The Supreme Court and the Diversification of National Labor Policy

By Lee Modjeska*

In this article the author analyzes certain labor and employment discrimination law decisions issued by the Supreme Court during its 1977 term and examines the extent to which those decisions reflect judicial and congressional diversification inconsistent with the basic goals of national labor policy. The author advocates that the Equal Employment Opportunity Commission be given a stronger and more centralized role.

The labor relations and employment discrimination decisions rendered by the Supreme Court during its October Term, 1977, reflect a series of paradoxes. In four decisions involving the National Labor Relations Act (NLRA)[1] the Court emphasized the concept that meaningful effectuation of national labor relations policy is substantially dependent upon the expertise and centralized authority of the National Labor Relations Board (NLRB). In three other decisions involving the NLRA, however, the Court opened the administration of national labor relations policy to the states and a non-labor federal agency.

The paradoxes extended into the employment discrimination cases. Equal employment opportunity is a part of national labor policy of at least equal import to labor relations matters. Indeed, the Court observed several years ago that "national labor policy embodies the principles of non-discrimination as a matter of highest priority . . . ."[2] Yet, in three decisions involving Title VII of the Civil Rights Act of 1964,[3] the Court failed to accord the

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[1] 29 U.S.C. §§ 151-169 (1976).

[2] Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974) cited in Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 66 (1975).

[3] 42 U.S.C. §§ 2000e to 2000e-17 (1976).

Equal Employment Opportunity Commission (EEOC) the kind of deference and status which it gives the NLRB. These and other Title VII decisions also reflected the inadequacy of the present regulatory and enforcement scheme of Title VII, the undesirability of leaving development of national equal employment policy to the judiciary, and the need for more centralized administration of national policy by the EEOC.

The Court created another paradox when it purported to recognize the past and present tragedies of discrimination in our society, yet placed substantial limitations upon affirmative action endeavors designed to remedy and relieve or prevent that discrimination. Furthermore, the Court prohibited state employment discrimination based upon nonresidency, yet permitted state employment discrimination based upon noncitizenship.

Ultimately, the majority of the decisions mirror the prejudice, hostility, and divisiveness within our society. They exemplify the need for a more vigorous commitment to civil rights not only by Congress, but by all concerned. This article examines the extent to which these decisions reflect judicial and congressional diversification inconsistent with the basic goals of national labor policy.

I. Deferral to Administrative Construction and Interpretation of National Labor Relations Policy

In the following cases arising under the NLRA,[4] the Court recognized and stressed the appropriateness of deferral to administrative agency construction and interpretation. The Court acknowledged the expertise of the NLRB as well as the NLRB's primary and centralized role in the administration and enforcement of national labor relations policy. The Court recognized that Congress gave the NLRB the complex and difficult task of applying a highly specialized statute to a myriad of situations while accomodating the conflicting interests of employers, unions, and employees. The Court also emphasized substantial autonomy for the NLRB in carrying out these statutory functions.

A. Pre-Hire Construction Contracts and Deferral to the NLRB.

In *Iron Workers,*[5] the Court upheld the Board's finding that

[4] NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workerse, 434 U.S. 335 (1978); Beth Israel Hosp. v. NLRB, 98 S.Ct. 2463 (1978); Eastex, Inc. v. NLRB, 98 S. Ct. 2505 (1978); American Broadcasting Cos. v. Writers Guild, 98 S. Ct. 2432 (1978); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

[5] NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron

an uncertified, minority union violated section 8(b)(7)(C)[6] of the Act by picketing to enforce a pre-hire contract lawful under section 8(f).[7] A dominant theme of the Court's opinion concerns the

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Workers, 434 U.S 335 (1978).

[6] 29 U.S.C. § 158(b)(7) (1976).

Section 8(b)(7) provides that . . . it is an unfair labor practice for a labor organization or its agents:

> (7) . . . to picket or cause to be picketed, or threatened to picket or cause to be picketed, or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
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> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.,
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> (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or
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> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.
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> Nothing in this paragraph (7) shall be construed to permit any acts which would otherwise be an unfair labor practice under this section 8(b).

[7] 29 U.S.C. § 158(f) (1976). Section 8(f) provides:

> It shall not be an unfair labor practice under subsectis (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building or construction industry with a labor organization of which building and construction employees are members (not established, maintained or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreements,

appropriateness of deferral to administrative agency construction and interpretation. Over the years labor law has become increasingly complex. Manipulation of one strand of the web of national labor policy creates a myriad of seen and unseen stresses upon other strands. Sections 8(b)(7) and 8(f) are among the most intricate provisions. Only a specialized agency like the NLRB can have a meaningful grasp of the overall design, as well as the inner patterns. The Court was quite correct in its observation that the Board's construction of sections 8(b)(7) and 8(f) is "perhaps not the only tenable one . . . ."[8] The Court's conclusion, however, that the Board's interpretation was "reasonable" and "defensible" and therefore entitled to "considerable deference" appears equally sound.[9]

In *Iron Workers,* Higdon Construction Company and Local 103 had been parties to a collective bargaining relationship since 1968. In 1973 Higdon and the Local entered into a pre-hire contract which contained no union-security provision but which obligated Higdon to follow the terms of a tri-state, multi-employer association agreement. Higdon Contracting Company was formed at about that time for the express purpose of performing nonunion construction work. Thereafter Local 103 picketed two Higdon Contracting projects with signs that read: "Higdon Construction Company is in violation of the agreement of the Iron Workers

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or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

[8] The Court stated that "the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purpose of the relevant statutory actions." NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 98 S. Ct. 335, 341 (1978).

[9] With regard to the contention that the Board had been inconsistent in its application of section 8(f) the Court observed that "An administrative agency is not disqualified from changing its mind . . . ." *Id.* at 351.

Local Number 103." Local 103 did not represent a majority of employees at either project, and the picketing at one project continued for more than 30 days without the filing of any representation petition.

The Board found that the pre-hire contract was not binding upon the employer[10] because Local 103 had never achieved majority status.[11] In the Board's view, a pre-hire contract does not give a minority union the rights of a majority union until the union in fact attains majority status in the relevant unit.[12] Prior to that time a pre-hire contract is voidable and lacks the binding effect of a majority union contract. The Board found that the picketing was not solely to enforce an existing agreement, but was designed to force Higdon Contracting to initially bargain with Local 103.[13] The picketing, therefore, had a proscribed object. Further, Local 103 was uncertified and had not filed a representation petition within a reasonable time from the start of the picketing. Thus, the Board found the picketing violative of section 8(b)(7)(C).[14]

The United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's order.[15] The Supreme Court reversed that judgment and upheld the Board's decision favoring a policy of majoritarian exclusivity.[16] Justice White, writing for the Court, stated that section 8(f)[17] is a limited exception to the general statutory prohibition against minority union recognition and minority agreements.[18] Section 8(f) legal-

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[10] NLRB v. Union 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 339 (1978).

[11] Local Union 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 216 N.L.R.B. 45, 46 (1975).

[12] The Board, in Local Union 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 216 N.L.R.B. 45, 46 (1975), cites David F. Irvin, 194 N.L.R.B. 52 (1971), *enforcement granted in part and denied in part,* 475 F.2d 1265 (3rd Cir. 1973).

[13] Local Union 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 216 N.L.R.B. 45, 46 (1975).

[14] 29 U.S.C. § 158(b)(7) (1976).

[15] Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. N.L.R.B. 535 F.2d 87 (D.C. Cir. 1976).

[16] NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335 (1978).

[17] 29 U.S.C. § 158(f) (1976).

[18] NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 344 (1978). The Court noted its decision in ILGW v. NLRB, 366 U.S. 731 (1961), where the Court held that the employer violated § 8(a)(1) and (2), and that the union violated § 8(b)(1)(A), by entering into an exclusive collective bargaining agreement with a union that represented only a minority of the employees. The Court there stated that there could "no clearer

izes minority agreements in the building and construction industry but does not protect the union against inquiry into majority status during the life of agreement.[19] The Court endorsed the Board's correlative principle that, absent a majority showing, an employer's refusal to honor a pre-hire contract is not violative of section 8(a)(5)[20]

Section 8(f) makes lawful "an agreement" between an employer and a minority union in the building and construction industry.[21] Section 8(f) further provides that such an agreement may contain a union security clause requiring union membership after seven days of employment, may provide for a union referral or hiring hall arrangement, and may specify employment qualifications and priorities. Section 8(f) does not qualify the substantive validity or vitality of such an agreement other than to provide that the agreement does not bar an election petition.[22]

In contrast to the narrow section 8(f) exception for the con-

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abridgment" of the § 7 rights of employees to select their own bargaining representative or to refrain from such activity than to grant exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. ILGW v. NLRB, 366 U.S. 731, 737 (1961).

[19] NLRB v. Local 103, Int'l Ass'n of Bridge, Structural, & Ornamental Iron Workers, 434 U.S. 335, 343 n. 8. The Court contrasted the presumption of continued majority status accorded to majority union contracts, citing Dayton Motel, Inc., 192 N.L.R.B. 674, 678 (1971), *remanded* 474 F.2d 328 (6th Cir. 1973), *enforced,* 525 F.2d 476 (6th Cir. 1976). The court said that the question of a union's majority status is also subject to litigation in a § 301 suit to enforce a § 8(f) contract. "[A]bsent a showing that the union is the majority's chosen instrument, the contract is unenforceable." 434 U.S. at 352. The Court stated that this construction of the statute does not render § 8(f) meaningless. The Court stated:

> Except for § 8(f), neither the employer nor the union could execute pre-hire agreements without committing unfair labor practices. Neither has the Board challenged the voluntary observance of otherwise valid § 8(f) contracts, which is the normal course of events. It is also undisputed that when the union successfully seeks majority support, the pre-hire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit.

Id. at 349-350.

[20] "The employer's duty to bargain and honor the contract is contingent on the union attaining majority support at the various construction sites."

[21] The terms "contract" and "agreement" are used repeatedly and interchangeably throughout the Act, and there is nothing to indicate that § 8(f) means something different.

[22] NLRB v. Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 342-46 (1978).

struction industry regarding minority union agreements, section 8(b)(7) broadly proscribes picketing to force an employer to recognize or bargain with a union. In *Iron Workers,* the Court agreed with the Board that section 8(b)(7)(C) is not to be interpreted literally so as to forbid any picketing with a bargaining object. Section 8(b)(7)(C) does ban picketing to force initial recognition and bargaining. Section 8(b)(7)(C), however, does not ban picketing by a majority union to enforce a contract. Because Local 103 did not represent a majority at the picketed projects, the Court affirmed the Board's conclusion that the picketing violated section 8(b)(7)(C).[23]

The Board, with Court approval, interprets the 8(b)(7) proscription to apply to initial recognition or bargaining. Majority union picketing to enforce a contract cannot be deemed to have such an initial object and therefore does not violate 8(b)(7). Minority union picketing to enforce a section 8(f) contract, however, is deemed to have an object of initial recognition and bargaining, despite the fact that recognition has already been extended and bargaining lawfully established under section 8(f). To conclude that a section 8(f) agreement is not a real and enforceable contract, as do both the Court and Board, or that section 8(f) *de facto* recognition and bargaining is not real recognition and bargaining, certainly appears to entail, to use Justice Stewart's phrase, a "tortured construction"[24] of the statutory language.

Application of the initial recognition theory to bring section 8(f) contract enforcement picketing within section 8(b)(7) seems unduly fictional. The concepts of duty and voluntarism would appear to furnish a more satisfactory rationale. Thus, sections 7,[25]

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[23] [Section 8(b)(7)'s] major purpose was to implement one of the Act's principal goals — to ensure that employees were free to make an uncoerced choice of bargaining agent . . . . *Id.* at 346. Privileging union and employers to execute and observe prehire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes. Hence the proviso that an election could be demanded despite the pre-hire agreement. By the same token, because § 8(b)(7) was adopted to ensure voluntary, uncoerced selection of a bargaining representative by employees, we cannot fault the Board for holding that § 8(b)(7) applies to a minority union picketing to enforce a pre-hire contract.

Id. at 349. The Court commented that, "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *Id.* at 351.

[24] *Id.* at 355 (Stewart, J., dissenting).

[25] 29 U.S.C. § 157 (1976).

8(a)(5),[26] 8(d)[27] and 9(a)[28] read as a "harmonizing text,"[29] impose upon an employer the duty not only to recognize and bargain with the duly chosen majority representative but also to honor any resultant contract.

While section 8(b)(7) abounds in ambiguity and imprecision,[30] nothing in its language or history suggests that it reaches majority union picketing to protest or remedy an employer's breach of contract.[31] Such picketing has traditionally been regarded as a legitimate union exercise of economic power under our national labor policy.[32] No such bargaining duty exists under section 8(f). Section 8(f) provides a narrow construction industry exception to the general statutory ban against minority union agreements. The construction employer has no statutory duty to recognize the minority union. Neither the employer nor the union has any statutory duty to enter into or honor the permitted agreement, rather section 8(f) only provides that they commit no affirmative unfair labor practice if they voluntarily elect to do so. Unless and until the union attains majority status, the contract is voidable. Accordingly, absent a statutorily mandated bargaining duty, there is no overriding policy or principle to warrant exclusion of section 8(f) contract enforcement picketing from the "comprehensive code"[33] of section 8(b)(7). The reason, however, is that as a basic policy matter minority union contracts are not accorded the same status and protections as majority contracts. It is not that section 8(f) precludes the initial establishment of a lawful and viable albeit limited bargaining relationship.[34]

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[26] *Id.* § 158(a)(5).

[27] *Id.* § 158(d).

[28] *Id.* § 158(a).

[29] United States v. Hutchenson, 312 U.S. 219, 231 (1941).

[30] *See generally* Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7),* 52 GEO. L. J. 220 (1964); Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw,* 30 U. CHI. L. REV. 78 (1962).

[31] Majority status alone, without such elements as certification or a contract, does not necessarily protect a union against a § 8(b)(7) violation. *See, e.g.,* Dayton Typographical Union No. 57 v. NLRB, 326 F.2d 634 (D.C. Cir. 1963).

[32] Section 8(b)(7) "establishes safeguards against the Board's interference with legitimate picketing activity." NLRB v. Drivers Local 639, 362 U.S. 274, 291 (1960).

[33] NLRB v. Drivers Local 639, 362 U.S. 274, 291 (1960).

[34] When Congress intended to deal separately with "initial" bargaining problems, it indicated its ability to do so specifically. Thus, section 8(d)(4)(B) prescribes certain mediation agency notices in the case of "bargaining . . . for an initial agreement . . . ." 29 U.S.C. § 158(d)(4)(B) (1976).

