THE SUPREME COURT AND LABOR LAW: THE OCTOBER 1978 TERM*

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American labor lawyers, whether they represent labor or management, have never had to concern themselves with a critical issue in labor-management relations throughout the world—job security. If Taft-Hartley was the full employment act for labor lawyers, a whole series of subsequent enactments, coupled with the ever rising caseload of the Labor Board, have turned the labor bar into veritable workaholics. The Supreme Court's labor law docket during the October 1978 Term continued to reflect this pattern, although the more important and interesting decisions included areas that, even if not properly characterized as traditional, have at least been before the Court with some frequency during these past few years.[1]

First, I shall briefly look at some of the constitutional issues which generally arise in the context of the public sector, although this Term, Mr. Chavez's United Farm Workers were knocking at the Court's doors attempting, unsuccessfully for the most part, to have answered a series of constitutional problems of major import. Second, the usual number of cases presented the seemingly never-ending problems of statutory construction under the National Labor Relations Act.[2] And third, and undoubtedly most important in their significance for our nation and society as a whole, were employment discrimination cases

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1. This Article does not cover all of the Court's work in labor law during the past Term. *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 95-112 (1979) (age discrimination and mandatory retirement); Mayor v. Evans, 99 S. Ct. 2066, 2072-76 (1979) (procedural problems under the Age Discrimination in Employment Act of 1967); Davis v. Passman, 99 S. Ct. 2264, 2276 (1979) (plaintiff stated cause of action under fifth amendment where discharge was based on grounds of sex); NLRB v. Catholic Bishop, 99 S. Ct. 1313, 1321-33 (1979) (NLRB does not have jurisdiction over teachers in church-operated schools that teach both religious and secular subjects).

2. 29 U.S.C. §§ 151-168 (1964).

arising under title VII of the Civil Rights Act of 1964[3] and other civil rights legislation, as well as the equal protection clause of the fourteenth amendment of the Constitution.

The latter portion of the Court's docket was most important, not only because of employment discrimination's intrinsic importance, but also because the Court was squarely presented with an issue which it had ducked a year ago—racial quotas.[4] This time around, the Court provided us with some reasonably clear guidelines. It squarely upheld the lawfulness of racial quotas in the context of statutory interpretation[5]—an arena in which Congress can always reverse the Court—and it took a position that is supposed to be at odds with that of the American public generally. While the matter is by no means free from doubt, my own judgment is that a conservative Court has contributed significantly, on both racial quotas and in the school desegregation cases,[6] to a better work environment and relationship between the races. The Court's employment discrimination position continues to be pendulum-like in its lack of consistency. But this Term alone, which heard howls of dissenting anguish from the high tribunal's two civil rights dissenters (not Justices Brennan and Marshall for a change, but rather Rehnquist and Burger), made *Weber* something of a liberal beacon on what, on balance, still seems to be a fairly conservative coastline.

THE CONSTITUTIONAL CASES

This past term, in three cases involving the public sector, the Court was at pains to establish the proposition that, whatever it had said previously about free speech, freedom of association, and the first amendment as it relates to the right to join labor organizations,[7] no labor relations statute or, more precisely, no obligation to "listen" or "engage in a dialogue" could be constitutionally thrust upon management. In *Smith v. Arkansas State Highway Employees*[8] the Court, in a *per curiam* opinion granting certiorari and vacating the lower court's judgment without oral argument, held that the first amendment was not violated where the public employer refused to consider or act upon a grievance that was filed by the union rather than an employee, even though under

3. 42 U.S.C. § 2000e (1976).

4. University of Calif. Regents v. Bakke, 438 U.S. 265, 287-320 (1978). See generally Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979).

5. United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979). See text & notes 213-61 *supra*.

6. Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979); Dayong Bd. of Educ. v. Brinkman, 99 S. Ct. 2791 (1979).

7. *See generally* United Transp. Union v. State Bar, 401 U.S. 576 (1971); United Mineworkers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

8. 99 S. Ct. 1826 (1979).

a labor relations statute such a practice would constitute an unfair labor practice.[9] Said the Court: "The first amendment is not a substitute for the national labor relations laws."[10] By analogizing *Smith* to a series of decisions that gave constitutional protection to the right to legal representation,[11] the lone dissenter in this case, Justice Marshall, objected to deciding "vital constitutional questions" without a plenary hearing, and complained about the summary reversal that "so cavalierly disposes of substantial First Amendment issues."[12]

In *Givhan v. Western Line Consolidated School District*,[13] Justice Rehnquist, speaking for a unanimous Court, concluded that the private expression of a school teacher's views to her superiors could be constitutionally protected under the first amendment.[14] Previously, the Court in *Pickering v. Board of Education*[15] had held that a school teacher's public statements could be protected by the first amendment.[16] The *Givhan* Court rejected the argument that protection of private speech would require employers to become "captive audiences" on the ground that this dispute will only arise where the employer has voluntarily opened his office door to the teacher and therefore could not be regarded as an "unwilling recipient" of her views.[17] A contrary rule might have encouraged confrontation and consequent acrimony as opposed to more informal discussions which could avoid the posturing that is often associated with public debate.[18]

The Court adhered to its view, first set forth in *Mt. Healthy City Board of Education v. Doyle*,[19] to the effect that the employer, once confronted with a showing that constitutionally protected conduct played a "substantial" role in the decision not to rehire, could still show by a preponderance of evidence that it would have reached the same decision in the absence of the exercise of protected conduct.[20] The Court in *Givhan* stated that the test in *Mt. Healthy* is whether the employee would have been hired "but for" her speech, where the speech was the "primary" reason for the dismissal or refusal to rehire.[21]

The difficulty here is that the Court, in Justice Rehnquist's opin-

9. *Id.* at 1828.
10. *Id.* at 1827.
11. United Transp. Union v. State Bar, 401 U.S. 576, 585-86 (1971); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 221-22 (1967).
12. *See* 98 S. Ct. at 1828-29.
13. 99 S. Ct. 693 (1979).
14. *Id.* at 697.
15. 391 U.S. 563 (1968).
16. *Id.* at 568.
17. 99 S. Ct. at 696.
18. *Id.* at 696-97.
19. 429 U.S. 274, 285 (1977).
20. 99 S. Ct. at 697.
21. *Id.*

ion, has seen fit to differentiate between a finding that first amendment activity is the "primary" cause of dismissal and a finding that but for the first amendment activity the dismissal would not have been instituted. In fact, the two criteria would seem to be remarkably similar. In both instances, it is the protected conduct that triggers the dismissal. It seems impossible to say that protected conduct is the primary cause of a dismissal when it has not triggered it.

Accordingly, the immediate practical significance of *Givhan* is twofold. In the first place, the thrust of *Givhan* seems to be that the employee claiming discrimination must have either an unblemished record or a slate that is completely clean. Unfortunately, as a second consequence the combination of *Mt. Healthy* and *Givhan* threatens to place my annual Labor Law I discussions of *Edward G. Budd Mfg. Co. v. NLRB*[22] on the scrap heap of history. In *Budd*, which involved the "extraordinary" case of Walter Weigand, the question of discharge of an employee in connection with section 7 activity, was presented. As the Court noted, "[I]f ever a workman deserved summary discharge, it was he."[23] His offenses involved being under the influence of liquor while on work, leaving the plant on an unauthorized basis without regard to working hours, and bringing a woman who was generally known as "the duchess" to the rear of the plant and introducing workers to her.[24] Weigand's case came to the NLRB, however, because when he joined the CIO he was discharged.[25] Quite obviously, his affiliation played a "substantial" or "primary" role in his discharge. Equally quite obvious is the fact that the employer had independent and lawful grounds to take such action and his case could be a more difficult one under the first amendment precedents. Nevertheless, the timing of Weigand's discharge indicates that it was triggered by his joining the union. The Board, however, has traditionally taken the view that if any of the number of reasons are responsible for an employee discharge or a union activity, the others are a "pretext" for it. If the rule established by the Supreme Court with regard to the first amendment for public employees has applicability to Labor Board cases, the Board's handling of so-called "mixed motive" cases may have to be altered. There has been no judicial consensus about the precise quantum of anti-union animus which is a prerequisite to make out a violation under the National Labor Relations Act [NLRA]. Many courts, like the First Circuit,[26] will undoubtedly begin to apply

22. 138 F.2d 86 (3d Cir. 1943).
23. *Id.* at 90.
24. *Id.*
25. *Id.*
26. NLRB v. Eastern Smelting Corp., 101 LRRM 2328, 2330-31 (1st Cir. 1979).

first amendment rules to the NLRA, rules which could make Mr. Weigand a loser.

The third in this series involving the public sector is *Babbitt v. United Farm Workers National Union*,[27] where the Court, in refusing to hear and adjudicate most claims of constitutional violations arising under Arizona's farm labor statute, concluded that an inferior and ineffective statutory election scheme did not curtail any first amendment freedom of association.[28] As in *Smith*, the Court refused to equate the right to voice one's view with an obligation upon the employers to engage in discussions.[29] The farm workers in *Babbitt* argued that the election process, far from facilitating collective bargaining, was more likely to frustrate it. According to the union, it was this process that interfered with freedom of association rights. Given the complexities involved in regulating a variety of facets of statutory procedures, however, the Court, perhaps appropriately, refused to become involved in the fairness or efficacy of the procedures.

Accordingly, what is troubling about the Court's posture in this past Term's adjudication in the freedom of association area is not so much *Babbitt*, but rather, the refusal to protect union representation in *Smith*. Although Congress has thus far refused to enact federal legislation providing state workers with the right to engage in collective bargaining, the complexity of the bargaining process and the attendant legal problems strongly support the Court's position. The problems raised by plaintiff's complaint in *Smith*, however, can be seen as more limited. The employee's right to designate a representative can be protected without obligating the employer to bargain collectively with a labor organization: The protection that comes with representation could be effective without the full trappings of the collective bargaining process. Yet whatever can be said about the Court's decision in *Babbitt*, surely Justice Marshall's dissent in *Smith* is persuasive, particularly with regard to the need for full oral argument on an issue which is of such import.

