Gay Law Students Association v. Pacific Telephone & Telegraph Co.: Constitutional and Statutory Restraints on Employment Discrimination Against Homosexuals by Public Utilities

The supreme court, in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,[1] addressed whether a cause of action exists under California law against a public utility that discriminates against homosexuals in employment matters. The court found that three distinct sources of law bar a public utility from engaging in arbitrary employment discrimination: the equal protection clause of the California Constitution, section 453(a) of the Public Utilities Code, and sections 1101 and 1102 of the Labor Code. Additionally, the court held that the California Fair Employment Practices Act (FEPA) does not grant the Fair Employment Practice Commission (FEPC) jurisdiction to act on complaints based on sexual orientation.

This Note argues that the causes of action the court recognized in *Pacific Telephone & Telegraph (PT&T)* lack a solid constitutional or statutory basis. Part I describes the facts and the court's opinion. Part II then analyzes the equal protection cause of action and argues that the court's approach to the issue of state action is unsatisfactory. Part III of the Note examines the cause of action under Public Utilities Code section 453(a). It contends that the court's interpretation of section 453(a) has no support in legislative history or common law and results in embroiling the Public Utilities Commission (PUC) in employment disputes. Part IV examines the "political discrimination" cause of action under Labor Code sections 1101 and 1102. It argues that the court's statutory construction unjustifiably extends protection to all aggrieved homosexual claimants and has the potential of applying to other groups as well. Part V examines and approves the court's holding that the FEPA prohibition of discrimination on the basis of "sex" does not extend to "sexual orientation." This Note concludes that *PT&T* is an unnecessarily broad decision that is certain to create significant problems for future employment relationships.

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1. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (Tobriner, J.) (4-3 decision).

I

THE CASE

A. The Facts

The suit was brought as a class action to challenge PT&T's alleged arbitrary discrimination in the hiring, firing, and promotion of homosexual employees and to challenge the FEPC's contention that it did not have jurisdiction over claims involving discrimination based on sexual orientation. The plaintiffs' complaint presented independent claims on behalf of two overlapping subclasses.

The first subclass (subclass I) was composed of homosexuals who had been or would be adversely affected by defendant PT&T's allegedly discriminatory practices. The named plaintiffs in this subclass included Robert DeSantis, who claimed that a PT&T official rejected his application when his homosexual orientation became known during an interview, and Bernard Boyle, who alleged that constant harrassment from PT&T coworkers because of his homosexual orientation caused him to resign.[2] The additional named plaintiffs were two organizations: the Gay Law Students Association—composed of students from Boalt Hall School of Law and Hastings College of the Law—and the Society for Individual Rights, Inc., a California corporation organized to promote equal treatment for homosexuals. The organizational plaintiffs claimed that several of their members had sought or would seek employment with PT&T.

The plaintiffs alleged in their complaint on behalf of subclass I that "PT&T has, since at least 1971, had an articulated policy of excluding homosexuals from employment opportunities with its organization."[3] They contended, in addition, that "PT&T refuses to hire any 'manifest homosexual' which [sic] may apply to it for employment at any occupational level or category,"[4] and that "PT&T will not hire anyone referred to [it] by plaintiff Society for Individual Rights."[5] The plaintiffs sought monetary, declaratory, and injunctive relief.

The second subclass (subclass II) consisted of homosexuals who had been or would be denied assistance by defendant FEPC. The named plaintiffs, in addition to all of the individuals and organizations named in subclass I, included Victor Galotti—whom Motorola, Inc.,

2. Plaintiffs DeSantis and Boyle each instituted in 1976 a discrimination suit against PT&T under 42 U.S.C. § 2000e (Title VII) and 42 U.S.C. § 1985(3). Another plaintiff named in *PT&T*, Donald Strailey, also brought suit against his employer on the same grounds. These suits were consolidated at the appellate level and were decided the same day that the *PT&T* decision was rendered. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

3. 24 Cal. 3d at 465, 595 P.2d at 596, 156 Cal. Rptr. at 18.

4. *Id.* at 501, 595 P.2d at 618, 156 Cal. Rptr. at 40.

5. *Id.* at 488, 595 P.2d at 611, 156 Cal. Rptr. at 33.

allegedly fired because of his activism on behalf of the civil rights of homosexuals—and Donald Strailey, who claimed to have been discharged from his position at the Happy Times Nursery School because of his sexual orientation. Both sought and were denied relief from the FEPC. The complaint alleged that the FEPC had consistently refused to accept jurisdiction over claims alleging discrimination based on sexual orientation. Plaintiffs sought declaratory relief and a writ of mandate ordering the FEPC to assume jurisdiction over such claims.

At trial PT&T demurred to the complaint on the ground that California law does not prohibit discrimination by private employers on the basis of sexual orientation. The FEPC admitted the truth of plaintiffs' allegations but asserted that the FEPA does not authorize the FEPC to handle claims of discrimination based on "sexual orientation." The trial court sustained PT&T's demurrer without leave to amend and denied the prayer for mandate and declaratory relief against the FEPC. The supreme court, holding that the plaintiffs had stated a cause of action against PT&T on three separate grounds, reversed the trial court's judgment in favor of the public utility. The court affirmed, however, the decision in favor of the FEPC.

B. The Court's Opinion

Writing for the majority, Justice Tobriner intimated that public policy had compelled the court to find that the employment practices of PT&T—and of all public utilities—were subject to constitutional and statutory restraints:

> If this court were to accede to PT&T's sought sanction for its alleged arbitrary discriminatory practices, we would approve of a rule that would extend beyond the subject of employment discrimination against homosexuals. We would necessarily empower any public utility to engage in an infinity of arbitrary employment practices. To cite only a few examples, the utility could refuse to employ a person because he read books prohibited by the utility, visited countries disapproved by the utility, or simply exhibited irrelevant characteristics of personal appearance or background disliked by the utility. Such possible arbitrary discrimination, casting upon the community the shadow of totalitarianism, becomes crucial when asserted by an institution that exerts the vast powers of a monopoly sanctioned by government itself. We do not believe a public utility can assert such prerogatives in a free society dedicated to the protection of individual rights.[6]

The court focused on PT&T's state-protected monopoly status in determining that the California Constitution and the Public Utilities Code prohibit a public utility from arbitrary employment discrimination.

6. *Id.* at 492, 595 P.2d at 613, 156 Cal. Rptr. at 35.

The court stressed the struggle of homosexuals for individual rights[7] in holding that employment discrimination against homosexuals may be actionable as "political discrimination" under the Labor Code.

The court first addressed whether plaintiffs had stated a cause of action against PT&T under the equal protection guarantee of the state constitution. The court stated that both the state and federal equal protection clauses[8] prohibit "the state or any governmental entity"[9] from arbitrarily[10] discriminating in its employment practices. Establishing that California precedent specifically extended this protection to homosexuals,[11] the court then sought to determine whether the state constitutional prohibition applied to PT&T.

The court observed that the history of the California equal protection clause "offered no suggestion that the provision was intended to apply broadly to all purely private conduct."[12] Some level of state involvement with the utility would thus be necessary to consider PT&T an arm of the state for equal protection purposes.

The court found state action in this case. It reasoned that the extent and nature of the California regulatory scheme for public utilities demonstrated that PT&T was "in many respects more akin to a governmental entity than to a purely private employer":

Both the prices which a utility charges for its products or services and

7. Numerous law review articles have surveyed the legal position of homosexuals, particularly in the area of employment discrimination. *See, e.g.*, Kovarsky, *Fair Employment for the Homosexual*, 1971 WASH. U.L.Q. 527; Pearldaughter, *Employment Discrimination Against Lesbians: Municipal Ordinances and Other Remedies*, 8 GOLDEN GATE U.L. REV. 537 (1979); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979); Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976); Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALB. L. REV. 84 (1973); Note, *1975-76 Ninth Circuit Survey—Constitutional Law: Due Process Rights of Homosexuals*, 7 GOLDEN GATE U.L. REV. 99 (1976).

8. The court cited no case decided under the state equal protection clause but noted two cases decided under the federal equal protection clause: Kotch v. Pilot Comm'rs, 330 U.S. 552, 556 (1947) ("a law applied to deny a person a right to earn a living [for a] reason having no rational relation to the regulated activities" *might* offend constitutional safeguards), and Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 569, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969) (Tobriner, J.) ("[T]he state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation."). All other cases cited were decided on federal due process grounds.

9. 24 Cal. 3d at 467, 595 P.2d at 597, 156 Cal. Rptr. at 19.

10. For purposes of assessing the sufficiency of plaintiffs' allegations, the court properly treated PT&T's demurrer as admitting the material fact of having discriminated arbitrarily against homosexuals in employment decisions. 24 Cal. 3d at 465 n.4, 595 P.2d at 596 n.4, 156 Cal. Rptr. at 18 n.4. *See* Glaire v. La Lanne-Paris Health Spa, Inc., 12 Cal. 3d 915, 918, 528 P.2d 357, 358, 117 Cal. Rptr. 541, 542 (1974).

11. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (Tobriner, J.) (Board's revocation of teacher's diplomas because of homosexual activity invalid under federal due process clause when such activity has no rational bearing on teacher's performance). *Cf.* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (due process forbids dismissal of civil servant for homosexual activity unless that activity impairs the efficiency of the Service).

12. 24 Cal. 3d at 468, 595 P.2d at 598, 156 Cal. Rptr. at 20.

> the standards which govern its facilities and services are established by the state (Pub. Util. Code, §§ 728, 761); in addition, the state determines the system and form of the accounts and records which a public utility maintains and it exercises special scrutiny over a utility's issuance of stocks and bonds. (*Id.*, §§ 792, 816.) Finally, the state had endowed many public utilities, like PT&T, with considerable powers generally enjoyed only by governmental entities, most notably the power of eminent domain. (*Id.*, §§ 610-624.) Under these circumstances, we believe that the state cannot avoid responsibility for a utility's systematic business practices and that a public utility may not properly claim prerogatives of "private autonomy" that may possibly attach to a purely private business enterprise.[13]

The court also stressed PT&T's status as a "state-protected" utility—that is, an entity with a state-protected monopoly:

> PT&T's monopoly over nearly 80 percent of the market for telephone service in California—and thus over tens of thousands of jobs—is guaranteed and safeguarded by the state Public Utilities Commission, which possesses the power to refuse to issue certificates of public convenience and necessity to permit potential competition to enter these areas and which establishes rates for telephone services that guarantee PT&T a reasonable rate of return. (See Pub. Util. Code §§ 1001, 1002, 726, 728.) Thus, to a significant degree, the state has itself immunized PT&T from many of the checks of free market competition and has placed the utility in a position from which it can wield enormous power over an individual's employment opportunities.[14]

The court offered several additional policy reasons to support its state action determination. It stressed that freedom of opportunity to work is a fundamental right,[15] that infringement of that right by a monopolistic utility may leave the employee with "no alternative employer to whom he can turn," and that the general public is placed in the position of giving indirect support to that infringement because the public is dependent upon the utility's "necessitous service."[16]

The court completed its constitutional analysis with a discussion of several federal labor union decisions.[17] These cases held that entities which are granted exclusive bargaining power may not exercise this power arbitrarily. The court drew an analogy between exclusive bargaining agent status and the exclusive state-granted monopoly of a public utility, arguing that "the relevant United States Supreme Court

13. *Id.* at 469-70, 595 P.2d at 599, 156 Cal. Rptr. at 21.

