

1991-92 ANNUAL SURVEY OF LABOR AND EMPLOYMENT LAW

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LABOR LAW

I. ORGANIZATIONAL AND REPRESENTATIONAL ACTIVITY

A. *Access Rights of Nonemployee Union Organizers to an Employer's Property: *Lechmere, Inc. v. NLRB*¹

Section 7 of the National Labor Relations Act ("NLRA") provides in relevant part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations."² Under § 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to "interfere with, coerce or restrain" employees in their exercise of rights guaranteed to them by § 7 of the NLRA.³ These § 7 rights include, among others, the right of employees to organize or form independent associations for mutual aid⁴ and the right to engage in area standards picketing.⁵ In seeking to facilitate the employees' exercise of their § 7 rights, unions have often engaged in conduct inconsistent with employers' traditional property rights, such as the right to exclude.⁶

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¹ 112 S. Ct. 841, 139 L.R.R.M. 2225 (1992).

² 29 U.S.C. § 157 (1988).

³ 29 U.S.C. § 158(a)(1) (1988).

⁴ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, 16 L.R.R.M. 620, 623 (1945).

⁵ *Giant Food Markets, Inc.*, 241 N.L.R.B. 727, 728, 100 L.R.R.M. 1598, 1599 (1979), *order set aside and case remanded*, 633 F.2d 18, 26, 105 L.R.R.M. 2916, 2922 (6th Cir. 1980). The National Labor Relations Board (the "Board" or "NLRB") in *Giant Food* defined area standards picketing as picketing "engaged in by a union to protect the employment standards it has successfully negotiated in a particular geographic area from the unfair competitive edge that would be enjoyed by an employer whose labor cost package was less than those of employers subjected to area contract standards." *Id.* The Board in *Giant Food* reasoned that such picketing is protected under § 7 because unions have a right to protect the employment standards they have negotiated. *Id.*

⁶ See generally *Lechmere*, 112 S. Ct. 841, 139 L.R.R.M. 2225 (union's organizing campaign inconsistent with employer's private property right); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 98 L.R.R.M. 2282 (1978) (union's area standards picketing inconsistent with employer's private property right); *Hudgens v. NLRB*, 424 U.S. 507, 91 L.R.R.M. 2489 (1976) (union's economic picketing inconsistent with employer's private property right); *Central Hardware Corp. v. NLRB*, 407 U.S. 539, 80 L.R.R.M. 2769 (1972) (union's organizing campaign inconsistent with employer's private property right); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 38 L.R.R.M. 2001 (1956) (union's organizing campaign inconsistent with employer's private property right); *Jean Country*, 291 N.L.R.B. 11, 129 L.R.R.M. 1201 (1988) (union's area standards picketing inconsistent with employer's private property right); *Fairmont Hotel Co.*, 282 N.L.R.B. 139, 123 L.R.R.M. 1257 (1986) (union's area standards picketing inconsistent with employer's private property right).

In 1956, in *NLRB v. Babcock & Wilcox Co.*, the United States Supreme Court held that an employer may validly bar nonemployee distribution of union literature on its property without violating § 8(a)(1) if the union has other reasonable means of communication that will enable it to reach the employees with its message.⁷ The case involved an employer's refusal to permit distribution of union literature by nonemployee union organizers on company-owned parking lots.⁸ The *Babcock* Court reasoned that the employees' organizational rights and the employer's property rights both deserved protection.⁹ The Court explained, however, that distribution of union literature by nonemployees is not entitled to the same protection as distribution of such literature by employees.¹⁰ The *Babcock* Court limited its holding to instances in which the employer does not discriminate against union distribution by allowing other third-party distribution.¹¹

In *Babcock*, nonemployee union organizers attempted to distribute union literature on the company-owned parking lot of a manufacturing plant.¹² The plant was located on a large parcel of land near a community of 21,000 people.¹³ Roughly forty percent of the company's 500 employees lived in that community while the others lived within thirty miles of the plant.¹⁴ The union had communicated with many of the company's employees by sending literature to them through the mail, speaking with them on the streets of the nearby town, making visits to employees' homes, and talking with them over the telephone.¹⁵

The National Labor Relations Board (the "Board" or "NLRB") in *Babcock* found that it was unreasonably difficult for the union to reach employees off company property and held that the employer had violated § 8(a)(1) of the NLRA by interfering with the employees' right of self-organization.¹⁶ The Board ordered the employer to refrain from interfering with the distribution of union literature by the nonemployee union organizers on its property.¹⁷ The com-

⁷ *Babcock*, 351 U.S. at 112, 38 L.R.R.M. at 2004.

⁸ *Id.* at 106, 38 L.R.R.M. at 2001-02.

⁹ *Id.* at 112, 38 L.R.R.M. at 2004.

¹⁰ *Id.* at 112-13, 38 L.R.R.M. at 2004. See *infra* note 20.

¹¹ *Id.* at 112, 38 L.R.R.M. at 2004.

¹² *Babcock*, 351 U.S. at 106, 38 L.R.R.M. at 2002.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 107 n.1, 38 L.R.R.M. at 2002 n.1.

¹⁶ *Babcock & Wilcox Co.*, 109 N.L.R.B. 485, 494, 34 L.R.R.M. 1373 (1954).

¹⁷ *Id.* at 486, 34 L.R.R.M. at 1374.

pany refused to obey the Board's order and the Board petitioned the United States Court of Appeals for the Fifth Circuit for enforcement.¹⁸ The court of appeals denied enforcement of the Board's order, reasoning that the NLRA did not authorize the Board to impose a "servitude" on the employer's property where no employee was involved.¹⁹

The Supreme Court in *Babcock* acknowledged that the employees' right of self-organization includes their right to learn the advantages of organization from others, but drew a substantive distinction between employees and nonemployees.²⁰ Faced with the issue of nonemployee union organizers' access to company property, the *Babcock* Court reasoned that the employees' organizational rights and the employer's property rights both deserve protection.²¹ The Court explained that accommodation between these two competing rights "must be obtained with as little destruction of one as is consistent with maintenance of the other."²² The Supreme Court in *Babcock* further explained that if reasonable efforts by the union to communicate with the employees are futile because of the inaccessibility of the employees, the employer must allow the union access to its property.²³ The *Babcock* Court indicated that the inaccessibility of the employees would be determined by the location of the plant and the living quarters of the employees.²⁴ Relying on the union's success in contacting over twenty percent of the employees by mailings, discussions on the streets of the nearby town, home visits and telephone calls, the *Babcock* Court rejected the Board's determination that the union had no reasonable alternative means of communicating with the employees.²⁵ Thus, the Court ruled that the employer had not violated the NLRA by barring nonemployee

¹⁸ NLRB v. *Babcock & Wilcox Co.*, 222 F.2d 316, 317, 36 L.R.R.M. 2097, 2097 (5th Cir. 1955).

¹⁹ *Id.* at 319, 36 L.R.R.M. at 2099.

²⁰ *Babcock*, 351 U.S. at 113, 38 L.R.R.M. at 2004. In emphasizing the difference between employees and nonemployees, the *Babcock* Court distinguished *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 16 L.R.R.M. 620 (1945). *Id.* The *Babcock* Court interpreted *Republic Aviation* as holding that no restriction may be placed on the employees' right to discuss self-organization with fellow employees on company property, unless the restriction is necessary to maintain the effective operation of the business. *Id.* (citing *Republic Aviation*, 324 U.S. at 803, 16 L.R.R.M. at 625).

²¹ *Babcock*, 351 U.S. at 112, 38 L.R.R.M. at 2004.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 113, 38 L.R.R.M. at 2004.

²⁵ *See id.* at 106, 113-14, 38 L.R.R.M. at 2001, 2004.

union organizers from its property because other reasonable avenues of communication existed.²⁶

Following its decision in *Babcock*, which defined the statutory right of access of nonemployee union organizers to company property, the Supreme Court, in a series of cases, considered whether nonemployees had a constitutional right under the First Amendment to solicit or picket on company property.²⁷ In 1968, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, the Court held that a privately owned shopping center could not prohibit area standards picketing in its parking lot.²⁸ In *Logan Valley*, members of a union picketed a retail store within the shopping center because the store was nonunion and its employees were receiving wages and benefits that were below union standards.²⁹ The *Logan Valley* Court reasoned that the shopping center was the "functional equivalent" of a municipality's business district and must be treated as such for First Amendment purposes.³⁰ Thus, the Court concluded that the picketers had a First Amendment right to picket on the privately owned shopping center property.³¹

Then, in 1972, in *Central Hardware Co. v. NLRB*, the Supreme Court held that the rights of nonemployee union organizers to confront and speak with the employees in the company-owned parking lots of a single retail store were not to be determined by the First Amendment's guarantee of free speech, but rather by the NLRA.³² *Central Hardware* involved company-owned parking lots that were maintained exclusively for the company's customers and employees and that were not part of a shopping center complex.³³ The *Central Hardware* Court reasoned that the First and Fourteenth Amendments do not apply to an owner of private property unless his or her property has assumed "to some significant degree the functional attributes of public property devoted to public use."³⁴

²⁶ *Babcock*, 351 U.S. at 113-14, 38 L.R.R.M. at 2004-05.

²⁷ See *Hudgens*, 424 U.S. at 512, 91 L.R.R.M. at 2495; *Central Hardware*, 407 U.S. at 547, 80 L.R.R.M. at 2772; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 315, 68 L.R.R.M. 2209, 2212 (1968).

²⁸ *Logan Valley*, 391 U.S. at 319-20, 68 L.R.R.M. at 2213-14.

²⁹ *Id.* at 311, 68 L.R.R.M. at 2210.

³⁰ *Id.* at 325, 68 L.R.R.M. at 2216. The *Logan Valley* Court applied the rationale of *Marsh v. Alabama*, 326 U.S. 501 (1945), in which the Supreme Court held that distribution of religious literature by a Jehovah's Witness in a company-owned town was protected under the First Amendment. *Id.* at 316-17, 68 L.R.R.M. at 2212-13.

³¹ *Id.* at 319-20, 68 L.R.R.M. at 2213-14.

³² 407 U.S. 539, 547-48, 80 L.R.R.M. 2769, 2772 (1972).

³³ *Id.* at 540, 80 L.R.R.M. at 2769.

³⁴ *Id.* at 547, 80 L.R.R.M. at 2772.

The Supreme Court in *Central Hardware* concluded that the retail store's parking lots had not acquired the characteristics of a public municipal facility simply because they were open to the public.³⁵ The *Central Hardware* Court thus held that *Logan Valley* was inapplicable and remanded the case with instructions to apply *Babcock's* principle of accommodating organizational rights and private property rights.³⁶

In 1976, in *Hudgens v. NLRB*, the Supreme Court recognized that *Logan Valley* had been overruled and held that the rights and liabilities of striking employees and the property owner were to be determined solely by the NLRA, not by the First Amendment.³⁷ *Hudgens* involved striking warehouse employees who picketed one of their employer's retail stores in an enclosed shopping mall.³⁸ The Court reasoned that the basic objective under the NLRA, as defined by *Babcock*, was the accommodation of § 7 rights and private property rights.³⁹ The *Hudgens* Court indicated that the required degree of accommodation would depend on the strength of the conflicting rights.⁴⁰ Thus, the Court remanded the case for a determination under the NLRA.⁴¹

In 1978, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the Supreme Court held that the NLRA did not preempt an employer's state-law trespass claims against union picketing that was arguably protected by the NLRA.⁴² *Sears* involved picketing by nonemployee union members in Sears's parking lot to protest the assignment of carpentry work in its store to a contractor who had neither used the union hiring hall nor agreed in writing to abide by the terms of the union's master agreement.⁴³

³⁵ *Id.*

³⁶ *Id.* at 544-45, 547-48, 80 L.R.R.M. at 2771, 2772. The *Central Hardware* Court noted that even after the requisite need for access to the employer's property had been demonstrated by the union, the union's access to company property must be limited to that necessary to accommodate the exercise of § 7 rights. *Id.* at 545, 80 L.R.R.M. at 2771.

³⁷ *Hudgens*, 424 U.S. at 518, 521, 91 L.R.R.M. at 2493-94, 2495.

³⁸ *Id.* at 509, 91 L.R.R.M. at 2490.

³⁹ *Id.* at 522, 91 L.R.R.M. at 2495.

⁴⁰ *Id.*

⁴¹ *Id.* at 523, 91 L.R.R.M. at 2495.

⁴² 436 U.S. 180, 207, 98 L.R.R.M. 2282, 2293 (1978).

⁴³ *Id.* at 182, 98 L.R.R.M. at 2283. The *Sears* Court assumed for the purpose of analysis that the union wanted Sears to comply with area standards and that the picketing was therefore protected by § 7. *Id.* at 186-87, 204, 98 L.R.R.M. at 2285, 2292. The Court noted that the picketing was arguably prohibited by § 8(b)(4)(D) or by § 8(b)(7)(C) of the NLRA, depending on the objective of the picketers. *Id.* at 185-86, 98 L.R.R.M. at 2285.

In determining whether the trespassory nature of the picketing caused the picketing to forfeit its protected status, the *Sears* Court considered *Babcock*.⁴⁴ The Court reasoned that *Babcock* established a general rule that an employer may bar nonemployee union organizers from its property.⁴⁵ The *Sears* Court explained that, under *Babcock*, in order to gain access to company property, the union must demonstrate that no other reasonable means of communicating with the employees existed or that the employer's access rules discriminated against the union.⁴⁶ The *Sears* Court assumed, but doubted, that picketing to enforce area standards was entitled to the same weight in the *Babcock* accommodation analysis as organizational solicitation.⁴⁷ The *Sears* Court concluded that the assertion of state court jurisdiction did not threaten protected conduct because the trespassory nature of the picketing would probably cause it to be unprotected.⁴⁸

Relying on Supreme Court precedent, in 1986, in *Fairmont Hotel Co.*, the Board held that the Fairmont Hotel did not violate the NLRA when it barred nonemployee union agents from using its property to distribute union literature.⁴⁹ In *Fairmont Hotel*, the union had an area standards dispute with a bakery that supplied the hotel with baked products.⁵⁰ On the premises of the hotel, the union distributed handbills explaining the union's dispute and requesting that the public not patronize the hotel as long as the hotel conducted business with the bakery.⁵¹ The Board reasoned that the property rights of the Fairmont Hotel clearly outweighed the § 7 rights of the union to engage in area standards picketing.⁵² Thus, the Board

⁴⁴ *Id.* at 204-05, 98 L.R.R.M. at 2291-92.

⁴⁵ *Id.* at 205, 98 L.R.R.M. at 2292.

⁴⁶ *Id.* The Supreme Court in *Sears* described the union's burden as a "heavy one" and observed that, in practice, unions had generally been denied access except in cases involving "unique obstacles" to nontrespassory means of communicating with the employees. *Id.* at 205 & n.41, 98 L.R.R.M. at 2292 & n.41 (citing *NLRB v. S&H Green Stamps, Inc.*, 372 F.2d 26, 64 L.R.R.M. 2295 (2d Cir. 1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 21 L.R.R.M. 2707 (6th Cir. 1948)).

⁴⁷ See *Sears*, 436 U.S. at 206 & n.42, 98 L.R.R.M. at 2292 & n.42. The Court indicated in a footnote that trespassory organizational solicitation is more worthy of protection under the NLRA than is trespassory area standards picketing because the right to organize is at the "very core of the purpose" of the NLRA. *Id.* at 206 n.42, 98 L.R.R.M. at 2292 n.42.

⁴⁸ See *id.* at 206, 207, 98 L.R.R.M. at 2292, 2293.

⁴⁹ *Fairmont Hotel*, 282 N.L.R.B. 139, 143, 123 L.R.R.M. 1257, 1261.

⁵⁰ *Id.* at 139, 123 L.R.R.M. at 1257.

⁵¹ *Id.*

⁵² *Id.* at 143, 123 L.R.R.M. at 1261.

concluded that the Fairmont Hotel could lawfully bar the nonemployee union members from its property.⁵³

Relying on the Supreme Court's decisions in *Babcock*, *Hudgens* and *Sears*, the Board in *Fairmont Hotel* articulated a test for resolving conflicting claims of property rights and § 7 rights.⁵⁴ Under this test, where the property owner's claim is stronger than the employees' § 7 right, the property right prevails; where the property owner's claim is weaker than the § 7 right, the § 7 right prevails.⁵⁵ The Board in *Fairmont Hotel* stated that reasonable alternative methods of communication were only relevant when the § 7 rights and property interests weighed evenly.⁵⁶ The Board then applied its newly articulated test to the facts before it and concluded that the hotel's right to exclude nonemployee union members from its property outweighed the union's interest in handbilling on hotel property for its area standards dispute with the bakery.⁵⁷

Then, in 1988, in *Jean Country*, the Board abandoned its *Fairmont Hotel* approach to resolving conflicting claims of property and § 7 rights because the approach failed to consider in every access-to-property case the availability of reasonable alternative methods of communication.⁵⁸ *Jean Country* involved picketing by nonemployee union members to inform the public that a retail store in a large shopping mall was nonunion.⁵⁹ The *Jean Country* Board ruled

⁵³ *Id.*

⁵⁴ *Fairmont Hotel*, 282 N.L.R.B. at 141-42, 123 L.R.R.M. at 1259-60.

⁵⁵ *Id.* at 142, 123 L.R.R.M. at 1260. The Board reasoned that factors to be considered in the analysis of the private property claim would include the use of the property, the degree to which the property was open to the public, and the size and location of the property. *Id.*, 123 L.R.R.M. at 1259-60. The Board would consider the following factors in its analysis of the § 7 claim: the nature and purpose of the § 7 right; the relationship of the targeted employer to the purpose; the location of the union's activity; the relationship of that location to the union's purpose; and the intended audience of the union's activity. *Id.*, 123 L.R.R.M. at 1260.

⁵⁶ *Id.* The Board concluded that its approach was consistent with *Babcock* because the Board viewed *Babcock* as a case in which the competing claims were relatively equal in strength and in which the Supreme Court therefore looked to the availability of alternative methods of communicating with the employees as a tie-breaker. *Id.* at 142 n.18, 123 L.R.R.M. at 1260 n.18.

⁵⁷ *Id.* at 142-43, 123 L.R.R.M. at 1260-61. The Board in *Fairmont Hotel*, therefore, did not consider whether the union had reasonable alternative methods of communicating its message. *Id.* at 143, 123 L.R.R.M. at 1261.

⁵⁸ 291 N.L.R.B. 11, 11 & n.2, 129 L.R.R.M. 1201, 1202-03 & n.2 (1988).

⁵⁹ *Id.* The Board concluded that the picketing had, in part, an area standards objective and that it was thus protected by § 7 of the NLRA. *Id.* at 17, 18 & n.17, 129 L.R.R.M. at 1208 & n.17.

that reasonable alternative methods of communication were a significant factor when balancing the § 7 right against the private property right.⁶⁰ Applying this balancing test to the facts of the case, the *Jean Country* Board found that the mall owner's property right was weak because the mall was readily open to the public, that the union's § 7 right to picket for area standards was also relatively weak, and that the union had no reasonably effective alternative methods of communicating its message to the mall's shoppers off the mall's property.⁶¹ The Board in *Jean Country* therefore concluded that the refusal to permit the picketing on mall property violated § 8(a)(1) of the NLRA.⁶²

During the *Survey* year, the United States Supreme Court in *Lechmere, Inc. v. NLRB* held that as long as nonemployee union organizers have reasonable access to employees off company property, the employer may post its property against nonemployee distribution of union literature.⁶³ The case involved a union's attempt to distribute handbills for organizational purposes on the premises of a retail store located in a shopping plaza.⁶⁴ The *Lechmere* Court interpreted *Babcock* as extending access rights to nonemployee union organizers only in rare cases where the "location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."⁶⁵ Thus, the *Lechmere* Court reasoned that the availability of alternative methods of communication with the employees is the threshold inquiry in access cases and that any balancing of the strength of the competing property and § 7 rights is the second level of inquiry, triggered only where access to employees is unavailable.⁶⁶ The Court therefore rejected the Board's *Jean Country* approach, where the conflicting claims of the parties were balanced against each other and with the availability of alternative means of communication.⁶⁷ The Supreme Court in *Lechmere* then applied its test to the facts of *Lechmere* and determined that the employer did not violate the NLRA by barring the union organizers from its

⁶⁰ *Id.* at 14, 129 L.R.R.M. at 1205.

⁶¹ *Id.* at 16-17, 18-19, 129 L.R.R.M. at 1207-09.

⁶² *Id.* at 19, 129 L.R.R.M. at 1209.

⁶³ *Lechmere*, 112 S. Ct. at 846, 848, 139 L.R.R.M. at 2228, 2230.

⁶⁴ *Id.* at 844, 139 L.R.R.M. at 2226.

⁶⁵ *Id.* at 849, 139 L.R.R.M. at 2230 (quoting *Babcock*, 351 U.S. at 113, 38 L.R.R.M. at 2004).

⁶⁶ *Id.* at 848, 139 L.R.R.M. at 2230.

⁶⁷ *Id.*

property because the organizers had alternative methods of contacting the employees.⁶⁸

Lechmere owned and operated a retail store in Newington, Connecticut, located in the Lechmere Shopping Plaza.⁶⁹ Lechmere's store was situated at one end of the plaza, adjacent to the main parking lot.⁷⁰ The parking lot was owned by both Lechmere and a developer of other stores in the plaza.⁷¹ The parking lot was separated from a public highway to its east, where the main entrance to the plaza was located, by a 46-foot wide grassy strip, almost all of which was public property.⁷²

Local 919 of the United Food and Commercial Workers Union (the "Union") began its campaign to organize the store's 200 employees, none of whom were represented by a union, in June 1987.⁷³ The Union placed a full-page advertisement in a local newspaper, but received little response.⁷⁴ As a result, nonemployee Union organizers entered Lechmere's parking lot and placed handbills on the windshields of cars parked in the employees' section of the parking lot.⁷⁵ Lechmere's manager immediately confronted the organizers, informed them of Lechmere's rules against solicitation and handbill distribution, and asked them to leave.⁷⁶ Lechmere consistently enforced its established policy prohibiting nonemployees from soliciting and distributing literature on Lechmere's property, including the parking lot.⁷⁷ The Union organizers left the parking lot as requested and the handbills were removed by Lechmere personnel.⁷⁸

The Union organizers repeated the handbilling on several other occasions, but each time, Lechmere personnel requested them to leave and removed the handbills.⁷⁹ The organizers subsequently attempted to pass out handbills from the grassy strip to cars entering

⁶⁸ *Lechmere*, 112 S. Ct. at 849-50, 139 L.R.R.M. at 2231.

⁶⁹ *Id.* at 843, 139 L.R.R.M. at 2226.

⁷⁰ *Id.* at 843-44, 139 L.R.R.M. at 2226.

⁷¹ *Id.* at 844, 139 L.R.R.M. at 2226.

⁷² *Lechmere*, 112 S. Ct. at 844, 139 L.R.R.M. at 2226.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*, 139 L.R.R.M. at 2226-27.

⁷⁷ *Lechmere*, 112 S. Ct. at 844 & n.1, 139 L.R.R.M. at 2226 & n.1. Lechmere even enforced this policy against the Salvation Army and the Girl Scouts. *Id.* at 844 n.1, 139 L.R.R.M. at 2226 n.1.

⁷⁸ *Id.* at 844, 139 L.R.R.M. at 2227.

⁷⁹ *Id.*

the lot during hours when the drivers would be primarily Lechmere employees.⁸⁰ The Union organizers continued their efforts for one month, and then picketed intermittently for an additional six months.⁸¹ The Union organizers also recorded the license plate numbers of cars parked in the employee parking area and, with the cooperation of the Connecticut Department of Motor Vehicles, obtained the names and addresses of forty-one (twenty percent) of the store's nonsupervisory employees.⁸² The Union sent four mailings to these employees and attempted to contact them by phone or in person.⁸³ The Union's efforts resulted in one signed union authorization card.⁸⁴

The Union filed a charge with the NLRB, alleging that Lechmere had committed an unfair labor practice when it barred the nonemployee organizers from its property.⁸⁵ The Administrative Law Judge ("ALJ") applied the test set forth in *Fairmont Hotel*, in which the stronger of the competing rights prevails regardless of the availability of reasonable alternative means, and ruled in the Union's favor.⁸⁶ The ALJ recommended that Lechmere be ordered, among other things, to cease and desist from barring the Union organizers from its parking lot.⁸⁷

Lechmere filed exceptions to the ALJ's decision with the Board.⁸⁸ The Board applied the analysis articulated in *Jean Country*, balancing the competing § 7 and property claims against each other and with the availability of alternative means of communication, affirmed the ALJ's rulings, and adopted the recommended order.⁸⁹ The Board in *Lechmere* determined that no reasonable alternative means of contacting the employees existed.⁹⁰ The United States

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Lechmere*, 112 S. Ct. at 844, 139 L.R.R.M. at 2227.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Lechmere, Inc.*, 295 N.L.R.B. 92, 98-99 (1988). The ALJ concluded that the § 7 right outweighed the private property right and found it unnecessary to consider the availability of reasonable alternative methods of communication open to the Union. *Id.* at 99. The ALJ, concerned that his finding would not be upheld, nonetheless considered this issue and determined that reasonable alternative methods were available to the Union. *Id.*

⁸⁷ *Id.* at 100.

⁸⁸ *Id.* at 92.

⁸⁹ *Id.* at 92-93, 94, 131 L.R.R.M. 1480, 1481-82.

⁹⁰ *Id.* at 93, 131 L.R.R.M. at 1482. The Board rejected the ALJ's finding that alternative methods of communicating with the employees were available to the Union. *See id.*; *see also supra* note 86.

Court of Appeals for the First Circuit, one judge dissenting, denied *Lechmere's* petition for review and enforced the Board's order.⁹¹

The United States Supreme Court in a 6-3 decision reversed the judgment of the First Circuit and denied enforcement of the Board's order.⁹² Writing for the majority, Justice Thomas first noted that the plain language of § 7 only extends rights to employees, and not to unions or nonemployee union organizers.⁹³ The Court then reviewed the facts and its reasoning in *Babcock* and interpreted *Babcock* as establishing a rule that an employer may prohibit distribution of union literature by nonemployees on its property without violating the NLRA.⁹⁴ The *Lechmere* Court reasoned that the *Babcock* Court had recognized an exception to this rule when unique obstacles impede reasonable union efforts to contact the employees.⁹⁵ If such circumstances are present, the *Lechmere* Court reasoned that, under *Babcock*, the employer's property rights must give way, permitting the union to inform the employees of their right to organize.⁹⁶

Acknowledging that the Court had not faced the precise issue in *Babcock* since *Babcock* itself, the *Lechmere* Court stated that its decisions in *Central Hardware*, *Hudgens* and *Sears* had not modified *Babcock* or established a general accommodation/balancing test, but rather affirmed *Babcock's* holding that an employer must only accommodate nonemployee organizers when the employees are otherwise inaccessible.⁹⁷ In making this statement, the *Lechmere* Court relied on the reasoning and language in *Sears*, where the Court noted that the employer's right to bar nonemployee organizers was the general rule and that unions bear a heavy burden of demonstrating that no other reasonable means of communicating its message to the employees exist.⁹⁸ The *Lechmere* Court recalled a *Sears* footnote which stated that, generally, nonemployee organizers had been denied access to employers' property in the absence of "unique

⁹¹ *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 325, 135 L.R.R.M. 2329, 2338 (1st Cir. 1990). In enforcing the Board's order, the First Circuit in *Lechmere* described the Board's *Jean Country* approach as a "useful analytic model for resolution of access-to-property cases." *Id.* at 321, 135 L.R.R.M. at 2334.

⁹² *Lechmere*, 112 S. Ct. at 850, 139 L.R.R.M. at 2231.

⁹³ *Id.* at 845, 139 L.R.R.M. at 2227.

⁹⁴ *Id.* at 845-46, 139 L.R.R.M. at 2227-28.

⁹⁵ *Id.* at 846, 139 L.R.R.M. at 2228. See *Babcock*, 351 U.S. 105, 38 L.R.R.M. 2001.

⁹⁶ *Lechmere*, 112 S. Ct. at 846, 139 L.R.R.M. at 2228.

⁹⁷ *Id.*

⁹⁸ *Id.* at 847, 139 L.R.R.M. at 2229.

obstacles" to communicating with the employees through other methods.⁹⁹

The *Lechmere* Court recognized that the Board's interpretation of the NLRA deserved deference from the courts.¹⁰⁰ The Court stated, however, that the Board's interpretation of the NLRA after a Supreme Court interpretation is not entitled to the same deference.¹⁰¹ The Supreme Court in *Lechmere* concluded that the Board, through *Jean Country's* formulation of accommodation principles, had misinterpreted the Supreme Court's reasoning and holding in *Babcock*.¹⁰² The Court stated that the Board had placed undue emphasis on the accommodation language of the Court in fashioning the *Jean Country* test in which the availability of alternative means of communication was but one factor to be considered.¹⁰³ The *Lechmere* Court rejected the Board's *Jean Country* "multi-factor balancing test" for failing to recognize the two separate stages of inquiry.¹⁰⁴ The Supreme Court in *Lechmere* concluded that it only becomes necessary to balance the competing property and § 7 rights when no alternative means of access to employees exist.¹⁰⁵

The Court considered its inquiry to be whether the facts of the case justified an exception to the general rule that an employer may bar nonemployee union organizers from its property.¹⁰⁶ Although the ALJ had determined that the Union had reasonable alternative means of communicating with the employees, the Board concluded that the Union had no such alternatives.¹⁰⁷ The *Lechmere* Court refused to accept the Board's determination, reasoning that it was based on an erroneous legal interpretation of *Babcock*.¹⁰⁸ The Court stated that exceptions to *Babcock's* general rule are rare and only apply where the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to contact them.¹⁰⁹ The Court reasoned that *Babcock*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Lechmere*, 112 S. Ct. at 847-48, 139 L.R.R.M. at 2229.

¹⁰² *Id.* at 848, 139 L.R.R.M. at 2230.

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See Lechmere*, 112 S. Ct. at 849, 139 L.R.R.M. at 2230.

¹⁰⁷ *Id.* *See supra* notes 87, 91.

¹⁰⁸ 112 S. Ct. at 849, 139 L.R.R.M. at 2230.

¹⁰⁹ *Id.* (citing *Babcock*, 351 U.S. at 113, 38 L.R.R.M. at 2004). Examples of such a situation, the *Lechmere* Court stated, would include logging camps, mining camps and mountain resort hotels that house the employees. *Id.*

created an exception to its general rule of no access in order to protect the § 7 rights of "employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."¹¹⁰

The *Lechmere* Court ruled that because Lechmere's employees were otherwise accessible, they did not fall within *Babcock's* exception.¹¹¹ The Supreme Court presumed that Lechmere's employees were not inaccessible to the Union organizers because the employees did not reside on Lechmere's property.¹¹² The *Lechmere* Court rejected the notion that the employees were inaccessible by virtue of their living throughout the Greater Hartford area, and held that the Union's success in reaching a large number of them directly, through mailings, phone calls and home visits, demonstrated their accessibility.¹¹³

The *Lechmere* Court, in addition, stated that direct contact was not necessarily the only form of reasonable alternative contact with the employees.¹¹⁴ The Court indicated that signs or advertising might also constitute reasonable alternative means and noted that the signs displayed from the public grassy strip would have alerted Lechmere's employees as to the Union's organizational efforts.¹¹⁵ Thus, the *Lechmere* Court reasoned that Lechmere's employees were not inaccessible to the Union under *Babcock's* narrow exception.¹¹⁶ The Court therefore ruled that the Board erred in determining that Lechmere violated the NLRA when it barred the Union organizers from its property.¹¹⁷

Justice White, joined by Justice Blackmun, dissented.¹¹⁸ Justice White disagreed with the majority's interpretation of *Babcock* as creating only a narrow exception to the general rule of no access for nonemployees.¹¹⁹ He argued that the *Babcock* Court never intended to confine its exception only to the rare situations identified by the majority.¹²⁰ According to Justice White, *Babcock* allowed the Board to consider the nature of the employer's property and the

¹¹⁰ *Id.*, 139 L.R.R.M. at 2231.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Lechmere*, 112 S. Ct. at 849, 139 L.R.R.M. at 2231.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 849-50, 139 L.R.R.M. at 2231.

¹¹⁶ *See id.* at 849, 139 L.R.R.M. at 2231.

¹¹⁷ *Id.* at 850, 139 L.R.R.M. at 2231.

¹¹⁸ *Lechmere*, 112 S. Ct. at 850, 139 L.R.R.M. at 2231 (White, J., dissenting).

¹¹⁹ *Id.* at 851, 139 L.R.R.M. at 2232.

¹²⁰ *Id.*

dispersion of the employees' residences in determining whether the Union should gain access to the employer's property.¹²¹ In addition, Justice White argued that *Babcock* recognized that "actual communication with nonemployee organizers, not mere notice that an organizing campaign exists, is necessary to vindicate § 7 rights."¹²² He therefore disagreed with the majority's contention that the signs displayed from the public grassy strip might constitute reasonable alternative means.¹²³

Justice White also reasoned that the majority's interpretation of *Babcock* was inconsistent with the accommodation language of the Court in *Central Hardware* and *Hudgens*.¹²⁴ In Justice White's view, *Hudgens* had interpreted *Babcock* as creating a flexible rule in access cases, not the rigid rule announced by the Court's majority.¹²⁵ Justice White argued that the Court's decisions in *Central Hardware* and *Hudgens* were more consistent with the Board's *Jean Country* approach than they were with the majority's opinion.¹²⁶ He also argued that previous Supreme Court cases had never articulated the two-stage inquiry set forth by the majority and had never required an initial determination of reasonable alternatives as a precondition to a balancing of the conflicting § 7 and private property rights.¹²⁷

Finally, Justice White asserted that *Babcock* itself conflicted with recent developments in the law concerning judicial deference to an administrative agency charged with administering a statute.¹²⁸ Stating that the Court's role in reviewing an agency's construction of a statute, where congressional intent is unclear, is to determine if the agency has reasonably construed the statute, Justice White argued that the *Babcock* Court had exceeded its role by usurping the Board's function in construing the NLRA and applying the facts.¹²⁹ He therefore contended that *Babcock*, and not *Jean Country*, rested on tenuous legal grounds.¹³⁰ Justice White argued that the Court should have deferred to the Board in *Lechmere* because he viewed

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Lechmere*, 112 S. Ct. at 850, 139 L.R.R.M. at 2231 (White, J., dissenting).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.* at 852, 139 L.R.R.M. at 2233.

¹²⁷ *Id.*

¹²⁸ *Lechmere*, 112 S. Ct. at 852, 139 L.R.R.M. at 2233 (White, J., dissenting) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

¹²⁹ *See id.* at 852-53, 139 L.R.R.M. at 2233.

¹³⁰ *Id.* at 853, 139 L.R.R.M. at 2233.

the Board's analysis in *Jean Country* as rational and consistent with the NLRA.¹³¹

Justice Stevens also filed a dissenting opinion.¹³² Justice Stevens agreed with Justice White that the majority's interpretation of *Babcock* was inconsistent with the *Hudgens* Court's interpretation of *Babcock*.¹³³ He disagreed, however, with Justice White's assertion that *Babcock* was at odds with modern concepts of deference to administrative agencies and argued that *Babcock* was correctly decided.¹³⁴

The Supreme Court's holding in *Lechmere* places a severe burden on unions in their efforts to organize employees. *Lechmere* signifies that union organizers will have to resort to newspaper advertisements and picketing on public property in order to inform and persuade the employees to organize. Although unions may also contact employees through mass mailings, telephone calls and home visits, these methods presuppose that the union knows, or can obtain, the names and addresses of the employees. Furthermore, these alternatives often have the disadvantages of increased costs and decreased effectiveness.

The Supreme Court's holding in *Lechmere* is a welcome development for employers. After *Lechmere*, employers may bar nonemployee union organizers from their property as long as the employers enforce their rules against solicitation evenhandedly and as long as the employees are accessible to the union away from company property. This general rule is not affected by the nature of the employer's property or the degree to which the employer has opened it to the public. Furthermore, the *Lechmere* Court, by presuming that employees are accessible to the union if the employees do not live on company property, indicated that the Court will rarely determine that employees are inaccessible.

An issue left unanswered by the Supreme Court in *Lechmere* is whether a union must actually attempt and exhaust every possible means of communicating with the employees in order to show that the employees are truly inaccessible, or whether the union may rely on objective facts, such as the living quarters of the employees and the location of the plant, in order to satisfy its burden. The *Lechmere* Court suggested that it might require the union to exhaust all

¹³¹ *Id.*, 139 L.R.R.M. at 2234.

¹³² *Lechmere*, 112 S. Ct. at 854, 139 L.R.R.M. at 2234 (Stevens, J., dissenting).

¹³³ *Id.*

¹³⁴ *Id.*

possible means when it stated that "mere conjecture or the expression of doubts concerning the effectiveness of nontrespasatory means of communication" would not satisfy the union's burden.¹³⁵

Another issue stemming from *Lechmere* is whether its holding only pertains to organizational activity or whether it also extends to other § 7 activity. If *Lechmere* applies to other § 7 activity, such as area standards picketing, many problems arise because the intended audience of area standards picketing is the customers of a company. Customers, unlike the company's employees, often cannot be identified in advance by the union and are, in that sense, less accessible to the union. The Board recognized this in *Fairmont Hotel and Jean Country* and adopted its balancing tests to ensure that weaker § 7 claims, such as area standards picketing, would not have greater success in obtaining access to employer property than would stronger § 7 claims, such as organizational activity.

In conclusion, the Supreme Court held in *Lechmere* that so long as nonemployee union organizers have reasonable access to employees outside the employer's property, the employer may bar the nonemployees from its property. In so holding, the Supreme Court rejected the Board's *Jean Country* formulation for resolving access cases. The *Lechmere* Court interpreted *Babcock* as extending access rights to nonemployee union organizers only in rare cases where the location of the plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.

B. **The Presumption of Arbitrability as Applied to Last Chance Agreements: United Steelworkers of America v. Lukens Steel*¹

More than thirty years ago, in a series of cases known as the *Steelworkers Trilogy*, the United States Supreme Court adopted a framework of principles governing the arbitration of grievances under collective bargaining agreements.² In 1986, the Supreme

¹³⁵ *Id.* at 849, 139 L.R.R.M. at 2230-31. The courts of appeals have disagreed on this issue. Compare *National Maritime Union of Am. v. NLRB*, 867 F.2d 767, 771, 130 L.R.R.M. 2641, 2644 (2d Cir. 1989) (holding that union need not attempt every possible method of communication in order to demonstrate that employees are inaccessible) with *NLRB v. Taminant, Inc.*, 451 F.2d 794, 799, 78 L.R.R.M. 2726, 2730 (3d Cir. 1971) (holding that union must show that it actually used reasonable efforts to communicate with employees).

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¹ 969 F.2d 1468, 140 L.R.R.M. 2757 (3d Cir. 1992).

² The *Trilogy* consists of: *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 L.R.R.M. 2423 (1960); *United Steelworkers of Am. v. Warrior & Gulf*

Court reaffirmed these principles in the case of *AT&T Technologies v. Communications Workers of America*.³ With the recent development of last chance agreements in labor law, the issue has arisen whether to extend the principles of arbitration to last chance agreements.

In *AT&T*, the Supreme Court rejected the notion that an arbitrator could properly determine the arbitrability of a grievance under the terms of the collective bargaining agreement.⁴ The case involved a dispute that arose when the company laid off union employees and replaced them with transferees from other plants.⁵ The union sought to arbitrate the grievance under an arbitration clause in the collective bargaining agreement, but AT&T asserted that other limitations in the agreement excluded the issue from arbitration.⁶

The *AT&T* Court held that the duty to interpret an agreement and to determine whether parties intended to arbitrate a grievance belongs to the courts.⁷ In reaching this conclusion, the Court utilized the principles set forth in the *Steelworkers Trilogy*, reasoning that arbitration is a matter of contract, and parties cannot be forced to arbitrate a dispute that they have not agreed to resolve in that manner.⁸ The Court further concluded that unless the parties explicitly provide otherwise, the court, not the arbitrator, is to decide the question of whether the parties agreed to arbitrate a particular issue.⁹ In making this decision, the Court held that a contract containing an arbitration clause creates a presumption of arbitrability, and an order to arbitrate a particular grievance should not be denied unless the arbitration clause is clearly not susceptible to an interpretation that covers the asserted dispute.¹⁰

The recent development of last chance agreements as a method of regulating the means of dispute resolution has added a new dimension to the question of the arbitrability of grievances. Last chance agreements are probationary contracts between an employer

Navigation Co., 363 U.S. 574, 46 L.R.R.M. 2416 (1960); and *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 46 L.R.R.M. 2414 (1960).

³ 475 U.S. 643, 648-49, 121 L.R.R.M. 3329, 3331-32 (1986).

⁴ *Id.* at 649, 121 L.R.R.M. at 3331-32.

⁵ *Id.* at 644, 121 L.R.R.M. at 3330.

⁶ *Id.* at 645-46, 121 L.R.R.M. at 3330.

⁷ *Id.* at 649, 121 L.R.R.M. at 3331-32.

⁸ 475 U.S. at 648, 121 L.R.R.M. at 3331 (quoting *Warrior & Gulf*, 363 U.S. at 582, 46 L.R.R.M. at 2419).

⁹ *AT&T*, 475 U.S. at 649, 121 L.R.R.M. at 3331-32.

¹⁰ *Id.* at 650, 121 L.R.R.M. at 3332 (quoting *Warrior & Gulf*, 363 U.S. at 582-83, 46 L.R.R.M. at 2419-20).

and an employee who faces removal or discipline for poor performance.¹¹ These agreements generally operate to allow an employee to remain in the company subject to satisfactory performance and adherence to the special terms of the agreement, which ordinarily include methods designed to curb poor performance.¹² Last chance agreements typically contain terms restricting the means of dispute resolution should the employee fail to perform adequately, and such terms frequently prohibit arbitration of issues covered by the agreement.¹³

Last chance agreements are a novel development in labor practice. Until this *Survey* year, only one federal appellate court case, *Stewart v. United States Postal Service*, had addressed the issue of the scope of a non-arbitration clause contained in such an agreement.¹⁴ The *Stewart* case arose from a last chance agreement that precluded appeals to any forum for the sanctions rendered against the problematic employee for absenteeism.¹⁵ During termination procedures, the question arose as to the validity of the claim that the employee had even violated the agreement, but the employer denied the employee any recourse to address this issue.¹⁶ The court held that, although Stewart had agreed to waive his right to appeal sanctions upon a finding of breach, he had not waived his right to have a neutral party determine the threshold issue of breach.¹⁷ Thus, the court, in interpreting the waiver in the last chance agreement, construed its terms narrowly and allowed Stewart to appeal to a neutral forum on the threshold issue of breach.¹⁸

During the *Survey* year, the United States Court of Appeals for the Third Circuit, in *United Steelworkers of America v. Lukens Steel*, considered the extent to which last chance agreements excluded certain issues from arbitration.¹⁹ In *Lukens*, the court held that although the last chance agreements in question stipulated that the

¹¹ *United States Dep't of Air Force v. Federal Labor Relations Auth.*, 949 F.2d 475, 478, 139 L.R.R.M. 2076, 2078 (D.C. Cir. 1991) (describing last chance agreements).

