

A review of the Supreme Court's Labor and Employment Law Decisions
2005-2006 Term

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Which side are you on?¹

This refrain from an old mining song, attributed to a miner named Florence Reece, could be the theme song of the Section of Labor and Employment Law. Our members hold strong and opposing views, and see things from either a worker or a management perspective. This reminds me of Judge Oliver Wendall Holmes' observation, sitting in an injunction case in the Massachusetts Supreme Court, that one of the eternal conflicts out of which life is made, is the effort of every man to get the most he can for his services and that of society, disguised under the name of capital, to get his services for the least possible return.²

If you are interested in taking sides, the score for the Supreme Court's labor and employment decisions for 2005-2006 is:

Workers 4 Capital 1

There are three other cases that can be considered labor and employment law cases, and they are either tied, undecided, or don't lend themselves to scoring as employee vs. employer. I also discuss several other cases that, while not technically employment or labor law cases, have potential importance for our discussion. These don't figure in my tally.

I am less interested in the score than in trying to see if this new Supreme Court, with a change in membership for the first time in over 10 years, has come any closer to reconciling the two sides in the cases it faced. On the surface it looks that way, as the

1 Florence Reece was the wife of a leader of the National Miners' Union, which was involved in a violent struggle in the early '30's against mining companies in Harlan County, Kentucky. It is said that she wrote the song on the back of a calendar she tore off the wall in anger, and set it to an old Baptist hymn. The song was later adapted for the Civil Rights movement. You can find this information in the liner notes of the Smithsonian Folkways CD "If I had a Hammer: Songs of Hope & Struggle," sung by Pete Seeger.
2 *Vegeahn v. Guntner et. al.*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

Court issued five unanimous decisions out of the eight that I will discuss. Two others had separate concurring opinions, one on a fairly minor point, and the other going more to the heart of the case. In only one case, *Garcetti v. Ceballos*, was a dissent filed.³ In that case we find a clear split between what might be called the liberal and conservative blocs, but even so there is surprising consensus on a major premise among the majority opinion and the two dissents. Justice Kennedy provided the critical fifth vote, and this suggests we may view this new Court as the Kennedy Court rather than the Roberts Court, because Justice Kennedy's vote may often be pivotal.⁴

While it is too early to take much of a measure of the new Justices, Chief Justice John Roberts and Associate Justice Samuel Alito, we do know a lot about the Justices they replace, Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor. In some of the cases I will discuss, the departure of these two justices may have made a difference.

It is always nice to find a theme for this kind of review, but quite candidly, no substantive pattern is obvious. With the exception of the Ceballos case, however, all the cases involve questions of statutory interpretation. Statutes are one of our principle stocks in trade, so it is helpful to understand the new Court's direction in approaching statutory issues. In examining these decisions, discern the slight shift in the Court's approach to statutory interpretation that will emerge as the theme of this review.

Donning and Doffing

It is not easy to be an employee in a food processing plant. In one of these two consolidated cases, employees had to put on and later take off such elaborate protective gear as hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, boots, and protective gear, including chain link metal aprons and plexiglass armguards for those who have to use knives.⁵ They conjure up images of Medieval Knights.

Under a 50 year-old Supreme Court precedent called *Steiner*, as well as other case authority, there was little doubt that in these cases the time spent donning and doffing this gear some 8 minutes, total, in one of the cases is considered compensable under the Fair Labor Standards Act.⁶ The parties did not challenge the point, nor did any party suggest that *Steiner* be overruled.⁷ Under the test of *Steiner* and its progeny, the donning and doffing of unique protective gear is considered a compensable principal activity under the Portal to Portal Act if it is an integral and indispensable part of the principal activities.⁸ If the gear is ordinary and non unique, it isn't part of the principal

3 *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).

4 *Garcetti*, 126 S.Ct. at 1951.

5 *IBP, Inc. v. Alvarez*, 126 S.Ct. 514, 522 (2005).

6 *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956).

7 *IBP*, 126 S.Ct. at 523.

8 *Steiner*, 350 U.S. at 256.

activities and isn't compensable.⁹ The donning and doffing case gives us no help, and neither do I, on how you draw this line, as the parties did not raise it.

The question raised in these cases is whether the travel time spent after the employee dons his protective clothing in order to get to the assembly line is also compensable.¹⁰ The same question arises at the end of the work day.¹¹ This would have added another four minutes of compensable time for a workforce that might hit 1,000 people.¹²

The Court had the following tools at its disposal:

The FLSA, the minimum wage act, requires a minimum wage for hours worked but it doesn't define work or workweek.¹³

In the 1946 *Anderson v. Mt. Clemens Pottery* case, the Court held that once you punch in, the time you spend after that reporting to the actual place of work is compensable.¹⁴ Congress railed at this conclusion, and enacted the Portal to Portal Amendments, designed to put a lid on compensable time.

4 (a)(1) says there is no compensation for travel to and from the actual place of performance of the principal activity or activities of the employee.¹⁵

4 (a) (2) says there is no compensation for activities which are preliminary to or postliminary to said principal activity or activities, which occur prior or subsequent to the principal activities (emphasis added).¹⁶

Further, a long standing Regulation says that once the work day commences, you are paid for all your time, even if you are just hanging around, except for specified lunch periods and break periods.¹⁷

So the donning and doffing employees were entitled to compensation for the time they spent changing, because *Steiner* had held that because these were principal activities under 4 (a) (2), they couldn't be preliminary or postliminary to these principal activities.¹⁸ *Steiner* didn't address the question of travel time under 4 (a) (1).

9 *Id.*

10 *IBP*, 126 S.Ct. at 518.

11 *Id.* at 522.

12 *Id.*

13 52 Stat. 1060, 29 U.S.C. §201, §7(a)(1).

14 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946).

15 61 Stat. 86-87, 29 U.S.C. §254(a), §4(a)(1).

16 61 Stat. 86-87, 29 U.S.C. §254(a), §4(a)(2).

17 29 C.F.R. §790.7(c).

18 *Steiner*, 350 U.S. at 254.

This gave the employer the opening to argue that this was not compensable travel time under 4 (a) (1), because it was travel to the principal activity of the employee, which activity was working on the assembly line.¹⁹ The employer contended this was the literal interpretation of 4 (a) (1).²⁰

During the oral argument, Chief Justice Roberts pounced on this contention, which he felt created a third category, that is, work that is integral, and therefore compensable, but which does not mark the beginning of the work day.²¹ His reaction gives us a hint of his approach to statutory interpretation:

But the statute . . . That's nowhere in the statute. If it's integral, if it's embraced by the principal activity, it is a principal activity, and that at least is more consistent with the statute in keeping it in two categories rather than inventing a third.²²

This observation is picked up in the opinion itself, which adopts the familiar maxim that identical words used in different parts of a statute are presumed to have the same meaning.²³ So if this is "principal activity" for purposes of 4 (a) (2), as it was in *Steiner*, it must be principal activity under 4 (a) (1).²⁴ If the donning is the principal activity, then it is hard to see how the subsequent travel is to a principal activity, unless there is more than one such activity.

And this is buttoned up "who would have thought it by the word said in 4 (a) (2) said principal activity."²⁵

The Court held in a unanimous opinion that because the donning and doffing was integral, it was a principal activity.²⁶ As such, it marked the start of the work day, and all time spent traveling after that was compensable.²⁷

Unless the reader practices in the FLSA area, he or she might not think, at first blush, that this is an important case. Of course, if you deal with FLSA issues in your practice, the case is very important. 4 minutes x 1000 employees x 200 days a year, adds up fast. If you are a plaintiff's lawyer, there is grist here for a class action. And if you represent employers, you might advise the employer how to keep the clothing and equipment changes minimal enough that they are not considered integral and

19 *IBP*, 126 S.Ct. at 523.

20 *Id.*

21 *Id.*

22 Transcript of Oral Argument at 16, *IBP*, 126 S.Ct. 514 (2005) (No. 03-1238).

23 *IBP*, 126 S.Ct. at 523 (citing *Sullivan v. Strop*, 496 U.S. 478, 484 (1990)).

24 *IBP*, 126 S.Ct. at 523-24.

25 61 Stat. 86087, 29 U.S.C. §254(a), §4(a)(2).

26 *IBP*, 126 S.Ct. at 525.

27 *Id.*

indispensable to the principle activities. In that way, the changing time would not be compensable, and the work day would only begin at the assembly time. The walk to the assembly line would also not be compensable under 4 (a) (1). You might advise the employer of ways to design the workplace more efficiently so that there is no walking time. Or, you might try to build on some existing doctrine that if the changing time is de minimis, it isn't compensable, and argue that the changing time plus the short walking time is also de minimis. Those avenues remain open, and were left to the lower courts on remand in one of the consolidated cases.

To complete the inventory of issues that might be of interest to a practitioner in this area, the second consolidated case addresses whether time spent in the changing area waiting for the clothes and equipment to show up is also compensable.²⁸ The Court, observing that this activity is now two steps removed from the assembly line activity, held that it is not compensable.²⁹ The lines drawn in this part of the decision are hard to understand, and since this discussion is not central to our main inquiry, I will pursue it no further.

But why is this case of interest to the rest of us?

In my first watch as Section Secretary, back in 1979, I drew the very important *Steelworkers v. Weber*, a case that upheld an affirmative action program against a Title VII challenge.³⁰ The case exposed a deep division in approaches to statutory interpretation that grew stronger in subsequent years. The dissenters, then Rehnquist and Chief Justice Burger, took a textualist approach.³¹ They said that the statute outlaws discrimination on the basis of race, and that's what happened in *Weber*, plain and simple.³²

Justice Brennan wrote what I consider a contextualist opinion.³³ He said we must look not only at the words of the statute, but we must examine their context and Congressional intent.³⁴ A Congress that wanted to eliminate racial discrimination in employment would hardly have intended to outlaw a benign program that was intended to correct the prior patterns of racial segregation and discrimination in the construction industry in the deep south.³⁵

In the years since *Weber*, the Supreme Court has often been split on its approach to statutory issues, with the textualist and contextualist camps taking opposing positions. I will provide just a few examples.

28 *Id.* at 527.

29 *IBP*, 126 S.Ct. at 527.

30 *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

31 *Weber*, 443 U.S. at 220 (Burger, C.J., dissenting).

32 *Id.*

33 *Id.* at 204.

34 *Id.* at 201.

35 *Id.* at 204.

