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THE LABOR LAW LEGACY OF THE BURGER COURT'S LAST TERM: A FAILURE OF IMAGINATION AND VISION*

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SUMMARY

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I. INTRODUCTION

The October 1985 Term of the Supreme Court closed the final chapter on the seventeen-year history of the Burger Court. For those of us who have reviewed the labor law decisions of the Burger Court in prior years,[1] the decisions of that term offer the opportunity to evaluate the last work product of the Burger Court in deciding labor and employment policy. These decisions also provide an especially timely occasion to reconsider the judicial perspective of the Burger Court on labor law.

During the October 1985 Term, the Supreme Court decided twenty odd labor law and employment discrimination cases. While these cases reflected many facets of law, several were relatively simple and straightforward, and some were decided on non-labor law issues. In contrast, the Court's employ-

1. *See* Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L. REV. 533 (1976); Bartosic & Minda, *Labor Law Myth in the Supreme Court, 1981 Term: A Plea for Realistic and Coherent Theory*, 30 U.C.L.A. L. REV. 271 (1982).

ment discrimination decisions were highly controversial and far from simple or straightforward.

Unfortunately, there was no grand theme nor did new overarching trends develop during the last term of the Burger Court. There was the significant affirmative action trilogy with a plethora of opinions but limited consensus. We shall emphasize those three cases and consider less extensively the other employment discrimination cases, the six Taft-Hartley cases, the public sector case involving the constitutional requirements for the collection of agency shop fees, and the various miscellaneous cases. Our purpose is to evaluate the leading decisions to determine whether these decisions add anything of significance to the labor law legacy bequeathed by the Burger Court.

II. EMPLOYMENT DISCRIMINATION

A. *Affirmative Action*

Racial discrimination at the workplace was again in the forefront during the 1985 Term, which was, of course, the last opportunity for the Burger Court to reconcile the stark choice posed by two fundamentally inconsistent visions of equality in employment. In a long line of cases reaching back to the Court's 1971 decision in *Griggs v. Duke Power Co.*,[2] and culminating in its 1984 decision in *Memphis Firefighters v. Stotts*,[3] two antithetical approaches toward remedying racial injustice in employment have hopelessly divided the Burger Court. At the center of the controversy has been one of the most divisive issues of our time—race-conscious affirmative action plans, which set quotas or goals that benefit minorities not themselves identified victims of past discrimination.[4] The precise legal issue is whether these plans may be voluntarily adopted or judicially imposed. Before analyzing last term's affirmative action decisions, we briefly survey the intricate fabric, with its entangled and knotted threads, that the Burger Court has woven in developing affirmative action doctrine.

1. *Background: Affirmative Action and the Burger Court*

Beginning with *Griggs v. Duke Power Co.*[5] the Burger Court recognized

2. 401 U.S. 424 (1971).

3. 467 U.S. 561 (1984).

4. The controversy over race-conscious affirmative action remedies has generated a voluminous body of scholarship. *See e.g.*, Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986); Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1; Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983); Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 KY. L.J. 1 (1981-82); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979); Morris, *The Bakke Decision: One Holding or Two?*, 58 OR. L. REV. 311 (1979); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

5. 401 U.S. 424 (1971).

the appropriateness of race-conscious remedies under Title VII as a necessary means for remedying discrimination attributable to minority group differences in society. In *Griggs*, the Court, speaking through Chief Justice Burger, unanimously concluded that federal courts should look to disparate impact statistics in determining whether employment criteria violate Title VII. The Court held that employment testing and educational job requirements that bear no significant relationship to job performance are unlawful if they have a disparate impact on black employees and applicants. In finding that employment discrimination could be established by proof of disparate impact, the *Griggs* Court made group differences between races a relevant factor for establishing Title VII liability. By the late 1970's, the Burger Court seemed to be moving toward a general "group-based" approach to employment discrimination issues, which embraced the notion that Title VII was broad enough to sustain race-conscious remedies even if they benefitted nonvictims.

The Supreme Court, however, did not squarely face the issue concerning the legality of race-conscious affirmative action programs until 1978, when it decided *Regents of the University of California v. Bakke*.[6] In *Bakke*, the Court ruled, five to four, that race could be used as a "plus" factor to achieve diversity in selecting students for medical schools and other institutions of higher learning.[7] While *Bakke* considered the validity of race-conscious programs in education, the Court in the following year decided *United Steel Workers v. Weber*,[8] upholding, five to two, (Justices Powell and Stevens not participating) a voluntary affirmative action quota established by a collective bargaining agreement which reserved fifty percent of the openings of an inplant training program for black employees. *Weber* concerned the legality under Title VII of a *voluntary* plan adopted in a *private* labor contract. Moreover, in its 1980 *Fullilove v. Klutznick* decision,[9] the Burger Court upheld, six to three, the constitutionality of a *congressionally established* set aside program that reserved a minimum amount of *public* work funds for contracts with minority-owned enterprises. Despite the closeness of the decisions and the splintered voting patterns, the Burger Court's decisions in *Bakke*, *Weber*, and *Fullilove* provided at least qualified approval for race-conscious remedies under Title VII. In fact, by 1984 courts of appeals in more than fifty cases had upheld racial quotas as remedies for adjudicated violations of Title VII.[10]

6. 438 U.S. 265 (1978). The constitutionality of affirmative action quotas first reached the Court in Defunis v. Odegaard, 416 U.S. 312 (1974), but in a five to four decision it avoided ruling on the question by finding the controversy moot.

7. The Court ruled, however, that the special admissions program of the Medical School at the University of California, Davis, which "set aside" a number of places in each class for qualified disadvantaged minorities, was invalid under Title VI of the Civil Rights Act of 1964.

8. 443 U.S. 193 (1979).

9. 448 U.S. 448 (1980).

10. *See* Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339, 345, n.15 (1985). Reading these cases, treatise writers reached the erroneous conclusion that the legality of race-conscious remedies under Title VII was "settled." *See* Local 28 Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3038 n.28 (1986) (Brennan, J., opinion for the Court), citing B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW ch. 37, at 1200 n.20

Yet ample reason existed for thinking that the legality of race-conscious remedies was far from settled. The Supreme Court had produced a contrary strand of case authority which was seemingly adverse to the use of Title VII remedies benefitting minorities who are not the identified victims of past discrimination. As early as 1977 the Supreme Court had suggested that affirmative action remedies under Title VII might be limited to *specific victims* of discrimination. In *Teamsters v. United States*,[11] the Court, seven to two, concluded that mere membership in the disadvantaged class is insufficient to warrant a seniority award[12] and that competitive seniority (seniority that grants preference to one employee over another) may be awarded only to an individual victim of discrimination.[13] In the same year the Court also decided *Hazelwood School District v. United States*,[14] which held that an employer was immune from liability for even intentional acts of discrimination that had occurred before the effective date of Title VII. When read together, *Teamsters* and *Hazelwood* suggested that Title VII remedies might be reserved only for identifiable victims of discrimination violative of the statute. The unmistakable implication of *Teamsters* was at least that race-conscious remedies would be invalid to the extent that they purport to grant competitive seniority to nonvictims.

The apparent conflict between these two lines of Supreme Court authority was finally faced by the Court in its 1984 *Firefighters v. Stotts* decision.[15] The controversy in *Stotts* arose during a budgetary crisis in Memphis which forced the city to lay off firefighters to allocate the burdens of fiscal austerity. Under the last hired-first fired seniority provision of the labor contract, senior white employees would be preferred to a group of junior black employees who had been hired by the city under an affirmative action consent decree.[16] The consent decree imposed hiring and promotion goals for blacks to remedy alleged racial discrimination by the city.[17] When the city proposed to lay off firefighters on a last hired-first fired basis, Stotts brought a class action to enjoin the seniority provision on the ground that the threatened layoffs violated the consent decree. The district judge granted the injunction and the Sixth Circuit affirmed.

The Supreme Court reversed six to three. In the opinion for the Court, Justice White extended the logic of *Teamsters* to hold that section 703(h) of Title VII prohibits federal courts from overriding the seniority rights of white employees and awarding black employees competitive seniority prefer-

(1976); C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 13.2, at 815 n.11 (1980).

11. 431 U.S. 324 (1977).

12. *Id.* at 367-71.

13. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court held that section 706(g) of Title VII authorized the award of competitive seniority as a make-whole remedy for victims of unlawful discrimination. *Teamsters* emasculated the broad import of *Franks* without overruling it by limiting the affirmative action remedy of competitive seniority to victims of past discrimination.

14. 433 U.S. 299 (1977).

15. 467 U.S. 561 (1984).

16. It is interesting to note that the "junior" black firefighters actually affected in *Stotts* ranked below the affected "senior" white employees on the seniority list only because the first letter of their last names came later in the alphabet; the seniority system used alphabetical priority as a tie-breaking criterion. *See* Fallon & Weiler, *supra* note 4, at 5.

17. *Stotts*, 467 U.S. at 566. The allegations of racial discrimination were never adjudicated.

ence, absent proof that the latter had been the actual victims of discriminatory practices. By strong dictum, Justice White's opinion also appeared to go beyond the *Teamsters* rationale. He stated: "[O]ur ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) to provide make-whole relief only to those who have been the actual victims of discrimination."[18] The clear import of this statement, which was unnecessary to resolve the issue in *Stotts*, suggested that race-conscious remedies might be invalid under section 706(g) whenever they afford benefits to minorities not proven to be identified discriminatees.

Despite the uncertainties remaining after *Stotts*, the Reagan administration promptly interpreted it as adopting a concept of "color blindness" that would have almost precluded the use of race as a factor in remedying Title VII violations. Because of this abrupt shift in policy, the Justice Department sought to undermine Executive Order 11246, filed motions to modify fifty-one outstanding court orders, and realigned itself in several Supreme Court employment discrimination cases last term. The apparent conflict between the limited pro-affirmative action thrust of *Bakke*, *Weber*, and *Fullilove* and the anti-affirmative action implications of *Teamsters*, *Hazelwood*, and *Stotts* set the stage for the 1985 Term.

2. *The Affirmative Action Trilogy*

In three important decisions, the Supreme Court had the opportunity to clarify its holding in *Stotts* and to reconsider the overall ramifications of race-conscious remedies under both Title VII and the guarantee of equal protection. The resulting opinions of the Justices in these cases can be considered a trilogy on affirmative action remedies. Unlike other labor law trilogies, however, the Burger Court's affirmative action trilogy is flawed by deep ambivalence which can only provoke further controversy and litigation. In fact, "trilogy" may be a misnomer, given that the three cases spawned a total of fourteen opinions. Such diversity cannot yield the clarity and unifying coherence one expects of a legal trilogy.

a. *Racial Preference in Public Sector Collective Bargaining Agreements*

In the first case, *Wygant v. Jackson Board of Education*,[19] the Court addressed the constitutionality of a labor contract between a teachers' union and a school board providing that the percentage of minority teacher layoffs could not exceed the percentage of minority personnel employed at the time of layoff. The layoff provision required the school district to maintain the percentage of minority teachers hired under an affirmative action plan which sought to bring the percentage of minority teachers into parity with the percentage of minorities in the student body. The Court held, five to four, that the plan violated the Equal Protection Clause.

Justice Powell, in a plurality opinion joined by Chief Justice Burger and

18. *Id.* at 579-80.
19. 106 S. Ct. 1842 (1986).

Justice Rehnquist, announced the Court's judgment. The fact that a disadvantaged group was the beneficiary of racial preference did not matter because all racial classifications, no matter how benign, must be subject to strict scrutiny. This inquiry requires a two-prong examination: (1) a "compelling governmental interest" must justify the racial classification; and (2) the state must adopt the least restrictive means in seeking to effectuate its objective by "narrowly tailor[ing]" the racial classifications to accomplish the state's asserted purpose.[20]

The first requirement—that the classifications be justified by a compelling governmental interest—placed upon the plaintiffs the ultimate burden of demonstrating particularized findings of prior discrimination.[21] Justice Powell thus rejected the school board's argument that the racial layoff preference was justified as providing minority "role models" for minority students who were themselves the victims of societal discrimination. The effects of societal discrimination were considered legally insufficient because in the absence of particularized findings of discrimination, the courts would be compelled to "uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."[22]

Justice Powell did recognize that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."[23] Although acknowledging that the Court had accepted this principle of remedial action in a number of affirmative action decisions,[24] Justice Powell nevertheless found a major obstacle in the Court's concern expressed in *Stotts* "over the burden that a preferential layoff scheme imposes on innocent parties."[25] In Justice Powell's view, the "burden [of hiring goals, as distinguished from the layoff plan] to be borne by innocent individuals is diffused to a considerable extent among society generally, [and] denial of a future job is not as intrusive as loss of an existing job."[26] He also concluded that the layoff plan was not sufficiently narrowly tailored because "[o]ther less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are

20. *Id.* at 1846.

21. *Id.* at 1848.

22. *Id.* Justice Powell would apparently create a constitutional impediment for all Title VII plaintiffs who seek to challenge state action on the basis of statistical disparities establishing general societal discrimination.

23. *Id.* at 1850. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Id.*, quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980), quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976).

24. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Fullilove v. Klutznick, 448 U.S. 448 (1980).

25. *Wygant*, 106 S. Ct. at 1851.

26. *Id.* The Sixth Circuit has recently interpreted this language to require "forceful consideration" to justify layoff provisions. In Berry v. School Dist., Benton Harbor, 801 F.2d 872 (6th Cir. 1986), the court of appeals held that no case or controversy existed when layoffs were not imminent, and the specific effects of the layoff provision were not presented to the court. The court noted in a school desegregation suit that "knowledge of the particular facts surrounding a layoff are crucial to a fair and equitable remedy. In other words, before approving or modifying a flat prohibition on the layoff of black faculty, . . . [the court would wish] to know, for example, who and how many are facing layoffs, why and for how long, and for how many years has the teacher to be laid off worked for the system in comparison to teachers being retained through affirmative action." *Id.* at 874-75.

available."[27]

Justice O'Connor, concurring in part and in the judgment, agreed with Justice Powell that racial classifications must be tested under a strict scrutiny standard of review requiring the remedy to be "narrowly tailored" to a "compelling governmental interest."[28] She also accepted Justice Powell's conclusion that "a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."[29] Finally, although she also concurred in rejecting the "role model" theory, she did distinguish it from the goal of promoting racial diversity among a faculty,[30] which is the traditional objective of affirmative action faculty recruitment plans at most colleges and universities.

More significantly, Justice O'Connor disagreed with Justice Powell on whether a particularized finding of prior discrimination is a constitutional requirement under the strict scrutiny standard. Unlike Justice Powell, Justice O'Connor urged that "a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan."[31] She reasoned that if the rule were otherwise, public employers would have no incentive to "meet their civil rights obligations" voluntarily because they would be required to admit to specific acts of illegal discrimination before establishing an affirmative action program.[32] In her opinion, public employers need only have a "firm basis" to conclude that affirmative action is warranted by demonstrable evidence supporting a prima facie violation of Title VII.[33]

Justice O'Connor concurred in the judgment because the means selected by the school board to accomplish its affirmative action objective were not narrowly tailored. The layoff plan was constitutionality flawed in that it was tied to the hiring goal, which in turn was "tied to the percentage of minority students in the school district, not to the percentage of qualified minority teachers within the relevant labor pool."[34] Justice O'Connor, however, left open the question whether racial preference goals applied to layoffs

27. *Wygant*, 106 S. Ct. at 1852.

28. *Id.* at 1853. While Justice O'Connor indicated that she subscribed to Justice Powell's standard of "strict scrutiny," she did mention that she thought that the diverse standard of review formulations of various members of the Court "do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles." *Id.* According to Justice O'Connor, all members of the Court agreed that racial classification must be tested under some sort of "strict scrutiny" test. *Id.* The only disagreement, in her view, had to do with defining "the degree to which the means employed" by the state must " 'fit' the ends pursued to meet constitutional standards." *Id. See also infra* text accompanying notes 31-33.

29. *Id.* at 1854.

30. *Id.* at 1854 n*.

31. *Id.* at 1855.

32. *Id.*

33. As Justice O'Connor explained: "For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as a School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination." *Id.* at 1856.

34. *Id.* at 1857.

might be constitutional upon a showing of a compelling governmental interest.

Justice White concurred in the judgment in a brief separate opinion. Not addressing the appropriate standard of review, he simply stated that "[w]hatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be the victim of any racial discrimination, is quite a different matter."[35] In distinguishing hiring goals from affirmative action layoff plans, he apparently adopted Justice Powell's view that racial layoff preferences are an impermissible means for remedying prior discrimination.

While it is open to speculation, it does appear that Justice White accepts Justice Powell's strict scrutiny standard. Justice White joined Justice Brennan's *Bakke* opinion, which argued for an intermediate standard of review, but he also authored a separate *Bakke* opinion, which stated in a footnote that he also joined Justice Powell's opinion discussing the appropriate standard of review. Hence, Justice White is probably a fifth vote in favor of strict scrutiny.

Justice Marshall, joined by Justices Brennan and Blackmun, dissented. He would have applied the standard that Justice Brennan formulated in *Bakke*: "Benign" racial classifications should be tested under an intermediate standard requiring that the classification serve "important governmental objectives" and be "substantially related to achievement of those objectives." This standard, in Justice Marshall's view, demands a genuinely "strict and searching judicial inquiry" more rigorous than the "rational basis" standard, but "not 'strict' in theory and fatal in fact."[36]

Applying this intermediate standard, Justice Marshall contended that while the record was devoid of factual findings and thus necessitated at least a remand for further proceedings, there were nevertheless sufficient reasons for concluding that the school board's plan was based on important governmental objectives and that the plan was substantially related to achieving those objectives. He criticized the plurality for ignoring that the principal stated purpose justifying the board's hiring policy was predicated upon "the turbulent history of the effort to integrate the Jackson Public Schools . . . which attest[ed] to the bona fides of the board's current employment practices."[37] The board's plan was also "substantially related" to important governmental objectives. The teachers' union had approved the plan by a majority vote and the board had adopted it "not once, but six times since 1972."[38] The plan's formulation in the crucible of clashing interests was evidence that it was also the least burdensome solution that could have been devised by a majority of the parties for resolving racial tension in the schools. Finally, Justice Marshall urged that Justice Powell's option for hir-

35. *Id.*

36. *Wygant*, 106 S. Ct. at 1861, *citing* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.) (quoting Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

37. *Wygant*, 106 S. Ct. at 1862.

38. *Id.* at 1866.

ing over layoff goals ignores that the two are related in their underlying objective and that "[a]s a matter of logic as well as fact, a hiring policy achieves no purpose at all if it is eviscerated by layoffs."[39]

In a separate dissent, Justice Stevens concluded that the board's decision to include more minority teachers in the school system and to protect that result from the threat of layoffs was a "valid public purpose" adopted "with fair procedures" and "given a narrow breadth" which insulated the decision from constitutional attack. Applying the third and most lenient standard, Justice Stevens concluded that the board's plan was based on a legitimate rational judgment "that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty."[40]

In reviewing the voting configurations in *Wygant*, one finds that at a highly generalized level, all the Justices *seem* to agree that race-conscious affirmative action plans involving *hiring*, as distinguished from *layoffs*, can be used by public employers in certain circumstances to remedy the effects of past discrimination without violating the Equal Protection Clause. The Court thus rejected the notion that all race-conscious remedies are per se unconstitutional.[41] On the other hand, the Court stopped short of declaring that all race-conscious remedies are per se constitutional.[42] All that can be said is that race-conscious remedies may pass constitutional muster if adopted for the compelling reason of remedying "prior discrimination by the governmental unit involved."[43] On other issues, the Court was badly fractionalized.

On whether a particularized finding of past discrimination is a condition precedent for sustaining these plans, five Justices (Brennan, Marshall, Blackmun, Stevens and O'Connor) found it unnecessary. Three Justices (Powell, Rehnquist, and Chief Justice Burger) expressly agreed it was necessary. Justice White was silent on the issue.

On the standard of review, four Justices (Powell, Rehnquist, O'Connor and Chief Justice Burger), and probably five if Justice White's ambivalent position in *Bakke* is so interpreted, insist on applying a test of "strict scrutiny."[44] At least three Justices (Brennan, Marshall and Blackmun) would require an intermediate level of review,[45] and one Justice (Stevens) would

39. *Id.* at 1864.

40. *Id.* at 1868.

41. For the position that race conscious remedies granting preferences based on race are invalid *per se*, *see* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25.

42. For the view that affirmative action plans should be presumed *per se* valid, *see* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974).

43. *Wygant*, 106 S. Ct. at 1847 (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ.).

44. Chief Justice Burger and Justices Powell, Rehnquist and O'Connor favor a standard of review which would require that the program be based on a "compelling governmental interest" and that the remedy be "narrowly tailored" to that interest. *See supra* notes 20-34 and accompanying text.

