greater leniency. Because the decision reduces the Commission's autonomy, there will be fewer reversals of the Secretary's citations. This conclusion is grounded not only in an understanding of the historical and political positions of orga-

mented in the written citation, and that when so done the Secretary specifically utilizes an interpretive mechanism for which Congress provided. *Id.* (citing 29 U.S.C. § 658 (1988)).

In the same context the Court referred to informal measures that the Secretary utilizes which can be used to some degree by a reviewing court to measure the consistency and reasonableness of the Secretary's interpretations. *Id.* These include the promulgation of interpretive rules and the publication of agency enforcement guidelines. *Id.*

⁶³ See *id.* at 1180.

⁶⁴ *Id.* at 1179.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1180. Following the remand to the Court of Appeals, CF&I filed a letter, rather than a supplemental brief, advising the Tenth Circuit that it was in chapter 11 bankruptcy. *Martin v. Occupational Safety and Health Review Comm'n*, 941 F.2d 1051, 1053 (10th Cir. 1991). The court concluded that the Secretary's interpretation was reasonable. *Id.* at 1057. It vacated the Commission's order to set aside the contested violation. *Id.* at 1059.

⁶⁷ 29 U.S.C. § 660(a) provides that an aggrieved party may seek review of an order of the Commission "in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . ." 29 U.S.C. § 660(a) (1988).

nizations and groups affected by the Act, but by reviewing the parties filing *amicus curiae* briefs before the Supreme Court.⁶⁸

Finally, the decision to accord deference to the Secretary's regulatory interpretations, eliminating the Commission's policymaking role, will result in regulatory predictability and, as a result, quicker compliance and fewer appeals.⁶⁹ With only one agency interpreting OSHA regulations, the regulated business community will no longer be able to rely on a variant interpretation by the Commission as a means to avoid or delay compliance. Therefore, the regulated community is more likely to comply with these regulations upon promulgation. In addition, those that do not initially comply but are then cited for noncompliance are less likely to appeal because the Commission can no longer offer an alternative regulatory interpretation to the extent that the Secretary's interpretation is reasonable.

But any analysis of the *Martin* decision must recognize that the split-enforcement model, the creation of a political compromise, still functions within a political arena comprised of several constituencies. The impact of the Court's decision depends on how the relevant communities (labor, business, Congress, the administrative agencies and the courts), independently, and in their interrelationships, respond to the decision and its reasoning. After *Martin*, resolution of a number of matters lies ahead.

First, the Commission's participation in policymaking may have been dealt a fatal blow. If prior to *Martin* the Commission's sole forum for expressing its independent viewpoint has been in the area of regulatory interpretation, then the *Martin* decision has effectively stifled the Commission's voice. If there are other ongoing disputes not involving regulatory interpretation, however, between

⁶⁸ See e.g., Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner, at 2-3, *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171 (1991) (no. 89-1541) (filed on behalf of the Secretary); Amici Curiae Brief of the National Association of Manufacturers and the Motor Vehicle Manufacturers Association in Support of Respondents, at 4-5; *Martin v. OSHRC*, 111 S. Ct. 1171 (1991) (no. 89-1541) (filed on behalf of the Commission); Brief for the Chamber of Commerce of the United States of America, the Industry Council on the Environment, Safety, and Health, and the United States Hispanic Chamber of Commerce as Amici Curiae in Support of Respondents, at 6-7, *Martin v. OSHRC*, 111 S. Ct. 1171 (1991) (no. 89-1541) (filed on behalf of the Commission); Brief of American Iron and Steel Institute as Amicus Curiae in Support of Respondent, at 2-3, *Martin v. OSHRC*, 111 S. Ct. 1171 (1991) (no. 89-1541) (filed on behalf of the Commission).

⁶⁹ It should be noted, however, that the interpretive disputes between the Secretary and the Commission have been limited to approximately two per cent of all citations. Nadler, *supra* note 47, at 1331 n.90 (1985).

the two agencies, then the decision has not necessarily foreclosed the Commission's policymaking contribution.

Second, the Commission or the reviewing courts, in their reviews of the Secretary's regulatory interpretations, may seek to go beyond the reasonableness requirement stated in *Martin*. Such an effort would be based on the Supreme Court's statement that a reviewing court may consult the Secretary's informal means of interpreting regulations, comparing them with the interpretation at hand to determine consistency and reasonableness.⁷⁰ Such increased scrutiny would require that parties study the Secretary's regulations and interpretive texts with more rigor, seeking new and different ways to discredit them.⁷¹

Third, the Secretary may seek to widen the definition of deference beyond the narrow scope enunciated in *Martin*, to areas other than the interpretation of ambiguous regulations. Matters might come before the Commission, for example, that require statutory interpretation or procedural interpretation with which the Commission would differ with the Secretary. *Martin* does not tell us how a reviewing court should treat a Commission decision on such issues that is at odds with the position of the Secretary.

On a different level, it is possible to deduce some guiding principles from *Martin*. First, agency disputes will be adjudicated on a case-by-case basis through an investigation of the historical record. Other agencies functioning under an identical or similar administrative structure may rely on *Martin*, but they will have to ground their claim in their own legislative history. Second, where due process mechanisms have been ineffective they will not be maintained merely for appearance's sake. Structural clarity and accountability are administratively essential, and need to be supported in the absence of any justification to the contrary.⁷² Finally, the *Martin* decision states that interpretation is the chief tool of the

⁷⁰ *Martin v. Occupational Safety and Health Review Comm'n*, 111 S. Ct. 1171, 1179 (1991) (less formal means of interpreting regulations include the promulgation of interpretive rules and the publication of agency enforcement guidelines).

⁷¹ The historical criticism of OSHA regulations has focused on their awkwardness, their ambiguity, their out-of-dateness, and such problems will not disappear now that the Secretary has been granted interpretive deference. See Johnson, *supra* note 3, at 323; Mark A. Rothstein, *OSHA After Ten Years: A Review and Some Proposed Reforms*, 34 VAND. L. REV. 71, 73-75 (1981).

⁷² A critical point of the Administrative Conference's report, "The Split-Enforcement Model for Agency Adjudication," was that through its study it was not able to conclude whether the self-enforcement model achieved greater fairness than the traditional structural model. See 1 C.F.R. § 305.86-4 (1991). See *supra* notes 21-23 and accompanying text for a discussion of the Administrative Conference's report.

policymaker. Because policymaking must reside with the rulemaker, the power of interpretation must be granted to the rulemaker. Where such a clear delegation of interpretive authority fails to happen, policy disputes ensue. Invariably such disputes move from the agencies up to the courts.⁷³ Once such divisiveness happens, it can only be repaired by a higher court. The Supreme Court appears to have first spoken on the issue in the *Cuyahoga* per curiam decision. When Congress fails to act, and when its own dicta is ignored, the Court will act when presented with a case.

In sum, the *Martin* Court favored the Secretary in the narrow area of the interpretation of ambiguous regulations. This cannot eliminate the tensions that exist in the effort to forge a national policy to ensure safe and healthy working environments when there is more than one administrative actor. Ahead we shall see whether the decision has broader applicability, whether the Court will be called on to decide on other interagency disputes, or whether Congress will act.

VI. ERISA

A. * *Agency Discretion in Restoring Terminated Pension Plans Based on the Existence of Follow-on Plans: Pension Benefit Guaranty Corp. v. LTV Corp.*¹

Under title IV of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), the Pension Benefit Guaranty Corporation ("PBGC"), a wholly-owned United States government corporation, is empowered to act as a national insurer of pension plans.² The PBGC was created partly as a response to Congress's concern about inadequately funded pension plans and the resulting

⁷³ See Sullivan, *supra* note 7, at 193-94. Sullivan commented on the problems with policymaking through the judicial process. *Id.* at 193. First, he noted that substantive policy expertise will be weakened to the extent that appellate courts seek to insert their own policy interpretations in the midst of conflicts between the Secretary and the Commission. *Id.* Second, he observed that the appellate courts, acting independently, disagree regarding the roles of the Secretary and the Commission, and because of that disagreement transfer the conflict from the administrative level to the judiciary. *Id.* at 193-94.

* By Susan Scott Hallal, Editor, BOSTON COLLEGE LAW REVIEW.

¹ 110 S. Ct. 2668, 12 Employee Benefits Cas. (BNA) 1593 (1990).

² Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1302 (1988). The pension plans that are insured under ERISA are "defined benefit" pension plans, as opposed to "defined contribution" or "individual account" plans. Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. at 2671 n.1, 12 Employee Benefits Cas. (BNA) at 1594 n.1; see also ERISA, 29 U.S.C. §§ 1002(34), (35), 1321 (1988).

deprivation suffered by employees entitled to pension benefits.³ In order to avert the tragedies created by underfunded plans, Congress enacted ERISA and created the PBGC, charging it to encourage the maintenance of voluntary pension plans and provide for consistent pension payments, while preserving low insurance premiums.⁴

Under title IV of ERISA, employers may voluntarily terminate an ERISA-insured pension plan.⁵ In addition, the PBGC may terminate a pension plan, particularly if the employer is unable to provide sufficient funding for the plan.⁶ When an employer or plan administrator terminates a plan voluntarily, the employer must allocate the available assets of the pension plan according to certain guidelines under ERISA.⁷ When an employer's plan has been involuntarily terminated, the PBGC may appoint a trustee to allocate available assets of the pension plan and oversee the termination process.⁸

³ ERISA, 29 U.S.C. § 1001(a).

⁴ See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374, 2 Employee Benefits Cas. (BNA) 1431, 1438 (1980) (quoting SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 4793 (Comm. Print 1976) (statement of Sen. Bentsen)).

⁵ ERISA § 4041, 29 U.S.C. § 1341. Employers might be motivated to terminate a plan in order to avoid paying pension benefits earned by employees but not insured by the PBGC. *In re Chateaugay Corp.*, 87 B.R. 779, 813, 9 Employee Benefits Cas. (BNA) 2209, 2242 (S.D.N.Y. 1988) (district court opinion in *Pension Benefit Guar. Corp. v. LTV Corp.*). The 1986 amendments to ERISA sought to address this problem by allowing "standard termination" by an employer only when a plan was sufficiently funded, and "distress termination" only when the employer could show sufficient economic distress. See *id.*; ERISA, 29 U.S.C. §§ 1301(a)(16), 1341(b), (c)(2)(B). An employer may not, however, terminate a pension plan if the termination would violate the terms of a collective bargaining agreement. ERISA § 4041(a)(3), 29 U.S.C. § 1341(a)(3).

⁶ *Id.* § 4042, 29 U.S.C. § 1342. The PBGC may terminate a pension plan under the statute regardless of whether the plan was established according to a collective bargaining agreement. *Id.* § 4041(a)(3), 29 U.S.C. § 1341(a)(3).

⁷ *Id.* § 4044, 29 U.S.C. § 1344.

⁸ *Id.* § 4042(b), 29 U.S.C. § 1342(b). The PBGC guarantees payment of the remaining "nonforfeitable" pension benefits, subject to limitations. *Id.* §§ 4022, 4061, 29 U.S.C. §§ 1322, 1361; 29 C.F.R. § 2621.3 (1990). Nonforfeitable benefits are those to which employees are entitled under the pension plan as of the date of its termination. ERISA, 29 U.S.C. § 1301(a)(8); see also *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 373, 2 Employee Benefits Cas. (BNA) 1431, 1437 (1980) (definition of "nonforfeitable" relates to an employee's right to collect pension as opposed to the amount an employee may collect). The funds used to pay these benefits are collected by the PBGC in the form of insurance premiums, which are paid by employers covered by PBGC insurance. ERISA, 29 U.S.C. §§ 1306, 1307. The premiums were initially set at one dollar per individual plan participant, but Congress has steadily increased the amount as the PBGC's deficit has increased. *Id.*; see J. Robert Suffoletta, Jr., *Who Should Pay When Federally Insured Pension Funds Go Broke?: A Strategy for Recovering from the Wrongdoers*, 65 NOTRE DAME L. REV. 308, 313-14 (1990). In

In addition to its power to terminate an underfunded pension plan, under section 4047 of the Act, the PBGC may also restore a plan that has been voluntarily or involuntarily terminated.⁹ Once a plan is restored, the PBGC is no longer liable for meeting the plan's obligations, and the employer must once again take responsibility for ensuring that the plan is adequately funded.¹⁰ The PBGC Executive Director may make a restoration decision following a recommendation by the Trusteeship Working Group, an administrative group within the PBGC that advises the agency about plan terminations and other issues under ERISA.¹¹ If the PBGC decides to restore a plan, the PBGC issues a Notice of Restoration to the employer and seeks to enforce restoration.¹²

Section 4047 of the Act does not explicitly set forth any restrictions or guidelines for the PBGC to follow in making a restoration decision.¹³ Instead, the Act provides only that the PBGC may restore

addition, employers of underfunded pension plans are liable to the PBGC for the amount required to fund the pension plan sufficiently. See *In re Chateaugay Corp.*, 87 B.R. 779, 787-88, 9 Employee Benefits Cas. (BNA) 2209, 2215 (S.D.N.Y. 1988) (citing 29 U.S.C. § 1362(b)(1)(A)). Theoretically the PBGC may recover one hundred percent of its expenditures. ERISA, 29 U.S.C. § 1362(b).

⁹ ERISA § 4047, 29 U.S.C. § 1347. Section 4047 of ERISA provides, in pertinent part: In the case of a plan which has been terminated under [29 U.S.C.] section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status, including, but not limited to, the transfer to the employer or a plan administrator of control of part or all of the remaining assets and liabilities of the plan.

Id.

¹⁰ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2672, 12 Employee Benefits Cas. (BNA) at 1596.

¹¹ See *In re Chateaugay Corp.*, 87 B.R. at 790-91, 9 Employee Benefits Cas. (BNA) at 2218-19.

¹² *Id.* at 792, 9 Employee Benefits Cas. (BNA) at 2220.

¹³ *Id.* at 808, 9 Employee Benefits Cas. (BNA) at 2237. In addition, the legislative history of section 4047 does not provide any insight into the scope or nature of the PBGC's restoration authority. *Id.* at 809 n.25, 9 Employee Benefits Cas. (BNA) at 2237-38 n.25. The House Conference Report regarding this provision reads:

[T]he [PBGC] may cease any termination activities and do what it can to restore the plan to its former status. As a result, a terminated plan being operated by a trustee as a wasting trust may be restored if, during the period of its operation by the trustee, experience gains or increased funding make it sufficiently solvent.

Id. (quoting H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 378 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5157-58). In addition, when Congress considered the Pension Protection Act of 1987, it did not adopt a proposal that would have explicitly prohibited the establishment of "replacement plans" or follow-on plans after a voluntary termination. *Id.* at 814-15, 9 Employee Benefits Cas. (BNA) at 2243-44.

a plan when the PBGC "determines such action to be appropriate and consistent with its duties under [title IV]."¹⁴ One rationale offered by the PBGC for restoring a terminated pension plan is the PBGC's "anti-follow-on plan" policy.¹⁵ A follow-on plan is essentially a plan developed by the employer, following plan termination, which approximates the benefits paid under the original pension plan.¹⁶

Although the PBGC has not enunciated an anti-follow-on plan policy through formal rulemaking, it has clearly stated its position in three opinion letters.¹⁷ Follow-on plans are abusive of the title IV insurance program, according to the PBGC, because they allow an employer to continue business as usual and provide the same pension benefits to employees, while the PBGC subsidizes part of the cost of these benefits.¹⁸ Thus, in order to avoid paying pension insurance to an employer who is not an intended beneficiary of the ERISA insurance plan, the PBGC has adopted the position that the existence of a follow-on plan is evidence of an employer's ability to fund a plan fully.¹⁹ Also, according to the PBGC, follow-on plans undermine employee resistance to plan termination.²⁰ Accordingly, if follow-on plans exist, the PBGC will restore the pension plan.

Only one case, in the context of a voluntarily terminated pension plan, has addressed restoration of a pension plan by the PBGC, based on the PBGC's anti-follow-on plan policy.²¹ In the 1987 de-

¹⁴ ERISA § 4047, 29 U.S.C. § 1347.

¹⁵ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 875 F.2d 1008, 1016, 10 Employee Benefits Cas. (BNA) 2425, 2433 (2d Cir. 1989).

¹⁶ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2673, 12 Employee Benefits Cas. (BNA) at 1597; *Pension Benefit Guar. Corp. v. LTV Corp.*, 875 F.2d at 1012, 10 Employee Benefits Cas. (BNA) at 2429.

¹⁷ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2674, 12 Employee Benefits Cas. (BNA) at 1597; see also *Application for Certiorari* at 165a, 110 S. Ct. 2668, 12 Employee Benefits Cas. (BNA) 1593 (1990); PBGC Pub. 81-11 (May 11, 1981); PBGC Pub. 86-27 (Dec. 17, 1986). For example, in one opinion letter, the PBGC stated: "[A] purported termination of one plan, contrived in concert with the establishment of new retirement arrangements which are designed to provide substantially the same benefits for the future, should not be treated as a termination within the statutory contemplation so as to require the payment of PBGC guarantees." PBGC Pub. 81-11 (May 11, 1981).

¹⁸ 110 S. Ct. at 2673-74, 12 Employee Benefits Cas. (BNA) at 1597; see also *In re Wheeling-Pittsburgh Steel Corp.*, 103 B.R. 672, 685, 11 Employee Benefits Cas. (BNA) 1097, 1108-09 (W.D. Pa. 1989).

¹⁹ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2673-74, 12 Employee Benefits Cas. (BNA) at 1597.

²⁰ *Id.* at 2678, 12 Employee Benefits Cas. (BNA) at 1601.

²¹ See *In re Wheeling-Pittsburgh Steel Corp.*, 103 B.R. at 685-86, 11 Employee Benefits Cas. (BNA) at 1108-09.

cision of *In re Wheeling-Pittsburgh Steel Corp.*, the United States District Court for the Western District of Pennsylvania held that the PBGC could not order restoration of a voluntarily terminated pension plan based on the existence of a follow-on plan that was bargained for by an employer and the union and implemented in bankruptcy proceedings.²² The district court upheld the employer's follow-on plan and rejected the PBGC's restoration, stating that the restoration contravened the purposes of ERISA, and was arbitrary and capricious.²³

In its analysis, the court noted that the PBGC failed to recognize that the bankruptcy process prevented the employer from continuing business as before.²⁴ The court also pointed out that, in rejecting the follow-on plans, the PBGC was not carrying out its mandate under ERISA to ensure the payment of pension benefits to retirees, which the follow-on plans arguably accomplished.²⁵ The court criticized the PBGC, stating that the PBGC's mission under ERISA was the payment of benefits in the event of insolvency, and that because Wheeling-Pittsburgh was insolvent, such payment was necessary and proper.²⁶ Finally, the court observed that restoration could result in immediate retermination of the plans, causing uncertainty and hardship on the part of retirees.²⁷ Thus, the court held that the PBGC could not decide to restore a voluntarily terminated pension plan based on the existence of follow-on plans, because the plans were not abusive and to restore the plan would contravene the purposes and policy of ERISA.²⁸ Until recently, the PBGC had never exercised its authority under section 4047 of ERISA to restore an

²² *Id.* at 686, 11 Employee Benefits Cas. (BNA) at 1109. *Wheeling-Pittsburgh* involved an employer who had filed for chapter 11 bankruptcy following a three month strike by its United Steelworkers employees. *Id.* at 677, 11 Employee Benefits Cas. (BNA) at 1099-1100. Seven pension plans were voluntarily terminated following the strike. *Id.* at 677, 11 Employee Benefits Cas. (BNA) at 1099. As part of a strike settlement agreement, the employer implemented a temporary plan and proposed a permanent follow-on plan which supplemented certain pension benefits. *Id.* at 677, 11 Employee Benefits Cas. (BNA) at 1100. The PBGC objected to the provision of the same pension benefits, with PBGC subsidization, as an abuse of the ERISA insurance program, and threatened restoration. *Id.* at 678, 11 Employee Benefits Cas. (BNA) at 1101.

²³ *Id.* at 684, 686, 11 Employee Benefits Cas. (BNA) at 1107, 1108-09.

²⁴ *Id.* at 685-86, 11 Employee Benefits Cas. (BNA) at 1108-09.

²⁵ *Id.* at 686, 11 Employee Benefits Cas. (BNA) at 1108-09. The court noted that the follow-on plan was a defined contribution plan, paid into by currently employed workers, and not covered by PBGC insurance. *Id.* at 687, 11 Employee Benefits Cas. (BNA) at 1110.

²⁶ *In re Wheeling-Pittsburgh Corp.*, 103 B.R. at 688, 11 Employee Benefits Cas. (BNA) at 1111.

²⁷ *Id.*

²⁸ *Id.* at 686, 11 Employee Benefits Cas. (BNA) at 1108-09.

involuntarily terminated pension plan, thus preventing the courts from considering the scope and nature of the PBGC's authority to do so.²⁹

During the *Survey* year, in *Pension Benefit Guaranty Corp. v. LTV Corp.*, the United States Supreme Court established the scope of the PBGC's restoration power following involuntary termination, stating that the PBGC need not consider bankruptcy and labor law policies in deciding to restore an involuntarily terminated pension plan.³⁰ More importantly, the Court held that the PBGC could properly restore plans based on follow-on plans that give employees substantially the same benefits they enjoyed under pre-termination pension plans.³¹ The Court's decision sends a clear signal to employers that the PBGC has wide discretion in determining whether an employer's post-termination arrangements for pension benefits indicate that the employer is again capable of taking on the preexisting pension plan without assistance from the PBGC.

The dispute in *LTV* arose from a bankruptcy filing in July of 1986 by the LTV Corporation ("LTV") and its subsidiaries under chapter 11 of the Bankruptcy Code.³² At that time, three pension plans administered by LTV were subject to title IV of ERISA, including the minimum funding requirements of that provision.³³ LTV filed for bankruptcy partly in order to restructure the chronically underfunded pension plans.³⁴ Because two of the three pension plans had been established as a result of collective bargaining, section 4041 of ERISA prevented LTV from voluntarily terminating the plans.³⁵

Consequently, LTV made it clear to the PBGC that it was unable to contribute further to the pension plans and that it desired that

²⁹ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 12 Employee Benefits Cas. (BNA) 2785, 2792 (S.D.N.Y. 1990) (on remand). The *Wheeling-Pittsburgh* court held that there was no distinction between voluntary and involuntary termination in the context of restoration decisions. *In re Wheeling-Pittsburgh Steel Corp.*, 103 B.R. at 685, 11 Employee Benefits Cas. (BNA) at 1108.

³⁰ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2676, 12 Employee Benefits Cas. (BNA) at 1599.

³¹ *Id.* at 2679, 12 Employee Benefits Cas. (BNA) at 1602.

³² *Id.* at 2672, 12 Employee Benefits Cas. (BNA) at 1596.

³³ *Pension Benefit Guar. Corp. v. LTV Corp.*, 875 F.2d 1008, 1011, 10 Employee Benefits Cas. (BNA) 2425, 2428 (2d Cir. 1989).

³⁴ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2672-73, 12 Employee Benefits Cas. (BNA) at 1596. The Court noted that by late 1986, there was a total of almost \$2.3 billion in accrued pension benefits that were unfunded. *Id.*

³⁵ *Id.*

the PBGC seek an involuntary termination of the plans.³⁶ LTV informed the PBGC that funding deficits could increase by as much as \$128 million in the next two years if the plans were not terminated.³⁷ LTV also suggested to the PBGC the possibility of plant shutdowns, which would create additional liabilities.³⁸ As a result, the PBGC agreed to terminate the plans under section 4042(a)(4) of ERISA.³⁹

Following involuntary termination of the plans in January of 1987, the United Steelworkers of America (the "Union") filed suit in bankruptcy court, claiming that LTV had violated the terms of the collective bargaining agreement and section 1113 of the Bankruptcy Code.⁴⁰ Under threat of strike, LTV reached a settlement with the Union in which retirees entitled to pension benefits would receive substantially the same benefits they would have received under the original LTV pension plans.⁴¹ The bankruptcy court approved this new pension arrangement over the objections of the PBGC.⁴²

The PBGC took the position that the new arrangements were "follow-on plans" which, when added to the insurance benefits provided by the PBGC, would place pension participants in the same position they would have been in under the original pension plans.⁴³ Because of the PBGC's anti-follow-on plan policy and as a result of LTV's apparently improved financial circumstances, the PBGC issued a Notice of Restoration of the pension plans on September 22, 1987.⁴⁴ The PBGC noted that plant shutdowns were no longer

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. at 2672-73, 12 Employee Benefits Cas. (BNA) at 1596.

⁴⁰ *Id.* Section 1113 of the Bankruptcy Code allows rejection of collective bargaining agreements by debtors-in-possession in certain circumstances. Pension Benefit Guar. Corp. v. LTV Corp., 875 F.2d 1008, 1012, 10 Employee Benefits Cas. (BNA) 2425, 2429 (2d Cir. 1989); 11 U.S.C. § 1113 (1988).

⁴¹ LTV Corp., 875 F.2d at 1012, 10 Employee Benefits Cas. (BNA) at 2429; see also *In re Chateaugay Corp.*, 87 B.R. 779, 789, 9 Employee Benefits Cas. (BNA) 2209, 2217 (S.D.N.Y. 1988).

⁴² Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. at 2674, 12 Employee Benefits Cas. (BNA) at 1597.

⁴³ *Id.* at 2673-74, 12 Employee Benefits Cas. (BNA) at 1597; see also Application for Certiorari at 165a, 110 S. Ct. 2668, 12 Employee Benefits Cas. (BNA) 1593 (1990); PBGC Pub. 81-11 (May 11, 1981) (explaining anti-follow-on plan policy); PBGC Pub. 86-27 (Dec. 17, 1986) (same).

⁴⁴ Pension Benefit Guar. Corp. v. LTV Corp., 110 S. Ct. at 2674, 12 Employee Benefits Cas. (BNA) at 1597.

imminent and that LTV was again capable of funding the plans.⁴⁵ When LTV refused to restore the pension plans, claiming that the PBGC's action violated the automatic stay provision of the Bankruptcy Code, the PBGC brought an enforcement action in federal court.⁴⁶

The United States District Court for the Southern District of New York held that the PBGC restoration decision was not based on adequate grounds or a sufficient administrative record, and was made without granting LTV adequate procedural opportunities.⁴⁷ The court held, however, that although the PBGC had acted within the scope of its authority in restoring the plans without prior court approval, it had exceeded its authority under section 4047 of ERISA in claiming that the LTV follow-on plans were an abuse of the statute.⁴⁸

The United States Court of Appeals for the Second Circuit affirmed, holding that the PBGC's decision to restore the pension plans was arbitrary and capricious under section 706 of the Administrative Procedure Act.⁴⁹ The court stated that the PBGC failed to give adequate weight to bankruptcy and labor law, and instead "focused inordinately" on ERISA.⁵⁰ Further, the court observed that the PBGC's conclusion that follow-on plans were abusive was insupportable under the administrative record and the legislative history of section 4047 of ERISA.⁵¹ The court also rejected the PBGC's grounds for concluding that LTV was financially able to fund the pension plans, charging that the PBGC failed to explain its economic assumptions adequately.⁵² In addition, the Second Circuit noted that the PBGC had not provided adequate procedural safeguards to LTV in reaching its restoration decision, and thus its decision was arbitrary and capricious.⁵³

The United States Supreme Court reversed and remanded, holding that the PBGC could properly consider the existence of follow-on plans in deciding to restore an involuntarily terminated

⁴⁵ *Id.*

⁴⁶ *Id.* at 2674, 12 Employee Benefits Cas. (BNA) at 1598.

⁴⁷ *In re Chateaugay Corp.*, 87 B.R. at 828-30, 9 Employee Benefits Cas. (BNA) at 2258.

⁴⁸ *Id.* at 815, 9 Employee Benefits Cas. (BNA) at 2244.

⁴⁹ *Pension Benefit Guar. Corp. v. LTV Corp.*, 875 F.2d 1008, 1021, 10 Employee Benefits Cas. (BNA) 2425, 2438 (2d Cir. 1989); *see also* Administrative Procedure Act, 5 U.S.C. § 706 (1988).

⁵⁰ *LTV Corp.*, 875 F.2d at 1016, 10 Employee Benefits Cas. (BNA) at 2433.

⁵¹ *Id.*

⁵² *Id.* at 1019, 10 Employee Benefits Cas. (BNA) at 2435-36.

⁵³ *Id.* at 1021, 10 Employee Benefits Cas. (BNA) at 2438.

pension plan.⁵⁴ The Court rejected the Second Circuit's determination that the PBGC must consider bankruptcy and labor laws in deciding whether to restore a pension plan, noting that the appellate court did not hold that the PBGC's decision actually conflicted with these laws.⁵⁵ The Court also deferred to the PBGC's characterization of follow-on plans as an abuse of title IV, and upheld the PBGC's authority to restore a plan based solely on the existence of such follow-on plans.⁵⁶

The Court first observed that the language of section 4047 allows the PBGC to make restoration decisions based on its responsibilities under title IV of ERISA, not the general public interest.⁵⁷ If agency decisions were routinely invalidated because they failed to consider all relevant policies outside the agency's enabling act, the Court pointed out, many agency decisions were likely to be overturned.⁵⁸ The Court also noted that the PBGC was not particularly equipped to consider questions of bankruptcy and labor law, and at any rate, at least some of these areas had been considered by Congress and incorporated into ERISA when it was written.⁵⁹

The Court next concluded that the court of appeals improperly reviewed the PBGC's statutory interpretation of its enabling act.⁶⁰ In reviewing PBGC action, the Court stated that the proper standard had been set forth in *Chevron v. Natural Resources Defense Council*, which required courts to determine, in the absence of explicit direction from Congress, whether an agency's interpretation is a permissible construction of a statute.⁶¹ The Court observed that

⁵⁴ 110 S. Ct. at 2681, 12 Employee Benefits Cas. (BNA) at 1604. On remand, the United States District Court for the Southern District of New York concluded that the Supreme Court indicated that the PBGC could restore a plan based solely on the existence of follow-on plans, without considering other factors such as the likelihood of retermination. *PBGC v. LTV Corp.*, 12 Employee Benefits Cas. (BNA) 2785, 2791 (S.D.N.Y. 1990). It therefore found that the PBGC's exercise of restoration authority was valid. *Id.* at 2793.

⁵⁵ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2675, 12 Employee Benefits Cas. (BNA) at 1598-99.

⁵⁶ *Id.* at 2678-79, 12 Employee Benefits Cas. (BNA) at 1601-02.

⁵⁷ *Id.* at 2675-76, 12 Employee Benefits Cas. (BNA) at 1599.

⁵⁸ 110 S. Ct. at 2676, 12 Employee Benefits Cas. (BNA) at 1599.

⁵⁹ *Id.* at 2676 & n.7, 12 Employee Benefits Cas. (BNA) at 1599 & n.7.

⁶⁰ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2676, 12 Employee Benefits Cas. (BNA) at 1599-1600.

⁶¹ *Id.* at 2676-77, 12 Employee Benefits Cas. (BNA) at 1600 (quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). If Congress has spoken on the matter, the court must give effect to Congress's unambiguous intent. If there is no clear expression of congressional intent, the court must determine whether the agency's interpretation is a permissible construction of the statute. 110 S. Ct. at 2676-77, 12 Employee Benefits Cas. (BNA) at 1600; see e.g., *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 10 Employee Benefits Cas.

neither the text of section 4047 nor the statutory purposes in section 4002 of title IV of ERISA spoke specifically to the PBGC's ability to base restoration of pension plans on follow-on plans.⁶² The Court concluded that a gap in the Act could not be construed as a prohibition.⁶³

Moreover, in considering the legislative history of ERISA, the Court disagreed with the appellate court's conclusion that the absence of any discussion regarding follow-on plans meant that Congress intended that the PBGC should not consider follow-on plans in restoring a terminated plan.⁶⁴ The Court noted that Congress's example of financial recovery as a ground for restoration was not meant to be exhaustive and did not preclude the PBGC's consideration of other factors in making a restoration decision.⁶⁵ In addition, the Court rejected any reliance on Congress's consideration and rejection of a 1987 amendment to ERISA that would have given the PBGC express authority to prohibit follow-on plans.⁶⁶ Rather, the Court suggested that Congress may have failed to enact the amendment because it thought the PBGC was properly exercising its authority in the LTV litigation.⁶⁷

The Court also rejected LTV's position that the PBGC's decision to base restoration decisions on the existence of follow-on plans was irrational.⁶⁸ The Court stated that the PBGC's consideration of follow-on plans was "eminently reasonable" because employees are less likely to object to the termination of a pension plan if they believe that a substantially similar follow-on plan will be created following termination.⁶⁹ Thus, follow-on plans remove the important "check" of employee resistance from the termination procedure, and undermine the maintenance of voluntary pension plans.⁷⁰

(BNA) 2569, 2572 (1988) (applying *Chevron* standard to determine meaning of § 4044(a) of ERISA); *In re Chateaugay Corp.*, 87 B.R. 779, 812, 9 Employee Benefits Cas. (BNA) 2209, 2241 (S.D.N.Y. 1988) (applying *Chevron* standard in interpreting § 4047).

⁶² 110 S. Ct. at 2677, 12 Employee Benefits Cas. (BNA) at 1600.

⁶³ *Id.* at 2677, 12 Employee Benefits Cas. (BNA) at 1600.

⁶⁴ *Id.* at 2677, 12 Employee Benefits Cas. (BNA) at 1601.

