

COURTESY OF JOHN VACHON/ANTHONY POTTER COLLECTION VIA GETTY IMAGES

I. Federal Statutes and Case Law

1787

***Fugitive Slave Clause* U.S. Const. Art IV, § 2, Cl. 3**

Summary of Provisions: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”¹

Subsequent History: Enslavement and involuntary servitude, except for punishment for crime, was later prohibited by the Thirteenth Amendment to the United States Constitution. (U.S. Const. amend. XIII, § 1.)

1850

***Strader v. Graham* 51 U.S. 82**

Summary of Facts and Issues: Dr. Christopher Graham, a Kentucky enslaver, allowed three of his enslaved persons to visit Ohio and Indiana.² But when they later fled to Canada through a steamboat owned by Strader and another man, enslaver Graham sued them for the monetary value of his lost enslaved persons.³ They defended saying that the enslaved persons had become free because of their time in Ohio and Indiana.⁴ The Louisville Chancery Court decided that the enslaved men did indeed belong to Graham and that he was entitled to recover \$3,000 for his damages caused by their escape by way of the steamboat.⁵

Impact of Ruling: The United States Supreme Court held that the United States Constitution would not control the law of Kentucky in this case and that the conditions of those enslaved in Kentucky depended on the laws of Kentucky.⁶ The Court therefore determined that the decision of the state court of appeals was conclusive and that the U.S. Supreme Court lacked jurisdiction to determine otherwise.⁷



An African American man picketing Bowman Dairy for job discrimination. (1941)

1865

Amendment XIII to the United States Constitution

Summary of Provisions: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.⁸

1872

***Slaughter-House Cases* 83 U.S. 36**

Summary of Facts and Issues: The State of Louisiana enacted a regulation allowing the City of New Orleans to regulate the place and manner of slaughtering of animals, including the butchering, inspection, and processing of animal meat within the city in an effort to better manage the city's sanitation, health, and safety.⁹ The city created a corporation, granting it exclusive rights to have and maintain slaughter-houses, landings for cattle, and yards for enclosing cattle, to the exclusion of all other slaughter-houses in the city.¹⁰ Existing slaughter-houses and butchers were required to close their facilities and instead bring their stock to the city corporation for processing at a cost.¹¹ The slaughter-houses affected by these changes sued under the Thirteenth and Fourteenth Amendments, claiming that the regulations amounted to involuntary servitude, abridged the privileges and immunities of citizens of the United States, denied them of equal protection of the laws, and deprived them of their property without due process of law.¹² The Court held that the regulation of the place and manner of conducting the slaughtering of animals, the business of butchering within a city, and the inspection of the animals to be killed for meat and of the meat afterwards, were among the most necessary and frequent exercises of a state's police power.¹³ In so holding, the Court reasoned that the statute under consideration was aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health, and comfort of the people require they should be located.¹⁴

Impact of Ruling: The Court reasoned in its holding that there was a distinction between citizens of the United States and citizens of a state and that the language of the federal Constitution was meant to protect citizens of the United States and was not intended to provide additional protection for citizens of a state.¹⁵ Therefore, "the entire domain of the privileges and immunities of citizens of the States . . . lay within the constitutional and legislative power of the States, and without that of the Federal government."¹⁶ The Court acknowledged that the main purpose of the Thirteenth and Fourteenth Amendments was the "freedom of the African race, the security and

perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery."¹⁷ The benefits of these amendments could flow more broadly to members of other races who are impacted by a deprivation of these rights, however.¹⁸

1905

***Clyatt v. U.S.* 197 U.S. 207**

Summary of Facts and Issues: The prohibition against peonage was authorized by provisions of the Thirteenth Amendment forbidding slavery or involuntary servitude. A statute provided that anyone who holds, arrests, or returns a person to a condition of peonage would be held liable.¹⁹ However, the person who made the arrest could not be convicted unless there was proof that the persons so returned had been in peonage prior to the arrest.²⁰

Impact of Ruling: Peonage was a form of compulsory service, based on indebtedness. It was used to circumvent the prohibition of slavery and involuntary servitude under the Thirteenth Amendment. *Clyatt* was one of the first cases in a lengthy federal effort to abolish peonage. However, the Court narrowly interpreted a statute that aimed to punish those who arrested persons with intent to subject them to a condition of peonage by stating that the statute requires the person to have been in a condition of peonage beforehand.²¹

1906

***Hodges v. U.S.* 203 U.S. 1**

Summary of Facts and Issues: On October 8, 1903, a grand jury indicted Reuben Hodges, William Clampt, and Wash McKinney with knowingly, willfully, and unlawfully conspiring to oppress, threaten, and intimidate a group of citizens who were of African descent.²² The defendants were convicted following a trial for threatening and intimidating the group of men, who were employed by a lumber manufacturing company, so that they would quit their jobs at the company, essentially preventing the men from enjoying the same rights and privileges as white citizens.²³ The defendants appealed their conviction to the Supreme Court, objecting to the indictment based on the argument that federal courts lacked jurisdiction over the matter.²⁴ In interpreting the Thirteenth Amendment, the Court opined that while the purpose of the Amendment was the emancipation of "the colored race" it was not an attempt to commit that race to the care of the nation and it was a denunciation of a condition and not a declaration in favor of a particular people.²⁵ The Court concluded that the federal government lacked jurisdiction to charge the defendants and reversed the judgment of the district court.²⁶

Impact of Ruling: The Court reasoned that if the inability to freely contract was a badge of slavery, then any other wrongs done to an individual would be enforceable by Congress under the Thirteenth Amendment. The Supreme Court ruled that the federal government did not have the constitutional power to convict defendants for using force and intimidation to prevent African American citizens from performing their employment contracts. The court held that: (1) the Thirteenth Amendment's protection extends to all races, not just the African race and that (2) the defendants' violent acts that prevented the employees from freely exercising their right to contract were not a badge of slavery.²⁷

Subsequent History: In *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, the Supreme Court overruled *Hodges*,²⁸ reasoning that Congress has the power under the Thirteenth Amendment to "determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."²⁹

1938

***New Negro Alliance v. Sanitary Grocery Co.* 303 U.S. 552**

Summary of Facts and Issues: New Negro Alliance requested that retail stores operated by Sanitary Grocery Co. adopt a policy of "employing negro clerks in certain of its stores in the course of personnel changes."³⁰ After the retailer ignored the request, New Negro Alliance "caused one person to patrol in front of one of the respondent's stores on one day carrying a placard which said, 'Do Your Part! Buy Where You Can Work! No Negroes Employed Here!' and caused or threatened a similar patrol of two other stores. . . ."³¹ The retailer sought to enjoin New Negro Alliance from picketing, patrolling, boycotting, or urging others to boycott the retailer's stores.³² The trial court ruled that labor laws had no application to the dispute and entered a decree prohibiting the New Negro Alliance from picketing, protesting, or boycotting the retailer.³³ The appellate court affirmed, holding that the issue was not a labor dispute within the meaning of the Norris-La Guardia Act, which is a factor in determining the jurisdiction of federal courts in issuing injunctions.³⁴ Therefore, the trial court had jurisdiction to enter the injunction. The Supreme Court reversed the decree, holding that under the Norris-La Guardia Act, "it was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful."³⁵

