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Labor Law Decisions of the Supreme Court during the 1977 Term

Raymond Goetz

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Labor Law Decisions of the Supreme Court During the 1977 Term

Raymond Goetz†

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† Professor of Law, University of Kansas. (This article is a revised and substantially expanded version of a paper delivered by Professor Goetz at the annual meeting of the ABA Section of Labor Relations Law in New York City on August 7, 1978.) The author wishes to express his appreciation to Elinor P. Schroeder of the University of Kansas School of Law for very helpful comments and suggestions regarding Part II of this article.
INTRODUCTION

Labor law decisions handed down by the Supreme Court during the 1977 term continue to reflect the phenomenal expansion taking place in the scope of labor relations law. Of twenty-one decisions this term of special interest to labor lawyers, only six concerned what is now referred to as "traditional" labor law under the National Labor Relations Act. In this category, the court addressed such perennial problems as federal preemption of state labor regulation and employer rules on union solicitation and distribution, along with more novel questions relating to union discipline of supervisor-members and union enforcement of pre-hire agreements. As in the past two terms, the labor work of the Court was dominated by employment discrimination cases—a branch of labor law that hardly existed just 15 years ago. These decisions dealt with questions on race, sex, and age discrimination, state discrimination against aliens and non-residents, attorney's fees, and procedural matters. Three cases involved still newer aspects of labor law under the Freedom of Information Act, the Occupational Safety and Health Act, and the Shipping Act. Despite this breadth of coverage, for the first time in several years the Court did not have any cases in the rapidly-growing subdivision of public sector labor law.

I

EMPLOYMENT DISCRIMINATION LAW

An orderly review of this diverse output of the Court during the 1977 term must begin with the employment discrimination cases. Not only were they numerically dominant, but in terms of public and professional interest one of them far overshadowed all other decisions handed down by the Court in recent years. That of course was the decision in Board of Regents of the University of California v. Bakke.¹

A. Bakke and Affirmative Action

Bakke was not, strictly speaking, a labor case. The issue there was confined to the legality of the special admissions program of the medical school of the University of California at Davis, which reserved sixteen openings in each entering class for applicants from designated minority groups. The program resulted in the exclusion of Mr. Bakke,

¹ 98 S.Ct. 2733 (1978).
a white applicant, despite a higher grade point average, Medical College Admissions Test (MCAT) score, and "bench mark" score than minority applicants who were admitted. The case is nevertheless of special interest to labor lawyers as the Court's first attempt to come to grips with the problem of the legality of affirmative action programs designed to compensate for the effects of past discrimination. This section focuses on possible ramifications of the decision for that aspect of employment discrimination law.

Because the majority failed to reach a consensus on any single principle on which to base the result, analysis of the Bakke decision is a hazardous undertaking. Under these circumstances the views expressed in the three decisive opinions must be separately scrutinized for clues that might bear on challenges to affirmative action under Title VII of the Civil Rights Act of 1964, or under the fifth or fourteenth amendments to the United States Constitution. It must be noted, however, that the illegality of the U.C. Davis special admissions program was decided under Title VI of the Civil Rights Act, which provides in section 601:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Labor lawyers primarily concerned with the application of Bakke to Title VII need not be detained by the troublesome threshold question whether Title VI does or does not provide a private cause of action. It seems sufficient to note that Justice Stevens along with Chief Justice Burger and Justices Stewart and Rehnquist ruled that it did, Justice White ruled that it did not, and Justices Powell, Brennan, Marshall, and Blackmun assumed that it did without deciding the question. Though the decision by the Court on Mr. Bakke's application was technically based on Title VI statutory grounds by an odd combination of diverse opinions, the Court's pronouncements on affirmative action were actually controlled by constitutional principles.

4. The Court's concern over the right to a private cause of action is derived from the fact that Congress did not expressly grant such a right. The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Congress carefully considered and included the right to private action in other titles of the Civil Rights Act of 1964 (Titles II and VII). According to Justice Stevens, the Chief Justice, Justice Stewart and Justice Rehnquist, a private action was allowable because Bakke's suit was brought to end a particular discriminatory practice and not to cut off the University's federal funding. The Court declared, "The grant of an injunction or declaratory judgement in a private action would not be inconsistent with the administrative program established by section 602." 98 S.Ct. at 2814 n. 26. Section 602 establishes an elaborate mechanism for governmental enforcement by federal agencies. Id. at 2814.
1. Justice Stevens' Approach

With the Title VI statutory base as a starting point, the easiest opinion to analyze is that of Justice Stevens, which built most directly on it. His opinion,5 joined in by Chief Justice Burger and Justices Stewart and Rehnquist, would have disposed of the case simply on the basis of a literal application of Title VI, without any necessity for reaching the constitutional question. Justice Stevens reasoned that since Mr. Bakke was unquestionably denied admission to the medical school because of his race, and since section 601 explicitly prohibits the exclusion of any person from a federally funded activity "on the ground of race," the plain language of the statute required affirmance of the trial court's finding that the statute had been violated. The mere fact that exclusion of white applicants because of race carried with it no racial stigma was of no significance because section 601's categorical prohibition of "exclusion" permits no such qualification or limitation.

If one agrees with Justice Stevens that the legislative history of Title VI does not reveal controlling congressional intent to proscribe only racial classifications that would violate the fourteenth amendment, his narrow approach represents sound judicial craftsmanship. As a guide to future application of Title VII, however, this opinion provides little help, except possibly for the case of a hiring program closely analogous to the U.C. Davis admissions program. Justices Stevens, Stewart and Rehnquist and the Chief Justice must be counted as the most inscrutable of the justices on affirmative action programs granting racial employment preference. All they offer is a rigid statutorily-based opinion on the illegality of voluntary racial quotas under Title VI, which provides ground only for speculation about their similar status under Title VII, and even less about the status of other forms of affirmative action under Title VII. Their opinion leaves one completely in the dark as to the status of racial preferences under the Constitution.

2. Justice Brennan's Approach

At the opposite extreme is the approach taken by Justice Brennan, joined by Justices White, Marshall and Blackmun.6 Justice Brennan differed sharply with Justice Stevens' reading of the legislative history of Title VI. Based on a lengthy review of that history, Justice Brennan concluded that Title VI "goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."7 This position permitted him to avoid a literal application of the wording of Title VI that could only lead to the result reached by Justice

5. 98 S.Ct. at 2809-15.
6. Id. at 2766-94.
7. Id. at 2767.
Stevens. Consequently, although Justice Brennan ostensibly was still applying the statute, his rationale was largely devoted to determining whether preferential treatment of racial minorities was consistent with the fourteenth amendment.8

In making this fourteenth amendment analysis, Justice Brennan conceded that even racial classifications established for benign or remedial purposes should be subject to strict review, rather than simply the minimal “rational basis” standard of review applied in some equal protection cases.9 He then announced a two-pronged test for such racial classifications, adapted from the Court’s recent gender-based discrimination decision in Califano v. Webster:10 first, an important and articulated governmental purpose must be shown; second, the classification must not “stigmatize” any group. Applying this test, he concluded that the purpose of “remedying the effects of past societal discrimination” was sufficiently important to justify the use of race-conscious admissions programs, and that the U.C. Davis program did not treat any discrete group or individual as inferior. Moreover, he found that the program’s use of race was reasonable in light of its objectives, since there was no other practical means by which the objectives could be attained in the foreseeable future and since each minority applicant’s personal history was reviewed on an individual basis to determine whether the applicant himself had been disadvantaged by racial discrimination. Finally, he saw no constitutional distinction between a program that sets aside a predetermined number of places for qualified minority applicants and one that simply uses minority status as a positive factor.11

The most debatable aspect of Justice Brennan’s rationale is his

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8. In Brennan’s view, Title VI prohibits only those types of racial criteria that would violate the fourteenth amendment if employed by a state or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the fourteenth amendment. Id. at 2768.

9. Id. at 2783-84. The Court elaborated: [B]ecause of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. . . . [A]n important and articulated purpose for its use must be shown. . . . Thus our review under the 14th Amendment must be strict. Id. at 2785.

10. 430 U.S. 313 (1977). The Court stated that racial/gender classifications designed for remedial purposes “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Id. at 430 U.S. at 316.

11. As an example of the latter type of program, the Harvard Admissions Committee has added race as one of the factors considered in making admission decisions in an attempt to expand the concept of diversity. Among the group of applicants who meet the standards of the school, an applicant of a particular race may have an advantage. The Committee has set no quotas, although it does pay some attention to numbers. Within the category of race Harvard strives as well for diversity, in keeping with the principles which make the original bias acceptable. 98 S.Ct. at 2764-66.
willingness to accept "past societal discrimination" against a class of persons as the basis for a racial preference that burdens individuals in a nonpreferred group. To justify this, he not only concluded that the failure of minorities to qualify for admission under the regular procedures was due principally to the effects of past discrimination, but also speculated that were it not for pervasive past discrimination, there would have been too many superior applicants of all races for medical schools to accept a person of Bakke's relatively modest qualifications. Unlike Justice Stevens, Justice Brennan seems to have addressed the case largely as a moral question, which in itself might be commendable were it not for the fact that the question arises in an area where Congress has already spoken with remarkably clear wording.12

This new standard for constitutional review of benign racial classifications leaves little doubt where Justice Brennan stands on affirmative action in general. Apparently, he would accept any type of racial preference if its purpose is to remove the disparate racial impact that might otherwise result from the actions of the state (or, presumably, an employer) where there is reason to believe that disparate impact is itself the product of past discrimination—whether its own or that of society at large.13 In reviewing a racial hiring preference under Title VII of the Civil Rights Act, Justice Brennan might not explicitly use fourteenth amendment analysis, but it seems reasonably clear he would reach essentially the same results based on a corresponding concept of discrimination. In fact, in Bakke he relied on prior decisions under Title VII, particularly Franks v. Bowman Transportation Co.,14 for his basic proposition that "Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination."15 Accordingly, the presence or absence of past discrimination by the particular employer involved in an affirmative action program would be largely irrelevant. Thus, he might approve a hiring quota designed to remedy the effects of past discrimination in society at large that would not brand any individuals as inferior. Less rigid forms of racial preference in hiring and employment under this standard would

13. Under the disparate impact theory, an individual may be the victim of a practice which, though neutral on its face, has as adverse impact on his racial group. Under the ruling in Griggs v. Duke Power Co., 401 U.S. 424 (1971), to establish a prima facie case on a disparate impact claim a plaintiff need not show that the employer had a discriminatory intent, only that a particular practice operates to exclude a racial group. Disparate impact is a basis for Title VII relief if the practice is not based on a business necessity or if it lacks a meaningful relationship to job performance.
14. 424 U.S. 747 (1976), holding that race-conscious affirmative action is permissible under Title VII.
15. 98 S.Ct. at 2787.
present even stronger cases against a finding of discrimination because of their increased consideration of individual factors.

3. Justice Powell's Approach

The four-to-four deadlock was of course broken by the opinion of Justice Powell. He agreed with Justice Brennan that in enacting Title VI, Congress intended to proscribe only those racial classifications that would violate the equal protection clause or the fifth amendment. However, found that the admissions program created a suspect classification under the fourteenth amendment because it totally foreclosed individuals from the sixteen special admissions seats solely because of their race or ethnic background, without any prior judicial, legislative, or administrative determination of discriminatory practice as a predicate for a remedial classification. His fundamental difference with Justice Brennan was in the standard of review to be applied to determine whether such a suspect classification is permissible under the fourteenth amendment. Justice Powell felt that since racial and ethnic distinctions of any sort are suspect, they call for the most exacting judicial examination. For him, the applicable standard was whether the classification "is precisely tailored to serve a compelling governmental interest." In applying this standard to the U.C. Davis special admissions program, Justice Powell recognized that the state has a legitimate and substantial interest in ameliorating the effects of discrimination, but he specifically rejected the purpose of helping certain groups whom the faculty of the medical school perceived as victims of societal discrimination. In this connection, the following comment is of particular significance:

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations . . . After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.

The implication of this passage seems to be that Justice Powell would accept racial classification, possibly even quotas, devised by the courts, the legislature, or an administrative agency, to remedy particularized findings of discrimination. In the absence of some such judicial, legislative, or administrative finding, however, he would consider quotas violative of the fourteenth amendment.

16. Id. at 2753.
17. Id. at 2757-58 (emphasis added).
Having rejected broad societal discrimination as a justification for the U.C. Davis admissions quota, Justice Powell went on to recognize that a constitutionally permissible goal would be the attainment of a diverse student body. In his judgment, however, the U.C. Davis program, which assigned a fixed number of places to a minority group, was not necessary to promote that interest. He observed that a program such as that of Harvard University, in which race or ethnic background may be deemed a "plus" in an applicant's file, is permissible because it does not insulate the individual from comparison with all other candidates for the available seats. In contrast, the fatal flaw in the U.C. Davis program was its sole focus on racial or ethnic origin to achieve diversity.

4. Synthesis

The end result of the Bakke decision was that the Court by a five-to-four vote, consisting of Justice Powell with the four members in Justice Stevens' group concurring in the judgment, affirmed the California Supreme Court order that Mr. Bakke be admitted to the medical school. By a differently constituted five-to-four vote consisting of Justice Powell along with the four members in Justice Brennan's group, the Court also reversed the California Supreme Court's judgment insofar as it enjoined any consideration of an applicant's race. What is important about this vote-counting is what it reveals, or fails to reveal, about the possibilities for marshalling a court majority for various theories of discrimination under the Constitution and the Civil Rights Act.

a. Under the Constitution

It is clear that five members of the Court believe that Title VI of the Civil Rights Act prohibits only those uses of racial criteria that would violate the fourteenth amendment. There is, however, no majority opinion as to the crucial question of what standard of scrutiny should be applied under the fourteenth amendment. Justice Powell endorsed the traditional standard for review of racial classifications, i.e., that a state must show that the challenged classification is necessary to promote a substantial state interest, and that amelioration of societal discrimination does not meet this test. Justice Brennan and three other justices developed a new and more relaxed standard of review to be utilized when classification is designed to assist a minority that has been discriminated against by society at large. The key factor in Justice Brennan's standard seems to be that it not "stigmatize" any group as inferior.

Justice Powell and Justice Brennan's group all agree, however,

18. See note 11 supra.
that regardless of which standard of scrutiny is applied, it may be permissible under the Constitution to consider race as a factor where some substantial state interest (such as student body diversity) can be shown. These five also seem to agree that government may take race into account to remedy past discrimination when appropriate findings have been made by judicial, legislative or administrative bodies.

It seems reasonable to conclude that such methods as judicially-imposed quotas, goals and timetables to remedy proven past discrimination by a public or private employer would in general withstand constitutional challenge. Justice Powell's favorable footnote reference to consent decrees and the Court's refusal to hear *Communications Workers v. EEOC* strongly suggests that such decrees will be similarly viewed. Other preferences resulting from legislative or administrative findings apparently are to be viewed in the same light, but just what sort of "findings" will be deemed "appropriate" remains to be seen. On such fine points, the yet-undisclosed constitutional views of Justice Stevens' group could become important.

By remaining silent on the Constitution, Justice Stevens and his group have preserved maximum flexibility on the constitutionality of racial quotas and more subtle racial preferences. Thus, it cannot automatically be assumed that all four of them would vote with Justice Powell in a case involving a purely constitutional challenge of a hiring preference voluntarily adopted by a state or local governmental agency to compensate for past societal discrimination. In such a case, there would be at least a possibility that one of the four might join with Justice Brennan on the more relaxed standard of review of the racial classification.

b. Under Title VII

The status of voluntarily adopted affirmative action programs under Title VII is even more unclear. Although *Bakke* was actually decided under the Civil Rights Act, it does not necessarily follow that the test for legality of benign racial preferences under Title VII will be the same as the standard borrowed from the fourteenth amendment by the five-justice majority in *Bakke*. The only case thus far in which the Court has used fourteenth amendment analysis to determine what is unlawful "discrimination" under Title VII is *General Electric Co. v. Gilbert*, in which Justices Rehnquist, Burger, Stewart, White, and Powell found the fourteenth amendment decision in *Geduldig v.

20. 429 U.S. 125 (1976). Plaintiff employees claimed that their employer's insurance plan violated section 703(a)(1) of Title VII, 42 U.S.C. § 2000e (1976), because it excluded pregnancy as a compensable disability. The Court held that the exclusion of pregnancy from the list of disabilities in such a plan does not constitute sex discrimination.

Thus, a case arising under Title VII would present the same threshold question that split the Court so badly in Bakke. It seems quite likely, but by no means certain, that Justice Stevens and his group would again base their decision on a literal application of the statutory wording, as they did in Bakke. A hint to Justice Stevens' thinking can be found in a footnote emphasizing the principles of fairness to individuals embodied in Title VII. This, taken with his proclivity for literal statutory application, might lead to the conclusion that Title VII would be violated whenever it could be shown that an applicant for an employment opening, promotion, or training program was rejected because of the applicant's race, no matter how well-intentioned the employer's action might be. Although the wording of Title VII is slightly different from Title VI, this group's decision probably would be the same on an employer policy of hiring a fixed number of minority applicants, to the exclusion of other races from those openings. We cannot, however, actually know the views of the group regarding application of the statute to lesser forms of racial preference.