45. Justices Brennan, Marshall, and Blackmun appear solidly in favor of an intermediate standard of review, under which affirmative action programs would be upheld if they are formed to be "substantially related to an important and articulated governmental interest." *See supra* note 36 and accompanying text.

adopt the least exacting standard—a rational basis or balancing test.[46] One can certainly sympathize with the position of Title VII counselors and litigators, as well as the lower courts, in seeking to discern which standard of review should be applied.

On whether racial preferences in layoffs by public employers are constitutional, four Justices (White, Powell, and Rehnquist and Chief Justice Burger) found them impermissible. Four Justices (Brennan, Marshall, Blackmun, and Stevens) would permit them in certain circumstances. Justice O'Connor did not take an express position but implied that some layoff plans might be permissible.

b. *Section 706(g) of Title VII Not Applicable to Consent Decrees*

The second case of the trilogy, *Local 93, Firefighters v. City of Cleveland*,[47] concerned a consent decree establishing numerical minority promotional goals. Without deciding the scope of remedies permitted by section 706(g), the Court held, six to three, that the federal courts can approve affirmative action remedies in a consent decree regardless of whether these remedies are prohibited by section 706(g). In the majority's view, consent decrees in Title VII cases are not an "order of the court" within the meaning of section 706(g).

In the *Cleveland Firefighters* case, the City of Cleveland settled a race discrimination suit brought by black and Hispanic firefighters, who alleged discrimination in hiring, assignment and promotion within the Fire Department.[48] The district court approved a consent decree between the minority firefighters' organization and the city which established numerical minority promotional goals for black and Hispanic firefighters. The firefighters' union intervened as a party-plaintiff and challenged the court's authority to enter the decree, arguing that the "use of racial quotas [would cause] serious racial polarization in the Fire Service."[49] Apart from stating that the race-conscious relief in the consent decree was "unreasonable," the union failed to assert any legal claim on behalf of non-minority firefighters.[50] Rejecting the union's contention, the district court approved the consent decree.

By the time the case reached the Court of Appeals for the Sixth Circuit, the Supreme Court had decided *Firefighters v. Stotts*.[51] Concerned with the

46. Only Justice Stevens would apply a rational basis or balancing text. *See supra* note 40 and accompanying text.

47. 106 S. Ct. 3063 (1986).

48. The *Cleveland Firefighters* case was but one of several cases brought against the city for alleged racial discrimination. By the time the *Cleveland Firefighters* litigation was brought in 1980, the city had already agreed to consent decrees establishing hiring goals, having unsuccessfully contested the basic factual issues concerning racial discrimination. *Id.* at 3067. In 1972, a federal district suit resulted in a finding that the Police Department had discriminated against minorities in hiring and promotions. *See* Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1972). In 1975, a similar finding of race discrimination was established in federal court against the Fire Department. *See* Headen v. City of Cleveland, No. C730-33 (N.D. Ohio Apr. 25, 1975). The litigation in these cases resulted in the entry of consent decrees imposing hiring goals. *Cleveland Firefighters*, 106 S. Ct. at 3067.

49. *Cleveland Firefighters*, 106 S. Ct. at 3070.

50. *Id.*

51. 467 U.S. 561 (1984).

possible impact of *Stotts*, the Sixth Circuit directed the parties to address whether *Stotts* denied the district court authority to enter a consent decree to which an intervener had objected on the ground that it provided relief to individuals not the actual victims of past discrimination. A divided Sixth Circuit panel ultimately concluded that *Stotts* was inapplicable because it involved an *injunction* requiring layoffs as opposed to a *consent decree*. The entry of a consent decree by the district court was thus affirmed. The union sought review in the Supreme Court on the ground that the race-conscious decree went beyond what a district court could "order" under section 706(g) of Title VII, as interpreted in *Stotts*.

The "sole issue" before the Supreme Court was whether the judicial entry and enforcement of the consent decree was an "order of the court" for purposes of section 706(g) and thus subject to the limitations that section 706(g) imposes on court-ordered relief in Title VII cases. The relevant sentence provides that "[n]o order of the court shall require the . . . promotion of an individual . . . if such individual was refused advancement . . . for any reason other than discrimination on account of race. . . ."[52] The union argued that this provision precludes a federal court from awarding relief in Title VII cases to individuals not the victims of discrimination and that this limitation on what a court can order applies to consent decrees. The United States as *amicus curiae* supported the union's position even though the Government had taken exactly the opposite position in *Steelworkers v. Weber*.[53]

In an opinion authored by Justice Brennan, the Court ruled that "whether or not [section] 706(g) precludes a court from imposing certain forms of race-conscious relief after trial, that provision does not apply to relief awarded in a consent decree."[54] In Justice Brennan's view, the result was controlled by his prior analysis of the purposes and legislative history of Title VII in his opinion for the Court in *Steelworkers v. Weber*.[55] According to him, "there [was] no reason to think that voluntary, race-conscious affirmative action such as was held permissible in *Weber* is rendered impermissible by Title VII simply because it is incorporated into a consent decree."[56]

Weber, however, can be distinguished from *Cleveland Firefighters*. *Weber* involved a *private* collective bargaining agreement, rather than a consent decree to which a *public* employer was party. Moreover, *Weber* did not

52. 42 U.S.C. § 2000e-5(g) (1982). The last sentence of the section reads:
No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payments to him of any back pay, if such individual was refused admission, suspended, or expelled, or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

53. *Cleveland Firefighters*, 106 S. Ct. at 3071 n.6.

54. *Id.* at 3072.

55. *Id.* at 3072-73. In Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that Title VII permits employers and unions voluntarily to agree in their labor agreements to use race-conscious affirmative action plans that benefit individuals who are not the actual victims of discrimination. Unlike the *Cleveland Firefighters* case, the only question in *Weber* concerned whether a private, voluntary affirmative action plan violated § 703(a) and (d) of Title VII. The *Weber* case did not involve a court-ordered affirmative action plan nor did the Court in *Weber* address the remedial limitations of § 706(g).

56. *Cleveland Firefighters*, 106 S. Ct. at 3073.

reach the question whether the remedial limitations of section 706(g) would preclude federal courts from sanctioning the type of relief incorporated into the parties' voluntary agreement. Finally and most significantly, there is the dictum in Justice White's majority opinion in *Stotts* that emphasized the need to limit anti-discrimination remedies to individuals who were actual victims. The emphasis on individual remedies for identifiable victims of discrimination in *Stotts* runs counter to Justice Brennan's group theory of affirmative action in *Weber*.[57] But for Justice Brennan, it was *Weber* not *Stotts* that was controlling.

Justice Brennan reasoned that section 706(g) did not place limits on the authority of federal courts to enter consent decrees because voluntary agreements and consent decrees are not "implicated by the concerns embodied in Section 706(g). . . ."[58] He argued that the legislative history underlying section 706(g) suggests that the remedial limitations on courts were drafted primarily to protect managerial prerogatives of employers and unions from federal court intervention and not to limit voluntary affirmative action agreements. Hence, it made no difference to Justice Brennan whether the entry of a consent decree was more like a court "order" or a "private contract."[59] He concluded that section 706(g) does not in any way limit voluntary agreements providing for race-conscious remedies incorporated within judicial decrees.

Nonetheless, Justice Brennan's opinion in *Cleveland Firefighters* does leave open the possibility that either the union or non-minority employees could challenge the legality of the consent decree's race-conscious remedial action on the ground that it is inconsistent with Title VII provisions other than section 706(g), for example, the general anti-discrimination provisions of section 703(a) or 703(d), prohibiting racial discrimination in hiring or promotions. Nor does *Cleveland Firefighters* rule out the possibility that the consent decree could be successfully challenged under a statute other than Title VII, for example, a civil service law, or under conflicting terms of the applicable labor contract. Justice Brennan also left open the possibility of a constitutional attack under the Equal Protection Clause because a public employer is involved. There thus remain the complicated constitutional questions to be decided in cases involving voluntary agreements of public employers *a la Wygant*. Indeed, in a brief concurring opinion, Justice O'Connor emphasized the narrow holding of the Court, commenting that "any challenge petitioner may make to the consent decree on substantive grounds, whether based on § 703 or the Fourteenth Amendment, should be left for resolution on remand."[60]

Justice White filed a separate dissent. In his view, *Weber* did not support the Court's decision because in *Weber*, unlike *Cleveland Firefighters*, there was a factual "predicate" establishing the defendant's prior discrimination which justified "a temporary remedy favoring black employees."[61] Jus-

57. *See* Fallon & Weiler, *supra* note 4.
58. *Cleveland Firefighters*, 106 S. Ct. at 3074.
59. *Id.*
60. *Id.* at 3080.
61. *Id.* at 3081.

tice White thus reads *Weber* similarly to the way Justice Powell analyzed *Wygant*: voluntary race-conscious remedies are consistent with Title VII only if they are based on a particularized factual predicate of prior discrimination. He argued that "an employer who litigates a Title VII case to judgment cannot lose unless it is proved that it has discriminated within the meaning of § 703."[62] Finally, Justice White, the author of the *Stotts* opinion, concluded that the race-conscious plan in the consent decree was invalid under section 706(g), just as the race-conscious layoff modification of the consent decree was in *Stotts*.[63]

Justice Rehnquist, joined by Chief Justice Burger, also dissented. He urged that consent decrees are not immune from examination under section 706(g), and the legality of a Title VII decree benefitting minorities was decided in *Stotts*. The plain meaning of section 706(g) precludes federal courts from entering or enforcing orders that have the effect of benefitting non-victim minorities.[64]

Of course, reasonable persons can disagree whether Congress intended section 706(g) to apply to consent decrees. Justice Rehnquist admitted that "the legislative history may be fairly apportioned among both sides."[65] From this, it would follow that the relevant statutory language should be interpreted in light of Title VII's underlying purposes, specifically the mischief it was designed to remedy. One should not, as Justice Rehnquist has done, interpret the statutory words formalistically by seizing on their dictionary meaning in a vacuum. When a statute is susceptible to contrary constructions, even the most traditionalist view on statutory interpretation calls for examining the objective the statute seeks to achieve and the wrong it seeks to remedy.[66]

Concerning the remedial section of Title VII, it would seem only fair to conclude that its provisions should be construed in light of the legislative purpose of eradicating "root and branch" centuries of racial injustice in American society. As Justice Brennan aptly stated in *Weber*: "[I]t would be *ironic* indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[67]

This is precisely why the Government's position in *Cleveland Firefighters* was ironic. By arguing that Title VII limits race-conscious group relief in consent decrees, the United States was contending that federal anti-discrimination laws prohibits voluntary efforts to abolish "traditional patterns of ra-

62. *Id.*

63. *Id.* at 3082.

64. According to Justice Rehnquist, "the failure of the District Court [was] to make any finding that the minority firemen who will receive preferential promotions were the victims of racial discrimination," *id.* at 3087.

65. *Id.*

66. *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529-33, 543-44 (1947).

67. *Weber*, 443 U.S. at 204 (emphasis added). Cited also in *Cleveland Firefighters*, 106 S. Ct. at 3072-73.

cial segregation and hierarchy" in the workplace. The Solicitor General would have made Title VII the obstacle frustrating voluntary efforts seeking to respond to this "[n]ation's concern over centuries of racial injustice." At the very least, one would expect that the reasoning, if not the holding, in *Weber*, would argue against reading the statute in a way that would turn Title VII on its head and turn the American dream of racial justice and equality into a nightmare of protecting the status quo of vested white interests.

For the same reason, Justice White's insistence on a factual predicate for judicial approval of voluntary agreements to redress prior discrimination should be rejected. If employees must admit to the factual predicate of discrimination they seek to remedy through voluntary action, they would have no incentive to fulfill civil rights obligations voluntarily. Even the six *Cleveland Firefighters* majority Justices acknowledged that whites could bring further legal action challenging a consent decree and seeking ultimately to impose liability under section 703 of Title VII, other laws, the Constitution, and labor contracts. It is thus only through federal inducement and encouragement of voluntary settlements and other action that the country can hope to eradicate the cruel and vicious effects of *de jure* and *de facto* discrimination.

Hence, one extremely practical question is whether the Court's discussion of affirmative action plans of public employers in *Wygant* and *Cleveland Firefighters* carries over to private sector employers under Title VII. In *Weber*, five Justices upheld voluntary affirmative action efforts of a private employer and union which had the effect of benefitting nonvictims of discrimination. Justice White, one of the five-Justice majority in *Weber*, "the company's prior discriminatory conduct provided the predicate for a temporary remedy favoring black employees."[68] In *Cleveland Firefighters*, Justice O'Connor concluded that "[i]f *Weber* indicates that an employer's or union's 'prior discriminatory conduct' is the necessary 'predicate for a temporary remedy favoring black employees . . . the Court's opinion leaves that requirement wholly undisturbed."[69]

The shadow cast over *Weber* by *Stotts* has surely not been dispelled by *Wygant* or *Cleveland Firefighters*. *Wygant*, however, does give support for affirmative action plans in hiring even if they benefit nonvictims. Hence, *Weber* apparently is still a valid guide for private and public employers with respect to hiring.[70] Layoff and promotion plans would face the concern Justice O'Connor expressed in *Wygant* that they be based on the relevant labor market. Further, several Justices regard seniority systems as so sacrosanct that they would seemingly give unions a veto over employer voluntary affirmative action plans or consent decrees. It is disturbing that a questionable

68. *Cleveland Firefighters*, 106 S. Ct. at 3081.

69. *Id.* at 3080.

70. In Youngblood v. Dalzell, 804 F.2d 360, 364-65 (6th Cir. 1986), while acknowledging that *Weber* involved a private employer and arose under Title VII and that *Cleveland Firefighters* did not reach the fourteenth amendment issue, the Sixth Circuit found *Weber* applicable in a public sector promotion case on the theory that "the same basic considerations apply when a race conscious remedy is challenged under the Equal Protection Clause of the Fourteenth Amendment."

anti-merit principle, such as seniority, would be permitted to thwart social justice.

c. *Use of Goals Benefitting "Nonvictims"*

In the last trilogy case, *Local 28, Sheet Metal Workers v. EEOC*,[71] the Court issued five opinions on the fundamental question left open in *Wygant* and *Cleveland Firefighters*: whether the Constitution or Title VII bars the federal courts from ordering race-conscious remedies that benefit nonvictims of discrimination. In three opinions, six Justices agreed that, under appropriate circumstances, federal courts can grant race-conscious relief to nonvictims through Title VII. Five of the six also agreed that the union's egregious discrimination justified the imposition of a non-white membership goal. Because of the fragmented opinions, however, it is uncertain what other circumstances warrant race-conscious relief under either section 706(g) or the constitutional guaranty of equal protection.

The *Sheet Metal Workers* case involved a two decade-long judicial effort to compel Local 28 of the Sheet Metal Workers International Union in New York City to comply with local, state and federal fair employment laws. Local 28 had retained its racially exclusive character until 1969, long after the effective date of Title VII, and even then the union continued racially restrictive admission and assignment practices. Twenty years after state court proceedings, twelve years after the Justice Department had brought suit, and eight years after the district court had found evidence of illegal discrimination leading to two contempt citations, the recalcitrant recidivist union was still resisting judicially imposed orders requiring that it remedy its egregious discriminatory practices. One would be hard-pressed to find a more compelling case favoring the imposition of race-conscious remedies, but not everyone saw it that way.

Judge Ralph Winter, for example, authored a strong dissent in reviewing the contempt proceedings in the Second Circuit. In his opinion, the minority membership goal was an illegal racial quota at odds with *Stotts*. He reasoned that the district court had failed to take into account economic conditions which had produced a sharp decline in the demand for the skills of sheet metal workers in the New York City metropolitan area. As he opined in a biting retort to the majority: "[I]n light of the facts that large numbers of journeymen did not work during the period in question or worked only meager hours, reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis."[72]

The Solicitor General, aligning the government with the union, essentially agreed with Judge Winter in arguing that the district court could not take race into account for benign purposes, absent a showing that the beneficiaries of the remedies were identified discriminatees. The position of the Solicitor General was that "there is simply nothing *remedial* about prefer-

71. 106 S. Ct. 3019 (1986).

72. EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172, 1193 (2d Cir. 1985) (Winter, J., dissenting).

ring an individual whose *personal* statutory right to nondiscriminatory treatment has in no way been infringed solely because that individual is a member of the same racial group as others who were so victimized."[73]

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, concluded that the language and the legislative history of Title VII and section 706(g) do not bar a federal court from imposing race-conscious relief benefitting nonvictims in cases "where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."[74] In a detailed analysis of the legislative history, Justice Brennan conceded that Congress had not considered the use of racial preferences as a remedy for prior discrimination at the time Title VII was enacted.[75] He contended, however, that various interpretations of the EEOC and the Justice Department, as well as the legislative history of the Equal Employment Opportunity Act of 1972 which amended Title VII, provided sufficient contemporaneous support for these remedies.[76]

Justice Brennan also distinguished the Court's decisions in *Teamsters* and *Stotts*. As for *Teamsters*, he reasoned that all the Court had decided was that courts may order relief under section 706(g) designed to make individual victims of racial discrimination whole by awarding competitive seniority, not that individual make-whole relief was the *only* type of remedy available under the statute.[77] Justice Brennan distinguished *Stotts*, contending that it was based upon the policy that "prohibit[s] a court from awarding make-whole relief, such as competitive seniority, backpay, or promotion, to individuals who were denied employment opportunities for reasons unrelated to discrimination."[78] This "policy" was not at issue in *Sheet Metal Workers* because the membership goal was not intended to make individual victims whole but rather to "dismantle prior patterns of employment discrimination and to prevent discrimination in the future."[79] According to Justice Brennan, courts should read *Stotts* as a limitation on individual make-whole relief and not on their authority to order race-conscious affirmative action.

Justice Brennan did emphasize, however, that the Court was adopting a "cautious approach" to the use of racial preferences under the statute and that section 706(g) might limit remedies in other cases. Left undecided is whether section 706(g) limits the use of racial preferences in cases involving episodic, serious, but not egregious acts of discrimination. District courts must carefully consider in each case whether affirmative action is necessary to remedy discrimination, and if so, the court must "tailor its orders to fit the nature of the violation it seeks to correct."[80]

Addressing the constitutional question whether the remedial order vio-

73. Reply Brief for the Equal Employment Opportunity Commission, Local 28 v. EEOC, No. 84-1656, at 19 (1986) [emphasis in original].
74. *Sheet Metal Workers*, 106 S. Ct. at 3034.
75. *Id.* at 3034.
76. *Id.* at 3044-45.
77. *Id.* at 3048.
78. *Id.* at 3049.
79. *Id.*
80. *Id.* at 3050.

lated equal protection under the Due Process Clause of the Fifth Amendment, Justice Brennan observed that the Court could not agree on the proper standard of review in *Wygant*. The relief ordered in *Sheet Metal Workers*, however, would pass constitutional muster even under strict scrutiny because the remedy was "narrowly tailored to further the Government's compelling interest in remedying past discrimination."[81]

In a separate concurring opinion, Justice Powell, the critical swing vote in *Sheet Metal Workers*, agreed with Justice Brennan in rejecting the Government's argument that Title VII remedies must be limited to individual victims of discrimination. Without expressly adopting Justice Brennan's analyses of the statute, Justice Powell concluded that the district court had sufficient authority under section 706(g) to order the membership goal, given the union's "contemptuous racial discrimination and . . . successive attempts to evade all efforts to end that discrimination."[82]

Justice Powell joined the plurality in reaching the constitutional issue. Because his was the crucial fifth vote, his opinion on the issue is likely to be influential in determining the constitutionality of judicially mandated race-conscious remedies in the future. Justice Powell first stated that the strict scrutiny standard, as discussed in *Wygant*, required the finding of a compelling governmental interest and a narrowly tailored remedy designed to accomplish the intended purpose. Justice Powell reasoned that the finding that the union had engaged in egregious violations of Title VII satisfied the compelling interest requirement. He also found that the membership goal was narrowly tailored to vindicate the governmental interest in remedying an egregious Title VII violation.[83] He reasoned that the *Sheet Metal Workers* membership goal was more "akin to a hiring goal,"[84] and, hence, distinguishable from the racial preference in *Wygant* "where the plurality opinion [had] noted that 'layoffs impose the entire burden of achieving racial equality on particular individuals.' "[85]

Justice O'Connor, concurring in part and dissenting in part, and Justice White, dissenting, would have found the district court's numerical racial preference remedy an unlawful quota, not a permissible goal, under Title VII. Justice O'Connor urged that Title VII merely precluded the courts from ordering *rigid* racial *quotas* as distinguished from *flexible goals*. Relying upon a 1973 memorandum of the EEOC and the Department of Justice, she defined an impermissible racial *quota* as a requirement that "would impose a fixed number or percentage which must be attained, or which cannot be exceeded."[86] By contrast, a permissible *goal*, in Justice O'Connor's view, is "a numerical objective, fixed realistically" and administered in accord

81. *Id.* at 3053.