⁶⁵ *Id.* at 2677-78, 12 Employee Benefits Cas. (BNA) at 1600-01 (quoting H.R. CONF. REP. NO. 93-1280, 93d Cong., 2d Sess. 378 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5157).

⁶⁶ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2678, 12 Employee Benefits Cas. (BNA) at 1601.

⁶⁷ *Id.* at 2678, 12 Employee Benefits Cas. (BNA) at 1601.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*, 12 Employee Benefits Cas. (BNA) at 1601-02; see also ERISA, 29 U.S.C. § 1302(a)(1).

Consequently, the Court concluded that the PBGC's consideration of follow-on plans was rational and permissible.⁷¹

Finally, the Court considered the adequacy of the PBGC's procedures in deciding to restore the LTV pension plans.⁷² The applicable standard, set forth by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, provided that courts cannot require agencies to undertake procedures not required under the Administrative Procedures Act.⁷³ The determination by the PBGC to restore LTV's pension plans was made through informal adjudication that, according to the Court, fell under section 555 of the Administrative Procedure Act and did not require procedural elements such as notice or an opportunity to submit proposed findings.⁷⁴ Thus, the Court held that the PBGC's action was sufficient under the law.⁷⁵

Justice White wrote a separate opinion, concurring in part and dissenting in part, in which Justice O'Connor joined. While Justice White agreed that the PBGC could restore LTV's pension plans based on the follow-on plan, he contended that the Notice of Restoration did not rely solely on this ground, but relied on both the anti-follow-on plan policy and the PBGC's assessment of financial factors.⁷⁶ Thus, Justice White suggested that if the PBGC's consideration of LTV's financial position was inadequate, the case should be remanded to determine whether the anti-follow-on plan policy alone was sufficient to justify the PBGC's restoration action.⁷⁷

Justice Stevens dissented, arguing that the PBGC's anti-follow-on plan policy conflicted with the PBGC's statutory role.⁷⁸ Justice Stevens stated that restoration could only be based on an improvement in the financial condition of LTV.⁷⁹ Justice Stevens further argued that a company in bankruptcy should be able to use the

⁷¹ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2679, 12 Employee Benefits Cas. (BNA) at 1602.

⁷² *Id.*

⁷³ *Id.* at 2680, 12 Employee Benefits Cas. (BNA) at 1603 (citing 435 U.S. 519, 524 (1978)). The Court distinguished *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), stating that *Overton Park* merely stood for the proposition that an agency must provide an explanation of its action sufficient to allow judicial review. 110 S. Ct. at 2680, 12 Employee Benefits Cas. (BNA) at 1603.

⁷⁴ *Id.* at 2680-81, 12 Employee Benefits Cas. (BNA) at 1604.

⁷⁵ *Id.* at 2681, 12 Employee Benefits Cas. (BNA) at 1604.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. at 2682, 12 Employee Benefits Cas. (BNA) at 1605 (Stevens, J., dissenting).

⁷⁹ *Id.*

PBGC insurance as a "financial cushion" to assist in reorganization.⁸⁰ In addition, Justice Stevens noted that follow-on plans are actually consistent with the stated objectives of ERISA because they are an alternative which helps preserve continued pension payments to employees.⁸¹ Finally, Justice Stevens argued that employee resistance to pension plan termination is misplaced when termination is involuntary and taken by the PBGC.⁸²

Hence, the *LTV* Court diverged from the lower courts by determining that the text and legislative history of ERISA allowed the PBGC to consider follow-on plans in deciding whether to restore a terminated pension plan.⁸³ The Court rejected the requirement that the PBGC consider bankruptcy and labor law in its restoration decisions.⁸⁴ Finally, the Court deferred to the PBGC's characterization of follow-on plans as an abuse of the policy of title IV of ERISA, and upheld the PBGC's discretionary power to restore a plan based solely on this factor.⁸⁵

The Supreme Court decision in *LTV* is significant because, prior to this decision, the PBGC's restoration authority under section 4047 of ERISA was untested.⁸⁶ The Notice of Restoration issued by the PBGC in *LTV* was the first to be issued under section 4047 of ERISA following involuntary termination.⁸⁷ Prior to *LTV*, courts gave considerable deference to the PBGC's interpretation and application of ERISA, and applied the *Chevron* standard of review.⁸⁸ In *LTV*, the Supreme Court adopted the same standard of review, and arguably gave additional deference to the PBGC in the construction and application of section 4047 of ERISA.

The most important implication of the *LTV* Court's deference to the PBGC is the Court's implied holding that the PBGC has

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2682-83, 12 Employee Benefits Cas. (BNA) at 1605-06 (Stevens, J., dissenting).

⁸³ *Id.* at 2677-78, 12 Employee Benefits Cas. (BNA) at 1601.

⁸⁴ *Id.* at 2676, 12 Employee Benefits Cas. (BNA) at 1599.

⁸⁵ *Id.* at 2678-79, 12 Employee Benefits Cas. (BNA) at 1601-02.

⁸⁶ *Id.* at 2682 n.2, 12 Employee Benefits Cas. (BNA) at 1606 n.2 (Stevens, J., dissenting); Lee A. Sheppard, *Supreme Court Hears Arguments in Landmark PBGC v. LTV Case*, 46 TAX NOTES 1110, 1110 (1990).

⁸⁷ 110 S. Ct. at 2682 n.2, 12 Employee Benefits Cas. (BNA) at 1606 n.2 (Stevens, J., dissenting); Sheppard, *supra* note 86, at 1110.

⁸⁸ See, e.g., *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 10 Employee Benefits Cas. (BNA) 2569, 2572 (1988) (applying *Chevron* standard to determine meaning of § 4044(a) of ERISA); *Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 730-31, 1 Employee Benefits Cas. (BNA) 1410, 1411-12 (1978), *cert. denied*, 440 U.S. 935 (1979) (deferring to agency); *In re Chateaugay Corp.*, 87 B.R. 779, 812, 9 Employee Benefits Cas. (BNA) 2209, 2241 (S.D.N.Y. 1988).

discretion to restore a plan even if restoration will lead immediately to retermination.⁸⁹ On remand, the United States District Court for the Southern District of New York concluded that the Supreme Court had stated that the PBGC could restore a plan based solely on the existence of follow-on plans.⁹⁰ Thus, the PBGC could initiate restoration without considering other factors such as the likelihood of retermination.⁹¹

The apparent effect of such broad discretion is that employers with financial difficulties, even those in bankruptcy, may once again find themselves responsible for terminated pension plans that they are not capable of funding.⁹² In addition, the Supreme Court's decision is likely to discourage employers from post-termination collective bargaining or other post-termination arrangements.⁹³ The Supreme Court was apparently not swayed by arguments such as those adopted by the *Wheeling-Pittsburgh* court, which stated that the PBGC should focus more on the protection of the retirees covered under ERISA and less on the PBGC's pecuniary interests in potential liability for underfunded plans.⁹⁴ The Court appeared to be similarly unimpressed with the *Wheeling-Pittsburgh* court's position that the PBGC's anti-follow-on plan policy failed to appreciate the plight of a bankrupt employer.⁹⁵ Instead, the Supreme Court upheld the PBGC's position that follow-on plans were an abuse of the system because of their tendency to undermine employee resistance to plan termination.⁹⁶

The Court's award of considerable discretion to the PBGC in its restoration decisions has two major practical implications. First, it may discourage unfair competition among ERISA-insured corporations. If LTV had been allowed to continue to refuse restora-

⁸⁹ See *PBGC v. LTV Corp.*, 12 Employee Benefits Cas. (BNA) 2785, 2791 (S.D.N.Y. 1990) (on remand).

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

⁹³ As Justice Scalia pointed out in the oral argument before the Supreme Court, "it's strange for the Federal government to allow your company to give the same benefits as before with the taxpayers paying 85 percent of the cost while your competitors pay the full cost of their pension benefits. Shouldn't you have said no to the union's demand for replacement benefits?" Sheppard, *supra* note 86, at 1112.

⁹⁴ See *In re Wheeling-Pittsburgh Steel Corp.*, 103 B.R. 672, 686, 11 Employee Benefits Cas. (BNA) 1097, 1109 (W.D. Pa. 1989).

⁹⁵ See *id.* at 688, 11 Employee Benefits Cas. (BNA) at 1111.

⁹⁶ *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2678, 12 Employee Benefits Cas. (BNA) 1593, 1601 (1990).

tion of its plans, it would have saved approximately two hundred million dollars per year, which equals a twenty dollar per ton of steel advantage over its competitors.⁹⁷ Thus, LTV would have been able to provide substantially the same pension benefits, with the cost subsidized by the PBGC and the premiums paid by LTV's competitors.⁹⁸ At oral argument, Justices Rehnquist and Scalia noted the patent unfairness of such an arrangement.⁹⁹

In addition, restoration of the LTV pension plans will save the PBGC approximately \$2.5 billion and prevent the "downward spiral" of the pension insurance program, which has been operating at a net deficit for many years.¹⁰⁰ By recognizing the PBGC's discretion to restore a plan based on the existence of follow-on plans, the Supreme Court may help ensure the future solvency of the federal pension insurance program, and the likelihood that federal funds will be available when they are truly needed. Thus, while the Supreme Court's grant of discretion to the PBGC in its restoration decisions may have negative implications for employers, it may also promote the long-term survival of the PBGC and the continued protection of pension beneficiaries.

In *Pension Benefit Guaranty Corp. v. LTV Corp.*, the United States Supreme Court held that the PBGC could restore a terminated pension plan under section 4047 of ERISA, based on the existence of follow-on plans.¹⁰¹ The Court further held that the PBGC's failure to consider all potentially relevant areas of law did not render its decision arbitrary and capricious.¹⁰² Moreover, the PBGC's restoration decision did not violate the procedural requirements of the Administrative Procedure Act.¹⁰³ Thus, the Supreme Court deferred to the PBGC's interpretation of its restoration authority, granting it broad discretion to make restoration decisions based on the existence of follow-on plans. Such broad restoration authority may concern financially burdened employers who fear restoration of pension plans they can no longer afford, but this burden is necessary to prevent abuse of ERISA's pension insurance program and to ensure its long-term viability.

⁹⁷ Sheppard, *supra* note 86, at 1111.

⁹⁸ *See id.*

⁹⁹ *See id.* at 1111-12.

¹⁰⁰ Ellin Rosenthal, *PBGC Breathes Sigh of Relief After LTV Victory: Pensions Targeted for Simplification*, 47 TAX NOTES 1546, 1546 (1990); J. Robert Suffoletta, Jr., *supra* note 8, at 314.

¹⁰¹ 110 S. Ct. at 2681, 12 Employee Benefits Cas. (BNA) at 1604.

¹⁰² *Id.*

¹⁰³ *Id.*

VII. INTERSTATE COMMERCE ACT

A. * *Exemption from Collective Bargaining Agreements in ICC-Approved Rail Carrier Transactions: Norfolk & Western Railway v. American Train Dispatchers Ass'n*¹

Section 11341 of the Interstate Commerce Act (the "ICA") grants to the Interstate Commerce Commission (the "ICC") exclusive power to examine and approve transactions among rail carriers within its jurisdiction.² In 1948, the United States Supreme Court held in *Schwabacher v. United States* that the ICA granted to the ICC plenary jurisdiction when evaluating railroad mergers and that the ICC must look only to the ICA for standards when passing on such mergers.³ The Court held that Congress granted this broad authority to enable the ICC to promote efficiency and profitability within the troubled railroad industry by means of carrier consolidations.⁴

Under section 11344(c) of the ICA, the ICC must approve any proposed transaction that it finds is consistent with the public interest.⁵ In such an evaluation the ICA requires the ICC to consider the impact of a transaction on railway employees and to stipulate labor-protective measures to be taken by the carrier.⁶ Once the ICC approves a transaction, section 11341(a) of the ICA exempts the parties from the "antitrust laws and from all other law, including

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¹ 111 S. Ct. 1156, 136 L.R.R.M. 2727 (1991).

² 49 U.S.C. § 11341 (1988). Section 11341 provides in part:

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control of franchises acquired through the transaction.

Id.

³ *Schwabacher v. United States*, 334 U.S. 182, 198 (1948).

⁴ *Id.* at 191-92.

⁵ 49 U.S.C. § 11344(c) (1988).

⁶ *Id.* §§ 11344(b)(1)(D), 11347. Section 11344(b)(1)(D) states that the ICC must consider at least "the interest of carrier employees affected by the proposed transaction." *Id.* § 11344(b)(1)(D). Section 11347 requires the ICC to impose certain labor-protective measures. *Id.* § 11347.

State and municipal law" as necessary to accomplish the transaction.⁷ Congress did not explicitly define a limit when it extended the ICC's exemption power to "all other law."⁸

In *Schwabacher*, the United States Supreme Court ruled against minority stockholders of a rail carrier whose shares were diminished in value by a merger that had received ICC approval.⁹ The appellants claimed that the transaction violated their contract rights under Michigan law because the corporate charter had guaranteed the value of their shares.¹⁰ Relying in part upon the immunity provision in section 5(11) of the Transportation Act of 1940 (later codified with minimal change as section 11341(a) of the ICA),¹¹ the Court held that contract rights protected by state law were superseded by the merger agreement that the ICC had found to be in the public interest.¹² The Court reasoned that the ICA required the ICC to consider such rights during its evaluation of the proposed merger, and that state-protected rights did not survive the merger once the ICC approved it.¹³

In addition to stockholders, railroad mergers can also adversely affect labor organizations who seek protection of their contract rights under the Railway Labor Act (the "RLA").¹⁴ The RLA dictates the obligations of management and labor to make and maintain collective bargaining agreements and lays out specific procedures for the construction and enforcement of such agreements.¹⁵ The ICC has asserted that its power to exempt carriers from "all other laws" under section 11341(a) of the ICA includes the power to

⁷ 49 U.S.C. § 11341(a) (1988); see also *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1159, 136 L.R.R.M. 2727, 2728-29 (1991).

⁸ 49 U.S.C. § 11341(a) (1988); see also *Norfolk & W.*, 111 S. Ct. at 1163, 136 L.R.R.M. at 2732.

⁹ *Schwabacher v. United States*, 334 U.S. 182, 201 (1948).

¹⁰ *Id.* at 184-85.

¹¹ 49 U.S.C. § 11341(a) (1988).

¹² See *Schwabacher*, 334 U.S. at 194-95.

¹³ *Id.* at 201.

¹⁴ 45 U.S.C. §§ 151-162 (1988). RLA section 152 provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Id. § 152.

¹⁵ *Id.*; see also *Norfolk & W.*, 111 S. Ct. at 1165, 136 L.R.R.M. at 2733.

relieve carriers from the obligations of collective bargaining agreements and the RLA.¹⁶

In 1989, the United States Supreme Court in *ICC v. Brotherhood of Locomotive Engineers* declined to address the merits of this claim, holding that on the facts of the case the ICC's decision was non-reviewable.¹⁷ In a concurring opinion, however, Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, contended that the reach of the exemption from "all other law" was determined by the scope of the approved transaction.¹⁸ Justice Stevens asserted that once the ICC has approved a transaction, the exemption under section 11341(a) automatically flows from the approval, suspending other laws where necessary to carry out the transaction as approved.¹⁹ The Court left undecided, however, the ICC's capacity to immunize rail carriers from their RLA-protected collective bargaining obligations to their employees.²⁰

During the *Survey* year, in *Norfolk & Western Railway v. American Train Dispatchers Ass'n*, the United States Supreme Court held that collective bargaining agreements *are* encompassed by the term "all other law" in section 11341(a).²¹ The Court held that where abrogation of collective bargaining agreements is necessary to accomplish an approved transaction, railroad carriers are not bound to the terms of these agreements.²² As a result of *Norfolk & Western*, the ICC, in its determination of whether a proposed rail merger is in the public interest, will be the sole arbiter of what is fair protection for employees affected by the transaction.²³ Consequently, rail-

¹⁶ See *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 295-96, 125 L.R.R.M. 2526, 2536 (1987) (Stevens, J., concurring). The case involved a claim by the labor union that the structure of an ICC-approved transaction violated the RLA and existing collective bargaining agreements that guaranteed protection to affected employees. *Id.* at 276, 125 L.R.R.M. at 2528. The ICC refused the union's appeal for a rehearing. *Id.* The Supreme Court held that when the ICC refuses to reopen a proceeding, only the refusal is reviewable, not the merits of the ICC's original order. *Id.* at 278, 125 L.R.R.M. at 2529. In a concurring opinion, Justice Stevens argued that the original ICC order was reviewable. *Id.* at 288-89, 125 L.R.R.M. at 2533. Furthermore, Justice Stevens contended that the ICC order was properly issued and that the § 11341(a) exemption automatically flowed from the order. *Id.* at 298-99, 125 L.R.R.M. at 2537.

¹⁷ *Id.* at 280, 125 L.R.R.M. at 2530.

¹⁸ *Id.* at 298, 125 L.R.R.M. at 2537.

¹⁹ *Id.* at 298-99, 125 L.R.R.M. at 2537.

²⁰ See *id.* at 280, 125 L.R.R.M. at 2530.

²¹ 111 S. Ct. 1156, 1166, 136 L.R.R.M. 2727, 2734 (1991).

²² *Id.* at 1163, 136 L.R.R.M. at 2732.

²³ *Id.* at 1159, 136 L.R.R.M. at 2728-29.

way labor unions may be left unprotected by their existing collective bargaining agreements in the face of railroad consolidations.²⁴

The *Norfolk & Western* decision reversed the holding of the Circuit Court of Appeals for the District of Columbia, which had combined two separate appeals from ICC cases with common issues.²⁵ In both lower court decisions, the ICC held that it could relieve rail carriers in approved transactions from collective bargaining agreements that hindered completion of the merger.²⁶ In the first case, *Norfolk Southern Corp.-Control-Norfolk and Western Railway and Southern Railway*, NWS Enterprises, Inc. had sought ICC approval of an application to acquire control of Norfolk and Western Railway and Southern Railway.²⁷ In March of 1982, the ICC approved the application, imposing the labor-protective measures, required by ICA sections 11344(b)(4) and 11347, commonly referred to as the *New York Dock* procedures.²⁸ In September 1986, the carriers proposed consolidating the assignment of locomotives to particular trains and facilities by transferring this activity from Roanoke, Virginia to Atlanta, Georgia.²⁹ Though the proposal included concessions to the affected employees, the American Train Dispatchers Association challenged the move as a change to the existing collective bargaining agreements, subject to mandatory negotiations under the RLA.³⁰ The union also alleged that the rail-

²⁴ See *id.* at 1163, 136 L.R.R.M. at 2732.

²⁵ *Id.* at 1161-62, 136 L.R.R.M. at 2731.

²⁶ *Id.* at 1159-61, 136 L.R.R.M. at 2729-31.

²⁷ *Norfolk S. Corp.-Control-Norfolk and W. Ry. and S. Ry.*, 366 I.C.C. 173, 175-76 (1982), *rev'd sub nom.* *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562, 131 L.R.R.M. 3228 (D.C. Cir. 1989), *rev'd sub nom.* *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 136 L.R.R.M. 2727 (1991).

²⁸ *Id.* at 229-31. The ICC established a comprehensive set of measures to satisfy § 11347 of the ICA in *New York Dock Ry.-Control-Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, *aff'd sub nom.* *New York Dock Ry. v. United States*, 609 F.2d 83, 102 L.R.R.M. 2835 (2d Cir. 1979). Section 2 of the *New York Dock* procedures provides:

the rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Id. at 84. Section 4 requires ninety days written notice be given to employees of the contemplation of any transaction that may cause their dismissal or displacement, and provides procedures for referral to arbitration of any dispute that cannot be resolved after 30 days. *Id.* at 85. Section 11 provides for mandatory referral of a dispute to arbitration at the request of either party. *Id.* at 87-88.

²⁹ *Norfolk & W.*, 111 S. Ct. at 1160, 136 L.R.R.M. at 2729.

³⁰ *Id.*

roads were obligated to preserve the affected employees' collective bargaining rights.³¹ After negotiations failed, the carriers invoked the *New York Dock* binding arbitration procedures.³²

The arbitration committee found that the transfer of work to Atlanta was a necessary step toward achieving the profitability goals of the ICC.³³ Furthermore, the committee held that it possessed the authority to override the collective bargaining agreements and the RLA where such an override was necessary to accomplish the merger.³⁴ Because the bargaining agreement would impede the transfer, the committee concluded that the affected employees should not retain their collective bargaining rights.³⁵ The ICC heard the union's appeal from the arbitration decision, and affirmed by a divided vote.³⁶ The ICC-mandated *New York Dock* procedures, it held, would supersede collective bargaining agreements and RLA provisions when necessary to implement an approved transaction.³⁷

In the second case before the Supreme Court, *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, the ICC had approved an application by CSX Corporation to acquire control of Chessie System, Inc., and Seaboard Coastline Industries, Inc.³⁸ The ICC imposed the *New York Dock* conditions to protect against employee displacements it foresaw as a result of the acquisition.³⁹ In August, 1986, the consolidated CSX notified the Brotherhood of Railway Carmen that it planned to move a repair shop from Georgia to Kentucky, and that it anticipated job reductions.⁴⁰ The union objected on the grounds that the reductions violated its 1966 collective bargaining agreement, known as the "Orange Book."⁴¹ A *New York Dock* arbitration panel ruled for the railroad.⁴² The panel held that

³¹ *Id.*

³² *Id.* at 1160, 136 L.R.R.M. at 2729-30.

³³ *Id.* at 1160, 136 L.R.R.M. at 2730.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ CSX Corp.-Control-Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc., 363 I.C.C. 521, 530-31 (1980), *rev'd sub nom.* Brotherhood of Ry. Carmen v. ICC, 880 F.2d 562, 131 L.R.R.M. 3228 (D.C. Cir. 1989), *rev'd sub nom.* Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156, 136 L.R.R.M. 2727 (1991).

³⁹ *Norfolk & W.*, 111 S. Ct. at 1161, 136 L.R.R.M. at 2730.

⁴⁰ *Id.*

⁴¹ *Id.* The Orange Book embodied an agreement between the carrier and the employees that each employee's job, work conditions and benefits were guaranteed for the employee's entire working life. *Id.*

⁴² *Id.*

despite the contrary provisions of the Orange Book, any collective bargaining agreement or RLA provision that impeded the changes authorized by the ICC-approved merger could be overridden.⁴³ As the Orange Book would only slightly limit the carrier's ability to complete the change, however, the panel held that the railroad could make the move but could not transfer employees protected by the Orange Book.⁴⁴ On appeal, the ICC refused to uphold the Orange Book provisions.⁴⁵ The ICC asserted that the collective bargaining agreement impeded the approved transaction, and that neither the RLA requirements nor the Orange Book would be allowed to undermine the acquisition.⁴⁶

The United States Court of Appeals for the District of Columbia Circuit combined the two ICC cases.⁴⁷ The court reversed both decisions and remanded to the ICC, holding that the exemption from "all other law" granted in ICA section 11341(a) did not mean "all legal obstacles."⁴⁸ Furthermore, the court held that ICC approval of a transaction does not permit carriers to excuse themselves from collective bargaining agreements that give rise to *contractual* obligations.⁴⁹ Such an interpretation, the court feared, would lead to "bizarre" results, potentially enabling carriers to flaunt obligations to creditors.⁵⁰ The D.C. Circuit Court held that Congress had intended to excuse parties only from laws that were positive enactments, such as antitrust and state legislation, not from common law rules of contract.⁵¹ The court declined to decide whether section 11341(a) could operate to override provisions of the RLA, or whether the *New York Dock* conditions could authorize an arbitration committee to supersede collective bargaining provisions with its own measures.⁵²

In *Norfolk & Western*, the United States Supreme Court reversed the circuit court's decision and held that the exemption from "all

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1161, 136 L.R.R.M. at 2730-31 (citing CSX Corp.-Control-Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc., 4 I.C.C.2d 641, 650 (1988)).

⁴⁶ *Id.*

⁴⁷ *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562, 562, 131 L.R.R.M. 3228, 3228 (D.C. Cir. 1989), *rev'd sub nom. Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 136 L.R.R.M. 2727 (1991).

⁴⁸ *Id.* at 567, 131 L.R.R.M. at 3232.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 570, 131 L.R.R.M. at 3234.

⁵² *Id.* at 573, 131 L.R.R.M. at 3236-37.

other law" in section 11341(a) does include the contractual obligations of a collective bargaining agreement.⁵³ The Supreme Court reasoned that a simple reading of the term "all other law" revealed an explicit, unambiguous intent to override all legal obstacles to the completion of a transaction once the ICC had considered and approved the transaction.⁵⁴ The Court stipulated that such an exemption existed only where the ICC had properly considered the public interest factors of section 11343(b)(1).⁵⁵ The Court also held that the decision to override a carrier's obligations must satisfy the labor-protective requirements of section 11347 and must be necessary to the implementation of the transaction.⁵⁶

The Court in *Norfolk & Western* began its analysis with an examination of the language of the statute.⁵⁷ It held that the language in section 11341(a) exempting carriers from "the antitrust laws and all other law, including State and municipal law" to be "clear, broad and unqualified."⁵⁸ The Court uncovered no basis for the distinction the court of appeals had drawn between positively enacted law and common law.⁵⁹ Rather, the Court held that section 11341(a) provides an exemption from *all law* as necessary to carry out the transaction.⁶⁰ The Court held that Congress intended an exemption this broad to ensure that once the ICC approved a transaction, other laws would not frustrate the economic results the ICA sought to achieve.⁶¹

The Court then turned to an analysis of the exemption's impact upon the Railway Labor Act.⁶² The Court held that the section 11341(a) exemption was broad enough to exempt carriers from laws that controlled the enforcement of contracts.⁶³ The Supreme Court reasoned that any contract depends upon the common and statutory law that makes it effective and enforceable.⁶⁴ It also noted that the RLA is the authority for the creation and enforcement of labor-management contracts, requiring both railroads and unions

⁵³ *Norfolk & W.*, 111 S. Ct. 1156, 1166, 136 L.R.R.M. 2727, 2734 (1991).

⁵⁴ *Id.* at 1163, 136 L.R.R.M. at 2732.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1163-64, 136 L.R.R.M. at 2732.

⁶¹ *Id.*

⁶² *Id.* at 1165, 136 L.R.R.M. at 2733.

⁶³ *Id.* at 1164, 136 L.R.R.M. at 2732.

⁶⁴ *Id.*

to make and maintain collective bargaining agreements.⁶⁵ The Court held, therefore, that where the RLA imposes upon a carrier collective bargaining obligations that impede the accomplishment of an approved transaction, the RLA is superseded by the ICA exemption.⁶⁶

The Court wrote that this holding followed from its decision in *Schwabacher*.⁶⁷ Just as the obligations of state contract law did not survive the merger in *Schwabacher*, the Court held that the collective bargaining agreements guaranteed by the RLA did not survive the ICC-approved mergers in *Norfolk & Western*.⁶⁸ In both cases, the Court observed, the exemption afforded relief to carriers from a law that gave force to contracts obstructing the accomplishment of an approved transaction.⁶⁹

The *Norfolk & Western* Court reasoned that its interpretation of section 11341(a) would be faithful to the ICA policy goal of promoting economy and efficiency in interstate transportation by relieving carriers of excessive cost burdens.⁷⁰ The Court noted that the ICA anticipated the effects of mergers and acquisitions upon rail labor, and imposed a number of labor-protective measures to ensure that the interests of employees are considered to the greatest extent possible.⁷¹ To submit approved transactions to the "interminable" procedures and protections under the RLA would be redundant, the Court reasoned, and would reduce the efficiency sought by the ICA.⁷² Finally, the Court maintained that because the operation of the exemption clause would only override collective bargaining agreements where the ICC had fully considered and approved the transaction and where the exemption was necessary to accomplish the transaction, its holding would not lead to "bizarre" results, as predicted by the D.C. Circuit Court.⁷³

Justice Stevens, joined by Justice Marshall, dissented from the decision.⁷⁴ Justice Stevens rejected as overbroad the majority's interpretation of the phrase "all other laws," stating that if Congress

⁶⁵ *Id.* at 1165, 136 L.R.R.M. at 2733.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1164, 136 L.R.R.M. at 2733 (citing *Schwabacher v. United States*, 334 U.S. 182, 188 (1948)).

⁶⁸ *Norfolk & W.*, 111 S. Ct. at 1165, 136 L.R.R.M. at 2733.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1165, 136 L.R.R.M. at 2733-34.

⁷¹ *Id.* (citing 49 U.S.C. §§ 11347, 11344(b)(1)(D) (1988)).

⁷² *Id.* at 1166, 136 L.R.R.M. at 2734.

⁷³ *Id.* (citing *Brotherhood of Ry. Carmen v. ICC*, 880 F.2d at 567, 131 L.R.R.M. at 3232).

⁷⁴ *Id.* (Stevens, J., dissenting).

had intended the ICC to possess the power to override the obligations of contracts, it would have stated so explicitly.⁷⁵ Justice Stevens argued that the original statute granting the exemption power to the ICC, Section 407 of the Transportation Act of 1920, targeted federal antitrust laws, not common law rules of contract.⁷⁶

Justice Stevens also rejected the majority's reading of the *Schwabacher* case.⁷⁷ The emphasis in *Schwabacher*, he argued, was on the importance of the ICC's ability to control the capital structure of a merger, and the difficulty of having such control obstructed by Michigan law.⁷⁸ According to Justice Stevens, *Schwabacher* did not relieve carriers of private contracts that limit the achievable benefits of rail consolidations.⁷⁹ Finally, Justice Stevens cited section 2 of the *New York Dock* procedures, which states that "existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements."⁸⁰ This provision, Justice Stevens argued, indicates that the drafters intended the collective bargaining agreements to survive ICC-approved mergers.⁸¹ Justice Stevens asserted that extending the ICA exemption to include collective bargaining agreements would therefore contradict the drafters' intent.⁸²

The Supreme Court's opinion in *Norfolk & Western* resolves to some degree the conflicting national policies embodied in the RLA and the ICA. Historically, employees of railroad carriers have enjoyed a unique degree of job protection in the face of consolidations.⁸³ In the more competitive transportation environment that has existed since the early 1980s, however, the extensive protections granted to rail labor under the RLA have enjoyed diminished public and congressional support.⁸⁴ The scope of discretion granted to the ICC as a result of *Norfolk & Western* gives the ICC more power to

⁷⁵ *Id.* at 1167, 136 L.R.R.M. at 2735 (Stevens, J., dissenting).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1169, 136 L.R.R.M. at 2736 (Stevens, J., dissenting).

⁷⁸ *Id.* at 1170, 136 L.R.R.M. at 2737 (Stevens, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *New York Dock Ry.-Control-Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, 84-90, *aff'd sub nom.* *New York Dock Ry. v. United States*, 609 F.2d 83, 102 L.R.R.M. 2835 (2d Cir. 1979)).

⁸¹ *Id.*

⁸² *Id.*

⁸³ William E. Thoms & Sonja Clapp, *Labor Protection in the Transportation Industry*, 64 N.D. L. REV. 379, 380 (1988).

⁸⁴ *Id.*

make carrier mergers economically feasible and efficient, potentially at the expense of railroad employees.⁸⁵

The *Norfolk & Western* decision affects labor-management disputes in two ways. First, the holding serves notice to labor unions confronted with carrier consolidations that collective bargaining agreements will not necessarily provide the security they once did. Railway union members may no longer enjoy the "job for life" security guaranteed by the RLA, especially when employed by severely strapped carriers who are able to make few concessions in executing an economically feasible merger.⁸⁶ Unions will need to seek other sources of relief to counterbalance the risk of relocation or layoffs.

Second, *New York Dock* arbitration and ICC hearings will be far more important to the unions as the only forums in which to "make their case" and demonstrate the severity of hardship that will result from a proposed merger. The ICC must still satisfy the labor-protective conditions of section 11347, and must determine that the merger and labor measures are in the public interest.⁸⁷ The *Norfolk & Western* decision leaves the evaluation of labor hardships that will result from a railroad transaction exclusively within the purview of the ICC.⁸⁸ No longer able to rely on the protections gained in collective bargaining negotiations, railroad unions threatened by a merger will only have recourse to arbitration under the *New York Dock* procedures and to the conditions imposed by the ICC during review and approval of merger applications under ICA sections 11347 and 11343(b).⁸⁹

⁸⁵ See *Norfolk & W.*, 111 S. Ct. at 1165, 136 L.R.R.M. at 2733-34. The Court stated that its holding will help achieve the goals of the ICA by ensuring that laws such as the RLA will not prevent the ICC from accomplishing the efficiencies the ICA seeks through consolidation. *Id.*

⁸⁶ See Thoms & Clapp, *supra* note 83, at 392.

⁸⁷ *Norfolk & W.*, 111 S. Ct. at 1163, 136 L.R.R.M. at 2732.

⁸⁸ See 49 U.S.C. § 11341 (1988); *Schwabacher v. United States*, 344 U.S. 182, 191-92 (1948). By eliminating collective bargaining agreements as a limitation on ICC approval of transactions, *Norfolk & Western* effectively frees the ICC to determine for itself what is fair treatment for labor.

⁸⁹ See *Norfolk & W.*, 111 S. Ct. at 1163, 136 L.R.R.M. at 2732. The *New York Dock* procedures must still be satisfied by the ICC according to § 11347 of the ICA, and the ICC can impose further protections to satisfy § 11344(b)(1)(D). See *id.* Once the ICC, in its judgment, has accomplished this, collective bargaining agreements and the RLA presumably will provide no further protection against displacement or layoffs. See *id.* at 1166, 136 L.R.R.M. at 2734.

