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Decisions of the Supreme Court, 1979-1980 - Labor Relations and Employment Discrimination Law

Lee Modjeska

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Decisions of the Supreme Court, 1979-1980—Labor Relations and Employment Discrimination Law

Lee Modjeska†

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† Professor of Law, Ohio State University; B.A., Antioch College, 1955; LL.B., University of Wisconsin, 1960. On leave, 1980-81, Visiting Professor, Duke University School of Law.
I

LABOR RELATIONS: DECISIONS UNDER THE LABOR ACT

A. International and District Liability for Local Wildcat Strikes

In Carbon Fuel Co. v. UMWA, the Court held that absent a showing of common-law agency responsibility, neither the international nor district unions were liable in damages for "wildcat" strikes engaged in by the local unions, notwithstanding the failure of the international and district unions to make reasonable efforts to end the strikes.

The employer and the United Mine Workers of America (UMWA) were parties to the National Coal Wage Agreements of 1968 and 1971. Between 1969 and 1973 three local unions of the UMWA engaged in forty-eight unauthorized or "wildcat" strikes at a number of the employer's mines. The district union, a regional subdivision of the UMWA, was unsuccessful in its efforts to persuade the miners not to strike and to return to work. Upon the employer's action for injunctive relief and damages, verdicts were returned against the international, the district and the three local unions.

2. The international and the district were promptly notified of each strike. In each instance, the district representative frequently advised the members that participation in illegal, unauthorized strikes could result in disciplinary action by the international or district. Most of the strikes ended within the first two days and none lasted over six days. To avoid aggravating a bad situation, the union did not take disciplinary action against the strikers. Id. at 412 n.1.
3. The employer's action was brought under section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 (1976), and was predicated on the ground that the strikes violated the contracts. 444 U.S. at 214. Injunctive relief was mooted by expiration of the contracts. Id. at 214 n.2.
4. On appeal the Fourth Circuit vacated the judgments against the international and district. UMWA v. Carbon Fuel Co., 582 F.2d 1346 (4th Cir. 1978). The district court had instructed the jury that the international and district had the duty and responsibility to use all reasonable means to prevent or terminate the wildcat strikes; failure to do so would render them liable. Id. at 1350. The circuit court held that such a duty could not be implied on the basis of a contract provision obligating the union to "maintain the integrity" of the contract; the court followed its decision in United Constr. Workers v. Haislip Baking Co., 223 F.2d 872 (4th Cir. 1955) and declined to follow Eazor Express, Inc. v. International Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975). 582 F.2d at 1350-51. The circuit court affirmed judgments against the locals for work stoppages characterized as "wildcat strikes," but vacated judgments against the locals for work
The Court rejected the argument that congressional policy favoring arbitration over strikes imposes an obligation on an international, which has agreed to submit grievances to arbitration, to use reasonable means to prevent and end locals' unauthorized strikes in breach of that agreement. Such a duty to exert reasonable efforts cannot be implied in law simply because the contract contains an arbitration clause.

In the Court's view, "the legislative history [of section 301 of the Labor Management Relations Act of 1947 (LMRA)] is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency."5 Under this test, liability may only be imposed on an international or district union (1) if under the "fundamental agreement of association" between the union and its members, the local is granted the authority to strike without receiving authorization from the international or district, or (2) if the international or district "instigated, supported, ratified, or encouraged" the strike.6 Since Congress clearly limited the legal responsibility of an international for the unilateral acts of a local, said the Court, it would be anomalous to hold the international liable for failure to respond to those acts.7

The Court also rejected the argument that the international and district unions had an implied obligation to use all reasonable means to end unauthorized strikes because of a contract provision obligating the international and district to "maintain the integrity" of the contract.8 The bargaining history reflected that while earlier contracts imposed an obligation upon the UMWA to "exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement,"9 the UMWA thereafter negotiated the deletion of the "best efforts" clause and no such obligation was contained in the new contract.10 The Court found that

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stoppages that qualified as sympathy strikes. *Id.* at 1348-49. This portion of the opinion was not appealed to the Supreme Court. 444 U.S. at 215 n.3.
5. 444 U.S. at 216.
6. *Id.* at 217-18.
7. *Id.*
8. *Id.* at 216.
9. *Id.* at 220 n.7.
10. The rewritten contract provided:

The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of the Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.
the inescapable conclusion to be drawn from their bargaining history is that, whatever the integrity clause may mean, the parties purposely decided not to impose on the Union an obligation to take disciplinary or other actions to get unauthorized strikers back to work. To impose such an obligation by judicial implication would damage not only the bargaining process but also the national labor policy furthering free collective bargaining.

Under the Court's decision an international union remains liable under section 301 if it authorizes strikes in violation of express or implied contract terms. The Court's decision makes equally clear, however, that absent common-law agency responsibility an international or district union is not liable for a local's unilateral, unauthorized strike action in breach of contract. Further, the failure of an international or district to exert reasonable efforts to prevent or end a strike will not be sufficient to establish the parent union's responsibility.

As it has done on so many occasions over the years, the Court honored the fundamental principles of free collective bargaining. For years the UMWA and Carbon Fuel Co. had freely negotiated such questions as union responsibility and liability for strikes in breach of contract. The UMWA negotiated the deletion of the "best efforts" clause not only to avoid liability but to preclude the imposition of restrictions upon its freedom of action in dealing with such strikes. The thrust of the Court's decision is that where, as here, the parties have negotiated a resolution of a particular problem, albeit not necessarily to the complete satisfaction of both, it is not for the courts to establish a different resolution.

There is undoubtedly a pragmatic strain beneath the surface of the Court's decision. As a practical matter the power of the international and district to control the actions of the locals and individual miners is limited. Disciplinary action, such as fines, expulsion from membership and trusteeships, is marvelous in theory, but its practical utility in the milieu of the mining industry is highly questionable. Imposing liability on the international or district for local conduct over which it has little actual control would be singularly unfair and inappropriate. The decision in Carbon Fuel Co. reflects the Court's recognition that judicial establishment of an implied duty to use "best efforts" to prevent local

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Id. at 221. The UMWA had previously negotiated the deletion of a no-strike provision in an effort to avoid liability under section 301 for contract breaches. Id. at 220.  
11. Id. at 221.  
12. Id. at 221-22.  
wildcat strikes would be contrary to the national labor policy favoring collective bargaining and could endanger labor peace in the mining industry.