82. *Id.* at 3054.

83. Justice Powell concluded that "it does not appear that non-minorities will be burdened directly if at all" by imposition of the membership goal." *Id.* at 3056.

84. *Id.* at 3057.

85. *Id.*, quoting *Wygant*, 106 S. Ct. at 1851-52.

86. *Sheet Metal Workers*, 106 S. Ct. at 3057, quoting from Memorandum—Permissible Goals and Timetables in State and Local Government Employment Practices (Mar. 23, 1973), *reprinted in* 2 CCH EMPLOYMENT PRACTICES § 3776 at 3856 (1985) [hereinafter Memorandum].

with a "good faith" standard.[87]

Justice White dissented, agreeing with Judge Winter that "the cumulative effect of the revised affirmative action plan and the contempt judgments against the union established not just a minority membership goal but also a strict racial quota that the union was required to attain."[88] Justice White, however, agreed with Justice Brennan that section 706(g) does not bar relief for nonvictims in all circumstances.[89] Justice White thus cast the sixth and final vote for Justice Brennan's position expressed in the plurality opinion that the statute does not in all circumstances preclude the federal courts from imposing race-conscious remedies benefitting nonvictims. Interestingly, Justice White noted that *Sheet Metal Workers* may be "one of those unusual cases where nonvictims of discrimination were entitled to a measure of the relief ordered by the District Court and affirmed by the Court of Appeals."[90]

Justice Rehnquist, joined by Chief Justice Burger, also dissented. Restating the position he espoused in *Cleveland Firefighters*, Justice Rehnquist observed that section 706(g) "forbids a court from ordering racial preferences that effectively displace non-minorities except to minority individuals who have been the actual victims of a particular employer's racial discrimination."[91]

d. *Implications*

On the day after the *Sheet Metal Workers* and *Cleveland Firefighters* decisions were announced, a *New York Times* headline read: "AFFIRMATIVE ACTION UPHELD BY HIGH COURT AS A REMEDY FOR PAST JOB DISCRIMINATION."[92] While the *Times* headline captured the essence of the Court's decision, it is equally clear that the Supreme Court has given an extremely cautious and limited approval of affirmative action remedies benefitting nonvictims of discrimination. All that can be said with any certainty is that six Justices have approved the use of racially preferential remedies for nonvictims under appropriate circumstances and five Justices have approved membership goals in cases involving egregious violations.

On the other hand, the Court's decision in *Sheet Metal Workers* is not insignificant. It was a sharp rebuff, if not a major defeat, for the Reagan administration.[93] As a practical political matter, the Court's decision caused

87. *Sheet Metal Workers*, 106 S. Ct. at 3060-61, quoting from Memorandum at 3856.
88. *Sheet Metal Workers*, 106 S. Ct. at 3062.
89. *Id.*
90. *Id.*
91. *Id.* at 3063.
92. N.Y. Times, July 3, 1986, at 1, col. 1. The Times story stated that "[t]he Supreme Court today firmly endorsed the use of affirmative action in the workplace to cure past discrimination against minority groups when less drastic approaches would not work." *Id.*
93. For a trenchant review of the Reagan Administration's record on affirmative action which calls into question the President's views on race issues, *see* Kennedy, *supra* note 4, at 1342-45. As Professor Kennedy explains:

> . . . what justifies skepticism toward the President's account is his long history of suspect views on racial issues. His active opposition to racial distinctions *benefitting* Negroes is not matched by analogous opposition to racial distinctions *harming* Negroes. Indeed, a strik-

the White House, if not the Justice Department, to rethink its effort to modify drastically the longstanding policy established by Executive Order 11246 which has served as the foundation of effective affirmative action programs.[94] Attorney General Meese and his Assistant, Mr. Reynolds, may seek to save face by piously proclaiming that their "color-blind" concept is "the moral position."[95] But Mayor William Hudnut of Indianapolis, a Republican opponent of the Reagan Administration on affirmative action, referring to Mr. Meese and Mr. Reynolds, stated that "they are wrong politically, legally and morally."[96] Realistically, *Sheet Metal Workers* has considerably strengthened the hand of Secretary of Labor Brock in his effort to retain the Executive Order, which is strongly favored by the U.S. Conference of Mayors,[97] and seems favored by many, if not most, employers.[98] Moreover, the Justice Department itself has withdrawn at least one of its fifty-one motions to modify outstanding affirmative action consent decrees and has begun a reexamination of its position in the remaining cases.[99]

One issue left undecided concerns the importance, if any, that should be attached to Justice O'Connor's and Justice White's position that section 706(g) bars racial quotas, as distinguished from racial goals. The problem with this distinction is that lower courts have used the word "quota" but have emphasized that quotas should not be rigid, inflexible or permanent.[100] Indeed, it is hard to imagine a federal district judge ordering rigid, inflexible racial preferences. That would demand an employer to do the impossible. Under careful analysis, the distinction between quotas and goals apparently serves only to make quota a pejorative word for an impermissible Title VII

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ingly consistent feature of President Reagan's long political career is his resistance to practically every major political effort to eradicate racism or to contain its effects. During the height of the civil rights revolution, he opposed the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Open Housing Act of 1968, legislation that his own Assistant Attorney General has rightly described as "designed to make equal opportunity a reality." . . . Repeatedly his Administration has shown callous disregard for the particular interests of blacks and resisted measures designed to erode racial hierarchy. These actions include the Administration's opposition (1) to the amendments that strengthened and extended the Voting Rights Act, (2) to anything more than the most cramped reading of the Civil Rights Act of 1964, (3) to creating a national holiday honoring Dr. Martin Luther King, Jr., (4) to maintaining the integrity of agencies involved in federal enforcement civil rights, and (5) to imposing sanctions on South Africa for its policy of apartheid.

Id. at 1342-43 (emphasis in original) (footnotes omitted).

94. *See* Boyd, *Court Rulings Stall White House Proposal on Affirmative Action*, The Sacramento Bee, Aug. 25, 1986, at A-7. *But see Labor Lawyers on Wygant's Impact on Affirmative Action*, 122 LAB. REL. REP. 97, 98 (BNA) (June 16, 1986) (management attorney arguing that "Court's decision in *Wygant* rejects the Justice Department's view that affirmative action plans must be limited to actual victims of past discrimination but otherwise does not resolve the questions raised by *Stotts* or affect the debate within the Reagan Administration over whether to remove the Labor Department's power to set hiring goals and timetables for federal contractors under EO 11246").

Executive Order 11246 requires affirmative action hiring goals in most government contracts. 3 C.F.R. 339 (1964-65), *reprinted in* 42 U.S.C. 2000e (1982).

95. N.Y. Times, July 3, 1986, at 1, col. 1.

96. *Indianapolis Mayor on Affirmative Action*, 123 LAB. REL. REP. 92 (BNA) (Sept. 29, 1986).

97. *Id.*

98. For example, in a survey of 499 of the Fortune 500 companies conducted by the Bureau of National Affairs, 180 or 87.4 percent of those responding did not plan to change their affirmative action programs in 1987. 123 LAB. REL. REP. ANALYSIS 49 (BNA) (Nov. 24, 1986). *See generally, Affirmative Action Today: A Legal and Practical Analysis* (BNA) (1986).

99. San Francisco Chronicle, Aug. 5, 1986, at 8, col. 5.

100. *See e.g.*, Spiegelman, *supra* note 10, at 339, n. 1.

remedy. It is thus difficult to see how this distinction could aid anyone in analyzing remedial problems under Title VII.

Perhaps what really concerns Justice O'Connor and Justice White is that employers and unions should not be required to engage in affirmative action in a shrinking job market if minorities with less experience, and perhaps less skill, would be favored over more experienced, and perhaps more skilled, white employees. This is, of course, precisely why affirmative action is so polarizing. It is understandable that claims of reverse discrimination and illegal quotas become widespread when courts in Title VII cases are forced to allocate the burdens of recession and fiscal austerity.

But to reason, as Judge Winter did, that Title VII obligations depend on the winds of economic change, with employers required to fulfill their Title VII obligations in boom periods, but not during a recession, is to advocate that we must accept perpetuating the effects of racism. What good is a hiring goal in a shrinking job market? Surely programs can and must be devised to honor our dedication to eradicating racial injustice in the workplace regardless of the state of the economy.

Even those Justices who have approved the use of racially preferential remedies under Title VII are ambivalent on the appropriate standards for affirmative action. If there is one underlying tension which has divided the Justices, it is whether the group theory of *Weber* or the individual rights theory of *Stotts* should be utilized in justifying and structuring affirmative action remedies. In *Wygant*, for example, Justice Powell chastised Justice Marshall for what he thought was the suggestion that affirmative action remedies should be seen in terms of the allocation of burdens between two racial groups. In Justice Powell's view, "[t]he Constitution does not allocate constitutional rights to be distributed like bloc grants within discrete racial groups. . . ."[101] Although Justice Powell was speaking of the Constitution, the point he made parallels the view of those Justices who argue that section 706(g) limits Title VII remedies to statutory violations affecting identifiable individual discriminatees.

Indeed, the lack of consensus during the Burger Court era on affirmative action doctrine is ultimately attributable to the conflict between those who think that affirmative action must be limited to remedying individual discriminatory acts and those who think that it should be extended to vindicate group rights and to correct societal patterns of injustice. As Professors Richard Fallon and Paul Weiler have suggested, the affirmative action decisions of the Burger Court have become hopelessly trapped within two "contending models of racial justice"—one, a highly individualistic, victim-specific model based on ideas of fault and retribution; the other, a group-based model premised upon notions of compensation and corrective justice.[102] Under the individual-based model of racial justice, affirmative action becomes a means for punishing wrongdoers and compensating victims. Under the group-based model, affirmative action becomes a means for correcting general societal injustice by compensating members of the disadvan-

101. *Wygant*, 106 S. Ct. at 1850 n.8.
102. *See* Fallon & Weiler, *supra* note 4.

taged class for past discrimination. It is understandable that the Justices have been unable to reach a consensus on affirmative action given that they have been faced with having to choose between these two polarized extreme views of racial justice.

The Court has been unable to make a once and for all choice because the choices posed by the two affirmative action models are limited and incomplete. The fault-based model of individual justice is incomplete because it fails to recognize that racism in America has established an entrenched racial hierarchy affecting racial minorities as a group or class. To argue, for example, that the law of affirmative action should be "color-blind on race" overlooks the reality of group injustice caused by racial hierarchy.[103] Should the law be color-blind to the fact that unemployment disproportionately impacts on blacks and Hispanics with twice the severity it does on whites? Certainly the best evidence of the need for a group-based model of racial justice is the correlation between economic inequality and race.[104] Moreover, because individuals make up groups, it would be an "egregrous denial of reality as well as of justice" to conclude that minority groups have no rights apart from those of the individual group members.[105] Finally, if inequality is defined merely in terms of individual injustice, affirmative action remedies will serve only as another public rationalization to explain, justify, and tolerate racism in America.[106]

The group-based model of racial justice is also incomplete in a number of important respects. If affirmative action remedies are appropriate to remedy general societal discrimination, then individuals who were not themselves victims of discrimination would receive, in the eyes of some, an "affirmative action windfall."[107] This would raise the charge of "reverse discrimination" by non-minorities who claim they must pay for affirmative action remedies to compensate for wrongs they were not personally responsible for causing. Unlike the individual-based model of racial justice which fails to go far enough, the group-based model may go too far in justifying remedies to individuals who do not need affirmative action and by imposing legal liabilities on others who are not guilty of, or responsible for, discrimination. Because there is no meta-principle to determine the reach of the model, the group-based conception of racial justice is subject to the charge of "social engineering."[108] Finally, even beneficiaries of affirmative action remedies may find that a group-based conception of racial justice has itself created yet another stigma of inferiority by viewing a particular minority group as disadvantaged and hence inferior.[109]

The Court has been unable to reach a consensus on affirmative action

103. *See generally*, Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 606 (1979).

104. *Id.* at 611.

105. *Id.* at 606.

106. *See generally*, Bell, The Supreme Court 1984 Term, Foreward: *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

107. *See e.g.*, Sullivan, *supra* note 4, at 94.

108. *See e.g.*, Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1320-23 (1986).

109. *See e.g.*, Bell, *supra* note 106, at 54.

because it has been unable to see beyond the rigid confines created by the abstractions of the two contending models of affirmative action. Instead of choosing between abstract models, the Court should be focusing more of its attention on the realities of racism and racial hierarchy.[110] Much of the discussion on affirmative action in the Supreme Court simply ignores the stark realities besetting blacks and Hispanics in American society. How can the Court ever hope to develop a concept of racial equality without first understanding how racial inequality now exists within existing social, political and economic relations in society. In moving from the abstractions of affirmative action theory to the reality of racism and racial hierarchy exemplified by recent events at Howard Beach, New York, and surely epitomized by the segregated board rooms of Wall Street and the offices of Capitol Hill, the Court would be in a much stronger position to develop a more complete vision of racial justice necessary for affirmative action doctrine. Instead of focusing on fault and sin,[111] the Court could then begin to assume its rightful responsibility for implementing a more complete concept of legal equality.

B. *Substantive Violations*

Last Term the Court also decided two important substantive employment discrimination cases, one involving race and the other, sex. At issue in *Bazemore v. Friday*,[112] was whether a public employer had a duty under Title VII to eradicate the continuing effects of salary disparities between white and black workers which could be traced to discriminatory practices existing before the date on which Title VII became applicable to the employer. *Meritor Savings Bank v. Vinson*,[113] addressed the Title VII rights of working women to be protected from sexual harassment. These two cases precipitated less disagreement among the Justices.

1. *Liability for Wage Disparity Caused by Pre-Act Discrimination*

In *Bazemore v. Friday* a southern state agricultural extension service maintained white and black branches before 1965. The latter was composed entirely of black personnel serving only black farmers. The service also operated segregated 4-H and homemaker clubs. In 1965 the service merged the separate branches and clubs into a single entity which began operating on a nondiscriminatory basis shortly thereafter. Wage disparities between black and white employees, however, continued as a result of the prior discriminatory practices.

A group of employees brought a Title VII suit claiming the wage disparities resulting from the service's prior racial discrimination should have

110. *See e.g.*, Kennedy, *supra* note 4, at 1339. ("[C]onventional scholarship leaves largely unexamined the possibility that the campaigns against affirmative action now being waged by political, judicial and intellectual elites reflect racially selective indifference, antipathy born of prejudice, or strategies that seek to capitalize on widespread racial resentments."

111. *See* Sullivan, *supra* note 4, at 92 ("making sins of past discrimination the justification for affirmative action . . . dooms affirmative action to further challenge even while legitimating it.").

112. 106 S. Ct. 3000 (1986).

113. 106 S. Ct. 2399 (1986).

been eliminated when the service became subject to Title VII in 1972. The plaintiffs relied upon multiple regression analyses to show the existence of wage disparities between black and white employees. The district court ruled in favor of the service, finding that the plaintiffs had failed to establish a pattern or practice of discrimination. The Fourth Circuit affirmed, holding that a public employer has no duty to eradicate salary disparities between white and black workers caused by pre-Act discrimination.[114] The Supreme Court vacated the judgment,[115] deciding the case *per curium*, with three opinions, two concurring and one dissenting in part.

The Court unanimously held the service liable under Title VII for pay discrepancies between whites and blacks that the service continued after Title VII became applicable to it. The service's discriminatory compensation practices before Title VII coverage could not excuse its continuing discrimination after coverage. For the Court, Justice Brennan reasoned that the contrary result "would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks."[116] Although the Court acknowledged that recovery may not be permitted for pre-Act discrimination, perpetuation of such discrimination after the effective date of the statute justified liability.[117] In *Bazemore*, each discriminatory paycheck after Title VII coverage was held to be an actionable wrong, regardless of the fact that the pattern had begun before the effective date of coverage.

Concerning the plaintiffs' proffered expert statistical evidence as proof of a pattern and practice violation, the Court ruled admissible their multiple regression analyses, even though all measurable variables affecting salary were not included. The Fourth Circuit had concluded that the analyses were "unacceptable as evidence of discrimination" because they did not include all measurable variables.[118] The Supreme Court found this view "plainly incorrect" in that the failure to include all variables goes to the analyses' probity, not their admissibility.[119] The Court decided that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence."[120] While acknowledging in a footnote that there "may be some re-

114. 751 F.2d 662 (4th Cir. 1984), *aff'g* Bazemore v. Friday, No. 2879 (E.D.N.C. Aug. 20, 1982). For a review of the Fourth Circuit's decision in *Bazemore*, *see* Case Comment, *Bazemore v. Friday: Salary Discrimination Under Title VII*, 99 HARV. L. REV. 655 (1986).

115. Leaving for determination upon remand the black employees' petition for certification as a class, the Court found irrelevant the fact that their salaries were funded from several sources, including counties. On the other hand, the Court ruled that the denial to certify the defendant-counties as a class was proper because of the lack of evidence of standardized employment practices among the counties. *Bazemore*, 106 S. Ct. at 3011-12.

116. *Id.* at 3006.

117. *Id.*

118. *Id.* at 3009. Other circuits had rejected the position of the Fourth Circuit in finding that the omission of particular variables does not invariably detract from the probity of plaintiff's statistics. *See* Segar v. Smith, 738 F.2d 1249, 1277 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985); Guardians Assoc. v. Civil Service Comm'n, 630 F.2d 79, 88 n.7 (2d Cir. 1980). *See also* Case Comment, *supra* note 114, at 664-65.

119. 106 S. Ct. at 3009.

120. *Id.*

gressions so incomplete as to be inadmissible as irrelevant,"[121] the Court emphasized that the lower courts must assess the relevance and probity of such studies in light of all the evidence presented, including the factual context of each case. All that is required is that the evidence establishes "that it is more likely than not that impermissible discrimination exists."[122]

The Court, however, held, five to four, that the extension service did not violate the Fourteenth Amendment because of the continuing existence of black and white 4-H and homemaker clubs after the service had discontinued its practice of segregation and had adopted a wholly neutral admissions policy. Writing for the majority, Justice White apparently found controlling the voluntary nature of membership, as contrasted with compulsory school attendance. Although Justice Brennan wrote the concurring opinion for the majority on all other issues, he, together with Justices Marshall, Blackmun and Stevens, dissented on the constitutional and statutory issues raised by the history of racial segregation in club membership. The dissenters emphasized statistical data showing relatively little progress in integrating the clubs. They would have imposed upon the extension service a duty under both the Fourteenth Amendment and Title VII to take affirmative steps to eliminate the vestiges of the service's prior segregative practices. They concluded that the duty arose from the prior *de jure* racial segregation when the clubs were organized in the public schools and public officials made membership assignments within a legal regime that openly fostered Jim Crow segregation. As the dissenters reasoned, "it is absurd to contend that the requirement that states take 'affirmative action' is satisfied when the Extension Service simply declares a neutral admissions policy and refrains from illegal segregative activities."[123]

The *Bazemore* decision makes it clear that employers, public and private, have a duty to eliminate wage differentials resulting from pre-Act racial discrimination. What is unclear is whether *Bazemore* is a narrow decision limited only to discrimination in compensation or whether, as some have suggested,[124] the decision signals a more expansive approach to the continuing violation theory, which the Supreme Court has severely curtailed in prior decisions.[125] The difficulty with reading *Bazemore* expansively is that one can consider a salary disparity caused by pre-Act discrimination as both the effect of a continuing violation and a current discriminatory practice.[126] Moreover, the Court appeared to indicate that it was not adopting a continuing violation theory by stating that "recovery may not be permitted for pre-

121. *Id.* at 3009 n.10.

122. *Id.* The critical inquiry should be whether the plaintiff's statistics have succeeded in establishing a prima facie case of discrimination not whether the plaintiff has measured all relevant factors. Whether plaintiff's statistics meet plaintiff's burden must ultimately be tested under a standard of reasonable persuasiveness. *See also* Case Comment, *supra* note 114, at 665.

123. *Bazemore*, 106 S. Ct. at 3016.

124. *See e.g.*, LAB. REL. REP. (BNA), 122 Analysis 41, 43 (July 21, 1986). *See also* Beck, *Labor Law Decisions of the Supreme Court, 1985-86*, 123 LAB. REL. REP. 30, 40 (BNA) (Sept. 8, 1986) [hereinafter cited as Beck].

125. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

126. *See* Beck, *supra* note 124, at 40.

