

Risky Business: Age and Race Discrimination in Capital Redeployment Decisions

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RISKY BUSINESS: AGE AND RACE DISCRIMINATION IN CAPITAL REDEPLOYMENT DECISIONS

MARLEY S. WEISS*

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INTRODUCTION

Capital redeployment, the reallocation of employment-related corporate capital investment, has become ubiquitous in today's economy. Management decisions to relocate plants, subcontract work, or consolidate operations, are commonplace. Many factors contribute to the current high rate of capital redeployment: technological advances, tax incentives, product market shifts, and labor cost differentials, among others.

Managerial choices about whether and how to restructure enterprises are sometimes unrelated to workforce demographics. Often, however, the make-up of the current or future employee complement is a decisive factor. An employer might decide to relocate its manufacturing operations in order to unload its aging workforce in favor of a pool of younger employees. Another employer, in selecting a new office site, might actively avoid a location where demographics would produce an undesired racial composition among the company's hires. A third company, without adequate business justification, might adopt facially neutral site-selection or relocation strategies that tend to exclude from its workforce black or older workers. This article contends that in each of these scenarios the employer has violated the employment discrimination laws.

Explicitly race- or age-based redeployment decisions are far more common than one might imagine. In addition, many redeployment decisions or policies are based on labor force factors heavily correlated with race or age, policies that may operate to select for closure facilities with predominantly black or older workforces. This article examines the evidence suggesting that racial or age-related discrimination is implicated in a great many redeployment decisions affecting thousands of workers annually.

Very few discriminatory redeployment cases have been brought;¹ even fewer have been successful.² In none of these cases have the courts squarely confronted the cognizability of such claims under federal employment discrimination laws. This article argues, based on the language and legislative history of these statutes, as well as precedents interpreting similar wording in other labor laws, that discrimination in redeployment decisionmaking violates Title VII of the Civil Rights Act of 1964 (Title VII)³ and the Age Discrimination in Employment Act of 1967 (ADEA).⁴ Where redeployment decisions are based, at least in part, on age or race, the claim is one of "disparate treatment," or intentional discrimination.⁵ Where such decisions are based, at least in part, on labor factors strongly correlated with age or race, this article urges that a cognizable "disparate impact" claim has been made out. Unless the employer can justify the exclusionary effect on black or older workers on grounds of business necessity, a violation of Title VII or the ADEA should be found.⁶ To the extent that both disparate treatment and disparate

1. Successful cases are cited *infra* note 2; some unsuccessful cases include *Bailey v. Delta Air Lines*, 722 F.2d 942, 944-45 (1st Cir. 1983) (plaintiffs unsuccessfully sought preliminary injunctive relief to prevent their overwhelmingly black skycap operations from being subcontracted) and *Payne v. Bobbie Brooks, Inc.*, 505 F. Supp. 707, 709 (N.D. Ohio 1980), *aff'd mem.*, 701 F.2d 180 (6th Cir.), *cert. denied*, 459 U.S. 858 (1982) (plaintiffs unsuccessfully challenged company's movement of work back and forth between facilities, denying transfer rights, rehiring preference, and notice of openings to workers laid off or terminated upon the closing of the predominantly black inner city plant).

2. Measured by the size of the verdict, one of the most successful capital redeployment discrimination cases is *Adama v. Doehler-Jarvis*, 419 Mich. 905, 353 N.W.2d 438 (1984). Under Michigan's age discrimination statute, the *Doehler-Jarvis* plaintiffs recovered lost back and future wages and benefits totaling about \$1.5 million. *Id.* at 906 n.1, 353 N.W.2d at 439 n.1. Measured by injunctive relief preventing the redeployment or restoring the status quo ante, *Cannistra v. FAA*, 24 Fair Empl. Prac. Cas. (BNA) 1621 (D.D.C. 1979), may rate as the greatest success. In *Cannistra* the plaintiffs won a preliminary injunction preventing the FAA from transferring the location of their two divisions, which were allegedly singled out for relocation because of their older employee complement. *Id.* at 1622-24. The most successful settlement is probably the one in *Bell v. Automobile Club*, 34 Fair Empl. Prac. Cas. (BNA) 3, 4, 5, 7 (E.D. Mich. 1983) (approving race discrimination case settlement containing \$4.7 million in monetary relief plus broad injunctive relief requiring, *inter alia*, that employer which had moved from the inner city to the suburbs provide transfer opportunities and assistance to black employees willing to work at the new location).

3. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

4. 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987).

5. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

6. See *id.*; see also, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121-26 (1989) (refining statistical proof methodology and altering allocation of burdens of proof); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2796-97 (1988) (applying

impact theories are viable under Title VII and the ADEA,⁷ both theories should apply to capital redeployment discrimination claims.⁸

Labor lawyers litigating under the National Labor Relations Act (NLRA),⁹ unlike those bringing suits under the equal employment laws, have attempted to address systemic issues of this sort. The results, however, have been mixed. NLRA case law acknowledges that redeployment decisions affecting the workforce in the aggregate are employment decisions. Nevertheless, the cases subject only certain redeployment decisions to the statutory limitations imposed on decisions affecting individual workers and their jobs. Labor law interpretations in this area are particularly incoherent and difficult to reconcile with the language and purposes of the statute.¹⁰ This article is intended to stimulate employment discrimination theorists' thinking so that a similar fate is avoided regarding the employment discrimination laws.

This article focuses on the pervasiveness of discriminatory capital redeployment decisions and on the issue of whether managerial decisionmaking¹¹ about capital redeployment may violate Title VII

disparate impact theory to subjective employee selection system); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-33 (1971) (applying disparate impact theory to selection criteria including objective tests and a high school diploma requirement).

7. The availability of disparate impact theory under the Age Discrimination in Employment Act of 1967 (ADEA) is not yet settled. *Compare Geller v. Markham*, 635 F.2d 1027, 1031-32 (2d Cir. 1980) *with Markham v. Geller*, 451 U.S. 945, 945 (1983) (Rehnquist, J., dissenting from denial of *certiorari*).

8. The argument is stronger, however, as to disparate treatment than as to disparate impact. *See infra* text accompanying notes 335-376.

9. 29 U.S.C. §§ 151-169 (1982).

10. *See infra* text accompanying notes 115-146, 166-376. *See generally* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 111-59 (1983).

11. Throughout this article, the discussion refers to decisions made by a single, solvent employer. When the employer is undergoing bankruptcy proceedings, federal policies apart from those governing labor and employment relations come into play. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-34 (1984). This article also assumes that the potentially discriminatory decisionmaking involves only a single employer. Adverse societal effects of industry-wide trends, for example, are beyond the compass of the equal employment laws, insofar as they cannot be addressed through single employer decisions or a conspiracy among several companies. *See, e.g., Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2122 (1989) ("If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' . . . employment practices cannot be said to have had a 'disparate impact' on nonwhites"); *Bazemore v. Friday*, 473 U.S. 385, 405-07 (1986) (issue of whether county hired agricultural agents discriminatorily must be determined county by county, even with respect to hiring for statewide agricultural program); *Trout v. Lehman*, 702 F.2d 1094, 1105 (D.C. Cir. 1983) (responsibility for initial placement was shared with other agencies the subject agency had no control over; therefore, the class was not entitled to relief for discriminatory initial placement), *vacated on other grounds*, 465 U.S. 1056 (1984); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-

or the ADEA. The applicability of other state and federal antidiscrimination provisions is noted, but not addressed in depth.¹²

76 (1986) (plurality opinion) (societal discrimination alone is not sufficient to justify public sector employer's racial classification governing order of layoff, even though race-based system was adopted to accomplish affirmative action); *cf.* *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 650, 653 (1987) (O'Connor, J., concurring) (suggesting voluntary affirmative action may be upheld only if there is more than general, societal discrimination). The threat of increasing racial polarization of the workforce is of grave concern, but beyond the scope of this article.

12. In many states, plaintiffs' counsel increasingly prefer to pursue employment discrimination claims under state law in state court. *See generally* Arterton, *Employment Discrimination Claims in State Court: A Laboratory for Experimentation*, 13 N.Y.U. REV. L. & SOC. CHANGE 499 (1985); Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 777 (1983); Saperstein, *Response*, 13 N.Y.U. REV. L. & SOC. CHANGE 509 (1985). State law may provide a right to trial by jury, and may permit prevailing plaintiffs to recover compensatory or punitive damages. *See, e.g.*, Arterton, *supra*, at 503; Catania, *supra*, at 784, 794; Saperstein, *supra*, at 511-12, 514. The Supreme Court has assumed, and the courts of appeals have uniformly held, that Title VII provides neither a statutory right to a jury trial, nor remedies at law. *See* *Lorillard v. Pons*, 434 U.S. 575, 583-84, 585 n.14 (1978) (dicta); *Curtis v. Loether*, 415 U.S. 189, 196-97 (1974) (dicta) (collecting cases). *See generally* B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1135-37, 1452 (2d ed. 1983).

The ADEA affords a prospective plaintiff some of these procedural advantages, including a right to a jury trial, 29 U.S.C. § 626(c)(2) (1982), *see* *Lorillard*, 434 U.S. at 580, and liquidated damages for willful violations. 29 U.S.C. § 626(b) (1982). *See* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-28 (1985) (narrowly defining "willful" violations for purposes of entitlement to ADEA liquidated damages). The ADEA, however, imposes serious obstacles to class action suits. *See generally* Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 122-23 (1982). *But see, e.g.*, *Sperling v. Hoffman-LaRoche, Inc.*, 862 F.2d 439, 447 (3d Cir. 1988) (collecting cases), *cert. granted*, 109 S. Ct. 1526 (1989) (district court in ADEA suit may authorize plaintiffs to send mailing to potential class members soliciting their filing of forms opting into the lawsuit). Some plaintiffs may be able to avoid ADEA class action rules by pursuing state remedies.

42 U.S.C. § 1981 (1982) may afford a race discrimination plaintiff procedural advantages such as a longer state personal injury actions statute of limitations; *see* *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); the right to a jury trial if plaintiff requests damages, *see* *Curtis v. Loether*, 415 U.S. 189, 195-97 (1974) (plaintiff entitled to jury trial in civil rights "tort" damage action under Fair Housing Act); and the availability of legal remedies, including compensatory and punitive damages. *See* *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2375 n.4 (1989); *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975). Section 1981 actions, however, require proof of discriminatory intent. *See* *Patterson*, 109 S. Ct. at 2377; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). Section 1981 has no application to discrimination based upon age. Moreover, in *Patterson* the Court recently limited the scope of § 1981 to its literal terms, prohibiting only racial "discrimination in the 'mak[ing] and enforce[ment]' of contracts" *Patterson*, 109 S. Ct. at 2372. The *Patterson* reasoning precludes use of the statute to challenge conditions of employment during a continuing employment relationship and also renders § 1981 inapplicable to discriminatory termination of employment. *But see* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976) (white discharges stated a claim for reverse discrimination under § 1981, as well as Title VII, when black coworker was not discharged for same offense). *McDon-*

While race and age discrimination are emphasized, the analysis is potentially applicable to discrimination against other protected classes of employees.¹³

ald is not mentioned by the *Patterson* majority, although it is cited in Justice Brennan's dissenting opinion. *Patterson*, 109 S. Ct. at 2380 (Brennan, J., dissenting); see also *id.* at 2387 (quoting legislative history of the Civil Rights Attorney's Fees Awards Act of 1976). Section 1981 consequently may be unavailable in cases alleging racially discriminatory redeployment affecting an incumbent workforce. The reconstruction era statute, however, may provide an avenue for relief in suits alleging racially discriminatory site selection as a species of discriminatory "refusal to enter into a contract with someone, [or] . . . the offer to make a contract only on discriminatory terms." *Id.* at 2372.

When standing requirements are likely to pose litigation difficulties, the choice of statutory theories takes on special significance. Standing requirements under § 1981 may be prohibitively restrictive. See M. Weiss, *United We Stand: Eligibility to Sue Under Title VII* (Sept. 19, 1989) (unpublished manuscript) (copy on file with *Maryland Law Review*). State courts often may be the forum of choice for actions challenging discriminatory capital redeployment since Article III does not bind the state judiciary. Steeped in common law tort theories that recognize a broadening array of victims as potential tort plaintiffs, state courts may have the greater leeway and inclination to grant standing to employment discrimination plaintiffs. See M. Weiss, *supra*; cf. *California v. ARC Am. Corp.*, 109 S. Ct. 1661, 1665-67 (1989) (rejecting preemption argument and upholding state's construction of state antitrust law as conferring statutory standing to sue for price fixing upon indirect purchasers, despite contrary interpretation of federal Clayton anti-price-fixing provision). But cf. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 234-39 (1988) (federal law standing issues should be treated as going to scope of cause of action on merits and state law should be analyzed along similar principles).

13. This article is limited to application of employment discrimination law to capital redeployment decisions. For theories about proof of such discrimination claims, see M. Weiss, *Capital Redeployment as Aggregate Employee Selection System: Proving and Remedying Race and Age Discrimination in Plant Closure, Location and Subcontracting Decisions* (Sept. 19, 1989) (unpublished manuscript) (copy on file with *Maryland Law Review*) [hereinafter M. Weiss, *Proving Capital Redeployment Discrimination*]. For a discussion of corporate practices and procedures in making redeployment decisions, as they relate to proving redeployment discrimination claims, see M. Weiss, *A Labor and Employment Discrimination Lawyer's Guide To Capital Redeployment Decision-Making* (Sept. 19, 1989) (unpublished manuscript) (copy on file with *Maryland Law Review*) [hereinafter M. Weiss, *Lawyer's Guide*]. For an indictment of this country's current stance favoring relatively unrestricted capital mobility, see B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* (1982). For applications of traditional labor law theories to capital redeployment situations, see generally R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 144-48, 509-23 (1976); C. MORRIS, *THE DEVELOPING LABOR LAW* 220-26, 767-70, 820-40 (2d ed. 1983) and 107-110, 381-89 (Supp. 1982-87) [hereinafter *DEVELOPING LABOR LAW*]; NATIONAL LABOR LAW CENTER, *PLANT CLOSINGS AND RUNAWAY INDUSTRIES: STRATEGIES FOR LABOR* (1981); Gorman, *The Negligible Impact of the National Labor Relations Act on Managerial Decisions to Close or Relocate*, 58 TUL. L. REV. 1354 (1984). Traditional labor law approaches, including arbitration under the labor agreement, see generally Feinberg, *Transfer and Sale of Plant Operations in Arbitration*, 13 LAB. L.J. 625 (1965); Comment, *Labor Agreements—Implied Limitations on Plant Removal and Relocation*, 1965 DUKE L.J. 546, and unfair labor practice charges under the National Labor Relations Act (NLRA), see Tykulsker, *For a Reformed*

I. CAPITAL REDEPLOYMENT AND DISCRIMINATION IN EMPLOYMENT: THE NATURE AND MAGNITUDE OF THE PROBLEM

A. *The Scope of the Problem*

A single company's decision to close or move an operation can cost the jobs of hundreds of workers and debilitate the economy of an entire community. Even if only a few such decisions each year were based on impermissible factors, the impact would nonetheless be of consequence. There is reason to believe, moreover, that a significant number of redeployment decisions are infected by impermissible discrimination on the basis of race and age in ways which violate antidiscrimination law.

Most of us still unthinkingly retain the notion of relatively sedentary capital. We think of workers employed at the same plant for thirty or forty years; of children following in their parents' footsteps, working in the same facility. The rapid pace of capital disinvestment

Labor Law to Limit Plant Closings, 12 COLUM. HUM. RTS. L. REV. 205, 233-46 (1981), have often proven ineffectual.

Novel legal strategies recently have been tested by plant closing opponents, with little more success. For example, see *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 46-48 (2d Cir. 1988) (rejecting claims for breach of express or implied contract under which, in return for municipal tax breaks, employer was obligated to remain at city site for a reasonable time, but no less than 60 years); *Local 1330, United Steelworkers v. United States Steel Corp.*, 631 F.2d 1264, 1269-83 (6th Cir. 1980) (rejecting theories based on promissory estoppel, antitrust, and claims of community property rights in the company's operations). But see *Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 869, 212 Cal. Rptr. 773, 774 (1985) (interlocutory appeal over class action and discovery issues in action by non-union, laid off employees alleging fraud, misrepresentation, and breach of contract because employer, during previous, unsuccessful union drive, had assured employees there would be no mass layoffs; the trial court's ruling rejecting defendant's demurrers is reported at 1986 Daily Lab. Rep. (BNA) No. 109 at A-1 (June 6, 1986); the subsequent \$1 million settlement in the case is reported at 1984 Daily Lab. Rep. (BNA) No. 54 at A-3 (Mar. 20, 1984)); but see also *Machinists Automotive Trades Dist. Lodge 190 v. Peterbilt Motors Co.*, 666 F. Supp. 1352, 1353 (N.D. Cal. 1987) (remanding to state court plaintiffs' plant closure case alleging: 1) intentional misrepresentation; 2) negligent misrepresentation; 3) breach of fiduciary duty; 4) intentional infliction of emotional distress; 5) negligent infliction of emotional distress; 6) negligence; 7) bad faith breach of contract; 8) breach of covenant of good faith and fair dealing; 9) wrongful termination violative of public policy). On innovative doctrinal and legislative approaches, see generally Barron, *Causes and Impact of Plant Shutdowns and Relocations and Potential Non-NLRA Responses*, 58 TUL. L. REV. 1389 (1984); Schatzki, *Some Comments on the Labor-Management Law Applied to Plant Closures and Relocations*, 58 TUL. L. REV. 1373 (1984). For a discussion of wrongful discharge theories regarding plant closings, see Rhine, *Business Closings and Their Effects on Employees—Adaptation of the Tort of Wrongful Discharge*, 8 INDUS. REL. L.J. 362 (1986). Most recently, Congress has enacted the Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890-895 (1988) (to be codified at 29 U.S.C. §§ 2101-2109), which requires employers contemplating plant closings or mass layoffs to provide a minimum of 60 days advance notice to their workers.

and redeployment, in economists Bluestone and Harrison's language, the "hypermobility of capital,"¹⁴ has rendered this vision obsolete. Improvements in communications, transportation, and production technology, coupled with increased corporate financial and structural fluidity, have increased significantly corporate ability to transfer operations across regional, national, and international boundaries.¹⁵

As the ease of capital redeployment has grown, its prevalence as a corporate strategy has increased vastly. Many companies are willing to abandon a facility because it is insufficiently profitable, even when the plant is not unprofitable or obsolete.¹⁶ One commentator summarized the new managerial approach:

Many think that a location problem needs to be considered only once every several years and that once a new plant is built there is no need to consider relocating until the economic life of the plant is nearing its end. Many companies have stayed in an area for 30 or 40 years without considering alternate locations. Actually, locational factors should be reconsidered at frequent intervals. . . .

Most companies are continuously evaluating present and possible new plant locations. A company making such an evaluation will consider (1) using expanded subcontracting instead of its own facilities, (2) expanding its present plant, (3) keeping the present plant and building a second, new one elsewhere, and (4) liquidating the present plant and relocating expanded facilities elsewhere. Such analysis should be continuous.¹⁷

14. B. BLUESTONE & B. HARRISON, *supra* note 13, at 195, 231, 244; Harrison & Bluestone, *The Incidence and Regulation of Plant Closings*, in SUNBELT/SNOWBELT 368, 396 (1984).

15. See, e.g., B. BLUESTONE & B. HARRISON, *supra* note 13, at 18, 115-32; Storper & Walker, *The Theory of Labour and the Theory of Location*, 1983 INT'L J. URB. & REGIONAL RES. 1, 2-3; Tabb, *Economic Democracy and Regional Restructuring: An Internationalization Perspective*, in SUNBELT/SNOWBELT 403, 404-05, 408 (1984).

16. See, e.g., B. BLUESTONE & B. HARRISON, *supra* note 13, at 4.

17. Epping, *Important Factors in Plant Location in 1980*, in GROWTH AND CHANGE 47 (1982). Roger W. Schmenner views the process similarly:

[A] manufacturing location decision should be viewed as a series of three smaller but interrelated judgments: (1) recognizing when a projected capacity shortfall is serious enough to merit the construction of additional manufacturing space; (2) considering whether new space ought to be erected on an existing site, an entirely new facility developed, or an existing plant relocated to a new site; and (3) deciding where any new facility ought to be located.

R. SCHMENNER, *MAKING BUSINESS LOCATION DECISIONS* 1 (1982). The process by which capital redeployment decisions are made is discussed in M. Weiss, *Lawyers' Guide*, *supra* note 13, at 8-15.

Another author noted that "[p]erhaps one reason why corporate managers in America have become so adept at capital redeployment is that Wall Street—quite independent of Washington—seems to reward such behavior."¹⁸ In 1985 *The Wall Street Journal* described the rate of corporate restructuring as "unprecedented," "profoundly altering much of U.S. industry."¹⁹ The *Journal* found that 398 out of 850 large North American corporations were in the midst of major restructuring.²⁰ In an 18 month period about 825 establishments worth \$40.2 billion were sold and an unspecified number of plants went out of business.²¹

Bluestone and Harrison estimate that some thirty-two million jobs were wiped out during the 1970s as a direct result of shutdowns and relocations of entire sites.²² Including data covering partial physical closures would raise their estimate of the total job loss to thirty-eight million.²³ The closure rate for "small" facilities,²⁴ with twenty or fewer employees, was very high: between one-half and three-fifths of "small" establishments open in 1969 were closed by 1976.²⁵ The figures for large facilities, where much greater stability would be expected, are at least as startling: between fifteen percent and thirty-six percent of establishments with five hundred or more employees, in business as of 1969, had been shut down by 1976.²⁶ In the South one of every three facilities existing in 1969 was closed during this seven year period.²⁷

Approximately 22 million jobs were eliminated or relocated from 1969 to 1976; Bluestone and Harrison compute the average annual job loss caused by plant shutdowns as 3.2 million jobs per year.²⁸ Significantly, these authors conclude that most sizeable

18. Anderson, *Managing Retreat: Disinvestment Policy, in AMERICA VERSUS JAPAN* 337, 347 (1987).

19. *Id.* at 348 (citing Wall St. J., Aug. 12, 1985, at 1, col. 6).

20. *Id.*

21. *Id.*

22. B. BLUESTONE & B. HARRISON, *supra* note 13, at 26, 35. The economists also found that plant closings are common in the South, as well as the North. *Id.* at 31, 32-33.

23. *Id.* at 35.

24. The term "facilities" includes plants, stores, and offices. The statistics in text refer to such individual establishments, not to entire companies. *See id.* at 32.

25. *Id.*

26. *Id.* The proportion of closures varied depending on region and industry. *Id.* The statistics in text were drawn by Bluestone and Harrison from a study by David Birch of the Massachusetts Institute of Technology Department of Urban Studies and Planning using data from Dun & Bradstreet's "Identifiers File." *See id.* at 27-29.

27. *Id.* at 32-33.

28. Harrison & Bluestone, *supra* note 14, at 373-74.

plant closings in larger corporations are caused by factors other than traditional business failure.²⁹

Bluestone and Harrison estimate that the chance of any particular large plant closing during the seven year period they studied was over thirty percent.³⁰ Roger W. Schmenner of the Fuqua School of Business at Duke University conducted a study of site selections, which included a sample of 175 plant closures, and reached a similar conclusion. In Professor Schmenner's study, the median age of plants closed was thirteen years; thirty-three percent of the closed plants had been open *six years or less*.³¹ If this pace of capital redeployment is maintained, the vast majority of workers will suffer through the closure of their workplaces several times during their thirty- or forty-year working lives.³²

Given the high rate of capital redeployment, one might predict that impermissible discrimination would play a role in a significant number of redeployment decisions. Verifying that hypothesis is difficult: corporations shroud in secrecy their decisionmaking processes for matters such as site selection, plant relocation, and subcontracting.³³ This lack of public information precludes direct estimates of the frequency of discrimination. Diverse sources, however, suggest that discrimination is widespread.

First, it is clear that older employees and black workers have been especially hard hit by plant relocations and closures. A recent

29. B. BLUESTONE & B. HARRISON, *supra* note 13, at 9-10.

30. *Id.* at 9.

31. R. SCHMENNER, *supra* note 17, at 238.

32. Other studies, although yielding lower job elimination figures, corroborate Bluestone and Harrison's conclusion that job loss caused directly by capital redeployment is a routine fact of life for an increasingly large proportion of the American workforce. See, e.g., Flaim & Sehgal, *Displaced Workers of 1979-83: How Well Have They Fared?*, MONTHLY LAB. REV., June 1985, at 3, 7, discussed *infra* text accompanying notes 34-38; see also OFFICE OF TECHNOLOGY ASSESSMENT, PLANT CLOSING: ADVANCE NOTICE AND RAPID RESPONSE: SPECIAL REPORT 1, 5 (1986) (citing U.S. Congress, General Accounting Office, GAO's Preliminary Analysis of U.S. Business Closures and Permanent Layoffs During 1983 and 1984 (paper presented at the OTA-GAO Workshop on Plant Closings, Apr. 30-May 1, 1986) (over a million workers in establishments with over one hundred employees lost their jobs in 1983-1984 because of permanent mass lay off or facilities closure; at least as many more jobs were probably lost during the same period in smaller establishments)); Fulmer, *Plant Closing: The Need for Compassionate Strategic Decisions*, SAM ADVANCED MGMT. J. 20, 21 & n.1 (Winter 1985) (citing *Plant Shutdowns: States Take a New Tack*, BUSINESS WEEK, Oct. 24, 1983, at 72-76 (from 1978 to 1982, plant closings cost the U.S. economy 6.8 million jobs, roughly half the total 12.7 million jobs eliminated during the period)).

33. See B. BLUESTONE & B. HARRISON, *supra* note 13, at 27-29 (discussing the limited sorts of data available to researchers); Harrison & Bluestone, *supra* note 14, at 373, 399 n.10 (same); J. GORDUS, P. JARLEY & L. FERMAN, PLANT CLOSINGS AND ECONOMIC DISLOCATION 18 (1981) (confidentiality of information).

Bureau of Labor Statistics (BLS) study suggests that capital redeployment often disproportionately eliminates the jobs of workers over age forty,³⁴ the class protected by federal law against age discrimination.³⁵ The BLS study focused on 5.1 million workers with 3 years or more invested in their jobs, whose employment had been terminated. Among the 748,000 workers in the BLS study who were 55 to 64 years old, 57.8 percent became unemployed because their facility had closed or relocated.³⁶ Among the 191,000 workers in the study who were age 65 and over, 70.8 percent gave the reason for elimination of their positions as closure or relocation.³⁷ Fewer than half the workers age fifty-four and younger lost their jobs because of facility closure or relocation.³⁸

The BLS study makes clear that older workers are disproportionately likely to lose their jobs because of capital redeployment. The injury is compounded in plant relocation situations. Even if afforded the opportunity to move, the older a worker is, the less likely he or she is to relocate, absent special incentives.³⁹

Facility shutdowns also have disproportionately eliminated the jobs of black workers.⁴⁰ Minority workers have remained concen-

34. See Flaim & Sehgal, *supra* note 32, at 7, 9. These data, however, may exaggerate the disproportionality of the impact of closings on older employees. Where employers apply seniority rules to govern order of layoff, many of the younger employees are laid off well before the final day the plant is closed, leaving the older workers as the apparent victims of the closure decision. See, e.g., Driever & Baumgardner, *Internal Company Preparation*, in *MANAGING PLANT CLOSINGS AND OCCUPATIONAL READJUSTMENT: AN EMPLOYER'S GUIDEBOOK* 6-7 (R. Swigart ed. 1984).

35. Age Discrimination in Employment Act § 12(a), 29 U.S.C. § 631(a) (1982 & Supp. IV 1986), makes the statutory prohibition against discrimination in employment applicable to individuals forty years of age or older.

36. Flaim & Sehgal, *supra* note 32, at 7, 9.

37. *Id.*

38. *Id.*

39. Several studies have demonstrated that worker mobility decreases sharply and directly with age. See, e.g., N. BRADBURN, *INTER-PLANT TRANSFER: THE SIOUX CITY EXPERIENCE* ii-iii, 46-48 (1964); J. LANSING & E. MUELLER, *THE GEOGRAPHIC MOBILITY OF LABOR* 40, 201-05, 335; Bendick, *Worker Mobility in Response to a Plant Closure*, in *MANAGING PLANT CLOSINGS AND OCCUPATIONAL READJUSTMENT: AN EMPLOYER'S GUIDEBOOK* 47, 48-49 (R. Swigart ed. 1984); Flaim & Sehgal, *supra* note 32, at 3, 6, 8, 11. When an employer offers the transferring employees the opportunity to carry with them their seniority rights, the age correlation becomes attenuated. Willingness to transfer tends to increase with increasing seniority, see, e.g., N. BRADBURN, *supra*, at 47-48, in part because of the importance of continuity of pensions and other fringe benefits. See Bendick, *supra*, at 50-51.

40. Much of the material in this paragraph and the next is drawn from Squires, *Capital Mobility Versus Upward Mobility: The Racially Discriminatory Consequences of Plant Closings and Corporate Relocations*, in *SUNBELT/SNOWBELT* 152-62 (1984). A study on which Squires relies heavily is ILLINOIS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL

trated in inner cities, particularly in the Northeast and Midwest "rustbelt." Many factories, however, have relocated in the past two decades from city to suburban or rural areas.⁴¹ Black workers have had only limited success in attaining higher-paying blue collar jobs. Ironically, what success they have attained has been focused on those unionized heavy industries, such as steel and auto, that are themselves undergoing severe retrenchment.⁴² A study by the Illinois Advisory Committee to the United States Commission on Civil Rights illustrates the results: while minorities constituted fourteen percent of the Illinois state labor force, they held twenty percent of the jobs in facilities which closed between 1975 and 1978.⁴³

Even when some employees are offered the opportunity to transfer, such offers commonly are limited to salaried, white collar employees.⁴⁴ Black workers tend to be disproportionately concentrated in blue collar positions, hence disproportionately denied the opportunity to move with the jobs.⁴⁵ Even when all workers are offered the chance to transfer, black workers, like older workers, are among those least likely to relocate.⁴⁶ For black workers, the threat of housing discrimination creates an additional disincentive for mobility.⁴⁷

The disproportionate adverse consequences for blacks and

RIGHTS, SHUTDOWN: ECONOMIC DISLOCATION AND EQUAL OPPORTUNITY (1981) [hereinafter ILLINOIS ADVISORY COMMITTEE]. Squires, *supra*, at 153. At least one study may suggest a contrary result. The Bureau of Labor Statistics (BLS) study by Flaim and Sehgal, discussed *supra* text accompanying notes 34-38, found that 49.6% of the white employees with 3 years or more of service had permanently lost their jobs because of closure or relocation of their establishments; 43.8% of the blacks studied had lost their jobs for similar reasons and 47.4% of workers of Hispanic origin had lost their jobs. Flaim & Sehgal, *supra* note 32, at 3, 9. The BLS study, like Squires' analysis, however, concludes that blacks and hispanics who lose their jobs because of plant closings are likely to remain unemployed significantly longer than whites. *Id.* at 3, 5-6.

41. See R. SCHMENNER, *supra* note 17, at 199-210 (national survey); *id.* at 223-25 (study of Cincinnati Metropolitan area).

42. See Squires, *supra* note 40, at 152-53.

43. ILLINOIS ADVISORY COMMITTEE, *supra* note 40, cited in Squires, *supra* note 40, at 153-54.

44. See Squires, *supra* note 40, at 152-53.

45. *Id.*

46. A number of studies have reached this conclusion. See, e.g., J. LANSING & E. MUELLER, *supra* note 39, at 48-51, 263-89, 337, 340, 343-44 (1967). But see N. BRADBURN, *supra* note 39, at 49-50 (where employer offered its blue collar workers opportunity to transfer, non-whites were twice as likely as whites to move to the new location, probably because incidence of racial discrimination in employment in their original location led them to move rather than risk unemployment in their hometown).

47. Squires, *supra* note 40, at 155; see also J. LANSING & E. MUELLER, *supra* note 39, at 340 (housing discrimination is a barrier to black geographic mobility in search of employment).

older workers resulting from transfers of operations, closures, and subcontracting decisions are some evidence that discrimination may be influencing corporate decisionmaking. Information about the closure and site selection decisionmaking process provides further evidence that many capital redeployment decisions include conscious or subconscious consideration of such factors as the age or race of existing or potential employees.

Most studies of relocation and site selection decisions rank labor factors as critically important.⁴⁸ Where specific labor variables are broken out, such variables as low labor turnover and absenteeism, availability of unskilled labor, availability of skilled labor, few work stoppages, high worker productivity, favorable attitude of workers, and worker indisposition towards unionization or toward union militancy, all rank as highly significant.⁴⁹ Textbook instructions to managers on selecting sites for new facilities invariably include future workforce composition as a factor to be considered.⁵⁰ Such a directive tacitly invites managers to compare the aggregate race, sex, age, and ethnic composition of the prospective workforce with that of the existing employee complement, where there is one, or with that of the prospective workforce at alternative sites.

Business managers, of course, seldom admit to making location decisions based on the age, race or other legally protected characteristics of their current or future employees. Business advisers are concerned enough about corporate image, if not potential liability, to warn against making such admissions. Admonitions in publications aimed at a corporate management audience suggest that overt consideration of workforce age and racial distribution is not uncommon. For example, one author advises:

The first step is to define what the reorganization is aimed at . . . [C]are is advisable in committing the objective to writing. "*Clean out the top deck of old, stick-in-the-mud employees,*" for example, is not a recommended statement to go into the rec-

48. See, e.g., Epping, *supra* note 17, at 47-48, 50 (noting the top priority of labor not only in the author's own study, but in numerous others).

49. See, e.g., Epping, *Tradition in Transition: The Emergence of New Categories in Plant Location*, 19 ARK. BUS. & ECON. REV. (No. 3) at 16-18 (1986); Goldstein, *Choosing the Right Site*, INDUSTRY WEEK 57, 57-58 (Apr. 15, 1985). The importance to redeployment decisionmaking of labor factors generally, and factors correlating with workers' race, sex or age in particular, is discussed in conjunction with burdens of proof in M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13, and M. Weiss, *Lawyer's Guide*, *supra* note 13.

50. See, e.g., R. SCHMENNER, *supra* note 17, at 20, 28-29, 35, 53; Singhvi, *A Quantitative Approach to Site Selection*, MGMT. REV., April 1987, at 47, 49-51.

ord for future paralegals to find. It should not say "old."⁵¹

Bluestone and Harrison highlight the age discrimination issue lurking in many corporate decisions to close one site and begin or continue production at another location:

[T]he question is: Why? Are there valid technical or perhaps resource-availability reasons why continued production at the old site really is unfeasible? Or is management simply seeking to shed its older, more experienced, higher-paid, often unionized workforce? This possibility must at least be considered in light of the finding that virtually all academic researchers—and even spokespersons for the business community—agree that when companies *do* relocate plants, "nine times out of ten," it is to reduce labor costs or to increase workplace discipline.⁵²

There is much evidence that actual or perceived cost differentials attached to older employees play a causal role in many corporate decisions to close a plant filled with aging workers.⁵³ Professor Schmenner's outstanding work on site selection and relocations, *Making Business Location Decisions*,⁵⁴ is shockingly blunt regarding the role of age (and sex) of the prospective or current workers in planning investment and disinvestment in a plant. The book is more discreet in omitting explicit reference to race.

Professor Schmenner divides the life cycle of a plant into three

51. S. HENRICI, *COMPANY REORGANIZATION FOR PERFORMANCE AND PROFIT IMPROVEMENT: A GUIDE FOR OPERATING EXECUTIVES AND THEIR STAFFS* 30 (1986) (emphasis added); see also *id.* at 44 (companies "need to be conscious of minority rights and opportunities. Something is awfully wrong with a plan that comes up with involuntary terminations heavily loaded with employees over fifty years old. Something is right with one that finds upward-bound spots for competent nonwhites and women"); *id.* at 134 (in a final reorganization, "Law Check," the list of terminated employees should be reviewed "to verify . . . [that it does not] suggest any violation of antidiscrimination law. . . . Conceivably the rush to cut and pare the organization may have let loose an unconscious yet nevertheless indefensible bias against sensitive groups").

52. B. BLUESTONE & B. HARRISON, *supra* note 13, at 252. But see R. SCHMENNER, *supra* note 17, at 237 (based on a survey covering 175 plant closings, the author concludes, "[t]he dominant influence on plant economics is neither labor, materials, nor transportation costs, but inefficient and outmoded production technology, exacerbated in many instances by poor factory layout and materials handling").

53. See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13; M. Weiss, *Lawyer's Guide*, *supra* note 13; see also *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899 (W.D. Mich. 1987); *Franci v. Avco Corp.*, 538 F. Supp. 250 (D. Conn. 1982); *Adama v. Doehler-Jarvis*, 419 Mich. 905, 353 N.W.2d 438 (1984); *Ex-Cello Corp.*, 60 Lab. Arb. (BNA) 1094 (1973) (Sembower, Arb.).

54. R. SCHMENNER, *supra* note 17.

parts and suggests that companies create a "charter" for each segment. The "early charter"

defines what the plant is intended to do. It should include features that should be planned for in start-up, such as:

.....
* number of workers, sex and age, and skill levels required, in the initial months and as the plant is broken in during the first few years

.....
* what it would take to close the plant (. . . cost problems or the like).

The "mature charter"

. . . defines the plant and its role in the long term and governs how its managers should react to change. It includes:

* how various workforce issues will be handled, such as worker advancement, quality of worklife programs, age and sex composition of the workforce, labor union organization and any contract negotiations, job hopping and wage effects on the plant's competitiveness.⁵⁵

The final life cycle stage, "plant closing," concerns obsolescence of aspects of the physical plant; severe sales declines; "substantial cost increases in labor, transportation, raw materials; [or] militant union or personnel problems."⁵⁶ Professor Schmenner's "plant charters" are permeated with age-correlated labor factors, including age itself.