Circuit City, decided in 2001, put to rest the issue that had emerged, but not been decided, in *Gilmer v. Interstate, Johnson Lane*.³⁶ In *Gilmer*, the Court enforced an employee's contractual agreement upon hire that he would submit all workplace disputes, including those arising under statute, to binding arbitration.³⁷ The unanswered question was whether the Federal Arbitration Act, which is the jurisdictional source of enforcement of agreements to arbitrate, applies to employment disputes.³⁸ The FAA exempts contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.³⁹ The issue was whether this exclusionary language exempted disputes arising out of all employment contracts, or only those employment contracts involving employees in the transportation industry.⁴⁰ The *Circuit City* majority opinion written by Justice Kennedy, held that the exclusion is narrow, covering only those employees who work in the transportation industry.⁴¹ The majority reached its conclusion based upon an examination of the statutory language alone, refusing to take into account the legislative history.⁴² The dissenters concluded that the legislative history gave eloquent testimonial that Congress had no intention of applying mandatory arbitration to employment disputes.⁴³

In another significant employment case, *Sutton v United Airlines*, the majority concluded, based solely on a confident look at the statutory text, that employees who wore glasses were not disabled within the meaning of the Americans With Disabilities Act, since whatever disability they might have suffered could be corrected with eyeglasses.⁴⁴ The certainty about the textual meaning rests on the shaky foundation of the reference in the preamble to 43,000,000 Americans who suffer from disabilities.⁴⁵ Justice O'Connor concluded for the majority that if persons with corrective lenses and other corrective devices were considered disabled, the number would swell way beyond 43,000,000.⁴⁶ Justice O'Connor's confidence in the meaning of the text also rested on the use of the present tense.⁴⁷ The majority's reliance upon the text led it to ignore any contextual arguments as to the statute's purpose.⁴⁸ The dissenters, in contrast, argued from the legislative history that the individuals in question were indeed disabled and

36 *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

37 *Gilmer*, 500 U.S. at 26.

38 *Id.* at 25 fn. 2.

39 Federal Arbitration Act, 9 U.S.C. §1 (2006).

40 *Circuit City*, 532 U.S. at 109.

41 *Id.* at 119.

42 *Id.* at 114-15, 119.

43 *Id.* at 126 (Scalia, J., dissenting).

44 *Sutton v. United Airlines*, 527 U.S. 471, 484 (1999).

45 *Sutton*, 527 U.S. at 487.

46 *Id.*

47 *Id.* at 482-83.

48 *Id.* at 482.

entitled to the protection under the statute.⁴⁹

General Dynamics v. Cline holds that the ADEA, the statute that outlaws age discrimination, does not provide for a cause of action by younger workers against older workers.⁵⁰ The majority, contextualists, relied upon legislative history to determine the Congressional purpose.⁵¹ In contrast, Justice Thomas took the strict textualist position that the statute outlaws discrimination based upon age, and that discrimination in favor of older workers is just as much discrimination as discrimination in favor of younger workers.⁵²

But in other cases the two approaches come together. For example, Justice Breyer authored a unanimous opinion in *Town and Country*.⁵³ The Court held that salts, job applicants who are on the payroll of the union and who seek work primarily so that they can help in an organizing drive, are “employees” under the statutory language of the NLRA.⁵⁴ While the Justices thought that the broad definition of “employees” on its face encompassed the salts, Justice Breyer also analyzed the underlying policy of the Act, as well as the legislative history, to be certain that the statute meant what it appeared to say.⁵⁵

Most of our work is about statutes, and we must be attuned to the Court’s current approach to statutory interpretation. And I think I see in this case and in the other statutory cases this term, a subtle shift in the Court’s direction. If you look at the Court’s decision - and more importantly, if you look at the oral argument - you find not a whisper of a division in approach to statutory interpretation. Rather, you find 9 highly skilled technicians trying to figure out the meaning of a complex statute, taking into account whatever tools seem helpful.

In the donning and doffing case, the language and structure of the statute & the actual words seemed to carry the day, as witnessed by Justice Roberts’ remarks at oral argument.⁵⁶ The employer did make a policy argument & that the Portal to Portal Act was designed to minimize a runaway escalation of compensable time.⁵⁷ That argument was considered and indeed there is a section of the opinion headed purpose, which follows the section on text.⁵⁸ But the argument was given short shrift by the suggestion that the employer can redesign the workplace to minimize the compensable time.⁵⁹

49 *Id.* at 499 (Stevens, J., dissenting).

50 *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 584 (2004).

51 *Gen. Dynamics*, 540 U.S. at 587-90.

52 *Id.* at 603 (Thomas, J., dissenting).

53 *N.L.R.B. v. Town and Country Elec., Inc.*, 516 U.S. 85, 87 (1995).

54 *Town and Country*, 516 U.S. at 97-98.

55 *Town and Country*, 516 U.S. at 91.

56 Transcript of Oral Argument at 16, *IBP*, 126 S.Ct. 514 (2005) (No. 03-1238).

57 *IBP*, 126 S.Ct. at 524.

58 *Id.*

59 *Id.*

None of the Justices suggested that the text should be given controlling weight or that the Justices should pay no attention to policy considerations. I see this as a pragmatic rather than dogmatic approach to statutory interpretation.

The Court also revealed its concern for stare decisis. While *Steiner* might have been crying out for reversal, since it stood as a roadblock to a reading of the Portal to Portal Act that might have limited recovery, no party urged that it be overruled.⁶⁰ That probably wouldn't have happened in any event, because the Court observed that stare decisis requires upholding an earlier, unanimous opinion that involves a statutory construction that has been accepted as settled law for decades.⁶¹

Deference to administrative regulations, under the *Chevron* doctrine, is another important aspect of judicial review in statutory interpretation cases.⁶² Although there was a Regulation of the Secretary of Labor that might have helped the employer, the Court gave it short shrift.⁶³ The Regulation was so ambiguous that Justice Scalia, who is normally like a vacuum cleaner on agency regulations, went out of his way in oral argument to observe that the regulation is noncommittal.⁶⁴

A point of contrast

This is a good time to note a significant concurrence by Justice Scalia in an entirely unrelated case B a criminal case called *Zedner v. US*, dealing with the Speedy Trial Act.⁶⁵ The majority, in an opinion by Justice Alito, held that Mr. Zedner was not given a speedy trial.⁶⁶ Though the opinion turns largely on the statutory language itself it does include a fairly detailed analysis of the legislative history, including such well-established interpretive aids as committee reports.⁶⁷

Justice Scalia, the leading pure textualist on the pre-Roberts Court, wrote a separate concurrence in which he railed against the Court's discussion of legislative history.⁶⁸ In what may be characterized as a minor tirade, Justice Scalia asserts that under the Constitutional provisions of Bicameralism and Presentment, the only thing that counts is the language of the statute itself.⁶⁹ At least in those cases where the statute is clear, as Scalia thinks is the case in *Zedner*, the Court may not consider

60 *Id.* at 523.

61 *IBP*, 126 S.Ct. at 523.

62 *Chevron*, U.S.A.v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984).

63 *IBP*, 126 S.Ct. at 526.

64 Transcript of Oral Argument at 11, *IBP*, 126 S.Ct. 514 (2005) (No. 03-1238).

65 *Zedner v. U.S.*, 126 S. Ct. 1976, 1990 (2006).

66 *Id.*

67 *Id.* at 1985-1986.

68 *Id.* at 1990-1991.

69 *Id.*

legislative history.⁷⁰ Reference to such legislative history, Justice Scalia says, is addictive.⁷¹ He says that the use of legislative history is illegitimate and ill advised in the interpretation of any statute B and especially a statute that is clear on its face.⁷²

That Justice Scalia stood alone on this position and that Chief Justice Roberts joined the Alito opinion, suggests that the current Court is prepared to take a serious look at legislative history, even under a statute whose text seems clear. Neither Chief Justice Roberts nor Justice Alito signed on to the Scalia concurrence.⁷³ The Justices they replaced B Rehnquist and O'Connor B were strong textualists who often declined to consider legislative history. So this may be a real shift in the Court's approach to statutory interpretation. I think this is a commendable approach, designed to make sure that the words that seem to yield a certain result, in fact, reflect Congressional intent. It responds to the concern of a leading trio of scholars of statutory interpretation, Eskridge, Frickey and Galloway, that blind obedience to the statutory language leads to mindless law.⁷⁴

In that vein, my only criticism of the donning cases is that the Court doesn't give us any indication of how the result serves some policy that is behind the Portal to Portal Act or the underlying FLSA. I would have preferred some validation of the statutory outcome by reference to legislative history or Congressional intent.

*Burlington Northern v. Sheila White*⁷⁵

This case involves two interrelated Sections of Title VII of the Civil Rights Act.

Section 703 (a), which the Court refers to as the substantive provision, says it is unlawful to discriminate against an individual:

With respect to his compensation, terms, conditions, or privileges of employment.⁷⁶

Section 704 (a), the anti-retaliation provision, says it is unlawful to discriminate against an employee:

Because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.⁷⁷

70 *Id.*

71 *Id.* at 1991.

72 *Id.*

73 *Id.* at 1990.

74

75 *Burlington N. & Santa Fe Ry. Co. v. Sheila White*, 126 S.Ct. 2405 (2006).

76 42 U.S.C. §703(a)(1) (1964); *Burlington N.*, 126 S.Ct. at 2412.

77 42 U.S.C. §704(a) (1964).

There is an obvious difference in the scope of the language of the two sections. The first is limited to discrimination with respect to terms, conditions or privileges of employment. The second contains no such limitation, but simply outlaws discrimination. Is this a deliberate distinction?

In an 8-1 decision, the Court holds that the distinction is deliberate.

In 1997, Sheila White was the only female working in the Railroad's right of way maintenance department.⁷⁸ In an important affirmative action case in 1987, *Johnson v. Santa Clara Transportation Agency*, the Supreme Court looked at a County highway department that in 1975 had not a single female road maintenance worker.⁷⁹ We might expect that in 1975, but what does the *Burlington* case tell us about the attitude towards women in these jobs some 20 years later?