B. Employee Solicitation and Distribution

In *Beth Israel Hosp. v. NLRB*,[35] the Court again stressed the principle of deferral to administrative expertise, in a context requiring balancing of organizational and property interests. The Court upheld the Board's finding that the employer violated section 8(a)(1) of the Act[36] by maintenance of a rule which banned employee union solicitation and distribution of union literature during nonworking time in the hospital cafeteria used by employees, patients and visitors.[37] The cafeteria was the common gathering room for employees. There were relatively few places on or in the vicinity of the hospital grounds where employees could congregate. The employer used and permitted use of the cafeteria for employee solicitation and distribution for purposes other than union activity.

The Board found that the rule was an unwarranted infringement of section 7[38] rights violative of section 8(a)(1).[39] The United States Court of Appeals for the First Circuit found that the hospital failed to show that the rule was justified by special circumstances and enforced the Board's order.[40] The Supreme Court affirmed.[41]

In *Beth Israel* the Board balanced the weight of the conflicting interests and allowed the employer to prohibit solicitation in patient care areas but not in mixed employee-patient-visitor access areas. The Court stressed the principles of deferral to administrative expertise and found the line sufficiently clear and rational to warrant approval. With such a myriad of variant situations requiring a balancing of organizational and property interests, it is not surprising that the Court deferred to the Board's expertise.

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[35] 98 S. Ct. 2463 (1978).

[36] 29 U.S.C. § 158(a)(1) (1976).

[37] The rule, which originated prior to union organizational activity, was liberalized following a state labor board proceeding. The rule was revised to its original broad form shortly after the NLRB acquired jurisdiction over nonprofit health care institutions. Beth Israel Hosp. v. NLRB, 98 S. Ct. 2463, 2466 (1978).

[38] 29 U.S.C. § 157 (1976).

[39] Beth Israel Hosp., 223 N.L.R.B. 1193, 1199 (1976). Section 8(a)(1) of the NLRA is codified at 29 U.S.C. § 158(a)(1) (1976).

[40] NLRB v. Beth Israel Hosp. 554 F.2d 4477 (1st Cir. 1977). The court clarified the order to rescind only that part of the rule prohibiting solicitation and distribution in the hospital's eating facilities. The court left the question open as to the validity of the rule as applied to other areas. The Board did not seek review of the confinement of the scope of the order.

[41] Beth Israel Hosp. v. NLRB, 98 S. Ct. 2463, 2477 (1978). Justices Blackmun and Powell, joined by Chief Justice Burger and Justice Rehnquist, wrote separate concurring opinions. *Id.* at 2477-82.

Justice Brennan's opinion for the majority reviewed the accepted Board doctrine that restrictions on employee solicitation during nonworking time and on distribution during nonworking time in nonworking areas, violate section 8(a)(1) unless the employer justifies the restrictions by establishing that special circumstances make the rule necessary to maintain production or discipline.[42] The Court said that, because of the special circumstances of hospitals, the Board was free to develop a slightly different rule which allows prohibitions on solicitation and distribution in strictly patient care areas but not in other areas absent a showing of disruption to patient care.[43]

While Congress enacted special provisions to avoid disruptions of patient care by strikes, the Court found that nothing in the history of the 1974 health care amendments indicated that Congress intended to limit the section 7[44] self-organizational rights of solicitation and distribution in the hospital context.[45] The Court placed the responsibility on the Board for developing that policy in the health-care industry and for striking the balance between employee organizational interests and employer management-property interests.

The hospital challenged the Board's expertise to make the essentially medical judgments concerning disruption of patient care. The Court's forthright acknowledgement of the realistic confines and limitations of the Board's expertise, however, is both surprising and interesting. The Court acknowledged that the Board has no such expertise and stated:

> It is true that the Board is not expert in the delivery of health-care services, but neither is it in pharmacology, chemical manufacturing,

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[42] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943); Stoddard Quirk Mgf. Co., 138 N.L.R.B. 615 (1962). *See also* Hudgens v. NLRB, 424 U.S. 507 (1976); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The Court in Beth Israel Hosp. v. NLRB, 98 S.Ct. 2468 (1978), noted that *Republic Aviation* held:

> [T]he Board is free to adopt, in light of its experience, a rule that, absent special circumstances, a particular employer restriction is presumptively an unreasonable interference with § 7 rights constituting an unfair labor practice under § 8(a)(1), without the necessity of proving the underlying generic facts which persuaded it to reach that conclusion.

Id. at 2470.

[43] Enforcement granted in part and denied in part. Beth Israel Hospital v. NLRB, 98 S. Ct. 2463, 2470 (1978).

[44] 29 U.S.C. § 157 (1976).

[45] Beth Israel Hospital v. NLRB, 98 S. Ct. 2463, 2473 (1978).

> lumbering, shipping or any of a host of varied and specialized business enterprises over which the Act confers its jurisdiction.[46]

In the Court's view, what is important is that the Board is "expert in federal national labor relations policy" and that Congress has given the Board the "responsibility for developing that policy in the health-care industry."[47] Thus, essentially, the court defers to the Board's familiarity with the Act and application of it to the diverse national scene and to its statutory or policy-making experience, rather than to any actual experience in the marketplace.

Deference to Board expertise is consistent with the Court's position in *Hudgens v. NLRB*[48] that it is the Board's task to seek an accomodation between the employees' section 7 rights and the employer's property rights "with as little destruction of one as is consistent with the maintenance of the other."[49] The Court placed the responsibility for determining the appropriate point on the spectrum between section 7 and private property rights with the Board.[50]

The right of employees to freely communicate concerning self-organization and labor disputes is a bedrock principle of constitutional dimensions that is central to the organizational and other concerted activities protected by section 7. Justice Rutledge

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[46] *Id.* at 2473.

[47] *Id.* at 2473-2474.

[48] 424 U.S. 507 (1976). In *Hudgens* the Court found that the Board's decision concerning the legality of shopping mall picketing partly rested upon invalid first amendment notions, namely a constitutional right of access to private property such as shopping centers that might be classified as quasi-public. The Court remanded the case to the Board to evaluate the legitimacy of the picketing solely under the statutory criteria of § 7. The Court made clear its rejection of the principles of Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). On remand the Board applied the NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), balancing test and found that the shopping mall owner's property rights must yield to the employees' § 7 rights. Scott Hudgens, 230 N.L.R.B. 414, 95 L.R.R.M. 1351 (1977), *supplementing,* 192 N.L.R.B. 111, 77 L.R.R.M. 1872 (1973).

[49] Hudgens v. NLRB, 424 U.S. 507, 521 (1978), *quoting* NLRB v. Babcock & Wilcox, Co., 351 U.S. 105, 112 (1956).

[50] [T]he locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accomodation must rest with the Board in the first instance.

Hudgens v. NLRB, 424 U.S. 507, 522 (1978).

stated in *Thomas v. Collins*[51] that "[t]he right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." Similarly, in *Thornhill v. Alabama*[52] Justice Murphy stated,

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.[53]

The vitality and significance of these organizational rights was underscored in the broad pronouncement of *NLRB v. Babcock & Wilcox Co.*,[54] built upon *Republic Aviation Corp. v. NLRB*,[55] that "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."[56] Thus, in both *Beth Israel* and *Eastex, Inc. v. NLRB*,[57] discussed more fully below, the Court gave substantial reaffirmation to these basic section 7 rights.

The Court concluded in *Beth Israel* that the Board's balancing of employee organizational rights with the employer's property rights was supported by substantial evidence and was not irra-

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[51] 323 U.S. 516, 532 (1944). *See* Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939).

[52] Thornhill v. Alabama, 310 U.S. 88 (1940).

[53] *Id.* at 102-103 [citations omitted]. National labor policy "manifests a congressional intent to encourage free debate on issues dividing labor and management," and care must be taken to minimize intrusions or threats of intrusions which might "dampen the ardor or labor debate and truncate the free discussion envisioned by the Act . . . ." Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 62, 64 (1966). *See* Old Dominion Branch 496, NALC v. Austin, 418 U.S. 264 (1974).

[54] 351 U.S. 105 (1956).

[55] 324 U.S. 793 (1945).

[56] NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956). *Accord,* Hudgens v. NLRB, 424 U.S. 507 (1976); NLRB v. Magnavox Co., 415 U.S. 322 (1974). *See generally* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 HARV. L. REV. 38 (1964); Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property,* 49 MINN. L. REV. 505 (1965); Gould, *The Question of Union Activity on Company Property,* 18 VAND. L. REV. 73 (1964); Hanley, *Union Organization on Company Property — A Discussion of Property Rights,* 47 GEO. L.J. 226 (1958); Modjeska, *Commentaries on the National Labor Relations Board: 1977,* 39 OHIO ST. L.J. 1, 19-30 (1978).

[57] 98 S. Ct. 2505 (1978).

tional.[58] The Court noted particularly the absence of evidence showing that solicitation was or would be harmful to patients, and that the hospital permitted some other solicitation and distribution.[59] The Court said the Board could rationally uphold prohibitions against solicitation in the dining areas of public restaurants but forbid such prohibitions in a hospital cafeteria. In the Court's view the different employer interests in the two situations justified different results. In the retail marketing and restaurant industries the primary business purpose of serving customers is done on the selling floor or in the dining area. Employee solicitation in such areas could substantially disrupt the business.

In the hospital context, however, the main functions of patient care and therapy are not performed in the cafeteria but rather in areas such as operating rooms, patients' rooms, and patients' lounges. The employer may curtail organizational activity in these latter areas. The Court observed that the Board's guidelines concerning no-solicitation and no-distribution rules in hospitals are still evolving and reserved authority to make further revisions.[60]

Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, concurred on the ground that the Beth Israel cafeteria was basically an employee-patron facility analogous to an employee cafeteria in a manufacturing plant. He regarded the situation as unusual for hospitals and expressed concern over application of an open-solicitation approach in the more usual hospital cases where the hospital cafeterias and coffeeshops are primarily patient and patient-relative oriented.[61] Justice Blackmun stated that "I entertain distinct doubts about whether the Board, in its preoccupation with labor-management problems, has properly sensed and appreciated the true hospital operation and its atmosphere and the institution's purpose and needs."[62]

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred on the ground that substantial evidence as to the invalidity of the no-solicitation and no-distribution rule supported the Board's decision in the particular case. He would not, however, apply the presumptions of the invalidity of such rules in the hospital context. In his view the conditions in in-

[58] Beth Israel Hosp. v. NLRB, 98 S. Ct. 2463, 2473-74 (1978).
[59] *Id.* at 2474-75.
[60] *Id.* at 2477.
[61] *Id.* at 2478.
[62] *Id.*

dustrial or manufacturing plants which support such presumptions[63] cannot be transferred automatically to other workplaces, and particularly not to hospitals.[64]

Eastex, Inc. v. NLRB[65] also concerned the distribution of union literature. In *Eastex,* the Court upheld the employee's right to distribute a newsletter in nonworking areas of the employer's plant during nonworking time. In this case, the union, which represented the employer's production employees, decided to distribute a four-part newsletter to the production employees in anticipation of upcoming contract negotiations.[66] The first and fourth sections of the newsletter urged employee support for and participation in the union and extolled the benefits of union solidarity. The remaining two sections concerned a state right-to-work statute and the federal minimum wage.

The employer refused to allow employees to distribute the newsletter anywhere at any time in the plant. The employer denied such permission because it did not regard the second and third sections of the newsletter as related to the employer-employee relationship. Rather, it felt that the matter was essentially political and that the union had alternate means for communication with the employees.

The Board found that distribution of all of the contents of the newsletter was protected under section 7 as concerted activity for

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[63] Justice Powell stated:

> The rule of *Republic Aviation* [324 U.S. 793] was adopted in the context of labor relations in industrial and manufacturing plants, where third parties unconnected with labor or management generally are not involved. In such a setting, it is relatively simple to divide the work environment into the two spheres defined in *Peyton Packing* [49 N.L.R.B. 828] . . . .
>
> Conditions in industrial or manufacturing plants differ substantially from conditions in sales and service establishments where employees and members of the public mingle.

Id. at 2478-2479.

[64] Justice Powell stated:

> A presumption developed in and geared to the context of industrial establishments, which the Board has declined to apply to retail stores, simply has no relevance to hospitals . . . . I would hold that the potential impact on patients and visitors of union solicitation and distribution of literature in hospitals requires the Board to make a far more sensitive inquiry into the actual circumstances of each case.

Id. at 2478-2479.

[65] 98 S.Ct. 2505 (1978).

[66] The union hoped thereby to increase union support and membership. The plant is located in Texas, a right-to-work state. *Id.* at 2508-2509.

the "mutual aid or protection"[67] of employees.[68] Because the employer had failed to show that its refusal was based upon special circumstances, the ban on distribution in nonworking areas during nonworking time violated section 8(a)(1).[69] The Fifth Circuit enforced the Board's order,[70] holding that section 7 protection extended to the entire newsletter because it was "reasonably related to the employees' jobs or to their status or condition as employees in the plant."[71]

The Supreme Court affirmed[72] and held that the so-called political sections of the newsletter came within the "mutual aid or protection" clause of section 7 and that the employees had the right to distribute the newsletter on the employer's property. The Court held that employees retain the protections of section 7 when they engage in otherwise protected concerted activities in support of employees of other employers,[73] as well as "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."[74]

The Court agreed with the Board that the second and third sections of the newsletter were protected under the "mutual aid or protection" clause of section 7. The second section, concerning incorporation of the right-to-work statute into the state constitution, was protected because union security is central to union solidarity and is a mandatory subject of bargaining in non-right-to-work states. The third section, criticizing a presidential veto of the proposed minimum wage increase and urging employees to

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[67] Section 7 of the Act provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activitiese for the purpose of collective bargaining or other *mutual aid or protection,* and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in the labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (1976) [[emphasis added].

[68] Eastex Inc., 215 N.L.R.B. No. 58, 271 (1974).

[69] 29 U.S.C. § 158(a)(1) (1976).

[70] Eastex, Inc. v. N.L.R.B., 550 F.2d 198 (5th Cir. 1977).

[71] *Id.* at 203.

[72] Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2517 (1978).

[73] The Court noted that § 2(3) of the Act defines "employee" to "include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . ." *Id.* at 2511. Section 2(3) is codified at 29 U.S.C. § 152(3) (1976).

[74] *Id.* at 2512.

register to vote, was protected because the minimum wage level generally affects bargaining wage levels. Further, the Eastex employees could legitimately be concerned with the plight of sub-minimum wage employees,[75] who might in turn support the Eastex employees in the future.

The Court held that the Board properly found that the employees were entitled to distribute the newsletter in nonworking areas of the employer's property during nonworking time.[76] The Court regarded the case as generally controlled by *Republic Aviation Corp. v. NLRB*,[77] where the Court held that an employer may not ban employee distribution of union organizational literature in nonworking areas during nonworking time absent a showing that the ban is necessary to maintain plant discipline or production.[78] The Court cautioned that it was not holding that the rule of *Republic Aviation* applies to every in-plant distribution of literature protected by section 7, noting that the area was new and evolving.