There also is reason to believe that some managers consider the racial makeup of the current and future workforce in deciding whether to redeploy existing operations and when choosing among potential sites for a new facility. An Equal Employment Opportunity Commission (EEOC) study found that one reason motivating employers to move their operations is the desire to avoid minority neighborhoods and minority employees.⁵⁷ Site selection guidelines routinely include labor force demographics as an important selection factor (although none of the standard selection factor lists explicitly mentions racial makeup of the potential workforce).⁵⁸ In an academic study of site selection by high technology firms, only a few variables showed consistent correlation in diverse metropolitan ar-

55. *Id.* at 28-29.

56. *Id.* at 29.

57. Squires, *supra* note 40, at 155.

58. See, e.g., R. SCHMENNER, *supra* note 17, at 28-29, 31-38.

eas. One consistent statistical relationship was the higher the percentage black population, the lower the level of high tech employment.⁵⁹ Another survey of specific variables in plant location decisions found numerous employers who actually admitted that racial considerations played a role.⁶⁰

A rare window on corporate site-selection policies opened up in the course of discovery in 1983 litigation over a land dispute involving Amoco Fabrics Company, a subsidiary of Standard Oil Company (Indiana). The company was forced to reveal correspondence evidencing a corporate policy against locating a new facility in an area with over thirty-three percent black population.⁶¹ When questioned by a reporter about the disclosure, industrial development specialists from several southern states, including some local government officials, acknowledged that numerous companies working with these specialists to select new plant sites automatically had excluded from consideration areas where black population exceeded a specified percentage.⁶² Other companies, these specialists stated, did not openly express such a policy, but had engaged in a pattern of site selection choices evidencing a desire to avoid or escape from locations with a high concentration of blacks.⁶³ The industrial specialists identified the companies stated reasons for such practices: (1) a be-

59. Glasmeier, Hall & Markusen, *Recent Evidence on High-Technology Industries' Spatial Tendencies: A Preliminary Investigation*, in TECHNOLOGY, INNOVATION, AND REGIONAL ECONOMIC DEVELOPMENT 145-67 (1984), discussed in Malecki, *Industrial Location and Corporate Organization in High Technology Industries*, 61 ECON. GEOGRAPHY 345, 350 (1985); see also A. MARKUSEN, P. HALL & A. GLASMEIER, *HIGH TECH AMERICA* (1987), cited in Cole & Deskins, *Racial Factors in the Employment Patterns of Japanese Auto Firms in America*, 31 CALIF. MGMT. REV. 9, 20 (1988).

60. Epping, *supra* note 49, at 16, 21. "Favorable racial make-up of the community" averaged 61st out of 84 factors by two of the three surveyed groups; it was rated 68th out of 84 by the third group. The factor was not very important to many respondents, but it was clearly quite important to a significant number. *Id.* at 21.

Another measure of the importance of the "racial make-up" variable is its average rating. The questionnaire asked the president of the organization to rate each factor on a nine-point scale, with nine the highest. The ranking of factors was then based on the average rating. Epping, *supra* note 17, at 48. The highest rated of the 84 factors averaged under 7.00. The lowest rated factors averaged close to 1.00. "Favorable racial make-up of the community" averaged 4.87 for the "Civic Interest" group, 4.49 for the group of "Manufacturers Not Locating in Arkansas," and 3.51 for the "Manufacturers Locating in Arkansas." Epping, *supra* note 49, at 18-21. Racial make-up of the community, for two of the three groups, was rated in the middle of the scale from 0 to 9 in importance for choosing a new plant site.

61. Stuart, *Businesses Said to Have Barred New Plants in Largely Black Communities*, N.Y. Times, Feb. 15, 1983, at A14, col. 1.

62. *Id.*

63. *Id.*

lief that black employees are less reliable and less skilled than whites; (2) the perception that blacks are easier to unionize than whites; (3) the desire to avoid problems with affirmative action programs; and (4) the wish to avoid racial issues in community relations.⁶⁴ Amoco Fabrics officials, in court papers, explained the rationale for Amoco Fabrics' race-based siting rule: "Our experiences are that the lower the concentration of minorities, the better we're able to perform and get a plant started up."⁶⁵ The track record of American businesses in relocating to and within the South betrays the influence race has had on company location choices.⁶⁶

It is evident that subconscious racism⁶⁷ sometimes influences the choice of a new plant site; it is also clear that overt racism systematically enters the decisionmaking calculus of some businesses. Concern over this problem is heightened as foreign investment in American enterprise mushrooms. Foreign ownership of American companies, particularly Japanese ownership, has increased greatly in recent years.⁶⁸ Multinational corporations usually make capital redeployment decisions at their headquarters; inevitably, their decisionmaking reflects the cultural traditions of the multinational corporation's home country.⁶⁹ The increased incidence of foreign ownership is likely to exacerbate the incidence of cases raising issues of racial discrimination in site selection. Other, more homogeneous societies are less likely to share the American social consensus supporting equality of opportunity despite heterogeneity of race, reli-

64. *Id.*

65. *Id.*

66. *See id.*; see also J. BROWNING, HOW TO SELECT A BUSINESS SITE 96-97 (1980) ("the black population, 16 percent of the Sunbelt, has scarcely shared in the economic upsurge." Rather, companies have located where they can find underemployed white labor, partly because their education level tends to be somewhat higher and they are not as likely to join a union as are blacks." (quoting Breckenfeld, *Business Loves the Sunbelt (and Vice Versa)*, 95 FORTUNE, June 1977, at 132)).

67. *See generally* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339-44 (1987).

68. Between 1979 and 1984, Japanese direct investments in this country increased over 33% per year. Encarnation, *Cross-Investment: A Second Front of Economic Rivalry in AMERICA VERSUS JAPAN* 117 (1987). In 1984 new direct Japanese investment in the U.S. was estimated at \$1.7 billion; the 1985 figure was predicted to top \$2.5 billion. Edid, Treece & Weiner, *Why Mazda is Settling in the Heart of Union Territory*, BUSINESS WEEK, Sept. 9, 1985, at 94. Another analyst, relying on figures supplied by the Japanese External Trade Office, estimated that by March 1984, total direct Japanese investment in the U.S. amounted to some \$16.535 billion, in some eleven thousand establishments. Kyle, *What Japanese Prospects Look For*, ECON. DEV. REV., Winter 1986, at 30.

69. *See, e.g.*, Roberts, *Comment*, in MULTINATIONALS, UNIONS, AND LABOR RELATIONS IN INDUSTRIALIZED COUNTRIES 49-50 (1977).

gion, sex or age.⁷⁰

The Japanese, in particular, are notorious for their racist attitudes toward non-Japanese,⁷¹ non-Asians in general,⁷² and blacks in particular.⁷³ The highly publicized racist statements of then-Prime Minister Yasuhiro Nakasone merely advised the American public of a state of affairs long accepted in Japan.⁷⁴ As Professor Robert E. Cole, a noted authority on Japanese industrial methods, described it:

It is . . . asserted [by many Japanese] that labor quality in the United States is declining because of government imposed affirmative action guidelines which require American firms to employ and retain incompetent, lazy and undisciplined workers. This claim seems directed primarily at American blacks and to a lesser extent at females. These views are quite common in Japan and have strong racist overtones.⁷⁵

70. See generally E. REISCHAUER, *THE JAPANESE* 411-13 (1979).

71. Professor Edwin O. Reischauer, a noted authority on Japan, and former United States Ambassador to Japan, characterizes Japanese attitudes toward non-Japanese in the following terms: "The Japanese concept of their difference from other peoples is not so much a matter of superiority, that is, of quality, but a difference in kind. . . . In essence it is a deeply racist concept, almost as though Japanese were a different species of animal from the rest of humanity." *Id.* at 411. Another authority on Japan uses remarkably similar terms, describing "the strong ethnocentrism that has persisted in Japan" as "evin[cing] a way of thinking that condemns a person to near subhuman status if he/she is not Japanese." M. HANE, *PEASANTS, REBELS & OUTCASTES: THE UNDERSIDE OF MODERN JAPAN* 139 (1982) (footnotes omitted). On the historical and cultural genesis of Japanese attitudes toward those of other nationalities, see generally E. REISCHAUER, *supra* note 70, at 401-07, 411-13, 415-16.

72. See, e.g., E. REISCHAUER, *supra* note 70, at 411-12.

73. See, e.g., *id.* at 412-13.

74. Prime Minister Nakasone asserted in a speech on September 23, 1986, to his ruling Liberal Democratic Party, that Japanese economic superiority over the United States was attributable in part to the low levels of intelligence of black, Puerto Rican and Mexican American workers. *N.Y. Times*, Sept. 24, 1986, at A12, col. 1. For the story of the aftermath of these remarks, see Barrow, Jr., *The Japanese: Are They Giving Us 'the Business?'*, *THE CRISIS*, Apr. 1988, at 16. The 1987 NAACP Convention adopted a resolution in reaction to these developments, condemning the "blatant racial prejudice" Yasuhiro Nakasone demonstrated in publicly stating before Japan's cabinet members and its advisers that "blacks, Mexicans, and Puerto Ricans have lowered the United States' educational and intellectual levels." The NAACP resolved to monitor Japan's fulfillment of Nakasone's apologetic promises to, *inter alia*, increase Japanese investment in minority-owned American banks "and to locate Japanese companies in predominantly black areas." *1987 Convention Resolutions as Adopted by the 78th Annual Convention of the NAACP, New York, New York, THE CRISIS*, May 1988, at 30, 32.

75. Cole, *Is American Labor Quality Declining?*, *JAPAN ECON. J.*, July 15, 1980, at 11.

Such attitudes are not left behind when Japanese corporations move some operations to America. Professor Cole states:

It is well known that one of the first questions Japanese managers starting operations in the U.S. ask when examining a prospective site is "what is the proportion of blacks in the area?" . . . Implicit here is the assumption that they will seek out sites in areas where they can recruit a non-black labor force.⁷⁶

Professor Cole, together with his colleague, Professor Deskins, conducted a study of the sites selected by Japanese and other automobile manufacturing firms opening facilities in the United States. The researchers found that

with the exception of the Volkswagen plant, the Japanese scored consistently lower in the ratio of black to white population in the area within the laborshed of their plants With few blacks relative to whites in the area where they locate their plants, Japanese firms can stay within EEOC guidelines and still hire very few blacks. By siting their plants in areas with very low black populations, they, in effect, exclude blacks from potential employment.⁷⁷

Moreover, blacks are under-represented in workforces at the Japanese-owned auto plants, compared to black representation in the surrounding areas.⁷⁸ At the major United States automakers' plants, minorities are substantially over-represented in comparison to the makeup of the surrounding communities.⁷⁹ On the strength of interviews and personal experiences, as well as their data, Cole and Deskins conclude, "The Japanese plant sitings reflect a pattern

76. *Id.* See also Cole & Deskins, *supra* note 59, at 18 (quoting a new plant recruitment official for a midwestern state as saying, "many Japanese companies . . . [in the early 1980s] specifically asked to stay away from areas with high minority populations"); *id.* (the Tokyo office of the Japan External Trade Organization, which provides detailed U.S. census data upon request to Japanese companies, reports that Japanese companies selecting U.S. plant locations usually examine the racial composition of the population around possible sites). Honda of America Manufacturing recently settled allegations that it had systematically excluded blacks and women from its workforce, by agreeing to offer jobs to 370 black or female rejected applicants, and to pay back pay totalling \$6 million. See McQueen & White, *Blacks, Women at Honda Unit Win Back Pay*, Wall St. J., Mar. 24, 1988, at 2, col. 2. Honda had located its manufacturing plants in mostly white, rural communities in central Ohio. Honda's policy preferring job applicants who resided within 30 miles of the plants operated to exclude most potential black applicants, who were concentrated in the nearest large city, Columbus. *Id.*

77. Cole & Deskins, *supra* note 59, at 13.

78. *Id.* at 15-17.

79. *Id.*

in which avoidance of blacks is *one* factor in their site location decision."⁸⁰

The Japanese are hardly the only nation harboring racist, "ageist" or other discriminatory attitudes.⁸¹ It is probably not coincidental that in the Cole and Deskins study, the German car-maker Volkswagen had by far the lowest ratio of blacks to whites living within a reasonable commuting radius of its automobile assembly plant, a figure only half that of the Japanese plants.⁸² The United States' extraordinary racial, religious, and ethnic heterogeneity underlies its social compact tolerating, accepting, even cherishing the diversity of its citizens. Despite America's serious problems with invidious discrimination, it outpaces many other cultures in its attempts to resolve these issues. The increased rate of foreign-based multinational investment in the United States raises the spectre that discriminatory motives will become substantially more prevalent in plant relocation, site selection, and subcontracting decisions.

Foreign-owned corporations, however, are by no means the only businesses that appear to be scrutinizing labor force racial demographics before deciding where to locate new facilities. The Cole and Deskins study of automobile industry plant sites, for example, found among plants owned by United States automakers, that unrehabilitated, aging plants had the highest ratio of blacks to whites in the surrounding community.⁸³ New plants had a much lower ratio, but lower still was the ratio of "retrofitted" plants, those extensively modernized since 1980.⁸⁴ United States automakers may well be influenced by the racial composition of the workforce or community in deciding which plants to renovate and which plants to abandon.⁸⁵ Cole and Deskins conclude,

80. *Id.* at 17 (emphasis in original). This finding is corroborated by the Japanese automobile manufacturers' record in franchising car dealerships. Blacks own only 8 of the almost 5,000 Japanese car dealerships in the U.S. In comparison, 170, or 3.4% of Ford's dealerships are minority owned while 204, or 2% of GM's dealerships are minority owned. *Id.* at 19.

81. See, e.g., E. REISCHAUER, *supra* note 70, at 411-13 (pointing particularly to East Asian nations; racism may be more evident in countries where many races live together, but it is ubiquitous, and is probably strongest where there is little interracial contact, leaving the issue submerged).

82. Cole & Deskins, *supra* note 59, at 13, 16. The authors allude to the fact that the Volkswagen plant was the object of several employment discrimination class actions during its relatively short life span. See *id.* at 13.

83. *Id.* at 13, 16.

84. *Id.*

85. See also *id.* at 15 ("the prime candidates for . . . closings are the traditional plants that have not yet been modernized. . . . [T]he jobs most at risk from the Japanese auto industry's continued competitive pressure are in the traditional plants with the highest

The fact that Japanese managers seem to voice racist sentiments should not be interpreted to mean that they are necessarily more racist than American managers. It is clear that many have yet to learn the American taboos with regard to talking about race. . . . White American managers may simply be more subtle in their behavior toward blacks rather than any less racist than the Japanese.⁸⁶

The activities of corporations of all nationalities and all sizes must be scrutinized regarding discriminatory site selection and re-deployment decisions.

B. Capital Redeployment: The Need for a Discrimination Theory

Discriminatory attitudes towards current or potential workers appear to affect a significant percentage of capital redeployment decisions. Thousands of redeployment decisions are made annually, affecting the employment prospects of hundreds of thousands of workers. It is crucial, therefore, that theories be developed to redress discrimination in these decisions.

Few lawsuits of this type have been brought to date, and very little academic commentary has been written on point.⁸⁷ Only a

ratio of black to white population" in the community area labor force); *id.* at 16 (there is some reason to think that the smaller the plant and the company, the more likely it is that blacks are under-represented in the workforce, regardless of whether the company is Japanese or American. Smaller companies are less subject to public scrutiny and thus less likely to adopt formal affirmative action programs"); *id.* at 20 (U.S. automakers' site location and retrofitting decisions "work against plant locations in areas of high minority concentrations—though not as significantly as Japanese OEM decisions").

86. *Id.* at 20.

87. In 1971 Professor Alfred W. Blumrosen addressed aspects of the problem of racial discrimination in capital redeployment. See Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 RUTGERS L. REV. 383 (1971). At about the same time, the Equal Employment Opportunity Commission (EEOC) considered adopting a policy applying Title VII along the lines suggested in Professor Blumrosen's work. The EEOC memorandum, building on Professor Blumrosen's theories, argued that Title VII disparate impact theory should be interpreted to create a prima facie case whenever a company relocated from the inner city to a suburban area containing a lower percentage of minorities in the workforce, or whenever the transfer of operations affected minorities among incumbent employees from the original plant more adversely than white incumbents. See EEOC memorandum dated July 7, 1971, reprinted in 118 CONG. REC. 4925-27 (1972), and in STAFF OF SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1735-39 (Comm. Print 1972) [hereinafter 1972 TITLE VII LEGISLATIVE HISTORY]. The EEOC memorandum was leaked to the press, and later became embroiled in congressional floor debate over the proposed 1972 amendments to the Civil Rights Act. See 118 CONG. REC. 4924-29, reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra*, at 1730-43.

Embarrassed by the premature disclosure of what he called "an internal working

handful of redeployment discrimination cases have been litigated to conclusion, and most of those cases have simply applied standard employment discrimination case law to the redeployment setting, without focusing on its distinctive aspects.⁸⁸

In light of the acceleration in the rate of capital redeployment, establishment of the applicability of Title VII and the ADEA to discrimination in redeployment decisions is an urgent matter. The economic impact of discrimination in capital redeployment upon older workers and black employees is substantial. Unless an employer's choices about structuring its corporate workforce are subjected to antidiscrimination analysis, many unnecessarily exclusionary workplace patterns will continue to impose barriers to full equal employment opportunity. Moreover, as it becomes more and more difficult for employers to conceal or justify other intentionally discriminatory hiring, promotion, and retention practices, consciously discriminating employers will have greater incentives to manipulate such structural escape hatches as locating, relocating or subcontracting operations in a fashion which will effectuate the company's discriminatory purposes.

Nevertheless, any theory of Title VII and ADEA law addressing redeployment decisions will first have to overcome certain business-oriented predispositions.⁸⁹ The managerial choices that would be

paper expressing the legal opinions of some staff attorneys," EEOC's then-Chairman William H. Brown issued a statement denying that the memorandum expressed either a recommendation to the Commission for action or current EEOC policy. See 118 CONG. REC. 4924-25, reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra*, at 1733.

Apparently, the proposal was abandoned totally; nothing more has been written of it. A LEXIS search conducted October 31, 1988, in the ALLREV file of the LAWREV library located no citations to Professor Blumrosen's article. A second search in the GENFED library, NEWER case file, produced no citations to the article either. This portion of the legislative history is further discussed *infra* text accompanying notes 448-454.

88. See, e.g., *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944-45 (1st Cir. 1983) (black employees sought to enjoin airline from subcontracting mostly black "sky cap" operations, employing traditional Title VII race discrimination theories); *Adama v. Doehler-Jarvis*, 419 Mich. 905, 906 n.1, 353 N.W.2d 438, 439 n.1 (1984) (employees successfully challenged decision to close plant based on age-linked cost of supplemental pension benefits, employing traditional age discrimination analyses).

89. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126-27 (1989) (if plaintiff establishes that the employer's policy causes a disparate impact, and asserts that the employer's legitimate business justification can be met equally well, without undue added cost, by a less discriminatory alternative practice, courts should be cognizant that employers have greater business expertise than the judiciary, so judges "should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit"); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786 (1989) (Title VII's emphasis on "maintenance of employer prerogatives"

challenged in capital redeployment cases seem far closer to current notions of a sacrosanct core of entrepreneurial discretion⁹⁰ in the operation of the enterprise than do individual hiring, promotion, and retention decisions. The next portion of this article argues that redeployment claims are cognizable under the employment discrimination laws and rejects arguments that the antidiscrimination statutes were not intended to encompass employers' entrepreneurial decisions, however discriminatory their motivation or impact.

Predictably, employers would oppose recognition of an employment discrimination cause of action, relying on corporate liberty or property rights or on traditional entrepreneurial control reasoning akin to arguments advanced with some success by employers in NLRA cases.⁹¹ Nevertheless, site selection, relocation, plant closing, and subcontracting decisions come within both the language and the purpose of the statutory prohibitions. The legislative history does not contradict the plain import of the language of Title VII and the ADEA,⁹² which encompasses most capital redeployment decisions. Labor law precedents also support the conclusion that at least some discriminatory work location decisions run afoul of the employment laws.⁹³

Wholesale exclusion of discriminatory redeployment claims by a narrow construction of the statutory prohibitions would be unwarranted. It would provide a ready means for employers to circumvent the law's basic commands. Assuming a sufficient race- or age-based nexus exists,⁹⁴ civil rights laws should be construed to pro-

mandates that an employer proven to have taken gender into account in making an employment decision nevertheless "shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision . . ."); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2788, 2790-91 (1988) (to avoid creating a "chilling effect on legitimate business practices," when applying disparate impact theory to subjective employee selection systems, a plurality of the Court insists upon deferential judicial review of the business decisions); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress, they should not attempt it").

90. *Cf. Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (redeployment decisions "lie at the core of entrepreneurial control").

91. The NLRA arguments are addressed *infra* text accompanying notes 115-130, 166-376. *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 77-78 (1984) (employer unsuccessfully argued that first amendment free association and other managerial control interests required exempting from Title VII's prohibitions against discrimination decisions regarding promotion of associates to partnership).

92. *See infra* notes 377-470 and accompanying text.

93. *See infra* notes 115-144, 166-334 and accompanying text.

94. The requisite degree of nexus is discussed in terms of scope of the employment

hibit discriminatory capital redeployment decisions. The wisdom and magnitude of interference with management decisionmaking is best addressed through careful definition of the elements of the claim, its defenses, and remedies. That further task, I undertake elsewhere.⁹⁵

II. EXISTING WORKFORCES

A. Construing the Statutory Language

Section 703(a) of Title VII⁹⁶ and section 4(a) of the ADEA⁹⁷ almost identically spell out two distinct sets of prohibitions. The sections state that it is unlawful 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 . . . terms, conditions, or privileges of employment, because of such individual's race (age) . . . ;

2. to limit, segregate, or classify his employees [or applicants for employment]⁹⁸ 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 (age)⁹⁹

In construing the employment discrimination laws, it is useful to consider separately two different types of workers whose employment opportunities may be affected by the various forms of capital

discrimination cause of action in *M. Weiss, Proving Capital Redeployment Discrimination*, *supra* note 13. The question of the requisite degree of nexus is discussed from the perspective of statutory standing to sue in *M. Weiss, supra* note 12.

95. The elements of the claim and defenses are addressed in *M. Weiss, Proving Capital Redeployment Claims*, *supra* note 13.

96. 42 U.S.C. § 2000e-2(a) (1982).

97. 29 U.S.C. § 623(a) (1982).

98. The phrase "or applicants for employment" was not in Title VII as originally enacted. See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703(a)(2), 78 Stat. 241, 255 (1964). The wording was added as a clarifying amendment during the 1972 amendments to Title VII of the Civil Rights Act. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 8(a), 86 Stat. 103, 109 (1972); see 118 CONG. REC. 7169 (1972), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1849 (conference report section-by-section analysis of H.R. 1746). The 1967 ADEA took its prohibitory language from the original Title VII language, and § 4(a)(2) of the ADEA never underwent parallel amendment to § 703(a)(2) of Title VII. For a discussion of possible significance in site selection cases of the difference in statutory wording, see *infra* note 471 and accompanying text. In any event, age discrimination is far less implicated in site selection decisions than race discrimination, so any difference between Title VII and ADEA coverage of discrimination against applicants for employment is probably unimportant for purposes of this discussion.

99. 29 U.S.C. § 623(a) (1982); 42 U.S.C. § 2000e-2(a) (1982).

redeployment decisions: (1) employees in an employer's existing workplace, whose jobs are eliminated, relocated or altered because of the restructuring of operations; (2) persons who would apply for jobs with the employer if the employer locates the facility at site A, and who will not apply if the establishment is placed at site B. This section addresses existing workforces; the next section will cover potential applicants at new work sites.

In settings involving incumbent workforces, each of the two statutory provisions appears plainly applicable. The discharge because of race or age of employees in the course of a plant closing, relocation or subcontracting of operations directly violates the prohibitions of section 703(a)(1) of Title VII or section 4(a)(1) of the ADEA. Even if a company merely lays off, reclassifies or demotes employees when it transfers work elsewhere because of the employees' race or age, it "otherwise" discriminates against them in violation of the same section.

Continued availability of the workers' jobs at the plant is arguably a "term, condition or privilege of employment."¹⁰⁰ The discriminatory elimination of the workers' jobs, whether by relocation, subcontracting or closure, then unlawfully "otherwise . . . discriminate[s] against [the workers] with respect to [their] terms, conditions, or privileges of employment because of [their race or age]."¹⁰¹

If discrimination affects decisions about relocation, subcontracting or elimination of existing jobs, the employer also violates the literal language of subsection (a)(2) of the appropriate discrimination statute. The employer is classifying its black or older employees in ways that tend to deprive them of their very jobs, the sum total of their employment opportunities, and that adversely affect their status as employees, because of their race or age. A decision to subcontract, relocate or eliminate the jobs of an existing group of employees, based at least in part on the race or age of the employees holding the jobs, or on labor factors correlated with the workers' race or age, violates both prohibitory provisions of Title VII or the

100. When it is not contractually mandated or uniformly provided by unilateral employer policy, job security against relocation, operation termination, or subcontracting arguably might not be a "term" or a "condition" of employment. See discussion *infra* notes 168-299 and accompanying text. At the least, however, it is a "privilege" of employment. See *Hishon v. King & Spalding*, 467 U.S. 69 (1984), discussed *infra* notes 147-165 and accompanying text.

101. 29 U.S.C. § 623 (a)(1) (1982); 42 U.S.C. § 2000e-2(a)(1) (1982).

ADEA.¹⁰²

102. Both subsections of the statute speak in the singular, a point which might be thought to pose an obstacle to the statutory interpretations urged in text. The redeployment or site selection decision, after all, is made on the basis of aggregate racial, age or correlated labor force characteristics, rather than the characteristics of particular individuals. Taken literally, the antidiscrimination provisions could be construed to apply only to decisions focusing on, or motivated by, the injured individual's race or age. Decisions taken because there were "too many" black or older workers in the workforce, on this view, would be beyond the statutory prohibitions.

Such an interpretation of § 703(a)(2) of Title VII, and perhaps § 4(a)(2) of the ADEA, as well, is foreclosed by the continued acceptance of disparate impact theory under Title VII. The gravamen of a disparate impact claim is individual injury because of the worker's membership in the racial group which in the aggregate fares less well under the employer's challenged employment practice. See *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2124-25 (1989). The disproportionate impact on plaintiff and others of her race renders the policy a "classification . . . which tend[s] to deprive the individual of employment opportunities because of such individual's race", see, e.g., *Connecticut v. Teal*, 457 U.S. 440, 448 (1982), and one which "adversely affect[s] [an individual's] status as an employee because of such individual's race." *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2786-87 (1988). To the extent the courts are willing to view § 703(a)(1) of Title VII as an alternative statutory foundation for disparate impact claims, see *infra* note 107 and accompanying text, an exclusively individualized construction of that section likewise is foreclosed. It is the aggregate impact of an employment practice on the racial or age group, coupled with injury to the individual group member, that suffices to state a disparate impact claim. See *Connecticut v. Teal*, 457 U.S. 440 (1982). Perforce, a redeployment or site selection decision adopted intentionally to cause the adverse impact on the racial or age group is unlawful.

Moreover, considerable precedent exists, most of it under the NLRA, holding that pretextual structural decisions based on a protected, predominant group characteristic such as union activism are unlawful and discriminatory. An employer may decide to lay off a shift, subcontract an operation or relocate a plant because too many employees in the affected operation are militant union adherents. There are always a few coworkers in the terminated shift, operation or plant who had no interest in, or even opposed the union. Where it is the prevalence of union supporters that motivates the employer's action, the decision is held unlawful as to all injured employees, even though no single individual's union activity could properly be treated as the employer's motive, and even though some of the injured employees were not literally injured because of their own union membership or activity, but were injured because of the union status of their coworkers. See, e.g., *NLRB v. A&T Mfg. Co.*, 738 F.2d 148, 149 (6th Cir. 1984) (gerrymandered layoffs to eliminate union adherents); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1355 (7th Cir. 1984) ("[w]here a layoff en masse is made in response to union activity, the Board does not have to prove anti-union motive as to each laid off employee"); *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (7th Cir. 1981) (relief awarded under NLRA to coworkers laid off as a result of the unlawful, anti-union motivated discharge of the two employees they assisted on production lines); *Majestic Molded Prods., Inc. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964) (all victims of mass layoff intended to discourage union activity entitled to relief, even if some laid off workers did not individually support union); see also *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1965) (possible remedy for discriminatorily-motivated plant closure is "reinstatement of the discharged employees in the other parts of the business"), *on remand*, 165 N.L.R.B. 1074, 1075 (1967) (awarding relief to all employees whose jobs were lost when employer closed plant and consolidated operations in nonunion plant to avoid the union), *enforced*, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969);

It is particularly significant that subsection (a)(2) of these statutes covers redeployment decisions. Title VII doctrine recognizes two main substantive theories:¹⁰³ disparate treatment, requiring proof of discriminatory intent,¹⁰⁴ and disparate impact, where the racially disproportionate adverse effect of a facially neutral policy renders the policy unlawful, absent adequate business justification.¹⁰⁵ While both subsections have been applied to claims of disparate treatment,¹⁰⁶ the precedents are inconsistent regarding

cf. *Nemeth v. Clark Equip. Co.*, 677 F. Supp. 899, 906-07 (W.D. Mich. 1987) (applying similar analysis to ERISA antidiscrimination provision). This analysis should be equally applicable under Title VII and the ADEA.

103. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 325 & n.15 (1977).

104. *See id.*; *see also, e.g., Watson*, 108 S. Ct. at 2784; *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1982); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

105. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (personnel tests), is the germinal case. The reasoning draws heavily on ideas expressed in Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). *See also, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height and weight requirements); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (personnel tests). In *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777 (1988), a recent case applying disparate impact analysis to subjective personnel selection systems, a badly fractured court issued a plurality decision significantly reworking the structure of disparate impact doctrine. The Court's decision last term in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), enshrines much of the reasoning of *Watson* as current law, particularly rewriting *Griggs* regarding burdens of proof, the strength of the business necessity the employer must proffer to justify the impact, and the precision of the fit required between plaintiffs' rebuttal offering of a less discriminatory alternative and the employer's business objectives. *See id.* at 2125-27.

106. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court explicitly "recognized . . . that both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2)." *Id.* at 141. Decisions regarding challenges to facially discriminatory policies or to other patterns of systemic disparate treatment usually have cited generally to § 703(a), or have cited both § 703(a)(1) and § 703(a)(2) as bases for the action. *See, e.g., Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1446 n.1, 1449 (1986) (challenge to sex-based affirmative action program); *Bazemore v. Friday*, 478 U.S. 385, 386-87 (1986) (*per curiam*); *id.* at 392 n.3, 393 n.4 (Brennan, J., concurring for the Court) (salary discrimination caused by perpetuation into the present of the effects of past race-based assignment and salary-setting formula); *United Steelworkers v. Weber*, 443 U.S. 193, 199 n.2, 201 (1979) (race-based apprenticeship entry affirmative action plan); *id.* at 227 & n.7 (Rehnquist, J., dissenting) (same); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306 n.12 (1977) (systemic disparate treatment hiring discrimination); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977) (systemic disparate treatment in hiring, assignment, and transfer). Other cases of these sorts specify no particular substantive provision of Title VII at all. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 323 (1977) (rule excluding women from prison guard positions). Many individual disparate treatment claims likewise recite both statutory subsections, or generally rely on § 703(a) or Title VII. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986)

disparate impact. Some Title VII cases regard disparate impact claims as cognizable only under section 703(a)(2) of Title VII; others treat both prohibitory provisions of Title VII as encompassing disparate impact theories.¹⁰⁷ The availability of subsection (a)(2) for redeployment claims provides a more certain statutory basis for advancing disparate impact theories in this category of cases.¹⁰⁸

(prohibition on the use of "necessary personal business" leave for religious observance); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) (plaintiff claiming "violation of § 703(a) . . . meets . . . [her or his] burden by offering evidence adequate to create an inference that [she or] he was denied an employment opportunity on the basis of a discriminatory criterion enumerated in Title VII"); *Burdine*, 450 U.S. at 251 (promotion claim); *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 569 (1978) (hiring case). Many individual disparate treatment cases, however, particularly those alleging hiring, discharge or compensation discrimination, are decided with reference to § 703(a)(1). See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 69 (1977) (discharge); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278 (1976) (discharge); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 87 (1973) (hiring); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 801 n.11, 805 n.18 (1973) (refusal to rehire). Several challenges to facially discriminatory policies, particularly compensation plans, have been based solely upon § 703(a)(1). See, e.g., *Arizona Governing Comm. for Tax Deferred Annuity Plans v. Norris*, 463 U.S. 1073, 1079 (1983) (pension benefits); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 675 (1983) (insurance benefits); *County of Washington v. Gunther*, 452 U.S. 161, 167 (1981) (wages); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 704 & n.1 (1978) (pension premium differential). Where statutory coverage of the practice has been in doubt, the Court has focused more closely on the words of the prohibitory subsections. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court analyzed "terms [or] conditions . . . of employment" to conclude that § 703(a)(1) prohibits sexual harassment creating a hostile environment, even absent a *quid pro quo* claim. *Id.* at 63-67. *Hishon v. King & Spalding*, 467 U.S. 69 (1984), applying Title VII to the denial of nondiscriminatory consideration for promotion to partnership, was decided as a § 703(a)(1) interpretation. *Id.* at 73-74. The case was also litigated under § 703(a)(2); however the Court declined to address the issue under that subsection. *Id.* at 74 n.4. Similarly, in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the Court analyzed plaintiff's claim that her candidacy for partnership was discriminatorily placed on hold as a § 703(a)(1) claim, *id.* at 1785; it did not address her belatedly advanced contention that a biased promotion process "tended to deprive" her of partnership in violation of § 703(a)(2). *Id.* at 1785 n.5.

107. Compare *Watson*, 108 S. Ct. at 2786-87 (1988) (specifying § 703(a)(2) as the basis of the adverse impact claim), *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (same) and *Griggs*, 401 U.S. at 426 & n.1 (same) with *Atonio*, 109 S. Ct. at 2118 & n.1 (quoting both subsections of § 703(a) as the bases for disparate impact theory), *American Tobacco Co. v. Patterson*, 456 U.S. 63, 70 (1982) (suggesting either prohibitory subsection of Title VII may provide the foundation for a disparate impact claim) and *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (same). See also *Teal*, 457 U.S. at 448 n.9 (suggesting an equality of result interpretation of § 703(a)(1) of Title VII); *Manhart*, 435 U.S. at 710-11 n.20 (same).

108. It is significant, therefore, that site selection claims may be more readily grounded on subsection (a)(1) than (a)(2). See *infra* text accompanying notes 471-500. If the Court follows through on its intimation in *Watson* limiting disparate impact claims to subsection (a)(2), but see *Atonio*, 109 S. Ct. at 2118 n.1, it may discourage the courts

It should be noted, however, that the United States Supreme Court has never settled whether a disparate impact case of any sort can be made out under the ADEA. The ADEA regulations currently appear to recognize the validity of disparate impact claims under the age discrimination statute.¹⁰⁹ The overwhelming weight of judicial authority holds that the parallel prohibitory language of the two laws mandates acceptance of Title VII disparate impact doctrine under the ADEA.¹¹⁰ The commentators, however, have been heavily opposed to transferring disparate impact theory to the ADEA setting.¹¹¹ The Justices' pronouncements on this issue are limited to one dissent from a denial of certiorari, by Chief Justice Rehnquist and Justice White, urging that disparate impact arguments be held not cognizable under the ADEA.¹¹² Assuming, however, that the Court accepts disparate impact as a viable theory under the ADEA, the age statute provides no special basis for excluding capital redeployment decisions, as opposed to other types of employment practices, from disparate impact analysis.¹¹³

There are no statutory defenses to either Title VII or the ADEA

from applying disparate impact analysis to redeployment claims involving site selection where there is no existing workforce whose "status as . . . employee[s]" is "adversely affect[ed]." See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

109. See 29 C.F.R. § 1625.7(d) (1988).

110. Compare *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984) (applying disparate impact theory in ADEA action); *Criswell v. Western Airlines*, 709 F.2d 544, 554-55 (9th Cir. 1983) (same), *aff'd on other grounds*, 472 U.S. 400 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983) (same); *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1319 (11th Cir. 1982) (same) and *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980) (same), *cert. denied*, 451 U.S. 945 (1983) with *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1307 (E.D. Mich. 1976) (contending disparate impact arguments should not be cognizable under ADEA).

111. See, e.g., Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS* 95 n.26 (Lake ed. 1982); Player, *Title VII Impact Analysis Applied to the Age Discrimination In Employment Act: Is a Transplant Appropriate?*, 14 U. TOL. L. REV. 1261, 1278-79 (1983); Powers, *Reductions in Force under the Age Discrimination in Employment Act*, 2 LAB. LAWYER 197, 211-12 (1986); Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 EMP. REL. L.J. 438, 451 (1985); Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038, 1071 (1984); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 852 (1982); Blumrosen, Book Review, 12 SETON HALL L. REV. 186, 192-93 (1981).

112. *Markham v. Geller*, 451 U.S. 945, 948 (1983) (Rehnquist, J., dissenting from denial of certiorari in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980)).

113. There is an argument applicable both to Title VII and the ADEA against construing the antidiscrimination laws to prohibit capital redeployment decisions that have a disparate impact on blacks or older workers. See *infra* text accompanying notes 335-376. There are also special difficulties framing the contours of a prima facie case and pertinent defenses to a disparate impact capital redeployment claim. These difficulties are addressed in M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

that might alter the applicability of the two antidiscrimination statutes to capital redeployment claims.¹¹⁴ Nothing in either law explicitly exempts managerial decisionmaking about capital redeployment from the prohibitions against discrimination in employment.

The prohibitory words of the federal antidiscrimination laws may be readily construed to cover employment discrimination stemming from capital redeployment decisionmaking. Labor law and employment discrimination case law, as well as pertinent legislative history and federal labor policy, add force to this interpretation.

