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Supreme Court 1978-79 Labor Relations and Employment Discrimination

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COMMENTARY

THE SUPREME COURT, 1978-79— LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION

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The labor relations and employment discrimination decisions rendered by the Supreme Court during its October Term 1978 stand like the tip of an iceberg. Reflected therein are glimpses of disarray and fragmentation in our so-called comprehensive national labor policy. Strains of bureaucratic rigidity and insensitivity are evident. Sounds of anger and frustration are heard from groups arbitrarily disenfranchised from federal constitutional or statutory protection. This Article briefly reviews and comments upon the Court's efforts to contain the chaos.

I

STRAINS OF BUREAUCRATIC INSENSITIVITY

Primary administrative authority for enforcement of national labor policy under the National Labor Relations Act[1] (NLRA) is committed to the National Labor Relations Board[2] (NLRB). Court deference to the Board's exercise of that authority has vacillated over the years. In three of the four NLRB cases which came before the Court this past Term the Court rejected the Board's interpretation and application of the statute.

In these cases there are glimpses of the increasing bureaucratic rigidity of the Board and of the Board's insensitivity to the nuances of a complex and diversified world. There are also traces of the Court's impatience with the Board's unresponsiveness to the Court's prior admonitions.

In *NLRB v. Baptist Hospital, Inc.*,[3] the Court upheld the Board's invalidation of a no-solicitation rule as applied to the hos-

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[1] 29 U.S.C. §§ 141-187 (1976).

[2] *Id.* § 160.

[3] 99 S. Ct. 2598 (1979). Justice Powell delivered the Court's opinion. Justice Blackmun, Chief Justice Burger, and Justice Brennan joined by Justices White and Marshall concurred separately.

pital's first-floor cafeteria, gift shop and lobbies, but held, contrary to the Board, that the rule was valid beyond immediate patient care areas and could include corridors and sitting rooms on floors of the hospital having either patients' rooms or operating or therapy rooms.[4] There was no basis, said the Court, for rejection of hospital evidence that union solicitation in the presence of or within the hearing of patients on patient-care floors could adversely affect patient recovery; therefore, the hospital had rebutted the Board's presumption against solicitation bans in non-immediate patient care areas.[5]

The Court questioned, but did not invalidate, the Board's general presumptions concerning the permissibility of union solicitation in hospitals. "It must be said, however, that the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital."[6] The Court urged the Board to heed the Court's prior admonitions to be more sensitive to the problems of the hospital world.[7] The Court counseled the Board to revise its rulings if experience reveals that the well-being of patients is being jeopardized.

In *Detroit Edison Co. v. NLRB*,[8] the Court again reacted to the Board's insensitivity to industrial reality and rejected the Board's indiscriminate reliance upon presumptions. The Court held, contrary to the Board, that the employer did not violate section 8(a)(5) of the NLRA by refusing to furnish the union with the actual test questions and employee answer sheets used in the employer's statistically validated psychological aptitude testing program, nor by refusing to furnish the test scores linked with employee names absent written consent from the individual employees.[9] The Court said that a union's bare assertion that

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[4] *Id.* at 2608.

[5] *Id.* at 2605. The Board regards solicitation bans as presumptively valid in immediate patient care areas such as patients' rooms, operating rooms, and treatment areas such as x-ray and therapy areas, and broader bans as presumptively invalid. *See id.* at 2603; Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978). *See generally* Modjeska, *The Supreme Court and the Diversification of National Labor Policy*, 12 U. CAL. DAVIS L. REV. 37, 45-50 (1979).

[6] 99 S. Ct. at 2607.

[7] *See* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 508 (1978).

[8] 440 U.S. 301 (1979). Justice Stewart delivered the Court's opinion. Justice Stevens concurred in part and dissented in part. Justice White, joined by Justices Brennan and Marshall, dissented.

[9] *Id.* at 316-17, 320.

information is necessary to grievance processing[10] does not trigger an employer obligation to furnish the information in the manner requested, and that the duty to supply information as well as the type of disclosure required turn upon the circumstances of the particular case.[11]

The Court found that the employer was contractually free to use aptitude tests as a promotion criterion, that the tests had empirical validity, that there was a critical relationship between secrecy and test validity, and that "[t]he Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve this interest, and we are unable to identify one."[12] The Court deemed inadequate the Board's remedy which barred the union from taking any action which might cause the tests to fall into the hands of employees who took or might take the tests.