The group led by Justice Brennan seems so committed to its philosophy of permitting non-stigmatizing racial preferences to remedy societal discrimination that it would be surprising if they could not find some rationale to carry their philosophy into Title VII. This would leave Justice Powell again at the fulcrum, and it is uncertain whether he would adhere to the equal protection analysis in a Title VII context. Under the constitutional analysis he followed in Bakke, predetermined quotas would be unlawful; under direct application of the statutory prohibition on discrimination they would certainly be no less unlawful. On other race-conscious employment programs, however, the choice between a constitutional test and a statutory test could be significant.

In short, Bakke provides few definite answers concerning affirmative action in employment. The general tenor of Justice Powell's decision, as well as Justice Brennan's, is that some racially-conscious programs to compensate for past discrimination are lawful under the Constitution and the Civil Rights Act, but to try to predict the Court's outcome on particular programs would be pure speculation. The problem is that Bakke provides only one case, with three opinions enunciating as many legal theories, none of which represents a majority of the Court, and none that deals specifically with employment.

22. 98 S.Ct. at 2813 n. 19.
B. Sex Discrimination

The sex discrimination cases of the 1977 term were Nashville Gas Company v. Satty, and City of Los Angeles v. Manhart. In both, the Court continued to grapple with the troublesome question of what constitutes unlawful discrimination. Both also staked out what were expected to be new boundaries on the scope of the Court’s controversial sex discrimination decision last term in General Electric Co. v. Gilbert. However, subsequent to these two decisions the Senate and the House passed somewhat different versions of a bill overturning Gilbert and requiring that pregnancy be treated the same as any other disability for all employment-related purposes. This legislation eliminated the need for some of the strained rationalizing resorted to in Satty and Manhart to limit the impact of Gilbert without overruling it.

1. Nashville Gas Co. v. Satty

The case closest to Gilbert was Satty, which challenged two employer personnel policies relating to pregnant women. One was the denial of sick pay during absence from work due to pregnancy. The other was the denial of accumulated seniority to women upon their return to permanent employment following pregnancy leave. The legality of each was analyzed separately by the Court.

a. The Sick Pay Exclusion

The Court, without a dissenting vote, vacated the pre-Gilbert judgment of the Court of Appeals for the Sixth Circuit that the denial of sick pay for pregnancy leave—legally indistinguishable from the disa-

25. 429 U.S. 125 (1976). In Gilbert the Supreme Court held that employers who excluded pregnancy-related disabilities from a disability plan providing coverage for non-occupational diseases and accidents for all employees did not violate Title VII absent a showing that such exclusion was a pretext for invidious discrimination against women.
27. Upon plaintiff’s return from pregnancy leave, she was denied employment in permanent positions that were available and to which she would have been entitled on the basis of her seniority. Even had she happened to find an open permanent position she could obtain without any seniority, she would have felt the effects of the seniority loss for the remainder of her employment with this employer, since with the acquisition of a permanent position, she would have regained previously accumulated seniority only for purposes of pension, vacation, etc., but not for the purpose of bidding on future job openings. For purposes of job bidding, seniority had to be completely rebuilt. Disabled men, on the other hand, did not suffer these disadvantages upon recovery. A statute designed to eliminate gender-based discrimination could hardly tolerate such a manifestly inequitable difference in treatment of men and women seeking reemployment after disabilities.
28. 522 F.2d 850 (6th Cir. 1976).
bility insurance program in *Gilbert*—violated section 703(a)(1) of Title VII of the Civil Rights Act of 1964.29 Justice Rehnquist, writing for the Court, reiterated his now obsolete opinion in *Gilbert* that exclusions of this kind are not *per se* violations of Title VII, and that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not gender-based discrimination at all."30 Questionable as the original equal protection rationale for that conclusion may have been in the context of Title VII,31 the Court unanimously accepted the *Gilbert* rule that a pregnancy benefit exclusion does not in itself amount to sex discrimination. In view of the congressional action on *Gilbert*, this phase of *Satty* now has only historical interest.

The portion of the *Satty* decision concerned with the sick pay exclusion, however, is worth noting for its exploration of an avenue touched on, but not pursued, in *Gilbert*: the proof of pretext. Quoting from *Gilbert*, Justice Rehnquist asserted that in a case such as this, the plaintiff could only succeed if through the presentation of other evidence she can demonstrate that the exclusion of pregnancy from the compensated conditions is a "mere [pretext] designed to effect an invidious discrimination against the members of one sex or the other."32 While in *Gilbert* the Court had found no semblance of such a showing, the plaintiff in *Satty* contended before the Supreme Court that the sick leave pay differentiation was unlawful because it was only the initial stage of disparate treatment that pervaded the actual pregnancy and recovery and continued for the remainder of her employment with the Company, and was therefore nothing but a pretext for discrimination.33 Justice Rehnquist acknowledged that the Company's refusal to allow pregnant employees to retain seniority might be deemed relevant by the trier of fact in deciding whether the sick leave plan was a pretext.34 He held, however, that the plaintiff had not adequately preserved her right to proceed further on this theory and remanded the case for determination on this point. Putting aside this procedural complication, it appears that among the evidence that can be considered in determining whether a particular "facially neutral" personnel policy is a pretext or subterfuge might be its relationship to other personnel policies shown

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30. 429 U.S. at 136. Justice Rehnquist reached his conclusion in *Gilbert* by determining that the tests for discrimination under Title VII and the equal protection clause are the same. He used the Court's earlier decision in the equal protection case of Geduldig v. Aiello, 417 U.S. 484 (1974), that a disparity in treatment between pregnancy and other health conditions is not a breach of equal protection to support his finding that no Title VII action existed in *Gilbert*.
32. 429 U.S. at 135.
33. 434 U.S. at 145.
34. Id.
to be discriminatory on their face or in effect. Thus, where personnel policies affording disparate treatment to women are more pervasive than the once-lawful underinclusiveness of a disability benefit plan, a facially neutral exclusion could still be considered discriminatory. Whether intent to discriminate would have to be shown was not made clear, but it would seem that if a sick leave exclusion were indeed an integral part of an overall pattern of discriminatory practices, then any needed intent could properly be inferred.

The opinion on the sick pay exclusion also dealt in a very confusing manner with another possibility not fully developed in *Gilbert*: proof of discriminatory effect as proof of illegality of a policy neutral on its face. Justice Rehnquist first noted that in *Gilbert* there had been no evidence that men drew substantially greater sums than women from the disability insurance program, but that the holding did not depend on that evidence. He went on to state that in cases such as this involving a "facially neutral plan whose only fault is underinclusiveness," the burden is on the plaintiff to show that the plan discriminates on the basis of sex. By that he presumably meant the plaintiff must show discriminatory *impact or effect*, since by hypothesis in these cases there had been no discriminatory *treatment*.

Does this raise the possibility of carrying the burden to show discriminatory impact by showing that a sick leave plan with some exclusion peculiar to women or men is monetarily worth more to one sex than the other? Justice Powell's concurrence (joined in by Justices Brennan and Marshall) was receptive to that possibility, and he would have broadened the remand to allow such evidence. If such a finding were made, he would view the case as not barred by *Gilbert*. Justice Rehnquist did not seem to agree. After noting that a violation of section 703(a)(2) can be established by proof of discriminatory effect, he pointed out that the attack in *Gilbert* was brought under section 703(a)(1), which would appear to be the proper section under which to analyze questions of sick leave. This would suggest that in his view proof of discriminatory effect—such as lesser monetary value—is not relevant to illegality of a sick pay plan under section 703(a)(1), but it is not clear why. Perhaps it is because such lesser value to a class would

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35. *Id.* at 144.
37. Section 703(a)(2) makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
not establish discrimination with respect to an "individual" within the terms of the statute.

Justice Stevens' concurrence provided a more common sense reason for not allowing the finding of discrimination based on the comparative value of the "package" to the respective sexes. Although Justice Powell would not insist on "mathematical exactitude" in total compensation of men and women in terms of disability benefits, Justice Stevens pointed out that "the laws of probability would invalidate an inordinate number of rules on such a theory." Experience with particular types of coverage can vary widely from year-to-year and group-to-group. For future cases, it would appear that a majority of the members of the Court would not favor use of benefit value comparisons to establish discriminatory effect. In view of the random factors that might influence the outcome of such comparisons, they would be a highly unreliable indicator of gender-based discrimination. In fact, such a class comparison approach not based strictly on factors uniformly unique to all members of the class would seem inconsistent with the approach in Manhart discussed below.

b. The Seniority Denial

Despite the indicated uncertainty as to what bearing the employer's seniority policy might have on the legality of the sick pay exclusion discussed above, the Court was unanimous in holding that the seniority policy violated section 703(a)(2) of Title VII of the Civil Rights Act. Under this policy, accumulated seniority was denied to females upon their return to employment following pregnancy leave, while employees on leave for other disabilities were allowed to retain and accumulate seniority. This had the effect of depriving the women of "employment opportunities" and adversely affected their "status as an employee" in violation of the express terms of that section. The facts of Satty made this painfully apparent.

Justice Rehnquist, however, complicated his rationale by insisting that the seniority policy on its face appeared to be neutral in its treatment of male and female employees. Presumably he took this position in an effort to be consistent with statements in Gilbert to the effect that exclusion of pregnancy is not gender-based discrimination. From this premise, it might have followed (until the Congressional response) that the employer's failure to treat pregnancy as a disease or disability for purposes of seniority retention would not on its face be discriminatory.

39. 434 U.S. at 146 n. 6.
40. Id. at 157 n. 9.
42. See note 27 supra.
since the only types of leave of absence for which employees did retain accumulated seniority were those taken for disease or disability other than pregnancy. Then, having preserved the integrity of the pregnancy exclusion principle on which Gilbert was founded, Justice Rehnquist attempted to distinguish the different result in Gilbert on the ground that in Satty, the employer had “not merely refused to extend to women a benefit that men cannot and do not receive, but [had] imposed on women a substantial burden that men need not suffer.”

Although Justice Rehnquist insisted this distinction between benefits and burdens is more than semantics, Justice Stevens, who dissented in Gilbert, strenuously disagreed. As he saw it, the distinction between benefits and burdens cannot provide a meaningful test of discrimination since by hypothesis the favored class is always benefitted and the disfavored class is correspondingly burdened. He therefore suggested a more understandable test for identifying the needed discriminatory effect—expressed in terms of whether the policy adversely affects a woman beyond the term of her pregnancy leave.

Unlike the denial of sick leave, the deprivation of seniority affects the formerly pregnant woman’s ability to regain employment and her compensation when she does return. Since the persons permanently disadvantaged in this way comprise an exclusively female class, the plan has an obvious discriminatory effect. This effect seems to be unrelated to the determination—permissible under Gilbert—that pregnancy is not an illness. In other words, the question is whether the disparate effect of the policy in question focuses on pregnancy, rather than on pregnant or formerly pregnant employees, i.e., the physical condition rather than the person.

Now that Gilbert has been overturned, it is no longer necessary to make any such distinction between a lawful benefit-exclusion and unlawful denial of seniority, since both are now equally unlawful; however, it may be worth noting that Justice Stevens’ rationale did provide a sensible way of applying this awkward distinction. Under his analysis, arbitrary mandatory leave requirements for pregnant women—another controversial personnel policy—probably would be unlawful as well. Like the denial of seniority, the pregnancy leave requirement would deprive only women of employment opportunity and would have nothing directly to do with a determination that pregnancy is not

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43. 434 U.S. at 142.
44. Gilbert allowed the employer to treat pregnancy leave as a temporal gap in full employment status. During this gap in employment status the employer may treat a pregnant employee in a manner consistent with the determination that pregnancy is not an illness. Under Justice Rehnquist’s test, the end of pregnancy leave is the key point at which the employer’s practice must begin to pass scrutiny. 434 U.S. at 155-56.
45. Such a policy was at issue in Richmond Unified Sch. Dist. v. Berg, 98 S.Ct. 623 (1977), remanded for further consideration in light of Gilbert and Satty and possible mootness.
an illness; it would discriminate against female employees while they are still able to work rather than being limited to the period during which they are in fact physically disabled.\textsuperscript{46}

2. \textit{City of Los Angeles v. Manhart}

\textit{Manhart}, the second case dealing with sex discrimination, also would have shortened the reach of \textit{Gilbert}. In what was essentially a seven-to-two decision, the Court ruled that the city water department violated section 703(a)(1) of the Civil Rights Act by requiring female employees to make larger contributions to its pension fund than male employees. This differential in pension contributions was based on standard mortality tables and experience among employees of the City showing that women as a class live several years longer than men. Since more monthly pension payments are made after retirement to the average female employee than to the average male employee, the cost of providing pension benefits for life after retirement to female employees was correspondingly higher, although the formula for computing monthly benefits for both sexes as the same. To take into account this overall difference in longevity, employee contributions—which provide slightly less than half the cost of the program—were fixed at a rate for women nearly 15\% higher than for men. Because contributions were withheld from employee paychecks, women had less take-home pay than men with the same gross compensation.

The case squarely posed the question whether the existence or nonexistence of "discrimination" for purposes of Title VII of the Civil Rights Act is to be determined by comparison of \textit{class} characteristics or \textit{individual} characteristics. For the two classes, the differential in take-home pay unquestionably was offset by the difference in value of the pension benefits provided. Women employees were treated differently from men employees for the simple reason that the two classes are in fact different in a way that is directly relevant to the contributions being assessed, namely, longevity. Nonetheless, Justice Stevens, writing for the Court, applied the statute quite literally. He noted that section 703(a)(1) expressly and unambiguously makes it unlawful "to discrimi-

\textsuperscript{46} 434 U.S. at 142 n. 4. Critics of \textit{Gilbert} may be relieved to find that in reaching the conclusion that the seniority policy violated section 703(a)(2), the Court placed some reliance here on support given by the 1972 EEOC guidelines specifying that policies and practices involving accrual and reinstatement of seniority must be applied to disability due to pregnancy on the same terms as to other temporary disabilities. In this footnote, the Court justified its refusal to defer to these guidelines with respect to \textit{Gilbert}-type exclusions of pregnancy from disability benefits on the ground that they conflicted with past interpretations by the EEOC, with interpretations of other federal agencies and with the applicable legislative history, whereas the guidelines applicable to the seniority policy are fully consistent with past interpretations of Title VII by the EEOC. Thus, fears that the Court might permanently ignore EEOC interpretations seem to be laid to rest, although the degree of deference to them may well have diminished.
nate 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."\(^{47}\) Consequently, even a correct generalization about the class is not an adequate reason for disqualifying an individual to whom the generalization does not apply.

Of course, there could be no assurance that any individual woman working for the City actually would live as long as the actuarial assumption. Those who did not live as long as the average man would nevertheless have received smaller paychecks solely because of their sex. While it may seem unfair that women as a class should in effect have their pension benefits subsidized by male employees, as would be the case if they both contribute the same amounts, Justice Stevens considered this to be a question of policy for the legislature rather than the Court. He also pointed out that differences in life expectancy could be related to race, but the statute could hardly be construed to permit take-home pay differentials on that basis. Moreover, the basic emphasis of the statute is on fairness to *individuals* rather than classes. Finally, there is no reason to believe that Congress intended any special definition of discrimination in the context of employee group insurance; some subsidization of the poorer risks by the better risks is inherent in any pooling of risks through insurance. Accordingly, Justice Stevens found that the differential in employee pension contributions did not pass a simple test of discrimination which he seemed to endorse: "whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different.'\(^{48}\)

Unquestionably, the differential in pension contributions was discriminatory. The difficult conceptual problem on which the case turned was whether this should be viewed as discrimination based on *sex* or *longevity*. Dissenting Justices Burger and Rehnquist took the latter view. If such a practice were properly considered a differential based on longevity, rather than sex, it would have been legitimated under section 703(h) of the Civil Rights Act.\(^{49}\) That section provides that a differential in compensation is not unlawful if authorized under the Equal Pay Act, which in turn makes an exception for a "differential based on any other factor other than sex."\(^{50}\)

There is no disputing that women on the average do live longer

49. 42 U.S.C. § 2000e-2(h) (1970). Section 703(h) states, "Notwithstanding any other Provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of only professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. . . ."
than men. Further, longevity is a controlling factor in determining pension costs. Therefore, if longevity could be predicted accurately in advance on an individual basis, differences in employee pension contributions related to individual longevity would represent a justifiable distinction, despite the fact that such a differential probably would result in most women receiving less take-home pay than men. The factor which made this case difficult, however, is that the individual differences in longevity that are bound to favor women in any sizable group of employees are still impossible to determine in advance on an individual basis. For a properly funded program, consequently, the only feasible procedure is to estimate costs in advance with the aid of actuarial studies which group individuals in classes. Thus, the individual treatment the statute calls for is an unattainable ideal with respect to pension programs that provide a fixed monthly benefit.

An individual's life expectancy, of course, is based on a number of factors of which sex is only one. Yet Chief Justice Burger contended that sex is merely the single constant under which all the elements leading to differences in longevity can be grouped and the only factor upon which anyone can reliably base a cost differential for the risk taken. In support of his interpretation of the statute, he also relied on a comment by Senator Humphrey on the floor of Congress to the effect that the Act would permit longstanding differences in treatment of women under industrial benefit plans. Justice Stevens' dismissal of this isolated bit of legislative history seems justified, however, and his literal interpretation of the statutory language is a defensible one.