B. Employment Discrimination and Labor Law Precedents

Despite the words of the employment discrimination laws, it could be argued that applying equal employment opportunity laws to entrepreneurial decisions involved in capital redeployment exceeds congressional intent and constitutes unsound policy. Supreme Court decisions, under certain circumstances, limit the applicability of the labor laws in cases of capital redeployment decisionmaking.¹¹⁵ These precedents might be thought relevant to equal employment law analysis in either of two ways. First, the statutory language of Title VII and the ADEA regarding "terms, conditions, or privileges of employment" is drawn from "terms or conditions of employment" language in older labor laws.¹¹⁶ The labor law precedents could bear on proper interpretation of the parallel antidis-

114. Title VII (but not the ADEA) does contain an affirmative defense that confirms the notion that Congress generally wished to encompass discrimination involving multiple establishments of a single employer. Unlike the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), a sex discrimination law enacted only the year before Title VII, the Civil Rights Act of 1964 does not limit its prohibition against discrimination to different treatment of workers within a single "establishment." Title VII thus is not limited to facility-by-facility analysis. For example, an employer who intentionally maintained one plant as the mostly black plant and a second plant, a few miles away, as the mostly white plant, undoubtedly would be held liable for racial discrimination in hiring and assignment between the two plants. In recognition of the reach of the statutory prohibitions, Congress added an affirmative defense in § 703(h) of Title VII permitting employers "to apply different standards of compensation, or different terms, conditions, or privileges of employment . . . to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race" To the extent proof of Title VII disparate impact capital redeployment claims turns on comparisons of demographics between facilities, this defense may preclude the cause of action, absent proof of discriminatory intent. The potential impact of this affirmative defense on the types of discrimination that will state a claim is addressed in M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

115. See *infra* text accompanying notes 131-146, 166-223, 249-263, 303-306, 316-324, 363-371.

116. See *infra* notes 389-391 and accompanying text.

crimination language.¹¹⁷

There are several inconsistent strands of NLRA case law.¹¹⁸ If translated to the equal employment law setting, these varying NLRA interpretations might support any of several limiting constructions of the scope of equal employment opportunity coverage with respect to redeployment decisions. Antidiscrimination law might be held to apply, not to all capital redeployment decisions involving workers' jobs, but only to decisions based in significant part on labor factors, including workers' race or age.¹¹⁹ Alternatively, Title VII and ADEA proscriptions might be limited to redeployment decisions based entirely on labor factors, including race or age.¹²⁰ The equal employment laws might be construed to apply only to cases of intentional discrimination in redeployment, where workers' race or age played a role, and not to cases challenging the racial or age-correlated effects of redeployment decisions based on facially neutral labor force characteristics like education levels.¹²¹ Other labor law decisions might support application of equal employment laws to plant relocations and operational consolidations but not to closures of facilities.¹²² Some labor law precedent might support limiting application of equal employment law to the portions of redeployment decisions that labor law cases characterize as addressing "effects" of the decision to redeploy upon the workforce, such as decisions about transferring workers with their relocated operations, but not decisions about whether to relocate, open or close a facility in the first place.¹²³

Internal inconsistencies would preclude imposition of certain combinations of these statutory construction constraints upon the scope of antidiscrimination laws. Any one of these limitations, however, arguably could be transposed from labor law to equal employment doctrine.

Second, the labor law decisions might be interpreted as holding that the overall balance between federal labor policy and the country's commitment to entrepreneurial freedom requires the preservation of management control over capital investment-related

117. See *infra* text accompanying notes 224-242, 299-300, 310-334, 363-375.

118. For a discussion of these cases and their implications for employment discrimination law, see *infra* text accompanying notes 166-376.

119. See *infra* text accompanying notes 203-204, 230, 299-300.

120. See *infra* text accompanying notes 205-215, 229.

121. See *infra* text accompanying notes 233, 300-376.

122. See *infra* text accompanying notes 199-202.

123. See *infra* text accompanying notes 216-228, 231, 243-263.

decisions.¹²⁴ This balance, it could be argued, is equally appropriate in the realm of equal employment opportunity. Either suggestion, however, would be ill-founded.

The statutory construction arguments cannot succeed. The wording that parallels the NLRA phrase appears only in one of the two prohibitory sections of the antidiscrimination laws, the (a)(1) subsections, leaving the other provision, the (a)(2) subsections, applicable.¹²⁵ Moreover, even the portion of the equal employment laws modeled on labor law language is broader than the NLRA phraseology, suggesting a broader prohibition of discriminatory redeployment decisions.¹²⁶ Finally, the NLRA precedents themselves do not support wholesale exclusion of capital redeployment decisions from the scope of the NLRA "terms and conditions of employment" phrase.¹²⁷ Labor law authority cannot be relied on to support a construction of the equal employment laws that fails to cover discriminatory redeployment of operations:

Moreover, the labor law arguments that favor exempting redeployment decisions from collective bargaining translate poorly to the employment discrimination setting. The legislative history of Title VII and the ADEA suggests that ad hoc judicial balancing of employer interests against employee rights, held appropriate under some provisions of the NLRA, is inappropriate as a matter of federal equal employment policy.¹²⁸ Equal employment opportunity is a policy to which this country has committed "the highest priority."¹²⁹ The policies implicated in antidiscrimination law weigh heavily when balanced against capital mobility, and they involve far less interference with entrepreneurial freedom than the NLRA duty to bargain in good faith to impasse prior to completion of the decision-making process.¹³⁰ Neither statutory construction nor federal employment policy can justify permitting employers, as a matter of

124. See *infra* text accompanying notes 198, 216-220, 234-240.

125. See *infra* text accompanying notes 131-146.

126. See *infra* text accompanying notes 147-165.

127. See *infra* text accompanying notes 166-242.

128. See *infra* text accompanying notes 377-381, 388, 433-443, 455-470.

129. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (preventing and remedying discrimination and its effects is congressionally-mandated policy of the "highest priority'") (citation omitted); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975) ("national labor policy embodies the principles of nondiscrimination as a matter of highest priority"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (because Congress considered national policy against discrimination to be the "highest priority," it provided for multiple forums for addressing discrimination claims); see also *infra* text accompanying notes 380, 470.

130. See *infra* text accompanying notes 234-240.

entrepreneurial freedom, to engage in race- or age-discriminatory capital redeployment.

1. *Title VII and ADEA Prohibitory Language Apart From "Terms, Conditions, or Privileges of Employment."*—The most important reason to regard labor law precedents as inapplicable to Title VII and the ADEA is evident on the face of the statutes. "Terms, conditions, or privileges of employment," the language similar to the NLRA, is only a part of the Title VII/ADEA antidiscrimination prohibitions. Were those words entirely omitted from the statutory prohibitions, the remaining operative language would suffice to reach capital redeployment decisions used to discriminate against black or older workers.

The statutory interpretation argument, analogizing from labor law to employment discrimination law, hinges on the phrase "terms, conditions, or privileges of employment" contained in section 703(a)(1) of Title VII¹³¹ and section 4(a)(1) of the ADEA.¹³² Two separate provisions of the NLRA contain similar wording. Section 8(d) of the NLRA¹³³ governs the scope of an employer's duty to bargain in good faith with the exclusive collective bargaining agent of the company's employees.¹³⁴ The employer is obligated to bargain with the union only over "wages, hours, and other terms and conditions of employment."¹³⁵ In *First National Maintenance Corp. v. NLRB*¹³⁶ the Court in 1981 narrowed prior interpretations¹³⁷ of section 8(d) to relieve the employer of a duty to bargain with the union before deciding to shut down a part of the business.¹³⁸

The scope of the *First National Maintenance* exemption from collective bargaining for redeployment decisionmaking is hotly contested.¹³⁹ A narrow reading of the opinion would exempt from bargaining only decisions that totally terminate a discrete line or

131. 42 U.S.C. § 2000e-2(a)(1) (1982).

132. 29 U.S.C. § 623(a)(1) (1982).

133. 29 U.S.C. § 158(d) (1982).

134. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982), imposes upon employers the duty to bargain.

135. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982).

136. 452 U.S. 666 (1981).

137. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), discussed *infra* text accompanying notes 182-184; see also *Order of Railroad Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330, 330-43 (1960) (construing the parallel provision of the Railway Labor Act, 45 U.S.C. § 152 (1982), discussed *infra* notes 186-191 and accompanying text).

138. 452 U.S. at 680.

139. See *infra* text accompanying notes 166-242.

portion of a business;¹⁴⁰ a broad reading would permit employers to engage in any significant redeployment of capital or operations without bargaining over the decision.¹⁴¹ Were the broad reading of *First National Maintenance* to be sustained and treated as a gloss upon the phrase "terms and conditions of employment," a parallel reading of similar language in the employment discrimination statutes could be urged. If "terms and conditions of employment" in labor law does not cover redeployment decisions that ineluctably cause termination of workers' jobs, perhaps "terms, conditions, or privileges of employment" in section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA likewise does not reach redeployment decisions.

Section 8(a)(3) of the NLRA also contains similar verbiage, prohibiting "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage" union activity.¹⁴² This NLRA antidiscrimination provision was interpreted by the Court in *Textile Workers Union v. Darlington Manufacturing Co.*¹⁴³ to cover all forms of retaliatory redeployment except total cessation of the business, provided the employer's objective was, in part, to discourage unionism in remaining portions of the enterprise. This broader interpretation of the wording in section 8(a)(3) of the NLRA undercuts arguments, based on the restrictive interpretation of section 8(d), to construe narrowly the similar Title VII and ADEA phrase.¹⁴⁴

In any event, the labor law debate about the meaning of "terms and conditions" is of limited pertinence to Title VII and the ADEA. Those words could be deleted from the equal employment laws, and the remainder would easily reach capital redeployment decisions. Section 703(a)(2) of Title VII and section 4(a)(2) of the ADEA do not contain the disputed "terms and conditions" phrase. Moreover, section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA include language prohibiting discrimination in hiring and discharging

140. See *infra* text accompanying notes 199-202.

141. See *infra* text accompanying notes 216-223.

142. 29 U.S.C. § 158(a)(3) (1982). The statute speaks of discrimination "... to encourage or discourage membership in any labor organization . . .," which has been broadly equated with discrimination encouraging or discouraging union activity. See, e.g., *Radio Officers v. NLRB*, 347 U.S. 17, 39-40 (1954) ("we have held that phrase [membership in any labor organization] to include discrimination to discourage participation in union activities as well as to discourage adhesion to union membership").

143. 380 U.S. 263, 275 (1965).

144. See *infra* text accompanying notes 300-334.

workers.¹⁴⁵ These prohibitions, severable from and independent of the phrase "terms, conditions, or privileges of employment," also could be applied to preclude discriminatory capital redeployment decisionmaking.

This comparison of statutory phraseology suggests that the import of the NLRA analogy is not to cabin the equal employment laws within the NLRA's restricted application to redeployment decisions; on the contrary, the distinctions suggest that Title VII and the ADEA must apply to all forms of discriminatory redeployment decisionmaking. The NLRA applies to redeployment decisions in many, but not all settings.¹⁴⁶ The more sweeping scope of the equal employment law prohibitions evidences congressional intent to be all-encompassing in addressing discrimination that directly impacts upon the employment relationship, including discriminatory redeployment decisions.

2. *Hishon*: Title VII's "Terms, Conditions, or Privileges."—The 1984 Supreme Court decision in a Title VII case, *Hishon v. King & Spalding*,¹⁴⁷ confirms the understanding that the employment discrimination laws cover capital redeployment decisions directly affecting workers' jobs. The *Hishon* Court held that if by contract, express or implied, an employer promised consideration for partnership as part of the inducement for plaintiff's acceptance of employment, such a promise would be a Title VII "term, condition, or privilege of employment," even if the change in status to partner were held not to be an employment decision at all.¹⁴⁸ Moreover,

145. It is only a modest stretch to characterize site selection based on the desire to avoid hiring a workforce with undesired racial or racially-correlated characteristics as discriminatory hiring. The site selection is the means of accomplishing the mass hiring discrimination. Similarly, it is only a modest stretch to characterize a decision to close or relocate a facility based on the desire to terminate the jobs of a workforce full of aging employees as discrimination in discharge. The closure or relocation is the means of accomplishing the mass discharge discrimination.

146. See *infra* text accompanying notes 166-334.

147. 467 U.S. 69 (1984).

148. *Id.* at 74-75. The *Hishon* reasoning also could support an argument that an employer's job security promises render relocation or subcontracting of an operation a change in a "term, condition, or privilege of employment" even if the statutory language were construed, absent such promises, not to cover capital redeployment decisionmaking.

Because the underlying employment relationship is contractual, it follows that the "terms, conditions, or privileges of employment" clearly include benefits that are part of an employment contract. . . . Indeed, this promise was allegedly a key contractual provision which induced [the plaintiff] to accept employment. . . . [T]hat promise clearly was a term, condition, or privilege of her employment.

even absent a promise, the Court held, partnership consideration was a "privilege of employment" that could not be discriminatorily denied.¹⁴⁹

The *Hishon* Court held that a section 703(a)(1) "term, condition, or privilege of employment" need not itself involve statutorily covered "employment."¹⁵⁰ NLRA decisions rejecting coverage of redeployment decisions often reason that the operational restructuring decision is not focused upon a "term or condition of employment," even though the redeployment directly affects employment conditions.¹⁵¹ These NLRA decisions implicitly apply a form of motivational analysis, characterizing as employment-based, corporate decisions whose focus is entirely on the workforce, such as decisions to lay off a shift, cut wages, or reduce the number of employees ten percent across-the-board.¹⁵² Corporate restructuring decisions, such as plant closure or subcontracting, on the other hand, are judicially presumed to rest on broader considerations of corporate capital and organizational structure. These types of decisions directly impact on the employees' jobs but are regarded by the Court as aimed primarily at accomplishing other corporate purposes.¹⁵³ The gap between the presumed nonemployment focus of this type of corporate decision and its inevitable effects upon the

Id. at 75. "Title VII would then bind" the employer to fulfill its promise without discrimination on bases prohibited by Title VII. *Id.*

149. *Id.* at 75-76.

150. *Id.* at 77. *Cf. Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 66-68 (1987) (sexually harassing work environment is a term or condition of employment). The Court has held the *Hishon* interpretation of "terms, conditions, or privileges of employment" applicable to the identical language in § 4(a)(1) of the ADEA. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

151. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)) (this site closure "decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment'").

152. *See, e.g., Lapeer Foundry & Mach., Inc.*, 289 N.L.R.B. No. 126, slip. op. at 6 (1988) ("[a]lthough job losses may result whether the decision is to lay off, shut down, or consolidate, the focus of the decision to lay off differs from the focus of the other two decisions in a critical manner. In deciding to lay off employees, management directly alters employees' terms of employment. This decision, like the decision to reduce workers' wages, necessarily turns on labor costs because the decision itself is to modify terms of employment in order to save money during economic downturns."); *see also, e.g., First Nat'l Maintenance*, 452 U.S. at 677 ("the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively 'an aspect of the relationship' between employer and employee").

153. *See, e.g., First Nat'l Maintenance*, 452 U.S. at 677 ("jobs were inexorably eliminated by the termination [of operations], but [the decision] had as its focus only the economic

workers has generated much of the indecision and confusion in NLRA case law¹⁵⁴ regarding applicability of the duty to bargain collectively to decisions focused on matters other than statutory employees' jobs.

The Title VII case law has taken a different approach. The *Hishon* Court assumed, without deciding, that promotion to partnership in the law firm would make the lawyer-plaintiff a "non-employee," taking her outside the protections of Title VII.¹⁵⁵ Moreover, the law firm's decision to deny Ms. Hishon promotion to partnership appears from the opinion to have been based entirely on the repercussions for the partnership, rather than on its effects on her as an employee or its effects on other associates, male or female.¹⁵⁶ Nevertheless, because of its effect upon her employment as an associate, the Court held, the discriminatory denial of partnership was a covered condition of employment.¹⁵⁷ *Hishon* supports the conclusion that Title VII and the ADEA are not limited to employer actions aimed at job conditions of statutorily covered "employees," but rather reach *any* employer action directly affecting jobs and working conditions, even if the action is motivated by entrepreneurial concerns.¹⁵⁸

The scope of the wording in section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA encompasses "privileges" as well as "terms" and "conditions" of employment.¹⁵⁹ The *Hishon* opinion explained the word "privileges" as encompassing "incidents of em-

profitability of the contract with [the customer], a concern under these facts wholly apart from the employment relationship.").

154. See *infra* text accompanying notes 171-242.

155. 467 U.S. at 77.

156. See *id.* at 72 & n.1, 78; see also *id.* at 79-80 (Powell, J., concurring). Denial of partnership automatically resulted in Ms. Hishon's termination as an employee, see *id.* at 76, but the employer did not argue that its reason for denying partnership to Ms. Hishon was its desire to fire her. See Brief for Petitioner at 47 & n.21, *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

157. "[E]ven if respondent is correct that a partnership invitation is not itself an offer of employment, Title VII would nonetheless apply. . . . The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment." *Hishon*, 467 U.S. at 77 (emphasis in original).

158. "The benefit a plaintiff is denied need not be employment" to be protected under the antidiscrimination laws, but surely when the benefit denied is continued employment, or continued employment at the same location or performing the same operation, its denial on the basis of the race, age, or correlated work force characteristics is subject to the proscriptions of Title VII and the ADEA.

159. Compare 29 U.S.C. § 623(a)(1) (1982) and 42 U.S.C. § 2000e-2(a)(1) (1982) with 29 U.S.C. §§ 158(a)(3), (d) (1982).

ployment"¹⁶⁰ that the employer is free to give or withhold at will, so long as the matter forms "an aspect of the relationship between the employer and employees."¹⁶¹ The Title VII and ADEA wording is modeled on, but significantly broader than, the phrasing in the NLRA. Discriminatory redeployment decisions based on workforce factors readily fall within "incidents of employment."

Hishon confirms that redeployment decisions at the "core of entrepreneurial control" may be exempt from collective bargaining, but not from the prohibitions against employment-related discrimination. From the employer's point of view, unfettered discretion regarding elevation to partnership is as much a part of a law firm's core of control over the nature of the enterprise as selection of a site for a manufacturing facility or the decision to substitute contract labor for the firm's own employees.¹⁶² From the worker's point of view, continued employment¹⁶³ is at stake under each of these circumstances.

The *Hishon* Court rejected freedom of association and managerial control as justifications for engrafting an exception onto Title VII's blanket rule forbidding discriminatory employment-related decisions¹⁶⁴ and pointedly noted: "[R]espondent argues that Title VII categorically exempts partnership decisions from scrutiny.

160. 467 U.S. at 75 (footnote omitted) (quoting S. REP. NO. 867, 88th Cong., 2d Sess. 11 (1964)).

161. *Id.* (footnote omitted) (quoting *Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971), interpreting NLRA § 8(d)).

162. *See id.* at 79-80, 79 n.3 (Powell, J., concurring) (listing many types of "judgmental and sensitive decisions" normally made collegially among partners, which may affect the firm as a whole and each partner thereof); *see also* Brief for Respondent at 7, *Hishon v. King & Spalding*, 467 U.S. 69 (1984) ("The application of Title VII to the selection of law partners would inject EEOC into decisions regarding the ownership and internal structure of law firms"); *Hishon v. King & Spalding*, 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (N.D. Ga. 1980) (analogizing professional partnership to marriage and application of Title VII to a shotgun wedding), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *rev'd*, 467 U.S. 69 (1984).

163. The legal partnership in *Hishon*, like many law firms, had a policy of terminating associates who did not attain partnership. *See supra* note 156. Even when non-promoted associates are permitted to remain employed as "permanent" or "senior" associates, however, the change from partnership track to nonpartnership track status entails a very drastic change in the "incidents of employment."

164. 467 U.S. at 77-78. *See also, e.g.*, *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1302-03 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984) (shareholder preference plan, limiting share ownership to persons of Italian descent with close family or personal ties to current shareholders, and linking pay, hours, and job assignments to share ownership, constituted discriminatory employment practice despite company contention that these were "proprietary rights"); *Pettway v. American Cast Iron Pipe Co.*, 332 F. Supp. 811, 815 (N.D. Ala. 1970) (racial segregation of elected employee advisory board which shared in management of the company and was cotrustee of company stock, deprived

However, respondent points to nothing in the statute or the legislative history that would support such a *per se* exemption. When Congress wanted to grant an employer complete immunity, it expressly did so."¹⁶⁵ The same is true for capital redeployment decisions.

3. *The Labor Law Gloss on "Terms or Conditions of Employment."*—Even the "terms, conditions . . . of employment" language of section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA can be interpreted to encompass discriminatory redeployment decisions without reference to "privileges." The NLRA scope of bargaining precedents, read together, support a construction of the phrase that would reach most, if not all, discriminatory redeployment decisions. The Court's interpretation of "terms and conditions of employment" language governing mandatory bargaining subjects, where the issue arises under statutory provisions other than section 8(d) of the NLRA, bolsters this interpretation. Finally, the precedents regarding scope of bargaining are less relevant to the interpretation of the equal employment laws than are precedents interpreting section 8(a)(3), the antidiscrimination provision of the NLRA. *Darlington*¹⁶⁶ and other section 8(a)(3) cases support construing the similar phraseology of Title VII and the ADEA to prohibit discriminatory capital redeployment decisions.¹⁶⁷

a. *Scope of Bargaining Precedents Regarding Capital Redeployment.*—Labor law capital redeployment precedents interpreting "terms and conditions of employment" in conjunction with the scope of the duty to bargain vary greatly. When the focus of the redeployment issues to be bargained over is itself workforce-related, however, the bargaining subject usually is held to be mandatory. While nonbargaining precedents would support a broader construction of "terms and conditions of employment," even the more limited view would suffice to reach many, if not all, claims of race or age discrimination in capital redeployment decisionmaking.

Section 8(a)(5) of the NLRA imposes on employers the duty to bargain collectively with their employees' union.¹⁶⁸ Section 8(d) of the NLRA defines the scope of that duty to require good faith bargaining "with respect to wages, hours, and other terms and condi-

black workers of equal opportunity to serve on the board, a "term, condition, or privilege of employment"), *rev'd on other grounds*, 494 F.2d 211, 265 (5th Cir. 1974).

165. *Hishon*, 467 U.S. at 77.

166. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1985).

167. See *infra* text accompanying notes 300-334.

168. 29 U.S.C. § 158(a)(5) (1982).

tions of employment. . . ."¹⁶⁹ Matters falling within the compass of "wages, hours, and other terms and conditions" are labelled "mandatory subjects of bargaining" to distinguish them from permissive topics. Collective bargaining about permissive topics is lawful, but not required.¹⁷⁰

The battle over whether capital redeployment falls within "terms and conditions of employment" and is thus a mandatory bargaining subject, has been hard fought for many years.¹⁷¹ The focal point of the major cases has been whether the employer is required to bargain to impasse over a particular redeployment decision as the decision is being made and before it has been implemented. The case law is subject to widely divergent interpretations.

It is plain that some management decisions must be bargained about first, particularly those directed primarily toward the employment relationship.¹⁷² It is equally plain that others need not be negotiated in advance. Decisions about "choice of advertising and promotion, product type and design, and financing arrangements . . . have only an indirect and attenuated impact on the employment relationship."¹⁷³ No bargaining is required about matters of this type.¹⁷⁴ There is, however, a significant middle category of redeployment decisions in which the extent of the bargaining obligation is less settled. These managerial decisions are primarily about the structure of the enterprise, rather than about its workforce. On the other hand, the impact of these decisions on workers' jobs is direct, immediate, and drastic.¹⁷⁵ In *First National Maintenance Corp. v. NLRB*¹⁷⁶ the Court concluded that

in view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a

169. *Id.* § 158(d).

170. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). See generally DEVELOPING LABOR LAW, *supra* note 13, at 558-66, 568-70, 757-77.

171. For pre-1964 developments, see *infra* notes 392-413 and accompanying text. Some of the pre-*First Nat'l Maintenance Corp. v. NLRB* 452 U.S. 666, 670-74 (1981) case law post-dating enactment of the employment discrimination statutes is discussed in the opinion; *id.* at 689 (Brennan & Marshall, JJ., dissenting); see also *infra* text accompanying notes 182-194. Developments subsequent to *First Nat'l Maintenance* are discussed *infra* text accompanying notes 199-223, 241, 247-263, 292-299.

172. See *First Nat'l Maintenance*, 452 U.S. at 674-75, 675 n.14, 677; see also *supra* notes 151-152 and accompanying text.

173. *First Nat'l Maintenance*, 452 U.S. at 677.

174. See *id.* at 676-77; *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

175. See *First Nat'l Maintenance*, 452 U.S. at 677.

176. 452 U.S. 666 (1981).

substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.¹⁷⁷

(1) *Section 8(d): First National Maintenance and Fibreboard.*— In *First National Maintenance* the employer terminated its contract to provide housekeeping services to Greenpark Care Center after Greenpark refused to increase First National's contractual service fee.¹⁷⁸ The Court thought the union was powerless to change the closure decision through collective bargaining,¹⁷⁹ and held that the employer's refusal to negotiate with the newly certified union representative over the decision to cease work at the nursing home did not violate First National Maintenance Corporation's NLRA duty to bargain over "terms and conditions of employment."¹⁸⁰ The *First National Maintenance* Court struck a balance against requiring collective bargaining because, under those circumstances, in the Court's judgment, negotiations offered minimal likelihood of union success in altering the employer's decision to eliminate the operation, while significantly impairing management's freedom.¹⁸¹

First National Maintenance must be reconciled with the Court's previous ruling on capital redeployment decision bargaining in *Fibreboard Paper Products Corp. v. NLRB*.¹⁸² In *Fibreboard* the Court held that the duty to bargain applied to an employer's decision to subcontract the performance of in-plant maintenance work.¹⁸³ The decision thus to eliminate employees' jobs, the *Fibreboard* Court reasoned, "is well within the literal meaning of the phrase 'terms and conditions of employment.'"¹⁸⁴ Moreover, the *Fibreboard* opinion¹⁸⁵

177. *Id.* at 679. For a full discussion of the Court's balancing test, and an attempt at a reasoned application of it to plant relocation decisions, see George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667 (1985).

178. 452 U.S. at 669-70, 687.

179. *Id.* at 687-88.

180. *Id.* at 686.

181. *Id.* at 686-88.

182. 379 U.S. 203 (1964).

183. *Id.* at 215.

184. *Id.* at 210. As one commentator points out, a reasonable definition of "terms and conditions," consistent with non-capital redeployment case law, might be "any terms of a contract or any aspect of the status quo upon which an employee's work will be or has been conditioned." Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1453 (1982). This definition is very close to the Court's interpretation in *Hishon* of the Title VII phrase, discussed *supra* text accompanying notes 147-165. A second commentator has

relied on an earlier Supreme Court ruling in *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*¹⁸⁶ interpreting "rates of pay, rules or working conditions" in the Railway Labor Act (RLA)¹⁸⁷ and "terms or conditions of employment" in the Norris-LaGuardia Anti-Injunction Act.¹⁸⁸ The *Railroad Telegraphers* decision construed this similar phraseology in these labor statutes to apply to a railroad's decision to close several hundred small train stations,¹⁸⁹ as well as to the union's responsive bargaining demand that "no position in existence on December 3, 1957, . . . be abolished or discontinued except by agreement between the carrier and the organization."¹⁹⁰

construed "terms and conditions of employment" as encompassing "all matters which directly and vitally affect or concern employees." Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance*, 58 IND. L.J. 433, 475 (1983); see also *id.* at 450 (prior to *First Nat'l Maintenance*, the Court had read "terms and conditions" "broadly to include all items directly and substantially affecting employee self-interest").

185. 379 U.S. at 210.

186. 362 U.S. 330 (1960).

187. Railway Labor Act (RLA) § 2, First, 45 U.S.C. § 152, First (1982) (defining bargainable topics under RLA); see also RLA § 2, Sixth, 45 U.S.C. § 152, Sixth (1982); RLA § 2, Seventh, 45 U.S.C. § 152, Seventh (1982); RLA § 6, 45 U.S.C. § 156 (1982).

188. Norris-LaGuardia Act § 13(c), 29 U.S.C. § 113(c) (1982). Section 8(d) of the NLRA is the historical descendant of this RLA and Norris-LaGuardia Act language. See Litvin, *supra* note 184, at 472-76.

189. See *Railroad Telegraphers*, 362 U.S. at 346-47 (railroad had several hundred barely used "one-man" stations and planned to discontinue station agent services at most of them) (Whittaker, J., dissenting).

190. *Id.* at 335-36, 339-41. The bargaining demand appears *id.* at 332. Section 4 of the Norris-LaGuardia Act deprives federal courts of jurisdiction to enjoin strikes "growing out of any labor dispute." 29 U.S.C. § 104 (1982). Section 13(c) of the Norris-LaGuardia Act defines "labor dispute" as "any controversy concerning terms or conditions of employment. . . ." *Id.* § 113(c). The Court held that the district court lacked jurisdiction to enjoin the strike, because "[u]nless the literal language of this definition is to be ignored, it squarely covers this controversy." *Railroad Telegraphers*, 362 U.S. at 335. The employer further argued that the strike was illegal, hence could be enjoined, because of the entrepreneurial nature of the matters over which the union sought to bargain. *Id.* at 338. The Court rejected this contention.

[F]ar from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." . . . It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with the Act's purpose to obtain stability and permanence in employment for workers.

Id. at 339-40.

The Court recently has limited the reach of the *Railroad Telegraphers* holding, applying the *Darlington* reasoning that an employer "has the absolute right to terminate his entire business," see *infra* text accompanying note 194, to exempt from mandatory bar-

The *First National Maintenance* Court attempted, with dubious success, to harmonize its ruling with *Fibreboard*.¹⁹¹ On its facts, the *First National Maintenance* decision exempted from the bargaining process *only* employer decisions to shut down a discrete part of the business for reasons wholly unrelated to labor costs.¹⁹² However, partial closure decisions like the one at issue in *First National Maintenance*, according to the Court, were "akin to the decision whether to be in business at all."¹⁹³ In *Darlington*, a section 8(a)(3) discrimination case, the Court reasoned that "an employer has the absolute right to terminate his entire business for any reason he pleases."¹⁹⁴

gaining under the RLA, a railroad's decision to sell all of its assets and leave the railroad business entirely. See *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2595-96 (1989), discussed *infra* text accompanying notes 249-263.

191. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-80, 681, 686 n.22, 687-88 (1981). The *First Nat'l Maintenance* Court also summarily and cryptically distinguishes *Railroad Telegraphers* in a footnote, stating, without elaboration, that "[t]he mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris-LaGuardia are not coextensive with the NLRA and the Board's jurisdiction over unfair labor practices." *Id.* at 686 n.23. To support this proposition, the Court cites dicta in a footnote cautioning against uncritical parallel interpretation of the scope of mandatory bargaining under the NLRA and the RLA. *Id.* (citing *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971)). The *First Nat'l Maintenance* footnote also employs a "*cf.*" reference, unaccompanied by parentheticals, to cite two cases generally reconciling Norris-LaGuardia's broad literal prohibition against federal court injunctions in labor disputes with the Labor Management Relations Act provision which has been construed to permit federal courts to enjoin violations of no-strike clauses contained in collective bargaining agreements. *Id.* at 686 n.23 (citing *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397 (1976); *Boys Market, Inc. v. Retail Clerks*, 398 U.S. 235 (1970)). For lack of more reasoned analysis, one can only conjecture about the reasons for the Court's impression that the railroad case was not on point. While the cases may be distinguished on the basis of their facts or differences between the statutes involved, the breadth of the reasoning in *Railroad Telegraphers* leaves little room for such distinctions. See also Litvin, *supra* note 184, at 475 (characterizing the footnote as "baffling").

The Court's new decision in *Pittsburgh & Lake Erie R.R.* also suggests that the scope of bargaining under the RLA may be broader than that under the NLRA, characterizing *Railroad Telegraphers* as limiting a portion of "the enlarged scope of mandatory bargaining under the RLA." 109 S. Ct. at 2595 n.17. On the other hand, the *Pittsburgh & Lake Erie R.R.* decision relies heavily on the Court's reasoning in *Darlington* in holding that implementation of a decision to cease being a railway "employer" as defined in the RLA terminates all RLA duties owed by the employer to its employees, including the duty to bargain over both the decision and its effects upon the employees. See *id.* at 2595-96. In a footnote, the *Pittsburgh & Lake Erie R.R.* Court also distinguishes *Railroad Telegraphers* from *Darlington* and *First Nat'l Maintenance* on grounds that *Railroad Telegraphers* involved a closure of locations but continuation in the line of business, as distinguished from closing down the entire, or perhaps a separable segment or line of the business. *Id.* at 2595 n.17.

192. See 452 U.S. at 687-88.

193. *Id.* at 677.

194. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965).

The *First National Maintenance* Court found the employer free to make its redeployment decision without bargaining first,¹⁹⁵ where "[t]he decision to halt work at . . . [the] specific location represents a significant change in [the employer's] operations, a change not unlike opening a new line of business or going out of business entirely."¹⁹⁶ On the other hand, decisions to consolidate, merge, relocate or subcontract existing operations were expressly left open in *First National Maintenance*.¹⁹⁷

The equivocal reasoning of *First National Maintenance* oscillates between emphasizing the narrowness of the opinion and the significance of the workers' interest in job security, on the one hand, and stressing the importance of the employer's need for control and flexibility in the management of its capital on the other hand.¹⁹⁸ This mixed message has led the National Labor Relations Board (NLRB), courts of appeals, and commentators to take a range of positions reconciling the Court's rulings.

The narrowest reading of *First National Maintenance* stresses that the decision turned upon the employer's complete termination of a portion of its business based upon economic reasons unrelated to labor costs.¹⁹⁹ As the opinion itself notes, the extent of capital investment, disinvestment or reinvestment was not a major factor in the Court's reasoning because *First National Maintenance Corpora-*

195. 452 U.S. at 686 (1981).

196. *Id.* at 688.

197. *Id.* at 687-88.

198. Compare *id.* at 687 (narrowly limiting holding) with *id.* at 681-86 (arguing more broadly); compare *id.* at 681 (the words of § 8(d) plainly cover termination of employment caused by plant closing; union's "legitimate concern over job security") with *id.* at 686 ("we hold that the decision itself is not part of § 8(d)'s 'terms and conditions' . . . over which Congress has mandated bargaining") (emphasis in original). Others have criticized the internal contradictions of the opinion. See, e.g., George, *supra* note 177, at 680; Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 10 (1981).

199. See 452 U.S. at 679-80 (distinguishing *Fibreboard* as continuing the operation, albeit substituting the subcontractor's workforce, and as emphasizing that the subcontracting decision was based on labor costs, a factor "peculiarly suitable for resolution within the collective bargaining framework" (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 214 (1964))); *id.* at 687-88 ("to illustrate the limits of our holding, . . . petitioner . . . had no intention to replace the discharged employees or to move that operation elsewhere. . . . [P]etitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. The most that the union could have offered would have been advice and concessions that Greenpark, the third party upon whom rested the success or failure of the contract, had no duty even to consider. These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard*."). See also Gould, *supra* note 198, at 16 (similarly narrowly reading *First Nat'l Maintenance*).

tion had virtually no capital tied up in the operation.²⁰⁰ On this view, the employer's bargaining duty would remain intact, regardless of the relationship between the employer's redeployment decision and labor factors, so long as the operation continues to be performed as part of the company's business. Workers from another plant or a subcontractor's employees may do the work, or the employer may consolidate the operations of two plants into one, reducing the total workforce and the size of the operation, provided the employer does not terminate the line of business. On this narrow reading of *First National Maintenance*, the employer would be required to bargain over most redeployment decisions.²⁰¹ A

200. *First Nat'l Maintenance*, 452 U.S. at 688.

201. This may be the current scope of the duty to bargain over capital redeployment decisions under the RLA, reconciling *Railroad Telegraphers with Pittsburgh & Lake Erie R.R.* See *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2595 n.17 (1989) (distinguishing closure of locations within an ongoing rail line from termination of all railroading operations); cf. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273-74 (1965) (distinguishing discriminatory redeployment of continuing operations, as to which no separate proof of purpose and effect to cause chilling effect is necessary, from partial closures, as to which such proof is required). The difficulty with such an interpretation of § 8(d) is that it gives effect to the reasoning at the end of the *First Nat'l Maintenance* decision, limiting the holding, *First Nat'l Maintenance*, 452 U.S. at 686 n.22, 687-88, and to the reasoning based on the majority decision in *Fibreboard*, 379 U.S. at 679-80, 687-88, at the expense of the flatly stated holding, *id.* at 686 ("[w]e hold that the [partial closure] decision itself is not part of § 8(d)'s 'terms and conditions' . . . over which Congress has mandated bargaining"), and the reasoning applying the Court's policy balancing to the generic facts of partial closures. *Id.* at 681-86; especially *id.* at 686 ("[w]e conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision"). See also Gould, *supra* note 198, at 16 (observing that "if the holding has been so limited, much of the . . . rationale of Justice Blackmun would seem to be superfluous indeed").

The National Labor Relations Board (NLRB) cases decided shortly after *First Nat'l Maintenance* tended to reconcile that decision with *Fibreboard* by focusing primarily on whether the decision was a partial closure, defined in terms of whether the operation or service continued to be performed or delivered, as opposed to subcontracting, relocation, consolidation or other continued performance of the operation. See, e.g., *Bob's Big Boy Family Restaurant*, 264 N.L.R.B. 1369, 1370-71 (1982) (subcontracting); *Whitehead Bros.*, 263 N.L.R.B. 895, 898 (1982) (subcontracting); *Park-Ohio Indus.*, 257 N.L.R.B. 413, 413 (1981) (relocation), *enforced*, 702 F.2d 624 (6th Cir. 1983); see also George, *supra* note 177, at 668, 684-86 & nn.87-91 (discussing and collecting pre-*Otis*, post-*First Nat'l Maintenance* cases). The NLRB General Counsel also initially distinguished from partial or total closures, decisions in which "the employer intends to remain in the same business, albeit elsewhere (relocation), or through the use of subcontracts (subcontracting), or with different equipment (automation), or at one location rather than several (consolidation)." See Memorandum 81-57, Office of the General Counsel, Nov. 20, 1981, *reprinted in* BUREAU OF NATIONAL AFFAIRS, LABOR RELATIONS YEARBOOK — 1981 315, 316. Such cases were then subjected to a second, balancing test, to see whether on the one hand, the decision was based on labor costs or other factors amenable to collective bargaining,

somewhat looser position would make the bargaining duty turn on substitution of workers at other plants, or use of subcontractors, with continued performance of the work and no major reductions in the size of the operation.²⁰²

Alternatively, one may focus on the connection between labor costs and the redeployment decision. Such a focus ties in with the *First National Maintenance* Court's rationale that the utility of bargaining should outweigh the burden caused by the constraint on entrepreneurial interests.²⁰³ The NLRB initially construed *First National Maintenance* to require bargaining whenever the redeployment decision involved an on-going portion of the business and was

and on the other hand, whether the need for "speed, flexibility and secrecy" or other circumstances would have rendered bargaining unusually burdensome. Later NLRB decisions, however, have reconciled the two Supreme Court cases quite differently. See *infra* notes 206-215, 224 and accompanying text.