¹² *Id.*

¹³ See, e.g., *Stewart v. United States Postal Serv.*, 926 F.2d 1146, 1147 (Fed. Cir. 1991) (no right of appeal through grievance/arbitration procedures); *McCall v. United States Postal Serv.*, 839 F.2d 664, 665 (Fed. Cir. 1988) (removal will be reissued with no right of appeal to any forum if employee fails to meet terms of agreement).

¹⁴ See *Stewart*, 926 F.2d at 1148-49.

¹⁵ *Id.* at 1147.

¹⁶ *Id.* at 1147-48.

¹⁷ *Id.* at 1149.

¹⁸ See *id.* at 1148-49.

¹⁹ *Lukens*, 969 F.2d at 1478, 140 L.R.R.M. at 2764.

disciplinary committee's disposition was final and not arbitratable, the agreements did not cover the issue of actual breach by the employees, and this issue was subject to arbitration under the collective bargaining agreement.²⁰ In so doing, the court extended the presumption of arbitrability set forth in *AT&T* to this new area of employment contracts.²¹

Lukens involved a dispute over the interpretation of three Last Chance Agreements ("Agreements") between Lukens and appellant United Steelworkers of America ("Union"), representing three of Lukens's former employees ("Employees").²² The Employees were hourly wage employees covered by a collective bargaining agreement between the Union and Lukens.²³ The collective bargaining agreement included grievance and arbitration procedures governing suspension and discharge.²⁴ Each Employee had tested positive for drug use at least once, but instead of being discharged, they executed Last Chance Agreements.²⁵ The Employees received conditional reinstatement in return for compliance with company rules and consent to limited recourse should they subsequently violate the agreement.²⁶ The operative terms of the Agreements provided that, upon violation of their terms, the employee would be allowed to plead his or her case before the disciplinary committee.²⁷ The disciplinary committee's decision would be final, and neither the Employee nor Union would have recourse to protest the decision through the grievance/arbitration procedure.²⁸

A few months after signing the Agreements, Lukens charged the Employees with violating the Agreements by either testing positive for drug use again or refusing to submit to a drug test.²⁹ Consistent with the Agreements, Lukens suspended the Employees for five days, and then convened the disciplinary committee to render its decision.³⁰ The committee rejected each of the Employee's explanations and terminated all three.³¹

²⁰ *Id.*

²¹ *See id.*

²² *Id.* at 1470, 140 L.R.R.M. at 2758.

²³ *Id.*, 140 L.R.R.M. at 2757.

²⁴ *Lukens*, 969 F.2d at 1470, 140 L.R.R.M. at 2758.

²⁵ *Id.* at 1471-73, 140 L.R.R.M. at 2758-61.

²⁶ *Id.*

²⁷ *Id.* at 1471 n.1, 140 L.R.R.M. at 2758 n.1.

²⁸ *Id.*

²⁹ *Lukens*, 969 F.2d at 1472-73, 140 L.R.R.M. at 2759-60.

³⁰ *Id.*

³¹ *Id.*

The dispute arose when the Union attempted to force Lukens to arbitrate each Employee's suspension and discharge.³² The Union asserted that, although the Employees waived their rights to arbitrate the final disposition of the disciplinary committee, the Agreements failed to specify the proper procedures for determining the threshold issue of breach.³³ The Union postulated that the Collective Bargaining Agreement entitled the Employees to have the question of whether they had violated the Last Chance Agreements arbitrated.³⁴ Lukens refused to accept the grievances, claiming that the Last Chance Agreements precluded the Employees from recourse through the grievance/arbitration procedure.³⁵ The Union filed three actions to compel arbitration in the United States District Court for the Eastern District of Pennsylvania.³⁶ The district court agreed with Lukens that the Agreements barred arbitration and entered summary judgment in its favor.³⁷

The United States Court of Appeals for the Third Circuit disagreed with the district court's interpretation of the Agreements and remanded the case with instructions to enter summary judgment in the Union's favor.³⁸ The court, employing a two-part analysis, first examined the terms of the Last Chance Agreements to ascertain the presence or absence of express exclusion.³⁹ Second, the court examined the surrounding circumstances to discern any intent to exclude the issue from arbitration.⁴⁰

The court determined that the Collective Bargaining Agreement contained a broad grievance and arbitration clause, and therefore the presumption of arbitrability was applicable.⁴¹ The court further asserted that only positive assurance that the broad arbitration clause did not cover the particular grievance could defeat the presumption of arbitrability.⁴² The court concluded that the language of the Agreements was unclear and ambiguous as to the arbitrability of the issue of breach.⁴³

³² *Id.*

³³ *Id.* at 1473, 140 L.R.R.M. at 2760.

³⁴ *Lukens*, 969 F.2d at 1473, 140 L.R.R.M. at 2760.

³⁵ *Id.* at 1472-73, 140 L.R.R.M. at 2759-60.

³⁶ *Id.* at 1470-71, 140 L.R.R.M. at 2757-58.

³⁷ *Id.*

³⁸ *Id.* at 1478, 140 L.R.R.M. at 2764.

³⁹ *Lukens*, 969 F.2d at 1475, 140 L.R.R.M. at 2762.

⁴⁰ *Id.*

⁴¹ *Id.* at 1474, 140 L.R.R.M. at 2761.

⁴² *Id.* (quoting *AT&T*, 475 U.S. at 650, 121 L.R.R.M. at 3332 (doubts should be resolved in favor of arbitrability)).

⁴³ *Id.* at 1475, 1476, 140 L.R.R.M. at 2761, 2762.

In order to overcome the presumption of arbitrability, the court required that Lukens show either an express exclusion of the grievance issue from arbitration or the existence of "strong and forceful" evidence of an intention to do so.⁴⁴ Examining the Agreements, the court found no express exclusion from arbitration of the threshold issue of breach.⁴⁵ Concluding that Lukens could have used clear and unambiguous language if it had intended to exclude the issue of breach from arbitration, the court rejected Lukens's contention that the Union's strict reading of the clause was strained.⁴⁶ The court found instead that such an interpretation was consistent with the Federal Circuit's reading of the agreement in *Stewart*, where the court held that Stewart had not waived his right to have a neutral party determine the issue of breach.⁴⁷

The court further held that the Last Chance Agreements and the events surrounding their formation contained no strong and forceful evidence of an intention to exclude the question from arbitration.⁴⁸ The court rejected Lukens's contention that the Union's interpretation of the Agreements made no sense because it conveyed no value to the employer.⁴⁹ Instead, the court found that the Union's reading ensured Lukens the benefit of foreclosing any possibility that an arbitrator might order reinstatement of a consistently troublesome employee by making the Disciplinary Committee's disposition final.⁵⁰ Moreover, the court noted that even if Lukens viewed the Agreements as precluding arbitration of the question of breach, there was no indication that the parties ever agreed on the issue.⁵¹ Thus, reading the Agreements in light of the presumption of arbitrability, and finding no express exclusion or intent to exclude the matter from arbitration, the court remanded

⁴⁴ *Lukens*, 969 F.2d at 1475, 140 L.R.R.M. at 2762.

⁴⁵ *Id.* at 1476, 140 L.R.R.M. at 2762. This is consistent with the only other appellate case deciding whether a last chance agreement precludes arbitration of the factual question of an employee's violation of the agreement. See *Stewart*, 926 F.2d at 1148-49 (last chance agreement prohibiting appeal to any forum of penalty for violations, but silent as to factual determination of violation's occurrence retains presumption of arbitrability as to that issue).

⁴⁶ *Lukens*, 969 F.2d at 1476-77, 140 L.R.R.M. at 2762-63. See *Stewart*, 936 F.2d at 1148 (waiver went only to issue of penalty, not to threshold question of breach).

⁴⁷ *Lukens*, 969 F.2d at 1476-77, 140 L.R.R.M. at 2763-64.

⁴⁸ *Id.* at 1478, 140 L.R.R.M. at 2764. See also *Morristown Daily Record, Inc. v. Graphic Communications, Local 8N*, 832 F.2d 31, 35, 126 L.R.R.M. 2902, 2906 (3d Cir. 1987) (strong and forceful evidence of an intention to exclude issue from arbitration overcomes presumption of arbitrability).

⁴⁹ *Lukens*, 969 F.2d at 1478, 140 L.R.R.M. at 2764.

⁵⁰ *Id.*

⁵¹ *Id.*

the case to the district court with instructions to render summary judgment in favor of the Union and allow arbitration of the threshold issue of breach.⁵²

Senior District Judge McCune, sitting by designation, dissented from the majority's interpretation of the Last Chance Agreements, concluding instead that the plain meaning of the words made no sense under the majority's reading.⁵³ Judge McCune asserted that if Lukens had not intended that the disciplinary committee decide the issue of breach, then the committee served no purpose, because it had nothing to decide.⁵⁴ Judge McCune also distinguished the *Stewart* case, noting that there was no disciplinary committee or other forum included in that Last Chance Agreement, but merely the possibility of the employer's reinstatement of the original discharge.⁵⁵ Judge McCune found this distinction significant because in *Stewart* no opportunity existed for the employee to plead his case upon charges of violating the agreement.⁵⁶ In *Lukens*, however, the Employees could plead their case to the disciplinary committee.⁵⁷ Thus, Judge McCune concluded that in contrast to *Stewart*, the potential for injustice in *Lukens* was greatly reduced.⁵⁸

The *Lukens* decision has several consequences for practitioners. First, *Lukens* is only the second appellate case to directly address the problem of the scope of arbitration restrictions in last chance agreements. Both decisions have imposed a strict interpretation on these types of agreements, demonstrating the courts' unwillingness to prevent an employee or union from seeking redress of grievances in a neutral forum.⁵⁹ Based on both cases, the judicial inclination seems to be in favor of a stringent examination of labor agreements, seeking to discover a means of allowing arbitration of grievances. The allowance of such arbitration in the *Lukens* scenario, however, is problematic, but not detrimental to the integrity of these types of agreements because the only issue arbitrable is a factual finding that the employees violated the agreement. Thus, to control the application of a presumption of arbitrability, it is necessary to draft last chance agreements carefully, anticipating the possible issues that could arise under the terms of the contract.

⁵² *Id.*

⁵³ *Id.* at 1479, 140 L.R.R.M. at 2764 (McCune, J., dissenting).

⁵⁴ *Lukens*, 969 F.2d at 1479, 140 L.R.R.M. at 2765.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *See Lukens*, 969 F.2d at 1478, 140 L.R.R.M. at 2764; *Stewart*, 926 F.2d at 1148.

Second, the *Lukens* decision may create confusion as to what is necessary to overcome the presumption of arbitrability under last chance agreements. Although the express exclusion test employed by the court is a rather clear standard, the strong and forceful intent test is vague and uncertain.⁶⁰ The *Lukens* court rejected affidavits expressing Lukens's intent in drafting the agreements, and also rejected the argument relied on in Judge McCune's dissent that the court's narrow construction of the non-arbitration clause conveyed little value to the employer.⁶¹ The court did not state what would constitute sufficiently "strong and forceful" evidence of an intent to exclude an issue from arbitration. Thus, practitioners drafting last chance agreements would be prudent in anticipating and expressly stating in the agreement all issues they intend to exclude from arbitration.

The third significant impact of *Lukens* is the potential it creates for increased litigation over the arbitrability of issues under existing last chance agreements. Courts may be less reluctant to reject an employer's interpretation of what constitutes a fool-proof non-arbitration clause after *Lukens*. Practitioners should be careful to reinspect any existing contracts and consider the possibility of renegotiating unclear agreements. A less drastic option for employers would be to provide the employee covered under an unclear agreement with documentation expressing the scope of the non-arbitration clause. Such documentation may be of assistance in providing a court with evidence of a sufficiently strong and forceful intent to exclude an issue from arbitration should litigation ensue.

In sum, the Third Circuit Court of Appeals' decision in *Lukens* has imposed a stringent presumption of arbitrability on non-arbitration clauses in last chance agreements.⁶² The *Lukens* court held that a collective bargaining agreement containing a broad grievance and arbitration clause creates a presumption of arbitrability applicable to the issue of breach of the last chance agreement if not clearly prohibited by that agreement.⁶³ The court's imposition of rigorous standards in determining an issue's exclusion from arbitration necessitates diligence in the drafting of last chance agreements. The *Lukens* decision paves the way for future litigation over what may seem to be binding prohibitions on arbitration and leaves

⁶⁰ See *Lukens*, 969 F.2d at 1478, 140 L.R.R.M. at 2764.

⁶¹ *Id.*

⁶² See *id.* at 1475, 140 L.R.R.M. at 2761.

⁶³ *Id.* at 1474, 140 L.R.R.M. at 2761.

one important question unanswered. In the absence of express terms restricting an issue from litigation, what evidence of an intent to exclude the issue is sufficient to overcome the presumption of arbitrability? The resolution of this question may provide some guidelines for those drafting and signing last chance agreements.

C. **NLRA Does Not Preempt Work Preservation Clause When City Is Acting as Market Participant: Associated Builders and Contractors, Inc. v. City of Seward*¹

The National Labor Relations Act of 1935 ("NLRA") was designed to entrust administration of the nation's labor policy to a centralized federal authority, thereby prohibiting most state regulation of labor relations.² In 1985, in *Golden State Transit Corp. v. City of Los Angeles*, the United States Supreme Court recognized two distinct principles governing when the NLRA preempts state labor regulation.³ The first principle forbids states from regulating activities that the NLRA protects or prohibits.⁴ Called the *Garmon* rule, this principle precludes states from interfering in the National Labor Relations Board's ("NLRB" or "Board") interpretation or enforcement of the NLRA.⁵ The second principle, developed in the 1976 case of *Machinists v. Wisconsin Employment Relations Commission* and referred to as the "*Machinists* preemption," prohibits states from regulating activities that Congress intended to leave to natural market forces.⁶

In *Golden State*, the United States Supreme Court relied upon this second *Machinists* preemption principle in holding that the Los Angeles City Council's conditioning of the renewal of plaintiff's taxi cab franchise on the settlement of a pending labor dispute was preempted by the NLRA.⁷ The *Golden State* Court reasoned that

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¹ 966 F.2d 492, 140 L.R.R.M. 2539 (9th Cir. 1992).

² National Labor Relations Act, 29 U.S.C. § 151 (1988). See also *Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 289-90, 121 L.R.R.M. 2737, 2740 (1986).

³ 475 U.S. 608, 613, 121 L.R.R.M. 3233, 3235-36 (1986).

⁴ *Id.* See also *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246, 43 L.R.R.M. 2838, 2842 (1959) (holding that NLRA precludes California state court from awarding damages to an employer for the peaceful picketing of his plant by labor unions who had not been selected by the plant's employees as their representatives).

⁵ *Golden State*, 475 U.S. at 613, 121 L.R.R.M. at 3236.

⁶ See 427 U.S. 132, 140, 92 L.R.R.M. 2881, 2883-84 (1976) (holding a state commission's prohibition against union refusals to work overtime during collective bargaining negotiations to be preempted by the NLRA).

⁷ 475 U.S. at 615-16, 121 L.R.R.M. at 3236-37.

Congress, in enacting the NLRA, intended to leave the bargaining process to the parties.⁸ Therefore, according to the Court, the city was preempted from regulating the collective bargaining activities of private parties.⁹

In 1985, in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, however, the United States Supreme Court stated, in dicta, that when the state's interference in the collective bargaining process is peripheral to the focus of the NLRA, deeply entrenched in local concerns, or deals with a matter Congress intentionally left to the states, the Court may determine that the NLRA does not preempt the regulation.¹⁰ In making such a determination, the Court will focus on the statute's intent.¹¹ Thus, in *Gould* the Court determined that a Wisconsin statute forbidding state procurement agents from purchasing products manufactured or sold by habitual violators of the NLRA was merely an attempt to enforce the NLRA.¹² The *Gould* Court held that the statute was preempted by the NLRA because the state was exercising its regulatory, as opposed to its spending power.¹³

The *Gould* Court was careful to note that although the Commerce Clause permits states to participate freely in the open market, the NLRA was designed to entrust administration of the nation's labor policy to a centralized federal authority.¹⁴ Thus, spending activities that may have been permissible for a state under the Commerce Clause were preempted when the NLRA was enacted.¹⁵ The *Gould* Court noted that because of the unique position of power occupied by the government in our society, the public sector is subject to special restraints.¹⁶ According to the Court, the NLRA, therefore, necessarily controls state activities to a greater extent than private parties.¹⁷

In 1991, the United States Court of Appeals for the First Circuit applied the Supreme Court's NLRA preemption analysis in *Associ-*

⁸ *Id.* at 616, 121 L.R.R.M. at 3237 (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103, 73 L.R.R.M. 2561, 2562 (1970)).

⁹ *See id.* at 615-16, 121 L.R.R.M. at 3236-37.

¹⁰ *See* 475 U.S. at 291, 121 L.R.R.M. at 2741 (1986) (citing *Garmon*, 359 U.S. at 243-44, 43 L.R.R.M. at 2841; *Associated Builders and Contractors of Mass./R.I., Inc. v. Massachusetts Water Resources Auth.*, 935 F.2d 345, 358, 137 L.R.R.M. 2249, 2259 (1st Cir. 1991) (en banc) *cert. granted*, 112 S. Ct. 1935 (1992)).

¹¹ *See Gould*, 475 U.S. at 291, 121 L.R.R.M. at 2741.

¹² *Id.* at 287, 121 L.R.R.M. at 2739.

¹³ *Id.*

¹⁴ *Id.* at 289-90, 121 L.R.R.M. at 2740.

¹⁵ *See id.* at 290, 121 L.R.R.M. at 2740.

¹⁶ *Gould*, 475 U.S. at 290, 121 L.R.R.M. at 2740.

¹⁷ *Id.*

ated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Authority, known as *Boston Harbor*.¹⁸ In *Boston Harbor*, the First Circuit held that the NLRA preempted an attempt by the Massachusetts Water Resources Authority ("MWRA") to limit bidding on a multi-million dollar Boston Harbor clean-up project to contractors who agreed to enter a collective bargaining agreement ("CBA") with the Construction Trades Council and affiliated labor organizations.¹⁹ The *Boston Harbor* court determined that: 1) the MWRA had interfered with the bargaining process itself and its actions did not fall under any of the exceptions to NLRA preemption articulated by the United States Supreme Court in *Gould*,²⁰ 2) although sections 8(e) and (f) of the NLRA permit pre-hire agreements for private employers, Congress implicitly excluded public employers from this exception, thereby demonstrating its intent to occupy the field exclusively;²¹ and 3)

¹⁸ 935 F.2d at 352, 137 L.R.R.M. at 2254.

¹⁹ *Id.* at 360, 137 L.R.R.M. at 2260.

²⁰ *Id.* at 353-54, 137 L.R.R.M. at 2255. These exceptions were originally developed by the United States Supreme Court in *Garmon*, 359 U.S. at 243-44, 43 L.R.R.M. at 2841.

²¹ *Boston Harbor*, 935 F.2d at 357, 137 L.R.R.M. at 2258. Sections 8(e) and (f) of the NLRA allow pre-hire agreements for private employers in the construction industry. 29 U.S.C. § 158(e) (1988) provides, in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work: . . .

29 U.S.C. § 158(f) provides, in pertinent part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because . . . (2) such agreement requires as a condition of employment, membership in such labor organization . . . , or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment. . . .

See also *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371, 137 L.R.R.M. 3001, 3004 (8th Cir. 1991) (holding that Sections 8(e) and (f) do not grant public employers the ability to enter into pre-hire agreements).

other than the dicta in *Gould* (which provided that only actions that are peripheral to the NLRA, deeply rooted in local interests or deal with matters Congress intentionally left to the states may evade NLRA preemption) no real proprietary interest or market participant exception to the NLRA exists.²² The *Boston Harbor* court determined that the efforts of the MWRA interfered too pervasively with the labor negotiation process to be regarded as either peripheral or of local concern.²³

During the *Survey* year, in *Associated Builders and Contractors, Inc. v. City of Seward*, the United States Court of Appeals for the Ninth Circuit addressed the issue of whether a city's adoption of a work preservation clause requiring contractors bidding on a particular project to have an agreement with the union that represents some of the municipality's employees is preempted by the NLRA.²⁴ The *Seward* court held that when a municipality is using its spending powers, thereby acting as a "market participant," to protect its own employees, rather than as a regulator of industrial relations, its actions are not preempted by the NLRA.²⁵ Relying on *Gould*, the *Seward* court focused on the non-regulatory intent of the municipality in adopting the work preservation clause to protect its own employees.²⁶ Furthermore, the court determined that a municipality should not be prevented from entering into an agreement that a private employer could freely enter.²⁷ Therefore, under *Seward*, when a state is not acting with intent to regulate industrial relations, but rather is operating in an area Congress intended to leave to the states, the state's actions are not preempted by the NLRA.²⁸

The dispute in *Seward* arose in 1990 when the City of Seward, Alaska ("City") received a grant from the Alaska legislature to replace a high-voltage transmission line.²⁹ The City owned and operated an electrical utility, staffed with its own employees.³⁰ These employees were covered by a CBA between the City and the International Brotherhood of Electrical Workers ("IBEW").³¹ Because

²² *Boston Harbor*, 935 F.2d at 358, 137 L.R.R.M. at 2259.

²³ *Id.* at 359, 137 L.R.R.M. at 2260.

²⁴ 966 F.2d 492, 494, 140 L.R.R.M. 2539, 2541 (9th Cir. 1992). Neither the fact that Seward is a municipality, as opposed to a state, nor that it acted not by statute but through adoption of a work preservation clause affects the preemption analysis defined by the Supreme Court. See *Golden State*, 475 U.S. at 614 n.5, 121 L.R.R.M. at 3236 n.5 (1986).

²⁵ 966 F.2d at 496, 498, 140 L.R.R.M. at 2542, 2543.

²⁶ *Id.* at 496, 140 L.R.R.M. at 2542.

²⁷ *Id.* at 498, 140 L.R.R.M. at 2543.

²⁸ See *id.*

²⁹ *Id.* at 493, 140 L.R.R.M. at 2540.

³⁰ *Seward*, 966 F.2d at 493, 140 L.R.R.M. at 2540.

³¹ *Id.*

the City lacked the heavy construction equipment necessary to perform the job internally, it sought a private contractor for the renovation project.³² To protect the interests of the City's IBEW employees, the union negotiated with the City to add a work preservation clause to their CBA, limiting bidding on the renovation project to contractors who agreed to enter into a labor agreement with the IBEW.³³

Trade associations representing construction industry contractors ("Contractors") sought to enjoin the enforcement of the work preservation clause in the United States District Court for the District of Alaska.³⁴ The Contractors argued that the work preservation clause was preempted by the NLRA.³⁵ The district court, ruling on stipulated facts, granted summary judgment for the City, and the Contractors appealed the matter to the Ninth Circuit.³⁶

The United States Court of Appeals for the Ninth Circuit affirmed, holding that when a municipality requires a contractor to enter an agreement with the union that represents the City's em-

³² *Id.*

³³ *Id.* The work preservation clause provided as follows:

The City of Seward ("the Employer") agrees to the extent permitted by law . . . it will not contract for or allow the subcontract for the construction of the 115 kv main electrical transmission inertie line between Lawing and Fort. Raymond [substations] for work traditionally performed by employees represented by the International Brotherhood of Electrical Workers, Local Union 1547 ("IBEW") except to a person, firm, or corporation that is a party to an appropriate current labor agreement with IBEW.

Id. at 493-94 n.1, 140 L.R.R.M. at 2540 n.1.

³⁴ *Id.* at 494, 140 L.R.R.M. at 2540.

³⁵ 966 F.2d at 494, 140 L.R.R.M. at 2540. The Contractors also argued that the work preservation clause was in violation of the Sherman Antitrust Act, and contrary to the Equal Protection and Due Process clauses of the United States Constitution. *Id.*

The Contractors based their antitrust claim on the Sherman Antitrust Act. *Id.* at 498, 140 L.R.R.M. at 2543. Section one of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1988). The *Seward* court concluded, however, that because the agreement entered into by Seward and the IBEW is valid under the NLRA, it would be inconsistent to render it illegal under antitrust law. 966 F.2d at 499, 140 L.R.R.M. at 2544.

As for the Contractors' constitutional claims, the *Seward* court concluded that there was no equal protection violation because a rational basis existed—like a private employer, a public employer is free to favor union contractors in a work preservation clause. *Id.* (citing *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1203, 97 L.R.R.M. 2259, 2263 (2d Cir. 1977), *cert. denied*, 440 U.S. 979, 100 L.R.R.M. 3055 (1979) (holding that rational basis exists for city policy favoring union printers over non-union printers and thus bidding requirements do not constitute violation of equal protection)). The *Seward* court also rejected the Contractors' due process claims because wishful bidders on a contract have no constitutionally protected property interests in a project. 966 F.2d at 499, 140 L.R.R.M. at 2544.

³⁶ *Seward*, 966 F.2d at 494, 140 L.R.R.M. at 2540.

ployees, who have traditionally performed the work being contracted out, the work preservation clause is not preempted by the NLRA.³⁷ The court reasoned that when a municipality acts merely out of concern toward furthering harmonious industrial relations, it functions as a market participant, rather than as a regulator whose interference with free market forces is preempted by the NLRA.³⁸ Furthermore, the court concluded that because Congress exempted public sector collective bargaining from the NLRA, the City's adoption of the work preservation clause represented an activity that Congress had intended to leave to the states.³⁹

The *Seward* court began its discussion by examining the Contractors' argument that the work preservation clause violated the *Machinists* principle prohibiting states from regulating activities that Congress intended to leave to free market forces.⁴⁰ The *Seward* court concluded that, unlike the City of Los Angeles in *Golden State*, which thwarted the natural bargaining process when it threatened to withhold a taxi franchise, the City of Seward was merely acting as a market participant.⁴¹ In support of this determination, the *Seward* court pointed to the fact that the City did not require all contractors doing business in the city to have agreements with the IBEW.⁴² Rather, the work preservation clause was limited to the specific project at issue.⁴³ The *Seward* court relied on the market participant exception carved out by the United States Supreme Court in the Commerce Clause context, extending it to the NLRA.⁴⁴

Recognizing the limits imposed by the *Gould* Court on the market participant exception, however, the *Seward* court then ex-

³⁷ *Id.* at 498, 140 L.R.R.M. at 2543.

³⁸ *Id.* at 496, 140 L.R.R.M. at 2542.

³⁹ *Id.* at 498, 140 L.R.R.M. at 2543.

⁴⁰ 966 F.2d at 494, 140 L.R.R.M. at 2540. See *International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 154-55, 92 L.R.R.M. 2881, 2889 (1976).

⁴¹ *Seward*, 966 F.2d at 495, 140 L.R.R.M. at 2541.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (citing *United Bldg. and Constr. Trades Council of Camden County v. Mayor and Council of the City of Camden*, 465 U.S. 208, 221 (1984)) (when the state acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise) (emphasis in original). Although the *Seward* court correctly noted that the United States Supreme Court has adopted a market participant exception in the Commerce Clause context, it failed to acknowledge the careful language of the *Gould* Court limiting the application of a market participant exception: "[W]e cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration,' under the NLRA as long as they did so through exercises of the spending power." *Gould*, 475 U.S. at 290, 121 L.R.R.M. at 2740 (quoting *Garmon*, 359 U.S. at 243, 43 L.R.R.M. at 2841).

amined the City's intent in requiring the winning bidder on the renovation project to comply with the work preservation clause.⁴⁵ The court concluded that, unlike the Wisconsin statute in *Gould*, which, on its face, manifested an intent to regulate labor relations, the work preservation clause was not motivated by regulatory concerns.⁴⁶ Rather, the City merely sought to provide a measure of economic protection for its *own* electrical employees when forced to utilize outside contractors.⁴⁷ Like a private employer, therefore, the City engaged in a collective bargaining process with the IBEW to insure harmonious relations with the union and its workers.⁴⁸

Next, the *Seward* court questioned whether the NLRA prohibits a public employer from creating such a work preservation clause.⁴⁹ The court noted that in enacting § 2(2) of the NLRA, which provides that "[t]he term 'employer' . . . shall not include . . . any State," Congress exempted public employers from the labor restrictions of the NLRA.⁵⁰ Thus, the *Seward* court concluded that Congress could not have intended to prohibit a public employer from establishing the same work preservation clause that a private employer might adopt.⁵¹ The court noted that if the NLRA were interpreted to prohibit municipalities from fulfilling their duties as employers, the court would be imputing an intent to Congress to enforce harsher restrictions on states, who are free to regulate their own labor regulations, than on private employers, whose activities are regulated.⁵² Thus, the court determined that the work preservation clause in *Seward* met the *Gould* Court's market participant exception because *Seward* was operating in an area Congress intended to leave to the states.⁵³

The *Seward* court also concluded its discussion of NLRA preemption by distinguishing the 1991 opinion of the United States Court of Appeals for the First Circuit in *Boston Harbor*.⁵⁴ The First

⁴⁵ 966 F.2d at 496, 140 L.R.R.M. at 2542.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Seward*, 966 F.2d at 497, 140 L.R.R.M. at 2542; 29 U.S.C. § 152(2) (1988); *See also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 223, 95 L.R.R.M. 2411, 2416 (1977) ("The [NLRA] leaves regulation of the labor relations of state and local governments to the States.").

⁵¹ 966 F.2d at 497, 140 L.R.R.M. at 2542. Presumably, the *Seward* court was referring to the pre-hire exceptions under 8(e) and (f) of the NLRA. *See supra* note 21.

⁵² *Id.* at 498, 140 L.R.R.M. at 2543.

⁵³ *See id.*

⁵⁴ *Id.* at 497, 140 L.R.R.M. at 2543. *See Boston Harbor*, 935 F.2d 345, 137 L.R.R.M. 2249.

Circuit held that the NLRA preempted an attempt by the Massachusetts Water Resources Authority ("MWRA") to curtail bidding on a multi-million dollar Boston Harbor clean-up project to contractors who consented to enter into a CBA with the Construction Trades Council and affiliated labor organizations.⁵⁵ Unlike the City of Seward, the MWRA did not employ workers who could have performed the job internally.⁵⁶ The *Boston Harbor* court noted, however, that had the MWRA been the actual employer of the workers on the project, the NLRA would have been inapplicable because of the exclusion of states from the definition of employer under § 2(2) of the NLRA.⁵⁷ The Ninth Circuit, therefore, distinguished *Boston Harbor* because, unlike the MWRA, the City was acting as a public employer and thus was not preempted by the NLRA.⁵⁸

In a dissenting opinion, Judge Wright argued that the majority's opinion rested on a faulty premise.⁵⁹ The dissent maintained that there was no evidence that the City was acting as a public employer when it conditioned bidding on the renovation project to contractors who would cooperate with the IBEW.⁶⁰ Moreover, the dissent noted, if such evidence existed, the NLRA would be inapplicable to the City's actions.⁶¹ Thus, the majority need not have gone through its detailed market participant analysis because the NLRA excludes states from the definition of "employer."⁶²

The dissent also disagreed with the majority's conclusion that because a private employer could adopt a work preservation clause, there was no reason why the City could not also adopt such a clause.⁶³ Rather, Judge Wright relied on the reasoning of the First Circuit in *Boston Harbor* in determining that while sections 8(e) and

⁵⁵ *Boston Harbor*, 935 F.2d at 360, 137 L.R.R.M. at 2260.

⁵⁶ See *id.* at 354, 137 L.R.R.M. at 2256; see also *Seward*, 966 F.2d at 497, 140 L.R.R.M. at 2543.

⁵⁷ *Boston Harbor*, 935 F.2d at 354, 137 L.R.R.M. at 2256.

⁵⁸ *Seward*, 966 F.2d at 498, 140 L.R.R.M. at 2543.

⁵⁹ *Id.* at 499, 140 L.R.R.M. at 2544 (Wright, J., dissenting).

⁶⁰ *Id.* at 500, 140 L.R.R.M. at 2545.

⁶¹ *Id.* at 499, 140 L.R.R.M. at 2544.

⁶² *Id.* Furthermore, the dissent forecasted the dangers of allowing a city to engage in regulation of other employer's labor relations. Taken to its logical extreme, the dissent argued, the majority's decision would permit an anti-labor state to allow only non-union contractors to bid on state projects. Moreover, by resting its decision on the City's intent in adopting the work preservation clause, the majority's opinion would force federal courts to evaluate the motives behind municipal decisions. The dissent argued, therefore, that when a state is acting as a public employer, its regulatory function should be limited to its employees only. *Id.* at 500, 140 L.R.R.M. at 2545 (Wright, J., dissenting).

⁶³ *Seward*, 966 F.2d at 500, 140 L.R.R.M. at 2545.

(f) of the NLRA allow pre-hire agreements for private employers in the construction industry, the statute does not explicitly include states in this exception.⁶⁴ In enacting the two NLRA sections, therefore, Congress occupied the field excluding local regulation, such as the work preservation clause at issue here.⁶⁵

In *Seward*, the Ninth Circuit Court of Appeals held that when a city is acting to protect its own employees it serves as a market participant and not as a regulator.⁶⁶ The Ninth Circuit extended the United States Supreme Court's dicta in *Gould*, where the Court indicated that state spending actions that are of great local concern, incidental to federal interpretation and enforcement of the NLRA, or involve areas intentionally left to the states by Congress, may co-exist with the NLRA.⁶⁷ The *Seward* court concluded that the City's enactment of the work preservation clause was an activity that Congress intended to leave to the states.⁶⁸ The court further relied on § 2(2) of the NLRA which exempts states from the NLRA's definition of "employer."⁶⁹ If the Ninth Circuit had demonstrated the employer-employee relationship, as suggested by Judge Wright in his dissent, its analysis could have ended there.⁷⁰ The *Seward* court failed, however, to demonstrate that the City, as opposed to the successful Contractor, would be the actual employer of the renovation line workers.⁷¹ Consequently, the court failed to demonstrate logically why the work preservation clause met the exception under § 2(2) of the NLRA.⁷² The Ninth Circuit did not prove that the work preservation clause governed an area that Congress had intentionally left to the states.

The *Gould* dicta also indicated that a state may regulate in areas that are either peripheral to the focus of the NLRA or deeply entrenched in local concerns.⁷³ Without demonstrating that the City of Seward would be the actual employer of the workers, however, the Ninth Circuit did not show that the City was doing anything but unnecessarily interfering in the collective bargaining process, as prohibited by the *Machinists* preemption principle. As stressed by

⁶⁴ *Id.*; *Boston Harbor*, 935 F.2d at 357, 137 L.R.R.M. at 2258.

⁶⁵ *Seward*, 966 F.2d at 500, 140 L.R.R.M. at 2545-46 (Wright, J., dissenting).

⁶⁶ *Id.* at 496, 140 L.R.R.M. at 2542.

⁶⁷ *Gould*, 475 U.S. at 291, 121 L.R.R.M. at 2741.

⁶⁸ 966 F.2d at 498, 140 L.R.R.M. at 2543.

⁶⁹ *Id.* at 497, 140 L.R.R.M. at 2542; 29 U.S.C. § 152(2) (1988).

⁷⁰ *See Seward*, 966 F.2d at 499, 140 L.R.R.M. at 2544-45 (Wright, J., dissenting).

⁷¹ *Id.*

⁷² *See id.* at 499, 140 L.R.R.M. at 2544-45.

⁷³ *Gould*, 475 U.S. at 291, 121 L.R.R.M. at 2741.

the United States Supreme Court in *Gould*, the government occupies a peculiar position of power in our society and its actions, unless confined to its own internal affairs, are therefore limited.⁷⁴

Finally, the Ninth Circuit's argument that the NLRA should not be read to prevent public employers from engaging in the same bargaining activities as private employers is illogical. The question of whether Congress intended to include public entities in the construction industry exception is unclear.⁷⁵ While § 2(2) of the NLRA excludes states from the NLRA's definition of "employer," the construction industry exceptions appearing in sections 8(e) and (f) use the word "employer."⁷⁶ Thus, Congress implicitly limited the pre-hire exceptions to private contractors only.⁷⁷ The *Seward* court is caught in this semantic trap, arguing both that the states are free from the NLRA's limitations on employers and that the City should be permitted to act as a private employer.⁷⁸ This statutory contradiction was raised by the First Circuit in *Boston Harbor*.⁷⁹ The United States Supreme Court has granted certiorari on *Boston Harbor* and may deliver a definitive answer on this issue this term.⁸⁰

II. LABOR MANAGEMENT RELATIONS ACT

A. *Federal Subject Matter Jurisdiction Under § 301(a) of the Labor Management Relations Act: *Wooddell v. International Brotherhood of Electrical Workers*¹

Section 301(a) of the Labor Management Relations (Taft-Hartley) Act ("LMRA") gives federal courts the authority to enforce collective bargaining agreements entered into by labor unions.² In

⁷⁴ See *Gould*, 475 U.S. at 290, 121 L.R.R.M. at 2740.

⁷⁵ But see, e.g., *Boston Harbor*, 935 F.2d at 357, 137 L.R.R.M. at 2258; *Glenwood Bridge*, 940 F.2d at 371, 137 L.R.R.M. at 3004 (enjoining city from rejecting contractor's low bid and awarding contract to another contractor who agreed to enter a labor stabilization agreement due to NLRA preemption).

⁷⁶ See 29 U.S.C. §§ 152(2), 158(e)-(f) (1988).

⁷⁷ See *Boston Harbor*, 935 F.2d at 357, 137 L.R.R.M. at 2258.

⁷⁸ 966 F.2d at 497, 140 L.R.R.M. at 2542.

⁷⁹ See *Boston Harbor*, 935 F.2d at 358, 137 L.R.R.M. at 2259.

⁸⁰ 112 S. Ct. 293 (1992).

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¹ 112 S. Ct. 494, 138 L.R.R.M. 2881 (1991).

² Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1992). Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district

the years following its enactment, the United States Supreme Court decided that § 301(a) created a new area of federal substantive law,³ and that this federal law preempted state court interpretation of the statute.⁴ The specific definition of what constituted a valid § 301(a) claim, however, remained unclear.⁵ The Court left unresolved whether individual workers could bring a § 301(a) claim,⁶ and what type of disputes fell within the § 301(a) meaning of "contract."⁷

The United States Supreme Court resolved the first of these issues in a 1961 case, *Smith v. Evening News*, by holding that individual union members, not just labor unions and employers, had standing to sue under § 301(a).⁸ In *Smith*, the Court permitted a newspaper worker to sue his employer for unfair labor practices.⁹ The Court reasoned that individual claims are often at the heart of collective bargaining contracts.¹⁰ The Court stated that limiting § 301(a) to disputes between unions and employers was overly restrictive and would frustrate the congressional policy establishing

court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

Prior to this legislation, it was difficult to sue labor organizations because many state statutes did not recognize such organizations as legal entities. *United Ass'n of Journeymen v. Local 334*, 452 U.S. 615, 624, 107 L.R.R.M. 2715, 2718 (1981). Congress enacted § 301(a) to promote labor stability by holding labor unions accountable for their collective bargaining agreements with employers. *Id.* See also CHARLES J. MORRIS, *THE DEVELOPING LABOR LAW* 875 (2d ed. 1983 & Supp. 1988).

³ *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456, 40 L.R.R.M. 2113, 2116 (1957). In *Lincoln Mills*, the United States Supreme Court held that a union could bring a federal cause of action against an employer under § 301(a) for violating an arbitration provision within the collective bargaining agreement between the two parties. *Id.* The Court ruled that instead of construing § 301(a) as merely procedural, the federal courts were to fashion substantive law from the policy of the national labor laws. *Id.*

⁴ See *Local 174, Teamsters v. Lucas Flour*, 369 U.S. 95, 103, 49 L.R.R.M. 2717, 2721 (1962) (reaffirming that claims litigated under § 301(a) would follow federal law); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507, 49 L.R.R.M. 2619, 2621 (1962) (cautioning if state courts interpreted § 301(a) differently from the federal courts, resulting inconsistencies would disrupt national labor market).

⁵ See *Smith v. Evening News Ass'n*, 371 U.S. 195, 200, 51 L.R.R.M. 2646, 2648 (1962); *Journeymen*, 452 U.S. at 619-21, 107 L.R.R.M. at 2617-18.

⁶ See *Smith*, 371 U.S. at 200, 51 L.R.R.M. at 2648.

⁷ *Journeymen*, 452 U.S. at 619-21, 107 L.R.R.M. at 2717-18.

⁸ *Smith*, 371 U.S. at 200-01, 51 L.R.R.M. at 2648-49.

⁹ *Id.* at 195-96, 200, 107 L.R.R.M. at 2646-47, 2649. The employer violated a collective bargaining agreement by preventing all union employees from reporting to work during another unrelated union strike. *Id.* at 195-96, 107 L.R.R.M. at 2646-47.

¹⁰ *Id.* at 200, 51 L.R.R.M. at 2648.

uniform labor law.¹¹ Suits brought by individual union members would be governed by state law, for example, while actions litigated by the union for the very same breach would be controlled by federal law.¹² Consequently, the Court reasoned that the meaning of specific contract terms would differ depending on who instituted the action.¹³ The Court concluded, therefore, that such a consequence would confuse the negotiation and administration of collective bargaining agreements and would thus disrupt labor stability.¹⁴

In 1981 the Supreme Court resolved the question of what type of disputes fall within the § 301(a) meaning of "contract"¹⁵ in *United Ass'n of Journeymen v. Local 334*. In *Journeymen*, the Court held that valid § 301(a) disputes were not limited to breaches of contract involving collective bargaining agreements.¹⁶ The Court determined that the term "contract" within the statute also extended to violations of union constitutions.¹⁷ The Court reasoned that union constitutions hold labor organizations legally accountable to each other¹⁸ and are therefore agreements within the § 301(a) meaning of "contract."¹⁹ Consequently, the Court determined that the statute allowed a local union to sue its international parent in federal court for a violation of the international's constitution.²⁰ The Court found such an interpretation consistent with the legislative intent of § 301(a) because enforcement of union constitutions contributed to the achievement of labor stability.²¹

The *Journeymen* decision, however, did not resolve whether individual union members could sue under a union constitution.²²

¹¹ *Id.*, 51 L.R.R.M. at 2649.