THE NATIONAL LABOR RELATIONS ACT: JURISDICTION, UNFAIR LABOR PRACTICES, AND REMEDIES

Preemption

In *New York Telephone Company v. New York State Department of Labor*,[30] the most recent of a series of cases involving the question

27. 99 S. Ct. 2301 (1979).
28. *Id.* at 2316.
29. *Compare id. with* Smith v. Arkansas State Highway Employees, 99 S. Ct. at 1828.
30. 99 S. Ct. 132 (1979).

whether state legislation is preempted by virtue of the National Labor Relations Act's comprehensive provisions, a divided Court upheld the constitutionality of New York's unemployment compensation benefits for strikers.[31] The opinion of the Court was written by Justice Stevens and joined in by Justice White and Justice Rehnquist. The New York unemployment compensation law normally authorized the payment of benefits after approximately one week of unemployment but, in the event of a strike or lockout or "other industrial controversy," the waiting period would be seven weeks.[32] The petitioners, the New York Telephone Company, which along with other employers bears the primary burden of financing the unemployment insurance system, brought suit against the state officials responsible for administration of the fund. The action sought a declaration that New York law, insofar as it authorizes payments of benefits for strikers, is in conflict with federal law and therefore unconstitutional.[33] The district court concluded that availability of unemployment compensation was a "substantial factor" in the workers' decision to remain on strike and that the funds provided in the strike engaged in by the Communication Workers of America against the company had "measurable impact on the progress of the strike."[34] Accordingly, the court agreed with petitioner's contention that the State's scheme interfered with the policy of free collective bargaining provided for by federal labor law.[35] The Court of Appeals for the Second Circuit reversed but did not disturb the district court's finding that the New York statute "alters the balance of collective bargaining relationship and, therefore, conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process."[36] The Supreme Court accepted this finding.[37]

The opinion of Justice Stevens provided two rationales: The "overriding interest in a uniform nation-wide interpretation of the federal statute by the centralized expert agency created by Congress;" and prior decisions under the preemption doctrine involving the consequent ouster of state interference with rights which are arguably protected by section 7[38] or arguably prohibited by the unfair labor practice provi-

31. *Id.* at 1328. See generally Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Gould, *The Garmon Case: The Decline and Threshold of Litigating Elucidation*, 39 U. DET. L.J. 539 (1962); Isaacson, *Federal Preemption Under the Taft-Hartley Act*, 11 IND. & LAB. REL. REV. 391 (1958).

32. *Id.* at 1322.

33. *Id.* at 1333.

34. *Id.*

35. *Id.*

36. *Id.* at 1334.

37. *Id.*

38. 29 U.S.C. § 157 (1976).

sions of section 8.[39] As the opinion noted, however, these cases, which comprised the "main body of labor preemption law," were not precisely analogous to the New York legislation because there was no claim by any party that New York sought to prohibit conduct regulated by section 8 or interfered with employee rights under section 7.

Accordingly, the Court focused on two decisions in which preemption was found despite concessions that the subject matter was neither protected by section 7 nor prohibited by section 8. In one case, state regulation of damage actions for peaceful secondary picketing, concededly neither protected nor prohibited by the federal act, was found preempted since Congress had made a deliberate legislative judgment to preserve the parties' authority to use such means of economic warfare as part of the collective bargaining process.[40] In the second case, the Court had held that a state administrative commission could not prohibit a union's concerted refusal to work overtime for much the same reasons, even though this partial strike activity had not been "subject of special Congressional consideration."[41]

Justice Stevens stated that the economic weaponry employed by labor and management in these two cases and in *New York Telephone* were "similar" and that the benefits to striking employees as well as the burdens imposed on struck employers altered the economic balance between labor and management.[42] Nevertheless, because the state statute at issue did not involve an attempt to regulate or prohibit private conduct in the labor-management relations field, but rather, was an attempt to provide "an efficient means of insuring employment security in the State," the Court was being asked to extend labor law preemption into new terrain.[43] Where the state law is of general applicability, said Justice Stevens, precedent had recognized a congressional intent to deprive the states of their power to enforce such general laws.[44] "It is more difficult to infer an intent to preempt laws directed specifically at concerted activity."[45] The plurality opinion stated that the New York statute was one of general applicability that protected interests "deeply rooted in local feeling and responsibility" and that, in such circumstances, the deprivation of state jurisdiction could not be inferred absent "compelling congressional direction."[46]

39. *Id.* § 158. *See* 99 S. Ct. at 1334-37.
40. Teamsters Union v. Morton, 377 U.S. 252, 259-60 (1964).
41. Aerospace Workers v. Wisconsin Employment Relations Comm'r, 427 U.S. 132, 149 (1976).
42. 99 S. Ct. at 1336.
43. *Id.* at 1337.
44. *Id.* at 1341.
45. *Id.* at 1337-38.
46. *Id.* at 1341. The Court borrowed from the language utilized in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959), relating to the extent to which there could be an

Where the statute does not directly affect the balance of power between labor and management, direct evidence of congressional intent to preempt is required. As Justice Stevens stated, "[A] State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the unexpressed intent of Congress."[47]

All of this leads to the second portion of the Stevens' opinion: The omission of any legislative instruction relating to the strike pay issue under either the National Labor Relations Act or the Social Security Act[48]—the Social Security Act allows the states latitude in fashioning their own programs—implied congressional intent that the states would be free to authorize such payments.

The first of Justice Stevens' two points in *New York Telephone*, special treatment for a statute of general applicability, prompted the filing of separate concurring opinions by both Justice Brennan and Justice Blackmun, with Justice Marshall concurring in the latter's opinion. Justice Brennan expressed some unease with the distinctions employed by Justice Stevens, stating that he was "not at all sure that the New York statute is a law of general applicability" and relied upon the legislative history of the Social Security Act as a basis for deference to the state law.[49]

Three justices dissented, Justice Powell writing for Chief Justice Burger and Justice Stewart. Justice Powell noted that, in the past, the Court had not applied the preemption doctrine in a manner that would differentiate cases based upon the generality of the law; rather, a state statute was considered in light of its impact or effect when applied in the context of labor-management relations. Here, given the impact upon the decision to strike and the economic balance of power between labor and management, the federal statute, which itself is concerned with the economic balance between labor and management, would be interfered with and frustrated by the state law involved.[50] Finally, the

exception to the general rule that the states are deprived of jurisdiction involving subject matter covered by the National Labor Relations Act. *See generally* Sears Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978); Farmer v. Carpenters Local 25, 430 U.S. 290 (1977); Linn v. Plant Guard Workers, 383 U.S. 53 (1970); Automobile Workers v. Russell, 356 U.S. 634 (1958). Until *New York Telephone*, however, the Court had not sought to use this standard in connection with statutes of general application. Indeed, as the dissenters in *New York Telephone* pointed out, 99 S. Ct. at 1346, *Garmon* itself rejected this kind of demarcation line. 359 U.S. at 244. The Court's approach in *New York Telephone* signifies an attack by three Justices upon this important part of the *Garmon* rationale.

47. 99 S. Ct. at 1344.

48. Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311, 42 U.S.C. §§ 501-504, 1101-1108 (1976).

49. 99 S. Ct. at 1345. The concurring opinion of Mr. Justice Blackmun also relied upon the legislative history of the Social Security Act. *Id.* at 1344-45.

50. *Id.* at 1354.

dissenters did not find the evidence of a legislative history not to preempt.[51]

While the majority result in *New York Telephone* seems to be the better one, it is for the reasons expressed by Justices Brennan, Blackmun, and Marshall. The notion that normal considerations of preemption are undercut and evidence of a strong congressional intent is required when a statute of general applicability is involved seems to be part of a theory initially articulated by Justice White[52] and, more recently, employed by Justice Stevens, in connection with state trespass[53] and emotional injury statutes.[54]

It represents a quantum jump for a number of reasons. In the first place, it seems more difficult to characterize unemployment compensation statutes of relatively recent vintage as "deeply rooted in local feeling and responsibility"—at least in the sense of the above-noted cases. Second, in all other local interest cases, the Court had been careful to balance the federally protected rights against state jurisdiction through requirements of malice in defamation suits and "outrageous" conduct in connection with emotional injury actions. But there is no balancing process which protects the federal interest in *New York Telephone*. All state involvement in labor-management relations is tolerated. Third, and closely related to the second point is that the Court has always expressed concern that limitation or interference with statutory rights be remote or slight. This is not true in *New York Telephone* where the Court accepted the district court's finding that the collective bargaining process was directly affected by the state legislation in question. The question of legislative intent is a close one. This is best demonstrated by the Justice Department's concession in its brief that some state payments, which were so generous as to provide more than security, might properly be deemed as payments that would shape the balance of power rather than provide workers with economic security in times of economic stress.[55] The majority position, however, seems sound.

Congress seems to have been willing to defer to the states to estab-

51. *Id.* at 1352-55.

52. Longshoremen Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201 (1970) (White, J., concurring). *See* Taggart v. Werneckes Inc., 397 U.S. 223, 227 (1970) (Burger, C.J., concurring).

53. Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 193 (1978).

54. Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290, 300 (1977).

55. Brief for the United States Amicus Curiae at 25, New York Tel. Co. v. New York State Dep't of Labor, 99 S. Ct. 1328 (1979). Unfair labor practice issues relating to economic weaponry utilized by both labor and management arise in a number of contexts at the federal level. *See generally*, NLRB v. Brown, 380 U.S. 278 (1965); American Shipbuilders Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 33 (1938); Local 155, Molders v. NLRB, 442 F.2d 742 (D.C. Cir. 1971); NLRB v. Great Falls Employers Council, 377 F.2d 772 (9th Cir. 1960).

lish their own programs. While only New York and Rhode Island provide unemployment compensation benefits for strikers, many more jurisdictions provide welfare benefits to strikers.[56] In Britain, as well as this country, this policy has become a matter of great controversy.[57] Underlying the debate is what was assumed by the district court and the Supreme Court to be accurate: Strike decisions are, in fact, made on the ability to obtain such benefits. The evidence is by no means crystal clear. This subject promises to be the subject of a lively policy, if not constitutional, debate in the 1980's.

But the point that bears repeating is that the plurality opinion in *New York Telephone* marks a major retreat from pro-preemption precedent. *New York Telephone* is not the last that we have heard of this issue.