The Court conceded that the actual employee test scores were of potential relevance to the grievance, but held that the sensitive nature of testing information predominated and justified disclosure conditioned upon employee consent. The Court stated:

> The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted. This we believe is one.[13]

The Court noted that although the Board has been granted broad discretion in devising remedies, "the rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action."[14]

In *NLRB v. Catholic Bishop of Chicago,*[15] the Court again rejected the Board's interpretation of the NLRA. The Court held

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[10] The union's request related to the arbitration of a grievance based on the employer's rejection of unit employees for job openings because of unacceptable test scores. *Id.* at 307.

[11] *Id.* at 314. *Cf.* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956) (entitlement to evidence substantiating employer's claim of inability to pay increased wages dependent on particular facts of case); American Cyanamid Co., 129 N.L.R.B. 683, 684 (1960) (refusal of employee access to job evaluation and job description reports not unfair labor practice when confidentiality of manufacturing techniques at stake).

[12] 440 U.S. at 315.

[13] *Id.* at 318 (footnotes omitted).

[14] *Id.* at 316.

[15] 440 U.S. 490 (1979). Chief Justice Burger delivered the Court's opinion. Justice Brennan, joined by Justices White, Marshall and Blackmun, dissented.

that the Board lacked jurisdiction over teachers in schools operated by a church to teach both religious and secular subjects.[16] The Court found that assertion of such jurisdiction[17] raised significant risks of infringement of the religion clauses of the first amendment. Absent a clear expression of affirmative congressional intention to cover church-operated schools under the NLRA, the Court avoided a construction of the Act which raised difficult and sensitive first amendment questions.[18] Board jurisdiction and consequent involvement in the context of mandatory collective bargaining, said the Court, would raise a significant risk of excessive entanglement with the religious mission of church-operated schools.[19]

The Court's lack of deference to the Board in the foregoing cases stands in marked contrast to the substantial deference accorded the Board in earlier days.[20] Focus has shifted from making the administrative process viable to making the process responsible. Maturation commands more stringent standards. Whether or not the Board can meet these high standards remains to be seen. The shibboleth of expertise is no substitute for balanced and reasoned judgments.[21] The Court clearly advises the Board to be more responsive to reality.

In *Beth Israel Hospital v. NLRB*,[22] the Court noted the realistic confines and limitations of the Board's expertise. The Court ob-

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[16] *Id.* at 507.

[17] The Board had certified unions as representatives of lay faculty members at two groups of Catholic high schools. *Id.* at 494.

[18] *Id.* at 507.

[19] *Id.* at 501-04. In the fourth NLRB case of the Term, Ford Motor Co. v. NLRB, 99 S. Ct. 1842 (1979), the Court held, in agreement with the Board, that in-plant cafeteria and vending machine food and beverage prices are mandatory subjects of collective bargaining. Justice White delivered the Court's opinion. Justices Powell and Blackmun concurred separately. Classifying such subjects as mandatory, said the Court, channels an area of common dispute into the collective bargaining process; these subjects were neither too trivial nor difficult for resolution in such process, nor beyond the employer's control. The fact that the matter may not have vitally affected terms and conditions of employment was not relevant, said the Court, because the matter involved an aspect of the employer-employee relationship and did not directly implicate third parties. *Id.* at 1851. *Cf.* Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176-79 (1971) (third-party interest in retirement benefits had no significant effect on terms and conditions of employment for active employees).

[20] *E.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944); Phelps Dodge Corp. v. NLRB, 313 U.S. 177. 194, 197 (1941).

[21] *See generally* Getman & Goldberg, *The Myth of Labor Board Expertise*, 39 U. CHI. L. REV. 681, 681-84 (1972).

[22] 437 U.S. 483 (1978).

served that the Board was expert in national labor policy rather than the marketplace.[23] This view may portend an increasingly activist role for the Court in labor relations. The Court may believe that it has attained a familiarity with the NLRA's application to the national scene equal to or greater than that of the Board. The Court may well be right.

II

Alterations in the Structure

Questions concerning the legitimacy of circumvention or supplementation of the procedural and remedial schemes of federal labor and employment discrimination laws confronted the Court in at least five cases. The Court rejected those potential alterations which threatened to upset the particular balances established by Congress. The Court tolerated concurrent schemes which entailed no significant interference or were consistent with federal policy.