¹² *Id.* at 200-01, 51 L.R.R.M. at 2649.

¹³ See 371 U.S. at 200, 51 L.R.R.M. at 2648-49.

¹⁴ See *id.* at 200-01, 51 L.R.R.M. at 2649.

¹⁵ See *Journeymen*, 452 U.S. at 624, 107 L.R.R.M. at 2719.

¹⁶ *Id.* at 627, 107 L.R.R.M. at 2719-20.

¹⁷ *Id.*, 107 L.R.R.M. at 2720.

¹⁸ *Id.* at 624, 107 L.R.R.M. at 2718. The Court inferred that this accountability stems from the fact that union constitutions detail the relationship between local union affiliates and their international parents. *Id.*

¹⁹ *Id.*, 107 L.R.R.M. at 2718-19.

²⁰ 452 U.S. at 616-17, 627, 107 L.R.R.M. at 2715, 2720.

²¹ *Id.* at 624, 107 L.R.R.M. at 2718.

²² *Id.* at 627 n.16, 107 L.R.R.M. at 2719 n.16. Nonetheless, most circuit courts have interpreted the *Journeymen* and *Smith* decisions liberally and have granted these types of intra-union actions federal jurisdiction under § 301(a). See *DeSantiago v. Laborers Int'l Union, Local 1140*, 914 F.2d 125, 128, 135 L.R.R.M. 2419, 2421 (8th Cir. 1990); *Lewis v. International Bhd. of Teamsters, Local 771*, 826 F.2d 1310, 1314, 126 L.R.R.M. 2030, 2034 (3d Cir. 1987); *Kinney v. International Bhd. of Elec. Workers*, 669 F.2d 1222, 1229, 109 L.R.R.M. 2779, 2784 (9th Cir. 1981); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1248, 75 L.R.R.M.

Prior to *Journeyman*, in *Trail v. International Brotherhood of Teamsters*, the United States Court of Appeals for the Sixth Circuit held that actions brought by an individual union member for violation of a union constitution were not within the purview of § 301(a).²³ The *Trail* court emphasized that the statute was expressly limited to disputes between an employer and a labor organization or between labor organizations.²⁴ The *Trail* court determined that *Smith* did not control because, in *Smith*, individual workers sued under a collective bargaining agreement and not a union constitution.²⁵ In addition, the court reasoned that disputes between union members and their unions were essentially internal matters outside the scope of the LMRA.²⁶ Because Congress never intended the courts to use the LMRA to police intra-union conflict, the court concluded that the application of § 301(a) to this dispute was inappropriate.²⁷

During the *Survey* year, the United States Supreme Court held in *Wooddell v. International Brotherhood of Electrical Workers* that a suit by an individual union member that alleges a violation of a union constitution is within the subject matter jurisdiction created by § 301(a) of the LMRA.²⁸ *Wooddell* involved an allegation by an individual union member that his local union breached a collective bargaining agreement to his detriment and thus violated the international constitution.²⁹ The Supreme Court reasoned that intra-union disputes disrupt labor stability as much as inter-union suits,³⁰ and therefore Congress must have intended such matters to be within the purview of § 301(a).³¹

2736, 2746 (2d Cir. 1970); *Parks v. International Bhd. of Elec. Workers*, 314 F.2d 886, 917, 52 L.R.R.M. 2281, 2304 (4th Cir. 1963), cert. denied, 372 U.S. 976, 52 L.R.R.M. 2943 (1963).

²³ *Trail v. International Bhd. of Teamsters*, 542 F.2d 961, 965, 93 L.R.R.M. 3076, 3078 (6th Cir. 1976). The plaintiffs were unionized truckers who initiated an unfair labor practices suit under § 301(a) against their local unions and the International Brotherhood of Teamsters. *Id.* at 964, 93 L.R.R.M. at 3077. The plaintiffs alleged that the unions failed to properly ratify the collective bargaining agreement that controlled their compensation. *Id.*

²⁴ See *id.* at 967, 93 L.R.R.M. at 3079.

²⁵ *Id.*, 93 L.R.R.M. at 3080.

²⁶ *Id.*, 93 L.R.R.M. at 3079-80.

²⁷ *Id.*, 93 L.R.R.M. at 3079.

²⁸ *Wooddell*, 112 S. Ct. at 501, 138 L.R.R.M. at 2884. In an alternate holding, the Supreme Court reaffirmed its recent decision in *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 573, 133 L.R.R.M. 2793, 2798 (1990), upholding the right of a jury trial for employees seeking injunctive relief and monetary damages on an LMRA claim. *Wooddell*, 112 S. Ct. at 498, 138 L.R.R.M. at 2882. Consequently, the plaintiff in *Wooddell* was granted a jury trial on remand. *Id.* See generally Susan M. Landers, *The Right to a Jury Trial in a Duty of Fair Representation Suit: Teamsters, Local 391 v. Terry*, 33 B.C. L. REV. 307, 309 (1992) (reviewing the *Terry* decision and the right to a jury trial under the LMRA).

²⁹ *Wooddell*, 112 S. Ct. at 497, 138 L.R.R.M. at 2882.

³⁰ See *id.* at 499, 138 L.R.R.M. at 2883.

³¹ *Id.*

The petitioner in *Wooddell* was a member of Local 71 of the International Brotherhood of Electrical Workers ("IBEW").³² He claimed that the local union did not give him job referrals in accordance with the union's collective bargaining agreement with electrical contractors.³³ As a consequence, the petitioner instituted this action in the United States District Court for the Southern District of Ohio.³⁴ He alleged that the union was in violation of the IBEW constitution and the bylaws of Local 71, and that this violation constituted a breach of contract under § 301(a) of the LMRA.³⁵

The district court ruled in favor of Local 71's motions for summary judgment, and dismissed the petitioner's claims.³⁶ Relying on its decision in *Trail*, the Sixth Circuit affirmed the lower court's ruling and held that § 301(a) did not authorize a breach of contract action brought by an individual union member.³⁷ The Sixth Circuit stated that the Supreme Court decision in *Journeyman* was limited to suits between union organizations, leaving open the issue of whether an individual union member could sue under a union constitution.³⁸ The court also reasoned that internal union conflicts did not share the same contractual nature as relationships between separate union organizations.³⁹ Therefore, § 301(a) was not applicable in these circumstances.⁴⁰

The United States Supreme Court granted the union member's petition for certiorari and reversed the Sixth Circuit decision.⁴¹ Writing for the majority, Justice White stated that § 301(a) subject matter jurisdiction may be properly asserted if the suit alleges either a violation of a contract between labor organizations or a contract

³² *Id.* at 497, 138 L.R.R.M. at 2881.

³³ *Id.* Before this suit was initiated, the local union president, who was also the petitioner's brother, filed internal disciplinary proceedings against the petitioner. *Wooddell v. International Bhd. of Elec. Workers*, No. 88-4049, 1990 U.S. App. LEXIS 10899 at *1 (6th Cir. June 27, 1990). The disciplinary measures allegedly stemmed from the petitioner's opposition to increases in union dues and the appointment of the president's son-in-law to the business manager position. *Id.* Although no conclusion was ever reached regarding these disciplinary matters, the petitioner asserted that he was denied referrals because of these proceedings. *Id.* at *2.

³⁴ *Wooddell v. International Bhd. of Elec. Workers*, 762 F. Supp. 747, 135 L.R.R.M. 2926 (S.D. Ohio 1988).

³⁵ *Wooddell*, 112 S. Ct. at 497, 138 L.R.R.M. at 2882.

³⁶ *Id.*

³⁷ *Id.* at 497 n.2, 138 L.R.R.M. at 2882 n.2.

³⁸ *Wooddell v. International Bhd. of Elec. Workers*, No. 88-4049, 1990 U.S. App. LEXIS 10899 at *8 (6th Cir. June 27, 1990).

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *Wooddell*, 112 S. Ct. at 501, 138 L.R.R.M. at 2884.

dispute between a labor organization and an employer.⁴² In addition, the majority determined that § 301(a) jurisdiction was not limited to suits brought by the actual contracting parties.⁴³

The Supreme Court determined that because Local 71 and the IBEW were labor organizations within the meaning of the statute,⁴⁴ jurisdiction would exist if a union constitution fell within the statute's meaning of the term "contract."⁴⁵ Relying on its decision in *Journeyman*, the *Wooddell* Court reasoned that union constitutions were within the § 301(a) meaning of contract.⁴⁶ The Court therefore concluded that § 301(a) governed this intra-union dispute founded upon a union constitution.⁴⁷ Furthermore, because the enforcement of union constitutions promoted labor stability, the Court reaffirmed its holding in *Journeyman* that Congress had intended the statute to encompass such constitutions.⁴⁸ The Court reiterated that union constitutions were among the most common form of contract when the statute was enacted and emphasized that Congress intended the language of § 301(a) to include constitutions.⁴⁹

The Court next focused its analysis on whether the union actually violated the IBEW constitution.⁵⁰ The Court noted that the IBEW constitution required local unions to honor collective bargaining agreements,⁵¹ and Local 71 agreed to comply with those terms.⁵² Because the petitioner alleged that Local 71 had breached the collective bargaining agreement by not giving him job referrals, the Court found that the petitioner's suit appropriately alleged a violation of a contract under § 301(a).⁵³

The Court also rejected the union's argument that § 301(a) jurisdiction did not extend to third parties seeking to enforce a violation of the contract.⁵⁴ Relying on its decision in *Smith*, the Court maintained that individuals are often beneficiaries of agreements

⁴² *Id.* at 498, 138 L.R.R.M. at 2883.

⁴³ *Id.*

⁴⁴ *Id.* at 499 n.5, 138 L.R.R.M. at 2883 n.5. Both entities are labor organizations in an industry affecting commerce. *Id.*

⁴⁵ *See id.* at 499, 138 L.R.R.M. at 2883.

⁴⁶ *See* 112 S. Ct. at 499, 138 L.R.R.M. at 2883.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 112 S. Ct. at 499, 138 L.R.R.M. at 2883.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 499, 500, 138 L.R.R.M. at 2883-84.

between unions.⁵⁵ The Court consequently reaffirmed that these individuals have standing to sue.⁵⁶

The Court also reasoned that the preclusion of suits initiated by union members would create discrepancies in the application of labor laws.⁵⁷ For example, the Court noted that Local 71 and the IBEW could bring a constitutional dispute to federal court.⁵⁸ If a dispute arising out of the same contract, however, had to be remitted to state court and to state law merely because it was not initiated by Local 71 or the IBEW, then it might be interpreted differently based solely upon the identities of the parties.⁵⁹ The Court concluded that this kind of inconsistency would be the type of disruptive influence on the collective bargaining process that Congress specifically sought to avoid.⁶⁰

In one sense, *Wooddell v. IBEW* merely promotes liberal interpretations of § 301(a). The decision represents a simple combination of the *Smith* and *Journeyman* holdings. *Smith* gave individual workers the right to sue under § 301(a);⁶¹ in *Journeyman*, the Court recognized union constitutions as contracts within the meaning of § 301(a).⁶² Applying these holdings simultaneously to a fact situation involving a union member bringing suit under a union constitution is merely logical. This logic, however, was not adopted by the Sixth Circuit as evidenced by its holding in *Wooddell*.⁶³ The Sixth Circuit was not persuaded by either the Supreme Court's prior interpretations of § 301(a),⁶⁴ or indeed, the weight of contrary decisions in other jurisdictions.⁶⁵ By rejecting this strictly literal approach, the Supreme Court appears to encourage a liberal interpretation of § 301(a) and invites the lower courts to read this statute more broadly.

⁵⁵ *Id.* at 499, 138 L.R.R.M. at 2883.

⁵⁶ 112 S. Ct. at 500, 138 L.R.R.M. at 2884.

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The Court also rejected the argument that its ruling would significantly burden the federal courts. *Id.* The Court noted that the federal courts that extended the application of § 301(a) did not experience overcrowding. *Id.* Furthermore, the Court stated that even if such overcrowding occurred, its interpretation of the statute would not necessarily be altered. *Id.*

⁶¹ *Smith*, 371 U.S. at 200-01, 51 L.R.R.M. at 2649.

⁶² *Journeyman*, 452 U.S. at 627, 107 L.R.R.M. at 2719-20.

⁶³ *See Wooddell*, 112 S. Ct. at 497 n.2, 138 L.R.R.M. at 2882 n.2.

⁶⁴ *Journeyman*, 452 U.S. at 627, 107 L.R.R.M. at 2719-20; *Smith*, 371 U.S. at 200-01, 51 L.R.R.M. at 2649.

⁶⁵ *See supra* note 22 and cases cited therein.

Consequently, the decision has important implications for the future course of labor negotiations. The ability of union members to bring suits under § 301(a) provides them with a certain leverage and bargaining strength that they did not previously enjoy. The decision empowers individual workers by giving them a role separate from their representative unions, and consequently, this increase in worker autonomy will significantly alter the traditional union-management dialogue.

The decision also promotes greater uniformity of federal labor law. By permitting § 301(a) to govern disputes between members and their unions, individual workers are assured consistent results even if they elect to bring their claim to a state court. Because § 301(a) is substantive and not merely procedural,⁶⁶ state courts are compelled to yield to federal interpretations of this law. If § 301(a) did not control, a wide variety of state interpretations would result.

Extending the reach of § 301(a) forces union accountability not only to management, but also to constituent union members. This additional accountability may require a more straightforward and honest approach from labor unions in their negotiations with other labor organizations and management. To the extent that more forthright negotiations decrease litigation and internal union strife, the decision advances Congress's stated policy of promoting greater labor stability.⁶⁷

Conversely, the decision also has the potential to disrupt labor stability. Unions are organized specifically to meet the needs of their members. The strength and power of a union rests almost entirely upon its ability to serve as the collective voice of workers. By allowing individual workers to further circumvent this established union role, this decision potentially undermines the effectiveness of unions. Organized unions have played an integral role in labor relations for almost six decades.⁶⁸ This decision may undercut their position by allowing workers to, in effect, represent themselves. In this way, this decision might have a destabilizing effect on the current relationship between labor organizations and their members.

In conclusion, *Wooddell v. IBEW* establishes that federal courts have subject matter jurisdiction over claims asserted by individual union members regarding a violation of an intra-union constitu-

⁶⁶ *Lincoln Mills*, 353 U.S. at 456, 40 L.R.R.M. at 2116.

⁶⁷ See, e.g., *Journeyman*, 452 U.S. at 624, 107 L.R.R.M. at 2718.

⁶⁸ The first national labor legislation of real significance was enacted in 1935 with the passage of the National Labor Relations Act. MORRIS, *supra* note 2, at 27.

tion.⁶⁹ This outcome is entirely consistent with the Court's earlier decisions in *Smith* and *Journeyman*. The decision promotes labor stability by ensuring that individual workers have some voice in the labor process, and it promotes uniformity of labor law by guaranteeing that federal law will control. After *Wooddell*, § 301(a) of the LMRA recognizes an individual union member's claim to bring suit against his or her union regarding a violation of the union constitution.⁷⁰

*B. *Section 301(a) of the Labor Management Relations Act Does Not Cover Extraterritorial Disputes: Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.¹*

Section 301(a) of the Labor Management Relations (Taft-Hartley) Act ("LMRA")² effectively places all labor relations disputes within the jurisdiction of the federal courts and federal labor law.³ The LMRA seeks to promote industrial peace and security by ensuring the enforceability of collective bargaining agreements ("CBAs") in federal courts under a uniform and predictable national labor policy.⁴ In delineating § 301(a)'s appropriate scope, the courts primarily focus on the nature of the contract and its relation to preventing labor strife in the United States.⁵ Thus, the United

⁶⁹ *Wooddell*, 112 S. Ct. at 501, 138 L.R.R.M. at 2884.

⁷⁰ *Id.*

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¹ 968 F.2d 191, 140 L.R.R.M. 2697 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 493, 141 L.R.R.M. 2784 (Nov. 16, 1992).

² Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1988) states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

³ See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102, 49 L.R.R.M. 2717, 2720 (1962) (federal labor law preempts incompatible local law doctrines); *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 120, 130 L.R.R.M. 2301, 2302 (7th Cir. 1988) (§ 301(a) occupies entire field of disputes over CBAs); cf. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507, 49 L.R.R.M. 2619, 2621 (1962) (state and federal courts have concurrent jurisdiction over § 301(a) matters).

⁴ *Dowd Box*, 368 U.S. at 509, 49 L.R.R.M. at 2621; *Painting and Decorators Contractors Ass'n v. Painters and Decorators Joint Comm.*, 717 F.2d 1293, 1295, 114 L.R.R.M. 2984, 2986 (9th Cir. 1983); *District 2 Marine Eng'rs Beneficial Ass'n—Assoc. Maritime Officers v. Grand Bassa Tankers*, 663 F.2d 392, 396, 108 L.R.R.M. 2873, 2875 (2d Cir. 1981).

⁵ See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352-53

States Supreme Court has declined to extend the LMRA to disputes with little connection to domestic labor relations.⁶

In 1957, in *Benz v. Companiera Naviera Hidalgo S.A.*, the Supreme Court upheld a lower court ruling that Congress did not intend the LMRA to cover labor disputes between foreigners even though the conflict erupted in U.S. territory.⁷ While temporarily docked in Portland, Oregon, foreign seamen went on strike seeking more favorable working conditions from their employer, a foreign ship.⁸ Emphasizing the dispute's tenuous connection to the United States,⁹ the Court noted that nothing in the Act itself, or in its legislative history, indicated a congressional intent to include contractual relations established under foreign laws within the purview of the LMRA.¹⁰ To the contrary, the Court determined that concerns over industrial strife in American labor relations apparently occupied the entire legislative history of the LMRA.¹¹ According to the Court, policy decisions such as this one, with ramifications on the "delicate field of international relations," more properly belonged with Congress.¹² Thus, the Court concluded that the judi-

(1985) (state tort law claim, which would require construction of certain provisions in CBA, must be adjudicated under federal law via § 301(a) because otherwise the resulting varying interpretations would subvert the congressional goal of unified body of labor-contract law); *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28, 49 L.R.R.M. 2670, 2674 (1962) (strike settlement agreement between employer and labor union resolving controversy arising from employment relationship was aimed at promoting peace between the parties similar to more traditional CBAs and thus qualified as "contract" within meaning of § 301(a)); *cf. Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 128 L.R.R.M. 2521, 2524, 46 FEP Cases 1553, 1556 (1988) (state tort remedy not preempted by § 301(a) because does not require construing CBA and thus poses no threat to uniformity in interpreting labor relations).

⁶ *See Benz v. Companiera Naviera Hidalgo S.A.*, 353 U.S. 138, 138-39, 39 L.R.R.M. 2636, 2636 (1957) (LMRA not fashioned to resolve labor disputes between foreign nationals operating ships under foreign law); *cf. International Longshoremen's Ass'n, Local 1416, v. Ariadne Shipping Co.*, 397 U.S. 195, 199-200, 73 L.R.R.M. 2625, 2626-27 (1970), *on remand*, 233 So. 2d 650, 74 L.R.R.M. 2559 (Fla. Dist. Ct. App. 1970) (National Labor Relations Act, 29 U.S.C. § 151 (1973), applied to American residents hired to work on American docks).

⁷ 353 U.S. at 138-39, 39 L.R.R.M. at 2636.

⁸ *Id.* at 139, 39 L.R.R.M. at 2636.

⁹ *See id.* at 142, 39 L.R.R.M. at 2638.

¹⁰ *Id.* at 142, 143-44, 39 L.R.R.M. at 2638.

¹¹ *See id.* at 143-44, 39 L.R.R.M. at 2638.

¹² *Benz*, 353 U.S. at 147, 39 L.R.R.M. at 2639-40. The *Benz* Court had previously noted the "storm of diplomatic protest," from Great Britain, Italy, Sweden, Norway, Denmark, the Netherlands, Germany and Canada, that greeted Congress's attempt to extend coverage of the Seaman's Act to foreign vessels in foreign ports following its earlier decision in *Jackson v. S.S. Archimedes*, 275 U.S. 463 (1928), not to do so judicially. *Benz*, 353 U.S. at 145-46, 39 L.R.R.M. at 2639.

ciary should avoid encroaching on another country's national sovereignty without a clear mandate from Congress.¹³

The issue of extraterritorial application has arisen more often in disputes involving U.S. labor laws other than § 301(a) of the LMRA.¹⁴ For example, in 1949 in *Foley Brothers, Inc. v. Filardo*, the United States Supreme Court held that a law requiring that contracts entered into by the United States must compensate employees at time and a half for work in excess of eight hours per day did not apply in territories over which Congress had no legislative control.¹⁵ In *Foley*, the defendant, an American company, contracted with the U.S. government to build public works in the Middle East.¹⁶ The plaintiff, an American citizen hired as cook, sued the company seeking additional compensation for hours worked in excess of eight per day.¹⁷ The *Foley* court reasoned that, without a clearly expressed legislative intent, U.S. labor law applied solely within U.S. territory.¹⁸ According to the Court, the legislative history of the eight hour law concerned only domestic labor conditions.¹⁹ The Supreme Court concluded, therefore, that the eight hour law only applied where the labor conditions of employees are probable concerns of Congress.²⁰

During the Survey year, in *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, the United States Court of Appeals for the Second Circuit held that § 301(a) does not extend the LMRA's effect outside

¹³ See *id.* at 147, 39 L.R.R.M. at 2639-40.

¹⁴ See, e.g., *EEOC v. Arabian American Oil*, 111 S. Ct. 1227, 1229, 55 FEP Cases 449, 449 (1991) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1988), does not apply to dispute between American company and American employee working in Saudi Arabia); *Oil, Chem. and Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 414, 92 L.R.R.M. 2737, 2739 (1976) (employee's predominant job situs triggers operation of § 14(b) of National Labor Relations Act, 29 U.S.C. § 151); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 13, 52 L.R.R.M. 2425, 2427 (1963) (NLRA, 29 U.S.C. § 151 does not extend to maritime operations of foreign flag ships employing alien seamen); *New York Cent. R.R. v. Chisolm*, 268 U.S. 29, 31 (1925) (Federal Employer's Liability Act of 1908 c. 149, 35 Stat. 65 as amended 1910 C. 143, 36 Stat. 291 presumed to be effective domestically); *Cruz v. Chesapeake Shipping*, 932 F.2d 218, 232 (3d Cir. 1991) (Fair Labor Standards Act, 29 U.S.C. § 201 (1978), does not apply to Filipino sailors on Kuwaiti oil tankers temporarily reflagged under United States flag).

¹⁵ 336 U.S. 281, 290 (1949) (interpreting eight hour law, 40 U.S.C. §§ 324, 325a, repealed by 40 U.S.C. §§ 328-30 (1982)).

¹⁶ *Id.* at 281, 283.

¹⁷ *Id.* at 283.

¹⁸ *Id.* at 285.

¹⁹ See *id.* at 286, 287.

²⁰ *Foley*, 353 U.S. at 286. In doing so, the Court relied on the lack of a distinction between alien and American employees in the statutory scheme. *Id.*

the territorial boundaries of the United States absent a clear expression of intent by Congress.²¹ The appellant, a South Korean labor union (the "Union"), sued the parent company of its employer for breaching their CBA by causing the shutdown of the Korean operation.²² The court reasoned that Congress did not make "unmistakably clear" that it intended the LMRA to cover such foreign disputes.²³ Thus, the Court concluded that the action could not be brought under U.S. labor law.²⁴

In 1985, Pico Macom, Inc. ("Macom"), the wholly owned subsidiary of the appellee, Pico Products, Inc. ("Pico Products"), incorporated Pico Korea, Ltd. ("Pico Korea"), for the purpose of making electronic components in South Korea.²⁵ The employees of Pico Korea organized the Union and subsequently succeeded in obtaining a CBA with Pico Korea.²⁶ Shortly thereafter, Pico Products ceased providing working capital to Pico Korea thereby effectively forcing the South Korean subsidiary to close.²⁷

The appellant union then sued Pico Products in the United States District Court for the Northern District of New York, claiming that the appellant's role in the demise of Pico Korea amounted to a breach of contract, or, alternatively, tortious interference with an advantageous contractual relationship.²⁸ The district court rejected the appellant's initial attempt to have the dispute adjudicated under federal labor law via § 301(a).²⁹ The district court concluded that Congress intended § 301(a) to apply solely to domestic workers.³⁰

On appeal, the United States Court of Appeals for the Second Circuit affirmed the lower court decision that U.S. federal labor law did not govern the dispute between the Union and Pico Korea.³¹

²¹ 968 F.2d at 195-96, 140 L.R.R.M. at 2700.

²² *Id.* at 192-93, 140 L.R.R.M. at 2697-98.

²³ *Id.* at 195, 140 L.R.R.M. at 2700.

²⁴ *Id.* at 195-96, 140 L.R.R.M. at 2700.

²⁵ *Id.* at 192, 140 L.R.R.M. at 2697.

²⁶ *Pico*, 968 F.2d at 192, 140 L.R.R.M. at 2697-98. All of the Union's members were "citizens and domiciliaries of South Korea." *Id.* at 192, 140 L.R.R.M. at 2697.

²⁷ *Id.* at 193, 140 L.R.R.M. at 2698.

²⁸ *Id.* at 193, 140 L.R.R.M. at 2698. The lower court opinion is unpublished.

²⁹ *Id.*

³⁰ *Id.* Proceeding under New York state law, the district court held that the appellee possessed insufficient control over Pico Korea to be liable for its role in the subsidiary's demise. *Id.* The court found that the appellee was fully aware of the valid contract between the plaintiff and Pico Korea and of the effect of its actions on the CBA. *Id.* The court emphasized that the appellee acted on reasonable business grounds and not maliciously. *Id.*

³¹ *Pico*, 968 F.2d at 195-96, 140 L.R.R.M. at 2700.

Conceding that Congress possessed the power to broaden the scope of § 301(a) to include extraterritorial disputes,³² the court reasoned that such a motive was not made unmistakably clear.³³ The court concluded that the disputed CBA was not the type of contract Congress intended to cover by enacting § 301(a).³⁴

The Second Circuit dismissed both of the appellant's arguments regarding statutory intent as misplaced.³⁵ The appellant first contended that the statutory phrase, "without regard to the citizenship of the parties,"³⁶ allowed the Union to sue under § 301(a) despite its South Korean citizenship.³⁷ According to the court, however, the issue was not standing to sue, but whether contracts of this nature fell within the province of § 301(a).³⁸ The appellant next argued that § 301(a) applied because the parties qualified as working in an industry "affecting commerce."³⁹ Although the court assumed that the parties satisfied the affecting commerce standard, the court explained that the argument still failed to address whether Congress intended to extend § 301(a) to cover disputes outside U.S. borders.⁴⁰ Consequently, the court determined that the statute did not indicate that Congress intended § 301(a) to cover CBAs outside U.S. territory.⁴¹ Such an intent, the court reasoned, must be made unmistakably clear in order to be effective.⁴²

³² *Id.* at 194, 140 L.R.R.M. at 2699. See *Arabian American*, 111 S. Ct. at 1230, 55 FEP Cases at 450.

³³ *Pico*, 968 F.2d at 195, 140 L.R.R.M. at 2700. The court noted that the plaintiff bore the burden of overcoming the general presumption that acts of Congress only operate within territories subject to U.S. control, absent a clear indication of contrary intent. *Id.* at 194, 140 L.R.R.M. at 2698.

³⁴ *Id.* at 195-96, 140 L.R.R.M. at 2700.

³⁵ *Id.* at 194, 195, 140 L.R.R.M. at 2699-700.

³⁶ Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1988).

³⁷ *Pico*, 968 F.2d at 194, 140 L.R.R.M. at 2698-99.

³⁸ *Id.* at 194, 140 L.R.R.M. at 2699. The court concluded that the statute's language simply established federal question jurisdiction for labor contracts already within the scope of § 301(a). *Id.*

³⁹ *Id.* For purposes of the LMRA, 29 U.S.C. § 152(6) (1973) defines commerce as:
... trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
29 U.S.C. § 152(6).

⁴⁰ *Pico*, 968 F.2d at 194, 140 L.R.R.M. at 2699.

⁴¹ *Id.* at 195, 140 L.R.R.M. at 2700.

⁴² *Id.* at 195, 140 L.R.R.M. at 2700. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286

Next, the court noted that Supreme Court precedents bolstered the view that Congress did not intend § 301(a) to apply extraterritorially.⁴³ Specifically, the *Pico* court pointed out that the Supreme Court, in *Benz v. Companiera Naviera Hidalgo S.A.*, elected not to apply the LMRA to the foreign seamen's dispute with their foreign ship because of the conflict's small connection to U.S. labor conditions.⁴⁴ Similarly, the *Pico* court cited the *Foley* court's refusal to apply the eight hour law extraterritorially based on the presumption that labor conditions in foreign countries did not concern Congress.⁴⁵ Thus, the court determined that § 301(a) should not govern the *Pico* dispute because of its comparable degree of estrangement from U.S. labor conditions.⁴⁶

Finally, the court applied the policies underpinning the Supreme Court precedents to the present controversy.⁴⁷ Viewing the conflict as essentially a South Korean dispute,⁴⁸ the court reasoned that the mere fact that the employer was the subsidiary of an American company could not, by itself, place the disagreement within the probable concern of Congress.⁴⁹ Likewise, the fact that the employees might have affected commerce within the United States did not sufficiently link the dispute to congressional concerns for domestic labor strife, especially when placed in the context of the present global economy.⁵⁰ Furthermore, the court reasoned that expanding § 301(a)'s scope to cover the *Pico* conflict would likely create problems in the foreign policy arena.⁵¹ The court cited concerns for "inevitable embarrassment" and the practicability of enforcing federal labor law outside U.S. borders as reasons to rein in

(1952) (Congress clearly intended Lanham Act, 15 U.S.C. §§ 1051-1127 (1988) patent infringement statute to apply to U.S. citizens abroad). In fact, Congress has amended 42 U.S.C. § 2000e to legislatively overturn the Court's ruling in *Arabian American*. The Civil Rights Act of 1991, § 109(b)(1)(A), 42 U.S.C. § 2000e(f) (1992) (added sentence providing, "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."). See *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1304, 57 FEP Cases 1445, 1446 (N.D. Cal. 1992) (§ 109 of Civil Rights Act of 1991 overturns *Arabian American*).

⁴³ *Pico*, 968 F.2d at 194, 140 L.R.R.M. at 2699.

⁴⁴ *Id.* at 194-95, 140 L.R.R.M. at 2699. See *supra* notes 7, 9-13 and accompanying text.

⁴⁵ 968 F.2d at 194, 140 L.R.R.M. at 2699. See *supra* notes 15, 18-20 and accompanying text. The *Pico* court noted that § 301(a), like the eight hour law, drew no distinction between alien and citizen labor. *Id.* See *supra* note 20 and accompanying text.

⁴⁶ See *Pico*, 968 F.2d at 194, 140 L.R.R.M. at 2699.

⁴⁷ See *id.* at 195, 140 L.R.R.M. at 2699-700.

⁴⁸ See *id.* at 195, 140 L.R.R.M. at 2699.

⁴⁹ *Id.*

⁵⁰ See *id.* at 195, 140 L.R.R.M. at 2699-700.

⁵¹ *Pico*, 968 F.2d at 195, 140 L.R.R.M. at 2700. The court stressed that the lawfulness of an act should be determined under the law of the country in which it occurred. *Id.*

§ 301(a).⁵² Thus, the court concluded that § 301(a) did not cover the CBA between the foreign union and its foreign employer.⁵³

Although apparently a novel issue,⁵⁴ the *Pico* court's decision not to apply § 301(a) extraterritorially stands on strong foundational grounds and is unlikely to be overturned.⁵⁵ The *Pico* holding conforms to previous judicial decisions, even to those outside labor law, that confine congressional acts to U.S. territory absent a clear expression of contrary intent.⁵⁶ Moreover, the practical difficulties of enforcing U.S. law on foreign soil, combined with the potential foreign relations consequences from encroaching on another nation's sovereignty, reinforce the wisdom of limiting § 301(a) to U.S. territory without a congressional finding of special circumstances.⁵⁷

Conversely, the United States courts could apply § 301(a) to govern conduct outside its borders that has substantial effects within the United States.⁵⁸ Already the effects of the increasingly global economy have rippled through the U.S. labor market.⁵⁹ An outcry might be heard for U.S. labor law to be imposed as a stabilizing force.

⁵² See *id.* at 195, 140 L.R.R.M. at 2700.

⁵³ *Id.* at 195-96, 140 L.R.R.M. at 2700.

⁵⁴ *Id.* at 193, 140 L.R.R.M. at 2698.

⁵⁵ See, e.g., *Arabian American*, 111 S. Ct. at 1230, 55 FEP Cases at 450; *Benz*, 353 U.S. at 147, 39 L.R.R.M. at 2639-40; *Foley*, 336 U.S. at 285.

⁵⁶ See, e.g., *Arabian American*, 111 S. Ct. at 1231, 55 FEP Cases at 450 (Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1988)); *Cruz v. Chesapeake Shipping*, 932 F.2d 218, 232 (3d Cir. 1991) (Fair Labor Standards Act, 29 U.S.C. § 201 (1978)). For cases outside of labor law, see also *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984) (7 U.S.C. § 15 (1980) does not empower Commission to serve subpoenas on foreign nationals in foreign countries); *United States v. Mitchell*, 553 F.2d 996, 1004-05 (5th Cir. 1977) (Marine Mammal Protection Act, 16 U.S.C. § 1361 (1988), inapplicable beyond that territory which Congress clearly intended to cover).

⁵⁷ See *FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1316 (D.C. Cir. 1980) (enforcing rule without proper jurisdiction violates international law and gives rise to claim by affected state); *Nahas*, 738 F.2d at 494 (Brazil formally protested service of process as significant intrusion on Brazilian sovereignty); Frank J. Priol, *U.N. Votes to Urge U.S. to Dismantle Embargo on Cuba*, N.Y. TIMES, Nov. 25, 1992, at A1 (American allies in United Nations voted against United States to signal anger at new American law that extends U.S. jurisdiction beyond boundaries of United States to cover foreign subsidiaries of U.S. companies).

⁵⁸ *Compagnie De Saint-Gobain*, 636 F.2d at 1316.

⁵⁹ See Thomas J. Lueck, *Trade Pact with Mexico Expected to Have Mixed Impact on Employers*, N.Y. TIMES, Oct. 13, 1992, at B5 (New York garment industry declined as companies moved to other nations); Peter T. Kilborn, *WORKING NIGHTS: A Special Report; Lives Upside Down to Help a World Go Round*, N.Y. TIMES, May 16, 1992, at A1 (growth in shift work, part-time and temporary jobs, result of labor force that has to accommodate round-the-clock global economy); Jonathan P. Hicks, *Few Strikers Return to Their Jobs as Caterpillar's Deadline Passes*, N.Y. TIMES, Apr. 7, 1992, at A1 (pattern bargaining is outdated concept that makes no sense in global economy).

Extending the reach of U.S. labor law, however, would not solve the problems that emerge as economic actors find themselves, more and more, performing on an international stage. The rapidly expanding flow of the "factors of production" between countries, effectively renders national borders moot for economic purposes.⁶⁰ In seeking to establish a single continental market, the North American Free Trade Agreement ("NAFTA")⁶¹ creates the potential for labor conflicts that transcend national boundaries.⁶² While the psychological barriers that separate workers in different countries may diminish, disparate treatment will persist due to the differences between bodies of governing labor law.⁶³ At the very least, workers will find it easier to compare labor conditions, thus planting the seeds of dissatisfaction.⁶⁴ Likewise, the lingering framework of discrete legal systems over labor relations will frustrate corporations, who increasingly are shedding national allegiances and assuming multinational characteristics.⁶⁵

The reasons for enacting § 301(a) anticipate problems likely to arise from the tension between these discrete national systems of labor relations coexisting and a continent-wide economy. Congress enacted the LMRA to minimize disruption of national commerce resulting from the evolution of a patchwork of inconsistent state rules governing labor relations.⁶⁶ Most likely, pressure will mount from both employers and employees to establish uniformity and predictability in industrial relations across the continent and possibly the globe. Even against the backdrop of a continent-wide economy, however, the reasons underpinning the *Pico* court's concern

⁶⁰ See ROBERT B. REICH, *THE WORK OF NATIONS* 8 (1991).

⁶¹ Keith Bradsher, *President and Congress Square Off on the North American Trade Accord*, N.Y. TIMES, Sept. 9, 1992, at A1. Announced on August 12, 1992, the agreement "would eventually eliminate customs duties and most other restrictions on the sale of goods and services across . . . borders." *Id.* The leaders of the three nations signed NAFTA on October 7, 1992. Gerald F. Seib, *North American Leaders Initial Free-Trade Pact*, WALL ST. J., Oct. 8, 1992, at A2.

⁶² See Dennis Farney, *Even U.S. Politics Are Being Reshaped by a Global Economy*, WALL ST. J., Oct. 28, 1992, at A1, A12.

⁶³ See Farney, *supra* note 62, at A12 (global market undermining nation-state as socially integrating force).

⁶⁴ See Henry Kamm, *Glasnost Debate Divides East Germany's Officials*, N.Y. TIMES, Mar. 8, 1989, at A6 (80-90% of East German population influenced by Western television).

⁶⁵ REICH, *supra* note 60, at 8, 110.

⁶⁶ See *Lucas Flour*, 369 U.S. at 103-04, 49 L.R.R.M. at 2721 (1962) (uniformity necessary to eliminate "disruptive influence" of two systems of law governing CBAs); *Retail Clerks*, 369 U.S. at 27, 49 L.R.R.M. at 2674 (minimize disruption of interstate commerce by ending inconsistencies between jurisdictions).

for political borders cannot be dispelled so easily. Hence, the likely solution to unpredictable and inconsistent labor laws will probably be hammered out among nations through more traditional international law mechanisms rather than the expansion of U.S. labor law beyond areas of predominant U.S. concern.

In conclusion, the Second Circuit held, in *Labor Union of Pico Korea v. Pico Products, Ltd.*, that, lacking any clear expression of congressional intent, § 301(a) of the LMRA did not extend federal labor law over the CBA dispute between the Union and Pico Products.⁶⁷ Emphasizing its "essentially foreign" nature, the court determined that the dispute's tenuous connection to U.S. labor conditions placed it outside the intended parameters of § 301(a).⁶⁸ In its reasoning, the court relied on analogous precedents and a general policy presumption against extraterritorial application of U.S. law.⁶⁹ Thus, the *Pico* decision confined the scope of § 301(a) of the LMRA, and federal labor law, to primarily domestic labor disputes.⁷⁰

III. NATIONAL LABOR RELATIONS BOARD'S SCOPE OF AUTHORITY

A. **Demanding Rationality in NLRB Deference to Pre-Arbitration Settlements: Plumbers and Pipefitters Local 520 v. NLRB*¹

The National Labor Relations Act ("NLRA"), passed by Congress in 1935, encourages the voluntary settlement of labor disputes by private parties.² The intent of Congress was to promote the integrity of the collective bargaining process through private dispute resolutions such as pre-arbitration settlements.³ The authority of the National Labor Relations Board ("NLRB" or "Board") to choose to defer to such private dispute resolutions furthers this goal.⁴

⁶⁷ See *Pico*, 968 F.2d at 195-96, 140 L.R.R.M. at 2679.

⁶⁸ See *id.* at 195, 140 L.R.R.M. at 2699.

⁶⁹ *Id.* at 194-95, 140 L.R.R.M. at 2699-700.

⁷⁰ See *id.* at 195, 140 L.R.R.M. at 2700.

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¹ 955 F.2d 744, 139 L.R.R.M. 2457 (D.C. Cir. 1992).

² See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 704, 112 L.R.R.M. 3265, 3269 (1983); *Alpha Beta Co.*, 273 N.L.R.B. 1546, 1547, 118 L.R.R.M. 1202, 1203, (1985), *pet. denied sub nom. Mahon v. NLRB*, 808 F.2d 1342, 124 L.R.R.M. 2762 (9th Cir. 1987); *Spielburg Mfg. Co. and Harold Gruenberg*, 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955).

³ *Spielburg*, 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153.

⁴ See *Local 520*, 955 F.2d at 745, 139 L.R.R.M. at 2458; *Spielburg*, 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153.

In the 1955 case of *Spielburg Manufacturing Co. and Harold Gruenberg*, the NLRB established that the Board is not bound by arbitration awards made under a collective bargaining contract.⁵ Furthermore, the Board held in *Spielburg* that the NLRB can exercise jurisdiction in unfair labor practice cases if the Board decides that interference in the private dispute resolution process is necessary to protect public rights under the NLRA.⁶ In *Spielburg*, the NLRB delineated the criteria for when it is appropriate to defer to an arbitration award, and dismiss a concomitant statutory claim, such as an unfair labor practice claim.⁷ Under the *Spielburg* standard, deferral is appropriate if (1) the arbitration proceedings appear to have been fair and regular; (2) all parties agreed to be bound; and (3) the decision reached was not "clearly repugnant" to the purposes and policies of the NLRA.⁸

The Board later revised this doctrine in *Olin Corp. and Local 8-77*, refining the third criterion, which prohibits a result clearly repugnant to the NLRA, and adding a fourth criterion.⁹ In revising the third criterion, the Board stated that it would find an arbitrator's decision was clearly repugnant to the NLRA if it was "palpably wrong."¹⁰ A decision is palpably wrong if no interpretation of the decision would be consistent with the NLRA.¹¹ In *Olin*, the Board established a fourth criterion that, in order for deference to be valid, the arbitrator must have considered the claim brought under the NLRA.¹² This criterion is satisfied when the contractual and statutory issues are factually parallel, and the decisionmaker is generally aware of the relevant facts.¹³

In 1986, the United States Court of Appeals for the District of Columbia remanded *Darr v. NLRB*, in which the Board had deferred to a grievance award providing reinstatement without back

⁵ 112 N.L.R.B. at 1081, 36 L.R.R.M. at 1153.