14. *Id.* at 471-72, 595 P.2d at 600, 156 Cal. Rptr. at 22.

15. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971). *See also* Truax v. Raich, 239 U.S. 33, 41 (1915).

16. 24 Cal. 3d at 471, 595 P.2d at 600, 156 Cal. Rptr. at 22.

17. Machinists v. Street, 367 U.S. 740 (1961); Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

authorities are consistent with [the] *conclusion* . . . [that] when the state grants a private entity monopoly power over employment opportunities, the private entity—like the state itself—may not use such power in an unconstitutional fashion."[18] The court thus held that "in this state a public utility bears a constitutional obligation to avoid arbitrary employment discrimination."[19]

The court then turned to the construction of Public Utilities Code section 453(a). Enacted in 1915 and most recently amended in 1975, this statute provides: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."[20] In holding that this section prohibits a public utility from engaging in arbitrary employment discrimination, and that plaintiffs therefore had a private cause of action for monetary damages against PT&T under PUC section 2106,[21] the court relied upon (1) the explicit language of section 453(a), (2) the provision's legislative history, (3) evolving common law principles, and (4) constitutional considerations.

The court contended that section 453(a)'s prohibition against discrimination should be read broadly. The "in any other respect" language, in particular, could be construed to include discrimination on the basis of sexual preference. Moreover, the court reasoned, the legislative history of section 453(a) supported such a reading:

> After initially enacting legislation that proscribed rate or service discrimination, the Legislature consciously broadened the statutory prohibition to bar utility discrimination "in any respect whatsoever"; the broadened prohibition has been repeatedly reenacted in revised utility regulatory schemes and is retained by the terms of section 453, subdivision (a) today. Under these circumstances, we cannot construe the section in violation of its literal language to exempt employment discrimination from its broad prohibition.[22]

The court also argued that evolving common law principles are relevant to the construction of section 453(a). The court believed that the legislature, in drafting the provision, drew upon the established

18. 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22 (emphasis added).

19. *Id.*

20. CAL. PUB. UTIL. CODE § 453(a) (West 1975).

21. This provision reads:

> Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful . . . either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. . . . An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

CAL. PUB. UTIL. CODE § 2106 (West 1975).

22. 24 Cal. 3d at 480, 595 P.2d at 605, 156 Cal. Rptr. at 27.

common law doctrine that a monopoly is not free to exercise its power arbitrarily. Citing *James v. Marinship Corp.*,[23] the court argued that the common law principle of nondiscrimination by monopolies in California "has developed to encompass discrimination in employment as well as in rates and service."[24] Accordingly, any proper construction of section 453(a) would have to include this common law development, thereby bringing employment discrimination on the basis of sexual orientation within that section's prohibition.

The court concluded its discussion of section 453(a) by stating that the constitution has some bearing on this provision. It declared that the constitutional analysis set forth in *PT&T*—that the equal protection clause prohibits employment discrimination against homosexuals—constituted "a strong basis for interpreting the existing statute as barring such discrimination."[25]

The court subsequently addressed whether plaintiffs had stated a cause of action against PT&T for interfering with their political freedom under Labor Code sections 1101 and 1102.[26] These sections provide, in substance, that no employer shall control or direct "the political activities or affiliations" of its employees or coerce its employees to "refrain from adopting or following any particular course or line of political action or activity." The court assumed that the statutory references to "political activity" extended to "the espousal of a candidate *or a cause*."[27] It also declared that the references to "employees" should be broadly construed to protect "applicants" as well; otherwise, the provisions "would allow employers to thwart the legislative purpose of protecting citizens by merely advancing their discriminatory prac-

23. 25 Cal. 2d 721, 155 P.2d 329 (1944).

24. 24 Cal. 3d at 481, 595 P.2d at 606, 156 Cal. Rptr. at 28.

25. *Id.* at 485, 595 P.2d at 609, 156 Cal. Rptr. at 31. Although the court did not develop this point, there are considerable similarities between the leading federal case cited as support for the result reached in the constitutional analysis and the chief California common law decision cited here. *Cf.* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (Railway Labor Act construed to require exclusive bargaining agent to represent all members of the class without discriminating on the basis of race), *and* James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944) (labor union with a closed shop and a closed union may not deny membership on the basis of race).

26. Labor Code § 1101 provides that "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." CAL. LAB. CODE § 1101 (West 1971). And Labor Code § 1102 provides that "No employer shall coerce or influence his employees or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." CAL. LAB. CODE § 1102 (West 1971).

27. 24 Cal. 3d at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32 (quoting Mallard v. Boring, 182 Cal. App. 2d 390, 395, 6 Cal. Rptr. 171, 174 (4th Dist. 1960) (emphasis added by the supreme court)).

tices to an earlier stage in employer-employee relations."[28]

The court then reasoned that the "gay liberation movement" was analogous to the civil rights struggles of other minorities and should be recognized as political activity. An important aspect of the homosexual movement, the court observed, was that homosexuals associate with others in working for equal rights. The court concluded its brief analysis by asserting that plaintiffs' allegations

> can reasonably be construed as charging that PT&T discriminates in particular against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations. So construed, the allegations charge that PT&T has adopted a "policy . . . tending to control or direct the political activities or affiliations of employees" in violation of section 1101, and has "attempt[ed] to coerce or influence . . . employees . . . to . . . refrain from adopting [a] particular course or line of political . . . activity" in violation of section 1102.[29]

Thus, the court declared that plaintiffs were entitled to maintain a private cause of action for monetary damages.[30]

Lastly, the court held that the FEPA[31] does not prohibit discrimination against homosexuals. In so doing, the court dismissed three arguments propounded by plaintiffs. First, the court rejected an analogy between the "illustrative" categories of the Unruh Civil Rights Act[32] and the categories of the FEPA. The court pointed to legislative history, declaring that whereas the Unruh Act represented a codification of common law principle proscribing *all* discrimination by public accomodations, the FEPA was innovative in creating specific, enumer-

28. *Id.* at 487 n.16, 595 P.2d at 610 n.16, 156 Cal. Rptr. at 32 n.16.

29. *Id.* at 488, 595 P.2d at 611, 156 Cal. Rptr. at 33.

30. The controlling provision reads: "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." CAL. LAB. CODE § 1105 (West 1971). As one commentator has explained, "The peculiar negative language of section 1105 can be interpreted to mean that section 1103, creating a criminal penalty, was not to be the only statutory remedy. However, since the statute does not specifically establish a civil action against employers, the injured employee has available only those limited remedies already existing at common law." Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1047 (1970).

31. CAL. LAB. CODE § 1410 *et seq.* (West 1971) (enacted in 1959).

32. The Unruh Act, CAL. CIV. CODE § 51 *et seq.* (West Supp. 1979), was enacted in 1959. The relevant language reads: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West Supp. 1979). As the court made clear, "whereas the Unruh Act represented a codification of the common law principle barring *all* discrimination by public accommodations in the provision of services, the prohibitions on employment discrimination contained in the FEPA are in no sense declaratory of preexisting common law doctrine but rather include areas and subject matters of legislative innovation, creating new limitations on an employer's right to hire, promote or discharge its employees." 24 Cal. 3d at 490, 595 P.2d at 612, 156 Cal. Rptr. at 34.

ated restrictions on the employer's previously absolute discretion in employment practices. Moreover, the legislature, through successive enactments of additional categories,[33] had demonstrated its belief that the FEPA does not bar all forms of arbitrary discrimination.

Second, the court declared that the legislature's prohibition against "sex" discrimination was not intended to encompass discrimination based on "sexual orientation." The court observed that the identical language in Title VII of the 1964 Civil Rights Act[34] had been uniformly interpreted narrowly,[35] and stressed that the FEPC's similar, consistent interpretation of the FEPA was "entitled to great weight."[36]

Finally, the court dismissed plaintiffs' suggestion that the statute is unconstitutional because of its underinclusiveness. Invoking *Katzenbach v. Morgan*,[37] it noted that a remedial statute is not invalid "simply because the Legislature has declined to extend its remedies to all potentially aggrieved groups."[38] The court concluded that plaintiffs had no cause of action against the FEPC, for "the FEPA does not grant the FEPC jurisdiction to act on complaints charging employment discrimination on the basis of homosexuality."[39]

II

THE CONSTITUTIONAL CAUSE OF ACTION

The supreme court based its holding that plaintiffs had a constitutional cause of action exclusively[40] on California's recently adopted equal protection guarantee.[41] In construing article I, section 7(a),[42] the

33. The most recent addition to the statute was "marital status" in 1976. 1976 Cal. Stats., ch. 1195, § 5, p. 5460-61.

34. This provision reads: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensaton, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1976).

35. Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978). *See also* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977).

36. 24 Cal. 3d at 491, 595 P.2d at 612, 156 Cal. Rptr. at 34 (quoting DiGiorgio Fruit Corp. v. Department of Employment, 56 Cal. 2d 54, 61-62, 362 P.2d 487, 491, 13 Cal. Rptr. 663, 667 (1961)).

37. 384 U.S. 641 (1966) (" '[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.' ").

38. 24 Cal. 3d at 492, 595 P.2d at 613, 156 Cal. Rptr. at 35.

39. *Id.*

40. Given adequate, independent state grounds, the court's decision is not reviewable by the United States Supreme Court. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

41. The increasing reliance by states on their own constitutions has been ably defended and discussed. As Justice Stanley Mosk noted in *The New States' Rights*, 10 J. CAL. L. ENFORCEMENT 75, 77 (1976) [hereinafter cited as *New States' Rights*], "[t]here is not the slightest impropriety

court did not explicitly declare that a "state action" requirement would always apply to equal protection claims under the California Constitution. It did, however, test for and find state action in this case.

A. The State Action Requirement of Article I, Section 7(a)

The equal protection clause of the California Constitution, unlike its counterpart in the United States Constitution, contains no express "state action" requirement. It was added as an amendment in November 1974.[43] As adopted, section 7(a) incorporated the equal protection

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when the highest court of a *state* invalidates *state* legislation, *state* administrative action, or the conviction of a defendant in a *state* prosecution as being violative of the state constitution." *Accord*, Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711 (1978). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976); Wright, *The Role of the Judiciary: From* Marbury *to* Anderson, 60 CALIF. L. REV. 1262 (1972); Project, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Comment, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977).

For discussion of California courts' increasing reliance on the state constitution, see Falk, *The Supreme Court of California, 1971-72—Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); *New States' Rights*, *supra*; Project, *supra*, at 324-26; Comment, *supra* at 300-16; Note, People v. Pettingill: *The Independent State Ground Debate in California*, 67 CALIF. L. REV. 768 (1979); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

42. On May 31, 1979, when *PT&T* was decided, § 7(a) read as follows: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

The provision was amended on November 6, 1979, to include an extensive proviso regarding school busing. The first sentence of § 7(a) now reads:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation.

For the full amended text, see CAL. CONST. art. I, § 7(a) (adopted 1974, amended 1979).