Union Solicitation on Company Property: The "Special Circumstances" of Hospitals

For the second term in a row, the Court dealt with the problem of union solicitation rights on company property in the context of hospitals and patient care. Last term, the Court, in *Beth Israel Hospital v. NLRB*,[58] held that the Board had properly struck the balance of union organizational rights *vis-a-vis* the employer's concern with patient care in favor of the former union, where the portion of company property involved was an employee cafeteria that was frequented by a very small percentage of patients, i.e., 1.6% of the customers. Seventy-seven percent of the patrons were employees, and the Court was able to characterize the cafeteria as a "natural gathering place for employees" as

56. *See, e.g.*, Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 123-26 (1974), *on remand*, 412 F. Supp. 192 (1976), *aff'd*, 550 F.2d 903 (1977), *cert. denied*, 434 U.S. 827 (1978) (upholding the granting of benefits to strikers under New Jersey law); ITT Lamp Div. v. Minter, 435 F.2d 989, 994-95 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971) (upholding the granting of welfare benefits to strikers under Masssachusetts law); Strat-O-Seal Mfg. Co. v. Scott, 72 Ill. App. 480, 484-86, 218 N.E.2d 227, 229-230 (1966) (upholding the granting of benefits to strikers under Illinois law); Int'l Union of Mine, Mill & Smelter Workers v. Montana State Dept. of Pub. Welfare, 136 Mont. 283, 299, 347 P.2d 727, 738 (1959) (construing Montana statute to give welfare benefits to strikers).

57. *See generally* J. GENNARD, FINANCING STRIKERS (1977); A. THIEBOLT & R. COWIN, WELFARE AND STRIKES: THE USE OF PUBLIC FUNDS TO SUPPORT STRIKERS (1972).

58. 98 S. Ct. 2463 (1978). The Court's work in this area has been considerable in the past few years. *See, e.g.*, Eastex, Inc. v. NLRB, 98 S. Ct. 2505 (1978); Hudgens v. NLRB, 424 U.S. 507 (1976). *Cf.* Giant Food Markets Inc., 241 NLRB 105 (1979) (area wage-standard picketing on private property open to the public protected by § 7); Seattle-First Nat'l Bank, 243 NLRB No. 145 (1979) (handbilling and communicating with customers inside bank building in connection with primary economic strike activity is protected by § 7). The extent to which these two Board decisions have provided for nonemployee union access to private property casts some doubt upon Mr. Justice Stevens' rationale in Sears Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978). In *Sears* the Court concluded that union trespass on company property should not be preempted in part because it was unlikely that such activity would be protected by the National Labor Relations Act. For a general survey prior to the recent litigation, see Gould, *The Question of Union Activity on Company Property*, 18 VANDERBILT L. REV. 73 (1964); Gould, *Union Organizational Rights and the Concept of 'Quasi-Public' Property*, 49 MINN. L. REV. 505 (1965).

opposed to a portion of company property concerned with patient care.[59] Said Justice Brennan in *Beth Israel:*

> [W]e reject as without merit petitioner's contention that in enacting the 1974 Health Care Amendments, Congress intended the Board to apply different principles regarding no-solicitation and no-distribution rules to hospitals because of their patient care functions. We therefore hold that the Board's general approach of requiring health-care facilities to permit employees solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients, is consistent with the Act. We hold further that, with respect to the application of that principle to petitioner's cafeteria, the Board was appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients.[60]

One year after the *Beth Israel* decision, in *NLRB v. Baptist Hospital, Inc.*,[61] the Court dealt with "the application of these principles to so-called immediate patient care areas" and held that the Board could not apply the same no-solicitation rules it had used in connection with lobbies, cafeterias, and gift shops to corridors and sitting rooms that either adjoin or are accessible to patient, operating, and treatment rooms.[62] In *Baptist Hospital* the Court noted that evidence had been introduced in the form of testimony by hospital officials to the effect that solicitation in patient care areas would interfere with the well-being of the patients. Said Justice Powell in referring to the evidence introduced:

> Patients in the most critical and fragile conditions often move or are moved through these corridors, either en route to treatment in some other part of the Hospital or as part of their own convalescence. The increased emphasis in modern hospitals on the mobility of patients as an important aspect of patient therapy is well known, and it appears to be part of patient care at the hospital. Small public rooms or sitting areas on the patient care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families—often during times of crisis. Nothing in the evidence before the Board provided any basis, with respect to those areas of the Hospital . . . for doubting the accuracy of the statement . . . that union solicitation in the presence or within the hearing of the patients may have adverse effects on their recovery.[63]

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59. 98 S. Ct. at 2476.
60. *Id.* at 2477.
61. 99 S. Ct. 2598 (1979).
62. *Id.* at 2605.
63. *Id.* (citations and footnotes omitted).

The Court, however, refused to reverse the Board's presumption with regard to other areas such as cafeterias and gift shops or the lobbies on the first floor, because no evidence had been introduced establishing the frequency of patient visitations in these areas.[64] Accordingly, the Court approved the Board's finding that solicitation here would be unlikely to have an adverse effect upon patients or patients' care.[65]

As noted in a separate concurring opinion by Justice Brennan, joined in by Justices White and Marshall, the majority not only approved a finding that there was no substantial evidence present to support the Board's presumption that the no-solicitation rule was invalid in corridors and sitting rooms, but also expressed the view that "experience to date raises serious doubts" about the Board's judgment in the health care field.[66] Referring to his opinion in *Beth Israel*, which had articulated the Board's primary responsibility in striking the balance of "conflicting legitimate interests" and "limited judicial review,"[67] Justice Brennan stated that "in dicta . . . the Court questions the application of the presumption to the corridors and sitting rooms of floors occupied by patients. . . . I do not share these sentiments."[68]

Thus, a majority of the Court seems to advocate a retreat which might be broader than the narrow holding of *Baptist Hospital*. Two considerations in Justice Powell's majority opinion could make Board judgments in the hospital field *ad hoc*: the availability of other alternate areas for solicitation and the extent to which employees and the public use the area where the right to solicit is asserted. These considerations, similar to those utilized by the Supreme Court in *NLRB v. Babcock & Wilcox*[69] and in cases in which the unions have asserted access to quasi-public property[70] could produce endless rounds of litigation. The difficulty with the former standard is that labor and management cannot have a clear guide as to what the boundaries for protected activity are—and thus must litigate with considerable frequency. When employers are confronted with union demands, they would rarely resolve the doubts against themselves unless they faced the prospect of serious economic pressure.

64. *Id.* at 2605-06.
65. *Id.*
66. *Id.* at 2607.
67. On questions of fact in this and other cases, the court is bound by the "substantial evidence" test formulated in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The substantial evidence test for judicial review of an NLRB decision found in NLRA sections 10(e) and 10(f) (29 U.S.C. § 160(e), (f) (1976)) is whether *on the record as a whole* there is substantial evidence to support the Board's findings. In applying that standard, the courts generally give deference to the Board's decision. Universal Camera Corp. v. NLRB, 340 U.S. at 488.
68. 99 S. Ct. at 2611 (citations omitted).
69. 351 U.S. 105, 112-13 (1956).
70. *See generally* Hudgens v. NLRB, 424 U.S. 507 (1976).

Mandatory Bargaining

A very different approach to Board expertise was employed in *Ford Motor Co. v. NLRB*,[71] where the Court dealt with two issues which have been before it on a number of occasions. One issue, which had been presented in a different context in both *Beth Israel* and *Baptist Hospital* was the extent to which the Court should defer to the Board's expertise, particularly as it relates to finding "terms and conditions of employment" within the meaning of section 8(d) of the NLRA.[72] Very much tied to this issue was the principal question in *Ford Motor Company*: Whether prices for in-plant cafeteria and vending machine food and beverages could properly fit within the definition of a term or condition of employment and, therefore, constitute a subject that is a subject of "mandatory" collective bargaining under the Act.[73] Justice White, writing the majority opinion, took the position that the subject matter was indeed one subject to mandatory collective bargaining, and that the Board's resolution of the issue was entitled to "considerable deference."[74] The Court focused on whether the Board's construction of statute was "reasonably defensible."[75]

The Court observed that the Board had "consistently held" that the parties were required to bargain about in-plant food prices.[76] Reviewing the legislative history of the 1947 amendments set forth in the Taft-Hartley Act, the Court noted a "conscious decision" on the part of Congress to "continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and the statutory duty to bargain."[77]

Of course, we have been up this hill before. The Court, while often deferring to the Board's expertise,[78] has reversed the Board on a number of occasions and, indeed, has accused the agency of regulation

71. 99 S. Ct. 1842 (1979).

72. 29 U.S.C. § 158(a)(5), (d) (1976).

73. 99 S. Ct. at 1845. However, the Court suggested an issue that has not surfaced previously, i.e., that an employer need not bargain if it unilaterally determines that these conditions of employment are not suitable for its employees. "We should not be understood as holding that whether in-plant food services are to be provided where such services do not already exist is a mandatory bargaining subject. That issue is not involved here. . . ." *Id.* at 1849 n.10. In previous cases it seems to have been assumed that the decision to provide benefits was itself bargainable.

74. *Id.* at 1848.

75. *Id.* at 1849.

76. *Id.*

77. *Id.* at 1848-49.

78. This has happened in the mandatory bargaining area. *Compare* Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) ("section 8(d) of the Act . . . does not immutably fix a list of subjects for mandatory bargaining") *with* Fibreboard Paper Products Corp. v. NLRB, 322 F.2d 411, 414 (D.C. Cir. 1963), *aff'd*, 379 U.S. 222 (1964) ("this language was a reflection of the Congressional awareness that the act covered a wide variety . . . of activity and a recognition that collective bargaining must be kept flexible").

that was unauthorized by Congress,[79] and has criticized its failure to give 'plain language' ordinary meaning."[80] Further, since the issue involved in *Ford Motor Co.* was one with which the Board had not had a good deal of success in the court of appeals, the possibility of disagreement between the Court and the Board loomed large. The Court, however, ruled that since the Board's view of the in-plant food prices and services issue was not an "unreasonable or unprincipled construction of the statute . . . it should be accepted and enforced."[81]

The first significant element in *Ford Motor Co.* is the Court's willingness to defer to the Board in the bargaining area—a deference which the Court has not always demonstrated in the past.[82] The second relates to the Court's apparent application of guidelines articulated in *Fibreboard Paper Products Corp. v. NLRB*,[83] as to what constitutes conditions of employment within the meaning of the Act. In *Fibreboard*, it is to be recalled the Court said that the question of what constitutes conditions of employment could be determined on the basis of (1) whether the subject matter was within the "literal meaning" of terms and conditions of employment; (2) whether bargaining of the issue would reduce industrial strife; (3) whether the subject matter had been dealt with by labor and management in other collective bargaining agreements; (4) whether management "entrepreneurial" concerns were involved.[84]

In *Ford Motor Co.*, the Court, dealing with the "literal meaning" aspect of the *Fibreboard* test, stated that it "need not strain to consider conditions relating to the availability of food as conditions of employment."[85] Said the Court: "It is not suggested by petitioner that an employee should work a whole 8-hour shift without stopping to eat. It reasonably follows that the availability of food and the working hours and conditions under which it is to be consumed, are matters of deep concern to workers. . . ."[86] Referring to Justice Stewart's concurring opinion in *Fibreboard*, the Court said that the "terms and conditions under which food is available on the job are plainly germane to the 'working environment'."[87]

79. NLRB v. Insurance Agents, 361 U.S. 477, 499 (1960); American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318 (1965).
80. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971).
81. 99 S. Ct. at 1849.
82. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 276-77 (1965); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965); NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 499 (1960).
83. 379 U.S. 203 (1964).
84. *Id.* at 210-17.
85. 99 S. Ct. at 1849.
86. *Id.*
87. *Id.* at 1849-50.