B. University Faculty as Managerial Employees

In *NLRB v. Yeshiva University*, the Court held that the full-time faculty at Yeshiva University were managerial employees excluded from collective bargaining under the National Labor Relations Act (NLRA).

In *Yeshiva*, the National Labor Relations Board (the Board) certified a union as bargaining agent for all full-time faculty members at ten of the private university's thirteen schools. The Board rejected the university's contention that the entire faculty was managerial and found that the faculty members were professional employees covered by the NLRA because "faculty participation in collegial decision-making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees."

In overturning the Board's decision to certify the union, the Second Circuit found that the Yeshiva faculty "substantially and pervasively operate[d]" the university and were therefore managerial employees. The Supreme Court agreed with the circuit court's finding that the faculty's authority over academic matters was absolute, and that faculty recommendations largely controlled personnel decisions.

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16. Yeshiva University Faculty Association.

17. The bargaining unit found appropriate by the Board included professors, associate and assistant professors, instructors, adjunct and visiting instructors and professors, department and division chairmen, senior faculty and assistant deans. Excluded were part-time faculty, lecturers, principal investigators, deans, acting deans and directors.


19. 582 F.2d 686, 698 (2d Cir. 1968).

20. University-wide policies were formulated by the central administration with approval of a board of trustees and included general guidelines concerning such matters as teaching loads, salary scales, tenure, sabbaticals, retirement and fringe benefits. The individual schools operated on a substantially autonomous basis, and the faculty at each school effectively determined curriculum, grading systems, admission and matriculation standards, academic calendars and course
The Court rejected the Board’s position that the faculty decisions were nonmanagerial because they involved independent professional judgments exercised in the faculty’s own interest rather than in the interest of the university.\textsuperscript{21} The Court recognized a tension between the NLRA’s exclusion of managerial employees and its inclusion of professionals, for professionals in executive positions continue to draw upon their professional expertise. In the Court’s view, however, the faculty’s professional interests at Yeshiva could not be separated from those of the institution.\textsuperscript{22}

The predominant business of the university, said the Court, is quality education; the university’s vitality ultimately depends upon academic policies formulated and implemented by the faculty. While faculty members may pursue professional goals, “there can be no doubt that the quest of academic excellence and institutional distinction is a ‘policy’ to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal.”\textsuperscript{23} The problem of divided loyalty between employer and union, which the managerial exclusion was designed to avoid, would be particularly acute because of the university’s heavy reliance on the faculty in the creation and implementation of university policy.\textsuperscript{24}

It is difficult to assess the breadth and potential impact of \textit{Yeshiva}.

\begin{footnotes}
\item schedules. Faculty recommendations also largely controlled faculty hiring, tenure, sabbaticals, termination and promotion. Some of the faculties made final decisions concerning admission, expulsion and graduation of students, teaching loads, student absence policies, tuition and enrollment levels. The Court argued that:
\begin{quote}
When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.
\end{quote}
444 U.S. 686 (footnote omitted).
\item \textit{Id}.
\item \textit{Id} at 688.
\item \textit{Id}. In the dissent’s view, the faculty in their governance function were neither accountable to nor controlled by the administration, and did not serve as management representatives when participating in university decisionmaking on academic subjects. Justice Brennan stated that “[w]hat the Board realized—and what the Court fails to apprehend—is that whatever influence the faculty wields in university decisionmaking is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives.” 444 U.S. at 697.
\item The Court stated:
The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy. . . . It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies. The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.
444 U.S. at 689-90 (footnotes omitted).
\end{footnotes}
The decision purports to rest upon the substantial governance authority exercised by the particular Yeshiva faculty, authority which extends beyond limited academic concerns. In a footnote, the Court indicated that faculty would not be excluded as managerial merely because they had the authority to determine their own course content, evaluate their own students or supervise their own research; that the faculty at higher education institutions other than Yeshiva might be entirely or predominately nonmanagerial; and that some faculty members (e.g., nontenured faculty) at Yeshiva and similar universities might be considered nonmanagerial.\(^{25}\)

Because the determination of the status of faculty as nonmanagerial or managerial is highly factual, the Board and courts may choose to interpret Yeshiva as limited to its particular facts. However, it is doubtful that the powers of the Yeshiva faculty are atypical of the powers generally possessed by university faculties. Indeed, the Board found no significant difference between the Yeshiva faculty and others it had considered.\(^{26}\) While the Yeshiva faculty participated in academic policy decisionmaking, they had no part in the development of fiscal and other managerial policies. Viewed in this light, Yeshiva is potentially of broad significance, for it may effectively foreclose the bargaining rights of substantial numbers of private university faculties, as well as those of many other categories of professional employees. In addition, the decision will have an impact on those state public employee bargaining laws which contain managerial and supervisory exclusions identical or analogous to those of the NLRA.

While there is clear tension between the managerial and supervisory exclusions and the professional inclusion, the fact remains that Congress expressly included professional employees under the NLRA with no faculty exception.\(^{27}\) Complex and elusive as the Yeshiva holding may be, accommodation rather than wholesale exclusion would seem to be required. As Justice Brennan argued in his extensive dissent, faculty interests are sufficiently different from those of the administration to warrant granting faculty the right to form their own union. The majority's examples of how the interests overlap are, to Brennan, more a matter of coincidence than anything else; as frequently as interests have coincided, they have been separate and at odds with one another.\(^{28}\)

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25. *Id.* at 690 n.31.
26. *Id.* at 684-85.
27. See note 18 *supra*.
28. *Id.* at 700-02. Brennan noted that:
   The Court's conclusion that the faculty’s professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. But the university of today bears little resemblance to the “community of scholars” of yesteryear. Education has become
There is another dimension to the Court's decision which is both important and unfortunate. The Court was highly critical of the Board for its failure to make adequate findings of fact and to sufficiently explain its rationale for its decision in *Yeshiva*, as well as for the Board's shifting rationales on the faculty managerial issue. The Court found that the Board's decision in *Yeshiva* was neither based on articulated facts nor consistent with the NLRA, and accordingly, decided not to defer to the Board's expertise. The Court's lack of deference to the Board and criticism of the Board's process and judgment is rapidly becoming a trend.

C. Secondary Product Picketing

In *NLRB v. Retail Store Employees Local 1001 (Safeco)*, the Court held that section 8(b)(4)(ii)(B) of the NLRA proscribes secondary picketing against a struck product where the picketing predictably encourages consumers to boycott the neutral party's business altogether.