Impact of Ruling: The Court's interpretation of the term "labor dispute" in section 13 of the Norris-LaGuardia Act

removed federal courts' jurisdiction to issue an injunction prohibiting labor action in cases involving labor disputes between labor unions seeking to represent employees and employers and between those seeking employment and potential employers.³⁶ By its terms, the Act permitted the picketing of company stores by any group with an interest in the dispute, including the terms and conditions of employment, which extended to the activities of an independent corporation demanding that the stores employ African American workers. The Act did not proscribe any particular background or motive for labor action.³⁷

1941

***Mitchell v. U.S.* 313 U.S. 80**

Summary of Facts and Issues: The Interstate Commerce Commission claimed that it lacked the ability to enforce a statute prohibiting discrimination in interstate transportation.³⁸ Upon entering Arkansas, an employee of a railroad company excluded from a Pullman carriage an African American U.S. Congressperson who was traveling across country.³⁹ The available car lacked the amenities of the Pullman car, such as air conditioning.⁴⁰ The United States Supreme Court held that the point of the statute was to prevent discrimination, including racial discrimination, and that the Commission's purpose was precisely to determine the fairness of the railroad carrier's practices.⁴¹ The Commission's determination that there was no violation of the Interstate Commerce Act because of an insufficient volume of African American passengers failed to recognize that the Act prohibited even a single incident in violation of the Act.⁴² Accordingly, subsequent actions by the railroad carrier to ensure that there would be no repetition of the discrimination was not sufficient to avoid liability under the Interstate Commerce Act.⁴³

Impact of Ruling: The purpose of the Interstate Commerce Act, beginning at title 49 United States Code section 1, was to end discrimination in interstate transportation.⁴⁴ The Interstate Commerce Commission had jurisdiction to determine whether a railroad carrier engaged in unlawful discrimination in failing to provide equal sleeping cars to different races, and a passenger had standing to bring suit even though they did not show that they intended to take another journey on the same train.⁴⁵ The Act requires carriers to provide equally comfortable accommodations to people of different races and a single instance of discrimination is sufficient to violate the Act even if the carrier's subsequent actions remedy the issue.⁴⁶

1942

***Taylor v. State of Ga.* 315 U.S. 25**

Summary of Facts and Issues: The United States Supreme Court held that a Georgia statute which would

in effect require peonage (a form of coerced labor) or threat of penal sanctions was a form of involuntary servitude and thereby violated the Thirteenth Amendment and the Act of 1867.⁴⁷

Impact of Ruling: The Court established that the Thirteenth Amendment prohibits more than slavery. The Supreme Court made it clear that “involuntary servitude” encompasses compelling debtors to work to repay debt, even if the contract was voluntary at the formation, if the consequence of the refusal or inability to work was a threat of penal sanction.⁴⁸

1944

***Pollock v. Williams* 322 U.S. 4**

Summary of Facts and Issues: Emmanuel Pollock was charged under a Florida statute making it a misdemeanor to induce advances with intent to defraud by a promise to perform labor and failing to perform the labor for which money was obtained.⁴⁹ Under the Florida statute, the failure to perform the labor for which the money was obtained was *prima facie* evidence of intent to defraud.⁵⁰ The Supreme Court held that the Florida statute violated the Thirteenth Amendment and the Federal Antipeonage Act, whose aim was not merely to end slavery, but to maintain a system of completely free and voluntary labor throughout the United States.⁵¹

Impact of Ruling: Despite the Antipeonage Act of 1867, peonage and other forms of coerced labor continued to exist in the United States by virtue of state laws like the Florida statute in this case. The Court noted that state statutes that presume intent and enforce peonage have a coercive effect in producing guilty pleas.⁵² Therefore, the Court rejected the state’s argument that although the presumption of intent language was omitted from the statute during its 1913 revision, the procedural presumption of intent was not at issue in this case because Pollock pleaded guilty to the charge.⁵³ The Court took a holistic approach to the reading of the Florida statute and found that the effect of peonage invalidated the entire statute.

***Steele v. Louisville & N.R. Co.* 323 U.S. 192**

Summary of Facts and Issues: An African American locomotive fireman employed by Louisville & N.R. Co. sued on behalf of himself and other African American firemen who were a minority of all firemen employed by the railroad, and who were essentially required to accept representation by the union chosen by the majority white firemen.⁵⁴ This union excluded African Americans from membership.⁵⁵ In 1940, the union, without informing the African American firemen, served notice to the railroad and 20 other railroads of the union’s desire to amend the existing collective bargaining agreement to

exclude all African American firemen from the service.⁵⁶ The union and railroads subsequently entered into a new agreement whereby African American firemen could not occupy more than 50 percent of the firemen positions in each class of service in each seniority district.⁵⁷ The agreement also controlled the seniority rights of African American firemen and their employment.⁵⁸ The Supreme Court held that under the 1934 Railway Labor Act the labor union chosen to act on behalf of a craft has a duty to represent all members of that craft regardless of union affiliation, and has at least the same duty to represent the interests of non-union African American people excluded from union membership as does a legislature under the Fourteenth Amendment’s equal protection clause.⁵⁹

Impact of Ruling: Section 2 of the 1934 Railway Labor Act empowered the labor union with the largest membership to act as exclusive bargaining representative of the craft of locomotive firemen. In this case, the labor union excluded African American firemen from its membership and bargained with the railroad to limit the number of African American firemen employed in various positions. The Court interpreted the statute to require a union to represent the interests of African American craftspeople, and to prohibit discrimination by the union against non-members on the basis of race.

Subsequent History: In companion case, *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, *Ocean Lodge No. 76* (1944) 323 U.S. 210, the Supreme Court affirmed the jurisdiction of federal courts under the Railway Labor Act.⁶⁰ Later, in *Graham v. Brotherhood of Locomotive Firemen and Enginemen* (1949) 338 U.S. 232, the Supreme Court again affirmed its holding in *Steele v. Louisville & N.R. Co.*, *supra*, following the union’s latest attempt to discriminate against African American firemen after the union negotiated an agreement with the Southern railroads to demote and make non-promotable African American firemen in favor of white firemen, irrespective of seniority.⁶¹ The Supreme Court reaffirmed that the Railway Labor Act imposes upon the union the duty to represent all members of the craft without discrimination and invests a racial minority of the craft with the right to enforce that duty.⁶² Still, in *Brotherhood of R. R. Trainmen v. Howard* (1952) 343 U.S. 768, the union there, by agreement, forced the railroad to agree to discharge African American train porters and instead fill their positions with white men, who under the agreement would do less work for more pay.⁶³ This “aggressive hostility” to the employment of African Americans employed in train, engine, and yard services led the Supreme Court again to affirm its holdings in *Steele* and *Graham* that the racial discrimination practiced by the union was unlawful, whether African Americans are classified as train porters, brakemen, or something else, and that federal courts have jurisdiction to provide a remedy.⁶⁴