The industrial strife issue was less important in the Court's rationale, although it was alluded to in response to the company's argument that the issue was trivial. The Court noted that the employees had pressed a boycott as a result of perceived industrial strife. At an earlier point, the Court had stated that the "national labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining. The assumption is that this is preferable to allowing recurring disputes to fester outside the negotiation process and until strikes or other forms of economic warfare occur."[88]

Very much related to this—the question of whether industrial strife is likely to occur in the absence of negotiations about the subject—of course, is the question of whether employees demonstrate a substantial interest in this particular case. Linked to this, is the question of industrial practice in other collective bargaining relationships and the Court noted that studies demonstrated that the contractual provisions in plant food services addressed the issue and therefore supported the view that the subject matter was susceptible to resolution by labor and management at the bargaining table.[89]

Finally, the Court noted that the Board was "in no sense attempting to permit the Union to usurp managerial decision making; nor [was] it seeking to regulate an area from which Congress intended to exlude it."[90]

Undoubtedly, the next major case concerning what constitutes mandatory collective bargaining will involve an issue much closer to *Fibreboard* than that presented in *Ford Motor Co.*: The extent to which the employer is obliged to bargain about economically motivated decisions that terminate all or part of the bargaining unit's work. In *Ford Motor Co.* and in prior decisions,[91] the Court has indicated that such cases invoke a different test: working conditions of employees are "vitally" affected where a third party interest is "directly implicated" in such instances.[92] The Court of Appeals for the Third Circuit has recently applied a three-part test to plant closure cases, which ex-

88. *Id.* at 1850.

89. *Id.* at 1850 n.11.

90. *Id.* at 1850. One interesting aspect of this case, however, is highlighted by the last portion of the majority opinion and by separate concurring opinions written by Justice Powell and Justice Blackmun. The majority opinion observed that even if an employer did not retain the right to review and control food services, management could initiate or alter subsidies to third party suppliers. *Id.* at 1852. Justice Powell expressed concern about the "absolute approach" adopted in connection with this dispute, *id.* at 1852-53, and Justice Blackmun opined about the apparent irrelevance of employer control over a third party to the question of what constitutes a mandatory subject of bargaining within the meaning of the Act. *Id.* at 1853.

91. Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971); Fibreboard v. NLRB, 379 U.S. 203, 215 (1964); Teamsters Union v. Oliver, 358 U.S. 283, 294 (1959).

92. *See* Ford Motor Co. v. NLRB, 99 S. Ct. 1842, 1851 (1979).

amines the strength of the employees' interest in challenging management's decision, the potential for resolution of the issue through the collective bargaining process, and the countervailing management concerns in not bargaining.[93] Because parties in the collective bargaining process do deal with such problems at the bargaining table and, quite obviously, the employees' interests in jobs is strong, the Third Circuit held that management was obliged to bargain with the union regarding such a decision where no countervailing managerial interests were concerned.[94] When the issue reaches the Supreme Court, however, it is sure to cause the Court more difficulty than the issues presented in *Ford Motor Co.* since third party interests, as well as entrepreneurial judgments, would be "directly implicated," thus, increasing the potential for more direct interference with managerial decisionmaking.

Remedies: Duty to Bargain

The Court sounded a very different theme about its relationship with the Board in *Detroit Edison Co. v. NLRB*.[95] This case involved a union demand relating to an employer's refusal to supply its aptitude test battery and answer sheets, the identity of test takers and their scores.[96] The union alleged that this refusal interfered with the ability to process the grievance of applicants who were denied promotion.[97] In contrast to *Ford Motor Co.*, the *Detroit Edison* Court reversed the Board. The company contended that these data should be provided to a psychologist who could advise the union, rather than to the union itself as part of its collective bargaining responsibilities.[98] The company's position was that disclosure to the union would inevitably constitute disclosure to the employees and that disclosure to employees was unethical and inconsistent with promises made to the employees by the company.[99] The company further argued that disclosure would violate title VII of the Civil Rights Act and Equal Employment Opportunity Commission [EEOC] regulations promulgated pursuant to it,[100] and that contempt sanctions were inadequate to cope with the potential abuse of disclosure.[101] The NLRB held that the company violated section 8(a)(5) of the National Labor Relations Act by refusing to provide

93. Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-741 (3d Cir. 1978). For a discussion of issues relating to *Ford Motor Co.* as well as *Brockway* and *Fibreboard*, see Oldham, *Organized Labor, The Environment and the Taft Hartley Act*, 71 Mich. 935 (1973).
94. 582 F.2d at 739-741.
95. 99 S. Ct. 1123 (1979).
96. *Id.* at 1125-26.
97. *Id.* at 1127.
98. *Id.* at 1128-29.
99. *Id.*
100. 42 U.S.C. § 2000e-12 (1976).
101. *Id.* at 1130.

data to the union.[102] Justice Stewart, speaking for a majority of the Court, concluded that the Board had abused its discretion in formulating such a remedy.[103]

In the Court's view, the security of the tests was inadequately protected because the union, which was not a party to the appellate procedure,[104] might not be subject to contempt sanctions and, in any event, there was still a danger of "inadvertent leaks."[105] The Court, however, discussing the problem of test security and sanctions, failed to even address the preliminary question whether the need for sanctions was substantial.

Finally, the Court held that the union has no absolute right to the test scores of individual workers unless the examiners provided consent for disclosure.[106] Upholding the interest in confidentiality and characterizing the burden upon the union as minimal, Justice Stewart stated:

> The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice. There is nothing in this record to suggest that the company promised examinees that their scores would remain confidential in order to further parochial concerns or to frustrate subsequent union attempts to process employee grievances. And it has not been suggested at any point in the proceeding that the Company's unilateral promise of confidentiality was itself violative of the terms of the collective bargaining agreement. Indeed the Company presented evidence that disclosure . . . had . . . resulted in . . . harassment of . . . examinees.[107]

Justice White's dissent, concurred in by Justices Brennan and Marshall and partially by Justice Stevens, was essentially based upon the view that the Labor Board's expertise in fashioning remedies of this kind is "abundantly clear" and could not be "disturbed" unless designed to meet ends other than those that could be fairly said to "effectuate the policies of the Act."[108] Moreover, the dissent noted that the union was unlikely to leak the material because it would want to preserve its long standing relationship with the company and responsibly represent unit employees.[109] Finally, the dissent argued that there was no basis for believing that "inadvertant disclosure" would

102. *Id.* at 1132-33. *See* National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976).
103. 99 S. Ct. at 1132-33.
104. *Id.* at 1131.
105. *Id.* at 1132.
106. *Id.*
107. *Id.* at 1133.
108. *Id.* at 1134 (quoting Virginia Electric Power Co. v. NLRB, 319 U.S. 533, 540 (1943)). *See* Fibreboard v. NLRB, 370 U.S. 203, 216 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).
109. 99 S. Ct. at 1135.

take place.[110] With regard to the test scores themselves, the dissent stated that there was no basis for believing that the employees themselves opposed disclosure.[111]

The Court, as it did in *Baptist Hospital* on solicitation and patient care,[112] reversed when the issue was a sensitive one about which it has strong feelings. The dissent's view about the potential for harm to employees and the likelihood of disclosure, however, was as plausible as that of the majority opinion. Moreover, the union was concerned with obtaining information related to a vital concern of employees—promotion in the context of a seniority system which might be undermined by preference given to junior employees who are good test takers but who might perform no more effectively than senior employees whom the contract was designed to protect. Under the circumstances, the Court should have deferred to the Board's expertise.

Remedies: Duty of Fair Representation

In another five to four decision, the Court held that the Railway Labor Act[113] does not permit punitive damages to be awarded to employees against labor organizations that have failed to represent bargaining unit employees fairly.[114] In *International Brotherhood of Electrical Workers v. Foust*,[115] Justice Marshall, speaking for the majority, relied upon a number of considerations to reverse the district court's judgment that had provided for punitive as well as actual damages.

The Court found that the prospect of "lucrative money recoveries unrelated to actual injury would be a powerful incentive"[116] to bring unfair representation litigation but noted that the prospect of such damage awards would impact upon the union's attitude as it pursued individual complaints.[117] The imposition of exemplary awards could "impair the financial stability of unions and unsettle the careful balance of individual and collective interests which the Court had previously established in the unfair representation area."[118] The Court also noted the reference to "usual judicial remedies' in the 1944 landmark *Steele*[119] decision as well as the reference to the compensation principle

110. *Id.*
111. *Id.* at 1137.
112. See text & notes 61-69 *supra*.
113. 45 U.S.C. §§ 151-152 (1976). The National Labor Relations Act will be subject to the same rules. *See* International Bhd. of Electrical Workers v. Foust, 99 S. Ct. 2121, 2125 n.8 (1979).
114. International Bhd. of Electrical Workers v. Foust, 99 S. Ct. 2121, 2128 (1979).
115. 99 S. Ct. 2121 (1979).
116. *Id.* at 2126.
117. *Id.*
118. *Id.*
119. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 207 (1944).

in the more recent *Vaca*[120] case.[121] In the view of Justice Marshall, three policy considerations supported the unavailability of punitive damages: (1) Union support of frivolous claims because of the fear of suits by disgruntled workers; (2) the possible depletion of union treasuries and consequent demise of unions as effective collective bargaining agents; and (3) the potential for community hostility expressed through large punitive damage awards.[122]

Justice Blackmun, speaking for the three other dissenters, Chief Justice Burger, Justice Rehnquist, and Justice Stevens, concurred in the result but on the ground that punitive damages should be unavailable in the circumstances of this case because the union's conduct "betrayed nothing more than negligence, and thus presented an inappropriate occasion for awarding punitive damages under any formula."[123] Justice Blackmun properly noted that neither *Steele* nor *Vaca* could be read to exclude punitive damages; those cases simply stressed the inadequacy of certain remedies and held that a worker's remedies must *include* damages.[124] Vigorously attacking the notion that federal labor policy is essentially remedial and "hence inhospitable to punitive awards,"[125] Justice Blackmun argued that cases arising under the National Labor Relations Act which had held that the NLRB lacked "authority" and "jurisdiction" to fashion punitive sanctions were inapplicable because, unlike the board, federal courts have both jurisdiction and the authority to apply exemplary damages.[126] Precedent precluding the award of punitive damages in secondary boycott actions was also termed inapplicable because the statute at issue and its legislative history stressed actual compensatory damages.[127]

The dissent rejected the policy considerations that motivated the majority, noting that it is a hardship for anyone, regardless of his wealth, to pay damages[128] and that, in any event, even if *Vaca* could be interpreted to evince concern for union treasuries egregious union mis-

120. Vaca v. Sipes, 386 U.S. 171, 196 (1967). *See generally* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Humphrey v. Moore, 375 U.S. 335 (1964); Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1956); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

121. 99 S. Ct. at 2126.