Justice Stevens expressed concern over the implications of allowing the section 11341(a) exemption to permit carriers to avoid their obligations under contracts to other parties.⁹⁰ Disregarding these obligations, he feared, could arguably be shown to be "necessary" to the economic goals of a consolidation.⁹¹ The majority's decision should not lead to this untoward result, however, because the ICA relieves carriers not from the contract signed in the collective bargaining agreement, but from the RLA, which governs the construction and enforcement of collective bargaining agreements.⁹²

The *Norfolk & Western* decision failed to resolve several issues. In *Brotherhood of Locomotive Engineers*, Justice Stevens contended in a concurring opinion that the exemption from "all other laws" is self-executing.⁹³ Once the ICC approves the transaction, according to Justice Stevens, immunity from "other laws" automatically attaches without further action by the ICC.⁹⁴ The *Norfolk & Western* decision refused to express an opinion on this proposition.⁹⁵ Furthermore, though the majority in *Norfolk & Western* emphasized that an exemption must be *necessary* to the transaction, a determination of necessity is a factual one.⁹⁶ The ICC in practice has not issued orders as to which measures will be necessary to a particular transaction.⁹⁷

Because the exemption may automatically attach without a finding of necessity, carriers may unilaterally assume that a particular measure is necessary to the approved transaction. Unions must then make a claim before the ICC that a transaction will violate existing law or that it is not necessary. Unions will have to monitor diligently a carrier's moves and evaluate which actions are necessary for a transaction to succeed. The union may then have to litigate each

⁹⁰ See *id.* at 1167, 136 L.R.R.M. at 2735 (Stevens, J., dissenting).

⁹¹ See *id.*

⁹² See *id.* at 1165, 136 L.R.R.M. at 2733.

⁹³ *Id.* at 1170, 136 L.R.R.M. at 2737 (Stevens, J., dissenting); *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 299, 125 L.R.R.M. at 2526, 2537 (1987) (Stevens, J., concurring).

⁹⁴ See *Norfolk & W.*, 111 S. Ct. at 1170, 136 L.R.R.M. at 2737 (Stevens, J., dissenting); *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 299, 125 L.R.R.M. at 2537.

⁹⁵ See *Norfolk & W.*, 111 S. Ct. at 1166, 136 L.R.R.M. at 2734.

⁹⁶ See *Railway Labor Executives' Ass'n v. ICC*, 883 F.2d 1079, 1082 (D.C. Cir. 1989), *amended*, 929 F.2d 742 (D.C. Cir. 1991). The D.C. Circuit Court refused to reverse an ICC order relieving participating carriers in an ICC approved merger from obligations under the RLA because the issue was not ripe. *Id.*

⁹⁷ See *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 300 n.14, 125 L.R.R.M. at 2537 n.14.

factual challenge, rather than rely on the RLA collective bargaining mechanisms.

In sum, the Supreme Court's decision in *Norfolk & Western* enlarges the authority of the ICC to control the structure and impact of proposed rail-carrier transactions. The Court's ruling, that a carrier's ICA section 11341(a) exemption from "all other laws" includes collective bargaining agreements, will permit the ICC to make railroad consolidations more profitable by relieving carriers of their RLA obligations. Railroad unions will need to persuade the ICC that employee hardship will outweigh the economic benefits of the merger, rather than rely upon adjudication of their collective bargaining agreements. Furthermore, once a transaction has been approved by the ICC, the carriers may act unilaterally in violation of collective bargaining agreements unless and until challenged by the union. The decision in *Norfolk & Western* should ease the consolidation of rail carriers, but it may also leave railroad unions with no collective bargaining protections against relocation and layoffs.

EMPLOYMENT LAW

I. PROCEDURAL DEVELOPMENTS

A. * *Clarifying the Timing Requirements for Federal Employees' Age Discrimination Claims: Stevens v. Department of the Treasury*¹

Section 633a of the Age Discrimination in Employment Act of 1967 ("ADEA") mandates that all personnel decisions affecting federal employees be made free from discrimination based on age.² Aggrieved federal employees who believe they are victims of age discrimination may pursue one of two alternative means of relief. First, the employee may proceed in an administrative action via the Equal Employment Opportunity Commission ("EEOC").³ Alternatively, the employee may file a civil action in federal district court.⁴ If a federal employee chooses to file a civil action, the ADEA provides that "no civil action may be commenced . . . until the individual has given the Commission not less than thirty days' notice of an intent to file such action."⁵ In addition, the ADEA requires that "such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred."⁶

Three issues arose in the lower courts concerning interpretation of the ADEA timing requirements that a federal employee who chooses to pursue an age discrimination claim in court must meet.⁷ First, whether the individual must file notice of intent to sue within 180 days of the alleged discriminatory incident, or actually file suit within 180 days.⁸ Second, whether the individual must file suit

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¹ 111 S. Ct. 1562, 55 FEP Cases 845 (1991).

² Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a (1988).

³ *Id.* § 633a(b).

⁴ *Id.* § 633a(c).

⁵ *Id.* § 633a(d).

⁶ *Id.*

⁷ *McGinty v. United States Dep't. of the Army*, 900 F.2d 1114, 1117, 54 FEP Cases 867, 868 (7th Cir. 1990) (administrative exhaustion); *Langford v. United States Army Corps of Eng'rs*, 839 F.2d 1192, 1193, 46 FEP Cases 121, 122 (6th Cir. 1988) (same); *Castro v. United States*, 775 F.2d 399, 403, 39 FEP Cases 162, 164 (1st Cir. 1985) (administrative exhaustion and timing requirements); *McKinney v. Dole*, 765 F.2d 1129, 1140, 38 FEP Cases at 364, 372 (D.C. Cir. 1985) (administrative exhaustion and timing requirements); *Purtill v. Harris*, 658 F.2d 134, 138, 26 FEP Cases 940, 943 (3d Cir. 1981), *cert. denied*, 462 U.S. 1131 (1983) (administrative exhaustion).

⁸ *Langford*, 839 F.2d at 1193, 46 FEP Cases at 122 (suit must be filed within 180 days of discriminatory action (citing district court opinion)); *Castro*, 775 F.2d at 403, 39 FEP Cases at 164 (suit filed within 180 days); *McKinney*, 765 F.2d at 1140, 38 FEP Cases at 372 (same).

within 30 days of notifying the EEOC, or at least 30 days after notifying the EEOC.⁹ The third issue is whether an individual must exhaust administrative remedies before proceeding to court.¹⁰

During the Survey year, in *Stevens v. Department of the Treasury*, the United States Supreme Court held that the ADEA requires a federal employee filing an age discrimination suit to provide the EEOC with notice of not less than thirty days before the suit is actually filed of the individual's intent to sue.¹¹ Such notice must be filed with the EEOC within 180 days of the alleged discriminatory incident.¹² The Court did not, however, rule on the exhaustion issue because the government changed its position and no longer alleged that a federally employed age discrimination plaintiff must first exhaust all administrative remedies through the EEOC before seeking relief through the courts.¹³ Thus, the *Stevens* decision establishes that a federal employee pursuing an age discrimination claim through the court need not exhaust administrative remedies, but must notify the EEOC within 180 days of the discriminatory incident of his or her intent to file suit and at least 30 days before the suit is actually filed.¹⁴

The appellant in *Stevens*, Charles Z. Stevens III, was an employee of the Internal Revenue Service ("IRS").¹⁵ In August 1986, at the age of 63, Stevens was accepted into the IRS's Revenue Officer Training Program and became a civil service employee with probationary status.¹⁶ Stevens was advised on April 26, 1987, that his performance in the training program was unsatisfactory.¹⁷ Rather than leaving the IRS, Stevens requested a demotion and a transfer out of the training program.¹⁸

⁹ *McGinty*, 900 F.2d at 1116-17, 54 FEP Cases at 868; *Langford*, 839 F.2d at 1193, 46 FEP Cases at 122 (citing district court opinion); *Castro*, 775 F.2d at 403, 39 FEP Cases at 164; *McKinney*, 765 F.2d at 1140, 38 FEP Cases at 372.

¹⁰ *E.g.*, *McGinty*, 900 F.2d at 1117, 54 FEP Cases at 868 (administrative exhaustion required); *White v. Frank*, 895 F.2d 243, 244, 55 FEP Cases 915, 915 (5th Cir.), *cert. denied*, 111 S. Ct. 232 (1990) (same); *Castro*, 775 F.2d at 404, 39 FEP Cases at 165 (same); *Purtill*, 658 F.2d at 136, 26 FEP Cases at 941 (same). *But see, e.g.*, *Langford*, 839 F.2d at 1194, 46 FEP Cases at 123 (no exhaustion required).

¹¹ 111 S. Ct. 1562, 1566, 55 FEP Cases 845, 847 (1991).

¹² *Id.*

¹³ *Id.* at 1568, 55 FEP Cases at 848.

¹⁴ *See id.* at 1566, 55 FEP Cases at 847.

¹⁵ *Id.* at 1565, 55 FEP Cases at 846.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

In September 1987, Stevens tried to utilize the IRS's administrative procedure for resolving age discrimination disputes by meeting with an Equal Employment Opportunity Counselor.¹⁹ Stevens had requested the meeting, however, long after the agency's period for complaint had expired.²⁰ Stevens then filed a formal administrative complaint with the Department of the Treasury on October 19, 1987.²¹ The complaint not only alleged age discrimination by the IRS but also gave notice of Stevens's intent to sue if the matter were not resolved to his satisfaction.²² This complaint was rejected on the grounds that Stevens had missed the deadline for consulting with an Equal Employment Opportunity Counselor.²³ Stevens appealed the rejection for untimeliness to the EEOC, which affirmed the decision on March 30, 1988.²⁴

Stevens next sought relief through civil suit, filing a complaint in the United States District Court for the Western District of Texas in 1988.²⁵ The district court dismissed the suit on grounds that Stevens had failed to exhaust administrative remedies and had failed to request a hearing within the required time period.²⁶ The district court also interpreted the ADEA's timing provisions as requiring that an individual who chooses court adjudication must file suit in federal court no later than 180 days after the alleged discriminatory event and must notify the EEOC within 30 days before bringing suit.²⁷ The Court of Appeals for the Fifth Circuit disagreed, holding that Stevens did not actually have to file suit, but had only to file *notice* with the EEOC within 180 days of the discriminatory act of his intent to sue.²⁸ The court of appeals, however, affirmed the dismissal of the suit on the grounds that Stevens's

¹⁹ *Id.*

²⁰ *Id.* 29 C.F.R. §§ 1613.511, 1613.512, and 1613.214(a)(1)(i) (1990) prescribed a 30-day period. Stevens had written his congressman for assistance on May 21, 1987, but that inquiry was unproductive. No reason was given for Stevens' having waited until September to meet with an Equal Employment Opportunity Counselor. *Stevens*, 111 S. Ct. at 1565, 55 FEP Cases at 846.

²¹ *Stevens*, 111 S. Ct. at 1565, 55 FEP Cases at 846.

²² *Id.* The EEOC considers notice to an individual's employing agency as complying with the statutory requirement of notice to the EEOC. *Id.* at 1566, 55 FEP Cases at 847.

²³ *Id.* at 1565, 55 FEP Cases at 846.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* The court held that Stevens had not properly invoked the administrative remedy and therefore had not exhausted that remedy because he failed to make his complaint to an Equal Employment Opportunity Counselor within 30 days of the incident.

²⁷ *Id.* Stevens brought suit 206 days after giving the EEOC notice of intent to file suit and over one year after the discriminatory incident. *Id.*

²⁸ *Id.* at 1566, 55 FEP Cases at 847.

notice to the EEOC was ineffective because his suit was not filed within 30 days of giving notice to the EEOC.²⁹

In 1991, in *Stevens v. Department of the Treasury*, the United States Supreme Court stated that the district court and court of appeals erred in interpreting the timing and notice requirements of the ADEA in a federal employee's age discrimination suit.³⁰ The Court held that under the ADEA a plaintiff must provide the EEOC with at least 30 days notice of intent to sue.³¹ Only the notice of intent to sue, and not the actual suit itself, must be filed within 180 days of the alleged discriminatory practice, in order to comply with the ADEA's requirements.³² Thus, contrary to the lower courts' decisions, wrote Justice Blackmun, Stevens had fulfilled both timing requirements of the ADEA by filing notice within 180 days of the alleged discriminatory incident of his intent to sue, and at least 30 days before the suit was actually filed.³³

The issue of Stevens's failure to exhaust the administrative procedure before filing suit was moot, the Court held, because the government changed its position and no longer asserted that a federal employee who seeks relief for age discrimination must exhaust the administrative process before bringing a civil action.³⁴ The Court reasoned that because both the government and Stevens agreed that there is no exhaustion requirement in the ADEA, no party stood adverse to Stevens.³⁵ The Court assumed the government would no longer defend its earlier position supporting an exhaustion requirement in either the instant case on remand, or in subsequent age discrimination suits brought by federal employees.³⁶ Therefore, in light of the government's change of position, the ADEA should no longer be read as requiring administrative ex-

²⁹ *Id.*

³⁰ *Id.* at 1567, 55 FEP Cases at 847.

³¹ *Id.* at 1566, 55 FEP Cases at 847.

³² *Id.*

³³ *Id.* Stevens notified the EEOC on October 19, 1987, the 176th day after the allegedly discriminatory demotion and transfer of April 27, 1987, and thus was within the ADEA's 180-day time limit for giving notice to the EEOC of intent to sue. In addition, Stevens filed suit on May 3, 1988, thereby giving the EEOC at least 30 days notice (206 days notice to be exact) as required by the ADEA. *Id.*

³⁴ *Id.* at 1568, 55 FEP Cases at 848-49.

³⁵ *Id.* The Court suggests that if future litigation does not lead to a definitive resolution, the importance of the exhaustion dispute may fade with time because the government will no longer be defending an exhaustion requirement. *Id.* at 1569, 55 FEP Cases at 849.

³⁶ *Id.* The Court noted that previous circuit court opinions holding that exhaustion is required will remain in conflict with the one circuit court opinion that held otherwise. The Court indicated there is nothing it should do in the *Stevens* case vis-à-vis those decisions. *Id.* at 1568, 55 FEP Cases at 849.

haustion before proceeding to court.³⁷ Justice Stevens dissented from the majority's view that the exhaustion issue is moot.³⁸

The *Stevens* decision has lengthened the time in which federal employees may file suit alleging age discrimination. An individual has up to 180 days after the discriminatory incident to file notice of intent to sue and need only provide the EEOC with at least 30 days notice before actually filing suit.³⁹ The only projected time limitation after giving proper notice would be the statute of limitations.⁴⁰

In addition, because of the government's change of position regarding exhaustion, a federal employee alleging age discrimination should now have greater flexibility in seeking relief. A plaintiff who, like Stevens, fails to meet the prescribed administrative requirements would not be foreclosed from relief but would still have a second means with which to pursue his or her claim.⁴¹ Similarly, a plaintiff who abandons the administrative remedy before final resolution, perhaps out of frustration or dissatisfaction with the process, may proceed to court instead. Such an option may in turn prompt the employing agency to respond more quickly than it might otherwise have done, knowing that federal employees are free to pursue their age discrimination claims in court.

B. Filing Federal ADEA Claims After State Administrative Decisions:
Astoria Federal Savings and Loan Ass'n v. Solimino*¹

The Age Discrimination in Employment Act of 1967 ("ADEA" or the "Act") prohibits discrimination by public and private em-

³⁷ See *id.* at 1568, 55 FEP Cases at 848.

³⁸ *Id.* at 1569, 55 FEP Cases at 849 (Stevens, J., dissenting). Justice Stevens stated that there is an adversarial posture, which the majority finds lacking, because of the government's status as the petitioner's former employer. *Id.* Justice Stevens urges resolution of the question in favor of petitioner Stevens's (and the government's new-found) position; to wit, that the ADEA does not require exhaustion of the administrative remedies before court action may commence. *Id.*

³⁹ *Id.* at 1566, 55 FEP Cases at 847.

⁴⁰ The Supreme Court, while noting that Stevens had filed suit within an applicable statutory period of limitations, did not decide which period of limitations—from either an analogous federal statute or from a state age discrimination statute—is applicable to a section 633a(c) civil suit. *Id.* at 1567, 55 FEP Cases at 848.

⁴¹ See *id.* at 1565, 55 FEP Cases at 846. Stevens had initiated a meeting with an Equal Employment Opportunity Counselor after the agency-prescribed 30-day period had expired. Thus, his administrative complaint was rejected as untimely. *Id.*

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¹ *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 55 FEP Cases 1503 (1991).

ployers on the basis of age.² Section 14(b) of the ADEA requires that in circumstances where a state has its own age discrimination law, complainants must first file a claim with state authorities before filing in federal court.³ The circuit courts have reached differing results, however, when faced with the question of whether judicially unreviewed state administrative decisions have preclusive effect in federal court.⁴

In the 1986 case of *University of Tennessee v. Elliott*, the United States Supreme Court stated that in the closely parallel context of title VII claims under the Civil Rights Act of 1964, Congress did not intend administrative decisions to have preclusive effect in federal court.⁵ The Court explained that title VII's language, which requires the Equal Employment Opportunity Commission ("EEOC") to give "substantial weight" to the findings of state or local authorities, shows that Congress did not intend these administrative proceedings to have preclusive effect in subsequent federal litigation.⁶ Moreover, the *Elliott* Court concluded that 28 U.S.C. § 1738, which ensures that state court judgments receive the same full faith and credit in all courts as they would in that state's own courts, does not require preclusion for judicially unreviewed findings of administrative agencies.⁷

Although the *Elliott* Court decided that Congress did not intend state administrative decisions in title VII actions to have preclusive effect, it came to the opposite result with respect to claims of civil rights violations under section 1983.⁸ The *Elliott* Court held that

² 29 U.S.C. §§ 621-634 (1988).

³ *Id.* § 633(b).

⁴ Compare *Stillians v. Iowa*, 843 F.2d 276, 282-83, 46 FEP Cases 645, 650 (8th Cir. 1988) (judicially unreviewed state administrative decisions have preclusive effect under the ADEA) and *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1283, 41 FEP Cases 1224, 1226 (9th Cir. 1986) (judicially unreviewed state administrative decisions may have preclusive effect under the ADEA) with *Duggan v. Board of Educ.*, 818 F.2d 1291, 1297, 43 FEP Cases 1025, 1030 (7th Cir. 1987) (judicially unreviewed state administrative decisions not given preclusive effect under the ADEA) and *Rosenfeld v. Department of the Army*, 769 F.2d 237, 240, 38 FEP Cases 1150, 1153 (4th Cir. 1985) (same).

⁵ 478 U.S. 788, 796, 41 FEP Cases 177, 180 (1986).

⁶ *Id.* at 795.

⁷ *Id.* at 795, 41 FEP Cases at 179. 28 U.S.C. § 1738 provides that state judicial proceedings in subsequent federal litigation "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state from which they are taken." 28 U.S.C. § 1738 (1988).

⁸ 478 U.S. at 797, 41 FEP Cases at 180. 42 U.S.C. § 1983 provides:

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to

there was no congressional intent in section 1983 to contravene the rules of preclusion.⁹ Since *Elliott*, the circuit courts have split over the question of state administrative preclusion for federal ADEA claims.¹⁰

A few months after the Supreme Court's decision in *Elliott*, the United States Court of Appeals for the Ninth Circuit decided in *Mack v. South Bay Beer Distributors* that state administrative decisions involving ADEA claims may have preclusive effect.¹¹ The *Mack* court relied on the United States Supreme Court's decision in *United States v. Utah Construction & Mining Co.*,¹² where the Court held that when an administrative agency is acting in a judicial capacity and the parties before it have had an adequate opportunity to litigate, courts must apply *res judicata* to enforce repose.¹³ Although *Mack* was decided after *Elliott*, the *Mack* court made no mention as to why the ADEA should be treated differently than title VII.¹⁴

By contrast, the United States Court of Appeals for the Seventh Circuit relied on *Elliott* in the 1987 case of *Duggan v. Board of Education*.¹⁵ The *Duggan* court reasoned that the ADEA and title VII contained sufficient parallels so that for purposes of administrative *res judicata*, courts should construe them similarly.¹⁶ The *Duggan* court also referred to a case, decided prior to *Elliott*, in which the United States Court of Appeals for the Fourth Circuit held that unreviewed administrative findings in ADEA cases are not entitled to preclusion in federal court.¹⁷

Contrary to the position taken by the *Duggan* court, the United States Court of Appeals for the Eighth Circuit allowed administrative estoppel in the 1988 case of *Stillians v. Iowa*.¹⁸ The *Stillians* court explained that there was no congressional intent evident in the

the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

⁹ 478 U.S. at 797, 41 FEP Cases at 180.

¹⁰ See *supra* note 4 and accompanying text.

¹¹ 798 F.2d 1279, 1283, 41 FEP Cases 1224, 1226 (9th Cir. 1986).

¹² 384 U.S. 394, 422 (1966).

¹³ *Mack*, 798 F.2d at 1283, 41 FEP Cases at 1226.

¹⁴ See *Duggan v. Board of Educ.*, 818 F.2d 1291, 1294, 43 FEP Cases 1025, 1027 (7th Cir. 1987).

¹⁵ *Id.* at 1294, 43 FEP Cases at 1027-28.

¹⁶ *Id.*

¹⁷ *Id.* at 1294, 43 FEP Cases at 1027 (citing *Rosenfeld v. Department of the Army*, 769 F.2d 237, 240, 241, 38 FEP Cases 1150, 1152-53 (4th Cir. 1985)).

¹⁸ 843 F.2d 276, 282-83, 46 FEP Cases 645, 649 (8th Cir. 1988).

ADEA to abrogate preclusion and, as such, administrative decisions should follow the common law rules of preclusion in subsequent federal litigation.¹⁹ The court reasoned that the parallels between title VII and the ADEA are immaterial if Congress did not intend to invalidate preclusion with the ADEA's enactment.²⁰ Moreover, the *Stillians* court emphasized that while preclusion is inconsistent with title VII, it is consistent with the ADEA.²¹ The court further noted that under section 633(a) of the ADEA, claimants may supersede state proceedings after sixty days by filing suit in federal court.²² The *Stillians* court explained that if preclusion were not allowed, administrative proceedings would serve as opportunities for claimants to test their cases.²³

During the *Survey* year, in *Astoria Federal Savings and Loan Ass'n v. Solimino*, the United States Supreme Court settled the conflict among these circuit court decisions by ruling that state administrative findings are not entitled to preclusive effect in subsequent federal ADEA litigation.²⁴ The *Astoria* Court recognized the importance of administrative estoppel both to enforce repose and to prevent the draining of resources.²⁵ Nevertheless, the Court held that the ADEA carries the same implication as title VII; namely, that Congress did not intend the rules of preclusion to apply when it enacted the statute.²⁶

In *Astoria*, Angelo Solimino filed a charge of age discrimination with the EEOC on March 18, 1982 against his former employer, Astoria Federal Savings and Loan Association ("Astoria").²⁷ Solimino had worked for Astoria for almost forty years before he was terminated at the age of sixty-three from his position as a vice president in the mortgage department.²⁸ The EEOC referred Solimino's claim to the New York State Division of Human Rights, which is responsible for the initial investigation of age discrimination claims under New York's Human Rights Law.²⁹ After a hearing, the state agency concluded on January 25, 1983 that there was no

¹⁹ See *id.* at 281, 46 FEP Cases at 649.

²⁰ *Id.*

²¹ See *id.* at 282, 46 FEP Cases at 650.

²² *Id.*

²³ *Id.*

²⁴ 111 S. Ct. 2166, 2172, 55 FEP Cases 1503, 1507 (1991).

²⁵ *Id.* at 2169, 55 FEP Cases at 1505.

²⁶ See *id.* at 2171, 55 FEP Cases at 1507.

²⁷ *Id.* at 2168, 55 FEP Cases at 1505.

²⁸ *Id.*

²⁹ *Id.*

probable cause to believe that Solimino had been terminated because of his age.³⁰ On May 30, 1984 the State Human Rights Appeal Board affirmed that decision.³¹

Instead of seeking review of the board's decision in state court, Solimino filed suit in the United States District Court for the Eastern District of New York under section 626 of the ADEA.³² The district court, following *Stillians*, granted Astoria's motion for summary judgment, and held that the presumption in favor of administrative estoppel was applicable because neither the language nor legislative history of the ADEA showed that Congress had addressed the issue.³³ Thus, the district court concluded that the decision of the state's Human Rights Division had preclusive effect in federal court.³⁴ The United States Court of Appeals for the Second Circuit reversed the district court's finding, holding that the ADEA's structure showed congressional intent to deny preclusion to state administrative agency decisions.³⁵

The United States Supreme Court granted certiorari in order to resolve the conflict between the circuits as to whether final state agency determinations in ADEA claims have preclusive effect in subsequent federal litigation.³⁶ Writing for a unanimous Court, Justice Souter reiterated the Court's commitment to its rationale in *United States v. Utah Construction & Mining Co.* that federal courts should allow preclusion only in situations where an administrative agency acts in a judicial capacity and where the parties have had adequate opportunity to litigate.³⁷ The *Astoria* Court reasoned that this principle of preclusion was applicable to state court decisions as well as to the findings of both state and federal agencies.³⁸

The *Astoria* Court explained, however, that when a case involves statutory interpretation, courts must decide whether the legislature intended to apply administrative estoppel.³⁹ The Court reasoned that where a well-established common law doctrine such as preclusion is involved, courts must presume that Congress intended the

³⁰ *Id.* at 2169, 55 FEP Cases at 1505.

³¹ *Id.*

³² *Id.* 29 U.S.C. § 626 governs the filing of civil suits under the ADEA.

³³ 111 S. Ct. at 2169, 55 FEP Cases at 1505.

³⁴ *Id.*

³⁵ *See id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

rule to apply unless a contrary statutory purpose is evident.⁴⁰ The Court noted that such a clear statement by Congress is only required to protect "weighty and constant values," thereby assuring that the legislature has dealt with the issue in traditionally sensitive areas.⁴¹ The *Astoria* Court found that administrative preclusion did not represent such a weighty value as to justify the protection of the clear statement rule.⁴² Instead, the Court explained that the application of administrative preclusion depends on the context of the rights, the power of the agency and the adequacy of procedures.⁴³ Consequently, the *Astoria* Court concluded that the presumption of administrative estoppel applies where Congress has not shown any intention on the issue.⁴⁴

The *Astoria* Court emphasized that the full faith and credit statute, 28 U.S.C. § 1738, requires state court judgments in title VII claims to enjoy preclusive effect in federal court.⁴⁵ The Court asserted, however, that section 1738 is inapplicable to judicially unreviewed findings of state administrative agencies.⁴⁶ Following instead the rule of *Elliott*, the Court stated that the test for applying the presumption of administrative estoppel is to determine if the legislature's intent in enacting the statute is consistent with preclusion.⁴⁷

Accordingly, the Court turned to its analysis in *Elliott*, noting that in section 1983 discrimination claims, it had found no congressional intent to undermine the common law rules of preclusion.⁴⁸ The Court stated that in contrast to section 1983, title VII by implication intends such a purpose by directing the EEOC to give "substantial weight" to findings made by state or local authorities.⁴⁹ The *Astoria* Court reasoned that if there is no preclusion for a federal agency, there can be none for a federal court.⁵⁰ The Court concluded that under the "substantial weight" standard, preclusion is not mandated.⁵¹

⁴⁰ *Id.* at 2170, 55 FEP Cases at 1505-06.

⁴¹ *Id.* at 2170, 55 FEP Cases at 1506.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2170-71, 55 FEP Cases at 1506.

⁴⁸ *Id.* at 2171, 55 FEP Cases at 1506.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

The *Astoria* Court found that the same implication existed in the ADEA.⁵² The Court explained that although the ADEA does not contain express language to evince this intention, its filing requirements clearly show that preclusion is inappropriate.⁵³ The *Astoria* Court specifically pointed to section 14(b)'s requirement that a complainant first file a claim with state authorities before filing in federal court.⁵⁴ Likewise, the Court noted that the deadline for filing with the EEOC also makes reference to the termination of state proceedings.⁵⁵ In addition, the Court explained that section 7(d)(2) of the ADEA provides that a section 14(b) claim must be filed with the EEOC within three hundred days after the alleged discrimination or within thirty days after the claimant receives notice of the termination of state proceedings, whichever occurs first.⁵⁶ Thus, the *Astoria* Court concluded that the language of these provisions assumes federal litigation involving the same claims after state agencies have terminated their proceedings.⁵⁷

The *Astoria* Court further acknowledged that these federal proceedings would be devoid of meaning if federal courts allowed state administrative findings to have preclusive effect.⁵⁸ The Court repeated its holding that the section 14(b) filing requirement was intended to screen from federal courts those complaints that could be adequately settled in state proceedings.⁵⁹ The *Astoria* Court reasoned that complainants filing in federal court would likely do so only when the state has not held in their favor.⁶⁰ In addition, the Court recognized that allowing state administrative decisions to have preclusive effect would always provide employers with a successful defense of collateral estoppel.⁶¹ Moreover, the Court stated that applying rules of preclusion would make these cases insignificant, leaving section 14(b)'s filing requirements without effect.⁶²

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2171, 55 FEP Cases at 1506-07. As the *Astoria* Court indicated, § 14(b) further provides that "no suit may be brought under [the ADEA] before the expiration of sixty days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated." *Id.* at 2171, 55 FEP Cases at 1507.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

The *Astoria* Court also emphasized that it was not necessary to the Court's holding that the ADEA contain title VII's language requiring courts to give "substantial weight" to state administrative decisions.⁶³ The Court acknowledged that the "substantial weight" provision was "simply the most obvious piece of evidence" that *res judicata* does not apply in title VII cases.⁶⁴ The *Astoria* Court explained that Congress added this language because the EEOC was giving too little weight to administrative decisions, and not because it was applying preclusion or giving these decisions too much deference.⁶⁵ The *Astoria* Court further stated that similar language in the ADEA has been unnecessary because the EEOC has shown adequate deference to state determinations.⁶⁶ Thus, the *Astoria* Court concluded that similar language in the ADEA was not required in order to determine legislative intent.⁶⁷

The *Astoria* Court asserted that even without the "substantial weight" language, the *Elliott* Court would have arrived at the same conclusion.⁶⁸ According to the *Astoria* Court, title VII's section 706(c), which provides for federal court action after state proceedings have ended, is almost identical to section 14(b) of the ADEA.⁶⁹ The *Astoria* Court recognized that section 706(c) would have been sufficient grounds on which to justify the *Elliott* Court's decision because it assumes federal intervention after state proceedings.⁷⁰ Accordingly, the *Astoria* Court concluded that the language of section 14(b) in the ADEA is enough to counter the "lenient presumption" towards administrative preclusion.⁷¹ Moreover, the Court rejected the notion of using preclusion to give agencies more deference because the administrative findings in age discrimination claims of federal employees have been found not to have preclusive effect.⁷²

The *Astoria* Court also found support in several policy considerations.⁷³ The Court first explained that a complainant had no

⁶³ *Id.* at 2172, 55 FEP Cases at 1507.

⁶⁴ *Id.* (quoting *Duggan v. Board of Educ.*, 818 F.2d 1291, 1297, 43 FEP Cases 1025, 1030 (7th Cir. 1987)).

⁶⁵ 111 S. Ct. at 2172, 55 FEP Cases at 1507.

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.* at 2172-73, 55 FEP Cases at 1508.

control over who conducts the initial investigation of an ADEA claim, as the investigating agency may be the EEOC or an analogous state agency.⁷⁴ Accordingly, the Court acknowledged that it would be unfair to subject the complainant's ability to obtain a court hearing to "bureaucratic chance."⁷⁵ Second, the Court explained that following *Astoria's* reading of section 14(b) of the ADEA would produce disparities among states, as some states may have their own age discrimination statutes while others do not.⁷⁶ The Court reasoned that because section 14(a) provides that state proceedings are superseded by federal action, administrative estoppel would encourage forum-shopping by leading complainants to file in federal court immediately after filing with the state.⁷⁷ Finally, the Court noted that claim preclusion by a federal court would impede the deferral system whereby complaints are resolved without entering federal court.⁷⁸

The *Astoria* Court concluded that its decision would provide claimants with another opportunity to present their claims, and that state determinations could still be used as evidence in the federal proceeding.⁷⁹ According to the Court, Congress's intent in denying preclusion also eliminated case by case determinations over whether a state agency "acted in a judicial capacity" and provided the parties with "an adequate opportunity to litigate" in order to apply administrative estoppel.⁸⁰

In sum, the *Astoria* Court stressed the importance of preclusion in subsequent federal litigation of both state and federal administrative agency determinations.⁸¹ The Court asserted, however, that in cases of statutory interpretation, congressional intent governed the application of administrative estoppel.⁸² The Court explained that preclusion had to be consistent with the statute's intent.⁸³ The *Astoria* Court concluded that because the language of the ADEA's filing requirements in section 14(b) assumes federal litigation of claims after the termination of state agency proceedings, preclusion is therefore inapplicable.⁸⁴

⁷⁴ *Id.* at 2172-73, 55 FEP Cases at 1507-08.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2172-73, 55 FEP Cases at 1508.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2173, 55 FEP Cases at 1508.

