

TUESDAY, FEBRUARY 15, 1994
2:15 - 3:45 p.m.

CONCURRENT SESSION TWO

The Washington Report

Faculty:

Fernand Dutile
Dennis Gregory
Sheldon Steinbach

**SELECTED 1993 UNITED
STATES SUPREME COURT
CASES AFFECTING
COLLEGES AND UNIVERSITIES**

**MONICA MICHELE LEACH
LAW STUDENT/RESEARCH ASSISTANT
STETSON UNIVERSITY COLLEGE OF LAW**

FOR

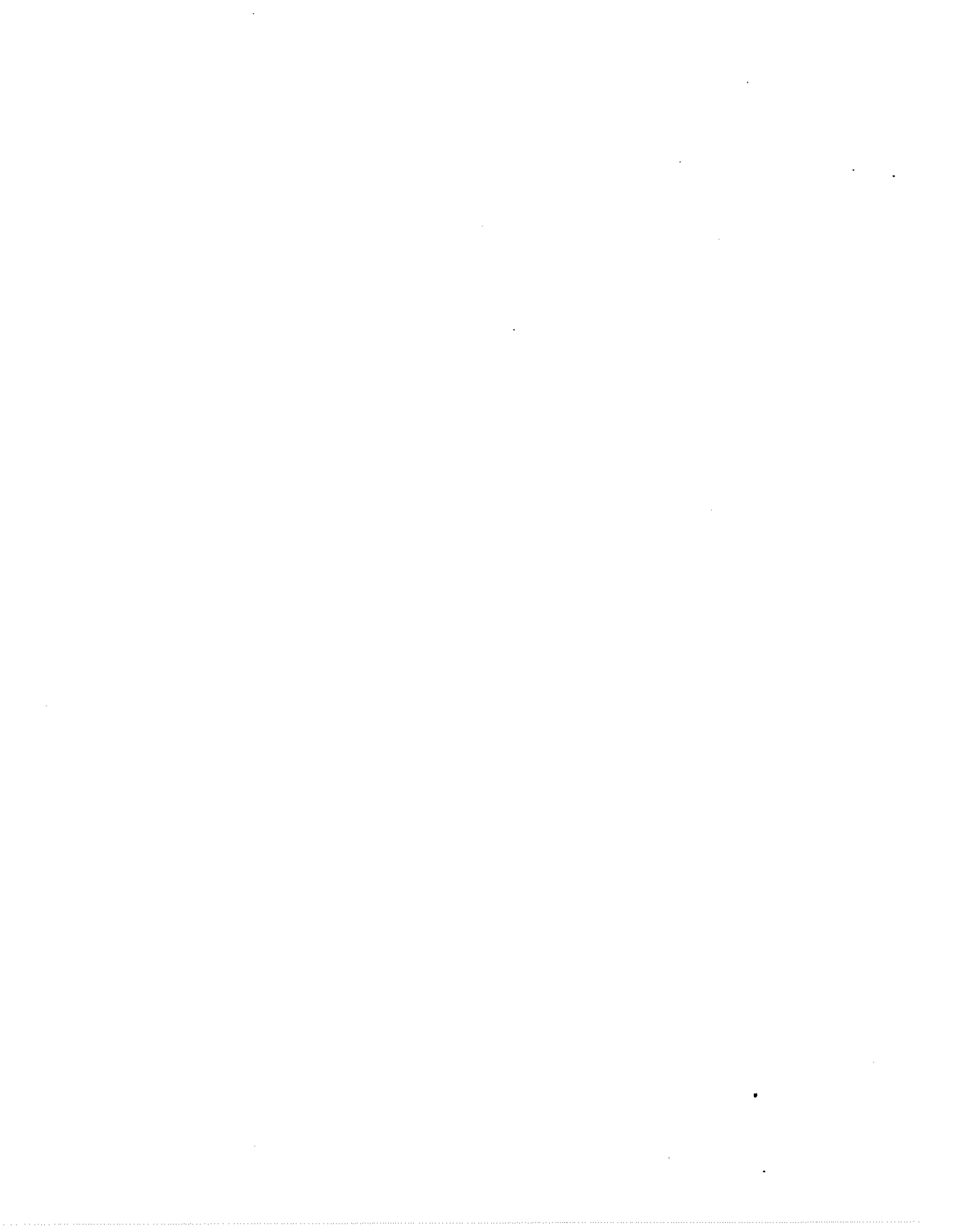
**PROFESSOR FERNARD DUTILE
PROFESSOR OF LAW
NOTRE DAME LAW SCHOOL
NOTRE DAME, INDIANA**