122. *Id.* at 2126-28.

123. *Id.* at 2128. However, the Court has not yet resolved the question of whether negligent conduct by the union may constitute a violation of the duty of fair representation principle. *See* Ruzicka v. General Motors Corp., 523 F. 2d 306 (6th Cir. 1975). *See generally* Rabin, *The Impact of the Duty of Fair Representation Upon Labor Arbitration*, 29 SYRACUSE L. REV. 851 (1978); Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251 (1977).

124. *Id.* at 2129.

125. *Id.*

126. *Id.* at 2129-31.

127. *Id.*

128. *Id.* at 2130.

behavior should justify an award of punitive damages.[129] Justice Blackmun characterized as "airy speculations" the view that union shop stewards would abandon "all vestiges of common sense" if faced with the prospect of punitive damages.[130] Said Justice Blackmun: "The question is whether punitive damages are also to be outlawed in cases, unlike this one, where the union's conduct has been truly egregious. A little chilling of union 'discretion' in *those* cases would not bother me."[131]

As the close vote of the Court suggests, *Foust* is a difficult case. On the one hand, those decisions which have emphasized the remedial nature of the statute have always articulated a distinction which is highly artificial and arbitrary. This is especially so in light of the Court's previous recognition that labor law remedies are designed to influence future conduct as well as to compensate for wrongs done in the past.[132] Moreover, since they have become strong and in some instances mature institutions, it would seem that labor unions, like other institutions, should be subject to punitive damages where they have engaged in morally culpable conduct. To some extent, certain arguments considered relevant by the Supreme Court in connection with labor injunction litigation, most particularly in the *Boys Market* decision,[133] are important in this connection.

On balance, however, the majority's view is the sounder one. I hold this view despite my belief that the majority's views about union officials' responsibility in response to prospective punitive damage awards are speculative and despite my judgment that the Supreme Court, at the expense of individual employee rights, has been far too protective of union discretion in the duty of federal presentation cases. The major consideration, however, which militates in favor of the majority opinion is that which Chief Justice Warren emphasized more than twenty years ago: The availability of punitive damages imposed by juries can be a vehicle to express community hostility against unpopular views and institutions.[134] Labor organizations, particularly in

129. *Id.*

130. *Id.*

131. *Id.* at 2131 (emphasis in original). Justice Blackmun's opinion did not mention another point of some significance—that, with or without the prospect of punitive damage awards against union treasuries, union representatives frequently claim that the possibility of litigation of any kind impels them to process many grievances which are unmeritorious.

132. The "affirmative action" in § 10(c) of the National Labor Relations Act, 29 U.S.C. §§ 151-187 (1976), is a "broad command" which the Board has at its disposal. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262 (1969).

133. Boys Market v. Retail Clerks Union, Local 770, 398 U.S. 235, 240-55 (1970). *See generally* Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Market Case*, 1970 SUP. CT. REV. 215; Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978).

134. UAW v. Russell, 356 U.S. 634, 651 (1958) (Warren, C.J., dissenting).

the South and so-called sunshine belt, are by no means well accepted. Punitive damage awards could disrupt a national labor policy which encourages the growth of collective bargaining—a process dependent upon viable labor organizations which are in a position to function institutionally.

EMPLOYMENT DISCRIMINATION

In a succession of decisions beginning in the late 1960's, the Supreme Court has expansively interpreted title VII of the Civil Rights Act of 1964[135] to the considerable benefit of victims of discrimination. Two years ago, I had occasion to appraise as positive the role of an otherwise conservative Supreme Court in employment discrimination cases.[136] Yet at the time my words were being published, the Court, in a series of cases, indicated that it was pulling back.[137] This trend continued this term with *Board of Trustees v. Sweeney*,[138] where the Court, in a *per curiam* opinion, appeared to restrict existing precedents regarding individual discrimination claims under title VII.[139]

The line of authority involved in *Sweeney* begins with *McDonnell Douglas Corp. v. Green*[140] which held that a plaintiff could make out a prima facie claim under title VII by establishing that he belonged to a racial minority, that he had applied and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that while the job remained open the employer continued to seek applicants from "persons of complainant's qualifications."[141] Once these elements had been established, the burden shifted to the employer to establish or "articulate" some legitimate nondiscriminatory reason for the employee's rejection."[142] The plaintiff could rebut this defense by introducing evidence, including statistical data demonstrating the exclusion of minorities from the jobs in question, in order to show that the employer's reason was a "pretext" for discrimination.[143]

In the 1977 term, the Court in *Furnco Construction Corp. v. Waters*[144] was confronted with a prima facie case under the *McDonnell*

135. W. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 48 (1977).
136. *Id.* at 46.
137. *See generally* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Airlines v. Evans, 431 U.S. 553 (1977). *See also* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
138. 99 S. Ct. 295 (1978).
139. *Id.* at 297-98.
140. 411 U.S. 792 (1973).
141. *Id.* at 802.
142. *Id.* at 802-03.
143. *Id.* at 804-05.
144. 438 U.S. 567 (1978).

Douglas standard: qualified black applicants had been rejected when vacancies were present,[145] the difference being that the employer had instituted an affirmative action program under which blacks had been hired.[146] Justice Rehnquist, speaking for the Court, concluded that under the circumstances it was inappropriate for the court of appeals to reject the employer's policy of refusing to hire at the gate while accepting written applications.[147] Said the Court in *Furnco*:

> When the prima facie case is understood in light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the most employment applications. Title VII prohibits him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt the hiring procedure that maximizes hiring of minority employees. . . .[148]

Since the court of appeals had not found that the failure to use alternate hiring methods was a pretext for discrimination, but indicated only that alternate methods would have permitted the employer to consider and hire more minority employees, the use of written applications was regarded as appropriate.[149]

Finally, the Court noted that while a racially balanced work force does not immunize an employer for liability attributable to "specific acts" of discrimination, a statistically racially balanced work force could be relevant in rebutting the prima facie case of the plaintiff. Said the Court: "We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of the minority applicants was discriminatorily motivated."[150]

In *Sweeney*, a majority of the Court indicated that the employer's defense was to be tested by the employer's ability to "articulate" the legitimate nondiscriminatory reason.[151] Because the court of appeals in *Sweeney* appeared to have imposed a heavier burden in requiring proof of the absence of discriminatory motive, the judgment was vacated and remanded.[152] Justice Stevens, in a dissenting opinion joined by Justices Brennan, Stewart, and Marshall, stated that he had joined

145. *Id.* at 575.
146. *Id.* at 572 & n.2.
147. *Id.* at 571-72.
148. *Id.* at 577-78 (emphasis in original).
149. *Id.* at 578.
150. *Id.* at 580.
151. 99 S. Ct. at 297.
152. *Id.*

in the *Furnco* case without recognizing any change in the extent of the employer's defense.[153] Indeed, as I previously noted, Justice Rehnquist's opinion refers to "probative value." As Justice Stevens said, the words "prove" and "articulate" were used interchangeably in *Furnco* and "properly so."[154] Said the dissenting opinion:

> In litigation the only way a defendant can 'articulate' the reason for his action is by adducing evidence that explains what he has done when an executive takes the witness stand to 'articulate' his reason, the litigant for whom he speaks is thereby proving those reasons. If the Court intends to authorize a method of articulating a factual defense without proof, surely the Court should explain what it is.[155]

However the test was phrased, the ultimate question involved "identification of the real reason for the employment decision."[156] The upshot of this decision is that the majority of the Court appears to have limited the burden or amount of proof the employer must assume in an individual discrimination case.

The second case that seemed to be moving the Court into a more conservative posture was *New York City Transit Authority v. Beazer*.[157] The Court, with Justice Stevens delivering the opinion, reversed a court of appeals decision[158] which had ruled that the transit authority's refusal to employ a methadone user violated the equal protection clause of the fourteenth amendment as well as title VII.[159] One of the plaintiff's major arguments was that the transit authority's policy disproportionately excluded blacks and Hispanics from employment and therefore violated title VII of the Civil Rights Act under *Griggs*[160] and its progeny.[161] While noting that eighty-one percent of the employees referred to the transit authority's medical director for suspected violations of the narcotics rule were black or Hispanic, the Court stated that this statistic told nothing about the racial composition of the employees suspected of using methadone or about the percentage of minority workers who had been dismissed for using methadone.[162] Although sixty-three percent of the recipients of methadone maintenance in New

153. *Id.* at 296.
154. *Id.* at 297.
155. *Id.*
156. *Id.* at 297-98.
157. 99 S. Ct. 1355 (1979).
158. *Id.* at 1370.
159. *Id.* at 1362.
160. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under the *Griggs* standard for title VII violations, an employment practice unrelated to job performance that has a disproportionate racial impact is prohibited notwithstanding the employer's lack of discriminatory intent. *Id.* at 429-33. *Cf.* Washington v. Davis, 426 U.S. 229, 239-45 (1976) (to find an equal protection violation under the Constitution, disproportionate racial impact must be traced to a discriminatory purpose).
161. 99 S. Ct. at 1361.
162. *Id.* at 1365.