1972 acts of discrimination."[127]

Especially troubling is the Court's decision on the constitutional duty of the service concerning club segregation. The majority suggested that adoption of a neutral admissions policy satisfied any obligation of the extension service under the fourteenth amendment to act affirmatively to eradicate the lingering effects of segregation. This position totally ignored the impact of prior racial segregation in structuring the current realities of everyday society. As the dissenters aptly noted, "[t]here is no room to doubt, and the Court does not even bother to argue otherwise, that one of the effects of prior discrimination is the legacy of single race clubs that still exist in North Carolina."[128] By adopting neutral admissions policies, public agencies can now claim that they are absolved from doing anything affirmative about racial discrimination. Of course, the real problem with the majority's approach is that it overlooks more than two hundred years of civil rights struggle first against *de jure* and now *de facto* discrimination. By merely requiring that public agencies simply remain neutral, decisions like *Bazemore* have the tragic consequence of advancing a concept of affirmative action that insulates public agencies from civil rights liability for failure to take meaningful action to extirpate the cruel disadvantages wrought by generations of racial discrimination.

2. *"Hostile Environment" Sexual Harassment*

In *Meritor Savings Bank v. Vinson*,[129] the Court unanimously held that Title VII protects individuals from sexual harassment even if it is not directly linked to the grant or the denial of an economic or tangible *quid pro quo*. According to the Court, in an opinion written by Justice Rehnquist, a plaintiff can establish Title VII liability for sexual harassment by proof that it created a hostile or offensive working environment.[130] The Court adopted

127. *Bazemore*, 106 S. Ct. at 3006. In Abrams v. Baylor College of Medicine, 528 F.2d 529, 533 (5th Cir. 1986), without reference to *Bazemore* the Fifth Circuit also cautioned that the continuing violation theory "has to be guardedly employed because within it are the seeds of destruction of statutes of limitation in Title VII cases. . . . If the mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely." Hence, the court held "that to establish a continuing violation, a plaintiff must show some application of the illegal policy to him (or to his class) within the 180 days preceding the filing of his complaint." *Id.*

128. *Id.* at 3016.

129. 106 S. Ct. 2399 (1986).

130. The claim of sexual harassment was based on Title VII's proscription that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000-2(a)(1) (1982). The lower courts have recognized two basic categories of illegal sexual harassment. (1) *Quid pro quo* harassment demands sexual consideration in exchange for job benefits. *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). [The term "*quid pro quo*" sexual harassment can be attributed to the work of Professor MacKinnon. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979).] (2) "Hostile environment" harassment creates an offensive working environment. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986); Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 943-47 (D.C. Cir. 1981); C. MACKINNON, *supra* at 40. *See generally* Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1454-55 (1984).

the EEOC Guidelines' definition of sexual harassment as conduct having "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[131] To be actionable, however, "[the harassment] must be sufficiently severe or pervasive to alter [the victim's] conditions of employment and create an abusive working environment."[132]

In *Vinson*, the plaintiff, a woman bank employee, alleged that she had constantly been subjected to sexual harassment by the Vice President and manager of the bank in violation of Title VII. The allegations of sexual harassment were particularly egregious. She testified that shortly after the commencement of her employment the Vice President had made "repeated demands" for sexual favors and requests for "sexual relations" during and after business hours;[133] that while she at first refused to comply with these requests, she eventually agreed "out of what she described as fear of losing her job;"[134] and that over the next several years she had intercourse with

131. *Vinson*, 160 S. Ct. at 2405, relying upon *Equal Employment Opportunity Commission Guidelines on Sexual Harassment*, 29 C.F.R. § 1604.11(a)(3) (1985).

132. *Id.* at 2406, quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), and citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982), quoting same. Unfortunately, the courts have shed little light on what constitutes prima facie proof of hostile environment sexual harassment. For a discussion of the case law, *see* Comment, *supra* note 130, at 1453-57.

Recently, however, the Sixth Circuit has purported to outline the basic elements of a prima facie claim: "[A] plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must assert and prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability." Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619-20 (1986) (citations omitted). This attempted "formulation" of a *prima facie* case is troublesome in that the second element seems to be more appropriate in analyzing a *"quid pro quo"* claim. Moreover, as the dissenter in Rabidue correctly observed, there is no basis for imposing upon the plaintiff the additional burden of establishing respondeat superior liability when hostile workplace harassment is involved. *Id.* at 625-26 (Keith, J., concurring in part and dissenting in part). This would be true in cases where a supervisor is responsible for the harm because "[t]he creating of a discriminatory work environment by a supervisor can only be achieved through the power accorded him by the employer." *Id.* at 625. Finally, in adopting a "reasonable person" standard, the majority in *Rabidue* failed to take account of the fact that men and women may have widely different perceptions of appropriate sexual conduct at the workplace. As the dissenter aptly argued, "unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men." *Id.* at 626, citing Comment, *supra* note 130, at 1451. *See also* text & notes *infra* at notes 159-67.

A question of considerable importance is whether the plaintiff must also prove discriminatory intent in a hostile environment case. While the case law is murky and contradictory on this point, a consensus seems to be developing that discriminatory intent is not required. *See* Comment, *supra* note 130, at 1457. Hostile environment claims can be best understood in terms of the disparate impact analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (All employment practices that operate to disadvantage protected groups violate Title VII if the employer cannot justify them as necessary to the conduct of the business. *See* Comment, *supra* note 130, at 1456-57.) Under the *McDonnell Douglas* disparate impact theory, hostile environment sexual practices violate Title VII when: (1) they pervade the workplace or are condoned or effectuated by supervisory personnel; (2) disadvantage women workers; and (3) are unnecessary to the conduct of the business. The prima facie case can be rebutted by evidence that incidents of harassment were isolated or trivial. *See* Katz v. Dole, 709 F.2d 251, 254-56 (4th Cir. 1983); Comment, *supra* note 130, at 1457 n.45.

133. *Vinson*, 106 S. Ct. at 2402.

134. *Id.*

this man approximately "40 or 50 times."[135] She also claimed that he had "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[136]

When the plaintiff sought to present evidence that other women bank employees had been subjected to similar instances of sexual harassment, the district court disallowed this showing in her case in chief, but ruled that "she might well be able to present such evidence in rebuttal to the defendants' cases."[137] The proffered evidence of a pattern and practice of sexual harassment was never presented to the district court and the defendant bank denied each and every allegation of sexual harassment.[138] The bank sought to collaborate its defense with the testimony of the Vice President, who testified that "he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her and never asked her to do so."[139]

Instead of resolving the conflicting testimony about the existence of sexual harassment, the district judge denied relief on the ground that even if the alleged sexual relation between the plaintiff and the Vice President existed in fact, the relation "was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution."[140] The D.C. Court of Appeals reversed, finding that the district court had not considered whether a violation of Title VII had occurred as a result of sexual harassment that creates a hostile or offensive working environment.

The Supreme Court affirmed, agreeing with the court of appeals, as stated above, that sexual harassment creating an intimidating, hostile, or offensive working environment can violate Title VII even in the absence of "tangible" discrimination or economic injury. The court of appeals correctly reversed the district court's finding that the plaintiff "was not the victim of discrimination"[141] because the finding was based on one or both of two erroneous views of law. First, the district court had failed even to consider the appropriateness of the hostile environment theory because the district judge had erroneously "believed that a claim of sexual harassment will not lie absent an *economic* effect on the complainant's employment."[142] Second, the district court might also have concluded, erroneously, that voluntary participation in sex-related conduct is a defense to a sexual harassment suit under Title VII.[143]

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135. *Id.*

136. *Id.* The plaintiff also testified that these "activities" eased after 1977 when she established a relationship with a steady boyfriend. *Id.*

137. *Id.* at 2403.

138. The bank also sought to deny liability on the ground that "any sexual harassment by [its Vice President] was unknown to the bank and engaged in without its consent or approval." *Vinson*, 106 S. Ct. at 2403.

139. *Id.*

140. *Id.* at 2403. The court ruled that the plaintiff "was not the victim of sexual harassment and was not the victim of sexual discrimination. . . ." *Id.*

141. Vinson v. Taylor, 23 FEP 37, 43 (D.D.C. 1980).

142. *Vinson*, 106 S. Ct. at 2406 (emphasis in original).

143. *Id.* at 2406. The district court concluded that "[i]f [the plaintiff] and the [Vice President] did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one," and

That the victim acted voluntarily, however, is not a defense; the test is whether the alleged advances were welcomed.[144] As Justice Rehnquist stated, "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[145] While the judgment of the court of appeals was affirmed, Justice Rehnquist rejected that court's concept of absolute liability of employers for misconduct by supervisors, finding that the courts should generally "look to" agency principles for "guidance," but he declined to provide a definitive rule for determining employer liability.[146]

Finally, the Court did rule that, although relevant, it is not dispositive for an employer to sh ow the failure of the complainant to use a grievance procedure established by the employer to enforce its policy against sexual harassment.[147] For example, the Court strongly implied that failure to invoke such a procedure would be excused when the alleged victim would be required to complain to the alleged offender. But the Court indicated that failure to invoke the grievance procedure "might" insulate the employer from liability if "[the grievance] procedures were better calculated to encourage victims of harassment to come forward."[148]

In a brief concurring opinion, Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, addressed the issue of employer liability. Justice Marshall contended that sexual harassment by a supervisor "should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."[149] In reaching this conclusion, he relied upon the EEOC guidelines, as promulgated, and upon agency princi-

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intimated that "voluntariness" might be a defense to a sexual harassment suit involving sex-related conduct. The Supreme Court, agreeing with the D.C. Circuit, concluded that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII." *Id.*

144. *Id.* at 2406. "The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcomed." *Id.*, citing, 29 C.F.R. § 1604.11(a) (1985).

145. *Vinson*, 106 S. Ct. at 2406.

146. *Id.* at 2408. The D.C. Circuit had "no difficulty" in concluding that "an employer may be held accountable for discrimination accomplished through sexual harassment by any supervisory employee with authority to hire, to promote or to fire." Vinson v. Taylor, 753 F.2d 141, 149-50 (D.C. Cir. 1985) (footnote omitted). The limitations of respondeat superior of tort and agency law were found to be inapplicable because:

> Title VII is a mandate from Congress to cure a perceived evil—certain types of discrimination in employment—in a prescribed fashion. Rules of tort law, on the other hand, have evolved over centuries to meet diverse societal demands by allocating risks of harm and duties of care. Without clear congressional instruction, we think it unsafe in developing Title VII jurisprudence to rely uncritically on dogma thus begotten.
>
> More particularly, limitations imposed by the doctrine of respondeat superior have no place in enforcement of the congressional will underlying Title VII. Confining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.

Id. at 150-51 (footnotes omitted). *See also* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) discussed *supra* note 132.

147. *Vinson*, 106 S. Ct. at 2408.

148. *Id.* at 2409.

149. *Id.* at 2411.

ples applied in enforcing general Title VII and other federal labor laws.[150] Thus, he rejected the Solicitor General's suggestion on behalf of the EEOC, that this approach be confined to sexual harassment cases involving tangible job detriments. He reasoned that because supervisors have general authority for both tangible and intangible conditions of the work environment, the same standard should apply to any abuse of their authority, including non-economic or intangible sexual harassment.[151] Justice Marshall did concede, however, that strict employer liability might not be imposed when a supervisor has no authority over an employee working in an entirely different part of the business.[152]

The *Vinson* case is significant because for the first time the Supreme Court addressed the epidemic problem of sexual domination in the workplace.[153] In recognizing a type of sexual harassment that is not conditioned upon an economic or tangible *quid pro quo*, the Court has made an important contribution in the emerging law of sex discrimination. *Vinson* should go far toward alleviating sexual abuse of working women by inducing employers to adopt and implement anti-sexual harassment policies and grievance procedures or to review and strengthen existing ones. Of even greater significance is that the Court has acknowledged that sexual harassment occurs in subtle forms which can be just as insidious as tangible forms of blatant sexual coercion. *Vinson* may thus serve to challenge many existing male stereotypes which have "legitimated" the use of sex as a power play to maintain male domination and hierarchy in the workplace.

The Court did open a number of important questions. For example, it did not specify how much harassment the plaintiff is required to show to create liability or the kind and extent of the evidence the defendant may use to establish the defense that sexual conduct was welcomed. The lower courts have indicated that an occasional, isolated or trivial instance of sexual harassment is insufficient to establish liability.[154] They have apparently taken a practical approach to these cases in finding that not everything unwelcome is illegal. The relevant cases are far from dispositive of this question because they usually involve a *quid pro quo* claim of sexual harassment brought in tandem with a hostile environment claim.[155] Even *Vinson* is am-

150. *Id.* at 2410-11.

151. *Id.* at 2411.

152. *Id.* Justice Stevens concurred in both the Court's opinion and the concurring opinion, seeing no inconsistency between them.

153. *See* C. MACKINNON, *supra* note 130; Comment, *supra* note 130, at 1451.

154. *See, e.g.*, Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986); Downes v. Federal Aviation Adm'n, 775 F.2d 288 (Fed. Cir. 1985); Craik v. Minnesota State Univ. Bd., 731 F.2d 465 (8th Cir. 1984); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Sardigal v. St. Louis Nat'l Stockyards Co., 42 FEP Cases 497 (S.D. Ill. 1986). *See also Employer's Liability for Supervisor's Sexual Harassment of Employee*, 122 LAB. REL. REP. (BNA), 122 Analysis 33 (June 30, 1986).

155. For a review of the case law and a discussion of this point *see* Comment, *supra* note 153 at 1457 nn. 45-46.

For a recent illustration of the confusion that has arisen in such cases *see* Sardigal v. St. Louis Nat'l Stockyards Co., 42 FEP Cases 495 (S.D. Ill. 1986). In *Sardigal*, a cocktail waitress charged "pervasive sexual harassment" involving requests to "wear skimpy costumes," a requirement to "parade" through the dining room in the costumes, an incident requiring the removal of the skirt of her costume, and "unwelcome sexual advances, requests for sexual favors and offensive touching of a sexual nature by a supervisor." *Id.* at 499. She also alleged "pervasive sexual harassment" in that "she was subjected to unwelcome sexual advances, requests for sexual favors and offensive touching

biguous on this point because it too involved allegations of demands for sexual favors and hence was not a pure hostile work environment case as such.

Indeed, it is difficult to see how any woman would ever "welcome" non-tangible sexual harassment where such conduct establishes an intimidating, hostile, or offensive working environment. But even if a finding could be made that a Title VII plaintiff somehow welcomed the harassment, why should Title VII liability be denied altogether if the evidence otherwise establishes that the defendant's purpose, or the effect of its conduct, was to create an intimidating, hostile, or offensive working environment for women? While the Title VII plaintiff may have welcomed the harassment, it does not follow that other women "welcome" the hostile working environment which the conduct creates nor does it serve as an excuse for the objectionable conduct of the employer. If Title VII is to be truly effective to combat hostile environment sexual harassment, the discrimination should be illegal regardless of whether someone welcomed it or not. It would seem only logical that if the "welcome" concept is a defense to a sexual harassment suit, it should be limited to *quid pro quo* claims or possibly hostile environment claims involving allegations of specific sex-related conduct, but not in general hostile environment cases involving only non-tangible discrimination or non-economic injury.

An even more perplexing and troublesome question concerns the proper standard governing hostile environment claims. Some courts have adopted a reasonable person standard in determining whether allegations of sexual harassment constitute illegal hostile environment discrimination. The prevailing attitude of judges appears to be that the perspective of the reasonable person must be decided in light of the general level of conduct at the shop and other workplaces where "humor and language are rough hewn and vul-

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of a sexual nature" by a co-worker and that she was terminated because she complained of his alleged misconduct. *Id.* at 499, 500. The district court dismissed the suit on the ground that the record showed the instances of "pervasive sexual harassment" were "groundless," *id.* at 499, or "unbelievable," *id.* at 500, or constituted a "single event" which did not reoccur, *id.*, and that the plaintiff had "welcomed, if not encouraged," the sex-related conduct of the co-worker. *Id.* at 501. Concerning the conduct of the co-worker, however, the court erroneously focused on the "voluntariness" of the plaintiff's conduct, stating:

> If the plaintiff had been subjected to the type of outrageous conduct described by her she would not voluntarily be in the company of the culprit, much less voluntarily visit him, and most incomprehensible of all, allow him to come into her home alone at night after he had threatened to rape her. This defies belief.

Id. at 501. The problem is that the plaintiff's voluntary participation in the sex-related conduct is irrelevant in light of the Supreme Court's decision in *Vinson*. Justice Rehnquist's opinion for the Court concluded that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Vinson*, 106 S. Ct. at 2406. More significantly, the idea that a "voluntary" sexual encounter establishes a defense to a sexual harassment suit trivializes, if it does not ignore, the experience of some women who have been raped or otherwise physically abused in even "normal" sexual relations. Even consensual sexuality may not be welcomed if consent is a product of male domination and power. *See* Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1191 (1985); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS J. of Women in Culture and Soc'y 635 (1983); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Comment, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983).

gar"[156] and "bawdy sexual horseplay" is commonplace.[157] The problem with the prevailing conception of the "reasonable person" standard is that it ignores the wide divergence in perception between men and women concerning appropriate sexual conduct. Feminist legal scholars have persuasively demonstrated that particular kinds of offensive sexual conduct are actually perceived by men as innocent or harmless.[158] Sexual jokes, sexual conversations and pornographic material may be acceptable forms of conduct for some working men even though they create an offensive and hostile working environment for women.

An illustration of the type of mischief that can arise is graphically presented by a recent decision of the Sixth Circuit Court of Appeals in *Rabidue v. Osceola Refining Co.*[159] In *Rabidue*, a Title VII plaintiff claimed that she had been unlawfully discharged for voicing objections to what she alleged to be an "anti-female" work environment. In support of her claim, the plaintiff proved that she and other women workers were exposed to pictures of nude or partially nude women belonging to male employees. For eight years, on a wall facing workers as they entered the office there was a poster of a prone woman with a golf ball on her breasts with a man standing over her holding a golf club and yelling "Fore."[160] The plaintiff also established that she was constantly the subject of obscene remarks. Indeed, a supervisor routinely referred to women as "whores," "cunts," "pussy" and "tits."[161] On one occasion, this supervisor, speaking in reference to the plaintiff, publically declared that "[a]ll that bitch needs is a good lay."[162] When the plaintiff complained of this conduct, the supervisor was given "a little fatherly advice" and was told about his positive professional potential if he learned to become "an executive type person."[163]

The court of appeals affirmed the decision of the district court in dismissing plaintiff's suit. According to the majority, the plaintiff had failed to meet her burden of proving that the defendant's conduct interfered with the work performance or impaired the psychological well-being of a "reasonable person" in a similar environment.[164] The obvious problem with the court's legal conclusion is that it assumed that the standard of reasonableness could be objectively defined in terms of a single uniform test, the perception of a "reasonable person," as determined by two male judges. But, as the dissent

156. Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, Rabidue v. Osceola Ref. Co., 803 F.2d 611 (6th Cir. 1986).

157. *Cf.* Mueller Brass Co. v. NLRB, 544 F.2d 823 (5th Cir. 1977) (Godbold, Circuit Judge, dissenting).

158. *See e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE—PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Menkel-Meadow, *Portia in A Different Voice: Speculations on a Woman's Lawyering Process*, 74 Calif. L. Rev. — (1986); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); MacKinnon, *supra* note 155; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

159. 803 F.2d 611 (1986).

160. *Id.* at 641 (Keith, J., concurring in part and dissenting in part).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 620.

correctly argued, "unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."[165] Because the reasonable person standard reflects sexist attitudes now dominating society, it is critical, as the dissent urged, to consider the experience of reasonable working women and reasonable victims[166] in evaluating claims of hostile environment sexual harassment.

Any effort devoted to formulating a uniform "objective" standard of reasonableness is bound to reflect the dominant perception of men.[167] Instead of the so-called "objective" standard of the reasonable person, the courts should allow working women plaintiffs to establish their claims through evidence based upon their subjective consciousness and experience. Clearly, the dissent in *Rabidue* took a step in the right direction in arguing that the divergent attitudes of women be adopted in evaluating hostile work environment claims.[168]

In *Vinson*, the Court also left open troublesome questions concerning the type of evidence admissible for establishing the sexual harassment claim and the defense. Because the plaintiff need not show that participation was involuntary, it would seem to follow that no showing of resistance is required. Justice Rehnquist found evidence of a women's dress and provocative speech, including discussion of personal fantasies, to be relevant. He emphasized, however, that the lower courts have ultimate discretion in deciding whether to admit such evidence, observing that "there is no per se rule against . . . admissibility."[169] Unresolved is the extent to which courts should consider as analogous issues arising in criminal sexual assault cases,

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165. *Id.* at 626 (Keith, J., concurring in part and dissenting in part).

166. *Id.*

167. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118, 1152-58 (1986).