⁶ *Id.* at 1081-82, 36 L.R.R.M. at 1153 (citing *NLRB v. Walt Disney Prod.*, 146 F.2d 44, 48, 15 L.R.R.M. 691, 695 (9th Cir. 1944), *cert. denied*, 324 U.S. 877, 16 L.R.R.M. 918 (1945)).

⁷ *Id.* at 1082, 36 L.R.R.M. at 1153.

⁸ *Id.*

⁹ *Olin Corp. and Local 8-77*, Oil, Chem. and Atomic Workers Int'l Union, 268 N.L.R.B. 573, 574, 115 L.R.R.M. 1056, 1058 (1984). In *Olin*, the Board also revised its deferral doctrine by shifting the burden of proving defects in the arbitration process to the party opposing deferral. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See *id.*; *United States Postal Serv. and McCullough*, 300 N.L.R.B. No. 23, slip op. at 7 (Sept. 28, 1990).

pay, even though the Board would have awarded make-whole relief including back pay upon the same facts.¹⁴ The court stated that judicial review required the Board to articulate not only its general theory of deference, but also how it was applied in a particular case.¹⁵ In *Darr*, the court held that the Board had failed to explain its theoretical basis for deferring under the third criterion that the decision not be clearly repugnant to the NLRA, when the Board itself would have ordered a substantially different award under the NLRA.¹⁶ In a 1990 case, *United States Postal Service and McCullough*, the Board clarified its approach, stating that it does not require make-whole relief in settlement agreements.¹⁷

In the 1987 case of *Alpha Beta Co.*, the *Spielburg/Olin* doctrine was expanded by the NLRB to apply to pre-arbitration grievance settlements.¹⁸ In *Alpha Beta*, the Board also established a "concessions test" for the third criterion, holding that a pre-arbitration settlement is not palpably wrong, provided both parties have made concessions during the pre-arbitration process.¹⁹ On appeal, the United States Court of Appeals for the District of Columbia stated that it would reverse the Board's decision to defer only if the Board had abused its discretion in developing and applying its standards for deferral.²⁰

During the *Survey* year, the United States Court of Appeals for the District of Columbia considered whether the NLRB may defer to a pre-arbitration grievance settlement reached by an employer and a union that disposed of a contract dispute between the employee and employer.²¹ In *Plumbers and Pipefitters Local Union No.*

¹⁴ 801 F.2d 1404, 1405, 1407, 123 L.R.R.M. 2548, 2548, 2550 (D.C. Cir. 1986), *amended*, 123 L.R.R.M. 3051.

¹⁵ *Id.* at 1409, 123 L.R.R.M. at 2552.

¹⁶ *Id.* at 1407, 1408, 123 L.R.R.M. at 2550, 2551.

¹⁷ 300 N.L.R.B. No. 23, slip op. at 7.

¹⁸ *Alpha Beta*, 273 N.L.R.B. at 1547, 118 L.R.R.M. at 1203. "[T]he deferral principles apply equally to settlements arising from the parties' contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes [citation omitted]." *Id.*

¹⁹ *Id.* at 1547, 118 L.R.R.M. at 1204. The Board, however, has accepted the position that employee consent is not necessary for deferral to settlement agreements (as opposed to awards), provided the employee's designated bargaining representative consented. Upon such appointment, a union may bind an employee to a settlement and waive his or her statutory rights. See *McCullough*, 300 N.L.R.B. slip op. at 5-6 & n.10 (Board deferred to grievance settlement entered into by union and employer over employee's objection); *Mahon v. NLRB*, 808 F.2d 1342, 1345, 124 L.R.R.M. 2762, 2765 (9th Cir. 1987) (same).

²⁰ *Mahon*, 808 F.2d at 1346, 124 L.R.R.M. at 2765.

²¹ *Local 520*, 955 F.2d at 745, 139 L.R.R.M. at 2458.

520 v. NLRB, the court held that the Board's policy of deference constituted a permissible construction of the NLRA, and that the Board did not abuse its discretion by deferring to a pre-arbitration settlement, even though the grievant objected to the final result.²² The court, nonetheless, rebuked the Board for failing to present a coherent theory for the clearly repugnant criterion in its deference policy.²³ While the D.C. Circuit did not remand the case because it found that the four criteria validating deference were met, the court threatened to remand future cases if the NLRB failed to develop a theoretical underpinning for its current deferral policy.²⁴

In *Local 520, UE&C-Catalytic, Inc.* ("Catalytic") fired Garland Berry, a union steward of the petitioner, Plumbers and Pipefitters Local Union No. 520 ("Local 520"), for gross insubordination in connection with a threatened work stoppage.²⁵ Catalytic had been hired by the Philadelphia Electric Company ("PECO") to remove the large shock absorbers, called "snubbers," at a nuclear power facility.²⁶ The work was to be performed by Catalytic's pipefitters, who were members of Local 520.²⁷ Because of PECO's past dissatisfaction with Catalytic's pipefitters, PECO awarded the contract for the repair of the snubbers to another contractor.²⁸ Local 520 objected to PECO's decision not to award the full removal and repair contract to Catalytic.²⁹

Catalytic management informed Berry, Local 520's union steward, that he and the seven other pipefitters assigned to the snubber removal job were to split the work shifts, with four working the usual day shift and four working the second shift.³⁰ Local 520's business manager advised Berry to tell the seven other pipefitters that Local 520 objected.³¹ Berry told the other pipefitters to report only for the usual day shift.³² When one of the workers asked Berry if he should ignore the foreman's instructions, Berry stated that the union's instruction should be obeyed.³³

²² *Id.* at 746, 753, 139 L.R.R.M. at 2458, 2462.

²³ *See id.* at 755, 139 L.R.R.M. at 2466.

²⁴ *Id.* at 757, 139 L.R.R.M. at 2467.

²⁵ *Id.* at 745-46, 139 L.R.R.M. at 2458.

²⁶ *Local 520*, 955 F.2d at 747, 139 L.R.R.M. at 2459.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Local 520*, 955 F.2d at 747, 139 L.R.R.M. at 2459.

³² *Id.*

³³ *Id.*

Upon learning of Berry's actions, the Labor Relations Manager for Catalytic contacted Local 520's international union, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("United Association").³⁴ Based on Catalytic's promise to hold a meeting to discuss the dispute over the snubber repair job, the United Association representative agreed to staff both shifts.³⁵ The affected pipefitters were notified, they reported for work as directed, and thus no work stoppage occurred.³⁶ The meeting regarding the snubber dispute was held, but the discussion focused on Berry, who was accused of threatening a welding inspector and of being a troublemaker.³⁷ Although it was proved that Berry did not threaten the inspector, Catalytic fired him for gross insubordination based on his instruction to the pipefitters to ignore management's directions regarding the split shifts.³⁸

Local 520 filed both an unfair labor practice claim as well as a grievance under its collective bargaining agreement with Catalytic, the General President's Project Management Agreement ("GPPMA").³⁹ The GPPMA provided for a four-step settlement process for disputes arising under the contract.⁴⁰ Step one consisted of a meeting between the employee and the supervisor.⁴¹ If no resolution was reached at step one, step two consisted of a meeting between a local union representative, an international union representative and the employer's labor relations manager.⁴² At step three, the employer and international union representatives could present oral and written testimony to a grievance board consisting of international union representatives.⁴³ If the parties and the board did not reach an agreement, either the employer or the international union could invoke step four: binding arbitration.⁴⁴

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Local 520*, 955 F.2d at 747, 139 L.R.R.M. at 2459.

³⁷ *Id.*, 139 L.R.R.M. at 2459-60.

³⁸ *Id.*

³⁹ *Id.* at 747-48, 139 L.R.R.M. at 2460. The GPPMA is negotiated on a nationwide basis and contains a no-strike provision prohibiting work stoppages by the covered unions and employees. *Id.* at 746-47, 139 L.R.R.M. at 2459. It also contains a management rights clause that authorizes management to discharge or discipline employees for proper cause. *Id.* at 747, 139 L.R.R.M. at 2459.

⁴⁰ *Id.* at 748, 139 L.R.R.M. at 2460.

⁴¹ *Local 520*, 955 F.2d at 748, 139 L.R.R.M. at 2460.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

After reaching no resolution at steps one and two, United Association invoked step three.⁴⁵ A board of international union representatives reviewed the grievance.⁴⁶ Berry and Local 520 representatives were not present, but a United Association representative, who had records of the prior meetings, presented oral and written statements of the union's position.⁴⁷ The grievance board's position was that Berry should be rehired without back pay.⁴⁸ United Association and Catalytic management accepted this conclusion, making the decision final under the contract.⁴⁹

Local 520 objected to the decision, believing Berry should be reinstated, as opposed to rehired, and should receive back pay.⁵⁰ Local 520 requested that United Association invoke step four, but United Association refused.⁵¹

More than a year after the grievance decision, a hearing was held before an Administrative Law Judge ("ALJ") on the unfair labor practice claim.⁵² The ALJ declined to defer to the result of the grievance board on the grounds that Berry and Local 520 objected to the decision.⁵³ The ALJ found that Berry should be reinstated with back pay.⁵⁴ The NLRB subsequently reversed the ALJ, stating that deferral was appropriate, and the local union appealed to the Court of Appeals for the District of Columbia.⁵⁵

In an opinion written by Judge Edwards, the court's discussion of the validity of the Board's decision was divided into three parts.⁵⁶ First, the court discussed whether the policy of deference is a permissible construction of the NLRA.⁵⁷ Second, the court discussed whether the Board had abused its discretion in deferring in this case.⁵⁸ Finally, the court discussed how the Board's current policy lacks a theoretical basis.⁵⁹

⁴⁵ *Id.*

⁴⁶ *Local 520*, 955 F.2d at 748, 139 L.R.R.M. at 2460.

⁴⁷ *Id.*

⁴⁸ *Id.* at 749, 139 L.R.R.M. at 2460.

⁴⁹ *Id.*, 139 L.R.R.M. at 2461.

⁵⁰ *Id.*; Catalytic, Inc. and Plumbers & Pipefitters Local Union No. 520, 301 N.L.R.B. No. 44, slip op. at 6 (Jan. 28, 1991).

⁵¹ *Local 520*, 955 F.2d at 749, 139 L.R.R.M. at 2461.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 749-50, 139 L.R.R.M. at 2461-62.

⁵⁶ *Local 520*, 955 F.2d at 750-57, 139 L.R.R.M. at 2462-67.

⁵⁷ *Id.* at 750-52, 139 L.R.R.M. at 2462-64.

⁵⁸ *Id.* at 752-55, 139 L.R.R.M. at 2464-66.

⁵⁹ *Id.* at 755-57, 139 L.R.R.M. at 2466-67. The court noted that the following issues,

Judge Edwards determined that the Board's policy of deference to grievance settlements was plainly consistent with the NLRA.⁶⁰ Noting that an employee's statutory right is waived by agreement to a grievance process under a collective bargaining contract, the court found no facts to indicate that deference to grievance settlements was invalid under the NLRA.⁶¹ The court stated that such deference effects a primary goal of the national labor policy by promoting the integrity of the collective bargaining process.⁶²

The court further explained that the Board did not abuse its discretion in deferring in this case because the four deference criteria were satisfied.⁶³ Under the first criterion, Local 520 contended that the process was not fair and regular because Berry was not permitted to be present and the decision-making body issued no written decision.⁶⁴ The court disagreed, reasoning that fairness required only the presence of the parties to the original contract, as they bore the obligation of carrying out the grievance process and, further, that the United Association representative was fully apprised of Berry's position.⁶⁵ The court also concluded that the lack of a written opinion by the decision-making body was not dispositive.⁶⁶

The court dismissed Local 520's contention that the second criterion was not met, and held that all parties had agreed to be bound by the settlement agreement.⁶⁷ The court concluded that

central to some cases, were not in dispute: Berry's termination was an issue covered by the collective bargaining contract, and his right to engage in a strike or work stoppage was waivable under the contract or through grievance procedures. *Id.* at 750-51, 139 L.R.R.M. at 2462. The court stated that rights can be appropriately waived through the grievance process because such procedures form "an integral part of the collective bargaining process." *Id.* at 751 n.6, 139 L.R.R.M. at 2463 n.6.

⁶⁰ *Id.* at 752, 139 L.R.R.M. at 2463.

⁶¹ *Local 520*, 955 F.2d at 752, 139 L.R.R.M. at 2463. Although Berry's right to engage in work stoppage was within the class of "waivable" rights, the court discussed the waivability doctrine, clarifying the appropriateness of waiver by contract. *See id.* at 751, 139 L.R.R.M. at 2462-63 (citing *Metropolitan*, 460 U.S. at 705-07, 112 L.R.R.M. at 3270-71; *American Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 832, 114 L.R.R.M. 3513, 3515-16 (D.C. Cir. 1983)).

⁶² *Id.* at 752, 139 L.R.R.M. at 2463-64.

⁶³ *Id.* at 755, 139 L.R.R.M. at 2466.

⁶⁴ *Id.* at 753, 139 L.R.R.M. at 2464.

⁶⁵ *Id.*

⁶⁶ *Local 520*, 955 F.2d at 753, 139 L.R.R.M. at 2464 (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 46 L.R.R.M. 2423, 2425 (1960) (arbitrator not obligated to give reasons for award); *Bloom v. NLRB*, 603 F.2d 1015, 1020, 102 L.R.R.M. 2082, 2086 (D.C. Cir. 1979) (deference appropriate despite fact that decision not set out in detailed written form)).

⁶⁷ *Id.* at 753-54, 139 L.R.R.M. at 2464-65.

United Association was empowered to bind Berry under the collective bargaining contract.⁶⁸ The contract designated the international union as the bargaining representative and signatory to the contract.⁶⁹

The court also found that the settlement result, directing Catalytic to rehire Berry without back pay, was not repugnant to the NLRA.⁷⁰ Local 520 argued most strenuously that this third criterion had not been met, on the basis that Berry was not made whole by the final settlement and that the agreement was therefore palpably wrong.⁷¹ The court disagreed, however, and concluded that the decision was not clearly repugnant to the NLRA under the palpably wrong test because Berry's statutory right to encourage a work stoppage was waived under the collective bargaining contract's no-strike and termination for proper cause provisions.⁷² The court reasoned that Berry and Local 520 retained no separate statutory claim for an unfair labor practice because the statutory right was "merged" into the contract provisions.⁷³ In support of its conclusion, the court stated that it would be a fallacy to find a separate statutory issue when the matter was covered by the collective bargaining contract.⁷⁴ Furthermore, the court reasoned that less than make-whole relief had been granted in previous Board decisions.⁷⁵

Finally, the court found that the fourth criterion, requiring that the parties to the grievance process fully consider the statutory issue, was satisfied.⁷⁶ Local 520 argued that the contractual claim and the statutory claim were separate issues, and that United Association had specifically disclaimed any interest in resolving the statutory issue.⁷⁷ Local 520 contended that this lack of interest had prevented the parties from fully considering the unfair labor practice issue.⁷⁸ Initially reasoning that this point was moot because Berry had

⁶⁸ *Id.* (citing *Metropolitan*, 460 U.S. at 705-07, 112 L.R.R.M. at 3270-71; *Mahon*, 808 F.2d at 1345, 124 L.R.R.M. at 2765; *Energy Coop. and Julius Sako*, 290 N.L.R.B. 635, 637, 129 L.R.R.M. 1256, 1258 (1988)).

⁶⁹ *Id.*

⁷⁰ *Id.* at 754, 139 L.R.R.M. at 2465.

⁷¹ *Local 520*, 955 F.2d at 754, 139 L.R.R.M. at 2465.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* (quoting *American Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 832, 114 L.R.R.M. 3513, 1315-16 (D.C. Cir. 1983)).

⁷⁵ *Id.* (citing *Alpha Beta*, 273 N.L.R.B. at 1547, 118 L.R.R.M. at 1203; *McCullough*, 300 N.L.R.B. No. 23, slip op. at 4, 7).

⁷⁶ *Local 520*, 955 F.2d at 755, 139 L.R.R.M. at 2465.

⁷⁷ *Id.* at 755, 139 L.R.R.M. at 2466.

⁷⁸ *See id.*

waived his statutory right, the court addressed whether the statutory claim had been adequately "considered" by the grievance board.⁷⁹

The court found that the "considered" test was satisfied because (1) the contractual and statutory issues were factually parallel, and (2) all parties were generally aware of the facts relevant to resolving the unfair labor practice issue because Berry's defense to each was the same.⁸⁰ The court rejected as "simply wrong" Local 520's contention that United Association had disclaimed interest in resolving the statutory issue.⁸¹ The court relied on the record, which indicated that the international union had pursued the issue to the third step of the grievance process.⁸²

The final part of the court's discussion criticized the Board for failing to provide a coherent theory for deferral in this case.⁸³ Noting that this case did not require remand because the facts satisfied the *Spielburg/Olin* test as developed in prior cases, the court expressed particular concern regarding the third criterion, which required that a decision not be clearly repugnant to the NLRA.⁸⁴ In deciding whether the result of the grievance process was clearly repugnant to the NLRA, the Board had reviewed the facts in light of the concessions test for whether a decision is palpably wrong.⁸⁵ The Board found that both sides had made concessions during the grievance process, and thereby concluded that the result was not clearly repugnant to the NLRA.⁸⁶

The appeals court found unpersuasive the Board's rationale for the NLRB's use of the concessions test.⁸⁷ Although the facts clearly met the criteria established under the contractual waiver doctrine, because the right at issue was waivable, the court objected to the Board's use of the concessions test because it appeared to give the Board discretion that precedent did not allow.⁸⁸ The court found no basis for the Board to choose *not* to defer to a settlement

⁷⁹ *Id.*, 139 L.R.R.M. at 2465-66. See also *McCullough*, 300 N.L.R.B. No. 23, slip op. at 7; *Bloom v. NLRB*, 603 F.2d 1015, 1020-21, 102 L.R.R.M. 2082, 2086-87 (D.C. Cir. 1979).

⁸⁰ *Local 520*, 955 F.2d at 755, 139 L.R.R.M. at 2465-66.

⁸¹ *Id.* at 755, 139 L.R.R.M. at 2466.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 756, 139 L.R.R.M. at 2466.

⁸⁵ See *Local 520*, 955 F.2d at 756, 139 L.R.R.M. at 2466.

⁸⁶ *Id.* at 756, 139 L.R.R.M. at 2467. See also *Alpha Beta*, 273 N.L.R.B. at 1547, 118 L.R.R.M. at 1202 (1985) (discussing the "concessions test"); *McCullough*, 300 N.L.R.B. No. 23, slip op. at 7 (settlement not palpably wrong because parties compromised).

⁸⁷ *Local 520*, 955 F.2d at 756, 139 L.R.R.M. at 2466.

⁸⁸ See *id.* at 756, 139 L.R.R.M. at 2467.

involving a waivable right, and hence rejected the use of the concessions test as a "veritable recipe for arbitrary action."⁸⁹ The court reprimanded the Board for using a test designed to permit the Board to defer when it approved of a settlement result, but to intervene when it did not.⁹⁰ The court threatened reversal of "less clear-cut" cases, which would not so clearly fulfill the *Spielburg/Olin* criteria, if the Board did not clarify its standard under the clearly repugnant criterion.⁹¹

Although the court's reprimand of the NLRB for failing to present a coherent standard for its clearly repugnant criteria approaches the level of a judicial directive to the Board, its failure to remand the current case evinces an inconsistency at the appellate level. In 1986, the same court remanded *Darr v. NLRB* for a similar failure to delineate the elements of the deferral doctrine.⁹² The facts in *Darr* also arguably fulfilled the *Spielburg/Olin* deferral criteria.⁹³ The court stated in *Local 520* that the Board's deferral in *Darr* "might have been justified" under the contractual waiver doctrine, but that remand was appropriate because the Board had "failed clearly to espouse that, or any other, theory of deference."⁹⁴

The court began its decision in *Local 520* by stating that remand was not necessary because "deference to the settlement agreement was clearly permissible on the record."⁹⁵ Deferral was also arguably permissible in *Darr* because the right at issue was waivable.⁹⁶ The court, however, refused to perform a similar assessment of the facts in *Darr* to determine whether deferral was ultimately permissible and chose instead to remand the case for the Board's further consideration.⁹⁷

In *Local 520* the court stated that it may reverse the Board's decision to grant deference in a particular case *only for an abuse of discretion*.⁹⁸ Although the court held in this case that deferral to

⁸⁹ *Id.* at 756-57, 139 L.R.R.M. at 2467. Under the contractual waiver doctrine, the Board is prohibited from deferring to settlements affecting non-waivable statutory rights. *Id.* at 756, 139 L.R.R.M. at 2467. Non-waivable rights are identified as those that constitute public rights. *See Darr*, 801 F.2d at 1406, 123 L.R.R.M. at 2551.

⁹⁰ *Local 520*, 955 F.2d at 756-57, 139 L.R.R.M. at 2467.

⁹¹ *Id.* at 757, 139 L.R.R.M. at 2467.

⁹² *See Darr*, 801 F.2d at 1408-09, 123 L.R.R.M. at 2550-52.

⁹³ *See id.*

⁹⁴ 955 F.2d at 755-56, 139 L.R.R.M. at 2466.

⁹⁵ *Id.* at 746, 139 L.R.R.M. at 2459.

⁹⁶ *See Darr*, 801 F.2d at 1408, 123 L.R.R.M. at 2551.

⁹⁷ *See id.* at 1409, 123 L.R.R.M. at 2552.

⁹⁸ *Local 520*, 955 F.2d at 750, 139 L.R.R.M. at 2462 (citing *Bakery, Confectionery &*

settlements in cases where the facts may be construed to meet the four criteria is *not* an abuse of discretion by the Board, the same court reversed *Darr* on facts that arguably satisfied the same criteria.⁹⁹ Furthermore, the court did not believe that the doctrinal problems identified in *Darr* had been resolved in *Local 520*, suggesting that the rationale for remand of *Local 520* was the same as that in *Darr*.¹⁰⁰

In reprimanding the Board for theoretical inconsistency in its deferral doctrine, the court's own application of a doctrine for deferral to Board decisions is inconsistent. In attempting to provide clearer guidance to the Board regarding what must be included in Board opinions in grievance deference cases, the court has undercut itself by presenting an inconsistent deferral doctrine of its own. This inconsistency leaves the Board and future litigants without a clear indication of the standards to be applied upon appeal of NLRB decisions.

In *Local 520*, the court held that the deferral doctrine constituted a permissible construction of the NLRA and that the Board did not abuse its discretion in deferring to a grievance settlement.¹⁰¹ The court appropriately criticized the Board's reasoning for its inconsistency with the standard evinced in prior cases.¹⁰² Upon review, the court found the facts of the case met the necessary criteria and that remand was therefore unnecessary.¹⁰³ In so deciding, the court itself evinced an inconsistent doctrine of deferral to Board decisions and failed to provide the clarity it demands of the Board.

*B. *Reinstating Union Contracts in Effect Under Company's Prior Owner—Remedial or Punitive?: U.S. Marine Corp. v. NLRB.*¹

Under section 8(a)(5) of the National Labor Relations Act ("NLRA"), it is an unfair labor practice for an employer to refuse

Tobacco Workers Int'l Union 25 v. NLRB, 730 F.2d 812, 813, 115 L.R.R.M. 3390, 3391 (D.C. Cir. 1984)).

⁹⁹ See *id.* at 755, 139 L.R.R.M. at 2466; *Darr*, 801 F.2d at 1408-09, 123 L.R.R.M. at 2550-52.

¹⁰⁰ See *Local 520*, 955 F.2d at 756, 139 L.R.R.M. at 2466.

¹⁰¹ *Id.* at 746, 139 L.R.R.M. at 2458.

¹⁰² *Id.* at 755-57, 139 L.R.R.M. at 2466-67.

¹⁰³ *Id.* at 757, 139 L.R.R.M. at 2467.

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¹ 944 F.2d 1305, 138 L.R.R.M. 2361 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1474, 139 L.R.R.M. 2808 (1992).

to bargain collectively with the representatives of its employees.² The National Labor Relations Board ("NLRB" or "Board") has established, and the United States Supreme Court has upheld, the rule that this bargaining obligation extends to a purchaser of a unionized company, if that purchaser is deemed to be a "successor" employer.³ Furthermore, such a successor employer violates section 8(a)(3) of the NLRA if it makes discriminatory hiring decisions and refuses to employ a predecessor's employees in order to avoid this obligation.⁴ Thus, when a violation of the NLRA occurs, the Board may impose a proper remedial remedy to restore the situation to what it would have been absent the violation.⁵ The Board, however, may not impose a remedy that is punitive in nature.⁶

In 1972, in *NLRB v. Burns International Security Services*, the United States Supreme Court first addressed the issue of a successor's obligation to bargain with a predecessor's union.⁷ The *Burns* Court sustained the Board's order that the successor company bargain with the predecessor's union, where a majority of the employees hired by the successor were employees of the predecessor and had been represented by a certified bargaining agent.⁸ The Court, however, refused to enforce the Board's order that the successor honor the substantive terms of the collective bargaining agreement that the union had negotiated with the predecessor.⁹ In making this

² 29 U.S.C. § 158(a)(5) (1988).

³ See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41, 125 L.R.R.M. 2441, 2447 (1987); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 278-79, 80 L.R.R.M. 2225, 2227 (1972). In determining successorship and whether a purchasing employer is obligated to bargain with the predecessor's union, the Board and the reviewing court consider whether the purchaser continues the predecessor's business in substantially the same manner and retains enough employees of the predecessor to comprise a majority of its own workforce. See *Fall River*, 482 U.S. at 41, 125 L.R.R.M. at 2446; *Burns*, 406 U.S. at 281, 80 L.R.R.M. at 2228.

⁴ See *Fall River*, 482 U.S. at 40, 125 L.R.R.M. at 2446; *Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees*, 417 U.S. 249, 262 n.8, 86 L.R.R.M. 2449, 2454 n.8 (1974); *Burns*, 406 U.S. at 280-81 n.5, 280-81, 80 L.R.R.M. at 2228 n.5, 2228.

⁵ See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *Systems Mgmt., Inc. v. NLRB*, 901 F.2d 297, 306-08, 134 L.R.R.M. 2001, 2008-09 (3d Cir. 1990), *enforcing in relevant part*, *Systems Mgmt., Inc. v. NLRB*, 292 N.L.R.B. 323 (1987).

⁶ See *NLRB v. Strong*, 393 U.S. 357, 359, 70 L.R.R.M. 2100, 2100-01 (1969). Section 10(c) of the NLRA empowers the Board, when adjudicating an unfair labor practice, to issue "an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay," as will effectuate the policies of the NLRA. 29 U.S.C. § 160(c).

⁷ *Burns*, 406 U.S. at 274, 277, 80 L.R.R.M. at 2225-27.

⁸ *Id.* at 281, 80 L.R.R.M. at 2228.

⁹ *Id.* at 281-82, 80 L.R.R.M. at 2228-29.

determination, the Court reasoned that the legislative history of the labor laws and the explicit language in section 8(d) of the NLRA made such an order inconsistent with the policies behind the NLRA, among them the protection of freedom of contract.¹⁰

Thus, under *Burns*, although a successor may be required to bargain with the predecessor's union, it is not bound by the predecessor's collective bargaining agreement.¹¹ The *Burns* Court, however, also carved out an exception as to when a successor may not be allowed to set these initial terms and conditions.¹² The Court noted that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."¹³

The interpretation of this "perfectly clear" exception is important in determining whether the Board has imposed a proper remedial remedy because such a remedy must restore the situation, as nearly as possible, to what it would have been absent a successor's unfair labor practice.¹⁴ Thus, while a status quo ante remedy is proper, the Board may not impose a remedy that is punitive in nature.¹⁵ In interpreting this perfectly clear exception, however, some circuits have concluded that an order that requires a successor to accept its predecessor's agreement goes beyond remediation, because the successor's only obligation is to bargain with the predecessor's employees even when it is perfectly clear that substantially all of them will be rehired.¹⁶

During the *Survey* year, in *U.S. Marine Corp. v. NLRB*, the United States Court of Appeals for the Seventh Circuit held that where a successor employer illegally refused to bargain with a predecessor's union, the Board's order to reinstate the contract in effect under the predecessor was a proper status quo ante remedy.¹⁷ The *U.S. Marine* court concluded that this was a proper remedy because, under the perfectly clear exception delineated in *Burns*, a successor

¹⁰ *Id.* at 282-84, 80 L.R.R.M. at 2229.

¹¹ *Id.* at 284, 80 L.R.R.M. at 2229.

¹² *Burns*, 406 U.S. at 294-95, 80 L.R.R.M. at 2233-34.

¹³ *Id.*

¹⁴ See, e.g., *Phelps*, 313 U.S. at 194; *Systems Mgmt.*, 901 F.2d at 306-08, 134 L.R.R.M. at 2008-09.

¹⁵ See *Strong*, 393 U.S. at 359, 70 L.R.R.M. at 2100-01.

¹⁶ See *Kallmann v. NLRB*, 640 F.2d 1094, 1102-03, 107 L.R.R.M. 2011, 2017-18 (9th Cir. 1981); *Saks & Co. v. NLRB*, 634 F.2d 681, 687-88, 105 L.R.R.M. 3274, 3278-79 (2d Cir. 1980).

¹⁷ 944 F.2d 1305, 138 L.R.R.M. 2361, 2375 (7th Cir. 1991).

that would have retained all or substantially all of the predecessor's employees, absent its discriminatory hiring practice, "loses the right to set the initial terms and conditions of employment and violates the Act if it unilaterally alters the predecessor's terms without first consulting the union."¹⁸ Consequently, after *U.S. Marine*, there is disagreement among the circuits as to whether a successor employer may still set the initial terms and conditions of employment where all or substantially all of a predecessor's employees would have been hired by a successor but for the successor's unfair labor practice.¹⁹

U.S. Marine involved the rights and responsibilities of U.S. Marine Corporation as a result of its purchase of Chrysler Marine Corporation.²⁰ Prior to the purchase, the International Union, Allied Industrial Workers of America, AFL-CIO, and Local 879 ("Union") represented Chrysler's production and maintenance employees.²¹ The most recent collective bargaining agreement between the Union and Chrysler was in effect from July 1, 1983, to June 30, 1984.²² During the course of negotiations, U.S. Marine made clear that it was only going to hire the most qualified applicants, that it anticipated hiring at least eighty-five percent of the former Chrysler employees, that it would not recognize the Union, and that it planned to hire employees under its own wage plan and working conditions and thus would not observe the terms set under the collective bargaining agreement with Chrysler.²³

Based on U.S. Marine's stipulations regarding its anticipated hiring process, the Union sought to enjoin the sale.²⁴ The United States District Court for the Eastern District of Wisconsin initially granted a preliminary injunction; the United States Court of Appeals for the Seventh Circuit, however, granted a stay and eventually reversed the injunction.²⁵ After completion of the sale to U.S. Marine, Chrysler laid off its entire workforce of 262 production and maintenance employees.²⁶

¹⁸ *Id.* at 1320, 138 L.R.R.M. at 2372.

¹⁹ Compare *U.S. Marine*, 944 F.2d at 1322, 138 L.R.R.M. at 2375 (restoration of previously existing employment terms is an appropriate remedy) with *Kallman*, 640 F.2d at 1103, 107 L.R.R.M. at 2018 (successor employer has no obligation to accept predecessor's labor agreement); *Saks*, 634 F.2d at 687, 105 L.R.R.M. at 3278 (same).

²⁰ *U.S. Marine*, 944 F.2d at 1308, 138 L.R.R.M. at 2362.

²¹ *Id.* at 1309, 138 L.R.R.M. at 2363.

²² *Id.* at 1309 n.3, 138 L.R.R.M. at 2363 n.3.

²³ *U.S. Marine*, 944 F.2d at 1309, 138 L.R.R.M. at 2363.

²⁴ *Id.*

²⁵ *Id.* at 1310, 138 L.R.R.M. at 2363.

²⁶ *Id.*

U.S. Marine wanted to reopen the plant as quickly as possible and therefore required a skilled labor force made up of employees who had experience in the operations of the plant.²⁷ Consequently, U.S. Marine began hiring and a week later, the plant was reopened with a staff of 219 workers, all of whom were former Chrysler employees.²⁸ During this time, U.S. Marine had projected that it would require 396 employees actually on the job by June 1984.²⁹ By January, U.S. Marine had hired all but 34 of the nearly 262 former Chrysler employees who applied for work.³⁰

Two days after the plant reopened and when 222 of the 231 U.S. Marine employees were former Chrysler workers, the Union requested to be recognized by the new management.³¹ U.S. Marine did not immediately respond to the request and subsequently modified its hiring projection figures from 396 to 460 workers required by June 1984.³² In February, the Union filed an unfair labor practice charge with the National Labor Relations Board alleging that U.S. Marine had unlawfully refused to bargain with it.³³ The Board sought a temporary injunction, and U.S. Marine contended that it was not required to recognize and bargain with the Union because it did not expect to retain its entire workforce until June 1984.³⁴ Additionally, U.S. Marine argued that because the entire workforce would consist of 460 employees, it had no legal obligation to recognize the Union because less than half of those employees would be former Chrysler employees.³⁵ The district court rejected U.S. Marine's arguments and granted a temporary injunction ordering U.S. Marine to recognize and bargain with the Union.³⁶

Pursuant to the district court's order, U.S. Marine began to recognize and bargain with the Union.³⁷ In October 1984, U.S. Marine presented a contract proposal to the Union and the Union rejected it.³⁸ At that point U.S. Marine declared that it was at an

²⁷ *Id.* at 1310, 138 L.R.R.M. at 2364.

²⁸ *U.S. Marine*, 944 F.2d at 1310, 138 L.R.R.M. at 2363-64.

²⁹ *Id.* at 1311, 138 L.R.R.M. at 2364.

³⁰ *Id.* at 1310, 138 L.R.R.M. at 2364.

³¹ *Id.* at 1311, 138 L.R.R.M. at 2364.

³² *Id.*

³³ *U.S. Marine*, 944 F.2d at 1311, 138 L.R.R.M. at 2364.

³⁴ *Id.* at 1311, 138 L.R.R.M. at 2364-65.

³⁵ *Id.* at 1311, 138 L.R.R.M. at 2365.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *U.S. Marine*, 944 F.2d at 1311, 138 L.R.R.M. at 2365.

impasse with the Union on several issues and, in January 1985, implemented the contract it had proposed in October.³⁹

Upon appeal to the United States Court of Appeals for the Seventh Circuit, the court was faced with two major issues.⁴⁰ First, U.S. Marine challenged the Board's conclusion that the company had violated the NLRA by making discriminatory hiring decisions when it refused to hire the thirty-four former Chrysler employees.⁴¹ Second, U.S. Marine challenged the Board's remedial order by requiring it to offer to hire the thirty-four former Chrysler employees with back pay and ordering that U.S. Marine reinstitute the terms and conditions of employment that were in effect under Chrysler.⁴² In addition, the court considered the Union's appeal that the remedial order did not include a visitorial clause allowing the Board to have access to U.S. Marine's records and statements and that it failed to award litigation expenses.⁴³

The Seventh Circuit upheld the Board's determination that U.S. Marine refused to hire the thirty-four employees to avoid having to bargain with the Union, thereby violating section 8(a)(3) of the NLRA.⁴⁴ In support of its decision, the court noted that there was substantial evidence to support the Board's conclusion that U.S. Marine acted with a discriminatory motive toward the Union,⁴⁵ and that the hiring process was designed to prevent Chrysler's employees from being hired as a majority, thereby avoiding being deemed a successor and having to bargain with the Union.⁴⁶ The court relied on the Board's finding that U.S. Marine falsely inflated the projected workforce figures in order to avoid the obligation to negotiate with the Union.⁴⁷ Thus, once the projection was set at 460 employees, U.S. Marine had to hire fewer than 231 former Chrysler employees to stay below the fifty-percent level and avoid incurring an obligation to bargain as a successor.⁴⁸

³⁹ *Id.* at 1311-12, 138 L.R.R.M. at 2365.

⁴⁰ *See id.* at 1315, 138 L.R.R.M. at 2368.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *U.S. Marine*, 944 F.2d at 1324, 1325, 138 L.R.R.M. at 2375, 2376.

⁴⁴ *Id.* at 1318, 138 L.R.R.M. at 2370.

⁴⁵ *Id.* at 1316, 138 L.R.R.M. at 2369. Section 10(e) of the NLRA stipulates, "On review, the Board's factual findings are 'conclusive' if they are supported by 'substantial evidence on the record as a whole.'" 29 U.S.C. § 160(e).

⁴⁶ *U.S. Marine*, 944 F.2d at 1318, 138 L.R.R.M. at 2370.

⁴⁷ *Id.* at 1317, 138 L.R.R.M. at 2369.

⁴⁸ *See id.* at 1318, 138 L.R.R.M. at 2370.

In addition, the court noted, there was substantial evidence supporting anti-union animus insofar as U.S. Marine made clear from the beginning that it would not deal with the Union.⁴⁹ Moreover, after the Union requested to be recognized, U.S. Marine's hiring continued, yet it declined to hire any of the thirty-four former Chrysler employees that were as qualified as those it had already hired.⁵⁰ Because there was sufficient evidence that U.S. Marine's actions were taken to avoid bargaining with the Union, the court upheld the Board's conclusion that U.S. Marine made discriminatory hiring decisions in violation of section 8(a)(3) of the NLRA.⁵¹

The *U.S. Marine* court also upheld the Board's "make whole" remedy to reinstate the terms and conditions of employment that were in effect under Chrysler.⁵² The court flatly rejected U.S. Marine's contention that such an order was improperly punitive.⁵³ The court reasoned that, under the perfectly clear exception set forth in *Burns*, a successor loses its right to set the initial terms and conditions of employment where all or substantially all of the predecessor's employees would have been hired had the successor not engaged in unlawful hiring discrimination.⁵⁴ Thus, where such an employer unilaterally alters the predecessor's terms before consulting the union, it violates the NLRA.⁵⁵ The court noted that had U.S. Marine not engaged in unlawful discriminatory hiring conduct, it would have hired substantially all of Chrysler's employees, rendering it obligated to bargain with the Union before setting the initial terms and conditions.⁵⁶ According to the court, reinstating the terms and conditions that were in effect under Chrysler restored the situation to what it would have been if U.S. Marine had not engaged in an unlawful labor practice and had permitted the bargaining process to get under way.⁵⁷

Furthermore, the court rejected U.S. Marine's argument that, under *Burns*, it was never perfectly clear that it intended to hire all

⁴⁹ *Id.* at 1316, 138 L.R.R.M. at 2369.

⁵⁰ *Id.* at 1317, 138 L.R.R.M. at 2370.

⁵¹ See *U.S. Marine*, 944 F.2d at 1319, 138 L.R.R.M. at 2371.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ *Id.* at 1320, 138 L.R.R.M. at 2372.

⁵⁵ *Id.*

⁵⁶ *U.S. Marine*, 944 F.2d at 1320, 138 L.R.R.M. at 2372.

⁵⁷ *Id.* at 1323, 138 L.R.R.M. at 2374.

of Chrysler's former employees.⁵⁸ The court, however, reasoned that it was U.S. Marine's unlawful conduct that created uncertainty as to whether substantially all of Chrysler's former employees would have been hired.⁵⁹ Because U.S. Marine may not benefit from its discriminatory conduct, the uncertainty must be resolved against it.⁶⁰ The court thus concluded that the order remedied violations of the NLRA and was not punitive.⁶¹

Judge Easterbrook, joined by four other judges, concurred in part and dissented in part to the court's opinion.⁶² Judge Easterbrook only disagreed with that part of the majority's opinion that enforced the Board's order to restore the terms and conditions of the contract in effect under Chrysler.⁶³ Judge Easterbrook argued that such a remedial order is, in actuality, punitive in nature and therefore not proper.⁶⁴ He reasoned that a bona fide sale of a business enables the successor to impose its own terms because such change may be the only way to revive the acquired business.⁶⁵ Furthermore, denying a successor the right to establish its own terms and conditions when it is likely it will hire substantially all the predecessor's employees would discourage successors from making generous offers to labor.⁶⁶ Judge Easterbrook argued further that when such a generous offer is made the predecessor's employees will want to be hired; because the NLRA forbids discrimination the successor will be forced to restore the preexisting contract once they are hired.⁶⁷ Alternatively, an unattractive offer will avoid the risk of having to reinstate the terms of a preexisting contract, but may also deprive the successor of the necessary skilled workers.⁶⁸

Judge Easterbrook relied on decisions in other circuits to further support his position.⁶⁹ He noted that these circuits have con-

⁵⁸ *Id.* at 1321, 138 L.R.R.M. at 2372-73.

⁵⁹ *Id.* at 1321, 138 L.R.R.M. at 2373.

⁶⁰ *Id.*

⁶¹ See *U.S. Marine*, 944 F.2d at 1322, 138 L.R.R.M. at 2374.

⁶² *Id.* at 1327, 138 L.R.R.M. at 2378 (Easterbrook, J., concurring in part, dissenting in part).

⁶³ *Id.* at 1328, 138 L.R.R.M. at 2378.

⁶⁴ See *id.*

⁶⁵ *Id.*

⁶⁶ *U.S. Marine*, 944 F.2d at 1328, 138 L.R.R.M. at 2378.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *id.* at 1328-29, 138 L.R.R.M. at 2379 (citing *Kallmann*, 640 F.2d at 1102-03, 107 L.R.R.M. at 2017-18; *Saks*, 634 F.2d at 687-88, 105 L.R.R.M. at 3278-79; *International Ass'n of Machinists v. NLRB*, 595 F.2d 664, 672-76, 98 L.R.R.M. 2787, 2792-95 (D.C. Cir. 1978); *NLRB v. Spruce Up Corp.*, 529 F.2d 516, 516, 90 L.R.R.M. 2525, 2525 (4th Cir. 1975)).

cluded that a successor may set its own terms and conditions whether or not it expects a substantial number of its predecessor's employees to be hired.⁷⁰ Judge Easterbrook reasoned from this conclusion that the perfectly clear exception in *Burns* only imposes a duty on the successor to "consult" with the Union before it sets the initial terms and conditions of employment.⁷¹ He noted that the duty to consult with the Union does not imply an obligation to accept the old terms of employment.⁷²

Judge Easterbrook determined that the remedy for discriminating against the thirty-four former Chrysler workers would be to hire them.⁷³ He noted that it would go beyond mere remediation to impose the prior terms under Chrysler because U.S. Marine would have had the right to set its own terms had it hired those employees initially.⁷⁴ Consequently, Judge Easterbrook concluded that because U.S. Marine violated its obligation as a successor to bargain once it expected a majority of its workers to come from Chrysler, the proper remedy is a bargaining order, not reinstatement of the contract that existed under the prior owner.⁷⁵

By enforcing the Board's order of reinstating the prior union contract, the *U.S. Marine* court has, for the first time, denied the right of a successor company to set its own initial terms and conditions of employment. The strength of the decision, however, is questionable and its reasoning is subject to criticism. First, in reaching its decision, the Seventh Circuit split six to five. What is more, the majority's interpretation of the perfectly clear exception in *Burns* is inconsistent with other circuits that have held that the exception does not prevent a successor from setting the initial terms and conditions of employment. Additionally, as Judge Easterbrook noted in his dissenting opinion, forfeiture of a successor's privilege to set initial terms and conditions of employment is punitive and contrary to the policies behind the NLRA, including the freedom of contract.