The dissent argued that § 8 of article I rather than § 7(a) should control. Section 8, amended in 1974 to include the term "employment," provides that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin." CAL. CONST. art. I, § 8. Based upon its premise that PT&T's conduct constitutes "state action" rather than private action, the majority correctly insisted that § 7(a) is applicable; otherwise "the *state* would be free arbitrarily to exclude whole classes of citizens—*e.g.*, the poor, the handicapped, unmarried persons—from employment opportunities. . . ." 24 Cal. 3d at 467-68 n.5, 595 P.2d at 597-98 n.5, 156 Cal. Rptr. at 19-20 n.5 (emphasis added).

43. Prior to this time "equal protection" was read into the "privileges and immunities" provision (CAL. CONST. of 1879, art. I, § 21; presently art. I, § 7(b)), the "uniform operation" provision (CAL. CONST. of 1879, art. I, § 11; presently art. IV, § 16(a)), and the "local or special laws" provision (CAL. CONST. OF 1879 art. IV, § 25; presently art. IV, § 16(b)). For a useful history of

guarantee and the previously existing due process guarantee—section 13[44] of article I[45]—which also contained no state action limitation.

In adjudicating claims under the prior due process guarantee, the court consistently required a finding of state action.[46] The court observed, in *Kruger v. Wells Fargo Bank*,[47] that "[t]he law of state action will evolve, as it has, by measured steps, with one appropriate decision building upon another. . . . To construe article I, section 13, to apply to private action *would involve a judicial innovation which, as of this date, is without precedent.*"[48] As recently as 1978 the court reiterated that the state action requirement applies to claims arising under section 13.[49] But in 1979, two months before deciding *PT&T*, the court's holding in *Robins v. Pruneyard Shopping Center*[50] seemed to indicate that under sections 2 and 3 of article I—the free speech and petition provisions—a state action finding might not be necessary. *Robins* suggests that the court might vary its state action standards depending upon the nature of the interests at stake.

PT&T thus presented the court with its first occasion to decide whether the state action doctrine applies to California's new equal protection provision, and, more generally, to clarify the doctrine's role in California's constitutional framework.

B. The State Action Analysis in PT&T

1. State Action Under Article I, Section 7(a)

Despite the opportunity to clarify the law, the supreme court failed to settle conclusively in *PT&T* whether the new equal protection clause contains a state action requirement. At no point did the court explicitly address this issue. The most that can be gleaned from the opinion are subtle suggestions. Thus the court cited in one place its approval of the *Kruger-Garfinkle* position on the necessity of state action in due process

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pre-1974 amendment "equal protection" coverage, *see* Note, *Rediscovering the California Declaration of Rights*, *supra* note 41, at 505-10.

44. "No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law . . . ." CAL. CONST. of 1879, art. I, § 13; presently art. I, § 15.

45. Article I, the California Declaration of Rights, comprises 27 sections. None of the provisions contains an explicit state action limitation. CAL. CONST. art. I.

46. *See, e.g.*, the following employment discrimination cases decided under former art. I, § 13: D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

47. 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974).

48. *Id.* at 365, 367, 521 P.2d at 449, 450, 113 Cal. Rptr. at 457, 458 (emphasis added).

49. 21 Cal. 3d 268, 578 P.2d 925, 146 Cal. Rptr. 208 (1978).

50. 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd*, 48 U.S.L.W. 4650 (June 9, 1980). In *Robins*, the court did not address the state action issue, yet held that §§ 2 and 3 protect the right of individuals to gather signatures at a *privately owned* shopping center.

claims arising under former section 13. This approval arguably creates an inference that a state action limitation is applicable to current section 7(a) due process claims and likewise attaches to section 7(a) equal protection claims.[51]

At another point, however, the court stated: "[A]lthough our court will carefully consider federal state action decisions with respect to the federal equal protection clause insofar as they are persuasive, we do not consider ourselves bound by such decisions in interpreting the reach of the safeguards of our state equal protection clause."[52] This passage reinforces the court's longstanding position that it may impose higher standards and greater protection under the California Constitution than exist under the federal Constitution.[53] It also serves to underscore the crucial distinguishing feature of the California provision—that on its face, section 7(a) requires no state action at all.[54]

Perhaps the best indicator of the court's disposition toward this issue is the fact that it actually examined whether state action existed in the case. Certainly, had the court believed that the equal protection clause contained no state action requirement, it would not have conducted such an examination. The court's reluctance to resolve explicitly the state action issue may be understandable. Perhaps it has not yet settled on a comprehensive state action doctrine. The court may thus be leaving the door open for future consideration and refinement of this important issue.

2. *The "Threshold Level" of State Involvement*

In examining the existence of state action in this case, the court failed to resolve two underlying issues: the "threshold level" of state involvement that must exist before a court may hold that there is state

51. As the dissent observed, "[t]he majority *apparently* acknowledges that the due process *and equal protection* guarantees of our state Constitution . . . protect only against *state* action, not private conduct." 24 Cal. 3d at 493, 595 P.2d at 614, 156 Cal. Rptr. at 36 (Richardson, J., dissenting) (emphasis added).

52. *Id.* at 469, 595 P.2d at 598, 156 Cal. Rptr. at 20.

53. Not only does the wording of the state and federal equal protection guarantees differ, but art. I, § 24 of the California Constitution expressly provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." The constitutional analysis made in *PT&T* thus reaffirms the belief, enunciated by Justice Mosk, *New States' Rights*, *supra* note 41, at 77, that "the American constitutional system neither requires nor necessarily prefers that state judges conform their interpretation of the state constitutions to the United States Supreme Court's interpretation of the federal Constitution." *Cf.* Cooper v. California, 386 U.S. 58, 62 (1967) (affirming a state's "power to impose higher standards on [state constitutional issues] than required by the Federal Constitution").

54. Note also the majority's cryptic comment that "a public utility may not properly claim prerogatives of 'private autonomy' that may *possibly* attach to a purely private business enterprise." 24 Cal. 3d at 470, 595 P.2d at 599, 156 Cal. Rptr. at 21 (emphasis added).

action, and the approach which is to be used to assess the degree of that involvement.

The court in *PT&T* did not articulate the "threshold level" of state involvement necessary to find state action. Moreover, it did not determine whether that threshold level would change depending upon the type of claim at stake. The court, once again, only hinted at an answer.

While the United States Supreme Court has expressly refused to adopt "relative" state action standards,[55] lower federal courts have in some instances[56] applied a double standard under the equal protection clause when *racial* discrimination is involved. That is, these courts have stated that a lower threshold level of state involvement, or a less exacting scrutiny of that involvement, is triggered because the challenged activity is race-based.[57] The *PT&T* majority acknowledged this dual standard in footnote nine of its opinion,[58] citing the Second Circuit's decision in *Weise v. Syracuse University*.[59]

In *Weise*, the court deemed a low threshold appropriate to a *sex* discrimination equal protection claim and suggested that the state action standard should vary according to the offensiveness of the challenged activity: "As the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to subject the issue to judicial scrutiny."[60] By citing *Weise* as authority for its state action

55. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373 (1974) (Marshall, J., dissenting): "The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented." *See* discussion of this decision in text accompanying notes 69-74 *infra*.

56. *See, e.g., Weise v. Syracuse University*, 522 F.2d 397, 403-08 (2d Cir. 1975); Rhode Island Chapter, Assoc. Gen. Contractors v. Kreps, 450 F. Supp. 338, 350 n.6 (D.R.I. 1978), and cases cited therein.

57. The triggering of this "lower state action threshold" is analogous to, but not to be confused with, the triggering of "strict scrutiny" in equal protection claims involving a suspect class or a fundamental right. The former process addresses the determination of whether state action is present; the latter presupposes it. The fact that the same essential elements in essentially the same relations are involved in both often results in a court subsuming the "state action" issue into a larger judgment as to whether the claim presented merits judicial action. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 475 (1978) [hereinafter cited as NOWAK]; Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39.

58. 24 Cal. 3d at 474 n.9, 595 P.2d at 601 n.9, 156 Cal. Rptr. at 23 n.9: "Numerous federal decisions have recognized that the federal courts have applied a different standard of state action in cases presenting procedural due process questions than has been traditionally applied in cases involving discrimination under the equal protection clause." While this statement suggests that distinct constitutional guarantees may merit distinct state action thresholds, a large majority of the cases cited by the court in Rhode Island Chapter, Assoc. Gen. Contractors v. Kreps, 450 F. Supp. 338, 350 n.6 (D.R.I. 1978), stand for the proposition that a uniform state action standard applies except in *racial* equal protection claims.

59. 522 F.2d 397 (2d Cir. 1975).

60. *Id.* at 406.

finding[61] and by stressing that class-based employment discrimination by a public utility is "particularly pernicious" because neither the victims nor the general public can turn elsewhere, the court may be implying that a low threshold of state involvement will be sufficient to establish state action in cases such as this. The court's choice is arguably justifiable. The reasons behind the choice, however, should have been fully articulated—both for the purpose of analyzing the specific claim in *PT&T* and for providing guidelines for future adjudication under California's equal protection clause.

3. The Approach Used to Assess State Involvement

The court confronted substantial difficulties in determining that state action was present in PT&T's allegedly discriminatory employment practices. No state or federal constitutional authority had found state action in this context.[62] Indeed, specific federal precedent against it exists.[63]

As with other aspects of the court's state action analysis in *PT&T*, the approach used by the majority to assess the degree of state involvement is elusive. The court spoke as if it were using the traditional quantitative approach[64] to state action. Appropriately applied, however, such an approach would not have produced a state action finding in this case. Thus the court may have actually employed an alternative method—perhaps a "balancing" approach,[65] the legitimacy of which is

61. 24 Cal. 3d at 474, 595 P.2d at 602, 156 Cal. Rptr. at 24.

62. The court's invocation of specific Supreme Court authority, *see* cases cited in note 17 *supra*, for its *conclusion* that "when the state grants a private entity monopoly power over employment opportunities, the private entity—like the state itself—may not use such power in an unconstitutional fashion," 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22, finesses the state action question. The labor union cases cited all involved the validity of various provisions of the Railway Labor Act (state action, in the form of a statute, was already present).

63. Martin v. Pacific Northwest Bell, 441 F.2d 1116 (9th Cir. 1971) (employment discrimination against public utility filed under U.S.C. § 1983 dismissed for lack of state action). As in the instance of employment practices, a public utility's service termination procedures have generally been adjudged not to constitute state action in federal due process claims. The chief decision in this area is Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), discussed in text accompanying notes 69-74 *infra*. For a survey of federal courts' handling of state action in utility service termination cases before *Jackson*, see Note, *Fourteenth Amendment Due Process in Termination of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1485-94 (1973).

64. Under traditional state action analysis, the court applies established tests (*e.g.*, "public function," "state encouragement," "mutual contacts") on a case-by-case basis to assess the number or type of contacts between the state and the private wrongdoer. If there are a sufficient number of state acts to connect the state with the challenged activity, then the private actor is subject to constitutional limitations. *See* NOWAK, *supra* note 57, at 456-73.

65. Under a balancing approach, a value-oriented rationale is applied, with the court balancing the extent of the state's involvement against the nature of the right infringed. For a useful discussion of state action balancing, see Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 232-61. *See also* Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's*

in doubt.

a. State Action Under a Quantitative Approach

On the face of the opinion, the court applied the traditional quantitative approach to state action analysis, relying to a great extent on a state aid argument[66] based on regulation and monopoly.[67] The court relegated to a footnote the controversial,[68] adverse Supreme Court decision of *Jackson v. Metropolitan Edison Company*.[69] *Jackson*, however, cannot be so readily dismissed.