AND

**PROFESSOR ROBERT D. BICKEL
PROFESSOR OF LAW
STETSON UNIVERSITY**

**Presented by Stetson University
College of Law at the :**

**15th ANNUAL NATIONAL CONFERENCE ON
LAW & HIGHER EDUCATION
Clearwater Beach, Florida
February 13-16, 1994**



INTRODUCTION

Since the 1993 Conference on Law and Higher Education, the United States Supreme Court has decided more than thirty cases that have a possible impact on colleges and universities throughout the country. This selection includes thirteen of the most popularly discussed decisions, in addition to other cases that may significantly affect the law of higher education in 1994 and thereafter.

FIRST AMENDMENT

FREE SPEECH

Wisconsin v. Mitchell
113 S.Ct. 2194 (1993)

Respondent Mitchell was convicted in Circuit Court of aggravated battery and theft. His sentence was enhanced on the grounds that he selected his victim based on the victim's race. Mitchell appealed, alleging violation of his First Amendment right to free speech. The Court of Appeals affirmed, and the Wisconsin Supreme Court reversed and remanded. Certiorari was granted by the Supreme Court to determine whether the penalty-enhancement provision is prohibited by the First and Fourteenth Amendments. The Supreme Court conceded that it is bound by a state court's construction of a state statute. The court stated, however, that in this case, the Wisconsin Supreme Court did not construe a particular word or phrase of the statute. Rather, the Wisconsin Court characterized the "practical effect" of the statute for purposes of the First Amendment. The Supreme Court ruled that once the ambiguities of a statute are resolved, the Supreme Court is entitled to form its own judgment as to the statute's operative effect. The Supreme Court held that physical assault is not expressive conduct protected under the First Amendment. Additionally, the Court stated that even though a person's beliefs or associations are protected by the First Amendment, the Constitution does not impose a *per se* barrier to admitting, for sentencing purposes, evidence regarding beliefs or associations. The Supreme Court reversed the Wisconsin Supreme Court, holding Mitchell's First Amendment rights were not violated by the sentence-enhancement provision.

COMMERCIAL SPEECH

City of Cincinnati v. Discovery Network, Inc.
113 S.Ct. 1505 (1993)

Respondent Harmon Publishing Company brought suit against the City of Cincinnati, petitioner, to enjoin enforcement of an ordinance barring distribution of the company's free real estate magazine on public property. The District Court enjoined enforcement of the ordinance on the grounds that the ordinance violated the publisher's First Amendment right under the "reasonable fit" standard applied to the regulation of commercial speech. The Court of Appeals affirmed and the Supreme Court granted certiorari to determine whether the ordinance was consistent with the First Amendment. The purpose of the ordinance, according to the city, was to decrease the number of newsracks on the streets, thereby increasing safety and esthetics. The Supreme Court, however, stated that the city's original purpose for enacting the ordinance was to prevent littering. The Court ruled the city did not establish a "reasonable fit" between its goals of safety and esthetics and its means to achieve those goals (the prevention of newsracks containing commercial handbills). The Court stated the fit was unreasonable because the number of newsracks containing the real estate magazines were minute compared to the number of newsracks on the streets. Additionally, the Court recognized that the city failed to distinguish between the newsracks containing commercial handbills and the newsracks containing newspapers. The Supreme Court further stated that this regulation was not content-neutral and therefore was not a valid time, place or manner restriction under the First Amendment. The Supreme Court affirmed the decision of the Court of Appeals to enjoin enforcement of the city ordinance.

United States v. Edge Broadcasting Co.
113 S.Ct. 2696 (1993)

Respondent Edge Broadcasting Company brought suit against the U.S. Government, alleging that the restrictions on broadcasting that prohibit non-lottery states from advertising lotteries of other states violates the First Amendment and Equal Protection Clause. Edge operated in North Carolina, a non-lottery state, and Edge is near the Virginia border; Virginia is a lottery state. Edge wanted to broadcast advertisements of Virginia's lottery. The District Court applied the four-part test for commercial speech set out in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*, 100 S.Ct. 2343, 2351 (1980). To assess a commercial speech restriction under *Central Hudson*, the following factors must be considered: ". . . 1) whether the speech concerns lawful activity and is not misleading, and 2) whether the asserted governmental interest is substantial, and if so, 3) whether the regulation directly advances the asserted interest, and 4) whether it is not more extensive than is necessary to serve the interest . . ." *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2699 (1993). The Court of Appeals affirmed the decision of the District Court in favor of Edge; the restriction failed the third factor of the *Central Hudson* test on the grounds that the statute did not