168. The problem is even more fundamental. As Ms. Diane Polan has pertinently and perceptively observed:

> The experience of going to court on a regular basis underscores the pervasive maleness of the legal system: it is a system infused with sexist values. Regardless of the language of a statute, it is individual judges who decide cases. The judiciary remains overwhelmingly male. Judges have grown up in a patriarchal culture; their attitudes are inevitably shaped by their life experiences and by their position as the beneficiaries of male supremacy. Similarly, the juries who weigh women's claims of sex discrimination and pass judgment on the guilt of rape defendants are made up of people who have lived their entire lives in a male supremacist culture. Thus, even while attempting to educate judges and jurors, this fundamental limitation on the usefulness of the legal system in the fight against male supremacy must be faced. Furthermore, even if sexism were formally eliminated from the legal system, and even if half the lawmakers and legal decision makers were women, the legal system would not become a nonsexist institution. The whole structure of law—its hierarchical organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values—defines it as a fundamentally patriarchal institution.

D. Polan, *Toward a Theory of Law and Patriarchy*, THE LAW OF POLITICS—A PROGRESSIVE CRITIQUE 295, 301 (D. Kairys, ed. 1982). *Cf.* Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 249, 280 n.88 (1984) (that judges are " 'mostly white, male, professional, and relatively wealthy' is true but misleading. The legal elite is a group in which one finds enthusiastic support for feminism and affirmative action, as anyone who teaches at a prestigious law school cannot help but be aware," quoting Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982)).

169. *Vinson*, 106 S. Ct. at 2407.

such as the relevance of the alleged victim's sexual history, whether related or unrelated to the accused supervisor or other supervisors and workers.[170] Of course, the problem with finding such evidence admissible is that is plays into existing sexual stereotypes and the biases of judges and jurors who are likely to be predisposed to believe that most women say "no" when they really mean "yes."[171] Since it is beyond question that we do live in a male-dominated and sexist society, it follows that prudence and fairness dictate that judges should be extraordinarily careful in ruling on the admissibility of evidence concerning how an alleged victim of sexual harassment dressed, acted, or spoke. Surely, courts should not read *Vinson* as establishing a per se rule in favor of the admissibility of such evidence.

Finally, Justice Stevens' concurrence in both the Court's and the concurring opinions, has cast doubt on the continuing validity of the EEOC Guidelines governing the liability of employers for supervisorial sexual harassment. The EEOC Guidelines, as promulgated, impose strict liability on an employer for the acts of a supervisor, but Justice Stevens has not indicated whether he would join the four Justices who voted in *Vinson* to uphold that position.

C. *Procedural Issues*

1. *Issue Preclusion by State Administrative Proceedings*

In *University of Tennessee v. Elliott*,[172] a unanimous Court held that state administrative findings are not entitled to preclusive effect in Title VII actions brought in federal courts. For the Court, Justice White concluded that the common-law rule of preclusion would be inconsistent with congressional intent in enacting Title VII. Moreover, under the statute, such findings do not bind the EEOC, and "it would make little sense for Congress to write [such a statutory] provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court."[173]

In actions brought under the reconstruction civil rights statute, however, no statute limits deference to administrative findings. The Court split five to three,[174] with the majority speaking through Justice White. By reason of common-law preclusion and the value of federalism, the majority held that in section 1983 and other reconstruction civil rights actions, federal courts are bound by state unreviewed administrative findings to the same extent as are state courts.[175]

Justice Stevens, joined by Justice Brennan and Blackmun, dissented on this issue. According to them, claims under post-civil war Acts do not implicate the objectives or policies "associated with finality or federalism."[176]

170. *See, e.g.*, Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

171. For a discussion of this issue in the context of rape see Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1188 (1985).

172. 106 S. Ct. 3220 (1986).

173. *Id.* at 3225.

174. Justice Marshall did not participate in the decision.

175. 106 S. Ct. at 3225.

176. *Id.* at 3227.

Citing *Monroe v. Pape*,[177] the dissenters also urged that one goal of the reconstruction era statutes was to prevent state agencies from depriving citizens of their federal rights.[178]

Even under the majority's ruling, a plaintiff may avoid preclusion by establishing that the state agency did not act in a judicial capacity, that the factual issues were not within its jurisdiction, that an adequate opportunity to litigate the issues was not within its jurisdiction, or that an adequate opportunity to litigate the issues was not afforded. There is also the issue concerning whether the plaintiff was given a "fair and full opportunity" to litigate a claim of discrimination in the state administrative proceeding.[179] In these important respects, the Court's *Elliott* decision throws little light on when the lower courts should preclude discrimination claims.[180]

Dissenting Justice Stevens is also surely correct in predicting that the Court's ruling will not make for judicial economy because a well represented plaintiff may avoid state administrative findings and bring both the Title VII and the reconstruction civil rights actions in federal court. Further, *Elliott* "sets a trap for the unwary pro se defendant or poorly represented complainant."[181] Those who pursue a remedy before a state administrative agency may unknowingly foreclose their option to seek possibly preferable review in the federal courts. Finally, there is the question of whether the *Elliott* rule is to be applied retroactively, with possible adverse impact on hundreds or perhaps thousands of pending reconstruction civil rights statutory claims.[182]

2. *Younger v. Harris Abstention*

In *Ohio Civil Rights Comm'n v. Dayton Christian Schools*,[183] the Court held that a federal district court should have abstained from considering a private religious school's application to enjoin a pending state administrative proceeding concerning a gender-based discrimination complaint. The state agency had determined probable cause existed to believe that the school had discriminated against one of its teachers by refusing to renew her contract because she was pregnant.[184] The school board based its decision partly upon its religious doctrine that mothers should stay home with their preschool age children. The board immediately suspended, and subsequently terminated, the teacher because she had violated the school's "biblical chain

177. 365 U.S. 167, 180 (1961).

178. *Elliott*, 106 S. Ct. at 3229.

179. What constitutes a "full and fair opportunity" to litigate a discrimination claim has been a question which has been especially troublesome in the context of non-fair-employment-practice state agencies. For example, the Second Circuit has recently ruled that such an opportunity does not exist in determining the right to unemployment compensation before the appropriate state agency. Hill v. Coca-Cola Bottling Co., 786 F.2d 550 (2nd Cir. 1986). *See also* Heath v. John Morrell & Co., 768 F.2d 245 (8th Cir. 1985); Ross v. COMSAT, 759 F.2d 355 (4th Cir. 1985); Pizzuto v. Perdue, Inc., 653 F. Supp. 1167 (D. Del. 1985); PRECLUSIVE EFFECT OF STATE AGENCY FINDINGS IN ACTIONS UNDER TITLE VII AND OTHER CIVIL RIGHTS ACTS, 122 Analysis 49 (BNA) (July 28, 1986).

180. *See* PRECLUSIVE EFFECT OF STATE AGENCY FINDINGS IN ACTIONS UNDER TITLE VII AND OTHER CIVIL RIGHTS ACTS, *supra* note 151.

181. Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883, 1909 (1982). *See* Bartosic & Minda, *supra* note 1, at 292.

182. *See* Bartosic & Minda, *supra* note 1, at 293.

183. 106 S. Ct. 2718 (1986).

184. *Id.* at 2721.

of command" by retaining an attorney to challenge the school's pregnancy policy in the courts instead of presenting a grievance to her immediate supervisor.[185] While the state administrative proceedings were pending, the school filed suit in federal district court to enjoin the proceedings on the ground that they violated the Religion Clauses of the First Amendment.[186]

In an opinion by Justice Rehnquist,[187] the Court decided, five to four, that the federal district court should have abstained from adjudicating the case under the abstention doctrine of *Younger v. Harris*.[188] In *Younger*, the Court ruled that a federal court should refuse to enjoin a pending state criminal proceeding except in unusual situations where injunctive relief is necessary to prevent great and immediate irreparable injury. The Court has also ruled that the *Younger* concerns for comity and federalism justify federal abstention when state administrative proceedings are pending on the same subject matter if important state interests are involved and if the federal plaintiff "would have a full and fair opportunity to litigate his constitutional claim."[189]

The majority found that "the elimination of prohibited sex discrimination [was] a sufficiently important state interest" and that the school would "receive an adequate opportunity to raise its constitutional claims" in the state proceedings.[190] Hence, regardless of the merits of the school's First Amendment claims, the majority decided that the *Younger* abstention doctrine precluded federal court intervention. Moreover, the majority concluded that the state agency proceedings did not violate the constitutional religious freedom of the school because all that was involved was an investigation to determine whether "the ascribed religious-based reason was in fact the reason for [the teacher's] discharge."[191]

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, concurred in the result. According to these four Justices, the abstention doctrine of *Younger* does not apply in a case raising the constitutionality of a pending administrative proceeding "when the constitutional challenge to . . . [the administrative] order can be asserted, if at all, only in state court judicial review of the administrative proceeding."[192] These Justices reasoned

185. The school's corporate charter contained a "Statement of Faith" which requires each board and staff member "to reaffirm his or her belief annually in the Bible, the Trinity, the nature and mission of Jesus Christ, the doctrine of original sin, the role of the Holy Ghost, the resurrection and judgment of the dead, the need for Christian unity, and the divine creation of human beings." *Id.* at 2720-21. The "Biblical chain of command" was created by the board as an internal dispute resolution mechanism to enforce the requirements of the statement of faith on the charter. *Id.* at 2721.

186. The district court refused to issue the injunction on the ground that the state agency's investigation of allegations of sex discrimination did not appear at the time to "impermissibly impinge" on the plaintiffs' first amendment rights to freedom of religion. Dayton Christian Schools v. Ohio Civ. Rights Com'n, 578 F. Supp. 1004, 1041 (S.D. Ohio 1984). The Sixth Circuit reversed, holding that the mere exercise of jurisdiction by the state agency violated both the Free Exercise and the Establishment Clauses of the First Amendment. Dayton Christian Schools v. Ohio Civ. Rights Com'n, 766 F.2d 932 (6th Cir. 1985).

187. *Dayton*, 106 S. Ct. at 2723.

188. 401 U.S. 37 (1971).

189. Gibson v. Berryhill, 411 U.S. 564, 567-577 (1972).

190. *Dayton*, 106 S. Ct. at 2723-24.

191. *Id.* at 2724.

192. *Id.* at 2726 n.5, *citing* Steffel v. Thompson, 415 U.S. 452 (1973) (*Younger* abstention is inappropriate if no state court proceeding is pending when federal action is commenced).

that the *Younger* doctrine should not apply in *Dayton* because it would deny the school a federal forum in which to adjudicate the constitutionality of a provisional remedy, such as reinstatement pending resolution of the state charges. In such a case, the plaintiff can assert the constitutional challenge only through state judicial review of the administrative proceedings.

The four concurring Justices agreed, however, that the federal suit should be dismissed because the controversy was not ripe, absent an intrusive remedy imposed by the state administrative agency. According to them, the school board's challenge to the state proceedings was not yet ripe for review because "[the state agency's] finding of probable cause and decision to schedule a hearing . . . does [sic] not also mean that the Commission intends to impose any sanction, let alone a sanction in derogation of the First Amendment's Religion Clauses."[193]

As a practical matter, whether *Dayton* is seen as a *Younger* abstention or a ripeness case, First Amendment doctrine precludes the argument that religious schools are generally exempt from state regulation.[194] Although the Religion Clauses of the First Amendment may require accommodations and place limits upon what the state can demand, the mere appeal to religion should not defeat the exercise of state jurisdiction to enforce civil rights protected under state law. The real significance of federal court abstention in a case such as *Dayton* is that the state agency can provide a provisional administrative remedy, such as reinstatement, while state proceedings are pending. But reinstatement pending review of all defenses, including the school's constitutional claims, would not significantly impinge on the religious principles of the school board. The school would still have an opportunity to present its First Amendment defense in either state or federal court after the agency takes administrative action.

D. *Attorneys' Fees*

1. *Waiver of Statutory Attorneys' Fees*

The Burger Court delivered what could well be a "fatal blow"[195] to private civil rights enforcement in an extremely important but little publicized case, *Evans v. Jeff D.*[196] In *Jeff D.*, a legal aid attorney brought a class action against the state of Idaho on behalf of mentally handicapped children in the care and custody of the state. The complaint alleged that the state kept the children in adult psychiatric facilities where they were subject to potential physical and sexual abuse from older patients. One week before trial, after the legal aid attorney had devoted years of work on the case, the state made a settlement offer in which it agreed to implement almost all the relief sought in the complaint but demanded that the plaintiffs waive any right to attorney's fees.[197]

193. *Dayton*, 106 S. Ct. at 2726.

194. As Justice Rehnquist put it, "even religious schools cannot claim to be wholly free from some state regulation." *Id.* at 2724, *citing* Wisconsin v. Yoder, 406 U.S. 205 (1972).

195. *See* Adkins, "U.S. Supreme Court Throws Up a Barrier to Civil Rights Cases," Sacramento Bee, Sept. 17, 1986, at B-7.

196. 106 S. Ct. 1531 (1986).

197. *Id.* at 1534.

The plaintiff's attorney, believing that his ethical obligation to his clients required him to accept the settlement, agreed to the waiver, which was subsequently approved by the district court. On appeal, the Ninth Circuit reversed, holding that a stipulated waiver of all attorneys' fees created an ethical conflict between the class action lawyers' interest in compensation and the class members' interest in relief which the federal courts should not countenance when they approve settlement offers, absent a showing of "unusual circumstances."[198] The Supreme Court granted certiorari to resolve a conflict among the circuits over whether courts may require plaintiffs' counsel to choose between accepting a settlement on favorable terms or pursuing a statutory fee award.[199]

By enacting the Civil Rights Attorneys' Fees Awards Act of 1976, Congress provided that federal courts have discretion to award reasonable attorney fees to prevailing parties in certain federal civil rights actions.[200] In *Maher v. Magne*[201] the Court held that the Attorneys' Fees Act allows the assessment of fees against state officials after settlement by the entry of a consent decree. In *Jeff D.* the Court held, six to three, that the Attorneys' Fees Act does not prevent or prohibit waivers of fees nor does it mandate that fees be paid for settlement. It also found that approval of a settlement, including waiver of attorney fees, was within the discretion of the district court.[202]

Justice Stevens, writing for the Court, declined to interpret the Fees Act as prohibiting waivers of attorneys' fees in settlement agreements because the potential liability for attorneys' fees can in some cases "overshadow the potential cost of relief on the merits and darken prospects for settlement if fees cannot be negotiated."[203] Further, Justice Stevens thought that the danger of waiver of fee awards diminishing the incentive of lawyers to represent civil rights claimants was "premature" in the absence of factual "documentation", and that "as a practical matter the likelihood of this circumstance arising is remote."[204] In his view, "[r]espondant's own waiver of attorney's fees and costs to obtain settlement of their educational claims is eloquent testimony to the utility of fee waivers in vindicating civil rights claims."[205]

198. *Id.* at 1536.

199. The decision of the Ninth Circuit in Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984), was in accord with the decision of the Third Circuit in Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977). At least four other circuits, however, followed a contrary rule allowing such waivers. *See* Moore v. National Ass'n of Securities Dealers, Inc., 762 F.2d 1093 (D.C. Cir. 1985); Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985); Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982) (dictum); Chicano Police Officers Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980). *See also Jeff D.*, 106 S. Ct. at 1536 n.11.

200. 42 U.S.C. § 1988. The relevant language of the Fees Act provides:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes,title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

201. 448 U.S. 122 (1980).

202. *Jeff D.*, 106 S. Ct. at 1545.

203. *Id.* at 1541-42.

204. *Id.* at 1545 n.34.

205. *Id.* at 1542.

Dissenting Justice Brennan, joined by Justices Marshall and Blackmun, contended that it was "embarrassingly obvious" that the Court's decision would "seriously impair" the ability of civil rights plaintiffs to obtain effective legal counsel.[206] It is unnecessary to conduct a study or gather evidence to verify that the Court's decision created disincentives for civil rights representation. As Justice Brennan asked rhetorically: "Is the Court really serious in suggesting that it takes a study to prove that this lawyer will be reluctant when, the following week, another civil rights plaintiff enters his office and asks for representation? Does it truly require that somebody conduct a test to see that legal aid services, having invested scarce resources on a case, will feel the pinch when they do not recover a statutory fee?"[207]

Justice Brennan would prohibit waivers of statutory fees, but he would also countenance simultaneous negotiation of fees and claims on the merits because "this would not contravene the purposes of the Fees Act" and "may even enhance the effectiveness [of the Act] by making it easier for a lawyer to dispose of his case more quickly."[208] Finally, Justice Brennan emphasized that the Court's decision in *Jeff D.* does not rule out "other avenues of relief" for plaintiffs' attorneys. First, he noted that the Court's decision in no way prevents a state or local bar association from adopting ethical rules prohibiting defense counsel from seeking fee waivers in civil rights litigation on the ground that these waivers exploit the ethical obligation of plaintiffs' counsel to accept settlement offers that are in the best interest of the client. Indeed, New York and the District of Columbia have adopted ethical rules which would have barred the waiver of fees in *Jeff D.*[209] Furthermore, Justice Brennan observed that the Court's decision also does not rule out the possibility that civil rights attorneys can seek agreements from their clients not to waive their attorney's fees upon settlement.[210]

Justice Brennan was correct in observing that the obvious impact of the Court's decision in *Jeff D.* will be to diminish private enforcement of civil rights laws. Although the Court's decision may give defense counsel the incentive to offer favorable terms to induce acceptance of a settlement which contains a waiver of all statutory fees, plaintiff's attorneys will now think twice before representing civil rights plaintiffs. As Justice Brennan aptly commented, "[i]t does not denigrate the high ideals that motivate many civil rights practitioners to recognize that lawyers are in the business of practicing law, and that, like other business people, they are and must be concerned with earning a living."[211] The reality is that most civil rights plaintiffs lack the funds to retain competent counsel because discrimination has relegated most minorities and women to low paying jobs. The *Jeff D.* decision will

206. *Id.* at 1554.
207. *Id.* at 1553.
208. *Id.* at 1557.
209. *See* COMMITTEE ON PROFESSIONAL ETHICS OF THE ASSOCIATIONS OF THE BAR OF THE CITY OF NEW YORK, Op. No. 82-80 (1985); DISTRICT OF COLUMBIA LEGAL ETHICS COMMITTEE, Op. No. 147, *reprinted in* 113 DAILY WASHINGTON LAW REPORTER 389 (1985).
210. Justice Brennan concluded in a footnote that the legality of such agreement must be determined as a matter of local law because "Congress has not sought to regulate ethical concerns either in the Fees Act or elsewhere." *Jeff D.*, 106 S. Ct. at 1557 n.20, *citing* Nix v. Whiteside, 106 S. Ct. 988, 994-97 (1986).
211. *Jeff D.*, 106 S. Ct. at 1553.

severely hinder victims of discrimination too poor to hire counsel from obtaining effective legal representation.

2. *Rejection of Proportionality Requirement Between Attorneys' Fees and Damages Recovered*

In *City of Riverside v. Rivera*,[212] a case brought under section 1988, the Civil Rights Attorneys' Fees Award Act,[213] but applicable to all civil rights cases, a plurality of four Justices found that attorney fees are not per se unreasonable merely because they exceed the amount of damages recovered by the plaintiff in the underlying civil rights action.[214] The plurality rejected the argument that courts should not use the "lodestar" method for calculating reasonable attorneys' fees (number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) in civil rights cases when a plaintiff recovers only monetary damages.[215] Thus the fee award need not be proportionate to the amount of damages a civil rights plaintiff actually recovers.

Justice Brennan authored the plurality opinion, joined by Justices Marshall, Blackmun, and Stevens. Justice Brennan did not adopt a rule of proportionality, which would "make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts."[216] He also reasoned that civil rights cases differ from private tort suits, in which the courts recognize a proportionality rule, because civil rights suits seek to serve the public interest. Moreover, one cannot measure the value of a successful civil rights suit solely in terms of a monetary recovery.[217] Courts should consider other factors, including the complexity of the issues of fact and law and the furtherance of the public interest.

In a separate concurring opinion, Justice Powell disagreed with the plurality to the extent that they sought to fashion any general rule based on prior Supreme Court decisions. Instead, he thought that although the fee award was "on its face" unreasonable, the district court's detailed findings of fact in support of its award were not an abuse of discretion. He thus concluded that the fee award must stand because the decision of the lower court was not "clearly erroneous."[218]

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212. 106 S. Ct. 2686 (1986).

213. 42 U.S.C. § 1988. In a recent decision decided in the current Term, North Carolina Dept. of Transp. v. Crest Street Community Council, 107 S. Ct. 336 (1986), the Court ruled, six to three, that attorney's fees authorized under the Attorney's Fees Award Act applies only to those civil rights actions brought under the statutes specifically enumerated within section 1988. Hence, a party that prevails in an administrative proceeding brought to enforce rights protected by Title VI cannot obtain an award of attorney fees in a separate federal action under Section 1988 to recover fees.