Even if Gilbert were not overturned by statute, it would now be clear from Manhart that a personnel policy which treats men differently from women cannot be justified by the mere fact that it is based on some factor that happens to represent an accurate characterization for the class as a whole. In fact, Manhart and Satty together could be viewed as part of an effort to confine Gilbert's impact to the peculiar situation of noncompensation for pregnancy leave, or some similar benefit exclusion that happens to correlate with a uniform physical characteristic of women.

Justice Stevens also made it plain that the discussion of relative benefit costs for men and women in Gilbert was not meant to establish any cost justification for discrimination under Title VII, and that the greater cost of providing retirement benefits for women was therefore

51. 435 U.S. at 726.
52. One cannot help wondering whether Congress had this widely-accepted actuarial differentiation between men and women in mind when it enacted the prohibition of discrimination on sex, or would have considered it discriminatory even if it had then come to mind. But in view of the recent Congressional response to Gilbert and Satty there can now be little doubt about what Congress would have done if Manhart had gone the other way.
irrelevant in *Manhart*. The Court’s reference to the greater cost of providing benefits for women in *Gilbert* was only to support the conclusion that the disability insurance plan which was not discriminatory on its face did not have a discriminatory effect. Since in *Manhart* the pension contribution differential was deemed discriminatory on its face, it was not necessary to show any discriminatory effect to establish a violation of Title VII.

After striking a blow for the rights of women, the remedy denied the restitution awarded by the district court of excess contributions by women. While paying lip service to the presumption in favor of retroactive relief in *Albemarle Paper Co. v. Moody*, the Court chose to stress the district court’s statutory duty to determine that such relief is “appropriate.” The Court then held that the district court in this case “gave insufficient attention to the equitable nature of Title VII remedies.” Justice Stevens felt that conscientious fund administrators could well have assumed that the contribution differential was justified, or even that requiring men to shoulder more than their actuarial share of the pension burden would be unlawful. Perhaps more influential was his concern for the potential impact retroactive liability might have on this pension fund and others. In his dissent to this portion of the decision, Justice Marshall pointed out that there would be no real threat to the plan’s solvency in this case since the parties seemed to assume that any retroactive payment would come from municipal funds. Nevertheless, the majority opinion provides plan administrators with reasonable assurance that they will be allowed time to make appropriate amendments in their plans to correct any features that might be considered discriminatory under *Manhart*.

Plan administrators are left with the problem of trying to determine what gender-oriented differentials in their plans, in addition to employee contributions, must be eliminated. One might well be the use of separate male and female actuarial tables for computing the reduction in benefits for employees who elect a joint and survivor option or some other survivorship benefit option. Another is the use of separate actuarial tables for men and women in determining the amount of monthly pension benefit payable under so-called “money purchase” pension plans, under which the benefit amount is not fixed in advance uniformly but is dependent on the estimated amount that can be provided with a given amount of accumulated employee and/or employer contributions.

Justice Stevens approved the insurance industry practice of considering the composition of an employer’s work force in determining

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53. 422 U.S. 405, 421 (1975).
54. 435 U.S. at 719.
probable cost of a retirement or death benefit plan. Nevertheless, his statements about the necessity for individual treatment and his rejection of sex as an acceptable determinative of longevity would seem to apply equally to the use of gender-oriented annuity tables for benefit purposes. Two commentators have persuasively argued that Title VII requires the elimination of all gender-oriented actuarial tables for benefit purposes, but federal agencies and at least one court have disagreed on the issue.

C. Racial Discrimination

_Furnco Construction Corp. v. Waters_ also was concerned with the fundamental problem of what evidence is needed to establish unlawful discrimination under Title VII. _Furnco_ involved a claim of racial discrimination under an unusual procedure for hiring bricklayers for the work of relining steel mill blast furnaces with firebrick. Under steel industry practice outside contractors, who maintain no permanent work force, hire bricklayers to do this work for the steel mills only as needed for particular blast furnace relining jobs. In this case, Furnco, upon being awarded a contract for relining a furnace for Interlake, Inc., delegated to the Furnco superintendent on the job the task of hiring needed bricklayers. In accordance with his custom, the superintendent hired from a list of bricklayers he knew to be experienced and competent and also hired other similarly experienced and competent bricklayers recommended by Furnco officials and by a black Furnco employee. No applications for employment were accepted at the jobsite. The practical reason given for this procedure was that the heavy emphasis placed by the steel mills on speed and safety made it essential that only experienced and highly qualified bricklayers be employed, and hiring "at the gate" would not provide an adequate method for matching qualified applications to job requirements.

Plaintiffs were three black bricklayers who had sought employment by Furnco on the Interlake job. Two of them were never offered employment, and the third was employed only long after he applied. They were not on the superintendent's hiring list although they were fully qualified; one had even worked with the superintendent before.

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57. 98 S.Ct. 2943 (1978).
Although there were no blacks on the superintendent's list, a number of qualified black bricklayers were ultimately hired on recommendations of others. In an effort to implement an affirmative action program initiated by Furnco following an earlier discrimination case, the superintendent on the Interlake job had been instructed to employ, to the extent possible, at least 16% black bricklayers. Black bricklayers worked 13.3% of the total man-days worked on the Interlake project. In contrast, only 5.7% of the bricklayers in the relevant labor force were minority group members.

In an opinion by Justice Rehnquist, the Court unanimously agreed with the Court of Appeals for the Seventh Circuit that plaintiffs had made out a prima facie case of employment discrimination under the standards adopted in *McDonnell-Douglas Corp. v. Green.* That case set out a four-part showing which creates an inference that it is more likely than not that the employer actions complained of were based on illegal discriminatory criteria. This test is for use in cases based on a "disparate treatment" theory of discrimination, as distinguished from cases involving a facially neutral practice having a claimed "disparate impact" or discriminatory effect on a particular racial group. In *Furnco*, plaintiffs had made out a prima facie claim by proving that: (1) they were members of a racial minority; (2) they did everything in their power to apply for employment; (3) they were qualified in every respect for the jobs which were about to be available; and (4) they were not offered employment although Furnco continued to seek applications from persons of similar qualifications.

There remained the crucial question of how an employer can overcome the inference of discrimination that thus arises. In the view of the Supreme Court, the Seventh Circuit had erroneously equated the prima facie showing with an ultimate finding of fact as to discriminatory refusal to hire. The Court of Appeals had then imposed on Furnco a hiring procedure of the Court's own devising, under which the employer would have to accept applications showing qualifications and experience and then compare those with the qualifications and experience of other bricklayers with whom the superintendent was acquainted. The apparent objective was to maximize the hiring of minority employees and overcome the racial imbalance existing in the craft which was the result of past discrimination in the industry.

The flaw in this approach was that it in effect treated the presump-

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60. Id. at 802.
61. The Court in *McDonnell-Douglas* noted that the set of rules will not be applicable to all fact situations, but does not specify where they do not apply. Id. at 802 n. 13.
62. 551 F.2d at 1088-89.
tion of discrimination as conclusive without giving the employer an ade-
quate opportunity to rebut it. To do so, the employer must show some 
"legitimate nondiscriminatory reason"\textsuperscript{63} for the minority applicant's re-
jection. The federal district court had been of the opinion that 
Furnco's practices were justified as a "business necessity" in that they 
were required for a safe and efficient operation.\textsuperscript{64} There was no evi-
dence that these practices were a pretext to exclude blacks. The Court 
of Appeals, however, disagreed with the district court that the impor-
tance of selecting bricklayers whose capability had been demonstrated 
to the superintendent provided a justification for the refusal to consider 
the plaintiffs.\textsuperscript{65} The Supreme Court did not specifically decide this 
question.

The Supreme Court, however, did determine that once the burden 
has shifted to the employer to prove that employment decisions were 
based on legitimate nondiscriminatory considerations, the employer 
does not have to prove that he "pursued the course which would both 
eable him to achieve his own business goal \textit{and} allow him to consider 
the \textit{most} employment applications."\textsuperscript{66} In other words, Title VII "does 
not impose a duty to adopt a hiring procedure that maximizes hiring of 
minority employees."\textsuperscript{67} It follows that the Court of Appeals exceeded 
its authority in insisting upon the revised hiring procedures.

Accordingly, the case was remanded to the Court of Appeals so 
that it could consider under the appropriate standard whether the pre-
sumption arising from the \textit{prima facie} showing of disparate treatment 
had been rebutted. Justice Rehnquist indicated that while statistics 
showing a racially balanced work force would not \textit{conclusively} demon-
strate lack of a discriminatory motive, they were not wholly irrelevant 
as the Court of Appeals had assumed.\textsuperscript{68} Presumably, the Court of 
Appeals therefore is reconsidering the entire question of legitimate non-
discriminatory reasons for the hiring practice.

Justice Marshall, joined by Justice Brennan, dissented on the ex-
tent of the remand. He would not have foreclosed further litigation on 
whether the hiring practices had a disparate \textit{impact}. In his opinion, "it 
is at least an open question whether the hiring of workers primarily 
from a list of past employees would, under \textit{Griggs}, violate Title VII 
where the list contains no Negroes but the Company uses additional 
methods of hiring to increase the numbers of Negroes hired."\textsuperscript{69} Al-

\textsuperscript{63} 98 S.Ct. at 2950.
\textsuperscript{64} 9 Empl. Prac. Dec. 9968 (N.D. Ill. 1975).
\textsuperscript{65} 551 F.2d at 1088.
\textsuperscript{66} 98 S.Ct. at 2950.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 2951.
\textsuperscript{69} Id. at 2953. See also note 13 \textit{supra}. 
though the policy of not hiring at the gate was facially neutral in that it applied equally to blacks and whites, there was no evidence that whites had ever applied and been rejected. In Justice Marshall's opinion the Court of Appeals had not addressed the district court findings on lack of disparate impact.

It is still too early to tell whether the *Furnco* hiring procedure is lawful or not under Title VII. The only certainty is that it is *not necessarily unlawful* simply because some qualified blacks were denied employment at the gate while hiring was going on elsewhere, even though this is sufficient to give rise to the presumption of discrimination under the *McDonnell-Douglas* criteria. Nor did this denial of employment at the gate justify the imposition of a hiring procedure designed to maximize consideration of minority applicants. The Court seems to be cautioning lower courts against substituting their own judgment for that of the employer as to the "best" hiring procedure, at least until it has been determined that the employer's actions are not otherwise legitimate and nondiscriminatory. The Court has now recognized that statistics as to racial balance in the work force may have some relevance.

Proof of discriminatory motive, presumptively or directly, is crucial to a disparate treatment case such as this.\(^70\) The basic question is whether the employer treated some persons less favorably than others *because of* their race. On this question of motive, this case was unusual in its combination of a claimed business reason for the hiring procedures with evidence of an affirmative action program that actually resulted in hiring a number of blacks about triple their representation in the area labor force. This successful effort to hire qualified black bricklayers tends to overcome the presumption that the refusal to hire at the gate was racially motivated. Though not conclusive, it is affirmative objective evidence to support Furnco's contention that the real motive for turning down applicants at the gate and hiring through other means was the business objective of obtaining a highly-qualified work force as efficiently as possible. Title VII, however, is designed to provide an equal employment opportunity for *each* applicant without regard to whether members of the applicant's race are already proportionately represented in the work force. The net effect of the Furnco procedure was that while some black bricklayers benefited from it, others were disadvantaged. This makes final resolution of this case especially difficult to predict.

It should be noted that plaintiffs here raised other claims of discrimination not based on any presumption under *McDonnell-Douglas*, but rather on claimed evidence of actual racial motivation in the man-

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\(^70\) B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1153-54 (1976).
ner in which the superintendent’s list was prepared and used. These claims are still open for consideration on remand. If such specific acts of discrimination are found, the racial balance of the work force would not immunize the employer from liability. Whatever relevance the statistics may have is limited strictly to rebutting discrimination that is presumed in the absence of specific evidence of racial motivation.

D. Age Discrimination

The case of United Air Lines, Inc., v. McMann might have been worthy of detailed analysis as an interpretation of the retirement plan exception to the Age Discrimination in Employment Act of 1967, but for the fact that Congress promptly nullified it. As the Act stood at the time of the decision it applied to persons between the ages of 40 and 65 and generally made it unlawful for an employer to discriminate against any individual because of the individual’s age. Section 4(f)(2), however, provided that it was not unlawful “to observe the terms of a . . . bona fide plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this [Act].” In a seven-to-two decision, the Court held that United’s retirement plan, established in 1941, came within this exception and legitimated the involuntary retirement of McMann at age 60.

Three months after the McMann decision Congress, while raising the upper limit on the protection of the Act to age 70, amended section 4(f)(2) by adding a provision that “no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.” The stated purpose of this amendment was to clarify that the exception was never intended to authorize involuntary retirement of an employee within the protected age group on account of age. The Conference Report went out of its way to “specifically disagree with the Supreme Court’s holding and reasoning” in McMann.

This congressional response must have been gratifying to dissenting Justices Marshall and Brennan, who had carefully analyzed the legislative history, and concluded that the original exception provision

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71. In particular, it was argued that the evidence proved that the superintendent hired from a list he had prepared, which supposedly included competent bricklayers with whom he had worked, but in fact included only white bricklayers with whom he had worked. 98 S.Ct. at 2951 n. 9.
72. 434 U.S. 192 (1977). The issue was whether under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976), retirement of an employee over his objection and prior to age 65, pursuant to a bona fide retirement plan, was permissible.
was not intended to authorize involuntary retirement under a pension plan. Chief Justice Burger, writing for the Court, had taken the position the legislative history was “irrelevant to an unambiguous statute,”" and considered the history only because the dissenters had relied upon it. Justice Stewart’s six-sentence concurrence insisted that since the statute “on its face” made United’s action under the retirement plan lawful, it was unnecessary for the Court to address legislative history.78 Congress itself plainly disagreed.

Thus, the *McMann* decision will probably be best-remembered not for its fleeting interpretation of section 4(f)(2) of the AEDA, but rather for the pointed lesson in statutory construction which Congress gave to the Court,79 reinforcing the importance of a judicial search for actual legislative intent. For this purpose, it is generally relevant to inquire into the legislative history, the general purpose of the statute, and the surrounding circumstances or context in which it was enacted. The fact that the statute may appear to a judge to be plain and unambiguous on its face does not end the search for meaning. A court perhaps can be forgiven for choosing the wrong meaning in a close case such as this, but not for limiting the scope of its inquiry.

E. State Discrimination Against Aliens and Non-Residents

A case of rather limited general interest to the labor bar was *Foley v. Connellee*,80 which held that a New York statute requiring state police officers to be citizens of the United States did not violate the rights of aliens under the equal protection clause of the fourteenth amendment to the United States Constitution.

For nearly 100 years, it has been clear that aliens are “persons” entitled to protection under the fourteenth amendment.81 As a general rule, laws singling them out for unfavorable treatment are “subject to strict judicial scrutiny.”82

This case, however, involved the application of an exception recognized by the Court for “state elective or important nonelective executive, legislative, and judicial position.”83 The majority opinion by

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77. 434 U.S. at 199.
78. Id. at 204.
79. Chief Justice Burger wrote: “In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem or artifice of evasion. In the context of this statute, “subterfuge” must be given its ordinary meaning and we must assume Congress intended it in that sense.” Id. at 203.
83. Sugarman v. Dougall, 413 U.S. 634 (1973). The Court held that a state may require citizenship as a qualification for office in an appropriately defined class of positions. This power derives from the states’ obligation to preserve the conception of a political community:
Chief Justice Burger relied heavily on the fact that state troopers make arrests and perform searches, often without judicial authority. He considered their position analogous to judicial officers and jurors who could be categorized as important nonelective officers who participate directly in the execution of broad public policy for purposes of the exception.

Justices Marshall, Brennan, and Stevens disagreed. In his dissenting opinion, Justice Stevens pointed out that if the characteristic justifying the discrimination against aliens for this employment is a foreign allegiance that raises questions about possible disloyalty, then the same justification could be used to disqualify aliens from the practice of law. Nevertheless, the Court has previously held that such an exclusion violates the fourteenth amendment.84

A somewhat different type of state discrimination was involved in Hicklin v. Orbeck,85 which held that the “Alaska Hire” statute86 violated the privileges and immunities clause of the United States Constitution.87 The statute required that all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes to which the state is a party include a provision requiring the employment of qualified Alaska residents in preference to nonresidents.88 The regulations implementing the statute further required that all nonresidents be laid off before any resident working in the same trade or craft was terminated.89 The ostensible purpose of the statute was to alleviate the state’s uniquely high unemployment. Justice Brennan, writing for the Court, held that even under the dubious assumption that a state may validly attempt to alleviate its unemployment problem by requiring private employers to discriminate against nonresidents, the statute still could not be upheld.

The unanimous decision was supported by a line of Supreme Court decisions holding that the privileges and immunities clause was violated by state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling

This power and responsibility of the state applies, not only to the qualification of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy or perform functions that go to the heart of representative government.

Id. at 647.

85. 98 S.Ct. 2482 (1978).
86. ALASKA STAT. § 38.40.010 et seq. (Michie 1977).
87. U.S. CONST., art. IV, § 2.
88. ALASKA STAT. § 38.40.030 (Michie 1977).
89. 8 ALASKA ADMIN. CODE § 35.015 (Michie 1977).
within the state.\textsuperscript{90} The clause simply states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."\textsuperscript{91} Justice Brennan observed that there was no showing in this case that nonresidents were "a peculiar source of the evil" that the statute was enacted to remedy.\textsuperscript{92} The major cause of Alaska's unemployment was not the influx of nonresidents seeking employment, but rather that a substantial number of residents were unable to secure employment because of lack of education and training or because of geographical remoteness.

