1976-1977 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW*

*Please note the following Survey year labor law decisions which were discussed in earlier issues of this volume: *Lodge 76, International Association of Machinist v. Wisconsin Employment Relations Commission; supra* at 494; *Buffalo Forge Co. v. United Steelworkers, supra* at 518.

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INTRODUCTION

This sixteenth Survey marks the third year since the scope of the Survey was expanded formally to include employment discrimination law as well as labor relations law.[1] This year, for the first time, the Survey devotes more coverage to employment discrimination law than to its more traditional topic of labor relations law. This change reflects the magnitude of the Supreme Court's work in the former area during the Survey year—April 1, 1976 through March 31, 1977. In its 1976 Term, the Supreme Court clarified or changed broad areas of the law under Title VII of the Civil Rights Act of 1964. By comparison, the Supreme Court, the lower federal courts, and the National Labor Relations Board were relatively quiet in the area of labor relations law.

During the Survey year, the Supreme Court rendered labor law decisions concerning work-preservation strikes as secondary boycotts,[2] choice of law rules for the application of right-to-work laws,[3] and standards of review under the Labor Management Reporting and Disclosure Act for restrictions on access to the union ballot.[4] The lower courts decided several cases interpreting the Supreme Court's *Buffalo Forge* decision.[5] The NLRB altered its position on the effect of labor union racial discrimination on the certification of a bargaining representative.[6]

Supreme Court employment discrimination law decisions during the Survey year include the Court's controversial sex discrimination decision concerning pregnancy disability benefits,[7] decisions affecting the rights of both federal and state employees under Title VII,[8] and a decision defining the Title VII rights of white discriminatees.[9] In addition, the lower courts decided various questions of standing to sue for employment discrimination[10] as well as the capacity of the Equal Employment Opportunity Commission to sue for employment discrimination where a charging party has already brought private suit.[11]

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[1] *See Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 966 (1975).

[2] See pp. 1047-62 *infra*.

[3] See pp. 1078-90 *infra*.

[4] See pp. 1090-1103 *infra*.

[5] Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976). See pp. 1062-77 *infra*.

[6] See pp. 1103-17 *infra*.

[7] See pp. 1118-34 *infra*.

[8] See pp. 1134-62 *infra*.

[9] See pp. 1182-89 *infra*.

[10] See pp. 1163-74 *infra*.

[11] See pp. 1174-82 *infra*.

I. SECONDARY BOYCOTTS — NLRB RIGHT-TO-CONTROL ANALYSIS OF WORK-PRESERVATION DISPUTES: *Enterprise Association.*

Section 8(b)(4)(B) of the National Labor Relations Act (Act) makes it an unfair labor practice for a union to engage in any strike or picketing of which an object is to cause a person, among other things, to cease doing business with or dealing in the products of any other person.[1] This provision was fashioned to prohibit a union from imposing secondary boycotts by using a "neutral," one with whom it has no dispute, as a vehicle for boycotting another person.[2] At the same time, a proviso to section 8(b)(4)(B) excludes from the statute's coverage otherwise lawful primary activity—strikes and picketing against an employer with whom the union does have a dispute—even though such activity may visit economic sanctions upon a neutral.[3] Applying this statutory distinction between the permissible incidental effects of primary activity and the impermissible objectives of secondary activity and the concomitant duty of fashioning meaningful standards for identifying the secondary boycott have proved especially elusive tasks for both the National Labor Relations Board (Board or NLRB) and the federal courts.

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[1] 29 U.S.C. § 158(b)(4)(B) (1970) provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents— . . .
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

A closely related statutory provision, 29 U.S.C. § 158(e) (Supp. V 1975), proscribes agreements or contracts that would impose a secondary boycott upon neutral employers. See note 6 *infra* for the text of section 8(e).

[2] The legislative history of the Labor Management Relations Act is illustrative of this point:

> Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

S. REP. NO. 105 on S. 1126 80th, CONG. 1ST. SESS. (1947), *reprinted in,* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 428 (1948).

[3] See text of section 8(b)(4) at note 1 *supra.*

Particularly troublesome has been the legality of concerted union activity to enforce work-preservation clauses—union-employer agreements to preserve work performed by members of the bargaining unit. Although such agreements arise within the context of collective bargaining relationships, their enforcement necessarily affects not only those who otherwise would perform the work, but also those in purchasing positions who would prefer to install materials fabricated away from the jobsite.[4] In the leading case of *National Woodwork Manufacturers Association v. NLRB*,[5] the Supreme Court held that a union's economic pressure upon its immediate employer to force the latter's compliance with a valid work-preservation clause,[6] does not necessarily violate section 8(b)(4)(B), despite its effects upon neutral parties.[7] The Court established as the proper test for a secondary purpose whether, in the totality of the circumstances, the agreement and the union's attempts to enforce it were aimed at preserving work traditionally performed by union members or whether the union's actions were "... calculated to satisfy union objectives elsewhere."[8]

The NLRB's application of the totality-of-the-circumstances test enunciated in *National Woodwork* gave rise to a conflict among the circuit courts of appeals.[9] Prior to *National Woodwork*, the Board had established a right-to-control test in order to determine whether the objectives of work preservation were secondary.[10] Under this test, the Board consistently found an immediate employer's lack of the right-to-control contested work to be a significant, if not determinative, indication that union objectives in enforcing a work-preservation clause were secondary and hence in violation of section 8(b)(4)(B).[11] The

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[4] For example: a builder, architect, or general contractor who specifies the use of a prefabricated product.

[5] 386 U.S. 612 (1967).

[6] A valid work-preservation clause is one that does not fall within the proscription of section 8(e) of the NLRA which prohibits "hot cargo" agreements. In relevant part section 8(e) provides that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void ....

29 U.S.C. 158(e) (Supp. V 1975). The test for validity under section 8(e) focuses upon whether the work subject to an agreement traditionally has been performed by union members. *National Woodwork*, 386 U.S. at 645-46.

[7] 386 U.S. at 644-45. In *National Woodwork*, the manufacturers of prefabricated doors that the union had refused to install were the affected parties. *Id.* at 645.

[8] *Id.* at 644-45.

[9] See text at notes 15-19 *infra*.

[10] 386 U.S. at 616 n.3. The first application of the Board's test occurred in Clifton Deangulo, 121 N.L.R.B. 676, 684-86, 42 L.R.R.M. 1420, 1421-22 (1958).

[11] *See, e.g.*, International Longshoremen's Ass'n, 137 N.L.R.B. 1178, 1181-82, 50 L.R.R.M. 1333, 1335-36 (1962); Enterprise Ass'n Local 638, 124 N.L.R.B. 521, 526-27,

Board continued to apply this right-to-control test after *National Woodwork* was decided.[12] While the courts of appeals for the Fourth and Ninth Circuits sustained the Board's adherence to its approach,[13] the Third,[14] Eighth[15] and District of Columbia[16] Circuits ruled that the Board's test focused mechanically upon the right-to-control factor to the exclusion of other circumstances surrounding the enforcement of a work-preservation clause. Consequently, the latter circuits ruled that the Board's test conflicted with *National Woodwork*.[17]

During the Survey year, the Supreme Court resolved this conflict by upholding the Board's application of its right-to-control test in *NLRB v. Pipefitters Local No. 638 (Enterprise Association)*.[18] The Court established that the existence of a valid work-preservation clause does not immunize union efforts to enforce the clause from the taint of secondary boycott.[19] Then, deferring to the Board's expertise, the Court concluded that the significance which the Board attaches to the lack of control over disputed work is within its discretion[20] and does not contravene the totality-of-the-circumstances test set forth in *National Woodwork*.[21] Applying these standards to the *Enterprise Association* record, the Court held the Board's determination that the union in that case had engaged in a secondary boycott was supported by substantial evidence on the record considered as a whole.[22]

In *Enterprise Association*, Local 638, a pipefitters union, rep-

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44 L.R.R.M. 1435, 1436 (1959). In reaching this conclusion, the Board has reasoned that the union's objectives must be to force some other employer, normally a general contractor, to grant its members the work assignments, or alternatively, to force its immediate employer to cease doing business with the other party. *Id.*

[12] *See, e.g.*, Local 438 United Pipefitters (George Koch Sons, Inc.), 201 N.L.R.B. 59, 63, 82 L.R.R.M. 1113, 1117-18 (1973).

[13] Associated General Contractors of California, Inc. v. NLRB, 514 F.2d 433, 438, 88 L.R.R.M. 3542, 3545 (9th Cir. 1975); George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 326-27, 84 L.R.R.M. 2957, 2959-60 (4th Cir. 1973). *But see* Western Monolithics Concrete Prods. v. NLRB, 446 F.2d 522, 525-26, 77 L.R.R.M. 3023, 3025-26 (9th Cir. 1971) (Ninth Circuit refused to sanction the Board's right-to-control analysis where it was employed to allow union picketing against a general contractor which was not the union's immediate employer but controlled the disputed work assignment).

[14] NLRB v. Local 164, Int'l Brotherhood of Electrical Workers, 388 F.2d 105, 109, 67 L.R.R.M. 2352, 2354-55 (3d Cir. 1968).

[15] American Boilers Mfrs. Ass'n v. NLRB, 404 F.2d 556, 561-62, 69 L.R.R.M. 2858, 2861 (8th Cir. 1968).

[16] Local 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906, 909, 74 L.R.R.M. 2851, 2853 (D.C. Cir. 1970).

[17] *Local 636*, 430 F.2d at 910-11, 74 L.R.R.M. at 2854; *American Boiler*, 404 F.2d at 561, 69 L.R.R.M. at 2861. *See Local 164*, 388 F.2d at 107-09, 67 L.R.R.M. at 2353-55. *See also*, Beacon Castle Square Bldg. Corp. v. NLRB, 406 F.2d 188, 192 n.10, 70 L.R.R.M. 2357, 2360 n.10 (1st Cir. 1969) (indicating disapproval of right-to-control test in *dicta*).

[18] 429 U.S. 507 (1977).

[19] *Id.* at 520-21.

[20] *Id.* at 528.

[21] *Id.* at 524.

[22] *Id.* at 530-31.

resented steamfitters employed by a plumbing and heating subcontractor, Hudik-Ross Co., Inc. (Hudik).[23] Local 638 and Hudik were parties to a collective bargaining agreement which included a work-preservation clause. Under this clause union members were entitled to perform the internal piping work on heating and air-conditioning units at the jobsite prior to installing them.[24] Hudik bid on and was awarded a subcontract with Austin Company (Austin), a general contractor. Despite the restrictive provisions of Hudik's collective bargaining agreement, Hudik's contract with Austin specified the installation of prefabricated climate control units manufactured by Slant/Fin Corporation (Slant/Fin).[25] When the prefabricated climate control units arrived at the construction site, upon Local 638's advice its members refused to install them. In so doing, the employees claimed that the internal piping work within the units was reserved for steamfitters by their contract.[26]

The general contractor, Austin, thereupon filed unfair labor practice charges with the Board alleging that Local 638 had violated section 8(b)(4)(B) by engaging in a work stoppage and encouraging Hudik employees to refuse to install the units.[27] Austin contended that Local 638's actions had impermissible secondary objectives: namely, to force Hudik to terminate its subcontract with Austin and to cause both Austin and Hudik to refrain from purchasing Slant/Fin products.[28] Local 638 countered that its objective was to preserve the internal piping work on the climate control units for jobsite completion by demanding that Hudik comply with its collective bargaining agreement.[29]

The National Labor Relations Board concluded that Local 638 had violated section 8(b)(4)(B).[30] Although the steamfitters' refusal to install the Slant/Fin units was based upon a valid work-preservation agreement between Local 638 and Hudik, the latter did not have the legal right to control assignment of internal piping work to steamfitters because this right had been contractually relinquished to Austin.[31] Accordingly, the Board concluded, the union's pressure on Hudik was secondary because it was designed to change Austin's purchasing policy or to cause Hudik to cease doing business with Austin.[32] Thus, the

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[23] *Id.* at 511.

[24] *Id.* at 512.

[25] *Id.* at 511-12.

[26] *Id.* at 512-13. Local 638's business agent informed both Austin and Hudik that the steamfitters would not install the units. *Id.*

[27] *Id.* at 513.

[28] *Id.*

[29] *Id.*

[30] 204 N.L.R.B. 760, 760, 83 L.R.R.M. 1396, 1397 (1973). In so doing the Board adopted the findings and conclusions of the Administrative Law Judge. *Id.*

[31] *Id.* The only additional evidence of secondary objectives cited by the Board was that Local 638 first informed Austin of its refusal to handle the climate control units and that it continued to do so. *Id.*

[32] *Id.*

Board ordered Local 638 to stop advising that its members refuse to install the prefabricated units.[33]

Upon Local 638's petition to review the Board's order,[34] the United States Court of Appeals for the District of Columbia, sitting en banc, rejected the Board's reliance on right-to-control as the discriminant between primary versus secondary union objectives.[35] Rather, a majority of the court concluded that the Board's application of the right-to-control test was in direct conflict with the totality-of-the-circumstances test set out in *National Woodwork*.[36] The court reasoned that the Board had applied its right-to-control test to find per se violations of section 8(b)(4)(B) wherever an immediate employer did not have the legal right to assign disputed work, thus automatically ascribing to that employer neutral status in the work-preservation controversy.[37] The majority rejected this automatic inference of neutrality.[38] In the court's view, a subcontractor, who contracts for work inconsistent with a work-preservation clause by which he is bound, initiates the dispute by breaching his collective bargaining agreement.[39] Thus, the court held that where an immediate employer has relinquished his legal right to assign work covered by a valid work-preservation agreement with the union, and the union does no more than engage in a work stoppage to protest work violating that agreement, the employer is presumed able to comply with its agreement in some manner. By corollary the court held that a presumption exists that the union's strike in response to a violation of a valid work-preservation clause is lawful primary activity beyond the scope of section 8(b)(4)(B).[40] Accordingly, the burden falls on the charging party to adduce other evidence that the union's tactical objectives are secondary under the standard set forth in *National Woodwork*.[41] The majority therefore remanded the case to the Board for its reconsideration of factors in addition to Hudik's lack of control which would show that Local 638's work stoppage had secondary objectives.[42]

The Supreme Court entirely rejected the approach adopted by the court of appeals. While accepting the applicability of the *National Woodwork* standard to situations such as in *Enterprise Association* where the immediate employer lacks control of the contested work,[43] the Court held that the Board's conclusion that Local 638 had engaged in

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[33] *Id.* at 761, 766, 83 L.R.R.M. at 1397-98.

[34] 521 F.2d 885, 885, 89 L.R.R.M. 2769, 2769 (D.C. Cir. 1975) (en banc). The Board also cross-appealed for enforcement of its order. *Id.*

[35] *Id.* at 904-05, 89 L.R.R.M. at 2782.

[36] *Id.* at 905, 89 L.R.R.M. at 2782.

[37] *Id.* at 890-91 & n.9, 89 L.R.R.M. 2771-72 & n.9.

[38] *Id.* at 903, 89 L.R.R.M. at 2781.

[39] *Id.* at 895, 903-04, 89 L.R.R.M. 2775, 2781-82.

[40] *Id.* at 904, 89 L.R.R.M. at 2782.

[41] *Id.* at 904-05, 89 L.R.R.M. at 2782. *See also id.* at 899-900, 89 L.R.R.M. at 2778.

[42] *Id.* at 905, 89 L.R.R.M. at 2782.

[43] *See* 429 U.S. at 524.

a secondary boycott was supported by substantial evidence.[44] The majority's analysis in *Enterprise Association* focused upon three issues: first, the immunizing effect of a valid contract clause upon union means of enforcing the clause;[45] second, the viability of the Board's right-to-control analysis under the totality-of-the-circumstances standard;[46] and finally, the correctness of the circuit court's application of the "substantial evidence" standard of review to the Board's decision.[47]

The Court began its analysis in *Enterprise Association* by rejecting what it perceived as the court of appeals's conclusion that the existence of a valid work-preservation clause always would provide an adequate defense to a section 8(b)(4) unfair labor practice charge based upon a union's strike or work stoppage to enforce such a clause.[48] That conclusion, the Court maintained, contravened its holding in *Carpenters v. NLRB (Sand Door)*[49] that "employer promises in a collective-bargaining contract provide no defense to a § 8(b)(4) charge against a union . . . ."[50] In *Sand Door*, the Supreme Court had rejected

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[44] *Id.* at 530-31.

[45] *Id.* at 514-21.

[46] *Id.* at 521-28.

[47] *Id.* at 528-32.

[48] *Id.* at 514-15. The court reached this conclusion by a process of deduction from the court of appeals proposition that "an employer who is struck by his own employees for the purpose of requiring him to do what he has lawfully contracted to do to benefit those employees can [n]ever be considered a neutral bystander in a dispute not his own." *Id.* at 514, *quoting* 521 F.2d at 903, 89 L.R.R.M. at 2781. If the employer could not be considered a neutral, then it followed (and the court of appeals specifically stated, *id.* at 904, 89 L.R.R.M. at 2782) that a strike or refusal to handle pursuant to the employer's breach "would not itself warrant an inference that the union sought to satisfy secondary, rather than primary, objectives, whatever the impact on the immediate employer or on other employers might be." 429 U.S. at 514-15. If, in turn, no inference of secondary objectives would be warranted by a mere strike or work stoppage to enforce the agreement, then the Court concluded "the existence of the agreement would always provide an adequate defense to a § 8(b)(4) unfair labor practice charge." *Id.* at 515.

In reaching the conclusion that under the circuit court's view the existence of a valid work-preservation agreement would bar secondary boycott charges, however, the Supreme Court's reasoning is questionable. In the first place, it does not follow logically that the existence of such an agreement provides an *absolute* defense to a section 8(b)(4)(B) violation simply because no inference of secondary objectives arises from union enforcement of the agreement *in and of itself*. Second, the circuit court's opinion does not warrant such a conclusion. Indeed, a majority of the court of appeals held that it would not *consider* an immediate employer a neutral in a dispute initiated by his breach of contract where a union merely engaged in a strike in response thereto. 521 F.2d at 903-04, 89 L.R.R.M. at 2781-82. The majority proceeded, however, to remand the case to the Board for reconsideration of the section 8(b)(4)(B) charges in light of circumstances in addition to, but including, legal control of the struck work at issue. *Id.* at 904-05, 89 L.R.R.M. at 2782. Had the court considered the existence of Local 638's work-preservation agreement as an absolute defense to the secondary boycott charges, a remand would not have been ordered. *But cf. id.* at 903 n.44, 89 L.R.R.M. at 2781 n.44 (suggesting that secondary objectives might not often be found where the only evidence is of union enforcement of valid work-preservation agreement). See text at notes 37-42 *supra* for a discussion of the court of appeals's opinion.

[49] 357 U.S. 93 (1958).

[50] 429 U.S. at 517-18.

the argument that the existence of a collective bargaining agreement, which contained a then-legal provision that employees could not be required to handle nonunion material,[51] was a defense to secondary boycott charges.[52] The *Enterprise* Court reasoned that section 8(e), a provision designed legislatively to prohibit the type of agreement found valid in *Sand Door,* did not impugn *Sand Door's* holding that means prohibited by section 8(b)(4)(B) cannot be employed to enforce otherwise legal contracts.[53] Moreover, the *Enterprise* Court continued, *Sand Door's* holding was supported by the Court's subsequent decision in *National Woodwork.*[54] *National Woodwork,* the *Enterprise* Court noted, rejected the application of a per se rule that a valid work-preservation clause may be enforced without violating section 8(b)(4)(B), and held that all actions by the union must be scrutinized to determine whether illegal secondary objectives exist.[55] Thus, *National Woodwork* also recognized that means prohibited by section 8(b)(4)(B) cannot be employed to enforce otherwise legal contracts.[56] Therefore, the Court concluded, a valid work-preservation agreement offered no immunity from secondary boycott charges.[57]

The majority next focused upon the viability of the Board's right-to-control analysis under the totality-of-the-circumstances standard which the Court found applicable to the *Enterprise* fact situation. Turning to *National Woodwork,* the *Enterprise* majority determined that the Board's reliance upon Hudik's lack of control did not contravene the standard set forth there requiring an evaluation of union actions in light of all circumstances to determine whether such actions were intended to influence labor relations with a primary employer or to visit economic sanctions upon another.[58] In contrast to the court of appeals, the Supreme Court found that the Board had considered all relevant circumstances, including market conditions, in reaching its decision.[59] The Court characterized the determination of the existence

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[51] 357 U.S. at 95. At the time contracts embodying such secondary objectives — boycott of nonunion goods with the objective of changing the manufacturer's labor policy — were not unlawful even though union attempts to achieve the same result by economic pressure alone were unfair labor practices under section 8(b)(4)(A). *Id.* at 106. The loophole in the secondary boycott provisions identified in *Sand Door* was closed in 1959 when Congress added section 8(e), which bans such "hot cargo" agreements. For text of section 8(e), 29 U.S.C. § 158(e) (Supp. V 1975), see note 6 *supra.*

[52] 357 U.S. at 107-08.

[53] 429 U.S. at 517-18.

[54] *Id.* at 518.

[55] *Id.* at 520.

[56] *Id.* at 520-21.

[57] *Id.* at 521.

[58] *Id.* at 524.

[59] *Id.* at 523-24 & n.12. The relevant market conditions were summarized by the Administrative Law Judge whose findings were adopted by the Board, 204 N.L.R.B. at 760, 83 L.R.R.M. at 1397:

> In my opinion, it is an appropriate subject of official notice that in New York City and probably in all or most of the major cities in this country, the building and construction industry is unionized, certainly with respect to major industrial, commercial, and public construction. Unionized

of impermissible secondary union objectives as a factual matter in which the Board could assign as much or as little weight as it chose to an employer's lack of control.[60] Such a determination the Court observed falls "well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers . . . ."[61] Accordingly, the Court concluded that the Board's right-to-control analysis was safely within the parameters of *National Woodwork's* totality-of-the-circumstances test.[62]

Having determined that the Board applied the correct legal standard to Local 638's conduct, the Court then addressed the question whether there was substantial evidence to support the Board's decision.[63] Rejecting the application of the substantial evidence test by the court of appeals,[64] the majority determined that the Board's decision was supported by substantial evidence.[65] Although the court of

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> in this context means that craft unions affiliated with the AFL-CIO represent and have contracts for the employees who work on such projects and, in fact, the unions are the source of the labor supply and furnish the employees to the employer-contractors. The strategic position of the unions in the industry is confirmed by the fact that governmental efforts to increase the number of minority employees in the industry are concentrated on the unions and not on the employers. In most industries, if it is desired to increase the number of minority employees, governmental pressure is effectively directed to the employers. But in the construction industry it is the unions that control the labor supply and if the union steamfitter employees of Hudik on the Norwegian job refuse to work, other steamfitters will not be available to Hudik or to anyone else to perform work on the job.

Id. at 764 n.10.

[60] 429 U.S. at 524.

[61] *Id.* at 528. Additionally, the Court noted not only had the Board's application of the test remained unchanged both prior to and subsequent to the *National Woodwork* case without legislative disturbance, but also that the courts of appeals had consistently upheld the Board prior to *National Woodwork*. *Id.* at 525-26, 527 n.15. *National Woodwork* itself had no occasion to address the propriety of the Board's right-to-control test, because the contractor-employer in the appeal had the legal right to assign the disputed work. 386 U.S. at 616 n.3.

[62] 429 U.S. at 524.

[63] The "substantial evidence on the whole record" standard of review for factual findings of the National Labor Relations Board is mandated by 29 U.S.C. § 160(e), and was explicated in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Therein, the Court stated:

> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act (codified at 29 U.S.C. § 160(e)) direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions. . . . The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Id. at 490.

[64] 429 U.S. at 531-32.

[65] *Id.* at 529. Despite the Court's earlier reference to other circumstances besides Hudik's lack of right-to-control, in concluding that the Board's decision had ample sup-

appeals had differed from the Board as to the inferences permissible from the Hudik's lack of control over the disputed work, the Court held review limited to whether the Board's result was supported by the record considered as a whole. The reviewing court was not permitted to substitute its judgment for the Board's by deciding whether it would reach the same result the Board did.[66] Thus, in addition to finding the Board's right-to-control analysis consistent with *National Woodwork,* the Court also upheld the Board's specific application of this analysis to Local 638's actions. Accordingly, the decision of the court of appeals was reversed.[67]

Justice Brennan, joined by Justices Marshall and Stewart,[68] dissented, taking the position that the Board's right-to-control test was precluded by *National Woodwork.*[69] This divergence from the majority's opinion stemmed primarily from the dissent's differing interpretations of *National Woodwork* and *Sand Door.* In the first place, the dissent noted, *National Woodwork* did not require separate evaluations of both a work-preservation clause and a union's attempts to enforce that clause in order to determine whether each individually is free from the taint of secondary pressure. Rather, the dissent concluded, *National Woodwork* stands for the proposition that where a contractual agreement "is intended to preserve work, its objective, and the objective of pressure to enforce it, is primary, and therefore legitimate . . . ," unless all the surrounding circumstances indicate a secondary purpose.[70] From this interpretation of *National Woodwork* followed the corollary that Hudik could not be characterized as a neutral based merely upon a lack of control of the right to assign work that resulted from its breach of the collective bargaining agreement.[71] To the contrary, under *National Woodwork,* the dissent maintained, Hudik would retain its primary status as the object of Local 638's efforts to enforce the breached clause, because it could have complied with the work-preservation clause in some manner other than boycotting Austin.[72]

Next, the dissenting opinion challenged the majority's application of the *Sand Door* case as inapposite to the facts at hand.[73] In *Sand Door,* noted the dissenters, the court held only that pressure brought to bear on an immediate employer in order to enforce a secondary boycott clause remains secondary and does not become primary simply because the secondary objective is embodied within a collective bargaining agreement.[74] The same inference of secondary objectives,

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port in the record, the Court relied almost exclusively on the inference to be drawn from the absence of the legal right to assign the work. *Id.* at 528 n.16, 530.

[66] *Id.* at 531-32.

[67] *Id.* at 532.

[68] Justice Stewart did not concur with Part V of the dissent. *Id.* at 544.

[69] *Id.* at 532 (Brennan, J., dissenting).

[70] *Id.* at 536.

[71] *Id.* at 536-38.

[72] *Id.* at 539.

[73] *Id.* at 541.

[74] *Id.* at 541-42.

however, does not arise from union enforcement of a clause with admittedly primary objectives. Indeed, the dissent concluded the opposite inference would be logical: that pressure exerted to enforce a primary clause remains primary.[75] In view of the primary objectives of Local 638's work-preservation clause, therefore, the dissent found the majority's application of *Sand Door* misplaced.[76]

In conclusion, the dissent predicted that the *Enterprise* decision would condone future employer breaches of work-preservation agreements.[77] In *National Woodwork,* the dissent observed, the Court had drawn support from a perceived congressional intent that labor and management negotiate the resolution of the conflict between technological change and work preservation. The likely result of *Enterprise Association,* the dissenters feared, would be to undermine this intent by removing work preservation from meaningful consideration at the bargaining table.[78]

The Board's treatment of right-to-control in *Enterprise Association* seems undesirable as a matter of policy because it effectively denies a subcontractor's employees the right to strike[79] their immediate employer in response to his breach of a primary clause in their collective bargaining agreement. Nevertheless, it is submitted that the Supreme Court reached the correct legal result in allowing the Board substantial latitude to define the scope of proscribed secondary boycotts under section 8(b)(4)(B). The majority's effective approval of the Board's right-to-control analysis, however, leaves unanswered two important questions in future applications of the doctrine: first, the factors that may outweigh the inference of secondary objectives arising from a subcontractor's lack of legal right-to-control disputed work; and second, the identity of the primary employer in the dispute against whom the union may assert its primary right to strike or picket. This chapter now will explore the analytical principles supporting the Supreme Court's deferral to the Board's expertise in *Enterprise Association.* Then it will define the parameters of the Board's right-to-control approach with emphasis upon factors that may counterbalance the absence of authority to assign disputed work, and upon the identity of a primary employer in work-preservation disputes.[80]

The Supreme Court's result in *Enterprise Association* is consistent with judicial review of administrative decisions limited to consideration of the reasonableness rather than the rightness of the decisions.[81] This

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[75] *Id.* at 542.

[76] *Id.* at 541.

[77] *Id.* at 543.

[78] *Id.*

[79] Of course, the right-to-control problem would not arise if the collective oargaining agreement contained a no-strike clause.

[80] For a discussion of the Board's decisions see text at notes 98-102 *infra.*

[81] *See* Schwartz, *Gray vs. Powell and the Scope of Review,* 54 MICH. L. REV. 1, 6 (1955).

limited review is attributable to the leading case of *Gray v. Powell*[82] where the Court applied a two-tiered standard for reviewing an agency's interpretation and application of the statute which it administers. Under this standard, a court first must question whether the agency is acting within the broad area entrusted to it by Congress.[83] This question in turn involves two distinct inquiries: whether the agency has perceived correctly the parameters of the statutory term it is applying in light of the underlying rationale of the statutory scheme; and whether the area is one in which Congress intended the agency to fill the interstices left by broad or vague statutory language.[84] Second, if both branches of this first question have been answered affirmatively, the court examines whether there is a rational basis for the agency's application of a statutory standard to a particular factual situation.[85]

Applying this two-tiered standard of limited review to *Enterprise Association* requires as an initial matter the identification of the statutory term or classification subject to administrative interpretation. Section 8(b)(4)(B) on its face does not identify a particular statutory term for application. Rather, it addresses proscribed union means and objectives. Yet, it is well established that the congressional purpose underlying section 8(b)(4)(B) is to protect neutral parties from labor disputes not their own.[86] The statute therefore creates a protected class of "neutral persons." In *Enterprise,* the Board perceived its task as determining whether an immediate employer could be characterized as a neutral and thus afforded the protection of section 8(b)(4)(B). Since in *National Woodwork,* the Supreme Court found congressional intent that immediate employers be considered neutrals under certain circumstances,[87] the Board's formulation of the broad statutory question demonstrates an accurate perception of the parameters of the protected class of "neutrals" that is consistent with the policies of the secondary boycott provisions.

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[82] 314 U.S. 402, 411-13 (1941). *Gray v. Powell* was not the first case in which the Supreme Court articulated the doctrine of limited review. As Professor Davis notes, the concept had been established unequivocally two years earlier in Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939). 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 30.05 at 215 (1958).

[83] 314 U.S. at 413.

[84] Nathanson, *Administrative Discretion in the Interpretation of Statutes,* 3 VAND. L. REV. 470, 473-75 (1950).

[85] 314 U.S. at 413. In *Gray v. Powell,* the Court summarized its position by stating:

> Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

Id.

[86] *National Woodwork,* 386 U.S. at 624-28; *Sand Door,* 357 U.S. at 100. *See generally* Resnick, *The Gravamen of the Secondary Boycott,* 62 COLUM. L. REV. 1363, 1363-66 (1962).

[87] *National Woodwork,* 386 U.S. at 644-45.

Having concluded that the Board correctly perceived that immediate employers may be protected as neutrals under section 8(b)(4)(B), the issue remains whether Congress intended the Board to determine which employers are protected by the section. The legislative history of section 8(b)(4)(B) offers little guidance with respect to the desirability of allowing the Board such discretion to identify neutral parties in work-preservation disputes.[88] In seeking to control secondary boycotts, Congress did not face squarely the problem of accommodating work preservation with technological advance. In the absence of affirmative statutory direction, the alternatives of administrative as opposed to judicial accommodation of these antagonistic aims must be evaluated from a policy standpoint.[89] A resolution of the conflicting goals of work preservation and prefabrication requires above all intimate familiarity with the labor market. Not only is the Board closely attuned to market conditions within various segments of the construction industry, but also it is equipped with the fact-finding mechanisms necessary to an evaluation of the union-subcontractor-general contractor triangle. In decisions involving the Board's specialized knowledge, particularly with reference to the labor market, the Court generally has deferred to the Board's expertise.[90] It is suggested therefore that the Board is best suited to identify parties neutral to work-preservation disputes and, as a consequence, to accommodate work preservation with prefabrication. By accepting this premise and deferring to the Board's decision in *Enterprise Association*, the Supreme Court effected a sensible resolution of this economically and socially troublesome issue. Thus, it is submitted that both branches of the first tier of the limited review standard are met in *Enterprise Association*.

Fulfilling the second tier of the standard of limited review requires only the existence of a rational basis for the Board's characterization of Hudik as a neutral. Precisely this type of evaluation was made in *Enterprise Association* when the Court considered whether the Board's decision was supported by substantial evidence.[91] In view of

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[88] See *id.* at 639-42 and *id.* at 649 (Harlan, J., concurring) for an exhaustive review of the legislative history of section 8(b)(4)(B).

[89] The alternative of leaving the issue within the collective bargaining arena is an illusory one. Far from reaching that result, a decision to deny subcontractors neutral status would tip the scales heavily in favor of the union. A subcontractor's choices would be limited to refusing contracts requiring the use of prefabricated materials or losing a portion of his profit margin through wage compensation. It is true that the Court's choice to defer to the Board's expertise has the present effect of favoring technological changes and management prerogative to embrace such changes. Nontheless, it leaves the Board the flexibility necessary to adjust to changing economic conditions affecting the balance of power between unions and employers within the construction industry. The Court's result in *Enterprise* may also be reasonably interpreted as accepting the cartelization analysis that is the logical outgrowth of unbridled union economic power. For a discussion of the cartel theory see Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904 (1976).

[90] *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944).

[91] 429 U.S. at 528-32m As employed by the federal courts the substantial evi-

the conflicting inferences arising from Local 638's refusal to install the prefabricated units and the weight normally attributed to the Board's judgment,[92] it is difficult to conclude that the Board's characterization of Hudik as a neutral lacks a rational basis. As the Court held: "It was not error for the Board to conclude [from Local 638's jobsite product boycott] that the union's objectives were not confined to the employment relationship with Hudik but included the object of influencing Austin."[93] Thus, under the two-tiered tandard of limited review, the Supreme Court was correct in upholding the Board's right-to-control analysis.

Despite the soundness of the legal result the Court reached in *Enterprise Association,* by determining that the Board's characterization of Hudik as a neutral was reasonably within the purview of section 8(b)(4)(B), the Court shifted the focus of inquiry in work-preservation disputes. Rather than focusing on a union's original purpose when it negotiates the work-preservation clause, the Court emphasized its immediate objective when it attempts to enforce the clause: pressuring some person in the subcontractor-purchaser chain to boycott the prefabricated product.[94] As a matter of legal reasoning, this change illustrates the *Enterprise* majority's deviation from the rationale of both *National Woodwork* and *Sand Door.*[95] In practical effect, this shift in em-

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dence standard often is more than just a test of the rationality or reasonableness of Board decisions. In effect, it is a shorthand method of applying a *Gray v. Powell* type of analysis in which reasonableness is a secondary inquiry. *See* Nathanson, *Administrative Discretion in the Interpretation of Statutes,* 3 VAND. L. REV. 470, 475 (1950). As such, the test's application presumes that the agency has perceived correctly the broad statutory question within which the agency is competent to act at its discretion. See discussion in text at notes 82-90 *supra.*

[92] The Board's expertise in interpreting broad statutory terms and the consistency of their application, both of which were found in *Enterprise,* 429 U.S. at 528, favor enforcement of Board decisions. Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 303-04 (1977). While these factors enter into the initial determination of whether the Board is acting within an area entrusted to it by Congress, see discussion in text at notes 82-89 *supran* they also weigh heavily in favor of the reasonableness of the Board's decision. See text at notes 91-93 *infra.* As the Court stated in *Bayside* where the interpretation of the jurisdictional term "employee" was at issue: "Regardless of how we might have resolved this question as an initial matter, the appropriate weight which must be given to the judgment of the agency whose special duty is to apply this broad statutory language to varying fact patterns requires enforcement of the Board's order." 429 U.S. at 304 (footnotes omitted).

[93] 429 U.S. at 530-31.

[94] *Id.* at 520. There the Court stated: "The substantial question before us is whether, *with or without* the collective bargaining contract, the union's conduct *at the time it occurred* was proscribed secondary activity within the meaning of [section 8(b)(4)(B)]." *Id.* (emphasis added). For a further discussion of the Court's opinion see text at notes 49-57 *supra.*

[95] *Enterprise Association* signals a retreat from the standard for evaluating work-preservation objectives enunciated in *National Woodwork. National Woodwork* instructed the Board to examine together a work-preservation clause and a union's attempt to enforce such a clause in determining whether a union's objectives are primary or secondary. 386 U.S. at 644-46. Thus, the dissenting opinion in *Enterprise,* written by the author of the majority opinion in *National Woodwork,* reasoned correctly that the validity of the clause itself under section 8(e), a function of its primary objectives, was considered

phasis undercuts substantially the efficacy of work-preservation agreements in the construction industry. To be effective, work-preservation clauses in the construction industry inevitably intend the prevention of factory prefabrication.[96] To achieve this purpose they must operate with a domino effect: restrictions in a subcontractor's collective bargaining agreement must restrict indirectly the contractor and, in turn, the architect or owner.[97] In short, they must reach the person making the purchasing decision. *Enterprise Association* effectively denies a union's right to strike a subcontractor over a breach of the work-preservation clause. Consequently, the viability of such a clause is now dependent largely upon a subcontractor's voluntary observance of the clause unless, of course, unions employ other lawful means of extracting a subcontractor's compliance. In its decision, the Supreme Court has shifted from the courts to the Board responsibility for the development and recognition of those alternative means along with concurrent responsibility for determining the proper balance between work preservation and technological progress in the construction industry.

The Supreme Court's deferral to Board expertise in *Enterprise* enhances the probability that the Board's future right-to-control decisions will be upheld. Moreover, the Court's deferral leaves for the Board's determination both the factors that may outweigh the absence

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in isolating the tactical objective of the union's enforcement of the clause. 429 U.S. at 542. The crucial question posed by *National Woodwork* was, on the one hand, whether the union sought to preserve work that its members traditionally performed or, on the other hand, whether it sought primarily to impose a product boycott for no legitimate purpose. Implicit in *National Woodwork* therefore, was an acceptance that a work-preservation purpose is a legitimate reason for a union to impose a product boycott.

In *Enterprise Association,* the Court departed from the reasoning of *National Woodwork* by considering the union's actions only at the time it attempted to enforce the work-preservation clause without regard to the union's original purpose. *Id.* at 520-21. This change resulted primarily from the Court's manipulation of the holding in *Sand Door* that a contractual provision is not a defense to a secondary boycott charge. Unlike *National Woodwork* and *Enterprise Association* which involved primary objectives embodied within collective bargaining agreements, *Sand Door* concerned a secondary objective embodied within such an agreement. What the Court prevented when it examined the union's actions at the time of enforcement in *Sand Door* was the union's attempt to transform a secondary boycott into protected activity by virtue of the primary collective bargaining relationship within which the clause was negotiated. It was this primary context of negotiation rather than the original objective of the clause that the court refused to consider in evaluating the union's actions. Indeed, the *Sand Door* Court inferred that union action to enforce the clause was secondary precisely because the objective of the clause itself was secondary. Thus, the *Enterprise Association* Court misconstrued the reasoning of *Sand Door* in analyzing the union's enforcement of the clause without reference to the primary nature of the clause's objective. The result of this manipulation of *Sand Door* and *National Woodwork* is to undermine the legitimacy of a work-preservation purpose for imposing product boycotts.

[96] For a perceptive discussion of this problem see Pipefitters Local No. 638 v NLRB, 521 F.2d 885, 905, 89 L.R.R.M. 2769, 2782 (D.C. Cir. 1975) (Bazelon, C.J., concurring).

[97] Local No. 636, United Ass'n of Journeymen v. NLRB, 430 F.2d 906, 909, 74 L.R.R.M. 2851, 2854 (D.C. Cir. 1970).

of right-to-control and hence defeat a subcontractor's neutral status, and the identity of a primary employer in a work-preservation dispute. Consequently, the Board's decisions are the soundest indicators of probable resolutions of these questions as well as of the legality of alternative methods for enforcing work-preservation agreements. Prior Board decisions indicate that the characterization of a subcontractor as a neutral is not inevitable. The Board has held that the inference of secondary objectives from a subcontractor's lack of control will be outweighed, and hence a work-preservation strike will be protected, whenever collusion between contractor and subcontractor designed to avoid the latter's contractual obligations is demonstrated.[98] Similarly, the Board has held picketing against a general contractor who has the right-to-control disputed work to be protected activity by characterizing the general contractor as the primary employer in the work-preservation dispute.[99] In addition, the Board has indicated that it considers some methods for enforcing work-preservation clauses to be lawful under section 8(b)(4).[100] These methods include resort to contractual grievance and arbitration procedures, and by implication litigation to enforce arbitration awards, which the Board has not considered to be coercive.[101] Another method sanctioned by the Board is wage compensation agreements in which a subcontractor, in return for a union promise to install the prefabricated materials, promises to pay employees for the work that would have been theirs under a valid work-preservation clause had prefabricated materials not been

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[98] Painters District Council No. 20, 185 N.L.R.B. 930, 932, 75 L.R.R.M. 1236, 1237 (1970). *See* Local No. 438 United Pipe Fitters (George Koch Sons, Inc.), 201 N.L.R.B. 59, 64, 82 L.R.R.M. 1113, 1119 (1973). In general, however, the Board's right-to-control approach seeks to balance the economic power of subcontractors and their unions, based upon a realistic evaluation of the relevant construction industry market in order to prevent subcontractors from being competitively crippled. The Fourth Circuit eleborated upon this analysis in George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 328, 84 L.R.R.M. 2957, 2960-61 (4th Cir. 1973) in an opinion endorsed by the *Enterprise* Court as well-reasoned. 429 U.S. at 527 n.15. See note 59 *supra* for the market conditions incorporated in the Board's *Enterprise* decision.

[99] Bricklayers and Stone Masons' Union Local No. 8, 180 N.L.R.B. 43, 46-47, 72 L.R.R.M. 1612, 1613 (1969). The Ninth Circuit rejected the Board's conclusion that a general contractor possessing right-to-control is the "primary" in the dispute. Western Monolithic Concrete Products, Inc. v. NLRB, 446 F.2d 522, 526, 77 L.R.R.M. 3023, 3025-26 (9th Cir. 1971). This holding may have been discredited, however, by the circuit court's later acceptance of the right-to-control test in Associated General Contractors of California, Inc. v. NLRB, 514 F.2d 433, 438, 88 L.R.R.M. 3542, 3544-45 (9th Cir. 1975).

[100] The Supreme Court apparently acknowledged the existence of other means of enforcement in *Enterprise Association* when it stated: "Even though a work-preservation provision may be valid in its intendment and valid in its application *in other contexts*, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by § 8(b)(4)(B)." 429 U.S. at 521 n.8 (emphasis added).

[101] *See, e.g.*, Associated General Contractors, 227 N.L.R.B. No. 27 at 14, 94 L.R.R.M. 1210, 1216 (1976); District-Council No. 16, 207 N.L.R.B. 698, 699-700, 84 L.R.R.M. 1513, 1514-15 (1973). The litigation approach was approved by the D.C. Circuit in Pipefitters Local No. 5 v. NLRB, 321 F.2d 366, 370, 53 L.R.R.M. 2424, 2427 (D.C. Cir. 1963).

specified.[102] The practical effect of the Supreme Court's decision in *Enterprise Association* is that construction industry unions will pursue effective work preservation by these alternative methods rather than by strikes and refusals to handle prefabricated materials.

II. ARBITRATION—*BUFFALO FORGE* DEVELOPMENTS—CLEAR AND UNMISTAKABLE WAIVER OF THE RIGHT TO ENGAGE IN SYMPATHY STRIKES—RECOVERY OF DAMAGES RESULTING FROM SYMPATHY STRIKES

In the 1970 landmark case of *Boys Markets, Inc. v. Retail Clerks Local 770,*[1] the Supreme Court created a narrow exception to the anti-injunction provisions of the Norris-LaGuardia Act.[2] Under the *Boys Markets* exception, federal courts have jurisdiction under section 301 of the Labor-Management Relations Act[3] to enforce the arbitration-no-strike provisions of a collective bargaining agreement by enjoining strikes called by a union with respect to an arbitrable grievance.[4] During the Survey year, the Supreme Court in *Buffalo Forge Co. v. United Steelworkers of America*[5] restricted the availability of *Boys Markets* injunctions by holding that a sympathy strike[6] was not enjoin-

[102] District Council No. 16, 207 N.L.R.B. at 699-700 & n.5, 84 L.R.R.M. at 1514-15 & n.5 (1973), *rev'd sub nom.* Assoc. General Contractors of California, Inc. v. NLRB, 514 F.2d 433, 439, 88 L.R.R.M. 3542, 3546 (9th Cir. 1975) (wage assessment found coercive).

[1] 398 U.S. 235 (1970). For a broad over-view of the *Boys Markets* decision, see Axelrod, *The Application of the Boys Markets Decision in the Federal Courts,* 16 B.C. IND. & COM. L. REV. 893 (1975).

[2] 398 U.S. at 253. The Norris-LaGuardia Act prohibits federal courts from enjoining strikes in most labor disputes. *See* 29 U.S.C. §§ 101, 104-05 (1970). Section 4 of the Act provides in pertinent part that "[n]o court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . . : (a) [c]easing or refusing to perform any work . . . ." 29 U.S.C. § 104 (1970).

[3] 29 U.S.C. 185 (1970). Section 301(a) provides that: "Suits for violation of contracts between an employer and a labor organization representing employees . . . , or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a) (1970).

[4] *See* 398 U.S. at 253-55. Under *Boys Markets,* a federal district court has jurisdiction pursuant to section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a) (1970), to enjoin strikes if it finds that: (1) the strike is a breach of a no-strike obligation under a collective bargaining agreement which contains a mandatory grievance adjustment and arbitration procedure; (2) the strike is "over a grievance which both parties are contractually bound to arbitrate;" and (3) traditional equitable considerations require the injunction. *Id.*

[5] 428 U.S. 397 (1976), *noted in* 18 B. C. IND. & COM. L. REV. 518 (1977).

[6] A sympathy strike, the refusal of one union's employees to cross the picket line of a different union, is a protected activity. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75-76 (1953); Gary-Hobart Water Corp., 210 N.L.R.B. 742, 744, 86 L.R.R.M. 1210, 1213 (1974), *aff'd* 511 F.2d 284, 287, 88 L.R.R.M. 2830, 2831 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975).

able by a federal court under the *Boys Markets* exception even where the striking union was a party to the collective bargaining agreement which contained no-strike and arbitration clauses.[7] The *Boys Markets* decision was distinguished by the *Buffalo Forge* Court as controlling only those situations where the strike sought to be enjoined resulted from an underlying dispute between the union and the employer which was subject to the grievance and arbitration provisions contained in their collective bargaining agreement.[8] In *Buffalo Forge*, the Court noted, the dispute underlying the sympathy strike was a dispute between the company and other of its employees, and hence was neither cognizable nor arbitrable under the sympathy strikers' collective bargaining agreement. Thus, the Court concluded, *Boys Markets* could not control the result.[9]

Two related reasons were set forth by the Court in support of its conclusion that *Boys Markets* was not dispositive of the issue presented in *Buffalo Forge*. First, the Court pointed out that *Boys Markets* in effecting an accommodation between the anti-injunction provisions of the Norris LaGuardia Act and section 301 of the Labor Management Relations Act, was designed to strengthen the national policy favoring arbitration of employer-union disputes over use of economic weaponry.[10] It was not intended, however, to remove completely the protection which Norris-LaGuardia affords to organized labor's legitimate economic weapons. If the federal courts were permitted to enjoin a sympathy strike which was itself the grievance sought to be arbitrated, they would be enforcing contract provisions which had not

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[7] 428 U.S. at 400-01, 412-13. In *Buffalo Forge*, production and maintenance (P&M) workers represented by the United Steelworkers and two of its locals, refused to cross picket lines at Buffalo Forge's plants which had been established by fellow employees who were engaged in an economic strike against the company. *Id.* at 399-400. The two collective bargaining agreements between the P&M workers and the company contained no-strike clauses prohibiting any "strikes, work stoppages or interruption or impeding of work," *id.* at 399 n.1, and dispute settlement provisions culminating in arbitration of grievances over ". . . the meaning and application of the provisions of this Agreement." *Id.* at 400 n.2. Subsequently, Buffalo Forge brought suit under section 301(a) of the Labor Management Relations Act seeking damages, a temporary restraining order and preliminary injunction, and an order compelling arbitration on the primary ground that the work stoppage violated the no-strike clause in the collective bargaining agreements. *Id.* at 401. The district court held that it was precluded from granting injunctive relief by section 4 of the Norris-LaGuardia Act. 386 F. Supp. 405, 410, 88 L.R.R.M. 2063, 2066-67 (N.D.N.Y. 1974). The district court narrowly construed *Boys Markets* to sanction injunctive relief only against strikes which were precipitated by grievances between the striking employees and their employer and not by the strike of a sister union. Because the strike sought to be enjoined did not result from any dispute cognizable under the P&M workers' collective bargaining agreements, but rather from a dispute between Buffalo Forge and its other employees, the district court denied all relief. *Id.* The United States Court of Appeals for the Second Circuit concurred in this application of *Boys Markets* and affirmed the district court's decision. 517 F.2d 1207, 1211, 89 L.R.R.M. 2303, 2306 (2d Cir. 1975).

[8] 428 U.S. at 407.

[9] *Id.* at 407-08.