214. In *Rivera*, the plaintiffs sought $254,456 in fees generated in obtaining an award of $33,350 in compensatory and punitive damages for violations of the plaintiff's constitutional rights on a section 1983 claim. 106 S. Ct. at 2689-90.

215. The lodestar method was adopted by the Court in Hensley v. Eckerhart, 461 U.S. 424 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

216. *Rivera*, 106 S. Ct. at 2696.

217. *Id.* at 2695.

218. *Id.* at 2700.

Chief Justice Burger dissented on the ground that the "fee award plainly constitutes a grave abuse of discretion" in that the result "will only add fuel to the fires of public indignation over the costs of litigation."[219] Justice Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, also dissented. In Justice Rehnquist's view, the fee award was clearly unreasonable when compared with the relief granted. He found it "hard to understand how any attorney can be said to have exercised 'billing judgment' in spending such huge amounts of time on a case ultimately worth only $33,350."[220] In a biting criticism of the plurality decision, Justice Rehnquist concluded that "[t]he Court's affirmance of the fee award emasculates the principles laid down in *Hensley* [the decision establishing the lodestar method], and turns § 1988 into a relief act for lawyers."[221]

The kind of abuse that concerned Justice Rehnquist does not appear to be particularly likely to occur, given that the majority of Justices were careful to preserve the discretion of district court judges in calculating reasonable attorney fees.[222] Surely federal judges can be trusted not to turn section 1988 into "a relief act for lawyers." Moreover, a contrary rule in favor of proportionality would fail to reflect the societal value of civil rights litigation. Because the value of civil rights is in many respects nonpecuniary in nature, it would be grossly unfair to require federal judges to utilize a pecuniary yardstick based on damages recovered to determine reasonable attorneys' fees. To do so would thwart the national policy of antidiscrimination law, the vindication of which has a value over and above the monetary recovery obtained by the individual plaintiffs. In this important respect, the plurality decision in *Rivera* was sound.

3. *Federal Immunity to Interest on Fees*

In *Library of Congress v. Shaw*,[223] the Court decided, six to three, that federal courts are not authorized either to award interest or to alter the lodestar calculation of attorneys' fees to make up for delay in the payment of fees when the Federal Government is the defendant. In an opinion by Justice Blackmun, the Court ruled that Congress had not waived the Government's historical immunity from interest on judgments. The Court held that Congress must expressly waive sovereign immunity; a statutory provision for expenses does not waive that immunity. In dissent, Justice Brennan, joined

219. *Id.* at 2701.

220. *Id.* at 2703. In *Rivera*, the district court found that the plaintiff's attorneys "reasonably" spent 1,946.75 hours to recover a money judgment of $33,350. The reasonable hourly fee was set at $125 per hour resulting in a total attorney's fee award of $245,456.25. *Id.* at 2701.

221. *Rivera*, 106 S. Ct. at 2702.

222. On the other hand, one can understand why the dissenters reacted so negatively to the award of fees in *Rivera*. As Chief Justice Burger explained:

> The two attorneys receiving this nearly quarter-million-dollar fee graduated from law school in 1973 and 1974; they brought this action in 1975, which resulted in the $33,350 jury award in 1980. Their total professional experience when this litigation began consisted of Gerald Lopez' 1-year service as a law clerk to a judge and Roy Cazares' two years' experience as a trial attorney in the Defenders' Program of San Diego County. For their services the District Court found that an hourly rate of $125 per hour was reasonable.

Rivera, 106 S. Ct. at 2701. The majority, however, declined to let a hard case make bad law.

223. 106 S. Ct. 2957 (1986).

by Justices Marshall and Stevens, argued that the archaic "no-interest" rule frustrates congressional intent to extend Title VII protection to federal employees to the same extent as to private employees.

On balance, it seems that Justice Brennan's position is correct. The Court has applied the rules of sovereign immunity formalistically to insulate the Federal Government from liability for interest on attorneys' fee awards. Surely, federal employees are entitled to the same protection as all other employees under federal civil rights litigation. If that was the intent of federal law, why deny federal employees' counsel interest on the fee award or adjustments for delay in payment of the award? The reason might be that a majority of the Justices have concluded that it is time to limit the recovery of plaintiffs' attorneys in civil rights litigation. Perhaps the Court's decisions in *Jeff D.* and *Shaw*, as well as the vociferous dissents in *Rivera*, may be best understood as a supportive reaction to Chief Justice Burger's many public statements on ethical abuses within the profession.

III. LABOR RELATIONS

A. *Taft-Hartley Act*

Of the six Taft-Hartley cases decided last Term, one involved the National Labor Relations Board's *Amoco IV* rule[224] on union affiliation votes, another, substantive arbitrability, and the remaining four, preemption. As in prior terms, the Burger Court's labor relations decisions were less controversial with less diversity of opinion among Justices. Indeed, it is fair to say that the labor relations decisions, especially the Court's Taft-Hartley decisions, are becoming of only marginal significance to the Supreme Court's overall workproduct. The decline of traditional labor law decisions in the Supreme Court can be traced generally to the overall decline of the labor movement in the private sector and the diminishing reach of collective bargaining.[225]

1. *Board's* Amoco IV *Rule Invalidated*

In *NLRB v. Financial Institution Employees Local 1182*,[226] the only case in which the Labor Board was a party, the Court considered the Board's new requirement that nonunion employees be permitted to vote on the decision of a certified union to affiliate with another union. To determine whether to issue a post-affiliation amended certification requiring continued employer recognition, the Board has traditionally applied a two-step test. It decides whether the union conducted the affiliation vote pursuant to due

224. Amoco Production Co., 262 NLRB 150 (1984), *enforced sub nom.* Oil, Chem. & Atomic Workers Local 4-14 v. NLRB, 721 F.2d 150 (5th Cir. 1983).

225. Professor Paul Weiler has observed that "[n]o feature of contemporary labor-management relations in the United States is more significant than the diminishing reach of collective bargaining." Weiler, *Promises to Keep: Securing Workers' Right to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 (1983). *See also* AFL-CIO, THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS: A REPORT BY THE AFL-CIO COMMITTEE ON THE EVOLUTION OF WORK 5 (1985) (estimated that the percentage of non-agricultural workers who are eligible to join a union and who actually belong to a union has fallen from 45% in 1954 to less than 28% today).

226. 106 S. Ct. 1007 (1986).

process safeguards or democratic procedures and then whether there is substantial continuity between the pre- and the post-merger unions.[227] *Amoco IV* changed this scheme by declaring that the Board would also determine as a threshold question or as part of its due process inquiry whether the union allowed all bargaining unit members, including nonunion employees, to vote on the affiliation. The Board required this unit-wide participation even if affiliation did not cause organizational changes sufficient to raise a question concerning representation. The Fifth and Seventh Circuits had sustained the Board's new rule;[228] the Ninth Circuit had held to the contrary.[229]

A unanimous Court, speaking through Justice Brennan, resolved the conflict by holding that the Board had exceeded its statutory authority in adopting the new requirement. The Court has two different litanies that it invokes, depending on whether it wishes to sustain or reverse a Board's interpretation of the Act. In *Financial Institution* it intoned its reversal chant. The Court reasoned that, given the Act's specific election procedures, the Board cannot in effect decertify the reorganized union when the affiliation does not raise a real question concerning representation. The Board's rule was also found to violate the congressional policy against interference in the decisionmaking of unions by outsiders.

Insisting that affiliation does not by itself implicate selecting a new bargaining agent, the Court acknowledged that affiliation might present changed circumstances that would raise a question concerning representation if it should become unclear whether the union continues to enjoy majority support. It also acknowledged that the Board might find that a question concerning representation exists and direct a representation election if administrative or organizational changes are "sufficiently dramatic to alter the union's identity."[230] Absent a question concerning representation, the Court reiterated, the Board has no statutory authority to interfere in the affairs of unions.

Although the Court recognized that changed circumstances could create a question concerning representation, it offered little, if any, guidance for evaluating the degree or the nature of the changes necessary. The explanation may very well be that these changes will be found only in very rare cases. Employers will undoubtedly seek to probe this area in future cases. The Court in *Financial Institution*, however, was very realistic in explaining why an independent local union may wish to affiliate with a larger union, namely, to strengthen its financial and bargaining position.[231] Employer arguments based on such changes thus seemed destined for rejection.

Finally, the Court expressly did not address the propriety of the Board's established practice of applying its due process and substantial continuity

227. For further discussion concerning the due process and substantial continuity tests, *see* F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR, 315-17 (2d ed. 1986); concerning the change in status of the union generally as affecting the termination of the bargaining relationship, see *id.* at 313-21.

228. Oil, Chem. & Atomic Workers Local 4-14 v. NLRB, 721 F.2d 150 (5th Cir. 1983); United Retail Workers Union Local 881 v. NLRB, 774 F.2d 752, 763 (7th Cir. 1985).

229. Financial Inst. Employees v. NLRB, 752 F.2d 356 (9th Cir. 1984).

230. *Financial Inst.* 106 S. Ct. at 1016.

231. *Id.* at 1011 n.5.

criteria. Although the Court stated that it was not suggesting that the two traditional criteria exceed the Board's statutory authority, the Court's emphasis on the autonomy of unions in their internal affairs casts some doubt on the Board's due process criterion. One thing is clear—the Court has protected an independent union's decision to affiliate from external interference by employers, nonunion employees, and, to a large extent, the Labor Board. It also seems certain that the Court's ruling in *Financial Institution* applies to disaffiliations as well as affiliations. In addition, the Seventh Circuit has held that it does apply to the merger of unions.[232]

2. *Substantive Arbitrability for the Courts: Exception Rejected*

The second Taft-Hartley case, *AT&T Technologies, Inc. v. Communication Workers of America*,[233] reaffirmed that the question of substantive arbitrability, that is, "whether or not . . . [a party is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court[s] on the basis of the contract entered into by the parties."[234] Judges, not arbitrators, should decide the question unless the parties have clearly and unmistakably agreed that the arbitrator should resolve it.[235]

The Seventh Circuit[236] reasoned that *Warrier & Gulf*[237] and *American Mfg. Co.*,[238] two cases of the *Steelworkers* or *Arbitration Trilogy*,[239] cautioned against courts becoming entangled in the merits of a labor dispute when deciding substantive arbitrability. It also thought that the Supreme Court had reopened the general rule in a footnote in *Nolde Bros. v. Local 358, Bakery & Confectionery Workers Union*,[240] where the Court had merely observed that certiorari had been neither sought nor granted on the arbitrator's authority to consider arbitrability after referral and that the Court expressed no view on it. These considerations and earlier Seventh Circuit cases led the Court of Appeals to announce "an important exception"[241] to the general rule: "a court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from the arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute."[242] A unanimous Supreme Court, with Justice White writing its opinion, rejected the Seventh

232. United Retail Workers Local Union 881 v. NLRB, 797 F.2d 421 (7th Cir. 1986).
233. 106 S. Ct. 1415 (1986).
234. John Wiley & Sons v. Livingston, 376 U.S. 543, 546-47 (1964), quoting Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962).
235. Steelworkers v. Warrier & Gulf Co., 363 U.S. 574, 582-83 (1960) and other cases cited in *AT&T*, 106 S. Ct. at 1418 n.9.
236. Communications Workers of America v. Western Elec., 751 F.2d 203 (7th Cir. 1984), *cert. granted sub. nom.* ATT Technologies, Inc. v. Communications Workers of America, 106 S. Ct. 1415 (1986).
237. *See supra* note 235.
238. Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).
239. Concerning the *Steelworkers* or *Arbitration Trilogy* generally, *see* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 358-64.
240. 430 U.S. 243, 255 n.8 (1977).
241. 751 F.2d at 205 (1984).
242. *Id.* at 206.

Circuit's exception. After generally restating the teaching of the *Arbitration Trilogy*, the Court reiterated that "[i]t was for the [trial] court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration."[243] The Supreme Court declined to decide the arbitrability issue based on its own examination of the contract. That is not its usual function; the district court should decide the issue, and the court of appeals should review that decision; it should not be referred to the arbitrator.

Justice Brennan, joined by the Chief Justice and Justice Marshall, concurring, underscored that the trial court could decide the substantive arbitrability issue without considering the merits of the underlying grievance as to the correct interpretation of the applicable contractual provisions. In restating the test to determine arbitrability, Justice Brennan observed that courts should order arbitration unless the party resisting arbitration, *inter alia*, "adduces 'the most forceful evidence' from the bargaining history"[244] that the dispute is not arbitrable. This may be significant because the circuits are divided on whether a court may consider bargaining history in deciding arbitrability.[245]

The Supreme Court vacated and remanded two judgments of courts of appeals for further consideration in light of its *AT&T* decision. In *American Petrofina Co. v. Oil, Chemical and Atomic Workers Local 4-23*,[246] the reason is obvious. The Fifth Circuit had interpreted *Warrier & Gulf*[247] as speaking "with clarity and firmness concerning the obligation of the parties to submit to the arbitrator the issue of arbitrability. . . ."[248] But in *Royal Center, Inc. v. Culinary Workers Local 226*,[249] the Court remanded to the Ninth Circuit a case in which the Court of Appeals had ruled on the arbitrability questions and referred grievances to the arbitrator for resolution on the merits.[250] It is true that the Ninth Circuit had held that the arbitrator was prohibited from making a ruling inconsistent with an NLRB general counsel's decision not to issue a complaint on an alter ego issue, and the Fifth Circuit had ruled that a refusal to issue a complaint on a discharge was not binding on the arbitrator. The Supreme Court's *AT&T* decision, however, will be of little, if any, assistance to either Court of Appeals on this second issue in reconsidering the cases.

3. *Preemption*

Last Term in four cases the Court continued, as it put it in *Sears Roebuck & Co. v. San Diego District Council of Carpenters*, to "decipher the presumed intent of Congress [on preemption] in the face of that body's

243. *AT&T*, 106 S. Ct. at 1420.
244. *Id.* at 1422.
245. *See* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 358.
246. 106 S. Ct. 2912 (1986).
247. *See supra* note 234.
248. Oil Co. & Atomic Workers Int'l Union Local 4-23 v. American Petrofina Co. of Tex., 759 F.2d 512, 515 (5th Cir. 1985).
249. 106 S. Ct. 1627 (1986).
250. Local Joint Exec. Bd. of Las Vegas, Culinary Wkrs. Union Local 165 v. Royal Center, Inc., 754 F.2d 835 (9th Cir. 1985).

steadfast silence."[251] Three cases involved the principal rule, *Garmon* preemption,[252] which prohibits the state regulation of conduct that Taft-Hartley protects, prohibits or arguably protects or prohibits. The fourth was decided under the second rule, *Machinists* preemption,[253] which precludes states from regulating activities that Congress intended to be unregulated or permitted.

a. Garmon *Preemption*

What is perhaps the leading preemption case of last Term, *International Longshoremen's Ass'n v. Davis*,[254] arose when a union defended on the merits a state court suit for fraud and misrepresentation by a ship superintendent who alleged that the union had assured the superintendents that it would get them reinstated in their jobs with back pay if they were discharged for engaging in union activities. The plaintiff-superintendent was apparently fired for his efforts on behalf of the union. The union raised its preemption defense for the first time in its motion for judgment notwithstanding the verdict. The state courts rejected the defense on the ground that a state procedural rule made preemption an affirmative defense, waivable unless timely raised at trial.

The Supreme Court, five to four, reversed the state courts' characterization of preemption. Justice White, writing for the majority, reasoned that Congress intended to establish the NLRB as generally the exclusive forum to adjudicate disputes under the National Labor Relations Act (NLRA). Preemption is thus a "choice of forum," not a "choice of law," question. Hence, the state procedural rule could not provide an independent state ground for decision. Rather preemption is in the nature of a non-waivable challenge to a state court's jurisdictional power to adjudicate, which may be raised at any time. The majority did expressly limit their conclusion to claims of preemption that involve a state's adjudicatory or regulatory power as distinguished from state substantive laws. Dissenting Justice Rehnquist, joined by Justices Powell, Stevens and O'Connor, was unpersuaded that Congress had mandated the result reached by the majority. He also argued that the majority's ruling will allow a sophisticated defendant to gamble on achieving a favorable verdict, raising preemption only after a defense on the merits has failed.

On the *Garmon* preemption issue itself, all the Justices except Justice Blackmun joined Justice White in rejecting the union's argument that because the NLRB had not made a clear determination that the superintendents were supervisors rather than employees, they were arguably employees, and, therefore, the state court was preempted. Similarly, a conclusory assertion that the plaintiff was an employee was insufficient. Instead, the union should have supported the preemption claim by "a showing sufficient to per-

251. 436 U.S. 180, 188 n.12 (1978). Concerning preemption generally, *see* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 37-57.

252. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

253. Machinists v. Wisconsin Employee Relations Comm'n, 427 U.S. 132 (1976).

254. 106 S. Ct. at 1904 (1986).

mit the Board to find"[255] that the plaintiff was an employee. The Court found that the union had not made this showing. Finally, Justice White stated: "The better view is that those claiming preemption must carry the burden of showing at least an arguable case. . . ."[256]

Justice Blackmun, dissenting on the merits of the preemption defense, strenuously objected that the Court had missed the point of *Garmon*. He contended that the majority had transformed the concept that arguably protected or prohibited activities are preempted into a requirement that to have a successful preemption defense a party must make out an "arguable case." The new formulation would permit a court, weighing the sufficiency of the evidence, to make the very determination *Garmon* held only the NLRB should make. Justice Blackmun also noted the practical problem that a party usually raises a preemption defense by a motion to dismiss. The new *Davis* approach thus seems to make it difficult for a defendant to prevail before discovery or before facts are otherwise developed. Justice Blackmun would find preemption "[i]f a fair reading of the complaint leads to a possibility that activity complained of may be protected or prohibited."[257]

Because of both the telling comments of Justice Blackmun and Justice White's peculiar phrase "better view" in the Court's opinion, it is unclear what showing a party claiming preemption must make. It is also uncertain whether and, if so, to what extent a state court, in ruling on a preemption defense, should decide issues previously reserved to the Board. Justice White has long opposed the "arguably protected" branch of the *Garmon* doctrine.[258] In *Sears Roebuck*[259] the Court acknowledged a limited exception for conduct arguably protected if the injured party lacks a means to bring the dispute to the Board. Justice Blackmun saw Justice White's *Davis* opinion as a further limitation because the plaintiff did have a means to bring the dispute before the Board. According to Justice Blackmun, Justice White's *Davis* standard by indirection is "nearly as effective"[260] as eliminating the arguably protected branch of *Garmon*.

In another *Garmon* preemption case, *Wisconsin Department of Labor v. Gould*,[261] a unanimous Court held preempted a state law forbidding state purchases from certain repeat Taft-Hartley violators. Justice Blackmun emphasized that *Garmon* was designed to prevent state "conflict in the broadest sense" with the "complex and interrelated federal scheme [not only] of law, [but also of] remedy, and administration."[262] Hence, *Garmon* precludes states from establishing their own regulatory or remedial provisions, as well as conflicting substantive standards, for conduct arguably protected or prohibited by Taft-Hartley.

Unquestionably, the state could not prohibit private firms from doing

255. *Id.* at 1914.
256. *Id.* at 1915.
257. *Id.* at 1921 n.4.
258. *See, e.g.*, Motor Coach Employees v. Lockridge, 403 U.S. 274, 325-332 (1971) (White, J., dissenting); Longshoremen v. Ariadne Co., 397 U.S. 195, 201 (1970) (White, J., concurring).
259. *See supra* note 251.
260. Davis, 106 S. Ct. at 1920 n.3.
261. 106 S. Ct. 1057 (1986).
262. *Id.*, *citing* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

business with Taft-Hartley recidivists, and the Court saw as a distinction without a difference the state's contention that it was exercising not its police regulatory power but its spending power. The debarment statute plainly established a Taft-Hartley enforcement mechanism to deter violators, and the potential for conflict was not significantly diminished because the state chose to use its spending power instead of its police power. Nor was the Court persuaded that the state was merely functioning as a private purchaser under the "market participation" doctrine. In any event, Congress in enacting the NLRA did not intend to permit interference with the federal scheme by states under either their police or their spending power.

The Court's decision, sound though it may be, does underscore the necessity for similar federal legislation or an executive order directed against recalcitrant Taft-Hartley recidivists. It will surprise no one that although the Reagan administration espouses a decentralized system of federalism, the Solicitor General authorized an amicus brief by the NLRB urging the Court to hold the state law preempted. Nor did Justice Rehnquist, that ardent advocate of states' rights, dissent.