In *Jackson*, a privately owned utility company had terminated plaintiff's electrical service because of alleged nonpayment. Plaintiff argued that the utility's failure to provide adequate notice and hearing prior to termination deprived her of property without due process of law. On the critical state action question, plaintiff alleged that the state's extensive regulation of the utility (including utility commission

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Proposition 14, 81 HARV. L. REV. 69 (1967); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

66. For an illuminating discussion of "state action" in general and the "state aid" theory in particular, see McCoy, *Current State Action Theories, The* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785 (1978). He observed that "[i]n its simplest applications it is relatively clear that the state aid theory of state action is based on a *concern for* the beneficiaries or *victims* of the aided activity. Whether the aided activity is state action is determined from the perspective of the affected individual." *Id.* at 822 (emphasis added).

67. *See* Justice Richardson's analysis of the state action finding. He perceives the majority's reasoning to be "that employment decisions made by PT&T constitute state action because 'the state has granted [PT&T] a monopoly over a significant segment of the telephonic communications industry in California' . . ., and also because 'the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct . . . .'" 24 Cal. 3d at 494, 595 P.2d at 614, 156 Cal. Rptr. at 36 (Richardson, J., dissenting).

68. As the *PT&T* majority observed, *Jackson* has received strong criticism. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1172 (1978); McCoy, *supra* note 66, at 807; *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 139 (1975). *But see* Glennon & Nowak, *supra* note 65, at 257-58. Contrast the Court's treatment of *Jackson*, involving a termination of service claim against a privately owned utility, with its handling of the same type of claim against a municipal utility in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

69. 419 U.S. 345 (1974) (Relnquist, J.) (6-3). In footnote 9, its only discussion of *Jackson*, the court observes: "[W]e need not comment on the substantive merits of the *Jackson* decision. . . . [T]here is absolutely no indication in the *Jackson* opinion that the court would similarly conclude that no 'state action' existed if the management of a public utility utilized its monopoly power to enforce private prejudices against, for example, . . . homosexuals." 24 Cal. 3d at 474 n.9, 595 P.2d at 601 n.9, 156 Cal. Rptr. at 23 n.9. *But see* Justice Marshall's dissent in *Jackson*:

> *The Court has not adopted the notion*, accepted elsewhere, *that different standards should apply to state action analysis when different constitutional claims are presented.* Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve.

419 U.S. at 372-73 (emphasis added).

approval of the company's termination procedures), the utility's state-created monopoly status, and the "public function" nature of the company's services compelled the conclusion that there was sufficient state involvement.

The Supreme Court dismissed plaintiff's arguments. Each factor that the plaintiff advanced was in itself insufficient, according to the majority, to make the utility's conduct attributable to the state for purposes of the fourteenth amendment. The majority stressed that "the inquiry must be whether there is a sufficiently close *nexus between the State and the challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[70]

In separate dissenting opinions, Justices Douglas[71] and Marshall[72] argued that the dispositive question in a state action inquiry is not whether any single fact or relationship presents a sufficient degree of state involvement, but whether the aggregate of all relevant factors compels a finding of state responsibility.[73] State action was present here, in their views, by virtue of the state's regulatory control and creation of the utility company's consumer monopoly. Marshall's opinion, in particular, expressed dissatisfaction with the implications of the majority's holding:

> What is perhaps most troubling about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. . . . Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve.[74]

The California supreme court's reasoning in *PT&T* was clearly influenced by Justice Marshall's dissent.[75] The court focused on the extensive regulatory ties between PT&T and the PUC.[76] It reasoned that "the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a

70. 419 U.S. at 351 (emphasis added).

71. *Id.* at 359 (Douglas, J., dissenting).

72. *Id.* at 365 (Marshall, J., dissenting).

73. *Id.* at 360 (Douglas, J., dissenting).

74. *Id.* at 373. Compare with this passage the conclusion of the majority opinion in *PT&T*, quoted in text accompanying note 6 *supra*.

75. *See* note 74 *supra* and notes 77 & 83 *infra*. Compare, for example, the following passages from the Marshall and Tobriner opinions, respectively: "When the State confers a monopoly on a group or organization, this Court has held that the organization assumes many of the obligations of the State." 419 U.S. at 372 (Marshall, J., dissenting). "[W]hen the state grants a private entity monopoly power over employment opportunities, the private entity—like the state itself—may not use such power in an unconstitutional fashion." 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22.

76. *See, e.g.*, CAL. PUB. UTIL. CODE §§ 451, 600, 616, 728, 816, 817, 851 (West 1975 & Supp. 1979).

governmental entity than like a private corporation."[77] Concuding that "tlie state cannot avoid responsibility for a utility's systematic *business* practices,"[78] the court found state action in this case.

This state-action-through-regulation argument, while directly applicable to PT&T's practices within the consumer/business context, is not necessarily transferable to the utility's actions within its employment/internal management sphere. Absent a showing that the state's regulatory scheme extends significantly[79] into the employment area, or that the state provides economic assistance in this area, the state's involvement does not promote PT&T's *employment* practices.[80] Thus, the court's contention—that the state's regulation[81] of PT&T's consumer practices is sufficient to make PT&T's employment practices the acts of the state—fails. It blurs the vital distinction between public and private action, for

> [i]t overlooks the essential point—that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint.[82]

The California court also emphasized, as had the dissent in *Jackson*,[83] the importance of a public utility's "state-protected" monopoly. The court handled this argument[84] very loosely. It suggested that the

77. 24 Cal. 3d at 469, 595 P.2d at 599, 156 Cal. Rptr. at 21. *Cf.* 419 U.S. at 368 n.1 (Marshall, J., dissenting): "The State's regulatory pattern makes it clear that it expects utility companies to behave more like governmental entities than private corporations."

78. 24 Cal. 3d at 470, 595 P.2d at 599, 156 Cal. Rptr. at 21 (emphasis added).

79. There are few provisions of the California Public Utilities Code that relate to the employment sphere. *See* § 451 (utilities must maintain adequate facilities to promote the safety and comfort of employees); § 465 (competitive bidding when utilities do not use their own employees as janitors); § 521 (defines employees of public utilities); § 523 (employees may be given free service by the utilities); and § 768 (employee use of safety devices). CAL. PUB. UTIL. CODE §§ 451, 465, 521, 523, 768 (West 1975).

80. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 659 (1974): "[O]nly that involvement which supports or promotes the challenged conduct, or the activity in the course of which the challenged denial of right occurred, justifies the attachment of constitutional standard."

81. For a useful discussion of treatment of the "regulation" theory in federal cases prior to *Jackson*, see *id.* at 685-90.

82. Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968), addresssing the "unpersuasive" contention "that New York's regulation of educational standards in private schools . . . makes their acts in . . . disciplining students the acts of the State." *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972) ("However detailed this type of regulation [of a private club by the State Liquor Control Board] may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination.").

83. "[A] state-protected monopoly status is highly relevant in assessing the aggregate weight of a private entity's ties to the State." 419 U.S. at 361 (Douglas, J., dissenting).

84. The "monopoly" argument is central to the court's holding. At the outset the court observes, "In the instant case, the question with which we are presented is a narrow but important one: Is the California constitutional equal protection guarantee violated when a privately owned

utility's "state protected monopoly" over eighty percent of the telecommunications industry translated into a "quasi" monopoly "over tens of thousands of jobs."[85] Undoubtedly, the presence of a genuine state-protected labor monopoly *would* make a material difference in the state action finding:[86] the power directly granted by the state would, in such a circumstance, be the source of the denial of the right. But the labor monopoly premise articulated by the majority is not borne out by the facts. PT&T possessed a monopoly in the telecommunications services market. PT&T exercised no monopoly power, however, in the labor market. Though the company employed more than 90,000 people, its control over the labor market did not reach monopoly proportions.[87] As the dissent correctly observed, "PT&T's monopoly control plays no role whatever"[88] with respect to the vast majority of the utility's employment opportunities.

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public utility, *which enjoys a state protected monopoly or quasi-monopoly*, utilizes its authority arbitrarily to exclude a class of individuals from employment opportunities?" 24 Cal. 3d at 469, 595 P.2d at 598-99, 156 Cal. Rptr. at 20-21 (emphasis added). The court later declares: "[W]e believe that the relevant United States Supreme Court authorities are consistent with this conclusion. As we shall see, those decisions have made clear that *when the state grants a private entity monopoly power* over employment opportunities, the private entity—like the state itself—may not use such power in an unconstitutional fashion." *Id.* at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22 (emphasis added).

85. *Id.* at 471, 595 P.2d at 600, 156 Cal. Rptr. at 22. The court hedges as to the extent of PT&T's control (in either the consumer or the labor sector) by using "monopoly" and "quasi-monopoly" interchangeably. The technically correct term, however, when applicable to the labor sphere, is "monopsony": a market situation in which there is a single buyer for a product or services offered by a number of sellers.

86. However, assuming, *arguendo*, that PT&T did possess a true labor monopoly, the rationale enunciated by the court would lead to a finding of no state action in the case of those utilities which lacked such control over labor. The dissent makes this point in another context. *See* 24 Cal. 3d at 499, 595 P.2d at 617, 156 Cal. Rptr. at 39 (Richardson, J., dissenting).

87. As certified by Mr. K.G. Stevens, Division Manager of Nonmanagement Employment, and by Mr. C.P. Gressani, Equal Opportunity Compliance Manager, of Pacific Telephone & Telegraph, the utility reported to the Equal Employment Opportunity Commission a labor force of 96,894 persons as of December 13, 1974 (the reporting period closest in time to plaintiffs' action filed in June 1975). 74,192 of the employees occupied nonmanagement positions.

Of the eleven job classifications subsumed under nonmanagement, only three are even arguably "unique" to PT&T. Within the #6 classification (Craft, Skilled, Outside: PBX installers and cable splicers), employee skills are generally transferable to private companies with PBX systems, to cable television, and to general maintenance electrician positions. This classification comprises 8.8% of the PT&T employees. In regard to the #9 classification (Craft, Semi-Skilled, Outside: station installers and line workers), representing less than 5.4% of the total PT&T work force, many positions are readily transferable outside public utilities to heavy construction, to cable television, and to residential wiring. The #10 classification (Craft, Semi-Skilled, Inside: frame workers), representing 2.1% of the labor force and serving as a threshold position into the crafts, is composed of employees whose circuitry skills may be transferable to radio and to assembly line mainframe positions in electronics.

It is worth noting that the single largest job classification within PT&T, comprising 17.4% of the employees, is the unskilled, entry level position of operator. Experienced operators, of course, can transfer to similar positions with PBX systems, hotel and hospital switchboards, and the like.

88. 24 Cal. 3d at 494, 595 P.2d at 614, 156 Cal. Rptr. at 36 (Richardson, J., dissenting).