The court's decision is faulty because it seems to have misinterpreted *Burns* and upheld a remedy that was, in actuality, punitive in nature. In determining that the remedy imposed by the Board

⁷⁰ *Id.* at 1328, 138 L.R.R.M. at 2378 (Easterbrook, J., concurring in part, dissenting in part).

⁷¹ *U.S. Marine*, 944 F.2d at 1329, 138 L.R.R.M. at 2379.

⁷² *Id.*

⁷³ *See id.* at 1330, 138 L.R.R.M. at 2380.

⁷⁴ *Id.*

⁷⁵ *Id.*

was proper, the *U.S. Marine* court relied squarely on the perfectly clear exception in *Burns* and concluded that a successor loses its right to set initial terms when all or substantially all of a predecessor's employees would have been hired but for the successor's unlawful labor practice. The loss of such a right, however, is actually a penalty. A more accurate interpretation of the language and rationale in *Burns* is that the perfectly clear exception only imposes a bargaining obligation on the part of the successor—the interpretation adopted by Judge Easterbrook in his dissent and by other circuits. Thus, the obligation to bargain does not create an obligation to accept a predecessor's labor contract; rather it imposes a duty on the successor to consult with the union before it sets its own initial terms and conditions of employment. Therefore, just as other circuits hold, because a successor is entitled to implement new terms regardless of whether or not a majority of the predecessor's employees will be hired, these terms establish the situation that the Board is entitled to restore.

Not only is this interpretation of the perfectly clear exception in *Burns* consistent with the holdings in the other circuits after *Burns*, but it is also consistent with such policies as freedom of contract and the need to resuscitate ailing business. In his dissent, Judge Easterbrook noted that, when a company is acquired, change may be necessary and the only alternative to keeping the company from folding. A potential successor to such a company may only be willing to take over if it can make certain changes. Denying a successor the right to set its own terms and conditions may discourage acquisition or hinder the successor's ability to resuscitate the ailing company after acquisition. Thus, interpreting the perfectly clear exception as a bargaining obligation, as opposed to a denial of a successor's right to set terms when it engages in an unfair labor practice, achieves the goal of forcing the successor to consult with the union before setting these terms without improperly penalizing the successor or discouraging acquisition and revitalization of failing concerns.

In conclusion, in *U.S. Marine*, the United States Court of Appeals for the Seventh Circuit held that a successor, who made discriminatory hiring decisions and refused to bargain with the predecessor's union, had engaged in unfair labor practices under sections 8(a)(3) and (5) of the NLRA. In so holding, the Seventh Circuit concluded that the Board's order to reinstate the contract in effect under the predecessor was properly remedial. By enforcing the Board's order, the *U.S. Marine* court's interpretation of the

perfectly clear exception in *Burns* appears to be inconsistent with the rationale in *Burns* as well as certain policies embedded within the NLRA and others regarding successor ownership. Moreover, the *U.S. Marine* court's decision creates a disagreement among the circuits as to whether a successor employer may set the initial terms and conditions of employment where all or substantially all of a predecessor's employees are expected to be hired. Thus, in light of the compelling arguments raised by the dissenters, the remedy enforced by the *U.S. Marine* court appears to be improperly punitive.

EMPLOYMENT LAW

I. CONSTITUTIONAL DEVELOPMENTS

A. **Retroactive Changes to Workers' Compensation Law and the Contract Clause: General Motors Corp. v. Romein*¹

The Contract Clause of the United States Constitution provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."² A conflict has existed among various state and federal courts over whether retroactive amendments to state workers' compensation laws violate this clause.³ Some courts have held that such amendments are unconstitutional impairments of rights arising from employment contracts.⁴ Other courts have held that workers' compensation laws are incidental to employment contracts and can therefore be changed retroactively without violating the Constitution.⁵ The Supreme Court has provided little help, characterizing workers' compensation law as both contractual and non-contractual in nature, depending on the context.⁶

The United States Court of Appeals for the Third Circuit, in the 1987 case of *Nieves v. Hess Oil Virgin Islands Co.*, adopted the

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¹ 112 S. Ct. 1105 (1992).

² U.S. CONST. art. I, § 10, cl. 1.

³ See, e.g., *Nieves v. Hess Oil Virgin Islands Co.*, 819 F.2d 1237, 1252 (3d Cir. 1987) (changes to workers' compensation law violate the Contract Clause); *Price v. All Am. Eng'g Co.*, 320 A.2d 266, 339, 340 (Del. 1974) (changes to workers' compensation law do not violate the Contract Clause).

⁴ See *Mitchell v. United States Fidelity and Guar. Co.*, 206 F. Supp. 489, 490 (E.D. Tenn. 1962) (changes to workers' compensation statute violate the Contract Clause); *Schreiner v. C.S. McCrossan, Inc.*, 465 N.W.2d 917, 919 (Minn. 1991) (quoting *Joyce v. Lewis Bolt and Nut Co.*, 412 N.W.2d 304, 307 (Minn. 1987)) (same); *Cooper v. Wicomico County, Dept. of Pub. Works*, 366 A.2d 55, 57, 58 (Md. 1976) (same); *Harris v. National Truck Serv.*, 321 So. 2d 690, 694 (Ala. Ct. App. 1975) (same); *Miller v. Dunn Paper Co.*, 209 N.W.2d 519, 521 (Mich. Ct. App. 1973) (same); *Noffsker v. K. Barnett & Sons*, 384 P.2d 1022, 1023 (N.M. 1963) (same).

⁵ *K-Mart Corp. v. State Indus. Ins. Sys.*, 693 P.2d 562, 567 (Nev. 1985) (workers' compensation is not contractual so its amendment does not violate the Contract Clause); *Price*, 320 A.2d 339, 340 (same); cf. *Panzino v. Continental Can Co.*, 364 A.2d 1043, 1046 (N.J. 1976) (change in workers' compensation act does not implicate the Due Process Clause).

⁶ In *Industrial Commission v. Nordenholt Co.*, the United States Supreme Court held that recovery in workers' compensation is based on contract rather than tort law, and that contracts of employment imply workers' compensation provisions. 259 U.S. 263, 271 (1922). On the other hand, in *Cudahy Packing Co. of Nebraska v. Parramore*, the Court said that "workmen's Compensation legislation rests upon the idea of status, not that of implied contract." 263 U.S. 418, 423 (1923).

view that retroactive amendments to workers' compensation laws are unconstitutional violations of the Contract Clause.⁷ The court held that the application of a Virgin Island law barring the borrowed employee doctrine to claims of workers injured prior to its effective date violated the Contract Clause.⁸ The *Nieves* court reasoned that the retroactive application of the statute substantially impaired implied employment contracts between the borrowing employer and employees, as the employer had a reasonable expectation that workers' compensation would cover them when they contracted for employment.⁹ The court also found that retroactive application of the law was not a reasonable means of serving a legitimate public purpose.¹⁰ Therefore, the *Nieves* court held that legislation that retroactively altered workers' compensation law violated the Contract Clause.¹¹

While the majority of courts that have addressed this issue have adopted the *Nieves* position that retroactive amendments to workers' compensation laws violate the Contract Clause,¹² several courts have adopted the contrary view, including the Delaware Supreme Court in the 1974 case of *Price v. All American Engineering Co.*¹³ The *Price* court ruled that a statute that increased workers' compensation benefits for totally disabled employees, including those injured before the law came into effect, did not violate the Contract Clause.¹⁴ The court reasoned that the workers' compensation act and the employer-employee relationships it creates are "status-oriented," rather than grounded in contract.¹⁵ Thus, the Delaware Supreme Court held that, as workers' compensation involves statutory rather

⁷ 819 F.2d at 1252.

⁸ *Id.* at 1252. The legislature passed a law that barred the application of the borrowed employee doctrine to pending workers' compensation cases, regardless of when the accidents which gave rise to the claim occurred. *Id.* at 1241. The court held that this law could not apply to the cases of six employees borrowed by Hess, who had suits pending against Hess for injuries allegedly caused by the company's negligence when the law was enacted. *Id.* at 1252.

⁹ *Id.* at 1248.

¹⁰ *Id.* at 1251.

¹¹ *Id.* at 1252.

¹² See cases cited *supra* note 4.

¹³ 320 A.2d 336, 339 (Del. 1974). See also *K-Mart*, 693 P.2d at 567; *McAllister v. Board of Educ.*, 191 A.2d 212, 218-19 (N.J. Super. Ct. App. Div. 1963) (duties under workers' compensation statute do not rise to a "contract").

¹⁴ *Price*, 320 A.2d at 337-38, 339. Employers and their insurance carriers brought suit claiming that it was unconstitutional to make them increase benefits for workers who became totally disabled prior to the law's effective date. *Id.* at 337-38.

¹⁵ *Id.* at 339.

than contractual rights and obligations, the Contract Clause does not protect against changes to it, even if they have retroactive effects.¹⁶

During the *Survey* year, in *General Motors Corp. v. Romein*, the United States Supreme Court addressed the issue of whether a retroactive change to workers' compensation law violates the Contract Clause.¹⁷ The Court unanimously held that a law that retroactively changes workers' compensation benefits does not violate the Contract Clause, because no contract existed regarding the workers' compensation terms at issue.¹⁸ Consequently, states can probably alter their workers' compensation laws without violating the Contract Clause, regardless of the effect the changes may have on existing arrangements.¹⁹

In *Romein*, the Court addressed a 1987 Michigan statute²⁰ that required employers to increase certain workers' compensation awards, and reimburse any employees that were underpaid due to the old benefit scheme.²¹ This law was the result of a lengthy debate that was carried out in both the courthouse and the legislative chambers.²² In 1981 the Michigan Legislature passed workers' compensation reform legislation allowing employers to decrease workers' compensation benefits for those disabled employees eligible to receive wage-loss compensation from other employer-funded sources.²³ The legislation did not specify whether this scheme, known as "benefit coordination," should apply to workers injured before its effective date of March 31, 1982.²⁴

Employers argued that the law allowed them to coordinate, and thus reduce, workers' compensation benefits for workers injured prior to the effective date.²⁵ The lower Michigan courts disagreed and held that coordination was only allowed for employees injured after that date.²⁶ Supporting this interpretation, the Michigan State

¹⁶ *Id.* at 340.

¹⁷ 112 S. Ct. 1105, 1109 (1992).

¹⁸ *Id.* at 1110.

¹⁹ *See id.* at 1111-12.

²⁰ MICH. COMP. LAWS § 418.354 (1991).

²¹ 112 S. Ct. at 1109.

²² *Id.* at 1108-09.

²³ *Id.* at 1108.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See, e.g.,* *Franks v. White Pine Copper Div., Copper Range Co.*, 332 N.W.2d 447, 449 (Mich. Ct. App. 1982), *aff'd in part & rev'd in part*, 375 N.W.2d 715 (Mich. 1985).

Senate and House of Representatives passed a concurrent resolution declaring that the legislature did not intend the coordination provisions to apply retroactively.²⁷

Despite this resolution, in 1985 the Michigan Supreme Court, in *Chambers v. General Motors Corp.*, held that the benefit coordination provision applied to all payment periods after its effective date regardless of the date on which the employee was injured.²⁸ The court stated that it had to follow the statute's "plain meaning" and apply it retroactively, because it did not explicitly state that it did not so apply.²⁹ The court also stated that because workers' compensation benefits are "social-welfare income-maintenance benefits," which are not protected by the Constitution, and because the legislature did not covenant not to make amendments to workers' compensation law in providing for such benefits, subsequent changes did not violate the Contract Clause.³⁰ Thus, the Michigan Supreme Court held that employers could apply the benefit coordination provisions retroactively.³¹

This decision spurred employers who had not been coordinating benefits for workers injured before 1982 to begin doing so, and to demand reimbursement from their workers who were overpaid due to non-coordination.³² On May 14, 1987, the legislature amended the coordination statute³³ so that it applied only to workers injured after the 1982 effective date.³⁴ The amendment expressly repudiated *Chambers*, declaring that the coordination provision did not apply to workers injured before its effective date, and that

²⁷ *Romein*, 112 S. Ct. at 1108.

²⁸ 375 N.W.2d 715, 727 (Mich. 1985). The *Chambers* case was brought by retired General Motors workers who were receiving pension and other benefits as well as workers' compensation. *Id.* at 719. General Motors' coordination of its benefits resulted in the elimination of its weekly workers' compensation payments. *Id.* at 719-20.

²⁹ *Id.* at 722.

³⁰ *Id.* at 722-23.

³¹ *Id.* at 727.

³² *Romein*, 112 S. Ct. at 1109.

³³ MICH. COMP. LAWS § 418.354 (1991).

³⁴ Section 418.354 provides in pertinent part:

The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to § 351, 361, or 835 for personal injuries occurring before March 31, 1983. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

§ 418.354(17).

employers who had coordinated benefits for these employees must reimburse them for all underpayments.³⁵

As a result, the petitioner-employers in *Romein* were ordered to refund nearly \$25 million. They brought suit, arguing that the statute was unfairly retroactive and therefore violated the Contract Clause.³⁶ The Michigan Supreme Court upheld the statute on the basis that the employers had no vested rights in coordination for Contract Clause purposes, and that the retroactive provisions furthered a rational legislative purpose.³⁷ The United States Supreme Court granted certiorari³⁸ and affirmed the decision.³⁹

The United States Supreme Court held that the retroactive provisions did not violate the Contract Clause because there was no affected contract.⁴⁰ It stated that workers' compensation law was not an implied term of employment contracts, and refused to recognize an implied right for employers to rely on past benefit periods as closed.⁴¹ The Court also found that the amendment did not affect the enforceability of the employment contracts.⁴²

To determine whether the amendment violated the Contract Clause, the *Romein* Court asked whether it had "operated a substantial impairment of a contractual relationship."⁴³ To answer this question, the Court engaged in a standard three-part inquiry.⁴⁴ Under this inquiry, the Court first asked whether there was a contractual relationship.⁴⁵ If there was, the Court would determine whether the change in law impaired that relationship.⁴⁶ If it did,

³⁵ *Romein*, 112 S. Ct. at 1109.

³⁶ *Id.* The employers also argued that the retroactive provisions of the amendment violated the Due Process Clause, but the Court rejected this claim. *Id.*

³⁷ *Id.* For the Michigan Supreme Court's opinion see *Romein v. General Motors Corp.*, 462 N.W.2d 555 (Mich. 1990).

³⁸ *General Motors Corp. v. Romein*, 111 S. Ct. 2008 (1991).

³⁹ *General Motors Corp. v. Romein*, 112 S. Ct. 1105, 1109 (1992).

⁴⁰ *Id.* at 1110. The Court also addressed the issue of whether the amendment violated the Due Process Clause and ruled that it did not. *Id.* at 1112. The Court stated that to satisfy due process all that is needed is a legitimate legislative purpose furthered by a rational means. *Id.* The Court asserted that this standard was satisfied as the retroactive payment provisions of the statute were a rational means of meeting the legislative objective of correcting the unexpected results of the Michigan Supreme Court's *Chambers v. General Motors Corp.* opinion. *Id.*

⁴¹ *Id.* at 1110-11.

⁴² *Id.* at 1111.

⁴³ 112 S. Ct. at 1109 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 1 Employee Benefits Cas. (BNA) 1477 (1978)).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

the Court would complete the inquiry by determining whether the impairment was substantial.⁴⁷ The Court only had to carry out the first part of the inquiry, as it determined that there was no violation of the Contract Clause because no contractual agreement existed regarding the workers' compensation terms at issue.⁴⁸

The Court rejected the assertion that workers' compensation law was an implied term of the employment contracts that the parties entered into after collective bargaining.⁴⁹ The Court noted that the parties formed these contracts before the enactment of the 1981 law requiring benefit coordination and that they made no express mention of workers' compensation benefits.⁵⁰ In fact, the Court stated, the parties did not manifest assent to coordinate benefit payments under the 1981 law in any way.⁵¹ Moreover, the Court reasoned, there was no occasion in their bargaining for the parties even to consider whether reduced benefits could later be restored after the "benefit period" had closed.⁵²

The Court also rejected the argument that employers have a right, "incorporated" into all employment contracts by law, to rely on past payment periods as "closed."⁵³ Because the petitioners failed to show that this right was part of Michigan law when they formed their contracts,⁵⁴ the Court applied the general rule that laws are only considered implied terms of private contracts if they affect the validity, construction or enforcement of the contracts.⁵⁵ The Court reasoned that such laws receive Contract Clause scrutiny because

⁴⁷ *Id.*

⁴⁸ *Romein*, 112 S. Ct. at 1110. While the Michigan Supreme Court came to the same conclusion, the United States Supreme Court noted that it had to decide the issue on its own, as the question of whether a contract was made is a federal question for purposes of Contract Clause analysis. *Id.* The Court held that while they "accord respectful consideration and great weight to the views of the state's highest court," they were ultimately "bound to decide for [themselves] whether a contract was made." *Id.* (citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)).

⁴⁹ *Romein*, 112 S. Ct. at 1110 (rejecting the employers' claim that they had the workers' compensation law in mind and had settled expectations based thereon when they formed these contracts).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Romein*, 112 S. Ct. at 1110. The Court therefore reasoned that the principle that "the laws which subsist at the time and place of the making of a contract . . . enter into and form part of it" was inapplicable. *Id.* (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934)).

⁵⁵ *Romein*, 112 S. Ct. at 1111.

they may impair the binding force of pre-existing contracts.⁵⁶ In *Romein*, however, the Court determined that the statute at issue did not affect the legal enforceability of the employment contracts.⁵⁷ Thus, because Michigan law did not specifically imply workers' compensation terms into employment contracts, and because such terms were not central to the bargained-for exchange between the parties or to the enforceability of the contracts as a whole, the Court refused to consider workers' compensation law as an implied term of the parties' employment contracts.⁵⁸

The Court also addressed policy reasons for not treating workers' compensation and other workplace regulations as implicit terms of private contract agreements.⁵⁹ The Court reasoned that to do so would extend the definition of a contract far beyond the Contract Clause's purpose of enabling individuals to order their affairs as they see fit.⁶⁰ Instead, the Court reasoned, adoption of the employers' position would greatly limit state legislatures' ability to amend regulatory legislation.⁶¹ Amendments would only affect matters that private contracts did not provide for, and therefore parties could avoid future regulation by entering into long-term contracts.⁶² Thus, the Supreme Court affirmed the decision of the Michigan Supreme Court and held that the retroactive provisions of the amendment were constitutional.⁶³

The Supreme Court's decision in *Romein* finally resolved the issue of whether states can retroactively change workers' compensation laws without violating the Contract Clause.⁶⁴ Its decision rests on certain factual findings, however, which may make it possible to distinguish future cases.⁶⁵ This is particularly important because the history of the legislation at issue gave the Court reasons to uphold it, which may not exist in other circumstances.⁶⁶ The decision nevertheless gives state legislatures more freedom to change workers' compensation laws without worrying about Contract Clause scrutiny.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1110.

⁵⁹ *Id.* at 1111-12.

⁶⁰ *Romein*, 112 S. Ct. at 1111.

⁶¹ *Id.*

⁶² *Id.* at 1111-12.

⁶³ *Id.* at 1110, 1112.

⁶⁴ *Id.* at 1112.

⁶⁵ *Romein*, 112 S. Ct. at 1108-09.

⁶⁶ *See id.* at 1111-12.

Due to the fact-specific nature of its holding, courts may be able to distinguish future cases from *Romein*. The Court, for example, reasoned that the workers' compensation provisions were not central to the bargained-for exchange between the parties.⁶⁷ Courts may find, however, that the particular regulation they are addressing is central to the employment agreement, and therefore not open to retroactive change under the Contract Clause.⁶⁸

Such distinction may be likely because the history of the *Romein* case made the Court particularly unsympathetic to the employers' position. Workers' compensation law in Michigan had long been the subject of bitter debate.⁶⁹ The Court seemed reluctant to change this law which was the result of such a long and complex compromise.⁷⁰ Additionally, the Court believed that the statute remedied an unfair situation in a logical way.⁷¹ It seems possible that other courts may come to a different conclusion if a case arises where the change is unfair and unforeseeable, rather than the result of a long legislative process yielding an equitable result. On the other hand, courts may be reluctant to do this due to the policy reasons that the Court set forth in *Romein*.⁷²

The Court's holding is also limited in that its determination that workers' compensation law is not an implicit part of employ-

⁶⁷ *Id.* at 1111.

⁶⁸ For an example of such a court, see *supra* notes 7-12 and accompanying text explaining *Nieves v. Hess Oil Virgin Islands Co.*

⁶⁹ 112 S. Ct. at 1108 (citing Robert VanderLaan & Richard K. Studley, *Workers' Compensation Reform: A Case Study of the Legislative Process in Michigan*, 14 U. MICH. J.L. REF. 451, 452-54 (1981)).

⁷⁰ See *Romein*, 112 S. Ct. at 1112. The Court went so far as to note that the petitioners knew of the distinct possibility that the courts or the legislature could resolve the issue to their detriment and therefore took the risk. *Id.* The Court expressed this in the concluding paragraph of the case saying:

In sum, petitioners knew they were taking a risk in reducing benefits to their workers, but they took their chances with their interpretation of the 1981 law. Having now lost the battle in the Michigan Legislature, petitioners wished to continue the war in court. Losing a political skirmish, however, in itself creates no ground for constitutional relief.

Id.

⁷¹ The Court found that the amendment preserved the delicate legislative compromise that had been struck by the 1980-81 laws—giving workers injured before 1982 their full benefits without coordination, but not the greater increases given to subsequently injured workers. Also, it equalized the payments made by employers who had gambled on the *Chambers* decision with those made by employers who had not.

Id.

⁷² See *supra* notes 59-62 and accompanying text for a discussion of policy reasons for not treating workers' compensation as contractual in nature.

ment contracts applies only to the federal Contract Clause.⁷³ State courts have determined whether such laws are contractual in nature for state-law purposes and will probably continue to do so regardless of the *Romein* decision.⁷⁴ Nonetheless, while the holding only applies to a specific constitutional challenge, it gives legislatures greater freedom because they are now able to change their states' workers' compensation scheme without risking a Contract Clause violation. At the same time, this decision limits employers' and employees' ability to predict future compensation rules that will affect them. This, in turn, will make it more difficult for a due process or equitable challenge to such a statute to succeed, as the parties will no longer be able to argue that they relied on the law to remain unchanged for past payment periods.

In sum, the Supreme Court, in *General Motors Corp. v. Romein*, finally resolved the issue of whether a retroactive amendment to workers' compensation law violates the Contract Clause.⁷⁵ The Court's holding that it does not, while subject to certain weaknesses, represents the first uniform decision on this issue. The decision gives legislatures the constitutional freedom to regulate this area of law as they see fit, although their actions may be subject to court challenges seeking to distinguish the particular law in question from the one in this case, and to challenges based on state law.

II. INJURED WORKERS AND EMPLOYER LIABILITY

A. **Liability of State-Owned Railroads Under FELA: Hilton v. South Carolina Public Railways Commission*¹

Section 51 of the Federal Employers' Liability Act ("FELA") provides that "[e]very common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages . . ." to any of its employees injured on the job due to the negligence of the carrier, its officers, agents or employees.² Two issues arise under

⁷³ See *Romein*, 112 S. Ct. at 1108.

⁷⁴ See, e.g., *In re Spera*, 713 P.2d 1155, 1156 (Wyo. 1986) (workers' compensation law found to be based on contract rather than tort, for decision that incarceration had no effect upon benefits); *M.J. Daly Co. v. Varney*, 695 S.W.2d 400, 403 (Ky. 1985) (workers' compensation law found to be contractual in nature in determination of which employers had tort immunity).

⁷⁵ 112 S. Ct. at 1110.

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¹ 112 S. Ct. 560 (1991).

² 45 U.S.C. § 51 (1988).

this statute when an employee of a state-owned interstate railroad alleges that he or she has been injured as a result of the railroad's negligence.³ The first issue is whether FELA creates a cause of action against state-owned railroads enforceable in state court.⁴ The second is whether FELA creates a cause of action against state-owned railroads enforceable in federal court by excepting the carrier from the states' Eleventh Amendment immunity.⁵

In 1964, the United States Supreme Court held in *Parden v. Terminal Railway of Alabama State Docks Department* that FELA authorizes suits against state-owned railroads operating in interstate commerce and that such suits could be brought in federal court.⁶ The plaintiffs in *Parden* were interstate railroad employees who had been injured on the job allegedly due to the negligence of their employer, an agency of the State of Alabama.⁷ The action was brought in district court, and the defendant moved to dismiss the action on the grounds that the Eleventh Amendment made the state immune from suit in federal court unless it consented, which it had not done.⁸ On appeal, the Supreme Court concluded that Congress intended that state-owned railroads be liable under FELA.⁹ The Court based this conclusion on the plain language of the Act and the fact that federal statutes regulating railroads generally apply to both private and state operators.¹⁰ The Court further decided that Congress implicitly conditioned the right of a state to operate an interstate railroad on the state's implied consent to suit in federal court under FELA, thereby overthrowing its Eleventh Amendment immunity.¹¹

In 1987, the Court partially overruled *Parden* in *Welch v. Texas Department of Highways and Public Transportation*.¹² The *Welch* plain-

³ See *Hilton*, 112 S. Ct. at 562-63.

⁴ See *id.* at 562.

⁵ See *id.* at 563. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

⁶ 377 U.S. 184, 192 (1964).

⁷ *Id.* at 184-85.

⁸ *Id.* at 184-85, 186.

⁹ *Id.* at 187-88.

¹⁰ *Id.*

¹¹ 377 U.S. at 192.

¹² 483 U.S. 468, 478 (1987). The *Welch* Court actually held that the language of the Jones Act (46 U.S.C. app. § 688 (1988)) was insufficient to abrogate the states' Eleventh Amendment immunity. *Id.* at 476. Because the Jones Act applied the remedial provision of FELA to seamen, the Court in *Hilton* stated that the legal analysis should be consistent. See *id.* at 471;

tiff, an employee of the State Highway Department, was injured during the course of her employment.¹³ She filed suit against the state agency under the Jones Act in district court, and the agency moved to dismiss on the grounds that the Eleventh Amendment barred the action.¹⁴ On appeal, the Supreme Court held that the modern understanding of the Eleventh Amendment led to the conclusion that Congress must use "unmistakable language in the statute itself" if it wishes to make states liable in federal court under that statute.¹⁵ Accordingly, the Court stated that the *Parden* Court's discussion of inferred congressional intent to negate Eleventh Amendment immunity is no longer valid law.¹⁶ The *Welch* Court further held that the language in the Jones Act—and by implication FELA—was insufficient to authorize suits against the states in federal court.¹⁷ The *Welch* decision did not reevaluate the language in the Jones Act to determine whether it authorized liability of state agencies in state court actions.¹⁸

In 1989, however, in *Will v. Michigan Department of State Police*, the Court's standard of statutory interpretation raised questions about the validity of that portion of the *Parden* decision that indicated that state-owned railroads could be sued under FELA in state court.¹⁹ In *Will*, the plaintiff filed suit against the state agency in the Michigan state court system under 42 U.S.C. § 1983, alleging that he had been denied a promotion in the Michigan State Police Department because some of his family members had been student activists.²⁰ The state court dismissed the suit because the Michigan Supreme Court held that a state is not a "person" authorized to be

see also *Hilton*, 112 S. Ct. at 564–65 n.2. *Welch* explicitly overruled those portions of *Parden* applicable to the Eleventh Amendment analysis. *Welch*, 483 U.S. at 478.

¹³ *Id.* at 471.

¹⁴ *Id.*

¹⁵ *Id.* at 474 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).

¹⁶ *Welch*, 483 U.S. at 478.

¹⁷ *Id.* at 471, 476. See also *Hilton*, 112 S. Ct. at 564–65 n.2 (implying that the statutory analysis of the Jones Act and FELA should be consistent).

¹⁸ See *Welch*, 483 U.S. at 495 (White, J., concurring). But see *id.* at 495–96 (Scalia, J., concurring in part and concurring in the judgment).

¹⁹ See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

²⁰ *Id.* at 60. 42 U.S.C. § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1988).

sued under § 1983.²¹ The United States Supreme Court granted certiorari and held that a state is not included in the term "person," as used in § 1983 describing who may be held liable under the statute.²² The Court concluded that the term "person" fell short of the "ordinary rule of statutory construction," that Congress must make its intention unmistakably clear in the language of the statute if it means to abrogate the states' general immunity from suit, even in their own courts.²³ The state courts were thus left to decide whether the implications of *Will* altogether prohibited FELA suits against state-owned railroads, because the language of FELA did not explicitly include state-owned railroads within its scope of coverage as required by the rule of statutory construction used in *Will*.²⁴

During the *Survey* year, in *Hilton v. South Carolina Public Railways Commission*, the United States Supreme Court reaffirmed in part its *Parden* decision by holding that FELA does create a cause of action against a state-owned railroad which is enforceable in state court.²⁵ The Court also recognized that after *Welch*, the only available venue for relief against a state-owned railroad under the federally created FELA is the state court system.²⁶ As a consequence of the *Hilton* decision, state courts cannot dismiss FELA suits against state-owned railroads on the grounds that FELA does not authorize such an action.²⁷

In *Hilton*, Kenneth Hilton was injured during the course of his employment with the South Carolina Public Railways Commission ("Commission"), an agency of the state.²⁸ Alleging that his injuries were due to the negligence of the Commission, he filed a FELA suit against his employer in the district court.²⁹ While the suit was pending, the United States Supreme Court decided *Welch*.³⁰ Hilton realized that *Welch* prohibited entertaining a FELA action against a state in a federal forum, so he withdrew his action and refiled in the South Carolina state court system.³¹

²¹ *Will*, 491 U.S. at 61.

²² *Id.* at 61, 64.

²³ *Id.* at 65.

²⁴ *See id.*; *see also Hilton*, 112 S. Ct. at 563.

²⁵ *Hilton*, 112 S. Ct. at 562.

²⁶ *See id.* at 566.

²⁷ *See id.*

²⁸ *Id.* at 562.

²⁹ *Id.*

³⁰ *Hilton*, 112 S. Ct. at 562.

³¹ *Id.*

The South Carolina trial court dismissed the action, claiming that *Parden* had effectively been overturned by *Welch* and *Will*, so that FELA does not authorize actions against state-owned railroads.³² Hilton then appealed this reading of FELA and the applicable case law to the South Carolina Supreme Court.³³ While his appeal was pending, that court announced its decision of another case that held in favor of the state on the precise issue on appeal in Hilton's suit.³⁴ Accordingly, Hilton's subsequent appeal was dismissed in a one-sentence opinion by the South Carolina Supreme Court.³⁵

The United States Supreme Court granted certiorari to Hilton's appeal in order to clarify whether *Will* had overturned the *Parden* holding that FELA authorizes a state court action against a state-owned railroad.³⁶ Writing for the majority, Justice Kennedy stated that under stare decisis, the *Parden* Court's interpretation of FELA was reviewable only with some "compelling justification."³⁷ The Court, therefore, refused to reevaluate its interpretation because there were "strong considerations" favoring adherence to stare decisis, and because there were no "sufficient, countervailing justifications" for departing from precedent.³⁸

The Court based its decision on two primary policy considerations.³⁹ First, the Court's jurisprudence has traditionally been very strong in adhering to stare decisis in matters of statutory, as opposed to constitutional, interpretation.⁴⁰ The Court concluded that it should give great weight to its earlier interpretation because Con-

³² See *id.* at 562-63.

³³ *Id.*

³⁴ *Id.* In *Freeman v. South Carolina Pub. Rys. Comm'n*, the South Carolina Supreme Court read the United States Supreme Court's *Will* decision as holding that a federal statute will not be read to authorize money damages against a state absent unmistakably clear language showing congressional intent to impose such liability. 393 S.E.2d 383, 384 (1990). The South Carolina Supreme Court decided on the basis of *Welch* that there was a lack of unmistakably clear language in FELA abrogating the states' sovereign immunity, and thus held that FELA does not impose liability on an agency of the state. *Freeman*, 393 S.E.2d at 384.

³⁵ *Hilton*, 112 S. Ct. at 563. See also *Hilton v. South Carolina Pub. Rys. Comm'n*, 411 S.E.2d 424, 424 (1990) (South Carolina Supreme Court dismissal of Hilton's suit).

³⁶ See *Hilton*, 112 S. Ct. at 563.

³⁷ *Id.* at 563-64.

³⁸ *Id.*

³⁹ See *id.* at 564. The Court stated general approval of stare decisis because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority." *Id.*

⁴⁰ See *id.* "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)).

gress had not amended FELA's language during the thirty years since the *Parden* interpretation of that language.⁴¹ The Court reasoned that this congressional silence indicated implicit acceptance of the interpretation.⁴²

Second, the Court noted that applying the doctrine of stare decisis has added force when the public and private sectors have relied on an earlier interpretation of a federal statute.⁴³ In the case of FELA, the Court noted, many states, including South Carolina, had explicitly excluded railroad workers from their workers' compensation laws on the assumption that those workers would be protected by FELA.⁴⁴ The Court stated that it was unwilling to risk the protection that the *Parden* interpretation afforded state-owned railroad employers and employees who had been acting on the assumption that their activities were covered by FELA.⁴⁵ The Court further reasoned that overruling *Parden* would cast doubt on the prior holdings that the entire federal system of railroad regulation applied to state-owned railroads.⁴⁶ Relying on these policies, the Court held that the factors weighing in favor of stare decisis controlled because there were no sufficient, countervailing justifications for a reevaluation of FELA's scope.⁴⁷

The Court directly rejected the argument that the *Welch* Court had considered and decided against the policies for applying stare decisis to FELA.⁴⁸ The Court stated that an overruling of *Parden* would leave injured state employees without a remedy.⁴⁹ The Court reasoned that because this consideration was not discussed in *Welch*, *Welch* only overruled that portion of *Parden* that held that FELA abrogated the states' Eleventh Amendment immunity to suit in federal court.⁵⁰ Because the Eleventh Amendment only applies to suits in federal court, the Court dismissed the argument that *Welch* was relevant to the analysis, and narrowed the issues to statutory interpretation and whether to apply the doctrine of stare decisis.⁵¹

⁴¹ *Hilton*, 112 S. Ct. at 564.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Hilton*, 112 S. Ct. at 564.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 564-65.

⁵¹ *Hilton*, 112 S. Ct. at 565.

The Court then addressed the contention that *Will* mandated a per se rule that courts examine all federal statutes, including FELA, that possibly impose liability on the states under the "clear statement" standard.⁵² The Court rejected this analysis of *Will*, stating that such a per se rule would make federal statutory interpretation standards coequal with the Eleventh Amendment jurisprudence.⁵³ The Court noted that the primary focus of the interpretation of 42 U.S.C. § 1983 conducted in *Will* was on the language and history of the statute.⁵⁴ The Court reasoned that this specific discussion would have been unnecessary if the decision had adopted a per se rule governing federal statutory interpretation.⁵⁵ The Court instead described the clear statement rule as one that is applied during statutory interpretation only where the statute's intent is vague.⁵⁶

The Court noted that although the use of a clear statement standard would be useful to both Congress and the courts in interpreting whether federal statutes impose liability on the states, the standard is not a rule of constitutional law.⁵⁷ The Court stated that the clear statement rule was not applied to FELA because a standard of statutory construction of less than constitutional import did not prevail over the doctrine of stare decisis where the prior interpretation implicated important reliance interests.⁵⁸ Accordingly, the Court reaffirmed its holding in *Parden* that FELA imposes liability on a state-owned railroad, enforceable in state court.⁵⁹

Justice O'Connor, joined by Justice Scalia, filed a dissenting opinion.⁶⁰ She read *Will* as establishing a per se rule that if a federal statute required a state to entertain a suit against itself, it must do so in a clear statement because of the principle that a state cannot normally be sued without its consent.⁶¹ Justice O'Connor argued that the result of *Hilton* should have been automatically resolved by

⁵² *Id.*

⁵³ *Id.* Eleventh Amendment jurisprudence requires a clear statement from Congress in the language of the statute when Congress abrogates the states' sovereign immunity from suit in federal court. *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Hilton*, 112 S. Ct. at 566.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 562.

⁶⁰ *Hilton*, 112 S. Ct. at 566 (O'Connor, J., dissenting).

⁶¹ *Id.* at 567.

an honest reading of both *Will* and *Welch*.⁶² She stated that *Welch* held that FELA does not contain the requisite clear statement to abrogate the states' Eleventh Amendment immunity and *Will* required a similar clear statement for states to be liable in state court under a federal statute.⁶³ She argued, therefore, that the Court was claiming to follow the policies of stare decisis while ignoring very recent precedent.⁶⁴

Justice O'Connor criticized the Court for ignoring the constitutional basis for the clear statement rule, stating that the rule is derived from the concepts of federalism inherent in the entire constitutional scheme.⁶⁵ Justice O'Connor reasoned that the Court has a constitutional mandate to be wary of "extending the effects of congressional enactments into areas traditionally governed by the states, unless Congress has directed [the Court] to do so by an unmistakably clear statement."⁶⁶ Justice O'Connor concluded by stating that a state is a proper defendant under FELA only if it consented to be sued by allowing itself to be treated as a railroad owner rather than as a sovereign for the purpose of the action.⁶⁷

The *Hilton* decision firmly establishes that employees of state-owned railroads that are engaged in interstate commerce may sue their employers for negligence under FELA in state court if they are injured on the job.⁶⁸ The current interpretation of FELA presents the anomalous situation where the state court is the only avenue of relief under a federal statute for certain classes of plaintiffs, namely, employees of state-owned railroads.⁶⁹ This lack of symmetry does not, however, disturb a majority of the Court so as to override the merits of stare decisis.⁷⁰

Apart from the direct impact the *Hilton* decision has on FELA lawsuits, the most important aspect of the decision appears to be that it carves out an exception to the use of the clear statement rule.⁷¹ In some very recent Supreme Court cases, the clear statement rule has been posited as the ordinary rule of statutory interpretation

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 566.

⁶⁵ *Hilton*, 112 S. Ct. at 568.

⁶⁶ *Id.*

⁶⁷ *Id.* at 570.

⁶⁸ *Id.* at 562.

⁶⁹ *See id.* at 566.

⁷⁰ *See Hilton*, 112 S. Ct. at 566.

⁷¹ *See id.* at 567 (O'Connor, J., dissenting).

when "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government.'"⁷² *Hilton* excepts from this interpretational mandate certain statutes that have previously been interpreted by the Court.⁷³ The decision creates a balancing test by which the clear statement standard will be applied only if there are sufficient justifications outweighing any factors favoring adherence to precedent.⁷⁴ The *Hilton* test apparently means that the Court will favor adhering to a precedential interpretation if it is long-standing and if states have relied on that interpretation in structuring their own remedial laws such that an injured party would have no avenue of relief if the federal law was found inapposite.⁷⁵

In sum, *Hilton* leaves injured state-owned railroad employees a state court, but not a federal court, remedy under FELA if they were injured due to their employer's negligence during the course of operations in interstate commerce.⁷⁶ Because the state will not be able to argue sovereign immunity in FELA suits, the state courts will not be able to dismiss such suits on the grounds that the statute does not authorize money damages against an agency of the state.⁷⁷ As a result of *Hilton*, state legislatures can continue to rely on the fact that injured employees of state-owned railroads have a possible avenue of relief under FELA.⁷⁸ The legislatures will therefore not need to reevaluate their workers' compensation laws if they are concerned about giving such employees a legal remedy.⁷⁹

B. **Land-Based Maritime Workers as "Seamen" Under the Jones Act:*
*Southwest Marine v. Gizoni*¹

The Jones Act² and the Longshore and Harbor Workers' Compensation Act ("LHWCA")³ provide federal remedies for injured

⁷² *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242). See also *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

⁷³ See *Hilton*, 112 S. Ct. at 564.

⁷⁴ See *id.*

⁷⁵ See *id.* The reliance consideration seemed to be the Court's overriding concern, as Justice Kennedy described it as "the most vital consideration of our decision." *Id.*

⁷⁶ *Id.* at 562.

⁷⁷ See *id.*

⁷⁸ See *Hilton*, 112 S. Ct. at 564.

⁷⁹ See *id.*

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¹ 112 S. Ct. 486 (1991).

² 46 U.S.C. app. § 688 (1988).

³ 33 U.S.C. § 901 *et seq.* (1988).

maritime workers whose occupations come within each Act.⁴ The Acts differ, however, with regard to the types of maritime workers that they cover.⁵ The Jones Act, for example, covers "seamen," or those maritime workers who assist in the function of a "vessel in navigation."⁶ The Jones Act allows a seaman to initiate a suit for damages for personal injuries suffered during the course of his or her employment.⁷ In contrast, the LHWCA provides an administrative compensatory scheme for injured land-based maritime workers such as longshoremen, ship repairmen and shipbuilders.⁸ The LHWCA's definition of "employee," however, explicitly excludes "a master or member of a crew of any vessel"—someone who is the quintessential Jones Act seaman plaintiff.⁹

In 1991 the United States Supreme Court in *McDermott International, Inc. v. Wilander* held that the Jones Act and the LHWCA were mutually exclusive because the LHWCA excluded any employee who was a master or member of a crew of any vessel.¹⁰ Thus, *Wilander* clarified that a master or member of a crew could only

⁴ See *id.*; 46 U.S.C. app. § 688.