⁸¹ *Id.* at 2169, 55 FEP Cases at 1505.

⁸² *Id.* at 2170, 55 FEP Cases at 1506.

⁸³ *Id.* at 2171, 55 FEP Cases at 1506.

⁸⁴ *Id.*

The Supreme Court's decision in *Astoria* represents the Court's view that Congress intended to treat the ADEA and title VII alike.⁸⁵ With so many similarities between the two statutes, it would be inconsistent for courts to interpret them differently.⁸⁶ Both statutes share the common goal of eliminating discrimination, and the legislative history of section 14(b) of the ADEA shows its source was section 706(c) of title VII.⁸⁷ As such, it is fair to conclude that Congress intended them to have the same construction.⁸⁸

Furthermore, the deferral mechanisms give state administrative agencies the opportunity to resolve these claims before the federal system is implicated.⁸⁹ Because Congress provided for consideration of ADEA claims in several forums, it is unreasonable to assume that the resolution of a claim ends with the decision of a state agency. The more plausible argument lies in the *Astoria* Court's conclusion that Congress did not intend the ADEA to preclude federal judicial action in situations where a state administrative agency has already acted.⁹⁰ Moreover, as the *Duggan* court recognized, the state agency and the EEOC are "informal agents of reconciliation," and it is doubtful that Congress intended the process to stop with state agencies without any court ever considering the claim.⁹¹ Thus, allowing claimants to file suit in federal court after state administrative proceedings have ended is consistent with both the language and the legislative history of the ADEA.

The Supreme Court has acknowledged that title VII indicates congressional intent to allow federal courts to act as the ultimate arbiters of title VII claims.⁹² The Supreme Court followed this line of reasoning in *Astoria* so as to provide the same protection for ADEA claimants.⁹³ Thus, the *Astoria* Court reinforced the power of the federal judiciary to determine discrimination cases.

After *Astoria*, plaintiffs may be inclined to file ADEA suits in federal court instead of seeking state review of administrative decisions. The Court allows this type of forum shopping because it

⁸⁵ See *id.* at 2170-71, 55 FEP Cases at 1506.

⁸⁶ See *Rosenfeld v. Department of the Army*, 769 F.2d 237, 240, 38 FEP Cases 1150, 1153 (4th Cir. 1985); *Nabors v. United States*, 568 F.2d 657, 659, 16 FEP Cases 948, 949 (9th Cir. 1978).

⁸⁷ See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 19 FEP Cases 1167, 1169 (1979).

⁸⁸ See *id.*

⁸⁹ See *Duggan v. Board of Educ.*, 818 F.2d 1291, 1295, 43 FEP Cases 1025, 1028 (7th Cir. 1987).

⁹⁰ See *id.*; *Astoria*, 111 S. Ct. at 2172, 55 FEP Cases at 1507.

⁹¹ See 818 F.2d at 1295, 43 FEP Cases at 1028.

⁹² See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56, 7 FEP Cases 81, 84 (1974).

⁹³ See 111 S. Ct. at 2171, 55 FEP Cases at 1506-07.

reflects a congressional choice. Although the Supreme Court has allowed preclusion when an administrative agency acts in a judicial capacity and the parties have had adequate opportunity to litigate, administrative estoppel is inapplicable where the legislature shows a preference for an independent evaluation of the issue.⁹⁴ Although the *Astoria* Court gives ADEA claimants greater leniency, these plaintiffs do not enter federal court with a clean slate. Defendants have the opportunity to introduce the findings of the state administrative agency as evidence,⁹⁵ as well as to emphasize the factors which that agency found particularly persuasive. Thus, the state agency determination continues to carry some weight in the subsequent federal proceeding.

In sum, the Supreme Court's ruling in *Astoria* that state administrative findings are not entitled to preclusive effect in subsequent federal ADEA litigation has resolved the split among the circuits.⁹⁶ Furthermore, the Supreme Court has maintained consistency in analyzing both the ADEA and title VII.⁹⁷ The *Astoria* Court has thus protected the rights of ADEA claimants to take their cases to federal court.

C.* *Concurrent State Court Jurisdiction in Title VII Claims: Yellow Freight System, Inc. v. Donnelly*¹

Under title VII of the Civil Rights Act of 1964 ("title VII") it is unlawful for an employer to discriminate on the basis of race, color, religion, sex or national origin.² Title VII provides that fed-

⁹⁴ *Rosenfeld v. Department of the Army*, 769 F.2d 237, 240, 38 FEP Cases 1150, 1153 (4th Cir. 1985).

⁹⁵ See *Astoria*, 111 S. Ct. at 2172-73, 55 FEP Cases at 1508.

⁹⁶ See *id.* at 2172, 55 FEP Cases at 1507.

⁹⁷ See *id.*

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¹ 110 S. Ct. 1566, 52 FEP Cases 875 (1990).

² Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a) (1982). Title VII provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin

Id.

eral courts have jurisdiction to hear title VII claims.³ The text of the statute is silent, however, regarding whether state courts can hear title VII claims.⁴ Concurrent state court jurisdiction over a federal claim is presumed unless Congress affirmatively acts to remove state court jurisdiction.⁵ In the 1981 case of *Gulf Offshore Co. v. Mobil Oil Corp.*, the United States Supreme Court stated that this presumption of concurrent state court jurisdiction may be rebutted by "explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests."⁶

A conflict has existed between and among state courts and federal district courts over the question of whether state courts have concurrent jurisdiction over title VII claims.⁷ In the 1984 case of *Valenzuela v. Kraft, Inc.*, the United States Court of Appeals for the Ninth Circuit held that federal courts have exclusive jurisdiction over title VII claims.⁸ The court determined that although the statute did not expressly remove concurrent state court jurisdiction, title VII contained an "unmistakable implication" of exclusive federal court jurisdiction.⁹ The court noted that various sections of title VII provided for the use of federal procedures, and that the statute contemplated appeals to the United States courts of appeals.¹⁰ Because it believed that Congress could not have intended to mandate that state courts use federal rules of procedure or be reviewed by federal circuit courts, the *Valenzuela* court found an "unmistakable implication" that Congress intended exclusive federal jurisdiction.¹¹

The *Valenzuela* court also determined that the legislative history of title VII supported exclusive federal jurisdiction.¹² The court

³ 42 U.S.C. § 2000e-5(f)(3) (1982). The statute states that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." *Id.*

⁴ *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435, 35 FEP Cases 782, 782 (9th Cir. 1984) ("The provision in Title VII which grants federal courts jurisdiction does not expressly state that federal jurisdiction shall be exclusive.").

⁵ See *Tafflin v. Levitt*, 110 S. Ct. 792, 795 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); *Claffin v. Houseman*, 93 U.S. 130, 136-37 (1876).

⁶ *Gulf Offshore*, 453 U.S. at 478. This analysis was mentioned by the Supreme Court as early as 1876. *Claffin*, 93 U.S. at 138 (citing THE FEDERALIST NO. 82 (Alexander Hamilton)).

⁷ *Valenzuela*, 739 F.2d at 435, 35 FEP Cases at 782.

⁸ *Id.* at 436, 35 FEP Cases at 783.

⁹ *Id.* at 435, 35 FEP Cases at 783.

¹⁰ *Id.* at 435-36, 35 FEP Cases at 783.

¹¹ *Id.*

¹² *Id.* at 436, 35 FEP Cases at 783.

determined that the legislative history's affirmative references to federal courts, as well as the lack of mention of state courts, implied that Congress intended exclusive federal jurisdiction.¹³ Finally, the court determined that Supreme Court precedent supported exclusive federal jurisdiction.¹⁴ The court cited a Supreme Court decision that did not mention state courts when listing the forums available to victims of title VII violations.¹⁵ The court also cited a Supreme Court decision where, in determining that there was exclusive federal jurisdiction under the Age Discrimination in Employment Act, the Court likened jurisdictional references in title VII to those in the Age Discrimination in Employment Act.¹⁶ Thus, the Ninth Circuit held that title VII actions must be brought exclusively in federal courts.¹⁷

Although the Third, Tenth and Eleventh Circuits adopted the *Valenzuela* position that title VII cases can only be heard in federal courts,¹⁸ the United States Court of Appeals for the Seventh Circuit, in the 1989 case of *Donnelly v. Yellow Freight System, Inc.*, held that state courts have concurrent jurisdiction over title VII claims.¹⁹ Unlike the Ninth Circuit, the Seventh Circuit was not persuaded by the legislative history of title VII that Congress intended federal jurisdiction over title VII claims to be exclusive.²⁰ Nor did the Seventh Circuit find that a "disabling incompatibility" would arise from state court jurisdiction of title VII claims, which would require exclusive federal jurisdiction over title VII claims.²¹

During the *Survey* year, the United States Supreme Court in *Yellow Freight System, Inc. v. Donnelly* resolved this conflict between the circuit courts,²² holding that state courts have concurrent juris-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)).

¹⁶ *Id.* (citing *Lehman v. Nakshian*, 453 U.S. 156, 164 n.12 (1981)).

¹⁷ *Id.*

¹⁸ *Long v. Florida*, 805 F.2d 1542, 1546, 42 FEP Cases 1058, 1061 (11th Cir. 1986) (holding res judicata did not bar plaintiff's claim because plaintiff could not have brought the title VII claim in state court); *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112, 45 FEP Cases 849, 850 (3d Cir. 1986) (stating in dicta that title VII vests exclusive jurisdiction in federal courts); *Jones v. Intermountain Power Project*, 794 F.2d 546, 553, 41 FEP Cases 1, 5 (10th Cir. 1986) (stating in dicta that title VII claims can only be filed in federal courts).

¹⁹ *Donnelly v. Yellow Freight Sys.*, 874 F.2d 402, 410, 49 FEP Cases 1253, 1258 (7th Cir. 1989) (holding that jurisdiction over title VII's vested in both state and federal courts), *aff'd*, 110 S. Ct. 1566, 52 FEP Cases 875 (1990).

²⁰ *Id.* at 406, 49 FEP Cases at 1255.

²¹ *Id.* at 407, 49 FEP Cases at 1256.

²² 110 S. Ct. 1566, 1568, 52 FEP Cases 875, 876 (1990). The *Yellow Freight* Court indicated that it granted certiorari to resolve the conflict among the circuits. *Id.*

diction over title VII claims.²³ In *Yellow Freight*, Colleen Donnelly, a qualified dock worker, applied for work at Yellow Freight System's facility.²⁴ The company informed Donnelly that no positions existed, but assured her that she would be the first person hired when a position became available.²⁵ For one and one-half years, Donnelly continued to make inquiries about job openings with Yellow Freight.²⁶ Even though the company was hiring men during that period, it asserted that there were no positions available.²⁷ In 1984, Donnelly filed a complaint with the Equal Employment Opportunity Commission ("EEOC").²⁸ She was subsequently hired by the company.²⁹

In March of 1985, the EEOC issued Donnelly a right to sue notice.³⁰ The notice informed Donnelly that she must file a complaint within ninety days or she would lose the right to sue.³¹ The notice, however, did not identify the forum in which she might sue.³² Subsequently, Donnelly filed a timely complaint against Yellow Freight System in Illinois state court, alleging that the company's actions constituted a violation of the Illinois Human Rights Act.³³

Yellow Freight System filed a motion to dismiss, claiming that Donnelly had not exhausted her state administrative remedies.³⁴ In response, Donnelly filed a motion to amend her complaint alleging that Yellow Freight's actions also constituted a violation of title VII.³⁵ Yellow Freight removed the case to federal court and filed a motion to dismiss the amended complaint because it had not been filed within the ninety-day period.³⁶ Yellow Freight argued that the filing in state court could not toll the limitation period because title VII jurisdiction was exclusively federal.³⁷ The district court denied Yel-

²³ *Id.* at 1567, 52 FEP Cases at 875.

²⁴ *Id.* at 1567, 52 FEP Cases at 875-76.

²⁵ *Id.* at 1567, 52 FEP Cases at 876.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1567-68, 52 FEP Cases at 876.

²⁹ *Id.* at 1567, 52 FEP Cases at 876.

³⁰ *Id.* at 1568, 52 FEP Cases at 876.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 405, 49 FEP Cases 1253, 1254-55 (7th Cir. 1989), *aff'd*, 110 S. Ct. 1566, 52 FEP Cases 875 (1990).

low Freight's motion to dismiss.³⁸ The United States Court of Appeals for the Seventh Circuit affirmed, holding that state courts have concurrent jurisdiction over title VII claims.³⁹ On review, the United States Supreme Court held that Congress did not divest state courts of concurrent jurisdiction over title VII claims.⁴⁰ The Court emphasized that because states are presumptively competent to adjudicate the laws of the United States, Congress must affirmatively remove concurrent jurisdiction from state courts in order to grant exclusive jurisdiction to federal courts.⁴¹

The Supreme Court began its analysis by reviewing the language of title VII.⁴² The Court stated that the text of title VII did not grant exclusive federal court jurisdiction expressly or take away state court jurisdiction.⁴³ The Court observed that the language of the statute merely stated that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."⁴⁴ Thus, the Court determined that the language did not divest state courts of their presumptive jurisdiction.⁴⁵

Although title VII does not limit jurisdiction expressly, Yellow Freight argued that federal courts should have exclusive jurisdiction over title VII cases because the legislative history shows that many members of Congress expected title VII cases to be tried solely in federal courts.⁴⁶ Yellow Freight cited a Congressman's comment that "[a] substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal judiciary" as opposed to the EEOC.⁴⁷ Yellow Freight also cited an EEOC Interpretive Memorandum which explained that "the party allegedly discriminated against may, with the written permission of one member of the Commission, bring his own suit in Federal court."⁴⁸

³⁸ *Yellow Freight Sys., Inc., v. Donnelly*, 110 S. Ct. 1566, 1567, 52 FEP Cases 875, 875 (1990).

³⁹ *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d at 404, 49 FEP Cases at 1253.

⁴⁰ *Yellow Freight Sys., Inc., v. Donnelly*, 110 S. Ct. at 1567, 52 FEP Cases at 875.

⁴¹ *Id.* at 1568, 52 FEP Cases at 876 (quoting *Tafflin v. Leviitt*, 110 S. Ct. 792, 795 (1990)).

⁴² *Id.* at 1568, 52 FEP Cases at 876.

⁴³ *Id.* at 1569, 52 FEP Cases at 876.

⁴⁴ *Id.* at 1568, 52 FEP Cases at 876 (quoting 42 U.S.C. § 2000e-5(f)(3) (1982)).

⁴⁵ *Id.* at 1569, 52 FEP Cases at 876.

⁴⁶ *Id.* at 1569, 52 FEP Cases at 877.

⁴⁷ *Id.* at 1569 n.4, 52 FEP Cases at 877 n.4.

⁴⁸ *Id.*

In response to Yellow Freight's argument, the Court acknowledged that the cited references indicated that certain members of Congress expected title VII claims to be adjudicated in federal courts.⁴⁹ The Court, however, indicated that concurrent state court jurisdiction could not be ousted merely because the legislative history expressly described the federal court jurisdiction without mentioning state court jurisdiction.⁵⁰ Moreover, the court stated that even if the entire Congress had envisioned an exclusively federal forum, such an expectation would not be sufficient to overcome the presumption of concurrent state jurisdiction without an affirmative legislative decision as to that effect.⁵¹

Finally, the Court rejected Yellow Freight's argument that there was a "clear incompatibility" between state court jurisdiction and the procedures provided in title VII.⁵² The Court agreed with Yellow Freight that section 706(c) of title VII required that state and local agencies be allowed at least sixty days to remedy the alleged discriminatory practices before the EEOC could commence any federal action.⁵³ The Court disagreed, however, with Yellow Freight's contention that to require state agency action, followed by federal agency action, as a prerequisite to state litigation resulted in an irregular procedure and, thus, that only a federal court should have jurisdiction.⁵⁴ The Court determined that the dual-agency procedure was not irregular because it was created merely to allow state administrative agencies an opportunity to employ state law.⁵⁵ The Court further explained that the EEOC's action was merely a prerequisite to any litigation under title VII.⁵⁶ Thus, the Court concluded that the fact that both state and federal agencies are given the opportunity to resolve discrimination complaints before litigation may occur under title VII does not have any affect on where such litigation must occur.⁵⁷

The Court also stated that the title VII references to other federal procedures did not preclude concurrent state court juris-

⁴⁹ *Id.* at 1569, 52 FEP Cases at 877.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1569-70, 52 FEP Cases at 877.

⁵⁷ *Id.* at 1570, 52 FEP Cases at 877.

diction.⁵⁸ The Court cited to earlier decisions where it found concurrent state jurisdiction over violations of the Labor Management Relations Act and the Racketeer Influenced and Corrupt Organization Act, even though those Acts referred to certain rules of federal procedure.⁵⁹ Finally, the Court stated that although federal judges may have more experience with title VII claims, there is a presumption that state court judges are sufficiently capable of adjudicating title VII claims.⁶⁰

In conclusion, the Supreme Court emphasized that Congress, using its powers under the Supremacy Clause, must affirmatively act to remove state court jurisdiction in order to overcome the strong presumption of concurrent state jurisdiction.⁶¹ The Court determined that the language of title VII did not expressly divest the state courts of jurisdiction.⁶² The Court further held that legislative history suggesting that certain legislators expected that title VII claims would be resolved by federal courts was not enough to divest state courts of concurrent jurisdiction.⁶³ Finally, the Court asserted that none of the procedures provided in title VII were "clearly incompatible" with concurrent state court jurisdiction over title VII claims.⁶⁴ Thus, the Court concluded that even if there were a universal expectation among the legislators, judges and administrators that title VII claims would be litigated exclusively in federal courts, this expectation was not enough to overcome the strong presumption of concurrent jurisdiction.⁶⁵

The Court's decision in *Yellow Freight* that federal courts do not have exclusive jurisdiction over title VII claims significantly narrows the test stated in *Gulf Offshore*. In *Gulf Offshore*, the Supreme Court stated that "the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."⁶⁶ Subsequent courts such

⁵⁸ *Id.* Moreover, the Court stated "[neither] does the Act's provision for appeals pursuant to 28 U.S.C. §§ 1291, 1292 (1982 ed.) and references to injunctive relief and appointment of masters pursuant to Federal Rules of Civil Procedure 65 and 53, preclude concurrent state court jurisdiction." *Id.*

⁵⁹ *Id.* at 1570, 52 FEP Cases at 877 (citing *Tafflin v. Levitt*, 110 S. Ct. 792 (1990); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962)).

⁶⁰ *Id.* at 1570, 52 FEP Cases at 877.

⁶¹ *Id.* at 1568, 52 FEP Cases at 876.

⁶² *Id.* at 1568-69, 52 FEP Cases at 876.

⁶³ *Id.* at 1569, 52 FEP Cases at 877.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1570, 52 FEP Cases at 877-78.

⁶⁶ *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

as *Valenzuela* found an "unmistakable implication" in legislative history and the procedures of title VII that Congress intended federal courts to have exclusive jurisdiction.⁶⁷ The Supreme Court in *Yellow Freight* also purported to use the *Gulf Offshore* analysis; in actuality, however, it severely limited it. In *Yellow Freight*, the Court determined that even a "universally" shared expectation by legislators, judges and administrators who were involved with the "enactment, amendment, enforcement, and interpretation of title VII" would not be enough to overcome the strong presumption of concurrent jurisdiction.⁶⁸ Thus, it is unlikely that the Court will ever exclude state court jurisdiction using only the second prong of the *Gulf Offshore* test, because it seems that exclusion by implication cannot be achieved even by universal intent.

Yellow Freight properly narrows the *Gulf Offshore* standard because a strong presumption of concurrent jurisdiction "lies at the core of our federal system."⁶⁹ This strong presumption of concurrent jurisdiction has existed since Alexander Hamilton's time, and the Court expressly reiterated its importance under law in 1876.⁷⁰ Congress knew of this presumption⁷¹ and merely had to state in the text of the statute that there was exclusive federal jurisdiction if that was its intent. Thus, if Congress really intended to exclude state court jurisdiction, it is fair for the Court to presume that Congress would have done so expressly, especially given the importance of the presumption of concurrent jurisdiction. Moreover, the Court was equitable in holding that title VII permits concurrent jurisdiction, because to rule otherwise would allow some title VII

⁶⁷ *Valenzuela v. Kraft, Inc.*, 739 F.2d 434, 435-36, 35 FEP Cases 782, 783 (9th Cir. 1984).

⁶⁸ 110 S. Ct. at 1569, 1570, 52 FEP Cases at 877, 878. Moreover, in the 1990 case of *Tafflin v. Levitt*, Justices Scalia and Kennedy stated in a concurring opinion that if exclusion by implication were to be allowed, it should be by implication in the text of the statute, not through "unmistakable implication from legislative history." 110 S. Ct. 792, 802 (1990) (Scalia, J., concurring). The justices also pointed out that, realistically, such an implication could not be "unmistakable" because legislative history merely shows congressional debate and discussion, unlike the legislative action that shows the final congressional agreement. *Id.* (Scalia, J., concurring).

⁶⁹ See *Yellow Freight*, 110 S. Ct. at 1570, 52 FEP Cases at 878.

⁷⁰ *Tafflin*, 110 S. Ct. at 801 (citing THE FEDERALIST No. 82, at 132 (Alexander Hamilton) (E. Bourne ed., 1947)); see also *Claffin v. Houseman*, 93 U.S. 130, 138 (1876) (citing THE FEDERALIST No. 82 (Alexander Hamilton)).

⁷¹ See *Yellow Freight*, 110 S. Ct. at 1568-69, 1569 n.3, 52 FEP Cases at 876, 876 n.3. The Court cited the Employment Retirement Income Security Act of 1974, where Congress expressly mandated exclusive federal jurisdiction, to indicate Congress's awareness of the presumption of concurrent jurisdiction. *Id.*

violators to escape liability on a mere technicality. Thus, it was reasonable for the Supreme Court to conclude that requiring concurrent jurisdiction, where it had not been expressly prohibited, best furthered the intent of title VII.

Given the Supreme Court's holding in *Yellow Freight*, state courts will have concurrent jurisdiction with federal courts over title VII claims unless Congress amends title VII. Thus, title VII cases can now be heard when filed in state courts, in federal courts or when removed from state court to federal court. Given the well-deserved importance of a strong presumption of concurrent jurisdiction, and given that concurrent jurisdiction furthers the purpose of title VII, the Supreme Court's decision was sound.

D. Collateral Estoppel and the Right to Jury Trial for Civil Rights Claims: Lytle v. Household Manufacturing, Inc.*¹

Title VII of the Civil Rights Act of 1964 ("title VII") makes it unlawful to discriminate in employment on the basis of race.² Similarly, 42 U.S.C. § 1981 ("section 1981") makes it unlawful to discriminate on the basis of race in the making and enforcement of contracts,³ including contracts in private employment settings.⁴ In

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¹ 110 S. Ct. 1331, 52 FEP Cases 423 (1990).

² See 42 U.S.C. § 2000e-2 (1988).

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

⁴ See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 10 FEP Cases 817, 819 (1975). The Court recently restricted the scope of section 1981, however, holding that section 1981 only prohibits discrimination in the making and enforcing of contracts and does not extend to conduct of an employer after the contract relationship has been established. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 179-80, 49 FEP Cases 1814, 1820-21 (1989). Since this decision, a number of federal circuit courts have held that section 1981 no longer provides remedies for discriminatory and retaliatory discharges. See *Trujillo v. Grand Junction Regional Ctr.*, 928 F.2d 973, 975, 55 FEP Cases 780, 781-82 (10th Cir. 1991); *Carter v. South Cent. Bell*, 912 F.2d 832, 839, 54 FEP Cases 1110, 1114-15 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916, 56 FEP Cases 576 (1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1256-58, 54 FEP Cases 644, 645-46 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2889, 56 FEP Cases 576 (1991); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 722, 53 FEP Cases 862, 867 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-12, 53 FEP Cases 505, 507-11 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306, 55 FEP Cases 352 (1991); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849, 52 FEP Cases 779, 781-82 (9th Cir. 1990). *But see Hicks v. Brown Group, Inc.*, 902 F.2d 630, 656, 52 FEP Cases 1027, 1047-48 (8th Cir. 1990) (holding that discriminatory and retaliatory discharges continue to be actionable under section 1981), *vacated*, 111 S. Ct. 1299, 55 FEP Cases 352 (1991).

1974, the United States Supreme Court held in *Johnson v. Railway Express Agency, Inc.* that a plaintiff alleging employment discrimination can pursue title VII and section 1981 claims concurrently.⁵ The Court stated that, although the two claims are similar, the remedies are "separate, distinct and independent" and, therefore, both claims are permissible.⁶ The elements of the title VII and section 1981 claims, however, are identical and thereby may lead to a problem of collateral estoppel.⁷ For example, the determination of the issues of the title VII claim may collaterally estop a subsequent determination of the identical issues under a section 1981 claim.⁸

Although section 1981 and title VII claims may involve identical elements, there is an important distinction between the nature of the two claims. Section 1981 claims are legal claims and therefore entitle a litigant to a jury trial.⁹ Conversely, title VII claims are generally considered equitable claims and thus do not entitle a litigant to a jury trial.¹⁰ In 1959, in *Beacon Theatres, Inc. v. Westover*, the Supreme Court established that when both legal and equitable claims are joined in one action, the trial court has the responsibility to protect the plaintiff's right to a jury trial on the legal claims against the court's prior determination of the equitable issues.¹¹ In furtherance of this doctrine, the Court ruled in the 1962 case of *Dairy Queen, Inc. v. Wood* that where joint legal and equitable claims involve common issues, the resolution of the legal claims, including all common issues, is required prior to any court determination of the equitable claims.¹² The order of determination of claims is important because under the Court's ruling in the 1979 case of *Park-*

⁵ See 421 U.S. at 461, 10 FEP Cases at 820.

⁶ *Id.*

⁷ *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 353, 43 FEP Cases 857, 860 (7th Cir. 1987).

⁸ See *id.* at 353, 43 FEP Cases at 860-61.

⁹ *Patterson*, 491 U.S. at 211, 49 FEP Cases at 1834 (Brennan, J., dissenting). Justice Brennan noted that one of the differences between the two statutes was "the right to a jury trial under § 1981, but not title VII . . ." *Id.* Section 1981 provides both equitable and legal relief, *Johnson*, 421 U.S. at 460, 10 FEP Cases at 819, and the Court has expanded the Seventh Amendment right to jury trial to include statutory causes of action providing legal remedies. *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974).

¹⁰ See *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375 (1979) (noting that courts have consistently denied jury trials to title VII parties because title VII expressly authorizes only equitable remedies). Recently, however, the Court has stated that it has yet to decide whether a title VII plaintiff has a right to a trial by jury. See *Chauffeurs, Local 391 v. Terry*, 110 S. Ct. 1339, 1348, 133 L.R.R.M. 2793, 2798 (1990). For further discussion of this issue see *infra* notes 88-92 and accompanying text.

¹¹ 359 U.S. 500, 510-11 (1959).

¹² 369 U.S. 469, 479 (1962).

lane Hosiery Co., Inc. v. Shore, an equitable determination may collaterally estop subsequent legal determinations without violating the litigant's Seventh Amendment right to a jury trial.¹³

Following *Parklane Hosiery*, a split developed among the federal courts of appeals regarding whether a court's resolution of equitable claims in an employment discrimination case collaterally estops relitigation of the litigant's identical legal claims. This issue has arisen in cases where a trial court has improperly dismissed a plaintiff's legal claims and has proceeded to resolve the plaintiff's equitable issues entirely by bench trial.¹⁴ Specifically, once the trial court's dismissal of the legal claims is determined on appeal to be erroneous, the question arises whether the trial court's resolution of the equitable claims collaterally estops litigation of the legal claims on remand.¹⁵ If the appellate court finds collateral estoppel applicable, the plaintiff will not receive a jury trial on the legal issues, thus possibly violating the plaintiff's Seventh Amendment right.¹⁶

One view, adopted by the United States Court of Appeals for the Fourth Circuit in the 1987 case of *Ritter v. Mount St. Mary's College*, holds that, notwithstanding the error in dismissing the legal claim, equitable determinations by the court collaterally estop relitigation of the legal claims before a jury.¹⁷ In support of this view, the *Ritter* court cited *Parklane Hosiery* for the proposition that the application of collateral estoppel does not violate a plaintiff's Seventh Amendment right to a jury trial.¹⁸ The Fourth Circuit, in interpreting *Parklane Hosiery*, reasoned that interests in judicial economy overrode the litigant's right to a jury trial.¹⁹ Furthermore, the court noted that the plaintiff was given a full and fair opportunity to litigate the case at the bench trial on all of the issues which would be relitigated at the jury trial.²⁰ Hence, the court stated, the trial court's findings would collaterally estop relitigation of the same

¹³ 439 U.S. 322, 335 (1979).

¹⁴ See *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 988, 43 FEP Cases 654, 654-55 (4th Cir.), cert. denied, 484 U.S. 913 (1987); *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 353, 43 FEP Cases 857, 860 (7th Cir. 1987).

¹⁵ See, e.g., *Ritter*, 814 F.2d at 988, 43 FEP Cases at 654-55; *Hussein*, 816 F.2d at 353, 43 FEP Cases at 860-61.

¹⁶ See *Ritter*, 814 F.2d at 988, 43 FEP Cases at 655; *Hussein*, 816 F.2d at 350, 353, 43 FEP Cases at 858, 861.

¹⁷ 814 F.2d at 988, 43 FEP Cases at 655.

¹⁸ *Id.* at 990-91, 43 FEP Cases at 657.

¹⁹ *Id.* at 991, 43 FEP Cases at 657.

²⁰ *Id.* at 994, 43 FEP Cases at 659-60.

issues unless the trial court's findings were found clearly erroneous.²¹

In contrast to the Fourth Circuit, the United States Court of Appeals for the Seventh Circuit held in the 1987 case of *Hussein v. Oshkosh Motor Truck Co.* that where a section 1981 legal claim is erroneously dismissed, collateral estoppel does not prevent relitigation of the legal claims even if the trial court has ruled against the plaintiff on identical title VII equitable claims.²² The Seventh Circuit noted that, had the district court in *Hussein* not erroneously dismissed the plaintiff's legal claims, the plaintiff would have received a jury trial on all issues common to both the legal and equitable claims.²³ The court distinguished *Parklane Hosiery* on the basis that *Hussein* involved a single action in which the plaintiff was required to join the equitable and legal claims whereas *Parklane Hosiery* involved two separate lawsuits.²⁴ Furthermore, the court stated that simple judicial error should not deprive a litigant of his or her right to have facts determined by a jury and not a judge.²⁵ Also, the court reasoned that the theory underlying collateral estoppel, to prevent "needless litigation," was inapplicable in *Hussein* because correction of judicial error through retrial was "hardly 'needless litigation.'"²⁶ The court therefore remanded the section 1981 legal claim for a full jury trial, despite upholding the trial court's ruling on the title VII claim.²⁷

During the *Survey* year, the United States Supreme Court addressed the collateral estoppel issue in *Lytle v. Household Manufacturing, Inc.*, which involved a claim for discriminatory discharge and retaliation.²⁸ The Court in *Lytle* unanimously held that the doctrine of collateral estoppel cannot be invoked to deny a plaintiff the right to a jury trial where a district court erroneously dismisses a plaintiff's section 1981 legal claim and, at a bench trial on the title VII claim, resolves issues common to both claims.²⁹

In *Lytle*, the Court reversed the Fourth Circuit's decision and held that a plaintiff's Seventh Amendment right to jury trial on

²¹ See *id.* at 992-93, 43 FEP Cases at 658-59.

²² 816 F.2d 348, 349-50, 43 FEP Cases 857, 858 (7th Cir. 1987).

²³ *Hussein*, 816 F.2d at 354-55, 43 FEP Cases at 861-62.

²⁴ See *id.* at 356, 43 FEP Cases at 862-63.

²⁵ *Id.* at 356-57, 43 FEP Cases at 863.

²⁶ *Id.* at 356, 43 FEP Cases at 863.

²⁷ See *id.* at 357, 43 FEP Cases at 863.

²⁸ 110 S. Ct. 1331, 1334-35, 52 FEP Cases 423, 427 (1990).

²⁹ *Id.* at 1338, 52 FEP Cases at 427.

section 1981 claims outweighs the interests in judicial economy promoted by the collateral estoppel doctrine.³⁰ The Court vacated the district court's title VII decision, reasoning that jury findings would have bound the district court if the jury trial had been properly held in the first place and that the vacate order would avoid the possibility of inconsistent decisions.³¹ The Court in *Lytle*, therefore, rejected the Fourth Circuit's application of collateral estoppel and adopted instead an approach similar to that of the Seventh Circuit. The Court, however, even went further than the Seventh Circuit, vacating the title VII decision.

In *Lytle*, an African-American employee sought monetary and injunctive relief under title VII and section 1981 against his former employer for discriminatory discharge and retaliation.³² During his employment with a subsidiary of the defendant, Schwitzer Turbochargers ("Schwitzer"), Lytle requested a vacation day to see a doctor on a particular Friday.³³ The supervisor approved Lytle's request but told Lytle that he would have to work on the Saturday after his vacation day instead.³⁴ Lytle objected to working on Saturday, claiming he would be too ill, and in fact did not report to work on either day.³⁵ Schwitzer classified Lytle's absences as unexcused and fired him under a company discharge policy that stated that eight hours of unexcused absences within a twelve-month period was grounds for discharge.³⁶ Lytle filed a charge of racial discrimination with the Equal Employment Opportunity Commission ("EEOC") and began seeking new employment.³⁷ Lytle also asserted that he was unable to find a new job because Schwitzer would not provide references to prospective employers but would provide only Lytle's dates of employment and job title.³⁸ Upon receiving a right to sue notice from the EEOC, Lytle brought concurrent title VII and section 1981 actions against Schwitzer.³⁹ Both Lytle's title VII and section 1981 actions alleged discriminatory discharge on the basis of his race and retaliation for his filing charges with the EEOC.⁴⁰

³⁰ See *id.* at 1337, 52 FEP Cases at 426.