202. See Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 FORDHAM L. REV. 81, 86, 100-02 (1970) (pre-*First Nat'l Maintenance* analysis combining *Fibreboard* and *Darlington* to require bargaining only "if the interference with employees' rights outweighs 'the business justification for the employer's action,' " striking that balance in favor of bargaining whenever the "employer plans to substitute non-unit workers for unit workers"). Mr. Schwarz's approach is cited in *First Nat'l Maintenance*, 452 U.S. at 686 n.22, along with NLRB cases concerning bargaining in redeployment contexts other than partial closures, as examples of the kinds of redeployment decisions the *First Nat'l Maintenance* Court was not addressing. Professor Harper outlines another approach which would exempt from mandatory bargaining "only decisions that determine what products are created and sold, in what quantities, for which markets, and at what prices." Harper, *supra* note 184, at 1450, 1463. Professor Harper's analysis would require bargaining over redeployment decisions so long as they are distinct from product market decisions, *id.* at 1471-72, which would include substitution or choice of workforces in relocation, subcontracting, automation, and consolidation decisions whenever the same products or services continued to be produced and marketed to the same general class of consumers. *Id.* at 1471-77, 1482.

203. See 452 U.S. at 679. The link is particularly strong between the side of the balancing test based on "amenability to resolution through the bargaining process," *id.* at 678, and labor-related factors. Thus, the initial NLRB response, see, e.g., *Bob's Big Boy Family Restaurants*, 264 N.L.R.B. 1369 (1982), reasons that the employer's decision is based in part on labor costs and other factors, such as quality control, over which the union has some influence. These are matters "'particularly suitable for resolution within the collective bargaining framework.'" *Id.* at 1370 (quoting *First Nat'l Maintenance*, 452 U.S. at 680 (quoting *Fibreboard*, 379 U.S. at 213-14)). Consequently the employer had a duty to bargain over its decision to subcontract the shrimp processing operation. *Bob's Big Boy*, 264 N.L.R.B. at 1371. However, the Board's analysis in *Bob's Big Boy* primarily hinges on whether the employer continues to perform the operation or to provide the service; this distinguishes "partial closing" from "subcontracting." See *id.* at 1370-71. In the subsequent line of NLRB cases, the Board members explicitly justify their emphasis on labor costs, and in *Member Dennis*' case, other factors within the union's control, on the basis of amenability to resolution through the bargaining process. See *Otis Elevator Co.*, 269 N.L.R.B. 891, 892 & n.3 (1984) (plurality opinion) [hereinafter *Otis Elevator II*]; *id.* at 896-97 (*Member Dennis*, concurring); *id.* at 900-01 (*Member Zimmerman*, concurring in part and dissenting in part).

based in part on labor factors, or based on other costs which could be offset by reduced labor costs.²⁰⁴ After Reagan administration appointments changed the NLRB's composition, however, the Board altered its interpretation of the employer's bargaining obligations.²⁰⁵

After persuading the Court of Appeals for the District of Columbia to remand the case for reconsideration,²⁰⁶ the Board issued a plurality opinion in *Otis Elevator II*,²⁰⁷ a plant relocation case, that differed in three significant respects from the Board's initial understanding of the *First National Maintenance* holding. First, the opinion omitted the qualification that the part of the business closed must be "separate and distinct" to exempt the decision from the bargaining duty.²⁰⁸ Second, the opinion expanded the types of managerial decisions presumptively excepted from the duty to bargain to include all forms of major operational reorganization, such as relocation, subcontracting, consolidation, and automation, as well as closures.²⁰⁹ Third, the opinion reversed the thrust of the inquiry about the relationship between the reasons for the employer's decision and labor costs. A narrow reading of the *First National Maintenance* decision would exempt from bargaining *only* those managerial capital redeployment decisions *wholly unrelated* to labor costs; the reasoning of the *Otis Elevator II* plurality opinion would exempt from bargaining all managerial capital redeployment decisions *except* those *turning wholly upon* labor costs.²¹⁰

Even under the *Otis Elevator II* approach,²¹¹ however, some re-

204. See *Bob's Big Boy*, 264 N.L.R.B. at 1370-71.

205. See George, *supra* note 177, at 668-69 & n.14.

206. The United States Court of Appeals for the District of Columbia granted the Board's motion to remand the case for reconsideration in light of *First Nat'l Maintenance* on August 12, 1981. See *Otis Elevator II*, 269 N.L.R.B. at 891.

207. *Id.*

208. *Id.* at 892-93. The Board formulated the requirement that the portion of the business be "a separate and distinct business enterprise" in *Bob's Big Boy Family Restaurants*, in order to distinguish subcontracting, relocation, and consolidation cases in which the employer remained in the general line of business from those involving partial termination, a change in the "nature and direction" of the business. *Bob's Big Boy*, 264 N.L.R.B. at 1371.

209. *Otis Elevator II*, 269 N.L.R.B. at 893 & n.5, 894. The *Otis Elevator II* holding applies to any decision "which affect[s] the scope, direction, or nature of the business." *Id.* at 893.

210. Compare *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 687 (1981) ("dispute . . . solely over the size of the management fee[;] . . . [t]he union had no control or authority over that fee") with *Otis Elevator II*, 269 N.L.R.B. at 893 (redeployment "decision turns upon a reduction of labor costs").

211. The plurality held:

deployment decisions are subject to mandatory bargaining. In *Ar-*

the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself; i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs; *not* its effect on employees nor a union's ability to offer alternatives.

269 N.L.R.B. at 892 (emphasis in original). Moreover, when labor costs are merely "among the considerations which cause management to decide to alter the scope or direction of its business," *id.* at 894, the employer is under no duty to bargain, under the plurality's analysis. *Id.*

The *Otis Elevator II* plurality position has never commanded a clear majority of the Board, but as the most stringent of the three tests proposed in the opinions in the case, redeployment decisions which have met the plurality test consistently have been held by the Board to be subject to the duty to bargain. Only Chairman Dotson and Member Hunter signed the *Otis Elevator II* plurality opinion. Member Zimmerman, concurring in part, would have required bargaining over plant relocation whenever the company's "decision may be amenable to resolution through bargaining," *id.* at 900, a test met "where the employer's decision is related to overall enterprise costs not limited specifically to labor costs." *Id.* at 901. Member Dennis' concurring opinion advocated a two-step approach. Her threshold test, to determine if the decision "is amenable to resolution through the bargaining process," *id.* at 897 (citation omitted), was whether a factor over which the union had control could have made a difference in the employer's decision. *Id.* Assuming the union passes this threshold, Member Dennis' opinion would then balance the benefit of bargaining against the burdens bargaining would impose on the employer's conduct of the enterprise. *Id.* Elements in assessing the burdens include the extent of capital commitment, the extent of changes in operations, and the need for speed, flexibility, or confidentiality. *Id.* For an indepth discussion of the various *Otis Elevator II* opinions, see George, *supra* note 177.

The composition of the Board has since changed, and no one of the *Otis Elevator II* positions has commanded a clear Board majority as of this writing. In recent opinions, newer Board members have avoided subscribing to any of the three *Otis Elevator II* positions. Often, Board members analyze fact patterns as meeting the *Otis Elevator II* plurality test, and then alternatively analyze the facts to show they likewise meet the more relaxed standards of the concurring opinions. See, e.g., *Reece Corp.*, 294 N.L.R.B. No. 33, slip op. at 6-8 & nn.4 & 6 (1989) (Chairman Stephens, Member Cracraft) (finding duty to bargain over plant closure, relocation, and consolidation of work under all three *Otis Elevator II* tests); *Connecticut Color, Inc.*, 288 N.L.R.B. No. 81, slip op. at 3 n.3 (1988) (Chairman Stephens and Member Babson) (finding duty to bargain over transfer of operation under all three tests); *Conoco, Inc.*, 287 N.L.R.B. No. 55, slip op. at 20-26 (1987) (Members Babson and Johansen) (no bargaining required over decision to close truck terminal, applying all three *Otis Elevator II* tests); *Eltec Corp.*, 286 N.L.R.B. No. 85, slip op. at 9 & n.8 (1987) (Members Johansen and Stephens) (employer violated its duty to bargain over decision to relocate and subcontract its parts operations, applying all three *Otis Elevator II* tests), *enforced*, 870 F.2d 1112 (6th Cir. 1989). Moreover, the Board recently has begun treating on-site and sometimes even off-site subcontracting decisions as mandatory subjects of bargaining under *Fibreboard*, without requiring analysis under *First Nat'l Maintenance and Otis Elevator II*, and without regard to the extent the decision turned on labor costs. Compare, e.g., *Collateral Control Corp.*, 288 N.L.R.B. No. 41, slip op. at 2-8 (1988) (if employer merely substitutes one group of workers for another in the same plant, under ultimate control of same employer, *Fibreboard* controls, and General Counsel need not show that decision turned on labor costs) and *Century Air Freight, Inc.*, 284 N.L.R.B. No. 85, slip op. at 9-13 (1987) (subcontracting operation merely substituted workforces as in *Fibreboard*, so bargaining is mandatory and Board members need not choose among *Otis Elevator II* tests) with, e.g., *Garwood-Detroit Truck Equip.*,

row *Automotive Industries*,²¹² for example, the Board held that the employer had breached its mandatory duty to bargain over the company's decision to close its unionized Massachusetts plant and to relocate the work to its nonunion South Carolina plant.²¹³ The Board found that the employer's decision to relocate the work turned primarily on labor costs and the parties' lack of progress in contract talks in settling economic issues.²¹⁴ Consequently, the Board held, the decision to move the work involved a mandatory subject of bargaining,²¹⁵ meaning it fell within the section 8(d) description "terms and conditions of employment."

On appeal, however, a divided panel of the Fourth Circuit denied enforcement.²¹⁶ Articulating the broadest judicial interpretation of the *First National Maintenance* exemption of redeployment decisions from the duty to bargain,²¹⁷ the court of appeals read *First National Maintenance* to create "a per se rule that an employer has no

274 N.L.R.B. 113, 114-15 (1985) (subcontracting decision involving substitution of on-site contractor turned on reducing lease and other overhead costs as well as labor costs; *Fibreboard* therefore not controlling and applying *Otis Elevator II* tests, decision not mandatory bargaining subject).

212. 284 N.L.R.B. No. 57 (1987), *enforcement denied*, 853 F.2d 223 (4th Cir. 1988); see also, e.g., *Reece Corp.*, 294 N.L.R.B. No. 33, slip op. at 6 (1989) (plant closure, relocation, and consolidation of operations; decision "turn[ed] essentially on labor costs, although factors were also involved"); *Pertec Computer Corp.*, 284 N.L.R.B. No. 88, slip op. at 3-4 (1987) (relocation of part of work and subcontracting of remainder; decision held to be mandatory subject of bargaining because transfer of operations did not change employer's basic enterprise and because labor costs were the "primary consideration" in the decision to subcontract); *Litton Systems, Inc.*, 283 N.L.R.B. No. 144, slip op. at 15 (1987) (relocation of unit work; decision turned on labor costs), *rev'd on other grounds*, 868 F.2d 854 (6th Cir. 1989).

213. 284 N.L.R.B. No. 57, slip op. at 8.

214. *Id.*, slip op. at 7.

215. *Id.*, slip op. at 6-8.

216. *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223, 232 (4th Cir. 1988).

217. See *id.* at 240 (Winter, C.J., dissenting). The Fifth Circuit has accepted the *Otis Elevator II* plurality approach, analyzing redeployment decisions based on whether the decision "turn[s] on labor costs." See *Local 2179, United Steelworkers v. NLRB* (Inland Steel Co.), 822 F.2d 559, 578-80 (5th Cir. 1987) (plant relocation). Several other circuits have upheld Board rulings finding an employer violated its duty to bargain, but have employed reasoning stemming from *Fibreboard*, and tests more favorable to mandatory bargaining. See, e.g., *NLRB v. Eltec Corp.*, 870 F.2d 1112, 1116-17 (6th Cir. 1989) (transfer and subcontracting of parts assembly operation, citing *Otis Elevator II* but relying on four-part test stemming from *Fibreboard*); *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 248 (7th Cir. 1988) (decision to terminate contract with joint employer and substitute subcontractor turned on labor costs and under *Fibreboard* was a mandatory bargaining subject); *NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 849 F.2d 15, 22-23 (1st Cir. 1988) (decision to terminate and subcontract news courier operation was mandatory subject, reaching result partly based on *Otis Elevator II* labor costs analysis, partly by distinguishing *First Nat'l Maintenance* and finding *Fibreboard* applicable based on factual comparisons).

duty to bargain over a decision to close part of its business," absent anti-union animus.²¹⁸ "Part of its business," to the Fourth Circuit majority, includes a plant or other facility, even if the enterprise continues to perform the operation elsewhere, and regardless of the reasons underlying the company's decision.²¹⁹ The Fourth Circuit appears to have held that *all* nondiscriminatorily motivated capital deployment decisions that constitute a "significant change in operations," certainly including all redeployment of large operations, fall outside the scope of "terms and conditions of employment" as to which employers must bargain.²²⁰ Precedent might compel exceptions for relocations to new plants and for on-premises subcontracting;²²¹ no rationalization was offered to reconcile these exceptions with the broad sweep of the court's reasoning that all large scale redeployment decisions involve changes in the nature and scope of the enterprise, and hence must be exempt from mandatory bargaining.²²² The Fourth Circuit's reasoning construes *First National Maintenance* as limiting *Fibreboard* to its precise factual setting, and would

218. *Arrow Automotive*, 853 F.2d at 227.

219. *Id.* at 229. The Fourth Circuit first limited the term "relocation" to instances in which the operation is moved to a newly opened facility, *id.*, and distinguished such cases from a "partial closing," as to which no bargaining is required, as the Court of Appeals interpreted *First Nat'l Maintenance*. "Partial closings," the Fourth Circuit held, include all other facilities closures. *Id.* Interestingly, the court quoted *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 275 (1986), for this proposition, ignoring the fact that the *Darlington* opinion exempted from its holding partial closings cases where the work was not eliminated but continued to be performed elsewhere. See *infra* notes 318-320, 326 and accompanying text. On the facts of *Arrow Automotive*, when the work was transferred to an existing facility whose capacity was commensurately expanded to perform the additional work, the Fourth Circuit characterized the redeployment as a closing, not a relocation or consolidation, hence exempt from the duty to bargain. 853 F.2d at 229. The Court of Appeals, however, then noted that the label should not matter; even if the label "partial closing," and the supposed per se rule exempting closures from bargaining did not apply, the decision would not be bargainable under the Fourth Circuit's understanding of a proper application of the *First Nat'l Maintenance* balancing test. *Id.* at 230. The Court of Appeals also viewed the role of labor costs in the employer's decision to be an irrelevant factor on the issue of mandatory bargaining. *Id.* at 228.

220. See *Arrow Automotive*, 853 F.2d at 227 ("*First National Maintenance* requires that employers be free to act without the constraints of bargaining when undertaking a decision of the magnitude involved in this case"); *id.* at 230 ("decisions of the magnitude involved here remain management prerogatives, not subject to a statutory bargaining obligation"); *id.* at 232 ("[c]ompanies must be able to make closing and consolidation decisions of the magnitude presented here"). However, the opinion elsewhere admits of possible exceptions for operations moved to newly opened plants, see *id.* at 229, as well as on-premises subcontracting of work. See *id.* at 231.

221. See *id.* at 229, 231.

222. See *supra* note 220.

eviscerate the vitality of the *Fibreboard* rationale.²²³

It will no doubt take years for the NLRB and the courts to develop a settled interpretation of section 8(d) in light of *First National Maintenance*.²²⁴ The central rationale of the decision is based on balancing employees' rights to bargain for their jobs against employers' need for freedom from restraints on capital redeployment.²²⁵ The diversity of subsequent court and NLRB decisions evidences the different relative importance that different judges and Board members ascribe to these competing interests in various factual settings.²²⁶ For purposes of the antidiscrimination laws, however, three points are significant.

First, if any of the various interpretations of section 8(d) were transported into construction of "terms, [or] conditions . . . of employment" in the equal employment laws, at least some capital redeployment decisions would remain subject to scrutiny under the antidiscrimination laws. The narrowest construction, the Fourth

223. See *Arrow Automotive*, 853 F.2d at 230-31 (limiting *Fibreboard*'s applicability to subcontracting of an ongoing operation, to be performed on the employer's premises). This is the Fourth Circuit's only mention of the *Fibreboard* majority opinion, as opposed to Justice Stewart's concurrence.

224. Even the NLRB itself has not settled completely on one interpretation. See *supra* note 211. Moreover, as the Fourth Circuit noted in *Arrow Automotive*, 853 F.2d at 228, the *Otis Elevator II* plurality test was initially applied to require decisions to turn "solely" on labor costs. See *Otis Elevator II*, 269 N.L.R.B. 891, 895 (1984); see also George, *supra* note 177, at 690 (inferring that labor costs must be the sole consideration). Later cases, however, have imposed bargaining duties, ostensibly applying the same test, where other factors played a role if labor costs played the predominant role in the decision. *Reece Corp.*, 294 N.L.R.B. No. 33 (1989), exemplifies this trend. While other factors plainly played a role in the decision to close the plant and relocate and consolidate much of its work in a remaining facility, the plurality precluded the employer from claiming its decision did not "turn" on labor costs. In concession bargaining with the union, the employer had assured the bargainiers that the plant would remain open if great enough labor cost cuts were made. *Id.*, slip op. at 7-8.

225. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981), quoted *supra* text accompanying note 177. Many commentators take this view. See, e.g., George, *supra* note 177, at 667-68, 680; Harper, *supra* note 184, at 1451-53; Litvin, *supra* note 184, at 453-58; see also Gould, *supra* note 198, at 10-12 (discussing internally contradictory application of balancing test in *First Nat'l Maintenance*).

226. Others similarly have understood the central thrust of the reasoning in these types of cases. See, e.g., Harper, *supra* note 184, at 1449-50, 1453, 1455, 1461, 1500; Litvin, *supra* note 184, at 453-67. Professor Gorman is more blunt, characterizing the underlying rationale of *First Nat'l Maintenance* as "an unexamined exaltation of the employer's interest in unfettered control over major managerial decisions, without sufficient concern for a most basic statutory policy, . . . the participation of workers in discussing decisions (without the power to dictate substantive terms) directly affecting their job security, literally their 'terms and conditions of employment.'" Gorman, *supra* note 13, at 1362. See generally J. ATLESON, *supra* note 10, at 121-35.

Circuit's in *Arrow Automotive*,²²⁷ would exempt decisions to close facilities, or relocate operations to existing facilities, but would apply antidiscrimination laws to decisions to move operations to newly opened plants, or to subcontract work on the employer's premises.²²⁸ The NLRB's current position, requiring that bargaining depend on whether the employer's redeployment decision "turns" on labor costs,²²⁹ if transferred to equal employment law, might lead to coverage of redeployment decisions that turn on labor costs, or perhaps more broadly, on labor factors, including workforce race or age composition, as well as correlated labor factors. The broader prior NLRB line of cases, if translated to antidiscrimination law, would cover redeployment decisions if they were based only in part (but did not "turn") on workforce race or age composition, or other labor factors.²³⁰ Moreover, in cases involving relocation or consolidation of operations, the employer's decision not to transfer its workforce from the closed facility to the new site very likely would be subject to the antidiscrimination laws under any analysis.²³¹

It should be evident that none of these potential boundary lines between exempt types of redeployment decisionmaking and those covered by prohibitions against employment discrimination makes much sense judged from the perspective of employment discrimination, rather than collective bargaining law. On this ground alone, it would be preferable to rely on other sources for construing Title VII and the ADEA. To the extent that the NLRA provides useful insight, the objectives of its antidiscrimination provision, section 8(a)(3), comport far more closely with the purposes of the equal em-

227. See *supra* note 217.

228. See *supra* text accompanying notes 216-223.

229. See *supra* text accompanying notes 206-215.

230. See *supra* text accompanying notes 202-205; cf. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1785-86 (1987) (applying NLRA mixed motive analysis to Title VII claims); Gorman, *supra* note 13, at 1357-58 & n.16 (discussing NLRA § 8(a)(3) cases applying mixed motive analysis to claims of discriminatory subcontracting or relocation).

231. Decisions regarding transferring workers are characterized as bargaining over "effects" of the decision, and are mandatory bargaining subjects, even when the decision to close or move is held to be nonbargainable. See *infra* text accompanying notes 243-244. This dichotomy between "decision" and "effects" tacitly assumes that eliminating the workers is the not reason for the move. If the employer is free not to bargain over the closure decision, when the decision is based entirely on its desire to get rid of its current employees, the employer must have foreclosed itself from bargaining in good faith, with an open mind, regarding whether to transfer the workers to another plant. The dichotomy also assumes that the employer's motive for redeployment is not the unionized status of its employees. When anti-union animus motivates the redeployment decision, the decision is in most cases violative of § 8(a)(3), whether or not the employer bargains about it. See *infra* text accompanying notes 300-324.

ployment opportunity laws than do the purposes of section 8(d), a provision designed to define the contours of collective bargaining.²³² Transferring the section 8(a)(3) analysis of "terms and conditions of employment" to Title VII would produce coverage of all forms of intentional, age- or race-based redeployment discrimination except an employer's decision to terminate its entire enterprise.²³³

Second, the Court's interpretation of section 8(d) "terms and conditions of employment" plainly is less a matter of construction of the words of the statute than of balancing the employees' rights to bargaining under the NLRA with the employers' capital mobility interests created by property, corporate, and other law external to the NLRA.²³⁴ In both *Fibreboard*²³⁵ and *First National Maintenance*²³⁶ the

232. See *infra* text accompanying notes 313-314.

233. See *infra* text accompanying notes 300-334.

234. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Other commentators have elaborated on this point. See, e.g., Harper, *supra* note 184, at 1449-50, 1455, 1461, 1500. *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2595 (1989), further illustrates how little heed the Court pays to the statutory words, and how much emphasis the Court places on its assessment of the proper balance of employers' and workers' equities in matters involving "entrepreneurial" decisions. In *Railroad Telegraphers* the Court had construed the words "working conditions" in § 2, First of the RLA to encompass both the railroad employer's decision to close dozens of its smallest train stations, and the union's bargaining demand that no workers lose their jobs as a result. Because of its impact on the workforce, the Court reasoned, the closure decision came within "working conditions," as did the union's bargaining proposal aimed at ameliorating the effects of the decision. See *supra* notes 190-191 and accompanying text; see also *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2595 n.17 ("[a] closely divided Court [in *Railroad Telegraphers*] reasoned that a railroad's proposal to abandon certain single-agent stations and hence abolish some jobs was a bargainable issue"). The impact of a total closure decision on workers' jobs is certainly no less direct and devastating than the impact of a multisite closure and consolidation decision. Nonetheless, the *Pittsburgh & Lake Erie R.R.* Court did not hesitate to construe the same words, "working conditions," appearing in the same phrase, "rates of pay, rules, and working conditions," in § 2, Seventh and § 6 of the RLA as not compelling bargaining over a decision to totally terminate a railroad employer's operation. See *id.* ("we are not inclined to extend [*Railroad Telegraphers*] to a case in which the railroad decides to retire from the railroad business"). Moreover, employees' jobs were held not to be among the status quo "working conditions" that the employer was statutorily obligated to preserve while it bargained over the effects of its closure decision. See *id.* at 2595-96 ("the decision to close down a business entirely is so much a management prerogative that only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain over the subject matter of union notices such as were served in this case"). The workers' jobs were not "working conditions" which had to remain unaltered pending bargaining over the effects of the closure decision. Nevertheless, continued employment or transfers of the workers appear to be among the "effects" about which the Court held bargaining was still mandatory (albeit limited to proposals the seller railroad could satisfy without having to renegotiate its deal with the buyer, and

Supreme Court proceeded to balance policy considerations *after* acknowledging that the words "terms and conditions of employment" on their face covered the situation at hand.²³⁷ In view of its concern over unions' potential use of "decision bargaining" to delay the onset of redeployment,²³⁸ the *First National Maintenance* Court was striving to fashion a practical accommodation of what it viewed as conflicting statutory policies, despite the intractability of Congress' words. There is no practical problem dictating a similar narrowing

limited in duration to the time the railroad remained an RLA "employer"). See *id.* at 2597. The Court's approach hardly could be more at odds with the normal approach to statutory construction, which requires parallel interpretation of identical words appearing only a few lines apart in the same statute.

235. 379 U.S. 203, 210-14 (1964).

236. 452 U.S. at 680-86.

237. *Id.* at 681 (quoting *Fibreboard*, 379 U.S. at 210). Similarly, in *Darlington*, the Court does not pretend to find in the NLRA § 8(a)(3) words "hire or tenure of employment or any term of condition of employment" a reasoned basis for differentiating between total closures and partial closures, or between partial closures where the work is discontinued, on the one hand, and plant relocation, subcontracting, and closing followed by reopening on the other. Nonetheless, the *Darlington* decision differentiates among each of these categories of redeployment decision. The decision holds that total closures are entirely outside the statutory prohibition against discrimination based upon union activity; partial closures come within the statute, but only if they specifically are motivated by the desire to chill unionism in the employer's remaining facilities; relocation, subcontracting, and other forms of redeployment are unlawful if based on anti-union animus without requiring any special showing of intent to chill support for the union among the employer's remaining employees. See *infra* text accompanying notes 300-320.

238. *First Nat'l Maintenance*, 452 U.S. at 681 ("[t]he union's practical purpose in participating [in the closure decision] . . . will largely be uniform: it will seek to delay or halt the closing"); *id.* at 683 ("[l]abeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose"). Fear that mandated bargaining would provide the union with a potent weapon to delay termination of the business is plainly also the driving force behind the Court's holding in *Pittsburgh & Lake Erie R.R.* The Court there held that even though the railroad had a duty to bargain over the effects of its decision to sell its assets and cease operations, see *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2597, it had no duty to preserve the status quo and defer consummation of the sale, see *id.*, pending exhaustion of the RLA's "purposely long and drawn out" bargaining procedures. *Id.* at 2593 (quoting *Brotherhood of Ry. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 246 (1966)). See also *id.* at 2595-96 ("only an unmistakable expression of congressional intent will suffice to require the employer to postpone a sale of its assets pending the fulfillment of any duty it may have to bargain . . .") (emphasis added); *id.* ("there is little or no basis for the unions expect that a § 156 notice would be effective to delay the company's departure from the railroad business"); *id.* ("nothing in the RLA to prevent the immediate consummation of P&LE's contract to sell"); *id.* at 2597 (emphasizing need to effectuate Interstate Commerce Commission (ICC) regulatory action "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions"; injunction "delaying the closing of the transaction" pending effects bargaining "would likely result in the cancellation of P&LE's sale and the frustration of Congress' intent . . .").

of the literal scope of the words in equal employment laws,²³⁹ nor are there competing policy considerations properly to be balanced against application of Title VII and the ADEA.²⁴⁰

Third, the NLRB and lower courts uniformly have interpreted *First National Maintenance* as not exempting redeployment decisions motivated by anti-union animus from the duty to bargain.²⁴¹ This result, too, cannot be based on the words of section 8(d) alone; "terms and conditions of employment" gives no hint that redeployment decisions based on union status are conditions of employment, while those based on other labor factors are not. Nevertheless, this interpretation highlights the understanding that "terms and conditions of employment" includes all²⁴² redeploy-

239. See *infra* note 332, differentiating delay caused by litigation from delay inherent in a bargaining obligation.

240. See *infra* text accompanying notes 377-382, 388, 417-443, 455-470.

241. See, e.g., *Parma Indus., Inc.*, 292 N.L.R.B. No. 9, slip op. at 2-3 & n.5 (1988) (partial closing and sale of assets violated § 8(a)(5) because turned on labor costs and retaliation against employees for unionizing); *Mid-South Bottling Co.*, 287 N.L.R.B. No. 146, slip op. at 3 (1988) (closure of facility and transfer of operations motivated by anti-union reasons covered by mandatory bargaining duty), *enforced*, 876 F.2d 458 (5th Cir. 1989); *SMCO, Inc.*, 286 N.L.R.B. No. 122, slip op. at 13-14 (1987) (decision to fire workers and subcontract terminal operations was based on anti-union motive, i.e., employer's desire to avoid contract talks with the union, so duty to bargain applied), *enforced*, 863 F.2d 49 (6th Cir. 1988); *Strawsine Mfg. Co.*, 280 N.L.R.B. 553, 553 (1986) (failure to bargain violated § 8(a)(5) where decision to close and relocate operation was motivated by anti-union reasons); *Weine*, 280 N.L.R.B. 132, 132 n.2 (1986) (subcontracting of work to reduce labor costs by eliminating union violated § 8(a)(5) as well as § 8(a)(3)); *Mashkin Freight Lines, Inc.*, 272 N.L.R.B. 427, 427 & n.7 (1984) (shutdown of terminal, layoff of terminal drivers, and transfer of operations violated §§ 8(a)(5) and 8(a)(3)); see also *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223, 228-29 (4th Cir. 1988) (in dicta, excepting decisions based on anti-union animus from holding generically categorizing as permissive bargaining subjects capital redeployment decisions involving closure of a plant or operation).

242. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 274 (1965), exempts the decision totally to cease doing business from the prohibition against employment decisions based upon anti-union reasons. See *infra* text accompanying notes 306, 325-326. See also *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2586-87 (1989) (exempting total cessation of railroad operations from the duty to bargain over the decision and exempting the sale and closure transaction from the duty to preserve the status quo during bargaining over effects). Perhaps total closure should not be characterized as redeployment, but as liquidation of capital and cessation of employer status under the relevant labor or employment law. See *Darlington*, 380 U.S. at 270-71 (upon total termination of the business, the employer ceases to be an employer under the NLRA); *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2587 (distinguishing the facts at issue from prior RLA decisions, because case "involve[d] the decision of a carrier to quit the railroad business, sell its assets, and cease to be a railroad employer at all"); *id.* at 2596 ("its agreement to sell to Railco, if implemented, would have removed it from the railroad business; no longer would it be a railroad employer").

ment decisions based in substantial part on the types of discriminatory animus the statute forbids.

(2) *Other Scope of Bargaining Precedents Regarding Redeployment.*—

There are two other settings in which the duty to bargain over redeployment arises. First, there is the duty to bargain over the effects on the workers of the employer's decision to close, relocate or subcontract an operation. Until now, "effects bargaining," as distinguished from "decision bargaining," uniformly has been held to be mandatory. Many aspects of redeployment decisions, particularly decisions about whether to lay off or transfer the existing workforce when operations are relocated, are treated for NLRA purposes as "effects" of the redeployment decision²⁴³ and remain subject to mandatory bargaining despite *First National Maintenance*.²⁴⁴

243. See, e.g., *NLRB v. Die Supply Corp.*, 393 F.2d 462, 467 (1st Cir. 1968) (employer has duty to bargain over employee transfers and other effects of relocation); *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 688 (2d Cir. 1967) (employer must bargain over employee transfers and other relocation issues); *Fast Food Merchandisers, Inc.*, 291 N.L.R.B. No. 121, slip op. at 10 (1988) (interstate transfer of operations was based on need for greater proximity to customers and transportation rather than labor costs; while decision to move work was not a mandatory subject, resulting layoffs were "effects" over which bargaining was mandatory); *Litton Business Sys.*, 286 N.L.R.B. No. 79, slip op. at 9-11 (1987) (conversion to labor saving machinery was entrepreneurial decision about which bargaining was not required but resulting layoffs constituted "effects" as to which bargaining was mandatory); *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 958-59 (1986) (plant relocation was caused by foreclosure on employer's original building, hence bargaining not required over decision to move; employer, however, violated duty to bargain over effects of relocation including possible transfer or hiring of workers into the new facility); *Morco Indus., Inc.*, 279 N.L.R.B. 762, 762-63 (1986) (bargaining not required when decision to transfer operations focused on need for expanded physical facilities; when business conditions changed and relocation of work caused layoffs at initial site, employer had duty to bargain over layoff and possible transfer of workers to new facility as "effects" of redeployment decision).

244. See 452 U.S. 666, 677 n.15, 681-82 (1981) (union's right to bargain over effects is adequate to serve union's legitimate needs, so it is unnecessary to require the employer to bargain over decision itself). *Otis Elevator II*, the NLRB's major case discussing employers' duty to bargain over redeployment decisions, was remanded to the administrative law judge, who found the employer had violated § 8(a)(5) of the NLRA by failing to bargain over "effects" of the redeployment, including which workers would transfer to the new site, and on what terms. The Board reaffirmed that § 8(d) "terms and conditions" includes transfer rights. The NLRB, however, found as a factual matter that the employer had fulfilled its duty to bargain over the transfer package regarding some, but not all the transferees. The Board also found the employer did not fulfill its duty to bargain over the criteria for selecting individuals for transfer. *Otis Elevator Co.*, 283 N.L.R.B. 223, 226 (1987). The NLRB cases requiring effects bargaining cited *supra* note 243 all post-date *First Nat'l Maintenance*. See also cases cited *infra* note 262; Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402, 415 (1983) (employer continues to have duty to bargain over "effects," including workers' continued employment at other facilities); *id.* at 423-24 (ar-

This should not be understood to endorse as coherent the distinction between "decisions" and "effects," in equal employment law or in collective bargaining law. Examination of how companies actually make redeployment decisions leads this observer to view worker transfer decisions as an integral component of the overall redeployment decision.²⁴⁵ The employer who makes a decision to close a plant to get rid of the workers makes the "effects" decision first, a decision *not* to transfer the workforce. This decision drives all the others: to redeploy, where to redeploy, whether to relocate, subcontract, consolidate or terminate the operation, and so on.²⁴⁶

Antidiscrimination issues only arise in which the decision is significantly based on workers' predominant race or age, or on labor factors heavily correlated with race or age. Consequently the supposed "effects" decision, to eliminate or avoid hiring the workforce, is the crux of the allegedly discriminatory redeployment. The "effect" is the thrust of the decision, so a collective bargaining-type distinction between the two is irrelevant and nonsensical. This is undoubtedly the reason why the *First National Maintenance* Court, and subsequent NLRB decisions regarding the scope of collective bargaining over redeployment, so carefully preserve the *Darlington* line of section 8(a)(3) anti-union discrimination cases by distinguishing from them bargaining cases lacking discriminatory motivation, a

guing for broad interpretation of "effects" as encompassing employee transfer, placement, and retraining).

245. See also *Ozark Trailers*, 161 N.L.R.B. 561, 570 (1966). See generally M. Weiss, Lawyer's Guide, *supra* note 13, at 8-15. Professor Harper recognizes somewhat differently the interconnection between so-called redeployment "decisions" and their "effects." He characterizes issues of job security and choice of work force as "effects" which are subject to mandatory bargaining so long as the same product or service continues to be produced. Harper, *supra* note 184, at 1481-84. For other commentary questioning the separate categorization of "decisions" and "effects," see Kohler, *supra* note 244, at 420 (distinction "may be one which in actuality barely exists"); *id.* at 424-25 ("the line appears to be an illusory one"); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803, 826 & n.112 (1971) [hereinafter Rabin, *Duty to Bargain*] (meaningful effects bargaining may be inextricably tied to decision bargaining); Rabin, *The Decline and Fall of Fibreboard*, 24 N.Y.U. ANN. CONF. ON LAB. 237, 261 (1972) [hereinafter Rabin, *Decline and Fall*] ("it is difficult to draw clear lines between decision and impact"). For the historical development of this dichotomy in NLRB case law, see Kohler, *supra* note 244, at 409-10.

246. See M. Weiss, Lawyer's Guide, *supra* note 13, at 8-15. This breakdown in the distinction between decisions and effects makes it impossible in cases involving workforce-driven redeployment decisions for employees to have a viable right to compel "effects" bargaining if a broad view of *First Nat'l Maintenance* prevails, exempting from mandatory bargaining redeployment decisions based on labor factors. See *supra* note 231.

distinction readily transferable to equal employment law.²⁴⁷ Moreover, the collapse of separable categories of "decision" and "effects" when the decision is based on discriminatory labor considerations no doubt partially underlies the line of cases construing *First National Maintenance* as requiring bargaining over redeployment decisions motivated by anti-union animus.²⁴⁸

The Court's most recent decision addressing issues of capital redeployment, *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Association*,²⁴⁹ illustrates other difficulties in viably distinguishing "effects" bargaining from "decision" bargaining. In *Pittsburgh & Lake Erie Railroad*, an RLA case, the Court for the first time imposed limits, of a sort, on the employer's duty to bargain over "effects" of redeployment decisions. After suffering continuing financial losses, the railroad decided to sell its assets to a new company, and leave the railroad business entirely.²⁵⁰ The Court looked to NLRA case law, relying on *Darlington* for the proposition that "an employer 'has an absolute right to terminate his entire business for any reason he pleases . . .'"²⁵¹ The Court construed *Darlington* as abrogating any NLRA duty to bargain over the decision, as well as obviating the NLRA prohibition against anti-union discrimination in cases of complete cessation of the enterprise.²⁵² The *Pittsburgh & Lake Erie Railroad* Court then found the NLRA rule equally appropriate under the RLA.²⁵³ The issue squarely confronting the Court, however, was the railroad's duty to bargain over the effects of the decision on the workers, rather than the decision itself.²⁵⁴

Under the RLA, once a union has demanded bargaining over the effects of the decision, the employer has an obligation to maintain the status quo as to "rates of pay, rules, or working conditions."²⁵⁵ The Court limited the reach of a prior decision that had interpreted the status quo clause to require the employer to main-

247. See *infra* text accompanying notes 307-311, 315-316 (discrimination in violation of § 8(a)(3)); see also *supra* text accompanying notes 241-242 (§ 8(a)(5) applies where anti-union animus motivates redeployment decision).