1969

***Glover v. St. Louis-San Francisco Ry. Co.* 393 U.S. 324**

Summary of Facts and Issues: Thirteen petitioners, eight of whom were African American, despite being qualified for higher positions, were classified as “helpers” for years and the railroad refused to promote them.⁶⁵ The petitioners alleged that apprentices were made to carry out jobs equivalent to the higher positions, but to avoid promoting any African American employees, the railroad did not promote any of the petitioners.⁶⁶ The Railway Labor Act gives the Railroad Adjustment Board exclusive jurisdiction over suits between employees and carriers, but as the Court observed this case was between employees and the union and management.⁶⁷ Respondents moved to dismiss the case because petitioners had not exhausted other remedies, namely, filing a grievance.⁶⁸ However, representatives had told respondents that nothing would be done and that a formal complaint would be a waste of time.⁶⁹ The Supreme Court held that in this matter, jurisdiction over the union and railroad was proper because the Railroad Adjustment Board had no power to order the kind of relief necessary in this case.⁷⁰ Further, the Court held that while in some cases there may be a requirement to exhaust administrative remedies, the exhaustion requirement is subject to exceptions such as the case here where exhaustion would defeat the overall purpose of the federal labor relations laws and the circumstances of the case indicated that any effort to proceed formally with contractual or administrative remedies would be wholly futile.⁷¹

Impact of Ruling: The Court determined that under the Railway Labor Act, the Railroad Adjustment Board did not have exclusive jurisdiction to interpret the terms of the collective bargaining agreement in this case. Plaintiffs were not required to exhaust all remedies for grievances, as the circumstances of this case were determined to have fallen under the exception for instances in which filing a grievance would be futile.

1971

***Griggs v. Duke Power Co.* 401 U.S. 424**

Summary of Facts and Issues: Defendant Duke Power Company required passage of two aptitude tests and a high school degree for applicants to be placed into a higher-waged department.⁷² African American employees challenged the policy under the Civil Rights Act. The court held that employers were in violation of the Civil Rights Act if they required standardized intelligence tests or a high school education if it was not significantly related to job performance.⁷³

Impact of Ruling: Title VII of the Civil Rights Act of 1964 prohibits neutral employment practices that discriminate on the basis of a protected trait, regardless of intent.⁷⁴ Here, the aptitude tests were not shown to be related to job performance and they disproportionately disqualified African American applicants as compared to white applicants.⁷⁵

1973

***McDonnell Douglas Corp. v. Green* 411 U.S. 792**

Summary of Facts and Issues: An African American mechanic and laboratory technician was laid off from his job with McDonnell Douglas Corp.⁷⁶ The employee (Green) was a long-time activist in the civil rights movement and claimed that his discharge and McDonnell Douglas's general hiring practices were racially motivated.⁷⁷ Green subsequently took part in at least one protest against the corporation, which disrupted its operation by blocking access to the plant.⁷⁸ Following the protest, McDonnell Douglas publicly advertised for qualified mechanics.⁷⁹ Green applied for the position and was denied based on his participation in the protests.⁸⁰ Green filed a complaint with the Equal Employment Opportunity Commission alleging McDonnell Douglas refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of the Civil Rights Act of 1964.⁸¹ The Commission issued a right to sue letter making no finding with respect to Green's allegation of racial bias, but finding reasonable cause to believe that Green had been fired because of his civil rights activity.⁸² Following a dismissal and subsequent appeal, the case was brought before the Supreme Court to decide the order and allocation of proof in a private, non-class action challenging employment discrimination.⁸³ The Court held, “[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.”⁸⁴ The Court found that Green had proved a prima facie case and that the burden then shifted to McDonnell Douglas to articulate some legitimate, nondiscriminatory reason for the employee's rejection.⁸⁵ If the employer successfully articulates this reason, the burden then shifts back to the employee to prove that the reason was in fact pretext.⁸⁶ The case was returned to the trial court to undergo this inquiry.

Impact of Ruling: In establishing a case of racial employment discrimination, the Court set forth the applicable

rules as to burden of proof and how it shifts upon the making of a prima facie case. This important framework reconciled the lack of harmony among the circuit courts.⁸⁷

Subsequent History: In *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, the Supreme Court held that in a disparate treatment case, liability depends on whether the protected trait actually motivated the employer's decision, and that whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.⁸⁸

1975

***Johnson v. Railway Exp. Agency, Inc.* 421 U.S. 454**

Summary of Facts and Issues: An African American railway employee filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that the railway company discriminated against African American employees with respect to seniority and job assignments.⁸⁹ Three weeks after the employee filed his complaint, he was terminated.⁹⁰ More than two and a half years after filing his complaint with the EEOC, the Commission issued a decision finding reasonable cause to believe the employee's allegations.⁹¹ It was over nine more months before the EEOC gave the employee his right to sue letter to institute an action under title VII of the Civil Rights Act of 1964.⁹² During that time, the statute of limitations had run on the employee's potential concurrent claim under 42 U.S.C. section 1981.⁹³ The Supreme Court held that if a worker experiences racism in private employment, there are different ways they can seek federal help and take action to resolve the issue, including by pursuing a claim under title VII of the Civil Rights Act of 1964 and/or pursuing an action under 42 U.S.C. section 1981.⁹⁴ The Court further held that just because someone files a timely discrimination claim with the EEOC, it does not pause or stop the deadline for filing a legal case based on the same facts under 42 U.S.C. section 1981, which exists co-extensively with title VII.⁹⁵ In other words, the clock for the legal time limit continues to run regardless of the EEOC filing.⁹⁶

Impact of Ruling: Racial discrimination by a private employer in making hiring decisions is prohibited under the law. This case clarified that section 1981 affords a federal remedy against discrimination in private employment on the basis of race.

Subsequent History: The Supreme Court in *International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.* (1976) 429 U.S. 229 later held that the existence and utilization of grievance or arbitration procedures under a collective bargaining contract also does

not toll running of limitations period for filing charge of discriminatory employment practices with the Equal Employment Opportunity Commission, since Civil Rights Act remedies are independent of other preexisting remedies available to an aggrieved employee.⁹⁷