directly advance the asserted governmental interest as applied to Edge, and therefore could not be considered Constitutional. The Supreme Court granted certiorari to determine whether the restriction violates the First Amendment. The Supreme Court indicated that the Court of Appeals based its invalidation of the speech restriction on the fact that people living in North Carolina, near the Virginia border, were already exposed to the Virginia-lottery advertisements since they listened to Virginia radio stations. Therefore, the Court of Appeals found the restriction, as applied to Edge, ineffective for the government's purpose. The Supreme Court ruled the appellate court erred by not dealing with the issue under the fourth factor. Under the fourth factor, the Supreme Court stated a "reasonable fit" is required between the restriction and the governmental interest. The Court found a reasonable fit between not allowing Edge to broadcast lottery advertisements and the government's interest to support North Carolina's lottery law. The Supreme Court reversed the appellate court's decision and held the restriction valid.

Edenfield v. Fane
113 S.Ct. 1792 (1993)

Respondent Scott Fane, Certified Public Accountant, brought suit against the Florida Board of Accounting, seeking declaratory and injunctive relief on the grounds that the Board's rule prohibiting "direct, in-person, uninvited solicitation" for new clients violated the First and Fourteenth Amendment guarantee of free speech. The District Court enjoined enforcement of the rule and the Court of Appeals affirmed. The Supreme Court granted certiorari to determine whether the rule violated the First and Fourteenth Amendments. The Supreme Court deemed the restriction on CPAs commercial expression protected by the First Amendment. The restriction endangers the societal interest of access to complete and accurate commercial information. Under *Central Hudson* (described above in *Edge Broadcasting*), the Board's interests in enacting the restriction are substantial; the Supreme Court indicated, however, the Board did not prove the ban advances its interest of protecting consumers from fraud in a direct or material way. Even though laws restricting commercial speech need only be tailored in a reasonable manner to serve a substantial state interest, the Court found still invalid the prohibition against CPA solicitation. Additionally, the Court ruled the ban could not be justified as a prophylactic rule because CPA solicitation in the business context is not subject to misconduct. The Court distinguished the CPA from the lawyer, noting that the CPA is not trained in the art of persuasion, as is the lawyer. Secondly, the clientele of the CPA is typically the experienced business executive rather than the injured lay person. The Court stated that Fane merely sought to communicate truthful information proposing a legal transaction to seek clients. The Supreme Court affirmed the Court of Appeals decision to enjoin the prohibition against CPA solicitation.

RELIGION

Lamb's Chapel v. Center Moriches School District
113 S.Ct. 2141 (1993)

Petitioner Lamb's Chapel brought suit against respondent school district, alleging that the school district's refusal to allow the church access to school facilities to show a film series on family values and child-rearing, assertedly from a religious perspective, violated the First Amendment. The District Court granted summary judgment in favor of the school district and the Court of Appeals affirmed. The Supreme Court granted certiorari to determine whether denying a church access to school premises to show a film series for public viewing violates the First Amendment. The Supreme Court suggested the school district would not be subject to a First Amendment violation if it had not permitted any after-hours use of the property. Because the school opened its facilities for use to the community, however, religious use must also be granted. The Court stated that access to a non-public forum can be based on subject matter or speaker identity only when the distinctions drawn are reasonable. The exclusions must be justified by a compelling state interest and be narrowly tailored to achieve that purpose. Additionally, the exclusions must be viewpoint-neutral. To distinguish a non-religious family-values film series from a religious family-values film series defies the First Amendment by suppressing a particular viewpoint. Second, the Court ruled that allowing the church to use school property to show a film would not be an establishment of religion under *Lemon v. Kurtzman*, 91 S.Ct. 2105 (1971), because the film would not be shown during school hours, would not be school sponsored, and would be open to the public. Third, the Court stated there is no evidence to support the assertion that the school district excluded the church's use based on the premise that the church was radical and presented a risk of violence to the public. The Supreme Court reversed the Court of Appeals decision to grant summary judgment to the school district.