The court's articulated rationales for its state action finding thus have no support.[89] The court failed to demonstrate that the state's regulatory scheme extends to the employment sphere. Its labor monopoly argument was equally unsubstantiated. Under traditional state action doctrine, which advises that "the only issue is whether sufficient state contacts do, or do not, exist,"[90] the court's state action finding in this instance is unwarranted.

b. State Action Under a Balancing Approach

The result reached in *PT&T*, however, may still be justifiable—albeit for reasons different from those expressly relied on by the court. Indeed, the court may have implicitly abandoned the traditional quantitative analysis, using instead a "balancing" approach which juxtaposes the extent of the state's involvement against the nature of the right infringed. The Second Circuit's opinion in *Weise* is precedent for such an approach. Observing that "a consideration of whether there is state action necessarily entails a balancing process," the Second Circuit argued that when particularly offensive conduct triggers a less stringent standard of state action, the court might use a "weighing" approach.

The Second Circuit's approach defines five factors as relevant: (1) the degree to which the challenged organization is dependent on governmental aid, (2) the extent and intrusiveness of the regulatory scheme, (3) whether the regulatory scheme connotes government approval or passivity, (4) the extent to which the organization serves a public function or acts as a surrogate for the state, and (5) whether the organization has "legitimate claims to recognition as a 'private' organization in associational or constitutional terms."[91] Each of these factors is to be assessed and "weighed"; each is material to a finding of state action, though no particular factor is conclusive.[92] Even if one factor is absent, a state action finding may still be "appropriate."[93] Moreover, even if an organization can make valid claims under the fifth factor, these will be overcome where the "harm wrought on the public interest"[94] is substantial.

89. *Cf.* Martin v. Pacific Northwest Bell, 441 F.2d 1116, 1118 (9th Cir. 1971) ("The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983 ['under color of' state authority] . . . . In this case, plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management.").

90. NOWAK, *supra* note 57, at 473.

91. Jackson v. Statler Found., 496 F.2d 623, 629 (2d Cir. 1974). *See also* Thompson, *supra* note 65, at 42-47.

92. 496 F.2d at 629.

93. *Id.* at 634.

94. 522 F.2d at 407.

When viewed as the product of a cumulative weighing approach, utilized in a low threshold context, the supreme court's state action arguments in *PT&T* assume more force. The initial factor in the Second Circuit's test—government aid—is present, for the state has granted PT&T a monopoly that has protected its economic growth and "has placed the utility in a position from which it can wield enormous power."[95] In terms of the second and third factors, the court may have concluded that the regulated privileges of PT&T—such as eminent domain[96] and a guaranteed rate of return[97]—suggested state approval rather than neutrality.[98] As the court observed, the state through its regulatory scheme "immunized PT&T from many of the checks of free market competition."[99]

Likewise, the majority's declaration that the regulatory scheme "demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity"[100] speaks to the fourth factor—the "state surrogate" element. Finally, the court's policy arguments as to the "particularly pernicious" nature of discriminaton by a monopolistic entity may be addressing the fifth factor, for the court concluded that "under the circumstances, PT&T can point to no legitimate countervailing interest in 'privacy' or 'personal autonomy' which

95. 24 Cal. 3d at 469, 595 P.2d at 599, 156 Cal. Rptr. at 21. Some commentators have argued that corporate economic power may be a sufficient basis for the imposition of constitutional restraints. *See, e.g.*, Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620 (1958). As Berle explained:

> Certain quasi-constitutional rules governing the behavior of *corporations* . . . are beginning to be imposed by the courts and by public opinion. . . . The preconditions of application are two: the undeniable fact that the corporation was created by the state and *the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree.* . . . Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.

100 U. PA. L. REV. at 942-43 (emphasis added). *But see* Latham, *The Commonwealth of the Corporation*, 55 NW. U.L. REV. 25, 51-53 (1960); Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 348, 374 (1961).

Even under the "economic power" theory, the "constitutionalizatiou" should be limited to the specific area of the power granted. *See* Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U.L.Q. 757, 781: "A private institution that has monopolistic, government-like power should be held to the state's constitutional responsibilities only in regard to specific aspects of its activities. It should be subject to the fourteenth amendment only in the exercise of the monopolistic, government-like control that it possesses."

96. CAL. PUB. UTIL. CODE §§ 600, 616 (West 1975).

97. CAL. PUB. UTIL. CODE § 451 (West Supp. 1979).

98. It should be noted, however, that the state does remain neutral in the significant area of regulating labor coutracts. *See, e.g.*, Pacific Tel. & Tel. Co. v. Public Utils. Comm'n, 34 Cal. 2d 822, 827, 215 P.2d 441, 444 (1950): "The [Public Utilities Code] does not, however, specifically grant to the commission power to regulate the contracts by which the utility secures the labor . . . necessary for the conduct of its business. . . ."

99. 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22.

100. *Id.* at 469, 595 P.2d at 599, 156 Cal. Rptr. at 21 (emphasis added).

could reasonably justify exempting its discriminatory employment practices from constitutional constraints."[101]

Thus, many of the court's assertions, unpersuasive under traditional state action analysis, suggest that the majority may have been addressing the state action issue from a value-oriented approach similar to that employed by the Second Circuit. If so, the court should have made this rationale explicit and marshalled its arguments into a framework suited to balancing. State action analysis—regardless of the result reached—merits detailed, judicious articulation.

c. *Balancing is Inappropriate for State Action Analysis*

If the court achieved its state action finding through balancing, one final issue arises. Is this approach an appropriate means of reaching a state action determination? This Note would argue that it is not. First, a balancing approach in the state action context is subjective, permitting a court to exercise unfettered discretion. The balancing test is more value-oriented than quantitative analysis. As one commentator defined it, balancing casts the "*value* of a challenged nongovernmental practice [against] the *value* of that asserted right."[102] This emphasis on values permits purely subjective determinations.[103]

Additionally, a balancing approach is concededly less rigorous than a quantitative approach. There is no established consensus as to the variables to be considered,[104] so that the inclusion or rejection of various factors lies within the court's discretion. Even where there is a clear set of variables, as in the Second Circuit's formulation, no guidelines exist to determine how to "weigh" the variables. The Second Circuit has even failed to articulate on which sides of the balance the different interests should be placed.[105] Thus, the balancing approach

101. *Id.* at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22.

There is an important distinction between the arguably less-than-compelling "private autonomy" interests PT&T might assert against the imposition of constitutional restraints in the employment sphere and PT&T's very significant "business autonomy" interests in remaining a privately owned, rather than a state-owned, company. As a privately owned utility, PT&T can manage its internal affairs free of political patronage and respond quickly to marketplace needs without first seeking legislative funding.

102. Glennon & Nowak, *supra* note 65, at 259 (emphasis added). *Cf.* the definition in Wahba v. New York Univ., 492 F.2d 96, 102 (2d Cir. 1974) ("*value* of preserving a private sector free from the constitutional requirements applicable to government institutions" also to be balanced) (emphasis added).

103. *See, e.g.*, the California court's conclusion that "PT&T can point to no legitimate countervailing interest" in remaining a private entity. 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22.

104. *Compare, e.g.*, the factors enumerated by the Second Circuit, *see* text accompanying note 91 *supra*, *with* those identified in Note, *supra* note 80, at 662.

105. Under the loose guidelines enunciated by the Second Circuit, *see* text accompanying notes 91-94 *supra*, various possibilities exist because of the inherently different natures of the

leaves courts unguided and unrestricted, inviting confusion and abuse.

The inherent subjectivity of the balancing approach is troublesome in view of the enormous consequences that result from a state action finding. The state action aspect of a constitutional issue is often outcome-determinative of the entire claim.[106] A finding of no state action means that the private actor is not constitutionally accountable. And within recent Supreme Court history, a finding that state action exists has almost always led to a finding that there is a constitutional violation, as the court has paid less attention to the substantive merits of claims.[107] Given this trend toward collapsed, unitary determinations, it is all the more imperative that state action analysis be as objective and precise as possible. That the United States Supreme Court has adopted a rigorous quantitative approach[108] underscores this need.

Thus, even though the court's state action finding in *PT&T* can be justified under a balancing approach, it would be unwise for the court to champion such an approach. The particular characteristics of balancing are unsuited to state action analysis. The quantitative approach provides a far better alternative.

This means, then, that the court's state action finding in *PT&T* was erroneous. A properly applied quantitative analysis would have concluded that there was no state action here. The court's reasoning demonstrated significant analytical gaps, indicating that a more principled approach to state action is needed.

4. Implications of the Constitutional Holding

While the equal protection holding is not, of course, a per se rule invalidating any discrimination by PT&T among its employment applicants and its employees, it is a broad prohibition against all arbitrary, irrational employment discrimination.[109] The constitutional cause of action recognized in *PT&T* applies to all public utilities. It thus affords

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factors. Factors 1, 2, and 4 address only the state's activities and call for a determination simply of whether state involvement exists; factors 3 and 5 call for an internal balancing. Moreover, the overall treatment of these factors is not articulated. It is unclear whether (a) factors 1, 2, and 4 are to be weighed, factors 3 and 5 balanced, and the total result cumulated; (b) factors 1, 2, and 4, once weighed, are to be balanced against factors 3 and 5; or (c) factors 1 through 5, once independently assessed, are to be cumulatively weighed as evidence of state involvement and then balanced against "the nature of the infringed right." Other permutations are also plausible.

106. NOWAK, *supra* note 57, at 474.

107. "The only major state action decision of the Court where state action was found and the challenged practice was upheld was Public Utilities Commission v. Pollak, 343 U.S. 451 (1952)." *Id.* at 475.

108. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

109. 24 Cal. 3d at 474, 595 P.2d at 602, 156 Cal. Rptr. at 24.

homosexuals employed by utilities protection that the legislature has refused to extend[110]—and provides it in the form most resistant to legislative challenge.

III

THE PUBLIC UTILITIES CODE CAUSE OF ACTION

That section 453(a) of the Public Utilities Code is a broad prohibition embracing employment discrimination is a novel conclusion that rests upon a strained analysis of the statutory language and legislative history. Additionally, the court's use of an evolving common law doctrine to interpret the statute is inapposite. Most importantly, the *PT&T* holding effectively embroils the PUC as well as the courts in resolving employment disputes.

A. The Construction of Section 453(a)

The majority's unique construction of section 453(a) is certainly not compelled by the statute's language. The question thus raised is whether section 453(a) even permits such an interpretation. It seems not. The court's open-ended reading is inappropriate as well as unprecedented for this kind of nondiscrimination boilerplate characteristic of the rates and services section of commerce and utility codes. First, the court's reading violates sensible canons of statutory construction by ignoring (1) the narrow "rate" related context of Article I of the Code, in which section 453(a) appears;[111] (2) the statute's plain language; and (3), as the dissent points out, the *ejusdem generis* principle which dictates that the term "or in any other respect" be construed to apply "only to persons or things of the same general nature or class as those enumerated."[112]

The majority's reliance on 1909 legislative intent to support this reading also fails to persuade. The court, characterizing section 34 of the 1909 California legislation regulating transportation companies[113]

110. *See* notes 166-67 and accompanying text *infra*.

111. Article I of the Public Utilities Code, under which § 453(a) is found, is titled "Rates." Prior to 1975, § 453 was titled "Preferential Rates Prohibited."

112. 24 Cal. 3d at 495-96, 595 P.2d at 615, 156 Cal. Rptr. at 37.