***Albemarle Paper Co. v. Moody* 422 U.S. 405**

Summary of Facts and Issues: A class of African American employees at a paper mill sued the mill under title VII asking the district court to enjoin every employment practice, policy, and custom that violated title VII.⁹⁸ The key issues at trial were the "plant's seniority system, its program of employment testing, and the question of [back pay]."⁹⁹ The plant also required a high school diploma for certain positions.¹⁰⁰ The district court found the seniority system discriminatory and ordered the mill to implement a plant-wide seniority system.¹⁰¹ Although the district court held the high school diploma requirement invalid, it concluded that the testing requirements were valid.¹⁰² Prior to trial, the mill engaged an industrial psychologist to study job relatedness, and the study found "statistically significant correlation with supervisory ratings in three job groupings for the Beta Test, in seven job groupings for either Form A or Form B of the Wonderlic Test, and in two job groupings for the required battery of both the Beta and the Wonderlic Tests."¹⁰³ The district court concluded that the validation study had proven that the testing requirements were job related and thus valid.¹⁰⁴ The district court also determined that the employees were not entitled to back pay under the job seniority program because there was no evidence of bad faith.¹⁰⁵ The court of appeals reversed, holding that the employees were entitled to back pay and that the testing requirements should have been enjoined.¹⁰⁶ The United States Supreme Court agreed with the court of appeals that the judgment should be vacated.¹⁰⁷ Although the Supreme Court had previously held in *Griggs v. Duke Power Co.*, *supra*, 401 U.S. 424 that an employer could use a test for hiring or promoting employees so long as the test was closely related to the skills and abilities required for the job, the mill in this matter had failed to demonstrate based on its own study that the testing program was sufficiently related to each of the job ranks in question.¹⁰⁸ The Supreme Court returned the case to the district court for it to reconsider the issues of back pay and the job-related testing in light of the Court's clarification of the standards related to those issues.¹⁰⁹

Impact of Ruling: In employment, employers can implement various tests for hiring or promoting employees. If a test is found to be discriminatory and unnecessary, then it would be illegal to use it. However, if a test is deemed necessary for the specific job, it could still be used. With respect to the other issues decided in this case, the Court resolved a conflict among the circuit courts and held that "given a finding of unlawful discrimination, [back pay]

should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”¹¹⁰

Subsequent History: The Civil Rights Act of 1991 created a right to recover compensatory and punitive damages for certain violations of title VII of the Civil Rights Act of 1964.¹¹¹ The Act added additional remedies for a violation, beyond equitable remedies such as back pay.

1976

***Brown v. General Services Administration* 425 U.S. 820**

Summary of Facts and Issues: An African American employed by a federal agency alleged that he was discriminated against because of his race in receiving a promotion.¹¹² The employee filed a complaint with the agency’s equal employment opportunity office and was informed by letter that race was not a factor in the decision not to promote him.¹¹³ The director’s letter also informed him that if he chose, he could carry the administrative process further by lodging an appeal with the Board of Appeals and Review of the Civil Service Commission and that, alternatively, he could file suit within 30 days in federal district court.¹¹⁴ The employee filed suit in federal district court 42 days later and the court dismissed the action because the employee did not file the suit within 30 days.¹¹⁵ The Supreme Court held that the applicable statute creating the administrative and judicial enforcement mechanism with respect to federal employment was the exclusive judicial remedy for claims of discrimination.¹¹⁶ Based on that statutory scheme, the employee’s complaint was properly dismissed for failure to timely file his complaint.¹¹⁷

Impact of Ruling: The Civil Rights Act of 1964 as amended provides the exclusive remedy for claims of discrimination in federal employment. This decision validated the complementary administrative and judicial enforcement mechanism designed to eradicate federal employment discrimination.

***Washington v. Davis* 426 U.S. 229**

Summary of Facts and Issues: Two African American police officers with the District of Columbia Metropolitan Police Department sued alleging that the promotion policies of the Department were racially discriminatory.¹¹⁸ Two African American applicants joined the complaint alleging that the recruiting testing program also discriminated on the basis of race and disproportionately excluded a high number African American applicants.¹¹⁹ Both claims challenged the practices under the due

process clause of the Fifth Amendment to the United States Constitution, 42 U.S.C. section 1981, and a provision of the District of Columbia Code.¹²⁰ The United States Supreme Court held that the police department’s hiring practice of a verbal skills test did not discriminate on the basis of race.¹²¹ In so holding, the Court stated that the standard for adjudicating claims of invidious racial discrimination under the due process clause of the Fifth Amendment is not identical to the standards applicable under the Equal Employment Opportunity Act.¹²² The Court further held that when evaluating a claim for discrimination under the equal protection clause, disproportionate impact alone, even with respect to race, does not trigger strict scrutiny.¹²³

Impact of Ruling: This ruling has had a significant impact in employment discrimination actions because it has made it more difficult for plaintiffs to challenge policies or actions that have a discriminatory impact but may not have been intentionally discriminatory. This is because plaintiffs must now prove discriminatory intent, which can be difficult to demonstrate.

1977

***International Broth. of Teamsters v. U.S.* 431 U.S. 324**

Summary of Facts and Issues: The United States as plaintiff brought an action against an employer under provisions of the Civil Rights Act of 1964 alleging that the employer followed hiring, assignment, and promotion policies that discriminated against African American employees and employees with Spanish surnames.¹²⁴ The trial court found that the employer had indeed engaged in a plan and practice of discrimination and that the seniority system violated title VII of the Act.¹²⁵ The trial court then fashioned relief by dividing the group of harmed plaintiffs into groups based on degree of harm and when the harm took place in relation to the effective date of title VII.¹²⁶ The appellate court rejected the trial court’s attempt at dividing the affected class and held that all affected employees were entitled to additional relief.¹²⁷ The Supreme Court agreed that the plaintiffs had met their burden in proving system-wide discrimination and reaffirmed that statistical analyses serve an important role in establishing racial discrimination.¹²⁸ With respect to the discriminatory seniority system, the Court reaffirmed its prior holding that retroactive seniority may be awarded as relief from an employer’s discriminatory hiring and assignment policies even if the seniority system agreement itself made no provision for such relief.¹²⁹ The Court also reaffirmed that under title VII, a practice, procedure, or test that is neutral on its face cannot be maintained if it operates to freeze the status quo of prior discriminatory employment practices.¹³⁰ However, “an otherwise

neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.¹³¹ The Court concluded that the employer's conduct in this case with respect to the maintenance of the seniority system did not violate the Act because the seniority system did not have its genesis in racial discrimination.¹³² The Court further held that an incumbent employee's failure to apply for a job did not necessarily bar the award of retroactive seniority.¹³³ The Court eventually returned the case to the trial court to make further findings regarding the individual employees' claims.¹³⁴

Impact of Ruling: This case establishes that an otherwise neutral, legitimate seniority system does not become unlawful under title VII because it may perpetuate pre-title VII discrimination, even where the employer has engaged in pre-title VII discriminatory hiring or promotion practices. This case also affirmed the burden shifting framework required in employment discrimination cases and established the principle that a person's failure to submit an application for a job does not inevitably and forever foreclose their entitlement to relief. The example the Court used to illustrate this point is the hypothetical employer who announces a policy of discrimination by a sign reading "Whites Only" on the hiring-office door; victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.¹³⁵ This principle creates a framework for non-applicants to establish employment discrimination. Further, the Court's holding made clear that title VII imposes no requirement that a work force mirror the general population.