Safeco was a title insurance underwriter involved in contract negotiations with a union representing some of its employees. Once the negotiations broke down, the union picketed five local title insurance companies that derived 90% of their gross income from the sale of Safeco policies. The pickets carried signs declaring that Safeco had no contract with the union and distributed handbills asking consumers to support the strike by cancelling their Safeco policies. The Court, in agreement with the NLRB, found that while the union's appeal was directed against Safeco policies, the picketing was nevertheless unlawful.

"big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any industrial organization. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decisionmaking process.

*Id.* at 702-03 (footnotes omitted).
29. *Id.* at 686-87.
30. *Id.* at 691.
33. 29 U.S.C. § 158(b)(4)(ii)(B) (1976). Section 8(b)(4)(ii)(B) provides in relevant part that it is an unfair labor practice for a union "to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . . 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. . . ."
34. 100 S. Ct. at 2375.
ful since sale of the policies accounted for substantially all of the neutral title companies' business; the picketing was therefore reasonably calculated to induce customers not to patronize the neutrals at all.\textsuperscript{35}

\textit{NLRB v. Fruit Packers (Tree Fruits)},\textsuperscript{36} said the Court, legitimized peaceful picketing at secondary sites when it only persuades customers not to buy the struck employer's product; picketing "to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer" is forbidden.\textsuperscript{37} The Court in \textit{Tree Fruits} had recognized congressional intent to tolerate business losses suffered by neutrals in a successful consumer boycott of the primary's goods, so long as the neutrals could avoid becoming embroiled in the primary dispute.\textsuperscript{38}

The \textit{Safeco} Court argued that the distinction between permissible struck product picketing and illegal secondary picketing breaks down where the struck product constitutes the sole or central product of the secondary employer.\textsuperscript{39} Where, as in \textit{Tree Fruits}, the struck product is only one of many products sold by the neutral retailer,\textsuperscript{40} decreased sales of the product will put pressure on the primary employer but will cause only marginal injury to the neutral retailer. The neutral thus avoids becoming involved in the labor dispute. In the central product situation, however, successful picketing against the struck product will result in a total boycott of the neutral’s business. Thus, the neutral becomes embroiled in the dispute, contrary to congressional intent to prevent such an expansion of labor discord:

As long as secondary picketing only discourages consumption of a struck product, incidental injury to the neutral is a natural consequence of an effective primary boycott . . . . But the Union's secondary appeal against the central product sold by the title companies in this case is "reasonably calculated to induce customers not to patronize the neutrals at all." . . . . The resulting injury to their businesses is distinctly different from the injury that the Court considered in \textit{Tree Fruits}. Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square with the language or the purpose of § 8(b)(4)(ii)(B). Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals with the object of "forcing or requiring [them] to cease . . . dealing in the [primary]

\textsuperscript{35} \textit{Id.}
\textsuperscript{36} 377 U.S. 58 (1964).
\textsuperscript{37} \textit{Id.} at 70, cited in \textit{Safeco}, 100 S. Ct. at 2376.
\textsuperscript{38} 100 S. Ct. at 2376.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} In \textit{Tree Fruits}, the union picketed large supermarkets to encourage customers to boycott Washington State apples.
produco[t] . . . or to cease doing business with the primary employer.\textsuperscript{41}

The Court also held that Congress may prohibit secondary picketing "that predictably encourages consumers to boycott a secondary business" without violating the free speech guarantees of the first amendment.\textsuperscript{42}

\textit{Tree Fruits} picketing and \textit{Safeco} picketing stand at opposite ends of the spectrum of secondary struck product picketing. Where the product picketed is but one of many items sold by the neutral, \textit{Tree Fruits} permits the picketing. Where the product picketed is the sole or central product sold by the neutral, \textit{Safeco} prohibits the picketing. As pointed out in Justice Brennan's \textit{Safeco} dissent,\textsuperscript{43} these decisions do not resolve the myriad of situations in between, such as where the product represents a major portion of the neutral's business but does not constitute a "single dominant product." Instead, the new test created under \textit{Safeco} is whether the union's appeal to consumers is likely to threaten the neutral with ruin or substantial loss; resolution of the question in particular cases is left to the Board's expertise.\textsuperscript{44}

In his dissent, Justice Brennan argued that this test is vague and inconsistent with \textit{Tree Fruits}. Under \textit{Tree Fruits}, said Justice Brennan, the legality of picketing of a neutral depended on whether the union urged a boycott of the primary employer's product or a boycott of all products carried by the neutral, including those from nonprimary sources; the extent of economic harm to the neutral due to lessened primary purchases was not considered. \textit{Safeco}, Justice Brennan contended, makes the test of illegal coerciveness depend upon the composition of the secondary's business, by identifying "coerciveness with the percentage of the secondary firm's business made up by the primary product."\textsuperscript{45} Under the \textit{Safeco} test the standard becomes more uncertain and puts a picketing union in the position of having to guess whether its picketing of a neutral is legal.

\textit{Tree Fruits} and \textit{Safeco} involve one of the most difficult of labor law issues. Balancing the right of unions to follow the primary product

\begin{footnotesize}
\textsuperscript{41} 100 S. Ct. at 2379 (footnotes omitted).

\textsuperscript{42} Justice Powell, joined by three justices on this part of the opinion, cited American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215, 229-31 (1974); Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957); and Electrical Workers v. NLRB, 341 U.S. 694, 705 (1951). Justices Blackmun and Stevens, in separate concurrences, complained that Justice Powell's opinion was too cursory in its discussion of the first amendment issue; however, each found the restriction on picketing here to be constitutional—Justice Blackmun on the ground that the government interest in protecting neutrals from coerced participation in the strike was sufficiently strong, and Justice Powell on the ground that picketing has strong elements of conduct and is therefore not entitled to the same protections as pure speech. Justice Brennan's dissent did not address the first amendment issue.

\textsuperscript{43} 100 S. Ct. at 2379-82.

\textsuperscript{44} Id. at 2377-78 n.11.

\textsuperscript{45} Id. at 2381.
\end{footnotesize}
with the right of neutrals to be free from disputes not their own involves major policy decisions. The language and legislative history of section 8(b)(4)(ii)(B) are not very illuminating; thus, the task of balancing the various interests falls on the Court. In the multiple-product situation at issue in *Tree Fruits*, the Court seemed to strike the balance in favor of the union's right to wage its primary dispute. In the central or dominant product situation posed by *Safeco*, the Court seemed to strike the balance in favor of protection for the neutral. Limitation of economic harm to the neutral seems to be the touchstone in both situations.