[10] *Id.* at 407.

yet been interpreted. Thus, the Court concluded that to allow a federal court to enjoin a sympathy strike in the *Buffalo Forge* fact situation would not further the national policy favoring arbitration of employer-union disputes over the use of economic weaponry.[11] Second, the Court reasoned that the *Boys Markets* rationale was persuasive only to the extent that it preserved the bargain of the parties to submit their grievances to arbitration.[12] In this light, although the parties in *Buffalo Forge* may have included no-strike provisions in their agreement which forbade the sympathy strike in question, whether these provisions in fact controlled the propriety of the employees' sympathy strike was a matter for an arbitrator to decide. The Court noted, however, that an injunction against the disputed arbitrable conduct would have the practical effect not only of depriving the parties of the arbitration for which they bargained, but also of usurping the function of the arbitrator.[13] As such, the courts would become "potential participants in a wide range of arbitral disputes . . . for the purpose of preliminarily dealing with the merits of the federal and legal issues that are subjects for the arbitrator. . . ."[14] Thus, the Court concluded that if the disputed conduct was enjoined, it was very likely that there would be nothing left to arbitrate, and as a consequence the parties' bargain to submit their grievances to arbitration would be rendered nugatory.[15]

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[11] *Id.* at 410-11. *Buffalo Forge's* admonition to the courts to refrain from enjoining mere contractual violations were adhered to in United Mine Workers of America v. Rochester & Pittsburgh Coal Co., 416 F. Supp. 74, 94 L.R.R.M. 2409 (W.D. Pa. 1976). In *Rochester & Pittsburgh Coal,* the union sought an injunction against the company on the grounds that it had caused supervisory personnel to perform classified production work in violation of the parties' collective bargaining agreement. *Id.* at 77, 94 L.R.R.M. at 2411. The district court, following *Buffalo Forge,* refused to require the employer to fulfill its contractual obligation and instead deferred to the arbitral process. *Id.* at 77-78, 94 L.R.R.M. at 2411-12.

[12] 428 U.S. at 411-12.

[13] *Id.* at 411.

[14] *Id.*

[15] *Id.* at 412. The Supreme Court's decision in *Buffalo Forge* to restrict the availability of *Boys Markets* injunctions against sympathy strikes is a controversial one that gained the support of only five justices. In a vigorous dissent, the four remaining members of the Court argued that under the principles enunciated in *Boys Markets* sympathy strikes should be enjoinable by the federal courts whenever a collective bargaining agreement contains no-strike and arbitration provisions and, in addition, there is convincing evidence that the strike is clearly within the no-strike clause. *Id.* at 431.

The dissent initially rejected the majority's attempt to distinguish the situation in *Buffalo Forge* from *Boys Markets* on three principle grounds. The dissent reasoned first that injunctions enforcing contractual commitments do not contravene the policy of the Norris-LaGuardia Act which is concerned primarily with protecting labor's ability to organize and to bargain collectively rather than with the enforceability of resulting collective bargaining agreements. *Id.* at 415-17. Next the dissent disagreed with the majority's proposition that denying injunctive relief would not deprive an employer of his bargain because the dissent pointed out an employer's agreement to arbitrate might be the *quid pro quo* for a union's commitment to refrain from all strikes, including sympathy strikes. *Id.* at 417-19. Finally, while noting that "a sympathy strike in violation of a no-strike clause does not directly frustrate the arbitration process," nevertheless the dissent main-

The Court's conclusion with respect to the unavailability of injunctive relief had no bearing on its consideration of the arbitrability of the strike's status. The Court found that because the collective bargaining agreements between Buffalo Forge and the sympathy strikers contained both no-strike and arbitration clauses, the issue of whether the no-strike clause prohibited sympathy strikes was arbitrable.[16] This result followed from both the specific language of the collective bargaining agreements at issue and the national labor policy favoring arbitration enunciated in the *Steelworkers Trilogy*.[17]

In analyzing the specific language of the collective bargaining agreements at issue, the Court noted initially that an arbitration clause might be broad enough to encompass union-employer disputes not only over other contractual provisions, but also over the interpretation of the no-strike clause.[18] Since in *Buffalo Forge*, the no-strike and arbitration clauses were distinct contractual provisions,[19] the Court concluded that the catch-all arbitration clause in which the parties agreed to arbitrate disputes over the meaning and application of all provisions of the agreement could be interpreted logically to give rise to an obligation to arbitrate the issue of whether the sympathy strike vio-

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tained that denial of injunctive enforcement of the no-strike clause would frustrate the underlying policy of motivating employers to agree to arbitration in the first place. *Id.* at 423-24.

Recognizing that the rationale of *Boys Markets* is not entirely applicable to *Buffalo Forge*, the dissent also addressed the majority's argument that allowing injunctions against sympathy strikes would conflict with the principle justification for the *Boys Markets* decision: fostering dispute settlement through arbitration. *Id.* at 424. Analyzing the function of the arbitration process itself, the dissent distinguished situations in which arbitration is utilized to provide for unforeseen contingencies resulting in labor disputes from those in which the parties have anticipated and resolved possible conflicts by negotiating appropriate contractual provisions. In the former case, the dissent reasoned the meaning of the parties' contract should be resolved by arbitration with an injunction issuing only to enforce the arbitration award. In the latter case, if the agreement were so unambiguous as to preclude the need for arbitration then the dissent concluded federal courts should have jurisdiction to enforce directly the parties' bargain. *Id.* at 425-26.

In order to reduce the risk of judicial error, however, the dissent added three qualifications beyond the normal considerations of equitable relief to its conclusion that federal courts should have jurisdiction to enjoin sympathy strikes. First, the dissent would require that a union be given adequate opportunity to be heard prior to issuance of an injunction. Second, under the dissent's view a judge "should not issue an injunction without convincing evidence that the strike is clearly within the no-strike clause." *Id.* at 431 (footnote omitted). Finally, the dissent maintained that any injunction issued should require the parties immediately to submit the status of the sympathy strike to arbitration. *Id.* Thus, with these factors in mind, rather than holding that the sympathy strike in *Buffalo Forge* should have been enjoined, the dissent would have remanded the case for the lower court's consideration. *Id.* at 432.

[16] *Id.* at 405.

[17] *Id.* The Steelworkers Trilogy is comprised of United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[18] 428 U.S. at 405.

[19] *Id.* at 399-400 nn. 1 & 2. See note 7 *supra* for the text of the clauses.

lated the no-strike clause.[20] Having determined that the parties intended to submit interpretations of the no-strike clause to arbitration, the Court readily acknowledged the employer's right to invoke the arbitral process.[21] The Court, however, qualified this conclusion by observing that if a collective bargaining agreement contained an arbitration clause, but either did not contain a no-strike clause or expressly excluded sympathy strikes from such a clause, then the courts would be precluded from implying a union's promise not to engage in sympathy strikes from the existence of an arbitration clause.[22]

In summary, the most obvious effect of *Buffalo Forge*, of course, was to restrict the availability of the *Boys Markets* injunction to situations in which a strike is precipitated by an underlying arbitrable grievance.[23] The Court's opinion can also be interpreted as a reaffirma-

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[20] *Id.* at 405.

[21] *Id.* The National Labor Relations Board has evidenced approval of the arbitral process by its policy of deferral both to the arbitration process itself, *see* Collyer Insulated Wire, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971); Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 70 L.R.R.M. 1472 (1969), and to arbitral awards. *See* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

[22] 428 U.S. at 408. This qualification was unnecessary to the decision in *Buffalo Forge*, because in that case the collective bargaining agreements contained no-strike clauses. Yet, the Court apparently felt constrained to treat the issue in order to clarify its decision in Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368 (1974). In *Gateway Coal*, the Supreme Court had broadened *Boys Markets* by holding that injunctive relief could be based on a no-strike obligation that was *implied* from mandatory arbitration provisions contained in the collective bargaining agreement between the striking union and the employer. *Id.* at 381-82. There, coal miners had gone on strike to protest safety conditions in Gateway's mine: namely, the company's reinstatement of supervisors who had been negligent in reporting air flow levels in the mine shafts. *Id.* at 372. Although the collective bargaining agreement between Gateway and the union did not contain a no-strike clause, it did contain broad arbitration provisions covering interpretation of contractual provisions and ". . . any local trouble of any kind aris[ing] at the mine." *Id.* at 375. The Court found that the safety dispute was encompassed within this arbitration clause. Because the parties had agreed to submit the dispute to arbitration, the Court reasoned that the union had an implied obligation not to strike over the dispute. *Id.* at 381-82. In reaching this conclusion, the Court relied on Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 97, 104-05 (1962) which held, in the context of an employer's suit for damages under Section 301 of the Labor Management Relations Act, that the employer's duty to arbitrate implied an obligation not to strike. 414 U.S. at 381-82. Thus, the *Gateway* Court held that the union's strike over the safety dispute was in violation of its implied no-strike obligation and, therefore, subject to injunction. *Id.* at 382.

Several courts of appeals had interpreted *Gateway Coal* as authority for the proposition that a mandatory arbitration clause implied an obligation not to engage in sympathy strikes. *See* 428 U.S. at 408 & n.10 and cases cited therein. In *Buffalo Forge*, this suggestion was summarily rejected. The Court noted that the determinative factor in these cases is whether the strike is precipitated by an underlying dispute which is itself arbitrable. Neither *Boys Markets* nor *Gateway Coal* authorized the enjoining of a sympathy strike merely because it is an alleged breach of contract which is arbitrable. 428 U.S. at 408 n.10.

[23] For recent applications of *Buffalo Forge* with respect to injunctions against sympathy strikes see Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336, 93 L.R.R.M. 2898 (3d Cir. 1976); Southern Ohio Coal Co. v. United Mine Workers, 551 F.2d 695, 94 L.R.R.M. 2609 (6th Cir. 1977); United States Steel Corp. v. United Mine

tion of the primary position of the arbitral process in national labor policy. Aside from its general endorsement of arbitration, *Buffalo Forge* made two additional pronouncements concerning the sympathy strike itself. First, the Court established that where a collective bargaining agreement contains both a broad arbitration and no-strike clause, the question of whether the union has promised not to engage in sympathy strikes is arbitrable.[24] Second, the Court determined that where a collective bargaining agreement contains an arbitration clause, but does not contain a no-strike clause or contains an express no-strike clause which specifically excludes sympathy strikes, there are no grounds upon which to imply a promise by the union not to engage in a sympathy strike.[25] The ramifications of these observations concerning sympathy strikes were considered in two subsequent Survey year decisions. In the first, the United States Court of Appeals for the Seventh Circuit addressed the question of the effect of *Buffalo Forge* on the viability of the National Labor Relations Board's (Board or NLRB) standard requiring a clear and unmistakable waiver of the right to strike. Then, in a related inquiry, the United States Court of Appeals for the Third Circuit considered the effect of *Buffalo Forge* on suits for damages resulting from sympathy strikes.

Workers of America, 418 F. Supp. 172, 93 L.R.R.M. 2495 (W.D. Pa. 1976). *Southern Ohio Coal, supra,* presented an interesting variation on the *Buffalo Forge* situation. There, the court held that a sympathy strike engaged in by a union which was subject to a prospective injunction prohibiting all strikes did not provide the basis for a contempt citation. 551 F.2d at 710-11, 94 L.R.R.M. at 2620. The court of appeals in *Southern Ohio Coal* also addressed the controversial issue of whether *Boys Markets* sanctions prospective injunctions against strikes over arbitrable disputes, and concluded that:

> prospective injunctions should only be granted in extreme cases where absolutely necessary to preserve the arbitration process agreed to by the parties. The decree must be narrowly drawn and firmly grounded on factual support in the record. Before an injunction may issue which grants prospective relief, the District Court should expressly find: that the present strike may be enjoined under *Boys Markets*; that the union has engaged in a pattern of strikes over arbitrable grievances that is likely to continue; that the strikes constituting the pattern of violation would warrant relief under the *Boys Markets* formula; and that the decree is limited to specifically identified areas of dispute which have already been adjudicated and which satisfy the *Boys Markets* guidelines.

Id. at 710, 94 L.R.R.M. at 2619-20 (citations omitted). Because the orders in the instant case failed to meet this standard, the injunctions were vacated. *Id.* at 711, 94 L.R.R.M. at 2620.

A discussion of the propriety of prospective injunctions is beyond the scope of this chapter; however, for similar interpretations of *Boys Markets* see United States Steel Corp. v. United Mine Workers of America, 534 F.2d 1063, 92 L.R.R.M. 2575 (3d Cir. 1976); Donovan Construction Co. v. Construction & Maintenance Laborers Union, Local 383, 533 F.2d 481, 92 L.R.R.M. 2068 (9th Cir. 1976); Old Ben Coal Corp. v. Local No. 1487, 500 F.2d 950, 87 L.R.R.M. 2078 (7th Cir. 1974); CF&I Steel Corp. v. United Mine Workers of America, 507 F.2d 170, 87 L.R.R.M. 3197 (10th Cir. 1974). For the opposite view see United States Steel Corp. v. United Mineworkers of America, 519 F.2d 1236, 90 L.R.R.M. 2539 (5th Cir. 1976). *See generally* Note, 90 HARV. L. REV. 790 (1977) for a discussion of prospective *Boys Markets* injunctions.

[24] *Id.* at 405.

[25] *Id.* at 408.

A. *Clear and Unmistakable Waiver of the Right to Engage in Sympathy Strikes:* National Labor Relations Board v. Keller-Crescent Co.

In *National Labor Relations Board v. Keller-Crescent Co.*,[26] the Seventh Circuit denied enforcement of a Board order directed against an employer who allegedly violated sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act[27] (NLRA or Act) by imposing disciplinary suspensions on employees who had refused to cross the picket lines of co-workers.[28] In *Keller-Crescent*, several units of the company's employees were represented by the Evansville Typographical Union No. 35 (Local 35) while others were represented by Local 117 of the Evansville Printing and Pressmen and Assistants Union, AFL-CIO (Pressmen).[29] Although Local 35 was affiliated with the International Typographical Union (ITU), the Pressmen's union was not.[30] The collective bargaining agreement between Local 35 and Keller-Crescent contained both a no-strike-arbitration clause (Section 13)[31] and a clause recognizing Local 35's right to honor picket lines established by other subordinate unions of ITU (Section 12).[32]

During the summer of 1972, contract negotiations between the Pressmen and the company broke down. As a result, the Pressmen called a strike and established a picket line.[33] In anticipation of the strike, the company notified an official of Local 35 that it would consider Local 35's refusal to cross the Pressmen's picket line a violation

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[26] 538 F.2d 1291, 92 L.R.R.M. 3591 (7th Cir. 1976).

[27] 29 U.S.C. §§158 (a)(1)(3) (1970). Section 8(a)(1) provides: "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [the rights to self-organization, to bargain collectively, to engage in other concerted activities, and to refrain from any or all such activities]." 29 U.S.C. §158(a)(1) (1970). Section 8(a)(3) provides in relevant part that it is an unfair labor practice for any employer "(3) 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 . . . ." 29 U.S.C. § 158(a)(3) (1970).

[28] 538 F.2d at 1292-94, 1301, 92 L.R.R.M. at 3591-92, 3598.

[29] *Id.* at 1292, 92 L.R.R.M. at 3591. Two other unions which were not involved in this case also represented some of Keller-Crescent's employees. *Id.*

[30] *Id.* at 1295,n.4, 92 L.R.R.M. at 3593 n.4.

[31] *Id.* at 1293 & n.2, 92 L.R.R.M. at 3591-92 & n.2. Section 13 created a "Joint Standing Committee" composed of members selected by the employer and the union to render final and binding arbitration of "all disputes which may arise as to the application of and construction to be placed upon any provision of this agreement, or alleged violation thereof, which cannot be settled otherwise." The section further provided that "[t]here shall be no strikes . . . during the term of this agreement unless either party refuses to comply with the [above] grievance procedures . . . ." *Id.* at 1293 n.2, 92 L.R.R.M. at 3591-92 n.2 (emphasis deleted).

[32] *Id.* at 1293 n.1, 92 L.R.R.M. at 3591 n.1. Section 12 provided that: "No employee covered by this contract shall be required to cross a picket line established because of a strike by, or lockout of, any other subordinate Union of the International Typographical Union, when such strike is authorized by, or such lockout is recognized by, the ITU." *Id.*

[33] *Id.* at 1292, 92 L.R.R.M. at 3591. The strike lasted from July 24, 1972 to July 29, 1972. *Id.*

of Section 12 and 13 of the collective bargaining agreement. Twelve members of Local 35, however, honored the picket line notwithstanding the fact that they were addressed by their president on two occasions, at which times they were told to honor their contract with Keller-Crescent.[34] During the course of the strike the company indicated that it would arbitrate any dispute.[35] At the termination of the Pressmen's strike, the sympathy strikers returned to work and were given disciplinary suspensions for refusing to cross the picket line.[36]

Local 35 subsequently brought unfair labor practices charges against Keller-Crescent claiming that the refusal to cross the picket line was protected activity and, therefore, that the disciplinary suspensions violated sections 8(a)(1) and (3) of the Act.[37] The Administrative Law Judge (ALJ) initially considered whether the sympathy strikers had lost the protection of the Act by violating the no-strike-arbitration provisions of Section 13.[38] Noting that Local 35's commitment not to strike was effective only with respect to arbitrable grievances, the ALJ determined that Section 13 extended only to disputes arising over interpretations of the contractual provisions in the collective bargaining agreement between Keller-Crescent and Local 35.[39] Because the underlying issue, the Pressmen's strike, was not cognizable under the provisions of Local 35's contract and hence, was not subject to arbitration, he concluded that the sympathy strike did not violate Section 13.[40] The ALJ did find, however, that the reservation contained in Section 12 of Local 35's right to honor the picket lines of ITU subordinate unions constituted an implied waiver of its right to honor the picket lines of non-ITU unions such as the Pressmen.[41] Accordingly, he found that the sympathy strikers, in refusing to cross the Pressmen's picket line, were engaged in unprotected activity, and consequently, that the company's disciplinary suspension of the strikers was not an unfair labor practice.[42]

Adopting the ALJ's reasoning as to the scope of Section 13 of the collective bargaining agreement, the Board agreed with this determination that Section 13's no-strike clause did not encompass the sympathy strike by Local 35 members, because the Pressmen's strike was not an arbitrable grievance under the provisions of Local 35's

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[34] *Id.* at 1293, 92 L.R.R.M. at 3591-92.

[35] *Id.*, 92 L.R.R.M. at 3592.

[36] *Id.* at 1293-94, 92 L.R.R.M. at 3592. Each of the sympathy strikers except Burdge, the union official, received a one week suspension. Burdge received a two-week suspension. *Id.* at 1293, 92 L.R.R.M. at 3592.

[37] *See id.* at 1292, 92 L.R.R.M. at 3591.

[38] Keller-Crescent Co., A Division of Mosler, 217 N.L.R.B. 685, 696, 89 L.R.R.M. 1201, 1204 (1975).

[39] *Id.*

[40] *Id.*

[41] *Id.*, 89 L.R.R.M. at 1204-05.

[42] *Id.*, 89 L.R.R.M. at 1204.

contract with Keller-Crescent.[43] However, the Board rejected the ALJ's conclusion that in Section 12 of the contract Local 35 had impliedly waived its right to honor the picket lines of non-ITU unions.[44]

In rejecting the ALJ's interpretation of Section 12 of the contract, the Board initially noted that "the right to engage in a sympathy strike or to honor another union's picket line is a right created and protected by the Act."[45] Moreover, the Board pointed out, such a statutory right could be waived only by clear and unmistakable language, and the Board found no such waiver in *Keller-Crescent.*[46]

Four factors had been advanced by the company in *Keller-Crescent* in support of the theory that Local 35 in Section 13 had waived its right to engage in sympathy strikes other than those approved by the ITU and in deference to other ITU affiliates. First, application of the principle *inclusio unius est exclusio alterius*—the express inclusion of one thing thereby includes all others—gave rise to the implication that Local 35's express reservation of its right to refuse to cross certain picket lines constituted a contractual undertaking not to cross all others.[47] Second, there was evidence that the union had proposed a substitute clause for Section 12 encompassing all sympathy strikes, but that this proposal had been rejected by the company at the last contract negotiations.[48] Third, during the Pressmen's strike, Local 35's president and the ITU had instructed the sympathy strikers to honor their contract with Keller-Crescent although neither explicitly directed Local 35's members to cross the picket line.[49] Finally, one of the sympathy strikers indicated his subjective understanding that the

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[43] *Id.* at 687, 89 L.R.R.M. at 1204. Keller-Crescent also contended that the dispute over the disciplinary suspension had been resolved against the union by the contractual grievance procedure short of arbitration and that the Board should therefore defer to the arbitral process under its decision in Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955). 217 N.L.R.B. at 686, 89 L.R.R.M. at 1203-04. Therein, the Board had adopted a policy of deferring to arbitral awards unless they were procedurally unfair or repugnant to the Act. 112 N.L.R.B. at 1082, 36 L.R.R.M. 1153. In the instant case, the grievance procedure provided for a four member standing committee composed of two employee and two management representatives. 217 N.L.R.B. at 686, 89 L.R.R.M. at 1203. If the committee became deadlocked over a dispute, as occurred here, it was to select a fifth member in order to facilitate a final and binding resolution. Although the evidence indicated that the union's representatives did not request a fifth member, neither did it indicate that management's representatives had done so. Thus the Board was unable to conclude that there had been a final resolution of the dispute to which the *Spielberg* doctrine could be applied. *Id.*, 89 L.R.R.M. at 1203-04. The Seventh Circuit did not consider this aspect of the Board's decision.

[44] *Id.* at 687, 89 L.R.R.M. at 1204.

[45] *Id.*

[46] *Id.* This standard was endorsed by the Seventh Circuit in Hyster Co. v. Independent Towing & Lifting Machine Ass'n, 519 F.2d 89, 92, 89 L.R.R.M. 2885, 2887 (7th Cir. 1975), *cert. denied,* 428 U.S. 910 (1976); Gary-Hobart Water Corp. v. NLRB, 511 F.2d 284, 288, 88 L.R.R.M. 2830, 2832 (7th Cir. 1975).

[47] 217 N.L.R.B. at 687, 89 L.R.R.M. at 1205.

[48] *Id.* at 688-89, 89 L.R.R.M. at 1205-06.

[49] *Id.* at 689-90, 89 L.R.R.M. at 1206-07.

instruction to honor the contract meant to cross the picket line.[50]

Under the "clear and unmistakable" standard, the Board found all of these factors insufficient to establish a waiver of the union's right to engage in sympathy strikes and therefore concluded that the refusal to cross the picket line was protected activity.[51] Thus, the suspensions constituted violations of sections 8(a)(1) and (3).[52] Accordingly, the Board ordered that the company cease and desist its unfair labor practices and pay the twelve strikers any lost wages incurred because of the suspensions.[53]

Upon the Board's application for enforcement of its order, the Seventh Circuit rejected the Board's approach to determining the status of the sympathy strike. The court found that the crucial issue was whether Local 35 was required to arbitrate its dispute over the application and construction of the picket line clause before refusing to cross the Pressmen's picket line. Therefore, the court turned to *Buffalo Forge*.[54] The court noted that prior to *Buffalo Forge* it had considered questions of arbitrability and enjoinability by analyzing the specific language of no-strike and arbitration clauses, and had applied the same standards for both arbitrability and enjoinability.[55] In *Buffalo*

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[50] *Id.* at 690, 89 L.R.R.M. at 1207.

[51] *Id.*, 89 L.R.R.M. at 1208.

[52] *Id.*

[53] *Id.* at 692, 89 L.R.R.M. at 1209.

[54] 538 F.2d at 1295, 92 L.R.R.M. at 3593-94.

[55] *Id.* at 1296, 92 L.R.R.M. at 3594. Two pre-*Buffalo Forge* decisions, Hyster Co. v. Independent Towing & Lifting Machine Ass'n, 519 F.2d 89, 89 L.R.R.M. 2885 (7th Cir. 1975), *cert. denied*, 428 U.S. 910 (1976), and Gary-Hobart Water Corp. v. NLRB, 511 F.2d 284, 88 L.R.R.M. 2830 (7th Cir. 1975), had held that a refusal to cross another union's picket line was not arbitrable under the no-strike provisions involved therein. 519 F.2d at 91, 89 L.R.R.M. at 2887; 511 F.2d at 288, 88 L.R.R.M. at 2832. *Hyster* was an injunction decision. There, the defendant union's members had refused to cross stranger union's picket lines at their employer's plant. *Id.* at 90, 89 L.R.R.M. at 2886. The sympathy strikers' collective bargaining agreement contained no-strike and arbitration clauses which did not provide for arbitration concerning "differences . . . about matters not specifically mentioned" in the agreement or relating to "any local trouble." *Id.* at 91, 89 L.R.R.M. at 2887. The Seventh Circuit reversed the district court's grant of an injunction on the grounds that: (1) the union had not waived the right to engage in sympathy strikes in clear and unmistakeable language; (2) the dispute was not arbitrable; and (3) therefore, *Boys Markets* did not apply. *Id.* at 92, 89 L.R.R.M. at 2887. In *Gary-Hobart*, clerical employees went on a sympathy strike during an economic strike by production and maintenance employees who were represented by a sister local. *Id.* at 286, 88 L.R.R.M. at 2830-31. The company discharged all clerical unit workers who had refused to cross the picket lines, refused to reinstate them following an unconditional offer to return to work, and prematurely terminated their collective bargaining agreement. *Id.*, 88 L.R.R.M. at 2831. A complaint was issued alleging violations of §§ 8(a)(1), (3) & (5) of the Act, but the Board deferred to the arbitral process although retaining jurisdiction. *Id.* Upon the company's refusal to arbitrate, the Board decided the case on the merits and found that the contractual no-strike provisions did not waive the clerical workers' statutory right to engage in sympathy strikes. *Id.* at 286-87, 88 L.R.R.M. at 2831. Therefore, the discharges contravened section 8(a)(3) and (1). *Id.* Accordingly, the discharged workers retained employee status, giving the union a majority status at the time the company had terminated its contract. *Id.* This resulted in the Board's finding an 8(a)(5) refusal to bargain violation. *Id.* at 287, 88 L.R.R.M. at

Forge, however, the Supreme Court had clearly stated that regardless of the availability of injunctive relief, the contractual status of a sympathy strike could be arbitrable. Thus, the Seventh Circuit concluded that it could no longer blend enforcement decisions with injunction decisions.[56]

Employing a straightforward analysis, the court in *Keller-Crescent* reasoned that the arbitration clause in Section 13 was designed to reach all disputes relating to the application, construction and alleged violation of any provision of the agreement. The picket-line clause, Section 12, was a provision of the agreement.[57] The dispute over the meaning of Section 12, therefore, was arbitrable. In view of this fact, Local 35's refusal to arbitrate prior to engaging in the sympathy strike violated its collective bargaining agreement.[58] This, in turn, the court concluded, rendered the strike an unprotected activity which caused the unfair labor practice charges to fail.[59] Accordingly, the court reversed the Board's decision.

It is submitted that the Seventh Circuit's decision in *Keller-Crescent* is sound. In *Buffalo Forge* the Supreme Court stated that an arbitration clause may be broad enough, as were the clauses at issue in *Buffalo Forge*, to reach disputes concerning the inclusion of sympathy strikes in a union's undertaking not to strike.[60] Under well-settled principles of labor law, if the legality of a sympathy strike is arbitrable the strike loses its status as protected activity under the NLRA when the union rejects an employer's legitimate request for arbitration.[61]

2831. The Seventh Circuit enforced the Board's order because it agreed that the no-strike-arbitration clause, which provided that ". . .there shall be no lockouts . . . and . . . no strike, stoppages of work or any other form of interference with [production or operation] . . ., and any and all disputes and controversies arising under or in connection with the terms of provisions hereof shall be subject to the grievance procedure . . ." was not broad enough to render sympathy strikes arbitrable. *Id.* at 288, 88 L.R.R.M. at 2832. The court added that even if it had not agreed with this conclusion it would have enforced the Board's order nonetheless in view of the Board's initial deference to arbitration and the employer's subsequent refusal to arbitrate. *Id.* at 289, 88 L.R.R.M. at 2833.

These decisions had been relied upon by the Board in *Keller-Crescent* to support its conclusion that a dispute over Local 35's sympathy strike was not arbitrable. 538 F.2d at 1297-98, 92 L.R.R.M. at 3595-96. (*Gary-Hobart* was cited in the Board's decision, 217 N.L.R.B. at 687 n.4, 89 L.R.R.M. at 1204 n.4. Presumably, *Hyster* was raised by General Counsel on brief. *See* 538 F.2d at 1297, 92 L.R.R.M. at 3595.) The court emphasized that this reliance was misplaced not only because of factual distinctions between those cases and *Keller-Crescent*, in particular the absence of a picket line clause, but also because of language in *Buffalo Forge* indicating that an arbitration clause might be broad enough to reach the meaning and application of the no-strike clause itself. 538 F.2d at 1296, 92 L.R.R.M. at 3595.

[56] *Id.* at 1296, 92 L.R.R.M. at 3594.

[57] *Id.* at 1298, 92 L.R.R.M. at 3596.

[58] *Id.* at 1300, 92 L.R.R.M. at 3598.

[59] *Id.*

[60] 428 U.S. at 405.

[61] This results because the strike is in violation of the parties' contract. *See, e.g.*, Section on Labor Relations Law, Am. Bar Ass'n, The Developing Labor Law 124 (C. Morris ed. 1971).

Thus, *Buffalo Forge,* by heightening the presumption of arbitrability, sanctions an implied waiver of a union's right to engage in sympathy strikes. By contrast, the standard applied by the Board in its pre-*Buffalo Forge* decision in *Keller-Crescent* required a clear and unmistakable waiver of the right to engage in a sympathy strike before the strike would be found arbitrable and hence unprotected.[62] Thus, it is apparent that the Board's "clear-and-unmistakable" standard could no longer remain viable after *Buffalo Forge,* because that case indicated that a finding of arbitrability is not dependent upon an express waiver of the right to sympathy strike, but rather is dependent upon the breadth of the arbitration and no-strike clauses at issue.[63]

In view of this strong presumption of arbitrability, the language and structure of Local 35's contract clearly warranted the circuit court's conclusion that the union's sympathy strike was arbitrable. The logic of the court's determination that the interpretation of section 12, a provision of the agreement, was arbitrable under Section 13, which made disputes over the meaning of all contractual provisions subject to arbitration, is unquestionable.[64] Once it had been concluded that

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[62] In *Keller-Crescent,* the Board did not expressly apply the "clear and unmistakable" test as a standard for arbitrability. *See* 217 N.L.R.B. at 687, 89 L.R.R.M. at 1204. It did, however, approve a portion of the Administrative Law Judge's opinion in which he applied the test in considering whether the sympathy strike was arbitrable under Section 13, the no-strike-arbitration provision of the contract. 217 N.L.R.B. at 696. Both the Board and the ALJ once again utilized the "clear-and-unmistakable" standard to determine whether Local 35 had impliedly waived its right to honor the Pressmen's picket line by Section 12, the limited picket line clause. 217 N.L.R.B. at 687, 696, 89 L.R.R.M. at 1204. See text at notes 41-52 *supra.* That the "clear and unmistakable" standard has functioned as a test of arbitrability is more clearly demonstrated in Gary-Hobart Water Corp., 210 N.L.R.B. 742, 86 L.R.R.M. 1210 (1974). There, the Board prefaced its examination of whether the sympathy strikes at issue came within the no-strike and arbitration provisions with a statement of the standard. *Id.* at 744-45, 86 L.R.R.M. at 1213.

[63] The language of *Buffalo Forge* not relied upon by the Seventh Circuit further supports this conclusion. In dicta, the Supreme Court noted that a sympathy strike would not present an arbitrable grievance if: (1) the collective bargaining agreement did not contain a no-strike clause; or (2) sympathy strikes were *expressly excluded* from such a clause. 428 U.S. at 408. From this language it can be assumed that a rule requiring clear and unmistakable inclusion of all sympathy strikes in a no-strike-arbitration clause or separate sympathy strike clause, prior to a finding of arbitrability would be precluded by *Buffalo Forge. See* 428 U.S. at 408. See text at note 25 *supra.* The Sixth Circuit, however, has interpreted this language as preserving the "clear and unmistakable" test. Southern Ohio Coal Co. v. United Mine Workers of America, 551 F.2d 695, 705, 94 L.R.R.M. 2609, 2615 (6th Cir. 1977). The collective bargaining agreement in *Southern Ohio Coal,* in fact, did not contain an express no-strike clause, *id.* at 705, 94 L.R.R.M. at 2615, and therefore the court's result is not incompatible with that of the Seventh Circuit. A comparison of the courts of appeals discussions does indicate that the "clear and unmistakable" test is not accorded consistent interpretations. The most accurate reading of *Buffalo Forge's* effect on the "clear and unmistakable" test results from a combination of the two courts' views. First, the test has survived to the extent that the existence of some type of no-strike clause is a prerequisite to finding a sympathy strike arbitrable. *Buffalo Forge,* however, no longer sanctions a test which requires express inclusion of all sympathy strikes, within either a general no-strike clause or a limited picket line clause, prior to finding arbitrability.

[64] See notes 31 and 32 *supra* for the text of section 12 and 13.

the status of Local 35's sympathy strike was arbitrable, it followed that the strikers' refusal to cross the picket line was unprotected activity and hence was susceptible to the employer's disciplinary actions. It is submitted therefore that *Keller-Crescent* is correct both in its fundamental reasoning and in its result. The Court's decision effects the policy favoring arbitration reaffirmed in *Buffalo Forge* by preserving the bargain of the parties to arbitrate disputes rather than to engage in economic warfare.

The practical result of *Keller-Crescent* will be that employers will seek express no-strike or no-sympathy-strike clauses and broad arbitration clauses which apply to disputes over all contractual provisions. Unions, on the other hand, will optimally negotiate for express exclusion of sympathy strikes from no-strike clauses and, at a minimum, will avoid the inclusion of any limited sympathy strike clause which might give rise to an implied waiver of the general right to engage in sympathy strikes.[65]

B. *Recovery of Damages Resulting from Sympathy Strikes:* United States Steel Corp. v. United Mine Workers, Local 6321

In another Survey year decision, *United States Steel Corp. v. United Mine Workers, Local 6321*,[66] the United States Court of Appeals for the Third Circuit held that an employer could not recover damages resulting from a sympathy strike where the collective bargaining agreement did not contain an express no-strike clause.[67] There, a mine complex operated by U.S. Steel was closed for approximately one week because employees who were members of the defendant union refused to cross picket lines maintained by certain coal miners.[68] The picketing miners were members of another United Mine Worker (UMW) local, but were not employed at the U.S. Steel plant.[69] The collective bargaining agreement between UMW and U.S. Steel did not contain a clause prohibiting either strikes or refusals to cross picket lines.[70] It did, however, contain a detailed grievance-arbitration procedure which covered disputes as to interpretation of provisions, as to

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[65] Two theories of implied waiver could be advanced against the union: first, implied waiver through arbitrability where there is a broad arbitration clause and a no-strike or picket line clause; and second, implied waiver simply from the existence of a limited picket line clause. Although the court refrained from deciding the latter issue, it did indicate that it considered this argument as to implied waiver to be persuasive. 538 F.2d at 1297, 92 L.R.R.M. at 3595.

[66] 548 F.2d 67, 94 L.R.R.M. 2049 (3d Cir. 1976).

[67] *Id.* at 74, 94 L.R.R.M. at 2053.

[68] *Id.* at 69, 94 L.R.R.M. at 2050.

[69] *Id.*

[70] *Id.* at 70, 94 L.R.R.M. at 2050. The collective bargaining agreement in effect was the National Bituminous Coal Lease Agreement of 1968. *Id.* at 69-70, 94 L.R.R.M. at 2050.

matters not specifically mentioned in the agreement, and as to any local trouble.[71]

U.S. Steel brought an action for damages under Section 301 of the Labor Management Relations Act claiming that the work-stoppage was a sympathy strike and that the union's failure to invoke the grievance-arbitration procedure had breached the collective bargaining agreement.[72] A jury rendered a verdict for U.S. Steel,[73] and the trial judge denied the union's alternative motions for a judgment notwithstanding the verdict or a new trial.[74] In so doing the trial court relied upon a pre-*Buffalo Forge* case decided by the Third Circuit, *Island Creek Coal Co. v. United Mine Workers,*[75] which held that a dispute over whether the union had the right to refuse to cross a picket line was arbitrable under a grievance-arbitration clause[76] virtually identical to that in the instant case.[77] The Third Circuit had based this holding of arbitrability in *Island Creek* upon its conclusion that a no-sympathy-strike obligation could be implied from the existence of a mandatory arbitration clause[78] under the Supreme Court's decision in *Gateway Coal.*[79] There, the Supreme Court had held that injunctive relief could be predicated upon a no-strike obligation implied from a mandatory arbitration agreement.[80] Unlike the situation in *Island Creek,* however, the underlying grievance in *Gateway Coal,* a safety dispute, was arbitrable under the parties agreement.[81]

While the United Mine Workers' appeal was pending, the Supreme Court decided *Buffalo Forge.*[82] Accordingly, the Third Circuit turned its attention to the effects of that case on the viability of its holding in *Island Creek.* The court noted that although *Buffalo Forge* had specifically addressed only the availability of injunctions, the principles which it announced with respect to the arbitrability of sympathy strikes were relevant to the instant case.[83] In fact, the crucial issue in *U.S. Steel* was whether the union had been under a contractual duty to arbitrate over the sympathy strike.[84] Absent such a duty, there could be no finding of a contractual violation and hence, no damage recovery. The Third Circuit then focused upon the language of *Buffalo*

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[71] *Id.* at 70, 94 L.R.R.M. at 2050. Additionally, the parties agreed both that the integrity of the contract be maintained and that all disputes not settled by agreement be settled by the machinery for disputes. *Id.* at 70, 94 L.R.R.M. at 2050-51.

[72] *Id.*, 94 L.R.R.M. at 2051.

[73] *Id.*, 94 L.R.R.M. at 2050.

[74] *Id.* at 70-71, 94 L.R.R.M. at 2050.

[75] 507 F.2d 650, 88 L.R.R.M. 2364 (3d Cir.), *cert. denied,* 423 U.S. 877 (1975).

[76] *Id.* at 653, 88 L.R.R.M. at 2366.

[77] 548 F.2d at 71, 94 L.R.R.M. 2051.

[78] 507 F.2d at 651, 88 L.R.R.M. at 2366.

[79] 414 U.S. 368 (1974).

[80] *Id.* at 381-82.

[81] *Id.* For a fuller discussion of *Gateway Coal* see note 22 *supra.*

[82] 548 F.2d at 71, 94 L.R.R.M. at 2051.

[83] *Id.* at 72, 94 L.R.R.M. at 2052.

[84] *Id.*

Forge which indicated that in the absence of a no-strike clause, there was no basis for implying a promise not to engage in a sympathy strike.[85] In addition, the circuit court noted that the Supreme Court while discussing *Gateway Coal* had specifically disapproved the *Island Creek* holding that a promise to refrain from engaging in sympathy strikes could be implied from the mandatory arbitration clause involved therein.[86] Thus, the court concluded that the defendant union's sympathy strike could not have violated the collective bargaining agreement, whose arbitration clause was so similar to the clause in *Island Creek*. Accordingly, the circuit court reversed the judgment of the district court thereby denying the recovery of damages from the sympathy strike.[87]

In light of *Buffalo Forge's* pronouncement not only that a mandatory arbitration clause alone could not give rise to a promise not to sympathy strike, but also that a mandatory arbitration clause practically identical to that in *U.S. Steel* did not give rise to such a promise, there is little question that the Third Circuit's decision is correct. The probable effect of the decision will undoubtedly be that management will seek express no-strike clauses in order to insure that a dispute over a sympathy strike will be found arbitrable. Without such a clause, the employer will be precluded not only from obtaining an order compelling arbitration and damages, but also from discharging sympathy strikers without exposing itself to the risk of unfair labor practice charges.

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[85] *Id.* at 73, 94 L.R.R.M. at 2053; *see* 428 U.S. at 408.

[86] 548 F.2d at 73, 94 L.R.R.M. at 2053; *see* 428 U.S. at 408 n.10.

[87] 548 F.2d at 74, 94 L.R.R.M. at 2053-54. The concurring opinion in *U.S. Steel* is noteworthy for its discussion of *Buffalo Forge* which analyzes the latter case in terms of its implications with respect to three categories of collective bargaining agreements: (1) agreements which expressly forbid sympathy strikes in addition to all other strikes, and provide for mandatory arbitration; (2) agreements which contain only general no-strike and arbitration clauses; and (3) agreements which contain arbitration clauses but do not contain any express no-strike clauses. *Id.* at 75, 94 L.R.R.M. 2054, at 2055. According to the concurring judge's interpretation of *Buffalo Forge*, a contract in the first category—express no-sympathy-strike clause—would lend itself both to injunctive relief against, and an order to arbitrate, a sympathy strike as well as to damages. Under the provisions of a contract in the second category—express no-strike-arbitration clause—an employer could obtain an order to arbitrate and damages, but no injunctive relief. Finally, under contracts in the third category—no express no-strike clause—such as in the instant case, neither injunctive relief or damages, nor an order compelling arbitration would be available. *Id.*

Although the concurring opinion seems correct in its interpretation of *Buffalo Forge* with respect to the implications of agreements in the second and third categories, it is submitted that under *Buffalo Forge* an injunction would not be available against a sympathy strike in the first category where the collective bargaining agreement contained an express no-sympathy-strike clause. Such a result is precluded by *Buffalo Forge* for several related reasons. First, the essence of the Supreme Court's rationale is that a strike sought to be enjoined must be precipitated by an underlying grievance arbitrable under the provisions of the sympathy strikers' contract with their employer. 428 U.S. at 407-08 & n.10. Even if sympathy strikes were expressly precluded, there would not be any underlying grievance arbitrable under the sympathy striker's collective bargaining

In primary effect, the Supreme Court's decision in *Buffalo Forge* forecloses federal courts from enjoining unions engaged in sympathy strikes. Yet, by indicating a preference for dispute resolution by arbitration rather than by injunction, the Court also enhanced the presumption that the legality of a sympathy strike is arbitrable. At the same time, however, the *Buffalo Forge* majority delineated one instance in which a union's promise to arbitrate the legality of a sympathy strike may not be implied: where a collective bargaining agreement does not contain an express no-strike clause. The Seventh Circuit's decision in *Keller-Crescent,* overruling the Board's "clear and unmistakable" standard for determining whether a union has waived its right to sympathy strike, is illustrative of the unanticipated effects following from *Buffalo Forge's* renewed endorsement of the arbitral process with respect to sympathy strikes. The Third Circuit's decision in *U.S. Steel,* on the other hand, in denying an employer recovery of damages resulting from a sympathy strike where its contract with the union did not contain an express no-strike clause, represents the logical extension of *Buffalo Forge's* observation that an implied promise to arbitrate does not arise absent an express no-strike clause. The breadth of *Buffalo Forge's* impact upon other areas of federal labor law will be revealed only by future decisions.

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agreement. The issue of the legality of the sympathy strike itself would be the only matter subject to arbitration. Second, *Buffalo Forge* established that it is not the federal courts' role to enjoin contractual violations. *Id.* at 410-11. The Court, in its *Gateway Coal* discussion, specifically noted that absent an underlying grievance, neither *Boys Markets* nor *Gateway Coal* "... furnishes the authority to enjoin a strike solely because it is claimed to be in breach of contract and because this claim is itself arbitrable." *Id.* at 408 n.10. A sympathy strike, allegedly in violation of a clause expressly prohibiting such strikes would present precisely this situation.

Finally, the Supreme Court concluded in *Buffalo Forge* that absent any no-strike clause, an obligation to refrain from sympathy strikes could not be implied from a mandatory arbitration clause. *Id.* at 408. It was an underlying premise of this conclusion that sympathy strikes are not arbitrable under the collective bargaining agreement between the sympathy strikers and the employer. Rather, it is proper to imply no-strike obligations from arbitration provisions only when a union may be deemed to have agreed to refrain from striking over contractual disputes which it has promised to resolve peacefully. If there is no dispute capable of resolution under the collective bargaining agreement over which the strike was called, then there can be no implied obligation to refrain from striking. In *Buffalo Forge,* the Supreme Court concluded that mandatory arbitration clauses did not give rise to a union's promise not to engage in sympathy strikes precisely for this reason: the dispute underlying the strike could not be cognizable under the sympathy strikers' collective bargaining agreement, but only under the contract between the primary disputants and the employer. Thus, regardless of whether an agreement contained a no-sympathy-strike clause, a sympathy strike would not be subject to injunction, although clearly an employer could obtain both an order compelling arbitration and damages if the strike were found illegal. To reach a contrary result would contravene directly *Buffalo Forge's* ruling that the courts should not usurp the function of the arbitrator by deciding the arbitrable dispute themselves.

III. APPLICABILITY OF STATE RIGHT-TO-WORK LAWS: *Oil, Chemical and Atomic Workers v. Mobil Oil Corp.*

Section 8(a)(3) of the National Labor Relations Act[1] (NLRA) allows employers and labor unions to include union-security agreements[2] in their collective bargaining contracts. Concurrently, Section 14(b) of the Act[3] enables individual states to enact so-called right-to-work laws prohibiting such union security agreements. This provision gives rise to a choice of law problem as to which state's law, if any, shall apply where an employment relationship extends to several states, some of which have right-to-work laws and some of which do not.[4]

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[1] 29 U.S.C. § 158(a)(3) (1970) provides:

(a) It shall be an unfair labor practice for an employer—

. . .

(3) 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: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . .

[2] There are several types of union security agreements, including the agency shop, the union shop and the closed shop. The agency shop agreement provides that union membership is optional but generally imposes the same financial obligations on non-member employees as does union membership. *See* NLRB v. General Motors Corp., 373 U.S. 734, 736 (1963). In the union shop, union membership is required within a specified period of time after hiring as a condition of continued employment. Oil, Chemical and Atomic Workers v. Mobil Oil Corp., 426 U.S. 407, 409 n.1 (1976) *(Mobil Oil)*. Under § 8(a)(3), this specified period can be no less than thirty-one days after the employment date or after the effective date of the union security agreement, whichever is later. 29 U.S.C. § 158(a)(3) (1970). See note 1 *supra*. In the closed shop, a prospective employee must be a union member in order to be hired. *Mobil Oil*, 426 U.S. at 409 n.1. Closed shops are banned by § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). In addition to the agency shop and the union shop, other forms of union security agreements, such as maintenance of membership and dues checkoff are permitted by § 8(a)(3). *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 639-76 (1976).

[3] 29 U.S.C. § 164(b) (1970) provides: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

[4] The issue of the application of section 14(b) in a multi-jurisdictional situation has arisen previously in cases before the National Labor Relations Board. Western Electric Co., 84 N.L.R.B. 1019, 24 L.R.R.M. 1367 (1949); Giant Food Shopping Center, Inc., 77 N.L.R.B. 791, 22 L.R.R.M. 1070 (1948); Northland Greyhound Lines, 80 N.L.R.B. 288, 23 L.R.R.M. 1074 (1948). For example, in *Northland Greyhound*, the employer operated buses and bus stations throughout eight states, three of which prohibited union shops. 80 N.L.R.B. at 290 & n.7, 23 L.R.R.M. at 1074 & n.7. The union which represented the employer's maintenance employees, office employees, station employees and bus drivers petitioned for authorization to establish a union shop agreement with the employer pursuant to the Taft-Hartley Act, ch. 120, § 9(e)(1), 61 Stat. 144 (1947) (current version at 29 U.S.C. § 159(e)(1) (1970)). 80 N.L.R.B. at 288-89, 23 L.R.R.M. at 1074. Determining that the headquarters of the employees "represent[ed] the focal points of the

During the Survey year, the Supreme Court in *Oil, Chemical and Atomic Workers v. Mobil Oil Corp.*[5] held that the location of the predominant job situs of the employees is determinative of the applicability of states' right-to-work laws.[6] The decision provides a test to determine the applicability of state right-to-work laws to employment relationships which extend to several states.[7]

The controversy in *Mobil Oil* involved a 1969 collective bargaining agreement which a division of Mobil Oil Corporation (Mobil) entered into with Maritime Local 8-801 of the Oil, Chemical and Atomic Workers International Union (Union).[8] The Union represented unlicensed seamen who worked on Mobil's fleet of ocean-going petroleum tankers.[9] The agreement contained an "agency shop" provision under which employees were required either to join the union or, in lieu of membership, to pay the union initiation fee and regular dues within thirty-one days of their employment date.[10] The employment relationship governed by this agreement had roots in Texas, where right-to-work laws were in force;[11] Mobil's headquarters—the site of final hiring decisions, personnel and other corporate administrative functions—was located in Beaumont, Texas.[12] Texas was also the residence of 123 of the 289 seamen involved in the agreement.[13] The seamen, however, spent eighty to ninety percent of their working time outside Texas on the high seas or in ports outside Texas.[14]

Almost two years after entering into the collective bargaining agreement at issue, Mobil filed suit in United States District Court for

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employment relationship"—being the location where the employees "report[ed] to work, receive[d] their instructions, and [were] paid their salaries,"—the Board concluded that the states which were the location of the individual employees' headquarters could determine the validity of the union shop agreement as to those employees. 80 N.L.R.B. at 291, 23 L.R.R.M. at 1075. This headquarters rule was subsequently applied in *Western Electric*. 84 N.L.R.B. at 1022-23, 24 L.R.R.M. at 1368.

[5] 426 U.S. 407 (1976).

[6] *Id.* at 414.

[7] Railway and airline employees, however, are not affected by the decision, since they are exempted from the operation of § 14(b) and state right-to-work laws by the Railway Labor Act, 45 U.S.C. § 152, eleventh (1970).

[8] 426 U.S. at 410.

[9] *Id.* at 410-11.

[10] The provision read as follows: "For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date." 426 U.S. at 410. The agreement was valid for the purposes of § 8(a)(3). See notes 1 and 2, *supra*.

[11] TEX. REV. CIV. STAT. ANN. arts. 5154a, 5154g, 5207a (Vernon 1971).

[12] 426 U.S. at 411. Other administrative functions performed in Beaumont included the payment to the State of Texas of unemployment compensation insurance to cover all personnel on Mobil's tankers, maintenance of payroll records, deduction of all state and federal taxes from the seamen's wages, monthly remittances of union dues deducted from the seamen's pay, and consideration of all grievances properly filed by the seamen. Mobil Oil Corp. v. Oil, Chemical and Atomic Workers, 81 L.R.R.M. 2051, 2052 (E.D. Tex. 1972).

[13] 426 U.S. at 411.