248. See cases cited *supra* note 241.

249. 109 S. Ct. 2584 (1989).

250. *Id.* at 2585.

251. *Id.* at 2595 (quoting *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965)).

252. *Id.* (citing *Darlington*, 380 U.S. at 267 n.5, 269-74).

253. *Id.* at 2595 n.17.

254. *Id.* at 2592.

255. *Railway Labor Act* § 6, 45 U.S.C. § 156 (1982). See *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2589.

tain "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."²⁵⁶ Instead, the Court held that "the decision of a railroad employer to go out of business and consequently to reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision. . . ."²⁵⁷

Nevertheless, the Court held, to the extent it remained feasible for the union to bargain with the employer over the effects of the closure without altering the terms of the previously negotiated sale transaction, the railroad remained under a duty to bargain with the unions over effects, until the railroad ceased operations and ceased to be an employer as defined in the RLA.²⁵⁸ The unions had proposed contract changes which would have guaranteed that no employee would suffer job loss or downgrade as a result of the sale of assets, and that the employer contractually would require the purchaser of the railroad to assume the existing collective bargaining agreements.²⁵⁹ As the majority noted, little of the unions' "effects" bargaining proposals could survive the Court's test;²⁶⁰ as the dissenters noted, the limited scope and duration the Court permitted for effects bargaining rendered the right to bargain practically nugatory.²⁶¹ Plainly, the majority viewed bargaining over effects as statutorily required, but in conjunction with the normal RLA status quo requirement, potentially so great an obstacle to consummation of the closure and sale as to be the functional equivalent of a duty to bargain over the decision itself. The Court limited the timing, duration, and scope of mandatory bargaining over effects and permitted the sale to go forward unhindered by any requirement to maintain the status quo, thereby ensuring that the employer could freely effectuate its decision to go out of the railroad business despite its duty to bargain over effects.

To the extent that the holding turns on RLA status quo provisions absent from the NLRA, and on other railroad regulatory provisions governing sales of railroad assets inapplicable outside the

256. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153 (1969), quoted in *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2593.

257. *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2596.

258. *Id.* at 2597.

259. *Id.* at 2589 n.5.

260. *Id.* at 2597.

261. *Id.* at 2600 (Stevens, Brennan, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

railroad industry, *Pittsburgh & Lake Erie Railroad* may have limited impact. In several cases decided after *First National Maintenance*, but before *Pittsburgh & Lake Erie Railroad*, the NLRB has held that an employer violated its duty to bargain when it failed to bargain over effects in the course of a total closure of the business.²⁶² Moreover, it seems evident that even under the RLA, the *Pittsburgh & Lake Erie Railroad* holding applies to total closures but not to station closures or other forms of consolidation or substitution of employees; the Court distinguished *Railroad Telegraphers* on that basis.²⁶³ Employers generally remain under a duty to bargain over the effects of their redeployment decisions upon the workforce. The effects are, by everybody's reckoning, "conditions of employment."

Other than bargaining over decisions and their effects at the point when redeployment already is looming, unions often advance collective bargaining proposals aimed at constraining a generic category of capital redeployment decisions to ensure continuation of employees' operations and their jobs.²⁶⁴ While the case law on this

262. See, e.g., *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306 (8th Cir. 1988) (closure and sale of assets of entire business), *enforcing* 285 N.L.R.B. No. 3 (1987); *Barney's Club*, 288 N.L.R.B. No. 90 (1988) (same); *St. Mary's Foundry Co.*, 284 N.L.R.B. No. 30 (1987) (same).

263. *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2595 n.17. To the extent that the Court alternatively relies on the need to harmonize the RLA with the ICC's provisions regulating railroad sales, the portion of the holding vitiating the status quo requirements during effects bargaining might apply to other sales of railroad lines, even if the railroad does not entirely leave the business. However, the ordinary rules governing duration and scope of mandatory effects bargaining would presumably apply, rather than the truncated bargaining applicable to a total closure. Where the employer remains in the railroad business, there is no reason to end the bargaining with the completion of the sale transaction. In addition, because the employer continues to operate a railroad, albeit a smaller one, it remains able to bargain over possible transfer of workers whose jobs are lost in the sale, as well as over severance pay and other benefits to cushion the impact of the shutdown. Finally, one reason behind the limited duration of effects bargaining in *Pittsburgh & Lake Erie R.R.* was the late timing of the union's bargaining demand. A demand for bargaining issued prior to completion of the sales contract talks may entitle the union to bargain over provisions affecting the purchaser, such as one requiring assumption of the collective bargaining agreement or retention of incumbent workers on the purchased operations. *But see id.* at 2595-96 (union is not entitled to bargain about terms of sale).

264. A BLS study published just after *First Nat'l Maintenance* was decided found that 36% of the collective bargaining agreements in the sample studied "placed restrictions of some type on management's right to close or relocate." BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 1425-20, MASTER COLLECTIVE BARGAINING AGREEMENTS: PLANT MOVEMENT, INTERPLANT TRANSFER AND RELOCATION ALLOWANCES 6 (1981), *cited in* Litvin, *supra* note 184, at 488; *see also* Gould, *supra* note 198, at 12-13 n.45.1 (discussing same BLS study); Litvin, *supra* note 184, at 488-89 & n.316 (job security or plant closing provisions are contained in labor agreements in many major industries); Rabin, *Duty to Bargain*, *supra* note 245, at 822-23 (labor contract clauses restricting

point is unsettled, bargaining over these proposals has been held in several settings to be mandatory.

For example, some collective bargaining agreements expressly prohibit the subcontracting of on-premises maintenance work.²⁶⁵ Some agreements prescribe procedural prerequisites to subcontracting by the employer, such as requiring the employer to meet and discuss its contemplated actions with union representatives and explore alternatives that could preserve employees' jobs.²⁶⁶ A few agreements prohibit the employer from closing plants²⁶⁷ or transferring operations so long as the employer remains in business.²⁶⁸ Although not unequivocal,²⁶⁹ court and NLRB decisions continue to characterize proposals generally providing for job security, or prohibiting or limiting plant closures, relocations or subcontracting, as mandatory subjects of collective bargaining.²⁷⁰

redeployment to provide workers with enhanced job security are not unusual, especially in the highly mobile apparel industry; giving examples). *See generally* Collective Bargaining Negot. & Cont. (BNA) 65:181-206 (giving many examples of clauses restricting subcontracting, plant relocation, closure, or addressing effects).

265. 1987-1990 General Motors Corp.-UAW National Agreement, ¶ 183(a) (prohibiting subcontracting of in-plant maintenance work currently performed by bargaining unit employees if contractor would use GM-owned equipment), ¶ 183(e) (flatly prohibiting layoff of any seniority employee as a result of on-premises subcontracting), *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 21:52; 1987-1990 Ford Motor Co.-UAW National Agreement, § 8 (similar to GM-UAW provisions), *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 65:191; 1987-1991 USX Corp.-United Steelworkers Master Agreement, § 2-C and Appendix D (prohibiting subcontracting of most bargaining unit work, in plant or out), *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 27:4-8, 58-61; 1988-1990 Atlantic Richfield Co. and ARCO Pipe Line Co. and Oil, Chemical & Atomic Workers Master Agreement, Art. XXIV (absolutely prohibiting contracting out of traditional, bargaining unit pipeline work; prohibiting subcontracting of bargaining unit refinery work unless no employees in plant or on layoff status are qualified to perform work; exception for major construction projects), *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 24:11.

266. *See, e.g.*, 1987-1991 USX Corp.-United Steelworkers Master Agreement, § 2-C, ¶ E, *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 27:6; 1987-1990 Ford Motor Co.-UAW National Agreement, § 8, *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 65:191; 1987-1990 General Motors Corp.-UAW National Agreement, ¶ 183(d), *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 21:52.

267. *See, e.g.*, 1987-1990 General Motors Corp.-UAW National Agreement, Letter of Understanding, Doc. No. 13, Plant Closing Moratorium, *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 21:105; 1987-1991 USX Corp.-United Steelworkers National Agreement, Appendix Q, § IV, Letter Agreement Regarding Fairless Works' Open Hearth Facility (committing not to shut down the specified facility for the duration of the agreement), *reprinted in* Collective Bargaining Negot. & Cont. (BNA) 27:80.

268. *See* Collective Bargaining Negot. & Cont. (BNA) 65:201-02 (giving examples).

269. *See infra* notes 291-299 and accompanying text.

270. Professor Harper reaches this result by denominating such job security provisions as "effects" bargaining, rather than "decision" bargaining. *See* Harper, *supra* note 184, at 1482-83. To some degree, the Court seems to be following this line of thinking

There are few cases focusing on such contractual work preservation proposals advanced in a context unrelated to a specific, imminent redeployment decision.²⁷¹ The Supreme Court has considered work preservation provisions, but only in cases directly addressing issues other than the duty to bargain. These decisions are consistent with the understanding that section 8(d) applies to lawful contract proposals generically limiting permissible forms of capital redeployment for the life of the agreement. In *National Woodwork Manufacturers Association v. NLRB*²⁷² the Court construed section 8(e) of the NLRA,²⁷³ which prohibits "hot cargo agreements," to permit labor contract provisions that preclude subcontracting, when the purpose of the agreement is to preserve work traditionally performed by union employees, because such job security provisions are mandatory subjects of bargaining.²⁷⁴ In *NLRB v. International Longshoremen's Association*²⁷⁵ the Court upheld, under section 8(e), a work preservation agreement that prevented the employer from contracting out technologically altered work.²⁷⁶

These cases reject employer contentions that work preservation clauses constitute unfair labor practices by unions in violation of the prohibition against hot cargo clauses. Their rationale, however, is predicated on the need to construe section 8(e) to avoid banning bargaining where bargaining is mandatory under the *Fibreboard* in-

as well. See *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2597 n.19 (1989) (holding limited to "duty to bargain about the effects of the sale only in the context of the facts existing when the unions' notices were served," rather than railroad's duty to bargain over labor protective provisions addressing sales, at time when no sale is contemplated). When he, however, is unable to characterize the contract proposal in terms of "effects" rather than the redeployment "decision," Professor Harper appears to assume that collective bargaining proposals governing redeployment are not subject to mandatory bargaining. See Harper, *supra* note 184, at 1452 & n.28, 1460.

271. Both of the Court's RLA capital redeployment cases involved union bargaining proposals broadly requiring guarantees that employees' jobs would be preserved in the course of capital redeployment. In both cases, however, the job security proposals were advanced in contemplation of specific, impending capital redeployment plans. See *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2592-93; *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 332, 340 & n.16 (1960). Nevertheless, in both cases, the Court did regard the union's job security proposals as mandatory bargaining subjects. See *Pittsburgh & Lake Erie R.R.*, 109 S. Ct. at 2597; *Railroad Telegraphers*, 362 U.S. at 332, 336-37, 339-40.

272. 386 U.S. 612 (1967).

273. 29 U.S.C. § 158(e) (1982).

274. 386 U.S. at 642 (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210 (1964)).

275. 447 U.S. 490 (1980).

276. *Id.* at 503, 506-07.

terpretation of section 8(d). Clauses precluding all subcontracting, or limiting permissible subcontracting based on factors such as full employment in the bargaining unit or lack of proper equipment to perform the work, have been held proper when challenged as violating section 8(e).²⁷⁷ Unlike bargaining when employees face a particular closure or worker substitution decision, substantive or procedural rules governing specific types of redeployment decisions are held to be subject to mandatory bargaining, for at least three reasons: these prescriptive rules *are* within the scope of the statutory phraseology;²⁷⁸ their purpose of protecting workers' jobs is at the heart of NLRA statutory concerns;²⁷⁹ and concerns about a union's possible dilatory bargaining tactics become irrelevant in the broader planning context.²⁸⁰

The Court always has been extremely liberal in assessing the connection between a proposed contractual restriction on entrepreneurial freedom and "wages, hours, and other terms and conditions of employment," finding virtually any union contract proposal to be a mandatory subject of bargaining if the proposed constraint on managerial freedom would in some way protect job security or labor standards. In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,²⁸¹ an antitrust case, the Court held that a union's con-

277. See generally, J. GETMAN & B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW, AND PRACTICE* 264-65 (1988); R. GORMAN, *supra* note 13, at 242, 264-70.

278. Cf. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 642 (1967) (relying on *Fibreboard* to construe § 8(e)); *Fibreboard Paper Prods.*, 379 U.S. at 210 (citing *Order of Railroad Telegraphers v. Chicago N.W. Ry.*, 362 U.S. 330 (1960), to construe § 8(d), "terms and conditions of employment").

279. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (redemption decision "touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs").

280. See Litvin, *supra* note 184, at 489 & n.318, 490; see also *Otis Elevator II*, 269 N.L.R.B. 891, 899 n.16 (1984) (Member Dennis concurring) ("During contract negotiations, a proposed work-preservation clause is a mandatory subject of bargaining. At that stage, any burden element is necessarily speculative and 'the benefit, for labor-management relations and the collective-bargaining process,' outweighs any hypothetical 'burden placed on the conduct of the business.'"). But see J. GETMAN & B. POGREBIN, *supra* note 277, at 116 ("in order to protect the jobs of its members, unions will be required to seek contract clauses limiting employer discretion even though insisting upon such clauses would under current doctrine probably constitute an unfair labor practice"). Cf. St. Antoine, *Legal Barriers to Worker Participation in Management Decision Making*, 58 TUL. L. REV. 1301, 1311 (1984) (bargaining for general contract language contrasted with bargaining at the point where the employer wishes to make a unilateral change in its operations; "[i]n both of these contexts the Supreme Court has apparently assumed, with little or no analysis, that the scope or ambit of mandatory subjects is the same").

281. 381 U.S. 676 (1965).

tract clause limiting the employer's marketing hours was subject to mandatory bargaining, and therefore exempt from antitrust scrutiny, because of the direct impact of marketing hours on the employees' working hours.²⁸²

In *Local 24, International Brotherhood of Teamsters v. Oliver*,²⁸³ a state law antitrust case, the Court held that the duty to bargain applied to a union proposal that would have required the common carrier employer to pay a minimum truck rental rate to owner-operator drivers who supplied their own trucks.²⁸⁴ The rental rate was designed to protect the union wage scale from being competitively undermined by owner-operators agreeing to drive for rates that were less than their real operating costs plus the union wage scale.²⁸⁵ This connection between lease rates and maintenance of the contractual wage structure was held sufficient to make the bargaining subject mandatory, hence application of the Ohio antitrust statute was held preempted by federal labor policy.²⁸⁶

In another federal antitrust case, *American Federation of Musicians v. Carroll*,²⁸⁷ the Court held that an agreement specifying the prices orchestras and bands could charge for engagements constituted a mandatory subject of bargaining and hence was exempt from antitrust regulation.²⁸⁸ The *Carroll* Court rejected the contention that "the distinction between mandatory and non-mandatory subjects turns on the form of the method taken to protect a wage scale" ²⁸⁹ The same reasoning could be applied regarding the method taken to protect employee jobs.²⁹⁰ Extending the rationale

282. *Id.* at 690-92. The result of holding the contract term a mandatory subject of bargaining was to insulate it under the nonstatutory labor exemption to the antitrust laws. *Id.* at 688, 689.

283. 358 U.S. 283 (1959).

284. *Id.* at 294-95.

285. *Id.* at 293-94.

286. *Id.* at 295-97.

287. 391 U.S. 99 (1968).

288. *Id.* at 101-02, 109-11.

289. *Id.* at 110.

290. When unions have bargained restrictive subcontracting clauses, which are unlawful under § 8(e), in arms-length negotiations with the employers of workers the union represents, in order to advance the interests of the workers and the unions and independent of any business or other non-labor organization, the courts have usually upheld such clauses against antitrust challenges. The subcontracting clauses are found to be mandatory subjects of bargaining, sometimes after ascertaining that they pass muster under other, additional tests, and are held to fall within the non-statutory labor exemption to the antitrust laws. *See, e.g., Local 210, Laborers' Int'l Union v. Associated Gen. Contractors*, 844 F.2d 69, 80 (2d Cir. 1988) (subcontracting clause was found to be product of bona fide arm's-length bargaining between union and general contractors

of the antitrust cases, any contract proposal reasonably formulated to protect employee jobs by controlling redeployment decisions without violating section 8(e) would come within the scope of "terms and conditions of employment" under section 8(d).

Neither the Court nor the Board has addressed definitively the mandatory or permissive status of contract proposals or clauses providing for work preservation or job security. To the extent that *Railroad Telegraphers* retains vitality, that decision strongly suggests that work preservation contract proposals are mandatory subjects of bargaining as "working conditions" under the RLA.²⁹¹ In recent bargaining cases, the Court has assumed that bargaining would be mandatory with respect to collective bargaining proposals assuring job security by constraining capital redeployment decisionmaking. In *First National Maintenance* part of the Court's rationale for concluding that unions did not need decision bargaining was that unions could meet the workers' need for job security not only through bargaining over effects, but also through "secur[ing] in contract negotiations provisions implementing rights to notice, information, and fair [decision] bargaining."²⁹² In *Pittsburgh & Lake Erie Railroad* the Court relied repeatedly on the absence of any contract provision, express or implied, that might have restrained the employer's decision to go out of business, or otherwise granted job security to its employees.²⁹³ The Court noted:

We address the duty to bargain about the effects of the sale only in the context of the facts existing when the unions' notices were served. We do not deal with a railroad employer's duty to bargain in response to a union's § 156 notice proposing labor protection provisions in the event that a sale, not yet contemplated, should take place.²⁹⁴

The four dissenting justices in *Pittsburgh & Lake Erie Railroad* plainly

and anticompetitive pressures were implicit in construction industry proviso) (citing with approval *Sun-Land Nurseries, Inc. v. Southern Cal. Dist. Council of Laborers*, 793 F.2d 1110 (9th Cir. 1986) (*en banc*)).

291. See *supra* note 271.

292. 452 U.S. 666, 682 (1981).

293. 109 S. Ct. 2584, 2593 & n.14 (1989) (in the absence of a work preservation clause, express or implied, employer has no RLA statutory duty to give notice and bargain about decision to close and sell assets); see *id.* at 2596 (had unions expressly waived right to bargain over sale of assets, union's notice demanding bargaining over effects proposals would not have required employer to preserve jobs as part of status quo pursuant to statutory provision; "the same result follows where the agreement is silent on the matter . . . there is little or no basis for the unions to expect that a § 156 notice would be effective to delay the company's departure from the railroad business").

294. *Id.* at 2597 n.19.

would hold such contract proposals to be mandatory subjects of bargaining.²⁹⁵

The Board has yet to address general work preservation language in a post-*First National Maintenance* case when there is no specific redeployment decision on the horizon.²⁹⁶ Board Member Dennis, concurring in *Otis Elevator II*, expressed her view that "[d]uring contract negotiations, a proposed work-preservation clause is a mandatory subject of bargaining,"²⁹⁷ so long as no particular redeployment decision is then at issue.

When broad work preservation clauses are applied to actual redeployment decisions, the NLRB cases become more equivocal. Some opinions focus on the particular redeployment decision. These cases hold that the application of the contract clause to the decision constitutes a mandatory subject only if the redeployment decision at issue is a mandatory bargaining subject.²⁹⁸ Other opin-

295. See *id.* at 2600 ("There is no disagreement that labor-protective provisions related to the effects of an abandonment or sale may be the subject of collective bargaining"). The dissenters criticize the majority for suggesting that the employer's duty to bargain might have been greater had the union presented general contractual work preservation proposals at a time when no sale was impending, viewing such proposals as identically requiring bargaining regardless of their timing in relation to the employer's decision to close. *Id.* at 2600 n.6.

296. If broad work preservation clauses are mandatory subjects of bargaining and an employer refuses to discuss such a proposal, a § 8(a)(5) violation arises. If a union insists on bargaining over, reaches impasse over, or strikes over a broad work preservation proposal, and the proposal is found to be a permissive bargaining subject, the union would be violating § 8(b)(3). See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). See generally *DEVELOPING LABOR LAW*, *supra* note 13, at 761-71. The author has found no post-*First Nat'l Maintenance* cases of either type.

The closest the NLRB has come to addressing a union's right to strike over a work preservation proposal in recent years is *Lone Star Steel Co.*, 231 N.L.R.B. 573 (1977), *enforcement granted in part and remanded*, 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981), which is more aptly characterized as a successorship case and pre-dates *First Nat'l Maintenance*. The Board also has approved an administrative law judge's opinion in *Charlie's Oil Co.*, 267 N.L.R.B. 764 (1983), dismissing § 8(a)(5) charges against the employer because the course of bargaining revealed no lack of subjective good faith, just hard bargaining over, *inter alia*, the employer's negotiating demand that the new labor contract eliminate a provision in the expired agreement prohibiting all subcontracting of bargaining unit work, and over the employer's subsequent decision to subcontract certain unit work. The opinion implicitly assumes both the clause and its elimination to be mandatory subjects of bargaining. See *id.* at 770-71.

297. 269 N.L.R.B. 891, 899 n.16 (1984).

298. In *Brown Co.*, 278 N.L.R.B. 783 (1986), *aff'd mem.*, 833 F.2d 1015 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1602 (1988) [hereinafter *Brown II*], then-Chairman Dotson and Member Babson reasoned: "Thus the transfer of . . . work . . . was a unilateral midterm modification of the collective-bargaining agreement However, . . . only a unilateral midterm modification of a *mandatory* subject of collective bargaining violates the Act. Therefore, we must determine whether the transfer of [this particular] opera-

ions focus on the job security objective of the contract clause. These cases hold the contract provision to be a mandatory bargaining subject at the point of application as well as during contract negotiations, even if the clause covers some redeployment decisions that are not mandatory subjects of bargaining. These decisions reason that the work preservation clause creates job security, a term or condition of employment that may not be altered unilaterally.²⁹⁹

tion] was a mandatory subject." *Id.* at 784 (emphasis in original) (citation omitted). *Accord* R.L. Broker & Co., 274 N.L.R.B. 709, 709 (1985) (denying summary judgment for alleged violation of §§ 8(d) and 8(a)(5) when NLRB General Counsel failed to plead (1) that the labor contract was in effect at the relevant time; (2) that it prohibited subcontracting; (3) that the work preservation clause was lawful under § 8(e), the "hot cargo" provision of the NLRA; and (4) facts demonstrating that the subcontracting decision at issue was a mandatory subject of bargaining); *cf.* Stine Scovil Constr. Co., 269 N.L.R.B. 465, 465-66 (1984) (denying summary judgment on claim that subcontracting of work violated §§ 8(a)(5) and 8(d) when General Counsel did not plead work preservation clause was valid under § 8(e)). The decision to transfer operations in *Brown* had previously been held to be based entirely on the employer's desire to avoid the terms of its labor agreement. *Brown Co.*, 243 N.L.R.B. 769, 771 (1979) [hereinafter *Brown I*]. The plurality therefore held it was plainly a mandatory subject of bargaining and the transfer of operations violated the NLRA. *Brown II*, 278 N.L.R.B. at 784-85.

The NLRB General Counsel's office has declined to issue unfair labor practice charges in cases, in which the employer has relocated or consolidated operations in apparent violation of a contractual work preservation clause, when the General Counsel has concluded that the underlying redeployment decision would not be a mandatory bargaining subject, absent the work preservation clause. *See* Advice Memorandum of NLRB General Counsel, 1982 Moving & Storage, Case No. 3-CA-11411, Apr. 29, 1983, *reprinted* in 113 L.R.R.M. (BNA) 1085 (1983); *Stewart Sandwiches, Inc.*, Case No. 7-CA-20834, Sept. 15, 1982, *reprinted* in 112 L.R.R.M. (BNA) 1422 (1982).

299. *See, e.g.*, *Desoto, Inc.*, 278 N.L.R.B. 788, 789-90, 790 n.2 (1986) (Member Dennis, dissenting); *Brown II*, 278 N.L.R.B. at 786 (Member Dennis, concurring). In *Rockwood & Co.*, 285 N.L.R.B. No. 138 (1987), the administrative law judge held, "whether or not Respondent's subcontracting of work to the temporary services was a mandatory subject of bargaining within the meaning of *Otis Elevator*, Respondent had agreed not to deprive employees of jobs during the term of its contract and cannot, in mid-term, modify that contract." *Id.*, slip op. at 5. *See also id.* ("[i]n *Otis Elevator*, the Board held that management decisions that affect the "scope, direction or nature of an enterprise are excluded from the mandatory bargaining obligation of Section 8(d) However, where there is specific language contained in the contract which the employer's decision modified, the Board will find a violation of Section 8(a)(5) and Section 8(d)"). The Board affirmed, albeit without any exceptions having been directed to the issue. *Id.*, slip op. at 1-2. In *Connecticut Color, Inc.*, 288 N.L.R.B. No. 81 (1988), a clause in an expired collective bargaining agreement prohibited the transfer of bargaining unit work. The employer, without the union's consent, transferred the work before the parties had reached impasse in their collective bargaining negotiations. *Id.*, slip op. at 8-9. The Board stated, "[E]ven after the contract expired, if the [employer] wished to change the practice of preserving gravure work for bargaining unit members, [it was] under an obligation to bargain collectively over the subject." *Id.*, slip op. at 3. However, the opinion then recited the administrative law judge's finding that the decision turned on labor costs, and ambiguously concluded that the unilateral transfer violated § 8(a)(5). *Id.* *See also* *Ad-Art, Inc.*, 290 N.L.R.B. No. 74, slip op. at 2 n.3, 33-34, (1988) (administrative law

Reconciling these distinct lines of section 8(d) case law, diversely construing one phrase about "terms and conditions of employment," is all but impossible. The Court has made a series of pragmatic choices about rules governing employer and union behavior. The outcomes turn mainly on the Court's varying assessment of the practicalities of collective bargaining and of the proper balance between employers' business needs and workers' NLRA rights. This understanding suggests that, even as to bargaining duties, "terms and conditions of employment" presumptively covers capital redeployment matters affecting workers' job interests. Effects of specific capital redeployment decisions and contract proposals restricting redeployment in advance generally will be subject to mandatory bargaining. In decision bargaining, however, if the specific redeployment decision to be bargained about has limited connection to workforce considerations, despite the impact of the decision on workers' jobs, the words "terms and conditions" will be construed less liberally than usual because the employer's need for flexibility and haste weighs heavily in the balance.

In the antidiscrimination law setting, the employer's actions turn directly on considerations of race or age, or on labor force characteristics associated with race or age. To make out an employment discrimination claim, the redeployment decision or policy perforce must be based in pertinent part on labor force considerations, making it precisely the type of case most likely to be held subject to mandatory bargaining under section 8(d). Redeployment claims, therefore, should be held to fall within the Title VII and ADEA prohibitions against discrimination in "terms [or] conditions . . . of employment."

b. Section 8(a)(3) and Darlington.—Section 8(d) is not the only provision of the NLRA to include words like "terms and conditions

judge reasoned that mid-term transfer of operations in contravention of contractual work preservation clause violated § 8(d) whether or not the decision to transfer work, absent the contract clause, would have been a mandatory subject of bargaining; NLRB panel concluded challenged decision was itself mandatory bargaining subject, and hence found "it unnecessary to rely on [the administrative law judge's] . . . theory"); *Island Creek Coal Co.*, 289 N.L.R.B. No. 121, slip op. at 2-3 (1988) (holding employer had fulfilled its duty to bargain over particular subcontracting decision where parties had bargained for, and included in labor agreement, subcontracting clause controlling particular decision; because General Counsel had not alleged that the subcontracting constituted a unilateral mid-term modification of terms contained in the labor agreement, the Board declined to consider whether the alleged breach of the contract provision violated the NLRA on that basis).

of employment." Section 8(a)(3),³⁰⁰ which antedates section 8(d),³⁰¹ makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization."³⁰² In the anti-union discrimination context, *Textile Workers Union v. Darlington Manufacturing Co.*³⁰³ construed these words as covering all forms of capital redeployment,³⁰⁴ without regard to whether they involve a "change in the scope and direction of the enterprise."³⁰⁵ The sole exception under *Darlington* is cessation of the entire business.³⁰⁶ The Court in *First National Maintenance*³⁰⁷ and, indeed, the Board in *Otis Elevator II*³⁰⁸ each carefully noted the absence of anti-union motivation in the employer's decision. Both decisions broadly reaffirm that, when the decision to close a part of the business is made for discriminatory purposes, the decision violates section 8(a)(3). "[T]he union's legitimate interest in fair dealing is protected by § 8(a)(3), which prohibits partial closings motivated by antiunion animus"³⁰⁹ Nowhere in *First National Maintenance* does the Court directly reconcile its varying interpretations of the nearly identical wording of section 8(a)(3) and section 8(d).

300. 29 U.S.C. § 158(a)(3) (1982).

301. *Id.* § 158(d). Section 8(a)(3) originally was enacted as § 8(3) of the Wagner Act in 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935); § 8(d), 29 U.S.C. § 158(d), was added to the Act as part of the 1947 Taft-Hartley amendments, Pub. L. No. 80-101, 61 Stat. 136, 142 (1947).

302. 29 U.S.C. § 158(a)(3).

303. 380 U.S. 263 (1965).

304. *Id.* at 272-74 (runaway shop, temporary closing, permanent subcontracting of department's work, and partial closing of business all subject to § 8(a)(3) prohibition against discrimination). Even total liquidation of the business, "if discriminatorily motivated, is encompassed within the literal language of [Section] 8(a)(3)." *Id.* at 269. Indeed, even the sale of the total enterprise, as an on-going concern, is distinguished by the Court from closure and piecemeal liquidation. *See id.* at 272 n.14; *see also id.* at 274-75 (discriminatory partial closures are unlike total closures, and are like runaway shops, temporary closings, and other "cases involving a continuing enterprise" because they "may have repercussions on what remains of the business" and because "a . . . remedy open to the Board in such . . . case[s] . . . is to order reinstatement of the discharged employees in the other parts of the business").

305. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)).

306. *Darlington*, 380 U.S. at 274-75.

307. 452 U.S. at 687.

308. 269 N.L.R.B. 891, 892 n.4 (1984).

309. *First Nat'l Maintenance*, 452 U.S. at 682 (citing *Darlington*, 380 U.S. at 275). *Accord Otis Elevator II*, 269 N.L.R.B. at 892 n.4.

Subsequent Board³¹⁰ and Court³¹¹ rulings continue to find unlawful the partial closing of a business if motivated by anti-union animus. If the parallel wording of section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA were construed similarly to section 8(a)(3) of the NLRA, Title VII and the ADEA would encompass discriminatorily motivated decisions regarding virtually all forms of capital redeployment that affect the existence or nature of employees' jobs.³¹² Not many employers will go out of business completely to avoid employing blacks or older workers.

It makes sense to construe the "terms and conditions" wording in the equal employment laws like section 8(a)(3) rather than section 8(d). The parallel between the antidiscrimination purposes of section 8(a)(3) and the equal employment statutes suggests that section 8(a)(3), rather than section 8(d), was the model for section 703(a)(1) of Title VII and section 4(a)(1) of the ADEA.³¹³ In addition, the language of section 8(a)(3), unlike section 8(d), includes a prohibition against discrimination with respect to "hire or tenure of employment," as well as "any term or condition."³¹⁴ This language is very close to the Title VII section 703(a)(1) and ADEA section 4(a)(1) provision making it unlawful for an employer "to [discriminatorily] fail or refuse to hire or to discharge" anyone.³¹⁵

Moreover, *Darlington* and *First National Maintenance* are at least partially reconcilable. *First National Maintenance* may be regarded as linking mandatory bargaining and application of section 8(d) "terms and conditions of employment" to the directness of the connection between the employer's redeployment decision and labor factors. By definition, a closure or relocation motivated, at least in part, by anti-union animus is a redeployment decision based, at least in part,

310. *E.g.*, *Cook Bros. Enters., Inc.*, 288 N.L.R.B. No. 46, slip op. at 2 n.2 (1988); *Mid-South Bottling Co.*, 287 N.L.R.B. No. 146, slip op. at 3 (1988), *enforced*, 876 F.2d 458 (5th Cir. 1989); *Imperia Foods*, 287 N.L.R.B. No. 126, slip op. at 2 n.3 (1988); *Strawsine Mfg. Co.*, 280 N.L.R.B. 553, 553 (1986); *see also* *SMCO, Inc.*, 286 N.L.R.B. No. 122, slip op. at 2, 13-15 (1987) (subcontracting of work and termination of employees to avoid labor negotiations with union), *enforced*, 863 F.2d 49 (6th Cir. 1988).

311. *E.g.*, *Carrier Corp. v. NLRB*, 768 F.2d 778, 783 (6th Cir. 1985); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1429-30 (11th Cir. 1985).

312. The *Darlington* analogy might suggest a different approach to disparate impact, as opposed to disparate treatment, analysis of capital redeployment situations. *See infra* text accompanying notes 335-376.

313. *See infra* notes 389-390 and accompanying text. *But cf.* *Hishon v. King & Spalding*, 467 U.S. 69, 75-76 (1984) (relying on § 8(d) and precedents thereunder to interpret § 703(a)(1) to reach sex-discriminatory denial of consideration for partnership in law firm).

314. 29 U.S.C. § 158(a)(3) (1982).

315. 42 U.S.C. § 2000e-2(a)(1) (1982); 29 U.S.C. § 623(a)(1) (1982).

on labor factors. Under this analysis, redeployment that is discriminatory, be it anti-union, race or age discrimination, is unlawful "discriminat[ion] . . . with respect to . . . terms [or] . . . conditions of employment."

There may be difficulties with applying section 8(a)(3) and *Darlington* as a model for equal employment opportunity prohibitions against discrimination. The labor statute ambiguously forbids the employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization" ³¹⁶ The prohibition against discrimination motivated by anti-union animus has been interpreted to encompass two types of discrimination: discrimination against workers based on the employer's perception of their status as union supporters and discrimination designed to discourage future support or activity for the union. ³¹⁷ Prospectively oriented discrimination, by definition, involves both discrimination based on union activity and intent to discourage union activity. On the other hand, the Court and the Board believe that retaliatory discrimination does not necessarily entail a purpose or effect of discouraging future union activity, although the circumstances often permit the drawing of an inference of intentional discouragement.

In *Darlington* the Court limited application of the section 8(a)(3) prohibition against discrimination to exclude plant closings not motivated by the desire to chill future union activity, even when the employer has decided to shut down in retaliation for the employees' election of a union representative. ³¹⁸ If discrimination based on sta-

316. 29 U.S.C. § 158(a)(3) (1982).

317. See generally Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1307-10 (1968); see also generally Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 743-56 (1965).

318. 380 U.S. 263, 275-76 (1965). Some courts thereafter held that the narrowing construction applied by the Court to § 8(a)(3) in *Darlington*, should be applied as well in interpreting mandatory subjects of bargaining as defined in the similar language of § 8(d) of the NLRA. See, e.g., *Morrison Cafeterias Consol. v. NLRB*, 431 F.2d 254, 257 (8th Cir. 1970) (reasoning that *Darlington* meant plant closing decisions, not motivated by the desire to chill future union activity in other plants, were not mandatory subjects of bargaining); see Litvin, *supra* note 184, at 449-50; Rabin, *Duty to Bargain*, *supra* note 245, at 819-21; Schwarz, *supra* note 202, at 88-89. *First Nat'l Maintenance*, however, does not adopt this line of reasoning, focusing instead on the benefits and burdens to the bargaining process. 452 U.S. 666, 677-79 (1981). Moreover, the focus in *Darlington* was not on the scope of "terms and conditions of employment" in § 8(a)(3); § 8(a)(3) also prohibits discrimination "with regard to hire or tenure of employment," and the *Darlington* Court thought it perfectly clear that selective plant closings fell within the statutory proscription against discrimination. See 380 U.S. at 274-76. *Darlington* instead turned on

tus, such as race or age, were fully analogized to retaliatory discrimination based on status as a union activist, *Darlington* might be understood to free the employer from all race or age discrimination claims regarding capital redeployment.

Neither the Court nor the Board, however, has applied the distinction between retaliatory motivation and prospective motivation to other discriminatory capital redeployment situations.³¹⁹ The *Darlington* majority noted with apparent approval existing Board decisions finding violations of section 8(a)(3) in runaway shop situations, in which employers relocate to eliminate or avoid the union; in cases in which employers feign permanent closure to avoid the union organizing drive, thereafter reopening; and in decisions to subcontract operations to eliminate the duty to bargain with the union.³²⁰ Moreover, this distinction between prospective and retaliatory motivation is often honored in the breach, as in *Darlington* itself, on remand.³²¹ At times, the Board ignores the chilling intent and effect requirements; at other times, it infers intent to discourage union activity at other plants, and a tendency for such discouragement to occur, after an employer retaliates against its workers for unionizing by closing their plant.³²² In addition, dicta referring to *Darlington* in *First National Maintenance* seems to eviscerate any distinction between retaliatory and prospectively oriented discrimination. The union may not be protected against an employer's relocation in mid-term of the labor agreement to escape from the company's collectively bargained obligations,³²³ but, according to

the discouragement purpose and effect requirements the Court read into § 8(a)(3), and on the Court's view that, although the necessary effect of every plant closing must be to discourage the union activity of the workers from that plant, their discouragement would not meet the statutory test because they would no longer work for the company anyway. *See id.*

319. *See generally* R. GORMAN, *supra* note 13, at 148 (discussing post-*Darlington* case law); Gorman, *supra* note 13, at 1357-59 (same).

320. 380 U.S. at 272-73. The *Darlington* Court itself seems to have viewed the prospective effect as inherent in discriminatory redeployment cases of these sorts. *See id.* at 273, 275 (characterizing these types of redeployment as "discriminatory employer action for the purpose of obtaining some benefit from employees in the future").