113. The 1909 Act provided for the organizing of the Railroad Commission of California, defined its powers and duties, and defined the powers and duties of its regulatees. Section 34 of the Act provided:

> *It shall also be unjust discrimination for any such transportation company* to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, *in any respect whatsoever*, or to subject any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to *any undue or unreasonable prejudice or disadvantage in any respect whatsoever*.

as a predecessor of section 453(a), argues that section 34 created new rights and obligations.[114] Yet the language of section 34, which introduced the phrases "in any respect whatsoever" and "any undue or unreasonable prejudice or disadvantage," was not unprecedented. It had a virtually identical forerunner in section 3 of the 1887 Interstate Commerce Act.[115] The Commerce Act provision was uniformly interpreted as pertaining only to *rates* and as codifying the existing common law.[116] It seems reasonable to assume that the California legislature, in drafting an identical provision in 1909, was aware of the Commerce Act and the established construction of its language.

Moreover, absent compelling evidence, it is not fair to argue that the legislature intended the phrase "in any other respect" to create significant new restrictions on a public utility. In enacting section 34, the legislature probably intended merely to refine and codify common law. The common law at that time did not prohibit discriminatory employment practices.[117] Thus the court's stress on the 1909 language, and its

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1909 Cal. Stats., ch. 312, at 511 (emphasis added).

114. In footnote 12, the court reprinted the relevant provisions of an 1878 Act in order to demonstrate its enlargement in the 1909 legislation. The 1878 Act created the office of "commissioner of transportation," defined its powers and duties, and detailed the powers and duties of its regulatees. It provided:

> A railroad company shall be deemed guilty of unjust discrimination in the following cases:
>
> *First*—When it shall directly or indirectly willfully charge, demand, or receive from any person or persons any less sum for passage or freight than from any other person or persons (except as in this Act herein provided), at the same time, between the same places, and the same direction, for the like class of passage, or for the like quantity of goods of the same class.
>
> *Second*—When it shall directly or indirectly willfully charge, demand, or receive from any person or persons, as compensation for receiving, handling, storing, or delivering any lot of goods of merchandise, any less sum than it shall charge, collect, or receive from any other person for the like service, to a like quantity of goods of the same class, at the same place.

The court conceded that in this legislation, " 'unjust discrimination' related only to discrimination in rates and services." 24 Cal. 3d at 479, 595 P.2d at 605, 156 Cal. Rptr. at 26-27.

115. Section 3 of the Interstate Commerce Act provided:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

24 Stat. 379, c. 104, § 3. *Cf.* language of § 34 of the 1909 California legislation, quoted in note 113 *supra*.

116. *See, e.g.*, Interstate Commerce Comm'n v. B. & O. R.R., 145 U.S. 263, 276, 282-84 (1892).

117. *See, e.g.*, Adair v. United States, 208 U.S. 161, 175 (1908); Greenwood v. Building Trades Council, 71 Cal. App. 159, 171, 233 P. 823, 827-28 (3d Dist. 1925); Overland Publishing Co. v. Union Lithograph Co., 57 Cal. App. 366, 370-71, 207 P. 412, 414 (1st Dist. 1922). The majority implicitly concedes this point when it analyzes the history of the FEPA: "[T]he prohibitions on employment discrimination contained in the FEPA are in no sense declaratory of preexisting common law doctrine but rather include areas and subject matters of legislative innovation,

avoidance of 1909 common law, is not convincing. Equally significant, it does not logically square with the court's later-stated position that section 453(a) embraces common law that is evolving today.[118]

Lastly, the court's interpretation of section 453(a) repudiates long-settled judicial and administrative construction. Offering no case for its position, the majority ignored *Pacific Telephone & Telegraph Co. v. Eshleman*[119] and unsatisfactorily distinguished *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*.[120] Both of these cases established that the PUC has the power only (1) "to regulate the relationship of the utility to the consumer" and (2) "to regulate the manner in which the utility provides the required services."[121] The court's novel construction also compelled it to disapprove a 1971 PUC case, *NAACP v. All Regulated Public Utilities*,[122] which determined that section 453 did not extend to employment practices.[123]

B. The Common Law Authority

In support of its reading of section 453(a), the court primarily emphasized a common law doctrine that it has actively championed in recent years. The majority reasoned that "pursuant to the thrust" of the evolving *Marinship* line of cases in California,[124] section 453(a) is applicable to discrimination in employment.[125] The *Marinship* doc-

creating new limitations on an employer's right to hire, promote or discharge its employees." 24 Cal. 3d at 490, 595 P.2d at 612, 156 Cal. Rptr. at 34.

118. *See* text accompanying notes 124-25 *infra*.

119. 166 Cal. 640, 17 P. 119 (1913).

120. 34 Cal. 2d 822, 215 P.2d 441 (1950). In this decision, the California Supreme Court flatly stated:

> The [Public Utilities] act does not, however, specifically grant to the commission power to regulate the contracts by which the utility secures the labor . . . necessary for the conduct of its business. . . . *In the absence of statutory authorization*, . . . it would hardly be contended that the commission has power *to formulate the labor policies of utilities*, to fix wages or to arbitrate labor disputes.

Id. at 827-29, 215 P.2d at 444-45 (emphasis added). Relying upon the same act and legislative history, the *PT&T* majority reached an opposite conclusion. Yet the majority declined to explicate the differences, asserting instead that "[s]ince the very issue in controversy here is whether or not section 453, subdivision (a) encompasses employment discrimination, PT&T's reliance on the *Pac. Tel. & Tel.* dictum obviously begs the determinative question in this case." 24 Cal. 3d at 478 n.11, 595 P.2d at 604 n.11, 156 Cal. Rptr. at 26 n.11.

121. 34 Cal. 2d at 827, 215 P.2d at 444.

122. 71 Cal. P.U.C. 460 (1971), *review denied*, 4 Cal. 3d Minutes, No. 13, at 6 (1971).

123. 24 Cal. 3d at 480 n.11, 595 P.2d at 606 n.11, 156 Cal. Rptr. at 28 n.11. As the dissent noted, the *NAACP* decision prompted two legislative bills. In 1972, Assembly Bill No. 195 and Senate Bill No. 333 were introduced; each proposed amending § 453(a) to include discrimination "in employment and promotional opportunities." Both bills failed.

124. The seminal decision in this line of cases is James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944). For discussion of this case and related decisions, see notes 126-45 and accompanying text *infra*. *See also* 24 Cal. 3d at 483, 595 P.2d at 607, 156 Cal. Rptr. at 29 (court's partial listing of *Marinship*-related cases).

125. It should be noted that the court's reliance on a broad common law rule under the

trine, however, is inapposite. The ultimate result of its judicial engrafting onto section 453(a) is to enlarge the obligations of a public utility beyond those existing for a private employer at common law today.

1. The Marinship *Doctrine*

The "*Marinship* doctrine"[126] derives from traditional common law principles. In its most general formulation, the doctrine prohibits arbitrary discrimination by private entities which, because of their unique posture in the marketplace, owe special duties to the public. The precise contours of the doctrine have not been fully delineated, for it is an evolving theory whose coverage has expanded significantly over the last several years. The *Marinship* doctrine clearly stems, however, from two intertwined roots—a "public service" principle and a "monopoly power" principle. The willingness of California courts to invoke this doctrine against a private entity depends upon the extent to which one or both of these elements is present.

The "public service enterprise"[127] aspect of the doctrine is rooted in notions concerning the peculiarly public nature of certain private business undertakings. At common law, a "public trust" status was impressed upon English enterprises which served the general public. Thus, because of the usefulness of their undertaking, entities such as common carriers, common farriers, and common innkeepers were burdened with obligations analogous to the fiduciary duties of public officers. As public service enterprises, they bore, for example, the successively imposed legal duties of serving all who applied, of charging reasonable prices, and of avoiding differential treatment.[128]

The "monopoly" aspect of the *Marinship* doctrine originates from the same root. Courts at common law imposed obligations on certain professions and enterprises possessing a consumer monopoly in a local-

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Marinship doctrine and its restrictive interpretation of the FEPA are not inconsistent. As the FEPC observed: "The holdings of these [*Marinship* doctrine] cases, of course became swallowed up in, not restricted by, the prohibition in the F.E.P. Act against discrimination based on race." And in the accompanying footnote, the FEPC stated: "There is no more reason to conclude that the F.E.P. Act may have repealed a broader rule for monopolies than there is to conclude that it repealed Labor Code sections 1101-1105 (prohibiting the [sic] discharge based on one's 'politics', 'political activities', or 'political affiliations') or Labor Code section 923 (prohibiting discrimination based on union activities)." Brief on behalf of Respondent FEPC, at 23, 24 n.8, Gay Law Students Ass'n v. Pacific Tel & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

126. *See* D. Moon & J. Metz (untitled and unpublished essay on file at *California Law Review*). *See also* Sloss & Becker, *The Organization Affected with a Public Interest and Its Members—Justice Tobriner's Contribution to Evolving Common Law Doctrine*, 29 HASTINGS L.J. 99 (1977); Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CALIF. L. REV. 1247 (1967).

127. This term was coined by Tobriner & Grodin, *supra* note 126, at 1253-54.

128. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 522, 527, 530 (1911).

ity[129] in order to offset their superior bargaining power. Thus, the common tailor and common surgeon, while retaining the traditional freedom to hire and fire at will, owed a duty not to discriminate arbitrarily in providing services.

From these narrowly circumscribed origins, this nondiserimination principle—traditionally limited to the consumer context—has undergone notable expansion. California courts have applied it to the consumer practices of such private entities as banks, insurance companies, and hospitals. The rationale is that these institutions are "quasi public in nature":

> The important products or services which these enterprises provide, their express or implied representation to the public concerning their products or services, their superior bargaining power, legislative recognition of their public aspect, or a combination of these factors, lead courts to impose on these enterprises obligations to the public and the individuals with whom they deal . . . .[130]

More significantly, the principle has been extended to contexts long considered the exclusive preserve of the enterprises's internal management. Courts have applied the principle, for example, to the staffing of hospitals[131] and to membership in medical associations.[132] The doctrine has even been invoked against organizations that are merely associated with or allied to public service enterprises, such as professional societies.[133] In each instance, the court imposed the obligations on the theory that the private entity was in a position to deny a licensed individual vital access to professional privileges and certifications.[134]

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129. Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 160 (1903).

130. Tobriner & Grodin, *supra* note 126, at 1253.

131. Ascherman v. Saint Francis Memorial Hosp., 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1st Dist. 1975) (*Ascherman II*).

132. Ascherman v. San Francisco Medical Soc'y, 39 Cal. App. 3d 623, 114 Cal. Rptr. 681 (1st Dist. 1974) (*Ascherman I*); Kronen v. Pacific Coast Soc'y of Orthodontists, 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965), *cert. denied*, 384 U.S. 905 (1966).

133. Cunningham v. Burbank Bd. of Realtors, 262 Cal. App. 2d 211, 68 Cal. Rptr. 653 (2d Dist. 1968); Switat v. Real Estate Comm'r, 116 Cal. App. 2d 677, 254 P.2d 587 (2d Dist. 1953).