The Court rejected the employer's contention that where the matter involved in the distribution is beyond the employer's control, the rule of *NLRB v. Babcock & Wilcox Co.* rather than *Republic Aviation* should apply, and that the distribution should be allowed only if alternate channels of communication were una-

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[75] Eastex employees were above the minimum wage. *Id.* at 2514.

[76] Justice White concurred but expressed concern over a doctrine which requires the employer to permit employee distribution on the employer's property of matters not related to the employer-employee relationship or to the bargaining relationship. Justice White expressed doubt that federal law would always require the employer to permit solicitation or distribution protected by § 7 on the employer's property. *Id.* at 2519. Justice Rehnquist, joined by Chief Justice Burger, dissented on the ground that the employer had a clear property right to prohibit distribution on its property of political material relating to matters beyond its control. In his view the precedents relied upon by the majority, particularly Republic Aviation Co. v. NLRB, 324 U.S. 703 (1945) and NLRB v. Babcock & Wilcox, Inc., 351 U.S. 105 (1956), were limited as an accommodation to the rights of self-organization. Justice Rehnquist found it clear that "Congress never intended to require the opening of private property to the sort of political advocacy involved in the case." Eastex, Inc. v. NLRB, 98 S. Ct. at 2519.

[77] 324 U.S. 793 (1945).

[78] Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2515 (1978). The Court also noted that the rule of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), requiring consideration of alternate means of communication applies where non-employees seek to enter upon the employer's property, not where employees are already lawfully on the property. The Court stated that the "difference was that the non-employees in *Babcock & Wilcox* sought to trespass on the employer's property, whereas the employees in *Republic Aviation* did not." Eastex, Inc. v. NLRB, 98 S. Ct. at 2515.

vailable.[79] The Court observed that since the employees were already lawfully on the employer's property, the employer's management interests rather than its property interests were involved.

Once more, as in *Thornhill v. Alabama*,[80] *Beth Israel* states that free discussion on labor related matters is essential in a modern industrial society.[81] Nonworking time in nonworking areas of the plant are the time and place uniquely appropriate and often solely available to modern industrial employees for exercising employment-related freedom of speech and association.[82]

Absent real interference with employer property and/or management interests,[83] employer suppression of employment-related employee speech and distribution of literature seems flatly inconsistent with the fundamental breadth of section 7's protective ambit.[84] Both *Beth Israel* and *Eastex* support that proposition. Furthermore, as a general nonstatutory proposition, it is none of the employer's business what the employees discuss, whether or not related to their employment interests. If the "mutual aid or protection" clause defines the limits of permissible plant discussion, then the requisite *nexus* is satisfied when the subject matter discussed is reasonably related to the employees' employment status, interests or conditions.

Determining the permissibility of plant discussion based upon the "political" nature of the material seems unworkable. This is especially true because the entire area of labor-management ac-

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[79] Eastex, Inc. v. NLRB, 98 S. Ct. 2505, 2516 (1978).

[80] 310 U.S. 88, 102-103 (1940).

[81] Beth Israel Hosp. v. NLRB, 98 S. Ct. 2463, 2469-2470 (1978).

[82] Interference with production or discipline, or the creation of litter, are examples of likely infringement. *E.g.*, McDonnell Douglas Corp. v. NLRB, 472 F.2d 539 (8th Cir. 1973); Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962); May Dept. Stores, 59 N.L.R.B. 976 (1944), *enforced as modified*, 154 F.2d 533 (8th Cir. 1946).

[83] *E.g.*, NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

[84] Note may be taken of the labor dispute definitions in § 2(9) of the NLRA and in § 13 of the Norris-La Guardia Act, 29 U.S.C. §§ 101, 113, which encompass a broad range of controversies and do not confine the statutory protections to immediate disputants or proximate relationships. *See* United States v. Hutcheson, 312 U.S. 219 (1940). Comparison may be made with the standards for determination of mandatory subjects of bargaining. *E.g.*, Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); Local 189, Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959); NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958). *See generally* Modjeska, *Guess Who's Coming to the Bargaining Table?*, 39 OHIO ST. L. J. 415 (1978).

tivity and regulation is charged with "political" elements. Similarly, a standard based upon the appropriateness of a topic of discussion for a particular industrial environment would be equally untenable. It has long been settled that the reasonableness of workers' decisions to engage in concerted activity is "irrelevant to the determination of whether a labor dispute exists or not."[85]

The foregoing solicitation and distribution cases show not only the Court's deferral to Board judgment and expertise but also the Board's underlying concern with the need to afford meaningful scope and protection to employee's fundamental section 7 rights. The Court and Board give substantial reaffirmation to the rights of employees to discuss self-organization and to communicate their positions in labor disputes. Finally, the decisions reaffirm the proposition that restrictions and intrusions upon section 7 rights will not be tolerated without substantial justification.

C. Union Discipline During a Strike

The Court again deferred to the Board in *American Broadcasting Co. v. Writers Guild*,[86] where the Court upheld the Board's adjustment of the conflicting interests of employers, supervisors and unions in the context of a strike. The Court held that the proscriptions of section 8(b)(1)(B)[87] apply not only to direct pressures on an employer, but also to indirect coercion of employers through pressure applied to supervisors which affects either their willingness to serve or their manner of serving.[88] Moreover, the

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[85] NLRB v. Washington Aluminum Co., 370 U.S. 9, 16 (1962). *See also* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 344 (1938): "The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute."

[86] 98 S. Ct. 2423 (1978).

[87] Section 8(b)(1)(B) makes it an unfair practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B) (1976).

[88] In this case, the union represented writers employed by various employers engaged in the production of motion picture and television films. The union issued strike rules applicable to all members, including supervisor-members. The rules prohibited members from crossing a picket line at struck premises or entering struck premises for union contract related purposes. They also required members to accept assigned picket duty, and prevented members, including supervisor-members, from working with anyone who violated the strike rules. Upon their employers' advise, the supervisor-members reported to work and

Court agreed with the Board that the relevant question is whether the union's discipline would adversely affect the supervisor's conduct in performing collective bargaining or grievance adjustment functions.[89] Union discipline which influences the supervisor in the performance of such functions during or after the strike deprives the employer of the supervisor's full services and thereby coerces and restrains the employer's choice of grievance-adjusting or collective bargaining representatives. Consequently, the union violated section 8(b)(1)(B) when it disciplined supervisory members who performed the employer's required supervisory work, but did no bargaining unit work.[90]

Under Congress' scheme employers are entitled to a bargaining representative and the undivided loyalty of supervisors.[91] Unions, on the other hand, are entitled to prescribe rules governing membership as well as protecting union status and solidarity during

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performed only their regular and primary functions. They did not writing or other bargaining unit work covered by the contract. The union conducted disciplinary trials against these supervirsor-members and thereafter imposed various penalties including expulsion, suspension, and substantial fines. The Board found that the union violated section 8(b)(1)(B) by attempting to compel the supervisor-members to refrain from working during the strike and by disciplining them for doing so. The United States Court of Appeals for the Second Circuit denied enforcement of the Board's order. The Supreme Court reversed the lower court and upheld the Board's order.

[89] The Court stated:

> This is not to say that *every* effort by a union to discipline a supervisor for crossing a picket line to do supervisory rather than rank-and-file work would satisfy the standards specified in *FP&L* [Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790 (1974)], or that on facts present here there is necessarily a violation of § 8(b)(1)(B) [29 U.S.C. § 158(b)(1)(B) (1976)]. But we are of the view that the Board correctly understood *FP&L* to mean that in ruling upon a § 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects to work during a strike, it may — indeed, it must — inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B).

American Broadcasting Cos. v. Writers Guild, 98 S. Ct. 2423, 2434 (1978).

[90] Justice Stewart, joined by Justices Brennan, Marshall and Stevens, dissented. *Id.* at 2438.

[91] Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790, 806-808 (1974); Hanna Mining Co. v. Dist. 2, MEBA, 382 U.S. 181 (1965). *See* Beasley v. Food Fair, Inc., 416 U.S. 653, 659-662 (1974); NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974); MEBA v. Interlake S.S. Co., 370 U.S. 173, 182 (1962). *See generally* Grissom, *Union Discipline of Supervisor-Members: Drawing the Line After Florida Power,* 27 ALA. L. REV. 575 (1975).

strikes[92] and supervisors are entitled to belong to unions.[93] Congress has given no real direction toward resolution of the tension created among these conflicting interests when a union fines supervisors for working during a strike. The balance struck by the Court and Board in *American Broadcasting*, however, is both a logical and reasonable accommodation of the various interests involved. The majority's decision also represents a rather fundamental policy determination concerning the balance of economic power during strikes which, as the dissent makes clear,[94] seems more appropriate initially for congressional resolution. As a realistic matter, however, it is unlikely that Congress would resolve the problem.[95] Hence interstitial judicial legislation[96] provides an appropriate resolution.

D. A Paradox: Federal Maritime Commission v. Pacific Maritime Association

In *Federal Maritime Commission v. Pacific Maritime*

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[92] NLRB v. Allis-Chalmers Mgf. Co., 388 U.S. 175, 181-182, (1967). *See* NLRB v. Boeing Co., 412 U.S. 67 (1973); Scofield v. NLRB, 394 U.S. 423 (1969). *See also* Booster Lodge, 405, 412 U.S. 84 (1973); NLRB v. Granite State Joint Bd., Textile Workers Local 1029, 409 U.S. 213 (1972); NLRB v. Industrial Union of Marine Workers, 391 U.S. 418 (1968). *See generally* Graver, *The Boeing Decision: A Blow to Federalism, Individual Rights and Stare Decisis*, 122 U. PA. L. REV. 556 (1974); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

[93] Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790 (1974). *See* Hanna Mining Co. v. Dist. 2, MEBA, 382 U.S. 181 (1965); Nassau & Suffolk Contractors' Ass'n, 118 N.L.R.B. 174 (1957).

[94] Justice Stewart, joined by Justices Brennan, Marshall and Stevens, dissented. Justice Stewart found that the union had no interest in restraining or coercing the employer in the selection or the manner of performance of their bargaining or grievance adjustment functions. Rather, the union's "sole purpose was to enforce the traditional kinds of rules that every union relies on to maintain its organization and solidarity in the face of the potential hardship of a strike." American Broadcasting Co. v. Writers Guild, 98 S. Ct. 2423, 2439 (1978). The sole function of § 8(b)(1)(B) is to protect an employer from coercion in his free choice of representative, not to enable the employer to interfere in the union's relationship with its supervisor-members. In Justice Stewart's view the effect of the Court's decision is to prevent a union with supervisory members from effectively maintaining a strike. Such a result presents an impermissible change in the balance of power established by Congress. *Id.* at 2440.

[95] *See* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1376-77 (1972).

[96] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

Association,[97] the majority of the Court found collective bargaining agreements containing anti-competitive restraints in the maritime industry subject to filing and approval of the Federal Maritime Commission under the Shipping Act of 1916.[98] Justice Powell's dissent, representing the better view, found that as a class, bona fide collective bargaining agreements were not within the filing and prior approval requirements of section 15 of the Shipping Act.[99] While prior clearance is not required, implementation of the agreement may be reviewed under other provisions of the Shipping Act and antitrust laws.[100] The contrary result undermines federal labor policy, imposes undue burdens on collective bargaining, and does not significantly further the objectives of the Shipping Act.

In his dissent, Justice Powell observed that the Commission is inexpert in labor and labor-antitrust matters. Its assertion of section 15 jurisdiction over maritime labor relations[101] would result in uncertainty, delay and disruption.[102] Thus, the dissent cautioned against adopting a policy which would undermine the NLRB's authority over labor relations.[103]

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[97] 435 U.S. 40, 67 (1968) (Powell, Brennan, Marshall, JJ., dissenting).

[98] 46 U.S.C. §§ 815 (1976).

[99] Justice Powell found that implementing agreements among carriers, stevedoring contractors and marine terminal operators, and not collective bargaining agreements, are subject to Commission authority under § 15. Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40, 64 (1978).

[100] Justice Powell stated that, "The parties cannot agree to terms that violate the law, but the remedy that is generally applied to post-execution invalidation and assessment of damages, rather than 'official compulsion over the actual terms of the contract.' " *Id.* at 71 (quoting Porter Co. v. NLRB, 397 U.S. 99, 107-108 (1970)).

[101] *Id.* at 64-65 n.1. Justice Powell noted that prior to 1968 the Commission had not applied § 15 to labor contracts, and that no intervening legislation justified the belated assertion of jurisdiction. Justice Powell also noted the Commission's prior assertion of jurisdiction over a labor contract in New York Shipping Ass'n v. Federal Maritime Comm'n, 495 F.2d 1215 (2d Cir. 1974), *cert. denied*, 419 U.S. 964 (1974).

[102] Justice Powell observed that the majority opinion was ambiguous as to whether ordinary labor contracts were exempt from § 15 filing because of presumed conformity with Shipping Act and antitrust policies or whether such contracts would be routinely approved after filing. Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40, 72 n.9 (1978). He stated, "Few agreements negotiated between a union and a multi-employer bargaining association for the purpose of governing working relations at a major port are likely to be so 'routine' that the parties safely may assume that they enjoy an exemption from § 15." *Id.* at 72.

[103] J. Powell warned that,

> The prospects for peaceful resolution of labor disputes in an industry

With due regard for the complexity of antitrust and maritime law, the majority's proposition that collective bargaining agreements are subject to filing and prior approval with the Federal Maritime Commission is startling. A potential for direct conflict with the authority of the NLRB and abritrators exists. Furthermore, subjecting collective bargaining agreements to the Commission's jurisdiction seriously interferes with the overall balance struck by national labor policy concerning the negotiations, regulation and enforcement of collective bargaining agreements. Ultimately, the belated assertion and grant of jurisdiction over maritime labor relations to an agency inexpert in both labor relations and labor law does not sound promising, either conceptually or pragmatically. As the dissent in *Federal Maritime Commission* pointed out, such a system of prior administrative restraints clashes with the preferred and protected status of a "federally sanctioned"[104] labor contract.

II. Decentralization and Diversification in National Labor Relations Policy

The foregoing cases reflect a Court focus upon the centralized administration and enforcement of national labor policy. In the following group of cases, in constrast, the Court permitted the states and a non-labor federal agency to regulate conduct subject to the NLRA. Contrary to the cases discussed previously, therefore, the following decisions suggest a trend toward decentralization and diversification.