³¹ *Id.* at 1338 & n.4, 52 FEP Cases at 427 & n.4.

³² *Id.* at 1334-35, 52 FEP Cases at 424.

³³ *Id.* at 1334, 52 FEP Cases at 424.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1334-35, 52 FEP Cases at 424.

The district court dismissed Lytle's section 1981 claims on the grounds that title VII was Lytle's exclusive remedy.⁴¹ Because only Lytle's title VII claims remained, the court denied Lytle's request for a jury trial and proceeded to hold a bench trial.⁴² At the close of Lytle's case-in-chief, the district court dismissed Lytle's discriminatory discharge claim and, after both parties presented all their evidence, it ruled in favor of Schwitzer on the retaliation claim.⁴³

The Fourth Circuit Court of Appeals affirmed the district court's rulings on Lytle's title VII claims.⁴⁴ The Fourth Circuit determined, however, that the district court had erred in dismissing the section 1981 action because the title VII remedy is not the exclusive remedy for employment discrimination cases.⁴⁵ Rather, the court noted, title VII and section 1981 provide separate and independent remedies.⁴⁶ Nevertheless, the court declined to remand the section 1981 claims for a jury trial.⁴⁷ The court stated that because the elements of the section 1981 action were identical to the elements involved in the title VII action, the district court's title VII findings collaterally estopped the relitigation of the section 1981 action.⁴⁸ The court reasoned that the purpose of collateral estoppel, preserving judicial resources, overrode Lytle's Seventh Amendment right to a jury trial.⁴⁹

The United States Supreme Court reversed the Fourth Circuit's decision, vacated the district court's title VII decision and remanded Lytle's case in its entirety.⁵⁰ The Court held that the judicial determination of the equitable issues—the result of judicial error—could not abrogate Lytle's Seventh Amendment right to a jury trial on the legal issues.⁵¹ In its analysis, the Court noted that Lytle would have been entitled to a jury trial on the section 1981 claims had the district court not erroneously dismissed those claims.⁵² The Court

⁴¹ *Id.* at 1335, 52 FEP Cases at 424. The dismissal was erroneous because the remedies under title VII and section 1981 are independent of each other. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Lytle v. Household Mfg., Inc.*, 51 FEP Cases 277, 279 (4th Cir. 1987), *rev'd*, 110 S. Ct. 1331, 52 FEP Cases 423 (1990).

⁴⁵ *Lytle*, 51 FEP Cases at 278 n.2.

⁴⁶ *Id.*

⁴⁷ *See id.* at 278–79.

⁴⁸ *Id.* at 279.

⁴⁹ *Id.* at 278.

⁵⁰ *Lytle v. Household Mfg., Inc.*, 110 S. Ct. 1331, 1338, 52 FEP Cases 423, 427 (1990).

⁵¹ *Id.* at 1335–37, 52 FEP Cases at 425–26.

⁵² *Id.* at 1335, 52 FEP Cases at 425. The Court assumed for the purposes of the case that Lytle had no right to a jury trial on his title VII claim because Lytle failed to argue that

further noted that under *Beacon Theatres* and *Dairy Queen* the jury would have determined the section 1981 claims, including those issues common to both claims, before the district court could have considered the title VII claims.⁵³ The order of the claims was critical, the Court stated, because under the principles of collateral estoppel set forth in *Parklane Hosiery*, prior judicial determinations of equitable claims may foreclose relitigation of identical legal claims before a jury without violating the Seventh Amendment.⁵⁴

The Court rejected Schwitzer's argument that *Parklane Hosiery* controlled in this case.⁵⁵ The Court held that *Parklane Hosiery* was not applicable because in *Parklane Hosiery* the legal actions were brought subsequent to and separate from the prior equitable determination that collaterally estopped them.⁵⁶ In contrast, the Court noted, Lytle brought the legal and equitable actions in one suit.⁵⁷ The Court declined to view the relitigation of Lytle's section 1981 legal claims as a separate action because Lytle had properly joined his legal and equitable claims in a single action and would have received a jury trial but for the district court's erroneous dismissal.⁵⁸ The Court further noted that it would be "anomalous" to permit a district court to foreclose the litigant's right to a jury trial simply by erroneously dismissing the litigant's legal claims.⁵⁹ The Court noted that such a result would be extremely unfair to Lytle because, in order to avoid the bar of *res judicata*, he had to join all possible legal and equitable claims arising out of the same incident.⁶⁰

The *Lytle* Court further stated that its refusal to invoke collateral estoppel was consistent with the Court's prior rulings in similar cases.⁶¹ For example, the Court noted that when a trial court wrongly denies a litigant's request for a jury trial on legal issues, the trial court's factual determinations do not collaterally estop full relitigation of the legal issues before a jury.⁶² In addition, the Court determined that the purposes underlying collateral estoppel—to

he had such a right. *Id.* at 1335 n.1, 52 FEP Cases at 424 n.1. The Court, however, noted that it had yet to rule whether title VII relief warranted a jury trial. *Id.*

⁵³ *Id.* at 1335, 52 FEP Cases at 425.

⁵⁴ *Id.* at 1335-36, 52 FEP Cases at 425.

⁵⁵ *Id.* at 1336, 52 FEP Cases at 425.

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1336-37, 52 FEP Cases at 425-26.

⁵⁹ *Id.* at 1336-37, 52 FEP Cases at 426.

⁶⁰ *Id.* at 1337, 52 FEP Cases at 426.

⁶¹ *Id.*

⁶² *Id.*

avoid multiple lawsuits and inconsistent decisions while conserving judicial resources—were inapplicable.⁶³ The Court stated that *Lytle* involved a single suit and, therefore, avoidance of multiple lawsuits was not at issue.⁶⁴ Furthermore, the Court reasoned that the relitigation was not a needless waste of judicial resources because it was the “only mechanism” available to correct the district court’s error and vindicate *Lytle*’s Seventh Amendment rights.⁶⁵

Finally, the Court rejected Schwitzer’s argument that relitigation of section 1981 was unnecessary notwithstanding collateral estoppel.⁶⁶ Schwitzer had argued that, had the district court not dismissed the section 1981 claims, the district court would have directed a verdict in Schwitzer’s favor on the section 1981 claims anyway.⁶⁷ Schwitzer asserted that because the issues involved in the section 1981 action were identical to those in the title VII action and because the district court had ruled in favor of Schwitzer on the title VII claims, the district court would have ruled in favor of Schwitzer on the section 1981 claims.⁶⁸

The Supreme Court found these arguments to be incorrect.⁶⁹ For example, with regard to the district court’s dismissal of the discriminatory discharge claim under title VII, the Court stated that the procedural standards for ordering a dismissal were different from those governing a directed verdict.⁷⁰ Hence, the Court noted, the district court would not necessarily have granted a directed verdict on *Lytle*’s section 1981 claims because it might have believed that the jury could have reasonably found for *Lytle*.⁷¹ Also, the

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* The Court emphasized that “judicial economy . . . remains an insufficient basis for departing from our longstanding commitment to preserving a litigant’s right to a jury trial.” *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1337–38, 52 FEP Cases at 426.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1338, 52 FEP Cases at 426–27. The Court stated that, Rule 41(b) allows the court “as trier of the facts” to determine the facts and the law “and render judgment against the plaintiff or . . . decline to render any judgment until the close of all the evidence.” In contrast, in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party . . .

Id.

⁷¹ *Id.* at 1338, 52 FEP Cases at 427. The Court explained that, “although a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b), that court might not take the same case away from the jury because it might believe that the jury could *reasonably* find for the nonmoving party.” *Id.*

Court noted that merely because the district court had decided in favor of Schwitzer on the retaliation claim did not mean that a jury could not reasonably have found otherwise.⁷² The Court therefore rejected Schwitzer's argument that the Fourth Circuit's judgment should be affirmed notwithstanding the applicability of collateral estoppel.⁷³

In addition to granting Lytle a jury trial on his section 1981 claim, the Court also vacated the district court's decision on the title VII claim to "afford Lytle complete and consistent relief."⁷⁴ The Court explained that absent the erroneous dismissal, the jury's determination of the same issues under the section 1981 claim would have governed the district court's determination of the title VII claim.⁷⁵ The Court also stated that it was necessary to vacate the trial court's decision to avoid the possibility of inconsistent decisions between the judge and jury.⁷⁶

In a concurring opinion, Justice O'Connor, joined by Justice Scalia, observed that the Court, quite properly, had not ruled on whether Lytle stated a valid cause of action under section 1981.⁷⁷ Schwitzer had argued that even though the trial court's reason for dismissal was erroneous, Lytle's section 1981 claim would be dismissed under the Court's recent ruling in *Patterson v. McLean Credit Union*, which held that section 1981 relates only to the formation or enforcement of contracts and not to post-formation conduct.⁷⁸ The Lytle Court had declined to consider this argument because the issue was not raised below nor was it included in the question on which certiorari was granted.⁷⁹ Justice O'Connor noted that the issue was not raised previously because *Patterson* was not decided until after the Fourth Circuit's ruling in *Lytle*.⁸⁰ According to Justice O'Connor, however, Schwitzer could properly raise this issue on remand.⁸¹

⁷² *Id.* The Court stated, "we have long recognized [that] a jury and a judge can draw different conclusions from the same evidence." *Id.*

⁷³ *Id.* at 1337-38, 52 FEP Cases at 426-27.

⁷⁴ *Id.* at 1338 n.4, 52 FEP Cases at 427 n.4.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1338-39, 52 FEP Cases at 427 (O'Connor, J., concurring).

⁷⁸ *See id.* at 1336 n.3, 52 FEP Cases at 425 n.3 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 49 FEP Cases 1814 (1989)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1339, 52 FEP Cases at 427 (O'Connor, J., concurring).

⁸¹ *Id.* at 1338, 52 FEP Cases at 427-28 (O'Connor, J., concurring).

The Court's decision in *Lytle* effectively resolved the split between the Fourth and Seventh Circuits over the application of collateral estoppel. The Court rejected the Fourth Circuit's expansion of *Parklane Hosiery* in favor of protecting the litigant's Seventh Amendment rights.⁸² By granting a jury trial, for Lytle's section 1981 action, that is unencumbered by the prior equitable determination, the Court correctly reaffirmed the policy underlying *Beacon Theatres* and *Dairy Queen* that the right to jury trial should not be forfeited when a plaintiff joins equitable and legal claims in one suit.⁸³ This outcome is particularly compelling because Lytle had taken all of the appropriate steps to secure a jury trial and yet was foiled by judicial error.⁸⁴ Furthermore, to permit the interest in judicial economy to preclude the correction of judicial error would only compound the injustice.⁸⁵ *Lytle* promotes the Court's "long-standing commitment to preserving a litigant's right to a jury trial."⁸⁶

Although the primary import of the *Lytle* decision stems from the Court's collateral estoppel ruling, the Court also briefly addressed an area of law of particular importance to employment discrimination practitioners: the availability of jury trials to title VII plaintiffs.⁸⁷ The Court assumed for the sake of argument that Lytle had no right to a jury trial on his title VII claims.⁸⁸ The Court, however, emphasized in a footnote that it had not ruled on whether all title VII plaintiffs were foreclosed from jury trials.⁸⁹ This footnote is significant because earlier Supreme Court opinions have implied that there is no right to a jury trial in title VII actions.⁹⁰

⁸² See *id.* at 1338, 52 FEP Cases at 427.

⁸³ See *id.* at 1336-37, 52 FEP Cases at 425-26.

⁸⁴ See *id.*

⁸⁵ See *id.* at 1337, 52 FEP Cases at 426.

⁸⁶ See *id.* The Court's decision, however, arguably may not be that helpful to Lytle and other similarly situated plaintiffs claiming discriminatory discharge and retaliation under both section 1981 and title VII. As Justice O'Connor emphasized in her concurring opinion, the district court on remand will most likely address the effect of *Patterson's* restrictive interpretation of section 1981 on Lytle's section 1981 claims. If the district court finds that the discriminatory discharge and retaliation claims involve post-contract-formation events, now interpreted as being beyond the scope of section 1981 under *Patterson*, Lytle's section 1981 claims will once again be dismissed along with his right to a jury trial.

⁸⁷ See *id.* at 1335 n.1, 52 FEP Cases at 424 n.1.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 211, 49 FEP Cases 1814, 1834 (1989) (Brennan, J., dissenting) (noting that section 1981 grants a jury trial but that title VII does not); *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 375

Thus, *Lytle* may be signaling the Court's openness to a challenge of the general presumption that title VII claimants are not entitled to jury trials.⁹¹ Perhaps the Court is calling attention to the possibility of jury trials for title VII actions because these plaintiffs will most likely lose their right to jury trial under the restrictive interpretation of section 1981 set forth in *Patterson*.⁹²

At a minimum, *Lytle* stands for the proposition that in a case involving both legal and equitable civil rights claims, judicial error and collateral estoppel may not combine to abrogate a litigant's right to a jury trial. The Court thereby continues its longstanding practice of preserving the Seventh Amendment right to jury trial. *Lytle*, however, also suggests the possibility that the Court may be willing to extend the right to jury trials to title VII actions.

II. RACIAL DISCRIMINATION

A. * *Section 1981 and Termination of Contracts Due to Racial Discrimination: Gersman v. Group Health Ass'n.*¹

The Civil Rights Act of 1866 guarantees certain enumerated rights to all people within the jurisdiction of the United States.² First among these is "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."³ Thus, this provision, codified at 42 U.S.C. § 1981, prohibits discriminatory conduct in contract affairs between private parties, an area that enjoys no direct protection under the Constitution.⁴

(1979) (noting that courts have consistently denied jury trials to title VII plaintiffs because title VII expressly authorizes only equitable remedies).

⁹¹ For a compelling article arguing for the rights of title VII claimants to jury trials, see Matthew F. Davis, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 U. KAN. L. REV. 1003 (1990).

⁹² See *infra* note 86 for a discussion of the effects of the Court's restrictive interpretation of title VII in *Patterson*.

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¹ 931 F.2d 1565 (D.C. Cir. 1991).

² 42 U.S.C. § 1981 (1988) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

³ *Id.*

⁴ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 188, 49 FEP Cases 1814, 1825 (1989).

In the 1989 case *Patterson v. McLean Credit Union*, the United States Supreme Court held that section 1981 prohibits discriminatory practices in private conduct.⁵ The Court limited such protection, however, to those rights specifically enumerated in section 1981.⁶ With respect to racial harassment in employment contracts, the Court noted that the language of section 1981 restricted the scope of the statute to the making and enforcement of such contracts.⁷

According to the *Patterson* Court, the first of these rights, the right to make contracts, applies solely to conduct that relates to the contract formation process.⁸ Thus, section 1981 does not address any discriminatory practices that occur during employment.⁹ The second right enumerated in section 1981 is the right to enforce contracts.¹⁰ This right prohibits employer conduct that might impair the employee's use of the legal process to enforce legitimate contract rights.¹¹

The *Patterson* Court held that racial harassment breaching the employment contract is clearly postformation conduct and therefore not protected under the making contracts clause of section 1981.¹² Similarly, the Court determined that racial harassment that rises to the extreme of an obvious breach of contract does not impair the legal process of contract enforcement.¹³ The Court concluded that such harassment does not infringe upon the rights protected by section 1981.¹⁴ Furthermore, the majority in *Patterson* noted its refusal to use section 1981 to federalize the traditional state common law claim for breach of contract even when the claim alleges discrimination.¹⁵ Therefore, an employee may only bring a claim

⁵ *Id.* at 172, 49 FEP Cases at 1818. In *Patterson*, the petitioner, Brenda Patterson, a black woman, was employed by the respondent, McLean Credit Union, as a teller and file coordinator. *Id.* at 169, 49 FEP Cases at 1817. She claimed that the respondent had "harassed her, failed to promote her . . . and then discharged her, all because of her race" in violation of section 1981. *Id.*

⁶ *Id.* at 175-76, 49 FEP Cases at 1820.

⁷ *Id.* at 176, 49 FEP Cases at 1820.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 177, 49 FEP Cases at 1820.

¹¹ *Id.* at 177-78, 49 FEP Cases at 1821.

¹² *Id.* at 179, 49 FEP Cases at 1821.

¹³ *Id.*

¹⁴ *Id.* at 179-80, 49 FEP Cases at 1821.

¹⁵ *Id.* at 183, 49 FEP Cases at 1823.

for harassment to the federal courts under a title VII employment discrimination action.¹⁶

During the *Survey* year, in *Gersman v. Group Health Ass'n*, the Circuit Court of Appeals for the District of Columbia addressed the issue of whether section 1981 prohibits discriminatory termination of a contract outside the scope of employment.¹⁷ The *Gersman* court held that *Patterson* applies to all private contractual relationships including those outside the confines of the employment context.¹⁸ Furthermore, the *Gersman* court determined that contract termination due to racial discrimination is postformation conduct that in no way impairs a person's right to make contracts or enforce legitimate contract rights.¹⁹ Therefore, the D.C. Circuit Court of Appeals held that section 1981 does not protect persons from contract termination due to racial discrimination.²⁰ After *Gersman*, plaintiffs may only bring their contract claims in state court in order to seek remedies for such conduct.²¹

In 1983, Gersman, President of Computer Security International ("CSI"), entered into a contract to provide software services to Group Health Association, Inc. ("GHA"), a health maintenance organization, for a one year period.²² Due to an automatic renewal provision within the contract, the original terms governed the contractual relationship for the four years during which the contract was in force.²³ The contractual relationship appeared healthy to Gersman for over three of those years.²⁴ In late 1986, however, Mohammed Ghafari, the new manager for GHA's Management Information System, had an assistant ask Gersman whether or not he was Jewish.²⁵ Upon learning that Gersman was indeed Jewish,

¹⁶ *Id.* at 180, 49 FEP Cases at 1821.

¹⁷ 931 F.2d 1565, 1571 (D.C. Cir. 1991).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.*

²² *Id.* at 1567. The original contract terms provided:

The initial term of this agreement shall be for 1 year. After expiration of the initial term, this agreement shall automatically renew for successive one month periods until terminated by either party upon receipt of written notice thirty days before the end of any of these successive periods. For renewal terms, notice of adjustment in the fixed charges shall be supplied in writing not less than forty-five (45) days prior to the renewal date at which the changes will take effect.

Id.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Ghafori allegedly sought to end the contractual relationship on the basis of Gersman's race.²⁶

After hearing rumors that GHA was dissatisfied with CSI, Gersman approached GHA management with his concerns about Ghafori's possible racial motivation.²⁷ GHA's management, while acknowledging awareness of Ghafori's racial inquiry, denied that race had anything to do with GHA's dissatisfaction with CSI's work.²⁸ Attempting to save the contractual relationship, Gersman proposed a change in contract terms more favorable to GHA.²⁹ Despite these efforts, GHA terminated the contractual relationship with CSI, pursuant to the contract terms, in October 1987.³⁰

Gersman and CSI brought suit against GHA in the Federal District Court for the District of Columbia, under both section 1981 and section 1-2511 of the D.C. Human Rights Act ("DCHRA"), alleging that racial discrimination motivated the contract termination.³¹ On GHA's motion, the district court dismissed the claims on two grounds.³² First, the court found that neither Gersman nor CSI had standing to bring such an action.³³ In addition, the court determined that the complaint failed to state a claim upon which relief could be granted.³⁴ Gersman and CSI subsequently appealed the dismissal to the D.C. Circuit Court of Appeals.³⁵

The D.C. Circuit Court of Appeals held that while Gersman had no standing in district court, CSI, as the contracting party and the party allegedly harmed by racial discrimination, had standing to bring suit under either of the two statutes.³⁶ The court also held, however, that section 1-2511 of the DCHRA protects only those

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Section 1-2511 of the DCHRA provides:

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.

D.C. CODE ANN. § 1-2511 (1981).

³² 931 F.2d at 1567.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* The court found no need to determine whether a corporation must have a "racial identity" in order to have standing but only that discrimination due to race harmed the corporate entity in some way. *Id.* at 1569.

rights enumerated in the statute.³⁷ Because contract terminations are not specifically mentioned in the DCHRA, the court of appeals dismissed the section 1-2511 claim for failing to state a claim upon which relief could be granted.³⁸

With respect to the contract claim under section 1981, the *Gersman* court recognized that *Patterson* was controlling law.³⁹ The appeals court noted that the plain language and meaning of both section 1981 and the *Patterson* decision demonstrated that each controlled outside the employment context.⁴⁰ The *Gersman* court observed that under *Patterson*, section 1981 applied not only to employment contracts, but to any contract formed by private parties.⁴¹ Thus, section 1981 prohibits racially motivated contract termination only if that termination infringed upon the rights of one party in making or enforcing its contract with another.⁴²

In *Gersman*, the D.C. Circuit Court of Appeals held that racially motivated contract terminations do not infringe upon the rights of a party to make and enforce contracts, which section 1981 protects.⁴³ The majority reasoned that because termination is postformation conduct, much like the breach in *Patterson*, it is not making or enforcing contracts under *Patterson*.⁴⁴ The court therefore concluded that racially motivated termination is left unprotected by section 1981.⁴⁵

Having held that racially motivated contract terminations are not protected under section 1981, the *Gersman* court next considered whether GHA's actions did indeed terminate the contract.⁴⁶ CSI contended that, because the contract renewed monthly, the parties created a new contract each month, and that GHA's failure

³⁷ *Id.* at 1574. See *supra* note 31 for the text of section 1-2511 of the DCHRA.

³⁸ 931 F.2d at 1574.

³⁹ *Id.* at 1570.

⁴⁰ *Id.* at 1570-71.

⁴¹ *Id.* at 1571.

⁴² 491 U.S. at 171, 49 FEP Cases at 1818.

⁴³ *Gersman*, 931 F.2d at 1571.

⁴⁴ *Id.*

⁴⁵ *Id.* The court termed *Gersman* a case of first impression for the D.C. Circuit and determined that holding racially motivated contract terminations unprotected by section 1981 was consistent with the holdings of a majority of other circuits. *Id.* (citing *Williams v. First Union Nat'l Bank*, 920 F.2d 232, 234, 55 FEP Cases 799, 801 (4th Cir. 1990); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258, 54 FEP Cases 639, 646 (6th Cir. 1990); *Gonzales v. Home Ins. Co.*, 909 F.2d 716, 722, 53 FEP Cases 862, 867 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09, 53 FEP Cases 505, 508 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Walker v. South Central Bell Tel. Co.*, 904 F.2d 275, 276-77, 53 FEP Cases 433, 433-34 (5th Cir. 1990); *Overby v. Chevron USA, Inc.*, 884 F.2d 470, 473, 50 FEP Cases 1211, 1213 (9th Cir. 1989)).

⁴⁶ *Id.* at 1572.

to renew was racially discriminatory preformation conduct in violation of section 1981.⁴⁷ The *Gersman* court rejected CSI's argument and held that each monthly renewal was not a new contract but conduct controlled by the original contract terms.⁴⁸ Furthermore, the court held that GHA terminated the contract in accordance with those original contract terms.⁴⁹

In holding that GHA's action terminated the contract, the court reasoned that the automatic monthly renewal of the contract continued until one party took some action to terminate the relationship.⁵⁰ The court determined that such an arrangement closely resembled an employment-at-will contract.⁵¹ Analogizing to the employment-at-will context, the court held that the terms of the relationship at any time were governed by the original contract.⁵² As such, the contractual arrangement between CSI and GHA never changed to such a degree that the parties formed a new contract.⁵³ The court determined that even when CSI offered new contract terms, such actions were postformation because they were governed by the original contract and did not change the responsibilities of the parties.⁵⁴

The dissent, written by Judge Wald, observed that the majority's scheme of labeling conduct as either postformation or preformation was too formal to be relevant in the real world.⁵⁵ The dissent noted a Third Circuit decision, *Perry v. Command Performance*, which demonstrated the problems created by such formalism.⁵⁶ In *Perry*, a black woman's husband made an appointment for the woman to get her hair cut.⁵⁷ When her usual hair stylist became ill, however, another stylist refused to cut her hair because she was black.⁵⁸ The Third Circuit Court of Appeals applied a preformation-postformation analysis of section 1981 and remanded the case to the district

⁴⁷ *Id.* at 1572-73.

⁴⁸ *Id.* at 1572.

⁴⁹ *Id.* at 1573.

⁵⁰ *Id.* at 1572.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1573. The court held in the employment-at-will context that only when the opportunity arises for a new and distinct relationship between the employer and employee, such as a promotion or demotion with new responsibilities, do the parties implicitly make a new contract. *Id.* (citing *Nelson v. School Bd.*, 738 F. Supp. 478, 480, 53 FEP Cases 255, 257 (S.D. Fla. 1990)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1576 (Wald, J., dissenting).

⁵⁶ *Id.* (Wald, J., dissenting) (citing *Perry*, 913 F.2d 99, 102 (3d Cir. 1990)).

⁵⁷ 913 F.2d at 100.

⁵⁸ *Id.*

court to determine when the parties made the contract.⁵⁹ According to Judge Wald's interpretation of *Perry*, if the contract was formed when the husband telephoned, the stylist's refusal constituted a contract termination outside the scope of section 1981.⁶⁰ If, however, the contract was formed when the stylist's performance began, the conduct was a refusal to contract forbidden by section 1981.⁶¹ The *Gersman* dissent considered the outcome in *Perry* to be a ridiculous consequence of the majority's reasoning and asserted that "[t]he real world of contract belies such stark formalism."⁶²

Furthermore, the dissent argued that termination of a contract is not analogous to breach of contract because termination does not merely infringe on contract rights but strips them away completely.⁶³ Therefore, while breach is actionable under state contract law, termination is not, *leaving victims of discriminatory termination without redress for their injuries*.⁶⁴ The *Gersman* dissent further observed that the majority's reasoning "prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to fire that person the next day because of her race."⁶⁵ According to the dissent, such an outcome negates section 1981's promise that all parties will have the same rights in private contract affairs.⁶⁶

In *Gersman*, the D.C. Circuit Court of Appeals demonstrated that the Supreme Court's reasoning in *Patterson* may be applied to broaden the scope of the restrictions imposed by section 1981 on contract cases. The *Gersman* court logically extended the *Patterson* holding to all contractual relationships.⁶⁷ The designation of racially motivated contract termination as postformation conduct, however, is a significant step beyond the *Patterson* decision.

In *Patterson*, the Supreme Court refused to extend section 1981 to cover breach of contract due to racial discrimination because it would federalize a traditional state law claim.⁶⁸ As the *Gersman* dissent noted, however, unlike the situation where a person breaches a contract, no state law claim exists once a person termi-

⁵⁹ *Id.* at 102.

⁶⁰ *Gersman*, 931 F.2d at 1576 (Wald, J., dissenting) (citing *Perry*, 913 F.2d at 101-02).

⁶¹ *Id.* (Wald, J., dissenting) (citing *Perry*, 913 F.2d at 101-02).

⁶² *Id.* at 1576 (Wald, J., dissenting).

⁶³ *Id.* at 1577 (Wald, J., dissenting).

⁶⁴ *Id.* at 1576-77 (Wald, J., dissenting).

⁶⁵ *Id.* at 1578 (Wald, J., dissenting). The majority counters that this is not a fair analysis of their view because such a hypothetical involves a contract formed under discriminatory terms prohibited by section 1981. *Id.* at 1572.

⁶⁶ *Id.* at 1578 (Wald, J., dissenting).

⁶⁷ *Id.* at 1571.

⁶⁸ 491 U.S. at 183, 49 FEP Cases at 1823.

nates a contract in accordance with the specific contract terms.⁶⁹ Thus, the Supreme Court's policy rationale for eliminating postformation conduct from section 1981 claims no longer applies.

Outside the employment contract context, a party whose contract was terminated due to racial discrimination does not enjoy the right to bring an action under title VII.⁷⁰ Similarly, a party whose contract was terminated due to racial discrimination does not enjoy the right to bring an action under state law claims.⁷¹ And after *Gersman*, a party whose contract was terminated due to racial discrimination does not enjoy the right to bring an action under section 1981.⁷² Thus, such a party, who is undeniably wronged by racial discrimination, is left with no remedy, unless the party is able to prove that such discriminatory conduct actually occurred at the time of the contract formation.⁷³

In *Gersman*, the D.C. Circuit Court of Appeals held that *Patterson* applies outside the employment context to all contractual relationships between private parties.⁷⁴ More importantly, however, the court held that termination of a contract on discriminatory grounds does not impair a person's right to make or enforce contracts.⁷⁵ The decision thus eliminates the wronged party's claim under section 1981 and, with it, any chance for remedy at all.

III. AGE DISCRIMINATION

A. * *Enforcing Arbitration Agreements in Age Discrimination Suits:* *Gilmer v. Interstate/Johnson Lane Corp.*¹

On February 12, 1925 President Coolidge signed the United States Arbitration Act.² Reenacted and codified in 1947 as the Fed-

⁶⁹ 931 F.2d at 1576-77 (Wald, J., dissenting).

⁷⁰ See *id.* at 1570. The applicable section of title VII states:

It shall be an unlawful employment practice for an employer—1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1988).

⁷¹ *Gersman*, 931 F.2d at 1577 n.3 (Wald, J., dissenting).

⁷² *Id.* at 1571.

⁷³ *Id.* at 1572.

⁷⁴ *Id.* at 1571.

⁷⁵ *Id.*

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¹ 111 S. Ct. 1647, 55 FEP Cases 1116 (1991).

² United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-15 (1988)).

eral Arbitration Act³ ("FAA" or the "Act"), the legislation was designed to reverse the judiciary's longstanding disfavor of arbitration agreements by giving such agreements the same protection as other contracts.⁴ Accordingly, the primary substantive provision of the Act, section 2, renders written arbitration agreements "valid, irrevocable, and enforceable" within the confines of traditional contract principles.⁵

The Act provides two devices for enforcing a written arbitration agreement. First, it requires United States courts to stay their proceedings on any issue raising a dispute referable to arbitration under the Act.⁶ Second, it empowers federal district courts to compel a non-cooperative party to an arbitration agreement to arbitrate arbitrable issues.⁷

The United States Supreme Court has adopted an aggressive posture in support of the FAA,⁸ interpreting the Act as declarative of a liberal federal policy favoring arbitration agreements.⁹ Consequently, the Court has extended the scope of the Act to encompass claims founded on statutory as well as contractual rights.¹⁰ Thus, in

³ Federal Arbitration Act of 1947, 9 U.S.C. §§ 1-15 (1988).

⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1651, 55 FEP Cases at 1119. Judicial hostility toward arbitration agreements in the United States has its origins in the English court system. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974). English courts "considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act." *Id.* (citing H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924)). See also *Dean Witter-Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 & n.6 (1985); Michael Lieberman, Note, *Overcoming the Presumption of Arbitrability of ADEA Claims: The Triumph of Substantive Over Procedural Values in Nicholson v. CPC International, Inc.*, 138 U. PA. L. REV. 1817, 1823 & n.36 (1990).

⁵ 9 U.S.C. § 2.

⁶ *Id.* § 3.

⁷ *Id.* § 4.

⁸ Beginning in the mid-1970s, the United States Supreme Court abandoned its reluctance to enforce arbitration agreements under the FAA and embraced a presumption in favor of enforcing arbitration agreements. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Dean Witter-Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express, Inc.*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). In the immediate wake of the Act, however, the federal judiciary devised exceptions to the FAA's policy in favor of arbitration. See Susan C. Davis, Note, *Bird v. Shearson Lehman/American Express, Inc.: Upholding Compulsory Arbitration of ERISA Claims Properly Treats All Investors Equally*, 75 MINN. L. REV. 123, 129 (1990). In particular, courts exempted the areas of securities, antitrust, bankruptcy and RICO. *Id.*

⁹ *Gilmer*, 111 S. Ct. at 1651, 55 FEP Cases at 1119; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹⁰ See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-

two recent cases, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* ("Mitsubishi")¹¹ and *Shearson/American Express, Inc. v. McMahon* ("McMahon"),¹² the Court established the current framework for evaluating whether a statutory claim is arbitrable under the FAA.

The framework for determining the arbitrability of statutory claims consists of a three prong test examining the statute's text, legislative history,¹³ and underlying policies and purposes for evidence of a congressional intent to preclude enforcement of arbitration agreements for the resolution of statutory disputes.¹⁴ The test is grounded on the premise that the FAA, taken alone, mandates enforcement of agreements to arbitrate, regardless of whether the claim is statutorily or contractually based.¹⁵ Accordingly, the test establishes a presumption of enforceability of agreements to arbitrate statutory claims, which can only be overcome by a contrary congressional command.¹⁶ Thus, the burden falls on the party opposing arbitration to prove congressional intent to preclude a waiver of judicial remedies for the statutory claim.¹⁷ Such a limitation would surface in either the text or legislative history, or result from an inherent conflict between arbitration and the statute's underlying purposes.¹⁸

The Court has applied the *Mitsubishi/McMahon* test to enforce arbitration agreements with respect to a number of statutory claims. These include claims arising under the Securities Exchange Act of 1934,¹⁹ the civil provisions of the Racketeer Influenced and Corrupt

86 (1989) (pre-dispute agreement to arbitrate claims under the Securities Act of 1933 held enforceable and resolution of claims in a judicial forum not required); *McMahon*, 482 U.S. at 238, 242 (Exchange Act claims and RICO claims arbitrable under the FAA); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (antitrust claims arbitrable pursuant to the FAA); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (FAA requires courts to compel arbitration of arbitrable state law claims even when such claims arise from the same transaction and are "intertwined" with non-arbitrable federal claims); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (claims under Securities Exchange Act of 1934 involving international business transactions subject to arbitration under the FAA).