[14] *Id.*

the Eastern District of Texas[15] seeking a declaratory judgment under section 301 of the Taft-Hartley Act.[16] Mobil alleged that the agency shop provision of the collective bargaining agreement violated Texas's right-to-work statutes and was therefore invalid and unenforceable.[17] The district court, reasoning that Texas was "intimately concerned with the collective bargaining agreement and with the employees working thereunder,"[18] ruled that Texas law applied and that therefore the union security agreement was void and unenforceable.[19] A three-member panel of the United States Court of Appeals for the Fifth Circuit reversed the decision of the district court and held that Texas's right-to-work laws could not void the agency shop agreement.[20] The panel reasoned that the job situs of the employees—the place where their work was actually performed—was "the most important and logical factor"[21] in determining the applicability of Texas's right-to-work laws. Since the Mobil employees' job situs was principally on the high seas, the panel concluded that Texas law did not apply to the collective bargaining agreement in question.[22]

On rehearing en banc, an eight-member majority of the Fifth Circuit rejected the panel's analysis.[23] The court of appeals chose to weigh all of the Texas contacts with the employment relationship in the light of national labor policy.[24] The majority's analysis thus entailed not only a consideration of the number of contacts Texas had with the Mobil employment relationship, but also a determination of the importance of those contacts in the context of the legislative purposes expressed in sections 8(a)(3) and 14(b).[25] Interpreting section 14(b) to "suggest" that a state may apply its right-to-work law where it has a significant interest in the application of a union security agree-

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[15] Mobil Oil Corp. v. Oil, Chemical and Atomic Workers, 81 L.R.R.M. 2051 (E.D. Tex. 1972).

[16] 29 U.S.C. § 185 (1970). For discussion of the federal district court's jurisdiction over actions brought by employers seeking declaratory judgments under section 301 and the Federal Declaratory Judgments Act, 28 U.S.C. § 2201 (1970), see Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179, 181-82, 52 L.R.R.M. 2038, 2039-40 (2d Cir. 1962); Weyerhauser Co. v. International Bhd. of Pulp, Sulphite and Paper Mill Workers, 190 F. Supp. 196, 197-98, 47 L.R.R.M. 2337, 2338-39 (D. Me. 1960). *But see* Mengel Co. v. Nashville Paper Prod. & Specialty Workers, 221 F.2d 644, 648, 36 L.R.R.M. 2028, 2032 (6th Cir. 1955) (with a dissent by Stewart, J.).

[17] 426 U.S. at 410.

[18] 81 L.R.R.M. at 2052.

[19] *Id.* at 2053.

[20] Mobil Oil Corp. v. Oil, Chemical and Atomic Workers, 483 F.2d 603, 609-10, 83 L.R.R.M. 3046, 3050-51 (5th Cir. 1973), *noted in* 11 HOUS. L. REV. 709 (1974). The three member panel of the court of appeals rejected the union's contention that the dispute with Mobil had not ripened into a present case or controversy. 483 F.2d at 607-08, 83 L.R.R.M. at 3048-49.

[21] 483 F.2d at 609, 83 L.R.R.M. at 3050.

[22] *Id.* at 610, 83 L.R.R.M. at 3050.

[23] 504 F.2d 272, 87 L.R.R.M. 2673 (5th Cir. 1974) (en banc), *noted in* 44 CIN. L. REV. 384 (1975); 88 HARV. L. REV. 1620 (1975).

[24] 504 F.2d at 274-75, 87 L.R.R.M. at 2675.

[25] *Id.* at 275, 87 L.R.R.M. at 2675.

ment, the court also examined Texas's interest in the agreement in question.[26] Based upon this analysis of national labor policies and Texas's interests, the court concluded "that the federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law to this employment relationship warrant[ed] application of Texas law, and consequently, invalidation of the agency shop provision."[27] Accordingly, the en banc court of appeals reversed the panel's decision and upheld the district court judgment invalidating the agency shop provision.[28]

On writ of certiorari,[29] the Supreme Court reversed the decision of the Fifth Circuit in a seven to two decision,[30] and held that it is the employees' "predominant job situs" which determines the applicability of state right-to-work laws under section 14(b).[31] The Court concluded that Texas's right-to-work laws did not reach the union security agreement in question because all of the Mobil employees performed most of their work beyond the territorial boundaries of that state.[32] Mr. Justice Marshall, writing for the Court, focused on the adequacy of Texas's connections with the employment relationship between the Union and Mobil in the light of the congressional policies underlying sections 8(a)(3) and 14(b) of the NLRA.[33] The majority considered three alternative solutions in its analysis. First, the United States as amicus curiae and the Union contended that the congressional concerns behind the adoption of section 14(b) required that job situs control the determination of the reach of state right-to-work laws.[34] Since the job situs of the workers in *Mobil* was on the high seas, under this approach Texas would have insufficient contact with the employment relationship to apply its laws.[35] Hence, federal law in section 8(a)(3) would apply and the agency shop provision would be valid.[36] Second,

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[26] *Id.* at 278-79, 87 L.R.R.M. at 2677-78.

[27] *Id.* at 275, 87 L.R.R.M. at 2675. Six dissenting judges, emphasizing the extensive federal control of maritime labor, concluded that the agency shop provision should be upheld. The dissenting judges reasoned that Texas contacts with the employment relationship did not justify the application of Texas law to maritime employment affairs which were traditionally the province of federal law. Thus, the dissent determined that the state's right-to-work laws should not reach a union security agreement permitted by § 8(a)(3) where maritime workers are involved. *Id.* at 282-86, 87 L.R.R.M. at 2681-84. (Ainsworth, J., dissenting). Two of the six dissenters would have preferred that the National Labor Relations Board, rather than the federal courts, exercise primary jurisdiction in this type of case. *Id.* at 287, 87 L.R.R.M. at 2684 (Brown, J., dissenting).

[28] *Id.* at 282, 87 L.R.R.M. at 2681.

[29] 423 U.S. 820 (1975).

[30] Mr. Justice Marshall was joined by Justices Brennan, White and Blackmun. Chief Justice Burger and Justices Powell and Stevens concurred in the judgment. Justice Stewart, joined by Justice Rehnquist, dissented. See note 66 *infra*.

[31] 426 U.S. 407, 414 (1976).

[32] *Id.*

[33] *Id.* at 412-13.

[34] *Id.* at 413.

[35] *Id.*

[36] *Id.* at 413-14.

Mobil, echoing the reasoning of the court of appeals en banc,[37] argued that the Court should consider all contacts between Texas and the Mobil-Union employment relationship in order to determine the applicability of Texas law.[38] Under this approach, Texas contacts with the employment relationship, including, *inter alia*, the residencies maintained by many of the seamen in Texas and the significant amount of Mobil's personnel administration which took place in that state, would be sufficient to enable state law under section 14(b) to invalidate the agency shop agreement.[39] Third, the majority considered the view, adopted by the dissenting justices,[40] that the policies underlying the enactment of both section 14(b) and Texas's right-to-work laws required the application of Texas law in this case because the final decisions to hire the Mobil seamen were made in Texas.[41]

The majority accepted the job situs test advanced by the Union and rejected the other two approaches. The Court reached this conclusion through its interpretation of the congressional concerns underlying sections 8(a)(3) and 14(b).[42] Although the Court saw congressional concern with the hiring process reflected in the federal ban of the closed shop in section 8(a)(3), it perceived the remaining provisions of section 8(a)(3) as governing post-hiring employment conditions.[43] As an example of this congressional concern with post-hiring conditions, the Court cited the provision of section 8(a)(3) which protects from discharge employees denied union membership for reasons other than failure to pay the union fees.[44] Moreover, that union security agreements were allowed at all under the Taft-Hartley Act, the Court interpreted as evidence of congressional concern with the possibility of non-union member employees already hired receiving the benefits of union representation without bearing any of its financial burden.[45] Like a discharge, this potential receipt of unfair benefits would occur during the post-hiring employment relationship.[46] The Court further saw section 8(a)(3)'s concern with the post-hiring relationship among employer, union and employee mirrored in section 14(b).[47] This conclusion, the court reasoned, followed because section 14(b) deals with union security agreements in allowing state policy to control their validity, and under the Court's interpretation of section 8(a)(3), such union security agreements, except for closed shop agreements, are related to the post-hiring employment relationship.[48]

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[37] See text at notes 27-31 *supra*.
[38] 426 U.S. at 413.
[39] *Id.* at 413-14.
[40] See text at notes 60-65 *infra*.
[41] 426 U.S. at 414.
[42] *Id.*
[43] *Id.* at 414-16.
[44] *Id.* at 415.
[45] *Id.* at 416.
[46] *Id.*
[47] *Id.* at 417.
[48] *Id.*

Having concluded that Congress intended sections 8(a)(3) and 14(b) primarily to focus on the post-hiring employment relationship, the Court then considered which of the three proposed approaches would best reflect this congressional intent. Concluding that job situs is the center of the post-hiring employment relationship, the Court dismissed all other state contacts as being insufficiently related to this relationship to trigger the application of state right-to-work laws under section 14(b).[49] Thus, the Court determined that a state having such right-to-work laws cannot apply them to invalidate a union security clause of an employment contract where the covered employees' job situs is beyond the territorial boundaries of that state.[50] Since the maritime job situs in *Mobil Oil* was outside any state's territorial boundaries, neither Texas nor any other state could apply its laws to the agency shop clause in question.[51] Accordingly, the Court concluded, the federal rule "favoring" such agreements, section 8(a)(3), assured the validity of the agency shop provision involved in *Mobil Oil*.[52]

In addition to the statutory policy reasons supporting the job-situs test, the majority added two "practical considerations" as reasons for rejecting both the place-of-hiring approach advanced by the dissenters[53] and the generalized weighing of state contacts with the employment relationship advocated by Mobil and adopted by the court of appeals en banc.[54] First, permitting the state, where nothing but hiring occurs, to apply its right-to-work laws would create the possibility of "patently anomalous extra-territorial application"[55] of such laws. For example, the Court pointed out, Texas as the place of hiring could apply its right-to-work laws even where all employees worked in another state.[56] Second, although under a generalized weighing of contracts approach the Court perceived no prospect of anomalous results, it nevertheless found such an approach undesirable as "less predictable and more difficult of application than a job situs test," because a generalized weighing of contacts would require a case-by-case analysis of all contacts between a state and an employment relationship.[57] Thus, holding that job situs is determinative of the

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[49] *Id.* at 417-18.

[50] *Id.* at 414.

[51] *Id.* at 420.

[52] *Id.* The Court did not expressly disclose how it determined that "[f]ederal policy favors" union and agency shop agreements, *id.* Presumably, this conclusion was drawn from its reading of the legislative history of the NLRA. See text at notes 44-50 *supra.* The conclusion that federal policy favors such union security agreements appears open to debate. *See* 426 U.S. at 427 & n.5 (Stewart, J., dissenting). See note 65 *infra.*

[53] See text at notes 60-65 *infra.*

[54] See text at notes 28-31 *supra.*

[55] 426 U.S. at 418.

[56] *Id.* at 419.

[57] *Id.*

applicability of state right-to-work laws, the Court reversed the decision of the court of appeals.[58]

In contrast to the majority's interpretation of the legislative policies underlying sections 8(a)(3) and 14(b), Justice Stewart in dissent[59] reasoned that the federal interest in union security agreements was limited to the ban of the closed shop in section 8(a)(3), with federal sanction of lesser union security agreements ceding to state control through section 14(b).[60] Justice Stewart found the language in section 14(b), assigning such control to states wherein the "execution" or "application" of a union security agreement takes place, too broad to provide a clear choice of law rule in a multi-jurisdictional situation such as that in *Mobil*.[61] Accordingly, Justice Stewart decided that, since Congress had left to each individual state the power to enforce its own policy with regard to the validity of most union security agreements,[62] the applicability of Texas's policy should be fashioned in this instance from consideration of the state interests underlying the Texas right-to-work laws.[63] Finding the interests reflected in this law to lie primarily in regulation of the hiring process, Justice Stewart maintained that the law of the place of hiring, Texas, should apply.[64] He therefore would have affirmed the decision of the court of appeals en banc.[65]

Mobil Oil is significant in that it establishes predominant job situs as the test of the applicability of state right-to-work laws in a multijurisdictional context.[66] Under this test, where an employment relationship has connections with several states, the law of the state

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[58] *Id.* at 414, 421.

[59] *Id.* at 422 (Stewart, J., dissenting).

[60] *Id.* at 424-27.

[61] *Id.* at 428-29.

[62] *Id.* at 429-30.

[63] *See id.* at 429-31.

[64] *Id.* at 430-32.

[65] *Id.* at 437. The dissent also concluded that even if job situs was selected as the key factor in deciding what law should govern union security agreements, Texas law should still apply because the *Mobil* employees performed more work in Texas than in any other state. *Id.* at 434. In making this determination, the dissent rejected the view that where the *Mobil* employee's predominant job situs was beyond any state's boundaries, no state law could abrogate the federal rule in section 8(a)(3) sanctioning most forms of union security agreements. *Id.* at 434-37. The dissent premised that the high seas are not a federal territory governed strictly by federal law. *Id.* at 434-35. Accordingly, federal law may preempt state law dealing with maritime affairs "*only* when the nature of the problem require[s] the application of a uniform rule or when the state law unduly hamper[s] maritime commerce." *Id.* at 435. The dissent next concluded that maritime labor law is not an area preempted by federal control, despite extensive federal regulation of maritime labor. *Id.* at 436-37. Since, under this analysis, *some* state's law should apply, the dissent concluded that even under the job situs test Texas law would control due to the relative amount of work occurring in that state. *Id.* at 437.

[66] 426 U.S. at 414. Only three justices joined in the opinion of Mr. Justice Marshall setting forth the job situs test. Chief Justice Burger concurred in the judgment without opinion. *Id.* at 421. Justices Stevens and Powell each filed concurring opinions. *Id.* at 421-22. The predominant job situs test is thus the product of a plurality opinion, arguably mitigating the decisiveness and significance of the holding.

which is the predominant job situs of the employees will determine the validity of a union security agreement affecting such employees. This test appears to have the advantages of predictability and ease of application sought by the Court,[67] allowing both labor contract negotiators and the courts to determine readily in most cases whether a union security clause will be valid. It is submitted, however, that the job situs test, fails to reflect adequately the congressional policies underlying sections 8(a)(3) and 14(b), and thus may lead to anomalous and unsatisfactory results. Although the dissent's approach in focusing on the place of hiring was less ambitious and limited to the present case, it is further submitted that the dissent's analysis of the legislative concerns underlying the NLRA was overly narrow. As a result of these considerations, it is submitted that some method of weighing statutorily significant state contacts with the employment relationship at issue, similar to that advanced by the court of appeals en banc, would have provided the best solution in *Mobil Oil.* Such a flexible method would have permitted the court to attach appropriate significance to all state contacts and at the same time would have avoided over-simplification of the legislative concerns underlying sections 8(a)(3) and 14(b) of the NLRA.

Analysis of sections 8(a)(3) and 14(b) was the starting point for both the majority and the dissenting opinions in *Mobil Oil.*[68] Section 14(b) definitively allows the prohibition of a union security agreement by any state or territory where the "execution or application" of the agreement occurs.[69] That section, however, does not indicate explicitly what connection or contact a state must have with a multi-jurisdictional employment relationship to constitute the location where a union security agreement is executed or applied.[70] Thus, both the majority and the dissent turned to analysis of the underlying legislative policies of sections 8(a)(3) and 14(b) to determine the adequacy of Texas's contacts with the *Mobil Oil* employment relationship.[71] It is therefore appropriate to begin an analysis of the *Mobil Oil* opinions with an examination of these provisions and their legislative history.

Of the concurring Justices, however, only Justice Powell explicitly objected to the job situs test. *Id.* at 421. Justice Stevens expressed reservations about the majority's suggestion that federal policy favors union security agreements, but otherwise joined in the Marshall opinion. *Id.* This suggests that the job situs test is supported by at least a five-member majority of the Court. Moreover, in the context of a 5-4 opinion, it seems to have been incumbent on the Chief Justice to articulate his reservations concerning the majority opinion. That he did not suggests that any reservations he had were not strongly held.

[67] *See* 426 U.S. at 419. Ease of application and predictability may not be satisfied in some situations, however. See text at notes 96-99 *infra.*

[68] *See* 426 U.S. at 412-14, 424-25.

[69] 29 U.S.C. § 164(b) (1970). See note 3 *supra.*

[70] *See* 426 U.S. at 428-29 (Stewart, J., dissenting).

[71] See text at notes 29-65 *supra.* The considerations of the policies, interests and purposes reflected in conflicting rules of law is common to several of the choice of law methods advanced by leading commentators. Professor Brainerd Currie was the first scholar to develop a choice of law method based upon a consideration of a state's "gov-

Sections 8(a)(3) and 14(b) were enacted in the 1947 Taft-Hartley amendments to the NLRA.[72] While the Taft-Hartley Act reaffirmed the rights to organize and bargain collectively established by section 7, of the NLRA,[73] its enactment resulted partly from anti-union sentiment and concern with the abuses of power by organized labor.[74] Thus, the provisions of the Taft-Hartley Act generally represented a retreat from the more pro-union policy characteristic of the NLRA as originally enacted.[75] Prior to the Taft-Hartley Act, the NLRA pro-

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ernmental interest" in applying its law to a multi-jurisdictional occurrence. Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242-43 (1963); Currie, *The Constitution and the Choice of Law: Governmental Interest and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-12 (1958). *See*, D. CAVERS, THE CHOICE OF LAW PROCESS, 63-64, 72-74 (1965); R. LEFLAR, AMERICAN CONFLICTS OF LAW § 97 (1968); Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L.REV. 407, 421-23 (1975). According to Currie's approach, the policies and purposes underlying a law are the principal sources of a jurisdiction's governmental interests in the application of that law in a multijurisdictional context, and the primary determinants of the applicability of that law to the occurrence in question. *See* Currie, *Comments on Babcock v. Jackson, supra*, at 1242-43; Currie, *The Constitution and the Choice of Law, supra*, at 9-10. To identify policies and purposes, Currie would have courts rely upon "the ordinary processes of construction and interpretation," whether the conflict involves statutes or common-law rules. Currie, *Comments on Babcock v. Jackson, supra*, at 1242; Currie, *The Disinterested Third State*, 28 LAW AND CONTEMP. PROB. 754, 761-62 (1963). Other scholars, although giving consideration to governmental purposes and policies, assign such analysis a more restricted role in the resolution of choice of law problems. *See generally* R. LEFLAR, *supra*, at §§ 97, 99, 105, 109-11; D. CAVERS, *supra*, at 93; Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

The approach taken by the dissenting Justices appears consistent with a variation of governmental interests analysis, the "functional analysis" advanced by Professors Von Mehren and Trautman. Generally, this approach looks to a consideration of policies to identify all "concerned jurisdictions," the latter consisting of jurisdictions with an interest in regulating some aspect of a multi-jurisdictional occurrence. If a jurisdiction has such an interest, a "regulating rule" is constructed for that jurisdiction which reflects the jurisdiction's policies. Where comparison of these regulating rules reveals that a true conflict exists, an attempt is made to determine whether there is a "predominantly concerned jurisdiction" which either has "ultimate effective control" or has a preempting interest by agreement of all concerned jurisdictions. *See* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS, 76-79 (1965). Where there is no predominantly concerned jurisdiction, the claims of all concerned jurisdictions are weighed with a view towards "the relative strength of the several policies in issue and the relative significance to the jurisdictions concerned of the vindication of their policies." *Id.* at 77.

The dissent's approach in *Mobil Oil* resembled this analysis insofar as it looked to both the policies expressed in the federal law and in Texas's right-to-work laws. Finding federal interest in union security agreements exhaused with the ban of the closed shop in section 8(a)(3)'s and section 14(b)'s allocation to the states of the power to regulate lesser agreements, see text at notes 60-65 *supra*, Justice Stewart apparently concluded that Texas was the predominantly concerned jurisdiction and proposed a solution based on Texas's policies. 426 U.S. at 424-34.

[72] Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (1947). *See generally* A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW, 75-94 (8th ed. 1977) (hereinafter cited as COX, BOK & GORMAN).

[73] COX, BOK & GORMAN *supra* note 72, at 93.

[74] *Id.* at 88-94. See text at notes 76-86 *infra*.

[75] *See* COX, BOK & GORMAN *supra* note 72, at 93-94.

hibited employers from discriminating against employees on the basis of union membership, but permitted agreements between employers and labor unions requiring compulsory union membership.[76] In its consideration of the Taft-Hartley amendments, Congress perceived abuses by organized labor in enforcing such union security agreements.[77] In particular, Congress was concerned with hiring restrictions placed on workers and employers by the closed shop, and with the oppressive abuse of union enforced discharges.[78] Under the closed-shop agreement, individuals were required to be union members in order to be hired.[79] Under all forms of union security agreements, unions had authority arbitrarily to require the discharge of workers whom union officials, for any reason, had declared were not in good standing with the union.[80]

To address these concerns, Congress banned the closed-shop in section 8(a)(3).[81] However, other forms of union security agreements imposing union obligations after hiring were still permitted due to a concern that non-union employees would share with union members the benefits of union representation without sharing any of its financial burdens.[82] Nonetheless, Congress did place restrictions on the employee discharges which a union can require under a union security agreement, prohibiting any such discharges for reasons other than an employee's dereliction in fulfilling his financial obligations to the union.[83] Moreover, in section 14(b), Congress reserved to individual states the power to ban the union security agreements otherwise permitted by section 8(a)(3).[84] Thus, the congressional interests in section 8(a)(3) focused upon hiring conditions in forbidding the restrictions of the closed shop, but upon post-hiring employment conditions in sanctioning lesser forms of union security agreements subject to state policy under section 14(b) and to limitations on union enforced discharges.[85]

In light of these congressional interests reflected in sections 8(a)(3) and 14(b), the majority in *Mobil Oil* appears to have been correct in seeking a solution which permitted the state most concerned with the post-hiring relationship to govern the validity of a union se-

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[76] *See* NLRB v. General Motors Corp., 373 U.S. 734, 738-40 (1963).

[77] *See* H.R. REP. NO. 245, 80th Cong., 1st Sess., 34 (1947), *reprinted in* I NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 324-25 (1948) [hereinafter LEGISLATIVE HISTORY]; S. REP. NO. 105, 80th Cong., 1st Sess., 6-7 (1947), *reprinted in* LEGISLATIVE HISTORY *supra*, at 412-13 (1948).

[78] *See* H.R. REP. NO. 245, 80th Cong., 1st Sess., 34 (1947), *reprinted in* LEGISLATIVE HISTORY *supra* note 77, at 324-25 (1948); S. REP. NO. 105, 80th Cong., 1st Sess., 6-7 (1947), *reprinted in* LEGISLATIVE HISTORY *supra* note 77, at 412-13 (1948).

[79] See note 2 *supra*.

[80] See authority cited in note 77 *supra*.

[81] *See* NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963).

[82] *Id.*

[83] *Id.* at 740-44.

[84] 29 U.S.C. § 164(b) (1970). The text of § 14(b) is set out at note 3 *supra*.

[85] *See* 29 U.S.C. § 158(a)(3) (1970).

curity agreement affecting this relationship. Since the closed shop is the only form of union security agreement that requires union membership as a condition of hiring,[86] it is logical to conclude that the congressional interest in the hiring process ended with section 8(a)(3)'s ban of the closed shop. Because the other forms of union security agreements permitted by section 8(a)(3) chiefly affect post-hiring conditions, it is also logical that the state most connected with the post-hiring employment conditions should be permitted to determine the validity of such agreements pursuant to section 14(b). By corollary, the dissent was incorrect in concluding that there is no federal interest in union security agreements other than that underlying the ban on the closed shop.[87] That Congress, in section 8(a)(3), permitted certain forms of union security agreements at all is evidence of some degree of federal interest in their preservation.

In seeking a test which would allow the state most concerned with the post-hiring employment conditions to control the validity of union security agreements, the majority selected job situs as the contact determinative of such concern.[88] The legislative history of section 8(a)(3), however, reveals that Congress sought primarily to avoid the prospect of non-union members benefiting from union bargaining

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[86] See note 2 *supra.*

[87] See text at note 60 *supra.* On the basis of this conclusion, the dissent turned to a consideration of Texas's right-to-work laws to determine whether Texas had a sufficient interest in the Mobil employment relationship to apply these laws. The dissent concluded that these laws evidenced a concern with the hiring process, justifying application of Texas law in this case because it was the place of hiring. See text at notes 63-64 *supra.*

Whether Texas's right-to-work laws are primarily concerned with the hiring process is debatable, however. Justice Stewart premised that "the language of the [Texas] statutes suggests that their principal purpose was, indeed, to democratize the hiring process," 426 U.S. at 430. The preamble of public policy in the Texas statute, however, contains no language explicitly supporting this premise. TEX. REV. CIV. STAT. ANN. art. 5154a, § 1 (Vernon 1971). Section 3 of Texas's right-to-work statute, *id.*, art. 5207a, § 3, voids contracts requiring union membership as a condition of employment of "employees or applicants for employment," thus including both the hiring process and post-hiring contract in its ambit. The public policy declaration states "that the right of persons to work shall not be denied *or abridged* on account of membership or nonmembership in any labor union . . ." (emphasis added), apparently extending protection both to job applicants and to employees well past the hiring stage. *Id.*, art. 5154g, § 3. The dissent cited Lungford v. City of Bryan, 156 Tex. 520, 297 S.W.2d 115, 39 L.R.R.M. 2306 (1957), as authority for its interpretations of Texas's right-to-work statutes. 426 U.S. at 431. Yet *Lungford,* because it involved an already hired employee discharged for joining a union, not job applicants discriminated against in the hiring process, hardly supports the proposition that the concerns underlying Texas's right-to-work laws deal primarily with the hiring process. Indeed, Justice Stewart seems to have conceded this when he acknowledged that "Texas' right-to-work laws are concerned with the process by which employees are hired and conditions which, *after their hiring,* may burden their employment." 426 U.S. at 431 (emphasis added). Accordingly, while the language of Texas's right-to-work statutes does indicate an interest with the hiring process, it provides no evidence of an overriding concern with the hiring process to the exclusion of other policy considerations involving the posthiring employment relationship.

[88] 426 U.S. at 417-18.

without providing the union any financial support, and at the same time to eliminate abuse of union power in enforcing employee discharges.[89] Both of these purposes deal with the administration of union security provisions, which occurs, for example, where union dues are subtracted from employee paychecks and where the decision to discharge an employee for failure to meet his union obligations is finalized. Thus, the transactions related to the principal legislative interests embodied in sections 8(a)(3) and 14(b) do not necessarily occur at the job site. Thus, because it ignores the significance of congressional policies relating to the post-hiring administration of union security agreements, the job situs test oversimplifies the choice of right-to-work laws in a multi-jurisdictional context.

This oversimplification inherent in the job situs test can produce results inconsistent with the legislative policies behind sections 8(a)(3) and 14(b) where significant post-hiring contacts exist with a state that is not the predominant job situs. For example, in view of the multiple post-hiring concerns reflected in sections 8(a)(3) and 14(b), the result in *Mobil Oil* seems inadequate. Almost half of the seamen listed Texas as their residence.[90] Texas was the site of all personnel administration involving the Mobil seamen;[91] all payroll records were maintained in Beaumont and all paychecks were written and mailed from there;[92] all check-offs of union dues were performed in Texas, as were all deductions for federal and state taxes;[93] all final hiring decisions and termination decisions were made in Texas.[94] Thus, it is clear that Texas is the site of all administration of the union security clause relating to the major congressional concerns reflected in sections 8(a)(3) and 14(b).[95] Yet, because Texas lacked sufficient connection with one contact tangential to these concerns—job situs—the state was prohibited from enforcing its policy with regard to the validity of the union security agreement.

The job situs test may also produce anomalous results where the predominant job situs is difficult or impossible to identify. For example, an interstate carrier might be headquartered in Georgia, and travel a route limited to Alabama, Georgia and Florida. All three states have enacted right-to-work laws;[96] yet, under the job situs test, this carrier might be subject to a union security clause in his employment contract because no one of these states was the predominant job situs. Although the employment relationship has contacts exclusively

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[89] See text and notes 76-85 *supra*.

[90] 426 U.S. at 411.

[91] *See* 504 F.2d at 273-74, 87 L.R.R.M. at 2674.

[92] *Id.* at 273, 87 L.R.R.M. at 2674.

[93] *Id.*

[94] *Id.* at 274, 87 L.R.R.M. at 2674.

[95] See text at notes 88-90 *supra*.

[96] ALA. CODE tit. 26, §§ 375(1)-375(7) (1958); GA. CODE ANN. §§ 54.902-905 (1974); FLA. CONST. art. 1, § 6.

with right-to-work states, it would be subject to no state's right-to-work laws. Thus, the job situs test is not only insensitive to the multiple legislative purposes reflected in section 8(a)(3) and 14(b),[97] but also is overly restrictive in placing paramount importance upon one state contact which can lead to awkward and anomalous results.

It is submitted that a generalized weighing of state contacts similar to that performed by the en banc panel of the court of appeals[98] would have been the most appropriate approach to the resolution of *Mobil Oil.* Such a weighing of contacts would avoid oversimplification because it is sensitive to the multiple legislative concerns underlying sections 8(a)(3) and 14(b). Although this approach requires case-by-case analysis, in view of the anomalous results which might occur by ignoring contacts relevant to these concerns, concession to uncertainty appears necessary. In application, all statutorily significant state connections with an employment relationship could be given appropriate weight based on their significance in relation to federal policy. As one such contact, job situs could be considered, as it was in the court of appeals majority opinion, but not at the expense of the other state contacts important in the light of congressional concerns.[99] Thus, in *Mobil Oil,* the extensive contacts between Texas and the Mobil employment relationship[100] should not have been eclipsed by exclusive reliance upon the single factor of job situs to determine where the union security agreement in question was applicable.

IV. REGULATION OF INTERNAL UNION AFFAIRS—ACCESS TO THE UNION BALLOT UNDER THE LMRDA

Congress enacted the Labor-Management Reporting and Disclosure Act (LMRDA)[1] in 1959 as a response to revelations of widespread corruption and oppressive leadership in labor unions.[2] By

[97] Several commentators criticize reliance upon statutory construction and interpretation as a choice of law tool. *See* R. LEFLAR, AMERICAN CONFLICTS LAW § 99 (1968); D. CAVERS, THE CHOICE OF LAW PROCESS, 73-74, 93, 96-97, 108-09 (1965); Reese, *Conflict of Laws and the Restatement Second,* 28 LAW AND CONTEMP. PROB. 679, 686 (1963). Particularly in point is Professor Cavers' suggestion that ordinary statutory construction is insufficient to resolve choice of law problems because statutes often have multiple purposes which occasionally lead to different conclusions regarding their application in a multi-jurisdictional context. D. CAVERS, *supra,* at 74, 108. This criticism, however, appears inapplicable to a generalized weighing of contacts approach, similar to that employed by the court of appeals en banc, where several contacts can be weighed according to their statutory significance. See text at notes 99-100 *infra.*

[98] See text at notes 27-31 *supra.*

[99] *See* 504 F.2d at 274-75, 87 L.R.R.M. at 2674-75. See text at notes 27-31 and notes 88-90 *supra.*

[100] See text at notes 90-96 *supra.*

[1] Pub. L. 86-257, 73 Stat. 519 (1959), *codified in* 29 U.S.C. §§ 401 *et seq.* (1970).

[2] See *S. Rep. No.* 187, 86th Cong., 1st Sess. 2 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 398 (1959) (hereinafter cited as LEGISLATIVE HISTORY) (LMRDA influenced by the

providing financial reporting and disclosure requirements;[3] limitations on trusteeships;[4] a union member's "Bill of Rights" which guarantees, among other rights, equal participation in union affairs and freedom of speech and assembly;[5] and regulations governing union elections,[6] Congress sought to further two goals. First, Congress believed that regulation of unions' financial dealings would insure "high standards of responsibility and ethical conduct. . . ."[7] Second, Congress sought, by promoting union democracy, to protect employees' rights to "organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities. . . ."[8]

As a means of sustaining union democracy, Congress established in Title IV[9] of the LMRDA procedural safeguards for the election of union officers. Section 401 of the LMRDA[10] sets maximum terms of office,[11] mandates elections by secret ballot,[12] and guarantees access to the election machinery to all candidates.[13] Section 401 also prohibits use of union funds for election campaigns.[14] In particular, section 401(e) protects participation in the election process by providing that:

> In any election required by this section which is to be held by secret ballot a *reasonable opportunity shall be given for the nomination of candidates* and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to *reasonable qualifactions* uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice . . . . Each member in good standing shall be entitled to one vote.[15]

Committee on Improper Activities in the Labor and Management Field ("McLellan Committee") investigation of labor racketeering).

[3] 29 U.S.C. §§ 431-41, 501-04 (1970).

[4] *Id.* at §§ 461-66 (1970).

[5] *Id.* at §§ 411-15 (1970).

[6] *Id.* at §§ 481-83 (1970).

[7] *Id.* at § 401(b) (1970).

[8] *Id.* at § 401(a) (1970). These rights were established by the National Labor Relations Act (NLRA), *id.* at § 157 (1970). The NLRA, however, operates primarily to protect these rights against employer interference rather than union interference. *Compare id.* at § 158(a)(1) (1970) (absolute prohibition against employer interference with § 7 rights) *with id.* at § 158(b)(1) (1970) (qualified prohibition against union interference with § 7 rights).

[9] *Id.* at §§ 481-83 (1970).

[10] *Id.* at § 481 (1970).

[11] *Id.* at §§ 481(a), (b) (1970).

[12] *Id.*

[13] *Id.* at § 481(c) (1970). This includes access to membership lists, and use of poll workers.

[14] *Id.* at § 481(g) (1970).

[15] *Id.* at § 481(e) (1970) (emphasis added). Section 401(e) also requires fifteen-day notice of elections, prohibits disqualification from voting for non-payment of dues, requires preservation of election records, and union elections to be conducted in accordance with the union's by-laws.

Section 402 of the Act in turn empowers the Secretary of Labor to enforce these guarantees.[16]

The precise meaning of "reasonable opportunity" for nomination and of "reasonable qualifications" under section 401(e) is not set out either in the Act or in its legislative history. In the 1968 decision of *Wirtz* v. *Hotel Employees Local 6*,[17] however, the Supreme Court examined section 401(e) and held that it proscribed a union rule which excluded from major union office candidates who had not held prior union office. The Court construed the section against a backdrop of Title IV's "special function" in furthering the overall goals of the LMRDA—"[t]o insure 'free and democratic' elections"[18]—and accordingly premised that careful scrutiny is required in evaluating the reasonableness of restrictions on eligibility for union office.[19] Regulations for enforcement of the LMRDA promulgated by the Department of Labor subsequent to *Hotel Employees* further delineate the meaning of "reasonable qualifications" for union office.[20] While acknowledging the general limits to nomination requirements imposed by the careful scrutiny required under *Hotel Employees*, these regulations nevertheless recognize "that labor organi-

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Section 504 disqualifies members of the Communist Party and persons convicted of specified major felonies from holding union office or acting as labor relations consultants. *Id.* at § 504 (1970). The provision disqualifying Communist Party members was held an unconstitutional bill of attainder in United States v. Brown, 381 U.S. 437 (1965).

[16] 29 U.S.C. § 482 (1970). Section 482 provides for the following enforcement procedure:

> 1. A labor organization member who has exhausted his internal remedies may file a complaint with the Secretary of Labor. The challenged election is presumed valid pending the final outcome of the challenge. *Id.* at § 482(a) (1970).
>
> 2. The Secretary must then investigate. If the Secretary finds probable cause for a § 401 violation, he must then file an action in federal district court. *Id.* at § 482(b) (1970).
>
> 3. If the district court finds by a preponderance of the evidence that a § 401 violation has occurred which "may have affected the outcome" of the election, the challenged election is declared void and a new election, to be supervised by the Secretary of Labor, is ordered. *Id.* at § 482(c) (1970).

The Secretary's decision not to bring an action if he finds no probable cause is subject to limited judicial review. *See* Dunlop v. Bachowski, 421 U.S. 560, 567-68 (1975), *noted in* 17 B.C. IND. & COMM. L. REV. 581 (1976).

[17] 391 U.S. 492 (1968).

[18] *Id.* at 496, *quoting* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 470-71 (1968). *See also* S. REP. NO. 187, 86th Cong., 1st Sess., 7 (1959), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 2, at 403.

[19] 391 U.S. at 499. *See also* 29 C.F.R. 452.35 (1976) ("[R]estrictions placed on the right of members to be candidates must be closely scrutinized . . . .").

[20] 29 C.F.R. 452.32-.54 (1976) (qualifications for office); *Id.* at 452.55 (1976) (nomination procedures).

The Department of Labor standards set out factors to be considered in assessing the reasonableness of a qualification of union office:

> (1) The relationship of the qualification to the legitimate needs and interests of the union;

zations may have a legitimate institutional interest in prescribing minimum standards for candidacy and officeholding in the organization."[21] The Labor Department regulations thus outlined the considerations which counterbalance those articulated in *Hotel Employees*.

Two Survey year decisions involved the definitions of "reasonable qualifications" and "reasonable opportunity" under section 401(e). In *Local 3489, United Steelworkers* v. *Usery*,[22] the Supreme Court resolved a split between circuits[23] by holding that a provision restricting eligibility for union office to members who attended at least half of a union's monthly meetings for three years preceding an election is not a "reasonable qualification" within the meaning of section 401(e).[24] In *Usery* v. *District 22, United Mine Workers*,[25] a case of first impression decided prior to *Local 3489*, the United States Court of Appeals for the Tenth Circuit mirrored the reasoning of *Local 3489* in

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(2) The relationship of the qualification to the demands of union office;
(3) The impact of the qualification in the light of the congressional purpose of fostering the broadest possible participation in union affairs;
(4) A comparison of the particular qualification with the requirements for holding office generally prescribed by other labor organizations; and
(5) The degree of difficulty in meeting a qualification by union members.

Id. at 452.36(b)(1)(5) (1976).

Hotel Employees involved a prior office-holding requirement which excluded 93% of the union's members from running for major union office. In striking down this union rule, the Supreme Court placed great emphasis on the numerical impact of the requirement in relation to the democratic goals of Title IV. *See* 391 U.S. at 502. The Court considered other factors as well however—the tenuous relationship of the restriction to the demands of union office, especially when members without prior office-holding experience could be appointed to major office; the uniqueness of the rule in labor union practice; and the control which it vested in incumbents. 391 U.S. at 504-05. Thus, *Hotel Employees*, while displaying especial emphasis on numerical impact, involved virtually all of the factors which, according to the Labor Department's guidelines, can be used in judging the reasonableness of eligibility requirements.

[21] 29 C.F.R. § 452.35 (1976).

[22] 429 U.S. 305 (1977).

[23] Brennan v. Local 3489, United Steelworkers, 520 F.2d 516, 521, 89 L.R.R.M. 3211, 3215 (7th Cir. 1975) (finding § 401 violation); Brennan v. Local 5724, United Steelworkers, 489 F. 2d 884, 891, 85 L.R.R.M. 2001, 2007 (6th Cir. 1973) (finding no § 401 violation). Both courts examined an identical provision in the United Steelworkers' International Constitution. *Local 3489, supra* at 518, 89 L.R.R.M. at 3212; *Local 5724, supra* at 885, 85 L.R.R.M. at 2002. See text at notes 28-33 *infra*.

The majority of district courts ruling on this same question have found no § 401 violation. Shultz v. Local 1150, United Steelworkers, 75 L.R.R.M. 2869, 2877 (S.D. Ill. 1970); Shultz v. Local 1299, United Steelworkers, 73 L.R.R.M. 2673, 2680 (E.D. Mich. 1970); Shultz v. Local 6799, United Steelworkers, 71 L.R.R.M. 2820, 2826 (C.D. Cal. 1969). *Contra* Brennan v. Local 3911, United Steelworkers, 372 F. Supp. 961, 966, 82 L.R.R.M. 3185 (N.D. Ill. 1973) (dictum).

[24] 429 U.S. at 307. A third Survey year decision involving § 401(e), decided prior to *Local 3489*, was virtually identical to that case. In Usery v. Local 1205, Amalgamated Transit Union, 545 F.2d 1300, 1304, 93 L.R.R.M. 2870, 2874 (1st Cir. 1976), the United States Court of Appeals for the First Circuit invalidated a union election conducted under a rule which required candidates to attend half the Local's monthly meetings over a twenty-four month period disqualified 94% of the Local's members from office.

[25] 543 F.2d 744, 93 L.R.R.M. 2648 (10th Cir. 1976).

holding that a prerequisite of the support of five of sixteen local unions for nomination to union district office does not afford "reasonable opportunity for nomination."[26] In both *Local 3489* and *District 22* the courts, taking a broad view of the LMRDA's mandate for promotion of union democracy, focused on the numerical impact of challenged union rules.[27] As a result, although arguably legitimate union interests supported the rules, both courts deemed them undemocratic in their effects, and consequently voided the contested union elections.

A. *Local 3489, United Steelworkers v. Usery*

The United Steelworkers of America's International Constitution, binding on the Steelworkers' 3,700 chartered locals, provided that eligibility for union office was limited to members in good standing who had attended at least one-half of the regular monthly meetings in the thirty-six months preceding an election.[28] The effect of this provision was to disqualify 84.8 percent to 96.5 percent of union members from holding office.[29] The United States Court of Appeals for the Sixth Circuit balanced this restrictive effect against the union's legitimate interest in candidates' fitness and members' participation,[30] and held the Steelworkers' rule a "reasonable qualification" under section 401(e).[31] The United States Court of Appeals for the Seventh Circuit, however, considered such a limitation on the number of members eligible for office and the concomitant discouragement of insurgent candidates to be "clearly unreasonable"[32] and hence a violation of section 401(e).[33]

The Supreme Court granted certiorari in *Local 3489* in order to resolve this conflict between circuits over the Steelworkers' meeting attendance rule.[34] In a six-to-three opinion, the Justices affirmed the decision of the Seventh Circuit[35] holding that the meeting attendance rule was an unreasonable qualification for union office within the meaning of section 401(e). With Justice Brennan writing for the

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[26] *Id.* at 749, 93 L.R.R.M. at 2652.

[27] See text at notes 37-45, 77-79 *infra*.

[28] International Steelworkers Union, *Const.* art. VII § 9(c), *cited in Local 3489*, 429 U.S. at 307 & n.1.

[29] Brennan v. Local 3489, United Steelworkers, 520 F.2d 516, 519, 89 L.R.R.M. 3211, 3214 (7th Cir. 1976) (96.5%); Brennan v. Local 5724, United Steelworkers, 489 F.2d 884, 888, 85 L.R.R.M. 2001, 2004-05 (6th Cir. 1973) (84.8% to 93.1%); Brennan v. Local 3911, United Steelworkers, 372 F. Supp. 961, 966, 82 L.R.R.M. 3185, 3189 (N.D. Ill. 1973) (94%).

[30] Brennan v. Local 5724, United Steelworkers, 489 F.2d 884, 889, 891, 85 L.R.R.M. 2001, 2005, 2006 (6th Cir. 1973).

[31] *Id.* at 891, 85 L.R.R.M. at 2007.

[32] Brennan v. Local 3489, United Steelworkers, 520 F.2d 516, 519-20, 89 L.R.R.M. 3211, 3213-14 (7th Cir. 1976).

[33] *Id.* at 521, 89 L.R.R.M. at 3215.

[34] 424 U.S. 907 (1976). *See* 429 U.S. at 307 (stating reason for grant of certiorari).

[35] 429 U.S. at 307.

majority, the Court began by reviewing the principles governing "reasonable qualifications" under section 401(e). Taking *Hotel Employees*[36] as its touchstone, the Court premised that the reasonableness of the Steelworkers' rule for the purposes of section 401(e) should be measured closely against Title IV's broad objective of union democracy. Applying these principles in *Local 3489,* the Court established as a starting point that "an attendance requirement that results in the exclusion of 96.5% of the members from candidacy for union office seems hardly to be a 'reasonable qualification' consistent with the goal of free and democratic elections."[37] The Court did not rest its decision here, however. Instead, it proceeded to examine the union's arguments in support of its charter provision in order to balance them against the provision's exclusory effect.

First, the union argued that a member could assure his eligibility for office simply by attending eighteen of his local's thirty-six monthly meetings over the three years preceding an election. This requirement, the union contended, would not unduly burden any one individual.[38] The Court rejected this argument, noting that since important issues which might prompt an insurgent candidacy will often arise less than three years before election, requiring members to plan a candidacy eighteen months in advance might foreclose late-starting candidacies.[39] Furthermore, the Court declined to measure the reasonableness of the attendance rule by the extent to which it burdened an individual candidate. Rather, the Court stated that it is more appropriate to "judge the eligibility rule . . . by its effect on free and democratic processes of union government."[40]

Second, the union contended that the Secretary of Labor, in challenging the attendance requirement, had a burden to show that the attendance rule actually had resulted in an "entrenched" leadership, and that the Secretary had not met this burden. The Court rejected this contention also. Congress, the Court noted, believed that union members themselves could correct abuses of power through free and democratic election procedures;[41] accordingly, the LMRDA sought to insure union democracy by regulating only the election procedure itself and not the results of that procedure.[42] Therefore, in the Court's view, the attendance rule should be judged on its face in

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[36] See text at notes 17-19 *supra.*

[37] 429 U.S. at 310.

[38] *Id.* The union sought by this argument to distinguish the prior officeholding requirement in *Hotel Employees,* see notes 17-18 *supra,* which allowed an individual member little control over his eligibility.

[39] *Id.* at 311.

[40] *Id.* at 310 n.6, *citing Hotel Employees,* 391 U.S. at 499.

[41] 429 U.S. at 311-12. *Cf.* S. REP. NO. 187, 86th Cong., 1st Sess. 6-7, 20 (1959), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 2, at 402-03 (union corruption cannot be prevented without governmental coercion, but free and democratic elections give union members power to insure responsive leadership).

[42] 429 U.S. at 311-12.

terms of its potential to result in entrenched leadership, without requiring any showing of actual entrenchment.

Finally, the union argued that the attendance rule advanced legitimate union interests in fostering both attendance at meetings and candidates informed and committed with respect to union affairs.[43] These arguments the Court rejected on two grounds: first, the evidence tended to show no actual effect on attendance due to the rule, and second, the voting members themselves could best judge the extent of candidates' knowledge and dedication.[44] Accordingly, the Court found none of the union's arguments sufficient to justify the exclusory impact of the meeting attendance rule. The Court therefore concluded that the limitation of "reasonable" qualifications in section 401(e) of the LMRDA "disabled unions from establishing eligibility qualifications as sharply restrictive of the openness of the union political process as is [the Steelworkers'] attendance rule."[45]

Justice Powell, joined by Justices Stewart and Rehnquist, dissented,[46] contending that the majority's decision did not accommodate sufficiently the federal policy of avoiding unnecessary intervention in internal union affairs.[47] Against the background of this policy, Justice Powell criticized the majority for adopting what he found amounted to a per se rule whereby the exclusion of 96.5% of Local 3489's members from union office was given "controlling weight."[48] This he found an unduly rigid extension of *Hotel Employees,* since the rule in that case was unique among union rules in requiring prior officeholding as a nomination qualification.[49] In the present case, Justice

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[43] *Id.* at 312.

[44] *Id.* The Court asserted that "the election provisions of the LMRDA express a Congressional determination that the best means to this end is to leave the choice of leaders to the membership in open democracy unfettered by arbitrary exclusions." *Id.* This analysis amounts to something of a tautology. § 401(e) provides that every union member in good standing is eligible to be a candidate "subject . . . to reasonable qualifications uniformly imposed." If the "best means" of determining qualification for leadership is, as a rule, the choice of the union electorate, however, then any formally imposed qualifications seem inappropriate. At the very least, the Court's analysis indicates categorical disfavor of qualification requirements for union office.

[45] *Id.* at 313. The Court also briefly took up and rejected a defense that the absence of a specific standard of reasonableness articulated by the Secretary of Labor made impossible the drafting of a requirement valid under § 401(e). *Id.* at 313-14. The Court found that the determination of "reasonableness" by its nature requires flexibility. Further, the Court concluded that in the light of the Secretary's outline of the various factors affecting the reasonableness of meeting-attendance requirements, then in effect, 29 C.F.R. § 452.38(a) (1974), coupled with the Court's clear disapproval of an eligibility requirement disqualifying 93% of the union members in *Hotel Employees,* 391 U.S. at 502, the union in the instant case had adequate notice that its rule could be found unreasonable. 429 U.S. at 313-14.

[46] *Id.* at 314-17 (Powell, J., dissenting).

[47] *Id.* at 314, *citing* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 470-71 (1968) ("Congress weighed how best to legislate against revealed abuses without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.").

[48] 429 U.S. at 315 (Powell, J., dissenting).

[49] *Id.*

Powell contended, the effects of the Steelworkers' requirement stemmed from members' own choice or indifference, not automatically from the attendance rule as did disqualification resulting from the *Hotel Employees* rule.[50] Accordingly, Justice Powell would have balanced the restrictive effect of the Steelworkers' meeting attendance rule against the legitimate union interests which the rule advanced and the relatively small burden which it placed on any individual member by requiring meeting attendance for what amounted to two hours per month.[51] Thus, Justice Powell would have agreed with the Sixth Circuit[52] and found that the Steelworkers' rule was a reasonable qualification for union office.

The significance of *Local 3489* lies in the Court's treatment of the exclusory impact of the Steelworkers' meeting attendance requirement. Although the Court applied a balancing test in measuring the reasonableness of the union's rule for the purposes of section 401(e), the Court gave almost conclusive weight to the exclusory effect of the rule and required the union to present "substantial justification" for the rule.[53] This approach indicates that where the effect of a restriction on eligibility for union office is to exclude a large percentage of the union's members from running for office, a heavy presumption arises against the reasonableness of that restriction under section 401(e).[54] While the Court foreshadowed this approach in *Hotel Employees,*[55] and several lower federal courts have followed such an approach,[56] *Local 3489* represents the Supreme Court's first clear adoption of an effects-oriented approach to Section 401(e).