**D. Containerization and Work Preservation**

In *NLRB v. ILA*, the Court held that the NLRB had applied an incorrect test for evaluation of whether collective bargaining agreement provisions regarding containerization in the shipping industry constituted lawful work preservation clauses under section 8(e) and 8(b)(4)(B) of the NLRA. The union and an employer association negotiated rules giving longshoremen the right to load and unload at the pier certain containers which would otherwise be loaded or unloaded locally (within a fifty-mile radius of the port) by someone other than the employees of the beneficial owner of the cargo; the rules also provided monetary penalties for any container handled in violation of the rules. The Board found that off-pier loading and unloading of containers had traditionally been done by employees of consolidators and truckers rather than longshoremen, that the rules which required shippers to cease doing business with consolidators and truckers had a work-acquisition rather than a work-preservation object, and that the rules and enforcement thereof constituted unlawful secondary activity. The Court held that the Board erroneously defined the work at issue and remanded the case to the Board for further proceedings.

The Court noted that the legality of a "work preservation agreement" depends on whether the agreement is aimed at preserving work traditionally done by the union's members or is actually designed to

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47. Containerization involves the use of large, reusable metal receptacles which can be moved on and off a ship unopened, and which can be attached to a truck chassis and transported intact to and from the pier like a conventional trailer. *Id.* at 2308.
49. *Id.* § 158(b)(4)(B).
50. A freight consolidator combines various shippers' goods into a single shipment at its own off-pier terminal and arranges for delivery to the pier. 100 S. Ct. at 2309 n.8.
51. *Id.* at 2318.
achieve unrelated union objectives. To be lawful, a work preservation agreement must pass two tests, said the Court. First, the objective of the agreement must be to preserve work traditionally done by employees represented by the union. Second, the contracting employer must have the right of control over the work in question. With regard to the first and basic question of identifying the work at issue, the Court found that the Board erroneously focused on the off-pier work performed by employees of consolidators and truckers, rather than on the work of the longshoremen as it existed before the containerization innovation.

By focusing on the work as performed after the innovation took place, by the employees who allegedly have displaced the longshoremen's work, the Board foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo. For the very reason the Rules were negotiated was that longshoremen do not perform that work away from the pier, and never have.

The Court said that the Board's determination that the loading and unloading of ships has historically been the work of longshoremen should only have been the beginning of its analysis. The Board should then have looked at how the contracting parties sought to preserve at least some of the work when faced with a massive technological change which largely eliminated the intermediate stage of cargo handling. At the same time, the Board should have evaluated the relationship between traditional longshore work and the work given longshoremen by the rule. The Court stressed that the Board's evaluation of the work preservation question on remand should be guided by the congressional preference that disputes over dislocations caused by technological innovations be resolved through collective bargaining.

Predominant in the Court's decision is its effort to honor private

53. 100 S. Ct. at 2313.
54. Because the Board found that the work was similar to that which had been done by consolidator and trucker employees before containerization, it concluded that the union was seeking to acquire the traditional work of those employees. Id. at 2315.
55. Id.
56. Id. at 2316.
57. The Court noted that "[t]he legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." Id. at 2316.
58. Only if the Board finds a lawful work preservation objective will it be obliged to consider whether the employer association had the right to control the loading and unloading of containers away from the pier, an issue not reached by the Board and not before the Court. Id. at 2307.
resolution of a monumental problem. As early as 1959 collective bar-
gaining agreements in the shipping industry contained provisions re-
flecting the efforts of unions and employers to deal with the
longshoremen-displacement problems caused by containerization. The parties' continuing concern could be seen in the complex rules de-
volved over the years in successive agreements. The Court was
clearly reluctant to upset the balance struck by the parties.

II
EMPLOYMENT DISCRIMINATION: TITLE VII OF THE CIVIL
RIGHTS ACT OF 1964

A. Minimum Term of Employment Requirement as Seniority System

In California Brewers Association v. Bryant, the Court held that a
contract clause according greater benefits to permanent employees than
to temporary employees and requiring 45 weeks of employment in a
single calendar year before an employee could attain permanent status
was a component of a “seniority system” within the meaning of section
703(h) of Title VII of the Civil Rights Act of 1964.

The multi-employer collective bargaining agreement adopted by
the brewing industry established three employee classifications—per-
manent, temporary and new—which determined employee rights con-
cerning hiring and layoffs. Permanent employees were defined as those
employed under the contract in the same job classification, for at least
45 weeks in one calendar year, by the California brewing industry.
Temporary employees were those nonpermanent employees who
worked under the contract in the preceding calendar year for at least 60
working days. New employees were those who were neither permanent
nor temporary. In the event of layoff new employees were laid off first,
followed by temporary employees and then permanent employees.

59. Id. at 2310.
60. Id.
61. 444 U.S. 598 (1980). Justice Stewart delivered the Court's opinion. Justice Marshall, joined by Justices Brennan and Blackmun, dissented. Justices Powell and Stevens did not partici-
pate.
63. The contract was between the California Brewers Association, on behalf of various
brewing companies, and the Teamsters Brewery and Soft Drink Workers Joint Board of Califor-
nia, on behalf of various unions. 444 U.S. at 602.
64. The contract classified employees as brewers, bottlers, drivers, shipping and receiving
clerks, and checkers; separate seniority lists were maintained for each classification. Id. at 602 n.5.
65. Permanent status was lost if the employee was not employed under the contract for any
consecutive two-year period, left the industry or was discharged for specified reasons. Id. at 602-
03.
66. Within each category employees were laid off in reverse order of plant seniority at the
particular plant. Employees were then rehired in reverse order of layoff. Id. at 603.
Permanent employees laid off at one plant could also displace (i.e., bump) junior temporary or new employees at other plants. Further, permanent employees had priority in dispatch from the hiring hall.

A black temporary employee brought a class action under Title VII, alleging that the foregoing seniority and referral provisions perpetuated historical discrimination in the brewing industry, and that the 45-week requirement precluded plaintiff and his putative class from achieving, or having a reasonable opportunity to achieve, permanent employee status. The Ninth Circuit, reversing the district court, held that the 45-week rule was neither a seniority system nor a part thereof under section 703(h), and that plaintiff was entitled to prove that the rule had a discriminatory impact under Griggs v. Duke Power Co. The Supreme Court reversed.

Seniority connotes length of employment, said the Court, and the principal feature of a seniority system is preferential treatment based on length of employment. The Court found that the 45-week rule conformed to this concept: "Rights of temporary employees and rights of permanent employees are determined according to length of plant employment in some respects, and according to length of industry employment in other respects." In the Court's view Congress intended to exempt from Title VII coverage those aspects of seniority systems which are not based solely on passage of time, thus affording employers significant freedom to create differing seniority systems.