¹¹ 473 U.S. 614 (1985).

¹² 482 U.S. 220 (1987).

¹³ *Mitsubishi*, 473 U.S. at 628; *McMahon*, 482 U.S. at 227.

¹⁴ *Mitsubishi*, 473 U.S. at 632-37; *McMahon*, 482 U.S. at 227.

¹⁵ See *McMahon*, 473 U.S. at 226.

¹⁶ *Id.*

¹⁷ *Id.* at 227; *Mitsubishi*, 473 U.S. at 628.

¹⁸ *McMahon*, 482 U.S. at 227.

¹⁹ See *McMahon*, 482 U.S. at 238.

Organizations Act,²⁰ and the Securities Exchange Act of 1933.²¹ Despite the presumption of arbitrability under the FAA, however, the Court has acknowledged that some controversies implicating statutory rights are not suitable for arbitration.²² In particular, employment discrimination statutes have repeatedly failed the Court's *Mitsubishi/McMahon* test of arbitrability.²³ In a series of cases, known as the *Gardner-Denver* trilogy, the Court denied enforcement of arbitration for various employment discrimination claims arising under the Fair Labor Standard Act,²⁴ under 42 U.S.C. § 1983,²⁵ and under title VII of the Civil Rights Act of 1964.²⁶

As a result of the *Mitsubishi* and *Gardner-Denver* cases, a split in the federal courts of appeals developed as to the enforceability of arbitration agreements regarding claims brought under the Age Discrimination in Employment Act of 1967 (ADEA).²⁷ The United States Supreme Court granted certiorari to resolve this conflict among the circuits regarding the arbitrability of claims brought under the ADEA.²⁸

²⁰ See *id.* at 242.

²¹ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-86 (1989).

²² See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284, 292, 115 L.R.R.M. 3646, 3649 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).

²³ See *McDonald*, 466 U.S. at 292, 115 L.R.R.M. at 3649; *Barrentine*, 450 U.S. at 745.

²⁴ *Barrentine*, 450 U.S. at 745.

²⁵ *McDonald*, 466 U.S. at 292, 115 L.R.R.M. at 3649.

²⁶ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60, 7 FEP Cases 81, 90 (1974).

²⁷ Compare *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 52 FEP Cases 26, (4th Cir. 1990) with *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 230, 49 FEP Cases 1678, 1685 (3d Cir. 1989).

The ADEA is codified at 29 U.S.C. §§ 621-624 (1988). Congress enacted the ADEA in 1967 to prohibit arbitrary discrimination against older employees and to promote employment of older persons based on their ability. *Id.* § 621(b). The ADEA states that "[it] shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . ." *Id.* § 623(a).

In the 1989 case of *Nicholson v. CPC International Inc.*, the United States Court of Appeals for the Third Circuit refused to compel arbitration under the FAA with respect to an ADEA claim. 877 F.2d at 230, 49 FEP Cases at 1685 (3rd Cir. 1989). In applying the *Mitsubishi/McMahon* test, the court noted that the language of the statute and the legislative history, while suggestive, were not conclusive of congressional intent regarding arbitration of ADEA claims. *Id.* at 225-227, 49 FEP Cases at 1681-82. Application of the third prong of the arbitrability test, however, revealed an inherent conflict between the objectives of the ADEA and displacement by arbitration of a judicial forum for claimants alleging age discrimination. *Id.* at 227-30, 49 FEP Cases at 1682-85. Consequently, the court refused to enforce an arbitration agreement that encompassed an ADEA dispute between a corporate officer and his employer. *Id.* at 231, 49 FEP Cases at 1686.

²⁸ 111 S. Ct. 41 (1990).

During the *Survey* year, the United States Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*, that an ADEA claim can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.²⁹ According to the Court's *Mitsubishi/McMahon* test, as applied in *Gilmer*, a party to an arbitration agreement is bound to arbitrate a claim under the ADEA unless that plaintiff can show that Congress intended to preclude a waiver of a judicial forum for the claim.³⁰

In *Gilmer*, *Interstate/Johnson Lane Corporation* ("Interstate") hired Robert Gilmer as Manager of Financial Services in May of 1981.³¹ As a condition of his employment with Interstate, Gilmer had to register as a securities representative with several stock exchanges, including the New York Stock Exchange ("NYSE").³² The NYSE registration application contained, among other provisions, an agreement to arbitrate when required by NYSE rules.³³ NYSE Rule 347, as applied to this case, required the arbitration of any controversy between Gilmer and Interstate arising out of the termination of Gilmer's employment.³⁴

In 1987, when Gilmer was 62 years of age, Interstate terminated his employment.³⁵ Thereafter, Gilmer filed an age discrimination charge with the Equal Employment Opportunity Commission ("EEOC").³⁶ Subsequently, Gilmer brought suit in the United States District Court for the Western District of North Carolina, alleging that Interstate had discharged him because of his age, in violation of the ADEA.³⁷ In response to Gilmer's complaint, Interstate moved to compel arbitration of the ADEA claim, relying on both the agreement in Gilmer's NYSE registration application and section 4 of the FAA.³⁸

The trial court denied Interstate's motion, concluding that Congress intended to insulate ADEA claimants from the waiver of a judicial forum.³⁹ The United States Court of Appeals for the Fourth

²⁹ 111 S. Ct. 1647, 1657, 55 FEP Cases 1116, 1123 (1991).

³⁰ *Id.* at 1652, 55 FEP Cases at 1120.

³¹ *Id.* at 1653, 55 FEP Cases at 1118.

³² *Id.*

³³ *Id.*

³⁴ *See id.* at 1651, 55 FEP Cases at 1115.

³⁵ *Id.* at 1651, 55 FEP Cases at 1118-19.

³⁶ *Id.* at 1651, 55 FEP Cases at 1119.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* The trial court stated that it was following *Alexander v. Gardner-Denver Co.*, 440 U.S. 410, 55 FEP Cases at 1119. *Gardner-Denver* held that an employee's statutory right to trial

Circuit reversed the lower court's decision and granted the motion to compel arbitration.⁴⁰ In applying the *Mitsubishi/McMahon* test, the Court of Appeals based its decision on the plaintiff's failure to demonstrate anything in the statutory language, legislative history or underlying goals of the ADEA that indicated a congressional intent to preclude enforcement of arbitration agreements.⁴¹

On review, the Supreme Court affirmed the decision of the Fourth Circuit and held that an ADEA claim can be subjected to compulsory arbitration.⁴² In an opinion by Justice White, the Court rejected all of Gilmer's arguments for denying the motion to compel arbitration. First, the Court rejected Gilmer's argument that the social policies furthered by the ADEA conflicted with arbitration.⁴³ Second, the Court rejected Gilmer's challenges to the adequacy of arbitration.⁴⁴ Third, the Court rejected Gilmer's argument that the unequal bargaining power between employers and employees warrants the decision to hold arbitration agreements unenforceable in the employment context.⁴⁵ Finally, the Court dismissed as "misplaced" Gilmer's reliance on *Alexander v. Gardner-Denver Co.* and its progeny.⁴⁶

In its analysis, the Court first noted its recent willingness to enforce arbitration of statutory claims pursuant to the FAA.⁴⁷ In reiterating the *Mitsubishi/McMahon* test of arbitrability for statutory claims, the Court noted that Gilmer had the burden of showing that Congress intended to preclude a waiver of a judicial forum for ADEA claims.⁴⁸ According to the Court, Gilmer failed to meet this burden.⁴⁹

In rejecting Gilmer's "inherent conflict" argument, the Court reviewed the purposes of the ADEA, as embodied in its text.⁵⁰ The Court conceded, as Gilmer argued, that the ADEA is designed not

de novo under title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of the claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement. 415 U.S. 36, 59-60, 7 FEP Cases 81, 90 (1974).

⁴⁰ *Gilmer*, 895 F.2d at 203.

⁴¹ *Id.* at 197.

⁴² *Gilmer*, 111 S. Ct. at 1657, 55 FEP Cases at 1123.

⁴³ *Id.* at 1652-54, 55 FEP Cases at 1120-21.

⁴⁴ *Id.* at 1654-55, 55 FEP Cases at 1121-22.

⁴⁵ *Id.* at 1655-56, 55 FEP Cases at 1122.

⁴⁶ *Id.* at 1656-57, 55 FEP Cases at 1122-23.

⁴⁷ *Gilmer*, 111 S. Ct. at 1651, 55 FEP Cases at 1119.

⁴⁸ *Id.* at 1652, 55 FEP Cases at 1122.

⁴⁹ *Id.* at 1657, 55 FEP Cases at 1123.

⁵⁰ *Id.* at 1652-53, 55 FEP Cases at 1120-21.

only to address individual grievances, but also to further important social policies.⁵¹ Nonetheless, the Court asserted that arbitration could implement such policies as effectively as could judicial resolution of claims.⁵²

The Court was also unconvinced by Gilmer's contention that arbitration would undermine the role of the EEOC in enforcing the ADEA.⁵³ The Court reasoned that individual ADEA claimants are still free to file charges with the EEOC irrespective of their ability to institute private judicial action.⁵⁴ Additionally, the Court found nothing in the text of the ADEA to indicate a congressional intent to involve the EEOC in all employment disputes.⁵⁵ Moreover, the Court remarked that the participation of an administrative agency in the enforcement of a statute does not by itself preclude arbitration.⁵⁶ Finally, the Court concluded that the ADEA's statutory scheme was consistent with arbitration.⁵⁷

The Court also rejected Gilmer's attacks on the adequacy of arbitration procedures.⁵⁸ Gilmer pointed to the dangers of biased panels and to the limited discovery and review opportunities in arbitration proceedings.⁵⁹ The Court dismissed Gilmer's bias argument as too speculative, and noted furthermore that the NYSE arbitration rules applicable to Gilmer provided sufficient protection against biased panels.⁶⁰

The Court had several responses to Gilmer's arguments pertaining to the limits on discovery. First, the Court asserted that

⁵¹ *Id.* at 1653, 55 FEP Cases at 1120. See *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (enactment of ADEA marked effort to prohibit age limitations in hiring practices, to dispel unfounded stereotypes and unfavorable myths with respect to elderly workers, and to ameliorate age discrimination's adverse effects on both the national economy and the psychological well-being of elderly workers).

⁵² *Id.*

⁵³ *Id.* at 1653-54, 55 FEP Cases at 1120-21.

⁵⁴ *Id.* at 1653, 55 FEP Cases at 1120.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1653, 55 FEP Cases at 1121. In particular, the Court cited to *McMahon* and *Rodriguez de Quijas*. *Id.*

⁵⁷ *Id.* at 1654, 55 FEP Cases at 1121. The Court noted that the EEOC is directed to pursue "informal methods of conciliation, conference, and persuasion." *Id.* (quoting 29 U.S.C. § 626(b)). The Court interpreted this language as indicative of a "flexible approach to resolution of claims" and supportive of out-of-court dispute resolution, such as arbitration. *Id.* at 1654, 55 FEP Cases at 1121.

⁵⁸ *Id.* at 1654-55, 55 FEP Cases at 1121-22. Mindful that recent arbitration cases had already rejected Gilmer's complaints, the Court devoted little time to addressing these arguments. *Id.* at 1654, 55 FEP Cases at 1121.

⁵⁹ *Id.* at 1654-55, 55 FEP Cases at 1121-22.

⁶⁰ See *id.* at 1654, 55 FEP Cases at 1121.

ADEA claims required no more discovery than other statutory claims held arbitrable in the past.⁶¹ Second, the Court observed that the NYSE rules afforded adequate protection to Gilmer by requiring that all arbitration awards be in writing, setting forth the facts and the basis for award.⁶² The Court further reasoned that any differences between judicial proceedings and arbitration merely derive from the nature of an arbitration agreement; a party to an arbitration agreement purposefully exchanges the procedures of the courtroom for the alternative benefits of arbitration—i.e., simplicity, informality and speed.⁶³

The Court dismissed Gilmer's argument pertaining to the unequal bargaining power often existing between employers and employees.⁶⁴ The Court observed that under the FAA, arbitration agreements are only enforceable to the limits of any other contract.⁶⁵ Accordingly, while any evidence of fraud, coercion or inequalities in bargaining position would warrant a revocation of an agreement, none existed in Gilmer's case.⁶⁶

Lastly, Gilmer argued that the Court's prior treatment of ADEA claims in the *Gardner-Denver* line of cases precluded arbitration of employment discrimination claims.⁶⁷ Characterizing Gilmer's reliance on these cases as being "misplaced," the Court pointed out several distinctions between the *Gardner-Denver* line of cases and *Gilmer*.⁶⁸ First, the Court noted that in the *Gardner-Denver* cases the issue was whether arbitration of contract-based claims prevented later adjudication of statutory claims, not whether arbitration of statutory claims could be compelled.⁶⁹ Second, the Court observed that an important issue in the *Gardner-Denver* cases was the tension between collective bargaining and individual statutory rights, a concern that this case did not present.⁷⁰ Third, the Court noted that the *Gardner-Denver* cases were not decided under the FAA.⁷¹

The Court concluded that Gilmer failed to meet his burden of showing that Congress intended to preclude arbitration of claims

⁶¹ *Id.*

⁶² *Id.* at 1655, 55 FEP Cases at 1122.

⁶³ *Id.* at 1655-56, 55 FEP Cases at 1122.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1656, 55 FEP Cases at 1122.

⁶⁶ *Id.*

⁶⁷ *Gilmer*, 111 U.S. at 1656, 55 FEP Cases at 1122-23.

⁶⁸ *Id.* at 1656, 55 FEP Cases at 1123.

⁶⁹ *Id.* at 1657, 55 FEP Cases at 1123.

⁷⁰ *Id.*

⁷¹ *Id.*

under the ADEA.⁷² Accordingly, the Court affirmed the judgment of the court of appeals granting Interstate's motion to compel arbitration of Gilmer's ADEA claim pursuant to the arbitration agreement in Gilmer's application for registration with the NYSE.⁷³

In the sole dissenting opinion, Justice Stevens, joined by Justice Marshall, argued that the arbitration clause contained in Gilmer's agreement with the NYSE was exempt from FAA coverage.⁷⁴ Consequently, Interstate should not be able to compel arbitration of Gilmer's ADEA claim.⁷⁵ Stevens's argument stemmed from his interpretation of section 1 of the Act.⁷⁶ The correct interpretation, according to Stevens, exempts all contracts between employers and employees from coverage under the FAA.⁷⁷ Thus, argued Stevens, the exclusion in section 1 of the Act should be interpreted broadly to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship.⁷⁸ Because the registration application with NYSE was a condition of Gilmer's employment, Stevens concluded that the application was part of the employment relationship and thus exempted by section 1.⁷⁹ That

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1657, 55 FEP Cases at 1123-24 (Stevens, J., dissenting). Section 1 of the FAA states, in pertinent part, that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). The majority opinion declined to consider the scope of this clause because Gilmer neither raised the issue in the lower courts nor in his petition for certiorari. *Gilmer*, 111 S. Ct. at 1651 n.2, 55 FEP Cases at 1119 n.2. Additionally, the majority stated that it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause at issue was not contained in a contract of employment, but rather in a contract with the NYSE, a third party. *Id.* The Court further relied on lower court holdings that the FAA § 1 exclusion clause is inapplicable to arbitration clauses contained in such registration applications. *Id.* Consequently, the Court held that § 1's exclusion clause did not apply to Gilmer's arbitration agreement. *Id.*

Stevens conceded that it was amici curiae in support of Gilmer who first raised the issue of coverage prior to oral argument, while Gilmer never raised the issue himself. *Id.* at 1657, 55 FEP Cases at 1124 (Stevens, J., dissenting). However, Stevens observed that the Court amply raised the issue with both parties at oral argument. *Id.* at 1658, 55 FEP Cases at 1124-25 (Stevens, J., dissenting). Additionally, Stevens noted that on past occasions the Court had considered "antecedent" and "dispositive" issues waived by the parties. *Id.* at 1658, 55 FEP Cases at 1125 (Stevens, J., dissenting). According to Stevens, the waived issue of coverage in *Gilmer* was even more compelling than the issues waived in those prior cases. *Id.* at 1658, 55 FEP Cases at 1124 (Stevens, J., dissenting).

⁷⁵ *Id.* (Stevens, J., dissenting).

⁷⁶ See *id.* at 1659, 55 FEP Cases at 1125 (Stevens, J., dissenting). "In my opinion the Court too narrowly construes the scope of the exclusion contained in § 1 of the FAA." *Id.*

⁷⁷ *Gilmer*, 111 S. Ct. at 1659, 55 FEP Cases at 1125 (Stevens, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.*

Gilmer's agreement to arbitrate with Interstate was contained in his application for registration before the NYSE, rather than in a specific employment contract made directly with Interstate, was irrelevant to Stevens.⁸⁰

Before *Gilmer*, the Court had already suggested that virtually all federal statutory claims arising in commercial contexts are subject to arbitration under the FAA. With *Gilmer*, the Court seems to have validated an expansive reading of section 1 of the Act, broadly encompassing disputes arising out of employment relationships as well. Viewed against the backdrop of an aging society and the increasing popularity of arbitration agreements, *Gilmer* will undoubtedly have significant and varied impacts on the nature of employment relations for both employees and employers.

The *Gilmer* decision is likely to trigger the proliferation of employment arbitration clauses encompassing ADEA claims. Even prior to *Gilmer*, increasingly large numbers of age discrimination suits have been instituted pursuant to the ADEA. The number of workers covered by the ADEA is increasing as the "baby boom" generation reaches middle age. Consequently, under *Gilmer*, arbitration could become a common dispute mechanism for older employees and their employers. Such a development could produce both benefits and dangers for parties involved in an ADEA dispute.

Arbitration of ADEA claims offers possible advantages to ADEA plaintiffs and defendants. First, arbitration of ADEA claims has several potential cost advantages for both employers and employees, which, in turn, may afford elderly workers greater access to the legal system. In contrast to the cost of litigation, the savings associated with arbitration may provide low income plaintiffs with the opportunity to resolve a claim at relatively small cost. Additionally, quicker resolution of claims through arbitration may help older workers who are often unable to find other employment in the event of a drawn-out lawsuit. Although employers are usually more capable than employees of absorbing the costs of litigation, the same advantages flowing from arbitration nonetheless apply to employers as well.

Employers and employees may also benefit from the applicability of arbitration to ongoing employment relationships. Unlike litigation, arbitration seeks compromise and a solution agreeable to both parties. Ideally, arbitration results in less tension and hostility

⁸⁰ *Id.* "I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled 'Contract of Employment.'" *Id.*

and generates more cooperation among the individuals involved. Thus, for those employees seeking to preserve their jobs, arbitration may help salvage a congenial employment relationship—a worthy goal from both the perspective of employer and employee. Finally, both employees and employers may benefit from the confidential nature of arbitration proceedings. Neither employers nor employees stand to gain from the negative publicity and bothersome intrusions associated with litigation.

On the other hand, the Court's extension of the FAA to ADEA claims within the context of employment relationships may have several negative implications for employees. The extension of section 1 FAA coverage to employment relationships in certain circumstances may result in less protection for employee rights. First, as argued in *Gilmer*, minimal discovery in arbitration may make it more difficult for ADEA plaintiffs to prove discrimination in an arbitral forum as opposed to a judicial proceeding. Second, arbitration of ADEA claims may frustrate the development of the exact social policies the statute was designed to implement. It is clearly against the congressional objectives of the Act to permit an employer practicing age discrimination to contract away an elderly employee's right to waive arbitration; to the contrary, it is the exact goal of the ADEA to protect the waiver of such rights. Moreover, because arbitrable decisions bypass the court system, arbitration of ADEA claims will not only remove ADEA law from public scrutiny, but will also impede the growth of case law interpreting and applying the statute.

In addition to the disadvantages of arbitration, the Court's holding in *Gilmer* presents other problems. First, *Gilmer* threatens to undermine the ADEA's attempt to protect workers from the waiver of civil rights. If employees like *Gilmer* can now inadvertently and unwittingly waive their rights to bring charges of employment discrimination by signing indirect contracts made with non-employers, then *Gilmer* raises cause for even greater concern. After *Gilmer*, employees must be acutely aware of what they are signing and with whom, lest they be held to have agreed to have waived their rights to a judicial proceeding pursuant to an arbitration agreement contained in some remote employment contract, application or agreement. Finally, that the Court is willing to extend the FAA to ancillary agreements upon which employment is conditional may signal the Court's willingness to extend the FAA to the entire arena of the employment relationship. It remains an open question whether the Court will extend its decision in *Gilmer* to hold

that employers may enforce arbitration agreements contained in employment contracts.

IV. GOVERNMENT EMPLOYMENT

A. * *The End of Political Patronage in Governmental Employment: Rutan v. Republican Party of Illinois*¹

Political patronage practices in American politics extend back to the early days of the nation.² These patronage practices traditionally embrace a wide range of political activities such as hiring loyal political supporters for government posts, rewarding political supporters with lucrative government contracts, and dismissing public employees belonging to an opposing political party.³ In the mid-1970s, however, the United States Supreme Court began to restrict the use of such political patronage practices by government officials.⁴ The Court held that low-level public employees were protected from patronage dismissals by virtue of the constitutionally guaranteed First Amendment freedoms of belief and association.⁵ The Court refused, however, to extend this protection to high-level governmental employees for whom, the Court reasoned, political loyalty was a valid job requirement given the policy-making function of their jobs.⁶

During the *Survey* year, the United States Supreme Court addressed the issue of political patronage once again in *Rutan v. Republican Party of Illinois*⁷ and extended First Amendment protection to hiring, promotion, transfer and recall after discharge of public employees.⁸ In *Rutan*, petitioners challenged the employment policies of Republican Illinois Governor James Thompson who issued an executive order in 1980 freezing all 60,000 state positions under his control.⁹ Thompson's executive order prohibited the hiring of

* By Robert Mahlowitz, Editor, BOSTON COLLEGE LAW REVIEW.

¹ 110 S. Ct. 2729 (1990).

² See *Elrod v. Burns*, 427 U.S. 947, 353 (1976). See generally MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR* (1971) for a discussion of American political patronage practices.

³ *Elrod*, 427 U.S. at 353.

⁴ See *id.* at 373 (holding that patronage dismissals violate the First Amendment).

⁵ *Id.*

⁶ *Id.* at 367-68.

⁷ 110 S. Ct. 2729 (1990).

⁸ *Id.* at 2739. While *Rutan* addressed patronage issues, the case did not confront the policy-maker/non-policy-maker issue which was first raised in *Elrod* because the state conceded that only non-policy-making positions were involved in the suit. *Id.* at 2755 n.5.

⁹ *Id.* at 2732.

new employees, the filling of any vacancy, the creation of any new position, or the taking of any similar action without the approval of his office.¹⁰ The five petitioners in *Rutan* argued that the governor used the freeze to engage in a political patronage system that limited state employment and conferred employment-related benefits to individuals supported by the Republican party.¹¹ Specifically, the petitioners claimed that the government's failure to promote, transfer, recall, and hire government employees for patronage reasons violated the First Amendment.¹² The petitioners filed suit in United States District Court for the Central District of Illinois alleging that such discrimination was a violation of their First Amendment rights of political association.¹³

The district court dismissed the complaint for failure to state a claim.¹⁴ The district court stated that the 1976 United States Supreme Court case of *Elrod v. Burns*¹⁵ and the 1980 United States Supreme Court case of *Branti v. Finkel*,¹⁶ upon which the petitioners relied, limited First Amendment protection against political patronage actions only to employee firings and that the reasoning of these cases did not extend to decisions to hire, promote, transfer or recall after layoff.¹⁷

In *Elrod* the Court, in a four to three plurality decision, held that patronage dismissals of non-policy-making public employees

¹⁰ *Id.*

¹¹ *Id.* The Court stated that in reviewing a particular request for a position, the governor's office evaluated whether the applicant voted in Republican primaries, whether the applicant had given monetary or other support to the Republican party, whether the applicant pledged support for the Republican party, and whether the applicant was supported by state or local Republican officials. *Id.*

¹² *Id.* at 2732-33.

¹³ *Id.* Cynthia Rutan worked for the State of Illinois beginning in 1974 as a rehabilitation counselor and claimed that, beginning in 1981, she was repeatedly denied promotions to supervisory positions for which she was qualified because she did not work for or support the Republicans. *Id.* at 2733. Franklin Taylor operated road equipment for the Illinois Department of Transportation and claimed that in 1983 he was denied a promotion due to lack of Republican support. *Id.* Taylor also claims that he was denied a transfer to an office nearer to his home. *Id.* James Moore claimed that he was repeatedly denied state employment as a prison guard due to lack of Republican support. *Id.* Rickey Standefer, a state garage worker, claimed that he was not recalled after layoff because he had voted in a Democratic primary. *Id.* And Dan O'Brien, who worked as a dietary manager in the mental health department, claimed that he was not recalled after layoff because he was not a Republican and that he later obtained a lower paying post with the state only after receiving the support of the local Republican party. *Id.*

¹⁴ *Rutan v. Republican Party*, 641 F. Supp. 249, 251, 259 (C.D. Ill. 1986).

¹⁵ 427 U.S. 347 (1976).

¹⁶ 445 U.S. 507 (1980).

¹⁷ 641 F. Supp. at 252-53.

unconstitutionally infringe upon the protected First Amendment rights of political belief and association.¹⁸ The United States Court of Appeals for the Seventh Circuit in *Elrod* ordered that a preliminary injunction issue on behalf of the fired workers, and the state then appealed the case to the United States Supreme Court.¹⁹ Justice Brennan, writing for the plurality, stated that the political beliefs and associations involved in *Elrod* are fundamental core activities protected by the First Amendment.²⁰ The Court noted that tying job security for a public position to a required pledge of allegiance or affiliation for a political party amounted to coercion of public employees and infringed on First Amendment rights.²¹ The *Elrod* Court stated that government restraints on First Amendment rights are only permitted where a vital governmental end is furthered and the means employed is the least restrictive of freedom of belief and association, such that the benefit gained by the governmental practice outweighs the loss of constitutional privileges.²² Because the Court decided that patronage dismissals severely restricted political belief and association without conferring sufficiently important benefits to the government, the Court held the practice of political patronage firings to be unconstitutional.²³

Although *Elrod* severely limited the ability of a government official to resort to patronage dismissals, the Court's decision did not entirely ban the practice.²⁴ In the end, the Court upheld the Seventh Circuit's order requiring a preliminary injunction barring the dismissal of the *Elrod* employees.²⁵ The important distinction for determining when patronage dismissals were permissible in *El-*

¹⁸ 427 U.S. at 373. Justice Brennan, joined by Justices White and Marshall, announced the judgment of the Court. *Id.* at 349. Justice Stewart issued a separate concurrence. *Id.* at 374 (Stewart, J., concurring). Chief Justice Burger and Justices Powell and Rehnquist dissented. *Id.* at 375, 376 (Burger, C.J., Powell, J., Rehnquist, J., dissenting). Justice Stevens did not participate in the decision. *Id.* at 374.

The Republican *Elrod* plaintiffs sued a newly-elected Democratic sheriff, claiming that they were fired from their government jobs solely because of their political affiliations. *Id.* at 349-50 (plurality opinion). Plaintiffs were employed as a process division deputy, a bailiff and security guard, a process server, and a sheriff's office employee. *Id.* at 350-51.

¹⁹ *Id.* at 349; see *Elrod v. Burns*, 509 F.2d 1133, 1135 (1975).

²⁰ *Elrod*, 427 U.S. at 356.

²¹ See *id.* at 355-56.

²² *Id.* at 363.

²³ *Id.* at 372-73.

²⁴ See *id.* at 372. The Court reasoned that patronage dismissals were appropriate in the case of an employee who performs policy-making functions and his or her dismissal was necessary to ensure the efficacy of an incoming political administration. *Id.* at 367.

²⁵ *Id.* at 373.

rod, was the definition of whether a state employee was in a policy-making or non-policy-making position because after *Elrod*, only public employees in non-policy-making positions were protected by the First Amendment from patronage dismissals.²⁶

The next Supreme Court political patronage case was the 1980 case of *Branti v. Finkel*, in which the Court refined the policy-maker versus non-policy-maker distinction articulated in *Elrod* by granting protection from patronage dismissals to some employees who were policy-makers under *Elrod*.²⁷ To determine whether the dismissals escaped First Amendment protection under *Elrod*, the *Branti* Court looked to whether the government employer could demonstrate that party affiliation was an appropriate requirement for the position of assistant public defender.²⁸ The Court in *Branti* noted that this approach was different from the *Elrod* policy-maker/non-policy-maker test inasmuch as there are some policy-making positions for which party affiliation is not an appropriate requirement (such as a state university football coach) and some non-policy-maker positions for which party affiliation is an appropriate requirement (such as a gubernatorial speech writer).²⁹ After *Branti*, the test to determine whether a public employee may constitutionally be dismissed no longer depended solely on the policy-maker/non-policy-maker distinction recognized in *Elrod*, but also included the question of whether party affiliation is an acceptable condition for government employment, even if a policy-making position is at issue.³⁰

Following *Branti*, a vast number of cases were brought by former public employees who claimed that their First Amendment rights were violated by dismissals based on their political party affiliation.³¹ In fact, each of the circuits has created its own test and

²⁶ *Id.* at 367. The plurality opinion noted three characteristics generally associated with policy-makers. *Id.* at 367-68. First, policy-makers usually have responsibilities broad in scope that are ill-defined while non-policy-makers have limited, specific duties. *Id.* at 368. Second, one who acts as an advisor may be considered a policy-maker. *Id.* Third, one whose position involves implementation of broad goals may be a policy-maker. *Id.* For a discussion of this test, see Susan Lorde Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 20 (1989).

²⁷ See 445 U.S. 507, 518 (1980). *Branti* involved the patronage dismissals of two Republican assistant public defenders by a newly-appointed Democratic public defender. *Id.* at 509.

²⁸ See *id.* at 518.

²⁹ *Id.* Because the Court determined that an assistant public defender must represent the interests of individual clients rather than the government, the Court held that partisan political interests are irrelevant to his or her job performance. *Id.* at 519.

³⁰ *Id.* at 518; see also Martin, *supra* note 26, at 22.

³¹ See generally Martin, *supra* note 26, for a comprehensive compilation of these cases.

method of applying the *Elrod/Branti* doctrine.³² Courts have had little trouble determining the ends of the spectrum of jobs for which party affiliation is an appropriate requirement and those for which the requirement is inappropriate.³³ The jobs in between posed the greatest problem for courts and lead to conflicting results for similar cases.³⁴

Thus, when the *Rutan* district court dismissed the complaint of the *Rutan* petitioners, the court relied on conflicting interpretations of the *Elrod/Branti* doctrine. The *Rutan* district court reached its decision in part by relying on the case of *LaFalce v. Houston*³⁵ in which the Seventh Circuit Court of Appeals refused to extend *Elrod* and *Branti* to protect against patronage practices in the awarding of public contracts and the hiring of public employees.³⁶ In *LaFalce*, the court noted that First Amendment concerns were not implicated because government contractors were not sufficiently pressured to change their beliefs or associations due to governmental patronage practices.³⁷ The *Rutan* district court also noted that in *Elrod* and *Branti* the petitioners were fired in retaliation for the exercise of First Amendment rights while the *Rutan* petitioners did not allege that the state acted in a retaliatory fashion.³⁸

The United States Court of Appeals for the Seventh Circuit in *Rutan* affirmed in part and reversed in part the district court's dismissal of the *Rutan* claims.³⁹ Relying on the Supreme Court's earlier holdings in *Elrod* and *Branti* that patronage dismissals violate the First Amendment, the Seventh Circuit held that other patronage practices also violate First Amendment rights of public employees when the patronage practice is the substantial equivalent of dis-

³² See generally Martin *supra* note 26, an in-depth discussion of each circuit's approach to the *Elrod/Branti* test.

³³ See e.g., *Vazquez Rios v. Hernandez Colon*, 891 F.2d 319, 324 (1st Cir. 1987) (*Elrod/Branti* protection for governor's cleaning woman); *Bauer v. Bosley*, 802 F.2d 1058, 1064 (8th Cir. 1986) (*Elrod/Branti* protection denied for government lawyers); see also Martin, *supra* note 26, at 23; *Brown v. Trench*, 787 F.2d 167, 170 (3d Cir. 1986) (*Elrod/Branti* protection denied for county assistant director of public information).

³⁴ See e.g., *Jones v. Dodson*, 727 F.2d 1329, 1338 (4th Cir. 1984) (*Elrod/Branti* protection extended for city deputy sheriff); *McBee v. Jim Hogg County, Tex.*, 730 F.2d 1009, 1015 (5th Cir. 1984) (*Elrod/Branti* protection denied for city deputy sheriff); see also Martin, *supra* note 26, at 23.