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[50] *Id.* at 315-16. See text at notes 17-18 *supra.*

[51] *Id.* at 316. Justice Powell conceded that these legitimate interests might be over-restrictively advanced, but termed this a "judgment call." *Id.* at 317.

[52] See text at notes 29-31 *supra.*

[53] 429 U.S. at 314.

[54] This approach changes the litigation posture of a challenge to a union election based on an alleged unreasonable qualification for office. Under § 402(a) of the LMRDA, 29 U.S.C. § 482(a), a union election is presumed valid pending a decision, based on a preponderance of the evidence, that it was invalid. Thus, the statute contemplates that the burden of proof falls on the Secretary to show that an eligibility requirement is unreasonable. *Local 3489* indicates that a showing of substantial exclusory impact satisfies this burden. The dissenters, on the other hand, would have had the Secretary retain the burden. *See* 429 U.S. at 317 (Powell, J., dissenting).

This presumptive approach is not entirely new, although *Local 3489* marks its first clear enunciation by the Supreme Court. *See* 29 C.F.R. 452.7(b) (1970) *deleted in* 29 C.F.R. 452.38 (1974) ("[S]hould the actual effect of the eligibility qualification be to disqualify from holding office all but a handful of the labor organization's members, its reasonableness would be subject to serious question."). For cases in which a similar approach was taken, see note 56 *infra.*

[55] 391 U.S. at 502 ("Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly be a 'reasonable qualification' "). *Hotel Employees* could be distinguished on its facts, however. *See* 429 U.S. at 315-16 (Powell, J., dissenting), discussed in text at notes 49-50 *supra.*

[56] A number of courts have given conclusive weight to the numerical impact of eligibility requirements. *See* Brennan v. Local 639, Int'l Bhd. of Teamsters, 494 F.2d 1092, 1098-99, 85 L.R.R.M. 2594, 2599-2600 (D.C. Cir. 1974) (attendance at 75% of

At the same time it clarified this effects-oriented approach, the *Local 3489* Court implicitly rejected any per se rule against restrictions on eligibility for union office which disqualify a substantial percentage of union members. The government in *Local 3489* argued that such a per se rule had already been enunciated in *Hotel Employees.*[57] The majority opinion did not address this argument, but apparently rejected it *sub silentio* by applying a balancing test, though a weighted one, rather than resting its decision on the exclusive effect of the Steelworkers' rule.[58] Nevertheless, as the dissenting Justices commented,[59] the presumptive weight which the Court gave the exclusive effect of the Steelworkers' attendance requirement approaches a per se "effects" rule; the arguments which the union advanced in favor of

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meetings in previous two years required—97% of members disqualified); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 405 F.2d 176, 177-78, 69 L.R.R.M. 2890, 2890-91 (3d. Cir. 1968) (attendance at 75% of meetings in previous two years required—97% of members disqualified); Wirtz v. National Maritime Union, 399 F.2d 544, 549-50, 68 L.R.R.M. 3017, 3020 (2nd Cir. 1968) (prior officeholding required for national office—99% of members disqualified); Brennan v. Local 3911, United Steelworkers, 372 F. Supp. 961, 966-67, 82 L.R.R.M. 3185, 3189 (N.D. Ill. 1973) (dictum) (same rule as in *Local 3489*—94% of members disqualified); Wirtz v. Local 263, Glass Bottle Blowers Ass'n, 290 F. Supp. 965, 966-67, 69 L.R.R.M. 2265, 2267 (N.D. Cal. 1968) (attendance at 75% of meetings in previous two years required—98.4% of members disqualified); Wirtz v. Independent Workers Union, 65 L.R.R.M. 2104, 2109-10 (M.D. Fla. 1967) (attendance at a meeting in each of thirteen quarters preceding election required—99% of members disqualified).

Several other courts have accorded considerable weight to exclusory impact, but have treated it in conjunction with other factors. *See* Usery v. Local 1205, Amalgamated Transit Union, 545 F.2d 1300, 1303, 93 L.R.R.M. 2870, 2872-73 (1st Cir. 1976) (attendance of six meetings per year over two years required attendance beginning eighteen months before election—94% of members disqualified); Hodgson v. Local 18, Int'l Union of Operating Engineers, 444 F.2d 485, 76 L.R.R.M. 3025, 3026-27 (6th Cir. 1971) (membership in parent union required, causing expensive dues—60% of members disqualified); Wirtz v. Local 406, Int'l Union of Operating Engineers, 254 F. Supp. 962, 964-65, 62 L.R.R.M. 2309, 2310-12 (E.D. La. 1966) (dues payment required with no grace period for arrears—97% of members disqualified); Wirtz v. Local 9, Int'l Union of Operating Engineers, 254 F. Supp. 980, 982-83, 58 L.R.R.M. 2550, 2550 (D. Colo. 1965) (dues payment required without notice or grace period for arrears—87% of members disqualified); Goldberg v. Amarillo Gen'l Drivers Local 577, 214 F. Supp. 74, 75-76, 79, 52 L.R.R.M. 2339, 2339-40, 2343 (N.D. Tex. 1963) (dues payment required without grace period and dues paid through employer checkoff—40% of members disqualified). Another court has struck down an eligibility requirement without examining its exclusory impact. Hodgson v. Local 624-A-B, Int'l Union of Operating Engineers, 80 L.R.R.M. 3049, 3050-51 (S.D. Miss. 1972) (attendance at each of eight meetings in different parts of the state required—no impact determined).

In addition to the Steelworkers cases upholding the meeting attendance requirement at issue in *Local 3489*, see note 23 *supra*, a meeting attendance requirement has been held reasonable in spite of severe exclusory impact in Martin v. International Bhd. of Boilermakers Local Lodge 636, 245 F. Supp. 375, 376, 378, 55 L.R.R.M. 2576, 2577, 2579 (W.D. Pa. 1963) (attendance at meeting in each of five quarters required but found not burdensome—92% of members disqualified). The result of this latter case is clearly questionable after *Local 3489*.

[57] *See* 429 U.S. at 315 (Powell, J., dissenting).

[58] See text at notes 37-44 *supra*.

[59] 429 U.S. at 315 (Powell, J., dissenting).

its requirement were accorded little weight in the Court's balancing.[60] Thus, at least where a union eligibility requirement is as exclusive as that in *Local 3489*, virtually any purpose underlying such a requirement is unlikely to rise to the level of "substantial justification."

What degree of exclusive effect or percentage of excluded members triggers this presumption and whether the justification it requires varies with such degree are questions left open after the decision in *Local 3489*. The Court, however, did indicate that Congress in the LMRDA sought a flexible rule rather than specific Department of Labor regulations in measuring "reasonableness" for the purposes of section 401(e).[61] This preference for flexibility suggests that as the exclusive effect of a union eligibility rule diminishes, the burden of justification might become lighter. Because "reasonableness" is inherently an issue involving all of the facts and circumstances at hand, such a sliding scale in the operation of the *Local 3489* presumption seems appropriate.

In contrast to the *Local 3489* majority's presumptive, effects-oriented approach to the Steelworkers' meeting attendance rule, the dissenting Justices explicitly preferred to impose on the Department of Labor the burden of showing the rule unreasonable.[62] These differences in approach to a section 401(e) inquiry reflect divergent views of the purpose and operation of the LMRDA. The majority premised that the principal purpose of Title IV of the LMRDA is to foster "free and democratic" union elections.[63] Thus, the majority's view indicates that where union office eligibility rules do not meet objective norms of democratic union elections they are likely to be struck down. By comparison, the dissenters' contention—that judicial intervention is inappropriate where a qualification for union office reflects legitimate union purposes[64]—reflects a view of the LMRDA as intended largely to correct the evil of corrupt or abusive union leadership; in effect, the dissenters viewed democratic election procedures chiefly as a device to prevent this perceived evil and not as a discrete statutory goal. Under this view of the LMRDA, a qualification for union office should be struck down only where it either serves no legitimate union purposes on its face, or where on balance it subjectively promotes evils at which the LMRDA is directed.

The majority's approach would seem to be the preferable view. First, both the LMRDA's Declaration of Purposes and Policy[65] and the

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[60] See text at notes 38-44 *supra*.

[61] 429 U.S. at 313, noting the various factors for judging reasonableness of meeting attendance requirements enunciated in 29 C.F.R. § 452.38(a) (1976). For the text of this regulation see note 20 *supra*.

[62] 429 U.S. at 317 (Powell, J., dissenting). Thus, Justice Powell would not alter the prima facie burden on the Secretary established in § 402(a). The effect of the majority's approach on this prima facie burden is discussed at note 54 *supra*.

[63] 429 U.S. at 309, *quoting Hotel Employees*, 391 U.S. at 504.

[64] 429 U.S. at 316-17 (Powell, J., dissenting).

[65] 29 U.S.C. § 401(a) (1970) ("It continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives,

legislative history of Title IV[66] stress as a goal of the Act rank and file participation in union affairs including election of union officers. Thus, they support the view that democratic union election procedures are an independent primary goal of the Act. The majority's approach in *Local 3489* focuses on the effect of the eligibility rules on rank and file participation and is less willing than the dissenters to admit of justification for exclusory rules. Thus, the majority's approach seems more apt than the dissenters' to advance the policy of rank and file participation embodied in the LMRDA by allowing more union members to run for office and giving the remainder a wider choice of candidates. Furthermore, even if the dissenting Justices in *Local 3489* were correct in viewing democratic union elections largely as a prophylactic device against abusive union leadership, their inquiry as to whether the Steelworkers' rule at issue had in fact resulted in entrenched leadership seems misplaced. The LMRDA's provisions safeguarding union election procedures would have little prophylactic value if it were necessary to show that a union is burdened with an entrenched or abusive leadership; an evil the provisions seek to prevent, before the union members may invoke the provisions' protection. The majority's approach in *Local 3489,* then, is more consistent with a view of democratic union elections either as a discrete goal of the LMRDA or as a means toward the goal of responsive union leadership.

B. *Usery v. District 22, United Mine Workers*[67]

District 22 of the United Mine Workers consists of sixteen local unions in Wyoming, Utah and Arizona.[68] According to its constitution, the district required that a candidate for district office be nominated by five locals, and candidates for sub-district office by three locals.[69] Since the locals vary greatly in size, it was possible for a candidate for district office to be nominated by the five smallest locals representing five percent of the total district membership, or to fall short of nomination with the support of the four largest locals representing fifty-eight percent of the total district membership.[70] In the 1973 elections for the United Mine Workers International Execu-

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bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . .").

[66] S. REP. NO. 187, 86th Cong., 1st Sess. 6-7 (1959) *reprinted in* I LEGISLATIVE HISTORY, *supra* note 2, at 402-03 ("Union members have a vital interest . . . in the policies and conduct of union affairs. To the extent that union procedures are democratic they permit the individual to share in the formulation of union policy.").

[67] 543 F.2d 744, 93 L.R.R.M. 2648 (10th Cir. 1976).

[68] *Id.* at 747, 93 L.R.R.M. at 2650.

[69] *Id.*

[70] *Id.* The International Constitution of the United Mine Workers was amended after the 1973 election to limit the number of nominations which may be required by a district to no more than one-fifth of the locals in the district. Thus the specific facts of *District 22* will not recur. *See id.* at 751, 93 L.R.R.M. at 2653.

tive Board, member Frank Roybal was nominated by three local unions representing thirty-eight percent of the district membership, while his opponent was nominated by eleven locals representing forty-eight percent of the membership.[71] Since he lacked the required five locals, Roybal was disqualified as a candidate.[72]

Contesting his disqualification, Roybal filed a complaint with the Secretary of Labor,[73] contending that the five-local requirement did not constitute "reasonable opportunity" for the nomination of candidates as required by section 401(e) of the Act. The Secretary accepted Roybal's contention and pursuant to section 402 of the LMRDA brought an action in district court seeking a new election.[74] The court in turn upheld the Secretary's and Roybal's view and ordered a new election for membership on the International Executive Board.[75]

The United States Court of Appeals for the Tenth Circuit affirmed,[76] and held that the requirement of nomination by five of sixteen locals does not provide reasonable opportunity for nomination in accordance with section 401(e). The court considered this question prior to the Supreme Court's decision in *Local 3489* and found no authority directly relevant to union preliminary support requirements. Hence, the court addressed the issue as one of first impression and analogized to *Hotel Employees* and other decisions dealing with eligibility requirements for union office under section 401(e), and to preliminary support requirements in political election cases.[77] On the

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[71] *Id.* at 747, 93 L.R.R.M. at 2650.

[72] *Id.* at 746-47, 93 L.R.R.M. at 2649.

[73] Before filing his complaint, Roybal exhausted his internal union remedies, *id.*, 93 L.R.R.M. at 2649-50, thus complying with 29 U.S.C. § 482(a).

[74] 543 F.2d at 747, 93 L.R.R.M. at 2650. *See* 29 U.S.C. § 482, discussed in text and note at note 16 *supra.*

The Secretary's action also sought a new election for four sub-district offices subject to the three-local rule, although the would-be candidates for those offices had not yet exhausted intra-union remedies. Because of this failure to exhaust remedies, the district court dismissed this portion of the Secretary's claim. 93 L.R.R.M. 2026, 2027 (D. Utah 1975). On cross-appeal by the Secretary, the court of appeals, finding that the Secretary's action was not limited to the complaint before him, reversed this finding and voided the elections affected by the three-local requirements. 543 F.2d at 750-51, 93 L.R.R.M. at 2652-53. *Cf.* Wirtz v. Local 125, Laborers Int'l Union, 389 U.S. 477, 484 (1968) (Secretary has broad authority to prosecute § 401 violations discovered incidentally to an investigation).

Since the three-local rule was found unreasonable on the same grounds as the five-local requirement, this discussion will focus, as did the Tenth Circuit court, on the latter requirement.

[75] 93 L.R.R.M. 2026, 2033 (D. Utah, 1975). The new election was completed January 16, 1976, and this time Roybal was elected. *See* 93 L.R.R.M. 2364, 2365 (D. Utah, 1976) (certifying new election).

[76] 543 F.2d at 751, 93 L.R.R.M. at 2653, with the modification that new elections were ordered in elections affected by the three-local requirement. See note 74 *supra.*

[77] *Id.* at 748-49, 93 L.R.R.M. at 2651, *citing* Wirtz v. Hotel Employees Union Local 6, 391 U.S. 492 (1968) (union office eligibility); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 405 F.2d 176, 69 L.R.R.M. 2890 (3d Cir. 1968) (union office eligibility); Storer v. Brown, 415 U.S. 724 (1974) (political election preliminary support require-

basis of these analogies the *District 22* panel found the effects of the District 22 rule to be the critical inquiry. The court found the effects burdensome because the rule in fact had excluded from running for office both Roybal, the choice of a substantial portion of the district's members, and an undetermined number of other candidates; and potentially could exclude a candidate supported by a majority of the district's members.[78] These effects, the court found inconsistent with the LMRDA's mandate of free and democratic elections.[79]

In light of the Supreme Court's subsequent decision in *Local 3489, District 22* appears correctly decided. The Tenth Circuit in *District 22* focused on the five-local rule's actual effects. Thus, the court gave controlling weight to its findings that the rule excluded Roybal, the choice of a significant percentage of union members from district office, and an undetermined number of other candidates from running for office, and potentially could deny nomination to a candidate supported by a majority of the District's members.[80] This emphasis on numerical effects is similar to the Supreme Court's treatment of the Steelworkers' meeting attendance rule in *Local 3489*. Like the Supreme Court in *Local 3489*, the circuit panel emphasized the role of Title IV of the LMRDA, first articulated by the Supreme Court in *Hotel Employees*,[81] as a guarantor of free and democratic union elections. The *District 22* panel measured the exclusory effects of the five-local rule against this perceived role of Title IV, and found them "inconsistent."[82] At the same time, the union evidently advanced no arguments supporting the reasonableness of its rule.[83] Thus, by analogy to the presumptive approach of *Local 3489*,[84] the circuit court's finding of inconsistency between the rule and Title IV implies a presumption of the rule's invalidity. This presumption, left unrebutted by the union, required the conclusion that the rule did not afford "reasonable opportunity for nomination," thereby violating section 401(e). Thus, the result and reasoning of *District 22* are consistent with the Supreme Court's opinion in *Local 3489*.

In both *Local 3489* and *District 22* the courts adopted broad views of Title IV's goal of union democracy as mandating strict review of restrictions on access to the ballot. Their practical effect is to indicate that any elections affected by restrictions which exclude a substantial number of union members from participation in the union election

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ment); Williams v. Rhodes, 393 U.S. 23 (1960) (political election preliminary support requirement). The circuit court also looked to the Department of Labor's factors relating to the reasonableness of eligibility requirements, see text and notes at notes 20-21 *supra*, and concluded that the preliminary support did not "bear up well" in that light. 543 F.2d at 748 n.3, 93 L.R.R.M. at 2651 n.3.

[78] *Id.* at 749, 93 L.R.R.M. at 2652.

[79] *Id.*

[80] *Id.*, 93 L.R.R.M. at 2651-52. See text at note 78 *supra*.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 748, 93 L.R.R.M. at 2651.

[84] See text at notes 53-54 *supra*.

process are open to successful challenge under section 401(e) of the LMRDA, even where some valid union interest exists to support the restrictions at issue.[85]

V. CERTIFICATION OF A DISCRIMINATORY BARGAINING REPRESENTATIVE — *Bekins* OVERRULED: *Handy Andy, Inc.*

In the 1974 decision of *Bekins Moving & Storage Co.*,[1] the National Labor Relations Board (NLRB or Board) confronted for the first time the question whether as a matter of constitutional law the NLRB is prohibited from certifying as bargaining representative a labor organization which discriminates on the basis of race or some other invidious classification.[2] A plurality of the Board, though disagreeing on the proper test for determining whether a union is discriminatory,[3] held that the NLRB, as a federal instrumentality, may not certify a discriminatory union without sanctioning private dis-

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[85] In recent years the effectiveness of LMRDA in protecting union democracy has been called into question. *See* Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407, 409-10 (1973); N.Y. Times, July 14, 1971, at 12, col. 4 (comment of Senator Griffin, co-author of LMRDA that widespread irregularities in 1969 United Mine Workers election between W. Anthony Boyle and Joseph Yablonski, culminating in Boyle's conviction for Yablonski's murder, indicated the Act had been unsuccessful). The more activist approach on the part of both the Labor Department and the courts reflected in *Local 3489* and *District 22* suggests the possibility that a renewed effort may be under way to make the Act effective. It remains to be seen whether such an effort will continue under President Carter and Secretary of Labor Marshall.

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[1] 211 N.L.R.B. 138, 86 L.R.R.M. 1323 (1974), *noted in Annual Survey of Labor Relations & Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 986 (1975).

[2] 211 N.L.R.B. at 138, 86 L.R.R.M. at 1325. The employer in *Bekins* sought to dismiss a union petition for an election on the ground that the union engaged in invidious discrimination against women and Spanish-speaking and Spanish-surnamed individuals. *Id.*, 86 L.R.R.M. at 1324.

[3] Member Jenkins and Chairman Miller authored a "lead" opinion. Member Kennedy concurred. Members Pennello and Fanning dissented.

Member Kennedy agreed with the lead opinion that the Board should hold a precertification inquiry to consider employer charges that a union discriminates in its recruitment or admission policies on the basis of race, alienage, or national origin. *Id.* at 143, 86 L.R.R.M. at 1329. He disagreed, however, with the lead opinion's test of "propensity to fail fairly to represent employees," *id.* at 139, 86 L.R.R.M. at 1326, because he believed that this test incorporated issues of fair representation into the precertification inquiry. Issues concerning fair representation, Member Kennedy stated, "must, of necessity, relate to actions following certification. Until a union has become the employees' exclusive bargaining representative, it is not subject to a duty to represent them fairly." *Id.* at 145, 86 L.R.R.M. at 1331 (Member Kennedy, concurring). Accordingly, Member Kennedy concluded, such issues should be deferred until after a certification has issued, and the precertification hearing should focus only on whether a union invidiously excludes employees from membership. *Id.*, 86 L.R.R.M. at 1331 (Member Kennedy, concurring).

crimination in violation of the fifth amendment.[4] In the Survey year decision in *Handy Andy, Inc.*,[5] a reconstituted Board abruptly overruled the *Bekins*' rationale that certification of a discriminatory labor organization amounts to unconstitutional "state action."[6] A majority, comprised of the two *Bekins* dissenters and Chairman Murphy, held that under the National Labor Relations Act (NLRA) the Board "is not authorized to withhold certification of a labor organization duly selected by a majority of the unit employees."[7]

In so holding, the *Handy Andy* Board indicated that henceforth the NLRB will consider employer allegations of invidious discrimination by a labor organization in the context of unfair labor practice rather than representation proceedings, unless an employer presents specific proof of clearly existing invidious discrimination which interferes with the employees' right to select a bargaining representative.[8] The Board thus has drastically limited its review of employer claims of union discrimination, and now will review only those discrimination claims connected with specific labor grievances arising within the familiar framework of labor-management relations and organizational rights. As a result, the Board apparently has deferred to other federal agencies such as the Equal Employment Opportunity Commission the responsibility of redressing alleged employment discrimination practiced by labor organizations.[9]

The dispute in *Handy Andy* arose when a union sought certification following its successful consent election.[10] The employer, Handy Andy, Incorporated, filed timely objection to this request in accordance with *Bekins*, alleging invidious discrimination by the union.[11] This allegation was based on several federal court decisions which had held that the challenged union's bargaining agreements with other employers had perpetuated the effects of those employers' past discriminatory practices.[12] Accordingly, Handy Andy contended that these decisions indicated that the requesting union would discriminate

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[4] *Id.* at 139, 86 L.R.R.M. at 1325. The constitutional rationale proffered in *Bekins* largely followed the reasoning of the United States Court of Appeals for the Eighth Circuit in NLRB v. Mansion House Center Management Corp., 473 F.2d 471, 82 L.R.R.M. 2608 (8th Cir. 1973). The court in *Mansion House* ruled that evidence supporting an employer's discrimination defense to a refusal to bargain was erroneously excluded by the Board. *Id.* at 475, 82 L.R.R.M. at 2612. Consequently, the court denied enforcement of the Board's bargaining order, holding that the remedial machinery of the NLRA was constitutionally unavailable to a union which was unwilling to correct past practices of racial discrimination. *Id.* at 477, 82 L.R.R.M. at 2613. *See generally* Comment, 58 MINN. L. REV. 335 (1974).

[5] 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (February 25, 1977).

[6] 94 L.R.R.M. at 1355.

[7] *Id.*

[8] *Id.* at 1361.

[9] See note 30 *infra*.

[10] *Id.* at 1355.

[11] *Id.*

[12] *See, e.g.*, Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 88 FEP Cas. 1246 (5th Cir. 1974), *vacated and remanded*, 431 U.S. 395, 406 (1977). The United States

in membership requirements and, additionally, had shown a propensity to discriminate in employee representation.[13] Although the regional director recommended dismissal of Handy Andy's claims, the Board decided to hear oral argument on the employer's objections.[14] Rather than consider only the sufficiency of the employer's allegations, the Board reopened the question presented in *Bekins* whether NLRB certification of an allegedly discriminatory union constitutes unconstitutional "state action."[15]

The *Handy Andy* Board's reversal of the *Bekins* doctrine was grounded primarily in a rejection of the *Bekins*' analysis of Supreme Court "state action" decisions. In *Bekins* the plurality, relying on the 1948 Supreme Court decision in *Shelley v. Kraemer,*[16] reasoned that by conferring benefits of certification on a discriminatory union the NLRB "would surely appear to be sanctioning . . . [private] discrimination, thereby running afoul of the due process clause of the fifth amendment."[17] The *Handy Andy* Board, by contrast, canvassed more recent Supreme Court "state action" decisions, in particular *Moose Lodge No. 107 v. Irvis,*[18] and concluded that the NLRB must be "significantly involved" with a union's discriminatory practices before its actions could constitute prohibited "state action."[19] To amount to such involvement, the Board determined, certification would have to have "enforced,"[20] "required,"[21] "authorized,"[22] or "fostered and encour-

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Court of Appeals for the Fifth Circuit had found in *Rodriguez* that the union's collective bargaining agreements establishing separate seniority rosters for different classifications of truck drivers tended to perpetuate the effects of past hiring discrimination practiced by the employer. 505 F.2d at 60, 8 FEP Cas. at 1261.

[13] 94 L.R.R.M. at 1355.

[14] *Id.*

[15] The Board in fact joined several cases. *See id.* at n.1.

[16] 334 U.S. 1 (1948). In *Shelley,* the Court held that state action enforcing or supporting the practice of private invidious discrimination contravenes the equal protection clause of the fourteenth amendment. *Id.* at 20. The federal government is bound by equal protection requirements even though the fifth amendment contains no equal protection clause because such requirements are implicitly embodied in the fifth amendment's due process clause. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[17] 211 N.L.R.B. at 139, 86 L.R.R.M. at 1325 (citation omitted).

[18] 407 U.S. 163 (1972). The Court in *Moose Lodge* held that the licensing of a private club to serve liquor by the Pennsylvania Liquor Control Board did not sufficiently implicate the state in the club's discriminatory guest practices so as to make those practices "state action" within the purview of the fourteenth amendment. *Id.* at 175-77. The Court, however, stated that a particular regulation promulgated by the Liquor Board could be enjoined because the regulation required compliance by the club with racially discriminatory provisions in its constitution and by-laws. *Id.* at 179.

[19] 94 L.R.R.M. at 1357.

[20] *Id. See* Shelley v. Kraemer, 334 U.S. 1 (1948). See note 16 *supra.*

[21] 94 L.R.R.M. at 1357. *See* Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (state convictions for trespass overturned because they had the effect of enforcing city ordinance compelling private restaurants to discriminate against patrons on the basis of race).

[22] 94 L.R.R.M. at 1357. *See* Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (state constitutional provision violated equal protection clause because it authorized racial discrimination in the housing market, thus involving the state in private discrimination).

aged"[23] union discrimination.[24] The Board then reasoned that NLRB certification, while conferring substantial benefits on a union as a result of its exclusive bargaining status, does not enforce, require, authorize or foster and encourage any of a labor organization's activities.[25]

The Board proffered two arguments in support of this conclusion. First, NLRB certification does not permit unions to engage in discriminatory practices otherwise prohibited both by the NLRA[26] and Title VII of the Civil Rights Act of 1964.[27] Second, certification of labor organizations is merely an acknowledgement by the NLRB that a majority of employees in the relevant unit have properly selected the exclusive representative with whom the employer is statutorily required to bargain.[28] Thus, in the Board's view, the facially neutral act of certification does not significantly involve the NLRB with a union's discriminatory practices and hence does not rise to the level of unconstitutional "state action."[29] Accordingly, the Board concluded that denial of certification of an allegedly discriminatory union is not constitutionally required.[30]

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[23] 94 L.R.R.M. at 1357. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972). See note 18 *supra.*

[24] 94 L.R.R.M. at 1357.

[25] *Id.*

[26] *Id.* at 1358. The Board noted that "the duty of fair representation in its various forms *specifically prohibits* a union from practicing unlawful discrimination under the [NRLA]." *Id.* (emphasis in original). *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976). This duty of fair representation requires a statutory bargaining representative to represent all unit employees equally, whether or not they are members of the union. Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944). Moreover, a breach of the duty can be redressed through an unfair labor practice proceeding. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 178 (1967), *citing* Local No. 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB, 368 F.2d 12, 19-20, 63 L.R.R.M. 2395, 2397-99 (5th Cir. 1966).

[27] 94 L.R.R.M. at 1358. Title VII provides that it is an unlawful employment practice for a labor organization to exclude any individual from membership or otherwise adversely to affect an employee's status on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(c) (Supp. II 1972).

[28] 94 L.R.R.M. at 1358.

[29] The *Handy Andy* Board took issue with the constitutional rationale of *Mansion House*, see note 4 *supra*, because the Eighth Circuit seemingly would require the NLRB to consider the discriminatory effects of its actions contrary to the test enunciated by the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976). In *Davis*, the Supreme Court held that action by a federal or state agency will not violate the equal protection clause unless there is demonstrable proof of a racially or invidiously discriminatory intent or purpose. *Id.* at 239, 252. Thus *Davis*, as the *Handy Andy* Board recognized, 94 L.R.R.M. at 1358, stands for the proposition that there are distinctions between the duties imposed by Title VII and those required by the Constitution with respect to employment discrimination.

[30] 94 L.R.R.M. at 1355, 1357. The *Handy Andy* Board also concluded that as a consequence of *Bekins'* constitutional determinations with respect to employment discrimination claims, the NLRB was permitted to intrude into the Equal Employment Opportunity Commission's (EEOC) primary, and perhaps exclusive area of federal responsibility. *Id.* at 1358-59, *citing* NAACP v. Federal Power Commission, 425 U.S. 662 (1976) (FPC is authorized only to consider the consequences of employment discrimina-

Having decided that there is no constitutional impediment to certification of an allegedly discriminatory labor organization, the *Handy Andy* Board then considered whether it was nevertheless required to deny certification by the provisions of the NLRA. In resolving this question, the Board first examined the certification requirements outlined in section 9(c)(1) of the Act.[31] Focusing on the mandatory language in that provision which states that the Board "shall" certify the results of a representation election, the Board reiterated the reasoning of the *Bekins* dissent that " 'absent unfairness in the election itself, the section *commands* the Board to issue a certification of representative to the winning labor organization.' "[32] The Board thus reasoned that its only duty under section 9(c)(1) was to ensure the fairness of the election process and, therefore, concluded that it lacked authority to consider in representation proceedings the potential future consequences of union discrimination.[33] Moreover, not only did the Board perceive denial of certification of an allegedly discriminatory union as precluded by section 9(c)(1), but also it believed that, as a practical matter, such denial could thwart the choice of a majority of employees and provide employers with a device for delaying or altogether avoiding collective bargaining.[34] Permitting such results, the Board concluded, would interfere impermissibly with the

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tion practices when such consequences are directly related to the FPC's primary authority to establish just and reasonable rates). Similarly, commentators have argued that because an overlapping responsibility to consider employment discrimination claims confuses the federal government's task to eradicate such discrimination, Congress must have assigned to one centralized agency, the EEOC, not the NLRB or other federal agencies, the authority to remedy employment discrimination. *See, e.g.*, Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies the Better?*, 42 U. CHI. L. REV. 1, 10-11 (1974) (hereinafter *Racial Discrimination); see also* Lopatka, *Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act For Employees Who Protest Discrimination in Private Employment*, 50 N.Y.U. L. REV. 1179, 1236 (1975).

The *Handy Andy* Board further attacked the constitutional rationale of *Bekins* by contending that the *Bekins*' construction of section 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1) (1970), amounted to an unauthorized adjudication of the constitutionality of a congressional enactment by an administrative agency. 94 L.R.R.M. at 1359. *But see generally* Note, 90 HARV. L. REV. 1682, 1706-07 (1977).

[31] 29 U.S.C. § 159(c)(1) (1970), which provides in relevant part:

> Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation . . . exists shall provide for an appropriate hearing . . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

[32] 94 L.R.R.M. at 1359, *quoting Bekins*, 211 N.L.R.B. at 147, 86 L.R.R.M. at 1334 (Members Fanning and Penello, dissenting) (emphasis added).

[33] 94 L.R.R.M. at 1359.

[34] *Id.* at 1360. In the instant case, noting that a substantial percentage of the minority employees voted in favor of the union, the Board reasoned that these employees would not have selected the union as their exclusive bargaining agent if they had suspected that it would not represent them fairly. Consequently, the Board characterized the employer's purpose in raising his discrimination allegations as an attempt to delay the onset of bargaining, rather than to protect minority employees. *Id.* at 1360-61.

NLRB's primary statutory responsibility to promote collective bargaining and facilitate the employees' selection of a bargaining representative.[35]

After determining that denial of certification of an allegedly discriminatory union would contradict both the express language of section 9(c)(1) of the NLRA and its underlying labor policy, the Board next examined whether the *Bekins* doctrine was an effective tool for implementing federal antidiscrimination policies. First, the Board noted, entrenched unions, which would have the least natural incentive to lower racial or other discriminatory barriers, can attain representative status by means other than an NLRB representation election. Therefore because the doctrine applied only in certification proceedings, it could not reach those unions which the Board believed were most likely to employ discriminatory practices.[36] Second, the Board pointed out that because the doctrine was invoked before the union actually represented a challenged unit, an employer, as in *Handy Andy*, could seek to prevent unit certification by relying on evidence that *other* bargaining units of the union engaged in discriminatory practices.[37] In such cases, the Board reasoned, the potential for a challenged unit to fail to represent fairly all employees frequently only could be presumed without actual proof of discrimination.[38] Third, the Board noted that the *Bekins* doctrine allowing denial of certification was capable of anomalous results, such as where the complaining employer is party to the alleged discrimination or where the challenged union is significantly supported by the discriminatee minority.[39] Consequently, the *Handy Andy* Board determined that denial of certification was an ineffective way to combat employment discrimination, and hence that the NLRA policy in favor of speedy resolution of questions concerning representation overrode the value of such denial as a means of advancing federal antidiscrimination policies.[40]

Although the *Handy Andy* Board concluded that neither the Constitution, the NLRA, nor federal antidiscrimination policies require it to consider discrimination issues in representation proceedings, it stated that nevertheless it will continue to do so where necessary to protect the integrity of its own processes.[41] The Board noted, for example, that it will consider "the possible impact of clearly existing

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[35] *Id.* at 1359-60.

[36] *Id.* at 1360.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 1360-61.

[41] *Id.* at 1361. For this authority to protect its processes, the *Handy Andy* Board cited to its earlier decision in Pioneer Bus Company, Inc., 140 N.L.R.B. 54, 51 L.R.R.M. 1546 (1962), which held that the NLRB has the authority to revoke certification of a union with collective-bargaining agreements which patently discriminate between black and white employees. *Id.* at 55, 51 L.R.R.M. at 1546.

invidious discrimination within the unit at issue or of appeals to prejudice directed at employees in such unit in cases where . . . necessary to protect the fairness of the election process."[42] The Board cautioned, however, that it will undertake such a review only when it is necessary to protect employees in their right to choose a bargaining representative.[43] Thus although the Board retained this option to review alleged union discrimination in representation proceedings, it restricted this review to the narrow circumstance where the employer demonstrates a specific nexus between the alleged discrimination and the election process.

All claims of discriminatory practices by a union other than those allegations of practices directly implicating the election process, the Board indicated it will consider in the context of unfair labor practice proceedings.[44] The Board explained that it has long utilized such proceedings to police a union's conduct with respect to unit employees through its power to remedy a labor organization's breach of its statutory duty of fair representation.[45] This mechanism, the Board pointed out, provides a remedy for such practices as rejection of an employee's grievance solely on the basis of his race;[46] allocation of the employees' work assignments by a labor organization on the basis of race;[47] or attempts by a union to force employers to continue practices which perpetuate past discrimination.[48] The Board further noted that even the remedy of revocation of a discriminatory union's certification is available.[49] Moreover, such proceedings, the Board reasoned, will accord bargaining representatives charged with employment discrimination the full panoply of procedural rights guaranteed by the NLRA, including judicial review, and will avoid delay in representa-

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[42] 94 L.R.R.M. at 1361 (citation omitted). *See, e.g.*, Sewell Manufacturing Company, 138 N.L.R.B. 66, 71, 50 L.R.R.M. 1532, 1535 (1962) (the employer's election victory overturned due to employer's racially-oriented election propaganda).

[43] 94 L.R.R.M. at 1361.

[44] *Id.* at 1361-62.

[45] *Id.* This approach is derived from the Board's decision in Miranda Fuel Co., Inc., 140 N.L.R.B. 181, 185, 51 L.R.R.M. 1584, 1587 (1962) where it held for the first time that section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A) (1970), prohibits a union, when acting in a statutory representative capacity, from taking any action against any employee with regard to considerations or classifications which are irrelevant, invidious or unfair.

[46] 94 L.R.R.M. at 1362. *See* Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers, 150 N.L.R.B. 312, 322-23, 57 L.R.R.M. 1535, 1540 (1964), *enforced*, 368 F.2d 12, 25, 63 L.R.R.M. 2395, 2404 (5th Cir. 1966) (union's refusal to process grievances protesting an employer's segregated plant violated the duty of fair representation); Independent Metal Workers Union, Local No. 1, 147 N.L.R.B. 1573, 1577, 56 L.R.R.M. 1289, 1294 (1964) (union's certification revoked).

[47] 94 L.R.R.M. at 1362-63. *See* Local 1367, International Longshoremen's Ass'n, AFL-CIO (Galveston Maritime Ass'n, Inc.), 148 N.L.R.B. 897, 897-98, 57 L.R.R.M. 1083, 1084 (1964).

[48] 94 L.R.R.M. at 1363. *See* Houston Maritime Ass'n, Inc. and Its Member Companies, 168 N.L.R.B. 615, 617, 66 L.R.R.M. 1337, 1340 (1967).

[49] 94 L.R.R.M. at 1363. *See, e.g.*, Independent Metal Workers Union, Local No. 1, 147 N.L.R.B. 1573, 1577, 56 L.R.R.M. 1289, 1294 (1964).

tion proceedings.[50] Thus, the *Handy Andy* Board concluded that because unfair labor practice proceedings were the most effective and appropriate means to combat union discrimination based on unlawful, invidious and irrelevant reasons, *Bekins* would be overruled and the union challenged in the present case would be certified.[51]

Member Walther concurred in the majority decision, agreeing that both *Bekins* and the employer's objections should be overruled.[52] Member Walther supported the majority's basic rationale, but disagreed in one significant aspect. On one hand, he agreed with the Board in viewing the employer charges of union discrimination as relating to a union's duty of fair representation and, as such, cognizable only in the adversarial context of an unfair labor practice proceeding.[53] At the same time, however, he believed that the Board could not ignore blatant discrimination in a challenged local union's constitution, by-laws, or other written policy statement restricting access to union membership on the basis of sex, race, national origin, or alienage.[54] Therefore, without addressing the "state action" issue, Member Walther, as a matter of discretion, would deny such a blatantly discriminatory union access to Board election machinery in order to preserve the integrity of the NLRB's processes.[55]

Member Jenkins, the only extant member of the *Bekins* majority, dissented primarily to defend the "state action" analysis underpinning the *Bekins*' conclusion that Board certification of a discriminatory labor organization is constitutionally proscribed by the due process clause of the fifth amendment.[56] To Member Jenkins, Board certification of a discriminatory union, at a minimum, would "appear to be sanctioning," if not actually assisting private discrimination.[57] He perceived such potential assistance occurring as a result of the substantial benefits flowing to a union upon its certification. Specifically, Member Jenkins noted, the union becomes the exclusive, statutorily protected bargaining agent for all employees;[58] minority employees who might have voted against the union cannot choose a separate representative;[59] nor can they engage in concerted activities to protest dis-

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[50] 94 L.R.R.M. at 1361, 1363.

[51] *Id.* at 1363.

[52] *Id.* at 1363-64 (Member Walther, concurring).

[53] *Id.*

[54] *Id.* Member Walther recognized that the proviso to section 8(b)(1)(A) of the Act prohibits litigation of membership discrimination claims in unfair labor practice proceedings, without explaining how that proviso affected the Board's ruling. *Id.* at 1364. *See* 29 U.S.C. § 158(b)(1)(A) (1970), wherein the proviso states: "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

[55] 94 L.R.R.M. at 1363-64 (Member Walther, concurring).

[56] *Id.* (Member Jenkins, dissenting).

[57] *Id.*, *quoting* Bekins Moving Co., Inc., 211 N.L.R.B. at 139, 86 L.R.R.M. at 1325.

[58] 94 L.R.R.M. at 1365.

[59] *Id.*

crimination by their employer or their union;[60] and a certified union's bargaining status in most instances cannot be challenged for a year and presumptively such status continues beyond one year.[61] In conferring such benefits on a discriminatory union, Member Jenkins contended, the Board, as a federal agency, would be fostering, supporting, and assisting union discrimination. Thus, in contrast to the majority's analysis, Member Jenkins believed that NLRB certification of a discriminatory union would amount to unconstitutional "state action."[62]

Member Jenkins also disagreed with the majority's conclusions both that unfair labor practice proceedings are more effective than denials of certification as a remedy for union discrimination and that the *Bekins* doctrine unduly hampered the NLRA policy that questions concerning representation by expeditiously resolved.[63] First, Member Jenkins viewed unfair labor practice proceedings, which might never be instituted, as no substitute for the immediate disqualification of a discriminatory union in a representation proceeding.[64] He added that the majority was "clearly in error" in stating that the participants in representation proceedings are denied the procedural rights of adversary proceedings since the NLRB had provided precertification procedures comparable to those in an unfair labor practice proceeding, including the opportunity to secure judicial review.[65] Second, Member Jenkins rejected the majority's contention that the *Bekins* doctrine unduly delayed the Board's representation process by encouraging employers to present inadequate evidence relating to discrimination claims. In the two-and-one-half years of applying the *Bekins* doctrine, Member Jenkins observed, the Board had dismissed expeditiously such spurious objections.[66] Whatever propensity employers had to

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[60] *Id.* at 1366. *See* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 70 (1975).

[61] 94 L.R.R.M. at 1365. *See* Brooks v. NLRB, 348 U.S. 96, 104 (1954).

[62] 94 L.R.R.M. at 1366. Moreover, Member Jenkins contended that the Board, by denying certification, would not be ignoring the mandatory provisions of the NLRA, nor impermissibly adjudicating the constitutionality of this statute. Rather, the Board would be applying the NLRA to a particular fact situation in a constitutional manner. *Id.*

[63] *Id.* at 1367-68.

[64] *Id.* at 1367.

[65] *Id.* at 1368. Member Jenkins explained that under *Bekins* a Hearing Officer would be appointed to conduct a hearing with the normal procedural formalities to consider genuine questions of discrimination. *Id.* He then cited Miami Newspaper Printing Pressman's Union Local 46 v. McCulloch, 322 F.2d 993, 53 L.R.R.M. 2786 (D.C. Cir. 1963), as authority for the proposition that upon denial of certification, the union may obtain judicial review in United States District Courts. 94 L.R.R.M. at 1368. The majority disputed this proposition, contending that such a review would be available only to consider whether the Board acted in excess of its statutory authority and contrary to a specific prohibition in the NLRA, but not to consider a factual finding that the union engaged in discrimination warranting disqualification. *Id.* at 1361n. 56. *See* Leedom v. Kyne, 358 U.S. 184, 189 (1958).

[66] 94 L.R.R.M. at 1367.

delay collective bargaining by raising discrimination issues in certification proceedings, he continued, was irrelevant to the "question whether certification should be denied when conclusive evidence of . . . discrimination is presented."[67] For example, whenever a union's governing instruments expressly exclude minorities from membership or segregate them in separate locals, Member Jenkins believed that this is "irrebutable (sic) evidence of invidious discrimination."[68] As such, he would find a sufficient basis to disqualify such a union in a representation proceeding.[69] Thus, Member Jenkins disagreed with both the majority's constitutional analysis and policy arguments. Accordingly, he concluded that the constitutionally-based remedy of a denial of certification set forth in *Bekins* should be retained.[70]

The practical significance of the *Handy Andy* decision lies in the Board's apparent intention to confine its consideration of employment discrimination charges to those arising within the statutory framework of the NLRA—those charges implicating the union's duty of fair representation or affecting the employees' right to select a bargaining representative. Thus, employer charges that a union has a propensity to discriminate invidiously against unit employees will be considered in unfair labor practice proceedings under section 8(b)(1)(A) of the NLRA as violations of the union's duty of fair representation. When such a violation is found, the Board will fashion an appropriate remedy, including possible decertification to enforce a union's duty to represent fairly unit employees.[71] Additionally, when an employer charges that discriminatory union conduct, such as appeals to racial prejudice, adversely affected the outcome of a Board-conducted representation election,[72] the Board will, under its section 9(c)(1) authority, review the election process in representation proceedings to ensure that the employees made a reasoned choice of a bargaining representative.[73]

The *Handy Andy* Board also indicated that when an employer presents specific evidence of "clearly existing invidious discrimination" within a unit, the Board will consider in representation proceedings the impact of such discrimination on the outcome of the representation election.[74] The Board nevertheless neglected to explain how "clearly existing invidious discrimination," as distinguished from "appeals to prejudice," necessarily affects the outcome of an election

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1368.

[71] *Id.* at 1362-63.

[72] *See, e.g.*, NLRB v. Sumter Plywood Corp., 535 F.2d 917, 929, 92 L.R.R.M. 3508, 3517 (5th Cir. 1976) (a racially-oriented election campaign directed almost exclusively toward a predominantly black bargaining unit did not rise to inflammatory stature so as to warrant reversal of the union's victory). *See also* Sewell Manufacturing Company, 138 N.L.R.B. 66, 50 L.R.R.M. 1532 (1962).

[73] 94 L.R.R.M. at 1361.

[74] *Id.*

thereby interfering with the employees' right to select a bargaining representative. This failure to identify a nexus between "clearly existing invidious discrimination" and employee rights ordinarily protected in representation proceedings implies that the Board may be reserving the additional authority, as Member Walther would have had the Board do explicitly,[75] to prevent a blatantly discriminatory union from attaining NLRB certification, regardless of whether the discrimination affects the integrity of the election process. Such an inference is further reinforced by the Board's stated intention to retain its existing decertification remedy for unions that engage in blatantly discriminatory representation.[76] Decertification, no less than a denial of certification, can frustrate the employees' choice of bargaining representative and afford employers the opportunity to delay collective bargaining.

This continued willingness on the part of the Board to deny or revoke certification of a blatantly discriminatory union is difficult to reconcile with the basic rationale of *Handy Andy*. Specifically, the Board in *Handy Andy* ruled that it has no discretion under section 9(c)(1) of the Act to deny certification to a union having won a fairly conducted representation election[77] and, concurrently, that Board certification does not amount to "state action" so as to override the mandatory character of section 9(c)(1).[78] Yet, the Board in *Handy Andy* claimed that it has the discretionary authority, similar to the "wholly discretionary" authority under its contract-bar rules,[79] to retain the option to examine in representation proeedings "clearly existing invidious discrimination."[80] In so doing, however, the Board did not explain the basis of this authority to consider such discrimination in circumstances where there appears to be no demonstrable nexus between the discrimination and the election process.

The Board's apparent willingness to retain this discretionary authority would not seem to be based on provisions or policies underly-

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[75] *See id.* at 1364 (Member Walther, concurring).

[76] *Id.* at 1361, *citing* Pioneer Bus Company, Inc., 140 N.L.R.B. 54, 55, 51 L.R.R.M. 1546, 1546 (1962) (collective bargaining contracts executed by union discriminatory between employees on the basis of race would warrant revocation of certification).

[77] 94 L.R.R.M. at 1359.

[78] *Id.* at 1357.

[79] The contract-bar rules are invoked by the NLRB to stabilize the employer-union relationship by allowing a valid collective-bargaining agreement to prevent the holding of a representation election for a certain period of time. The Board in *Handy Andy* explained that because these rules are self-imposed and discretionary, the NLRB can refuse to apply them in situations where to do so would not contribute to stability in labor relations, *see* The Pulitzer Publishing Company (Owner and Operator of Stations KSD and KSD-TV), 203 N.L.R.B. 639, 83 L.R.R.M. 1177 (1973), or adversely affect the integrity of the NLRB's processes by extending a governmental sanction to racially separate groupings, *see* Pioneer Bus Company, Inc., 140 N.L.R.B. 54, 55, 51 L.R.R.M. 1546 (1962). 94 L.R.R.M. at 1361 n.51.

[80] 94 L.R.R.M. at 1361.

ing the NLRA, for the Board concluded that the specific mandatory language of section 9(c)(1) does not allow it to deny certification to an allegedly discriminatory union which has validly obtained a majority.[81] The policies underlying section 9(c)(1) appear to support this conclusion.[82] In particular, the nonadversary, factfinding character which the NLRA specifies for such hearings, coupled with their exemption from judicial review, indicates a congressional perception that certification involves no legal issues. Moreover, the fundamental labor policy of facilitating collective bargaining, as the *Handy Andy* Board recognized,[83] would be impaired by allowing the NLRB discretion to deny the majority's choice of a bargaining representative or to allow employers to delay certification.[84]

The absence of statutory authority for the Board's apparent wil-

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[81] *Id.* at 1359-61.

[82] *Compare* Miami Newspaper Printing Pressman Local 46 v. McCulloch, 322 F.2d 993, 997-98, 53 L.R.R.M. 2786, 2790 (D.C. Cir. 1963) (Section 9(c)(1) is mandatory except that the Board can set aside an election which has been unfairly conducted either because of union or employer misconduct or because of some reason implicating the mechanics of the election process) *with* R. & M. Kaufman v. NLRB, 471 F.2d 301, 304, 81 L.R.R.M. 2309, 2312 (7th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973) (Board must consider prior to certification the conduct of a bargaining representative whose independence and loyalty are properly drawn into question). One commentator has argued that while the Board's implied authority to depart from the language of section 9(c)(1) to proscribe union conduct is unclear, the Board should attack discriminatory union practices only in unfair labor practice proceedings. Meltzer, *Racial Discrimination*, *supra* note 30, at 25-26.

[83] 94 L.R.R.M. at 1359-60.

[84] If the Board did exercise such implied discretion under section 9(c)(1) to remedy employment discrimination, it is submitted that it would be expanding its authority under the NLRA in at least two ways. First, such expansion would result because the Board would be implementing federal antidiscrimination policies, not labor policies. To do so appears to conflict with the 1975 Supreme Court decision in Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), *noted in Annual Survey of Labor Relations & Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 994 (1975), in which the Court held that the Board could not enlarge the scope of section 7 to protect minority employees attempting to bargain separately from their elected bargaining representative. 420 U.S. at 69-70. The Court in *Emporium Capwell* cautioned that "the employees' substantive right to be free of racial discrimination . . . cannot be pursued at the expense of the orderly collective-bargaining processes contemplated by the NLRA." *Id.* at 69. Thus the principles enunciated in *Emporium Capwell* would seem to prevent the Board from implying authority under the NLRA to implement federal policies against employment discrimination by denying certification to an allegedly discriminatory union.