In *Baker v. General Motors Corp.*,[263] the Court terminated eighteen years of litigation by holding, six to three, that *Garmon* preemption does not preclude a state's denial of unemployment benefits to laid off workers on the ground that they had caused their own unemployment by financing, in a meaningfully connected way, the labor dispute that caused their unemployment.

The laid off workers had paid emergency strike dues both to support a strike by the UAW against Ford and to protect General Motors workers if they should strike. Ford and the UAW settled the strike before the emergency dues were collected, and the union negotiated a contract with GM without a strike. When three UAW locals then struck GM foundries, the strikers were paid benefits from the fund in which the emergency dues had been deposited. Because of the integrated nature of GM operations, more than 19,000 employees at twenty-four other plants were idled, and most of them applied for unemployment benefits. Those benefits were eventually denied under state law.

Finding no *Garmon* preemption, Justice Stevens for the majority stressed the "broad freedom" which Congress accorded the states in the Social Security Act and the distinction between voluntary and involuntary employment as being generally the touchstone of eligibility under the Act. He noted that in the *New York Telephone Co. v. New York Labor Dep't* case[264] the Court had not found preemption, holding that the Congress had intended that a state may, but need not, pay unemployment benefits to strikers who are responsible for their unemployment. *New York Telephone*, decided under the *Machinists* preemption doctrine, was admittedly not controlling in the instant case, however, because the laid off workers, replying on *Garmon* preemption, had plainly exercised their section 7 NLRA rights in paying the emergency dues that financed the local strikers.

263. 106 S. Ct. 3129 (1986).
264. 440 U.S. 519 (1979).

On the other hand, the workers' reliance on *Nash v. Florida Industrial Commission*[265] was misplaced. In *Nash*, the state denied a union member unemployment benefits after the employer had fired her for filing an NLRB unfair labor practice charge against it; the theory was that filing the charge initiated a disqualifying labor dispute. The Court held the state clearly preempted from defeating or handicapping the national labor policy of having all persons free of coercion in filing charges with the Board. But in *Baker* the unemployment of the laid off workers was not tainted by any employer unlawful action nor were the workers laid off because they had engaged in the protected section 7 right of paying the emergency dues. Instead, the workers became voluntarily unemployed because of the "meaningful connection between the decision to pay the emergency dues, the strikes which ensued and ultimately their own layoffs."[266]

Finally, the majority emphasized that it was not concerned with the wisdom of the state policy nor possible applications of the "financing" disqualifications of other states. The majority specifically noted that they were not addressing the circumstances, if any, under which workers might be disqualified merely because they had paid their regular union dues pursuant to a union security agreement.

Justice Brennan, joined by Justices Marshall and Blackmun, dissented. They agreed with the majority that the state statute was not preempted to the extent that it disqualifies workers who pay special dues to finance a strike that itself causes their unemployment. The state statute, however, had been interpreted to deny benefits to workers who had paid money to finance one dispute but were laid off because of a different one on the ground that the layoffs were foreseeable when the money was paid. Under this rule, the state disqualifies laid off workers for financing a labor dispute although they did not necessarily intend to finance the dispute. The dissenters thought that absent this intent the laid off workers cannot be considered disqualified as strikers, and their disqualification is preempted because of its interference with their section 7 rights. The dissenters would have remanded the case for consideration of "whether the local foundry strikes were expressly contemplated by the UAW in its decision to collect the emergency dues."[267]

The dissenters' distinction is a fine one—worthy of a scholastic metaphysician or a talmudic scholar—but whether one subscribes to it or not has less to do with logic than with one's policy predilections on protecting section 7 rights. Again it is not surprising that the Government's amicus brief in *Baker* argued against preemption, unlike the NLRB's in *Gould*.

b. Machinists *Preemption*

The Court's fourth preemption case, *Golden Gate Transit Corp. v. Los Angeles*[268] arose when the city in effect conditioned its renewal of a taxicab franchise upon the company's settlement of its labor dispute with a union

265. 389 U.S. 235 (1967).
266. *Baker*, 106 S. Ct. at 3130.
267. *Id.* at 3143.
268. 106 S. Ct. 1395 (1986).

which had struck over a new contract. Applying the *Machinists* doctrine, the Court held, eight to one, that the city's action was preempted. The union's and the employer's self-help economic tactics to prevail in the dispute were permissible and a legitimate part of the collective bargaining process. The city thus had no power to thwart that process by imposing a limit on the duration of the self-help activities. The NLRA sets no time limit on bargaining or permissible economic struggle, and the legislative history establishes the policy of the voluntary settlement of disputes. The Court emphasized that the protection of the free use of economic weapons during negotiations was the rationale for the Court's *Machinists* preemption doctrine.

The city argued that it was merely exercising a traditional municipal function of issuing taxi franchises. The Court responded that it had rejected a state's similar attempted reliance on the spending power in *Gould*,[269] and that as to transportation, it had ruled in *Bus Employees v. Missouri*[270] that a state is preempted from prohibiting a strike by employees of a privately owned transit company. The Court was also unpersuaded by the city's argument that it was in a no-win situation of favoring either the union or the company. The Court responded that its holding did not require the city to issue or deny the franchise; it required merely that franchise renewal not be conditioned in a manner intrusive upon collective bargaining. Finally, the Court observed that it did not reach the question of *Garmon* preemption in *Golden Gate* because the company and its amici, including the Labor Board, relied exclusively on the *Machinists* doctrine.

In his dissent, Justice Rehnquist sharply attacked the "extraordinary breadth"[271] of the Court's holding. After reciting his version of the development of the labor preemption doctrine, he complained that it "sweeps ever outward though still totally uninformed by any directive from Congress."[272] Because he could find no legislative history that speaks to the issue presented in the case, he was of the opinion that Congress had not intended preemption to apply.

Recently, one commentator, Professor David L. Gregory, persuasively but perhaps with some exaggeration, contended that for the last quarter century "the Supreme Court has consistently undercut the labor preemption doctrine" and that "the court's approach to the [*Garmon*] doctrine has been contradictory and generally hostile."[273] Although he admits that last Term's *Gould* and *Golden Gate* decisions "certainly do not guarantee the future of the labor preemption doctrine,"[274] he sees them as "strong reaffirmations"[275] of it and suggests that "1986 may have marked a turning point in the history of labor preemption."[276] The difficulty is that *Gould* and

269. *See supra* note 259.
270. 374 U.S. 74 (1963).
271. *AT&T*, 106 S. Ct. at 1402.
272. *Id.* at 1403.
273. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Lost Hurrah?*, 27 WM. & MARY L. REV. 507, 508, 512 (1986).
274. *Id.* at 580.
275. *Id.*
276. *Id.* at 581.

Golden Gate were relatively simple and easy cases, the former decided unanimously, the latter with only Justice Rehnquist dissenting.

Moreover, Professor Gregory summarily dismisses *Davis* by stating incorrectly that it "primarily involved federal procedure rather than the labor preemption doctrine as such"[277] and summarily suggests that "*Baker* may be considered a mere aberration limited to its facts—the illegitimate but predictable progeny of *New York Telephone*."[278] But the Court's opinions in both *Davis* and *Baker* can also definitely be read as restricting the arguably protected prong of *Garmon*, and they may signal the continuing gradual retreat from federal labor preemption that has occurred.

On the other hand, one can readily agree with Professor Gregory when he observes that the fate of the labor preemption doctrine has yet to be resolved. Of interest in this regard and in partial support of his reading of *Baker* is the recent Eighth Circuit case of *Steelworkers v. Johnson*.[279] After a union had voted to strike, some employees, both union and nonunion, tried to go to work, but all were refused entry by the employer. There was thus a union strike and a management lockout. The state denied unemployment compensation benefits to the striking union members-employees on the ground that they were participating in a labor dispute, but the state granted benefits to non-union employees, including those who had resigned from the union, on the ground that the employer had locked them out. The majority of an Eighth Circuit three-member panel held this denial of unemployment compensation preempted under the protected activity branch of *Garmon*. They discussed both *Golden Gate* and *Baker*, noting the Court had decided the former under the *Machinists* preemption doctrine. *Baker* was distinguished because it involved an emergency strike fund, whereas in *Johnson* the union employees had paid only ordinary union dues. Also, the state involved in *Johnson* is a right to work state, unlike that in *Baker*. What is of more importance is that the *Johnson* majority concluded that the Supreme Court's *Golden Gate* and *Baker* decisions left the *Garmon* doctrine intact. According to the dissenting judge in *Johnson*, the Social Security Act tolerated the arguable interference with NLRA section 7 rights. He also observed that Taft-Hartley authorization of right to work laws recognized that labor disputes involving union and nonunion employees would occur but it did not give guidance to the states on the impact of those laws on state unemployment compensation programs. Further litigation, whether elucidating or not, can certainly be expected in the wake of last Term's four preemption cases.

B. *Public Employment—Constitutional Requirements for Collection of Agency Shop Fees*

In 1977, the Supreme Court in *Abood v. Detroit Board of Education*,[280] sustained the constitutionality of agency shop agreements in the public sec-

277. *Id.* at 579 n.395.
278. *Id.*
279. 799 F.2d 402 (8th Cir. 1986).
280. 431 U.S. 209 (1977). Concerning the rights of dissenting employees generally to protest the use of union security monies, *see* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 431-41.

tor to the extent that they require public employees to pay service fees to cover the costs of the negotiation and administration of collective bargaining agreements. It held it unconstitutional, however, for a union to collect from objecting nonmember employees any amounts of agency fees not germane to collective bargaining. Last Term in *Chicago Teachers Union Local 1 v. Hudson*,[281] the Court addressed the constitutionally required procedures to determine the amount constitutionally payable by objecting nonunion employees. A unanimous Court, through Justice Stevens, held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for a fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker and an escrow for the amounts reasonably in dispute while such challenges are pending.[282]

The Court explained that a rebate of the amount improperly expended cannot justify the forced exaction of that amount. Further, identification of the amount admittedly not required to be paid is insufficient. The union must in advance of exacting payment provide potential objectors with sufficient information to judge the union's fee; the union can do this by identifying the major categories of union expenditures, including negotiation and administration expenses, verified by an independent audit. A nonunion employee objector is also entitled to a reasonably prompt resolution in an impartial forum. A procedure, even arbitration, controlled by the union is inadequate, but the Supreme Court disagreed with the Seventh Circuit's requirement of a full administrative hearing with evidentiary safeguards. Expeditious arbitration would appear adequate if the union does not control the arbitrator's selection. The concurring opinion of Justice White, joined by the Chief Justice, seems to establish that as a condition to bringing suit, an objector must invoke the impartial forum provided by the union but is not required to exhaust regular internal union remedies.

The union's 100 percent escrow of all payments was held inadequate since it failed to provide the required adequate advance information or an impartial decisionmaker's prompt resolution. Indeed, a union must establish even a limited escrow pursuant to an independent audit and independently verify the escrow figure.

Unlike the Seventh Circuit, the Supreme Court found it unnecessary to reach the constitutionality of a public sector union's requiring payment of expenditures not germane to collective bargaining even if they are not "political" or "ideological."[283] Hence, the Court did not further clarify the *Ellis v. Railway Clerks* decision[284] as to what categories of expenses may be successfully challenged. *Hudson* also leaves unsettled exactly how detailed the advance information provided to nonmembers must be, whether a precollection reduction is constitutionally required or whether a properly calculated escrow will suffice, and finally whether employees may unilaterally reduce or cease paying agency fees should the union fail to establish the

281. 106 S. Ct. 1066 (1986).
282. *Id.* at 1078.
283. *Id.* at 1075 n.13.
284. 104 S. Ct. 1883 (1984).

required impartial procedures.[285]

A public sector case, *Hudson* obviously brought the Constitution into play. A major question is whether *Hudson's* constitutional requirements are a limitation on the enforcement of union security agreements under the Railway Labor Act and Taft-Hartley. Twenty years before *Abood*, the Supreme Court in *Railway Employees Dep't v. Hanson*[286] found state action and subjected Railway Labor union security clauses to constitutional scrutiny because, although private agreements, they are "made pursuant to federal law which expressly declares that state law is superseded."[287] But in its subsequent Railway Labor union security cases—*Machinist v. Street*,[288] *Railway Clerks v. Allen*[289] and *Ellis*[290]—the Court carefully avoided constitutional issues by finding extensive implied statutory limitations on the expenditure of Railway Labor union security funds. In *Ellis*, the Court did confirm *Abood's* teaching that the statutory "germane to collective bargaining" test is also the constitutional test. Because *Hanson* required Railway Labor union security agreements to pass constitutional muster, because *Street*, *Allen*, and *Ellis* were decided under a constitutional penumbra, and because the *Abood* constitutional and the Railway Labor statutory tests have been found to be identical, it seems very likely that the Court would hold the three *Hudson* constitutional requirements applicable to Railway Labor union security agreements either on a constitutional or at least a statutory basis.

Taft-Hartley union security agreements are an entirely different matter.

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285. *See* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 441.

Three related cases were pending before the Court when *Hudson* was decided. One case, remanded by the Court for consideration in light of *Hudson*, ended when the union consented to judgment against it. *See* San Jose Teachers' Ass'n v. Superior Court, 38 Cal. 3d 839, 700 P.2d 1252, 215 Cal. Rptr. 250, *cert. granted and remanded, sub. nom.* Abernathy v. San Jose Teachers' Ass'n, 106 S. Ct. 1372 (1986), on remand, San Jose Teachers' Ass'n v. Superior Court, 42 Cal. 3d 130, 719 P.2d 682, 227 Cal. Rptr. 1112 (1986) (order of judgment in favor of objector).

In another case, Tierney v. City of Toledo, the union's plan included a rebate procedure which did not provide for an advance calculation of the amounts to be exacted. 121 L.R.R.M. (BNA) 3342 (1984), 121 L.R.R.M. (BNA) 3346 (N.D. Ohio 1985), 785 F.2d 310 (6th Cir. 1986), *cert. granted and judgment vacated* 106 S. Ct. 1628 (1986). During the plan's first year, the union placed in escrow one hundred percent of all funds collected from nonmembers, with amounts owing to the union to be determined at the year's end by an independently appointed arbitrator. The *Tierney* plan obviously did not comply fully with the *Hudson* requirements.

In a third case, Board of Educ. v. Kramer, the Court, over Justice Blackman's objection, denied certiorari. Matter of Board of Educ. of Town of Boonton, 494 A.2d 279 (N.J. 1985), *cert. denied sub. nom.* Kramer v. Public Employment Relations Comm'n, 106 S. Ct. 1388 (1986). The New Jersey plan in *Kramer* also involved a rebate system not fully in compliance with the *Hudson* requirements. The plan, however, was a creature of state statute, not that of a contractual agreement between a union and a state employer. Thus the case would have enmeshed the Supreme Court in the question of possible differences between general legislative action as distinguished from agreements between individual state agencies and individual unions. The New Jersey statute also provides that objectors' claims will be heard by an independent appeal board which can presumably impose the *Hudson* requirements. *Kramer* could be interpreted as implying a "substantial compliance" exception to the *Hudson* requirements. That and other issues will likely be resolved by cases now making their way through the courts. *See, e.g.*, McGlumphy v. Fraternal Order of Police, 633 F. Supp. 1074 (N.D. Ohio 1986); Lehnert v. Ferris Faculty Ass'n—MEA-NEA, 643 F. Supp. 1306 (W.D. Mich. 1986); Damiano v. Matish, 644 F. Supp. 1058 (W.D. Mich., 1986); Lowary v. Lexington Bd. of Educ., 124 L.R.R.M. (BNA) 2516 (N.D. Ohio 1986).

286. 351 U.S. 225 (1956).

287. *Id.* at 232.

288. 367 U.S. 740 (1961).

289. 373 U.S. 113 (1963).

290. *See supra* note 284.

In *Hudson*, the Court noted that Taft-Hartley section 14(b) provides that such agreements do not supersede but are superseded by state right to work laws banning them.[291] The lower courts are also sharply divided on whether, without the displacement of contrary state law, the negotiation and the enforcement of Taft-Hartley union security agreements make for governmental action and thus subject them to constitutional limitations.[292] Most recently, the Fourth Circuit, sitting en banc in *Beck v. CWA*[293] and the Second Circuit in *Price v. UAW*[294] have denied federal jurisdiction on constitutional grounds. Of course, only the High Court can resolve the question definitively. It is also quite possible that the Court will find the same implied statutory limitations in Taft-Hartley that it did in the Railway Labor Act.[295]

IV. MISCELLANEOUS FEDERAL STATUTES

The Supreme Court decided during the 1985 Term four other labor cases, each involving a different federal statute. We will briefly survey these miscellaneous employment decisions to highlight the growing importance of non-traditional labor relations litigation in the Court. These decisions reflect for the most part the new character of labor law practice as we approach the 1990's.

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291. *Hanson*, 351 U.S. at 332 n.5.

292. For discussion and collection of cases, *see* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 432-33.

293. 800 F.2d 1280 (4th Cir. 1986). As an *en banc* per curiam opinion explained, the majority panel opinion in *Beck*, 776 F.2d 1187 (4th Cir. 1985), had found jurisdiction on two statutory grounds, Taft-Hartley section 8(a)(3) and 28 U.S.C. § 1337 for breach of the duty of fair representation, and it had "opined that . . . it seemed 'unnecessary . . . to consider the constitutional basis for jurisdiction' *id.* [776 F.2d at 1204-05], but despite this, it proceeded to state that on constitutional grounds jurisdiction in the cause was sustainable. . . ." 800 F.2d at 1281. After the *en banc* hearing, the two majority panel judges continued to adhere to their initial opinion on constitutional jurisdiction; three judges found it unnecessary to consider the question, and five judges denied jurisdiction on constitutional grounds. According to the en banc per curiam opinion, six judges sustained jurisdiction under 28 U.S.C. § 1337 for breach of the duty of fair representation; five of these six voted that jurisdiction had also been properly invoked under section 8(a)(3); and four other judges voted to sustain the position of the dissenting panel opinion that federal jurisdiction should be denied on either statutory or constitutional grounds.

294. 795 F.2d 1128 (2d Cir. 1986).

295. For further discussion and collection of cases, see F. BARTOSIC & R. HARTLEY, *supra* note 227, at 437-38.

In EEOC v. FLRA, 106 S. Ct. 1678 (1986), the Court, seven to two, decided that certiorari had been improvidently granted on whether a federal union's contractual proposal providing for compliance with OMB contracting-out guidelines is not negotiable as conflicting with the management rights clause of Title VII of the Civil Service Reform Act of 1978. The Court found that the three principal arguments of the EEOC in support of its claim of nonnegotiability, none of which had been raised before the Federal Labor Relations Authority, were not properly before the Court. Dissenting Justices White and Stevens thought the Court should have decided the case on the merits. Justice Stevens was also persuaded that the proposal was nonnegotiable.

In Attorney General of New York v. Soto-Lopez, 106 S. Ct. 2317 (1986), the Court, six to three, found violative of the Equal Protection Clause a civil service preference offered by a state only to resident veterans who lived in the state at the time of their entry into military service. Justice Brennan, joined by Justices Marshall, Blackmun and Powell, would have also ruled the preference an unconstitutional interference with the right to travel. The Chief Justice and Justice White concurred in the judgment in separate opinions. Justice O'Connor, joined by Justices Rehnquist and Stevens, dissented.

A. *Constitutionality of Multiemployer Pension Plan Amendments Act*

Connolly v. Pension Benefit Guaranty Corp.,[296] addressed a facial challenge to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which requires an employer withdrawing from a multi-employee pension plan to pay to the plan the employer's proportionate share of the plan's unfunded vested benefits. According to the trust agreement in *Connolly*, a participating employer's sole obligation was to pay to the pension fund contributions as defined by the applicable union contract; the agreement expressly stated that employers were not liable for underfunding.

The Supreme Court unanimously held that the MPPAA does not violate the Taking Clause of the Fifth Amendment. In its opinion, written by Justice White, the Court agreed with the trustees that the involuntary transfer of assets required by the Act constitutes a real and substantial debt. The Court reasoned, however, that the subject matter area is one that Congress has authority to regulate and that the burden created by the Act was not different from others imposed by legislation requiring that the assets of one person be used to benefit another. The private contractual limitation on liability could not defeat the regulatory power of Congress, and the government had not taken any assets for its own use.

The Court next considered the operation of the MPPAA under a three-factor "taking" analysis. First, the "character" of the government action was that of a "public program that adjusts the benefits and burdens of economic life to promote the common good. . . ."[297] Second, the Act's economic impact is mitigated by various provisions that limit employer liability. Finally, the statutory imposition of withdrawal liability had not interfered with the employers' reasonable investment-backed expectations, given the enactment of the 1974 Employee Retirement Income Security Act (ERISA), including the establishment of the Pension Benefit Guaranty Corporation, which had the discretion to pay benefits upon the termination of a multiemployer plan. Hence, the Court concluded that fairness does not require that the public, instead of withdrawing employers, rescue financially trouble pension plans.