⁵ *Southwest Marine*, 112 S. Ct. at 491. Compare 46 U.S.C. app. § 688 with 33 U.S.C. § 901 *et seq.*

⁶ *McDermott Int'l, Inc. v. Wilander*, 111 S. Ct. 807, 817 (1991). In determining whether or not the vessel is in fact a vessel in navigation, the courts consider factors such as whether the vessel has its own source of power, a navigation system or living facilities. See *Southwest Marine*, 112 S. Ct. at 489–90; *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385, 388 (9th Cir. 1990).

⁷ The Jones Act provides in relevant part:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

46 U.S.C. app. § 688(a).

Although the term "seaman" is not defined in the Jones Act, the Supreme Court in *Wilander* defined seaman in terms of the employee's relation to the vessel in navigation. 111 S. Ct. at 817–18. The Court held that the determination of seaman status depends on the nature of the vessel and the employee's precise relation to it. *Id.* The Supreme Court rejected the idea that an employee must assist in navigation in order to qualify as a seaman under the Jones Act. *Id.*

⁸ 33 U.S.C. § 902(3). Under the LHWCA, the liability of an employer "shall be exclusive and in place of all other liability of such employer to the employee. . . ." *Id.* § 905(a).

⁹ The LHWCA defines "employee" as: "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. . . ." *Id.* § 902(3). The LHWCA then excludes a list of individuals from its scope, including masters or members of a crew of any vessel. *Id.* § 902(3)(g).

¹⁰ 111 S. Ct. at 813 (citing *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7 (1946)).

seek relief under the Jones Act.¹¹ Left unresolved by the language of the statutes as well as the case law was the issue of whether a land-based maritime employee covered under the LHWCA might also be able to recover as a seaman pursuant to the Jones Act.¹²

A conflict arose between two federal appellate courts concerning the question of whether a maritime worker whose occupation is one of those enumerated in the LHWCA may be a seaman entitled to sue for damages under the Jones Act.¹³ In 1986, the United States Court of Appeals for the Sixth Circuit, in *Petersen v. Chesapeake & Ohio Railroad Co.*, held that a plaintiff is limited to LHWCA remedies unless a genuine issue of fact exists regarding the plaintiff's seaman status at the time of the injury.¹⁴ *Petersen* involved a machinist whose estate brought a Jones Act claim against a railway company for fatal injuries sustained due to prolonged asbestos exposure.¹⁵ Petersen's duties involved repairing equipment and machinery on railway car ferries as they sailed across the Great Lakes.¹⁶ Because there was a genuine issue of fact as to whether Petersen was a Jones Act seaman, the decedent's estate was not limited to LHWCA remedies.¹⁷

In contrast, in 1987 the United States Court of Appeals for the Fifth Circuit held in *Pizzitolo v. Electro-Coal Transfer Corp.* that maritime workers whose occupations are enumerated in the LHWCA are prohibited from claiming the benefits under the Jones Act as seamen or members of a crew of a vessel.¹⁸ *Pizzitolo* involved an electrician who was employed by a company that owned and operated a coal terminal and dock on the Mississippi River.¹⁹ *Pizzitolo*

¹¹ See 111 S. Ct. at 813.

¹² See 46 U.S.C. app. § 688; 33 U.S.C. § 902(3). Compare *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 985 (5th Cir. 1987) with *Petersen v. Chesapeake & Ohio R.R. Co.*, 784 F.2d 732, 739 (6th Cir. 1986).

¹³ Compare *Petersen*, 784 F.2d at 739 (holding that a plaintiff is not limited to LHWCA remedies if able to show that a genuine factual issue exists as to whether he or she was a seaman at the time of injury) with *Pizzitolo*, 812 F.2d at 983 (holding that a worker who engages in an occupation enumerated in the LHWCA is ineligible to claim benefits under the Jones Act).

¹⁴ *Petersen*, 784 F.2d at 739.

¹⁵ *Id.* at 734-35.

¹⁶ *Id.* at 734.

¹⁷ *Id.* at 739. The *Petersen* court affirmed the judgment of the district court where the jury decided that the amount of time spent on the vessel during the course of his duties qualified Petersen for seaman status. See *id.* at 735, 738.

¹⁸ *Pizzitolo*, 812 F.2d at 983. Also, 33 U.S.C. § 903(a) provides that "compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . ." *Id.*

¹⁹ *Pizzitolo*, 812 F.2d at 979.

spent twenty-five percent of his time repairing equipment on vessels tied to docks.²⁰ While repairing a conveyor used to load a vessel, he was injured when the scaffold board he was standing on broke, causing him to fall into the river.²¹ Pizzitolo subsequently filed a Jones Act suit against his employer.²² The *Pizzitolo* court concluded that the implementation of the LHWCA essentially amended the Jones Act to exclude maritime workers from Jones Act remedies.²³

During the *Survey* year, in *Southwest Marine v. Gizoni*, the United States Supreme Court resolved the conflict between the Fifth and Sixth Circuits by unanimously holding that a maritime worker who qualifies for receipt of benefits under the LHWCA may nonetheless be a seaman under the Jones Act.²⁴ Gizoni was a ship repairman who was injured on a floating platform as it was being towed into position alongside a vessel in need of repairs.²⁵ In its statutory interpretation of the LHWCA and the Jones Act, the Court reasoned that there is a possibility that Jones Act seamen may perform jobs enumerated under the LHWCA.²⁶ In addition, the Court determined that there is no evidence of congressional intent to limit Jones Act remedies to seamen who assist in navigation.²⁷ Therefore, the Court concluded, a maritime worker is entitled to pursue Jones Act remedies if there is a genuine issue of fact regarding the worker's seaman status.²⁸

The plaintiff in *Southwest Marine*, Gizoni, was employed as a foreman of a ship repair facility for Southwest Marine in San Diego,

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 812 F.2d at 983. The *Pizzitolo* court relied on the reasoning of the prior Fifth Circuit decision of *Bouvier v. Krenz* in which the court in its statutory interpretation of the LHWCA and the Jones Act stated that the LHWCA specifically covers harborworkers, ship repairmen or shipbuilders, but does not include a master or member of a crew of any vessel. *Id.* at 982-83; *Bouvier*, 702 F.2d 89, 91 (5th Cir. 1983). The *Pizzitolo* court concluded that the statutory language of the LHWCA "arguably demands" the conclusion that land-based harbor workers are not, as a matter of law, members of a crew or Jones Act seamen. *Pizzitolo*, 812 F.2d at 983.

A subsequent decision by the Fifth Circuit limited the scope of the *Pizzitolo* decision to cases where "the evidence is insufficient to warrant a finding of seaman's status." *Legros v. Panther Servs. Group*, 863 F.2d 345, 349 (5th Cir. 1988). Prior to a rehearing en banc, however, the *Legros* parties settled and the appeal was dismissed, thereby negating the precedential effect of the decision. See *Legros v. Panther Servs. Group, Inc.*, 874 F.2d 953, 954 (5th Cir. 1989).

²⁴ See *Southwest Marine*, 112 S. Ct. at 492.

²⁵ *Id.* at 489-90.

²⁶ *Id.* at 492.

²⁷ *Id.*

²⁸ *Id.*

California.²⁹ Southwest Marine owned floating platforms that did not have engines, navigation equipment or living facilities.³⁰ Tugboats moved these platforms into position alongside vessels to aid ship repairmen engaged in their work.³¹ Gizoni rode the floating platforms in the normal course of his duties and occasionally served as a lookout and provided maneuvering signals to the tugboat operator as the platform was being towed into position.³² While in the course of his duties, Gizoni was injured when his foot broke through a thin wooden sheet covering a hole in the deck of the platform.³³

After receiving medical and compensation benefits from Southwest Marine in accordance with the provisions in the LHWCA, Gizoni filed a negligence suit under the Jones Act against Southwest Marine in the United States District Court for the Southern District of California.³⁴ In his suit, Gizoni alleged that he was a seaman injured as a result of Southwest Marine's negligence.³⁵ The district court granted the employer's summary judgment motion, finding that the LHWCA's exclusive remedy provision prohibited Gizoni from bringing his Jones Act suit.³⁶ In addition, the district court ruled that Gizoni did not satisfy the criteria for Jones Act seaman status because the platforms were not "vessels in navigation."³⁷ Furthermore, the Court reasoned that Gizoni's presence on board the platforms derived from his duty as a ship repairman, and did not include any responsibility to assist in the navigation of the platforms.³⁸ In granting Southwest Marine's motion for summary judgment, the district court therefore ruled that, as a matter of law, Gizoni was not a Jones Act seaman.³⁹

The United States Court of Appeals for the Ninth Circuit reversed the district court's determination that the exclusive remedy provisions of the LHWCA barred Gizoni from pursuing his Jones

²⁹ *Southwest Marine*, 112 S. Ct. at 489.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 490.

³³ *Id.*

³⁴ *Southwest Marine*, 112 S. Ct. at 490; *Gizoni v. Southwest Marine*, 909 F.2d 385 (9th Cir. 1990); *Gizoni v. Southwest Marine*, No. 87-1424, (S.D. Cal. Sept. 16, 1988).

³⁵ *Southwest Marine*, 112 S. Ct. at 490.

³⁶ *Id.* For the relevant portion of the text of the LHWCA's exclusive remedy provision, see *supra* note 7.

³⁷ *Southwest Marine*, 112 S. Ct. at 490. For a definition of "vessel in navigation," see *supra* note 5.

³⁸ 112 S. Ct. at 490.

³⁹ *Id.*

Act claim.⁴⁰ The Ninth Circuit also reversed the trial court's determination that Gizoni was not a seaman as a matter of law, holding that questions of fact existed as to Gizoni's status as a seaman.⁴¹ In its decision, the Ninth Circuit reasoned that the key factor in determining whether or not the maritime employee is covered by the LHWCA or the Jones Act depends on the nature of the worker's employment and the congressional intent embodied in these Acts, rather than the worker's job title.⁴² The question of Gizoni's employment status under the LHWCA and Jones Act is therefore a question of fact that should be submitted to a jury.⁴³

The Supreme Court affirmed the Ninth Circuit's ruling unanimously.⁴⁴ The Court held that an employee whose work involved ship repair is not restricted to LHWCA remedies.⁴⁵ The Court affirmed the Ninth Circuit's reasoning that the nature of the worker's employment and the congressional intent in enacting the LHWCA and the Jones Act, as opposed to the employee's job title, should be the prevailing factors to consider in determining coverage under these statutes.⁴⁶

Writing for the Court, Justice White stated that the district court was incorrect in holding that, as a matter of law, the LHWCA provided the exclusive remedy for all harbor workers.⁴⁷ The Court reasoned that the LHWCA cannot provide the exclusive remedy for all harbor workers because the LHWCA could apply to a harbor worker who was also a member of a crew of any vessel, as specified under the Jones Act.⁴⁸ The phrase "member of a crew of any vessel" was a "refinement" of the term "seaman" in the Jones Act, according to the Court.⁴⁹ Consequently, the question of whether a longshoreman could be a seaman could not be resolved as a matter of law.⁵⁰

The Court rejected Southwest Marine's argument that the fact-specific inquiry into seaman status must always be decided as a

⁴⁰ *Id.*; *Gizoni*, 909 F.2d at 389.

⁴¹ *Gizoni*, 909 F.2d at 387-88. The questions of fact included: "whether the floating platforms were vessels in navigation, whether Gizoni's relationship to those platforms was permanent, and whether he aided in their navigation." *Id.*

⁴² *Id.* at 389.

⁴³ *Id.*

⁴⁴ See *Southwest Marine*, 112 S. Ct. at 490.

⁴⁵ See *id.* at 492.

⁴⁶ See *id.* at 490, 492; *Gizoni*, 909 F.2d at 389.

⁴⁷ *Southwest Marine*, 112 S. Ct. at 491.

⁴⁸ *Id.*

⁴⁹ *Id.* at 491.

⁵⁰ See *id.*

matter of law if the employee's job fits within one of the occupations enumerated in the LHWCA.⁵¹ The Court stated that Southwest Marine's argument failed to consider the possibility that some maritime workers may be Jones Act seamen performing a job specifically enumerated in the LHWCA.⁵² The Court then reiterated its holding in *Wilander* that an examination of the Jones Act, the LHWCA and other sources did not reveal a congressional intent to exclude from Jones Act remedies those "traditional seamen" who are affiliated with a vessel at sea, but who do not aid in navigation.⁵³ The Court noted that in some cases a ship repairman may not qualify for seaman status because he or she may lack the requisite connection to the vessel in navigation.⁵⁴ Not all ship repairmen, however, lack the requisite connection as a matter of law because the determinative factor is not the employee's particular job, but the employee's connection to a vessel.⁵⁵ The Court concluded that a maritime worker is limited to remedies under the LHWCA only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act.⁵⁶ Thus, the LHWCA preserves a Jones Act remedy for a vessel's crew even if they are shipyard employees.⁵⁷

The Court also rejected several other arguments by Southwest Marine in its attempt to prevent Gizoni's Jones Act suit.⁵⁸ First, the Court determined that the decisions holding that the LHWCA provided an exclusive remedy for specified injured railroad workers otherwise permitted by the Federal Employers' Liability Act⁵⁹ were not determinative in this case.⁶⁰ The Court based its decision on the

⁵¹ *Id.* at 492. Southwest Marine's argument followed the Fifth Circuit precedent of *Pizzitolo*, 812 F.2d at 983. See *Southwest Marine*, 112 S. Ct. at 490 n.1, 492.

⁵² *Id.* at 492.

⁵³ *Id.*; *Wilander*, 111 S. Ct. 807, 817-18, discussed *supra* notes 6-11 and accompanying text.

⁵⁴ *Southwest Marine*, 112 S. Ct. at 492.

⁵⁵ *Id.* Justice White wrote, "Because a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission—even one used exclusively in ship repair work—that worker may qualify as a Jones Act seaman." *Id.* at 494. See also *McDermott Int'l v. Wilander*, 111 S. Ct. 807, 817 (1991) (holding that seaman status depends on the maritime worker's connection to the vessel in navigation).

⁵⁶ *Southwest Marine*, 112 S. Ct. at 492.

⁵⁷ *Id.*

⁵⁸ *Id.* at 492-94.

⁵⁹ 45 U.S.C. § 51 *et seq.* (1988).

⁶⁰ *Southwest Marine*, 112 S. Ct. at 492-93. See also *Chesapeake & Ohio R.R. Co. v. Schwalb*, 493 U.S. 40, 42, 48 (1989) (holding that injured railroad employees who were repairing coal loading equipment for maritime vessels were covered by the LHWCA); *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 338-40 (1953) (holding that the LHWCA was the exclusive remedy for a railroad brakeman injured while working on a railroad car float in navigable waters).

fact that the LHWCA does not contain an exclusion for railroad workers comparable to the Jones Act exclusion for seamen.⁶¹

The Court also rejected Southwest Marine's argument that, where a maritime worker is "arguably covered" by the LHWCA, the district court should stay or preclude a traditional Jones Act suit pending an LHWCA administrative decision that the worker is a master or member of a crew.⁶² The Court reasoned that Congress did not intend the LHWCA to preclude or stay traditional Jones Act suits brought in the district courts.⁶³ In fact, the LHWCA actually anticipates that such suits could be brought without administrative action, according to the Court.⁶⁴ The Court thus concluded that Gizoni was not required to await an administrative determination of his status prior to a judicial determination.⁶⁵

In addition, the Court rejected Southwest Marine's argument that a judicial proceeding under the LHWCA was subject to the same jurisdictional restrictions required under the National Labor Relations Act.⁶⁶ Cases involving the NLRA's complicated administrative proceedings required that state and federal courts yield to the authority of the National Labor Relations Board.⁶⁷ The level of complexity at the administrative level in the NLRA was not present in the LHWCA, according to the Court.⁶⁸ The Court therefore rejected Southwest Marine's argument that the LHWCA proceedings should preempt any action taken by the plaintiff in federal court.⁶⁹

Finally, the Court rejected Southwest Marine's argument that an employee who receives benefits under the LHWCA is barred from seeking relief under the Jones Act.⁷⁰ The Court stated that it

⁶¹ *Southwest Marine*, 112 S. Ct. at 493.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Southwest Marine*, 112 S. Ct. at 493. *See* 29 U.S.C. § 151 *et seq.* (1988); *see also* International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 388-91, 122 L.R.R.M. 2369, 2372-74 (1986); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

⁶⁷ *See Southwest Marine*, 112 S. Ct. at 493 (citing *Davis*, 476 U.S. at 391, 122 L.R.R.M. at 1272). The *Davis* Court stated that it has repeatedly reiterated in its decisions that Congress, in enacting the NLRA, intended the Board to have exclusive jurisdiction in these matters. *Davis*, 476 U.S. at 391, 122 L.R.R.M. at 2393. Congress intended that the NLRA's scheme of law, remedy and administration be applied consistently by a centralized administrative board in order to avoid conflicts that would arise from the application of the NLRA's rules by a wide number of tribunals. *Id.* at 389, 122 L.R.R.M. at 2372-73.

⁶⁸ *Southwest Marine*, 112 S. Ct. at 493.

⁶⁹ *See id.*

⁷⁰ *See id.*

is universally accepted that an employee who receives voluntary payments under the LHWCA, without a formal determination of his or her seaman status, is not prevented from seeking relief under the Jones Act.⁷¹ In addition, the Court emphasized that statutory interpretation of the LHWCA did not reveal an intent to preclude a maritime worker from pursuing a Jones Act remedy.⁷² Furthermore, the Court rejected the contention that a maritime worker who pursued a Jones Act remedy would benefit from double recovery by pointing out that under the LHWCA, any Jones Act recovery for an injury is credited against liability imposed by the LHWCA.⁷³ Thus, by dispensing with the possibility of double recovery, the Court maintained either LHWCA or Jones Act remedies for injured maritime workers.⁷⁴

The Court's decision in *Southwest Marine* effectively resolves a split between the Fifth and Sixth Circuits and firmly signals the Court's desire to clarify the interaction between claims made under the LHWCA and suits brought under the Jones Act.⁷⁵ As such, the Court establishes clear avenues for an injured maritime worker to follow in seeking compensation for injuries suffered on the job. An injured maritime worker should not be denied an opportunity to recover compensatory damages (by a jury trial) merely based on the title of his or her job. This decision, although based upon reasoning that arguably contradicts prior judicial interpretation of the Jones Act and the LHWCA and the legislative intent behind these Acts, greatly benefits a class of workers who should not have been foreclosed from recovery on the basis of job title.

This decision greatly benefits injured land-based maritime workers by making remedies available for those such as Gizoni who, although they are longshoremen under the LHWCA, spend nearly all of their time working aboard a vessel in furtherance of the

⁷¹ *Id.* See also GRANT GILMORE & CHARLES L. BLACK, JR., LAW OF ADMIRALTY 435 (2d ed. 1975); 4 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 90.51(a), at 16-507 (1989).

⁷² See *Southwest Marine*, 112 S. Ct. at 494.

⁷³ See *id.* at 494 & n.5. The Court also noted that the LHWCA specifically provided for full compensation credit for claims made under the Jones Act. *Id.* In addition, 33 U.S.C. § 903(e) provides:

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 Appendix (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this chapter.

⁷⁴ See *Southwest Marine*, 112 S. Ct. at 494 & n.5.

⁷⁵ See *supra* note 23 and accompanying text.

vessel's objectives. By allowing injured maritime workers to pursue Jones Act remedies in addition to LHWCA remedies, it can be expected that the total amount of compensatory damages awarded to injured maritime workers will vary considerably from case to case due to the unpredictable nature of juries in granting damage awards.⁷⁶ A maritime worker who is successful in a Jones Act suit will most likely be awarded a higher amount of compensatory damages from a jury than he or she would have received from an administrative body. This result is appropriate, especially in instances where the severity of the worker's disabling injury would essentially prohibit the employee from ever returning to his or her desired profession.

Nevertheless, commentators have argued that the Ninth Circuit's decision, as affirmed by the Supreme Court in the principal case, is flawed because the Court's reasoning contradicts the intent of the LHWCA by upsetting the uniform compensatory scheme for all workers whose occupations are enumerated within the Act.⁷⁷ In addition, it has been argued that the Ninth Circuit's ruling contradicted the Supreme Court's decision in *Wilander*,⁷⁸ where the Court determined that the LHWCA and the Jones Act were mutually exclusive, thereby clarifying the distinction between land-based maritime workers covered by the LHWCA and workers who qualify for seaman status under the Jones Act.⁷⁹ These commentators prefer a clear-cut distinction be made between land-based maritime workers covered under the LHWCA and traditional seamen covered under the Jones Act.⁸⁰

This decision does not violate the intended purpose and judicial interpretation of these Acts, however, as the majority of workers whose occupations are enumerated within the LHWCA will only be able to recover under that Act. Arguably, this decision creates an opportunity to pursue both LHWCA and Jones Act statutory rem-

⁷⁶ See Edith Green, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 LAW & CONTEMP. PROBS. 225, 225-27 (Fall 1989) (addressing generally the competence and decision-making process of juries in determining damage awards).

⁷⁷ See Kenneth G. Engerrand, *Seaman Status Reconstructed*, 32 S. TEX. L. REV. 169, 182 n.91 (1991); Eileen R. Madrid, *Seaman Status: The Supreme Court Recharts Its Course: Wilander and Gizoni*, 51 LA. L. REV. 1149, 1179-81 (1991).

⁷⁸ *Wilander*, 111 S. Ct. at 817.

⁷⁹ See Engerrand, *supra* note 77, at 182 n.91; Madrid, *supra* note 77, at 1179-81.

In *Wilander*, the Court determined that the LHWCA and the Jones Act were mutually exclusive because the LHWCA excluded any employee who was a master or member of a crew of any vessel. 111 S. Ct. at 813. See *supra* notes 10-12 and accompanying text.

⁸⁰ See Engerrand, *supra* note 77, at 182 n.91; Madrid, *supra* note 77, at 1179-81.

edies for a discrete number of individuals, namely, those maritime workers whose occupations are enumerated under the LHWCA and who also qualify as Jones Act seamen. Although there are a limited number of maritime workers who will be allowed to pursue both remedies, the Court clarified that they will not benefit from double recovery, because the LHWCA specifically provides for full compensation credit for claims made under the Jones Act.⁸¹ This factor will most likely discourage land-based plaintiffs from stretching an argument that they should qualify as Jones Act seamen.

In sum, *Southwest Marine* resolved the split between the circuits by unanimously holding that injured maritime workers whose occupations are enumerated within the LHWCA may pursue damages under the Jones Act, provided that there is a genuine issue of fact as to the worker's seaman status.⁸² Because the number of injured maritime workers in this employment category is extremely limited, this decision arguably affects very few people. Thus, after *Southwest Marine*, injured maritime workers who satisfy the criteria for both the LHWCA and the Jones Act will have a choice of remedies to pursue and will be assured of attaining the maximum amount of allowable compensatory damages for their injuries.

III. RACIAL DISCRIMINATION

A. **The Use of After-Acquired Resume Fraud as a Defense to Discrimination Claims: Washington v. Lake County, Illinois*¹

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis of race, sex, religion and national origin.² Employers, however, can sometimes escape liability even if an employment decision was motivated by discrimination.³

⁸¹ *Southwest Marine*, 112 S. Ct. at 494 & n.5. See *supra* notes 73-74 and accompanying text.

⁸² 112 S. Ct. at 492.

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¹ 969 F.2d 250, 59 FEP Cases 989 (7th Cir. 1992).

² 42 U.S.C. § 2000e-2 (1988). The applicable section of Title VII states:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 49 FEP Cases 954, 959 (1989).

If an employer can prove that it would have taken the same action absent discrimination, the employer will not be liable.⁴

In the 1989 case of *Price Waterhouse v. Hopkins*, the United States Supreme Court decided that an employer may not be liable even if an impermissible factor under Title VII substantially influenced an employment decision.⁵ The plaintiff in *Price Waterhouse* alleged she was denied promotion because of her sex.⁶ The Court held that if an impermissible factor played a part in an employment decision the employer can avoid liability if the same decision would have been made without consideration of the impermissible factor.⁷ Thus, an employer who based an employment decision on a mixture of permissible and impermissible motives may escape Title VII liability.⁸

Analogizing to this so-called "mixed motive" doctrine, federal appellate courts have allowed the use of evidence acquired after the employee's termination as a defense to employment discrimination claims.⁹ In 1988, in *Summers v. State Farm Mutual Automobile Insurance Co.*, the United States Court of Appeals for the Tenth Circuit held that evidence of employee misconduct discovered after the employee's termination was relevant to a "mixed motive" analysis.¹⁰ The court found that the employee would have been discharged had the employer known about the misconduct, regardless of any other motivation.¹¹ While the after-acquired evidence could not have been a cause of the employee's discharge, the court did find it relevant to the employee's claim of injury and precluded any recovery.¹²

The federal courts have developed two standards in cases involving after-acquired evidence of dishonesty in the employment application process.¹³ Some courts have allowed employers to escape

⁴ See *id.* at 244-45, 49 FEP Cases at 960-61.

⁵ *Id.* at 250, 49 FEP Cases at 962.

⁶ *Id.* at 232, 49 FEP Cases at 955.

⁷ *Id.* at 242, 49 FEP Cases at 959 (plurality). See also *id.* at 259-60, 49 FEP cases at 966 (White, J., concurring); *id.* at 261, 49 FEP Cases at 967 (O'Connor, J., concurring).

⁸ See *Price Waterhouse*, 490 U.S. at 247, 49 FEP Cases at 961.

⁹ See, e.g., *Milligan-Jensen v. Michigan Tech. Univ.*, No. 91-1894, 1992 WL 224610, at *3, 59 FEP Cases 1249, 1250-51 (6th Cir. Sept. 17, 1992); *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 704-08, 48 FEP Cases 1107, 1110-13 (10th Cir. 1988); *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614, 623, 34 FEP Cases 217, 225 (4th Cir. 1984), *cert. denied*, 469 U.S. 832 (1984).

¹⁰ See 864 F.2d at 708, 48 FEP Cases at 1113.

¹¹ *Id.*

¹² *Id.*

¹³ See *Bonger v. American Water Works*, 789 F. Supp. 1102, 1106, 58 FEP Cases 1430, 1433-34 (D. Colo. 1992).

liability if they can prove that they would not have hired the employee had they known of the resume fraud.¹⁴ In place of this "would not have hired" standard, other courts have applied the "would have fired" standard that requires employers to show that they would have fired the employee had they known about the misrepresentations during the employee's employment.¹⁵ In some cases, courts have applied both of these standards.¹⁶ No circuit court, however, has clarified the relationship between these standards.¹⁷

During the *Survey* year, in *Washington v. Lake County, Ill.*, the United States Court of Appeals for the Seventh Circuit held that the "would have fired" standard applies when an employee lies on the employment application and is later fired for an unrelated reason.¹⁸ The *Washington* court determined that the facts of each case dictate which standard should apply.¹⁹ Accordingly, the *Washington* court is the first federal appellate court to examine closely the relationship between the "would not have hired" and "would have fired" standards in a case involving after-acquired evidence of resume fraud.²⁰

In *Washington*, plaintiff Eddie Washington began work as a jailor at the Lake County Sheriff's Department ("the Department") in September 1986.²¹ Before being hired, Washington completed and signed an application that stated that any misrepresentation would result in discharge.²² On the application, Washington rep-

¹⁴ See *Punahale v. United Air Lines*, 756 F. Supp. 487, 490-91, 55 FEP Cases 44, 47 (D. Colo. 1991); *Mathis v. Boeing Military Airplane Co.*, 719 F. Supp. 991, 994-95, 50 FEP Cases 688, 691 (D. Kan. 1989).

¹⁵ See *O'Day v. McDonnell Douglas Helicopter Co.*, 784 F. Supp. 1466, 1468-69, 58 FEP Cases 535, 537 (D. Ariz. 1992); *O'Driscoll v. Hercules, Inc.*, 745 F. Supp. 656, 659-61, 53 FEP Cases 951, 953-55 (D. Utah 1990).

¹⁶ See, e.g., *Milligan-Jensen*, 1992 WL 224610, at *3, 59 FEP Cases 1249, 1250-51; *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409, 415, 57 FEP Cases 1362, 1367 (6th Cir. 1992); *Churchman v. Pinkerton's, Inc.*, 756 F. Supp. 515, 521, 55 FEP Cases 81, 86 (D. Kan. 1991).

¹⁷ See *Washington v. Lake County, Ill.*, 969 F.2d 250, 254 n.3, 59 FEP Cases 989, 992 n.3 (7th Cir. 1992).

¹⁸ *Id.* at 256, 59 FEP Cases at 993.

¹⁹ See *id.* at 254-56, 59 FEP Cases at 992-93.

²⁰ See *id.* at 254-57, 59 FEP Cases at 991-94.

²¹ *Id.* at 251, 59 FEP Cases at 989-90.

²² *Washington*, 969 F.2d at 252, 59 FEP Cases at 990. This provision stated:

I agree that if any misrepresentation has been made by me . . . any offer of employment may be withdrawn or my employment terminated immediately without any obligation to me other than for payment, at the rate agreed upon, for services actually rendered. . . .

Id., 59 FEP Cases at 990.

resented that he had never been convicted of a criminal offense.²³ In fact, Washington had been convicted of criminal trespass in 1974 and third-degree assault in 1981.²⁴

On July 13, 1989, the Department fired Washington.²⁵ At this time, the Department did not know that Washington had lied on his application.²⁶ The letter of termination stated that Washington was fired because his recent arrest for criminal sexual assault had discredited the Department.²⁷ The complainant later dropped this sexual assault charge.²⁸ The letter further explained that Washington's file contained evidence of twelve transgressions of Department policy, including insubordination and violation of jail security.²⁹

Washington filed suit in the United States District Court for the Northern District of Illinois.³⁰ In his complaint, Washington, who is African-American, alleged that the defendants had unfairly singled him out because of his race and had falsely characterized the incidents reported in his file.³¹ The district court dismissed several of Washington's claims, leaving a Title VII claim of racial discrimination against Lake County.³² Washington presented evidence of an appraisal conducted less than two months before his firing in which he received all "excellent" and "proficient" ratings with no "adequate" or "marginal" scores.³³ He also compared his situation with that of Officer Linda Blau, a white member of the Department.³⁴ Blau was involved in a hit-and-run accident while in uniform.³⁵ The police arrested her for driving while under the influence of alcohol and for leaving the scene of an accident, but the Department only suspended her for three days.³⁶ Despite the

²³ *Id.* at 251-52, 59 FEP Cases at 990.

²⁴ *Id.* at 252, 59 FEP Cases at 990.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Washington*, 969 F.2d at 252, 59 FEP Cases at 990.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Washington's amended complaint charged Lake County, Illinois, the Department, and Lieutenant Harry Frossard, individually and in his official capacity, with violating Title VII, 42 U.S.C. § 1983 and with violating his procedural due process rights under the Constitution. *Id.*

³² *Washington*, 969 F.2d at 252, 59 FEP Cases at 990. The district court also did not dismiss claims under 42 U.S.C. § 1983 against the county and Lieutenant Harry Frossard. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

presentation of this evidence, in March 1991, the district court granted summary judgment in favor of the defendants on Washington's remaining claims.³⁷ The district court based its decision on the after-acquired evidence of Washington's resume fraud.³⁸ On appeal, the United States Court of Appeals for the Seventh Circuit affirmed.³⁹

The *Washington* court observed that the "would not have fired" and "would have fired" standards were confusingly intermingled.⁴⁰ Because the Tenth Circuit's decision in *Summers* involved after-acquired evidence of on-the-job misconduct and not a falsified application, the *Washington* court found *Summers* inapplicable to resume fraud cases.⁴¹ According to the *Washington* court, which standard is applied can alter the outcome of a case involving after-acquired evidence of resume fraud.⁴² The court reasoned that an employer will most likely not hire someone who lies on an application, especially if the misrepresentation concerns a material requirement for the position sought.⁴³ On the other hand, an employer might be loath to fire an employee if the falsification were discovered after the employee had proven capable in the position.⁴⁴

The *Washington* court found guidance in *Price Waterhouse* for deciding when each of the two standards should apply.⁴⁵ The court noted that *Price Waterhouse* focused on the time of the adverse employment decision and inquired whether the same decision would have been made without the discriminatory motive.⁴⁶ The *Washington* court concluded that this temporal focus should be used in cases involving after-acquired evidence.⁴⁷ Thus, the court stated that in after-acquired evidence cases an employer must prove that if acting in a race-neutral manner, it would have made the same decision had it known of the after-acquired evidence at the time of decision.⁴⁸ Because Washington claimed that he was unjustly fired, the court concluded that the "would have fired" standard was ap-

³⁷ *Washington*, 969 F.2d at 252, 59 FEP Cases at 990.

³⁸ *See id.*

³⁹ *Id.* at 257, 59 FEP Cases at 994.

⁴⁰ *Id.* at 254, 59 FEP Cases at 991.

⁴¹ *See id.*, 59 FEP Cases at 992.

⁴² *See Washington*, 969 F.2d at 254, 59 FEP Cases at 992.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 255, FEP Cases at 992-93.

⁴⁶ *Id.* at 255-56, 59 FEP Cases at 992-93.

⁴⁷ *Washington*, 969 F.2d at 256, 59 FEP Cases at 993.

⁴⁸ *Id.* at 255, 59 FEP Cases at 993.

propriate.⁴⁹ The court found equitable appeal in the idea that a person who would not have been hired but for his misrepresentations should not receive legal relief for a later employment decision.⁵⁰ Nevertheless, the court found that its temporal focus made the "would not have hired" standard irrelevant in this case.⁵¹ Furthermore, the court stated that the "would not have hired" standard would unjustifiably incorporate property right concepts into employment discrimination law.⁵² According to the court, a "property right" in one's job is not required and could not be required to show injury under Title VII because much employment is "at-will," where an employee can be fired for any reason or no reason.⁵³

Applying the "would have fired" standard to the facts of the case, the *Washington* court determined that the Department, acting in a race-neutral manner, would have fired Washington if it had discovered the resume fraud during his employment.⁵⁴ Washington failed to produce affirmative evidence to counter affidavits from the Superintendent of the Lake County Jail and the Sheriff of Lake County, which both stated that Washington would have been discharged if the facts of his criminal convictions were known at the time of his employment.⁵⁵ Also, the court found the facts of Washington's and Officer Blau's situations too dissimilar to justify a conclusion that the Department treated white and black officers differently.⁵⁶ Finally, even though the Department had no formal policy to fire employees whom it later discovered had lied on their applications, the court stated that Washington did not affirmatively prove that an employee would not have been fired for resume fraud.⁵⁷ Thus, the Seventh Circuit affirmed the district court's summary judgment in favor of the defendants.⁵⁸

The *Washington* court logically determined that the timing of the adverse employment decision should dictate which of the two standards apply.⁵⁹ The court correctly reasoned that situations could

⁴⁹ *Id.* at 256, 59 FEP Cases at 993.

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *Washington*, 969 F.2d at 256, 59 FEP Cases at 993.

⁵³ *Id.*

⁵⁴ *Id.*, 59 FEP Cases at 994.

⁵⁵ *Id.* at 256-57, 59 FEP Cases at 994.

⁵⁶ *Id.* at 257, 59 FEP Cases at 994. The court noted that, unlike Washington, Blau did not lie on her application and her criminal act did not involve personal violence, which the court found relevant to Washington's position as a jailor. *Id.*

⁵⁷ *Washington*, 969 F.2d at 257, 59 FEP Cases at 994.

⁵⁸ *Id.*

⁵⁹ *See id.* at 256, 59 FEP Cases at 994.

arise in which an employer would not fire an employee if the employer subsequently discovered resume fraud, even though the employee would not have been hired if the resume fraud had been discovered during the hiring process.⁶⁰ An employee, trained with the employer's resources, who had proven to be a proficient worker, might *not* be fired for subsequently discovered resume fraud.⁶¹ Thus, this standard correctly burdens an employer with the more difficult task of proving that it would have fired a capable employee in spite of the employee's good work.⁶²

The *Washington* court's distinction between the two standards is rational.⁶³ Nevertheless, permitting the use of after-acquired evidence in employment discrimination cases is unwise.⁶⁴ The after-acquired evidence defense is antithetical to Title VII's goal of encouraging employers to eliminate discrimination.⁶⁵ Through the use of after-acquired evidence, employers can terminate an employee unlawfully and then escape liability by searching the employee's background for flaws in order to create a "legitimate" reason for the termination.⁶⁶ Courts undermine the strength of Title VII when they allow the use of after-acquired evidence to prevent a victim of employment discrimination from gaining a remedy.⁶⁷

In sum, in *Washington v. Lake County, Ill.*, the Seventh Circuit addressed and clarified the interaction between the "would not have hired" and "would have fired" standards in the context of Title VII of the Civil Rights Act of 1964.⁶⁸ The *Washington* court determined that if a case involves after-acquired evidence of resume fraud in which an employee claims to be the victim of an unlawful firing, the "would have fired" standard applies.⁶⁹ On the other hand, if the employee's claim involves discriminatory hiring, the "would not

⁶⁰ See *id.* at 254, 59 FEP Cases at 991-92.

⁶¹ See *id.*, 59 FEP Cases at 992; see also *Bonger*, 789 F. Supp. at 1106 & n.4, 58 FEP Cases at 1434 & n.4.

⁶² See *Bonger*, 789 F. Supp. at 1106, 58 FEP Cases at 1434. .

⁶³ See *id.*

⁶⁴ See *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1179-81, 59 FEP Cases 997, 1001-02 (11th Cir. 1992) (after-acquired evidence defense does not encourage employers to eliminate discrimination).

⁶⁵ See *id.* at 1180, 59 FEP Cases at 1102 (goal of Title VII is to achieve equality of employment opportunity) (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

⁶⁶ *Wallace*, 968 F.2d at 1180, 59 FEP Cases at 1102.

⁶⁷ See *id.*

⁶⁸ *Washington*, 969 F.2d at 254-57, 59 FEP Cases at 991-94.

⁶⁹ *Id.* at 256, 59 FEP Cases at 993.

have hired" standard applies.⁷⁰ Whether other circuit courts will follow the *Washington* court's reasoning remains to be seen.

IV. AGE DISCRIMINATION

A. **Retaliation Claims Under § 4(d) of the ADEA: EEOC v. Board of Governors of State Colleges and Universities.*¹

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits discrimination by an employer on the basis of age.² Section 4(d) of the ADEA makes it unlawful for an employer to discriminate against any employee who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or litigation under this [Act]."³ This prohibition against retaliatory action on the part of an employer derives its spirit and wording from a similar provision in Title VII of the Civil Rights Act of 1964 ("Title VII").⁴ The purpose of such provisions is to protect persons who seek to redress congressionally recognized forms of discrimination by initiating legal action.⁵

Courts have generally raised three main questions when considering an individual employee's right to protection from retaliatory action under the ADEA or Title VII.⁶ First, must a plaintiff demonstrate a particular retaliatory *intent* or state of mind in the employer?⁷ Second, what affirmative defenses might an employer legitimately advance to defeat such claims?⁸ Finally, can an employee waive the right to protection from retaliatory action, either individually or through a collective bargaining agreement?⁹

⁷⁰ See *id.* at 255 n.5, 59 FEP Cases at 993 n.5.

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¹ EEOC v. Board of Governors of State Colleges and Univs., 957 F.2d 424, 58 FEP Cases 292 (7th Cir. 1992).

² 29 U.S.C. §§ 621-634 (1988).

³ *Id.* § 623(d).

⁴ See EEOC v. Cosmair, Inc., 821 F.2d 1085, 1088, 44 FEP Cases 569, 571 (5th Cir. 1987); 42 U.S.C. § 2000e-3(a) (1988).

⁵ *Cosmair*, 821 F.2d at 1088, 44 FEP Cases at 571.

⁶ See *Board of Governors*, 957 F.2d at 427-31, 58 FEP Cases at 294-97.

⁷ See *TWA v. Thurston*, 469 U.S. 111, 128-29, 36 FEP Cases 977, 985 (1985); *Rose v. Hearst Magazines Div., The Hearst Corp.*, 814 F.2d 491, 492-93, 43 FEP Cases 641, 642 (7th Cir. 1987).

⁸ See *Thurston*, 469 U.S. at 129, 36 FEP Cases at 986; *Board of Governors*, 957 F.2d at 429, 58 FEP Cases at 296; *Rose*, 814 F.2d at 493, 36 FEP Cases at 985.

⁹ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52, 7 FEP Cases 81, 87 (1974); *Cosmair*, 821 F.2d at 1089-90, 44 FEP Cases at 572-73.

In *TWA v. Thurston*, the United States Supreme Court held in 1985 that the defendant airline's transfer policy for pilots over the age of sixty violated the ADEA even though the discrimination was not willful.¹⁰ TWA's policy subjected captains over the age of sixty to a complex bidding procedure for available engineer positions, while captains who became disqualified from serving for reasons other than age could automatically displace less senior engineers.¹¹ The Court held that the ADEA required the airline to afford sixty-year-old captains the same transfer privileges that it gave to captains disqualified for reasons other than age.¹² TWA's affirmative defense that it was acting reasonably and in good faith by attempting to bring its policy into compliance with the ADEA was only sufficient to shield it from liability for the payment of liquidated damages.¹³

In *Rose v. Hearst Magazines Division, The Hearst Corp.*, however, the United States Court of Appeals for the Seventh Circuit ruled in 1987 that a federal district court's verdict of retaliatory discharge against an employee who had filed an ADEA complaint could not stand because the jury had found no willful intent on the part of the employer.¹⁴ Rose, an advertising sales manager, claimed that he had been discharged in retaliation for filing ADEA discrimination charges.¹⁵ The jury found that the filing of the age discrimination charges had been a determining cause for Rose's discharge, but that Hearst's violation of the ADEA had not been willful, because it had discharged Rose only after his work performance deteriorated following an automobile accident.¹⁶ The *Rose* court held that these two conclusions were irreconcilable and reasoned that as long as Hearst was acting in good faith, it could not be found to have retaliated against Rose.¹⁷

In 1987, the United States Court of Appeals for the Fifth Circuit held in *EEOC v. Cosmair, Inc.*, that an employee's right to file a discrimination claim with the Equal Employment Opportunity Commission ("EEOC") cannot be waived, either by the individual

¹⁰ See *Thurston*, 469 U.S. at 130, 36 FEP Cases at 986. Intent remained an issue in the *Thurston* Court's determination that the plaintiff was not entitled to liquidated damages because the violation was not "willful." *Id.*

¹¹ *Id.* at 116-17, 36 FEP Cases at 980.

¹² *Id.* at 130, 36 FEP Cases at 986.