67 Employers were obligated to fill vacancies through the union hiring hall. Employees of the particular employer were dispatched first according to employer seniority, followed by permanent, temporary and new employees according to industry seniority. Id. at 603-04.
68 The complaint was also based on 42 U.S.C. § 1981 (1976) and 29 U.S.C. §§ 159, 185 (1976); it alleged that the unions breached their duty of fair representation by negotiating disparate and unreasonable employee privileges. 444 U.S. at 601.
69 The complaint further alleged a specific instance of discriminatory referral. Id. at 601-02.
70 Section 703(h) provides in relevant part:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.
71 Griggs established that facially neutral employment practices which have a disparate impact on one racial group may be unlawful regardless of intent, if they operate to freeze previously discriminatory practices. See generally L. Modjeska, Handling Employment Discrimination Cases § 1.9 (1980).
72 444 U.S. 605-06.
73 Id. at 606.
74 Id. at 607. However, the Court cautioned:

But that freedom must not be allowed to sweep within the ambit of § 703(h) employment rules that depart fundamentally from commonly accepted notions concerning the accept-
The fact that the contract established two parallel seniority ladders, one for permanent and the other for temporary employees, said the Court, did not prevent the system from being a 703(h) seniority system. The Court noted that the propriety of such parallel seniority tracks was established in Teamsters v. United States. The 45-week rule served as the necessary threshold requirement for entry into the permanent track and, like the analogous employment rule in Teamsters, was valid. The Court noted that accrual of industry employment and seniority did not necessarily guarantee that a temporary employee would achieve permanent status, for the 45-week requirement might remain unsatisfied, but found that this imperfection did not change the nature of the system itself: "Under any seniority system, contingencies such as illness and layoffs may interrupt the accrual of seniority and delay realization of the advantages dependent upon it."

In California Brewers, plaintiff and his putative class remain entitled to show on remand that the seniority system was not bona fide, or that the disparate employment conditions produced by the system resulted from intentional race discrimination. Such a showing would remove the system from the protections of the section 703(h) exception to the nondiscrimination prohibitions of Title VII.

National labor policy under Title VII makes employment nondiscrimination and the integration of blacks a matter of the "highest priority." National labor policy under the NLRA promotes collective
bargaining in the establishment of terms and conditions of employment and supports the fullest possible freedom of contract without the mandatory inclusion of substantive terms. As it did last term in *United Steelworkers v. Weber,* the Court in *California Brewers* balanced the sometimes conflicting policies in favor of collective bargaining resolutions. In contrast to its broad-based approval of affirmative action in *Weber,* the Court in *California Brewers* resolved the conflict by means of a rather technical analysis of what constitutes a seniority system.

**B. Applicability of FRCP Rule 23 to EEOC Actions**

In *General Telephone Co. of the Northwest, Inc. v. EEOC,* the Court held that the Equal Employment Opportunity Commission (EEOC) may seek classwide relief under section 706(f)(1) of Title VII without first obtaining certification pursuant to rule 23 of the Federal Rules of Civil Procedure.

The EEOC complaint alleged multistate sex discrimination against women and sought injunctive relief and back pay for those women affected by the challenged practices. Based on the statutory language and enforcement procedures, as well as the legislative history of section 706, the Court found that rule 23 is inapplicable to section 706 enforcement actions brought by the EEOC in its own name.

Section 706 specifically authorizes the EEOC to bring a civil action in its own name to terminate unlawful practices and to secure appropriate relief, including reinstatement or hiring with or without back pay, for victims of employment discrimination. This authority, said the Court, is not dependent upon or affected by rule 23, and clearly includes the right of the EEOC to seek relief for a group of aggrieved

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83. 443 U.S. 193 (1979). The Court there held that Title VII does not prohibit employers and unions in the private sector from taking voluntary race-conscious affirmative action to eliminate manifest racial imbalances in traditionally segregated job categories.
86. The EEOC action, based on charges filed by four employees, attacked the employer's practices concerning restrictions on maternity leave, access to craft jobs and promotion to managerial positions. The complaint did not mention rule 23, and the EEOC did not seek class certification under rule 23. The EEOC moved in the district court under Fed. R. Civ. P. 42(b) for an order bifurcating the issue of class liability from the issue of individual damages. General Telephone moved to dismiss the complaint on grounds of noncompliance with rule 23. The motion was denied by the district court and certified for interlocutory appeal to the Ninth Circuit, which affirmed the lower court's ruling. 599 F.2d 322 (9th Cir. 1979).
individuals. The Court noted that the EEOC requested relief only for those persons adversely affected by the unlawful practices and in an amount to be proved at trial. There was thus no spectre of unjustified, windfall back pay awards. 100 S. Ct. at 1703.


89. The Court noted that rule 23 had never been held applicable to pre-1972 actions by the Attorney General under § 707 that were based on a suspected "pattern or practice" of discrimination, even though specific relief was awarded to non-party individuals. The 1972 amendments transferred private sector pattern or practice authority to the EEOC, and the Court found no legislative intent to add rule 23 requirements. 100 S. Ct. at 1704-06.

90. Id. at 1707. The Court noted that the putative class in some EEOC actions might be too small to meet the minimum class size requirement; that the typicality requirement might limit EEOC actions to claims typified by charging party rather than to any violations found by the EEOC during its investigation; and that the adequacy of representation requirement might interfere with the EEOC's right to proceed in a unified action for the most satisfactory overall relief notwithstanding competing or conflicting interests. The Court stated that "the EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist." Id. at 1706-07.

91. In commenting on the importance of retaining overlapping remedies against discrimination, the Court pointed out the potential for differences between public and private interests. Id. at 1707-08.

92. Id. at 1708 n.16.
quish their private action rights.93

C. Attorney's Fees in State Proceedings

In New York Gaslight Club, Inc. v. Carey,94 the Court held that under Title VII federal courts may award the prevailing party attorney's fees for legal services rendered in state administrative and judicial proceedings.

The charging party filed a Title VII charge of employment discrimination95 with the EEOC; the EEOC forwarded the charge to a state agency pursuant to the state deferral provisions of Title VII.96 In the state proceedings, the charging party was represented by private counsel and ultimately obtained substantial relief excepting attorney's fees. However, prior to the state proceedings' termination, the charging party filed a Title VII action in federal court.97 The Court held that section 706(k) of Title VII98 permitted the federal court to award the charging party attorney's fees for legal work done in the state proceedings.