York were black or Hispanic, this statistic said nothing about the number of individuals who had worked for or sought work with the transit authority; nor did it reveal the racial composition of job applicants and employees with the authority who were receiving methadone treatments.[163] Moreover, there were no data on the methadone users in the city private programs, "leaving open the possibility that the percentage of blacks and Hispanics in the class of methadone users is not significantly greater than the percentage of those minorities in the general population of New York City."[164]

Justice White's dissenting opinion[165] noted that there was "every reason to conclude" that a majority of methadone users were from minority groups.[166] Said Justice White:

> Almost 5% of all applicants are rejected due to the rule, and undoubtedly many black and Hispanic users are among those rejected. Why should proportionately fewer of them than whites secure work with petitioner absent the challenged practice? The Court gives no reason whatsoever for rejecting the sensible inference, and where the inference depends so much on local knowledge, I would accept the judgment of the District Court rather than purport to make an independent judgment from the banks of the Potomac.[167]

The real reason for the majority's position seems to be predicated upon business necessity and a deep concern about the employability of the individuals in question rather than the failure of the employees' statistics to demonstrate discrimination. While accepting the district court's finding that a "strong majority" of those receiving methadone maintenance for at least a year were free from illicit drug use, the Court found that a significant number were not: "On this critical point, the evidence relied upon by the District Court reveals that even among participants with more than twelve months' tenure on methadone maintenance programs, the incidence of drug and alcohol abuse may often approach and even exceed 25%."[168] Moreover, the Court observed that the district court recognized that "at least one-third of the persons receiving methadone treatment—and probably a good many more—would unquestionably be classified as unemployable."[169]

As in *Beazer*,[170] the Court demonstated its reluctance to find a

163. *Id.* at 1365-66.
164. *Id.* at 1366.
165. *Id.* at 1371. Justice White's opinion was joined in by Justice Marshall as well as Justice Brennan insofar as it dealt with title VII. *See* Davis v. Califano, 21 FEP Cases 272 (D.C. Cir. 1979).
166. *Id.* at 1373.
167. *Id.*
168. *Id.* at 1360-61 (footnote omitted).
169. *Id.* (footnote omitted).
170. *See* text & notes 161-64 *supra*.

deprivation of equal protection on the basis of statistics in *Personnel Administrator v. Feeney*.[171] In this case, the Court held that women were not unconstitutionally discriminated against by an absolute lifetime preference for veterans under the Massachusetts civil service statute.[172] Justice Stewart, speaking for the Court, noted the absence of any showing of any discriminatory purpose in connection with adoption of the statute and stated that a two-fold inquiry is appropriate where there is an attack upon a statute which is gender-related on its face.[173] Said Justice Stewart:

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. . . . In this second inquiry, impact provides an 'important starting point' . . . but purposeful discrimination is 'the condition that offends the Constitution.'[174]

Yet, as Justice Stevens' separate concurring opinion notes, it is quite difficult to see what difference there is between these supposedly different questions.[175] The Court pointed to two considerations which undermine the notion that discriminatory purpose was involved by virtue of disparate impact: Veteran status has been defined so as to be inclusive of women who have served in the military, and the nonveteran class is not substantially all female and "significant numbers" of nonveterans are men.[176] To the argument that enlistment policies of the armed forces have discriminated on the basis of sex, as the Court has found in previous cases and, indeed, had conceded in *Feeney*,[177] Justice Stewart responded that "the history of discrimination against women in the military is not on trial in this case."[178] The Court, however, has, in fact, considered this kind of evidence in discrimination cases involving federal statutes.[179]

The Court conceded that it would be "disengenuous" to contend that the adverse consequences of the legislation for women were "unintended, in the sense that they were not volitional or in the sense that they were not foreseeable,"[180] but, nevertheless, stated that the discrim-

171. 99 S. Ct. 2282 (1979).
172. *Id.* at 2296.
173. *Id.* at 2293.
174. *Id.*
175. *Id.* at 2297.
176. *Id.* at 2294-95.
177. *Id.* at 2295.
178. *Id.*
179. *See generally* Gaston County v. United States, 395 U.S. 285 (1969). For a discussion of this case in the context of Griggs v. Duke Power Co., 401 U.S. 424 (1971), see W. GOULD, *supra* note 135, at 92-98.
180. 99 S. Ct. at 2296.

inatory purpose requires more than awareness of consequences.[181] To be sure, Justice Stewart recognized that the "inevitability or foreseeability of consequences" flowing from a neutral rule would have a "bearing upon the existence of discriminatory intent and that an inference that the adverse effects were 'desired' could be reasonably drawn."[182] The inference, however, was a "working tool" and not "proof," and since here the benefits were to be given to "any person" who was a veteran, the statute was constitutional.[183]

Justice Stevens concurred on the basis that the number of men disadvantaged by the veteran's preference was such a substantial number.[184] Justice Marshall dissented, along with Justice Brennan. In essence, their position was that there was such extreme disproportionate exclusion—only two percent of the class were women—that the burden should be upon the state to establish that sex-based consideration played no role in the legislative scheme.[185] Justice Marshall would have found no important governmental objective that would override gender-based discrimination. First, substantial numbers of the veterans involved were not recently discharged, and, therefore not in need of readjustment assistance.[186] Second, the possibility of *ex post facto* civil service preference did not significantly influence enlistment, and in any event, the statute bestowed benefits upon those who were drafted as well as those who volunteered.[187] Finally, there were alternatives in the form of tax abatements, education subsidies, and special programs for needy veterans that could have served to reward those who served their country without imposing hardship upon women.[188]

With the Court's highly publicized decision in *Bakke*[189] dealing with the propriety of race conscious admissions programs in universities decided only last term, its pronouncements on the same issue in the employment discrimination field were eagerly awaited. The first opportunity was presented in the *County of Los Angeles v. Davis*[190] where the Court had agreed to review two questions: whether the use of employment policies which were exclusionary in operation, but not purposely discriminatory, violated the Civil Rights Act of 1866,[191] and whether the imposition of minimum hiring quotas for "fully qualified

181. *Id.*
182. *Id.* at 2296 n.25.
183. *Id.* at 2296 & n.25.
184. *Id.* at 2297.
185. *Id.* at 2298-99.
186. *Id.* at 2300.
187. *Id.*
188. *Id.*
189. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
190. 99 S. Ct. 1379 (1979).
191. 42 U.S.C. § 1981 (1976).

minority applicants" was an appropriate remedy in the circumstances of this employment discrimination case.[192] In an opinion delivered by Justice Brennan, a majority of the Court avoided these important issues and held that the issue before the Court was moot.[193] In so doing, however, the Court provided standards to determine those circumstances under which employer post-litigation conduct could be taken into account in dealing with the question of whether violations or remedies could be considered.[194]

Briefly, the facts in *Davis* were as follows: In 1969, the Los Angeles County Fire Department required a written civil service examination and a physical agility test which all parties agreed had a disparate adverse impact upon minority hiring.[195] In 1971 this 1969 procedure was replaced with a new method when 500 of the applicants had passed a test that was designed to exclude illiterates who were selected at random for interviews and physical agility tests and ranked on the basis of such.[196] The first test was given in January 1972 and there was no disparate adverse impact upon minorities, the use of the written examination not being challenged in this litigation.[197] As a result of an action filed in state court challenging this random selection process, the county was enjoined from using the new method and the hiring process came to a halt.[198]

Subsequent to the failure to find a new and acceptable procedure, a class action was brought in January 1973 on behalf of present and future black and Mexican American applicants to the Fire Department, who charged that both the 1969 hiring procedures and the 1972 written test violated the Civil Rights Act of 1866.[199] The district court found that the County had acted without discriminatory intent but held that the 1969 and 1972 written examinations had not been validated as predictive of job performance and that, therefore, the County had violated the statute.[200] The Court also permanently enjoined future discrimination, mandated a good faith affirmative action effort, and entered a remedial hiring order which required that at least twenty percent of the new firefighter recruits be black and that another twenty percent be Mexican American, until both groups reached a percentage in the work force commensurate with the percentage in Los Angeles County.[201]

192. 99 S. Ct. at 1381.
193. *Id.*
194. *Id.* at 1383-84.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 1381-82.
199. *Id. See* 42 U.S.C. § 1981 (1976).
200. 99 S. Ct. 1381-82.
201. *Id.*

The Ninth Circuit reversed the district court with regard to the 1969 examination on the ground that the plaintiffs lacked standing to seek relief because no present or future applicant had been affected by the 1969 test.[202] The district court's decision with regard to the 1972 proposal, however, was upheld.[203] The Supreme Court held that any case relating to the 1972 proposal would have become moot during the pendency of the litigation.[204]

The Court came to this conclusion for two reasons. In the first place, the Court said that there was no "reasonable expectation" that the County would revert to unvalidated civil service procedures: the 1972 procedures were a response to a "temporary emergency" which was "unique" and "unlikely to recur."[205] Critical to the Court's thinking in this regard was its view that the County had "succeeded in instituting an efficient and non-random method of screening job applicants and increasing minority representation in the Fire Department."[206]

What is particularly important about the Court's decision is its reliance upon interim events which had eradicated the violation question and made the decree unnecessary. The Court referred to the fact that the County had complied with the decree for five years and its hiring of fifty percent minorities had "completely cured any discriminatory effects of the 1972 proposal."[207] This approach is seemingly at odds with decisions of numerous appellate courts taking the view that post-litigation changes of conduct should not generally influence the court's judgment because they have been undertaken in response to litigation and not good faith compliance with the law. The Fourth Circuit has stated that a "last minute change of heart is suspect, to say the least."[208] The Fifth Circuit referred to such changes of conduct as "equivocal in purpose, motive, and permanence."[209] Whether *Davis* signals a departure from this view is not entirely clear. It may be that the Court's ruling should be read within the context of the failure of the district court to find discriminatory intent or purpose,[210] the inability of the County to take action prior to litigation due to the attacks made upon it from two

202. *Id.*
203. *Id.*
204. *Id.* at 1383.
205. *Id.*
206. *Id.*
207. *Id.* at 1384.
208. Cypress v. Newport News General and Non-Sectarian Hosp. Ass'n, 375 F.2d 648, 658 (4th Cir. 1967).
209. Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) (footnote omitted). *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970); United States v. IBEW, Local 38, 428 F.2d 144, 151-52 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Anderson v. City of Albany, 321 F.2d 649, 657 (5th Cir. 1963).
210. 99 S. Ct. at 1382.

sources,[211] and the fact that it had complied with the decree for a substantial period of time.[212]

Although *Davis* did not deal with the issue of quotas, another decision before the Supreme Court this Term, *United Steelworkers v. Weber*,[213] did. In sharp contrast to the Court's attempt to deal with the problem of race conscious programs and quotas last term in *Bakke*,[214] *Weber* was relatively clear-cut as it provided a resounding approval of voluntary affirmative action programs that not only are race conscious, but provide for quotas as well.