In *Union Pacific Railroad v. Sheehan*,[24] the Court found *per curiam* that a decision of the National Railroad Adjustment Board (NRAB) was final and binding on the parties and judicially nonreviewable; the NRAB had held that a discharged employee had not filed his appeal within the time requirements of the collective bargaining agreement.[25] The Court reaffirmed the principle that judicial review of NRAB orders is limited to three specific grounds: (1) failure of the NRAB to comply with Railway Labor Act[26] requirements; (2) failure of the NRAB to conform, or confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption.[27] The Court said that a court may set aside an NRAB order only upon one or more of these bases, and no such grounds were shown by the NRAB determination concerning the time limitations of the contract.[28]

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[23] *Id.* at 501.

[24] 439 U.S. 89 (1978).

[25] *Id.* at 95.

[26] 45 U.S.C. §§ 151-188 (1976).

[27] *Id.* § 153 First (q). *See* Andrews v. Louisville & Nashville R. R., 406 U.S. 320, 325 (1972); Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R. R., 373 U.S. 33, 38 (1963).

[28] 439 U.S. at 93. Specifically, the NRAB found that the contractual time limitations were not tolled during the pendency of the employee's state court action alleging wrongful discharge and denial of fair hearing. The NRAB dismissed the employee's NRAB claim as untimely. *Id.* at 89.

The NRAB was created as an employee-employer tribunal to secure the prompt, orderly and final settlement of daily grievances regarding rates of pay, rules and working conditions.[29] Congress deemed it essential to keep such so-called "minor" disputes within the NRAB and out of the courts.[30] Finality of NRAB determinations is essential to achieve the stability that the Railway Labor Act was designed to promote in the railroad industry. Thus, the Court stated:

> The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations. Normally finality will work to the benefit of the worker: He will receive a final administrative answer to his dispute; and if he wins, he will be spared the expense and effort of time-consuming appeals which he may be less able to bear than the railroad.... Here, the principle of finality happens to cut the other way. But evenhanded application of this principle is surely what the Act requires.[31]

In *Great American Federal Savings & Loan Association v. Novotny*,[32] the Court held that the conspiracy provisions of the Reconstruction Civil Rights Act[33] may not be invoked to redress violations of Title VII.[34] To permit assertion of Title VII violations through section 1985(c), said the Court, would enable a complainant to avoid the detailed and specific provisions of Title VII, particularly the crucial administrative process.[35] The Court said that section 1985(c) does not create any substantive rights but simply provides a remedy for violation of the rights it designates. "It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section."[36]

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[29] *See* Gunther v. San Diego & Ariz. E. Ry., 382 U.S. 257, 263 (1965); Union Pac. R.R. v. Price, 360 U.S. 601, 616 (1959); Slocum v. Delaware, Lackawanna & W. R. R., 339 U.S. 239, 240 (1950); Elgin, Joliet & E. Ry. v. Burley, 327 U.S. 661, 664 (1946).

[30] 439 U.S. at 94. *See* Brotherhood of R. R. Trainmen v. Chicago R. & Ind. R. R., 353 U.S. 30, 40 (1957).

[31] 439 U.S. at 94 (citation omitted).

[32] 99 S. Ct. 2345, 2352 (1979). Justice Stewart delivered the Court's opinion. Justice Powell and Justice Stevens concurred separately. Justice White, joined by Justices Brennan and Marshall, dissented.

[33] 42 U.S.C. § 1985 (c) (Supp. I 1977).

[34] 42 U.S.C. §§ 2000e to e-15 (1976).

[35] 99 S. Ct. at 2351.

[36] *Id*

In *Oscar Mayer & Co. v. Evans*,[37] the Court held that the Age Discrimination in Employment Act[38] (ADEA) requires an aggrieved person to resort to appropriate state proceedings before bringing a court action.[39] The Court said, however, that the ADEA does not require that state proceedings be commenced within the time limits specified by state law in order to preserve the federal right of action. ADEA section 14(b) "requires only that state proceedings be commenced 60 days before federal litigation is instituted; besides commencement no other obligation is placed upon the ADEA grievant."[40] The ADEA simply gives the states a limited opportunity to settle ADEA grievances in a voluntary or localized manner and avoid the necessity for independent federal relief.[41]

In *International Brotherhood of Electrical Workers v. Foust*,[42] the Court held that the Railway Labor Act[43] does not permit an employee to recover punitive damages against a union that breaches its duty of fair representation.[44] Punitive sanctions, said the Court, are contrary to the compensatory purposes of fair representation suits, could impair the financial stability of unions, could curtail the broad discretion afforded unions in handling grievances, and could unsettle the careful balance of individual and collective interests previously articulated by the Court in the unfair representation area. The Court also noted that community hostility toward unions, management or unpopular views could find expression in punitive awards.[45]

In *New York Telephone Co. v. New York State Department of Labor*,[46] the Court held that Congress, in enacting the National

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[37] 99 S. Ct. 2066 (1979). Justice Brennan delivered the Court's opinion. Justice Blackmun concurred. Justice Stevens, joined by Chief Justice Burger and Justices Powell and Rehnquist, concurred in part and dissented in part.