Prior preemption decisions have generally established that in order to avoid state and federal conflicts of law and to further the primary administrative authority of the Board, the states lack jurisdiction when the activity involved is arguably subject to the NLRA.[105] State jurisdiction and remedies have been permitted in

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> marked by a history of industrial strife . . . are not enhanced by the Court's imposition of a system of administrative prior restraints. Collective bargaining works best when the parties are free to arrive at negotiated solutions to problems without first having to secure the approval of government regulators. The legal consequences of a bargain may be assessed after the fact, but the parties should be free to negotiate an agreement within the framework of procedures prescribed by the National Labor Relations Board.

Id. at 69 [citations omitted].

[104] Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 297 (1959).

[105] *See* Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. Rev. 1435 (1970). Thus, the Court stated in *Garmon* that, "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive

a variety of situations including areas of serious local concern or of only peripheral concern to the NLRA or federal labor policy.[106] In *Sears, Roebuck T & Co. v. San Diego County Dist. Council of Carpenters,*[107] however, the Court allowed the states to regulate conduct clearly subject to the Act and of central concern to federal labor policy. Thus, the Court effectively turned back the clock on the evolution of the preemption doctrine.

In *Sears* the Court held that a state court had jurisdiction to enforce state trespass laws against peaceful union picketing arguably subject to the NLRA.[108] The employer was having carpentry work performed at its department store by persons who had not been dispatched from the union's hiring hall. The union requested that the employer have the work performed by a contractor using dispatched carpenters or that the employer sign the union's master labor agreement. When the employer did not accede to the union's requests, the union commenced peaceful and orderly picketing on the privately owned walkways and parking areas adjacent to the store.[109] The state court enjoined the

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competence of the NLRB if the danger of state interference with national policy is to be averted." San Diego Bldg. Trade Council v. Garman, 359 U.S. 236, 245 (1959).

[106] *E.g.*, Farmer v. Carpenters Local 25, 426 U.S. 903 (1977) (intentional infliction of emotional distress); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974) (picketing of foreign flag vessels); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) (libel); UAW v. Russell, 356 U.S. 634 (1958) (violence); IAM v. Gonzalez, 356 U.S. 617 (1958) (wrongful expulsion from union membership); Local 1111, IBEW v. Wisconsin Employee Relations Bd., 315 U.S. 740 (1942) (mass picketing). *Compare* Hanna Mining Co. v. MEBA, 382 U.S. 181 (1965) *with* Beasley v. Food Fair, Inc., 416 U.S. 653 (1974) (supervisors).

[107] 436 U.S. 180 (1978).

[108] Justices Blackmun and Powell concurred separately. Justice Brennan, joined by Justices Stewart and Marshall, dissented. *Id.* at 208-37.

[109] The union refused the employer's demand that the pickets be removed from the employer's property, and the employer filed an action in the superior court of California seeking an injunction against the continuing trespass. The court entered a temporary restraining order and thereafter a preliminary injunction, enjoining the union from picketing on the employer's property. *Id.* at 183.

The California Court of Appeals upheld the injunction as within that exception to the general labor preemption doctrine which permits state regulation of conduct which touches interests deeply rooted in local feeling and responsibility. The Supreme Court of California reversed the appellate court, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 17 Cal.3d 893, 553 P.2d 603, 132 Cal.Rptr. 443 (1976), holding that the picketing was arguably subject to the NLRA within the meaning of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), and therefore beyond state jurisdiction. 436 U.S. at 183-184.

The California Supreme Court found that the picketing was arguably pro-

union from picketing on the employer's property.

The Court found that the picketing was both arguably prohibited as well as arguably protected by federal law, but that no danger of federal-state conflict existed because federal law was concerned with the objective of the picketing, whereas state law was concerned with the location of the picketing.[110] Thus, if an

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tected by § 7 of the Act because its purpose was to secure work for union members as well as to publicize that the employer was not observing area standards. The court found that the picketing was arguably prohibited by § 8 because it may have been recognitional picketing proscribed by § 8(b)(7)(C). The court concluded that because the picketing was arguably protected by § 7 and arguably prohibited by § 8, state jurisdiction was preempted under *Garmon*. 436 U.S. at 183.

[110] The Court stated that the San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), guidelines have not been applied in a literal, mechanical fashion, and that traditional areas of state regulation are not to be preempted without careful analysis of the various interests affected. With regard to the arguably prohibited branch of the *Garmon* doctrine the key questions concern the significance of the state interest involved and whether or not the respective controversies presented to the state and federal forums are identical. The Court stated:

> The critical inquiry, therefore, is not whether the State is enforcing the law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in Garner v. Teamsters Local 776, 346 U.S. 485 (1953)) or different from (as in Farmer v. Carpenters Local 25, 430 U.S. 290 (1977)) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

Sears, Roebuck & Co. v. San Diego County Dist. County of Carpenters, 436 U.S. 180, 197 (1977). The Court found that if the employer had filed charges, the federal issue would have concerned the recognitional or work assignment objectives. *Id.* at 198. In state court the employer challenged only the location of the picketing, so the issue of the legality of the objective of the picketing under federal law was irrelevant. The Court therefore concluded that state court assertion of jurisdiction over the trespass claim "would create no realistic risk of interference" with the NLRB's unfair labor practice jurisdiction. *Id.*

The Court found that the arguably protected branch of the *Garmon* doctrine invokes the questions concerning the NLRB's primary jurisdiction, *id.* at 199-200; but the primary jurisdiction rationale does not preclude state jurisdiction when the employer cannot invoke, and the union cannot be forced to invoke the Board's jurisdiction to determine the protected status of the conduct. The arguably protected character of the picketing could create a potential overlap between the controversies presented to the state court and the NLRB. Before granting relief the state court would have to decide whether the trespass was protected by federal law, and in making that determination the state court

object of the picketing was to force the employer to reassign the carpentry work from its own employees to union-dispatched workers, then the picketing woud be prohibited by section 8(b)(4)(D).[111] Alternatively, if an object of the picketing was to force the employer to sign a pre-hire or members-only agreement with the union, then the picketing was arguably protected by section 8(b)(7)(C). Moreover, if such charges had been filed, the Board's concern would have been limited to the objective of the picketing and the location of the picketing would have been irrelevant.

Conversely, if the sole object of the picketing was to force the employer to abide by area standards,[112] then the pickering was arguably protected by section 7,[113] and the employer's demand that the pickets leave the employer's property would violate section 8(a)(1). In *Sears*, the Court held that neither aspect of the picketing was sufficient to preempt state authority over enforcement of its trespass laws where the subject matter regulated by the state is the location and not the object of the picketing.[114] Central to the decision, however, was the fact that the union declined to file section 8(a)(1) charges which would have provided the NLRB with an opportunity to resolve the protected nature of its conduct.

In its decisions this term in *Beth Israel Hosp. v. NLRB*[115] and *Eastex, Inc. v. NLRB*,[116] as well as in such earlier decisions as

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might have to make an accomodation between the employer's property rights and the employee's § 7 rights. If the union filed § 8(a)(1) charges against the employer's demand for removal of the pickets, the Board might have to make the same accommodation. Unlike the arguably prohibited aspect, questions concerning the location would be at issue in both forums.

The Court found no danger of overlapping jurisdiction here, however, because "the primary jurisdiction rationale justifies pre-emption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so." *Id.* at 201. The employer could not directly obtain an NLRB determination concerning the federally protected status of the trespass, and the union could have elected not to file a charge to obtain such a determination. *Id.* at 201-202.

[111] 29 U.S.C. § 158(b)(4)(D) (1976).

[112] Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 186-187 (1977).

[113] *Id.* at 187. The Court cited Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970).

[114] The Court noted "Since the Wagner Act was passed in 1935, this Court has not decided whether, or under what circumstances, a state court has power to enforce local trespass laws against a union's peaceful picketing. The obvious importance of this problem led us to grant certiorari in this case." Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 184 (1978). The Court noted that the issue was left open in Meat Cutters Local 427 v. Fairlawn Meats, Inc. 353 U.S. 20, 24-25 (1957). 436 U.S. at 184 n.6.

[115] 98 S. Ct. 2463 (1978).

[116] 98 S. Ct. 2505 (1978).

NLRB v. Babcock & Wilcox Co.[117] and *Hudgens v. NLRB,*[118] the Court stressed the complexity, difficulty and delicacy of balancing employer property rights with employee organizational and bargaining rights. The Court acknowledged both the need for the Board's expertise in making those accommodations, and the congressional delegation of that task to the Board. That state courts are competent to undertake this specialized task is dubious. As Justice Brennan's dissent in *Sears* notes, state courts lack the NLRB's expertise and specialized sensitivity to labor matters and that state action in this area will "threaten the fabric of national labor policy."[119]

The real problem with *Sears* is that it fails to realize that the Board, not the courts, "is expert in federal national labor relations policy . . . ."[120] Even more dubious is the proposition that the states are equipped to handle national labor relations policy. "To leave the State free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."[121] *Sears* opens a breach of uncertain dimensions in the central wall of national labor policy and apparently reflects a trend toward legal decentralization and diversity.[122]

The Court also allowed regulation in *Malone v. White Motor Corp.,*[123] wherein the Court held that the National Labor Relations Act (NLRA)[124] did not preempt state regulation of a negotiated pension plan.[125] The Court held that while pensions are pro-

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[117] 351 U.S. 105 (1956).

[118] 424 U.S. 507 (1976).

[119] Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 237 (1978).

[120] Beth Israel Hosp. v. NLRB, 98 S.Ct. 2463, 2473-74 (1978).

[121] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

[122] See BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 116 (1970).

[123] 98 S. Ct. 1185 (1978).

[124] 29 U.S.C. §§ 151-169 (1976).

[125] In White Motor v. Malone, 98 S. Ct. 1185 (1978), the employer and the union negotiated a pension plan, as part of their collective bargaining contract, which contained specific standards for qualifications, vesting, levels of benefits and funding, and which provided that the employer had the right to terminate the plan. A few weeks before the employer terminated the plan the state enacted a pension law which established more stringent standards for funding and vesting than those contained in the parties' negotiated plan, and which imposed a pension fundig charge directly against an employer who terminated a pension plan or place of employment. Thereafter, when the employer terminated the plan due to a plant closure, the state imposed a $19 million dollar pension funding charge against the employer, a sum far in excess of the employer's liability under the negotiated plan.

per subjects of compulsory bargaining under the NLRA, the NLRA does not foreclose all state regulation of pensions. The Court found that resolution of the preemption question turns upon the intent of Congress. Nothing in the NLRA expressly precludes state regulation of negotiated pension plans, and preemption cannot be implied in light of the federal Welfare and Pension Plans Disclosure Act of 1958.[126]

The Court found that the provisions and history of the Disclosure Act "clearly indicate that Congress at that time recognized and preserved state authority to regulate pension plans, including those plans which were the product of collective bargaining."[127] The Court found that the Disclosure Act reflected Congress' intent at that time to create a federal reporting and disclosure statute, not a regulatory statute, and thus leave regulatory responsibility over pension plans to the states. The Court also found that Congress drew no distinction between collectively bargained and all other pension plans.

The subsequent enactment of the Federal Employee Retirement Income Security Act (ERISA),[128] which expressly preempts state regulation of covered employee pension plans, makes *White Motor* of limited applicability. Like *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*,[129] the decision reflects the Court's willingness to permit some state regulation of a matter regulated by federal labor law. Unlike *Sears,* however, the

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[126] 29 U.S.C. § 301 (1970). The Disclosure Act was specifically repealed by the Federal Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, § 2, 88 Stat. 829 (codified at 29 U.S.C. § 1001 (1976)), which did not become effective until after the operative events in the instant case.

[127] Malone v. White Motor Corp., 98 S. Ct. 1185, 1190 (1978). The Court noted particularly §§ 10(a) and 10(b) of the Disclosure Act. Section 10(a) shields employers from duplicative state and federal filing requirements and then states in part that "nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan." Section 10(b) provides:

> The provisions of this Act, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

[128] Act of Sept. 2, 1974, Pub. L. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1381 (1976)).

[129] Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpentry, 98 S. Ct. 1745 (1978).

decision reflected a traditional preemption analysis focused upon congressional preemptive intention.

The Court in *White Motor* stated that its decision was not inconsistent with the general principles of *Local 24, Int'l Bhd. of Teamsters v. Oliver,*[130] that the collective bargaining process is to be independent from state interference.[131] The Court said there is an exception, however, where, as here, Congress has indicated that the subject matter may be left to regulation by the states. The Court noted the equitable considerations raised by application of a state statute enacted following negotiation of the contract, but said that these considerations were not relevant to the preemption issue.

To some extent the decision represents a retreat from some of the broad statements of *Local 24, Teamsters v. Oliver,*[132] where a state anti-trust law was not permitted to preclude bargaining upon a wage-related and therefore mandatory subject of bargaining. While the state regulation involved in *White Motor* certainly affected the parties' agreement, it was not as direct and restrictive as the interference in *Oliver.* Danger of state and federal conflict is a touchstone of preemption, and the Court may well have regarded that danger as remote in *White Motor.* As with *Sears,* however, to the extent state regulation is allowed, national labor policy becomes less comprehensive, coordinated or uniform.

Finally, in *Federal Martime Commission v. Pacific Maritime Commission* (PMA), discussed, *supra,*[133] the majority of the Court gave the Federal Maritime Commission control over an area of labor law better left to an agency such as the NLRB. The dissent, it should be noted, found that the collective bargaining agreements were outside the Shipping Act's requirements and were threfore subject to the NLRB. The majority held that collec-

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[130] 358 U.S. 283 (1959).

[131] The Court noted and stated its continued adherence to the following language in *Oliver:*

> Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . . and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide . . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problem of wages and working conditions.

Malone v. White Motor Corp., 98 S. Ct. 1185, 1194, quoting Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296 (1959).

[132] Local 24, Int'l Bhd. of Teamsters, 358 U.S. 283 (1959).

[133] 435 U.S. 40 (1977). *See* text accompanying notes 117-125 *supra.*

tive bargaining agreements in the maritime industry which contain anticompetitive restraints are subject to the filing and prior approval requirements of section 15 of the Shipping Act of 1916.[134] The Court found that the Shipping Act reaches any contract, including a collective bargaining contract, which controls, regulates, prevents or destroys competition in the shipping industry. The Court then considered whether the nonmember participation agreement negotiated in *PMA* had a competitive impact that subjected it to filing requirements under the Shipping Act.

In the Court's view, conditioning implementation of contracts upon Commission approval does not interfere with the national labor policy favoring the prompt implementation of contracts because most shipping industry contracts need not be filed. Section 15 of the Shipping Act applies only to agreements between two or more persons subject to the Act. It would not include contracts between a union and a single employer. Moreover, association contracts must be approved absent requisite anticompetitive findings and failure to satisfy the specified standards.

The Court in *PMA* gave jurisdiction over maritime labor relations to the Federal Maritime Commission, a governmental agency inexpert in labor law. As the dissent pointed out, the benefits of opening the arena of federal labor law to a non-labor governmental agency are questionable.[135] When *Pacific Maritime* decision is examined in conjunction with *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*[136] and *Malone v. White Motor Corp,*[137] a discernible trend of legal decentralization and diversification emerges.