The Court noted that "use of the broadly inclusive disjunctive phrase 'action or proceeding' " in section 706(k) indicates that fee awards are authorized not only for court actions but for administrative proceedings as well.99 Further, use of the term "proceeding" throughout Title VII to refer to the different types of statutory enforcement proceedings—state, federal, administrative and judicial—shows that fees are authorized for work performed at the state and local levels as well as at the federal level.100

93. Id. at 1708.
95. The charging party alleged that she had been denied employment as a cocktail waitress because she was black. Id. at 2027.
97. Following a state administrative investigation, hearing and appeal proceedings and state judicial appeal and enforcement proceedings, during which the charging party was represented by private counsel, the respondent was ordered to offer the charging party employment and back pay, but no attorney's fees were awarded. EEOC proceedings commenced during the pendency of the state proceedings, and, following failure of conciliation efforts, the EEOC issued the charging party a right-to-sue letter. While the state judicial proceedings were pending, the charging party filed a Title VII action in federal district court seeking employment, back pay, retroactive benefits, attorney's fees and declaratory and other relief. 100 S. Ct. at 2028.
98. Section 706(k) provides:
In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private party.
99. 100 S. Ct. at 2029.
100. Id. at 2030.
The Court found that the fee award was consistent with congressional intent to facilitate meritorious discrimination complaints and to supplement state remedies with EEOC proceedings and federal court actions. Availability of a federal fee award, said the Court, should not turn upon whether or to what degree the complainant is successful at the state or local level.

Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.

The Court's decision is significant in that it emphasized the importance of federal-state cooperation in implementing Title VII policies and placed a high value on state resolution of employment discrimination claims. The Court did not regard mandatory initial deferral to state and local remedies as merely a token or grudging exception to a paramount federal scheme. On the contrary, the Court viewed Title VII as not only leaving the states free but encouraging them to exert their regulatory power to remedy employment discrimination. Given the premise that federal relief is only supplementary to state and local action, and given that attorney's fees are an integral part of complete relief, the Court's approval of federal fee awards for work performed by attorneys at the state level is appropriate.

D. Filing Limitations in Deferral States

In *Mohasco Corp. v. Silver*, the Court held that under section 706(c) and (e) of Title VII charges of unlawful employment practices

101. In the Court's view, the availability of a state agency attorney did not supplant the need for private counsel. *Id.* at 2033-34.

102. *Id.* at 2033. The Court observed that "[i]nitial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief." *Id.* at 2031.

103. The Court noted that if a federal fee award was authorized only when an independent reason existed for the federal court suit, such ground could almost invariably be found. The Court found, however, that such an incentive would encourage complainants to abandon state proceedings as quickly as possible, and would undermine congressional encouragement of full use of state remedies. *Id.* at 2032 n.6.

104. *Id.* at 2032.


107. Section 706(c) provides in part that where an alleged unlawful employment practice occurs in a state which has a law prohibiting such practice, no charge may be filed with the EEOC
in deferral states must be filed with the EEOC within 300 days of the alleged unlawful employment practice, and that the pendency of state proceedings does not extend that period.  

The procedural sequence in the case was as follows: (a) on August 29, 1975, the charging party was discharged; (b) on June 15, 1976 (291 days later), the charging party filed a letter with the EEOC alleging religious discrimination; (c) the EEOC referred the letter to the state agency; (d) on August 20, 1976, while state proceedings were pending (more than 60 days after the letter was filed with the EEOC and 357 days after the discharge), the EEOC notified the respondent of the filing of the charge and proceeded to investigate the charge.  

The Court found that the 300-day period had run before the charge was filed with the EEOC and that the filing was therefore untimely.

Applying the language of section 706(c) and (e) literally, the Court found that while the EEOC could properly refer a charge to a state agency or hold a charge in abeyance, the EEOC could neither proceed with the charge nor regard the charge as filed until either state proceedings had ended or 60 days had passed. The charging party was regarded as having initially instituted state proceedings on June 15, 1976 (291 days after the discharge). Since the state proceedings had not terminated until after the expiration of the 300-day period, the 300-day limitations period applied. Even if the charge was considered automatically filed upon termination of state proceedings, the charge was nevertheless filed with the EEOC on the 351st day, not the 291st, and was therefore untimely. The Court considered its decision to be consistent with a straightforward reading of the statute and with the legislative history. The Court declared that the relatively short time limits reflected congressional intent to encourage prompt processing of employment discrimination charges, and that “experience teaches that strict adherence to the procedural requirements specified by the legisla-

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108. 100 S. Ct. at 2492.
109. On February 9, 1977, the state agency found that the charge lacked merit, and this finding was upheld by an appellate board on December 22, 1977. Id. at 2489 n.5.
110. Id. at 2489. On August 24, 1977, the EEOC made a finding that there was no reasonable cause to believe the charge was true and issued the charging party a right-to-sue letter. The charging party filed a court action 91 days thereafter, and the respondent did not raise the 1-day untimely filing as a defense. Id.
111. Id. at 2492. The Court had so held in Love v. Pullman Co., 404 U.S. 522, 526 (1972).
112. 100 S. Ct. at 2492.
ture is the best guarantee of evenhanded administration of the law.”

Justice Blackmun noted in his dissent that under the majority's decision, a complainant in a deferral state need only file a charge within 240 days of the alleged unlawful practice to insure that his federal rights are preserved. If the charge is filed later, but less than 300 days after the alleged unlawful practice, the right to seek Title VII relief would still be preserved if the state agency completes its consideration of the charge prior to the end of the 300-day period. As a result, a complainant's federal rights between day 240 and day 300 necessarily become uncertain and speculative.

III.

Cases Under Other Statutes and the U.S. Constitution

A. Discharge of Public Employees for Political Affiliation

In *Branti v. Finkel*, the Court held that the first and fourteenth amendments protect county assistant public defenders from discharge based solely upon their political affiliation.

Two incumbent Republican assistant public defenders were selected for termination upon the appointment of a Democratic public defender. Termination was based solely upon their Republican party affiliation and not on unsatisfactory job performance. The Court affirmed entry of an injunction against their termination.