Second, the Board would be expanding its authority by deciding that it has wide discretion to determine that a particular union is not a proper employee representative. Such action would conflict with the fundamental labor policy of avoiding judicial or Board intervention in either internal union affairs or the conduct of a bargaining representative so long as such conduct remains within the defined contours of labor law. *Cf.* 29 U.S.C. § 158(b)(1)(A) (1970). *See also* Scofield v. NLRB, 394 U.S. 423, 428-30 (1969). Accordingly, there appears to be no discretionary authority under either the NLRA or federal antidiscrimination policies for the Board's apparent willingness to hear in representation proceedings questions of "clearly existing invidious discrimination" within a labor organization that has prevailed in a valid representation election.

lingness to consider in representation proceedings instances of "clearly existing invidious discrimination" not affecting the election process suggests that any such authority necessarily must be grounded on a constitutional rationale capable of superseding the mandatory command of section 9(c)(1). The Board, of course, specifically rejected a constitutional rationale in *Handy Andy* because it concluded that under no circumstances could there be a "nexus between the Board's certification and any discrimination undertaken by the union which has received such a certification."[85] It is submitted, however, that there may be circumstances where the Board may be allowed, and even required, under a constitutional "state action" rationale to consider prior to certification whether NLRB certification would amount to a constitutionally prohibited degree of involvement with the union's discrimination. This premise is predicated upon an interpretation of the Supreme Court's decision in *Moose Lodge No. 107 v. Irvis*[86] which differs from the one advanced by the Board in *Handy Andy*.

The Court in *Moose Lodge* held that the licensing and general regulation of a private club by a state liquor control board did not involve the State in the club's discriminatory guest practices so as to rise to the level of unconstitutional "state action."[87] The Court additionally found, however, that even though a particular liquor control board regulation requiring regulated organizations to adhere to their constitutions and by-laws was neutral on its face, the result of its application to an organization whose constitution and by-laws require discrimination "would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule."[88] Interpreting these holdings, the Board in *Handy Andy* reasoned that the NLRB's involvement through certification with a labor organization is no greater than the State's involvement with the private club through the general licensing and regulatory scheme found constitutional in *Moose Lodge*.[89] In addition, the *Handy Andy* Board distinguished NLRB certification from the unconstitutional state regulation requiring the club to adhere to its discriminatory constitution and by-laws. In the Board's view, certification is not an act which has the effect of specifically requiring a union to discriminate.[90]

The Board's interpretation of *Moose Lodge*, however, seemingly ignores two factors concerning certification. First, Board certification accords a labor organization an exclusive bargaining status for one

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[85] 94 L.R.R.M. at 1357.

[86] 407 U.S. 163 (1972). See text and notes 16-19 *supra* for a discussion of the Board's "state action" analysis.

[87] 407 U.S. at 177.

[88] *Id.* at 178-79.

[89] 94 L.R.R.M. at 1357.

[90] *Id.* The Board in *Handy Andy* primarily derived this constitutional analysis from a student law review article, *see* Note, 47 S.CAL. L. REV. 1353, 1372-73 (1974) [Hereinafter *De Facto Discrimination*]. *Handy Andy*, 228 N.L.R.B. at__n.6a (The Board appended footnote 6a as a correction after the *Handy Andy* opinion was published in the Labor Relations Reference Manual).

year,[91] similar to a monopoly status found lacking in the State's regulatory scheme in *Moose Lodge*.[92] Moreover, this status is further enhanced, as Member Jenkins pointed out, by other substantial benefits flowing to a labor organization upon its certification.[93] Second, Board certification implicitly requires a labor organization to adhere to its constitution, by-laws, and other stated policies, thereby imparting to certification characteristics of the state regulation found unconstitutional in *Moose Lodge*.[94] At a minimum, when the Board is aware that a union's governing instruments blatantly restrict access to membership on the basis of invidious classifications, certification appears to put the weight of the NLRB, concededly a valued and important adjunct to a labor organization, behind the labor organization's discrimination.[95] Therefore if the Board certifies such a union without proscribing this "clearly existing invidious discrimination," it would appear to be enforcing a discriminatory private rule and, as such, certification could be viewed as "significant involvement" by the NLRB in a union's discriminatory practices. Accordingly, where it is specifically demonstrated that the challenged unit engages in open, documented and pervasive discriminatory membership practices rising to the level of "clearly existing invidious discrimination," it is submitted that the NLRB should employ a constitutional approach to deny such a union access to its representation machinery.[96]

It is further submitted that the Board's conclusion in *Handy Andy* that there was no nexus between NLRB certification and the challenged union's alleged discrimination was correct because the alleged discrimination did not rise to the level of "clearly existing invidious discrimination." The employer in *Handy Andy* never demonstrated that the challenged union intended to discriminate against employees in the requesting unit. Instead, the employer's allegations were limited to claims of potential discrimination arising from past practices of the challenged union in other bargaining units.[97] On the basis of these allegations, Board consideration in a representation proceeding of the constitutionality of its certification decision is unwarranted because the challenged unit had not demonstrated an intent to discriminate. Intent to discriminate is a necessary element in a claim of un-

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[91] 29 U.S.C. §§ 159(c)(3), 159(e)(2)(1970).

[92] 407 U.S. at 177.

[93] See text at notes 57-61 *supra*.

[94] *Cf.* McNamara v. Johnston, 522 F.2d 1157, 1163, 90 L.R.R.M. 2401, 2405 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (Labor Management Reporting and Disclosure Act § 501, 29 U.S.C. § 501 (1975), requires union representatives when acting in a fiduciary capacity to act within authority conferred by the union's constitution, by-laws and policies).

[95] *Cf. Moose Lodge*, 407 U.S. at 182-83 (Douglas J., dissenting). *But see De Facto Discrimination, supra* note 90, at 1375-78.

[96] *See Bekins*, 211 N.L.R.B. 138, 143, 86 L.R.R.M. 1323, 1329 (1974) (Member Kennedy, concurring). See note 3 *supra*.

[97] See text and notes 10-13 *supra*.

constitutional "state action" after *Washington* v. *Davis*,[98] where the Supreme Court held that a showing of an intent or purpose to discriminate on the part of a governmental agency is a prerequisite to a finding of unconstitutional governmental action under the fourteenth amendment. Accordingly, no "state action" could have been found in *Handy Andy* because there was no demonstration of discriminatory intent on the part of the union which then could have been imputed to the Board.

"State action" might be found, however, as noted above, where a union's intent to discriminate invidiously in membership requirements against certain employees clearly exists within its constitution, by-laws or other written or oral policy statements. In such cases, an intent to discriminate could be imputed to the Board if it certifies the union as an exclusive statutory bargaining agent with knowledge of such "clearly existing invidious discrimination."[99]

Furthermore, grounding a response to "clearly existing" union discrimination not affecting the election process on a constitutional rationale provides a principled method for dealing with such discrimination without conflicting with the mandatory character of section 9(c)(1). Such an approach also avoids the danger of the Board engaging in broad discretionary review of a union's qualifications or representative status, since this constitutional stricture could be invoked only when the union's intent to discriminate is sufficiently manifest to give rise to the inference that NLRB certification condones such discrimination.

Thus the NLRB, as it did in *Handy Andy*,[100] should defer consideration of questions of discrimination based only on claims of potential union discrimination until they are raised in unfair labor practice proceedings. The Board should reserve its constitutional review in certification proceedings for cases in which intentional union discrimination is clearly demonstrated. Accordingly, it is submitted that the Board should apply the *Handy Andy* ruling only in two circumstances: where allegations of union discrimination are based either on violations not reaching the constitutional dimensions of intentional discrimination, or on discrimination claims regarding other bargaining units not probative of the intent to discriminate in the challenged unit. However, where a clear showing is made that the specific unit requesting certification intends to discriminate in membership requirements on the basis of race or other invidious classifications, it is submitted that the Board should deny certification to the union.

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[98] 426 U.S. 229, 239, 252 (1976).

[99] *Cf. Washington*, 426 U.S. at 253 (Stevens, J., concurring) (governmental agency is presumed to have intended the natural consequences of its deeds).

[100] 94 L.R.R.M. at 1355, 1363.

VI. SEX DISCRIMINATION—EXCLUSION OF PREGNANCY FROM DISABILITY BENEFITS: *General Electric Co. v. Gilbert*

In 1974, the Supreme Court by a divided vote of 6-3 held in *Geduldig v. Aiello*[1] that California's exclusion of normal pregnancy from coverage under its disability insurance program did not violate the equal protection clause of the fourteenth amendment.[2] The *Geduldig* Court determined that the pregnancy exclusion did not create a sex-based classification.[3] Since the exclusion was rationally related to the state's legitimate interest in maintaining a self-sufficient disability insurance program, the Court concluded that the program did not violate the equal protection clause.[4] Subsequent to *Geduldig*, the question logically arose as to whether the *Geduldig* Court's finding that exclusion of pregnancy from disability insurance programs did not constitute sex discrimination under the fourteenth amendment mandated a similar finding where similar pregnancy disability exclusions were challenged under Title VII of the Civil Rights Act of 1964.[5] The four circuit courts of appeals which addressed this question unanimously concluded that *Geduldig* was not dispositive of this issue and that such an exclusion did constitute illegal sex discrimination under Title VII.[6] In a major development during the Survey year, the Supreme Court, by a divided vote,[7] held in *General Electric Co. v. Gilbert*[8] that a private employer may without violating Title VII adopt a disability program which compensates employees for all temporary disabilities except pregnancy.[9]

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[1] 417 U.S. 484 (1974).

[2] *Id.* at 496-97.

[3] *Id.* at 496.

[4] *Id.* at 496-97.

[5] 42 U.S.C. §§ 2000e *et seq.* (1970 & Supp. V 1975). *See, e.g.*, 1974-75 *Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 1063-68 (1975).

[6] *See* Satty v. Nashville Gas Co., 522 F.2d 850, 855, 11 FEP Cas. 1, 4 (6th Cir. 1975); Hutchinson v. Lake Oswego School Dist., 519 F.2d 961, 965, 11 FEP Cas. 161, 164 (9th Cir. 1975); Gilbert v. General Electric Co., 519 F.2d 661, 663, 10 FEP Cas. 1201, 1202 (4th Cir. 1975), *reversed*, 429 U.S. 125, 128 (1976); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 207, 9 FEP Cas. 227, 232 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737, 746 (1976). *See also* Communication Workers v. A.T. & T. Co., 513 F.2d 1024, 1028, 10 FEP Cas. 435, 438 (2d Cir. 1975) (reversing the district court ruling which had held that, absent a showing of discriminatory pretext, *Geduldig* required that exclusion of pregnancy from a disability benefits program would not constitute a violation of Title VII). *Cf.* Tyler v. Vickery, 517 F.2d 1089, 1097-98, 11 FEP Cas. 972, 977-78 (5th Cir. 1975) (rejecting constitutional challenges to Georgia bar examination, and stating that *Geduldig* was applicable only to constitutional challenges and not to Title VII challenges).

[7] The vote was 4-2-3. Justice Rehnquist authored the majority opinion in which Justices Powell, White and Chief Justice Burger joined. Justices Stewart and Blackmun concurred in separate opinions. Justice Brennan, joined by Justice Marshall, dissented. Justice Stevens also dissented.

[8] 429 U.S. 125 (1976).

[9] *Id.* at 145-46.

The *Gilbert* plaintiffs challenged a disability plan by which General Electric (G.E.) provided non-occupational sickness and accident benefits to all employees.[10] Disabilities arising from pregnancy, however, were excluded from the plan's coverage.[11] The plaintiffs filed a timely suit in the United States District Court for the Eastern District of Virginia alleging that this exclusion of pregnancy under the G.E. program constituted sex discrimination in violation of section 703(a)(1) of Title VII.[12] The district court determined that the G.E. plan violated Title VII and accordingly entered a judgment which both enjoined G.E. from continuing to exclude pregnancy-related disabilities from its plan and provided for future monetary awards to those who had been affected.[13] By a divided vote the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court.[14] The Supreme Court then granted certiorari and reversed.[15]

In *Gilbert,* Justice Rehnquist, writing for the Court, initially noted that there were similarities between the language of section 703(a)(1) of Title VII, which forbids employment discrimination on the basis of "race, color, religion, sex, or national origin,"[16] and the language employed in judicial consideration of the equal protection clause of the fourteenth amendment.[17] Although the Court admitted that this similarity did not necessarily imply that Congress intended to incorporate into Title VII those concepts of discrimination which had emerged from judicial consideration of the equal protection clause, it concluded nevertheless that those concepts supplied "a useful starting point in interpreting the [congressional language of Title VII]."[18] Accordingly, the Court determined that its decision in *Geduldig,* involving as it had a "strikingly" similar disability plan, was "relevant" in deciding whether the pregnancy exclusion in *Gilbert* constituted sex discrimination within the meaning of Title VII.[19]

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[10] *Id.* at 127.

[11] *Id.*

[12] 42 U.S.C. § 2000e-2(a)(1) (1970). Section 703(a)(1) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

[13] 375 F. Supp. 367, 386, 7 FEP Cas. 796, 810-11 (E.D. Va. 1974).

[14] 519 F.2d 661, 663, 10 FEP Cas. 1201, 1202 (4th Cir. 1975).

[15] 429 U.S. at 146.

[16] For the text of § 703(a)(1) see note 12 *supra.*

[17] 429 U.S. at 133.

[18] *Id.* In particular, the Court cited the use of the term "discrimination" which was not defined in Title VII, but which was extensively analyzed in equal protection cases "in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII." *Id.*

[19] *Id.* It should be noted that the California disability program involved in *Geduldig* was, in one respect, different from the G.E. plan involved in *Gilbert.* Whereas the *Gilbert* plan excluded all disabilities arising from pregnancy, 429 U.S. at 127, the *Gedul-*

Particularly, noting that "it is a finding of sex-based discrimination that must trigger . . . the finding of an unlawful employment practice under [section] 703(a)(1) . . .," the *Gilbert* Court found "precisely in point" *Geduldig's* finding that a disability program's exclusion of pregnancy from its coverage did not create a sex-based classification.[20] Quoting extensively from *Geduldig,* the *Gilbert* Court explained why it had decided there that California's disability program was not sexually discriminatory: " 'California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged . . . relates to the asserted underinclusiveness of the set of risks that the State has selected to insure.' "[21] The Court in *Geduldig* had reasoned that this underinclusiveness did not create a sex-based classification since both men and women were covered equally by the disability program. The simple exclusion of one physical condition—pregnancy—from possible compensation, the *Geduldig* Court had determined, did not amount to gender-based discrimination.[22] This determination, the *Gilbert* Court reasoned, applied equally well to the G.E. disability benefits program. Accordingly, the *Gilbert* Court concluded that G.E.'s program was not sexually discriminatory per se.[23]

After determining that G.E.'s program by its terms did not create a sex-based classification, the *Gilbert* Court proceeded to the second stage of the *Geduldig* analysis. In that stage the *Geduldig* Court had undertaken to determine whether despite the fact that the program was not discriminatory per se, it could nevertheless be shown "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . . ."[24] The Court had determined in *Geduldig* that such a design was not shown and consequently had concluded that California's program did not discriminate on the basis of sex.[25] On this issue of pretext, the *Gilbert* Court concluded that there was no more showing in *Gilbert* than there had been in *Geduldig* that the program was intended to accomplish an invidious discrimination.[26] Despite the fact that pregnancy is confined to women, the Court cited the district court's findings that pregnancy is not a "disease" at all and is often a voluntary and desired condition,[27] and concluded that pregnancy is thus "significantly different from the typical covered disease or dis-

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dig plan excluded disabilities arising from normal pregnancy, but allowed recovery for disabilities certified by a doctor as arising from abnormal pregnancy. 417 U.S. at 491 & n.15.

[20] 429 U.S. at 136.

[21] *Id.* at 134, *quoting Geduldig,* 417 U.S. at 494.

[22] 417 U.S. at 496-97 n.20.

[23] 429 U.S. at 136.

[24] 417 U.S. at 496-97 n.20.

[25] *Id.* at 496-97.

[26] 429 U.S. at 136.

[27] *Id. citing* 375 F. Supp. at 375, 377, 7 FEP Cas. at 802-03.

ability."[28] By thus distinguishing pregnancy from the disabilities which G.E.'s program did cover, the *Gilbert* Court justified its conclusion that the program was not a pretext for discriminating on the basis of sex.[29]

Having discussed the applicability of *Geduldig* to the situation presented in *Gilbert* and having advanced its conclusion that G.E.'s program did not constitute sex discrimination per se, the Court in *Gilbert* proceeded to examine whether the G.E. program was nevertheless discriminatory in its effect. Recognizing that prior cases had held that a Title VII violation may be established by a showing that an otherwise facially neutral program has the effect of discriminating against a protected class, the Court stated, however, that it found no such showing in *Gilbert*.[30] The Court pointed out that the district court had not found—nor was there any evidence which could have supported such a finding—that the financial benefits of the program worked to discriminate against a particular group or class of people in terms of the coverage supplied by the program.[31] Consequently, the Court determined:

> As there is no proof that the package is in fact worth more to men then to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive.[32]

Thus, because there was no proof that the program was "worth" more to men than to women, the Court determined that the requisite showing of a discriminatory effect had not been met, and accordingly concluded that G.E.'s program was not violative of Title VII.[33]

Having arrived at its conclusion that G.E.'s program did not violate Title VII, the Court proceeded to analyze an Equal Employment Opportunity Commission (EEOC) guideline[34] which was in direct conflict with this conclusion. The guideline explicitly called for the inclusion of "pregnancy, miscarriage, abortion, childbirth, and recovery therefrom" in disability programs.[35] The Court, however, discounted the weight to be accorded the guideline by noting that no authority to promulgate rules and regulations had been vested in the EEOC by Congress through the provisions of Title VII.[36] Although the Court

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[28] 429 U.S. at 136.
[29] *Id.*
[30] *Id.* at 137.
[31] *Id.* at 138.
[32] *Id.* at 138-39 (footnote omitted).
[33] *Id.*
[34] 29 C.F.R. § 1604.10(b) (1976).
[35] *Id.*
[36] 429 U.S. at 141. The Court stated that the EEOC had been given authority to issue procedural guidelines, by the provisions of § 713(a) of Title VII, 42 U.S.C. § 2000e-12(a) (1970), but noted that "[n]o one contends . . . that the above-quoted regula-

acknowledged that such fact did not mean that the guidelines should not be entitled to consideration in determining legislative intent, the Court nevertheless reasoned that the proper weight to be accorded the guideline "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[37] Judged by this standard, the Court determined that the guideline did not fare well.

As an initial factor in considering the guideline, the Court pointed out that since the guideline was promulgated in 1972, eight years after Title VII had been enacted, it was not a "contemporaneous interpretation of [the statute]."[38] As such, its claim to legitimacy was not as strong as guidelines promulgated soon after passage of legislation.[39] Second, and even more important to the Court was the fact that the guideline flatly contradicted the position taken by the EEOC in several opinion letters issued in 1966, only two years after enactment of Title VII, that exclusion of maternity from a disability plan would not violate Title VII.[40] The Court noted that in the past it has refused to follow administrative guidelines which conflict with earlier positions taken by the agency.[41] Moreover, the Court pointed out that Congress had specifically provided in an amendment to Title VII that differences in compensation based on sex which were authorized under the Equal Pay Act would not constitute unlawful employment practices under Title VII.[42] In fact, Senator Humphrey, who managed the Title VII bill on the Senate floor, had stated that the purpose of the amendment was to make it "unmistakably clear" that "differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law."[43] Because of this amendment, the Court determined, interpretations of relevant provisions of the Equal Pay Act were applicable to Title VII as well.[44] In this regard the Court quoted

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tion is procedural in nature or in effect." 429 U.S. at 141 n.20. The Court neglected to point out, of course, that it is not the authority to promulgate rules and regulations which has in past cases led the Court to conclude that EEOC guidelines are entitled to "great deference." Rather, it is the fact that the guidelines are interpretations of legislation by the enforcing agency which has resulted in their being accorded such deference. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). See text at notes 99-108 *infra*.

[37] 429 U.S. at 142, *quoting* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[38] 429 U.S. at 142.

[39] *Id.* The Court has stated that particular deference is due administrative interpretations which involve "contemporaneous interpretations" of statutes by the enforcing agency. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961).

[40] 429 U.S. at 142.

[41] *Id.* at 143, *citing* United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858-59 n.25 (1975); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973).

[42] 429 U.S. at 143-44. *See* 42 U.S.C. § 2000e-2(h) (1970).

[43] 110 CONG. REC. 13, 663-13, 664 (1964).

[44] 429 U.S. at 144.

an interpretive regulation promulgated by the Wage and Hour Administrator under the Equal Pay Act which stated:

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.[45]

Consequently, the Court noted, if both the EEOC and the Wage and Hour Administrator's guidelines were accepted as valid, G.E.'s program would be declared an unlawful employment practice under the EEOC guideline but not under the Wage and Hour Administrator's guideline.[46] It was the combination of all these factors—the promulgation of the EEOC guideline eight years after the enactment of Title VII, the direct conflict between the EEOC guideline and earlier positions advanced by the agency, the quoted language of Senator Humphrey, the floor manager of Title VII, and the conflict with the interpretation of the Equal Pay Act by the Wage and Hour Administrator—which the Court determined justified its conclusion that the EEOC guideline was inconsistent with the "'plain meaning' of the language [of Title VII]."[47] Thus, the Court decided that the guideline was entitled to little weight and accordingly reiterated its conclusion that G.E.'s program was not violative of Title VII.[48]

The Court ended its discussion in *Gilbert* by again invoking the theme of the relevance of judicial construction of the fourteenth amendment to the concept of discrimination under Title VII: "When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . . ,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant."[49] Thus, the Court concluded that G.E.'s exclusion of pregnancy from its disability program did not violate Title VII, and accordingly reversed the decision of the court of appeals.[50]

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[45] *Id.*, *quoting* 29 C.F.R. § 800.116(d) (1976).

[46] 429 U.S. at 144-45.

[47] *Id.* at 145.

[48] *Id.*

[49] *Id.*, *quoting* 42 U.S.C. § 2000e-2(a)(1) (1970).

[50] 429 U.S. at 145-46. Both Mr. Justice Blackmun and Mr. Justice Stewart concurred in the Court's judgment. *Id.* at 146. Justice Blackmun stated that he agreed with the Court's holding that G.E.'s program was not a per se violation of Title VII, that discriminatory effect therefore had to be proven, and that no such effect had been shown. *Id.* He was careful to note, however, that he did not agree with any inference or suggestion—if there was one—in the majority's opinion "that effect may never be a controlling factor in a Title VII case." *Id.*

Justice Stewart also concurred in the Court's holding that the G.E. program was not per se violative of Title VII and that no discriminatory effect had been shown. *Id.* He added that he, unlike Justice Blackmun, did not read the majority's opinion to question the significance of proof of discriminatory effect in Title VII cases. *Id.*

Mr. Justice Brennan and Mr. Justice Marshall dissented, rejecting the majority's holding that G.E.'s program did not violate Title VII.[51] Initially, the dissent pointed out that resolution of the issue presented essentially turned upon which of two views was taken in analyzing the pregnancy exclusion of G.E.'s program. The dissent noted that whereas the plaintiffs and lower courts had reasoned that the exclusion of pregnancy by definition affected only women and was therefore discriminatory, the Supreme Court's majority chose to view the program as "a gender-free assignment of risks" which was simply under-inclusive.[52] Since it was not self-evident which "conceptual framework" was more appropriate, the dissent elected to subject to further scrutiny the soundness of the Court's assumption that the program was "the untainted product of a gender-neutral risk-assignment process," using as a backdrop G.E.'s past employment practices and policies concerning inclusion of compensable risks.[53]

In analyzing G.E.'s past practices, the dissent noted the majority's reliance on *Geduldig*, with its requirement that even facially neutral programs be analyzed to see if "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other."[54] Thus, the dissent concluded, *Geduldig* itself required the Court to determine whether G.E.'s exclusion of pregnancy from its disability plan resulted from the application of "neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women's role in the labor force."[55] Despite this requirement, however, the dissent pointed out that the Court in *Gilbert* chose to ignore both "a history of General Electric practices that have served to undercut the employment opportunities of women who became pregnant while employed"[56] and "the undisturbed conclusion" of the district court

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[51] *Id.* (Brennan, J., dissenting).

[52] *Id.* at 147-48 (Brennan, J., dissenting).

[53] *Id.* at 148 (Brennan, J., dissenting).

[54] 417 U.S. at 496-97 n.20.

[55] 429 U.S. at 149 (Brennan, J., dissenting).

[56] *Id.* In a footnote, Justice Brennan catalogued some of G.E.'s historical employment practices. *Id.* at 149-50 n.1. For example, Justice Brennan pointed out that in 1926 G.E. did not offer a benefit plan for its female employees because of the company's belief that " 'women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company.' " *Id.* at 150 n.1 *quoting* D. LOTH, SWOPE OF G.E.: STORY OF GERARD SWOPE AND GENERAL ELECTRIC IN AMERICAN BUSINESS (1958). Additionally Justice Brennan continued, the district court had noted in discussing more recent G.E. policy:

> In certain instances it appears that the pregnant employee was required to take leave of her position three months prior to birth and not permitted to return until six weeks after the birth. In other instances the periods varied .... In short, of all the employees it is only pregnant women who have been required to cease work regardless of their desire and physical ability to work and only they have been required to remain off their job for an arbitrary period after the birth of their child.

429 U.S. at 149-50 n.1 (Brennan, J., dissenting) *quoting* 375 F. Supp. at 385, 7 FEP Cas. at 810.

that G.E.'s " 'discriminatory attitude' toward women was 'a motivating factor in its policy' . . . and . . . the pregnancy exclusion was 'neutral [neither] on its face' nor 'in its intent.' "[57] Thus, the dissent concluded that the majority's assessment of G.E.'s program as a neutral risk selection process was difficult to reconcile with the "historical record" of the case.[58]

After noting the majority's refusal properly to deal with the "historical record" of the case, the dissent proceeded to criticize the majority's determination that pregnancy was reasonably excluded from G.E.'s program because, unlike the covered disabilities, it was a "voluntary" condition and not a "disease." The dissent pointed out that even if the Court's assessment of "non-voluntariness" and "disease" as the criteria for coverage by the G.E. plan was accurate, use of those criteria would not explain why the plan did cover such "voluntary" conditions as sport injuries and attempted suicides.[59] Similarly inexplicable would be the fact that the plan did not cover the ten percent of pregnancies which are complicated by diseases.[60] Thus, the dissent reasoned that "even if 'non-voluntariness' and 'disease' [were] construed as the operational criteria for inclusion of a disability in General Electric's program, application of these criteria [was] inconsistent with the Court's gender-neutral interpretation of the company's policy."[61]

A further point which undermined the majority's position that G.E.'s plan was neutral, the dissent stated, was the infirmity of the majority's contention, advanced in a descriptive phrase borrowed from *Geduldig*, that: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[62] The dissent argued that this principle was contradicted by the fact that the plan covered such specifically male-oriented risks as prostatectomies, vasectomies, and circumcisions while it failed to cover the most common female specific risk — pregnancy.[63] Consequently, the dissent concluded that the combination of G.E.'s past employment practices with the "absence of definable gender-neutral sorting criteria" under its disability program warranted acceptance of plaintiffs' perception of the disability program as inherently discriminatory over the Court's view of the plan as a gender-free assignment of risks.[64]

The dissent went on to note that in fact purposeful discrimination did not have to be shown to recover under Title VII. Rather, all

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[57] 429 U.S. at 150 (Brennan, J., dissenting) *quoting* 375 F. Supp. at 382, 383, 7 FEP Cas. at 807, 808.

[58] 429 U.S. at 150 (Brennan, J., dissenting).

[59] *Id.* at 151 (Brennan, J., dissenting).

[60] *Id.*

[61] *Id.*

[62] 417 U.S. at 496-97 (footnote omitted).

[63] 429 U.S. at 152 (Brennan, J., dissenting).

[64] *Id.* at 153 (Brennan, J., dissenting).

that was required to establish a prima facie violation of Title VII was proof that the effect of a facially neutral classification was to discriminate against a protected class of people.[65] In that regard, the majority by focusing on the fact that the program covered all disabilities which could affect both sexes had concluded that such an effect had not been shown. The dissent pointed out, however, that if one focused instead, as the plaintiffs had, on the related facts that all male-specific disabilities were covered by the program as were all female-specific disabilities except for the most prevalent—pregnancy—then a discriminatory effect could reasonably be found.[66] The discriminatory effect, of course, would result from the fact that men are protected against all sex-specific risks while women lack coverage for the most prevalent female specific risk.

Regardless of the focus chosen, however, the most important consideration in the opinion of the dissent was "whether the social policies and aims to be furthered by Title VII and filtered through the phrase 'to discriminate' contained in [section] 703(a)(1) fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women but not to men."[67] It was exactly this type of issue, the dissent contended, which Congress intended to leave to the EEOC to resolve.[68] Thus, past decisions of the Court had consistently recognized that EEOC guidelines should be entitled to "great deference," and not simply to "consideration" as the majority had stated in repudiating the 1972 guideline of the EEOC which required inclusion of pregnancy in disability programs.[69] The Court had accorded the guideline little weight under its "consideration" standard because of the related facts that the guideline was not promulgated contemporaneously with the enactment of Title VII but rather was issued seven years later, and that in the interim several opinion letters of the EEOC's General Counsel had stated that pregnancy need not be included in disability programs.[70] The dissent, however, considered neither of these factors persuasive.[71] Rather, the dissent argued that the seven-year lapse before promulgation of the guideline was specifically due to the meticulous approach taken by the EEOC in confronting the problems and concerns with which it was faced:

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[65] *Id.* at 154-55 (Brennan, J., dissenting), *citing* Washington v. Davis, 426 U.S. 299, 238-39 (1976); Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[66] 429 U.S. at 155 (Brennan, J., dissenting).

[67] *Id.*

[68] *Id.*

[69] *Id.* at 155-56 (Brennan, J., dissenting), *citing* Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

[70] 429 U.S. at 142-43.

[71] *Id.* at 156 (Brennan, J., dissenting).

> It is bitter irony that the care that preceded promulgation of the 1972 guideline is today condemned by the Court as tardy indecisiveness, its unwillingness irresponsibly to challenge employers' practices during the formative period is labeled as evidence of inconsistency, and this indecisiveness and inconsistency are bootstrapped into reasons for denying the Commission's interpretation its due deference.[72]

Thus the dissent determined that the guideline was properly entitled to "great deference" and should have been accepted by the Court.[73]

The concluding aspect of the dissent's discussion concerned the more general policies inherent in Title VII and invoked the Court's prior recognition of the fact that discrimination does not operate in a vacuum, but rather in a social context requiring that discrimination take its meaning from the ultimate social objectives sought by the relevant legislation.[74] These objectives, the dissent pointed out, may require "due consideration to the uniqueness of 'disadvantaged' individuals."[75] Accordingly, the dissent determined that the G.E. program with its sole exclusion of pregnancy should be considered in light of the historic and continuing suppression of women in the labor market.[76] The dissent reasoned that proper recognition both of this "disadvantaged" position of today's working woman and of G.E.'s past and present employment practices, including its otherwise all-inclusive disability program, fully justified the EEOC's determination that exclusion of pregnancy from a disability program constituted illegal sex discrimination under Title VII.[77] That interpretation by the EEOC, the dissent determined, was also in keeping with Title VII's "ultimate objective . . . 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].' "[78] Consequently, the dissent concluded, the judgment of the court of appeals should have been affirmed.[79]

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[72] *Id.* at 157 (Brennan, J., dissenting).

[73] *Id.* at 157-58 (Brennan, J., dissenting).

[74] *See* Lau v. Nichols, 414 U.S. 563 (1974). In *Lau*, the Court held that the City of San Francisco violated the ban on racial or national origin discrimination of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), by failing to take affirmative action to provide Chinese-speaking students with special English language instruction. 414 U.S. at 565, 569. The Court reversed a court of appeals decision which, in upholding San Francisco's refusal to provide special instruction, had reasoned that "[e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system." 483 F.2d 791, 797 (9th Cir. 1973).

[75] 429 U.S. at 159 (Brennan, J., dissenting) *citing* Lau v. Nichols, 414 U.S. 563 (1974). See note 74 *supra*.

[76] 429 U.S. at 160 (Brennan, J., dissenting).

[77] *Id.*

[78] *Id., quoting* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[79] 429 U.S. at 160 (Brennan, J., dissenting).

In a separate and succinct discussion, Mr. Justice Stevens also dissented, reasoning that an otherwise all-inclusive disability plan which excluded pregnancy was discriminatory per se.[80] Justice Stevens noted first that since the burden of proving a constitutional violation of the equal protection clause was different from the burden of proving discrimination as a statutory violation, the constitutional holding in *Geduldig* was not dispositive of the statutory issue presented in *Gilbert*.[81] Justice Stevens then reasoned, in direct contrast to the majority's holding, that the G.E. plan was not governed by "neutral criteria," but rather was discriminatory "[b]y definition" since pregnancy was placed "in a class by itself . . . [and] . . . it is the capacity to become pregnant which primarily differentiates the female from the male."[82] Thus, Justice Stevens concluded that the plan's exclusion of pregnancy created a sex-based classification.[83] Since G.E. had not advanced a statutory affirmative defense to justify the classification, Justice Stevens determined that the plan violated Title VII, and hence that the decision of the court of appeals should have been affirmed.[84]

It is submitted that the positions advanced in the dissents of both Mr. Justice Brennan and Mr. Justice Stevens are persuasive and sound. Justice Stevens, of course, focused simply on the question whether an otherwise all-inclusive disability plan which excluded pregnancy was discriminatory per se. He concluded that it was, employing essentially a common-sense approach to the question. Women are threatened by the risk of pregnancy while men are not, Justice Stevens argued, and accordingly any plan which fails to cover only pregnancy discriminates against women.[85] Justice Stevens thus concluded that by excluding pregnancy alone from its coverage, the plan created a sex-based classification which, absent a statutory affirmative defense, by definition contravened the provisions of section 703(a)(1) of Title VII.[86]

The logic behind Justice Stevens' approach is straightforward and compelling. The G.E. plan allows men to receive full compensation for all disabilities including such male-specific risks as prostatectomies, vasectomies, and circumcisions. Women, however, are denied the plan's coverage for the most prevalent female-specific risk—pregnancy. Consequently, the G.E. plan, by its very provisions, creates a double standard of coverage, keyed to sexual characteristics. To state, as the majority did, that the plan only divides "potential recipients into two groups—pregnant women and nonpregnant persons"[87] is not simply misleading, but rather is patently wrong. As Jus-

[80] *Id.* at 161-62 (Stevens, J., dissenting).
[81] *Id.* at 160-61 (Stevens, J., dissenting).
[82] *Id.* at 161-62 (Stevens, J., dissenting).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 135, *quoting Geduldig*, 417 U.S. at 496-97 n.20.

tice Stevens noted, "[i]nsurance programs, company policies, and employment contracts all deal with future *risks* rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not."[88] Thus, since only women face the risk of pregnancy, the inevitable conclusion is that the G.E. plan, with its dissimilar treatment of men and women, creates a sex-based classification in direct violation of section 703(a)(1) of Title VII.

Justice Brennan, instead of speaking only to the threshold question addressed by Justice Stevens of whether the G.E. plan by its terms is sexually discriminatory, directed his dissent more generally to the reasoning upon which the majority had based its conclusion that the G.E. program operated in a neutral fashion. The majority, of course, relied on *Geduldig* for its determination that G.E.'s plan did not establish a sex-based classification. As Justice Brennan pointed out, however, "[b]eyond [the sex-based classification issue], *Geduldig* offers little analysis helpful to decision of [*Gilbert*]."[89] Justice Brennan is correct. Whereas *Geduldig* involved a constitutional challenge under the equal protection clause, *Gilbert* dealt solely with an alleged Title VII violation. Accordingly *Gilbert* should have been analyzed under Title VII standards, not under equal protection standards. As the Supreme Court stated in its 1976 landmark decision of *Washington v. Davis*,[90] "[W]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[91] Thus, the Court's insistent application of *Geduldig's* equal protection analysis to *Gilbert's* Title VII allegations was misplaced. To resolve properly *Gilbert* and its issue of discrimination under Title VII, the Court should have analyzed Title VII precedent rather than equal protection cases.[92]

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[88] 429 U.S. at 161-62 n.5 (Stevens, J., dissenting) (emphasis in original).

[89] *Id.* at 149 (Brennan, J., dissenting).

[90] 426 U.S. 229 (1976).

[91] *Id.* at 239.

[92] As Justice Stevens stated in his dissent, "[q]uite clearly Congress could not have intended to adopt this Court's analysis of sex discrimination because it was seven years after [Title VII] was passed that the Court first intimated that the concept of sex discrimination might have some relevance to equal protection analysis." 429 U.S. at 161 n.3 (Stevens, J., dissenting).

It should also be noted, however, that even the Court's substantive equal protection analysis was persuasively rejected by Justice Brennan in dissent. See text at notes 54-64 *supra*. As Justice Brennan pointed out, the *Geduldig* mode of analysis adopted by the Court required the determination of whether G.E.'s pregnancy classification was used as a '"mere pretext . . . designed to effect an invidious discrimination against the members of one sex . . . "' 429 U.S. at 149 (Brennan, J., dissenting) *quoting Geduldig*, 417 U.S. at 496-97 n.20. Thus, *Geduldig's* pretext requirement, Justice Brennan noted, mandated a determination by the Court as to whether G.E.'s exclusion of pregnancy from its disability benefits plan was based on "neutral, persuasive actuarial considerations" or rather was a result of a systematic policy of downgrading women's role in the labor force. 429 U.S. at 149 (Brennan, J., dissenting).

The majority summarily dismissed the possibility of an illegal "pretext" on G.E.'s

Prior Title VII cases have consistently held that a prima facie violation of the Act can be established by a showing that an otherwise facially neutral program has the effect of discriminating against a protected class of people.[93] While the Court majority in *Gilbert* acknowledged this aspect of Title VII law, it nevertheless reasoned that such a showing had not been made since the G.E. plan extended comparable financial benefits to both men and women. Under the majority's reasoning therefore, "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks."[94] Thus, the Court's analysis focused only on the economic consequences of G.E.'s plan. Since the plan with its exclusion of pregnancy was not "worth" more to men than to women, the Court concluded that there was no discriminatory effect. This economic analysis of the plan's effect, however, is entirely inappropriate in construing Title VII. Title VII's primary objective is not merely to assure economic parity among employees, but rather "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women]."[95] Accordingly, G.E.'s plan and its effect must be analyzed in light of Title VII's ultimate goal of employment equality to determine whether the plan is in fact discriminatory.

The inconsistency of the G.E. plan with Title VII's goal becomes evident upon analysis of that plan. G.E.'s plan insures its male employees against all possible risks including those that are male-specific. In contrast, G.E.'s plan affords its female employees coverage of all risks except pregnancy. Thus the most prevalent female-specific disability is the only risk not covered by this otherwise all-inclusive plan. Inevitably, therefore, those female employees who wish to have children, must do so at the risk of losing their wages for the time they are absent from their jobs. Their male counterparts, on the other

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part by distinguishing pregnancy from the other disabilities covered by the plan. This distinction was based upon the purported "voluntariness" of pregnancy and the fact that pregnancy was not a "disease." 429 U.S. at 136. Justice Brennan, however, exposed the fallacy of the majority's argument by detailing other conditions covered by the plan which, at a minimum, demonstrated an inconsistent application of the supposed criteria for coverage by the plan. See text at notes 59-61 *supra*. Furthermore, the plan's coverage of such male-specific disabilities as prostatectomies and circumcisions clearly indicated a biased willingness on G.E.'s part to consider sex-based characteristics. Surely factors such as these, especially when viewed in light of G.E.'s historic suppression of women in the labor force, see note 56 *supra*, were sufficient to establish "pretext" under *Geduldig* standards. Thus, even the majority's reasoning under an equal protection analysis was inadequate.

[93] Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[94] 429 U.S. at 139 (emphasis in original).

[95] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

hand, are assured disability benefits when they leave work in order to undergo such male-specific operations as prostatectomies or vasectomies. The employment inequity which is bred by a system which covers all possible risks for men, including male-specific ones, but which omits from its coverage the most prevalent female-specific risk, pregnancy, is both clear-cut and irrefutable. The effect of the G.E. plan is to cover all possible risks for male employees, but not for female employees thus "foster[ing] [a sexually] stratified job environment to the disadvantage of [women]." It was, of course, Title VII's objective to eliminate all such stratified systems. Consequently, under a risk analysis, in contrast to the economic analysis employed by the *Gilbert* majority it seems clear that the requisite showing of a discriminatory effect has been met. Thus, G.E.'s plan should have been held violative of Title VII.

The majority's reluctance to resort to prior Title VII cases for guidance in analyzing the issues presented in *Gilbert* was again manifested when it declined to give "great deference" to an EEOC guideline which required the inclusion of pregnancy in disability plans.[96] Inexplicably, the Court summarily ignored the consistent line of Title VII cases which called for the "great deference" standard,[97] and instead stated that the guideline was entitled only to "consideration." The *Gilbert* majority justified its refusal to accord the EEOC guideline "great deference" by noting that Congress in Title VII had not conferred upon the EEOC the authority to promulgate rules and regulations. Consequently, the majority reasoned, it could "accord less weight to [the guideline] than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability."[98] Accordingly, the majority concluded, the guideline was entitled only to "consideration" and under the "consideration" standard, the majority determined, it fared poorly.[99]

The "consideration" standard invoked by the majority stemmed from a 1944 Supreme Court case dealing with administrative interpretations of the Fair Labor Standards Act.[100] Its invocation and application in *Gilbert* contradicted not only the line of prior Title VII cases which had called for the "great deference" standard, but also the recent Supreme Court cases upon which the Title VII cases are based which hold that administrative interpretations of legislation by the enforcing agency are entitled to "great deference."[101] The only previous

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[96] See text at notes 34-48 *supra*.

[97] Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

[98] 429 U.S. at 141 (citations omitted).

[99] *Id.* at 142-45. See text at notes 34-48 *supra*.

[100] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[101] *See, e.g.*, United States v. City of Chicago, 400 U.S. 8, 10 (1970); Udall v. Tallman, 380 U.S. 1, 16 (1965).

instance where the Court declined to accord "great deference" to an EEOC guideline occurred in the 1973 case of *Espinoza v. Farah Manufacturing Co., Inc.*[102] In *Espinoza,* the Court held that an employer did not violate Title VII's ban on employment discrimination based on national origin when the employer refused to hire a person who was not a United States citizen.[103] The Court's holding in *Espinoza* conflicted with a pertinent EEOC guideline, which the Court stated "[was] no doubt entitled to great deference."[104] However, the Court further stated that "that deference must have limits, where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question."[105] Thus, the *Espinoza* Court did not reject the "great deference" standard, but rejected only the application of that standard when such application was inconsistent with the intent of Congress.[106] The *Gilbert* Court, however, did not base its refusal to accord the EEOC guideline "great deference" on an alleged inconsistency with congressional intent. Rather, the Court rejected the "great deference" standard itself, stating simply that "courts properly may accord less weight to [interpretive] guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability."[107] Such reasoning, as noted, summarily ignores consistent precedent[108] and consequently is difficult logically to justify. Thus, the *Gilbert* Court's refusal to accord the EEOC guideline "great deference" is an unwarranted break from clear Title VII precedent.

The final and perhaps most compelling argument against the Court's holding in *Gilbert* is that of social policy. Indisputably, women's position in the labor environment has been and continues to be an oppressed one. And, as Justice Brennan pointed out, discrimination does not exist in a vacuum but must take its meaning "from the desired end products of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of 'disadvantaged' individuals."[109] As a consequence, and with proper recognition of the applicability of Justice Stevens' comment that "it is the

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[102] 414 U.S. 86 (1973).

[103] *Id.* at 95-96.

[104] *Id.* at 94.

[105] *Id.*

[106] The *Espinoza* Court also pointed out that the EEOC guideline conflicted with an earlier view taken by the agency. *Id.* The Court recognized in a footnote, however, that the EEOC's earlier position had involved a different fact situation than that presented in *Espinoza* and had expressly reserved any decision on the particular facts eventually faced in *Espinoza. Id.* at n.7. The *Espinoza* Court then stated that the guideline was inconsistent with congressional intent and it specifically based its refusal to accord the guideline "great deference" on the guideline's inconsistency with congressional intent. *Id.* at 94.

[107] 429 U.S. at 141.

[108] See notes 97 and 101 *supra.*

[109] 429 U.S. at 159 (Brennan, J., dissenting) (footnote omitted).

capacity to become pregnant which primarily differentiates the female from the male,"[110] it follows that Title VII requires the inclusion of pregnancy in disability plans "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified environments to the disadvantage of [women]."[111]

It is difficult to assess what the Supreme Court's decision in *Gilbert* portends for the future of Title VII.[112] Perhaps the most disturbing element of the decision is the inference in the majority's opinion that the constitutional analysis of the equal protection clause may be applicable under Title VII, thus eliminating the Title VII effect standard and incorporating into Title VII law the newly enunciated intent requirement necessary for a constitutional finding of discrimination.[113] For two reasons, however, it is unlikely that such a wholesale change in Title VII law will take place. First, it is doubtful that a majority of the Court would agree to such a change. Clearly, Justices Brennan, Marshall and Stevens, the three dissenters in *Gilbert*, have definitively stated their support of the effect standard.[114] Similarly, both Justices Stewart and Blackmun, who specially concurred in the judgment of the Court, indicated that they also believed in the continuing viability of the effect standard under Title VII.[115] Second, in a later Title VII case the Supreme Court clearly adopted the effect standard in a sex discrimination case. In *Dothard v. Rawlinson*,[116] the Court was presented with statistical evidence which showed that minimum height and weight requirements, imposed by statute in Alabama for work in Alabama correctional facilities, had a disparate effect on women. The Court held in *Dothard* that such a showing con-

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[110] *Id.* at 162 (Stevens, J., dissenting).

[111] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[112] The United States Senate has already reacted to the Supreme Court's decision in *Gilbert*. On September 18, 1977 the Senate by a vote of 75 to 11 passed legislation which amended Title VII and specifically provided that Title VII's prohibition against sex discrimination includes discrimination based on pregnancy, childbirth, and pregnancy-related disabilities. *See* S. 995, 95th Cong., 1st Sess., 123 CONG. REC. 15,059 (daily ed. Sept. 18, 1977). On September 19, 1977 S. 995 was sent to the House Committee on Education and Labor where it is presently being considered.

[113] *See* Washington v. Davis, 426 U.S. 229, 239, 248 (1976).

[114] Justice Brennan, joined by Justice Marshall, wrote in dissent:

> Notwithstanding unexplained and inexplicable implications to the contrary in the majority opinion, this Court and every Court of Appeals now have firmly settled that a prima facie violation of Title VII, whether under § 703(a)(1) or § 703(a)(2), also is established by demonstrating that a facially neutral classification has the *effect* of discriminating against members of a defined class.

429 U.S. at 153-55 (Brennan, J., dissenting) (citations and footnotes omitted) (emphasis in original).

Justice Stevens, *citing* to Griggs v. Duke Power Co., 401 U.S. 424, 429-32 (1971), wrote in dissent that "facially neutral criteria may be illegal if they have a discriminatory effect." 429 U.S. at 161 (Stevens, J., dissenting).

[115] See note 50 *supra*.

[116] —— U.S. ——, 97 S. Ct. 2720 (1977).

stituted a prima facie case of discrimination.[117] Thus, it seems likely that a showing of a discriminatory effect will still suffice to establish a prima facie violation of Title VII. However, even if the effect standard remains viable, it is clear that Title VII's goal of equalization of employment opportunities suffered a severe setback in *Gilbert*.

VII. APPLICATION TO THE STATES OF TITLE VII AND OTHER EMPLOYMENT DISCRIMINATION LAWS: *Fitzpatrick v. Bitzer*

Amendments in 1972 extended Title VII's coverage to state and local governmental employees who had previously been excluded from the Act's protection.[1] Since remedies under Title VII include back pay and back benefits awards,[2] the effect of the 1972 amendments was to authorize state and local governmental employees to sue in federal courts to recover retroactive monetary relief against the states.[3] The governmental employers argued, however, that the eleventh amendment[4] prohibited such awards and limited the remedies of state and local governmental employees to prospective injunctive relief only. Lower courts divided on the question.[5]

During the Survey year, the Supreme Court in *Fitzpatrick v. Bitzer*[6] determined that the eleventh amendment does not prohibit the recovery of retroactive monetary awards and attorneys' fees in Title VII suits against a state employer.[7] *Fitzpatrick* involved an action by male employees of the state of Connecticut who alleged that certain

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[117] *Id.* at ——, 97 S. Ct. at 2726-27.

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[1] *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103. The amendments changed the definition of "person" to include "governments, governmental agencies, [and] political subdivisions," *id.*, § 2 (1), 86 Stat. 103, and struck the specific exclusion of "a State or political subdivision thereof" from the definition of "employer." *Id.*, § 2 (2) (b), 86 Stat. 103. A similar exclusion was struck from the definition of "employment agency." *Id.*, § 2 (3), 86 Stat. 103. The amendments also extended to public employees the right to sue on account of unlawful employment practices after satisfying certain procedural requirements. *Id.*, § 4 (a), 86 Stat. 104. The amendments are codified at 42 U.S.C. §§ 2000e (a)-(cc), 2000e-5(a)-(g) (Supp. V 1975).

[2] 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

[3] 42 U.S.C. § 2000e-5(f) (Supp. V 1975).

[4] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The amendment has been interpreted also to bar suit against a state by a citizen of that state. *See* Edelman v. Jordan, 415 U.S. 651, 662-63 (1974); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

[5] *Compare* Manhart v. City of Los Angeles, 13 FEP Cas. 1622, 1624 (C.D. Cal. 1975) (eleventh amendment no bar to award against a municipality), *aff'd without discussion of the issue*, 553 F.2d 581, 592, 13 FEP Cas. 1625, 1634 (9th Cir. 1976), *cert. granted*, —— U.S. ——, 98 S. Ct. 51 (1977) *with* Yerrell v. Maryland Highway Adm'n, —— F. Supp. ——, ——, 13 FEP Cas. 1746, 1750-51 (D.Md. 1976) (eleventh amendment bars award against the state).