134. The paradigm supreme court decisions in this area are Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969) (*Pinsker I*), and Pinsker v. Pacific Coast Soc'y of Orthodontists, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974) (*Pinsker II*). In *Pinsker I*, the court concluded that arbitrary exclusion of an orthodontist from two orthodontic societies was proscribed by common law because of the "public service" characteristics of the voluntary associations and the "compelling economic necessity" of membership. *Pinsker II* established "fair procedure" requirements to ensure that membership applicants received fair treatment. The court reiterated the organization's duty to avoid arbitrary discrimination, provided for judicial review of the organization's substantive decision, and warned that " '[i]n making such an inquiry, the court must guard against unduly interfering with the Society's autonomy . . . .' Only when a society rule is contrary to established public policy or is so 'pa-

James v. Marinship,[135] from which the doctrine derives its name, was the first of the California decisions[136] to extend the nondiscrimination principle to the internal sphere. Chief Justice Gibson, writing for an unanimous supreme court, applied the principle to labor union membership, analogizing the situation created by a closed union with a closed shop to that of a consumer monopoly:

> Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union . . . has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.[137]

The court enjoined the union from refusing to admit blacks into membership under the same terms and conditions applicable to nonblacks, and enjoined the employer of a black worker, as a third party, from dismissing the worker.[138]

The decision heralded the expansion of the consumer monopoly principle to unions whose control over the labor force allowed them to dictate the terms under which a trade or profession could be practiced. In *Williams v. International Etc. of Boilermakers*,[139] a subsequent opinion by Justice Gibson, the court applied this duty of nondiscrimination even to unions that did not possess full monopoly powers[140] and reaffirmed the judicial right to enjoin an employer "from *indirectly* assisting a union in carrying out discriminatory practices."[141]

The court has since applied the doctrine as frequently to nonconsumer activities as to the consumer context. It has never *directly* applied[142] *Marinship* to employment practices, although in 1977 the court

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tently arbitrary and unreasonable' as to be 'beyond the pale of the law' should a court prohibit its enforcement." 12 Cal. 3d at 558, 526 P.2d at 266, 116 Cal. Rptr. at 258 (citations omitted).

For detailed discussions of *Pinsker I* and *Pinsker II*, see Sloss & Becker, *supra* note 126, at 102-11.

135. 25 Cal. 2d 721, 155 P.2d 329 (1944).

136. The "monopoly" nondiscrimination principle had been applied to a labor union by a New Jersey court in 1938. *See* Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J. Eq. 347, 350, 197 A. 720, 722 (1938).

137. 25 Cal. 2d at 731, 155 P.2d at 335. Since the case involved a shipbuilding union designated by the NLRA as the exclusive bargaining agent in its field, the decision did not rest solely on common law. The court made clear, however, that the common law alone was sufficient: "The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved." *Id.* at 740, 155 P.2d at 340.

138. *Id.* at 742, 155 P.2d at 340-41.

139. 27 Cal. 2d 586, 165 P.2d 903 (1946).

140. *Id.* at 589, 592, 165 P.2d at 905, 906.

141. *Id.* at 594, 165 P.2d at 907 (emphasis added).

142. *See, e.g.*, Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948), *aff'd*,

approached such a holding in *Ezekial v. Winkley*.[143] The doctrine has been increasingly invoked, however, in situations where the *economic power* of a private entity poses a threat to individual interests. As Justice Tobriner elsewhere observed, "Courts now impose obligations upon private undertakings in order to protect the individual from the economically powerful enterprises."[144] And in *Ezekial*, the court clearly stated that the doctrine had evolved into a broad "economic power" rationale: "[T]he application of the common law rule does not depend on the existence of 'monopoly' power. [citations] The judicial inquiry, rather, has consistently been focused on the practical power of the entity in question to affect substantially an important economic interest."[145]

2. *The* Marinship *Doctrine Is Inapposite*

The court's application of *Marinship* to the facts of *PT&T* was neither candid nor appropriate. In invoking the doctrine as ostensible support for its construction of section 453(a), the majority declined to acknowledge that the doctrine had evolved into a broad economic power theory. The court's lack of forthrightness in confronting this may signify concern on the part of some justices regarding the potentially wide ranging application of this economic power rationale.

The court also failed, in relying solely upon the "monopoly" and "public service" underpinnings of the doctrine, to emphasize that these principles had never before been applied to a "pure" employment situation. The court had previously limited *Marinship* to membership or quasi-licensing contexts. As the court made clear in *Ezekial*,

> These common law principles were, of course, never intended to invoke legal sanctions . . . on behalf of every employee threatened with discharge by a private employer. Rather, *Marinship* and successive cases

339 U.S. 460 (1949). In *Hughes*, the court referred to the *Marinship* doctrine in its affirmance of the contempt citations of union picketers who had violated a preliminary injunction. The picketing itself, according to the California court, had been directed toward an unlawful objective—that of compelling the hiring of grocery store employees in proportion to the racial origin of customers.

143. 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977). In *Ezekial* the issue was not exclusion but expulsion, the setting was a private hospital, and the context was the dismissal of a trainee from a surgical residency program. Confronted with the fact that plaintiff was not an already-skilled professional and with the further complication that, as a resident, he was an employee of the hospital, the court explained away these matters, deeming residency training to be analogous to hospital staff membership. While the court effectively protected plaintiff's interest as an employee at the same time that it protected his interest in attaining a professional specialty status, the decision rested expressly on the latter grounds: "In the instant case we look beyond plaintiff's immediate status as an employee of Kaiser and examine an entirely distinct interest which also inheres in his residency, namely, his expectation of achieving necessary certification as a surgeon." *Id.* at 275, 572 P.2d at 37, 142 Cal. Rptr. at 423.

144. Tobriner & Grodin, *supra* note 126, at 1255,-1265.

145. 20 Cal. 3d at 277, 572 P.2d at 38-39, 142 Cal. Rptr. at 424-25.

> have emphasized that the membership privileges, or the professional recognition, which certain private institutions may arbitrarily grant, deny, or withdraw are practical *prerequisites* to *any* effective employment in a *chosen* field.[146]

The court's invocation of *Marinship* in the *PT&T* context was thus inappropriate—both specifically, in regard to the monopoly principle, and generally, in regard to the "pure" employment context presented. The court's monopoly analysis is simply wrong. Of the thousands of potential applicants for employment with PT&T, only a few are candidates for the limited number of unique, nontransferable telecommunications positions over which PT&T has sole control. Fewer still are qualified in those unique trades such that rejection means denial of access to a chosen profession. Equally significant, *PT&T* represents a "pure" employment context—the kind of context to which *Marinship* principles should not apply. An employer possesses materially different interests than a professional association or a voluntary membership organization. Whereas a professional association usually wants to accept all qualified members and thereby enhance its strength and prestige, an employer has a strong interest in selecting among a pool of qualified applicants. Denial is the rule rather than the exception: it is in the employer's best interests to exclude all qualified applicants except those few possessing the additional imponderable characteristics deemed by the employer to be crucial to success. As the FEPC observed, "Employment selection . . . is in many cases an inherently arbitrary process."[147]

That the court chose not to rest its holding on the *Marinship* doctrine per se but rather to use it as support for the more narrow holding under section 453(a) is particularly significant. This may be, on the one hand, an implicit concession that the *Marinship* doctrine has never stood as a general barrier to non-FEPA proscribed employment discrimination. On the other hand, the *PT&T* decision deliberately leaves the door open to future applications of the *Marinship* doctrine directly to employment. The court, concluding its analysis, expressly reserved determination of "whether California common law, in and of itself, prohibits a public utility from engaging in arbitrary employment discrimination."[148]

C. The Concurrent Jurisdiction Problems

The majority opinion held that PT&T's alleged practices consti-

146. *Id.* at 275, 572 P.2d at 37, 142 Cal. Rptr. at 423 (emphasis added).

147. Brief on behalf of Respondent FEPC, at 54, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

148. 24 Cal. 3d at 483, 595 P.2d at 607, 156 Cal. Rptr. at 29.

tuted a violation of Public Utilities Code section 453(a) and therefore gave rise to a private damages action under Public Utilities Code section 2106.[149] As the dissent observed,[150] by determining that a cause of action exists under section 2106, the majority necessarily embroils not only the courts but also the PUC in employment discrimination disputes. That this result was deliberate rather than incidental seems evident from the majority's having decided the statutory issue at all, for the constitutional issue rested on congruent grounds.[151] That it will be difficult to implement is also clear.

General jurisdiction over section 453(a) claims rests with the PUC.[152] Under section 2106, however, the courts share special, concurrent jurisdiction[153] with the PUC for alleged violations of the Public Utilities Code. The courts' jurisdiction, however, "is in aid of and not derogation of" the PUC's jurisdiction.[154] Thus, although the majority

149. Section 2106, reprinted in part in note 21 *supra*, is the only statutory authority in the Public Utilities Code permitting *an individual* to recover compensatory and exemplary damages from a utility for its unlawful acts.

150. 24 Cal. 3d at 496, 595 P.2d at 615, 156 Cal. Rptr. at 37 (Richardson, J., dissenting).

151. "[W]e believe that the constitutional considerations . . . constitute a strong basis for interpreting the existing statute as barring employment discrimination." *Id.* at 485, 595 P.2d at 609, 156 Cal. Rptr. at 31.

This represents a reversal of the traditional judicial posture of deciding a case on the narrowest possible grounds and suggests that the statutory holding is unnecessary. However, the § 453(a) holding has jurisdictional implications extending beyond those of a cause of action under the equal protection provision. *See generally* text accompanying notes 152-57 *infra*.

152. Public Utilities Code § 701 provides: "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part [includes § 453(a)] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." CAL. PUB. UTIL. CODE § 701 (West 1975). Section 1759 provides:

> No court of this State, except the Supreme Court to the extent specified in this article [§§ 1756-1758], shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

CAL. PUB. UTIL. CODE § 1759 (West 1975).

153. The Public Utilities Code recognizes that in some instances there is concurrent jurisdiction between the Commission and the superior court, though these instances are not enumerated. For an example of this recognition, see §§ 735 and 736, which refer to "concurrent jurisdiction." The most recent judicial affirmation of concurrent jurisdiction over § 2106, prior to *PT&T*, is Masonite Corp. v. Pacific Gas & Elec. Co., 65 Cal. App. 3d 1, 7, 135 Cal. Rptr. 170, 174 (1st Dist. 1976) (citations omitted):

> [T]he commission does not have *exclusive* jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities . . . . On the contrary, section 2106 expressly empowers the state courts to award both compensatory and (in a proper case) exemplary damages against the public utility for *all* damages, loss or injury resulting from any unlawful act or omission . . . .

154. Vila v. Tahoe Southside Water Util., 233 Cal. App. 2d 469, 479, 43 Cal. Rptr. 654, 661 (3d Dist. 1965). To avoid conflict with § 1759, courts have consistently read an implicit limitation into § 2106. *See* Masonite Corp. v. Pacific Gas & Elec. Co., 65 Cal. App. at 7, 135 Cal. Rptr. at 174: "[T]he PUC as an expert administrative body has wide regulatory power with respect to public utilities which the courts generally may not abrogate (§ 1759; *E.B. Ackerman Importing Co.*

did not expressly acknowledge PUC jurisdiction,[155] the holding under section 2106 affords subclass I plaintiffs not only a private damages action but also access to the administrative protection of the PUC.