Ms. White worked as a track laborer, a job that had some heavy and messy lifting and clearing, but also offered an opportunity to operate the forklift, which was a more desirable assignment.⁸⁰ After Ms. White complained to management about some sexist remarks by her supervisor, she found herself off the forklift and back on the tracks.⁸¹ After she filed a complaint with EEOC claiming that this action was taken in retaliation, and alleging other sex discrimination, Ms. White was suspended for 37 days for insubordination.⁸² She claimed that this too amounted to retaliation.⁸³ When her case finally went to court, the jury agreed that these actions were taken in retaliation for her internal and agency complaints.⁸⁴

The statutory issue

The Company's principal argument to the Court was that Ms. White was not demoted, nor were her terms of employment adversely affected.⁸⁵ She was simply given one piece of a discretionary job assignment and not another.⁸⁶ Her wages and hours were not affected.⁸⁷ The Company argued that while Section 704 (a), the retaliation section, doesn't have the same limitations as 703 (a), they should be implied (the good old *in pari materia* argument), and a retaliation action should be limited to those situations in which the employee suffers an actual change in terms and conditions

78 *Burlington N.*, 126 S.Ct. at 2409.

79 *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 623 (1987).

80 *Burlington N.*, 126 S.Ct. at 2409.

81 *Id.*

82 *Burlington N.*, 126 S.Ct. at 2409.

83 *Id.*

84 *Id.* at 2410.

85 Brief of Petitioner-Appellant at 27-28, *Burlington N. & Santa Fe Railway Co. v. Sheila White*, 126 S.Ct. 2405 (2006) (No. 05-259).

86 Brief for Petitioner, *Burlington N.*, 126 S.Ct. 2405 (No. 05-259), at 27-28.

87 *Id.* at 28.

of employment.⁸⁸

Of course one could decide the case on the basis that this was in fact a demotion and a change in terms and conditions of employment, thus satisfying even the restrictive reading of 704 (a) advocated by the Company. In fact, Justice Alito, in a very curious concurrence, would agree with that position.⁸⁹ But the majority - 8 justices - decided to tackle the statutory issue head on.

Justice Breyer wrote one of his usually clear, short and straightforward opinions, taking what I consider a conventional and unexceptional approach to statutory interpretation, considering both text and context, at least to the extent of taking policy into account.

Justice Breyer pointed out that the substantive provision is expressly limited to those actions that affect workplace conditions.⁹⁰ In contrast, no such limiting words appear in the anti-retaliation provision.⁹¹ Given these linguistic differences, the question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ, Congress “intentionally and purposely” meant for the words to have different meanings.⁹² So far, we have a strictly textualist interpretation.

But Justice Breyer went further, and, more significantly, brought 7 other Justices with him. As a policy matter, he said, we could not achieve the Congressional goal of preventing retaliation if Section 704 reached only workplace related actions.⁹³ For the employer could always accomplish retaliation by causing some harm outside the workplace.⁹⁴ The examples he gives are somewhat far-fetched, such as filing a false criminal charge against the employee, something that undoubtedly violates some other law.⁹⁵ The opinion concludes that a provision limited to employment-related actions would not deter the many forms that effective retaliation can take.⁹⁶

The magnitude of the harm

That’s the pure statutory issue in *Burlington*. But that’s not all. Perhaps an even more significant aspect of the opinion deals with the magnitude of the harm that will trigger employer liability under the anti retaliation provision. The employer argued that Ms. White’s reassignment, involving no loss of pay, was simply too trivial to warrant

88 *Id.* at 24.

89 *Burlington N.*, 126 S.Ct. at 2421.

90 *Id.* at 2411-12.

91 *Id.* at 2412.

92 *Id.*

93 *Burlington N.*, 126 S.Ct. at 2412.

94 *Id.*

95 *Id.* at 2412 (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996)).

96 *Id.* at 2412.

redress.⁹⁷ The employer picked up on the sexual harassment cases, like Oncale, which underscore that Title VII was not designed as a “general civility code.”⁹⁸ Petty slights and minor annoyances are not enough to trigger substantive liability for sexual harassment.⁹⁹ The Court agreed that the anti retaliation provision similarly reaches only significant, not trivial, harms.¹⁰⁰ The test it formulates for actionable retaliation is that it must be a materially adverse action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination (emphasis added).¹⁰¹ The reasonable worker formulation makes this an objective standard.

The majority points out that whether the particular retaliation is materially adverse depends upon context.¹⁰² Building upon an example that came up in a lively oral argument about lunches, the opinion says that refusing to invite an employee to lunch is trivial, but it is significant if the lunch is a weekly training lunch.¹⁰³ Ms. White’s case didn’t involve lunch, but the Court observed that assigning her to the less desirable aspect of her job is one good way to discourage her from bringing discrimination charges.¹⁰⁴

A far-reaching point?

The decision covers yet another point, one that may give the case its greatest significance for the future. It turns out that before the case came to trial, the employer decided, presumably through a union-management grievance procedure, to rescind Ms. White’s suspension and give her back pay for the 37 days she was suspended.¹⁰⁵ The employer argued that she had in fact been made whole, and that no injury remained unremedied.¹⁰⁶ The Court disagreed. In rather startling recognition by the Court of the reality of being canned, it said:

White and her family had to live for 37 days without income. They did not know during that time whether or when White could return to work. Many reasonable employees would find a month without a paycheck to be a serious hardship.¹⁰⁷

The Court also noted that Ms. White suffered physical and emotional hardship

97 Brief for Petitioner, *Burlington N.*, 126 S.Ct. 2405 (No. 05-259), at 27-28.

98 *Id.* at 21 (citing *Oncale v. Sundower Offshore Servs. Inc.*, 523 U.S. 75, 81 (1998)).

99 *Burlington N.*, 126 S.Ct. at 2415.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Burlington N.*, 126 S.Ct. at 2415-16; Transcript of Oral Argument at 8-10, *Burlington N. & Santa Fe Ry. Co. v. Sheila White*, 126 S.Ct. 2405 (2006) (No. 05-259).

104 *Burlington N.*, 126 S.Ct. at 2416.

105 *Burlington N.*, 126 S.Ct. at 2417.

106 *Id.*

107 *Burlington N.*, 126 S.Ct. at 2417; Transcript of Oral Argument at 154, *Burlington N.*, 126 S.Ct. 2405 (No. 05-259).

and required medical treatment for emotional distress.¹⁰⁸ Of course Title VII, after the 1991 amendments, provides for compensatory as well as punitive damages.¹⁰⁹ Ms. White's claim for punitive damages was rejected by the jury.¹¹⁰ Yet, even apart from the Company's back pay for the 37 day suspension, Ms. White received \$43,500 in compensatory damages, including \$3,250 in medical expenses.¹¹¹ It is striking that this is not just Justice Breyer's observation (of course the other 7 who signed on to his opinion obviously endorse it), but the questioning by some of the other Justices indicates that they were sympathetic to the situation of a worker who is cut off from her income stream while awaiting the outcome of a claim of an unlawful suspension.¹¹² Even Justice Alito endorsed the ultimate remedy in his concurrence.¹¹³

Those brave employees who stick their necks out in a union organizing campaign only to be fired, often have to wait for years before receiving back pay, if they get it at all. The same holds true of grievants in just cause arbitrations and plaintiffs under other provisions of Title VII. When you are a worker, with no other form of support, the damages you suffer while your claim is pending may be far greater than a simple back pay award can remedy. This opinion is a startling recognition of that reality. Because claims under 704 (a) are not tethered to tangible deprivations of terms and conditions of employment, and not limited to make whole relief, the potential for larger damages awards may be greater than under 703 (a), and may drive plaintiffs to increasingly use this provision as an adjunct or even alternative to 703 (a). Statistics brought out in oral argument suggest that retaliation cases presently make up about 30% of the EEOC's docket, and have doubled in volume.¹¹⁴

A curious concurrence

Justice Alito's concurrence is curious. It may be said that it puts him to the right of Justices Thomas and Scalia, who signed on to the majority opinion without reservation. In fairness, though, in the oral argument Justice Alito's questions showed a sympathetic view towards the employee as to the kinds of reprisal that might be actionable.

Justice Alito took the position that Sections 703 (a) and 704 (a) must be read together, so that the terms and conditions of employment qualifier in 703 (a) applies as well to 704 (a) even though it is not there.¹¹⁵ He says, this is not, admittedly, the most straightforward reading of the bare language of § 704 (a), but it is a reasonable reading

108 *Burlington N.*, 126 S.Ct. at 2417.

109 *Id.*

110 Brief for Petitioner, *Burlington N.*, 126 S.Ct. 2405 (No. 05-259), at 7.

111 *Id.*

112 Transcript of Oral Argument at 24-25, *Burlington N.*, 126 S.Ct. 2405 (No. 05-259).

113 *Burlington N.*, 126 S.Ct. at 2421.

114 Transcript of Oral Argument at 3, *Burlington N.*, 126 S.Ct. 2405 (No. 05-259).

115 *Burlington N.*, 126 S.Ct. at 2419.

that harmonizes §§ 703 (a) and 704 (a). It also provides an objective standard that permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subjected to real retaliation.¹¹⁶

What kind of approach to statutory interpretation is this? What does this portend? It is not textualism. A strict textualist, like Justice Scalia, would go for the more straightforward reading of Justice Breyer. Is this a surmise by Justice Alito that Congress must have intended, though it did not use the obvious words, to impose an objective test of those kinds of actions subject to the retaliation provision? Or is it simply Justice Alito's own notion of a desirable safeguard to keep some lid on the number of these cases that end up in court or to provide a more objective basis for deciding them? Justice Alito also criticizes the majority's test of retaliatory acts that might have dissuaded an employee from complaining as having no sound basis.¹¹⁷ He thinks that test is too open ended, and would prefer the more certain test of limiting retaliation claims to those actions that affect terms and conditions of employment.¹¹⁸

Lest one think that this is judicial activism B despite the fact that the two newly appointed justices tried to make clear in their confirmation hearings that they would follow precedent and not make law B one must compare the other labor and employment law cases the Term in which the Court predicates decisions less on statutory language than on considerations of judicial administration. Justice Ginsburg's opinion in the *Moonlight Café* case, which comes up later, is one such example.¹¹⁹ So is the debate between Justices Ginsburg and Breyer, who wrote the majority and dissent, respectively, in the *McVeigh* case, which I mention briefly later on.¹²⁰ So activism may cut across ideological lines.

Justice Alito nevertheless concurs in the result B including the substantial damages award B because he concludes that Ms. White's reassignment was a materially adverse employment action that would have satisfied 703 (a) as well, as was her suspension without pay.¹²¹

*Sereboff v. Mid Atlantic*¹²²

Here are two people, Marlene and Joel Sereboff, who get into a car accident.

116 *Id.*

117 *Id.* at 2420.

118 *Id.* at 2421.

119 *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235 (2006).