Subsequent History: Although the Court in *Teamsters* held that title VII does not require an employer to mirror the demographics of their work force with the general population, it later held in *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) 443 U.S. 193 that private sector employers have the discretion under title VII to voluntarily adopt affirmative action plans designed to eliminate a conspicuous racial imbalance in traditionally segregated job categories.¹³⁶ In *Weber*, the court was confronted with a collective bargaining scheme that reserved for African American employees 50 percent of the openings in an in-plant craft training program.¹³⁷ There, the Court held against the white plaintiff employees because the plan did not unnecessarily trammel the interests of the white employees nor did it require the discharge of white workers and their replacement with new African American trainees.¹³⁸ Instead, the plan was a temporary measure that was not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance designed to end as soon as the percentage of African American skilled craft workers in the plant approximated the percentage of African Americans in

the local labor force.¹³⁹ The 1991 amendments to the Civil Rights Act codified the burden of proof required in disparate impact cases.¹⁴⁰ Under this section, an unlawful employment practice based on disparate impact is established only if (1) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (2) the complaining party makes a demonstration that there was an alternative employment practice that the respondent refused to adopt (based on the laws as they existed on June 4, 1989).¹⁴¹

***Hazelwood Sch. Dist. v. United States* 433 U.S. 299**

Summary of Facts and Issues: The U.S. Attorney General sued a school district, alleging employment discrimination in violation of the Civil Rights Act of 1964.¹⁴² The trial court found that the government had failed to establish a pattern or practice of discrimination and entered judgment for the district.¹⁴³ The appellate court reversed, rejecting the trial court's analysis of the statistical data used and instead relying on a comparison of 1970 census figures, showing that 15.4 percent of teachers in that area were African American, while less than 2 percent of Hazelwood's teachers were African American.¹⁴⁴ The Supreme Court reversed and returned the case to the trial court, holding that an employer that makes its employment decisions in a wholly nondiscriminatory way does not violate the Act, even if it previously maintained an all-white work force by purposefully excluding African Americans.¹⁴⁵ The Court reasoned that the government and appellate court relied on statistics that included an exceptional school district whose policy attempted to maintain a 50 percent African American staff, which distorted the comparison with respect to the relevant market.¹⁴⁶ As a result, the trial court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases.¹⁴⁷ The Court remanded the case to the district court to determine whether to compare the percentage of African American teachers in the school district with the percentage of African American teachers in other school districts in the county, or with the percentage of African American teachers in other school districts in the County and the City of St. Louis combined.¹⁴⁸

Impact of Ruling: An employer that excluded applicants based on race prior to the Civil Rights Act of 1964 can rebut a plaintiff's prima facie case of discrimination by proving that the racial statistics for the current workforce is a product of pre-title VII hiring.

1982

***Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania* 458 U.S. 375**

Summary of Facts and Issues: Pennsylvania and a group of 12 African American plaintiffs representing a class of minority groups challenged a union's hiring hall system, which originated from a collective bargaining agreement negotiated by the union and local construction trade organizations.¹⁴⁹ Under the terms of the agreement, the contracting companies were required to hire engineers from a union referral list.¹⁵⁰ To join the list, an engineer went through a program administered by the union.¹⁵¹ The suit charged that the union systematically denied African American workers access to the referral list and training program, and only referred them for jobs with short hours and low pay.¹⁵²

Impact of Ruling: The Court ruled that liability cannot be imposed through section 1981 of the Civil Rights Act of 1866 without proof of intentional discrimination, and that a showing of a disparate impact of a race-neutral policy on a racial minority is not sufficient to establish a claim.¹⁵³ The Court reasoned that since the law was passed to protect freedmen from intentional discrimination by whites who sought to “make their former slaves dependent serfs [and] victims of unjust laws,” race-neutral policies were not liable under the Act.¹⁵⁴ This holding raised the standard for a plaintiff alleging racial discrimination. If an employer (or union) imposes policies that have a negative effect on a racial minority, such as an exam or referral system, they are not liable under section 1981, unless the employee can produce evidence of intentional discrimination.¹⁵⁵

1986

***Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission* 478 U.S. 421**

Summary of Facts and Issues: A union was found culpable of “engaging in a pattern and practice of discrimination against black and Hispanic individuals . . . in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and ordered to end their discriminatory practices, and to admit a certain percentage of nonwhites to union membership by July 1981.”¹⁵⁶ The trial court established a quota goal of 29 percent nonwhite membership, based on the percentage of nonwhites in the relevant labor pool in New York City, and ordered the union to meet the goal by July 1, 1981.¹⁵⁷ In 1982 and 1983, the union had not met the goal as ordered by the trial court and the court subsequently found the union guilty of contempt for disobeying the court's earlier order.¹⁵⁸ The trial court then established a new quota of 29.23

percent nonwhite membership based on labor pool covered by the newly expanded union, with a compliance deadline of August 31 1987.¹⁵⁹ Among the issues decided by the Supreme Court was whether contempt was the appropriate remedy and whether the trial court's quota goal was an available remedy under title VII of the Civil Rights Act of 1964.¹⁶⁰ The Supreme Court held that section 706(g) of the Act does not foreclose a district court from instituting some sort of racial preference where necessary to remedy past discrimination, although such relief is not always proper.¹⁶¹ In so holding, the Court concluded that the contempt fines and special fund orders were proper remedies for civil contempt and that the trial court properly appointed an administrator to supervise the union's compliance with the court's orders.¹⁶²

Impact of Ruling: Although the Court did not determine the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures, the Court did agree that a district court may, in appropriate circumstances, order preferential relief benefitting individuals who are not the actual victims of discrimination, as a remedy for violations of title VII.¹⁶³

1989

***Wards Cove Packing Co. v. Atonio* 490 U.S. 642**

Summary of Facts and Issues: Defendant owned salmon canneries and placed nonwhite Filipinos and Alaska Natives in its unskilled cannery positions and whites in its skilled cannery positions.¹⁶⁴ “Virtually all of the noncannery jobs pay more than cannery positions. The predominantly white noncannery workers and the predominantly nonwhite cannery employees live in separate dormitories and eat in separate mess halls.”¹⁶⁵ Plaintiffs, a class of nonwhite cannery workers, sued the company alleging racial discrimination and discriminatory hiring practices.¹⁶⁶ The Supreme Court held that in this case, statistical evidence of a disproportionate race ratio itself did not establish a sufficient case of disparate impact in violation of title VII.¹⁶⁷ The Court held that the courts below relied on a flawed comparison between the racial composition of the cannery work force and that of the noncannery work force as being probative of a prima facie case of disparate impact in the selection of noncannery workers, when the cannery work force in no way reflected the pool of qualified job applicants or the qualified population in the labor force.¹⁶⁸ In so holding, the Court reasoned that “[m]easuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other ‘skilled’ noncannery positions found to exist by the District Court . . . by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling

cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites."¹⁶⁹

Impact of Ruling: A statistical imbalance between white and nonwhite employees, by itself, does not amount to a solid and sufficient showing of violating title VII. A title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial imbalance in the work force.¹⁷⁰ As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.