By indirectly authorizing the PUC to entertain employment discrimination disputes, the court is thwarting legislative intent. The legislature created the FEPC to adjudicate employer-employee disputes. The FEPC itself has established comprehensive machinery for this purpose, including detailed procedures for utility employees who file employment discriminaton complaints.[156] For the PUC also to develop employment discriminaton hearing procedures and administrative machinery will represent an expensive, unnecessary duplication of state facilities.

Additionally, PUC assumption of employee-relations tasks poses problems of conflicting results and multiple remedies. If the procedures adopted by the PUC are inconsistent with those of the FEPC, they will create conflicting results—at a minimum—for utility employees protected by the FEPA (*e.g.*, blacks, aliens, women, physically handicapped). That is, an FEPA-protected utility employee will have *two* administrative remedies, as well as the private damages action under section 2106. Similarly, the court's holding produces another anomaly, which the dissent notes.[157] Aggrieved homosexual applicants to, or employees of, a public utility will be able to proceed to the PUC or directly to court, whereas all other persons alleging employment discrimination must first exhaust their remedies through the FEPC.

In short, the holding creates serious practical problems that the court failed to address. Significantly, it also usurps the long-settled prerogatives of the FEPC, established by the legislature.

IV

THE LABOR CODE CAUSE OF ACTION

The cause of action established in *PT&T* under the Labor Code can best be described as judicial legislation. In finding a private damages action against PT&T for interfering with plaintiffs' political freedom, the majority carved out an argument that plaintiffs had neither

v. City of Los Angeles (1964) 61 Cal. 2d 595 [39 Cal. Rptr. 726, 394 P.2d 566])." *Accord*, Waters v. Pacific Tel. Co., 12 Cal. 3d 1, 4, 523 P.2d 1161, 1162, 114 Cal. Rptr. 753, 754 (1974): "[Section 2106] must be construed as limited to those situations in which an award of damages would not hinder or frustrate the commission's declared supervisory and regulatory policies."

155. Elsewhere the majority refers obliquely to potential PUC jurisdiction over employment discrimination complaints. *See* 24 Cal. 3d at 477 n.11, 486 n.15, 595 P.2d at 604 n.11, 609 n.15, 156 Cal. Rptr. 26 n.11, 31 n.15.

156. *Id.* at 475 n.10, 595 P.2d at 602 n.10, 156 Cal. Rptr. at 24 n.10.

157. *Id.* at 498, 595 P.2d at 617, 156 Cal. Rptr. at 39.

specifically pleaded in their complaint nor raised in their briefs.[158] The majority unjustifiably broadened both the language and rationale of the controlling statute—and created significant future complications in so doing.

A. The Construction of Sections 1101-1102

The court's extension of statutory protection to *applicants* contravenes the explicit language of sections 1101-1102, which refer to existing employees only. Similarly, the majority's overall interpretation of the provisions disregards the plain meaning[159] of Labor Code sections 1101-1105. As these provisions have generated little case law or critical consideration,[160] the fullest explanation of their terms continues to be the one set forth in the 1946 case of *Lockheed Aircraft Corporation v. Superior Court*.[161] The supreme court there determined that

> [t]he words "politics" and "political" imply orderly conduct of government, not revolution . . . . In each case, the interference is with political activities or affiliations," and *the test is not membership in or activities connected with any particular group or organization, but whether those activities are related to or connected with the orderly conduct of government and the peaceful organization, regulation and administration of the government*.[162]

Thus, absent evidence of concerted, government-directed action, the mere fact of being identified as a homosexual, and the fallacious equation of this with being part of the "gay liberation movement," satisfies neither the settled judicial definition nor the common sense meaning of "political."

B. Implications of the Holding

By carving out Labor Code protection for plaintiffs in *PT&T*, the majority effectively afforded subclass II—and all aggrieved homosexual employees and employment applicants—a remedy similar to that enjoyed by FEPA-protected claimants. This judicial protection, how-

158. 24 Cal. 3d at 500-01, 595 P.2d at 618, 156 Cal. Rptr. at 40. The first and only mention of Labor Code §§ 1101-1105 was in a footnote of the FEPC brief filed with the court of appeal. *See* note 125 *supra*.

159. In support of the "plain meaning" of the statutory provisions, the majority observed: "As explained in *Mallard v. Boring* [citation omitted]: 'The term "political activity" connotes the espousal of a candidate *or a cause*, and some degree of action to promote the acceptance thereof by other persons.' (Italics added.)" 24 Cal. 3d at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32. *But see* the immediately preceding sentence in *Mallard*: "[S]tatutes must be given a reasonable and common-sense construction in accordance with the apparent purpose and intention of the lawmakers." 182 Cal. App. 2d 390, 395, 6 Cal. Rptr. 171, 174 (4th Dist. 1960).

160. The only detailed discussion of these statuory provisions is found in Note, *supra* note 30.

161. 28 Cal. 2d 481, 171 P.2d 21 (1946).

162. *Id.* at 485, 171 P.2d at 24 (emphasis added).

ever, creates significant complications for future employment relations within the state.

One problem arising from the court's construction of sections 1101 and 1102 is that "manifest" members of numerous groups will be able to present a justiciable claim under the loose standards enunciated here. The vagueness of the claims recognized in *PT&T* and the new breadth of the term "political" make it possible, for example, for female applicants or employees to allege discrimination based on their identification with the "women's liberation" movement. Thus, the court's holding has the damaging potential of embroiling the judiciary not only in employment discrimination actions brought by homosexuals but also in those brought by other groups of employees. This, of course, frustrates legislative intent, for the political provisions of the Labor Code were not intended to serve as a floodgate for litigation.

Moreover, the majority's holding under the Labor Code adds yet another avenue of litigation to those already established by *PT&T*. This panoply of remedies may allow a homosexual employee or applicant to "pick and choose" among them, thus raising the problem of potential abuse. For example, a subclass I plaintiff can choose among (1) a constitutional cause of action, (2) a PUC administrative remedy, followed, if necessary, by a private damages action, and (3) a private damages action under the Labor Code. If that subclass I plaintiff is also FEPA-protected (a black, for example), he may now, under the vague standards set in *PT&T*, avoid the conciliation procedures of both the PUC and the FEPC by pursuing a "political" action[163] in the courts. Or, he can choose to pursue simultaneous proceedings—in court, under Labor Code sections 1101 and 1102, and in either administrative agency. Add to these possibilities the further complication that the broadened construction of the Labor Code affords protection not only to subclass I and subclass II plaintiffs, but to other groups as well, and the tremendous potential for abuse of the Labor Code remedy becomes clear.

Finally, there are special problems within the context of litigation that attend not only the "political" cause of action but the entire decision. Can, or must, an employer inquire into the sexual orientation of its employees to demonstrate to an agency or a court that it does have homosexuals on its payrolls and no pattern of discrimination? If, indeed, there is a duty to inquire, then there will be a correlative duty to

163. The majority's statement, in the constitutional analysis, that "nothing in this opinion is intended to imply that an employee may pursue a claim for which a remedy is provided by the FEPA without exhausting the administrative remedies provided by that act" does not address the possibility of a claimant alleging discrimination on political grounds rather than on FEPA-proscribed grounds. 24 Cal. 3d at 475 n.10, 595 P.2d at 602 n.10, 156 Cal. Rptr. at 24 n.10.

disclose on the part of applicants and existing employees who wish to benefit from the new sources of protection established in *PT&T*. These inquiry-disclosure duties are sensitive matters which deserved consideration and analysis by the court.

V

THE FAIR EMPLOYMENT PRACTICES ACT HOLDING

The court's refusal[164] to expand the express language of the FEPA—which proscribes employment discrimination on the grounds of "race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex"[165]—to cases involving sexual orientation rests on sound grounds. The majority's approach, in marked contrast to its treatment of the Public Utilities Code and Labor Code provisions, gave deserved emphasis to prior administrative and judicial construction of the statute.

The strongest argument against an expansive construction of the FEPA, and the one the court implicitly adopted,[166] is grounded upon the legislature's continued refusal to add "sexual orientation" to the FEPA categories. During the past five years, several such amendments have been proposed; all were defeated or died in the legislature.[167] Such a consistent failure to extend protection to homosexuals, coupled with amendments to cover other groups, strongly indicates the legislature's intent to leave the law unchanged in this respect. Thus, in affirming that the FEPA does not grant the FEPC jurisdiction to act on complaints of employment discrimination on the basis of homosexuality, the majority was faithful to the legislature's directives.

CONCLUSION

The court's opinion in *PT&T* is consistent with its prior defense of "the right of an individual to live his private life, apart from his job, as he deems fit,"[168] its belief in the active role of the judiciary,[169] and its

164. The dissent joins issue with the majority on this point. *Id.* at 493, 595 P.2d at 613, 156 Cal. Rptr. at 35 (Richardson, J., dissenting).

165. CAL. LAB. CODE § 1420(a) (West Supp. 1979). The same language appears in §§ 1411, 1412, 1419(f), (h), and (i), 1420(b), (c) (West Supp. 1979).

166. The dissent noted the legislative inaction on A.B. 633 and S.B. 2053. 24 Cal. 3d at 500, 595 P.2d at 618, 156 Cal. Rptr. at 40.

167. *See* note 166 *supra*. *See also* A.B. 1302 (1977-78), S.B. 3 (1979), and S.B. 18 (1979). A.B. 1 (1979-80) was defeated subsequent to the *PT&T* decision.

Attempts to amend Title VII to include protection for homosexuals have also been unsuccessful. *See* H.R. 5452, 94th Cong., 1st Sess., 121 CONG. REC. 8554 (1976) and H.R. 2998, 95th Cong., 1st Sess., 123 CONG. REC. 859 (1977).

168. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 239, 461 P.2d 375, 394, 82 Cal. Rptr. 175, 194 (1969) (Tobriner, J.). Along with *Morrison*, a leading California decision on homosexual rights, the court's two other significant opinions in this area were written by Justice Tobriner:

tendency to afford individuals protection against the majoritarian process.[170] In recognizing three distinct causes of action for homosexual employees and applicants, however, the court sacrificed careful analysis. Each cause of action rests on questionable grounds and contains broad implications that the majority failed to address adequately. The court, in pondering the complex, sensitive issues presented by *PT&T*, would have been well advised to heed an earlier observation of one of its own justices. "[D]espite their past, realistic responses to the challenges of society, the court cannot solve all of the conflicts confronting society. . . . [T]he court's role is limited. The legislative bodies must bear the ultimate responsibility for resolving these social issues."[171]

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Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977), and Lerner v. Los Angeles City Bd. of Educ., 59 Cal. 2d 382, 380 P.2d 97, 29 Cal. Rptr. 657 (1963). *See* Willemsen, *Justice Tobriner and the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change*, 29 HASTINGS L.J. 73 (1977).

169. *See* Tobriner, *Social Challenge and the Courts' Response*, 8 LINCOLN L. REV. 19 (1973). *See generally* Tobriner & Grodin, *supra* note 126.

170. As former Chief Justice Wright observed, "[A] constitutional democracy recognizes the right of the minority to be protected from the arbitrariness or, in some instances, the tyranny of the majority. When forces within our system would abridge these rights, the Court must intervene and protect those who have proved unable to protect themselves." Wright, *supra* note 41, at 1265. A recent instance of the supreme court's intervention is Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977).

171. Tobriner, *supra* note 169, at 22.

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