Church of the Lukumi Babalu Aye v. City of Hialeah
113 S.Ct. 2217 (1993)

Petitioner Church of the Lukumi Babalu Aye brought suit against respondent City of Hialeah to enjoin the city ordinances prohibiting the ritual slaughter of animals on the grounds that the ordinances violate its rights under the First Amendment's Free Exercise of Religion Clause. The District Court ruled for the city on the grounds that the compelling governmental interests in preventing health risks and cruelty to animals justified the prohibition. The Court of Appeals affirmed, and the Supreme Court granted certiorari to determine whether the ordinances violate the Free Exercise Clause of the First Amendment. The Church practices the Santeria religion which involves the sacrifice of animals. The Supreme Court ruled in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 10 S.Ct. 1595 (1990), that a law that is not neutral or generally applicable, and that therefore is discriminatory on its face, must be justified by a compelling state interest and must be narrowly tailored to achieve that purpose.

The ordinances in question are not neutral. According to the Court, the central objective is to suppress the practice of the Santeria religion. The Court further stated that the governmental interests of health and prevention of cruelty to animals could be satisfied by means other than completely prohibiting the Santeria sacrificial practice. The Court stated that the ordinances address only animal cruelty with regard to religious practices, and do not take into account the numerous animal deaths arising for non-religious reasons. Similarly, the ordinances are under-inclusive as to the public-health interest. Again, these portions of the ordinances are merely directed at religiously related conduct. The Supreme Court reversed the judgment of the Court of Appeals.

Zobrest v. Catalina Foothills School Dist.
113 S.Ct. 2462 (1993)

Petitioner James Zobrest, a deaf student, along with his parents, brought suit against respondent school district to require the school district to provide the student attending a Roman Catholic high school with a sign-language interpreter. The District Court ruled in favor of the school district and the Court of Appeals affirmed the decision. The Supreme Court granted certiorari to determine whether the Establishment Clause bars the school district from providing an interpreter. The Supreme Court stated that a governmental program that provides nondiscriminatory benefits to any child qualifying as disabled under the Individuals with Disabilities Education Act (IDEA) at a sectarian or non-sectarian, public or non-public, school does not violate the Establishment Clause merely because the sectarian school may derive an indirect financial benefit. Which school a disabled child attends is the parents' choice and not the choice of the state. Therefore, the Court stated that the presence of an interpreter in a private sectarian school cannot be attributable to state decision making in violation of the Establishment Clause, and thus, cannot be viewed as a promotion of the student's religious development at government expense. Additionally, the Court stated that, unlike a teacher, an interpreter merely transposes information presented in the classroom and does not add or subtract from the school's environment. The Supreme Court reversed the decision of the appellate court and held that placing an interpreter in a sectarian school does not entangle church and state and does not violate the Establishment Clause.

EMPLOYMENT

TITLE VII

Harris v. Forklift Systems, Inc.
114 S.Ct. 367 (1993)

Petitioner Teresa Harris sued her former employer, Forklift Systems, Inc., alleging that Forklift's president engaged in conduct that constituted "abusive work environment" harassment based on gender. Specifically, Harris alleged that Forklift's president often insulted her, in the presence of other employees, relative to her gender, including through sexual connotations. The District Court dismissed the action and the Court of Appeals affirmed. The Supreme Court granted certiorari to review what constituted a discriminatorily "abusive work environment" under Title VII of the 1964 Civil Rights Act. The Court stated that Title VII makes it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex" *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993). The Court stated that in order for conduct to fall within the purview of Title VII, it must be severe and pervasive enough to the reasonable person to create an objectively hostile environment, and that the victim must subjectively view the environment as hostile and abusive. The Court indicated that all circumstances must be considered in determining whether an environment is hostile or abusive, including: the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening and humiliating, or a mere offensive utterance; and whether the conduct reasonably interferes with an employee's performance. The Supreme Court reversed the Court of Appeals decision rendered in favor of Forklift. The Supreme Court reasoned that the appellate court reached its ultimate conclusion only after determining that Harris was not psychologically injured. This standard was inappropriate for Title VII issues. The Supreme Court ruled that psychological injury is not required as long as the environment would be reasonably perceived as hostile and abusive.