321. *Darlington Mfg. Co.*, 165 N.L.R.B. 1074 (1967), *enforced*, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

322. *See, e.g.*, *George Lithograph Co.*, 204 N.L.R.B. 431, 432 (1973) (inferring intent and foreseeable effect of chilling remaining employees); *Holland Custard & Ice Cream, Inc.*, 158 N.L.R.B. 1137, 1147 & n.17 (1966) (finding violation in retaliatory plant closure without separate finding regarding chilling purpose and effect); *see also* Gorman, *supra* note 13, at 1357 & nn.12, 13.

323. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682-86 (1981); *see Milwaukee Spring Div., Illinois Coil Spring Co.*, 268 N.L.R.B. 601 (1984), *aff'd sub nom. UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

the Court, under section 8(a)(3), the union "has direct protection against a partial closing decision that is motivated by an intent to harm a union."³²⁴

In any event, there is neither a malicious intent nor a discouraging effect requirement in either Title VII or the ADEA. The Title VII and ADEA prohibitions against race and age discrimination in employment protect status while the NLRA prohibition against anti-union discrimination protects future employee behavior. The civil rights laws regulate discrimination on the basis of uncontrollable, inalterable employee characteristics, such as race or age. To the extent courts rely on interpretations of the section 8(a)(3) wording to assist in construing the antidiscrimination laws' prohibitory language, they should follow *Darlington* in holding that the prohibition against discrimination in hire, tenure, and terms or conditions of employment applies to plant relocations and other forms of capital redeployment. Because there is no Title VII or ADEA element akin to the section 8(a)(3) requirement that the Board establish discouragement of future union activity, the *Darlington* distinction between retaliatory and prospectively oriented discrimination should be irrelevant for Title VII and ADEA purposes.

It is also arguable that the Court's reasoning in *Darlington* provides support for excluding from the equal employment laws employer decisions to shut down a business completely. *Darlington* exempts from the strictures of section 8(a)(3) an employer's decision to terminate its business completely, reasoning that total closure entirely severs any employer-employee relationship and prevents any future benefit for the employer from the discrimination.³²⁵ The *Darlington* Court carefully distinguished from total, permanent closure of the business, closing temporarily, followed by reopening, as well as partial closing and plant relocation, each of which violates the NLRA if motivated by anti-union animus.³²⁶ To the extent that the Court's reasoning in *Darlington* turns on a deep

324. *First Nat'l Maintenance*, 452 U.S. at 682.

325. 380 U.S. 263, 272-74 (1965). See also *Palmer v. Thompson*, 403 U.S. 217 (1971), in which the Court rejected claims of violation of the fourteenth amendment to uphold the decision of Jackson, Mississippi to close its swimming pools rather than comply with a court order requiring that they be desegregated. *Id.* at 219. The Court reasoned that the racially invidious motivation, standing alone, did not state a claim since the closure was facially neutral and did not differentiate between whites and blacks; all were deprived equally of city-sponsored pools. *Id.* at 220. The Court also accepted the city's action as a total cessation of swimming pool operations even though one of the pools was reopened by a private entity and operated on a segregated basis. *Id.* at 222-23.

326. 380 U.S. at 272-75, 272 n.16, 273 n.18.

reluctance to question the assumption that an employer has an unlimited right to end the enterprise, this reasoning may be equally applicable to the antidiscrimination laws.

On the other hand, to the extent that the Court's *Darlington* holding turns on the NLRA's future-oriented behavioral objectives, even the narrow *Darlington* exemption may be inapplicable to the antidiscrimination statutes. The *Darlington* Court construes section 8(a)(3) to proscribe only discrimination that encourages or discourages union activity. Discrimination that harms an employee but has no prospective effect on any employee's activities is not prohibited by the NLRA.³²⁷ At least in part, *Darlington* turned on the Court's belief that there would be no such future impact if the employer ceased to exist, and that any impact on employers other than the closing one would be beyond the scope of the Act's coverage.³²⁸

The ADEA and Title VII, however, contain blanket prohibitions against discrimination, without respect to its impact on future behavior. Arguably, therefore, even a decision to close completely should not be excluded from scrutiny under the civil rights laws. In practice, however, it is hard to envision any employer completely and permanently closing because of racial animus. Were the Court to follow *Darlington* regarding race- or age-motivated decisions by an employer to go out of business, it would matter little or not at all.

At bottom, it would seem that the Court is clear that "terms or conditions of employment," whether in section 8(a)(3) or section 8(d), is a phrase encompassing all capital redeployment decisions entailing direct consequences for employees' jobs and job security. The Court has chosen to curtail literal enforcement of the full scope of the statutory provisions when it perceives important conflicting public policies to be implicated.³²⁹ This has led the Court to truncate differently the scope of nearly identical statutory language in the section 8(d) duty to bargain and in the section 8(a)(3) prohibition on anti-union discrimination.³³⁰ In particular, the outcome in *First National Maintenance* seems to have been driven largely by the Court's insistence that managers need not risk being held up indefinitely by filibuster-like collective bargaining tactics when the company is trying to execute a quick, often secret, strategic corporate

327. *Id.* at 276.

328. *Id.* at 272-73.

329. See *supra* text accompanying notes 234-240, 299-300 (discussing § 8(d)), 325-326 (discussing § 8(a)(3)).

330. See *supra* text accompanying notes 178-234, 303-306.

decision to leave a line of business.³³¹ This problem is not present in discrimination cases, of course, whether under section 8(a)(3) of the NLRA or under Title VII or the ADEA.³³² The Court and, indeed, the NLRB³³³ continue to view discriminatory capital redeployment decisionmaking as within the scope of the NLRA "terms or conditions of employment" language.³³⁴ The Court should regard discriminatory capital redeployment decisions as falling within the

331. See *supra* note 238 and accompanying text.

332. It may be possible for litigants to seek injunctive relief to delay implementation of the employer's decision under the NLRA or under antidiscrimination statutes. See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13. This, however, is not the sort of delay that concerns the Court in the labor law cases. Under § 10(j) of the NLRA, once the NLRB has issued an unfair labor practice complaint, it may seek an injunction *pendente lite* to prevent an employer from relocating or subcontracting operations where it is claimed that the redeployment decision was infected by anti-union animus or that the employer breached its duty to bargain. 29 U.S.C. § 160(j) (1982). See, e.g., *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953 (1st Cir. 1983); *Gottfried v. Echlin, Inc.*, 113 L.R.R.M. (BNA) 2349 (E.D. Mich. 1983); *Kobell v. Thorsen Tool Co.*, 112 L.R.R.M. (BNA) 2397 (M.D. Pa. 1982); *Zipp v. Bohn Heat Transfer Group*, 110 L.R.R.M. (BNA) 3013 (C.D. Ill. 1982). Some federal courts will also enjoin work relocations or closures pending arbitration where there is a plausible claim that the employer's action violates provisions of a collective bargaining agreement. See generally Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396 (1979). Similarly, under Title VII or the ADEA, EEOC may go to court for injunctive relief precluding the move while the charge is in the administrative process, and federal district court plaintiffs may seek preliminary injunctive relief which would defer any movement of the work until the conclusion of the litigation. See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13 (discussing these and other matters regarding relief).

Court-imposed delays in effectuating the employer's decision, however, do not pose the kind of problem about which the Court was concerned in *First Nat'l Maintenance*. When parties seek injunctive relief, they must persuade a court, *inter alia*, that they have a substantial probability of success on the merits and that the balance of hardships runs in their favor. Employers confronted with marginal claims have the opportunity to persuade a federal court to let them proceed with the operational redeployment, despite the pendency of the litigation. Where the employer's position on the merits is accompanied by an ability to claim great hardship if the relocation or other redeployment is deferred, the employer's equitable position becomes quite strong. The judicial involvement serves as a check on irresponsible action interfering with proper employer activity.

In the bargaining setting, however, no such check is possible. If the duty to bargain applies, the employer is precluded from finally deciding to close, subcontract or relocate the work until after it has bargained to impasse with the union. In some circumstances, the duty to bargain before completing and implementing the decision may indeed "afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 683 (1981); see also *supra* note 238 and accompanying text.

333. See cases cited *supra* note 310.

334. *First Nat'l Maintenance*, 452 U.S. at 682.

scope of the "terms or conditions" language in Title VII and the ADEA as well.

4. *Darlington and Effects Tests Under Employment Discrimination Law.*—Notwithstanding the language of the statutes,³³⁵ the legislative history evidencing Congress' purpose to root out all aspects of discrimination in employment,³³⁶ and the viability of well-bounded theories of proof pertaining to capital redeployment decisions,³³⁷ the Court may be hesitant to encompass capital redeployment within the rubric of employment discrimination law. The Court will probably surmount its reluctance to involve the judiciary in corporate processes in cases of disparate treatment,³³⁸ where the employer is proven to be an intentional discriminator.³³⁹ Knowing "evil-doers" may forfeit their right to have their interests balanced against employees' rights to equal employment opportunity. By their very nature, intentional discrimination cases confine judicial intrusion to the limited number of instances where unlawful motivation plays a role in the decision.³⁴⁰ Moreover, the company wishing to avoid court interference in its inner workings need only hew to the straight and narrow, scrupulously avoiding consideration of race- and age-based factors in making its decisions.³⁴¹ Precisely because this class of cases is self-limiting, the employer's interest in

335. See *supra* text accompanying notes 96-114.

336. See *infra* text accompanying notes 377-470.

337. See generally M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

338. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 & n.15 (1977); see also, e.g., *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2784 (1988); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1982); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

339. Cf. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1803-04 (1989) (O'Connor, J., concurring) ("the explicit consideration of race . . . in making employment decisions was the most obvious evil Congress had in mind when it enacted Title VII While the *prima facie* case under *McDonnell Douglas* and the statistical showing of imbalance involved in an impact case may both in indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate"); cf. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (Supreme Court is comfortable with affirmative action only when it is "penance" for employer's past "sins" of discrimination).

340. See, e.g., *Price Waterhouse*, 109 S. Ct. at 1784-85 (plurality opinion); *id.* at 1804 (O'Connor, J., concurring).

341. Cf. *id.* (O'Connor, J., concurring) ("To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.").

freely managing the business carries little weight against claims of intentional race or age discrimination.

Disparate impact theories stand on shakier ground. Disparate impact claims are based on proof that a facially neutral policy or decision operates disproportionately to exclude or harm the job opportunities of blacks or older workers.³⁴² The gravamen of disparate treatment claims is unlawful intent; the gravamen of disparate impact claims is unjustifiable, disproportionate effects.³⁴³

Disparate impact claims challenge the legitimacy of a wide range of factors, correlated with race or age, on which employers base business decisions.³⁴⁴ Disparate impact theory does, however, come equipped with its own internal balancing test. A policy or decision creating a disparate impact on blacks, for example, is unlawfully discriminatory only if it cannot be justified on grounds of business necessity.³⁴⁵ Moreover, the scope of the business necessity

342. *Dothard v. Rawlinson*, 433 U.S. 321, 328-31 (1977) (height and weight requirements); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (personnel tests); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) (personnel tests). See generally Cooper and Sobol, *supra* note 105.

The most recent elaboration of disparate impact doctrine, a version which in many ways strains the fabric woven in *Griggs* and its progeny, is found in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) and *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988). Although these opinions fail to acknowledge any academic sources, they may be drawing on ideas expressed in Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 299, 301-04 (1971) (outlining limited theory of disparate impact as a "functional equivalent" of intentional discrimination, when facially neutral criterion disproportionately limits employment opportunities of blacks, and criterion is weakly related to productivity and is a qualification individual employees lack control over or cannot readily attain), Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985) (disparate impact theory should be sharply limited and burdens of proof should at all times remain on plaintiffs to avoid encouraging employers to use racial quotas to escape Title VII liability) or Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 553-62 (1977) (advocating acceptance under the Equal Protection Clause of limited version of disparate impact theory of discrimination where criterion is the "functional equivalent" of race, or to avoid perpetuating into the present the effects of past discrimination; "a [facially neutral] criterion is the functional equivalent of race when its only plausible function is racial selection").

343. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 & n.15 (1977).

344. See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

345. See, e.g., *Atonio*, 109 S. Ct. at 2125-26. Under the rubrics of disparate impact and business necessity, the courts explicitly balance the goal of equal economic attainment by blacks, an objective expressly embraced by Congress in enacting, see, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 26-29 (1963), ISREPRINTED IN 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2513-16, and in EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 2122, 2147-50 (1968) [hereinafter 1964 TITLE VII LEGISLATIVE HISTORY]; 110 CONG.

defense and the disparate impact prima facie case often seem to be intertwined; the broader the kinds of proof of impact acceptable to the courts in fulfilling the plaintiffs' prima facie case, the easier the employer's burden regarding business necessity.³⁴⁶ Nevertheless, the line between forbidden and permitted actions is far less luminous than the line in claims based on discriminatory intent, and many more employer policies and actions may be swept within the ambit of disparate impact theories compared to disparate treatment claims. Consequently, the Court may be far less inclined to intervene in corporate decisionmaking when discriminatory redeployment claims are based on disparate impact theory.

Lack of well-defined boundaries for a disparate impact theory extending beyond selection system issues, is one part of this prob-

REC. 6547-48 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. 6562 (1964) (remarks of Sen. Kuchel); 110 CONG. REC. 7203-04 (1964) (remarks of Sen. Clark); 110 CONG. REC. 13,080 (1964) (remarks of Sen. Clark); see also *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979); *Griggs*, 401 U.S. at 429-30; and amending Title VII, see, e.g., S. REP. NO. 415, 92d Cong., 1st Sess. 6-8 (1971), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 410, 415-17; 118 CONG. REC. 589-90 (1972) (remarks of Sen. Humphrey), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 671, against entrepreneurial freedom, a political and economic policy premise extrinsic to § 703. See *infra* text accompanying notes 416-443; cf. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786-88 (1989) (characterizing Title VII as employing both policies in a congressionally-set balance). The extent to which entrepreneurial freedom was assumed as a premise by the Congress that passed the legislation is subject to debate on political, economic and social grounds. Compare, e.g., Fiss, *supra* note 342, at 303 and Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 Nw. U.L. REV. 776, 785-93 (1983) with, e.g., Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 1012-13 (1982) and Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 100-01 & n.173 (1972). See also *infra* notes 416-433 and accompanying text.

346. In past cases, the more expansive the definition of disparate impact and the lower the plaintiffs' threshold for showing substantial disparity of effects, the broader the range of excuses accepted to establish "business necessity" and the lower the defendant's evidentiary burden. Compare, e.g., *Albemarle Paper Co.*, 422 U.S. at 425-35 (strong disparate impact evidence, high business necessity threshold) and *Griggs*, 401 U.S. at 429-33 (same) with, e.g., *Watson*, 108 S. Ct. at 2787-91 (including subjective decisionmaking among those employee selection devices which are subject to disparate impact attack, but easing employer's burden from one of persuasion to one of production of evidence, and relaxing stringency of business necessity standard) and *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 590-92 (1979) (accepting as sufficient employer's scanty evidence of business necessity, assuming, arguendo, plaintiffs' weak evidence sufficed to make out a prima facie disparate impact case). *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), however, breaks with this trend. *Atonio* narrows the types of proof acceptable to show disparate impact, see *id.* at 2121-25, eases employers' burden of proof, *id.* at 2126, linguistically broadens the scope of business justifications which will meet the employers' burden, see *id.* at 2125-26, and raises plaintiffs' "less discriminatory" alternative burden in rebuttal. See *id.* at 2126-27.

lem, a problem whose solution I tackle elsewhere.³⁴⁷ Thus far, the Court has applied disparate impact theory under Title VII only to employee selection systems and other job mobility issues.³⁴⁸ In several opinions, the Court has noted its hesitance to expand disparate impact analysis to other conditions of employment.³⁴⁹ Where the lower courts have addressed disparate impact theories in other employment discrimination contexts, particularly wage discrimination and fringe benefit distribution issues, doctrinal confusion has been the result.³⁵⁰ Redefinition of the traditional Title VII elements for

347. See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13. For an earlier discussion tackling the need to bound disparate impact theory in the constitutional law arena, see Perry, *supra* note 342.

348. *Connecticut v. Teal*, 457 U.S. 440 (1982), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), involved written tests. *Dothard v. Rawlinson*, 433 U.S. 321 (1977), involved height and weight requirements. *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), concerned a transit police rule against employing methadone users. Plaintiff in *Watson* challenged a subjective system of awarding promotions. 108 S. Ct. at 2782, 2786. Plaintiffs in *Atonio* challenged the cumulative impact of recruitment, hiring, rehiring, assignment, transfer, and promotion practices, which had resulted in a racially stratified workforce. 109 S. Ct. at 2120, 2124-25; *id.* at 2128 n.4, 2135 & nn.27, 28 (Stevens, Brennan, Marshall & Blackmun, JJ., dissenting). *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the only other Title VII case the Court has decided on a disparate impact theory, involved a company policy denying to workers who had taken maternity leave job placement rights upon completion of the leave of absence as well as retention and continued accumulation of seniority. *Id.* at 138-39. These rights were provided to workers taking disability leaves for reasons other than pregnancy. *Id.* at 140 & n.3. Because the Court had decided the previous year, in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), that intentional discrimination on the basis of pregnancy did not constitute disparate treatment on the basis of sex, the *Satty* Court was foreclosed from holding that the pregnancy-based disparate treatment constituted intentional sex discrimination. 434 U.S. at 140. Instead, the Court reasoned that Ms. Satty and many other women would be disadvantaged for the remainder of their working careers because of the unique adverse treatment of maternity leaves, a burden never imposed on men, hence one with a disparate impact on women. *Id.* at 141-42. The Court also has suggested that, but for § 703(h), immunizing bona fide seniority systems not intended to discriminate, it would have analyzed seniority systems under a disparate impact theory. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 349-50 (1977). *But cf. Lorance v. AT&T Technologies*, 109 S. Ct. 2261, 2265 (1989) (precluding an attack on a discriminatorily-motivated change in a seniority system, despite its disparate impact, unless timely charge is filed challenging the unlawful intent at the time of adoption of the change).

349. See *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 714-16 (1978); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 139-140 (1976). *But cf. Atonio*, 109 S. Ct. at 2124 n.9 (intimating viability of claim based on housing and eating facilities segregated on the basis of job classification where nonwhite employees were overwhelmingly restricted to disfavored set of jobs); *id.* at 2127 n.4 (Stevens, Brennan, Marshall & Blackmun, JJ., dissenting).

350. The chaos in the case law is best exemplified by cases challenging J.C. Penney's policy limiting employer-provided health insurance coverage to "heads of households," employees whose earnings exceed their spouses'. The rule operates to exclude most

both the *prima facie* case and the business necessity defense will be necessary to encompass redeployment discrimination claims, as well as other non-selection system cases.³⁵¹ This difficulty, however, can be surmounted.³⁵² Deeply rooted judicial assumptions about entrepreneurial freedoms are the far more fundamental obstacle.³⁵³

Many judges and commentators proclaim, as a premise, that courts should be reluctant to apply disparate impact analysis to policies regarding the management of the workforce or conditions of employment. In one Title VII case, *Furnco Construction Corp. v. Waters*,³⁵⁴ the Court remarked, "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."³⁵⁵ In *Watson v. Fort Worth Bank & Trust*³⁵⁶ a plurality of the Court recently reiterated and expanded upon this point.³⁵⁷ The plurality worried that applying disparate impact theory to subjective employee selection decisionmaking would "have [a] . . . chilling effect on legitimate business practices"³⁵⁸ and attempted to reassure employers of def-

women workers and few men from receipt of the fringe benefit. *Compare, e.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1128 (7th Cir. 1987) (reversing dismissal in head of household case), *Wambheim v. J.C. Penney Co.*, 642 F.2d 362, 365 (9th Cir. 1981) (holding that plaintiffs had established a disparate impact *prima facie* case based on head of household rule) and 29 C.F.R. § 800.149 (1988) (rejecting employer argument that head of household rule qualifies for "any factor other than sex" defense to Equal Pay Act violation because of the high correlation between head of household definition and male gender) with *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253-54 (6th Cir. 1988) (accepting cost minimization as business necessity defense for disparate impact claim based on head of household rule) and *J.C. Penney Co. v. Wambheim*, 705 F.2d 1492, 1495-96 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (affirming District Court finding that company had established "legitimate and overriding business considerations [that] provide justification" for head of household rule, because rule is "designed to benefit the largest number of employees and those with the greatest need . . . [k]eep[ing] the cost of the plan to employees [and employer] as low as possible").

351. See M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

352. I attempt to redefine the traditional Title VII elements in M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

353. See *supra* note 89 (collecting cases). For a broad discussion of the influence judicial perceptions have had on the development of labor law, see J. ATLESON, *supra* note 10. Professor Atleson discusses *Darlington* and related cases, *id.* at 136-42, and, more generally, the erosion of workers' NLRA rights in capital redeployment situations. *Id.* at 111-70.

354. 438 U.S. 567 (1978).

355. *Id.* at 578.

356. 108 S. Ct. 2777 (1988).

357. The *Watson* Court did so, however, while applying disparate impact theory to precisely the type of subjective, discretionary decisionmaking the *Furnco* Court had hinted should not be analyzed on the basis of disparate impact, because of the need to preserve the employer's freedom to select its employees. See *Furnco*, 438 U.S. at 575 n.7.

358. *Watson*, 108 S. Ct. at 2788.

erential judicial review of their subjective decisionmaking.³⁵⁹

The majority in *Wards Cove Packing Co. v. Atonio*,³⁶⁰ decided last term, embraced the *Watson* reasoning and expanded upon it. The *Atonio* Court cautioned that courts should remember the *Furnco* admonition about employers' superior business competence when courts consider plaintiffs' rebuttal arguments, proposing less discriminatory alternatives that could meet an employer's asserted business needs while reducing the disparity of the impact of the employer's practices.³⁶¹ "[C]onsequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit."³⁶² If courts are nervous about intervening where the decisions involve individual workers, their reluctance perforce will be greater when large groups of employees and substantial amounts of capital are at issue.

*Darlington*³⁶³ and related NLRA precedent could provide the courts with a foundation for rejecting disparate impact claims regarding capital redeployment decisions even if disparate treatment claims are accepted. In *Darlington* the Court accepted the NLRB's position that a plant closure should not be analyzed under section 8(a)(1) of the NLRA,³⁶⁴ but only under section 8(a)(3).³⁶⁵ Section 8(a)(3) is the antidiscrimination provision that was construed in *Darlington* to require an intent to discriminate for the purpose of chilling the exercise of NLRA rights of other workers before it could be applied to prohibit, as an unfair labor practice, a plant closure shutting down less than the entire business.³⁶⁶ Section 8(a)(1), on the other hand, makes it an unfair labor practice for an employer to "interfere, restrain, or coerce employees in the exercise of" their rights under the Labor Act.³⁶⁷ This provision generally functions as an "effects" test, rather than an "intent" test; if the employer's actions tend to interfere with employees' rights to organize or bargain collectively, the employer will be held to have violated section 8(a)(1).³⁶⁸ The closing of their plant will virtually always interfere

359. *Id.* at 2790-91.

360. 109 S. Ct. 2115 (1989).

361. *Id.* at 2126-27.

362. *Id.* at 2127.

363. 380 U.S. 263 (1965).

364. 29 U.S.C. § 158(a)(1) (1982).

365. *See Id.* § 158(a)(3); 380 U.S. at 268-69.

366. 380 U.S. at 271-75.

367. 29 U.S.C. § 158(a)(1) (1982).

368. *See Darlington*, 380 U.S. at 269 ("A violation of § 8(a)(1) alone . . . presupposes an

with employees' organizing or bargaining. To apply section 8(a)(1) to closures, relocations, and subcontracting decisions, therefore, the Court would have had to ascribe to Congress, in enacting the NLRA, the intent to prescribe job security for unionized or unionizing workers against these common forms of capital redeployment. The Court understandably refused to do so.³⁶⁹

Justice Harlan's reasoning for the Court, however, sweeps far more broadly. The opinion emphasizes the need to balance the employer's business justification against the extent of interference with employee organizational rights.³⁷⁰ Implicitly, the Court concludes that employer interests in closures always will outweigh employee rights under the Act, because closures are "so peculiarly matters of management prerogative that they would never constitute violations, . . . whether or not they involved sound business judgment, unless they also violated section 8(a)(3)," ³⁷¹ that is, unless the decisions were intentionally discriminatory.

Were Justice Harlan's line of reasoning to be followed in the employment discrimination setting, the core entrepreneurial nature of redeployment decisions might provide a basis for judicial refusal to apply disparate impact theories to such matters. Such a rationale would be far more encompassing than the need to devise adequate boundaries for any disparate impact theory that could be applied. The Harlan analysis, however, should not be translated to the employment discrimination setting for two reasons.

First, as noted above, the underlying reason for the Court's refusal to apply section 8(a)(1) to redeployment decisions was that applying section 8(a)(1) to redeployment claims was an all-or-nothing proposition. There was no way to say that one plant closing interfered with union organizing or collective bargaining more than another. So long as the employees are not being transferred under circumstances where the union could survive the closing, every closing of a unionized plant destroys the union and eliminates collective bargaining. Likewise, the termination of an operation the union is seeking to organize, eliminates the incipient bargaining unit, again presenting the ultimate claim of interference with employees' right to organize collectively. By definition, when the workers all lose

act which is unlawful even absent a discriminatory motive."'). See generally DEVELOPING LABOR LAW, *supra* note 13, at 76-78; R. GORMAN, *supra* note 13, at 132-33, 146.

369. *Darlington*, 380 U.S. at 268-69.

370. *Id.* at 269.

371. *Id.*

their jobs, there is no workplace collective left; no interference could be greater.

This is not so in the employment discrimination law cases, of course, where impact is measured on a comparative basis between blacks and whites or old and young.³⁷² Title VII disparate impact is a far more circumscribed theory than section 8(a)(1) interference effects, which are assessed on an absolute, not comparative, basis. Moreover, employment discrimination disparate impact claims include built-in recognition of the employer's interest. A sufficient business necessity will entitle the employer to continue an employment policy despite a substantially or even overwhelmingly disparate impact upon black workers.³⁷³ If no proof of intent were necessary to establish a section 8(a)(1) capital redeployment case, on the other hand, employers simply would be forbidden to move, close, relocate or otherwise redeploy operations without union permission. Because the interference with workers' exercise of their NLRA rights is so total, business justifications could seldom, if ever, outweigh the interference entailed in redeployment decisions, absent the *Darlington* holding that the redeployment justification always trumps the interference with employees' rights. Permitting effects-based NLRA challenges to redeployment would produce far more drastic results than permitting disparate impact claims under Title VII or the ADEA, in which employers simply need a job related criterion for the decision, if based on labor factors,³⁷⁴ or perhaps otherwise a business necessity justification.³⁷⁵

372. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121 (1989) ("It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms the proper basis for the initial inquiry in a disparate impact case."). For a more detailed analysis of the comparative nature of disparate impact theory generally, and as applied to redeployment decisions in particular, see M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

373. See *supra* text accompanying notes 344-346. The greater the disparity of the impact, however, the more likely that the plaintiffs will be able to "persuade the factfinder that 'other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest.'" *Atonio*, 109 S. Ct. at 2126 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

374. See cases cited *supra* note 346. See generally M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

375. On the question of business necessity contentions based on matters other than labor factors, see *supra* notes 349-352 and accompanying text. *Atonio* uses loose language about "business considerations," 109 S. Ct. at 2124, "business ends," *id.* at 2125, and "legitimate business justification defense," *id.* at 2126, but creates a less discriminatory alternative test requiring that the alternative practice "be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals." *Id.* at 2127.

Second, the Board and the courts for a long time have grappled unsuccessfully with devising a coherent boundary for section 8(a)(1) effects-based claims, because the subject matter of the NLRA is activity or behavior, such as organizing a union or collective bargaining, rather than an uncontrollable status, such as race or age. Weighing the effect of an employer's action on employees' behavior involves speculation about workers' future conduct that is unnecessary in considering the impact of a racially correlated employment policy. Precisely because of this difference, applying current Title VII disparate impact and business necessity doctrine to capital redeployment claims would not entail a prohibition of capital redeployment in run-of-the-mill closures or relocations, nor would it create a theory so open-ended that employers could not guide their conduct to avoid decisions that would enmesh the courts in reviewing their operations. A company need simply avoid using race, age or correlated labor factors in its capital redeployment policies and decisions, or have strong, demonstrable business reasons for any facially neutral, race- or age-correlated factors upon which the company does rely.³⁷⁶

Accordingly, the reasoning of *Darlington* should not be extended to Title VII and the ADEA. Given that a well-bounded disparate impact theory can be devised for application to capital redeployment decisions, the courts should recognize that theory. Courts should accept claims for discriminatory capital redeployment based on comparative adverse effects on blacks or older workers, without requiring proof of discriminatory intent, unless there is adequate business justification for the redeployment policy or decision.

C. Congressional Employment Discrimination Policy

A broad interpretation of congressional intent in Title VII and the ADEA to prohibit discriminatory capital redeployment decisions is well supported. The legislative history of the 1964 Civil Rights Act is replete with expressions of general congressional intent to eradicate every facet of discriminatory employment practices³⁷⁷ and

376. For elaboration of this point as a matter of evidentiary burdens, see M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

377. *E.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 30 (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2517, *and in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2151; 110 CONG. REC. 13,079-80 (1964) (remarks of Sen. Clark), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3092-93. The opponents, of course, also acknowledged the broad scope of the bill. *See, e.g.*, 110 CONG. REC. 13,169 (remarks of Sen. Byrd, opposing prior House version of the bill), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3119. The Court has repeat-

to prevent employer policies designed to evade that statutory objective.³⁷⁸ In *Franks v. Bowman Transportation Co.*³⁷⁹ the Court summarized congressional intent as follows: "[I]n enacting Title VII . . . Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority.'"³⁸⁰ To fulfill the congressional mandate, the Supreme Court has instructed, courts should "avoid interpretations of Title VII that would deprive victims of discrimination of a remedy without clear Congressional mandate."³⁸¹

Antidiscrimination law, therefore, should be construed so that victims deprived of equal employment opportunities because of discriminatory capital redeployment decisions are entitled to redress. The words of the statutory prohibitions appear, several times over, to outlaw discriminatory capital redeployment. Excluding such practices from the statute's commands, therefore, would require "a clearly expressed legislative intent contrary to the plain language of the statute."³⁸² Review of the legislative history, however, reveals nothing of the kind. There is nothing in the history of the 1964 enactment directly exempting capital redeployment decisions of any sort.

Indeed, there is a dearth of discussion on the specific topic of redeployment.³⁸³ This is quite understandable. Prior to the enact-

edly acknowledged this central objective of Title VII. See, e.g., *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786-87 (1989) (plurality opinion) ("Title VII tolerates no racial discrimination, subtle or otherwise") (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)); *id.* at 1802 (O'Connor, J., concurring) (same); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982) ("Title VII's primary goal, of course, is to end discrimination") (emphasis in original).

378. See, e.g., 110 CONG. REC. 2594 (1964) (remarks of Sen. Griffin) ("if a union, or an employer, . . . engages in a practice which actually is a subterfuge amounting to discrimination on the basis of race, . . . in some indirect fashion, then a court could probably find that such a practice would fall within the scope of this bill"), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3240-41; see also *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 447 n.26 (1986) (plurality opinion) ("in the nature of things, Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act . . . Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration") (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). See generally Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299, 1303-07 (1987).

379. 424 U.S. 747 (1976).

380. *Id.* at 763. See also *supra* note 129 and accompanying text.

381. *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

382. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982).

383. There are a few tangential discussions of matters related to capital redeploy-

ment of Title VII, except perhaps in states with vigorously enforced fair employment laws, employers regarded themselves as free to hire and fire on the basis of race, age or any other criteria they chose. Senator McClellan offered an "occupational qualifications" amendment to the bill that would have permitted an "employer to hire on basis of race, . . . where the employer, on the basis of substantial evidence, believed that the individual would be more beneficial to his business than someone hired without reference to such factors."³⁸⁴ Other members of Congress expressed similar sentiments.³⁸⁵ Opponents of the legislation repeatedly protested that the bill would destroy the absolute freedom of management to hire and fire;³⁸⁶ several legislators contended that the threatened impairment of these managerial "rights" was unconstitutional.³⁸⁷

ment. *See, e.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 27 (1963) (concentration of black workers in lower level jobs heightens their chances of early and long layoffs, especially with rapid upgrading of job skills associated with automation, exacerbating problems of underutilization of blacks in labor force), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2513-14, *and in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2148. There is also similar language in the Title VII legislative history regarding Rep. Reid's amendment, *see* Vaas, *Title VII Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 439 (1966), to clarify that the provision which was enacted as § 703(d) of Title VII was intended to prohibit discrimination in retraining as well as training programs.

384. The Senate debated and rejected this amendment on June 15, 1964. *See* 110 CONG. REC. 13,825-26 (1964), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3183.

385. For example, the minority views attached to the House Labor Committee report accompanying H.R. 7152 protested the proposed measure because, among other things, enactment of Titles VI and VII would mean that

the farmer . . . would be required to hire people of all races, without preference for any race. If experience has taught the farmer that a member of one race is less reliable than a member of another race, does less for his pay, he will no longer be allowed to hire those he prefers for this reason. If he is of the belief that members of one race are more prone to accident, less trustworthy, more neglectful of duties, are, in short, less desirable employees than those of another race, he will no longer be allowed to exercise his independent judgment.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 69 (1963) (minority report), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2438, *and in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2069.

386. *See, e.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess. 65 (1963) (minority report), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2433-34, *and in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2065; *see also* 110 CONG. REC. 7771 (1964) (remarks of Sen. Tower) (expressing concern regarding the impact of regulation on the competitiveness of U.S. business), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3254-55.

387. *See, e.g.*, 110 CONG. REC. 9911 (1964) (remarks of Sen. Smathers) ("an infringement upon the freedom of employers to choose their associates, contrary to the spirit if not the letter of the Constitution"), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 9

Capital was less mobile in the early 1960s than it is today; on those infrequent occasions when the issue arose, it would seldom have occurred to an employer to base a subcontracting or site selection decision on the racial makeup of its employee complement or of the applicant pool. At the time, employers believed themselves free simply to fire the blacks and replace them with whites, or hire only whites in the first place. Why bother to transfer the operations when a direct change in the workforce was unimpeded?

Nevertheless, the Congress that enacted Title VII in 1964 did anticipate that employers would develop new practices to accomplish indirectly the discrimination that Congress was seeking to outlaw. Congressional intent to preclude all sorts of subterfuges to evade the purposes of the Civil Rights Act is manifest throughout the legislative history and throughout Supreme Court interpretations of Title VII.³⁸⁸ The broad congressional objective of interdicting practices designed to circumvent the equal employment opportunity laws, as well as practices directly contravening the antidiscrimination prohibition, requires that the prohibitory language of section 703(a) be construed broadly to encompass racially discriminatory capital redeployment decisions.

Moreover, Congress consciously modeled Title VII on the NLRA, RLA, and Norris-LaGuardia Act.³⁸⁹ Congressional use of

(1981) [hereinafter ADEA LEGISLATIVE HISTORY]; 110 CONG. REC. 9024 (1964) (remarks of Sen. Tower) ("[E]nforcement of this . . . provision would be virtually impossible outside of a police state in which the Federal Government took charge of all the hiring, firing, promotion, and demotion policies and activities of the formerly free business system of this Nation"), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3133; 110 CONG. REC. 13,825 (1964) (remarks of Sen. McClellan) ("destructive of property rights and . . . confiscatory in their consequences"), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3183.

388. See *supra* notes 377-378 and accompanying text. Indeed, it was this understanding of congressional intent that led to the Supreme Court's interpretation of the statute to prohibit employment policies whose impact disproportionately excludes blacks from employment opportunities, even if the disparate effect is wholly unintended. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). See generally Rutherglen, *supra* note 378, at 1309-11. But cf. *supra* note 342.

389. See *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261, 2267-68 (1989) (statute of limitations); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 446-47 n.26 (1986) (remedies); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982) (remedies); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982) (statute of limitations); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977) (remedies); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768-70 & n.29 (1976) (remedies); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975) (remedies). Congress patterned Title VII "in a number of respects . . . after the National Labor Relations Act and other existing legislation in the field of labor-management relations." 110 CONG. REC. 8453 (1964) (remarks of Sen. Javits, reprinting New York City Bar Association re-

broader proscriptive language than the labor law words of art, "terms [or] conditions . . . of employment,"³⁹⁰ a phrase itself very

port evaluating Title VII), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3086.

Title VII's legislative history is replete with evidence that Congress relied on prior labor laws as models for the employment section of the Civil Rights Act, and that Congress expected and intended the courts to refer to analogous labor law doctrine in construing parallel language in Title VII. Congress consciously relied on NLRA, RLA, Norris-LaGuardia Act, Fair Labor Standards Act (FLSA), and Labor-Management Reporting and Disclosure Act (LMRDA) precedents to support its view that the bill it was enacting was constitutional. *See, e.g.*, 110 CONG. REC. 8453 (1964) (remarks of Sen. Javits, reprinting New York City Bar Association report evaluating Title VII) (Title VII patterned after NLRA, LMRDA, and other labor laws), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3086; 110 CONG. REC. 7210-11 (1964) (remarks of Sen. Clark, reprinting memorandum of Department of Labor) (relying on FLSA, NLRA, Norris-LaGuardia Act, and RLA precedents, including specifically §§ 8(a)(3) and (a)(4) of the NLRA), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3079-80. In discussing the substantive provisions of the bill, members of Congress repeatedly noted the similarity of Title VII to § 8(a)(3) of the NLRA; 110 CONG. REC. 7209 (1964) (remarks of Sen. Clark, reprinting opinion letter of Deputy Attorney General Nicholas deB. Katzenbach) (relying on RLA, NLRA, and Norris-LaGuardia Act precedent), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3078-79; 110 CONG. REC. 7208 (1964) (remarks of Sen. Clark, reprinting legal memorandum from Milbank, Tweed, Hadley & McGloy regarding constitutionality of the bill) (relying on NLRA, FLSA, LMRDA, and Norris-LaGuardia Act precedents, noting "[i]t is but a short step to proceed from a statute which prevents the discharge of workers for union activity to one which seeks to outlaw discrimination in employment on account of race"), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3077. *See, e.g.*, 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams) (comparing Title VII to NLRA antidiscrimination provision, to rebut arguments that bill would entail undue interference with employer's freedom to manage the business), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3189; 110 CONG. REC. 7770 (1964) (remarks of Sen. Tower) ("[e]mployers have sometimes found it difficult under the National Labor Relations Act, which imposes the restriction that an employer not discriminate because of his employees' union activity [I]t is proposed to add five more considerations for the employer to worry about—race, religion, color, national origin, and sex"), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3253; 110 CONG. REC. 7216-17 (1964) (memorandum of Sen. Clark, a floor manager of the bill, responding to questions of Sen. Dirksen) (defining "discrimination" by reference to prohibitions in state fair employment practices commission laws, the NLRA, and the FLSA), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3011-15.