III. Employment Discrimination

In contrast to the substantial deference and support which it gave to the NLRB, the Court gave little deference or support to the Equal Employment Opportunity Commission. Three of the employment discrimination cases arising under Title VII indicate that the Court is willing neither to acknowledge EEOC expertise nor to accord the EEOC significantly more status in the effectuation of Title VII than that accorded a private party litigant. A fourth decision reflects procedural confusion created by a Title

[134] 46 U.S.C. § 814 (1975). Justice Powell, joined by Justice Brennan and Justice Marshall, dissented. Justice Blackmun did not participate. Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40, 64 (1977).

[135] 435 U.S. 40, 73 (1978) (Powell, J., dissenting).

[136] 436 U.S. 180 (1978).

[137] 435 U.S. 497 (1978).

VII enforcement scheme heavily dependent upon the vagaries of private litigation rather than the orderly processes of a centralized administrative agency. The decisions reflect a lack of meaningful centralization as well as a severe fragmentation in the current administrative and enforcement of national employment non-discrimination policy.

In the past the Court has often given little or no weight to EEOC opinions and guidelines.[138] In *Nashville Gas Co. v. Satty,*[139] however, the Court shifted slightly toward increased deference to the Equal Employment Opportunity Commission. Thus, the Court observed that the relevant EEOC guideline is entitled to some weight because it is consistent with past EEOC interpretations and other federal agency opinions. While the Court's deference to the EEOC is far less than that accorded the NLRB, it represents a step in the right direction.

Unlike the NLRB, Congress has not vested the EEOC with primary administrative authority over the field of employment discrimination. Rather, the EEOC shares regulatory responsibility with numerous federal agencies as well as with the states. These agencies' opinions have often been inconsistent and conflicting. The Court has thus been faced with the difficult if not impossible task of extracting an expertise of consensus from this diversity.

In *Nashville Gas* the Court held that the employer violated section 703(a)(2) of Title VII of the Civil Rights Act of 1940[140] by denying accumulated seniority credit to female employees upon their return to work following pregnancy leave. The employer's denial of sick pay to female employees while on pregnancy leave, however, did not violate the Act.[141]

In *Nashville Gas,* the employer maintained a policy requiring pregnant employees about to give birth to take a formal leave of absence of indeterminate length without sick pay. Such an employee lost any job seniority accrued prior to the leave and did

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[138] *E.g.*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

[139] 434 U.S. 136 (1977).

[140] 42 U.S.C. § 2000e to 2000e-17. Section 703(a)(2) makes it an unlawful employment practice for an employer: "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . . ."

[141] Justice Stevens concurred. Justice Powell, joined by Justices Brennan and Marshall, dissented in the result and dissented in part. Nashville Gas Co. v. Satty, 434 U.S. 136, 146, 153 (1977).

not accumulate seniority during the leave. If the employee eventually obtained re-employment in a permanent position, the employee regained previously accumulated seniority for such benefits as pension and vacation but not for bidding on future job openings. Regaining permanent employment, however, was neither guaranteed nor necessarily probable.[142] In contrast, employees who took leaves of absence because of disease or any disability other than pregnancy retained accrued seniority and continued to accumulate seniority during the leave.[143]

The Court found that the seniority policy was facially neutral in its treatment of male and female employees. Males and females retained seniority during leaves for nonoccupational disease or any disability other than pregnancy. In contrast, both males and females were divested of seniority during leaves for any other reason, including pregnancy. Relying upon *General Electric Co. v. Gilbert,*[144] the Court held that both intentional discrimination as well as facially neutral policies which have a discriminatory effect may violate section 703(a)(2). The Court found that the pregnancy seniority divestment policy was unlawful in that it placed a substantial burden on women that was not placed on men. The Court distinguished *Gilbert* on the basis that the employer here imposed a substantial burden on women that men do not suffer[145] by jeopardizing their status as employees by denying them accumulated seniority credit.

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[142] The employer's job was not held during the leave. Following the leave the employee would be placed in any open permanent position for which she was qualified and for which no active employee was bidding. If no permanent position was open the employer would attempt to place the employee in an interim temporary job.

[143] The employer contended that it applied the same policy for pregnancy leaves that it applied to educational leaves. The evidence showed, however, that denial of accumulated seniority had only been applied in the pregnancy context.

[144] 401 U.S. 431 (1971).

[145] The Court said:

> [The employer] has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in Gilbert that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence," . . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.
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> [T]here was no showing that General Electric's policy of compensating for all non-job-related disabilities except pregnancy favored

The employer also maintained a policy granting sick pay to any employee disabled by nonoccupational sickness or injury but not to any employee disabled by pregnancy. The Court found that the sick leave policy was legally indistinguishable from the disability insurance program upheld in *Gilbert*. Consequently, the plan was lawful absent evidence that the plan had a discriminatory effect or was a pretext designed to effect invidious discrimination based on sex.

The Court reserved judgment on whether proof of intent is requisite to establishing a *prima facie* violation of section 703(a)(1) for a facially neutral plan. *Griggs* held that proof of a discriminatory effect can establish a section 703(a)(2) violation. The Court said that exclusion of pregnancy from a sick pay or disability insurance program results in a loss of income and not in deprivation of employment opportunities or other adverse affect on employment status within the meaning of section 702(a)(2). Thus, questions concerning sick leave or disability payments should be raised under section 703(a)(1), as in *Gilbert*. The Court said that plaintiff had failed to show that the sick pay plan had a discriminatory effect. The Court concluded that the illegality of the seniority policy did not render the sick pay policy illegal. It could be relevant on remand to the consideration of whether the sick pay plan was a pretext designed to effect sex discrimination.[146]

> men over women. No evidence was produced to suggest that men received more benefits from General Electric's disability insurance fund than did women; both men and women were subject generally to the disabilities covered and presumably drew similar amounts from the insurance fund.

Nashville Gas Co. v. Satty, 434 U.S. 136, 141-42 (1977).

The Court also noted that there was no proof of any business necessity to justify the seniority policy. The Court commented that, "If a company's business necessitates the adoption of particular leave policies, Title VII does not prohibit the company from applying these policies to all leaves of absence, including pregnancy leaves; Title VII is not violated even though the policies may burden female employees." *Id.* at 143.

[146] The Court left for lower court determination the question of whether plaintiff had adequately preserved the right to proceed on such pretext theory. The Court declined to remand to allow plaintiff to develop a new theory, not articulated to the Court, that the employer's sick pay plan was monetarily worth more to men than women. In the Court's view no such drastic change had occurred in the law since the time of trial to warrant the raising or reopening of issues on remand that would otherwise be foreclosed.

Justice Powell concurred with the Court's opinion concerning the illegality of the seniority policy but regarded the scope of the Court's remand of the sick pay policy issue as unduly restrictive. Because the lower court determinations were

Justice Stevens concurred in the result but preferred to predicate the legal distinctions between the seniority and sick pay policies upon a "simpler rationale."[147] In his view, discrimination against pregnancy, compared to other physical disabilities, is not unlawful sex discrimination. Rather, discrimination against pregnant or formerly pregnant employees compared to employees, is unlawful sex discrimination. Justice Stevens stated that, "This distinction may be pragmatically expressed in terms of whether the employer has a policy which adversely affects a woman beyond the term of her pregnancy leave."[148] The disability plan in *Gilbert*, as well as the sick pay plan in *Nashville Gas*, was lawful because benefits were denied only during the period of maternity leave. At all other times the woman was treated the same as other employees with regard to the plan's benefits. The plans did not discriminate against pregnant or formerly pregnant employees while they were working for the employer. *Gilbert* permits an employer to treat pregnancy leave as a temporal gap in employment. During that time, "the employer may treat the employee in a manner consistent with the determination that pregnancy is not an illness."[149] The seniority plan was unlawful because it at-

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made prior to the Court's decision in *Gilbert*, and at a time when the courts of appeal had uniformly held that a disability plan which treated pregnancy differently from other disabilities was *per se* violative of Title VII, he found that there was no reason for the plaintiff to attempt to show the gender-based discrimination required by *Gilbert*. Justice Powell stated:

> Given the meandering course that Title VII adjudication has taken, final resolution of a lawsuit in this Court often has not been possible because the parties or the lower courts proceeded on what was ultimately an erroneous theory of the case. Where the mistaken theory is premised on the pre-existing understanding of the law, and where the record as constituted does not foreclose the arguments made necessary by our ruling, I would prefer to remand the controversy and permit the lower courts to pass on the new contentions in light of whatever additional evidence is deemed necessary.

Nashville Gas Co. v. Satty, 434 U.S. 136, 148 (1977) (Brennan, Marshall, JJ., concurring). Justice Powell said that in her brief before the Court plaintiff had abandoned the theory upon which she prevailed in the lower courts, and that she now urged that her case was distinguishable from *Gilbert* in that the combined operation of the employer's seniority and sick pay (and possible other) policies resulted in less net compensation for females. He regarded plaintiff's contention as plausible, and as one neither required to have been raised prior to *Gilbert* nor foreclosed by the record evidence, and would have given plaintiff the opportunity on remand to attempt to show that the benefit package was in fact worth more to men than women. *Id.* at 150-151.

[147] *Id.* at 157.

[148] *Id.* at 155.

[149] *Id.* at 156.

tached consequences to the condition of pregnancy which extended beyond the maternity leave period.[150]

In *Nashville Gas*, the Court continued to struggle toward development of a coherent, cohesive rationale for pregnancy discrimination cases. Distinctions between benefits and burdens, pregnancy and post-pregnancy, pregnant conditions and pregnant persons are elusive bases upon which to rationalize the various cases.[151] Congress appears to have resolved the major aspects of the problem by passing section 701(k), which makes clear that Title VII sex discrimination prohibitions include discrimination based on pregnancy, childbirth or related medical conditions.[152]

City of Los Angeles Dep't of Water & Power v. Manhart[153] also considered problems of sex-based discrimination under Title VII. In *Manhart*, the Court held that the employer violated section 703(a)(1) of Title VII of the Civil Rights Act of 1964[154] by requiring female employees to make larger contributions to a pension fund than male employees.[155] The employer[156] maintained a contribu-

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[150] Justice Stevens commented as follows:

> These two limitations — that the effect of the employer's policy be limited to the period of the pregnancy leave and that it be consistent with the determination that pregnancy is not an illness — serve to focus the disparate effect of the policy on pregnancy rather than on pregnant or formerly pregnant employees. Obviously, policies which attach a burden to pregnancy also burden pregnant or formerly pregnant persons. This consequence is allowed by Gilbert, but only to the extent that the focus of the policy is . . . on the physical condition rather than the person.

Id. at 156 n.7.

[151] *Id.* at 136 (1977).

[152] Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (to be codified as 42 U.S.C. § 2000e(k)).

[153] 435 U.S. 702 (1978).

[154] 42 U.S.C. § 2000e-2(a)(1) (1976).

[155] The Court also held that the district court's award of retroactive relief to the entire class of female employees and retirees was inequitable. The Court said that Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), created a presumption in favor of retroactive liability in Title VII cases that can rarely be overcome, but that such an award is not automatic, and that *Albemarle* did not dispense with the necessity of a determination that retroactive liability is appropriate in the particular case. The Court said that the district court had not been sufficiently sensitive to a variety of significant equitable considerations such as: the breadth of the refund order; the complexity and uncertain legal status of the problem; the potential impact on the economy of changes in rules affecting insurance and pension plans; and the adverse effects of retroactive liability on a pension fund. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 719-721 (1977). Justice Marshall concurred with the Court that the contribution differential violated Title VII, but he disagreed with the Court's failure to uphold the district court's order of retroactive relief. In his view the

tory retirement plan[157] which provided equal monthly benefits for men and women of the same age, seniority and salary. From mortality tables the employer determined that its 2,000 female employees would live several years longer than its 10,000 male employees. Therefore, pension costs for the average female employee would be greater than costs for the average male employee because the average female would receive more monthly pension payments. Consequently, the employer required female employees to pay a contribution 14.84% higher than that required for comparable male employees.[158]

The Court said that while women as a class live longer than men, individuals within each class do not necessarily fit the generalization. Many women do not outlive the average man, and many men outlive the average woman. Discrimination is to be determined by comparison of individual characteristics, not class characteristics.[159] Thus, the Court held that the requirement that men and women make unequal contributions to the employer-operated retirement fund constituted unlawful sex discrimination in violation of section 703(a)(1).

The decision echoes the theme sounded repeatedly by the Court since the early days of Title VII. Employment decisions may not be based upon generalizations and stereotyped characterizations concerning the sexes.[160] Employment decisions must

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presumption in favor of retroactive liability had not been overcome, and no abuse of district court discretion had been shown. Justice Marshall agreed with the district court that regulations of the Equal Employment Opportunity Commission (EEOC) gave plan administrators notice of the potential illegality of contribution differentials. Justice Marshall said that the amount involved in the order was modest rather than devastating, that there was no claim that the order would threaten the plan's solvency, and that the plan's administrators may in fact have foreseen the risk and calculated liabilities and contribution rates accordingly. Justice Marshall said that it was speculative that the order could affect employee benefits or contributions, and that the employer itself contemplated that the money for the award would come from city revenues. *Id.* at 728-733 (Marshall, J., concurring).

[156] The City of Los Angeles Department of Water and Power.

[157] The employer contributed an amount equal to 110% of employee contributions. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 705 n.4 (1978). The plan was funded by the employer and employee contributions, and no private insurance company was involved.

[158] Pension contributions were withheld from paychecks, and females thus received less net pay than comparable males. One example in the opinion showed that a female employee contributed $18,171.40, while a similarly situated male would have contributed $12,843.53. *Id.* at 705 n.5.

[159] *Id.* at 707-709 (1978).

[160] *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

be based upon sexually neutral individualized judgments.[161] Thus, the Court rejected the employer's argument that since the employer could not determine which individuals would outlive the average male, it was necessary to assess women as a class to avoid unfairness to men as a class. The Court found that the question of fairness was a policy matter for Congress, and that the statute was clear in its prohibition of differentials based upon sex.[162]

The Court also rejected the argument that the contribution differential was lawful under *General Electric Co. v. Gilbert*.[163] The Court distinguished *Gilbert* on the basis that the two groups treated differently in *Gilbert* were pregnant women and nonpregnant persons of both sexes, while the two groups treated differently in the instance case were exclusively male and female.[164] The Court said that while actuarial evidence might preclude a *prima facie* showing that the contribution differential had a discriminatory effect on women as a class, it would not defeat a claim that the differential discriminated on its face against every individual woman employee.[165] Moreover, the different costs in providing benefits to the two classes did not rebut discrimination, said the Court, for their is no cost justification defense under Title VII.[166]

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[161] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[162] The Court stated:

> Congress had decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute which was designed to make race irrelevant in the employment market could not reasonably be construed to permit a take-home pay differential based on a racial classification.