St. Mary's Honor Center v. Hicks
113 S.Ct. 2742 (1993)

Respondent Melvin Hicks, a black man, was employed as a correctional officer by petitioner St. Mary's Honor Center. As a result of Hicks' demotion and discharge, he brought suit under Title VII, alleging that his demotion and discharge were due to his race. The District Court ruled in favor of the Halfway House and Hicks appealed. The Court of Appeals set aside evidence introduced by the Halfway House establishing two legitimate, nondiscriminatory reasons for demoting and firing Hicks, and held that Hicks was entitled to judgment as a matter of law once he proved that petitioner's proffered reasons for his demotion and discharge were pretextual. The Supreme Court granted certiorari to review whether

the District Court's rejection of the Halfway House's proffered reasons mandated judgment as a matter of law for Hicks. The Court cited *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973), for its framework regarding Title VII discriminatory-treatment cases. According to this framework, once Hicks proved a prima-facie case of discrimination, a presumption arose that the Halfway House discriminated, and the burden of proof shifted to the Halfway House to rebut the presumption. This presumption was rebutted by the Halfway House's production of nondiscriminatory reasons for Hicks' demotion and ultimate discharge, and thus its burden of proof was satisfied. The Supreme Court indicated that even though Hicks met his initial burden of proving a prima-facie case of discrimination, Hicks, as a Title VII plaintiff, carried the "ultimate" burden of persuasion throughout the case to prove discrimination. The Supreme Court held that the Court of Appeals erred in concluding that the District Court's disbelief of the Halfway House's proffered reasons mandated judgment as a matter of law for Hicks. The Court stated that disbelief or falsity of the proffered reasons does not place the Halfway House in the same position as if it had not proffered the nondiscriminatory reasons, and therefore is not sufficient alone to sustain the plaintiff's case. Compelling judgment as a matter of law, according to the Supreme Court, would be to ignore the principle that Title VII plaintiffs bear the ultimate burden of persuasion at all times even when the defendant's proffer is proven false. The Supreme Court ruled that the Halfway House's proffered reasons should lead the trier of fact to the ultimate question of whether Hicks has proven, by a preponderance of the evidence, intentional discrimination on the basis of his race.

ADEA AND ERISA

Hazen Paper Co. v. Biggins
113 S.Ct. 1701 (1993)

Petitioner Hazen Paper fired Respondent Walter Biggins from his position as technical director when he was 62 years of age and a few weeks before his pension vested (according to the ten-year pension plan of Hazen Paper). Biggins brought suit, alleging that age was the determinative factor in his discharge. A jury found a willful violation of the Age Discrimination in Employment Act (ADEA) and the Employment Retirement Income Security Act (ERISA). The District Court denied Hazen Paper's motion for judgment notwithstanding the verdict on the ADEA and ERISA claims, but granted it on the "willfulness" claim. The Court of Appeals affirmed the ADEA and ERISA holdings, but reversed the willfulness judgment, based on *Transworld Airlines, Inc. v. Thurston*, 105 S.Ct. 613 (1985). Under *Thurston*, willfulness can be found under the ADEA if the employer knew or showed reckless disregard concerning whether its conduct violated the ADEA. The Supreme Court granted certiorari to determine whether Hazen Paper's interference with the vesting of Biggins' pension violates the ADEA, and whether the *Thurston* standard applies where the ADEA violation was an informal decision by Hazen Paper that was motivated by Biggins' age. The Supreme Court stated that a disparate-treatment claim could not succeed under the ADEA unless Biggins' age played a role in and had a determinative impact on his discharge. The Court distinguished between an employee's age and years of service, and suggested that years of service is not necessarily an age-based factor under the ADEA. The Court did, however, indicate that firing an employee on the basis of years of service to prevent pension vesting is actionable under ERISA but is not alone sufficient to violate the ADEA. Since the Court of Appeals cited a confidentiality agreement which Biggins was required to sign (when no other employee was required to do so), the Supreme Court remanded the issue for determination of whether the jury had sufficient evidence to find a violation under the ADEA. Regarding the *Thurston* framework for the term "willful", the Supreme Court held that the "knew or showed reckless disregard" standard applies to all disparate-treatment decisions, formal or informal. The Supreme Court stated that once a willful violation has been shown, the employee need not go further to demonstrate outrageousness, motivation or predominance. The Supreme Court affirmed the Court of Appeals on the issue of "willfulness".

Mertens v. Hewitt Associates
113 S.Ct. 2063 (1993)

Petitioners, a class of former employees who participated in a company retirement-pension plan, brought suit against the plan's actuary under the Employment Retirement Income Security Act (ERISA). Petitioners alleged that respondent failed to change the plan's actuarial assumptions to reflect changes in the company's operations, that the plan was subsequently terminated, and, as a result, that the employees suffered losses of the higher pension benefits afforded them under the plan. The District Court

dismissed the petitioners' complaint and the Court of Appeals affirmed. The Supreme Court granted certiorari to determine whether the actuary, a nonfiduciary, is liable for participation in a breach of fiduciary duty under ERISA resulting in losses suffered by the employee pension plan, and whether money damages are authorized. The Court stated that ERISA does make liable "anyone" who exercises control over the plan. The Court indicated, however, that no provision in ERISA holds nonfiduciaries liable for participation in a fiduciary's breach of duty. Second, the Court stated that although it has never interpreted "other appropriate relief" under ERISA, it has construed similar language in Title VII of the Civil Rights Act to preclude compensatory or punitive damages. The Supreme Court affirmed the decision rendered by the Court of Appeals.