Subsequent History: Title 42 U.S.C. section 2000e-2(k) codified the burden of proof required in disparate impact cases. Under this section, an unlawful employment practice based on disparate impact is established only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes a demonstration that there was an alternative employment practice that the respondent refused to adopt (based on the laws as they existed on June 4, 1989).¹⁷¹

1993

Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla. 508 U.S. 656

Summary of Facts and Issues: A Florida city ordinance granted preferential treatment to certain minority-owned businesses in the award of city contracts.¹⁷² An association of individuals and firms in the construction industry who did business in the city sued under 42 U.S.C. section 1983 to enjoin enforcement of the ordinance, claiming that the ordinance violated the equal protection clause of the Fourteenth Amendment.¹⁷³ This raised the issue of whether the association and other similarly situated persons had standing to sue when they had not demonstrated that, but for the program, any member would have bid successfully for any of the contracts. The Supreme Court held that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."¹⁷⁴ In so holding, the Court concluded that the association had standing to sue even though they did not show that one

of its members would have received a contract but for the city ordinance.¹⁷⁵

Impact of Ruling: This case coalesced the principle that when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.

2009

Ricci v. DeStefano 557 U.S. 557

Summary of Facts and Issues: White firefighters and one Hispanic firefighter sued New Haven, Connecticut and city officials, alleging that the city violated title VII by refusing to certify the results of a promotional examination, due to the city's belief that the test results would have a disparate impact on non-white firefighters.¹⁷⁶

Impact of Ruling: The Court held that the city's refusal to certify the results violated title VII because its decision was expressly motivated by race, i.e., the city rejected the test results because "too many whites and not enough minorities would be promoted[.]"¹⁷⁷ Though the city justified its decision as seeking to avoid disparate impact on racial minorities—which title VII also requires—the Court held that the city lacked a strong basis in evidence to support its fear of liability for violating the disparate impact provision.¹⁷⁸

2010

Lewis v. City of Chicago 560 U.S. 205

Summary of Facts and Issues: The City of Chicago implemented a written test for firefighter applicants, and used scores to sort applicants into well-qualified, qualified, and not qualified buckets, then pulled applicants first from only those "well-qualified" applicants that scored above the cutoff point.¹⁷⁹ Several African American applicants who scored "qualified" on the exam filed complaints with the Equal Opportunity Employment Commission, received right to sue letters, and brought suit against the city, alleging the practice of selecting candidates only from the pool above a certain cut-off had a disparate impact on African Americans in violation of title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2(k)(1)(A) (i).¹⁸⁰ Title VII requires a person to file their claim within 300 days of an employer executing the alleged unlawful practice.¹⁸¹ The city claimed plaintiffs' action was untimely since the only practice was the development of the lists in the first place, while plaintiffs' alleged that each round of

selection based on the lists constituted a discriminatory employment practice.¹⁸²

Impact of Ruling: The Supreme Court held that a prima facie disparate impact claim is established by showing the employer “uses a particular employment practice that causes a disparate impact” based on race.¹⁸³ The city “made use of the practice of excluding those who scored 88 or

below each time it filled a new class of firefighters,” such that plaintiffs’ stated a prima facie claim.¹⁸⁴ And it “use[d] that practice in each round of selection.”¹⁸⁵ This expanded the ability of African Americans to challenge employment practices on a disparate impact theory beyond the date of the implementation of the practice. Instead, they can be challenged each time the practice is used.

II. State Statutes and Case Law

1944

***James v. Marinship Corp.* 25 Cal.2d 721**

Summary of Facts and Issues: African American employees sued their employer and labor unions for requiring membership in unions that did not accept African Americans and only provided auxiliary union membership, which lacked the same benefits and privileges of the main union.¹⁸⁶

Impact of Ruling: The court found “substantial discrimination” in the treatment of those who did accept membership in the auxiliary local, in the lack of similar benefits and privileges, rendering the lack of equality the “same as if they were wholly denied the privilege of membership,” resulting in discrimination contrary to the public policy of the United States and California.¹⁸⁷

Subsequent History: The holding and rationale in *Marinship* developed a common law doctrine known as the “right of fair procedure,” seen through its progeny of cases *Pinsker v. Pac. Coast Soc. Of Orthodontists* (1969) 1 Cal.3d 160, *Ezekial v. Winkley* (1977) 20 Cal.3d 267, and *Potvin v. Metro. Life Ins. Co.* (2000) 22 Cal.4th 1060. The cases address the exclusion or expulsion from membership in gatekeeper organizations (such as labor unions, professional societies and associations, and access to staff privileges at hospitals). The right of a fair procedure applies to private decisions which can effectively deprive an individual of the ability to practice a trade and profession, and the “right to practice a lawful trade or profession is sufficiently ‘fundamental’ to require substantial protection against arbitrary administrative interference.”¹⁸⁸ Therefore, any “decision-making must be both substantively rational and procedurally fair.”¹⁸⁹

1970

***Alcorn v. Anbro Engineering, Inc.* 2 Cal.3d 493**

Summary of Facts and Issues: Plaintiff, an African American truck driver, sought damages for intentional infliction of emotional distress and Unruh Act violations.

The claims arose from an incident during which plaintiff informed a white field superintendent and foreman that plaintiff had informed other drivers not to drive a certain truck on the job site.¹⁹⁰ The response from a white employee was “rude, violent and insolent,” including phrases: “you goddam ‘niggers’ are not going to tell me about the rules. I don’t want any ‘niggers’ working for me. I am getting rid of all the ‘niggers’ . . . you’re fired.”¹⁹¹

Impact of Ruling: The Court found plaintiff sufficiently plead a cause of action for damages by pleading the special employer-employee relationship, his particular susceptibility to emotional distress, and his firing without cause.¹⁹² However, the Court also found that “discrimination in employment” was not covered by the Unruh Act.¹⁹³

Subsequent History: In *Isbister v. Boys’ Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, the Court, reading Unruh broadly, found the term “business establishments” means all private and public groups or organizations and places that provide public accommodations.¹⁹⁴ Then in *Payne v. Anaheim Mem’l Med. Ctr., Inc.* (2005) 130 Cal.App.4th 729, the court found a doctor could sue a hospital under the Unruh Act since the hospital operates as a business which offers its facilities to qualified physicians, who are not its employees, in exchange for fees and other considerations.¹⁹⁵

1980

***Price v. Civil Service Com.* 26 Cal.3d 257**

Summary of Facts and Issues: The Supreme Court held that the Civil Service Commission of Sacramento County was authorized under the county charter to adopt a general remedial affirmative action program to overcome the effects of its past discriminatory employment practices, and the race-conscious hiring ratios did not violate the county charter, the Fair Employment Practice Act, the federal Civil Rights Act of 1964, or either the federal or state equal protection clauses.¹⁹⁶ The Supreme Court remanded the case to the trial court for a determination as to whether the evidence presented at the hearing of the civil service commission was sufficient to support

the remedial order under the requirements of the commission's rule establishing quota hiring systems where necessary to remedy imbalances.¹⁹⁷

Impact of Ruling: This case upheld the validity of affirmative action programs in employment, under the state and federal Constitutions.