City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978) [citations omitted].

[163] 429 U.S. 125 (1976). The Court also rejected the argument that the contribution differential was based on the factor of longevity rather than sex, and was therefore authorized by the Equal Pay Act's exception, incorporated into Title VII by § 703(h), which authorizes a "differential based on any other factor other than sex." The Court found that the actuarial distinction was based entirely on sex. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 712 (1978).

[164] "On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability." City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 715 (1978).

[165] *Id.*

[166] The Court stated that there was no cost justification defense under Title VII comparable to the affirmative defense in price discrimination cases. *Id.* at 716-717.

Justice Blackmun concurred in the Court's judgment. He felt that the Court's opinion cast doubt upon the continued vitality of *Geduldig v. Aiello*[167] and *General Electric Co. v. Gilbert*,[168] however, and that the Court should have dealt directly with the question of their precedential value.[169] Justice Blackmun noted that both the contribution differential in the instant case and the disability insurance exclusion in *Gilbert* exacerbated gender consciousness, yet the program in *Gilbert* was upheld. He found the Court's distinction that *Gilbert* involved permitted classes of pregnant women and nonpregnant persons "to be just too easy," although "probably the only distinction that can be drawn." Furthermore, it was not founded "on any principled basis."[170]

The contribution differentials in *Manhart* and the disability insurance exclusions in *Geduldig v. Aiello*[171] and *General Electric Co. v. Gilbert*[172] appear to have been based upon differences between males and females, rather than upon sexually neutral criteria. This being so, one struggles along with Justice Blackmun for a principled basis upon which to distinguish *Geduldig* and *General Electric*.

The Court's difficulty with conflicting agency guidelines on issues such as sex-based discrimination demonstrates that centralization is essential for meaningful effectuation of national

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[167] 417 U.S. 484 (1974).

[168] 429 U.S. 125 (1976).

[169] Justice Blackmun concurring, commented as follows:

> Given the decisions in *Geduldig* and *General Electric* — the one constitutional, the other statutory — the present case just cannot be an easy one for the Court. I might have thought that those decisions would have required the Court to conclude that the critical difference in the Department's pension payments was based on life expectancy, a nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis. I might have thought, too, that there is nothing arbitrary, irrational, or "discriminatory" about recognizing the objective and accepted . . . disparity in female-male life expectancies in computing rates for retirement plans. Moreover, it is unrealistic to attempt to force, as the Court does, in individualized analysis upon what is basically an insurance context. Unlike the possibility, for example, of properly testing job applicants for qualifications before employment, there is simply no way to determine in advance when a particular employee will die.

City of Los Angeles, Dep't. of Water & Power v. Manhart, 435 U.S. 702, 724 (1978) [citations omitted].

[170] *Id.* at 725.

[171] 417 U.S. 484 (1974).

[172] 429 U.S. 125 (1976).

equal employment poicy. Such primary adminitrative authority clearly belongs with the EEOC. Executive reorganization is one step in this direction,[172] but most needed is a clearer congressional statement than is now made by Title VII. The Wagner Act[174] declared the national policy to protect employee organizational and bargaining rights. Congress made its statement clear by creating an agency with power to enforce that policy, the NLRB. The nation's disadvantaged minorities are entitled to at least as much. Congress should make the requisite clear statement concerning national equal employment policy by granting the EEOC primary administrative authority and enforcement power to issue cease and desist, reinstatement and back pay orders. The EEOC should be empowered to take such other affirmative action as will effectuate the policies of Title VII.

Christiansburg Garment Co. v. EEOC,[175] a case involving attorney's fees, represented a move away from the goal of effectuating Title VII's policies. The EEOC notified an employee that conciliation efforts had failed on her charge of racial discrimination against the employer, and advised her of her rights to sue in federal court. The employee did not file an action. Almost two years later, after Title VII was amended to give the EEOC the right to sue on charges pending or filed thereafter, the EEOC filed an action in federal district court against the employer.

The district court granted the defendant employer's motion for summary judgment on the ground that the charge was no longer pending when the EEOC was given court enforcement authority.[176] The employer then moved for an allowance of attorney's fees against the EEOC under section 706(k).[177] The district court found that an award of attorney's fees was not justified because the EEOC's suit was neither unreasonable nor meritless.[178] The

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[173] *See* Exec. Order No. 12,067, 43 Fed. Reg. 28967 (1978), *reprinted in* 42 U.S.C.A. § 2000(e), at 915 (West Cum. Supp. 1978).

[174] 49 Stat. 449, ch. 372 (codified at 29 U.S.C. §§ 151-166 (1976)).

[175] 434 U.S. 412 (1978).

[176] EEOC v. Christiansburg Garment Co., 376 F. Supp. 1067 (W.D. Va. 1974). The court found that the EEOC's authority over the charge terminated when it issued the right to sue notification letter to the charging party, and that only those charges under negotiation or conciliation at the time of the 1972 Title VII amendments could be regarded as pending.

[177] Section 706(k), 42 U.S.C. §§ 2000(e)-5(k) (1964), provides as follows:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[178] 12 Fair Empl. Pract. Cas. 533 (1974).

district court's reason was that the issue raised by the EEOC's acton was one of first impression requiring judicial resolution, and that the EEOC's statutory interpretation of the 1972 amendments was not frivolous.

The Court decided that a district court has discretion to award attorney's fees to a successfull defendant in a Title VII action where the plaintiff's action is frivolous, unreasonable or without foundation. Furthermore, a finding of subjective bad faith is not prerequisite to making the award. The Court noted that *Albermarle Paper Co. v. Moody*[179] made clear that the private attorney general concept[180] standards applied in *Newman v. Piggie Park Enterprises*[181] to Title II of the Civil Rights Act of 1964,[182] providing that the courts should generally award attorney's fees to prevailing plaintiffs, also apply to Title VII.[183] Through such statutes, Congress has placed the plaintiff in the role of a private attorney general charged with vindication of high priority congressional policies.

Piggie Park further established that subjective bad faith was not a prerequisite to making an award. The American common-law rule already allowed awards of attorney's fees to plaintiffs against defendants who acted in bad faith. Therefore Congress would not have enacted new attorney's fees provisions if it had simply intended the same requirement to apply.[184]

The Court said that analogous considerations governed the award of attorneys' fees to prevailing defendants in Title VII cases. The Court found that the sparse legislative history of section 706(k) revealed that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis."[185] Accordingly, defendant's attorneys' fees are appropriate

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[179] 422 U.S. 405 (1975).

[180] 42 U.S.C. §§ 2000e to 2000e-17 (1976).

[181] 390 U.S. 400 (1968).

[182] 42 U.S.C. §§ 2000a to 2000a-6 (1976).

[183] 42 U.S.C. §§ 2000e to 2000e-17 (1976). Absent legislation to the contrary, litigants must pay their own attorney's fees. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415 (1978) citing Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

[184] The Court also noted that while Title VII plaintiffs vinidicate important policies, ultimate effectuation of those policies belongs to a vigorous and fair adversary judicial process. Congress could not intend to distort this process by giving incentives for private plaintiffs to sue, while preventing defendants from recovering expenses in resisting a groundless action unless they show bad faith. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978).

[185] *Id.* at 420.

where the plaintiff's action is frivolous, unreasonable or without foundation.[186] In this case, however, the Court concluded that the district court's denial of attorneys' fees was an appropriate exercise of discretion.[187]

The Court's decision in *Christiansburg Garment* may inevitably discourage potentially meritorious private Title VII actions. The uncertain hazards of judging between reasonable and unreasonable lawsuits may discourage many legitimate plaintiffs from filing suit. Although the Court leaves open the possibility of policy distinctions in evaluating the reasonableness of EEOC suits, a secondary unfortunate effect may be the inevitable restraint on EEOC litigation efforts.

To the extent that *Christiansburg Garment* discourages civil actions, Title VII becomes more ineffective than it already is. While there is no desirability in furthering frivolous actions, the result highlights the inefficiency and ineffectiveness of an enforcement scheme which leaves effectuation of equal employment opportunity policy to the vagaries of the adversarial judicial process. The need exists for a centralized administrative enforcement scheme which places initial adjudicatory responsibility in the EEOC[188] and, like the NLRA, which relies upon the specialized prosecutorial discretion of the agency. So long as Congress tolerates a weak enforcement scheme, its commitment to equal employment is suspect.

The EEOC does not enjoy the same status before the Court as does the NLRB. Moreover, the EEOC is not held in the highest regard by many segments of bench, bar and public. The Court fails to improve the situation by giving such inhospitable scope to EEOC judgments. The EEOC is young. Excessive management and administrative problems have plagued its short tenure. Although some responsibility for these problems is attributable

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[186] *Id.* at 422.

[187] The Court noted that fee awards against the EEOC rest on the same standards as awards against private plaintiffs, but that "a district court may consider distinctions between the Commission and private plaintiffs in determining the reasonableness of the Commission's litigation efforts . . . . " *Id.* at 423 n.20.

[188] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945).

> One of the purposes which lead to the creation of such boards [as the NLRB] is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.

So long as Congress tolerates a weak enforcement scheme, its commitment to equal employment is suspect.

to hostile forces outside the agency, Congress gave the EEOC the monumental task of enforcing a complex, cumbersome, spineless and controversial charter.

New leadership and the EEOC's traditionally dedicated and competent personnel, combined with presidential reorganization plans, suggest a meaningful step toward centralization in the EEOC of national non-discrimination policy. The EEOC should not be labeled or rendered ineffective because of its inevitable growing pains. As EEOC expertise matures with experience, hopefully, the Court will acknowledge that expertise and give the EEOC sufficient latitude and responsibility to allow the maturation process to occur.

In the last of the employment discrimination cases, *Furnco Construction Corporation v. Waters,*[189] the Court applied principles analogous to those applied by the courts and Board[190] to at least a disparate treatment claim under Title VII. The Court held that to rebut a *prima facie* Title VII claim of disparate treatment, the employer must show a legitimate, nondiscriminatory reason for the employment practice and not that the employment practice maximized minority group opportunities.[191]

In *Furnco,* the employer did not maintain a permanent force of bricklayers. The employer hired a job superintendent for a particular job, who in turn hired the crew for the job. Pursuant to established industry practice, the job superintendent did not accept applications at the jobsite. Rather, the superintendent hired only those workers known personally or recommended as experienced and competent at the work.[192] In accordance with the employer's self-imposed affirmative action plan, the employer's general manager instructed the job superintendent to attempt to employ black bricklayers to comprise at least 16% of the workforce. The superintendent was also instructed to hire several specific bricklayers who had previously filed a discrimination suit against the employer.

Minority group members comprised 5.7% of the bricklayers in the relevant labor force. Twenty percent of the bricklayers hired for the Interlake job were black.[193] On the Interlake job, black

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[189] 98 S. Ct. 2943 (1978).

[190] 29 U.S.C. § 158(a)(3) (1976).

[191] Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2950 (1978).

[192] Various considerations such as efficiency, economy and safety dictated that only experienced and highly qualified fire-bricklayers be employed. Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2946 (1978).

[193] Most of the bricklayers hired on the Interlake job were known to the job

bricklayers worked approximately thirteen percent of the total of 1819 man days.[194] Three of the plaintiffs were black qualified bricklayers who sought employment on the Interlake job by applying at the jobsite gate.[195] Two of these were not hired and one who had previously worked for the job superintendent was hired long after his initial application.

Plaintiffs filed an action claiming that the employer's hiring practices violated Title VII. The district court held that the plaintiffs had failed to prove a claim under either the disparate treatment theory of *McDonnell Douglas Corp. v. Green*[196] or the disparate impact theory of *Griggs v. Duke Power Co.*[197] The United States Court of Appeals for the Seventh Circuit reversed,[198] finding that plaintiffs had established a *prima facie* case of discrimination under *McDonnell Douglas*. The appellate court determined that the defendant employer had failed to effectively rebut that case since different hiring practices would have resulted consideration and hiring of in more minority employees. The court did not regard the employer's hiring practice as legitimate and nondiscriminatory,[199] although it did not find that the practice

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superintendent as experienced and competent. The others hired were recommended to the job superintendent as skilled by his general foreman, a black employee, another of the employer's job superintendents in the area, and the employer's general manager. *Id.* at 2947.

[194] *Id.*

[195] Certain other plaintiffs never applied for the Interlake job or were discharged or not employed for valid reasons such as insubordination or poor workmanship. Their claims were denied in the lower courts and were not before the Supreme Court. *Id.* at 2948 n.4.

[196] 411 U.S. 792 (1973). The district court in *Furnco* appeared to find that plaintiffs had failed to establish a *prima facie* case of discrimination, and that if a *prima facie* case was established, the employer had effectively rebutted that case by showing that the hiring practices were justified as a business necessity required for safe and efficient operations and were not a pretext to exclude blacks. Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2947 (1978).

[197] 401 U.S. 424 (1971). The *Furnco* district court found that the employer's policy of not hiring at the jobsite was racially neutral on its face and that plaintiffs did not show that policy had a disparate, or disproportionate, impact or effect. Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2947 (1978).

[198] Waters v. Furnco Constr. Corp., 551 F.2d 1085 (7th Cir. 1977).

[199] The court stated:

> The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?

Id. at 1089.

was a pretext for discrimination. The Seventh Circuit found that a more appropriate hiring procedure would have been for the employer to take written applications, including inquiry into qualifications and experience, and evaluation and comparison of those applicants against other bricklayers known to the job superintendent.

The Supreme Court reversed the Seventh Circuit and held that to rebut a *prima facie* Title VII claim of disparate treatment the employer is only required to establish a legitimate, nondiscriminatory reason for the employment practice. The employer is not required to show that his employment practice maximized minority group opportunities. The Court agreed with the lower court, however, that the *McDonnell Douglas* analysis for establishing a *prima facie* case of discrimination applied.[200]

The Court also agreed that the plaintiffs had established a *prima facie* case under *McDonnell Douglas.*[201] The Court said, however, that the court of appeals erred in failing to recognize that a *McDonnell Douglas prima facie* case merely raises a rebuttable inference of discrimination[202] and is not the equivalent of an ultimate finding of discrimination.[203] While the courts might require different minority utilization practices as a remedy for a proven Title VII violation, the absence of such affirmative action

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[200] The Court noted that the case did not involve employment tests as in Griggs v. Duke Power Co., 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); nor particularized requirements such as height and weight specifications as in Dothard v. Rawlinson, 433 U.S. 321 (1977); nor a pattern or practice action as in Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2949-2951 (1978).

[201] The Court held that a plaintiff could establish a *prima facie* claim 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.

Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2949 (1978) (citing McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1973)).

[202] The central issue, said the Court, is disparate treatment for a proscribed reason (race, color, religion, sex or national origin). McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973) merely provided an orderly method grounded on experience for evaluation of evidence on that issue. An employer generally does not act totally arbitrarily and without reasons. If all legitimate reasons for conduct are eliminated, it is more likely than not the employer acted unlawfully. Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943, 2949 (1978).

[203] Furnco Constr. Corp. v. Waters, 98 S. Ct. 2993, 2949 (1978).

practices neither establishes discrimination nor the standard for rebuttal of a *McDonnell Douglas prima facie* case. The employer may rebut the *prima facie* case by showing a legitimate consideration for its conduct.[204] The plaintiff may then attempt to prove that the reason given is a pretext.

While Title VII and the NLRA have an uncertain relationship, *Furnco* is basically an application of familiar principles applied by the NLRB and the courts in the evaluation of discrimination cases under section 8(a)(3) of the NLRA. Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."[205] In the conventional disparate treatment or discrimination case, such as a discharge, refusal to hire, or discipline, the crucial question under the NLRA is whether the employer's action was motivated by antiunion considerations or was supported by legitimate business considerations. The "true purpose"[206] or "real motive"[207] is the object of the investigation. Absent unlawful motivation, the employer's action in such discharge or analogous discrimination cases does not violate section 8(a)(3).[208] Both the substantive analysis and the allocations of proof in disparate treatment cases such as *Furnco* and *McDonnell Douglas Corp. v. Green*[209] essentially track the doctrines developed in basic NLRA discrimination cases.

Under the NLRA, affirmative remedial action must be predi-

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[204] *[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race.* To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring or minority employees. . . . [T]he employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection. [emphasis added]

Id. at 2950.

[205] 29 U.S.C. 158(a)(3) (1976).

[206] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937).

[207] Associated Press v. NLRB, 301 U.S. 103, 132 (1937).

[208] *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

[209] 411 U.S. 792 (1973).

cated upon the existence of a statutory violation. The lack of affirmative action does not prove the violation or disprove an employer's proffered business justification.[210] Similarly, *Furnco* holds that while affirmative action might appropriately remedy a proven Title VII violation, absence of affirmative action neither proves discrimination nor negates an employer's otherwise legitimate business defense.[211]

A second prong of section 8(a)(3) discrimination analysis involves discriminatory conduct that is inherently destructive of employee interests. In such cases the conduct may be deemed unlawful without proof of antiunion motivation. Absent proof of an overriding business justification, the employer's conduct may be held unlawful.[212] It may well be that the second prong of Title VII discrimination analysis, the disparate impact theory of *Griggs v. Duke Power Co.*,[213] essentially tracks this inherently destructive conduct theory to NLRA doctrine. If these hypotheses concerning NLRA analogies are accurate, they may aid in the understanding and development of Title VII doctrine. They may also suggest that these Title VII doctrines are not as revolutionary or unfounded as some would believe.

IV. Constitutional Considerations and Employment Discrimination

The following group of cases involved questions concerning the degree to which national employment non-discrimination policy is effectuated by constitutional limitations upon diversified state employment regulation. Two of the three cases directly involved employment discrimination and paradoxically resulted in state employment discrimination being permissible against noncitizens yet impermissible against nonresidents. The third case involved educational discrimination. It is included because of its ramification in the area of employment discrimination.

A. The Equal Protection Clause

1. *Citizenship Requirement for State Police Officers*

In *Foley v. Connelie*,[214] the Court held that a state's interest in

[210] *See* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 671-677 (1961). *See also* NLRB v. New Syndicate Co., 365 U.S. 695, 699-700 (1961).

[211] 98 S. Ct. 2943, 2950 (1978).

[212] *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). *See generally* Gorman, Labor Law: Unionization and Collective Bargaining 326-338 (1976).

[213] 401 U.S. 424 (1971).

[214] 435 U.S. 291 (1978).

self-government justified a law requiring all police officers to be United States citizens.[215] Chief Justice Burger's opinion stated that the state's exclusion of aliens from its police force was supported by a rational basis and therefore consitutional. State restraints on aliens have generally been subject to close scrutiny, but such legislation is not inherently invalid, nor are all such limitations suspect.[216] Close scrutiny is required, however, for state exclusions of aliens which strike at the noncitizens' ability to exist in the community.[217] As the Court noted, this position seems inconsistent with the congressional determination to admit the alien to permanent residence.[218]

State exclusions of aliens from participation in the state's democratic political institutions and processes, however, need only be supported by a rational basis. This latter policy recognizes the value of local rule in a democratic society and permits the state to preserve the basic concepts of a political community.[219] Similarly, citizenship may be a relevant qualification for non-elective positions which entail important public policy responsibilities.[220]

The Court considered the police function an important public responsibility and basic governmental function. Police officers

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[215] In Foley v. Connelie, 435 U.S. 291 (1978), plaintiff, a lawful permanent resident alien, was denied permission by New York state authorities to take the competitive examination for employment as a state police officer pursuant to a state statute which provided that: "No person shall be appointed to the New York State police force unless he shall be a citizen of the United States." N.Y. EXEC. LAW. § 215(3) (McKinney 1973). Plaintiff filed a class action in federal district court seeking a declaratory judgment that the statute violated the equal protection clause of the fourteenth amendment to the United States Constitution. A three-judge federal district court held the statute constitutional. Foley v. Connelie, 419 F. Supp. 889 (S.D.N.Y. 1976), *aff'd*, 435 U.S. 291 (1978).

[216] Foley v. Connelie, 435 U.S. 291, 294 (1978).

[217] *Id.* at 295. The Court cited as examples the following state class exclusion of aliens: Graham v. Richardson, 403 U.S. 365 (1971) (welfare assistance); Nyquist v. Mauclet, 432 U.S. 1 (1977) (educational benefits); Sugarman v. Dougall, 413 U.S. 634 (1973) (broad range of public employment); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) and *In re* Griffiths, 413 U.S. 717 (1973) (practice of licensed professions, engineers and lawyers, respectively).

[218] Foley v. Connelie, 435 U.S. 291, 295 (1978).

[219] The Court cited as examples the right of a state to deny aliens the right to vote, or to run for elective office, or to exclude aliens from jury service. *Id.* at 296.

[220] Sugarman v. Dougall, 413 U.S. 634, 647 (1973). The Court found that *Sugarman v. Dougall* recognized an exception, allowing aliens to be barred from "state elective or important nonelective executive, legislative, and judicial positions" because persons in such positions "participate directly in the formulation, execution, or review of broad public policy." Foley v. Connelie, 435 U.S. 291, 296 (1978).

have authority to exercise a wide variety of discretionary powers. Their duties affect the public significantly, often in sensitive areas.[221] Moreover, "the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have a serious impact on individuals."[222] Thus, police officers are within the category of important nonelective officers who participate in the execution of broad public policy.[223] The Court concluded that citizens need not be subjected to the exercise of these broad discretionary powers by noncitizen police officers and the states may reasonably presume that citizens are "more familiar with and sympathetic to American traditions.[224]

The Court's emphasis on the role of the police officer as a policy maker seems strained. Justice Marshall's dissent argued that state police officers were not within the narrow "important officers" exception[225] to the general rule that discrimination against aliens is presumptively unconstitutional. The dissent concluded that aliens may be excluded only from those important positions which involve broad policy-making responsibilities. Mere participation in the execution of public policy is not enough because, ultimately, every state employee is charged with execution of public policy. Furthermore, *Surgarman v. Dougall*[226] clearly held that a blanket exclusion of aliens from state jobs is unconstitutional.

In Justice Marshall's view, state police officers do not make policy judgments. Legislatures make those judgments which are contained in constitutions, statutes and regulations. Police officers exercise more limited responsibilities and make factual judgments.[227] Justice Marshall noted that *In re Griffith*[228] held that aliens could not be excluded from the practice of law despite the fact that attorneys play a vital public and political role.[229] Justice

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[221] The Court noted that the police had power in various circumstances to invade the privacy of an individual in public places, to break down a door to enter a dwelling or other building in execution of a warrant, to stop vehicles on public highways, and to arrest and search. *Id.* at 297-298.

[222] *Id.* at 298.

[223] *Id.* at 300.

[224] *Id.*

[225] Justice Marshall found that the exception had been drawn from dictum in Sugarman v. Dougall, 413 U.S. 634 (1973). Foley v. Connelie, 435 U.S. 291, 303 (1978) (Marshall, J., dissenting).

[226] 413 U.S. 634 (1973).

[227] Justice Marshall observed, "There is a vast difference between the formulation and execution of broad public policy and the application of that policy to specific factual settings." Foley v. Connelie, 435 U.S. 291, 304.

[228] 413 U.S. 717 (1973).

[229] Justice Marshall said it was not anomalous for citizens to be arrested or

Marshall concluded that there was no rational reason, much less a compelling state interest, to support the statute. The alien exclusion was therefore violative of equal protection.

An unpleasant suspicion lingers that an unarticulated premise of the Court's decision was the possible disloyalty or untrustworthiness of aliens as a class. Although the state did not rely upon this argument in its brief to the Court,[230] it had previously persuaded the trial court of its validity. Thus, Justice Stevens' dissent complained that the Court's opinion failed to identify the group characteristic which would justify discrimination against aliens as a class.[231]

It is perhaps best to take the Court's opinion in good faith and conclude that disloyalty was not a factor in its judgment and that police officers are important policymakers. Uncertainty remains, however, whether disloyalty or some analogous prejudice toward aliens remains the true basis for the state's exclusionary statute. The judgment of Professor Michael Perry seems uniquely applicable here: "In the political-constitutional dialogue between the judiciary and the other agencies of government—a subtle, dialectical interplay between Court and society, a rigorous process of reasoned moral development—perhaps what emerges is a far better political morality than would otherwise appear."[232]

2. *Racial Preference in University Special Admissions Programs*

Regents of University of California v. Bakke[233] recalls Justice

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searched by noncitizen police officers, since state statutes gave all private persons, including aliens, arrest and search authority in certain situations. Foley v. Connelie, 435 U.S. 291, 306 (1978).

[230] *Id.* at 307.

[231] *Id.* at 308.

[232] Perry, *The Abortion Funding Cases: A Comment On The Supreme Court's Role In American Government*, 66 Geo. L. J. 1191, 1235 (1978).

[233] Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978). In *Bakke*, the university medical school maintained one regular admissions program for general applicants and another special admissions program for disadvantaged minority applicants under which 16 of 100 class positions were reserved for minority students. Special candidates were not subject to the grade point average cutoff applied to general candidates and were neither rated nor compared against general candidates. Plaintiff, a white male applicant, was considered only under the general admissions program. Plaintiff was rejected while special admission slots were unfilled, and special applicants were admitted with significantly lower scores than plaintiff's.

Plaintiff filed an action in state superior court seeking mandatory, injunctive and declaratory relief compelling his admission to the medical school. Plaintiff alleged that the special admissions program excluded him upon the basis of his

Cardozo's observation that, "The great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by."[234] *Bakke* is a highly unusual and uncertain opinion and any commentary thereon is both speculative and hazardous. The Court, "in many opinions, no single one speaking for the Court,"[235] held that the special admissions program violated Title VI of the Civil Rights Act of 1964[236] and that the University should be ordered to admit plaintiff to the medical school.[237] The Court also held, however, that under the equal protection clause of the fourteenth amendment[238] the University could accord some consideration to race in the admissions process.[239]

Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, concluded that the special admissions program was unlawful solely on the statutory grounds of Title VI. Justice Powell concluded that the program was unlawful under Title VI as well as under the equal protection clause. These five members of the Court formed a majority affirming the judgment of the California Supreme Court that the program was unlawful and that plaintiff was entitled to admission.[240]

As to the use of race as a factor in affirmative action programs, Justices Brennan, White, Marshall and Blackmun concluded that the University could establish an affirmative admissions

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race and thereby violated his rights under the equal protection clause of the fourteenth amendment, the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964 (current version at 42 U.S.C. §§ 2000a-2000h 6 (1976)). The superior court found that the special admissions program operated as a racial quota, that the university could not take race into account in making admissions decisions, and that the program violated the state and federal constitution, and Title VI, 42 U.S.C. §§ 2000d-2000d-6 (1976). The court also found that plaintiff failed to show that he would have been admitted but for the special program and declined to order his admission. The Supreme Court of California held that the special program violated the equal protection clause of the fourteenth amendment and ordered plaintiff's admission to the medical school. Bakke v. Regents of the Univ. of Cal. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part and rev'd in part,* 98 S. Ct. 2733 (1978).

[234] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (21st printing 1971).

[235] Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2766 (1978) (Brennan, White, Marshall, Blackmun JJ., concurring in part and dissenting in part).

[236] 42 U.S.C. §§ 2000d to 2000d-6 (1976).

[237] Justice Powell, with Chief Justice Burger and Justices Stewart, Rehnquist and Stevens concurring in this judgment. Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2809 (1978).

[238] U.S. CONST. art. XIV, § 1.

[239] Justice Powell, with Justices Brennan, White, Marshall and Blackmun concurring in this judgment. Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2766 (1978).

[240] *Id.*

program that takes race into account. The special admissions program was both lawful under Title VI and constitutional under the equal protection clause.[241] Justice Powell provided the deciding vote and concluded that some uses of race in university admissions are permissible under Title VI and the equal protection clause.[242] These five justices formed a majority, reversing the judgment of the California Supreme Court insofar as it prohibited the University from according any consideration to race in its admission process or from establishing race-conscious programs.[243]

The fragmented decision itself and the many divergent opinions of the Justices reflect not only the ambivalence of Congress' commitment to civil rights but also the fundamental divisions within our society. Even the general summary attempted in the joint opinion of Justices Brennan, White, Marshall and Blackmun was specifically rejected in Justice Stevens' opinion, joined by Chief Justice Burger and Justices Stewart and Rehnquist.[244] The Court is so badly split over the issue of racial preference and race-conscious programs that it is virtually impossible to distill the essence of the decision in the educational context. Applying the decision in the employment context is even more speculative.

With regard to employment discrimination, the joint opinion of Justices Brennan, White, Marshall and Blackmun,[245] and the

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[241] U.S. CONST. amend. XIV, § 1.

[242] Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2747-2763 (1978).

[243] *Id.* at 2739, 2766 (Brennan, White, Marshall, Blackmun, JJ., concurring).

[244] *Id.* at 2809. The Court's failure to resolve the question concerning the implication of a private cause of action under Title VI makes speculative any predictions concerning the implication of such actions in handicap discrimination cases under The Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794 (1976). *See generally* Adams, *The Equal Rights for Handicapped Individuals: Judicial Enforcement of Section 504 of the Rehabilitation Act of 1973*, 38 OHIO ST. L.J. 667 (1978).