[38] 29 U.S.C. §§ 621-634 (1976).

[39] 99 S. Ct. at 2073.

[40] *Id.*

[41] *Id.* at 2074.

[42] 99 S. Ct. 2121 (1979). Justice Marshall delivered the Court's opinion. Justice Blackmun, joined by Chief Justice Burger and Justices Rehnquist and Stevens, concurred.

[43] 45 U.S.C. § 151-188 (1976).

[44] 99 S. Ct. at 2128.

[45] *Id.* at 2127 n. 14. In International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979), the Court prevented another encroachment on the federal labor scheme. The Court held that noncontributory pension plans are not subject to federal regulation as securities.

[46] 440 U.S. 519 (1979). Justice Stevens announced the Court's judgment in an opinion joined by Justices White and Rehnquist. Justice Brennan filed an opinion concurring in

Labor Relations Act[47] and the Social Security Act[48] (SSA), did not preempt the power of a state to pay unemployment compensation to strikers.[49] The opinion by Justice Stevens announcing the judgment of the Court stated that traditional labor law preemption doctrine did not invalidate the state law because (1) the state did not attempt to regulate or prohibit private conduct in the labor-management field but rather operated a program for the distribution of benefits to certain members of the public in order to insure employment security;[50] (2) the state law was of general applicability rather than a regulation of relations between employees, union and employer;[51] and (3) congressional silence in view of their awareness of the possible impact of unemployment compensation on the bargaining process implies that Congress intended that the states be free to authorize or to prohibit such payments.[52] Justice Stevens said that the state law was entitled to the same deference afforded analogous state laws of general applicability and local interest, where preemption is not inferred absent compelling congressional direction.[53] Justice Stevens stated:

> In an area in which Congress has decided to tolerate a substantial measure of diversity, the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power.[54]

The opinions of Justices Brennan and Blackmun relied upon NLRA and SSA legislative history to find non-preemption, and refrained from joining the plurality's preemption analysis. Justice Blackmun disagreed with the plurality's purported requirement of compelling congressional direction to find preemption.[55]

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the result. Justice Blackmun filed an opinion concurring in the judgment, joined by Justice Marshall. Justice Powell dissented, joined by Chief Justice Burger and Justice Stewart.

[47] 29 U.S.C. §§ 141-187 (1976).

[48] Social Security Act, tit. IX, 49 Stat. 639 (1935) (codified in scattered sections of 26, 42 U.S.C.), *as amended by* Federal Unemployment Tax Act, ch. 23, 68A Stat. 439 (1954).

[49] 440 U.S. at 545-46.

[50] *Id.* at 532.

[51] *Id.* at 533.

[52] *Id.* at 544.

[53] *Id.* at 539-40.

[54] *Id.* at 546.

[55] *Id.* at 548-49.

In these decisions, the Court was careful to preclude encroachments upon the federal labor scheme as well as to preserve existing balances. The Court also underscored the primary administrative authority of the various federal labor agencies. Adherence to legislative intent predominated. Even the holding in *New York Telephone Co.* appeared controlled by the historicity of congressional silence toward state employment compensation for strikers.

Caution seemed particularly appropriate in *Electrical Workers.* While the duty of fair representation may in some respects stand as a bulwark against union oppression, the doctrine itself has uncertain dimensions and the potential for abuse.[56] The threat of financial liability for serious misjudgment necessarily works a chilling effect upon the freedom of union decisionmaking. The added imposition of punitive damages could be devastating indeed and "disrupt the responsible decisionmaking essential to peaceful labor relations."[57]

Caution was equally appropriate in *Union Pacific, Great American,* and *Oscar Mayer.* The cases all presented a potential bypass of or limitation upon federal process and procedure, and to that extent threatened the industrial peace and nondiscrimination contemplated by national policy.