120 *Empire Healthchoice Assur., Inc. v. McVeigh*, 126 S.Ct. 2121 (2006).

121 *Burlington N.*, 126 S.Ct. at 2421.

122 *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006).

Marlene and her husband are covered by her employer's health insurance plan, which is an ERISA regulated plan.¹²³ The Sereboffs' medical expenses, some \$75,000, are covered by the Plan.¹²⁴ Later on, the Sereboffs bring a tort action against the other driver and other parties, and they recover a big settlement of \$750,000.¹²⁵

The Plan comes after the Sereboffs and asks them for reimbursement of the \$75,000 in medical expenses, since, after all, the Sereboffs have recovered that money from the tortfeasor (an old law school term that I never thought I'd get to use).¹²⁶ You might think this is a no-brainer, as the Sereboffs have been compensated by the other party for their injuries, and under familiar principles of subrogation, why shouldn't the Sereboffs' insurer, the Plan, be subrogated to their claim against the driver? Well, one answer might be that the recovery from the driver addressed other items of the claim, such as pain and suffering. Or, it could be that the settlement was a compromise of the claim, and the Sereboffs didn't receive full reimbursement for their medical expenses.

However, the Plan was quite specific about indemnification. It has an Acts of Third Parties provision which says that a beneficiary who receives benefits under the plan for her injuries is required to reimburse Mid Atlantic for those benefits from all recoveries from a third party (whether by lawsuit, settlement, or otherwise.)¹²⁷ The Plan further provides that Mid Atlantic's share of the recovery will not be reduced because [the beneficiary] has not received the full damages claimed unless [Mid Atlantic] agrees in writing to a reduction.¹²⁸

So there you have it. An explicit provision for subrogation with no offsets. Why shouldn't the Plan recover from the Sereboffs?

The answer is in the statute and we have another issue of statutory interpretation. Mid Atlantic filed its suit under Section 502(a)(3) of ERISA.¹²⁹ That section says that a fiduciary (and that would cover Mid Atlantic) may bring a civil action under this provision:

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii)

123 *Sereboff*, 126 S. Ct. at 1872.

124 *Id.* at 1873.

125 *Id.*

126 *Id.*

127 *Id.* at 1872.

128 *Id.* at 1872 (quoting App. to Pet. for Cert. 38a).

129 Employee Retirement Income Security Act (ERISA) §502(a)(3), 29 U.S.C. §1132(a)(3) (2005); *Sereboff*, 126 S. Ct. at 1873.

to enforce any provisions of this subchapter or the terms of the plan.¹³⁰

The issue of statutory interpretation is whether the Sereboffs are seeking equitable relief.¹³¹

What we don't know so far is whether this provision has a preemptive reach. That is, if the suit doesn't satisfy the jurisdictional requirements of this section, does that bar similar relief under some other statute or cause of action? The answer to that question might make the stakes in this case high indeed. The Court does not address it, and an earlier case on the same topic, which I'll come to shortly, indicates that this may be an open issue.

So here we are, driven back to an issue that we thought was important only in law school. When does a claimant seek equitable relief, and when is it legal relief? A careful study of this opinion takes us back to the middle ages of law, as Chief Justice Roberts twice reminds us, of the days of the divided bench.¹³² It took me back to the dark ages of law school when, if memory serves, we learned about obscure differences between actions in law and equity and references to the size of the Chancellor's foot. The opinion even forces the reader to try to understand such arcane concepts as equitable restitution, constructive trusts, equitable liens, and tracing of funds.¹³³ The case is so old fashioned that the caption has an *et ux* in it.

Chief Justice Roberts offered some insight during oral argument, when he treated us to this exchange.¹³⁴ Justice Stevens was pressing counsel for the Plan to say whether the claim was equitable or legal.¹³⁵ The exchange seemed to turn on whether the Sereboffs had received full compensation from the driver for their medical injuries, or whether the settlement was a compromise, in which case the Sereboffs would not have been fully compensated for their medical injuries, and the Plan should therefore not recover the full amount.¹³⁶ The Plan's lawyer insisted this was an equitable recovery.¹³⁷ Justice Roberts jumped in:

Counsel, it seems to me you B you must be biting your tongue here. There's an easy answer to Justice Stevens . . . and it's that we get all the money first because that's what the contract says. But you can't give that answer because then it starts to look like a legal claim. Instead, you get

130 Acronym (ERISA) §502(a)(3), 29 U.S.C. §1132(a)(3) (2005).

131 *Sereboff*, 126 S. Ct. at 1873.

132 *Id.* at 1874 (quoting *Great-W. Life and Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)).

133 *Sereboff*, 126 S. Ct. at 1874.

134 Transcript of Oral Argument at 35, *Sereboff v. Mid. Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) (No. 05-260).

135 *Id.* at 33-34.

136 *Id.*

137 *Id.* at 34.

mired in all these obscure equitable doctrines because you're B when there's a simple answer there in black and white, but it's in the contract. And as soon as you say that, it starts to sound legal rather than equitable.¹³⁸

Even though Justice Roberts telegraphed that he thought this was clearly a legal claim, he ended up authoring a unanimous opinion that went the other way. How did he do that?

I think he did it with a rule of statutory construction. He noted that the purpose of Sec. 502 (a)(3)(B)(ii) is to enforce plan terms (my emphasis, but the Court's as well), so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make [the section] an empty promise.¹³⁹ In other words, you don't want to read the statute in a way that makes one part of it a nullity. So, just because you are enforcing the plan's terms does not make it a legal as opposed to equitable action. But does this mean that all suits to enforce a plan's terms are equitable actions? No.

I say no because the Court had earlier dealt with a very similar case in which it denied relief because the relief sought was legal, not equitable. That was the 2002 case of *Great-West Life & Annuity vs. Knudson*.¹⁴⁰ *Knudson* also involved an auto accident in which the injured parties were covered by a Plan that had a first lien on any recovery from a third party.¹⁴¹ Great -West tried to recover from Ms. Knudson the money she received for her injuries in her action against the other driver, since the Plan had already paid her for her medical expenses.¹⁴² Ms. Knudson had placed the funds she received from her recovery in a Special Needs Trust under California law.¹⁴³ The very same Supreme Court held in *Knudson* that the relief sought by the Trust was not equitable - the imposition of a constructive trust or equitable lien on particular property - but legal - the imposition of personal liability for the benefits that [Great-West] conferred upon [Knudson].¹⁴⁴

So how is our case different? In our case the Sereboffs received their tort recovery and distributed the settlement proceeds to themselves.¹⁴⁵ Further, from the very beginning, Mid-Atlantic in writing asserted a lien on any proceeds from the law suit.¹⁴⁶ Later, Mid-Atlantic sought a preliminary injunction requiring the couple to retain

138 Transcript of Oral Argument at 35-36, *Sereboff v. Mid-Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) (No. 05-260).

139 *Sereboff*, 126 S. Ct. at 1874.

140 *Great-W. Life and Annuity*, 534 U.S. at 214.

141 *Id.* at 207.

142 *Id.* at 208.

143 *Id.* at 207.

144 *Id.* at 214.

145 *Sereboff*, 126 S. Ct. at 1873.

146 *Id.* at 1872.

and set aside \$75,000 from the proceeds to satisfy their claim (thus, I suppose, avoiding the situation in *Knudson*).¹⁴⁷ Certainly the action for an injunction would be equitable. The Sereboffs caved in and agreed to “preserve” that money in separate funds until the case went through the courts.¹⁴⁸

So, in *Sereboff* the Plan sought to recover from an identifiable fund that had been set up by the Sereboffs and was within their possession. Unlike *Knudson*, the Plan was not simply imposing personal liability for a contractual obligation to pay money. Rather, the Plan was seeking recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs’ assets generally.¹⁴⁹

Are we happy with this distinction? Should it turn on whether the Plan is smart enough to start out with an injunctive action (how many plans will be alert enough to do this before the money, as happened in *Knudson*, is parceled out)? Should it turn on whether the beneficiary of the Plan agrees to set up the identifiable fund, as in *Sereboff*? Would a lawyer representing beneficiaries after *Sereboff* advise his client to set up such a fund?

I am happy that this is not my field. But some observations seem in order. First, this is an extraordinarily technical and historical opinion. The distinctions the Court draws between this case and *Knudson*, which went the other way, are not very compelling. Indeed, this case suggests that as a practical matter *Knudson* has been all but overruled. The Court takes some pains to suggest that the claim in *Knudson* was based strictly upon a theory of equitable restitution, and not on the alternative theory, pursued in *Sereboff*, of an equitable agreement. A claim that is limited to a restitution theory must demonstrate that there are identifiable funds in the beneficiary’s possession, which was not the case in *Knudson*.¹⁵⁰ This suggests that all the Plan claimant needs to allege is that its claim to the money is pursuant to an agreement. From that will follow the Court’s reasoning that once the recovery comes into the beneficiaries’ hands, it is held in trust for the claimant, who now has an equitable lien upon it, and, voila, it is a suit in equity.¹⁵¹ The opinion further suggests that wise counsel for plans will develop plain language that makes crystal clear that under the Third Party Recovery clause any money received by the beneficiary from a third party is deemed to be held in trust for the Plan.¹⁵² That should be the end of any further defenses.

In the *Knudson* case just four years earlier, Justice Ginsburg wrote a dissent which challenged the majority’s reasoning that the claim was legal, not equitable.¹⁵³

147 *Id.* at 1873.

148 *Id.*

149 *Id.* at 1874.

150 *Id.*

151 *Id.* at 1875.

152 *Id.*

153 *Great-W. Life and Annuity*, 534 U.S. at 224 (Ginsberg, J., dissenting).

She was joined by her usual compatriots – Justices Stevens, Souter and Breyer.¹⁵⁴ She said that the rarified rules underlying this rigid and time-bound conception of the term “equity” were hardly at the fingertips of those who enacted Sec. 502(a)(3). By that time, she said, “the days of the divided bench were a fading memory.”¹⁵⁵ She said it would be “fanciful to attribute to members of . . . Congress familiarity with” what one scholar had called needless and obsolete distinctions.¹⁵⁶

This is not a novel point. Other cases too have questioned the wisdom of attributing so much weight to doctrinal technicalities widely unknown to those who voted for a statute. Justice Ginsburg preferred to decide the case on policy grounds - the desirability of a uniform enforcement scheme for ERISA claims.¹⁵⁷

What light does all this throw upon *Sereboff*? It reminds us that for all the analysis about law vs. equity, we’re told very little about why the statute limits jurisdiction to equitable relief, why Congress might have cared about the distinction between law and equity, and what policy is served by reading the statute to allow recovery in *Sereboff* but not in *Knudson*. While the result in *Sereboff* may be sound, the reasoning is deficient for not considering these policy issues.