The Court rejected the contention that *Elrod v. Burns* prohibited only dismissals resulting from an employee's failure to capitulate to po-

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113. *Id.* at 2497.
114. If the state agency is less than one year old, the period would be 180 days, because the EEOC must defer to such agency for 120 rather than 60 days. 42 U.S.C. § 2000e-5(c) (1976).
115. Justice Blackmun termed the Court's rule a "240-day maybe" and "wait and see" rule. 100 S. Ct. at 2501. He observed:
   This "wait and see" rule seems out of place in the context of a federal statute designed to vindicate workers' rights to be free from invidious discrimination in the workplace. Moreover, the Court's rule will no doubt result in future complications that the courts or Congress will have to disentangle.

116. *Id.* at 1287 (1980). Justice Stevens delivered the Court's opinion. Justice Powell, joined by Justice Rehnquist and in part by Justice Stewart, dissented. Justice Stewart also authored a separate dissent.
117. *Id.* at 1291.
118. The public defender was appointed by the county legislature which had shifted from Republican to Democratic control. Virtually all of the newly appointed or retained assistant public defenders were Democrats selected by Democratic legislators or town chairmen pursuant to procedures established by the Democratic caucus. *Id.* at 1290 n.5.
119. *Id.* at 1291.
120. 427 U.S. 347 (1976). The Court there invalidated the dismissal of certain non-civil service employees (sheriff's office process servers, juvenile court bailiff and a security guard) because of their political party affiliation. The Court held that the first and fourteenth amendments protect
political coercion. There is no requirement, said the Court, that dismissed employees prove they were coerced into actually changing or pretending to change their political allegiance. Rather, it is sufficient to prove that the discharge was based on party affiliation or sponsorship.\footnote{121}

The Court recognized the principle that party affiliation may be an acceptable requirement for those types of government employment in which the employee's private political beliefs would interfere with the discharge of the employee's public duties. In such a situation, said the Court, first amendment interests might be subordinated to a state's "vital interest in maintaining governmental effectiveness and efficiency."\footnote{122} The Court stated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."\footnote{123}

The Court held that party affiliation is not sufficiently related to effective job performance in the case of assistant public defenders, whose primary responsibility is to represent individual citizens in controversies with the state.\footnote{124} Whatever policymaking might be involved is in connection with individual client needs, not partisan political interests. Similarly, the Court found that confidential information obtained from the attorney-client relationship has no bearing on partisan political interests. In the Court's view, "it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party."\footnote{125}

The primary responsibility of an assistant public defender, like that of appointed counsel,\footnote{126} is to serve the client's individual interests. An assistant public defender, in order to represent a client effectively, must be able not only to act independently of the government but also to oppose it in adversary litigation.\footnote{127} Partisan politics are neither relevant nor appropriate in evaluating a public defender's performance.
The Court's decision necessarily calls into question the legitimacy of the patronage system in the selection and retention of public employees in various governmental positions previously considered a matter of legislative or executive discretion. Continuing the approach of *Elrod v. Burns*, the Court in *Branti* pays slight heed to the argument that patronage serves substantial governmental interests. The courts still must determine on a case-by-case basis whether political affiliation is sufficiently related to the performance of various governmental jobs to overcome employees' first amendment objections. Application of the constitutional standard involved thus remains somewhat uncertain.

**B. Child Labor Penalty Assessment Procedures Under the Fair Labor Standards Act**

In *Marshall v. Jerrico, Inc.*, the Court held that the statutory requirement that sums collected as civil penalties for unlawful employment of children be returned to the Employment Standards Administration (ESA) of the Department of Labor does not violate the Due Process Clause of the fifth amendment.

Civil penalties for violations of the child labor provisions of the Fair Labor Standards Act (FLSA) are determined and assessed by the assistant regional administrator of each ESA office. The sums collected are returned to the ESA in reimbursement of the costs of determining, assessing and collecting such penalties, and are allocated by the ESA national office subject to the approval of the Secretary of Labor. The ESA has discretion to return the sums collected to the regional offices in proportion to the amount expended on enforcement efforts, and on at least one occasion prior to this decision had done so.

The Court found that the functions of the assistant regional administrator resembled those of a prosecutor more closely than those of a judge, and decided that the strict due process requirement that par-

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130. The Court noted that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Id.* at 1613.
132. *Id.* §§ 9a, 216(e).
133. Allocation practices varied over the years. In 1976, sums collected were retained by the ESA national office. In 1977, sums collected were allocated to the national office, the Office of the Solicitor of Labor and the regional offices in proportion to the amounts expended on enforcement of the child labor provisions. In 1978, sums collected were held in the Treasury. *Id.* at 1615.
134. In 1977, the Chicago office received $44,300, which was the largest amount received by a regional office; the Denver office received the smallest amount, $4,900. *Id.* at 1615 n.8.
135. In the instant case the ESA assistant regional administrator assessed a fine of $103,000 against the employer for child labor violations, including $84,500 in punitive damages. The em-
ties to adjudicative proceedings be provided with an impartial tribunal. 136 While the Court did not lay down limits as to the degree of personal or financial interest which might be unacceptable in future cases, it found that the possibility of such influence in the instant case was exceptionally remote. No government official stood to profit economically from vigorous child labor law enforcement; salaries of assistant regional administrators were fixed by law; the possibility of institutional gain from zealous enforcement efforts was remote, since penalties collected comprised less than 1% of the ESA budget; the national office made the allocation decision; and ESA administration of the Act had minimized any potential bias. Accordingly, said the Court, the possibility of increased enforcement efforts with concomitant unjustified or excessive penalties “is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions.” 138

The real significance of Marshall v. Jerrico may be its implications regarding due process limitations on the partisanship of administrative prosecutors. The Court noted that while administrative as well as criminal prosecutors have traditionally been accorded wide discretion in the enforcement process, 139 prosecutors nevertheless remain public officials who must serve the public interest. Thus, the tradition of prosecutorial discretion has not immunized administrative decisions motivated by improper or illegal factors from judicial scrutiny. 140 The Court recognized that the decision whether to enforce may place significant bur-

136. The Court cited Ward v. Village of Monroeville, 409 U.S. 57 (1972) (sums produced from mayor’s court accounted for substantial portion of municipal revenues); Tumey v. Ohio, 273 U.S. 510 (1927) (mayor’s salary paid in part by fees and costs levied by mayor acting in judicial capacity). 100 S. Ct. at 1613. The Court observed that “[t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.” Id.

137. The Court noted that the assistant regional administrator is not a judge, performs no judicial or quasi-judicial functions, hears no witnesses and rules on no disputed factual or legal questions, and that an employer has the right to a de novo hearing before an administrative law judge. Id. at 1615-16.