[6] 427 U.S. 445 (1976).

[7] *Id.* at 447-48.

provisions of the state's statutory retirement benefit plan discriminated in favor of female employees.[8] The United States District Court for the District of Connecticut held that the retirement system did violate Title VII[9] and entered an injunction ordering the defendants to administer the system without discrimination.[10] Although the employees had asked that they be awarded back benefits and attorneys' fees, the court denied this request,[11] reasoning that the eleventh amendment prohibited the recovery of any such awards which would have to be paid from the state treasury.[12]

In reaching this result the district court relied on the Supreme Court's decision in *Edelman v. Jordan*.[13] *Edelman* involved a class action by welfare recipients against Illinois welfare officials for their failure to process welfare applications within the time limits established by the Department of Health, Education, and Welfare (HEW).[14] The suit requested declaratory and injunctive relief, including a specific prayer for "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all [welfare] benefits wrongfully withheld."[15] In deciding whether the welfare recipients could recover the requested back benefits, the Supreme Court in *Edelman* noted that Congress had not specifically authorized damage suits against a state for violation of the HEW regulations.[16] Hence, the Court was loathe to read such a provision into the legislation in light of the proscriptions of the eleventh amendment.[17] Consequently, the Court denied the plaintiffs retroactive recovery of benefits, holding that the eleventh amendment barred such a recovery of money which would have to be paid from the state treasury.[18] However, the Court did permit prospective injunctive relief to be entered against the state officials since such relief would have only an "ancillary effect" on state finances.[19] On the basis of *Edelman* the district court in *Fitzpatrick* permitted only prospective injunctive relief to be entered against the defendant state.[20]

The employees appealed the district court's denial of monetary relief.[21] The United States Court of Appeals for the Second Circuit,

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[8] *Id.* at 448.
[9] 390 F. Supp. 278, 288, 8 FEP Cas. 877, 884 (D. Conn. 1974).
[10] *Id.* at 290, 8 FEP Cas. at 885-86.
[11] *Id.* at 288-89, 8 FEP Cas. at 884-85.
[12] *Id.* at 289, 8 FEP Cas. at 885.
[13] 415 U.S. 651 (1974).
[14] *Id.* at 653-56.
[15] *Id.* at 656.
[16] *Id.* at 672.
[17] *Id.* at 673-74.
[18] *Id.* at 664-66, 678.
[19] *Id.* at 659, 668.
[20] 390 F. Supp. 278, 290, 8 FEP Cas. 877, 885 (D. Conn. 1974).
[21] 519 F.2d 559, 561, 10 FEP Cas. 956, 957 (2d Cir. 1975). The state did not appeal either the finding of a violation or the entering of injunctive relief. *Id.* at 562, 10 FEP Cas. at 958.

however, agreed with the district court that *Edelman* barred the recovery of the back benefits.[22] The court reasoned that in light of the eleventh amendment, Congress lacked authority to grant such a remedy in Title VII actions against states.[23] The court did permit the plaintiffs to recover attorneys' fees, however, reasoning that such a recovery would have only an "ancillary effect" on the state treasury. As such, the award was permissable under the *Edelman* rationale.[24]

The Supreme Court reversed the Second Circuit's denial of retroactive damages and held that the eleventh amendment does not prohibit private damage suits against the states to enforce the provisions of Title VII.[25] Writing for the Court, Mr. Justice Rehnquist recognized that the relief sought in *Fitzpatrick* was identical to that sought in *Edelman, viz.*, a damage award payable to a private party from the state treasury.[26] However, he also noted that in *Edelman* there had been no showing of specific congressional authorization of damage suits against a state.[27] Since Title VII specifically authorized such suits, Justice Rehnquist found that the decision in *Edelman* was not dispositive of the issue in *Fitzpatrick.*[28] The Court also found inapposite to a decision in *Fitzpatrick* an earlier Supreme Court case[29] which had permitted damage suits against the states under a statute passed pursuant to congressional authority under the commerce clause.[30] The Court noted that the amendments to Title VII involved in *Fitzpatrick* had not been passed under the commerce clause, but rather had been passed pursuant to congressional authority under section 5 of the fourteenth amendment.[31] Since section 5 specifically au-

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[22] *Id.* at 563, 10 FEP Cas. at 958.

[23] *Id.* at 569-71, 10 FEP Cas. at 963-65.

[24] *Id.* at 571-72, 10 FEP Cas. at 965.

[25] 427 U.S. at 447-48, 456. The decision was unanimous: seven Justices joined the majority opinion and two, Justices Brennan and Stevens, filed separate concurrences.

[26] *Id.* at 452. On appeal to the Second Circuit the employees had argued that since the damages would be paid from a separate pension fund, the award was not actually one against the state. The court of appeals rejected this argument. 519 F.2d 559, 564-65, 10 FEP Cas. 956, 959-61 (2d Cir. 1975). The issue was not raised before the Supreme Court. *See* 427 U.S. at 452 n.8.

[27] 427 U.S. at 452, *citing Edelman*, 415 U.S. at 672.

[28] 427 U.S. at 452.

[29] Parden v. Terminal Ry., 377 U.S. 184, 190-92 (1964) (by operating a railroad in interstate commerce, a state waives immunity to suit under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1964), a statute passed pursuant to congressional powers to regulate interstate commerce. U.S. CONST. art. I., § 8, cl. 3).

[30] 427 U.S. at 452-53.

[31] 427 U.S. at 453 n.9, *citing* H.R. REP. NO. 92-238, 92d Cong., 1st Sess., 19 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2154; S. REP. NO. 92-415, 92d Cong., 1st Sess., 10-11 (1972). The fourteenth amendment reads in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without

thorizes Congress to "enforce" the fourteenth amendment "by appropriate legislation,"[32] the Court reasoned that section 5 of the amendment is necessarily a specific limitation on the eleventh amendment and the principle of state sovereignty which it embodies.[33] Accordingly, the Court determined in *Fitzpatrick* that the eleventh amendment was no bar to the plaintiffs' recovery of either damages or attorneys' fees under Title VII.[34]

Justice Stevens concurred in the result of *Fitzpatrick,* but questioned the majority's reasoning with respect to the fourteenth amendment issue.[35] Justice Stevens did not agree that Title VII was necessarily "appropriate legislation" to enforce the provisions of the fourteenth amendment since he was unsure that the 1972 amendments were "needed to secure the guarantees of the Fourteenth Amendment."[36] In addition, he noted that the employees in *Fitzpatrick* had not proved a direct violation of the fourteenth amendment.[37]

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due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

[32] See the text of the amendment at note 31 *supra.*

[33] 427 U.S. at 456. The Court relied on *Ex parte* Virginia, 100 U.S. 339 (1880), where the Court examined the impact of the fourteenth amendment on state sovereignty:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . .
>
> [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.
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> . . . .
>
> [T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.

Id. at 346, 347-48.

[34] 427 U.S. at 456-57. Because the Court concluded that the eleventh amendment was no bar to the recovery of monetary damages against a state in Title VII actions, it did not need to decide the issue of whether attorneys' fees generally have only an "ancillary effect" on state treasuries. *Id.* at 457.

[35] *Id.* at 458 (Stevens, J., concurring).

[36] *Id.* (Stevens, J., concurring).

[37] *Id.*

Hence, Justice Stevens did not rely on the fourteenth amendment to overcome Connecticut's eleventh amendment defense. Instead, he initially determined that the commerce clause provided an adequate constitutional basis for congressional extension of Title VII coverage to state and local governmental employees.[38] He then proceeded to analyze the eleventh amendment issue on that basis. Justice Stevens found that the back benefits requested by the employees would have to be paid from the state's pension funds.[39] Accordingly, awarding those damages against the state was permissible because the eleventh amendment as interpreted in *Edelman* prohibited only payments from a state treasury.[40] Justice Stevens would also have allowed the employees in *Fitzpatrick* to recover attorneys' fees, reasoning that such fees fell in the same category as other litigation costs.[41] Thus, although Justice Stevens questioned the majority's conclusion that Title VII was appropriate legislation to enforce the provisions of the fourteenth amendment, he ultimately agreed with the Court that the eleventh amendment did not bar the plaintiffs from recovering back benefits against the state.[42]

The Supreme Court's conclusion in *Fitzpatrick* that the eleventh amendment does not bar a plaintiff's recovery of monetary damages against a state in a Title VII action is a sound one. Prior decisions of the Court support the proposition that Title VII is appropriate legislation to enforce the provisions of the fourteenth amendment.[43] Because the protections of Title VII are needed to secure the fourteenth amendment rights of state and local governmental employees, it is

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[38] *Id.*

[39] *Id.* at 459-60 (Stevens, J., concurring). See note 26 *supra.*

[40] 427 U.S. at 460 (Stevens, J., concurring).

[41] *Id.*

[42] *Id.* at 458 (Stevens, J., concurring).

Justice Brennan also concurred in the judgment of the Court in *Fitzpatrick.* He reiterated the position he took in Parden v. Terminal Ry., 377 U.S. 184, 186 (1964) and Employees of the Dep't of Pub. Health & Welfare of Mo. v. Dep't of Pub. Health and Welfare of Mo., 411 U.S. 279, 309 (1973) (Brennan, J., dissenting), that the eleventh amendment by its terms precludes federal court suits against a state only by citizens of another state. *Fitzpatrick,* 427 U.S. at 457 (Brennan, J., concurring). Since in *Fitzpatrick* citizens of Connecticut were suing the state of Connecticut, Justice Brennan concluded that the eleventh amendment did not itself bar the suit. *Id.* Justice Brennan instead analyzed the case in terms of the applicability of the "nonconstitutional but ancient doctrine of sovereign immunity," *id.,* and determined that the states surrendered that immunity when they ratified the Constitution "at least insofar as the States granted Congress specifically enumerated powers." *Id.* at 457-58 (Brennan, J., concurring). Justice Brennan then noted that Congress had the power under both the commerce clause and the fourteenth amendment of the Constitution to enact the provisions of Title VII. *Id.* at 458 (Brennan, J., concurring). Since Congress had thus passed the challenged legislation pursuant to powers specifically granted to it by the states, Justice Brennan determined in *Fitzpatrick* that the state of Connecticut could not claim to be immune from that Congressional action. *Id.* Accordingly, Justice Brennan concurred in the judgment of the Court which applied the provisions of Title VII to the state of Connecticut. *Id.*

[43] *See* Katzenbach v. Morgan, 384 U.S. 641, 648-50 (1966), *discussed at* notes 44-49 and 81-84 *infra. See also* authority cited in note 49 *infra.*

submitted that Congress can constitutionally authorize private damage suits against the states under the enforcement provisions of the fourteenth amendment.

In the 1966 case of *Katzenbach v. Morgan*[44] the Supreme Court established the framework for reviewing legislation passed pursuant to section 5 of the fourteenth amendment. *Katzenbach* involved an action by New York City voters seeking declaratory relief and an injunction against enforcement of the Voting Rights Act of 1965.[45] The Voting Rights Act provided that no person who had successfully completed the sixth primary grade in an American school should be disqualified from voting on the basis of an English literacy requirement, even if English had not been the language of instruction in the school.[46] The act had been passed pursuant to section 5 of the fourteenth amendment.[47] The Supreme Court upheld the statute as a constitutional exercise of congressional authority[48] and determined that the proper inquiry in reviewing a congressional statute under section 5 of the amendment is whether the act is "appropriate legislation to enforce the Equal Protection Clause."[49]

Title VII is appropriate legislation to enforce the equal protection clause of the fourteenth amendment. Congress passed the 1972 amendments to Title VII to remedy the "failure of state and local governmental agencies to accord equal employment opportunities."[50] Senator Jacob Javits stated during debate on a proposal to continue exempting state employees from Title VII coverage that "Section 5 of the 14th amendment, giving the power to Congress to enforce by appropriate legislation the provisions of this article, . . . makes it mandatory, not discretionary, in terms of the highest morality, that we act affirmatively on this aspect of this bill."[51] Both the House and Senate reports on the bill contain the same recognition that congressional ac-

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[44] 384 U.S. 641 (1966).

[45] *Id.* at 643-46. The relevant sections of the Voting Rights Act are Pub. L. No. 89-110, § 4(e), 79 Stat. 439 (current version at 42 U.S.C. § 1973b(e) (1970)).

[46] Pub. L. No. 89-110, § 4(e)(2), 79 Stat. 439.

[47] *Id.* § 4(e)(1), 79 Stat. 439.

[48] 384 U.S. at 646.

[49] *Id.* at 649-50. *See also* Oregon v. Mitchell, 400 U.S. 112, 141, 144, 150 (1970) (opinion of Douglas, J.) (residency, literacy and age provisions of the Voting Rights Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 315 (current version at 42 U.S.C. §§ 1973aa-bb (1970 & Supp. V 1975)) are within congressional powers of § 5 of the fourteenth amendment). *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (Congress has the power, *see* 42 U.S.C. § 1982 (1970), under the enforcement provisions of the thirteenth amendment, U.S. CONST. amend. XIII, § 2, to eliminate all racial barriers to the acquisition of real and personal property); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (Congress has power under the enforcement provisions of the fifteenth amendment, U.S. CONST. amend. XV, §2, to fashion specific remedies for voting discrimination).

[50] 118 CONG. REC. 1815 (1972) (remarks of Sen. Williams). *See also* 118 CONG. REC. 1816 (1972), *reprinting U.S. Comm'n on Civil Rights, For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Gov't Emp.* (1969).

[51] 118 CONG. REC. 1840 (1972) (remarks of Sen. Javits).

tion was needed to guarantee equal employment opportunities to state workers.[52] Under the circumstances, extension of Title VII to state governmental workers is "appropriate" to enforce the provisions of the fourteenth amendment. Accordingly, Congress can constitutionally authorize private parties to bring Title VII damage suits against state and local governmental employers.

Once it is established that Congress can constitutionally authorize private Title VII suits against a state, it is necessary to determine the standard of liability which courts should apply in such cases.[53] Class actions against private employers under Title VII require only a showing of the discriminatory impact of the challenged employment practice.[54] However, the Supreme Court recently determined that the Title VII standard of liability is distinct from the constitutional standard applied in discrimination cases brought under the equal protection doctrine of the fifth[55] and fourteenth amendments.[56] In *Washington v. Davis,*[57] an employment discrimination case in which the plaintiffs brought a fifth amendment challenge to pre-employment tests utilized by the District of Columbia police department,[58] the Supreme Court decided that constitutional challenges to discriminatory practices must meet a stringent standard of liability. That standard requires a showing that the challenged practice has both a racially disproportionate impact[59] and a racially discriminatory purpose.[60] Thus, the showing required to establish a constitutional claim of discrimination is greater than that required to establish a Title VII violation.[61]

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[52] H. R. REP. NO. 92-238, 92d Cong., 1st Sess., 17-19 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2152-54; S. REP. NO. 92-415, 92d Cong., 1st Sess., 9-11 (1971), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 418-20 (Comm. Print 1972).

[53] Apart from arguing that the eleventh amendment limited the employees' Title VII remedies, the state in *Fitzpatrick* did not challenge the application to it of the substantive provisions of Title VII. *See* 427 U.S. at 456 n. 11.

[54] *See* Griggs v. Duke Power Co., 401 U.S. 424, 426, 432 (1971).

[55] The due process clause of the fifth amendment does not specifically mention equal protection. *See* U.S. CONST. amend. V. The Supreme Court has, however, interpreted the clause as containing an equal protection component. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[56] U.S. CONST. amend. XIV, § 1.

[57] 426 U.S. 229 (1976).

[58] *Id.* at 232-34. In *Washington,* black applicants for employment with the District of Columbia police department sued under the fifth amendment, alleging, *inter alia,* that a written personnel test excluded a disproportionate number of black applicants. *Id.* at 232-33. In evaluating the claims the United States Court of Appeals for the District of Columbia Circuit applied Title VII standards to determine the employment discrimination claims and granted summary judgment for the applicants. 512 F.2d 956, 957-58 n.2, 10 FEP Cas. 105, 105-06 n.2 (D.C. Cir. 1975). The Supreme Court reversed the circuit court's judgment, holding it impermissible to apply Title VII standards to constitutional claims. 426 U.S. at 238-39.

[59] 426 U.S. at 239.

[60] *Id.* at 244-45.

[61] *Id.* at 246-48.

Since the constitutional basis of applying Title VII to the states is the fourteenth amendment,[62] the issue remains as to whether the states can be held liable under Title VII for practices which are not constitutional violations, yet which are Title VII violations as established by the less stringent statutory standards.

Lower courts have divided on the issue of whether Title VII standards are applicable in Title VII actions against state and local governments. Thus, in *Harrington v. Vandalia-Butler Board of Education,*[63] the United States District Court for the Southern District of Ohio determined that the less stringent Title VII standards determined the liability of a school board for alleged acts of employment discrimination.[64] In direct contrast, the United States District Court for the Northern District of Alabama, in *Scott v. City of Anniston,*[65] concluded that plaintiffs in a Title VII action against a city must prove that allegedly discriminatory acts violated the fourteenth amendment standard of liability.[66]

Harrington v. Vandalia-Butler involved suit against the local school board by a woman who taught girls' physical education classes. The woman alleged that her working conditions were inferior to those of the men who taught physical education to the boys of the school.[67] The defendant school board asked the court to rule that the board would be liable only for intentional acts of discrimination.[68] The court refused so to rule, stating:

> Citing *Washington v. Davis,* defendant contends that, unless plaintiff proves intentional acts of discrimination, she may not recover under Title VII. Nothing in the *Washington* case supports this proposition. Indeed, the holding of *Griggs v. Duke Power Co.* was reaffirmed in *Washington:* "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[69]

Accordingly, the *Harrington* court required the plaintiff to show only discriminatory effect and not intentional discrimination in order to establish the Title VII violation.

In *Scott v. City of Anniston,* the court did require the plaintiff in a Title VII action against a city to show intentional discrimination.[70] *Scott* was a class action brought on behalf of past, present and future black employees of the public works department of the city of Annis-

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[62] *See* authority cited in note 31 *supra.*

[63] 418 F. Supp. 603, 13 FEP Cas. 702 (S.D. Ohio 1976).

[64] *Id.* at 607, 13 FEP Cas. at 705.

[65] 430 F. Supp. 508, 14 FEP Cas. 1099 (N.D. Ala. 1977).

[66] *Id.* at 515, 14 FEP Cas. at 1103-04.

[67] 418 F. Supp. at 605-06, 13 FEP Cas. at 703-04. The woman claimed that the facilities, equipment and office she used were inferior to those provided for the boys' physical education instructors. *Id.*

[68] *Id.* at 607, 13 FEP Cas. at 705.

[69] *Id.* (emphasis in original).

[70] 430 F. Supp. at 515, 14 FEP Cas. at 1103-04.

ton, Alabama.[71] The named plaintiffs, former black employees, introduced statistical evidence tending to show that the department discriminated in promotions on the basis of race.[72] The court held that this evidence sufficiently established a prima facie Title VII case.[73] The defendant city, however, subsequently produced evidence showing that the city affirmatively recruited blacks and that those responsible for promotions did not discriminate intentionally on the basis of race.[74] The court held that this evidence successfully rebutted the plaintiffs' case,[75] specifically ruling that the standard of liability under which the court would judge the city was the standard of intentional discrimination as established in *Washington v. Davis:*

> [T]his court believes that the intent standard, i.e., that there must be proof of discriminatory racial purpose as in *Washington v. Davis,* should be applied in civil rights litigation brought under Title VII. . . . The Supreme Court held in *Fitzpatrick* that the authority for the 1972 amendment extending Title VII to state and local governments was the fourteenth amendment . . . . Therefore, it is simple logic that a statute can be no broader than its Constitutional base. Consequently, since the extension of Title VII to state and local government rests upon the fourteenth amendment, the statute cannot be any broader than the Constitutional authority upon which it is based. It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in *Washington*; i.e., there must be proof of discriminatory racial purpose.[76]

Since the plaintiffs in *Scott* failed to produce specific evidence contradicting the city's showing that it had not acted with discriminatory intent,[77] the *Scott* court entered judgment in favor of the city.[78]

Thus, the issue of the correct standard to apply in determining the liability of state and local governments for alleged violations of Title VII is not yet resolved. It is submitted that the proper resolution of this issue is the one reached by the court in *Harrington,*[79] *viz.,* that a court should apply Title VII standards in Title VII actions against state and local governments. This result is reached through further consideration of the Supreme Court's opinion in *Katzenbach v. Morgan.*[80]

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[71] *Id.* at 510-11, 14 FEP Cas. at 1099.
[72] *Id.* at 512, 14 FEP Cas. at 1100-01.
[73] *Id.* at 516, 14 FEP Cas. at 1104.
[74] *Id.* at 512-13, 14 FEP Cas. at 1101.
[75] *Id.* at 516-17, 14 FEP Cas. at 1105.
[76] *Id.* at 515, 14 FEP Cas. at 1103-04.
[77] *Id.* at 516-17, 14 FEP Cas. at 1105.
[78] *Id.* at 517, 14 FEP Cas. at 1106.
[79] 418 F. Supp. at 607, 13 FEP Cas. at 705.
[80] 384 U.S. 641 (1966).

In *Katzenbach v. Morgan,* discussed above,[81] the Supreme Court determined that section 5 of the fourteenth amendment enlarges congressional power.[82] Thus, an action prohibited by Congress under section 5 need not be prohibited by the amendment itself:

> A construction of §5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of §1 of the Amendment.[83]

Hence, the Court's inquiry need focus only on the propriety of the enforcement legislation rather than on whether the prohibited conduct itself violates the amendment.[84] Since Title VII is appropriate enforcement legislation,[85] the fact that a Title VII violation may not be a violation of the fourteenth amendment should not constitutionally preclude application of the statutory standard in actions against the states as employers. Accordingly, courts should follow the holding of *Harrington v. Vandalia-Butler Board of Education*[86] and apply Title VII standards in Title VII actions against state and local governments.[87]

The impact of *Fitzpatrick v. Bitzer* on the application to state and local governments of employment discrimination law also can be analyzed in light of *National League of Cities v. Usery,*[88] a Supreme Court decision rendered four days prior to *Fitzpatrick* which also considered Congress' authority to regulate the employment practices of

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[81] See text at notes 44-49 *supra.*

[82] 384 U.S. at 648.

[83] *Id.* at 648-49 (footnote omitted).

[84] *Id.* at 649-50. *Accord,* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (thirteenth amendment enforcement legislation); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (fifteenth amendment enforcement legislation).

[85] See text at notes 50-52 *supra.*

[86] 418 F. Supp. at 607, 13 FEP Cas. at 705.

[87] Since the Supreme Court's opinion in Washington v. Davis, district courts in general have not distinguished Title VII actions against private parties from Title VII actions against states in determing the evidence required to sustain a claim. *See, e.g.,* Davis v. Weidner, 421 F. Supp. 594, 599, 14 FEP Cas. 544, 548 (E.D. Wis. 1976); King v. New Hampshire Dep't of Resources and Economic Dev., 420 F. Supp. 1317, 1325-27, 13 FEP Cas. 1056, 1062-64 (D.N.H. 1976).

[88] 426 U.S. 833 (1976). The case was a five to four decision. *See generally* Note, *Constitutional Law—Commerce Clause—The Reaffirmation of State Sovereignty as a Fundamental Tenet of Constitutional Federalism—National League of Cities v. Usery,* 18 B.C. IND. & COM. L. REV. 736 (1977) for a more extensive treatment of *National League of Cities.*

state and local governments. *National League of Cities* involved suit by various state and local governmental interests seeking to enjoin the Secretary of Labor from enforcing an extension to state and local governments of the Fair Labor Standards Act's[89] minimum wage and maximum hours provisions.[90] The Court, again writing through Mr. Justice Rehnquist, held this extension unconstitutional.[91] The Court reasoned that the Constitution places limits on congressional authority to interfere with state sovereignty,[92] and it noted that employment decisions of the states *qua* states are such an attribute of state sovereignty.[93] Accordingly, the Court held that "insofar as the challenged amendments [to the Fair Labor Standards Act] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the commerce clause] Art. I, § 8, cl. 3."[94] The Court in a footnote expressly stated that it was making no decision with respect to attempts by Congress to affect "integral operations of state governments" under other sections of the Constitution, such as section 5 of the fourteenth amendment.[95] The Court directly addressed this question left open in *National League of Cities* when it held in *Fitzpatrick*[96] that Congress could affect state employment decisions under section 5 of the fourteenth amendment. In *Fitzpatrick* the Supreme Court decided that Congress had the authority to extend the provisions of Title VII to state and local governments. The issue remains as to whether Congress has similar power to extend to the states other employment discrimination laws such as the Equal Pay Act (EPA)[97] and the Age Discrimination in Employment Act (ADEA).[98]

District courts during the course of the Survey year have had to determine the constitutionality of those provisions of the EPA and the ADEA which apply to the states.[99] In *Christensen v. Iowa*,[100] for exam-

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[89] 29 U.S.C. §§ 203, 206 (Supp. V 1975); *id.* § 207 (1970 & Supp. V 1975).

[90] 426 U.S. at 836-37, 839.

[91] 426 U.S. at 852.

[92] *Id.* at 842, 845.

[93] *Id.* at 845.

[94] *Id.* at 852. Justice Stevens dissented in *National League of Cities* on the grounds that the statute was constitutionally enacted under the commerce clause. *Id.* at 880-81 (Stevens, J., dissenting) (by implication). This position is consistent with that taken in his concurrence in *Fitzpatrick*. See text at note 38 *supra*.

[95] 426 U.S. at 852 n.17. The Court also mentioned that it was expressing no opinion with respect to exercises of congressional authority under the spending power, U.S. CONST. art. I, § 8, cl. 1. *Id.*

[96] 427 U.S. at 456.

[97] 29 U.S.C. § 206(d) (1970). The EPA provides generally that employers may not discriminate in pay for comparable work on the basis of sex. *Id.* § 206 (d)(1) (1970).

[98] 29 U.S.C. §§ 621-34 (1970 & Supp. V 1975). The ADEA in general prohibits discrimination on the basis of an individual's age with respect to the "compensation, terms, conditions, or privileges" of the individual's employment. *Id.* at § 623(a)(1) (1970).

[99] *See* 29 U.S.C. § 203 (Supp V 1975) (extending the provisions of the EPA to the states); *id.* § 203 (extending the provisions of the ADEA to the states).

[100] 417 F. Supp. 423, 13 FEP Cas. 161 (N.D. Iowa 1976).

ple, plaintiffs challenged the practice of the University of Northern Iowa of paying female clerical help less money than was paid to male employees for allegedly similar work.[101] Plaintiffs stated claims under both the EPA, which is codified as part of the Fair Labor Standards Act, and Title VII.[102] The university moved to dismiss the EPA claim on the grounds that the Supreme Court in *National League of Cities* had struck down the Fair Labor Standards Act as applied to the states.[103] The United States District Court for the Northern District of Iowa, however, did not consider *National League of Cities* to be dispositive.[104] It distinguished the case before it on the ground that discrimination in pay is not the "fundamental employment decision" that minimum wage or maximum hours is:

> It is difficult to say that the capacity of a state or its subdivision to direct that different pay be accorded for comparable work, based solely on the sex of the worker, is a function "essential to separate and independent existence" of the state. . . . Likewise, the ability to exercise such discrimination is not, consistent with equal protection, an "attribute of sovereignty."[105]

Accordingly, the court refused to dismiss the plaintiffs' Equal Pay claim.[106]

The United States District Court for the Southern District of Iowa in *Usery v. Bettendorf Community School District*[107] reached an identical result in an action by the Secretary of Labor against the defendant school district for alleged violations of the Equal Pay Act.[108] The court in *Bettendorf* cited *Christensen* with approval as a case which had limited the *National League of Cities* decision to its facts.[109] In addition to finding, as had the court in *Christensen,* that discrimination in pay was not an attribute of sovereignty,[110] the court in *Bettendorf* also analogized to the Supreme Court's decision in *Fitzpatrick.*[111] In *Fitzpatrick* the Supreme Court had upheld the application to the states of Title VII.[112] The *Bettendorf* court then determined that the provisions of Title VII and the EPA were to be read together " 'since both statutes serve the same fundamental purpose.' "[113] Thus, since Title VII

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[101] *Id.* at 424, 13 FEP Cas. at 162.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 424-25, 13 FEP Cas. at 162.
[105] *Id.* at 425, 13 FEP Cas. at 163.
[106] *Id.*
[107] 423 F. Supp. 637, 13 FEP Cas. 634 (S.D. Iowa 1976).
[108] *Id.* at 638, 13 FEP Cas. at 635.
[109] *Id.* at 638-39, 13 FEP Cas. at 635.
[110] *Id.*
[111] *Id.* at 639, 13 FEP Cas. at 636.
[112] 427 U.S. at 456.
[113] 423 F. Supp. at 639, 13 FEP Cas. at 636, *quoting* Shultz v. Wheaton Glass Co., 421 F.2d 259, 266, 9 FEP Cas. 502, 507 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).

was still applicable to the states, and since Title VII and the EPA were to be read together, the court determined that the EPA was still valid.[114] Accordingly, it denied the school district's motion for summary judgment.[115]

In a third action, the United States District Court for the District of Utah determined that the Age Discrimination in Employment Act[116] as applied to the states survives the Supreme Court's decision in *National League of Cities*. In *Usery v. Board of Education of Salt Lake City*,[117] the defendant school board moved for summary judgment in an action by the Secretary of Labor to enforce the provisions of the ADEA.[118] The court denied the motion,[119] distinguishing *National League of Cities* on two grounds. First, the court noted that *National League of Cities* established a balancing test for determining the constitutionality of the application of federal standards to state practices. Using this test the court determined that any interference with an integral governmental function through enforcement of the ADEA would be minimal, particularly when balanced against the "significant national interest" in nondiscriminatory employment practices.[120] The second ground on which the court distinguished *National League of Cities* lay in its determination that section 5 of the fourteenth amendment was an adequate constitutional base for congressional passage of the ADEA.[121] Since the Supreme Court in *Fitzpatrick* recognized that fourteenth amendment enforcement legislation could be applied to the states, the court in *Board of Education* permitted the ADEA through section 5 of the fourteenth amendment to be applied to the states.[122]

It is submitted that the courts in *Bettendorf, Christensen* and *Board of Education* are correct on two grounds in upholding the constitutionality of the EPA and the ADEA as applied to state and local governments. The first ground involves consideration of the Supreme Court's decision in *Fitzpatrick*. In *Fitzpatrick* the Supreme Court determined that employment discrimination stands on a different footing from minimum wage and maximum hours standards.[123] The four-

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[114] 423 F. Supp. at 639, 13 FEP Cas. at 636. *Accord,* Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 154-56, 13 FEP Cas. 1188, 1193-94 (3d Cir. 1976); Usery v. Dallas Independent School Dist., 421 F. Supp. 111, 116 (N.D. Tex. 1976). *Contra,* Usery v. Owensboro-Daviess County Hosp., 423 F. Supp. 843, 847 (W.D. Ky. 1976); Howard v. Ward County, 418 F. Supp. 494, 500-01, 14 FEP Cas. 548, 551 (D. N.D. 1976).

[115] 423 F. Supp. at 639, 13 FEP Cas. at 636.

[116] 29 U.S.C. § 621-34 (1970 & Supp. V 1975). See note 98 *supra.*

[117] 421 F. Supp. 718, 13 FEP Cas. 717 (D. Utah 1976).

[118] *Id.* at 718, 13 FEP Cas. at 717. The Secretary of Labor alleged that the defendant school board's selection process for filling administrative vacancies in the public school system discriminated against three individuals on the basis of their age. *Id.*

[119] *Id.* at 719, 13 FEP Cas. at 717.

[120] *Id.* at 719-20, 13 FEP Cas. at 718-19.

[121] *Id.* at 721, 13 FEP Cas. at 719-20.

[122] *Id.*, 13 FEP Cas. at 720.

[123] *See* 427 U.S. at 456.

teenth amendment guarantees a citizen "equal protection" from state practices and procedures. Section 5 of the amendment permits Congress to pass appropriate legislation to enforce this provision. Whether Congress specifically relied on the fourteenth amendment in passing the ADEA or the EPA is inconsequential[124] since both acts are supported by that amendment.[125] So long as there is a basis in the constitution for the statute, it should be upheld.[126] Thus, the ADEA and the EPA can be adjudged constitutional under section 5 of the fourteenth amendment even though Congress never specifically relied on the amendment in passing the statutes.

The second ground on which the constitutionality of the EPA and the ADEA can be upheld is the commerce clause. Despite the Supreme Court's decision in *National League of Cities*,[127] *Board of Education* correctly recognized that the Supreme Court balanced the state interest against the federal interest in striking down the legislation in-

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[124] *See* Griffin v. Breckenridge, 403 U.S. 88, 104 (1971) ("Our inquiry [with respect to the constitutionality of 42 U.S.C. § 1985 (3) (1970] need go only to identifying *a* source of congressional power to reach the private conspiracy alleged by the complaint in this case.") (emphasis added). *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.")

[125] ADEA: *See Board of Education*, 421 F. Supp. at 721, 13 FEP Cas. at 720 (ADEA is supported by the fourteenth amendment). *Accord*, Remmick v. Barnes County, 435 F. Supp. 914, 916, —— FEP Cas. ——, —— (D. N.D. 1977); Aaron v. Davis, 424 F. Supp. 1238, 1241, 14 FEP Cas. 362, 364 (E.D. Ark. 1976). *Cf.* H.R. REP. NO. 93-913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2849-50 (stressing that discrimination based on age is comparable to discrimination based on race).

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam), which held that compulsory retirement at age fifty from a state's police force does not violate equal protection, *id.* at 312, 317, is not to the contrary. The *Murgia* Court determined only that the compulsory retirement was not a direct violation of the fourteenth amendment. Since the employee had stated no claim under the ADEA, *see* 427 U.S. at 310 n.2, the Court considered no issue with respect to the ADEA as fourteenth amendment enforcement legislation.

EPA: Usery v. Charlestown County School Dist., 558 F.2d 1169, 1170-71, —— FEP Cas. ——, —— (4th Cir. 1977). *See also Christensen*, 417 F. Supp. at 425, 13 FEP Cas. at 163 (discrimination between the sexes is not, consistent with equal protection, an "attribute of sovereignty"). *Cf. Bettendorf*, 423 F. Supp. at 639, 13 FEP Cas. at 636, *citing* Schultz v. Wheaton Glass Co., 421 F.2d 259, 266, 9 FEP Cas. 502, 507 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) (EPA and Title VII provisions prohibiting discrimination in pay should be construed harmoniously).

[126] *See* Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 155, 13 FEP Cas. 1188, 1193-94 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977) ("Nor do we attach any significance to the fact that the legislative history of the Equal Pay Act does not explicitly rely on the fourteenth amendment. In exercising the power of judicial review, as distinguished from the duty of statutory interpretation, we are concerned with the actual powers of the national government.") *Cf.* United States v. Vuitch, 402 U.S. 62, 70 (1971) ("[O]f course statutes should be construed whenever possible so as to uphold their constitutionality.")

[127] See notes 88-95 *supra* and accompanying text.

volved in *National League of Cities.*[128] *Board of Education* also recognized that there is no legitimate state interest in employment discrimination which can outweigh the national interest against such discrimination.[129] As *Bettendorf* and *Christensen* determined, such discrimination is not the inherent governmental function that establishing wages and hours generally was found to be in *National League of Cities.*[130] Accordingly, courts should continue to apply the discrimination provisions of the Equal Pay Act and the ADEA to the states.

VIII. RIGHTS OF FEDERAL EMPLOYEES: *Chandler v. Roudebush–Brown v. GSA*

In 1972 Congress amended Title VII[1] and added a new section, section 717,[2] which extended Title VII's protections against employment discrimination based on race, color, religion, sex, or national origin[3] to federal employees and applicants for federal employment. Section 717(b) grants to the Civil Service Commission primary authority for enforcing the provisions of section 717.[4] Such authority includes the right to grant appropriate remedies for federal employment discrimination, such as reinstatement or hiring of employees with or without back pay.[5] Section 717(c) grants to federal employees and applicants for employment the right to file in federal district court a civil action alleging discrimination, after meeting certain jurisdictional and procedural requirements.[6] Section 717(d) in turn

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[128] *See* 421 F. Supp. at 719, 13 FEP Cas. at 718, *citing National League of Cities,* 426 U.S. at 852-53.

[129] *See* 421 F. Supp. at 720, 13 FEP Cas. at 718-19.

[130] *Bettendorf,* 423 F. Supp. at 638, 13 FEP Cas. at 635; *Christensen,* 417 F. Supp. at 425, 13 FEP Cas. at 163.

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[1] Pub. L. 92-261, 86 Stat. 103 (1972).

[2] 42 U.S.C. § 2000e-16 (Supp. V 1975).

[3] 42 U.S.C. § 2000e-2(a) (1970).

[4] 42 U.S.C. § 2000e-16(b) (Supp. V 1975).

[5] *Id.* § 717(b) also provides that the Civil Service Commission shall promulgate rules and regulations, *id.,* annually review and approve national and regional equal employment opportunity plans, 42 U.S.C. § 2000e-16(b)(1) (Supp. V 1975), review and evaluate the operation of all agency equal employment opportunity programs, 42 U.S.C. § 2000e-16(b)(2) (Supp. V 1975), and consult with and solicit recommendations from interested groups and organizations. 42 U.S.C. § 2000e-16(b)(3) (Supp. V 1975).

[6] 42 U.S.C. § 2000e-16(c) (Supp. V 1975). Any complainant must first seek relief with the agency that has allegedly discriminated against him, proceeding pursuant to rules and regulations promulgated by the Civil Service Commission. *See* 5 C.F.R. § 713.214 (1977). He must discuss the alleged discriminatory action within 30 days of the date of that action with the agency Equal Employment Opportunity Counselor. 5 C.F.R. § 713.214(a)(1)(i) (1977). A complaint must then be filed with the agency within 15 days of the date of the final interview with the Equal Employment Opportunity Counselor. 5 C.F.R. § 713.214(a)(1)(ii) (1977). The agency is required to conduct an investigation of the complaint, 5 C.F.R. § 713.216 (1977), and upon completion of the investigation, the agency must provide an opportunity for adjustment of the complaint on an informal basis. 5 C.F.R. § 713.217(a) (1977). If no such adjustment is reached, the employee may,

specifies that those provisions of Title VII which deal with private sector civil actions shall, "as applicable," govern civil actions brought pursuant to section 717(c).[7]

During the Survey year the Supreme Court answered two important questions relating to federal employees' rights under Title VII. In *Chandler v. Roudebush*,[8] the Court determined that section 717 gives federal employees and applicants for federal employment the right to a trial de novo of employment discrimination claims.[9] Then in *Brown v. GSA*,[10] delivered the same day as *Chandler*, the Court decided that section 717 provides the exclusive judicial remedy for claims of discrimination in federal employment.[11] Although both of these cases resolved important issues under section 717, they show no consistent line of reasoning in their approach to the scope of federal employees' rights.

A. *Chandler v. Roudebush*

In *Chandler*, the plaintiff, Jewell Chandler, was a black employee of the Veterans Administration.[12] After being denied a promotion in 1972, she pursued administratively a claim of employment discrimination.[13] Having appealed her claim through the Civil Service Commission Board of Appeals and Review without achieving a satisfactory result, she filed a timely suit alleging employment discrimination against the Veterans Administration under section 717(c) of Title VII in United States District Court for the Central District of California.[14] She then initiated discovery proceedings which were challenged on the ground that section 717(c) limits judicial action to a review of the administrative record only.[15] The district court adopted the ruling of

within 15 days, request a decision by the agency head. 5 C.F.R. § 713.217(b) (1977). If the employee desires, he may request a hearing before a complaints examiner prior to the decision by the agency head. *Id.* Following the decision of the agency head, the complainant has two options. First, he may, within 15 days, appeal the decision to the Civil Service Commission, 5 C.F.R. §§ 713.231,.233 (1977), and, if unable to achieve a satisfactory decision from the Civil Service Commission, he may, within 30 days of such decision, file a civil action in a federal district court. 42 U.S.C. § 2000e-16(c) (1970 and Supp. V 1975). Alternatively, the complainant may decide not to appeal to the Civil Service Commission, and may within 30 days of notice of final agency action, file a civil action in federal district court. 42 U.S.C. § 2000e-16(c) (Supp. V 1975). It should be noted that section 717 also provides that if after 180 days of the filing of the complaint or appeal, the agency or Civil Service Commission has failed to take final action, the complainant may file a civil action in a federal district court. 42 U.S.C. § 2000e-16(c) (Supp. V 1975).

[7] 42 U.S.C. § 2000e-16(d) (Supp. V 1975).

[8] 425 U.S. 840 (1976).

[9] *Id.* at 864.

[10] 425 U.S. 820 (1976).

[11] *Id.* at 835.

[12] 425 U.S. at 841.

[13] *Id.* at 841-42.

[14] 7 FEP Cas. 266 (C.D. Cal. 1973).

[15] 425 U.S. at 842.

the District Court for the District of Columbia in *Hackley v. Johnson*[16] that a "trial *de novo* is not required [under section 717(c)] in all cases" and that a review of the administrative record will suffice if "an absence of discrimination is affirmatively established by the clear weight of the evidence in the record . . . ."[17] Applying this threshold test, the district court in *Chandler* concluded that the administrative record before it clearly established an absence of discrimination.[18] Accordingly, the district court held itself limited to review of the administrative record, and upon such review granted a motion for summary judgment against Chandler.[19] On appeal, the United States Court of Appeals for the Ninth Circuit agreed with the district court as to the limited scope of review required under section 717(c) and therefore affirmed the judgment.[20]

The Supreme Court granted certiorari and unanimously reversed the circuit court, holding that section 717(c) accords "a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII."[21] The Court based its opinion both on the specific wording of section 717 and on the section's legislative history. As an initial step, the Court undertook a careful reading of the section,[22] noting that section 717(d) states that "[t]he provisions of [sections 706(f)-(k)], *as applicable,* shall govern civil actions brought hereunder."[23] Sections 706(f)-(k), the Court pointed out, govern private actions brought under Title VII.[24] The Court then noted that it had previously held that section 706 gives private employees the right to a trial de novo.[25] "[S]yllogistically," the Court concluded, section 717 seemingly extended the same right to federal employees.[26] However, since the lower courts in *Chandler* had relied on *Hackley v. Johnson* to arrive at a different analysis of section 717, the Court proceeded to examine that case.

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[16] 360 F. Supp. 1247, 6 FEP Cas. 79 (D.D.C. 1973), *rev'd sub nom.* Hackley v. Roudebush, 520 F.2d 108, 113, 11 FEP Cas. 487, 490 (D.C. Cir. 1975).

[17] 360 F. Supp. at 1252, 6 FEP Cas. at 83.

[18] 7 FEP Cas. at 267.

[19] *Id.*

[20] 515 F.2d 251, 255, 10 FEP Cas. 689, 691-92 (9th Cir. 1975).

[21] 425 U.S. at 864. The Court thus resolved a conflict which had developed among the circuits. Four courts of appeals had held that § 717(c) gave federal employees the right to a trial de novo in the district court. Abrams v. Johnson, 534 F.2d 1226, 1227, 12 FEP Cas. 1293, 1294 (6th Cir. 1976); Caro v. Schultz, 521 F.2d 1084, 1087, 11 FEP Cas. 327, 329 (7th Cir. 1975); Hackley v. Roudebush, 520 F.2d 108, 117, 11 FEP Cas. 487, 493 (D.C. Cir. 1975); Sperling v. United States, 515 F.2d 465, 481, 10 FEP Cas. 654, 667 (3d Cir. 1975). Three other courts of appeals, on the other hand, had held that § 717(c) did not give federal employees such a right. Haire v. Calloway, 526 F.2d 246, 249, 11 FEP Cas. 769, 772 (8th Cir. 1975); Chandler v. Johnson, 515 F.2d 251, 255, 10 FEP Cas. 689, 691-92 (9th Cir. 1975); Salone v. United States, 511 F.2d 902, 904, 10 FEP Cas. 1,2 (10th Cir. 1975).

[22] 425 U.S. at 843-44.

[23] *Id.* at 844, *quoting* 42 U.S.C. § 2000e-16(d) (Supp. V 1975) (emphasis added).

[24] 425 U.S. at 844. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

[25] Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974).

[26] 425 U.S. at 846.

The Court noted that the district court in *Hackley* had reasoned that the qualification "as applicable" in section 717(d) indicated that Congress did not intend to grant federal employees all the rights enjoyed by private sector employees, and had thereby limited what otherwise would be a federal employee's right to a trial de novo.[27] The Supreme Court, however, read the phrase "as applicable" in a completely different manner. The Court reasoned that this language refers to those portions of section 706 which could "have no possible relevance to judicial proceedings involving federal employees."[28] As an example the Court cited the provision of section 706 (f) (1) which authorize suits and permissive intervention by the Equal Employment Opportunity Commission (EEOC) or the Attorney General.[29] The Court noted that these provisions could not possibly be applicable to a federal employee's civil action,[30] since under section 717(c), the aggrieved federal employee or applicant is the only one who can institute a civil action. The Court therefore determined that the inapplicability to federal employment discrimination of the provisions of section 706 related to the enforcement responsibilities of the EEOC and the Attorney General is "[t]he most natural reading of the phrase 'as applicable' . . . ."[31] As a result, the Court decided that the district court in *Hackley* had misinterpreted this phrase.[32] Consequently, the Court concluded that the "as applicable" language of section 717(d) does not limit the apparent meaning of section 717 that federal employees enjoy the same right to a trial de novo as do private employees.[33]

The Court then analyzed extensively the legislative history of the 1972 Amendments.[34] The Court found nothing in the legislative his-

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[27] *Id., citing* 360 F. Supp. at 1252 & n.9, 6 FEP Cas. at 82 & n.9.

[28] 425 U.S. at 846.

[29] 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

[30] 425 U.S. at 846-47.

[31] *Id.* at 847.

[32] *Id.* at 847-48.

[33] *Id.* at 848.

[34] *Id.* at 848-61. The Court noted initially that two basic themes dominated the legislative history. The first was the ineffectiveness of the individually instituted and maintained trial de novo by private employees in enforcing Title VII. *Id.* at 848-49. The second concerned federal employees and their lack of safeguards against employment discrimination and included the congressional perception noted in *Brown v. GSA* that federal employees lacked judicial remedies for such discrimination. *Id.* at 849 & n.9. See text at notes 60-62 *infra.*

The Court followed the legislative history from the original bills reported in 1971 by the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare to the final bill approved in 1972 by both houses of Congress. The Court pointed out that both the original committee bills proposed to give the EEOC power to issue cease-and-desist orders in the private sector while maintaining the private employees' right to a trial de novo in specified instances. *Id.* at 850. Debate in the committees had focused on whether the EEOC should have cease-and-desist powers subject only to review by the federal courts of appeals on a substantial-evidence basis or whether the EEOC should only have the power to institute trial de novo suits in federal district courts on behalf of private employees. *Id.* at 850. The Court in *Chandler* em-

tory to support the theory, espoused in *Hackley* and adopted by the Ninth Circuit in *Chandler*, that federal sector civil actions would re-

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phasized that with this debate as a backdrop, both committees included provisions in their bills allowing federal employees to file civil actions in federal district courts. These provisions, the Court noted, referred *not* to the sections of the bills which provided for substantial-evidence review of EEOC cease-and-desist orders, but rather to the sections of the bills which retained the private employee's right to a trial de novo in certain instances. *Id.* at 852-53. On this basis the *Chandler* Court concluded that both committees after "a thorough and meticulous consideration of the question whether an administrative agency or a court should be given primary adjudicative responsibility for particular categories of Title VII complaints" decided that the federal employees should be granted "the right to plenary trials in the federal district courts." *Id.* at 853-54.

The House committee bill was amended on the floor to allow the EEOC to institute private sector civil actions but the amendments denied the EEOC cease-and-desist powers. This denial was based on the fear that granting primary adjudicative authority over private employees' Title VII complaints to the EEOC, which was also responsible for prosecuting such complaints would bias the agency's adjudications. H.R. 1746, 92d Cong., 1st Sess., § 3(e) (1971). *See, e.g.*, 117 CONG. REC. 31958-59 (1971) (remarks of Rep. Martin); *id.* at 31968, 32092 (remarks of Rep. Erlenborn); *id.* at 32106 (remarks of Rep. Broomfield); *id.* at 32107-08 (remarks of Rep. Shoup); *id.* at 32109-10 (remarks of Rep. Fisher). Significantly, the amendments in the House also deleted the extension of Title VII to federal employees. H.R. 1746, 92d Cong., 1st Sess. (1971).

The Senate Committee bill encountered opposition on the floor similar to that encountered by the House Committee bill. Senator Dominick, who had dissented from the Senate Committee bill's provision granting the EEOC cease-and-desist power, introduced an amendment which would replace this aspect of the committee bill with a provision allowing the EEOC the right to institute de novo proceedings in federal district courts on behalf of private-sector employees. 118 CONG. REC. 591-92 (1972). Senator Dominick argued that private-sector and federal-sector employees should be treated equally and he noted:

> [T]hat one of the first things we have to do is at least to put employees holding their jobs, be they government or private employees, on the same plane so that they have the same rights, so that they have the same opportunities, and so that they have the same equality within their jobs, to make sure that they are not being discriminated against and have the enforcement, investigatory procedure carried out the same way.

Id. at 594 (remarks of Sen. Dominick). Senator Dominick noted that the committee bill already provided that federal employees were entitled to plenary adjudication of their claims in federal district court and hence private employees should be treated similarly. *Id.* at 595, 942, 943, 3389, 3809, 3967.