Even if nonresidents had been the source of the problem, Justice Brennan reasoned that the required discrimination did not bear a substantial relationship to that problem, since the statute simply granted all Alaskans a flat across-the-board employment preference, regardless of employment status, education, or training. The fact that the oil and gas which was the subject of the statute happened to be owned by the state was not deemed sufficient to remove such pervasive discrimination from the prohibitions of the privileges and immunities clause.

It is difficult to understand how Alaska could have expected this legislation to withstand constitutional challenge. It may well have violated the equal protection clause of the fourteenth amendment as well as the privileges and immunities clause, but the Court found it unnecessary to reach that question. The "Alaska Hire" program seems both out of step with the principles of union on which our nation was founded and out of tune with the tenor of current times. Hicklin reaffirms the doctrine that a resident of one state is still "constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State."\textsuperscript{93}

\textbf{F. Award of Attorney's Fees}

The case of \textit{Christiansburg Garment Co. v. EEOC}\textsuperscript{94} involved an interesting twist on the award of attorney's fees under Title VII of the Civil Rights Act of 1964. Section 706(k) provides: "In any action or proceeding under this title the court in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ."\textsuperscript{95} It had previously been established that under this provision a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances

\begin{itemize}
  \item \textsuperscript{90} Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer v. Witsell, 334 U.S. 385 (1948); Ward v. Maryland, 79 U.S. 418 (1870).
  \item \textsuperscript{91} U.S. CONST., art. IV, § 2.
  \item \textsuperscript{92} 98 S.Ct. at 2489.
  \item \textsuperscript{93} \textit{Id.} at 2488.
  \item \textsuperscript{94} 434 U.S. 412 (1978).
  \item \textsuperscript{95} 42 U.S.C. § 2000e-5(k) (1976) (emphasis added).\end{itemize}
would render such an award unjust.\footnote{Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); cf. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).} (The statute expressly precludes recovery of fees by the EEOC.) The employer in \textit{Christiansburg Garment}, however, claimed an allowance from the EEOC for attorney’s fees as a prevailing defendant and contended that the same principle should apply. In a unanimous decision written by Justice Stewart, the Court held that a plaintiff in an action under Title VII should not be assessed the opponent’s attorney’s fees unless a court finds that the claim was “frivolous, unreasonable or without foundation.”\footnote{434 U.S. at 422.} In this case, the district court had found that the Commission’s action in bringing suit could not be characterized as “unreasonable or meritless” since it involved an issue of first impression. The Supreme Court held that the district court had properly exercised its discretion within the bounds of section 706(k) in denying recovery of legal fees.

The difference in treatment between prevailing defendants and plaintiffs was justified on the basis of the discretionary language of the statute and its purpose. Unlike the defendant, the plaintiff is “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’”\footnote{390 U.S. at 402.} In contrast, a defendant against whom attorney’s fees are assessed is a violator of federal law.

Yet the Court declined to limit the award of attorney’s fees to those cases where the plaintiff’s action has been brought in bad faith—a standard urged by the Commission in this case. The Court felt that bad faith should not be required as such a standard would make the statutory provision merely redundant. Under common law rules, defendants can recover attorney fees in lawsuits brought against them in bad faith. Consequently, the Court was unwilling to assume that in enacting section 706(k), Congress intended to give plaintiffs an incentive to sue while foreclosing defendants from the possibility of recovering expenses in resisting a groundless action unless brought in actual bad faith.

It would be difficult to find serious fault with the denial of attorney’s fees to the employer in this case. The award of fees to prevailing defendants on the same basis as plaintiffs doubtless would have a powerful inhibiting effect on enforcement efforts that would be inconsistent with the objectives of the statute. Even the “frivolous, unreasonable, or without foundation” standard adopted by the Court for the allowance to prevailing defendants may have a similar effect. Nevertheless, the legislative history reviewed by the Court indicates that the Congress did intend to deter the bringing of lawsuits without foundation by pro-
viding that the “prevailing party,” plaintiff or defendant, could obtain legal fees.\textsuperscript{99} Apparently there is a need for such a deterrent since there have been numerous cases in which courts have awarded legal fees to prevailing defendants in suits which seem manifestly vexatious.\textsuperscript{100} Although in this case the EEOC happened to be the original plaintiff, it is clear from a footnote to Justice Stewart’s opinion that the same standard would be applied to a private plaintiff from whom legal fees are claimed, though a distinction might be made in determining the reasonableness of the litigation efforts.\textsuperscript{101}

Under the standard adopted by the Court in \textit{Christiansburg Garment}, there is a danger that a case might be deemed “groundless, or without foundation” simply because it is lost. The Court cautioned against such \textit{post hoc} reasoning, but did suggest that a claim that may have seemed to have a reasonable foundation at the outset should not continue to be litigated if it clearly becomes groundless during the course of the suit.

\section*{G. Procedural Matters}

The Court this term heard three employment discrimination cases dealing with procedural problems, two under the Age Discrimination in Employment Act of 1967. One was \textit{Lorillard v. Pons},\textsuperscript{102} which held that either party to a suit brought by a private individual for lost wages under the ADEA is entitled to a trial by jury. The unanimous decision written by Justice Marshall was based on the statute itself and the Court found no need to reach the constitutional question whether the seventh amendment provides a right to jury trial in such cases.

Under section 7(b) of the ADEA,\textsuperscript{103} violations are treated as violations of the Fair Labor Standards Act,\textsuperscript{104} and rights created by the ADEA are to be “enforced in accordance with the powers, remedies and procedures” of specified sections of the FLSA. The FLSA does not expressly provide for jury trials, but long before enactment of the ADEA it had been established that there is a right to trial by jury in private actions brought under the FLSA.\textsuperscript{105} Congress was presumed to have known of this right and consequently was found to have intended to incorporate it by implication into the ADEA. This inference was buttressed by the references to “\textit{legal or equitable relief}” in sections

\begin{itemize}
\item \textsuperscript{99} Grubbs v. Butz, 548 F.2d 973, 975 (D.C. Cir. 1976).
\item \textsuperscript{100} See, e.g., Carrion v. Yeshiva University, 535 F.2d 722 (1976).
\item \textsuperscript{101} 434 U.S. at 422 n.20.
\item \textsuperscript{102} 434 U.S. 575 (1978).
\item \textsuperscript{103} 29 U.S.C. § 626(b) (1976).
\item \textsuperscript{104} 29 U.S.C. § 216 (1976).
\item \textsuperscript{105} 434 U.S. at 580 and n.7.
\end{itemize}
7(b) and (c) of the ADEA. Since the seventh amendment generally provides a right to a jury trial in cases in which “legal” relief is available, use of this term was further evidence that Congress intended trial by jury to be available in cases under the ADEA involving the “legal” remedy of back pay.

The correctness of this reading of congressional intent has since been confirmed by 1978 ADEA amendments of section 7(c) expressly providing for jury trial on any issue of fact in an action for “amounts owing” as a result of a violation, including both the pecuniary or economic loss in wages and fringe benefits and the equal amount allowed for liquidated damages for willful violations, which had not been covered by Pons. The fact that equitable relief may also be requested is immaterial under the amendment.

While the outcome of the case was probably disappointing for employer-defendants in ADEA cases, it contains a hint of possible good news to come for them under Title VII of the Civil Rights Act. Lorillard had argued that Title VII does not provide for jury trials and that this evidenced congressional intent not to provide jury trials under ADEA, which has the similar objective of eliminating employment discrimination. This reliance on Title VII was misplaced, however, since Justice Marshall found significant differences between the remedial provisions of the two statutes. Title VII does not include any express reference to “legal relief,” and the availability of back pay under Title VII is a matter of equitable discretion. Although Justice Marshall was careful to disavow any intimation of the Court’s view as to whether a jury trial is available under Title VII, his emphasis on the different congressional intent under ADEA can be taken as some indication of an attitude of the Court with respect to Title VII.

The second procedural case was Shell Oil Co. v. Darst, which involved the requirement under section 7(d) of the ADEA of filing notice of intent to sue with the Secretary of Labor within 180 days after occurrence of the alleged unlawful practice. The Tenth Circuit had approved an equitable extension of the time for filing on the ground that the Department of Labor had neglected to advise the complainant of this requirement and had delayed notifying her of her right to bring a private action. The underlying question was whether the notice re-

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106. 29 U.S.C. § 626(b), (c) (1976).
109. Three Circuits have so held, e.g., Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969).
111. 539 F.2d 1256 (10th Cir. 1976).
requirement was a jurisdictional prerequisite or a statute of limitations. The case itself settled nothing, since the judgment of the Tenth Circuit was simply affirmed in a per curiam decision by an equally divided Court, with Justice Stewart not participating. The case, however, did stimulate congressional action. The 1978 ADEA amendments eliminated the notice requirement in section 7(d) and substituted a requirement that a “charge” be filed with the Secretary of Labor within the 180-day period following occurrence of the alleged unlawful practice,112 clearly creating a statute of limitations.

A final procedural question concerned the appealability of a federal district court denial of class certification in a class action suit claiming sex discrimination under Title VII of the Civil Rights Act. In Gardner v. Westinghouse Broadcasting Co.,113 the Court unanimously held that denial of a motion for class certification under Federal Rule 23(b)114 is not immediately appealable as an order refusing an injunction, even though injunctive relief was sought for the class. The decision was consistent with the long-standing policy against piecemeal appeals, except where there would be some serious or irreparable consequence.

II
DECISIONS UNDER THE NLRA

Of the six decisions this term involving “traditional” labor law questions under the National Labor Relations Act, the most difficult opinion and the one with the most far-reaching significance was the preemption decision in Sears, Roebuck & Co. v. San Diego District Council of Carpenters,115 which takes the law on this perplexing subject down a strange new path.

A. Federal Preemption

To understand the Sears decision, it is important to recall briefly how the law on this subject has evolved over the years, almost entirely without explicit direction from Congress.116 The basic problem for the Court has been to try to divine the extent to which Congress intended to allow state courts and administrative agencies to regulate activity that touches on labor relations.

The Court’s initial approach to the preemption problem was an

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116. For a perceptive review of this history see Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations, Parts 1-2, 59 Colum. L. Rev. 6, 269 (1959).
attempt to decide on a case-by-case basis whether particular forms of state regulation conflicted in some relevant manner with federal policy. By 1959, the Court realized the hopelessness and ineffectiveness of this course and laid down broad general principles that could be more easily administered by the state and federal courts beset with preemption questions. The result was the Garmon rule,\(^{117}\) designed to preserve not only the constitutional supremacy of federal law but also the primary jurisdiction of the National Labor Relations Board over the interpretation and application of the NLRA. One portion of this rule states that state regulation must yield "[w]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act or constitute an unfair labor practice under § 8."\(^{118}\) We are concerned here with the more sweeping portion of the rule, which holds: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."\(^{119}\) In other words, Garmon precludes both actual and potential interference with federal labor policy.

For nearly twenty years, Garmon has been the foundation of the preemption doctrine. A few narrow exceptions have been made,\(^{120}\) and there have been vexing questions about how to determine whether an activity is arguably protected or prohibited.\(^{121}\) A 1976 case decision went so far as to hold that certain conduct neither protected or prohibited is immune from such regulation on the grounds that Congress, in leaving it unregulated, intended it to be controlled by the free play of economic forces.\(^{122}\) The most authoritative recent treatment of the rule had been the 1971 Supreme Court decision of Amalgamated Association of Street Employees v. Lockridge,\(^{123}\) which affirmed the standard despite a three-justice minority calling its propriety sharply into ques-


\(^{118}\) Id. at 244.

\(^{119}\) Id. at 245 (emphasis added).

\(^{120}\) Under the Garmon rule, the preemption doctrine has not been applied where the state-regulated activity is of only peripheral concern under the NLRA or where it reached matters such as violence or threats of violence so deeply rooted in a particular locality as to render preemption inappropriate. See, e.g., IAM v. Gonzoles, 356 U.S. 617 (1958); UAW v. Russel, 356 U.S. 634 (1958); United Constr. Wkrs. v. Laburnum Constr. Corp., 347 U.S. 656 (1954); Younghahl v. Rainfair, 355 U.S. 131 (1957); Linn v. United Plant Guard Wkrs. Local 114, 383 U.S. 53 (1966); Vaca v. Sipes, 386 U.S. 171 (1967); Farmer v. Carpenters Local 25, 430 U.S. 290 (1977).

\(^{121}\) See, e.g., Hanna Mining v. Marine Eng'rs, 382 U.S. 181 (1965).


\(^{123}\) 403 U.S. 274, 302 (1971). The Court held that a state court damage action by an employee against his union involved a matter arguably protected or prohibited by the NLRA and thus was within the exclusive jurisdiction of the Board.
The prospect of some narrowing of the rule was further signalled by the 1977 opinion of Justice Powell in *Farmer v. Carpenters Local 25*, holding that federal labor law did not preempt state court action for damages by a union member against a union for intentional infliction of emotional distress.

1. *Sears, Roebuck & Co. v. San Diego District Council of Carpenters*

   In *Sears*, the Court in a seven-to-two decision refused to apply *Garmon* to preempt a state court injunction of picketing that admittedly was either protected by section 7 or prohibited by section 8 of the Act. Instead, the Court carved out of *Garmon* an entirely new exception, the contours of which are difficult to delineate. This decision has the potential to significantly alter the relationship between state and federal regulation of labor relations.

   The case involved a simple and not uncommon example of peaceful unobstructive picketing on private property. The picketing took place after the carpenters’ union learned that Sears was having certain work performed at its store in Chula Vista, California, a single retail establishment not located in a shopping center, by carpenters who had not been dispatched from the union hiring hall. The union’s request to the store manager that the work be performed by a contractor employing carpenters referred by the union, or that the company agree to such exclusive referrals, was unavailing. Pickets thereupon patrolled on the store’s privately-owned walkways and in the parking lot a few feet away, carrying signs stating they were sanctioned by the carpenters’ union. When Sears’ security manager demanded that the pickets be removed from Sears’ property, the union refused, stating that the pickets would remain unless forced to leave by legal action. Sears filed a verified complaint in the California Superior Court seeking to enjoin the pickets’ continuing trespass. A temporary restraining order was entered the following day, and after a hearing twenty-three days later, the court entered a preliminary injunction. The injunction was later set aside by the California Supreme Court on the ground that the picketing was arguably “area standards” picketing protected by section 7 of the *NLRA* and arguably prohibited recognitional picketing under section 8(b)(7)(C), and that under *Garmon* state action was therefore preempted.

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124. *Id.* at 325-332.
125. 430 U.S. 290 (1977). The Court in *Farmer* found a “significant” and “substantial” state interest in preventing torts involving personal harm.
128. 17 Cal. 3d 893, 132 Cal. Rptr. 433, 533 P.2d 603 (1976). It should be noted that the
Although the legality of the picketing under federal law was unclear, Justice Stevens, writing for the Court, conceded it was arguably prohibited under section 7 or arguably prohibited under section 8. For purposes of the decision on preemption, he also assumed that the union's picketing on Sears' property after the request to leave constituted a violation of California law.

While acknowledging the continuing vitality of Garmon, Justice Stevens noted that the Court has refused to apply it mechanically. Quoting from Farmer, he pointed out that inflexible application of Garmon is to be avoided "especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." 

a. The "Arguably Prohibited" Standard

Justice Stevens first considered whether the arguable illegality of the picketing under federal law should oust the state court of jurisdiction to enjoin its trespassory aspects. Citing Garner v. Teamsters Union as the leading case on arguably prohibited activity, he noted that the reason for preemption in this situation was a congressional intent to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." Garmon recognized that a state should be allowed to enforce certain laws of general applicability—not designed to regulate relations between employees, their union, and their employer—where the conduct being regulated touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Typical examples of such interests are state regulation of violence or threats of violence.

Justice Stevens did not, however, rest state jurisdiction on that long-standing exception to Garmon. Rather, the Court applied to

question here did not involve the question of whether peaceful picketing on private property was protected by the first amendment and immune from state court injunctive relief on that ground. That question was decided in Hudgens v. NLRB, 424 U.S. 507 (1976).

129. The union disputed this point, and the California Supreme Court will rule on the question on remand. Justice Stevens emphasized that there was no claim by Sears in the state court that the picketing violated any state or federal law. Sears had merely sought removal of the pickets from its property to public walkways, and the state court injunction granted only that relief.


135. This exception was not applied in Sears despite language by Chief Justice Burger in Taggart v. Weinacker's, Inc., 397 U.S. 223, 227-28 (1970), that would have suggested it as a proper
the “arguably prohibited” branch of *Garmon* the broader exception promulgated in *Farmer*. The relevant factors were: first, that there was a “significant state interest” in protecting the citizen from the challenged conduct; and second, that the exercise of state jurisdiction would entail little risk of interference with the regulatory jurisdiction of the NLRB. The critical issue was “whether the controversy presented to the state court was identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not presented to the Labor Board.”