138. Id. at 1618. The Court indicated that the result might have been different had the alleged biasing influence contributed to prosecution against particular persons rather than general zealoussness in the enforcement process. Id. at 1617 n.12.


dens on a defendant or a statutory beneficiary, even if the individual is ultimately vindicated. The Court stated that “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant of impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”

The proposition that the exercise of prosecutorial discretion is nonreviewable has tended to assume the proportions of a shibboleth in administrative law, despite the fact that the judicial underpinnings of the doctrine have always been rather equivocal. The Court’s opinion in Marshall casts further doubt on the principle of nonreviewability by suggesting, as noted above, that “serious constitutional questions” could arise if personal interests were injected into the determination of whether to prosecute. This concern is an important one; it is submitted that, even allowing due regard for considerations of governmental efficiency, the concept of absolute and nonreviewable prosecutorial discretion is untenable under our jurisprudential scheme.

C. Refusal to Work in Dangerous Conditions Under the Occupational Safety and Health Act

In Whirlpool Corp. v. Marshall, the Court held valid a regulation promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSH Act) permitting an employee to refuse a job assignment because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.

The employer had reprimanded two maintenance employees for refusing to perform their usual maintenance duties on a horizontal wire mesh guard screen approximately twenty feet above the manufacturing plant floor. The employees had refused, fearing that stepping on the

141. 100 S. Ct. at 1617.
142. 445 U.S. 1 (1980). Justice Stewart delivered the Court’s opinion. For a more complete discussion of this case, see Drapkin, The Right to Refuse Hazardous Work After WHIRLPOOL, 4 INDUS. REL. L.J. 000 (1980).
143. The Court upheld the validity of a regulation promulgated by the Secretary, which provides in pertinent part:

[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

screen could lead to death or serious bodily harm. On several previous occasions, employees had been seriously injured after portions of the screen had given way underneath them, and one had plunged to his death the week before. The district court found that the danger was real, that the employees' fear was genuine, that the employees acted in good faith, and that no reasonable alternative was available.

The Court agreed with the Secretary of Labor that such self-help in life- or serious injury-threatening situations is a right protected by the OSH Act, and that written reprimands placed in the workers' employment files therefore violated the nondiscrimination provisions of section 11(c)(1) of the OSH Act. The Court noted that in most situations involving dangerous conditions, employees are protected by detailed Occupational Safety and Health Administration (OSHA) complaint, inspection and enforcement procedures, coupled with swift and voluntary employer compliance. Because of this statutory protection, employees are not generally entitled to walk off the job. In those rare situations where the employee "justifiably believes" that the statutory arrangement affords insufficient protection against death or serious injury, said the Court, the employee may refuse to expose himself to the dangerous condition without being subject to employer reprisals. The Court found that the regulation was consistent with the OSH Act's fundamental objective of preventing occupational deaths and serious injuries, and was an appropriate aid to the Act's "general duty" clause mandating a safe place of employment.

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145. 445 U.S. at 7. The two employees had previously voiced their concerns to the plant maintenance superintendent and the plant safety director, and one of the employees had discussed the guard screen problem with a regional OSHA official. Id. at 7.

146. The employer thereafter implemented some alterations, repairs and revised procedures. Id. at 6.

147. Id. at 7-8.

148. Id. at 22.

149. Section 11(c)(1) provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.


The Court found that the reprimands constituted discrimination under section 11(c)(1), but since the issue was not reached by the lower courts, the Court did not reach the question of whether a suspension without pay for the approximately six hours unworked also constituted discrimination. The question remained for the district court on remand. 100 S. Ct. at 894 n.31.

150. Id. at 10-11.


Whirlpool raises intriguing questions concerning potentially conflicting standards under the OSH Act and the Labor Act. Where working conditions are abnormally dangerous, section 502 of the LMRA exempts good faith walkouts from the ban of contractual no-strike clauses. Section 502 may only be invoked where the employee has a good faith belief that the condition is dangerous and where there is actual objective evidence of the unsafe condition; discharge or discipline of employees will be upheld if later proof of the physical facts fails to support their prior belief.

The OSHA regulation upheld in Whirlpool appears to embody a different standard which does not depend upon the ultimate determination of danger in fact. The regulation purports to require only that a reasonable person under the circumstances confronting the employee would conclude that there is a real danger of death or serious injury and insufficient time for resort to regular statutory enforcement procedures. Interpreting the regulation, the Court spoke in terms of justifiable or reasonable employee belief, and indicated that the regulatory protection may be lost if a court "subsequently finds that he acted unreasonably or in bad faith." It remains to be seen whether the Court will incorporate the more stringent Labor Act standard.

uncorrected after governmental inspection and notification, did not indicate congressional rejection of the right to refuse to work in the highly perilous and swift-moving situations covered by the subject regulation. Further, congressional concern related to the employer's obligation to continue to pay strikers, whereas the regulation only precluded discrimination—that is, treating similarly situated persons disparately. The Court also found that congressional rejection of provisions in the Daniels bill, supra, and in the Williams bill, S. 2193, 91st Cong., 2d Sess. (1970), LEG. HIST., supra at 204-95 (bill as reported to Senate by Senate Committee on Labor and Public Welfare), which would have permitted the Department of Labor in imminent danger situations to temporarily shut down an employer's plant, reflected congressional concern over drastic, unilateral governmental action, whereas the subject regulation simply gave employees of private employers the right to avoid gravely dangerous conditions. The regulation gave employees no power to compel employer correction or evacuation of employees, and employees acted in reliance on the regulation at peril of discharge or reprimand if a court determined their action to have been unreasonable or in bad faith. Id.

153. Section 502 provides in relevant part: "No shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." 29 U.S.C. § 143 (1976).


155. See note 143 supra.

156. 445 U.S. at 21.

157. The Court noted summarily that the regulation comports with the general pattern of federal labor legislation concerning safety and health, citing section 502 of the LMRA, 29 U.S.C. § 143 (1976), and Gateway Coal Co. v. UMWA, 414 U.S. 368 (1974) (which held that section 502 requires ascertainable, objective evidence). However, the Court did not attempt to reconcile the potentially disparate standards. 445 U.S. at 17-18 n.29.
IV

CONCLUSION

Mr. Justice Holmes observed that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."\footnote{Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917).} With due regard for the ultimate artificiality of affixing a label to a term of the Supreme Court, Holmes' observation seems applicable to much of the Court's work this past term in the labor relations and employment discrimination areas. Most of the decisions were narrow and highly technical and involved patchwork in crevices left by Congress in the statutory scheme.