¹³ *Id.*

¹⁴ *Rose*, 814 F.2d at 493, 43 FEP Cases at 643.

¹⁵ *Id.* at 493, 43 FEP Cases at 642.

¹⁶ *Id.* at 492-93, 43 FEP Cases at 642.

¹⁷ *Id.* at 493, 43 FEP Cases at 642.

or by a union in a collective bargaining agreement.¹⁸ In *Cosmair*, the employer terminated the benefits of an employee who filed an age discrimination complaint with the EEOC, claiming that the employee had signed an agreement waiving his right to file such claims.¹⁹ The court reasoned that any waiver by an employee of the right to file an ADEA charge would be against public policy and thus void.²⁰ Accordingly, the court held that the employer could not rely upon an employee's signed statement as a justification for a retaliatory employment policy.²¹

In *Alexander v. Gardner-Denver Co.*, a discrimination suit brought under Title VII, the United States Supreme Court held in 1974 that an employee who had filed a grievance under the non-discrimination clause of a collective bargaining agreement was not foreclosed from filing a similar complaint with the EEOC.²² Writing for the Court, Justice Powell reasoned that Congress intended to provide employees with parallel and overlapping remedies as a means of furthering both the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices.²³ Thus, the Court held that the waiver of an individual's right to be free from discriminatory employment practices "can form no part of the collective-bargaining process. . . ."²⁴

During the *Survey* year, the United States Court of Appeals for the Seventh Circuit, in *EEOC v. Board of Governors of State Colleges and Universities*, held that the provision in a collective bargaining agreement requiring employees to choose between an in-house grievance proceeding and the filing of a complaint with the EEOC was retaliatory on its face, and thus violated § 4(d) of the ADEA.²⁵ Neither the employer's good faith nor its lack of willful intent was a valid affirmative defense.²⁶ After *Board of Governors*, a court hearing a complaint under § 4(d) of the ADEA need only consider the effects of the retaliatory action on the employee, without reference to the employer's intent or motivation.²⁷ In addition, unions may

¹⁸ See *Cosmair*, 821 F.2d at 1089-90, 44 FEP Cases at 573.

¹⁹ *Id.* at 1087, 44 FEP Cases at 570-71.

²⁰ *Id.* at 1090, 44 FEP Cases at 573.

²¹ *Id.*

²² See *Alexander*, 415 U.S. at 59-60, 7 FEP Cases at 90.

²³ *Id.* at 47, 7 FEP Cases at 85.

²⁴ *Id.* at 51, 7 FEP Cases at 87.

²⁵ *Board of Governors*, 957 F.2d at 431, 58 FEP Cases at 298.

²⁶ *Id.* at 428, 58 FEP Cases at 294-95.

²⁷ See *id.* at 427, 58 FEP Cases at 294.

expect that courts will invalidate any collective bargaining agreement that waives their members' ADEA rights.²⁸

In April 1984, Raymond Lewis, a professor at Northeastern Illinois University ("University"), filed a grievance with the University Professionals of Illinois ("Union") when the President of the University decided not to recommend Lewis for tenure, allegedly in violation of University procedures.²⁹ Six days before his arbitration hearing was set to convene, Lewis filed an age discrimination claim under the ADEA at the urging of the EEOC.³⁰ Article 17.2 of the collective bargaining agreement between the Union and the Board of Governors of State Colleges and Universities ("Board") stipulates: "If . . . while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to . . . proceed further with the matter pursuant to this grievance procedure."³¹ Even though the Board learned of Lewis's EEOC claim after the arbitration hearing had concluded, it invoked article 17.2 to prevent the arbitrator from rendering a decision.³² The Board's termination of the grievance proceeding prompted the EEOC to file a federal action.³³

The case generated three federal district court opinions, designated by the United States Court of Appeals for the Seventh Circuit as *BOG I*, *BOG II* and *BOG III*.³⁴ In *BOG I*, the Board moved to dismiss the complaint, asserting that it had a fundamental contractual right under article 17.2 of the collective bargaining agreement not to submit the dispute to arbitration.³⁵ The Board also argued that the termination agreement served the purpose of avoiding the waste of duplicate proceedings on the same complaint.³⁶

²⁸ See *id.* at 431, 58 FEP Cases at 297.

²⁹ *Id.* at 426, 58 FEP Cases at 293.

³⁰ *Board of Governors*, 957 F.2d at 426, 58 FEP Cases at 293.

³¹ *Id.*

³² *Id.*

³³ *Id.*, 58 FEP Cases at 293-94. Subsequently, the Board reinstated Lewis's grievance proceeding, but the EEOC decided to proceed to trial to challenge article 17.2, which the Board had used against three other employees who had filed charges of discrimination, and which the Board had not modified. *Id.* at 426-27 & n.2, 58 FEP Cases at 293-94.

³⁴ *Id.* at 426, FEP Cases at 293. The cases are reported as: *EEOC v. Board of Governors of State Colleges and Univs.*, 735 F. Supp. 888, 52 FEP Cases 1265 (N.D. Ill. 1990); *EEOC v. Board of Governors of State Colleges and Univs.*, 706 F. Supp. 1377, 50 FEP Cases 126 (N.D. Ill. 1989); *EEOC v. Board of Governors of State Colleges and Univs.*, 655 F. Supp. 630, 44 FEP Cases 724 (N.D. Ill. 1987).

³⁵ *Board of Governors I*, 665 F. Supp. at 633, 44 FEP Cases at 726.

³⁶ *Id.*

Judge Getzendanner of the United States District Court for the Eastern District of Illinois rejected the Board's motion, holding that article 17.2 of the collective bargaining agreement constituted a prima facie case of forbidden retaliation under § 4(d) of the ADEA.³⁷

In *BOG II*, Judge Aspen of the United States District Court for the Eastern District of Illinois denied an EEOC motion for partial summary judgment on the ground that the Board's desire to avoid duplicative litigation was a non-malicious justification for article 17.2.³⁸ Thus, there was a genuine issue as to the Board's good faith in adopting the measure.³⁹ Judge Aspen relied upon dicta in *Rose v. The Hearst Corp.* which stipulated that retaliatory action must be willful to be actionable.⁴⁰

In *BOG III*, Judge Aspen granted summary judgment for the Board, concluding that article 17.2 was not invalid, absent evidence that the provision was adopted with intent to retaliate.⁴¹ In *Board of Governors*, however, the Seventh Circuit reversed, ruling that the district court in *BOG III* had misapplied the *Rose* case.⁴² Its ruling effectively restored Judge Getzendanner's initial opinion that article 17.2 of the collective bargaining agreement was invalid per se as a form of retaliation forbidden by § 4(d) of the ADEA.⁴³

The court's reasoning in *Board of Governors* comprised a two-step process.⁴⁴ First, it demonstrated that any retaliatory employment policy constitutes a per se violation of § 4(d), and is thus invalid regardless of the employer's intent or its proffer of a good faith justification.⁴⁵ Second, it determined that article 17.2 of the collective bargaining agreement was such a retaliatory policy with respect to ADEA claimants.⁴⁶

The court insisted that § 4(d) explicitly prohibits discrimination against employees who engage in protected activity, and that no

³⁷ *Id.* at 635, 44 FEP Cases at 727-28.

³⁸ *Board of Governors II*, 706 F. Supp. at 1386-87, 50 FEP Cases at 133. After Judge Getzendanner resigned from the judiciary, the case was assigned to Judge Aspen. See EEOC v. Board of Governors of State Colleges and Univs., 957 F.2d 424, 427, 58 FEP Cases 292, 294 (7th Cir. 1992).

³⁹ *Board of Governors II*, 706 F. Supp. at 1386, 50 FEP Cases at 133.

⁴⁰ *Id.* (citing *Rose*, 814 F.2d at 493, 43 FEP Cases at 642).

⁴¹ *Board of Governors III*, 735 F. Supp. at 891, 52 FEP Cases at 1267.

⁴² *Board of Governors*, 957 F.2d at 427, 58 FEP Cases at 294.

⁴³ *Id.*

⁴⁴ See *id.* at 429, 58 FEP Cases at 296.

⁴⁵ *Id.*

⁴⁶ *Id.*

showing of willful intent is necessary in cases involving retaliatory employment policies.⁴⁷ The court rejected the Board's good faith motive for adopting the retaliatory policy and its contention that discrimination ought to be illegal only if it is malicious.⁴⁸ Rather, the court observed that Congress had relieved the judiciary of the responsibility of distinguishing between legal and illegal discrimination by choosing not to provide any affirmative defenses to a charge of retaliation and by providing no exceptions for discrimination that an employer might find "rational or financially prudent."⁴⁹ The court acknowledged that the invalidation of article 17.2 would allow an employee of the University overlapping legal and contractual remedies.⁵⁰ Moreover, this choice of remedies was consonant with the strong federal policy against discriminatory employment practices.⁵¹

In holding that the Board's asserted good faith defense was irrelevant, the court distinguished the treatment of intent in *Rose*.⁵² In *Rose*, the court required a finding of both retaliation and willful intent because of the particular facts in that individual-disparate-treatment case.⁵³ In *Board of Governors*, the court did not extend the rationale of *Rose* to a case that involved a discriminatory policy.⁵⁴

⁴⁷ *Board of Governors*, 957 F.2d at 427, 58 FEP Cases at 294.

⁴⁸ *Id.* at 428, 58 FEP Cases at 294.

⁴⁹ *Id.*, 58 FEP Cases at 295.

⁵⁰ *Id.* (citing *Alexander*, 415 U.S. at 47, 7 FEP Cases at 85).

⁵¹ *See id.* at 428, 58 FEP Cases at 295.

⁵² *Board of Governors*, 957 F.2d at 428, 58 FEP Cases at 295 (citing *Rose*, 814 F.2d at 493, 43 FEP Cases at 642).

⁵³ *Rose*, 814 F.2d at 493, 43 FEP Cases at 642. The determination of "willfulness" or "discriminatory intent" is central to the two-tier liability scheme set up by the ADEA. *Board of Governors*, 957 F.2d at 428-29, 58 FEP Cases at 295. Section 623 constitutes the first tier and subjects the employer to the payment of damages for non-willful age discrimination. *Id.* *See also* *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1064, 49 FEP Cases 395, 396 (7th Cir. 1989). Section 626(b) provides for the second tier of liability and subjects an employer to double damages for willful violations. *See Burlew*, 896 F.2d at 1064, 49 FEP Cases at 396. The Supreme Court's standard for determining if a violation is willful is whether "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *TWA v. Thurston*, 469 U.S. 111, 128, 36 FEP Cases 977, 985 (1985). In *Rose*, the employer confronted the plaintiff with a series of criticisms of his work and "angrily chastised him for filing the age discrimination charges." 814 F.2d at 492, 43 FEP Cases at 642. The United States Court of Appeals for the Seventh Circuit ruled that under those circumstances, the jury could not return a finding of non-willful retaliation, because the employer's flagrant conduct must have been evidence of a willful intent to commit an action prohibited by the ADEA. *Id.*

⁵⁴ *Board of Governors*, 957 F.2d at 429, 58 FEP Cases at 295. At least two other federal circuit courts have rejected the holding in *Rose*, even in cases of individual disparate treatment. *See Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1571, 50 FEP Cases 622, 628

Such cases, it asserted, require no inquiry into the defendant's state of mind in order to determine whether the policy has a discriminatory effect.⁵⁵

Having concluded that any retaliatory policy is a per se violation of § 4(d), the *Board of Governors* court proceeded to explain why article 17.2 of the collective bargaining agreement constituted such a retaliatory policy with respect to ADEA claimants.⁵⁶ Article 17.2 authorized the Board to terminate an in-house grievance proceeding for the sole reason that the employee had filed an ADEA complaint.⁵⁷ Although the Board acknowledged that article 17.2 compelled an employee to choose between two forms of relief, it claimed that the loss of the contractual right to a grievance procedure did not create a legal issue, because the University was under no obligation to provide employees with the right to a grievance procedure in the first place.⁵⁸ The court rejected this argument on the grounds that an employer is not free to dole out benefits in a discriminatory fashion, even if the employer would have been free not to provide the benefit at all.⁵⁹

Similarly, the court rejected the Board's contention that article 17.2 was not discriminatory because it did not apply solely to employees who brought ADEA or Title VII discrimination claims, but to any employee who brought an employment-related action in any judicial or administrative forum.⁶⁰ The court reasoned that a policy is no less discriminatory toward a protected group simply because it adversely affects non-protected persons as well.⁶¹ Adoption of the Board's position would enable employers to apply all kinds of discriminatory criteria against a protected group as long as they were careful to include some members of a non-protected class.⁶²

(2d Cir. 1989) (asserting that a finding of retaliation may result in a finding of willfulness, but need not do so in every case); *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 636, 48 FEP Cases 516, 519 (10th Cir. 1988) (rejecting the view that a finding against willfulness must be inconsistent with a jury finding of intentional discrimination).

⁵⁵ *Board of Governors*, 957 F.2d at 429, 58 FEP Cases at 296 (citing *Burlew*, 869 F.2d at 1065, 49 FEP Cases at 397).

⁵⁶ *Board of Governors*, 957 F.2d at 429, 58 FEP Cases at 296.

⁵⁷ *Id.* at 430, 58 FEP Cases at 296.

⁵⁸ *Id.*

⁵⁹ *Id.* (citing *Hishon v. King & Spalding*, 467 U.S. 69, 75, 34 FEP Cases 1406, 1410 (1984)).

⁶⁰ *Board of Governors*, 957 F.2d at 430, 58 FEP Cases at 296. For example, under article 17.2, an employee's decision to file a contract claim in a judicial forum would similarly result in the termination of his or her grievance proceeding. *Id.*

⁶¹ *Id.* at 430, 58 FEP Cases at 297.

⁶² *Id.* at 431, 58 FEP Cases at 297.

In a concurring opinion, Judge Manion expressed concern that the court's hard line against retaliatory employment policies such as article 17.2 might inadvertently have effects that were not intended by the federal laws against discrimination.⁶³ Judge Manion acknowledged that the choice which article 17.2 imposed, between an in-house grievance procedure and the filing of an age discrimination charge, did technically violate § 4(d) of the ADEA.⁶⁴ Nevertheless, he warned that the rigid result reached by the majority might cause employers to eliminate the contractual grievance procedure as a viable option to litigation as a means of resolving employment disputes.⁶⁵

In sum, *EEOC v. Board of Governors* strongly reinforced § 4(d)'s prohibition against policies that penalize employees who exercise their statutory rights under the ADEA.⁶⁶ The court recognized that the effectiveness of the EEOC depends upon the willingness of employees to come forward with their claims.⁶⁷ It should reassure employees that their rights to bring such claims will be forcefully protected by statutory provisions against retaliation such as those in the ADEA or Title VII.

The *Board of Governors* decision should deter employers from adopting policies that inhibit their employees from exercising their ADEA rights by imposing adverse employment consequences.⁶⁸ It seems that courts will invalidate provisions in any collective bargaining agreement which stipulate that grievances will proceed to arbitration only if an employee is willing to forego his or her right to bring a complaint under the ADEA.⁶⁹ The *Board of Governors* decision also warns union leaders that even though they may be free to bargain away certain rights, such as the right to strike, in exchange for other benefits or concessions, any attempt to waive employees' rights under the ADEA or Title VII will be void as against federal employment policy.

Judge Manion's concurring opinion in *Board of Governors*, however, speculates that without provisions such as article 17.2, employers may have little incentive to provide in-house procedures for

⁶³ *Id.* at 432, 58 FEP Cases at 298 (Manion, J., concurring).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See *Board of Governors*, 957 F.2d at 431, 58 FEP Cases at 297.

⁶⁷ *Id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

hearing and resolving employment grievances.⁷⁰ As the "baby boom" generation ages and the number of workers covered by the ADEA grows, age discrimination complaints can be expected to increase. The advantage of a grievance procedure that includes binding arbitration is that a just result can often be achieved without sending every employment dispute into the federal courts for resolution.⁷¹ In-house grievance procedures provide both employers and employees with a mechanism for resolving disputes without the financial expense and negative publicity that accompany drawn-out litigation. Moreover, in those instances where the employee seeks to preserve an ongoing employment relationship, the in-house grievance procedure is far more likely to result in an amicable compromise than is a combative lawsuit.

Judge Manion pessimistically foresees that the strong ruling in *Board of Governors* may inadvertently result in a dramatic increase in the number of age discrimination claims brought before federal courts.⁷² Such cases instead might well have been aired in a timely fashion and justly settled through in-house grievance procedures.⁷³ Faced with the prospect that employees will simultaneously bring their complaints in two fora and take the most advantageous result, employers may determine that it will be more efficient and economical if legal action is the only available alternative.⁷⁴

There will always be employers who are skeptical of in-house grievance hearings, particularly where the complainant's peers participate in the adjudication, because such hearings tend to result in findings that are sympathetic to employees. Those employers may indeed bear out Judge Manion's pessimism by using the decision in *Board of Governors* to rationalize the abandonment of in-house grievance proceedings in cases involving ADEA claims. For the majority of employers who recognize that the in-house resolution of such employment disputes is preferable to the publicity and expense of time-consuming litigation, *Board of Governors* should have a salutary, clarifying effect. Because employers can expect courts to adopt a hard line against retaliatory employment practices, they are far more likely to avoid such practices altogether. They are also likely to devise grievance procedures that produce just results instead of seeking ways to subvert the process of in-house dispute resolution.

⁷⁰ *Id.* at 432, 58 FEP Cases at 298.

⁷¹ *Board of Governors*, 957 F.2d at 432, 58 FEP Cases at 298.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.*

In sum, the ruling in *EEOC v. Board of Governors* ensures that the Seventh Circuit will apply § 4(d) of the ADEA to strike down any retaliatory employment policy regardless of the employer's good faith or lack of willful intent.⁷⁵ Courts may also invalidate any collective bargaining agreement in which a union waives its members' ADEA rights.⁷⁶ The *Board of Governors* court has thus strengthened the rights given to ADEA claimants under § 4(d) and increased the likelihood that employers will seek to resolve age discrimination disputes through in-house grievance procedures instead of defending their retaliatory employment practices in inhospitable courts.

V. NATIONAL ORIGIN DISCRIMINATION

A. **American Subsidiaries of Foreign Corporations Immune from Title VII*: *Fortino v. Quasar Co.*¹

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination by employers on the basis of an individual's national origin.² Discrimination on the basis of national origin is not, however, the same as discrimination on the basis of citizenship.³ Thus an employer's refusal to hire alien employees does not constitute discrimination on the basis of national origin and is not unlawful under Title VII.⁴

In 1973, in *Espinoza v. Farah Manufacturing Co.*, the United States Supreme Court held that the term "national origin" refers not to one's country of citizenship, but instead to the country of one's ancestors.⁵ In *Espinoza*, the petitioner, a Mexican citizen lawfully residing in the United States with her American husband, was denied employment with Farah Manufacturing because Farah had a policy against hiring aliens.⁶ Espinoza sued Farah alleging that it

⁷⁵ *Id.* at 428, 58 FEP Cases at 295.

⁷⁶ *Board of Governors*, 957 F.2d at 431, 58 FEP Cases at 297.

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¹ 950 F.2d 389, 57 FEP Cases 712 (7th Cir. 1991).

² Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a) (1989). Title VII states in part: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ." *Id.*

³ See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 87-88, 6 FEP Cases 933, 933-34 (1973).

⁴ See *id.* at 88, 6 FEP Cases at 934.

⁵ *Id.*

⁶ *Id.* at 87, 6 FEP Cases at 933. The Court pointed out that the original draft of Title VII included a prohibition against discrimination on the basis of national origin and ancestry, but the word "ancestry" was eventually dropped because it was considered synonymous with

had discriminated against her on the basis of national origin.⁷ The *Farah* Court reasoned that the terms "national origin" and "citizenship" were distinct.⁸ Thus, the Court held that *Farah* had not violated Title VII.⁹

Then, in 1976, in *McDonald v. Santa Fe Trail Transportation Co.*, the United States Supreme Court held that Title VII protects the interests of whites in being free from discrimination the same way it protects the interests of nonwhites.¹⁰ In *McDonald*, two white employees and one black employee of the Santa Fe Trail Transportation Company ("Santa Fe") were caught stealing sixty gallons of anti-freeze being transported for a Santa Fe customer.¹¹ Shortly thereafter, the two white employees, the petitioners, were fired, but the black employee was not.¹² The petitioners sued Santa Fe under Title VII alleging racial discrimination.¹³ The Court based its ruling on prior Equal Employment Opportunity Commission decisions that prohibited racial discrimination against whites in the same manner as racial discrimination against nonwhites.¹⁴ The Court also examined the legislative history of Title VII and concluded that Title VII was intended to protect whites from discrimination in the same way it protects nonwhites.¹⁵

Pursuant to certain treaty rights, however, employers who are not American corporations may be immune from Title VII.¹⁶ Between 1946 and 1956, the United States entered into sixteen treaties

national origin. *Id.* at 89, 6 FEP Cases at 934. The Court also relied on the common federal practice since 1914 of denying aliens entrance to competitive examination for federal employment as indicative of the distinction between national origin and citizenship for the purposes of discrimination. *Id.* Furthermore, the Court reasoned that the federal government had excluded aliens from federal employment, while at the same time issuing executive orders that prohibit discrimination in federal employment on the basis of national origin, thus indicating the distinction between the two terms. *See id.*

⁷ *Id.* at 87, 6 FEP Cases at 933.

⁸ *Espinoza*, 414 U.S. at 87, 6 FEP Cases at 933-34.

⁹ *See id.* at 95-96, 6 FEP Cases at 937.

¹⁰ *See* 427 U.S. 273, 280, 12 FEP Cases 1577, 1580 (1976).

¹¹ *Id.* at 276, 12 FEP Cases at 1578.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 279, 12 FEP Cases at 1579-80.

¹⁵ *McDonald*, 427 U.S. at 280, 12 FEP Cases at 1580.

¹⁶ *See, e.g., MacNamara v. Korean Airlines*, 863 F.2d 1135, 1141, 48 FEP Cases 980, 983 (3d Cir. 1988) (where Title VII protections conflict with rights granted through FCN treaty, conflict must be resolved in favor of treaty). *See also Wickes v. Olympic Airways*, 745 F.2d 363, 367, 35 FEP Cases 1766, 1769 (6th Cir. 1984) (companies of parties to FCN treaty can discriminate in favor of their own citizens); *Spiess v. C. Itoh & Co.*, 643 F.2d 353, 362, 25 FEP Cases 849, 855 (5th Cir. 1981) (treaty permits Japanese companies to discriminate in favor of their own citizens).

with foreign nations.¹⁷ Although the terms of the treaties varied slightly depending on the particular parties, the treaties basically served to establish guidelines for the treatment each country was expected to give the other and the rights of each country to conduct business in the territory of the other.¹⁸ In 1953, the United States entered into a Friendship, Commerce and Navigation ("FCN") treaty with Japan that governed the countries' commercial relationship.¹⁹

In 1982, the United States Supreme Court addressed the issue of whether Title VII immunity under an FCN treaty extended to an American subsidiary of a foreign corporation.²⁰ The Supreme Court held, in *Sumitomo Shoji America, Inc. v. Avagliano*, that certain FCN treaty rights that permit the parties to the treaty to hire executives of their choice do not apply to the American subsidiary of a Japanese corporation engaged in business pursuant to the treaty.²¹ An American subsidiary of a Japanese corporation doing business in the United States pursuant to the FCN treaty between the United States and Japan was sued by a group of employees who alleged that Sumitomo's practice of hiring only male Japanese citizens for its high-level positions violated Title VII.²² The Court reasoned that the American subsidiary did not acquire the same rights under the FCN treaty as the Japanese corporation.²³ Thus the *Sumitomo* Court held that the American subsidiary could not invoke the rights granted through article VIII(1) of the treaty.²⁴

The treaty in *Sumitomo* provided that Japanese companies doing business in the United States could employ "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."²⁵ The treaty also provided that compa-

¹⁷ Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

¹⁸ *Id.*

¹⁹ *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185-86, 28 FEP Cases 1753, 1757 (1982). See Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063.

²⁰ *Sumitomo*, 457 U.S. 179-80, 28 FEP Cases at 1754-55.

²¹ See *id.* at 179, 181-82, 28 FEP Cases at 1754, 1755.

²² *Id.* at 177-78, 28 FEP Cases at 1754-55. *Sumitomo* was incorporated in New York and was doing business as a United States company. *Id.* at 182, 28 FEP Cases at 1756.

²³ *Id.* at 182-83, 28 FEP Cases at 1756.

²⁴ *Id.* Article VIII(1) of the treaty provides "[C]ompanies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.* at 181, 28 FEP Cases at 1755 (emphasis added).

²⁵ *Sumitomo*, 457 U.S. at 181, 28 FEP Cases at 1755.

nies incorporated within the territory of one of the parties would be considered a company of that party.²⁶ The *Sumitomo* Court relied on the plain language of the treaty to decide that Sumitomo was not entitled to the same rights as a Japanese company operating in the United States because Sumitomo was incorporated under New York law.²⁷ The Court also reasoned that it was unnecessary to give an American subsidiary corporation, incorporated in the United States, the same right as its parent company because the American subsidiary was already on equal ground with other American companies.²⁸ The Court concluded that the purpose of the treaty, to equate the rights of Japanese companies doing business in the United States with the rights of American companies, was fully met even when an American subsidiary was not considered a Japanese company.²⁹ Thus, Court held that article VIII(1) of the FCN treaty, which allows parties to the treaty to hire executives of their choice, did not apply to the American subsidiary.³⁰

After *Sumitomo*, courts have consistently held that discrimination on the basis of citizenship by a foreign corporation operating in the United States pursuant to a FCN treaty does not fall within the realm of Title VII.³¹ For example, in 1988, in *MacNamara v. Korean Airlines*, the United States Court of Appeals for the Third Circuit held that the FCN treaty between the United States and Korea provided protection for Korean corporations engaged in business in the United States from local laws that prohibit discrimination on the basis of citizenship.³² *MacNamara* involved an Amer-

²⁶ *Id.* at 182, 28 FEP Cases 1756.

²⁷ *Id.* at 181-82; 28 FEP Cases at 1756. The treaty provided in pertinent part that "the term 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their judicial status recognized within the territories of the other Party." *Id.* at 182, 28 FEP Cases at 1756. The Court also examined testimony of the Ministry of Foreign Affairs, who stated that an American subsidiary, wholly owned by a Japanese company, is not a Japanese company under the treaty. *Id.* at 183, 28 FEP Cases at 1756.

²⁸ *Id.* at 187-88, 28 FEP Cases at 1758.

²⁹ *Id.*

³⁰ *Sumitomo*, 457 U.S. at 189, 28 FEP Cases at 1759.

³¹ See *MacNamara*, 863 F.2d at 1141, 48 FEP Cases at 983. See also *Wickes*, 745 F.2d at 367, 35 FEP Cases at 1769 (companies of parties to FCN treaty can discriminate in favor of their own citizens); *Spies*, 643 F.2d at 362, 25 FEP Cases at 855 (treaty permits Japanese companies to discriminate in favor of their own citizens).

³² See *McNamara*, 863 F.2d at 1147, 48 FEP Cases at 989. The treaty provided in pertinent part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.* at 1138, 48 FEP Cases at 981.

ican executive who was terminated from Korean Airlines after eight years of employment and replaced by a Korean citizen.³³ The employee sued Korean Airlines alleging that Korean Airlines had discriminated against him on the basis of race, national origin and age.³⁴ The *MacNamara* court explained that the legislative history of FCN treaties suggested that American negotiators intended to secure American companies the right to employ their own citizens when doing business in Korea, similar to the rights they would have if they were operating in the United States.³⁵ The court subsequently held that the Korean company had not violated Title VII by showing preference toward its own citizens in hiring Korean managers.³⁶

During the *Survey* year, the Court of Appeals for the Seventh Circuit held, in *Fortino v. Quasar Co.*, that discrimination by an American subsidiary of a Japanese corporation in favor of Japanese citizens, based on express treaty authorization, is not actionable under Title VII as discrimination based on national origin.³⁷ In *Fortino*, three American executives charged their former employer with discriminating against them on the basis of national origin by choosing Japanese employees to replace them.³⁸ The *Fortino* court distinguished between discrimination by a foreign company, doing business in the United States pursuant to a treaty that favors citizens of its own country, from discrimination on the basis of national origin.³⁹ The *Fortino* court extended immunity from Title VII, based on a FCN treaty, to an American subsidiary of a Japanese corporation doing business in the United States.⁴⁰

In *Fortino*, three American executives charged their former employer, Quasar Co., an American subsidiary of the Japanese corporation Matsushita Electric Industrial Company ("Matsushita"), with discrimination on the basis of national origin in violation of Title VII.⁴¹ Quasar was an unincorporated division of an American

³³ *Id.* at 1137, 48 FEP Cases at 981.

³⁴ *Id.* at 1138, 48 FEP Cases at 981.

³⁵ *Id.* at 1144-45, 48 FEP Cases at 986.

³⁶ *Id.* at 1147, 48 FEP Cases at 989.

³⁷ *Fortino v. Quasar Co.*, 950 F.2d 389, 393, 57 FEP Cases 712, 715-16 (7th Cir. 1991).

³⁸ *Id.* at 391, 57 FEP Cases at 714.

³⁹ *Id.* at 392, 57 FEP Cases at 715.

⁴⁰ *See id.* at 393, 57 FEP Cases at 715-16.

⁴¹ *Id.* at 391, 57 FEP Cases at 714. The petitioners in *Fortino* also alleged discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b) (1988). *Id.* The *Fortino* court dismissed one petitioner's ADEA claim based on his execution of a valid waiver of any claims against Quasar. *Id.* at 394-95,

company owned by Matsushita that marketed Matsushita products in the United States.⁴² Matsushita periodically sent Japanese executives to America to work temporarily for Quasar.⁴³ Although these Japanese executives were under the control of Quasar while they were in the United States, they continued to be official Matsushita employees.⁴⁴ In fact, the visiting Japanese executives, called "expatriates," were referred to as "MEI (Matsushita Electrical Industrial) Personnel" on the Quasar payroll records.⁴⁵ While the expatriates were in the United States, Matsushita retained control over their performance evaluations, personnel files and salary information.⁴⁶

In 1985, Quasar suffered a substantial financial setback.⁴⁷ In order to recoup its losses and reorganize Quasar, Matsushita sent a Japanese executive to the United States to work at Quasar.⁴⁸ This executive reorganized Quasar and reduced its workforce by fifty percent.⁴⁹ During the reorganization the three plaintiffs were terminated.⁵⁰ Other American executives were also terminated as a result of the overhaul of Quasar, including two American executives of Japanese descent, but none of the Japanese citizens were discharged.⁵¹

57 FEP Cases at 716-17. The court reversed and remanded for new trial the lower court's verdict in favor of the remaining two petitioners on the basis of two evidentiary errors by the district court. *Id.* at 395-97, 399, 57 FEP Cases at 717-19, 720. In order to help the court and the parties on remand, the *Fortino* court explained its opinion on the issues of prejudgment interest and front pay in ADEA cases. *Id.* at 397-98, 57 FEP Cases at 719-20. The *Fortino* court explained that prejudgment interest should not be awarded in cases where double damages are also awarded because the prejudgment interest becomes an "unauthorized form of punitive damages." *Id.* at 397-98, 57 FEP Cases at 719. The *Fortino* court also stated that there is no right to a jury trial on the issue of front pay as front pay serves as a damage award in lieu of the equitable remedy of reinstatement. *Id.* at 398-99, 57 FEP Cases at 720.

⁴² *Fortino*, 950 F.2d at 391-92, 57 FEP Cases at 714.

⁴³ *Id.* at 392, 57 FEP Cases at 714. Under the FCN treaty, Japanese citizens working for Quasar were allowed to enter the United States to do executive or supervisory work for any company that was at least half-owned by Japanese citizens provided the work was authorized by the treaty. *Id.* at 392, 57 FEP Cases at 714-15. This treaty authorized corporations from the United States to employ executives of their choice in business in Japan, and companies from Japan to employ executives of their choice in business in the United States. *Id.*

⁴⁴ *Id.* at 392, 57 FEP Cases at 714.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Fortino*, 950 F.2d at 392, 57 FEP Cases at 715.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Not only were none of the Japanese executives discharged, but most received raises while none of the American executives who retained their jobs were given raises. *Id.*

Three former employees filed suit in the United States District Court for the Northern District of Illinois.⁵² The district court ruled in favor of the plaintiffs, holding that Quasar had discriminated against its American executives on the basis of their national origin.⁵³ The district court found that Quasar had violated Title VII based on the fact that Quasar terminated only American executives during its reorganization while at the same time employing more executives from Japan and giving raises to the Japanese executives who remained at Quasar.⁵⁴

On appeal, the Court of Appeals for the Seventh Circuit reversed the lower court's ruling and held that discrimination against American citizens in favor of Japanese citizens working in the United States pursuant to a FCN treaty did not constitute discrimination on the basis of national origin.⁵⁵ The *Fortino* court, relying on *McDonald*, which held that Title VII prohibits discrimination against whites in favor of nonwhites, concluded that Title VII prohibited discrimination against people of non-Japanese descent in favor of people of Japanese descent.⁵⁶ The *Fortino* court also noted that in *Espinoza*, the United States Supreme Court had distinguished between discrimination on the basis of national origin, which was expressly prohibited by Title VII, and discrimination on the basis of citizenship, which was not prohibited.⁵⁷ Following *Espinoza*, the court stated that although citizenship and national origin were closely related, discrimination on the basis of citizenship, especially when authorized by a treaty, was not prohibited by Title VII.⁵⁸ The court concluded that although Quasar's behavior was clearly discriminatory against its American executives, such discrimination was based on citizenship rather than national origin and was authorized by the FCN treaty and thus did not violate Title VII.⁵⁹

The court also analyzed the language and intent of the FCN treaty between the United States and Japan.⁶⁰ The court reasoned

⁵² *Fortino*, 950 F.2d at 391, 57 FEP Cases at 714.

⁵³ *See id.*

⁵⁴ *See id.* at 392, 57 FEP Cases at 714.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Fortino*, 950 F.2d at 392, 57 FEP Cases at 715.

⁵⁸ *Id.* at 392-93, 57 FEP Cases at 715.

⁵⁹ *Id.* The appellate court admitted the evidence regarding the treaty between the United States and Japan even though the issue had not been raised in the district court. *Id.* at 391, 57 FEP Cases at 714. The court based its decision to admit the treaty on comity between the United States and Japan. *Id.*

⁶⁰ *Id.* at 392-94, 57 FEP Cases at 715-16. Like the FCN treaties in *MacNamara*, *Wickes*,

that if Quasar's preference for Japanese citizens were considered discrimination on the basis of national origin, the treaty would be unable to serve its purpose.⁶¹ Based on *MacNamara*, where the court looked to the rights of the parties under the FCN treaty to hold that a Korean company had not violated local discrimination laws, the *Fortino* court reasoned that a treaty expressly granting Japanese businesses the right to hire executives of their own choice could not be nullified by Title VII.⁶² Because the power to hire executives of their own choice was granted through the treaty, the court would be removing a term of the treaty by upholding a judgment against Quasar for choosing Japanese executives over American executives.⁶³

Although the court stated that Matsushita was clearly granted express rights through the treaty, the court questioned whether these rights extended to Quasar as an American subsidiary.⁶⁴ The court decided that the treaty rights did extend to Quasar by distinguishing *Sumitomo*, which held that an American subsidiary of a Japanese company did not fall under the terms of a FCN treaty.⁶⁵ According to the *Fortino* court, there was no evidence in *Sumitomo* that the Japanese parent company was influential in the subsidiary's decision to discriminate.⁶⁶ The *Fortino* court concluded that a judgment precluding Quasar from treating Japanese executives sent by Matsushita more favorably than American executives would affect Matsushita in the same way as a judgment entered directly against it; Matsushita would be prevented from choosing its own executives to run Quasar in place of choosing American executives.⁶⁷ The court held that the American division of the Japanese corporation had the same rights under the FCN treaty as its Japanese parent corporation and was not liable under Title VII.⁶⁸

Under the reasoning of the *Fortino* court, any unincorporated subsidiary of a Japanese-owned American corporation who takes its

and *Spies*, the treaty in *Fortino* authorized in pertinent part that "... companies of either Party [i.e., the U.S. and Japan] to engage, within the territories of the other Party ... executive personnel ... of their choice." *Id.* at 392, 57 FEP Cases at 715.

⁶¹ *Id.*

⁶² *Fortino*, 950 F.2d at 392, 57 FEP Cases at 715.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 393, 57 FEP Cases at 715-16.

⁶⁶ *Id.* at 393, 57 FEP Cases at 715.

⁶⁷ *Id.* The court determined that there was no evidence of wrongful discrimination, but the court left open the question whether the treaty provided total immunity to the parties from Title VII claims. *Fortino*, 950 F.2d at 393, 57 FEP Cases at 716.

⁶⁸ See *id.* at 393-94, 57 FEP Cases at 715-16.

direction from its Japanese parent may be entitled to immunity from Title VII for discrimination in favor of Japanese citizens.⁶⁹ The *Fortino* decision gives real latitude to foreign-owned American corporations doing business in the United States. In cases where FCN treaties exist between the foreign parent's company and the United States, an unincorporated subsidiary must only show that its foreign parent directed the alleged discrimination in favor of its own citizens to avoid Title VII liability. This means, however, that where an American subsidiary has a substantial influence over discriminatory behavior, it may not be considered a party to the treaty and may be subject to liability.

The Seventh Circuit's decision in *Fortino* that Quasar, as an American subsidiary of a Japanese company, is not subject to Title VII considerations seems inconsistent with the United States Supreme Court's decision in *Sumitomo*. The Court in *Sumitomo* held that companies incorporated in the United States do not fall under the protection of the treaty.⁷⁰ In *Sumitomo*, although the subsidiary was a division of a Japanese company, it was incorporated in the United States.⁷¹ In *Fortino*, the subsidiary was an unincorporated division of an American company that was Japanese-owned.⁷² Although the *Fortino* court did not consider whether it was relevant that Quasar was unincorporated, the United States Supreme Court may find no distinction between the entity in *Sumitomo* and the entity in *Fortino*. Thus the question remains open whether protection under a FCN treaty that is denied to an incorporated United States subsidiary will be given to a United States subsidiary that is unincorporated. In *Sumitomo*, the Supreme Court based its decision not to consider *Sumitomo* a "party" for purposes of the FCN treaty on the fact that *Sumitomo* was not a company of Japan because it was incorporated in New York.⁷³ If the Supreme Court were to apply this same reasoning to the facts of *Fortino*, it seems that it would come to the same result. *Fortino* would not be considered a party for purposes of the treaty because although it is unincorporated, it is a division of a company incorporated in the United States that happens to be Japanese-owned.

In sum, the Seventh Circuit held in *Fortino* that the unincorporated American subsidiary of a Japanese corporation is not liable

⁶⁹ See *id.*

⁷⁰ *Sumitomo*, 457 U.S. at 181-82, 28 FEP Cases at 1754-55.

⁷¹ *Id.* at 178, 28 FEP Cases at 1754.

⁷² *Fortino*, 950 F.2d at 391, 57 FEP Cases at 714.

⁷³ *Sumitomo*, 457 U.S. at 181-82, 28 FEP Cases at 1756.

under Title VII for discrimination in favor of Japanese citizens.⁷⁴ The *Fortino* court relied on the FCN treaty between the United States and Japan to conclude that in order to effectuate the intent of the parties to the treaty, the subsidiary must be given the same rights as its parent company.⁷⁵ The Seventh Circuit's decision in *Fortino* has taken the protection afforded to foreign corporations a step further than the United States Supreme Court was willing to do in *Sumitomo* by extending these rights to American subsidiaries.

VI. GENDER DISCRIMINATION

A. *Statutory Denial of Unemployment Compensation Benefits to an Individual Who Voluntarily Leaves Employment to Relocate with a Spouse: *Austin v. Berryman*¹

Section 60.2-618(1)(ii) of the Code of Virginia Annotated denies unemployment compensation to an individual who voluntarily leaves employment to relocate with his or her spouse.² In general, the statute allows individuals who voluntarily leave employment to collect benefits if they can demonstrate to the Virginia Employment Commission ("VEC") that they left for a "good cause."³ Subsection (ii), however, creates a presumption that relocating with a spouse is not good cause for leaving employment.⁴ Although the Virginia law

⁷⁴ *Fortino*, 950 F.2d at 393, 57 FEP Cases at 715-16.

⁷⁵ *Id.*

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¹ 955 F.2d 223 (4th Cir. 1992) [hereinafter *Austin V.*].

² VA. CODE ANN. § 60.2-618(1)(ii) (Michie 1992). The statute states "'good cause' shall not include . . . (ii) voluntarily leaving work with an employer to accompany or to join his or her spouse in a new locality." *Id.* This provision was added in response to pressure from public employers of the spouses of frequently transferred military personnel. *Austin V.*, 955 F.2d at 226. Instead of paying a standard tax, public employers in Virginia have the option of reimbursing the Unemployment Compensation Trust Fund for the full amount of any benefits paid to their employees. *Id.* Thus, public employers directly benefit from the denial of unemployment compensation to any of their former employees. *See id.*

³ VA. CODE ANN. § 60.2-618(1). The issue of whether relocating with a spouse constitutes "good cause" for voluntarily leaving employment has been subject to considerable debate; states that lack a controlling statute have been split on the issue. *See, e.g.,* *Lind v. Employment Sec. Div.*, Dep't of Labor, 608 P.2d 6, 7 (Alaska 1980) (need to join husband was good cause); *Robinson v. Unemployment Sec. Bd. of Review*, 434 A.2d 293, 303 (Conn. 1980) (accompanying husband who had been transferred to another state was good cause); *Douglas v. Unemployment Ins. Appeals Bd.*, 133 Cal. Rptr. 604, 610 (1976) (accompanying husband for a three-month assignment in another state was for personal pleasure and not good cause).