Moreover, the Title VII legislative history several times cites *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), which broadly construed "labor disputes" over "terms and conditions of employment" in § 13 of the Norris-LaGuardia Anti-Injunction Act to encompass picketing of a retail store by black nonemployees seeking to persuade the picketed company to cease its racially discriminatory hiring practices. *Id.* at 560-61. *See, e.g.*, 110 CONG. REC. 8453 (1964) (remarks of Sen. Javits, reprinting New York City Bar Association report evaluating Title VII) (quoting *New Negro Alliance*, 303 U.S. at 561), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3086; 110 CONG. REC. 7210 (1964) (remarks of Sen. Clark, reprinting memorandum of Department of Labor) (quoting *New Negro Alliance*, 303 U.S. at 561), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3080.

390. "Terms, conditions, or privileges of employment" is plainly a deliberately broad-

broadly interpreted at the time Congress was debating Title VII,

ened version of § 8(a)(3) of the NLRA's "terms or conditions of employment" wording. The copying of the § 8(a)(3) phraseology, however, may have been done not in the 88th Congress, which enacted Title VII, but by much earlier Congresses, or perhaps by the New York state legislature. Section 703(a) was taken, unaltered, from H.R. 405, 88th Cong., 1st Sess. § 5(a) (1963), which in turn was based on the language contained in H.R. 10,144, 87th Cong., 2d Sess. § 5(a) (1962). See H.R. REP. NO. 914, 88th Cong., 1st Sess. 57 (additional views of Rep. Meador), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2426, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2057; 110 CONG. REC. 2551 (1964) (remarks of Rep. Powell); see also 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 9; Gold, *supra* note 342, at 572. Compare H.R. 10,144, 87th Cong., 2d Sess. § 5(a) (1962) and H.R. 405, 88th Cong., 1st Sess. § 5(a) (1963) with H.R. 7152, 88th Cong., 1st Sess. § 704(a) (1963) and Civil Rights Act of 1964, title VII, Publ. L. No. 88-352, § 703(a), 78 Stat. 255 (1963). At that point, too, the resemblance to § 8(a)(3) of the NLRA was acknowledged. The minority opposed H.R. 10,144 largely because the EEOC it would have created, and the proposed substantive provisions the EEOC would have administered, were so closely modeled on the NLRA and the NLRB, which the minority viewed with great distaste. See H.R. REP. NO. 1370, 87th Cong., 2d Sess. 19-21 (1962), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2173-75. The minority particularly noted that the NLRB, like the proposed EEOC, "was established to administer and enforce a law which, among other things, prohibited discrimination in regard to hire or tenure of employment or any term or condition of employment." H.R. REP. NO. 1370, 87th Cong., 2d Sess. 19 (1962), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2173.

H.R. 10,144, in turn, appears to be the lineal descendant of a 1950 federal bill, modeled, in turn, on a 1945 New York State statute. Sociologists Paul Burstein and Margo MacLeod have traced the origins of the language in Title VII through a succession of federal fair employment practices bills in the 1950s and early 1960s, to the first state antidiscrimination law, Act of Mar. 12, 1945, ch. 118, 1945 N.Y. Laws 457. See Burstein & MacLeod, *Prohibiting Employment Discrimination: Ideas and Politics in the Congressional Debate Over Equal Employment Opportunity Legislation*, 86 AM. J. SOC. 512, 521 & n.15 (1980); see also Gold, *supra* note 342, at 568-69. While the language varies in these early bills, all make it an unlawful practice for an employer to refuse to hire or to discharge because of race. Virtually all of these bills address conditions of employment, and they fall into one of two categories in the specific phraseology they employ. One line of proposed legislation makes it unlawful for the employer to discriminate "in compensation or in other terms or conditions of employment." See Burstein & MacLeod, *supra*, at 520-21 & n.15; Gold, *supra* note 342, at 568-72, 569 n.525. The other line of bills makes it unlawful for the employer to discriminate "in compensation or in terms, conditions, or privileges of employment." See Burstein & MacLeod, *supra* at 520-21 & n.15; Gold, *supra* note 342, at 568-72, 569 n.525. The origin of this phraseology, in either version, in § 8(a)(3) of the NLRA must have been self-evident to the legislators, especially to those legislating in the 1940s, only a decade or so after passage of the original NLRA. Those bills adding "privileges" to "terms or conditions" manifestly intended to broaden the scope of the prohibition, given not only the direct comparison to the NLRA language, but also the direct comparison to competing bills throughout these years containing the NLRA "terms or conditions" phrase, without the addition of "privileges."

The historical antecedents of the addition of "privileges" to "terms or conditions" also corroborates the intuition, see *supra* text accompanying note 313, that § 8(a)(3)'s antidiscrimination prohibition, rather than § 8(d)'s definition of the scope of bargaining, is the source of the language in § 703(a)(1) of Title VII. Section 8(d) was enacted as part of the 1947 Taft-Hartley amendments to the NLRA; the language was added by the Senate as a compromise in lieu of a more limited, detailed list of mandatory bargaining

corroborates the understanding that Congress anticipated application of the Title VII prohibitory language to capital redeployment decisions.³⁹¹

In 1963-1964, when Congress was debating and enacting Title VII, contemporaneous constructions of phraseology similar to "terms [or] conditions . . . of employment" in other labor statutes were broad enough to encompass virtually all decisions to redeploy operations. A 1961 Supreme Court case, *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*,³⁹² had expansively interpreted "conditions of employment" language within the RLA and the Norris-LaGuardia Act to encompass a railroad's decision to close many of its smaller train stations.³⁹³ By 1963 and early 1964, after some initial hesitation, the NLRB had followed *Railroad Telegraphers* with equally expansive interpretations of sections 8(d) and 8(a)(3) of the NLRA.³⁹⁴

topics passed by the House. See H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 34-35 (1947) (enunciating the compromise), reprinted in 1947 U.S. CODE CONG. & ADMIN. NEWS 1135, 1147-52, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 538-39 (1959) [hereinafter LMRA LEGISLATIVE HISTORY]; H.R. 3020, 80th Cong., 1st Sess. § 2(11), H.R. REP. NO. 245 (1947), reprinted in LMRA LEGISLATIVE HISTORY, *supra*, at 39-40; see also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 675 & n.14 (1981) (reviewing legislative history of § 8(d)). The Senate bill was not even introduced until the spring of 1947; plainly, the 1945 New York state statute was drafted and enacted long before, and could only have been based on § 8(a)(3), as well, perhaps, as RLA and Norris-LaGuardia Act language.

391. "[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown v. General Servs. Admin.*, 425 U.S. 820, 828 (1976). See also *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 658 (1982). When one statute is modeled on another, courts should assume Congress was aware of contemporary precedents "and that it expected its enactment to be interpreted in conformity with them," *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), even when those contemporary precedents subsequently are modified. *Id.* at 696-99 (construing Title IX of the Education Amendments of 1972 in conformity with interpretations of Title VI of the Civil Rights Act of 1964 prevailing at time of enactment of Title IX).

392. 362 U.S. 330 (1960).

393. See *supra* notes 186-190 and accompanying text. See also *Milk Wagon Drivers' Union, Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 98-100 (1940) (construing "labor disputes" and "terms or conditions of employment" in Norris-LaGuardia Act to apply to union picketing aimed at unionizing "vendors" and transforming them from purported independent contractors into employees).

Litvin traces the genealogy of the phrases "terms and conditions" and "working conditions" as words expressing breadth rather than limitation. He starts with § 20 of the Clayton Act, follows the phrases through § 13(c) of Norris-LaGuardia, into § 9(a) of the NLRA, and then into § 8(d) of the NLRA. See Litvin, *supra* note 184, at 472-76; see also Rabin, *Decline and Fall*, *supra* note 245, at 250-52 (reviewing Taft-Hartley legislative history equating plant closings and pay rates as bargaining topics, and rejecting amendments that would have limited scope of bargaining regarding "managerial rights").

394. Pre-*Railroad Telegraphers* decisions, while not uniform, predominantly treated cap-

Immediately after *Railroad Telegraphers* was decided, the Eisenhower NLRB in *Fibreboard I* rejected a parallel interpretation of section 8(d) of the NLRA, holding that only the "effects" of redeployment decisions, and not the decisions themselves, were subject to the duty to bargain.³⁹⁵ The subsequent change in administration led to changes in appointments to the NLRB; thereafter, in *Town & Country Manufacturing Co.*,³⁹⁶ the recomposed Board translated the reasoning of *Railroad Telegraphers* to the NLRA and held that the scope of the duty to bargain under section 8(d) of the NLRA encompassed employer decisions to subcontract operations.³⁹⁷ Next, in *Fibreboard II*,³⁹⁸ the recent Kennedy appointees to the Board reversed the original Board ruling and again held that section 8(d) imposed a duty to bargain over subcontracting decisions.³⁹⁹ By the time Title VII was debated in Congress, the Board

ital redeployment decisions entailing elimination of workers' jobs as mandatory subjects of bargaining. See Kohler, *supra* note 244, at 407-09; see also *id.* at 408 nn.32-33 (collecting cases); Litvin, *supra* note 184, at 438-39 (reviewing pre-Taft-Hartley NLRB case law interpreting duty to bargain in light of § 9(a) language—"rates of pay, wages, hours of employment, or other conditions of employment"—to include, *inter alia*, subcontracting decisions, and characterizing enactment in 1947 of § 8(d) as codifying Board case law in defining scope of the duty). But see Rabin, *Duty to Bargain*, *supra* note 245, at 807 & n.17 (interpreting pre-*Fibreboard* NLRB case law as "requir[ing] bargaining only as to the effects of a decision to terminate bargaining unit work, not the decision itself," while noting that "[t]he Board's view" during this period "was not altogether clear"); Schwarz, *supra* note 202, at 82-83 (in pre-*Railroad Telegraphers* NLRB case law, the "dichotomy between decision-bargaining and effect-bargaining existed unquestioned," although there were "prophetic indications to the contrary"). In many of the cases, the Board found both § 8(a)(5) and § 8(a)(3) violations when the employer closed, transferred or subcontracted an operation to escape from its labor contract and its duty to bargain with the union. See, e.g., *Star Baby Co.*, 140 N.L.R.B. 678, 681 (1963), *enforced as modified*, 334 F.2d 601 (2d Cir. 1964); *American Mfg. Co.*, 139 N.L.R.B. 815, 819 (1962), *enforced in part*, 351 F.2d 74 (5th Cir. 1965); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212, 221 (1960), *enforced as modified*, 293 F.2d 170 (2d Cir. 1961); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 168 (1957); *Gerity Whitaker Co.*, 33 N.L.R.B. 393, 406-07 & n.11 (1941) (collecting cases) ("The removal to Adrian was such a drastic and crucial change in [the employer's] employment conditions that the refusal to bargain inherent in such a removal, when presented as an accomplished fact, could not be cured by the bargaining that subsequently occurred in regard to the employment at Adrian of some employees laid off at Toledo . . ."). Section 8(a)(3) consistently had been interpreted to prohibit discriminatorily motivated capital redeployment decisions, starting long before *Railroad Telegraphers*. See *infra* notes 409-412 and accompanying text.

395. *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558, 1560-61 (1961) [hereinafter *Fibreboard I*].

396. 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

397. *Id.* at 1026-28.

398. *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962), *modifying* 130 N.L.R.B. 1558 (1961), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964) [hereinafter *Fibreboard II*].

399. *Id.* at 554. See also *Royal Plating & Polishing Co.*, 148 N.L.R.B. 545, 546 (1964).

had construed section 8(d) to require employers to bargain over decisions to automate operations,⁴⁰⁰ subcontract work,⁴⁰¹ consolidate operations,⁴⁰² and undertake other forms of corporate reorganization.⁴⁰³ By that time, the Board also had found violations of the prohibition in section 8(a)(3) against anti-union discrimination in redeployment situations including "runaway shops,"⁴⁰⁴ closing and reopening the plant,⁴⁰⁵ subcontracting,⁴⁰⁶ partial closing,⁴⁰⁷ and going out of business entirely.⁴⁰⁸

enforcement denied, 350 F.2d 191 (3d Cir. 1965); *Winn-Dixie Stores, Inc.*, 147 N.L.R.B. 788, 793 (1964), *enforced as modified*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966); *Adams Dairy, Inc.*, 137 N.L.R.B. 815, 817 (1962), *enforcement denied*, 322 F.2d 553 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965).

400. *Carl Rochet*, 136 N.L.R.B. 1294, 1296 (1962).

401. *See cases cited supra* note 399.

402. *Northwestern Publishing Co.*, 144 N.L.R.B. 1069, 1070 (1963), *enforced*, 343 F.2d 521 (7th Cir. 1965).

403. *See generally* Rabin, *Decline and Fall*, *supra* note 245, at 244 & nn.22-26 (collecting cases); Rabin, *Duty to Bargain*, *supra* note 245, at 808-10 (collecting cases).

404. *See, e.g.*, *NLRB v. Wallick*, 198 F.2d 477, 484 (3d Cir. 1952) (employer failed to reopen plant and transferred operations to other sites to eliminate the union), *enforcing* *Wallick & Schwalm Co.*, 95 N.L.R.B. 1262 (1951), *cited in* *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 272 n.16 (1965); *Winchester Elecs., Inc.*, 128 N.L.R.B. 1292, 1292 n.4, 1316-17 (1960), *enforced*, 295 F.2d 288 (2d Cir. 1961); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212, 217-20 (1960), *enforcement denied in pertinent part*, 293 F.2d 170 (2d Cir. 1961); *Bermuda Knitwear Corp.*, 120 N.L.R.B. 332, 332 (1958); *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162, 168-72 (1957), *enforced per curiam sub nom.* *NLRB v. Mackneish*, 272 F.2d 184 (6th Cir. 1959); *In re Joffe*, 74 N.L.R.B. 1568, 1569-70 (1947).

405. *See, e.g.*, *Scott Mfg. Co.*, 133 N.L.R.B. 1012, 1016 (1961), *enforced sub nom.* *NLRB v. United States Air Conditioning Corp.*, 302 F.2d 280 (1st Cir. 1962); *Dickey*, 108 N.L.R.B. 561, 562 n.1, 570-73, 577 (1954) (closure, organization of alter ego, reopening); *In re L.B. Hosiery Co.*, 88 N.L.R.B. 1000, 1012-16 (1950) (closure, sale to alter ego, reopening), *enforced mem.*, 187 F.2d 335 (3d Cir. 1951); *In re Goodyear Footwear Corp.*, 80 N.L.R.B. 800, 801-02 (1948) (closure and reopening).

406. *See, e.g.*, *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1029 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963); *Kelly & Picerne, Inc.*, 131 N.L.R.B. 543, 544 (1961), *enforced*, 298 F.2d 895 (1st Cir. 1962); *Bonnie Lass Knitting Mills, Inc.*, 126 N.L.R.B. 1396, 1397 (1960); *R.C. Mahon Co.*, 118 N.L.R.B. 1537, 1540-44 (1957); *In re Williams Motor Co.*, 31 N.L.R.B. 715, 735-36 (1941), *enforced*, 128 F.2d 960 (8th Cir. 1942); *In re Bank of Am. Nat'l Trust & Sav. Ass'n*, 26 N.L.R.B. 198, 212 (1940), *enforced as modified*, 130 F.2d 624 (9th Cir. 1942), *cert. denied*, 318 U.S. 791 (1943).

407. *See, e.g.*, *American Mfg. Co.*, 139 N.L.R.B. 815, 817-19 (1962) (discontinuance of trucking operations), *enforced in part*, 351 F.2d 74 (5th Cir. 1965); *Savoy Laundry, Inc.*, 137 N.L.R.B. 306, 331 (1962) (discontinuance of operation), *remanded on other grounds*, 327 F.2d 370 (2d Cir. 1964); *New England Web, Inc.*, 135 N.L.R.B. 1019, 1024-25 (shutdown and liquidation of operation), *enforcement denied*, 309 F.2d 696 (1st Cir. 1962); *Stewart Hog Ring Co.*, 131 N.L.R.B. 310, 311-12 (1961) (discontinuance of trucking operations to eliminate two union officers); *Missouri Transit Co.*, 116 N.L.R.B. 587, 590 (1956), *enforced*, 250 F.2d 261 (8th Cir. 1957); *Norma Mining Corp.*, 101 N.L.R.B. 944, 946 (1952), *enforced as modified*, 206 F.2d 38 (4th Cir. 1953) (mine closures to avoid bargaining with the union).

408. *See, e.g.*, *Neiderman*, 140 N.L.R.B. 678, 679-81 (1963), *enforcement denied in parti-*

The applicability of section 8(a)(3) to all forms of discriminatory capital redeployment, by then, was very well established, and dated back to cases from the early days of the Wagner Act.⁴⁰⁹ For example, in 1940, in *Schieber Millinery Co.*,⁴¹⁰ the NLRB held that an employer had discriminated on the basis of union activity in violation of section 8(3) (now section 8(a)(3)) of the NLRA, when it relocated its plant and refused to transfer its employees so that it could escape its obligations under the union contract and avoid further dealings with the union.⁴¹¹ The employer asserted that its move had been based on legitimate business reasons. The NLRB, however, found persuasive evidence that the employer had moved because it believed that the community to which it relocated "was a

nent part, 334 F.2d 601, 604 (2d Cir. 1964); *Darlington Mfg. Co.*, 139 N.L.R.B. 241, 245-52 (1962), *enforcement denied*, 325 F.2d 682 (4th Cir. 1963) (en banc), *vacated and remanded*, 380 U.S. 263 (1965); *Barbers Iron Foundry*, 126 N.L.R.B. 30, 31-33 (1960).

409. See, e.g., *Santa Cruz Fruit Packing Co.*, 1 N.L.R.B. 454, 459-60, 465, 466-67 (1936) (closure and purportedly permanent subcontracting of work to discharge and avoid reinstating employees to avoid unionization), *enforced as modified*, 91 F.2d 790 (9th Cir. 1937), *aff'd*, 303 U.S. 453 (1938); *Bank of Am. Nat'l Trust & Sav. Ass'n*, 26 N.L.R.B. 198, 206-10 (1940) (discontinuance and subcontracting of operations), *enforced*, 130 F.2d 624 (9th Cir. 1942), *cert. denied*, 318 U.S. 791 (1943); *Williams Motor Co.*, 31 N.L.R.B. 715, 731-33 (1941), *enforced*, 128 F.2d 960 (8th Cir. 1942); *Ford Motor Co.*, 31 N.L.R.B. 994, 1095-97, 1107-08 (1941) (closing and reopening without reinstating UAW adherents constituted "discriminatory lock out" in furtherance of employer's campaign to destroy the union in violation of § 8(3) (now § 8(a)(3))); *Gerity Whitaker Co.*, 33 N.L.R.B. 393, 403-05, 420 (1941) ("runaway shop," the transfer of operations to circumvent labor contract and avoid duty to bargain with union, violated § 8(3)), *enforced as modified*, 137 F.2d 198 (6th Cir. 1942). As early as 1936, a commentator, discussing the problem of runaway shops, wrote:

Some remedy may, however, be found in the National Labor Relations Act if the employer comes within its broad definition of interstate commerce. Precedents of the National Labor Relations Board under the N.I.R.A. support the legality of a removal *per se*. However, where the circumstances of a removal indicated that it was motivated by a desire to avoid the obligations of a trade agreement, or even to dodge collective bargaining with unionized employees, the act was held to be violated. Since a discrimination against old employees at the new location has been held sufficient evidence of illegal motivation, it would seem that most runaway cases could be brought within the statute.

Note, *Legal Problems Raised by the Relocation of Industry: The Runaway Shop*, 36 COLUM. L. REV. 776, 792 (1936) (footnotes omitted). See also *id.* at nn.93-95. There is also some legislative history to support the application of § 8(a)(3) to runaway shops and other forms of corporate reorganization, if used to jettison union supporters. See H.R. REP. NO. 1147, 74th Cong., 1st Sess. 19 (1935) ("This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay-off, demotion or transfer, hire, forced resignation, or division of work; in reinstatement or hire following a technical change in corporate structure, a strike, lock-out, temporary lay-off, or a transfer of the plant"), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 3046, 3068-69 (1985).

410. 26 N.L.R.B. 937, *enforced as modified*, 116 F.2d 281 (8th Cir. 1940).

411. *Id.* at 957, 960-61.

strong, 'non-union' town," while the city from which it departed was heavily unionized, and that the two plants were staffed accordingly.⁴¹² These interpretations of sections 8(a)(3) and 8(d) "terms and conditions of employment" as covering capital redeployment decisions, along with the parallel prior interpretation of similar words under the RLA and the Norris-LaGuardia Act, were the precedents informing the Congress that placed those words of art into the text of Title VII of the Civil Rights Act in 1964.

Nor was congressional knowledge of the Supreme Court's ruling in *Railroad Telegraphers* limited to what appeared in the newspaper or the *United States Reports*. Senator Everett Dirksen responded to the Supreme Court decision by sponsoring a bill that would have amended section 13(c) of the Norris-LaGuardia Act, section 8(d) of the NLRA, and section 2 of the RLA to overrule *Railroad Telegraphers* and exclude "the creation or discontinuance of jobs" from the meaning of "terms or conditions of employment" and "working conditions."⁴¹³ Congress hardly could have overlooked the *Railroad Telegraphers* decision only two or three years later when it considered precursors to Title VII with the same prohibitory language regarding "terms or conditions of employment"⁴¹⁴ and then another year or two later when it debated and passed a bill with similar phraseology.⁴¹⁵

One aspect of the 1964 Act's legislative history might be cited in opposition to its application to capital redeployment decisions. The bill's opponents decried the Civil Rights Act as a drastic measure, unduly empowering government at the expense of enterprise.⁴¹⁶ Most of this criticism came from opponents of the bill and

412. *Id.* at 947, 950, 957, 958-61.

413. S. 3548, 86th Cong., 2d Sess., 106 CONG. REC. 10,232, 10,255-56 (1960). The bill was referred to the Senate Committee on the Judiciary, *see* 106 CONG. REC. 10,232 (1960), where the bill apparently died without further action. The bill proposed no change in § 8(a)(3) of the NLRA, presumably because that section addresses discriminatory behavior rather than the scope of the duty to bargain and the corollary scope of matters over which unions may strike free of federal judicial interference.

414. H.R. 10,144, 87th Cong., 2d Sess. § 5(a) (1962); H.R. 405, 88th Cong., 1st Sess. § 5(a) (1963). For a discussion of the bills, *see supra* note 390.

415. For a discussion tracing the lineage of the substantive provisions of Title VII to earlier labor statutes, demonstrating the 88th Congress' awareness of this pedigree and its expectation that Title VII would be interpreted in light of precedents arising under those statutes, *see supra* notes 389-391.

416. *See, e.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess. 111 (1963) (separate minority views of Reps. Poff and Cramer) ("[w]e do not believe that the American people want to make this departure in the functional aspects of the American free enterprise system"), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2478, *and in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2111; 110 CONG. REC. 1620 (1964) (remarks of

so has been discounted by the courts in construing the statute. Seven members of the House Judiciary Committee majority, however, in reporting the original version of Title VII of the Civil Rights Act, made one such, oft-quoted statement: "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible."⁴¹⁷ When the Court is asked to adopt a narrow construction of Title VII's antidiscrimination prohibitions, this statement often is trotted out, usually without setting it in context.

In context, however, the statement is a response to opponents who charged that the bill would lead to racial quotas in the workplace,⁴¹⁸ and to pervasive government interference with the day-to-day minutiae of hiring, promotion, assignment, and other personnel decisions.⁴¹⁹ Seven members of the House Judiciary Committee answered contentions of this sort by saying, in effect: the government will only intervene if the decision, policy or practice involves discrimination on the basis of race, sex, religion or national origin. *Absent taint of discrimination*, employers will retain their full freedom in managing their businesses. A review of the text from which the excerpt is taken demonstrates this:

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, noth-

Rep. Abernethy) (Title VII would reach and control "the most remote corner of our social structure and virtually all of our economic structure"), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3286.

417. H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963) (additional views of Reps. McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias & Bromwell), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2516, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2150. *See, e.g.*, *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979) (quoting the cited language).

418. H.R. REP. NO. 914, 88th Cong., 1st Sess. 69 (1963) (minority report) (farmers would be required to racially balance their workforces), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2438, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2069; H.R. REP. NO. 914, 88th Cong., 1st Sess. 72-73 (1963) (minority report) (workers would be denied jobs because they were not of the race needed to attain racial balance), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2441, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2072-73; *see also* 110 CONG. REC. 9881-82 (1964) (remarks of Sen. Allott) (proposing an antiquota amendment, the substance of which was later incorporated in the Mansfield-Dirksen compromise package as § 703(j), in response to these fears), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3187.

419. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 64-65 (1963) (minority report), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2433, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2064-65; 110 CONG. REC. 7770 (1964) (remarks of Sen. Tower), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3252-53.

ing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with *except to the limited extent that correction is required in discrimination practices*. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualifications.⁴²⁰

Recent Supreme Court analysis appears to understand similarly the legislative history.⁴²¹

Despite opponents' expressed fears about Title VII producing extensive governmental intrusion into business practices, the prohibitory language in the statute remained unchanged throughout the Congressional debates over the bill. The language eventually enacted in section 703(a) of Title VII was taken from H.R. 405,⁴²² which in turn was drafted using as a template H.R. 10,144, the Equal Employment Opportunity Act of 1962, which had been reported by the House Education and Labor Committee but had failed to clear

420. H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963) (emphasis added), reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2516, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2150. See also 110 CONG. REC. 11,848 (1964) (memorandum explaining H.R. 7152, prepared by Sen. Humphrey) ("[e]mployers would continue to be free to establish their own job qualifications provided they do not discriminate because of race . . ."), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3259.

421. See, e.g., *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786 (1989) (plurality opinion) ("To say that an employer may not take gender into account is not, however, the end of the matter The other important aspect of the statute is its preservation of an employer's remaining freedom of choice") (emphasis added); *id.* at 1787 (plurality opinion) ("The central point is this: while an employer may not take gender into account in making an employment decision . . . it is free to decide against a woman for other reasons.").

422. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 45, 57 (1963) (additional views of Rep. Meador), reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2414, 2426, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2045, 2057; H.R. REP. NO. 914, 88th Cong., 1st Sess. 87 (1963) (minority report), reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2455, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2086-88; H.R. REP. NO. 914, 88th Cong., 1st Sess. 117-19 (1963) (additional views of Rep. Cramer), reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2483-85, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2117-19; see also Gold, *supra* note 342, at 489-90 & n.214, 526-27; Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 692-93 & n.30 (1980); Vaas, *supra* note 383, at 435.

the House Rules Committee.⁴²³

The portion of the bill ultimately enacted as Title VII of the Civil Rights Act was amended repeatedly.⁴²⁴ The Mansfield-Dirksen Senate substitute bill and other amendments adopted in the Senate made several changes designed to meet the objections of those contending that the bill was an undue incursion into management's prerogatives.⁴²⁵ With the exception of Representative Smith's amendment in the House, however, which added sex to the bases upon which discrimination was prohibited under Title VII,⁴²⁶ no changes were made in the prohibitory language, which was enacted as section 703(a).⁴²⁷ When Congress responded to concerns about hamstringing management or trade unions, it enacted specific language addressing the particular concern. Responding to opponents' contentions that Title VII would vitiate seniority systems, the Senate adopted section 703(h), limiting the application of the statute to bona fide merit or seniority provisions.⁴²⁸ After debate grew

423. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 57 (additional views of Rep. Meador), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2426, and in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2057; 110 CONG. REC. 2551 (1964) (remarks of Rep. Powell); *see also* Gold, *supra* note 342, at 572; 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 9. Compare H.R. 10,144, 87th Cong., 2d Sess. § 5(a) (1962) and H.R. 405, 88th Cong., 1st Sess. § 5(a) (1963) with H.R. 7152, 88th Cong., 1st Sess. § 704(a) (1963) and Title VII, § 703(a), Pub. L. No. 88-352, 78 Stat. 255 (1963). H.R. 10,144, in turn, appears to be the lineal descendant of a 1950 bill, modeled, in turn, on a 1945 New York State statute. *See supra* note 390.

424. See 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 10. *See generally* Gold, *supra* note 342, at 525-26; Vaas, *supra* note 383, at 437-56. The unusual legislative history of Title VII is spelled out in detail in Vaas, *supra* note 383.

425. See 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 10; Vaas, *supra* note 383, at 445-50.

426. See 110 CONG. REC. 2577-84, 2718, 2720-21 (1964), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3213-22, 3229, 3230-32; *see also* Vaas, *supra* note 383, at 439, 441-42.

427. See 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 1004; 110 CONG. REC. 12,721 (1964) (remarks of Sen. Humphrey), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3003; 110 CONG. REC. 12,812, 12,818 (1964) (annotated copy of House bill submitted by Sen. Dirksen showing changes created by Mansfield-Dirksen Senate substitute; indicating no changes except renumbering in provision that became § 703(a)), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3017, 3050; *see also* 110 CONG. REC. 16,001 (1964) (Rep. McCulloch's comparative analysis of House bill and Senate substitute) (showing no differences in House and Senate versions regarding substantive prohibition against discrimination enacted as § 703(a)), *reprinted in* 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3024. *See generally* Gold, *supra* note 342, at 489-91 (outlining sequence of legislative events and noting lack of changes in substantive prohibitions); Vaas, *supra* note 383, at 437-56 (discussing all amendments adopted).

428. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 350-55

heated regarding personnel tests,⁴²⁹ the Senate added the Tower amendment to section 703(h), permitting the use of standardized tests not designed, intended or used to discriminate.⁴³⁰ To counter opponents' allegations that Title VII would require employers to create and maintain racially balanced workforces, the Mansfield-Dirksen substitute added section 703(j), expressly disclaiming such a statutory purpose.⁴³¹ Indeed, the Court has characterized section 703(j) as embodying a compromise preserving managerial freedom from excessive encroachment by those enforcing Title VII: Section 703(j) "was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue 'Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance.'" ⁴³² The legislative discussion of management prerogatives, then, provides no basis for a limiting construction of section 703(a), the provision that remained absolutely unaltered despite these expressions of congressional concern. When the debating was over, Congress had adopted no amendment addressing capital redeployment, and passed unmodified the prohibitory language intended to forbid discrimination "in any phase of employment."⁴³³

The broad interpretation of the scope of Title VII's prohibitory language is cemented by the legislative history of the amendments

(1977) (reviewing pertinent legislative history); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 758-62 (1976) (same).

429. See, e.g., 110 CONG. REC. 9024-25, 11,251, 13,492-504 (1964) (remarks of Sen. Tower), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3133-60; 110 CONG. REC. 13,504-05 (1964) (remarks of Sens. Case, Humphrey, Lausche & Miller), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3160-62.

430. See 110 CONG. REC. 13,724 (1964), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3163.

431. See 110 CONG. REC. 12,723 (1964) (explanatory statement of Sen. Humphrey regarding Senate substitute bill), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3005.

432. *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979) (quoting 110 CONG. REC. 14,314 (1964) (remarks of Sen. Miller)). The Court has engaged in somewhat similar reasoning regarding § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1982), governing remedies, which the Court has interpreted as preserving managerial prerogatives regarding affirmative action vis-à-vis judicial encroachment. See *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519-21, 519 n.11 (1986) (collecting pertinent legislative history). Section 706(g), however, was amended while the bill was still in the House, see 110 CONG. REC. 2567-71 (1964), and was not a part of the bipartisan compromise required to enact the Civil Rights Act over the Senate filibuster. See Vaas, *supra* note 383, at 438.

433. 110 CONG. REC. 16,001 (1964) (Rep. McCulloch's comparative analysis of House bill and Senate substitute), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3024.

to Title VII contained in the Equal Employment Opportunity Act of 1972.⁴³⁴ The 92d Congress adhered to the 88th Congress' broad view of the purposes of Title VII: "The avowed purpose of Title VII is the elimination of all vestiges of employment discrimination in the country," proclaimed Senator Humphrey during the debate.⁴³⁵ In 1972 Congress displayed greater sensitivity to the depth of the discrimination problem it was attempting to eradicate:

During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. . . .

434. Equal Employment Opportunity Act, Pub. L. No. 92-261, 86 Stat. 103 (1972). It is always hazardous to rely on subsequent legislative history to interpret a previously enacted statute. Here, however, resort to the 1972 amendments is supported not only by logic, but by precedent. The 1972 amendments enlarged the EEOC's enforcement powers and greatly expanded Title VII coverage by lowering the minimum number of employees necessary to bring an employer within the statute and by adding state and local government employment coverage. See H.R. CONF. REP. NO. 899, 92d Cong., 2d Sess. 15-21 (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2179, 2179-85, and in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1835-41. See generally Rutherglen, *supra* note 422, at 713-20; Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 847-80 (1972). Congress expressed its desire that

in any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it is assumed that the present case law as developed by the courts shall continue to determine the applicability of Title VII. It is also the intent of this legislation to remedy deficiencies in the current law.

118 CONG. REC. 7166, 7564 (1972) (section-by-section analysis of the bill as adopted in conference), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1844. The model of an ongoing dialogue between Congress and the Court applies particularly well to Title VII, because the legislative history in 1972 repeatedly endorses the Court's very expansive construction of the statutory prohibitions contained in the 1964 enactment. The Court has relied on 1972 legislative history in interpreting portions of the statute not materially altered from the 1964 enactment, particularly with regard to disparate impact theory, see *Connecticut v. Teal*, 457 U.S. 440, 447-49, 447 n.8 (1982), and with regard to affirmative action. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979). But see *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989) (effectively overruling *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as to disparate impact burdens of proof, despite 1972 legislative history); *id.* at 2129 & n.9 (Stevens, Brennan, Marshall & Blackmun, JJ., concurring) ("Congress has declined to act—as the Court now sees fit—to limit the reach of this 'disparate impact' theory . . . ; indeed, it has extended its application," citing other discrimination statutes). Cf. *Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2861 (1989) (the "interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute," declining to construe ADEA provision contained in original, 1967 enactment in light of legislative history of 1978 amendments, where language in question was not modified).

435. 118 CONG. REC. 590 (1972), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 673.

Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . .⁴³⁶

Senator Stevenson emphasized the likelihood that discriminatory practices were mutating into new forms that were harder to detect and combat. He described the purpose of both the original legislation and the proposed amendments as being "to effectively combat the subtle yet vicious forms of employment discrimination we can expect to encounter in the 1970's."⁴³⁷ In sum, it was the intent of the 92d Congress to preclude all practices, of whatever sort, involving discrimination on the basis of race in any aspect of the employment relationship.

The minority report on the 1972 bill as originally proposed, which advocated an approach to strengthening enforcement⁴³⁸ that ultimately won congressional approval,⁴³⁹ predicated its argument on a premise fundamentally different from the premise attributed to Congress in enacting the labor laws: ending all forms of discrimination in employment is an absolute imperative.⁴⁴⁰ This policy may

436. H.R. REP. NO. 238, 92d Cong., 1st Sess. 8 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2143-44, and in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 68. Virtually identical language appears in the Senate report on the 1972 amendments to Title VII, *see* S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 414, and in Sen. Williams' remarks, 118 CONG. REC. 294 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 584. *See also* 118 CONG. REC. 590 (1972) (remarks of Sen. Humphrey) ("employment discrimination is, in most instances, the result of deeply ingrained practices and policies which frequently do not even herald their discriminatory effects on the surface [M]uch of what we previously accepted as sound employment policy does, in effect, promote and perpetuate discriminatory patterns which can be traced back to the Civil War and earlier"), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 671.

437. 118 CONG. REC. 2394 (1972) (remarks of Sen. Stevenson), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1290; *see also* S. REP. NO. 412, 92d Cong., 1st Sess. 19 (1971) ("recognizing and solving the more subtle, institutional forms of discrimination"), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 428.

438. H.R. REP. NO. 238, 92d Cong., 1st Sess. 58-62 (1971), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2168-71, and in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 118-22.

439. *See* Rutherglen, *supra* note 422, at 713-19 (outlining legislative process and its results); Sape & Hart, *supra* note 434, at 838-45 (outlining both House and Senate legislative compromises leading to adoption of EEOC court enforcement authority in lieu of NLRB-like cease-and-desist and other administrative powers); *id.* at 862-80 (outlining Title VII procedures under the amended statute).

440. H.R. REP. NO. 238, 92d Cong., 1st Sess. 62 (1972), *reprinted in* 1972 U.S. CODE

not be balanced against any other.⁴⁴¹

This legislative history suggests that Congress intended that Title VII's prohibition against discriminatory employment practices not be judicially balanced against other objectives, such as entrepreneurial freedom or competitiveness. Alternatively, one could argue that Congress itself struck the balance, precluding all forms of discrimination on the basis of race, sex, religion, and national origin, but otherwise preserving the employer's freedom to run the business.⁴⁴² The legislative history of Title VII strongly suggests that Congress wished the antidiscrimination language to be construed broadly to reach all sorts of practices which might impede the attainment of full equal employment opportunity. Unlike the NLRA, which *First National Maintenance* interprets as requiring the NLRB and courts to balance between the collective bargaining mandate and entrepreneurial freedom,⁴⁴³ Title VII's legislative history interdicts similar judicial balancing. The broad policy sentiments embodied in the 1972 legislative history plainly support application of Title VII to capital redeployment decisions.