For those who are interested in the issues raised by *Sereboff*, I recommend the *Empire Healthchoice v. McVeigh* case.¹⁵⁸ *McVeigh* involved the same sort of underlying pattern of an insurance company that pays health care costs of a beneficiary, the beneficiary’s recovery against the tort-feasor, and then a subrogation action by the insurance company against the insured for reimbursement.¹⁵⁹ This was not an ERISA claim. Rather, the plan was set up pursuant to a federal statute, the Federal Employees Health Benefits Act of 1959, which sets up a comprehensive scheme for private carriers to offer health plans to Federal employees.¹⁶⁰

The insurance carrier brought its subrogation action against the insured in Federal Court, claiming jurisdiction under 28 U.S.C. 1331.¹⁶¹ The basic question for the Court was whether this raised a federal question.¹⁶² Justice Ginsburg, for the majority, thought that this action was ancillary to the federal scheme, and therefore did not

154 *Id.*

155 *Id.*

156 *Id.* at 225 (quoting 4 C. Wright & A. Miller, *supra*, § 1041, at 131).

157 *Id.* at 227.

158 *Empire Healthchoice Assurance, Inc., dba Empire Blue Cross Blue Shield V. Denise F. Mcveigh, as Administratrix of the Estate of Joseph E. Mcveigh*, 126 S.Ct. 2121 (2006).

159 *Id.*

160 *Id.* at 2126.

161 *Id.* at 2127.

162 *Id.* at 2131.

present a claim for the federal courts.¹⁶³ In his dissent, Justice Breyer concluded that I believe I can find a basis for federal jurisdiction.¹⁶⁴

The case illustrates for me that not every statutory case has its answer in the text. Here the text gives virtually no help, and the Justices have to decide whether as a practical matter this particular piece of the insurance arrangement is integral to the Federal program. The justices cannot avoid taking into account policy considerations, and speculating as to the likely intent of Congress.

The *McVeigh* Court is strangely divided. Justice Ginsburg picks up only one member of her normal bloc, Justice Stevens; Justices Scalia, Thomas and the Chief Justice round out the majority. Justice Breyer gains one of his usual allies, Justice Souter, and is joined as well by Justice Kennedy and Justice Alito.

Graduation Day

In a 15 minute address to Law Graduates at Georgetown University on May 21, 2006, Chief Justice Roberts may have told us more about the Court's approach this Term than we can learn from the opinions themselves.¹⁶⁵

The Chief said he was seeking greater consensus on the Court, and thought this could be best accomplished if cases were decided on the narrowest possible grounds.¹⁶⁶ In a quotation that doesn't quite ring, he said if it is not necessary to decide more to a case, then in my view it is necessary not to decide more in a case.¹⁶⁷

The Chief accomplished unanimity, or close to it, in almost all the labor and employment cases this year. Of the three main cases I discuss, the donning and doffing case and *Burlington Railroad* were not decided on narrow grounds.¹⁶⁸ Rather, they addressed statutory issues head on.¹⁶⁹ The remaining main case, *Ceballos*, was as divided as a Court can get, though there is some unanimity on the underlying premise that a public employee's First Amendment rights are diminished when he speaks pursuant to his job duties.¹⁷⁰

The two cases that follow may be examples of the graduation address.¹⁷¹ The first two achieve unanimity, or close to it, by remanding to allow for a better focus on the

163 *Id.* at 2127.

164 *Id.* at 2138.

165 *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at 16.

166 *Id.*

167 *Id.*

168 *Burlington N.*, 126 S.Ct. at 2412-13; *IBP*, 126 S.Ct. at 522.

169 *Burlington N.*, 126 S.Ct. at 2412-13.

170 *Garcetti v. Ceballos*, 126 S.Ct 1951, 1960 (2006).

171 *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at 16.

issues.¹⁷² I'm not sure this accomplishes much, except to postpone to another day some difficult issues on which there is not likely to be unanimity.

*U.S. v. Georgia*¹⁷³

Tony Goodman, a prisoner in Georgia state prison, brought an action against the state for monetary damages under Title II of the Americans with Disabilities Act.¹⁷⁴ Title II expressly abrogates state sovereign immunity under the XII Amendment for suits under Title II.¹⁷⁵

The XIV Amendment provides that no state shall deny any citizen the equal protection of the laws.¹⁷⁶ This means that at least some substantive Constitutional rights restrict State conduct through the XIV Amendment.

Section 5 of the XIV Amendment gives Congress prophylactic enforcement powers to permit citizens to enforce their rights against the state for actual violation of Constitutional rights.¹⁷⁷

In a series of cases the Supreme Court has considered whether Congress has the authority to create in citizens the power to sue the state under certain statutes, given Article XI's grant of sovereign immunity.¹⁷⁸ The result has been a fractured Court and a series of cases that are hard to harmonize. Congress' authority is less clear when it grants the authority to sue a state for a violation of statutory rights. Here such cases as *Tennessee v. Lane* and *Kimel v. Florida* create confusion.¹⁷⁹

Goodman alleged both Section 1983 claims of invasion of Constitutional rights, chiefly of the VIII Amendment ban on cruel and unusual punishment, and statutory violations under Title II of the ADA.¹⁸⁰ Justice Scalia, for the majority, notes that some of Goodman's claims could potentially violate both the Constitution and Title II.¹⁸¹

The Court remands the case so that the lower courts can make a better record of what Goodman actually alleges, as his pro se complaint is all over the place.¹⁸² The Court says that to the extent that *Goodman* raises Constitutional claims, the

172 *U.S. v. Georgia*, 126 S.Ct. 877, 882 (2006); *Whitman v. Dep't of Transp.*, 126 S.Ct. 2014, 2016 (2006).

173 *Georgia*, 126 S.Ct. 877.

174 *Id.* at 879.

175 42 U.S.C. §12202 (2000 ed.).

176 U.S. CONST. amend. XIV.

177 *Georgia*, 126 S.Ct. at 881.

178 *Id.*

179 *Tennessee v. Lane*, 541 U.S. 509, 532-34 (2004); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 91 (2000).

180 *Georgia*, 126 S.Ct. at 879.

181 *Id.* at 882.

182 *Id.*

abrogation of sovereign immunity by Congress is valid.¹⁸³ What is not clear, and remains unclear under the string of recent cases, is whether Congress has the power to lift State sovereign immunity as to statutory claims. To make matters a little simpler, there is no doubt in this case that Congress has declared that sovereign immunity is lifted in Title II claims.

The holding in this incredibly short opinion is insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity (emphasis is the Court's).¹⁸⁴ Thus, the Court follows Chief Justice Roberts' goal of minimizing fractions on the Court by deciding cases on the narrowest possible basis.¹⁸⁵ Here, the Court remands to allow the building of a better record, so that the Court can isolate those claims that violate Title II but don't have a Constitutional component that would be protected under the XIV Amendment.¹⁸⁶

The Stevens and Ginsburg concurrence suggests that the court on remand should explore whether there are other Constitutional violations beyond the VIII Amendment that would overcome sovereign immunity.¹⁸⁷

*Whitman v. Department of Transportation*¹⁸⁸

Here's a guy who works for the FAA, I'm not sure in what position, and under FAA policy he is subject to random drug testing.¹⁸⁹ They test him 14 times in a short period.¹⁹⁰ He asks, what are the odds that my number would come up that often if the testing were truly random? He files a claim under 49 USC 45104(8), and includes a First Amendment claim.¹⁹¹ Presumably he argues that the excessive testing was an attempt to silence him.

The case has a potentially interesting and important issue on the relevance of the grievance procedure. The employer argued that Whitman's sole remedy was under the negotiated collective bargaining agreement.¹⁹² So we were looking, potentially, at a revisit of *Alexander v. Gardner Denver*, in light of *Gilmer* and *Circuit City*, something we badly need to do.¹⁹³

183 *Id.* at 881.

184 *Id.* at 882.

185 *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at 16.

186 *Georgia*, 126 S.Ct. at 882.

187 *Id.* at 884 (Stevens, J., concurring).

188 *Whitman v. Dep't of Transp.*, 126 S.Ct. 2014 (2006)

189 *Whitman*, 126 S.Ct. at 2014-15.

190 Brief for Petitioner at 9, *Whitman v. Dep't of Transp.*, 126 S.Ct. 2014 (2006) (No. 04-1131).

191 *Whitman*, 126 S.Ct. at 2015.

192 Brief for Respondent at 11-12, *Whitman v. Dep't of Transp.*, 126 S.Ct. 2014 (2006) (No. 04-1131).

193 *Circuit City Stores, Inc. v. Adams*, 535 U.S. 105 (2001); *Gilmer v. Interstate & Johnson Lane Corp.*, 500 U.S. 20 (1991); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

In a per curiam decision, the Court follows Chief Justice Roberts' graduation address and remands. Here's the echo of the Chief Justice:

It may be that a decision on these questions can obviate the need to decide a more difficult question of preclusion.¹⁹⁴

The Court directs the lower courts to address a host of issues in order to frame more clearly what is at stake.¹⁹⁵ Some of these issues include how the claim fits within the agency's statutory scheme, the type of claim that is raised (for the statute makes some distinctions for prohibited personnel practices), and whether the claimant is required to exhaust and has exhausted his administrative remedies.¹⁹⁶

*U.S. v. Olson*¹⁹⁷

Some miners injured in an Arizona mining accident sue the United States.¹⁹⁸ Their cause of action is under the Federal Tort Claims Act, which authorizes private tort actions against the United States, claiming that the negligence of federal mine inspectors contributed to the accident.¹⁹⁹ The Federal Tort Claims Act authorizes private tort actions against the United States "under circumstances where the United States, if a private person, would be liable to the claimant" under applicable law.²⁰⁰

So we have another sovereign immunity case (*U.S. v. Georgia* is the other one), this time involving the Federal government, and not getting us into the sovereign immunity issues raised by the XI Amendment.²⁰¹

The Federal District Court dismissed the claim on the basis that the allegations didn't show that a private person would be liable under these circumstances.²⁰²

The Ninth Circuit complicated matters by departing from the statutory scheme. The Circuit Court couldn't see how there could be a private person analogy, since private citizens don't normally inspect mines.²⁰³ So the Circuit Court substituted the

194 *Whitman*, 126 S.Ct. at 2016.