The Court majority believed that the controversy which Sears might have presented to the Board was *not* the same as the controversy presented to the state court. Before the Board, the issue on an unfair labor practice charge against the union would have been whether the picketing had a recognitional objective for purposes of section 8(b)(7)(C) of the Act, or a work reassignment objective for purposes of section 8(b)(4)(D). In the state action, on the other hand, Sears challenged only the location of the picketing; the objective of the picketing was irrelevant to the trespass claim. Accordingly, the Court concluded that there was no practical risk of state interference with the Board’s primary jurisdiction to enforce statutory prohibitions against unfair labor practices. Thus, in the Court’s view, the reasons for federal preemption of state jurisdiction over conduct arguably prohibited by federal law were inapplicable.

To this point, the decision might be viewed as little more than a logical extension of *Farmer* to the less personal tort of trespass, a cause of action in which the states have a legitimate interest completely apart from regulation of labor relations. *Sears* might even represent a stronger case than *Farmer* for nonapplication of the “arguably prohibited” prong of *Garmon*, since it was much clearer that the state court could adjudicate the merits of Sears’ claim without touching on the merits of the potential unfair labor practice charge against the Union. Because of this, there seemed to be less risk that state jurisdiction over the trespass claim would interfere with Board regulation of unfair labor practices.

This aspect of the *Sears* opinion does shed light on the manner in which the Court intends to apply the *Farmer* qualification of the “arguably prohibited” preemption test. It confirms the Court’s abandonment in *Farmer* of the required interest “deeply rooted in local feeling...
and responsibility" and substitution of the less metaphorical "substantial" or "significant" state interest in regulation of the conduct. Although all three terms are imprecise, the Court's latest designation of the type of state interest that will be deferred to, as borne out by inclusion of the trespass claim in this action, seems to broaden permissible state court litigation beyond traditional tort actions involving personal harms to individuals.

More importantly, Sears clarifies that the crucial factor in cases of this type is whether the controversy in the state court can be adjudicated without touching on the merits of the unfair labor practice charge, rather than the particular category of state cause of action or the degree of state interest. While this standard still leaves considerable room for the exercise of discretion, it provides a better articulated test for exception to the preemption doctrine than do cases before Farmer. The re-emphasis given this factor in Sears would also seem to indicate that it will still be applied in cases of state court actions by individual employees against their unions even though its effect might be to deprive the employee of any remedy, as was the case in Lockridge.

b. The "Arguably Protected" Standard

It is the "arguably protected" portion of the Sears decision that really broke new ground. The picketing in question was arguably protected either as "area standards" picketing, or possibly as recognition picketing that would not become unlawful under section 8(b)(7) of the Act until it had been carried on for 30 days. The underlying reason for federal preemption of state court regulation of activity that is arguably, but not definitely, protected under section 7 of the Act is that otherwise there would be a danger that a state court might prohibit employees from exercising a right guaranteed by federal law. This was at least a possibility here. After the right to strike, the right to picket peacefully is perhaps the most prized form of protected activity under section 7.

The mere fact that the picketing in Sears was taking place on the employer's premises without its permission would not automatically remove it from protection under federal law. NLRB v. Babcock & Wilcox

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139. 436 U.S. at 196.
Co. suggests that employers do not have an absolute right to prohibit union activity on their property, and this may be true even when the activity is engaged in by nonemployees. In such cases, the Board tries to strike a balance between the employer's property rights and employees' right to self-organization and to engage in concerted activity, accomplishing the balance "with as little destruction of one as is consistent with the maintenance of the other." It would be useless to speculate about how the Board might have balanced these competing interests in the Sears situation, but the closeness of the question is clear from the Board's recent holding that picketing by striking warehouse employees on property of their employer adjacent to a retail outlet in a shopping center is protected under section 7 of the Act. The question for the Board in Sears would have been whether trespassory picketing by nonemployees should be similarly protected.

The problem that has troubled some members of the Court and various commentators about the "arguably protected" prong of the Garmon rule is that, as a practical matter, it is often difficult if not impossible for an employer to obtain a Board determination as to whether given union or employee conduct is considered protected under the Act. This was a crucial factor in the Court's approach to the Sears case. The only way a Board determination could be obtained as to the protected or unprotected nature of the picketing would be for the union to file an unfair labor practice charge under section 8(a)(1) of the Act alleging that Sears' order to leave the premises had interfered with the union's claimed right under section 7 to engage in peaceful picketing. The union, however, elected not to file such a charge, and Sears had no way of initiating Board proceedings on its own that would focus on the trespassory nature of the picketing.

While recognizing that the Board should have "primary jurisdiction" when the same controversy may be presented to the state court or to the NLRB, Justice Stevens concluded that this primary jurisdiction rationale "does not provide a sufficient justification for preempting state jurisdiction over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so." Nevertheless, in his view the unavailability to the employer of any direct means for obtaining a Board ruling on the protected nature of the union's trespass was not in itself enough to eliminate the possibility of preemption. There might still be a significant risk of misinterpretation of federal law by the state court, and consequent prohibition of feder-

143. Id. at 112.
145. 436 U.S. at 202-03 (emphasis in original).
ally protected conduct, since before granting any relief from the union's continuing trespass, the state court would have to decide that the trespass was not actually protected by federal law. In this case, however, Justice Stevens found that the risk was minimal:

For while there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected.¹⁴⁶

Justice Stevens also observed that the risk that a state court might on occasion enjoin a trespass that the Board would have protected is minimized by the fact that in cases in which the argument in favor of protection is strongest, the union is likely to invoke Board jurisdiction and thereby avoid the state forum. Furthermore, he felt that whatever risk may exist of an erroneous state court adjudication was outweighed by “the anomalous consequences of a rule which would deny employer access to any forum in which to litigate either the trespass issue or the protection issue in those cases in which the disputed conduct is least likely to be protected by § 7.”¹⁴⁷ He concluded that the assertion of state jurisdiction here did not create a significant risk of prohibition of protected conduct.

To summarize, it would appear that the Court has created a new exception to Garmon that allows state court jurisdiction over employee activity arguably protected under section 7 of the Act where:

1. The party who could have presented the protection issue to the Board has not done so, and the other party to the dispute has no acceptable means of doing so; and

2. The risk of erroneous state court adjudication of the protection issue is outweighed by the anomalous consequences of denying the employer any forum in which to litigate.¹⁴⁸

In a final footnote, Justice Stevens emphasized that the fact the employer demanded that the union discontinue the trespass before the employer initiated the trespass action was “critical to our holding.”¹⁴⁹ He reasoned that mere resort to court action by an employer without such a demand would not under current Board rulings provide the basis for a section 8(a)(1) charge by the union. Consequently, if the employer were not required to demand discontinuance of the trespass before being allowed to proceed in state court, the union would be deprived of an opportunity to present the protection issue to the agency created by Congress to decide such questions. The stress placed on this

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¹⁴⁶. *Id.* at 205.
¹⁴⁷. *Id.* at 206-07.
¹⁴⁸. *Id.* at 187 n.11. If the conduct in question is actually protected under § 7 then the state court action would of course be preempted.
¹⁴⁹. *Id.* at 207 n.44.
opportunity for the union to have the protection question resolved by the Board (as a means of avoiding error by a state tribunal) suggests that if a union does file such a charge, it will have the effect of cutting off any state remedy, at least until the unfair labor practice question is resolved. Justice Blackmun's concurrence took pains to make this suggestion explicit, but the waters were unfortunately muddied by dispute on this point in Justice Powell's concurrence. Justice Brennan, in his dissent, found Justice Blackmun's logic unassailable.

c. Evaluation

One's appraisal of the qualification on federal preemption established in *Sears* is necessarily reduced to a subjective value judgment about the relative acceptability of a potentially erroneous denial of a section 7 right versus denial of any forum to an employer who would otherwise be entitled to relief. Archibald Cox has expressed concern about the injustice of denying an employer his day in court on what could be a substantive wrong. Enactment of section 14(c) of the NLRA in response to the "no-man's land" created by the trilogy of opinions represented by *Guss v. Utah Labor Relations Board,* seems

150. *Id.* at 209-10.
151. *Id.* at 212-14.
152. *Id.* at 233.

If nothing were to be said on the other side, the differences might justify the ousted of state jurisdiction. What is to be said, however, is that ouster results in the complete denial of a legal or equitable remedy to some employers who by hypothesis are entitled to relief. The cost of denying one group the remedies to which it is entitled seems an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err by granting another group relief barred by the federal act.

The short of the matter, therefore, is that in order to avoid the risk of a state court misinterpretation or misfinding, the "arguably protected" rule shuts the door to determination of the question, and thus denies the hope of remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court. It seems unlikely that so unjust a formula can long survive unless shored up by other considerations.


154. 29 U.S.C. § 164(c) (1976). That section provides in pertinent part:

(1) The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it could assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

155. 353 U.S. 1 (1957). These cases involved equitable relief and held that the Board's refusal to assert jurisdiction did not invest the states with power over the activity thus creating the "no-mans land" subject only to congressional or Board correction.
indicative of congressional repugnance to such denial of remedy.

Justice Brennan's dissent emphasized that the denial of any remedy to the employer is "an entirely acceptable social cost for the benefits of a pre-emption rule that avoids the danger of state-court interference with national labor policy." He expressed little confidence in the ability of state courts to properly make the assessment of the risk of erroneous prohibition of protected activity called for under the new exception. As evidence of the likelihood of error, he pointed to the majority's own opinion that trespassory organizational activities by nonemployees is more likely to be unprotected than protected, which he considers plainly wrong. Consequently, he foresees a flood of new state preemption case decisions coming before the Court for review.

It would seem that as the opportunity for state court rulings on protected activity is broadened, the necessity for Supreme Court review will necessarily be increased. For example, would the risk of erroneous state court adjudication be enlarged or reduced where the trespassory pickets, instead of being nonemployees engaged in some variety of area standards picketing, are employees engaged in a primary economic strike? And what would the risk be in a situation where the facility being picketed is a store where the striking employees work but which is not owned by the struck employer and is inside a small shopping center? These are the sorts of subleties the Supreme Court of Kansas will have to try to take into account as a result of remand by the United States Supreme Court of another trespassory picketing case subsequent to Sears. To the extent that such factors increase the probability of state court error, they should strengthen the case for preemption, even absent the filing by the union of an unfair labor practice charge.

The reach of Sears does not seem limited to arguably protected trespassory picketing, but could extend to any arguably protected conduct which an employer attempts to interfere with and to which interference the union does not respond by filing a section 8(a)(1) charge. Justice Brennan's dissent adverts to the possibility that the Sears standard may even be applicable to employee or union conduct that is possibly unprotected and with respect to which the employer is unable to obtain a determination by filing a charge against the union under section 8(b). The opportunities for state litigation are accordingly revived.

The Sears decision leaves unresolved the critical labor law question that lay at the heart of the case: is trespassory picketing by nonemployees adjacent to a retail establishment protected activity or is it not? Justice Stevens' opinion seems to indicate that in his judgment under the facts of this case, it probably would not be protected, but Justice

156. 436 U.S. at 227.
Blackmun's concurrence was careful to point out that this should not be considered any direction as to how the Board should proceed in the future. Ironically, until the Board has spoken and its decisions have been reviewed by the courts, rulings on this question of federal labor law may have to come from state courts in trespass actions. Although Sears represents a defeat for labor, the decision is less extreme than previous dissenting opinions by Justice White, where he strongly advocated eliminating the "arguably protected" prong of Garmon altogether and substituting an "actually protected" test.\footnote{158}{Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 309 (1971).}

2. \textit{Malone v. White Motor Corp.}

The second preemption case is \textit{Malone v. White Motor Corp.},\footnote{159}{435 U.S. 497 (1978).} which reemphasizes the controlling effect to be given congressional intent in this area and casts new light on the broad preemption language embodied in \textit{Teamsters Union v. Oliver}.\footnote{160}{358 U.S. 283 (1959).} Both \textit{Oliver} and \textit{White Motor Corp.} involved the same basic problem: the extent to which state regulation of negotiated terms of a collective bargaining agreement is preempted by the duty to bargain provisions of the NLRA. \textit{Oliver} involved state regulation under its antitrust law of certain minimum truck leasing rates for driver-owners prescribed in a collective bargaining agreement, while \textit{White Motor} involved regulation under the Minnesota Private Pension Benefit Protection Act\footnote{161}{MINN. STAT. ANN. § 181B.01 et seq. (Cum. Supp. 1976) (West 1960).} of certain collectively bargained pension funding arrangements. \textit{Oliver} stands for the general principle that state law may not be applied to "frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving."\footnote{162}{358 U.S. at 296.}

\textit{White Motor} presents an unusual role reversal, with the employer arguing for federal preemption and the NLRB and the AFL-CIO, as \textit{amici}, arguing against it. The Minnesota Commissioner of Labor and Industry determined that $19 million in employer pension fund contributions were due from the company to comply with the Minnesota statute, which imposed a "pension funding charge" directly against any employer who terminated a pension plan. White Motor had terminated the plan established through collective bargaining with the United Auto Workers covering two plants in Minnesota, one of which was being shut down. The statutory funding charge (which became a lien on the company's assets) would provide all employees with more than ten years of service full payment of accrued pension benefits, re-
regardless of whether or not their rights to these benefits had vested under the terms of the plan.

The company filed suit in federal district court to have the statute declared invalid, claiming among other things that under the principles announced in Oliver the state action was preempted by sections 8(a)(5), 8(b)(3) and 8(d) of the NLRA. Clearly, the statutory requirements went far beyond the funding arrangements agreed upon by the company and the UAW. Those arrangements provided that the past service liability was to be funded by company contributions over thirty-five years and that pension benefits were to be payable only from the fund established in accordance with the plan. In addition, the company had agreed that in the event of termination of the plan, it would guarantee certain minimum pensions to employees who had fulfilled the eligibility requirements; this represented a commitment of approximately $7 million over the assets of the pension fund.

The district court rejected the preemption claim, but the Court of Appeals for the Eighth Circuit in a four-to-three decision held the Minnesota statute preempted on the basis of Oliver. It found that the Minnesota law would improperly override the terms of the collectively bargained agreement in at least three ways: (1) it granted employees vested rights beyond those available under the plan; (2) it required payment of benefits from the general assets of the company while the plan provided that benefits would be payable only from the pension fund; and (3) it imposed liability for post-termination payments beyond the agreed-upon supplemental guarantee. The Supreme Court, also in a four-to-three decision, reversed, relying primarily on preemption disclaimer provisions and the legislative history of the federal Welfare and Pension Plans Disclosure Act, which was still in effect when the White Motor plan was terminated effective May 1, 1974.

This basis for the decision in White Motor Corp. limits the future significance of the case on the question of state power to regulate nego-

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165. 545 F.2d 599 (8th Cir. 1976).

Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan. . . . . The provisions of this Act, except subsection (a) of this section and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.
tiated pension plans. The Welfare and Pension Plan Disclosure Act has subsequently been superseded by the federal Employee Retirement Income Security Act (ERISA) which expressly provides for preemption of state law regulating covered plans.167 Nevertheless, the decision still seems noteworthy for the guidance it may provide for applying Oliver to questions concerning federal preemption of state regulation of other types of collectively bargained arrangements. The continuing vitality of Oliver has been affirmed, but a qualification on it, which has perhaps always been implicit, has now been explicitly recognized. The Oliver rule, as clarified by White Motor Corp., might now be paraphrased as holding that states may not alter the terms of existing collective bargaining agreements covering mandatory subjects of bargaining unless Congress has somehow indicated that states are free to impose the particular modification.168

The difficulty with this newly-explicated exception to Oliver is that congressional intent is rarely evidenced with indisputable clarity. Even in White Motor, the dissenters (Justices Stewart, Powell and Chief Justice Burger) felt that the preemption disclaimer provisions of the Welfare and Pension Plans Disclosure Act and the failure of that Act to undertake substantive regulation of pension plans were not sufficient to show that Congress intended to allow Minnesota to override national labor policy barring state interference with negotiated solutions to mandatory subjects of bargaining. Thus, the question may still arise, for example, whether similar ambiguous references to state regulation in the federal Civil Rights Act of 1964169 are sufficient evidence of an intent to allow states under their fair employment practice statutes to regulate provisions in a collective bargaining agreement that would be lawful under federal law. Similar questions could also arise under state insurance laws which are uniquely protected by the McCarran Act, which expresses a general policy favoring state regulation of insurance and specifically precludes federal impairment of state law enacted for the purpose of regulating “the business of insurance.”170 If a state were to try to contravene some provision of a collectively bargained insurance agreement, or an agreement covering uninsured employee benefits similar to those provided through insurance, White Motor Corp. could provide strong arguments against federal preemption.

168. 358 U.S. 283, 297 (1959). While Oliver recognized that states are free to impose health or safety regulations, the problem arises where the conflict is “between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce.”
The final chapter on Minnesota's effort to impose its pension funding charge on employers prior to the January 1, 1975, effective date of ERISA, was written by the Court in Allied Structural Steel Co. v. Spannaus. That case held that the state's application of its Pension Act violated the contracts clause of the United States Constitution, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." In a five-to-four decision by Justice Stewart, the Court found the state had severely altered the employer's contract relationship with its employees by imposing a pension funding obligation of $185,000 beyond what the employer had voluntarily assumed to undertake. While Justice Stewart recognized that the constitutional prohibition does not obliterate police power of the states, he cited United States Trust Co. v. New Jersey for the proposition that legislation affecting the rights and responsibilities of contracting parties must be "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." In the eyes of the majority, Minnesota's action in this case did not meet that test. In dissent, Justice Brennan, joined by Justices Marshall and White, argued the contracts clause was inapplicable to situations such as this, where the state action does not abrogate or dilute any contractual obligation but rather imposes new obligations on a class of persons. Justice Brennan felt that the only constitutional provision applicable was the due process clause of the fourteenth amendment, which he would hold was not violated.