III

Sounds of the Disenfranchised

The voices of those who are excluded from coverage or protection under various federal labor and employment discrimination laws were loudly heard before the Court this past Term. Orphan status, with its concomitant lack of effective process and remedy, has left these disenfranchised persons to the vagaries of general litigation. Issues of constitutional rights and remedies, and of the implication of private causes of action, formed the focal point for such litigation during the Term. The Court approached these issues with an abundance of caution, and the scope of the resultant decisions appears confined. Overall, the groups before the Court, such as public employees and agricultural workers, found little relief.

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[56] *See generally* Modjeska, *The Uncertain Miranda Fuel Doctrine,* 38 Ohio St. L. J. 807 (1977).

[57] 99 S. Ct. at 2127.

Public employees excluded from the coverage of the National Labor Relations Act[58] sought unsuccessfully to predicate mandatory collective bargaining upon constitutional grounds. In *Smith v. Arkansas State Highway Employees, Local 1315*,[59] the Court held *per curiam* that the refusal of the employer to consider or act upon grievances when filed by the union rather than by the employee directly did not violate the first amendment.[60] The Court said that the first amendment is not a substitute for the national labor relations laws; while the refusal to deal with the union might well be an unfair labor practice were public employers subject to the same labor laws applicable to private employers, the refusal is not prohibited by the Constitution. The public employee's first amendment rights of association and advocacy were not infringed, said the Court, nor was there any claim of retaliation or discrimination proscribed by the first amendment. The Court stated:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. . . . But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.[61]

Similarly, agricultural employees excluded from the coverage of the NLRA[62] sought unsuccessfully to create effective representation and bargaining rights based upon constitutional grounds. In *Babbitt v. United Farm Workers National Union*,[63] the Court held that the allegedly dilatory and voter-restrictive election procedures in the Arizona Agricultural Employment Relations Act did not violate the first amendment.[64] Because the Constitution guarantees individual or collective employee expression but does not compel the employer to respond or even listen, Arizona was not constitutionally required to provide any representational procedures with attendant mandatory bargaining. "That it has under-

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[58] 29 U.S.C. §§ 151-169 (1976). *See generally* D. LESLIE, CASES AND MATERIALS ON LABOR LAW 735-65 (1979).

[59] 99 S. Ct. 1826 (1979). Justice Powell did not participate. Justice Marshall dissented.

[60] *Id.* at 1828.

[61] *Id.* (citation omitted).

[62] *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 31-33 (1976).

[63] 99 S. Ct. 2301 (1979). Justice White delivered the Court's opinion. Justice Brennan, joined by Justice Marshall, concurred in part and disssented in part.

[64] *Id.* at 2317.

taken to do so in an assertedly niggardly fashion, then, presents as a general matter no First Amendment problems."[65] Moreover, the Court said, the statute did not preclude voluntary recognition.[66]

Aliens sought unsuccessfully to limit under the Constitution the growing class of permissible state exclusions of aliens from participation in a state's political institutions and processes. In *Ambach v. Norwick*,[67] the Court upheld, in the face of a fourteenth amendment equal protection clause attack, a state law forbidding certification as a public school teacher of any person not a United States citizen unless that person manifested an intention to apply for citizenship.[68] Because of the role of public education and the degree of responsibility and discretion teachers possess in fulfilling that role, public school teachers come within the governmental function exception to the stricter general standard applicable to alienage classifications.[69] The Constitution requires only that the citizenship requirement bear a rational relationship to a legitimate state interest.[70] The Court found that the citizenship requirement bore a rational relationship to the state's interest in furtherance of educational goals.

Females sought unsuccessfully to find relief under the Constitution from the adverse effects of verterans' preference laws. In

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[65] *Id.* at 2316. During the same Term, the Court held that the first amendment at least protects the public employee's right to speak, even if the employer need not listen. In Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), the Court held that a public employee's private communications with his governmental employer are entitled to first amendment protection. *Cf.* Madison Sch. Dist. v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) (state requirement prohibiting teachers who are not union representatives from speaking at public meeting violates first amendment). The Court said that prior decisions applying first amendment protection to public expression by public employees did not turn upon the fact of public expression; a public employee does not forfeit his protection against governmental abridgement of freedom of speech because he expresses his views privately rather than publicly. 439 U.S. at 414. *See* Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968). The Court remanded for a determination of whether or not the teacher would have been rehired but for her protected criticism.

[66] 99 S. Ct. at 2316.

[67] 441 U.S. 68 (1979). Justice Powell delivered the Court's opinion. Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, dissented.

[68] *Id.* at 80.

[69] *Id.* at 75-80. *See* Foley v. Connelie, 435 U.S. 291, 295-96 (1978) (police within governmental function exception); Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (all civil servants not within governmental function exception).