[245] In their joint opinion Justices Brennan, White, Marshall and Blackmun found that Title VI prohibits only those uses of racial criteria which would violate the equal protection clause of the fourteenth amendment. They found further that neither Title VI nor the equal protection clause bars the preferential treatment of racial minorities as a means of remedying past societal discrimination. In their view, Title VI was intended to terminate federal funding of private programs which discriminate against blacks and not to bar affirmative action programs for federally financed programs. Title VI does not bar racial preferences to remedy societal discrimination even absent findings of indentifiable past discrimination by the particular institution or against particular persons.

The four Justices found that under the equal protection clause racial classifications established for ostensibly benign purposes, or designed to further remedial purposes, must be strictly reviewed. This means, said the Justices, that the

single opinion of Justice Powell,[246] appear to preserve the use of preferential racial or ethnic classifications as a remedy for identi-

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classification must be justified by an important and articulated purpose and must not stigmatize or single out any discrete group of individual to bear the brunt of the benign purpose. The Justices found that the special admissions program satisfied these tests. The program does not stigmatize or single out any discrete group or individual, or even any identifiable nonminority group. Instead, it but simply reduces the number of whites who may be admitted to the regular admissions program in order to permit admission of a reasonable percentage of underrepresented qualified minority applicants. Regents of the Univ. of Calif. v. Bakke, 98 S. Ct. 2733, 2766 (1978).

[246] In his separate opinion, Justice Powell found that Title VI proscribes only those racial classifications which would violate the equal protection clause. Justice Powell found that the special admissions program was undeniably a classification based on race and ethnic background, and that under the equal protection clause, "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 2749.

Justice Powell rejected the university's contention that the Court had sometimes approved preferential classifications without applying the most exacting scrutiny. In the school desegregation and employment discrimination cases, said Justice Powell, the existence of previous discrimination served as the predicate for the imposition of a preferential remedy and "we have never approved preferential classifications in the absence of proven constitutional or statutory violations." *Id.* at 2755 n.41. The sex discrimination cases, said Justice Powell, involve neither the same complex questions nor the same "lengthy and tragic history" as racial and ethnic preferences. *Id.* at 2755. Further, "the Court has never viewed such [gender based] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal-protection analysis." *Id.* at 2755.

Justice Powell found that the state's interests in maintaining the special admissions program were not compelling or substantial enough to justify the use of a suspect classification. If the school's purpose was to assure a specified percentage of a particular group simply because of its race or ethnic background its object would be facially invalid. Racial classifications may be justified to remedy identified or specific instances of discrimination, but not to remedy general societal discrimination. *Id.* at 2757-59.

Moreover, while the state might have a substantial interest in improving health care service in minority or deprived communities, said Justice Powell, there was no evidence that the special admissions program was either needed or geared to promote the goal. Whereas the attainment of a diverse student body is a constitutionally permissible goal for a university, the program's racial classification was neither necessary for nor in furtherance of genuine diversity. He noted with approval university admissions programs which take race or ethnic background into account as one factor in achieving educational diversity, but which do not insulate the individual from comparison with all other candidates for the available openings. Each applicant must be treated as an individual in the admissions process, and the university must proceed on an individualized, case-by-case basis which preserves fairness in individual competition for opportunities. *Id.* at 2757-66.

fiable rather than general societal discrimination.[247] The comments of these five Justices indicate that they would regard such preferential remedial action as appropriate where there have been legislative, judicial or administrative findings of constitutional or statutory violations.[248]

The Brennan-Powell position on employment discrimination is consistent with prior decisions which have endorsed the use of judicially imposed affirmative action remedies, including both preferences and goals, where illegal discrimination has been found. Indeed, since *Franks v. Bowman Transportation Company*,[249] there has been little question that courts may impose affirmative relief to the extent necessary to redress the wrongs inflicted upon the victims of illegal discrimination. Affirmative action programs embodying racial and ethnic preferences, and perhaps even quotas, would appear to remain appropriate as a remedy for constitutional and statutory violations resulting in identifiable race-based injury to individuals entitled to the preference. Under Justice Powell's view it is arguable, for example, that most or all of the EEOC's enforcement work would come within the category of congressionally authorized administrative action and would thus be constitutionally permissible. Thus, the decisions would appear to leave the door open for judicially, congressionally or administratively imposed remedial quotas, as well as preferences, goals and timetables.

Questions as to the validity of voluntary affirmative action plans and quotas, however, still remain. The decision neither answers nor suggests an answer. Moreover, Justice Powell would not appear to agree with Justice Brennan's opinion that racial preferences and quotas are constitutionally permissible to remedy past societal discrimination. Such quotas arguably conflict not

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[247] For the divergent views of various government officials and private parties concerning the meaning and effect of *Bakke* and *Furnco* in the employment area *see, e.g.*, [1978] 98 LAB. REL. REP., NEWS AND BACKGROUND INFORMATION [BNA] 201, 229, 288, 290, 331, 334.

[248] Justice Powell said that the Court did not find it necessary to resolve the difficult question of whether or not a private cause of action exists under Title VII, but rather assumed for the purposes of the case that plaintiff had a right of action under Title VI Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2745 (1978). Justices Brennan, Marshall and Blackmun agreed with this conclusion. *Id.* at 2769. Justice White believed that the Court should address the questions and that no private cause of action exists under Title VI. *Id.* at 2794. Chief Justice Burger and Justices Stewart, Rehnquist and Stevens expressed the view that a private action does exist. *Id.* at 2815.

[249] 424 U.S. 747 (1975).

only with the central thrust of section 703(a) of Title VII[250] but also conflict with provisions of section 703(j).[251] That latter section specifically does not require any employer to engage in affirmative action hiring.[252] Further, *McDonald v. Santa Fe Trails Transportation Co.*[253] holds that Title VII prohibits racial discrimination against whites upon the same standards as blacks.[254] These considerations would seem to imperil the validity of voluntary nonremedial affirmative action racial preferences.

The Court may resolve the fate of voluntary preferences in *Weber v. Kaiser Aluminum and Chemical Corp.*[255] This case raises the question whether a private employer may adopt a quota for minority workers absent a showing that the minority workers involved were the victims of past discrimination.[256] The lower court held that a preferential quota system was lawful under Title VII only if the preferred workers were identifiable victims of unlawful hiring discrimination. The Court of Appeals stated, "In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII."[257] The court also rejected attempts to distinguish between numerical goals and quotas and held that Executive Order 11246[258] could not validly mandate a racial quota.[259]

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[250] 42 U.S.C. § 2000e-2(a) (1976).

[251] 42 U.S.C. § 2000e-2(j) (1976).

[252] *Id.*

[253] 427 U.S. 273 (1976). If the Court in the future accepts the proposition that race or ethnic distinctions may be a factor but not the controlling factor in employment decisions, and that these factors may be dispositive in the theoretical but possible given case where all other independent criteria are precisely equal, then a useful analogy might already exist in decisions construing § 9(c)(5) of the NLRA, 29 U.S.C. § 159(c)(5) (1976). NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 442 (1965).

[254] McDonald v. Santa Fe Trails Transp. Co., 427 U.S. 273, 278-85 (1976).

[255] 563 F.2d 216 (5th Cir. 1977) *cert. granted,* 47 U.S.L.W. 3401 (1978).

[256] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 218 (5th Cir. 1977).

[257] *Id.* at 224.

[258] Exec. Order No. 11,246, 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e, at 1232 (1976).

[259] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 226-227 (5th Cir. 1977). The employer acted to comply with the government contractor obligtions established by Revised Order No. 4 issued under Executive Order 11246, which requires goals and timetables. The lower court said that "attempts to distinguish a numerical goal from a quota have proved illustory, and most such goals suggested by the OFCC [Office of Federal Contract Compliance] can fairly be characterized as quotas." 563 F.2d at 222. The court said further that "[i]f

Equally uncertain is the outcome of a purely constitutional challenge to a voluntary governmental affirmative action plan which embodies racial quotas and is designed to remedy past societal discrimination. The plan might be valid under the more tolerant standards of Justices Brennan, White, Marshall, and Blackmun and invalid under the stricter scrutiny standards of Justice Powell. The potential alignment of the remaining four Justices—Chief Justice Burger and Justices Stewart, Rehnquist and Stevens—is wholly speculative, for they did not reach constitutional issues. Further, Justice Powell might find that attainment of a diverse student body is a sufficiently compelling state interest to justify use of racial or ethnic distinctions as one factor to be considered in the educational context. There is considerable doubt, however, that he would find analogous compelling interests in the employment context.

B. Privileges and Immunities Clause

In the other employment discrimination case, *Hicklin v. Orbeck*,[260] the Court held that an Alaska law which required employment preference for Alaskan residents violated the privileges and immunities clause because there was no substantial legitimate reason for the discrimination. The statute, the so-called Alaska Hire law,[261] enacted to reduce unemployment in Alaska, required that oil and gas leases, easements, right-of-way permits for pipelines and unitization agreements contain a provision requiring the employment of qualified Alaska residents in preference to nonresidents.[262]

Executive Order 11246 mandates a racial quota . . . by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition." 563 F.2d at 227.

[260] 98 S. Ct. 2482 (1978).

[261] ALASKA STAT. ANN. §§ 38.40.010-.40.090 (1977). The employment preference was administered by issuance of certificates of residence (residence cards) to persons meeting Alaska residency requirements. Serious enforcement of the law began when construction on the Trans-Alaska Pipeline neared its peak, at which time the Alaska Department of Labor began to issue residency cards and to limit union dispatchment to oil pipeline jobs to resident cardholders. Plaintiff nonresidents were unable to qualify for residency cards and were prevented from obtaining pipeline-related work. Plaintiffs filed an action in state superior court alleging that the Alaska Hire law was unconstitutional and seeking declaratory and injunctive relief. The court denied the claim. The Alaska Supreme Court held that the general preference for Alaska residents was constitutional. 565 P.2d 159 (Alas. 1977). The Supreme Court reversed. Hicklin v. Orbeck, 98 S. Ct. 2482 (1978).

[262] *Id.* at 2487. The Court cited Ward v. Maryland, 12 Wall. 418 (1870) (discriminatory licensing requirements and fees and other restrictions on nonresi-

Justice Brennan's opinion for the Court focused upon the familiar national interests in interstate travel. Justice Brennan noted prior decisions which established generally that the privileges and immunities clause is violated by "state discrimination against nonresidents seeking to play their trade, practice their occupation, or pursue a common calling within the State."[263] The Court stated that generally "a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State."[264] Disparity of treatment may be permitted where the statute is narrowly and restrictively tailored to achieve a legitimate state objective, for instance where "there is something to indicate that non-citizens constitute a peculiar source of evil at which the [discriminatory] statute is aimed."[265] Even making the dubious assumption that a state may attempt to alleviate unemployment by nonresident discrimination, the majority said there was no showing that nonresidents were "a peculiar source of the evil"[266] the Alaska Hire law sought to remedy.

The Court stated that the lack of training or education or geographical remoteness of a substantial number of jobless residents was the major cause of Alaskan unemployment, rather than nonresidents.[267] The Court also found the statute unconstitutionally broad in that it gave employment preference to all residents regardless of their employment status, education or training. There was thus no substantial relationship between the general nonresident discrimination and the particular unemployment problem.[268]

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dent merchants); Toomer v. Witsell, 334 U.S. 385 (1948) (discriminatory license fees for nonresident commercial shrimp fishermen); and Mullaney v. Anderson, 342 U.S. 415 (1952) (discriminatory license fees for nonresident commercial fishermen), as support.

[263] Hicklin v. Orbeck, 98 S. Ct. 2482, 2488 (1978).

[264] *Id.*, quoting from Toomer v. Witsell, 334 U.S. 385 (1948).

[265] Hicklin v. Orbeck, 98 S. Ct. 2482, 2488 (1978).

[266] *Id.* at 2488-2489.

[267] The Court stated:

> If Alaska is to attempt to ease her unemployment problem by forcing employers within the State to discriminate against nonresidents — again, a policy which may present serious constitutional questions — the means by which she does so must be more closely tailored to aid the unemployed the Act is intended to benefit.

Id. at 2489.

[268] The Court stated, "We do not agree that the fact that a State owns a resource, of itself, completely removes a law concerning that resource from the prohibitions of the Clause [sic]." *Id.*

The Court rejected the contention that the state's ownership of the oil and gas covered by the Alaskan Hire law justified the nonresident discrimination and rendered the privileges and immunities clause inapplicable.[269] State ownership of the property covered by a statute is often a significant and dispositive factor. Where the state has little or no proprietary interest in much of the activity swept within the law, however, it is not sufficient. Furthermore, the Alaska Hire law reaches employers, such as suppliers who have no connection with the state's oil and gas.[270] It also reaches activities such as refineries and distribution systems not connected with the extraction of the state's oil and gas.[271]

The Court cited commerce clause decisions[272] limiting a state's preference of its citizens in the utilization of natural resources as support.[273] The Court emphasized that Alaska's oil and gas resources "are of profound national importance" and "the breadth of the discrimination mandated by Alaska Hire goes far beyond the degree of resident bias Alaska's ownership of the oil and gas can justifiably support."[274]

Conclusion

The 1977 Term does not appear to have been a triumph for principles of embracing federalism. Non-discrimination is a goal of national labor policy under both the NLRA and Title VII. Achievement of that goal is vital to our society. In the incisive

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[269] *Id.* at 2490.

[270] *Id.* at 2491.

[271] The Court observed that the commerce and privileges and immunities clause had a "mutually reinforcing relationship . . . that stems from their common origin in the Fourth Article [sic] of the Articles of Confederation and their shared vision of federalism." *Id.* at 2491 (citing Baldwin v. Fish & Game Comm'n, 98 S. Ct. 1852).

[272] The Court cited West v. Kansas Natural Gas, 221 U.S. 229 (1911), and Pennsylvania v. West Virginia, 262 U.S. 553 (1923), as having "established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even pricipally for the State's residents." Hicklin v. Orbeck, 98 S. Ct. 2482, 2491 (1978). The Court also cited Foster Packing Co. v. Haydel, 278 U.S. 1 (1928) as having "limited the extent to which a State's purported *ownership* of certain resources [destined for interstate commerce] could serve as a justification for the State's economic discrimination in favor of residents." Hicklin v. Orbeck, 98 S. Ct. at 2492.

[273] Hicklin v. Orbeck, 98 S.Ct. 2482, 2492 (1978).

[274] Sowle, Time of Trouble . . . Times of Hope 11 (Univ. of Cin. Occasional Papers No. 6, 1968).

words of Dean Claude Sowle, "Employment opportunities must be broadened. Discrimination must be eliminated."[275] Diversification and decentralization of national effort, and restrictive limitations upon permissible enforcement and remedial measures do not contribute to prompt realization of that goal.