Although the pension plan involved in the Spannaus case was not established pursuant to a collective bargaining agreement, there is no reason to believe any different principles would be applicable to negotiated agreements of the type in White Motor Corp. Thus, the decision in Spannaus not only expands the type of "impairment" that may be governed by the contracts clause, but also opens up a possible new line of attack on attempted state regulation of the terms of collective bargaining agreements where the regulation appears to have unusually severe impact and seems inappropriate to the claimed public purpose.

B. No-Solicitation, No-Distribution Rules

The Court considered two novel facets of the recurring question of the extent to which an employer must allow employees to use employer

171. 98 S.Ct. 2716 (1978).
174. Id. at 22.
property for solicitation of union membership and for distribution of union literature. One case involved distribution of a union newsletter, the other union solicitation and distribution in a hospital cafeteria and coffee shop. The task for the NLRB and the Court in cases of this type is to strike an appropriate balance between the statutory rights of employees under section 7 of the NLRA and the conflicting constitutional property rights of the employer.

In both these cases, the Court made a fairly predictable extension of the basic principles developed by the Court many years ago in Republic Aviation Corp. v. NLRB176 and NLRB v. Babcock & Wilcox Co.177 and refined by the Labor Board in a series of related decisions. In general, the Board holds that employer restrictions on employee solicitation during nonworking time, and on distribution during nonworking time in nonworking areas, are violative of section 8(a)(1), which prohibits employer interference with employee rights under section 7, unless such restrictions are justified by special circumstances making the rule necessary for the maintenance of production or discipline.178

1. Eastex, Inc. v. NLRB

In Eastex, Inc. v. NLRB,179 a solid seven-to-two majority of the Court held the refusal of the company to allow distribution, in a nonworking area of its premises during nonworking time, of a union newspaper containing political material which included propaganda on a state “right-to-work” law and federal minimum wage legislation, violated section 8(a)(1) as an interference with the right of employees under section 7 “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”180 The case arose in Texas, a state which has a “right-to-work” statute.181 The United Paperworkers, which represented a majority of the Company’s 800 production employees, was about to enter negotiations for a new collective bargaining agreement. In an effort to strengthen employee support, the union decided to distribute a newsletter that was divided into four sections. The first and fourth sections urged employees to

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176. 324 U.S. 793 (1945).
178. Peyton Packing Co. 49 N.L.R.B. 828 (1943); Stoddard Quirk Mfg. Co., 138 N.L.R.B. 615 (1962). Babcock and Wilcox held that an employer may prohibit the distribution of union literature by nonemployee union organizers if: (1) “reasonable efforts . . . through other available channels of communication will enable [the union] to reach the employees,” and (2) the employer does not discriminate against the union by allowing distribution by other employees. NLRB v. Babcock and Wilcox, 351 U.S. at 113.
181. TEX. REV. CIV. STAT. ANN. art. 5207 § 2 (Vernon 1971).
support and participate in the union and emphasized the benefits of solidarity. The second section encouraged employees to write their legislators to oppose incorporation of the state's "right-to-work" statute into a revised constitution, warning that this would weaken unions. The third advised employees that the President had vetoed a bill to increase the federal minimum wage and compared this action to increases in prices and profits in the oil industry. This section closed with an admonition to "defeat our enemies and elect our friends." When union officials asked management for permission to distribute this newsletter in nonworking areas of the plant, it was denied.

The case turned on two subsidiary issues. The Court first found that distribution of this newsletter was activity for "mutual aid or protection" within the meaning of section 7, despite the fact that the second and third sections did not relate to any specific dispute between the employees and their own employer over any issue the employer had the power to affect. Justice Powell, writing for the Court, felt that the broad definition of "employee" in section 2(3)\(^2\) and the "mutual aid or protection" clause of section 7 protected employees when they engage in activities in support of employees of employers other than their own. This protection is not lost when employees seek to improve their lot as employees through channels outside the immediate employee-employer relationship. If activity of this nature were unprotected, employees would be open to retaliation for engaging in such activity, which would frustrate the policy of the Act to protect the right of workers to act together to improve their working conditions. The Court conceded that at some point the relationship of the concerted activity to the employees' interests as employees might become so attenuated that the activity would not come within the "mutual aid or protection" clause. The Court, however, could not conclude that was the case here.

The Court then considered the question whether the company's property rights gave rise to a countervailing interest that outweighs the exercise of section 7 rights in that location. In answering this question in the negative, Justice Powell found the situation analogous to that of Republic Aviation in three respects: (1) employees sought to distribute literature in nonworking areas on employer premises during nonworking time; (2) the employer had not shown that distribution would interfere with discipline or production; and (3) distribution of the newsletter would be protected by section 7 if it took place off the premises. The fact that part of the newsletter did not address purely organizational matters, but rather included other activity protected under section 7, was no basis for distinction in the eyes of the Board, and Justice Powell could not fault the Board for not engaging in such refinement of its

rules on the basis of the content of each distribution. He also rejected the argument that, absent a showing that no alternative channels of communication were available, the distribution would be an unnecessary intrusion on employer property rights.

Justice Rehnquist, dissenting, noted that this is the first case that would hold that employees have a protected right to engage in anything other than organizational activity on the employer's property. Finding no definite expression of congressional intent to require an employer to open his property to political advocacy, he would not have permitted the Board to "balance away" the employer's right to exclude political literature.

In view of the publicity given this controversial decision, it could provide an impetus to union requests for permission to engage in such activity. Certainly the workplace is the most convenient place for a union to disseminate information to employees, both members and nonmembers, on issues of common interest. On the other hand, employers are understandably reluctant to allow political activity by employees on their premises promoting objectives diametrically opposite the employer's interests. The difficult question yet to be resolved is how far a union will be permitted to push in this direction.

Justice White's concurrence indicated some reservations in this regard. He did not doubt that in this case the activity engaged in by the employees was the kind of activity protected by section 7 of the Act, in the sense that employees could not be disciplined for engaging in such distribution off the employer's property. He was disturbed, however, at the lack of a requirement that the literature sought to be distributed be connected with the bargaining relationship. The only limitation in the majority opinion is a suggestion that to be within the "mutual aid or protection" clause, the political material should at least be designed to "improve their lot as employees" or have some "immediate relationship to employees' interests as employees." That relationship seemed quite close in this instance. The political material was sandwiched between two organizational appeals in the newsletter. The right-to-work comments referred specifically to union negotiating power and the "business edge" at the bargaining table. References in this section to union security clauses and "free riders" could be considered part of organizational efforts, and minimum wage legislation has a very real effect on bargaining and is of direct interest to employees in their status as employees. In view of the broad range of political interests unions have, however, one can probably expect future cases in which political material being circulated by unions will be somewhat farther removed from the interests of workers as employees. It will be

183. 98 S.Ct. at 2513.
interesting to see how the Board exercises the discretion given it by the Eastex Court to delineate the extent of union-related political activity that employers must permit.

2. Beth Israel Hospital v. NLRB

In Beth Israel Hospital v. NLRB the Court unanimously upheld an NLRB ruling that the hospital violated section 8(a)(1) of the Act by prohibiting distribution of union literature and solicitation of union support by employees during nonworking time in the hospital cafeteria and coffee shop used primarily by employees, but also frequented by patients and visitors.

This was the Court’s first occasion to apply the NLRA to hospitals since amendments were enacted in 1974 extending its coverage to employees of nonprofit health care institutions. The leading statement of the Board’s general position on hospital no-solicitation and no-distribution rules was set forth in its unanimous 1976 decision in St. John’s Hospital & School of Nursing, Inc. In that case, the Board recognized that hospitals have special characteristics that justify somewhat more stringent prohibitions than are permitted other employers. This is because “the primary function of a hospital is patient care” and “a tranquil atmosphere is essential to carrying out that function.” Accordingly, that decision acknowledged that solicitation could be banned “in strictly patient care areas, such as patients’ rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas,” since it might be unsettling to patients. Conversely, the Board determined in St. John’s Hospital that such a prohibition could not extend to areas other than immediate patient care areas such as lounges and cafeterias, absent a showing that disruption to patient care would necessarily result.

Although the issue in Beth Israel concerned only the application of the rule to the cafeteria and coffee shop, the opinion of Justice Brennan, writing for the Court, expressed general approval of the Board’s policy in St. John’s Hospital. The separate opinions of Justices Powell and Blackmun, joined in by Justices Burger and Rehnquist, concurred in the judgment but on narrow ground.

Turning first to the legislative history of the 1974 amendments,
Labor Law Decisions

Justice Brennan could find nothing indicating that the Board's approach to enforcement of section 7 rights of employees in the hospital context was inconsistent with congressional policy. Witnesses testifying on the proposed 1974 amendments to the Act had expressed concern for the need to avoid disruption of patient care wherever possible, but this concern was primarily to avoid disruption due to strikes, and resulted in enactment of special provisions concerning strike notice and mediation. However, no special provisions were enacted concerning solicitation and distribution in that industry.

Justice Brennan rejected the contention that the Board was acting outside its area of expertise and therefore not entitled to deference, noting that the ultimate problem here was "the balancing of conflicting legitimate interests," a function committed by Congress to the Board. He also found support for the Board's conclusion that "the possibility of any disruption in patient care resulting from solicitation or distribution is remote," as patients were not allowed to visit the cafeteria unless their doctors certified that they were well enough to do so. Patients use the cafeteria infrequently; only 1.56% of cafeteria patrons are patients. For a significant period, the hospital, under compulsion of the Massachusetts Labor Commission, had permitted limited union solicitation in the cafeteria "apparently without untoward effects." Use of the cafeteria for other types of solicitation including fund drives had been permitted. Finally, the only areas in which the hospital had granted organizational rights were scattered locker areas and adjacent restrooms, which were not conducive to this use because of limited access; the natural gathering place for employees during nonworking time was the cafeteria.

In fact, the undisputed evidence portraying the cafeteria as being essentially operated for employees and almost wholly unrelated to patient care was so strong that Justice Powell's concurrence was based on this evidentiary factor, rather than agreement with any general extension of the Republic Aviation presumptions to hospitals. Like Justice Blackmun, he stressed the unique characteristics of hospitals. Both Justices Powell and Blackmun, along with Justices Burger and Rehnquist, might be expected to reach a different result in a case where the evidence demonstrates more widespread use of the cafeteria by patients or by the public.

The Court distinguished the Board's rule on hospital cafeterias

191. 98 S.Ct. at 2474.
192. Id.
193. Id.
194. Id. at 2479.
from its conflicting rule on public restaurants, where solicitation and
distribution may be prohibited in the dining areas at all times.\textsuperscript{195} The
justification for the public restaurant rule is that soliciting has a ten-
dency to upset patrons, which the hospital argued was equally applicable
to nonemployee patrons of the hospital cafeteria who comprised 9%
of the total patronage. The Court pointed out that the primary purpose
of a public restaurant is to serve customers, which is done in the dining
area, with the result that employee solicitation in these areas, if disrup-
tive, would directly and substantially interfere with the employer’s
business. Moreover, such establishments normally have non-public ar-
eas in which solicitation of nonworking employees may take place. In
the case of a hospital, on the other hand, its main function is patient
care and therapy, which functions are largely performed in operating
rooms and patients’ rooms, where the Board allows rules prohibiting
organizational activity.

Hospital resistance to union organizational efforts and distribution
of critical propaganda on hospital premises is perhaps understandable,
but once the industry became subject to essentially the same statutory
provisions as other employees covered by the Act, it should not have
been surprising that they are subject to the same basic rules on the exer-
cise of employee organizational rights. The protection of hospitals’ pri-
mary medical concern—the prevention of disruption of patient care—is
all that can reasonably be expected in the absence of express statutory
exceptions. The Board’s standards for hospitals attempt to take this
concern into account. Even discounting the reservations of the four
concurring justices, it seems logical to infer from this decision that the
Court will continue to give great deference to Board expertise in hospi-
tal cases involving areas of broad statutory discretion such as this.

\textbf{C. Union Discipline of Supervisory Employees}

For the second time in four years, the Court was confronted with
the inflammatory question of whether a union may properly discipline
members who occupy supervisory or managerial positions with an em-
ployer. In the 1974 case of \textit{Florida Power & Light Co. v. IBEW Local
641},\textsuperscript{196} the Court by a slim five-to-four majority had held that such
discipline did not violate section 8(b)(1)(B) of the Act.\textsuperscript{197} This seldom-
used section makes it an unfair labor practice for a labor organization
“to restrain or coerce . . . an employer in the selection of his represen-
tative for the purpose of collective bargaining or grievance adjust-
ment.”

\textsuperscript{195} Marriott Corp., 223 N.L.R.B. 978 (1976); Bankers Club, Inc., 218 N.L.R.B. 22 (1975).
\textsuperscript{196} 417 U.S. 790 (1974).
This term, the Court by an equally slim margin held in *American Broadcasting Companies, Inc. v. Writers Guild of America, West, Inc.* that this section was violated. In essence, *ABC* was an endorsement by the Court of the Board's application of the principles enunciated in *Florida Power and Light* to a distinguishable set of facts, as indicated by the following statement in the majority opinion by Justice Powell:

> But we are of the view that the Board correctly understood *FP&L* to mean that in ruling upon a § 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects to work during a strike, it may—indeed, it must—inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B).

The case arose out of a 1973 strike by the Writers Guild against the three major television networks, which produce films written by Guild members. Among the membership were a number of producers, directors, and story editors whose duties included the selection and direction of writers and certain limited writing duties, who were referred to as "hyphenates." They were not covered by the collective bargaining agreement, but apparently chose to retain membership while in managerial positions because of movement in and out of the bargaining unit. Guild rules, among other things, strictly prohibit members from crossing a Guild picket line. Nevertheless, many of the hyphenates at the insistence of management did report to work after being assured they would not be requested to perform writing duties covered by the collective bargaining agreement. They apparently did work only at their primary duties as producer, director, or story editor and were never charged by the Guild with violating its rule against performing writing functions for a struck employer. More than thirty hyphenates, however, were charged with violating the Guild rule against crossing a picket line and two related rules. Substantial fines, ranging up to $50,000 in two cases, were assessed, but on appeal ultimately reduced to a maximum of $3,900. The hyphenates were either expelled from membership or suspended. In addition, the Guild threatened to place them on a "Roll of Dishonor" in perpetuity and to drive them from the industry. As a practical matter, they could not resign from the union if they wanted to because once the strike started, Guild policy was not to permit withdrawal until six months after completion of negotiations. The Court upheld the Board's finding that the Union's discipline of its supervisor-members in *ABC* adversely affected their conduct in per-

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199. *Id.* at 2434.
200. *Id.* at 2426.
forming grievance-adjustment functions on behalf of the employer in violation of the test drawn from *Florida Power and Light*.

Although the test for legality of union fines assessed against supervisor-members now seems firmly established, the application of section 8(b)(1)(B) to such action is hotly debated. By its terms, the section says nothing about that practice. Justice Stewart, joined by Justices Brennan and Marshall, found in his dissent that the union had had no interest in restraining or coercing the employer in the selection of its bargaining representative, the activity section 8(b)(1)(B) seeks to prevent. The union’s purpose was simply to enforce union solidarity during a strike.

Until 1968, the Board itself confined the application of this section to direct pressure by a union upon an employer to control the choice of representative. In *San Francisco-Oakland Mailers’ Union No. 18 (Northwest Publications, Inc.*) decided that year, the Board adopted the theory that section 8(b)(1)(B) would also apply to union discipline of supervisory members because that amounted to indirect pressure on the employer which interfered with the employer’s control of the supervisor and might necessitate replacement. In a later case, the Board reasoned that the purpose of section 8(b)(1)(B) was “to assure to the employer that its selected collective bargaining representative will be completely faithful to its desires.” In *Florida Power and Light* the Court did not question the Board’s basic theory, but found it inapplicable because the supervisor-members had been fined for doing bargaining unit work during a strike, and the fine therefore could not be said to affect their grievance adjustment functions. In *ABC*, on the other hand, supervisors who crossed a picket line to go to work were simply working at their normal jobs. Thus, although the decision in *ABC* is a bitter pill for unions, it still does not make it unlawful for a union to fine a supervisor-member who engages in bargaining unit work during a strike.

The primary thrust of *Florida Power and Light* had been directed toward permitting union fines for supervisor-members and restricting the applicability of section 8(b)(1) to such conduct. The Court observed that “the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.” Although Congress in the 1947 Taft-Hartley amendments was concerned with the problem of divided loyalties on the part of supervisors, it took care of that problem specifically

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201. 172 N.L.R.B. 2173 (1968).
by excluding them from the definition of "employee" in section 2(3). Consequently, an employer may properly insist that supervisors refrain from union membership or be discharged. The dissenters in ABC felt that this was adequate protection for the employer's interest and that a union ought to be able to impose disciplinary sanctions on members who give "aid and comfort to the enemy" during a strike. They considered the decision to be "a radical alteration of the natural balance of power between labor and management."