[70] 441 U.S. at 80. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam).

Personnel Administrator of Massachusetts v. Feeney,[71] the Court held that a state statute which granted an absolute lifetime preference to veterans for employment in civil service positions did not discriminate against women in violation of the equal protection clause of the fourteenth amendment.[72] The statute was not a pretext for gender-based discrimination, said the Court, and while the statute had disproportionately adverse effects upon women, no unconstitutional discriminatory purpose was involved.[73] "When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered . . . the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women."[74]

Older federal employees failed to find constitutional protection against age discrimination. In *Vance v. Bradley*,[75] the Court held that the mandatory retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system did not violate the equal protection component of the due process clause of the fifth amendment.[76] The Court found that distinctive requirements bearing upon high performance in the conduct of foreign relations—the need for a correctly balanced and particularly able Foreign Service corps, the rigors of overseas duty—afforded a rational basis for the statute.[77] The Court said that Congress could reasonably believe "that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability."[78]

One orphaned group, federal employees expressly unprotected by Title VII, sought and found a remedy under the Constitution for sex discrimination in employment. In *Davis v. Passman*,[79] the Court held that a congressional employee could

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[71] 99 S. Ct. 2282 (1979). Justice Stewart delivered the Court's opinion. Justice Stevens, joined by Justice White, concurred. Justice Marshall, joined by Justice Brennan, dissented.

[72] *Id.* at 2296-97.

[73] *Id.* at 2296. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

[74] 99 S. Ct. at 2296 (citations omitted).

[75] 440 U.S. 93 (1979). Justice White delivered the Court's opinion. Justice Marshall dissented.

[76] *Id.* at 108-09.

[77] *Id. See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976) (per curiam) (application of rational basis standard to age classifications).

[78] 440 U.S. at 111.

[79] 99 S. Ct. 2264 (1979). Justice Brennan delivered the Court's opinion. Chief Justice Burger, joined by Justices Powell and Rehnquist, dissented.

maintain a cause of action for damages under the equal protection component of the due process clause of the fifth amendment for sex discrimination in employment, and that a federal district court has jurisdiction under 28 U.S.C. § 1331(a) to consider such a claim.[80] Section 717 of Title VII is the exclusive remedy only for federal employees covered by Title VII,[81] said the Court, not for those excluded. The Court said that alternate judicial remedies are available to those federal employees expressly unprotected by Title VII.[82]

The legal results reached in these cases were certainly quite logical. The social results, however, were more problematical. One is reminded of Justice Frankfurter's observation that, "[t]he syllogism is perfect. But this is a bit of verbal logic from which the meaning of things has evaporated."[83] Here, the syllogism remains intact.

Large segments of our society, including public and agricultural employees, remain unprotected by federal labor relations legislation. Such disenfranchisement is obviously not the Court's fault, and the Court could seek to remedy the situation only by an intolerable degree of judicial activism. The problem is legislative, and the decisons before the Court simply mirror the tragic situation created by legislative inaction.

Large segments of our society, including aliens, females, and the aged, receive less constitutional protection than others, and less process than due. The Court has more control over this disenfranchisement. Judicial treatment of alienage, sex and age as suspect classifications would surely eliminate much of the discrimination suffered by these persons. It is doubtful that the teacher exclusions of *Ambach*, or the veterans' preference laws of *Personnel Administrator*, or the mandatory retirement of *Vance*, could survive a strict scrutiny analysis.

IV

Application of Traditional Standards

Unlike the situation under the NLRA, primary responsibility for the development and enforcement of the law under Title VII

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[80] *Id.* at 2272, 2276.

[81] *See* Brown v. GSA, 425 U.S. 820 (1976).

[82] 99 S. Ct. at 2278.

[83] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191 (1941).

has not been entrusted by Congress to an administrative agency. The Equal Employment Opportunity Commission (EEOC) has no adjudicatory authority.[84] Development of the law under Title VII has been entrusted to the federal judiciary. During the past Term the Court continued to define the workings of the complex and confusing Title VII mechanism. The Court appeared to emphasize the need for the utilization of more traditional and precise techniques in Title VII litigation.

In *Board of Trustees of Keene State College v. Sweeney*,[85] the Court held *per curiam* that in order to rebut a prima facie showing of discrimination in a disparate treatment case the employer need only articulate some legitimate nondiscriminatory reason for the employee's rejection and is not required to prove absence of discriminatory motive.[86] In correcting the First Circuit's misapprehension of prior case law,[87] the Court found a significant distinction between merely "articulating" some legitimate nondiscriminatory reason and "proving" absence of discriminatory motive, and held that the former is sufficient to meet the employee's prima facie case of discrimination.