Justice O'Connor, joined by Justice Powell, concurring, recited the issues left open by the Court. It did not decide whether ERISA or MPPAA, as applied in particular cases, may operate in such an arbitrary fashion as to violate the Due Process or Taking Clauses. She suggested that a withdrawing employer's retroactive liability must be based on some element of the employer's conduct that would make it rational to conclude that the funding of benefits was its responsibility. Further, she noted that the Court had not considered (1) the broad provisions for determining which pension plans the Acts cover or (2) the differences between single employer, unilaterally established and administered, defined benefits plans and Taft-Hartley section 302(c)(5) jointly negotiated and administered plans, most of which possess aspects of both defined benefits and fixed contributions plans. Finally, she emphasized that the Court had not addressed various "extremely harsh re-

296. 106 S. Ct. 1018 (1986).
297. *Id.* at 1026.

sults"[298] that the withdrawal provisions of MPPAA might impose.

B. *Occupational Safety and Health Act (OSHA): Unreviewable Discretion of Secretary of Labor to Withdraw Citations*

In a *per curiam* decision, *Cuyahoga Valley Ry. Co. v. United Transportation Union*,[299] the Court ruled, six to three, that the Secretary of Labor has unreviewable discretion to withdraw a citation charging an employer with an OSHA violation. Rejecting the Sixth Circuit's position that the Occupational Safety and Health Commission could review the Secretary's withdrawal and agreeing with eight other courts of appeals, the Court reasoned that the Secretary was solely responsible for OSHA enforcement, including setting substantive standards and issuing citations. To permit the Commission to review withdrawal of a citation would discourage settlements and unduly hamper the Secretary's enforcement function. It would also permit the Commission, which Congress established only to adjudicate disputes, to make prosecutorial decisions as well. The Court decided *Cuyahoga* summarily without prior notice to the parties or an opportunity to file briefs on the merits. Justices Brennan, Marshall, and Blackmun dissented from this summary disposition.

The majority noted that *Cuyahoga* did not concern judicial review of agency action. For this and other reasons, "the case does not pose the question whether an agency's decision, resting on jurisdictional concerns, not to take enforcement action is presumptively immune from judicial review under § 701(a)(2) of the Administrative Procedure Act."[300]

C. *Trade Act of 1974: Associational Standing of Union to Sue on Behalf of Members*

In *UAW v. Brock*,[301] the Court held, five to four, with Justice Marshall authoring the majority opinion, that the union had standing to sue on behalf of its members under the Trade Act of 1974, which provides trade readjustment allowance benefits to workers laid off because of competition from imports.

The majority observed that associational representation was a long settled issue and analyzed the case under the three-part test enunciated in *Hunt v. Washington Apple Advertising Comm'n*.[302] First, considering whether the union members would have standing in their own right, the majority rejected the reliance of the Secretary of Labor on the Act's provision for state review of benefit determinations. The instant case did not seek review of individual benefit eligibility decisions but instead challenged a federal guideline for making those state decisions, and hence the members or their union could properly bring the action in federal court. The federal guideline at issue was the Secretary's 1975 interpretation that the states should exclude leaves of

298. *Id.* at 1031-32.
299. 106 S. Ct. 286 (1985).
300. *Id.* at 287 n.1, *citing* Heckler v. Chaney, 105 S. Ct. 1649, 1656 n.4 (1985).
301. 106 S. Ct. 2523 (1986).
302. 432 U.S. 333, 343 (1977).

absence, sick leave, vacation, and military leave when determining whether employees meet the eligibility requirement of 26 weeks of employment in the 52 immediately before layoff.[303] Second, the majority found that the case raised issues germane to the union's purpose, particularly because of the efforts of the UAW and other unions to secure passage of the Trade Act and the role accorded unions under it. Third, the majority concluded that neither the claim asserted nor the relief sought required the participation of individual union members. Hence, they decided that the case raised a "pure issue of law: whether the Secretary properly interpreted the Trade Act's . . . eligibility requirements."[304]

The majority next rejected the Secretary's suggestion that it abandon the *Hunt* principles and require class actions in cases of this kind. They noted the special advantages in associational representation, including the expertise, resources, and research efforts available to the association. They indicated, however, that if a case should arise in which an association appeared to be an inadequate representative, the Court would consider how to alleviate the problem.

Finally, the majority ruled that the state agencies were not required to be joined as necessary parties. They again refused to characterize the suit as one to review individual benefits. They also disagreed that any relief granted would be futile.Even without joinder, the majority expected state agencies to follow Labor Department directives for reprocessing claims, if that should be ordered, because the agencies had agreed to follow federal guidelines so that their costs would be fully reimbursed.

Justice White, joined by the Chief Justice and Justice Rehnquist, dissented. They thought that the Act's provisions for state review of benefit decisions barred federal jurisdiction and that the only live controversy involved claims already submitted for determination by state agencies. Justice Powell wrote a separate dissent. He suggested that the union's representation in this case might be inadequate if it were representing only a small number of members. He also speculated that a union might institute a suit for reasons other than to protect members' rights, such as publicity. Because of what he perceived as dangers of inadequate representation, he would not have found standing on the basis of the record before the Court.

D. *Fair Labor Standards Act: Standard of Review*

Icicle Seafoods, Inc. v. Worthington[305] concerned the appropriate standard of review of factual issues under the Fair Labor Standards Act (FLSA). Workers in an engineering department of a seafood processing company sued their employer for overtime benefits. Finding that the employees' work included maintenance and operation of a non-self-propelled barge while moored or under tow by a boat, the district court concluded that the plaintiffs fell within the exclusion of "seamen" from FLSA coverage. Upon a de

303. This guideline was superseded by a legislative amendment which became effective October 1, 1981; it did not retroactively modify the guideline.
304. 106 S. Ct. at 2532.
305. 106 S. Ct. 1527 (1986).

novo review, the Ninth Circuit found that because the maritime work of the plaintiffs took only a small part of their work time, they were not seamen, but rather industrial maintenance employees covered by the Act.

The Supreme Court, eight to one, with Justice Rehnquist writing the opinion, reversed and remanded. The Court held that the proper standard of review was the clearly erroneous standard of Federal Civil Procedure Rule 52(a). Reaffirming its holding in *Walling v. General Industries Co.*,[306] the Court ruled that the Ninth Circuit should not have independently reviewed the factual record. Instead of making its own findings of facts, the court of appeals had three options: to remand for further findings, to set aside the findings as clearly erroneous, or to find that the proper rule of law had not been applied.

Justice Stevens, in dissent, urged that the facts of the case were undisputed and he objected to the Supreme Court's requiring the Ninth Circuit to remand for the ministerial task of entering undisputed facts as formal findings. He observed that appellate courts often correct an erroneous interpretation of law and then apply the proper legal standard to undisputed facts. Accordingly, he would have affirmed the Ninth Circuit's judgment.

The decisions of the Burger Court involving miscellaneous federal legislation illustrate how non-traditional labor issues have become preoccupied with *process* and *administrative law* concerns. The Court's attention in all four cases, *Connolly*, *Cuyahoga*, *Brock* and *Icicle Seafoods*, was primarily focused on the fairness and stability of process and procedure. The underlying labor law issues became more the subject of administrative and constitutional law rather than traditional labor law. The practice of labor law will thus become more complicated, requiring expertise in non-traditional labor law subjects. Certainly, traditional labor law must be redefined to include the broader context of general employment law.

V. CONCLUSION—THE LABOR LAW LEGACY OF THE BURGER COURT AND THE NEW REHNQUIST COURT

We have reviewed the labor law decisions of the Burger Court on two previous occasions,[307] but we must confess error in prediction. We thought that its traditional labor decisions would have been more pro-employer. Of course, unions have not been pleased with the Court's decisions on some issues, such as shopping center picketing, secondary boycotts and successorship,[308] but the radical conservatism of the Reagan Board has muted, if not silenced, union criticism of the Burger Court's moderate conservatism. In the traditional labor law arena, the subtitle of a book on the Burger Court is apt—its legacy is the "counter-revolution that wasn't."[309]

In reviewing the labor law decisions of the October 1982 Term, we found that the single most distinguishing characteristic of the Burger Court

306. 330 U.S. 545 (6th Cir. 1947).

307. *See* Bartosic, *supra* note 1; Bartosic & Minda, *supra* note 1.

308. *See* St. Antoine, *Individual Rights in the Work Place: the Burger Court and Labor Law*, in THE BURGER COURT, THE COUNTER-REVOLUTION THAT WASN'T 157, 179 (Blasi ed. 1983).

309. *Id.*

was equivocal and mediocre decisionmaking.[310] We reported that "[t]he Court's opinions . . . rarely disclosed any underlying theory or coherent rationale to help predict future results."[311] In this respect, the 1985 Term cases are no exception. Indeed, if there is one single theme that characterizes the labor law legacy of the Burger Court, it is the failure of imagination and vision in deciding labor law policy. Unlike the Warren Court,[312] the Burger Court has failed to spark the mind in approaching the economic realities of employment discrimination and labor relations. There has been no counterrevolution because the Burger Court has failed to present a reasoned extension or alternative to the labor law legacy of the Warren Court era.

The failure of the Burger Court has been especially acute in dealing with remedial racial classifications in affirmative action cases. In this controversial area, all the Supreme Court decisions are the product of the Burger Court. Despite many attempts over its seventeen-year era, there was no "authoritative pronouncement" on any of the most significant and serious questions posed by race-conscious affirmative action.[313] The Court simply vacillated between two polar positions which are flatly inconsistent in their underlying premises and conclusions. While some may find the ambivalence of the Burger Court on race intentional, and perhaps "diplomatic,"[314] one wonders if the Burger Court's legacy of uncertainty and inconsistency on affirmative action has not merely served to add yet another rationalization for ignoring the single most enduring domestic crisis of America—the problem of *racial hierarchy*.

On the other hand, we should not be too harsh on the Court for its failure to agree on a policy and standard to clarify more definitively the affirmative action dilemma. The divided Court simply mirrors a divided society. We are faced in the workplace with the effects of *de jure* and *de facto* discrimination. Tragically, we are at least subconsciously a racist, sexist and selfish society. To remedy the present effects of past discrimination, the nation must acknowledge its collective responsibility for compensatory reparations by reallocating its values and resources to provide education, training and jobs for the disadvantaged and dispossessed. Supreme Court Justices could develop just rules attuned to the economic, social and political realities of the workplace. But they do not have the power to solve the problem. It is only Congress, with enlightened presidential leadership, that can fashion the requisite policies and take the appropriate action to create a truly just society.

What changes if any can be expected in the labor relations decisions of the new Rehnquist Court? Because of the drastic policy changes that characterize the decisions of the Reagan NLRB it has understandably begun to

310. *See* Bartosic & Minda, *supra* note 1, at 326.

311. *Id.* at 323.

312. For a review of the labor law legacy of the Warren Court, see Modjeska, *Labor and the Warren Court*, 8 INDUST. REL. L.J. 479 (1986).

313. *See* remarks of Dean Jesse H. Choper, *Constitutional Law Conference*, 55 U.S.L.W. 2225, 2228 (Oct. 28, 1986).

314. *See* Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and The Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 930 (1983) (discussing Justice Powell's cryptic *Bakke* opinion).

encounter resistance in the courts of appeals.[315] Practitioners and Supreme Court watchers await the reception of Reagan Board cases by the Rehnquist Court. There is the "liberal" block of Brennan, Marshall and Blackmun, often joined by Stevens. Justices Powell and O'Connor and even Justice White are moderate conservatives, quite independent and strong-willed. Newly appointed Justice Scalia, an administrative law expert, is not known as being particularly sympathetic to federal regulatory agencies, including the NLRB. It has been correctly observed that "[h]e will demand greater discipline in Board decisionmaking—at least an open discussion of inconsistencies in the application of precedent,"[316] which was the reason leading to the Court's *Financial Institution* decision last Term.[317] For example, in a 1986 opinion, then Judge Scalia denied enforcement of a Board order that would have required a union to pay lost wages. He found the Board bound by its 1949 *Colonial Hardware*[318] ruling to the contrary which it has failed to reverse. He also reprimanded the Board for not having explained its prior decisions and for relying on Board "counsel's 'post hoc rationalization' of why the agency could have come out the way it did. . . ."[319] The Burger Court generally deferred to the NRLB. It is another question whether the Rehnquist Court will so readily defer to the major doctrinal shifts of the Reagan Board.[320]

The Burger Court's affirmative action legacy of uncertainty and inconsistency is likely to be a theme which continues during the first term of the new Rehnquist Court. The Rehnquist Court will address at least two affirmative action cases this Term that will give it the opportunity to clarify the *Sheet Metal Workers*[321] and *Wygant*[322] cases. *United States v. Paradise*[323]

315. *See, e.g.*, Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), *rev'g and remanding* Meyers Industries, Inc., 268 NLRB 493 (1984) involving the constructive concerted activity doctrine; Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986), *remanding* E.I. DuPont, 274 NLRB (No. 1761104), 118 L.R.R.M. (BNA) 1555 (1985) concerning the Weingarten rights of non-union employees. *See* NLRB v. Weingarten, Inc., 420 U.S. 251 (1975). Concerning *Prill* and related material generally, *see* F. BARTOSIC & R. HARTLEY, *supra* note 227, at 188-91; concerning Weingarten rights generally, *see id.* at 191-95.

316. Analysis of Judge Scalia's Opinions, 122 L.R.R.M. (BNA) 135, 136 (1986).

317. *See supra*, notes 226-32 and accompanying text.

318. United Furniture Workers (Colonial Hardware Flooring Co.), 84 N.L.R.B. 563 (1949).

319. International Ass'n of Bridge v. N.L.R.B., 792 F.2d 241, 247 (D.C. Cir. 1986).

320. For various views on the Reagan Board and the status of Taft-Hartley, see Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1 (1986); Phalen, *The Destabilization of Federal Labor Policy Under the Reagan Board*, 2 LABOR LAWYER 33 (1986); St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI-KENT L. REV. 631 (1985); Dennis, *A Principled Approach to NLRB Decisionmaking*, 1 LABOR LAWYER 483 (1985); Benard, *Recent Developments Under the National Labor Relations Act*, 1 LABOR LAWYER 745 (1985); Bernstein & Gold, *Mid-Life Crisis: The NLRB at Fifty*, Spring, 1985 Dissent 213; Gregory & Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's "Celebration" of the 50th Anniversary of the National Labor Relations Act*, 18 CONN. L. REV. 7 (1985).

321. *See supra* notes 71-91 and accompanying text.

322. *See supra* notes 19-40 and accompanying text.

323. Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985), *cert. granted sub. nom.* United States v. Paradise, 106 S. Ct. 3331 (1986). *Paradise* and Johnson v. Transportation Agency, 748 F.2d 1308 (9th Cir. 1984) (discussed *infra* text accompanying note 324) present the Court for the first time with the question of affirmative action in the context of promotion, as distinguished from hiring or firing. [Ed. note: While this Article was in production, the Supreme Court decided *Paradise*, 55 U.S.L.W. 4211 (U.S. Feb. 24, 1987). The Court, 5-4, upheld the constitutionality of the promotional quota, substantially for the reasons set forth *infra* note 326].

concerns the constitutionality of one-for-one racial promotional quotas for state troopers until 25 percent of higher ranks are filled by minorities, or an acceptable promotion plan has been developed, when quotas were authorized by prior consent decrees and are enforced to remedy specific findings of the state's past discrimination. In *Johnson v. Transportation Agency*[324] the question is whether the constitutional analysis of *Wygant* applied to a Title VII challenge to an affirmative action promotion program justified on the basis of a conspicuous statistical imbalance between female and male employees in the workplace, not discrimination by the public employer.

While it is difficult to predict with any certainty how the Rehnquist Court will decide *Paradise* and *Johnson*, it is safe to assume that the fragmentation of opinions in last Term's affirmative action trilogy will continue to plague the Court. Of course, Justice Scalia, as an academician, was an outspoken, harsh critic of *Bakke* and *Weber*.[325] But even if Justice Scalia remains hostile to affirmative action, he would be, at best, a mere alter ego replacement for the equally hostile position of Chief Justice Burger. On the other hand, Justice Scalia promises to be an exceptionally competent, intellectual jurist and a most persuasive colleague. If Chief Justice Rehnquist moderates his views on some questions, then Justice Scalia and the new Chief Justice may be able to attract votes from the more moderate independent Justices. The "swing votes" of Justices Powell, O'Connor and Stevens would then be the "key" to the formation of a new consensus on affirmative action. In that eventuality, there would no longer be a majority on the Court willing to uphold the constitutionality of most affirmative action programs.

Justice Brennan, however, is already a master consensus builder, and the position of a solid majority of the Justices appears firm and committed on race-conscious remedies. Only Justices Powell, O'Connor, and perhaps Justice White, are uncommitted on some issues. Absent new appointments to the Court, it will be surprising if there are any major changes in last Term's fascinating, but frustrating, affirmative action trilogy.[326] The

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324. 748 F.2d 1308 (9th Cir. 1984), *cert. granted*, 106 S. Ct. 331 (1986). *Johnson* is the first case to reach the Supreme Court involving an affirmative action plan favoring women.

325. Scalia, *The Disease as Cure: "In order to get beyond racism we must first take account of race,"* 1979 WASH. U.L.Q. 147, 148, 150-51.

326. Thus, it is likely that a majority of the Justices will uphold the constitutionality of the promotional quota established by the consent decree in the *Paradise* case now pending before the Court. *See supra* note 321. Because *Paradise* involves a long history of egregious discrimination involving a state agency, it would seem clear that a majority of the Justices would uphold the use of the race-conscious relief even if nonvictims are benefitted. Moreover, while the Justices have not ruled on the appropriateness of race-conscious remedies in the context of promotions, it is possible in light of *Wygant* that a majority would approve promotional goals on the ground that, like hiring goals, they are not as burdensome as layoff goals.

For example, in Youngblood v. Dalzell, 804 F.2d 360, 364 (6th Cir. 1986), a public sector promotion case, the Sixth Circuit distinguished *Wygant* "because it involved a plan by which nonminority public employees were displaced by minority employees" and "was not a case where 'the actual burden shouldered by nonminority [employees] is relatively light.' *Id.* [*Wygant*, 106 S. Ct.] at 1851, quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980)." Also citing *Wygant*, the Sixth Circuit observed that the Supreme Court had stated several times that "race-conscious remedies must be 'narrowly tailored' to achieve a legitimate goal in furtherance of a compelling governmental interest" and that "Justice Powell, who provided the 'swing vote' in Sheet Metal Workers v. EEOC, applied similar standards in concluding that the race-conscious remedy was valid under the Consti-

Rehnquist Court, at least in its beginning years, will probably replicate the fragmentation and inconsistency of the Burger Court's affirmative action cases. Whether the Rehnquist Court will be able to establish a new consensus on affirmative action, or general employment law, will ultimately depend upon whether future Justices can evoke new imagination and vision in deciding labor and employment law policy.

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tution as well as under Title VII." *Id.* at 365. Moreover, in *Paradise* as in *Youngblood*, the compliance order "was carefully crafted by a distinguished district judge whose evenhandedness and concern for fairness to all parties is displayed throughout the record" and in both cases "[n]o qualified white candidate was denied advancement and only qualified black candidates received promotions." *Id.* Although in *Paradise*, unlike in *Youngblood*, the public employer did not appoint higher rank officers not otherwise required, in both cases "the only price any member of the force was required to pay was a delay in the time when he or she might have the opportunity to qualify for promotion to file a future vacancy." *Id.* Similarly, the Supreme Court could conclude in *Paradise*, as the Sixth Circuit did in *Youngblood*, that such a delay "is not too great a burden to impose upon the nonminority candidates in view of a long history of virtual exclusion of black[s] . . . from the promoted ranks." *Id.*

It is unlikely, however, that there are five votes to uphold the use of affirmative action goals to remedy societal discrimination absent proof of prior, deliberate discrimination. Whether statistical disparity based upon the sex composition of the workforce can justify the use of sex-conscious affirmative action plans by a public employer, which is the question presented by the *Johnson* case pending before the Court, *see supra* note 324, is another matter. Dean Choper, for example, has concluded that "there may be a majority on the Court that would agree that a statistical disparity is all that need be shown to justify a government employer's race-based program, even where the employer has no history of prior intentional discrimination, or even where there's no strong basis for believing that it had engaged in such prior discrimination." *See* remarks, *supra* note 313. It is far from clear, however, whether newly appointed Justice Scalia or the moderate Justices (Powell, O'Connor, and Stevens) would adopt such a view. Undoubtedly, of the two affirmative action cases now pending before the Court, *Johnson* poses the most difficult and perplexing issues.