⁴ VA. CODE ANN. § 60.2-618(1)(ii). This automatic denial of benefits was approved by the Associate Regional Administrator for Unemployment Insurance ("Administrator") of the United States Department of Labor, who found that the Virginia law did not conflict with

is facially gender-neutral,⁵ the group of individuals denied benefits under the statute is largely comprised of women, indicating possible discrimination under the Fourteenth Amendment.⁶

In 1979, in *Personnel Administrator of Massachusetts v. Feeney*, the United States Supreme Court held that a statute that is gender-neutral on its face does not violate the Equal Protection Clause of the Fourteenth Amendment solely because of its disproportionate impact on women.⁷ The plaintiff in *Feeney* challenged a gender-neutral statutory preference system for hiring veterans based on the fact that a disparate percentage of the adversely affected class were women.⁸ The *Feeney* Court reasoned that when faced with an equal protection challenge based on a statute's disparate impact, a court should apply a two-fold inquiry.⁹ Initially, a court must ask whether the statute's classification is overtly or covertly gender-based.¹⁰ If it is neither, the court must ask whether the adverse effects of the statute reflect invidious gender-based discrimination.¹¹ Applying this inquiry to the facts of *Feeney*, the Supreme Court held that the veteran preference statute did not violate the Equal Protection Clause of the Fourteenth Amendment.¹²

The *Feeney* Court began its analysis by recognizing that classifications based on gender require a heightened level of scrutiny due to the pervasive and subtle discrimination traditionally surrounding such classification.¹³ Furthermore, the Court noted that facially neutral statutes are often merely a pretext for discrimination.¹⁴ The

the requirements of the Federal Employment Tax Act ("FETA"). 26 U.S.C. § 3304 (1988). See *Austin v. Berryman*, 768 F. Supp. 188, 189 (W.D. Va. 1991) [hereinafter *Austin IV*]. This is an important consideration as the grant of federal funds to state unemployment systems is conditioned upon federal approval of state laws. 42 U.S.C. § 502 (1988). The original form of the provision submitted to the Administrator only applied to individuals in public employment, and as such was found by the Administrator to contravene the requirements of FETA. 26 U.S.C. § 3304(a)(6)(A) (1988). To resolve this problem, the bill was amended before enactment to apply to all employers, public and private. *Austin IV*, 768 F. Supp. at 189.

⁵ VA. CODE ANN. § 60.2-618(1).

⁶ *Austin V*, 955 F.2d at 226. Women comprised 86.8% of the affected group. *Id.*

⁷ See 442 U.S. 256, 274, 19 FEP Cases 1377, 1384 (1979).

⁸ See *id.* at 259, 19 FEP Cases at 1379.

⁹ *Id.* at 274, 19 FEP Cases at 1384.

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Feeney*, 442 U.S. at 281, 19 FEP Cases at 1387.

¹³ *Id.* at 273, 19 FEP Cases at 1384. The Court has held that classifications based on gender must bear a close and substantial relationship to important governmental objectives. *Id.* at 273, 19 FEP Cases at 1384.

¹⁴ See *id.* at 272, 19 FEP Cases at 1384.

Court also recognized, however, that some level of classification is inevitable as is some degree of disparate impact on group members.¹⁵ Thus, a mere disproportionate impact on a particular group does not necessarily signify that a classification is a pretext for discrimination.¹⁶ To strike a balance between these countervailing concerns, the Court devised a two-fold inquiry of gender bias and invidious discriminatory purpose.¹⁷

To determine whether a classification demonstrates gender bias, a court must inquire into the purpose of a statute.¹⁸ The *Feeney* Court reasoned that where a classification can be explained as serving a legitimate purpose, gender bias cannot be inferred from impact alone.¹⁹ Even where a legitimate purpose is served, however, a court still needs to determine whether the adverse effect of a statute reflects invidious discrimination.²⁰ Where a statute's impact can be explained in neutral terms, the *Feeney* Court reasoned that merely foreseeing that the classification will disadvantage women does not indicate discriminatory intent.²¹

Many states have enacted statutes that deny benefits to individuals who voluntarily leave employment to relocate with a spouse or to fulfill marital, filial or domestic circumstances.²² The statutes vary in detail and application, but, with one exception, they have been upheld in the state courts.²³ Instead of applying the two-fold *Feeney* inquiry, each state court that has upheld its statute has reasoned

¹⁵ See *id.* at 271-72, 19 FEP Cases at 1384.

¹⁶ *Id.*

¹⁷ See *Feeney*, 442 U.S. at 274, 19 FEP Cases at 1384.

¹⁸ *Id.* at 274-75, 19 FEP Cases at 1385.

¹⁹ *Id.* The Court in *Feeney* found that the veteran preference statute served the legitimate goal of rewarding veterans for their service. *Id.* at 277, 19 FEP Cases at 1385. Further, the distinction between veterans and non-veterans is directly related to this purpose. See *id.* at 275, 19 FEP Cases at 1385. The Court also held that there was no evidence of a gender-based purpose. *Id.* at 281, 19 FEP Cases at 1387.

²⁰ *Id.* at 274, 19 FEP Cases at 1384-85.

²¹ The Court noted that the impact could easily be described in neutral terms because a large number of men are included in the class of non-veterans, and women are included in the class of veterans. *Id.* at 275, 19 FEP Cases at 1385.

²² See MISS. CODE ANN. § 71-5-513(A)(1)(a) (1983); UTAH CODE ANN. § 35-4-5(a) (Supp. 1992); IDAHO CODE § 72-1366 (Supp. 1992); Act of Dec. 5, 1936, P.L. (1937) 2897, *as amended*, 43 PA. CONS. STAT. § 802 (amended 1980) [hereinafter PA. CONS. STAT. § 802]; 1953 Cal. Stat. § 1309 (renumbered § 1264) (repealed 1976) [hereinafter Cal. Stat. § 1309].

²³ See, e.g., *Warren v. Board of Review*, 463 So. 2d 1076, 1077 (Miss. 1985) (court upheld statute); *Chandler v. Department of Employment Sec.*, 678 P.2d 315, 318 (Utah 1984) (same); *Pyeatt v. Idaho State Univ.*, 565 P.2d 1381, 1383 (Idaho 1977) (same); *Gilman v. Unemployment Comp. Bd. of Review*, 369 A.2d 895, 896 (Pa. Commw. Ct. 1977) (same). *But see Boren v. California Dep't of Employment Dev.*, 130 Cal. Rptr. 683, 690 (Cal. Ct. App. 1976) (court struck down statute).

that under the state constitution, the classifications were not discriminatory and thus did not warrant the heightened scrutiny of a suspect class.²⁴ Thus the state courts merely examined whether the classification bore a rational relationship to a legitimate state interest.²⁵

For example, in the 1977 case of *Gilman v. Unemployment Compensation Board of Review*, the Commonwealth Court of Pennsylvania upheld a statutory provision that denied unemployment compensation benefits to persons voluntarily leaving employment to relocate with a spouse or for other marital or domestic obligations. Unlike the Virginia law, however, this provision did not apply to sole or major family wage earners.²⁶ The claimant in *Gilman*, denied compensation when she terminated employment to follow her transferred husband, contended that the Pennsylvania law's exemption of major family wage earners further increased the disparate impact of the statute because husbands greatly outnumber wives as major family wage earners.²⁷ The court, however, holding that numerical disparity alone is insufficient to demonstrate a gender-based classification, applied the rational relationship standard of review.²⁸ The court reasoned that the neutral distinction between major and secondary family wage earners was rationally related to the state's legitimate goal of protecting the unemployed from financial hardship.²⁹ Consequently, the court held that the classification did not violate the Equal Protection Clause.³⁰

Then in 1984, in *Chandler v. Department of Employment Security*, the Supreme Court of Utah upheld a statute that was strikingly similar to the Virginia statute.³¹ The six female claimants in *Chandler*

²⁴ See Warren, 463 So. 2d at 1077; *Chandler*, 678 P.2d at 318; *Pyeatt*, 565 P.2d at 1382-83; *Gilman*, 369 A.2d at 897.

²⁵ See Warren, 463 So. 2d at 1077; *Chandler*, 678 P.2d at 318; *Gilman*, 369 A.2d at 897. But see *Boren*, 130 Cal. Rptr. at 686.

²⁶ 369 A.2d at 896. The statute states:

An employe[e] shall be ineligible for compensation for any week . . . in which his or her unemployment is due to leaving work (I) to accompany or to join his or her spouse in a new locality, or, (II) because of a marital, filial or other domestic obligation . . . provisions of this subsection (2) shall not be applicable if the employe[e] . . . was the sole or major support.

43 PA. CONS. STAT. § 802.

²⁷ 369 A.2d at 896.

²⁸ *Id.* at 897.

²⁹ *Id.* The court, noting the historical controversy surrounding the issue of whether domestic necessity is good cause, reasoned that the distinction was justified because the family as a whole suffered more from the unemployment of a major wage earner. *Id.* at 897-98.

³⁰ *Id.* at 898.

³¹ See 678 P.2d at 318. The statute stated that "a claimant who has left work voluntarily

challenged the statute on an equal protection basis after they were denied benefits when they left employment to relocate with their spouses.³² The *Chandler* court, describing the classification of relocating spouses as neutral,³³ held that the classification was related to the state's legitimate goal of limiting unemployment compensation to those who become unemployed through no fault of their own.³⁴ Concluding that the classification did not offend the Constitution, the court upheld the denial of benefits.³⁵

In 1976, in *Boren v. California Department of Employment Development*, the California Court of Appeals for the Third District became the only state court to strike down a statute that denied benefits to individuals voluntarily leaving employment to relocate with a spouse or for domestic reasons.³⁶ The claimant in *Boren* left her job when her employer required her to work a shift that conflicted with child care arrangements.³⁷ Although the claimant was denied compensation on other grounds, the court held both the relocation and domestic duty portions of the statute unconstitutional.³⁸ The *Boren* court noted that under California law discrimination may be demonstrated by statistics.³⁹ Because the statute was found to have had a statistically disparate impact on women, the court held that the classification was suspect.⁴⁰ Then, applying a strict scrutiny standard of review, the court held that the suspect classifications did not support a compelling state interest.⁴¹ Besides

to accompany, follow or join his or her spouse to or in a new locality does so without good cause." UTAH CODE ANN. § 35-4-5(a).

³² 678 P.2d at 316-17.

³³ *Id.* at 318. The court distinguished those who voluntarily left work to follow a spouse from those who voluntarily left work for other good cause. *Id.*

³⁴ *Id.* The court reasoned that an individual who follows a spouse is motivated by personal lifestyle considerations rather than external pressure. *Id.*

³⁵ *Id.*

³⁶ See 130 Cal. Rptr. at 690. The statute stated in pertinent part that an employee who leaves his or her employment to be married or to accompany his or her spouse to or join her or him at a place from which it is impractical to commute to such employment or whose marital or domestic duties cause him or her to resign from his or her employment shall not be eligible for unemployment insurance benefits.

Cal. Stat. § 1309.

³⁷ See 130 Cal. Rptr. at 685.

³⁸ *Id.* at 690. Claimant was ineligible for benefits because she was found to have voluntarily left work for domestic reasons. *Id.* at 690.

³⁹ *Id.* at 687.

⁴⁰ *Id.* at 686. The court accepted as fact the plaintiff's allegation that 99% of the persons disqualified under the statute in 1971 were women. *Id.*

⁴¹ *Id.* at 689. The court stated that fiscal integrity of state programs may be a legitimate

being distinguishable as decided under California state law, this case was decided before the Supreme Court set out its gender-biased, discriminatory standard in *Feeney*.⁴²

During the *Survey* year, in *Austin v. Berryman*, the United States Court of Appeals for the Fourth Circuit held that Virginia's statutory denial of unemployment benefits to an individual who voluntarily leaves employment to relocate with his or her spouse did not violate the Equal Protection Clause of the Fourteenth Amendment.⁴³ Because the plaintiff's equal protection challenge was based on the statute's disparate impact on women, the *Austin* court applied *Feeney*'s two-fold inquiry.⁴⁴ The court reasoned that the plaintiff failed to satisfy either prong of the *Feeney* standard and upheld the spousal relocation provision of the Virginia Code.⁴⁵

In June of 1985, Austin voluntarily left her employment to accompany her husband on a move 150 miles from their place of residence.⁴⁶ The purpose of this relocation was her husband's desire to live with and care for his aging mother.⁴⁷ At the time of the move, Austin was the sole wage earner for her family of four children.⁴⁸ Following the move, she applied for unemployment compensation but was denied benefits pursuant to the Virginia law.⁴⁹ After exhausting the administrative remedies available through the VEC,⁵⁰ Austin filed suit in the District Court for the Western District of Virginia, claiming that the statute violated the Equal Protection Clause of the Fourteenth Amendment.⁵¹

The district court did not address the merits of Austin's equal protection claim because it found the Virginia statute to be uncon-

policy choice but that it is not a compelling governmental interest required under strict scrutiny analysis. *Id.*

⁴² *Id.* at 687.

⁴³ 955 F.2d 223, 225 (4th Cir. 1992). This is the first time that a federal court has examined one of the state statutes that deny benefits to individuals who leave employment to relocate with a spouse. *See id.*

⁴⁴ *Id.* at 226.

⁴⁵ *Id.* at 229.

⁴⁶ *Id.* at 225.

⁴⁷ *Austin v. Berryman*, 670 F. Supp. 672, 673 (W.D. Va. 1987) [hereinafter *Austin I*].

⁴⁸ *Austin V*, 955 F.2d at 225. The Virginia law does not exempt sole or primary wage earners from the denial of benefits. *See* VA. CODE ANN. § 60.2-618.

⁴⁹ *Austin V*, 955 F.2d at 225.

⁵⁰ *Austin IV*, 768 F. Supp. 188, 190 (W.D. Va. 1991). Austin appealed her disqualification to an appeals examiner who held that she was not entitled to benefits. *Id.* The examiner's decision was affirmed in an appeal to the VEC. *Id.*

⁵¹ *Austin I*, 670 F. Supp. at 673. Austin's suit in federal district court also claimed that the Virginia statute violated her First Amendment right to exercise her religious beliefs and her fundamental marital rights protected by the Fourteenth Amendment. *Id.*

stitutional based on other grounds raised by Austin.⁵² The VEC appealed and the Fourth Circuit affirmed, holding the statute unconstitutional on grounds other than equal protection.⁵³ In reconsideration of the appeal, the Fourth Circuit, sitting en banc, vacated its previous opinion and overruled the lower court decision, holding that the challenges addressed by the lower court were without merit.⁵⁴

Because on rehearing the court of appeals overruled the lower court's holding that the Virginia statute was unconstitutional, the case was remanded for consideration of Austin's equal protection claim.⁵⁵ The district court, applying the *Feeney* test, upheld Virginia's statute, denying Austin unemployment compensation benefits.⁵⁶ Austin appealed the decision to the Fourth Circuit.⁵⁷

On appeal, the appellate court applied the two-fold inquiry of *Feeney*.⁵⁸ Addressing the first prong of the test, the court held that Austin failed to demonstrate that the statute's classification was overtly or covertly based on gender.⁵⁹ In analyzing this prong, the court first concluded that the statute was facially neutral because it

⁵² *Id.* at 680. The district court held that the Virginia statute was unconstitutional because it burdened fundamental marital rights by impinging upon the right of married couples to live together. *Id.* at 677. The court also held that as applied to Austin, the statute violated her right to freely exercise her religion by hindering the exercise of her religious belief that she should follow her husband and honor and help her mother-in-law. *Id.* at 675.

⁵³ *Austin v. Berryman*, 862 F.2d 1050, 1055, 49 FEP Cases 26, 27 (4th Cir. 1988) [hereinafter *Austin II*]. The Fourth Circuit overturned the lower court's decision that the Virginia statute was per se unconstitutional, reasoning that the denial of unemployment benefits does not interfere with fundamental marital rights and thus the district court had erred in applying a heightened level of scrutiny. *Id.* Instead, the court of appeals held that the spousal relocation provision bore a reasonable and rational relationship to the state's desire to protect its Unemployment Compensation Fund from meritless claims. *Id.* On the other hand, the appellate court upheld the lower court's finding that, as applied to Austin's particular situation, the Virginia statute violated her First Amendment right to free exercise of religion. *Id.*

⁵⁴ *Austin v. Berryman*, 878 F.2d 786, 787, 50 FEP Cases 323, 324 (4th Cir. 1989) [hereinafter *Austin III*]. On rehearing, the court of appeals held that Virginia's spousal relocation provision did not violate Austin's First Amendment right to free exercise of religion, reasoning that the true cause of Austin's unemployment was geographic distance, not religious belief. *Id.*

⁵⁵ *Id.* at 788, 50 FEP Cases at 324.

⁵⁶ *Austin IV*, 768 F. Supp. 188, 191-92 (W.D. Va. 1991). In applying the *Feeney* test, the district court summarily decided the first prong, moving directly to the second prong inquiry of invidious discrimination. See *id.* at 191. Then, deferring to the legislature's stated goals, the court held that the plaintiff failed to demonstrate a discriminatory purpose. *Id.* at 191-92.

⁵⁷ See *Austin V*, 955 F.2d at 224.

⁵⁸ *Id.* at 226.

⁵⁹ *Id.* at 227.

excluded spouses of either gender from collecting unemployment benefits when they voluntarily left employment to relocate with a spouse.⁶⁰ The court then looked at several of the factors suggested by the *Feeney* Court under the first prong of the test.⁶¹ Examining the legislative motivation behind the statute and the legitimate goals presented by the defendants, the court held that the classification of "spouses" was not covertly gender-based.⁶²

Turning to the second prong of the *Feeney* test, the court held that Austin failed to demonstrate that the disparate impact of the statute on women reflected invidious gender-based discrimination.⁶³ The court first noted that the statute negatively impacts men as well as women by denying men benefits if they leave employment to follow their wives.⁶⁴ The court also noted that it impacts both spouses regardless of who is denied benefits because it decreases the total family income.⁶⁵

To support its finding that the legislature was not motivated by invidious discrimination, the court examined the relationship between the classification and the state's interest.⁶⁶ The defendants claimed that the statute's classification served legitimate state goals: insuring a stable workforce, avoiding tax penalties on employers who maintain employee positions and reserving benefits for persons who become unemployed through no fault of their own.⁶⁷ The court, considering the legislative history of the statute, held that the state's goals were legitimate and that denying benefits to individuals who voluntarily leave employment to follow a spouse is rationally related to attaining those goals.⁶⁸

The court summarily rejected Austin's argument that the defendants' knowledge of the possible disparate impact of the statute demonstrated purposeful discrimination.⁶⁹ The court held that the clear mandate of *Feeney* requires that the plaintiff demonstrate more than a mere awareness of disparate consequences.⁷⁰ In so holding, the court reasoned that even if Austin could prove that the defen-

⁶⁰ *Id.* at 226.

⁶¹ *See id.* at 227.

⁶² *Austin V*, 955 F.2d at 227.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.* at 228.

⁶⁷ *Austin V*, 955 F.2d at 227.

⁶⁸ *See id.* at 228.

⁶⁹ *Id.*

⁷⁰ *Id.*

dants knew that the statute would have a disparate impact, such knowledge would not invalidate the statute.⁷¹

After *Austin*, no matter how overwhelmingly a gender-neutral statute impacts women, it is unlikely that a fourth circuit court will find it a pretext for gender discrimination. Challenges of facially gender-neutral statutes, such as a spousal relocation clause, are likely to be subject to *Feeney*'s two-fold inquiry rather than warranting the heightened scrutiny reserved for gender and other suspect classifications.⁷² Thus, even where a large number of the individuals adversely impacted by a statute are women, the legislature will not be required to show that the classification was substantially related to an important governmental objective.⁷³ Before *Austin*, because the class in *Feeney* was only comprised of 61.3 percent women, a good faith argument could be made that a statute that overwhelmingly impacted women did not fall under the *Feeney* test.⁷⁴ Now, however, unless a plaintiff can demonstrate invidious discrimination, the two-prong *Feeney* test, with its lower level of scrutiny, will most likely be applied to equal protection challenges of facially neutral statutes.

Although the analysis applied by the state courts that have upheld the state unemployment statutes differs in form from the *Austin* court's analysis, it is similar in substance.⁷⁵ Instead of using the two-prong test of *Feeney*, the state courts merely describe their statutes' classifications as neutral and proceed to examine whether the classification bears a rational relationship to a legitimate state interest.⁷⁶ They do not purport to search for invidious discrimination as did the *Austin* court.⁷⁷ The *Feeney* inquiry into invidious discrimination focuses, however, on whether the impact can be explained in neutral terms and whether the classification is related to a legitimate purpose.⁷⁸ Thus a similar effect is achieved by either method.

⁷¹ *Id.*

⁷² See *Feeney*, 442 U.S. at 274, 19 FEP Cases at 1384.

⁷³ See *id.*

⁷⁴ See *id.* at 275, 19 FEP Cases at 1385. Although the disparate impact of the Virginia statute was more extreme than the impact of the *Feeney* statute, the court rejected Austin's attempt to statistically distinguish the Supreme Court decision. *Austin V*, 955 F.2d at 227.

⁷⁵ See, e.g., *Warren*, 463 So. 2d at 1077; *Chandler*, 678 P.2d at 318; *Pyeatt*, 565 P.2d at 1382-83; *Gilman*, 369 A.2d at 897-98.

⁷⁶ *Warren*, 463 So. 2d at 1077; *Chandler*, 678 P.2d at 318; *Gilman*, 369 A.2d at 897.

⁷⁷ See *Warren*, 463 So. 2d at 1077; *Chandler*, 678 P.2d at 317-18; *Pyeatt*, 565 P.2d at 1382-83; *Gilman*, 369 A.2d at 897-98.

⁷⁸ See 442 U.S. at 276-77, 19 FEP Cases at 1385-86.

The *Austin* decision adds one more persuasive argument to the abundance of state court decisions upholding unemployment compensation provisions that deny benefits to individuals who voluntarily leave employment to relocate with a spouse.⁷⁹ This support will possibly spur a proliferation of such provisions in the future, significantly increasing the number of individuals excluded from unemployment compensation systems.⁸⁰

B. **Tenth Circuit Provides Alternative for Majority Plaintiffs to State a Prima Facie Case Under Title VII: Notari v. Denver Water Department*¹

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of an individual's race, color, religion, sex or national origin.² Congress enacted Title VII in order to prohibit "disparate treatment," which occurs when an employer treats some employees less favorably than others because of their race, color, religion, sex or national origin.³ In passing Title VII, Congress sought to remove employment barriers that historically had affected minority group employees.⁴ Nonetheless, Title VII's

⁷⁹ See *Warren*, 463 So. 2d at 1077; *Chandler*, 678 P.2d at 318; *Pyeatt*, 565 P.2d at 1383; *Gilman*, 369 A.2d at 896.

⁸⁰ See *Austin V*, 955 F.2d at 226. Conversely, the creation of such statutes could be viewed as protecting innocent employers, who maintain positions for their employees, from additional unemployment compensation costs. See *id.*

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¹ *Notari v. Denver Water Dep't*, 971 F.2d 585, 59 FEP Cases 739 (10th Cir. 1992).

² 42 U.S.C. § 2000e *et seq.* (1965). Section 2000e-2 provides in relevant part:

Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

³ BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1286 (American Bar Association 1983). Four theories of employment discrimination have evolved under Title VII: disparate treatment; policies or practices that perpetuate in the present the effects of past discrimination; policies or practices that have an adverse impact not justified by business necessity; and failure to make reasonable accommodation to an employee's religious practices. *Id.* at 1.

⁴ See *id.* at 1286.

protections do extend to members of historically or socially favored groups.⁵

In 1973, in *McDonnell Douglas Corp. v. Green*, the United States Supreme Court addressed the allocation of proof in a non-class action challenging employment discrimination under Title VII.⁶ The plaintiff in *McDonnell Douglas*, a black male, was laid off as a result of the general reduction of his employer's workforce.⁷ The next year the employer advertised openings in the plaintiff's trade.⁸ The plaintiff applied for re-employment, but the defendant rejected his application.⁹ After his rejection, the plaintiff sued his employer for alleged racial discrimination.¹⁰

The *McDonnell Douglas* Court established a three-part analysis for evaluating a Title VII disparate treatment claim.¹¹ The plaintiff has the initial burden of proving a prima facie case of discrimination;¹² the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the employee's rejection;¹³ and finally, if the defendant meets the burden, the court must afford the plaintiff a "fair opportunity" to demonstrate that the employer's stated reason for rejection is in fact "pretext."¹⁴

In *McDonnell Douglas*, the Court articulated four elements necessary to establish a prima facie case of disparate treatment under Title VII.¹⁵ A plaintiff must demonstrate: (i) that he or she belongs to a minority group; (ii) that he or she applied and was qualified for a position for which the employer sought applicants; (iii) that the employer rejected the plaintiff's application despite his or her qualifications; and (iv) that, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants

⁵ See *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252, 41 FEP Cases 1713, 1714 (10th Cir. 1986).

⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 5 FEP Cases 965, 968 (1973).

⁷ *Id.* at 794, 5 FEP Cases at 966.

⁸ *Id.* at 796, 5 FEP Cases at 966.

⁹ *Id.*

¹⁰ *Id.* at 797, 5 FEP Cases at 967. The plaintiff also alleged that the employer had refused to rehire him because of his involvement in the civil rights movement. *Id.* at 796, 5 FEP Cases at 966. Before he brought suit in federal court, the plaintiff had filed a formal complaint with the Equal Employment Opportunity Commission. When the Commission failed to conciliate the dispute, it advised the plaintiff of his right to bring a civil action in federal court. *Id.* at 797, 5 FEP Cases at 966.

¹¹ *McDonnell Douglas*, 411 U.S. at 802-04, 5 FEP Cases at 969-70.

¹² *Id.* at 802, 5 FEP Cases at 969.

¹³ *Id.*

¹⁴ *Id.* at 804, 5 FEP Cases at 970.

¹⁵ *Id.* at 802, 5 FEP Cases at 969.

from persons of plaintiff's qualifications.¹⁶ If a plaintiff establishes the *McDonnell Douglas* elements of a prima facie case, the plaintiff creates an inference of discrimination.¹⁷

The *McDonnell Douglas* Court acknowledged, however, that the elements of a prima facie case for Title VII discrimination may not apply in every respect to differing factual situations.¹⁸ Thus, the Supreme Court broadened the first element of a prima facie case of gender discrimination in *Texas Department of Community Affairs v. Burdine*, where the qualified female plaintiff had sought an available position, but was rejected in favor of a male previously under her supervision.¹⁹ The Supreme Court held that the plaintiff needed only to show that she was a woman in order to satisfy the first element of a prima facie case under *McDonnell Douglas*.²⁰ Similarly, in *Mortensen v. Callaway*, where the plaintiff alleged that she had been passed over for a supervisory position because of her gender, the United States Court of Appeals for the Tenth Circuit held that a plaintiff in a promotion case meets the fourth element by showing that the employer hired another person for the position.²¹

In *Holmes v. Bevilacqua*, the United States Court of Appeals for the Fourth Circuit created an alternative to the four elements of a prima facie case articulated in *McDonnell Douglas*.²² The plaintiff, a black male, alleged racial discrimination in the defendant's failure

¹⁶ *McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 969.

¹⁷ See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 17 FEP Cases 1062, 1066 (1978). In *Furnco*, the Supreme Court stated:

A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id.

¹⁸ 411 U.S. at 802 n.13, 5 FEP Cases at 969 n.13.

¹⁹ 450 U.S. 248, 250-51, 25 FEP Cases 113, 114 (1981).

²⁰ *Id.* at 254 n.6, 25 FEP Cases at 116 n.6. Referring to the flexibility intended for the prima facie elements, the *Burdine* Court noted that:

In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male . . . who had been under her supervision.

Id.

²¹ 672 F.2d 822, 823, 29 FEP Cases 111, 112 (10th Cir. 1982).

²² 794 F.2d 142, 146, 41 FEP Cases 43, 46 (4th Cir. 1986).

to promote him.²³ The appeals court held that a plaintiff may establish a prima facie case of disparate treatment under Title VII either by direct evidence of discrimination or by indirect evidence whose "cumulative probative force" would support a reasonable inference that but for the plaintiff's minority status the employment decision would have favored the plaintiff.²⁴ The court stated that without such direct or indirect evidence, the plaintiff must establish a prima facie case under the *McDonnell Douglas* formulation.²⁵

The United States Supreme Court has not addressed the issue of whether a majority plaintiff alleging "reverse discrimination" may establish a prima facie disparate treatment case under the *McDonnell Douglas* formulation, and thus benefit from the resulting inference of discrimination.²⁶ In *Parker v. Baltimore and Ohio Railroad Co.*, the United States Court of Appeals for the District of Columbia stated that a reverse discrimination case demands modification of the *McDonnell Douglas* elements.²⁷ The *Parker* court held that a majority plaintiff must show "background circumstances" which support the suspicion that the defendant is an unusual employer who discriminates against historically favored groups.²⁸ A number of courts have adopted the *Parker* requirement.²⁹ Other courts, however, have rejected this background circumstances requirement and have held that majority plaintiffs, as well as their minority counterparts, may rely upon an unmodified *McDonnell Douglas* prima facie formulation.³⁰

During the Survey year, in *Notari v. Denver Water Department*, the United States Court of Appeals for the Tenth Circuit followed the *Parker* line of cases and held that a reverse discrimination plaintiff may benefit from the *McDonnell Douglas* inference only when background circumstances support the suspicion that the defendant is an unusual employer that discriminates against majority group individuals.³¹ The appeals court also held, however, that majority

²³ *Id.* at 143, 41 FEP Cases at 44.

²⁴ *Id.* at 146, 41 FEP Cases at 46.

²⁵ *Id.*

²⁶ *Notari*, 971 F.2d at 588, 59 FEP Cases at 742.

²⁷ 652 F.2d 1012, 1017, 25 FEP Cases 889, 894 (D.C. Cir. 1981).

²⁸ *Id.*

²⁹ See, e.g., *Livingston*, 802 F.2d at 1252, 41 FEP Cases at 1714; *Murray v. Thistledown Racing Club*, 770 F.2d 63, 67, 38 FEP Cases 1065, 1068 (6th Cir. 1985).

³⁰ See, e.g., *Collins v. School Dist. of Kansas City, Mo.*, 727 F. Supp. 1318, 1321, 51 FEP Cases 1574, 1577 (W.D. Mo. 1990) (court asserted, "Surely the Supreme Court, by recognizing that proof in Title VII cases would vary, did not mean to provide the expeditious framework of *McDonnell Douglas* only to members of 'socially disfavored groups' and deny it to those who are members of 'socially favored groups.'").

³¹ 971 F.2d at 589, 59 FEP Cases at 742.

individuals still may assert an employment discrimination claim even if they cannot satisfy the elements of a prima facie case under *McDonnell Douglas*.³² Extending the *Holmes* alternative to reverse discrimination cases, the court held that a majority plaintiff may state a prima facie case of disparate treatment under Title VII if the plaintiff presents direct evidence of discrimination or indirect evidence sufficient to support a reasonable probability that, but for the plaintiff's status, the challenged employment decision would have favored the plaintiff.³³ Consequently, after *Notari*, a majority employee has an alternative for stating a prima facie case of reverse discrimination under Title VII and thus shifting the burden of proof to the defendant.

In 1974, Kenneth Notari, a white male, commenced his employment with the Denver Water Department.³⁴ Notari held various positions with Denver Water, and on five different occasions applied for the position of safety and security coordinator.³⁵ In June 1988, Denver Water selected a woman for that position.³⁶

The application process at Denver Water includes an oral board examination.³⁷ The board rates the candidates and refers the top three for interviews with the department head.³⁸ In Notari's case, the interviewers determined that Notari was the applicant best qualified for the vacant position and submitted their selection sheet to the Director of Personnel.³⁹ The Director rejected the interviewers' selection and advised them that the position's focus should shift from "safety" to "security."⁴⁰ After this shift, the interviewers maintained their decision that Notari was the best qualified applicant.⁴¹ Despite this determination, Denver Water conducted a reevaluation and selected a woman for the position of safety and security coordinator.⁴²

After Denver Water did not select Notari for the position, he filed a sex discrimination claim with the Equal Employment Op-

³² *Id.* at 590, 59 FEP Cases at 742.

³³ *Id.*, 59 FEP Cases at 743.

³⁴ *Id.* at 586, 59 FEP Cases at 740.

³⁵ *Id.*

³⁶ *Notari*, 971 F.2d at 586, 59 FEP Cases at 740.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 587, 59 FEP Cases at 740. The Director of Personnel at Denver Water was a woman. *Id.*

⁴⁰ *Notari*, 971 F.2d at 587, 59 FEP Cases at 742.

⁴¹ *Id.*

⁴² *Id.*

portunity Commission ("EEOC").⁴³ Notari brought suit in the United States District Court for the District of Colorado after the EEOC terminated proceedings.⁴⁴ In his suit, Notari alleged that he was more qualified than the woman and that her selection violated his rights protected by Title VII and 42 U.S.C. § 1983.⁴⁵ Denver Water filed a motion for summary judgment. The district court subsequently granted Denver Water's motion on both the § 1983 and Title VII claims.⁴⁶

In its analysis of Notari's Title VII claim, the appeals court referred to the elements of a *prima facie* discrimination case first established in *McDonnell Douglas*.⁴⁷ Noting that the United States Supreme Court had acknowledged that such elements must vary with each Title VII case, the court examined whether reverse discrimination cases require a modification of the *McDonnell Douglas* *prima facie* showing.⁴⁸ In particular, the court focused upon the split between courts advocating the background circumstances requirement first established in *Parker* and those that allow a majority plaintiff to rely upon the *McDonnell Douglas* formulation.⁴⁹

The appeals court followed the background circumstances requirement of *Parker* and its progeny and required modification of the *McDonnell Douglas* *prima facie* formulation when a plaintiff pursues a reverse discrimination case.⁵⁰ The court noted that the

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Notari*, 971 F.2d at 587, 59 FEP Cases at 742.

⁴⁶ *Id.* The district court granted Denver Water's motion on Notari's § 1983 claim for two reasons. First, the court determined that the § 1983 claim arose from the same factual allegations as Notari's Title VII claim. Second, the court held that Notari had not demonstrated the violation of an independent constitutional or federal statutory right. The district court also dismissed the Title VII claim because Notari had not shown background circumstances that would support an inference that Denver Water was an unusual employer that discriminates against the majority, and thus had not stated a *prima facie* case of reverse discrimination. *Id.*, 59 FEP Cases at 741.

In analyzing Notari's § 1983 claim, the appeals court referred to its holding in *Drake v. City of Fort Collins*, 927 F.2d 1156, 1163, 55 FEP Cases 600, 605 (10th Cir. 1991). The *Notari* court asserted that a Title VII plaintiff who alleges the violation of his equal protection rights and requests remedies for the alleged violations under § 1983 has stated an independent basis for that claim. 971 F.2d at 587, 59 FEP Cases at 741. The court noted that Notari's § 1983 claim asserted his rights under the Fourteenth Amendment's Equal Protection and Due Process Clauses. *Id.* at 588, 59 FEP Cases at 741. Finding the substantive legal bases for Notari's § 1983 and Title VII claims distinct, the appeals court reversed the lower court's dismissal of Notari's § 1983 claim. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* See *McDonnell Douglas*, 411 U.S. at 802, 5 FEP Cases at 969.

⁴⁹ *Notari*, 971 F.2d at 588-89, 59 FEP Cases at 742.

⁵⁰ *Id.* at 589, 59 FEP Cases at 742.

inference of discrimination in Title VII analysis when a plaintiff belongs to a minority group may not be justified when a plaintiff belongs to a historically favored group.⁵¹ Consequently, the court held that to rely upon the *McDonnell Douglas* formulation and benefit from the resulting inference of discrimination, a majority plaintiff must demonstrate background circumstances supporting a suspicion that the defendant is one of those unusual employers who discriminates against the majority.⁵²

Because Notari had failed to show such background circumstances, the court affirmed the district court's holding that he could not rely upon the *McDonnell Douglas* formulation to state his prima facie case.⁵³ The court, however, held that Notari's inability to rely upon *McDonnell Douglas* did not necessarily mean that he had failed to state a prima facie case of intentional discrimination.⁵⁴ The court stated that reverse discrimination plaintiffs barred from the *McDonnell Douglas* formulation must have an alternative for pursuing their Title VII claims.⁵⁵

In its analysis, the court posited the disparate situations of black employees and white employees with only persuasive indirect evidence to support a discrimination claim.⁵⁶ The black employees' lack of direct evidence does not foreclose Title VII discrimination claims because they can state a prima facie case under *McDonnell Douglas*.⁵⁷ In contrast, white workers with no direct evidence are foreclosed by a modified *McDonnell Douglas* formulation unless they can show the requisite background circumstances.⁵⁸ A failure to satisfy the background circumstances requirement compels dismissal of a white employee's case.⁵⁹ Unlike the black employees, the white plaintiffs would have no opportunity to use their persuasive indirect evidence to support their claim of employment discrimination.⁶⁰

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Notari*, 971 F.2d at 589, 59 FEP Cases at 743.

⁵⁵ *Id.* at 590, 59 FEP Cases at 743. *See also* *Ortega v. Safeway Stores*, 943 F.2d 1230, 1236, 56 FEP Cases 1282, 1288 (10th Cir. 1991), where the court held that historically disadvantaged plaintiffs alleging a disparate treatment claim must rely either upon the *McDonnell Douglas* formulation or present direct proof of discriminatory intent. *Id.*

⁵⁶ *Notari*, 971 F.2d at 589-90, 59 FEP Cases at 743.

⁵⁷ *Id.* at 589, 59 FEP Cases at 743.

⁵⁸ *Id.* at 590, 59 FEP Cases at 743.

⁵⁹ *Id.*

⁶⁰ *Notari*, 971 F.2d at 590, 59 FEP Cases at 743.

The appeals court reasoned that such disparity runs counter to the goals of Title VII.⁶¹ An individual majority plaintiff can experience intentional employment discrimination even if no evidence shows that the defendant is that unusual employer who discriminates against historically favored groups.⁶² The court stated that an employee who experiences intentional discrimination, and who offers sufficient evidence of that discrimination, should be allowed to proceed beyond the *prima facie* stage of litigation.⁶³ The court asserted that just as the *McDonnell Douglas* formulation never operates to foreclose claims of minority plaintiffs who experience intentional workplace discrimination, so should it not bar similarly victimized reverse discrimination plaintiffs.⁶⁴

To prevent such disparate outcomes for majority and minority plaintiffs, the appeals court extended to reverse discrimination plaintiffs the *prima facie* alternatives established by the United States Court of Appeals for the Fourth Circuit in *Holmes*.⁶⁵ The court held that a majority plaintiff states a *prima facie* case of intentional discrimination under Title VII if the plaintiff presents direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff.⁶⁶

In establishing this alternative means for stating a *prima facie* case, the appeals court emphasized that a plaintiff who uses this method cannot rely upon the implicit *McDonnell Douglas* inference of discrimination.⁶⁷ Further, the court asserted that this alternative approach does not replace the *McDonnell Douglas* formulation, but offers an alternative basis upon which plaintiffs can satisfy their burden of proof and state a *prima facie* case.⁶⁸ In light of this alternative basis, the court reversed and remanded *Notari's* case.⁶⁹

⁶¹ *Id.*, 59 FEP Cases at 742.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Notari*, 971 F.2d at 590, 59 FEP Cases at 742. See *Holmes*, 794 F.2d at 146, 41 FEP Cases at 46.

⁶⁶ *Notari*, 971 F.2d at 590, 59 FEP Cases at 743.

⁶⁷ *Id.*, 59 FEP Cases at 743-44.

⁶⁸ *Id.*, 59 FEP Cases at 744.

⁶⁹ *Notari*, 971 F.2d at 591, 59 FEP Cases at 744. *Notari* affects only the first step of the *McDonnell Douglas* allocation of burdens of proof in a Title VII employment discrimination case. If a plaintiff states a *prima facie* case under the *Notari* alternative, the burden then shifts to the defendant to articulate a nondiscriminatory justification for its decision. The

The court's decision in *Notari* occupies a middle ground between the *Parker* "background circumstances" requirement and the application of an unmodified *McDonnell Douglas* formulation in reverse discrimination cases under Title VII. A number of courts follow the *Parker* standard, which effectively can bar majority plaintiffs from asserting their Title VII rights. The *Notari* decision, by providing members of favored groups with an alternative means to state a prima facie case of employment discrimination, may allow more majority plaintiffs to assert their rights under Title VII.

The *Notari* decision marks a significant shift in Title VII analysis, which for the most part has sought to alleviate historical inequities. *Notari* gives credence to the assumption that Title VII proscribes all discriminatory behavior, not just discrimination against historically disfavored groups. While courts may have acknowledged this general proscription in the past, a number of jurisdictions still used the background circumstances requirement effectively to ban majority plaintiffs' claims. By acknowledging this disparity and establishing a prima facie alternative for majority plaintiffs, *Notari* may allow more majority plaintiffs to assert their Title VII rights.

Indeed, it is likely that *Notari* will encourage majority plaintiffs to take advantage of their rights under Title VII. This probable increase in Title VII claims may prove particularly notable in light of the current backlash against affirmative action programs.⁷⁰ Further, it is likely that other courts will adopt the *Notari* alternative in order to provide majority individuals with legitimate discrimination claims the same legal recourses as their minority counterparts. Although *Notari* allows majority plaintiffs greater opportunities to state prima facie discrimination claims, it likely will not herald a flood of reverse discrimination cases. Even under the *Notari* alternative, questionable claims can be foreclosed at an early stage if a plaintiff fails to offer sufficient indirect evidence supporting a suspicion of discrimination. Thus, just as the *McDonnell Douglas* formulation allows deserving minority plaintiffs to proceed beyond the prima facie case stage of litigation, so does *Notari* offer an equal opportunity to their similarly situated majority counterparts.

plaintiff then has the opportunity to demonstrate that the defendant's explanation is pretextual. *Id.*

⁷⁰ A different analysis applies to reverse discrimination cases when affirmative action programs contribute to the alleged discrimination. See SCHLEI & GROSSMAN, *supra* note 3, at 775-870.

In sum, the United States Court of Appeals for the Tenth Circuit, in *Notari v. Denver Water Department*, held that a reverse discrimination plaintiff may state a prima facie case under Title VII in two ways. First, majority plaintiffs may take advantage of the *McDonnell Douglas* inference of discrimination if they can show the requisite background circumstances to support a suspicion that the defendant is that unusual employer who discriminates against historically favored groups. If majority plaintiffs cannot show this background, however, *Notari* allows them to state a prima facie case by presenting direct evidence of discrimination or indirect evidence sufficient to support a reasonable probability that but for their majority status the employment decision would have favored them. The *Notari* alternative enables majority plaintiffs to assert the same Title VII rights as similarly situated minority plaintiffs and may encourage majority plaintiffs to assert their rights under Title VII.