The *Weber* case arose out of a collective bargaining agreement at fifteen Kaiser plants which had contained an affirmative action plan designed to "eliminate conspicuous racial imbalances" in an almost exclusively white craft work force.[215] Rather than hire skilled tradesmen from the street, as had been done in the past, the employer agreed to train unskilled production workers, both black and white, to provide them with the skills necessary to become tradesmen.[216] The plan reserved fifty percent of the openings in these newly created training programs for blacks.[217]

Brian Weber, a white production worker, was denied admission to the training program during its first year of operation, while a black worker who had less seniority was admitted to the program.[218] The plaintiff Weber charged that the plan constituted racial discrimination.[219] The Fifth Circuit upheld the complaint, setting the stage for the first major test of a voluntary affirmative action program.[220] The Court, speaking through Justice Brennan in a five to two decision, and, noting that the case did not involve an alleged violation of the equal protection clause or the propriety of court-imposed affirmative action programs, reversed the court of appeals and held that the program was permissible under title VII.[221] As the Court said, "The only question before us is the statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan."[222]

211. *Id.* at 1381-82.
212. *Id.*
213. 99 S. Ct. 2721 (1979).
214. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
215. 99 S. Ct. at 2725.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 2726.
220. *Id.*
221. *Id.* at 2730.
222. *Id.* at 2726 (emphasis in original). The case did not involve any alleged violations of the equal protection clause, nor the propriety of court-imposed affirmative action programs. *Id.*

In holding that the racial preferences of the kind contained in the Kaiser-USWA agreement were not in violation of title VII, the Court focused upon two major considerations. First, the Court noted that Congress' "primary concern" in prohibiting racial discrimination was both the high unemployment rate and the deteriorating position of black workers economically in the early 1960's.[223] In light of legislative history, Justice Brennan stated that Congress could not have intended to "prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[224] The statutory scheme, in the Court's view, could not be read to provide an "absolute prohibition" against voluntarily negotiated race conscious affirmative action efforts. Said Justice Brennan: "It 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 so long' . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[225]

Second, the majority opinion of the Court rejected the argument that the antipreferential treatment provision of title VII, section 703(j)[226] prohibited such plans, by noting that provision simply stated that nothing in title VII would "require" an employer to grant preferential treatment on account of a racial imbalance and that the provision did not address the issue of whether preferential treatment was to be permitted.[227] In this connection, the Court drew upon legislative history, which is sure to be addressed in future litigation, and noted that prohibition of voluntarily negotiated agreements would simply augment the powers of the federal government and diminish traditional management prerogatives and thus would be inconsistent with the intentions of some of title VII's more reluctant supporters.[228] If parties are unable to take voluntary action, the need for government involvement would increase.

The Court, however, did not approve of all affirmative action programs. It simply rejected the argument that the statute contained some kind of "absolute prohibition" against them.[229] What kind of race conscious affirmative action programs are permissible? The Court did not answer the question definitively. Justice Brennan, however, explained that

223. *Id.* at 2727-28.
224. *Id.* at 2728.
225. *Id.*
226. 42 U.S.C. § 2000e-2(j) (1976).
227. 99 S. Ct. at 2729.
228. *Id.*
229. *Id.* at 2728-2730.

> the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers, and their replacement with new black hires . . . nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.[230]

Finally, the Court rejected the argument put forward by both Kaiser and the government as to the standard for affirmative action programs—that there be some potential for title VII litigation by black plaintiffs in the absence of such a plan or that, in the words of Mr. Justice Blackmun's concurring opinion, there be an "arguable" violation[231]—and concluded that plans could be acceptable which were "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[232] The Court dropped a footnote referring to literature which explained the traditional exclusion of blacks in the skilled trades.[233] Presumably, a judicial finding in future cases will be predicated upon similar scholarly work or government reports. Justice Brennan, in articulating the "conspicuous racial imbalance" rule, stated that "this is not to suggest that the freedom of an employer to undertake race-affirmative action effort depends upon whether or not his effort is motivated by fear of liability under Title VII."[234]

Justice Blackmun's concurring opinion suggests some of the reasons why the majority's approach is preferable to one which would allow quotas only when an arguable "violation or fear of liability" is present. Justice Blackmun noted that the Court's use of statistical imbalance in traditionally segregated jobs reaches conduct that is not necessarily violative of the law because statistics, while creating prima facie liability, are not conclusive proof of discrimination.[235] The concurring opinion goes to the heart of the reverse discrimination litigation problem:

> The great difficulty in the District Court was that no one had any incentive to prove that Kaiser had violated the Act. . . . The blacks harmed had never sued and so had no established representative. . . . To make the 'arguable violation' standard work, it would

230. *Id.* at 2730.
231. *Id.* at 2731-32.
232. *Id.* at 2730 (footnote omitted).
233. *Id.* at 2725 n.1.
234. *Id.* at 2730 n.8.
235. *Id.* at 2733.

> have to be set low enough to permit the employer to prove it without obligating himself to pay a damage award. The inevitable tendency would be to avoid hair splitting litigation by simply concluding that a mere disparity between the racial composition of the employer's work force and the composition of the qualified local labor force would be an 'arguable violation,' even though actual liability could not be established on that basis alone.[236]

Weber itself contained a record that was sparce, considering the potential title VII violations in that case.

Second, Justice Blackmun argued that a contrary result would preclude unions and employers from remedying practices that title VII itself does not prohibit such as pre-Act practices.[237] Moreover, the Court's approach would permit a statistical comparison with the black percentage of the entire work force where there is bound to be more minority representation as opposed to a comparison to the employees who meet "valid job classification."[238]

The *Weber* case, more than any other labor law decision of this Term, will leave an impact upon a wide variety of employment practices and raises issues which are bound to be at issue in future employment discrimination litigation. First, despite the Court's refusal to link the permissibility of a race conscious plan to the threat of potential for title VII liability, the *Weber* decision has enormous implications for the flow of title VII litigation. The courts and EEOC are engulfed with complaints of discrimination. Labor and management must be able to devise voluntary settlements without resorting to the judiciary and the delay, expense, and rancor that are so frequently associated with such procedures. Race conscious remedies have been properly perceived by the courts as an essential remedy for the elimination of discrimination and it is therefore difficult to avoid litigation and consequent monetary liability without establishing a voluntary race conscious program.

A second and similar benefit is that the principles enunciated in *Weber* may forestall the rising tide of reverse discrimination claims. Of course, the Court encouraged this trend a few years ago in *International Brotherhood of Teamsters v. United States*.[239] Through a dubious interpretation of legislative history, the Court had concluded that all of the circuit courts had erred in holding that the existence of a pattern of discrimination authorized the courts to award seniority credits to the group discriminated against and that such seniority could antedate to

236. *Id.* (citation omitted).
237. *Id. See generally* Gould, *Seniority and the Black Worker; Reflections on Quarles and Its Implications*, 47 TEXAS L. REV. 1039 (1969); Gould, *Employment Security, Seniority, and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOWARD L.J. 1 (1967).
238. 99 S. Ct. at 2733.
239. 431 U.S. 324 (1977).

July 2, 1965, the effective date of the statute.[240] When the Court changed the rules in midstream, white workers, who had been competitively disadvantaged by what had been regarded as good law for the previous decade, filed charges and complaints.[241]

Third, *Weber* will encourage a demoralized civil rights movement to press forward with new and old claims. All too often affirmative action plans are public-relations plans. *Weber* will encourage minorities, women workers, and civil rights organizations to enforce and improve upon voluntarily negotiated affirmative action plans like that approved in *Weber*.

Now problems of racial imbalance can be addressed by unions and employers where the imbalance is "conspicuous" and where the plan does not "trammel" the interest of white workers.[242] Although one would assume that the transitional nature of the plan, as well as provision for some opportunities for whites will be critical, it is unclear whether all of the criteria referred to by the Court in *Weber* must be present in order for the plan to pass muster.[243] In any event, the limitations are sensible ones and generally consonant with the principles set forth by the circuit courts when imposing quotas.[244]

How is it that the conservative Court, which gave us the decisions described above in *Sweeney, Feeney*, and *Beazer*, could come to the result in *Weber*? *Weber* becomes even more puzzling when one considers the fact that, in truth, there was no legislative history on this subject: Congress in 1964 never dreamed that unions and employers would behave as Kaiser and the Steelworkers did. Further, if one speculates about what would have been the congressional intent in 1964, I am not at all sure that the answer is as clear as Justice Brennan has led us to believe.[245] In sharp contrast to the Court's approach to

240. *Id.* at 426.

241. In Stamps v. Detroit Edison Co., 431 U.S. 951 (1977), numerous reverse complaints were filed by white workers in the wake of the *Teamsters* decision.

242. United Steelworkers v. Weber, 99 S. Ct. at 2730.

243. *See id.*

244. *See* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972).