Senator Dominick's amendment was adopted, *id.* at 3979-80, and the committee bill, as amended, was passed by the Senate. *Id.* at 4944. Since the House bill differed from the Senate's amended bill in that its coverage did not extend to federal employees, the two bills went to a conference committee which adopted the Senate bill's provision covering federal employees. S. Conf. Rep. No. 92-681, pp. 1, 10-11, 20-21 (1972) *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2167. This conference bill was passed by both the House and the Senate. Pub. L. 92-261, 86 Stat. 103 (1972).

The Court after examining this complete legislative history pointed out that the legislative history behind the Senate bill was the most relevant to its consideration in *Chandler* since it was that bill's coverage of federal employees which was adopted by the conference committee and passed by Congress. 425 U.S. at 858. In that regard, the Court noted, Senator Dominick's emphasis on equal rights for both federal sector and private sector employees and his use of the federal sector de novo procedure as a model were historically significant. *Id.* Hence the Court determined that the legislative history indicated a congressional intent to accord the right to a trial de novo to both federal sector and private sector employees. *Id.*

ceive de novo consideration in some instances, but only record review in others.[35] Rather, the Court determined that

> the options which Congress considered were entirely straightforward. It faced a choice between record review of agency action based on traditional appellate standards and trial *de novo* of Title VII claims. The Senate committee selected trial *de novo* as the proper means for resolving the claims of federal employees. The Senate broadened the category of claims entitled to trial *de novo* to include those of private-sector employees, and the Senate's decision to treat private- and federal-sector employees alike in this respect was ratified by the Congress as a whole.[36]

The Court focused much of its discussion of the legislative history on this perceived desire of Congress to treat federal sector employees and private sector employees alike.[37] From this congressional intent, the Court logically concluded that federal employees should have the same right to a trial de novo as that enjoyed by private employees.[38]

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[35] *Id.* at 861.

[36] *Id.*

[37] See note 64 *supra.*

[38] 425 U.S. at 861. The Court did note in a footnote that several statements made in the floor debate by both Senator Williams and Senator Cranston did not support the Court's conclusion that Congress intended to treat federal employees and private employees equally. Senator Williams had said:

> Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for a *review of the administrative proceeding record* after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. . . . There is no reason why a Federal employee should not have *the same private right of action enjoyed by individuals in the private sector,* and I believe that the committee has acted wisely in this regard.

118 CONG. REC. 4922 (1972) (emphasis added). The Court refused to give this statement "controlling weight" even though Senator Williams had been a sponsor and floor manager of the Senate Bill. The Court cited three reasons for its refusal. 425 U.S. at 858 n.36. First, the Court noted that Senator Williams' statement was self-contradictory in that it called for "a review of the administrative proceeding record," but at the same time stated "[t]here is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector . . . ." Since by the provisions of the pending Senate bill private employees were entitled to a trial de novo, the Court pointed out that Senator Williams' statement was internally inconsistent. *Id.* Second, the Court noted that the Senate committee had proposed the federal sector provision which was before the Senate and had clearly chosen to allow federal employees the right to a trial de novo. See note 64 *supra.* As such, the Court declared that "[t]he committee's unambiguous and unaltered treatment of federal-sector 'civil actions' is more probative of congressional intent than the casual remark of a single Senator in the floor debate." 425 U.S. at 858 n.36. Finally, the Court refused to give Senator Williams' statement controlling weight because Senator Williams had himself earlier acknowledged that Senator Dominick was "[t]he principal architect of . . . changes dealing with the civil service area . . . ." 118 CONG. REC. 595 (1972) (remarks of Sen. Williams). The Court pointed out that this statement was made immediately after Senator Dominick had discussed the committee's decision allowing federal employees the right to bring "civil actions" in federal district court rather than restricting them to administrative ad-

The Court ended its discussion in *Chandler* by noting that the "clear expression of congressional intent" behind section 717 overcame both the general proposition advanced in earlier decisions by the Court that de novo review is generally not to be presumed,[39] and also the contention that administrative disposition of federal employment discrimination complaints would furnish an adequate basis for record review.[40] Though the Court recognized that "routine trials *de novo* in the federal courts [could] ultimately . . . defeat, rather than . . . advance the basic purposes of the statutory scheme,"[41] it felt that this issue was best left for future congressional action. For the present, the Court thought it better not to "disturb" the clear intent of Congress.[42] Accordingly, the Court reversed the judgment of the court of appeals and held that section 717(c) grants federal employees and applicants for federal employment the right to a trial de novo of employment discrimination claims.[43]

It is submitted that the Court's decision in *Chandler* is sound, and is clearly supported by the legislative history of the 1972 amendments to Title VII. This legislative history, as the *Chandler* Court correctly reasoned, indicates that Congress intended federal sector and private sector employees to enjoy parallel rights in remedying employment dis-

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judication of their complaints with substantial evidence review by the courts. 425 U.S. at 858 n.36; *see* 118 CONG. REC. 594 (1972) (remarks of Sen. Dominick). Thus, the Court refused to give Senator Williams' statement "controlling weight." 425 U.S. at 858 n.36.

The Court also dismissed a statement made by Senator Cranston near the end of the floor debate. As noted by the Court, Senator Cranston's remarks were reported in the daily edition of the Congressional Record to the effect that discrimination suits brought by federal employees would be based, as were all suits brought under Title VII, on the agency and/or Civil Service Commission record and would *not* be a trial de novo. 425 U.S. at 858 n.36, 860. The Court pointed out that approximately one year later and ten months after the 1972 amendments had been enacted, Senator Cranston informed the Senate that his statement had been incorrectly reported and the word "not" was misplaced. *Id.* Accordingly the language was corrected, and as corrected, read: "review would *not* be based on the agency and/or CSC record and would be a trial de novo." *See* 118 CONG. REC. 4929 (1972) (emphasis added). Although the Court conceded that the correction was not probative, it also refused to hold that the uncorrected version was itself probative. 425 U.S. at 858 n.36, 860. In fact, the Court stated that Senator Cranston's uncorrected statement, like that of Senator Williams, was self-contradictory in that it equated the rights of federal sector and private sector employees and then concluded that a federal sector suit was "not . . . a trial de novo." *Id., quoting* 118 CONG. REC. S. 2287 (daily ed. Feb. 22, 1972). As the Court noted, "the private-sector suit *was* to be a trial de novo." 425 U.S. at 858 n.36, 860 (emphasis in original). Hence, Senator Cranston's uncorrected statement was contradictory and could not stand even on its own merits. As a final point, the Court chose again to emphasize the fact that the Senate committee had elected to equate federal sector civil actions with private sector trials de novo and as such the committee's decision was "more probative of congressional intent than a fleeting remark in the floor debate." *Id.* Thus, the Court refused to give probative weight either to Senator Cranston's or Senator Williams's statement. *Id.*

[39] *Id.* at 861, *citing* Consolo v. Federal Maritime Commission, 383 U.S. 607, 619 n.17 (1966).

[40] 425 U.S. at 863.

[41] *Id.* at 863-64.

[42] *Id.* at 864.

[43] *Id.*

crimination.[44] As such, the Court correctly determined that federal employees should have the same right to a trial de novo as do private employees under Title VII.

B. *Brown v. GSA*

Clarence Brown was a black man employed by the General Services Administration (GSA).[45] After failing to receive a promotion, Brown filed an administrative complaint with the GSA Equal Employment Opportunity Office alleging that racial discrimination had affected the promotion decision.[46] When Brown was informed by the GSA Regional Administrator that an investigation had revealed no evidence of racial discrimination, he requested a hearing before a complaints examiner of the Civil Service Commission.[47] The examiner also found no evidence of racial discrimination, and soon thereafter the GSA rendered its final decision that no considerations of race had entered the promotional process.[48] Brown was notified of this conclusion by letter and was informed that he could either carry the administrative process further by lodging an appeal with the Board of Appeals and Review of the Civil Service Commission or he could initiate judicial review by filing suit in federal district court within thirty days.[49]

Forty-two days later, Brown filed suit in the United States District Court for the Southern District of New York seeking review of his discrimination claim.[50] Brown alleged that the court had jurisdiction under Title VII,[51] under general federal question jurisdiction,[52] under the Declaratory Judgment Act,[53] and under 42 U.S.C. section

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[44] See text and notes 34-38 *supra.*

[45] 425 U.S. at 822. Brown was classified in grade GS-7 and twice had been denied promotion to a GS-9 position, first in December 1970 and subsequently in June 1971. *Id.* Each time Brown had been one of three people recommended for the promotion but in both instances a white applicant was chosen. *Id.*

[46] *Id.* Following his first denial of promotion, Brown had filed a complaint with the GSA Equal Employment Opportunity Office alleging racial discrimination, but had withdrawn the complaint when informed that another GS-9 position would be available in the near future. *Id.*

[47] *Id.*

[48] *Id.* at 822-23.

[49] *Id.*

[50] 8 FEP Cas. 1298 (S.D.N.Y. 1973). It is clear that up to this point Brown had properly satisfied the jurisdictional and procedural requirements set forth in the rules and regulations promulgated by the Civil Service Commission and in the provisions of section 717(c). See note 6 *supra.* He pursued his complaint within the agency and upon final agency action elected not to appeal to the Civil Service Commission but rather to file suit directly in federal district court pursuant to section 717(c). What Brown failed to do, however, was to file suit within 30 days as is definitively required by section 717(c). 42 U.S.C. §2000e-16(c) (Supp. V 1975).

[51] 42 U.S.C. § 2000e *et seq.* (1970 and Supp. V 1975).

[52] 28 U.S.C. § 1331 (1970).

[53] 28 U.S.C. §§ 2201-02 (1970).

1981.[54] The district court dismissed the complaint for lack of subject matter jurisdiction.[55] The court reasoned that since Brown had not filed suit within thirty days of final agency action as required by section 717(c), the government had not consented to suit and since the doctrine of sovereign immunity bars recovery against the government without such consent, Brown's claims were thereby barred.[56] On appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment of dismissal, holding that section 717 provides "the exclusive judicial remedy for federal employee discrimination grievances."[57]

The Supreme Court in *Brown* upheld this judgment,[58] relying heavily on the legislative history of the 1972 amendments which extended Title VII's coverage to federal employees and applicants for federal employment. Noting first that nothing in section 717 itself speaks to its intended "position in the constellation of antidiscrimination law,"[59] the Court proceeded to examine the complete legislative history to ascertain the intent of Congress. From this examination, the Court determined that the congressional perception of the state of the law prior to the adoption of section 717 was that "federal employees who were treated discriminatorily had no effective judicial remedy."[60]

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[54] 42 U.S.C. § 1981 (1970).

[55] 8 FEP Cas. 1298 (S.D.N.Y. 1973).

[56] *Id.*

[57] 507 F.2d 1300, 1306, 8 FEP Cas. 1299, 1303 (2d Cir. 1974). The court of appeals emphasized the fact that statutes such as section 717 which waive sovereign immunity must be strictly construed. As a result, since Brown had not met the section 717(c) requirement of filing suit within 30 days of final agency action, his suit had to be dismissed. *Id.* at 1307, 8 FEP Cas. at 1304.

The court of appeals also ruled that section 717 operates retroactively and is available to any employee whose administrative complaint was pending at the time that section 717 became effective on March 24, 1972. *Id.* at 1306, 8 FEP Cas. at 1303. This aspect of the decision was presumably not appealed to the Supreme Court since the Court noted in a footnote that "[t]he parties have apparently acquiesced in this holding . . . and we have no occasion to disturb it." 425 U.S. at 824 n.4. The court of appeals also ruled that even if section 717 did not preempt other remedies, Brown improperly failed to exhaust his administrative remedies and his claim would fail on that basis. 507 F.2d at 1307, 8 FEP Cas. at 1304. The court noted that even though Brown obtained a final agency decision, he did not appeal the decision to the Board of Appeals and Review of the Civil Service Commission as is provided for in 5 C.F.R. §§ 713.231-.234 (1977). See note 6 *supra*. Since appeal to that board might have resulted in Brown's attaining the relief he sought, the court of appeals concluded that Brown had "inexcusably failed to exhaust available administrative remedies." 507 F.2d at 1308, 8 FEP Cas. at 1305. Since the Supreme Court held that section 717 preempted all other judicial remedies, it did not need to reach the issue of exhaustion of remedies. *See* 425 U.S. at 835.

[58] The court decided *Brown* by a 6-2 majority. Mr. Justice Stewart authored the opinion. Mr. Justice Marshall took no part in the consideration or decision of the case.

[59] 425 U.S. at 825.

[60] *Id.* at 828. *See, e.g.*, H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 25 (1971); S. REP. NO. 92-415, 92d Cong., 1st Sess. 16 (1971); 118 CONG. REC. 4929 (remarks of Sen. Cranston) (1972). *Equal Employment Opportunities Enforcement Act of 1971: Hearings on S.2515 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public*

The Court went on to state that this congressional perception, whether correct or incorrect, was controlling in determining the legislative intent behind the 1972 amendments.[61] This perception indicated to the Court that Congress was attempting to create "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination."[62] The Court found additional support for this conclusion in "[t]he balance, completeness, and structural integrity of [section] 717."[63] The Court explained that section 717 both establishes a comprehensive administrative system in which the Civil Service Commission has full authority to enforce its provisions,[64] and also provides an aggrieved employee with the right to file a civil action in federal district court.[65] These complementary administrative and judicial powers of enforcement, the Court reasoned, could only be seen as evidence of a congressional intention to provide an *exclusive* remedy for federal employees.[66] The Court pointed out that if other remedies were to be left available to federal employees, "[section] 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency" simply by the use of artful pleading.[67]

The Court in *Brown* concluded its discussion by invoking the canon of construction that "a precisely drawn, detailed statute preempts more general remedies."[68] Since section 717 was such "a precisely drawn, detailed statute," while other statutes under which Brown had filed suit were "more general remedies,"[69] the Court applied this canon to the situation in *Brown*. This application further supported the Court's conclusion that section 717 "provides the exclusive judicial remedy for claims of discrimination in federal employment."[70] Since Brown had failed to file his complaint within the thirty-day period allowed by section 717 (c), the Court held that the case had been properly dismissed and therefore affirmed the judgment of the court of appeals.[71]

Mr. Justice Stevens, joined by Mr. Justice Brennan, dissented in *Brown*, reasoning that Congress intended the 1972 amendments to

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Welfare, 92d Cong., 1st Sess. 296 (1971); *Equal Employment Opportunity Enforcement Procedures: Hearings on H.R. 1746 before the General Subcommittee on Labor of the House Committee on Education and Labor*, 92d Cong., 1st Sess. 391-92 (1971).

[61] 425 U.S. at 828.

[62] *Id.* at 829.

[63] *Id.* at 832.

[64] *See* 42 U.S.C. § 2000e-16(b) (Supp. V 1975).

[65] 42 U.S.C. § 2000e-16(c) (Supp. V 1975).

[66] 425 U.S. at 832-33.

[67] *Id.* at 833.

[68] *Id.* at 834. The Court relied on Preiser v. Rodriguez, 411 U.S. 475 (1973); United States v. Demko, 385 U.S. 149 (1966); Patterson v. United States, 359 U.S. 495 (1959); Johansen v. United States, 343 U.S. 427 (1952). See text at notes 95-104 *infra*.

[69] See text and notes 51-54 *supra*.

[70] 425 U.S. at 835.

[71] *Id.*

allow federal employees enjoyment of the same rights as private employees in remedying employment discrimination claims.[72] The dissent relied on the Court's statement in *Chandler v. Roudebush*[73] that the history of the 1972 amendments indicated Congress was attempting to accord " '[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under Title VII.' "[74] Since it was well established that private employees have a choice of remedies and are not limited exclusively to Title VII,[75] the dissent argued that federal employees should have parallel rights.[76]

It is submitted that the position advanced by the dissent in *Brown* is a sound one. The majority based its conclusion that section 717 provides the exclusive judicial remedy for federal employment discrimination on three grounds: first, the legislative history of the 1972 amendments which indicated a congressional perception that there was no available judicial remedy for federal employment discrimination prior to 1972;[77] second, "[t]he balance, completeness, and structural integrity of [section] 717;"[78] and third, the applicability of the canon of construction that "a precisely drawn, detailed statute preempts more general remedies."[79] None of these grounds, however, is persuasive.

The first ground upon which the *Brown* majority based its holding was that the legislative history indicated a congressional perception that there was no available remedy for federal employment discrimination prior to 1972. This congressional perception, whether or not accurate, led the majority to conclude that Congress intended to create the *exclusive* judicial remedy for federal employees by adopting section 717.[80] This progression from the congressional perception of the underlying wrong to the legislative intent with regard to the remedy adopted, however, is difficult to justify logically. Simply because Congress thought when it enacted section 717 that no other remedy for federal employment discrimination existed, it does not follow a fortiori that Congress intended to create an *exclusive* remedy. Congress could have assured the exclusivity of the section 717 remedy simply by writing such language into the section. It did not do so. Taken alone, the congressional perception that no remedies existed for the resolution of federal employment discrimination grievances does not indicate a congressional intent to create an exclusive remedy. In the ab-

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[72] *Id.* at 836-39 (Stevens, J., dissenting).

[73] 425 U.S. 840 (1976). See text at notes 12-44 *supra*.

[74] 425 U.S. at 841, *quoting* S. REP. No. 92-415, 92d Cong., 1st Sess. 16 (1971).

[75] *See, e.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974).

[76] 425 U.S. at 838 (Stevens, J., dissenting).

[77] *Id.* at 828.

[78] *Id.* at 832.

[79] *Id.* at 834.

[80] *Id.* at 829.

sence of explicit congressional intent, the proper role for the Court in construing the statute was not to presume this intent, but rather, as Justice Stevens noted in dissent, "simply [to] read the statute as Congress wrote it."[81] Such a reading of section 717 would have led to the conclusion that Congress was creating *a remedy* for employment grievances, but not necessarily an exclusive one.

The second factor upon which the majority based its determination that section 717 was the exclusive judicial remedy for federal employment discrimination was "the balance, completeness, and structural integrity of [section] 717."[82] This structural analysis, however, does not justify the majority's holding in *Brown*. Although the system created by section 717, with its blend of administrative and judicial enforcement powers is an extensive one, the sections of Title VII governing private employees are comparably extensive.[83] These sections require numerous administrative preconditions[84] and, although they do not grant administrative enforcement powers comparable to those granted to the Civil Service Commission under section 717(b),[85] they do call for the extensive involvement of both the EEOC and the Attorney General.[86] The comprehensiveness of these sections relating to private employees was not viewed by the Court in *Johnson v. Railway Express Agency, Inc.*[87] as an obstacle to permitting private employees to

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[81] *Id.* at 839 (Stevens, J., dissenting).

[82] *Id.* at 832.

[83] *See* 42 U.S.C. §§ 2000e-5 (1970 & Supp. V 1975). These sections governing private employees provide that if the state in which the alleged discrimination took place has a state law prohibiting the challenged practice and authorizing a state agency to grant relief, then the employee must initially file his complaint with the state. 42 U.S.C. § 2000e-5(c) (Supp. V 1975). If the issue is not resolved within 60 days, or within 120 days if the state law is in its first year, *id.*, then the employee may file a charge with the EEOC within 300 days of the alleged violation. 42 U.S.C. § 2000e-5(e) (Supp. V 1975). Absent any applicable state law, the employee must file a charge with the EEOC within 180 days of the alleged violation. *Id.* Within ten days of receiving a complaint, the EEOC must notify the employer. 42 U.S.C. § 2000e-5(b) (Supp. V 1975). The EEOC then investigates the charge. *Id.* If the EEOC determines there is not reasonable cause to believe the charge is true, then it must dismiss the charge and promptly notify all parties. *Id.* If the investigation reveals there is reasonable cause to believe the charge is true, then the EEOC must attempt to eliminate the discriminatory practice through informal "conference, conciliation, and persuasion." *Id.* If a conciliation agreement is not secured within 30 days of the filing of the charge, the EEOC, or the Attorney General if the charged party is a government, governmental agency, or political subdivision, may bring a civil action against the employer. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). If after investigation of the charge the EEOC either finds no reasonable cause to believe the charge or finds reasonable cause but fails to secure a conciliation agreement or to bring suit, then the employee must be so notified. *Id.* The employee may then file a civil action in federal district court within 90 days of the receipt of such notice. *Id.* An employee may also request and receive such notice of his right to sue any time after 180 days of the filing of his charge, if at the time the employee requests the notice the EEOC has not settled the complaint to his satisfaction. *Id.*

[84] See note 83 *supra*.

[85] 42 U.S.C. § 2000e-16(b) (Supp. V 1975).

[86] See note 83 *supra*.

[87] 421 U.S. 454 (1975).

seek remedies independent of Title VII. The *Johnson* Court, holding that Title VII did not preempt other private employment discrimination remedies,[88] stated that "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief."[89] The Court in *Brown* distinguished its holding in *Johnson* on two grounds. First, the Court pointed out that *Johnson* had not involved any problems of sovereign immunity, since in *Johnson* the government was not a defendant, as it was in *Brown*.[90] Second, and more important to the Court, was the fact that *Johnson* had relied on the legislative history of Title VII as it was originally enacted in 1964. That history, the Court stated, in direct contrast to the legislative history of the 1972 amendments, evinced a " 'congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' "[91] Thus, the *Brown* Court concluded that *Johnson* was distinguishable since the legislative history relied on in *Johnson* differed markedly from the legislative history relied on in *Brown*.[92]

It is submitted, however, that the Court's position that the legislative histories of the 1964 Act and the 1972 amendments are different is not tenable in light of the Court's decision in *Chandler*. In *Chandler*, the Court established conclusively that the legislative history of the 1972 amendments indicated that Congress intended federal employees to have available the same rights to remedy employment discrimination as were available to private employees.[93] As a result, the reasoning which dictated the decision in *Johnson* should have governed in *Brown*, for, as Justice Stevens noted in dissent, "[t]here is no evidence, either in the statute itself or in its history, that Congress intended the 1972 Amendment to be construed differently from the basic statute."[94] Thus, the Court's use of its structural analysis of section 717 to support its determination that section 717 is the exclusive judicial remedy for federal employment discrimination grievances was unwarranted.

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[88] *Id.* at 459.

[89] *Id.*

[90] 425 U.S. at 833.

[91] *Id., quoting Johnson,* 421 U.S. at 459, *quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974).

[92] 425 U.S. at 834.

[93] 425 U.S. at 858. See note 34 *supra*.

[94] *Id.* at 837 (Stevens, J., dissenting). It should be noted that Justice Stevens' logic also counters the majority's contention that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 833. By allowing federal employees and applicants for employment to pursue other remedies besides section 717, the congressional "scheme" in section 717 would be circumvented not by "artful pleading," but rather, as in private cases, by the exercise of additional available rights.

The final basis upon which the majority rested its holding in *Brown* was the canon of construction that "a precisely drawn, detailed statute pre-empts more general remedies."[95] In support of this principle, the majority cited one case involving a habeas corpus action[96] and several cases involving attempts by injured federal employees to proceed under facially applicable tort recovery statutes.[97] The habeas corpus action, *Preiser v. Rodriquez*,[98] involved a state prisoner who, in challenging his loss of good-behavior-time credits, attempted to proceed under 42 U.S.C. section 1983[99] rather than under the federal habeas corpus statute which provided a specific federal remedy but first required exhaustion of state remedies.[100] In holding that the federal habeas corpus statute provided the exclusive means of relief, the *Preiser* Court stated that:

> [t]he rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. . . . It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of these problems.[101]

Accordingly, the *Preiser* Court ruled that the federal habeas corpus statute preempted section 1983, but it was primarily the interest in federal-state comity upon which preemption was based in *Preiser*, rather than the displacement of a general remedy by a detailed one.

In the other cited cases, the Court had held that specific compensation statutes preempted more general tort recovery statutes.[102] In those cases, however, the preemption of the more general tort recovery statutes by specific compensation statutes was based on the Court's admitted recognition of an "historic truth"[103] that "compensa-

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[95] *Id.* at 834.

[96] Preiser v. Rodriguez, 411 U.S. 475 (1973).

[97] United States v. Demko, 385 U.S. 149 (1966) (the compensation system in 18 U.S.C. § 4126 (1970) preempts the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1970); Patterson v. United States, 359 U.S. 495 (1959) (Federal Employees' Compensation Act, 39 Stat. 742 *et seq.*, 5 U.S.C. § 751 *et seq.*, (1970), preempts Admiralty Act, 41 Stat. 525 *et seq.*, 46 U.S.C. § 741 *et seq.* (1970); Johansen v. United States, 343 U.S. 495 (1959) (Federal Employees' Compensation Act, 39 Stat. 742 *et seq.*, 5 U.S.C. § 751 *et seq.* (1970), preempts Public Vessels Act, 43 Stat. 1112, 46 U.S.C. § 781 *et seq.* (1970)).

[98] 411 U.S. 475, 476-77 (1973).

[99] 42 U.S.C. § 1983 (1970).

[100] 28 U.S.C. § 2254 (1970).

[101] 411 U.S. at 491-92.

[102] See note 97 *supra*.

[103] United States v. Demko, 385 U.S. 149, 151 (1966).

tion laws are practically always thought of as substitutes for, not supplements to, common-law tort actions."[104] Thus in those cases, just as in *Preiser,* preemption was not primarily based on the canon of construction that general remedies are preempted by precisely drawn, detailed statutes. Consequently, all of the cases which the Court cited in support of its principle that a precisely drawn, detailed statute preempts more general remedies are distinguishable from *Brown,* and do not require application of the principle in that case.

It is submitted, therefore, that a proper reading of section 717 and its legislative history supports the dissent's view that federal sector and private sector employees were intended to enjoy parallel rights to redress employment discrimination grievances, and that accordingly federal employees should have a choice of remedies for such grievances not limited to Title VII. Nevertheless, the Court's decision in *Brown* unequivocally holds that section 717 of Title VII is the exclusive remedy available to federal employees for the redress of employment discrimination.

In both *Chandler* and *Brown* the Court resolved important issues under section 717 of Title VII concerning adjudication of federal employment discrimination grievances. Yet, the theoretical underpinnings of these decisions are seemingly at variance. In *Brown,* the Court held section 717 to be the exclusive judicial remedy for claims of discrimination in federal employment, while in *Chandler* it held section 717 to entitle federal employees and applicants for federal employment to a trial de novo of such claims. Thus, although the Court conclusively established in *Chandler* that Congress intended section 717 to accord federal and private sector employees parallel remedies for employment discrimination claims, the Court ignored this intent in *Brown.* Consequently, in *Brown* the Court refused to allow federal sector employees access to the remedies other than Title VII which are available to private sector employees. In *Chandler,* however, the Court did accord federal sector employees the same right to a trial de novo enjoyed by private sector employees. *Brown* thus manifests a restrictive view of the scope of the rights of federal employees and applicants for employment under section 717, and *Chandler* an expansive view.

In practice, these divergent opinions can be viewed together as a compromise of sorts. Under this compromise, although federal employees and applicants for federal employment may obtain judicial review of employment discrimination claims only through section 717 of Title VII, they are assured nevertheless that they may present those claims fully in a de novo proceeding.

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[104] *Id., citing* Patterson v. United States, 359 U.S. 495 (1959) *and* Johansen v. United States, 343 U.S. 427 (1952).

IX. STANDING IN TITLE VII ACTIONS: *Waters, Gray, RWDSU*

Title VII permits charges of unlawful employment practices filed with the Equal Employment Opportunity Commission (EEOC) to be made "by or on behalf of a person claiming to be aggrieved."[1] If the EEOC does not dispose of the charge to the charging party's satisfaction, the "person aggrieved" is then authorized to bring suit in federal district court to redress the challenged employment practice.[2] Accordingly, an initial question arising in any Title VII action is whether the party suing is such a "person aggrieved" within the meaning of Title VII. Courts generally consider this question in the context of a challenge to the plaintiff's standing. The challenge may occur whether the plaintiff is an individual or an organization. This chapter will discuss the issue of standing in the context of Title VII suits by both persons and organizations.

A. *Personal Standing*

The standing doctrine as applied in federal courts has two dimensions, one constitutional and one prudential.[3] The constitutional dimension is based upon the language of article III that federal judicial power is limited to the hearing of "cases" and "controversies."[4] The question of standing focuses on the party before the court and tests whether that party has " 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[5] The plaintiff must allege "actual injury redressable by the court."[6] In addition, the alleged injury must "fairly . . . be trace-[able] to the challenged action of the defendant."[7] Satisfaction of this constitutionally mandated standing requirement of "injury in fact" is necessary to invoke the jurisdiction of a federal court. However, a plaintiff who has satisfied the constitutional minimum may yet lack standing because of the further existence of prudential limitations on the doctrine of standing.

The prudential limitations on standing encompass judicially developed rules of self-restraint. One such rule is generally applied where the party seeking relief asserts a legal interest created by statute. It is phrased in terms of a "zone of interest" test: is the interest

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[1] 42 U.S.C. § 2000e-5(b) (Supp. V 1975). *See also id.* § 2000e-5(e).

[2] *Id.* § 2000e-5(f)(1), (3).

[3] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[4] U.S. CONST. art. III, § 2, cl. 1.

[5] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976), *quoting* Warth v. Seldin, 422 U.S. 490, 498-99 (1975), *quoting* Baker v. Carr, 369 U.S. 186, 204 (1962) (emphasis added in *Warth*).

[6] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 39 (1976).

[7] *Id.* at 41.

which the party is asserting "arguably within the zone of interest to be protected or regulated by the statute . . . in question [?]"[8] Another rule applied to determine standing generally prohibits a litigant from asserting the rights or legal interests of third parties.[9] For example, a party claiming to be injured by harm done to other persons may be precluded from litigating the rights of those third parties.[10] However, prudential standing rules, unlike the constitutionally required showing of "injury in fact," can be altered by Congress.[11] Congress does so by conferring legal interests on persons, the invasion of which injures them in fact.[12] Indeed, by permitting "persons aggrieved" to sue under Title VII, Congress has created such a legal interest in freedom from employment discrimination which is coterminous with the injury in fact requirement of article III. By so doing, Congress has authorized standing as broadly as permitted by the Constitution.

Courts first recognized that Congress had broadly authorized standing in Title VII actions in *Hackett v. McGuire Brothers, Inc.*[13] *Hackett* involved suit by a black former employee against his former employer claiming that the employer had discriminated on the basis of race against the employee by maintaining discriminatory job conditions.[14] The employee Hackett also claimed that he had been discharged from his employment solely because of his race.[15] Hackett filed charges of discrimination with the EEOC and received notice of his right to sue.[16] After receiving this notice but before commencing his suit, Hackett applied for and was granted a pension from his former employer.[17] On the basis of this pensioner status the district court denied Hackett standing to sue for the past discrimination.[18] The United States Court of Appeals for the Third Circuit reversed, holding that Hackett was a "person aggrieved" within the meaning of Title VII.[19] In particular, the court noted that the language "a person claiming to be aggrieved" in Title VII "shows a congressional inten-

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[8] Association of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 153 (1970).

[9] Warth v. Seldin, 422 U.S. 490, 509 (1975).

[10] *See id.* at 509-10, in which the Court barred taxpayers claiming to be adversely affected by the zoning policies of a neighboring municipality from asserting the constitutional and statutory rights of third parties who were excluded by such policies.

[11] *Id.* at 509.

[12] Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976). *See also* Warth v. Seldin, 422 U.S. 490, 512-13 (1975).

[13] 445 F.2d 442, 3 FEP Cas. 648 (3d Cir. 1971).

[14] *Id.* at 444, 3 FEP Cas. at 649. The conditions of which the employee complained were the maintenance of separate lines of seniority and vacation schedules for certain employees, including himself, and the existence of harrassment and intimidation to which he was subjected. *Id.*

[15] *Id.* In addition to stating claims against his employer, Hackett charged his union with acquiescing in the employer's discrimination. *Id.*

[16] *Id.* at 444-45, 3 FEP Cas. at 649-50.

[17] *Id.* at 445, 3 FEP Cas. at 650.

[18] 321 F. Supp. 312, 314, 2 FEP Cas. 1076, 1078 (E.D. Pa. 1970).

[19] 445 F.2d at 445, 3 FEP Cas. at 650.

tion to define standing as broadly as is permitted by Article III of the Constitution."[20] Since Hackett had alleged the requisite "injury in fact," the court thus recognized Hackett's standing.[21]

The Supreme Court impliedly approved of the *Hackett* result in *Trafficante v. Metropolitan Life Insurance Co.*,[22] a suit brought under Title VIII of the Civil Rights Act of 1968.[23] *Trafficante* involved suit by a white and a black tenant of an apartment complex, both of whom alleged that the apartment owner discriminated against black apartment applicants on the basis of race in violation of Title VIII.[24] Title VIII permits suit by any "person aggrieved," defined as "[a]ny person who claims to have been injured by a discriminatory housing practice. . . ."[25] The tenants alleged that they had been injured by the apartment owner's discriminatory practices in that:

> (1) they [the tenants] had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; [and] (3) they had suffered embarassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto."[26]

Both the district court [27] and the court of appeals[28] denied the tenants standing, determining that since they had not been the objects of the alleged discrimination, they lacked standing to challenge it. The Supreme Court reversed.[29] The Court initially noted that *Hackett* had established the principle in Title VII suits that standing to sue was as broad as constitutionally permissible.[30] The Court then stated that it "reach[ed] the same conclusion" with respect to suits brought under Title VIII of the Civil Rights Act of 1968 at least insofar as "tenants of the same housing unit that is charged with discrimination are concerned."[31] Accordingly, since the tenants had alleged the requisite present injury,[32] the Court determined that they had standing to challenge the housing discrimination. A concurring opinion specifically recognized that the plaintiffs in *Trafficante* had standing only because of the broad congressional authorization to sue present in Title VIII

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[20] *Id.* at 446, 3 FEP Cas. at 650.

[21] *Id.* at 446, 3 FEP Cas. at 650-51.

[22] 409 U.S. 205 (1972).

[23] Pub. L. No. 90-284, § 804, 82 Stat. 83 (current version at 42 U.S.C. § 3604 (Supp. V 1975)).

[24] 409 U.S. at 206-07.

[25] 42 U.S.C. § 3610(a) (1970).

[26] *Trafficante*, 409 U.S. at 208.

[27] 322 F. Supp. 352, 353 (N.D. Cal. 1971) (mem. op.).

[28] 446 F.2d 1158, 1163-64 (9th Cir. 1971).

[29] 409 U.S. at 208.

[30] *Id.* at 209. See text at note 20 *supra*.

[31] 409 U.S. at 209.

[32] *Id.* at 209-10.

of the Civil Rights Act of 1968.[33] Absent the statute, the concurring Justices stated, the plaintiffs would lack standing.[34]

Trafficante exposits the Supreme Court's view on the issue of standing under civil rights statutes authorizing suit by "persons aggrieved." When suing under such statutes, a party need meet only the constitutionally required showing of "injury in fact" caused by the defendant's actions. Since Title VII is such a civil rights statute authorizing suit by "persons aggrieved,"[35] courts in a Title VII action need focus only on the constitutionally required minimum showing in determining issues of standing.[36]

During the Survey year courts have recognized this constitutional minimum in the context of challenges to individual plaintiff's standing. Thus, in *Gray v. Greyhound Lines, East*[37] the United States Court of Appeals for the District of Columbia Circuit found that a current employee had suffered the requisite "present injury" as a result of the employer's allegedly discriminatory hiring practices.[38] *Gray* involved suit by a black Greyhound employee, alleging that Greyhound's hiring practices discriminated against blacks.[39] Greyhound moved for summary judgment on the grounds that since the employee had been hired on his first application, he had suffered no injury from the challenged practices. Accordingly, Greyhound argued, the employee lacked standing to sue.[40] The United States District Court for the District of Columbia granted the motion for summary judgment.[41] The court of appeals, however, reversed and held that the plaintiff did have standing to sue.[42] The appeals court stressed that it was reviewing a summary judgment action in which the moving party, in this case Greyhound, "bears the burden of presenting evidence which demonstrates the nonexistence of any issue of material fact."[43] In the case before it the employee had specified the nature of his injury in deposition and affidavit:

> [The employee] claimed that by improperly restricting the number of blacks hired Greyhound's policies rendered those blacks who were employed vulnerable to arbitrary discipline, discriminatory treatment in assignment of routes and equipment, and inadequate representation by the

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[33] *Id.* at 212 (White, J., concurring).

[34] *Id.* For further discussion of the theoretical difference between the majority and the concurrence in *Trafficante*, see note 73 *infra*.

[35] 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

[36] *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 517, 12 FEP Cas. 451, 455 (6th Cir. 1976).

[37] 545 F.2d 169, 13 FEP Cas. 1401 (D.C. Cir. 1976).

[38] *Id.* at 175, 13 FEP Cas. at 1405.

[39] *Id.* at 171-72, 13 FEP Cas. at 1402.

[40] *Id.* at 173, 13 FEP Cas. at 1403-04.

[41] 10 FEP Cas. 259, 260 (D.D.C. 1975).

[42] 545 F.2d at 176-77, 13 FEP Cas. at 1406.

[43] *Id.* at 174, 13 FEP Cas. at 1404-05.

> union. He also claimed that the isolation he felt as a result of being one of the favored blacks who had slipped through the allegedly discriminatory screening practices adversely affected his mental state.[44]

The court noted that this claim of injury was not controverted by Greyhound. Accordingly, the court determined that Greyhound would be entitled to summary judgment only if the allegations of injury were insufficient to confer standing on the plaintiff.[45] The court then concluded that the allegations were sufficient since the plaintiff claimed "injury in fact as a result of defendant's allegedly illegal practices."[46] Since Title VII allowed suit whenever constitutionally permitted and since the plaintiff had met the constitutional minimum, the court recognized the plaintiff's standing.[47]

Alternatively the court in *Gray* concluded that even if Congress had not authorized standing under Title VII as broadly as constitutionally permissible, the plaintiff would still have had standing. This result obtained since in addition to having satisfied the constitutional "injury in fact" test of standing, the plaintiff had also met the prudential "zone of interest" test:[48] since the plaintiff complained that Greyhound's discriminatory hiring practices adversely affected his own employment conditions, his claim was "clearly within the scope of Title VII's protection."[49]

As a final point, the court in *Gray* concluded that the plaintiff's claim of psychological harm from the hiring discrimination itself satisfied the "zone of interest" test. The court noted that the EEOC has consistently concluded that Title VII grants an employee a right to "a working environment free of racial intimidation."[50] Judicial decisions, too, the *Gray* court pointed out, have recognized in Title VII "a congressional purpose 'to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.' "[51] Accordingly, the *Gray* court concluded that a claim of psychological injury from employment discrimination was redressable under Title VII.[52]

Another Survey year case treating the issue of the standing of an individual to sue under Title VII is the Ninth Circuit's decision of *Waters v. Heublein, Inc.*[53] In *Waters* a white woman sued her employer

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[44] *Id.* at 173, 13 FEP Cas. at 1404.

[45] *Id.* at 175, 13 FEP Cas. at 1405.

[46] *Id.* at 176, 13 FEP Cas. at 1406.

[47] *Id.*

[48] *Id.* See text at note 81 *supra.*

[49] 545 F.2d at 176, 13 FEP Cas. at 1406.

[50] *Id., quoting* EEOC Decision No. 74-84, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6450 (1975).

[51] 545 F.2d at 176, 13 FEP Cas. at 1406, *quoting* Rogers v. EEOC, 454 F.2d 234, 238, 4 FEP Cas. 92, 94 (5th Cir. 1971) (opinion of Goldberg, J.), *cert. denied,* 406 U.S. 957 (1972).

[52] 545 F.2d at 176, 13 FEP Cas. at 1406.

[53] 547 F.2d 466, 13 FEP Cas. 1409 (9th Cir. 1976).

alleging discrimination against women, blacks and Hispanics.[54] The district court dismissed Water's claims of discrimination based on race and national origin on the ground that she lacked standing to pursue them.[55] The court of appeals reversed, finding the case "logically indistinguishable" from *Trafficante*.[56] *Trafficante* had permitted a white person to sue to redress housing discrimination against blacks because the white person claimed that the discrimination caused him to lose "important benefits from interracial association."[57] Similarly, the circuit court in *Waters* reasoned, discrimination in employment would cause white employees to suffer the loss of interracial association.[58] Such association, the court noted, was no less important in employment than in housing:

> Indeed, in modern America, a person is as likely, and often more likely, to know his fellow workers than the tenants next door or down the hall. The possibilities of advantageous personal, professional or business contacts are certainly as great at work as at home. The benefits of interracial harmony are as great in either locale.[59]

Accordingly, the court permitted the white woman to raise the issue of employment discrimination against blacks and Hispanics.[60]

Both the *Waters* court and the *Gray* court applied the correct standing test in Title VII actions. That test requires simply the constitutional showing of "injury in fact" caused by the defendant's actions.[61] *Gray* applied this standard, deciding properly that employee

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[54] *Id.* at 467, 13 FEP Cas. at 1409.

[55] 8 FEP Cas. 908, 909 (N.D. Cal. 1974).

[56] 547 F.2d at 469, 13 FEP Cas. at 1411.

[57] 409 U.S. at 209-10. See text at notes 22-34 *supra* for discussion of *Trafficante*.

[58] 547 F.2d at 469, 13 FEP Cas. at 1411.

[59] *Id.*

[60] *Id.* at 470, 13 FEP Cas. at 1412.

[61] *But see* EEOC v. Beaver Gasoline Co., —— F. Supp. ——, 14 FEP Cas. 1343 (W.D. Pa. 1977). There, the United States District Court for the Western District of Pennsylvania dismissed an action brought by the EEOC predicated on a charge of sex discrimination filed by a male. The man had filed the charge, alleging that he had been demoted from his position as manager of a gas station because he had hired a female attendant. *Id.* at ——, 14 FEP Cas. at 1344. The district court determined that because the man had not suffered discrimination because of *his* sex, he was not a "person aggrieved" within the meaning of Title VII. *Id.* at ——, 14 FEP Cas. at 1345. The court then determined that since no valid administrative charge had been filed, the EEOC had no authority to bring suit. *Id.* at ——, 14 FEP Cas. at 1347. Accordingly, the court dismissed the action. *Id.* at ——, 14 FEP Cas. at 1348.

Under the *Trafficante* rationale of the *Waters* and *Gray* decisions, the court's ruling in *EEOC v. Beaver Gasoline* was erroneous. *Trafficante*, *Waters* and *Gray* establish that nondiscriminatees have standing to sue to redress discrimination so long as the nondiscriminatees have alleged injury as a result of the discrimination. Since the man who filed the charge in *EEOC v. Beaver Gasoline* alleged injury to himself—*viz.*, demotion—because of his employer's discrimination, he had standing under the *Trafficante* rationale to complain of the discrimination. Hence the court should have permitted the EEOC to sue on his behalf.

Gray had alleged injury in fact, namely, psychological harm and discriminatory job treatment, caused by the defendant employer's discriminatory hiring practices.[62] These allegations sufficed to grant the employee standing to raise in his suit the rights of the black employment applicants. Similarly the decision in *Waters* is correct. Although the *Waters* court failed to mention the allegations of the complaint, it appears from the district court opinion that the woman suing had alleged psychological injury from working in an environment which was not free from discrimination.[63] Accordingly, under the *Trafficante* rationale, the woman had standing to raise the rights of the third party discriminatees. Since the circuit courts[64] and impliedly the Supreme Court[65] have recognized that Congress has created in Title VII an employee's interest in working in a nondiscriminatory environment, courts are correct to grant standing to redress the employment discrimination of those employees deprived of a nondiscriminatory workplace.

B. *Organizational Standing*

Courts during the Survey year have also confronted challenges to the standing of organizations to sue under Title VII. Such challenges require consideration of *Warth v. Seldin*,[66] a leading Supreme Court case discussing issues of organizational standing. *Warth* involved a challenge on various constitutional grounds to the exclusionary zoning practices of a New York community.[67] Plaintiffs included an association of community residents claiming that exclusionary zoning denied its members the benefits of living in an integrated community[68] and an association of construction firms who claimed that the zoning practices denied its members business opportunities and profits.[69] In deciding a challenge to both associations' standing, the Supreme Court established principles for determining such claims. The Court initially

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[62] 545 F.2d at 173, 176, 13 FEP Cas. at 1404, 1406.

[63] 8 FEP Cas. 908, 909 (N.D. Cal. 1974).

[64] *See Hackett*, 445 F.2d at 446, 3 FEP Cas. at 650 (3d Cir.); Senter v. General Motors Corp., 532 F.2d 511, 517, 12 FEP Cas. 451, 455 (6th Cir. 1976); *Waters*, 547 F.2d at 469-70, 13 FEP Cas. 1411-12 (9th Cir.) (by implication); *Gray*, 545 F.2d at 176, 13 FEP Cas. at 1406 (D.C. Cir.).

[65] *See Trafficante*, 409 U.S. at 209. *Trafficante's* continuing validity was recognized in the two recent Supreme Court cases on standing. *See* Simon v. Easter Ky. Welfare Rights Org., 426 U.S. 26, 41 n.22 (1976); Warth v. Seldin, 422 U.S. 490, 512-14 (1975).

[66] 422 U.S. 490 (1975).

[67] *Id.* at 493. Plaintiffs claimed that the town's zoning ordinance excluded persons of low and moderate income from living in the community, thereby violating both the plaintiffs' first, ninth and fourteenth amendment rights and 42 U.S.C. §§ 1981-83 (1970). *Id.*

[68] *Id.* at 512.

[69] *Id.* at 514-15. Other plaintiffs included individuals of low and moderate income who claimed to have been excluded by the zoning practices, *id.* at 502-03, and taxpayers of an adjacent city alleging that their taxes were increased because the challenged community failed to provide its share of low and moderate income housing. *Id.*

stated that an organization has standing to sue for injury to itself.[70] Moreover, the Court noted, an organization may have standing to sue as the representative of its members even absent direct injury to itself.[71] In such an instance the association must allege injury to one or all of its members of the sort sufficient to establish a case or controversy had the members themselves brought suit.[72] Thus, the Court would analyze the standing of the organizations' members in order to determine the standing of the organization itself. In applying such analysis in *Warth,* the Court denied standing to the organization of community residents. The Court determined that the members lacked standing in their own right to challenge the practices,[73] and that consequently the organization also lacked standing.[74]

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at 508-09. In addition, a second association of builders attempted to intervene as plaintiff. *Id.* at 497. The association's motion to intervene was denied, *id.* at 517, and the complaint was dismissed as to all plaintiffs because all plaintiffs lacked standing. *Id.* at 518.

[70] *Id.* at 511.

[71] *Id.*

[72] *Id.*

[73] The Court concluded that even though the plaintiff association alleged that its members suffered injury from living in a nonintegrated community, the *Trafficante* decision did not operate to grant the association standing. *Id.* at 512. The Court distinguished *Trafficante* on the ground that the plaintiffs there stated a claim under the Civil Rights Act of 1968, Pub. L. No. 90-284, § 804, 82 Stat. 83 (current version at 42 U.S.C § 3604 (Supp. V 1975)), which included a broad definition of "person aggrieved." 422 U.S. at 512-13. The plaintiffs in *Warth,* on the other hand, had asserted no such statutory claim. *Id.* at 513. Accordingly the Court determined that the plaintiffs could not rely on *Trafficante* to support their standing claim. *Id.* at 514.

In discussing *Trafficante,* the *Warth* Court relied on the concurring opinion of Justices White, Blackmun and Powell, rather than the majority opinion of Justice Douglas. *Id.* at 513-14. The difference between the two opinions in *Trafficante* lies in the significance accorded the statute under which the plaintiffs were suing. The majority considered the statute to satisfy the prudential rules of standing which would normally bar the plaintiffs from asserting the rights of third parties. 409 U.S. at 212. The concurring opinion, on the other hand, considered the statute to affect the constitutional rules of standing. Absent the statute in *Trafficante,* the concurring Justices would have found it difficult to conclude that the plaintiffs had established an article III case or controversy. *Id.* at 212 (White, J., concurring). In *Warth* the majority explained the theory of the *Trafficante* concurrence thusly: "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Id.* at 514, *citing* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1975), *citing Trafficante,* 409 U.S. at 212 (White, J., concurring). In applying the principles of *Warth* and *Trafficante* to Title VII cases, the theoretical difference between the majority and the concurring opinions in *Trafficante* should not affect the results of the cases. This is so because Title VII contains an authorization to sue by "persons aggrieved" similar to that construed in *Trafficante.* Thus, whether the authorization is viewed as affecting prudential considerations—the majority position in *Trafficante*— or as affecting the constitutional "injury in fact" requirement—the concurring position in *Trafficante*—the result is the same, *viz.,* allowing persons aggrieved to sue to redress discrimination directed at others. For a discussion of the distinction between the two opinions in *Trafficante* and of the implication of that distinction see Comment, *Standing to Challenge Exclusionary Zoning in the Federal Courts,* 17 B.C. IND. & COM. L. REV. 347, 370-74 (1976).

[74] 422 U.S. at 514.