³⁵ 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984).

³⁶ *Rutan*, 641 F. Supp. at 253 (citing *LaFalce*, 712 F.2d at 294).

³⁷ *LaFalce*, 712 F.2d at 294.

³⁸ *Rutan*, 641 F. Supp. at 255-56.

³⁹ 868 F.2d 943, 958 (7th Cir. 1989).

missal.⁴⁰ The court stated that an employment decision is equivalent to a dismissal when it is one that would cause a reasonable person to resign.⁴¹ The court, therefore, dismissed the cause of action for failure to hire, stating that such a practice does not violate the First Amendment.⁴² The court remanded the matters of failure to promote, transfer and recall after layoff to the district court for further proceedings in line with its newly articulated standard.⁴³

The petitioners appealed to the Supreme Court for a review of the Seventh Circuit's holding and the Supreme Court granted *certiorari*.⁴⁴ In a five to four decision by Justice Brennan, the Supreme Court rejected the Seventh Circuit's analysis and held that First Amendment protection from patronage practices extends to hirings, transfers, promotions and failure to recall after layoff.⁴⁵ The Court addressed the matters of failure to promote, failure to transfer, and failure to recall after layoff separately from the claim of failure to hire.⁴⁶

The state had argued that because the petitioners had no right to promotion, transfer or rehire, they could not sue for a violation of the First Amendment based on a denial of promotion, transfer or rehiring.⁴⁷ The Court rejected this argument, relying on its 1972 case of *Perry v. Sindermann*.⁴⁸ In *Perry*, the Court held that a state-employed teacher's lack of contractual or tenurial right to government employment was immaterial to a First Amendment claim.⁴⁹

⁴⁰ *Id.* at 956.

⁴¹ *See id.* at 955.

⁴² *Id.*

⁴³ *See id.* at 958.

⁴⁴ *Rutan v. Republican Party*, 110 S. Ct. 48 (1989).

⁴⁵ *Rutan v. Republican Party*, 110 S. Ct. 2729, 2739 (1990).

⁴⁶ *Id.* at 2735, 2738.

⁴⁷ *Id.* at 2735.

⁴⁸ *Id.* at 2735-36 (citing *Perry*, 408 U.S. 593 (1972)). In *Perry*, a professor in the state college system of Texas sued the regents of the state college system after the regents failed to renew his contract as a professor. 408 U.S. at 594-95. Just prior to the expiration of his contract, the plaintiff served as the president of the Texas Junior College Teacher's Association, and, as the president, had many public disagreements with the state board of regents. *See id.* The plaintiff alleged, inter alia, that his contract was not renewed in retaliation for his exercise of constitutionally-guaranteed free speech rights. *Id.* at 595. The defendant argued that the plaintiff's lack of tenure or right to re-employment precluded his resort to First Amendment protection. *See id.* at 596. The Court, however, disagreed. *Id.* The Court stated that the government is precluded from controlling protected speech and association by denying a job to a person who engages in non-sanctioned speech. *Id.* at 597. Therefore, the Court stated the lack of a "right" to re-employment was irrelevant to the plaintiff's free speech claim. *Id.* at 597-98. The Court, having determined that the plaintiff stated a cause of action, remanded the matter to the district court for a hearing on the merits. *Id.* at 598.

⁴⁹ *Perry*, 408 U.S. at 596-98.

The *Rutan* Court cited the portion of *Perry* that stated that although a person has no right to a governmental benefit and thus, the government may deny a person such benefit for a number of reasons, there are reasons upon which the government may not rely in denying a benefit.⁵⁰ The *Perry* Court stated that one such impermissible basis is one that infringes upon freedom of speech.⁵¹ Thus, the *Rutan* petitioners' lack of right to governmental benefits was no bar to their suit.⁵²

The *Rutan* Court then rejected the state's argument that because the employment decisions at issue were not retaliatory, there was no adverse impact on the petitioners' protected First Amendment rights.⁵³ The Court noted that the penalties imposed by a refusal to promote, transfer or rehire, while not as significant as those imposed by an outright dismissal, are significant enough to impair the exercise of First Amendment rights.⁵⁴ Such penalties imposed by the state for the exercise of the First Amendment freedoms of political belief and association, the *Rutan* Court stated, are the same concerns that motivated the Court's *Elrod* and *Branti* decisions.⁵⁵

The *Rutan* Court noted that for the state to impair such protected First Amendment rights, the patronage practices had to be narrowly tailored and had to further vital government interests.⁵⁶ The Court reiterated its position in *Elrod* and *Branti* that the government's interest in ensuring effective employees can be met by less restrictive means than resorting to political patronage.⁵⁷ At this point, the Court explicitly rejected the Seventh Circuit's standard that would have found a First Amendment violation for a patronage practice only where such practice was the equivalent of a dismissal.⁵⁸ Thus, political patronage practices short of outright dismissals could violate the *Elrod* and *Branti* principles.⁵⁹

⁵⁰ *Rutan*, 110 S. Ct. at 2736 (citing *Perry*, 408 U.S. at 597).

⁵¹ *Id.*

⁵² *Id.* at 2735-36.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *id.* at 2736-37 (citing *Elrod v. Burns*, 427 U.S. 347, 365-68 (1976); *Branti v. Finkel*, 445 U.S. 507, 518, 520 n.14 (1980)). The *Rutan* Court stated that governmental employers were able to resort to discharging, demoting or transferring deficient employees in order to ensure high quality of work. *Id.* at 2737.

⁵⁸ *Rutan*, 110 S. Ct. at 2737.

⁵⁹ *Id.*

Finally, the Court addressed the issue of whether failure to hire for political patronage reasons violates the First Amendment.⁶⁰ The Court noted that patronage hiring places burdens on free speech similar to those imposed by the other patronage practices.⁶¹ Because a public job provides work when work is scarce in the private sector and because the government may be the only or the major source of employment for some jobs, the Court stated that denial of a state job is a serious deprivation.⁶² The Court, therefore, reasoned that the government may only condition hiring decisions on political beliefs and associations when a vital interest is at issue.⁶³ For the same reason that the Court found no vital interest to be at stake regarding promotions, transfers and failures to rehire—namely, that patronage furthers no job performance ends—the Court stated that there is no governmental justification to base hiring on patronage considerations.⁶⁴ Thus, the *Rutan* Court held that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall and hiring decisions based on political patronage considerations.⁶⁵ Although the Court held that the petitioners in *Rutan* stated valid claims for violations of the First Amendment, it remanded the case to the district court for a factual determination of whether the State of Illinois violated the constitutional rights of the petitioners.⁶⁶

In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, maintained that *Elrod*, *Branti* and *Rutan* were all improperly decided and should be overturned.⁶⁷ Justice Scalia stated that employment decisions based on political patronage were not unconstitutional.⁶⁸ Because patronage practices are not expressly prohibited by the Bill of Rights and because patronage was long tolerated, Justice Scalia stated that the legitimacy of patronage is a matter most properly addressed by state legislatures and not by the Court.⁶⁹ Under such an approach, Justice

⁶⁰ *Id.* at 2738.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Rutan*, 110 S. Ct. at 2739.

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *See Rutan*, 110 S. Ct. at 2756 (Scalia, J., dissenting).

⁶⁸ *See id.* at 2748 (Scalia, J., dissenting). Justice Scalia wrote, "When it appears that the latest 'rule,' or 'three-part test,' or 'balancing test' devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens." *Id.* (Justice O'Connor did not join in this portion of the dissent).

⁶⁹ *Id.* at 2748, 2756 (Scalia, J., dissenting).

Scalia wrote, legislatures may decide to enact civil service legislation that will determine which government jobs are open to patronage practices and which jobs are closed to such practices.⁷⁰

Justice Scalia further attacked the constitutional test applied by the majority.⁷¹ Justice Scalia stated that the majority's approach, which required the state to show a narrowly-tailored practice which furthers vital government interests, was an inappropriate standard to be applied when evaluating patronage.⁷² Justice Scalia stated that when the government acts in its capacity as an employer, as in *Rutan*, the Court has consistently evaluated the government's conduct under a less strict constitutional test than when the government engages in its lawmaking capacities.⁷³ Justice Scalia argued that so long as the government does not act in a patently arbitrary or discriminatory manner when dealing with its employees, the government's regulations must merely bear a rational relationship to the end desired to be attained.⁷⁴ Justice Scalia also maintained that the Supreme Court has generally evaluated First Amendment restraints on governmental employees under a less stringent test than that applied to First Amendment restrictions on non-employees.⁷⁵

Justice Scalia contended, moreover, that the vital governmental interest served by political patronage practices enables the practice to pass constitutional muster.⁷⁶ In support of this proposition, Justice Scalia analyzed the important function of political patronage, stating that patronage promotes political stability and facilitates integration of politically powerless groups.⁷⁷ By rewarding political loyalists, Justice Scalia argued, political parties will remain stable, ensuring vigorous multi-party debate.⁷⁸ Thus, Justice Scalia stated, patronage practices limiting First Amendment rights are constitutional.⁷⁹ Finally, Justice Scalia stated that because *Elrod*, *Branti* and *Rutan* were wrongly decided, recently decided and unworkable, the Court should not be reluctant to overturn this line of cases.⁸⁰ Justice

⁷⁰ See *id.* at 2758 (Scalia, J., dissenting).

⁷¹ *Id.* at 2749 (Scalia, J., dissenting).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Rutan*, 110 S. Ct. at 2749.

⁷⁵ See *id.* at 2750 (Scalia, J., dissenting).

⁷⁶ *Id.* at 2752-55 (Scalia, J., dissenting).

⁷⁷ *Id.* at 2752 (Scalia, J., dissenting).

⁷⁸ See *id.* at 2753 (Scalia, J., dissenting).

⁷⁹ See *id.* at 2755-56 (Scalia, J., dissenting).

⁸⁰ *Id.* at 2756 (Scalia, J., dissenting). Justice Scalia stated that the current line of cases makes employees unsure of whether or not their jobs are protected and that such uncertainty will cause all government employees to refrain from political activity. *Id.* at 2757 (Scalia, J.,

Scalia argued that because the Court could draw no clear line to determine when a patronage consideration is permissible, the Court should leave the matter to the state legislatures.⁸¹

Rutan appears to strike the final blow against the remaining political patronage practices in the United States by extending the *Elrod/Branti* doctrine's First Amendment employment protection to decisions to hire, promote, transfer and recall low-level public employees.⁸² In so doing, *Rutan* opens a vast new area of labor cases to the already muddled policy-maker/non-policy-maker test first articulated in *Elrod*. *Rutan* does nothing to clarify the confusion over just which employees are policy-makers and which are not. Prior to *Rutan*, government employers were urged to document carefully job-related reasons for any discharge to guard against possible claims of patronage dismissal.⁸³ Given *Rutan's* expanded scope for possible constitutional violations against employees, government officials will likely feel pressure to fully document even more personnel decisions in order to protect against scores of future employment claims.

It is possible, however, that some of the pre-*Rutan* cases that limited the scope of *Elrod* and *Branti* may still apply to actions brought regarding claims other than wrongful discharge and failure to hire, promote, transfer or recall after layoff. The district court's reference in *Rutan* to *LaFalce v. Houston*,⁸⁴ in which the Seventh Circuit permitted patronage practices in the awarding of government contracts, is one area that could still remain free from this line of cases because in reaching its holding, the *LaFalce* court utilized reasoning similar to that of the Supreme Court in *Rutan*.⁸⁵ *LaFalce* noted that contractors would feel little pressure to alter their beliefs or associations due to patronage considerations and therefore the First Amendment was not implicated.⁸⁶

dissenting). On the other side, Justice Scalia wrote, the government will be unsure of its ability to implement its electoral mandate because it will be afraid of dismissing any employee under the uncertain *Elrod/Branti/Rutan* line of cases. *Id.* Thus, Justice Scalia concluded that "[w]hen the courts are flooded with litigation under that most unmanageable of standards (*Branti*) brought by that most persistent and tenacious of suitors (the disappointed office-seeker) we may be moved to reconsider our intrusion into this entire field." *Id.* at 2758-59 (Scalia, J., dissenting).

⁸¹ *Id.* at 2757-58 (Scalia, J., dissenting). Justice Stevens filed an extensive concurrence in *Rutan* which attacked Justice Scalia's dissent. *Id.* at 2740 (Stevens, J., concurring).

⁸² See *id.* at 2739; see also, Ruth Marcus, *Job Patronage Barred by High Court Ruling*, *Washington Post*, June 22, 1990, at A1.

⁸³ See Martin, *supra* note 26, at 57.

⁸⁴ 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984).

⁸⁵ See *id.* at 294.

⁸⁶ *Id.*

Even in those cases that will be brought after *Rutan*, it will be difficult to predict whether a plaintiff will succeed because the Court did not determine the standards necessary to prevail on a *Rutan* wrongful-patronage claim. It will, therefore, be up to the lower courts to set the parameters of this cause of action. As such, it is still unclear how easy or hard it will be for potential plaintiffs to win such a patronage claim against the government.

While the doctrinal expansion in *Rutan* puts an end to most political patronage, there is considerable doubt as to the staying power of the entire *Elrod/Branti/Rutan* doctrine. Justice Scalia's dissent, joined by three other members of the Court, explicitly calls for the overturning of the entire line of cases.⁸⁷ Justices Brennan and Marshall have retired since the decision was handed down. Marshall also voted with the *Rutan* majority. This leaves on the court a solid block of justices committed to overturning the case.⁸⁸ Because *Rutan* creates so many potential plaintiffs, it is certain that Justice Scalia will have the opportunity to see the matter of political patronage before the Court again in the near future. When such a case gets to the Supreme Court, the court should follow Justice Scalia's arguments and overrule the line of cases that began with *Elrod*. As Justice Scalia maintained in his *Rutan* dissent, legislatures are the best places for patronage issues to be resolved. Statutes enacted by these legislatures protect certain jobs from patronage. Thus, other jobs are explicitly left open to political patronage. Given that the Constitution is silent on this matter and that legislatures are acting to protect those jobs that they deem need protection from patronage, the Court should defer to the decisions of lawmakers in this area.

B.* *Pre-Employment Payments To Individuals Who Enter Government Service: An Approval in Crandon v. United States*¹

Under 18 U.S.C. § 209(a) it is a criminal violation for a person to receive any salary, or contribution to or supplementation of salary, as compensation for services as an officer or employee of the

⁸⁷ *Rutan v. Republican Party*, 110 S. Ct. 2729, 2756 (Scalia, J., dissenting).

⁸⁸ Justices White, Marshall, Blackmun and Stevens joined in the majority opinion. *Id.* at 2731. Chief Justice Rehnquist and Justices Scalia, Kennedy and O'Connor joined in the dissent. *Id.* Justice Souter's and Justice Thomas' positions on this matter remain unknown. Thus, the entire field of law remains undecided and is ripe to be overturned.

* By Thomas E. Kenney, Editor, BOSTON COLLEGE LAW REVIEW.

¹ *Crandon v. United States*, 494 U.S. 152, 36 Cont. Cas. Fed. (CCH) ¶ 75795, at 83542 (1990).

United States from any source other than the government of the United States.² This law also makes the payor of such salary, or contribution or supplementation of salary, criminally liable.³ Section 209(a) is one of a series of statutory provisions aimed at graft, bribery and conflicts of interest in government jobs.⁴ Other conflicts statutes include section 201, which prohibits payments made in an attempt to corrupt or bribe government officials, and section 203, which prohibits payments made to government officials in exchange for specific services that the officials perform for the payors' benefit.⁵ Section 209(a), in contrast, focuses on the payment of a government official's compensation, rather than any illicit relationship that such a payment establishes.⁶ The statute does not state whether a single or "lump-sum" payment constitutes "salary, or contribution to or supplementation of salary" within the meaning of section 209(a).⁷

There has been limited judicial interpretation of the reach of section 209(a).⁸ During the first half of the twentieth century, the United States Supreme Court decided two cases under the predecessor to section 209(a).⁹ In the 1922 case of *International Ry. Co. v. Davidson*, the Court determined that the predecessor to section

² The first clause of section 209(a) states:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality . . . (shall be subject to the penalties set forth in section 216 of this title).

18 U.S.C. § 209(a) (Supp. 1991).

³ The second clause of section 209(a) states:

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—Shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 209(a) (Supp. 1991).

⁴ See 18 U.S.C. §§ 201–224 (1988).

⁵ See 18 U.S.C. §§ 201, 203 (1988).

⁶ See 18 U.S.C. § 209 (Supp. 1991).

⁷ *Id.*

⁸ *Crandon v. United States*, 494 U.S. 152, 176, 36 Cont. Cas. Fed. (CCH) ¶ 75795, at 83552 (1990) (Scalia, J., concurring); see also *Muschany v. United States*, 324 U.S. 49, 67–68 (1944); *International Ry. Co. v. Davidson*, 257 U.S. 506, 514–15 (1922); *United States v. Oberhardt*, 887 F.2d 790, 793–94 (7th Cir. 1989); *United States v. Muntain*, 610 F.2d 964, 969–70 (D.C. Cir. 1979).

⁹ *Muschany*, 324 U.S. at 67–68; *Davidson*, 257 U.S. at 514–15.

209(a) prevented the Secretary of the Treasury from passing a regulation requiring private import companies to pay the overtime wages of customs officials who cleared the companies' cargo for importation into the United States on Sundays and holidays.¹⁰ The *Davidson* Court stated that the statute prevented outside sources from paying government officials for the performance of government duties.¹¹ In contrast, in the 1944 case of *Muschany v. United States*, the Court decided that the statute did not apply to the payment of government officials' salaries from income that the government had received from selling federal land to private parties.¹² The *Muschany* Court reasoned that this payment system did not violate the statute because the government, and not the private parties, was the actual payor of the officials' salaries, even though the salaries depended on payments that private sources made to the government in exchange for land.¹³ Although both of these cases concerned lump-sum payments, the Court decided the cases differently, distinguishing between payments that private sources made to government officials and payments originating from private sources that the government paid to the officials.¹⁴

Congress enacted the predecessor to section 209(a) in 1917 as an amendment to the Bureau of Education's legislative appropriation.¹⁵ The statute provided that "no Government official or employee shall receive any salary in connection with his services" from a private source.¹⁶ In 1948, Congress amended the law, transferring it from 5 U.S.C. § 66 to 18 U.S.C. § 1914 and adding the phrase "being a Government official or employee."¹⁷ The United States Supreme Court has noted, however, that Congress did not alter the

¹⁰ 257 U.S. at 509.

¹¹ *Id.* at 515.

¹² 324 U.S. at 52-53, 67-68.

¹³ *Id.* at 67-68.

¹⁴ *See id.*; *Davidson*, 257 U.S. at 515.

¹⁵ *Crandon v. United States*, 494 U.S. 152, 160, 36 Cont. Cas. Fed. (CCH) ¶ 75795, at 83545 (1990).

¹⁶ *Id.* The original statute stated:

[N]o Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States

Id. at 160-61 n.12, 36 Cont. Cas. Fed. (CCH) at 83546 n.12.

¹⁷ *Id.* at 160-61, 36 Cont. Cas. Fed. (CCH) at 83545-46.

scope of the law by adding this phrase.¹⁸ Finally, in 1962, Congress revised the statute, moving it to 18 U.S.C. § 209.¹⁹ Although Congress deleted the phrase "being a government official or employee" from the law in 1962, the Court again stated that Congress intended no substantive change in the statute's proscription.²⁰ Thus, section 209(a) is very similar in scope and reach to the law's two prior versions.²¹

Two recent circuit court cases have considered the applicability of section 209(a) to single, lump-sum payments.²² In the 1979 case of *United States v. Muntain*, the United States Court of Appeals for the District of Columbia held that section 209(a) did not apply to a private source's payment of travel reimbursements to a government official.²³ The *Muntain* court declared that, because the official's speech at the private source's meeting was beyond the scope of the official's government duties, the payments did not amount to compensation as defined in the statute.²⁴ In the 1989 case of *United States v. Oberhardt*, the United States Court of Appeals for the Seventh Circuit held that a single two hundred dollar payment from a private source to a government official for the purchase of an official document did violate the statute.²⁵ The *Oberhardt* court stated that section 209(a) applied because the parties knew that the government official was performing government service at the time he accepted payment.²⁶ Under these two cases, a government official cannot receive from a private source, and a private source cannot provide, any compensation, including lump-sum payments, for services that are part of the official's governmental duties.²⁷

During the *Survey* year, the United States Supreme Court held in *Crandon v. United States* that lump-sum payments made by a former employer to a former employee before the employee took a governmental office did not violate section 209(a).²⁸ In *Crandon*,

¹⁸ *Id.* at 161-62, 36 Cont. Cas. Fed. (CCH) at 83546.

¹⁹ *Id.* at 162-63 & n.16, 36 Cont. Cas. Fed. (CCH) at 83546 & n.16.

²⁰ *Crandon*, 494 U.S. at 162-63, 36 Cont. Cas. Fed. (CCH) at 83546.

²¹ *See id.* at 162-63 & n.16, 36 Cont. Cas. Fed. (CCH) at 83546 & n.16.

²² *See United States v. Oberhardt*, 887 F.2d 790, 793 (7th Cir. 1989); *United States v. Muntain*, 610 F.2d 964, 969-70 (D.C. Cir. 1979).

²³ 610 F.2d at 969-70.

²⁴ *Id.*

²⁵ 887 F.2d at 793-94.

²⁶ *Id.*

²⁷ *See id.*; *Muntain*, 610 F.2d at 969-70.

²⁸ *Crandon v. United States*, 494 U.S. 152, 168, 36 Cont. Cas. Fed. (CCH) ¶ 75795, at 83548-49 (1990).

the federal government filed a civil suit against the Boeing Corporation ("Boeing") and five of its former employees under section 209(a) for paying and receiving lump-sum severance payments following the employees' departure from Boeing and acceptance of federal government positions.²⁹ The Court determined that section 209(a)'s legislative history shows that the statute was not intended to prevent severance payments made to employees who had terminated employment with a company before those employees assumed their government positions.³⁰ Consequently, after *Crandon*, a private corporation may make severance payments to employees who leave the company to enter the public sector, as long as such payments are made before the employees actually become government officers.³¹

In 1981 and 1982, five executives of Boeing left the company to accept positions in the executive branch of the United States government.³² Following each executive's resignation, but before each former employee officially entered government service, Boeing made a single severance payment to each former executive to alleviate the financial loss that each former employee was expected to suffer because of the change of position.³³ Although the lump-sum payments were made unconditionally and there was no evidence of favorable treatment either sought by Boeing or offered by the five former employees, the United States filed a civil complaint in 1986 against Boeing and each of the five former executives.³⁴ The government claimed that these payments violated both the fiduciary duty, established in section 209(a), that the individual employees owed to the federal government and the standards of conduct created by the common law principle of agency.³⁵

In the 1987 case of *United States v. Boeing*, the United States District Court for the Eastern District of Virginia ruled that Boeing's severance payments did not violate section 209(a).³⁶ First, the court determined that the five individual employees did not owe the federal government a fiduciary duty at the time of the payments

²⁹ *Id.* at 154-56, 36 Cont. Cas. Fed. (CCH) at 83542-44.

³⁰ *Id.* at 160-64, 36 Cont. Cas. Fed. (CCH) at 83545-47.

³¹ *See id.*

³² *Id.* at 154, 36 Cont. Cas. Fed. (CCH) at 83542.

³³ *Id.* at 154, 36 Cont. Cas. Fed. (CCH) at 83542-43.

³⁴ *Crandon*, 494 U.S. at 156, 36 Cont. Cas. Fed. (CCH) at 83543-44.

³⁵ *Id.*; *United States v. Boeing Co.*, 653 F. Supp. 1381, 1387, 34 Cont. Cas. Fed. (CCH) ¶ 75239, at 80316-17 (E.D.Va. 1987).

³⁶ *Boeing*, 653 F. Supp. at 1387, 34 Cont. Cas. Fed. (CCH) at 80316.

because they were not government employees at that time.³⁷ Second, the court ruled that because the five individuals were not yet government officials when they accepted the payments, and because Boeing intended the payments to be severance pay and not compensation for government service, the payments did not violate section 209(a) even if the individual defendants did owe the federal government a fiduciary duty at that time.³⁸ Third, the court found that the defendants did not violate the common law principle of agency because they told government officials of the payments and there was no actual or apparent conflict of interest.³⁹ Finally, the court reasoned that because there was no evidence of any injury to the United States, the government was not entitled to any relief.⁴⁰

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court's decision, holding that the payments in question violated section 209(a).⁴¹ The court determined that the language and history of section 209(a) showed that the statute did not require payments to occur while an individual was a government officer.⁴² Next, the court rejected the district court's finding that Boeing did not intend, and the individual defendants' did not understand, the payments to be compensation for government service.⁴³ The court of appeals stated that the fact that Boeing calculated the payments based on the expected monetary loss of each employee contradicted the lower court's conclusion.⁴⁴ The court further declared that the government was not required to show any injury because section 209(a) was a prophylactic statute and the defendants' admission of receipt of the payments was not a defense under section 209(a).⁴⁵ After finding a violation of section 209(a), the court concluded that the United States could recover against either Boeing or the individual defendants, but was not entitled to double recovery.⁴⁶

The case reached the United States Supreme Court under the name *Crandon v. United States*, and, in 1990, the Court reversed the

³⁷ *Id.* at 1386, 34 Cont. Cas. Fed. (CCH) at 80316.

³⁸ *Id.* at 1386-87, 34 Cont. Cas. Fed. (CCH) at 80316.

³⁹ *Id.* at 1387, 34 Cont. Cas. Fed. (CCH) at 80317.

⁴⁰ *Id.*

⁴¹ *United States v. Boeing Co.*, 845 F.2d 476, 481, 34 Cont. Cas. Fed. (CCH) ¶ 75498, at 81691 (4th Cir. 1988).

⁴² *Id.* at 479-80, 34 Cont. Cas. Fed. (CCH) at 81690.

⁴³ *Id.* at 480, 34 Cont. Cas. Fed. (CCH) at 81690.

⁴⁴ *Id.* at 481, 34 Cont. Cas. Fed. (CCH) at 81690.

⁴⁵ *Id.*

⁴⁶ *Id.* at 481, 482, 34 Cont. Cas. Fed. (CCH) at 81691, 81692.

Fourth Circuit Court of Appeals, holding that section 209(a) does not apply to severance payments made before the recipient becomes a federal officer.⁴⁷ Justice Stevens, writing for the Court, began by noting that Congress did not create an express civil remedy for violations of section 209(a), which establishes criminal punishment for violations.⁴⁸ The Court reserved comment on the government's attempt to combine the common law rule of fiduciary duty with the prohibitions included in section 209(a), stating that the government clearly could not rely solely on the fiduciary duty theory but had to prove a violation of section 209(a) in order to prevail.⁴⁹

The Court then examined the two clauses that make up section 209(a).⁵⁰ The Court noted that while the first clause of the section prohibits "any person" from receiving salary as compensation for his or her services, the second clause prohibits any person from making such payments to "any such officer or employee."⁵¹ The Court stated that the literal reading of "any such officer or employee" from the second clause supports the conclusion that the recipient of the payment must be a government employee at the time the payment is made.⁵² The Court declared that, although Congress worded the statute awkwardly, the legislature intended the provision's two clauses to be coextensive; therefore, the text of section 209(a) dictates that status as a federal employee at the time of receipt of payment is an element of the offense.⁵³

Next, The Court explained that the legislative history of section 209(a) indicates that a violation of the statute occurs only when a current federal employee is the recipient of a private donation.⁵⁴ The Court stated that the predecessor to section 209(a), enacted in 1917, declared that "no government official or employee" could accept salary payments from private sources.⁵⁵ The Court also stated that in 1948 Congress added the phrase "being a government official or employee" to the law, language which the Court claimed unquestionably required the recipient of a payment to be a govern-

⁴⁷ *Crandon v. United States*, 494 U.S. 152, 168, 36 Cont. Cas. Fed. (CCH) ¶ 75795, at 83548-49 (1990).

⁴⁸ *Id.* at 157-58, 36 Cont. Cas. Fed. (CCH) at 83544.

⁴⁹ *Id.* at 158, 36 Cont. Cas. Fed. (CCH) at 83544.

⁵⁰ *Id.* at 159, 36 Cont. Cas. Fed. (CCH) at 83545.

⁵¹ *Id.*

⁵² *Crandon*, 494 U.S. at 159, 36 Cont. Cas. Fed. (CCH) at 83545.

⁵³ *Id.*

⁵⁴ *Id.* at 160-64, 36 Cont. Cas. Fed. (CCH) at 83545-47.

⁵⁵ *Id.* at 160, 36 Cont. Cas. Fed. (CCH) at 83545.

ment employee at the time of payment.⁵⁶ The Court noted that, although the phrase "being a government official or employee" was eliminated from the statute in its most recent modification in 1962, Congress stated that the change was not intended to alter the statute's meaning but only to assist in its clarity.⁵⁷

The Court further stated that the language of other congressional enactments showed that the 1962 amendment did not extend section 209(a) to cover pre-government employment payments.⁵⁸ The Court noted that sections 201 and 203 of title eighteen explicitly cover payments made before the officer assumes duties, but section 209(a) does not mention such payments.⁵⁹ The Court claimed that because Congress explicitly included pre-government payments in two statutes, it did not intend such payments to be covered in statutes in which it was silent on the issue, such as section 209(a).⁶⁰ Also, the Court noted that Congress added two subsections to section 209 in the 1962 amendment that focus on payments made during government service.⁶¹ The Court declared that these legislative enactments indicate that Congress did not intend the 1962 amendment to change the meaning of section 209(a).⁶²

The Court also referred to the policies expressed in statements by then President John Kennedy and then Attorney General Robert Kennedy as evidence that the 1962 amendment did not extend the reach of section 209(a).⁶³ In a 1961 speech, President Kennedy said that conflict-of-interest laws must not impair the government's ability to recruit qualified employees.⁶⁴ One year later, Attorney General Kennedy issued a memorandum that claimed that the new legislation (of which section 209(a) was a part) would lead to a significant expansion of the available pool of talent for government service.⁶⁵ The Court declared that the policies expressed in these official statements are consistent with the view that the 1962 changes to section 209(a) did not extend the statute's coverage to pre-government employment payments.⁶⁶

⁵⁶ *Id.* at 160-61, 36 Cont. Cas. Fed. (CCH) at 83545-46.

⁵⁷ *Crandon*, 494 U.S. at 162-63, 36 Cont. Cas. Fed. (CCH) at 83546.

⁵⁸ *Id.* at 163-64, 36 Cont. Cas. Fed. (CCH) at 83546-47.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 164, 36 Cont. Cas. Fed. (CCH) at 83547.

⁶² *Crandon*, 494 U.S. at 164, 36 Cont. Cas. Fed. (CCH) at 83547.

⁶³ *Id.* at 166-67, 36 Cont. Cas. Fed. (CCH) at 83548.

⁶⁴ *Id.*

⁶⁵ *Id.* at 167, 36 Cont. Cas. Fed. (CCH) at 83548.

⁶⁶ *Id.* at 167, 36 Cont. Cas. Fed. (CCH) at 83548-49.

The Court stated that while there are valid policy arguments both in favor of and against Boeing's pre-government employment payments, it is not the Court's duty to approve or disapprove of the payments.⁶⁷ The Court noted that because section 209(a) is a criminal statute the rule of lenity should apply, thus any ambiguity over the statute's breadth should be resolved in the defendants' favor until Congress provides a clearly contrary meaning.⁶⁸ Therefore, payments made by private sources before the recipient enters government service do not violate section 209(a).⁶⁹

In his concurring opinion, Justice Scalia stated that he did not believe that pre-employment payments are necessarily exempt from section 209(a), although he did believe that the payments in question were exempt from the statute because they were not periodic payments and did not serve as salary for federal service.⁷⁰ Although Justice Scalia agreed with the majority that the two clauses of section 209(a) are coextensive, he wrote that there is no evidence that Congress intended to require current employment status in either clause.⁷¹ Not only is such a reading of section 209(a) grammatically incorrect, according to Justice Scalia, it is also logically incorrect because, while it is impossible for a person to be a government official before entering government service, it is possible for a private source to pay the salary of a government officer in violation of the second clause of the statute before or after that officer's actual government service.⁷² Thus, Justice Scalia reasoned that because Boeing's payments to former employees who resigned to enter government service were lump-sum, rather than periodic payments, section 209(a) did not apply.⁷³

Justice Scalia then used the language and history of section 209(a) to show that the statute applies only to periodic payments.⁷⁴ He first argued that the government wrongly interpreted section 209(a) broadly as prohibiting the payment of an official's "compensation" when in fact the act prohibits the more specific payment of "any salary, or any contribution to or supplementation of salary" of

⁶⁷ *Crandon*, 494 U.S. at 167-68, 36 Cont. Cas. Fed. (CCH) at 83548.

⁶⁸ *Id.* at 168, 36 Cont. Cas. Fed. (CCH) at 83549.

⁶⁹ *Id.* at 168, 36 Cont. Cas. Fed. (CCH) at 83548-49.

⁷⁰ *Id.* at 168-69, 36 Cont. Cas. Fed. (CCH) at 83549 (Scalia, J., concurring). Justices Kennedy and O'Connor joined Justice Scalia's concurring opinion.