Subsequent History: However, in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537 the Court held that Proposition 209 changed the constitutional standard reflected in *Price*, as cited in *Strauss v. Horton* (2009) 46 Cal.4th 364, and found that a municipal program requiring contractors bidding on city projects to utilize a certain percentage of non-white and women subcontractors violated the California Constitution.¹⁹⁸ Proposition 209, a constitutional amendment adopted in 1996, prohibited certain types of affirmative action in public employment, public education, and public contracting.¹⁹⁹ Further, in *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, after directly violating section 31 of the California Constitution (Proposition 209) through preferential treatment in awarding public contracts to non-white and women owned business, the City challenged the validity of Proposition 209 under the political structure doctrine, an argument under the federal equal protection clause.²⁰⁰ But in upholding Proposition 209,

the Court found that instead of burdening equal treatment, Proposition 209 “directly serves the principle that all government use of race must have a logical end point.”

1982²⁰¹

***Commodore Home Systems, Inc. v. Superior Court* 32 Cal.3d 211**

Summary of Facts and Issues: Two African American former employees alleging job discrimination sought punitive damages under Fair Employment and Housing Act (FEHA).²⁰² The Court stated that *Alcorn* “recognized a right independent of the FEPA to seek emotional-distress and punitive damages when overt racial malice is the motive for a discharge.”²⁰³ It then went on to find that all relief generally available in non-contractual actions, including punitive damages, is available under FEHA.²⁰⁴

Impact of Ruling: This case established that, in a FEHA civil action, punitive damages and all relief generally available in non-contractual actions may be obtained by the plaintiff.

Subsequent History: In *Dyna-Med, Inc. v. Fair Employment Housing Com.* (1987) 43 Cal.3d 1379, a sex-discrimination case, the Supreme Court held that the FEHA did not authorize the Commission to award punitive damages.²⁰⁵

Endnotes

- ¹ U.S. Const., art IV, § 2, cl. 3.
- ² *Strader v. Graham* (1850) 51 U.S. 82, 93.
- ³ *Ibid.*
- ⁴ *Ibid.*
- ⁵ *Ibid.*
- ⁶ *Id.* at pp. 93-94.
- ⁷ *Id.* at p. 94.
- ⁸ U.S. Const., 13th Amend.
- ⁹ *Slaughter-House Cases* (1872) 83 U.S. 36, 59.
- ¹⁰ *Ibid.*
- ¹¹ *Id.* at pp 59-60.
- ¹² *Id.* at pp. 36-38.
- ¹³ *Id.* at pp. 62-63.
- ¹⁴ *Id.* at p. 64.
- ¹⁵ *Id.* at pp. 73-74.
- ¹⁶ *Id.* at p. 77.
- ¹⁷ *Id.* at p. 37.
- ¹⁸ *Id.* at pp. 71-72.
- ¹⁹ *Chyatt v. U.S.* (1905) 197 U.S. 207, 208.
- ²⁰ *Id.* at p. 222.
- ²¹ *Ibid.*
- ²² *Hodges v. U.S.* (1906) 203 U.S. 1, 2 overruled in *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409.
- ²³ *Id.* at pp. 2-3.
- ²⁴ *Id.* at p. 4.
- ²⁵ *Id.* at pp. 16-17.
- ²⁶ *Id.* at p. 20.
- ²⁷ See *id.* at pp. 17-18.
- ²⁸ *Jones v. Alfred H. Mayer Co.* (1968) 392 U.S. 409, 441, fn. 78.
- ²⁹ *Id.* at p. 440.
- ³⁰ *New Negro Alliance v. Sanitary Grocery Co.* (1938) 303 U.S. 552, 559.
- ³¹ *Ibid.*
- ³² *Ibid.*
- ³³ *Ibid.*
- ³⁴ *Ibid.*
- ³⁵ *Id.* at pp. 562-563.
- ³⁶ *Id.* at pp. 560-561.
- ³⁷ *Id.* at p. 561.
- ³⁸ *Mitchell v. U.S.* (1941) 313 U.S. 80, 91-92.
- ³⁹ *Id.* at p. 89.
- ⁴⁰ *Id.* at p. 90.
- ⁴¹ *Id.* at pp. 94-95.
- ⁴² *Id.* at pp. 96-97.
- ⁴³ See *id.* at p. 96.
- ⁴⁴ *Id.* at pp. 94-95.
- ⁴⁵ *Id.* at pp. 92-93.
- ⁴⁶ *Id.* at p. 94.
- ⁴⁷ *Taylor v. State of Georgia* (1942) 315 U.S. 25, 29.
- ⁴⁸ *Ibid.*
- ⁴⁹ *Pollock v. Williams* (1944) 322 U.S. 4, 6.
- ⁵⁰ *Id.* at p. 5.
- ⁵¹ *Id.* at p. 17.
- ⁵² See *id.* at pp. 15-16.
- ⁵³ *Id.* at pp. 7, 12-13.
- ⁵⁴ *Steele v. Louisville & N.R. Co.* (1944) 323 U.S. 192, 194-195.
- ⁵⁵ *Ibid.*
- ⁵⁶ *Id.* at p. 195.
- ⁵⁷ *Ibid.*
- ⁵⁸ *Ibid.*
- ⁵⁹ *Id.* at p. 202.
- ⁶⁰ *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76* (1944) 323 U.S. 210, 213.
- ⁶¹ *Graham v. Brotherhood of Locomotive Firemen and Enginemen* (1949) 338 U.S. 232, 239.
- ⁶² *Ibid.*
- ⁶³ *Brotherhood of R. R. Trainmen v. Howard* (1952) 343 U.S. 768, 770.
- ⁶⁴ *Id.* at pp. 774-775.
- ⁶⁵ *Glover v. St. Louis-San Francisco Ry. Co.* (1969) 393 U.S. 324, 325.
- ⁶⁶ *Ibid.*
- ⁶⁷ *Id.* at pp. 328-329.
- ⁶⁸ *Id.* at p. 326.
- ⁶⁹ *Ibid.*
- ⁷⁰ *Id.* at p. 329.
- ⁷¹ *Id.* at pp. 330-331.
- ⁷² *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 427-428.
- ⁷³ *Id.* at pp. 431-432.
- ⁷⁴ See *id.* at p. 430.
- ⁷⁵ *Id.* at pp. 430-431.
- ⁷⁶ *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 794, modified by *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604.
- ⁷⁷ *Ibid.*
- ⁷⁸ *Ibid.*
- ⁷⁹ *Id.* at p. 796.
- ⁸⁰ *Ibid.*
- ⁸¹ *Ibid.*
- ⁸² *Id.* at p. 797.
- ⁸³ *Id.* at pp. 798-800.
- ⁸⁴ *Id.* at p. 802.
- ⁸⁵ *Ibid.*
- ⁸⁶ *Id.* at p. 804.
- ⁸⁷ *Id.* at p. 801.
- ⁸⁸ *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610, 612.
- ⁸⁹ *Johnson v. Railway Exp. Agency, Inc.* (1975) 421 U.S. 454, 455.
- ⁹⁰ *Ibid.*
- ⁹¹ *Ibid.*
- ⁹² *Id.* at pp. 455-456.
- ⁹³ *Id.* at p. 456.
- ⁹⁴ *Id.* at p. 459.
- ⁹⁵ *Id.* at pp. 459-460.
- ⁹⁶ *Id.* at pp. 462-463.
- ⁹⁷ *International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.* (1976) 429 U.S. 229, 236.
- ⁹⁸ *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 408-409.
- ⁹⁹ *Id.* at p. 409.
- ¹⁰⁰ *Id.* at p. 410.
- ¹⁰¹ *Id.* at p. 409.
- ¹⁰² *Id.* at p. 411.