Perhaps the decision in ABC can best be explained as traditional deference to the Board's judgment on a construction of the Act that is not plainly unreasonable or inconsistent with its general purpose. Another factor in the outcome may have been the unusually heavy-handed nature of the discipline meted out by the union. It does not strain the imagination to conclude, as did the administrative law judge, that the severe retribution by the union had restrained and coerced the hyphenates from performing their managerial and supervisory duties, including their handling of grievances, and that this in turn restrained and coerced their employer from selecting them as representatives for this purpose.

D. Pre-Hire Agreements in the Construction Industry

Symptomatic of the increasing involvement of the NLRB with labor relations in the construction industry is the Court's first encounter with section 8(f) of the NLRA. This section authorizes employers in that industry to enter into collective bargaining agreements without the necessity for first establishing the majority status of the union. The provision was enacted in 1959 in recognition of the relatively short duration of work on most construction projects by tradesmen employed by a particular contractor. This, plus the employer's need to know labor costs in advance and to have available a pool of skilled craftsmen, makes it impractical to defer execution of labor agreements until after a representative number of employees have been hired on the project to be covered by the agreement. Congress in section 8(f) thus granted an exception to the general rule that an employer commits an unfair labor practice by concluding a collective bargaining agreement with a union that has not been designated as the representative of

204. 29 U.S.C. § 152(3).
205. Summers, Legal Limitations on Union Discipline, 64 HARV. L. REV. 1049, 1066 (1951).
206. Id. at 2439.
a majority of the employees in an appropriate unit. Thus, so-called "pre-hire agreements," executed in advance of starting work on a particular covered project, have become standard and lawful in the unionized portion of the industry.

Problems arise, however, when an employer who is a party to such a pre-hire agreement attempts to repudiate it. A normal union response would be to picket at the construction site to compel the employer to abide by the agreement. If the union happens to represent a majority of the employees on the picketed project at the time the picketing takes place, this would be lawful protected activity (assuming it fulfills all the technical requirements for primary picketing). But what if the union does not represent a majority? In *NLRB v. Ironworkers Local 103*, the Court in a six-to-three decision accepted the Board's view that such picketing by a minority union violates the ban on recognition picketing under section 8(b)(7)(C) of the Act, if it continues for a reasonable period not to exceed thirty days without a representation petition being filed.

The pivotal question was whether the picketing could properly be considered to be for the purpose of "forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees" within the meaning of section 8(b)(7). Prior Board decisions under that section had recognized a distinction between picketing by a majority union that previously had been lawfully recognized by the employer, and picketing to force an employer's "initial acceptance" of the union as bargaining representative.

The majority opinion by Justice White in *Ironworkers Local 103* viewed determination of the object of the picketing as "a recurring and necessary function of the Board." While conceding room for argument on the point, the majority accorded customary deference to the Board's holding that "picketing by a minority union to enforce a pre-hire agreement that the employer refuses to honor effectively has the object of attaining recognition as the bargaining representative with majority support among the employees, and is consequently violative of §8(b)(7)(C)." The Board's position was viewed as a defensible balance of congressional policy against "top down organizing" ex-

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213. 434 U.S. at 342 n.7.
214. *Id.* at 341.
pressed in section 8(b)(7) versus the unique needs of the construction industry legitimated by Congress in section 8(f).

A corollary of the Board's position on the status of picketing to enforce pre-hire agreements is its ruling that an employer is not guilty of a refusal to bargain in violation of section 8(a)(5) when it refuses to abide by a section 8(f) pre-hire agreement, unless the union can demonstrate its majority status in the unit. In a continuing battle with the Board, the Court of Appeals for the District of Columbia Circuit had taken the opposite stance. It reasoned that an employer who wants to challenge a union's majority status under a pre-hire agreement should do so only by filing a representation petition, which under the second proviso to section 8(f) would not be subject to the usual contract bar rules. The decision in Iron Workers Local 103 now leaves sections 8(a)(5) and 8(b)(7)(C) virtually unaffected by section 8(f). The decision gives Supreme Court endorsement to the Board's theory that a section 8(f) pre-hire agreement is merely a permissible preliminary step that does not in itself entitle a minority union to be treated as the majority representative until and unless it attains majority support. When the union does so, of course, the section 8(f) relationship matures into a full-fledged section 9(a) relationship, with all the rights and duties flowing therefrom.

Because of the pre-existing relationship between the union and the employer under the pre-hire agreement, Justice Stewart's dissent took the position that the picketing here did not fall in the category of forcing an employer's initial acceptance of the union as bargaining representative. He was troubled by the fact that holding this picketing in violation of section 8(b)(7)(C) would leave employers immune from peaceful primary picketing in protest of repudiation of pre-hire agreements made lawful under section 8(f).

The problem for construction trade unions created by this decision is how to establish their majority status. For the most part, because of the relatively short duration of employment by a particular group of craftsmen, an NLRB representation election is not a feasible method of determining majority status. In Ironworkers Local 103, the Court did not attempt to deal with the question of how enforceable bargaining rights could be obtained as it was clear the union in that case did not represent a majority of the employees in the unit being picketed. Indeed, the facts were unusual in that the union apparently did not even represent a majority at the original jobsite where work was first performed pursuant to the pre-hire agreement. Since the employer had

fully lived up to the terms of the pre-hire agreement at that site and presumably must have obtained the tradesmen needed through the union hiring hall, it might be assumed that this would result in the union representing a majority of the employees so hired for that project. Whether it did or not, however, the repudiation being protested by the union related to two other sites for which the employer had "gone non-union" by means of formation of a separate corporation, found by the Board to be the alter ego of the first. Due to this finding the legal effect was the same as if the union were picketing the original signatory employer at a new project, with respect to which the employer had repudiated a pre-hire area-wide agreement which by its terms covered all projects in the area. In a situation such as this it would be difficult, if not impossible, for a union to establish majority status because an employer will usually hire an entirely different complement of employees at additional jobsites.

Nevertheless, the view expressed by Justice Stewart in his dissent that employers may now dismiss pre-hire agreements as nullities seems exaggerated. For the great majority of employers in the construction industry, pre-hire agreements appear to be regarded as serious commitments that cannot be lightly set aside without risking serious disruption of production and long-standing union relationships. For many, use of the union hiring hall, or the enforcement of union security agreements preclude effective repudiation on particular construction projects. The same could be true of those who have a semipermanent complement of craftsmen who move from project to project. Even those who may be in a position to evade the union on an entirely new project may be deterred by the prospect of thirty days of recognitional picketing before the remedies under section 8(b)(7) become available. Finally, the ingenuity of union counsel may still be

217. 434 U.S. at 353. The majority seems to acknowledge that enforcement by suit under § 301 of the Act, 29 U.S.C. § 185 (1976), would not be allowed in the absence of proof of union majority status. Id. at 351-52. However, an advice memorandum by the Board's General Consel has observed that where there has been a long-standing bargaining relationship, union picketing to enforce a pre-hire agreement does not necessarily violate § 8(b)(7), even though that agreement was made before the union had obtained majority status. See the General Counsel's memo in Operating Eng'rs Local 101, 1078 CCH NLRB DEC. ¶ 20,187.

218. The Senate Committee on Labor and Welfare in explaining the purpose of section 8(f) stated:

A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.


220. Recognitional picketing does not become unlawful under section 8(b)(7)(C) until it has
adequate to the task of devising forms of picketing or other types of equally effective economic pressure that would not constitute prohibited recognitional picketing under section 8(b)(7).

Despite these possibilities, Ironworkers Local 103 must still be viewed as having a debilitating effect on pre-hire agreements in the construction industry and providing legal sanction for construction contractors to evade the union on future projects even though they may be signatory to area agreements. As the Board recently held in Dee Cee Floor Covering, Inc.,221 the mere fact that a union might have represented a majority of the employees at previous jobsites is of no consequence on the duty to bargain at new jobsites, since the union must demonstrate its majority at each new jobsite in order to invoke the refusals to bargain provisions of section 8(a)(5) of the Act.

The unusual grouping of Justices Brennan and Marshall with the Chief Justice and Justices White, Powell, and Rehnquist in a decision against organized labor probably can be explained by the emphasis on congressional intent in section 8(b)(7) to ensure voluntary, uncoerced selection of bargaining representatives by employees. The decision seems to represent a logical resolution of that objective with the somewhat conflicting formulation of section 8(f) to accommodate the special circumstances in the construction industry, particularly since both sections were concurrent amendments of the Act.

It would be unwise, however, to assume that it is now permissible for construction employers to walk away from long-standing bargaining relationships at will. This case really did not deal with that kind of situation. In many cases, there may still be special circumstances that would make it difficult for the Board to find that the picketing of a repudiating contractor by a union is intended to secure initial acceptance as bargaining representative, a motive that is generally required as a prerequisite for violation of section 8(b)(7).

III

CASES UNDER OTHER STATUTES

The final group of labor decisions by the Court this term includes cases arising under three miscellaneous statutes, two of which are not designed to directly affect the regulation of labor relations.

A. Witness Statements Under the Freedom of Information Act

From the standpoint of the NLRB, probably the most gratifying

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Supreme Court endorsement this term came in *NLRB v. Robbins Tire & Rubber Co.*, a case which finally settled the status under the Freedom of Information Act (FOIA) of written statements and affidavits given to the Board by prospective witnesses. In sweeping terms, the majority opinion, written by Justice Marshall, concluded that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." \(^{224}\)

Despite the wide practical significance of the decision for the litigation of all types of unfair labor practice proceedings, the relevant question of construction of the FOIA was quite narrow. The employer, charged with violations of section 8(a)(1) of the NLRA during a representation election campaign, made a request to the Board pursuant to FOIA for copies of all potential witnesses' statements collected during the Board's investigation. The Board declined on the ground that this material was exempt under several statutory exemption provisions, although the only one considered by the Supreme Court was exemption 7(A). It provides that disclosure is not required of "investigatory records compiled for law enforcement proceedings but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . ."\(^{225}\) The employer then filed suit in federal district court seeking an order requiring the Board to produce the statements and injunctive relief enjoining the Board from proceeding with the hearing. The district court rejected the Board's exemption claim and ordered the Board to provide the statements at least five days prior to any hearing where the person making the statement would be called as a witness.

The Court of Appeals for the Fifth Circuit affirmed, holding that exemption 7(A) is available only where there has been a specific evidentiary showing of the possibility of actual interference in an individual case by the party requesting records under the FOIA.\(^{226}\) This holding was in conflict with six other Circuits.\(^{227}\) The Court of Appeals found that the Board had failed to carry its burden of demonstrating the availability of exemption 7(A) because it had introduced no ev-

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\(^{222}\) 98 S.Ct. 2311 (1978).  
\(^{224}\) 98 S.Ct. at 2324.  
\(^{226}\) 534 F.2d 725 (5th Cir. 1977).  
\(^{227}\) *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977); Abrahamson Chrysler-Plymouth, Inc. v. NLRB, 561 F.2d 63 (7th Cir. 1977); *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir. 1975), cert. denied, 429 U.S. 834 (1976); *New England Medical Center Hospital v. NLRB*, 548 F.2d 377 (1st Cir. 1976); *Roger J. Au & Son v. NLRB*, 538 F.2d 80 (3rd Cir. 1976); *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139 (9th Cir. 1976); *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63 (10th Cir. 1976).
dence tending to show that witness intimidation was in fact likely to occur in this particular case during the five-day period between disclosure and hearing.\textsuperscript{228}

The basic question for the Supreme Court was what should be required of the Board to demonstrate that furnishing the requested information would "interfere with enforcement proceedings" so as to bring it within exemption 7(A). The Court rejected the approach adopted by the Fifth Circuit. Starting with the statutory language, Justice Marshall could find little to support the view that determinations of "interference" could only be made on a case-by-case basis. Comparison of the phraseology of clause (A) with other portions of exemption 7 made it appear to him that general determinations were contemplated by 7(A). Nevertheless, he conceded that this question could not be resolved by resort to the statutory language alone. He therefore made a detailed analysis of the legislative history, from which he concluded: "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would \textit{generally} 'interfere with enforcement proceedings.'"\textsuperscript{229}

Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, took a much simpler approach. In a terse literal reading of the statute, Justice Stevens started from the premise that "interference" can be defined as an "act of meddling."\textsuperscript{230} In his opinion, any discovery greater than that available under rules normally applicable to an enforcement proceeding would "interfere" with the proceeding in that sense. He not only agreed that the FOIA does not authorize any such interference with NLRB enforcement proceedings, he went on to state that his concurrence was based on the understanding that this rationale applies equally to \textit{any} enforcement proceeding.

Justices Powell and Brennan concurred in the conclusion that the statute does not require a case-by-case determination of interference. They dissented in part, however, on the ground that the Board demonstrated a "reasonable possibility" that harm would result from prehearing disclosure of statements only by current employees that were \textit{damaging to their employer's cause} in the unfair labor practice proceeding. They would therefore reverse the Court of Appeals only to the extent its opinion required prehearing disclosure of such unfavorable statements by current employees. Justice Powell reasoned that the danger of interference with enforcement proceedings lay in the special influence that an employer or union charged with an unfair labor

\textsuperscript{228} 563 F.2d at 731.
\textsuperscript{229} 98 S. Ct. at 2324 (emphasis added).
\textsuperscript{230} \textit{Id.} at 2327.
practice can exercise over employees or members whose welfare and opportunity for advancement depend on remaining in the good graces of the charged party. He therefore agreed with Justice Marshall that the danger of altered testimony provides sufficient justification for the judgment that disclosure of witness statements before they are called to testify would interfere with enforcement proceedings. He felt, however, that this rationale was inapplicable to favorable statements and statements by union representatives or other persons not employed by or affiliated with the charged party, or in the case of a charge against a union, statements by employer representatives or other nonmembers of the union. With respect to the statements of such individuals, he would require a particularized showing of likely interference.

Whether or not the furnishing of witness statements to charged parties would in fact have a chilling effect on the willingness of potential witnesses to provide information, or would give rise to the danger of altered testimony, would be extremely difficult to prove by empirical evidence. Lacking such evidence, we have only Board experience and common sense, both of which tell us that there is at least a reasonable likelihood of such effects, notwithstanding statutory protection against retaliation. It may be that the position of Justices Powell and Brennan on the probable lack of such effect with respect to favorable statements and statements by nonemployees and employer and union representatives is well founded, but the majority of the Court was not in this opinion inclined to make such refined distinctions.

More fundamentally, this case comes down to the question whether Congress intended the FOIA to be used as a discovery statute in enforcement proceedings by federal agencies. Although the legislative history does not leave this question entirely free from doubt, Justice Marshall's analysis seems convincing. The key phrase "only to the extent that production of such records would (A) interfere with enforcement proceedings" was a 1974 amendment introduced by Senator Hart during debates on other FOIA amendments. It was substituted for the original phrase "except to the extent available by law to a private party," which clearly exempted witness statements for which there is no existing discovery procedure by law or Board regulations. The original exemption was expressly designed to protect the existing NLRB policy forbidding disclosure of statements of prospective witnesses until after they had testified in an unfair labor practice proceed-

231. Id. at 2332.
From a comparison of the two clauses, it seems clear the amendment must have been intended to narrow the scope of the original exemption. The question is, how much?

Senator Hart’s primary concern in proposing the amendment was to limit the exemption so that material would not be permanently exempt merely because it could be categorized as an investigatory file compiled for law enforcement purposes, as the original exemption had been interpreted by the courts, inconsistently with Congress’ original intent. He also recognized that the effect of the original provision was to deny “an opposing litigant earlier or greater access to investigative files than he would otherwise have,” and indicated continued agreement with that purpose. There was nothing to show any intention on his part to undercut an original congressional concern that the exemption might be construed to permit disclosure of statements of witnesses before they are called on to testify. It is significant that this problem was stressed in debate despite court holdings prior to 1974 that exemption 7 protected witnesses’ statements in pending NLRB proceedings. Justice Marshall discounted the significance of Senator Hart’s floor position that it is “only relevant” to consider whether an interference would result “in the context of the particular enforcement proceeding.” As even Justice Powell recognized, probably the most telling piece of legislative history was the reaction of the amendments sponsors in urging an override of President Ford’s veto of the 1974 amendments. The President’s message to Congress accompanying the veto specifically referred to onerous new requirements of exemption 7 that would require the government to prove to a court “separately for each paragraph of each document” that disclosure would cause a specific harm. Proponents of the bill found the President’s concern “ludicrous” and expressly stated that the burden would be substantially less than he had indicated.