The legislative history of the 1972 amendments reflects a degree of congressional awareness that Title VII could be applied to capital redeployment decisions. Representative Drinan expressed fear that transfers of business operations from city to suburbs was

CONG. & ADMIN. NEWS 2171, and in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 122.

441. As the minority report stated:

The problem Title VII seeks to correct is not one susceptible to the kind of policy balancing that is usual in the administration of law regulating utilities or other situations involving competing interests. Racial discrimination does not occupy the status of an 'interest' under our system of law. It is a grave injustice which should be eliminated in as quick and efficient a manner as possible.

Id.; see also 117 CONG. REC. 31,970 (1972) (remarks of Rep. Railsback) ("[Q]uasi-judicial bodies typically must resolve competing interests and it is my opinion that employment discrimination is not of such a nature as to be termed an 'interest' under our system"), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 221. *But cf.* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1786-88 (1989) (plurality opinion) ("Title VII's balance between employee rights and employer prerogatives" which is "evident from the statute itself and from its history, both in Congress and this Court," preserves the employer's freedom to make employment decisions based on factors other than race, sex, religion or national origin; employer may therefore avoid liability, despite proof of discriminatory motive, if employer shows it would have made the same decision absent consideration of the prohibited factor).

442. See also *supra* notes 377-378, 416-421 and accompanying text.

443. 452 U.S. 666, 678-79 (1981). Even before *First Nat'l Maintenance*, some commentators viewed *Fibreboard* and *Darlington* as incorporating a test balancing the interests of labor and management into the application of §§ 8(a)(3) and (5) of the NLRA to plant closings. See, e.g., Schwarz, *supra* note 202, at 85-86, 99.

leading to "incendiary polarization" of the races.⁴⁴⁴ He argued that in cases applying Title VII to plant migrations from central cities to the suburbs, settlement without litigation was imperative.⁴⁴⁵ Therefore, he urged, the EEOC's enforcement capabilities should be strengthened.⁴⁴⁶ An administrative enforcement process modeled on the NLRB's would facilitate settlements, avoiding disruptions to employment relationships or to business operations, Representative Drinan contended.⁴⁴⁷

Representative Ashbrook turned the argument around. He opposed giving EEOC any additional enforcement authority and argued that, because of EEOC's overreaching, it did not deserve expanded powers. As his prime example of EEOC overreaching, Representative Ashbrook cited an EEOC internal memorandum which advocated that plant relocations from inner city ghettos to mostly white suburbs be challenged as unlawful under Title VII.⁴⁴⁸

The Senate also was advised of the EEOC memorandum, this time by Senator Allen, arguing against passage of the House bill provisions granting EEOC administrative enforcement powers. Senator Allen inveighed against "a diabolical scheme by present and former EEOC attorneys to snuff out freedom of movement by business"⁴⁴⁹ by requiring a company to prove business necessity for a

444. 117 CONG. REC. 31,976 (1971), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 237.

445. *Id.*

446. *Id.*

447. . . . [T]he already unmistakable distress of our major cities—some have called it agony—is being aggravated by a major new threat with obvious implications for the EEOC and H.R. 1746: the increasing migration of large and important companies to suburbia, leaving minority workers trapped, without jobs or decent housing, in ghettos.

* * *

In the case of these large urban corporations, as well as in the area of employment discrimination generally, it is important not to disrupt seriously the employer-employee relationship or operations.

Id.

448. 117 CONG. REC. 32,101 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 287-88. Rep. Ashbrook inserted into the record the full text of the source of his information about the EEOC memorandum, an editorial from the Indianapolis News of Sept. 7, 1971. As the Indianapolis News and Rep. Ashbrook described the memorandum, EEOC attorneys had recommended that EEOC handle cases involving plant relocations by requiring the employer to prove that its decision to relocate was free of discriminatory purpose or effect, and instead was made solely because of the company's economic or competitive position. *Id.*

449. 118 CONG. REC. 4924 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1731. The article is quoted in full, 118 CONG. REC. 4924 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1732-33. See also 118

plant relocation that adversely affected minority workers.⁴⁵⁰ The EEOC memorandum was Senator Allen's primary argument for refusing to give EEOC "coercive and oppressive," NLRB-like enforcement powers,⁴⁵¹ and he caused the full text of the memorandum to be included in the *Congressional Record*.⁴⁵² The legislative record also includes the full text of an equivocal disclaimer by then-Chairman Brown of the EEOC, explaining that the memorandum was an internal working paper and did not represent formally adopted EEOC policy. Chairman Brown added that the issue was too complex to be covered thoroughly in a short memorandum.⁴⁵³

One cannot draw much of a conclusion from this vignette in the legislative history. After Senator Allen's diatribe, the subject of the EEOC memorandum, in particular, and applicability of Title VII to capital redeployment decisions, in general, was dropped entirely; neither supporters nor opponents of the pending legislation mentioned the subject thereafter.⁴⁵⁴ One can nevertheless say, at a minimum, that the 1972 Congress was aware that EEOC or the courts could apply the prohibitions of Title VII to plant relocations. The 92d Congress enacted no amendment expressing any contrary intent; no senator or representative proposed one.

The legislative history of Title VII confirms the understanding that redeployment decisions that are intended to deny or have the effect of denying black workers equal employment opportunity, fall within the scope of section 703(a) prohibitions. Based on identical statutory language, similar statutory purposes, and broadly similar

CONG. REC. 4925 (1972) (remarks of Sen. Allen), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1734.

450. See 118 CONG. REC. 4926 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1737.

451. 118 CONG. REC. 4924, 4925, 4927-29 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1731, 1734, 1742.

452. 118 CONG. REC. 4925 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1735. The memorandum appears at 118 CONG. REC. 4925-27 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1735-39.

453. 118 CONG. REC. 4924-25 (1972), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1733.

454. As eventually passed by Congress, the 1972 amendments gave EEOC greater enforcement authority than desired by opponents such as Rep. Ashbrook, 118 CONG. REC. 7573 (1972) (Rep. Ashbrook voting against the final bill approved in conference), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1874, and Sen. Allen, 118 CONG. REC. 7170 (1972) (Sen. Allen voting against the final bill approved in conference), *reprinted in* 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1854. Proponents of the original form of the legislation which would have endowed the EEOC with NLRB-like administrative adjudicatory authority, however, had to settle for a compromise permitting EEOC to litigate in federal district court.

legislative history, the ADEA likewise should be held to proscribe discriminatory capital redeployment decisionmaking.

The ADEA legislative history and its subsequent amendments, in many respects, mirrors the history of Title VII. The prohibitory language of section 4(a) of the ADEA is taken word for word from Title VII as originally enacted. Consequently, the Court has concluded that Congress intended a parallel construction of the ADEA and Title VII prohibitions of employment discrimination.⁴⁵⁵ Like Title VII, the prohibitory language of section 4(a) of the ADEA was not altered in the course of enactment, suggesting that unless a statutory defense is applicable, there should be no judicial balancing of employer interests against those of older workers. The defenses and amendments embody all the balancing the statutory framers deemed necessary.

In enacting the ADEA, as in enacting Title VII, Congress had concerns about preserving employer interests to the extent consistent with eliminating age discrimination unrelated to an employee's ability to perform the job. Senator Javits spelled out the ADEA legislative compromise:

We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business, and with complete fairness to the workers [A]mong those amendments were the elimination of the criminal penalty in favor of a provision for double damage in cases of willful violation; an exemption for the observance of bona fide seniority systems or retirement, pension, insurance or similar plans⁴⁵⁶

Like Title VII before it, the ADEA was designed to balance employer interests against the antidiscrimination objection only in the sense that employers' freedoms to make decisions regarding their

455. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(interpretation of Title VII § 703(a)(1) "applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in *haec verba* from Title VII' " (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978))); see also *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("There are important similarities between the two statutes . . . , both in their aims — the elimination of discrimination from the workplace — and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in *haec verba* from Title VII"); cf. *Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2868-69 (1989) (construing ADEA defense as limitation on scope of prohibition, relying on parallelism with Title VII).

456. 113 CONG. REC. 31,254 (1967), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 145; see also 113 CONG. REC. 34,746 (1967) (remarks of Rep. Daniels), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 157.

workers were preserved so long as they did not involve age discrimination. Like Title VII, this compromise was embodied in a series of procedural amendments as well as in substantive defenses designed to make clear that no claim will be made out absent discrimination; more rarely, even age-based actions will be lawful where age is demonstrably, integrally linked to ability to perform the duties of the job. A special defense also was added to address the higher costs of certain fringe benefit plan coverage for older workers. Representative Daniels explained,

The point should be made, however, that the bill takes into full consideration the problems and interests of employers. It allows for situations in employment where age is a bona fide occupational qualification for a particular job. It also takes account of the problems of employers in the field of pension and other benefit plans. The bill would permit the hiring of older workers without requiring that they necessarily be included in all employee benefit plans. This provision is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits.⁴⁵⁷

Like Title VII, the prohibitory language of section 4(a) of the ADEA was not altered in the course of enactment. Unless a statutory defense is applicable, no judicial balancing of employer interests against those of older workers is proper. Congress balanced the competing interests, and the ADEA defenses and amendments embody all the balancing Congress deemed appropriate. The ADEA, like Title VII, therefore should be interpreted to prohibit discriminatory capital redeployment decisionmaking.

Congress has expressed sentiments favoring broad remedial construction of the ADEA, much like those in the Title VII legislative history. The preamble to the statute spells out Congress' assessment of the problem and its objectives in devising a legislative solution. After finding, *inter alia*, that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice,"⁴⁵⁸ Congress concluded that "[i]t is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age

457. 113 CONG. REC. 34,746 (1967), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 157. See also *id.* (remarks of Rep. Olsen) (characterizing the procedures and defenses accompanying the strong prohibition as providing a "balanced approach").

458. 29 U.S.C. § 621(a)(2) (1982).

discrimination in employment."⁴⁵⁹ "To sum up, this is a bill to give every American the opportunity to be equally considered for employment and promotional opportunity," explained the floor manager, Senator Yarborough, in his opening statement about the bill.⁴⁶⁰

Like the Congress that enacted Title VII, the 90th Congress displayed its intent that the ADEA preclude subterfuge and covert discrimination aimed at defeating realization of the statutory goals. This congressional purpose is evident most strongly in the wording of the amendment, enacted as part of section 4(f)(2), that permits employers to discriminate on the basis of age in the course of observing the terms of a "bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter"⁴⁶¹ Congress was afraid that absent an exception permitting employers to exclude older employees from these benefits, employers might "actually be discouraged from hiring older workers. At the same time, [Congress wished to make it] clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers."⁴⁶²

In 1978, when Congress amended the ADEA expressly to prohibit mandatory retirement, it reiterated its concern that the Act be interpreted to preclude circumvention of the statutory protections for older workers' jobs. Senator Javits, for example, inveighed against the Court's contrary interpretation of the original language of section 4(f)(2) of the ADEA as permitting "wholesale evasion of the act's protections."⁴⁶³ Representative Waxman explained, "[I]t is the intent of this Congress to prevent both open and subtle forms of age discrimination. Exceptions only should be applied in the strictest sense and only with full justification and cause."⁴⁶⁴

Throughout the development of age discrimination legislation, there are a few mentions of the problems imposed on workers by job loss and career interruption caused by factors such as the eco-

459. *Id.* § 621(b).

460. 113 CONG. REC. 31,253 (1967), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 144.

461. 29 U.S.C. § 623(f)(2) (1982).

462. 113 CONG. REC. 31,255 (1967) (remarks of Sen. Javits), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 146.

463. 124 CONG. REC. 8218 (1978), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 539.

464. 124 CONG. REC. 7888 (1978) (remarks of Rep. Waxman), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 535.

conomic cycle, automation, plant relocations, and mergers. The focus of these references, however, is on the improbability of subsequent reemployment for older workers who lose their jobs in mass layoffs stemming from such causes.⁴⁶⁵ Until passage of the ADEA, a great many employers had arbitrary age limits above which they would not even consider an older worker for hire. These arbitrary hiring rules preoccupied Congress during the 1967 debates about enactment of the ADEA.⁴⁶⁶

The thrust of Congress' purpose, both in the original enactment of the ADEA and in the 1978 amendments,⁴⁶⁷ might be summarized as follows: To end policies and practices that unfairly disadvantage older workers as a group, while upholding the em-

465. See, e.g., 113 CONG. REC. 34,744 (1967) (remarks of Rep. Pucinski) (older workers who lose their jobs because, *inter alia*, of automation, business closure or relocation, are shocked to find themselves excluded from consideration for new jobs because of their age), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 155; 112 CONG. REC. 20,822 (1967) (statement for the record of Sen. Murphy) (same), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 53; see also, e.g., SENATE SPECIAL COMMITTEE ON AGING, 95TH CONG., 1ST SESS., THE NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT: WITH SPECIAL REFERENCE TO MANDATORY RETIREMENT POLICY 16-17 (Comm. Print 1977) (similar discussion in legislative history of ADEA amendments prohibiting mandatory retirement and raising upper age limit for statutory coverage from age 65 to age 70), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 279, 296-97; see also 110 CONG. REC. 13,491 (1964) (remarks of Sen. Long, supporting unsuccessful proposed amendment to add age to list of bases of prohibited discrimination in bill which was enacted as Title VII) ("In the big industrial plants in my State, much automation is being used. Those companies do not want to employ anyone if he is over 40, because they do not want to be stuck with the retirement bill Those are the people who are being discriminated against more and more."), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 3173; H.R. REP. NO. 1370, 87th Cong., 2d Sess. 3 (1962) (committee report on H.R. 10144, 87th Cong., 2d Sess., a precursor to both Title VII and the ADEA with identical prohibitory language) (older workers' careers are increasingly disrupted by automation, plant movement, mergers, and the economic cycle, leading to underutilization of older workers in the American workforce), reprinted in 1964 TITLE VII LEGISLATIVE HISTORY, *supra* note 345, at 2157.

466. See *Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2867 (1989) ("the primary purpose of the bill . . . [is to foster the nondiscriminatory] hiring of older workers" (quoting S. REP. NO. 723, 90th Cong., 1st Sess. 4 (1967); H.R. REP. NO. 805, 90th Cong., 1st Sess. 4 (1967))).

467. After the 1967 passage of the ADEA and its 1974 extension to public sector and smaller employers, advocates of equal employment rights for older workers found their next major battle front to be mandatory retirement, along with extending the ADEA's protections beyond age 65. The 1978 amendments to the age discrimination law were intended to close the mandatory retirement loophole, which Congress regarded as an erroneous, judicially-created escape hatch from the statutory prohibition against age discrimination in employment. See, e.g., 124 CONG. REC. 8218 (1978) (remarks of Sen. Javits) ("This exception was not intended to permit the wholesale evasion of the act's protections by means of involuntary retirement provisions contained in employee benefit plans"), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 539.

ployer's entitlement to make non-age-based, individualized assessments of the abilities of older employees, even where it means their discharge, involuntary retirement, or denial of hire.⁴⁶⁸ This purpose is evident especially in statements throughout the 1978 legislative history suggesting that mandatory retirement is just a device to spare lazy, inefficient administrators and managers the burden of individually assessing the competence of older employees the same way personnel officers rate younger workers' job performance.⁴⁶⁹

468. The preamble to the ADEA emphasizes this central statutory objective. See *supra* text accompanying notes 458-459 (quoting pertinent statutory language), see also, e.g., S. REP. NO. 493, 95th Cong., 1st Sess. 2 (1977) (One of the three purposes behind the ADEA is "to promote employment of older persons based on their ability rather than age . . ."), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 505, and in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 435; S. REP. NO. 493, 95th Cong., 1st Sess. 3 (1977) ("[t]he committee believes that as a matter of basic civil rights people should be treated in employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about race, sex, or age"), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 506, and in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 436; 113 CONG. REC. 34,740 (1967) (statement of Rep. Perkins) (the ADEA "in fact, is more than a bill to bar age discrimination. It is a bill to promote employment of middle aged persons and older persons based on their ability"), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 151; 113 CONG. REC. 34,746 (1967) (statement of Rep. Olsen) ("a statement of national policy to promote the employment of older workers on the basis of their ability alone has long been overdue"), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 157; 113 CONG. REC. 34,747 (1967) (statement of Rep. Dent) ("The bill recognizes fully the legitimacy of employment decisions, practices, and arrangements which take account of the facts—where they are facts—of the relationship between age and capacity. If someone cannot perform his or her job, the bill provides no relief. . . ."), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 158; 113 CONG. REC. 34,747 (1967) (the bill's "essential purpose" is "the promotion of employment of older workers based on their ability"), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 158. The legislative history of the 1978 ADEA amendments contains similar expressions of Congressional sentiment. See, e.g., 123 CONG. REC. 34,294 (1977) (statement of Sen. Williams) (workers' basic civil rights require that they be treated in employment on the basis of their individual abilities rather than their race, sex or age), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 481.

The reasonable factor other than age (RFOTA) exception, enacted in § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) (Supp. V 1987), exemplifies Congress' thrust toward mandating individual, non-age based, merit-based assessment of older workers. See, e.g., 113 CONG. REC. 31,253 (1967) (opening statement of Sen. Yarborough, explaining the defense) ("Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply."), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 144. See also, e.g., 123 CONG. REC. 29,008 (1977), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 405 (colloquy between Reps. McClory and Hawkins).

469. See, e.g., 123 CONG. REC. 34,305 (1977) (statement of Sen. Church), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 492; 123 CONG. REC. 34,306 (1977) (statement of Sen. Church, causing to be reprinted in the record a column by Mark Rosenblum which had appeared in the New York Times, making a similar argument), reprinted in ADEA LEGISLATIVE HISTORY, *supra* note 387, at 493.

Plant closings and other forms of capital redeployment may be used deliberately to rid the company of concentrated groups of older workers, a pretext for discrimination much like compulsory retirement often was. Transfers of operations, subcontracting, and closures, like mandatory retirement, are frequently the personnel administrator's shortcut substitute for individual evaluation of workers when productivity in a plant gets too low and wage and benefits costs average too much. It would comport best with the intent of the Congresses that initially enacted Title VII and the ADEA, as well as the Congresses that later amended each of those statutes, to interpret the prohibitory language of both laws to outlaw discriminatory decisionmaking about capital redeployment directly affecting workers' jobs.

Like the Title VII history, the ADEA history refutes any suggestion that a balance should be struck in favor of employers' entrepreneurial and property interests at the expense of older employees' jobs. Senator Javits' remarks about the policy equation underlying the vote to eliminate mandatory retirement summarize the congressional attitude toward balancing managerial interests against employees' civil rights:

I hope that the Senate is now prepared to promote opportunity for older workers by altering what has become an acceptance of the institutional value of efficiency as having primacy over what should be our primary individual value—that of permitting each person to continue working past age 65 as a matter of individual choice and ability.⁴⁷⁰

The language of the antidiscrimination laws, the legislative history, and the statutory purposes, all militate strongly in favor of interpreting the ADEA and Title VII to prohibit discriminatory capital redeployment decisions. The arguments to the contrary appear weak in light of the minor incursion into entrepreneurial control entailed and in view of the illegitimacy of any employer interest in freedom to discriminate on the basis of race or age in deciding where or how to conduct its operations. The prohibitory language of Title VII and ADEA should be construed as forbidding employers to discriminate because of the race or age of their actual or potential employees in decisions about site selection, plant relocation, subcontracting, and consolidation of operations.

470. 123 CONG. REC. 34,297 (1977), *reprinted in* ADEA LEGISLATIVE HISTORY, *supra* note 387, at 484.

III. NEW WORK SITES

The discussion regarding redeployment of existing facilities applies as well to new site selection. Some special considerations, however, arise from the lack of an incumbent workforce and from the specific nature of the capital redeployment at issue in a facility start-up. Section 703(a)(2) of Title VII speaks only of "employees" or "applicants."⁴⁷¹ Where no facility yet exists, there are no current "employees" whose status as such has been otherwise adversely affected. Perhaps there are also no "applicants" for the hypothetical plant. If "applicants" includes those who would have applied had the plant been built in their town, such plaintiffs still must show that applicants were classified in such a way as to tend to deprive them of employment opportunities or otherwise to adversely affect their status as employees.

In *International Brotherhood of Teamsters v. United States*⁴⁷² the Court accepted as constructive job applicants "discouragees," black employees who were deterred even from applying for transfer to

471. The ADEA language was taken from Title VII as originally enacted, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (1964), prior to the 1972 clarifying amendment adding the word "applicant." Pub. L. No. 92-261, § 8(a), 86 Stat. 103, 109 (1972); see 118 CONG. REC. 7161, 7169 (1972) (conference report section-by-section analysis of H.R. No. 1746), reprinted in 1972 TITLE VII LEGISLATIVE HISTORY, *supra* note 87, at 1843, 1849. This distinction is of little import for several reasons. First, in adding the word "applicant" in 1972, Congress characterized itself as merely clarifying its pre-existing intent. See *supra* note 99. The ADEA's prohibitions, despite the absence of the word "applicant," therefore should be construed identically to Title VII's prohibitions. Second, the Title VII language was itself modeled on NLRA language, which speaks only of "employees," but has long been held to encompass applicants and discharged workers. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-88 (1941) (construing § 8(3) of the NLRA to include applicants denied hire, despite language in the remedial provision of the Act, § 10(c), providing, *inter alia*, for "such affirmative action, including reinstatement of employees . . .") (emphasis added). Third, even if age discrimination claims regarding site selection could not be advanced pursuant to § 4(a)(2) of the ADEA, they might well be cognizable under § 4(a)(1) of the statute, which refers to discrimination against "individuals." See *infra* notes 483-492 and accompanying text.

In any event, most age discrimination issues will involve an incumbent workforce; few site selection cases will raise ADEA claims. When a plant lays off junior workers and does little hiring for several years, the average age of the workers at the plant often becomes higher than that in the community, hence higher than the fruits of nondiscriminatory hiring (without priority for incumbent employees) at a new plant. A decision to close one plant and start another therefore frequently produces age discrimination issues. On the other hand, the difference in the average age among the potential workforce in one geographical location versus another will seldom vary greatly enough to be a major factor in selecting a new site. Because instances of age discrimination in new site selection decisions are rare, the discussion in this article will focus on the Title VII race discrimination context.

472. 431 U.S. 324 (1977).

certain all-white positions because they reasonably believed application to be futile.⁴⁷³ The *Teamsters* opinion recognized "discouragees" as discriminatees, victims of unlawful discrimination, because the discouragees were potential applicants who would have applied but for the employer's discriminatory practices.⁴⁷⁴ In site selection cases, one could analogously characterize as discriminatees those nonemployee, potential applicants who would have applied had the employer located the plant in their town.

The nature of the challenged practice is quite different in the site selection situation, as compared to *Teamsters*, in which the employer hired minorities as city drivers but discriminatorily refused to hire, assign or transfer minorities to over-the-road truck driver positions. Moreover, the workers in *Teamsters* were incumbent employees whose "status as employees" was affected adversely by the employer's policies. In the site selection setting, the potential applicants have no actual "status as employees" that is injured; it is their potential "status as employees" that is precluded by the employer's choice of a site. Nonetheless, both the *Teamsters* fact pattern and the site selection situation involve allegedly racially discriminatory employer policies that were designed to dissuade, and had the effect of dissuading, black workers from applying for open jobs.

In spite of the difficulties, the courts should interpret expansively the employment discrimination term "applicants" to include workers prevented from applying because of the employer's discriminatory redeployment policy. Employers whose discrimination is the most blatant and notorious, who create the most obvious and artificial hiring barriers to discourage blacks and women from applying, otherwise would be rewarded by being least vulnerable to suit. Parallel reasoning has persuaded several lower courts to broaden the *Teamsters* holding to encompass nonemployees, discriminatorily deterred from becoming applicants for hire, as well as employees discouraged from becoming applicants for promotions.⁴⁷⁵

473. *Id.* at 363-64. See also *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2122 & n.7 (1989) (no disparate impact claim is sustainable where dearth of qualified non-white applicants is attributable to "reasons that are not petitioners' fault," but "the analysis would be different if [the shortage] was due to practices on [the employer's] part which—expressly or implicitly—deterred minority group members from applying for noncannery positions"). See generally Note, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Employment Opportunity*, 64 B.U.L. REV. 151 (1984).

474. 431 U.S. at 363-64. See also *id.* at 367 (collecting prior discouragee cases).

475. See, e.g., *Byrd v. IBEW, Local 24*, 18 Fair Empl. Prac. Cas. (BNA) 1280 (D. Md. 1977). *Byrd* challenged the racially discriminatory operation of a union hiring hall. *Id.* at 1281. Nonapplicants were precluded from joining the suit as to most skilled trades be-

The main concern about this expansive interpretation of the antidiscrimination laws is that it may open the door to vast numbers of potential plaintiffs, with attendant problems of proof, and the danger of fraud.⁴⁷⁶ However, the *Teamsters* solution would seem to translate fairly well to site selection cases and to minimize these dif-

cause of the absence of objective criteria for determining class membership. *Id.* at 1288. Nonapplicants who could demonstrate current skill in the trade were permitted to join the suit as to that particular trade. *Id.* at 1289. See also, e.g., *Domingo v. New England Fish Co.*, 28 Empl. Prac. Dec. (CCH) ¶ 32,444, at 23,942, 23,944-45 (W.D. Wash. 1981) (awarding relief to claimants who had proven that "they actually applied for the position or that they wanted to apply and would have but for the employer's discriminatory policies . . . [because they were] deterred from applying for a job by the employer's practices and that [they] would have applied had it not been for those practices"), *aff'd in part and vacated in part*, 727 F.2d 1429, 1434, 1442, 1445 (9th Cir. 1984) (affirming entitlement to relief of deterred non-applicants and easing their burden of proof on remand in light of the severity of the segregated employment conditions which presumptively discouraged non-whites from seeking "white" positions); *Thompson v. Boyle*, 499 F. Supp. 1147, 1161-62, 1171, 1176-79 (D.D.C. 1979) (finding discrimination against and awarding relief to incumbent employee discouragees discriminatorily deterred from applying for promotions), *aff'd in part and rev'd in part on other grounds sub nom.*; *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 469 F. Supp. 329, 336-39, 369, 392, 393-94 (E.D. Pa. 1978) (certifying class containing non-employee, non-union members, who were deterred from applying for referrals through union hiring hall, leaving open possibility of limiting their claims for individual monetary relief); *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982). But cf. *Rios v. Marshall*, 100 F.R.D. 395, 403-04 (S.D.N.Y. 1983) (migrant farmworkers discouraged from applying for jobs excluded from plaintiff class; administrative problems in identifying and locating such potential class members would be overwhelming).

476. Unmanageability of the class is particularly important to judges denying class certification to groups of discouragees. See, e.g., *Rios*, 100 F.R.D. at 402-04; *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74, 84 (N.D. Tex. 1979) (holding a class of nonapplicants claiming deterrence to be too indefinite to be manageable). Professor Rutherglen has noted that "[t]he problem with extending relief to nonapplicants is that, unlike present employees deterred from applying for promotions, nonapplicants are not easily distinguishable from members of the public at large." Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 52 (1983) (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 368 n.52 (1977)). *Byrd v. IBEW, Local 24*, illustrates these concerns quite well. In *Byrd*, the court was asked to certify a plaintiff class including all black applicants and all nonapplicants who would have applied had they not been discouraged from applying because they were aware of the union's racially discriminatory practices in operating its hiring hall job referral system. The court refused to certify a broad discouragee class, but did certify a separate, readily ascertainable subclass of nonapplicants who could demonstrate current skill in the trade, thereby consolidating their claims and limiting the potential size of the class. 18 Fair Empl. Prac. Cas. at 1287-89. Problems in awarding relief also may deter judges from certifying classes of discouragees, although this problem can be resolved by limiting relief, rather than precluding the cause of action entirely. See, e.g., *EEOC v. Enterprise Ass'n Steamfitters, Local 638*, 542 F.2d 579, 586-88 (2d Cir. 1976), *cert. denied sub nom.* *Rios v. Enterprise Ass'n Steamfitters, Local No. 638*, 430 U.S. 911 (1977) (denying relief to those who were deterred from applying to construction branch of labor union if not discriminated against in work referral practices); *EEOC v. Local 28, Sheet Metal Workers*, 532 F.2d 821, 832-33, 833 n.6 (2d Cir. 1976) (allowing relief to those who can

ficulties. The deterred nonapplicant would have to establish two distinct points: (1) that she would have applied for a job with the company, but for the discriminatory selection of the plant site, and (2) that the plant would have been located in her city of residence, absent discrimination.⁴⁷⁷ If the plaintiffs prevailed, the company subsequently would have the opportunity to show that any particular worker, in any event, would have been nondiscriminatorily rejected for the job.⁴⁷⁸

One way greatly to reduce the vast numbers of potential applicants would be to require plaintiffs to submit reasonably concrete proof that they would have applied for jobs with the employer had the plant been placed in their geographic area.⁴⁷⁹ Moreover, even if fears about manageability of litigation were to persuade the Court to preclude nonemployee applicants from recovering individualized relief based on antidiscrimination law claims, the statutory mandate could be partially carried out through the alternative device of suit by the EEOC. The Court could permit EEOC to sue for some forms of relief, such as an order requiring a future plant to be located in the rejected, heavily black city,⁴⁸⁰ avoiding the complexities of a class action for discriminatorily deterred nonapplicants.⁴⁸¹

Once it is accepted that "employees or applicants for employment" covered by section 703(a)(2) include those discriminatorily prevented from making application, section 703(a)(2) of Title VII appears to reach site selection claims. By its avoidance of sites surrounded by a predominantly black workforce, the employer is "limit[ing]" or "classify[ing]" his employees or applicants for employment in [a] way which would deprive or tend to deprive [black] individual[s] of employment opportunities . . . because of such individual's race," in violation of section 703(a)(2).⁴⁸²

produce testimonial evidence of their application and rejection, but denying relief to those who never applied); *see also* Note, *supra* note 473, at 188 n.177.

477. *See Teamsters*, 431 U.S. at 367-71; *see also* M. Weiss, *supra* note 12.

478. *Teamsters*, 431 U.S. at 362, 368, 369 n.53.

479. *See id.* at 371 n.58 (requiring discourages to produce specific evidence that they would have applied to transfer to over-the-road truck driver jobs had they not believed the company's discriminatory practices would have rendered application futile).

480. For a more detailed discussion about alternative forms of relief in capital redeployment discrimination cases, *see* M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13.

481. This would fulfill at least partially the compensatory and deterrent purposes of relief under Title VII. *See id.*

482. A preempted applicant by definition has no "status as an employee" for the employer to "otherwise adversely affect" in violation of § 703(a)(2), unless "status as an employee" is construed as encompassing status as applicant or potential applicant.

Section 703(a)(1) poses different construction problems. There, the statutory wording is not confined to "employees or applicants" but also reaches discrimination against "any individual." The question under subsection (a)(1), however, is whether locating the plant so as to avoid attracting many black job applicants falls within a broad construction of the words "fail or refuse to hire . . . any individual."⁴⁸³ One could then frankly characterize the site selection decision—on the basis of the purpose for which the decision is being manipulated—as an employee selection device, subject to the usual Title VII rules regarding employee selection systems.⁴⁸⁴

One alternatively might characterize the employer's action as imposing a relocation or commuting condition on black individuals, thereby "otherwise discriminat[ing] against [those] individual[s] with respect to [their] . . . terms [or] conditions . . . of employment, because of such individual[s]' race."⁴⁸⁵ There are, however, three added difficulties with this last approach. First, "terms or conditions of employment" would have to be construed to encompass location or commuting distance. This obstacle might be comparatively minor. Labor law traditionally interprets the words "terms and conditions of employment" in section 8(d) of the NLRA,⁴⁸⁶ and "terms or conditions of employment" in section 8(a)(3) of the NLRA,⁴⁸⁷ to include almost any condition imposed by management upon the worker, so long as it is related directly to work or the employment relationship.⁴⁸⁸ Employee relocation rights and conditions certainly are encompassed by that phrase,⁴⁸⁹ suggesting that location or com-

483. 42 U.S.C. § 2000e-2(a)(1) (1982).

484. The Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. 1607 (1988), embody Title VII doctrine prior to the recent decisions in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) and *Watson v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777 (1988).

485. 42 U.S.C. § 2000e-2(a)(1) (1982).

486. 29 U.S.C. § 158(d) (1982).

487. *Id.* § 158(a)(3).

488. *See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) ("The terms and conditions under which food is available on the job are plainly germane to the 'working environment'" (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring))). *See supra* notes 166-334 and accompanying text for construction of the words "terms [and/or] conditions of employment" in labor law decisions.

489. *See, e.g., cases cited supra* note 243; *see also, e.g., Lanco*, 277 N.L.R.B. 85, 96 (1985) (commutation expense payments for employees transferred with their operations to new, more remote location, constituted mandatory bargaining subject). *But cf. Otis Elevator II*, 269 N.L.R.B. 891, 892 (1984) (Otis' decision to discontinue research and development operations in two locations and to consolidate them in another was not dependent solely on labor costs hence was not within "terms and conditions of employment") (discussed *supra* notes 206-210 and accompanying text).

muting distances may be as well. Since the framers of Title VII explicitly modeled the new antidiscrimination law on older labor laws,⁴⁹⁰ resort to NLRA and other labor law precedents sheds light on congressional intent in importing parallel phraseology. Second, the difficulties imported from labor law regarding application of "terms and conditions of employment" to capital redeployment would pose problems as to site selection decisions akin to those discussed earlier regarding redeployment affecting incumbent employees.⁴⁹¹

The third and greatest difficulty is that the Court, in dicta, has limited the prohibitory coverage of the Title VII phrase "terms, conditions, or privileges of employment" to actual employment conditions of already-hired employees.⁴⁹² If the Court adheres to this statutory interpretation, the "otherwise discriminate" clause will provide no protection to applicants or potential applicants. Extending "refuse to hire any individual" to encompass location policies designed to permit the employer to avoid hiring many black employees, therefore, may be the least strained application of Title VII to the site selection context.

In *Price Waterhouse v. Hopkins*⁴⁹³ the Court recently held that an employer violates Title VII if sex stereotyped performance evaluations lead the firm to deny a woman a promotion she would have received had she been a man.⁴⁹⁴ The plurality explained,

[W]e are beyond the day when an employer could evaluate employees by assuming . . . that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'⁴⁹⁵

Racial stereotyping, no less than gender stereotyping, is a central evil at which Title VII was aimed.⁴⁹⁶ If an employer cannot lawfully decline to hire one individual based on stereotyped

490. See *supra* notes 389-390 and accompanying text.

491. See *supra* text accompanying notes 166-376.

492. *Hishon v. King & Spalding*, 467 U.S. 69, 74 & n.5 (1984).

493. 109 S. Ct. 1775 (1989).

494. *Id.* at 1790-92 (plurality opinion); *id.* at 1795-96 (White, J., concurring); *id.* at 1796, 1802-06 (O'Connor, J., concurring); *id.* at 1813-14 (Kennedy and Scalia, JJ., and Rehnquist, C.J., dissenting).

495. *Id.* at 1791 (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

496. *Cf. Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2374 (1989) (racial har-

assumptions about her because she is black, it is inconceivable that an employer can reject an entire potential workforce, based on similar, stereotyped thinking, because too many of its members are black. Title VII was passed, in large measure, to preclude employment decisions based on racial prejudice and stereotypes, and to require instead assessments of individuals' qualifications and abilities.⁴⁹⁷ "The intent to drive employers to focus on qualifications rather than on race, . . . is the theme of a good deal of the statute's legislative history."⁴⁹⁸ A company whose policy precludes locating new plants in areas where the workforce is more than one-third black, because management believes blacks are less reliable than whites, or less skilled than whites, or easier to unionize than whites,⁴⁹⁹ discriminates en masse against black workers, and relies on quintessentially racially stereotyped thinking. To effectuate congressional intent "to strike at the entire spectrum of disparate treatment . . . resulting from racial stereotypes,"⁵⁰⁰ it is essential that Title VII be construed to reach site selection as well as other discriminatory redeployment decisions.

CONCLUSION

Reading the Title VII and ADEA statutory language to reach discriminatory redeployment decisions of all types comports well with the strong congressional commitment to eradicating employment discrimination "root and branch." This interpretation is consistent with the statutory language, the precedents under Title VII and other labor statutes, and the legislative history of the employment discrimination laws. Anything less, in this era of capital mobility, creates a ready vehicle for corporate evasion of equal opportunity responsibilities, and undermines the national effort to induce employers to "eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."⁵⁰¹ Unless the statute is construed to foreclose this potential loophole, any employer determined to escape its equal employment

assessment altering conditions of employment, like sexual harassment, states a claim under Title VII).

497. See, e.g., *Price Waterhouse*, 109 S. Ct. at 1787 & n.9; *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

498. *Price Waterhouse*, 109 S. Ct. at 1787.

499. See *supra* text accompanying notes 61-66.

500. *Price Waterhouse*, 109 S. Ct. at 1791 (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 & n.13 (1978)).

501. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

opportunity obligations would be free to do so, using any of an array of techniques for manipulating its workforce. Moreover, employers who cannot justifiably reject individual workers based on labor force characteristics heavily correlated with race or age, would be permitted to screen out entire workforces on the basis of the identical characteristics.

Judicial acceptance under Title VII and the ADEA of a cause of action based on discriminatory capital redeployment decisionmaking is only the beginning. The viability of such claims will also depend on methods of proof and the allocation of burden of production and persuasion, as well as the availability of sufficient relief to warrant EEOC or members of the bar in undertaking such arduous litigation.⁵⁰² The threshold barrier, however, is recognition of the cause of action; all else is dependent upon that. The foundation is then laid for judicial redress of this form of employment discrimination that so devastates masses of black and older workers and their communities.

502. For a discussion of burdens of proof, see M. Weiss, *Proving Capital Redeployment Discrimination*, *supra* note 13. For a discussion of how companies make redeployment decisions, and methods of proof of discrimination based upon these corporate policies and patterns, see M. Weiss, *Lawyer's Guide*, *supra* note 13.