- ¹⁰³ *Ibid.*
- ¹⁰⁴ *Ibid.*
- ¹⁰⁵ *Id.* at p. 410.
- ¹⁰⁶ *Id.* at pp. 411-412.
- ¹⁰⁷ *Id.* at p. 436.
- ¹⁰⁸ *Id.* at pp. 431-432.
- ¹⁰⁹ *Id.* at p. 436.
- ¹¹⁰ *Id.* at p. 421, fn. omitted.
- ¹¹¹ 42 U.S.C. § 1981a(a).
- ¹¹² *Brown v. General Services Administration* (1976) 425 U.S. 820, 822.
- ¹¹³ *Id.* at pp. 822-823.
- ¹¹⁴ *Id.* at p. 823.
- ¹¹⁵ *Id.* at p. 824.
- ¹¹⁶ *Id.* at p. 835.
- ¹¹⁷ *Ibid.*
- ¹¹⁸ *Washington v. Davis* (1976) 426 U.S. 229, 232.
- ¹¹⁹ *Id.* at p. 233.
- ¹²⁰ *Ibid.*
- ¹²¹ *Id.* at p. 246.
- ¹²² *Id.* at p. 238.
- ¹²³ *Id.* at p. 242.
- ¹²⁴ *International Broth. of Teamsters v. U.S.* (1977) 431 U.S. 324, 329.
- ¹²⁵ *Ibid.*
- ¹²⁶ *Id.* at p. 332.
- ¹²⁷ *Id.* at p. 333.
- ¹²⁸ *Id.* at p. 339.
- ¹²⁹ *Id.* at p. 347.
- ¹³⁰ *Id.* at p. 349.
- ¹³¹ *Id.* at pp. 353-354.
- ¹³² *Id.* at p. 356.
- ¹³³ *Id.* at pp. 365-366.
- ¹³⁴ *Id.* at pp. 376-377.
- ¹³⁵ *Id.* at pp. 365-366.
- ¹³⁶ *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) 443 U.S. 193, 208.
- ¹³⁷ *Id.* at p. 197.
- ¹³⁸ *Id.* at p. 208.
- ¹³⁹ *Id.* at pp. 208-209; see also *id.* at p. 216 (conc. opn. of Blackmun, J.).
- ¹⁴⁰ 42 U.S.C. § 2000e-2(k).
- ¹⁴¹ *Ibid.*
- ¹⁴² *Hazelwood School Dist. v. U.S.* (1977) 433 U.S. 299, 301.
- ¹⁴³ *Id.* at p. 304.
- ¹⁴⁴ *Id.* at pp. 304-305.
- ¹⁴⁵ *Id.* at p. 307.
- ¹⁴⁶ See *id.* at p. 303.
- ¹⁴⁷ *Id.* at p. 308.
- ¹⁴⁸ *Id.* at p. 313.
- ¹⁴⁹ *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania* (1982) 458 U.S. 375, 378-380.
- ¹⁵⁰ *Id.* at p. 379.
- ¹⁵¹ *Ibid.*
- ¹⁵² *Id.* at p. 380.
- ¹⁵³ *Id.* at p. 391.
- ¹⁵⁴ *Id.* at p. 388.
- ¹⁵⁵ *Id.* at p. 391.
- ¹⁵⁶ *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.* (1986) 478 U.S. 421, 426.
- ¹⁵⁷ *Id.* at p. 432.
- ¹⁵⁸ *Id.* at p. 426.
- ¹⁵⁹ *Id.* at p. 437.
- ¹⁶⁰ *Id.* at p. 442.
- ¹⁶¹ *Id.* at pp. 474-475.
- ¹⁶² *Id.* at pp. 443-444, 482-483.
- ¹⁶³ *Id.* at p. 475.
- ¹⁶⁴ *Wards Cove Packing Co., Inc. v. Atonio* (1989) 490 U.S. 642, 647.
- ¹⁶⁵ *Ibid.*
- ¹⁶⁶ *Id.* at pp. 647-648.
- ¹⁶⁷ *Id.* at p. 650.
- ¹⁶⁸ *Id.* at p. 651.
- ¹⁶⁹ *Id.* at pp. 651-652, fn. omitted.
- ¹⁷⁰ *Id.* at p. 657.
- ¹⁷¹ 42 U.S.C. § 2000e-2(k).
- ¹⁷² *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.* (1993) 508 U.S. 656, 658.
- ¹⁷³ *Id.* at p. 659.
- ¹⁷⁴ *Id.* at p. 666.
- ¹⁷⁵ See *id.* at pp. 668-669.
- ¹⁷⁶ *Ricci v. DeStefano* (2009) 557 U.S. 557, 574-575.
- ¹⁷⁷ *Id.* at p. 579.
- ¹⁷⁸ *Id.* at p. 592.
- ¹⁷⁹ *Lewis v. City of Chicago* (2010) 650 U.S. 205, 208-209.
- ¹⁸⁰ *Id.* at p. 209.
- ¹⁸¹ *Id.* at p. 210.
- ¹⁸² *Ibid.*
- ¹⁸³ *Id.* at p. 212.
- ¹⁸⁴ *Ibid.*
- ¹⁸⁵ *Ibid.*
- ¹⁸⁶ *James v. Marinship Corp.* (1944) 25 Cal.2d 721, 726.
- ¹⁸⁷ *Id.* at p. 739.
- ¹⁸⁸ *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 272.
- ¹⁸⁹ *Potvin v. Metro. Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066.
- ¹⁹⁰ *Alcorn v. Anbro Eng'g, Inc.* (1970) 2 Cal.3d 493, 496.
- ¹⁹¹ *Id.* at p. 497.
- ¹⁹² *Id.* at pp. 498-499.
- ¹⁹³ *Id.* at p. 500.
- ¹⁹⁴ *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 79.
- ¹⁹⁵ *Payne v. Anaheim Mem'l Med. Ctr., Inc.* (2005) 130 Cal.App.4th 729, 748-749.
- ¹⁹⁶ *Price v. Civ. Serv. Com.* (1980) 26 Cal.3d 257, 277, 283.
- ¹⁹⁷ See *id.* at p. 286.
- ¹⁹⁸ *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 541-542.
- ¹⁹⁹ *Id.* at p. 541.
- ²⁰⁰ *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 326.
- ²⁰¹ *Id.* at p. 332.
- ²⁰² *Commodore Home Sys., Inc. v. Superior Ct.* (1982) 32 Cal.3d 211, 215.
- ²⁰³ *Id.* at p. 220.
- ²⁰⁴ *Id.* at p. 221.
- ²⁰⁵ *Dyna-Med, Inc. v. Fair Employment Housing Com* (1987) 43 Cal.3d 1379, 1383.