195 *Id.* at 2015-16.

196 *Whitman*, 126 S.Ct. at 2016.

197 *U.S. v. Olson*, 126 S.Ct. 510 (2005).

198 *Olson*, 126 S.Ct. at 512.

199 *Id.*

200 *Olson*, 126 S.Ct. at 511; 28 U.S.C. §1346(b)(1) (2000).

201 *Olson v. U.S.*, 362 F.3d 1236 (9th Cir. 2004).

202 *Olson*, 362 F.3d at 1240.

203 *Id.* at 1241.

touchstone question of whether a local government would be liable under the circumstances.²⁰⁴ The Ninth Circuit held that Arizona law would make local government liable under the circumstances, so sovereign immunity against the United States is lifted, and the lawsuit proceeds.²⁰⁵

Justice Breyer wrote a unanimous opinion, in his usual concise style. We here interpret these words to mean what they say.²⁰⁶ The statute says you look at whether a private person would be liable, and not, as the Ninth Circuit did, to whether a state or local government would be liable.²⁰⁷

The Breyer opinion did not proceed blindly from the statutory language. It took at least a tentative look at the clues that could be found in legislative history and context: Indeed, we have found nothing in the Act's context, history, or objectives or in the opinions of this Court suggesting a waiver of sovereign immunity solely upon that basis.²⁰⁸

The Court also suggested that on remand the court could be a little more flexible and imaginative in determining whether a private person would be liable. Justice Breyer's opinion emphasizes the complete text, which says in the same manner and to the same extent as a private individual under like circumstances.²⁰⁹ Relying upon an old chestnut called *Indian Towing*, the Court suggested by analogy that in a case involving a claim against the government for negligent operation of a lighthouse, the Coast Guard had the same duties of care as would a private person, even though private persons may not operate lighthouses.²¹⁰ As the Court put it, rather poetically, the lower courts should have looked to analogous cases where private individuals have duties to third parties similar to the relationship between a lighthouse operator and a ship dependent on the lighthouse's beacon.²¹¹

Justice Thomas dissented on the basis of his ongoing, and presumably not shared, view that the FAA doesn't apply to proceedings in state court, and therefore cannot displace Florida's jurisdiction to knock out the contract.

*Arbaugh v. the Moonlight Café*²¹²

This is another sexual harassment case (*Burlington* is the other).²¹³ The

204 *Id.* at 1240.

205 *Id.*

206 *Olson*, 126 S.Ct. at 511.

207 *Olson*, 126 S.Ct. at 512.

208 *Olson*, 126 S.Ct. at 512-13.

209 *Id.* at 513 (citing 28 U.S.C. §2674).

210 *Id.* at 513 (citing *Indian Towing Co. v. U.S.*, 350 U.S. 61, 64-65 (1955)).

211 *Id.* at 513 (citing *Indian Towing*, 350 U.S. at 64-65, 69).

212 *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235 (2006).

213 *Arbaugh*, 126 S.Ct. 1235.

employer's technical title, as it appears in the caption, is Y&H Corporation, but I like the d/b/a moniker, the Moonlight Café.²¹⁴

The plaintiff was sexually harassed by one of the owners, and quit in what was ruled a constructive discharge.²¹⁵ Ms. Arbaugh pursued her discovery, went to trial and won.²¹⁶ A jury gave her \$5,000 in back pay, \$5,000 in compensatory damages, and \$30,000 in punitive damages.²¹⁷

Then it dawned on the Moonlight Café that it might have less than the 15 employees that Title VII says is a requisite for being a defendant: The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees."²¹⁸

The District Court, complaining that it was a big waste of time and money to get this far and then have the employer move to dismiss after an adverse jury finding (maybe the Moonlight Café was hedging its bets?), held that because the numbers requirement (numerosity) is jurisdictional, it may be raised at any time, and can't be waived.²¹⁹ That is, either the court has jurisdiction or it doesn't. As the Court says, subject matter jurisdiction "can never be forfeited or waived."²²⁰ On the other hand, if numerosity is simply an aspect of the plaintiff's cause of action, then it is too late to raise a defense on the merits at this point of the trial.²²¹

Justice Ginsburg wrote for a unanimous Court.²²² This decision may be up there with *Sereboff* in its focus on obscure distinctions.²²³ Here's the tip off: >Jurisdiction . . . is a word of many, too many, meanings.²²⁴ Further, on the distinction between subject matter jurisdiction and failure to state a claim, the Court and other courts have been less than meticulous.²²⁵ That is, many decisions fail to state clearly whether one or the other concept is the basis for a dismissal. The most famous of the Court's prior cases that fudged the issue (it found coverage) is *Hishon v. King and Spaulding*, involving a woman who was denied partnership in a law firm.²²⁶

The Court gives a not altogether convincing explanation as to why, as a matter of

214 *Id.*

215 *Id.* at 1240.

216 *Id.* at 1241.

217 *Id.*

218 *Arbaugh*, 126 S.Ct. at 1241; 42 U.S.C. §2000e (b) (2000).

219 *Arbaugh*, 126 S.Ct. at 1241.

220 *Id.* at 1244 (citing *U.S. v. Cotton*, 535 U.S. 625, 630 (2002)).

221 *Id.* at 1245.

222 *Id.* at 1238.

223 *Sereboff*, 126 S.Ct. at 1874.

224 *Arbaugh*, 126 S.Ct. at 1242 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1993) (internal quotation marks omitted)).

225 *Id.* at 1242.

226 *Hishon v. King & Spaulding*, 467 U.S. 69, 78-79 (1984).

statutory interpretation, numerosity is not a jurisdictional prerequisite. The best it can say is that nothing in the basic statutory grant of federal jurisdiction in 28 USC 1331 and 1332 makes numerosity a jurisdictional measure.²²⁷ In contrast, for example, Congress has specified that the amount in controversy is a jurisdictional prerequisite in diversity cases.²²⁸ Further, nothing in the language of Title VII makes this a jurisdictional requirement, though Congress could have done so if it wished.²²⁹

Rather, the decision turns on policy considerations. Characterizing numerosity as jurisdictional has undesirable consequences.²³⁰ Subject matter issues may never be waived, and the factual discrepancies are resolved by judges, not juries.²³¹ Further, a dismissal on the merits may preserve pendant state claims, while a dismissal for lack of jurisdiction kills everything at the federal level.²³² Treating the numerosity requirement as jurisdictional can lead to wasteful results, as in this case.²³³ Therefore, the Court concludes that unless the statute indicates that a prerequisite is jurisdictional, the Court should treat it as a subject matter and not jurisdictional requirement.²³⁴ In other words, there is a presumption. The Court treats this as a readily administrable bright line.²³⁵

I like this case because it supports the view that judges ought to consider the wisdom and purpose of a statute rather than blindly following its language. All 8 participating judges sign on to this approach in this case. Justice Alito wasn't involved in this case.

Odds and Ends

*Buckeye Check Cashing v. Cardegna*²³⁶

This consumer case may prove significant for us because of its implications for employment agreements that contain mandatory arbitration provisions.

A group of consumers regularly cashed checks with Buckeye; they agreed to pay

²²⁷ *Arbaugh*, 126 S.Ct. at 1245.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 1245.

²³¹ *Id.* at 1244.

²³² *Arbaugh*, 126 S.Ct. at 1244-45.

²³³ *Id.* at 1245.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (2006).

a finance charge for this service, and to submit any disputes to arbitration.²³⁷ When they brought a class action suit in Florida State Court claiming that the finance charge was “usurious,” Buckeye moved to compel arbitration.²³⁸ The consumers in turn argued that the entire agreement, including the provision for arbitration, was void because of the “usurious” rates, which made the contract “criminal on its face.”²³⁹

In a 7-1 decision, with Justice Alito not participating, the Court, purporting to build upon existing case law, held that under the Federal Arbitration Act, questions as to the validity of the underlying agreement itself are for the arbitrator to decide.²⁴⁰ In contrast, where the challenge is only to the agreement to arbitrate, and not to the underlying contract, the decision as to the validity of the arbitration agreement is for the court to decide.²⁴¹ This is how the Court sees the distinction under Section 2 of the Federal Arbitration Act, which provides that:

A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁴²

The Gilmerization of employment law, affirmed after *Circuit City*, allows employers to force their employees, as a condition of employment, to submit all employment disputes to arbitration. But since these agreements are grounded in the Federal Arbitration Act, the escape provided by the final clause quoted above is vital to employees who wish to avoid mandatory arbitration.²⁴³

In this terse opinion by Justice Scalia, the Court gives little rationale for the distinction it draws between challenging the underlying contract (for the arbitrator to decide) and challenging the agreement to arbitrate (for a court to decide).²⁴⁴ Nor does it provide a lot of guidance for determining whether the challenge is to the one or the other.²⁴⁵

I assume that the Court’s pronouncement in the consumer context will hold in the employment setting as well. I also suspect that most of the challenges that employees mount under employment contracts are to the agreement to arbitrate rather than to the underlying contract that contains the arbitration clause. That is because a body of law

237 *Buckeye Check Cashing, Inc.*, 126 S.Ct. at 1207.

238 *Buckeye Check Cashing*, 126 S.Ct. at 1207.

239 *Id.*

240 *Id.* at 1209.

241 *Id.*

242 Federal Arbitration Act, 9 U.S.C. §2 (2006).

243 *Id.*

244 *Buckeye Check Cashing*, 126 S.Ct. at 1209-10.

245 *Id.*

has developed in which employees have had some success at contending that the agreement to arbitrate is invalid on account of the procedures for selecting an arbitrator, a lack of mutuality between the rights of the employer and the employee in arbitration, or provisions that require the employee to pay a portion of the arbitrator's fee. In those cases the Court gets to decide, and this is consistent with the approach of the Steelworkers Trilogy in labor cases under Section 301 of the NLRA. In some cases, analogous to Buckeye, the employee may find some basis to invalidate the underlying agreement, and in that case the employee must press his challenge before the arbitrator.