⁷¹ *Id.* at 169-71, 36 Cont. Cas. Fed. (CCH) at 83549-50 (Scalia, J., concurring).

⁷² See *Crandon*, 494 U.S. at 170-71, 36 Cont. Cas. Fed. (CCH) at 83550 (Scalia, J., concurring).

⁷³ *Id.* at 183-84, 36 Cont. Cas. Fed. (CCH) at 83555 (Scalia, J., concurring).

⁷⁴ *Id.* at 171-75, 36 Cont. Cas. Fed. (CCH) at 83550-51 (Scalia, J., concurring).

an official.⁷⁵ Next, Justice Scalia stated that the first two versions of section 209(a) were clearly aimed at regular, salary-like payments and that the government even admitted that the 1962 amendment did not alter the meaning of the statute as established under its earlier versions.⁷⁶ He also provided some policy reasons for limiting section 209(a) to periodic payments.⁷⁷ From a historical perspective, Justice Scalia claimed that it would not seem strange in 1917, when the predecessor to section 209(a) was originally enacted, for Congress to prohibit only periodic payments as it was a regular practice for government officials to receive such payments at that time.⁷⁸ As for the present, he declared that periodic payments pose a greater risk of corruption and many lump-sum payments, such as grants or gifts, are innocent payments that provide necessary income for those in public service and should not be criminalized.⁷⁹

Justice Scalia attacked the government's reliance on previous authority that has interpreted section 209(a) to apply to lump-sum payments.⁸⁰ He noted that the government had relied upon administrative authority almost exclusively as few courts had had the opportunity to interpret section 209(a).⁸¹ Justice Scalia then wrote that an administrative interpretation of a criminal statute was not worthy of judicial deference as courts, not administrative agencies, implement criminal law.⁸²

Noting the difficulty that administrative agencies had had interpreting section 209(a) consistently, Justice Scalia concluded that lump-sum payments should be left outside the reach of the statute.⁸³ He stated that the administrative history shows that section 209(a) is unmanageable if interpreted to cover more than periodic salary payments.⁸⁴ The government could enforce the statute more effectively, according to Justice Scalia, if it limited section 209(a) to the

⁷⁵ *Id.* at 171-73, 36 Cont. Cas. Fed. (CCH) at 83550 (Scalia, J., concurring).

⁷⁶ *Id.* at 173-74, 36 Cont. Cas. Fed. (CCH) at 83550-51 (Scalia, J., concurring). Justice Scalia also agreed with the majority that, because section 209(a) is a criminal statute, any conflicts concerning its meaning should be resolved for the defendants. *Id.* at 175, 36 Cont. Cas. Fed. (CCH) at 83551 (Scalia, J., concurring).

⁷⁷ *Crandon*, 494 U.S. at 175-76, 36 Cont. Cas. Fed. (CCH) at 83551-52 (Scalia, J., concurring).

⁷⁸ *Id.* at 175, 36 Cont. Cas. Fed. (CCH) at 83551-52 (Scalia, J., concurring).

⁷⁹ *Id.* at 175-76, 36 Cont. Cas. Fed. (CCH) at 83552 (Scalia, J., concurring).

⁸⁰ *Id.* at 176-83, 36 Cont. Cas. Fed. (CCH) at 83552-54 (Scalia, J., concurring).

⁸¹ *Id.* at 176-77, 36 Cont. Cas. Fed. (CCH) at 83552 (Scalia, J., concurring).

⁸² *Crandon*, 494 U.S. at 177, 36 Cont. Cas. Fed. (CCH) at 83552 (Scalia, J., concurring).

⁸³ *Id.* at 178-83, 36 Cont. Cas. Fed. (CCH) at 83553-54 (Scalia, J., concurring).

⁸⁴ *Id.* at 178, 36 Cont. Cas. Fed. (CCH) at 83553 (Scalia, J., concurring).

prohibition of periodic salary payments and regulated lump-sum payments by executive order or administrative regulation.⁸⁵ Applying his reasoning to the facts of the case, Justice Scalia stated that Boeing's lump-sum payments to former employees who left the corporation to enter government service did not violate section 209(a).⁸⁶

The Court's holding in *Crandon* allows private sources to make lump-sum severance payments to government candidates before those candidates officially enter government service.⁸⁷ As the Fourth Circuit Court of Appeals noted, this was a case of first impression as no previous court had decided if payments made before the recipients enter government service violate section 209(a).⁸⁸ In holding that such pre-employment payments do not violate the statute, the Court relied on the language of section 209(a), as well as the statute's legislative and administrative history, which the Court stated required the recipient to be a government employee at the time of payment.⁸⁹ Applying the rule of lenity, the Court interpreted the statute narrowly and challenged Congress to supply a broader meaning if such was intended.⁹⁰

The *Crandon* decision clears the way for corporations to encourage employees to accept government positions by providing severance payments that approximate the former employees' lost benefits, thereby easing the financial loss of those who leave the corporation. Over-staffed corporations now have a more humane alternative to mandatory retirements or layoffs; those corporations can provide monetary incentives for employees to resign and enter public service. By the same token, such monetary incentives should help remove the economic barriers that have apparently kept the federal government from benefitting from the skills of highly talented members of the private sector.

Although the majority claimed that such pre-employment lump-sum payments are not as likely to lead to corruption as ongoing payments, Justice Stevens did note that the threat of employee favoritism for the former employer is still a valid concern.⁹¹ While

⁸⁵ *Id.* at 182-83, 36 Cont. Cas. Fed. (CCH) at 83554-55 (Scalia, J., concurring).

⁸⁶ *Id.* at 183-84, 36 Cont. Cas. Fed. (CCH) at 83555 (Scalia, J., concurring).

⁸⁷ *Id.* at 168, 36 Cont. Cas. Fed. (CCH) at 83548-49.

⁸⁸ See *United States v. Boeing Co.*, 845 F.2d 476, 479, 34 Cont. Cas. Fed. (CCH) ¶ 75498, at 81689 (4th Cir. 1988).

⁸⁹ *Crandon*, 494 U.S. at 158-67, 36 Cont. Cas. Fed. (CCH) at 83544-48.

⁹⁰ *Id.* at 168, 36 Cont. Cas. Fed. (CCH) at 83549.

⁹¹ *Id.* at 167-68, 36 Cont. Cas. Fed. (CCH) at 83548.

it seems rather unlikely that a government official would have the opportunity or the desire to favor a former employer merely because of a single severance payment, Congress enacted section 209(a) to prevent the appearance of impropriety, even if that appearance arises in otherwise innocent payments.⁹² A situation such as that in *Crandon*, however, in which there is no evidence of the private party seeking favoritism or the former employees offering it, is so devoid of any unethical appearance that it should be beyond the concern of section 209(a).

Under Justice Scalia's interpretation of section 209(a), a violation would require periodic payment of an official's salary, rather than mere employment status at the time of any type of payment.⁹³ His interpretation of the statute seems to favor a narrower reading of the statute than the majority's because it would allow private sources to make payments to individuals even after those individuals enter government service as long as such payments are in lump-sum rather than periodic form. Justice Scalia's opinion is more in line with both the original purpose of section 209(a), to remove the appearance of conflicts-of-interest in government service, and with the government's later attempts to encourage public service than is the majority opinion.⁹⁴ Lump-sum payments appear more innocent than periodic payments, even periodic payments made before the recipient enters government service. Also, allowing private parties to make lump-sum payments to officials at any time allows those officials to accept needed income such as cash grants or gifts and thereby may prevent many officials from leaving public service for economic reasons. While only a concurring opinion, Justice Scalia's interpretation of section 209(a) hopefully signals a shift of the Court toward an even narrower interpretation of the statute's scope so as to facilitate private sector movement into government positions.

In sum, during the *Survey* year, the Court in *Crandon* held that lump-sum payments made by private sources to former employees before those employees assume their governmental duties do not violate section 209(a).⁹⁵ Justice Scalia, in his concurring opinion, stated that such payments do not violate the statute because they are lump-sum, rather than periodic payments.⁹⁶ This decision is a

⁹² *Id.* at 164-65, 36 Cont. Cas. Fed. (CCH) at 83547.

⁹³ *Id.* at 168-69, 36 Cont. Cas. Fed. (CCH) at 83549 (Scalia, J., concurring).

⁹⁴ *Id.* at 164-66, 166-67, 36 Cont. Cas. Fed. (CCH) at 83547, 83548.

⁹⁵ *Id.* at 1006-07, 36 Cont. Cas. Fed. (CCH) at 83,548-49.

⁹⁶ *Id.* at 1007, 36 Cont. Cas. Fed. (CCH) at 83,549 (Scalia, J., concurring).

victory for those who want to enter government service from the private sector and for private parties who want to encourage such service through monetary incentives. Section 209(a), however, is only one of a handful of federal conflict-of-interest statutes.⁹⁷ Nevertheless, the unanimous *Crandon* decision demonstrates that the Supreme Court is unwilling to extend the conflict-of-interest laws to innocent lump-sum payments made to individuals before those individuals actually enter government service, recognizing that the benefits of encouraging participation in public sector jobs outweighs any detriment.

V. ENERGY REORGANIZATION ACT

A. * *Federal Preemption of State Tort Law Claims in the Nuclear Industry: English v. General Electric Co.*¹

In 1974 Congress enacted the Energy Reorganization Act of 1974 ("ERA" or the "Act") to promote the development of atomic and other energy sources within the United States.² The Act contains a "whistle blower provision," section 5851, which prohibits retaliatory discharge of and discrimination against nuclear industry employees who report safety violations to the Nuclear Regulatory Commission ("NRC"), or who participate in any proceeding to enforce regulations under ERA or the Atomic Energy Act of 1954.³ Since passage of ERA, federal courts on several occasions have had to decide to what extent ERA preempts state law actions stemming from conduct and events falling within the statute's purview.⁴

In general, federal preemption of state law occurs in three situations.⁵ The first is when Congress explicitly provides in a statute that federal law preempts state law.⁶ Second, if federal legislation is silent on preemption, it preempts state law only when the federal legislation regulates conduct in a field over which Congress in-

⁹⁷ *Id.* at 1002, 36 Cont. Cas. Fed. (CCH) at 83,544-45.

* By Peter Augustine Kraus, Editor, BOSTON COLLEGE LAW REVIEW.

¹ 110 S. Ct. 2270 (1990).

² Energy Reorganization Act of 1974, 42 U.S.C. § 5801(a) (1988).

³ *Id.* § 5851(a).

⁴ See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984); *Norris v. Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1151 (1st Cir. 1989).

⁵ *English*, 110 S. Ct. at 2275.

⁶ See *id.* at 2275; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 32 Empl. Prac. Dec. (CCH) ¶ 30,216, 30,220 (1983).

tended the federal government to have exclusive control.⁷ A court may infer this congressional intent either when the federal regulatory scheme is so pervasive that no room is left for states to supplement it, or when the federal interest in an area is so great that it must preclude state regulation of the same subject.⁸ When the question of preemption involves areas of law customarily occupied by the states, congressional intent to occupy the field exclusively must be "clear and manifest."⁹ Finally, federal law preempts state law when there is an actual conflict between the laws that makes it impossible to follow both.¹⁰ Such preemption occurs also when state law stands as an obstacle to Congress's goals in enacting the legislation.¹¹

In the seminal case of *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, the United States Supreme Court in 1983 held that the federal government had completely occupied the field of nuclear safety.¹² In *Pacific Gas*, the plaintiff utility company challenged a California law that prohibited the construction of any nuclear power plant until a state agency had found that the federal government had implemented adequate disposal procedures for nuclear waste.¹³ *Pacific Gas* argued that the California law was predicated on safety concerns and that the federal government exerted exclusive control over nuclear safety regulation.¹⁴ Although the Supreme Court agreed that the federal government did occupy the entire field of nuclear safety, it held that the states retained their traditional control over economic aspects of public utilities.¹⁵ The *Pacific Gas* Court, after considering the California statute's legislative history, accepted the California legislature's avowed economic purpose as the law's rationale.¹⁶ Thus, the

⁷ See *English*, 110 S. Ct. at 2275; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁸ See *English*, 110 S. Ct. at 2275; *Rice*, 331 U.S. at 230.

⁹ *English*, 110 S. Ct. at 2275; *Rice*, 331 U.S. at 230.

¹⁰ *English*, 110 S. Ct. at 2275; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹¹ *English*, 110 S. Ct. at 2275; *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

¹² 461 U.S. 190, 212 (1983).

¹³ *Id.* at 194-95.

¹⁴ *Id.* at 204.

¹⁵ *Id.* at 207-08.

¹⁶ *Id.* at 216. The purported economic reason for the law was that a lack of adequate disposal procedures for nuclear waste could ultimately lead to the shutdown of nuclear reactors and unpredictably high energy costs. *Id.* at 213-14. The *Pacific Gas* Court also rejected, for similar reasons, petitioner's argument that the California statute contradicted the NRC's own determination that adequate waste disposal existed and therefore it would

Court held that a state law prohibiting nuclear plant construction for economic reasons rather than safety reasons was not preempted.¹⁷

Even after *Pacific Gas*, the question remained whether nuclear industry employees could assert claims based on state tort law for harm suffered while working for nuclear employers. The United States Supreme Court partially answered this question in the 1984 case of *Silkwood v. Kerr-McGee Corp.*, in which it held that federal law did not preempt a claim for punitive damages stemming from personal injuries suffered in a nuclear accident.¹⁸ In *Silkwood*, an employee at a nuclear fuel production plant was exposed to radiation at work.¹⁹ She died shortly thereafter in an auto accident, but her father as administrator of her estate filed suit based on common law tort principles.²⁰ The *Silkwood* Court reasoned that there was no evidence that Congress, in enacting and later amending the Atomic Energy Act of 1954, intended to foreclose state remedies for those suffering from radiation injuries in a nuclear plant.²¹ The Court observed, moreover, that Congress in passing the Price-Anderson Act in 1957—establishing an indemnification scheme for suits against nuclear power facilities—assumed that state tort actions for personal injuries would remain available.²² The Court held, therefore, that a state-based award of punitive damages did not conflict with the purposes of the federal scheme of nuclear regulation.²³ Thus, the Supreme Court recognized that there exist some legal claims beyond those provided by federal legislation, even when the cause of action arises from a failure of plant safety.²⁴

permit licensing of more nuclear plants. *Id.* at 218–19. Finally, the Court rejected petitioner's argument that the California statute frustrated the ERA's objective of encouraging nuclear power, reasoning that Congress left room for the states to prohibit nuclear plants for economic, not safety, reasons. *Id.* at 223.

¹⁷ *Id.* at 222–23.

¹⁸ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984).

¹⁹ *Id.* at 241.

²⁰ *Id.* at 242–43.

²¹ *Id.* at 251.

²² *Id.* at 251.

²³ *Id.* at 258.

²⁴ Justice Powell, joined by Justices Marshall and Blackmun, dissented, asserting that the majority's decision undercut the regulatory authority of the NRC. *Id.* at 285 (Powell, J., dissenting). He noted that the imposition of punitive damages in this case meant that a lay jury would be applying safety standards completely separate from those promulgated by the NRC. *See id.* at 283–84 (Powell, J., dissenting). Thus, a lay jury could find that even though the defendant company complied with NRC regulations, the company could be held liable

A split in the federal courts developed, however, regarding whether federal nuclear regulation preempts other state tort law claims. In the 1989 case of *English v. General Electric Co.* ("English I"), the United States Court of Appeals for the Fourth Circuit held that ERA preempted a state law claim for intentional infliction of emotional distress stemming from the retaliatory discharge of a whistle blowing employee of a nuclear facility.²⁵ Later in the same year, however, the United States Court of Appeals for the First Circuit held, in *Norris v. Lumbermen's Mutual Casualty Co.*, that ERA does not preempt plaintiff's state law claims for wrongful discharge and for breach of the implied covenant of fair dealing.²⁶ The Supreme Court granted certiorari in *English* to resolve the "apparent" conflict between the circuits regarding exactly which state law actions are preempted.²⁷

During the *Survey* year, the United States Supreme Court held in *English v. General Electric Co.* ("English II") that ERA does not preempt a state law claim for intentional infliction of emotional distress stemming from the retaliatory discharge of a whistle blowing nuclear employee.²⁸ The Court held that such a claim neither falls within the preempted field of nuclear safety nor conflicts with specific provisions of the Act.²⁹ Consequently, after *English II*, employers in the nuclear industry who subject their employees to retaliatory discharge are liable under both ERA's whistle blower provision and state laws that allow actions for intentional infliction of emotional distress. According to the Supreme Court's test as set forth in *English II*, the only state tort remedies preempted by ERA

for punitive damages if the jury felt that the regulations did not achieve their purpose. *Id.* at 284 (Powell, J., dissenting). In a separate dissent, Justice Blackmun, joined by Justice Marshall, noted that the majority's opinion "enables a state to enforce a standard that is more exacting than the federal standard." *Id.* at 265 (Blackmun, J., dissenting).

²⁵ 871 F.2d 22, 23 (4th Cir. 1989).

²⁶ 881 F.2d at 1151 (1st Cir. 1989).

²⁷ *English v. General Elec. Corp.*, 110 S. Ct. 862 (1990). The Supreme Court seems to have said "apparent" conflict because *Norris* and *English I* were not in direct conflict; the two cases involve different claims. There was, however, an actual split between the federal district courts within California on the issue of preemption of wrongful discharge claims. See, e.g., *Snow v. Bechtel Constr. Co.*, 647 F. Supp. 1514, 1518-19, 123 L.R.R.M. 3245, 3248-49 (C.D. Cal. 1986) (whistleblower provision of ERA preempts state claim for wrongful discharge); *Stokes v. Bechtel North Am. Power Corp.*, 614 F. Supp. 732, 744-45 (N.D. Cal. 1985) (whistleblower provision of ERA is permissive remedy which supplements state law of wrongful discharge but does not supplant or preempt it).

²⁸ 110 S. Ct. 2270, 2281 (1990).

²⁹ *Id.*

are those laws that have a nuclear safety rationale, have a direct and significant effect on nuclear safety decisions, or otherwise directly conflict with or frustrate the purposes of the federal law.³⁰

In *English II*, Vera English worked as a laboratory technician from 1972 to 1984 at the General Electric ("GE") nuclear fuel production facility in Wilmington, North Carolina.³¹ In February 1984, English complained about a number of alleged safety violations at the plant to GE's management and to the NRC.³² One of these safety breaches was the failure of plant personnel to clean up radioactive spills in the laboratory.³³ Unsatisfied by GE's response, English, at one point, deliberately failed to clean a work table left contaminated by radioactive material by a preceding shift.³⁴ She also outlined the contaminated areas with red tape, which resulted in a brief work stoppage while the area was inspected and cleaned.³⁵

A short time later, GE charged English with deliberate failure to clean up the radioactive contamination, and assigned her temporarily to other work.³⁶ Then, on April 30, 1984, GE told English that it would terminate her employment unless she successfully bid for another position that did not expose her to nuclear materials.³⁷ English did not find such a position, and consequently GE terminated her on July 30, 1984.³⁸

In August, English filed a complaint with the Secretary of Labor under the whistle blower protection provision of ERA.³⁹ This provision makes it unlawful for a employer in the nuclear industry to discharge or otherwise discriminate against an employee for initiating or threatening to initiate an enforcement action under ERA, for testifying in such a proceeding, or for participating in any way in such a proceeding.⁴⁰ English charged GE with wrongful discharge

³⁰ See *id.*

³¹ *Id.* at 2273.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *English*, 110 S. Ct. at 2273.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a) (1988). Section 5851(a) states:
(a) Discrimination against employee

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any

in retaliation for her complaints.⁴¹ The matter was referred to an NRC administrative law judge, who found that GE had violated the whistle blower provision.⁴² The case was dismissed, however, because English had not filed it within the thirty day limitations period set forth in the statute.⁴³

In March of 1987, English filed a civil suit in the United States District Court for the Eastern District of North Carolina, claiming wrongful discharge and intentional infliction of emotional distress, and requesting punitive and compensatory damages.⁴⁴ The district court allowed GE's motion to dismiss on the grounds that section 5851(a) of ERA preempted both the wrongful discharge and intentional infliction of emotional distress claims.⁴⁵ The district court did note, however, that English had pleaded a valid claim for intentional infliction of emotional distress under North Carolina law.⁴⁶ On the other hand, the court noted that even if section 5851 did not preempt the claim for wrongful discharge, the plaintiff had failed to state a claim for wrongful discharge.⁴⁷ English appealed the district court's decision on the intentional infliction of emotional distress claim, but not the wrongful discharge claim.⁴⁸ The United

employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) —

(1) commenced, cause to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

Id.

⁴¹ *English*, 110 S. Ct. at 2274.

⁴² *Id.*

⁴³ *Id.* The statute provides that the aggrieved employee must bring an action within thirty days of the violation. Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b)(1) (1988). The Secretary of Labor determined that the "violation" occurred on May 15, the date GE notified English of its final decision on the disciplinary action. *English*, 110 S. Ct. at 2274.

⁴⁴ *Id.* at 2274.

⁴⁵ *English v. General Elec. Corp.*, 683 F. Supp. 1006, 1015, 1017-18 (E.D.N.C. 1988).

⁴⁶ *Id.* at 1017.

⁴⁷ *Id.* at 1015.

⁴⁸ *English*, 110 S. Ct. at 2274 n.4.

States Court of Appeals for the Fourth Circuit affirmed the district court's decision on the basis of the lower court's reasoning and analysis of the law.⁴⁹

The United States Supreme Court reversed, holding that section 5851 does not preempt English's emotional distress claim under state law.⁵⁰ In a unanimous opinion written by Justice Blackmun, the Court rejected both of GE's arguments for preemption of the state intentional infliction of emotional distress claim. First, the Court rejected the argument that the state law on which the claim was based fell within the field of nuclear safety, which the federal government had preempted completely.⁵¹ Second, the Court rejected the argument that the state tort claim conflicted with specific provisions of ERA.⁵²

In its analysis, the Court first reiterated the situations in which federal preemption of state law occurs.⁵³ The Court noted that because the federal nuclear regulatory statutes said nothing explicitly about preemption, a holding of preemption would have to rest either on "field preemption" or on a direct conflict with the Act.⁵⁴ Although the lower courts rested their findings of preemption only on purported actual conflicts with ERA, GE argued both field preemption and actual conflict before the Supreme Court.⁵⁵

In refuting GE's field preemption argument, the *English II* Court observed first that its decision in *Pacific Gas* had established that Congress had indeed occupied the entire field of nuclear safety.⁵⁶ The Court noted, however, that Congress, in enacting section 5851, demonstrated no clear intent to preempt state tort laws that traditionally were available to employees who allege the type of outrageous conduct that English claimed.⁵⁷ The Court observed that to hold that section 5851 preempted all state tort remedies relating to retaliatory conduct by nuclear employers would imply that it preempted all state law criminal remedies for similar retaliatory conduct as well.⁵⁸ The Court refused to accept that Congress

⁴⁹ *English v. General Elec. Corp.*, 871 F.2d 22, 23 (4th Cir. 1989).

⁵⁰ *English*, 110 S. Ct. at 2281.

⁵¹ *Id.* at 2279.

⁵² *Id.* at 2281.

⁵³ *Id.* at 2275-76. See *supra* notes 5-11 and accompanying text for a discussion of the general rules of preemption as set forth by the *English II* Court.

⁵⁴ See *id.* at 2275-76.

⁵⁵ See *English*, 110 S. Ct. at 2276.

⁵⁶ *Id.* at 2277.

⁵⁷ *Id.* at 2279.

⁵⁸ *Id.* at 2277.

intended this result.⁵⁹ The Court recognized that although the state law supporting the claim bore some relation to nuclear safety, its primary objective was to protect employee rights.⁶⁰ The Court concluded, therefore, that the state law claim did not fall within the preempted field on the mere rationale that it arose from conduct covered by the Act.⁶¹

The Court also rejected English's view of the extent of federal preemption in nuclear safety matters. English argued that the rule of *Pacific Gas* was that only state laws that were motivated by safety fell within the preempted field.⁶² Although the Court agreed that the safety motivation formed part of the preempted field, it asserted that a safety motivation was not necessary to put a state law in the preempted field.⁶³ The Court maintained, rather, that a state law having a direct effect on nuclear safety, even if enacted with a non-safety motivation, would also fall within the preempted field.⁶⁴

The Court noted that it was clear that the law behind English's emotional distress claim was not motivated by nuclear safety, and thus the only question was whether the state law has so great an effect on nuclear safety as to be preempted.⁶⁵ The Court first observed that not every state law having the slightest effect on safety decisions of nuclear plant managers would be preempted, but that the effect must be direct and substantial.⁶⁶ The Court held that the state law at issue did not have such a direct and substantial effect.⁶⁷

The *English II* Court bolstered its conclusion by comparing this case to its decision in *Silkwood*, in which the Court held that a claim for punitive damages stemming from a nuclear accident is not preempted.⁶⁸ The *English II* Court reasoned that potential liability for punitive damages from personal injuries from a nuclear accident would affect safety decisions more directly than would potential liability for infliction of emotional distress in retaliation for whistle blowing.⁶⁹ Consequently, the Court asserted that it would be "odd, if not irrational" to conclude that a punitive damages claim was not

⁵⁹ *English*, 110 S. Ct. at 2277.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 2278.

⁶⁴ *English*, 110 S. Ct. at 2278.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2278-79.

⁶⁹ *Id.* at 2279.

preempted but that the emotional distress claim was.⁷⁰ The Court held, therefore, that there was no "clear and manifest" desire of Congress to preempt state tort claims such as English's.⁷¹

The Court also rejected the district court's holding that English's claim violated specific provisions of section 5851.⁷² The district court relied on three specific provisions of section 5851. The first was a provision stating that the prohibition of retaliation does not apply when an employee has deliberately violated ERA or the Atomic Energy Act.⁷³ The Court did not think that this provision reflected congressional intent to bar all relief to whistle blowers who intentionally violate safety regulations.⁷⁴ The Court instead noted that the provision specifically limited its applicability to the remedy provided in section 5851, and that there was no evidence in the statute or legislative history that Congress intended to bar state tort actions.⁷⁵ The Court also noted that, in any case, an administrative law judge had found that English had not violated any safety regulation.⁷⁶

The second purported conflict with section 5851 was the absence of any authorization for exemplary damages for retaliatory conduct against employees.⁷⁷ The district court had held that this absence implied a congressional intent to bar all state actions that authorize exemplary damages.⁷⁸ The Supreme Court rejected this argument, observing that section 5851 does, in fact, authorize exemplary damages in actions brought by the Secretary of Labor.⁷⁹ The Court further noted that state actions are not ordinarily preempted merely because they impose liability beyond that prescribed by federal law.⁸⁰ Consequently, the Court stated that it could

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2279-81.

⁷³ Energy Reorganization Act of 1974, 42 U.S.C. § 5851(g) (1988).

⁷⁴ *English*, 110 S. Ct. at 2280.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *English*, 110 S. Ct. at 2280.

⁷⁹ *Id.* The Energy Reorganization Act of 1974 states in part: "In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages." 42 U.S.C. § 5851(d) (1988).

⁸⁰ *English*, 110 S. Ct. at 2280 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989)).

not conclude that Congress meant to preempt all state actions permitting exemplary damages.⁸¹

Third, the Court rejected the district court's holding that the short time limitation for actions under section 5851 reflected a congressional decision that whistle blowers should not be able to recover for retaliation after the limitations period under ERA has expired.⁸² The district court reasoned that if a state law remedy were still available after the time limit for filing an action under section 5851, employees would have less incentive to bring actions under that section, and as a result, regulatory agencies would remain unaware of safety violations.⁸³ Rejecting that reasoning, the Court observed that many retaliations for whistle blowing arise because of safety complaints that employees make to federal regulatory agencies.⁸⁴ Thus, the enforcement agencies are usually aware of the violation regardless of whether the plaintiff claims relief under section 5851 or state law.⁸⁵ In addition, the Court did not believe that employees would ignore their remedies under section 5851 and rely exclusively on state law remedies.⁸⁶ The *English II* Court found that assertion merely speculative.⁸⁷

The Court concluded that English's state law claim for intentional infliction of emotional distress was not preempted either by falling into the preempted field of nuclear safety or by directly contradicting or frustrating section 5851 of ERA.⁸⁸ Accordingly, the Court reversed the judgment of the court of appeals and remanded the case for adjudication of the emotional distress claim.⁸⁹

Subsequent to its decision in *English II*, and on the basis of its holding in that case, the Supreme Court remanded the case of

⁸¹ *Id.*

⁸² *Id.* at 2281.

⁸³ *Id.*

⁸⁴ *English*, 110 S. Ct. at 2281.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* On remand, the United States District Court for the Eastern District of North Carolina allowed English to amend her complaint to include factual allegations relating to the emotional distress claim. *English v. General Elec. Co.*, 765 F. Supp. 293, 297 (E.D.N.C. 1991). The court denied, however, English's motion to amend her complaint to include a claim for bad faith wrongful discharge, reasoning that North Carolina law does not recognize the claim. *Id.* at 295-96. The court also noted that English's failure to appeal the dismissal of the wrongful discharge in violation of public policy claim, which North Carolina had recently recognized, precluded her from reasserting that claim. *Id.* at 295.

*Masters v. Daniel International Corp.*⁹⁰ In *Masters*, the defendant company allegedly discharged the plaintiff in retaliation for reporting safety violations to the NRC.⁹¹ In its original decision, the United States Court of Appeals for the Tenth Circuit held that ERA preempted state law claims for wrongful discharge.⁹² On remand, however, the appeals court held, in light of *English II*, that ERA did not preempt the wrongful discharge claim.⁹³

The Supreme Court's decision in *English II* will have several effects on the nuclear industry. First, the Court's holding in *English II* provides a test for federal field preemption of other state claims stemming from retaliatory actions of nuclear employers against whistle blowing employees. After *English II*, the analysis of field preemption will involve determining, first, whether the state law is motivated by nuclear safety concerns, and second, whether the state law has a significant and direct effect on nuclear safety decisions of nuclear employers. Federal law will preempt state law that has either of these traits.

The Court asserted that it was granting certiorari to *English I* in order to resolve a conflict between the circuits. *English II* does not, however, really resolve the conflict between the holdings of *Norris* and *English I*. *Norris* involved preemption of a wrongful discharge claim, whereas the claim in *English I* was for intentional infliction of emotional distress. A strict reading of *English II* provides only guidance, not a dispositive rule, for wrongful discharge claim preemption analysis. Although the Supreme Court has not yet specifically ruled on the question whether ERA preempts state actions for wrongful discharge, it implicitly indicated in its treatment of *Masters* that it also intended *English II* to control the question of preemption of wrongful discharge actions.

Given this interpretation, *English II* may have a significant impact on a number of industries. ERA's whistle blower provision was modeled on a similar provision in the Mine Safety and Health Act.⁹⁴ Numerous other federal statutes contain analogous whistle blower provisions.⁹⁵ Nevertheless, though *English II* may be influential, it

⁹⁰ 110 S. Ct. 3208, 3208 (1990).

⁹¹ *Masters v. Daniel Int'l Corp.*, 895 F.2d 1295, 1296 (10th Cir. 1990).

⁹² *Id.* at 1296.

⁹³ *Masters v. Daniel Int'l Corp.*, 917 F.2d 445, 456 (10th Cir. 1990).

⁹⁴ See *Snow v. Bechtel Constr. Co.*, 647 F. Supp. 1514, 1518, 123 L.R.R.M. 3245, 3247 (C.D. Cal. 1986).

⁹⁵ See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2622(a) (1988); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(A) (1988); Solid Waste Disposal Act, 42 U.S.C. § 6971(a) (1988).

will not be dispositive of whether these other whistle blower provisions preempt state actions for wrongful discharge or intentional infliction of emotional distress. The reason is that preemption is field-specific; preemption analysis in one field, such as nuclear safety, may not apply to others.

Another effect of *English II* is that it opens the door to large settlements and jury verdicts for whistle blowers who bring state tort claims, including claims for wrongful discharge and intentional infliction of emotional distress.⁹⁶ Practitioners suggest that these potentially large jury awards will deter retaliatory discharge more effectively than would the federal remedy, which in most cases is limited to actual damages.⁹⁷ Not only do discharged whistle blowers get a second bite of the proverbial apple if they miss the time limit of a federal statute, it is a bigger bite, because a jury verdict is potentially much larger than the likely decision of an administrative agency.⁹⁸

In sum, the Supreme Court's decision in *English II* has three major effects. First, it provides a test for federal preemption of state tort claims stemming from retaliatory conduct by nuclear employers against whistle blowing employees. Second, it explicitly allows intentional infliction of emotional distress claims for flagrant retaliatory conduct, notwithstanding ERA's whistle blower provision. Finally, although the Supreme Court in *English II* ruled on the specific question of preemption of an emotional distress claim, it gives notice to lower federal courts that state claims for wrongful discharge probably escape preemption as well. These claims are far more common and easy to establish than emotional distress claims. The effect on the nuclear industry, and perhaps on other industries covered by federal whistle blower legislation, will be to deter employers from retaliating against whistle blowing employees, for fear of large jury verdicts based on state tort claims.

⁹⁶ See *Court Lights Way to Big Awards: Nuke Whistleblowers Win*, NAR'L L.J., July 9, 1990, at 3.

⁹⁷ See *id.*

⁹⁸ *Supreme Court Decision May Open Door to Large Whistleblower Tort Claims*, NUCLEARFUEL, June 11, 1990, at 9.