In *New York City Transit Authority v. Beazer*,[88] the Court held that the employer's refusal to employ persons who use narcotic drugs, including methadone and those receiving methadone maintenance treatment to cure heroin addiction, violated neither Title VII nor the equal protection clause of the fourteenth amendment.[89] The Court found the statistical evidence insufficient to establish a prima facie Title VII showing of disparate impact upon blacks and Hispanics.[90] Even if such a case was established, it was rebutted by the employer's showing that con-

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[84] *See generally* Modjeska, *The Regressive Reorganization of Federal Employment Discrimination Laws*, 44 Mo. L. Rev. 680 (1979).

[85] 439 U.S. 24 (1978). Justice Stevens, joined by Justices Brennan, Stewart and Marshall, dissented.

[86] *Id.* at 25.

[87] The Court found that the court of appeals had imposed a heavier burden upon the employer than is required under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Furnco Construction Co. v. Waters, 438 U.S. 567 (1978). *See generally* Modjeska, *supra* note 5, at 77-81.

[88] 440 U.S. 568 (1979). Justice Stevens delivered the Court's opinion. Justice Powell concurred in part and dissented in part. Justice Brennan dissented, and Justice White, joined by Justice Marshall, also dissented.

[89] *Id.* at 587, 594.

[90] *Id.* at 584-87. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); Teamsters v. United States, 431 U.S. 324, 339-40 (1977).

siderations of safety and efficiency made the rule and its application to methadone users job related.[91]

The statutory provisions of Title VII are a nightmare of ambiguity and imprecision, and the legislative history abounds with confusion.[92] There has been resultant confusion and uncertainty concerning the requisite substantive and procedural elements of a Title VII lawsuit. The foregoing cases reflect the Court's continuing efforts to conform Title VII litigation practices to traditional civil litigation practices. Neither allocation of burdens of proof nor utilization of statistics are shrouded in mystique. Both concepts and devices relate simply to common evidentiary standards and are to be utilized accordingly. Thus, *New York City Transit Authority* indicates that overly generalized statistical evidence is insufficient to establish a Title VII case, and *Keene State College* indicates that Title VII imposes no special evidentiary standard for rebuttal of a Title VII case.

V

THE FELT NECESSITIES OF THE TIME

The legitimacy of affirmative action is one of the most difficult and controversial employment discrimination issues of our time. During the past Term the issue came before the Court in

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[91] 440 U.S. at 587. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). The Court also found that the blanket exclusion of narcotic drug users did not violate the equal protection clause by the absence of more precise rules for methadone users who had progressed satisfactorily with treatment and who might individually qualify for nonsensitive jobs. While the general rule was perhaps broader than necessary and unwise, it was rational, neither unprincipled nor invidious in the sense of implying disrespect for the excluded subclass. Because "it does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority." 440 U.S. at 593.

The Court noted that equal protection cases have recognized a distinction between invidious discrimination—classification drawn unequally or with hostile motivation—and those special rules necessary for the application of general benefits, such as supplying water, preventing fires, cleaning streets, etc. *Id.* at 593 n. 40. *See* Washington v. Davis, 426 U.S. 229 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Barbier v. Connolly, 113 U.S. 27 (1885). The Court said that the employer's rule was clearly motivated by the operational interest of a safe and efficient transportation system and not by special animus against a specific group of persons. Therefore neither presumption of illegality nor especially attentive judicial judgment was invoked. 440 U.S. at 593 n. 40.

[92] *See* Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

two cases. In one case the Court found that voluntary affirmative action plans are permissible under Title VII. In the second case the Court held that affirmative action was not mandated by the Rehabilitation Act.