With respect to the organization of construction firms, the Court initially did not challenge the standing of its individual members to bring suit. Rather the Court determined that further inquiry into the claim for relief was necessary in order to decide the standing issue. The Court decided that for an organization to have standing, in addition to showing injury to its members, it must also show that neither the nature of the claim nor the relief sought would require the participation of its individual members in order properly to resolve the case.[75] Thus, the Court would permit an organization to sue for declaratory or injunctive relief on behalf of its members since such prospective relief would benefit the organization's injured members without requiring their participation.[76] However, absent any assignment of its individual members' claims for damages, the Court would not allow an organization to recover damages which were due its members.[77] An award of retroactive relief to the organization, the Court indicated, would not necessarily inure to the benefit of those organizational members who had actually been injured.[78] Accordingly, the Court determined that an organization would lack standing to pursue such an award.[79] On the basis of these principles the Court denied the builders' association standing[80] because of the fact that the association was seeking damages on behalf of its members which it was not authorized to collect.[81] Moreover, the Court concluded that any injury to the association's membership was particularized, requiring participation of the individual members in order to prove the claims.[82] Accordingly the Court held that the organization lacked standing to pursue the members' case.[83]

Courts during the Survey year have applied the constitutional principles articulated in *Warth* in granting standing to unions to sue in Title VII actions on behalf of their members. In *Local 194, Retail, Wholesale and Department Store Union (RWDSU) v. Standard Brands, Inc.*[84] the Seventh Circuit permitted a union to sue the employer to redress allegedly discriminatory hiring and promotion practices. Plaintiffs included three individuals and the union.[85] The district court

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[75] *Id.* at 511.
[76] *Id.* at 515.
[77] *Id.*
[78] *Id.* at 515-16.
[79] *Id.*
[80] *Id.* at 516.
[81] *Id.* at 515.
[82] *Id.* at 515-16.
[83] The association had also joined the other plaintiffs' prayer for prospective relief. *Id.* at 515. The Court concluded that it also lacked standing to pursue such relief on the ground that it had not alleged facts sufficient to establish a case or controversy with respect to any of its members. *Id.* at 516. Accordingly, under the principles of organizational standing outlined above, see text at note 72 *supra*, the association itself would lack standing.
[84] 520 F.2d 864, 13 FEP Cas. 499 (7th Cir. 1976).
[85] *Id.* at 865, 13 FEP Cas. at 499-500.

dismissed the suit with respect to the union, holding that the union lacked standing.[86] The circuit court reversed,[87] recognizing that the union had alleged injury, *viz*, discrimination, to some of its members.[88] Accordingly, the court applied the principles of *Warth* and recognized the union's standing to seek declaratory and injunctive relief on behalf of its members.[89] In reaching this conclusion the court rejected the defendant's argument that because union members have conflicting interests the union lacked standing to represent any of them.[90] The court noted that a union is not precluded from acting in a collective bargaining situation simply because its members may have conflicting interests.[91]. Moreover, the court pointed out, although a union has a duty to represent fairly all members without discrimination,[92] Title VII imposes no duty of exclusive representation.[93] Accordingly, the court granted the union standing to represent those employees who wished to be represented.[94]

Similarly in *Thompson v. Board of Education of the Romeo Community Schools*[95] the United States District Court for the Western District of Michigan recognized a union's standing to sue on behalf of its members. In *Thompson* two teachers' unions joined the individual plaintiffs in challenging the disability and sick leave provisions established by various school districts in the state of Michigan.[96] The defendants moved to dismiss the unions for lack of standing, but the district court denied the motion.[97] In concluding that the unions had standing, the court applied the principles of *Warth* which permit an organization to sue on behalf of members who have themselves been injured.[98] Accordingly, since the unions in *Thompson* alleged injury to some of their members,[99] the court held that the unions had standing.[100]

The district court in *Thompson* did not, however, discuss the requirement of *Warth* that the unions' standing be limited to pursuit of declaratory and injunctive relief only. Although the court would have

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[86] 13 FEP Cas. 497, 498 (N.D. Ill. 1975).

[87] 540 F.2d at 865, 13 FEP Cas. at 499.

[88] *Id.* at 865, 13 FEP Cas. at 500.

[89] *Id.* The court followed *Warth* and specifically precluded the union from seeking any monetary relief on behalf of the discriminatees. *Id.*

[90] *Id.* at 866, 13 FEP Cas. at 501.

[91] *Id.*

[92] Although not cited by the court, Title VII itself prohibits a union from discriminating against its members. 42 U.S.C. § 2000e-2(c) (1970 & Supp. V 1975).

[93] 540 F.2d at 866, 13 FEP Cas. at 501.

[94] *Id.* The court also concluded that the union need not meet the requirements of Federal Rules of Civil Procedure 23, concerning class action suits, in order for the union to have standing to represent its members. 540 F.2d at 866-67, 13 FEP Cas. at 501-02.

[95] 71 F.R.D. 398, 12 FEP Cas. 1700 (W.D. Mich. 1976).

[96] *Id.* at 400-01, 12 FEP Cas. at 1702.

[97] *Id.* at 403-04, 12 FEP Cas. at 1704-05.

[98] *Id.* at 403, 12 FEP Cas. at 1704.

[99] *See id.* at 400, 12 FEP Cas. at 1702.

[100] *Id.* at 404 & n.7, 12 FEP Cas. at 1705 & n.7.

been more correct to state this limitation, its failure to do so does not render the result of the case erroneous for two reasons: the nature of the claim stated in *Thompson* and the posture of the case.

The claim stated in *Thompson* was one of continuing violation of Title VII.[101] Should the plaintiffs establish their case, relief would therefore consist of both an injunction and a possible award of back benefits.[102] Thus, in *Thompson* the claim was amenable to the prospective relief for which the union did have standing to sue. Accordingly, it would have been improper for the court to have dismissed the unions from the suit for lack of standing.[103]

Furthermore, in evaluating the court's failure in *Thompson* to limit the unions' standing to pursuit of prospective relief only, it is also important to note both the posture of the case and the effect of the district court's decree. The court was deciding only preliminary challenges to the suit.[104] It did not determine the relief to which the plaintiffs would be entitled if they prevailed on the merits.[105] Although the court did not limit the unions to pursuit of prospective relief only, neither did it permit the unions to recover damages on behalf of their members. The issue was simply not discussed. Accordingly, since the district court did not authorize the unions to recover relief to which they were not entitled and since there existed a claim which the unions had standing to assert, the district court in *Thompson* correctly recognized the unions' standing. The court's failure expressly to limit that standing did not render erroneous its result in the case.

Thompson and *RWDSU* are examples of the manner in which courts determine issues of organizational standing under Title VII.[106]

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[101] The violation was a continuing one since the disability and sick leave provisions which were being challenged currently affected those teachers who were subject to them. *See id.* at 402, 12 FEP Cas. at 1704.

[102] *See* 42 U.S.C. § 2000e-5(g) (Supp. V 1975). *Cf.* Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (award of backpay should be denied in Title VII action on which the plaintiff prevails "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination"); *accord,* Franks v. Bowman Transp. Co., 424 U.S. 747, 764-66 (1976) (retroactive seniority relief).

[103] In *Warth* where the Court dismissed the builders' association for lack of standing, the association lacked standing to pursue claims for either prospective relief or damages. 422 U.S. at 515-16.

[104] 71 F.R.D. at 401, 12 FEP Cas. at 1702.

[105] The court did, however, conclude that the eleventh amendment did not bar the plaintiffs from recovering monetary relief from the defendant school boards. *Id.* at 415-16, 12 FEP Cas. at 1715. For discussion of the effect of the eleventh amendment on Title VII actions against state and local governmental units, see *Annual Survey of Labor and Employment Discrimination Law,* 18 B.C. IND. & COM. L. REV. 1134 (1977).

[106] *See also* Whilhite v. South Central Bell Tel. & Tel. Co., 426 F. Supp. 61, 64-65, 14 FEP Cas. 1270, 1272 (E.D. La. 1976) (union has standing to represent its members in claims for injunctive relief, but may not assert its members' individual claims); League of United Latin American Cities v. Santa Ana, 410 F. Supp. 873, 886-87, 12 FEP Cas. 651, 660-61 (civil rights organization may sue on behalf of injured members in a challenge to a city's hiring practices and procedures; no discussion of the organiza-

Such standing is recognized in accordance with the principles of *Warth*. Granting such standing is consistent not only with those principles, but also with the policies underlying Title VII: "[p]rivate enforcement suits are an 'essential means of obtaining judicial enforcement of Title VII' and of 'vindicat[ing] the important congressional policy against discriminatory employment practices.' The effectiveness of these suits can be increased by allowing [organizations] to place their financial resources and expertise behind the suit."[107] Accordingly, courts are correct in recognizing organizational standing in Title VII actions.

X. TEMPORARY INJUNCTIVE RELIEF UNDER TITLE VII: *EEOC v. Pacific Press Publishing Association*

Amendments to Title VII enacted in 1972[1] provided the Equal Employment Opportunity Commission (EEOC or Commission) with civil enforcement tools to enable the Commission better to effectuate Title VII's broad remedial purpose of achieving employment equality.[2] These amendments included sections 706(f)(1)[3] and (2)[4] under which the EEOC is given the authority to bring a civil action for permanent relief and the right to seek temporary judicial relief.

Prior to the addition of these sections, the Commission's efforts were limited solely to its conciliation authority. These efforts at conciliation were largely ineffective, due in part to the voluntary nature of the process, and in part to the employers' confidence that the aggrieved party would lack the initiative to institute private litigation.[5] Congress viewed the grant of civil enforcement authority to the Commission, however, not as an alternative to the agency's prior goal of conciliation, but as an adjunct to it. As stated in the House Report on the proposed amendments, "[o]ne of the main advantages of granting enforcement power to a regulatory agency is that the existence of

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tion's ability or inability to collect a damage award), *modified on other grounds*, —— F. Supp. ——, ——, 13 FEP Cas. 1019, 1020 (C.D. Cal. 1976).

[107] *RWDSU*, 540 F.2d at 866, 13 FEP Cas. at 500, *quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

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[1] Pub. L. No. 92-261, § 4, 86 Stat. 104 (1972) (codified at 42 U.S.C. § 2000e (Supp. V 1975)).

[2] H.R. REP. NO. 238, 92d Cong., 2d Sess. 9-10, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2144-46. The broad purposes of Title VII are to achieve employment equality by eradicating discrimination and by providing compensation for injuries suffered as a result of past discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

[3] 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). This section provides in part: "If within 30 days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement . . . the Commission may bring a civil action . . . ."

[4] 42 U.S.C. § 2000e-5(f)(2) (Supp. V 1975).

[5] H.R. REP. NO. 238, 92d Cong., 2d Sess. 9, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2144.

the sanction encourages settlement of complaints before the enforcement stage is reached.[6] Thus Congress envisioned that civil enforcement would serve as an incentive to conciliation, thereby keeping the controversy out of the courts. This would not only prevent flooding of already congested court dockets but also would serve to relieve the courts of the difficult task of dealing with the complexities of employment discrimination cases by initially leaving enforcement in the congressionally favored forum—the EEOC.[7] Since dismissal of an employee during the Commission's investigation and attempted conciliation would be an obvious interference to this administrative process,[8] empowering the EEOC to seek preliminary injunctive relief was seen as a method of preserving the status quo between the parties until the Commission had time to "bring its expertise to bear on the controversy."[9] Accordingly, section 706(f)(2) provides in part that:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge.[10]

Section 706(f)(2) thus permits the EEOC to go into court on the basis of a preliminary investigation and request a temporary injunction prohibiting the employer from taking any action adverse to the charging party until the Commission has completed its findings and determined its course of action.

During the Survey year the United States Court of Appeals for the Ninth Circuit was asked to decide whether section 706(f)(2) authorizes the EEOC to seek temporary relief in a district court after the charging party has instituted a private suit. In *EEOC v. Pacific Press Publishing Association*,[11] two employees of Pacific Press Publishing Association (Press) filed charges with the EEOC alleging sex discrimination by their employer.[12] After requesting and receiving a right-to-sue letter from the EEOC, one of the employees filed a civil action against Press.[13] When Press retaliated by threatening to discharge the employee, the EEOC brought an action under section 706(f)(2) for

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[6] *Id.* at 11, [1972] U.S. CODE CONG. & AD. NEWS at 2147.

[7] *Id.* at 8-10, [1972] U.S. CODE CONG. & AD. NEWS at 2144-46.

[8] Hyland v. Kenner Prod. Co., 9 Empl. Prac. Dec. ¶ 10,108 at 7517 (S.D. Ohio 1974).

[9] *Id.*

[10] 42 U.S.C. § 2000e-5(f)(2) (Supp. V 1975).

[11] 535 F.2d 1182, 12 FEP Cas. 1312 (9th Cir. 1976).

[12] *Id.* at 1184, 12 FEP Cas. at 1313.

[13] *Id.* The right-to-sue letter is a jurisdictional prerequisite to a § 706(f)(1) suit in federal court by an individual. The section provides in pertinent part:

> . . . if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the

temporary injunctive relief to prevent the dismissal. The United States District Court for the Northern District of California granted the relief sought.[14]

The Ninth Circuit in a divided opinion reversed and held that the district court did not have authority to issue such injunctive relief.[15] The Court reached this determination through statutory interpretation of section 706(f)(2). Specifically, the court found in the statutory language the limitation that the Commission could only seek temporary relief "pending final disposition of such charge."[16] Relying on legislative history, the court determined that the phrase "final disposition" clearly referred to completion of the Commission's administrative process rather than to judicial resolution of the charge.[17] Noting that the purpose of section 706(f)(2)'s injunctive relief was to aid the Commission's conciliatory efforts, the court held that the district court's authority to issue temporary relief ended with the termination of the agency's proceedings.[18] The circuit court then concluded that the commencement of a private suit marked such an end of the administrative stage since the filing of a private action "signalled the failure of efforts at conciliation and terminated the EEOC's opportunity to bring suit under [section 706(f)(1)]."[19] Consequently, the court

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person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . .

42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

[14] 12 FEP Cas. 1307, 1309 (N.D. Cal. 1975).

[15] 535 F.2d at 1187, 12 FEP Cas. at 1316.

[16] *Id.* at 1185-86, 12 FEP Cas. at 1314.

[17] *Id.* The court cited to H.R. REP. NO. 238, 92d Cong., 2d Sess. 28, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2163.

[18] 535 F.2d at 1186, 12 FEP Cas. at 1314.

[19] *Id.* The court found precedential support for its conclusion in Tuft v. McDonnell Douglas Corp., 517 F.2d 1301, 10 FEP Cas. 929 (8th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976). In *Tuft* the court stated: "Before the 1972 amendments administrative procedures ended with the termination of conciliation efforts while under the current statute these administrative procedures end with a determination of whether to file suit." 517 F.2d at 1309, 10 FEP Cas. at 935. It is not entirely clear whether the court meant that procedures would terminate only upon the EEOC's determination of the failure of conciliation or whether a determination by a private individual would also terminate the administrative phase.

In EEOC v. North Hills Passavant Hospital, 544 F.2d 664, 13 FEP Cas. 1129 (3d Cir. 1976), the Third Circuit permitted an EEOC suit under § 706(f)(1) after a private action based on the same charges had been filed. *Id.* at 672, 13 FEP Cas. at 1135. Since it permitted the EEOC suit the court must have concluded that the initiation of a private suit did not end the administrative phase for purposes of allowing a Commission action under § 706(f)(1). Thus in the Third Circuit it may be that the administrative phase is terminated *only by an EEOC decision* as to whether or not to sue for the purposes of § 706(f)(1) relief. The authority of the EEOC to file suit after the initiation of private litigation appears to be the basis of the dissenting opinion in *Pacific Press. See* 535 F.2d at 1190-91, 12 FEP Cas. at 1318 (Sneed, J., dissenting). See also notes 36-44 *infra*. However, since the purpose of relief under § 706(f)(2) is to keep the controversy out of the courts by aiding conciliation, and the initiation of private action necessarily

held that once a private action was brought, the administrative phase was ended and the justification for granting temporary injunctive relief, as set forth in the legislative history, was no longer applicable.

Several factors were advanced by the circuit court in support of its decision in *Pacific Press*. First, the court noted that the remedy envisioned by 706(f)(2) is only "temporary," to fill the need for "prompt judicial action." The court then pointed out that in *Pacific Press* the claim for injunctive relief was based on charges the most recent of which had been filed with the EEOC eight months prior to the section 706(f)(2) action for temporary relief.[20] The court found that this eight month delay by the Commission "belied" the need for speedy relief envisioned by section 706(f)(2).[21] Since in the court's opinion the relief sought by the Commission was not in fact prompt, the court saw no necessity for invoking section 706(f)(2) relief.

Second the court reasoned that if a private action did not terminate the availability of temporary relief under 706(f)(2), then such relief could seemingly be sought indefinitely—since the administrative phase could thus continue indefinitely—absent a determination by the Commission as to whether to bring suit pursuant to section 706(f)(1).[22] The court recognized that under its holding, termination of the administrative phase would be coterminus with the instigation of either a private action or an EEOC civil action. Such a result would be beneficial, the court stated, because injunctive relief under section 706(f)(2) would thereby be left in the exclusive control of the EEOC and the charging party, and "(i)t may then become a weapon to be used against those who are the objects of the charges."[23]

Finally, the court determined that a contrary holding, allowing relief for an indefinite period of time, could not be reconciled with the ease with which a temporary injunction could be obtained.[24] The court concluded that "[u]nlike the more traditional route to preliminary injunctive relief, the usual requirement of irreparable injury is relaxed because of the statutory authority granted to the EEOC to seek judicial relief against Title VII violations."[25] In reaching this conclusion the court touched on the most significant point of its holding. The proof requirements for a showing of irreparable harm are re-

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places the issue before the courts, any section 706(f)(1) action, whether brought by the EEOC or the aggrieved individual should conclude the administrative phase for the purposes of § 706(f)(2) temporary relief.

[20] 535 F.2d at 1186, 12 FEP Cas. at 1315.

[21] *Id.*

[22] *Id.* at 1187, 12 FEP Cas. at 1315.

[23] *Id.*

[24] *Id. See* Murray v. American Standard, Inc., 488 F.2d 529, 531, 7 FEP Cas. 787, 788 (5th Cir. 1973); Hyland v. Kenner Prod. Co., 9 Empl. Prac. Dec. ¶ 10,108 at 7517 (S.D. Ohio 1974). (These cases also distinguish the ease with which a temporary injunction can be obtained under a statutory provision providing for temporary relief.)

[25] 535 F.2d at 1187, 12 FEP Cas. at 1315. For a discussion of the requirements for obtaining a temporary injunction under § 706(f)(2) see text at notes 33-38 *infra*.

laxed in a suit seeking temporary relief under section 706(f)(2).[26] That relaxation stems from the fact that section 706(f)(2) gives the Commission authority to seek injunctive relief upon a showing that such action is "necessary to carry out the purpose of this Act. . . ."[27] Courts have interpreted this statutory language to necessitate a standard of proof of irreparable harm lower than that required by Rule 65 of the Federal Rules of Civil Procedure.[28] Relief under section 706(f)(2) is seen as wholly statutory, and the traditional proof requirements for injunctive relief, as codified in Rule 65, are therefore inapplicable.[29] Therefore when a Title VII violation is alleged by the EEOC, irreparable harm is presumed from the fact of the alleged violation itself and temporary relief is granted merely upon a prima facie showing of Title VII discrimination.[30] Because of the ease with which a temporary injunction can issue under section 706(f)(2), the *Pacific Press* court felt itself compelled to limit the circumstances under which section 706(f)(2) could be employed. The *Pacific Press* court thus refused to grant the EEOC section 706(f)(2) temporary relief once the private party has filed suit.

The court withheld the grant of temporary relief even though the aggrieved party had filed with the EEOC other charges which were not part of the party's current suit.[31] The court recognized that these new charges had not yet come to any "final disposition," thus making relief under section 706(f)(2) theoretically possible.[32] However, the court determined that, even though injunctive relief might technically be available, nevertheless such relief was inappropriate since the party in the private action could amend the complaint to encompass the allegations subsequently filed with the EEOC.[33] Since the court found that resolution of the private action thus could resolve all issues, and since administrative conciliatory remedies had failed to resolve the initial claim, the court found "no useful purpose would be served by invoking [section 706(f)(2).]"[34] Accordingly, the court held that once the private action was brought the EEOC could no longer obtain injunctive relief under the statute despite the filing of additional charges with the Commission.[35]

The dissenting judge agreed with the majority that injunctive relief was not available upon termination of administrative pro-

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[26] *Id.* at 1187, 12 FEP Cas. 1315.

[27] 42 U.S.C. § 2000e-5(f)(2) (Supp. V 1975).

[28] 535 F.2d at 1187, 12 FEP Cas. at 1315. *See also* Murray v. American Standard, Inc., 488 F.2d 529, 531, 7 FEP Cas. 787, 788 (5th Cir. 1973); Hyland v. Kenner Prod. Co., 9 Empl. Prac. Dec. ¶10, 108 at 7517 (S.D. Ohio 1974).

[29] EEOC v. Union Bank of Arizona, 12 FEP Cas. 527, 530 (D.C. Ariz. 1976).

[30] *Id.*

[31] 535 F.2d at 1186, 12 FEP Cas. at 1314.

[32] *Id.*, 12 FEP Cas. at 1315.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1186, 12 FEP Cas. at 1314-15.

ceedings.[36] However, Judge Sneed parted company with the majority on the issue of when such administrative proceedings were terminated. The majority had found that the filing of a suit by an aggrieved party constituted such termination.[37] Judge Sneed, on the other hand, would remand the case to determine whether the administrative phase had been suspended rather than terminated, since he reasoned that a private action might only "suspend" rather than terminate the proceedings.[38] The Judge based this distinction between suspension and termination on a Commission regulation which mandates suspension of EEOC proceedings following the issuance of a right-to-sue letter.[39] Since under this regulation suspension continues indefinitely until lifted or until the administrative process is otherwise ended, the dissent concluded that suspension is not technically termination of the EEOC's phase and therefore does not necessarily foreclose relief under section 706(f)(2).[40] Thus under the dissent's view the Commission could still obtain injunctive relief after a showing that the Commission had not determined whether to file suit since if the Commission had not as yet made a decision on whether to sue, the administrative phase would not yet be ended. Therefore Judge Sneed would have remanded the case to the district court to determine if the EEOC had decided whether or not to sue. If the Commission had made a determination, the administrative phase would have ended and according to Judge Sneed's view, the district court would have to dismiss the suit for temporary relief. If however the EEOC had not yet decided whether to bring suit, Judge Sneed would consider the EEOC proceeding merely suspended and would permit the lower court to grant the requested relief.[41]

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[36] *Id.* at 1187, 12 FEP Cas. at 1316 (Sneed, J., dissenting).

[37] *Id.* at 1188-89, 12 FEP Cas. at 1317 (Sneed, J., dissenting).

[38] *Id.*

[39] *Id.* 29 C.F.R. § 1601.5.25b(d) (1976). This Regulation provides:

> Issuance of notice . . . shall suspend further Commission proceedings unless the Field Director determines that it is in the public interest to continue such proceedings, or unless, within twenty (20) days after receipt of such notice, a party requests the Field Director, in writing, to continue to process the case.

[40] 535 F.2d at 1189, 12 FEP Cas. at 1317 (Sneed, J., dissenting).

[41] *Id.* at 1190, 12 FEP Cas. at 1318 (Sneed, J., dissenting). The dissenting opinion's reasoning is apparently predicated on an interpretation of section 706(f)(1) which would permit the EEOC to bring suit after the instigation of an action for relief by an individual. One line of interpretation would bar the EEOC from instituting a suit for relief under section 706(f)(1) based on the same charges as a suit by a private individual under section 706(f)(1). There is a conflict within the circuits as to whether the EEOC has such a right. *Compare* EEOC v. Continental Oil Co., —— F.2d ——, 14 FEP Cas. 365, 370 (10th Cir. 1977) (the EEOC limited to permissive intervention upon the filing of a private action) *with* EEOC v. North Hills Passavant Hospital, 544 F.2d 664, 672, 13 FEP Cas. 1129, 1135 (3d Cir. 1976) (the EEOC permitted to maintain an independent action). Since the dissent would remand this case to determine whether the EEOC had made a decision as to whether to sue, obviously under the dissent's interpretation the private suit does not foreclose the EEOC from determining whether to bring its own suit.

It is submitted that the majority's conclusion that injunctive relief is unavailable to the Commission once a private action has been initiated is sounder than the dissent's view that the Commission may still obtain such relief upon a showing that it has not yet determined whether to sue. Both the dissent and the majority agree that the end of the administrative processing of a charge constitutes a "final disposition" and terminates the EEOC's authority to seek relief under section 706(f)(2). They disagree only regarding what constitutes such a final disposition. The dissent determined that a private suit might merely suspend rather than terminate an EEOC proceeding and based its conclusion on the language of a Commission regulation regarding suspension of proceedings.[42] However that suspension regulation refers only to suspension of proceedings following the issuance of a right-to-sue letter. Since the letter is not self-executing in that the charging party must still decide whether to take the letter and file charges in district court, the administrative proceedings could still be considered suspended during the period in which the charging party has the letter and has not yet acted upon it. It would appear to require the further action of the aggrieved party actually taking the next step—filing suit—to end the administrative phase. Reasoning thus, there is no inconsistency between the issuance of a right-to-sue letter "suspending" Commission proceedings and the instigation of a private suit ending them. The dissent in distinguishing between suspension and termination fails to take into account this last logical step of the charging party acting upon his right-to-sue letter by bringing suit in district court, and so ignores the purpose behind the enactment of section 706(f)(2). Congress intended the section to encourage parties to conciliate by giving the Commission the power to obtain injunctive relief in order to maintain the status quo during conciliation. However, to permit the EEOC to continue seeking temporary relief after the institution of a private action would not further the congressional goal of pre-court conciliation.[43] Thus the majority's holding in *Pacific Press* properly advances the congressional intent behind section 706(f)(2), because, as the majority recognized, once suit is filed "[t]he parties no longer look to the EEOC for relief but instead shift their attention to the court."[44] Consequently, as the majority finds, the institution of a private action should be the logical end of the EEOC's administrative phase, and therefore the end of the availability of section 706(f)(2) relief.

Since *Pacific Press* holds that the commencement of a private action marks the end of the administrative phase, and thus the end of 706(f)(2)'s availability,[45] any injunctive relief which a party desires after the bringing of a private action must be sought as part of the

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[42] 535 F.2d at 1188-89, 12 FEP Cas. at 1317 (Sneed, J., dissenting).
[43] See text at notes 7-9 *supra* for a discussion of the purposes of § 706(f)(2) relief.
[44] 535 F.2d at 1186, 12 FEP Cas. 1314.
[45] *Id.* at 1187, 12 FEP Cas. at 1315-16.

private suit pursuant to Rule 65 of the Federal Rules of Civil Procedure. Rule 65 requires an affirmative showing of irreparable harm.[46] Thus if an action for temporary relief is brought pursuant to Rule 65 and not under the statutory provision of section 706(f)(2) irreparable harm may not be presumed by the court.[47] Moreover, the Supreme Court has ruled that the temporary loss of recoverable income does not usually constitute irreparable injury.[48] Thus, the discharge of an employee would be grounds for injunctive relief only in rare cases since the harm stemming from a discharge is generally the loss of recoverable income.[49] Since a threatened discharge would not generally meet the requirements of irreparable harm, most employees would therefore not be able to obtain injunctive relief once they have commenced their private actions. However, certain jurisdictions have interpreted section 706(f)(2) to permit suits for temporary relief to be brought directly by the aggrieved individual without the assistance of the EEOC.[50] In terms of future litigation strategy, aggrieved

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[46] Rule 65 of the Fed. Rules of Civ. Pro. provides in part: "A temporary restraining order may be granted . . . only if (1) it clearly appears from specific facts shown . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition . . . ."

[47] *See* 535 F.2d at 1187, 12 FEP Cas. at 1315-16. *See also* Hyland v. Kenner Prod. Co., 9 Empl. Prac. Dec. ¶ 10,108 at 7517 (S.D. Ohio 1974).

[48] Sampson v. Murray, 415 U.S. 61, 90 (1974); *see also Pacific Press*, 535 F.2d 1187, 12 FEP Cas. 1315-16; Jerome v. Viviano Food Co., 489 F.2d 965, 966, 7 FEP Cas. 145, 146 (6th Cir. 1974); Theodore v. Elmhurst College, 421 F.Supp. 355, 357-58, 14 FEP Cas. 163, 165 (N.D. Ill. 1976).

[49] 535 F.2d at 1187, 12 FEP Cas. at 1316. In Sampson v. Murray, 415 U.S. 61 (1974) the respondent was a probationary government employee who was dismissed for her "unwillingness to follow office procedure. . . ." *Id.* at 65. Since the procedural protections afforded most probationary employees are limited, respondent sought a temporary injunction while she challenged her dismissal. *Id.* at 64-66. The Court held that the district court was in error in issuing a temporary injunction since such relief requires a showing of irreparable harm. *Id.* at 88. The Court held that even if the dismissal results in the temporary loss of income, ultimately to be recovered, this does not usually constitute irreparable harm. *Id.* at 90. The Court went further and said that even had the respondent established that her reputation would be damaged as a result of her dismissal this showing would fall far short of the type of irreparable harm which is a necessary predicate to the issuance of a temporary injunction. *Id.* at 91-92. The Court found it difficult to define in advance when attendant circumstances surrounding a discharge would amount to irreparable harm. *Id.* at 92 n.68.

[50] Drew v. Liberty Mutual Ins. Co., 480 F.2d 69, 5 FEP Cas. 1077 (5th Cir. 1973); Hyland v. Kenner Prod. Co., 9 Empl. Prac. Dec. ¶ 10,108 at 7517 (S.D. Ohio 1974). These jurisdictions adhere to the view that since § 706(f)(2) relief is statutory, irreparable harm may be assumed on a prima facie showing of alleged Title VII violations. See 9 Empl. Prac. Dec.¶10,108 at 7517. See text at notes 35-38 *supra*. Other jurisdictions have held that the issuance by the EEOC of a right-to-sue letter is a jurisdictional prerequisite to a § 706(f)(2) suit by a private individual. Thus the private party would be prevented from seeking injunctive relief under § 706(f)(2) until after the party had received the letter. The letter is not issued until either the EEOC has dismissed the charge or until at least 180 days have passed since the charges were filed and the EEOC has not concluded the case to the charging party's satisfaction. *See* 42 U.S.C. § 2000e-5(f)(1). *See also* Nottleson v. A.O. Smith Corp., 397 F.Supp. 928, 11 FEP Cas. 1214 (E.D. Wis. 1974); Troy v. Shell Oil Co., 378 F.Supp. 1042, 8 FEP Cas. 1044 (E.D. Mich.

employees and their counsel in these jurisdictions should consider when possible the opportunity of seeking injunctive relief individually or through the EEOC before initiating a private suit, especially since a suit seeking temporary relief under section 706(f)(2) would not bar a private party from subsequently bringing a section 706(f)(1) action for permanent relief.[51] Thus by delaying the private action and theoretically the end of the administrative process until after the institution of a section 706(f)(2) suit for temporary relief, an employee may avoid the higher standards required for irreparable harm in traditional temporary injunction actions, and be required only to meet the lower standards necessary for temporary relief under section 706(f)(2) suits.

1974). Since in all likelihood, the EEOC will be too overburdened to investigate charges and bring an action for temporary relief on behalf of the charging party, see 480 F.2d at 74, 5 FEP Cas. at 1080, the practical effect of requiring the issuance of a right-to-sue letter as a jurisdictional prerequisite to a private action under § 706(f)(2) is that no temporary relief can be obtained between the time charges are filed and the issuance of a right-to-sue letter at least 180 days later. It is unclear whether those jurisdictions which would require a right-to-sue letter as a jurisdictional prerequisite to a § 706(f)(2) suit by a private individual would impose the more stringent requirements for irreparable harm. However, since the lesser standard is based on a statutory interpretation of § 706(f)(2) it is unlikely that these courts would require the higher standard in suits for temporary relief under the statute.

[51] EEOC v. Rinella & Rinella, 401 F. Supp. 175, 186, 13 FEP Cas. 472, 481 (N.D. Ill. 1975). *But cf.* Continental Oil Co., —— F.2d ——, 14 FEP Cas. 365 (10th Cir. 1977) (The court here would not permit the instigation by the EEOC, and the aggrieved party of separate section 706(f)(1) actions based on the same facts). In *Rinella*, after investigating charges of discrimination, the EEOC instigated an action for temporary relief under § 706(f)(2) in federal district court. *Id.* at 178, 13 FEP Cas. at 474. The aggrieved party subsequently filed an action for permanent relief under § 706 (f)(1). The defendant argued that the statutory scheme precludes duplicative lawsuits based on the same facts. *Id.* at 185-86, 13 FEP Cas. at 480. The court, while agreeing with this salutary principle, noted that the injunctive suit by the Commission was based on § 706(f)(2) while the private action was based on a separate statutory provision, 706(f)(1), and that thus there were different forms of relief sought. 401 F.2d at 186, 13 FEP Cas. at 481. Accordingly the *Renella* court permitted both suits to continue.

While the court in *Rinella* permitted the private action for permanent relief pursuant to § 706(f)(1) to be brought subsequent to the EEOC suit for temporary relief under § 706(f)(2), this situation is distinguishable from the one presented in *Pacific Press*. In *Rinella* the § 706(f)(2) suit by the EEOC was brought prior to the private action. To deny a private party the right then to seek permanent relief would be to deny him the full scope of remedies provided by the statute. 401 F.Supp. at 186, 13 FEP Cas. at 481. The Court in *Rinella* found nothing in the statutory framework which would prevent the expansion of a § 706(f)(2) suit into a § 706(f)(1) suit for permanent relief. *Id.* In *Pacific Press*, on the other hand, since the second action is the EEOC suit for temporary relief, the charging party is not denied the full panoply of statutory relief when the court denies the later EEOC action for temporary relief. The aggrieved party might also be able to intervene in the Commission's 706(f)(2) suit and expand it into a suit for permanent relief under section 706(f)(1). EEOC v. Rinella & Rinella, 401 F. Supp. 175, 186, 13 FEP Cas. 472, 481 (N.D. Ill. 1975). The court in *Rinella* took note of, without answering, the question of whether the statute would permit intervention in a § 706(f)(2) suit by private parties since intervention is given as a matter of right only to private individuals in § 706(f)(1) suits. *Id.* at 186, 13 FEP Cas. at 481.

XI. DISCRIMINATION AGAINST WHITES: *McDonald v. Santa Fe*

Title VII prohibits discrimination in employment practices against "any individual . . . because of such individual's race, color, religion, sex, or national origin."[1] Although no federal court of appeals directly confronted the issue, federal district courts divided on the question of whether Title VII encompasses suits by white persons for discrimination on the basis of their race.[2] Similarly, lower federal courts divided on the question of the applicability to employment discrimination suits by whites of 42 U.S.C. § 1981[3] which grants to "[a]ll persons" in the United States "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."[4] During the Survey year the Supreme Court decided *McDonald v. Santa Fe Trail Transportation Co.*,[5] concluding that both Title VII[6] and section 1981[7] extend to employment discrimination against members of the white race. Accordingly, white persons may now sue under either statute to redress discrimination grievances.

McDonald involved suit by two white employees against their employer, alleging that the employer had discriminatorily fired them.[8] The white employees and a black co-worker had been charged with misappropriating sixty one-gallon cans of antifreeze from a shipment being carried by the employer Santa Fe Trail Transportation Co. (Santa Fe). Santa Fe fired the two white employees but retained the black worker.[9] The white workers filed charges with the Equal Employment Opportunity Commission (EEOC) and after receiving

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[1] 42 U.S.C. § 2000e-2(a) (1970 & Supp. V 1975). *See also id.* §§ 2000e-2(b)-(d), 2000e-3.

[2] *Compare* Parks v. Brennan, 389 F. Supp. 790, 793, 10 FEP Cas. 358, 360 (N.D. Ga. 1974) (court has jurisdiction under Title VII for claim of racial discrimination against whites), *rev'd on other grounds sub nom.* Parks v. Dunlop 517 F.2d 785, 786, 11 FEP Cas. 230, 231 (5th Cir. 1975) (per curiam) *with* Mele v. United States Dep't of Justice, 395 F. Supp. 592, 596, 10 FEP Cas. 1000, 1002 (D.N.J. 1975) (white male is not a member of the class protected by Title VII).

[3] *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 325, 3 FEP Cas. 900, 907 (§ 1981 extends to both blacks and whites), *impliedly aff'd on rehearing*, 452 F.2d 315, 327, 329-30, 4 FEP Cas. 121, 123-24 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90, 94, 10 FEP Cas. 473, 475-76 (D. Conn. 1975) (same). *Contra*, Balc v. United Steelworkers, 6 FEP Cas. 824, 825 (W.D. Pa. 1973), *aff'd without opinion*, 503 F.2d 1398, 8 FEP Cas. 1006 (3d Cir. 1974) (§ 1981 does not apply to racial discrimination against whites); Ripp v. Dobbs House, Inc., 366 F. Supp. 205, 211, 6 FEP Cas. 566, 570 (N.D. Ala. 1973) (same).

[4] 42 U.S.C. § 1981 (1970).

[5] 427 U.S. 273 (1976).

[6] *Id.* at 285.

[7] *Id.* at 296.

[8] *Id.* at 276. The employees also charged their union International Brotherhood of Teamsters Local 988 with having "acquiesced and/or joined in" the employer's discrimination. *Id.* at 284. The Court determined that the union would also be liable under Title VII for the same reasons, see text at notes 16-26 *infra*, that it determined the employer would be liable. *Id.* at 285.

[9] *Id.* at 276.

notice of their right to sue[10] brought an action against Santa Fe in federal district court, stating claims under both Title VII and 42 U.S.C. § 1981.[11] The United States District Court for the Southern District of Texas dismissed the claim on the pleadings, holding that section 1981 is inapplicable to white persons.[12] The court also concluded that since the employees had not alleged that the charges of misappropriation were false, the fact that a black employee was retained while the similarly situated white employees were fired was insufficient to state a claim under Title VII.[13] The United States Court of Appeals for the Fifth Circuit, in a per curiam opinion, affirmed the district court's dismissal of both the Title VII and the section 1981 claims.[14]

The Supreme Court reversed the decision of the court of appeals and upheld the petitioner's right to bring suit under both Title VII and section 1981.[15] The Court dealt with each claim separately.

With respect to the petitioners' Title VII claim, the Court unanimously concluded that Title VII encompasses discrimination against whites.[16] The Court reached this decision through consideration of the language, legislative history and EEOC interpretations of the statute. Title VII, the Court noted, prohibits discrimination against "any individual" on account of race.[17] Hence, the Court concluded that by its terms the statute's application is not limited to members of a particular race.[18] Moreover, the Court noted several examples of legislative history which supported its view that Title VII's protections extend to all races.[19] For example, the Court quoted remarks made during House floor debate on Title VII that the proposed bill "[would] cover white men and white women and all Americans."[20] The Court also cited statements made in an interpretive Senate memorandum that the policies of Title VII included "the obligation not to discriminate against whites."[21] Thus, the Court concluded that the legislative history was "uncontradicted" to the effect that Title VII's coverage extended to white persons.[22]

In addition, the Court recognized that the EEOC's interpretations of Title VII, which were entitled to "great deference" by

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[10] *Id.*

[11] 10 FEP Cas. 1162, 1163 (S.D. Tex. 1974).

[12] *Id.*

[13] *Id.* at 1165.

[14] 513 F.2d 90, 90-91, 10 FEP Cas. 1165, 1165-66 (5th Cir. 1975) (per curiam).

[15] 427 U.S. at 285, 296.

[16] *Id.* at 280. Although this part of the opinion was joined by all members of the Court, the Court was not unanimous in its resolution of the section 1981 issue. See note 41 *infra*.

[17] 427 U.S. at 278, *quoting* 42 U.S.C. § 2000e-2(a)(1) (1970).

[18] 427 U.S. at 278-79.

[19] *Id.* at 280.

[20] *Id.* at 280, *quoting* 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler).

[21] *McDonald,* 427 U.S. at 280, *quoting* 110 CONG. REC. 7218 (1964) (memorandum of Sen. Clark).

[22] 427 U.S. at 280.

reviewing courts,[23] were in accord with the legislative history.[24] The Court noted that the EEOC has consistently concluded that Title VII's protections extend to whites.[25] Accordingly, the Court held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [their co-worker] white."[26]

Although the Court determined that its holding in *McDonald* was consistent with prior Title VII cases, it did recognize that its previous cases which had raised issues of racial discrimination had involved discrimination against blacks.[27] In two such cases, *Griggs v. Duke Power Co.*[28] and *McDonnell Douglas Corp. v. Green,*[29] the Court had dealt with issues of burden of proof. In *Griggs* the Court stated that Title VII proscribed "[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*."[30] Thus, *Griggs* was consistent with the holding in *McDonald* that Title VII's protections extended to whites.[31]

The consistency between the *McDonald* holding and the language of *McDonnell Douglas* was not, however, so readily apparent. In *McDonnell Douglas* the Court established the manner in which a plaintiff could prove a prima facie case in an individual Title VII action.[32] One of the requisite elements of that prima facie case was that "[a plaintiff] belong[] to a racial minority . . . ."[33] However, after delineating the elements of the prima facie case, the Court then qualified its definition by stating that "specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations."[34] Accordingly, the Court in *McDonald* read its prior statement requiring that plaintiff belong to a racial minority as being merely illustrative:

> [r]equirement (i) [belonging to a racial minority] of this sample pattern of proof was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an

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[23] *Id.* at 279, *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[24] 427 U.S. at 279-80 & n.7.

[25] *Id., citing inter alia* EEOC Decision No. 75-268, 10 FEP Cas. 1502, 1504 (1975) (employer who fails to hire a white woman because of her race violates Title VII); EEOC Decision No. 74-31, 7 FEP Cas. 1326, 1328 (1973) (the EEOC must not derogate its "congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians.")

[26] 427 U.S. at 280.

[27] *Id.* at 279 & n.6.

[28] 401 U.S. 424, 432 (1971).

[29] 411 U.S. 792, 802 (1973).

[30] 401 U.S. at 431, *quoted in McDonald,* 427 U.S. at 279 (emphasis added in *McDonald*).

[31] *See* 427 U.S. at 279.

[32] 411 U.S. at 802.

[33] *Id.*

[34] *Id.* at n.13.

> indication of any substantive limitation of Title VII's prohibition of racial discrimination.[35]

Thus, the Court concluded that its holding in *McDonald* that racial discrimination against whites was within the purview of Title VII did not conflict with its decision in *McDonnell Douglas*.[36].

The Court in *McDonald v. Santa Fe* also noted that even if the charges of misappropriation were true, this would not serve as an adequate defense to the employees' allegation of racial discrimination.[37] The Court conceded that an employee's participation in stealing cargo from an employer could constitute sufficient grounds for discharge.[38] However, in order for an employer to avoid violating Title VII, the Court stated, any criteria for discharge had to be applied without discrimination: "[Title VII] prohibits *all* racial discrimination in employment, without exception for any group of particular employees and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination."[39] Accordingly, since the Court concluded that petitioners had stated a valid Title VII claim, it remanded the case to the lower court for consideration of the complaint on its merits.[40]

Seven Justices reached the same conclusion with respect to the section 1981 claim, namely, that section 1981 is applicable to racial discrimination in private employment against white persons.[41] The Justices reached this conclusion through interpretation of the language and the legislative history of the section.[42] Although the language of section 1981 granted rights "as [are] enjoyed by white persons," the majority noted that such rights were granted to "*all* persons," including whites.[43] The Court construed the language "as is enjoyed by white persons" as simply "emphasizing 'the racial character of the rights being protected.' "[44] Under the Court's construction, therefore, the white employees' claim against Santa Fe was cognizable under section 1981 since the employees alleged that their rights had been abridged because of their race.

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[35] 427 U.S. at 279 n.6.

[36] *Id*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 283 (emphasis in original).

[40] *Id.* at 296.

[41] *Id.* at 286-87. Justices White and Rehnquist dissented from the Court's conclusion with respect to the § 1981 claim, 427 U.S. at 296 (White and Rehnquist, JJ., concurring in part and dissenting in part), on the basis of their dissent in Runyon v. McCrary, 427 U.S. 160 (1976). In *Runyon* the dissenters concluded that § 1981 was inapplicable to claims of private discrimination. 427 U.S. at 192 (White and Rehnquist, JJ, dissenting). Accordingly, since *McDonald* involved a case of private discrimination, Justices White and Rehnquist would not agree that § 1981 was applicable to the case. 427 U.S. at 296 (White and Rehnquist, JJ., concurring in part and dissenting in part).

[42] 427 U.S. at 286-87.

[43] *Id.* at 287, *quoting* 42 U.S.C. § 1981 (1970) (emphasis added in *McDonald*).

[44] 427 U.S. at 287, *quoting* Georgia v. Rachel, 384 U.S. 780, 791 (1966).

The Court found in the legislative history of section 1981 further support for the position that the statute extended to whites.[45] Section 1981 was originally codified in the Civil Rights Act of 1866.[46] The Court noted that in the Senate where the original bill, without the language "as is enjoyed by white citizens," was considered and passed, both proponents and opponents of the legislation recognized that the bill would apply equally to blacks and whites.[47] After passage in the Senate the bill went to the House and was there amended to include the descriptive phrase indicating that the rights guaranteed would be those "as [are] enjoyed by white citizens."[48] The floor manager of the bill offered the amendment, as a technical adjustment, to "perfect" the bill, and the House accepted the amendment without discussion or debate.[49] The *McDonald* Court noted, that in subsequent debate on the amended bill, members of the House recognized that the legislation still covered all races.[50] As the House floor manager stated, the bill "secures to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another."[51] The purpose of the floor manager's amendment, the *McDonald* Court pointed out, was to satisfy the members of the House that the bill would not extend to discrimination against women or minors.[52] Rather, the amendment was enacted to emphasize that the bill addressed issues of racial discrimination.[53] Thus, the *McDonald* Court determined that the members of the House in passing the bill intended it to cover all races.

The *McDonald* Court next analyzed the legislative history which stemmed from the Senate's subsequent consideration of the amended House bill. The Court noted that during Senate debate on this House version of the bill the amendment "as is enjoyed by white citizens" was not viewed as limiting to blacks the protection of the legislation.[54] Indeed, the Senate floor manager agreed that the amending language was "superfluous,"[55] stating: "I do not think [the words] alter the bill. . . . [A]nd as in the opinion of the [Senate Judiciary] [C]ommittee which examined this matter, [the words] did not alter the meaning of the bill, the Committee thought proper to recommend a concurrence

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[45] 427 U.S. at 287.

[46] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (amended by Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144).

[47] 427 U.S. at 288-90.

[48] *Id.* at 290-91, *citing* CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866).

[49] *Id.*

[50] 427 U.S. at 291-92.

[51] CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (remarks of Rep. Wilson), *quoted in McDonald*, 427 U.S. at 292-93.

[52] 427 U.S. at 293 & n.23.

[53] *Id.* at 293.

[54] *Id.* at 294.

[55] CONG. GLOBE, 39th Cong., 1st Sess. 1413 (1866) (remarks of Sen. Trumbull), *quoted in McDonald*, 427 U.S. at 295.

. . . ."[56] Consequently, as the *McDonald* Court noted,[57] the Senate acquiesced in the House version of the bill.[58] The bill was sent to President Andrew Johnson, who vetoed it, returning it to Congress for further consideration.[59] Both Houses subsequently overrode the veto by the requisite margin and the bill became law.[60] The *McDonald* Court found nothing in the legislative history of these subsequent considerations which contradicted its determination that the congressional intent behind section 1981 was to provide protection from racial discrimination to all people.[61] Thus, the Court concluded that

> [u]nlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And while the statutory language has been somewhat streamlined in reenactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons.[62]

Consequently, the Court permitted the white employees in *McDonald,* in redressing their charge of racial discrimination, to join a claim under section 1981 with their Title VII claim.[63]

McDonald was applied during the Survey year in the Sixth Circuit case of *Haber v. Klassen.*[64] In *Haber* the United States District Court for the Northern District of Ohio had initially determined that a white male postal clerk could not sue under Title VII when a less qualified black employee was granted a work assignment which the white employee had desired.[65] The Sixth Circuit in a per curiam opinion reversed the district court's decision in light of *McDonald.*[66] The circuit court thus recognized that a claim of racial discrimination against whites is cognizable under Title VII.

Not all such claims of "reverse discrimination" may, however, be recognized under Title VII. Although in *McDonald* the Supreme

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[56] *Id.*
[57] 427 U.S. at 295.
[58] CONG. GLOBE, 39th Cong., 1st Sess. 1416 (1866).
[59] *See id.* at 1679.
[60] *See id.* at 1809 (Senate); *id.* at 1861 (House).
[61] 427 U.S. at 295.
[62] *Id.* at 295-96.
[63] *Id.* at 296.
[64] 540 F.2d 220, 13 FEP Cas. 450 (6th Cir. 1976), *rev'g per curiam* 10 FEP Cas. 1446 (N.D. Ohio 1975).
[65] 10 FEP Cas. 1446, 1446-47 (N.D. Ohio 1975).
[66] 540 F.2d at 220, 13 FEP Cas. at 450 (6th Cir. 1976) (per curiam).

Court held that Title VII applies to white persons to the same extent that it applies to minority races,[67] the Court noted that *Santa Fe* did not claim that it fired the white employees pursuant to any affirmative action program. The Court specifically emphasized that "we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted."[68] Thus, *McDonald* expressly reserves decision on the validity of affirmative action programs. Accordingly, although the Supreme Court in *McDonald* determined that whites are covered under Title VII and section 1981, decision on affirmative action awaits another case.[69]

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[67] 427 U.S. at 280.

[68] *Id.* at 281 n.8.

[69] The Court currently has before it a case involving a challenge to a special admissions program favoring disadvantaged minority applicants to the medical school of the University of California at Davis. That challenge is based on the equal protection clause of the fourteenth amendment. Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 38, 553 P.2d 1152, 1155, 132 Cal. Rptr. 680, 683 (1976), *cert. granted*, 429 U.S. 1090 (1977).

See also Hefner v. New Orleans Pub. Serv., Inc.,—F. Supp.—, 14 FEP Cas. 826 (E.D. La. 1977), a decision in which the district court denied relief to white employees who claimed that they had been injured by seniority relief which had been awarded to their black co-workers pursuant to a consent decree filed in a prior Title VII action against the white and black workers' employer. *Id.* at—, 14 FEP Cas. at 826-27. The white employees had sued under both Title VII and § 1981. *Id.* at—, 14 FEP Cas. at 827. The court dismissed the Title VII claim on the ground that the Supreme Court in Franks v. Bowman Transp. Co., 424 U.S. 747, 771 (1976), had authorized such seniority relief in Title VII actions despite the fact that such relief may adversely affect white employees.— F. Supp. at—, 14 FEP Cas. at 828. Accordingly, the district court refused to entertain a challenge to the relief by white employees, particularly since the employees had neglected to intervene during the pendency of the original suit. *Id.* The court dismissed the § 1981 claim on the ground that the circuit court in *McDonald* had determined that whites may not sue under § 1981. *Id.*

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