245. But Justice Rehnquist's dissenting opinion is far less persuasive. Justice Rehnquist completely overlooks the fact that Congress was not debating the question of the propriety of affirmative action programs in 1964—and when it did, in 1972, it approved of numerous decisions which had provided for court imposed quotas. *See* W. GOULD, *supra* note 135, at 99-135. Congress evidenced an intent, however, to prohibit discrimination on account of race for all the races. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976). Justice Rehnquist also referred to the *Clark-Case Memorandum* in which the proponents of title VII stated that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual." United Steelworkers v. Weber, 99 S. Ct. at 2744 (Rehnquist, J., dissenting) (citing and quoting 110 CONG. REC. 7213 (1964)). As Justice Brennan's opinion points out, however, *Weber* involves not an attempt to maintain a racial balance, but an attempt to deal with extreme imbalances. 99 S. Ct. at 2730. Justice Rehnquist refers to the fact that no speaker referred to the possibility that employers might voluntarily prefer racial minorities over whites during the entire

the seniority issue in *Teamsters*, however, I think that the Court understood that a contrary decision would have created havoc in employment relationships throughout the country: Many carefully balanced affirmative action plans adopted by business and labor would go up in smoke if the plaintiff's complaint had been sustained. The fact that labor, management, and minorities were on the same side in *Weber*—a rare occurrence indeed—must have impressed the Court. Most important, again, the *Teamsters* decision serves as a foil: I think that a majority of the Court knew that judicial disruption of an accepted practice would mean a new and potentially destructive round of litigation that would haunt the courts for years to come.[246]

Now that the Court has spoken, one must look at the questions that are not resolved by *Weber*. Does the holding apply to affirmative action plans of a similar nature for other groups besides blacks? It is to be recalled that Justice Brennan's focus in the *Weber* opinion was upon black unemployment and inequities with which blacks were confronted.[247] Although the principal focus of the debate about title VII, as well as legislative history referred to by Justice Brennan, did indeed refer to blacks, a reading of the decision that would limit the appropriateness of quotas to black workers would be both impractical and inconsistent with the 1964 Act's general attack upon discrimination. It seems clear that where there is a conspicuous imbalance for other groups such as women, Mexican Americans, Asian Americans, or American Indians and where a plan has been devised to remedy it, *Weber* will have some applicability. Of course, in *Weber*, skilled trades jobs were involved and the Court was able to cite and take judicial notice of the general exclusion of blacks from the trades. Whatever the group or job involved in future cases, somewhat analogous showings would seem to be of some importance.

Beyond this problem of application, however, *Weber* was a special case, in that the employer was creating new jobs for incumbent employees that had been previously filled by skilled tradesmen who had worked for other employers. The seniority expectations of the plaintiff were unimpaired and, indeed, the potential impact of the bona fide seniority proviso contained in section 703(h)[248] was not even raised, briefed, or considered in *Weber*. Apparently, it was assumed that unions and employers could negotiate affirmative action plans that would change seniority. It is interesting, however, to note that Justice Black-

83 days of Senate debate, *id.* at 2752, but, of course, this is because no one contemplated the possibility of affirmative action programs.

246. See text & notes 239-41 *supra*.

247. 99 S. Ct. at 2725-26.

248. 42 U.S.C. § 2000e-2(h) (1976).

mun assumed that "[h]ere seniority is not an issue because the craft training program is new and does not involve an abrogation of preexisting seniority rights."[249]

Does section 703(h) limit the parties' ability to modify the seniority rights of white workers through affirmative action programs? The Court's decision in *Teamsters* makes it clear that the seniority of an incumbent employee cannot be modified or interfered with unless discrimination against others has been made out on an individual basis,[250] but the Court in *Weber* did not take any notice of this problem. Moreover, the bona fide seniority proviso is aimed at prohibiting conduct that can be deemed synonymous with an unlawful employment practice. Although the legislative history on the seniority issue is concerned with the harm which title VII could do to individual white workers, it seems that the Court's reasoning in *Weber*, as applicable to section 703(j), would carry over to section 703(h). That is to say, a union and an employer may enter into a collective agreement that might provide more affirmative action than a court could impose. Just as the anti-preferential treatment proviso cannot interdict voluntary quotas that meet the *Weber* standards, so also will voluntary modifications of collectively negotiated seniority rights be regarded as permissible, *Teamsters* notwithstanding.

Where seniority issues are involved, an employer might have more difficulty in escaping the strictures of title VII when acting unilaterally, although even here voluntary action to address a conspicuous imbalance would seem authorized under the reasoning of Justice Brennan.[251] Of course, the employer would be confronted with breach of contract problems before an arbitrator or court.[252] Perhaps here the arguable violation standard would be appropriate. Otherwise, without reference to any standard, an employer could undermine contractual obligations encouraged by national labor policy. The potential for mischief would be substantial. In addition, under these circumstances, it may be that an obstinate and unreconstructed union violates its duty of fair representation. Whether employers or unions are the defendants, it would seem that the only party which has a direct stake in enforcement, the black workers, should be a part of the proceedings.

Another major issue lurking down the road is court imposed quota remedies under title VII. The position of the AFL-CIO in *Weber*,

249. 99 S. Ct. at 2734.
250. International Bhd. of Teamsters v. United States, 431 U.S. 324, 371-76 (1977).
251. 99 S. Ct. at 2728-30.
252. The Fifth Circuit has held that a union may sue an employer for breach of contract under similar circumstances. Southrage Plastics Div. v. United Rubber Workers Local 759, 16 FEP Case 507 (5th Cir. 1978). *See* W. GOULD, *supra* note 135, at 207-42.

which supported the Steelworkers and opposed the plaintiff, was that the quotas could be voluntarily negotiated but were at odds with the legislative history of title VII insofar as the ability of the judiciary to impose them is concerned.[253] This position is contrary to the opinions of every court that has confronted the issue.[254] Nevertheless, as the Court's holding in *Teamsters* establishes, unanimity among the circuits provides little if any guidance in employment discrimination litigation before the high tribunal. The Court specifically stated that it was not concerned with court imposed quota remedies.[255] Nevertheless, some of the AFL-CIO's thinking wove its way into Justice Brennan's opinion: The distinction between the promotion of "management's prerogatives,"[256] and governmental interference, as well as the assumption that race conscious plans may be permitted but may not be required.[257] The irony here is that quotas that flow from a judicial proceeding where violations have been made out are imposed with more safeguards for all concerned. These cases are less troublesome, in this respect, than the voluntary plan in *Weber*. Justice Powell, who did not participate in *Weber*,[258] seemed to recognize this point in his *Bakke* opinion.[259]

Should the Court accept the AFL-CIO position in the future, an important part of the significance of *Weber* would be eliminated, because, next to the prospect of monetary liability in the form of back pay, front pay, and other damages,[260] quotas provide the strongest incentives for compliance with the statute and voluntary affirmative action plans. If that incentive is eliminated, the importance of *Weber* will be undermined. Judicial promotion of voluntarism will be substantially minimized.

Finally, an important issue that flows from *Weber* is the question of what is to be defined as a voluntary program. Although the Court treated the *Weber* program as a voluntary one, it is the prospect of

253. Brief for AFL-CIO at 70, 72, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

254. *See, e.g.*, Morrow v. Chisler, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc); Carter v. Gallagher, 452 F.2d 315, 326-27 (8th Cir. 1972), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); United States v. Central Motor Lines Inc., 338 F. Supp. 532, 560 (W.D.N.C. 1971). *See generally* W. GOULD, *supra* note 135, at 99-135.

255. United Steelworkers v. Weber, 99 S. Ct. at 2726.

256. *Id.* at 2729.

257. *Id.*

258. Justice Powell was ill at the time of oral argument and thus participated in neither the arguments or the discussion. Justice Stevens disqualified himself from participation, apparently because of the involvement in this litigation of clients that he had represented prior to his appointment to the bench.

259. 438 U.S. at 301-02.

260. *Cf.* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-460 (1975) (in addition to title VII relief of back pay, the court recognized the independent federal remedies of equitable and legal relief under § 1981 of the Civil Rights Act, including compensatory, and under certain circumstances, punitive damages).

litigation as well as threatened or actual pressure from the government vis-a-vis its contractors that induces affirmative action. This was the case in *Weber*. Is a plan submitted to the federal government under its contract compliance program voluntary within the meaning of *Weber*? Although the issue is extremely close, it would seem that the recent District of Columbia Circuit decision holding that contract compliance as a method to implement wage-price guidelines is lawful[261] argues for an affirmative answer to this question. As the facts in *Weber* themselves demonstrate, a different conclusion would appear to exalt form over substance, for the agreement in *Weber* was itself the product of government pressure under the Executive Order.

A contrary conclusion would seem to apply in connection with a consent decree inasmuch as it has the force of law, including contempt sanctions behind it. The fact that such an order is a negotiated compromise between the parties, however, may give the courts some pause, even here.

Thus, *Weber* is a respite—but a very significant one—in a new wave of conservative decisions. Chief Justice Burger and Justice Rehnquist—whose dissents in race cases are increasingly strenuous and emotional[262]—are in at least temporary isolation. Although it should not be, the question of court imposed preferential quotas may be a closer one. The Court is sure to have a crack at this issue soon.

To sum up, while there has been some slippage during the interim, the Court ends this decade of employment discrimination adjudication on the same high ground that it began in 1971. For that was the year that *Griggs v. Duke Power Co.*[263] established the proposition that intent was not a prerequisite to the finding of a violation under title VII. That decision was authored by Chief Justice Burger who, at that time, regarded *Griggs* as the most important decision since he had arrived at the Supreme Court.[264]

It was *Griggs*, coupled with the *Albermale*[265] decision (creating a presumption that back pay should be awarded after a violation had been found) and court imposed quotas which set the stage for *Weber*. Those decisions made labor and management willing to do something about employment inequities. While Chief Justice Burger and others in the nation were weary of racial problems and racial litigation, the

261. AFL-CIO v. Kahn, — F.2d —, —, (D.C. Cir. 1979).
262. *See* United Steelworkers v. Weber, 99 S. Ct. at 2734 (Burger, C.J., dissenting); *id.* at 2736 (Rehnquist, J., dissenting); Franks v. Bowman Transp. Co., 424 U.S. 747, 780-81 (1977) (Burger, C.J., concurring in part and dissenting in part).
263. 401 U.S. 424 (1971).
264. *Id.* at 432.
265. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

alternative remedies in title VII litigation were too grim to be confronted in many instances.

Weber then is the culmination of a decade of hard fought litigation. It is by no means the final word on employment discrimination problems, but it undercuts those who saw gloom in the *Bakke* standoff, and it permits labor and business, hopefully in conjunction with those for whom the statute is intended to benefit, to deal with injustices without courts and agencies. It is the high point of the Court's labor law work—and indeed perhaps all of its efforts—in the October 1978 Term. Most important, the Court, through its landmark decisions of the past quarter century, particularly *Brown v. Board of Education*,[266] *Griggs*, and *Weber*, has at least glimpsed the reality of racial injustice. The question, however, of whether that injustice will be remedied remains with us, surely through the end of this century and perhaps well into the next one.

Conclusion

It was a busy term for the Court. Besides *Weber*, which had dominated the Court's labor law work both before and after the decision, decisions such as *Foust* have broad implications. The plurality opinion in *New York Telephone* seems to represent a gathering storm on the preemption horizon. But, on balance, cases like *Ford Motor Co.* and *Detroit Edison Co.* seemed to sound the dominant theme: The flushing out of previously adumbrated principles in preparation for problems that may require the Court to paint with a broader brush in the future.

266. 347 U.S. 483 (1954).