The tactical question is which forum gives the employee or the employer his best shot? I can't answer. Nor can I offer any insight as to how challenges will be handled procedurally when they go both to the question of the formation of the underlying contract and the validity of the arbitration clause. But Buckeye at least appears to set out the factors that will tell us whether it is a Court or an arbitrator that decides the question.²⁴⁶

*Domino's Pizza v. McDonald*²⁴⁷

Mr. McDonald, a black man, had a solely owned corporation called JWM.²⁴⁸ JWM made a contract to build some restaurants for Domino's.²⁴⁹ Mr. McDonald got into a spat with Domino's, and alleged that Domino's dragged its feet on these contracts because it didn't like dealing with a black man.²⁵⁰ JWM eventually filed for bankruptcy, and there was some ensuing litigation that resulted in a settlement in favor of JWM, with a complete release.²⁵¹

Mr. McDonald filed an action as an individual under Sec. 1981, claiming Domino's broke its contract with him because of racial animus.²⁵² Section 1981 protects the equal right of all persons within the jurisdiction of the United States to make an enforce contracts" without respect to race.²⁵³ Domino's defended on the ground that it had made no contract with Mr. McDonald, but only with JWM.²⁵⁴ The Ninth Circuit, apparently the only circuit to take this view, concluded that where there are injuries distinct from that of the corporation, an individual who is not a party to the contract may

²⁴⁶ *Id.*

²⁴⁷ *Domino's Pizza, Inc. v. McDonald*, 126 S.Ct. 1246 (2006).

²⁴⁸ *Domino's Pizza, Inc.*, 126 S.Ct. at 1247.

²⁴⁹ *Id.* at 1248.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ 42 U.S.C. §1981 (2006).

²⁵⁴ *Domino's*, 126 S.Ct. at 1248.

nevertheless sue under Sec. 1981.²⁵⁵

This unanimous opinion authored by Justice Scalia (Justice Alito not participating) holds that a plaintiff under Sec. 1981 can only enforce rights under his own contract, and not any rights obtained derivatively as an officer or agent of the contracting corporation.²⁵⁶

The opinion relies heavily upon the text of Sec. 1981, but has heavy doses of policy analysis. A key statement is that nothing in the text of Sec. 1981 suggests that it was meant to provide an omnibus remedy for all racial injustice. If so, it would not have been limited to situations involving contracts” (court emphasis).²⁵⁷ There is no indication that the case departs from the teaching of prior case law.

It is hard to say to what extent the outcome turns on the fact that Dominick’s had already settled with the corporation, which meant that Mr. McDonald was essentially getting a second bite at the apple. The Court might take a different approach in which the corporation had not been involved in prior litigation, and the individual was making the only legal foray.

You talk too much

What’s eating the Court in *Ceballos v. Garcetti*?

Ceballos is an assistant District Attorney in the LA County DA’s office, headed by Gil Garcetti.²⁵⁸ Gil Garcetti achieved some notoriety when his office handled the O.J. Simpson case.²⁵⁹ Responding to a defense attorney’s questioning, Ceballos discovered there may have been some inaccuracies in an affidavit his office had prepared to support a search warrant.²⁶⁰ He brought the matter to the attention of his superiors, and prepared a disposition memorandum that urged dismissal of the case.²⁶¹ The superiors disagreed and the case went forward.²⁶² Ceballos eventually testified in the underlying criminal case, having been called by the defense, and the court in the criminal case found no infirmity in the warrant.²⁶³ Apparently Ceballos’ internal debate with his superiors and colleagues was heated.²⁶⁴

255 *Id.* at 1249.

256 *Id.* at 1252.

257 *Id.*

258 *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1955 (2006).

259 Thomas L. Jones, *Framing a Guilty Man?*, Court TV, date, http://www.crimelibrary.com/notorious_murders/famous/simpson/man_8.html.

260 *Garcetti*, 126 S.Ct. at 1955.

261 *Id.*

262 *Id.* at 1956.

263 *Id.*

264 *Id.*

Ceballos contended that in retaliation for bringing up this matter, he was given less satisfactory assignments and was denied a promotion.²⁶⁵ Ceballos claimed that his speech was protected under the First Amendment, citing such chestnuts as *Pickering* and *Connick*.²⁶⁶ Ceballos' comments were all made within the DA's office; he made no public utterances, except in his testimony at the trial of the underlying matter and in one public appearance, but those public remarks are not before the Court.²⁶⁷

In a 5-4 opinion authored by Justice Kennedy, who may well be the swing man on this Court, the Court said that Ceballos presented no First Amendment claim:

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.²⁶⁸

While not clear at first, the prevailing rule for a long time has been that a public employee doesn't lose the First Amendment rights he would enjoy as a citizen simply because he is a public employee or because he talks about matters within his special knowledge as a public employee.²⁶⁹ In *Pickering*, the germinal case in this line, the Court noted that *Pickering*, the teacher, had superior knowledge about how the school's funds were being spent, and therefore it is essential that [teachers] be able to speak out freely on such questions without fear of retaliatory dismissal.²⁷⁰

At the same time, *Pickering* tells us that when the public employee speaks out about matters affecting his job, the state has a greater interest in regulating his speech than in the case of a private citizen.²⁷¹ The famous quote is that we must arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.²⁷² There was no serious suggestion in *Pickering* that the teacher's remarks were disruptive to the school board's interests. But the idea was that whatever interest the state has in regulating speech in these situations, it doesn't abrogate the teacher's First Amendment rights.²⁷³ Rather, it subjects them to a balancing.²⁷⁴

265 *Id.*

266 *Garcetti*, 126 S.Ct. at 1956 (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 205 Will. Cty., 391 U.S. 563 (1968)); *Connick*, 461 U.S. 138 (1983).

267 *Garcetti*, 126 S.Ct. at 1959.

268 *Id.* at 1960.

269 *Pickering*, 391 U.S. at 574.

270 *Id.* at 472.

271 *Id.* at 568.

272 *Id.*

273 *Id.* at 572-73.

274 *Id.* at 568.

Ceballos could have been approached as a question of balancing, as in *Pickering*. In fact, the 9th Circuit found *Ceballos*' speech protected under the First Amendment, followed the *Pickering* approach, and concluded that *Ceballos*' remarks survived the *Pickering* balancing.²⁷⁵ Indeed, it said that the DA's office was not objectively reasonable.²⁷⁶

The later *Connick* case also involved an assistant District Attorney, Sheila Myers, who sent out an internal questionnaire to fellow DA's asking how they had been treated and whether they felt pressured to work in a political campaign.²⁷⁷ This time Justice White wrote the majority opinion.²⁷⁸ He had written a separate opinion concurring and dissenting in *Pickering*, on a secondary issue of whether *Pickering*'s statements were knowingly or recklessly false.²⁷⁹ The *Pickering* majority included Brennan, Marshall, Black and Douglas.²⁸⁰ You could feel the pendulum swinging back in *Connick* as the Court's ideological composition changed.

One of the key contentions of the employer in *Connick* was that the *Pickering* balancing test did not even apply, because Ms. Myers' speech involved "only internal office matters" and was not a matter of public concern.²⁸¹ The Court held there was much force to this position, and that government offices could not function if every employment decision became a constitutional matter.²⁸² The Court noted that in almost all the *Pickering* line of cases cited by the employee, including *Mt. Healthy* and *Givhan*, two well known public sector speech cases, the employee spoke out on a matter of public concern.²⁸³ The *Connick* Court concluded that if Ms. Myers' questionnaire could not be "fairly characterized" as involving a matter of public concern, the employer would be free to deal with her without First Amendment constraints.²⁸⁴ The *Connick* Court concluded that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel action taken by a public agency. . . .²⁸⁵

However, the *Connick* Court found that one part of the questionnaire B the matter of pressure to work in political campaigns B did involve a public issue.²⁸⁶ On this limited point in which *Pickering* balancing applied, the Court held that the *Pickering* balance fell

275 *Ceballos v. Garcetti*, 361 F.3d 1168, 1180 (9th Cir. 2004).

276 *Garcetti*, 361 F.3d at 1182.

277 *Connick*, 461 U.S. at 140.

278 *Id.* at 140.

279 *Pickering*, 391 U.S. at 583-84.

280 *Id.* at 563.

281 *Connick*, 461 U.S. at 143.

282 *Id.*

283 *Id.* at 145-46.

284 *Id.* at 146.

285 *Id.* at 147.

286 *Id.* at 149.

in the employer's favor, as Ms. Myers' statements could be disruptive of office morale.

One other case, *Givhan*, is also important as a backdrop to *Ceballos*. This case involved a public school teacher who spoke out critically about the school district's lack of progress in desegregating.²⁸⁷ Her complaints, like *Ceballos*'s, were entirely internal.²⁸⁸ The Court, in a unanimous opinion by Justice Rehnquist, held that a public employee doesn't lose his First Amendment protection merely because she expresses her views internally.²⁸⁹

So the stage was set for *Ceballos*. The fact that he raised his complaint internally should not, under *Givhan*, make a difference.²⁹⁰ But under *Connick*, if his complaint was only about employment matters, and not matters of public concern, there would be no First Amendment protection, and *Pickering* balancing wouldn't even come into the picture.²⁹¹

Why did the Court conclude that *Ceballos* had no First Amendment right?

Obviously, the Court thinks this is an employment issue, not an issue of public concern.²⁹² But doesn't this beg the underlying question? When an Assistant DA questions the basis for initiating a criminal matter, why isn't that a matter of concern to the citizenry, as was one of the issues in *Connick*? Why does the Court see this as strictly a personnel matter?

Perhaps, as the concurring Judge in the 9th Circuit saw it, this is too difficult a line to draw.²⁹³ Maybe the touchstone of whether the remark is made pursuant to the employee's job duties gives us a brighter line for determining whether this is a matter of public concern or strictly an employment issue.

Commentators may suggest that *Ceballos* turned on the fact that the Assistant DA made his complaint internally. Surely the focus on this point in the oral argument suggests it was important to the Court.²⁹⁴ If that is so, then ironically the employee who wants First Amendment protection for his comments must go public. This leads to the perverse result that the public employee who tries to work things out internally enjoys no First Amendment protection.

However, as I read *Ceballos*, particularly against the background of *Givhan*, the internal/external distinction is not a per se category. There is nothing in the opinion that

287 *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411-12 (1979).

288 *Givhan*, 439 U.S. at 412-13.

289 *Id.* at 415-16.

290 *Id.*

291 *Connick*, 461 U.S. at 146.

292 *Garcetti*, 126 S.Ct. at 1960.

293 *Garcetti*, 361 F.3d at 1190-91.

294 Transcript of Oral Argument at 9-11, 42-43, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04-473).

suggests that the internal nature of the complaint deprived *Ceballos* of his First Amendment rights or that he would have necessarily been on more solid ground had he gone public. Indeed, the Court says in Part III of the opinion, that *Ceballos* expressed his views inside his office, rather than publicly, is not dispositive.²⁹⁵

While not dispositive, the internal/external distinction may still be a factor, because the more the complaint is aired in public the more likely a court is to conclude that the remark was not made pursuant to the employee's job duties, and that it is a matter of public concern and not a mere internal employment issue.