In *Steelworkers v. Weber*,[93] the Court held that Title VII does not prohibit employers and unions in the private sector from taking voluntary race-conscious affirmative action to eliminate manifest racial imbalances in traditionally segregated job categories.[94] The Court upheld a negotiated agreement which established an entrance ratio for the employer's on-the-job craft training program of one minority worker to one white worker until such time as the percentage of minority craft workers approximated the percentage of minority population in the particular plant area.[95]

The Court stressed "the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation."[96] Such action, said the Court, is consistent with the Title VII goals of opening employment opportunities for blacks in occupations traditionally closed to them. The Court said that section 703(j)[97] was simply designed to make clear that Title VII permits but does not require employers to grant preferential treatment to racial minorities because of de facto racial imbalances in the work forces; the section is a limit on federal interference in the private sector.[98]

Since the days when President Kennedy breathed life into the concept, affirmative action in employment for minority groups has become increasingly acceptable and commonplace in the industrial world. It is also one of society's nobler ventures. A different result in *Steelworkers* would have been intolerable. The Court's approval of the affirmative action program in *Steelworkers* recalls the following appraisal by Justice Holmes:

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[93] 99 S. Ct. 2721 (1979). Justice Brennan delivered the Court's opinion, joined by Justices Stewart, White and Marshall. Justice Blackmun filed a concurring opinion. Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens did not participate.

[94] *Id.* at 2730.

[95] *Id.* at 2729-30. The Court summarily distinguished Regents of University of California v. Bakke, 438 U.S. 265 (1978) as involving fifth and fourteenth amendments rather than commerce power considerations. 99 S. Ct. at 2729 n. 6.

[96] 99 S. Ct. at 2726.

[97] 42 U.S.C. § 2000e-2(j) (1976).

[98] 99 S. Ct. at 2729.

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[99]

While *Steelworkers* is cast in restrictive language, there is no reason to believe that the decision is limited to racial affirmative action. The touchstone of the decision appears to be the legitimacy under Title VII of private efforts to eliminate traditional patterns of segregation and imbalance. This rationale would seem to apply equally to other minority groups protected by Title VII, and thus to justify private efforts to eliminate imbalances predicated upon national origin, sex or religious discrimination.

Governmental affirmative action efforts for those of the nation's handicapped who remain outside the mainstream did not receive encouragement during the Term. In *Southeastern Community College v. Davis*,[100] a nonemployment case with substantial employment ramifications, the Court held that section 504 of the Rehabilitation Act of 1973[101] proscribes discrimination based upon handicap by recipients of federal funds, but does not impose an affirmative action obligation.[102] The Court found that a licensed practical nurse was lawfully denied admission to a state college's nursing program because of a serious hearing disability which precluded her participating safely in the normal clinical training program or caring safely for patients.[103] Although the refusal to accommodate the needs of a disabled person might amount to discrimination in a given case, the college's unwillingness to make major adjustments in its nursing program did not constitute such discrimination.[104]

The Court also said that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context. Section 504 protects the class of otherwise qualified handicapped individuals, said the Court, and "[a]n otherwise

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[99] O.W. HOLMES, THE COMMON LAW 1 (1881).

[100] 99 S. Ct. 2361 (1979). Justice Powell delivered the Court's opinion.

[101] 29 U.S.C. § 794 (1976).

[102] 99 S. Ct. at 2370.

[103] *Id.* at 2371. The Court did not address the question of whether or not section 504 provides a private right of action. *Cf.* Cannon v. Univ. of Chicago, 99 S. Ct. 1946, 1961 (1979) (implied private cause of action under Title IX of the Education Amendments of 1972 for sex discrimination in admissions).

[104] 99 S. Ct. at 2370.

qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[105]

With its focus upon private voluntarism, *Steelworkers* casts uncertainty on the validity of certain governmentally mandated affirmative action programs. *Southeastern Community College* does not appear to contain any such adverse implications because the Court's decision is predicated squarely upon the language and history of section 504. The decision does not discourage Congress, should it so desire, from the more direct encouragement or mandate of affirmative action for the handicapped. Whether or not *Regents of University of California v. Bakke*[106] stands to curtail such governmental efforts remains one of the monumental questions of the day.

CONCLUSION

The labor relations and employment discrimination decisions of the last Term reflect the Court's profound awareness of and sensitivity to the separation of legislative and judicial powers. Exercising extreme judicial restraint, the Court generally declined to create rights or remedies beyond those established by Congress, or to upset legislative schemes and balances. The Court avoided broad pronouncements, and narrowly limited the scope of its decisions.

The legal results of the cases were quite logical. The social results of some of the cases were more problematical. Too many individuals remain disenfranchised in whole or in part from comprehensive federal protection. They will certainly be heard from again.

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[105] *Id.* at 2367.

[106] 438 U.S. 265 (1978). The Court there held that the university violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976), by denying admission to a white applicant pursuant to a special admissions program that reserved positions for disadvantaged minority students. The Court noted, however, that under the equal protection clause of the fourteenth amendment, some consideration may be accorded to race in the admission process. 438 U.S. at 317.