The effect of this decision is that we now have what amounts to a per se rule that no witness’s statements in NLRB files are subject to discovery under the FOIA prior to their testimony in an unfair labor practice proceeding. Naturally, this has to be a disappointment to those engaged in defense of unfair labor practice charges, who un-

236. Id. at 332-33.
239. 98 S.Ct. at 2323.
240. Source Book (1975), supra note 233, at 484.
241. Id. at 405-06.
doubtedly view it as inconsistent with the current policy in favor of disclosure and counter to the modern procedural trend toward full discovery. Cases of this kind, however, do not seem to involve the type of public interest in the government operations that the FOIA was designed to protect. In the context of unfair labor practice investigations, it is difficult to see any serious threat to open functioning of the democratic process as a result of this decision. All it does is interfere with defense discovery efforts to which trial lawyers have become accustomed. If there is to be any such discovery mechanism in unfair labor practice proceedings, it is now apparent it will have to come through Board regulations.\textsuperscript{242}

The \textit{Robbins Tire} decision has added significance because of its potential impact on EEOC proceedings. Here Justice Powell's distinction between statements by employees and nonemployees could have greater impact. In addition, Justice Marshall's emphasis on the original expressed intent of Congress to protect witness statements in NLRB proceedings may put that agency in a distinguishable category. Nevertheless, Justices Stevens, Burger and Rehnquist were surprisingly blunt about the applicability of their simplistic rationale to any enforcement proceeding. Justice Marshall's opinion seems to indicate receptivity to a generalized showing by the EEOC of possible intimidation of witnesses as a basis for invoking exemption 7(A). That, however, would be contrary to \textit{Charlotte-Mecklenberg Hospital v. Perry},\textsuperscript{243} in which the Fourth Circuit held that the district court is required in each case to examine statements \textit{in camera} to determine whether their disclosure would interfere with EEOC enforcement proceedings. The value of that decision as precedent has been placed in doubt, not only because of the general theory of \textit{Robbins Tire}, but also because Justice Marshall specifically rejected the argument that FOIA provisions for \textit{in camera} review of documents by the district court necessarily contemplate that the Board must specifically demonstrate in each case that disclosure of the particular witness's statement would interfere with a pending enforcement proceeding. Justice Marshall observed: "The \textit{in camera} review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case."\textsuperscript{244}

\textsuperscript{242} Current Board regulations provide only that a pretrial statement will be furnished to a litigant "after a witness called by the general counsel or by the charging party has testified in a hearing" when such statement may be used "for the purpose of cross-examination." 29 C.F.R. § 102.118(b)(1) (1977). For a brief summary of possible changes in the NLRB General Counsel's attitude toward discovery see comments of John Higgins, Jr., 1976 Proceedings, A.B.A. Section of Labor Relations Law 164-65 (1977).


\textsuperscript{244} 98 S.Ct. at 2318.
B. Warrantless Search Under the Occupational Safety and Health Act

One of the more widely publicized and sensitive constitutional questions faced by the Court this term arose under the Occupational Safety and Health Act of 1970 (OSHA), which empowers agents of the Secretary of Labor to inspect the work area of any employment facility covered by the Act. No search warrant is expressly required under the Act. In *Marshall v. Barlow's, Inc.*, a five-to-three decision written by Justice White, the Court held that such an inspection without a warrant constitutes an unreasonable search in violation of the fourth amendment of the United States Constitution.

This case provides a provocative illustration of the tension between the needs of law enforcement on the one hand and the constitutional protection against unreasonable searches and seizures on the other. To many in labor, government, and environmental groups, it seemed to strike a fatal blow to the routine inspection program that is an integral part of this major piece of social legislation. To management representatives, farmers, and libertarians, it was something of a *cause célèbre* pitting the small-town rugged individualist against bureaucratic oppression by big government.

The facts were well-tailored to contrast these interests. Barlow's Inc. was an electrical and plumbing installation business located in Pocatello, Idaho. Company president William Barlow was on hand when an OSHA inspector appeared at his place of business without advance warning and informed him he wanted to inspect the working area. There had been no complaint of any violation. When Barlow asked whether he had a warrant, the inspector replied in the negative, and Barlow refused him admission. After the Secretary of Labor obtained a federal district court order compelling Barlow to admit the inspector, Barlow continued to deny him admission and countered with a federal district court suit for injunctive relief against the warrantless search. The district court held that the fourth amendment required a warrant and that the statutory authorization for warrantless searches

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248. U.S. Const. amend. IV, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

249. 29 C.F.R. § 1903.4 (1977) authorizes an inspector to seek compulsory process if an employer refuses. Fourth amendment protection of course is waived if the individual consents to the inspection. *See, e.g.*, Dorey Elec. Co. v. OSHRC, 553 F.2d 357 (4th Cir. 1977).
was unconstitutional. An injunction was entered against searches or inspections pursuant to section 8(a) of the Act. The Supreme Court affirmed the judgment of the district court, but held section 8(a) of OSHA unconstitutional only insofar as it purports to authorize inspections without a warrant or its equivalent. Accordingly, the injunction against inspections was limited to that extent.

On the basis of Supreme Court precedent, Barlow's had a strong case. At one time the fourth amendment was deemed inapplicable to regulatory searches, as distinguished from criminal investigations. In 1967, however, that position was reversed in the companion cases of Camara v. San Francisco Municipal Court and See v. Seattle, which held that such warrantless searches to enforce health and safety regulations are generally unreasonable. See also made it clear that this principle applied to business premises, stating:

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Efforts by the government to bring the case within an exception for "pervasively regulated businesses" were dismissed rather brusquely by Justice White. This exception, which has been applied to businesses dealing in goods such as liquor and firearms, is limited to industries which are so regulated that when an entrepreneur embarks upon such a business, he can be said to have in effect voluntarily subjected himself to a full arsenal of government regulation. The regulation that Barlow's business could be exposed to under the Walsh-Healy Act and the National Labor Relations Act was not considered to be in this category since all businesses affecting commerce are subject to such regulation. If this were enough to make the fourth amendment inapplicable, the exception would become the rule.

The furor created by this case revolves around its effect on the OSHA enforcement program. Justice White rejected the argument that

254. 387 U.S. 541 (1967).
255. Id. at 543.
warrantless searches are reasonable because essential to proper enforcement of OSHA, while Justice Stevens took the position the Court should not substitute its judgment for that of Congress as to what inspection authority is needed to effectuate the purposes of the Act. They differed sharply about the practicalities of the situation.

Regarding the advantage of surprise afforded by a warrantless search, Justice White noted that this could be preserved by warrants issued *ex parte*, without notice. He also discounted the claimed burden this would impose on the inspection system. He minimized the burden by providing needed clarification of the type of showing necessary to meet the "probable cause" requirement of the warrant clause of the fourth amendment. Probable cause in the criminal sense—cause to believe there is a violation on the premises to be inspected—is not required. That, of course, would have completely eliminated routine inspection programs. All that is needed for an administrative search such as this is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. Specifically, Justice White suggested:

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.\(^{260}\) The "administrative probable cause" showing outlined by Justice White has made the decision a mixed blessing to management representatives\(^{261}\) and is the portion of the opinion which will attract the future attention of labor lawyers.

Justice Stevens' vigorous dissent joined by Justices Blackmun and Rehnquist, maintained that these *ex parte* warrants are not adequate to satisfy the probable cause requirement of the fourth amendment, since "particularized" probable cause was the procedural safeguard against general warrants contemplated by the framers in the warrant clause.\(^{262}\) But even if the majority were correct about full compliance with the probable cause requirement, Justice Stevens still would consider the search reasonable under the "unreasonable search and seizure" clause without any warrant at all. He would distinguish *See* on the ground that it involved a locked warehouse, whereas in *Barlow's* the area to be inspected was one to which employees have regular access and for which no special claim to confidentiality could be raised. Justice


261. 8 O.S.H. Rep. 5 (June 1, 1978) (BNA).

262. 436 U.S. at 328.
White, however, differentiated a government inspector from an employee. He reasoned convincingly that without a warrant, the inspector stands in no better position than a member of the general public. If the presence of employees were enough to eliminate the necessity for a warrant, fourth amendment protection for administrative searches would have virtually no meaning for businesses.

The term "probable cause" in the fourth amendment seems broad enough to be reasonably susceptible of either interpretation, but the adequacy of the diluted version for administrative searches has been firmly established since *Camara* and *See*. Once it was concluded in those cases that the fourth amendment protection extends to routine regulatory inspections of commercial establishments (subject to the narrow exception for "certain carefully defined classes of cases"), this special "administrative probable cause" is about all that could be expected if routine inspection programs are not to be completely ruled out.

Coverage of OSHA spot checks by the first clause of the fourth amendment seems well-founded. It recognizes "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" without any reference at all to criminal prosecutions. Of course, the fourth amendment does not by its terms require a warrant for every search, but this decision simply follows the existing rule that a warrantless search of a place of business is presumptively unreasonable. This seems in keeping with the fourth amendment's purpose to safeguard the privacy and security of individuals against arbitrary invasions by government, a protection basic to a free society. Although criminal investigations may pose a greater threat, unannounced administrative enforcement investigations are arguably equally obnoxious to employers. By interposing a neutral magistrate to verify the necessity for the search, the requirement of a warrant at least provides protection against a particular business being singled out for harassment; the inspection must be pursuant to an administrative plan containing neutral criteria. Easy as these requirements may be to satisfy, they nevertheless perform an important function in guaranteeing the security the fourth amendment is meant to provide.

Yet the continuing need for rigorous enforcement of safety and health standards in the workplace certainly cannot be denied. The

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263. Application of the fourth amendment to regulatory searches of businesses was recently affirmed in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-59 (1977).
265. The Act makes a strong statement of the congressional purpose "to assure as far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b) (1976).
provisions for inspection without advance warning are the heart of OSHA enforcement procedures since they provide a continuing inducement to voluntary compliance with these standards. But no less important is the private right of citizens to be secure against unreasonable searches by government agents. If congressional sentiment as to the overriding necessity for expeditious, unsupervised searches were to control the reconciliation of these important interests, fourth amendment protection would almost always be lost. Moreover, congressional intent with respect to the necessity for warrants for OSHA searches is by no means clear.

Only experience will disclose the ultimate effect of the decision on the OSHA inspection program. For the present, it appears likely that existing procedures for requesting admission without a warrant will continue to be followed, presumably because of the difficulty of obtaining warrants. Warrants will be requested only if entry is refused. If refusals should become widespread, the Department of Labor may have to resort to routinely seeking ex parte warrants in advance based on the administrative probable cause showing outlined above, a procedure not entirely satisfactory to business interests. In the alternative, the Department could seek judicial process that would provide the functional equivalent of a warrant, which the Court in Barlow's recognized as an acceptable substitute. It cannot be assumed that these alternatives would necessarily cripple the enforcement program, though it would certainly make it more time-consuming and expensive.

The Court purported to limit its holding to the facts and law concerned with OSHA and took pains to outline possible distinctions that might limit its applicability to similar statutory inspection programs such as those under the Clean Air Act of 1970, the Federal Water Pollution Control Act of 1972, and the Toxic Substances Control Act. As Justice White commented, "The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute." He pointed out that some of the other regulatory statutes that might be affected apply only to a single industry where the "pervasively regulated" exception could apply. Consequently, it seems likely that agencies charged with administration of such other statutes will stay with existing proce-

266. Kent, supra note 122, at 284 n. 9.
267. 8 O.S.H. Rep. 3 (June 1, 1978) (BNA).
268. Id.
272. 436 U.S. at 321.
dures unless and until they are struck down by successful court challenge. The decision in Barlow’s, however, provides new support for such challenges.

C. Approval of Collective Bargaining Agreements Under the Shipping Act

Some of the special labor problems of the maritime industry were illustrated by Federal Maritime Commission v. Pacific Maritime Association,275 in which the Court approved potentially serious interference by the Maritime Commission with the negotiated terms of collective bargaining agreements. That case held that section 15 of the Shipping Act276 required approval by the Commission of a 1972 collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen’s and Warehousemen’s Union. Since the holding is not applicable to all collective bargaining agreements in the maritime industry, the practical difficulty for employers and unions in that industry will be determining which agreements must be filed.

In broad terms, the Act requires filing of agreements which affect competition and empowers the Commission to cancel or modify agreements it finds to be unjustly discriminatory or contrary to public interest.277 The agreement in question here required, as a condition on the use of union/Association hiring halls, that employers who were not members of the Association participate in all fringe benefit programs, pay the same dues and assessments as Association members, and be treated as Association members during work stoppages. On complaint of the nonmember ports, the Commission found that this agreement did not fall within the implied “labor exemption” to the Act’s filing requirements, previously recognized by the Commission.278 Because the agreement’s thrust was to bring nonmembers into parity with Association members by requiring them to submit to bargaining unit terms, the Commission felt this had a potentially severe and adverse effect upon competition and only a superficial effect on the collective bargaining process. The Court of Appeals for the District of Columbia Circuit set aside the Commission’s order on the ground that any collective bargaining agreement was exempt from the Shipping Act, whatever its impact on competition, or in the alternative that this particular agreement should be exempt.279 The Supreme Court, in a five-to-three decision, reversed.

279. 543 F.2d 395 (D.C. Cir. 1976).
Because of the sweeping wording of section 15 of the Shipping Act, it would be difficult to say this decision was clearly wrong, but it certainly could have most unfortunate effects on collective bargaining in the maritime industry. Since agreements filed cannot be implemented until approved, the result is bound to be delay, uncertainty and instability. As Justice Powell noted in his dissent, it seems very unlikely that Congress ever envisioned the application of section 15 to collective bargaining agreements when it enacted this provision in 1916; labor unions themselves are not even covered by the Act. Since section 15 applies only to agreements among persons covered, the anomalous effect of *Pacific Maritime Association* is to require filing of multi-employer agreements that might have anti-competitive effects, but not such agreements between unions and single employers in the industry.

While the direct impact of this decision will be confined to unions and employers in the maritime industry, representatives of labor and management generally have reason to be concerned about the prospect of collective bargaining agreements being submitted for advance approval to a governmental agency not charged with administration of federal labor law. The decision is also of general interest as an example of the fundamental conflict between the national policy favoring competition and the policy promoting collective bargaining—a conflict the Court has been attempting to reconcile for years with a vaguely defined "labor exemption" from the antitrust laws. Despite the confusion and peculiar fact situations running through the Court's decisions in this area, the Maritime Commission in 1972 attempted to summarize this antitrust exemption of the Court with a four-point rule of thumb to be used for determining which collective bargaining agreements will be subject to its own jurisdiction under the Shipping Act.280 In *Pacific Maritime Association*, the Court approved these four criteria as "roughly equivalent to the exemption from the antitrust laws that the courts hold the labor statutes require for collective bargaining contracts ..."281

One of the Commission's four exemption criteria is that the agreement must not impose terms on entities outside the collective bargaining group. Thus, when *Pacific Maritime Association* held the Commission had properly assumed jurisdiction since the Association

280. United Stevedoring Corp. v. Boston Shipping Ass'n, 16 Fed. Mar. Comm'n Rep. 7, 12-13 (1972). The four criteria are: (1) the collective bargaining must be in good faith; (2) the matter must be a mandatory subject of bargaining, a proper subject of union concern, and commonly associated with a bona fide labor purpose; (3) the result of the bargaining must not impose terms on entities outside the bargaining group; (4) the union must be acting in its capacity as labor representative.

281. 435 U.S. at 52.
and the union had undertaken to impose employment terms and conditions on employers outside the bargaining unit, the Court seemed to be indicating that this factor standing alone would also have been enough to forfeit exemption under the antitrust laws. In fact, it cited United Mine Workers of America v. Pennington282 on this point.283

The Court made it clear, however, that "denying the [antitrust] exemption does not mean there is an antitrust violation."284 This dictum reaffirms the distinction between nonexemption and violation that first appeared in Pennington and resurfaced in Connell Construction Co. v. Plumbers Local 100.285 It has been suggested that in cases where an agreement imposes wages or working conditions on outsiders, the additional factor needed to establish a violation should be a predatory intent to harm competitors.286 In any event, Pacific Maritime Association provides a reminder that a collective bargaining agreement does not automatically violate antitrust law merely because it attempts to establish wages, hours or working conditions at other bargaining units or for an entire industry, even though the labor exemption probably is thus lost.

IV

Conclusion

After review of such a wide assortment of cases, only a few general observations seem in order. On the whole, the court seemed less doctrinaire in its approach to labor issues this term than it has been in some time. The term certainly could not be characterized as pro-labor, but in fairness, it could not be designated pro-management either. Unions suffered major setbacks in Sears (preemption), Ironworkers Local 103 (pre-hire agreements), ABC (union discipline), and Barlow's (OSHA searches), but employers took equally unpalatable defeats in Beth Israel Hospital (no solicitation), Eastex (no distribution), Robbins Tire (FOIA), and Manhart (sex discrimination). Most of the other employment discrimination cases defy simplistic labelling as either pro-labor or pro-management. In the Shipping Act case, both labor and management lost. The only consistent winner was the NLRB, which made a clean sweep of all five cases in which it was a party. This would seem to indicate basic neutrality of the Court on traditional labor law.

It is even difficult to line up consistent voting patterns among

283. 435 U.S. at 53-63.
284. Id. at 61.
members of the Court. More often than not, Chief Justice Burger and Justice Rehnquist continued to vote together on the management side of labor cases, with Justices Brennan and Marshall in opposition, but even these pairings occasionally split. For example, in the OSHA warrantless inspection case, Justice Marshall voted with the majority against the position of organized labor, and Justice Rehnquist dissented from the position of Chief Justice Burger and various conservative organizations. Among the remaining five Justices, alignments frequently shifted.

The most disturbing feature of these decisions (and perhaps others as well) is the Court's fragmentation. Of the twenty-one labor decisions, only four were unanimous, all on relatively minor issues. In the rest, an outpouring of needlessly prolix verbiage, in the form of separate dissents, concurrences, partial dissents, and partial concurrences, frustrates the effort to isolate and explain coherent general principles—Bakke being the leading example. As a result, the future value of these decisions to practitioners, lower courts, students and educators is unfortunately debased. Much “tidying up” remains to be done.