With the wisdom of advancing years, I try to approach things with better balance. I think to myself, there must be two sides to this, even if I'm not getting one. And even though my initial reaction was that of course Mr. *Ceballos* has a First Amendment right to raise his concern within the DA's office, I see that my position is not all that solid.

First of all, doubts were already raised about it in *Connick*, which held that employment matters are beyond the protection of the First Amendment.²⁹⁶

But even more sobering is that the *Ceballos* Court is unanimous B that's right, unanimous B in agreeing that the employee who speaks out on matters within his job duties has diminished First Amendment protection.²⁹⁷

The main dissent, by Justice Souter, gives the public employee the right to Pickering balancing only if "he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. . . . Only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor."²⁹⁸

Justice Breyer says that the majority's view, that the public employee who speaks out pursuant to his job duties "never" has First Amendment protection is "too absolute," though he understands the need to protect government's ability to manage its operations.²⁹⁹ But he says that Justice Souter's formulation doesn't adequately protect the employer's interests.³⁰⁰ The Souter standard fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes," and just doesn't screen out enough cases.³⁰¹ Justice Breyer concludes that we need a way to screen in advance, to keep these cases out of the judicial system, and to encourage use of alternative systems such as arbitration and whistle blower remedies.³⁰²

295 *Garcetti*, 126 S.Ct. at 1959.

296 *Connick*, 461 U.S. at 147.

297 *Garcetti*, 126 S.Ct. at 1955.

298 *Id.*

299 *Id.* at 1974.

300 *Id.* at 1975.

301 *Id.*

302 *Id.* at 1975-76.

However, Justice Breyer thinks there are cases, such as this one, where there are special demands for the speech and where the governmental justifications for restraining it are limited.³⁰³ Here the speech is professional speech - the speech of a lawyer. It is subject to independent regulation by the canons of the profession, which sometimes require the lawyer to speak. This is especially the case under ABA Model Rule 1.13, the substance of which has been adopted in California.³⁰⁴ So the government's interest in forbidding that speech is diminished.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available.³⁰⁵

The law provides other "nonconstitutional protection," and that "diminishes the need for a constitutional forum."³⁰⁶

What else is troubling the Court in *Ceballos*?

First, the Court seems concerned about becoming a super arbitrator of employment disputes. There is a potential for a lot of these cases, and the Court just doesn't want to get involved in what can be tedious and time consuming cases.

Second, there may be other ways of resolving these disputes. You have civil service laws, perhaps union contracts, perhaps whistleblower statutes, maybe internal grievance procedures. But as the dissent points out, these are only maybes.³⁰⁷ The First Amendment shouldn't turn on what else is available. The Founders did not write that Congress shall make no law infringing speech unless there is some other forum that can redress the infringement. If the Court's concern is that other forums are available, why not handle this by an exhaustion requirement?

Third, the Court tries to draw a bright line, but its test may not be all that bright. The Court says that Ceballos clearly wrote his memo in the line of duty.³⁰⁸ So the Court has "no occasion to articulate a comprehensive framework for defining an employee's duties in subsequent cases."³⁰⁹ I don't think this will be an easy job.

However, the Court issues a caveat that employers can't restrict employees' First

303 *Id.* at 1974.

304 MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002); CAL. MODEL RULES OF PROF'L CONDUCT R. 3-600 (2006).

305 *Garcetti*, 126 S.Ct. at 1975.

306 *Id.* at 1976.

307 *Id.* at 1970.

308 *Id.* at 1959-60.

309 *Id.* at 1961.

Amendment rights by excessively broad job descriptions.³¹⁰

Here's what I find troubling. The trouble is compounded by the timing. This case came down within a week or two of the jury verdict in the Enron matter.³¹¹ The jury had just pronounced Ken Lay and Jeff Skilling, two of the highest corporate officials, guilty.³¹² The Enron debacle came to light because courageous employees came forward.

In a well known concluding comment by Judge Sporkin in *Lincoln Savings and Loan*, the Judge noted that Mr. Keating, the CEO of Lincoln, said he was relying upon lawyers and accountants to insure that all the transactions were legal.³¹³ Judge Sporkin wrote

Where were these professionals . . . when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions? Where also were the outside accountants and attorneys when these transactions were effectuated?³¹⁴

The ABA, hardly a radical organization, reacts slowly to excesses. Model Rule 1.13 is the response to Enron.³¹⁵ It permits lawyers to speak out, overriding the obligation of confidentiality to clients. It requires them to report up. When a lawyer finds corporate wrongdoing that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, he usually has an obligation to report this to higher authority within the organization.³¹⁶

Mr. Ceballos thought that his office was violating the Constitutional rights of a criminal defendant. He thought that under Brady the defects in the warrant should be corrected. He might have been wrong, but he thought there was a real problem.

Wouldn't a lawyer governed by the ABA Rules, and California's Rules are based largely on the ABA's 1.13, have a duty to report up? This entails great personal risks, especially if you are employed by your organization and can lose your job, not merely your retainer. Or, as in *Ceballos'* case, you may lose the most satisfying aspects of your job.³¹⁷

310 *Id.*

311 Alexei Barrionucvo, *The Enron Verdict: The Overview; 2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1.

312 *Id.*

313 *Lincoln Sav. and Loan Ass'n v. Wall*, 743 F.Supp. 901, 920 (D.D.C. 1990).

314 *Lincoln Sav. and Loan Ass'n*, 743 F.Supp. at 920.

315 MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002).

316 *Id.*

317 *Garcetti*, 126 S.Ct. at 1956.

Of course there may be wrongful discharge causes of action in state courts. But not all states have them. We still operate under a regime of employment at will. Employees must struggle to find protection against unwarranted discharge. The courts were slow to recognize a cause of action for attorneys who were fired for bringing an issue to the attention of their clients. The early cases took the view that because the attorney had an obligation to speak out, he or she didn't need the protection of the wrongful discharge doctrine to encourage him or her to speak out.³¹⁸ Later cases recognized that this puts a conscientious attorney to a perilous choice, and began to recognize a cause of action for wrongful discharge in these situations.³¹⁹

But Ceballos sends an opposite signal. Though a First Amendment case, it appears to undermine the premise of these more recent and commendable unlawful discharge cases and these laudatory rules of professional responsibility.

Something else is going on in this case, as well as in others this Term. The Court is concerned about burdening the courts with too much trivial or time consuming litigation. That was the employer's argument in *Burlington*, reflected in the lone Alito concurrence.³²⁰ And it is the Court's concern in *Ceballos*, reflected even in the dissents.³²¹ The Justices think we need a bright line that will keep these cases out of court and chill unnecessary litigation.³²² The Ceballoses of the world will think twice before they try to bring this kind of case under the First Amendment.

Is this what is really important? Should we worry that somebody like Mr. Ceballos might burden a court with what turns out to be an unwarranted claim? Or should we worry about the opposite result, that a public employee now gets the message that you'd better not complain about something that you have a duty to speak out about, because even if you are disciplined for making these comments you enjoy no First Amendment protection, and the promise of *Pickering* is not available to you.

"I Dreamed I saw Joe Hill"

It is striking that this year's crop of cases included none under the National Labor Relations Act. Nor has that venerable statute, which once was at the heart of the legal work done by members of our Section, figured very heavily in the work of the Court in recent years. Can it be that the law is so well settled under the NLRA that no clarification is needed by the Supreme Court? Or is it possible that the statute is so tangential to workplace issues that nobody pays much attention to it?

318 *Bella v. Gambro*, 584 N.E.2d 104, 110 (Ill. 1991).

319 *Crews v. Buckman Labs.*, 78 S.W.3d 852, 862 (Tenn. 2002).

320 *Burlington N.*, 126 S.Ct. at 2420-21.

321 *Garcetti*, 126 S.Ct. at 1961; *Garcetti*, 126 S.Ct. at 1968 (Souter, J., dissenting).

322 *Garcetti*, 126 S.Ct. at 1960.

The cases that were decided by the Court this Term involve complex workplace issues. Even if these issues do not arise under the NLRA, a union at the workplace can advise affected employees of the directions they should take to vindicate their rights. Yet, with union density so low, workers in most workplaces must turn to other sources for help, such as government agents and private attorneys. Even though none of these cases was an NLRA case, unions apparently figured in most of them.

For example, there was a union in the picture in *Burlington Northern*, and the decision to assign somebody else to the fork lift apparently turned in part upon the recognition of seniority under the collective bargaining agreement.³²³ Further, Ms. White secured her reinstatement under a grievance procedure, presumably one administered jointly with a union.³²⁴

Mr. Ceballos, the District Attorney, filed a grievance at his workplace.³²⁵ While the record doesn't give us this information, it is a fair assumption that the grievance procedure was set up at the behest of a union.

In the *Whitman* case, one of the cases the Court "ducked" in order to develop a more complete record, the Employer's position rested in part on the availability of a union-management grievance procedure to Mr. Whitman.³²⁶

The issues were important enough to workers in the *Whitman* and *Sereboff* cases that unions filed amicus briefs, though the *Sereboff* brief was filed in connection with the ERISA fund.³²⁷ And in the three major cases I discussed, the doffing and donning case, *White* and *Ceballos*, the AFL-CIO filed amicus briefs.³²⁸

So unions did play a role, even if indirect, in a substantial number of the cases that were before the Court this Term.

323 *Burlington N.*, 126 S.Ct. at 2409.

324 *Id.*

325 *Garcetti*, 126 S.Ct. at 1956.

326 *Whitman*, 126 S.Ct. at 2015.

327 Brief for the National Treasury Employees Union as Amicus Curiae Supporting Petitioner, *Whitman v. Dep't of Transp.*, 126 S.Ct. 2014 (2006) (No. 04-1131); Brief for the United States as Amicus Curiae Supporting Respondent, *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006) (No. 05-260).

328 Brief of the American Federation of Labor And Congress Of Industrial Organizations and the Brotherhood of Maintenance of Way Employees Division, International Brotherhood Of Teamsters as Amicus Curiae in Support of Respondent, *Burlington N. & Santa Fe Ry. Co. v. Sheila White*, 126 S.Ct. 2405 (2006) (No. 05-259); Brief of The American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Respondent, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04-473).