CIVIL RIGHTS

(see also Harris and St. Mary's supra)

Bray v. Alexandria Women's Health Clinic
113 S.Ct. 753 (1993)

Respondents, abortion clinics and abortion-rights organizations, sued to enjoin petitioners, antiabortion organization and individuals from conducting demonstrations at the abortion clinics. The District Court held in favor of the petitioners and the Court of Appeals affirmed. The Supreme Court granted certiorari to determine whether respondents had a Section 1985(3) cause of action, and whether attorney's fees should be awarded. 42 U.S.C. Section 1985(3) provides a federal cause of action against persons engaged in private conspiracies if the plaintiff shows that a racial or otherwise class-based discriminatory animus exists, and that the purpose of the conspiracy is to interfere with rights protected against private as well as official encroachment. The Supreme Court rejected the District Court's implied conclusion that opposition to abortion constitutes discrimination against the "class" of women seeking abortions. The court stated that the term "class" for Section 1985(3) purposes means more than a group of individuals who seek to engage in particular conduct opposed by the defendants. "Women seeking abortions" is not a qualifying class. Further, the animus requirement of Section 1985(3) mandates a purpose that focuses on women because of their sex. Thus, the respondents' claim that the discrimination was based against women in general is not valid; men and women fall equally on both sides of the abortion issues. Second, respondents' claim fails because a Section 1985(3) private conspiracy to deprive persons from equal protection requires "intent" to deprive persons of such a right. No intent was shown in this case, according to the Supreme Court. The Supreme Court stated that, even though a substantial number of women travel interstate to reach the abortion clinics, this was not enough to effect their right to interstate travel. Deprivation of a right that is an incidental effect of conduct is not conduct that is "aimed" at deprivation. Additionally, the right to interstate travel is protected from two sets of burdens: erection of actual barriers to interstate movement, and discriminatory treatment vis-a-vis intrastate travelers. The only movement barrier in this case occurred in the immediate vicinity of the clinics, was therefore considered an intrastate restriction by the Supreme Court, and, thus, did not violate the right to interstate travel unless applied discriminatorily. Third, the Supreme Court stated that the right to an abortion cannot be considered a purpose of a private conspiracy. The Court reasoned that Section 1985(3) does not apply to private conspiracies that are aimed at a right specifically defined as a right only against state interference. Since no 1985(3) cause of action was found, the Supreme Court vacated the award of attorney's fees.

ELEVENTH AMENDMENT IMMUNITY

Puerto Rico Aqueduct & Sewer Authority v. Metcalf and Eddy
113 S.Ct. 684 (1993)

Respondent engineering company, Metcalf and Eddy, Inc., brought suit against petitioner Puerto Rico Aqueduct and Sewer Authority, seeking declaration of rights regarding a contract entered into between the parties, and damages for breach of contract. The District Court denied the Puerto Rican agency's motion to dismiss on the grounds of Eleventh Amendment immunity, and the Court of Appeals dismissed the appeal for lack of jurisdiction. The Supreme Court granted certiorari to determine whether a state or state entity claiming to be an arm of the state may take advantage of the collateral-order doctrine to appeal a denial of an Eleventh Amendment immunity claim. The Supreme Court stated that under 28 U.S.C. Section 1291, most appeals must be taken from final decisions of district courts. The Court recognized, however, a "small class" of incomplete judgments that are immediately appealable. The Court stated that once the state or state entity claiming to be an arm of the state proves its immunity from suit in federal court, the collateral-order doctrine becomes applicable. The Court further stated that to fall within the "small class" exception, the order must be conclusive regarding the disputed issue, resolve an issue separate from the merits of the case, and be unreviewable from a final judgment. In this case, the denial of Eleventh Amendment immunity was deemed to be a final determination; a motion to dismiss on the Eleventh Amendment immunity claim had no effect on the merits of the underlying cause of action, and the benefits of immunity to states and state entities would be lost and unreviewable from the final judgment. The Supreme Court reversed the Court of Appeals decision and held that the Eleventh Amendment immunity claim could be appealed and reviewed.

